

Appendix H

# **Conservation Easement Template**



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RECORDING REQUESTED BY AND )  
WHEN RECORDED MAIL TO: )  
)  
)  
[Easement Holder] )  
[Easement Holder's Address] )  
Attention: \_\_\_\_\_ )  
)

Space Above Line for Recorder's Use Only

TEMPLATE NOTES:

- *This template is prepared for use on privately-owned fee lands. Certain of the provisions below will likely require modification for conservation easements covering Permittee- or other public entity- owned properties (i.e. management plan, recreational uses, and condemnation provisions.)*
- *Consistent with the Habitat Plan, this template assumes the Implementing Entity will hold the conservation easements over privately-owned fee lands. Italicized bracketed language is included below for insertion in conservation easements the Implementing Entity determines will be held by another nonprofit organization, as allowed in the Habitat Plan.*
- *This template does not identify recreational/public access as allowable uses. Additional provisions (i.e. specific restrictions and allowed uses, as well as reference to “recreation plan” contemplated by SVHCP) would need to be included if any recreational uses are contemplated for the Easement Area/Property [use Easement Area or Property, as applicable depending on whether part or all of a legal parcel is being committed to the reserve area, selection made in Recital A].*
- *This template also assumes the Implementing Entity, and not the Landowner, will conduct the management and monitoring activities set forth in the Management Plan.*

CONSERVATION EASEMENT AGREEMENT

THIS CONSERVATION EASEMENT AGREEMENT (the “**Agreement**”) is made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between [insert full legal name of landowner] (“**Landowner**”), and [Santa Clara Valley Habitat Agency, a California Joint Powers Authority] (“**Easement Holder**”). Landowner and Easement Holder are also referred to herein individually as a “**Party**” and collectively as the “**Parties.**”

RECITALS

A. Landowner is the [insert description of ownership interest] of certain real property

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containing approximately \_\_\_\_\_ acres, located in the County of Santa Clara, State of California, more particularly described in **Exhibit A** attached hereto and incorporated herein by this reference (the “**Property**”) and depicted on the map attached hereto as **Exhibit B** and incorporated herein by reference.

**OR**

A. Landowner is the [*insert description of ownership interest*] of certain real Property located in the County of Santa Clara, State of California, more particularly known as Assessor’s Parcel Number(s) XXXXXX. Landowner intends to grant this Conservation Easement over approximately xx acres of the Property (the “**Easement Area**”), as described in **Exhibit A** attached hereto and incorporated herein by this reference and depicted on the map attached hereto as **Exhibit B** and incorporated herein by reference.

B. This Agreement is being executed and delivered to satisfy certain habitat conservation requirements set forth in the following documents (collectively, the “**Habitat Plan Instruments**”):

(i) The Santa Clara Valley Habitat Plan (“**Habitat Plan**”), dated \_\_\_\_\_, prepared by County of Santa Clara County (“**County**”), City of San Jose (“**San Jose**”), City of Gilroy (“**Gilroy**”), City of Morgan Hill (“**Morgan Hill**”), Santa Clara Valley Water District (“**Water District**”), and Santa Clara Valley Transportation Authority (“**VTA**”), and approved by the United States Fish and Wildlife Service (“**USFWS**”) under Section 10 of the federal Endangered Species Act of 1973 (16 U.S.C. Section 1531 *et seq.*, as it may be amended from time to time) (“**ESA**”), and by California Department of Fish and Game (“**CDFG**”) under the California Natural Community Conservation Planning Act (California Fish and Game Code Section 2800 *et seq.*, as it may be amended from time to time) (“**NCCPA**”); and

(ii) Implementing Agreement for the Santa Clara Valley Habitat Plan (the “**Implementing Agreement**”), dated \_\_\_\_\_, by and among USFWS and CDFG (collectively, the “**Wildlife Agencies**”), Santa Clara Valley Habitat Plan Implementing Agency, a Joint Powers Authority (“**JPA**” or “**Implementing Entity**”), County, San Jose, Gilroy, Morgan Hill, Water District, and VTA (collectively, JPA, County, San Jose, Gilroy, Morgan Hill, Water District, VTA, are referred to herein as “**Permittees**”); and

(iii) The federal incidental take permit issued by USFWS to Permittees for the Habitat Plan pursuant to Section 10 of ESA; and

(iv) The state incidental take permit issued by CDFG to Permittees for the Habitat Plan pursuant to the NCCPA.

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C. CDFG has jurisdiction, pursuant to Fish and Game Code Section 1802, over the conservation, protection, and management of fish, wildlife, native plants and the habitat necessary for biologically sustainable populations of those species, and CDFG is authorized to hold easements for these purposes pursuant to Civil Code Section 815.3, Fish and Game Code Section 1348, and other provisions of California law.

D. USFWS is an agency of the United States Department of the Interior and is authorized by Federal law to be a third party beneficiary of the Conservation Easement and to administer the Federal Endangered Species Act, 16 U.S.C. § 1531, et seq. (“ESA”), the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c, and the Fish and Wildlife Act of 1956, 16 U.S.C. § 742(f), et seq.

E. The Easement Holder is a California joint powers authority, and authorized to hold conservation easements pursuant to, among other provisions of law, California Civil Code Section 815.3.

F. In addition to serving as the holder of the conservation easement interest created under this Agreement, JPA also serves as the “Implementing Entity” of the Habitat Plan, and as such, is responsible for overseeing implementation of the Habitat Plan Instruments, including carrying out planning and design, habitat restoration, monitoring, adaptive management programs, and periodic coordination with USFWS and CDFG. *[When used herein, the term “Implementing Entity” refers to the JPA acting in its capacity as the Implementing Entity under the Habitat Plan and the Implementing Agreement, which confer separate rights and obligations on JPA that will survive any future transfer of the Conservation Easement by JPA. In contrast, the term “Easement Holder” is used herein to refer to JPA as the initial holder of such conservation easement interest, as well as any other qualified successor or assignee to which this conservation easement interest has been transferred in accordance with the terms and conditions set forth below.] [TEMPLATE NOTE: The italicized language above will require revision if JPA is not the Easement Holder.]*

G. The *Easement Area/Property* possesses wildlife, habitat values, and associated open space values that are of great importance to Easement Holder, the people of Santa Clara County and the people of the State of California and of the United States (the “**Conservation Values**”). The **Initial Conservation Values**, described in **Exhibit C** attached hereto and incorporated herein by reference, are those Conservation Values that are identified in the Habitat Plan and present on the Easement Area/Property at the time of the execution of the Agreement.

