

**Implementation Policy of the East Contra Costa County Habitat  
Conservancy (Conservancy) Regarding Use of Conservancy  
Restoration Sites for Mitigation of Projects Not Covered by the East  
Contra Costa County Habitat Conservation Plan / Natural Community  
Conservation Plan (HCP/NCCP)**

**Purpose:** The purpose of this Policy is to set forth guidelines on when and under what conditions the Conservancy would consider selling restoration credit to proponents of projects that are not covered by the HCP/NCCP. The HCP/NCCP *allows* for providing mitigation for non-covered projects under certain conditions (see excerpts from HCP/NCCP at the end of this Policy), but mainly addresses preservation credit rather than restoration credit and does not provide detailed guidance on the circumstances when the Conservancy *should* consider selling restoration credit. This Policy intends to provide that guidance.

**Key Assumptions:**

- The Policy only addresses the Conservancy’s policy on such arrangements. The regulatory agency or agencies requiring the mitigation have ultimate authority to approve or disapprove proposed mitigation.
- If portions of Conservancy restoration sites are used to mitigate for non-covered activities, these portions cannot be used to meet the Conservancy’s recovery or mitigation requirements under the HCP/NCCP.
- Use of mitigation funds from non-covered activities to assist with buying land is a separate topic and is not addressed by this Policy (i.e., this Policy covers restoration credit not preservation credit).
- Reflecting the requirements of the HC/NCCP, the Conservancy’s primary restoration activities relate to wetlands restoration and creation. However, in addition, the Conservancy specifically pursues and tracks restoration of oak savanna and occupied habitat for fairy shrimp species and for giant garter snake. This policy applies to all restoration/creation activities of the Conservancy.

**Location of activity seeking mitigation:** The location of the activity seeking mitigation on Conservancy restoration sites may influence the Conservancy’s willingness to provide restoration credit. Foreseeable areas that might seek mitigation at Conservancy restoration sites include:

- Antioch
- Non-covered activities within the HCP inventory area (e.g., rural residential development, wind development, mining)
- Delta region of Contra Costa County outside of inventory area
- Concord hills
- Livermore/Pleasanton

During development of the HCP/NCCP, a key principle guiding the planning effort was that mitigation for projects that occurred in Contra Costa County should be retained in the County. A mitigation coordination effort is underway in Eastern Alameda County and care should be taken not interfere with that effort.

Policy: When evaluating whether to allow a non-covered project to purchase restoration credit from the Conservancy, the Conservancy should look most favorably at projects within the inventory area followed by projects within the County and adjacent to the inventory area, followed by projects inside the County but not adjacent to the inventory area. Projects from outside the County should only be considered if suitable mitigation opportunities are not available in the county where the project is located, there is no danger of interference with a mitigation coordination program in that county, and the Conservancy is being asked to assist by a resource agency.

**Type of activity seeking mitigation:** This criterion refers to the nature and purpose of the project seeking mitigation, e.g., whether the project is private or public or whether or not it will serve the citizens of east Contra Costa County. Such considerations were discussed by the PAC but it was generally felt that there was not a need at this time for the Conservancy to attempt to judge the specific merits of a project seeking mitigation.

Policy: The type of project need not be a major consideration for the Conservancy at this time.

**Type and amount of restoration credit sought:** Four interrelated questions must be asked on this topic:

- a) What type of credit is being requested and how much? The Conservancy needs to know if the applicant is requesting seasonal wetland credit, fair shrimp credit, etc. and how many acres are needed.
- b) How much restoration of that type(s) requested has the Conservancy performed and how much of that has already been used to mitigate past impacts? The Conservancy cannot sell what it does not have and should not sell restoration credit when it is not meeting the Plan's Stay Ahead requirements (or its HCP/NCCP permits could be suspended or revoked). However, the Conservancy may look more favorably at a request if it is for a type of restoration credit that the Conservancy has in surplus and if the amount of requested credit is small.
- c) How much restoration of the type requested will the Conservancy need to mitigate the impacts of future covered activities in the pipeline? The Conservancy needs to forecast demand and ensure that selling credit to outside projects does not interfere with covering covered projects.
- d) How much restoration capacity is available in the Preserve System? Is it adequate to meet ultimate demand? This may not be a major consideration initially, but as more and restoration opportunities are utilized over the years, there may be a finite limit to how additional restoration can be accommodated.

