



2012-2013 SANTA CLARA COUNTY CIVIL GRAND JURY REPORT

THE SANTA CLARA VALLEY HABITAT CONSERVATION PLAN: HOW WILL THIS AFFECT SANTA CLARA COUNTY RESIDENTS?

Introduction

The Santa Clara County Civil Grand Jury (Grand Jury) received a complaint regarding the level of spending for a Habitat Conservation Plan, currently called the Santa Clara Valley Habitat Conservation Plan (Plan or SCVHCP). In completing its investigation, the Grand Jury has elected not to issue findings and recommendations; however, because the Plan is an important step in addressing diminishing natural resources and assisting in the recovery of endangered species in Santa Clara County we decided to publish an informational report so that the general public could have a general understanding of what the Plan is all about.

The SCVHCP is a regional plan that is designed to meet federal and state endangered species requirements and is intended to streamline the permitting process to allow appropriate development to take place and at the same time to protect, maintain, recover, and enlarge the natural habitat of endangered native species.

The current SCVHCP was issued in August 2012, and consists of approximately 2475 pages. The outside costs, including consultant costs, so far, are about \$ 6.3 million, along with additional costs from each of the implementing organizations that could approach the outside costs. The total cost estimates to implement the 50-year Plan have been reduced over the past two years from about \$1.2 billion in 2010 to \$990 million in 2011 to \$660 million today. Implementation is expected to commence by the end of 2013.

The SCVHCP, as envisioned, would be a 50-year Plan that would allow for the permitting by a new local agency created under a Joint Powers Agreement (JPA) by Santa Clara County and the cities of San Jose, Morgan Hill, Gilroy, and Santa Clara County.¹ The impact of the implementation of the SCVHCP to the average resident within the covered area is not expected to be noticeable.

Under the SCVHCP, there would be no need for the developer to prepare an environmental report or obtain permits from a multitude of federal and state agencies nor would the developer be required to acquire conservation lands for any mitigation that may be required. A proposed development within the covered area would require the issuance of a building permit and the HCP fees would be added to building permit fees.

¹ The Santa Clara Valley Water District and Santa Clara Valley Transportation Authority are considered Permittees under the Plan.

A new agency would impose fees that would be paid as part of a building permit process for certain developments within the covered areas of the plan. The fees would be used to acquire lands on a regional basis to be set aside for conservation purposes and to provide for the restoration and maintenance of these set-aside lands. In addition, the fees would pay for the staff and services for the new agency. It is expected that over 45,000 acres would be acquired over the 50-year period and the annual operating costs of the new agency are estimated to be about \$11.7 million or a total of about \$660 million over the 50-year period.

Methodology

The Grand Jury obtained information for this report by interviewing county employees, employees of cities and special districts, elected officials, stakeholders, and consultants. In addition, the Grand Jury reviewed numerous documents that pertained to the SCVHCP including, but not limited to, inter-agency correspondence, draft and final plans of the SCVHCP, as well as Memorandums Of Understanding (MOUs). The Grand Jury also attended certain public hearings convened to address issues concerning the SCVHCP.

Background

History of the Federal and State Laws Regarding Permitting and Mitigation

The SCVHCP being contemplated for implementation for most of Santa Clara County has its origins in the California Environmental Quality Act of 1970; the Federal Endangered Species Act (ESA) of 1973; the California Endangered Species Act of 1984; and the California Natural Community Conservation Plan of 1991.

The ESA was enacted to protect certain species identified as endangered and the California Endangered Species Act expanded the ESA by also protecting certain species from becoming endangered. The ESA was designed to protect critically imperiled species from extinction as a consequence of economic growth and development, as well as to protect the ecosystems upon which they depend. The ESA's primary goal is to prevent the extinction of endangered plant and animal life and secondly, to recover and maintain those populations by removing or lessening threats to their survival. The ESA is administered by the United States Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration (NOAA). NOAA is responsible for marine species and the USFWS has responsibility for freshwater fish and all other species. The California Endangered Species Act (CESA) is administered by the California Department of Fish and Wildlife (CDFW), formerly the California Department of Fish and Game.

Since 1973 there have been several amendments made to the ESA, the combined result of which has created a law vastly different from the ESA of 1973. Before the ESA was amended in 1982, a listed endangered species could be taken only for scientific or research purposes. This is known as the "take" prohibition.

The 1982 amendment created a permit process to circumvent the “take” prohibition². This process provides incentives to land owners to help protect threatened species while allowing economic development that may affect or “harm”³ the threatened species.⁴ For example, the ESA now permits “incidental takes” of threatened species. Incidental taking means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

If a potential project is identified as having a likelihood of adversely affecting a listed species or its designated critical habitat, ESA requires an Incidental Take Permit in order to avoid violation of federal law. As part of the permit application process for a specific project a conservation plan must be prepared and submitted when applying for an Incidental Take Permit.

In addition, the State of California imposes similar requirements under several California laws, including the California Endangered Species Act, California Environmental Quality Act and the Natural Community Conservation Planning Act.

The California Endangered Species Act prohibits the take of wildlife and plants listed as threatened or endangered by the California Department of Fish and Wildlife. Under California law, a “take” is defined as any action or attempt to hunt, pursue, catch, capture or kill a listed species. Incidental takes of a listed species may be permitted upon the submission of an approved plan that fully mitigates the impact of the “take.” The Natural Community Conservation Planning Act encourages local, state and federal agencies to prepare and implement broad-based planning that balances appropriate development and growth with conservation of wildlife and habitat.

From 1982 to 2001, the primary method used to obtain a permit for development from the above agencies to allow an incidental “taking” of a listed endangered species was to implement a mitigation plan and possibly acquire certain lands that would be set aside and maintained for conservation purposes. This permitting and mitigation process was implemented on a project-by-project basis.

Recognition of Need for Permitting and Mitigation on a Regional Basis

Sometime prior to 2001, the USFWS determined that permitting and mitigation on a project-by-project basis was not as effective as permitting and mitigation on a regional basis.

² The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct.

³ The term “harm” is defined as a 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. The term “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.

⁴ The term “threatened species” means a species of wildlife listed in 50 CFR 17.11 or plant listed in 50 CFR 17.12, and designated as threatened.

During 2001, there were several projects that were being planned that included the widening of Highway 101 from San Jose to Morgan Hill, the Bailey Avenue Extension to Highway 101, Highway 101 and the Highway 85 South Interchange, and Coyote Valley Research Park. In July 2001, the USFWS issued an opinion letter permitting the forgoing projects to proceed, provided that a regional Plan be developed and presumably implemented. The Plan to be prepared was initially contemplated by the USFWS to cost approximately \$1 million, and \$4.4 million was estimated by them to acquire and maintain certain serpentine lands to protect the habitat of a certain endangered butterfly.

Changes in the Federal and State Laws Regarding Endangered Species Paved the Way for the SCVHCP

The purpose of the SCVHCP process associated with the Incidental Take Permit is to protect and enhance ecological diversity in the greater portion of Santa Clara County, while allowing appropriate and compatible growth and development. The Plan's primary goal is to protect, enhance, and restore ecosystem integrity and functionality for threatened and endangered species while allowing for planned development. The Plan's secondary goal is to contribute to the recovery and possible delisting of protected species and reducing the likelihood of adding species to endangered status.

Implementation of the Santa Clara Valley Habitat Conservation Plan

The regional habitat conservation plan developed for compliance with the Federal Endangered Species Act and California related laws is called the Santa Clara Valley Habitat Conservation Plan. The SCVHCP is the federal and state compliant plan that covers the cities of San Jose, Morgan Hill, and Gilroy, the Santa Clara Valley Transportation Authority, the Santa Clara Valley Water District and a significant part of the County of Santa Clara. These six government entities are also referred to as the Local Partners or Permittees.

The local governmental organizations originally involved in the Plan development were identified as the Local Partners and included the City of San Jose, County of Santa Clara (County), Santa Clara Valley Water District (SCVWD) and the Santa Clara Valley Transportation Authority (VTA). In 2004, the initial Local Partners entered into an MOU to develop the Plan and to absorb the internal costs and equally share the outside costs. In 2005 the Cities of Morgan Hill and Gilroy were added. The new members were to share 10% each of the outside costs and the original partners would then share 20% of the outside costs.⁵ All of the Local Partners, plus the USFWS, CDFW, and stakeholders worked together to produce a final SCVHCP in 2012.

⁵ MOU dated 2005

The SCVHCP's purpose is to facilitate planned development and maintenance activities in exchange for providing a comprehensive conservation strategy to address the impacts to natural resources from these activities. The SCVHCP is designed to streamline endangered species permitting by allowing project proponents to obtain approvals at the local level rather than securing permits directly from the USFWS and CDFW wildlife agencies, which is the current practice. This transfer of permit authority to the local level should save time for project proponents with projects that impact endangered species. In addition, it will provide a pre-planned road map for the mitigation and conservation requirements associated with project environmental impacts.

The administration of SCVHCP endangered species permitting will be accomplished by the Local Partners and the duration of the SCVHCP will be 50 years from the date of commencement. The permit area will encompass approximately two-thirds of the county's land mass and is estimated to cost about \$660 million over the 50-year period. Those communities within Santa Clara County that are not parties to the SCVHCP will still be required to obtain all necessary environmental permits from the USFWS and CDFW (see Appendix Figures 1-1 and 1-2, Maps of the SCVHCP).

It is expected that the USFWS and CDFW will provide assurances to the Permittees that should unforeseen circumstances occur during the term of the Plan, no additional money, commitments, or restrictions of land or water will be required. It is expected that such assurances will be granted and will be contingent upon full implementation of the Plan. In layman's terms, this means that if there is an additional species that needs to be protected, the regulatory agencies will not be able to impose additional obligations or environmental restrictions on the Plan after the fact.

SCVHCP Conservation Strategy

The conservation strategy of the SCVHCP is to mitigate the impacts of development on covered species and to contribute to the recovery of these species. There are eighteen covered species under the SCVHCP, listed as follows:⁶

⁶ Final Santa Clara Valley Habitat Plan, Volume 1, August 2012. Table ES-1.

Covered Species

Invertebrates	Bay checkerspot butterfly
Amphibians and Reptiles	California tiger salamander California red-legged frog Foothill yellow-legged frog Western pond turtle
Birds	Western burrowing owl Least Bell's vireo Tricolored blackbird
Mammals	San Joaquin kit fox
Plants	Tiburon Indian paintbrush Coyote ceanothus Mount Hamilton thistle Santa Clara Valley dudleya Fragrant fritillary Loma Prieta hoita Smooth lessingia Metcalf Canyon jewelflower Most beautiful jewelflower

The conservation strategy consists of the following major components:

- a. Acquisition of land and creation of a reserve system that will protect over 45,000 acres.
- b. Long-term management, enhancement and restoration of natural communities within the reserve system.
- c. Development and implementation of a conservation strategy to address the needs of covered amphibians and reptiles.
- d. Implementation of a comprehensive management and monitoring program.
- e. Implementation of avoidance and minimization measures on covered activities.

SCVHCP Fees

The SCVHCP has a fee schedule for development of land that creates an endowment for the maintenance of protected lands. In addition, the schedule addresses ecologically sensitive areas by imposing fees that are commensurate with offsetting losses of land cover types, covered species habitat and other biological values. Fees are based on the type of land that is developed since habitat determines which species occupy the land.

The three major fee zones are:

- **Zone A** is low-density land such as ranchland and natural land. It is outside the valley floor—the Diablo Range and the Santa Cruz Mountains and foothills. Covered and protected species would be greatly impacted by development. The fee per acre on this type of land is \$15,416 per acre.⁷
- **Zone B** is mostly agricultural and valley floor residential lands; the land can be covered with grassland, has row crops, orchards and vineyards. There is lesser impact on species here, and the permitting fee is \$10,688 per acre.⁸
- **Zone C** are small sites that meet all of the following:
 - Undeveloped site
 - .5-10 acres
 - Surrounded on all four sides by one or more types of land—urban/suburban, land-fill, or agricultural/developed land
 - No stream, pond, wetland, riparian or serpentine land cover
 - Lands that are classified as **Zone C** will have a \$3,905 per acre fee.⁹

In addition to the Zone fees, other fees can be assessed to protect sensitive species. One of the more innovative fees is the “nitrogen deposition fee” used to offset the effects of pollution on the sensitive serpentine soil environment. This will be a one-time fee that will be charged for new development in the covered area. The fee is computed at \$3.60 per new commuting trip and assumes about 9.5 trips per day.¹⁰ The logic behind this fee is that nitrogen released by automobile engines is deposited on the soil, enriching the soil, and making it less hospitable for native species such as the dwarf plantain—home of the Bay checker spot butterfly. The fees will be used to preserve the quality of the serpentine soil environment.

⁷ Final Santa Clara Valley Habitat Conservation Plan, Volume 3, August 2012, p. 9-25.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid, Table 9b-7 Note 4.

Proposed SCVHCP Fees Based on Environment¹¹

<i>Proposed Land Cover Fees</i>	August 2012 Final Plan	% Change from Dec 2010 Plan to August 2012
Zone A —Ranchlands and Natural Lands	\$15,416 per acre	-22%
Zone B —Mostly Cultivated Agricultural Lands	\$10,688 per acre	-22%
Zone C —Small Vacant Sites between 0.5 and 10 acres surrounded by urban development	\$3,905 per acre	-21%
Nitrogen Deposition Fee	\$3.60 per trip - one-time payment per approved each new vehicle trip (estimate 9.57 trips per additional commuter)	-51%
Proposed Special Fees		
Wetland Related Impacts		
Willow Riparian Forest and Mixed Riparian	\$139,709 per acre	+ 35%
Central California Sycamore Woodland	\$255,182 per acre	+37%
Fresh Water Marsh	\$171,322 per acre	+31%
Seasonal Wetlands	\$374,842 per acre	+29%
Pond	\$153,221 per acre	+33%
Stream—per linear foot	\$588 per linear foot	+15%
Other Impacts:		
Western Burrowing Owl Nesting Habitat	\$50,438 per acre	
Serpentine Land	\$50,166 per acre	-1%

¹¹ Ibid, Table 9-6, San Jose City Council Meeting Jan 29, 2013.

Activities Not Covered by the SCVHCP Plan

Although the SCVHCP is a very comprehensive and well-reasoned plan that has taken several years to develop, there are some development activities within the geographical area of the Plan that will not be covered by the issuance of Incidental Take Permits authorized by the USFWS and CDFW.

For example, if a proposed development activity involves any dredge and fill activities in any waters or wetlands, the developer would need to obtain a permit from the United States Army Corps of Engineers (USACE) and perform mitigation measures if the development is approved. This is necessary because the USACE has jurisdiction over these types of activities. [See Clean Water Act (CWA), 33 U.S.C. §1251 Section 404]. Although the USACE is in the process of evaluating and considering the possibility of issuing a regional general permit under the umbrella of the SCVHCP, they have not done so to date.

In addition, there are certain other development activities falling under the jurisdiction of the Regional Water Quality Control Boards (RWQCB) requiring their approval and permit before development can commence. The Regional Water Quality Control Board has the responsibility to ensure the protection of water quality, including storm water, wastewater treatment, water quality monitoring, wetlands protection, ocean protection and contaminated sites cleanup (see CWA Section 402). Therefore, before any development is started that affects or involves these types of activities, approval and a permit from RWQCB is required.

Going Forward: The Implementing Entity

In order to implement the SCVHCP, the Local Partners have determined that a new government entity, Implementing Entity (IE) would be created under the Joint Exercise of Powers Act (See California Government Code Section 6500-6536).

This Implementing Entity would manage the implementation of the SCVHCP, including the authority to adopt coordinated and uniform fees for the entire Plan area. The IE would be comprised of an 8-member Governing Board that would have two elected officials from the County of Santa Clara and the Cities of San Jose, Morgan Hill and Gilroy.

The Governing Board is responsible for the governance/administration of the IE and the approval of all impact fees and modifications thereof, as well as the approval of the IE annual budget. In addition, there will be an Implementation Board consisting of two representatives each; at least one shall be an elected official, from the County of Santa Clara, San Jose, and Morgan Hill, Gilroy and the Santa Clara Valley Water District, and one representative from the VTA. The Implementation Board will make recommendations to the Governing Board regarding impact fees, hiring/procurement of personnel, services or equipment and annual budget, including making decisions regarding real property acquisitions and any other duties delegated by the Governing Board.

The cost of compliance with the Plan will be covered by fees levied as an additive part of any building permit fee charged by the cities of Gilroy, Morgan Hill, San Jose, and the County of Santa Clara for those geographical areas covered by the Plan.

Current Status

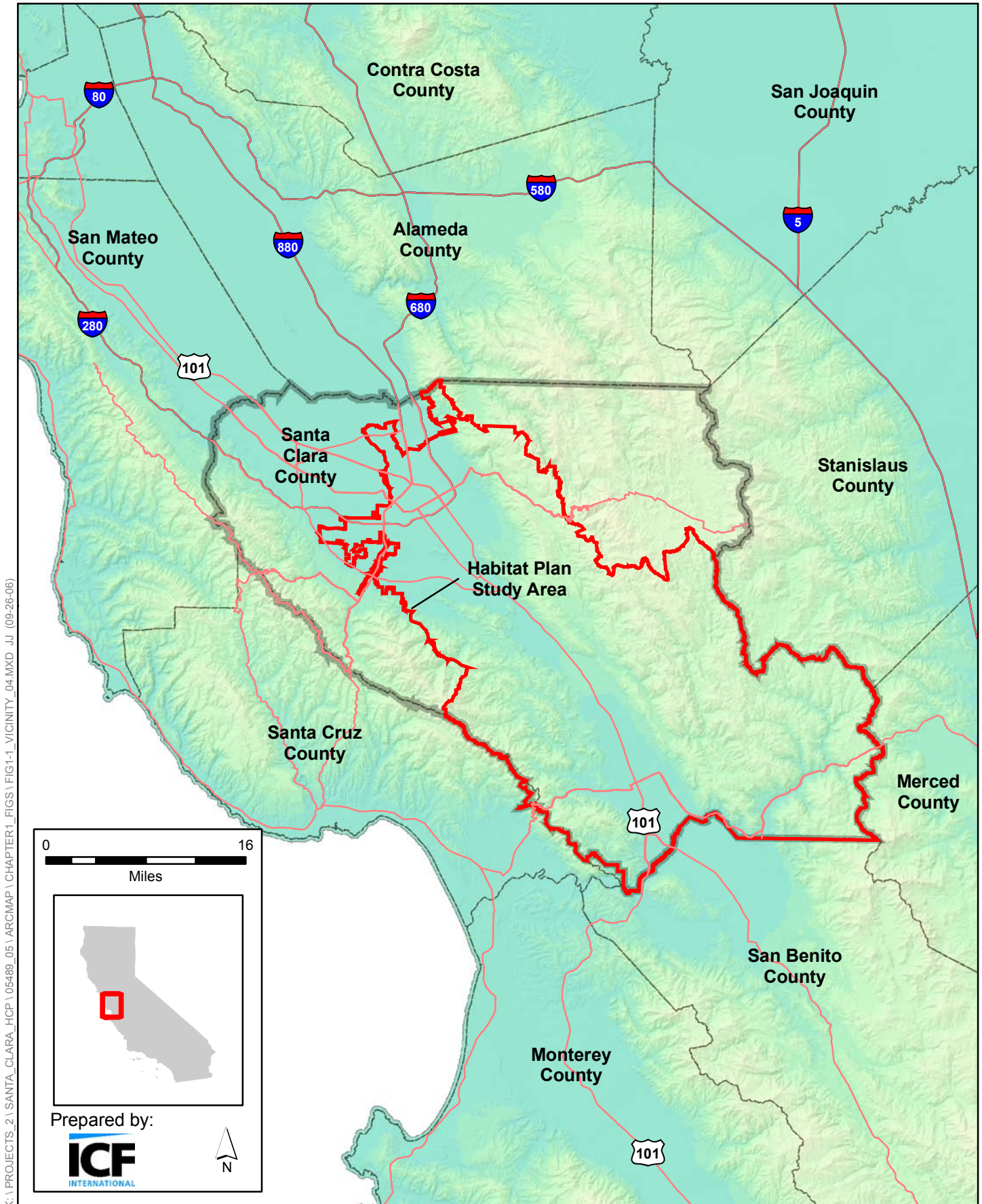
As of January 29, 2013, the SCVHCP has been approved by the Local Partners, subject to certain clarifications by the City of San Jose.

Conclusion

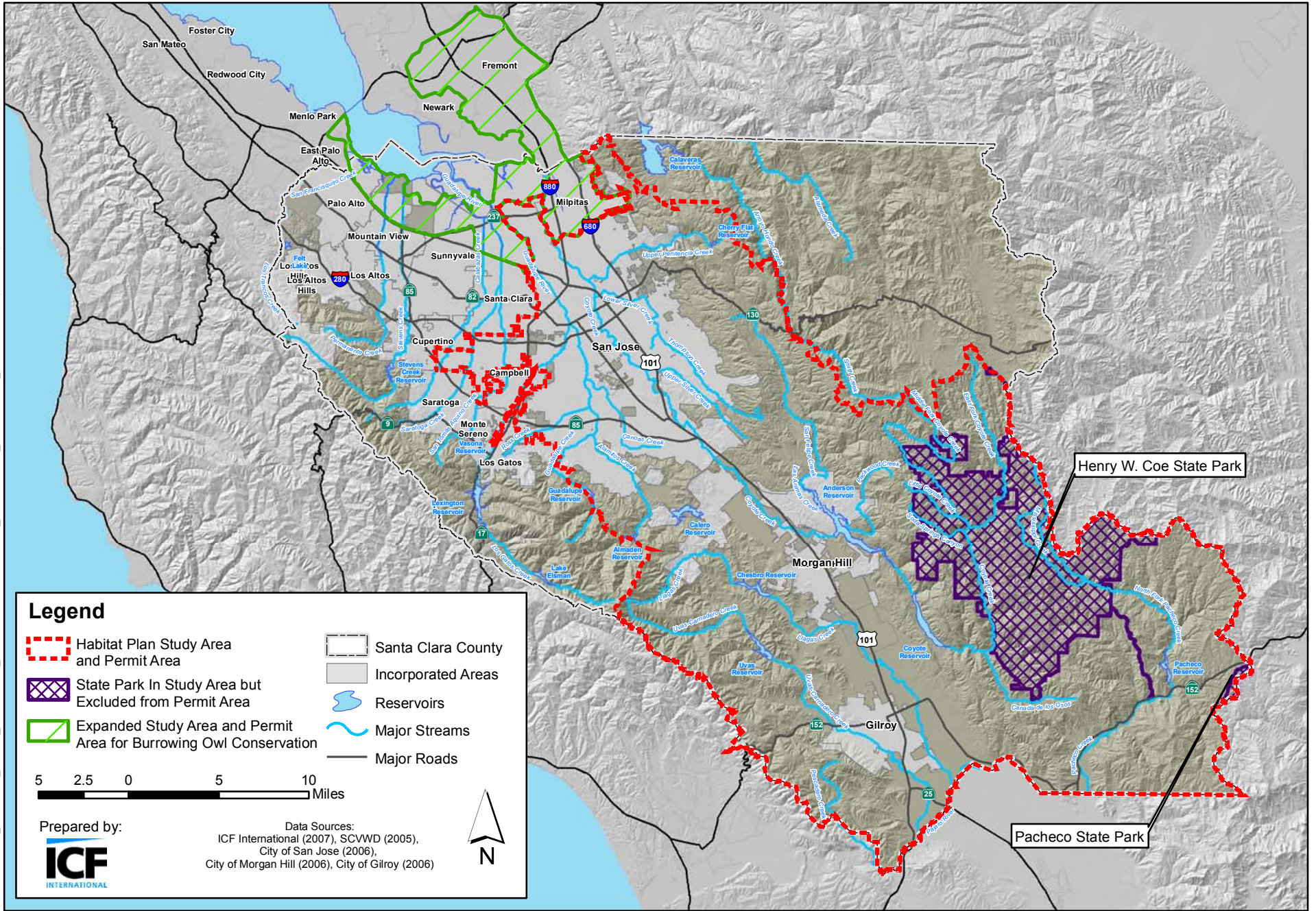
There has been a significant amount of effort, resources, and money expended in the past 12 years to develop the Plan. The magnitude and complexities involved in developing a comprehensive regional habitat conservation plan that involved both federal and state agencies, as well as six local government entities, including many affected parties, made the task quite challenging.

The impact of the implementation of the SCVHCP to the average resident within the covered area is not expected to be noticeable. A proposed development within the covered area would require the issuance of a building permit and the SCVHCP fees would be added to the building permit fees. There would be no need for a developer to prepare environmental reports or obtain permits from the USFWS and CDFW nor would the developer be required to acquire conservation lands for any mitigation that may be required. The new IE would use the new fees to acquire conservation lands and would be responsible for the maintenance and restoration of endangered species habitats.

The SCVHCP framework appears to be a reasonable approach to balance the protection of the habitat of endangered species against the need for appropriate development. While the costs and regulatory complexity associated with this solution are substantial, they may be acceptable if the SCVHCP approach succeeds in its intended purpose. The Plan appears to have little impact to the average resident but hopefully the endangered species will benefit significantly. If the SCVHCP process does not provide the promised benefits or if the costs increase significantly, new solutions to balance these competing interests will be required.



Regional Location of the Habitat Plan Study Area



Santa Clara Valley Habitat Plan Study Area and Permit Area

This report was **PASSED** and **ADOPTED** with a concurrence of at least 12 grand jurors on this 11th day of April, 2013.

Steven P. McPherson
Foreperson

Lyn H. Johnson
Foreperson pro tem

Chester F. Hayes
Foreperson pro tem

Francis A. Stephens
Secretary