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Final  
**Santa Clara Valley Habitat Plan**

Santa Clara County, California

**Exhibit A**  
Corrections, Clarifications and Updates  
to the Santa Clara Valley Habitat Plan (HCP/NCCP)

County of Santa Clara  
City of San José  
City of Morgan Hill  
City of Gilroy  
Santa Clara Valley Water District  
Santa Clara Valley Transportation Authority  
U.S. Fish and Wildlife Service  
California Department of Fish and Wildlife

April 4, 2013

# Final Santa Clara Valley Habitat Plan

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*Prepared by:*

City of Gilroy  
City of Morgan Hill  
City of San José  
County of Santa Clara  
Santa Clara Valley Transportation Authority  
Santa Clara Valley Water District  
U.S. Fish and Wildlife Service  
California Department of Fish and Wildlife

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# **Exhibit A: Corrections, Clarifications and Updates to the Santa Clara Valley Habitat Plan (HCP/NCCP), April 4, 2013**

## **1.1 Introduction**

This document lists corrections, clarifications, and updates recommended for the Final Santa Clara Valley Habitat Plan (“Habitat Plan” or “HCP/NCCP”) after publication on August 31, 2012. During the process of review, comments were received that made clarifications advisable to discrete sections of the Habitat Plan; however, none of the clarifications included herein change the substance or meaning of any of the clarified sections or any other provisions of the Habitat Plan. Activities not covered by the Habitat Plan will independently ensure compliance with all applicable laws, including but not limited to, CEQA, NEPA, CESA, and ESA.

## **1.2 Errata**

Changes to the documents are indicated by ~~strikethrough~~ for deletions and underlined text for additions.

**1.2.1.** On January 1, 2013, the name of the California Department of Fish and Game was officially changed to the California Department of Fish and Wildlife. Therefore, unless the context dictates otherwise, all references in the Plan to the “California Department of Fish and Game” are hereby changed to “California Department of Fish and Wildlife.”

**1.2.2.** The fifth full paragraph of Chapter 2, Section 2.3, *Covered Activities*, is amended to read as follows:

Development projects, or portion thereof, that are in the process of receiving local jurisdiction approvals upon the Operative Date of ~~at the time the~~ Habitat Plan is adopted (i.e., “pipeline projects”) are not activities subject to the Habitat Plan if all of the following apply:

1. it has received at least one of the following approved development entitlements with a specified expiration date (including allowed renewals/extensions) prior to the Operative Date of the Habitat Plan adoption: site and architectural permit/approval, planned development approval, conditional use approval, or a tentative map; and
2. it is issued a grading or building permit within 1 year of issuance of the Habitat Plan's state and federal incidental take permits; and
3. the project review process identified no impacts to any of the Habitat Plan's covered species.

This provision applies only to the portion of a project that is issued a grading and/or building permit(s) within the 1-year period.

- 1.2.3.** Add the following paragraph and footnote after the fifth full paragraph of Chapter 2, Section 2.3, *Covered Activities*:

With regard to any development agreement<sup>1</sup> between a Permittee and a private developer, the adoption and implementation of the Habitat Plan will not add to or remove any of the rights and obligations of the parties to a development agreement that: (1) was entered into and adopted prior to the operative date of the Habitat Plan in accordance with California Government Code section 65864 et seq. and the applicable local regulations governing development agreements, and (2) remains consistent with the Permittee's land use approvals for the project.

<sup>1</sup> California state law authorizes cities and counties to enter into enforceable development agreements with any person having a legal or equitable interest in real property and specifies the contents and adoption requirements for such agreements. See California Government Code sections 65864-65869.5.

- 1.2.4.** The third full paragraph of Chapter 2, Section 2.3.2, *Private Development Subject to the Plan*, is amended to read as follows:

In addition, private development activities additions of less than 5,000 square feet of new impervious surface to ~~on~~ existing developed sites, regardless of parcel size, are not subject to the Plan unless they add 5,000 square feet or more of impervious surface. Also not covered by the Plan are modifications or additions to existing improvements within the stream and riparian setback that do not change the footprint of the existing developed area (buildings, service area, equipment, and the like).

**1.2.5.** Add the following paragraphs at the end of Chapter 2, Section 2.4, *Projects and Activities Not Covered by this Plan*:

- **Minor private development on existing developed parcels.** Private development activities on existing developed sites, regardless of parcel size, are not subject to the Plan unless they add 5,000 square feet or more of impervious surface. Project proponents may request coverage under the Habitat Plan as described in Section 6.7 if they desire take coverage.
- **Private development in a stream and riparian setback that does not change the existing footprint.** Modifications or additions to existing improvements within the stream and riparian setback that do not change the footprint of the existing developed area (buildings, service area, equipment, and the like).
- **Existing mitigation agreements with Wildlife Agency.** Any land owner who mitigates the impacts of their project in accordance with an agreement with the applicable Wildlife Agency entered into prior to the operative date of the Habitat Plan is not subject to the Habitat Plan, unless they choose to request coverage under the Habitat Plan. These project proponents will independently ensure compliance with all applicable laws, including but not limited to, CEQA, NEPA, CESA, and ESA.
- **Norman Y. Mineta San José International Airport.** The Plan does not provide coverage for development activities at the Norman Y. Mineta San José International Airport ("San José Airport"), including the Airport's VHF Omnidirectional radio range or "VOR" site (which supports airplane navigation operating as part of the airfield despite being a physically separate parcel from the rest of the airfield). The City of San José is required to comply with Federal Aviation Administration ("FAA") regulations regarding wildlife hazard management on and near Airport property for aircraft and public safety purposes. The San José Airport is considered a bird-strike prone airport and is currently preparing an FAA-required Wildlife Hazard Management Plan. Since 1997, the City of San José has been actively implementing a burrowing owl mitigation and monitoring program developed for the San José Airport Master Plan EIR, which attempts to balance burrowing owl preservation and aircraft safety. On November 15, 2012, the Wildlife Agencies provided the City with a letter (attached hereto as Exhibit "A-1") confirming the understanding that "the Wildlife Agencies agree with the City's and Local Partners' determination that the [San José] Airport is not a covered activity" described in the Habitat Plan. Development activities at the San José Airport will independently comply with CESA and ESA.

