

SANTA CLARA VALLEY HABITAT PLAN

IMPLEMENTING AGREEMENT

August 14, 2012

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# AGREEMENT

## 1. PARTIES

This Implementing Agreement ("**Agreement**"), made and entered into by and among the United States Fish and Wildlife Service ("**USFWS**") of the United States Department of the Interior, the California Department of Fish and Game ("**CDFG**") of the State of California Natural Resources Agency, the Santa Clara Valley Habitat Agency (the "**Implementing Entity**"), the County of Santa Clara ("**County**"), the City of San Jose ("**San Jose**"), the City of Gilroy ("**Gilroy**"), the City of Morgan Hill ("**Morgan Hill**"), the Santa Clara Valley Water District ("**Water District**"), and the Santa Clara Valley Transportation Authority ("**VTA**") governs the implementation of the joint habitat conservation plan and natural community conservation plan for the Santa Clara Valley (the "**Santa Clara Valley Habitat Plan**," the "**Plan**," or the "**SCVHP**") as of the Effective Date.

These entities may be referred to collectively as the "**Parties**" and individually as a "**Party**." The USFWS and CDFG may be referred to collectively as the "**Wildlife Agencies**." San Jose, Gilroy, and Morgan Hill may be referred to collectively as the "**Cities**" and each individually as a "**City**." The Implementing Entity, County, Cities, Water District, and VTA may be referred to collectively as the "**Permittees**" and each individually as a "**Permittee**."

## 2. RECITALS

The Parties have entered into this Agreement in consideration of the following:

**2.1.** In 2001, the preparation of a habitat conservation plan was included as an element of the project description used for a USFWS biological opinion for the Coyote Valley Research Park and four other projects. The habitat conservation plan was included to address the cumulative and indirect effects of urban growth, infrastructure development and operations and maintenance activities in Santa Clara County. In 2004, the County, San Jose, the Water District and the VTA entered into a Memorandum of Understanding that stated their shared intent to develop a joint habitat conservation plan and natural community conservation plan that would address certain existing and future environmental regulatory requirements for their various activities, including requirements pertaining to cumulative and indirect effects.

**2.2.** In 2005, the County, the Cities, the Water District, the VTA, USFWS and CDFG entered into a planning agreement pursuant to the California Natural Community Conservation Planning Act (the "**Planning Agreement**"). The Planning Agreement identified guidelines, criteria and procedures for the preparation of a joint habitat conservation plan and natural community conservation plan that would provide for the comprehensive management and conservation of numerous wildlife species. The SCVHP has been prepared according to the process described in the Planning Agreement.

**2.3.** The SCVHP is a plan to protect and enhance ecological diversity and function in a substantial portion of Santa Clara County, while allowing appropriate and compatible growth and development to occur in accordance with certain environmental laws. The Plan includes measures that provide for the conservation and management of certain “covered” species, and that avoid, minimize, and mitigate impacts on the “covered” species and their habitat resulting from various public and private activities, including urban growth and a variety of road, water, and other needed infrastructure construction and maintenance activities. The primary goal of the Plan is to fulfill the requirements of the federal Endangered Species Act and the California Natural Community Conservation Planning Act in order to obtain authorizations for the incidental take of certain covered species that may result from these activities.

**2.4.** The federal Endangered Species Act (“ESA”) prohibits the “take” of species listed as endangered or threatened under the ESA, as take is defined under federal law. Under Section 10 of ESA, USFWS may issue a permit authorizing the incidental take of endangered or threatened species during otherwise lawful activities if certain statutory requirements are met by the applicant and such take will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. To obtain a federal incidental take permit, the applicant must submit a habitat conservation plan describing, among other things, the steps the applicant will take to minimize and mitigate to the maximum extent practicable the impact of such “taking.” The Permittees submitted the SCVHP to USFWS and applied for a federal permit for incidental take of certain “covered” species within the area encompassed by the Plan. The incidental take permit issued by USFWS will be issued concurrently with its execution of this Agreement.

**2.5.** Like the ESA, the California Endangered Species Act (“CESA”) prohibits the take of species listed as endangered, threatened or candidate species under CESA. The Natural Community Conservation Planning Act (“NCCPA”) allows CDFG to authorize by permit the take of any species other than mountain lions (California Fish and Game Code section 4800 et seq.), including species listed as an endangered, threatened or candidate species under CESA, where the conservation and management of the species is provided for in a natural community conservation plan approved by CDFG. Because the SCVHP was developed to meet the standards of the NCCPA, it will do more than minimize and mitigate the impacts of the activities covered in the Plan, as the ESA requires. The Plan will also contribute to the recovery of listed species and help prevent other species from becoming threatened or endangered. The Permittees submitted the SCVHP to CDFG for approval and permitting for take pursuant to NCCPA. CDFG will issue a permit based on the SCVHP concurrently with its execution of this Agreement.

**2.6.** All of the Permittees intend to receive coverage under the federal incidental take permit, and the state permit issued pursuant to the NCCPA, for certain “covered” activities that they will implement, including infrastructure projects and operations and maintenance activities. In addition, the County and the Cities intend to allow developers, infrastructure project proponents and certain landowners to receive coverage under the permits for certain development and other activities, subject to the conditions in the Permits. The Implementing Entity may also negotiate agreements with other public entities to allow certain activities of such entities to be covered by the permits, subject to the conditions in the Permits.

2.7. The Permittees are agreeing to substantial commitments of land, natural resources, financial resources, human resources and other assets to conserve and manage the "covered" species, their habitats and other natural communities, in exchange for the assurances provided by the Wildlife Agencies in this Agreement.

### 3. DEFINITIONS

The following terms as used in this Agreement will have the meanings set forth below. Terms specifically defined in applicable federal or state statutes, including but not limited to, the ESA, CESA or NCCPA or the regulations adopted by USFWS and CDFG under those statutes will have the same meaning when used in this Agreement. Definitions used in this Agreement may elaborate on, but are not intended to conflict with, such statutory or regulatory definitions.

3.1. **"Agreement"** means this Implementing Agreement.

3.2. **"Annual Report"**

The Annual Report prepared by the Implementing Entity about implementation of the SCVHP, as provided in Agreement Section 14 and further described in SCVHP Chapter 8.11.

3.3. **"Authorized Take"** means the extent of incidental Take of Covered Species authorized by USFWS in the Federal Permit issued to the Permittees pursuant to Section 10(a)(1)(B) of the ESA, and the extent of Take of Covered Species authorized by CDFG in the State Permit issued to the Permittees pursuant to California Fish and Game Code section 2835.

3.4. **"CDFG"** means the California Department of Fish and Game, a department of the California Resources Agency.

3.5. **"CEQA"** means the California Environmental Quality Act (Pub. Resources Code §21000 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.

3.6. **"CESA"** means the California Endangered Species Act (Fish & G. Code, §2050 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.

3.7. **"Changed Circumstances"** as defined at 50 C.F.R. §17.3 means changes in circumstances affecting a Covered Species or the geographic area covered by the SCVHP that can reasonably be anticipated by the Parties and that can reasonably be planned for in the SCVHP. Changed Circumstances and planned responses to Changed Circumstances are more particularly defined in Agreement Section 11.3 and SCVHP Chapter 10.2.1. Changed Circumstances do not include Unforeseen Circumstances.

3.8. **"Chapter"** means a chapter, subchapter, or section of the SCVHP.

3.9. **"Conditions" or "Conditions on Covered Activities"** means the avoidance and minimization measures described in SCVHP Chapter 6, and the requirement to pay certain fees, or to provide land or implement conservation actions in lieu of such fees, described in SCVHP Chapter 9, which will be incorporated in Covered Activities, as provided in Agreement Section 8.

- 3.10. **“Conserve,” “Conserving,” or “Conservation”** means to use, and the use of, methods and procedures within the SCVHP Permit Area that are necessary to bring the federally and state-listed Covered Species to the point at which the measures provided pursuant to the ESA and CESA are not necessary, and to maintain or enhance the condition of the non-listed Covered Species so that listing pursuant to the ESA and CESA will not become necessary.
- 3.11. **“Conservation Measure”** means each action detailed in SCVHP Chapter 5 that is a component of the Conservation Strategy.
- 3.12. **“Conservation Strategy” or “SCVHP Conservation Strategy”** means the conservation strategy described in SCVHP Chapter 5.
- 3.13. **“Covered Activities”** means the otherwise lawful activities and projects described in SCVHP Chapter 2.3 that the Permittees or Third Party Participants may implement in the Permit Area for which incidental Take is authorized by the Wildlife Agencies pursuant to the Permits.
- 3.14. **“Covered Species”** means the species, listed and non-listed, whose conservation and management are provided for in the SCVHP and for which incidental Take is authorized by the Wildlife Agencies pursuant to the Permits. Covered Species are listed in **Exhibit A** to this Agreement.
- 3.15. **“Effective Date”** means the date of the first business day after all of the following have occurred: execution of this Agreement by all Parties; issuance of both of the Permits; adoption of an SCVHP implementing ordinance by each of the Cities and the County, as provided in Agreement Section 17.1, and formation of the Implementing Entity described in 3.21 of the Agreement.
- 3.16. **“Evaluation Checklist”** means the checklist prepared by the Implementing Entity to guide the County and the Cities’ review of habitat plan application packages submitted by private project proponents.
- 3.17. **“Federal Listed Species”** means the Covered Species that are listed as threatened or endangered species under the ESA as of the Effective Date, and the Covered Species that are listed as threatened or endangered pursuant to the ESA during the term of the SCVHP as of the date of such listing.
- 3.18. **“Federal Permit”** means the federal incidental take permit issued by USFWS to the Permittees based on the SCVHP pursuant to Section 10(a)(1)(B) of the ESA.
- 3.19. **“ESA”** means the Federal Endangered Species Act of 1973, as amended (16 U.S.C § 1531 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.20. **“Fully Protected Species”** means any species identified in California Fish and Game Code sections 3511, 4700, 4800, 5050 or 5515.

- 3.21. **"Implementing Entity"** means the Santa Clara Valley Habitat Agency, a joint exercise of powers agency composed of the County and the Cities, formed pursuant to the Joint Powers Act, Gov. Code § 6500 et seq.
- 3.22. **"Independent Conservation Assessment Team"** means the Independent Conservation Assessment Team as provided in Agreement Section 11.2.3 and further described in SCVHP Chapter 7.2.3.
- 3.23. **"Listed Species"** means a species (including a subspecies, or a distinct population segment of a species) that is listed as an endangered or threatened species under the ESA or as an endangered, threatened or candidate species under CESA.
- 3.24. **"Migratory Bird Treaty Act"** means the federal Migratory Bird Treaty Act (16 U.S.C. §703 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.25. **"NCCPA"** means the California Natural Community Conservation Planning Act (Fish & G. Code, §2800 et seq.), as amended on January 1, 2012, and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.26. **"NEPA"** means the National Environmental Policy Act (42 U.S.C. §4321 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.27. **"Neighboring Landowner"** means an owner of specific types of agricultural lands that are within one mile of lands included in the Reserve System who has received a special certificate (Exhibit C) from the Implementing Entity pursuant to Agreement Section 7.4.3 that extends Authorized Take coverage for certain Covered Species resulting from certain agricultural land uses.
- 3.28. **"Non-listed Species"** means a species (including a subspecies, or a distinct population segment of a species) that is not listed as endangered or threatened under the ESA or as an endangered, threatened, or candidate species under CESA.
- 3.29. **"Participating Special Entity"** means an entity that is not subject to the City's or the County's land use or other regulatory authority that has entered into a special agreement with the Implementing Entity pursuant to Agreement Section 7.4.2 to receive Authorized Take coverage for a project or activity within the Permit Area.
- 3.30. **"Party"** and **"Parties"** mean the signatories to this Agreement, individually and collectively.
- 3.31. **"Permit Area"** means the area within which the Permittees are seeking authorization from the Wildlife Agencies for the Take of Covered Species resulting from Covered Activities. The Permit Area is further described in SCVHP Chapter 1.2.2 and is depicted in Figure 1-2 of the SCVHP.
- 3.32. **"Permits"** means the Federal Permit and the State Permit, which incorporate the SCVHP and the Agreement by reference.
- 3.33. **"Permittees"** means the Implementing Entity, County, Cities, Water District, and VTA.

- 3.34. **"Planning Agreement"** means the document executed in 2005, by the County, the Cities, the Water District, the VTA, USFWS and CDFG pursuant to the NCCPA to guide the preparation of the SCVHP.
- 3.35. **"Planning Limit of Urban Growth"** means the geographical extent of Authorized Take coverage for urban development as described in SCVHP Chapter 2.2.3 and further explained in SCVHP Chapter 2.2.1, and as delineated in Figure 2-2 of the SCVHP.
- 3.36. **"Private Project Participant"** means a private person or entity that has received Take Authorization coverage from a City or the County pursuant to Agreement Section 7.4.1 for a project or activity within the Permit Area that is subject to the land use or other regulatory authority of the City or the County.
- 3.37. **"Reserve Unit Management Plan"** means a Reserve Unit Management Plan as provided in Agreement Section 10.1 and as further described in SCVHP Chapter 5.2.5.
- 3.38. **"Reserve System"** means the land acquired and dedicated in perpetuity through either a fee interest or conservation easement intended to meet the preservation, conservation, enhancement and restoration objectives of the Conservation Strategy of the SCVHP. The Reserve System may also include up to one thousand (1,000) acres of land owned by the Santa Clara Valley Open Space Authority as of the Effective Date, on which the recordation of a conservation easement is precluded by law, without recordation of a conservation easement, provided the lands otherwise meet the requirements for Reserve System lands as further described in SCVHP Chapter 5.2.3 and SCVHP Chapter 9.4.2.
- 3.39. **"SCVHP"** and **"Plan"** mean the joint habitat conservation plan and natural community conservation plan prepared by the Permittees and approved by the Wildlife Agencies under Section 10 of the ESA and Section 2820 of the California Fish and Game Code.
- 3.40. **"SCVHP Fees"** means the Land Cover Fee, the Serpentine Fee, the Nitrogen Deposition Fee, the Endowment Fee Component, the Plan Preparation Cost Recovery Fee Component, the Wetland Fee, the Temporary Impact Fee, and the Burrowing Owl Fee, as further described in SCVHP Chapter 9.4.1.
- 3.41. **"Section"** means a section or subsection of this Agreement.
- 3.42. **"State Listed Species"** means the Covered Species that are listed as threatened or endangered species, or a candidate for such status, under CESA, as of the Effective Date, and the Covered Species that are listed as threatened or endangered, or a candidate for such status pursuant to CESA during the term of the SCVHP, as of the date of such listing.
- 3.43. **"State Permit"** means the state Take permit issued to the Permittees based on the SCVHP pursuant to Section 2835 of the California Fish and Game Code.
- 3.44. **"Take"** and **"Taking"** have the same meaning provided by the ESA and its implementing regulations with regard to activities subject to the ESA, and also have the same meaning

provided in section 86 of the California Fish and Game Code with regard to activities subject to CESA and NCCPA.

- 3.45. **"Third Party Participants"** means Private Project Participants, Participating Special Entities, Neighboring Landowners and other persons or entities that that are not Permittees and that receive Authorized Take coverage from a Permittee in accordance with Agreement Section 7.4.
- 3.46. **"Three Creeks Habitat Conservation Plan" and "3CHCP"** mean the habitat conservation plan being developed by the Santa Clara Valley Water District to protect and enhance habitats for aquatic species and provide conservation for species affected by the District's on-going water supply operations in the northern Santa Clara Valley.
- 3.47. **"Unforeseen Circumstances"** under the Federal Permit, as defined at 50 C.F.R. §17.3, means changes in circumstances affecting a Covered Species or geographic area covered by the SCVHP that could not reasonably have been anticipated by the Permittees and USFWS at the time of the SCVHP's negotiation and development, and that result in a substantial and adverse change in the status of a Covered Species. **"Unforeseen Circumstances"** under the State Permit means changes affecting one or more species, habitat, natural community, or the geographic area covered by a conservation plan that could not reasonably have been anticipated at the time of plan development, and that result in a substantial adverse change in the status of one or more Covered Species.
- 3.48. **"USFWS"** means the United States Fish and Wildlife Service, an agency of the United States Department of Interior.
- 3.49. **"Wetlands"** means the wetlands types described in SCVHP Chapter 3.3.5, including coastal and valley freshwater marsh and seasonal wetlands.
- 3.50. **"Wildlife Agencies"** means USFWS and CDFG.

#### 4. PURPOSES OF THIS AGREEMENT

This Agreement defines the Parties' roles and responsibilities and provides a common understanding of actions that will be undertaken to avoid, minimize and mitigate the effects on the Covered Species caused by the Covered Activities within the Permit Area, and to provide for the conservation of the Covered Species within the Permit Area. The purposes of this Agreement are:

- To ensure implementation of each of the terms and conditions of the Permits;
- To note the existence of long term assurances to the Permittees that, pursuant to the federal "No Surprises" provisions of 50 Code of Federal Regulations, sections 17.22(b)(5) and 17.32(b)(5), and California Fish and Game Code section 2820, subdivision (f), as long as the terms and conditions of this Agreement, the SCVHP, and the Permits are fully satisfied, the Wildlife Agencies will not require of the Permittees the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources, either to minimize and mitigate the impacts of Authorized Take, or to

provide for the conservation and management of the Covered Species in the Permit Area, except as provided in this Agreement and the SCVHP; and

- To describe remedies and recourse should any Party fail to perform its obligations as set forth in this Agreement.

## **5. INCORPORATION**

### **5.1 Incorporation of the Plan**

The SCVHP and each of its provisions are intended to be, and by this reference are, incorporated herein. This Agreement is intended to specify the obligations of the Parties under the SCVHP, recognizing that the SCVHP is a conservation plan and was not drafted as a contract. In the event of any direct contradiction, conflict or inconsistency between this Agreement and the SCVHP, the terms of this Agreement will control. In all other cases, the provisions of this Agreement and the SCVHP will be interpreted to be consistent with and complementary to each other.

### **5.2 Incorporation into the Permits**

This Agreement and the SCVHP shall be incorporated as terms and conditions of the Permits. In the event of any direct contradiction among the provisions of the SCVHP, the terms of this Agreement or the terms of the Permits, the terms of the Permits shall control. Each Party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by the other Party or anyone acting on behalf of the other Party that is not embodied in the SCVHP, this Agreement, or the Permits.

## **6. IMPLEMENTATION ROLES AND RESPONSIBILITIES**

The general roles and responsibilities of the Parties for the implementation of the SCVHP are as follows.

### **6.1. Permittees' Responsibilities**

The Permittees will fully and faithfully perform all obligations assigned to them collectively, and to each of them individually, under this Agreement, the SCVHP, and the Permits.

### **6.2. USFWS Responsibilities**

USFWS will provide timely technical assistance and review, collaboration and consultation to the Permittees regarding implementation of the SCVHP, as provided in this Agreement and the SCVHP, throughout the duration of the Federal Permit. USFWS will also use all reasonable efforts to assist the Permittees to achieve the SCVHP conservation and recovery goals for the Covered Species, as described in SCVHP Chapters 8.7.3 and 9.4.3.

