

PARTICIPATING SPECIAL ENTITY AGREEMENT

Between

THE SANTA CLARA VALLEY HABITAT AGENCY

and

**SANTA CLARA VALLEY OPEN SPACE AUTHORITY
(OSA)**

**OSA LLAGAS CREEK RECREATIONAL BRIDGE AND TRAIL AT RANCHO
CANADA DEL ORO OPEN SPACE PRESERVE PROJECT
(PSE-2022-003)**

1.0 PARTIES

This Agreement, for reference dated January 19, 2023, is made and entered into by the Santa Clara Valley Habitat Agency, a California joint exercise of powers agency ("Agency"), and Santa Clara Valley Open Space Authority (OSA), a California special district ("Participating Special Entity" 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

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

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 construct a clear span pedestrian bridge to replace an at-grade ford crossing on Llagas Creek. The bridge would eliminate historic pedestrian impacts to Llagas Creek. The project also includes replacement of existing barbed wire fence with wildlife friendly fencing. PSE also proposes to construct 0.25-mile trail loop segments connecting the existing parking lot and trail. The new trail would be five feet wide and improved with decomposed granite.
- 2.8** The Agency has concluded, based on the terms of this Agreement, including the Conditions of Approval attached hereto and incorporated herein by reference as Exhibit 1, and the location/site map attached hereto and incorporated by reference as Exhibit 3, that PSE has provided adequate assurances that it will comply with all applicable terms and conditions of the IA, the SCVHP, and the Permits.

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

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

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

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.

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

- 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

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

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 1).

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

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

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 1 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

The Project will not permanently or temporarily impact Llagas Creek, which is designated as a Water of the U.S.

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

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

pay all fees, including all applicable mitigation fees (Subsection 5.5.1), and PSE charge (Subsection 5.6), 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 are \$3,815.04 for 0.16 acres of permanent impacts to Fee Zone A (Ranchlands and Natural Lands). In addition, the project will permanently impact 0.069 acres of Mixed Riparian Forest with fees of \$14,320.05. The project will also incur 124 new daily trips and \$725.40 in Nitrogen Deposition Fees. Total mitigation fees will include the combined land cover fees + Nitrogen Deposition Fee (\$18,860.49), the PSE charge (\$10,000.00) 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

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

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.

5.6.2 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 \$18,860.49, in mitigation fees, a \$50.00 Notice of Exemption filing fee, the \$10,000.00 PSE charge and the application processing costs of \$1,970.00, for a total of \$30,880.49 (See Fees and Charges, Exhibit 2)

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

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, the Habitat Agency is the CEQA lead agency. The Habitat Agency prepared a Notice of Exemption (NOE) for the Project. The Agency is a CEQA responsible agency for purposes of the Project 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 approval and has prepared an Initial Study and Mitigated Negative Declaration to be considered by the Authority Board of Directors in March of 2023.

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

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

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,

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

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

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

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

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

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
- 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

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

c/o Executive Officer
535 Alkire Avenue, Suite 100, Morgan Hill, CA 95037
Email: Edmund.Sullivan@scv-habitatagency.org
Phone: 408-779-7261

For PSE:

Andrea Mackenzie, General Manager
Santa Clara Valley Open Space Authority
Las Colinas Lane
San José, CA 95119
Email: amackenzie@openspaceauthority.org
Phone: 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

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

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

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

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

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: _____

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

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

EXHIBIT 1

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

The Authority will comply with all laws protecting legally protected plant and wildlife species and avoid direct impacts through the planning, design, construction, postconstruction, operations and maintenance of the proposed project. Special-status species that have the potential to occur within the project area are described and listed in Attachment 2a. *Llagas Creek Land Cover and Habitat Survey Report*, Section 3.3 and Appendix A.

Mitigation measures developed as part of the CEQA documentation for this project will address plant and wildlife species that could be negatively impacted by the project.

Condition 3: Maintain Hydrologic Conditions and Protect Water Quality

To protect watershed health, the Authority will implement effective measures to reduce stormwater discharge and pollutant runoff from the project site as may be required by the Central Coast Regional Water Quality Control Board. This project will also incorporate the applicable avoidance and minimization measures included in Table 6-2 of the Habitat Plan. To minimize wildlife entanglement and plastic debris pollution, the Authority, as may be needed, will use temporary erosion and sediment control products that either do not contain netting, or that contain netting manufactured from 100% biodegradable non-plastic materials such as jute, sisal, or coir fiber.