H. Following recordation of this Agreement, the *Easement Area/Property* will be incorporated into the Reserve System (as such term is defined in the Habitat Plan) (“**Reserve System**”) and will count toward the land acquisition requirements set forth in the Habitat Plan.

I. The Implementing Entity *[has developed] [will develop]* a management plan, known as “\_\_\_\_\_,” that applies to the *Easement Area/Property* (the “**Management Plan**”). The Management Plan *[has been] [will be]* developed in accordance with the applicable requirements of the Habitat Plan Instruments *[and [identify any applicable reserve unit management*

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plans]].

J. The Management Plan *[is] [upon completion, will be]* incorporated herein by reference. Landowner and Easement Holder recognize that changes (e.g., in weather cycles, natural resource management technologies, conservation practices) may dictate an adaptation in the management of the *Easement Area/Property*, consistent with the purposes of this Conservation Easement and the Habitat Plan Instruments. It may be revised from time to time with the written approval of the Landowner, Easement Holder and the Wildlife Agencies, so long as the revisions are consistent with the requirements of the Habitat Plan Instruments *[and [identify applicable reserve unit management plans]]*. A full and complete copy of the current Management Plan, including any such revisions, shall be kept on file at the offices of the Implementing Entity. *[Include if the Management Plan has not been developed as of the effective date of the agreement: The Easement Area/Property will be managed in accordance with the applicable requirements of the Habitat Plan until the Management Plan is developed.]*

K. The State of California recognizes the public importance and validity of conservation easements by enactment of California Civil Code Section 815 *et seq.*

## AGREEMENTS

NOW, THEREFORE, in consideration of the above and mutual covenants, terms, conditions and restrictions contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and pursuant to the laws of the State of California, including California Civil Code Section 815 *et seq.*, Landowner hereby voluntarily grants and conveys to Easement Holder, its successors and assigns, a conservation easement in gross forever in, on, over and across the Easement Area/Property described in Exhibit A and depicted on Exhibit B (the “**Conservation Easement**”), subject to the terms and conditions set forth herein, restricting forever the uses which may be made of the Easement Area/Property, and the parties agree as follows:

1. **Purpose.** The purpose of this Conservation Easement is to ensure that existing and future natural values and associated wildlife and habitat values of the *Easement Area/Property* will be forever protected by preventing any use of the *Easement Area/Property* that would impair or interfere with the Conservation Values. Landowner intends that this Conservation Easement will confine the use of the *Easement Area/Property* to such activities that are consistent with the purposes set forth herein, including, without limitation, those involving the preservation, restoration, and enhancement of the *Easement Area/Property*'s Covered Species and their habitats.

2. **Baseline Documentation Report.** The parties acknowledge that a Baseline Documentation Report (the “**Report**”) has been prepared for the *Easement Area/Property* and approved in writing by Landowner and Easement Holder. A copy of the Report is on file with Landowner and Easement Holder at their respective addresses for notices set forth below. The parties agree that the Report contains an accurate representation of the biological and physical condition of the *Easement Area/Property* at the time this Agreement is recorded in the Official Records of Santa Clara County (“**Official Records**”), including a full inventory of all of the

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*Easement Area/Property's* Covered Species and natural communities found thereon. Notwithstanding the foregoing, if a controversy arises with respect to the nature and extent of the physical or biological condition of the *Easement Area/Property* or the allowed uses of the *Easement Area/Property*, the parties shall not be foreclosed from utilizing any and all other relevant documents, surveys or other evidence or information to assist in the resolution of the controversy.

3. **Rights of Easement Holder.** To accomplish the purposes of this Conservation Easement, Landowner hereby grants and conveys the following rights to Easement Holder:

(a) To preserve, protect, sustain, restore, and enhance the Conservation Values for the *Easement Area/Property* described in **Exhibit C** or which develop on the *Easement Area/Property* in accordance with the Management Plan and the terms and conditions of this Conservation Easement;

(b) To enter upon the *Easement Area/Property* to monitor Landowner's compliance with, and to otherwise enforce the terms of, this Conservation Easement, and for scientific research necessary to support monitoring and in order to support adaptive management of the Conservation Values; *provided*, that Easement Holder shall not unreasonably interfere with Landowner's allowed uses and quiet enjoyment of the *Easement Area/Property*;

(c) To enter upon the *Easement Area/Property* to carry out, at Easement Holder's sole cost and expense, those management and monitoring requirements applicable to the Easement Area/Property that are set forth in the Management Plan and in Habitat Plan Chapters 5 and 7, [*including, without limitation, installation and maintenance of fencing around the perimeter of the Easement Area/Property to the extent referenced in the Management Plan as necessary to protect the Conservation Values;*] *provided*, that Easement Holder shall use reasonable good faith efforts to conduct such management and monitoring activities in a manner that does not unreasonably interfere with Landowner's allowed uses and quiet enjoyment of the *Easement Area/Property*;

(d) To prevent any activity on or use of the Easement Area/Property that is inconsistent with the purposes of this Conservation Easement and to require the restoration of such areas or features of the Easement Area/Property that may be damaged by any act, failure to act, or any use that is inconsistent with the purposes of this Conservation Easement;

(e) To require that all mineral, air and water rights held by Landowner that Easement Holder deems necessary to preserve, protect and sustain the biological resources and Conservation Values of the *Easement Area/Property* shall remain a part of and be put to beneficial use upon the *Easement Area/Property*, consistent with the purposes of this Conservation Easement; and

(f) All present and future development rights and wind power rights allocated, implied, reserved or inherent in the *Easement Area/Property*; such rights are hereby

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terminated and extinguished, and may not be used on or transferred to any portion of the Property. Landowner understands and agrees that nothing in this Conservation Easement relieves Landowner of any obligation or restriction in relation to the development or use of the *Easement Area/Property* imposed by law, including but not limited to local land use restrictions.

