

Based on USFWS *December 23, 1998, DRAFT* (rev. Aug. 5, 2004)

IMPLEMENTING AGREEMENT

for the

STATE OF OREGON

for

THE ELLIOTT STATE FOREST

[*DATE*]

March 19, 2008 DRAFT

Including Previous Joint Edits of ODF, FWS and NMFS,
species corrections by ODF, as of 1-18-08, and ODF's changes after
NMFS announced on 2-4-08 listing of Oregon coastal coho salmon as
threatened)

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1.0 PARTIES

The parties to this Implementing Agreement (“Agreement”) are the State of Oregon, acting by and through the Oregon Department of Forestry and the Department of State Lands (“State”); the United States Fish and Wildlife Service (“FWS”); and the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NMFS”). In this Agreement, FWS and NMFS are referred to collectively as the “Services.” The State and the Services are referred to collectively as “the Parties,” and each individually as a “Party.”

2.0 RECITALS AND PURPOSES

2.1 Recitals. The Parties have entered into this Agreement in consideration of the following facts:

(a) The Elliott State Forest has been determined to provide, or potentially provide, habitat for the following listed species:

Northern spotted owl (*Strix occidentalis*), Marbled murrelet (*Brachyramphus marmoratus*), Bald eagle (*Haliaeetus leucocephalus*), and Coho salmon (*Oncorhynchus kisutch*).

(b) The Elliott State Forest has also been determined to provide, or potentially provide, habitat for the following species not presently listed:

Birds - Northern goshawk (*Accipter gentilis*), Olive-sided flycatcher (*Contopus cooperi*), Western bluebird (*Sialia Mexicana*).

Fish - Chinook salmon (*Oncorhynchus tshawytscha*), Steelhead trout (*Oncorhynchus mykiss*), Coastal cutthroat trout (*Oncorhynchus clarki clarki*), Chum salmon (*Oncorhynchus keta*), Pacific lamprey (*Lampetra tridentata*), River lamprey (*Lampetra ayresi*), Western brook lamprey (*Lampetra richarsoni*).

Mammals –Fisher (*Martes pennanti*)

Amphibians - Red-legged frog (*Rana aurora*), Southern seep salamander (*Rhyacotriton variegates*), Tailed frog (*Ascaphus truei*).

(c) State has developed a series of measures, described in the HCP as the basis for the Permits being issued by FWS and by NMFS (collectively, the “Permits”), to minimize and mitigate to the maximum extent practicable the effects of take of Covered species incidental to the State’s Covered activities. The Permits will authorize any incidental take of Covered species to the extent such take might occur in connection with Covered activities on Covered lands.

2.2 Purposes. The purposes of this Agreement are:

- (a) To ensure implementation of each of the terms of the HCP;
- (b) To describe a dispute resolution process, and remedies and recourse should any Party fail to perform its obligations as set forth in this Agreement and in the HCP; and,
- (c) To provide assurances to the State that as long as the terms of the HCP, the Permits, and this Agreement are performed, no additional conservation or mitigation measures will be required of the State, with respect to Covered species, except as provided for in this Agreement or required by a change in law.

3.0 DEFINITIONS

The following terms as used in this Agreement will have the meanings set forth below:

3.1 Terms defined in Endangered Species Act. Terms used in this Agreement and specifically defined in the federal Endangered Species Act (“ESA”) or in regulations adopted by the Services under the ESA have the same meaning as in the ESA and those implementing regulations, unless this Agreement expressly provides otherwise.

3.2 “Changed circumstances” means changes in circumstances affecting a Covered species or the geographic area covered by the HCP that can reasonably be anticipated by the State and that can reasonably be planned for (e.g. the listing of a new species, or a fire or other natural catastrophic event in areas prone to such event). Changed circumstances and the planned responses

to those circumstances are described in Section 9 of this Agreement. Changed circumstances are not Unforeseen circumstances.

3.3 “Covered activities” means certain forest management activities carried out by the State on Covered lands that may result in incidental take of Covered species. Covered activities include forest management activities as described in Section 1.4.3 of the HCP, whether conducted by the State or by entities authorized by the State, provided that these activities are otherwise lawful. Covered activities include:

- Mechanized timber management;
- Forest product transport;
- Road and landing construction, use, maintenance, and abandonment;
- Harvest site preparation (excluding the use of herbicides);
- Tree planting;
- Fertilizer application;
- Silvicultural activities;
- Fire suppression (excluding chemicals);
- Aquatic and terrestrial habitat restoration;
- Rock pit development and use;
- Other management activities, including vertebrate control and harvesting of minor forest products; and
- Research and monitoring.

3.4 “Covered lands” means the lands and waters upon which the Permits authorize incidental take of Covered species and the lands and waters to which the HCP's conservation and mitigation measures apply. Those lands are described in Exhibit A of this agreement. Covered lands include any land added by modification under Section 12.1 of this Agreement or by amendment under Section 12.2 of this Agreement.

3.5 “Covered species” means the species (including all populations and subspecies on the Covered lands), identified in Section 1.3 of the HCP, each of which the HCP addresses in a manner sufficient to meet all of the criteria for issuing an incidental take permit under ESA § 10(a)(1)(B).

3.6 “ESA” means the federal Endangered Species Act, codified at 16 U.S.C. 1531 to 1544.

3.7 “HCP” means the habitat conservation plan prepared by the State and approved by the Services for the Elliott State Forest, as it may be amended from time to time.

3.8 “Listed species” means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is listed as endangered or threatened under the ESA.

3.9 “Party” or “Parties” means party to this Agreement, as specified in Section 1.0 of this Agreement.

3.10 “Permits” means the incidental take permits issued separately by FWS and by NMFS to the State pursuant to Section 10(a)(1)(B) of the ESA for take incidental to Covered activities on Covered lands, as they may be amended from time to time.

3.11 “Unforeseen circumstances” means changes in circumstances affecting a species or geographic area covered by the HCP that could not reasonably have been anticipated by the State or the Services at the time the HCP was completed, and that result in a substantial and adverse change in the status of a Covered species.

3.12 “Unlisted species” means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is not listed as endangered or threatened under the ESA.

4.0 OBLIGATIONS OF THE PARTIES

4.1 Obligations of the State. The State will fully and faithfully perform all obligations assigned to it under this Agreement, the Permits, and the HCP, to the extent that each is in effect.

