

V. Institutional Program

This chapter discusses the procedure by which the conserved habitat will be created and maintained and by which the HCP will be implemented. The primary purpose of the HCP is to provide habitat on San Bruno Mountain for the indefinite perpetuation of the Mission Blue, Callippe Silverspot and other species of concern. In order to accomplish that, it is necessary to arrange for an institutional structure of sufficient durability to be able to fulfill its primary mission. There must be created as part of the institutional structure a funding mechanism which is adequate to provide for indefinite, long-term habitat maintenance. In addition, to the extent possible, the institutional structure should be able to address the entire habitat on San Bruno Mountain despite the division of the habitat by the overlapping jurisdiction of various governmental agencies and the complex pattern of private and public ownership of the habitat. Finally, the institutional structure must have adequate management flexibility to respond to the unanticipated needs of the future.

Concurrent with the issuance of the Section 10(a) Permit, an agreement will be signed by the federal, state and local agencies involved and the participating landowners and developers. The Agreement sets forth the understandings of the parties and their agreement to their obligations as set forth in the HCP. The Agreement also contains provisions coordinating the various activities of state, local and federal agencies with respect to habitat conservation on San Bruno Mountain. The Agreement also provides that compliance with the Agreement and the Permit will be sufficient for Visitacion Associates and their successors to meet the requirements of the Endangered Species Act and no further requirements will be imposed upon them. The Agreement contains more specific provisions for implementing this HCP. The Agreement is entitled "Agreement With Respect to San Bruno Mountain Area Habitat Conservation Plan", hereinafter "Agreement".

A. LAND USE REGULATION

San Bruno Mountain presently is under the jurisdiction of four public entities. The County of San Mateo has jurisdiction over all of the unincorporated land on the mountain (approximately 3,200 acres). The cities have jurisdiction over land in the following approximate amounts: Brisbane, 200 acres; Daly City, 90 acres, South San Francisco, 10 acres. The cities have been assigned potential jurisdiction over the following approximate amounts of land currently under San Mateo County jurisdiction: Brisbane, 500 acres; Daly City, 100 acres, South San Francisco, 300 acres.

Within the various jurisdictions are lands owned by one large private owner, Visitacion Associates (VA), and by several smaller private owners. Public land owners include the State of California (which owns the state park), the County of San Mateo (which owns the county park), and two school districts, which own school sites. Publicly owned lands cover approximately 2,000 acres on the mountains privately owned lands cover 1,500 acres.

Land use on the unincorporated areas of the mountain is presently regulated by the County, which has adopted a General Plan which includes the mountain. As sections of the mountain are prepared for development, they will be annexed to the surrounding

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cities (Brisbane, South San Francisco, Daly City). Those cities will also regulate land use by means of a General Plan, adopted pursuant to state law, along with other statutory land use regulations. Land annexed to the surrounding cities will still be subject to the HCP and the Agreement.

The County and the three cities will be co-applicants for the Section 10(a) Permit and shall exercise their land use authority, as set forth in the California Government Code and in the California Constitution, to enforce the conditions of the Permit and the terms of the Agreement. As permittees, the Cities of Brisbane, Daly City and South San Francisco and the County of San Mateo have a duty to comply with the Section 10(a) Permit and also to enforce the Permit and the Agreement. The terms of the Permit are subject to the final enforcement authority of the U.S. Fish and Wildlife Service.

The owners of 93% of the private land area on San Bruno Mountain have submitted plans which are included in this HCP. The remaining 7% of the land (the Unplanned Parcels) will be subject to local land use authority and no takings on the Unplanned Parcels will be authorized by the Section 10(a) Permit unless (1) the landowner agrees to comply with the Section 10(a) Permit and the Agreement, and (2) the local government having land use regulatory authority exercises its authority to require compliance with the Section 10(a) Permit and the Agreement.

Developers who plan construction in the San Bruno Mountain area will submit their plans to the appropriate local agency and follow the normal approval procedures. In addition, the developers shall consult with the Plan Operator and shall demonstrate to the local agency as provided below that they are complying with the Section 10(a) Permit and the Agreement. Land use proposals for unplanned parcels may be subject to modification in conformance with the HCP and the Agreement.

At or prior to the time of the initial discretionary project approval (including applications in connection with zoning, specific plans, subdivision tract maps, use permits, planned developments, building and grading permits) with respect to projects which have not yet received such approvals (e.g., Reservoir Hill has received such approval), copies of all application materials dealing with HCP compliance will be sent by the local agency to the U.S. Fish and Wildlife Service, the California State Department of Fish and Game and the Plan Operator. These agencies shall have 30 days to comment upon the application before a local agency public hearing is held to consider compliance of the proposed action with the Agreement and the Section 10(a) Permit Conditions. The local agency shall hold a noticed public hearing of the proposed action on compliance with the Agreement. Notice shall be given as provided in Government Code §65854 and §165854.5, or any successor statutes. This hearing will be held in conjunction with any other local public hearing scheduled to consider the development proposal.

