

ADMIN FINAL

IMPLEMENTING AGREEMENT

for the

**ORANGE COUNTY TRANSPORTATION AUTHORITY  
NATURAL COMMUNITY CONSERVATION PLAN (NCCP) / HABITAT  
CONSERVATION PLAN (HCP)**

by and among

THE CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE

THE UNITED STATES FISH AND WILDLIFE SERVICE,

THE ORANGE COUNTY TRANSPORTATION AUTHORITY,

AND

THE CALIFORNIA DEPARTMENT OF TRANSPORTATION

ADMIN FINAL

2016

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## Table of Contents

<b>1.0</b>	<b>PARTIES TO THIS AGREEMENT.....</b>	<b>1</b>
<b>2.0</b>	<b>RECITALS AND PURPOSES OF THE AGREEMENT .....</b>	<b>1</b>
2.1	Recitals .....	1
2.2	Purposes .....	2
<b>3.0</b>	<b>DEFINITIONS .....</b>	<b>2</b>
<b>4.0</b>	<b>CONSERVATION STRATEGY.....</b>	<b>9</b>
4.1	Avoidance and Minimization of Impacts.....	10
4.2	Land Acquisition and Assembly of Preserve Areas.....	10
4.3	Land Acquired Through Partnerships with Other Agencies and Organizations .....	11
4.4	Credit for Lands Acquired and Restoration Projects Funded Before Issuance of the Permits.....	11
<b>5.0</b>	<b>PRESERVE AREA MANAGEMENT.....</b>	<b>13</b>
5.1	Resource Management Plans .....	13
5.2	Recreation Uses .....	13
<b>6.0</b>	<b>COVERED ACTIVITIES.....</b>	<b>14</b>
6.1	Freeway Capital Improvement Projects .....	14
6.2	Future Minor Freeway Capital Improvement Projects .....	19
6.3	Preserve Management, Restoration, and Monitoring Activities .....	19
<b>7.0</b>	<b>TAKE AUTHORIZATIONS FOR PERMITTEE.....</b>	<b>19</b>
7.1	Extension of Take Authorizations to the Participating Special Entity .....	20
7.2	Take Authorizations for Non-Listed Covered Species .....	21
7.2.1	ESA Section 10 .....	21
7.2.2	NCCPA.....	21
7.3	Take Authorizations for Migratory Bird Species .....	21
7.4	No Take Above Levels Authorized.....	21
7.5	No Take Authorization for Fully Protected Species .....	22
7.6	No Take Authorization for Specially Protected Mammal Species .....	22
<b>8.0</b>	<b>OBLIGATIONS OF THE PARTIES.....</b>	<b>22</b>
8.1	Obligations of Permittee.....	22
8.1.1	Role of Permittee.....	23
8.1.2	Coordination between Permittee and other Regional Conservation Plans .....	23
8.2	Obligations of the Participating Special Entity.....	24
8.2.1	Role of Participating Special Entity .....	24
8.2.2	Remedies and Enforcement by Permittee Against the Participating Special Entity.....	25
8.3	Obligations of the Service.....	25
8.3.1	Permit Issuance, Implementation and Monitoring.....	25
8.3.2	Consultation with Public Agencies.....	25
8.3.3	Future Environmental Review Under NEPA.....	26
8.4	Obligations of CDFW .....	26

8.4.1	CEQA .....	26
9.0	<b>MONITORING AND ADAPTIVE MANAGEMENT .....</b>	<b>27</b>
9.1	Preserve Management and Monitoring .....	27
9.2	Permittee-initiated Adaptive Management .....	27
9.3	Wildlife Agency-initiated Adaptive Management.....	28
9.4	Reductions in Mitigation .....	28
9.5	No Increase in Take .....	28
10.0	<b>REPORTING .....</b>	<b>29</b>
10.1	Annual Report.....	29
10.1.1	Other Reports.....	29
10.1.2	Certification of Reports.....	30
10.1.3	Monitoring Results.....	30
10.2	Monitoring by the Wildlife Agencies.....	30
11.0	<b>CHANGED CIRCUMSTANCES.....</b>	<b>30</b>
11.1	Response to Changed Circumstances.....	31
11.1.1	Wildlife Agency-initiated Response to Changed Circumstances.....	31
12.0	<b>FUNDING.....</b>	<b>31</b>
12.1	Funding Endowments for Long-Term Management and Monitoring of Preserves .....	32
12.2	Effect of Inadequate Funding .....	34
13.0	<b>REGULATORY ASSURANCES .....</b>	<b>34</b>
13.1	Assurances Under the ESA .....	34
13.2	Assurances Under the NCCPA .....	34
13.2.1	Permittee.....	34
13.3	Process to Respond to Unforeseen Circumstances .....	35
13.4	Interim Obligations Upon a Finding of Unforeseen Circumstances .....	36
14.0	<b>TERM.....</b>	<b>36</b>
14.1	Effective Date .....	36
14.2	Initial Term.....	36
14.3	Extension of the Permits.....	36
15.0	<b>AMENDMENTS AND PERMIT AMENDMENTS .....</b>	<b>37</b>
15.1	Minor Amendments to the Plan.....	37
15.1.1	Minor Amendments .....	37
15.1.2	Major Amendments .....	38
15.2	Amendment to this Agreement .....	39
16.0	<b>ENFORCEMENT OF PERMIT AND DISPUTE RESOLUTION.....</b>	<b>40</b>
16.1	General Authorities and Legal Rights under Federal Permit .....	40
16.1.1	Permit Suspension.....	40
16.1.2	Reinstatement of Suspended Permit .....	40
16.1.3	Surrender or Revocation of the Federal Permit .....	41
16.2	State Permit .....	41
16.2.1	Suspension or Revocation of the State Permit .....	41
16.2.2	Rough Proportionality.....	41
16.2.3	Approval, Adoption or Amendment of Future Plans or Projects by Permittee.....	42
16.2.4	Reinstatement of Suspended Permit .....	43

16.2.5	Obligations in the Event of Suspension or Revocation.....	43
16.3	Dispute Resolution .....	43
16.3.1	Dispute Resolution Process .....	44
17.0	MISCELLANEOUS PROVISIONS.....	<b>44</b>
17.1	Incorporation of the Plan .....	44
17.2	Relationship to CESA, the NCCPA, the ESA, and Other Authorities.....	45
17.3	Changes in Environmental Laws.....	45
17.4	References to Regulations .....	45
17.5	Applicable Laws .....	45
17.6	Governing Law.....	46
17.7	Independent State and Federal Permits .....	46
17.8	Availability of Funds.....	46
17.9	Duplicate Originals .....	46
17.10	No Third-Party Beneficiaries.....	46
17.11	Agreement is not an Enforceable Contract as between Service and Permittee.....	47
17.12	Defense .....	47
17.13	Successors and Transferees.....	47
17.14	Notices .....	48
17.15	Calendar Days.....	49
17.16	Response Times .....	49
18.0	MISCELLANEOUS PROVISIONS BETWEEN PERMITTEE AND CDFW .....	<b>49</b>
18.1	Entire Agreement.....	49
18.2	Severability .....	49
18.3	No Partnership .....	50
18.4	Elected Officials Not to Benefit.....	50

## Exhibits

Exhibit A	Plan Area
Exhibit B	Covered Species
Exhibit C	Certificate of Inclusion under the State Permit
Exhibit D	Certificate of Inclusion under the Federal Permit

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## **1.0 PARTIES TO THIS AGREEMENT**

The Parties to this Implementing Agreement (Agreement) are the Orange County Transportation Authority (OCTA or Permittee), the California Department of Fish and Wildlife (CDFW) and the United States Fish and Wildlife Service (Service). The Service and CDFW are herein collectively referred to as the Wildlife Agencies.

## **2.0 RECITALS AND PURPOSES OF THE AGREEMENT**

### **2.1 Recitals**

(a) The Service is a federal agency within the United States Department of the Interior charged with responsibility for administering the federal Endangered Species Act (ESA) and providing for the conservation of federally listed species and their habitat. The Service is authorized to issue a Take permit under section 10(a) of ESA for the incidental Take of federally listed animal species provided that the applicant for such a permit submits an HCP that meets permit issuance criteria set forth in section 10 of the ESA.

(b) CDFW is a state agency within the California Natural Resources Agency charged with responsibility for administering the California Endangered Species Act (CESA) and the Natural Community Conservation Planning Act (NCCPA). CDFW is authorized to issue permits under section 2835 of the Fish and Game Code to authorize the Take of any species, whether or not it is listed as an endangered, threatened or candidate species under State law, where the conservation and management of the species is provided for in a Natural Community Conservation Plan (NCCP) approved by CDFW. CDFW enters into this Agreement pursuant to the NCCPA.

(c) The OCTA is the sponsor of the Natural Community Conservation Plan/Habitat Conservation Plan (NCCP/HCP or Plan). OCTA has undertaken a collaborative, systematic approach to protecting ecologically significant resources, including candidate, threatened and endangered species and their habitats in the Plan Area, and to ensuring that the Covered Activities comply with applicable federal and state laws.

(d) Caltrans is a department of the California State Transportation Agency established under the provisions of the California Government Code Sections 14000 *et seq.* Caltrans is the owner and operator of the State highway system. It is the lead agency for construction and rehabilitation projects undertaken on the State highway system. Caltrans is expected to act as Construction Lead on behalf of OCTA for certain freeway capital improvement projects. Caltrans will implement freeway improvement projects as a Participating Special Entity and OCTA will issue a Certificate of Inclusion to Caltrans on a project-by-project basis that will describe the authorized take and required avoidance and minimization measures.

(e) The Plan Area set forth in Exhibit A, defined below, and as described in the Plan Section 1.2.2.1, has been determined to provide habitat for the Listed Species and Unlisted Species set forth in Exhibit B;

(f) In 2009, OCTA, Caltrans, the Service, and CDFW entered into a Planning Agreement that identified goals, objectives, guidelines, criteria and procedures for the preparation of a joint NCCP and HCP. For purposes of the NCCPA, the Plan and this Agreement have been prepared according to the Planning Agreement.

(g) OCTA has developed a series of measures, described in Chapter 5 of the Plan, to minimize and mitigate to the maximum extent practicable the effects of Take of Covered Species as a result of the Covered Activities, and to adequately provide for the conservation and management of the Covered Species and their habitat.

(h) OCTA is making substantial commitments of land, natural resources, financial resources, and human resources to provide for the conservation and management of the Covered Species, their habitats and other natural communities to obtain Take authorizations and regulatory assurances from the Wildlife Agencies.

## **2.2 Purposes**

The purpose of this Agreement is to clarify the provisions of the Plan and the processes the Parties intend to follow to ensure successful implementation of the Plan in accordance with the State and Federal Permits and applicable law.

## **3.0 DEFINITIONS**

Terms used in this Agreement and specifically defined in CESA, the NCCPA, the ESA, or in regulations adopted pursuant to those statutes shall have the same meaning when utilized in this Agreement, unless this Agreement expressly provides otherwise.

### **3.1 Agreement**

“Agreement” means this Implementing Agreement, which incorporates the NCCP/HCP and the Permits by reference.

### **3.2 Annual Report**

“Annual Report” means the Annual Report prepared by the Permittee, as provided in Section 9.1.



### **3.3 Authorized Take**

“Authorized Take” means the extent of Take of Covered Species authorized by the Federal and State Permits.

### **3.4 CDFW**

“CDFW” means the California Department of Fish and Wildlife, a department of the California Natural Resources Agency.

### **3.5 CEQA**

“CEQA” means the California Environmental Quality Act (Pub. Resources Code §21000 *et seq.*) and all rules, regulations and guidelines promulgated pursuant to that Act.

### **3.6 CESA**

“CESA” means the California Endangered Species Act (Fish & Game Code, §2050 *et seq.*) and all rules, regulations and guidelines promulgated pursuant to that Act.

### **3.7 Changed Circumstances**

“Changed Circumstances” for purposes of the Federal Permit, means changes in circumstances affecting a species or the geographic area covered by the Plan that can reasonably be anticipated by Permittee and the Service, and that can be planned for in the Plan (50 C.F.R. § 17.3). Changed Circumstances and planned responses to those circumstances are described in Section 8.6.2 of the Plan. Under California law, “Changed Circumstances” are defined to mean reasonably foreseeable circumstances that could affect a Covered Species or the geographic area covered by the NCCP (California Fish and Game Code § 2805 (c)).

### **3.8 Conservation Easement**

“Conservation Easement” means a conservation easement as that term is used in California Civil Code section 815 *et seq.* and is described by California Civil Code section 815.1 as any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive

owners of such land, the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.

### **3.8 Conservation Measure**

“Conservation Measure” means each action detailed in Chapter 5 of the Plan that is a component of the Conservation Strategy.

### **3.9 Construction Lead**

“Construction Lead” means the agency that will have primary responsibility for implementing construction activities.

### **3.10 Covered Activities**

“Covered Activities” means the freeway capital improvement projects and the conservation activities described in Chapter 3 of the Plan that may result in Take of Covered Species authorized under the Permits.

### **3.11 Covered Species**

“Covered Species” means those species listed in Exhibit B to this agreement, each of which the Plan addresses in a manner intended to meet all of the criteria for issuing a permit under the NCCPA and an incidental take permit under the ESA.

### **3.12 Effective Date**

“Effective Date” means the date following execution of this Agreement by all Parties on which the State Permit and Federal Permit are issued.

