Planning Agreement

regarding the

Bay Delta Conservation Plan

October 6, 2006

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BAY DELTA CONSERVATION PLAN
Planning Agreement

This agreement (Planning Agreement) regarding the planning and preparation of the Bay Delta Conservation Plan (BDCP) is entered into as of the Effective Date by and among the California Resources Agency, the Fishery Agencies, the Potential Regulated Entities, and the Non-Governmental Organizations, as listed in Exhibit A.

1. Definitions

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

1.1. "BDCP" means the Bay Delta Conservation Plan, a conservation plan prepared to meet the requirements of Federal Endangered Species Act (FESA), California Endangered Species Act (CESA) and/or the Natural Community Conservation Plan Act (NCCPA).

1.2. "Biological Assessment" or "BA" means the information prepared by or under the direction of a Federal Action Agency for the purpose of identifying the potential effects of the agency action within the Planning Area on species which are listed or proposed to be listed and critical habitat which has been designated or proposed, and submitted to the United States Fish and Wildlife Service (USFWS) and/or National Marine Fisheries Service (NMFS) pursuant to section 7(c)(1) of FESA.

1.3. "CEQA" means the California Environmental Quality Act, Public Resources Code, section 21000, *et seq.*

1.4. "CESA" means the California Endangered Species Act, California Fish and Game Code, section 2050, *et seq.*

1.5. "Covered Activities" means those certain activities that will be addressed in the BDCP and for which the Potential Regulated Entities may seek take authorizations pursuant to the California Fish and Game Code (section 2080.1, section 2081, and/or section 2835) and FESA.

1.6. "Covered Species" means those certain species that may be identified in the BDCP, both listed and non-listed, whose conservation and management are provided for in the BDCP, and which may be authorized for take under State and/or federal law once the BDCP is approved.

1.7. "CVP" means the Central Valley Project.

1.8. "Effective Date" means the date on which this Planning Agreement has been executed by the Parties, as listed in Exhibit A.

1.9. "Federal Action Agency" means a federal agency that authorizes, funds, or carries out actions that may require consultation with USFWS and/or NMFS pursuant to FESA section 7(a)(2).

1.10. "FESA" means the federal Endangered Species Act, 16 United States Code section 1530, *et seq.*

1.11. "Fishery Agencies" means Department of Fish and Game (DFG), USFWS and NMFS.

1.12. "Habitat Conservation Plan" or "HCP" means a conservation plan prepared pursuant to section 10(a) (1) (B) of FESA.

1.13. "Implementing Agreement" or "IA" means an agreement that defines the terms for implementing the BDCP.

1.14. "Statutory Delta" means the Sacramento-San Joaquin Delta as defined by section 12220 of the California Water Code.

1.15. "Listed Species" means those species designated as candidate, threatened or endangered pursuant to CESA and/or listed as threatened or endangered under FESA.

1.16. "MOA Projects" means those projects identified in Attachment B (water supply projects), Attachment C (water quality projects), Attachment D (ecosystem projects", Attachment E, (levees and other work in the waterways), and Attachment F (project schedules) to the "Memorandum of Agreement for Supplemental Funding for Certain Ecosystem Actions and Support for Implementation of Near-Term Water Supply, Water Quality, Ecosystem, and Levee Actions."

1.17. "Natural Community Conservation Plan" or "NCCP" means a conservation plan created to meet the requirements of Fish and Game Code, section 2800, *et seq.*

1.18. "Natural Community Conservation Planning Act" or "NCCPA" means Fish and Game Code, section 2800, *et seq.*

1.19. "NEPA" means the National Environmental Policy Act, United States Code section 4321, *et seq.*

1.20. "Non-Governmental Organizations" or "NGOs" means the Non-Governmental Organizations identified in Exhibit A. As of the Effective Date, the Non-Governmental Organizations are American Rivers, Environmental Defense, the Natural Heritage Institute, and The Nature Conservancy. Additional NGOs may be added as Parties in accordance with Section 9.6 of this Planning Agreement.

1.21. "Other Delta Water Users" means the Other Delta Water Users identified in Exhibit A. As of the Effective Date, Mirant Delta is the sole Other Delta Water User. Additional Other Delta Water Users may be added as Parties in accordance with Section 9.6 of this Planning Agreement.

1.22. "Party" means an entity that is a signatory to this Planning Agreement. Such entities may be referred to individually as "Party" or collectively as "Parties." Additional Parties may be added in accordance with Section 9.6 of this Planning Agreement. The Parties are identified on Exhibit A.

1.23. "Planning Area" means the geographic area proposed to be addressed in the BDCP as described in section 5 and Exhibit B.

1.24. "Potential Regulated Entities" means certain federal and non-federal entities that export, divert or otherwise benefit from diversion of water from the Delta and/or its tributaries within the Planning Area, which may seek take authorizations pursuant to the California Fish and Game Code (section 2080.1, section 2081, and/or section 2835) and/or FESA. The Potential Regulated Entities are identified in Exhibit A. As of the Effective Date, Reclamation, Department of Water Resources (DWR), the Water Contractors, and Other Delta Water Users are the Potential Regulated Entities. Additional Potential Regulated Entities (i.e., Water Contractors and Other Delta Water Users) may be added as Parties in accordance with Section 9.6 of this Planning Agreement.

1.25. "Section 7" means 16 United States Code section 1536.

1.26. "Section 10" means 16 United States Code section 1539.

1.27. "Steering Committee" means the committee established in accordance with Section 7.4.1 of this Planning Agreement.

1.28. "SWP" means the State Water Project.

1.29. "Water Contractors" means the Water Contractors identified in Exhibit A. As of the Effective Date, the Water Contractors are Metropolitan Water District (MWD), Kern County Water Agency (KCWA), Santa Clara Valley Water District (SCVWD), Zone 7, San Luis Delta Mendota Water Agency (SLDMWA) and Westlands Water District (WWD). Additional Water Contractors may be added as Parties in accordance with Section 9.6 of this Planning Agreement.

2. Purposes of this Agreement

The purposes of this Planning Agreement are to:

- Define the Parties' goals and commitments with regard to development of the BDCP;
- Define the initial geographic scope of the Planning Area;
- Identify a preliminary list of natural communities and species known or reasonably expected to be found in those communities that are intended to be the initial focus of the BDCP;
- Identify preliminary conservation objectives for the Planning Area;
- Establish a process for the inclusion of independent scientific input into the planning process;
- Ensure coordination among the Fishery Agencies, particularly with respect to FESA;
- Establish a process to review certain interim projects within the Planning Area that will help achieve the preliminary conservation objectives and maintain viable conservation opportunities and alternatives for the BDCP; and
- Ensure public participation and outreach throughout the planning process.