4.2 Obligations of the Services. The Services will fully and faithfully perform all obligations assigned to them under this Agreement, the Permits, and the HCP, to the extent that each is in effect. Upon execution of this Agreement by all Parties, and satisfaction of all other applicable legal requirements, FWS and NMFS will each issue to the State a Permit under Section 10(a)(1)(B) of the ESA, authorizing incidental take by the State of each listed Covered species under their respective jurisdictions resulting from Covered activities on Covered lands. The Permits will be consistent with this Agreement and the HCP.

4.2.1 Permit coverage – Species Under FWS’s Jurisdiction. The Permit issued by FWS will identify all Covered species under FWS’s jurisdiction. The Permit will take effect for listed Covered species at the time the Permit is issued. Subject to compliance with all other terms of this Agreement, the Permit will take effect for an unlisted Covered species automatically upon the listing of such species.

4.2.2 Permit Coverage – Species Under NMFS’s Jurisdiction. The Permit issued by NMFS will identify all Covered species under NMFS’ jurisdiction. The Permit will take effect for listed Covered species at the time the Permit is issued. Subject to compliance with all other terms of this Agreement, the Permit will take effect for an unlisted Covered species automatically upon the listing of such species.

4.2.3 “No surprises” assurances. Provided that the State has complied with its obligations under the HCP, this Agreement, and the Permits, the Services can require the State to

provide mitigation, or to take or refrain from taking any action beyond that provided for in the HCP, this Agreement or the Permits only under unforeseen circumstances, and only in accordance with the “no surprises” regulations at 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5), and 222.307(g), which are set forth in Exhibit B to this Agreement.

The Services shall notify the State if any changes in the ESA, regulations adopted by the Services implementing the ESA, other changes in federal law, or court decisions alter or eliminate the “no surprises” assurances provided in connection with the HCP, the Permits, or this Agreement.

4.2.4 Use of best data. In making determinations, findings, and decisions under this Agreement, including without limitation decisions regarding modifications to mitigation measures or to any action the State is required to take or refrain from taking under the Changed circumstances, Unforeseen circumstances, and adaptive management provisions of this Agreement, the HCP, or the Permits, the Services will use the best scientific and commercial data available.

5.0 INCORPORATION OF HCP

The HCP and each of its provisions are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this Agreement and the HCP, the terms of this Agreement will control. In all other cases, the terms of this Agreement and the terms of the HCP will be interpreted to be consistent with each other.

6.0 TERM

6.1 Initial Term. This Agreement and the HCP will become effective on the date on which a permit is first issued by either FWS or NMFS. This Agreement, the HCP, and the Permits will remain in effect for a period of 50 years, except as provided below. In the event that the Permits issued by FWS and NMFS are not in effect within 180 days of the execution of this Agreement by all Parties, the State may in its sole discretion terminate this Agreement.

6.2 Permit suspension or revocation. The Services may suspend or revoke the Permits for cause in accordance with the laws and regulations in force at the time this Agreement was executed. (See 5 U.S.C. § 558; 50 C.F.R. §§ 13.27 - 13.29, 222.306, 15 C.F.R. Part 904.) Such suspension or revocation may apply to the entire Permits, or only to specified Covered species, Covered lands, or Covered activities. If applicable federal regulations are modified subsequent to the effective date of this Agreement, those modifications will apply only to the extent required by subsequent enactment of Congress or court order, or upon agreement of all the Parties. Unless prohibited by law, the Services shall provide the State with 120 days prior written notice of any proposed suspension or revocation of the Permits, and an opportunity to discuss the grounds for the proposed action, the means to cure the basis for the suspension or revocation of the Permits, and alternatives to such action. Suspension or revocation will trigger the post-relinquishment mitigation review process described in Section 6.3.2 of this Agreement, beginning with the Services providing

notice to the State of any required mitigation within 120 days of suspension or revocation. The State's obligations under this Agreement will continue only to the extent described in Section 6.3.2.

6.3 Relinquishment of the Permits.

6.3.1 Generally. The State may relinquish the Permits at any time for any reason, in whole or only as it applies to specific Covered species, Covered activities, or Covered lands. Such relinquishment will be in accordance with the procedural regulations of the Services in force on the date of such relinquishment. (Those regulations are currently codified at 50 C.F.R. §§ 13.26, 306(d)). Notwithstanding relinquishment of the Permits, the State will be required to provide post-relinquishment mitigation for any take of covered species that the Services determine will not have been fully mitigated in accordance with the HCP by the time of relinquishment, as described in Section 6.3.2 of this Agreement. The Services and the State agree that the strategies described in the HCP, including adaptive management, are intended to minimize and mitigate the impacts of take on all Covered species associated with the Covered activities to the maximum extent practicable, on a "pay as you go" basis throughout the term of the Permits. The intent is that the incidental take of all Covered species at any given point in time would be offset by the strategies described in the HCP that have been implemented up to that point in time. Thus, with the State's implementation of the strategies as identified in the HCP, the Services and the State anticipate little or no mitigation will be required should the State relinquish the Permits during the term of the Permits.

6.3.2 Procedure for relinquishment. If the State elects to relinquish the Permits in whole or in part before expiration of the full term of the HCP, the State will provide written notice to the Services at least 120 days prior to the planned relinquishment. Such notice will include a status report in substantially the same form as Appendix J to the HCP, detailing the nature and amount of potential incidental take of all Covered species. Such take will be expressed as the quantity of early, intermediate and advanced structure habitat, including mapped murrelet habitat, harvested to date. The notice will describe the status of the State's implementation of the strategies described in the HCP. The notice also will report the status of the State's compliance with other terms of the HCP pertinent to the relinquishment or partial relinquishment.

Within 90 days after receiving written notice and the status report meeting the requirements of this section, the Services shall give notice to the State stating whether any post-relinquishment mitigation is required and, if so, the amount and terms of such mitigation, and the basis for the Services' conclusions. The Services may determine that post-relinquishment mitigation is required only if the Services find that the State has not implemented the strategies as identified in the HCP, which the State and the Services agree are intended to minimize and mitigate the impacts of take on all Covered species associated with the Covered activities to the maximum extent practicable, on a "pay as you go" basis throughout the term of the Permits.