After the noticed public hearing, the local agency shall impose on the applicant the conditions required by the Agreement and by the Section 10(a) Permit (in addition to other conditions permitted by law). In no case shall an agency approve an application without first making written findings that the application complies with the Section 10(a) Permit and the Agreement. Such a finding of compliance with the Section 10 (a) Permit and the Agreement

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fulfills the agency's obligation under CEQA to assess the impact, including the cumulative impact, of the project on the species of concern. The local agency shall apply the provisions of the HCP, Chapter III, pages 22-28, to the unplanned parcels.

Developers who plan construction in the San Bruno Mountain Area will submit their plans to the appropriate local agency and follow the development procedures. However, prior to the first discretionary approval (and, where no discretionary approval is required prior to any grading or any major construction or any change in land use on any parcel, whichever comes first), at least one public hearing must be held to determine whether the proposed action on the parcel complies with the Section 10(a) Permit and with this Agreement. Whenever a subsequent public hearing is required by the normal planning or approval procedures, the local agency shall take no action at that hearing without first making written findings that the proposed action complies with the Section 10(a) Permit and this Agreement. The local agency shall take no subsequent discretionary action without first finding that the action complies with this Agreement, but if a public hearing is not otherwise required by this Agreement or by applicable law, such discretionary action may be taken and such findings may be made without a public hearing being held. The following examples are given as an aid in interpreting this section:

1. If a project receives an initial discretionary approval from a city at a public hearing at which the required findings are made, then this Agreement requires no further public hearings. However, if the city's usual planning process requires additional public hearings, then at each such hearing prior to taking action, the city must find that the proposed action complies with the Section 10(a) Permit and with this Agreement. If the city's usual planning process allows discretionary action, subsequent to the first public hearing, to be taken without additional public hearings, then the city must find that the subsequent actions comply with the Section 10(a) Permit and this Agreement prior to taking action, but need not make the findings at a public hearing.
2. Some projects would normally proceed without any public hearings. Projects which require only a city building permit are one example. In those cases, this Agreement requires that at least one public hearing be held prior to any grading, major construction or change in land use. At that public hearing, the city must find that the proposed grading, major construction or change in land use complies with the Section 10(a) Permit and with this Agreement. Until the city makes such findings, the grading, major construction or change in land use shall not take place.

When a local government issues a building permit or a grading permit in compliance with the applicable conditions of the Agreement, such issuance automatically authorizes takings under the Section 10(a) Permit. The incidental takings under the Section 10(a) Permit must be performed by an employee or agent of the local government or by a private entity under the direct control of the local government through its land use authority, general police power, or any contractual rights. Each local government may issue grading permits and building permits upon satisfaction of the applicable conditions of the Agreement and of the Section 10(a) Permit, and other local requirements unrelated to wildlife conservation. For purposes of the Section 10(a) Permit, any Landowner (together with its agents, employees and contractors) who has agreed in writing to be bound by the terms of the Agreement and by the conditions of the Section 10(a) Permit by signing a copy of this Agreement and when acting (together with its

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agents, employees and contractors) under a permit issued in accordance with this Agreement, shall be deemed to be acting under the direct supervision and control of a permittee under the Section 10 (a) Permit.

Each developer shall offer for dedication to the County of San Mateo those parcels which are designated as conserved habitat in Chapter VII. The offer of dedication of Conserved Habitat may be phased at the option of the Landowner but shall occur prior to or concurrently with the recordation of the final subdivision tract map for the area to be dedicated. Title shall be dedicated in fee to the County or the State, as appropriate. San Mateo County shall accept these dedications. Temporary access to portions of any Developable Administrative Parcel which are to become Conserved Habitat shall be provided by the respective Landowner to the Plan Operator in order to permit the Plan Operator to monitor plan compliance and to develop plans for the protection, operation and enhancement of the Conserved Habitat upon reasonable terms and conditions (including waivers of liability, insurance, etc.) and to conduct any activity consistent with the Agreement. Owners of unplanned parcels may be required, during the planning process, to dedicate land as conserved habitat as a condition of authorization to take Mission Blue under the Section 10 (a) Permit.

Some developments may utilize Development Agreements as authorized by California Government Code §165864, et seq. Any such Development Agreement shall provide that the development is subject to and will comply with the terms of the Agreement and the conditions of the Section 10(a) Permit.

To change an unplanned parcel into a planned parcel or to obtain approval of a reclamation plan, the parcel owner shall submit the proposed plans to the Plan Operator. The Plan Operator shall review the proposed plans and recommend to the local agency with local use jurisdiction that the plans be approved or disapproved. The Plan Operator shall give the USF&WS and CDFGG notice and copies of the proposed plans. The OSF6WS and CDFBG shall have 30 days to review and comment upon the proposed plans. At the end of that time, the local agency with land use jurisdiction shall either approve or disapprove the plans. Upon approval of plans to change an unplanned parcel into a planned parcel, the parcel becomes a planned parcel.