The Potential Regulated Entities have not yet determined whether it would be feasible or practicable to implement the BDCP, if it is developed, to meet the substantive requirements of the NCCPA. However, to enable the BDCP to serve as an NCCP, should that be feasible and practicable, the Parties intend that this Planning Agreement will fulfill the NCCPA's requirements for planning agreements and will establish a mutually agreeable planning process for the BDCP that meets the procedural requirements of the NCCPA, CESA and FESA.

3. Planning Goals

The planning goals for the BDCP include the following:

- Provide for the conservation and management of Covered Species within the Planning Area;
- Preserve, restore and enhance aquatic, riparian and associated terrestrial natural communities and ecosystems that support Covered Species within the Planning Area through conservation partnerships;
- Allow for projects to proceed that restore and protect water supply, water quality, and ecosystem health within a stable regulatory framework;
- Provide a means to implement Covered Activities in a manner that complies with applicable State and federal fish and wildlife protection laws, including CESA and FESA, and other environmental laws, including CEQA and NEPA;
- Provide a basis for permits necessary to lawfully take Covered Species;
- Provide a comprehensive means to coordinate and standardize mitigation and compensation requirements for Covered Activities within the Planning Area;

- Provide a less costly, more efficient project review process which results in greater conservation values than project-by-project, species-by-species review; and
- Provide clear expectations and regulatory assurances regarding Covered Activities occurring within the Planning Area.

These BDCP planning goals are consistent with the objectives of the CALFED Bay-Delta Program as set forth in the CALFED Record of Decision (ROD). (August 28, 2000, ROD, at pp. 9, 10.) While the Parties have developed specific decision-making protocols for the BDCP in section 7.4.1, they anticipate exchanging information and cooperating with participants in other public processes, such as the proposed Delta Vision Process.

The goal of the BDCP to "provide for the conservation and management of Covered Species" means that the plan will ensure the implementation of measures that will contribute to the recovery of Covered Species, taking into consideration the scope of the BDCP Planning Area in relation to the geographic range of the Covered Species, and the effect of Covered Activities on these species in relation to other activities not addressed by the BDCP. The Parties acknowledge that this planning goal is intended to reflect the constraints inherent to the BDCP that may limit its capacity to ensure the recovery of Covered Species.

The Parties further recognize that, until conservation strategies are developed for the Covered Species and their habitats, and conservation partnerships formed, the cost and feasibility of achieving these goals will not be known. During the development of the BDCP, the BDCP goals, preliminary conservation objectives, Covered Species, Covered Activities, and Planning Area may be modified to ensure that implementation of the BDCP will be practicable. The Parties recognize that, regardless of any such modifications, the BDCP must meet applicable State and federal regulatory requirements to support the issuance of permits or authorizations for Covered Activities.

4. Compliance with Federal and State Fish and Wildlife Protection Laws

The Planning Area contains valuable biological resources, including native species of fish and wildlife and their habitats. Among the species within the Planning Area are certain species that are protected, or may be protected in the future, under CESA and/or FESA. The Parties intend for the BDCP to meet the requirements of State and federal fish and wildlife protection laws that apply to Covered Activities and to provide a basis for State and federal authorizations for the take of Covered Species that may be caused by Covered Activities.

Under State law, take of species listed pursuant to CESA may be authorized under Fish and Game Code section 2080.1, section 2081, (both provisions of CESA) or section 2835 (a provision of the NCCPA). The NCCPA provides that after the approval of an NCCP, DFG may permit the taking of any identified species, listed or non-listed, whose conservation and management is provided for in the NCCP. Take of listed species may also be authorized pursuant to CESA. Non-listed species may be included as covered

species in a conservation plan prepared pursuant to CESA, but a CESA take authorization would become effective with regard to non-listed species only if and when such species were listed.

The Parties intend for the BDCP to be sufficient to support the issuance of take authorizations for Covered Activities under CESA or the NCCPA. Alternatively, the BDCP may be developed to support the issuance of take authorizations under both CESA and the NCCPA, in which case, at DFG's discretion, take authorizations may be provided under CESA for some Covered Activities and Covered Species and under the NCCPA for those species whose conservation and management are provided for under the BDCP.

The Parties also intend for the BDCP to serve as a Habitat Conservation Plan that meets the requirements of section 10(a)(2)(A) of FESA, and to serve as a Biological Assessment that provides the basis for consultations between Reclamation and the USFWS and/or NMFS under section 7(a)(2) of FESA, to support the issuance of take authorizations for Covered Activities. The Parties acknowledge that the BDCP may be used to address compliance with other applicable federal and State statutes.

FESA provides that after the approval of an HCP, USFWS and/or NMFS may permit the taking of fish and wildlife species covered in the HCP if the HCP and permit application meet the requirements of section 10(a)(2)(A) and (B) of FESA. Take authorization for FESA-listed fish and wildlife species covered in the HCP are generally effective upon approval of the HCP and issuance of an incidental take permit. Take authorization for any non-listed species covered in the HCP becomes effective if and when the species is listed pursuant to FESA.

For actions authorized, funded or carried out by a Federal Action Agency, take of listed species may be authorized under section 7 of FESA based on a biological opinion prepared by the USFWS and/or NMFS. Take of non-listed species cannot be authorized under section 7 of FESA.

4.1. Potential Regulated Entities' Obligation to Implement the BDCP

The Potential Regulated Entities recognize that they will be obligated to implement and/or fund implementation of measures in the BDCP that are required to appropriately minimize and mitigate (including, in certain instances, to avoid destruction or adverse modification of critical habitat pursuant to section 7 of FESA) the impacts of Covered Activities on Covered Species and their habitat within the Planning Area in accordance with applicable federal and State fish and wildlife protection laws. However, the Parties may elect to include in the BDCP additional measures that exceed what is necessary to appropriately minimize or mitigate Covered Activities. For example, the BDCP may include measures that are necessary to provide for the conservation and management of Covered Species, but are not necessary to minimize and mitigate the impacts of Covered Activities. The Parties acknowledge that the Potential Regulated Entities' execution of this Planning Agreement and participation in the BDCP planning process does not reflect a commitment on the part of the Potential Regulated Entities to assume

the obligation to implement conservation measures that exceed minimization and mitigation requirements. Rather, the Parties expect that the obligation to fund and/or to implement any such conservation measures would be shared by the Parties and that the Potentially Regulated Entities' share would be roughly proportional to the impact of their Covered Activities on Covered Species and their habitats. The shared obligation would be defined by mutual agreement and set forth in the Implementing Agreement. Nothing in this Planning Agreement obligates the Potentially Regulated Entities to fund or implement measures to minimize and mitigate impacts to Covered Species resulting from the activities of individuals or entities that do not participate in the implementation of the BDCP or to fund and/or implement conservation measures required as a result of such activities.

