

**EAST CONTRA COSTA COUNTY  
HABITAT CONSERVANCY**

**DATE:** May 10, 2012  
**TO:** Governing Board  
**FROM:** Conservancy Staff  
**SUBJECT:** Participating Special Entity Agreement with Contra Costa Transportation Authority transferring the rights and unfulfilled obligations of the State Route 4 Bypass Authority

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**RECOMMENDATION**

**AUTHORIZE staff to execute a Participating Special Entity Agreement with Contra Costa Transportation Authority transferring the rights and unfulfilled obligations of the State Route 4 Bypass Authority to Contra Costa Transportation Authority for development of Phase 2 Segment 2 of the State Route 4 Bypass Project. AUTHORIZE staff to terminate existing agreement with State Route 4 Bypass Authority once the new agreement with the Contra Costa Transportation Authority takes effect.**

**DISCUSSION**

The Conservancy entered into a Participating Special Entity (“PSE”) Agreement with the State Route 4 Bypass Authority on December 23, 2008, extending take coverage for the development of Phase 2 of Segment 2 of the State Route 4 Bypass Project (“Project”). In January of 2009, the State Route 4 Bypass Authority paid all mitigation fees required in the PSE Agreement for the Project. In October 2011, the State Route 4 Bypass Authority reached an agreement with the Contra Costa Transportation Authority (“CCTA”) that transfers the duty to administer construction of the Project to CCTA. The State Route 4 Bypass Authority sent a letter to the Conservancy dated January 5, 2012, requesting transfer of coverage for the Project to CCTA. CCTA seeks to execute a new PSE Agreement with the Conservancy to receive take coverage for the Project.

CONTINUED ON ATTACHMENT: <u>YES</u>	
ACTION OF BOARD ON: <u>May 10, 2012</u> APPROVED AS RECOMMENDED: _____	
OTHER:	
<b><u>VOTE OF BOARD MEMBERS</u></b>	
<u>  </u> UNANIMOUS	
AYES: _____	I HEARBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF AN ACTION TAKEN AND ENTERED ON THE MEETING RECORD OF THE CONSERVANCY GOVERNING BOARD ON THE DATE SHOWN.  ATTESTED _____ <i>CATHERINE KUTSURIS, SECRETARY OF THE EAST CONTRA COSTA COUNTY HABITAT CONSERVANCY</i>  BY: _____, DEPUTY
NOES: _____	
ABSENT: _____	
ABSTAIN: _____	

The State Route 4 Bypass Project (“Bypass”) is a cooperative effort between east County cities and Contra Costa County. The purpose of the Bypass is to ease traffic congestion in Brentwood and Oakley and to provide access to the growing areas of southeast Antioch and western Brentwood. The Project, Phase 2 of Segment 2, consists primarily of the addition of two eastbound lanes from south of Lone Tree Way to south of San Jose Avenue. This includes the necessary on/off ramps, a western extension of Sand Creek Road, and a clear span bridge crossing over Sand Creek.

In order for CCTA to receive permit coverage under the HCP/NCCP, the Conservancy and CCTA must enter into an agreement obligating compliance with the applicable terms and conditions of the Implementing Agreement, the HCP/NCCP, and the state and federal permits. The agreement must describe and bind CCTA to perform all the avoidance, minimization, and mitigation measures applicable to the Project. Conservancy staff and CCTA have jointly prepared a proposed PSE Agreement extending take coverage and transferring the rights and unfulfilled obligations of the State Route 4 Bypass Authority to CCTA. The proposed PSE Agreement contains the same terms and conditions as the original PSE Agreement with the State Route 4 Bypass Authority, but recognizes that all required mitigation fees have been paid. The proposed PSE Agreement does provide for CCTA reimbursement of Conservancy staff and attorney costs associated with developing and processing the proposed PSE Agreement, advising CCTA on implementing permit conditions before and during construction, and reviewing reports on construction and compliance monitoring. The proposed PSE Agreement caps such costs at \$10,000.