Field maps (used to show grading boundaries, location of fencing, etc.) shall be reviewed by the Plan Operator for compliance with the HCP prior to their use. If the Plan Operator disapproves a field map, that decision may be appealed to, and reviewed by, the local agency with land use planning

B. FUNDING PROGRAM

A basic element of the HCP is creation of a funding mechanism which is able to support the monitoring, research, enhancement and other conservation techniques provided for in this HCP for permanent habitat conservation. The amount of funding must be adequate and protected against inflation. It does not seem possible to provide permanent, inflation-free funding solely by reliance on discretionary appropriations from public entities. As a result, the HCP proposes to rely on private funding for habitat maintenance. Funds for habitat maintenance would be deposited in three distinct but overlapping phases: initial funding, service contract funding, and permanent funding.

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- Interim funding will begin upon the execution of this Agreement, and will be paid by the Landowners. Upon full implementation of the program, it is anticipated that the total amount of interim funding paid by the Landowners will be approximately \$50,000.00 per year.
- Funds will also be raised through fees charged to the developers for monitoring of development, and for consultation provided to the developers, by the Plan Operator. The fees charged will cover the Plan Operator's costs and expenses and will also provide some extra money for operation and enhancement of the Conserved Habitat.
- Permanent and ongoing funding for habitat operation, maintenance and enhancement will be provided by a \$20.00 annual charge per dwelling unit within the Development Areas and a \$10.00 annual charge per 1,000 square feet of floor area of private non-residential development on the mountain. As the construction is completed and permanent funding is imposed, interim funding will be phased out.

Concurrently with the execution of this Agreement, the County and the Cities shall either enter into a trust agreement and thereby and thereupon establish the 'San Bruno Mountain Area Habitat Conservation Trust Fund' (hereinafter 'Trust Fund') or form an Assessment District or provide for other appropriate funding sources as provided below. The funding source shall have the duty to use the funds for habitat conservation on San Bruno Mountain so as to provide for the conservation of the Mission Blue, Callippe Silverspot and other Species of Concern and the San Bruno Mountain Area Ecological Community.

The trustees of the Trust Fund shall be the Managers for the County and the Cities who shall act and administer the Trust Fund solely for the purpose of providing the County with funds for the protection and enhancement of the Species of Concern by the operation, maintenance and enhancement of the Conserved Habitat for such purposes, all as set forth in greater detail in said Trust Agreement.

The funds will be paid annually to the funding source, as appropriate, and dedicated solely to habitat conservation activity. Upon full implementation of the program, it is anticipated that the amount of annual funding will be in excess of \$60,000.00, which has been determined to be sufficient for habitat conservation. The exact amount of annual funding cannot be calculated because Landowners will begin participation in the funding program at different times. The Trust will consist of one representative each from San Mateo County, Brisbane, Daly City and South San Francisco. The Trustees of the Trust shall have the duty to use the funds for habitat conservation on San Bruno Mountain so as to provide for the conservation of the Mission Blue, Callippe Silverspot and other Species of Concern and the San Bruno Mountain Area Ecological Community.

In connection with the subdivision, development and use of the Developable Administrative Parcels, the respective local agency having jurisdiction shall require, and in any event (except as provided in the Agreement) each Landowner with respect to each Development Area, or portion thereof, shall record, a covenant with respect to such Developable Administrative Parcels, or portion thereof.

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Prior to the time when the funding from covenants and restrictions assessments provided for above becomes available, the parties shall establish an Interim Funding (Interim Fund) in the amount of at least \$50,000.00 per year for preliminary habitat restoration activities, native plant seeding and species population monitoring, and other habitat enhancing and monitoring activities. It is anticipated that additional interim funding will nose from new projects, contributions from public agencies and from fees for monitoring and consultation, so that the interim funding will probably be in excess of \$50,000.00 per year.

As a contribution to the Interim Fund, each of the following Landowners shall pay to the Plan Operator the amount of money set forth below opposite its name monthly in advance, commencing with the later of (i) the approval of a specific plan, rezoning for residential or commercial purposes, PAD, or tentative subdivision map for any portion of the Developable Administrative Parcel set forth opposite the respective Landowner's name below; or (ii) the execution of this Agreement by each Landowner.

Landowner/Developable Administrative Parcel	Monthly Payment	Pro Rata Limit
Cadillac-Fairview Homes West: Northeast Ridge Project	\$ 1,956.67	\$ 23,480.00
W.W. Dean & Associates: South Slope Project	781.67	9,380.00
Presley: Reservoir Hill	681.67	8,180.00
Foxhall Investment, Ltd: Rio Verde Estates and Rio Verde Heights	746.67	8,960.00

With respect to all other Developable Administrative Parcels, the Landowner with respect thereto, upon the approval of any PUD, tentative subdivision tract map, building permit, grading permit, conditional use permit or special use permit shall be required commence and continue paying to the Plan Operator for the Interim Fund, in the same manner and to the same extent provided above with respect to the Landowners specified in this subsection, a charge in the amount of \$20.00 per year for every residential unit and \$10.00 per year per per 1,000 square feet of non-residential floor area proposed to be developed under the approval sought.