Should the Services determine that post-relinquishment mitigation is required, the Services shall use the reporting and monitoring information referenced in Section 8.1 of this Agreement to calculate the amount of such mitigation. The Services shall take into account the current status of Covered species and shall take into account and give credit for any change in state or federal law that has the effect of modifying forest land management practices in a manner that

provides greater habitat protection than existed at the time the HCP was adopted.

If the Services determine that no post-relinquishment mitigation is required, and the relinquishment is a complete relinquishment, all obligations assumed by the Parties under this Agreement will terminate upon the Services' issuance of such notice and this Agreement will terminate on that date. If the State relinquishes the Permits only in part, then upon the Services' issuance of such notice, those obligations attendant to the portions of the Permits that the State is relinquishing will terminate on that date.

If the State disagrees with the Services' determination regarding whether mitigation is required or the amount of such mitigation, the State may invoke the dispute resolution procedures described in Section 13 of this Agreement. The Parties will continue to carry out their obligations under the Permits, the HCP and this Agreement until any such dispute is resolved, or until the Services notify the State that all post-relinquishment mitigation required by the Services is completed. If the Parties are unable to agree, the Services will have the final authority to determine whether the State is required to provide post-relinquishment mitigation, provided, however, that the State shall be required to mitigate only for take that occurred but that has not been fully mitigated before it relinquished the Permits, or before the Permits were suspended or revoked. Unless the Parties agree otherwise, the Services may not in any event require more mitigation than would have been provided if the State had carried out the full term of the HCP.

6.4 Effect of suspension, revocation, or relinquishment

6.4.1 Generally. It is intended that the HCP, the Permits, and this Agreement will terminate concurrently. Therefore, this Agreement will terminate as of the effective date of any termination of the HCP or the Permits, including any voluntary relinquishment of the Permits in whole by the State, revocation of the Permits by the Services, or court order revoking the Permits. If the HCP or the Permits are suspended, this Agreement also will be suspended, except that the State and the Services agree to the extent reasonably possible to refrain from taking any action inconsistent with the continuation of the HCP, the Permits or this Agreement in order to be able to resume their respective rights and obligations in the event that the HCP, the Permits and the Agreement come back into effect.

6.4.2 Relationship of documents. Any suspension of the Permits, in whole or in part, automatically suspends the relevant commitments of the HCP and this Agreement. Further, if either Permit is suspended in part, the State may suspend the HCP and Permit in full because the HCP and Permits are intended to function as an integrated whole and it may be unreasonable for the State to continue accepting the burdens of the HCP without obtaining the full benefits of the Permits.

6.4.3 No retroactive liability. Any suspension, revocation, or relinquishment of the HCP, the Permits, or this Agreement will subject the Covered activities to all applicable ESA take prohibitions. However, the Parties do not intend that any retroactive liability will be imposed for actions taken in a good faith belief that the HCP and Permits were in effect at the time such actions were taken. The Services are expected to exercise prosecutorial

discretion as necessary to avoid imposing retroactive liability for such actions. If citizen suits are brought with respect to alleged take attributable in whole or in part to actions taken at a time when the HCP and Permits had not been suspended or terminated by notices published in the Federal and state registers or by a court order, the Services will provide such factual documents as may be reasonably requested by the defendants to establish that the HCP and Permits appeared by their terms to be in effect and had not been suspended or revoked as of specified dates.

6.5 Treatment of unlisted species. For purposes of Sections 6.2 and 6.3 of this Agreement, unlisted Covered species within the Services' jurisdiction will be treated as though they were listed Covered species in determining the amount of take authorized under the HCP and the mitigation required. With respect to unlisted Covered species within the Services' jurisdiction, the State will not be subject to the provisions of Sections 6.2 and 6.3 of this Agreement when permit revocation, suspension or relinquishment has occurred before such species is listed. The parties agree that the State may terminate, in whole or in part, the commitments of the HCP and this Agreement regarding Covered species not listed at the time this Agreement is executed, upon 75 days' written notice to the Services. Termination of the commitments of the HCP with regard to such Covered species relieves the Services of their obligations contained in this agreement and the HCP to issue a permit.

6.6 Extension of the Permits. Upon agreement of the Parties and compliance with all applicable laws, the Permits may be extended beyond their initial term under regulations of the Services in force on the date of such extension. If the State desires to extend the Permits, it will so notify the Services at least 180 days before the then-current term is scheduled to expire. Any extension of the Permits would constitute extension of the HCP and this Agreement for the same amount of time, subject to any modifications that the parties may agree to at the time of extension.

7.0 FUNDING

7.1 State funding. The State will provide such funds as may be necessary to carry out its obligations under the HCP, provided, however, that the State's obligations to pay any funds in connection with the HCP, the Permits or this Agreement are subject to the restrictions of Article XI, Section 7 of the Oregon Constitution. The State by and through the Oregon Department of Forestry shall use good faith and best efforts to secure authorization from the Oregon legislature for any State appropriation or expenditure limitation reasonably necessary in connection with the State's obligations under this Agreement. This will include submission of a budget each biennium and best faith efforts to ensure that the budget receives legislative authorization.

7.2 Federal funding. The Services shall include in their annual budget requests sufficient funds to fulfill their respective obligations under the HCP, the Permits, and this Agreement.

7.3 Cooperation. All Parties at all times will support efficient and effective use of available funds to accomplish the purposes of the HCP, the Permits, and this Agreement, to the maximum extent practicable.

7.4 Limitations. Implementation of the HCP, the Permits, and this Agreement by the Services is subject to requirements of the federal Anti-Deficiency Act, and implementation by the State is subject to analogous provisions of the state constitution, state laws, and the availability of appropriated state and federal funds. Nothing in this Agreement will be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury or any State funds; however, a failure to appropriate funds sufficient to carry out the requirements of the HCP may be cause for suspension or revocation of the Permits. The Parties acknowledge that they will not be required under this Agreement to expend any federal or state agency's appropriated funds unless and until an authorized official affirmatively acts to commit to such expenditures as evidenced in writing.