### **6.3. CDFG Responsibilities**

CDFG will provide timely technical assistance and review, collaboration and consultation to the Permittees regarding implementation of the SCVHP, as provided in this Agreement and the SCVHP,



throughout the duration of the State Permit. CDFG will also use all reasonable efforts to assist the Permittees to achieve the SCVHP conservation and recovery goals for the Covered Species, as described in SCVHP Chapters 8.7.3 and 9.4.3.

#### **6.4. Role of Implementing Entity**

The Permittees collectively are ultimately responsible for compliance with all applicable terms and conditions of the Permits. The Implementing Entity will have primary responsibility for implementing the SCVHP on behalf of the other Permittees. The Implementing Entity may delegate the implementation of specific actions to other Parties or qualified third parties, including but not limited to public agencies, private conservation organizations, university scientists, and contractors, but the Implementing Entity itself will remain responsible for ensuring overall implementation of the SCVHP on behalf of the other Permittees in accordance with the Permits. As further described in SCVHP Chapter 8.3, the Implementing Entity's responsibilities generally include, but are not necessarily limited to, implementation and management of all of the following elements of the SCVHP:

- administration of the SCVHP, including staffing, and providing necessary scientific, legal, and financial expertise and consulting services;
- oversight of compliance with the Permits;
- creation of the Reserve System;
- management of Reserve System Lands;
- monitoring, adaptive management and changed circumstances;
- funding; and
- information management.

##### **6.4.1. SCVHP Implementation Key Deadlines for Compliance**

The Parties' agreement about how key elements of the SCVHP will be implemented over time are summarized in the implementation compliance deadlines set forth in Table 8-2 of the SCVHP and further explained in SCVHP Chapter 8.12. The Parties recognize that, under certain circumstances, it might be reasonable and appropriate to modify one or more of the deadlines by modifying or amending the SCVHP, this Agreement, or the Permits, as provided in Agreement Section 15. However, absent such a modification or amendment, the Implementing Entity, on behalf of the Permittees, will meet the implementation deadlines set forth in SCVHP Table 8-2.

#### **6.5. Collaboration among the Parties**

The Parties agree that successful collaboration among them is important to the success of the SCVHP. Notwithstanding any other Section of this Agreement or Chapter of the SCVHP, each Party will make a reasonable effort to: meet and confer with any other Party upon the request of that Party to address matters pertaining to the SCVHP, the Permits, or this Agreement; provide relevant, non-proprietary, non-confidential information pertaining to the SCVHP upon the request of any Party; and provide timely responses to requests from any Party for advice, concurrence, or review and comment on reports, surveys or other documents, regarding matters pertaining to the SCVHP, the Permits, or this Agreement.

## **6.6. Dispute Resolution**

The Parties recognize that disputes concerning implementation or interpretation of this Agreement, the SCVHP, and the Permits may arise from time to time. The Parties intend to resolve most disputes at the staff or field personnel level. However, the Parties recognize that some disputes might not be resolved at the staff or field personnel level. The Parties agree to work together in good faith to resolve such disputes using the informal dispute resolution procedure set forth in this Section. Any Party may seek any available remedy without regard to this Section if the Party concludes that circumstances so warrant. However, unless the Parties agree upon another dispute resolution process, or unless a Party has initiated administrative proceedings or litigation related to the subject of the dispute in federal or state court, the Parties agree to use the following procedures to attempt to resolve disputes.

### **6.6.1. Notice of Dispute; Meet and Confer**

If a Wildlife Agency objects to any action or inaction by any Permittee on the basis that the action or inaction is inconsistent with the SCVHP, the Permits, or this Agreement, it will so notify the Permittee and the Implementing Entity and when appropriate, other Wildlife Agencies, in writing, explaining the basis of such objection. The Permittee or Implementing Entity will respond to the notice within thirty (30) days of receiving it, stating what actions the Permittee or Implementing Entity proposes to take to resolve the objection or, alternatively, explaining why the objection is unfounded. If the response resolves the objection to the satisfaction of the Wildlife Agency, the agency will so notify the Permittee and the Implementing Entity, and the Permittee or Implementing Entity, as appropriate, will implement the actions, if any, proposed in the response to the agency. If the response does not resolve the objection to the Wildlife Agency's satisfaction, the agency will notify the Permittee or Implementing Entity accordingly, and the agency, the Permittee and the Implementing Entity will meet and confer to attempt to resolve the dispute. The meeting will occur within thirty (30) days after the Permittee or Implementing Entity receives the Wildlife Agency's response, or at such later time as the Permittee, the Implementing Entity and the Wildlife Agency may agree. A representative of the Implementing Entity will take notes at the meeting, summarize the outcome, and distribute meeting notes to each Party in attendance.

The Implementing Entity or any other Permittee will use the same procedure to raise and to resolve objections to any action or inaction of a Wildlife Agency, and the Wildlife Agency will respond in the same manner to notices delivered by any Permittee.

### **6.6.2. Elevation of Dispute**

If the Parties do not resolve a dispute after completing the dispute resolution procedure in Agreement Section 6.6.1, any one of the Parties may elevate the dispute to a meeting of the chief executives of the involved Parties. For purposes of this provision, "chief executive" means the city manager of a city, the county executive of the County, the chief executive officer of the Water District, the general manager of the VTA, the executive director of the Implementing Entity, the CDFG Regional Manager, and the USFWS Field Supervisor. Each Party will be represented by its chief executive in person or by telephone at the meeting, and the meeting will occur within forty-five (45) days of a request by any Party following completion of the dispute resolution procedure.

## **7. TAKE AUTHORIZATION**

As of the Effective Date, the Permittees may Take the Covered Species, provided the Take is incidental to the implementation of Covered Activities in the Permit Area, as further authorized by and subject to the conditions of this Agreement, the SCVHP, and the Permits. The Covered Activities include all activities identified as such in SCVHP Chapter 2.3. The Permits do not authorize Take resulting from projects or activities that are not identified as Covered Activities in SCVHP Chapter 2.3.

The Permittees' Take authority covers all of their respective elected officials, officers, directors, employees, agents, subsidiaries, and contractors who engage in any Covered Activity. Each Permittee will be responsible for supervising compliance with the relevant terms and conditions of the Permits by its own elected officials, officers, etc., and all contracts between a Permittee and any such person or entity regarding the implementation of a Covered Activity will require compliance with the Permits. The Implementing Entity will periodically provide an educational program to fully inform all such persons and entities of the relevant terms and conditions of the Permits. In this context, 'periodically' means at least once every five years or sooner if at least 50% of the targeted positions have new personnel.

### **7.1. Issuance of the Permits**

Concurrent with its execution of this Agreement, and after satisfaction of all other applicable legal requirements, USFWS will issue the Permittees a permit under Section 10(a)(1)(B) of the ESA (the "**Federal Permit**"). The Federal Permit will authorize incidental take of all Federal Listed Covered Species resulting from Covered Activities in the Permit Area. Subject to compliance with all other terms of this Agreement, the Federal Permit will take effect for all Non-listed Covered Species upon the listing of such species under the ESA.

Concurrent with its execution of this Agreement, and after satisfaction of all other applicable legal requirements, CDFG will issue the State Permit.

### **7.2. Ongoing Role of Wildlife Agencies**

As of the Effective Date, the Permittees may implement Covered Activities and extend Authorized Take coverage to Third Party Participants in accordance with the Permits without the prior approval of the Wildlife Agencies, except as provided in Agreement Section 7.2.1. As further described in SCVHP Chapter 8.7.3, the Wildlife Agencies' will monitor implementation of the SCVHP to ensure overall compliance with the Permits. To ensure that the Wildlife Agencies are adequately informed about the Permittees' use and extension of Authorized Take coverage, the Permittees will provide copies of any application and supporting information required in SCVHP Chapter 6.8 for any Covered Activity upon the request of any Wildlife Agency.

As further described in SCVHP Chapter 8.7.3, the Wildlife Agencies' approval is required for certain components of the conservation strategy and specific projects. The Wildlife Agencies will be third-party beneficiaries on conservation easements recorded on Reserve System lands, as further described in SCVHP Chapter 8.6.3. The Wildlife Agencies will also participate in implementation of the SCVHP adaptive management program, as further described in SCVHP Chapter 7.

### **7.3. Authorized Take for Projects and Activities Implemented by Permittees**

Each Permittee will ensure that all Covered Activities it implements comply with the Permits. As further described in SCVHP Chapter 8.7.1, as of the Effective Date, each Permittee will document such compliance and provide a copy of that documentation to the Implementing Entity, which will maintain a record of compliance documentation for all Covered Activities implemented by Permittees.

Within one (1) month after the Effective Date, the Permittees will develop a template to standardize the form in which they document their compliance with the Permits. The template will be substantively similar to the "Habitat Plan Application Package" for Private Project Participants, as described in Agreement Section 7.4 and SCVHP Chapter 6.7 and SCVHP Chapter 6.8. However, the Permittees may adapt the form of the Habitat Plan application package for their use as they deem appropriate. Until the template is developed for Covered Activities implemented by the Permittees, the Permittees will use the Habitat Plan Application Package used for Private Project Participants.

When one or more SCVHP Fees are required for a Covered Activity implemented by a Permittee, the Implementing Entity will calculate the required fee amount, and the Permittee will transfer that amount to the Implementing Entity before initiating the Covered Activity. As further described in SCVHP Chapter 9.4.1, Permittees may use any applicable alternative to fee payment allowed in the SCVHP, including, but not limited to, providing suitable land in lieu of some or all fees. Permittees with the ability to implement actions described in SCVHP Chapter 5, pertaining to the SCVHP Conservation Strategy, or SCVHP Chapter 7, pertaining to the SCVHP monitoring and adaptive management program, that contribute to the successful implementation of the SCVHP Conservation Strategy, may obtain a credit against all or a portion of a required fee amount in exchange for implementation of those actions. The Implementing Entity will prepare a written determination of whether any such credit proposed by a Permittee conforms to the SCVHP and is approved. The written determination will include the amount of any approved credit, as described in SCVHP Chapter 9.4.1.

Take Authorization coverage for any Covered Activity implemented by a Permittee will take effect upon the Permittee's delivery to the Implementing Entity of its documentation of compliance with this Agreement, the SCVHP, and the Permits, and any required fee amount or any fee alternative approved by the Implementing Entity.

### **7.4. Extension of Take Authorization to Third Party Participants**

As further provided by the Permits, Authorized Take coverage may be extended to "**Third Party Participants**," which include "**Private Project Participants**," "**Participating Special Entities**" and "**Neighboring Landowners**." The Implementing Entity may extend Authorized Take coverage to Participating Special Entities and Neighboring Landowners and will be responsible for determining whether applications or requests from potential Participating Special Entities and Neighboring Landowners comply with all applicable terms and conditions of the Permits. The County and Cities may extend Authorized Take coverage to Private Project Participants and will be responsible for determining whether applications from potential Private Project Participants comply with all such

terms and conditions and will make findings supporting such determination before extending Authorized Take coverage.

#### **7.4.1. Private Project Participants**

The County and the Cities will each require proponents of private projects that are subject to their land use or other regulatory authority and fall within the categories of projects and activities described in SCVHP Chapter 2.3 to comply with all applicable terms and conditions of the Permits, and will extend Authorized Take coverage to such projects, as provided in this Section.

##### **7.4.1.1. SCVHP Application Process**

As further described in SCVHP Chapter 6.7.2, the County and the Cities will require proponents of private projects that are subject to their land use or other regulatory authority and fall within the categories of projects and activities described in SCVHP Chapter 2.3 to submit an application package as described in SCVHP Chapter 6.8 and will review the application package based on an "Evaluation Checklist" that will be prepared by the Implementing Entity. The County's and Cities' review of the application package will occur concurrently with the environmental review of the project pursuant to CEQA, for projects subject to CEQA.

Based on its review of each application package, the applicable City or the County will prepare a written determination regarding whether the private project, as proposed in the application package, includes all applicable terms and conditions of the Permits and that take associated with the implementation of the proposed project is properly authorized through the Permits. If the City or County concludes that the project as proposed does not include all applicable terms and conditions, it will explain the deficiency or omission in writing to the private project proponent and will reject the application. If the City or County concludes that the project as proposed includes all applicable terms and conditions, it will prepare a written determination to that effect (a "Compliance Determination").

The Cities and the County will provide each Compliance Determination to the Implementing Entity and maintain a copy of all SCVHP application packages for which they have prepared a Compliance Determination, which shall be made available to the Implementing Entity as part of annual and other reviews.

Nothing in this Section shall be construed to affect the ability of the County or a City to determine that an application for a private project is incomplete or to deny a private project application for any reason unrelated to the SCVHP or the Permits.

##### **7.4.1.2. Extension of Authorized Take Coverage to Private Project Participants**

If a City or the County prepares a Compliance Determination for a private project following completion of the SCVHP application process, the private project proponent will be eligible for Authorized Take coverage as a Private Project Participant. The City or County will require the private project proponent to comply with all applicable terms and conditions of the Permits. The City or County may enter into an agreement in which the project's proponent assumes the obligation to comply with such terms and conditions or may require such compliance as a condition of project approval. Once the agreement is entered into or the conditions of approval are imposed,

all applicable SCVHP Fees have been paid to the Implementing Entity as provided in Agreement Section 8.2 and further described in SCVHP Chapter 9.4.1, and any lands in lieu of fees have been provided as provided in Agreement Section 8.2 and further described in SCVHP Chapter 8.6.7, and the City or County has otherwise finally approved the project, the applicable City or the County will extend Authorized Take coverage to the project proponent. The project proponent thereafter will have Authorized Take coverage as a Private Project Participant.

Once Authorized Take coverage has been extended to a Private Project Participant, it will remain in effect with regard to the project for as long as the Private Project Participant fully complies with all applicable terms and conditions of the Permits, unless:

- the Wildlife Agencies have suspended or revoked the Permits;
- Take has not yet occurred; and
- the Wildlife Agencies determine that Take caused by the project would result in jeopardy.

If the Private Project Participant does not comply with such terms and conditions, or if the applicable City or County suspends or revokes its approval of the project, the City or County will also suspend or revoke the Authorized Take coverage for the project.

The County and the Cities will not require Private Project Participants to provide any additional mitigation to address impacts to Covered Species beyond what is required in the Permits for purposes of extending Authorized Take; provided, however, that the County and Cities may impose additional requirements for purposes of other state or federal environmental permits, e.g., permits under the Federal Clean Water Act.

#### **7.4.1.3. SCVHP Implementing Ordinances**

Before the Effective Date, the Cities and the County will each consider the adoption of an SCVHP implementing ordinance substantively similar to the model ordinance attached to this Agreement as **Exhibit B** that sets forth the application process for potential Private Project Participants. The implementing ordinance will, among other things: provide for the imposition of SCVHP Fees, as provided in Agreement Section 8.2 and further described in SCVHP Chapter 9.4.1; establish the jurisdiction's procedure for extending Authorized Take coverage to Private Project Participants, as provided in this Agreement Section 7.4.1; and provide for the conveyance of land in lieu of SCVHP Fees, in accordance with Agreement Section 8.3 and SCVHP Chapter 8.6.7. The Cities and the County may extend Authorized Take coverage to Private Project Participants only after adopting an SCVHP implementing ordinance in accordance with this Section. In addition, the Permittees recognize that the Wildlife Agencies' findings regarding the adequacy of funding for SCVHP implementation will be based, in part, on the expectation that the Cities and the County will adopt implementing ordinances that require the payment of SCVHP Fees and that failure by a City or the County to adopt an implementing ordinance will prevent the Permits from taking effect.

The model ordinance in **Exhibit B** is intended to exemplify the necessary substantive terms of an SCVHP implementing ordinance; it is not intended to dictate the precise terms of each such ordinance. The County and each City may each adapt the model ordinance to reflect its independent findings, to maximize administrative efficiency, or for other reasons, provided the

substance of the operative terms in the model ordinance is reflected in each implementing ordinance.

#### **7.4.2. Participating Special Entities**

As further described in SCVHP Chapter 8.4, the Implementing Entity may extend Authorized Take coverage to public entities that are not Permittees, including, but not limited to, school, water, irrigation, transportation, park and other districts and utilities, pursuant to a contractual agreement that defines all planning, implementation, management, enforcement and funding responsibilities necessary for the entity to comply with the Permits. Such public entities thereafter will have Authorized Take coverage as Participating Special Entities.

The Implementing Entity may, with Wildlife Agency approval, enter into an agreement with a Participating Special Entity if the Participating Special Entity explains how it will comply with all applicable terms and conditions of the Permits in an application satisfying the criteria detailed in SCVHP Chapter 6.8. Among other things, the agreement must adequately address the legal and equitable remedies available to the Implementing Entity if the Participating Special Entity fails to perform its contractual obligations. As provided in SCVHP Chapter 8.4, after execution of such an agreement and the payment of all fees specified by the Implementing Entity, the Implementing Entity may issue a "Participating Special Entity Certificate of Inclusion" to the Participating Special Entity that describes the scope of its Authorized Take coverage and sets forth the conservation measures the Participating Special Entity is required to implement. A Participating Special Entity Certificate of Inclusion template will be developed by the Implementing Entity and approved by the Wildlife Agencies prior to the Implementing Entity extending authorized take coverage to any Participating Special Entity. The Implementing Entity will enforce the terms of the Permits with regard to any such Participating Special Entity and will withdraw the Certificate of Inclusion and terminate any Authorized Take coverage extended to the Participating Special Entity if the Participating Special Entity fails to comply with such terms.

#### **7.4.3. Neighboring Landowners**

The Implementing Entity may extend Authorized Take coverage to owners of farmlands, as further described in SCVHP Chapter 10.2.7, and as provided herein. Owners of farmlands are eligible to receive Authorized Take coverage as a Neighboring Landowner for any portion of their lands that is within one mile of the boundary of lands included in the Reserve System. For purposes of this Section, "farmlands" means lands in production at the time applicable reserve unit is created on which normal agricultural practices are conducted, including, but not limited to, crop planting and production, irrigation and fertilization, soil tilling, crop harvesting, grazing including intensive livestock grazing on irrigated pasture, forage production, animal production and husbandry, and other associated activities such as fence construction and maintenance, vehicle or horse use, and construction and maintenance of typical farm outbuildings. Authorized Take for Neighboring Landowners will cover only normal agricultural practices. Participation in the SCVHP as a Neighboring Landowner is voluntary; farmland owners are not required by the SCVHP to seek Authorized Take coverage for normal agricultural practices.

#### **7.4.3.1. Activities Covered by Neighboring Landowner Take Authorization**

Neighboring Landowner Take Authorizations will cover routine agricultural practices, as further described in SCVHP Chapter 10.2.7, including without limitation normal crop rotation practices in which land is periodically fallowed and subsequently returned to cultivation.