In the event that any of the Landowners above fails to meet its interim habitat funding obligation, the obligation to make payments shall terminate and the respective Landowner shall thereafter have no obligation to make further payments and the Landowner shall lose its rights and benefits under the Section 10 (a) Permit. As the permanent funding provided becomes available, the Interior Funding shall be phased out.

The parties to this Agreement recognize and agree that the permanent charge/assessment may be satisfied through collection on the annual County property tax bill of an equivalent amount. Such collection may be through an assessment levied

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by a public entity or district such as a landscape and lighting district pursuant to Streets and Highways Code §§22500-22679, an open space maintenance district pursuant to Government Code §§50575-50628, or some other mutually agreed upon funding source. All parties agree to cooperate in good faith in the formation of such a funding source as is selected by the Cities and the County and the Landowners shall consent to the formation of any such funding source so selected.

C. ENFORCEMENT

As set forth above, the local agencies, as permittees, have the duty to enforce the conditions of the Section 10(a) Permit and the terms of the Agreement. Their enforcement authority includes the issuance of stop work orders.

The Section 10(a) Permit provides that no grading shall occur within the Conserved Habitat other than in specifically designated Reclaimed Habitat areas. The applicant for a grading permit shall sign a statement acknowledging that grading in the Preserved Habitat may be a crime. The statement shall be in substantially the following form:

"I understand that grading is being permitted by federal authority in certain areas which may contain an endangered species -- the Mission Blue butterfly, the San Bruno Elfin butterfly or the San Francisco Garter Snake. I also understand that grading is permitted only inside areas which have been fenced. I understand that grading beyond the fenced area is not permitted and that it may be punishable as a federal crime to grade beyond the fenced area if such grading kills or injures butterfly eggs, larvae or adult butterflies, or kills or injures San Francisco Garter Snakes."

There shall be no grading within 300 feet of any point on a boundary of the Conserved Habitat which is required by Chapter VII of this HCP to be fenced until a fence is erected on the boundary of the Conserved Habitat for a reasonable distance and a pre-grading conference is held. Signs shall be posted on the fence every 100 feet which shall state, in the following language, that grading beyond the fence is not permitted and may result in the imposition of criminal penalties:

"NOTICE: Grading beyond this fence could result in a violation of federal law (16 U.S.C. §§1531-1543) and could result in a fine of \$20,000.00 and imprisonment for one year (16 United States Code §1540(b))."

At the pre-grading conference, the prohibition against grading beyond fenced areas shall be explained. The parties to the pre-grading conference shall include, in addition to the local agency, at a minimum, the contractors, developers, foremen, heavy equipment operators and the Habitat Manager.

The appropriate local agency shall issue and enforce a stop work order immediately upon its determination that there has been grading outside the grading boundaries as shown on the approved grading plan. Local agencies may exercise this authority based upon the Agreement, the police power, the Section 10 (a) Permit, the grading permit itself and any contractual agreements with developers to enforce the Agreement, the Section 10(a) Permit and/or the grading permit.

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Local agencies shall have available the full extent of legal and equitable remedies available to them in the event of violations of the Agreement or the Section 10(a) Permit. Violations may result in requiring reclamation of any improperly graded area, donation to the County of undisturbed habitat within the permit area equivalent to the habitat improperly graded, forfeiture of bonds, revocation of the grading permit (and concomitantly the authorization for taking under that grading permit) and/or any other appropriate and available remedies in the discretion of the local public entity.

The USF&WS and the local agencies agree that the Section 10(a) Permit is severable for enforcement purposes by management unit or portions thereof. Violations that occur in one management unit are not grounds for revocation of the permit or other remedies against a separate management unit. Revocation of the permit will not be considered until other remedies and sanctions have been tried and found by the USF&WS to be inadequate. USF&WS may suspend or revoke the permit pursuant to the provisions of 50 CFR §13.51. The violation of the Section 10 (a) Permit with respect to any management unit, or portion thereof, shall not adversely affect any Landowner or local agency with respect to any other management unit, or portion thereof. The past conduct of a violator with respect to one management unit may be considered in determining the appropriate remedies with respect to such violator's activities with respect to another Management Unit.

In the event that the development of any Development Area entails grading within 200 feet of any Conserved Habitat, the Landowner shall post a bond in favor of the Cities, the Plan Operator and the San Bruno Mountain Area Habitat Conservation Trust Fund or Assessment District securing performance of the following obligations:

1. The Landowner shall not grade any Conserved Habitat except as provided in this Agreement;
2. In the event that any Landowner does grade any Conserved Habitat (including, but not limited to Preserved Habitat) in violation of this Agreement, such Landowner shall expeditiously comply with the reasonable directives of the Plan Operator to restore the improperly graded area; and
3. In the event of a breach of the obligations described in subsections (i) and (ii) above, it would be impracticable or extremely difficult to fix the actual damages resulting from the breach and therefore the Landowner shall pay to the Trust Fund or to the Assessment District or alternate funding source liquidated damages, and not as a penalty, the sum of \$20,000.00 per acre of Conserved Habitat that is improperly graded. The liquidated damages per acre shall be prorated according to the amount of Conserved Habitat that is improperly graded, but in no event shall be less than \$2,000.00. These sums represent a reasonable endeavor by the parties hereto to estimate a fair compensation for the foreseeable losses that might result from a breach of such obligations.

