



CONTRA COSTA

05 DEC -1 PM 3:13

December 1, 2005

VIA FACSIMILE
925-335-1299

Mr. John Kopchik
Community Development Department
Contra Costa County
651 Pine Street, North Wing, Fourth Floor
Martinez, CA 94553

Re: Draft East Contra Costa County Habitat Conservation Plan and EIR/EIS

Dear John:

The Home Builders Association of Northern California ("HBA") respectfully submits these comments on the draft East Contra Costa County Conservation Plan ("HCP") and the associated EIR/EIS. At the outset, we would like to acknowledge the hard work you and others have done in shepherding the HCP through its lengthy and sometimes difficult development process. We have appreciated the opportunity to participate in this process and your openness to many of our suggestions. Ultimately, it is our goal and hope that the hard work done by all of the participants will result in a final HCP that will enjoy broad-based support.

We view the joint letter dated March 19, 1998 from USFWS and CDFG to the Contra Costa County Board of Supervisors as one important "measuring stick" in evaluating the HCP. We believe the letter, headed "Purpose and Need for a Habitat Conservation Plan in East Contra Costa County," is worth quoting here:

Regional HCPs/NCCPs establish a coordinated process for permitting and mitigating the incidental take of endangered species. Developers seeking coverage under the HCP/NCCP typically pay a mitigation fee and receive an incidental take authorization or permit for their project, consistent with the terms of the HCP/NCCP. Developers are then typically relieved of the expense of endangered species surveys and of individually securing mitigation.... There are many benefits of such a regional and multi-species HCP/NCCP to the County and its residents. A regional HCP/NCCP would:...reduce the economic and

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logistic burden of environmental compliance on individual landowners and streamline the responsibilities of local jurisdictions...[and] decrease permitting agencies' project review time and facilitate timely progression of projects... Two of the largest benefits a regional HCP/NCCP offers local jurisdictions are early identification of significant resource issues, and regulatory certainty and predictability in planning for future urban growth and development.

HBA's comments and recommendations are set forth below. We request that they be reflected in the final HCP. In some instances, comments and recommendations made to the HCP also apply to corresponding provisions in the draft Implementing Agreement ("IA") or draft Model Ordinance ("MO").

HCP Executive Summary

- **ES-1: Comment:** The Executive Summary should acknowledge that the participating jurisdictions will be providing local "no surprises" assurances that parallel the federal and state agency assurances. We note that the IA contains draft local "no surprises" language. However, the language appears to cover only Unforeseen Circumstances and be contingent on assurances being "available" under state and federal law. **Recommendation:** The local assurances should be as broad as both the state and federal assurances and specifically include a commitment to limit exaction measures on biological or open space resource issues to those in the HCP. *See, e.g., CEQA Guidelines Section 15065.*
- **ES-3: Comment:** The Tables use the phrase "maximum allowable impact" for each species. It is our understanding that this is inaccurate because the HCP does not contain species-by-species impact limits. **Recommendation:** Change language to "maximum estimated impact."

L-1

L-2

Chapter 1

- 1-5 (and elsewhere): **Comment:** We believe it is very important that the HCP respect the planning decisions of the participating (and potentially future participating) local jurisdictions. **Recommendation:** Re-examine the conservation strategy, and in particular the preserve acquisition priorities, to make every feasible effort to accommodate currently planned development in the plan area.

L-3

Comment: Along these lines, where there is an unavoidable conflict between planned development and an area designated as high or medium priority acquisition, it is our understanding that although the project will not receive “take” coverage under the HCP, nothing in the HCP, IA, or MO is intended to restrict a local government’s land use authority to approve the project. It is our further understanding that the project would not be subject to the HCP mitigation regime. Of course, we recognize that all relevant environmental laws, including the ESA and CESA, would apply to the project. Recommendation: Confirm whether this understanding is correct.

L-4

- 1-5: Comment: The HCP provides that current and historic Oakley tidal areas are excluded from permit coverage. Recommendation: Clarify what this means and provide additional discussion of the rationale.

L-5

- 1-9: Comment: Existing language regarding Section 7 assurances does not accurately reflect the actual scope of the assurances provided in Chapter 10. Recommendation: Change language to parallel language in Chapter 10.

L-6

- Comment: It is very important that the HCP clearly state that if the HCP is suspended, there is no presumption that an activity would cause actual “take” by virtue of the fact that it would have been a covered activity and subject to the HCPs mitigation requirements. Recommendation: Add language to that effect.

L-7

Chapter 3

- Table 3-9 (Covered Species): Comment: The HCP does not cover certain federally-listed aquatic species in the region (including, for example, Delta smelt, chinook salmon, and steelhead). A central tenant of the HCP is its promise of providing regulatory certainty and streamlined permitting with federal and state wildlife agencies. Covered Activities under the HCP that occur near or adjacent to the various sloughs, creeks, and other waterways will be required to fulfill their full obligations under the HCP, yet may still face permitting delays and uncertainty concerning these other, federally-listed species. As currently proposed, however, the HCP includes a number of measures that either avoid impacts to these aquatic species, or provide additional benefits to these species. For example, Conservation Measures 1.7 (Stream Setbacks), 1.10 (Hydrologic Conditions), 1.13 (Food Control Facilities), and 2.12 (Wetland and Stream Avoidance), as well as the conservation and acquisition goals for aquatic areas and adjacent wetlands as part of the Conservation Strategy, all contribute to protections for these federally-listed aquatic species that are not presently

L-8

Covered Species under the HCP. Recommendation: If these measures are complied with, we suggest either adding these species now, or moving to add these species once the HCP is in place so that Permittees and individual project applicants can reap the full benefits of participating in a regional plan.

L-8 (Cont.)

Chapter 4

- 4-10: Comment: Existing language provides that “To the extent feasible, covered activities throughout the inventory area will be modified to avoid the breeding season of covered species.” It is our understanding that the HCP does not contain such a blanket requirement, though there are certain species specific measures. In any event, such a requirement would be inconsistent with the fundamental streamlining promise of the HCP. Recommendation: Delete this language.

L-9

Chapter 5

- 5-5, 5-13: Comment: Existing language provides that impacts to low quality habitat “will be allowed.” This could be read as implying that only impacts to low quality habitat will be allowed in the permit area. The HCP does not prohibit impacts to higher quality habitat in the permit area. Recommendation: Change language to “most impacts are expected to occur on lower quality habitat.”
- 5-24: Comment: Existing language provides the availability of the land dedication option is available under “special” circumstances. This language could be read to imply that there are restrictions on the use of this alternative that are not spelled out in the HCP. Recommendation: Change language to “the circumstances specified in the HCP.”
- 5-52: Comment: Existing language contains a stringent “Stay Ahead” provision. We are concerned that the “Stay Ahead” provision may be overly aggressive both because it requires proportionate preserve acquisition of several individual land cover types and it becomes effective after year 1 and must be evaluated each year. This specificity could impair the ongoing success of the HCP. The “cure” provisions in the HCP are somewhat helpful, but do not provide the comfort needed by the building community that the permits issued by the agencies will not be compromised due to problems in land acquisition in the early years of the HCP. Also, we are unsure why a mandatory land contribution requirement would serve as an acceptable remedy for this problem. Many builders may not be in the position to satisfy such a requirement and it undermines one of the larger benefits of the HCP (*i.e.*, pay a fee, get a permit). Recommendation: Utilize the “rough

L-10

L-11

L-12

- proportionality” standard contained in the NCCP Act as the exclusive method of measuring HCP/NCCP progress. This approach measures progress based on comparing total plan impacts to total plan acquisition success. | L-12 (Cont.)
- 5-106, 5-107: Comment: Existing language implies that all impacts to Golden eagle and Western burrowing owl are intended to be avoided or will be avoided on a project-by-project basis. It is our understanding that this is not the intent of the HCP. Recommendation: Clarify this language. | L-13
 - 5-112, 113: Comment: The HCP contains a stringent individualized mitigation regime for Giant Garter Snake (“GGS”) and implies that impacts to GGS habitat must be avoided if possible. We believe this is excessive in light of the fact that there are no records of GGS in the survey area, most potentially suitable habitat is marginal, the identified “suitable” habitat has only been “modeled” as suitable, and the Implementing Entity (“IE”) will be acquiring at least 250 acres of cropland or pasture in Zone 6. Recommendation: Conform GGS requirements to other covered animal species. | L-14
 - 5-113: Comment: Existing language provides that HCP conservation measures “may” benefit GGS. Recommendation: Change language to “are expected to benefit.” | L-15
 - 5-115: Comment: Existing language provides that impacts to California tiger salamander (“CTS”) will be avoided or minimized to the maximum extent practicable on a project-by-project basis. It is our understanding that this is inconsistent with the intent of the HCP. Recommendation: Clarify that avoidance and minimization for CTS is achieved through the regional conservation strategy and not on a project-by-project basis. | L-16
 - 5-119: Comment: The HCP provides for stringent mitigation requirements for occupied shrimp habitat that include season wetland mitigation obligations. Recommendation: To the extent that the HCP includes non-species related aquatic resource mitigation requirements (discussed further in comments on Chapter 6) , there should be credit against any seasonal wetland mitigation obligations. | L-17
 - 5-119: Comment: CM 3.8 provides for project-by-project mitigation for occupied shrimp habitat. Recommendation: Provide that this measure is only invoked if the preserve system does not have adequate occupied shrimp habitat already conserved. | L-18

- 5-120 to 5-130: Comment: The HCP Mission Statement provides that one of its overall guiding principles is to “Reduce[] the cost...of federal and state permitting.” Elsewhere, the HCP provides that a guiding principle for developing the planning survey requirements is to “simplify and reduce the preproject survey requirements relative to current and future environmental regulations without the HCP/NCCP” (6-3). It is not clear to us that the HCPs survey requirements are consistent with this principle with respect to covered plant species. None of these species are currently listed and it appears that the survey requirements may be more stringent than would be required under existing practices.
Recommendation: Ensure that the HCP is consistent with the stated principles.

L-19

Comment: Along the same lines, our understanding is that a fundamental premise of the HCP is that it would not impose more stringent avoidance, mitigation requirements, or limitations on mitigating impacts than under existing practices (see Mission Statement quote above). Again with respect to the covered but unlisted plants, the HCP appears to be more burdensome than existing practices.
Recommendation: Ensure that the HCP is consistent with this fundamental premise.

L-20

Chapter 6

- 6-1: Comment: Existing language could be read to imply that only impacts to low quality habitat and aquatic resources will be allowed. Recommendation: Eliminate this language.
- 6-4: Comment: Existing language could be read to suggest that project-by-project avoidance is required if possible. Recommendation: Change language from “if avoidance is not possible” to “if avoidance does not occur.”
- 6-4: Comment: Existing language requires description of avoidance and minimization measures in survey reports. Recommendation: Eliminate this language.
- 6-4: Comment: Existing language could be read to imply that avoidance must occur unless it is “not possible.” Recommendation: Eliminate this language.
- 6-4: Comment: Existing language provides that the results of planning surveys will inform project design, again possibly implying on-site avoidance

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L-25

requirements. Recommendation: Clarify that the results of planning surveys may inform project design to a limited extent. L-25 (Cont.)

- 6-8: Comment: Existing language requires that wetlands reports document avoidance and minimization measures. This and similar provisions suggest that the Implementing Entity is going to be reviewing land plans and recommending avoidance and minimization measures. These provisions are vague and undermine the certainty and streamlining sought by the HCP, as well as the policy of concentrating conservation efforts in the preserve area. Our view is that the HCP should rely only on the specific requirements of Section 6.3. L-26
Recommendation: Eliminate this language.

- 6-8: Comment: Existing language could be read to imply that avoidance is generally required and projects must be “unable” to avoid impacts before mitigation is allowed. There should be no requirement for delineations on every project in which wetlands may be present, particularly in light of ongoing controversy over the extent of jurisdiction with respect to isolated and adjacent wetlands. This language introduces a high level of discretion into a process that could undermine the very positive and laudable provisions contained on 6-28. Also, we believe the requirement for avoidance of “all streams of any type” is far too broad. Recommendation: Eliminate this language. L-27

- 6-10: Comment: Existing CM 1.6 (minimize development footprint adjacent to open space) applies to “existing public land” and all “open space.” We believe this broad application of the CM is inconsistent with the intent of the HCP. L-28
Recommendation: Change language so that CM 1.6 only applies to areas adjacent to preserve sites.

- 6-12, 6-13: Comment: Existing language calls for local jurisdictions to exceed minimum setback requirements and/or develop additional creek protection measures. These provisions are vague and, we think, inappropriate. If the setback requirements in the HCP are appropriate and effective, they should not be identified as “minimum” requirements. Also, the HCP should not encourage more onerous setback requirements than those found to be appropriate and effective. Recommendation: Make necessary changes. L-29

Comment: Existing language provides that where practicable, stream setbacks should exceed minimum requirements. Recommendation: see previous Comment and Recommendation. L-30

Comment: We believe the development fee should not be imposed on stream setback or similar areas. Recommendation: Make necessary changes. L-31

- 6-14: Comment: Existing CM 1.8 requires private projects to bear the burden of the 100-ft buffer zone between urban development and preserve areas. We believe the preserve system should bear the burden of this edge effect measure as the HCP provides that “The Preserve System should include buffer land within its boundaries.” (p.5-11) (emphasis added). Recommendation: Eliminate this CM. L-32

- 6-15: Comment: Existing language in CM 1.9 could be read to make all of the identified interface design elements mandatory for every project adjacent to a preserve site. Recommendation: Clarify that the identified measures are a menu of permissible design elements. L-33

- 6-16: Comment: Existing language extends SF Regional Water Quality Control Board’s NPDES storm water requirements (C3 provision) to all covered activities. This is an inappropriate extension of Clean Water Act and Porter-Cologne requirements. Recommendation: The HCP should require compliance with the terms of the permit where it is applicable. L-34

- 6-27: (and elsewhere): Comment: The HCP contains stringent aquatic resource reporting, conservation, and mitigation measures that in some cases are independent of species habitat. The HCP also expressly states that these measures are intended to satisfy Clean Water Act and Porter-Cologne requirements. One of the most important goals of the regulated community in the HCP development process is to establish some sort of mechanism that will effectively integrate satisfaction of Section 404 and 401 requirements into the HCP. We acknowledge the tremendous effort that you have made in attempting to achieve this goal. Presently, it is uncertain when, whether, or the extent to which the goal will be achieved. Recommendation: Make these aquatic resource reporting, conservation, and mitigation measures optional for a project applicant unless and until an appropriate integrating mechanism is established. L-35

Recommendation: Clarify certain aquatic resource provisions so that in the event a project applicant elects to utilize them, the requirements are clear. For example, the HCP (6-9) requires that any wetlands delineation be “accompanied by a report containing information about the wetlands and other waters consistent with the current standards of both agencies.” It is not clear whether this “report” is separate and apart from other environmental and/or permitting documents that already contain wetland delineation information. Existing permitting and other documents that contain this information should be relied upon where available, instead of creating a parallel and duplicative procedure. It is also unclear at what point in the permitting process such a report would be required, or which agency L-36

would ensure that the report is consistent with HCP requirements. If it is required upon application of final approval under the HCP, then the condition should so state.

L-36 (Cont.)

Similarly, the HCP (6-28) identifies "site-specific analysis" of wetland and stream avoidance and minimization measures. The specific content of the site-specific analysis should be clearly delineated, so that there is no ambiguity. Also, to the extent there are other reports or analyses either conducted under the HCP or required under existing permit requirements, such analysis should be combined so as to avoid duplication. We also believe there are other clarifications that should be made to the wetlands-related provisions of the HCP and would like to have further discussions with you on these issues.

L-37

- 6-30: Comment: CM 2.13 calls for minimization of effects on Oaks. Oaks are not a covered species and are adequately addressed by other conservation measures. Recommendation: Eliminate this CM.
- 6-31: Comment: Existing language requires pre-construction surveys for Townsend's big-eared bat where there is potential or suitable habitat. Recommendation: Clarify that pre-construction surveys are only required where occupied breeding or roosting habitat is identified.
- 6-31: (and elsewhere) Comment: Existing language appears to preface survey/mitigation requirements on a project being "unable" to (or "cannot") avoid impacts. Recommendation: Change language to "if project does not avoid impacts."
- 6-32: (and elsewhere) Comment: Existing language requires pre-construction surveys for several species if planning surveys identify suitable habitat. Recommendation: Clarify that pre-construction surveys are only required if planning surveys identify suitable breeding habitat.
- 6-37: (and elsewhere): Comment: The HCP uses various terms to refer to the approval process for projects applicants, but nowhere is that process clearly delineated. In Chapter 6, for example, the HCP refers to an "application package" that will be required for a "permit." (It is not clear whether individual project applicants would ever receive a "permit," as opposed to other land use entitlements.) The MO, on the other hand, refers to complying with certain approval procedures "upon the initiation of a project" or "receipt of an application." The precise terminology, application, and approval procedures

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- should be further delineated so as to ensure a clear, consistent process among agencies and applicants. L-43 (Cont.)

- 6-39,6-40; Comment: Existing language calls for project-by-project avoidance and minimization of impacts to CTS and California red legged frog breeding habitat. It is our understanding that this is not the intent of the HCP. L-44
Recommendation: Eliminate this language.

- Comment: Existing language requires 30-day advance notification to USFWS and CDFG before disturbance of suitable CTS and CRLF habitat to allow the agencies the opportunity to translocate individual animals. It is important that there be clear procedures for this process that do not undermine the HCPs certainty and streamlining provisions. L-45
Recommendation: Clarify that there are no restrictions on the nature or date of the disturbance so long as the requisite notice is given. Require agencies to notify project proponent of intent to translocate within 14 days of receiving notice.

- Table 6-5: Comment: It is important that the HCP clarify that “take” is defined differently under the ESA and the fully protected species statute. The HCP incorrectly gives the impression that “harm” or “harassment” of fully-protected species is prohibited by state law. The same is true for certain other categories of species. L-46
Recommendation: Make necessary changes.

Chapter 8

- 8-19: Comment: We believe that land contributed by conservation or other organizations should receive full credit based upon biological value. Such lands should be recognized at full value for all HCP provisions. L-47
Recommendation: Make necessary changes.

- 8-20: Comment: We believe the language relative to the use of the HCP to mitigate for projects not in the permit area (but considered within the cumulative impacts analysis) should be strengthened. In particular, given the high level of interest among builders in Antioch to participate in the HCP, there should be stronger recognition given to this possibility. L-48
Recommendation: Make necessary changes.

- 8-28: Comment: We are troubled by the language requiring projects to “apply” for inclusion in the HCP. The standards articulated here, and on 2-15, appear to give local decision makers extremely broad discretion as to whether individual L-49

- projects should receive take coverage. Recommendation: Eliminate or greatly restrict this language to allow any project within the permit area to participate without the exercise of discretion by local agencies. | L-50
- Fig. 8-3: Comment: Existing language implies that design changes in projects are mandatory if feasible to avoid impacts. Recommendation: Eliminate this language. | L-51

Chapter 9

- 9-16: (and elsewhere): Comment: The HCP does not contemplate reducing the base development fee if state, federal, or other local funding sources exceed those identified in the HCP funding plan. With respect to state and federal funds, the reason given is that “state and federal funding can only be used for portions of the Plan that contribute to species recovery (not for mitigation).” Although the HCP developed a methodology for establishing the base development fee based on a “fair share” concept, we do not think the HCP demonstrates a biological “bright line” establishing that the development fee funding only mitigates impacts and does not go further and contribute to recovery. For example, we note that of the 10,718 acres that can be developed under the maximum allowable permit area, only 45% is expected to be natural land cover (with 55% expected to be cropland and pasture). However, the land that will be acquired for the preserve system with fee funding will be almost exclusively higher value natural land cover. Thus, we think the developer fee funding does go beyond mitigation and contribute to recovery and that if future funding exceeding expectations were secured, lowering the development fee would not run afoul of state or federal funding restrictions. We believe the HCP itself confirms this point at 5-51 (“The development mitigation fees and other local funding described in Chapter 9 will more than cover the responsibilities and requirements that the Implementing Entity and local jurisdictions have to mitigate impacts in the inventory area.”) Recommendation: Provide for reduction in development fee if future funding sources exceed expectations. | L-52

Chapter 10

- 10-1: (and elsewhere): Comment: The HCP describes the relationship between the USFWS “No Surprises” Regulation and Changed Circumstances. It is our understanding that the HCP makes a finding that all potential Changed Circumstances are identified and adequately funded under the existing funding plan. It is also our understanding that the responses identified in the HCP with | L-53

respect to Changed Circumstances do not include imposition of additional conservation or mitigation requirements on the participating local governments or private parties subject to the HCP and therefore cannot be imposed without the consent of both. Recommendation: Confirm whether this understanding is correct.

L-53 (Cont.)

Comment: Along these lines, the HCP identifies Adaptive Management Program responses as a planned response to certain Changed Circumstances. The recently approved Riverside County MSHCP contains language assuring local governments and regulated private parties that additional conservation and mitigation requirements will not be imposed as an Adaptive Management Program response to Changed Circumstances without consent:

Pursuant to the 'No Surprises' Rule, the Permittees and the Service agree that the following [HCP] components are not subject to modification as a result of the...Adaptive Management Provisions without the consent of the Permittees, except for those projects that constitute an action authorized, funded or carried out by a federal agency (i.e., have federal involvement) which are exempt from such assurances....:

L-54

The permitted activities....

The [HCP]...funding plan

Any other change not currently described in this Plan that would significantly increase the Plan's costs or the interests of land of the Permittees, or any landowner in the...Plan Area." (Riverside MSHCP at 6-101)

Recommendation: Include similar assurance language in the HCP, but specify that the consent of the regulated party is required also.

- 10-3: Comment: The HCP identifies the listing of a non-covered species as a Changed Circumstance and obligates the Implementing Entity to avoid any actions that "may cause take, jeopardy, or adverse modification of critical habitat." We do not believe it is appropriate to use the HCP to attempt to regulate either the Implementing Entity, the local jurisdictions, or the regulated community with respect to future actions that may affect resources not covered by the HCP. This HCP should not attempt to constrain future action with respect to non-covered species. That is the province of the ESA and other relevant resource protection laws. Recommendation: Eliminate this language.
- 10-16: Comment: The HCP discusses the procedures for modifying the HCP. Potential modifications that are identified include changes in survey and monitoring requirements. Recommendation: Clarify that these types of

L-55

L-56

modifications are subject to the No Surprises Regulation, the state assurances provisions, and the local assurances provisions, and cannot be imposed on the regulated community without consent.

L-56 (Cont.)

Implementing Agreement

- 8.2: Comment: The IA treats the Jump Start provision as mandatory rather than as a guideline as described in the HCP. Recommendation: Clarify that Jump Start is a goal.

L-57

- Comment: The IA should specify that a project that satisfies its mitigation obligations under the HCP, such as payment of the required fee, shall not lose take coverage if the permit is subsequently suspended.

L-58

- Comment: We are aware of problems experienced by project applicants under some existing regional HCPs where there are disputes between a project applicant and the wildlife agencies over implementation issues and the agencies take the position that only the local government permittees have standing to challenge the agencies' actions. In some cases, the local government may not want to litigate over a disagreement that does not affect it directly. Recommendation: Create a mechanism for project applicants to have the right to have disputes with the wildlife agencies resolved by an independent third party.

L-59

- Comment: We believe the East Bay Regional Park District should have more clearly defined acquisition obligations in order to provide greater assurances that the non-developer local contribution requirements will be met.

L-60

Model Ordinance

- P.3: Comment: Section B prohibits a local jurisdiction from approving a project if the Implementing Entity has notified the jurisdiction that it is not successfully implementing the HCP. Recommendation: The MO should specifically reference the HCP and IA procedures that must be followed by all of the parties, including the IE, before the IE is authorized to send such a notification.

L-61

- P.3: Comment: Section C provides that if a local jurisdiction determines that a project is "likely to result in harm" to a listed but non-covered species, the local jurisdiction shall not approve the project. It also attempts to direct the future action of the project proponent. We believe it is not the province of local jurisdiction's to determine whether a project violates the ESA, and that it is inappropriate to utilize the MO for this HCP to attempt to control the land use authority of a local government or the responses of a private party with respect to

L-62

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future actions that may affect non-covered species. Recommendation: Eliminate this provision.

L-62 (Cont.)

- P.4: Comment: Section A.4. provides for the timing of payment of the development fee to be "prior to project approval." Recommendation: Specify that payment is due upon issuance of a grading permit (unless the assessment option is chosen). This is consistent with the language in the HCP (9-18).

L-63

- Comment: The MO should specify the process for increasing the developer fee, including notice and hearing requirements and when the fee increases become effective. It should also provide that fee increases cannot be adopted as urgency measures.

L-64

Thank you for the opportunity to comment. HBA appreciates the considerable hard work that you, the representatives of the governmental agencies, the consultants, and others have done and we look forward to a successful conclusion to this important process.

Yours truly,



Paul Campos
Vice-President and General Counsel

cc: Lori Rinek, Division Chief, U.S. Fish and Wildlife Service (via facsimile to 916-414-6713)

Response to Letter L, from Northern California Homebuilders Association

Response to Comment L-1

In response to the HCP/NCCP, the commenter suggests that assurances should be provided by local agencies similar to the “no surprises” assurances provided by the federal and state agencies.

Revisions to the HCP/NCCP

Text has been added to the Executive Summary that local jurisdictions will provide similar assurances to local applicants.

Response to Comment L-2

In response to the HCP/NCCP, the commenter suggests that the title in the third column in Table ES-3 be changed to reflect the actual intent of the Plan. We concur.

Revisions to the HCP/NCCP

The title in Table ES-3 has been revised to change “maximum allowable” to “maximum estimated” impact to habitat.

Response to Comment L-3

In response to the HCP/NCCP, the commenter states that it is important for the HCP/NCCP to respect the planning decisions of the participating jurisdictions. As stated on page 1-2 of the Draft HCP/NCCP, an important purpose of the Plan is to allow for the continued growth of the participating jurisdictions. As stated on page 1-7 of the Draft EIS/EIR, a specific objective of the Plan is to “Enable the County and the Cities of Brentwood, Clayton, Oakley, and Pittsburg to reasonably and efficiently implement their respective general and species plans, which collectively represent the foreseeable development in eastern Contra Costa County.”

See responses to comments J-1 and J-2.1 regarding land use policy and the HCP/NCCP.

Response to Comment L-4

In response to the HCP/NCCP, the commenter wants confirmation that, where there is unavoidable conflict between planned development and an area designated as high or medium priority for acquisition, the hypothetical project would not receive take coverage under the Plan, and nothing in the HCP/NCCP, Implementing Agreement, or Implementing Ordinance is intended to restrict local government’s land use authority to approve the project. This interpretation is correct. The hypothetical project would still be subject to state and federal endangered species laws, and it would be up to the California Department of Fish and Game and the U.S. Fish and Wildlife Service whether to apply the same or different standards of mitigation to this project than found in the HCP/NCCP.

Nothing obligates local, state, or federal agencies to apply the conservation program in the HCP/NCCP to projects not covered by the Plan.

No changes to the HCP/NCCP or EIS/EIR are required.

Response to Comment L-5

In response to the HCP/NCCP, the commenter requests clarification of the statement on page 1-5 that current and historic tidal areas in Oakley were excluded from permit coverage. As stated on that page, “Current and historic tidal areas (as determined by Soil Conservation Service soil surveys [1977]) are excluded to avoid duplicating other conservation efforts focused on species and natural communities restricted to the Sacramento–San Joaquin Delta.” Tidally-influenced areas were excluded from the permit area to avoid covering tidal species such as black rail, salt marsh harvest mouse, California clapper rail, and numerous salt-marsh plants. Adding such species would have greatly complicated the Plan and would have resulted in additional cost and potential delays.

No changes to the HCP/NCCP or EIS/EIR are required.

Response to Comment L-6

In response to the HCP/NCCP, the commenter recommends changing the language regarding Section 7 consultation assurances to match the language in chapter 10 of the HCP/NCCP. We concur.

Revisions to the HCP/NCCP

Text in Chapter 1 has been revised to note that unless otherwise required by law or regulation, USFWS will ensure that the biological opinion for the proposed project covered by the Plan is consistent with the biological opinion issued for the HCP/NCCP and the federal permit and that USFWS will not impose measures on applicants for coverage under the HCP/NCCP in excess of those that have been or will be required by the Implementing Agreement, the HCP/NCCP, and the permits, unless otherwise required by law or regulation.

Response to Comment L-7

In response to the HCP/NCCP, the commenter states that the Plan should clearly state that, if the HCP/NCCP is suspended, there is no presumption that an activity would cause take as a covered activity under the suspended Plan.

As described in Chapter 3 of the HCP/NCCP, the species distribution models were developed to help identify areas where covered species occur or could occur based on habitat suitability. The accuracy of the models is limited by several factors, including the minimum mapping unit of each land cover type (ranges from 0.25 to 10 acres), our knowledge of species habitat requirements, and other factors described on page 3-43 of the Draft HCP/NCCP. The species distribution models are not intended to be used for site-specific planning outside of the Plan.

Revisions to the HCP/NCCP

Text has been added to Chapter 3 to note that species distribution models have been developed on a regional scale using regional data and to note that if the HCP/NCCP is suspended, these models

should not be used for site-specific analysis and do not create a presumption of take under state or federal law.

Response to Comment L-8

In response to the HCP/NCCP, the commenter states that additional aquatic species should be added to the HCP/NCCP now or later because these special-status species will benefit from the conservation measures in the Plan.

While a major goal of the Plan is to provide regulatory certainty and streamlined permitting under the state and federal endangered species acts, there is a limit to the certainty and streamlining that can be provided. A decision was made early in the planning process by the Habitat Conservation Plan Association (HCPA) to limit to list of covered species to terrestrial species. We concur that many provisions of the Plan will either have no effect on or may benefit aquatic species downstream of the permit area. In particular, the protection, restoration, and improved management of up to 30,000 acres in the middle and upper watersheds of the inventory area will help protect the hydrology and sediment sources for all of the major creeks and streams in eastern Contra Costa County. This will benefit native fish in these streams and in the Delta. The HCPA will not add additional covered species without a strong compelling reason at this time because adding such species would cause considerable delay in approval of the Plan.

We believe that most covered activities will not encounter listed aquatic species and will therefore not require take authorization from CDFG or USFWS. Projects that do require take authorization should first evaluate how their contributions to the HCP/NCCP may benefit these species and therefore will help compensate for any impacts of their project. The Implementing Entity may consider at a later time whether to add listed aquatic species to the HCP/NCCP.

No changes to the HCP/NCCP or EIS/EIR are required.

Response to Comment L-9

In response to the HCP/NCCP, the commenter recommends deleting a sentence on page 4-10 regarding seasonal restrictions on covered activities because it is inconsistent with other sections of the Plan.

We concur that this statement is inaccurate.

Revisions to the HCP/NCCP

The subject sentence was deleted.

Response to Comment L-10

In response to the HCP/NCCP, the commenter states that the HCP/NCCP does not prohibit impacts to higher quality habitat in the permit area and the language on pages 5-5 and 5-13 should be changed to reflect this.

We concur that language on page 5-13 should be changed. However, there is no reference to this issue on page 5-5, so it is unclear to what the commenter refers.

Revisions to the HCP/NCCP

Text has been revised to note that HCP/NCCP preserves were designed to protect high-quality habitat for covered species and allow most impacts to occur on low-quality habitat.

Response to Comment L-11

In response to the HCP/NCCP, the commenter states that the use of the term “special circumstances” may be misinterpreted when applied to conditions under which land dedication in lieu of development fees is an available option.

We concur.

Revisions to the HCP/NCCP

The term “special circumstances” has been replaced by “certain circumstances” regarding acceptance of land dedication in lieu of fee payment.

Response to Comment L-12

In response to the HCP/NCCP, the commenter states that the Stay Ahead provision described in Section 8.6.1 of the Plan may be overly aggressive because it required proportionate preserve acquisition of several land cover types, because it becomes effective after year 1 of implementation, and because it must be evaluated annually. The commenter also asks why a mandatory land contribution requirement would be an acceptable remedy for the situation that the Implementing Entity was unable to meet the Stay Ahead requirement on its own.

The Stay Ahead provision was developed closely with CDFG and USFWS (the Wildlife Agencies) to comply with the requirements of the Natural Community Conservation Planning Act (NCCPA) to maintain rough proportionality between impacts and conservation, and to provide a requirement that was feasible. Similar provisions are found in many other NCCPs in California, including the Western Riverside County HCP/NCCP (approved) and the Coachella Valley HCP/NCCP (public draft). The Plan allows a 5% deviation from the Stay Ahead provision above without penalty to account for the likely pattern of infrequent land acquisition of large parcels.

As described Section 8.6.1, the Stay Ahead provision will apply after year 1 and be measured by CDFG and USFWS first at the end of the second full year of implementation to provide the Implementing Entity with enough time to collect enough fees to begin acquiring large blocks of land. The land acquisition process can take considerable time (e.g., identify and negotiation with willing sellers and conduct pre-acquisition surveys). The Stay Ahead provision was delayed by two years to, in part, give the Implementing Entity enough time to become established and conduct several land acquisitions. As documented in Table 5-21 and Figure 5-12 of the HCP/NCCP, 2,383 acres of land have been acquired or preserved during development of the HCP/NCCP that may be counted toward fulfilling the requirements of the HCP/NCCP once management is ensured. This is equivalent to almost 10% of the total acres projected to be acquired under the initial urban development area during the 30 year term of the permits. Additional acquisitions are in progress. Likewise, the Department of the Interior announced in September 2006 that more \$6.5 million had been awarded through the Cooperative Endangered Species Conservation Fund to acquire lands in Eastern Contra Costa County that would complement the existing approved HCP in San Joaquin County. These funds would be

spent within with the inventory area of the East Contra Costa County HCP/NCCP. The U.S. Bureau of Reclamation and the U.S. Fish and Wildlife Service have also approved a \$991,000 grant to support land acquisition consistent with the HP/NCCP through the Central Valley Project Conservation Plan. The HCPA and the Wildlife Agencies believe that the Stay Ahead provision is achievable. The significant amount of land acquisition that has occurred already and the allocation of substantial initial land acquisition funds support this assertion.

The Stay Ahead provision will be measured by land cover type (under one of two alternative methods) in order to ensure that impacts to habitat for covered species is being mitigated through acquisition of similar habitat. Without this provision, there could be significant delays between the time of impact and when habitat is preserved or restored. During the interim period, populations of covered species could decline. Tracking Stay Ahead by land cover type is essential to ensure that assembly of the Preserve System tracks the impacts from covered activities.

A mandatory land acquisition requirement in the event that Stay Ahead cannot be met is designed to provide an option for coverage under the Plan without resorting to withholding take authorization completely. This approach has worked successfully in the Natomas Basin HCP in Sacramento and Sutter Counties (although in that case the mandatory land dedication was a result of land prices escalating beyond the reach of the HCP operator). Because of this track record in other areas nearby, the HCPA and the Wildlife Agencies believe it is a viable remedy for the problem of Stay Ahead not being met.

No changes to the HCP/NCCP or EIS/EIR are required.

Response to Comment L-13

In response to the HCP/NCCP, the commenter states that existing language on pages 5-106 and 5-107 implies that impacts to golden eagle and western burrowing owl are intended to be avoided on a project-by-project basis.

This is not the intent of these sections.

Revisions to the HCP/NCCP

The text has been revised to clarify that landscape-level and community level conservations will benefit golden eagle and western burrowing owl.

Response to Comment L-14

In response to the HCP/NCCP, the commenter notes that mitigation requirements for giant garter snake (Conservation Measure 3.6) are excessive in light of the fact that there are no records of giant garter snake in the inventory area, most potentially suitable habitat is marginal, the habitat model has limitations, and that the Implementing Entity will be acquiring at least 250 acres of cropland or pasture in Zone 6.

First, as stated in the species account for giant garter snake (see Appendix D of HCP/NCCP), although there are no confirmed records of giant garter snake in the inventory area, this is likely an artifact of a lack of survey effort. Suitable habitat for giant garter snakes is present on Dutch Slough

in Oakley and experts speculate that the species is likely present there². Trapping surveys conducted in 2005 in suitable habitat on the adjacent Cypress Corridor Specific Plan site (approximately 1,000 acres) detected no giant garter snakes³. Similarly, trapping surveys conducted in 2003 on the nearby Cypress Grove project detected no snakes⁴. Taken together, this information suggests that, if giant garter snakes are present in the inventory area, they may occur at relatively low densities compared to other parts of the species' range. There is not enough field data to determine the quality of suitable habitat or whether most suitable habitat in the inventory area is marginal.

The Implementing Entity will be acquiring at least 250 acres of cropland or pasture in Zone 6, but it is not certain that these acquisitions will provide suitable habitat for giant garter snake. The primary purpose of these acquisitions will be to provide opportunities for riparian woodland restoration along Marsh Creek or Kellogg Creek to enhance nesting habitat and increase nesting opportunities for Swainson's hawk and other migratory birds. Because of these uncertainties, and because few projects were expected to take giant garter snake (see the habitat model for this species in Appendix D of the HCP/NCCP), a project-by-project mitigation approach was developed for this species.

Since publication of the Draft HCP/NCCP, however, it has come to light that there are greater opportunities to preserve suitable habitat for giant garter snake on land adjacent to Dutch Slough as part of the East Cypress Corridor Specific Plan, as allowed by the HCP/NCCP conservation strategy (see p. 5-41 of the Draft HCP/NCCP).

Revisions to the HCP/NCCP

The text has been revised to note the opportunities to preserve suitable habitat as part of the East Cypress Corridor Specific Plan and to address the possibility that land acquired in other areas may support giant garter snake and should be credited against future impacts.

Response to Comment L-15

The commenter suggests a revision to the HCP/NCCP on page 5-113 to indicate that several conservation measures "are expected to benefit" giant garter snake.

Revisions to the HCP/NCCP

The suggested change was made.

Response to Comment L-16

The commenter suggests a revision to the HCP/NCCP on page 5-115 to clarify that avoidance and minimization for California tiger salamander (CTS) is achieved through the HCP/NCCP and not on a project-by-project basis.

Revisions to the HCP/NCCP

² John Cain. 2004. Dutch Slough Tidal Marsh Restoration Project Preliminary Opportunities and Constraints Report. Prepared for the California State Coastal Conservancy. February.

³ Christian Marsh, Briscoe, Ivester & Bazel, LLP, personal communication, October 2005.

⁴ City of Oakley. 2005. Draft EIR for East Cypress Corridor Specific Plan. August.

The suggested change was made.

Response to Comment L-17

In response to the HCP/NCCP, the commenter recommends that credit should be given for occupied shrimp habitat for any seasonal wetland mitigation, which provides suitable habitat for many of the covered crustaceans.

Revisions to the HCP/NCCP

The suggested change was made.

Response to Comment L-18

In response to the HCP/NCCP, the commenter recommends that Conservation Measure 3.8 is invoked only when the preserve system does not have adequate occupied covered shrimp habitat already preserved.

Revisions to the HCP/NCCP

The suggested change was made.

Response to Comment L-19

In response to the HCP/NCCP, the commenter states that the survey requirements for covered plants are not consistent with the guiding principal of the Plan to reduce the cost of federal and state permitting and to reduce the preproject survey requirements relative to current and future environmental regulations without the HCP/NCCP.

It is true that none of the covered plant species are listed, but they were included as covered species because there is a good chance that all of them would become listed during the 30-year permit term. The regulatory streamlining provided by the HCP/NCCP will become more substantial when and if these covered plants become listed. Applicants still must comply with the requirements of the California Environmental Quality Act (CEQA) on all of their projects. To demonstrate compliance with CEQA, project proponents must now survey for all special-status plants and demonstrate that their project either avoids these plants, has impacts that are below significance thresholds, or provides mitigation for significant impacts. This requirement is unchanged with the HCP/NCCP, so the planning surveys required for covered plants is no additional burden on project proponents. Even if surveys were not required for covered plants under the HCP/NCCP, surveys would still be required for non-covered special-status plants.

As described on page 6-5 of the Draft HCP/NCCP, surveys for covered plants must be conducted by project proponents because of the lack of data on covered plant locations in the inventory area. Surveys for covered wildlife species could be minimized because the habitat requirements of these species are better known than plants and because, in general, wildlife species are much better surveyed than plants. The conservation requirements for covered plants are tracked by numbers of populations (see Table 5-20 in the HCP/NCCP), so the number of populations impacted by covered activities must be determined in the field. The only way to accomplish this is to require surveys of covered plants on project sites.

No changes to the HCP/NCCP or EIS/EIR are required.

Response to Comment L-20

In response to the HCP/NCCP, the commenter is concerned that the HCP/NCCP imposes survey requirements on project proponents for covered plants that are more stringent than under existing practices.

See the response to comment L-19 above.

No changes to the HCP/NCCP or EIS/EIR are required.

Response to Comment L-21

In response to the HCP/NCCP, the commenter states that existing language on page 6-1 could be interpreted to mean that only impacts to low quality habitat and aquatic resources will be allowed.

This was not the intent of this section.

Revisions to the HCP/NCCP

Text has been revised to note that impacts on some habitat for covered species and some wetlands and waters will be allowed under the Plan (e.g. not just low-quality habitat and wetlands).

Response to Comments L-21, L-22, L-24, and L-25

In response to the HCP/NCCP, the commenter states that language on page 6-4 regarding avoidance and how planning surveys will be used to inform project design is inconsistent with other sections of the HCP/NCCP and with the principles established for avoidance measures.

Revisions to the HCP/NCCP

Text has been clarified to make it consistent with other sections of the HCP/NCCP and with the avoidance principles.

Response to Comment L-23

In response to the HCP/NCCP, the commenter requests that the planning survey requirement be modified to delete the requirement describing avoidance and minimization measures incorporated into a covered activity.

It is important for applicants for coverage under the HCP/NCCP to demonstrate their compliance with the limited avoidance and minimization requirements in Chapter 6. Not all avoidance and minimization requirements will apply to every applicant, so this requirement is not expected to be burdensome.

Revisions to the HCP/NCCP

Text has been clarified to note that applicants will need to provide a description (and map, if appropriate) of the applicable avoidance and minimization measures required by the HCP/NCCP and incorporated into project design or project implementation (e.g., pre-construction surveys).

Response to Comment L-26

In response to the HCP/NCCP, the commenter states that the requirement on page 6-8 for wetland delineations to include a description of avoidance and minimization measures suggests that the Implementing Entity will be reviewing project avoidance and minimization measures. The commenter suggests that this language be deleted.

We concur. The Implementing Entity will not be reviewing land use plans for their avoidance and minimization of jurisdictional wetlands. All projects that affect jurisdictional wetlands or waters of the United States must obtain their own permits in compliance with the Clean Water Act and state laws and regulations protecting state waters and regulated streams. Furthermore, the HCP/NCCP already addresses wetland avoidance and minimization requirements on a regional scale so individual projects with impacts to wetlands of 3 acres or less do not need to avoid these resources on a project level under the HCP/NCCP.

Revisions to the HCP/NCCP

The HCP/NCCP has been revised to note that project delineation reports will document the expected impact on the wetlands and waters that would result from the project but do not have to document the integration of the avoidance and minimization measures.

Response to Comment L-27

In response to the HCP/NCCP, the commenter states that language referring to project proponents being “unable” to avoid impacts implies that avoidance is generally required. The commenter also states that there should be no requirement for delineations on every project in which wetlands may be present.

We concur that the use of the term “unable” is misleading. The revision below will be made to the HCP/NCCP to clarify this point. However, we do not agree that wetland delineations should be required on only some projects covered by the Plan. As described on page 5-25 of the HCP/NCCP, wetland preservation, restoration, and creation is largely tied to the level of impacts to wetlands by covered activities. Therefore, the extent of wetlands on project sites covered by the Plan must be determined accurately so that the Implementing Entity knows how much and of what type of wetland to protect and restore or create. The most reliable and repeatable method available for determining wetland extent in the field is the method adopted by the U.S. Army Corps of Engineers for delineating jurisdictional wetlands.

There will be no change to the HCP/NCCP to address this comment.

Response to Comment L-28

In response to the HCP/NCCP, the commenter states that Conservation Measure 1.6 incorrectly applies to “existing public land” and all “open space” and should instead apply only to areas adjacent to the Preserve System.

Revisions to the HCP/NCCP

Conservation Measure 1.6 has been revised to clarify when it applies.

Response to Comment L-29 and L-30

In response to the HCP/NCCP, the commenter states that setback requirements should not be labeled “minimum” setbacks and it is not appropriate for the Plan to call for local jurisdictions to develop additional creek protection measures.

Stream setbacks are now described as “required” rather than “minimum” so that there would be no ambiguity in HCP/NCCP requirements. The specific call for additional measures by local agencies has been deleted while retaining the thought that stream setbacks larger than those required in the HCP/NCCP may convey other benefits.

Revisions to the HCP/NCCP

The text has been clarified per this response as noted above.

Response to Comment L-31

In response to the HCP/NCCP, the commenter states that the development fee should not be imposed on the stream setback area required by the HCP/NCCP.

We concur. Development fees will not be charged within stream setbacks when the property provides deed restrictions on the setback area to preclude future impacts.

*Revisions to the HCP/NCCP****The text has been clarified per this response as noted above***
Response to Comment L-32

In response to the HCP/NCCP, the commenter states that the 100-foot fuel management buffer between covered activities and the HCP/NCCP Preserve System (Conservation Measure 1.8 on page 6-14) should be on the preserve side of the line rather than the development side.

The HCPA and the Wildlife Agencies feel strongly that the buffer zone between new development and the Preserve System should be on the developed side of the line, as currently written in the Draft HCP/NCCP. The required buffer zone is only 100 feet, so does not present a substantial burden to the few (and likely large) developments that will occur adjacent to the Preserve System. Furthermore, land uses allowed within the buffer zone include roads, trails, irrigated turf, fire-resistant landscaping, and other uses that are compatible with fire hazard reduction. Therefore, if designed properly, this buffer zone can be integrated into the rest of the development site and result in no loss of usable acreage on the property.

No changes to the HCP/NCCP or EIS/EIR are required.

Response to Comment L-33

In response to the HCP/NCCP, the commenter states that the description of urban-wildland interface design elements in Conservation Measure 1.9 should be clarified to say that the list of bullets is a menu of options rather than a list of required measures.

Revisions to the HCP/NCCP

The text has been modified as suggested.

Response to Comment L-34

In response to the HCP/NCCP, the commenter states that Conservation Measure 1.10 on page 6-16 should not be extended to all covered activities and instead should apply to covered activities that would be subject to the Clean Water Act and Porter-Cologne requirements without the HCP/NCCP.

The intent of this measure was to incorporate the existing stormwater requirements into the HCP/NCCP conservation strategy. Therefore, the covered activities subject to this conservation measure can be restricted to those projects subject to C.3 requirements already.

Revisions to the HCP/NCCP

The HCP/NCCP has been revised to clarify that the C.3 requirements apply already and thus that Conservation Measure 1.10 only applies to projects it would already apply to without the HCP/NCCP.

Response to Comment L-35

In response to the HCP/NCCP, the commenter states that any requirements for the conservation or mitigation of impacts to aquatic resources that go beyond the needs of aquatic covered species should be made optional until regional wetlands permits are secured by the HCPA. Reference is made to page 6-27 and elsewhere in the document.

Section 17.4 has been added to the Implementing Agreement that provides a process for adjusting wetland-related requirement if regional wetland permit processes are not provided..

Revision to the HCP/NCCP

The IA has been revised as described above.

Response to Comment L-36

In response to the HCP/NCCP, the commenter states that the Plan should clarify when a wetland delineation must be submitted to satisfy HCP/NCCP requirements and whether the “report” is a separate requirement from the delineation.

It is the intent of the HCP/NCCP to utilize existing regulatory documents as much as possible and not create substantially more reporting for the purposes of the Plan. The jurisdictional delineation is typically submitted to the U.S. Army Corps of Engineers (Corps) in the form of a delineation report. This is the “report” intended in the reference on page 6-9. See response to comment L-26 for revisions to page 6-9 that address comment L-36 and clarify the intent of this requirement.

The wetland delineation report must be verified by the Corps, an appropriate state regulatory agency, or the Implementing Entity prior to submission to the cities or County so that the exact amount of wetlands on the site and the amount of wetland to be filled or avoided can be determined. The precise amount of wetland fill is needed to determine the wetland fee to be paid by the project proponent to the local jurisdiction. The precise amount of wetland avoided is needed for documentation purposes.

No changes to the HCP/NCCP are required.

Response to Comment L-37

In response to the HCP/NCCP, the commenter states that the reference on page 6-28 to a “site-specific analysis” of wetland and stream avoidance and minimization should be clarified to describe the contents of this analysis.

To clarify, the site-specific analysis and demonstration of avoidance and minimization required in Conservation Measure 2.12 applies only to streams and to wetlands greater than 3.0 acres. To comply with the requirements of the Clean Water Act, projects must avoid and minimize their effects on wetlands and streams to the maximum extent practicable. The analysis provided should demonstrate compliance with this standard. The analysis can be included in the wetland delineation report, so no additional reports need to be submitted.

Revisions to the HCP/NCCP

The text has been clarified and updated regarding these requirements based on recent discussions with the Corps to support the regional wetlands permits.

Response to Comment L-38

In response to the HCP/NCCP, the commenter states that Conservation Measure 2.13 should be eliminated because effects on oaks and oak woodlands are adequately addressed in other conservation measures.

After discussion with the Wildlife Agencies, we concur that Conservation Measure 2.13 is redundant with other conservation measures and does not add any substantial protection for covered species or natural communities. As evidence of this, Conservation Measure 2.13 is not referenced in any biological goal or objective in the Plan (see Table 5-1). Existing local tree ordinances already protect large native trees such as oaks, so this measure is not necessary.

Revisions to the HCP/NCCP

Conservation Measure 2.13 on page 6-30 has been deleted.

Response to Comment L-39

In response to the HCP/NCCP, the commenter states that survey requirements for Townsend’s big-eared bat should be clarified to say that preconstruction surveys are required only for occupied breeding or roosting habitat not “potential” habitat.

Revisions to the HCP/NCCP

Text has been revised as suggested.

Response to Comment L-40

In response to the HCP/NCCP, the commenter states that the language regarding preconstruction surveys for Townsend's big-eared bat and other species is unclear and should be changed to read "if project does not avoid impacts."

Revisions to the HCP/NCCP

Text has been revised as suggested.

Response to Comment L-41

In response to the HCP/NCCP, the commenter states that preconstruction surveys are only required if planning surveys identify suitable breeding habitat rather than simply "suitable habitat" on page 6-32 for San Joaquin kit fox, on page 6-39 for California tiger salamander, and on page 6-40 for California red-legged frog.

Revisions to the HCP/NCCP

Text has been revised as suggested.

Response to Comment L-42 and L-43

In response to the HCP/NCCP, the commenter states that the process for project applicants is not defined clearly in the Plan.

The requirements for applying for take coverage are summarized in a new Section 6.2 of the HCP/NCCP and described in more detail in the rest of Chapter 6. To make the process clearer, the Implementing Entity will develop an application form and a checklist for local staff to use when evaluating and processing HCP/NCCP application packages. The references to project proponents receiving "permits" is incorrect. Project proponents will receive coverage under the permits issued to the Permittees (the cities, County, EBRPD and Flood Control District).

Revisions to the HCP/NCCP

A new section 6.2, "Receiving Take Authorization under the Plan," has been added to Chapter 6 and Section 8.7 of Chapter 8 has been revised to clarify roles and responsibilities in the application process.

Response to Comment L-44

In response to the HCP/NCCP, the commenter states that references to project-by-project avoidance measures for California tiger salamander and California red-legged frog on pages 6-39 and 6-40 should be deleted because it is inconsistent with the intent of the HCP/NCCP.

Revisions to the HCP/NCCP

The text has been revised to reflect the discussions and agreements with the Wildlife Agencies regarding the approach to these two species.

Response to Comment L-45

In response to the HCP/NCCP, the commenter states that the minimization measures for California tiger salamander and California red-legged frog on pages 6-39 and 6-40 should include a timing requirement for notification of project proponents by USFWS and CDFG of their intent to translocate these species from the project site.

We concur with this suggestion.

Revisions to the HCP/NCCP

The text has been revised to reflect the discussions and agreements with the Wildlife Agencies regarding the approach to these two species.

Response to Comment L-46

In response to the HCP/NCCP, the commenter states that Table 6-5 regarding no-take species gives the impression that “take” prohibited by state law (i.e., fully protected species) is the same as “take” prohibited by the federal or state ESA.

We concur that the table is unclear by itself and could be misinterpreted.

Revisions to the HCP/NCCP

Text has been clarified to distinguish the difference between take for fully protected species and take under the federal or state ESA.

Response to Comment L-47

In response to the HCP/NCCP, the commenter states that land contributed by conservation and other organizations should receive full credit based upon its biological value.

As described on page 8-19 of the HCP/NCCP, full or partial credit toward HCP/NCCP acreage or other requirements of the conservation strategy will be determined on a case-by-case basis. Partial credit will be determined based on the purpose and location of the acquisition, the management of the land acquired, and consistency with the goals and objectives of the HCP/NCCP. Full credit will be given for land acquired by conservation and other organizations if all of the land acquired meets the requirements of the HCP/NCCP and all of the land will be managed according to the terms of the HCP/NCCP. There may be cases, however, when only partial credit can be given. For example, land may be encumbered by easements that are inconsistent with the goals of the Plan (e.g., wind turbine leases) or the landowner is only willing to manage a portion of the conservation land according to the terms of the Plan. The Implementing Entity will make every effort to receive full credit for conservation lands purchased in partnership with other organizations, but there may be cases where only partial credit is appropriate.

No changes to the HCP/NCCP or EIS/EIR are required.

Response to Comment L-48

In response to the HCP/NCCP, the commenter states that the HCP/NCCP should expand its ability to use mitigation for non-covered projects, as described on page 8-20.

Project proponents with projects in or near the inventory area that are not covered by the Plan but that affect covered species may be interested in using the HCP/NCCP as a vehicle to mitigate their projects. These projects may be required to conduct mitigation or conservation actions under a variety of state and federal regulations, including ESA, CESA, CWA, Porter-Cologne Water Quality Act, NEPA, or CEQA. If these actions are compatible with the HCP/NCCP, there are advantages to using the conservation strategy of the Plan as a guide to mitigating non-covered projects because of lower costs and greater conservation benefits. Some non-covered project proponents may be interested in contributing land to the HVP/NCCP as their mitigation.

Revisions Made

The discussion above has been added to the HCP/NCCP, Chapter 8, Section 8.6.2.

Response to Comments L-49 and L-50

In response to the HCP/NCCP, the commenter states that local agencies should have little or no discretion when considering applications from project proponents to receive coverage under the HCP/NCCP as described on page 8-28 and 2-15 of the Plan.

Project proponents must apply for coverage under the HCP/NCCP because all project proponents must supply certain information about their project site, their project impacts, and demonstrate compliance with applicable avoidance and minimization measures in the Plan (see Chapter 6). Applicants must also pay their HCP/NCCP fees in accordance with the Implementing Ordinance of that jurisdiction. Local agencies may need to retain discretion to allow projects to be covered by the Plan because the Permittees (the cities and County) must demonstrate to CDFG and USFWS that they are complying with all elements of the Plan, including proper fee collection and implementation of avoidance and minimization measure on applicable covered activities. The only way to ensure the Permittee's compliance with these measures is to require specific application material and fees from project proponents. Permittees must also make a determination of consistency with the HCP/NCCP before granting take authorization. A new Section 6.2 has been added to the HCP/NCCP to describe the process for receiving take authorization and it provides additional information. It is expected that, as HCP/NCCP implementation progresses and project proponents learn how to comply with the Plan, the application procedure will be relatively easy and streamlined.

Revisions to the HCP/NCCP

A new section 6.2, "Receiving Take Authorization under the Plan," has been added to Chapter 6.

Response to Comment L-51

In response to the HCP/NCCP, the commenter states that Figure 8-3 should be modified to no longer imply that design changes in projects are mandatory if feasible to avoid impacts.

We concur that Figure 8-3 is misleading.

Revisions to the HCP/NCCP.

Figure 8-3 has been revised in response to this comment.

Response to Comment L-52

In response to the HCP/NCCP, the commenter states that the Plan should have a provision to reduce the development fee if future funding sources exceed expectations.