4.2. Future FESA Section 7 Consultations

To the extent allowed under law, the Parties intend that the measures adopted to meet regulatory standards included in the BDCP, once approved by the USFWS and NMFS and included as a condition of federal incidental take authorizations to any Potential Regulated Entity, will serve as the range of measures to be incorporated into biological opinions associated with future section 7 consultations between the USFWS and/or NMFS and a Federal Action Agency regarding Covered Activities that may adversely affect listed Covered Species and/or that may result in the destruction or adverse modification of critical habitat.

4.3. Other Fish and Wildlife Protection Laws

Based on the BDCP, the Potential Regulated Entities may seek approval or authorization under other State and federal fish and wildlife protection laws, including, but not necessarily limited to, the Magnuson-Stevens Fishery Act, the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and various provisions of the Water Code and Fish and Game Code. The Parties agree to collaborate to explore the feasibility of developing the BDCP to serve as the means by which Covered Activities may comply with these additional laws.

4.4. Concurrent Planning for Wetlands and Waters of the United States

Based on the BDCP, the Potential Regulated Entities may seek future programmatic permits or other forms of authorization under the Clean Water Act, section 1600 *et seq.* of the Fish and Game Code, and the Rivers and Harbors Act, as necessary for Covered Activities. The Parties agree to work together to explore the feasibility of undertaking concurrent but separate planning regarding these permits. However, such programmatic permits or other forms of authorization are not necessary for approval of the BDCP or for issuances of take permits.

4.5. Regulatory Assurances Under FESA

Upon approval of the BDCP and issuance of incidental take permits for Covered Activities, USFWS and NMFS will provide assurances to those Potential Regulated Entities that receive coverage under FESA Section 10(a) that neither the USFWS nor NMFS will 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 Covered Species, without the consent of the affected Potential Regulated Entities, in accordance with 50 C.F.R. section 17.22(b)(5), section 17.32(b)(5), and section 222.307(g).

4.6. Regulatory Assurances Under the NCCPA

If the BDCP meets the criteria for issuance of NCCP permits under section 2835 of the Fish and Game Code, DFG will approve the BDCP and provide assurances consistent with its statutory authority upon issuance of NCCP permits. Under section 2820(f) of the Fish and Game Code, DFG may provide assurances for the Covered Activities commensurate with the level of long-term conservation and associated implementation measures provided in the BDCP, including the assurance that, if unforeseen circumstances arise during implementation of the BDCP, DFG will not require additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources without the consent of the affected Potential Regulated Entities, as long as the BDCP is being implemented consistent with the terms of the Implementation Agreement and associated take permit.

5. Planning Area

Because the Parties expect that the BDCP's Covered Activities will be situated within the Statutory Delta, the Planning Area for the BDCP will consist of the Statutory Delta. The Parties anticipate, however, that it may be necessary for the BDCP to include conservation actions outside of the Statutory Delta that advance the goals and objectives of the BDCP, including as appropriate, conservation actions in the Suisun Marsh, Suisun Bay, and areas upstream of the Delta. The Parties intend that conservation actions will be implemented pursuant to cooperative agreements or similar mechanisms with local agencies, interested non-governmental organizations, landowners, and others. A map of the Planning Area is attached hereto as Exhibit B.

6. Preliminary Conservation Objectives

The preliminary conservation objectives the Parties intend to achieve through the BDCP are to:

- Provide for the protection of Covered Species and associated natural communities and ecosystems that occur within the Planning Area;
- Preserve the diversity of fish, wildlife, plant and natural communities within the Planning Area;
- Minimize and mitigate, as appropriate, the take of proposed Covered Species;
- Preserve and restore habitat and contribute to the recovery of Covered Species;
- Reduce the need to list additional species;
- Set forth species-specific goals and objectives;
- Set forth specific habitat-based goals and objectives; and
- Implement an adaptive management and monitoring program to respond to changing ecological conditions;

- Avoid actions that are likely to jeopardize the continued existence of Covered Species or result in the destruction or adverse modification of critical habitat.

6.1. Conservation Elements

6.1.1. Ecosystems, Natural Communities, and Covered Species List

The BDCP will employ a strategy that focuses on the conservation of ecosystems, natural communities, and ecological processes in the Planning Area. In addition, the BDCP will establish species-specific minimization, mitigation, conservation and management measures where appropriate.

The BDCP will focus primarily on aquatic ecosystems and natural communities. The BDCP may also cover adjacent riparian and floodplain natural communities, as appropriate, to fully address the impacts of Covered Activities and to provide for the conservation of Covered Species. Natural Communities that are likely to be addressed by the BDCP include: riverine aquatic, lacustrine, tidal sloughs, tidal perennial aquatic, nontidal perennial aquatic, saline emergent wetland, freshwater emergent wetland, and riverine natural communities.

Species that are intended to be the initial focus of the BDCP include aquatic species such as Central Valley steelhead, Central Valley Chinook salmon (spring run and fall/late-fall runs), Sacramento River Chinook salmon (winter run), Delta smelt, green sturgeon, white sturgeon, splittail, and longfin smelt. Other species that will be considered for inclusion in the BDCP include Swainson's hawk, bank swallow, giant garter snake and valley elderberry longhorn beetle.

This list identifies the species that will be evaluated for inclusion in the BDCP as proposed Covered Species and is not necessarily the BDCP's final Covered Species list. The Parties anticipate that species may be added or removed from the list once more is learned about the nature of the Covered Activities and the impact of Covered Activities on native species within the Planning Area. Issuance of State and federal take authorizations for any particular Covered Species will require an individual determination by the applicable Fishery Agency that the BDCP meets applicable State and/or federal permit issuance requirements.

6.1.2. Conservation Areas and Viable Habitat Linkages

The BDCP will protect, enhance, or restore aquatic, and associated riparian and floodplain habitat throughout the Planning Area and provide or enhance habitat linkages, where appropriate within the Planning Area. The BDCP will also identify where linkages between important habitat areas inside and outside the Planning Area should occur. The BDCP conservation strategy will address a range of environmental gradients and ecological functions, and will address appropriate principles of ecosystem management, ecosystem restoration, and population biology.

6.1.3. Project Design

The BDCP will ensure that each Covered Activity is appropriately designed to avoid and/or minimize direct and indirect impacts to Covered Species and their habitats.

7. Preparing the BDCP

The Parties intend that this Planning Agreement will establish a mutually agreeable process for preparing the BDCP that meets the procedural requirements of the NCCPA, CESA and FESA. The process used to develop the BDCP will incorporate independent scientific input and analysis and include extensive public participation with ample opportunity for comment from the general public and from key groups of stakeholders, as described below.

7.1. Best Available Scientific Information

The BDCP will be based on the best available scientific information, including, but not limited to:

- Principles of conservation biology, community ecology, aquatic ecology, individual species' ecology, and other appropriate scientific data and information;
- Thorough information about all natural communities and proposed Covered Species within the Planning Area; and
- Advice from well-qualified, independent scientists.