The amount of any bond obtained pursuant to this provision shall be no less than \$25,000.00 per acre of Conserved Habitat, other than areas constituting Reclaimed Habitat, that occurs within 200 feet of any area that is to be graded. Such bond shall be posted *by* the Landowner and required *by* the local agency having planning jurisdiction prior to the initiation of such grading.

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Suspension

1. The USF&WS may suspend the Section 10(a) Permit for any violation of the Permit or this Agreement.
2. Except where the USF&WS determines that emergency action is necessary to protect any endangered or threatened species, the USF&WS shall not suspend the Section 10(a) Permit without first: (a) requesting the appropriate City or the County to take appropriate remedial or enforcement action; and (b) providing to the affected City or County permittee and to each affected Landowner under the direct control of the affected permittee, notice in writing of the facts or conduct which may warrant the suspension and an opportunity to demonstrate or achieve compliance with the Permit and this Agreement.
3. Any suspension under this subsection shall be lifted immediately upon the reasonable determination by the USF&WS that the violation(s) has been effectively redressed.
4. It is the intent of the parties hereto that in the event of any suspension of the Section 10(a) Permit, all parties shall act expeditiously to cooperate to lift any suspension of the Section 10 (a) Permit to carry out the objectives of this Agreement. Notwithstanding any provision of this subsection, no suspension of the Section 10(a) Permit, or the rights, benefits or privileges of the Section 10(a) Permit shall extend beyond a period of 180 days, unless the USMS makes the determinations required below.

Revocation or Termination

1. The USF&WS shall not revoke or terminate the Section 10(a) Permit for a violation of the Permit or this Agreement unless the USF&WS determines that such violation: (a) involves a taking of an endangered or threatened species; (b) has significantly and adversely affected such species throughout its range (c) cannot be effectively redressed by other remedial or enforcement action, and (d) destroys more than 5% of the total Conserved Habitat in that Administrative Parcel.
2. The USF&WS shall not revoke or terminate the Section 10(a) Permit without first: (a) requesting the appropriate City or the County to take appropriate remedial or enforcement action and (b) providing to the affected City or County permittee and to each affected Landowner under the direct control of the affected permittee, notice in writing of the facts or conduct which may warrant the revocation or termination and a reasonable opportunity (but not less than 60 days) to demonstrate or achieve compliance with the Permit and this Agreement.

D. HABITAT MAINTENANCE

The County shall grant to the California Department of Fish and Game, the California Department of Parks and Recreation and to the U.S. Department of the Interior an easement to enter the conserved habitat owned by the County to enforce the terms of the Agreement and to enforce the conditions of the Section 10(a) Permit. The County shall also restrict the conserved habitat by deed or other recorded document so that the

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land will be used only for habitat purposes and for other uses consistent with use as a habitat. The document shall provide that the restrictions on use can only be relaxed or modified with the consent of the USF&WS, the California State Department of Parks and Recreation and Fish and Game, the County of San Mateo and the cities of Brisbane, Daly City and South San Francisco.

The California Department of Parks and Recreation shall grant to the County, the California Department of Fish and Game and to the U.S. Department of Interior an easement to enter the conserved habitat owned by the State to enforce the terms of the Agreement and to enforce the conditions of the Section 10(a) Permit. The State shall also restrict the conserved habitat by deed or other recorded document so that the land will be used only for habitat purposes and for other uses consistent with use as a habitat. The document shall provide that the restrictions on use can only be relaxed or modified with the consent of the USF&WS, the California State Department of Parks and Recreation and Fish and Game, the County of San Mateo and the cities of Brisbane, Daly City and South San Francisco.

In order to effect the maximum economy, it is anticipated that the conservation activities will be closely integrated with the activities of San Mateo County as manager of a park on San Bruno Mountain.

The day-to-day management of the HCP will be handled by the Plan Operator. The Plan Operator will provide personnel and equipment to perform the physical job of conservation and maintenance of the conserved habitat. That work will be done under the supervision of a scientist or other appropriate personnel who will either be hired by the Plan Operator or under contract with the Plan Operator. The scientific consultant will perform whatever periodic review and planning is required by the HCP.

For the initial five years of the Plan, the Plan Operator will consult with the Technical Advisory Committee (TAC), composed of representatives of USF&WS, CDF&G, the County of San Mateo, the cities of Brisbane, Daly City and South San Francisco, Visitation Associates, the Committee to Save San Bruno Mountain and a biologist. The duties of the TAC are to review the operation, implementation and success of the HCP as follows:

- Review the work of the Plan Operator, including the results of research, monitoring and habitat enhancement activities and including the planning and design assistance to the landowners.

- Recommend revisions to plan activities, research, monitoring or enhancement, as necessary.

The TAC shall meet formally at least once a year to review the ongoing implementation of the Plan, and more often as appropriate. After the initial five years, the TAC may be continued if major uncertainties regarding biological activities for habitat maintenance and enhancement remain to be resolved. The TAC may, with the unanimous consent of the County and Cities, establish a

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subcommittee of scientific and technical personnel, including representatives of the resource agencies to provide it with needed biological advice.

