

**PARTICIPATING SPECIAL ENTITY AGREEMENT**

**Between**

**THE SANTA CLARA VALLEY HABITAT AGENCY**

**and**

**SANTA CLARA VALLEY OPEN SPACE AUTHORITY**

**MALECH ROAD PUBLIC ACCESS PROJECT**

**1.0 PARTIES**

This Agreement, for reference dated January 6, 2021, is made and entered into by the Santa Clara Valley Habitat Agency, a California joint exercise of powers agency ("Agency"), and the Santa Clara Valley Open Space Authority, a California not-for-profit corporation (OSA or "PSE") as of the Effective Date.

**2.0 RECITALS**

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

- 2.1** The Santa Clara Valley Habitat Conservation Plan/Natural Community Conservation Plan ("SCVHP" or "Plan") is intended to provide a comprehensive framework to protect natural resources within Santa Clara County, specifically in portions of the Santa Clara Valley bounded on the east by the Diablo Range, on the west by the Santa Cruz Mountains, and on the North by the San Francisco Bay shoreline (the Plan Area), while improving and streamlining the environmental permitting process for certain projects that would cause impacts on endangered and threatened species. The primary policy priority of the Plan is to provide comprehensive species, wetlands, and ecosystem conservation and contribute to recovery of endangered and threatened species within the Plan Area while balancing open space, habitat, agriculture, and urban development. To that end, the Plan describes how to avoid, minimize, and mitigate, to the maximum extent practicable, impacts on Covered Species and their habitats while allowing for certain development and other activities in selected regions of the County of Santa Clara and the Cities of San Jose, Morgan Hill, and Gilroy.
- 2.2** The Agency is a joint powers authority formed by its members, the County of Santa Clara ("County"), the City of San Jose ("San Jose"),

the City of Morgan Hill ("Morgan Hill"), and the City of Gilroy ("Gilroy"), to implement the SCVHP.

- 2.3** The SCVHP covers almost two-thirds (62%) of the County, or 519,506 acres, all in Santa Clara Valley, in which impacts from certain development and other activities are evaluated, and in which conservation will occur.
- 2.4** The area covered by the SCVHP has been determined to provide, or potentially provide, habitat for eighteen (18) species that are listed as endangered or threatened, that could in the future be listed as endangered or threatened, or that have some other special status under federal or state laws.
- 2.5** The Agency has received authorization from the United States Fish and Wildlife Service ("USFWS") under incidental take permit TE 94345A-0, and the California Department of Fish and Wildlife ("CDFW"), under incidental take permit 2835-2012-002-03, for the take of the eighteen (18) special-status species and certain other species, as take is defined respectively under federal and state law, while carrying out certain development and other activities.
- 2.6** The Agency may enter into agreements with participating special entities that allow certain activities of theirs to be covered by the Federal Permit and the State Permit, subject to the conditions in the Implementing Agreement ("IA"), the SCVHP and the Permits.
- 2.7** PSE proposes to implement the Malech Road Public Access Project, which consists of the construction of a public access parking lot on the east side of Malech Road, including a vault toilet, picnic/day use areas, group gathering area, informational signage, a loop trail and additional trail construction to facilitate public access to the adjacent Coyote Ridge Open Space Preserve trail network.
- 2.8** The Agency has concluded, based on the terms of this Agreement, including the location/site map attached hereto and incorporated herein by reference as Exhibit 1, and the Conditions of Approval attached hereto and incorporated by reference as Exhibit 2, that PSE has provided adequate assurances that it will comply with all applicable terms and conditions of the IA, the SCVHP, and the Permits.

### **3.0**        **DEFINITIONS**

The following terms as used in this Agreement will have the meanings set forth below. Terms specifically defined in FESA, CESA or NCCPA or the regulations

adopted by USFWS and CDFW under those statutes shall 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 “Application”** means the relevant application submitted by the PSE in accordance with Chapter 8.4 of the SCVHP. The Application contains a cover sheet, a location/site map of the project, the results of required planning surveys, the PSE’s proposed avoidance, minimization and mitigation measures, and the proposed conditions under Chapter 6 of the SCVHP, for inclusion as conditions of the PSE using Agency’s Permits.
- 3.2 “Authorized Take”** means the extent of incidental Take of Covered Species authorized by the USFWS in the Federal Permit issued to the Agency pursuant to Section 10(a)(1)(B) of FESA, and the extent of Take of Covered Species authorized by CDFW in the State Permit issued to the Agency pursuant to California Fish and Game Code section 2835.
- 3.3 “CDFW”** means the California Department of Fish and Wildlife, a department of the California Resources Agency.
- 3.4 “CESA”** means the California Endangered Species Act (Fish & G. Code, § 2050 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.5 “Changed Circumstances”** 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 Sections 3.7, 11.3, and 11.3.1 of the IA and in Chapter 10.2.1 and Exhibit A of the SCVHP. Changed Circumstances do not include Unforeseen Circumstances.
- 3.6 “Conditions of Approval”** means the conditions of approval required by the Agency for the approval of this PSE Agreement, including but not limited to conditions relating to compliance with Chapter 6 of the SCVHP and all avoidance, minimization and mitigation measures that are specified in Exhibit 2 hereto.
- 3.7 “Covered Activities”** means those land uses and conservation and other activities described in Chapter 2.3 of the SCVHP to be carried out by the Agency or its agents that may result in Authorized Take of Covered Species during the term of the SCVHP, and that are otherwise lawful.

