

EAST CONTRA COSTA COUNTY HABITAT CONSERVANCY

DATE: October 22, 2012
TO: Governing Board
FROM: Conservancy Staff
SUBJECT: Workshop Update

RECOMMENDATION

ACCEPT update from staff on the October 2, 2012 Public Workshop: East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan (HCP/NCCP) Amendment Ideas and Suggestions

DISCUSSION

At the July 26, 2012 Conservancy Board meeting, in response to a request from Discovery Builders, the Board directed staff to convene a workshop at which stakeholders could provide input on possible modifications to the HCP/NCCP. On October 2, 2012 the Conservancy held the public workshop. The intent of this report is to provide an update on the workshop and identify general next steps.

On October 2, 2012 Conservancy Staff hosted a public workshop for East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan (HCP/NCCP) Amendment Ideas and Suggestions. The agenda is attached. Approximately 45 people attended the meeting. The sign-in sheet is provided separately, though many in attendance did not sign in. Please also find attached a summary compiled by Conservancy staff of the October 2 workshop.

CONTINUED ON ATTACHMENT: Yes
 ACTION OF BOARD ON: October 22, 2012
 OTHER

APPROVED AS RECOMMENDED: _____

VOTE OF BOARD MEMBERS

___ UNANIMOUS

AYES: _____

NOES: _____

ABSENT: _____

ABSTAIN: _____

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF AN ACTION TAKEN AND ENTERED ON THE MEETING RECORD OF THE CONSERVANCY GOVERNING BOARD ON THE DATE SHOWN.

ATTESTED

*CATHERINE KUTSURIS, SECRETARY OF THE EAST CONTRA COSTA COUNTY
HABITAT CONSERVANCY*

BY: _____, DEPUTY

As reflected in the summary, a significant number of concerns and suggested amendments were raised during the workshop. The major categories of concerns raised were:

- Fees are too high and were not determined appropriately/correctly
- Private applicants should be able to opt out of Plan compliance
- Application of Plan to ruderal/disturbed/infill sites is not justified
- Inefficiencies in seeking and receiving take coverage
- Other miscellaneous concerns

The workshop summary also reflects that a number of individuals and organizations, including the wildlife agencies, support the Plan as is and do not support or favor amending the Plan at this time. Some of the types of arguments raised in support of this perspective were:

- Plan is working well.
- Compromises were built into the Plan during a long public process and a deal is a deal
- Fee reductions not justified/appropriate for various reasons
- If Plan is changed it should be strengthen biological protections / add Antioch
- If there are inefficiencies, address these administratively

Staff is still working to evaluate the input received during the workshop and intends the following next steps:

- Complete the new fee audit (many of the comments relate to how fees are calculated; these comments have been shared with the audit team)
- Continue to meet with Discovery Builders to better understand and attempt to address their concerns
- Consult with staff from other participating agencies on these issues
- Develop a response/plan of action on these issues for future Board consideration

Additional guidance from the Board is welcomed.

Attachments:

- Workshop agenda
- Sign-in sheet
- Summary of October 2 Workshop (including powerpoint slides)



**EAST CONTRA
COSTA COUNTY
HABITAT
CONSERVANCY**

City of Brentwood

City of Clayton

City of Oakley

City of Pittsburg

Contra Costa County

PUBLIC WORKSHOP:

East Contra Costa County Habitat Conservation Plan / Natural Community Conservation Plan (HCP/NCCP) Amendment Ideas and Suggestions

Tuesday, October 2, 2012

1:00 p.m.

City of Pittsburg
City Hall, Council Chambers, 3rd Floor
65 Civic Avenue, Pittsburg, CA 94565

Background: At the July 26, 2012, meeting of the Conservancy Governing Board, the Board received a request from a stakeholder organization to convene a workshop at which stakeholders could explain their ideas or suggestions for amendments to the HCP/NCCP. This workshop is being convened in response to that request.

AGENDA

- 1:00 Welcome and introductions.**
- 1:10 Review background and purpose of workshop. Review HCP/NCCP Plan Amendment procedures.**
- 1:15 Stakeholder comment period: Attendees are invited to explain their ideas or suggestions for amendments to the HCP/NCCP. Equipment to display powerpoint slides is available for those who wish to use it (please let staff know if you intend to use powerpoint slides).**
- 2:00 Wildlife agency comments.**
- 2:15 Open discussion.**
- 2:50 Wrap-up and next steps.**
- 3:00 Adjourn**

If you have questions about this agenda or desire additional meeting materials, you may contact Maureen Parkes of the Contra Costa County Department of Conservation and Development at 925-674-7203.

The Conservancy will provide reasonable accommodation for persons with disabilities planning to participate in this meeting who contact staff at least 24 hours before the meeting.

