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MEMORANDUM

TO: Ken Schreiber

**FROM: Chris Beale
Merswind Reyer**

DATE: June 15, 2009

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, the Santa Clara Valley Open Space Authority, 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 implement the Santa Clara Valley Habitat Plan – A Conservation Legacy ("SCVHP"). You asked us to describe and assess alternative structures for a joint powers authority ("JPA") that could be used for purposes of implementing the SCVHP. This memorandum provides a brief overview of the joint powers authority structure in general, and two general models for that structure for purposes of selecting an implementing entity for a habitat conservation plan.

1. Joint Powers Authority 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 Act¹ ("Act"). 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

¹ 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).

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 them to do 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 powers to be exercised, and provide for the method by which the purpose will be accomplished or the manner in which the powers 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. 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.

Note that “each member of the JPA must have independent authority to perform the activity agreed to be performed jointly.” 71 Ops. Atty. Gen. 266 (1988). The Joint Exercise of Powers Act “grants no new powers [other than those explicitly conferred with respect to the issuance of bonds] but merely sets up a new procedure for the exercise of existing powers.” Id. (citing The City of Oakland v. Williams (1940) 15 Cal. 2d 542, 549). This limitation may not be circumvented by creating a so-called “limited” or “associated” member of the JPA not party to the agreement creating the JPA: “The Act contains no authority for a joint powers agency, by contract or otherwise, to enlarge upon or waive the provisions of the Act.” 81 Ops. Atty. Gen. 362 (1998) (concluding that a JPA could not have “different classes of members,” some authorizing issuance of bonds and others not). We were unable to find an example of a JPA agreement in which different classes of JPA members are created by limiting their voting rights to specific actions or decisions over which they have authority. This Attorney General’s Opinion appears to suggest that such an arrangement would not be valid.

Boundaries. Joint powers authorities are free to determine their jurisdictional boundaries. While boundaries 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.

Note that the Act does not create independent authority to delegate power: member entities may not delegate power where no such authority to delegate exists outside the Act. 71 Ops. Atty. Gen. 266 (1988) (noting also that “[a]s a general rule, powers conferred upon public

agencies and officers which involve the exercise of judgment and discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization”). Thus, a JPA member entity may not delegate any power under the Act to a non-JPA-member entity (such as another participant in a habitat conservation plan effort) in the absence of the authority to delegate such power outside the Act.

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).

2. Model Structures of Joint Powers Authorities.

There are at least two general models for a JPA that could be used for an implementing entity for a habitat conservation plan like the SCVHP. The models differ by the composition of the JPA and, therefore, by the powers shared by the JPA members. For reference, the relevant powers of each of the Local Partners as we understand them are summarized below.

	Cities/County	Transportation Authority	Water District	Open Space District
<i>Power to:</i>				
Contract	x	x	x	x
Sue & be sued	x	x	x	x
Eminent Domain	x	x	x	x
Tax	x	x	x	x
Incur debt	x	x	x	x
Issue bonds	x	x	x	x
Apply for and manage public grants	x	x	x	x
Apply for and manage private grants	x	x	x	x
Acquire & hold property	x	x	x	In specified circumstances
Establish special assessment districts	x	In specified circumstances	—	—
Enforce (police power)	x	—	—	—
Assess & manage mitigation fees	x	—	—	—

i) Full Membership JPA

One potential model is a “full membership” JPA. This model maximizes participation by the Local Partners by making them all JPA members. However, the powers of the JPA would be only those shared by all parties. Under this model, each city and the County would individually collect and manage SCVHP related mitigation fees. One or more Local Partners could be assigned responsibility for specific SCVHP related actions in a separate contract or agreement (such as the SCVHP Implementing Agreement) but otherwise all decisions regarding SCVHP implementation would be made by the JPA board.

**ii) Limited Membership with Advisory Committee Input:
East Contra Costa County Habitat Conservancy**

Another potential model, patterned after the JPAs that implement the habitat conservation plans in Contra Costa County and Riverside County, is a JPA composed only of the county and the cities participating in the SCVHP. This model maximizes the powers the JPA can exercise by reducing its membership to those entities that share the greatest range of relevant powers. Those entities would form the JPA and would ultimately be responsible for making all decisions. However, other interested entities could be given the ability to weigh in on JPA decisions affecting their interests by becoming members of advisory committees with whom the JPA must consult prior to making those decisions. As with the first model, this model permits implementation of discrete activities under a contract between the JPA and non-JPA-member interested parties.

Contra Costa County provides a recent example of this JPA structure. In April 2007, Contra Costa County and four cities within the County formed a joint powers authority, the East Contra Costa County Habitat Conservancy, which is responsible for implementation of the East Contra Costa County Habitat Conservation Plan and Natural Community Conservation Plan (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. Two districts that were plan participants are not members of the board of directors. 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’ realm of 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.”

Here, by analogy, the JPA members would be the County of Santa Clara, the City of Gilroy, the City of Morgan Hill, and the City of San Jose; the JPA would collect and manage fees necessary for implementation of the SCVHP. The Santa Clara Valley Water District (“Water District”), the Santa Clara Valley Open Space Authority (“OSA”), and the Santa Clara Valley Transportation Authority (“VTA”) would not be on the JPA’s board of directors, but they would be members of advisory committees defined in the JPA agreement that would review matters affecting their interests. The JPA agreement could require that certain actions or decisions must

be reviewed by these advisory committees. It could further provide that such actions or decisions must be *approved* by the advisory committees as a precondition of approval by the JPA. For example, the JPA agreement could provide that a “Water Conservation Committee” must first review and approve certain SCVHP actions pertaining to stream restoration or canal maintenance before they could be approved by the JPA.