**1.2.6.** The first and second full paragraphs of Chapter 4, Section 4.6.8, *Smooth Lessingia*, are amended to read as follows:

Suitable habitat for smooth lessingia includes serpentine bunchgrass grassland and serpentine rock outcrops. ~~All Thirty eight of the thirty nine~~ 39 extant occurrences of smooth lessingia are located within the study area ~~which comprises the entire range of this species;~~ (Table 4-6; California Natural Diversity Database 2012). There are estimates for 22 of these occurrences and the numbers for some of them are quite high (10,000 for two and 57,400 for another). There are also lower numbers in the 100–200 range, but on the whole this species tends to have high numbers where it occurs. The total of the 22 occurrences with estimates is 101,629 individuals, and these estimates are mostly from 2003–2008, although there are three from 1996, 1999 and 2000 (California Natural Diversity Database 2012; J. Hillman pers. comm.).

Impacts from covered activities may occur on a maximum of six occurrences from SCVWD canal reconstruction, dam seismic safety retrofits, or dam maintenance activities to Almaden Dam, Anderson Dam, Calero Main Dam, and Chesbro Dam (Table 4-6) if no additional occurrences are discovered. Prior to impact, two occurrences must be protected for every permanent impact to one occurrence. Dam retrofits and maintenance activities will impact an estimated ~~6,000~~ 9,605 individual plants (30 at Almaden Dam, 3,600 at Chesbro Dam, 175 at Calero Main and 5,800 near Anderson Dam), based on 2006 surveys conducted by SCVWD. Canal reconstruction is estimated to impact approximately 6,500 individuals, according to surveys conducted by SCVWD in 2008.

**1.2.7.** The first paragraph of Chapter 4, Section 4.6.9, *Loma Prieta Hoita*, is amended to read as follows:

Fourteen of ~~30~~ 26 known extant occurrences of this species are located in the study area.

1.2.8. Table 4-6, *Covered Plant Occurrences and Estimated Permanent Impacts from Covered Activities*, is amended as follows:

Species Name	Number of Extant Occurrences in California <sup>1</sup>	Number of Known Occurrences in Study Area <sup>1,2</sup>	Study Area Occurrences in Type 1 Open Space <sup>3</sup>	Study Area Occurrences in Type 1, 2, or 3 Open Space <sup>3</sup>	Permanent Impact Limit if No Additional Occurrences Found <sup>4</sup>	Impact Proportion on Known Study Area Occurrences (%)	Total Permanent Impact Limit if Additional Occurrences are Found and Protected in Study Area <sup>5</sup>
Tiburon Indian paintbrush	9	2	0	2	0 <sup>6</sup>	N/A	0
Coyote ceanothus	3	3	0	2	0 <sup>7</sup>	N/A	0
Mt. Hamilton thistle	48	40	2	15	6	15%	8
Santa Clara Valley dudleya	209	207	2	72	11	5%	14
Fragrant fritillary	59	8	0	4	1	13%	3
Loma Prieta hoita	<del>26</del> 30	14	1	10	0	0%	2
Smooth lessingia	39	<del>39</del> 38	3	18	6	15%	9
Metcalf Canyon jewelflower	11	10	1	3	2	20%	2
Most beautiful jewelflower	86	39	3	22	6	15%	8
<b>Total</b>	<b>490</b> <del>494</del>	<b>362</b> <del>361</del>	<b>12</b>	<b>148</b>	<b>32</b>	<b>9%</b>	<b>46</b>

Notes:  
<sup>1</sup> Includes all CNDDDB occurrences except those classified as "extirpated." See Chapter 3 and Chapter 5 for a complete list of data sources.  
<sup>2</sup> For the purposes of this Plan and the analyses, occurrences are equivalent to populations for all species except for Mt. Hamilton thistle, Santa Clara Valley dudleya, and smooth lessingia. Populations may be redefined during implementation based on field monitoring and other data.  
<sup>3</sup> Occurrences that are only partially in open space are not included in totals.  
<sup>4</sup> This column provides the limit of impacts by number of occurrences allowable under the Habitat Plan. Impact is defined as a permanent loss of an entire occurrence or a partial loss that results in a reduction of viability (as further described in Chapter 6, Condition 20). See text for methods to determine whether partial impacts to an occurrence will be counted against the impact limit. The impact limit assumes that no new occurrences of the species are discovered during the permit term and that occurrences impacted are in worse condition than those protected within reserves (See Section 5.3.1. for a discussion on incorporating covered plant species into the Reserve System). Impact limits were determined based on estimated impacts of covered activities. In some cases, impacts were capped to ensure regulatory standards are met.  
<sup>5</sup> Impact limits in this column are the total allowable impacts if additional natural occurrences (i.e., not created populations) are discovered and protected in reserves. Protected occurrences must be of higher conservation value than impacted occurrences. New occurrences must be found and protected before impacts occur. See Chapter 5 and Table 5-16 for protection ratios that must occur in order for impact limits to be increased.  
<sup>6</sup> Loss of a population of this species is not allowed or needed due to covered activities. Impact is allowed to a portion of one population due to management actions within the Reserve System (e.g., prescribed burning) or inadvertent trampling due to livestock grazing.  
<sup>7</sup> Impacts are allowed to no more than 3,650 individuals or 5% of the individuals in the population adjacent to Anderson Dam, whichever is smaller.

**1.2.9.** The sixth full paragraph of Chapter 4, Section 4.7.1, *Bay Checkerspot Butterfly*, is amended to read as follows:

The impact analysis does not identify impacts by critical habitat unit; however, impacts to Bay checkerspot butterfly habitat is limited to 3% of the unprotected portion (everything except Type 1 open space) of any core or satellite habitat unit targeted for conservation (as defined in Table 5-7) with the exception of the Kirby/East Hills core unit which has a 11% allowance to accommodate the Kirby Landfill expansion (80 acres) and the Pound Site core habitat unit which has an 13% allowance to accommodate the Mariposa Lodge/Sheriff's Firing Range project (approximately 27 acres).

**1.2.10.** The first full paragraph of Chapter 5, Section 5.4.15, *Loma Prieta Hoita*, is amended to read as follows:

There are a total of ~~30~~ 26 known occurrences of Loma Prieta Hoita throughout its range. There are 14 known occurrences in the study area. Only 18 of the ~~30~~ 26 occurrences have population estimates (see Chapter 4, Section 4.6.9 *Non-Serpentine Plants* for more details). No impacts are allowed to these occurrences by covered activities (**Tables 4-6 and 5-16**).