Except where there is an imminent threat to the *Easement Area/Property* or its Conservation Values, Easement Holder and its employees, contractors or agents will only enter the Easement Area/Property at reasonable times and with at least forty-eight (48) hours advance notice to Landowner. The Landowner may waive these requirements in whole or in part by written notice to Easement Holder.

4. **Prohibited Uses.** Any activity on or use of the *Easement Area/Property* that adversely affects the purposes of this Conservation Easement is prohibited. Without limiting the generality of the foregoing, Landowner, Landowner's personal representatives, heirs, successors, assigns, employees, agents, lessees, licensees and invitees are expressly prohibited from doing or allowing any of the following uses and activities on the *Easement Area/Property*, unless, and then only to the extent that, a generally prohibited activity set forth below is: (i) an allowed use or practice (e.g., agricultural, rangeland or recreational uses) set forth on **Exhibit D** attached hereto and incorporated herein by reference; (ii) a management practice set forth in the Management Plan, (iii) necessary in connection with the performance of any of the conservation actions described in Habitat Plan Chapter 5; or (iv) otherwise necessary to maintain or enhance the Conservation Values:

- (a) Unseasonal watering;
- (b) Use of fertilizers, pesticides, biocides, herbicides or other chemicals;
- (c) Use of off-road vehicles and use of any other motorized vehicles except on existing roadways, excepting off-road vehicle use required to conduct any allowed management practice set forth in the Management Plan;
- (d) Any construction, reconstruction, relocation or placement of any road, building, billboard, fencing, or sign, or any other structure or improvement of any kind, or altering the surface or general topography of the *Easement Area/Property* without written approval by the Easement Holder and Wildlife Agencies unless otherwise allowed in the Management Plan;
- (e) Agricultural uses, including, without limitation, vineyards, nurseries, or intensive livestock use (e.g., dairy, feedlot) except as may be provided for in the Management Plan (e.g., prescribed grazing);
- (f) Any legal or de facto division, subdivision or partitioning of the *Easement Area/Property* or any fee transfer of less than the entire Easement Area/Property;



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- (g) Depositing or accumulation of soil, trash, ashes, refuse, waste, bio-solids or any other materials;
- (h) Planting, introduction, or dispersal of nonnative plant or animal species;
- (i) Filling, dumping, excavating, draining, dredging, mining, drilling, removing, or exploring for or extraction of minerals, loam, soil, sands, gravel, rocks, or other material on or below the surface of the *Easement Area/Property*, and granting or authorizing any surface entry for any of these purposes;
- (j) Removing, destroying, or cutting of trees, shrubs, or other vegetation;
- (k) Manipulating, impounding, or altering any water course, body of water, or water circulation on the *Easement Area/Property*, and activities or uses detrimental to water quality, including but not limited to degradation or pollution of any surface or subsurface waters; and
- (l) Without the prior written consent of Easement Holder, which Easement Holder may reasonably withhold, transferring, encumbering, selling, leasing or otherwise separating the mineral, air or water rights for the *Easement Area/Property* owned by Landowner; changing the place or purpose of use of the water rights owned by Landowner; abandoning or allowing the abandonment of, by action or inaction, any water or water rights, ditch or ditch rights, spring rights, reservoir or storage rights, wells, ground water rights or other rights in and to the use of water historically used on or otherwise appurtenant to the *Easement Area/Property* that are owned by Landowner, including but not limited to: (i) riparian water rights; (ii) appropriative water rights; (iii) rights to waters which are secured under contract with any irrigation or water district, to the extent such waters are customarily applied to the *Easement Area/Property*; and (iv) any water from wells that are in existence or may be constructed in the future on the *Easement Area/Property*.

***[TEMPLATE NOTE: Section 4 “Prohibited Uses” for any Conservation Easement may include additional prohibited uses, or refinements of the above, to address specific site conditions, Landowner preferences and operations, and species and habitat needs, as contemplated by Habitat Plan Section 8.6.3 and approved by the Easement Holder and the Wildlife Agencies. Additionally, this prohibited uses section may require modification to address public access and recreation uses to the extent contemplated or required at the Easement Area/Property under the Management Plan.]***

5. **Unlawful Entry.** Landowner shall undertake all reasonable actions to prevent the unlawful entry and trespass on the *Easement Area/Property* by persons whose uses or activities may degrade or harm the Conservation Values or are otherwise inconsistent with the purposes of this Conservation Easement.

6. **Landowner's Reserved Rights; Allowed Uses.** Landowner reserves to itself, and to its personal representatives, heirs, successors, and assigns, all rights accruing from its ownership of the *Easement Area/Property*, including without limitation, the following (collectively, the “**Allowed Uses**”): (a) those specific uses and activities identified in the Management Plan(s) or detailed in **Exhibit D** attached hereto, and (b) all other uses of the *Easement Area/Property* that are not expressly prohibited or limited by this Agreement, and are consistent with the purposes of this Conservation Easement as set forth in Section 1. Landowner shall have the right to exercise any of the Allowed Uses directly or to allow or invite others to engage in any of the Allowed Uses. While Landowner is not obligated under this Agreement to perform the management and monitoring actions set forth in the Management Plan(s), Landowner's exercise of the Allowed Uses shall be conducted in a manner that is consistent with the Management Plan(s) and Conservation Values.