#### **7.4.3.2. Limitations of Neighboring Landowner Take Authorizations**

Neighboring Landowner Take Authorizations are limited to the Take of three Covered Species whose populations have the potential to expand into farmlands from Reserve System lands. These three Covered Species are California red-legged frog, California tiger salamander, and western pond turtle. Neighboring Landowner Take Authorizations therefore will not cover take of other Covered Species or Take that occurred on farmlands before Reserve System lands were established within one mile of the farmlands. Neighboring Landowner Take Authorizations will cover only normal agricultural practices that occur within one mile of the boundary of Reserve System lands.

Neighboring Landowner Take Authorizations will not cover:

- conversion of farmlands to non-agricultural uses;
- conversion of crop lands to permanent crops, such as vineyards and orchards;
- non-agricultural uses;
- non-agricultural activities on farmlands; or
- pesticide use.

The Implementing Entity will establish the term of Neighboring Landowner Take Authorizations, which in no event will exceed the term of the Permits.

#### **7.4.3.3. Neighboring Landowner Certificates of Inclusion**

The Implementing Entity may extend Neighboring Landowner Take Authorization coverage to a farmland owner by issuing the landowner a Neighboring Landowner Certificate of Inclusion (Exhibit C) that reflects the requirements of Agreement Section 7.4.3 following the documentation of baseline environmental conditions on the farmlands. Farmland owners seeking a Neighboring Landowner Take Authorization may either retain their own qualified biologist to prepare a baseline conditions report or may request the Implementing Entity to evaluate and record the baseline environmental conditions. A farmland owner that uses the Implementing Entity for this purpose will reimburse the Implementing Entity's costs. Farmland owners are responsible for paying the costs of surveys and reports required to obtain a Neighboring Landowners Take Authorization. For purposes of this provision, a "qualified biologist" is a professional biologist approved by the Implementing Entity, USFWS and CDFG, as further described in SCVHP Chapter 6.8.5. The baseline conditions report must contain, at a minimum, a description of the extent and quality of Covered Species habitat present on the farmlands, the results of Covered Species surveys on the lands, and any records of Covered Species occurrences within one mile of the lands. The Implementing Entity will review all baseline conditions reports submitted by farmland owners to ensure that they are complete and based on accepted scientific practices for species and habitat surveys, and will reject incomplete or inadequate reports. Once the baseline environmental conditions have been documented in a complete and adequate baseline conditions report, and subject to the terms and



conditions in this Agreement Section 7.4.3 and SCVHP Chapter 10.2.7, the Implementing Entity will issue the owner of the farmlands a Certificate of Inclusion providing Neighboring Landowner Take Authorization coverage for normal agricultural practices on the land.

The Implementing Entity will require the covered farmland owner to sign the Neighboring Landowner Certificate of Inclusion. Neighboring Landowner Certificates of Inclusion will not be transferable. Subsequent owners of farmlands covered by a Neighboring Landowner Certificate of Inclusion must request the Implementing Entity to issue, and must sign, a new Neighboring Landowner Certificate of Inclusion, if they choose to continue enrollment. Subsequent owners of covered farmlands will not, however, be required to prepare, or to ask the Implementing Entity to prepare, a new baseline conditions report if there is no lapse in coverage under or compliance with the Neighboring Landowner Certificate of Inclusion.

The Implementing Entity will maintain a record of all Neighboring Landowner Certificates of Inclusion, and the size and location of lands covered by them, and will include a summary of this information in its Annual Report. Copies of Neighboring Landowner Certificates of Inclusion will be provided to the Wildlife Agencies upon request.

#### **7.5. Contra Costa Goldfields**

Nothing in the Permits is intended or will be construed to allow the Take of Contra Costa goldfields (*Lasthenia conjugens*), as further described in SCVHP Chapter 6.3.

#### **7.6. The Migratory Bird Treaty Act**

The Federal Permit will constitute a Special Purpose Permit under the Migratory Bird Treaty Act as provided at 50 Code of Federal Regulations section 21.27 for the Take of least Bell's vireo (*Vireo bellii pusillus*), subject to the terms and conditions specified in the Federal Permit, as of the Effective Date. The Special Purpose Permit will be valid for a period of three (3) years from the Effective Date, provided the Federal Permit remains in effect for such period. The Special Purpose Permit will be renewed in accordance with the Migratory Bird Treaty Act provided that the Permittees remain in compliance with the Federal Permit. Each such renewal will be valid for the maximum period allowable under the applicable regulations at the time of the renewal (which, as of the Effective Date, is three (3) years), provided that the Federal Permit remains in effect for such period. If and when any other Covered Species that is a migratory bird becomes a Federal Listed Species, the Federal Permit will automatically constitute a Special Purpose Permit for that species as of the date the Federal Permit becomes effective as to such species, as provided in Agreement Section 7.1.

#### **7.7. Activities Not Covered**

Projects and activities that are not Covered Activities, as described in SCVHP Chapter 2.4, will not receive Authorized Take Coverage and are not subject to the terms and conditions of the Permits.

#### **7.8. Relationship of SCVHP to Three Creeks Habitat Conservation Plan**

The Water District is expected to apply for separate incidental take permits from USFWS and the National Marine Fisheries Service to cover activities addressed in the "Three Creeks Habitat Conservation Plan" (the "3CHCP"). If issued, the Water District's 3CHCP incidental take permits will

be independent and severable from the SCVHP Federal Permit, such that, if the 3CHCP permits are subsequently suspended or revoked, such suspension or revocation will not, by itself, affect the SCVHP Federal Permit or the Permittees' obligations under the SCVHP Federal Permit, and vice versa. The Water District's 3CHCP incidental take permits are expected to cover some activities that are also SCVHP Covered Activities, such that the Water District will have incidental take authorization for certain SCVHP Covered Activities under both the SCVHP Federal Permit and the 3CHCP incidental take permits.

The Water District will be solely responsible for administering and implementing the 3CHCP. The Water District will coordinate with the Implementing Entity and the Wildlife Agencies regarding implementation of 3CHCP as appropriate to eliminate redundancies. If, and to the extent that, the 3CHCP requires mitigation for impacts also addressed by the SCVHP, the Parties agree that the Water District will not be required to implement the duplicative measure twice (e.g., will not both have to pay a fee under the SCVHP that is intended to fund land acquisition and also directly to fund a land acquisition under the 3CHCP to mitigate the impacts of the same project or activity). The Implementing Entity will be responsible for monitoring and reporting on measures implemented by the Water District that fulfill SCVHP requirements just as it is responsible for monitoring and reporting on other SCVHP measures, regardless of whether the measures also fulfill requirements under the 3CHCP.

Notwithstanding anything in this Agreement or the SCVHP to the contrary, the Parties further agree that conservation actions anticipated to be undertaken by the Water District in implementing the 3CHCP will be eligible to offset SCVHP Fees and, if implemented and approved by the Implementing Entity, may be credited against any SCVHP Fees the Water District may otherwise be obligated to pay, in the manner and to the extent provided in SCVHP Chapter 9.4.1.

## **8. CONDITIONS ON COVERED ACTIVITIES**

The impacts to Covered Species and natural communities resulting from Covered Activities will be minimized and mitigated by the implementation of the SCVHP Conservation Strategy, by avoidance and minimization measures for Covered Activities, and related application and survey requirements, described in SCVHP Chapter 6, and by the payment of certain fees that will be used to fund implementation of the SCVHP described in SCVHP Chapter 9. The measures described in SCVHP Chapter 6 and the fee requirements described in SCVHP Chapter 9 are referred to herein and in the SCVHP as **"Conditions on Covered Activities"** or **"Conditions."** Most of these Conditions apply to specific types of Covered Activities; no individual Covered Activity is anticipated to need to comply with all Conditions. Instead, each Covered Activity will comply with certain applicable Conditions. The Permittees will ensure that all applicable Conditions are incorporated in Covered Activities, as provided in this Section.

### **8.1. Avoidance and Minimization of Impacts**

As further described in SCVHP Chapter 6, the SCVHP includes Conditions to avoid or minimize the Take of Covered Species resulting from Covered Activities. These Conditions are designed to form a regional program that will be implemented systematically to: prevent Take of individuals of certain

Covered Species; avoid impacts to Covered Species to the maximum extent practicable; minimize adverse effects on Covered Species and natural communities to the maximum extent practicable; and avoid and minimize direct and indirect impacts on wetlands and streams. Each Permittee will incorporate all applicable Conditions within all Covered Activities that it implements. In addition, the County and the Cities will require all applicable Conditions as conditions of approval for all Private Project Participant Covered Activities, and the Implementing Entity will ensure that the Conditions are incorporated in all Participating Special Entity Covered Activities.

#### **8.1.1. Avoidance and Minimization of Impacts to Species Protected under Laws other than the ESA or CESA**

All Covered Species that are bird species (western burrowing owl, least Bell's vireo, and tricolored blackbird) are protected under the Migratory Bird Treaty Act. As provided in Agreement Section 7.7, the Federal Permit will be a Special Purpose Permit under the Migratory Bird Treaty Act for the least Bell's vireo, which is a Federal Listed Species. However, unless and until the western burrowing owl or the tricolored blackbird become Federal Listed Species and the Federal Permit becomes a Special Purpose Permit for those species, the Migratory Bird Treaty Act will prohibit killing or possessing them or their young, nests, feathers, or eggs.

The Permits authorize Take of Covered Species only. As further described in Condition 1, Covered Activities must comply with applicable state and federal laws that protect species that are not Covered Species just as they would without the Permits.

#### **8.1.2. Exemptions from Conditions to Avoid and Minimize Impacts**

Certain Covered Activities will not disturb the ground or will have little measurable impact on Covered Species or natural communities. These Covered Activities will receive the same Authorized Take coverage as other Covered Activities. However, as further described in SCVHP Chapter 6.2 and SCVHP Table 6-1, some or all conditions on Covered Activities described SCVHP Chapter 6, including the requirement in SCVHP Chapter 6.8 to submit a Habitat Plan Application, will not apply to these Covered Activities.

### **8.2. SCVHP Fees**

As provided in this Section and further described in SCVHP Chapter 9, the Implementing Entity will use revenues generated from certain fees placed on Covered Activities to fund the implementation of the conservation strategy described in SCVHP Chapter 5. Such actions include, but are not limited to creation of the SCVHP Reserve System, management of Reserve System lands, monitoring of and reporting on SCVHP implementation, adaptive management, responses to Changed Circumstances, and related planning and administrative costs. These actions, together with the avoidance and minimization measures provided for in Agreement Section 8.1, will fulfill all requirements under the ESA and the NCCPA to minimize and mitigate for the impacts of Covered Activities on Covered Species and natural communities.

The SCVHP includes several types of fees, which are referred to collectively in this Agreement as the "SCVHP Fees." The SCVHP Fees, exemptions from the fees, fee credits, and the method of calculating the fees is further described in SCVHP Chapter 9.4.1.

### **8.2.1. Exemptions from SCVHP Fees**

Certain Covered Activities will not disturb the ground or will have little measurable impact on Covered Species or natural communities. As further described in SCVHP Chapter 6.2 and SCVHP Table 6-1, the requirement to pay SCVHP fees does not apply to these Covered Activities, except to the extent that the requirement applies to them expressly in SCVHP Chapter 9.4.1. These Covered Activities will receive the same Authorized Take coverage as other Covered Activities, and Take from these Covered Activities will be tracked and reported in the same way as Authorized Take from other Covered Activities. Covered Activities that are exempt from SCVHP Fees are further described in SCVHP Chapter 9.4.1.

### **8.2.2. Payment and Collection of Fees**

The Permittees will ensure that all applicable SCVHP Fees are paid, and all applicable fee credits are applied, for all Covered Activities, as further described in SCVHP Chapter 9.4.1. The County and the Cities will make payment of all applicable SCVHP Fees a condition of final approval for Private Project Participant Covered Activities; the Implementing Entity will require payment of all applicable SCVHP Fees for Participating Special Entity Covered Activities; and the Permittees will pay all applicable SCVHP Fees for Covered Activities that they implement. The Implementing Entity may require Participating Special Entities to pay an amount in addition to applicable SCVHP Fees to reimburse the Implementing Entity for costs associated with extending take coverage to Participating Species Entities and to help fund SCVHP conservation actions intended to contribute to the recovery of Covered Species.

The Cities and the County will collect fee payments from Private Project Participants and provide the fee revenues to the Implementing Entity at least annually. The Implementing Entity will collect all fee revenues, including fee payments from the Permittees for Covered Activities that they implement. The Implementing Entity will comply with all applicable provisions of the Mitigation Fee Act (Gov. Code §66000, et seq.) as to the deposit, accounting, expenditure and reporting of such fee revenues.

### **8.3. SCVHP Fee Credits**

As further described in SCVHP Chapter 8.6.7 and SCVHP Chapter 9.4.1, the Implementing Entity may approve SCVHP Fee credits for the conveyance of lands that are added to the Reserve System and for the implementation of SCVHP conservation actions. The SCVHP Fee credits may be used for some of the SCVHP Fees that apply to one or more Covered Activities, except that SCVHP Fee credits may not be used for the Wetland Fee. SCVHP Fee credits do not have any value except as credits for SCVHP Fees incurred during the Permit Term. SCVHP Fee credits remaining after the Permit Term will have no value, and no payment or "refund" will be made. Selling or trading of SCVHP Fee credits will not be allowed.

The Implementing Entity will prepare a written determination stating whether any proposed SCVHP Fee credit meets the requirements of the SCVHP and this Agreement, and whether, or to what extent, the credit is approved by the Implementing Entity. The written determination will include the amount of any approved credit. The amount of an approved SCVHP Fee credit may be

deducted from the SCVHP Fees that apply to any Covered Activity implemented by the Permittee, Private Project Proponent, or Participating Special Entity that received the approved credit.

The Implementing Entity may disapprove a proposed SCVHP Fee credit if it determines that approval of the credit would constrain the Implementing Entity's ability to meet Reserve System requirements or otherwise impede the successful implementation of the SCVHP, such as, for example, and without limitation, by creating a shortfall in fee revenues for Reserve System management or monitoring or by impairing the Implementing Entity's ability to meet the requirements of Agreement Section 9.4 or SCVHP Chapter 8.6.1.

#### **8.4. Timing of Fee Payment**

All applicable SCVHP Fees, subject to any SCVHP Fee credits, will be collected before the Covered Activity for which the fees are required is implemented. The County and the Cities will require Private Project Participants to pay all applicable fees before or concurrent with the issuance of a grading permit for each Private Project Proponents' Covered Activity. If a grading permit is not required for the Covered Activity, payment of the fees will be required before the first building or construction permit is issued. The Implementing Entity will require Participating Special Entities to pay all applicable fees before initiating ground-breaking activities for their Covered Activities, and the Permittees will pay all applicable fees before implementing any Covered Activity.

#### **8.5. Adjustment of Fees**

As further described in SCVHP Chapter 9.4.1, there are three ways in which the Implementing Entity will evaluate the amount of SCVHP Fees and adjust them as necessary to account for increases or decreases in the cost of implementing the SCVHP: by annual adjustments, by biennial reviews, and by periodic assessments. The Implementing Entity will adjust the rate of the SCVHP Fees annually, by the date established by the Implementing Entity for this adjustment, according to the indices and procedures described in Table 9-12 of the SCVHP, beginning the calendar year following the Effective Date. The date of the automatic update will be determined by the Implementing Entity's Governing Board within the first six months of Plan implementation. At least once every two (2) years, the Implementing Entity will review fee revenues and compare them to the actual and projected portion of SCVHP implementation costs that must be funded by fee revenues to determine whether the annual adjustments to SCVHP fees are sufficient to keep pace with actual costs and to provide the Implementing Entity an additional opportunity to adjust fees, if needed.

In addition, the Implementing Entity will conduct a periodic assessment concurrent with an annual adjustment of the SCVHP Fees to evaluate whether fee revenues are adequate to cover the appropriate portion of implementation costs, as described in SCVHP Chapter 9. The Implementing Entity will conduct the periodic assessment at least once every five (5) years, where year one (1) is the first full calendar year after the Effective Date.

SCVHP fees may be increased or decreased based on the results of the annual adjustments, biennial review, or periodic assessment. However, SCVHP fees must always be based on the mitigation requirement methodology described in SCVHP Chapter 9.4.1. The Permittees will not be required to

increase SCVHP Fees to address shortfalls in other sources of funding or to decrease the Fees in response to windfalls in other sources of funding.

## **9. CREATION OF RESERVE SYSTEM**

The creation and management of the Santa Clara Valley Habitat Plan Reserve System (the “**Reserve System**”) is an essential element of the SCVHP Conservation Strategy. The Implementing Entity will create the Reserve System on behalf of the Permittees as provided in this Section and further described in SCVHP Chapter 5 and SCVHP Chapter 8. With the exception of existing Santa Clara Valley Open Space Authority lands, described in Agreement Section 9.2, the Reserve System will be created by permanently protecting land containing certain terrestrial and aquatic land cover types and managing and monitoring them in perpetuity. Lands consistent with the conservation strategy that are owned by a Permittee may be added to the Reserve System upon approval by the Implementing Entity and Wildlife Agencies and protection through a conservation easement, as provided in this Section and as further described in SCVHP Chapter 5.2.3 and SCVHP Chapter 8.6.

Reserve System lands will be actively managed for the benefit of Covered Species, and habitat on Reserve System lands will be enhanced or restored where appropriate, to improve habitat for Covered Species and natural communities, as provided in Agreement Section 10 and further described in SCVHP Chapters 5.2.5, 5.3 and 5.4.

The Implementing Entity will create and complete the Reserve System according to prescribed deadlines as provided in Agreement Section 6.4.1 and further described in SCVHP Chapter 5.3.1, Table 5-14, and Chapter 8.12. In addition, lands must be added to the Reserve System at a pace that is roughly proportional to the rate at which Covered Activities are implemented and Authorized Take occurs, as provided in Agreement Section 9.4 and further described in SCVHP Chapter 8.6.1, even if this would require the Reserve System to be created and completed more quickly than needed to meet the deadlines.

### **9.1. Criteria for Reserve System Lands**

As further described in SCVHP Chapter 8.6, the Implementing Entity must obtain USFWS' and CDFG's advance approval for all lands added to the Reserve System, including lands owned by a Permittee, fee title transfers and conservation easement acquisitions; provided, however, that if either Wildlife Agency does not respond to a written request for approval of a proposed addition of lands from the Implementing Entity within thirty (30) days after receiving such a request, the Wildlife Agency will be deemed to have approved the acquisition for purposes of this Agreement, the SCVHP and the Permits.

Only lands that meet all of the following criteria may be counted toward the Reserve System requirements of the SCVHP.

- The lands must contribute to the SCVHP Conservation Strategy.
- The land has no hazardous materials or property encumbrances that conflict with the SCVHP Conservation Strategy.