8.0 MONITORING AND REPORTING

8.1 Planned periodic reports. As described in Section 11.1.8 of the HCP, the State shall submit periodic implementation and monitoring reports describing its activities and results of the monitoring program provided for in the HCP. Every eight years, the State shall present those reports to the Services in a combined format. Within 90 days of receipt thereof, the Services shall determine the status of the State's compliance with the terms of the HCP, and shall provide written notice to the State of any outstanding mitigation that the Services believe the State is required to perform as of the date of the State's report. Any such mitigation identified by the Services shall be limited to commitments made by the State in accordance with the HCP.

8.2 Other reports. The State will provide, within 30 days of being requested by the Services, any additional information in its possession or control related to implementation of the HCP that is requested by the Services for the purpose of assessing whether the terms and conditions of the Permits and the HCP, including the HCP's adaptive management plan, are being fully implemented. This provision shall not be construed to waive any privilege provided by law, including the attorney-client privilege. If the State determines that collection, copying and delivery of such information would require significant amounts of overtime costs or otherwise divert significant resources from other HCP compliance duties, it may inform the Services of that problem and request the Services to take any of the following actions: (1) reduce the scope of their requests, (2) provide funds for the State to retain temporary staffing to meet the Services' requests, (3) send people to gather, copy and deliver the requested information under the State's direction. The Parties then will meet and confer to agree on reasonable, prudent, and practicable ways to gather sufficient information for the Services to perform their ESA duties without imposing unreasonable burdens on the State.

8.3 Certification of Reports. All reports required under Section 8.1 will include the following certification signed by a responsible State official who supervised or directed preparation of the report:

I certify that, to the best of my knowledge, after appropriate inquiries, the information submitted is true, accurate, and complete.

8.4 Monitoring by Services. The Services may conduct inspections and monitoring in connection with the Permits in accordance with their regulations. (See 50 C.F.R. §§ 13.47, 222.301(j).) Within 120 days after completion of such inspections and monitoring, the Services will provide the State a copy of any non-privileged written report that the Services have prepared that documents observations made during such inspection or monitoring.

9.0 CHANGED CIRCUMSTANCES

9.1 State-initiated response to changed circumstances. The State will give notice to the Services within 30 days after determining that any of the changed circumstances listed in Chapter 11 of the HCP have occurred. The State and the Services will then cooperate to implement the responses to changed circumstances described in Chapter 11 of the HCP, in accordance with the type of changed circumstance at issue. As soon as practicable thereafter, but no later than 60 days after determining that a changed circumstance has occurred, the State will modify its activities in the manner described in Chapter 11 of the HCP to the extent necessary to mitigate the effects of the changed circumstances on Covered species, and will report to the Services on its actions. The State will make such modifications without awaiting notice from the Services.

9.2 Service-initiated response to changed circumstances. Services will give notice to the State within 30 days after determining that any of the changed circumstances listed in Chapter 11 of the HCP have occurred. The State and the Services will then cooperate to implement the responses to changed circumstances described in Chapter 11 of the HCP, in accordance with the type of changed circumstance at issue. If the Services determine that the State has not responded in accordance with Chapter 11 of the HCP, the Services will so notify the State, describing what actions the Services believe need to be undertaken. The Services and the State will consult regarding the proposed action. Within 60 days after receiving such notice, the State will make the required changes and report to the Services on its actions. Such changes are provided for in Chapter 11 of the HCP, and hence do not constitute unforeseen circumstances or require amendment of the Permits or HCP.

10.0 ADAPTIVE MANAGEMENT

10.1 State-initiated adaptive management. The State will implement changes to management approaches or practices based upon the adaptive management provisions in Chapter 11 of the HCP, when the State determines that such changes are appropriate to achieve the HCP's requirements or to respond to monitoring results or new scientific information. The State will make such changes without awaiting notice from the Services, and will report to the Services on any actions taken pursuant to this section. Changes that result from the adaptive management process described in Chapter 11 of the HCP do not require amendments to the HCP except as provided in Sections 10.3 and 10.4 of this Agreement.

10.2 Service-initiated adaptive management. If the Services determine that one or more

of the adaptive management provisions in the Chapter 11 of the HCP have been triggered and that the State has not changed its management practices in accordance with Chapter 11 of the HCP, the Services will so notify the State, describing what actions the Services believe need to be undertaken, and will consult with the State on making the required changes. Within 60 days after receiving such notice, the State will make the required changes and report to the Services on its actions. Such changes are provided for in the HCP, and hence do not constitute unforeseen circumstances or require amendment of the Permits or HCP, except as provided in this section.

10.3 Reductions in mitigation. The State may implement adaptive management changes that result in different types or levels of mitigation than provided for Covered species under the original terms of the HCP, if the Services first provide written approval. The Parties acknowledge that conservation objectives may be achieved through different techniques without causing a reduction in mitigation. The State may propose any such adaptive management changes by notice to the Services, specifying the adaptive management modifications proposed, the basis for them, including supporting data, and the anticipated effects on Covered species, and other environmental impacts. Within 120 days of receiving such a notice, the Services will take one of the following actions: approve the proposed adaptive management changes; approve them as modified by the Services; or notify the State that the proposed changes may constitute Permit amendments that must be reviewed under Section 12.2 of this Agreement.

10.4 No increase in take. This section does not authorize any modifications to the HCP that would result in an increase in the amount and nature of take of Covered species authorized by the Permits. Any such modification must be reviewed as a Permit amendment under Section 12.2 of this Agreement.

11.0 LAND TRANSACTIONS

11.1 Acquisition of land by the State. Nothing in this Agreement, the HCP, or the Permits limits the State's authority to acquire additional real property in connection with the Elliott State Forest. Except as otherwise provided in Section 12.1 of this Agreement, lands that the State may acquire to add to the Elliott State Forest will not be Covered Lands except upon amendment of the Permits as provided in Section 12.2 of this Agreement.

11.2 Disposal of land by the State. The State has a program of land acquisition and disposition, including but not limited to transfers, sales, exchanges, and purchases. During the first ten years of HCP implementation, Covered lands to be disposed of will not include T&E core areas.

At least 90 days before the completion of any conveyance of Covered lands to another person or entity, the State shall provide written notice to the Services. The notice shall include:

1. A description of the land to be conveyed;
2. A statement as to whether the prospective new owner will become a party to the HCP;
3. A statement regarding any habitat modifications under the Permits on the particular land during the term of the Permits up to the time of the conveyance;

4. A statement of the extent of mitigation accomplished, if any, to offset such habitat modification; and
5. Any changes to the mitigation necessary to offset any adverse effect of the conveyance.