- 3.8 “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 specified in Exhibit A of the IA.
- 3.9 “Effective Date”** means the date when this Agreement is fully executed.
- 3.10 “Federal Listed Species”** means the Covered Species which are listed as threatened or endangered species under FESA as of the Effective Date, and the Covered Species which are listed as threatened or endangered pursuant to FESA during the term of the SCVHP as of the date of such listing.
- 3.11 “Federal Permit”** means the federal incidental Take permit issued by USFWS to the Agency and other local agencies pursuant to Section 10(a)(1)(B) of FESA (permit number TE 94345A-0), as it may be amended from time to time.
- 3.12 “FESA”** 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.
- 3.13 “Fully Protected Species”** means any species identified in California Fish and Game Code sections 3511, 4700, 4800, 5050 or 5515 that occur within the Plan Area.
- 3.14 “SCVHP” or “Plan”** means the Santa Clara Valley Habitat Conservation Plan/Natural Community Conservation Plan.
- 3.15 “Implementing Agreement” or “IA”** means the “Santa Clara Valley Habitat Plan Implementing Agreement.”
- 3.16 “Jurisdictional Wetlands and Waters”** means State and federally regulated wetlands and other water bodies that cannot be filled or altered without permits from either the U.S. Army Corps of Engineers under section 404 of the Clean Water Act or, from the State Water Resources Control Boards under either section 401 of the Clean Water Act or the Porter-Cologne Water Quality Act, or CDFW under section 1602 of the Fish and Game Code, as further explained in Chapter 1.3.5 of the SCVHP.
- 3.17 “Listed Species”** means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is listed as endangered or threatened under FESA or CESA.

- 3.18 **“NCCPA”** means the Natural Community Conservation Planning Act (Fish & G. Code, § 2800 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.19 **“Non-listed Species”** means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is not listed as endangered or threatened under FESA or CESA.
- 3.20 **“Party”** or **“Parties”** means any or all of the signatories to this Agreement.
- 3.21 **“Permit Area”** means the area within the Plan Area where the Agency has received authorization from the Wildlife Agencies for the Authorized Take of Covered Species while carrying out Covered Activities.
- 3.22 **“Permits”** means the Federal Permit and the State Permit.
- 3.23 **“Plan Area”** means the geographic area analyzed in the SCVHP, located in within Santa Clara County, specifically in portions of the Santa Clara Valley bounded on the east by the Diablo Range, on the west by the Santa Cruz Mountains, and on the North by the San Francisco Bay shoreline, as depicted in Figures 1-1 and 1-2 of the SCVHP. The Plan Area is further described in detail in Chapter 1.2.2 of the SCVHP.
- 3.24 **“Planning Survey”** collectively means all of the land cover and species surveys required by Chapter 6.8 of the SCVHP.
- 3.25 **“Preserve 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 SCVHP.
- 3.26 **“Project”** means the Project as described in Section 2.7 of this Agreement.
- 3.27 **“State Permit”** means the state Take permit issued to the Agency and other local agencies pursuant to Section 2835 of the California Fish and Game Code (permit number 2835-2012-002-03), as it may be amended from time to time.
- 3.28 **“Take”** has the same meaning provided by FESA and its implementing regulations with regard to activities subject to FESA, and also has the same meaning provided in the California Fish and Game Code with regard to activities subject to CESA and NCCPA.
- 3.29 **“Unforeseen Circumstances”** under the Federal Permit means changes in circumstances affecting a Covered Species or

geographic area covered by the SCVHP that could not reasonably have been anticipated by the Plan developers and USFWS at the time of the Plan'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 the 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.

**3.30 "USFWS"** means the United States Fish and Wildlife Service, an agency of the United States Department of Interior.

**3.31 "Wildlife Agencies"** means USFWS and CDFW collectively.

#### **4.0 PURPOSES**

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 Project, and to provide for the conservation of the Covered Species within the Plan Area. The purposes of this Agreement are to ensure implementation of each of the terms and conditions of this Agreement, and the relevant terms of the IA, the SCVHP, and the Permits, and to describe remedies and recourse should either Party fail to perform its obligations as set forth in this Agreement.