East Contra Costa County Habitat Conservancy Public Workshop

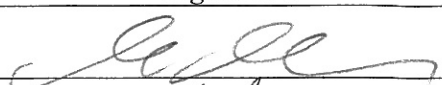

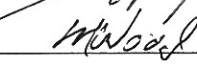
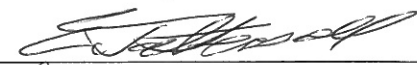
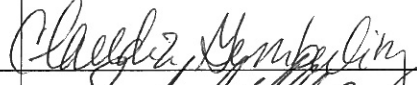
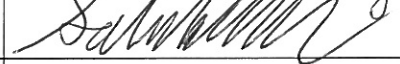
Attendance Record

Tuesday, October 2, 2012

1:00 pm

Please Note: You are not required to sign in. The attendance record will be used in a meeting summary to the Governing Board.

	NAME (Please Print Your Name)	ORGANIZATION	Signature
1	John Kopchik	East Contra Costa County Habitat Conservancy-Staff	
2	Abby Fateman	East Contra Costa County Habitat Conservancy-Staff	
3	Krystal Hinojosa	East Contra Costa County Habitat Conservancy-Staff	Krystal Hinojosa
4	JOE CIOLEK	AGRICULTURAL TRUST	Joe Ciolek
5	Nancy Wenninger	East Bay Regional Park District	Nancy Wenninger
6	Jim BWERDER	Souza REALTY + DEV	James A. Cuneo
7	Chris Barton	EBRPD	
8	David Zippin	ICP INTERNATIONAL	
9	Cary C. Gouda	FWS	Cary C. Gouda
10	Randi Adair	DEG	Randi Adair
11	Randy Long	REL Ecology	Randy Long
12	Mack Casterman	California Native Plant Society, EAST BAY CHAPTER	Mark Casterman
13	Nancy Workring	Save Mount Diablo	Nancy Workring
14	Matt VanderSluis	Greenbelt Alliance	Matt VanderSluis
15	Josh McMurray	City of Oakley	
16	Ken Strelo	City of Oakley	
17	Kristi Pollet	City of Pittsburg	
18	Diane Burgis	Friends of Marsh Creek Watershed	Diane Burgis

	NAME (Please Print Your Name)	ORGANIZATION	Signature
19	Greg Gantrell	CCWD	
20	Brian Hooker	CONGRESSMAN GARMKEWDI	
21	Mike Wood	Wood Biological Cons	
22	ERIC TATTERSALL	USFWS	
23	Claudia Gemberling	CCCPLWD	
24	SALVATORE EVOLA	PITTSBURGH	
25	Stephanie Jentsch	USFWS	
26			
27			
28			
29			
30			
31			
32			
33			
34			
35			
36			
37			
38			
39			
40			

Draft Summary of October 2, 2012, Public Workshop: East Contra Costa County Habitat Conservation Plan / Natural Community Conservation Plan (HCP/NCCP) Amendment Ideas and Suggestions

Below please find a summary compiled by Conservancy staff of the above-described meeting. The meeting was held in the Pittsburg City Council Chambers. Approximately 45 people attended the meeting. The sign-in sheet is provided separately, though many in attendance did not sign in.

1) Welcome and introductions.

John Kopchik, ECCC Habitat Conservancy, convened the meeting at approximately 1 pm and welcomed attendees. John invited attendees to introduce themselves and participants took turns stating their name and any affiliation.

2) Review background and purpose of workshop. Review HCP/NCCP Plan Amendment procedures.

John Kopchik stated that at the July 26, 2012, meeting of the Conservancy Governing Board, the Board received a request from a stakeholder organization to convene a workshop at which stakeholders could explain their ideas or suggestions for amendments to the HCP/NCCP. The Board granted this request and this workshop was convened in response. John Kopchik stated the workshop would provide an opportunity for participants to voice their perspectives. He stated a summary of the workshop will be presented to the Governing Board at their next meeting on October 22. Conservancy staff would be focused on listening to perspectives and that any specific response or possible actions to address views raised would not be provided at this meeting and would be pending presentation to the Board.

John Kopchik provided a brief overview of the process for amending the HCP, stating that the details were spelled out in the HCP/NCCP and Implementing Agreement. Though there are nuances and subtleties, the provisions can be summarized as generally requiring signatories to the Implementing Agreement to all agree on amendments (both local agencies and wildlife agencies).

3) Stakeholder comment period: Attendees are invited to explain their ideas or suggestions for amendments to the HCP/NCCP. Equipment to display powerpoint slides is available for those who wish to use it (please let staff know if you intend to use powerpoint slides).

John Kopchik asked which participants wished to make remarks in this section of the agenda. Louis Parsons indicated that he and two of his colleagues wished to offer presentations accompanied by powerpoint slides. John Kopchik invited them to begin their remarks.

The three presenters were:

- Louis Parsons, Discovery Builders
- Kathie Studwell, Senior Associate Applied Development Economics (representing Discovery Builders)

- Paul P. (“Skip”) Spaulding, III, Farella Braun + Martel LLP (representing Discovery Builders)

Copies of their powerpoint slides are presented on the following pages and provide a summary of their comments.

HABITAT CONSERVATION PLAN WORKSHOP PRESENTATION

LOUIS PARSONS
DISCOVERY BUILDERS, INC.

