

**FUNDING AGREEMENT FOR THE  
SAFE, CLEAN WATER AND  
NATURAL FLOOD PROTECTION PROGRAM  
PARTNERSHIPS FOR THE CONSERVATION OF HABITAT LANDS  
PROJECT D7  
BY AND BETWEEN  
THE SANTA CLARA VALLEY WATER DISTRICT  
AND THE SANTA CLARA VALLEY HABITAT AGENCY**

This Funding Agreement for the Safe, Clean Water and Natural Flood Protection Program (Safe, Clean Water Program) Partnerships for the Conservation of Habitat Lands Project D7 (Project D7) ("AGREEMENT"), for reference dated \_\_\_\_\_, is made and entered into by and between the SANTA CLARA VALLEY WATER DISTRICT, a special district of the State of California (hereinafter "DISTRICT") and the SANTA CLARA VALLEY HABITAT AGENCY, a joint powers authority (hereinafter "AGENCY"). The DISTRICT and AGENCY are collectively the "Parties" and each a "Party" to this AGREEMENT.

WHEREAS, the cities of Morgan Hill, Gilroy and San Jose, the County of Santa Clara, the DISTRICT, and the Santa Clara County Valley Transportation Authority adopted, in August 2012, the Santa Clara Valley Habitat Plan Implementing Agreement ("IMPLEMENTING AGREEMENT") which runs for 50 years; and

WHEREAS, the IMPLEMENTING AGREEMENT identifies the DISTRICT as a Permittee along with the other signatories, and provides that Permittees receive federal Endangered Species Act (ESA) incidental take authorization and state coverage for certain "covered species" and "covered activities," including infrastructure projects and operations and maintenance activities, identified in the 2013 Santa Clara Valley Habitat Plan ("Habitat Plan"), that the Permittee intends to implement over the fifty-year permit term; and

WHEREAS, the Permittees agreed to substantial commitments of land, natural resources, financial resources, human resources and other assets to conserve and manage the covered species, their habitats and other natural communities; and

WHEREAS, the IMPLEMENTING AGREEMENT contains detailed terms addressing topics such as implementation roles and responsibilities in Section 6.6 (including dispute resolution), monitoring, adaptive management and changed circumstances in Section 11, funding in Section 13, reporting and information management in Section 14, and remedies and enforcement in Section 16; and

WHEREAS, in November 2012, the voters of Santa Clara County-approved Measure B, the Safe, Clean Water Program, as a countywide special parcel tax for 15 years with a sunset date of June 30, 2028; and

WHEREAS, the Safe, Clean Water Program Project D7 helps the community acquire important habitat land to preserve local ecosystems; and

WHEREAS, the Safe, Clean Water Program Project D7 supports the implementation of the Habitat Plan; and

WHEREAS, the Safe, Clean Water Program Project D7 Key Performance Indicator is to provide up to \$8 million for the acquisition of property for the conservation of habitat lands; and

WHEREAS, the cities of Morgan Hill, Gilroy and San Jose, the County of Santa Clara formed the AGENCY, and the DISTRICT and the Santa Clara County Valley Transportation Authority partnered with the other entities (referred to collectively as “Local Partners”) to enter into a Memorandum of Understanding (“MOU”) in May 2013, which remains in effect indefinitely; and

WHEREAS, the MOU also details Local Partner and AGENCY roles, remedies, and dispute resolution; and

WHEREAS, the AGENCY, on behalf of the Permittees, is responsible for the implementation of certain permit requirements, including identification of target preserve acquisitions and is working with the Local Partners and interested entities to identify and evaluate possible land acquisitions which would fulfill the goals of the Habitat Plan; and

WHEREAS, the MOU acknowledges that Local Partners may contribute land, provide services, or “undertake other activities (e.g., habitat creation, restoration, monitoring)” that fulfill Habitat Plan implementation requirements, and that Local Partners may, among other things, provide loans or grants to the AGENCY; and

WHEREAS, the Anderson Dam Seismic Retrofit Project is a high priority project that is a covered activity identified by the Habitat Plan; and

