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MEMORANDUM

TO: **Ken Schreiber**

FROM: **Chris Beale**

DATE: **October 19, 2007**

RE: **Santa Clara Valley HCP/NCCP Implementation Organizational Structures**

The County of Santa Clara, the Santa Clara Valley Water District, the City of Gilroy , the City of Morgan Hill, the City of San Jose, and the Santa Clara Valley Transportation Authority (the "Local Partners") are working with the U.S. Fish and Wildlife Service ("USFWS"), the National Marine Fisheries Service ("NMFS") and the California Department of Fish and Game ("DFG") to prepare the Santa Clara Valley Habitat Plan – A Conservation Legacy ("SCVHCP"). The plan will integrate: (1) a habitat conservation plan approved by the USFWS and NMFS; and (2) a natural community conservation plan approved by DFG. You asked us to describe and assess alternative organizational structures that could be used for purposes of implementing the SCVHCP once it is approved.

The selection of the right organizational structure for implementation of the SCVHCP will likely revolve around two basic considerations. The first is how the Local Partners would like to oversee or govern implementation. The Local Partners may each have a somewhat different perspective on governance. Some Local Partners may want to play a direct, ongoing role in most or all decisions regarding implementation of the plan. Others may want to play an indirect role, following implementation of the plan, but interceding only on issues that directly pertain to their activities or interests. However, the Local Partners must decide collectively how to govern implementation. To the extent they incline to a less direct role in implementation, a less centralized governance structure that invests significant responsibility in a separate and independent entity or entities would be appropriate. To the extent they incline to a more direct role, a more centralized governance structure that best facilitates the Local Partners' collective decision-making would be appropriate.

The second basic consideration is what, if any, elements of implementation the Local Partners would like to entrust to one or more separate entities. The Local Partners themselves will ultimately be responsible for ensuring that all aspects of the HCP/NCCP are properly implemented. They may elect to implement some or all of the HCP/NCCP with their "in-house" resources, including important elements of the SCVHCP such as acquiring and managing land, managing mitigation fee revenues, and monitoring and reporting on plan implementation. The Local Partners may also seek additional institutional or financial capacity for implementation of

certain elements of the SCVHCP by enlisting the support of one or more separate entities. If so, the best organizational structure will be the one that includes the new or existing entities that are best able to support the Local Partners' implementation of the SCVHCP.

This memo describes and briefly assesses organizational structures that have been used in regional habitat conservation plans or other regional open space conservation efforts in California. The organizational forms and implementing entities addressed here are not mutually exclusive and can be combined in various ways to form a new organizational structure with the most appropriate implementing entity(ies) and method of governance for the SCVHCP. The intent of this memo is to provide the Local Partners with a broad range of options and a brief explanation of the relative merits of each so that the Local Partners may "mix and match" to form an organizational structure.

The organizational structure selected by the Local Partners could be formalized in the implementation agreement for the SCVHCP or in a separate agreement, such as a memorandum of understanding or a joint exercise of powers agreement. It is important to note that, to be a party to the implementation agreement and receive coverage under the incidental take permits issued by the USFWS, NMFS and DFG, any new implementing entity would have to be formed before the implementation agreement is finalized.

Option 1: One Local Partner is responsible for most or all aspects of SCVHCP implementation.

a. Overview.

Under this approach, one Local Partner would assume the primary responsibility for implementing the SCVHCP. The key characteristic of this approach is that a designated Local Partner itself, either with its own staff or contractors, or in partnership with another organization, would assume the central role in implementing the SCVHCP. This could include responsibility for some or all of the following:

- program administration (personnel, overhead, contract administration, etc.);
- land acquisition;
- habitat/wetland restoration;
- site management;
- restoration management;
- monitoring, adaptive management and remedial measures;
- securing funding;
- identifying/defining mitigation measures for individual projects;
- collecting and managing revenues from mitigation fees;
- ensuring compliance with and coordinating implementation of the SCVHCP; and
- coordinating with the USFWS, NMFS, and DFG.