**1.2.11.** The first full paragraph of Chapter 5, Section 5.4.16, *Smooth Lessingia*, is amended to read as follows:

There are a total of 39 known occurrences of smooth lessingia throughout its range, ~~38 of which~~. All known occurrences are located in the study area. Only 22 of the 39 known occurrences have population estimates (see Chapter 4, Section 4.6.8 *Serpentine Plants* for more information). Impacts are allowed to six known occurrences by covered activities, if no additional occurrences are discovered during the permit term (**Tables 4-6 and 5-16**).

**1.2.12.** Table 5-16, *Species Occurrences, Impacts, and Conservation Requirements for Covered Plants*, is amended as follows:

**Table 5-16.** Species Occurrences, Impacts, and Conservation Requirements for Covered Plants

Covered Species	Current Known Occurrences <sup>1,2</sup>			Occurrences in Study Area During Plan Implementation <sup>3</sup>		Plant Occurrence Impacts and Conservation					Total Occurrences Protected in Reserve System	
	Extant in California	Study Area	Type 1 Open Space <sup>4</sup>	Additional Occurrences Found (relative to baseline)	Total in Study Area	Total Maximum Impacted <sup>5</sup>	Mitigation Ratio <sup>6</sup>	Protected per Mitigation Ratio	Protected to Contribute to Recovery <sup>7</sup>	Total Protected in Reserve System <sup>8</sup>	Acquired <sup>9</sup>	Allowable Creation in lieu of New Occurrence Acquisition <sup>10</sup>
Tiburon Indian paintbrush	9	2	0	–	2	0	N/A	–	1	1	1	–
Coyote ceanothus	3	3	0	–	3	0 <sup>11</sup>	N/A	–	5	5	3	2
Mt. Hamilton thistle	48	40	2	0	40	6	3:1	18	4	22	22	–
				6	46	7		21		25	25	–
				12	52	8		24		28	28	–
Santa Clara Valley dudleya	209	207	2	0	207	11	4:1	44	11	55	55	–
				6	213	12		48		59	59	–
				12	219	13		52		63	63	–
				18	225	14		56		67	67	–
Fragrant fritillary	59	8	0	0	8	1	3:1	3	1	4	4	–
				5	13	2		6		7	7	–
				10	18	3		9		10	10	–
Loma Prieta hoita	<del>26</del> 30	14	1	0	14	0	2:1	0	4	4	4	–
				3	17	1		2		6	6	–
				6	20	2		4		8	8	–
Smooth lessingia	39	<del>39</del> 38	3	0	<del>39</del> 38	6	2:1	12	12	24	12	12
				7	<del>46</del> 45	7		14		26	14	
				10	<del>49</del> 48	8		16		28	16	
				13	<del>52</del> 51	9		18		30	18	
Metcalf Canyon jewelflower	11	10	1	–	10	2	N/A	–	10	13	3	10
Most beautiful jewel-flower	86	39	3	0	39	6	2:1	12	5	17	17	–
				4	43	7		14		19	19	–
				8	47	8		16		21	21	–

Covered Species	Current Known Occurrences <sup>1,2</sup>			Occurrences in Study Area During Plan Implementation <sup>3</sup>		Plant Occurrence Impacts and Conservation					Total Occurrences Protected in Reserve System	
	Extant in California	Study Area	Type I Open Space <sup>4</sup>	Additional Occurrences Found (relative to baseline)	Total in Study Area	Total Maximum Impacted <sup>5</sup>	Mitigation Ratio <sup>6</sup>	Protected per Mitigation Ratio	Protected to Contribute to Recovery <sup>7</sup>	Total Protected in Reserve System <sup>8</sup>	Acquired <sup>9</sup>	Allowable Creation in lieu of New Occurrence Acquisition <sup>10</sup>
Most beautiful jewel-flower	86	39	3	0	39	6	2:1	12	5	17	17	-

Notes:

<sup>1</sup> See Chapter 3 for data sources.

<sup>2</sup> For the purposes of this Plan and the analyses, occurrences are equivalent to populations for all species except for Santa Clara Valley dudleya.

<sup>3</sup> More occurrences may be found during Plan implementation than were known during Plan preparation (baseline). These columns represent the minimum number of known occurrences that must be known in the study area before impacts described in the subsequent column can occur. The first line for each species accounts for occurrences known at the time of permit issuance. "Additional Occurrences Found" refers to the number of additional occurrence found during the permit term. "Total in Study Area" is the number of additional occurrence found during the permit term plus the number of occurrence known during Plan preparation.

<sup>4</sup> Occurrences that are only partially in open space are not included in totals.

<sup>5</sup> Occurrences are considered impacted if the occurrence is removed or a qualified biologist determines that occurrence viability will be reduced as a result of covered activities, as further described in Chapter 6, Condition 20. Impacts solely associated with implementation of the conservation strategy are not reflected in this column as those impacts will be minor and temporary in nature and will have a net benefit to the species. No new occurrence acquisition will allow additional impacts beyond what is listed in this table. Refer to Chapter 4 for full explanation of impacts by species.

<sup>6</sup> Mitigation ratios were only developed for species for which additional impacts could occur in the event that additional occurrences are found during the permit term. Ratios were calculated as the number of occurrences acquired if no additional occurrences were discovered during the permit term by the total maximum occurrences that could be impacted if no additional occurrences were discovered during the permit term. The mitigation ratio represents the number of occurrences that must be acquired prior to each impact, including the first impact. Species-specific requirements regarding timing of mitigation/conservation relative to impact are provided in Section 5.4 for the Tiburon Indian paintbrush, Coyote ceanothus, and Metcalf Canyon jewelflower.

<sup>7</sup> Recovery actions will occur regardless of impacts; however, acquisition activities performed for mitigation purposes can count toward recovery once the total mitigation obligation is achieved.