WHEREAS, the Anderson Dam Seismic Retrofit Project will impact the federally-listed endangered Coyote Ceanothus, a white-flowered shrub that is only found in 3 locations in Santa Clara County, and re-construction of the dam will result in removal of a large proportion of one of the existing Coyote Ceanothus populations that grow on it; and

WHEREAS, the Habitat Plan requires that, prior to the occurrence of impact, a new population of Coyote Ceanothus must be created, or protected through direct purchase of land or through a conservation easement; and

WHEREAS, the DISTRICT also plans to implement critical infrastructure improvement projects, including pipeline rehabilitation, recycled water delivery expansion and seismic improvements for its water storage facilities; these projects are covered activities that will impact the federally- and state-listed endangered species, and riparian and wetland habitats identified in the Habitat Plan; and

WHEREAS, the Habitat Plan specifies a “Stay-Ahead Provision” (Habitat Plan Section 8.6.1) which requires that the conservation strategy (acquisition of appropriate mitigation property) be implemented at a pace that stays ahead of the impacts on habitat or covered species; and

WHEREAS, the DISTRICT has developed funding criteria for the allocation of Project D7 funds that the AGENCY may utilize as guidelines in its mission, and will also help achieve DISTRICT objectives; and

WHEREAS, the DISTRICT requests AGENCY participation in the acquisition of properties that could fulfill current and future Valley Habitat Plan mitigation requirements related to the Anderson Dam Retrofit Project and other critical infrastructure projects identified as covered activities in the Habitat Plan.

NOW, THEREFORE, THE PARTIES HEREBY AGREE AS FOLLOWS:

**SECTION 1.**            **RECITALS.**

The recitals set forth above are incorporated herein.

**SECTION 2.**            **PROJECT FUNDING.**

- A. DISTRICT shall provide to AGENCY Safe, Clean Water and Natural Flood Protection Program Priority D7 funds, up to a maximum of \$8 million dollars, for the acquisition of property for the conservation and restoration of habitat lands as identified in the Santa Clara Valley Habitat Plan.
- B. AGENCY shall focus on acquisition (including related administrative costs) of types of properties specified in EXHIBIT A, entitled "PROJECT FUNDING," which is attached hereto and incorporated herein by this reference (the "Projects"). EXHIBIT A is subject to changes based on mutual agreement of the parties and as otherwise necessary due to evolving circumstances.

**SECTION 3.**            **EFFECTIVE DATE AND TERM OF AGREEMENT.**

This AGREEMENT is effective on the date it is fully executed. The term of this AGREEMENT shall remain in effect until it is terminated or until the funding is fully expended subject to the provisions of SECTION 9.

**SECTION 4.**            **REPORTING.**

Consistent with Chapter 8, Plan Implementation of the Santa Clara Valley Habitat Plan (August 2012), and specifically Section 8.11, Reporting, AGENCY will prepare annual reports over the term of the Habitat Plan that document permit compliance, conservation actions, management actions, restoration/creation actions, and monitoring results. Specific D7 fund expenditures shall be documented as set forth in Exhibit A.

**SECTION 5.**            **RELATIONSHIP OF PARTIES**

The Parties acknowledge and agree that nothing set forth in this AGREEMENT shall be deemed or construed to render the Parties as joint venturers, partners, agents, a joint enterprise, employer-employee, lender-borrower or contractor of each other. Neither Party shall have any authority to employ any person as employee or agent on behalf of the other for any purpose. No Party, nor any person using or involved in or participating in any actions or inactions relating to this AGREEMENT shall be deemed an employee or agent of the other, nor shall any such person or entity represent himself, herself or itself to others as an employee or agent of the other.

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## **SECTION 6.            ASSIGNABILITY.**

The parties agree that the expertise and experience of each of the parties are material considerations for this AGREEMENT. Neither Party shall assign or transfer any interest in this AGREEMENT nor the performance of any obligations hereunder, without the prior written consent of the other Party, and any attempt by either Party to so assign this AGREEMENT or any rights, duties, or obligations arising hereunder shall be void and of no effect.