E. LANDOWNER COMMITMENTS

Landowners shall be required to:

1. Demonstrate compliance with the Agreement and the Section 10(a) Permit as described in paragraph A above.
2. Participate in the Funding Program as set forth in the Agreement.
3. Satisfy the conditions of Chapter VII as to each parcel for which the landowner proposes development.
4. Dedicate conserved habitat as set forth in Chapter VII of the HCP.
5. Prepare and comply with reclamation plans as described in Chapter VII for areas designated to be reclaimed.
6. Comply with applicable provisions of the Agreement and the conditions of the Section 10(a) Permit.
7. Comply with the requirements for grading permits set forth in the Agreement.
8. Stop grading work immediately upon the issuance of a stop work order duly and properly issued by the local government having land use jurisdiction.

F. AMENDMENT PROCEDURE

It is necessary to establish a procedure whereby the Agreement and the Section 10(a) Permit can be amended. However, it is extremely important that the cumulative effect of amendments will not jeopardize any endangered species or other species of concern. The fundamental purpose of the Agreement is to provide permanent protection for those species and for their conserved habitat. No amendments which conflict with that purpose will be approved. Amendments must be evaluated based on their effect on the habitat as a whole. The Plan Operator must be consulted on all proposed amendments.

In order to ensure that changes in development plans are consistent with this HCP, the amendment procedures vary depending on the type of amendments proposed. For purposes of this Chapter, "amendment" means any change in the boundary, as set forth in Chapter VII, of the conserved habitat, or development area, or any change in any of the conditions set forth for any parcel in Chapter VII or any change in any of the funding provisions of the HCP or any obligations of any public entity under the HCP.

Amendments types 1, 2 and 3 as set forth below shall not be regarded as having a substantial effect upon any endangered species or the habitat of any endangered species. The types of proposed amendments and the applicable amendment procedures are as follows:

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1. Amendments In The Development areas

Upon the written request of the respective landowner, the local public entity having land use jurisdiction is authorized in accordance with applicable law to approve amendments to the development plans for Development Areas which do not occur in the conserved or reclaimed habitat other than the conditions set forth in Chapter VII.

2. Amendments For Minor Boundary Adjustments

Upon the written request of the respective landowner, after consultation with the Habitat Manager, the local jurisdiction is authorized to approve minor boundary adjustments in the reclaimed or preserved habitat upon information notice, sent to the cities of Daly City, Brisbane and South San Francisco, the County of San Mateo, the California State Department of Fish and Game, the California State Parks Department and the U.S. Fish and Wildlife Service set forth in the preceding section, if the amendment will result in:

a. Reestablishing a boundary not more than 30 nominal feet measured on the ground surface, except as provided in Chapter VII, on either side of that boundary as delineated on a tentative subdivision map approved by a local public entity in accordance with Chapter VII (or on either side of that boundary, as determined by the local agency, if no subdivision map has yet been approved), and

b. The cumulative loss per administrative parcel from all minor boundary adjustments is not greater than 5% of the total conserved habitat in that administrative parcel as shown in Chapter VII.

3. Amendments For Exchange Of equivalent Conserved Habitat Prior To Grading

Amendments to Chapter VII may be prepared for the exchange of land designated as conserved habitat with land designated as a development area within the same administrative parcel, only if no grading has yet occurred after issuance of the Section 10(a) Permit in the proposed new conserved habitat and upon a written finding that the amendment will provide new conserved habitat which is essentially equivalent in biological value and acreage to the habitat which will be lost as a result of the amendment. Any decisions approving such proposed amendments must be in writing and must be made by both the local jurisdiction and the USF&WS.

4. Unforeseen Circumstances

a. In reconciling their interests, and in identifying the measures in the Habitat Conservation Plan, the parties have used their best efforts to anticipate and take into consideration future changes in circumstances affecting the San Bruno Mountain Ecological Community and Species of Concern. The following procedures shall be followed, however, with respect to unforeseen circumstances which either (i) appreciably reduce the likelihood of survival of the Mission Blue butterfly, San Bruno Elfin butterfly or San Francisco Garter Snake, or (ii) result in new species being listed under the Endangered Species Act whose conservation necessitates additional emphasis in the HCP or the Plan Operator's operating program for Conserved Habitat areas.

