

ATTACHMENT A

SANTA CLARA VALLEY HABITAT AGENCY

Participating Special Entity Policy

A. **Purpose:**

This policy describes the circumstances under which the Santa Clara Valley Habitat Agency (Agency) will consider entering into a Participating Special Entity (PSE) agreement as described in the Santa Clara Valley Habitat Plan (Habitat Plan or Plan) and other applicable governing documents, and establishes the general requirements for such an agreement and the process for considering, approving, and enforcing such an agreement.

B. **Definitions:**

1. **“Covered Activities”** – is as defined in Section 3.13 of the Santa Clara Valley Habitat Plan Implementing Agreement.

2. **“Covered Species”** – is as defined in Section 3.14 of the Implementing Agreement.

3. **“Participating Special Entity” or “PSE”** – is defined in Section 3.29 of the Implementing Agreement as an entity that is not subject to the Permittee City’s or the Permittee County’s land use or other regulatory authority that has entered into a special agreement with the Habitat Agency pursuant to Implementing Agreement section 7.4.2 to receive Authorized Take Coverage for a project or activity within the Permit Area. A PSE is a public or quasi-public entity that receives take authorization under the Habitat Plan for an activity that may affect Covered Species and their habitats. Examples of potential PSEs are listed in Chapter 8.4 of the Habitat Plan.

4. **“Permit Area”** – Is defined in Section 3.31 of the Implementation Agreement and is further described in Chapter 1.2.2 of the Habitat Plan and is depicted in Figure 1-2 of the Habitat Plan.

C. **Implementation Board:**

The Implementation Board shall consider the approval of all PSE agreements, and may approve, modify, or deny such agreements. The Implementation Board shall enforce PSE Agreements. The Implementation Board may amend this policy by resolution.

D. Process for Considering a Participating Special Entity Agreement:

Take authorization may be granted to an applicant for PSE by the Agency for one or more Covered Activities. The Agency has discretion whether or not to approve any such application and to establish appropriate conditions of permit coverage which will be set forth in the required agreement between the Agency and the PSE. The application and approval process is as follows:

1. An application to enter into a PSE Agreement shall be made to the Agency in the form prescribed by the Agency Executive Officer (Executive Officer) and approved by Agency Legal Counsel and shall include all of the information required in Chapter 6.8 and Chapter 8.4 of the Habitat Plan. The application shall include the completed Habitat Plan application package, payment of Administrative Costs as required by resolution of the Governing Board and this Policy, and any additional information required by the Executive Officer in order to evaluate whether the Agency should exercise its discretion to approve an application. The Executive Officer shall provide copies of the application to the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife (the "Wildlife Agencies") as well as the local jurisdiction(s) in which the project occurs.

2. If a submitted PSE application is incomplete, the Executive Officer shall so advise the applicant in writing and provide the applicant an opportunity to file a complete application. If the application is not completed within the time period provided in the written notice, the Executive Officer shall notify the applicant in writing that the application is denied. The denial of the incomplete application by the Executive Officer is final.

3. The Executive Officer shall review a PSE application for consistency with the Habitat Plan (including Chapter 6.8 and Chapter 8.4), the Implementing Agreement, this Policy, and the permits issued under the Plan by the Wildlife Agencies (collectively, the Governing Documents). The Executive Officer may consult the Agency's Technical Advisory Committee and utilize Agency consultants during this review.

4. If the submitted application is inconsistent with the Governing Documents, the Executive Director shall so advise the applicant in writing and provide the applicant an opportunity to address, and if possible, correct the inconsistency. If the Executive Officer determines that the inconsistency is not corrected within the time period provided in the written notice, the Executive Officer shall notify the applicant in writing that the application is denied. This denial of the inconsistent application by the Executive Officer is final, unless a timely written request for review is filed with the Clerk of the Implementation Board within 10 days of the denial, which request shall specify in detail the reasons for the review and include

all supporting documentation relevant to the applicant's request for review. Requests for review shall be scheduled for the next available meeting of the Implementation Board that is no less than 30 days from the date of the request for review. The Implementation Board may approve, modify or deny the PSE application. The Implementation Board's determination shall be consistent with the Habitat Plan and Agency Policy. Any modification or approval by the Implementation Board shall be returned to the Executive Officer for preparation of a PSE agreement in a manner consistent with Agency policy and with the direction of the Implementation Board.