## **SECTION 7.            INSURANCE REQUIREMENTS.**

DISTRICT agrees to have and maintain the policies set forth in EXHIBIT C, entitled "INSURANCE" which is attached hereto and incorporated herein by this reference. These requirements are subject to amendment or waiver if so approved in writing by the AGENCY'S Executive Officer and DISTRICT. DISTRICT agrees to provide AGENCY with a letter of self-insurance before execution of this AGREEMENT.

AGENCY agrees to have and maintain the policies set forth in EXHIBIT C, entitled "INSURANCE," which is attached hereto and incorporated herein by this reference. These requirements are subject to amendment or waiver if so approved in writing by the DISTRICT'S Risk Manager and AGENCY. AGENCY agrees to provide DISTRICT with a copy of said policies, certificates, and/or endorsements before execution of this AGREEMENT.

## **SECTION 8.            NONDISCRIMINATION. AND EQUAL OPPORTUNITY**

DISTRICT and AGENCY shall comply with all applicable federal, state, and local laws and regulations concerning nondiscrimination and equal opportunity in contracting and shall not in the performance of this AGREEMENT, provision of services, allocation of benefits, accommodation in facilities, or employment of personnel discriminate, in any way, against any person on the basis of race, sex/gender, color, age, religion, sexual orientation, actual or perceived gender identity or orientation, mental or physical handicap or disability, ethnicity, national origin, medical condition, political beliefs, organizational affiliations, or marital status in connection with or related to the performance of this AGREEMENT.

The DISTRICT and the AGENCY are both governmental entities and equal opportunity employers in the performance of the AGREEMENT, both will comply with all applicable federal, state, local laws and regulations, and will not discriminate against any person, on the basis of sex (which includes pregnancy, childbirth, breastfeeding and medical conditions related to pregnancy, childbirth or breastfeeding), race, religion, color, national origin (including language use restrictions), ancestry, religious creed (including religious dress and grooming practices), political affiliation, disability (mental and physical, including HIV or AIDS), medical condition (cancer and genetic characteristics), genetic information, marital status, parental status, gender, age (40 and over), pregnancy, military and veteran status, sexual orientation, gender identity and gender expression, the exercise of family and medical care leave, the exercise of pregnancy disability leave, or the request, exercise, or need for reasonable accommodation.

**SECTION 9.           TERMINATION.**

- A. Either party shall have the right to terminate this AGREEMENT, without cause, by giving not less than thirty calendar (30) days written notice of termination to the nonterminating Party, except that if a property acquisition is in escrow, the AGREEMENT may not be terminated prior to the close of escrow.
- B. If either Party fails to perform any of its material obligations ("material breach") under this AGREEMENT, in addition to all other remedies provided by law, the Party claiming material breach may terminate this AGREEMENT immediately upon written notice. The thirty-day notice requirement set forth in section A above shall not apply for any such for-cause terminations.
- C. AGENCY's Executive Officer is empowered to terminate this AGREEMENT on behalf of AGENCY. DISTRICT's Chief Executive Officer is empowered to terminate this AGREEMENT on behalf of the DISTRICT.
- D. In event of termination by either party, the provisions of the 2013 MOU shall govern, but the funding shall continue for any acquisitions in progress, consistent with subsection (A) above, and any restoration projects in progress.

**SECTION 10.           GOVERNING LAW.**

This AGREEMENT, and all the rights and duties of the parties arising from or relating in any way to the subject matter of this AGREEMENT and the transactions contemplated by it, shall be governed by, construed and enforced in accordance with the laws of the State of California (excluding any conflict of law provisions that would refer to and apply the substantive laws of another jurisdiction). Any suit or proceeding relating to this AGREEMENT, including mediation or other alternative dispute resolution proceedings, shall be brought only in Santa Clara County, California. EACH OF THE PARTIES CONSENT TO THE EXCLUSIVE PERSONAL JURISDICTION AND VENUE OF THE COURTS, STATE AND FEDERAL, LOCATED IN SANTA CLARA COUNTY, CALIFORNIA.

**SECTION 11.           COMPLIANCE WITH LAWS.**

DISTRICT and AGENCY shall comply with all applicable laws, ordinances, codes and regulations of the federal, state and local governments.