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b. In response to any unforeseen circumstances as set forth in subsection (a) above, any party to this Agreement may request the other parties to this Agreement to meet to discuss appropriate modifications or amendments to: the HCP as applied to Conserved Habitat areas, the Plan operator's operating program, the Trust Fund Agreement or any provision of this Agreement. Any party to this Agreement who fails to vote upon any such proposed changes shall be bound by the terms and conditions of any modification or amendment adopted pursuant to the provisions of this Section.

c. The parties to this Agreement shall, to the maximum extent possible, attempt to reach a consensus in response to the unforeseen circumstances described in subsection (a) of this section. No modification or amendment proposed under subsection (b) of this section shall be adopted and become effective without the unanimous consent of all parties to this Agreement who voted upon such modifications or amendment.

d. Notwithstanding the provisions of subsection (c) of this section, upon a written finding by the USF&WS that an emergency exists wherein either the continued implementation of the HCP, as applied to the Conserved Habitat areas, or the Plan Operator's operating program, appreciably reduces the likelihood of survival of a species listed under the Endangered Species Act, such plan or program shall be immediately modified in accordance with the recommendations of the USF&WS. Within 30 days after the modification of such plan or program, the USF&WS shall hold an informal noticed public hearing in San Mateo County for the purpose of setting forth its justification for requesting a modification of the HCP or the Plan Operator's operating program and taking public comment thereon. Such requested modifications shall be withdrawn within 30 days after the hearing unless the USF&WS presents, in writing, substantial evidence which demonstrates that the modifications were (i) necessary for the conservation of a species listed under the Endangered Species Act, (ii) could not be accomplished through the continued implementation of the existing HCP or Plan Operator's operating program, and (iii) represented the minimal modifications available which would not appreciably reduce the likelihood of survival of the affected listed species. Upon the issuance of such findings, the requested modifications shall remain in force and effect until such time as the USF&WS determines that the emergency threat to the existence of the affected listed species has been avoided.

5. All Other Amendments

All other amendments are subject to approval as follows: (a) upon the prior written agreement of the fee title owners of the lands directly affected; and (b) after a noticed public hearing, and (c) upon written approval of the local jurisdiction, the County of San Mateo (only with respect to impacts on conserved habitat) and the U.S. Fish and Wildlife Service, and (d) supported by a biological study demonstrating that the amendment does not conflict with the primary purpose of the HCP to provide for indefinite, long term perpetuation of the Mission Blue, Callippe Silverspot and other species of concern, and (e) will be considered an amendment to the Section 10(a) Permit, subject to any other procedural requirements of federal law or regulation which may be applicable to amendment of such a permit. Amendments in planned administrative parcels may be approved only at three calendar year intervals.

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Amendments in unplanned administrative parcels are not subject to the three year limit, until after they become planned parcels.

Amendments in planned administrative parcels may be proposed and approved according to the following schedule:

Decision On Proposed Amendment Must Be Submitted By	Amendment Must Be Made By
1. June 30, 1985	December 31, 1985
2. June 30, 1988	December 31, 1988
3. June 30, 1991	December 31, 1991
4. June 30, 1994	December 31, 1994
5.Etc.	

Amendments shall be proposed by June 30 and decisions shall be made by December 31 at three year intervals as set forth herein and continuing on like dates forever.

Notwithstanding the foregoing, proposed amendments in the provisions of Volume II with respect to: (i) the boundary of the conserved habitat or development area; or (ii) any conditions set forth in Chapter VII regarding any administrative parcel may be considered at any time until such administrative parcel has been planned and is the subject of a specific plan or tentative subdivision tract map approval, after which time the time limits set forth above for consideration of amendments shall apply.

G. PROPOSED PERMIT

The County of San Mateo and the cities of Brisbane, Daly City and South San Francisco will be joint applicants for a permit for taking of the Mission Blue under Section 10(a) of the Endangered Species Act. Each of the four local governments will be named as a permittee.

The permit application will set forth proposed conditions under which the local governments will operate. The conditions will include the following items:

1. No taking of the Mission Blue on San Bruno Mountain shall occur except in compliance with procedural and substantive requirements of the Agreement.
2. The conserved habitat shall be held, used and administered in accordance with the HCP and Agreement.
3. The development areas shall be used and administered in accordance with the conditions in Chapter VII of the HCP.
4. A permanent institutional structure and funding mechanism shall be established in accordance with Chapter V of the HCP and compliance with the applicable funding requirements shall be demonstrated by each developer prior to the issuance of any grading permit or building permit.
5. The permit shall be valid for an initial thirty year term.

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6. The Agreement, as required by Chapter V of the HCP, shall be executed concurrently with the issuance of the Section 10(a) Permit.

H. APPLICATION OF THE ENDANGERED SPECIES ACT

The primary question underlying the issuance of the Section 10(a) Permit under the Endangered Species Act is whether the endangered species of concern will be better conserved by this HCP than by no action at all. The HCP contemplates the exclusion and loss of some existing habitat and the incremental taking of the endangered species of concern. This plan is based on the finding that the existing habitat for the endangered species is threatened because of the succession of brush replacing existing grasslands, increasing recreational use and the threat of conversion to urban uses. It is believed that this trend can be stabilized by the regulation and enhancement of conserved habitat generally and by requiring mitigation for the contemplated exclusion and conversion of areas for urban uses. The mitigation required will provide funding and title to privately held lands, stabilizing and promoting conservation of these species of concern.