7.2. Data Collection

The Parties agree that the BDCP will be based on the best available scientific information, and that the Parties will collaborate to ensure that such information is obtained through a range of credible governmental and non-governmental sources. Data collection efforts for preparation of the BDCP will be coordinated with existing efforts, including the CALFED Science Program. Preference should be given to collecting data essential to address the needs of natural communities and proposed Covered Species for purposes of developing conservation measures and strategies for the BDCP. The science advisory process and analysis of existing information may reveal data gaps currently not known that are necessary for the full and accurate development of the BDCP. Data needed for preparation of the BDCP may not be known at this time nor identified herein. Therefore, the Parties anticipate that data collection priorities may be adjusted from time to time during the planning process. All data collected for the preparation and implementation of the BDCP will be made available to the Fishery Agencies in hard and digital formats, as requested.

7.2.1. Types of Data

Data will be gathered to establish baseline conditions, evaluate impacts of Covered Activities on Covered Species, and develop conservation strategies and measures for Covered Species. Data needed to accomplish these tasks may include, but will not necessarily be limited to: species life histories, species occurrence, population abundance and distribution, population trends, population genetics, habitat locations and conditions, hydrologic regime, hydrodynamics, salinity, temperature, flow patterns,

water quality, barrier and hazard types and locations, habitat connectivity, ecological threats and stressors, and riverine processes.

7.3. Independent Scientific Input

The Parties intend to include independent scientific input and analysis to assist in the preparation of the BDCP. For that purpose, independent scientists representing a broad range of disciplines, including conservation biology and locally-relevant ecological knowledge, will, at a minimum:

- Recommend scientifically sound conservation strategies for species and natural communities proposed to be covered by the BDCP;
- Recommend a range of conservation actions that would address the needs of species, ecosystems, and ecological processes in the Planning Area proposed to be addressed by the BDCP;
- Recommend management principles and conservation goals that can be used in developing a framework for the monitoring and adaptive management component of the BDCP; and
- Identify data gaps and uncertainties so that risk factors can be evaluated.

The independent scientists may be asked to provide additional feedback on key issues during preparation of the BDCP, and may prepare reports regarding specific scientific issues throughout the process, as deemed necessary by the Parties.

The Parties will design and implement the science advisory process, in consultation with the Steering Committee and the CALFED Science Program, and will ask the CALFED Science Program's Independent Science Board to recommend potential science advisors. The Parties will develop a detailed scope of work for the independent science advisory process and establish funding and payment procedures. The independent science advisory process will include the use of a professional facilitator, input from technical experts, and production of a report by the scientists. The Parties will make the report available to the public during the planning process.

7.4. Public Participation

The Parties will ensure an open and transparent process with an emphasis on obtaining input from a balanced variety of public and private interests. The planning process will provide for thorough public review and comment.

7.4.1. Steering Committee and Interested Observers

To assist in the development of the BDCP, the Parties have formed a Steering Committee. The Steering Committee consists of representatives of the Parties, with the USFWS and NMFS participating as ex officio members. The Parties expect that Steering Committee will be the principal forum within which key policy and strategy issues pertaining to the BDCP will be discussed and considered. The Parties intend that the meaningful exchange of ideas and viewpoints during Steering Committee meetings will help guide the development of the plan.

7.4.1.1. Process

The Steering Committee will convene in regularly scheduled public meetings, and its proceedings will be facilitated by the Secretary's Office of the California Resources Agency. The Steering Committee may elect to form subcommittees and workgroups as it may deem appropriate to analyze issues in greater detail and to report back to the full Steering Committee. Members of the Steering Committee are encouraged to caucus between such meetings. Staff and consultants from the Parties will work with the Steering Committee to provide technical expertise and share information for the development and implementation of the BDCP. Technical documents, draft agreements, and other information or documents will be provided to members of the Steering Committee at a stage early enough to allow for meaningful participation in deliberations.

With respect to those matters that are considered by the Steering Committee, the Parties agree that every reasonable effort should be made to have each such matter approved by a consensus of the members. Consensus is reached when a position reflects the predominant opinion of the Steering Committee members. In the event that a Steering Committee member opposes a proposal that has predominant support, that member will propose for further discussion an alternative that it would support. The Parties will make all reasonable efforts to prevent disputes and resolve matters by consensus in the Steering Committee. However, the Parties acknowledge that if consensus about a given matter is not reached in the Steering Committee, the Potential Regulated Entities, in consultation with the Fishery Agencies, will decide how to address the matter and maintain progress in the development of the BDCP.

7.4.1.2. Reserved Authority

The Parties recognize that decisions made by the Steering Committee in the course of preparing the BDCP are preliminary and are not legally binding. The Parties further recognize that several Parties have statutory or legal responsibilities that cannot be delegated, and that no action of the Steering Committee or provision of this Agreement shall be construed to delegate or abrogate any of those responsibilities.

7.4.1.3 Interested Observers

The Parties recognize the involvement of "Interested Observers," representing other stakeholder interests. Interested Observers will be provided notice of Steering Committee meetings and invited to attend. At each Steering Committee meeting, Interested Observers and other members of the public will have an opportunity to provide comments. A list of Interested Observers will be maintained on the BDCP website.

7.4.2. Outreach

Parties will provide access to information for persons interested in the BDCP, including interested tribes and people of all races, cultures and socio-economic status. The Parties expect and intend that public outreach regarding preparation of the BDCP will be conducted largely by and through the Steering Committee meetings. In addition,

Parties will hold public meetings to present key decisions regarding the preparation of the BDCP to allow the public the opportunity to comment on and inquire about the decisions. The Parties may use Bay Delta Public Advisory Committee or its successor as a venue for public meetings. Other outreach efforts will include a BDCP website and informational mass mailings.

7.4.3. Availability of Public Review Drafts

The Parties will designate and make available for public review in a reasonable and timely manner "public review drafts" of pertinent planning documents including, but not limited to, plans, memoranda of understanding, maps, conservation guidelines, and species coverage lists. Such documents will be made available by the Parties at least ten working days prior to any public hearing addressing these documents. In addition, the Parties will make available all reports and formal memoranda prepared by the Steering Committee. Not all documents drafted during preparation of the BDCP will be distributed for public review. However, the Parties will periodically designate various pertinent documents drafted during preparation of the BDCP as "public review drafts", and will make these documents available to the public. The Parties agree the Internet will be the principal means of making documents available for public review, but that more traditional means such as distribution and display of hard copies of such documents will be used where practicable.

7.4.4. Public Hearings

Public hearings regarding development of the BDCP will be planned and conducted in a manner that satisfies the requirements of CEQA, NEPA, and any other applicable State or federal laws.

