

Distributed on:
DEC 5 2012
City Manager's Office

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: HABITAT CONSERVATION PLAN **DATE:** December 5, 2012

Approved

Date

12/5/12

INFORMATION

BACKGROUND

On December 4, 2012, the City Council conducted a public hearing on the appeal of the Planning Commission's certification of the Environmental Impact Report (EIR) for the Santa Clara Valley Habitat Conservation Plan/Natural Community Conservation Plan (Habitat Plan). As part of the discussion of the appeal, the City Council requested that staff forward to the full City Council three items of correspondence received by the City pertaining to the Habitat Plan. Attached, please find copies of:

1. November 9, 2012 Letter form the US Army Corps of Engineers to Ken Schreiber
2. November 13, 2012 Letter from California Department of Fish and Game and the US Fish and Wildlife Service to Santa Clara County Planning Directors
3. November 15, 2012 Letters from Habitat Conservation Now to cities of Milpitas, Mountain View, Palo Alto, and Santa Clara

/s/

JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

Attachments: Letters

For questions, please contact Andrew Crabtree at (408) 535-7893.



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
1455 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94103-1398

NOV - 9 2012

Regulatory Division

SUBJECT: File Number 2012-00302S

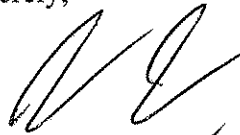
County of Santa Clara
Mr. Ken Schreiber
Office of the County Executive
70 W. Hedding Street, 11th Floor
San Jose, California 95110

Dear Mr. Schreiber:

This letter is written in response to your inquiry regarding the processing of a new Regional General Permit (RGP) in Santa Clara County. We received the application by the County on 1 November, 2012, and have begun the evaluation process. While it is not possible for the San Francisco District to make any kind of commitment at this point regarding the outcome of the processing, we can say that the District has encouraged the application for a Regional General Permit and that we support a programmatic approach to entitlement. We have been actively seeking opportunities to make use of existing (and in-process) habitat conservation plans (HCPs) by the U.S. Fish & Wildlife Service and other federal agencies specifically to streamline entitlement. We are aware of the complexities associated with regional permitting and want to make full and comprehensive use of the hard work done by everyone who has been involved in the HCP process. We have previously asked that the application to this office for a Regional General Permit take a close look at the draft HCP and use it specifically as a framework, including taking a look at the applicability of utilizing both the geographic scope defined by the HCP as well as the scope of potential projects and their associated impacts. Within this context, we are certain that many applications to this office will see improvements in entitlement efficiency. We expect that there will be considerable overlap between the proposed RGP and the draft HCP, and expect that there will be efficiencies to be gained in resulting project entitlement pursuant to the Clean Water Act. As we have just received the application, we have not yet gained an understanding on how the proposal intends to link (or if) the proposed mitigation in the HCP to any proposed mitigation associated with Clean Water Act impacts. We look forward to working with all of the associated agencies, the county, cities, and stakeholders.

Should you have any questions regarding this matter, please contact either Ian Liffmann of our Regulatory Division at Ian.Liffmann@usace.army.mil, or Cameron Johnson at Cameron.L.Johnson@usace.army.mil. Please address all correspondence to the Regulatory Division and refer to the File Number at the head of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Hicks', written over a horizontal line.

Jane M. Hicks
Chief, Regulatory Division

Enclosures

Copy Furnished:

US FWS, Cay Goude, Sacramento



DEPARTMENT OF FISH AND GAME

BAY DELTA REGION
7329 SILVERADO TRAIL
NAPA, CA 94558
(707) 944-5500

U. S. FISH AND WILDLIFE SERVICE

SACRAMENTO FISH AND WILDLIFE OFFICE
2800 COTTAGE WAY, ROOM W-2605
SACRAMENTO, CA 95825
(916) 414-6600



In reply refer to:
08ESMF00-2013-TA-0068

November 13, 2012

Mr. John Doughty, City of East Palo Alto
Mr. Terrence Grindall, City of Newark
Mr. Hanson Hom, City of Sunnyvale
Mr. Steven McHarris, City of Milpitas
Mr. Kevin Riley, City of Santa Clara
Mr. Jeff Schwob, City of Fremont
Ms. Arti Shrivastava, City of Cupertino
Mr. Randy Tsuda, City of Mountain View
Mr. Curtis Williams, City of Palo Alto