<sup>8</sup> With the exception of the Coyote ceanothus (see Section 5.4.11), all occurrences acquired or created in this Plan will be permanently protected within the Reserve System with a conservation easement and/or will be owned in fee by the Implementing Entity. The first row for each species in this column represents the minimum requirement of acquisition and creation regardless of the number of occurrences impacted (e.g., if no additional occurrences of Mt. Hamilton thistle are found during Plan implementation, the Implementing Entity will acquire 22 occurrences for the Reserve System even if less than six occurrences are impacted during the permit term).

<sup>9</sup> Acquisition of naturally-occurring occurrences could occur through fee title and/or conservation easement. Occurrences could be on land newly acquired under the Habitat Plan or on existing open space that is incorporated into the Reserve System. Occurrences must be acquired prior to impacts, with the exception of the Coyote ceanothus (see Section 5.4.11).

<sup>10</sup> For occurrence preservation, priority will always be given to acquisition, however, if acquisition is infeasible, creation is allowed as stipulated in Section 5.4. The decision to focus conservation effort on occurrence creation will be made jointly with the Wildlife Agencies. Creation will be completed by Year 40, acquisition will be completed by Year 45.

<sup>11</sup> Impacts are allowed to no more than 3,650 individuals or 5% of the population adjacent to Anderson Dam, whichever is smaller. This standard will be applied to the population as it existed during the 2009 surveys. It will not be applied to any new recruits that are a result of natural or artificial disturbance event such as fire.

- 1.2.13. Table 6-1, *Covered Activities Exempt from Plan Conditions and/or Plan Fees*, is revised to add the following footnote:

**Table 6-1. Covered Activities Exempt from Plan Conditions and/or Plan Fees<sup>1</sup>**

<sup>1</sup> "Covered activities" are described in Section 2.3 of Chapter 2 of the Plan. Projects and activities that are not "covered activities" under the Plan, are described in Section 2.4 of Chapter 2 of the Plan.

- 1.2.14. Add the following paragraphs after the second full paragraph of Chapter 8, Section 8.2.5, *Wildlife Agencies*:

In addition to providing assistance to attempt to secure state and federal funding for Plan implementation, it is also a goal of the Wildlife Agencies and the Permittees for the Permittees to be able to use the Plan framework to obtain programmatic wetland permits from the Corps and the San Francisco and Central Coast Regional Boards (see Sections 2.1 and 2.2.2 of the September 2005 Planning Agreement among the Wildlife Agencies and Permittees). The Wildlife Agencies and the Permittees have identified the specific steps in **Table 8-1. Schedule for Major Implementation Tasks** in furtherance of that goal.

Section 1.A of the 2004 Memorandum of Understanding among the Permittees (the Cities of Gilroy and Morgan Hill joined in 2005) also expresses a goal of this Plan to preserve and protect species and habitats while supporting the economic health of the region. Section 1.1.2 of this Plan includes as a purpose of the Plan the standardization, avoidance, minimization, mitigation, and compensation requirements of ESA, CESA, NCCP Act, CEQA, NEPA, and other applicable laws and regulations relating to biological and natural resources, and equal and consistent governance. And, Section 2.3 of the September 2005 Planning Agreement among the Wildlife Agencies and Permittees recognizes that there is benefit to public and private projects from a comprehensive means of coordinating and standardizing the mitigation and compensation requirements of FESA, CEQA, NEPA, NCCPA and other applicable laws and regulations so that there is a consistent and equal application of such requirements. Although the Wildlife Agencies and the Permittees recognize that this Plan governs covered activities in the permit area, in order to achieve such consistency and the broader regional habitat conservation and economic health goal expressed in the 2004 MOU, the Wildlife Agencies and the Permittees remain committed to the those objectives and to continue to work together to exercise best efforts so that substantially similar mitigation requirements are employed throughout Santa Clara County and Southern Alameda County for covered species and

their habitat in neighboring areas, specifically with regard to burrowing owl, riparian corridor, and nitrogen deposition requirements.

The Wildlife Agencies have also expressed their commitment to achieving this goal in the October 12, 2012 letter to the City of San Jose (attached hereto and incorporated by reference as Exhibit "A-2") and the letter to other jurisdictions outside the Plan area that was submitted on November 13, 2012 and is attached hereto as Exhibit "A-3").

- 1.2.15. Table 8-1, *Schedule for Major Implementation Tasks*, is revised to amend the fifth, sixth and seventh paragraphs under "*Tasks and Milestones*" in the time period entitled "*Prior to Permit Issuance.*"

**Table 8-1.** Schedule for Major Implementation Tasks

<u><i>Time Period</i></u>	<u><i>Tasks and Milestones</i></u>	<u><i>Responsible Party</i></u>
<u><b>Prior to Permit Issuance (i.e., Year 0)</b></u>		
	<u>No later than 90 days prior to the operative date of the Habitat Plan, Develop and make publicly available template Habitat Plan application package for use by private applicants and Permittees that includes all items required in Chapter 6, Section 6.8 (Items 1 through 6).</u>	Local Partners
	<u>No later than 90 days prior to the Operative Date of the Habitat Plan, Develop a checklist prior to the first ordinance-taking-effect for local planners to evaluate Habitat Plan application package. This will help ensure compliance by each project receiving coverage under the Plan. The checklist must include a statement of certification that project applicants meet the relevant terms of the Habitat Plan. [Chapter 6, Section 6.7.2]</u>	Local Partners

	<p><u>No later than 90 days prior to the operative date of the Habitat Plan, prepare a template form prior to the first ordinance taking effect for local planners to document that a private applicant's project is consistent with the Plan. This consistency determination will be made based on the checklist described above. [Chapter 6, Section 6.7.2]</u></p>	<p>Local Partners</p>
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1.2.16. Table 8-1, *Schedule for Major Implementation Tasks*, is revised to add the following paragraphs under "Tasks and Milestones" in the specified time periods:

**Table 8-1.** Schedule for Major Implementation Tasks

<u><b>Time Period</b></u>	<u><b>Tasks and Milestones</b></u>	<u><b>Responsible Party</b></u>
<p><u><b>Prior to Permit Issuance (i.e., Year 0)</b></u></p>		
	<p><u>Through a series of meetings between USFWS, the Corps and Local Partner staff, the Corps has agreed that the Final Habitat Plan could serve as the basis for a Corps Regional General Permit (RGP) and a mitigation program within the Habitat Plan Permit Area for impacts to jurisdictional wetlands under federal Clean Water Act Section 404. The Local Partners have filed a RGP application that would provide streamlined permitting by the Corps and ensure that project proponents with jurisdictional wetlands impacts could use their Habitat Plan fees to satisfy the Corps for wetland mitigation. Continue discussion with the Corps regarding post-application permit conditions and status of permit</u></p>	<p><u>Local Partners and USFWS</u></p>