7.4.5. Public Review and Comment Period Prior to Adoption

The Potential Regulated Entities will make the draft BDCP and Implementing Agreement available for public review and comment a minimum of 60 days before adoption. The draft BDCP and Implementing Agreement will be distributed with the draft environmental impact report prepared for the BDCP pursuant to CEQA and/or the draft environmental impact statement prepared for the BDCP pursuant to NEPA.

7.5. Covered Activities

The BDCP will identify and address the Covered Activities carried out by the Potential Regulated Entities that may result in take of Covered Species within the Planning Area. Covered Activities may include, but are not necessarily limited to, existing or new activities related to:

- Conveyance elements of the State Water Project (SWP) and Central Valley Project (CVP)
- Operational activities, including emergency preparedness, of the SWP and CVP
- Operational activities related to water transfers involving Water Contractors or to serve environmental programs
- Maintenance of the SWP, CVP, and other Potential Regulated Entities' facilities

- Facility improvements of the SWP and CVP
- Ongoing operation of, and recurrent and future projects related to Other Delta Water Users
- Projects designed to improve salinity conditions
- Conservation measures included in the BDCP, including, but not limited to, adaptive habitat management, restoration, enhancement and monitoring activities

The Parties intend that the BDCP will allow Covered Activities in the Planning Area to be carried out in compliance with FESA and applicable provisions of the Fish and Game Code, and potentially with other laws as described in Section 4.

7.6. Interim Project Processing

The Parties recognize that before the Fishery Agencies approve the BDCP, certain projects and activities associated with Potential Regulated Entities may be proposed within the Planning Area. The Parties agree to the following interim project process to: (1) help ensure that new major discretionary projects approved or initiated in the Planning Area before completion of the Plan are consistent with the preliminary conservation objectives (section 6) and do not compromise successful completion and implementation of the Plan; (2) facilitate CEQA, CESA, and FESA compliance for such interim projects that require it; and (3) ensure that processing of such interim projects is not unduly delayed during preparation of the Plan.

The Parties acknowledge and agree that MOA Projects will not require separate or additional review pursuant to the interim project process set forth in this section. The Parties recognize that the MOA Projects will be required to comply with all applicable State and federal wildlife protection laws and environmental review processes. Other projects or activities within the Planning Area that are proposed by the Potential Regulated Entities that require discretionary approvals will be subject to the interim project process. The Parties agree that the development of the BDCP shall not delay the implementation of any of the MOA Projects or interim projects.

7.6.1. Notification Process for Interim Projects

The PRE proposing to undertake or approve an interim project will notify the Fishery Agencies of the project prior to the time, or as soon as possible after, the project description or application is deemed complete. The PRE will notify the particular individuals designated by the Fishery Agencies to be notified of interim projects, and will provide these designated individuals with (1) a depiction of the project location on a United States Geological Survey 7.5 minute quadrangle map with the quadrangle name and section, township, and range identified; (2) copy of the project description or application, including a description of the project along with the land cover types present on the project site using the most current land cover data available to the PRE; and (3) any other biological information available to the PRE about the project area.

7.6.2. Fishery Agency Review of Interim Projects

Information concerning interim projects will be presented to the Fishery Agencies in a complete and timely manner, and the Fishery Agencies will use reasonable efforts to review and provide any comments on the projects to the referring PRE within the legally prescribed comment periods. The Fishery Agencies will recommend mitigation measures or project alternatives that would help achieve the preliminary conservation objectives and will not preclude important conservation planning options or connectivity between areas of high habitat values. Any take of listed or candidate species arising out of an interim project will be authorized in accordance with applicable federal and/or state law. In providing any such authorizations, the Fishery Agencies acknowledge that they may not impose mitigation measures or project alternatives that result in regulatory obligations that exceed the requirements of applicable State and federal wildlife protection laws.

7.6.3. Coordinating Interim Process with BDCP Preparation

The Parties will meet as needed to discuss interim projects and to coordinate with development of the BDCP. Independent scientific input will be considered by the Parties during interim project review.

7.7. Protection of Habitat and Other Resources During Planning Process

7.7.1. Conservation Actions

The Parties may elect to preserve, enhance or restore, either by acquisition or other means, aquatic and associated riparian and floodplain habitat in the Planning Area that support native species of fish, wildlife or natural communities prior to approval of the BDCP. The Parties will confer with the Fishery Agencies regarding potential resources to be protected. The Fishery Agencies agree to credit such resources toward the land and water acquisition or habitat protection, enhancement, and restoration requirements of the BDCP, as appropriate, provided these resources are appropriately conserved, restored or enhanced, and managed and contribute to the BDCP's conservation strategy.

7.7.2. Mitigation

Actions to protect, enhance, or restore habitat that are undertaken solely to mitigate the impacts of specific projects, actions, or activities approved prior to BDCP approval will only be considered as mitigation for those projects, actions or activities. Such measures will be considered during the BDCP analysis, but will not count toward future mitigation obligations of the BDCP.

7.8. Implementing Agreement

An Implementing Agreement that includes specific provisions and procedures for the implementation, monitoring and funding of the BDCP will be developed for the BDCP. A draft of the Implementing Agreement will be made available for public review and comment with the final public review draft of the BDCP. The Implementing Agreement will contain provisions for:

- Conditions of species coverage;

- The long-term protection of any habitat reserves or other measures that provide equivalent conservation;
- Implementation of mitigation and conservation measures;
- Adequate funding to implement the plan;
- Terms for suspension or revocation of the take permit;
- Procedures for amendment of the BDCP, Implementing Agreement, and take authorizations;
- Implementation of monitoring and adaptive management;
- Oversight of BDCP effectiveness and funding; and
- Periodic reporting.

8. Commitment of Resources

8.1. Funding

The Parties agree that they will work together to bring available funding to the planning effort.

8.1.1. Funding of Fishery Agencies' Costs

As set forth in Section III(A) of the "Memorandum of Agreement for Supplemental Funding for Certain Ecosystem Actions and Support for Implementation of Near-Term Water Supply, Water Quality, Ecosystem and Levee Actions," (see Exhibit C) for calendar years 2006 and 2007, Reclamation and DWR on behalf of the SWP shall contribute an aggregate of approximately $3 million annually for the collective use of DFG, USFWS, and NMFS staff and for administrative costs related to the development of the BDCP. The Fishery Agencies shall use the contributed funds to provide technical and scientific information, analyses, and advice to assist in the timely and efficient development of the BDCP. Reclamation and DWR may be reimbursed in whole or in part in the event that Other Delta Water Users become Parties to this Agreement.

8.1.2. DFG and DWR Assistance with Funding

DFG and DWR agree to cooperate with the other Parties in identifying and securing, where appropriate, federal and State funds that may be used to support the development and implementation of the BDCP. DFG and DWR's commitments and obligations under this Planning Agreement are subject to the availability of appropriated funds and the written commitment of funds by an authorized DFG or DWR representative.