**SECTION 12.           WAIVER.**

DISTRICT and AGENCY agree that waiver by either party of any breach or violation of any term or condition of this AGREEMENT shall not be deemed to be a waiver of any other term or condition contained herein or a waiver of any subsequent breach or violation of the same or any other term or condition. The acceptance by AGENCY or DISTRICT of the performance of any AGREEMENT terms or conditions, in whole or in part, shall not be deemed to be a waiver of any other term or condition, in whole or in part, of this AGREEMENT.

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**SECTION 13. BOOKS AND RECORDS.**

- A. DISTRICT and AGENCY shall maintain reasonably sufficient accounting ledgers, books of account, invoices, vouchers, cancelled checks, and other related records or documents for a minimum period of two (2) years from the date of termination of this AGREEMENT.
- B. Excepting confidential records, any records or documents required to be maintained shall be made available for inspection or audit at no cost to either party, upon written request by the Executive Officer or CEO, Finance Officer, and Counsel. Copies of such documents shall be provided at no cost. Unless an alternative is mutually agreed upon, the records shall be available within the County of Santa Clara at the offices of DISTRICT or AGENCY during normal entity hours of operation (Monday through Friday, excluding holidays and other closures, between the hours of 9:00am and 5:00pm only).

**SECTION 14. NOTICES.**

All notices and other communications required or permitted to be given under this AGREEMENT shall be in writing and shall be personally served or mailed postage prepaid and return receipt requested, addressed to the respective parties as follows:

To AGENCY: Edmund Sullivan, Executive Officer  
Santa Clara Valley Habitat Agency  
535 Alkire Avenue, Suite 100  
Morgan Hill, CA 95037

To DISTRICT: Norma J. Camacho, CEO  
Santa Clara Valley Water District  
5750 Almaden Expressway  
San Jose, CA 95118

Notice shall be deemed effective on the date personally delivered or, if mailed, three (3) days after deposit in the mail.

**SECTION 15. NO THIRD-PARTY RIGHTS.**

The Parties do not intend to create rights in, or to grant remedies to, any third party as a beneficiary of this AGREEMENT or of any duty, covenant, obligation, or undertaking established herein. This AGREEMENT shall not be construed as nor deemed to be an agreement for the benefit of any third party or parties, and no third party or parties shall have any right of action herein for any cause whatsoever.

**SECTION 16.**            **INTERPRETATION, PRIOR AGREEMENTS AND AMENDMENTS.**

This AGREEMENT, including all Exhibits attached hereto, represents the entire understanding of the Parties as to the specific subject matter contained herein. In the event that the terms specified in any of the Exhibits attached hereto conflict with any of the terms specified in the body of this AGREEMENT, the terms specified in the body of this AGREEMENT shall control. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder. No agreement, amendment, modification, understanding or waiver of or with respect to this AGREEMENT or any term, provision, covenant or condition hereof, nor any approval or consent given under or with respect to this AGREEMENT, shall be effective for any purpose unless agreed to in writing and signed by authorized representatives of both Parties to this AGREEMENT.

**SECTION 17.**            **SIGNATURES; COUNTERPARTS.**

This AGREEMENT may be executed in several counterparts, and all of such counterparts so executed together shall be deemed to constitute one and the same agreement, and each such counterpart shall be deemed to be an original. Facsimile or electronic signatures shall have the same legal effect as original or manual signatures if followed by mailing of a fully executed original to both Parties.

**SECTION 18.**            **CONSTRUCTION; NEGOTIATED TERMS.**

This AGREEMENT shall not be construed as if it had been prepared by any one of the Parties, but rather as if both Parties have prepared it. Each Party has had the opportunity to be advised by legal counsel and other professionals in connection with this AGREEMENT, and each Party has obtained such advice as each Party deems appropriate. The Parties agree that the terms and conditions of this AGREEMENT are the result of negotiations between the Parties and that this AGREEMENT shall not be construed in favor of or against any Party by reason of the extent to which any Party or its professionals participated in the preparation of this AGREEMENT.