	<p><u>issuance.</u></p> <p>[Chapter 8, Section 8.2.5]</p>	
	<p><u>Engage in and continue discussion with the San Francisco Regional Board, the Central Coast Regional Board, and the State Board (as necessary) to integrate application packages, attempt to obtain a programmatic CWA Section 401 Water Quality Certification of the RGP from the Regional Boards using the Habitat Plan as mitigation, and to streamline issuance of permits. Before a project applicant can undertake an activity that will impact jurisdictional waters, they must receive both a Clean Water Act Section 404 permit from the Corps and a Section 401 Certification from the Regional Boards. The Local Partners will work with both the San Francisco and Central Coast Regional Boards to integrate and coordinate the Section 401 Certification process with the RGP.</u></p> <p>[Chapter 8, Section 8.2.5]</p>	<p><u>Local Partners and Wildlife Agencies</u></p>
<p><b><u>0 - 6 months</u></b></p>		
	<p><u>Continue discussion with Army Corps regarding post-application permit conditions and status of permit issuance until issuance of permit.</u></p> <p>[Chapter 8, Section 8.2.5]</p>	<p><u>Permittees and USFWS</u></p>
	<p><u>Continue discussion with the Regional Boards to attempt to integrate application packages, attempt to obtain a Section 401 Certification from the Regional Boards using the Habitat</u></p>	<p><u>Permittees and Wildlife Agencies</u></p>

	<p><u>Plan as mitigation, and to streamline issuance of the Section 401 Certification.</u></p> <p>[Chapter 8, Section 8.2.5]</p>	
<b><u>6 months - 1 year</u></b>		
	<p><u>If applicable, continue discussion with Corps regarding post-application permit conditions and status of permit issuance until issuance of permit.</u></p> <p>[Chapter 8, Section 8.2.5]</p>	<u>Permittees and USFWS</u>
	<p><u>If applicable, continue discussion with the Regional Boards to attempt to integrate application packages, attempt to obtain a Section 401 Certification from the Regional Boards using the Habitat Plan as mitigation, and to streamline issuance of permits until issuance of a Section 401 Certification.</u></p> <p>[Chapter 8, Section 8.2.5]</p>	<u>Permittees and Wildlife Agencies</u>
<b><u>1 - 5 years</u></b>		
	<p><u>If applicable, continue discussion with the Corps regarding post-application permit conditions and status of permit issuance until issuance of permit.</u></p> <p>[Chapter 8, Section 8.2.5]</p>	<u>Permittees and Wildlife Agencies</u>
	<p><u>If applicable, continue discussion with the Regional Boards to attempt to integrate application packages, attempt to obtain a Section 401 Certification from the Water Boards using the Habitat Plan as mitigation, and to streamline issuance of permits until issuance of the Section 401 Certification.</u></p> <p>[Chapter 8, Section 8.2.5]</p>	<u>Permittees and Wildlife Agencies</u>

<b><u>6 – 50 years</u></b>		
	<p><u>Prior to expiration of the Corps RGP (which as of the date of Plan adoption has a 5-year term), file an application with the Corps for a new RGP and a mitigation program within the Habitat Plan Permit Area for impacts to jurisdictional wetlands under federal CWA Section 404 whenever necessary due to pending RGP expiration.</u></p> <p>[Chapter 8, Section 8.2.5]</p>	<p><u>Permittees</u></p>
	<p><u>If applicable, continue discussion with the Regional Boards to attempt to integrate application packages, attempt to obtain a Section 401 Certification from the Regional Boards using the Habitat Plan as mitigation, and to streamline issuance of permits until issuance of the Section 401 Certification.</u></p> <p>[Chapter 8, Section 8.2.5]</p>	<p><u>Permittees and Wildlife Agencies</u></p>

**1.2.17.** In Chapter 8, Section 8.7.3, *Wildlife Agency Responsibilities*, add the following bullet:

The Wildlife Agencies' main responsibility however, will be ensuring that the Permittees are in compliance with the state and federal permits, Implementing Agreement, and Plan. Reviewing and commenting on annual reports and monitoring reports (see Section 8.10 Data Tracking) will be a key means for the Wildlife Agencies to monitor compliance. The Wildlife Agencies will also review and approve all:

- Changes to modeled habitat maps and land cover maps.

- 1.2.18. In Chapter 9, Section 9.4.2, *Local Funding*, add the following sentence to the end of the last paragraph:

Notwithstanding the above, any Local Partner may choose, at its sole option and upon making appropriate findings therefor, to pay all or a portion of any mitigation fee for private development from any available source of the Local Partner to the extent allowed by applicable law.

- 1.2.19. In Appendix D, *Loma Prieta Hoita*, the following text is amended to read as follows:

### **General**

Loma Prieta hoita is endemic to California, where it occurs primarily in the Santa Cruz Mountains of Santa Clara and Santa Cruz Counties (Figure 1). The species also occurs in the Diablo Range in Santa Clara, Alameda, and Contra Costa Counties. There are 3026 known occurrences of Loma Prieta hoita (California Natural Diversity Database 2012~~2006~~ T. Cochrane pers.comm.).

### **Extant**

Fourteen extant occurrences of Loma Prieta hoita have been reported from the study permit area (California Natural Diversity Database 2012~~2010~~ and T. Cochrane pers. comm.). Three occurrences are located in Almaden Quicksilver County Park (California Natural Diversity Database Occurrence #5, #23, and #24, and #27). California Natural Diversity Database Occurrence # 5 and #27 were assumed to be the same occurrence due to their close proximity. An occurrence consisting of three colonies was reported from Santa Teresa County Park (California Natural Diversity Database Occurrence #6). Two occurrences were reported from the hills east of Coyote Creek, one on private land and one on land of unknown ownership (California Natural Diversity Database Occurrence #10 and #11 respectively). Three occurrences were reported from Rancho Cañada del Oro Open Space Preserve (California Natural Diversity Database Occurrence #13, #25, and #26). One occurrence was reported in the vicinity of Chesbro Reservoir (California Natural Diversity Database Occurrence #16). One occurrence was reported from along Javelina Loop Trail in Calero County Park (California Natural Diversity Database Occurrence #22). Two new occurrences were added from field data collected by Tom Cochrane and John Falkowski at Santa Clara County Parks (2010) in the Rancho San Vicente property at Calero County Park. A third new occurrence was documented in Rancho Cañada del Oro Open Space Preservewithin Rancho San Vicente.