Condition 4: Avoidance and Minimization for In-Stream Projects

This project includes the construction of a new bridge, and therefore qualifies as an in-stream project. The Habitat Plan defines in-stream projects as the stream bed and bank and the adjacent riparian corridor. This project will incorporate the applicable avoidance and minimization measures included in Table 6-2 of the Habitat Plan. Considering the potential for Foothill Yellow legged Frog to be downstream of the project area, minimizing the introduction of pathogens will be important, therefore AMM 92 in Table 6-2 will be given special consideration when constructing the project.

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

Condition 7: Rural Development Design and Construction Requirements

As a capital improvement project occurring outside of the Habitat Plan's urban service area, the Authority will implement applicable requirements of Condition 7. The project proposes new development that will be built close to, and utilize to the extent practicable, existing infrastructure at the Llagas Creek Bridge and Day Use Area project site. Existing roads and disturbed areas will be used for construction staging and off-road travel will avoid sensitive communities such as riparian land cover.

The site will be graded as to direct any runoff to natural areas and to blend with the existing topography. The Authority will comply with stormwater requirements of the City of San José and the Central Coast Regional Water Quality Control Board.

The Authority will minimize ground disturbance and maintain as much natural vegetation as possible. Temporarily disturbed soils will be revegetated with stockpiled site soil or appropriate native grass seed 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.

The project will comply with all applicable local planning ordinances.

Condition 10: Fuel Buffer

The Llagas Creek Bridge and Day Use Area project site is located in a "Very High" Fire Hazard Severity Zone as designated by the California Department of Forestry and Fire Protection (CAL FIRE). Vegetation within the proximity of project features will be managed by the Authority to avoid heavy fuel loads and reduce risk of fire transmitting to nearby dwellings or structures. There are no occupied structures proposed as part of this project.

Condition 16: Least Bell's Vireo

A survey of the proposed project area and within 250 feet of proposed project area was conducted by Ascent Environmental concurrently with botanical surveys in 2019 and 2021 to determine the presence of least Bell's vireo nesting habitat. During the surveys, no least Bell's vireos or their nests were detected. Additional preconstruction surveys will take place by qualified biologists prior to ground disturbance to confirm the presence or absence of least Bell's vireo or their nests as described in Habitat Plan pages 6-68 to 6-69. Avoidance measures consistent with the Habitat Plan will be implemented based on the outcomes of those surveys.

Condition 17: Tricolored Blackbird

Exhibit F

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

A survey of the proposed project area and within 250 feet of proposed project area was conducted by Ascent Environmental concurrently with botanical surveys in 2019 and 2021 to determine the presence of tricolored blackbird nesting habitat. During the surveys, no tricolored blackbirds or their nests were detected. Additional preconstruction surveys will take place by qualified biologists prior to ground disturbance to confirm the presence or absence of tricolored blackbirds or their nests as described in Habitat Plan pages 6-69 to 6-71. Avoidance measures consistent with the Habitat Plan will be implemented based on the outcomes of those surveys.

EXHIBIT 2

FEES AND CHARGES

Project	
Santa Clara Valley Open Space Authority Llagas Creek Recreational Bridge and Trail at Rancho Canada del Oro Open Space Preserve	
Fee Summary	
<i>Mitigation Fees</i>	\$18,860.49
<i>PSE Charge</i>	\$10,000.00
<i>Administration Fees</i>	
Habitat Agency Exec Officer	\$128.00
Habitat Agency Attorney	\$125.00
Habitat Agency Principal Planner	\$1,238.00
Habitat Agency Conservation Planner	\$479.00
<i>County NOE filing fee</i>	\$50.00
<i>Total Fees</i>	\$30,880.49
Deposit Received	(\$5,000.00)
Total Due	\$25,880.49

PSE-2022-003
OSA Llagas Creek Recreational
Bridge and Trail at Rancho Canada del Oro
January 2023

EXHIBIT 3
LOCATION / SITE MAPS OF PROJECT