Dear Planning Directors:

Subject: Streamlining Mitigation for Impacts to Biological Resources

The California Department of Fish and Game (CDFG) and United States Fish and Wildlife Service (FWS) (Wildlife Agencies) are writing jointly to draw your attention to progress in your region to streamline compliance with the environmental laws applicable to development projects approved or carried out by participating jurisdictions.

I. Overview of the Santa Clara Valley Habitat Plan/Natural Communities Conservation Plan (SCVHP).

The Santa Clara Valley Habitat Plan/Natural Communities Conservation Plan (SCVHP) establishes a framework by which future development projects within participating jurisdictions may comply with several state and federal regulatory processes that apply to those development projects regardless of the jurisdiction's participation in the SCVHP. Specifically, the SCVHP standardizes avoidance, minimization, mitigation, and compensation requirements set forth in the Federal Endangered Species Act (ESA), the California Endangered Species Act (CESA), the Natural Community Conservation Planning Act (NCCP), the California Environmental Quality Act (CEQA), the National Environmental Policy Act (NEPA) as well as in other applicable laws and regulations relating to biological and natural resources within the planning area, so that public and private actions will be governed equally and consistently, thus reducing delays, expenses, and regulatory duplication.

The foundation for that consistency and efficiency is the SCVHP's analysis of environmental impacts and development of a long-term strategy for the mitigation and conservation of 18 endangered, threatened, and rare species within Santa Clara County. Mitigation measures set forth within the SCVHP include: the acquisition of land and the creation of a reserve system of protected lands; long-term management, including enhancement and restoration of the natural communities on those lands; a comprehensive set of policies to protect riparian corridors and other aquatic resources; and specific avoidance and minimization measures to be applied to new development projects. Through the SCVHP, fees will be collected from new development projects to fund these measures, including fees for loss of habitat.

The SCVHP was developed and will be implemented locally by the County of Santa Clara, cities of San Jose, Morgan Hill and Gilroy, Santa Clara Valley Water District, Santa Clara Valley Transportation Authority and an Implementing Entity established by these local agencies. Most of those local agencies have already adopted the SCVHP and the Wildlife Agencies anticipate the City of San Jose and Santa Clara Valley Transportation Authority will adopt the SCVHP in December 2012.

II. The SCVHP Establishes Consistency to Streamline Participating Jurisdictions' Compliance with CEQA for Development Projects.

CEQA is among the environmental regulations for which the SCVHP facilitates compliance. By way of background, CEQA requires that any public agency approving or carrying out a project for which there is substantial evidence of a potentially significant impact must identify measures necessary to mitigate impacts to a less-than-significant level. Pub. Res. Code § 21081. Mitigation measures must be feasible and enforceable. Pub. Res. Code § 21081.6. Adequate mitigation measures can be particularly difficult to identify for cumulatively significant impacts.

The absence of feasible and enforceable measures to mitigate impacts to a less-than-significant level (individually or cumulatively) results in increased planning time and project costs by removing the option of complying with CEQA via a Mitigated Negative Declaration. Even if a project would otherwise trigger an Environmental Impact Report, the absence of feasible measures to mitigate to a less-than-significant level will necessitate the lead agency's consideration of whether it is appropriate to adopt a statement of overriding considerations. Cal. Pub. Res. Code § 21081(b).

The SCVHP and other similar regional planning efforts establish standardized, equitable, feasible and enforceable measures by which participating jurisdictions can mitigate impacts to a less-than-significant level. The impact and mitigation analyses in the SCVHP are based on extensive analysis and the best available science and have resulted in the identification and design of feasible mitigation that may not have been identified in prior environmental documents.