- The lands must be consistent with SCVHP reserve design and assembly principles, as described in SCVHP Chapter 5.
- The lands must meet all relevant criteria in SCVHP Chapter 5.3.1 for landscape linkages, land cover types, plant populations, modeled species habitat, and species occupancy.
- The biological functions and values on the lands that contribute to the SCVHP Conservation Strategy must be permanently protected, with the exception of existing Santa Clara Valley Open Space Authority Land, described further in Agreement Section 9.2.
- A Reserve Unit Management Plan must be prepared for the lands, as provided in Agreement Section 10 and further described in SCVHP Chapter 5.2.5 and SCVHP Chapter 5.3.
- The lands were not used to fulfill mitigation requirements for a project or activity that is not a Covered Activity.

## **9.2. Permanent Protection of Reserve System Lands**

As provided in Agreement Section 9, Reserve System lands will be permanently protected. For purposes of the Permits, Reserve System lands will be regarded as permanently protected if the biological functions and values on the lands that contribute to the SCVHP Conservation Strategy are protected by a permanent, recorded conservation easement that meets the requirements of this Section and SCVHP Chapter 8.6.3. However, up to one-thousand (1,000) acres of land owned by the Santa Clara Valley Open Space Authority as of the Effective Date, on which the recordation of a conservation easement is precluded by law, may be added to the Reserve System without recordation of a conservation easement, provided the lands otherwise meet the requirements for Reserve System lands, as further described in SCVHP Chapter 5.2.3 and SCVHP Chapter 9.4.2.

### **9.2.1. Conservation Easements**

As further described in SCVHP Chapter 8.6.3, the Implementing Entity will negotiate the specific terms and conditions of conservation easements used to permanently protect Reserve System lands with each landowner on a case-by-case basis, based on site conditions, land uses, and Covered Species and habitat needs. However, all Reserve System conservation easements will comply with California Civil Code section 815 et seq., Government Code section 65965 et seq., and other applicable laws; will achieve certain objectives and prohibit certain uses, as further described in SCVHP Chapter 8.6.3; and will identify the Wildlife Agencies as third party beneficiaries for purposes of enforcing the terms of the easement. Reserve System conservation easements will be held by the Implementing Entity in most cases. If the Implementing Entity owns fee title to the land covered by the conservation easement, the conservation easement will be held by another conservation organization approved by the Wildlife Agencies. In addition, the Implementing Entity may, on a case-by-case basis, allow other conservation organizations approved by the Wildlife Agencies to hold Reserve System conservation easements, provided such conservation organizations enter into a binding agreement with the Implementing Entity in which they assume the obligation to enforce the terms of the conservation easement in accordance with the SCVHP, this Agreement, and the Permits and comply with all applicable legal requirements including, but not limited to, Government Code section 65965 et seq.

For purposes of lands added to the Reserve System, the Implementing Entity will use a conservation easement template agreed to by the Parties (Appendix H of the SCVHP). Reasonable variations from the template may be needed to address site-specific constraints. CDFG and USFWS, along with the Implementing Entity, must review and approve any modifications to the template easement prior to its execution.

### **9.3. Requirement for a Reserve Unit Management Plan**

As provided in Agreement Section 9 and Agreement Section 10, all Reserve System lands will be managed in perpetuity according to the applicable Reserve Unit Management Plan. Lands may be counted toward the Reserve System requirements of the SCVHP before a Reserve Unit Management Plan is prepared only if the lands are permanently protected and the fee owner of the lands is subject to an enforceable legal obligation to manage the lands, or to allow the lands to be managed, according to a Reserve Unit Management Plan.

### **9.4. Stay-Ahead or Rough Proportionality Requirement**

The Implementing Entity will ensure that lands are added to the Reserve System, and that required habitat restoration and creation occurs, at or faster than the pace at which Covered Activities impact habitat, which will fulfill the NCCPA's requirement to ensure that implementation of mitigation and conservation measures on a plan basis is roughly proportional in time and extent to the impact on habitat or covered species. (Cal. Fish & G. Code section 2820(b)(3)(D)(9).) This requirement is also referred to in the SCVHP as the "stay-ahead" requirement and will assist the USFWS in making a finding that the SCVHP will meet the requirement of Section 10(a)(2)(B)(ii) of the ESA. In order to make findings that the proposed impacts are mitigated to the maximum extent practicable, USFWS will consider temporal losses resulting from the time of impact relative to the time of mitigation. As further described in SCVHP Chapter 8.6.1, SCVHP Table 5-12 and SCVHP Table 5-14, the amount of each land cover type restored, created, and added to the Reserve System as a proportion of the total requirement for each land cover type will be equal to or greater than the impact on that land cover type as a proportion of the total impact expected by all Covered Activities. For example, at or before the time twenty-five percent (25%) of the expected impacts on mixed serpentine chaparral have occurred, the Implementing Entity will add twenty-five percent (25%) of the required acreage of mixed serpentine chaparral to the Reserve System. The Implementing Entity will in good faith attempt to maintain strict proportionality between creation of the Reserve System and the impacts of Covered Activities, but the Implementing Entity will fulfill the requirements of this Section and SCVHP Chapter 8.6.1 so long as it ensures that the pace at which the Reserve System is created, and at which required habitat restoration and creation occurs on Reserve System lands, does not fall behind the pace at which Covered Activities impact habitat by more than ten percent (10%) for each land cover type. As further described in SCVHP Chapter 8.6.1, SCVHP Chapter 5.4 and SCVHP Table 5-16, the Stay-Ahead provision also includes a requirement for acquisition of covered plant occurrences to stay ahead of impacts, with the exception of the Coyote ceanothus as described in SCVHP Chapter 5.4.11. SCVHP Chapter 8.6.1 also describes a Stay-Ahead provision specific to the Burrowing Owl Conservation Strategy. The Implementing Entity will measure and report on rough proportionality as described in Chapter 8.6.1.



#### **9.4.1. Reserve System Lands Acquired Using State or Federal Funding**

As provided in Agreement Section 13 and further described in SCVHP Chapter 9, the SCVHP funding strategy for completion of the Reserve System identifies and assumes contributions of state and federal funding. Lands added to the Reserve System using funds from state or federal agencies will be counted toward the Reserve System requirements of the SCVHP and the stay-ahead/rough proportionality requirement, but will not be credited toward SCVHP mitigation requirements.

#### **9.4.2. Failure to Stay Ahead or to Maintain Rough Proportionality**

If the Wildlife Agencies determine that the requirements of this Section or SCVHP Chapter 8.6.1 have not been fulfilled, they will so notify the Implementing Entity in writing, and the Implementing Entity and Wildlife Agencies will meet to develop a mutually agreeable plan of action that will fulfill such requirements, as further described in SCVHP Chapter 8.6.1. If the Wildlife Agencies determine specifically that the requirements of this Section and SCVHP Chapter 8.6.1 regarding the addition of land to the Reserve System have not been fulfilled, they may, by written notice to the Implementing Entity, require it to initiate the requirement to dedicate land in-lieu of SCVHP Fees set forth in Agreement Section 9.4.1. The Parties acknowledge that failure to fulfill the requirements of SCVHP Chapter 8.6.1 would constitute a violation of the Federal and State Permits and that the Wildlife Agencies will take appropriate responsive actions to address any such violation in accordance with the ESA and the NCCPA, which could include suspension or revocation of the Permits, in whole or in part.

##### **9.4.2.1. NCCPA Procedure for Addressing Failure to Maintain Rough Proportionality**

In addition to the response described in Agreement Section 9.4.2, SCVHP Chapter 8.6.1 and SCVHP Chapter 9.4.4, the NCCPA requires a specific procedure for responding to a failure to maintain rough proportionality. This Section fulfills that requirement. If CDFG determines that the requirements of this Section or SCVHP Chapter 8.6.1 have not been fulfilled, with or without the concurrence of USFWS, the Implementing Entity will either regain rough proportionality within forty-five (45) days or will enter into an agreement with CDFG within forty-five (45) days, which will set a course of action to expeditiously regain rough proportionality. The agreement may include any of a variety of commitments or adjustments to the SCVHP designed to regain rough proportionality, including but not limited to, a plan to acquire, restore, or enhance lands of the appropriate land cover or plant population type expeditiously. However, if USFWS concurs with CDFG's determination, and the Implementing Entity and the Wildlife Agencies meet to develop a plan of action, as described above, the agreement will be based on that plan of action. The Implementing Entity will provide written notice of the agreement to the other Permittees. Each Permittee will implement all actions set forth in the agreement that apply to the Permittee.

If the Implementing Entity does not regain rough proportionality within forty-five (45) days and does not enter into an agreement with CDFG within forty-five (45) days setting a course of action to regain rough proportionality, CDFG will suspend or revoke the State Permit, in whole or in part, pursuant to California Fish and Game Code section 2820, subdivision (c). The Parties agree that partial suspension or revocation may include removal of one or more Covered Species for purposes

of the State Permit or reducing the geographic scope of Authorized Take under the State Permit. Before suspending or revoking the State Permit *in whole* due to a failure to maintain rough proportionality, CDFG will meet with the Permittees to determine whether mutually agreeable modifications to the SCVHP would obviate a suspension or revocation *in whole*. The Parties agree that if CDFG suspends or revokes the State Permit, the Permittees may, based on the SCVHP, apply for one or more CESA incidental take permits under section 2081, subdivision (b), of the California Fish and Game Code to replace the State Permit.

If the NCCPA procedure for addressing a failure to maintain rough proportionality in California Fish and Game Code section 2820 is amended, the new procedure shall supersede the procedure in this Section 9.4.2.1 to the extent they are inconsistent.

The Implementing Entity will follow the same procedure with USFWS as described in this section 9.4.2.1 for responding to a failure to maintain rough proportionality for purposes of the ESA.

#### **9.4.3. Conveyance of Land in Lieu of SCVHP Fees to Maintain Rough Proportionality**

If the Implementing Entity determines at any time that the pace at which lands are added to the Reserve System is likely to fail to meet the requirements of this Agreement Section 9.4, the Implementing Entity may, after consultation with the other Permittees, require that some or all Permittees provide, and require Third Party Participants to provide, land in lieu of fees, as provided in Agreement Section 8.3 and further described in SCVHP Chapters 8.6.1 and 8.6.7. The Implementing Entity will provide written notice thereof to the other Permittees. The Implementing Entity's notice will recommend a scope of the land in lieu of fee requirement, for example, applying the land in lieu of fee requirement to Covered Activities that will impact ten (10) acres or more. All Permittees will thereafter apply the recommended land in lieu of fee requirement to Covered Activities that they implement; the Implementing Entity will apply the requirement to Participating Special Entities; and the County and Cities will consider applying the requirement to Private Project Participants. However, SCVHP Fee credits derived from the implementation of conservation actions specifically approved for SCVHP Fee credit in SCVHP Chapter 9.4.1 may be used regardless of a land in lieu of fee requirement from the Implementing Entity. The County and Cities acknowledge that failure to apply the land in lieu of fee requirement to Private Project Participants when needed to meet the requirements of this Agreement Section 9.4 may result in suspension or revocation of the Permits.

The Implementing Entity may terminate the land in lieu of fee requirement only after it determines that the pace at which lands added to the Reserve System without the requirement will likely meet the requirements of this Agreement Section 9.4. Upon making such a determination, the Implementing Entity will so notify the other Permittees in writing, and the Permittees may thereafter terminate the requirement with regard to their own Covered Activities and to Third Party Participants. However, if the Implementing Entity initiated the requirement because it was required to do so by the Wildlife Agencies as provided in Agreement Section 9.4.2, it may terminate the land in lieu of fee requirement only with the approval of the Wildlife Agencies, which approval will not be withheld unreasonably.

### **9.5. Additional Criteria for Lands Conveyed in Lieu of SCVHP Fees**

As provided in Agreement Section 8.3 and Agreement Section 9.4.1, under certain circumstances lands may be conveyed to the Reserve System in lieu of payment of some SCVHP Fees that apply to one or more Covered Activities. As further described in SCVHP Chapter 8.6.7, such lands may be added to the Reserve System and counted toward the Reserve System requirements of the SCVHP, if the lands:

- meet the criteria for Reserve System Lands in Agreement Section 9.1;
- are approved for inclusion in the Reserve System by the Implementing Entity and the Wildlife Agencies in accordance with Agreement Section 9.1; and
- are within an area designated as high or moderate priority for acquisition, as further described in SCVHP Chapter 5 and SCVHP Figure 5-8, or have unique or exceptional habitat values that meet the criteria for such high or moderate priority areas.

### **9.6. Lands Conveyed by Entities other than Permittees**

Lands acquired or owned by any Permittee that meet the requirements of Agreement Section 9.1 may be added to the Reserve System and counted toward the Reserve System requirements of the SCVHP, as further described in SCVHP Chapter 8.6.2.

#### **9.6.1. Lands in Private Mitigation Banks**

Lands in private mitigation banks within the Permit Area can be counted toward the Reserve System requirements of the SCVHP as described in SCVHP Chapter 8.6.2. With the Implementing Entity's prior approval, a Permittee or Third Party Participant may purchase credits at a private mitigation bank to fulfill the requirements of the SCVHP only if the bank occurs within the Permit Area and meets all relevant requirements pertaining to the Reserve System, habitat enhancement, adaptive management, and monitoring described in SCVHP Chapter 5 and SCVHP Chapter 7.

### **9.7. Gifts of Land**

The Implementing Entity may accept lands in fee title, or conservation easements on lands, as a gift or charitable donation. Such lands may be added to the Reserve System only if they meet the criteria in Agreement Section 9.1 and the nature of the real property interest is consistent with the requirements of Agreement Section 9.2. The Implementing Entity may sell or exchange lands it receives as a gift or donation that do not meet the criteria in Agreement Section 9.1 or the requirements of Agreement Section 9.2.

## **10. MANAGEMENT OF RESERVE SYSTEM LANDS**

The Implementing Entity, on behalf of the Permittees, will ensure that Reserve System lands are managed as provided in this Section and further described in SCVHP Chapters 5.2.5, 5.3, and 5.4. The Implementing Entity may delegate management responsibility to other Parties or qualified third parties, including but not limited to public agencies, private conservation organizations, university scientists, and contractors. However, the Implementing Entity or any successor will be responsible for ensuring the management of Reserve System lands in perpetuity.

### **10.1. Reserve Unit Management Plans**

The Implementing Entity will ensure that all Reserve System lands are managed according to appropriate Reserve Unit Management Plans. As further described in SCVHP Chapter 5.2.5, Reserve Unit Management Plans will be prepared for each reserve unit within the Reserve System to identify, on the basis of site-specific conditions, the management and maintenance actions necessary to ensure that SCHVP objectives regarding ecosystem characteristics and functions are maintained and enhanced, and to achieve other objectives, as further described in SCVHP Chapter 5.2.5.

#### **10.1.1. Role of the Wildlife Agencies in Preparation of Reserve Unit Management Plans**

All Reserve Unit Management Plans must be approved by the Wildlife Agencies. The Wildlife Agencies will review each draft Reserve Unit Management Plan and provide comments to the Implementing Entity within sixty (60) days after receiving the draft plan. The Implementing Entity will revise the draft plan based on the Wildlife Agencies' comments, if any, and will provide a revised draft to the Wildlife Agencies, which will have an additional sixty (60) day review period. If an initial draft Reserve Unit Management Plan or any subsequent revised draft Reserve Unit Management Plan adequately addresses a Wildlife Agency's comments, the Wildlife Agency will so notify the Implementing Entity within sixty (60) days, and the Reserve Unit Management Plan will thereafter be deemed to be approved by that Wildlife Agency for purposes of the Permits. In addition, if a Wildlife Agency does not provide comments within sixty (60) days after receiving the revised draft Reserve Unit Management Plan, the Wildlife Agency will thereafter be deemed to have approved the revised draft plan for purposes of this Agreement, the SCVHP and the Permits. The Implementing Entity will incorporate comments submitted by the Wildlife Agency in the revised draft Reserve Unit Management Plan to the extent that the Implementing Entity determines the comments can be incorporated. In the event that the Implementing Entity determines that some or all of the Wildlife Agency comments cannot be incorporated, it will notify the Wildlife Agencies of its determination and the basis for such. The Implementing Agency will then work with the Wildlife Agencies to determine if other measures can be developed that adequately address the Wildlife Agencies' concerns.

The same Wildlife Agency review procedure will apply to all major revisions to Reserve Unit Management Plans.

#### **10.1.2. Preparation and Revision of Reserve Unit Management Plans**

As further described in SCVHP Chapter 5.2.5 and SCVHP Chapter 5.3, the Implementing Entity will prepare a Reserve Unit Management Plan for each reserve unit within the Reserve System as soon as reasonably possible. The Implementing Entity will prepare a draft Reserve Unit Management Plan for Wildlife Agency review not later than five (5) years after the first parcel has been acquired within the reserve unit. Until the Reserve Unit Management Plan has been approved by the Wildlife Agencies, the Implementing Entity will manage the reserve unit based on the best available information and management methods derived from other Reserve Unit Management Plans or from other land management in the Permit Area.

Following the initial approval of a Reserve Unit Management Plan, the Implementing Entity will periodically update each Reserve Unit Management Plan as new lands are added to the reserve unit to include new management and monitoring methods, if any, needed for the new lands. The Implementing Entity will also review and, if necessary, revise all Reserve Unit Management Plans every five (5) years based on information provided through the SCVHP monitoring and adaptive management program described in SCVHP Chapter 7 and relevant outside research.

#### **10.2. Reserve Unit Management Plan Components**

The Implementing Entity will ensure that each Reserve Unit Management Plan includes the components identified in SCVHP Chapter 5.2.5 and SCVHP Chapter 5.3.2.

#### **10.3. Recreational Uses**

Recreational and educational uses will be allowed on Reserve System lands where the Implementing Entity determines that such uses would be compatible with the preservation and enhancement of Covered Species and natural communities. The Implementing Entity will ensure that a recreational uses strategy is included in all Reserve Unit Management Plans for reserve units on which educational or recreational uses will be allowed, as further described in SCVHP Chapter 6.4.6. The Implementing Entity will not allow recreational uses within any reserve unit of the Reserve System until the Wildlife Agencies have approved a Reserve Unit Management Plan that includes a recreational uses strategy for the unit in accordance with Agreement Section 10.1.1; provided, however, that existing recreational uses on lands incorporated into the Reserve System from existing open space (e.g., County Parks) will continue until the Reserve Unit Management Plan and associated recreational use strategy is completed.

#### **10.4. Monitoring Program**

All Reserve System lands will be monitored as further described in SCVHP Chapter 7. As further described in SCVHP Chapter 5.2.5 and SCVHP Chapter 7, the Implementing Entity will prepare and implement a comprehensive monitoring program for the Reserve System within five (5) years after the Effective Date.

#### **10.5. Technical Advisory Committee**

As further described in SCVHP Chapter 8.2.4, the Implementing Entity will create a technical advisory committee composed of but not limited to representatives of each land management agency that manages lands that are part of the Reserve System, including each Permittee that manages such lands, and the Wildlife Agencies, with the USFWS participating in an *ex officio* capacity. The purpose of the technical advisory committee will be to share information regarding land management generally and to coordinate the management of Reserve System lands.