The SCVHCP and implementation agreement would assign implementation obligations to the Local Partner, which would have both primary responsibility for and principal control over implementation. The Local Partner would likely be required to augment its staff significantly to

develop sufficient capacity for implementation. As the central implementing entity, the Local Partner would coordinate with other Local Partners regarding shared responsibilities, such as implementing mitigation for individual projects covered by each Local Partner's state and federal permits.

Funding options available to cities and counties include the ability to tax, as well as the ability to establish special assessment districts under a variety of different statutes, each of which includes its own conditions and limitations. They may form a public facilities financing district to levy an assessment in proportion to the benefit to be received by each parcel to be developed. Cal. Gov't Code § 53175 (Integrated Financing District Act). They may establish a special district for the improvement and maintenance of natural habitat pursuant to California Fish & Game Code section 2901 and California Government Code section 50060 et seq. Such assessments may be levied against the parcels that benefit from the habitat maintenance, and must be related to the benefits to the property assessed. They also may form open space maintenance districts funded by ad valorem assessments. Cal. Gov't Code § 50575 et seq. And the Mello Roos Community Facilities Act authorizes the establishment of community facilities districts and imposition of special taxes. Cal. Gov't Code § 53311 et seq.

Local governments may apply for and manage public grants, including grants from the USFWS, NMFS and DFG for implementation of habitat conservation plans and natural community conservation plans, and other grants made available as a result of state capital improvement bonds. Local governments may also apply for and manage grants from private philanthropies.

b. Example of County Governance: San Diego County Multi-Habitat Conservation Plan ("MHCP").

San Diego County's south county MHCP is both a habitat conservation plan and a natural community conservation plan. It is implemented primarily by the County's Department of Parks and Recreation, which acquires lands for an MHCP preserve system and manages lands within the preserve. While cities within the County are responsible for implementing portions of the MHCP, the County's obligations are separate and largely independent of the implementation obligations of the cities. For this reason, the County is not required to act as a liaison between the cities and state and federal agencies on behalf of the cities.

c. Relative Strengths of Local Partner Implementation.

This approach would simplify and centralize control over implementation. If the County or one of the cities were the implementing Local Partner, it would have the legal authority to perform all required implementation actions. Because of the simple, centralized implementation structure, the implementing Local Partner could be relatively efficient, even taking into account public agency contracting requirements. Because a new entity would not have to be formed, startup costs and, to some extent, new overhead costs would be avoided. A variety of revenue generating options generally available only to local governments would be available. If the designated Local Partner were a local government authorized to collect mitigation fees under the Mitigation Fee Act, it would clearly have the authority to manage such fees. A local government

agency would also clearly have a sufficiently stable and durable organizational structure to implement the plan.

However, the specialized capacity and capability required for SCVHCP implementation may be limited among the Local Partners--the primary implementation role would likely require increased expertise and staff augmentation in natural lands restoration and management. This structure may also be perceived by the agencies and the public as lacking focus or credibility. Local governments have numerous obligations and limited resources. As a consequence, this approach is generally disfavored by the state and federal agencies because of concern that a city or county's level of focus on implementation may vary from year to year due to competing priorities, staffing constraints and other reasons. In addition, the Local Partners collectively may be uncomfortable delegating responsibility for implementing to one Local Partner. The Local Partners could enter an agreement with that Local Partner to ensure accountability, but this may not be adequate for Local Partners that would want a direct role in decisions regarding implementation. Likewise, none of the Local Partners may want to take on primary responsibility for implementation, particularly if they are not given sufficient discretion to carry out the responsibility as they think best.

Option 2: Form or collaborate with a special district.

a. Overview and Controlling Law.

A special district is an "agency of the state for the local performance of governmental or proprietary functions within limited boundaries." Cal. Gov't Code §§ 16271(d), 56036. Special districts can be created under a principal act of the Legislature or a special act. A principal act is a generic statute providing for the creation of districts of a broad type through procedures identified in the act, such as through citizen petition followed by general election. If a proposed special district does not fit within requirements described in a principal act, the Legislature can nonetheless create the district by special act, a statute that forms and empowers that particular district.