For example, the SCVHP establishes standards for mitigation of impacts to several species that depend on serpentine soils, such as the Bay checkerspot butterfly. Potentially significant impacts to such species include direct impacts resulting from ground disturbing activities as well as indirect, cumulative, and highly dispersed impacts such as nitrogen deposition. In the past, the effects of nitrogen deposition on special-status plants and wildlife have been underestimated or were not understood; however, this is no longer true and nitrogen impacts are articulated in detail in the SCVHP.

Nitrogen deposition is known to have deleterious effects on many of the serpentine plants in the SCVHP area, as well as the host plants that support the Bay checkerspot butterfly. Industrial point sources and nonpoint sources such as automobiles emit nitrogen compounds into the air. Because serpentine soils tend to be nutrient poor, and nitrogen deposition artificially fertilizes serpentine soils, nitrogen deposition facilitates the spread of invasive plant species. Non-native annual grasses grow rapidly, enabling them to out-compete serpentine species. The displacement of these species, and subsequent decline of the several federally-listed species, including the butterfly and its larval host plants, has been documented on Coyote Ridge in central Santa Clara County (the last remaining core population of butterflies). Nitrogen tends to be tightly recycled by the plants and microbes in infertile soils like those derived from serpentines, so fertilization impacts could persist there for years and result in cumulative habitat degradation. The invasion of native grasslands by invasive and/or non-native species is now recognized as one of the major causes of the decline of this listed animal.

All major remaining populations of the butterfly and many of the sensitive serpentine plant populations occur in areas subject to air pollution from vehicle exhaust and other sources in your jurisdiction and the Bay area. Therefore, even relatively small amounts of nitrogen could contribute to a cumulatively significant impact by diminishing the population sizes of serpentine species and possibly the chances of survival of the threatened butterfly and the serpentine-specific plant species.

The SCVHP's conservation strategy is designed not only to mitigate impacts to and further the recovery of Bay checkerspot butterfly but incorporates specific measures to minimize and mitigate nitrogen deposition. *See* Final Santa Clara Valley Habitat Conservation Plan, Chapter 5 Conservation Strategy, Table 5.1c (identifying SCVHP 11.1 to consist of protection of 4,554 acres of modeled Bay checkerspot butterfly habitat, including 4,000 acres of serpentine grasslands in core populations of Bay checkerspot butterfly, to protect a range of slopes, aspects, and microhabitats as part of the Reserve System within the study area). *See also*, Table 5-b (identifying mitigation measures to address nitrogen deposition including GRASS-1, GRASS-2, GRASS-3, GRASS-4, GRASS-7, LM- 8, and LM-11).

The SCVHP also provides an up-to-date and comprehensive conservation and mitigation strategy for burrowing owl, which species is likely to occur in your jurisdiction. For many years, the Wildlife Agencies have recognized the need for a comprehensive conservation and mitigation

strategy for burrowing owls in the south bay area and other portions of California. In 1995, DFG prepared the “1995 Staff Report on Burrowing Owl Mitigation,” which contained recommended burrowing owl mitigation measures and burrow survey techniques intended to offset the loss of habitat and slow or reverse further decline of this species. Notwithstanding these measures, burrowing owls have continued to decline in portions of their range. DFG determined that reversing declining population and range trends for burrowing owls required implementation of more effective conservation actions. In 2012, after evaluating the efficacy of the 1995 Staff Report, CDFG produced an updated “Staff Report on Burrowing Owl Mitigation” (2012 Staff Report). The 2012 Staff Report provides an updated summary of the best available science’s analyses of avoidance, minimization and mitigation approaches for burrowing owls.

The SCVHP provides both a mitigation and conservation framework for burrowing owls consistent with the goals of the 2012 Staff Report. As an example, the SCVHP establishes standards for the protection of the western burrowing owl, including a prohibition on disturbance or relocation of owl nests throughout the breeding season, requirement of a 250-foot buffer around occupied burrows for all construction activity, and a developer fee funded system to mitigate the loss of owl habitat caused by a development project by permanent preservation of off-setting suitable burrowing owl habitat lands and management and enhancement of lands that support owls.