#### **5.0 AVOIDANCE, MINIMIZATION AND MITIGATION OF IMPACTS**

##### **5.1 General Framework**

As required by FESA and NCCPA, the SCVHP includes measures to avoid and minimize take of Covered Species and to conserve natural communities and Covered Species at the landscape-, habitat- and species-level. Chapter 6 of the SCVHP provides further instructions to determine which avoidance and minimization measures are applicable to particular Covered Activities. PSE shall implement all applicable avoidance and minimization measures as required by the SCVHP, including but not limited to those identified in Chapter 6, as described in this Agreement and Conditions of Approval (Exhibit 2).

##### **5.2 Surveys and Avoidance Measures**

Planning Surveys are required prior to carrying out any Covered Activity for which a fee is collected or land in lieu of a fee is provided. PSE has submitted Planning Surveys with its application for approval by the Agency in accordance with Chapter

6.8 of the SCVHP. The Planning Survey report is contained within the Application, which describes the results of the Planning Survey and describes in detail the pre-construction surveys, construction monitoring, avoidance measures and mitigation measures that apply to the Project and shall be performed by PSE. Based on the Application, the Agency has incorporated specific Conditions of Approval in Exhibit 2 to this Agreement and has determined that PSE will implement and comply with all applicable preconstruction surveys and construction monitoring requirements described in Chapters 6.3, 6.4, 6.5 and 6.6 of the SCVHP and the Conditions of Approval hereto.

### **5.3 No-Take Conditions**

Nothing in this Agreement, the SCVHP or the Permits shall be construed to allow the Take of the following species as described below:

- 5.3.1** Burrowing Owl - Injury or death to Burrowing Owl, including, but not limited to, passive relocation occurring before a positive growth trend as described in Chapter 5.4.6 of the SCVHP is achieved.
- 5.3.2** Least Bell's Vireo – Disturbance of active nests during the breeding season as described in Condition 16 of Chapter 6 of the SCVHP.
- 5.3.3** Tricolored Blackbird – Disturbance of nesting colonies as described in Condition 17 of Chapter 6 of the SCVHP.
- 5.3.4** San Joaquin Kit Fox - Injury or death to San Joaquin Kit Fox as specified in Condition 18 of Section 6.6.1 of the SCVHP (“San Joaquin Kit Fox – Avoidance and Minimization”).
- 5.3.5** Tiburon Indian Paintbrush - Loss of occurrences of Tiburon Indian Paintbrush, as described in Table 4-6 of the SCVHP.
- 5.3.6** Coyote Ceanothus - Loss of occurrences of Coyote Ceanothus, as described in Table 4-6 of the SCVHP.
- 5.3.7** Loma Prieta Hoita - Loss of occurrences of Loma Prieta Hoita until additional occurrences are found, as described in Table 4-6 of the SCVHP.
- 5.3.8** Contra Costa Goldfields - as described in Condition 1 of Chapter 6 of the SCVHP.
- 5.3.9** Fully Protected Species under California Fish and Game Code sections 3511, 4700, 4800, 5050 or 5515.

### **5.4 Delineation of Jurisdictional Wetlands and Waters**

No state or federal waters will be impacted by the project as proposed.

## **5.5 Fees and Dedications**

The payment of fees and charges, and/or dedication of land, must be made in full before any ground-disturbance associated with the Project occurs. PSE agrees to pay all fees, including all applicable mitigation fees (Subsection 5.5.1), and PSE charge (Subsection 5.5.4), or a combination thereof, that are required for the Project in the following manner and in the amounts specified in Exhibit 3 hereto:

- 5.5.1 Mitigation Fees.** Pay the Agency Mitigation Fees, calculated as follows: The land cover fees totalling \$467,740.05 for permanent impacts to 5.17 acres of serpentine bunchgrass grassland. Total mitigation fees will include the land cover fees (\$467,740.05), the PSE charge (\$46,774.00) and the Notice of Exemption filing fee (\$50.00). The land cover and specialty fee amount is the sum of all applicable fees multiplied by the acres of impact or miles of stream or vehicle trips (as applicable) for each fee category listed in Table 9-6 of the SCVHP and as adopted by the Agency's Governing Board Ordinance No. 2013-01 and Governing Board Resolution No. G-2015-003 and as may be adjusted periodically. AND
- 5.5.2 Fee Adjustments.** Notwithstanding the above, the Parties acknowledge that (a) the Agency adjusts its fee schedule annually and may make other periodic adjustments to the fees in accordance with the fee adjustment provisions of Chapter 9.4.1 of the SCVHP, and (b) fees that apply to the applicant's project may require adjustment as the result of refinement of the project, changes resulting from conditions that vary from those previously evaluated, or other similar conditions requiring an adjustment to fees. If the PSE pays in full and construction of the Project commences before any fee adjustment occurring after the effective date of this Agreement, the amount due will be as stated above. If PSE pays on or after any fee adjustment occurring after the effective date of this Agreement, or commences construction of the Project on or after any fee adjustment occurring after the effective date of this Agreement, then the amount due will be subject to all fee adjustments applicable at the time of payment and construction as authorized in Chapter 9.4.1 of the SCVHP and Ordinance No. 2013-01. Based on these adjustments, if PSE pays before any fee adjustment, but construction does not commence until after the fee adjustment or there are changes to the project pursuant to Section 5.5.3(b) herein following



commencement of construction, PSE will either be required to submit an additional payment for any increases or be entitled to a refund without interest for any decreases.