Two additional occurrences are outside the study permit area east of Highway 17, including one reported in 2004 at Sierra Azul Open Space Preserve (California Natural Diversity Database Occurrence #12). ~~In addition, eCollections made on Loma Prieta Peak and at the head of Uvas Creek on lands of unknown ownership (California Natural Diversity Database Occurrence #4) may be within the study~~ is outside of the permit area. Figure 2 shows the locations of these occurrences.

- 1.2.20. In Appendix D, *Smooth Lessingia*, the following text *is amended to read as follows*:

### **General**

Smooth lessingia is endemic to Santa Clara County on the eastern slopes of the Santa Cruz Mountains and the hills adjacent to the Santa Clara Valley (Figure 1). There are 39 known occurrences of smooth lessingia (California Natural Diversity Database 2008), all 38 of which are located within the study area.

### **Extant**

There are ~~thirty-nine~~ eight extant occurrences of smooth lessingia within the study area, twenty-six of which are known from the California Natural Diversity Database (2008). The remaining occurrences were reported from the Santa Clara Valley Water District or Santa Clara County Parks and Recreation. Most of the smooth lessingia occurrences are located west of Highway 101 with the exception of several occurrences that occur directly adjacent to Highway 101 to the east. Occurrences occur primarily on private land although there are several occurrences in Santa Teresa County Park and one occurrence each in Calero and Mt. Madonna County Parks.

- 1.2.21. In Appendix D, *San Joaquin Kit Fox*, the following text is amended to read as follows:

### Recent

There are four occurrences on record from 1972–2002 for the San Joaquin kit fox in Santa Clara County (California Natural Diversity Database 2006, U.S. Fish and Wildlife Service 2006). Of those records, ~~one is~~ two are based on an observation of an individuals and ~~two~~ three are derived from San Joaquin kit fox range maps from 1972–1975. The ~~two~~ three occurrences from the 1970's are not included here due to a lack of precision and because they are based on kit fox range maps and very general ~~not actual~~ observations. The 2002 observation was of a lone individual during the fall dispersal period in Henry Coe State Park (California Natural Diversity Database 2012, Occurrence #45).

There are two other notable observations just south of the permit area, in San Benito County, which are relevant when describing San Joaquin kit fox in the region. In 1992 a den site was found in San Benito County with two surviving pups (though the adult female had apparently been killed) (California Natural Diversity Database 2012, Occurrence #605). The best description of the location of this den site is very general, stating that it is from Hollister north to Gilroy. It is included here simply as a placeholder and to acknowledge that habitat potential may exist in this area. The second observation (2002) was of a lone individual during the fall dispersal period in Henry Coe State Park (California Natural Diversity Database 2006). A third The second observation from San Benito County, which is not in the CNDDDB, was of a road kill kit fox over six miles south of the Highway 152/156 junction (U.S. Fish and Wildlife Service 2006; California Natural Diversity Database 2012, Occurrence #86). All other records of kit fox in northern San Benito County were from the 1975 range assessment described above. This occurrence falls just outside of the study area.

- 1.2.22. Appendix A, *Glossary*, is hereby amended to add the following term and definition:

**Operative Date.** The date upon which the implementing ordinances of the County of Santa Clara and the Cities of Gilroy, Morgan Hill, and San Jose become operative, which will occur upon adoption by the Implementing Entity of the Mitigation Fees and the issuance of the Take Permits by the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife (See section entitled "Operative Date" in Exhibit B, *Model Implementing Ordinance*, to the Implementing Agreement in Glossary, Exhibit B of the Habitat Plan).



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November 15, 2012

Ms. Vera Todorov  
Sr. Deputy City Attorney  
200 East Santa Clara Street, 16<sup>th</sup> Floor Tower  
San Jose, CA 95113-1905

Dear Ms. Todorov:

Subject: Santa Clara Valley Habitat Plan – Mineta San Jose International Airport

The United States Fish and Wildlife Service and the California Department of Fish and Game (Wildlife Agencies) reviewed your letter dated November 2, 2012 requesting our understanding of whether projects at Mineta San Jose International Airport (Airport) are covered activities as described in the Santa Clara Valley Habitat Plan (SCVHP). As described in your letter, the City of San Jose (City) has determined the Airport is not a covered activity. The City, County of Santa Clara, City of Morgan Hill, City of Gilroy, Santa Clara Valley Water District and Santa Clara Valley Transportation Authority (Local Partners) are responsible for implementing the SCVHP; therefore, the Wildlife Agencies agree with the City's and Local Partners' determination that the Airport is not a covered activity. Please note that whether projects at the Airport are covered activities under the SCVHP or not, any projects at the Airport that result in impacts to SCVHP covered species or their habitats may need to provide adequate mitigation pursuant to the California Environmental Quality Act and/or obtain necessary local, state or federal authorizations which may include Endangered Species Act and California Endangered Species Act authorizations.

If you have any questions, please feel free to contact either of us at the phone numbers above.

Sincerely,

Handwritten signature of Cay C. Goude.

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

Handwritten signature of Scott Wilson.

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



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In reply refer to:  
81420-2009-TA-0077 (Service)

October 12, 2012

Mayor Chuck Reed  
City of San Jose  
200 E. Santa Clara Street  
San Jose, California 95113

**Subject:** Approval of the Santa Clara Valley Habitat Conservation Plan/Natural  
Community Conservation Plan

Dear Mayor Reed and Members of the City Council:

This letter, which is partly in response to issues raised at the September 25, 2012 City Council meeting, identifies benefits of adopting the Santa Clara Valley Habitat Conservation Plan and Natural Community Conservation Plan (SCVHP) and consequences if the SCVHP is not adopted.