Policy: The Conservancy's first responsibility should be to present and future covered activities. The Conservancy should only sell mitigation credit when it believes that it has

accomplished enough successful restoration of the type requested that even if the request is granted, that enough acres of that type of restoration will remain unused to satisfy the anticipated demand for that restoration by covered activities for three years<sup>1</sup>. The Conservancy should conservatively estimate future demand by examining projects in the pipeline, by extrapolating from 30-year estimates in the HCP and by examining demand in years passed. A conservative amalgamation of these approaches should be used. The Conservancy should also make a finding that selling the restoration credit will not compromise the Conservancy's ability to meet its ultimate, long term restoration requirements for current and future covered activities.

**Cost recovery:** HCP/NCCP fees were based on projected costs and were calculated to pay for all costs during the 30-year permit term (funding for long term management beyond 30 years is a major future responsibility of the Conservancy). Selling restoration credits to non-covered project will have actual costs, including costs of managing restoration in perpetuity. Full cost recovery when selling credits would be an important minimum objective.

Policy: The Conservancy should only sell mitigation credit when its full costs will be recovered, including the actual costs of restoring, monitoring and adaptively managing the feature until success criteria are met in about five years, as well as the costs of management and monitoring in perpetuity.

**Contribution to recovery:** As an NCCP, the Plan requires the Conservancy to go above and beyond mitigation requirements by contributing to recovery of endangered species. The Conservancy intends to primarily use grants and other public funds to contribute to recovery, but also asks Participating Special Entities such as Caltrans and PGE to make a contribution to recovery as part of agreements to provide coverage.

Policy: The Conservancy should require a contribution to recovery when selling restoration credit to non-covered projects and should look more favorably at projects with a higher contribution to recovery. These funds would be used to acquire, maintain, restore and enhance habitat above and beyond what is required in the HCP/NCCP for mitigation and could also be used to address in a general way the costs of management after year 30.

**Good government considerations:** Local, state and federal agencies have invested considerable effort at largely public expense to set up the HCP and its associated system of converting funding into habitat. There may be some rationale for making as much public use out of this system as possible. The desire not to interfere with other mitigation is another consideration.

Policy: The Conservancy should consider the broader public benefits of offering its services (and any disadvantages) when asked to assist a non-covered activity.

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<sup>1</sup> Three years is recommended because it will provide a comfortable amount of time to use the funds received to plan and construct a new restoration project. It is also approximately the amount of time in advance that we tend to hear about large projects needing large mitigation.

**Provisions in the HCP/NCCP:** The HCP/NCCP anticipated that non-covered activities might request to mitigate through the Conservancy's program. The prospect of such mitigation was generally viewed positively, presenting an opportunity, to leverage additional funding, take advantage of economies of scale, secure contributions to recovery and maximize the public benefit of the HCPs mitigation program. Consequently, the Plan contains two sets of provisions related to mitigation for non-covered projects. One relates to the contribution of land and the other relates to contribution of funds. Neither mechanism offers the project proponent take coverage under the HCP/NCCP and both focus more on preservation credit than on mitigation credit, though implications for restoration credit are relatively clear. Excerpts from the relevant sections of the HCP/NCCP are provided below.

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### **HCP/NCCP Chapter 8, Section 8.6.2**

#### **Mitigation for Activities Not Covered by the HCP/NCCP**

By creating a framework for habitat conservation, the HCP/NCCP could attract additional mitigation to the HCP/NCCP inventory area by projects located in or around the inventory area but not covered by the HCP/NCCP. Land acquired, preserved in perpetuity, and managed for natural resource purposes to mitigate for the impacts of activities not covered by the HCP/NCCP may complement and augment the conservation achieved by the HCP/NCCP if the location and management of the land is consistent with the goals of the HCP/NCCP. For example, mitigation from non-covered activities may preserve areas that would not have been preserved under the HCP/NCCP. Alternatively, mitigation may accomplish conservation objectives of the HCP/NCCP, enabling conservation under the HCP/NCCP to be redirected to other areas or conservation purposes (as described in Chapter 5 Conservation Measure 1.1, in the section *Conservation in the Inventory Area beyond HCP/NCCP Requirements*).

Project proponents with projects in or near the inventory area that are not covered by the Plan but that affect covered species may be interested in using the HCP/NCCP as a vehicle to mitigate their projects. These projects may be required to conduct mitigation or conservation actions under a variety of state and federal regulations, including ESA, CESA, CWA, Porter-Cologne Water Quality Control Act, NEPA, or CEQA. If these actions are compatible with the HCP/NCCP, there are advantages to using the conservation strategy of the Plan East Contra Costa County Habitat Conservation Plan Association as a guide to mitigating non-covered

projects because of lower costs and greater conservation benefits. Some non-covered project proponents may be interested in contributing land to the HCP/NCCP as their mitigation. See also *Mitigation Funding from Activities Not Covered by the Plan* in Chapter 9, section 9.3.2, regarding the contribution of mitigation funds to the HCP/NCCP.

