

MEMORANDUM OF UNDERSTANDING
BY AND AMONG
THE CITY OF SAN JOSE, THE COUNTY OF
SANTA CLARA, THE SANTA CLARA VALLEY
WATER DISTRICT, AND THE SANTA CLARA VALLEY
TRANSPORTATION AUTHORITY
REGARDING PREPARATION OF A HABITAT CONSERVATION
PLAN/NATURAL COMMUNITY CONSERVATION PLAN
AND RELATED ENVIRONMENTAL DOCUMENTS

This **MEMORANDUM OF UNDERSTANDING** ("MOU") is made and entered into as of this _____ day of _____ ("EFFECTIVE DATE") by and among, the CITY OF SAN JOSE, a municipal corporation ("SAN JOSE"), the COUNTY OF SANTA CLARA, a political subdivision of the State of California ("COUNTY"), the SANTA CLARA VALLEY WATER DISTRICT, a public entity ("WATER DISTRICT"), and the SANTA CLARA VALLEY TRANSPORTATION AUTHORITY, a public entity ("VTA"), all in connection with the proposed preparation of a Habitat Conservation Plan (defined below) pursuant to the Federal Endangered Species Act of 1973, as amended [16 U.S.C. §§1531 *et seq.*; and "take" being defined in Section 3(19) [16 U.S.C. § 1532(19)] ("ESA") and Natural Community Conservation Plan (defined below) pursuant to the Natural Community Conservation Planning Act, as amended [California Fish and Game Code § 2800, *et seq.*] ("NCCP Act") and the California Endangered Species Act of 1984, as amended [California Fish and Game Code §§ 2050 *et seq.*] ("CESA"), and related environmental documents, such as an Environmental Impact Report under the California Environmental Quality Act of 1970, as amended, and an Environmental Impact Statement under the National Environmental Policy Act of 1970, as amended. SAN JOSE, COUNTY, WATER DISTRICT, and VTA are collectively referred to herein as the "LOCAL PARTNERS" and sometimes referred to individually as a "LOCAL PARTNER." Any jurisdiction or other public entity that becomes a signatory to this MOU after the EFFECTIVE DATE shall be included in the term "LOCAL PARTNERS" hereunder effective upon the date that the respective amendment to this MOU to include that new LOCAL PARTNER is effective.

RECITALS

WHEREAS, certain LOCAL PARTNERS are managing growth within their jurisdictions according to their respective General Plans and policies and by this MOU wish to cooperate in the development of a Habitat Conservation Plan and Natural Community Conservation Plan in order to protect natural resources and secure regulatory permits in areas of Santa Clara County subject to growth pressures; and

WHEREAS, some future growth and infrastructure maintenance activities within the jurisdictions and responsibilities of the signatory agencies may have the potential to adversely affect Species (defined below) and could result in the unauthorized "take" of Species that is prohibited under CESA and ESA; and

WHEREAS, ESA, CESA and the NCCP Act provide mechanisms to allow for the lawful "take" of Species under specified circumstances when it is incidental to otherwise lawful

activities, and the mechanism for receiving an incidental take permit under Section 10 of the ESA is known as a "Habitat Conservation Plan," ("HCP") and an similar mechanism under State law is a "Natural Communities Conservation Plan" ("NCCP") which may be prepared pursuant to the Natural Communities Conservation Planning Act [Fish and Game Code § 2800 et seq.] or by submitting an application for a regional permit under the provisions of Section 2081 of CESA, though the planning requirements of both approaches are likely to be similar [Fish and Game Code § 2081 et seq.]; and

WHEREAS, the HCP is also intended to serve as a basis for a "no jeopardy" determination under § 7 of ESA; and

WHEREAS, an HCP for federally listed species is submitted to the United States Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NOAA-FISHERIES") for approval and incidental take permit issuance under ESA, and an NCCP and Section 2081 permit applications are submitted to the California Department of Fish and Game ("CDFG") for approval; and