The U.S. Fish and Wildlife Service (Service) and the California Department of Fish and Game (DFG) (Wildlife Agencies) have worked with the County of Santa Clara, cities of San Jose, Morgan Hill and Gilroy, Santa Clara Valley Water District (SCVWD) and the Santa Clara Valley Transportation Authority (VTA) (Local Partners) over the last 10 years as the Local Partners have developed and circulated the draft and final SCVHP and Environmental Impact Report/Environmental Impact Statement (EIR/EIS). The Wildlife Agencies support Local Partner approval of the SCVHP. We believe the SCVHP is necessary to meet past Federal approvals and mitigate impacts to threatened and endangered species from habitat impacts including nitrogen deposition. Additionally, approval of the SCVHP will provide greater regulatory certainty for current and future species listing and wetlands permit streamlining, park and open space land acquisition and management funding, and enhances the environment for the Local Partners' citizens.

### **Background**

Preparation of the SCVHP was committed to as part of a series of project-related permits, most of which were issued in 2001, for direct and cumulative impacts to listed species. Projects covered by these permits included widening Highway 101, the Bailey Avenue/Highway 101 interchange, Route 85/Highway 101 interchange and the Silicon Valley Research Park. In addition, consultation regarding value of a Habitat Conservation Plan/Natural Community

Conservation Plan for Santa Clara Valley Water District (SCVWD) water importation contracts was part of the decision by the Local Partners to undertake the SCVHP. Letters committing to preparation of the SCVHP were submitted by the City of San Jose, County of Santa Clara, SCVWD and VTA. The future SCVHP was incorporated into Service prepared biological opinions and permits for City, County, and VTA projects.

A subsequent Service biological opinion addressing Bureau of Reclamation provision of water from the Central Valley Project to various water agencies, including the SCVWD, cited in the Key Assumptions and Effects Overview sections that the SCVWD, along with the County of Santa Clara, the City of San Jose and VTA, would carry out the 2001 commitments to develop the SCVHP. If the SCVHP is not adopted, the Lead Federal Agency for each of the above mentioned biological opinions are required by law to reinitiate review and consultation on each project with the Service and the applicable local jurisdictions (City of San Jose, County of Santa Clara, SCVWD and VTA) regarding these approvals and ramifications of not having an adopted SCVHP.

#### **SCVHP Provides Feasible Mitigation for Significant and Cumulative Impacts**

The SCVHP establishes feasible mitigation under the California Environmental Quality Act (CEQA) for impacts to listed species, including to the Bay checkerspot butterfly and serpentine plants resulting from cumulatively significant nitrogen deposition and significant and cumulatively significant impacts to western burrowing owls. The feasible mitigation in the SCVHP is based on extensive analysis and the best available science. The mitigation for western burrowing owls is consistent with the most recent "Staff Report on Burrowing Owl mitigation" prepared by DFG dated March 7, 2012. Comparable CEQA mitigation would be necessary for other nearby jurisdictions such as Sunnyvale, Mountain View, Palo Alto, Santa Clara, and Fremont, for projects such as urban infill (i.e., residential, commercial, industrial), rural residential, power plants, road widenings, utilities and others that result in nitrogen deposition from additional vehicle trips, impacts to western burrowing owl, or impacts to other SCVHP covered species.

All projects by the Local Partners and others (with or without adoption of the SCVHP), such as expansion of the San Jose Waste Pollution Control Plant, south county wastewater treatment facilities, water delivery, transportation, other public infrastructure and private development, will require similar feasible mitigation for these impacts. In the absence of an approved SCVHP, the process and costs or fees for implementing the feasible mitigation on these projects, including Local Partner projects that benefit the public would likely be much greater and take longer to complete. The Wildlife Agencies have heard and understand the concerns raised by the San Jose City Council on fees, competitiveness and other issues. However, we also recognize the SCVHP as the best way to both conserve listed species and provide feasible mitigation for CEQA significant and cumulatively significant impacts. Since CEQA requires the implementation of all feasible mitigation measures be implemented even for impacts that cannot be mitigated to a less-than-significant level, the ability to override those impacts with no effort to lessen the

impact is subject to greater legal scrutiny. This is especially true where the reason of override in the past was financial as the fee structure within the SCVHP has been shown to not create financial hardship (see *Economic Impact Analysis of the Santa Clara Valley Habitat Conservation Plan*; Willdan Financial Services, 2011) and thus should not be cited in future Statements of Overriding Considerations. Additionally, the EIR/EIS for the SCVHP concluded “[o]verall social and economic benefits would result from conservation actions” by implementing the SCVHP. The Wildlife Agencies encourage the Local Partners to consider the value of the SCVHP for providing needed CEQA mitigation when deciding whether to approve the SCVHP.

### **Benefits of Adopting the SCVHP**

Approval by the Local Partners of the SCVHP they developed will provide many important benefits to the Local Partners and citizens. The SCVHP will not only address past permits but will provide the permitting and mitigation mechanism, for the next 50 years, for future public and private sector projects including infrastructure, transportation, water supply, waste water treatment, utility, and development in the SCVHP area. The SCVHP will provide certainty regarding the time and cost of addressing endangered species issues through the Wildlife Agencies. In other areas where habitat plans have been implemented, the certainty has improved development conditions, and millions of federal, state and private foundation dollars have been provided to implement the plans and add to the local economies.

The SCVHP is being closely coordinated with the United State Army Corps of Engineers who have indicated their goal to use the approved SCVHP to provide a Regional General Permit (RGP) for wetland impacts, similar to the recently issued RGP for the East Contra Costa Habitat Conservation Plan/Natural Community Conservation Plan (ECC Habitat Plan). Additionally, DFG will be using the SCVHP to issue Streambed Alteration Agreements for impacts to streams. The Local Partners and Wildlife Agencies have also been coordinating with the Regional Water Quality Control Board and will work with them to best use the SCVHP to streamline their approvals.

