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VIA E-MAIL AND FACSIMILE

John Kopchik
Senior Planner
Contra Costa County
651 Pine St., 4th Floor NW
Martinez, CA 94553

Re: East Contra Costa County HCP/NCCP and EIS/EIR

Dear Mr. Kopchik:

We represent Discovery Builders, which is primarily a single-family residential developer and builder based in Contra Costa County. Discovery Builders and its affiliates ("Discovery Builders") own several hundred acres of land in the Inventory Area described in the East Contra Costa County Habitat Conservation Plan and Natural Communities Conservation Plan (the "HCP" or the "Plan") and the related Draft Environmental Impact Statement/ Environmental Impact Report ("EIS/EIR") prepared by the East Contra Costa County Habitat Conservation Plan Association ("HCPA").

Discovery Builders supports the development of a fair, streamlined, and comprehensive regulatory structure to provide landscape-level conservation benefits to species and ecosystems and allow for planned development. In light of the prominent role that private landowners must necessarily play in species and habitat conservation, *see National Academy of Sciences, Science and the Endangered Species Act* 61-62 (1995), the purposes of the Endangered Species Act cannot be achieved without public-private partnerships, such as Habitat Conservation Plans and Natural Communities Conservation Plans ("NCCPs"). At the same time, as the California legislature has recognized, comprehensive conservation efforts must allow for appropriate development and growth, which makes the participation of local agencies and landowners in the development of NCCPs critical. *See Cal. Fish & Game Code § 2801(b)*. The importance of the role that private landowners and local jurisdictions must play in the development of landscape-level conservation planning efforts has been recognized in the development and preparation of the East Contra Costa County HCP/NCCP as reflected in principles of participation compiled by

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the Contra Costa County Community Development Department for the Board of Supervisors (attached as Exhibit 1). The importance of the principals is underscored by their subsequent incorporation into the project purpose, need, goals, and objectives in the HCP and EIS/EIR.

As we discussed in our recent meeting, the current draft Plan does not comport with several key principles of participation or provide for the achievement of a number of HCP goals and objectives. Also as we discussed, recent changes to the urban limit lines (ULLs) of Antioch and Pittsburg necessitate adjustments to the HCP. Although we anticipate, based on our recent meeting, that the HCPA plans to address many, if not all of the issues discussed in detail below, Discovery Builders appreciates the opportunity to provide comments on the current version of the HCP and the related EIS/EIR. Resolving the issues noted below is critically important due to concerns raised about the HCP's approach to important habitat planning and regional growth planning issues, and because the current draft documents have overly burdensome survey requirements and have substantial areas of ambiguity with respect to implementation that drastically reduce streamlining benefits and landowner certainty. Where we identify shortcomings in the draft HCP and EIS/EIR, we have attempted to provide specific mechanisms to address the issues to facilitate our further discussions. We believe that the shortcomings we identify may be remedied prior to preparation of the final draft of the HCP, and look forward to working with you to address them.

DISCUSSION

I. THE HCP MUST BE ADJUSTED IN LIGHT OF RECENT CHANGES TO THE URBAN LIMIT LINES OF THE CITIES OF ANTIOCH AND PITTSBURG.

As you know, voters in Inventory Area cities Antioch and Pittsburg recently adopted changes in their ULLs, which direct future growth in the Plan Area. Since the HCP defines its Permit Area by reference to the ULL, it is necessary to make adjustments to the HCP to address the ULL changes. Most important for Discovery Builders, the ULL in Pittsburg has shifted to include properties owned by Discovery Builders' commonly known as Faria South and Montreux. These development areas now are designated for development under the City's adopted General Plan, pre-zoned, and within the City of Pittsburg ULL. But they are located in an area described in the current draft HCP as Acquisition Analysis Zone 1. Furthermore, Faria South, in part, is designated high priority and, therefore, apparently would be excluded from the HCP Permit Area pursuant to the current draft of the Plan.

J-1

We believe that the HCP must be altered to reflect the Permit Area as revised by the recent changes in the ULL, and to change the preserve acquisition priority assigned to the areas now within the ULL, particularly by reducing the high priority assigned to Subzone 1a. This ULL change will not vitiate the conclusions of the draft HCP and EIS/EIR with regard to the impact and biological effects of the Plan. We believe, furthermore, that the change is not likely to require extensive revision of the documents or result in new unanalyzed, significant adverse

impacts for two reasons. First, the current draft HCP does contemplate changes in the Permit Area as the ULL changes over time, so incorporating the recently adopted ULL changes into the Plan baseline before adoption is consistent with the Plan's current long-term approach to definition of the Permit Area.

Second, changing the high priority designation for areas like Subzone 1a to a lower priority does not preclude their acquisition for conservation or eliminate any protection for resources.

Further, in the specific case of Subzone 1a, it was identified in the HCP for preservation based primarily on large-scale habitat mapping. However, more detailed, site-specific information demonstrates that the current draft HCP has substantially over-stated the biological value of that particular Subzone. The draft HCP designates Subzone 1a as a high priority (1) to protect ridgelines and headwaters in the Willow Creek and Lower Mount Diablo Creek subbasins, (2) to provide a connection for San Joaquin kit fox, (3) to protect known occurrences of California Tiger Salamander, and (4) to provide connectivity to existing open space within the City of Pittsburg. But a Biological Resources Assessment of Subzone 1a, prepared by Michael Brandman Associates and attached as Exhibit 2, indicates that acquisition of the property will not achieve these goals.

J-1 (Cont.)

As a result, the areas now within the ULL and particularly Subzone 1a can be added to the Permit Area, and their high priority acquisition designation removed, without substantially reducing the biological benefits of the HCP or precluding implementation of an appropriate conservation strategy.

II. THE HCP MUST BE CHANGED BOTH TO COMPORT WITH THE PLAN GOALS AND OBJECTIVES AND TO COMPLY WITH APPLICABLE LAW.

The HCP states that it "is intended to provide an effective framework to protect natural resources in eastern Contra Costa County, while improving and streamlining the environmental permitting process for impacts on endangered species." HCP at ES-1. The stated guiding principles for development of the HCP include, among others, balancing open space, habitat, agriculture, and urban development; reducing the cost and increasing the clarity and consistency of federal and state permitting; consolidating and streamlining these processes into one, locally controlled plan; and protecting the rights of private-property owners. HCP at 1-1, -2. Discovery Builders strongly supports these goals. As discussed in the general comments below, however, the current draft HCP fails to achieve a number of these goals. These shortcomings can and should be remedied in preparing the final draft of the Plan.

J-2

A. *The Plan is Inconsistent with Existing General Plans of the City Permittees.*

The Plan states that it "has been designed to accommodate reasonable and expected growth of the participating jurisdictions based on current General Plans." HCP at 1-6. One

J-2.1

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objective of the HCP is to “[E]nable the County and the Cities of Brentwood, Clayton, Oakley, and Pittsburg to reasonably and efficiently implement their respective general and specific plans...” EIS/EIR at 1-7.

Contrary to this goal, however, the HCP actually interferes with the ability of the participating jurisdictions to implement their respective general and specific plans. The HCP map of land use designations “illustrates city land use designations in incorporated areas and County designations in unincorporated areas.” HCP at 2-3. These County land use designations, in turn, apparently provided one basis for determining the constraints that the HCP will impose on specific properties. As a result, the HCP bars participating cities from implementing their respective general and specific plans within their sphere of influence or planning area unless those plans are consistent with the County’s General Plan. *See* Exhibits 3 through 8 (identifying conflicts between the HCP and the General Plans of Pittsburg, Antioch, Brentwood, and Oakley). The EIS/EIR explains, “HCP acquisition of [certain lands covered by a city’s General Plan] could conflict with a city’s general plan policies.” EIS/EIR at 4-25. The EIS/EIR even includes a table identifying some conflicts between the City General Plans and the HCP. EIS/EIR at 4-28. However, the conflicts identified and briefly analyzed comprise only a subset of the actual conflicts with City General Plans created by the HCP. The HCP should not substantially constrain or purport to override local General Plan authority.

J-2.1 (Cont.)

Under the draft HCP, this planning conflict directly affects Discovery Builders. For example, the majority of the area designated as Subzone 1a in the Plan, *see* HCP at Figure 5-1, is owned by Discovery Builders and designated for residential development in the adopted City of Pittsburg General Plan. City of Pittsburg General Plan at Figure 2-2. In addition, Subzone 1a is now within the City of Pittsburg’s ULL and pre-zoned for development. In contrast, the HCP shows Subzone 1a as agriculture, HCP at Figure 2.1, and designates the majority of Subzone 1a as a high priority acquisition area, HCP at Figure 5-3.

Likewise, a portion of the area designated as Subzone 1d in the Plan, *see* HCP at Figure 5-1, is owned by Discovery Builders and designated for residential development in the City of Pittsburg General Plan. City of Pittsburg General Plan at Figure 2-2. In addition, that portion of Subzone 1d is now within the City of Pittsburg’s ULL and pre-zoned for development. In contrast, the HCP shows all of Subzone 1d as agriculture, HCP at Figure 2.1, and designates Subzone 1d as a low priority acquisition area, HCP at Figure 5-3.

Similarly, the northern portion of the area designated as Subzone 6a in the Plan is designated for a combination of land uses – including residential and commercial uses – in the City of Oakley General Plan. City of Oakley General Plan at Figure 2-2. In contrast, the HCP shows Subzone 6a as agriculture, HCP at Figure 2.1, and designates it as an acquisition area. HCP at Figure 5-3.

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The HCP does not offer any way to work through this conflict in plans, nor does the EIS/EIR analyze the effects that such conflicts will have on city General Plans, including land use, housing, and population impacts resulting from these conflicts. It is not appropriate, however, to ignore the interest of the cities in planning land use and growth within their sphere of influence. Cal. Gov't Code § 56001 *et seq.* Moreover, adopting an HCP that conflicts with city General Plans imposes a new and substantial burden on the cities. In light of the rule that any decision by a city affecting land use and development must be consistent with its General Plan, *see Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553, 570 (1990), the cities may have to commit to implement General Plan amendments that will resolve the conflict created by the HCP in order to conform city General Plans to the County General Plan. Not only are such amendments a new burden on the cities, but the apparent obligation to amend General Plans may create a major planning problem as the cities try to fit planned uses into a new configuration. (One such issue, discussed further below, is that cities may be relying on future development in their sphere of influence or planning area to provide for development consistently with their adopted growth projections, and to meet regional and affordable housing needs. Removing areas of planned development will limit or foreclose their ability to meet housing and development obligations.)

J-2.1 (Cont.)

Like the draft HCP, Alternative 11 in the EIS/EIR would require local land use agencies to develop and adopt changes to their existing General Plans. The difficulties with any alternative that requires such local government actions are well summarized in the EIS/EIR.

The time and cost associated with development of new general plans for each applicable jurisdiction would be prohibitive and would effectively offset any efficiencies local jurisdictions would hope to achieve in preparing the proposed HCP/NCCP. Development of and reliance on a growth model that is different from the current general plans would be highly speculative due to the legislative/political nature of such action. Accordingly, this alternative is not feasible due to legal and financial reasons.... Additionally, requiring significant changes to existing general plans, does not meet the participating jurisdictions' specific CEQA goal and objective of reasonably and efficiently implementing their respective general and specific plans.

EIS/EIR at 2-43. These bases for eliminating Alternative 11 from consideration also apply to the draft HCP. For this reason, rejecting Alternative 11 in favor of the draft HCP is not reasonable.

To address the conflict among plans, the HCP should assess unincorporated areas within the Inventory Area that are within the sphere of influence or planning area of a city on a case-by-case basis to determine whether the two applicable General Plans are inconsistent. Where there is a conflict, we believe that it is appropriate to retain the land use designation that provides for greater development in order to avoid conflict with city land use planning authority planning for adopted growth projections, and state regional and affordable housing requirements, and to avoid

widening the jobs/housing imbalance. This approach is necessary to assure that the HCP does not usurp local land use authority.

J-2.1 (Cont.)

B. The Plan Limits the Ability of Participants to Meet Regional and Affordable Housing Needs, and the EIS/EIR Fails to Adequately Analyze these Impacts of the HCP.

The analysis provided within the EIS/EIR with respect to direct, indirect, and cumulative land use and population/housing impacts is expected to result from the HCP is inadequate. For example the EIS/EIR prematurely dismisses the need to assess the population/housing impact of the Plan on housing and, specifically, Regional and Affordable Housing Needs impacts. The EIS/EIR dismisses these impacts by reasoning that urban development leads to population growth and a subsequent increased demand for additional housing, and since “urban development is not authorized as part of the [HCP]” and “growth in population and housing is anticipated in the long-range planning for the region and is accommodated in and consistent with the General Plans of the local land use agencies,” there is no need to assess the potential housing impacts which the HCP is expected to have within the EIS/EIR. EIS/EIR at 3-3.

This reasoning fails because the HCP (i) does conflict significantly with the General Plans of the jurisdictions affected by the HCP, and (ii) does potentially have an identifiable and significant adverse impact on housing in those adopted General Plans. Potentially significant impacts include the following:

J-2.2

- *The HCP creates a barrier to residential development on parcels designated for such development pursuant to existing General Plans of the jurisdictions covered under the HCP, which development is needed in order to meet state-mandated regional housing needs.*
- *The HCP could jeopardize the ability of these jurisdictions to adequately meet their regional and affordable housing needs, particularly to the extent that areas designated for residential development under city General Plans are designated for high priority acquisition under the HCP and thus precluded from obtaining a permit under the HCP.*
- *The HCP places new requirements and restrictions upon the development of properties within the Plan Area to meet local housing needs and adds an additional layer of administrative approvals to the development process, which can result in costly delays that can discourage or even block potential housing development.*
- *The HCP increases the cost of developing the lands covered by the EIS/EIR as the housing provider must now pay conservation fees on the lands to be developed and undertake extensive planning surveys for all properties within the covered areas in order to meet the HCP requirements.*

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- *The HCP is one of at least eight large-scale HCPs being prepared in Northern California and all of them will have land use, housing, and population effects yet the EIS/EIR fails to analyze the cumulative population/housing impacts of the HCPs taken together.*

1. Inconsistencies with Local General Plans. To the extent that the HCP remains inconsistent with the General Plans of the affected jurisdictions, the EIS/EIR is required to discuss these inconsistencies.

The EIR shall discuss any inconsistencies between the proposed project and applicable general plans and regional plans. Such regional plans include, but are not limited to, the applicable ... regional housing allocation plans...

CEQA Guidelines § 15125(d). An analysis of the significant impact that a project may have on housing within the affected region is also required under the CEQA Guidelines. *Id* § 15126.2(a). Furthermore, public agencies are required to consider housing factors pursuant to section 15131(c) of the CEQA Guidelines. As we note below, the EIS/EIR fails to discuss a number of significant inconsistencies between the HCP and the General Plans of the affected jurisdictions. Furthermore, these inconsistencies could have significant adverse impacts on the regional housing plans for these jurisdictions. To the extent that the Final HCP eliminates conflicts with City General Plans, these impacts become moot.

J-2.2 (Cont.)

a. Inconsistencies Between the HCP and Pittsburg's General Plan

An analysis of the effect of the HCP on the General Plan of the City of Pittsburg demonstrates the identifiable, significant adverse impact that the Plan will have on housing. In 1999, the Association of Bay Area Governments ("ABAG") issued its most recent Regional Housing Needs Determination ("RHND") in which the City of Pittsburg was assigned to build 2,513 dwelling units ("DUs") that are further allocated by income level as: Very Low Income (534 DUs), Low Income (296 DUs), Moderate Income (696 DUs), and Above Moderate Income (987 DUs). Pursuant to applicable statutes, each jurisdiction must include in its General Plan a housing element that includes its share of the RHND so the RHND allocations then form the basis for each jurisdiction's General Plan Housing Element. Cal. Gov't Code §§ 65583-84.

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Table 1 below shows the City of Pittsburg's progress as of December 2004 towards meeting its RHND requirements.

**Table 1 – Percent of Regional Housing Needs
 Determination met by City of Pittsburg**

RHND Allocation (1999-2006)	Units Approved or Constructed (as of 2003)	%	Units Remaining (2004-2006)	%
2,513	1,511	60%	1,002	40%
Source: City of Pittsburg General Plan Housing Element at Table 13.6-1. December 2004.				

As of December 2004, the City of Pittsburg had met only 60% of its RHND requirement, with two years left to achieve 100% of its allocation.

As part of its General Plan Housing Element (updated in December 2004), the City of Pittsburg identified a total of 719.5 acres within its General Plan planning area that could accommodate the housing it needs to provide in order to meet its state-mandated RHND obligations. However, 87.9% (632.6 acres) of these areas planned by the City of Pittsburg for housing under its General Plan are identified as acquisition areas under the proposed HCP.

J-2.2 (Cont.)

**Table 2 – Acreage Available for Residential Development
 within the City of Pittsburg**

Total Housing Acreage	Acreage Within Proposed HCP/NCCP Acquisition Areas	% Within Acquisition Areas
719.5	632.6	87.9%
Source: Michael Brandman Associates, Analysis of East Contra Costa County HCP/NCCP (2005).		

The reduction in acreage available for residential development associated with implementation of the HCP is significant and unexplored in the EIS/EIR. It constitutes a serious depletion in the lands available to meet the current and future housing needs and affordable housing needs of the residents of the City of Pittsburgh.

The individual properties that are within the proposed HCP acquisition areas (*i.e.*, Subzone 1e) are summarized below:

Table 3 – Properties within City of Pittsburg Identified for Acquisition

Name	Acreage	General Plan Designation	Potential Units
Ridge Farms / Ridge Farms II	61.4	Low Density Residential	429*
Vista Del Mar	53.6	Low Density Residential	308
	37.1	Medium Density Residential	234
San Marco	25	High Density Residential	420
	64.5	High Density Residential	1,101**
San Marco Meadows	148	Low Density Residential	444*
	21	Hillside Low Density Residential	105*
Bailey Estates	56	Hillside Low Density Residential	249
Sky Ranch II	166	Low Density Residential	415
Total Acreage	632.6	Total Potential Units	3,705
* Maximum allowable density was used for this figure; actual density may be significantly lower due to site constraints and/or zoning requirements. ** Unit count reflects Development Agreement Source: City of Pittsburg General Plan Housing Element at Table 13-6.4. December 2004.			

J-2.2 (Cont.)

At buildout, the areas listed above could include as many as 3,705 dwelling units under Pittsburg's General Plan.

Since the HCP may be expected to cause a significant reduction in the available supply of dwelling units in the City of Pittsburg as demonstrated above, it is clear that the HCP has an immediate and quantifiable adverse impact on housing within the areas covered by the HCP. If the HCP acquisition areas are implemented as currently proposed, the acquisition of these areas would limit the City of Pittsburg's ability to meet its RHND requirements, putting the City of Pittsburg at risk of losing State funds as well. Moreover, limiting planned growth in these areas would likely exacerbate housing supply issues in Contra Costa County and could create pressure to develop other areas in the region that may have more biological importance. The appropriateness and legality of the HCP – in light of such impacts – is uncertain. *Cf. Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 607-09 (1976) (setting forth a test to

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determine the constitutionality of local requirements that have regional impacts). Thus, the environmental impact of the HCP on housing should have been adequately studied, and, as a consequence, the EIS/EIR is inadequate. These inadequacies could be remedied in the final HCP by assuring availability of permits in areas generally planned for development by cities, and by assuring streamlined permitting as discussed further below.

In addition to the impact on meeting current housing requirements, the HCP conflicts directly with the General Plan as to areas within the City's planning area. For example, several areas in the City of Pittsburg's planning area that are designated for future urban development under its General Plan are inside preserve areas within the HCP. They are summarized below:

Table 4 – Properties within the City of Pittsburg's Planning Area identified for Acquisition

Planning Area	Properties	Section
Southwest Hills	Faria Investors	1a
Woodlands	Montreux, Chevallier & Torres, Thomas (2), Riley, Southport	1d

Source: Michael Brandman Associates, Analysis of East Contra Costa County HCP/NCCP (2005).

J-2.2 (Cont.)

While these properties are not part of any current RHND strategy, they are likely to be a part of the City of Pittsburg's future RHND strategy and inventory analysis pursuant to the anticipated population growth that will occur in the City of Pittsburg over the next 15 years. As noted above, limiting planned growth in these areas would likely exacerbate housing supply issues in Contra Costa County and therefore could create additional development pressures for other areas within the region that may have more biological importance.

b. Inconsistencies Between the HCP and Other General Plans

Antioch

While the City of Antioch is not a participant in the HCP, it is in the Inventory Area and the impacts on Antioch's General Plan and housing must be considered under CEQA. Antioch was assigned to build 4,459 dwelling units between 1999 and 2006. The table below shows the City's progress towards meeting its RHND requirements, as of June 2002.

**Table 5 - Percent of Regional Housing Needs
 Determination met by City of Antioch**

RHND Allocation (1999-2006)	RHND Units Approved or Constructed (as of June 2002)	%	RHND Units Remaining (2003-2006)	%
4,459	3,387	76%	1,826	24%

Source: City of Antioch General Plan Housing Element at Table 9-T. November 2003.

As of June 2002, the City of Antioch had met 76% of its RHND.

Brentwood

The City of Brentwood was assigned to build 4,073 dwelling units between 1999 and 2006. The table below shows the City's progress towards meeting its RHND requirements, as of January 2004.

J-2.2 (Cont.)

**Table 6 - Percent of Regional Housing Needs
 Determination met by City of Brentwood**

RHND Allocation (1999-2006)	RHND Units Approved or Constructed (as of December 2003)	%	RHND Units Remaining (2004-2006)	%
4,073	3,013	74%	1,060	26%

Source: City of Brentwood Community Development Department (Telephone Conversation). 2005.

As of January 2004, the City of Brentwood met 74% of its RHND obligation. According to City Staff, Brentwood surpassed its moderate income and above-moderate income housing obligations, but has failed to meet its very-low income and low income obligations. For all the reasons discussed in relationship to the City of Pittsburg General Plan, implementation of the HCP could have a profound affect on the ability of Antioch and Brentwood to meet RHND requirements and to implement affordable housing strategies. To the extent the HCP continues to conflict with adopted city General Plans, the EIS/EIR must set forth a thorough analysis of potential, land use, housing, population, and socio-economic impacts including environmental justice impacts, which we explore in greater detail below.

2. Additional Requirements for Development. The EIS/EIR states that “[t]he proposed HCP/NCCP does not ... interfere with the ability of the local land use agencies to provide a reasonable balance of housing for the population.” EIS/EIR at 3-3. This statement is inconsistent with the content and practical application of the HCP since the HCP will impinge

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upon housing development within the Plan Area because it adds new and additional hurdles that must be met (*e.g.*, within the Permit Area the HCP establishes stream setbacks, HCP at 6-11, requires avoidance and minimization of direct and indirect impacts of new development on local hydrological conditions and erosion, *id.* at 6-16, requires wetland, pond, and stream avoidance and minimization, *id.* at 6-27, imposes wetland mitigation fees, *id.* at 9-19, and establishes compensation ratios for restoration/creation of wetlands, *id.*). These new restrictions can reasonably be expected to discourage or, in some cases, altogether prohibit development of these covered areas in a manner consistent with the applicable local land use agency's General Plan.

In addition, contrary to the HCP goals and objectives, the imposition of the HCP as currently drafted on the covered areas will have the effect of broadening the reach of and lengthening the approval process for the development of housing. For example, planning surveys will now be required for all properties, even if there is no indication that the lands to be developed are environmentally sensitive. *See* HCP at 6-2 to -4. Moreover, even the definition of covered activities to encompass all "ground-breaking activities," HCP at 1-7, creates new governmental approvals for activities that today do not require approval.

3. Increased Fees and Costs to Develop Lands. Rather than streamlining the permit process as intended, the draft HCP creates increased fees and costs for development without providing meaningful streamlining for project approvals that offset additional costs. The costs for developers of dwelling units will increase immediately upon the implementation of the HCP. Developing areas covered by the HCP for housing purposes will become more expensive because the housing provider will then have to pay conservation fees of up to \$22,936 per acre on the lands it seeks to develop for housing even though these lands may be located in urban areas and well-known as not being of an environmentally sensitive nature. In addition to these hard fees, a housing developer is expected to bear the cost of planning surveys. On top of these identifiable costs, the developer also faces the time cost of money as the approval process and the completion of the planning survey will likely increase development time. These additional costs may discourage the development of these lands, many of which are already earmarked for potential housing development and, in turn, could cause jurisdictions to fail to adequately meet their the requirements of the Housing Element of their General Plans. Because the fees and costs imposed upon the landowner by the HCP may have impact the ability of a local jurisdiction to meet its RHND requirements, it should have been addressed within the EIS/EIR.

4. Cumulative Impacts of Multiple Large-Scale HCPs. The HCP is one of at least eight large-scale HCPs being prepared in Northern California (the others are San Joaquin County, Placer County, Solano County, Santa Clara Valley, South Sacramento County, Sutter/Yuba County, and Yolo County) and all of them will have land use, housing, and population effects, yet the EIS/EIR fails to analyze the cumulative impacts of the HCPs taken together. The EIS/EIR references only the San Joaquin HCP, and the only impacts of the San Joaquin HCP that are mentioned are the "expected beneficial impacts to Covered Species." EIS/EIR at 5-3.

J-2.2 (Cont.)

While the impacts of the draft HCP on regional and affordable housing are significant, it is possible to substantially reduce the impacts by making the changes described in Section II.A. of this letter, *supra*. Specifically, the HCP should assess unincorporated areas within the Inventory Area that are within the sphere of influence or planning area of a city on a case-by-case basis to determine whether the two applicable General Plans are inconsistent, and – where there is a conflict – the HCP should retain the land use designation that provides for greater development. In addition, as suggested below, the draft HCP should be revised to provide adequate permit streamlining. Taking these steps will allow for cities to implement their adopted General Plans and thereby substantially reduce the impacts of the HCP on housing.

J-2.2 (Cont.)

C. *The Plan Includes Substantial Mitigation Requirements for Impacts to Wetlands and Water Quality that are Unduly Burdensome and Inequitable in light of the Fact that Applicants will be subject to separate Wetlands and Water Quality Permitting Requirements.*

Although two key goals in the development of the HCP are streamlined permitting and certainty of mitigation, EIS/EIR at 1-6 to -7, the HCP fails to achieve real streamlining or mitigation certainty, particularly with respect to wetlands and riparian resources. The HCP states that it is only “intended to serve as a basis for subsequent applications for regional wetland permits currently in development.” HCP at ES-1, emphasis added. This is not consistent with the general goal of providing a streamlined permitting process. Since the U.S. Army Corps of Engineers (“ACOE”), San Francisco Bay Regional Water Quality Control Board (“SFBRWQCB”), and Central Valley Regional Quality Control Board (“CVRWQCB”) are not parties to the HCP, impacts to wetlands, riparian resources, and water quality must be separately permitted by those agencies under sections 401 and 404 of the Clean Water Act. Such impacts also must be authorized by the California Department of Fish and Game (“CDFG”) under Fish and Game Code 1602. Moreover, there is no certainty that compliance with the HCP will be accepted as full and appropriate mitigation by those agencies to support permit issuance.

J-2.3

Further, while the HCP does impose mandatory mitigation measures for impacts to wetlands, riparian resources, and water quality, it does not ensure that those mitigation measures will be sufficient to attain authorization for such impacts. Instead, the ACOE, SFBRWQCB, CVRWQCB, and CDFG remain free to impose additional mitigation requirements for impacts to such resources. The prospect of additional mitigation and associated lack of uncertainty are unduly burdensome in light of the considerable HCP mitigation requirements. For example, the HCP establishes stream setbacks, *see* HCP at 6-11, requires avoidance and minimization of direct and indirect impacts of new development on local hydrological conditions and erosion, *see id.* at 6-16, requires wetland, pond, and stream avoidance and minimization, *see id.* at 6-27, imposes wetland mitigation fees, *see id.* at 9-19, and establishes compensation ratios for restoration/creation of wetlands, *see id.* at Table 9-5. The mitigation fees imposed range from \$57,000/acre to \$160,000/acre. *See id.*

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The mitigation measures imposed are very broad. For example, stream setback requirements apply not only to perennial, intermittent, and ephemeral streams, but also to concrete channels. HCP at 6-11, Table 6-2. In addition, the avoidance and minimization requirements to limit impacts on hydrological conditions and erosion are conditions that currently extend to only a portion of the Permit Area under the Contra Costa County Clean Water Program's National Pollution Discharge Elimination System ("NPDES") permit issued by the SFBRWQCB. Yet those conditions will be imposed throughout the Permit Area, that is, beyond the jurisdiction of the Board that imposed the conditions. *See id.* at 6-16. Furthermore, the rationale for the avoidance and minimization requirements is "to ensure that new development permitted under the HCP has no or minimal adverse effects on downstream fisheries to avoid take of fish listed under ESA or CESA." *Id.* But there are no fish species among the Covered Species.¹ It is inequitable to impose the burden of mitigation requirements for species that are not covered by the HCP because there is no corresponding benefit to Permittees.

J-2.3 (Cont.)

Based on this analysis, it is evident that the draft HCP exposes project applicants to the risk of multiple, overlapping, and inconsistent mitigation requirements. Projects in the Plan Area that affect wetlands, riparian resources, and water quality must obtain separate permits from as many as three regulatory agencies, and each of those agencies may impose additional mitigation measures that may or may not be consistent with those in the HCP. We recommend making implementation of certain wetlands and water quality mitigation requirements (*i.e.*, Conservation Measures 1.7, 1.10, 2.12) and the mitigation fee contingent upon the approval by the regulatory agencies of regional wetlands permits. Such an approach weds the benefit of the regional permit with the burden of the specified mitigation. It also leaves in place adequate mitigation measures to conserve Covered Species and associate natural communities (*i.e.*, Conservation Measures 1.1, 1.2, 1.3, 2.2, 2.3, 3.2, 3.6, 3.7, 3.8). We further recommend expanding the covered species list to recognize protection afforded to fish species by the HCP Conservation Measures.

¹ In fact, one of the alternatives analyzed but eliminated from detailed consideration was an expanded list of Covered Species. EIS/EIR at 2-38. Expanding the list to cover species such as the listed Delta Smelt is appropriate in the event that the HCP is implemented with avoidance and minimization measures for those species. The EIS/EIR states that adding species would be cost prohibitive but at the same time suggests that existing conservation measures would be sufficient to conserve the necessary habitat for the species. The basis for dismissing this alternative is tenuous.

D. The Designation of Acquisition Zones Without a Clear Implementation Approach Leaves Landowners Without Certainty in Planning.

A principal shortcoming of the HCP's existing approach stems from the uncertainty it creates for landowners. Particularly confusing is the effect of designating private property as part of an "Acquisition Zone." The Plan does say that "[l]and acquisition will be undertaken in accordance with a detailed set of requirements, while maintaining flexibility in how the Preserve System is ultimately assembled." HCP at 5-16. Although Discovery Builders supports flexibility in the Plan's approach to assembling a preserve system, the Plan must be clear about the effect of the designation, and must allow development to proceed in a reasonable manner. At present it is impossible for landowners to determine the effect of an "acquisition" designation on their property. The HCP does not describe how development can proceed within acquisition zones or expressly indicate whether it is possible to obtain take coverage for activities that occur within Acquisition Zones.

1. Development and Take Authorization within Acquisition Zones.

It is evident from the size and location of acquisition areas, and the anticipated expansion of the Permit Area, that development must be possible within the Acquisition Zones. Simply the fact that the Plan calls for preservation of 23,500 acres, in the Initial Development scenario, while the Acquisition Zones total 85,780 acres, demonstrates that other uses can go forward in the Acquisition Zones. HCP at 5-1, 5-17 to -19. The permissibility of development in the Zones is also inferred from the expectation that the Maximum Urban Development Area will be formed by expanding development into the acquisition areas. The Acquisition Zones "incorporate all undeveloped land outside the major urban areas of Bay Point, Pittsburg, Antioch, Oakley, and Brentwood that is not already protect in large preserves..." HCP at 5-17. In other words, the Zones include almost all lands outside the Initial Urban Development Area (*i.e.*, the initial Permit Area) other than parks, open space, and agricultural lands. *See* HCP at Figure 5-2. At the same time, the Maximum Urban Development Area (*i.e.*, the maximum Permit Area) is more than 4,000 acres greater than the Initial Urban Development Area, *see* HCP at ES-2, -3, and it is not possible to attain the Maximum Urban Development Area without some level of development within Acquisition Zones. For this reason, it may be inferred that some amount of development is permissible within the Acquisition Zones. In spite of these logical inferences, the HCP does not expressly address how development is to go forward in these areas.

J-2.4

Moreover, a legitimate concern of landowners is that Permittees will be reluctant to approve development in Acquisition Zones – particularly high priority Acquisition Zones – due to a desire to retain those lands in an undeveloped status until funds exist for acquisition. But there is no certainty about whether and when such funds will be available, or which lands within the broad Acquisition Zones that the Implementing Entity will target for acquisition. This leaves landowners waiting indefinitely for the Implementing Entity to act. And, although the HCP

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indicates that preserve lands will only be acquired from willing sellers, landowners who do not choose to sell their property for preserve assembly may be unable to develop while Permittees also wait for the Implementing Entity before granting development approvals.

The HCP should make clear that development is allowed in Acquisition Zones, and that that development will not be unduly delayed by HCP procedures. It should also be made clear that the HCP's benefits apply to all landowners in the affected area. In other words, the HCP should state that landowners in all Acquisition Zones within the Permit Area may seek take coverage under the HCP through the process described in Section 8.7 of the HCP.

The HCP should also be clear about development and take coverage in Acquisition Zones outside the Permit Area. As an initial point, there is no apparent reason that all the land in the Inventory Area should not also be within the Permit Area. If development is otherwise allowed by local governments, and the Plan is meeting its conservation goals, activities throughout the Inventory Area should be covered. It is inequitable to require landowners outside the Permit Area to pay fees while burdening their land with an Acquisition Zone designation and denying them take coverage under the Plan. If, however, there are legitimate reasons for excluding such lands from the Permit Area, the HCP should provide that landowners outside the Permit Area (and therefore largely within Acquisition Zones), may seek take coverage under the HCP through an alternative process. Provided such landowners undertake sufficient biological surveys, propose development consistent with the HCP Conservation Strategy, and pay the requisite fees, they should not be foreclosed from obtaining take coverage.

J-2.4 (Cont.)

2. Effect of Changes in Permit Area.

The HCP defines the Permit Area to include the ULL of Contra Costa County or the city limits of the participating cities, whichever is larger, HCP at 1-6, and also provides for the expansion or reduction of the Permit Area as the ULL changes over time. Again, Discovery Builders supports flexibility in the design of the Plan, and agrees that it is not currently possible to define the maximum permit area. However, the flexible definition of the Permit Area could lead to circumstances in which some landowners invest in the development of their land only to see their efforts undone by refusal to include an area within the maximum permit area.

To rectify this inequity, we recommend advance notice of changes to the Permit Area that occur subsequent to adoption of the Plan to provide landowners with 180 days to plan for such changes. We also recommend allowing applicants that have obtained one or more local discretionary permits to develop a project prior to a change in the Permit Area, and are otherwise able to comply with the HCP, to complete the project irrespective of that change to the Permit Area.

3. Description and Biological Value of Acquisition Zones.

The uncertainty created by the designation of Acquisition Zones is exacerbated by the identification and discussion of those Zones. For example, the HCP states that at least 25 percent of Subzone 1d will be acquired and acquisition will be focused in the southern half of the Subzone. HCP at 5-31. But the total acreage of Subzone 1d is unknown so that it is not possible to determine the acreage to be preserved. Similarly, the HCP states that at least 1,450 acres of annual grasslands within Subzones 1b and 1c will be acquired, HCP at 5-30, but the HCP does not indicate the total acreage of those Subzones. If the Subzones only cover 1,450 acres, the designation has the effect condemning the property by foreclosing any use other than acquisition.

The HCP should provide more extensive and accessible information regarding the Acquisition Zones. We recommend providing a single table with all the Zones and Subzones and the following information: total acreage, acreage to be acquired for Initial Urban Development Area, acreage to be acquired for Maximum Urban Development Area, habitat type(s) to be preserved, and location(s) of acreage to be conserved. Some of this information is not included in the current draft HCP, and the information that is included is scattered throughout Chapter 5 and, therefore, relatively inaccessible.

J-2.4 (Cont.)

Further, the biological value of the Acquisition Zones was determined based on landscape level data. Where better, more detailed, scientific information becomes available, it is appropriate and consistent with the Plan goals and objectives to allow landowners whose holdings include land in high priority Acquisition Zones to submit more detailed, up-to-date biological data and provide Permittees an opportunity to make a decision about the conservation values of such lands on the basis of that more detailed data. This comports with the adaptive management component of the larger Conservation Strategy.

E. Neither the EIS/EIR nor the Plan Explain the Practical Consequences of the Plan's Land Use Designations

The Plan includes a consolidated map of land use designations. See HCP at Figure 2.1; EIS/EIR at Figure 3-2. In unincorporated areas, the map is based on county land use designations. See HCP at 2-3. City land use designations beyond City boundaries were not considered, even in areas within City spheres of influence and/or ULLs. See *id.* The practical consequences of the HCP land use designations are uncertain. In meetings with the development community, HCPA personnel expressly have indicated that the HCP is not a land use plan and the designations have no regulatory effect. But the HCP states that the Permit Area may be expanded beyond the initial urban development area "at such time as [certain] urban land use designations are approved." HCP at 2-17. We recommend clarifying that the land use designations included in the HCP were identified merely as one of a number of tools to devise the overall Conservation strategy and those designations have no other purpose or regulatory effect.

J-2.5

F. The Plan includes Overly Burdensome Survey Requirements.

The Plan includes substantial survey requirements. “Three types of surveys may be required prior to or during implementation of covered activities: planning surveys, preconstruction surveys, and construction monitoring. Surveys are required for all covered activities except those causing temporary impacts less than 0.05 acres or temporary impacts specifically excluded from the temporary impact fee.” HCP at 6-2. These requirements are imposed in addition to avoidance and minimization measures. *See id.*

The planning surveys required by the HCP are identified in section 6.2.1. They include extensive plant surveys and wildlife habitat surveys along with a jurisdictional delineation. The HCP appears to impose all planning survey requirements on all applicants for take coverage irrespective of the characteristics of the land involved. Thus, an applicant with land that has little or no biological value must complete the same extensive planning surveys as an applicant with land characterized by high biological value. In addition, the survey methods required may be quite onerous. *See* HCP at 6-5, 6-8 to -9. For example, they may involve multiple site visits and/or may only allow for surveying to occur during certain months of the year.

J-2.6

A more reasonable approach would be to provide greater latitude to applicants to undertake the necessary planning surveys. HCPA personnel have suggested that the intent was to set forth such an interpretation. There is some support for this reasonable approach in the HCP. For example, the Plan states that “[i]f wetlands are present on the site, project proponents must conduct a delineation of waters of the United States and waters of the State according to the accepted standards of USACE and CDFG.” HCP at 6-8. *Accord* Implementing Agreement (“IA”) at 14. The implication is that no delineation is necessary if no wetlands are present on site. The HCP should clearly state that the only planning survey universally required is the survey of land-cover type and qualified biologists may determine the other planning surveys, if any, that are necessary in light of the characteristics of the property and its environs.

G. Implementation Provisions are Ambiguous.

Discovery Builders strongly supports locally-controlled implementation process, consistent with the general goals and specific objectives of the HCP. The Plan is intended to “[P]rovide a streamlined permitting process resulting in improved conservation.” EIS/EIR at 1-6. Further, the EIS/EIR identified the following specific objective: “Establish a coordinated and streamlined permitting process for compliance with ESA and CESA that accelerates and integrates the permitting process, improves regulatory certainty, reduces applicants’ permitting costs, and facilitates needed public infrastructure projects.” EIS/EIR at 1-8. Providing for all implementation actions by local government Permittees is the most effective means to achieve the goal of establishing a streamlined process.

J-2.7

Although the HCP does include provisions that appear to give primacy to the local government Permittees, it also has other, conflicting, provisions. For example, the HCP states

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that “the participating jurisdictions will vest the responsibility for implementing the Plan to the Implementing Entity as described below. In other words, the Implementing Entity will oversee implementation of the Plan on behalf of the participating jurisdictions.” HCP at 8-2. *Cf.* EIS/EIR at 2-22 (stating that HCP implementation “would be overseen by the Implementing Entity”); EIS/EIR at 2-23 (stating that the Implementing Entity “would be responsible for the day-to-day tasks of implementing the HCP/NCCP ‘on the ground’ ...”). Furthermore, the EIS/EIR states, that “[a]ll activities or projects seeking coverage under the proposed HCP would be subject to approval by the local jurisdiction ... and the HCP Governing Board.” EIS/EIR at 2-14. The HCP should clearly state that the authority to extend take coverage to project applicants is vested solely in the Permittees and that, under the Plan, the Permittees are expected to exercise that authority.

The HCP also fails to specify a timeframe for processing of applications for take coverage. A processing timeframe is a critical component of any realistic effort to streamline the permitting process. A number of HCPs, including the recently-adopted Western Riverside MSHCP, include timeframes for processing of applications for take coverage. The draft IA does include a 60-day timeframe for processing of all applications, plans, or reports. IA at 14. But it indicates that in some instances approval by two or more Parties to the IA will be necessary and then the 60-day timeframe apparently is not mandatory; instead, the reviewing Parties are only required to use “best efforts” to respond within the timeframe. In addition, in the event of a minor or technical denial, there is no provision for the applicant to make corrections without proceeding through the entire process again.

To address these issues regarding a timeframe for processing applications, we recommend establishing specific timeframes for processing of applications, as follows: The Permittee should have 15 days to determine if the application is complete and 45 days to complete review of the application. If the application is deemed incomplete, the applicant may cure the defect and can then proceed directly to the 45 day review period.

H. The Plan Should Provide that Compliance with the Plan Mitigates Biological Impacts to a Level Less than Significant for the Purposes of CEQA.

As explained above, one of the general goals of the HCP is to streamline the permitting process. EIS/EIR at 1-6. A related general goal of the HCP is “to coordinate and standardize mitigation and compensation requirements under ESA, CEQA, NEPA, NCCPA, and other applicable laws and regulations...” EIS/EIR at 1-7. However, the HCP does not standardize mitigation between the HCP and the CEQA requirements that may be applied to projects in the Plan area. Instead, the HCP states only that “[i]t is expected that the conservation provided in this Plan will be sufficient to meet all CEQA mitigation standards for impacts to the special-status species that are covered by this Plan.” HCP at 1-14. Yet the HCP does not provide that compliance with the Plan will be sufficient to meet CEQA mitigation standards. And neither the HCP nor the related documents contains any commitment by the Permittees that they will treat

J-2.7 (Cont.)

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compliance with the HCP as complete mitigation for CEQA purposes. Therefore, even with respect to Covered Species, mitigation may be imposed under CEQA over and above the mitigation imposed by the HCP. This is unacceptable in view of the goals and objectives of the HCP.

The HCP should clearly provide that compliance with the HCP is all the mitigation that Permittees will require for impacts to Covered Species and for cumulative biological resource impacts. In light of the fact that the Plan is a Natural Community Conservation Plan that must meet the standards set forth in the NCCP Act, its conservation benefits are not limited to covered species but instead extend to species, natural communities, and landscapes, that is, the universe of biological resources within the Plan Area. *See* Cal. Fish & Game Code § 2820. In addition, the Conservation Strategy expressly provides for the preservation of cores (or large blocks of habitat) and linkages (or wildlife corridors). The benefits provided by implementation of the Plan consistent with the NCCP Act and the Plan Conservation Strategy should provide a sufficient basis to determine that compliance with the Plan is sufficient to mitigate any biological resource impacts.

J-2.8 (Cont.)

I. The Plan has Edge Effects that are not Properly Analyzed in the EIS/EIR and Are Unduly Burdensome.

The HCP includes Urban-Wildlife Interface Design Guidelines. *See* HCP at 6-15, Appendix E. The HCP requires applicants to incorporate design elements to minimize indirect impacts of development on adjacent preserve lands. The design elements apply to the urban-wildlife interface, which is a 100-foot buffer area in lands at the edge of the urban development area or adjacent to areas with moderate or high priorities for land acquisition. HCP at 6-15. Thus, the HCP imposes a substantial burden on lands at the edge of the urban development area or adjacent to acquisition Zones in direct conflict with the principles of participation in the Plan compiled by the County with input from stakeholders, which state that “[p]roperties bordering lands to be used as mitigation must be protected from any impacts caused by the mitigation program.” Principles of Participation, East Contra Costa County Regional Habitat Conservation Plan. We recommend changing the HCP in order to make the buffer area part of the Preserve System.

J-2.9

Furthermore, as drafted, the Urban-Wildlife Interface Design Guidelines and associated requirements specified in the HCP will impose a considerable burden on lands in the Plan area. Yet the EIS/EIR does not address the effects of the Guidelines. In the event that the buffer area is not incorporated into the Preserve System, there should be discussion in the EIS/EIR assessing the effect of the Guidelines on land use and related impacts.

Finally, the HCP and related documents, including the IA, should expressly state that no additional mitigation for edge effects beyond compliance with the HCP will be imposed.

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J. The Plan Does not Provide a Clear Basis for a 30-Year Permit Duration.

The duration of the HCP is 30 years. *See* HCP at ES-1, 1-4. Discovery Builders supports the establishment of a permit term that will provide a stable, predictable regulatory environment to third parties that seek take authorization. At the same time, the permit duration must conform to the Fish and Wildlife Service's regulations implementing the ESA and five-point policy. *See* 50 C.F.R. 17.32; Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35,242, 35,255-56 (June 1, 2000). Among the factors the Service must consider when evaluating permit duration are "the extent of information underlying the HCP, the length of time necessary to implement and achieve the benefits of the operating conservation program, and the extent to which the program incorporates adaptive management strategies." 65 Fed. Reg. at 35,256. The HCP does not provide a clear basis for the 30-year permit duration consistent with the relevant regulations. The HCP includes just two sentences explaining the permit duration. *See* HCP at 1-4 ("Third years was chosen as the permit duration because it is a reasonable timeframe in which to forecast local growth.... This 30-year timeframe is also expected to be necessary to assemble the Preserve System called for in this Plan.").

J-2.10

One of the project alternatives identified in the EIS/EIR is a reduced permit duration alternative. *See* EIS/EIR at 2-41. The alternative is rejected on the grounds that it is insufficient to implement the HCP's Conservation Strategy and could have adverse impacts on funding for the HCP. *See id.* But the EIS/EIR fails to compare the consistency of the preferred alternative and reduced permit duration alternative with the five-point policy. Therefore, we are concerned that the HCP and EIS/EIR violate the ESA implementing regulations and five-point policy, and we recommend analyzing the permit duration in light of these regulations.