There are about 3,400 special districts in California, of which about 120 are special act districts. Two principal acts provide for the creation of districts relating to open space, park and habitat lands:

- *Regional Park and Open Space Districts* . Public Resources Code section 5500 et seq., provides for regional park districts, park and open space districts, and regional open space districts (herein collectively "open space districts"). An open space district can hold lands dedicated for "open-space purposes." Cal. Pub. Res. Code § 5540. "Open-space lands" are defined broadly at Government Code section 65560, and include land for preservation of natural resources, including habitat.

- *Recreation and Park Districts.* Public Resources Code section 5780 et seq., provides for recreation and park districts. As applicable to recreation and park districts, the term "recreation" includes habitat and open-space conservation (Cal.

Pub. Res. Code § 5780.1(g)) and a "recreation facility" includes open space. Id. § 5780.1(h).

The choice between an open space district and a recreation and park district partly depends upon whether the lands of the preserve system will be made available only, at most, for unsupervised public access, or whether there may also be supervised recreation programming in some locations. Habitat preservation goals can be achieved under either structure. With a recreation and park district, however, supervised recreation programming can be more a salient feature of the organization's mission, which may engender greater public acceptance for the entity. In choosing between forms for a special district, the Local Partners would want to consider whether appropriate supervised programming on carefully-selected preserve lands could increase public support for the SCVHCP.

Boundaries. A recreation and park district may be created within the boundaries of one or more cities and counties, and may be discontinuous. Cal. Pub. Res. Code § 5781.

An open space district may be formed by two or more cities and counties that are contiguous, where the combined population exceeds 50,000. All the territory in an open space district must be contiguous. Cal. Pub. Res. Code § 5502.

Formation. Formation of a recreation and park district may be initiated by citizen petition or by resolution of the board of supervisors or city council in which the district is to be located. Cal. Pub. Res. Code §§ 5782.1, 5782.5. The proposed district is then reviewed by the local agency formation commission. Cal. Pub. Res. Code § 5782.7.

Formation of an open space district is initiated by the voters presenting a petition with signatures to the board of supervisors of the county. The board then calls an election of all of the affected voters. Cal. Pub. Res. Code § 5514. In some cases where growth acutely threatens open space, special legislation has been enacted removing the petition requirement, or otherwise modifying the district formation procedures. See, e.g., Cal. Pub. Res. Code §§ 5506.3-5506.11 (affecting San Diego, Napa, Marin, Sonoma, Riverside, San Bernardino, Los Angeles, Sacramento and Santa Barbara Counties). The local agency formation commission provides an impartial analysis of the proposed district. Cal. Pub. Res. Code § 5517.1.

Directors. For a recreation and park district that contains unincorporated territory and the territory of one or more cities, the district board of directors may be elected or appointed by the county board of supervisors and the city councils in which the district is located. Cal. Pub. Res. Code §§ 5783.5(a), 5784, 5783.11.

Open space districts are governed by a publicly-elected board of directors, who appoint a general manager to function as chief administrative officer. While an open space district may be governed at the outset by appointed members, the statute requires that the district be governed by elected directors by the January following its formation. Cal. Pub. Res. Code § 5523. Directors serve four-year terms. Cal. Pub. Res. Code § 5533. At the time the district is formed, each director represents one of either five or seven wards/subdistricts, the boundaries of which must be drawn so that each contains approximately an equal number of electors. Cal. Pub. Res. Code §

5515. After the initial election, the boundaries of the wards may be redrawn to increase the number of directors. Cal. Pub. Res. Code § 5534.5.

Powers. In addition to the powers to establish and operate recreation, park and open space systems, the powers of recreation and park districts and open space districts include many of the same powers as other units of local government, including: the power to sue and to be sued; to acquire and (with limitations) dispose of real or personal property; to exercise the right of eminent domain; to tax; and to incur indebtedness and issue bonds. See, e.g., Cal. Pub. Res. Code §§ 5541, 5542, 5544, 5545, 5566, 5786, 5786.1. The Mello Roos and Integrated Financing District Acts apply to special districts. Cal. Gov't Code §§ 53316, 53317(h), 53177, 53179(f). If created pursuant to special legislative act, that act can tailor the powers of the district beyond those provided for in the principal acts.

b. Examples of Special Districts:

i) East Bay Regional Park District

The mission of the East Bay Regional Park District (www.ebparks.org) is to acquire, develop, manage, and maintain a high quality, diverse system of interconnected parklands that balances public usage and education programs with protection and preservation of natural and cultural resources within Alameda and Contra Costa Counties.