8.1.3. USFWS, NMFS, and Reclamation Assistance with Funding

The USFWS, NMFS, and Reclamation agree to cooperate with the other Parties in identifying and securing, where appropriate, federal and State funds earmarked for habitat conservation planning purposes. Potential federal funding sources may include: the USFWS' Cooperative Endangered Species Conservation Fund, Land and Water Conservation Fund, and land acquisition grants or loans through other federal agencies such as the Environmental Protection Agency, the Army Corps of Engineers, or the Departments of Agriculture or Transportation. The commitments of the USFWS, NMFS and Reclamation under this Planning Agreement are subject to the requirements of the

federal Anti-Deficiency Act (31 U.S.C. section 1341) and the availability of appropriated funds. The Parties acknowledge that this Planning Agreement does not require any federal agency to expend its appropriated funds unless and until an authorized officer of that agency provides for such expenditures in writing.

9. Miscellaneous Provisions

9.1. Public Officials Not to Benefit

No member of or delegate to Congress will be entitled to any share or part of this Planning Agreement, or to any benefit that may arise from it.

9.2. Statutory Authority

The Planning Agreement is not intended, nor will it be construed, to modify any authority granted by statute, rule or regulation, or to make applicable to the CVP any State law that, in the absence of this Planning Agreement, would not apply to the CVP.

9.3. Multiple Originals

This Planning Agreement may be executed by the Parties in multiple originals, each of which will be deemed to be an official original copy.

9.4. Effective Date

The Effective Date of this Planning Agreement will be the date on which it is fully executed by the Parties.

9.5. Duration

This Planning Agreement will be in effect until the BDCP is approved and permitted by the Fishery Agencies, but shall not be in effect for more than three years following the Effective Date, unless extended by amendment. This Planning Agreement may be terminated pursuant to Section 9.7 below.

9.6. Amendments

This Planning Agreement can be amended only by written agreement of all Parties; provided, however, that without amending this Planning Agreement, new Potential Regulated Entities and other Parties may be added pursuant to the process described in Section 7.4.1.

9.7. Termination and Withdrawal

Subject to the requirement in Section 9.7.1 of the Planning Agreement, any Party may withdraw from this Planning Agreement upon 30 days' written notice to the other Parties, after which time the withdrawing Party shall no longer be a Party. The Planning Agreement will remain in effect as to all non-withdrawing Parties unless the remaining Parties determine that the withdrawal requires termination of the Planning Agreement. This Planning Agreement can be terminated only by written agreement of all non-withdrawing Parties.

9.7.1. Funding

In the event that federal, State or local funds have been provided to assist with BDCP preparation or implementation, any Party withdrawing from this Planning Agreement shall return to the granting agency unspent funds awarded to that Party prior to withdrawal. A withdrawing Party shall also provide the remaining Parties with a complete accounting of the use of any federal, State or local funds it received regardless of whether unspent funds remain at the time of withdrawal. In the event of termination of this Planning Agreement, all Parties who received funds shall return any unspent funds to the grantor prior to termination.

9.8. No Precedence

This Planning Agreement is not intended, and shall not be construed, to modify any existing or subsequently amended law, rule, regulation or other legal authority, or requirements established thereunder.

The Parties' execution of this Planning Agreement and participation in the development of the BDCP is voluntary and does not ensure that any of said Parties will participate in later planning phases of the BDCP or related agreements or actions. As provided in Section 9.7, above, any Party may withdraw from this Planning Agreement. In addition, participation in this Planning Agreement shall not be deemed acquiescence to the development of an NCCP. The Potential Regulated Entities shall decide whether to seek approval of the BDCP under the NCCPA or to apply for a section 2081 permit at or before the time that the BDCP is finalized.

The Parties recognize that participation in this Planning Agreement or in the BDCP planning process does not constitute, expressly or implicitly, an authorization by any of the Fishery Agencies to take any species listed under CESA and/or FESA. The Parties further recognize that such participation does not reflect or represent an acknowledgement by any Party that its activities or projects are not in compliance with any State or federal law or that the BDCP is necessary to comply with any such law.

SIGNATURES:

Dated: NOV 13 2006, 20__

APPROVED AS TO LEGAL FORM AND SUFFICIENCY

OFFICE OF REGIONAL SOLICITOR
DEPARTMENT OF THE INTERIOR

THE U.S. BUREAU OF RECLAMATION

By: _____

Title: Deputy Regional Director

Dated: 11-2, 2006

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

By: _____

Title: GENERAL MANAGER

Dated: 12/6, 2006

THE KERN COUNTY WATER AGENCY

By: _____

Title: General Manager

Dated: Nov. 14, 2006

THE NATIONAL MARINE FISHERIES SERVICE

By: Rodney R McInnis

Title: Regional Administrator

Dated: 11/14, 2006

THE CALIFORNIA DEPARTMENT OF WATER RESOURCES

By: _____

Title: Director

Approved as to legal form and sufficiency:

~~Asst~~ Chief Counsel, DWR
acting

SIGNATURES:

Dated: October 24, 2006

THE CALIFORNIA RESOURCES AGENCY

By: Mike Chrisman

Title: Secretary for Resources

Dated: 6 NOV., 2006

U.S. FISH AND WILDLIFE SERVICE

By: Steve Thompson

Title: CNO MANAGER

Dated: 10/04, 2006

CALIFORNIA DEPARTMENT OF FISH AND GAME

By:

Title: DIRECTOR.

Dated: 11/20, 2006

THE SANTA CLARA VALLEY WATER DISTRICT

By:

Title: Chief Operating Officer
Water Utility Enterprise

SIGNATURES:

Dated: Oct. 26, 2006

ALAMEDA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT, ZONE 7

By: [signature]

Title: General Manager

Dated: 12/6, 2006

THE SAN LUIS & DELTA MENDOTA WATER AUTHORITY

By: [signature]

Title: Executive Director

Dated: 12.6., 2006

THE WESTLANDS WATER DISTRICT

By: [signature]

Title: General Manager

Dated: 12/6, 2006

MIRANT DELTA

By: Jeffrey D. Russell

Title: PRESIDENT

Dated: 11/8, 2006

AMERICAN RIVERS

By: Rebecca R. Wodder

Title: President

SIGNATURES:

Dated: October 30, 2006

ENVIRONMENTAL DEFENSE

By: Ann Hayden

Title: Water Resource Analyst

Dated: 25 Oct, 2006

THE NATURAL HERITAGE INSTITUTE

GREGORY A. THOMAS

By: [signature]

Title: President

Dated: 11-14, 2006

THE NATURE CONSERVANCY

By: [signature]

Title: Director of CA Water Policy

EXHIBIT A

The Parties to the Planning Agreement are as follows:

The California Resources Agency
The Resources Agency mission statement is to restore, protect and manage the state's natural, historical and cultural resources for current and future generations using creative approaches and solutions based on science, collaboration and respect for all the communities and interests involved. The Resources Agency is home to all California's natural resources policies and programs. It operates on a $4.1 billion budget, employs over 14,500 people in 24 departments, commissions, boards and conservancies on conservation, water, fish and game, forestry, parks, energy, coastal, marine and landscape.