OCTOBER 2, 2012

INTENT OF THE PLAN

- ☐ Provide framework to protect natural resources in eastern Contra Costa County
 - ☐ Improve and Streamline the environmental permitting process for IMPACTS on endangered species
 - ☐ Avoid project-by-project permitting
-

QUESTIONS BASED ON INTENT OF THE PLAN

- ☐ What if a proposed project does not require any environmental permits?
 - ☐ What if a proposed project is exempt from CEQA?
 - ☐ What if the biological and wetland analysis completed for a project indicates that there are no impacts to wetlands and endangered species and therefore no mitigation is required?
 - ☐ RWQCB not part of the HCP. Separate permitting required with RWQCB. Isn't this still project-by-project permitting?
-

Urban Infill



Urban Infill



Urban Infill



Urban Infill



Urban Infill

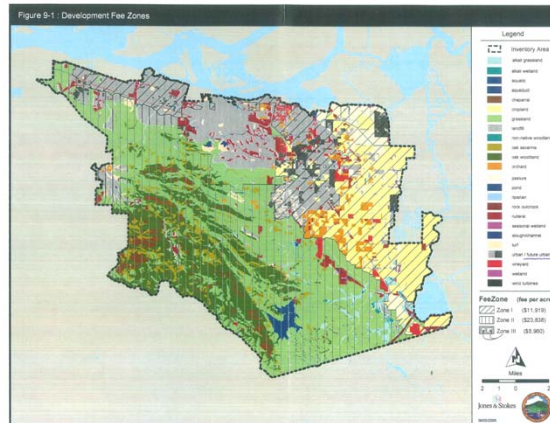


APPLICATION OF HCP

- ❑ This plan has been in place for approximately 6 years
 - ❑ Application of this plan on development projects is raising numerous concerns and highlighting a variety of problems and flaws with the plan
-

Land Cover Mapping – Type and Classification

- ❑ This plan consists of 24 land cover types and 3 separate fee zones
 - ❑ Land cover types were identified by conducting very limited field analysis, aerial photo analysis and literature review. Based on this broad based/non-specific review, many land cover types are erroneous
 - ❑ Parcel by parcel field studies were not conducted when determining the land cover type and fee zone classification
 - ❑ Other than urban, turf, landfill and/or aqueduct, there is no correlation between the land cover type and the specified fee zone – there is a disconnect
-



URBAN/FUTURE URBAN LAND COVER TYPE

- ❑ Sites that are developed were mapped as URBAN
- ❑ Sites that were not expected to need or receive take authorization were mapped as FUTURE URBAN in the plan
- ❑ FUTURE URBAN sites still have to pay HCP fees and complete Planning Surveys even though permits are not necessary – does this make sense?
- ❑ Most FUTURE URBAN sites, that the HCP acknowledges are slated and planned for development and are not expected to need permits for development, already have local General Plan and Zoning designations.
- ❑ HCP staff has indicated that FUTURE URBAN sites have to pay the fee, even though they are anticipated to be developed and do not need permits because there is a need to, “...spread the pain.”

'RUDERAL' LAND COVER TYPE

- Merrian Webster defines Ruderal as follows - adj: *growing where the natural vegetational cover has been disturbed by humans*; noun: *a weedy and commonly introduced plant growing where the vegetational cover has been interrupted*

RUDERAL CONTINUED

- The HCP cross references other land classification systems
- Holland System – Ruderal not identified
- CNPS Classification – Ruderal not identified
- California Wildlife Habitat Relationship – Ruderal defined as 'barren'
- The plan does not contemplate preserving or creating new 'ruderal' land

Fee Zone & Cost Allocation

- ❑ In accordance with the August 3, 2006 memo from EPS, "Irrigated and intensively farmed lands were considered to provide approximately 50% of the habitat and open space value of natural lands..."
 - ❑ We've identified a variety of lands that have been intensively impacted and farmed, yet they have been often designated 'Ruderal' and have also been assigned the highest fee zone category (Zone II). This represents an internal inconsistency in the document
-

Development Fee Zones

- ❑ Zone I – *Cultivated Disturbed Lands*
 - ❑ Zone II – *Natural Areas – dominated by natural land cover types*
 - ❑ Zone III – *Small Vacant Lots*
 - ❑ Zone II fee is twice the amount of Zone I fees
 - ❑ There are many examples in the plan where 'Cultivated Disturbed Lands' have been incorrectly designated Zone II. Again this is an internal inconsistency in the document
-





Planning Survey - Applications

- ❑ When submitting a project to a City that participates in the HCP, a landowner must complete a Planning Survey Review (PSR) application
 - ❑ The idea was to simplify, expedite and reduce the project's survey requirements
 - ❑ The PSR must be reviewed and deemed complete by the governing agency before the overall development application can be deemed complete
-