The district was created in 1934 pursuant to section 5500 et seq. of the Public Resources Code (i.e., it was created under the principal act for open space districts). The East Bay Municipal Utilities District ("EBMUD") had declared approximately 10,000 acres of watershed land as surplus, and the community galvanized to conserve the land as open space for public recreation. The voter-approved legislation created the district to acquire and manage EBMUD's land. Voters have approved subsequent initiatives to expand the jurisdiction of the park district. Today, its jurisdiction includes all of the land in the two counties. With its 65 regional parklands totaling approximately 97,000 acres, the East Bay Regional Park District claims to be the largest agency of its kind in the United States.

The district is governed by a seven-member board of directors. Board members are publicly elected to serve four-year terms. Each director represents a specific geographic area of the district.

The district's major source of financial support is property tax revenues. Measure AA — the Regional Open Space, Wildlife, Shoreline and Park Bond Act passed by District voters in 1988 — has provided funding to help complete a major portion of the District's system of parks, regional trails and essential development projects that were envisioned in the 1988 Master Plan.

The Park District receives donations through the related Regional Parks Foundation. Founded in 1969, the foundation supports the district through fundraising that helps provide public access, resource protection and preservation, educational and recreational programs, and acquisitions of parklands.

ii) Santa Clara County Open Space Authority

The mission of the Santa Clara County Open Space Authority (www.openspaceauthority.org) is to preserve open space and create greenbelts between communities, lands on the valley floor, hillsides, viewsheds and watersheds, baylands and riparian corridors, as well as to develop and implement land management policies that provide proper care of open space lands, allow public access appropriate to the nature of the land for recreation, and are consistent with ecological values and compatible with agricultural uses. The State legislature created the Authority as an independent special district in 1993 in response to efforts by citizens and local governments of Santa Clara County. Cal. Pub. Res. Code § 35101 et seq.

A seven-member board of directors, each representing a unique district, governs the Authority. Directors are elected by constituents in their respective districts to 4-year terms. The Authority has preserved over 9,000 acres of land and manages over 1,000 acres of conservation easements and mitigation lands.

iii) Ambrose Recreation & Park District

The mission of the Ambrose Recreation & Park District (www.ambroserec.org) is to provide recreation and park services through planning, organizing and conducting recreation programs and community services and to acquire, develop, maintain, protect and interpret parks, landscape areas, recreation trails, natural and cultural resources, historic resources and open spaces within the district. The District was formed in 1946 under California Public Resources Code section 5780 (the principal act for recreation and park districts), and at that time included one park site; since then the District has acquired and developed three additional parks, a mini park and a community center. A five-member board of directors governs the District.

c. Relative Strengths of Special Districts.

The types of special districts discussed here offer the legal authority to implement most if not all aspects of a habitat conservation plan (including the authority to receive and manage public and private grants) and would have the stability of a government agency. They would also likely have ample capacity, focus, and credibility as an implementing entity. Perhaps most significantly, special districts have the power to directly impose special taxes. See Cal. Pub. Res. Code § 5566, 5786.31. The use of special legislation to create a special district, as in the example of the Santa Clara County Open Space Authority, permits flexibility and tailoring of its formation, structure and capabilities to meet specific needs. Among other things, special legislation can expedite formation of a special district and avoid the inherent risk in relying on a local election to form an important SCVHCP implementing entity.

However, the Local Partners would have somewhat limited control over a special district; a special district would not be directly accountable to the Local Partners. The special districts discussed here are governed by directors appointed by counties and cities (recreation and park district) or elected by the public (open space district). In the case of a recreation and park district, the Santa Clara Valley Water District and the Santa Clara Valley Transportation Authority would not have a direct role in governance. In the case of a park and open space district with publicly

elected directors, none of the Local Partners would have a direct role in governance. This may well concern the Local Partners if they were depending primarily on a special district to implement the SCVHCP. A special district would not have the authority to enforce compliance with the SCVHCP. In addition, creating a special district would be inefficient in comparison to other implementing entities. Establishing a special district can be difficult and would require an initial investment for startup costs, as well as ongoing overhead costs.[1] Special districts are also subject to the Ralph M. Brown Act (Cal. Gov't Code § 54950, et seq.) and laws governing contracts with public agencies.