### **11. MONITORING, ADAPTIVE MANAGEMENT AND CHANGED CIRCUMSTANCES**

The Implementing Entity, on behalf of the Permittees, will implement the SCVHP monitoring and adaptive management program as provided in this Section and further described in SCVHP Chapter 7. The Implementing Entity may delegate monitoring responsibilities to other Parties or qualified

third parties, including but not limited to public agencies, private conservation organizations, university scientists, and contractors.

The overarching purpose of the SCVHP monitoring and adaptive management program is to inform and refine SCVHP implementation so that it may achieve the goals and objectives of the SCVHP Conservation Strategy. The Implementing Entity will administer the adaptive management process by using information gathered from the monitoring program to inform and refine the design and management of the Reserve System. The Implementing Entity will also incorporate the recommendations of science advisors and other experts in the design and management of the Reserve System, as appropriate, and will consider the cost of implementing the monitoring and adaptive management program in its budget analysis and funding decisions.

The scope of the SCVHP monitoring and adaptive management program is limited by the regulatory assurances provided by the Wildlife Agencies, as provided in Agreement Section 12.

#### **11.1. Monitoring**

The Implementing Entity will conduct three main types of monitoring, as further described in SCVHP Chapter 7.2.1: compliance monitoring, effectiveness monitoring, and targeted studies. The Implementing Entity will provide the results of all SCVHP monitoring annually in its Annual Report. Compliance monitoring, also known as implementation monitoring, will track the status of SCVHP implementation and verify that the Implementing Entity is meeting the terms and conditions of the Permits. Effectiveness monitoring assesses the biological success of the Plan—specifically, it evaluates the implementation and success of the conservation strategy described in SCVHP Chapter 5. Targeted studies will identify the best methodologies for monitoring, provide information about the efficacy of Reserve System management techniques, and resolve critical uncertainties in order to improve Reserve System management.

#### **11.2. Adaptive Management**

The Implementing Entity will implement the SCVHP adaptive management program, as further described in SCVHP Chapters 7.1.2, 8.3.8, and 9.3.5. The purpose of adaptive management will be to adapt the design and management of the Reserve System in order to maximize the likelihood of the successful implementation of the SCVHP Conservation Strategy. The Implementing Entity will have ultimate responsibility for implementing the adaptive management program and will ultimately decide what adaptations will be made in the management of Reserve System lands. However, the Implementing Entity will consider the advice of the Wildlife Agencies, science advisors, the Independent Conservation Assessment Team, other land management agencies, and the public, as provided in this Section and as further described in SCVHP Chapter 7.2.3. In addition, any major changes in the adaptive management program will require the approval of the Wildlife Agencies prior to implementation, including, but not limited to, any proposed actions that would be inconsistent with the SCVHP or detrimental to a Covered Species, introducing new and untested management techniques, discontinuing and replacing ineffective management techniques that are recommended in the Conservation Strategy, or applying management techniques on a much larger or smaller scale than envisioned in the SCVHP.

#### **11.2.1. Role of the Wildlife Agencies**

The Wildlife Agencies will provide biological expertise and policy-level recommendations to the Implementing Entity regarding potential changes to the design and management of the Reserve System based on the results of monitoring and the advice of science advisors and the Independent Conservation Assessment Team, as further described in SCVHP Chapter 7.2.3. The Implementing Entity will confer with the Wildlife Agencies before initiating substantial adaptations to the design or management of the Reserve System. The Implementing Entity and Wildlife Agencies will attempt in good faith to reach agreement regarding any such adaptations or alternative adaptations that the Wildlife Agencies may propose. If they cannot reach agreement, any of them may initiate the dispute resolution procedure provided in Agreement Section 6.6.

#### **11.2.2. Role of Science Advisors**

The Implementing Entity will consult with science advisors regarding SCVHP implementation when needed to obtain expert scientific advice and recommendation regarding key scientific aspects of SCVHP implementation, such as the design, management and monitoring of the Reserve System, as further described in SCVHP Chapter 7.2.3. Science advisors will be selected by the Implementing Entity, with input from the Wildlife Agencies. For purposes of this Agreement, “science advisors” means scientists or resource managers with expertise in one or more of the following areas:

- The biology of Covered Species;
- Landscape ecology;
- Natural communities in the Reserve System;
- Ecological processes;
- Resource management;
- Biological monitoring; or
- Statistical analysis and experimental design.

#### **11.2.3. Role of the Independent Conservation Assessment Team**

The Implementing Entity will select and convene an “**Independent Conservation Assessment Team**” at least once every five (5) years to evaluate SCVHP implementation and recommend ways to improve progress toward achieving the SCVHP Conservation Strategy’s goals and objectives, as further described in SCVHP Chapter 7.2.3. The Independent Conservation Assessment Team will be composed of independent scientists and resources managers who are recognized experts in their fields. The Implementing Entity will consult with the Wildlife Agencies regarding the selection of members of the Independent Conservation Assessment Team. The Implementing Entity, in consultation with the Wildlife Agencies, will determine the scope and focus of the Independent Conservation Assessment Team’s review based on the most relevant issues and circumstances at the time of each review. However, each review will in any case include a program-level evaluation of recommendations for the following:

- The design of the Reserve System and the success of habitat restoration efforts;
- The appropriateness of monitoring and methods for purposes of achieving the SCVHP Conservation Strategy goals and objectives;

- The appropriateness of the interpretation of monitoring results as reflected in the five (5) most recent Annual Reports; and
- Adaptations that may be needed in the management of Reserve System lands.

#### **11.2.4. Advice from Other Land Management Agencies**

The Implementing Entity will from time to time consult with land management agencies in the Permit Area to share information regarding land management generally and to coordinate management of lands adjacent to Reserve System lands with the management of Reserve System lands. Organizations consulted for advice could include, but will not be limited to, private non-profit conservation organizations that are active in or near the Permit Area.

#### **11.2.5. Advice from the Public**

The Implementing Entity will provide members of the public with opportunities to learn about the status of SCVHP implementation and to provide advice regarding the adaptive management program, as further described in SCVHP Chapter 7 and SCVHP Chapter 8.2.7.

#### **11.2.6. No Increase in Take**

Section 11.2 of this Agreement does not authorize any adaptations to the design or management of the Reserve System that would result in an increase in the amount and nature of Authorized Take, or increase the impacts of Authorized Take, of Covered Species beyond that analyzed in the SCVHP and any Amendments thereto. Any such modification must be reviewed as a Permit Amendment under Agreement Section 15.

### **11.3. Changed Circumstances**

The Implementing Entity will implement responses to Changed Circumstances as provided in this Section and further described in SCVHP Chapter 10.2.1. Changed Circumstances identified and planned for in the SCVHP are contained in SCVHP Chapter 10.2.1. In the event a Changed Circumstance identified in SCVHP Chapter 10.2.1 occurs, the Implementing Entity will implement the remedial measures or actions prescribed in SCVHP Chapter 10.2.1 for that Changed Circumstance. Neither the Implementing Entity nor any other Permittee or Third Party Participant will be required to take any additional action to respond to a Changed Circumstance (i.e., any action not otherwise required by the Permits), except as described in SCVHP Chapter 10.2.1.

Changed Circumstances are provided for in the SCVHP and therefore are not Unforeseen Circumstances. The Permittees' responses to Changed Circumstances, as well as the funding to assure that the responses are implemented, are described in the SCVHP. Therefore, Changed Circumstances do not require an Amendment of the SCVHP or the Permits. The Parties agree that SCVHP Chapter 10.2.1 identifies all Changed Circumstances and describes appropriate and adequate responses for them. Other changes not identified as Changed Circumstances will be treated as Unforeseen Circumstances, as provided in Agreement Section 12.

#### **11.3.1. Initiating Responses to Changed Circumstances**

The Implementing Entity will notify the Wildlife Agencies within seven (7) days after learning that any of the Changed Circumstances listed in SCVHP Chapter 10.2.1 has occurred. The Implementing



Entity will respond to Changed Circumstances as described in SCVHP Chapter 10.2.1.

If a Wildlife Agency determines that a Changed Circumstance has occurred and that the Implementing Entity has not responded as described in SCVHP Chapter 10.2.1, the Wildlife Agency will so notify the Implementing Entity, specifically identifying the Changed Circumstance. After receiving the Wildlife Agency's notice, the Implementing Entity will initiate responsive actions in the manner described in SCVHP Chapter 10.2.1.

After it has initiated remedial measures to a Changed Circumstance as described in SCVHP Chapter 10.2.1, the Implementing Entity will promptly inform the Wildlife Agencies of its actions. The Implementing Entity will continue implementation of any such remedial measures to completion and will describe in its Annual Report for that year the Changed Circumstance and the remedial measures implemented. Subsequent Annual Reports will track the response of the Reserve System and the Covered Species to evaluate whether remedial measures implemented as a result of Changed Circumstances have been effective.

## **12. REGULATORY ASSURANCES**

The Wildlife Agencies acknowledge that the Permittees have agreed to take on the substantial responsibility of developing and implementing the SCVHP in large part to obtain regulatory assurances, as provided in the ESA and the NCCPA and further described in this Section and SCVHP Chapter 10.2.

### **12.1. ESA Regulatory Assurances**

Provided that the Permittees have complied with their obligations under this Agreement, the SCVHP and the Federal Permit, USFWS can require a Permittee or Third Party Participant to provide additional mitigation beyond that provided for in the SCVHP only with its consent and only under Unforeseen Circumstances, in accordance with the "No Surprises" regulations at 50 Code of Federal Regulations section 17.22(b)(5) and section 17.32(b)(5).

### **12.2. NCCPA Regulatory Assurances**

As long as the Permittees are properly implementing this Agreement, the SCVHP, and the State Permit, CDFG will not seek to impose on the Permittees or Third Party Participants, for purposes of compliance with the NCCPA or CESA, any avoidance, minimization, mitigation, or conservation measures or requirements regarding the impacts of Covered Activities on Covered Species within the Permit Area beyond those required by this Agreement, the SCVHP, and the State Permit. If there are Unforeseen Circumstances, additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources will not be required without the consent of Permittees for the term of this Agreement, unless CDFG determines that the SCVHP is not being implemented consistent with the substantive terms of this Agreement, the SCVHP, and the State Permit.

The provisions of this Agreement and the SCVHP that address Changed Circumstances are not Unforeseen Circumstances and therefore are not subject to these assurances. However, CDFG acknowledges that the Changed Circumstances provisions of the SCVHP are not intended to require

modifications to the SCVHP that would impose significant additional burdens on Permittees or Third Party Participants.

#### **12.3. Interim Obligations upon a Finding of Unforeseen Circumstances**

If a Wildlife Agency finds that an Unforeseen Circumstance has occurred with regard to a Covered Species and that additional mitigation measures are required for the Covered Species as a result, during the period necessary to determine the nature and location of the additional or modified mitigation, the Permittees will avoid causing an appreciable reduction in the likelihood of the survival and recovery of the affected species. The Permittees will not be responsible for implementing any additional mitigation measures or modifications, unless the Permittees consent to do so.

#### **12.4. Section 7 Consultations regarding Covered Activities**

Nothing in this Agreement is intended to alter the obligation of a federal agency to consult with USFWS pursuant to Section 7 of the ESA (16 U.S.C. §1536(a)); the Parties understand that the assurances described in Agreement Section 12.1 cannot be provided to federal agencies. Unless otherwise required by law or regulation, in any consultation under Section 7 of the ESA involving the Permittees or an existing or prospective Third Party Participant and a proposed public or private project in the Permit Area that may adversely affect one or more Covered Species that are Federal Listed Species, USFWS will ensure that the biological opinion for the proposed project is consistent with the biological opinion issued for the SCVHP and the Federal Permit, provided that the proposed project and associated effects are consistent with the Covered Activities and effects analyzed in the SCVHP and the Federal Permit. Unless otherwise required by law or regulation, USFWS will not impose measures on a Permittee or an existing or prospective Third Party Participant in excess of those that have been or will be required by the Permits.

#### **12.5. Assurances for Third Party Participants**

Pursuant to the "No Surprises" regulations described in Agreement Section 12.1, in the event of a finding of Unforeseen Circumstances, USFWS cannot require the commitment of additional land, water or financial compensation without the consent of the affected Permittee or Third Party Participant, provided that the Permittees have complied with their obligations under the Federal Permit. Likewise, as provided in Agreement Section 12.2, as long as the Permittees are properly implementing this Agreement, the SCVHP, and the State Permit, CDFG will not seek to impose on any Permittee or Third Party Participant, for purposes of compliance with the NCCPA or CESA, any avoidance, minimization, mitigation, or conservation measures or requirements regarding the impacts of Covered Activities on Covered Species within the Permit Area beyond those required by this Agreement, the SCVHP, and the State Permit. If there are Unforeseen Circumstances, additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources will not be required of a Third Party Participant without its consent for the term of this Agreement, unless CDFG determines that the SCVHP is not being implemented consistent with the substantive terms of this Agreement, the SCVHP, and the State Permit.

Nothing in this Agreement will preclude the Permittees from imposing on Third Party Participants any mitigation, compensation, or other requirements in excess of those required by the Permits for impacts other than impacts of Covered Activities on Covered Species. Such other impacts may include, but are not limited to, impacts on parks, recreational facilities, and agriculture.

### **13. FUNDING**

The Implementing Entity, County, Cities, Water District and VTA will ensure that all required mitigation, conservation, monitoring, and reporting measures are adequately funded throughout the term of this Agreement, and that certain monitoring, reporting and adaptive management measures are adequately funded in perpetuity. The Permittees do not intend to use, nor are they required to use, funds from their respective general funds to implement the SCVHP; rather they intend to obtain sufficient funds through a comprehensive strategy further described in SCVHP Chapter 9 that includes: fees and dedications from Covered Activities; federal and state grants; grants from nonprofits and foundations; and ongoing conservation efforts by local and state agencies that have a demonstrated record of acquiring and managing lands for conservation purposes in the Permit Area. The Permittees may use or establish other local funding measures, including, but not limited to, utility surcharges, special taxes or assessments, or bonds, to the extent allowed by law. The Permittees are responsible to seek all feasible increases in revenues that are necessary to keep pace with rising costs, as described in SCVHP Chapter 9. Each Permittee will promptly notify the Wildlife Agencies of any material change in the Permittee's financial ability to fulfill its obligations under this Agreement. In addition, the Implementing Entity will include in its Annual Report reasonably available financial information to demonstrate the Permittees' collective ability to fulfill their obligations under this Agreement in light of a material change in a Permittee's finances, if any.

As further provided in Agreement Section 18.8, this Agreement does not require the obligation, appropriation, or expenditure of any money without express authorization by, as applicable, the County Board of Supervisors, appropriate City Councils and/or governing boards of the Implementing Entity, Water District, and VTA.

#### **13.1. Funding for Management and Monitoring in Perpetuity**

As further described in SCVHP Chapter 9.4.4, the Permittees will manage the Reserve System in perpetuity in accordance with the requirements of the SCVHP, including applicable SCVHP adaptive management requirements and monitoring requirements. The Permittees anticipate that Reserve System management obligations will be fully funded by interest on the endowment created by the Endowment Fee, a component of the SCVHP Fees.

The Permittees' obligations with regard to SCVHP requirements other than Reserve System management requirements will terminate upon the termination of the Permits.

#### **13.2. Effect of Inadequate Funding**

In the event there is inadequate funding to implement the SCVHP, the Wildlife Agencies will assess the impact of the funding deficiency on the scope and validity of the Permits. Unless the Permittees

exercise the authority to withdraw, as provided in Agreement Section 17, or the Wildlife Agencies revoke the Permits, in whole or in part, as provided in Agreement Section 16, the Parties agree that they will meet and confer to develop a strategy to address the funding shortfall and to undertake all practicable efforts to maintain both the level of conservation provided under the SCVHP and the level of Authorized Take coverage afforded by the Permits until the funding deficiency can be remedied. The strategy to address a funding shortfall may include, but is not necessarily limited to, the actions described in SCVHP Chapter 9.4.4. However, the Permittees do not intend to, nor are they required to use, funds from their respective general funds to implement the SCVHP in the event of funding shortfalls, either in the short term or the long term.

If overall SCVHP fee revenues for the term of the Permits fall short of SCVHP projections because fewer Covered Activities are proposed or implemented, the resulting shortfall in SCVHP funding could prevent or constrain the Permittees' ability to implement the SCVHP fully. If it appears that the allowed Authorized Take will not be used during the term of the Permits, substantially reducing SCVHP fee revenues, the Parties anticipate that the Permittees will apply for an extension of the Permits in accordance with Agreement Section 17.4 to allow the full use of Authorized Take and full implementation of the SVHP, or will apply for a Permit modification or amendment in accordance with Agreement Section 15.5.

### **13.3. State and Federal Funding**

As further described in SCVHP Chapter 9.4.3, through the SCVHP and this Agreement, USFWS and CDFG will use their best efforts to contribute 14,900 acres of land, which will be administered, managed, and monitored by the Implementing Entity, to the Reserve System. The funds provided to acquire the 14,900 acres of land could come from a variety of sources, including funds administered directly by USFWS and CDFG, as well as funds administered by the Wildlife Conservation Board, the California Coastal Conservancy, California Department of Parks and Recreation, and other state and federal sources. If, after the exercise of all available authority and use of all available resources, state and federal funds are unable to contribute 14,900 acres to the Reserve System, the Implementing Entity, the Permittees, CDFG and USFWS will reevaluate the SCVHP and work together to develop or identify an alternative funding mechanism.

The Implementing Entity will track state and federal funds progress toward the goal of contributing 14,900 acres, measured by the number of acres added to the SCVHP Reserve System, and will include a summary of the progress in each report it prepares under Agreement Section 14.1. State and federal funds will be counted only toward that portion of the Reserve System that contributes to the recovery of Covered Species. If, for any acquisition of lands that are added to the Reserve System, state or federal funding is used to pay a portion of the overall acquisition costs, the number of acres counted toward this goal will be the portion of the total acres acquired that reflects the proportion of total acquisition costs paid with state or federal funds.

If a state or federal agency manages, or funds the management of, lands acquired with state or federal funds, the number of acres from state and federal funds contributing to the Reserve System will be reduced from 14,900 acres in recognition of the contribution of management funding, as

further described in SCVHP Chapter 9.4.3. The amount of the reduction will be accounted for by mutual agreement among USFWS, CDFG and the Implementing Entity.

## **14. REPORTING AND INFORMATION MANAGEMENT**

The Implementing Entity, on behalf of the Permittees, will report on and manage information regarding SCVHP implementation as provided in this Section and further described in SCVHP Chapters 7 and 8.11. The Implementing Entity may delegate reporting and information management tasks in this Section and the SCVHP to other Parties or qualified third parties, including universities, scientists and other contractors. However, the Implementing Entity will remain solely responsible for ensuring implementation of such tasks, on behalf of the Permittees.