Fishery Agencies

The California Department of Fish and Game
DFG is the agency of the State of California authorized to act as trustee for the fish and wildlife of the State, designated rare and endangered plants, game refuges, ecological reserves, and other areas administered by the Department. DFG also administers and enforces the provisions of the Fish and Game Code and is authorized to enter into agreements with federal and local governments and other entities for the conservation of species and habitats. Take of threatened or endangered species which is incidental to an otherwise lawful activity may be authorized by DFG under CESA. DFG may also permit taking and provide regulatory assurances under the NCCPA for identified species whose conservation and management is provided for in a DFG-approved NCCP.

The United States Fish & Wildlife Service
The USFWS is an agency of the United States Department of the Interior authorized by Congress to administer and enforce FESA with respect to terrestrial wildlife, certain fish species, insects and plants, to enter into agreements with states, local governments, and other entities to conserve threatened, endangered, and other species of concern, to authorize incidental take under FESA, and to provide regulatory assurances in accordance with 50 C.F.R. section 17.22(b)(5) and section 17.32(b)(5).

The National Marine Fisheries Service
NMFS is an agency of the United States Department of Commerce authorized by Congress to administer and enforce FESA with respect to marine mammals and certain fish species (including anadromous fish), to enter into agreements with states, local governments, and other entities to conserve federally threatened, endangered, and other species of concern, to authorize incidental take under FESA, and to provide regulatory assurances in accordance with 50 C.F.R. section 222.307(g).

Potential Regulated Entities

The California Department of Water Resources

DWR operates and maintains the State Water Project, including the California Aqueduct. The Department also provides dam safety and flood control services, assists local water districts in water management and conservation activities, promotes recreational opportunities, and plans for future statewide water needs.

The U.S. Bureau of Reclamation

The mission of the Bureau of Reclamation is to manage, develop, and protect water and related resources in an environmentally and economically sound manner. Originally conceived under the Reclamation Act of 1902 as a means to help settle the West by providing infrastructure for agricultural development, the Reclamation program focused on the construction of dams and facilities to store and convey water. As the potential for additional project purposes was identified by the states and local entities, Congress supplemented the Reclamation Act to add hydropower production, flood control, municipal and industrial water, recreation, and fish and wildlife enhancement to the list of authorized project purposes.

Water Contractors

The Metropolitan Water District of Southern California

MWD is a special water district organized and existing under California Water Code Appendix, Chapter 109. MWD acquires and develops water for delivery to 26 public agencies who in turn deliver water directly to homes and businesses, or to other water agencies who ultimately deliver the water to retail customers. The water acquired and developed by MWD, which includes water from the State Water Project, serves approximately 18 million people in portions of six southern California counties (Ventura, Los Angeles, Orange, San Bernardino, Riverside, and San Diego).

The Kern County Water Agency

KCWA is a special water district organized and existing under California Water Code Appendix, Chapter 99. KCWA is a contractor for water from the State Water Project. The State Water Project water is diverted to 15 member units and is used to irrigate, in whole or in part, more than 500,000 acres of prime farmland and to serve municipal water throughout Kern County, including the City of Bakersfield.

The Santa Clara Valley Water District

SCVWD is a special district organized and existing under California Water Code Appendix, Chapter 60. SCVWD's water supply includes water developed by both the Central Valley Project and the State Water Project. SCVWD's water supply serves approximately 1.7 million people in homes and businesses located throughout Santa Clara County, including the vital high technology industry in the area known as "Silicon Valley." SCVWD is a member agency of the SLDMWA.

Alameda County Flood Control and Water Conservation District, Zone 7
Zone 7 Water Agency is one of the 10 active zones of the Alameda County Flood Control and Water Conservation District. Zone 7 receives up to 75% of its water from the State Water Project. Along with flood protection, Zone 7 manages the local ground water basins and is the wholesale water supplier to all of eastern Alameda County and a population of more than 190,000. Treated water is sold to local retailers,including the cities of Livermore and Pleasanton, the Dublin San Ramon Services District, and the California Water Service Company. Zone 7 also distributes untreated water to local agriculture operations and golf courses.

The San Luis & Delta Mendota Water Authority
The SLDMWA is a joint powers authority formed pursuant to California Government Code section 6500 *et seq.* The SLDMWA consists of 32 member public agencies that contract with Reclamation for water supply from the CVP for distribution and use within areas of San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito, and Santa Clara Counties, California.

The Westlands Water District
WWD, a member of the SLDMWA, is a California water district formed pursuant to California Water Code section 34000 *et seq.* WWD holds contractual rights to receive water from Reclamation, through the Central Valley Project, for distribution and consumption within the areas of Fresno County and Kings County. WWD provides water for municipal and industrial uses, and for the irrigation of approximately 500,000 acres on the west side of the San Joaquin Valley in Fresno County and Kings County. WWD's farmers produce more than 60 high quality commercial food and fiber crops sold for the fresh, dry, canned and frozen food markets, both domestic and export. More than 50,000 people live and work in the communities, dependant on WWD's agricultural economy

Other Delta Water Users

Mirant Delta
Mirant Corporation owns and operates two natural-gas fired power generation plants on the Delta, one in Pittsburg and one in an unincorporated area of Contra Costa County east of Antioch. Both plants use water from the adjacent Sacramento River for power generation operations.