The HCP/NCCP already has this provision. Fees will be recalibrated according the periodic fee adjustment schedule on page 9-24. As described on page 9-25:

“If either portion of the development or road fee (land acquisition or preserve management) is found to be lower than needed to offset the fee share of actual costs, that portion of the fees will be increased. If either portion of the fees is found to be significantly higher than needed to offset the fee share of actual costs, then the fees will be reduced.”

No changes to the HCP/NCCP or EIS/EIR are required.

Response to Comment L-53

In response to the HCP/NCCP, the commenter states that the HCP/NCCP makes a finding that all potential changed circumstances are identified and adequately funded under the existing funding plan. This interpretation is correct.

The commenter also states that the responses identified in the HCP/NCCP with respect to changed circumstances do not include imposition of additional conservation or mitigation requirements on the participating local governments or private parties subject to the HCP/NCCP and therefore cannot be imposed without the consent of both. As stated on pages 10-1, 10-2, and 10-9, the federal No Surprises regulations provide assurances to permit holders that no additional money, commitments, or restrictions of land or water will be required should unforeseen circumstances requiring additional mitigation arise once the permit is in place. The state NCCPA provides similar assurances as described on page 10-12. As described in Section 14.1.4 of the Draft Implementing Agreement (see Appendix B of the HCP/NCCP), these federal and state assurances will be provided to private parties (called “Third Party Participants” by the Implementing Agreement) similar assurances consistent with the Permittees’ obligations and the state and federal HCP/NCCP permits.

No changes to the HCP/NCCP or EIS/EIR are required.

Response to Comment L-54

In response to the HCP/NCCP, the commenter states that assurances should be added to Chapter 10 providing that additional conservation and mitigation requirements will not be added as an adaptive management program without the consent of the regulated party similar to what was included in the adopted Western Riverside County MSHCP.

We concur that the provision to address changed circumstances due to invasion by new exotic species or diseases (page 10-6) or due to drought (page 10-8) are unclear in their application of the Adaptive Management Program.

Revisions to the HCP/NCCP

Text has been revised in Chapter 10 to clarify how the Adaptive Management Program would apply under these circumstances.

Response to Comment L-55

In response to the HCP/NCCP, the commenter states that language on page 10-3 is overly prescriptive in addressing actions in the event of a non-covered species becoming listed during the permit term.

We concur that the language in page 10-3 is inappropriate and unduly constrains the Implementing Entity and the Permittees in complying with the ESA or the California Endangered Species Act (CESA) in the event of a non-covered species becoming listed under either law. The existing laws will be sufficient to address the mitigation and conservation needs of these species.

Revisions to the HCP/NCCP

Text has been revised in Chapter 10 to clarify procedures in the event of new listings.

Response to Comment L-56

In response to the HCP/NCCP, the commenter states that changes to monitoring and survey requirements are subject to the No Surprises regulation, state assurances, and local assurances and cannot be imposed on the regulated community without consent.

We concur that the amendment language is unclear.

Revisions to the HCP/NCCP

The text has been revised to note the applicability of the federal No Surprises regulations, state assurances, and local assurance provisions found in the Implementing Agreement.

Response to Comment L-57

In response to the IA, the commenter states that in Section 8.2 the IA incorrectly treats the Jump Start guideline as a mandatory requirement. The commenter requests clarification in the IA that the Jump Start guideline is instead simply a goal.

Response: The commenter is correct that the Jump Start guideline is a goal, rather than a mandatory requirement, as explained on pages 5-51 and 5-52 of the draft HCP/NCCP. The Jump Start guideline states that the Implementing Entity should acquire 500 acres of land before the ESA and NCCPA permits are issued, but does not require the Implementing Entity to do so. However, Section 8.2 of the IA addresses the Stay Ahead requirement, which is a separate, mandatory requirement, as explained on page 5-52 and 5-53 of the draft HCP/NCCP. The Stay Ahead provision generally requires the Implementing Entity to acquire lands in proportion to take authorized under the ESA and NCCPA permits in order to ensure that the lands acquired meet or exceed compensatory mitigation requirements for such impacts. Section 8.2 of the IA correctly characterizes the Stay Ahead requirement as mandatory.

No changes to the IA are required.

Response to Comment L-58

The commenter requests that the IA be revised to specify that a project that satisfies its mitigation obligations under the HCP/NCCP will retain authority under the ESA and NCCPA permits to take Covered Species even if one or both of the permits is subsequently suspended.

To clarify when the Permittees may extend take authorization under the HCP and NCCPA permits to a project or project proponent, and under what circumstances the terms of the take authorization may be suspended or revoked once it is extended to a project or project proponent, the IA has been revised substantially.

Revisions to the HCP/NCCP

A new Section 12.2.2 of the IA has been added to clarify extension of take authorization and suspension/revocation circumstances.

Response to Comment L-59

The commenter requests that the IA include a mechanism for project proponents to participate in disputes with the USFWS and CDFG regarding implementation of the HCP/NCCP and to have such disputes resolved by an independent third party.

The ESA and NCCPA permits will be issued to the Permittees, and the Permittees and the Implementing Entity will assume the legal obligations imposed under the IA, the HCP/NCCP and the permits. Project proponents and other third parties will have an interest in how the HCP/NCCP will be implemented, but they will not share the Permittees obligations to ensure that the HCP/NCCP as a whole is properly implemented. It is therefore appropriate for any disputes regarding implementation of the HCP/NCCP to be resolved by the Permittees, the Implementing Entity, the USFWS and CDFG. However, input from project proponents and other stakeholders regarding disputes over implementation of the HCP/NCCP would be useful and appropriate.

Revisions to the HCP/NCCP

To provide an opportunity for input, and to clarify generally how disputes regarding implementation of the HCP/NCCP will be resolved, the IA has been revised substantially. A new Section 20.1 has been added to the IA.

Response to Comment L-60

In response to the IA, the commenter suggests that the East Bay Regional Park District should have more clearly defined acquisition obligations to help ensure that the Preserve is created in accordance with the HCP/NCCP.

Since the release of the Draft HCP/NCCP, EBRPD are now proposed to be a permittee and signatory to the IA. The revised IA contains the specific commitments made by EBRPD concerning the continuation of their historic role in preservation acquisition in concert with the HCP/NCCP.

Revisions to the HCP/NCCP

The HCP/NCCP and IA (Section 9.4) have been revised to clarify EBRPD's role and responsibilities.

Response to Comment L-61

In response to the Model Ordinance, the commenter asks for additional detail about the circumstances under which the Implementing Entity may notify a Permittee that the Permittee is prohibited from approving a project because the HCP/NCCP is not being successfully implemented.

Section IV.B. of the Model Ordinance refers to circumstances in which the Implementing Entity is unable to acquire Preserve lands quickly enough to remain in compliance with the Stay Ahead and Rough Proportionality requirements in the IA and the HCP/NCCP. In other words, it refers to circumstances when the Implementing Entity itself is unable to successfully implement the HCP/NCCP by acquiring land for the Preserve system at the same pace that development and, consequently, authorized Take is occurring.

Revisions to the Model Ordinance

The Model Ordinance has been clarified in respect to these circumstances .

Response to Comment L-62

The commenter states that Section IV.C of the Model Ordinance exceeds the scope of the HCP/NCCP and would restrict the local land use decisions regarding projects that may impact species that are not covered in the HCP/NCCP. The commenter requests that Section IV.C be eliminated.

Section IV.C would complement the conservation strategy of the HCP/NCCP, but as the commenter suggests, it applies only to species that are not Covered Species under the HCP/NCCP and therefore exceeds the scope of the HCP/NCCP.

Revisions to the Model Ordinance.

Section IV.C has been deleted from the Model Ordinance.

Response to Comment L-63

The commenter requests that Section V.A.4. of the Model Ordinance be revised to state that development fees will be required prior to issuance of a grading permit for a project as provided in the HCP/NCCP, rather than prior to project approval as provided in the draft Model Ordinance.

The commenter correctly points out that Section V.A.4. is inconsistent with Chapter 9.3.1 of the HCP/NCCP.

Revisions to the Model Ordinance

Section V.A.4. of the HCP/NCCP has been revised to make it consistent with Chapter 9.3.1

Response to Comment L-64

The commenter requests that the Model Ordinance be revised to specify what process will be followed before development fees are increased.

The process has been clarified in the Model Ordinance.

Revisions to the Model Ordinance

The Model Ordinance has been modified to describe the process to be followed if and when development fees are to be increased.