Experience with other Habitat Plans including the ECC Habitat Plan, which the City of Antioch declined to participate in, and the Coachella Valley Habitat Plan, which the City of Desert Hot Springs refused to adopt a Final Plan, demonstrates that cities that do not address identified endangered species issues through a Habitat Plan realize that they are at a competitive disadvantage with jurisdictions that have a Plan. Subsequent efforts by the cities of Antioch and Desert Hot Springs to gain coverage for their activities’ impacts to species are proving both difficult and expensive. Preparation of the SCVHP clearly demonstrates that the future growth in the City of San Jose will have direct and cumulative impacts on the Bay checkerspot butterfly (listed as threatened under the Federal Endangered Species Act), the California tiger salamander (listed as threatened under both State and Federal laws), four Federally listed plants dependent on Serpentine habitat as well as other listed and likely to be listed species.

If only by using the SCVHP to address, with permit processing time and mitigation cost

certainty, the impacts of nitrogen deposition and impacts on the western burrowing owl, San Jose will have a competitive advantage versus cities that will need to achieve project-by-project permitting/approvals containing a satisfactory level of mitigation. During SCVHP implementation, the Local Partners have the ability to review a variety of aspects of SCVHP implementation, including fees and how to achieve conservation goals. In coordination with the Wildlife Agencies, the Local Partners can implement alternative funding methods to achieve SCVHP goals and requirements and will have the ability to review and modify the fee schedule and coordination with nearby jurisdictions. The Wildlife Agencies believe approval of the SCVHP and modification as appropriate during SCVHP implementation is a prudent course of action to address San Jose City Council concerns, and provides much greater certainty and flexibility to the Local Partners than re-writing the scope and participation in the SCVHP at this point in time.

Once the SCVHP is approved, the Wildlife Agencies will work with the Local Partners, including through the SCVHP's Technical Advisory Committee, to identify projects and permits where Wildlife Agency coordination and mitigation provided consistent with a final SCVHP should occur. The Wildlife Agencies will provide written correspondence on necessary feasible mitigation for projects that result in nitrogen deposition and impacts to species to Santa Clara County, other nearby local jurisdictions and private, State and Federal projects, through the CEQA review process and for inclusion in Wildlife Agency permits. The Wildlife Agencies will reference the Habitat Plan as adequate mitigation for these significant impacts.

Following SCVHP approval, we encourage the City of San Jose to work with the Wildlife Agencies to identify a time to address with representatives of nearby jurisdictions the SCVHP's mitigation standards. The Wildlife Agencies will actively participate and clearly spell out our future mitigation expectations consistent with the SCVHP.

### **Consequences of Not Adopting the Valley Habitat Plan**

The SCVHP is not currently written as a severable plan. As such, all Local Partners must approve the SCVHP or it cannot be permitted. If the SCVHP is not approved, all projects described in the EIR/EIS including urban development and in-fill, Local Partner infrastructure and other development would need to develop and implement comparable feasible CEQA mitigation for significant and cumulatively significant impacts. Without the SCVHP to provide a coordinated and comprehensive mitigation approach, the Wildlife Agencies would expect the costs for the necessary CEQA mitigation to increase for public and private project proponents.

Additionally, instead of paying a fee and meeting conditions identified in the SCVHP, public and private sector projects that lack incidental take authorization will need to consult on an individual project-by-project basis with each of the Wildlife Agencies. The project-by-project review process often results in delays because consultation requires multi-year species surveys and project-specific mitigations. Mitigation will vary during the next 50 years as it will be dependent on species baseline conditions at the time of project consultation, as opposed to the

Mayor Reed and San Jose City Council Members  
October 12, 2012  
Page 5

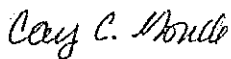
SCVHP, which has assurances that additional mitigation will not be required. Economies of scale associated with the SCVHP will be lost as a result of the SCVHP not being approved. Without the SCVHP, individual project proponents will be responsible for locating, managing, and monitoring mitigation lands, all of which require in perpetuity land management funding.

### Conclusion

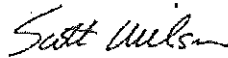
In conclusion, the Wildlife Agencies support immediate Local Partner approval of the SCVHP as the most prudent course to provide regulatory and economic certainty, ensure timely and cost effective infrastructure and private development, fund parks and open space, conserve habitats and species, enhance the quality of life and image of the area, and provide a visionary conservation and planning legacy that will continue to benefit the area and its citizens for decades to come.

If you have any questions or concerns, please feel free to contact either of us at the phone numbers listed above.

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: San Jose City Council  
Vice Mayor Madison Nguyen, District 7 – [District7@sanjoseca.gov](mailto:District7@sanjoseca.gov)  
Councilmember Pete Constant, District 1 – [District1@sanjoseca.gov](mailto:District1@sanjoseca.gov)  
Councilmember Ash Kalra, District 2 – [District2@sanjoseca.gov](mailto:District2@sanjoseca.gov)  
Councilmember Sam Liccardo, District 3 – [District3@sanjoseca.gov](mailto:District3@sanjoseca.gov)  
Councilmember Kansen Chu, District 4 – [District4@sanjoseca.gov](mailto:District4@sanjoseca.gov)  
Councilmember Xavier Campos, District 5 – [District5@sanjoseca.gov](mailto:District5@sanjoseca.gov)  
Councilmember Pierluigi Oliverio, District 6 – [Pierluigi.oliverio@sanjoseca.gov](mailto:Pierluigi.oliverio@sanjoseca.gov)  
Councilmember Rose Herrera, District 8 – [Rose.herrera@sanjoseca.gov](mailto:Rose.herrera@sanjoseca.gov)  
Councilmember Donald Rocha, District 9 – [District9@sanjoseca.gov](mailto:District9@sanjoseca.gov)  
Councilmember Nancy Pyle, District 10 – [District10@sanjoseca.gov](mailto:District10@sanjoseca.gov)



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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 laws<sup>1</sup> 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.

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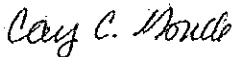
<sup>1</sup> Although the SCVHP is designed primarily to comply with the ESA, CESA, and the NCCP Act, the SCVHP is also consistent with other federal and state wildlife and related laws and regulations including: (1) Migratory Bird Treaty Act; (2) Bald Eagle and Golden Eagle Protection Act; (3) California 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.**

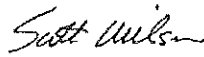
The SCVHP is an important step forward in protecting endangered, threatened, and rare species and their habitats in Santa Clara County. We expect that jurisdictions not directly participating in the SCVHP will follow requirements in both state and federal law to implement comparable mitigation measures 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