### **14.1. Annual Report**

The Implementing Entity will prepare an annual report on implementation of the SCVHP (the “**Annual Report**”), as further described in SCVHP Chapter 8.11. The Annual Report will summarize actions taken to implement the SCVHP during the previous calendar year and will be submitted to the Wildlife Agencies by March 15 of the following calendar year, beginning the calendar year after the first full calendar year of implementation. The Annual Report will: provide information necessary to demonstrate that the SCVHP is being implemented in accordance with the Permits; include or describe the applications and approvals for take authorization, including take authorizations for Covered Activities that are exempt from SCVHP Fees or Conditions; identify any significant problems encountered during implementation, including any Changed Circumstances or Unforeseen Circumstances, and any remedial measures taken; identify issues that require consultation with the Wildlife Agencies; and identify proposed Minor Modifications or Amendments that would support successful implementation of the SCVHP. The Implementing Entity will provide a copy of the Annual Report to all Parties. The Implementing Entity will also create and maintain an Internet website for the public distribution of information regarding SCVHP implementation and will post each Annual Report on the website.

### **14.2. Monitoring Results**

As provided in Agreement Section 11.1, the Implementing Entity will provide the results of compliance monitoring, effectiveness monitoring and targeted studies annually in the Annual Report. The Parties will use the results of the Implementing Entity’s monitoring to ensure that the SCVHP is being properly implemented and to measure the Implementing Entity’s progress toward the successful implementation of the SCVHP Conservation Strategy (SCVHP Chapter 5), as further described in SCVHP Chapters 7 and 8.10.2.

### **14.3. Information Management**

Within one (1) year after the adoption of the last implementing ordinance as provided in Agreement Section 7.4.1.3, the Implementing Entity will develop and maintain a comprehensive data repository for compliance tracking information and other relevant information regarding SCVHP implementation, as further described in SCVHP Chapter 8.10.1. The Implementing Entity will make the data repository accessible to the Parties, including the Wildlife Agencies. The Wildlife

Agencies will keep confidential sensitive species information to the extent permitted by the Freedom of Information Act, the California Public Records Act or other applicable laws. Subject to the California Public Records Act, the Implementing Entity may determine in its sole discretion whether to grant access to any information in the data repository to third parties, including Third Party Participants.

#### **14.4. Other Information**

Within thirty (30) days of receipt of a written request from the Wildlife Agencies, the Implementing Entity will provide any requested, non-confidential, non-proprietary information in its possession or control that is relevant for the purpose of assessing whether the Permittees are in compliance with the terms and conditions of the Permits. The Implementing Entity shall list and briefly describe each document withheld for containing confidential or proprietary information.

### **15. MODIFICATIONS AND AMENDMENTS**

The Parties may from time to time modify or amend the SCVHP, this Agreement, or the Permits, in accordance with this Section and the requirements of the ESA, the NCCPA, NEPA and CEQA.

#### **15.1. Administrative Changes**

The Parties understand that ordinary administration and implementation of the SCVHP will require minor variations in the way certain conservation actions are implemented. Such administrative changes, as described in SCVHP Chapter 10.3.1, will not require modification or amendment of this Agreement, the SCVHP, or the Permits, and will not require the prior approval of the Wildlife Agencies. Administrative changes to the SCVHP that may be approved pursuant to this Section include, but are not limited to, the examples described in SCVHP Chapter 10.3.1.

#### **15.2. Minor Modifications of the SCVHP**

The Implementing Entity may propose minor modifications, defined in SCVHP Chapter 10.3.2, to the SCVHP by providing written notice to all of the other Parties. Such notice will include a statement of the reason for the proposed modification and an analysis of its environmental effects, if any, including any effects on Covered Species. The Wildlife Agencies will each approve or disapprove proposed modifications within sixty (60) days of receipt of such notice or will explain in writing to the Implementing Entity why such approval or disapproval cannot be provided within sixty (60) days and will specify when such approval or disapproval will be provided. Proposed modifications will become effective upon the Wildlife Agencies' written approval. The Wildlife Agencies will not approve minor modifications to the SCVHP if they determine that such modifications would result in adverse effects on Covered Species or natural communities under the SCVHP that are significantly different from those analyzed in the SCVHP or would result in additional Take of Covered Species not analyzed in the SCVHP. If any Wildlife Agency disapproves a proposed modification, it may be proposed as an amendment of that Wildlife Agency's Permit as provided in Section 15.4.

Minor modifications of the SCVHP that may be approved pursuant to this Section include, but are not limited to, the examples of minor modifications described in SCVHP Chapter 10.3.2

### **15.3. Amendment of this Agreement**

This Agreement may be amended only with the written agreement of all Parties; provided, however, that any amendment or portion thereof pertaining to Private Project Participants, implementing ordinances under Agreement Section 7.4.1.3, or any other provision of this Agreement pertaining to the land use or other regulatory decisions of the Cities or County will not require the consent of the Water District or VTA.

### **15.4. Amendment of the SCVHP and the Permits**

The Permittees may substantially revise the SCVHP by obtaining the applicable Wildlife Agency's approval of an amendment, as described in SCVHP Chapter 10.3.3, to one or more of the Permits as provided in this Section and in accordance with all applicable laws and regulations, including but not limited to the ESA, NEPA, NCCPA and CEQA. The Implementing Entity will provide written notice to all of the other Parties of any proposed Permit amendment. Such notice will include a copy of any required application for the proposed amendment, a statement of the reason for the amendment and an analysis of its environmental effects, if any, including any effects on Covered Species. The Wildlife Agency will review and approve or disapprove the proposed Permit amendment in an expeditious manner, commensurate with the level of environmental review appropriate to the magnitude of the proposed amendment. Unless and until CDFG adopts regulations that set forth specific requirements for the amendment of NCCPA take authorizations, for purposes of proposed amendments to the State Permit CDFG will accept an application for a Permit amendment that meets the requirements of this Section and ESA requirements for an application for an amendment of an incidental take permit; provided, however, that CDFG's approval or disapproval of the proposed Permit amendment will be based on the requirements of the NCCPA and CEQA and not on the requirements of the ESA.

Revisions of the SCVHP that would require an amendment of one or more of the Permits include, but are not limited to, the examples described in SCVHP Chapter 10.3.3.

### **15.5. Modification or amendment of SCVHP Deadlines**

The Parties acknowledge that it is possible that, even over the full fifty (50) year term of the Permits, Covered Activities and Authorized Take might not occur to the extent projected in the SCVHP and that SCVHP Fee revenues might therefore fall short of projections. A shortfall of SCVHP Fee revenues under these circumstances could make it difficult or impossible for the Permittees to complete the Reserve System within the term of the Permits. If it appears likely that such a shortfall will make it difficult or impossible for the Implementing Entity and other Permittees to meet all SCVHP land acquisition requirements, and all Reserve System habitat restoration and creation requirements, within the timeframes required under Agreement Section 6.4.1, SCVHP Chapter 5.3.1 and SCVHP Chapter 8.12, the Parties anticipate that the Permittees may propose an amendment to the SCVHP, this Agreement, and the Permits to reduce the Authorized Take and Reserve System land acquisition and habitat restoration and creation requirements or to extend the term of the permits in order to allow full implementation of the SCVHP in accordance with all applicable laws and regulations, including but not limited to the ESA, NEPA, NCCPA and CEQA, as provided in

Agreement Section 15.4, SCVHP Chapter 9.4.4 and SCVHP Chapter 10.3.3. This Agreement does not obligate the Wildlife Agencies to approve any such amendment proposal.

#### **15.6. General Land Use and Regulatory Authority of the County and Cities**

The Parties acknowledge that the adoption and amendment of general plans, specific plans, community plans, zoning ordinances and other land use and regulatory ordinances, and the granting of land use entitlements or other regulatory permits by the County or Cities are matters within the sole discretion of the County or Cities and will not require amendments to the Permits, or the approval of other Parties to this Agreement. However, no such action by the County or Cities will alter or diminish their obligations under the Permits.

### **16. REMEDIES AND ENFORCEMENT**

Each Party will have all of the remedies available in equity (including specific performance and injunctive relief) and at law to enforce the terms of the Permits, and to seek redress for any breach or violation thereof; except that none of the Parties will be liable in damages to any other Party or to any other person or entity 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. The Parties acknowledge that the Covered Species are unique and that their loss as species would be irreparable and that therefore injunctive and temporary relief may be appropriate in certain instances involving a breach of this Agreement. Nothing in this Agreement is intended to limit the authority of the Federal and State governments to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA, CESA or other applicable law.

#### **16.1. Suspension of Federal Permit**

USFWS may suspend the Federal Permit, in whole or in part, for cause in accordance with 50 Code of Federal Regulations section 13.27 and other applicable laws and regulations in force at the time of such suspension. Except where USFWS determines that emergency action is necessary to avoid irreparable harm to a Covered Species, it will not suspend the Federal Permit without first (1) attempting to resolve any disagreements regarding the implementation or interpretation of the SCVHP or this Agreement in accordance with Agreement Section 6.6, (2) requesting the Permittees to take appropriate remedial actions, and (3) providing the Permittees with written notice of the facts or conduct which may warrant the suspension and an adequate and reasonable opportunity for the Permittees to demonstrate why suspension is not warranted.

#### **16.2. Reinstatement of Suspended Federal Permit**

In the event USFWS suspends the Federal Permit, in whole or in part, as soon as possible after such suspension, USFWS will meet and confer with the Permittees concerning how the suspension can be ended. Subsequent to the conclusion of any such conference, USFWS will identify reasonable, specific actions, if any, necessary to effectively redress the suspension. In making this determination, USFWS will consider the requirements of the ESA and its regulations, the conservation needs of the Covered Species, the terms of the Federal Permit and any comments or



recommendations received during the meet and confer process. As soon as possible, but not later than thirty (30) days after the conference, USFWS will send the Permittees written notice of any available, reasonable actions necessary to effectively redress the deficiencies giving rise to the suspension. Upon performance or completion, as appropriate, of such actions, USFWS will immediately reinstate the Federal Permit. It is the intent of the Parties that in the event of any total or partial suspension of the Federal Permit, all Parties will act expeditiously and cooperatively to reinstate the Federal Permit.

### **16.3. Suspension of the State Permit**

In the event of any material violation of the State Permit or material breach of this Agreement by the Permittees, CDFG may suspend the State Permit in whole or in part; provided, however, that it will not suspend the State Permit without first (1) attempting to resolve any disagreements regarding the implementation or interpretation of the SCVHP or this Agreement in accordance with Agreement Section 6.6, (2) requesting the Permittees to take appropriate remedial actions when such remedial actions are reasonable and available, and (3) providing the Permittees with written notice of the facts or conduct which may warrant the suspension and an adequate and reasonable opportunity for the Permittees to demonstrate why suspension is not warranted or to take steps necessary to cure the violation or breach.

#### **16.3.1. Failure to Maintain Rough Proportionality**

As provided in Agreement Section 9.4.2, in the event that CDFG has determined that the Permittees have failed to meet the rough proportionality requirement as provided in Agreement Section 9.4, and if the Permittees have failed to cure the default or entered into an agreement to do so within forty-five (45) days of the written notice of such determination, CDFG will suspend the State Permit in whole or in part in accordance with California Fish and Game Code section 2820.

### **16.4. Reinstatement of Suspended State Permit**

In the event CDFG suspends the State Permit, as soon as possible but no later than ten (10) days after such suspension, CDFG will confer with the Permittees concerning how the violation or breach that led to the suspension can be remedied. At the conclusion of any such conference, CDFG will identify reasonable, specific actions necessary to effectively redress the violation or breach. In making this determination, CDFG will consider the requirements of NCCPA, the conservation needs of the Covered Species, the terms of the State Permit and this Agreement and any comments or recommendations received during the meet and confer process. As soon as possible, but not later than thirty (30) days after the conference, CDFG will send the Permittees written notice of the reasonable actions necessary to effectively redress the violation or breach. Upon performance of such actions, CDFG will immediately reinstate the State Permit. It is the intent of the Parties that in the event of any suspension of the State Permit, all Parties will act expeditiously and cooperatively to reinstate the State Permit.

### **16.5. Revocation of Federal Permit**

USFWS agrees that it will revoke or terminate the Federal Permit, in whole or in part, pursuant to 50 Code of Federal Regulations sections 13.28-13.29 and 50 Code of Federal Regulations sections

17.22(b)(8) and 17.32(b)(8) only after completing the meet and confer process set forth in Agreement Section 6.6, unless immediate revocation is necessary to avoid the likelihood of jeopardy to a listed species. USFWS agrees that it will not revoke or terminate the Federal Permit, in whole or in part, to avoid the likelihood of jeopardy to a listed species, without first notifying the Permittees of those measures, if any, that the Permittees may undertake to prevent jeopardy to the listed species and maintain the Federal Permit and giving Permittees a reasonable opportunity to implement such measures.

#### **16.6. Revocation of State Permit**

CDFG may revoke or terminate the State Permit for a material violation of the State Permit or material breach of this Agreement by the Permittees if the CDFG determines in writing that (1) such violation or breach cannot be effectively redressed by other remedies or enforcement action, or (2) revocation or termination is required to avoid jeopardizing the continued existence of a Covered Species and to fulfill a legal obligation of the CDFG under the NCCPA.

CDFG agrees that it will not revoke or terminate the State Permit without first (1) attempting to resolve any disagreements regarding the implementation or interpretation of the SCVHP or this Agreement in accordance with Agreement Section 6.6, (2) requesting that the Permittees take appropriate remedial action, and (3) providing the Permittees with notice in writing of the facts or conduct which warrant the revocation or termination and a reasonable opportunity (not less than forty-five (45) days) to demonstrate or achieve compliance with NCCPA, the State Permit and this Agreement.

However, in the event that CDFG has determined that the Permittees have failed to meet the rough proportionality standard provided in Agreement Section 9.4, and if the Permittees have failed to cure the default or to enter into an agreement to do so within forty-five (45) days of the written notice of such determination, CDFG will suspend or revoke the State Permit in whole or in part in accordance with California Fish and Game Code section 2820.

#### **16.7. Obligations in the Event of Suspension or Revocation**

In the event of revocation or termination of a Permit, or of suspension of a Permit pursuant to Agreement Section 16.8, consistent with the requirements of 50 Code of Federal Regulations sections 17.32(b)(7) and 17.22(b)(7), the Permittees will remain obligated to fulfill any existing and outstanding minimization and mitigation measures and conservation measures required under this Agreement, the SCVHP and the Permit for any Take that occurs prior to such revocation, termination, or suspension, until the applicable Wildlife Agency determines that all Take of Covered Species that occurred under the Permit has been mitigated to the maximum extent practicable in accordance with the SCVHP. Regardless of whether the Permit is terminated, suspended, or revoked, the Permittees acknowledge that lands added to the Reserve System must be protected, managed and monitored in perpetuity.

#### **16.8. Emergency Suspension of Permits to Avoid Jeopardy**

If new circumstances arise in which continued implementation of the Covered Activities would appreciably reduce the likelihood of survival and recovery of a Federal or State Listed Species in the

wild, USFWS or CDFG may suspend its Permit on an emergency basis, in whole or in part, without resorting to the procedures specified in this Section. The period of such emergency suspension will be no longer than ninety (90) days. Before extending the suspension beyond ninety (90) days, USFWS and CDFG will comply with the requirements of Agreement Section 16 pertaining to non-emergency Permit suspensions or revocations. During such 90-day period, USFWS will comply with 50 Code of Federal Regulations section 13.27.

#### **16.9. Force Majeure**

In the event that the Permittees are wholly or partially prevented from performing obligations under this Agreement because of unforeseeable causes beyond the reasonable control of and without the fault or negligence of the Permittees ("**Force Majeure**"), including, but not limited to, acts of God, labor disputes, sudden actions of the elements not identified as Changed Circumstances, or actions of non-participating federal or state agencies or local jurisdictions, the Permittees will be excused from whatever performance is affected by such unforeseeable cause to the extent so affected, and such failure to perform will not be considered a material violation or breach, provided that nothing in this section will be deemed to authorize any Party to violate the ESA, CESA or NCCPA, and provided further that:

- The suspension of performance is of no greater scope and no longer duration than is required by the Force Majeure;
- Within fifteen (15) days after the occurrence of the Force Majeure, affected Permittees will give the Wildlife Agencies written notice describing the particulars of the occurrence;
- Permittees will use their best efforts to remedy their inability to perform (however, this paragraph will not require the settlement of any strike, walk-out, lock-out or other labor dispute on terms which in the sole judgment of the Permittees are contrary to their interest); and
- When Permittees are able to resume performance of their obligations, the affected Permittees will give the Wildlife Agencies written notice to that effect.

#### **16.10. Inspections by Wildlife Agencies**

The Wildlife Agencies may conduct inspections and monitoring of the site of any Covered Activity, and may inspect any data or records required by the Permits, in accordance with applicable law and regulations. The Wildlife Agencies will also have reasonable access to conduct inspections of the Reserve System and lands enrolled under the Neighboring Lands Agreement.

### **17. TERM OF AGREEMENT**

#### **17.1. Effective Date**

This Agreement will be effective on the date after all of the following have occurred:

- Formation of the Implementing Entity;
- execution by all Parties;

- issuance of both of the Permits; and
- adoption of an SCVHP implementing ordinance by each of the Cities and the County.

#### **17.2. Term of the Agreement**

This Agreement will run for a term of fifty (50) years from the Effective Date, unless extended pursuant to Agreement Section 17.4, or unless all of the Permits are permanently terminated pursuant to Agreement Section 16, in which case this Agreement will automatically terminate. This Agreement may also be terminated by mutual written agreement of the Parties.

#### **17.3. Term of the Permits**

The Permits will run for a term of fifty (50) years from the date of issuance on the face of the Permits, unless terminated as provided in this Agreement.

#### **17.4. Extension of the Permits**

Upon agreement of the Parties and in compliance with all applicable laws and regulations in force at the time, the Wildlife Agencies may, with respect to the Permits under their respective jurisdictions, extend the Permits beyond their initial terms. If the Permittees desire to extend the Permits, they will so notify the Wildlife Agencies at least six (6) months before the then-current term is scheduled to expire. Extension of the Permits constitutes extension of this Agreement and the SCVHP for the same amount of time, subject to any modifications agreed to by the Parties at the time of extension.

#### **17.5. Withdrawal by a Permittee**

Upon ninety (90) days written notice to the Wildlife Agencies, the Implementing Entity and all other Permittees, any Permittee except for the Implementing Entity may unilaterally withdraw from this Agreement. As a condition of withdrawal, the Permittee will remain obligated to ensure implementation of all existing and outstanding minimization and mitigation and conservation measures required under the Permits for any Take that the Permittee itself caused and any Take by Private Project Participants for which the Permittee extended Authorized Take coverage prior to withdrawal. If a Permittee withdraws before causing or extending any Authorized Take coverage under the Permits, the Permittee will have no obligation to ensure implementation of any minimization or mitigation measures. Such withdrawal of a Permittee from this Agreement will be deemed to constitute a surrender of the Permittee's Authorized Take coverage under the Permits.

Withdrawal by a Permittee will not diminish or otherwise affect the obligations of the remaining Permittees under this Agreement, the SCVHP, or the Permits. The Permittees acknowledge that if one or more Permittees withdraws from this Agreement and, as a result of the withdrawal, it is no longer feasible or practicable to implement the SCVHP successfully, it may be necessary to modify the SCVHP or to amend the Permits, or both, in response to the withdrawal. However, the withdrawal of a Permittee will not, by itself, be sufficient cause for the Wildlife Agencies to revoke or suspend the Permits or take any other enforcement action.