7. **Easement Holder's Remedies.** If Easement Holder or any Third-Party Beneficiary (as defined in **Section 7(d)** below) determines there is a violation of the terms of this Agreement or that such violation is threatened, written notice of such violation and a demand for corrective action sufficient to cure the violation shall be given to Landowner, with a copy provided to Easement Holder and each other Third-Party Beneficiary. The notice of violation shall specify the measures the Landowner must take to cure the violation. If Landowner fails to cure the violation within thirty (30) days after receipt of written notice and demand from Easement Holder or any Third-Party Beneficiary, as applicable; or if the cure reasonably requires more than thirty (30) days to complete and Landowner fails to begin the cure within such thirty (30) day period; or Landowner fails to continue diligently to complete the cure, Easement Holder or any Third-Party Beneficiary may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Agreement, to recover any damages to which Easement Holder and the Third-Party Beneficiaries may be entitled for violation of the terms of this Agreement or for any injury to the Conservation Values, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies, or for other equitable relief, including, but not limited to, the restoration of the *Easement Area/Property* to the condition in which it existed prior to any such violation or injury. Without limiting Landowner's liability therefor, any damages recovered may be applied to the cost of undertaking any corrective action on the *Easement Area/Property* at the election of the party receiving such damages.

If Easement Holder or any Third-Party Beneficiary, each in its sole discretion, determines that circumstances require immediate action to prevent or mitigate damage to the Conservation Values, Easement Holder and/or any Third-Party Beneficiary may pursue its remedies under this section without prior notice to Landowner or without waiting for the period provided for cure to expire. The rights of Easement Holder and the Third-Party Beneficiaries under this section apply equally to actual or threatened violations of the terms of this Agreement. Landowner agrees that Easement Holder's and Third-Party Beneficiaries' remedies at law for any violation of the terms of this Agreement are inadequate and that Easement Holder and/or any Third-Party Beneficiary shall be entitled to the injunctive relief described in this section, both prohibitive and mandatory, in addition to such other relief to which Easement Holder and the Third-Party Beneficiaries may be entitled, including specific performance of the terms of this Agreement, without the necessity of

proving either actual damages or the inadequacy of otherwise available legal remedies. Remedies described in this section shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity, including but not limited to, the remedies set forth in California Civil Code Section 815, *et seq.* The failure of Easement Holder or any Third-Party Beneficiary to discover a violation or to take immediate legal action in response to such action shall not bar such party from taking legal action at a later time.

(a) **Costs of Enforcement.** Any reasonable costs incurred by the Easement Holder or any Third Party Beneficiary, where it is the prevailing party, in enforcing the terms of this Conservation Easement against the Landowner, including, but not limited to, costs of suit and attorneys' and experts' fees, and any costs of restoration necessitated by Landowner's negligence or breach of this Agreement shall be borne by Landowner. In any action where an agency of the United States is a party, the right to recover fees and costs shall be governed by federal law.

(b) **Enforcement Discretion.** Enforcement of the terms of this Agreement against Landowner shall be at the respective discretion of Easement Holder and each of the Third-Party Beneficiaries, and any forbearance by any such party to exercise its rights under this Agreement in the event of any breach of any term of this Agreement shall not be deemed or construed to be a waiver by such party of such term or of any subsequent breach of the same or any other term of this Agreement or of any of such party's rights under this Agreement. No delay or omission by Easement Holder or any Third-Party Beneficiary in the exercise of any right or remedy upon any breach shall impair such right or remedy or be construed as a waiver.

(c) **Acts Beyond Landowner's Control.** Nothing contained in this Agreement shall be construed to, or shall entitle, Easement Holder or any Third-Party Beneficiary to bring any action against Landowner for any injury to or change in the *Easement Area/Property* resulting from (i) any natural cause beyond Landowner's control, including, but not limited to, climate change, fire not caused by Landowner, flood, storm, and earth movement, or any prudent action taken by Landowner under emergency conditions to prevent, abate, or mitigate significant injury to the *Easement Area/Property* resulting from such causes; (ii) acts by Easement Holder or any Third-Party Beneficiary or any of their employees, contractors or agents; or (iii) acts by persons that entered the *Easement Area/Property* unlawfully or by Trespass whose activities degrade or harm the Conservation Values of the *Easement Area/Property* or whose activities are otherwise inconsistent with this Conservation Easement where Landowner has undertaken all reasonable actions to prevent such activities [*for public agencies only: or (iii) acts by persons that entered the Easement Area/Property lawfully or unlawfully whose activities degrade or harm the Conservation Values of the Easement Area/Property or whose activities are otherwise inconsistent with this Conservation Easement where Landowner has undertaken all reasonable actions to discourage or prevent such activities*].

(d) **Third Party Beneficiary Rights.** The parties intend for each of Implementing Entity (during any such period, if any, that Implementing Entity does not also constitute Easement Holder), USFWS and CDFG (collectively, “**Third-Party Beneficiaries**”) to be a third-party beneficiary of this Agreement. All rights and remedies conveyed to Easement Holder under this Agreement shall extend to and are enforceable by each of the Third-Party Beneficiaries in accordance with the terms hereof. Landowner and Easement Holder acknowledge that, as third party beneficiaries of this Conservation Easement, the Third-Party Beneficiaries shall have the same rights of access to the *Easement Area/Property* granted to Easement Holder in **Section 3** above, and with rights to enforce all of the provisions of this Agreement. If at any time in the future Landowner uses, allows the use, or threatens to use or allow use of, the *Easement Area/Property* for any purpose that is inconsistent with or in violation of this Agreement then, despite the provisions of California Civil Code Section 815.7, the California Attorney General and each Third-Party Beneficiary has standing as an interested party in any proceeding affecting the Conservation Easement. These rights are in addition to, and do not limit, the rights of enforcement under the Habitat Plan Instruments. In addition, if CDFG reasonably determines that the *Easement Area/Property* is not being held, monitored, or stewarded for conservation purposes in the manner specified in this Agreement, the Habitat Plan Instruments, or the Management Plan, the Conservation Easement shall revert to the State of California or another entity as described in California Government Code Section 65967, subdivisions (b) and (c), and subject to approval by CDFG.