The Water District, OSA or VTA could also be directly or indirectly responsible for the implementation of certain types of actions. For example, the SCVHP implementing agreement could provide that the Water District is responsible for implementing or overseeing stream restoration activities or provide that the Open Space Authority is responsible for implementing or overseeing certain land acquisition and management responsibilities. The JPA’s direct authority over those actions could be limited accordingly.

3. Relative Strengths of Each JPA Model.

Both JPA models would provide a way to share the responsibility for and potential liability associated with implementation of the SCVHP. And both models allow for a great deal of flexibility in how they would be administered. As with any JPA, under either of these JPA models, staff could be hired by the JPA, borrowed from any of the JPA members, or retained under contract with a separate person or entity. Similarly, under either JPA model, office space and equipment, and other capital resources could be secured independently, borrowed from any of the JPA members (e.g., the JPA could be housed in a County building), or secured by and through a private entity (e.g., the JPA could, under contract, use the office space and other resources of a private non-profit entity). However, the two JPA models differ in key ways with respect to their powers and governance.

Full Membership JPA – Figure 1

The first model would give all Local Partners an equal role in the JPA, which would ensure that the SCVHP implementing entity is fully accountable to all Local Partners. However, under this model the JPA would have more limited powers, which could limit its effectiveness. The JPA would likely be unable to collect or manage mitigation fees and would be unable to take actions that require the land use authority or police power of the cities or the County. Under this model, those types of actions would require the coordination of independent actions by the cities and the County.

Limited Membership JPA – Figure 2

The second model would maximize efficiency by maximizing in one entity, the JPA, most or all of the powers necessary to implement the SCVHP. The second model would also preserve the ability of all Local Partners to influence SCVHP implementation by requiring the JPA to act in consultation with non-JPA-member Local Partners on matters of interest to those Local Partners. However, this model would not give all Local Partners an equal role in the SCVHP implementing entity.

Figure 1

JPA Model One: Full Membership

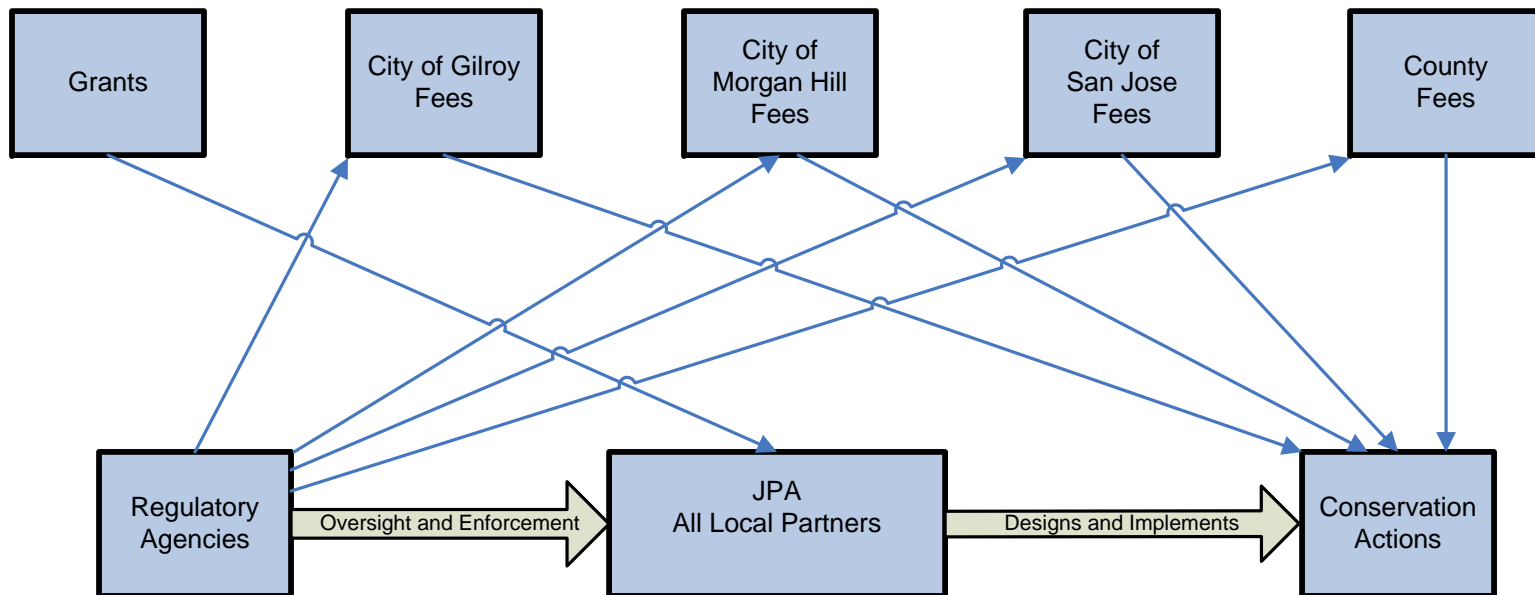


Figure 2

JPA Model Two: Limited Membership with Advisory Committees