Option 3: Create a joint powers authority.

a. Overview and Controlling Law.

A joint exercise of powers agency or "joint powers authority" is a governmental entity created by two or more other governmental entities. Through the new agency, the creating entities exercise their powers jointly to achieve common purposes. The new entity is legally separate from the governments that form it. Cal. Gov't Code § 6507. There are approximately 1800 joint powers authorities on file with the Secretary of State in California.

Joint Exercise of Powers Act. A joint powers authority is created under the Joint Exercise of Powers Act[2]. Cal. Gov't Code § 6500 et seq. Pursuant to the act, two or more "public agencies" may "by agreement" jointly exercise any power "common to" the contracting parties. Cal. Gov't Code § 6502.

"Public Agency." As contemplated in the act, "public agency" means, among other things, the federal government, the state, a county, city, public corporation, public district, or any other joint powers authority. Cal. Gov't Code § 6500. Private nonprofit entities may form joint powers authorities with public agencies if a specific statutory provision authorizes their doing so. See, e.g., Cal. Gov't Code § 6523.9.

"By Agreement." The agreement forming a joint powers entity is an inter-governmental contract. It may take a variety of forms, but must state the purpose of the agreement or the power to be exercised, and provide for the method by which the purpose will be accomplished or the manner in which the power will be exercised. Cal. Gov't Code § 6503. The agreement may be of definite or indefinite duration. Cal. Gov't Code § 6510.

"Common Powers." Although the powers exercised by the new entity must be common to the agreeing entities, it is not necessary that each power be exercisable by each contracting party in every geographical area in which the power is to be jointly exercised. Cal. Gov't Code § 6502. The powers delegated to a joint entity are described in the agreement forming the entity.

[1] By engaging the Santa Clara County Open Space Authority as a partner for purposes of implementing some elements of the SCVHCP, the Local Partners could take advantage of the strengths of a special district without the need to form a new district.

[2] Though created under the "Joint Exercise of Powers Act," both common usage and the statute itself variously refer to the agency implementing a joint powers agreement as a "joint powers agency" (e.g., Cal. Gov't Code § 6508) or as a "joint powers authority" (e.g., Cal. Gov't Code § 6516.8).

These powers can be tailored to the purposes for which the entity is created. For example, a joint powers entity need not be given the power of eminent domain.

Boundaries. Both joint powers authorities and special districts, discussed below, are free to determine their jurisdictional boundaries. While both may be coterminous with the underlying governmental boundaries, nothing compels them to be.

Administration of Agreement and Board Membership. The joint entity itself need not administer the agreement. Rather, the agreement may designate that the agreement will be administered and executed by:

- one or more of the member entities to the agreement;
- a commission or board constituted pursuant to the agreement; or
- a person, firm or corporation, including a nonprofit corporation, designated in the agreement. Cal. Gov't Code § 6506.

Money and Services. The contribution of each member agency toward the joint authority may be in the form of money, property, personnel, or services. Cal. Gov't Code §§ 6504, 6506. Member agency contributions may be paid to and disbursed by the entity administering the agreement, "which may include a nonprofit corporation designated by the agreement to administer or execute the agreement for the parties to the agreement." Cal. Gov't Code § 6504.

A joint powers authority may issue revenue bonds to pay the cost and expenses of acquiring, constructing, or improving a project or conducting a program for, among other things, a regional or local public park, recreational area, or recreational center, and related facilities and improvements. Cal. Gov't Code § 6546. In addition to the revenue raising powers shared in common by the Local Partners which thus may be exercised by a joint powers authority, the Mello Roos and Integrated Financing District Acts explicitly apply to joint powers authorities. Cal. Gov't Code §§ 53316, 53317(h), 53177, 53179(f).

b. Examples of Joint Powers Authorities.

i) East Contra Costa County Habitat Conservation Plan Association and the East Contra Costa County Habitat Conservancy