Transfers of Covered lands will be processed as minor modifications when consistent with the criteria of Section 12.1 of this Agreement. In addition, transfers of Covered lands will be processed as minor modifications in accordance with Section 12.1 of this Agreement if:

(a) The land will be transferred to an agency of the federal government and, before transfer, the Services have determined that transfer will not compromise the effectiveness of the HCP based on commitments by that agency regarding management of such land;

(b) The land will be transferred to a non-federal entity that has entered into an agreement acceptable to the Services (e.g., an easement held by the State with the Services as third-party beneficiaries) to ensure that the lands will be managed in such a manner and for such duration so as not to compromise the effectiveness of the HCP;

(c) The land will be transferred to a non-federal entity that, before completion of the land transaction, has agreed to be bound by the HCP as it applies to the transferred land and has obtained an incidental take permit for Covered species; or

(d) The Services determine that the cumulative amount of land to be transferred in any single transaction does not exceed 640 acres and will not have a material impact on the ability of the State to comply with the requirements of the HCP and the terms and conditions of the Permits.

Land dispositions under paragraph 11.3 (d) of this Agreement may include, at the sole discretion of the State, a requirement of the recipient to commit to managing the disposed land in accordance with the Permits, the HCP and this Agreement. If the acquiring entity commits in writing to the State that the disposed lands will be managed to maintain the commitments of the Permits, the HCP, and this Agreement, the State will continue to be given credit for such lands for the purpose of determining compliance with the HCP, this Agreement, and the Permits. If the management of new lands or disposition of lands results in incidental take beyond the level authorized in the Permits, an amendment of the Permits as provided in Section 12.2 of this Agreement may be required by the Services to define additional, mutually-agreed-upon mitigation measures.

12.0 MODIFICATIONS AND AMENDMENTS

12.1 Minor modifications.

(a) Any Party may propose minor modifications to the HCP or this Agreement by providing notice to all other Parties. Such notice shall include a statement of the reason for the proposed modification and an analysis of its environmental effects, including its effects on operations under the HCP and on Covered species. The Parties will use best efforts to respond to

proposed modifications within 60 days of receipt of such notice. Proposed modifications will become effective upon all other Parties' written approval. If, for any reason, a receiving Party objects to a proposed modification, it must be processed as an amendment of the Permits in accordance with Section 12.2 of this Agreement. The Services will not propose or approve minor modifications to the HCP or this Agreement if the Services determine that such modifications would result in operations under the HCP that are significantly different from those analyzed in connection with the original HCP, adverse effects on the environment that are new or significantly different from those analyzed in connection with the original HCP, or additional take not analyzed in connection with the original HCP.

(b) Minor modifications to the HCP and IA processed pursuant to this subsection may include but are not limited to the following:

(1) Correction of typographic, grammatical, and similar editing errors that do not change the intended meaning;

(2) Correction of any maps or exhibits to correct errors in mapping or to reflect previously approved changes in the Permits or HCP;

(3) Minor changes to survey, monitoring or reporting protocols;

(4) With agreement of the State and the Services, coverage by the HCP and the Permits of additional parcels of land contiguous with the Elliott State Forest that the State may acquire, so long as any one parcel at the time of acquisition does not exceed 640 total acres.

(c) Any other modifications to the HCP or IA will be processed as amendments of the Permits in accordance with Section 12.2 of this Agreement.

12.2 Amendment of the Permits. The Permits, the HCP or this Agreement may be amended by the Parties' mutual agreement in accordance with all applicable legal requirements, including but not limited to the ESA, the National Environmental Policy Act, the Services' permit regulations, and State law governing the management of the Covered lands. The Party proposing the amendment shall provide a statement of the reasons for the amendment and an analysis of its environmental effects, including its effects on operations under the HCP and on Covered species.

13.0 REMEDIES, ENFORCEMENT, AND DISPUTE RESOLUTION

13.1 In general. Except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this Agreement, the Permits, and the HCP.

13.2 No monetary damages. No Party shall be liable in damages to any other Party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement.

13.3 Injunctive and temporary relief. The Parties to this Agreement acknowledge that injunctive and temporary relief may be appropriate to ensure compliance with the terms of this Agreement.

13.4 Enforcement authority of the United States. Nothing contained in this Agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA or other applicable law.

13.5 Dispute resolution. The Parties recognize that disputes concerning implementation of, compliance with, or termination of this Agreement, the HCP, and the Permits may arise from time to time. Examples of such disputes include, without limitation: whether and to what extent post-termination mitigation may be required; whether the State is in compliance with the terms of the Permits or the HCP; whether adaptive management is called for under Section 10 of this Agreement; and whether or not changed or unforeseen circumstances exist and, if so, what response is appropriate. The Parties agree to work together in good faith to resolve such disputes, using the informal dispute resolution procedures set forth in this section, or such other procedures upon which the Parties may later agree. However, if at any time any Party determines that circumstances so warrant, it may seek any available remedy without waiting to complete informal dispute resolution.

13.5.1 Informal dispute resolution process. Unless the Parties agree upon another dispute resolution process, or unless an aggrieved Party has initiated administrative proceedings or suit in federal court, the Parties may use the following process to attempt to resolve disputes:

(a) The aggrieved Party will notify the other Parties of the provision that may have been violated, the basis for contending that a violation has occurred, and the remedies it proposes to correct the alleged violation.

(b) The Party alleged to be in violation will have 30 days, or such other time as may be agreed, to respond. During this time it may seek clarification of the information provided in the initial notice. The aggrieved Party will use its best efforts to provide any information then available to it that may be responsive to such inquiries.

(c) Within 30 days after such response was provided or was due, representatives of the Parties having authority to resolve the dispute will meet and negotiate in good faith toward a solution satisfactory to all Parties, or will establish a specific process and timetable to seek such a solution.

(d) If any issues cannot be resolved through such negotiations, the Parties will consider non-binding mediation and other alternative dispute resolution processes and, if a dispute resolution process is agreed upon, will make good faith efforts to resolve all remaining issues through that process.

(e) This Section 13.5.1 survives any termination or relinquishment of the HCP, the Permits and this Agreement to the extent necessary to resolve any disputes arising while this

Agreement was in effect and any disputes related to the Parties' post-termination rights or obligations.