Planning Survey Review- DBI's Experience

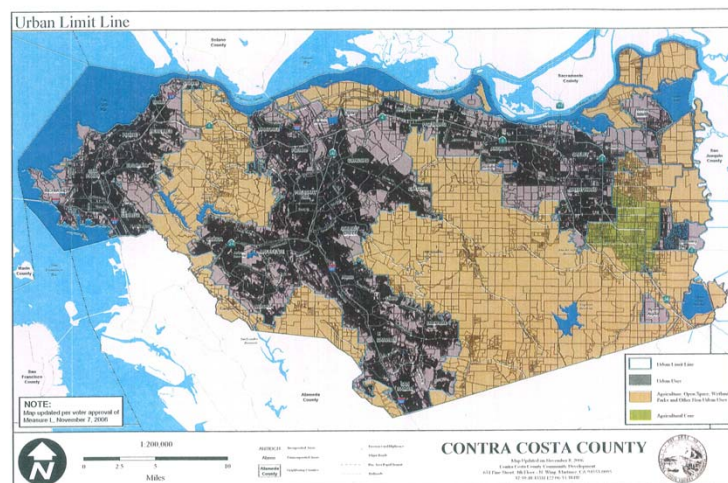
- ❑ Enormous confusion as to who reviews and makes the final determination (governing agency or HCP staff) as to completeness of the PSR
 - ❑ A wetland delineation must be completed and 'verified' prior to the PSR being deemed complete (obtaining a verified wetland delineation can take between 6 months to 1 year). This must be completed prior to an entitlement application being deemed complete.
 - ❑ Biologist completing the PSR must go through an Ad Hoc process with HCP Conservancy staff in order to get the biologist 'approved' by the regulatory agencies - this process must occur each time a PSR is completed (this takes 2-3 months). This must occur and be completed prior to each time an application is deemed complete.
 - ❑ This is not streamlining. This causes significant delays in entitlement application processing. It does not allow for parallel processing.
-

PRESERVE SYSTEM – PER HCP PLAN

- ❑ The goal under the maximum urban development scenario is to preserve 30,300 acres
 - ❑ The HCP will acquire the preserve system via acquisitions with a goal of 'staying ahead' of impacts
 - ❑ The preserve system will aid in enhancing populations of covered species
-

URBAN LIMIT LINE

- ❑ In 2006 the County approved Measure L establishing the Urban Limit Line for the County
- ❑ Areas outside of the Urban Limit Line are Agriculture, Open Space, Wetlands, Parks and Other Non Urban Uses
- ❑ Within the Urban Limit Line, all the land is designated for Urban uses. Why does property, proposed for development, within the urban limit line, designated for urban uses, that will not impact habitat or species have to provide money to the HCP conservancy for land acquisition



FUNDING

- ❑ The cost for implementing the HCP for the maximum urban development area is \$350,040,000
 - ❑ The costs, including grants, for implementing the Plan were allocated between future development and the public based on a “fair share” analysis
-

What does “fair share” analysis/apportionment mean?

- ❑ The “fair share” approach is based on the premise that costs allocated to future development are in proportion to impacts caused by future development
 - ❑ The conservation area of the plan under maximum build out is 30,300 acres and the cost responsibility for acquiring this is divided between public funding for past development and private funding for future development
-

Problems with 'fair share' apportionment approach

- ❑ It does not take into account the 'financial feasibility' of the fee amount
 - ❑ The August 3, 2006 technical memo from Economic Planning Systems clearly indicates that the 'financial feasibility' approach for determining this HCP fee was not used. According to HCP staff, "The fee is what the fee is."
 - ❑ Financial feasibility must be considered anytime a government agency collects a fee in accordance with the Mitigation Fee Act
-

Land Acquisition to Date

- ❑ It is our understanding that about 1/3 of the 30,300 acres has been acquired
 - ❑ Less than \$300,000 has been paid by private residential development for land acquisition, wetland creation and plan implementation
 - ❑ Based on the substantial amount of public funding that has been obtained, doesn't it warrant re-analyzing the Fair Share Apportionment and Analysis assumptions in Appendix H of the HCP?
-

Effect of Annexation/Jurisdictional Amendments on the HCP

- ❑ Many properties with HCP land use designations and fee zone classifications are not within incorporated cities
 - ❑ Large scale annexations take place to non-participating cities or if land is annexed from a non-participating city to a participating city, based on the scope of the annexation, a major amendment to the plan amendments are necessary?
-

HCP Participation Should be Optional

- ❑ When this HCP was being drafted, there were discussions that participation by property owners could be optional
 - ❑ HCP staff has indicated that they could not get approval from regulatory agencies if participation was optional
 - ❑ It is my understanding that in other areas that have an HCP or that an HCP is pending, participation is optional
-

Necessary Modifications to the Plan

- ❑ Section 10.3 of the HCP describes the types of modifications to the plan and outlines how these can be processed. Streamlining the modification process needs to be explored
 - ❑ HCP staff has not been inclined to proceed with minor or major modifications to the plan
 - ❑ Any plan of this magnitude and scope requires revisions and therefore we want HCP staff to work on revisions to the land cover/fee zone map and sections to exempt projects that have no biotic value. Furthermore, participation in this should be optional, not required. These amendments can and should be processed via the minor and/or major amendment process envisioned in the plan
-