**SECTION 19.**            **PARTIAL INVALIDITY OR ILLEGALITY.**

If any provision of this AGREEMENT, or the application of it to any person or circumstances, shall to any extent be invalid, void or unenforceable, the remainder of this AGREEMENT, or the application of this provision to any person or circumstances other than those as to which it is invalid, void or unenforceable, shall not be affected, and each provision of this AGREEMENT shall be valid and enforceable to the fullest extent permitted by law except where such illegal, invalid, void or unenforceable provision is material to the AGREEMENT in which case this AGREEMENT shall be void.

**SECTION 20.**            **CAPTIONS.**

The captions in this AGREEMENT are inserted for convenience of reference and in no way define, describe or limit the scope or intent of this AGREEMENT or any of the provisions

hereof.

**SECTION 21.**

**AUTHORITY.**

Each Party executing the AGREEMENT on behalf of such entity represents that he or she is duly authorized to execute and deliver this AGREEMENT on the entity's behalf.

IN WITNESS WHEREOF, the Parties hereby execute this AGREEMENT effective as of the last date signed by all Parties below (the "Effective Date").

**"DISTRICT"**

APPROVED AS TO FORM  
AND LEGALITY:

SANTA CLARA VALLEY WATER DISTRICT

\_\_\_\_\_  
JOSEPH ARANDA  
Assistant District Counsel

\_\_\_\_\_  
RICHARD P. SANTOS  
BOARD CHAIR

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**"AGENCY"**

APPROVED AS TO FORM:

SANTA CLARA VALLEY HABITAT AGENCY

\_\_\_\_\_  
VALERIE J. ARMENTO  
General Counsel

\_\_\_\_\_  
EDMUND SULLIVAN  
EXECUTIVE OFFICER

Date: \_\_\_\_\_  
\_\_\_\_\_

Date: \_\_\_\_\_  
\_\_\_\_\_



## **EXHIBIT A**

### **PROJECT FUNDING**

The Safe, Clean Water, D7 Project Fund can provide up to \$8 Million for the acquisition of property for the conservation of habitat lands.

The AGENCY shall acquire property for the conservation of habitat lands consistent with the DISTRICT'S established funding criteria (Exhibit B). Beginning in FY 2018-19, the DISTRICT shall deposit \$1 million with the AGENCY, which shall be set aside in a segregated account for the purposes of this AGREEMENT. The account shall be referred to as the D7 Project Fund and annual report regarding expenditures shall be documented and reported as specified below.

#### **Eligible Expenditures**

Eligible expenditures of the D7 Project Funds include twenty percent for administrative costs anticipated to be incurred in conjunction with the land acquisition process.

Administrative cost categories anticipated to be incurred for AGENCY property acquisitions are:

1. Property Appraisal
2. Phase 1 and/or Phase 2 Environmental Assessments
3. Infrastructure (i.e. roads, grazing related, buildings, etc.) Assessments
4. Title Reports & Title Insurance
5. Property Insurance
6. Broker's Fees
7. Legal Fees
8. Transaction Costs
9. Interest on any loans secured to purchase property (from NGOs such as Moore Foundation, Conservation Legacy Fund, or POST)
10. Property Surveys
11. Biological Surveys
12. Potential Demolition of Buildings etc.
13. AGENCY staff time related directly to land acquisition as specified in the MOU.

#### **Reporting and Accountability**

The AGENCY process for the development of an annual budget, and accounting and reporting practices is specified in Sections 11 and 18 of Joint Exercise of Powers Agreement Creating the AGENCY. In addition, DISTRICT Board members serve on the Implementation Board and participate in the budgeting and financial review process. Fund expenditures will be tracked and reported to the AGENCY Governing Board and Implementation Board through the existing budget and reporting process. The AGENCY will add the D7 Project Fund proposed expenditures as a budget line item for Governing Board adoption in June; each September the AGENCY will document D7 expenditures by cost category as part of the End of Year Report of the previous year for Governing Board and Implementation Board review and approval.

Additional D7 funding requests may be made to the DISTRICT Board of Directors and should include a fiscal and program progress report, or if associated with a specific land acquisition amount a description of the acquisition.