**Next steps:** If the Conservancy Governing Board authorizes staff to execute the proposed PSE Agreement, key next steps in granting take coverage would be as follows:

- CCTA executes the PSE Agreement.
- Staff will seek concurrence from the Wildlife Agencies as required in Section 8.4 of the HCP/NCCP, that the PSE Agreement includes all applicable requirements of the Plan and imposes a duty on CCTA to implement them. If, and only if, the Wildlife Agencies concur, the Executive Director of the Conservancy will sign the PSE Agreement. Note: Participating Special Entity Agreements, unlike the granting of take authorization by a participating City or County, require Wildlife Agency concurrence.
- The Conservancy issues CCTA a Certificate of Inclusion. Take authorization would then be in effect, subject to the terms of the PSE Agreement.
- The Conservancy terminates the PSE Agreement with the State Route 4 Bypass Authority.
- CCTA implements the Project subject to the terms of the PSE Agreement including:
  - a) conducts pre-construction surveys to determine which species-specific avoidance and minimization measures are required during construction.
  - b) develops and submits a construction monitoring plan to the Conservancy in accordance to Section 6.3.3 of the HCP/NCCP.

**Attachments:**

1. Letter from CCTA requesting new PSE Agreement
2. Proposed PSE Agreement with Contra Costa Transportation Authority



# Joint Exercise of Powers Agency

City of Antioch City of Brentwood City of Oakley County of Contra Costa

January 5, 2012

2012 JAN 20 11:58

DEPARTMENT OF CONSERVATION  
AND DEVELOPMENT

John Kopchik  
East Contra Costa County Habitat Conservancy  
C/o Contra Costa County Department of Conservation and Development  
651 Pine Street, North Wing, 4<sup>th</sup> Floor  
Martinez, CA 94553

Re: HCP Agreement/Permit for the SR4 Bypass Sand Creek Road Interchange and 4-Laning Project (SR4 Bypass - Segment 2)

Dear Mr. Kopchik:

As we discussed, CCTA will be performing the construction administration of the SR4 Bypass, Sand Creek Interchange and 4-lane widening project (Segment 2), which is permitted under an Agreement/Permit between the East Contra Costa County Habitat Conservancy (Conservancy) and the SR4 Bypass Authority. Since CCTA will be administering the project, we are requesting the Conservancy transfer the Agreement/Permit for the subject project to the Contra Costa Transportation Authority (CCTA) at the Conservancy's March 2012 Meeting. We understand that CCTA will need to enter into an agreement with the Conservancy for this project and requesting your assistance in completing this transfer. Until the transfer is effective in March 2012, the SR4BA will retain and use the permit for any project needs to maintain the project implementation schedule.

Please contact me at 925-595-4587 if you have any questions.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Dale Dennis', is written over a blue horizontal line.

Dale Dennis  
Program Manager

NW:nw

G:\transeng\2011\SR4BPA\Correspondence\SR4BA letter to J. Kopchik to transfer HCP Agreement.doc

cc: R. Chittenden, CCTA

**Board of Directors:**  
Jim Frazier, Chair  
Robert Taylor, Vice Chair  
Federal Glover  
Brian Kalinowski

**Authority Staff Office:**  
Contra Costa County  
255 Glacier Drive  
Martinez, CA 94553  
(925) 686-0619

**AGREEMENT IMPLEMENTING THE EAST CONTRA COSTA COUNTY  
HABITAT CONSERVATION PLAN/NATURAL COMMUNITY  
CONSERVATION PLAN AND GRANTING TAKE AUTHORIZATION**

**BETWEEN**

**EAST CONTRA COSTA COUNTY HABITAT CONSERVANCY, Implementing  
Entity, and CONTRA COSTA TRANSPORTATION AUTHORITY, a  
Participating Special Entity**