8. **Public Access.** Nothing contained in this Agreement gives or grants to the public an independent right to enter upon or use the *Easement Area/Property* or any portion thereof. Nor shall this Agreement extinguish any public right to enter upon or use the *Easement Area/Property*.

9. **Costs and Liabilities.** Except for those specific obligations to be undertaken by Easement Holder under Section 3 above, Landowner shall retain all responsibilities and shall bear all costs and liabilities of any kind related to Landowner’s ownership, operation, management, and maintenance activities on and relating to the *Easement Area/Property*. Landowner agrees that neither the Easement Holder nor Third Party Beneficiaries shall have any duty or responsibility for the operation or maintenance of the *Easement Area/Property*, the monitoring of hazardous conditions thereon, or the protection of Landowner, the public or any third parties from risks relating to conditions on the *Easement Area/Property*. Each of Landowner and Easement Holder shall remain responsible for obtaining any applicable governmental permits and approvals for any of such Party’s activity or use allowed on the *Easement Area/Property* under this Agreement, and each of Landowner and Easement Holder shall undertake all allowed activities and uses of the *Easement Area/Property* in accordance with all applicable federal, state, local and administrative agency statutes, ordinances, rules, regulations, orders and requirements. Landowner shall pay before delinquency all taxes, assessments, fees, and charges of whatever description levied on or assessed against the *Easement Area/Property* by competent authority (collectively “**taxes**”), including any taxes imposed upon, or incurred as a result of, this Agreement, and shall furnish Easement Holder with satisfactory evidence of payment upon request. Landowner and Easement Holder shall keep the *Easement Area/Property* free from any liens, including those arising out of any obligations incurred

by such Party for any labor or materials furnished or alleged to have been furnished to or for such Party at or for use on the *Easement Area/Property*.

10. **Indemnification.**

(a) **Indemnification by Landowner.** Landowner shall hold harmless, protect and indemnify Easement Holder and the Third-Party Beneficiaries, and their respective members, directors, officers, employees, agents, contractors, and representatives and the heirs, personal representatives, successors and assigns of each of them (each a “**Landowner Indemnified Party**” and, collectively, the “**Landowner Indemnified Parties**”) from and against any and all liabilities, penalties, costs, losses, damages, expenses (including, without limitation, reasonable attorneys' and experts' fees and costs), causes of action, claims, demands, orders, liens or judgments (each a “**Claim**” and, collectively, “**Claims**”), arising from or in any way connected with: (i) the activities of Landowner on the *Easement Area/Property*; (ii) the inaccuracy of any representation or warranty made by Landowner in this Agreement; (iii) the breach by Landowner of any provision of this Agreement; (iv) any injury to or the death of any person, or physical damage to any *Easement Area/Property* resulting from any act, omission, condition, or other matter related to or occurring on or about the *Easement Area/Property*, unless such injury or death or physical damage to any *Easement Area/Property* relates to an activity on, or use of, the Easement Area/Property by Easement Holder, including without limitation, those activities performed under the Management Plan, or negligent or willful misconduct of the Landowner Indemnified Party; or (v) any violation of, or failure to comply with, any state, federal or local law, regulation or requirement, by Landowner, or by any entity, other than one of the Landowner Indemnified Parties, acting at the time upon permission from Landowner, in any way affecting, involving or relating to the *Easement Area/Property*. If any action or proceeding is brought against any of the Landowner Indemnified Parties by reason of any such Claim, Landowner shall, at the election of and upon written notice from Easement Holder and the Third-Party Beneficiaries, defend such action or proceeding by counsel reasonably acceptable to the Landowner Indemnified Party.

(b) **Indemnification by Easement Holder.** Easement Holder shall hold harmless, protect, and indemnify Landowner and the Third-Party Beneficiaries, and their respective members, directors, officers, employees, agents, contractors, and representatives and the heirs, personal representatives, successors and assigns of each of them (each, an “**Easement Holder Indemnified Party,**” and collectively, the “**Easement Holder Indemnified Parties**”) from and against any and all Claims arising from or in any way connected with: (a) the activities of Easement Holder on the *Easement Area/Property*, including without limitation the Easement Holder's performance of management and monitoring activities set forth in the Management Plan; (b) breach by Easement Holder of any provision of this Agreement; (c) any injury to or the death of any person, or physical damage to any *Easement Area/Property* occurring on or about the *Easement Area/Property* resulting from any act, omission, condition, or other matter related to, an activity on, or use of, the *Easement Area/Property* by Easement Holder, including without limitation, those

performed under the Management Plan, unless due solely to the negligence or willful misconduct of the Easement Holder Indemnified Party; and (d) any violation of, or failure to comply with, any state, federal or local law, regulation or requirement, by Easement Holder in any way affecting, involving or relating to the *Easement Area/Property*. If any action or proceeding is brought against any of the Easement Holder Indemnified Parties by reason of any such Claim, Easement Holder shall, at the election of and upon written notice from Landowner, defend such action or proceeding by counsel reasonably acceptable to the Easement Holder Indemnified Party.

11. **Extinguishment.** The Conservation Easement created by this Agreement constitutes a property right. It is the Parties' intention that the terms and conditions of this Agreement shall be carried out in perpetuity. Liberal construction is expressly required for purposes of effectuating the Conservation Easement in perpetuity, notwithstanding economic hardship or changed conditions of any kind. If circumstances arise in the future that render the purposes of this Agreement impossible to accomplish, this Agreement can only be terminated or extinguished, in whole or in part, by judicial proceedings in a court of competent jurisdiction. In addition, no such extinguishment shall affect the value of Easement Holder's interest in the *Easement Area/Property*, and if the *Easement Area/Property*, or any interest therein, is sold, exchanged or taken by power of eminent domain after such extinguishment, Easement Holder shall be entitled to receive the fair market value of the Conservation Easement at the time of such extinguishment. If such extinguishment occurs with respect to fewer than all acres of the *Easement Area/Property*, the amounts described above shall be calculated based on the actual number of acres subject to extinguishment.