HABITAT CONSERVATION PLAN ANALYSIS

Kathie Studwell, Senior Associate
Applied Development Economics

MITIGATION FEE ACT REQUIRED NEXUS FINDINGS

- ☐ Fee Purpose
 - ☐ Use of Fee
 - ☐ Reasonable Relationship
 - Use of Fee & development project
 - Need for reserve and development proj.
-

35

MITIGATION FEE ACT REQUIRED NEXUS FINDINGS

- ☐ Relationship Between Amount of Fee and Impact:
 - Properties without impact should not be charged the fee.
 - ☐ Rough Proportionality of Fee Levels to Cost to Mitigate:
 - Lower impacts require lower fees
-

36

HCP Uses Flawed Methodology

- ❑ The HCP Appendix H – Funding Analysis Apportionment of Plan Costs
- ❑ The plan considered 4 different funding approaches and selected one
- ❑ The plan should have used them together

37

HCP Uses Flawed Methodology

- ❑ Four approaches
 - A. Fair Share Apportionment
 - B. Financial Feasibility
 - C. Mitigation v. Contribution to Recovery
 - D. Availability of Other Funding Sources

38

HCP Uses Flawed Methodology

☐ **Fair Share Apportionment:**

- HCP chose this methodology to apportion monies raised through grants for habitat recovery due to development impacts prior to 2003
- Developer fees for land purchase and maintenance due to future development
- Not sufficient by itself to meet the requirements of the law.

39

HCP Uses Flawed Methodology

- ☐ Method to determine fees should have addressed financial feasibility
- ☐ Standard Practice requires that an aggregate cost burden analysis be conducted
- ☐ Consider total of all fees when analyzing financial feasibility

40

HCP Uses Flawed Methodology

- ❑ Increases likelihood that development will not take place
- ❑ Without development, Plan cannot be funded

41

HCP Uses Flawed Methodology

- ❑ **Financial Feasibility Analysis**
 - HCP failed to use this evaluation tool to determine reasonableness of fees.
 - The Mitigation Fee Act requires that there be reasonable relationship between the fee levels and the cost of new facilities resulting from new development.

42

HCP Uses Flawed Methodology

- **Mitigation vs. Contribution to Recovery**
 - Mitigation Fee Act requires that fees be limited to mitigating impacts only
 - NCCP Act requires the HCP/NCCP to “contribute to the recovery” of covered species

43

HCP Uses Flawed Methodology

- “This approach has the advantage of allocating costs to developers that are clearly their responsibility (mitigation). However, categorizing conservation action by mitigation versus conservation is difficult because 1) there are no recovery plans for most of the covered species and because to use biology or regulatory standards to draw a clear line between the conservation actions needed for mitigation and those that contribute to recovery.”
(Appendix H, HCP/NCCP Funding Analysis, EPS memo dated 8/3/06, p.2)
- The Mitigation Fee Act requires that this be done anyway

44

HCP Uses Flawed Methodology

□ Availability of Other Funding

- This method starts with an assumption as to how much funding is available first from other sources and then determining the developer fee based on the gap between total needed and amount of other funding
- This may result in development fees that are financially infeasible

45

HCP Uses Flawed Methodology

- The HCP uses flawed approach to establish fees
 - The mitigation inventory, expressed in terms of acres of land to preserve and associated dollar costs, is fixed and not related to the level of impact actually created by development covered in the HCP.
 - This is a far more serious flaw in reasoning and results in a failure to meet the nexus tests for the HCP fee program.

46

Feasibility of Mitigation Fee

- ☐ The Mitigation Fee is not consistent with the economics of covered activities
- ☐ There is not an appropriate Feasibility Assessment within the adopted Financing Plan

47

Mitigation Fee Funding

- ☐ Failure to establish a linkage- "Nexus"- between impact of covered activity and level of fee

48

Adaptation of HCP Over Time

- ❑ The ability to refine the HCP Plan is critical but it is very cumbersome
- ❑ It should be streamlined

East Contra Costa County Habitat Conservancy – Habitat Conservation Plan Workshop –

October 2, 2012

Comments Submitted On Behalf of
Discovery Builders, Inc.