**1.0 PARTIES**

This Agreement is made and entered into by the East Contra Costa County Habitat Conservancy (“Conservancy”) and **CONTRA COSTA TRANSPORTATION AUTHORITY** (“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 East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan (“HCP/NCCP,” or “Plan”) is intended to provide a comprehensive framework to protect natural resources in eastern Contra Costa County, 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 East Contra Costa County while balancing open space, habitat, agriculture, and urban development. To that end, the Plan describes how to avoid, minimize, and mitigate, to the maximum extent practicable, impacts on Covered Species and their habitats while allowing for certain development and other activities in selected regions of the County and the Cities of Pittsburg, Clayton, Oakley, and Brentwood.
- 2.2** The Conservancy is a joint powers authority formed by its members, the County of Contra Costa (“County”), the City of Pittsburg (“Pittsburg”), the City of Clayton (“Clayton”), the City of Oakley (“Oakley”) and the City of Brentwood (“Brentwood”), to implement the HCP/NCCP.
- 2.3** The HCP/NCCP covers approximately one-third of the County, or 174,082 acres, all in East Contra Costa County, in which impacts from certain development and other activities are evaluated, and in which conservation will occur.
- 2.4** The area covered by the HCP/NCCP has been determined to provide, or potentially provide, habitat for twenty-eight (28) 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 Conservancy has received authorization from the United States Fish and Wildlife Service (“USFWS”) under incidental take permit TE 160958-0 (“Federal Permit”), and the California Department of Fish and Game (“CDFG”), under incidental take permit 2835-2007-01-03 (“State Permit”), for the Take of the twenty-eight (28) 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 Conservancy may enter into agreements with participating special entities to allow certain activities of the participating special entities to be covered by the Federal Permit and the State Permit, subject to the conditions in the Implementing Agreement (“IA”), the HCP/NCCP and the Permits.
- 2.7** The Conservancy entered into a participating special entity agreement with the State Route 4 Bypass Authority dated December 23, 2008 providing coverage for development of Phase 2 of Segment 2 of the State Route 4 Bypass Project.
- 2.8** The State Route 4 Bypass Authority has reached agreement with the Contra Costa Transportation Authority to transfer responsibility for development of Phase 2 of Segment 2 of the State Route 4 Bypass Project to the PSE.
- 2.9** The Conservancy and State Route 4 Bypass Authority have agreed to terminate their December 23, 2008 agreement as of the effective date of this Agreement.
- 2.10** Then intent of this Agreement is to transfer to the PSE the rights and unfulfilled obligations of the State Route 4 Bypass Authority under the participating special entity agreement between the Conservancy and the State Route 4 Bypass Authority under substantively the same terms and conditions of that agreement.
- 2.11** PSE is now responsible for constructing the State Route 4 Bypass project and seeks extension of the Conservancy’s permit coverage for development of Phase 2 of Segment 2 of the State Route 4 Bypass Project, which consists primarily of the addition of two lanes from the Lone Tree Way to 2360 feet south of San Jose Avenue (“Project”).
- 2.12** The Conservancy has concluded, based on the terms of this Agreement and the application submitted by PSE (the “Application”), that PSE has provided adequate assurances that it will comply with all applicable terms and conditions of the IA, the HCP/NCCP, and the Permits. The Application is attached hereto as Exhibit 1 and is hereby incorporated into this Agreement by reference. Exhibit 1 was originally completed by the State Route 4 Bypass Authority for purposes of its participating special entity agreement with the Conservancy, and the State Route 4 Bypass Authority is listed in Exhibit 1 as the “project proponent”. Under this Agreement, the PSE is the “project proponent” as referenced in Exhibit 1 and will be responsible for all obligations set forth in Exhibit 1.