12. **Condemnation.** The purposes of this Conservation Easement are presumed to be the best and most necessary public use as defined in California Code of Civil Procedure Section 1240.680 notwithstanding Code of Civil Procedure Sections 1240.690 and 1240.700. *[TEMPLATE NOTE: If Easement Holder is CDFG or another state agency, substitute the preceding sentence with the following: This Conservation Easement is a "wildlife conservation easement" acquired by an agency of the State of California, the condemnation of which is prohibited except as provided in California Fish and Game Code Section 1348.3.]*

13. **Transfer of Conservation Easement.** This Agreement may be transferred by Easement Holder upon written approval of the Third-Party Beneficiaries, which approval shall not be unreasonably withheld or delayed; provided, that Easement Holder shall give the Third-Party Beneficiaries at least sixty (60) calendar days prior written notice of the proposed assignment or transfer. Easement Holder may transfer its rights under this Agreement only to an entity or organization: (a) authorized to acquire and hold conservation easements pursuant to California Civil Code Section 815.3 and California Government Code Section 65967(c) (and any successor or other provisions then applicable), or the laws of the United States; and (b) otherwise reasonably acceptable to the Third-Party Beneficiaries. Easement Holder shall require the transferee to record the conveyance in the Official Records of the County where the *Easement Area/Property* is located. The failure of Easement Holder to perform any act provided in this section shall not impair the validity of this Agreement or limit its enforcement in any way. Any transfer under this section shall be subject to the requirements of **Section 17** below.

14. **Transfer of Easement Area/Property.** Landowner agrees to incorporate the terms of this Agreement by reference in any deed or other legal instrument by which Landowner divests itself of any interest in all or any portion of the *Easement Area/Property*, including, without limitation, a leasehold interest. Landowner further agrees to give written notice to Easement Holder and the Third-Party Beneficiaries of the intent to transfer any interest at least thirty (30) calendar days prior to the date of such transfer. Easement Holder and the Third-Party Beneficiaries shall have the right to prevent subsequent transfers in which prospective subsequent claimants or transferees are not given notice of the covenants, terms, conditions and restrictions of this Agreement. The failure of Landowner to perform any act provided in this section shall not impair the validity of this Agreement or limit its enforceability in any way. Any successor in interest of Landowner, by acceptance of a deed, lease, or other document purporting to convey an interest in the *Easement Area/Property*, shall be deemed to have consented to, reaffirmed and agreed to be bound by all of the terms, covenants, restrictions, and conditions of this Agreement.

15. **Notices.** Any notice, demand, request, consent, approval, or communication that Landowner, Easement Holder, or any Third-Party Beneficiary desires or is required to give to the others shall be in writing and be served personally or sent by recognized overnight courier that guarantees next-day delivery or by first class mail, postage fully prepaid, addressed as follows:

To Landowner: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To Easement Holder: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

To Implementing Entity:  
[Santa Clara Valley Habitat Agency]  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

To USFWS: United States Fish and Wildlife Service  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

To DFG: California Department of Fish and Game  
Bay Delta Region

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7329 Silverado Trail  
Napa, CA 94558  
Attn: Regional Manager

With a copy to: Department of Fish and Game  
Office of the General Counsel  
1416 Ninth Street, 12th Floor  
Sacramento, California 95814-2090  
Attn: General Counsel

or to such other address as a party shall designate by written notice to the others. Notice shall be deemed effective upon delivery in the case of personal delivery or delivery by overnight courier or, in the case of delivery by first class mail, five (5) calendar days after deposit into the United States mail.

16. **Amendment.** This Agreement may not be amended, modified or otherwise changed in any manner, except by a written amendment executed by the parties hereto, or their successors in interest, it being understood that no easement holder or landowner will ever be obligated to negotiate or enter into any such amendment; and no discretionary approval that this Agreement may allow to be made from time to time by a party will operate to amend or modify any of the terms of this Agreement to any extent or in any manner. Any such amendment shall be subject to the prior written consent of the Third-Party Beneficiaries; any amendment made without such consent is void and without effect. Any such amendment shall be consistent with the purposes of the Conservation Easement and shall not affect the perpetual duration of the Conservation Easement. Any such amendment must refer to this Agreement by reference to its recordation data, and must be recorded in the Official Records of the County where the *Easement Area/Property* is located.

17. **Merger.** The doctrine of merger shall not operate to extinguish the Conservation Easement if the Conservation Easement and the *Easement Area/Property* become vested in the same party. If, despite this intent, the doctrine of merger applies to extinguish the Conservation Easement then, a replacement conservation easement, with a new Easement Holder identified by the Implementing Entity and approved by the Third-Party Beneficiaries, containing the same protections embodied in this Agreement shall be recorded against the *Easement Area/Property*.

18. **No Hazardous Materials Liability.** Landowner represents and warrants that, after reasonable review of Landowner's records as of the date of this Agreement, Landowner has no knowledge or notice of any Hazardous Materials (as defined below) or underground storage tanks existing, generated, treated, stored, used, released, disposed of, deposited or abandoned in, on, under, or from the *Easement Area/Property*, or transported to or from or affecting the *Easement Area/Property* [except as disclosed in the Report]. [Insert site-specific conditions, if applicable.] Landowner further represents and warrants that Landowner shall comply with all Environmental Laws (as defined below) in using the *Easement Area/Property* and that Landowner shall keep the *Easement Area/Property* free of any material environmental defect, including, without limitation,

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Draft Date: May 26, 2012

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contamination from Hazardous Materials (as defined below). Without limiting the obligations of Landowner under this Agreement, Landowner hereby releases and agrees to indemnify, protect and hold harmless the Landowner Indemnified Parties (as defined in **Section 10(a)**) from and against any and all Claims (as defined in **Section 10(a)**) arising from or connected with any Hazardous Materials or underground storage tanks present, alleged to be present, or otherwise associated with the *Easement Area/Property* at any time, except any Hazardous Materials placed, disposed or released by Landowner Indemnified Parties, or their employees or agents. This release and indemnification includes, without limitation, Claims for (a) injury to or death of any person or physical damage to any *Easement Area/Property*; and (b) the violation or alleged violation of, or other failure to comply with, any Environmental Laws (as defined below). If any action or proceeding is brought against any of the Landowner Indemnified Parties by reason of any such Claim, Landowner shall, at the election of and upon written notice, defend such action or proceeding by counsel reasonably acceptable to the Landowner Indemnified Party.