## **5.6 PSE Charges**

In addition to the fees specified above in Section 5.5, Chapter 8.4 of the SCVHP authorizes the Agency to require PSEs to pay charges over and above those specified in Chapter 9 to cover indirect costs of extending permit coverage under the SVHCP, including the cost of Agency staff time to assist with permit coverage, a portion of the costs of Implementing Entity staff time to assist with permit coverage, a portion of the costs of the initial preparation of the Plan, and a portion of the costs of conservation actions designed to contribute to species recovery. Such charges have been adopted by the Agency Governing Board resolution, which may be amended from time to time, as follows:

**5.6.1 Application Processing Costs.** PSE shall pay to the Agency all of Agency's actual costs of review and consideration of the PSE's application (including amendments thereto), including all costs of staff, consultants, legal counsel, and other costs including reproduction, public notice, publication, and any other cost necessary to process PSE's application for consideration of approval by the Agency. The Agency may require the PSE to deposit a sum at the time of submission of PSE's application in an amount estimated to compensate Agency for all such application processing costs. In the event that such amount is insufficient to compensate the Agency for its application processing costs, then PSE shall deposit additional funds for such costs within 10 calendar days of receipt of a request for additional funds by the Agency. If the deposit exceeds the amount of the application processing costs, then Agency shall refund such excess deposit to the PSE within 60 calendar days of the final Agency determination on the PSE application. All such application processing costs shall be paid in full by PSE to Agency prior to the effective date of this Agreement.

**5.6.3** This Section 5.6 is not intended to, and shall not be construed to, limit PSE's duty to indemnify the Agency as provided in Section 7.7 of this Agreement.

## **5.7 Total Fees**

The total charges include the Mitigation Fees, any fee adjustments, and Application Processing Costs. The total fees include \$467,740.05 in mitigation fees, a \$50.00 Notice of Exemption filing fee, the \$46,774.00 PSE charge and the

application processing costs of \$4,297.00, for a total of \$513,246.05 (See Fees and Charges, Exhibit 3). Additional charges for covered plant surveys on two properties being considered for Land-in-Lieu of fees total \$7,004.25. Payment for these plant surveys is required with this Agreement. The payment for one or both surveys will be refunded to OSA if a conservation easement over one or both of the properties on which the plant surveys were conducted are conveyed to the Agency as Land-in-Lieu of fees at a later date.

## **6.0 TAKE AUTHORIZATION**

### **6.1 Extension of Take Authorization to PSE**

As provided in Chapter 8.4 of the SCVHP, after receipt of the Wildlife Agencies' written concurrence that the Proposed Activity complies with the SCVHP, the Permits and the IA, and after execution of this Agreement, payment of fees, compliance with the California Environmental Quality Act (Public Resources Code section 21000, et seq.) ("CEQA"), the Agency shall issue a Certificate of Inclusion to PSE that specifically describes the Authorized Take and required conservation measures and extends Take authorization under the Permits to PSE. PSE is ultimately responsible for compliance with all applicable terms and conditions of this Agreement, the IA, the SCVHP and the Permits.

#### **6.1.1 Compliance with the California Environmental Quality Act**

The Agency's issuance of a Certificate of Inclusion to the PSE is a public agency action that must comply with CEQA. For purposes of the Project PSE, the Habitat Agency is the CEQA lead agency. The Habitat Agency prepared a Notice of Exemption (NOE) for the purpose of executing the PSE. The Agency is a CEQA responsible agency for purposes of the Project PSE and, as such, will rely on the NOE for purposes of fulfilling its responsibilities under CEQA. The Authority is the CEQA lead agency for the purposes of the Project design and environmental impact analysis and has prepared an Initial Study and Mitigated Negative Declaration to be approved by the Authority Board of Directors in March of 2022.

### **6.2 Duration of Take Authorization**

**6.2.1** After the Take authorization has been extended to the Project, the project and/or activities for which it is granted shall commence and progress in a timely and consistent manner towards completion within 36 calendar months of issuance of the Take authorization, or the Take authorization will automatically expire at the end of that period. The time for commencement and progression of work or the expiration date of the Take authorization may be

extended by the Parties by written amendment to this Agreement.