### **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 DFG 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 “Agreement”** means this Agreement, which incorporates the IA, the HCP/NCCP, the Permits, and the Application by reference.
- 3.2 “Application”** means the application submitted by the PSE in accordance with Chapter 8.4 of the HCP/NCCP, and which is attached hereto as Exhibit 1. The Application contains a cover sheet, the results of required planning surveys and the avoidance, minimization and mitigation measures that will be a condition of the PSE using Conservancy’s Permits.
- 3.3 “Authorized Take”** means the extent of incidental Take of Covered Species authorized by the USFWS in the Federal Permit issued to the Conservancy pursuant to Section 10(a)(1)(B) of FESA, and the extent of Take of Covered Species authorized by CDFG in the State Permit issued to the Conservancy pursuant to California Fish and Game Code section 2835.
- 3.4 “CDFG”** means the California Department of Fish and Game, a department of the California Resources Agency.
- 3.5 “CESA”** means the California Endangered Species Act (Fish & G. Code, § 2050 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.6 “Changed Circumstances”** means changes in circumstances affecting a Covered Species or the geographic area covered by the HCP/NCCP that can reasonably be anticipated by the Parties and that can reasonably be planned for in the HCP/NCCP. Changed Circumstances and planned responses to Changed Circumstances are more particularly defined in Section 12.2 of the IA and Chapter 10.2.1 of the HCP/NCCP. Changed Circumstances do not include Unforeseen Circumstances.
- 3.7 “Covered Activities”** means those land uses and conservation and other activities described in Chapter 2.3 of the HCP/NCCP to be carried out by the Conservancy or its agents that may result in Authorized Take of Covered Species during the term of the HCP/NCCP, and that are otherwise lawful.
- 3.8 “Covered Species”** means the species, listed and non-listed, whose conservation and management are provided for by the HCP/NCCP and for which limited Take is authorized by the Wildlife Agencies pursuant to the Permits. The Take of Fully Protected Species is not allowed. The Take of extremely rare plants that are Covered Species is allowed only as described in Section 6.3 and 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 HCP/NCCP as of the date of such listing.
- 3.11 “Federal Permit”** means the federal incidental Take permit issued by USFWS to the Conservancy and other local agencies pursuant to Section 10(a)(1)(B) of FESA (permit number TE 160958-0), 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 “HCP/NCCP” or “Plan”** means the East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan.
- 3.15 “Implementing Agreement” or “IA”** means that document attached as Appendix B to the HCP/PCCP.
- 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 CDFG under section 1602 of the Fish and Game Code, as further explained in Chapter 1.3.5 of the HCP/NCCP.
- 3.17 “Listed Species”** means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is listed as endangered or threatened under FESA or CESA.
- 3.18 “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.
- 3.19 “Party” or “Parties”** means any or all of the signatories to this Agreement.
- 3.20 “Permit Area”** means the area within the Plan Area where the Conservancy has received authorization from the Wildlife Agencies for the Authorized Take of Covered Species while carrying out Covered Activities.
- 3.21 “Permits”** means the Federal Permit and the State Permit.
- 3.22 “Plan Area”** means the geographic area analyzed in the HCP/NCCP, located in the eastern portion of Contra Costa County, as depicted in Figure 1-1 of the HCP/NCCP. The Plan Area is further described in detail in Chapter 1.2.1 of the HCP/NCCP. The Plan Area is also referred to as the “Inventory Area” in the HCP/NCCP.

- 3.23 **“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 HCP/NCCP.
- 3.24 **“Proposed Activities”** means the activities described in Exhibit 1 that will be covered by the extension of the Conservancy’s take authorization.
- 3.25 **“State Permit”** means the state Take permit issued to the Conservancy and other local agencies pursuant to Section 2835 of the California Fish and Game Code (permit number 2835-2007-01-03), as it may be amended from time to time.
- 3.26 **“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.
- 3.27 **“Unforeseen Circumstances”** under the Federal Permit means changes in circumstances affecting a Covered Species or geographic area covered by the HCP/NCCP that could not reasonably have been anticipated by the Plan developers and USFWS at the time of the Plan’s negotiation and development, and that result in a substantial and adverse change in the status of a Covered Species. **“Unforeseen Circumstances”** under the State Permit means changes affecting one or more species, habitat, natural community, or the geographic area covered by the Plan that could not reasonably have been anticipated at the time of Plan development, and that result in a substantial adverse change in the status of one or more Covered Species.
- 3.28 **“USFWS”** means the United States Fish and Wildlife Service, an agency of the United States Department of Interior.
- 3.29 **“Wildlife Agencies”** means USFWS and CDFG.

#### **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 Proposed Activities, 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 HCP/NCCP, 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 HCP/NCCP 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 HCP/NCCP 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 HCP/NCCP, including but not limited to those identified in Chapter 6, as described in the Application and this Agreement.

## **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 a planning survey report for approval by the Conservancy in accordance with Chapter 6.2.1 of the HCP/NCCP. This planning survey report is contained within the Application, which describes the results of the planning survey and describes in detail the pre-construction surveys, construction monitoring, avoidance measures and mitigation measures that apply to the Proposed Activities and shall be performed by PSE. Based on the Application, the Conservancy has determined that PSE will implement and comply with all applicable preconstruction surveys and construction monitoring requirements described in Chapters 6.2.2 and 6.2.3 of the HCP/NCCP.

