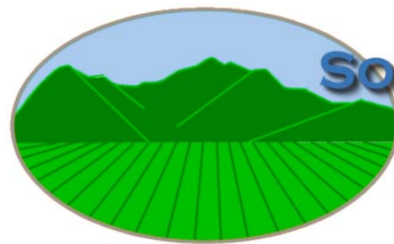


# Mitigation Program of the Solano Land Trust



**SOLANO LAND TRUST**

CONSERVING  
FARMLAND & OPEN SPACE

# Mitigation Program of the Solano Land Trust



**A Project of the  
Solano Land Trust**

September 2004

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This report is dedicated to

~ Rob Schonholtz ~

Supporter of the Solano Land Trust and  
Member of the Ad-Hoc Mitigation Committee

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## OUR THANKS & APPRECIATION

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## REPORT INFORMATION

Mitigation Program of the Solano Land Trust.  
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# EXECUTIVE SUMMARY

A wide variety of activities may prompt the need for mitigation in Solano County due to impacts to land and natural resources. Federal, state and local agencies with permitting authority, as well as project proponents, are asking Solano Land Trust to consider involvement in preparation, evaluation, implementation, and perpetual management of mitigation projects. The projects can take a wide variety of forms, ranging from SLT accepting land in fee title, to allowing a restoration project on existing SLT lands, to SLT initiating projects to utilize mitigation fees that have been collected.

SLT has accepted – or is considering – acceptance of a small number of mitigation projects. This report describes a comprehensive program that will inform and guide SLT’s activities in relation to mitigation projects. For a land trust that traditionally works with landowners on a voluntary basis to permanently conserve land, mitigation projects require careful consideration and specific steps to avoid any impact upon the land trust’s identity and credibility. The issues are described in the report as well as actions to take to avoid or minimize problems.

It is to SLT’s advantage to accept mitigation projects that meet its mission, goals and funding requirements. SLT will not become substantively involved in mitigation projects until after the relevant permitting agency(s) has identified the specific mitigation requirements for a project. SLT reviewed four types of project types and will consider accepting the following:

- **Protection** – fee title and conservation easements. They are conveyed to SLT.
- **Enhancement** – restoration and enhancement projects. The priority projects are for these types of projects to occur on SLT’s existing properties. SLT will consider projects that involve the creation of wetlands or habitat but they may require additional evaluation, and it will consider acceptance of creation projects for perpetual management after they have been created and stabilized by other entities.
- **Mixed Projects** – projects that involve both protection and enhancement elements.
- **Mitigation Fees** – ad-hoc fees, in-lieu fee programs, legal settlements. Ad-hoc fees are

## EXECUTIVE SUMMARY

one-time fees for a project; a fee program is an established system for collecting fees in-lieu of specific performance. SLT will not consider the creation of mitigation banks, but will consider acceptance of sold-out mitigation banks for management in perpetuity.

A dozen criteria have been identified for evaluation of projects. The topics of the criteria are SLT mission and priorities, funding, expertise, existing plan, consistency with existing requirements, other values, due diligence, project size, contiguity, manageability, surrounding land uses, and landowner relations. Some projects, such as those already held by other entities, have additional criteria.

A three phase decision-making process is proposed with several steps within each. The first phase is a **screening** process to identify those projects that warrant further consideration. The second phase is **preparation and evaluation** of mitigation projects. This phase concludes with a recommendation for final acceptance or rejection of the project. If the project is accepted, the third phase is **execution**, such as signing and recording of a conservation easement or posting of contingency funds before beginning a restoration project. SLT will reserves the right to reject any project at any point in the process.

A critical factor in SLT's acceptance of mitigation projects is whether the project will have adequate funding. The funding needs of each project will be individually determined, and will include items such as acquisition costs, one-time capital improvements, management and stewardship costs in perpetuity. These are the costs necessary for the project to be executed and managed. In addition, project proponents will have to cover the cost for SLT's personnel resources to screen, prepare and evaluate the mitigation projects.

Adopting a mitigation program will require a number of actions and organizational changes by SLT. The Implementation section of the report provides discussion for five different areas:

- Staffing and organizational requirements
- Management of financial resources
- Participation, outreach and education
- Preparation of model easements
- Preparation of enhancement opportunities

Throughout the report, 42 recommendations are made. The majority are concerned with the program itself: types of projects, project evaluation, decision-making process and funding. Twelve recommendations are made in the Implementation

section. The ten recommendations identified below are high priority and require immediate action to create SLT's mitigation program.

- ▶▶ SLT is creating a mitigation program and will undertake the necessary actions to implement and maintain it. [R1 on p. 11]
- ▶▶ SLT will prepare brief legal agreements that project proponents will sign (1) as part of submitting a project application and (2) before SLT commences the preparation and evaluation phase. The purpose of the legal statements is to expressly state and memorialize the terms under which SLT will consider a mitigation project. [R25 on p. 31]
- ▶▶ SLT will establish specific fees and billing rates for the mitigation program. The fees and rates will be regularly reviewed and adjustments made as needed. [R27 on p. 35]
- ▶▶ SLT will immediately dedicate a part-time staff or contract position to the mitigation program. [R30 on p. 39]
- ▶▶ The Mitigation Committee will be created as a standing committee of the SLT board to provide oversight of, and direction to, the mitigation program. A scope of authority and specific duties will be identified. It will remain small to minimize staff management time and to provide ready availability to staff. [R32 on p. 39]
- ▶▶ SLT will evaluate its current financial and accounting systems, and establish the appropriate systems for creating and maintaining sufficiently detailed records for each mitigation project. [R33 on p. 40]
- ▶▶ SLT will establish two funds into which mitigation funds (whether related to performance specific projects or mitigation fees) will be deposited: (1) management and stewardship, and (2) easement defense. If permitting agencies want other arrangements, these will be considered on a case-by-case basis and will be a factor in project evaluation. [R34 on p. 40]
- ▶▶ SLT will prepare and adopt an investment and management policy for mitigation-related funds. [R35 on p. 41]
- ▶▶ Wherever possible, SLT will participate in the planning processes that affect its mitigation programs. It will start with participation in the Solano Multispecies Habitat Conservation Plan and Natural Community Conservation Plan process led by the Solano County Water Agency. [R37 on p. 42]



- ▶ SLT will take the initiative in communicating the mitigation program to permitting agencies, project proponents, and SLT friends, supporters and landowners. [R38 on p. 42]

Many important lands and natural resources with significant conservation values have the potential to become involved in mitigation projects. Solano Land Trust is a local land trust with strong expertise in creating conservation projects and managing lands and easements in perpetuity. A strong mitigation program can help SLT advance its mission and goals. SLT can also assist permitting agencies, project proponents and the public by offering a high quality, professional organization that can assure that mitigation projects in Solano County are well designed, have adequate financial resources, and a competent holder.



# 1 INTRODUCTION TO MITIGATION

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Like all counties, Solano County's lands and natural resources are being adversely impacted for a variety of reasons. Among these are projects and activities ranging from construction of new housing and power facilities to changes in land use or management.

Some of these changes require mitigation under one or more local, state or federal laws, such as the Clean Water Act. For example, one type of project that will require mitigation concerns the water supply from Lake Berryessa in Napa County. To assure the continuation of water delivery in Solano County, the Solano County Water Agency is leading creation of the Solano Multispecies Habitat Conservation Plan and Natural Community Conservation Plan (HCP). The HCP and other sources will result in lands and natural resources requiring protection and management in perpetuity.

Mitigation projects often result in land being permanently protected or can result in a variety of habitat enhancement projects on lands that have already been protected. Such projects require competent, long-term managers experienced with

conservation lands and projects. In Solano County, the Solano Land Trust (SLT) is such an entity.

SLT has accepted a small number of mitigation projects and is regularly requested to accept new mitigation projects or funds. The Board of Directors appointed an Ad-Hoc Mitigation Committee to undertake a systematic consideration of whether SLT should accept mitigation projects. This report is the result of its analysis, and it is designed to serve as the "Policies and Procedures" for a SLT Mitigation Program. The program has been created in response to the mitigation needs in Solano County and to further SLT's mission of land preservation.

## **OVERVIEW OF PROJECT MITIGATION**

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Local governments are increasingly requiring mitigation as a condition of approval for projects when the project results in the loss or degradation of natural resources. Public agencies at regional, state and federal levels also require project mitigation. Many projects proposed by developers, landowners, energy companies, and other types of for-profit companies are compelled to provide real property or

partial interests in real property (i.e., conservation easements), fund or implement restoration activities, purchase credits from a mitigation bank, or provide cash in order to proceed. Many project proponents do not want to hold the property; neither do some public agencies. When land or conservation easements are created, there is often a search for long-term holders and managers of these real property interests.

A local land trust is an obvious recipient of such properties. Land trusts are often the best-situated entities to perform land management and, in general, land trusts have the best easement stewardship practices. Further, if designed properly, the mitigation program may help advance the land trust's goals. However, mitigation projects raise significant issues, concerns and costs. As research has shown, a land trust should only enter into this area after due consideration and creation of a "program" for determining types of projects that can be accepted, delineation of drafting and management roles and responsibilities, evaluation criteria and decision-making process, and the types of costs it must calculate for each project.<sup>1</sup>

## **LOCAL ENTITIES**

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Project mitigation occurs within a dynamic context of many actors that have their own areas of interest, authority and expertise.

- **Federal and state resource agencies**, such as U.S. Fish and Wildlife Service, California Department of Fish and Game. These agencies have responsibility to conserve natural resources, and hold authority to impose mitigation under specific statutes, such as the California Endangered Species Act.
- **Federal and state agencies concerned with infrastructure**, such as the U.S. Army Corps of Engineers, Bureau of Reclamation, and California Department of Transportation. In addition to their executing their own projects that may require mitigation (e.g., a CalTrans freeway widening project), these agencies may also have responsibilities for resource protection, such as the U.S. Army Corps of Engineers under the Clean Water Act. Their responsibilities include permitting of projects proposed by other entities.
- **Local governments**, such as the County of Solano and any of its seven cities. Similar to the distinctions made above, local governments can have permitting authority as well as be engaged

in their own projects which require mitigation. The most common relationship that SLT will have with local governments in Solano County is through their authority in the land use approval process.

- **Other public entities.** Solano County has other types of public entities that could have some interest or role to play in the project mitigation arena. The Solano County Water Agency (SCWA) is the lead agency on the Solano Multispecies Habitat Conservation Plan and Natural Community Conservation Plan (HCP) in which priority areas and mitigation requirements are being identified in association with continued water supply from Lake Berryessa.<sup>2</sup> Special districts, such as the Solano Transportation Authority, may require mitigation for their activities. The Tri-City and County Cooperative Planning Authority may have potential sites or enhancement needs for the conservation lands within its area.

Resource Conservation Districts (RCD) are a form of special district within California. RCDs were created to provide information and technical assistance to agricultural operators and landowners. Their expertise can be valuable in designing projects, long-term management issues or identifying potential project sites. Solano County has RCDs that work in different

areas of the county, such as the Suisun RCD and the Solano RCD.

- **Other nonprofit organizations.** Solano Land Trust is a nonprofit conservation organization that is interested in a role in project mitigation in Solano County. There are other land conservation organizations that work in the county, such as The Nature Conservancy and Ducks Unlimited, although they have not expressed interest in project mitigation within Solano County. Of concern, however, are nonprofit organizations that accept mitigation projects whose primary mission is not land conservation (e.g., museums) or that have been created specifically for the purpose of facilitating creation and acceptance of mitigation projects.
- **For-profit corporations.** Two forms of for-profit corporations are worth identifying herein. First, a group of for-profit corporations engage in the creation of mitigation banks in which they sell “credits” to project proponents to support the acquisition, restoration, creation and/or management of land. The mitigation banks are created in areas where types of natural resources occur that require mitigation and where sufficient demand for mitigation is anticipated. Exploration of several mitigation banks is underway by for-profit corporations in Solano County, such as Wildlands, Inc.

Another group of firms are involved in many mitigation projects: consulting and professional firms. Firm sizes vary from staffs of hundreds to sole practitioners. These firms are often hired by project proponents to provide for potentially any aspect of a mitigation project, from negotiations to project design to budgeting. Professional firms, such as law firms, are also often involved. SLT is also likely to engage these firms for a number of activities, such as evaluating or designing complex restoration projects, preparing management plans, and legal services.

- **Private landowners.** To the extent that off-site mitigation is required in the county, private landowners (who are not the project proponents) will own much of the land that could provide mitigation opportunities in the county. Some may be interested in selling land or easements, or in allowing enhancement or restoration projects on their property. Fair market value or appropriate project expenses will have to be provided to those who are interested and willing. There may also be a need to help inform or provide technical assistance to interested landowners about mitigation opportunities.

## **RATIONALES FOR CREATING A MITIGATION PROGRAM**

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The Solano Land Trust fully considered whether it should become involved in mitigation projects in addition to its regular land conservation activities. A number of advantages were identified for the land trust to begin a mitigation program that would also benefit the project proponents, permitting agencies, and the long-term health of conservation lands and natural resources in Solano County.

- **Mitigation resources can contribute to SLT's own goals and capacity.** The land trust's mission is to preserve agricultural lands, open space and natural resources. Mitigation can provide significant resources to help achieve this goal. The specific nature of the resources will vary – land or easements, restoration or enhancement projects, or cash. SLT can also ensure that any mitigation projects it accepts include the appropriate level of funding for perpetual management and defense. By building a portfolio of these projects, the land trust will reach the level at which certain economies of scale can be achieved to support staff with certain types of expertise, such as land managers or ecologists.
- **The land trust has the necessary expertise.** SLT is focused solely upon the preservation and

management of land for conservation purposes. It has the expertise to prepare and evaluate projects at each stage, including project formation, easement drafting, enhancement restoration, and management in perpetuity.

- **The land trust can provide close and frequent monitoring of the project site.** In the past, mitigation projects required by resources agencies were often held by the state and federal agencies that imposed the requirements. The permitting agency offices are typically far from project sites, and their staffs are responsible for vast territories. Their geographic distance tends to preclude close oversight of projects. In contrast, the land trust's geographic scope is limited to Solano County. SLT can provide very close and frequent oversight of the project site and can be more aware of changes to the project site, adjacent properties, and the area's resources.
- **Mitigation is going to occur and conservation benefit can result.** Regardless of any involvement or action by SLT, impacts from a wide range of projects will occur. Some projects will negatively impact lands or resources with conservation values, such as agricultural lands or wildlife habitat. Mitigation is required to provide the public benefits being lost or compromised by the project. If SLT is

involved, the project is more likely to secure the conservation values and retain these values over time.

- **Protect the reputation of conservation projects.** The general public doesn't distinguish between protected lands held by the land trust and those held by others. For instance, if mitigation requires that a certain amount of vernal pool habitat be protected, the public doesn't distinguish between whether the land is held by SLT or by another entity. If the land is poorly managed, if the proposed restoration project never occurs, or if there is an easement violation, the public and some landowners will view the project negatively. A view may develop that "restoration doesn't work" or "conservation easements can be violated with impunity".

If the land trust is well known in the area, many may assume that it is a land trust project. Therefore, SLT has an interest in ensuring that projects involving land conservation or resource enhancement or management within Solano County are implemented and managed responsibly.

## ISSUES AND CHALLENGES

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Mitigation projects are not without a set of issues and challenges that the Mitigation Committee considered carefully. Specific steps can be taken to address these concerns.

**a. Organizational Identity and Reputation** – In accepting mitigation projects, some land trust members, landowners or other members of the public may view the land trust’s activities as enabling or facilitating projects that produce negative impacts on lands that have significant conservation values. There may also be a misperception that SLT has regulatory powers. SLT can take four steps to avoid this:

- Proactively describe its decision to begin accepting mitigation properties. Explain the value of the conservation lands and natural resources, the land trust’s role, and how it will help advance the land trust’s mission.
- The land trust can carefully identify and limit its role. To avoid any actual involvement in facilitating projects, the land trust will explicitly avoid involvement prior to the permitting agency’s determination of the mitigation requirements.

- Retain the authority to reject projects for any reason (see “b” below).
- SLT must capture all of the costs for the project to ensure that the land trust does not subsidize mitigation projects (see “d” below).

**b. Avoid Any Compromise of Independence** – The land trust will want to retain independence in determining which projects it will accept as well as requirements for any project element, such as project selection, design or management endowment. This must include the right to reject a project for any reason. For example, SLT may choose not to accept some projects that involve destruction of irreplaceable resources, those with a very large public opposition, or for other similar reasons that could have an unacceptable negative impact on the land trust’s identity or community support.

**c. Project Viability** – Some mitigation projects suffer from characteristics that undermine their long-term viability. The difficulties can be rooted in project design, implementation failure, legal creation or inadequate funding. Many restoration and enhancement projects are not completed or do not function in the way they should.<sup>3</sup> SLT will want to take all steps within its

expertise and authority – including case-by-case review of mitigation projects – to assure that well-designed and high quality mitigation projects are created and fully implemented.

- d. Adequate Funding** – SLT is taking on perpetual responsibilities to manage land and easements, or to execute and manage restoration and enhancement projects. SLT must take the steps needed to fully calculate the short- and long-term costs of the project. These costs should be fully born by the project proponent.

Financial adjustments are very difficult – and usually impossible – to make after the mitigation project has been accepted. However, land trusts can take three steps to help identify and support adequate funding for mitigation projects:

- First, it can be challenging to calculate all costs, but the land trust should make its best effort to do so. On a regular basis, the land trust should review its cost structure and make adjustments as needed. Realistic timeframes for regular review of the cost structure is every 12 or 18 months. Tracking its real costs on all projects will be an important source of information for the annual review.

- Second, most project proponents will expect fairly detailed explanations and justification of funds they are asked to provide. If approached as a business transaction, the land trust will educate project proponents about the costs involved, convey its competency as an entity, and communicate the content in a way that the project proponent understands and will find persuasive.
- Third, the land trust must have a financial management system and other policies necessary for tracking and managing the funds, as well as a system and investment policy to manage the permanent endowment funds. This will require regular tracking and financial summaries by the bookkeeper and/or Executive Director.

- e. Timing** – SLT has considered where it wants to enter the mitigation process. In general, SLT will begin working with project proponents after the permitting agency has determined the mitigation requirements. This is to protect SLT’s identity and avoid a large time investment before any specifics are known. At the same time, SLT wants to be open to information exchange and informal communication. For example, before decisions are made by the permitting agency, the land trust could provide general information



to project proponents about SLT's program and process. The SLT staff may also seek information about the agency's authorities and process, or to generally discuss available mitigation opportunities.

Further, SLT may work with permitting agencies to consider creation of some key agreements or documents, such as a model conservation easement that is acceptable to both entities and will streamline the decision-making process. Finally, once a project is in preparation, SLT will frequently communicate with the agencies on the specifics of a mitigation project to discuss what is under consideration.

- f. Mission** – The land trust is focused on the preservation of agricultural lands, open space and natural resources, and it traditionally works with willing landowners to achieve these goals. SLT will monitor its overall dedication of resources to mitigation projects and the types of projects it is accepting to ensure comfort with the level of mitigation activity and that it is not accepting projects unrelated to its mission. The latter should be accomplished if the projects meet SLT's evaluation criteria.
- g. Time Investment** – Mitigation projects can require a substantial amount of time by the land

trust staff. Katherine Kelly, Executive Director of the Yolo Land Trust, has completed a number of mitigation projects. She describes the process as a "time sink" that can take an enormous amount of time, and she noted the difficulty of consistently and accurately forecasting which projects will consume an inordinate amount of time.

Mitigation projects can vary considerably in size, complexity, and the individual personalities involved. The time spent by land trust staff should be funded by the project proponent, and tied to the specific time worked. In some cases, it can be more efficient for project proponents to take the lead in designing a mitigation project, and in other cases, the project and SLT's long-term stewardship interests are advanced by SLT's substantive involvement in project preparation.<sup>4</sup>

- h. Fulfilling Terms of Mitigation** – Permitting agencies require proof that the mitigation requirement has been fulfilled. In all categories of mitigation projects except *Mitigation Fees*, this should be the responsibility of the project proponent.<sup>5</sup> The land trust will readily provide any information or documentation about the project.

**i. Funder Relationships** – The land trust receives the largest percentage of its funding from grants awarded by private foundations and public agencies. Nearly all of this funding is restricted, and extreme caution has to be exercised if considering any grant funding in relation to a mitigation project. For example, if a grant allowed a land purchase, and mitigation funds were subsequently utilized for a mitigation project on the property, the grant funds may have to be reimbursed. SLT has encountered such a situation already.<sup>6</sup>

**j. Building Relationships with Permitting Agencies** – In entering into a mitigation program, the land trust will be working closely with the agencies requiring the mitigation. Both need to understand each other’s goals and processes. There is also the opportunity to create agreements with the permitting agencies that streamline the processes involved for all parties.

**k. SLT’s Relationships with Key Groups** – Beyond possible impacts to the land trust’s identity and reputation (see point “a” above), key groups with whom the SLT works may have particular concerns about the mitigation and/or SLT’s acceptance of projects. For instance, SLT has been working to develop and grow its

relationship with the agricultural community. Some may feel that mitigation projects could be implemented directly by farmers and ranchers.





## 2 MITIGATION PROGRAM

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This section of the report describes the program that will inform and guide SLT's engagement with mitigation projects. SLT's Ad-Hoc Mitigation Committee, convened to create the program, recommends the program to the board. Throughout the report, specific recommendations are indicated in the following way:

» **R0 This is how a recommendation will be depicted.**

The final section of this report includes (1) the recommendations that warrant priority or immediate action, and (2) a complete listing of the recommendations.

### **PROGRAM DESCRIPTION**

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The Solano Land Trust will consider accepting mitigation projects that result from the land use approval process, and from environmental quality, natural resource protection, and other relevant laws and regulation. It will work with permitting agencies and project proponents to consider,

prepare, evaluate, execute and perpetually manage mitigation projects. Each project will be evaluated by SLT to ensure that it meets the land trust's goals and funding requirements. The land trust reserves the right to not accept any project.

- » **R1 SLT is creating a mitigation program and will undertake the necessary actions to implement and maintain it.**
- » **R2 SLT will consider and accept mitigation projects that meet its mission, goals and perpetual funding requirements, and which pass screening and evaluation processes.**

### **GOALS**

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In creating a mitigation program, SLT's goal is to advance its mission to preserve agricultural land, open space and natural resources.<sup>7</sup> Its specific objectives are to:

- Create high-quality projects that preserve important lands and natural resources in compensation for the loss or degradation of land and resources due to project impacts.
- Provide long-term management and stewardship of land and related conservation values.
- Create a management plan for each property that SLT holds in fee-title.
- Maintain standards for land conservation projects, tools and organizational operations
- Promote enhanced farming operations and the environmental benefits coming from farming in the county by providing mitigation opportunities or resources to interested landowners (as resources permit).
- Provide lasting benefit to the residents of Solano County through ensuring high-quality mitigation projects, thorough execution, and perpetual management.
- Continue the growth of SLT's conservation, ecological and management expertise and capacity. This specifically includes training as well.

The types of projects that the land trust will consider include those reflected in its mission:

agricultural lands, open space, and natural resources within Solano County. For the purpose of the mitigation program, SLT will consider mitigation projects involving lands and natural resources on the following types of lands:

- **agricultural farm and ranch lands** include land that is used to produce any form of crop, such as row crops, orchards, vineyards, grass or wood, to generate income for the farm or ranch.
- **open space** includes lands containing wildlife habitat, scenic attributes, recreation, or various types of buffers.
- **wetlands** include any lands that have hydrology sufficiently persistent at any time of the year (including ephemerally or seasonally) to have any of the plants and animals known to be indicative of wetlands. This may include any creeks, rivers, lakes, ponds or bay, as well as the riparian and shoreline areas surrounding these water bodies even in urban settings. Common wetland types in Solano County include the "marshlands and sloughs of the Suisun Marsh and the claypan vernal pools of the native bunchgrass prairie".<sup>8</sup>

## **SLT's ROLE IN THE MITIGATION PROCESS**

The land trust has no authority to require or impose mitigation, to determine the type or amount of mitigation required, or to approve a project as fulfilling the permitting agency's requirements. All of these factors are solely within the purview of a permitting agency with regulatory authority. The land trust will have no formal involvement in mitigation projects until the permitting agency determines that mitigation is required and the type and/or amount. Until these decisions are made by the permitting agency, the land trust's involvement will be limited to providing information to the agency or project proponent about the land trust's program, goals, process and costs, and general mitigation opportunities.

After the permitting agency has made its decisions, the land trust will work with the project proponent and agency to prepare, evaluate and implement a project. SLT's capacity and expertise in the process includes:

- experience in land/easement negotiation and preparation, and in executing fee simple and conservation easements.
- some experience in habitat enhancement and restoration, including project design. Such projects may often require additional expertise

depending upon their particular biological, physical, engineering or hydrological requirements.

- professional expertise and organizational capacity to ensure management and stewardship in perpetuity.
- a local presence, which allows a high level of awareness, responsiveness and cost-effectiveness for project implementation and for management and stewardship activity.

SLT has a responsibility to ensure that any mitigation it accepts meets its conservation goals and standards, and that it includes adequate resources for long-term management. The land trust will evaluate each potential project and make a decision regarding its acceptance. It may decline to accept any project.

- ▶ **R3** **SLT's substantive involvement in mitigation projects will not begin until the permitting agency has determined that mitigation is required and the type and amount of mitigation.**
- ▶ **R4** **SLT will individually evaluate each proposed project according to SLT's evaluation criteria, and will make a decision regarding its acceptance.**

» **R5 SLT will identify the project types and sub-types of which it will consider acceptance in order to guide the screening and evaluation processes.**

- purchase of fee title by the project proponent or land trust. If the project proponent purchases the land, it will be subsequently assigned to the land trust.
- assignment of fee title that is currently owned by the project proponent to the land trust

## **TYPES OF MITIGATION PROJECTS**

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The types of projects that SLT will encounter can be organized into four categories. Each of these types has sub-types that will be further delineated below.

- protection
- enhancement
- mixed
- mitigation fees

### **Protection Projects**

Protection projects are the acquisition of real property interest, typically fee title or a conservation easement. The protection must occur in perpetuity to qualify for SLT acceptance. A wide variety of factors will influence the preferred protection tool (e.g., fee title or conservation easement). These factors may include ownership patterns, surrounding land uses, and urban impacts.

**Fee Title.** The fee title to a property can be secured in several ways:

Key concerns with fee title will be to ensure that the deed is properly conveyed, due diligence to examine a variety of factors (e.g., presence of hazardous waste), the size of the property, foreseeable management issues, biologic or agricultural viability, and adequate funding for creation of a management plan and land management in perpetuity. Long-term issues about the management of the property will be addressed through in a management plan for each property.

**Conservation Easements.** For mitigation purposes, a conservation easement can be acquired in two ways:

- purchase of easement by the project proponent or land trust. If the project proponent purchases, it will subsequently assign to the land trust.
- creation and assignment of easement on fee title that is currently owned by the project proponent to the land trust

Key concerns with a conservation easement are drafting that meets current land trust practices, landowner understanding of easement and stewardship, potential for productive relationship with landowner, any concerns raised through the due diligence process, and adequate funding for stewardship and defense. The permitting agency and project proponent are likely to be concerned only with the conservation purposes they are seeking to mitigate. However, SLT may want additional or secondary purposes identified in the easement document so that its ability to retain the easement in future years under changing conditions can be strengthened.<sup>9</sup>

*Easement Holding Issues.* In some instances, the agency that required the mitigation will want to co-hold the easement or hold a reversionary interest in the easement. Co-holding arrangements can be configured in a range of ways. SLT will accept a co-holding arrangement if the terms are acceptable to SLT, particularly with regard to full authority to steward and defend/enforce the easement. SLT may separately account for stewardship and defense funds on its conservation easements, and may manage the funds or contract with a third party to manage the funds.

Another variation that may occur is that the permitting agency (or another public agency, such

as a city) may accept fee title lands in mitigation, and ask SLT to hold a conservation easement. Further, either agency may ask SLT to manage the land. In this case, SLT will negotiate the conservation easement and a separate agreement for managing the property. Its costs for the easement (including stewardship and defense) will be determined, as will the costs of managing the property. The management agreement may be long-term and permanent or it may be on a short-term (e.g., five year) contract basis.

**Conservation Interests Previously Protected.**

Other organizations may have accepted fee title or conservation easements that were required for mitigation in the past, or such properties may be accepted in the future. Examples include public agencies, another nonprofit, or a for-profit mitigation bank. These organizations may seek to assign the properties to SLT for management. As a local manager of land and natural resources for conservation purposes, assignment to SLT may often make sense.

A number of questions arise for such projects, including:

- If SLT has limited resources to evaluate and accept projects, is a property that is already



protected a high priority in terms of carrying out the land trust's mission?

- If the property is already protected, does the additional increment of improved protection or management justify the assignment?
- Is there adequate funding that can be transferred to SLT with the property?
- Is the project advancing a habitat type of concern in the county?
- Does the documentation of the project meet SLT standards, such as the terms of the conservation easement or the existence of a baseline document?

These projects will be considered by the same evaluation criteria as it would any other new protection project with the additional of five additional criteria (see pp. 26-27). Projects that enjoy the highest priority are (1) lands adjacent to lands already owned or managed by SLT, or (2) lands that are part of a landscape identified by the land trust as a high priority (e.g., the vernal pool complex in southern Solano County).

In conclusion, for each of these types of protection projects, SLT has an interest in the project design or negotiations that may commence before SLT can be substantively involved. SLT will encourage project

proponents to not engage in extensive negotiations or transactions until SLT can be involved. SLT's early engagement in such activities will increase the likelihood that the project will meet SLT's requirements and be accepted.

- ▶ **R6 Protection projects are a class of mitigation projects that SLT will consider accepting. Fee title and conservation easements are eligible. Land or easements already held by another entity will be considered but are subject to additional evaluation criteria.**
- ▶ **R7 Protection projects must be in perpetuity.**
- ▶ **R8 SLT will identify priority areas based upon its existing goals and plans, such as its conservation plan for vernal pools.**

### Enhancement Projects

Many mitigation projects involve some form of manipulation of the physical, chemical or biological characteristics on land that may or may not be permanently protected. The different types of

projects can be defined and grouped into several categories. For example, a common set of definitions and categories has been articulated by the U.S. Army Corps of Engineers and is excerpted in Table 1 below.

The definitions apply to the Corps' responsibilities to regulate impacts to aquatic resources, but the definitions readily apply to terrestrial projects as

well. For ease of discussion herein, unless otherwise noted, the term "enhancement" is used to encompass all the types of mitigation projects that consist of manipulating natural characteristics.

SLT's chief concerns about enhancement projects include the project design, who performs the work (e.g., consultant, SLT staff), project oversight, approval of modifications, and interim monitoring.

**Figure 1.**

**U.S. Army Corps of Engineers Definitions** (excerpts)<sup>10</sup>

1. **Creation.** The manipulation of the physical, chemical or biological characteristic(s) present to develop a wetland on an upland or deepwater site, where a wetland did not previously exist. Creation results in a gain in wetland acres.
2. **Restoration.** The manipulation of the physical, chemical or biological characteristics of a site with the goal of returning natural or historic functions to a former or degraded wetland. For the purpose of tracking net gains in wetland acres, restoration is divided into:
  - **Re-establishment.** The manipulation of the physical, chemical or biological characteristics of a site with the goal of returning natural or historic functions to a former wetland. Re-establishment results in rebuilding a former wetland and results in a gain in wetland acres.
  - **Rehabilitation.** The manipulation of the physical, chemical or biological characteristics of a site with the goal of returning natural or historic functions to a degraded wetland. Rehabilitation results in a gain in wetland function but does not result in a gain in wetland acres.
3. **Enhancement:** The manipulation of the physical, chemical or biological characteristics of a wetland (undisturbed or degraded) site to heighten, intensify, or improve specific function(s) or to change the growth stage or composition of the vegetation present. Enhancement is undertaken for specified purposes such as water quality improvement, flood water retention, or wildlife habitat. Enhancement results in a change in wetland function(s) and can lead to a decline in other wetland functions, but it does not result in a gain in wetland acres. This term includes activities commonly associated with enhancement, management, manipulation, and directed alteration.

Most of these concerns are rooted in the fact that enhancement activities will typically occur on lands owned by SLT; it has a responsibility to ensure that projects are well-designed and fully implemented, thus striving to avoid unintended consequences. These projects will meet identified needs on SLT lands, and not be determined solely by the preferences of the permitting agency. The land trust wants to avoid a “following the dollars” phenomenon and to ensure that unnecessary or duplicative work is not undertaken.

*Identification of Enhancement Opportunities.* An obvious source for enhancement projects is on lands owned by SLT. This program includes the recommendation that SLT adopt a goal to create management plans for its current and future lands. Each management plan will include identification of possible enhancement projects. For example, the land trust owns Rush Ranch, and it is about to begin creation of a management plan for the ranch. The management plan should identify specific enhancement needs and opportunities. If the management plan identifies opportunities for enhancing red-legged frog habitat, any mitigation projects with this need can be directed to the opportunity at Rush Ranch.

Sites other than SLT’s properties also exist for enhancement projects. One source to be explored

fully is enhancement opportunities on lands in private ownership to which SLT holds a conservation easement. *Only at the request of the landowner*, and according to available resources, SLT will consider working with interested landowners to generate a list of possible projects on easement-protected properties. This process can have considerable brokering costs for SLT as well as possibly creating a new permanent obligation upon SLT to monitor the improvement in perpetuity. However, it can be an additional benefit that SLT can offer to landowners who have previously sold or donated a conservation easement to the land trust. One cost-efficient strategy may be to include this task as part of creating a baseline document.

SLT can also identify lands that may be suitable for enhancement projects where the landowner is willing to consider both enhancement and permanent protection (e.g., conservation easement). With this list, SLT would have a ready list of possible sites that can be matched to the mitigation needs of project proponents. This process would act as an additional vehicle to conserve important conservation lands in the county, and would provide a service to landowners. However, SLT’s labor would have to be supported and it could detract from enhancement projects on SLT’s lands.

*Delayed Acceptance of Projects with Enhancement Element.* Some projects may have initial periods of 5 or 10 years during which the project proponent is responsible for enhancement or habitat construction. After this period, it may be contemplated that SLT will assume responsibility for the project. In projects of this type, SLT may impose conditions, such as:

- The permitting agency must provide final approval of the mitigation project and completion of all requirements associated with it. This is often done through issuance of a final letter of approval.
- SLT will inspect the property and meet with the landowners (if applicable) as part of its evaluation process.
- During the interim period, and depending upon the project, the project proponent may have to provide SLT with an annual stipend to support staff to accompany the project proponent (or its consultant) to evaluate the project's progress, identify and discuss problems, and so forth.
- SLT will reserve the right to decline to accept the project at the end of the interim period in the event that the project is not functional or for other reasons. In such cases, any endowments will be return and SLT's relationship to the project will end.

**Projects on Non-SLT Lands.** The land trust may also be asked to consider enhancement projects on lands held by organizations other than SLT. This is a very low priority for SLT, but it may, on occasion, warrant consideration. SLT's concerns include the strategic value of the project to the organization's mission, the capacity of SLT to perform the work, monitor the project, impact on the land trust's reputation, and the land trust's interim and/or long-term involvement in the project.

Factors in SLT's consideration will include:

- Is a long-term involvement contemplated for SLT and/or will the property be assigned to SLT at a future point?
- Is the property contiguous with SLT lands?
- Does the property contain critical resources within the county?
- Does the project's conservation value justify diversion from other SLT projects?

**Habitat Creation.** These projects seek to create habitat with certain characteristics that do not currently exist (see Figure 1). This can be a controversial area with some types of projects not well-understood and mixed track records of success. Yet, some types of creation projects can be well understood and have good rates of success. The

land trust recognizes some of the controversies in this area, especially in the creation of wetlands.

Even in those cases that SLT chooses not to be involved in a habitat creation project, other entities in the county will undertake such projects. SLT will consider accepting such projects for long-term holding and management if they are successful and stabilized. SLT will evaluate these projects as it would any other protection project.

- ▶ **R9**    **Enhancement projects are a class of mitigation projects that SLT will consider accepting. Enhancement, restoration and rehabilitation projects are eligible.**
- ▶ **R10**    **Creation projects are also eligible for consideration although complex projects may require additional evaluation time or criteria. SLT will also consider management and ownership of creation projects after they have been successfully created and stabilized.**
- ▶ **R11**    **Enhancement or restoration projects on lands held by other organizations are a low priority for SLT but can be considered.**
- ▶ **R12**    **Management plans will be prepared for (1) SLT's existing properties, and (2) any new mitigation properties accepted. New properties must include funding for a management plan.**
- ▶ **R13**    **Each management plan will include identification of enhancement and restoration opportunities for the property. SLT will review the plans periodically.**
- ▶ **R14**    **As resources and priorities allow, SLT may create a list of enhancement needs on properties on which the land trust holds a conservation easement. This will be done only where the landowner requests consideration of enhancement projects, and the list will be created in cooperation with the landowner. If resources and priorities allow, SLT may also consider creating a list of non-protected properties where the landowner may be interested in mitigation opportunities.**
- ▶ **R15**    **SLT's priority for enhancement projects are mitigation projects that**

will occur on SLT's fee-title properties.

- ▶ **R16** Project proponents will be encouraged to propose projects that are consistent with needs identified in management plans.

**Mixed Projects**

Some projects contain both protection and enhancement elements, such as permanently protecting a property through fee title acquisition and undertaking enhancement activities at the same time. This is a common occurrence in mitigation projects, and such projects have already been proposed to the land trust.

In reviewing these proposed projects, the land trust will distinguish the protection and enhancement elements and evaluate each according to the criteria for that type of project. Funding for these projects will have to be appropriate to cover the full range of costs for all elements.

- ▶ **R17** Mixed projects are a class of mitigation projects that SLT will consider accepting.

- ▶ **R18** Each component of a mixed project (i.e., protection, enhancement) will be evaluated according to the evaluation criteria for that component.

**Mitigation Fees**

Mitigation fees are a payment of cash (or other liquid assets) by the project proponent. Rather than require specific performance, the project proponent is able to move forward with his/her project after conveying the mitigation fee. The fee is held until a mitigation project is fashioned and executed.

Mitigation fees fall into three categories:

- Mitigation fees – ad-hoc, program
- Mitigation banks
- Legal Settlements

**Mitigation fees: Ad-Hoc Fees.** Ad-hoc fees are negotiated for an individual project. The fees are disbursed to SLT for protection or enhancement types of projects. An ad-hoc fee agreement will be evaluated as would any project type. Fees can be disbursed to SLT for protection or enhancement types of projects. Fees can be desirable for several reasons:

- to mitigate “small” impacts that are insufficient for supporting a viable, stand-alone projects
- to direct projects to particular areas to assemble large protected areas that offer greater biological viability and management efficiencies
- to allow a project proponent to move forward when a mitigation project will take some time to identify and execute

On the other hand, mitigation fees also raise at least two concerns. One concern is whether there are good projects that can be executed if mitigation fees are available. In some built-out areas, there may not be viable alternatives close to the project location. Second, there needs to be the organizational capacity and systems to expend the fees in a timely manner. Otherwise, the fees can languish and not provide the mitigation intended.

A common example of how a fee project works is that the permitting agency collects a fee that is calculated to cover the cost of the mitigation project (e.g., land acquisition), the transaction costs, and the management endowment. Approval is granted for the project proponent to proceed. The land trust will seek an appropriate opportunity (e.g., suitable fee title or easement to purchase or an enhancement opportunity) in response to the mitigation sought. The land trust creates the

project and the permitting agency approves use of the funds.

*Timing.* There is always a timing issue in fee projects. The project is allowed to proceed although the mitigation is not in place. Although SLT will work diligently, it is not SLT’s responsibility to ensure that the mitigation conditions required by the agencies are achieved. For instance, the permitting agency may have required the purchase of a conservation easement on 20 acres of agricultural lands with prime soils. However, adequate funding for 20 acres may not have been collected or changes in land prices between the fee collection and the easement purchase may reduce the acreage that can be purchased. SLT cannot forego recovery of its expenses to compensate for inadequate acquisition funds.

*Process.* Another important issue is the process between the land trust and the permitting agency in preparation and approval of the projects. The project goals and evaluation criteria needs to be clearly understood between the two. This will prevent the land trust from fashioning projects with little chance of approval. However, circumstances unforeseen by the agency staff can arise, such as political pressure against an acquisition. The question of what occurs if the project is not

approved ultimately should be addressed as part of the overall process.

On the funding question, the standard costs associated with assuming property or management responsibility (e.g., management in perpetuity, easement defense, administration) needs to be incorporated as part of the fee schedule. Similarly, the land trust will incur transaction costs in identifying, negotiating and executing projects, and these costs must also be an approved expense for SLT to recover.

**Mitigation fees: In-Lieu Fee Program.** In contrast to ad-hoc mitigation fee, an in-lieu fee program takes a programmatic approach to fees by creating a process in which a fee option is routinely available to project proponents for certain types of mitigation projects. For example, a certain city may say that the conversion of lands with prime agricultural soils will have to be mitigated, and that the project proponent can provide a per-acre fee rather than specific mitigation performance.

The amount of the fee is determined by the mitigation required and some amount per unit, such as 10 acres of mitigation required at a rate of \$1,000/acre. However, the specific mitigation project is not determined at the time the fee is collected. For example, an in-lieu fee program may

require a project proponent to contribute a per acre amount for each acre of mitigation required plus a percentage for transaction costs (e.g., negotiation, legal, appraisal) and management costs. The fee structure of the program will have to demonstrate and document its nexus to the project's impacts and reasonable project costs.

Permitting agencies can establish in-lieu fee programs to which project proponents can contribute. If there is any interest by the permitting agency, SLT can work with the agency to design and implement the program.<sup>11</sup> The land trust will often have useful information to contribute. Additionally, if SLT is intended as the one to create projects for the in-lieu fee program, it will have considerable interest in the program requirements, processes and costs.

**Mitigation Banks.** A bank can be established by for-profit or non-profit organizations and must be approved by the appropriate state and/or federal agencies. It typically requires a considerable up-front expenditure by the organization. Some mitigation banks also involve the creation of new wetlands or habitat where it did not exist previously. Others purchase land with intact resources. A permitting agency can approve the purchase of "credits" by a project proponent in relation to the mitigation requirements. The mitigation bank sells



credits to project proponents to capture the acquisition and management costs of a property. The advantages of mitigation banks are that it allows better conservation planning and will focus upon protection of a large area as opposed to small, scattered mitigation sites.

For SLT, there are several concerns: the land trust does not have the up-front expenditure required to establish a bank, banks have been overbuilt and underutilized in some counties, many mitigation banks are created and operated as a business operation by for-profit corporations which could impact SLT's identity as a nonprofit corporation.

Most of these concerns are insurmountable for the land trust at the present time. Therefore, SLT will not anticipate creation of mitigation banks for the foreseeable future. If needs or opportunities change, this idea could be reconsidered.

Even without operating a mitigation bank, SLT may have a role to play. One or more mitigation banks are currently being proposed within Solano County. If the banks are built, the credits may eventually be exhausted and the owner of the bank will look for a local entity to assume ownership for management purposes.<sup>12</sup> SLT will consider acceptance of such "sold-out bank" that meets the land trust's mission. The project would have to be gifted to SLT with the

appropriate funding for management in perpetuity. It would be evaluated as any other protection project. Although it would not then be serving to mitigate a proposed project, it was nevertheless rooted in the mitigation process.

**Legal Settlements.** Legal settlements are sometimes made in cases involving damage to the environment or the breaking of environmental laws. The settlements may include punitive damages. The courts determine the amount and parameters for the use of a settlement. On occasion, as it has in the past, SLT may receive legal settlements.

SLT has no ability to influence court decisions, although the land trust can be prepared to respond to inquiries. For example, SLT's can have its list of possible mitigation projects available (e.g., enhancement projects identified in SLT's management plans). SLT can also self-identify as an entity for receiving such settlements and provide descriptions of its programs, geographic boundaries, expertise and so forth on its website.

As with the other projects, SLT will have transaction and administrative costs in utilizing legal settlements, and the resulting projects will have perpetual management obligations. These costs should be identified as with any other project. However, it should be clear in any documentation

that SLT is flexible on these points. A court holds authority to shape legal settlement funds, and it may not wish to allow transaction or management costs. In such cases, the land trust may choose to raise the transaction and management costs from other sources.

- ▶ **R19 Mitigation fees are a class of mitigation projects that SLT will consider accepting. Ad-hoc fees, in-lieu fee programs and legal settlements are all eligible for consideration.**
- ▶ **R20 SLT is willing to explore creation of in-lieu fee programs with permitting agencies. Any programmatic agreements will be memorialized.**
- ▶ **R21 SLT does not anticipate creating mitigation banks in the foreseeable future. It will consider ownership of sold-out mitigation banks, and consideration will follow the standard evaluation process as will any other protection project.**

**PROJECT EVALUATION CRITERIA**

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SLT will evaluate each project independently to determine its suitability and viability for acceptance. The particulars of an individual project may necessitate additional factors of evaluation. SLT has identified the following factors for evaluating projects:

1. **SLT Mission and Priorities** – Does the project further SLT’s mission and priorities?
2. **Funding** – Is there adequate funding for all immediate and perpetual costs of the mitigation project?
3. **Expertise** – Does the land trust have the knowledge to work with the project proponent, evaluate, and manage the property effectively? Does the proposed mitigation project require additional staff and/or specialized knowledge or expertise?
4. **Existing Plan** – Does the property fall within an existing land trust plan, such as SLT’s Agricultural Conservation Easement Plan, or is it in an area identified by SLT as high conservation priority, such as in and around Suisun Marsh, the vernal pool complex south of Dixon, the tri-city and county cooperative planning area, or the bay-delta area? Is the property in an area

identified by another conservation organization as high conservation priority?

5. **Consistency with Existing Requirements** – Is the mitigation project consistent with the land requirements, obligations to donors, contract terms, and management regimes for the property. (This is primarily applicable to enhancement projects.)
6. **Other Values** – Does the project have other conservation values not associated with the mitigation requirements, but which SLT values, such as public access, historic or cultural values?
7. **Due Diligence** – Are any problems discovered during the due diligence process, such as hazardous materials?
8. **Project Size** – Is the property sufficiently large to achieve its purposes? Does the size impose disproportionate management costs? Small properties can have very significant conservation values, such as riparian corridors or properties that buffer riparian corridors. However, as a general class, small properties are less likely to be biologically or agriculturally viable, and tend to require proportionally greater management expenses.

9. **Contiguity** – Is the project adjacent to a property already protected by SLT or by another conservation entity? Properties that are contiguous with other protected properties are of higher conservation value because they can function as part of a larger protected landscape. It is also related to manageability.
10. **Manageability** – Will the property enjoy management efficiencies?
11. **Surrounding Land Uses** – Are the surrounding land uses compatible with the project’s conservation purposes? Are other surrounding land uses foreseeable (e.g., residential subdivision)? Will the current or future land uses negatively impact the property or increase management costs dramatically?
12. **Landowner Relations** – Does the current landowner understand and support SLT’s stewardship responsibilities (in the case of a conservation easement)?

**Special Criteria.** For properties that already have some form of protection, but which the holding entity may seek to assign to SLT, the following factors will also be considered:

13. **Priority** – Is the property a *high* priority in terms of carrying out SLT’s mission?

- 14. **Justification** – Does the additional increment of improved protection or management justify the transfer?
  - 15. **Funds for Transfer** – Is there sufficient funding for the costs of management in perpetuity? (In many cases, the other entity may not have secured adequate funds originally.)
  - 16. **Regional Concern** – Is it advancing protection of a particular habitat type(s) or resource of concern in the county?
  - 17. **Existing Documentation** – Does the documentation meet SLT standards, such as the terms of a conservation easement or the existence of a baseline document?
- » **R22 SLT will evaluate each project individually to determine its suitability and viability for acceptance. SLT will utilize a set of evaluation criteria and any additional factors necessitated by the particulars of the project.**

**DECISION-MAKING PROCESS**

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Mitigation projects will have a wide variety of elements and time frames. Project proponents will also need to know what SLT’s process is for evaluation and decision-making.

SLT’s general process for mitigation projects is for the Board of Directors to adopt the general process, criteria and routine fees. Relying upon this policy direction, the Mitigation Committee will (1) evaluate individual projects and make recommendations to the full board, and (2) annually review the mitigation program and fees and make recommendations to the board as needed. Staff will prepare the screening reports and project portfolio, and work with the mitigation committee and board of directors to secure decisions and execute implementation.

The decision-making process consists of three phases with eight steps. SLT will follow the specific steps to consider any proposed mitigation projects. These steps are:

- 1. Staff receives initial inquiry and project proponent submits application.** A project proponent will contact SLT about its willingness and process to accept

mitigation projects. Staff will send an application packet to the project proponent. It consists of a set of questions to elicit information about the proposed project and the project proponent. Staff will spend a minimum of time on the phone or in meetings in advance of the project proponent reviewing the packet or submitting an application.

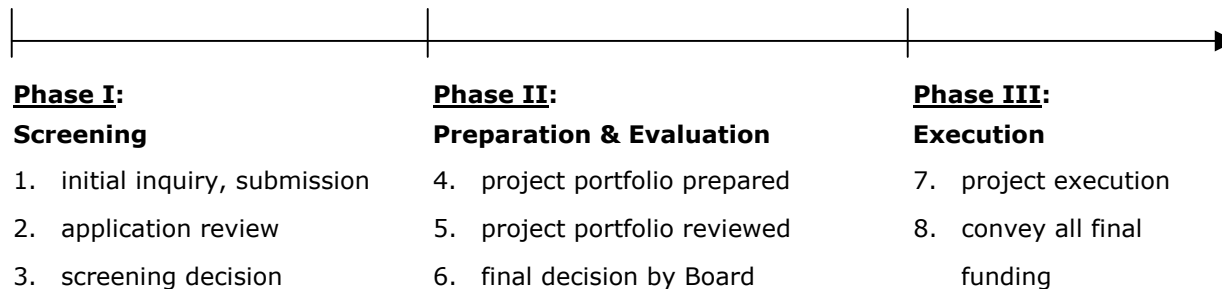
Any entity can submit an application to SLT. Projects clearly inconsistent with SLT’s mission and evaluation criteria for mitigation projects may be advised about the low chance of success. For the application to be reviewed, three items must be received by SLT:

a completed application form, application fee and signed agreement.

- 2. Application Review.** SLT staff will review each application that is submitted, with the required information and fee. As needed, staff will seek additional information from the project proponent, permitting agency(s) or others. Staff will confirm that project is ripe for consideration, i.e., the mitigation requirements have been determined by the permitting agency. Staff will prepare a **Screening Checklist** that includes the information from the project proponent as well any other pertinent information collected by staff.

## Figure 2. Project Phases

A proposed mitigation project will move through a three-phase process. All projects may not progress through all of the phases if it is not approved for further consideration or acceptance. The phases are:



**3. Screening Decision by Mitigation Committee.** Using the information provided and SLT's criteria for mitigation projects, staff will work with the Mitigation Committee to review the Screening Checklist. The Mitigation Committee will approve or deny the application. As a general practice, the Mitigation Committee will make this decision, but it can make a recommendation to SLT's Board of Directors on any proposed project.

Approval of the application means that SLT will work with the project proponent to further consider the project, collect more information, participate in preparation of the project (e.g., easement drafting), and evaluation. A denial of the application means that SLT is not interested in participating in any further evaluation of the project.

If the project is accepted for further consideration, the project proponent will be notified. Staff will identify the project as a "major project" that requires the standard deposit, or as a "minor project" whose deposit will be evaluated on a case-by-case basis. A work agreement and estimate will be provided to the project proponent with a request for a deposit to begin the next phase. If the project is denied, the project proponent is notified.

If a project is accepted at this stage, there is an assumption that it is likely to be ultimately accepted by SLT. However, it is important to understand that SLT provides no guarantee. A project may appear to meet all of SLT's criteria at the outset. As it is fashioned by the project proponent and evaluated by SLT, changes may occur or decisions made that substantively affect the project. For example, if an easement is to be assigned, the easement document may have terms that are unacceptable to SLT, or sufficient funding for a management endowment is not available. SLT will work with the project proponent diligently and in good faith to find a way for a mitigation project to be accepted.

**4. Project Portfolio is Prepared.** For projects that pass the screening, the project proponent will demonstrate its willingness to move forward with SLT by submitting the written agreement and deposit to SLT. Upon receipt of these two items, SLT will begin working with the project proponent and permitting agency to create a ***Project Portfolio***.

If it is a protection project, the specific properties will be identified, legal documents drafted, perpetual management costs calculated, and so forth. For enhancement projects, a detailed

project design plan will be prepared (usually by the project proponent's consultants), locations and suitable contractors identified, and so forth.

The Project Portfolio will be reviewed by the permitting agency(s) to identify any potential problems and receive their approval. The goal is to complete all the necessary work so that if SLT accepts the project, implementation can begin immediately.

Staff will prepare the Project Portfolio, although the project proponent or the agency may provide various pieces of it. Staff will seek the information it requires for analysis and preparation of the project. It may consult with the mitigation committee or the board, as needed, as well as contracting for needed professional services (e.g., attorney, ecologist).

**5. Project Portfolio Reviewed by Mitigation Committee.** When a Project Portfolio is complete, the Mitigation Committee will evaluate the mitigation project and make a recommendation to the full board regarding acceptance or rejection. The Mitigation Committee will be guided by the evaluation criteria for SLT's mitigation program.

**6. Final Decision by Board of Directors.** The Board may accept or reject the recommendation of the Mitigation Committee, it may request additional information before making a decision, it may provisionally approve a project subject to specific directives, or it may undertake a detailed review of the proposed project.

Staff will notify the project proponent of the Board's decision. If more information is needed from the project proponent, it will be collected and conveyed to the Board for a final decision. If the project is provisionally approved, staff will initiate steps to satisfy the board's directives, such as further negotiations. If the project is rejected, SLT will provide a final accounting of its services along with a refund from any unused amount of the deposit.

**7. Mitigation Project Execution.** Once the project has been approved, the agreement between the project proponent and SLT will be executed. The project proponent will provide funding to SLT according to the agreed upon timeline. Property interests can be executed and conveyed to SLT. If applicable, contractors will be hired. Work can begin on any enhancement projects, and upon capital improvement or management tasks for protection projects.

**8. Funding Conveyed.** A final step in a mitigation project will often be conveyance of all funding for the project.

This three phase, eight-step process may seem clear and distinct. However, some projects will present unusual circumstances or needs that will require a different process. SLT reserves the right to vary its process if needed.

**An Expedited Decision-Making Process.** There are some mitigation projects for which SLT wants to consider an expedited decision-making process. These are projects that SLT identifies as high priority projects. For such projects, the final decision would rest with the Mitigation Committee rather than the board. Examples of the types of projects that could be considered are:

- Enhancement projects that meet an identified need in a SLT management plan.
- Protection projects in specific areas identified in priority areas of SLT conservation plans.
- Mitigation fees that are part of an adopted in-lieu fee program with a permitting agency.
- Protection properties that employ SLT's model easement.

SLT will establish its mitigation program and complete several projects through the regular decision-making process before implementing any expedited processes.

- ▶ **R23** **SLT will undertake a three-phase decision-making process of (1) screening, (2) preparation and evaluation, and (3) execution. Eight specific steps are identified in this process, and key decisions come at the end of steps three and six.**
- ▶ **R24** **The Mitigation Committee can make recommendations to the Board at any point. It is anticipated that in the typical project, the Committee will approve or reject projects at the end of step three, and that the Committee will make a recommendation on project acceptance for the Board of Director's decision in step six.**
- ▶ **R25** **SLT will prepare brief legal agreements that project proponents will sign (1) as part of submitting a screening application and (2) before SLT commences the preparation and evaluation phase. The purpose of**



**the legal statements is to expressly state and memorialize the terms under which SLT will consider a mitigation project.**

- **R26 SLT will consider creation of an expedited decision-making process for high-priority types of projects. The qualifying types of projects and specific steps in the process will be described in detail and presented for consideration and adoption by the Board of Directors.**

### **FUNDING**

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The creation and perpetual management of mitigation projects require funding. The costs of an individual project will vary according to the specifics of each project. Each type of project has a set of costs associated with it. The variation will be considerable between different types of projects.

SLT will have two basic fees for reviewing and evaluating projects: an application fee and a fee for preparation and evaluation of a project. The fees fund the time and expenses of SLT to work on proposed mitigation projects. They will be reviewed regularly by SLT and revised as needed.

Beyond the fees, a set of costs associated with the execution and perpetual management of the mitigation project will be identified. The costs for project implementation and perpetual management of the project will be calculated for each project. Projects will vary considerably, and not all costs can be identified in advance.

The following types of costs will be typical and can be anticipated:

**Project Screening.** SLT must screen each project to determine if it appears to be worth further preparation and evaluation, and whether it has a reasonable chance of final acceptance by the land trust. SLT will provide an application form and information about SLT's mitigation program to any interested party. Upon receipt of the application form and fee, SLT will review the project to determine if it passes the screening. A flat, non-refundable fee is charged for project screening.

**1. Preparation and evaluation of mitigation project.** SLT will work with the project proponent and the agency to prepare a project portfolio for SLT's evaluation. SLT's final decision about acceptance of the project will be based upon the portfolio. A deposit from the project proponent will be required to begin this phase. SLT will charge a billing rate for its work

on the project against the deposit. If the project requires more work or additional expertise than the deposit would support, additional funds will be requested. If the project is accepted before the initial deposit is exhausted, the balance will be returned.

**2. Acquisition costs.** Protection projects require the purchase, assignment or granting of fee title lands or conservation easements. In cases of purchase and depending upon the project design, the project proponent may provide funds to SLT for the purchase or buy the land/easement itself. Acquisition costs will often include legal, appraisal, assessment (e.g., baseline documentation) and other expenses. SLT can provide figures to project proponents of typical land and easement costs for different parts of the county or types of land (e.g., vernal pool).

**3. One-time or capital improvement costs.** Protection projects are likely to have certain costs beyond acquisition. These one-time costs may be of several types. One, they may be related to assessment and management of the property. Examples may include preparation of baseline documents or management plans, or a one-time acceptance fee for accepting a conservation easement.<sup>13</sup> Two, they may be

expenses related to establishing proper management of the property and realization of conservation values, such as signage, removal of structures, construction of fencing or public use facilities. Management may also require specialized equipment or contribution to equipment purchases. Three, one-time expenses may be for enhancement of the property's natural resources, such as erosion control or removal of invasive non-native vegetation. (Depending upon the particulars of the mitigation project, these costs can also be recurring and so may be included in long-term management funds.)

**4. Management and stewardship in perpetuity.** SLT is assuming responsibility for the management of land and stewardship of conservation easements in perpetuity. These costs will occur each year in perpetuity. To meet these obligations, SLT requires funds that can be invested to generate an annual income to support the perpetual management and stewardship of the property. SLT will calculate the likely annual costs, figure a reasonable rate of return<sup>14</sup>, and include a small amount whose income can be reinvested to maintain the purchasing power of the fund.

**5. Easement defense.** Conservation easements will occasionally require legal proceedings to defend or enforce the terms. When mitigation projects include a conservation easement, funds for easement defense will be required.

**6. Enhancement element.** The focus of an enhancement project is the tasks that are necessary to enhance the natural resources and/or natural functions of the property. The costs will vary widely depending upon the nature of the project. Projects can include planting/seeding, grading, fencing, bank stabilization, vegetation removal, stock pond enlargement, construction and so forth. The scope of the projects may be very sophisticated restoration of habitat that has been substantially degraded or destroyed, or it may be projects more akin to management to ensure the continued viability of a habitat type of species. In many cases, the project proponent may contract with a consulting firm to create an enhancement plan. In all cases, SLT reserves the right to approve the contractor, the enhancement plan, and to hire, if necessary, professional services to review the plan. If SLT does not perform the work itself, it will still require resources to monitor progress and completion of the project.

**7. Short-term management.** It is expected that enhancement projects will be occurring on lands already owned by SLT or that SLT will assume ownership of in the near future. Enhancement projects will often require additional management for a short period (e.g., 5 years) to ensure their success. For example, newly planted vegetation may require monitoring until established, monitoring of riparian enhancements through the first few seasons of precipitation to ensure that the enhancements perform as intended, or monitoring of areas where invasive non-native species were removed to eliminate new recruits. Contractors may perform the work, although it is expected that SLT will typically undertake the short-term management.

Some projects may not perform as designed. To assure the necessary resources are available to respond to problems, SLT may require the project proponent to provide a remediation plan as part of the mitigation project's design or contingency resources. Construction bonds are often used, but they are not readily usable (can be difficult to cash and use). An alternative is for the project proponent to set aside a contingency amount into a Certificate of Deposit that the permitting agency holds authority to release. After the short-term management

period ends, the contingency resources are released back to the project proponent.

- 8. Other Costs.** SLT will incur other costs in relation to accepting and managing mitigation projects. For example, fee title properties will have property taxes associated with them. SLT must also maintain adequate insurance to cover its liability both for its employees and volunteers, as well as the general public that may visit the property (legally or not).

It should be noted these costs are only for SLT. The permitting authority may impose additional costs upon the project proponent in relation to a mitigation project. For example, projects that mitigate for the loss of wildlife may include a component of performing species counts or other tasks to monitor the effectiveness of the project. Depending upon the nature of the requirements, the project proponent may contract with SLT or a professional firm for such services.

- ▶ **R27** **SLT will establish specific fees and billing rates for the mitigation program. The fees and rates will be regularly reviewed and adjustments made as needed.**
- ▶ **R28** **The two primary costs to a project proponent before SLT makes a final**

**decision on project acceptance is (1) a one-time, non-refundable fee that accompanies the application before any screening of the project can occur, and (2) a deposit for work to be performed in the preparation and evaluation phase by SLT and/or its sub-contractors.**

- ▶ **R29** **The project proponent will also be required to fund the full costs of the mitigation project. The amount will be determined by the particulars of the project.**





# 3

## PROGRAM IMPLEMENTATION

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There are a number of actions SLT will need to undertake to implement the program. These can be organized in the following way:

- Staffing and Organizational Requirements
- Management of Financial Resources
- Participation, Outreach and Education
- Preparation of Model Easements
- Preparation of Enhancement Opportunities

### **STAFFING AND ORGANIZATIONAL REQUIREMENTS**

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Undertaking a mitigation program will require increased personnel resources and some organizational changes. Types and levels of personnel resources will grow and change from time-to-time as SLT's portfolio of mitigation projects grows.

#### **Personnel Resources**

To carry out the work of the program, SLT will need personnel resources to meet at least four types of expertise and knowledge: (1) program management, (2) land management, (3) ecological restoration, and (4) legal. The first can be an SLT employee or a contractor to manage the program.

This person will work with project proponents and agencies, collect information and evaluate projects, identify and supervise any necessary consultants, and coordinate the organization's decision-making (e.g., board of directors and mitigation committee). Based on the level of mitigation inquiries and projects the SLT is already receiving, a part-time staff person or contractor could be supported now, and the position is expected to quickly grow into a full time position. This position will require considerable knowledge and communication skills. Ideally, the person will be knowledgeable and experienced in ecology and restoration, should have experience in budgeting and forecasting costs, as well as enough knowledge to review and understand policy, regulatory processes and legal agreements. The program manager will need good communication and negotiation skills.

Additional land management staff will inevitably be needed. Land managers, experienced in land and natural resource management, are another likelihood. The particular configuration of staffing resources in this area will be determined by a regularly reviewing the needs of the mitigation properties.

Third, most projects are likely to require some additional professional expertise, such as restoration ecologists and attorneys. For example, attorneys will be needed to draft and/or review property deeds, conservation easements, contracts, and other legal agreements; restoration ecologists will be needed to either design restoration projects or review the plans prepared by the project proponent's consultants. The program manager would determine the expertise needed for any individual project, and hire the appropriate professionals on a contract basis.

#### **Board and Committee Roles**

SLT will also need to consider the additional workload that the mitigation program will place on the board of directors. The board will have additional matters of policy and programs to consider. For example, the board will identify the policies to guide the implementation and management of the mitigation program, and it will need to regularly review fees and outreach materials for the program, as well as any programmatic agreements with permitting agencies. Additionally, the mitigation program also requires board approval of each project. The board may choose to carefully understand the particulars of each project.

To maintain a manageable workload, the board will make the current Ad-Hoc Mitigation Committee into a standing committee. SLT has other permanent committees to which a scope of authority is delegated. The proposed responsibilities of the committee would include:

- Reviewing Screening Checklists and approving or rejecting projects for further preparation and evaluation.
- Reviewing Project Portfolios and making a recommendation to the board about final acceptance or rejection of each mitigation project.
- Working with staff throughout the process of screening, preparing and evaluating mitigation projects.
- Regular reviewing the overall mitigation program, including fees, personnel resources, and communication strategies and materials. Make recommendations for board action as needed.
- Consider programmatic agreements with agencies, such as in-lieu fee programs or agreement on model conservation easements.
- Design future components of SLT's mitigation program, such as a streamlined decision-making process for some types of projects.

The workload of board members who sit on the Mitigation Committee will increase (unless they reduce their contributions to other areas of the organization). However, the delegation of work to the Mitigation Committee will reduce the total time expenditure of the Board of Directors.

It is useful for staff to have a sounding board to discuss some of the more questionable or controversial projects or project elements. The staff will sometimes be faced with decisions that require a very rapid response to which committee members can respond. On the other hand, a committee can require considerable time and attention by the staff. It is recommended, therefore, that the mitigation committee remain either fairly small or that a small number be designated for immediate and ongoing contact by staff.

- ▶ **R30 SLT will immediately dedicate a part-time staff or contract position to the mitigation program.**
- ▶ **R31 As SLT's mitigation program changes, the need for personnel resources will be regularly reviewed and evaluated.**
- ▶ **R32 The Mitigation Committee will be created as a standing committee of the SLT board to provide oversight**

**of, and direction to, the mitigation program. A scope of authority and specific duties will be identified. It will remain small to minimize staff management time and to provide ready availability to staff.**

## **MANAGEMENT OF FINANCIAL RESOURCES**

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### **Financial Management**

Several issues arise in the area of managing the financial resources that will accompany the mitigation projects. First, the land trust will need to evaluate its financial and accounting systems to ensure that distinct and detailed records (including timesheets) can be maintained for each mitigation project. The one-time costs for each project will need to be tracked separately.

It will be critical that SLT establish systems that facilitate the incorporation of all expenses associated with the mitigation programs and the land trust's billing rate for personnel into project costs. For example, the mitigation program will be using office space, equipment, telephone, fax, internet, supplies, and reception and accounting services.



Considerable time can be required to manage the various consultants to a project. Without careful attention, it will be easy for the organization to slip into a position of providing indirect support for the projects.

### **Endowment Issues**

Another set of issues arises for the funds collected for management and stewardship in perpetuity. These issues are more complex and difficult to resolve. For SLT's current, non-mitigation lands and easements, it is SLT's policy to co-mingle management and stewardship funds. Ideally, this policy would continue for mitigation projects. For the properties and easements that come through the mitigation program, SLT would prefer to create two funds: one for annual management and stewardship, and a second for easement defense. The management and stewardship funds would be drawn upon for all lands and easements that are received through the mitigation program. The same would be true for the easement defense funds.

However, difficulties can arise from the permitting agencies. Some agencies want the "endowment" for *each* mitigation project held and managed separately. More problematically for SLT, some will want to hold the endowments themselves and reimburse SLT on a periodic basis for its costs.

Unfortunately, this system is not responsive to the realities of land management nor has its implementation for other non-profits worked well.<sup>15</sup> It also implicitly gives the agency final authority about management, stewardship and legal defense long after the mitigation has been implemented – SLT is left with responsibility for the lands and easements but without the assured authority to act. If such practices are desired by the permitting agency, SLT will incorporate it as a factor in the individual evaluation of the mitigation project.

### **Investment Policy**

Finally, SLT needs to create and/or review its applicable investment policy and strategy for management of the funds. The agencies may want to review the policy(s) and some may want to approve it. Project proponents may be interested as well.

- ▶ **R33 SLT will evaluate its current financial and accounting systems, and establish the appropriate systems for creating and maintaining sufficiently detailed records for each mitigation project.**
- ▶ **R34 SLT will establish two funds into which mitigation funds (whether related to performance specific**

**projects or mitigation fees) will be deposited: (1) management and stewardship, and (2) easement defense. If permitting agencies want other arrangements, these will be considered on a case-by-case basis and will be a factor in project evaluation.**

- » **R35 SLT will prepare and adopt an investment and management policy for mitigation-related funds.**

## **PARTICIPATION, OUTREACH, AND EDUCATION**

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### **Participation**

The mitigation program requires that SLT build relationships with organizations with whom it has had limited or no contact and to interact in new areas. The obvious example is to begin and maintain relationships with permitting agencies. These agencies exist at a local, regional, state and federal level. SLT will need to become knowledgeable about the law, regulation and processes of the agencies, and in turn, educate them about SLT's program and process. From the

agency perspective, it wants to see the lands and resources protected or enhanced. SLT is assuming a responsibility that the agency would often rather not have. The basis exists for cooperative relationships to be built.

Similarly, SLT will have to participate in deliberations and planning processes that affect its mitigation programs. There is wide latitude in how mitigation is structured and implemented. To the extent practical, SLT will want to provide information and comment to increase the likelihood that the requirements are informed by SLT's practices and policies. A local example of a process underway is the Solano Multispecies Habitat Conservation Plan and Natural Community Conservation Plan. SLT's involvement could inform the process on subjects such as project types, eligible costs, financial support for long-term management and defense. Other likely examples include Solano County, its cities, and federal, state and regional agencies. Some of the agencies have or may adopt policies related to mitigation by means of their land use regulations.

### **Outreach and Education**

As noted at the beginning of this report, undertaking a mitigation program can have repercussions for the land trust's identity. It is important that SLT take

the initiative in communicating its program, role in the process, and rationale for accepting mitigation projects. It will consider several audiences and prepare a communication strategy for each. The audiences include:

- **permitting agencies** – At its most basic, the focus is to educate the agencies about SLT’s program: what types of mitigation projects it will consider, its funding requirements, process and timeline, and the point at which SLT will become involved. At best, the communication with the agency can grow to include programmatic agreements, agency approval of SLT’s model conservation easements, two-way communication about quality and design of projects, and so forth. SLT will prepare written materials for this group, but should also seek communication opportunities about the program.
- **project proponents** – Much like the agencies above, SLT needs to describe its program in detail. Model agreements, spreadsheets with possible costs, and examples of project design will help the project proponent respond to SLT’s required information and increase the likelihood of acceptable projects. Clear and concise information will help to reduce the costs of preparing and evaluating projects. Much of this communication will be in written form.

It is not unusual for project proponents to come to SLT with legal documents already drafted. SLT will encourage project proponents to consult early in the process with the land trust. Active outreach and information about SLT’s model documents can also inform project proponents of their existence and increase the likelihood that the model documents will be used.

- **land trust friends, supporters and landowners** – The purpose of communication with these audiences is to protect the land trust’s identity and credibility among these key stakeholders. SLT will want to explain the land trust’s rationale for accepting mitigation projects, its role in the process, and the steps it is taking to assure successful projects.
  - » **R36 SLT will build and maintain relationships with permitting agencies.**
  - » **R37 Wherever possible, SLT will participate in the planning processes that affect its mitigation programs. It will start with participation in the Solano Multispecies Habitat Conservation Plan and Natural Community Conservation Plan process led by the Solano County Water Agency.**

- » **R38 SLT will take the initiative in communicating the mitigation program to permitting agencies, project proponents, and SLT friends, supporters and landowners.**
- » **R39 Communication strategies will include written materials (e.g., brochures, newsletter articles) and meetings or presentations. The strategy for each audience will vary; for some audiences, for example, a website posting may be sufficient.**

#### **PREPARATION OF MODEL EASEMENTS**

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It will be tremendously advantageous for the land trust to invest in the creation of model easements for the mitigation program. SLT has one existing model easement – for agricultural easements. This should be reviewed in light of mitigation issues, and if needed, modifications made.

The land trust can also consider creation of a model easement for conservation easements whose primary purpose is habitat protection. This is the other type of mitigation project for which the land trust is already experiencing a significant demand. To streamline and expedite the process of creating a

model easement, SLT could begin with an easement from a permitting agency, such as California Department of Fish and Game, and modify it to address SLT's concerns and preferences. Then it would work with the agency to consider whether it can receive preliminary approval. While the agency will still want to review and approve each easement, it can expedite the process by having pre-approval of the terms and issues that arise with all or nearly all easements. At a minimum, SLT will inform the permitting agencies and project proponents about the model easement that currently exists.

- » **R40 SLT will promote the use of its model easements for mitigation projects.**
- » **R41 SLT has previously created a model for purchased agriculture easements. It will be reviewed in light of mitigation issues and any necessary modifications made.**
- » **R42 SLT will create a model easement for habitat purposes and employ it several times to refine it. Then SLT can work with permitting agencies to secure general approval of the model to expedite future projects.**

**PREPARATION OF ENHANCEMENT OPPORTUNITIES**

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As discussed above in the enhancement section, the land trust will identify a list of enhancement opportunities on the lands it presently owns and on future lands that it accepts. This will be done as part of the preparation or update of management plans. The lists will need to be reviewed periodically.

Additional enhancement opportunities exist where SLT holds conservation easements. Many landowners of such properties may be interested in allowing enhancement projects on their property. In addition to helping the landowner address some need on their property, it also provides SLT the opportunity to bring value to its relationship with landowners who have permanently protected their property. At the time of baseline creation, the SLT staff may inquire if the landowner is interested in considering mitigation opportunities.

Identifying enhancement opportunities is highly recommended for the land trust. One, it will help to ensure that the land trust doesn't "chase the dollars" in terms of what project proponents want to do. Two, it will also help SLT sort through the relative priorities of the various enhancement opportunities

that exist, and to direct mitigation projects to those of highest priority and/or best-suited.



# 4 RECOMMENDATIONS

A series of recommendations have been made throughout the report and they are collected in this section for ease of review. Before the complete list, however, a shorter list is offered of those items that require immediate action for creation of the mitigation program.

## **PRIORITY ACTIONS**

- » R1 SLT is creating a mitigation program and will undertake the necessary actions to implement and maintain it. [p. 11]
- » R25 SLT will prepare brief legal agreements that project proponents will sign (1) as part of submitting a project application and (2) before SLT commences the preparation and evaluation phase. The purpose of the legal statements is to expressly state and memorialize the terms under which SLT will consider a mitigation project. [p. 31]
- » R27 SLT will establish specific fees and billing rates for the mitigation program. The fees and rates will be regularly reviewed and adjustments made as needed. [p. 35]
- » R30 SLT will immediately dedicate a part-time staff or contract position to the mitigation program. [p. 39]
- » R32 The Mitigation Committee will be created as a standing committee of the SLT board to provide oversight of, and direction to, the mitigation program. A scope of authority and specific duties will be identified. It will remain small to minimize staff management time and to provide ready availability to staff. [p. 39]
- » R33 SLT will evaluate its current financial and accounting systems, and establish the appropriate systems for creating and maintaining sufficiently detailed

records for each mitigation project. [p. 40]

and SLT friends, supporters and landowners. [p. 42]

- ▶ R34 SLT will establish two funds into which mitigation funds (whether related to performance specific projects or mitigation fees) will be deposited: (1) management and stewardship, and (2) easement defense. If permitting agencies want other arrangements, these will be considered on a case-by-case basis and will be a factor in project evaluation. [p. 40]
- ▶ R35 SLT will prepare and adopt an investment and management policy for mitigation-related funds. [p. 41]
- ▶ R37 Wherever possible, SLT will participate in the planning processes that affect its mitigation programs. It will start with participation in the Solano Multispecies Habitat Conservation Plan and Natural Community Conservation Plan process led by the Solano County Water Agency. [p. 42]
- ▶ R38 SLT will take the initiative in communicating the mitigation program to permitting agencies, project proponents,

## **ALL RECOMMENDATIONS**

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- ▶ R1 SLT is creating a mitigation program and will undertake the necessary actions to implement and maintain it. [p. 11]
- ▶ R2 SLT will consider and accept mitigation projects that meet its mission, goals and perpetual funding requirements, and which pass screening and evaluation processes. [p. 11]
- ▶ R3 SLT's substantive involvement in mitigation projects will not begin until the permitting agency has determined that mitigation is required and the type and amount of mitigation. [p. 13]
- ▶ R4 SLT will individually evaluate each proposed project according to SLT's evaluation criteria, and will make a decision regarding its acceptance. [p. 13]
- ▶ R5 SLT will identify the project types and sub-types of which it will consider acceptance in order to guide the

screening and evaluation processes.  
[p. 14]

projects after they have been successfully created and stabilized. [p. 20]

» R6 Protection projects are a class of mitigation projects that SLT will consider accepting. Fee title and conservation easements are eligible. Land or easements already held by another entity will be considered but are subject to additional evaluation criteria. [p. 16]

» R11 Enhancement or restoration projects on lands held by other organizations are a low priority for SLT but can be considered. [p. 20]

» R7 Protection projects must be in perpetuity. [p. 16]

» R12 Management plans will be prepared for (1) SLT's existing properties, and (2) any new mitigation properties accepted. New properties must include funding for a management plan. [p. 20]

» R8 SLT will identify priority areas based upon its existing goals and plans, such as its conservation plan for vernal pools. [p. 16]

» R13 Each management plan will include identification of enhancement and restoration opportunities for the property. SLT will review the plans periodically. [p. 20]

» R9 Enhancement projects are a class of mitigation projects that SLT will consider accepting. Enhancement, restoration and rehabilitation projects are eligible for consideration. [p. 20]

» R14 As resources and priorities allow, SLT may create a list of enhancement needs on properties on which the land trust holds a conservation easement. This will be done only where the landowner requests consideration of enhancement projects, and the list will be created in cooperation with the landowner. If resources and priorities allow, SLT may also consider creating a list of non-

» R10 Creation projects are also eligible for consideration although complex projects may require additional evaluation time or criteria. SLT will also consider management and ownership of creation



protected properties where the landowner may be interested in mitigation opportunities. [p. 20]

- ▶▶ R15 SLT’s priority for enhancement projects are mitigation projects that will occur on SLT’s fee-title properties. [p. 20]
- ▶▶ R16 Project proponents will be encouraged to propose projects that are consistent with needs identified in management plans. [p. 21]
- ▶▶ R17 Mixed projects are a class of mitigation projects that SLT will consider accepting. [p. 21]
- ▶▶ R18 Each component of a mixed project (i.e., protection, enhancement) will be evaluated according to the evaluation criteria for that component. [p. 21]
- ▶▶ R19 Mitigation fees are a class of mitigation projects that SLT will consider accepting. Ad-hoc fees, in-lieu fee programs and legal settlements are all eligible for consideration. [p. 25]
- ▶▶ R20 SLT is willing to explore creation of in-lieu fee programs with permitting

agencies. Any programmatic agreements will be memorialized. [p. 25]

- ▶▶ R21 SLT does not anticipate creating mitigation banks in the foreseeable future. It will consider ownership of sold-out mitigation banks, and consideration will follow the standard evaluation process as any other protection project. [p. 25]
- ▶▶ R22 SLT will evaluate each project individually to determine its suitability and viability for acceptance. SLT will utilize a set of evaluation criteria and any additional factors necessitated by the particulars of the project. [p. 27]
- ▶▶ R23 SLT will undertake a three-phase decision-making process of (1) screening, (2) preparation and evaluation, and (3) execution. Eight specific steps are identified in this process, and key decisions come at the end of steps three and six. [p. 31]
- ▶▶ R24 The Mitigation Committee can make recommendations to the Board at any point. It is anticipated that in the

- typical project, the Committee will approve or reject projects at the end of step three, and that the Committee will make a recommendation on project acceptance for the Board of Director’s decision in step six. [p. 31]
- ▶ R25 SLT will prepare brief legal agreements that project proponents will sign (1) as part of submitting a project application and (2) before SLT commences the preparation and evaluation phase. The purpose of the legal statements is to expressly state and memorialize the terms under which SLT will consider a mitigation project. [p. 31]
  - ▶ R26 SLT will consider creation of an expedited decision-making process for high-priority types of projects. The types of projects that qualify and specific steps in the process will be described in detail and presented for consideration and adoption by the Board of Directors. [p. 32]
  - ▶ R27 SLT will establish specific fees and billing rates for the mitigation program. The fees and rates will be regularly reviewed and adjustments made as needed. [p. 35]
  - ▶ R28 The two primary costs to a project proponent before SLT makes a final decision on project acceptance is (1) a one-time, non-refundable fee that accompanies the application before any screening of the project can occur, and (2) a deposit for work to be performed in the preparation and evaluation phase by SLT and/or its sub-contractors. [p. 35]
  - ▶ R29 The project proponent will also be required to fund the full costs of the mitigation project. The amount will be determined by the particulars of the project. [p. 35]
  - ▶ R30 SLT will immediately dedicate a part-time staff or contract position to the mitigation program. [p. 39]
  - ▶ R31 As SLT’s mitigation program changes, the need for personnel resources will be regularly reviewed and evaluated. [p. 39]

- ▶▶ R32 The Mitigation Committee will be created as a standing committee of the SLT board to provide oversight of, and direction to, the mitigation program. A scope of authority and specific duties will be identified. It will remain small to minimize staff management time and to provide ready availability to staff. [p. 39]
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- ▶▶ R39 Communication strategies will include written materials (e.g., brochures, newsletter articles) and meetings or presentations. The strategy for each audience will vary; for some audiences, for example, a website posting may be sufficient. [p. 42]

- ▶ R40 SLT will promote the use of its model easements for mitigation projects. [p. 43]
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- ▶ R42 SLT will create a model easement for habitat purposes and employ it several times to refine it. Then SLT can work with permitting agencies to secure general approval of the model to expedite future projects. [p. 43]



# Appendix A

## GLOSSARY OF TERMS

**Baseline document** – A document which describes the features and condition of a property to which a conservation easement has been conveyed. It usually includes written text, maps and photographs. In the event of a violation, it is used to prove the features or condition that were present at the time the easement was created.

**Capital costs** – In the context of conservation and land management, capital costs are those expenditures for land or easement acquisition, for the construction of major improvements, such as fencing, interpretive centers, roads, and so forth. They are often, but not necessarily, one-time costs.

**Conservation easement** – Under California state law, a conservation easement “means any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.” A conservation easement

is described in a recorded document and is perpetual in duration. It can only be acquired and held by a tax-exempt nonprofit organization qualified as a 501(c)3 by the Internal Revenue Code, or by a public agency. See California Civil Code Section 815.

Although conservation easement is the term most often utilized, in California, a local government entity “cannot condition the issuance of an entitlement for use on the applicant’s granting of a conservation easement pursuant” to Civil Code Section 815. An easement created in this condition is an “open space easement” and is governed by California Government Code Section 51070-51097. They are recorded, and can be in perpetuity or for a term of years.

**Easement stewardship** – The national standards and practices for land trusts identify a number of practices and resources that are necessary for the proper stewardship of conservation easements.<sup>16</sup> This includes the preparation of a baseline document at the time of easement creation, regular monitoring, maintaining contact with landowners,

enforcing easement terms when they are violated, and building an adequate source of funds for the perpetual monitoring and enforcement.

**Endowment** (or stewardship fund) – The perpetual ownership, management and stewardship of land and easements require funding. The only practical way to provide this funding – long past when any particular individuals and companies may exist – is to create an endowment. An endowment is a fund in which a sum is deposit of an amount sufficient which is conservatively invested to produce an annual income that is used to fund the costs of ownership and management and stewardship.

**Enforcement** – A land trust will have to enforce its ownership rights from time to time. On fee title lands, it may need to act against a trespasser, for instance. It is expected, however, that enforcement will be more common with conservation easements. A land trust has to enforce any violations to the purpose and terms of the easement. It may also be sued by a landowner and be forced to defend the easement.

**Fee title** – The most complete set of rights to a property, including the rights to occupy and to develop or convert it.

**Land management** – Like any private landowner, a land trust assumes the full costs and duties of land ownership when it owns land. All of the responsibilities and activities are commonly referred to as land management. It includes a wide variety of responsibilities and activities, such as maintenance of all improvements (structures, roads, fences), prevention or cure of erosion, care of resources on the property, prescribed burning (if appropriate), removal of exotic invasive vegetation and animals, payment of taxes and insurance, and so forth. A land trust may also contract to perform land management of property with conservation values that are held by another nonprofit or public agency; in such cases it does not assume all responsibilities of ownership, such as taxes or insurance.

**Land trust** – A private, nonprofit conservation organization formed to directly protect land through the acquisition of land and interests in land with any variety of conservation and natural resources. The acquisition may occur by purchase, donation, or may be conveyed to satisfy mitigation requirements imposed by permitting agencies.

**Mitigation ratio** – Permitting agencies will often identify the ratio of mitigation that is required based upon the impacts of a project. It may be based upon acreage or upon replacing the impacted functions. For example, a mitigation ratio may be

that three acres of farmland must be preserved to mitigate for every acre of farmland that is converted to a non-agricultural use. The ratio may exceed one-to-one in order to ensure that there is no net-loss of the natural resources of concern, that the ecosystem processes will be functional, and to allow an adequate margin of safety to reflect anticipated success.<sup>17</sup> The ratio may also be less than one-to-one where the functions associated with the area being impacted are demonstrably low and the replacement area of higher function.<sup>18</sup> This may also be referred to as “functional replacement”.

**Model easement** – A model easement is a document that describes the terms and conditions of conveying a conservation easement, but which is in a general form and can be tailored to the particulars of an individual easement. It includes the standard terms acceptable to the land trust or public agency that created it.

**Monitoring** – The holder of a conservation easement has a responsibility to regularly inspect the property to identify any violations of the easement purpose and terms that may exist. Easement holders may lose their rights under the easement, in whole or part, if violations are unchallenged. The inspection is often called monitoring, and at least annual monitoring is the recommended practice for land trusts. Each

monitoring visit is recorded in a written form and often with photo documentation. In addition to identifying violations, another important reason to monitor is to build and maintain communication with the landowner.

**Permitting agency** – A federal, state, regional, or local public agency which holds authority to grant permits for various activities and can require mitigation to compensate for the loss, degradation or impact of the proposed activity. Examples include the U.S. Army Corps of Engineers, the California Department of Fish and Game, and the County of Solano.

**Successor Landowner** – Because conservation easements run in perpetuity, the owner of the underlying fee title to a conservation easement will change periodically. The landowner who sells or grants the conservation easement is commonly referred to as the “original landowner” or “original donor” by land trusts. All subsequent landowners are often referred to as “successor landowners”. The research to date suggests that serious violations are far more likely with successor landowners than with the original landowner.







## Appendix B

# PROCESS FOR PROJECT TYPES

Below are descriptions of general processes that can be expected for different types of projects.

### **Protection Projects – Fee Title**

- SLT identifies priority areas based upon its existing goals and plans. To the extent feasible, project proponents are encouraged to identify properties in these areas. SLT will also consider properties in other areas if the project proponent already owns the property or if the permitting agency requires the mitigation to occur in locales other than SLT's priority areas.
- SLT will work with the project proponent to gather the necessary information for the land trust evaluation.
- A decision is made regarding the acceptance of the mitigation project.

### **Protection Projects – Conservation Easement**

- SLT drafts a model easement(s) for use by project proponents and permitting agency.

- If appropriate, SLT identifies areas for suitable easements.
- SLT, project proponent and/or landowner negotiate terms of easement.
- If not included in previous step, SLT meets with landowner, discusses easement and explains stewardship elements
- SLT reviews easement document.
- All key parties – SLT, permitting agency, project proponent, and the landowner – agree upon a final draft of the conservation easement.
- SLT evaluates acceptance of project

### **Enhancement Projects**

- SLT will review enhancement plans prepared by the project proponent or permitting agency. Depending upon the particulars of the project, SLT staff may be involved in project design.
- SLT must approve the design of, and modifications to, the project.

## PROCESS FOR PROJECT TYPES **B**

- In many cases, qualified individuals other than SLT staff will implement enhancement and restoration projects with oversight by SLT staff, such as consultants. Other qualified individuals or SLT staff may also carry out management improvements. SLT must approve any proposed subcontractors.
- Monitoring to meet permitting agency requirements (e.g., species counts for the first five years of the project) will be the responsibility of the project proponent and/or permitting agency. SLT staff may be involved in conducting the mitigation, but this will vary, of course, based upon the particular features of a project.
- The project proponent must provide funding to cover SLT's costs for any special expertise to evaluate the project design, monitoring the project during the course of the enhancement actions and contingency funds in the event that problems arise.
- Final approval by the permitting agency of the completed project remains the responsibility of the project proponent.

### **Mixed Projects**

- The land trust will distinguish the protection and enhancement elements and evaluate each

according to the typical process for that type of project.