Despite any contrary provision of this Agreement, the parties do not intend this Agreement to be, and this Agreement shall not be, construed such that it creates in or gives to Easement Holder or the Third Party Beneficiaries any of the following:

- (a) The obligations or liability of an "Landowner" or "operator," as those terms are defined and used in Environmental Laws (as defined below), including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. Section 9601 *et seq.*; hereinafter, "CERCLA"); or
- (b) The obligations or liabilities of a person described in 42 U.S.C. Section 9607(a)(3) or (4); or
- (c) The obligations of a responsible person under any applicable Environmental Laws; or
- (d) The right to investigate and remediate any Hazardous Materials associated with the *Easement Area/Property*; or
- (e) Any control over Landowner's ability to investigate, remove, remediate or otherwise clean up any Hazardous Materials associated with the *Easement Area/Property*.

The term "**Hazardous Materials**" includes, without limitation, (a) material that is flammable, explosive or radioactive; (b) petroleum products, including by-products and fractions thereof; and (c) hazardous materials, hazardous wastes, hazardous or toxic substances, or related materials defined in CERCLA, the Resource Conservation and Recovery Act of 1976 (42 U.S.C. Section 6901 *et seq.*; hereinafter "**RCRA**"); the Hazardous Materials Transportation Act (49 U.S.C. Section 6901 *et seq.*; hereinafter "**HTA**"); the Hazardous Waste Control Law (California Health & Safety Code Section 25100 *et seq.*; hereinafter "**HCL**"); the Carpenter-Presley-Tanner Hazardous Substance Account Act (California Health & Safety Code Section 25300 *et seq.*; hereinafter "**HAS**"),

and in the regulations adopted and publications promulgated pursuant to them, or any other applicable Environmental Laws now in effect or enacted after the date of this Agreement.

The term “**Environmental Laws**” includes, without limitation, CERCLA, RCRA, HTA, HCL, HSA, and any other federal, state, local or administrative agency statute, ordinance, rule, regulation, order or requirement relating to pollution, protection of human health or safety, the environment or Hazardous Materials.

19. **Representations and Warranties.** Landowner hereby makes the following representations and warranties for the benefit of Easement Holder and the Third-Party Beneficiaries:

(a) **Authority.** Landowner has good and sufficient title to the *Easement Area/Property* (including all appurtenances thereto, including, without limitation, [*all minerals and mineral rights and all water and water rights*]), and Landowner has full right and authority to enter into this Agreement and convey the Conservation Easement to Easement Holder. There are no monetary liens and encumbrances recorded against the *Easement Area/Property* except as expressly identified in **Exhibit E**. All deeds of trust and mortgages recorded against the *Easement Area/Property*, or any portion thereof, are and shall continue to be subordinated to this Conservation Easement; documentation of such subordinations are contained in Exhibit E.

(b) **Compliance with Laws.** Landowner has not received notice of, and has no knowledge of, any material violation of any federal, state, county or other governmental or quasi-governmental statute, ordinance, regulation, law or administrative or judicial order with respect to the *Easement Area/Property* [*except as disclosed in the Report*]. [*Insert site-specific conditions, if applicable.*]

(c) **No Litigation.** There is no action, suit or proceeding which is pending or threatened against the *Easement Area/Property* or any portion thereof relating to or arising out of the Landownership or use of the *Easement Area/Property*, or any portion thereof, in any court or in any federal, state, county, or municipal department, commission, board, bureau, agency or other governmental instrumentality.

20. **General Provisions.**

(a) **Controlling Law.** The interpretation and performance of this Agreement shall be governed by the laws of the State of California, disregarding the conflicts of law principles of such state, and by applicable federal law.

(b) **Liberal Construction.** It is the intent of this Agreement to preserve the condition of the *Easement Area/Property* and each of the Conservation Values protected herein, notwithstanding economic or other hardship or changes in circumstances or conditions. The provisions of this Agreement shall be liberally construed to effectuate the purposes of the Conservation Easement and to allow Landowner’s use and enjoyment of the

*Easement Area/Property* to the extent consistent with such purposes. Liberal construction is expressly required for purposes of effectuating this Agreement in perpetuity, notwithstanding changed conditions of any kind. The Conservation Easement created by this Agreement is the intended best and most productive use of the *Easement Area/Property*. No remedy or election given by any provision in this Agreement shall be deemed exclusive unless so indicated, but it shall, wherever possible, be cumulative with all other remedies at law or in equity. The parties acknowledge that each party and its counsel have had the opportunity to review and revise this Agreement and that no rule of construction that ambiguities are to be resolved against the drafting party shall be employed in the interpretation of this Agreement. In the event of any conflict between the provisions of this Agreement and the provisions of any use and zoning restrictions of the State of California, the county in which the *Easement Area/Property* is located, or any other governmental entity with jurisdiction, the more restrictive provisions shall apply. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purposes of this Agreement that would render the provision valid shall be favored over any interpretation that would render it invalid.

(c) **Severability.** If a court of competent jurisdiction voids or invalidates on its face any provision of this Agreement, such action shall not affect the remainder of this Agreement. If a court of competent jurisdiction voids or invalidates the application of any provision of this Agreement to a person or circumstance, such action shall not affect the application of the provision to other persons or circumstances.