WHEREAS, cities, counties and other local agencies may, with the approval of the regulatory agencies with jurisdiction, develop a regional HCP/NCCP to provide an incidental take permit for multiple species over a broad geographic area, and such plans typically extend permit coverage to individual projects in exchange for defined mitigation or some equivalent conservation action, and mitigation funds are collected and pooled to be used to protect, acquire and or manage habitat areas for the species identified in the regional HCP/NCCP; and

WHEREAS, regional HCPs/NCCPs and permitting plans allow local agencies to identify significant resource issues in advance, streamline permitting for projects, improve interagency coordination, and provide for regulatory certainty and predictability in planning for future urban development and construction and maintenance of infrastructure; and

WHEREAS, portions of Santa Clara County consist of a regional area feasible for the protection of communities of sensitive species listed by both CESA and ESA; and

WHEREAS, regional HCPs/NCCPs make possible improved protection of biological resources by incorporating regional-level analysis and mitigation to protect ecosystems – an approach to conservation that is considered more effective than separately addressing single species impacted by single, small projects; and mitigation actions may be coordinated to achieve multiple objectives, such as providing habitat connectivity, providing open space, comprehensive preserve management and leveraging and optimizing the use of limited funds; and

WHEREAS, the regional HCP/NCCP effort may facilitate permitting or approvals pursuant to other environmental regulations implemented by other regulatory agencies and certain LOCAL PARTNERS may elect to apply for or obtain additional regional permits concurrently with this HCP/NCCP process; in particular, regulations related to impacts to waters of the United States may be addressed concurrently with Species concerns, and agencies involved in regulating waters of the United States in Santa Clara

County include the United States Army Corps of Engineers ("USACE"), the United States Environmental Protection Agency ("USEPA"), the California Regional Water Quality Control Board ("RWQCB") in addition to USFWS and CDFG; and

WHEREAS, certain LOCAL PARTNERS have been in discussions with the Resource Agencies to develop more focused HCPs/NCCPs that may relate to the broader HCP/NCCP effort described under this MOU, or may desire to do so in the future; and

WHEREAS, LOCAL PARTNERS recognize that there are several other municipalities and public agencies that may have an interest in participating in the development of an HCP/NCCP once they have had an opportunity to consider this matter and LOCAL PARTNERS encourage the participation of all potentially affected agencies in this MOU.

NOW, THEREFORE, THE LOCAL PARTNERS HEREBY SET FORTH THEIR MUTUAL UNDERSTANDINGS IN CONNECTION WITH THE MATTERS SET FORTH HEREINBELOW AS FOLLOWS:

SECTION 1. PURPOSE.

- A. LOCAL PARTNERS seek to enter into this MOU to define relationships and create a cooperative program to provide for the development of a Habitat Conservation Plan and Natural Community Conservation Plan to provide for the mutually agreed upon long term protection of ecosystems and biodiversity within the Santa Clara Valley area, while providing for the continued economic health of the region. For the purpose of developing this MOU among the LOCAL PARTNERS, the provisions below outline the project goals, process and contributions to the process the LOCAL PARTNERS would like to achieve.
- B. LOCAL PARTNERS intend to develop mechanisms under which the development of an HCP/NCCP will be funded and managed for submission to the appropriate Resource Agencies, as further described hereinbelow. LOCAL PARTNERS intend that once an HCP/NCCP is approved by appropriate Resource Agencies (defined in SECTION 3 below), the HCP/NCCP will establish and set forth further funding mechanisms that serve to preserve and enhance native habitats that support Species and that also provide local land use planning and infrastructure management agencies with regional incidental take permits under federal and state laws.

SECTION 2. TERM; ANNUAL APPROPRIATIONS.

- A. LOCAL PARTNERS recognize and acknowledge that the development of an HCP/NCCP as described under this MOU constitutes a multi-year effort and commitment. The term of this MOU shall be from the EFFECTIVE DATE until all of the LOCAL PARTNERS jointly decide to terminate this MOU or the date of final approval by the Resource Agencies of an HCP/NCCP prepared pursuant to this MOU, whichever date first occurs (the "Term").