By Paul P. (“Skip”) Spaulding, III
Farella Braun + Martel LLP



Presentation Topics

1. HCP Fee Issues
2. HCP Involuntary Nature Problems
3. Absence of HCP Exceptions and “Off-Ramps”
4. HCP Implementation Problems



HCP Mitigation Fees

HCP Fees are governed by the rigorous legal principles of U.S. Constitution, State Constitution and Mitigation Fee Act (MFA) since they are imposed by the Cities/County

The Mitigation Fee Act requires a public agency to make these critical findings before imposing any fee:

- There is “a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed”
- The fees “shall not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed”
- The fee does not hinder economic development through “untimely or improper allocation of development fees”

3

No Basis For Conservancy Fees

Conservancy is proposing a new slate of development and wetland mitigation fees without providing MFA supporting information

Problems include:

- Conservancy failed to conduct HCP fee audit (2 years late)
 - Conservancy staff has now been directed to conduct a true audit by independent auditor including aggregate cost burden analysis and MFA consistency
- Conservancy failed to provide any information on:
 - Conservancy administrative costs
 - Preserve operations, maintenance or management costs

Result: MFA “nexus” requirements are not satisfied

4

HCP Fee Nexus Problems - Pittsburg

- Home prices have suffered dramatic reductions (Brion Report)
 - 56% reduction in County home prices between 2007 and 2011
 - 65% reduction in Pittsburg during same period
 - County land prices have been reduced by similar amounts – this is land available for preserve
- Yet HCP development fees decreased only nominally and wetlands fees increased by 5% to 30%
- Therefore:
 - No reasonable relationship between fees and actual costs
 - No demonstration that costs are reasonable (no audit 6 years later)
 - HCP fees are too high and constitute impediment to development

5

HCP Fees – Financial Feasibility

Mitigation Fee Act contains strong public policy in favor of not hindering economic development by avoiding imposition of mitigation fees that are not financially feasible

EPS (Teifion Rice-Evans) -- Conservancy Consultant (9/24/12)

- “Mitigation fee program should be consistent with economics of covered activities”
- “If mitigation fees turn large numbers of feasible projects infeasible, may undermine Plan”

Economists have developed financial models to address financial feasibility

HCP Here: No financial feasibility analysis has been performed

6

HCP Participation – Involuntary At High Cost

- Most HCPs are voluntary in the sense that they allow a developer to obtain, or establish no need for, ESA/CESA “incidental take” authority instead of paying HCP fees to obtain it
- Examples:
 - Santa Clara Valley HCP
 - San Joaquin County Multi-Species HCP
 - Orange County Central/Coastal Subregions
- Good public policy
 - Some properties do not need incidental take authority
 - It takes account of changed property conditions

7

Involuntary HCP Programs Can Violate Legal Standards

MFA requires that a fee imposed as a condition of approval for a particular development demonstrate a “reasonable relationship” between:

- purpose of the fee and the type of development project
- need for the public facility and the type of development project
- amount of fee and the cost of the public facility attributable to that project

These fee “nexus” requirements are evaluated on both a programmatic and individual project basis.

There is no “reasonable relationship” if a development fee is imposed on a development that will not result in a “take”

8

Involuntary HCP Programs Can Violate Legal Standards

CESA contains an explicit requirement that mitigation must be “roughly proportional” to the impact:

- “The impacts of the authorized take shall be minimized and fully mitigated. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species.” Fish & Game Code 2081(a)(2)
- If no taking will occur, then take authorization is not required, obviating need for mitigation
- If no taking will occur, then a per/acre mitigation fee overshoots the “roughly proportional” requirement

This HCP completely ignores the “rough proportionality” test, particularly when applied to particular property parcels

9

Involuntary HCP Programs Can Violate Legal Standards

- Development fees imposed on a property that do not bear a reasonable relationship to the impact being mitigated may constitute a taking
 - Property that has no habitat/presence would not require take authorization to develop
 - If no taking will occur, then imposition of fee bears no reasonable relationship to non-existent impact
- Imposing land cover designations inconsistent with actual habitat value of property may violate
 - Equal protection where similar properties have different land cover designation, and
 - Due process as arbitrary and capricious
- Conservancy takes inflexible and unreasonable “everything is frozen in 2005/2006” approach

10

Fairness Requires Providing “Off-Ramps” to Avoid Hardships

HCP impact fees are imposed on properties based on Land Cover designation unless excluded per HCP (e.g., “urban”)

In other contexts, such as zoning, variances must be provided when application of a general regulation would be confiscatory or produce unique hardships

Voluntary HCPs generally provide “off-ramp” from HCP requirements if property owner demonstrates that no “incidental take” authority is needed

11

Amendment to HCP is Required to Add Off-Ramp

Only wildlife agencies and local government participants have right to seek “Major” or “Minor” amendments to HCP

- Third party applicants (such as developers) have no access to these mechanisms
- This situation puts them in a worse position than if they directly sought ESA and CESA authorizations

HCP imposes unfair resource and time burden on the participating public agencies to request “amendments” for developers and properties within their jurisdiction subject to hardships

Process is unfair to third parties that are at the mercy of the agencies, which will decide whether or not they want to request an amendment on behalf of the third party

12

HCP Provides For In-Lieu Mitigation But Not an Exemption if No Take Occurs

The ordinances adopted by participating cities provide that the City Planner may waive the development fee if:

- the developer obtains take authorization directly from FWS/CDFG, and
- the mitigation and conservation requirements under the FWS/CDFG approval are equivalent to or exceed what would be required under this chapter (see e.g., Pittsburg Ord. 15.108.080(C))

Problems:

1. Local agencies have discretion to impose a fee even if “take” authority was obtained
2. This waiver option presumes that take authorization is necessary and does not apply if the development will result in no take at all

Therefore: An applicant who does not need “take” authority must pay the full HCP fee

13

HCP Implementation -- Problems

HCP requires a “certified” wetland delineation

- Developers are not allowed to obtain preliminary jurisdictional determinations (PJDs) allowed by law
- The Conservancy and the Regional Board are given authority to “certify” the delineations
- These provisions eliminate legally allowable options and put decision making power in hands of agencies not trained in this area

HCP requires onerous plant and animal species surveys, despite fact that species and their habitat are “assumed” to be present

- Scope unnecessary unless “no take” species are present
- Goes far beyond avoidance and minimization measures
- Significantly delays acceptance of application

14

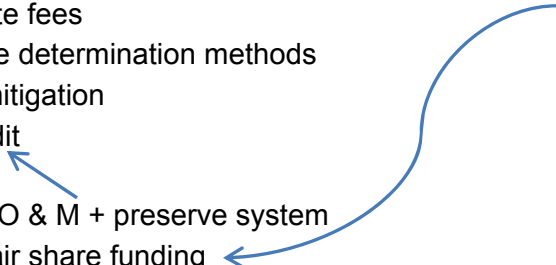
HCP Issue Summary

1. Need to complete rigorous fee audit
2. MFA “nexus” for fees not demonstrated
3. MFA financial feasibility standard not satisfied
4. CESA “rough proportionality” standard not met
5. No fee exemption if no “incidental take” authority needed
6. No administrative process for amending fee zone designation on particular property
7. No third-party/developer right to seek HCP amendment
8. Burdensome and legally questionable application requirements

3) Stakeholder comment period (continued)

Following the conclusion of the slide presentations, John Kopchik introduced David Zippin, ICF Jones and Stokes, the lead author and scientist for the consulting team that drafted the HCP/NCCP. John asked David to attempt to summarize/categorize the amendment suggestions and comments and concerns on flip charts so that the group would have in front of them a broad summary of what had been expressed. David Zippin wrote his summary on the flip charts and explained his summary as he wrote it. Below please find a typed version of what David wrote on the two flip charts:

COMMENTS – FEE

- Clearer link between fees and impacts
 - Rough proportionality CEQA 2081(b)
 - Reduce plan costs to account for lower home and land costs
 - Re-evaluate fees
 - Use all four fee determination methods
 - Limit fees to mitigation
 - 'True' Fee Audit
 - Provide costs O & M + preserve system
 - Re-evaluate fair share funding
- 

COMMENTS

- "Future Urban" – fees?
- Ruderal land cover – pay fees?
highest?
- Planning Surveys – Streamlined
 - Verification of Delineations
Simplify
 - Plant and Animal Surveys
- Allow 3rd parties to propose amendments
- HCP Participation Optional
 - Off-ramp
 - Others do this

4) Wildlife agency comments.

John Kopchik introduced Cay Goude, Assistant Field Supervisor, U.S. Fish and Wildlife Service and Ms. Goude made a number of points. The following is a rough, general summary of the points made by Ms. Goude:

- The reason this HCP started was not only species issues on individual projects, but also to deal with indirect effects of water contracts in East County. Major species/impact issues associated with population growth, indirect effects, needed to be dealt with. That is what began HCP/NCCP process. It was about how we get water; cumulative effect in CEQA, NEPA, etc.
- Benefit with HCP/NCCPs – they are very vetted documents with a lot of input/comments. Doesn't mean things don't come up through implementation, but Plan goes through rigorous comment/input to be adopted. Expected changes through implementation is why have adaptive management process.
- Federal/State agencies have provided more than \$30 million because of HCP/NCCP. Because of the grant funding, the Plan is way ahead of ball game.
- Because of the 30 year permit, the plan covers species that can be listed during life of Plan. The plan covers species not listed with idea that they might be listed in future. Plan has no surprises provision, which means requirements will not change as a result of listing of species. The Service works hard to live up to the commitment that a deal is a deal. A deal is not one-sided, partnership very important and the Service assumes local partners see it the same way.
- The Section 7 consultation process for individual projects takes a long time. There is a huge benefit with an HCP/NCCP as an individual permit takes a long time to process. HCP's now are the only way things getting through FWS quickly. Under HCP, wildlife agencies have each issued permit to local jurisdictions who can extend to third parties.
- Overall the plan has performed well. For example, the conservation efforts have been very successful and Plan is way ahead of stay ahead requirements. HCP now has RGP with the Corps--that doesn't happen absent HCP.
- A lot of comments we are seeing today are same as those dealt with years ago. Some of the comments made suggest some people don't want the Plan. If don't want Plan this has to come from partners. There have been small hiccups and the Service is willing to continue to work with partners/others to make the Plan run as well as possible.