## **5.3 No Take of Extremely Rare Plants or Fully Protected Species**

Nothing in this Agreement, the HCP/NCCP or the Permits shall be construed to allow the Take of extremely rare plant species listed in Table 6-5 of the HCP/NCCP (“No-Take Plant Population”) or any Fully Protected Species under California Fish and Game Code sections 3511, 4700, 4800, 5050 or 5515. PSE shall avoid Take of these species.

### **5.3.1 Golden Eagle**

The Permits do not authorize Take of the golden eagle and PSE shall avoid Take of any golden eagle. The avoidance measures set forth in the HCP/PCCP, including but not limited to Conservation Measure 1.11, should be adequate to prevent Take of golden eagles, but the Conservancy shall notify PSE in writing of any additional or different conservation measures that are designed to avoid Take of these species and that apply to PSE. PSE shall implement all such avoidance measures to avoid Take of golden eagles.

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

Jurisdictional Wetlands or Waters are present on the site of the Proposed Activities, and PSE has provided to the Conservancy a jurisdictional delineation in accordance with Chapter 6.3.1 of the HCP/NCCP. PSE shall pay the Wetland Mitigation Fee based on the delineation, as specified in the Application.

## **5.5 Fees and Dedications**

Under the participating special entity agreement between the State Route 4 Bypass

Authority and the Conservancy, the Authority agreed to pay the Conservancy \$892,209.59, which amount included all HCP/NCCP mitigation fees necessary for the Proposed Activities. The overall payment amount is based on a summation of individual HCP/NCCP mitigation fees as follows:

- Development fees: \$880,435.48
- Wetland mitigation fees: \$11,774.11
- Temporary impact fees: \$0

The State Route 4 Bypass authority submitted payment for the full amount of the fees (\$892,209.59) on January 5, 2009. The Conservancy subsequently refunded the State Route Bypass Authority \$98,159.26, as provided in the Agreement between the Conservancy and the State Route 4 Bypass Authority, due to the reduction in mitigation fee rates which occurred on March 15, 2009.

All HCP/NCCP mitigation fees necessary for the Proposed Activities have been paid. No additional HCP/NCCP mitigation fees are required under this Agreement for the Proposed Activities.

## **6.0 TAKE AUTHORIZATION**

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

As provided in Chapter 8.4 of the HCP/NCCP, after execution of this Agreement, payment of fees or dedication of land as set forth in Section 5.6, and receipt of the Wildlife Agencies' written concurrence that the Proposed Activity complies with the HCP/NCCP, the Permits and the IA, the Conservancy 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 HCP/NCCP and the Permits.

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

Once the Take authorization has been extended to the Proposed Activities, it shall remain in effect for a period of 15 years, unless and until the Permits are revoked by USFWS or CDFG, in which case the Take authorization may also be suspended or terminated.

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

### **7.1 Rights**

Upon the Conservancy's issuance of a Certificate of Inclusion to PA, PSE may Take the Covered Species while carrying out the Proposed Activities in the Permit Area, as further authorized by and subject to the conditions of this Agreement, the IA, the HCP/NCCP, and the Permits. The authority issued to PSE applies to all of the elected officials, officers, directors, employees, agents, subsidiaries, contractors, and subcontractors, and

their officers, directors, employees and agents who engage in any Proposed Activity on behalf of the PSE. 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 consultants and contractors associated with Project 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 HCP/NCCP, the Permits, including but not limited to the obligations assigned in the following chapters of the HCP/NCCP: Chapter 6.0 (Conditions on Covered Activities), Chapter 8.4 (Participating Special Entities), and Chapter 9.0 (Funding). PSE shall ensure that all mitigation, conservation, monitoring, reporting and adaptive management measures required of it are adequately funded throughout the term of this Agreement, and that monitoring, reporting and adaptive management measures are adequately funded in perpetuity as further described in the Application. PSE will promptly notify the Conservancy 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 CDFG suspend or revoke the Permits pursuant to Sections 19.0 and 21.0 of the IA, PSE will remain obligated to fulfill its mitigation, enforcement, management, and monitoring obligations, and its other HCP/NCCP obligations, in accordance with this Agreement and applicable statutory and regulatory requirements for all Proposed Activities implemented 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 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 below at Section 15.2.2 and Section 15.3.2, 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 Chapter 7 and Chapter 10 of the HCP/NCCP, and PSE shall implement any measures for such circumstances as called for in the HCP/NCCP, as described in Section 12.2 of this Agreement.