- B. Notwithstanding Subsection 2.A above, each LOCAL PARTNER understands and acknowledges that each of the LOCAL PARTNERS intends to annually appropriate or otherwise budget for the contribution of that LOCAL PARTNER to this HCP/NCCP effort as described under this MOU. Each and every obligation of a LOCAL PARTNER under this MOU is subject to the annual appropriation or other appropriate budgetary action by the legislative body of that LOCAL PARTNER regarding those certain funds to be contributed by that LOCAL PARTNER pursuant to this MOU. A decision by the legislative body of a LOCAL PARTNER to not appropriate or otherwise contribute for the following year the funds of that LOCAL PARTNER for this HCP/NCCP effort shall constitute a withdrawal of that LOCAL PARTNER from this MOU, subject to the meeting of the LOCAL PARTNERS pursuant to SECTION 13 hereunder.

SECTION 3. PROJECT DESCRIPTION.

- A. LOCAL PARTNERS agree that the primary goal of the efforts described in this MOU is the creation of a multi-Species, multi-habitat HCP/NCCP that establishes an overall preserve system or framework that will be implemented through related sub-area plans.
- B. LOCAL PARTNERS envision that this HCP/NCCP will be developed through a collaborative planning effort initially involving those LOCAL PARTNERS identified herein on the EFFECTIVE DATE. LOCAL PARTNERS further envision and intend that development of the HCP/NCCP will include a comprehensive stakeholder involvement and public outreach program and meet the regulatory requirements established by the USFWS, the National Marine Fisheries Service ("NOAA-FISHERIES") and the CDFG.
- C. USFWS, NOAA-FISHERIES, CDFG, USACE, USEPA and RWQCB are sometimes referred to collectively herein as the "Resource Agencies."
- D. The term "Species" used in this MOU means those animal and plant species that the LOCAL PARTNERS determine will be covered by the HCP/NCCP, which may include all of the following:
1. Any and all species protected under or pursuant to federal or state laws, including without limitation ESA and CESA, by being officially listed or proposed for listing as threatened, rare or endangered under those laws; and
 2. Any and all species proposed for protection under or pursuant to federal or state laws by being identified as a candidate for official listing under or pursuant to those laws; and
 3. Any species considered under or pursuant to federal or state laws to be a species of special concern.

SECTION 4. GOALS.

- A. LOCAL PARTNERS agree that the goals for the HCP/NCCP are as follows:
1. To address and satisfy immediate regulatory compliance needs of the LOCAL PARTNERS associated with those areas within Santa Clara Valley subject to the highest anticipated development pressures; and
 2. To include in the HCP/NCCP program those certain areas generally located in the southeast portion of the Coyote, and Uvas/Llagas watersheds, which areas comprise approximately Three Hundred Forty-five Thousand (345,000) acres and are more particularly shown upon that certain map entitled "AREA MAP," attached hereto as EXHIBIT "A" and incorporated herein by this reference; and
 3. To provide for a mutually agreed upon process to allow for an HCP/NCCP applicable to the greater Santa Clara Valley area, based upon mutually defined goals, concerns and triggers; and
 4. To conserve and protect the species and habitats identified within the HCP/NCCP in the manner described in the HCP/NCCP, while providing for the continued economic health of the region.
- B. Each LOCAL PARTNER shall prepare its own or participate in a regional implementation plan for implementation of the HCP/NCCP within that respective jurisdiction, which implementation plan shall be consistent with the goals and provisions of the HCP/NCCP.

SECTION 5. DEVELOPMENT OF HCP/NCCP.

- A. LOCAL PARTNERS agree that development of the HCP/NCCP shall include the following components:
1. Identification of natural communities to foster the continued survival of those Species included in the HCP/NCCP to conserve and protect biodiversity within the Santa Clara Valley area; and
 2. A comprehensive public participation program, including stakeholders, to ensure that a wide range of perspectives is considered as a part of the HCP/NCCP; and
 3. A program for the education and commitment of the community and general public regarding habitat conservation as described in the HCP/NCCP.
- B. LOCAL PARTNERS agree that the content of the HCP/NCCP shall include and reflect the following elements:

1. A legally defensible and cost-effective strategy to protect those Species and habitats identified in the HCP/NCCP; and
 2. An equitable distribution of the implementation obligations to ensure that the costs of mitigation, compensation, and recovery measures identified and described in the HCP/NCCP are fairly allocated among LOCAL PARTNERS and/or any other participating agencies and/or stakeholders; and
 3. An ecosystem preservation program focused on the acquisition, preservation, restoration, monitoring and management of habitat utilized by those Species identified in the HCP/NCCP.
- C. LOCAL PARTNERS agree that outcomes of the HCP/NCCP effort that LOCAL PARTNERS shall strive to achieve all of the following:
1. A coordinated approach to biological resource and habitat preservation consistent with the provisions of the HCP/NCCP that encourages cooperation among jurisdictions.
 2. ESA/CESA regulatory predictability and permit streamlining for appropriate development and activities for both public and private projects.
 3. Land use and resource management policies of LOCAL PARTNERS, if applicable, such as general plans and zoning ordinances and regulations that protect the environment and preserve Species and habitat in a manner consistent with the HCP/NCCP.

SECTION 6. INFORMATION SHARING AND COORDINATION.

LOCAL PARTNERS believe that information sharing and coordination between the LOCAL PARTNERS regarding those matters pertinent to the development of an HCP/NCCP is a crucial component of the HCP/NCCP process, particularly with respect to scientific and electronic data. LOCAL PARTNERS agree to share and coordinate information among LOCAL PARTNERS in connection with the HCP/NCCP effort.

SECTION 7. MOU AMENDMENT PROCESS; NEW SIGNATORIES.

- A. This MOU may be amended only by a written agreement of all LOCAL PARTNERS to the MOU at the time of the proposed amendment.
- B. The addition of other entities as signatories to this MOU to include them as LOCAL PARTNERS under this MOU constitutes an amendment to this MOU requiring the written agreement of all LOCAL PARTNERS.
- C. Any new signatory to this MOU must reimburse the other existing LOCAL PARTNERS for an equitable share of the costs previously incurred by LOCAL PARTNERS for the HCP/NCCP effort prior to the signatory being added to this MOU as a LOCAL PARTNER and as determined through negotiations between the LOCAL

PARTNERS and the new signatory. The LOCAL PARTNERS and any new signatory also will negotiate and develop a revised cost sharing allocation for costs incurred for the HCP/NCCP effort to become effective once the new signatory is added as a LOCAL PARTNER to this MOU. Any revised cost allocation agreement among the LOCAL PARTNERS will be incorporated into the amended MOU.

SECTION 8. ORGANIZATIONAL STRUCTURE AND GOVERNANCE.

- A. The basic institutional structure for the HCP/NCCP agreed upon by the LOCAL PARTNERS is set forth in EXHIBIT "B," entitled "Organizational Structure," attached hereto and incorporated herein by this reference. The legislative governing body of each LOCAL PARTNER has the ultimate decision making authority regarding the HCP/NCCP for that LOCAL PARTNER. The "Governing Body Liaison Group" shown on EXHIBIT "B" consists of up to two (2) members appointed by and for each of the respective legislative governing bodies of each LOCAL PARTNER; provided, however, that each LOCAL PARTNER shall have a total of one (1) vote where decisions are made by a vote of the LOCAL PARTNERS hereunder. The "Management Team" shown upon EXHIBIT "B" consists of staff members designated by and from each LOCAL PARTNER.
- B. The legislative governing bodies of each LOCAL PARTNER are responsible for making significant decisions related to the HCP/NCCP for that LOCAL PARTNER. "Significant Decisions" include, but are not limited to, actions such as: approval of amendments to this MOU; approval or amendment of a planning agreement with USFWS, CDFG, and other resource agencies; approval of the project financing, budget and cost sharing agreement; approval of a draft and final HCP/NCCP; approval of a final application to appropriate Resource Agencies for an HCP/NCCP; review, approval or certification of the final EIS/EIR for the HCP/NCCP, and approval of the final HCP/NCCP. The decision-making authority for other decisions that are not Significant Decisions and do not otherwise require approval by the respective legislative governing body of a LOCAL PARTNER is delegated to the Management Team.
- C. The Management Team shall meet regularly and be responsible for implementing the direction provided by the respective legislative governing bodies of the LOCAL PARTNERS in connection with the HCP/NCCP, which authority shall include collectively making those decisions that are not Significant Decisions necessary to implement the direction provided by the respective legislative governing bodies of the LOCAL PARTNERS, such as budget management, species selection, conservation strategies, scopes of work for consultants, and any other authority delegated to the Management Team by the Elected Representatives Group. The Management Team also will be responsible for providing direction to the various HCP/NCCP staff and consultants, including the HCP Manager shown upon EXHIBIT "B." The Management Team will consult regularly with the Governing Body Liaison Group to apprise them of the status of the HCP/NCCP and to seek input and informal direction on policy matters. The Management Team will provide periodic status reports to the Governing Body Liaison Group and/or the legislative governing bodies of each of the LOCAL PARTNERS. Regarding funding and budget allocation issues, the Management

Team will meet at least once during every twelve (12) month period during the Term of this MOU, which initial period shall begin on the EFFECTIVE DATE set forth hereinabove and then on the anniversary of the EFFECTIVE DATE each successive year, to ascertain the total amount of funds contributed by each LOCAL PARTNER for that year and to allocate the appropriate use of those funds pursuant to and towards fulfillment of the terms and provisions of this MOU.

- D. The "HCP Manager" shall be the entity designated on the Organizational Structure attached hereto as EXHIBIT "B." The HCP Manager shall coordinate with all other members identified on the Organizational Structure, as appropriate or needed, to successfully manage and oversee the implementation of the tasks, processes, and goals described under this MOU.
- E. The "HCP Technical Committee" shall consist of those persons identified on the Organizational Structure, or such other persons selected by the Management Team. The HCP Technical Committee shall provide assistance to the Management Team in performing the tasks, implementing the processes and fulfilling the goals of this MOU, all pursuant to the requests and direction of the Management Team.
- F. The "HCP Legal Group" shall be those attorneys assigned to provide legal guidance and advice to this HCP/NCCP effort by each LOCAL PARTNER. The attorneys assigned to the HCP/NCCP effort by each LOCAL PARTNER as of the EFFECTIVE DATE are identified on the Organizational Structure.

SECTION 9. DECISION MAKING AND DISPUTE RESOLUTION PROCESS.

LOCAL PARTNERS shall make decisions regarding the HCP/NCCP effort in accordance with this SECTION 9 and SECTION 8 hereinabove. For all decisions made at or above the Management Team level, LOCAL PARTNERS will use their best efforts to arrive at a consensus decision. If a consensus decision is not reached within a reasonable time, the matter may be submitted to a mutually agreed upon mediator, with any mediation costs shared equally between all LOCAL PARTNERS. If the issue is not resolved through mediation, or if none of the LOCAL PARTNERS wish to mediate the issue, the matter may be resolved by a 2/3 vote of all LOCAL PARTNERS, with each LOCAL PARTNER having one (1) vote; provided, however, that a unanimous decision of each and every LOCAL PARTNER shall be required to approve a draft and a final HCP/NCCP and the annual funding contributions of each LOCAL PARTNER. LOCAL PARTNERS agree that any environmental documents prepared pursuant to this MOU must be certified by each and every entity that holds lead agency status in order for that environmental document to be utilized for environmental clearance for an HCP/NCCP prepared pursuant to this MOU.

SECTION 10. INTERACTION WITH RESOURCE AGENCIES.

LOCAL PARTNERS recognize the importance of coordinated communications and activities with the Resource Agencies. LOCAL PARTNERS may communicate and undertake other, separate permitting activities individually with the Resource Agencies, so long as those communications and activities are done in good faith and with respect

for the other LOCAL PARTNERS and are not anticipated to nor reasonably likely to adversely impact the HCP/NCCP process or outcome.

SECTION 11. CONSULTANT SELECTION, ADMINISTRATION AND MANAGEMENT.

Any consultants hired to perform any work on the HCP/NCCP that will be paid for through, or credited toward, the project financing and cost sharing provisions contained in this MOU will be subject to the decision making processes set forth in SECTIONS 8 and 9. This does not prevent a LOCAL PARTNER from hiring, at that LOCAL PARTNER's own expense, consultants to advise that LOCAL PARTNER on the HCP/NCCP, so long as those relationships do not adversely impact the HCP/NCCP process.

SECTION 12. WORK PROGRAM DEVELOPMENT.

Within three (3) months of executing this MOU, the LOCAL PARTNERS will agree upon a work program for completing the HCP/NCCP (the "Work Program"). This Work Program will include major project milestones, a timetable for completing each milestone, and the estimated costs and funding for completing the work associated with each milestone. Each LOCAL PARTNER shall strive to comport with all elements of the Work Program.

SECTION 13. PROJECT FINANCING AND COST SHARING.

Funding for the HCP/NCCP shall be split in an equitable manner among and as determined by all of the LOCAL PARTNERS over the term of this MOU. The estimated total budget for development of the HCP/NCCP and related environmental documents is Six Million Dollars (\$6,000,000.00). The Project Manager identified in EXHIBIT "B" may approve expenditures of Twenty Thousand Dollars (\$20,000) or less that are consistent with the Work Program, the Estimated Project Budget, and the budget established for the year in which the expenditure is made and for which funds are then currently available for expenditure. Any expenditures exceeding Twenty Thousand Dollars (\$20,000) must first be approved by the Management Team.

If, for any reason, any one or more of the LOCAL PARTNERS becomes unable to fund its cost allocation, the LOCAL PARTNERS shall promptly meet to explore options for resolving the resulting funding shortfall. Any revision to the HCP/NCCP financing and cost sharing arrangement shall require a written amendment to this MOU.

SECTION 14. PUBLIC PARTICIPATION

LOCAL PARTNERS recognize that the HCP/NCCP effort has the potential to affect the interests of many members of the public and further recognize that input from a wide variety of interests is both necessary and valuable to developing the optimal HCP/NCCP. LOCAL PARTNERS envision and agree that the process for public input into the