14.0 MISCELLANEOUS PROVISIONS

14.1 No partnership. Neither this Agreement nor the HCP shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

14.2 State management. Nothing in this Agreement limits the State's ability to manage and protect these lands in accordance with the State Constitution, Statutes and other state or federal law, and Administrative Rules. However, in the event that changes in State law render the State unable to fulfill any of its obligations under the HCP or this Agreement, the Services reserve the right to suspend or revoke the Permits in accordance with Section 6.2 of this Agreement.

14.3 Notices. Any notice permitted or required by this Agreement shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any Party may from time to time specify to the other Parties in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail. Notices shall be transmitted so that they are received within the specified deadlines.

Assistant Regional Director
United States Fish and Wildlife Service
911 N.E. 11th Ave.
Portland, Oregon 97232-4181
Telephone: 503-231-6159
Telefax: 503-231-2019

Regional Administrator
National Marine Fisheries Service
7600 Sand Point Way N.E.
Seattle, Washington 98115-0070
Telephone: 206-526-6150
Telefax: 206-526-6426

State Forester
Oregon Department of Forestry
2600 State Street
Salem, Oregon 97310
Telephone: 503-945-7200
Telefax: 503-945-7212

Director

Oregon Department of State Lands
775 Summer Street NE, Suite 100
Salem, Oregon 97301
Telephone: 503-378-3805
Telefax: 503-378-4844

14.4 Entire agreement. This Agreement, together with the HCP and the Permits, constitutes the entire agreement among the Parties. It supersedes any and all other agreements, either oral or in writing, among the Parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

14.5 Elected officials not to benefit. No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

14.6 Duplicate originals. This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the Parties hereto.

14.7 No third-party beneficiaries. Without limiting the applicability of rights granted to the public pursuant to the ESA or other federal law, this Agreement shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof, nor shall it authorize anyone not a party to this Agreement to maintain a suit for personal injuries or damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing law.

14.8 Relationship to the ESA and other authorities. The terms of this Agreement shall be governed by and construed in accordance with the ESA and applicable federal law. In particular, nothing in this Agreement is intended to limit the authority of the Services to seek penalties or otherwise fulfill their responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Services as agencies of the federal government. Nothing in this Agreement will limit the right or obligation of any federal agency to engage in consultation required under Section 7 of the ESA or other federal law; however, it is intended that the rights and obligations of the State under the HCP and this Agreement will be considered in any consultation affecting the State's use of the Covered lands.

14.9 References to regulations. Any reference in this Agreement, the HCP, or the Permits to any federal or state law or regulation shall be deemed to be a reference to such law or regulation in effect at the time an action is taken, except that the State may elect to rely on federal laws and regulations in effect at the time this Agreement was executed if necessary to protect its rights under the Sections of this Agreement addressing "No Surprises" Assurances, Suspension, Termination, Relinquishment, and Term.

14.10 Applicable laws. All activities undertaken pursuant to this Agreement, the HCP, or

the Permits must be in compliance with all applicable state and federal laws and regulations.

14.11 Successors and assigns. This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns. Assignment or other transfer of the Permits shall be governed by the Services' regulations; under the regulations in force on the effective date of this Agreement, a permit issued under ESA Section 10(a) may be assigned or otherwise transferred only in accordance with the regulations at 50 CFR § 13.25.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement to be in effect as of the date on which a Permit is first issued by either FWS or by NMFS .

BY _____ Date _____
Deputy Regional Director
United States Fish and Wildlife Service
Portland, Oregon

BY _____ Date _____
Regional Administrator
National Marine Fisheries Service
Seattle, Washington

BY _____ Date _____
Marvin Brown, State Forester
Oregon Department of Forestry
Salem, Oregon

BY _____ Date _____
Louise Solliday, Director
Department of State Lands
Salem, Oregon

EXHIBIT A

ELLIOTT STATE FOREST

DOUGLAS COUNTY

Township 22 South, Range 10 West, Willamette Meridian:

- Section 07: E $\frac{1}{2}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, Lots 1, 2, 6 thru 9 and a portion of Lot 3
- Section 08: Lots 5 and 7
- Section 14: Lot 9 and SE $\frac{1}{4}$ SW $\frac{1}{4}$
- Section 15: Lots 9, 10, a portion of Lot 7, and SE $\frac{1}{4}$ SE $\frac{1}{4}$
- Section 17: E $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, Lots 5 thru 8 and 10 thru 15
- Sections 18 thru 20: All
- Section 21: All except Lot 18
- Section 22: All
- Section 23: Lots 5 thru 11, SW $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$
- Sections 26 thru 34: All
- Section 35: E $\frac{1}{2}$ SW $\frac{1}{4}$ and a portion of S $\frac{1}{2}$ SE $\frac{1}{4}$

Township 22 South, Range 11 West, Willamette Meridian:

- Section 01: Lots 5 and 9 thru 14
- Section 02: S $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ and Lots 5 thru 9
- Section 03: NW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$, Lot 1 and a portion of SW $\frac{1}{4}$ NE $\frac{1}{4}$
- Section 09: Lots 1 thru 4, N $\frac{1}{2}$ S $\frac{1}{2}$, NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$
- Section 10: Lots 2 and 3, N $\frac{1}{2}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$

Section 11: Lots 1, 4 thru 7, a portion of Lot 3, NE¹/₄NW¹/₄, NE¹/₄, NE¹/₄SE¹/₄, and a portion of NW¹/₄SE¹/₄

Sections 12 thru 14: All

Section 15: S¹/₂, NW¹/₄ and a portion of S¹/₂NE¹/₄

Township 22 South, Range 11 West, Willamette Meridian:

Section 16: All

Section 17: N¹/₂SW¹/₄, SE¹/₄SW¹/₄, W¹/₂SE¹/₄, SW¹/₄NE¹/₄, SE¹/₄NW¹/₄ and Lots 5 thru 7

Section 19: S¹/₂NE¹/₄, NE¹/₄NE¹/₄, SE¹/₄ and Lots 1 thru 4

Section 20: S¹/₂NW¹/₄, W¹/₂E¹/₂, SW¹/₄ and Lots 1 thru 4

Sections 21 thru 36: All

Township 22 South, Range 12 West, Willamette Meridian:

Section 24: Lots 2 thru 4, W¹/₂SE¹/₄, SW¹/₄NE¹/₄, SE¹/₄NW¹/₄ and E¹/₂SW¹/₄

Section 25: Lot 4, SW¹/₄SE¹/₄ and S¹/₂SW¹/₄

Section 26: N¹/₂SE¹/₄ and SE¹/₄SE¹/₄

Section 35: NE¹/₄NE¹/₄, SW¹/₄NE¹/₄ and a portion of E¹/₂SE¹/₄

Section 36: All

Township 23 South, Range 9 West, Willamette Meridian:

Section 06: W¹/₂NW¹/₄ and a portion of S¹/₂

Township 23 South, Range 10 West, Willamette Meridian:

Section 02: Lots 1 thru 13, 16 thru 21 and W¹/₂SW¹/₄

Section 03: All

Section 10: All

Section 11: Lots 1, 4, 5, 8 and 9, SE¹/₄NW¹/₄, E¹/₂SW¹/₄, and SE¹/₄

Section 14: N $\frac{1}{2}$ NE $\frac{1}{4}$ and NW $\frac{1}{4}$

Sections 15, 22 and 23: All

Section 24: Portions of SE $\frac{1}{4}$ and NW $\frac{1}{4}$

Township 23 South, Range 10 West, Willamette Meridian:

Section 26: SW $\frac{1}{4}$

Section 27: All

COOS COUNTY

Township 23 South, Range 10 West, Willamette Meridian:

Sections 04 thru 09, 16 thru 21 and 28 thru 30: All

Section 31: W $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, Lots 1 thru 5 and a portion of Lot 6

Section 32: N $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$

Section 33: W $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$ and a portion of NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$

Township 23 South, Range 11 West, Willamette Meridian:

Sections 01 thru 06: All

Section 07: E $\frac{1}{2}$ W $\frac{1}{2}$, E $\frac{1}{2}$ and Lots 2, 3 and 4

Sections 08 thru 17: All

Section 18: N $\frac{1}{2}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, Lot 3 and a portion of NE $\frac{1}{4}$ SW $\frac{1}{4}$

Section 19: S $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, Lots 2 thru 4 and a portion of Lot 1

Sections 20 thru 25: All

Section 26: S $\frac{1}{2}$, N $\frac{1}{2}$ N $\frac{1}{2}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, portions of SE $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$

Sections 27 thru 29: All

Section 30: Lots 1, 3 and 4, SE¹/₄, E¹/₂SW¹/₄, N¹/₂NE¹/₄ and NE¹/₄NW¹/₄

Sections 31 thru 36: All

Township 23 South, Range 12 West, Willamette Meridian:

Section 01: Lots 1 thru 4

Section 12: S¹/₂NE¹/₄, SE¹/₄NW¹/₄ and SE¹/₄

Section 13: NE¹/₄ and E¹/₂NW¹/₄

Section 16: N¹/₂SW¹/₄

Section 25: E¹/₂SE¹/₄

Section 27: SE¹/₄SE¹/₄ and a portion of SW¹/₄SE¹/₄

Section 34: E¹/₂NE¹/₄, S¹/₂S¹/₂ and NE¹/₄SE¹/₄

Section 35: S¹/₂, NE¹/₄, W¹/₂NW¹/₄ and SE¹/₄NW¹/₄

Section 36: S¹/₂SE¹/₄, SW¹/₄, N¹/₂NE¹/₄, W¹/₂NW¹/₄, portions of S¹/₂NE¹/₄ and N¹/₂SE¹/₄

Township 24 South, Range 10 West, Willamette Meridian:

Section 06: Lots 1 thru 4 and 7 thru 18

Township 24 South, Range 11 West, Willamette Meridian:

Sections 01 and 02: All

Section 03: Lots 1 thru 4, S¹/₂N¹/₂, SE¹/₄, E¹/₂SW¹/₄ and portions of W¹/₂SW¹/₄

Section 04: All except a portion of SE¹/₄SE¹/₄

Sections 05 thru 08: All

Section 09: N¹/₂, SW¹/₄, N¹/₂SE¹/₄ and SW¹/₄SE¹/₄

Section 10: All

Section 11: N¹/₂, N¹/₂S¹/₂

Section 12: N¹/₂

Sections 15 and 16: All

Section 17: N¹/₂, N¹/₂SW¹/₄, NW¹/₄SE¹/₄, Lots 1 thru 3 and a portion of SE¹/₄SE¹/₄

Township 24 South, Range 11 West, Willamette Meridian:

Section 18: All

Section 19: A portion of N¹/₂NE¹/₄

Section 20: A portion of Lot 1, Lots 2 thru 7, NE¹/₄SE¹/₄ and a portion of E¹/₂NE¹/₄

Section 21: All

Section 22: N¹/₂, N¹/₂S¹/₂ and Lots 1 and 2

Section 27: Lots 4 and 5, W¹/₂SW¹/₄, SE¹/₄SW¹/₄ and SW¹/₄SE¹/₄

Sections 28 and 29: All

Section 30: A portion of Lot 1

Section 32: N¹/₂, N¹/₂SW¹/₄ and NW¹/₄SE¹/₄

Section 33: NW¹/₄, N¹/₂NE¹/₄ and SE¹/₄NE¹/₄

Section 34: N¹/₂N¹/₂

Township 24 South, Range 12 West, Willamette Meridian:

Sections 01 and 02: All

Section 03: All except a portion of SW¹/₄SE¹/₄

Section 04: NE¹/₄SE¹/₄ and SE¹/₄NE¹/₄

Section 09: SE¹/₄SE¹/₄ and a portion of E¹/₂NE¹/₄

Sections 10 thru 14: All

Section 15: E¹/₂, NE¹/₄NW¹/₄, Lot 1, portions of Lot 2 and SE¹/₄SW¹/₄

- Section 16: $S\frac{1}{2}N\frac{1}{2}$ and $N\frac{1}{2}NE\frac{1}{4}$
- Section 22: $NE\frac{1}{4}$, $SE\frac{1}{4}NW\frac{1}{4}$, $NE\frac{1}{4}SW\frac{1}{4}$ and $N\frac{1}{2}SE\frac{1}{4}$
- Section 23: All except $SE\frac{1}{4}SE\frac{1}{4}NE\frac{1}{4}$
- Section 24: Lots 1 and 2, $NE\frac{1}{4}NE\frac{1}{4}$, $W\frac{1}{2}E\frac{1}{2}$, $SE\frac{1}{4}SE\frac{1}{4}$, $S\frac{1}{2}NW\frac{1}{4}$, $SW\frac{1}{4}$ and a portion of $SE\frac{1}{4}NE\frac{1}{4}$
- Section 25: Lots 1 and 2, $N\frac{1}{2}NE\frac{1}{4}$ and a portion of $S\frac{1}{2}NW\frac{1}{4}$