Within forty-five (45) days after receiving written notice of withdrawal from a Permittee, the Wildlife Agencies, the Implementing Entity and all Permittees will meet to discuss and evaluate whether the SCVHP can be successfully implemented without the participation of the withdrawing

Permittee. Relevant factors in this evaluation include but are not limited to whether, without the participation of the withdrawing Permittee, SCVHP implementation will continue to be adequately funded, whether the Permittees can continue to comply with the stay-ahead requirement, whether all required conservation actions can be implemented, and whether the overall SCVHP Conservation Strategy can be implemented consistent with the SCVHP. Based on this meeting or meetings, and based on any other relevant information provided by the Implementing Entity or the remaining Permittees, the Parties will determine whether it is necessary to modify the SCVHP or amend the Permits, or both, in response to the withdrawal.

Upon ninety (90) days written notice to USFWS and CDFG, the Permittees collectively may withdraw from this Agreement. As a condition of such withdrawal, the Permittees will be obligated to ensure implementation of all existing and outstanding minimization, mitigation, and conservation measures required under the Permits for any Take that occurred prior to such withdrawal, to the maximum extent practicable pursuant to 50 C.F.R. 17.22(b)(7) and 17.32(b)(7) for the Federal Permit, and pursuant to Fish and Game Code sections 2820, 2821 and 2834 for the State Permit, until:

(1) The applicable Wildlife Agencies determine that all Take of Covered Species that occurred under the Permits has been mitigated in accordance with the SCVHP, which determination the Wildlife Agencies will make as soon as reasonably possible. The conservation measures required for Take that occurred prior to withdrawal are the same as the conservation measures required to comply with the rough proportionality requirement, in accordance with Agreement Section 9.4 and SCVHP Chapter 8.6.1, with regard to Take that occurred prior to withdrawal; and

(2) The Wildlife Agencies, the Implementing Entity and all Permittees meet to identify and evaluate activities that could voluntarily be undertaken or continued in support of the SCVHP Conservation Strategy notwithstanding the collective withdrawal.

If the Permittees collectively notify USFWS in writing that they plan to withdraw from this Agreement or to discontinue the Covered Activities, they will surrender: (1) the Federal Permit issued by that agency pursuant to the requirements of 50 Code of Federal Regulations Part 13.26; and (2) the State Permit pursuant to Fish and Game Code section 2835 including but not limited to the assurances or authorization for any Take that has not occurred at the time of withdrawal.

Regardless of withdrawal and surrender of the Permits, the Permittees acknowledge that lands in the Reserve System must be protected, managed and monitored in perpetuity.

## **18. MISCELLANEOUS PROVISIONS**

### **18.1. Calendar Days**

Throughout this Agreement and the SCVHP, the use of the term “day” or “days” means calendar days, unless otherwise specified

### 18.2. Response Times

Except as otherwise set forth herein or as statutorily required by CEQA, NEPA, CESA, ESA, NCCPA or any other laws or regulations, the Wildlife Agencies and the Permittees will use reasonable efforts to respond to written requests from a Party within a forty-five (45) day time period. The Parties acknowledge that the Cities and the County are subject to the Permit Streamlining Act and that nothing in this Agreement will be construed to require them to violate that Act. In addition, the Wildlife Agencies will provide timely review of proposals for Covered Activities to be implemented directly by the Permittees, where such review is required by the Permits.

### 18.3. Notices

The Implementing Entity will maintain a list of individuals responsible for ensuring SCVHP compliance for each of the Parties, along with addresses at which those individuals may be notified ("Notice List"). The Notice List as of the Effective Date is provided below. Each Party will report any changes of names or addresses to the Implementing Entity and the other Parties in writing.

Any notice permitted or required by this Agreement will be in writing, and delivered personally, by overnight mail, or by United States mail, postage prepaid. Notices may be delivered by facsimile or electronic mail, provided they are also delivered by one of the means listed above. Delivery will be to the name and address of the individual responsible for each of the Parties, as stated on the most current Notice List.

Notices will be transmitted so that they are received within deadlines specified in this Agreement, where any such deadlines are specified. Notices delivered personally will be deemed received on the date they are delivered. Notices delivered via overnight delivery will be deemed received on the next business day after deposit with the overnight mail delivery service. Notices delivered via non-certified mail will be deemed received seven (7) days after deposit in the United States mail. Notices delivered by facsimile or other electronic means will be deemed received on the date they are received.

The following Notice List contains the names and notification addresses for the individuals currently responsible for overseeing and coordinating SCVHP compliance:

<b><u>County:</u></b> County Executive County of Santa Clara 70 W. Hedding Street, 11 <sup>th</sup> Floor, East Wing San Jose, CA 95110	<b><u>San Jose:</u></b> City Manager City of San Jose 200 East Santa Clara Street San Jose, CA 95112
<b><u>Gilroy:</u></b> City Administrator City of Gilroy 7351 Rosanna St. Gilroy, CA 95020	<b><u>Morgan Hill:</u></b> City Manager City of Morgan Hill 17575 Peak Avenue Morgan Hill, CA 95037

<b><u>Water District:</u></b> Chief Executive Officer Santa Clara Valley Water District 5750 Almaden Expressway San Jose, CA 95118	<b><u>VTa:</u></b> General Manager Santa Clara Valley Transportation Authority 3331 N. First Street San Jose, CA 95134
<b><u>Implementing Entity:</u></b>	

#### **18.4. Entire Agreement**

This Agreement, together with the SCVHP and the Permits, constitutes the entire agreement among the Parties. This Agreement 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 of 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.

#### **18.5. Limitations on Remedies**

Notwithstanding any language to the contrary in this Agreement, this Agreement is not intended to create, and shall not be construed to create, any rights or remedies against the Wildlife Agencies for money damages or any other relief, including specific performance, that would result in a violation of the ESA, the NCCPA or any other federal or state law or regulation. No Party to this Agreement shall be liable in damages to any other Party or any other person for any performance or failure to perform any obligation identified in this Agreement

#### **18.6. Defense**

The USFWS and the Permittees acknowledge that the Permittee have a significant and independent interest in maintaining the validity and effectiveness of the SCVHP, this Agreement, and the Permit, and supporting documentation, including documentation under the National Environmental Policy Act and ESA, and that the Permittees' interests may not be adequately protected or represented in the event of a judicial challenge to the Permit unless some or all of the Permittees are able to participate in such litigation. Subject to Agreement Section 18.9 (Availability of Funds), the USFWS will, upon the request of the Permittees, and subject to the responsibilities of the U.S. Department of Justice in the conduct of litigation, use reasonably available resources to provide appropriate support to the Permittees in defending, consistent with the terms of the Federal Permit, lawsuits against the Permittees arising out of the USFWS's approval of the Federal Permit.

Upon request, CDFG will, to the extent authorized by California law, cooperate with the Permittees in defending, consistent with the terms of the SCVHP, lawsuits arising out of the Permittees' adoption of this Agreement and the SCVHP.

#### **18.7. Attorneys' Fees**

If any action at law or equity, including any action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, each Party to the litigation will bear its own attorneys'

fees and costs, provided that attorneys' fees and costs recoverable against the United States will be governed by applicable federal law.

#### **18.8. Elected Officials Not to Benefit**

No member of, or delegate to, the California State Legislature, the United States Congress, the County Board of Supervisors, the city councils of the respective Cities, or the governing boards of the other Permittees will be entitled to any share or part of this Agreement or to any benefit that may arise from it.

#### **18.9. Availability of Funds**

Implementation of this Agreement and the SCVHP by USFWS is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the United States Treasury. The Parties acknowledge and agree that USFWS will not be required under this Agreement to expend any federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

Implementation of this Agreement and the SCVHP by CDFG is subject to the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the Treasury of the State of California. The Parties acknowledge and agree that CDFG will not be required under this Agreement to expend any state appropriated funds unless and until an authorized official of that agency affirmatively acts to commit such expenditure as evidenced in writing.

Implementation of this Agreement and the SCVHP by the Permittees is subject to the availability of their respective appropriated funds, including but not limited to the special purpose revenues dedicated to implement the SCVHP. Nothing in this Agreement will be construed to require the obligation, appropriation, or expenditure of any money without express authorization by the County Board of Supervisors, appropriate City Councils and/or governing boards of the Implementing Entity, Water District, and VTA. Notwithstanding these requirements and limitations, the Permittees are required to fund their respective obligations under the Permits as provided in Agreement Section 13. The Parties acknowledge that if the Permittees fail to provide adequate funding for their respective obligations under the Permits, the Permits may be suspended or revoked as provided in Agreement Section 16.

#### **18.10. Governing Law**

This Agreement will be governed by and construed in accordance with the laws of the United States and the State of California, as applicable.

#### **18.11. Duplicate Originals**

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



#### **18.12. Relationship to the ESA, CESA, NCCPA and Other Authorities**

The terms of this Agreement are consistent with and will be governed by and construed in accordance with the ESA, CESA, NCCPA and other applicable state and federal laws. In particular, nothing in this Agreement is intended to limit the authority of USFWS and CDFG to seek penalties or otherwise fulfill its responsibilities under the ESA, CESA and NCCPA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of USFWS as an agency of the federal government or CDFG as an agency of the State of California.

#### **18.13. No Third Party Beneficiaries**

Without limiting the applicability of rights granted to the public pursuant to the ESA, CESA, NCCPA or other applicable law, this Agreement will not create any right or interest in the public, or any member thereof, as a third party beneficiary thereof, nor will it authorize anyone not a Party to this Agreement to maintain a suit for personal injuries or property damages under the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third party beneficiaries will remain as imposed under existing state and federal law.

#### **18.14. References to Regulations**

Any reference in this Agreement, the SCVHP, or the Permits to any regulation or rule of the Wildlife Agencies will be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

#### **18.15. Applicable Laws**

All activities undertaken pursuant to the Permits must be in compliance with all applicable local, state and federal laws and regulations.

#### **18.16. Severability**

In the event one or more of the provisions contained in this Agreement is held to be invalid, illegal or unenforceable by any court of competent jurisdiction, such portion will be deemed severed from this Agreement and the remaining parts of this Agreement will remain in full force and effect as though such invalid, illegal, or unenforceable portion had never been a part of this Agreement. The Permits are severable such that revocation of one of the Federal or State Permits does not automatically cause revocation of the other. For example, if CDFG revokes the State Permit, it does not automatically cause revocation of the Federal Permit.

#### **18.17. Due Authorization**

Each Party represents and warrants that (1) the execution and delivery of this Agreement has been duly authorized and approved by all requisite action, (2) no other authorization or approval, whether of governmental bodies or otherwise, will be necessary in order to enable it to enter into and comply with the terms of this Agreement, and (3) the person executing this Agreement on behalf of each Party has the authority to bind that Party.

**18.18. Assignment**

Except as otherwise provided herein, the Parties will not assign their rights or obligations under this Agreement, the Permits, or the SCVHP to any other individual or entity.

**18.19. Headings**

Headings are used in this Agreement for convenience only and do not affect or define the Agreement's terms and conditions.

**18.20. Legal Authority of USFWS**

USFWS enters into this Agreement pursuant to the ESA, the Fish and Wildlife Coordination Act, and the Fish and Wildlife Act of 1956. Section 10(a) of the ESA expressly authorizes USFWS to issue permits to allow the incidental Take of species listed as threatened or endangered under the ESA.

**18.21. Legal Authority of CDFG**

CDFG enters into this Agreement pursuant to the NCCPA.

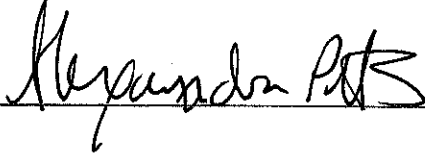
**18.22. No Limitation on the Police Power of the Cities or the County**

Nothing in this Agreement, the SCVHP or Permits limits the exercise of or in any way surrenders the police power of the Cities or the County.

**IN WITNESS WHEREOF, THE PARTIES HERETO** have executed this Implementing Agreement to be in effect as of the Effective Date.

Dated: JUL 30 2013, 201  

UNITED STATES FISH & WILDLIFE SERVICE

By: 

Dated: \_\_\_\_\_, 201  

CALIFORNIA DEPARTMENT OF FISH & GAME

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201  

SANTA CLARA VALLEY HABITAT  
AGENCY

By: \_\_\_\_\_

**18.18. Assignment**

Except as otherwise provided herein, the Parties will not assign their rights or obligations under this Agreement, the Permits, or the SCVHP to any other individual or entity.

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**18.21. Legal Authority of CDFG**

CDFG enters into this Agreement pursuant to the NCCPA.

**18.22. No Limitation on the Police Power of the Cities or the County**

Nothing in this Agreement, the SCVHP or Permits limits the exercise of or in any way surrenders the police power of the Cities or the County.

**IN WITNESS WHEREOF, THE PARTIES HERETO** have executed this Implementing Agreement to be in effect as of the Effective Date.

Dated: \_\_\_\_\_, 201\_

UNITED STATES FISH & WILDLIFE SERVICE

By: \_\_\_\_\_

Dated: July 31, 2013

CALIFORNIA DEPARTMENT OF FISH & GAME

By: Sandra Gray

Dated: \_\_\_\_\_, 201\_

SANTA CLARA VALLEY HABITAT  
AGENCY

By: \_\_\_\_\_

**18.18. Assignment**

Except as otherwise provided herein, the Parties will not assign their rights or obligations under this Agreement, the Permits, or the SCVHP to any other individual or entity.

**18.19. Headings**

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**18.21. Legal Authority of CDFG**

CDFG enters into this Agreement pursuant to the NCCPA.

**18.22. No Limitation on the Police Power of the Cities or the County**

Nothing in this Agreement, the SCVHP or Permits limits the exercise of or in any way surrenders the police power of the Cities or the County.

**IN WITNESS WHEREOF, THE PARTIES HERETO** have executed this Implementing Agreement to be in effect as of the Effective Date.

Dated: \_\_\_\_\_, 201\_

UNITED STATES FISH & WILDLIFE SERVICE

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CALIFORNIA DEPARTMENT OF FISH & GAME

By: \_\_\_\_\_

Dated: July 1, 2013

SANTA CLARA VALLEY HABITAT  
AGENCY

By: Cat Tucker

Dated: 4/26/ 2013

COUNTY OF SANTA CLARA

By: 

APPROVED AS TO FORM AND LEGALITY:  
Lizanne Reynolds, Deputy County Counsel  
CITY OF SAN JOSE

Dated: \_\_\_\_\_, 201\_

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CITY OF GILROY

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CITY OF MORGAN HILL

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

SANTA CLARA VALLEY WATER DISTRICT

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

SANTA CLARA VALLEY TRANSPORTATION  
AUTHORITY

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

COUNTY OF SANTA CLARA

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CITY OF SAN JOSE

By:  \_\_\_\_\_

CITY OF GILROY

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CITY OF MORGAN HILL

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_


SANTA CLARA VALLEY WATER DISTRICT

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

SANTA CLARA VALLEY TRANSPORTATION  
AUTHORITY

By: \_\_\_\_\_

4/11/13  
Approved as to form:   
Sr. Deputy City Attorney

Dated: \_\_\_\_\_, 201\_

COUNTY OF SANTA CLARA

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CITY OF SAN JOSE

By: \_\_\_\_\_

Dated: 4/15, 2013

CITY OF GILROY

THOMAS J. HAGLUND, CITY ADMINISTRATOR

By: [Signature]

Dated: \_\_\_\_\_, 201\_

approved as  
to Form - Lila Colton, City Attorney  
CITY OF MORGAN HILL

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

SANTA CLARA VALLEY WATER DISTRICT

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

SANTA CLARA VALLEY TRANSPORTATION  
AUTHORITY

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

COUNTY OF SANTA CLARA

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CITY OF SAN JOSE

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CITY OF GILROY

By: \_\_\_\_\_

Dated: APRIL 18, 2013

CITY OF MORGAN HILL

By: 

Approved As To Form:

By: 

Renee A. Gurza, City Attorney

SANTA CLARA VALLEY WATER DISTRICT

Dated: \_\_\_\_\_, 201\_

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

SANTA CLARA VALLEY TRANSPORTATION  
AUTHORITY

By: \_\_\_\_\_



Dated: \_\_\_\_\_, 201\_

COUNTY OF SANTA CLARA

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CITY OF SAN JOSE

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CITY OF GILROY

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CITY OF MORGAN HILL

By: \_\_\_\_\_

Dated: 4/16, 2013

SANTA CLARA VALLEY WATER DISTRICT

By:  \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

SANTA CLARA VALLEY TRANSPORTATION  
AUTHORITY

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

COUNTY OF SANTA CLARA

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CITY OF SAN JOSE

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CITY OF GILROY

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

CITY OF MORGAN HILL

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 201\_

SANTA CLARA VALLEY WATER DISTRICT

By: \_\_\_\_\_

Dated: April 15, 2013

SANTA CLARA VALLEY TRANSPORTATION  
AUTHORITY

By: Michael J. Sauer

EXHIBIT A  
COVERED SPECIES

**EXHIBIT A**  
**COVERED SPECIES**

Species	Scientific Name	Status <sup>1</sup>	
		State/CNPS	Federal
<b>Invertebrates</b>			
Bay checkerspot butterfly	<i>Euphydryas editha bayensis</i>	–	FT
<b>Amphibians and Reptiles</b>			
California tiger salamander	<i>Ambystoma californiense</i>	ST	FT
California red-legged frog	<i>Rana draytonii</i>	CSC	FT
Foothill yellow-legged frog	<i>Rana boylei</i>	CSC	–
Western pond turtle	<i>Clemmys marmorata</i>	CSC	–
<b>Birds</b>			
Western burrowing owl	<i>Athene cunicularia hypugea</i>	CSC	MBTA
Least Bell's vireo	<i>Vireo bellii pusillus</i>	SE	FE, MBTA
Tricolored blackbird	<i>Agelaius tricolor</i>	CSC	MBTA
<b>Mammals</b>			
San Joaquin kit fox	<i>Vulpes macrotis mutica</i>	ST	FE
<b>Plants</b>			
Tiburon Indian paintbrush	<i>Castilleja affinis</i> ssp. <i>neglecta</i>	ST/1B	FE
Coyote ceanothus	<i>Ceanothus ferrisiae</i>	1B	FE
Mount Hamilton thistle	<i>Cirsium fontinale</i> var. <i>campylon</i>	1B	–
Santa Clara Valley dudleya	<i>Dudleya abramsii</i> ssp. <i>setchellii</i>	1B	FE
Fragrant fritillary	<i>Fritillaria liliacea</i>	1B	–
Loma Prieta hoita	<i>Hoita strobilina</i>	1B	–
Smooth lessingia	<i>Lessingia micradenia</i> var. <i>glabrata</i>	1B	–
Metcalf Canyon jewelflower	<i>Streptanthus albidus</i> ssp. <i>albidus</i>	1B	FE
Most beautiful jewelflower	<i>Streptanthus albidus</i> ssp. <i>peramoenus</i>	1B	–

Notes:

<sup>1</sup> Status

**Federal**

FE Federally Endangered.