### **Ad-Hoc Mitigation Fees**

- SLT prepares and executes agreement with project proponent and/or permitting agency that describes the project.
- The fees are paid directly to the land trust, to the permitting agency, or to a mutually acceptable third-party depending upon the project and the authority of the permitting agency.
- SLT proposes a specific project that meets the purposes and criteria for available funds.
- If SLT received the funds, it expends the funds for the project. If the fee was paid to the permitting agency, then SLT applies to the agency for use of the fees. If a third-party holds the funds, the agency will approve expenditure of the funds (or whatever other process has been agreed upon).

### **In-Lieu Fee Program**

- Permitting agency and land trust create an agreement.
- Fees collected by permitting agency.

- SLT reviews and prepares projects – there is early review (e.g., “screening”) by permitting agency before mitigation project progresses very far.
- SLT undertakes protection or enhancement project based upon available funding and permitting agency approval.
- Permitting agency gives final approval to project; disburses funding or approves use of the funds.





## Appendix C

# PROFILES OF OTHER MITIGATION PROGRAMS

### **Case #1: EBRPD's RESOURCE ENHANCEMENT PROGRAM<sup>19</sup>**

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The East Bay Regional Park District (EBRPD) began the Resource Enhancement Program (REP) in 1998 to response to requests by permitting agencies and project proponents for EBRPD to accept mitigation properties and enhancement projects. EBRPD will consider projects that are consistent with its 1997 Master Plan that includes:

- vegetation management
- wildlife management
- rare, threatened and endangered species management
- riparian and wetland resources
- wildlands management
- public access

EBRPD's Environmental Programs Manager works with the project proponents to review and evaluate mitigation proposals, and makes a recommendation to the General Manager regarding whether any project should be accepted. The General Manager holds final authority for determining whether the

project will benefit EBRPD. Declined proposals are explained by a brief written report to the applicant. EBRPD charges a project review and processing fee for most projects.

Proposed projects are evaluated by nine criteria. For projects to be approved, EBRPD requires a number of conditions to be met including completed project approval by the CEQA lead agency, and the applicant must have obtained all the necessary agency approvals and permits.

Since it was created, nearly twenty mitigation projects have been approved and funded. Six projects have been constructed or completed, more than 1,500 acres of habitat have been acquired and completed, and more than 16 million received in funding to acquire, restore, improve and manage open space habitat.

EBRPD has purchased land with high-quality habitat for particular species that are being adversely impacted by numerous projects, such as red-legged frog. The lands are typically abutting existing EBRPD properties. In-lieu fees can be applied to

these projects to help fund them, or the fees are used to purchase conservation easements on the property. Unlike Solano Land Trust, EBRPD will sometimes have capital resources to make investments in advance of recovery through the Resource Enhancement Program. It has resulted in mitigation projects with a high degree of perceived biological and management viability because of adjacency to other protected lands.

An example is the Black Diamond Mines Regional Preserve. It provides habitat for a number of special-status species, and is part of a critical link between the open space at Black Diamond Mines Regional Park and Mt. Diablo State Park. The project proponent purchased a 62-acre conservation easement (it is held by a permitting agency). This funding helped to fund the purchase of the property, and funded the construction of habitat improvements, preparation of a management plan and provided a perpetual management endowment. The habitat improvements included new fencing and gates to manage livestock grazing, removal of non-native vegetation and control of feral pigs.

*To learn more about this program, contact the East Bay Regional Parks District at 510-635-0138 or at [www.ebparks.org](http://www.ebparks.org).*

#### **Case #2:**

#### **IN-LIEU FEE PROGRAM FOR WETLAND MITIGATION<sup>20</sup>**

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The U.S. Army Corps of Engineers (USACE) and The Nature Conservancy (TNC) have developed an in-lieu fee program to mitigate impacts to wetlands and other U.S. waters in a large geographic area in Texas that includes the Dallas/Fort Worth, Austin, and San Antonio areas. A number of other agencies were involved in developing the program procedures to ensure that their responsibilities and concerns were supported by the program. These agencies were the U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, Texas Parks and Wildlife Department, Texas Natural Resource Conservation Commission, Railroad Commission of Texas, and Texas General Land Office.

The program establishes a regional trust fund that will be employed to mitigate wetland impacts as required under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The program goals are:

- a. provide Department of the Army permit applicants greater flexibility in compensating for adverse impacts to the aquatic ecosystem, especially when those impacts would be relatively minor;

- b. substantially increase the extent and quality of restoration, enhancement, and protection of aquatic resources over that typically achieved by other forms of compensatory mitigation for activities that have relatively minor adverse impact to the aquatic ecosystem; and
- c. reduce the extent of cumulative adverse impacts to the aquatic ecosystem.<sup>21</sup>

The geographic area is divided into regions based upon a number of natural features, level of permitting activity, availability of mitigation banks and other factors. The regions are "large enough to generate funds sufficient to conduct meaningful mitigation activities yet small enough to provide compensatory mitigation as close to adversely impacted areas as practicable."<sup>22</sup> The areas are prioritized, and types of typical aquatic systems, extent of impacts and suitable areas for mitigation are identified.

An applicant for a USACE permit can request the option of paying an in-lieu fee to the regional trust fund rather than perform other mitigation. There are requirements about complying with all applicable laws and regulations to avoid and minimize impacts. If the project requires the review of other agencies, USACE will solicit and consider the agency's comments. If a fee payment is approved, the fee

amount is calculated according to the number of acres USACE determines is required for mitigation and an established regional per acre fee schedule.

The fee is paid to TNC, which has had no role in determining whether mitigation is required, the amount of mitigation, or any other factor related to the proposed project. TNC notifies USACE when payments are received and keeps detailed records regarding the transaction and the location and characteristics of the project that has prompted the mitigation. It accepts, holds and expends the fees according to the written agreement and in separate accounts in its financial system.

TNC develops acquisition, restoration or enhancement projects for each region that are consistent with the impacts that have occurred. A written proposal describing the project is submitted to USACE for approval. It must include:

- Detailed description of the mitigation project areas
- Detailed description of the project
- Description of the local hydrology and related issues
- Description of how impacts to aquatic ecosystem and wildlife habitat would be minimized



- Discussion of any potential effects of project on listed species
- Description of other pertinent issues
- Plan for monitoring development and success of project
- Detailed description of projected costs of project implementation, long-term management, and contingencies

USACE will seek comments from the other public agencies identified above as well as public comment. If USACE approves the project, TNC receives authorization for use of the indicated sum of trust funds. All the agencies and TNC regularly review the trust fund account, fee schedules, regional delineations and other features of the program, and may make changes as needed.

To learn more, visit [www.swf.usace.army.mil/pubdata/environ/regulatory/handouts/ilfinfo.pdf](http://www.swf.usace.army.mil/pubdata/environ/regulatory/handouts/ilfinfo.pdf)



## Appendix D ENDNOTES

- <sup>1</sup> Guenzler, Darla. 2004. *Using Conservation Easements to Meet Regulatory Objectives*. Berkeley, CA: University of California, Berkeley. Doctoral Dissertation.
- <sup>2</sup> For more information about HCPs, see: Beatley, Timothy. 1994. *Habitat Conservation Planning: Endangered Species and Urban Growth*. Austin: University of Texas Press. Cylinder, Paul, Kenneth Bogdon, and David Zippen. "Understanding the Habitat Conservation Planning Process in California: A Guidebook for Project and Regional Conservation Planning." Sacramento, CA: Institute for Local Self Government.
- <sup>3</sup> For instance, one wetland mitigation project was a constructed wetland in the cloverleaf of a highway near Davis, California. It is cut off from a naturally occurring water source, there are significant refuse problems, and waterfowl and other birds encounter interstate traffic on multiple sides of the wetland. Another example is the conservation easements that are poorly drafted or are created without baseline documentation or funding for perpetual management and defense – some of the widely recognized needs of conservation easements. Many mitigation easements are small and not near other protected lands which makes for management inefficiencies.
- For more detail about problems with mitigation projects, see the following:
- Griswold, Thodore J. "Messing with Mother Nature: The Quagmire of Wetland Mitigation Banking" *California Regulatory Law Reporter* 13(2&3):1, Spring/Summer 1993
- Johnston, Robert A. and Wade S. McCartney. 1991. Local government Implementation of Mitigation Requirements under the California Environmental Quality Act. *Environmental Impact Assessment Review* vol. 11, no. 1:53-67 (March).
- Marsh, Lindell L., Douglas R. Porter, and David . Salvesen, eds. 1996. *Mitigation Banking: Theory and Practice*. Washington, DC: Island Press

National Research Council. 2001. *Compensating for Wetland Losses Under the Clean Water Act*.

Washington, D.C.: National Academy Press.

Nyhus, Philip, Hank Fischer, Francine Madden and Steve Osofsky. 2003. Taking the Bite out of Wildlife Damage: The Challenges of Wildlife Compensation Schemes. *Conservation in Practice*. vol. 4, no. 2:37-40. Spring.

<sup>4</sup> For example, the project proponent can employ a restoration ecologist to design an enhancement project. SLT's primary task will be to review the proposed project. Alternatively, it may be tempting to allow the proponents to negotiate with landowners and draft a conservation easement. However, this often results in a poorly drafted conservation easement (if an attorney experienced with easement drafting is not involved). Further, the project proponent is unlikely to understand or explain easement stewardship issues to the landowner. The land trust must be involved in landowner discussions to ensure that the easement terms and stewardship obligations of the easement holder are understood. This also allows the landowner and easement holder to determine if they want to work each other. In such instances, there are still ways to reduce the land trust's time, e.g., encouraging project proponents to utilize SLT's model easements.

<sup>5</sup> The exceptions to this are the projects that the land trust carries out because the project proponent provided funding for the mitigation; the proponent's responsibility has been fulfilled with the payment of the fee.

<sup>6</sup> It received funding from the Coastal Conservancy for purchase of the first phase of the King-Swett properties. The availability of mitigation funds for red-legged frog habitat on site raised concerns about the Coastal Conservancy's grant; the Conservancy could have required a portion of the grant to be repaid. An agreement was reached with the Coastal Conservancy to use the mitigation funds in a way that further management objectives associated with the property. Funding entities have to be careful that their funds do not advance or subsidize mitigation-related projects.

<sup>7</sup> The complete mission statement is: Solano Land Trust is a private, non-profit organization whose mission is the preservation of agricultural land, open space, and natural resources through the acquisition of land and conservation easements, education, and land management.

<sup>8</sup> Meisler, Julian. 2001. *Conservation Strategy for the Vernal Pools of the Greater Jepson Prairie Ecosystem*. Fairfield, CA: Solano County

- Farmlands and Open Space Foundation.  
(February) p. 1
- <sup>9</sup> For example, the conservation easement's primary purpose may be agricultural preservation, but the land trust may suggest a secondary purpose of scenic open space. If changing conditions in the future prevent an economically-viable agricultural use of the property, the easement need not be lost because its secondary purpose can still be satisfied.
- <sup>10</sup> U.S. Army Corps of Engineers. "Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899" in Regulatory Guidance Letter. No. 02-2. December 24, 2002. p. 4.
- <sup>11</sup> The permitting agency and the land trust may want to create a Memorandum of Understanding or other form of agreement to document their mutual understanding of the roles and responsibilities of each party. The project selection and funding process between the two will have to be thoroughly considered. For example, what are the boundaries in which projects may be considered? This may need to be a larger than the area in which the fee program is applicable. The land trust may also require some funding up-front to cover its transaction costs; perhaps this is available after an initial screening of the proposed project by the permitting agency.
- <sup>12</sup> The projected demand for a bank may also not materialize so that all credits are not sold. At some point, the bank owner may decide to assign the property to a local organization even though all credits have not been sold.
- <sup>13</sup> For example, the Center for Natural Lands Management requires a one-time \$80,000 fee for accepting a conservation easement.
- <sup>14</sup> A 5% rate of return is the customary percentage used by nonprofit organizations. They must invest more conservatively than many other types of investors to reduce the chance of losses. The years in which income may exceed 5% is balanced by years that earnings fall below 5%.
- <sup>15</sup> A number of non-profit organizations have complained about the difficulties and delays in receiving reimbursement for management, stewardship or monitoring. Because it is a reimbursement system, the non-profit must also

advance the cash for the agency – a system that can be challenging from a cash flow perspective. See Guenzler and Deakin.

<sup>16</sup> See Standard 14: Conservation Easement Stewardship in **The Standards and Practices Guidebook: An Operating Manual for Land Trusts**. 1993. Washington, D.C.: Land Trust Alliance.

<sup>17</sup> U.S. Army Corps of Engineers. p. 3

<sup>18</sup> Ibid.

<sup>19</sup> This profile is based upon the REP brochure (dated November 2002), REP project profiles, and several in-person communications with Brad Olson in November 2002 through March 2003.

<sup>20</sup> This profile is closely based on the written program description (An Agreement Between The Nature Conservancy and the U.S. Army Corps of Engineers, Fort Worth District, to Establish an In-Lieu Fee Program in the Fort Worth District, executed November 1998) and in-person communication with Diane Schenke of The Nature Conservancy, February 3, 2003.

<sup>21</sup> Ibid, p. 1

<sup>22</sup> Ibid, p. 1