The East Contra Costa County Habitat Conservation Plan Association ("ECCCHCPA") (http://www.co.contra-costa.ca.us/depart/cd/water/HCP/index.html) is a joint powers authority formed by Contra Costa County, four cities within the county, the Contra Costa Water District, and East Bay Regional Park District, to manage and fund the development of the East Contra Costa County Habitat Conservation Plan/Natural Communities Conservation Plan ("ECCC HCP/NCCP"). In 1988, the USFWS and DFG sent a letter to local government agencies urging the development of a regional habitat conservation plan for east Contra Costa County. Contra Costa County, the four cities, and the two districts formed this joint powers authority in 2000 to be the lead agency in drafting the habitat conservation plan and overseeing compliance with the California Environmental Quality Act and National Environmental Policy Act.

In July, 2007 the USFWS approved the ECCC HCP/NCCP and issued an incidental take permit covering an approximately185,000-acre planning area. The plan provides a framework and funding mechanism to protect natural resources in eastern Contra Costa County while improving and streamlining the environmental permitting process for impacts on rare and sensitive species and their habitat.

In April, 2007, Contra Costa County and the four cities formed a new joint powers authority, the East Contra Costa County Habitat Conservancy, which is responsible for implementation of the ECCC HCP/NCCP. Among other things, the Conservancy is principally responsible for managing revenues from plan related mitigation fees, acquiring and managing habitat lands, and monitoring and reporting on plan implementation. The Conservancy is governed by a board of directors comprised of one elected representative of the County and each of the four cities. The two districts that were part of the original joint powers authority are not members of the board of directions. Instead they are members of advisory committees formed to make recommendations to the Conservancy about how to coordinate implementation of the plan with the districts' activities. The Contra Costa Water District is a member of a "Flood Control and Water Conservation Committee," and the East Bay Regional Park District is a member of a "Habitat and Regional Parks Partnership Liaison Committee."

ii) Other Examples of Joint Powers Authorities

Joint powers authorities are often combined with other organizational structures. For example:

The Santa Monica Mountains Conservancy (http://smmc.ca.gov/partners.html) is a department within the Resources Agency established by Public Resources Code section 33200, to protect the Santa Monica Mountain Zone. The conservancy is a state-chartered conservancy, a form of organization discussed below. The conservancy has entered into seven agreements to create joint powers authorities with different public entities. The URL provided links to a brief description of the joint powers authorities that the conservancy has established, together with the seven agreements forming those authorities.

The Conejo Open Space Conservation Agency (http://www.conejo-openspace.org) is a joint powers agency formed by the City of Thousand Oaks and the Conejo Recreation and Park District, a special district. The joint agency has been addressing open-space needs in and around the City of Thousand Oaks since 1977. It works closely with a nonprofit, the Conejo Open Space Foundation (http://www.cosf.org/2001/html/home.html), to promote and maintain open space and trails.

c. Relative Strengths of Joint Powers Authorities.

A joint powers authority has the legal authority, credibility, revenue-generating ability (including the authority to receive and manage public and private grants), capacity, and stability of a government agency. The Local Partners themselves would presumably govern a joint powers authority (ensuring control and accountability), and the terms of a joint exercise of powers agreement could ensure that the joint powers authority is sufficiently focused on implementation of the SCVHCP. A joint powers authority is relatively efficient in that it is easy

to form and to add members as compared with either a special district formed under a principal act or a district or conservancy formed under special act of the Legislature. It may also rely on one of its members to provide staff, thus minimizing additional overhead costs. The structure of joint powers authorities are flexible and can be adapted to formalize collaborations with other public and private entities and as otherwise necessary to meet the needs of its member agencies. A joint powers authority would provide a good way to share the responsibility for and potential liability associated with implementation of the SCVHCP.

A joint powers authority would not, however, be any more efficient than any of the Local Partners acting independently under Option 1. It would be subject to the Brown Act and laws governing contracts with public agencies, and would likely be perceived as creating an unwanted "additional layer of government."[3] Finally, a joint powers authority would have the same capability and capacity of its members. Additional expertise in the acquisition and management of land, for example, would have to be developed within the joint powers authority or secured through a partnership with another entity or contractor.

Option 4: Form a private nonprofit tax-exempt public benefit corporation.

a. Overview and Controlling Law.