K. The Plan's Stay-Ahead Provision is Impractical.

The "stay-ahead" provision of the HCP requires the Implementing Entity to acquire lands equal to the proportion of impact that occurs in each year, after the first year. HCP at 5-52, 8-18. The stay-ahead provision is impractical as currently formulated for several reasons.

First, because funds for acquisitions are derived in large part from fees imposed on activities in the Permit Area, there is an inherent conflict in the Plan: development must go forward in order to generate fees to acquire preserve land, but cannot go forward until preserve land is acquired and the stay-ahead is met. If preserve lands are not acquired quickly the Plan could fail after only one year. For the Plan to be successful, it must resolve this apparent catch-22. The HCP actually acknowledges this problem, but does not resolve it, in discussing the jump-start provision, which if fully funded would provide preserve lands before the Plan takes effect: "given the difficulty of acquiring land prior to collecting fees under the Plan, the Jump-Start provision is a guideline." HCP at 5-51. One year is not enough time to generate fees for

J-2.11

acquisition funds. Since there is no guarantee of abundant early funding from state or federal sources, we recommend that the start-up period be extended from one to five years.

Second, the annual review imposes too great a burden on the Plan. At both the beginning of the permit duration and toward the end there may be a number of practical obstacles to acquisition of lands at the same pace as activities in the Permit Area. Experience with other HCPs, including San Diego and Western Riverside, suggests that preserve acquisition can take a lot of administrative time, and land availability responds more to real estate market forces than to the dictates of an HCP. As a result, the Plan should provide enough flexibility for the Implementing Entity to acquire preserve land at a practical pace, without risking failure of the stay-ahead and therefore the entire Plan. Since there are substantial areas in the Inventory Area that are already in conservation, and the lands conserved under the Plan will build on existing conserved lands, some value should be assumed for conservation already in place. This should be viewed as an existing "jump-start" which assures conservation benefit while leaving room for flexibility in when and where acquisitions take place. We recommend reporting annually, but requiring compliance with the stay-ahead provision only every fifth year.

J-2.11 (Cont.)

Third, the stay-ahead accounting should be done by aggregate acres, rather than by land-cover type. Requiring accounting by land-cover unduly constrains the Implementing Entity to pursue small amounts of many land-cover types, when higher total conservation value might be preserved by acquiring large blocks of only one or two land-cover types. "Measurement Method #2" addresses this concern for grasslands in Zone 2 in the first 10 years, but does not really resolve the problem. The most efficient acquisition strategy may turn out to focus on land-cover types other than grassland, and the efficiency issue will extend throughout the life of the permit, not just 10 years. Moreover, the purpose of the Plan is to conserve at a large scale, with regional or subregional benefit. Accounting by land-cover type is not consistent with a regional scale. Incorporation of these recommendations into the final HCP will minimize the practical issues created by the existing stay ahead provision. As a result, continued plan implementation will be more certain.

L. The Draft EIS does not Comply with Environmental Justice Guidance and Policies.

According to the U.S. Department of Justice and EPA, "Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." *See, e.g.,* Assistant Attorney General Thomas L. Sansonetti, *Integrating Environmental Justice at the Department of Justice*, 30 Human Rights Magazine [PAGE] (2003). Meaningful involvement is particularly relevant when assessing an EIS under NEPA or EIR under CEQA since a core function of those statutes is to inform the public and provide for public input into governmental decision making. It is a concept that both the federal and State governments have embraced. *See* Council on Environmental Quality, Environmental

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Justice: Guidance under the National Environmental Policy Act 13 (1997); Office of Planning and Research, Environmental Justice in California State Government 15 (2003).

As the EIS/EIR points out, Contra Costa County has rapidly growing Hispanic and Asian and Pacific Islander populations. According to the EIS/EIR, as of 2000, the Hispanic population was over 17.5 percent and the Asian and Pacific Islander population was over 12.5 percent. Furthermore, Census data indicates that 26 percent, or more than one of four, persons in the County speak a language other than English at home. In such circumstances, CEQA guidance recommends a number of mechanisms to overcome barriers to participation such as coordination with individuals, institutions, or organizations in the affected community or communities; translation of major documents or summaries thereof; and use of accessible facilities for public meetings. See Environmental Justice: Guidance under the National Environmental Policy Act at 13. Additional mechanisms to promote meaningful involvement that are routinely utilized in the NEPA context are identified in The Model Plan for Public Participation developed by the National Environmental Justice Advisory Council. We are concerned that such mechanisms were not used to this point and recommend use of such mechanisms moving forward.

J-2.12 (Cont.)

In addition to the procedural deficiency identified above, we are concerned about a substantive deficiency with respect to the analysis of environmental consequences contained in the EIS/EIR. That analysis focuses solely on the removal of lands from agricultural production and corresponding loss of agricultural jobs. (EIS/EIR at 4-51.) The EIS/EIR fails to consider the environmental justice impacts associated with limitations the HCP will impose on the availability of regional and affordable housing. Such impacts are worthy of at least passing consideration in light of the widening jobs/housing imbalance and high median price of a home in the State. Furthermore, the effect of such impacts on minority and low income populations may be more acute than the effects on the general population. See Environmental Justice: Guidance under the National Environmental Policy Act at 14. The EIS/EIR suggests that implementation of the HCP may actually increase the pace of land development in the Plan Area, but the suggestion is implausible in light of the fact that HCP will limit future development through the permanent conservation of thousands of acres of land in the County. We recommend conducting a more detailed analysis of environmental justice impacts associated with the HCP.

CONCLUSION

Notwithstanding statutory language and expectations of the participants, there are a number of ways in which the HCP is not voluntary. For example, an Interagency Staff Report dated April 2000 states that "Plans are typically voluntary, meaning that developers can participate in the HCP or choose the current permitting process." Interagency Staff Report Proposed East County Habitat Conservation Plan 5 (April 3, 2000). Likewise, principles of participation in the Plan compiled by the County with input from stakeholders state that "[o]pportunities for site-by-site planning and permitting by individual property owners should be continued." Principles of Participation, East Contra Costa County Regional Habitat

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Conservation Plan. In spite of these assurance, however, there is no provision for applicants to opt out of the HCP. Discovery Builders understands the need for a consistent conservation approach, and a uniform development fee system, in order to assure a successful HCP. Since everyone will have to abide by the Plan, however, it is especially important that the Plan's requirements are carefully tailored to assure an efficient, streamlined process and equitable treatment of all affected landowners. We look forward to working with the HCP preparers to address the concerns and suggestions above and to adopt a fair and effective Plan.

Very truly yours,

/s/

Paul S. Weiland

for NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP

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PSW