## **7.6 Obligation to Compensate Conservancy for Expenses Incurred**

PSE shall compensate the Conservancy for its direct costs associated with this Agreement, including but not limited to, staff, consultant and legal costs incurred as a result of drafting and negotiating this Agreement, monitoring and enforcement of this Agreement, and meetings and communications with PSE (collectively, Conservancy's "Administrative Costs"). Conservancy's Administrative Costs shall not exceed \$10,000. Conservancy shall provide PSE with invoices detailing its Administrative Costs monthly or quarterly, at Conservancy's discretion. PSE shall remit payment of each invoice within thirty (30) days of receiving it.

## **8.0 REMEDIES AND ENFORCEMENT**

If PSE fails to comply with the terms of this Agreement, the IA, the HCP/NCCP, or the Permits, the Conservancy may withdraw the Certificate of Inclusion and terminate any Take authorization extended to PSE. The Conservancy 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 HCP/NCCP and the Permits, and to seek redress and compensation for any breach or violation thereof. PSE shall defend, indemnify, protect, and hold harmless the Conservancy from and against any claim, loss, damage, cost, expense, or liability directly or indirectly arising out of or resulting from (i) PSE's breach of this Agreement or the inaccuracy of any representation or warranty made by PSE in this Agreement, or (ii) PSE's, performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement, including without limitation claims caused by or arising out of the negligence, recklessness, or intentional misconduct of any representative, employee, or agent of PSE. The Parties acknowledge that the Covered Species are unique and that their loss as species would be irreparable and that therefore injunctive and temporary relief may be appropriate in certain instances involving a breach of this Agreement.

## **9.0 FORCE MAJEURE**

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

- The suspension of performance is of no greater scope and no longer duration than is required by the Force Majeure;

- Within seven (7) days after the occurrence of the Force Majeure, the Party invoking this section shall give the Conservancy 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 HCP/NCCP, 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. Notices may be delivered by facsimile or electronic mail, provided they are also delivered by one of the means listed above. Delivery shall be to the name and address of the individual responsible for each of the Parties, as follows:

John Kopchik, Executive Director  
 East Contra Costa County Habitat Conservancy  
 c/o Contra Costa County Department of Conservation and Development  
 30 Muir Road  
 Martinez, CA 94553  
 Email: john.kopchik@dcd.cccounty.us  
 Phone: 925-674-7819

Ross A. Chittenden  
 Deputy Executive Director, Projects  
 Contra Costa Transportation Authority  
 2999 Oak Road, Suite 100  
 Walnut Creek, CA 94597  
 Phone: (925) 256-4735  
 Email: rchittenden@ccta.net

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 HCP/NCCP 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 Conservancy shall be able to recover its attorneys' fees and costs if it prevails.

### **10.6 Governing Law**

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

### **10.7 Duplicate Originals**

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

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

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

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

Without limiting the applicability of rights granted to the public pursuant to FESA, CESA, NCCPA or other applicable law, this Agreement shall not create any right or interest in the public, or any member thereof, as a third party beneficiary thereof, nor shall it authorize anyone not a Party to this Agreement to maintain a suit for personal

injuries or property damages under the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third party beneficiaries shall remain as imposed under existing state and federal law.

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

Any reference in this Agreement, the IA, the HCP/NCCP, 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 HCP/NCCP, or the Permits must be in compliance with all applicable local, state and federal laws and regulations.

#### **10.12 Severability**

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

#### **10.13 Due Authorization**

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

#### **10.14 No Assignment**

The Parties shall not assign their rights or obligations under this Agreement, the Permits, or the HCP/NCCP 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  
Implementing Agreement to be in effect as of the date last signed below.

**EAST CONTRA COSTA COUNTY HABITAT CONSERVANCY**

By: \_\_\_\_\_  
Catherine Kutsuris, Secretary Date

By: \_\_\_\_\_  
John Kopchik, Executive Director Date

**CONTRA COSTA TRANSPORTATION AUTHORITY**

By: \_\_\_\_\_  
David E. Durant, Chair Date

Attest:

\_\_\_\_\_  
Randell H. Iwasaki, Executive Director Date