



SANTA CLARA VALLEY  
**HABITAT AGENCY**

Santa Clara Valley Habitat Agency

# Mitigation Only Policy

## 1. PURPOSE

The conservation strategy in the Santa Clara Valley Habitat Plan (Habitat Plan) was designed to mitigate impacts on covered species and natural communities and to contribute to the recovery of those species and natural communities in the Plan area. The conservation strategy defines land acquisition, and the management, restoration, and monitoring of those lands acquired, as the primary conservation action for mitigating impacts to and contributing to the recovery of Habitat Plan covered species and natural communities.

The Habitat Agency is charged with implementing the conservation strategy and determining how various projects are or are not covered, with Wildlife Agency approval, by the Habitat Plan. In some instances, an applicant with a project not covered by the Habitat Plan may need to provide project-specific mitigation. This mitigation may be related to one or more Habitat Plan covered species or natural communities within the Plan Area. Project specific mitigation may be required by U.S. Fish and Wildlife Service (USFWS) or California Department of Fish and Wildlife (CDFW) permits (Wildlife Agency permits). Wildlife Agency permits requiring mitigation include a Biological Opinion (BO) issued by the USFWS, or as specified by the CDFW in a Consistency Determination under California Fish and Game code (F&G) section 2080.1, an Incidental Take Permit (ITP) under F&G section 2081(b), or Lake or Streambed Alteration Agreement under F&G section 1600. For some projects, particularly those involving Plan covered species not subject to the Endangered Species Act (ESA) or the California Endangered Species Act (CESA), mitigation may be required by the lead agency pursuant to the California Environmental Quality Act (CEQA).

This policy details the process for an applicant to enter into a mitigation only agreement with the Santa Clara Valley Habitat Agency. A mitigation only agreement is not required, but such an agreement is a way to facilitate mitigation implementation. Mitigation only agreements will be handled on a case-by-case basis with detailed evaluation pertaining to the specific project.

## 2. SCOPE

This policy applies when the applicant requests the Habitat Agency to provide the mitigation required for a project or activity within the Habitat Plan area (except for N-deposition impacts) not covered by the Habitat Plan (non-covered project), and the required project mitigation is a result of one or more Wildlife Agency permits or is required under CEQA and the mitigation is consistent and compatible with the Habitat Conservation Plan (HCP) and the Natural Communities Conservation Plan (NCCP). Examples of non-covered

projects are those specified in Chapter 2, Section 2.4 *Projects and Activities Not Covered by this Plan*, or projects that have received Wildlife Agency permits apart from the Habitat Plan. Only impacts within the Plan Area may be addressed by the Habitat Agency; out of Plan Area impacts cannot be mitigated by the Habitat Agency.

Any non-covered project approved to mitigate project impacts through the Habitat Plan must be consistent and compatible with the goals and objectives of the conservation strategy and conditions of the Habitat Plan permit. In addition, all impacts, as defined by Wildlife Agency permits, must have occurred in the Plan area to be eligible to seek mitigation only coverage from the Habitat Plan. Mitigation land acquired or restored due to approval of a mitigation only agreement will not count towards the Habitat Agency's acreage or restoration or take requirements as defined in the Habitat Plan. Mitigation only project impacts and corresponding mitigation will be tracked separately from Habitat Plan obligations.

### 3. POLICY

The Habitat Agency will provide a project not covered by the Habitat Plan with mitigation, consistent with the requirements set forth in the Wildlife Agency permits or the applicable CEQA document, and the provisions of the Habitat Plan.

For projects with Wildlife Agency permits, the Habitat Agency will provide mitigation so long as inclusion of the project has been approved by the Wildlife Agencies and so long as a Wildlife Agency permit sets forth the mitigation required.

1. After the applicant has processed the project with the USFWS and/or CDFW, the applicant must request that the Habitat Agency enter into a mitigation only agreement (agreement) to manage the habitat mitigation required related to the respective Wildlife Agency permits granted to the project. Due diligence on the part of the Habitat Agency may require additional information submittals.

2. The agreement between the applicant and the Habitat Agency will specifically reference the applicable Wildlife Agency permits, the species and natural communities involved, and identify how the financial contributions would be allocated. Any mitigation money received based upon "covered project" calculations shall be used for the acquisition and management of habitat for the species being mitigated for.

3. In recognition that Habitat Agency staff and consultant time will be required to develop the agreement, to provide any required public notice and related publication, and to process the agreement for consideration by the Implementation Board, and USFWS and CDFW as applicable, the applicant will provide funds to the Habitat Agency to cover the direct and indirect costs incurred by it in performance of these tasks. The funds paid to the Habitat Agency are to cover the administrative costs related to the mitigation assistance request and are not intended to cover any other fees or charges set by resolution or ordinance of the Habitat Agency, including, but not limited to, mitigation fees and application processing charge.