These two examples (nitrogen deposition and burrowing owl) illustrate the manner in which the SCVHP developed measures to mitigate impacts and demonstrate the feasibility of such measures.

Since CEQA requires implementation of all feasible mitigation measures even for impacts that cannot be mitigated to a less-than-significant level and the mitigation program developed for the SCHVP includes feasible mitigation measures, other jurisdictions should develop and implement similar feasible mitigation for significant impacts. The Wildlife Agencies recommend your jurisdiction develop and incorporate comparable mitigation measures for projects that result in significant impacts. We believe given the development of feasible mitigation measures under the SCVHP, it would be difficult for other local lead agencies to adopt a Statement of Overriding Considerations absent incorporation of similar feasible mitigation measures and any such override would be subject to greater public scrutiny. It would be particularly difficult for a CEQA lead agency to establish the adequacy of any Statement of Overriding Considerations based on economic hardship now that the SCVHP has demonstrated that a feasible mitigation program and fee structure can be implemented without such hardship (see *Economic Impact Analysis of the Santa Clara Valley Habitat Conservation Plan*; Willdan Financial Services, 2011) and thus we believe should not be cited in any future Statements of Overriding Considerations.

III. SCVHP Standardizes Avoidance, Minimization, Mitigation, and Compensation Requirements Under Other Laws.

In addition to mitigation requirements of CEQA, development projects may be subject to environmental regulation under other laws¹ included but not limited to ESA and CESA.

Section 9 of the ESA prohibits the take of any federally-listed animal species by any person. “Take” is defined broadly as meaning “...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” “Harm” has been further defined to include significant habitat modification or destruction that results in death or injury to a listed species by interfering with essential behavioral patterns, such as breeding, foraging, or resting. “Harass” is defined as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering (50 CFR 17.3).

Take incidental to an otherwise lawful activity may be authorized under ESA by one of two procedures. If a federal agency is involved with the permitting, funding, or carrying out of the activity and a federally-listed species is going to be adversely affected or its designated critical habitat then initiation of formal consultation between that agency and FWS pursuant to section 7 of ESA is required. If a federal agency is not involved and federally-listed species may be taken as part of the project, then an Incidental Take Permit pursuant to section 10(a)(1)(B) of ESA should be obtained in order to avoid violating federal law. Without the SCVHP, there would be unmitigated impacts of vehicle exhaust that would need to be addressed by future public and private sector development. Failure to address and consult with FWS, through one of the two methods described above, regarding the impacts of vehicle exhaust (and other sources of nitrogen deposition) on federally-listed species would constitute an unmitigated significant environmental impact and would constitute a violation of ESA.

CESA prohibits take of wildlife and plants listed as threatened or endangered by the California Fish and Game Commission. Take is defined under the California Fish and Game Code as any action or attempt to “hunt, pursue, catch, capture, or kill.” Like ESA, CESA allows exceptions to the prohibition for take that occurs during otherwise lawful activities. The requirements of an application for incidental take under CESA are described in Section 2081 of the California Fish and Game Code. Incidental take of state-listed species may be authorized if an applicant submits an approved plan that minimizes and “fully mitigates” the impacts of this take.

¹ Although the SCVHP is designed primarily to comply with the ESA, CESA, and the NCCP Act, the SCVHP is also consistent with other federal and state wildlife and related laws and regulations including: (1) Migratory Bird Treaty Act; (2) Bald Eagle and Golden Eagle Protection Act; (3) California Fish and Game Code Sections 3511, 4700, 5050 and 5515 (fully protected species); (4) California Fish and Game Code Section 3503 (bird nests); (5) California Fish and Game Code Section 3503.5 (birds of prey); (6) National Environmental Policy Act of 1969; (7) Clean Water Act of 1972 Sections 401 and 404; (8) Porter-Cologne Water Quality Control Act; and (9) California Fish and Game Code Sections 1600–1616 (Lake or Streambed).

