



SAN FRANCISCO BAY
RESTORATION AUTHORITY

MEMORANDUM

DATE: October 15, 2021
TO: Governing Board
San Francisco Bay Restoration Authority
FROM: Amy Hutzal, Acting Executive Officer
Jessica Davenport, Deputy Program Manager
San Francisco Bay Restoration Authority

SUBJECT: Use of Mitigation Funds on Property Used for Authority Projects

Environmental laws require that projects, such as constructing a housing development or building a road, be designed to avoid or minimize environmental impacts. If the project results in unavoidable impacts, environmental regulatory agencies will only issue permits for the project if the private developer or public agency agrees to take measures to compensate for or “mitigate” the environmental impact. Some mitigation measures must be carried out at the site of the activities causing the impact. In other cases, regulatory agencies allow for mitigation funds to be used in a different location from the impacted site.

For impacts to habitat, regulatory agencies may allow the permittee to undertake the mitigation themselves or to direct mitigation funds to a mitigation bank, which is a habitat restoration or conservation project established specifically for this purpose. Private companies create mitigation banks with the oversight of regulatory agencies and once the bank is approved, the company can sell mitigation credits to developers and agencies that need them.

In some cases, regulatory agencies allow mitigation funds to be used as a contribution to a voluntary conservation project, such as the acquisition of private land for conservation purposes by a land trust or open space district. Mitigation funds can also be used to fund habitat restoration work by public agencies and nonprofit organizations, if those entities are willing to accept such funds.

Authority Policy on Eligibility of Projects Using of Mitigation Funds

Accepting mitigation funds will not necessarily make a project ineligible for funds from the San Francisco Bay Restoration Authority (Authority), but the Authority avoids funding mitigation, which is the responsibility of the company or agency that is creating the environmental impact. The Authority also seeks to ensure that the potential grantee would not be “double dipping,” or taking grant funds and mitigation funds for the same work.

The Authority has adopted the following guidance related to the use of mitigation funds, as described in Appendix D of the Measure AA 2020 Request for Proposals:

“The Authority may contribute to a project that is making use of mitigation funds, but the Authority's share of the funds must pay for an incremental improvement

beyond compensation for damages that may have occurred elsewhere as part of the mitigation requirements.”

This policy prevents the Authority from subsidizing mitigation but allows for flexibility in funding projects that use mitigation funds. For example, if mitigation funds cover only one part of a project with multiple components, the Authority can fund other project components. The Authority can then include approval of the use of mitigation funds in the staff recommendation, grant agreement and related documents.

Authority Requirements of Grantees Accepting Mitigation Funds

The ideal approach is for the Authority to consider the use of mitigation funds prior to its approval of the project. However, it is possible that an Authority grantee could request the use of mitigation funds after the Authority funds acquisition or restoration of property.

For acquisitions and restoration projects funded by the Authority, the Authority prohibits use of property for mitigation without the prior approval of the Authority’s Executive Officer. This policy is a contractual obligation within our grant agreements.

The typical language expressing this policy in our grant agreements reads as follows:

Without the written permission of the Executive Officer, the grantee shall not use or allow the use for mitigation (in other words, to compensate for adverse changes to the environment elsewhere) of any portion of real property on which the Authority has funded construction. In providing permission, the Executive Officer may require that all funds generated in connection with any authorized or allowable mitigation on the real property shall be remitted promptly to the Authority. As used in this section, mitigation includes, but is not limited to, any use of the property in connection with the sale, trade, transfer or other transaction involving carbon sequestration credit or carbon mitigation.

The Authority has not yet funded any acquisitions, but in the case of acquisitions, similar language would be included as a use restriction recorded against the property. This would take the form of an irrevocable offer to dedicate, deed restriction, or an agreement of restrictive covenants.

State Coastal Conservancy Examples of the Use of Mitigation Funds

The Authority’s approach to restricting grantee’s use of mitigation funds is based on that of the State Coastal Conservancy (Conservancy). The Conservancy has allowed the use of mitigation funds both before and after project approval.

Examples of projects in which the Conservancy has allowed the use of mitigation funds prior to project approval include the following:

1. **Use of Environmental Enhancement and Mitigation Program (EEMP) funds in the Franklin Canyon Acquisition Project.** The EEMP was created by the California State Legislature and is run by the California Natural Resources Agency. This program funds projects to mitigate the environmental impacts caused by new or modified public transportation facilities. EEMP funds urban forestry projects and projects to acquire, restore or enhance resource lands and waters, such as wetlands, forests, grasslands, and

rivers and streams. The Conservancy has approved funding for many projects in which grantees also made use of EEMP funds. For example, in the Franklin Canyon Acquisition Project, the Muir Heritage Land Trust used funds from the Conservancy, EEMP, and other sources to acquire property in Franklin Canyon in the City of Hercules for the purposes of open space, public access, watershed protection, and limited agricultural use.

2. **Use of Caltrans mitigation funds in the Suscol Headwaters Preserve Acquisition Project.** For this acquisition by the Napa County Regional Park and Open Space District, the Conservancy authorized part of the funding while the California Department of Transportation also committed funds to the acquisition out of monies budgeted for red-legged frog mitigation associated with the Highway 12–Jameson Canyon widening project.

Examples of projects in which the Conservancy has allowed the use of mitigation funds after project approval include the following:

1. **Wetland Creation on Argano Ranch.** The Conservancy’s Executive Officer approved a request from the Land Conservancy of San Luis Obispo County to use mitigation funds to create wetlands through floodplain restoration on a portion of the former Argano Ranch. The property was acquired by the land trust with grant funds from the Conservancy. The mitigation was for impacts resulting from two projects, both of which had a net public benefit. One of the projects needing mitigation was the Nacimiento Water Project, which consists of an intake facility at Lake Nacimiento with pump stations, storage tanks, a control system, and a transmission pipeline that delivers water to communities within San Luis Obispo County. The other project needing mitigation was the Octagon Barn Center Project, which created a community center that holds educational, cultural, social and commercial events.
2. **Red-Legged Frog Habitat Improvements at Mindego Hill.** The Conservancy approved a request from the Midpeninsula Regional Open Space District to use mitigation funds to implement California red-legged frog habitat improvements (pond restoration and invasive species management) at Mindego Hill. The Mindego Hill property was acquired by with grant funds from the Coastal Conservancy. The mitigation was for a project with net public benefits, San Mateo County’s Cordilleras Mental Health Hospital Replacement Project.

Guidance to Grantees

Staff has created guidance (Attachment 1) that is intended to assist a grantee with the process for seeking Authority approval of the grantee’s proposal to use for mitigation real property that the grantee has acquired or restored with funding under an Authority grant. The grantee is required to first consult with the Authority project manager and must then submit a proposal in writing for the Executive Officer’s review. See Attachment 1 for issues to be addressed in the proposal and considered by the Executive Officer in determining whether permission to use mitigation funds will be granted.