FT Federally Threatened.

BGPA Bald and Golden Eagle Protection Act.

MBTA Migratory Bird Treaty Act.

SOC Species of Concern (National Marine Fisheries Service only).

**State**

SE State Listed as Endangered.

ST State Listed as Threatened.

SR State Listed as Rare.

SC Candidate.

CSC California Special Concern Species.

FP Fully Protected.

**California Native Plant Society (CNPS)**

1B Rare, Threatened, or Endangered in California and Elsewhere.

EXHIBIT B  
MODEL IMPLEMENTING ORDINANCE

EXHIBIT B

MODEL IMPLEMENTING ORDINANCE

ORDINANCE NO. \_\_\_\_\_

**AN ORDINANCE OF THE [NAME OF COUNCIL/BOARD] ADDING [TITLE/CHAPTER #] TO THE [NAME OF ENTITY] CODE ADOPTING BY REFERENCE AND IMPLEMENTING THE SANTA CLARA VALLEY HABITAT CONSERVATION PLAN/NATURAL COMMUNITY CONSERVATION PLAN INCLUDING AUTHORITY TO COLLECT THE LOCAL DEVELOPMENT MITIGATION FEES ADOPTED BY THE SANTA CLARA VALLEY HABITAT AGENCY FROM PROJECT APPLICANTS AND REMIT THE FEES TO THE AGENCY FOR FUNDING THE PRESERVATION OF NATURAL ECOSYSTEMS IN ACCORDANCE WITH THE PLAN**

WHEREAS, the Santa Clara Valley Habitat Conservation Plan/Natural Communities Conservation Plan ("HCP/NCCP") has been developed to preserve the ecosystems of the southeastern portion of Santa Clara County, which include the [Name of Entity] ("[City/County]"), the central portion of the Santa Clara Valley, portions of the Santa Cruz Mountains to the west, portions of the Diablo Range to the east, the Coyote watershed and portions of the Pajaro watershed, and a significant portion of the Guadalupe watershed ("Plan Area") to conserve and prevent further endangerment of the plant and animal species that are dependent upon those ecosystems and to comply with federal and state legal requirements for such preservation; and

WHEREAS, the HCP/NCCP was drafted by the County of Santa Clara, the Cities of Gilroy, Morgan Hill, and San Jose, the Santa Clara Valley Water District, and the Santa Clara Valley Transportation Authority (collectively the "Local Partners") in association with the U.S. Fish and Wildlife Service and the California Department of Fish and Game, and in consultation with stakeholder groups and the general public; and

WHEREAS, the County of Santa Clara and the Cities of Gilroy, Morgan Hill, and San Jose formed the Santa Clara Valley Habitat Agency, a joint powers agency ("Implementing Entity"), to implement the HCP/NCCP on behalf of the Local Partners, obtain long-term authorized Take coverage through permits from the U.S. Fish and Wildlife Service and the California Department of Fish and Game for the Local Partners' own activities, and extend such authorized Take coverage to private project applicants under their jurisdiction; and

WHEREAS, the HCP/NCCP was adopted by the [Council/Board] on \_\_\_\_\_, 201\_, and

**WHEREAS**, the purpose and intent of this ordinance is to:

- protect vegetation communities and natural areas within the Plan Area which are known to support threatened, endangered, or key sensitive populations of plant and wildlife species;
- enable the [City/County] to achieve the conservation goals set forth in the HCP/NCCP;
- protect the existing character of the [City/County] and the region through the implementation of a system of reserves which will provide for permanent open space, community edges, and habitat conservation for species covered by the HCP/NCCP;
- preserve the ability of affected property owners to make reasonable use of their land consistent with the requirements of applicable laws, which include but are not limited to the National Environmental Policy Act ("NEPA") (42 U.S.C. §§ 4321-4347), the California Environmental Quality Act ("CEQA") (Public Resources Code § 21000 *et seq.*), the Federal Endangered Species Act ("ESA") (16 U.S.C. §§ 1531-1544), the California Endangered Species Act ("CESA") (Fish & Game Code § 2050 *et seq.*), and the California Natural Community Conservation Planning Act ("NCCPA") (Fish & Game Code §§ 2800-2835);
- insure the collection of the Implementing Entity's local development mitigation fees to assist in the maintenance of biological diversity and the natural ecosystem processes that support this diversity; and
- maintain economic development within the [City/County] by providing a streamlined regulatory process from which development can proceed in an orderly process; and

**WHEREAS**, the [Name of Entity] General Plan, adopted by the [Council/Board] on [Date], ("General Plan") contemplates the adoption of the HCP/NCCP, incorporates the goals of the HCP/NCCP, and includes specific strategies to further the goals of the HCP/NCCP as follows:

[Add list of General Plan consistency findings – see section 2.1 of HCP/NCCP for possible language]

**WHEREAS**, the findings set forth herein are based on the [City's/County's] General Plan, the HCP/NCCP and the studies referenced therein, and the estimated acquisition, management and maintenance costs for such property as set forth in the HCP/NCCP (a copy of the HCP/NCCP is on file in the [City/County] Clerk's office); and

**WHEREAS**, the California Constitution authorizes the [City/County] to enact measures that protect the health, safety, and welfare of its citizens; and

**WHEREAS**, Government Code section 66000 *et seq.* authorizes the Implementing Entity to impose fees and other exactions to provide necessary funding for public facilities required to mitigate the negative effect of new development projects within the Plan Area; and

WHEREAS, in accordance with the Implementing Agreement, the Implementing Entity may authorize the [City/County] to collect such fees from project applicants on behalf of the Implementing Entity and remit them to the Implementing Entity; and

WHEREAS, on \_\_\_\_\_, 201\_, the [Council/Board] certified the Draft Environmental Impact Report/Environmental Impact Statement for the HCP/NCCP project and made appropriate findings pursuant to CEQA and NEPA under File No. \_\_\_\_\_.

NOW, THEREFORE, BE IT ORDAINED BY THE [COUNCIL/BOARD] OF THE [NAME OF ENTITY]:

SECTION 1. [Title/Chapter] \_\_\_\_\_ is hereby added to the [Name of Entity] Code to read as follows:

[TITLE/CHAPTER] \_\_\_\_\_

**HABITAT CONSERVATION PLAN**

**Sections:**

- \_\_\_\_\_ Purpose
- \_\_\_\_\_ Adoption of Habitat Conservation Plan by Reference
- \_\_\_\_\_ Definitions
- \_\_\_\_\_ Application to Covered Activities
- \_\_\_\_\_ Mitigation Fees
- \_\_\_\_\_ Authorized Take Coverage
- \_\_\_\_\_ Guidelines
- \_\_\_\_\_ Interpretation
- \_\_\_\_\_ Operative Date

**Section \_\_\_\_\_ Purpose.**

The purpose of this [Title/Chapter] is to implement the Santa Clara Valley Habitat Conservation Plan/Natural Communities Conservation Plan ("HCP/NCCP") and the associated Implementing Agreement and Take Permits in order to provide a regulatory framework for promoting the protection and recovery of natural resources, including Covered Species, while streamlining the permitting process for both publicly funded and privately funded planned development in the [Name of Entity]. The HCP/NCCP was developed by the County of Santa Clara, the Cities of Gilroy and Morgan Hill, the Santa Clara Valley Water District, and the Santa Clara Valley Transportation Authority (collectively the "Local



Partners”) in association with the U.S. Fish and Wildlife Service and the California Department of Fish and Game, and in consultation with stakeholder groups and the general public.

As a result of the adoption of the HCP/NCCP by the [City/County], the [City/County] (among the other Local Partners) is the recipient of long-term endangered species permits/authorized Take coverage from the U.S. Fish and Wildlife Service and the California Department of Fish and Game for the [City’s/County’s] own activities and, in addition to coverage of its own public projects, the [City/County] will be able to extend authorized Take coverage to private Project Applicants under its jurisdiction.

Rather than separately permitting and mitigating individual projects, the HCP/NCCP evaluates natural resource impacts and mitigation requirements comprehensively in a manner that is more efficient and effective for at-risk species and their essential habitats. This approach will allow the [City/County] to streamline future mitigation requirements into one comprehensive program. The U.S. Fish and Wildlife Service (“USFWS”) the California Department of Fish and Game (“CDFG”) authorized Take coverage also provides assurances that no further commitments of funds, land, or water from covered public and private projects will be required to address impacts on Covered Species beyond that described in the HCP/NCCP to address changed circumstances as long as the HCP/NCCP is properly implemented..

In addition to strengthening local control over land use and species protection, the HCP/NCCP provides a more efficient process for protecting natural resources by creating new habitat reserves that will be larger in scale, more ecologically valuable, and easier to manage than the individual mitigation sites created under the current approach. This more efficient and streamlined approach to obtaining authorized Take coverage for both public and private projects will significantly reduce the time and resources previously required to obtain Take coverage on an individual project-by-project basis. Unless an activity is deemed to be in compliance with the federal and state Endangered Species Acts by the Implementing Entity, as described in Chapter 6.2 of the HCP/NCCP, all covered activities occurring within the Local Plan Area will be subject to applicable conditions and fees described in the HCP/NCCP.

**Section \_\_\_\_\_ Adoption of Habitat Conservation Plan/Natural Communities Conservation Plan by Reference.**

The HCP/NCCP is incorporated by reference as though fully set forth herein. Complete copies of the HCP/NCCP are available for inspection at the Office of the [City/County] Clerk and the [Name of Administering Department].

**Section \_\_\_\_\_ Definitions.**

The definitions set forth in this section shall govern the application and interpretation of this [Title/Chapter]. Words and phrases not defined in this section shall be interpreted so as to give this [Title/Chapter] its most reasonable application.

A. "Building Permit" includes a full structural building permit as well as a partial permit such as a foundation-only permit, grading permit, or any other permit or approval for a project authorizing a ground-disturbing activity for a Covered Activity.

B. "Covered Activity" means any activity defined in Section 2.3 of Chapter 2 of the HCP/NCCP as a covered activity and not otherwise exempted from the requirements of the HCP/NCCP.

C. "Covered Species" means the species, listed and non-listed, whose conservation and management are provided for in the HCP/NCCP and for which incidental Take is authorized by the Wildlife Agencies pursuant to the Take Permits. Covered Species are also listed in Exhibit A to the Implementing Agreement.

D. "Habitat Conservation Plan/Natural Communities Conservation Plan" or "HCP/NCCP" means the Santa Clara Valley Habitat Conservation Plan/Natural Communities Conservation Plan adopted by the [Council/Board] on \_\_\_\_\_, 201\_, and any amendments thereto.

E. "Implementing Agreement" means that agreement made and entered into by and among the United States Fish and Wildlife Service ("USFWS") of the United States Department of the Interior, the California Department of Fish and Game ("CDFG") of the State of California Natural Resources Agency, the Santa Clara Valley Habitat Agency (the "Implementing Entity"), the County of Santa Clara ("County"), the City of San Jose ("San Jose"), the City of Gilroy ("Gilroy"), the City of Morgan Hill ("Morgan Hill"), the Santa Clara Valley Water District ("Water District"), and the Santa Clara Valley Transportation Authority ("VTA") that defines the parties' respective roles and responsibilities and provides a common understanding of actions that will be undertaken to implement the HCP/NCCP.

F. "Implementing Entity" means the Santa Clara Valley Habitat Agency formed on \_\_\_\_\_, 201\_, by and among the County of Santa Clara and the Cities of Gilroy, Morgan Hill, and San Jose pursuant to the Joint Powers Act, Gov. Code § 6500 et seq.

G. "Local Plan Area" means that portion of the geographic study area defined in the HCP/NCCP that lies within the [corporate boundaries/unincorporated area] of the [Name of Entity].

H. "Mitigation Fees" or "Fees" means any Habitat Plan fee(s) that applies to Covered Activities in the Local Plan Area as adopted by the Implementing Entity in accordance with Chapter 9 of the HCP/NCCP and the fee studies in support thereof, and any amendments to those fees, unless otherwise exempted from the fee requirements of the HCP/NCCP by the Implementing Entity.

I. "Planning Permit" means any discretionary permit that authorizes a ground disturbing activity for a Covered Activity including, but not limited to, [list each agency's applicable discretionary land use approvals here, such as tentative map, parcel map, conditional use permit, site development permit, planned development permit, or special use permit], or any other discretionary permit, excluding general plan amendments, zoning and rezoning, annexation, specific plans, and area development policies. The term "Planning Permit" also includes any Building Permit where no other Planning Permit is required.

J. "Project Applicant" means any person or entity applying for a Planning Permit for a project authorizing a ground-disturbing activity for a Covered Activity, including any person or entity opting in to the HCP/NCCP pursuant to Chapter 6.2 of the HCP/NCCP.

K. "Take" and "Taking" have the same meaning provided by the Federal Endangered Species Act ("ESA") (16 U.S.C. §§ 1531-1544) and its implementing regulations with regard to activities subject to the ESA, and also have the same meaning provided in section 86 of the California Fish and Game Code with

regard to activities subject to the California Endangered Species Act ("CESA") (Fish & Game Code § 2050 *et seq.*), and the California Natural Community Conservation Planning Act ("NCCPA") (Fish & Game Code §§ 2800-2835).

L. "Take Permits" means the federal incidental Take permit issued by USFWS to the Implementing Entity, the County, San Jose, Gilroy, Morgan Hill, the Water District, and VTA (collectively, "Permittees") based on the HCP/NCCP pursuant to Section 10(a)(1)(B) of the ESA, and the state incidental Take permit issued by CDFG to the Permittees based on the HCP/NCCP pursuant to Section 2835 of the California Fish and Game Code.

#### Section \_\_\_\_\_ Application to Covered Activities.

All Project Applicants for Covered Activities within the Local Plan Area shall comply with the conditions on Covered Activities in Chapter 6 of the HCP/NCCP. Each Planning Permit application for a Covered Activity in the Local Plan Area shall include details of the methods and timing in which the project will comply with the HCP/NCCP in the form and manner required by the Director of [Name of Administering Department]. Applicable conditions on Covered Activities from Chapter 6 of the HCP/NCCP as well as other measures required to implement the conservation strategy of the HCP/NCCP shall be included in each Planning Permit approval for a Covered Activity.

#### Section \_\_\_\_\_ Mitigation Fees.

A. As a condition of each land use approval for a Covered Activity in the Local Plan Area, the Mitigation Fees shall be paid in full by the private Project Applicant to the [City/County] no later than the date of issuance by the [City/County] of a Building Permit. The Mitigation Fees shall be paid to the Implementing Entity at the time of issuance of the first Building Permit if more than one Building Permit is required for the project.

B. If the Implementing Entity authorizes another manner of compensation in lieu of the Mitigation Fees (such as a land donation in lieu of payment of the Mitigation Fees), the Project Applicant shall provide the [City/County] with written documentation from the Implementing Entity of compliance with such alternative manner of payment and the dollar equivalent amount of such alternative manner of compensation.

C. In the event the [City/County] determines the project subject to the Planning Permit to be exempt from payment of the Mitigation Fees, no Mitigation Fees shall be required for the project.

D. The [City/County] may collect the Mitigation Fees on behalf of the Implementing Entity if authorized to do so by the Implementing Entity.

#### Section \_\_\_\_\_ Authorized Take Coverage.

Upon payment in full of the Mitigation Fees and approval of Planning Permits incorporating all applicable HCP/NCCP conditions of approval, the Project Applicant shall receive authorized Take coverage for the Covered Activity in accordance with the terms of the HCP/NCCP, the Implementing Agreement, and the Take Permits.

**Section \_\_\_\_\_ Guidelines.**

The [Council/City Manager, in conjunction with the [Director of Planning/Planning, Building and Code Enforcement,]] may adopt guidelines to assist in the implementation and administration of all aspects of this [Title/Chapter].

**Section \_\_\_\_\_ Interpretation.**

In the event of a conflict between any term or requirement of this [Title/Chapter], the HCP/NCCP, the Implementing Agreement or the Take Permits, the term or requirement of the Take Permits shall govern.

**Section \_\_\_\_\_ Operative Date.**

This [Title/Chapter] shall be operative upon adoption by the Implementing Entity of the Mitigation Fees and the issuance of the Take Permits by the U.S. Fish and Wildlife Service and the California Department of Fish and Game.

[Include agency-specific adoption language and signature block]

EXHIBIT C  
NEIGHBORING LANDOWNER CERTIFICATE OF INCLUSION

Exhibit C

**SANTA CLARA VALLEY HABITAT PLAN**  
**NEIGHBORING LANDOWNER CERTIFICATE OF INCLUSION**

The United States Fish and Wildlife Service and the California Department of Fish and Game have issued Permits pursuant to the federal Endangered Species Act and the California Natural Community Conservation Planning Act (collectively "Permits") authorizing "Take" of certain species in accordance with the terms and conditions of the Permits, the Santa Clara Valley Habitat Plan ("Habitat Plan") and the associated Implementing Agreement. Under the Permits, Section 10.2.7 of the Habitat Plan, and Section 7.4.3 of the Implementing Agreement, certain activities by the party or entity below are authorized to "Take" certain species (California red-legged frog, California tiger salamander, and Western pond turtle), provided all applicable terms and conditions of the Permits, the Habitat Plan, and the Implementing Agreement are met.

As the owner/operator of the property described by Assessor's Parcel Number and gross acres on Exhibit 1 attached thereto and incorporated herein by this reference, you are entitled to the protection of the Permits to Take those species identified in Section 7.4.3 in connection with normal agricultural practices occurring within a one mile of the boundary of Reserve System lands and with the limitations set forth in Section 10.2.7 of the Habitat Plan and Section 7.4.3 of the Implementing Agreement. In the event that the property depicted on Exhibit 1 is used for other purposes without the express consent of the Santa Clara Valley Habitat Agency, Take Authorization under the Permits will automatically cease. Such authorization is provided as described in the Permits, the Habitat Plan, and the Implementing Agreement. By signing this Certificate of Inclusion you signify your election to receive Take Authorization under the Permits in accordance with the terms and conditions thereof. This Certificate of Inclusion does not give state and federal agencies additional regulatory control over the signatory nor require the signatory to provide additional information not called for in the Certificate of Inclusion, but instead ensures compliance with 50 Code of Federal Regulations, section 13.25(d). Coverage under the Permits will become effective upon receipt of the fully-completed and executed Certificate of Inclusion by the Santa Clara Valley Habitat Agency. In the event that the subject property is sold or leased, buyer or lessee must be informed of these provisions and execute a new Certificate of Inclusion.

Owner	Operator
Print Name:	Print Name:
Signature:	Signature:
Address:	Address:

City/State/Zip:	City/State/Zip:
Phone:	Phone:
Date:	Date:

<b>Santa Clara Valley Habitat Agency</b>
By (Print Name:
Signature:
Date: