

STAFF REPORT

SUBJECT: Amendment Establishing Date-Certain Process for Project Mitigation

RECOMMENDED ACTION: Motion to Approve the Amendment Establishing Date-Certain Process for Project Mitigation

DISCUSSION:

SUMMARY:

Under the San Joaquin County Multi-Species Habitat Conservation and Open Space Plan (SJMSCP), development projects are provided take coverage (developers can disturb land which may be habitat to protected species) by jurisdictions through federal and state permits within San Joaquin County. Under the Plan (Section 5.3), the developer does not have to “mitigate”¹ for that take until specific events occur, such as seeking a building permit. In other words, up to this point, a developer can receive coverage under the Plan, disturb dozens, maybe hundreds, of acres and not “mitigate” for the ground disturbance until a building permit is issued. That building permit may be years in the future and, as we have seen during the recession, may not ever happen. The Plan anticipated that, over time, projects disturbing ground would be fully mitigated. “Overtime” was meant to be months, maybe a few years, not decades. However, with construction coming to a complete standstill following 2007, many project proponents that had disturbed land went out of business or found that there were no tenants for that land. Therefore, hundreds of acres, approximately 800 acres, throughout San Joaquin County sit disturbed with no habitat mitigation having taken place.

While the plan was being drafted, there was recognition there might be a lag between ground disturbance and mitigation. The plan included a maximum amount of 500 acres of land that could be disturbed without mitigation. The plan states that once the 500 acres has been reached, projects coming after that point must be 100% mitigated, upfront (section 5.3.2.3.A)

The SJMSCP has exceeded the allowance of unmitigated acres covered within the plan as defined under the 500 Acre Cap scenario.

¹ Mitigation can come in the form of paying the approved fee, bringing land in lieu, or purchase appropriate land bank credits.

Working in partnership with U.S. Fish and Wildlife and California Department of Fish and Wildlife, there was agreement that the current construction environment is temporary and, as construction recovers, those unmitigated acres under the 500 acre cap will be reduced.

In order to assure that the plan does not get into this position again, staff has proposed, and HTAC has concurred, establishment of a shelf life for all unsigned incidental take minimization measures (ITMM) will only be valid for six months and once the ITMM is fully executed with signatures by the project proponent and SJCOG, Inc. staff, the ITMM will be 'Officially Issued' to the project. The ITMM under the plan will require the project proponent, prior to ground disturbance, to comply with the ITMM's and provide the appropriate mitigation for the project or acquire a bond that can be called upon to mitigate the project impacts at a date-certain of not greater than six months from the official issuance date.

RECOMMENDATION:

Recommendation to the SJCOG, Inc. Board to approve the amendment establishing date-certain processing for project mitigation which allows projects to participate under the SJMSCP providing biological coverage for the project for impacts to the habitat types under the federal and state permits.

FISCAL IMPACT:

SJCOG, Inc. to be provided mitigation for the project impacts as required under the SJMSCP.

BACKGROUND:

The San Joaquin County Multi-Species Habitat Conservation and Open Space Plan (SJMSCP) was developed to allow projects to mitigate species and habitat impacts during the development process. Historically, mitigation and coverage under the plan for all jurisdictions in the development process was at the time of issuance of the building permit. The SJMSCP permitted this mitigation timing to occur as long as the development (ground disturbance) occurring without being mitigated under the habitat plan did not exceed 500 acres county wide.

Projects were issued incidental take minimization measures (ITMMs) for development activity which occurred prior to mitigation with the anticipation that building permits were to be issued in the near future and mitigation to occur at building permit issuance. Some projects did in fact pull building permits and mitigate close to issuance of the ITMMs, while other projects delayed pulling building permits to a much later date or not at all. Due to the ITMMs not having a mitigation date certain under the SJMSCP, combined with the slowing of the economy, projects have not been pulling building permits and mitigating as quickly as anticipated which has caused the unmitigated acres to exceed the 500 acre cap. Once the SJMSCP exceeds that 500 acre cap, all future projects covered under the SJMSCP and allowed to disturb habitat through incidental take minimization measures (ITMM) are required to mitigate all impacts prior to ground disturbance instead of building permit issuance (Attachment 1).

To ensure future development actions do not continuously exceed the 500 acre cap, SJCOG, Inc., as the administrators of the plan, has proposed the following revised administrative language regarding mitigation timing:

All projects requesting coverage under the SJMSCP if project applicants do not have fully executed ITMMs on or before December 31, 2012, then the following shall apply:

1. *Incidental Take Minimization Measures (ITMMs) will be issued to the project and must be signed by the project applicant prior to any ground disturbance but no later than six (6) months from receipt of the ITMMs. If ITMMs are not signed within six months, the applicant must reapply for SJMSCP Coverage. Upon receipt of signed ITMMs from project applicant, SJCOG, Inc. staff will sign the ITMMs. This is the effective date of the ITMMs.*
2. *Under no circumstance shall ground disturbance occur without compliance and satisfaction of the ITMMs.*
3. *Upon issuance of fully executed ITMMs and prior to any ground disturbance, the project applicant must:*
 - a. *Post a bond for payment of the applicable SJMSCP fee covering the entirety of the project acreage being covered (the bond should be valid for no longer than a 6 month period); or*
 - b. *Pay the appropriate SJMSCP fee for the entirety of the project acreage being covered; or*
 - c. *Dedicate land in-lieu of fees, either as conservation easements or fee title; or*
 - d. *Purchase approved mitigation bank credits.*
4. *Within 6 months from the effective date of the ITMMs or issuance of a building permit, whichever occurs first, the project applicant must:*
 - a. *Pay the appropriate SJMSCP for the entirety of the project acreage being covered; or*
 - b. *Dedicate land in-lieu of fees, either as conservation easements or fee title; or*
 - c. *Purchase approved mitigation bank credits.**Failure to satisfy the obligations of the mitigation fee shall subject the bond to be called.*

Because this proposed change is an administrative function by the administrative entity with concurrence of the permitting agencies, the SJCOG, Inc. Board should take action as the Joint Powers Authority administering the plan. The action will be immediately implemented as part of the SJMSCP.

COMMITTEE ACTIONS:

- Habitat Technical Advisory Committee: Approved Recommendation to Adopt

ATTACHMENTS:

1. SJMSCP Section 5.3.2.3

5.3.2.3 Timing of Fee Payments, In-Lieu Dedications or Mitigation Banking

Under the normal permitting process implemented by local government jurisdictions in San Joaquin County, ground disturbance (including grading) may occur prior to the local government jurisdiction's issuance of a Building Permit. For example, once a *tentative* subdivision map to create new residential lots is approved by a local government agency (e.g., the City of Tracy's City Council or the San Joaquin County Board of Supervisors) with conditions, the Project Proponent must fulfill many of the project conditions (e.g., constructing new roads or installing water or sewer lines) before gaining approval of a *final* subdivision map. Once the final subdivision map is completed, new residential lots may be sold to the general public. Once a newly created subdivision lot is purchased, the new owner of the lot normally applies for a Building Permit to construct a new home on the newly created subdivision lot.

However, different development projects may undergo variations in this permitting process (e.g., Project Proponents may receive only Building Permits for small projects which address both building and grading activities, but Project Proponents are not required to secure Grading Permits due to the relatively small amounts of dirt being moved by the project). The majority of development projects in San Joaquin County require Building Permits during at least one phase of the development process. Many of San Joaquin County's largest projects also require Grading Permits. Therefore, given this variation in the types of permits which may be issued at varying times during the development process, the following provisions shall be implemented 1) to address the variations in the types of permits required, and timing of the acquisition of those permits, for the various development projects in San Joaquin County, 2) to provide a uniform approach amongst the local government agencies for timing the collection of fees or requiring purchases of mitigation banking credits, 3) to provide maximum flexibility for developers to finance their projects without creating adverse impacts to SJMSCP Covered Species, and 4) to ensure that compensation will occur pursuant to the SJMSCP by using familiar permitting procedures already used by local government agencies:

For so long as the 350-acre jump-start (Section 8.6) remains in place, the timing of compensation pursuant to the SJMSCP shall be as follows:

- A. Collection of Fees/Purchase of Mitigation Banking Credits for Projects Less Than or Equal to 350 Acres in Size (projects equivalent in size or smaller than the jump-start): collection of fees or purchase of banking credits will occur prior to or at the time of issuance of Building Permits so long as Site Disturbance without compensation (i.e., grading or vegetation removal has occurred with or without permits, but Building Permits have not yet been issued) does not exceed 500 acres total at any time during the term of the SJMSCP for SJMSCP Permitted Activities undertaken by project proponents opting for coverage pursuant to the SJMSCP. When Site Disturbances without compensation pursuant to this provision reaches 500 acres total, then the JPA and Permittees shall require the fee collections or purchase of banking credits for projects less than or equal to 350 acres in size to occur pursuant to the same schedule as required for projects exceeding 350 acres as described in paragraph B.
- B. Collection of Fees/Purchase of Mitigation Banking Credits for Projects Exceeding 350 Acres: collection of fees for land acquisition or purchase of banking credits will occur either:
1. Prior to issuance of a Grading Permit (or prior to Ground Disturbance if no Grading Permit is required) ; or,
 2. The Project Proponent may bond for payment of the applicable SJMSCP fees prior

Attachment 1

to the issuance of a Grading Permit (or prior to the commencement of Ground Disturbance if no Grading Permit is required). Bonds posted pursuant to this provision shall be released, to the extent possible, after full project buildout and after all appropriate fees have been paid with respect to each building permit associated with the project. Provisions for releasing portions of the bond as buildout progresses may be established on a case-by-case basis upon request of the Project Proponent. Only bonds issued by a bond surety admitted in California by the California Department of Insurance will be accepted unless otherwise approved by the JPA with the concurrence of the Permitting Agencies.