Non-Governmental Organizations

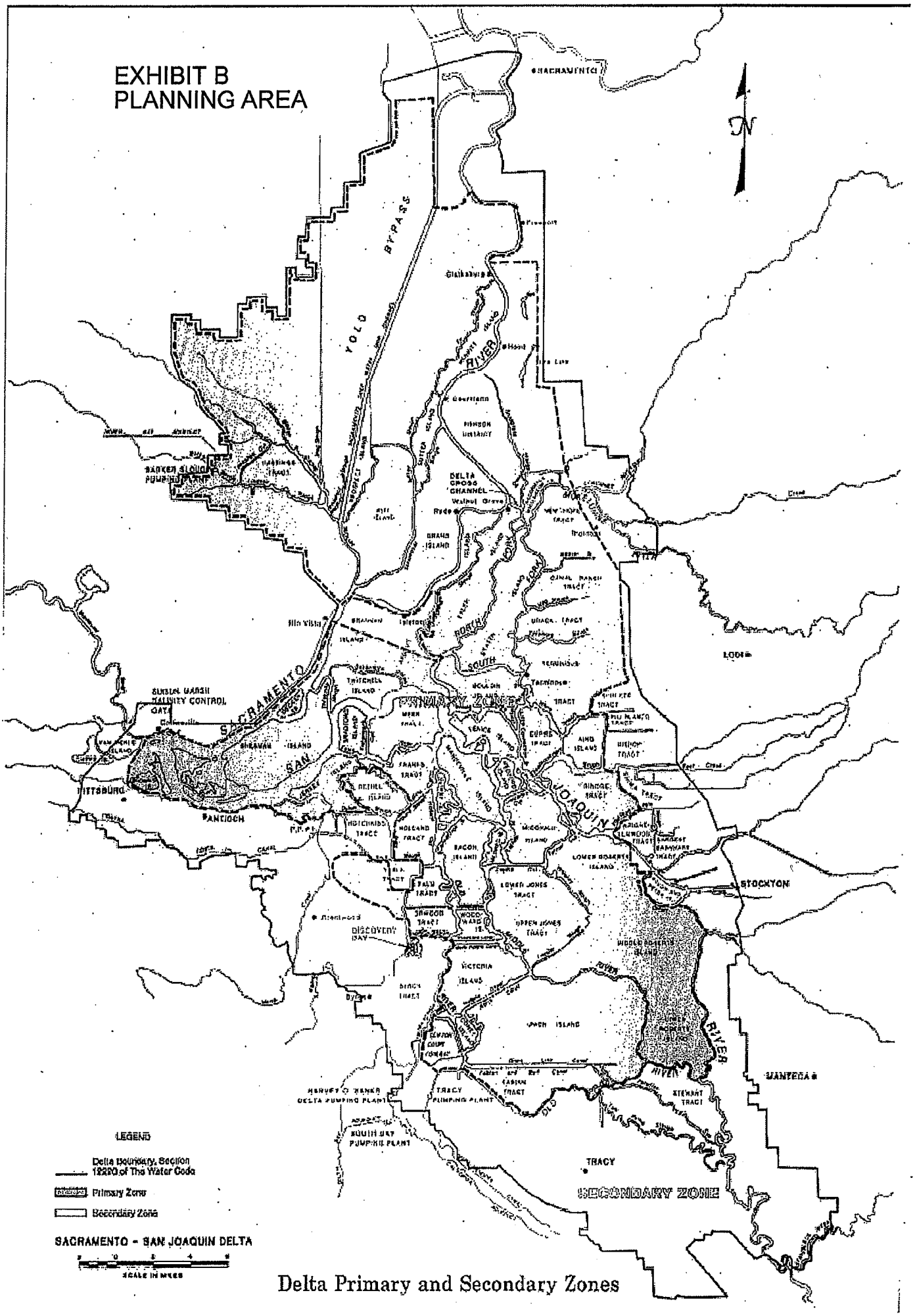
American Rivers
American Rivers is a national non-profit conservation organization founded in 1973 dedicated to protecting and restoring healthy natural rivers and the variety of life they sustain for people, fish, and wildlife. We deliver innovative solutions to improve river health; raise awareness among decision-makers and the public; serve and mobilize the river conservation movement; and collaborate with our partners to develop the Citizens' Agenda for Rivers which creates a unified vision for improving river health across the

country. We have a membership of approximately 40,000. Our national office is located in Washington, DC and we operate a regional office in the Northwest with locations in Seattle and Portland. In addition, we have six field offices in California, Connecticut, Nebraska, Pennsylvania and South Dakota.

Environmental Defense
Environmental Defense is a national non-profit organization, with over 50,000 members residing in California. The organization seeks to link science, economics and law to create innovative, equitable and cost-effective solutions to today's most important environmental problems. For more than three decades, Environmental Defense has used technical, legal and political expertise to advocate for the protection and restoration of the San Francisco Bay-Delta ecosystem through water policy reform and market-based incentives to encourage efficient and equitable water use.

The Natural Heritage Institute
Natural Heritage Institute is a non-profit corporation organized under the laws of the State of California. Natural Heritage Institute's mission is to restore and protect rivers and other aquatic ecosystems in California, other states, and world-wide. It acts in two capacities: as a law firm which represents other conservation organizations and public agencies, and also independently on its own behalf. In these several capacities, since 1989 it has actively participated in regulatory proceedings to establish or modify water rights, water quality standards, and other requirements for the protection and restoration of the Bay-Delta.

The Nature Conservancy
The Nature Conservancy is an international nonprofit membership organization, whose mission is to preserve plants, animals, and natural communities by protecting the lands and waters they need to survive. Founded in 1951, The Nature Conservancy and its more than one million embers have safeguarded more than 12 million acres in all 50 states and Canada. The Conservancy has also worked with like-minded partner organizations to preserve more than 100 million acres in Canada, Latin America, the Caribbean, the Pacific, and Asia. In California, The Nature Conservancy has protected more than 1.2 million acres, including over 10,000 acres in the Delta.



Delta Primary and Secondary Zones

EXHIBIT C

III. Near-Term Funding

Subject to Section V, this MOA proposes to provide, over the next two years, $60 million in contributions for the BDCP, Species Recovery Capital Fund, Ecosystem Restoration Program, POD Studies, and the 100-Year Vision for the Future of the Delta. This $60 million does not include the value of the commitments made pursuant to Section III.E for the Environmental Water Account.

In order to provide sufficient supplemental funds, which when combined with state, federal and other funding that will enable implementation of priority ecosystem restoration projects for Delta pelagic and anadromous fish through the end of Stage 1 (December 31, 2007), the following near-term funding is proposed:

A. BDCP

1. For calendar years 2006 and 2007, the USBR and DWR on behalf of the State Water Project (hereinafter referred to as The Projects) shall contribute an aggregate of $3 million annually for the collective use of DFG, USFWS, and NOAA Fisheries for staff and administrative costs related to the development of the BDCP. The budget in Attachment A details how these funds are anticipated to be spent.
2. The Projects and/or other applicants who have activities that will be covered by the BDCP will develop a cost-share agreement as part of the application process for the BDCP, which may provide for reimbursement of the The Projects and/or other applicants if new parties are able to utilize work for which The Projects and/or other applicants paid.
3. DFG, USFWS, and NOAA Fisheries will expend contributions made under this section consistent Attachment A.
4. DFG, USFWS, and NOAA Fisheries shall seek additional contributions for agency costs from other BDCP participants.
5. DFG, USFWS, and NOAA Fisheries will apply for additional funding through a Federal Endangered Species Act (FESA) Section 6 application.
6. If new bond funds become available and are appropriated for this purpose, the contributions by The Projects for agency staff and administrative costs shall be reduced accordingly.