- 6.2.2** Unless the Take authorization expires for failure to timely commence and progress the Project as described in Section 6.2.1, it shall remain in effect unless and until the Permits are revoked by USFWS or CDFW, in which case the Take authorization may also be suspended or terminated as provided in the SCVHP and the IA.

### **6.3 Section 7 Consultations with USFWS**

Nothing in this Agreement is intended to alter the obligation of a federal agency to consult with USFWS pursuant to Section 7 of FESA (16 U.S.C. §1536(a)). The PSE acknowledges that, if the Proposed Activities are authorized, funded, or carried out by a federal agency, the federal agency and the Proposed Activities must also comply with Section 7. As provided in Section 12.4 of the IA, USFWS has made a commitment that, unless otherwise required by law or regulation, it will not require any measures under Section 7 that are inconsistent with or exceed the requirements of the SCVHP and the Permits for activities covered by the SCVHP and the Permits.

The Project is not authorized, funded, or carried out by a federal agency and therefore PSE is not required to comply with Section 7 of FESA with regard to the Project.

## **7.0 RIGHTS AND OBLIGATIONS OF PSE**

### **7.1 Rights**

Upon the Agency's issuance of a Certificate of Inclusion to PSE, PSE may Take the Covered Species while carrying out the Project in the Permit Area, as further authorized by and subject to the conditions of this Agreement, the IA, the SCVHP, and the Permits. The authority issued to PSE applies to all of its elected officials, officers, directors, employees, agents, subsidiaries, contractors, and subcontractors, and their officers, directors, employees and agents to the extent that they participate in the implementation of the Project. PSE shall periodically conduct an educational program to fully inform all such persons and entities of the terms and conditions of the Permits, and PSE shall be responsible for supervising their compliance with those terms and conditions. All contracts between PSE and such persons and entities shall require their compliance with the Permits.

### **7.2 General Obligations**

The PSE will fully and faithfully perform all obligations assigned to it under this Agreement, the IA, the SCVHP, the Permits, including but not limited to the

obligations assigned in the following chapters of the SCVHP: Chapter 6 (Conditions on Covered Activities), Chapter 8.4 (Participating Special Entities), and Chapter 9 (Funding). PSE shall implement all measures and adhere to all standards included in the Conditions of Approval, and PSE shall reserve funding sufficient to fulfill its obligations under this Agreement, the IA, the SCVHP and the Permits throughout the term of this Agreement. PSE will promptly notify the Agency of any material change in its financial ability to fulfill its obligations under this Agreement.

### **7.3 Obligations In the Event of Suspension or Revocation**

In the event that USFWS and/or CDFW suspend or revoke the Permits pursuant to Section 16 of the IA, PSE will remain obligated to fulfill its mitigation, enforcement, management, and monitoring obligations, and its other SCVHP obligations, in accordance with this Agreement and applicable statutory and regulatory requirements for all impacts resulting from implementation of the Project prior to the suspension or revocation.

### **7.4 Interim Obligations upon a Finding of Unforeseen Circumstances**

If the Wildlife Agencies make a finding of Unforeseen Circumstances (as defined in Section 11.3 of the IA) with regard to a Federal Listed Covered Species, during the period necessary to determine the nature and location of additional or modified mitigation, PSE will avoid contributing to an appreciable reduction in the likelihood of the survival and recovery of the affected species. As described in Section 12.3 of the IA, the Wildlife Agencies shall be responsible for implementing such additional measures or modifications, unless PSE consents to do so.

### **7.5 Obligations In The Event Of Changed Circumstances**

Changed Circumstances, as described in 50 Code of Federal Regulations section 17.22(b)(5)(i), are adequately addressed in Section 11.3 of the IA and further described in Chapter 10.2.1 of the HCCP/NCCP of the SCVHP, and PSE shall implement any measures for such circumstances as called for in the SCVHP, as described in Section 11.3.1 of the IA.

### **7.6 Indemnification**

PSE agrees to defend, indemnify, and hold harmless the Agency and its board members, officers, contractors, consultants, attorneys, employees and agents from any and all claim(s), action(s), or proceeding(s) (collectively referred to as "Proceedings") brought against Agency or its board members, officers, contractors, consultants, attorneys, employees, or agents arising out of or resulting from any of the following:

- Decisions or actions of the Agency related to the Project, this PSE Agreement, or compliance with the California Environmental Quality Act of 1970, as amended ("CEQA") with regard to the Project; and
- The negligence, recklessness, or intentional misconduct of any representative, employee, or agent of PSE.

Notwithstanding the above, (i) PSE shall have no duty to defend, indemnify, or hold harmless the Agency to the extent damages are sought in a tort claim arising out of or resulting from the individual negligence, recklessness, or intentional misconduct of any representative, employee, or agent of the Agency and (ii) the indemnification obligations set forth above shall in no way limit the rights and remedies of PSE with respect to any breach of the terms and conditions of this PSE Agreement by the Agency.