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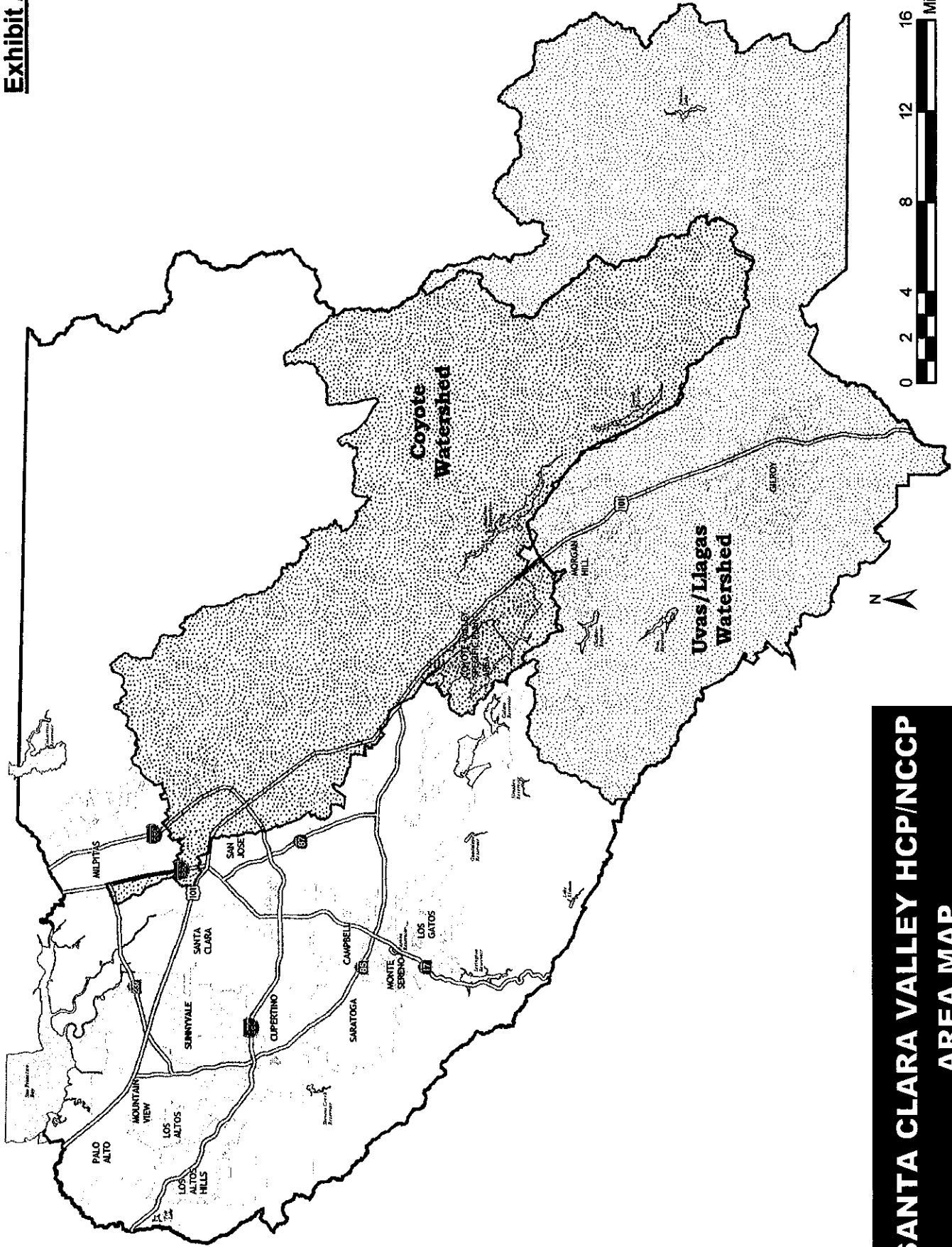
HCP/NCCP effort will be established by the LOCAL PARTNERS, as set forth in a planning agreement between LOCAL PARTNERS and the Resource Agencies.

WITNESSETH the parties below have set forth their understandings in connection with the matters set forth hereinabove as of the EFFECTIVE DATE:

<p>APPROVED AS TO FORM:</p> <p>By: _____ RENEE A. GURZA Its: Senior Deputy City Attorney</p>	<p>"CITY"</p> <p>CITY OF SAN JOSE, a municipal corporation</p> <p>By: _____ PATRICIA L. O'HEARN Its: City Clerk</p>
<p>ATTEST:</p> <p>By: _____ PHYLLIS A. PEREZ Its: Clerk of the Board</p> <p>APPROVED AS TO FORM AND LEGALITY:</p> <p>By: _____ LIZANNE REYNOLDS Its: Deputy County Counsel</p>	<p>"COUNTY"</p> <p>COUNTY OF SANTA CLARA, a political subdivision of the State of California</p> <p>By: _____ BLANCA ALVARADO, Chairperson Board of Supervisors</p>
<p>APPROVED AS TO FORM:</p> <p>_____ Its: Counsel</p>	<p>"VTA"</p> <p>SANTA CLARA VALLEY TRANSPORTATION AUTHORITY, a public entity</p> <p>By: _____ PETER M. CIPOLLA Its: General Manager</p>

<p>APPROVED AS TO FORM:</p> <p>By: _____ Emily J. Côté</p> <p>Its: Assistant General Counsel</p>	<p>"WATER DISTRICT"</p> <p>SANTA CLARA VALLEY WATER DISTRICT, a public entity</p> <p>By: _____ SIG SANCHEZ</p> <p>Its: Chair of the Board of Directors</p>
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Exhibit A



SANTA CLARA VALLEY HCP/NCCP AREA MAP

Map created by the Local Partners, July 2003. While the GIS data used to create this map is deemed reliable, it should be only be used for planning purposes and the Local Partners assume no liability.

Exhibit B

SANTA CLARA HCP/NCCP

Proposed Organizational Structure