If mitigation by non-covered projects occurs in areas that are a priority for conservation in the HCP/NCCP, the Implementing Entity, CDFG, and USFWS will confer and determine how to redirect HCP/NCCP resources to other objectives. In such circumstances, HCP/NCCP resources may be redirected toward other areas such as the following.

- Additional land acquisition that will be prioritized as described in Chapter 5 Conservation Measure 1.1, in the section *Conservation in the Inventory Area beyond HCP/NCCP Requirements* (note that such additional land acquisition may not match the size and extent of such non-Plan mitigation acre for acre due to differences in land cover types, conservation value, cost, and other factors).
- Other measures necessary to achieve the objectives of the Plan. Mitigation for covered species by non-covered projects cannot be counted towards either the mitigation requirements or the Stay-Ahead provision of the HCP/NCCP and must result in a redirection of HCP/NCCP resources toward other conservation purposes as described above.

CDFG and USFWS will, to the extent consistent with their responsibility to ensure effective mitigation proximate to the location of impact, promote mitigation in the HCP/NCCP inventory area by non-covered projects to complement and augment the conservation to be achieved by the HCP/NCCP.

### **HCP/NCCP Chapter 9, Section 9.3.2**

#### **Mitigation Funding from Activities Not Covered by the Plan**

There may be a number of benefits to addressing the mitigation needs of noncovered projects through the implementing structure of the HCP/NCCP. USFWS and CDFG may wish to use the conservation strategy and implementing structure of the Plan to maximize the conservation benefits to covered species and natural communities. Project proponents may wish to utilize the mitigation approach of the Plan to

facilitate their mitigation obligations under a variety of state and federal regulations. The HCP/NCCP Implementing Entity may benefit from the additional flexibility to implement the Plan afforded by access to revenue early in the permit term. See also *Mitigation Acquisitions by Activities Not Covered by the HCP/NCCP* in Section 8.6.2, *Land Acquired by Other Organizations or through Partnerships*.

Mitigation funds collected from non-covered activities must augment the mitigation and conservation obligations of the Plan (i.e., they may not offset these requirements). To achieve this, the Implementing Entity, the project proponent, USFWS, and CDFG will meet to discuss a mutually acceptable mitigation funding arrangement. Such an arrangement will rest on a description of conservation actions (e.g., land acquisition, restoration) over and above those required by the HCP/NCCP that must be performed to mitigate the non-covered activity. The subsection of Conservation Measure 1.1 entitled *Conservation in the Inventory Area beyond HCP/NCCP Requirements* in Chapter 5 entitled will help guide the identification of the expanded conservation requirements. The expanded conservation requirements must be approved by CDFG and USFWS. The Implementing Entity must be willing to perform the additional conservation with the funds offered, and the funding arrangement must be acceptable to the project proponent. It is likely that an agreement involving all four parties will be necessary to implement such mitigation funding arrangements.

To facilitate successful implementation of the HCP/NCCP and to ensure that mitigation from non-covered activities is coordinated with the HCP/NCCP, mitigation funding arrangements will include the provisions described below.

- Flexibility to use the additional revenue to meet existing HCP/NCCP requirements and to use future HCP/NCCP revenue to meet the expanded conservation requirements of the non-covered activity. This will enable the Implementing Entity to use the additional funds in an opportunistic fashion and to meet urgent Plan requirements, such as habitat connectivity requirements in Acquisition Analysis Zone 2, faster than it could otherwise do.
- Flexibility in adapting the Stay-Ahead provision to the expanded conservation requirements. In measuring compliance with the Stay-Ahead provision in annual reports, the Implementing Entity will be

able to choose either to (a) disregard the expanded the conservation requirements and the land purchased with additional revenue from the non-covered activities when measuring compliance, or (b) include both the expanded conservation requirements (i.e., the HCP/NCCP requirements plus the requirements of the non-covered activities and any continued land acquisition obligations) and the land purchased with additional revenue from non-covered activities when calculating compliance.

Mitigation funding arrangements will describe the specific application of these provisions in each instance. The additional revenue received from non-covered activities cannot be taken into account during the periodic audits used to recalibrate HCP/NCCP fees.