PSE's duty to indemnify the Agency includes, but is not limited to, damages, fees and/or costs awarded against or incurred by Agency, if any, and costs of suit, claim or litigation, including without limitation attorneys' fees and other costs, liabilities and expenses incurred in connection with any Proceedings.

#### **7.6.1 Enforcement of Indemnification Provision**

PSE agrees to indemnify Agency for all of Agency's costs, fees, and damages incurred in enforcing the indemnification provisions of this Agreement.

#### **7.6.2 Compliance Costs**

PSE agrees to defend, indemnify and hold harmless Agency, its officers, contractors, consultants, attorneys, employees and agents from and for all costs and fees incurred in additional investigation or study of, or for supplementing, redrafting, revising, or amending, any document (such as this Agreement or any document required for purposes of compliance with CEQA) if made necessary by any Proceedings.

#### **7.6.3 Obligations in the Event of Litigation**

In the event that PSE is required to defend Agency pursuant to Section 7.6 of this Agreement in connection with any Proceedings, Agency shall have and retain the right to approve, which approval shall not be withheld unreasonably:

- the counsel to so defend Agency;
- all significant decisions concerning the manner in which the defense is conducted; and
- any and all settlements.

Agency shall also have and retain the right to decline to participate in the defense, except that Agency agrees to reasonably cooperate with PSE in the defense of the

Proceedings. If Agency participates in the defense, all Agency fees and costs shall be paid by PSE.

PSE's defense and indemnification of Agency set forth herein shall remain in full force and effect throughout all stages of litigation including any and all appeals of any lower court judgments rendered in the Proceedings.

## **8.0 REMEDIES AND ENFORCEMENT**

If PSE fails to comply with the terms of this Agreement, the IA, the SCVHP, or the Permits, the Agency may withdraw the Certificate of Inclusion and terminate any Take authorization extended to PSE. The Agency shall also have all of the remedies available in equity (including specific performance and injunctive relief) and at law to enforce the terms of this Agreement, the IA, the SCVHP and the Permits, and to seek redress and compensation for any breach or violation thereof. 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.

## **9.0 FORCE MAJEURE**

In the event that a Party is 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 Party ("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 Party shall be excused from whatever performance is affected by such unforeseeable cause to the extent so affected, and such failure to perform shall not be considered a material violation or breach, provided that nothing in this section shall be deemed to authorize either Party to violate FESA, 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 seven (7) days after the occurrence of the Force Majeure, the Party invoking this section shall give the other Party written notice describing the particulars of the occurrence;
- The Party shall use best efforts to remedy its inability to perform (however, this paragraph shall not require the settlement of any strike, walk-out, lock-out or other labor dispute on terms which in the sole judgment of the Party is contrary to its interest); and

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- When the Party is able to resume performance of their obligations, it shall give the other Party written notice to that effect.

## **10.0 MISCELLANEOUS PROVISIONS**

### **10.1 Calendar Days**

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

### **10.2 Notices**

Any notice permitted or required by this Agreement shall be in writing, and delivered personally, by overnight mail, or by United States mail, certified and postage prepaid, return receipt requested. Delivery shall be to the name and address of the individual responsible for each of the Parties, as follows:

For Agency:

Santa Clara Valley Habitat Agency  
c/o Executive Officer  
535 Alkire Avenue, Suite 100, Morgan Hill, CA 95037  
Email: [Edmund.Sullivan@scv-habitatagency.org](mailto:Edmund.Sullivan@scv-habitatagency.org)  
Phone: 408-779-7261

For PSE:

Andrea Mackenzie, General Manager  
Santa Clara Valley Open Space Authority  
33 Las Colinas Lane  
San Jose, CA 95119  
Email: [amackenzie@openspaceauthority.org](mailto:amackenzie@openspaceauthority.org)  
408-224-7476

Notices shall be transmitted so that they are received within the specified deadlines. Notices delivered personally shall be deemed received on the date they are delivered. Notices delivered via overnight delivery shall be deemed received on the next business day after deposit with the overnight mail delivery service. Notice delivered via certified mail, return receipt requested, shall be deemed received as of the date on the return receipt or five (5) days after deposit in the United States mail, whichever is sooner. Notices delivered by facsimile or other electronic means shall be deemed received on the date they are received.

### **10.3 Entire Agreement**

This Agreement, together with the IA, 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, between 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.

#### **10.4 Amendment**

This Agreement may only be amended with the written consent of both Parties.

#### **10.5 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, the prevailing Party shall be able to recover its attorneys' fees and costs.

#### **10.6 Governing Law**

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

#### **10.7 Duplicate Originals**

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

#### **10.8 Relationship to the FESA, CESA, NCCPA and Other Authorities**

The terms of this Agreement are consistent with and shall be governed by and construed in accordance with FESA, CESA, NCCPA and other applicable state and federal law.