### **3.13 Early Action Plan**

“Early Action Plan” means a Plan that the OCTA Board of Directors approved on August 13, 2007 (five-year Measure M2 Early Action Plan) to advance the implementation of several key Measure M2 projects, including providing funding for the Plan, acquisition of Preserves, funding of restoration projects, and related activities.

### **3.14 ESA**

“ESA” means the Federal Endangered Species Act of 1973, as amended (16 U.S.C § 1531 *et seq.*) and all rules, regulations and guidelines promulgated pursuant to that Act.

### **3.15 Federally Listed Species**

“Federally Listed Species” means the Covered Species that are listed as threatened or endangered species under the ESA as of the Effective Date, and the Covered Species that are listed as threatened or endangered pursuant to the ESA during the term of the Plan as of the date of such listing.

### **3.16 Federal Permit**

“Federal Permit” means the federal incidental Take Permit issued by the Service to Permittee pursuant to section 10(a)(1)(B) of the ESA.

### **3.17 Fully Protected Species**

“Fully Protected Species” means any species identified in California Fish and Game Code sections 3511 (birds), 4700 (mammals), 5050 (amphibians and reptiles) or 5515 (fish). No Fully Protected Species are Covered Species under this Plan.

### **3.18 HCP**

“HCP” means the habitat conservation plan prepared by Permittee for the Plan Area.

### **3.19 Listed Species**

“Listed Species” means a species (including a subspecies, or a distinct population segment of a species) that is listed as an endangered or threatened species under the ESA or as an endangered, threatened or candidate species under CESA.

### **3.20 Migratory Bird Treaty Act**

“Migratory Bird Treaty Act” means the federal Migratory Bird Treaty Act (16 U.S.C. §703 *et seq.*) and all rules, regulations and guidelines promulgated pursuant to that Act.

### **3.21 NCCP**

“NCCP” means a natural community conservation plan prepared according to the California Natural Community Conservation Planning Act.

### **3.22 NCCPA**

“NCCPA” means the California Natural Community Conservation Planning Act (Fish & Game Code, §2800 *et seq.*), as amended on January 1, 2012, and all rules, regulations and guidelines promulgated pursuant to that Act.

### **3.23 NCCP Permit or State Permit**

"NCCP Permit" or "State Permit" means the Permit issued in accordance with this Agreement by CDFW under section 2835 of the California Fish and Game Code to permit the Take of Covered Species.

### **3.24 NEPA**

“NEPA” means the National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*) and all rules, regulations and guidelines promulgated pursuant to that Act.

### **3.25 No Surprises Assurances**

"No Surprises Assurances" with regard to the Federal Permit means the regulations at 17.3, 17.22(b)(5), and 17.32(b)(5) that govern the ability of the Service to require conservation and mitigation measures beyond those provided in the Plan in the event of an Unforeseen Circumstance where Permittee is properly implementing the terms of the Plan and Federal Permit. With regard to the NCCP Permit, No Surprises assurances means that if there are Unforeseen Circumstances CDFW will not require additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources for the life of the NCCP permit without the consent of Permittee, provided Permittee is implementing the Plan, the Permits, and this Agreement, unless CDFW determines that continued implementation of the Plan would jeopardize the continued existence of a Covered Species (California Fish and Game Code § 2820 (f)).

### **3.26 Non-listed Species**

“Non-listed Species” means a species (including a subspecies, or a distinct population segment of a species) that is not listed as endangered or threatened under the ESA or CESA.

### **3.27 Participating Special Entity**

“Participating Special Entity” means Caltrans.

### **3.28 Party or Parties**

“Party” and “Parties” mean the signatories to this Agreement, individually and collectively.

### **3.29 Permit Area**

“Permit Area” means the portion of the Plan Area within which the Permittee is seeking authorization from the Wildlife Agencies for the Take of Covered Species resulting from Covered Activities. The Permit Area includes those lands in the Plan Area that are defined by either of the following parameters: (1) the lands along existing freeways (I-5, I-405, SR-22, SR-55, SR-57, SR-91) on which M2 freeway capital improvement projects will be conducted (Exhibit A); or (2) the boundary of any land protected and managed under the Plan (i.e., Preserves).

### **3.30 Permits**

“Permits” means the Federal HCP Permit and the NCCP Permit.

### **3.31 Permittee**

“Permittee” means OCTA.

### **3.32 Plan Area**

“Plan Area” means the area covered by the NCCP/HCP. The Plan Area is described in Chapter 1 of the NCCP/HCP and depicted in Exhibit A of this Agreement.

### **3.33 Planning Agreement**

“Planning Agreement” means the Planning Agreement regarding the OCTA NCCP/HCP executed in 2009 and amended in 2014 by OCTA, Caltrans, the Service, and CDFW.

### **3.34 Renewed Measure M or M2**

“Renewed Measure M” or “M2” means the Orange County Renewed Measure M Transportation Ordinance and Investment Plan, approved by Orange County voters in November 2006. The Renewed Measure M is an extension of a ½-cent transportation sales tax, beginning in 2011 through 2041, for transportation improvements throughout Orange County.

### **3.35 Preserve or Preserve Area**

“Preserve” or “Preserve Area” means the land dedicated in perpetuity through fee title, conservation easement or equivalent legal protection mechanism to meet the preservation, conservation, enhancement and restoration objectives of the Conservation Strategy of the Plan.

### **3.36 Rough Proportionality**

“Rough Proportionality” means implementation of mitigation and Conservation Measures under the Plan that is roughly proportional in time and extent to the impact on habitat or Covered Species authorized under the Plan and Permits.

### **3.37 Specially Protected Mammal Species**

“Specially Protected Mammal Species” means any species identified in California Fish and Game Code section 4800. One Specially Protected Mammal Species, the mountain lion, is a Covered Species under the Federal HCP Permit.

### **3.38 Take and Taking**

“Take” and “Taking” have the same meaning provided by the ESA and its implementing regulations with regard to activities subject to the ESA, and also have the same meaning provided in section 86 of the California Fish and Game Code with regard to activities subject to CESA and NCCPA. “Take” under the ESA does not apply to plant species, and take of plant species is not prohibited under the ESA; however, the plant species identified in Exhibit B are listed on the Federal Permit as Covered Species in recognition

of the conservation measures provided for them under the Plan and receive “No Surprises” regulatory assurances under the Federal Permit. For the purposes of this Agreement, Take includes impacts to covered plant species. For purposes of State law, take shall have the same meaning provided in Section 86 of the California Fish and Game Code.

### **3.39 Unforeseen Circumstances**

“Unforeseen Circumstances” as defined at 50 C.F.R. § 17.3 means, with regard to the Federal Permit, changes in circumstances affecting a species or geographic area covered by the Plan that could not reasonably have been anticipated by Permittee and the Service at the time of the Plan’s negotiation and development, and that result in a substantial and adverse change in the status of the Covered Species. Under the State Permit “Unforeseen Circumstances” as defined at Fish and Game Code section 2805, subdivision (k), means changes affecting one or more species, habitat, natural community, or the geographic area covered by a conservation plan that could not reasonably have been anticipated at the time of plan development, and that result in a substantial adverse change in the status of one or more Covered Species.

### **3.40 Unlisted Species**

“Unlisted Species” means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is not listed as endangered or threatened under CESA or the ESA.

## **4.0 CONSERVATION STRATEGY**

Chapter 5 of the Plan presents the Conservation Strategy. The Conservation Strategy identifies the take mitigation and minimization requirements for the Covered Activities intended to ensure that these activities are in compliance with the ESA, NCCPA, and CEQA, and other applicable environmental regulations. The Conservation Strategy includes specific and measurable biological goals and objectives that will be met through the acquisition of a Preserve Area that provides for the protection of habitat, natural communities, and species diversity on a landscape level. The Conservation Strategy also includes project-specific conservation measures to avoid, minimize, and mitigate impacts of the Covered Activities on Covered Species and their habitats. The creation and protection of the Preserve Area together with these conservation measures are intended to provide for the conservation of the Covered Species by (1) helping to maintain the ecological integrity of large habitat blocks, ecosystem functions, and biological diversity in the Plan Area; (2) providing linkages between natural communities, including Covered Species habitat, in the Plan Area; (3) providing large habitat blocks that support sustainable populations of Covered Species; (4) incorporating lands that represent a range

of environmental gradients and habitat diversity to provide for shifting species, including Covered Species, distributions due to Changed Circumstances; and (5) providing lands that support the effective movement and interchange of organisms between habitat areas in a manner that maintains the ecological integrity of the Covered Species habitat areas within the Plan Area. Lastly, the Conservation Strategy provides for the establishment of a monitoring and adaptive management program to ensure that management of the Preserve Area can evolve as new data and information become available. The Plan outlines the requirements of the Permittee for implementation of the Conservation Strategy.

#### **4.1 Avoidance and Minimization of Impacts**

The conservation strategy includes measures to avoid and minimize Take of Covered Species and to conserve natural communities and Covered Species at the landscape, habitat, and species level. Avoidance and minimization measures include species surveys and specific conditions on Covered Activities, as detailed in Chapter 5 of the Plan. Permittee shall implement, or ensure the implementation of, all applicable avoidance and minimization measures as required by the Plan.

#### **4.2 Land Acquisition and Assembly of Preserve Areas**

Permittee may acquire lands for the Preserve Area by fee title or by Conservation Easement. All fee title acquisitions will be held in fee by a Wildlife Agency or be protected by a Conservation Easement in favor of an entity approved in writing by the Wildlife Agencies that ensures that the acquired lands are protected in perpetuity as open space for Covered Species and their habitats. If Permittee acquires Preserve land by Conservation Easement, the terms of the Conservation Easements must be approved in writing by the Wildlife Agencies and identify the Wildlife Agencies as third party beneficiaries with a right of access to the easement areas and the right to enforce the terms of the Conservation Easement. All Conservation Easements shall be recorded in perpetuity pursuant to Civil Code section 815 *et seq.* and shall be subject to the Preserve Area commitments of the Plan.

Although not required by the Plan, this Agreement, or the Permits, OCTA may elect to acquire additional lands for the Preserve Area in the future. If OCTA elects to add additional lands to the Preserve, the identification, selection, and acquisition of the future Preserve(s) will be completed following the Environmental Oversight Committee (EOC) Preserve selection process. The Wildlife Agencies will have the opportunity to review and approve the selection of future Preserves. Any future Preserves and Conservation Easements put in place and recorded on such lands must have the approval of the Wildlife Agencies.



### 4.3 Land Acquired Through Partnerships with Other Agencies and Organizations

Permittee may enter into agreements and other partnerships involving land acquisitions within the Plan Area with other land management agencies and organizations where those acquisitions meet the goals and objectives of the Plan. However, such acquisitions will be formally credited towards the obligations set forth in the Plan only where the Wildlife Agencies approve the acquisition and concur that the acquisition (a) contributes to meeting the goals and objectives of the Plan, (b) contains a Conservation Easement that meets the requirements of Section 4.2 (unless owned in fee by the Wildlife Agencies), and (c) will be managed in perpetuity pursuant to a Resource Management Plan (RMP).

### 4.4 Credit for Lands Acquired and Restoration Projects Funded Before Issuance of the Permits

The Plan's Preserve Area includes lands acquired before issuance of the Permits that shall be credited towards the land commitments and obligations of the Plan once Permittee records a Conservation Easement. The lands shall be formally credited towards the Plan as follows:

<b>Preserve Area</b>		
<b>Preserve</b>	<b>Total Acres <sup>1</sup></b>	<b>Acres of Natural Habitat</b>
Aliso	151.1	146.9
Ferber Ranch	395.7	380.4
Hafen	48.0	47.9
Hayashi	298.8	293.6
MacPherson	203.5	200.0
O'Neill Oaks	116.1	112.4
Saddle Creek South <sup>2</sup>	82.8	51.3
<b>Total</b>	<b>1,296.0</b>	<b>1,232.5</b>

<sup>1</sup> These acreages are approximate based on the best currently available survey data. Final acreages are not expected to vary significantly, but may be adjusted slightly in the future when more accurate data is available.

<sup>2</sup> Saddle Creek South Preserve was purchased, in part, with funding provided by the National Fish and Wildlife Foundation. OCTA receives a percentage of the available credits based on the percentage of the total cost of acquiring and managing the Preserve contributed by OCTA (75.36%).

The Plan provides for credits for restoration projects funded during preparation of the Plan on lands permanently protected through conservation easements, restrictive covenants, deed restrictions, or equivalent title restrictions approved by the Wildlife

Agencies. The Wildlife Agencies, in their sole discretion, may approve habitat restoration projects on United States Forest Service lands focused on improving conditions for arroyo chub to support sustainable populations in occupied areas, provided that the United States Forest Service provides adequate assurances of durability and addresses other relevant Wildlife Agency concerns. Credits under the Plan for the following restoration projects shall be available to Permittee once the Wildlife Agencies have concurred that the project has met the performance criteria established in the Wildlife Agency approved restoration plan, as follows:

- **Agua Chinon/Bee Flat – Irvine Ranch Conservancy.** 90.1 acres of restoration consisting of chaparral, grassland, coastal sage scrub, elderberry scrub, oak woodland, and riparian (mulefat scrub/elderberry shrubland).
- **Big Bend – Laguna Canyon Foundation.** 3.7 acres of restoration consisting of coastal sage scrub and riparian woodland to enhance wildlife connectivity.
- **City Parcel – City of San Juan Capistrano.** 53 acres of restoration consisting of riparian and coastal sage scrub within Trabuco Creek Wildlife Linkage.
- **Fairview Park – City of Costa Mesa.** 23 acres of restoration consisting of wetlands, grasslands, coastal sage scrub, and riparian.
- **UC Irvine Ecological Preserve – Nature Reserve of Orange County.** 8.5 acres of restoration consisting of cactus scrub.
- **Aliso Creek – Laguna Canyon Foundation.** 55 acres of restoration consisting of riparian and transitional habitat.
- **Chino Hills State Park – California Department of Parks and Recreation.** 13.5 acres of riparian restoration and 6.0 acres of cactus scrub restoration.
- **Harriett Weider Regional Park – Bolsa Chica Conservancy.** 8.2 acres of restoration consisting of grassland, coastal sage scrub, and riparian habitat.
- **Lower Silverado Canyon – Irvine Ranch Conservancy.** 28.4 acres of restoration consisting of riparian and coastal sage scrub habitat.
- **North Coal Canyon – California Department of Parks and Recreation.** 5.5 acres of restoration consisting of coastal sage scrub habitat within a key wildlife connectivity linkage area.
- **West Loma – Irvine Ranch Conservancy.** 62.47 acres of restoration consisting of coastal sage scrub and riparian habitat.

Conservation actions involving restoration projects include an estimate of conserved habitats based on conceptual restoration design plans. The final acreage of restored habitat may be refined during final restoration design and during implementation. Satisfaction of mitigation obligations will be achieved once the Wildlife Agencies concur in writing that the restoration project meets the restoration design success criteria.

Permittee has committed to funding additional restoration projects following the EOC restoration project selection process. The Plan identifies requirements for future restoration to ensure that the Plan provides conservation for all Covered Species.

## **5.0 PRESERVE AREA MANAGEMENT**

Permittee shall remain solely responsible for ensuring the management of the Preserve in perpetuity in accordance with Wildlife Agency-approved RMPs, as those plans may be revised over time, and for the timeliness and quality of all requirements of preserve management. Management activities on all Preserve Area lands that are identified as obligations of the Plan are considered Covered Activities. Permittee may contract with another entity for management planning and plan preparation, and subsequently contract with a designated land manager to perform the various implementation tasks. The Preserve manager(s), which must be approved by the Wildlife Agencies, may be a land use agency(ies), non-profit organization(s), for-profit land management company(ies), or other qualified entity(ies). The Preserve manager will carry out the preserve management responsibilities described in Chapter 7 of the Plan.

### **5.1 Resource Management Plans**

Within two (2) years of the dedication of any parcel of land to the Preserve Area, as evidenced by recordation of a Conservation Easement or fee title held by a Wildlife Agency, Permittee shall ensure that an RMP for each parcel is finalized pursuant to Section 7.2 of the Plan after receiving written concurrence from the Wildlife Agencies. During the preparation of RMPs, Permittee shall be responsible for ensuring the land is managed in accordance with the Plan to maintain and improve Covered Species habitat using the best available information and management methods in practice within the Plan Area until the RMP is completed. The RMPs will be reviewed every 5 years and updated as necessary.

### **5.2 Recreation Uses**

The Parties acknowledge that providing low-intensity recreational opportunities on Preserve Area lands may be acceptable, subject to appropriate constraints to protect Covered Species and natural communities. Permittee may integrate recreation planning goals and objectives (Section 7.2.5, “Preserve Management Guidelines”, of the Plan) into the RMPs to the extent consistent with the Plan’s biological goals and objectives and the requirements of this Agreement and the Permits, and subject to the prior written concurrence of the Wildlife Agencies. Permittee recognizes that recreation opportunities, and thus any recreation planning goals and objectives, are secondary to the need to protect biological resources committed for conservation under the Plan. Permittee shall manage all recreational uses allowed under the RMPs to ensure such uses are consistent with the RMP. In the event that recreationists fail to follow rules for access/conduct/site use resulting in habitat damage and/or disturbance to wildlife beyond that contemplated in the Plan, Permittee may need to curtail uses or eliminate public access on a temporary or permanent basis as necessary to achieve compliance with the RMPs.

## 6.0 COVERED ACTIVITIES

This section describes the Covered Activities within the Permit Area for which the Plan will provide compensation, avoidance, and minimization of impacts for Covered Species. These are the Covered Activities for which take authorization will be obtained. As stated in Section 5.6 of the Plan, avoidance and minimization measures are requirements that will be evaluated and implemented on a project-by-project basis for each Covered Activity. These include measures to avoid sensitive biological resources and species specific minimization measures. The Plan includes coverage for two major categories of Covered Activities:

- Freeway capital improvement projects proposed by OCTA along 13 highway segments as described in Section 6.1 and additional future minor freeway capital improvement projects funded by M2 and described in Section 6.2.
- Preserve Management, Restoration, and Monitoring Activities as described in Section 6.3.

### 6.1 Freeway Capital Improvement Projects

Freeway capital improvement projects covered by the NCCP/HCP include the thirteen freeway capital improvement projects proposed by Permittee through its M2 transportation planning and project implementation process. These proposed projects are designed to reduce congestion, increase capacity, and improve traffic flow of Orange County's important transportation infrastructure. The freeway improvement projects are, in all instances, along existing freeways and will include lane additions, interchange improvements, and associated facility upgrades. Freeway capital improvement projects do not include the construction of new freeways.

There are 13 discrete proposed freeway segments in which freeway capital improvement projects have been identified for coverage under the Plan, which are described in greater detail below.

**1) Project A: Santa Ana Freeway (Interstate 5) Improvements between Costa Mesa Freeway (State Route 55) and "Orange Crush" Area (State Route 57)**

The objective of Project A is to increase freeway capacity and reduce congestion on the Santa Ana Freeway (I-5). Project A would affect two segments: Segment 1, extending from SR-55 to SR-57, and Segment 2, located at the I-5/SR-55 interchange. These Improvements would add capacity on I-5 between SR-55 and SR-57 and relieve congestion at the I-5/SR-57 interchange, an area known as the "Orange Crush." Construction would take place within the existing right-of-way. Interchange

improvements would occur between the Fourth Street and Newport Boulevard ramps on I-5, between Fourth Street and Edinger Avenue on SR 55 as it crosses SR-55 and SR-57. Project-specific improvements are subject to approved plans developed in coordination with local jurisdictions and affected communities.

**2) Project B: I-5 Improvements from SR-55 to El Toro “Y” Area**

The objective of Project B is to increase freeway capacity and reduce congestion on I-5 between SR-55 and I-405, an area known as the El Toro “Y.” These improvements would consist of construction of new lanes and improvements to existing interchanges. Project B construction would take place within the existing right-of-way. Specific improvements are subject to approved plans developed in cooperation with local jurisdictions and affected communities.

**3) Project C: North and South Portions of I-5 Improvements between El Toro Interchange and Avenida Pico**

The objective of Project C is to increase freeway capacity and reduce freeway congestion on I-5 south of the El Toro “Y”. It is also intended to improve and update key interchanges on I-5 to relieve street congestion around older interchanges and on ramps.

The north portion of Project C (Segment 1) would improve I-5 south of the El Toro “Y” by constructing new lanes from the vicinity of the El Toro interchange in Lake Forest to the vicinity of SR-73 in Mission Viejo. The south portion of Project C (Segment 2) involves improvements similar to those proposed for the north portion between Pacific Coast Highway and Avenida Pico to reduce freeway congestion in San Clemente.

Project C also involves major improvements to local interchanges. Project C, Segment 2 includes the I-5/Avenida Pico interchange. Project C, Segment 1 includes the I-5/Avery Parkway interchange and the I-5/La Paz Road interchange. Project C construction takes place within the existing right-of-way. Specific improvements are subject to approved plans developed in cooperation with local jurisdictions and affected communities.

**4) Project D: I-5 Local Interchange Upgrades**

Project D updates and improves the following key interchanges on I-5:

- I-5/Avenida Pico Interchange—integrated into Project C, Segment 2
- I-5/Ortega Highway Interchange

- I-5/Avery Parkway Interchange—integrated into Project C, Segment 1
- I-5/La Paz Road Interchange—integrated into Project C, Segment 1
- I-5/El Toro Interchange

These interchanges occur in southern Orange County, in the vicinity of Mission Viejo, Laguna Niguel, San Juan Capistrano and San Clemente. Improvements are subject to approved plans developed in cooperation with local jurisdictions and affected communities.

**5) Project E: Garden Grove Freeway (SR-22) Access Improvements**

Project E improves interchanges along SR-22 at Euclid Street, Brookhurst Street, and Harbor Boulevard in order to reduce freeway and surface street congestion near these interchanges. Specific improvements are subject to approved plans developed in cooperation with local jurisdictions and affected communities.

**6) Project F: SR-55 Improvements**

The objective of Project F is to increase freeway capacity and reduce congestion through the addition of new lanes to SR-55 between the Garden Grove Freeway (SR-22) and the San Diego Freeway (I-405). The south portion of Project F (Segment 1) is between I-405 and I-5. The north portion of Project F (Segment 2) is between I-5 and SR-22. These improvements include merging lanes between interchanges to smooth traffic flow. Project F would also provide freeway operational improvements for the portion of SR-55 between SR-91 and SR-22.

**7) Project G: SR-57 between Orangewood Avenue and Lambert Road Northbound—General-Purpose Lane Improvements**

The objective of Project G is to increase freeway capacity and reduce congestion associated with SR-57. This project is composed of several segments.

- Segment 1a: Construction of a northbound lane between Orangewood Avenue and Katella Street.
- Segment 1b: Construction of a northbound lane between Katella Street and Lincoln Avenue.
- Segment 2a: Construction of a northbound lane between Orangethorpe Avenue and Yorba Linda Boulevard.

- Segment 2b: Construction of a northbound lane between Yorba Linda Boulevard and Lambert Road.
- Segment 3: Improvements to the Lambert Interchange
- Segment 4: Construction of a northbound truck climbing lane between Lambert Road and Tonner Canyon Road.

The improvements are designed and coordinated specifically to reduce congestion at the SR-57/SR-91 interchange. All improvements associated with Project G generally would occur within the existing right-of way. Specific improvements are subject to approved plans developed in coordination with local jurisdictions and affected communities.

**8) Project H: Project H: Riverside Freeway (SR-91) from SR-57 to I-5 Westbound—General-Purpose Lane Improvements**

Project H adds capacity in the westbound direction on State Route 91 to smooth traffic flow and relieve congestion in the SR-57/SR-91 interchange. It also provides operational improvements at on- and off-ramps to SR-91 between I-5 and SR-57. These improvements generally occur within the existing right-of-way. Specific improvements are subject to approved plans developed in cooperation with local jurisdictions and affected communities.

**9) Project I: SR-91 Improvements from SR-57 to SR-55 Interchange**

Project I would add freeway capacity to SR-91 between SR-57 and SR-55. Project I (Segment 1) includes improvements to the SR-91/SR-55 and SR-91/SR-57 interchange complexes and nearby local interchanges at Tustin Avenue and Lakeview Avenue.

Project construction generally would occur within the existing right-of-way. Specific improvements are subject to approved plans developed in cooperation with local jurisdictions and affected communities.

**10) Project J: SR-91 Improvements from SR-55 to the Orange County/Riverside County Line**

Project J would improve SR-91 from SR-55 to the Orange County/Riverside County boundary. The project would provide up to four new lanes of capacity between SR-241 and the Riverside County line by adding reversible lanes, building elevated sections, and improving connections to SR-241. These projects would be constructed in conjunction with similar coordinated improvements in Riverside County extending to I-15.

Improvements in Riverside County are paid for from other sources. Specific improvements are subject to approved plans and are developed in cooperation with local jurisdictions and affected communities.

**11) Project K: San Diego Freeway (I-405) Widening Project from SR-55 to San Gabriel River Freeway (I-605)**

Project K would increase freeway capacity and reduce congestion associated with I-405. The proposed project would add new lanes to the San Diego Freeway between I-605 and SR-55, generally within the existing right-of-way. The project would update interchanges and widen all local overcrossings according to city and regional master plans.

The proposed improvements are coordinated with other planned I-405 improvements, including improvements to the I-405/SR-22/I-605 interchange area to the north and I-405/SR-73 improvements to the south. The improvements adhere to the recommendation of the I-405 major investment study, adopted by the OCTA in October 2005, and are developed in coordination with local jurisdictions and affected communities.

**12) Project L: Project L: I-405 Improvements between SR-55 and I-5**

Project L would increase freeway capacity and reduce congestion associated with I-405. The proposed project would add new lanes to I-405 from SR-55 to I-5. The project would ease chokepoints at interchanges and add merging lanes near on- and off-ramps such Irvine Center Drive and SR-133, and to improve overall freeway operations in the I-405/I-5 El Toro “Y” area. Project L, Segment 2 includes improvements at the Lake Forest Interchange on the I-5.

Project L is constructed generally within the existing right-of-way. Specific improvements are subject to approved plans developed in cooperation with local jurisdictions and affected communities.

**13) Project M: I-605 Freeway Access Improvements**

Project M would improve freeway access and arterial connection to I-605 serving the communities of Los Alamitos and Cypress. The project is coordinated with other planned improvements along SR-22 and I-405. Specific improvements are subject to approved plans developed in cooperation with local jurisdictions and affected communities. This improvement connects to interchange improvements at I-405 and SR-22 as well as new freeway lanes between I-405 and I-605. This project is integrated with Project K.



## **6.2 Future Minor Freeway Capital Improvement Projects**

In addition to the thirteen freeway capital improvement projects outlined above, additional future minor freeway capital improvement projects are eligible for coverage under the Plan as Covered Activities provided that the projects meet the guidelines for Covered Activities as described in Chapter 3 of the Plan, meet all HCP and NCCP Permit requirements, including those outlined in Chapter 3 of the Plan, occur within the Permit Area, and do not result in exceedance of the acreage impact caps established for the Plan, additional take of Covered Species, or greater or significantly different impacts to the environment than analyzed in the NEPA/CEQA document for the NCCP/HCP, as determined by the Wildlife Agencies.

## **6.3 Preserve Management, Restoration, and Monitoring Activities**

Preserve Management, Restoration and Monitoring Activities are the long-term habitat management activities associated with Preserves, described in Chapter 3 of the Plan, that may result in Take of Covered Species during the term of the Plan and for which Take coverage is provided under the Take authorizations. These Covered Activities include the following categories:

- Management and recreational facilities;
- Management activities;
- Habitat enhancement, restoration, and creation, including the collection of seed if performed, or directly overseen, by an experienced restoration specialist;
- Species surveys, monitoring, and research; and
- Responses to Changed Circumstances.

Public access and passive recreation that is consistent with the Plan and RMPs will be a compatible use that does not require coverage under the Permit because it is not anticipated to result in Take of Covered Species.

## **7.0 TAKE AUTHORIZATIONS FOR PERMITTEE**

Following execution of this Agreement by all Parties and a determination that all applicable legal requirements have been met, the Service will issue a Federal Permit under Section 10(a)(1)(B) of the ESA to Permittee that authorizes the incidental Take of Covered Species resulting from Covered Activities, and CDFW will issue an NCCP Permit under Section 2835 of the California Fish and Game Code to Permittee that authorizes the Take of Covered Species resulting from Covered Activities. This

Agreement will take effect with regard to the Federal Permit and NCCP Permit, respectively, upon issuance of each Permit.

Authorized Take under the Permits will cover the Permittee, the Participating Special Entity to the extent provided under Section 7.1, and entities and persons who are under the direct control of Permittee for purposes of implementing the Covered Activities under the Permits, including all of its respective officers, directors, employees, agents, subsidiaries, member agencies, and contractors, as applicable, who engage in any Covered Activity and implementation of the Plan.

### **7.1 Extension of Take Authorizations to the Participating Special Entity**

For any Covered Activity for which the Participating Special Entity assumes the role of Construction Lead, the Participating Special Entity shall sign a Certificate of Inclusion under the Federal Permit and a Certificate of Inclusion under the State Permit for that Covered Activity in substantially the same form as Exhibits C and D, respectively. Revisions to the template Certificates of Inclusion must be approved in writing by the Wildlife Agencies. The Permittee shall then issue to the Participating Special Entity the Certificates of Inclusion, which specifically describe the Authorized Take under the Federal and State Permits, respectively, and required avoidance and minimization measures and extend Take authorization under the Permits to the Participating Special Entity. Permittee represents that it has legal control over the Participating Special Entity for the purposes of implementing the terms and conditions of this Agreement, the Plan and the Permits and acknowledges that it is responsible for ensuring compliance by the Participating Special Entity with all applicable terms and conditions of this Agreement, the Plan and the Permits and is liable for any non-compliance by the Participating Special Entity with such terms and conditions. Upon Permittee's issuance of the Certificates of Inclusion to the Participating Special Entity, the Participating Special Entity may Take the Covered Species while carrying out the Covered Activity in the Permit Area in accordance with the terms and conditions of this Agreement, the Plan and the Permits. The Take authorization issued to the Participating Special Entity applies to all of its elected officials, officers, directors, employees, agents, subsidiaries, contractors, and subcontractors. The Participating Special Entity shall comply fully with the applicable terms and conditions of the Agreement, the Plan and the Permits and shall ensure that its elected officials, officers, directors, employees, agents, subsidiaries, contractors, and subcontractors comply with the applicable terms and conditions of the Agreement, Plan, and Permits. The Participating Special Entity shall be liable for any non-compliance with such terms and conditions, including non-compliance by its elected officials, officers, directors, employees, agents, subsidiaries, contractors, and subcontractors. Nothing in this Agreement or the Certificates of Inclusion shall limit CDFW's ability under the NCCPA to enforce the terms and conditions of this Agreement, the Plan and the NCCP Permit against the Permittee or the Participating Special Entity.

## **7.2 Take Authorizations for Non-Listed Covered Species**

### **7.2.1 ESA Section 10**

The Federal Permit will identify all Covered Species. The Federal Permit will take effect for listed Covered Species at the time the Federal Permit is issued and, subject to compliance with the terms of the Federal Permit, will take effect for an unlisted Covered Species upon the listing of such species. Any reference in this Agreement or the Plan to incidental take of Covered Species shall, for the purpose of Covered plant Species refer to loss or impacts to Covered plant Species identified in the Permit.

### **7.2.2 NCCPA**

Under the NCCPA, take of unlisted species may be authorized under a Section 2835 permit. The State Permit authorizes the take of all Covered Species as of the Effective Date, regardless of whether they have been listed under State law.

## **7.3 Take Authorizations for Migratory Bird Species**

The Federal Permit to be issued in reliance on the Plan and this Agreement also constitutes a Special Purpose Permit under 50 Code of Federal Regulations section 21.27 for the take of Covered Species listed under the Migratory Bird Treaty Act (16 U.S.C. § 703 *et seq.* (MBTA)) that are also listed under the ESA as threatened or endangered. The take of any of these birds as the result of a Covered Activity carried out in accordance with the Plan and the Federal Permit will not constitute a violation of the MBTA. The Special Purpose Permit will be valid for three years and will be renewed pursuant to the MBTA provided Permittee is in compliance with the Federal Permit. Each renewal of the Special Purpose Permit shall be for the maximum period of time allowed under 50 C.F.R. § 21.27 or its successor at the time of renewal, provided the Federal Permit remains in effect for such period. The Federal Permit shall also constitute a Special Purpose Permit for each of the unlisted MBTA Covered Species that may become listed under the ESA during the term of the Permit, concurrent with the listing of the species.

## **7.4 No Take Above Levels Authorized**

The amount of Take for each Covered Species, including Take resulting from habitat modification authorized under the Permits, is defined in Chapter 6 of the Plan and in the Permits. Modifications to the Plan through adaptive management or other provisions of the Plan that would result in an increase in the take of Covered Species beyond that analyzed under the original Plan and provided in the Permits are not authorized. Any

such modification must be reviewed and approved as an NCCP/HCP and permit amendment. See Section 15.2 of this Agreement and Section 8.5 of the Plan.

Section 2820(b)(3) of the California Fish and Game Code requires that the Agreement include a provision specifying the actions CDFW shall take if the level of take exceeds that authorized by the Permit. For purposes of the NCCP Permit, if CDFW determines, after conferring with Permittee, that take is occurring above levels authorized by the NCCP Permit, CDFW, at its discretion, may suspend or revoke the State Permit, in whole or in part, pursuant to the procedures in Section 16.2 of this Agreement. CDFW will work with Permittee to obviate the need for Permit revocation or suspension as stated in Section 8.7.2.6 of the Plan.

### **7.5 No Take Authorization for Fully Protected Species**

No Fully Protected Species (as defined under section 3.17) are included in the list of Covered Species, although six Fully Protected Species are expected to occur in the Plan Area. Take of these species is not proposed by Permittee nor authorized under the NCCP Permit, and CDFW acknowledges and agrees that the measures set forth in the Plan for the Covered Activities are intended to avoid causing the Take of any Fully Protected Species.

### **7.6 No Take Authorization for Specially Protected Mammal Species**

One Specially Protected Mammal Species, mountain lion, is included in the list of Covered Species for the Federal HCP Permit. Take of this species is not proposed by Permittee, nor authorized under the NCCP Permit, and CDFW acknowledges and agrees that the measures set forth in the NCCP/HCP for the Covered Activities are intended to avoid causing the Take of this Specially Protected Mammal Species under State law.

## **8.0 OBLIGATIONS OF THE PARTIES**

### **8.1 Obligations of Permittee**

Permittee will fully and faithfully perform all obligations assigned to it under the Plan, this Agreement and the Permits, including overseeing and managing implementation of the Plan and compliance with all take avoidance, minimization, and mitigation measures, all responses to Changed Circumstances, all monitoring and reporting requirements, and funding of the Plan. Permittee shall undertake all necessary actions to enforce the terms of the Plan, this Agreement and the Permits as to itself and all entities and persons under its direct control to which it extends Take authorization, including, upon issuance of a Certificate of Inclusion, the Participating Special Entity. Any non-compliance by

Permittee or an entity or person under its direct control for purposes of the Permits, including the Participating Special Entity, may be deemed by the Service or CDFW as a violation by Permittee of the Federal Permit or State Permit, respectively. In particular, covered freeway capital improvement projects will be implemented by Permittee, in coordination with the Participating Special Entity and contractors, in conformance with the Plan, this Agreement, and the Permits. Preserve Management Covered Activities will be implemented by Permittee and its management entities in conformance with the Plan, this Agreement, and the Permits.

### **8.1.1 Role of Permittee**

Permittee's responsibilities for implementing the Plan include, but are not limited to:

- Overseeing the assembly and management of the Preserve Area as further described in the Plan and summarized in Sections 4 and 5 of this Agreement;
- Funding and overseeing Plan implementation, including all Take minimization, mitigation and other conservation measures applicable to Covered Activities both within and outside of the Preserve Area;
- Ensuring compliance by the Participating Special Entity with the Plan, the Agreement, and the Permits;
- Ensuring mitigation and conservation measures are being implemented roughly proportional in time and extent to the impact of Authorized Take, as provided in Section 16.2.2 of this Agreement;
- Providing technical support and advice to Preserve Managers about what Plan measures apply to Covered Activities and how they should be applied, including, but not limited to, avoidance and minimization measures;
- Promoting coordination among Preserve Managers to ensure that the Plan is implemented consistently and effectively;
- Preparing or ensuring the preparation of RMPs, as further described in Section 5.1 of this Agreement and Section 7.2 of the Plan;
- Monitoring, adaptive management and Changed Circumstances;
- Information management; and
- Preparing the Annual Report.

### **8.1.2 Coordination between Permittee and other Regional Conservation Plans**

The Plan Area adjoins or overlaps with two other regional habitat conservation plans, the County of Orange Central and Coastal Subregion NCCP/HCP, and the Southern Orange County HCP. The Conservation Strategy for the Plan is designed to enhance the overall level of conservation in Orange County by building on existing conserved lands and

providing increased connectivity between existing conserved lands and thus is consistent with overlapping and adjoining plans.

## **8.2 Obligations of the Participating Special Entity**

It is expected that the Participating Special Entity will assume the role of Construction Lead on behalf of the Permittee for a number of freeway capital improvement projects that are Covered Activities. The Participating Special Entity will not assume any obligations for Covered Activities in Preserve Areas. For all Covered Activities for which the Participating Special Entity assumes the role of Construction Lead, the Participating Special Entity will execute Certificates of Inclusion under the Federal and State Permits. The Participating Special Entity will fully and faithfully perform all obligations assigned to it under the Plan, this Agreement, the Certificates of Inclusion, and the Permits, specifically including the implementation of all applicable avoidance and minimization measures.

### **8.2.1 Role of Participating Special Entity**

The responsibilities of the Participating Special Entity for implementing the Plan when it acts as Construction Lead include:

- Ensuring all applicable avoidance and minimization measures are implemented, including; (1) the aquatic resources and species policy; ; (2) covered plant species policy; (3) wildlife crossing policy; (4) nesting birds policy; (5) wildfire protection techniques; (6) stormwater and water quality BMPs; (7) streambed and wetland and riparian habitat avoidance and minimization measures and (8) standard avoidance and minimization measures BMPs;
- Ensuring funding for implementation of applicable avoidance and minimization measures;
- Reporting to the Permittee regarding implementation of the Covered Activity, including avoidance and minimization measures.

The Participating Special Entity has no obligations regarding implementation of the following Plan components:

- Mitigation measures, including measures related to assembly and management of the Preserve Area;
- Preparing RMPs
- Monitoring, Adaptive Management, and Changed Circumstances;
- Preparing the Annual Report.

### **8.2.2 Remedies and Enforcement by Permittee Against the Participating Special Entity**

If the Participating Special Entity fails to comply with applicable terms of this Agreement, the Plan, the Certificates of Inclusion, or the Permits, the Permittee may withdraw the Certificates of Inclusion and terminate any Take Authorization extended to the Participating Special Entity. Nothing in this Agreement shall limit the remedies otherwise available to OCTA in equity and in law to enforce compliance.

## **8.3 Obligations of the Service**

### **8.3.1 Permit Issuance, Implementation and Monitoring**

Following execution of this Agreement by each Party and satisfaction of all other applicable legal requirements, the Service will issue Permittee a Federal Permit authorizing incidental Take by Permittee of each listed animal Covered Species resulting from Covered Activities within the Plan Area. The Permit will be conditioned on compliance with all terms and conditions of the Permit, including the Plan, this Agreement and applicable law. The Service shall cooperate and provide to the extent appropriated funds are available for that purpose, technical assistance to Permittee in implementing the Federal Permit. The Service will use its reasonable efforts to expeditiously review all conservation easements or equivalent legal mechanisms proposed to conserve lands dedicated to the Preserve Area and all RMPs submitted to it for review and approval under the Plan. The Service shall also monitor Permittee's implementation of the Plan, this Agreement and the Federal Permit to ensure compliance.

### **8.3.2 Consultation with Public Agencies**

To the maximum extent allowable, in any consultation on any Covered Activity involving Permittee under Section 7 of the ESA, the Service shall ensure that the biological opinion issued in connection with the proposed action is consistent with the biological opinion issued for issuance of the Section 10 Permit for the Plan, provided that the Covered Activity as proposed in the consultation is consistent, and will be implemented in accordance with the Plan, this Agreement and the Federal Permit. Any reasonable and prudent measures and terms and conditions in the biological opinion on the proposed action shall, to the maximum extent appropriate and allowable under Section 7 and its implementing regulations, be consistent with and not be in excess of those measures required of the Permittee under the Plan, this Agreement and the Federal Permit.

### **8.3.3 Future Environmental Review Under NEPA**

In the event that the Service participates as a lead or cooperating agency under NEPA with respect to the implementation of a Covered Activity, the Service, to the maximum extent consistent with the requirements of NEPA and other applicable federal law, will utilize the NEPA document prepared for the Plan and Federal Permit.

## **8.4 Obligations of CDFW**

### **8.4.1 CEQA**

#### **8.4.1.1 Agencies Responsible for CEQA Analysis**

Permittee served as lead CEQA agency and CDFW has served as a responsible agency under CEQA regarding the development of the joint EIR/EIS for the Plan. Prior to or concurrent with the Effective Date, Permittee and CDFW each evaluated the Plan pursuant to CEQA and issued findings addressing whether the implementation of the Plan would cause significant adverse impacts to the environment.

#### **8.4.1.2 Future Environmental Review Under CEQA**

Unless otherwise required by CEQA or other applicable law, the Permittee and CDFW shall rely on and use relevant portions of the EIS/EIR and the CEQA findings when conducting future environmental review of Covered Activities. In the event that CDFW participates as a lead, responsible, or trustee agency under CEQA with respect to the implementation of a Covered Activity, CDFW will not require, recommend, or request the imposition of any additional or more stringent minimization or mitigation measures directed at the protection or conservation of Covered Species or their habitats. As a responsible or trustee agency under CEQA, CDFW will further notify the lead CEQA agency that any avoidance, minimization, and mitigation measures otherwise required for any impact to or Take of any Covered Species or habitat resulting from Covered Activities will be satisfied through the implementation of the Plan.

#### **8.4.1.3 Lake and Streambed Alteration Agreements for Covered Activities**

CDFW acknowledges and agrees that the Plan, this Agreement, and the NCCP Permit shall be deemed to provide an equivalent level of protection for wildlife, habitat, or other biological resources as the measures that would otherwise be required or recommended to address the impacts of Covered Activities on Covered Species pursuant to Fish & Game Code §§ 1600–1616.



In any future notification provided to CDFW under Section 1602 related to a Covered Activity, CDFW will ensure that any Streambed Alteration Agreement issued in response to the notification is consistent with the Plan (including the Streambed Program in Appendix E), this Agreement, and the NCCP Permit. Unless otherwise required by law or regulation, CDFW will not require through the Streambed Alteration Agreement additional land, water or other natural resources, or financial compensation or additional restrictions on the use of land, water, or other natural resources to address impacts of Covered Activities on Covered Species beyond the measures provided for under the Plan, this Agreement, and the NCCP Permit.

## **9.0 MONITORING AND ADAPTIVE MANAGEMENT**

### **9.1 Preserve Management and Monitoring**

Permittee will implement the Preserve Management and Monitoring Program as described in Section 7.2 of the Plan. The Permittee will conduct three main types of monitoring: compliance monitoring, effectiveness monitoring, and targeted studies. The Permittee will provide the results of all monitoring in its Annual Report. Compliance monitoring, also known as implementation monitoring, will track the status of Plan implementation and verify that the Permittee is meeting the terms and conditions of the Permits. Effectiveness monitoring assesses the biological success of the Plan. Specifically, it evaluates the implementation and success of the conservation strategy described in Chapter 5 of the Plan. Targeted studies will identify the best methodologies for monitoring, provide information about the efficacy of Preserve Area management techniques, and resolve critical uncertainties in order to improve Preserve Area management.

### **9.2 Permittee-initiated Adaptive Management**

Permittee will implement and periodically evaluate the adaptive management provisions described in Section 7.2.7 of the Plan when changes in management practices are necessary to achieve the Plan's biological goals and objectives, or to respond to monitoring results or new scientific information. The overarching purpose of the monitoring and adaptive management program is to inform and refine Plan implementation so that it may achieve the goals and objectives of the Conservation Strategy as defined in Chapter 5 of the Plan. The Permittee will implement adaptive management by using information gathered from the monitoring program to inform and refine the future management of the Preserve Area as defined in Chapter 7 of the Plan. Permittee will be responsible for implementing the adaptive management program and will consider the recommendations of the Wildlife Agencies, science advisors, other land management agencies, and the public, as provided in this Section and as further described in Chapter 7 of the Plan. Permittee will notify and obtain concurrence of the Wildlife Agencies for any proposed adaptive management actions to be taken pursuant to this

section. In addition, any major changes in the adaptive management program will require the approval of the Wildlife Agencies prior to implementation, including, but not limited to, any proposed actions that would be inconsistent with the Plan or detrimental to a Covered Species, introducing new and untested management techniques, discontinuing and replacing ineffective management techniques that are recommended in the Conservation Strategy, or applying management techniques on a much larger or smaller scale than envisioned in the Plan.

### **9.3 Wildlife Agency-initiated Adaptive Management**

If either Wildlife Agency determines that one or more of the adaptive management provisions in the Plan have been triggered and Permittee has not changed its management practices in accordance with Section 7.2.7 of the Plan, then the Service or CDFW will notify Permittee and direct Permittee to make the required changes. Within 30 days of receiving such notice, Permittee will make the required changes and report to the Wildlife Agencies on its actions. Such changes are provided for in the Plan, and hence do not constitute Unforeseen Circumstances or required amendment of the Permits or Plans, except as provided in this section.

### **9.4 Reductions in Mitigation**

Permittee will not implement adaptive management changes that may result in less mitigation than provided for Covered Species under the original terms of the Plan, unless the Wildlife Agencies first provide written approval. Permittee may propose any such adaptive management changes by notice to the Wildlife Agencies, specifying the adaptive management modifications proposed, the basis for them, including supporting data, and the anticipated effects on Covered Species, and other environmental impacts. Within 120 days of receiving such notice, the Wildlife Agencies will either: (1) approve the proposed adaptive management changes, (2) approve them as modified by the Wildlife Agencies, or (3) notify Permittee that the proposed changes constitute Permit amendments that must be reviewed under Section 15.2 of this Agreement.

### **9.5 No Increase in Take**

Permittee is not authorized to implement adaptive management modifications that would result in change in the nature of Take or an increase in the amount or level of Take of Covered Species beyond that analyzed in connection with the original Plan and any amendments thereto. Any such modification must be reviewed as a Permit amendment under Section 15.2 of this Agreement.

## **10.0 REPORTING**

### **10.1 Annual Report**

Permittee will prepare an Annual Report on Plan implementation as further described in Section 8.4 of the Plan. The Annual Report will summarize actions taken to implement the Plan for the period January 1 through December 31. The Annual Report will include the following:

- Description and location of Covered Activities completed, including a summary of avoidance and minimization measures undertaken for each Covered Activity and any on-site restoration that is required to offset temporary impacts.
- Summary of total acres of natural habitat types impacted by Covered Activities and an accounting of the Plan-to-date habitat types impacts in comparison with the impact caps approved by the Plan.
- For covered plant species only, accounting in ledger-type format of credits and debits as described at 5.6.2.2 of the Plan.
- Summary of any impacts exceeding 0.10 acre to natural habitat resulting from Preserve management Covered Activities and an accounting of Plan-to-date natural habitat impacts in comparison with the 11-acre cap approved by the Plan.
- Summary of the status of Preserve management and monitoring activities, effectiveness monitoring, any actions taken through and results of adaptive management and any responses to Changed Circumstances;
- Summary of the status of Permittee-funded restoration projects, including the results of monitoring activities and any remedial actions taken to achieve success criteria.
- Summary of land added to the Preserve System.
- Summary of Plan funding, including endowment budgets. This will include the amount of earnings, amount spent or obligated, and annual inflation adjustments.
- Any revisions and amendments to the Plan, IA or Permits.

Permittee will provide a copy of the Annual Report to all Parties by March 15 of the year following the Reporting Period. The Annual Report shall be presented at an OCTA public workshop or meeting and copies of the Annual Report shall be made available to the public.

#### **10.1.1 Other Reports**

Permittee will provide, within 30 days of being requested by the Service or CDFW, any additional information in its possession or control related to implementation of the Plan

for the purpose of assessing whether the terms and conditions of the Federal or State Permit, including the Plan, are being fully implemented.

#### **10.1.2 Certification of Reports**

All reports will include the following certification from a responsible official of Permittee who supervised or directed preparation of the report:

I certify under penalty of law, to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this report, the information submitted is true, accurate and complete.

#### **10.1.3 Monitoring Results**

As provided in Section 9.1, the Permittee will provide the results of compliance monitoring, effectiveness monitoring, and targeted studies in the Annual Report. To fulfill the compliance monitoring obligation as stated in Sections 7.1 and 8.4 of the Plan, Permittee will summarize the amount of Take on an annual basis and provide this information in the Annual Report. Permittee will provide a summary for each year and a cumulative summary for all years of total acres of natural habitat types affected by Covered Activities in comparison with the impact cap approved by the Plan. The Parties will use the results of the Permittee's monitoring to ensure that the Plan is being properly implemented and to measure the Permittee's progress toward the successful implementation of the Plan's Conservation Strategy (Chapters 5 and 7).

### **10.2 Monitoring by the Wildlife Agencies**

The Wildlife Agencies may conduct inspections and monitoring of the site of any Covered Activity and of any land within the Preserve system, and may inspect any data or records required by this Agreement, the Plan or the Permits, in accordance with applicable law and regulations in order to monitor compliance with the Permits.

## **11.0 CHANGED CIRCUMSTANCES**

Section 8.6.2 of the Plan identifies changes in the circumstances affecting the Plan's Preserve Areas or Covered Species that reasonably can be anticipated and planned for and describes the responses to such changes that will be carried out by Permittee.

## **11.1 Response to Changed Circumstances**

Permittee will give notice to the Wildlife Agencies within seven days after learning that any of the Changed Circumstances listed in Section 8.6.2 of the Plan has occurred. As soon as practicable thereafter, but no later than 30 days after learning of the Changed Circumstances, Permittee will undertake the response described in Section 8.6.2 of the Plan and will report to the Wildlife Agencies on its actions. Permittee will make such modifications without awaiting notice from the Wildlife Agencies.

### **11.1.1 Wildlife Agency-initiated Response to Changed Circumstances**

If either Wildlife Agency determines that Changed Circumstances have occurred and that Permittee has not responded in accordance with Section 8.6.2 of the Plan, one or both of the Wildlife Agencies will so notify Permittee and will direct Permittee to make the required changes. Within 30 days of receiving such notice, Permittee will make the required changes and report to the Wildlife Agencies on its actions. Such changes are provided for in the Plan, and hence do not constitute Unforeseen Circumstances or require amendment of the Plan or Permits.

## **12.0 FUNDING**

Permittee warrants that it has and will expend such funds as may be necessary to fulfill its obligations under the Plan and Permits. Permittee shall ensure that all required mitigation, conservation, monitoring, reporting, and adaptive management measures are adequately funded during the term of this Agreement, and that management, maintenance, monitoring, reporting, and adaptive management activities on Preserve Area lands are adequately funded in perpetuity. Section 8.3 of the Plan describes the Permittee's funding capacity and the funding process under Renewed Measure M and demonstrates that Permittee will ensure adequate funding to implement the Plan. For the initial years of Plan implementation, during which time the non-wasting endowment is being fully funded over a period of up to fifteen years, OCTA will fully fund Plan implementation, including Preserve management and monitoring, using annual appropriations from the M2 EMP revenue stream.

Permittee will promptly notify the Wildlife Agencies of any material change in the Permittee's financial ability to fulfill its obligations under the Plan and this Agreement. In addition to providing any such notice, Permittee will also include in its Annual Report to the Wildlife Agencies reasonably available financial information to demonstrate the Permittee's ability to fulfill its funding obligations.

## **12.1 Funding Endowments for Long-Term Management and Monitoring of Preserves**

Within six months of issuance of the State Permit, OCTA will ensure that one or more permanent, non-wasting endowments are established, after the review and approval of the Wildlife Agencies, to fund in perpetuity Preserve Management, Restoration, and Monitoring Activities as described in Section 6.3, and for no other purpose. OCTA may hold and manage any of the endowments under Government Code section 65968(b)(1) associated with a Preserve property that it holds, or, with the approval of the Wildlife Agencies, it may select a third party entity or entities qualified to hold and manage any of the endowments pursuant to Government Code Sections 65965 through 65968 .

OCTA may also be qualified to hold and manage any of the endowments under Government Code section 65968(b)(2) based on the arrangements for the endowment detailed below, including, but not limited to, OCTA's qualifications, capitalization rate, return objectives, and the spending rule and disbursement policies. If OCTA chooses to retain responsibility for management of a portion of the Preserve and the associated endowment, it has a track record of managing endowment funds, including those for transit and commuter rail operations, and has a fully functioning treasury with appropriate investment policies and fund management experience. OCTA's management of the endowment will follow the safeguards and audit features applied to the M2 program including, but not limited to the following:

- All spending will be subject to an annual independent audit.
- Spending decisions will be annually reviewed and certified by an independent Taxpayer Oversight Committee.
- The endowment will be subject to public review at least every 10 years and an assessment of progress in delivery, public support, and changed circumstances. Any significant proposed changes to the endowment will be approved by the Taxpayer Oversight Committee (TOC) and OCTA Board. The Wildlife Agencies will be consulted on changes to the endowment prior to its presentation to the TOC and OCTA Board.
- All entities receiving funds will report annually on expenditures and progress in implementing projects.
- At any time, at its discretion, the Taxpayer Oversight Committee may conduct independent reviews or audits of the spending of endowment funds.

OCTA's endowment will be governed by the Uniform Prudent Management of Institutional Funds Act. OCTA's endowment funds are held in separate and distinct funds. Each fund is legally protected from the other funds. OCTA utilizes fund accounting for the recording of these assets. Furthermore, the EOC was established pursuant to the M2 Ordinance No. 3 to make recommendations to the OCTA Board on the allocation of net revenues for the EMP. Changes to the use of M2 funds related to the EMP will also require recommendations by the EOC.

The estimated endowment amount(s) will be based on an effective spending rate of 2.5% of average endowment value over a specified period. The final endowment funding requirements will be based on a Property Analysis Report (PAR) or PAR-like analysis that will be completed by OCTA within seven years of Plan approval. This analysis will itemize and define the long-term obligations at each Preserve using Preserve-specific information developed for the Preserve RMPs. The final endowment funding level will be based upon actual negotiated long-term management contracts for each individual Preserve. OCTA will coordinate with the Wildlife Agencies and obtain the Wildlife Agencies' review and approval of the PAR analysis and determination of the permanent endowment funding requirements.

Permittee will accumulate funding for the endowment(s) using the ongoing revenue generated for the M2 EMP and will fully fund the endowment no later than 15 years following Permit issuance in accordance with Section 8.3.3 of the Plan. An initial estimate of the endowment funding requirements is included in Table 8-2 of the Plan. The capitalization rate for the endowment is 2.5 % and the return objective is the median return that is achieved by comparable non-profit organizations.

After the endowment is fully funded, OCTA shall disburse to the designated land manager(s) from the endowment annual, advance payments that the land manager(s) shall use to pay the costs of Preserve Management, Restoration, and Monitoring Activities as described in Section 6.3 to be performed by the Land Manager throughout the forthcoming calendar year. OCTA will require land manager(s) to submit payment requests between July 1 and September 30, and will disburse endowment payments in December for Preserve Management, Restoration, and Monitoring Activities for the next calendar year.

The Parties agree that the detailed accounting of the estimated costs associated with the various components of the Plan, as set out in Chapter 8 and Tables 8-1 and 8-2, reflects best efforts to determine the level of funding necessary to implement the Plan. The Parties further agree that the process provided under the Plan and summarized under this section 12.1 ensures that the endowment to be established is adequate, and that a schedule for fully funding the endowment has been established as stated in Government Code section 65966(o). Therefore, California Government Code sections 65966(b)-(e) do not apply to the endowment(s) under this Plan.

Where Permittee has funded an endowment to fully satisfy certain conservation obligations under the Plan and the endowment has been reviewed and approved in writing as adequate by the Wildlife Agencies, funding is deemed adequate to carry out such obligations, and the Wildlife Agencies shall not require additional funds or resources from the Permittee.

## **12.2 Effect of Inadequate Funding**

If funding becomes inadequate to implement the Plan, the Wildlife Agencies will assess the impact of the funding deficiency on the scope and validity of the Permits. Except in cases of withdrawal by Permittee or permit revocation by the Wildlife Agencies, the Parties agree to meet and confer to develop a strategy to address the funding shortfall, and to undertake all practicable efforts to maintain the level of conservation and Take authorization afforded by the Permits consistent with protection of the Covered Species and their habitats until the funding situation can be remedied.

If circumstances warrant suspension or revocation of the Federal Permit or State Permit, in whole or in part, the applicable Wildlife Agency(ies) shall use its reasonable efforts to meet and confer with the Permittee within thirty (30) days of such determination to identify potential actions, if any, that may be available to forestall the suspension or revocation of a Permit(s).

## **13.0 REGULATORY ASSURANCES**

### **13.1 Assurances Under the ESA**

Upon issuance of the Federal Permit, Permittee shall receive regulatory assurances pursuant to the No Surprises Rule at 50 C.F.R. sections 17.22(b)(5) and 17.32(b)(5). Pursuant to the No Surprises Rule, as long as Permittee has complied with its obligations under the Plan, this Agreement and the Federal Permit with regard to the Covered Species and Covered Activities, the Service shall not require the Permittee to provide conservation and mitigation measures to respond to Unforeseen Circumstances that involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for economic development or use under the original terms of the Plan and Federal Permit without the consent of Permittee.

### **13.2 Assurances Under the NCCPA**

#### **13.2.1 Permittee**

Under the NCCPA, CDFW provides assurances to permittees commensurate with the long-term conservation assurances and associated implementation measures that will be implemented under a plan (Fish & Game Code § 2820(f)). In its determination of the level and duration of the assurances to be afforded a permittee, CDFW takes into account the conditions specific to the plan, including such factors as:

- The level of knowledge of the status of covered species and natural communities;



- The adequacy of analysis of the impact of take on covered species;
- The use of the best available science to make assessments of the impacts of take, reliability of mitigation strategies, and appropriateness of monitoring techniques;
- The appropriateness of the size and duration of the plan with respect to quality and amount of data;
- The sufficiency of mechanisms for long-term funding of all components of the plan and contingencies;
- The degree of coordination and accessibility of centralized data for analysis and evaluation of the effectiveness of the plan;
- The degree to which a thorough range of foreseeable circumstances are considered and provided for under the adaptive management program; and
- The size and duration of the plan.

As long as the Permittee is properly implementing this Agreement, the OCTA NCCP/HCP, and the State Permit, CDFW will not seek to impose on the Permittee, for purposes of compliance with the NCCPA, any avoidance, minimization, mitigation, or conservation measures or requirements regarding the impacts of Covered Activities on Covered Species within the Plan Area beyond those required by this Agreement, the OCTA NCCP/HCP, and the State Permit. The assurances provided to the entities receiving permits under the NCCPA will ensure that if there are Unforeseen Circumstances, no additional financial obligations or restrictions on the use of resources will be required of the Permittees without their consent, unless CDFW determines that the Plan is not being implemented consistent with the substantive terms of this Agreement, the Plan, and the State Permit. Specifically, the NCCPA directs that,

[i]f there are Unforeseen Circumstances, additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources shall not be required without the consent of plan participants for a period of time specified in the implementation agreement, unless CDFW determines that the plan is not being implemented consistent with the substantive terms of the implementation agreement (Fish & Game Code § 2820(f)(2)).

The NCCPA requires that CDFW suspend or revoke a permit, in whole or in part, if the continued take of a Covered Species would jeopardize its continued existence.

### **13.3 Process to Respond to Unforeseen Circumstances**

If the Service believes that an Unforeseen Circumstance exists, it shall provide written notice of its proposed finding of Unforeseen Circumstances to Permittee. The Service shall clearly document the basis for the proposed finding regarding the existence of Unforeseen Circumstances pursuant to the requirements of 50 C.F.R. sections 17.22(b)(5)(iii)(C) and 17.32(b)(5)(iii)(C). Within fifteen (15) days of receiving such

notice, the Permittee and the Service shall meet or confer to consider the facts cited in the notice and potential changes to the Plan. Pursuant to 50 C.F.R. sections 17.22(b)(5)(iii)(C) and 17.32(b)(5)(iii)(C), the Service shall make an Unforeseen Circumstances finding based on the best scientific evidence available, after considering any responses submitted by the Permittee pursuant to this section, and the Service shall have the burden of demonstrating that Unforeseen Circumstances exist.

### **13.4 Interim Obligations Upon a Finding of Unforeseen Circumstances**

If either Wildlife Agency finds that an Unforeseen Circumstance has occurred with regard to a Covered Species and that additional measures may be required for the Covered Species as a result, during the period necessary to determine the nature, scope and location of any additional measures, the Permittee will avoid causing an appreciable reduction in the likelihood of the survival and recovery of the affected species. The Permittee will not be responsible for implementing any additional measures contrary to the regulatory assurances provided under the No Surprises Rule or the NCCPA unless the Permittee consents to do so.

## **14.0 TERM**

### **14.1 Effective Date**

This Agreement shall be effective with regard to the Federal Permit and State Permit, respectively, on the date, following execution of the Agreement by all Parties, on which the Permit is issued.

### **14.2 Initial Term**

This Agreement, the Plan, and the Federal and State Permits, respectively, will remain in effect for an initial term of 40 years from issuance of the original Permits or until termination of the affected Permit, whichever occurs sooner.

### **14.3 Extension of the Permits**

Upon agreement of the Parties and compliance with all applicable laws, the Permits may be renewed in accordance with regulations of the Wildlife Agencies in force on the date of such renewal.

## **15.0 AMENDMENTS AND PERMIT AMENDMENTS**

### **15.1 Minor Amendments to the Plan**

#### **15.1.1 Minor Amendments**

The Permittee, may, under certain circumstances, request an amendment to the Plan without amending the Permits, provided such amendments are minor in nature, the effects on the Covered Species involved and the levels of take resulting from the amendment are not greater than those described in the Plan and provided for by the Permits, and the action is otherwise consistent with the Plan, this Agreement, and the Permits and will not result in new or greater environmental effects beyond those analyzed under NEPA and CEQA for the Plan as originally approved. Minor Amendments will not alter the terms of the HCP Permit or NCCPA Permit.

Examples of actions that may require Minor Amendments to the Plan include, but are not limited to:

- Change in location of a covered freeway improvement project provided that the revised project location is within the Permit Area, changes do not exceed the caps for impacts on habitat types, result in an increased level of take for Covered Species, or result in new environmental impacts that were not addressed in the Plan and the Environmental Impact Report/Environmental Impact Statement for the Plan. OCTA will be required to address the project changes and demonstrate that the changes are consistent with these criteria.
- Addition of a covered minor freeway capital improvement project as described in Section 6.2. These potential additional projects must be consistent with the scope of the covered freeway projects, occur within the Permit Area, and cannot exceed the acreage impact caps established for the Plan. These projects also cannot result in additional take of Covered Species, or be significantly different or have greater impacts to the environment than what was analyzed within the Environmental Impact Report/Environmental Impact Statement for the Plan, as determined by the Wildlife Agencies.
- Change to cap of 500 individuals of each covered plant species to no more than 1,000 individuals if OCTA can demonstrate to the Wildlife Agencies that mitigation achieved through the Plan conservation actions or through project-specific biological superior alternative(s) provides a biological benefit that is greater than the anticipated impacts. The relative biological benefit of impacts and conservation/restoration will depend not only on the number of individuals impacted or conserved, but also on factors such as long-term sustainability of the occurrences, importance for maintaining

connectivity and contiguity between other occurrences in the area, and other factors that may make the occurrences in question biologically valuable or unique.

OCTA will submit in writing to the Wildlife Agencies a description of the proposed Minor Amendment in the form of an addendum with the following subject items addressed:

- An explanation why the Minor Amendment is necessary or desirable.
- An explanation of why OCTA believes the effects of the proposal are not significantly different from those described in the original Plan and would not result in greater impacts on the environment, including the Covered Species and their habitats, or levels of take beyond those analyzed in connection with the Plan and the Permits.
- An analysis of the environmental impacts of the proposed change.

OCTA may propose a Minor Amendment to the Plan by providing a written submission to the Wildlife Agencies. The Wildlife Agencies will use their reasonable efforts to respond to proposed Minor Amendments within 60 days of receipt of such submission by either approving or denying the Minor Amendment or by notifying the OCTA that the proposed Minor Amendment must be processed as a Permit Amendment. Proposed Minor Amendments will become effective upon the Wildlife Agencies' written approval. The Wildlife Agencies will not approve Minor Amendments to the Plan if they determine that such Minor Amendments will result in adverse effects on the environment that are new or significantly different from those analyzed in connection with the original Plan or may result in additional take that was not analyzed in connection with the original Plan.

### **15.1.2 Major Amendments**

Major amendments to the Plan will require detailed analyses of the anticipated effects of the proposed action on conserved habitats and Covered Species, on sensitive habitats and species not addressed in the Plan, and on the additional conservation to be provided through the Amendment process. Major amendments will be processed as Permit Amendments in accordance with all applicable federal and state statutory and regulatory requirements, including NEPA and CEQA. The Wildlife Agencies will provide technical assistance to Permittee during the amendment process. All Major Amendments to the Plan approved by the Wildlife Agencies will be memorialized through an addendum to the Plan, a Permit Amendment, and, if necessary, an amendment to this Agreement, and will be documented in the Annual Report.

Major Amendments to the Plan and Permits will be required if a proposed action would include but are not limited to any of the following:

- Proposed increased level of take of a Covered Species. For the three plant species, this level would include any cumulative impact above 1,000 individuals.
- Proposed addition of a Covered Species.
- Proposed addition or substantial modification to Covered Activities associated with Preserve management that could reduce conservation commitments in the Plan.
- Proposed addition of a freeway capital improvement project that does not meet the criteria included in Section 6.2 and would require additional conservation to offset impacts.
- Proposed addition of operation and maintenance of constructed freeway capital improvement projects as a Covered Activity.
- Proposed change in the location of a covered freeway project that is outside of the Permit Area, and would result in impacts that exceed caps to habitat type(s), and/or results in new environmental impacts that were not addressed in the Plan and the Environmental Impact Report/Environmental Impact Statement for the Plan.
- Increased impacts associated with covered freeway capital improvement projects that result in the caps for habitat type(s) to be exceeded. Adjustments to the caps can be made based on an analysis of conservation achieved under the Plan and if there is a determination, with the written concurrence of the Wildlife Agencies, that there are excess credits to warrant the caps on a specific habitat to be increased.
- Increased permanent impacts within Preserves that would result in the cap of 13 acres of impact on natural habitat to be exceeded.
- Proposed addition of a Preserve or other conservation actions that contribute to the conservation credits under the Plan.

## **15.2 Amendment to this Agreement**

In addition to other approval requirements identified in this Section that may apply, this Agreement may only be amended consistent with applicable law and with the consent of each Party.

## **16.0 ENFORCEMENT OF PERMIT AND DISPUTE RESOLUTION**

### **16.1 General Authorities and Legal Rights under Federal Permit**

Nothing contained in this Agreement is intended to, or shall, limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement and other responsibilities under the ESA or other applicable federal law. Nothing contained in this Agreement limits the rights of Permittee under the U.S. Constitution or other applicable federal or state law to seek redress against the Service as otherwise permitted by law.

#### **16.1.1 Permit Suspension**

The Service may suspend the Federal Permit, in whole or in part, for cause in accordance with the laws and regulations in force at the time of such suspension. (*See* 50 C.F.R. §§ 13.27-13.29, 17.22(b) and 17.32(b)). However, except where the Service determines emergency action is necessary to avoid irreparable harm to a Covered Species, it will not suspend the Federal Permit without first requesting the Permittee to take appropriate remedial actions, if any such actions are available, and providing the Permittee with written notice of the facts or conduct which may warrant the suspension, and an adequate and reasonable opportunity, including, where appropriate, use of the voluntary dispute resolution process outlined in Section 16.4, to demonstrate why suspension is not warranted.

#### **16.1.2 Reinstatement of Suspended Permit**

In the event the Service suspends the Federal Permit, in whole or in part, as soon as practicable, and if possible within ten (10) days after such suspension, the Service shall confer with the Permittee concerning actions, if any, they would allow the suspension to be lifted. After conferring with the Permittee, the Service shall identify reasonable specific actions, if any, necessary to effectively redress the suspension. In making this determination the Service will consider the requirements of the ESA, regulations issued thereunder, the conservation needs of the Covered Species, the terms of the Federal Permit and any comments or recommendations received from the Permittee. As soon as practicable, and if possible within thirty (30) days after the conference, the Service shall send Permittee written notice of any available, reasonable actions necessary to effectively redress the suspension. Upon Permittee's timely and acceptable performance of such actions, the Service will promptly reinstate the Federal Permit. It is the general intent of the Parties that in the event of a total or partial suspension of the Federal Permit, and provided such action is appropriate in light of the circumstances that resulted in the suspension, the Parties will act expeditiously and cooperatively to reinstate the Federal Permit.

### **16.1.3 Surrender or Revocation of the Federal Permit**

Permittee may withdraw from the Federal Permit by surrendering the Federal Permit to the Service in accordance with the regulations of the Service in force on the date of such surrender. (These regulations are currently codified at 50 CFR 17.22(b)(7) and 17.32(b)(7) and by their express terms apply in place of 50 CFR 13.26 to the extent of any conflict). In addition, the Service may revoke the Federal Permit for cause. (These regulations are currently codified at 50 CFR 17.13.28, 17.22(b)(8) and 17.32(b)(8)). Upon surrender or revocation of the Federal Permit, no further Take shall be authorized under the Permit. Notwithstanding surrender of the Federal Permit by Permittee or revocation of the Federal Permit by the Service, Permittee will remain obligated to fulfill any existing and outstanding minimization and mitigation measures required under the Plan, this Agreement, and the Federal Permit for any Take that occurred prior to surrender or revocation. A surrendered Federal Permit shall be deemed cancelled only upon a determination by the Service that such minimization and mitigation measures have been implemented.

## **16.2 State Permit**

### **16.2.1 Suspension or Revocation of the State Permit**

CDFW may suspend or revoke, in whole or in part, the State Permit in the event that it determines that the Permittee has failed to fulfill their obligations under the Plan, this Agreement, or the State Permit as stipulated in Section 7.3 of the Agreement. Unless an immediate suspension is necessary to avoid jeopardy, CDFW shall not suspend or revoke the State Permit without first notifying in writing the Permittee of the basis for its determination and the proposed action to revoke or suspend and meeting and conferring with the Permittee regarding the matter. The Parties shall meet and confer within fifteen (15) days of issuance of such notice to assess the action or inaction that warranted CDFW's determination and to identify any appropriate responsive measures that may be taken. Within forty-five (45) days of receiving notice from CDFW, Permittee shall either satisfy CDFW that they are in compliance with the State Permit or reach an agreement with CDFW to expeditiously obtain compliance.

Following this forty-five (45) day period, CDFW may suspend, but shall not revoke the State Permit until such time as the review process set forth in Section 16.4 of this Agreement has been completed, provided the process has been invoked by the Permittee.

### **16.2.2 Rough Proportionality**

Section 2820 (b)(9) of the Fish and Game Code requires NCCP Permittees to ensure that implementation of mitigation and conservation measures on a plan basis is roughly

proportional in time and extent to the impact on habitat or Covered Species authorized under the Plan. Permittee will ensure rough proportionality after the Permits have been issued by implementing mitigation and conservation measures ahead of impacts from Covered Activities, as described in Chapter 5 of the Plan. As further described in Section 5.8.2 and Tables 5.3, and 5.5 of the Plan, the amount of each land cover type restored, created, and added to the Preserve Area as a proportion of the total requirement for each land cover type will be equal to or greater than the impact on that land cover type as a proportion of the total impact expected by all Covered Activities. The Permittee will fulfill the requirements of this Section and Section 5.8.2 of the Plan so long as it ensures that the pace at which the Preserve is created, and at which required habitat restoration and enhancement occurs throughout the Plan Area in core habitat areas and within key habitat linkages and riparian corridors, does not fall behind the pace at which Covered Activities impact habitat by more than ten percent (10%) of the commitments made in the Plan for each land cover type. The Permittee will include in the Annual Report a summary of all take that has occurred as a result of all Covered Activities (i.e., cumulative take; not just for that particular year) and the amount of mitigation undertaken to show that the Plan is meeting the rough proportionality requirement. If at any time CDFW determines that the requirement for rough proportionality on a Plan basis is not being met, it will provide written notification to Permittee. Permittee will either: (1) regain rough proportionality within forty-five (45) days; or (2) enter into an agreement with CDFW within forty-five (45) days, which will set a course of action to expeditiously regain rough proportionality.

If Permittee does not regain rough proportionality within forty-five (45) days or enter into an agreement with CDFW within forty-five (45) days setting a course of action to regain rough proportionality, CDFW shall suspend or revoke the NCCP Permit, in whole or in part, pursuant to Fish and Game Code section 2820(c).

### **16.2.3 Approval, Adoption or Amendment of Future Plans or Projects by Permittee**

The approval, adoption, or amendment of a future plan or project by Permittee that is inconsistent with the objectives and requirements of the Plan, without the concurrence of the Wildlife Agencies, is grounds for suspension or revocation of the State Permit. If CDFW determines, after conferring with the Permittee, that such a plan or project has been approved, adopted, or amended in a manner that is substantially inconsistent with the objectives or requirements of the Plan, CDFW will provide written notice to the Permittee documenting the nature of the inconsistency.

Within fifteen (15) days of the issuance of such notice, CDFW and the Permittee shall meet and confer to consider the basis for CDFW's determination and to identify steps that may be taken to address any such inconsistency. In the event that the inconsistency is not satisfactorily addressed within forty-five (45) days or within a period mutually agreed to by the CDFW and the Permittee, CDFW, at its discretion, may suspend or revoke the State Permit, in whole or in part.



#### **16.2.4 Reinstatement of Suspended Permit**

In the event CDFW suspends the State Permit, as soon as possible but no later than ten (10) days after such suspension, CDFW shall confer with the Permittee concerning how the violation or breach that led to the suspension can be remedied. At the conclusion of any such conference, CDFW shall identify reasonable specific actions necessary to effectively redress the violation or breach. In making this determination, CDFW shall consider the requirements of the NCCPA, the conservation needs of the Covered Species, the terms of the State Permit and this Agreement, and any comments or recommendations received during the meet and confer process. As soon as possible, but not later than thirty (30) days after the conference, CDFW shall send the Permittee written notice of the reasonable actions necessary to effectively redress the violation or breach. Upon performance of such actions, CDFW shall immediately reinstate the State Permit. It is the intent of the Parties that in the event of any suspension of the State Permit, all Parties shall act expeditiously and cooperatively to reinstate the State Permit.

#### **16.2.5 Obligations in the Event of Suspension or Revocation**

In the event of revocation, termination, or suspension of the State Permit, Permittee will remain obligated to fulfill any existing and outstanding minimization and mitigation measures and conservation measures required under this Agreement, the Plan, and the NCCP Permit, including measures to ensure rough proportionality under the NCCPA and Section 16.2.2., for any Take that occurs prior to such revocation, termination, or suspension, until CDFW determines that all Take of Covered Species that occurred under the NCCP Permit has been mitigated in accordance with this Agreement, the Plan, and the NCCP Permit.

### **16.3 Dispute Resolution**

The Parties recognize that disputes concerning implementation of, compliance with, or termination of this Agreement, the Plan, and the Permits may arise from time to time. The Parties agree to work together in good faith to resolve such disputes, using the informal dispute resolution procedures set forth in this section, or such other procedures upon which the Parties may later agree. However, if at any time, the Service or CDFW determines that circumstances so warrant, either agency may seek any available administrative or judicial remedy without engaging in or waiting to complete informal dispute resolution.

### **16.3.1 Dispute Resolution Process**

Unless the Parties agree upon another dispute resolution process, or unless the Service or CDFW has initiated administrative or judicial proceedings, the Parties may use the following process to attempt to resolve disputes:

(a) The USFWS or CDFW will notify Permittee of the alleged non-compliance with, or violation of the Permit, including the Plan and this Agreement, the basis for contending that the non-compliance or violation has occurred, and the remedies the affected Wildlife Agency proposes to correct the alleged non-compliance or violation. Where Permittee alleges that one or both Wildlife Agency's supervision of the Permit, including Plan implementation, is inconsistent with the terms of the Permit, Permittee will notify both Wildlife Agencies of its objection, the basis for the objection and the manner in which Permittee believes the Permit should be interpreted and implemented.

(b) The notified parties will have 30 days, or such other time as may be agreed to by the Parties, to respond. During this time any Party may seek clarification of the information provided in the initial notice. The Parties will use their reasonable efforts to provide any information then available to it that may be responsive to such inquiries.

(c) Within 10 days after such response was provided or was due, a representative from each Party will meet and negotiate in good faith toward a solution satisfactory to all Parties, or will establish a specific process and timetable to seek such a solution.

(d) If any issues cannot be resolved through such negotiations, the Parties may consider non-binding mediation and other alternative dispute resolution processes and, if a dispute resolution process is agreed upon, will make good faith efforts to resolve all remaining issues through that process.

## **17.0 MISCELLANEOUS PROVISIONS**

### **17.1 Incorporation of the Plan**

The Plan and each of its provisions are intended to be and by this reference are incorporated herein. Notwithstanding such incorporation, it is acknowledged by the parties that the Plan was drafted by the Permittee and submitted to the Service and CDFW in support of applications for Federal and State Permits. Characterizations, analyses and representations in the Plan, and in particular, characterizations, analyses and representations in the Plan of Federal or State laws, regulations, and policies, represent the views of the Permittee and shall not control the administration of the Permits by the Service and CDFW in accordance with Federal and State laws, regulations, and policies. In the event of any inconsistency between the Plan and this Agreement, the provisions of

this Agreement control. Similarly, in the event of any inconsistency between the Plan or this Agreement and the Federal or State Permits, the Permits control.

### **17.2 Relationship to CESA, the NCCPA, the ESA, and Other Authorities**

The terms of this Agreement shall be governed by and construed in accordance with the federal and state Permits, NCCPA, the ESA, and other applicable federal and State law. In particular, nothing in this Agreement limits or is intended to limit the authority of the Wildlife Agencies to seek penalties or otherwise fulfill their responsibilities under CESA, the NCCPA, or the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Service as an agency of the federal government or of CDFW as an agency of the State of California.

### **17.3 Changes in Environmental Laws**

It is acknowledged by the Parties that through acceptance of the Permits, the Permittee commits to perform substantial avoidance, minimization, mitigation, conservation, and management measures as set forth in the Plan, this Agreement and the Permits. If a change in, or an addition to, any federal or state law governing or regulating the impacts of Covered Activities on land, water or biological resources as they relate to Covered Species, including, but not limited to, the ESA, NEPA, NCCPA, CESA, and CEQA, the Wildlife Agencies, to the extent consistent with governing law, shall give due consideration to the measures required under the Plan in applying the new laws and regulations to the Permittee.

### **17.4 References to Regulations**

Any reference in this Agreement, the Plan, or the Permits to any regulation or rule of the Wildlife Agencies will be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

### **17.5 Applicable Laws**

All activities undertaken pursuant to this Agreement, the Plan, or the Permits must be in compliance with all applicable State and federal laws and regulations.

## **17.6 Governing Law**

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

## **17.7 Independent State and Federal Permits**

The State and Federal Permits are independent such that revocation of the State Permit or of the Federal Permit does not automatically cause revocation of the other Permit.

## **17.8 Availability of Funds**

Implementation of this Agreement and the Plan by the Service is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that the Service will not be required under this Agreement to expend any federal agency's appropriated funds unless and until an authorized official of the agency affirmatively acts to commit to such expenditures as evidenced in writing.

Implementation of this Agreement and the Plan by CDFW is subject to the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the Treasury of the State of California. The Parties acknowledge and agree that CDFW will not be required under this Agreement to expend any state appropriated funds unless and until an authorized official of that agency affirmatively acts to commit such expenditure as evidenced in writing.

## **17.9 Duplicate Originals**

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

## **17.10 No Third-Party Beneficiaries**

Without limiting the applicability of rights granted to the public pursuant to the ESA, CESA, NCCPA or other applicable law, this Agreement shall not create any right or

interest in the public, or any member thereof, as a third-party beneficiary, nor shall it authorize anyone to maintain a suit for personal injuries or damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing law.

#### **17.11 Agreement is not an Enforceable Contract as between Service and Permittee**

Notwithstanding any language to the contrary in this Agreement, this Agreement is not intended to create and shall not be construed to create an enforceable contract between Permittee and the Service under law with regard to the Permit, and neither the Service nor Permittee shall be liable in damages to each other or to any other third party for any performance or failure to perform any obligation identified in this Agreement. The sole purpose of this Agreement as between the Service and Permittee is to clarify the provisions of the Plan and the processes the Parties intend to follow to ensure successful implementation of the Plan in accordance with the Permit and applicable federal law. Notwithstanding the foregoing, the Service intends to follow the provisions of this Agreement in administering the Permit, and Permittee intends to follow the provisions of this Agreement in implementing the Plan. This Agreement will be incorporated by reference into the Federal Permit.

#### **17.12 Defense**

Upon request by OCTA, CDFW will, to the extent authorized by California law, including but not limited to Section 7 of Article 16 of the California Constitution and subject to the responsibilities of the California Attorney General, cooperate with the Permittee in defending lawsuits regarding the Plan, this Agreement or the State Permit, and lawsuits against Permittees arising out of CDFW's approval of the State Permits. Subject to Section 17.8 (Availability of Funds), the Service, upon the request of Permittee, and subject to the responsibilities of the U.S. Department of Justice in the conduct of litigation, will use reasonably available resources to provide appropriate support to Permittee in defending, consistent with the terms of the Plan, this Agreement and the Federal Permit, lawsuits against Permittee, arising out of the Service's approval of the Permit.

#### **17.13 Successors and Transferees**

This Agreement and each of its covenants and conditions shall inure to the benefit of the Parties and their respective successors and transferees incident to transfer of the Permits under applicable law. Succession or other transfer of the Permits will be governed by

provisions of the ESA, CESA, and NCCPA pertaining to the right of succession or transfer of Permits.

### **17.14 Notices**

Any notice permitted or required by this Agreement shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any Party may from time to time specify to the other Parties in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail. Notices shall be transmitted so that they are received within the specified deadlines.

Assistant Regional Director  
Pacific Southwest Region  
United States Fish and Wildlife Service  
2800 Cottage Way, Room W-2605,  
Sacramento, CA 95825  
Telephone: (916) 414-6600  
Fax: (916) 414-6712

Field Supervisor  
Carlsbad Field Office  
United States Fish & Wildlife Service  
2177 Salk Avenue, Suite 250  
Carlsbad, California 92008  
Telephone: (760) 431-9440  
Fax: (760) 431-5901

Deputy Director, Ecosystem Conservation Division  
California Department of Fish and Wildlife  
1416 9<sup>th</sup> Street, 12<sup>th</sup> Floor  
Sacramento, CA 95814  
Telephone: (916) 653-6956  
Fax: (916) 653-9890

Chief Executive Officer  
Orange County Transportation Authority  
550 S. Main Street  
Orange, CA 92863  
Telephone: (714) 560-5343

### **17.15 Calendar Days**

Throughout this Agreement and the Plan, the use of the term “day” or “days” means calendar days, unless otherwise specified.

### **17.16 Response Times**

Except as otherwise set forth herein or as statutorily required by CEQA, NEPA, CESA, ESA, NCCPA or any other laws or regulations, the Parties will use reasonable efforts to respond to written requests from any Party within a forty-five (45) day time period.

## **18.0 MISCELLANEOUS PROVISIONS BETWEEN PERMITTEE AND CDFW**

The following provisions apply as between the Permittee and CDFW.

### **18.1 Entire Agreement**

This Agreement, together with the Plan and the Permits, constitutes the entire agreement among the Parties. It supersedes any and all other agreements, either oral or in writing, among the Parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

### **18.2 Severability**

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

### **18.3 No Partnership**

Neither this Agreement nor the Plan shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

### **18.4 Elected Officials Not to Benefit**

No member of or delegate to the California State Legislature or the United States Congress will be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

**IN WITNESS WHEREOF, THE PARTIES HERETO** have executed this Implementing Agreement to be in effect as of the date that the Wildlife Agencies issue the Permits.

BY \_\_\_\_\_ Date \_\_\_\_\_  
Deputy Regional Director  
Pacific Southwest Region  
U.S. Fish and Wildlife Service  
Sacramento, California

BY \_\_\_\_\_ Date \_\_\_\_\_  
Sandra Morey  
Deputy Director  
Ecosystem Conservation Division  
California Department of Fish and Wildlife

BY \_\_\_\_\_ Date \_\_\_\_\_  
Darrell Johnson  
Chief Executive Officer  
Orange County Transportation Authority





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**Exhibit B**

## Covered Species for the Plan and their Listing Status

Common Name	Scientific Name	Special-Status <sup>1</sup>
<b>Plants</b>		
Intermediate mariposa lily	<i>Calochortus weedii</i> var. <i>intermedius</i>	CNPS:1B.2
Many-stemmed dudleya	<i>Dudleya multicaulis</i>	CNPS:1B.2
Southern tarplant	<i>Centromadia parryi</i> ssp. <i>australis</i>	CNPS:1B.1
<b>Fish</b>		
Arroyo chub	<i>Gila orcutti</i>	CDFW:SSC
<b>Reptiles</b>		
Coast horned lizard	<i>Phrynosoma blainvillii</i>	CDFW:SSC
Orangethroat whiptail	<i>Aspidoscelis hyperythra</i>	CDFW:WL
Western pond turtle	<i>Emys marmorata</i>	CDFW:SSC
<b>Birds</b>		
Cactus wren	<i>Campylorhynchus brunneicapillus</i>	USFWS:BCC; CDFW:SSC
Coastal California gnatcatcher	<i>Poliophtila californica californica</i>	FT; CDFW:SSC
Least Bell's vireo	<i>Vireo bellii pusillus</i>	FE; SE
Southwestern willow flycatcher	<i>Empidonax traillii extimus</i>	FE; SE
<b>Mammals</b>		
Bobcat	<i>Lynx rufus</i>	--
Mountain lion <sup>2</sup>	<i>Puma concolor</i>	CDFW:SPM

<sup>1</sup> CNPS: Taxa with a California Rare Plant Rank of 1B are considered rare, threatened, or endangered in California and elsewhere and the majority are endemic to California. A Threat Rank of 0.1 indicates that it is seriously threatened in California (over 80% of occurrences threatened/high degree and immediacy of threat). Threat Rank 0.2 indicates that it is moderately threatened in California (20-80% of occurrences threatened/moderate degree and immediacy of threat).

<sup>2</sup> Mountain lion, designated as a CDFW Specially Protected Mammal Species, is included on the list of Covered Species for the federal HCP permit but not under the state NCCP permit.

ABBREVIATIONS: CNPS = California Native Plant Society; CDFW = California Department of Fish and Wildlife; SSC = California Species of Special Concern; SPM = California Specially Protected Mammal; USFWS = U.S. Fish & Wildlife Service; BCC = Birds of Conservation Concern; FT = Federally Threatened; FE = Federally Endangered; SE = State Endangered.

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## Certificate of Inclusion Under the State Permit

The California Department of Fish and Wildlife (CDFW) has issued a permit to OCTA pursuant the Natural Community Conservation Planning Act, California Fish and Game Code section 2835 (State Permit) authorizing the Take of certain species (Covered Species) in accordance with the terms and conditions of the OCTA Renewed Measure M Habitat Conservation Plan/Natural Community Conservation Plan (Plan) and the associated Implementing Agreement (Agreement). The State Permit is issued for a term of 40 years. Under the State Permit, OCTA is authorized to take the Covered Species incident to certain activities (Covered Activities) as defined in the Plan provided all of the terms and conditions of the Plan, the Agreement, and the State Permit are met. The Plan and the Agreement section 7.1 provide that OCTA may extend Take authorization under the State Permit to the California Department of Transportation (Caltrans) by executing a Certificate of Inclusion with Caltrans. OCTA, as Permittee, remains liable for compliance with the Plan, the Agreement and the State Permit, including those aspects implemented by Caltrans pursuant to this Certificate of Inclusion.

You (Caltrans) are engaged in [*insert freeway capital improvement project or activity name*] (Project), which is one of the Covered Activities covered by the State Permit. By executing this Certificate of Inclusion, you agree: to comply with all applicable terms, conditions, and requirements of the Plan, the Agreement, and the State Permit that are within your responsibilities detailed in the Agreement section 8.2.1, including implementing the avoidance and minimization measures for the Project set forth in detail in Exhibit “A” to this Certificate of Inclusion; to assume liability for any non-compliance with such applicable terms and conditions; to the enforcement of such applicable terms and conditions by Permittee and by CDFW against you; and to allow access to your property by Permittee and CDFW for purposes of monitoring and enforcing your compliance with such applicable terms and conditions. If you fail to abide by the applicable terms and conditions of the Plan, Agreement, and State Permit in carrying out the Project, the Take authorization extended to you through this Certificate of Inclusion will lapse and you may be subject to civil and criminal liability under the California Endangered Species Act.

Your Take authorization under the State Permit will become effective upon execution of this Certificate of Inclusion by you and by OCTA. In the event the Project is assumed by another, you agree to immediately notify OCTA.

---

Signature (Caltrans)

---

DRAFT

Title

OCTA Representative: \_\_\_\_\_

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

DRAFT

## **Exhibit A**

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## Certificate of Inclusion

The United States Fish and Wildlife Service (Service) has issued a take authorization to the Orange County Transportation Authority (OCTA or Permittee) pursuant to Section 10(a)(1)(B) of the Endangered Species Act of 1973, 16 U.S.C. §1539(a)(1)(B) (Permit). The Permit is issued for a term of forty (40) years and authorizes the take of certain species ("Covered Species") within the area covered by the OCTA Renewed Measure M Habitat Conservation Plan/Natural Community Conservation Plan (Plan). Under the Permit, OCTA is authorized to take the Covered Species incident to certain activities (Covered Activities) as defined in the Plan provided all of the terms and conditions of the Plan, associated Implementing Agreement, and Permit are being met. In accordance with 50 CFR § 13.25(d), the Permittee may extend the incidental take authorization granted to it to certain third parties, provided such third parties are under the Permittee's direct control for purposes of implementing the requirements of, and complying with the terms and conditions of the Plan, Implementing Agreement and Permit. The Plan and the Implementing Agreement (Agreement) provide that OCTA may extend take coverage under the Permit to the California Department of Transportation (Caltrans) by executing a Certificate of Inclusion.

You (Caltrans) are engaged in [*insert freeway capital improvement project or activity name*], which is one of the Covered Activities covered by the Permit. By executing this Certificate of Inclusion, you commit to implement all of the avoidance and minimization measures set forth in detail in Exhibit "A" to this Certificate of Inclusion. By executing this Certificate of Inclusion, you further acknowledge and consent to the enforcement against you of the terms and conditions and applicable requirements of the Plan, Agreement and Permit and consent to allow access to your property, in accordance with Section        of the Agreement, by Permittee, and the U.S. Fish and Wildlife Service for purposes of monitoring your compliance with the Plan, Agreement and Permit. If you fail to abide by the terms and conditions of the Plan, Agreement and Permit in carrying out the Covered Activity, the incidental take authorization granted to you through the Certificate of Inclusion will lapse and you may also be subject to civil and criminal liability under the Endangered Species Act.

Extension to you of incidental take coverage under the Permit will become effective upon execution of this Certificate of Inclusion by you and by OCTA. In the event the Covered Activity is assumed by another, you agree to immediately notify OCTA. Any subsequent operator will not be insulated from liability for incidental take until and unless such subsequent operator and OCTA execute a new Certificate of Inclusion. OCTA, as Permittee, remains liable for compliance with all of the terms and conditions and applicable requirements of the Plan, Agreement and Permit, including those implemented by Caltrans pursuant to this Certificate of Inclusion.

\_\_\_\_\_  
Signature (Caltrans)

\_\_\_\_\_  
Title

OCTA Representative: \_\_\_\_\_  
Date: \_\_\_\_\_

## Exhibit A