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## **EXHIBIT B**

### **D7 FUNDING CRITERIA**

#### **Safe, Clean Water and Natural Flood Protection Program**

In November 2012, the voters of Santa Clara County-approved Measure B, the Safe, Clean Water and Natural Flood Protection Program, as a countywide special parcel tax for 15 years with a sunset date of June 30, 2028.

The Safe, Clean Water Program identified five priorities: Priority D is “Restore Wildlife Habitat and Provide Open Space.” The eight projects under Priority D restore and protect wildlife habitat and provide opportunities for increased access to trails and open space. Funding for Priority D pays for control of non-native, invasive plants, revegetation of native species, and maintenance of previously revegetated areas. Other projects include removal of fish barriers, improvement of steelhead habitat and stabilization of eroded creek banks.

Funding from Project D7 helps the community acquire important habitat land to preserve local ecosystems. The project supports implementation of the Valley Habitat Plan, a multi-agency agreement that pools mitigation dollars to purchase large areas of habitat land for conservation.

The D7 Key Performance Indicator is to provide up to \$8 million for the acquisition of property for the conservation of habitat lands.

The Criteria for Allocation of Partnership Funding for the Conservation of Habitat Lands is provided herein.

**Safe, Clean Water Program Project D7**

**Criteria for Allocation of Partnership Funding to the Santa Clara Valley Habitat Agency for the Conservation of Habitat Lands**

Safe, Clean Water Criteria	Scoring Objective	Scoring Metric(s)	Assessment Methodology		
<b>Partnership fulfills elements of the Habitat Plan (HP) Conservation Strategy</b>	Proposed partnership supports HP reserve system design and assembly principles to fulfill the requirements of the permit.	Proposed partnership/ area is identified in the HP reserve design or other published critical habitat or recovery plan.	Partnership area is identified as Low or not in the HP Land Acquisition Strategy.	Partnership area is identified as Medium in the HP Land Acquisition Strategy.	Partnership area is identified as High in the HP Land Acquisition Strategy.
<b>Contributes to the recovery of special status species</b>	Proposed partnership or acquisition helps achieve: ▪ Protect 100 miles of streams ▪ Creation or restoration of ponds or freshwater wetlands ▪ Supports Conservation Strategy -- Natural Community Level and Species Level Goals	Addresses critical habitat or species need(s) as specified by an adopted Recovery Plan or Habitat Conservation Plan, which have more importance.	Proposed enhancement for single species	Habitats to supports several species or critical habitat or species' need as identified by a formally adopted plan.	Proposed project addresses documented critical habitat or species needs
<b>Coordinates regional mitigation projects, resulting in less fragmented conservation lands that are more beneficial for wildlife and the environment.</b>	Assesses how many organizations would benefit and how does the project improve coordination and/or landscape linkages between key habitat areas and existing protected areas	Funding sources and/or ability to support reduced fragmentation of conservation areas.	Grantee funding only (in addition to District grant) isolated project or acquisition.	Multiple funding sources (in addition to District grant)/ project or acquisition reduces fragmentation of conservation areas.	Multiple funding sources (in addition to District grant) and supports connection or enhancement of existing preserve areas.
<b>Fulfills a portion of the District's commitment to the HP.</b>	Fulfills Endangered Species Act (ESA)/California ESA requirements or conditions for implementation of key District covered activities	Objectives of the proposal support implementation of specific District or key partnership projects specified in the HP.	Proposed project is not a covered activity or is outside HP or Recovery Plan area.	N/A	Project would support or expedite implementation of a Safe, Clean Water project.

## **EXHIBIT C**

### **INSURANCE REQUIREMENTS**

Without limiting the indemnification of either Party in this AGREEMENT, each Party shall maintain the following insurance coverage through self-insurance coverage, commercial insurance or a combination of both (1) commercial general liability with limits of liability not less than one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) annual aggregate; (ii) workers' compensation providing statutory coverage; and (iii) professional errors and omissions liability with limits of liability not less than one million dollars (\$1,000,000) per occurrence/aggregate; AGENCY acknowledges and agrees that the DISTRICT is self-insured for the above.

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