IV. Coordination with the SCVHP Local Agencies and Wildlife Agencies.

The SCVHP is an important step forward in protecting endangered, threatened, and rare species and their habitats in Santa Clara County. We expect that jurisdictions not directly participating in the SCVHP will follow requirements in both state and federal law to implement comparable mitigation measures and obtain permits when necessary for projects under their authority to achieve this important goal. As part of the CEQA review process and through Wildlife Agency authorizations, the Wildlife Agencies will provide information addressing the adequacy of proposed mitigation measures for significant project impacts.

In addition, following final adoption of the SCVHP, the Wildlife Agencies and the local agencies participating in the SCVHP will arrange a workshop and invite your jurisdiction to participate to describe SCVHP implementation and how your jurisdiction may develop comparable mitigation approaches for CEQA and State and Federal Endangered Species Act compliance. The Wildlife Agencies are available to discuss species impact, feasible mitigation, and permitting needs with your jurisdiction. If you have questions, please contact Mr. Craig Weightman, CDFG Acting Environmental Program Manager, at (707) 944-5577; or Mr. Mike Thomas, FWS Conservation Planning Division Chief, at (916) 414-6600.

Sincerely,



Cay C. Goude
Assistant Field Supervisor
Endangered Species Program
Sacramento Fish and Wildlife Office
U.S. Fish and Wildlife Service



Scott Wilson
Acting Regional Manager
Bay Delta Region
California Department of Fish and Game

cc: Mr. David Bischoff, Director of Planning and Environmental Services, City of Gilroy
Ms. Debbie Cauble, Santa Clara County Office of the County Executive
Mr. Joe Horwedel, Planning Director, City of San Jose
Mr. Ignacio Gonzalez, Director of Planning and Development, Santa Clara County
Mr. Mitch Oshinsky, Community and Economic Development Director, City of Morgan Hill
Mr. Ken Schreiber, Program Manager, Santa Clara Valley Habitat Plan



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Audubon Society

thrive!

morgan hill



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Open Spaces & Vibrant Places



COMMITTEE FOR
GREEN FOOTHILLS



The Nature
Conservancy

Protecting nature. Preserving life.



California Native Plant Society
Santa Clara Valley Chapter

November 15, 2012

City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

Dear Mayor Matthews and members of the Council,

Habitat Conservation Now (HCN), a diverse set of environmental organizations working to protect the natural resources of Santa Clara Valley, strongly urges the City of Santa Clara to undertake the recommendations made by the U.S. Fish and Wildlife Service and California Department of Fish and Game in their November 13, 2012 letter to you.

In particular, the Wildlife Agencies advised the City to consider using mitigation measures similar to the ones set out in the Santa Clara Valley Habitat Conservation Plan (Habitat Plan) to the extent that they would apply to new public and private development projects. Doing so would allow for conformance on the part of the City with the California Environmental Quality Act (CEQA) [PRC Section 21002] to lessen all significant impacts for which there are feasible mitigation measures.

The scientific research performed for the Habitat Plan has established acceptable and feasible mitigation for impacts to endangered species from nitrogen emissions (deposition) in Santa Clara County. The increase in airborne nitrogen, which falls to the earth as depositional nitrogen, has been proven by the Habitat Plan to favor growth of nonnative annual grasses over native serpentine species. These nonnative species adversely impact our unique serpentine ecosystem and habitat for endangered species, including the Bay checkerspot butterfly, Tiburon Indian paintbrush, coyote ceanothus, Santa Clara Valley dudleya, and Metcalf Canyon jewelflower. Hence, private and public projects such as construction or other economic development that gives rise to increased emissions from vehicles and other industrial and nonindustrial sources of increased airborne nitrogen may result in the 'incidental' taking of a listed species. The development, growth and infrastructure improvements undertaken in every city in Santa Clara County, including that of Santa Clara, are likely to contribute to nitrogen deposition, which must be mitigated under CEQA.