#### **10.9 No Third Party Beneficiaries**

Without limiting the applicability of rights granted to the public pursuant to FESA, CESA, NCCPA or other applicable law, this Agreement shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary thereof, nor shall 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 shall remain as imposed under existing state and federal law.

#### **10.10 References to Regulations**



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

#### **10.11 Applicable Laws**

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

#### **10.12 Severability**

In the event one or more of the provisions contained in this Agreement is held invalid, illegal or unenforceable by any court of competent jurisdiction, such portion shall be deemed severed from this Agreement and the remaining parts of this Agreement shall remain in full force and effect as though such invalid, illegal, or unenforceable portion had never been a part of this Agreement.

#### **10.13 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.

#### **10.14 No Assignment**

The Parties shall not assign their rights or obligations under this Agreement, the Permits, or the SCVHP to any other individual or entity.

#### **10.15 Headings**

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

**IN WITNESS WHEREOF, THE PARTIES HERETO** have executed this Participating Special Entity Agreement to be in effect as of the date last signed below.

**SANTA CLARA VALLEY HABITAT AGENCY:**

DATE: \_\_\_\_\_

## Exhibit D

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Malech Road Public Access Project  
January 2022

By: \_\_\_\_\_  
Edmund Sullivan, Executive Officer

Approved as to form:

By: \_\_\_\_\_  
Valerie J. Armento, Legal Counsel

### **SANTA CLARA VALLEY OPEN SPACE AUTHORITY**

DATE: \_\_\_\_\_

By: \_\_\_\_\_  
Andrea Mackenzie, General Manager

Exhibits:  
EXHIBIT 1 (Location/Site Map of Project)  
EXHIBIT 2 (Conditions of Approval)  
EXHIBIT 3 (Fees and Charges)

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## EXHIBIT 1

### PROJECT LOCATION AND SITE PLAN

#### MALECH ROAD PUBLIC ACCESS PROJECT

Figure 2. Site Plan



## **EXHIBIT 2**

### **CONDITIONS OF APPROVAL**

The following provides Condition Compliance Documentation as prescribed by Items 4, 5, 6, and 7 and Part IV of the Santa Clara Valley Habitat Plan Application for Participating Special Entities.

#### **Condition 1. Avoid Direct Impacts on Legally Protected Plant and Wildlife Species**

Special status plant and wildlife species that have potential to occur within the project area, as identified in the Biological Resources Survey Report (Vollmar, April 2021), include (not limited to) Golden eagle, Western burrowing owl, California tiger salamander, California red-legged frog, Bay checkerspot butterfly, Santa Clara Valley dudleya, Metcalf Canyon jewel-flower, and smooth lessingia. The Project footprint is designed to avoid impacts to Federally and State protected special status wildlife and plant species. In addition, as part of CEQA documentation, protection measures could include preconstruction surveys no more than 14-days prior to ground disturbance and installation of exclusion barrier around the project site prior to ground disturbance.

#### **Condition 3. Maintain Hydrologic Conditions and Protect Water Quality**

To protect watershed health, stormwater discharge and pollutant runoff measures will be implemented, as required by the San Francisco Bay Regional Water Quality Control Board. To minimize wildlife entanglement and plastic debris pollution, temporary erosion and sediment control products will be used that either do not contain netting, or netting manufactured from 100% biodegradable non-plastic materials, such as jute, sisal, or coir fiber.

#### **Condition 7. Rural Development Design and Construction Requirements.**

As a capital improvement project occurring outside of the Habitat Plan's urban service area, applicable requirements of Condition 7 will be implemented. The Project will be constructed close to and utilizes, to the extent practicable, existing infrastructure at the Malech Road project site. Existing roads and disturbed areas will be used for construction staging and off-road travel will avoid sensitive communities such as known occurrences of covered plants.

A stormwater pollution prevention plan (SWPPP) will be developed for the project to maintain hydrologic conditions and protect water quality, and the Authority will comply with stormwater requirements of the County of Santa Clara and the San

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Francisco Bay Regional Water Quality Control Board. Environmental protection measures developed as part of the CEQA documentation for this project address avoiding ground disturbance after heavy precipitation events and the implementation of best management practices consistent with the requirements of the SWPPP.

Natural vegetation will be maintained to the maximum extent and comply with County-mandated fuel buffers at the project site. Temporarily disturbed soils will be revegetated with native grasses upon completion of construction. All temporarily disturbed areas will be returned to pre-project or ecologically improved conditions within one year of the completion of construction.