EXHIBIT B

50 C.F.R. §17.22(b)(5) provides:

(5) Assurances provided to permittee in case of changed or unforeseen circumstances. The assurances in this paragraph (b)(5) apply only to incidental take permits issued in accordance with paragraph (b)(2) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. These assurances cannot be provided to Federal agencies. This rule does not apply to incidental take permits issued prior to March 25, 1998. The assurances provided in incidental take permits issued prior to March 25, 1998 remain in effect, and those permits will not be revised as a result of this rulemaking.

(i) Changed circumstances provided for in the plan. If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(ii) Changed circumstances not provided for in the plan. If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the plan's operating conservation program, the Director will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(iii) Unforeseen circumstances. (A) In negotiating unforeseen circumstances, the Director will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(B) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Director may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the permittee.

(C) The Director will have the burden of demonstrating that unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. The Director will consider, but not be limited to, the following factors:

- (1) Size of the current range of the affected species;
- (2) Percentage of range adversely affected by the conservation plan;
- (3) Percentage of range conserved by the conservation plan;

(4) Ecological significance of that portion of the range affected by the conservation plan;

(5) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and

(6) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(6) Nothing in this rule will be construed to limit or constrain the Director, any Federal, State, local, or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

(7) Discontinuance of permit activity. Notwithstanding the provisions of § 13.26 of this subchapter, a permittee under this paragraph (b) remains responsible for any outstanding minimization and mitigation measures required under the terms of the permit for take that occurs prior to surrender of the permit and such minimization and mitigation measures as may be required pursuant to the termination provisions of an implementing agreement, habitat conservation plan, or permit even after surrendering the permit to the Service pursuant to § 13.26 of this subchapter. The permit shall be deemed canceled only upon a determination by the Service that such minimization and mitigation measures have been implemented. Upon surrender of the permit, no further take shall be authorized under the terms of the surrendered permit.

(8) Criteria for revocation. A permit issued under paragraph (b) of this section may not be revoked for any reason except those set forth in § 13.28(a)(1) through (4) of this subchapter or unless continuation of the permitted activity would be inconsistent with the criterion set forth in *16 U.S.C. 1539(a)(2)(B)(iv)* and the inconsistency has not been remedied.

50 CFR § 17.32(b)(5) provides:

(5) Assurances provided to permittee in case of changed or unforeseen circumstances. The assurances in this paragraph (b)(5) apply only to incidental take permits issued in accordance with paragraph (b)(2) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. These assurances cannot be provided to Federal agencies. This rule does not apply to incidental take permits issued prior to March 25, 1998. The assurances provided in incidental take permits issued prior to March 25, 1998 remain in effect, and those permits will not be revised as a result of this rulemaking.

(i) Changed circumstances provided for in the plan. If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(ii) Changed circumstances not provided for in the plan. If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the plan's operating conservation program, the Director will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(iii) Unforeseen circumstances. (A) In negotiating unforeseen circumstances, the Director will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(B) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Director may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the permittee.

(C) The Director will have the burden of demonstrating that such unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. The Director will consider, but not be limited to, the following factors:

- (1) Size of the current range of the affected species;
- (2) Percentage of range adversely affected by the conservation plan;
- (3) Percentage of range conserved by the conservation plan;
- (4) Ecological significance of that portion of the range affected by the conservation plan;
- (5) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and
- (6) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(6) Nothing in this rule will be construed to limit or constrain the Director, any Federal, State, local, or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

(7) Discontinuance of permit activity. Notwithstanding the provisions of § 13.26 of this subchapter, a permittee under this paragraph (b) remains responsible for any outstanding minimization and mitigation measures required under the terms of the permit for take that occurs prior to surrender of the permit and such minimization and mitigation measures as may be required pursuant to the termination provisions of an implementing agreement, habitat conservation plan, or permit even after surrendering the permit to the Service pursuant to § 13.26 of this subchapter. The permit shall be deemed canceled only upon a determination by the Service that such minimization and mitigation measures have been implemented. Upon surrender of the permit, no further take shall be authorized under the terms of the surrendered permit.

(8) Criteria for revocation. A permit issued under paragraph (b) of this section may not be revoked for any reason except those set forth in § 13.28(a)(1) through (4) of this subchapter or unless

continuation of the permitted activity would be inconsistent with the criterion set forth in *16 U.S.C. 1539(a)(2)(B)(iv)* and the inconsistency has not been remedied.

50 CFR § 222.307(g) provides:

(g) Assurances provided to permittee in case of changed or unforeseen circumstances. The assurances in this paragraph (g) apply only to incidental take permits issued in accordance with paragraph (c) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. These assurances cannot be provided to Federal agencies. This rule does not apply to incidental take permits issued prior to March 25, 1998. The assurances provided in incidental take permits issued prior to March 25, 1998, remain in effect, and those permits will not be revised as a result of this rulemaking.

(1) Changed circumstances provided for in the plan. If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(2) Changed circumstances not provided for in the plan. If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the plan's operating conservation program, NMFS will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(3) Unforeseen circumstances. (i) In negotiating unforeseen circumstances, NMFS will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(ii) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, NMFS may require additional measures of the permittee where the conservation plan is being properly implemented. However, such additional measures are limited to modifications within any conserved habitat areas or to the conservation plan's operating conservation program for the affected species. The original terms of the conservation plan will be maintained to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the permittee.

(iii) NMFS has the burden of demonstrating that unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. NMFS will consider, but not be limited to, the following factors:

- (A) Size of the current range of the affected species;
- (B) Percentage of range adversely affected by the conservation plan;
- (C) Percentage of range conserved by the conservation plan;

(D) Ecological significance of that portion of the range affected by the conservation plan;

(E) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and

(F) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.