The focus of this plan is on the conservation of habitat for these species of concern. This emphasis on habitat is particularly helpful here because the endangered species are invertebrates. As long as a certain population size is retained, the taking of a few individual insects has far less significance to population survival than does the taking of an equivalent number of a species of large vertebrates (e.g., grizzly bear, California condor). Insects are short-lived and have high individual reproductive output -- the entire population replaces itself each year. Large vertebrates, on the other hand, are long-lived, take years to reach maturity and have low individual reproductive output. In this sense, the protection of habitat for invertebrates may have greater long run significance for the endurance of the species than the protection of some individual members of the species.

1. Permitted Taking Under Section 10(a)

Section 10(a) of the Act authorizes the Secretary to permit, under such terms and conditions as he may prescribe, any act otherwise prohibited by Section 9 of the Act. The acts may be permitted for scientific purposes, or to enhance the propagation or survival of the affected species (16 U.S.C. §1539). Section 9 of the Act, in turn, prohibits the "taking" of any endangered species.

If the Secretary is to grant a permit under Section 10(a) of the Act, he is required to find that (1) the exception was applied for in good faiths (2) the exercise of the exception will not operate to the disadvantage of the endangered species; (3) the exception is consistent with the purposes and policies set forth in Section 1531 of this title (16 U.S.C. §1539(d)). The Secretary may impose on such a permit terms and conditions to further the purposes of the Act.

The legislative history of Section 10(a) indicates that it was intended to provide the Fish and Wildlife Service with the flexibility to permit the taking of individual members of an endangered species where the taking would occur as part of activities to encourage the

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propagation or survival of the affected species. The House committee report on the 1973 legislation made the following comment with regard to this section:

Any such activities to encourage propagation or survival may take place in captivity, in a controlled habitat or even in uncontrolled habitat so long as this is found to provide the most practicable and realistic opportunity to encourage the development of the species concerned. They might even in extraordinary circumstances include the power to cull excess members of a species where the carrying capacity of its environment is in danger of being overwhelmed. H.R Rep. No. 412, 93d Cong. 1st Sess. 17 (1973). (Emphasis added.)

Similarly, the Senate report states:

The Secretary may make certain exemptions from the prohibitions for scientific purposes or for the propagation of the species in controlled habitats, if he finds that such excepted conduct furthers the intent of the Act. Sen. Report No. 307, 93d Cong., 1st Sess. 4 (1973).

This is not an instance where the habitat is overpopulated with the species and certain individuals must be taken for the protection of the species itself. However, it now appears that this is an instance where the proposed habitat conservation plan is '...the most practicable and realistic opportunity to encourage the development of the species.'

In Section 2 of the Act (15 U.S.C. §1531), Congress found and declared that:

(a)(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;...

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

As mentioned above, a critical feature of this permit is that a significant portion of the habitat is on private land. It is unlikely that adequate public funds can be located to acquire the entire habitat area. Under this approach, over half of the -private land would be permanently preserved in its natural condition as habitat. The conserved habitat would be carefully selected both to protect the richest habitat areas and to provide an adequate diversity of habitat. In addition, the contemplated urban uses will

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be a source of permanent, ongoing funding for continued habitat conservation.

In its general expressions of intent in Section 2, Congress stated its concern about the impact on species of "economic growth and development untempered by adequate concern and conservation." However, Congress sought to encourage "interested parties" "...to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved and to provide a program for the conservation of such endangered and threatened species."

Application of the Act to the private land on San Bruno Mountain as suggested would mean that the Secretary was exercising his permit authority to provide a program for the conservation of the species and its ecosystem by requiring the adoption and funding of this Habitat Conservation Plan. Under these circumstances, especially where the Act is being applied to an invertebrate species on private land, this is the most practicable and realistic means for providing the conservation of the species. In addition, the Secretary may impose on a permit for the taking of individuals, terms and conditions necessary to further the intent of Congress. In this case, the permit would generally authorize the taking of individuals of the endangered species subject to specific terms and conditions which would assure that the conservation purposes of the permit are achieved. Generally, these conditions could include implementation of specific elements of this Plan, including the regulation of conserved habitat, biological evidence developed by a qualified independent biologist that the HCP will be sufficient to provide for the indefinite perpetuation of the species, permanent funding to provide for habitat maintenance and protection, and an institution responsible for implementation of the habitat management plan which has the legal independence and authority to fulfill its responsibilities.

Because a permit for takings incidental to development activity would be issued under Section 10(a), there would be no conflict with the recent decision of the Ninth Circuit Court of Appeals in Palila v. Hawaii Department of Land and Natural Resources, 639 F.2d 495 (Cir. 9, 1981).

2. Consultation Under Section 7

The approach to resolving any potential endangered species conflict on San Bruno Mountain should involve both the application for a permit, pursuant to Section 10(a), to carry out the plan and the issuance of a favorable biological opinion pursuant to Section 7b of the Act. Section 7 of the Endangered Species Act requires federal agencies, in consultation with the Secretary of the Interior, to ensure that any action, authorized, funded or carried out by them is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such species (16 U.S.C. §1536(b)).

Section 7 should be utilized in this instance by consultation of the Fish and Wildlife Service Permit Office with the Endangered Species Office on the application for an endangered species permit under Section 10(a) of the Act to carry out the plan and the associated development activities.