5. If a PSE application appears to be consistent with the Governing Documents, or could be found to be consistent once appropriate conditions are imposed under a PSE Agreement, the Executive Officer will schedule the application for consideration by the Implementation Board and will provide his/her recommendation on the application including conditions of approval to be included in the agreement. The Agency's template PSE Agreement, as approved by the Wildlife Agencies, will be used. The Agreement will define all planning, implementation, management, enforcement and funding responsibilities necessary for the PSE to comply with the permits and will address the legal and equitable remedies available to the Agency if the PSE fails to perform its obligations under the Agreement. The Agency will require the PSE to pay all impact fees specified in the Agency's Fee Schedule that are applicable to the requested use. Excepting charges relating to application review and processing in Section 2 above, the recipient of the PSE will also pay the charges applicable to the PSE pursuant to Chapter 8.4 of the Habitat Plan in the amount established by the Governing Board.

6. The Executive Officer will coordinate with the Wildlife Agencies to obtain their review and comments on the proposed PSE and, if they concur with the PSE, their written approval as required in Chapter 8.4 of the Habitat Plan.

7. If the Implementation Board approves a PSE Agreement and the Wildlife Agencies have approved the inclusion of the PSE, then the Agency will issue a Certificate of Inclusion to the PSE by the Agency after the PSE has executed the Agreement, paid all fee(s) and charges specified therein (or alternatively provided land in-lieu for such fees or charges or portions thereof), and satisfied any other conditions of the Agreement that must be met prior to issuance of the Certificate.

E. Master PSE Agreement: With the consent of the Wildlife Agencies, the Implementation Board may enter into a Master PSE Agreement with an entity that anticipates coverage for multiple activities planned to occur over two or more construction seasons. Such a Master Agreement may provide for subsequent project-based agreements that build upon and are

consistent with the Master Agreement. Each individual project or set of projects proposed to be added to a Master Agreement must comply with all steps under the Process for Considering a Participating Special Entity Agreement section of this policy.

F. Required findings for approval: The Implementation Board may approve a PSE Agreement only if it makes each the following findings:

1. The proposed activity complies with all terms and requirements of the Governing Documents;
2. The Wildlife Agencies have concurred in writing with approval of the PSE;
3. The impacts of the proposed activity fall within those analyzed in the Habitat Plan, the ESA Section 7 biological opinion for the Habitat Plan, and the Plan's EIR/EIS in general type, location, magnitude and effects;
4. The impacts of the proposed activity do not deplete the amount of take coverage to such an extent that not enough is available for future Covered Activities;
5. The proposed activity does not conflict with the conservation strategy or the ability of the Agency to meet Plan goals and objectives; and
6. The PSE Agreement will further the ability of the Agency to implement Plan goals and objectives.

G. Failure of PSE to comply with Agreement: As provided in Section 7.4.2 of the Implementing Agreement, the Agency must withdraw the Certificate of Inclusion and terminate authorized take coverage extended to a PSE if the PSE fails to comply with the terms of the PSE Agreement. The Executive Officer shall annually report to the Implementation Board regarding compliance of all outstanding PSEs. Should a PSE fail to comply with the terms of its PSE Agreement, the Executive Officer shall place the matter on a meeting agenda of the Implementation Board for review and possible action to withdraw the Certificate and terminate take coverage. The PSE will be given at least 14 days notice of any meeting at which such actions may be taken.

H. Mitigation Fees: The PSE shall be required to pay all applicable mitigation fees in the manner and amount established by ordinance and/or resolution of the Governing Board.

I. Non-Mitigation Charges: In accordance with Chapter 8.4 of the Plan, the PSE shall pay to the Agency the following non-mitigation charges over and above those specified in Chapter 9 of the Plan:

1. **Administrative 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 administrative costs. In the event that such amount is insufficient to compensate the Agency for its costs of administration, 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 administrative 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 administrative costs shall be paid in full by PSE to Agency prior to the effective date of the PSE Agreement. The Executive Officer is hereby authorized to enter into agreements for the payment of administrative costs in a form approved by Agency legal counsel.

2. **PSE Charge.** In addition to the payment of all applicable Mitigation Fees (including land in lieu) as established by ordinance or resolution of the Governing Board, and as may be adjusted from time to time, the PSE shall also pay to the Agency a PSE Charge in the manner and amount established by ordinance and/or resolution of the Governing Board. As of the date of adoption of this policy, the PSE Charge is \$5,000 or ten percent (10%) of all applicable Mitigation Fees, whichever is greater. Such PSE Charge, including adjustments thereto, shall be paid in full prior to any ground-disturbing activity and shall be based upon the Mitigation Fees, including all adjustments to the Mitigation Fees, applicable at the time of commencement of the ground disturbing activity.