The California Nonprofit Public Benefit Corporation Law (Cal. Corp. Code § 5110, et seq.) sets forth the requirements for forming and operating a nonprofit. The affairs of a nonprofit are ultimately controlled by a board of directors, which may delegate certain powers to others.

A nonprofit corporation must have a chairman of the board (or president, or both), a secretary, and a chief financial officer. Within certain limits, more than one title can be held by a single person. The corporation can also have other officers, as desired. By law there is no prescribed number of directors, but the articles of incorporation or bylaws may set a minimum or maximum number.

New board members may be elected by members of the corporation, chosen by the current board, or designated by another person or entity. No more than 49% of directors may be "interested persons," meaning persons who are paid to render services to the corporation and their family-members.

A nonprofit corporation may have "members," but is not required to. A member is a person given the right to vote on specified matters, including, for example: (1) the election of directors; or (2) changes to the articles of incorporation or bylaws. Non-members may also be given certain rights, such as the right to receive notices of meetings. If there are no members, the board of directors holds the powers that members otherwise might.

[3] The legislation that enables formation of joint powers authorities explicitly allows the new agency to execute its duties with the help of another more flexible entity, such as a nonprofit corporation. The joint powers authority could thus form a public-private partnership and potentially ameliorate concerns regarding the formation of a new government agency.

b. Example of Nonprofit: The Natomas Basin Conservancy.

The parties to the implementation agreement for the Natomas Basin Habitat Conservation Plan (USFWS, DFG, the City of Sacramento, and County of Sutter) have selected The Natomas Basin Conservancy (http://www.natomasbasin.org) as the "plan operator." Under the agreement, any failure by the plan operator to carry out the city's and county's obligations, is attributed to the city and county.

The plan operator is responsible for acquiring, locating, managing and maintaining the "mitigation lands" acquired pursuant to the habitat conservation plan. In doing so, the plan operator must consult with the wildlife agencies and the "technical advisory committee" established to help implement the plan. In the implementation agreement, the conservancy also agrees to "accept" mitigation fees from the city and county, and agrees to use those fees exclusively to implement its responsibilities as described in the habitat conservation plan. The conservancy is also required to establish an endowment sufficient to permanently sustain management of the mitigation lands beyond the termination or expiration of the incidental take permits.

In addition, the conservancy prepares:

- site-specific management plans for each "mitigation land site" that it acquires;
- a "planwide biological monitoring plan";
- regular surveys of species covered under the plan; and
- an "implementation annual report."

If the conservancy is dissolved or goes bankrupt, the accumulated mitigation lands and fees go to DFG, or to another successor that may be agreed upon by DFG, the USFWS, the City, and the County.

The conservancy is governed by a ten-member board of directors. All board members are appointed to three-year terms of office by the City of Sacramento and the County of Sutter. The city and the county each appoint five members. Through its bylaws and the implementation agreement, the conservancy has undertaken to comply with selected provisions of the Brown Act, a commitment that has reportedly hampered its ability to negotiate land deals effectively.

c. Relative Strengths of Nonprofits.

Private nonprofit corporations can be operated efficiently because they tend to have low overhead and can engage in hiring, procurement and contracting with relative speed and flexibility. Forming a new nonprofit is relatively easy and inexpensive, but as with all new organizations, would require an initial investment for startup costs. A nonprofit corporation could receive and manage public and private grants. With appropriate approvals from the Internal Revenue Service and Franchise Tax Board, a nonprofit may be deemed a charity, rendering donations to the entity tax deductible for the donors. As a result, a nonprofit may have an advantage in obtaining public and private grant funding, compared with a government agency. If a new nonprofit corporation is formed, the Local Partners could appoint its board of directors, ensuring a high degree of accountability. However, an existing, independent nonprofit would

likely to be more competitive for public and private grant funds. A nonprofit that is directly accountable to the Local Partners may be perceived to be focused too much on the Local Partners' obligation to implement the SCVHCP, rather than on conservation or other public interests generally. (The Natomas Basic Conservancy has reported this problem.) Either a newly formed or existing nonprofit would likely have sufficient focus and credibility as a conservation organization with the state and federal agencies and the general public if its mission and bylaws reflected a commitment to conservation.