(d) **Entire Agreement.** This instrument sets forth the entire agreement of the parties with respect to this Agreement and supersedes all prior discussions, negotiations, understandings, or agreements relating to this Agreement. No alteration or variation of this instrument shall be valid or binding unless contained in an amendment in accordance with **Section 16**.

(e) **No Forfeiture.** Nothing contained herein will result in a forfeiture or reversion of Landowner's title in any respect.

(f) **Successors.** The covenants, terms, conditions, and restrictions of this Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall constitute a servitude running in perpetuity with the *Easement Area/Property*.

(g) **Termination of Rights and Obligations.** A party's rights and obligations under this Agreement terminate upon transfer of the party's interest in the Agreement, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

(h) **Captions.** The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon its construction or interpretation.

(i) **Additional Easements.** Landowner shall not grant any additional easements, rights of way or other interests in the Property (other than a security interest that is subordinate to this Agreement), or grant or otherwise abandon or relinquish any water right or agreement relating to the Property, without first obtaining the written consent of Easement Holder and the Third-Party Beneficiaries. Easement Holder and the Third-Party Beneficiaries may withhold such consent if it determines that the proposed interest or transfer is inconsistent with the purposes of this Conservation Easement or will impair or interfere with the Conservation Values. This section shall not prohibit transfer of a fee or leasehold interest in the Property that is subject to this Agreement and complies with **Section 14**.

(i) **Recording.** Easement Holder shall record this Agreement in the Official Records of the county where the *Easement Area/Property* is located, and may re-record it at any time as Easement Holder deems necessary to preserve its rights hereunder.

(k) **Counterparts.** The parties may execute this Agreement in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

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IN WITNESS WHEREOF Landowner and Easement Holder have executed this Agreement the day and year first above written.

**LANDOWNER:**

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**EASEMENT HOLDER:**

*[Santa Clara Valley Habitat Agency, a California Joint Powers Authority]*

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**EXHIBITS:**

- Exhibit A -- Legal Description of the *Easement Area/Property***
- Exhibit B -- Map of the *Easement Area/Property***
- Exhibit C -- Initial Conservation Values**
- Exhibit D -- Allowed Uses**
- Exhibit E -- Title Encumbrances**



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**Exhibit A**

**Legal Description of the *Easement Area/Property***





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**Exhibit B**

**Map of the *Easement Area/Property***



## Exhibit C

### Initial Conservation Values

*[In accordance with Habitat Plan Section 8.6.3, this Exhibit C will set forth those land-cover types and covered species habitat described in Habitat Plan Chapter 3 that are present on the Easement Area/Property. Section 8.6.3 also requires the Conservation Easement to either include or incorporate by reference the initial pre-acquisition assessment of covered species and natural communities present, so Exhibit C should also be prepared in a way that satisfies this requirement. by either listing covered species and natural communities consistent with those in the pre-acquisition assessment or by including an explicit cross-reference and incorporation by reference to the pre-acquisition assessment. If a complete biological inventory is available, it will be incorporated by reference in this Exhibit C.]*



**PLEASE NOTE: The following sample Agreement is provided for reference. The Department of Fish and Game updates this document as needed, and it does not necessarily contain all provisions appropriate for a given project.**

## **Exhibit D**

### **Allowed Uses**

#### ***Template Notes:***

- ***As contemplated in Habitat Plan Section 8.6.3, this Exhibit D will include a list of specific allowable uses and improvements on the Easement Area/Property that will be developed with the Landowner, customized to protect the nature and resource values of the specific Easement Area/Property while allowing, to the extent practicable, the Landowner's current and future uses of the property***
- ***If the Easement Area/Property is cultivated agricultural land, Habitat Plan Section 8.6.3 requires the conservation easement to describe the agricultural practices to be undertaken to ensure the Easement Area/Property's suitability as foraging and breeding habitat for covered species and/or as landscape linkages for native species, measures to maintain or enhance aquatic or riparian habitat, if present, and how the Easement Area/Property meets the Habitat Plan goals and objectives.***
- ***If the Easement Area/Property is currently grazed or planned to be grazed, Habitat Plan Section 8.6.3 requires the conservation easement to describe the general nature of the grazing to be allowed, specify desired vegetation and other habitat conditions. Specific guidelines or conditions for grazing will be included in the Management Plan. In addition, the following will be included in this Exhibit D:***

*Landowner shall have the right to maintain, repair, reasonably enlarge, and reasonably replace the improvements that exist on the Easement Area/Property and which are acknowledged in this Conservation Easement, in the same or different locations, provided that Landowner shall first obtain Easement Holder's and Wildlife Agencies prior written approval for any enlargement, relocation or replacement. Said approval shall not be unreasonably withheld, conditioned, or delayed but in no event shall that approval be granted if said enlargement or replacement would impair or diminish the Conservation Values of the Easement Area/Property. Notwithstanding the foregoing, (i) maintenance, repair, enlargement and replacement of improvements authorized in the Management Plan may be undertaken without additional Easement Holder or Wildlife Agency approval, and (ii) existing fences may be repaired and replaced for purposes of reasonable and customary management of livestock and wildlife, without further permission of Easement Holder or Wildlife Agencies; provided, all repair, and replacements shall be, designed and installed to protect, and not impair, the Conservation Values of the Easement Area/Property, including, but not limited to, wildlife corridors.*

WATER RESOURCES:

*Landowner may maintain such surface water resources on the Easement Area/Property as are noted in the Report as currently existing on the Easement Area/Property provided that said maintenance is consistent with the terms and conditions of this Conservation Easement and the Management Plan. Landowner may only develop new or enhance existing surface water resources with the prior written approval of Easement Holder and Wildlife Agencies which approval shall not be unreasonably withheld, conditioned, or unreasonably delayed, and then only if said development is necessary for allowed ranching operations or to enhance, restore, create, preserve, or protect the Conservation Values of this Conservation Easement, and the development does not impair the Conservation Values of this Conservation Easement and that such development is consistent with State Water Law]*