5. The applicant must pay mitigation fees for the mitigation required by its project consistent with the Habitat Agency's Schedule of Fees in effect at the time the agreement is entered. Mitigation fees include an Endowment Fee and a Plan Preparation Cost Recovery Fee. Both impact fees and administrative fees shall be paid by all applicants, including Co-Permittees. Specific requirements related to fees shall be documented and tracked. Separate accounts will be used for the various fees. Temporary impact fees are only to be used for land management purposes.

6. The applicant must, in addition to land cover mitigation fees, pay a mitigation only application processing charge, in recognition of the fact the project was not permitted under the Plan. The mitigation only application processing charge shall be \$10,000 or 10% of the total applicable mitigation fees, whichever is higher.

7. Habitat Agency Annual Reports shall address mitigation only agreements and related fees separately.

8. In instances where a conservation easement is involved, there must be a recorded document containing a legal description and map. The conservation easement must clearly identify the portion of the site fulfilling the mitigation requirement and any specific management requirements must be noted in the conservation easement or related management plan.

A. U.S. Fish and Wildlife Service Permits (Biological Opinions)

i. Mitigation priorities are to use existing conservation banks, and joint acquisitions or projects, and the Habitat Agency will encourage project applicants to seek mitigation through approved conservation banks rather than through a Mitigation Only Agreement. For species where there are no approved conservation banks and/or the project applicant might be in direct competition with the Habitat Agency for mitigation lands, project applicant is encouraged to work directly with the Habitat Agency by funding joint acquisition and management of land for the covered species.

ii. Emergency and other non-covered Co-Permittee projects may be eligible to enter into a Mitigation Only Agreement and require coordination with CDFW only to the extent necessary. Alternatively, emergency and remedial projects (Section 7 formal consultation) may pay standard Habitat Plan mitigation fees. Mitigation for non-covered projects may not be used to meet the Habitat Plan's federal mitigation requirements.

iii While technically outside the Plan Area, projects with N-deposition only impacts affect the Plan Area and therefore certain projects outside the Plan Area, at the discretion of the Habitat Agency, could utilize a mitigation only agreement.

iv. Timelines set forth in a Biological Opinion will be required to be met by the Habitat Agency in the mitigation only agreement.

B. California Department of Fish and Wildlife Permits (Consistency Determination, Incidental Take Permit, Lake or Streambed Alteration Agreement)

i. Mitigation option must identify a parcel of land that will be encumbered with a conservation easement and includes an endowment for long-term management and monitoring.

ii. The Habitat Agency will act as the land owner or easement holder and endowment recipient, and specific requirements related to land management must be articulated in the mitigation agreement.

iii. For Incidental Take Permits, there is a comprehensive process for selecting, evaluating and approving a mitigation parcel. Conditional approval of mitigation lands may be provided after the Incidental Take Permit is issued and prior to finalization of all mitigation land documents. Additional fees may be charged, such as payment of remedial costs if there is a restoration requirement. Funding assurances are required

under CESA if project-related activities are expected to be conducted prior to all minimization and mitigation requirements being implemented.

For projects without Wildlife Agency permits but with CEQA-required covered species mitigation, the Habitat Agency will provide mitigation so long as inclusion of the project has been approved by the permitting entity and so long as the applicable permit sets forth the mitigation required. The process will mirror the process set forth above for Wildlife Agency permits, adjusted as appropriate for the particular situation.

#### 4. DEFINITIONS

**Definitions in Habitat Plan Section 4.2 are incorporated by reference.**

1. **Applicant:** Entity not automatically covered under the terms of the Habitat Plan for a Covered Activity and requesting assistance from the Habitat Agency for project mitigation in order to comply with Wildlife Agency permit requirements.
2. **Biological Opinion:** A determination made by a federal agency (USFWS) providing an opinion on whether the project is likely to jeopardize a listed species or destroy or adversely modify critical habitat of a listed species.
3. **Mitigation fees:** Mitigation fees or fees means any fees that apply to a covered activity as adopted by the Governing Board in accordance with Chapter 9 and Table 9.6 of the Habitat Plan and the *Santa Clara Valley Habitat Plan Fee Nexus Study* including any applicable amendments and adjustments to such fees unless otherwise exempted from the fee requirements of the Habitat Plan by the Habitat Agency. All mitigation fees imposed by Ordinance No. 2013-01 include both the Endowment Fee Component and the Plan Preparation Cost Recovery Fee Component described in Section 9.4.1 of Chapter 9 of the Habitat Plan. Mitigation fees consist of all of the following types of fees: land cover fee; serpentine fee; nitrogen deposition fee; western burrowing owl fee; wetlands fees; and temporary impact fees.

#### 5. REFERENCE

Executive Officer Directive No. 7