However, the legal authority of a private nonprofit corporation is limited as compared to a government agency. Nonprofits cannot assess fees, impose taxes, or issue bonds, and a private nonprofit corporation probably cannot manage fees collected under the Mitigation Fee Act. A nonprofit could not enforce compliance with the SCVHCP. In addition, nonprofits, particularly new nonprofits, do not have the stability of other potential implementing entities, such as government agencies. An established nonprofit conservation group could well have the capacity and capability to perform important elements of SCVHCP implementation, such as land acquisition and management. However, a newly formed nonprofit corporation would not.

Option 5: Create a state-chartered conservancy.

a. Overview and Controlling Law.

State-chartered conservancies (http://resources.ca.gov/dbcc.html) are board-governed departments within the California Resources Agency, which are charged with acquiring land within specified geographic areas in order to advance specified conservation goals. Conservancies can also facilitate the acquisition of land by other entities.

There are currently nine conservancies in California:

- California Tahoe Conservancy
- State Coastal Conservancy
- Santa Monica Mountains Conservancy
- San Joaquin River Conservancy
- San Diego River Conservancy
- Coachella Valley Mountains Conservancy
- Sierra Nevada Conservancy
- San Gabriel and Lower Los Angeles Rivers and Mountains Conservancy, and
- Baldwin Hills Conservancy

The boards of each of these, except for the State Coastal Conservancy, include a mix of state and local members. The Santa Monica and Coachella conservancies also include federal members.

b. Example of State-chartered Conservancy: Coachella Valley Mountains Conservancy.

The Coachella Valley Mountains Conservancy (http://www.cvmc.ca.gov) was established by the Legislature in 1990. In 1997, the conservancy became a department within the Resources Agency. In 2000, the conservancy's mission and territory were expanded to include acquisition of preserve lands upon approval of the Coachella Valley Multiple Species Habitat Conservation Plan/Natural Community Conservation Plan.

The conservancy has a staff of four and is governed by a twenty-eight-member board, including federal, state, and local members. According to staff at the Coachella Valley Association of Governments, it is likely that the conservancy would be involved in land acquisition under the Coachella Valley Multiple Species Habitat Conservation Plan/Natural Community Conservation Plan, but somewhat less likely that it will be managing the preserves, since its staff is small. More likely, the management function will be contracted out to a group such as the Center for Natural Lands Management, which already manages extensive acreage in the "Coachella Valley Preserve" system acquired through a 1985 HCP focused on the Coachella Valley fringe-toed lizard.

c. Relative Strengths of State-chartered Conservancies.

A state-chartered conservancy would have the stability of a state department and would likely have tremendous credibility among state and federal agencies and the general public. Because they are created by special legislation, a conservancy can be given legal authority carefully tailored to its circumstances. It could be given sufficient legal authority to implement any or all elements of the SCVHCP. Perhaps most importantly, a state-chartered conservancy would have an advantage in accessing state monies. Substantial funding in Propositions 40 and 84 is earmarked specifically for state-chartered conservancies. A new conservancy could be named in similar future bond issues. A conservancy could receive and manage public and private grants. In addition, as a state department, a state conservancy could be regularly supported in part by the state through routine budget appropriations. Conservancies often have extensive expertise in land acquisition and revenue generation and management. A new conservancy would have to develop that capacity and capability over time.

However, a state conservancies are state departments and would be governed by a board created in state legislation. That board could be composed partly by representatives of the Local Partners, but would probably also include other representatives favored by the environmental community and other political constituencies. Either as a result of the legislation that created it, or the direction of its board, a conservancy may not focus its efforts on SCVHCP implementation. Instead, it would probably have a broader conservation mandate and could have a scope that extends beyond the SCVHCP planning area. The geographic boundaries of a state-chartered conservancy are usually quite large. A conservancy may also raise concerns about efficiency in several respects. Because it requires an act of the State Legislature, formation of a conservancy is more difficult than other possible organizational forms. In addition, as they are state departments, conservancies are subject to certain procedural and administrative requirements that may be considered burdensome, including requirements regarding acquisition of land such as review by the California Department of General Services.