The Wildlife Agencies' letter asserts the City's need to address incidental take in order to remain in compliance with the Federal Endangered Species Act. Depending on the circumstances of the project, this can be achieved either by obtaining an Incidental Take Permit or participating in a formal consultation with the U.S. Fish and Wildlife Service.

Going forward, when undertaking CEQA review cities should include nitrogen deposition impacts as an impact, which can and should be mitigated. The environmental community will be

working closely with the Agencies to ensure the standards created by the Habitat Plan are upheld throughout Santa Clara County. Projects that create substantial numbers of new vehicle trips are of particular concern. The following projects, some with certified Environmental Impact Reports, represent the type of significant new development that should include mitigation for nitrogen emissions, as they will generate substantial amounts of vehicle trips:

- Santa Clara's new 49ers stadium,
- Palo Alto's proposed "27 University Avenue" office tower and theater project by developer John Arrillaga, the Jay Paul Company office and apartment development on California Avenue or the new Lytton Plaza "Gateway" office building,
- Mountain View's proposed new office space, hotel and retail development at San Antonio Center by developer Merlone Geier,
- Sunnyvale's planned large office development project at Moffett Park or the large medical building approved for the Palo Alto Medical Foundation.

In light of the findings of the Habitat Plan, the Santa Clara Valley Transportation Authority will be considering commissioning a nexus study to determine the environmental impacts of development by non-Habitat Plan permittee cities in the county. This would include cumulative impacts from nitrogen emissions and species take. A completed study will further define Habitat Plan standards for cities outside of the Plan, and Santa Clara will be restricted in their ability to upgrade vital infrastructure improvements without recognizing the impacts future growth has on protected species.

To avoid enforcement actions by state agencies and/or environmental organizations, HCN calls on the City of Santa Clara to abide by the Wildlife Agencies counsel. Taking such action will be beneficial to the City on a number of levels, such as reducing development project timeline and costs, in addition to helping preserve what makes Santa Clara County a great place to raise children, live, work and travel to.

Sincerely,

Habitat Conservation Now

California Native Plant Society, Santa Clara Valley Chapter

Committee for Green Foothills

Greenbelt Alliance

The Nature Conservancy

Santa Clara County chapter of the California League of Conservation Voters

Santa Clara Valley Audubon Society

Sierra Club Loma Prieta Chapter

Thrive! Morgan Hill

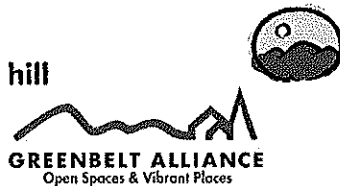
cc: Mr. Kevin Riley, Planning Director, City of Santa Clara
Mayor Chuck Reed, City of San Jose
Councilmember Pete Constant, City of San Jose
Councilmember Ash Kalra, City of San Jose
Councilmember Sam Liccardo, City of San Jose
Councilmember Kansen Chu, City of San Jose
Councilmember Xavier Campos, City of San Jose
Councilmember Pierluigi Oliverio, City of San Jose
Councilmember Madison Nguyen, City of San Jose
Councilmember Rose Herrera, City of San Jose
Councilmember Donald Rocha, City of San Jose
Councilmember Nancy Pyle, City of San Jose
Mr. Joe Horwedel, Planning Director, City of San Jose
Mr. Michael Burns, General Manager of the Santa Clara Valley Transportation Authority
Mr. Ken Schreiber, Program Manager, Santa Clara Valley Habitat Plan



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November 15, 2012

City of Palo Alto
250 Hamilton Avenue
Palo Alto, CA 94301

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Thrive! Morgan Hill

cc: Mr. Curtis Williams, Planning Director, City of Palo Alto
Mayor Chuck Reed, City of San Jose
Councilmember Pete Constant, City of San Jose
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