### **Condition 8. Implement Avoidance and Minimization Measures for Rural Road Maintenance**

BMPs will be implemented that are consistent with the requirements of the SWPPP for the project prior to ground disturbance. Perimeter siltation fencing, wattles, and use of erosion control mats will prevent exposed soils from being displaced by rain or wind and entering nearby waterbodies. Avoidance and minimization measures of Condition 8 will be implemented, including use of existing roads for access and disturbed areas for staging as site constraints allow. Off-road travel will avoid sensitive communities such as wetlands and known occurrences of covered plants. All new public roads that are accessible to general public vehicular use will be paved.

### **Condition 10. Fuel Buffer**

The site is located in a Fire Hazard Severity Zone, designated as “High” by the California Department of Forestry and Fire Protection (CAL FIRE). Environmental protection measures developed as part of the CEQA documentation for this project include requirements to reduce risk of fire during construction. Vegetation within the proximity of project features will be managed to avoid heavy fuel loads and reduce risk of fire transmitting to nearby dwellings or structures. There are no occupied structures as part of this project.

### **Condition 13. Serpentine and Associated Covered Species Avoidance and Minimization**

Project features are designed to limit impacts to the smallest patches of serpentine bunchgrass grassland feasible. The proposed parking lot is primarily located in a previously disturbed area, designated as low-quality habitat (Vollmar Natural Lands Consulting). Other features are located in low to high quality serpentine areas, however, no more than 5% of a portion of an occurrence of a covered plant

will be impacted at the project site. Educational signage will be installed to encourage visitors to stay on designated paths and built features will be designed to reinforce messaging to encourage visitors to stay in designated areas.

The design will reduce visitor impacts to habitat. Educational programming about the unique Preserve environment and accessible use areas will serve visitors with a range of abilities. The concentration of public access amenities is designed to meet programming needs near the Preserve entrance while reducing the need for programmatic features on the Reserve System-enrolled portion of Coyote Ridge Open Space Preserve.

Avoidance and minimization measures will be employed to limit impacts to covered plants. Preconstruction surveys to locate any covered plant species within the project development area. Plants that are found will be flagged and construction crews will be directed to avoid the plants and flagged areas. In addition, a Land-in-Lieu application will convey 40-48 acres of serpentine grasslands on the Coyote Valley Open Space Preserve to the Habitat Agency to further offset impacts to serpentine natural communities in the region.

### **Condition 15. Western Burrowing Owl**

An initial survey of the proposed project area and within 250 feet of proposed project area was conducted (Vollmar Natural Lands Consulting) during the spring season botanical surveys (2019 and 2020) determined no burrowing owl individuals or signs of presence were detected. Additional preconstruction surveys will be conducted by qualified biologists prior to ground disturbance to confirm the presence or absence of western burrowing owl, as described in the Habitat Plan (pages 6-76 to 6-80). Avoidance measures consistent with the Habitat Plan will be implemented based on the outcomes of those surveys.

### **Condition 19. Plant Salvage when Impacts are Unavoidable**

The Authority acknowledges that the Habitat Agency may elect to conduct plant salvage operations on covered plant species from the project site. The salvage of rare plant propagules are considered under the environmental protection measures developed as part of the CEQA documentation for this project. OSA submitted a Plant Salvage request to the Habitat Agency and it was determined plant salvage is not recommended for this Project.

### **Condition 20. Avoid and Minimize Impacts to Covered Plant Occurrences**

Surveys by qualified biologists verified the presence and location of covered plant species at the proposed project site (Attachment 2a. - Malech Road Staging Area

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Biological Resources Survey Report). The following species had the potential to occur at the project site: smooth lessingia, fragrant fritillary, Metcalf canyon jewelflower, most beautiful jewelflower, Tiburon paintbrush, Coyote ceanothus, and San Santa Clara Valley dudleya. The project is designed to avoid and minimize impacts to covered plant species, including flagging and fencing of special-status plants for avoidance during construction.

The Authority acknowledges that the Habitat Agency may monitor covered plant occurrences on the project site and may implement conservation actions on the site that would help maintain or improve the condition of the occurrence.

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### **EXHIBIT 3**

#### **FEES AND CHARGES**

<b>Project</b>	
<b>Santa Clara Valley Open Space Authority Malech Road Public Access Project 2021</b>	
<b>Fee Summary</b>	
<b><i>Mitigation Fees</i></b>	\$467,740.05
<b><i>PSE Charge</i></b>	\$46,774.00
<b><i>Plant Surveys</i></b>	\$7,004.25
<b><i>Administration Fees</i></b>	
Habitat Agency Exec Officer	\$279.00
Habitat Agency Attorney	\$250.00
Habitat Agency Principal Planner	\$1,944.00
Habitat Agency Planner	\$1,824.00
<b><i>County NOE filing fee</i></b>	\$50.00
<b><i>Total Fees</i></b>	\$525,865.30
Deposit Received	(\$5,000.00)
<b>Total Due</b>	\$520,865.30