John Kopchik introduced Randi Adair, California Department of Fish and Game and Ms. Adair made several points. The following is a rough, general summary of the points made by Ms. Adair:

- Ms. Goude's comments captured most of what she would like to say.
- Implementation of the Plan has been mainly successful (e.g. land acquisition), but there is no guarantee that state and federal grant funding will continue.
- There are some improvements she thinks the Department/partners can work together to make to improve implementation (e.g. greater clarity/efficiency)

5) Open discussion.

John Kopchik invited meeting participants to share their thoughts and perspectives. The following is a rough, general summary of the points made by those who offered comments:

Nancy Wenninger, East Bay Regional Park District (EBRPD):

- Very concerned about any changes to HCP. Need to retain balance in Plan between conservation/development.
- Nearly all of the cost of land acquired to date has been covered by public funds. But it is not correct to think we can or should rely on public money to continue to float preserve system acquisition/management.
- Significant acreage (more than 8000 acres) has been purchased in this joint partnership to date, but we have not seen the reductions in land prices assumed in the slide presentation.
- Preserve Management – EBRPD has carried the bulk of this cost to date. EBRPD Board is very concerned about funding for preserve management. Conservancy has commitment to provide funding to help with preserve management costs, but fee revenue has been very low due to economic climate. Concerned that fee reductions will/could compromise preserve management funding. Don't know actual cost of managing lands at this point as most of that work has yet to be performed and management plans still being developed.

Nancy Woltering, Save Mount Diablo:

- The HCP is working well and is well regarded from even outside the region. Should be very careful about considering changes to the Plan when it is currently doing well.
- Plan has to look at costs/funding over long period of time. Be cautious in reducing fees because ultimately Plan must ensure covering management costs in perpetuity.
- Plan should not be weakened in any way. If it were amended, Save Mount Diablo would want prohibition of development outside growth boundaries, more species protection, more avoidance and minimization, more protection. But Save Mount Diablo supports it as is.

Matt Vander Sluis, Greenbelt Alliance:

- Supports the Plan as it is crafted. Serves residents of County, was a product of numerous compromises.
- If fees are cut, harder to make it to finish line. Spreading costs of Plan was equity decision by advisory group that put it together
- If any modifications considered for Plan, those changes should be to strengthen Plan & habitat protection. Examples:
 - Include Antioch in the Plan.
 - Stronger limitations of development / prohibitions on impacts to wildlife corridors

Paul Campos, Home Builders' Association of the Bay Area:

- Conservancy is doing fee audit now to see if fees need to be adjusted. We should wait to see what audit facts establish before advocating against for fee reductions. Conservation advocates inappropriately jumping gun on proposing reductions. To just say can't reduce fees ignores intent of fee adjustment principles. Calls for a moratorium on development are misguided.

- As a participant in development of the Plan, he can say that the goal of the Plan was not to create a cumbersome process for developers. If process is too cumbersome (e.g. Planning Survey requirements), these issues should be fixed. If important changes are needed, they should be made even if they require amendment. Focus on practicalities and help make plan work better and fulfill original intent.
- Consider ways for adjusting or eliminating fees on infill sites, acknowledging SB375.
- Discovery Builders raises some important issues. Cay has indicated some items would undermine the Plan. But we should focus on other important issues that would not undermine the Plan.

(Cay Goude stated that she can't often say she generally agrees with Paul Campos but in this case she does)

Albert Seeno III

- His company has infill parcels in Pittsburg that they have owned for over 30 years. Those parcels are already approved to be served water by Pittsburg. Relative to the CCWD water supply issue, is mandatory participation HCP/NCCP for these properties resulting in them being double-dipped?

Cay Goude

- The issue was increased water demand overall for new development. Some areas may have service, but the ongoing request for new water and its indirect effects and cumulative effects was the issue.
- Certain things can be dealt with within scope of Plan. We should look at administrative changes rather than amendment process. Amendment would require permittees (local agencies) to pay for EIR/EIS modifications.

(Mr. Seeno clarified that he had been addressing the question to John)

Albert Seeno III

- Plan has no discretion for private property owners to choose to opt in/out. Land cover types are pre-designated in Plan and the inability to opt out when a site is already surrounded by development is unfair.
- Another issue is his company can't get permits, even if the Conservancy takes the fee money.

John Kopchik

- Clarified that the project being referred to was Bancroft Gardens.
- He stated the money paid to the Conservancy was for a streambed alteration agreement issued by Fish and Game. The fee payment could be credited toward fees for coverage under the HCP/NCCP but they would need to apply for that coverage through the City as the project was in the pipeline pre-HCP. He would like to work with Discovery Builders to get this project covered both under the HCP and under the RGP.

Albert Seeno III

- Would an additional fee be required to be covered under the RGP?

John Kopchik

- No additional fee required. The HCP/NCCP fees satisfy the RGP requirements.

Albert Seeno III

- Stated that the Montreux Project was another example of difficulty receiving permits. It took 16 months to get the Corps to verify the delineation as required in the HCP/NCCP. The project was held up in the meantime. As the only or one of the only developers pursuing permits he believes he is encountering problems others haven't seen yet.

John Kopchik

- Stated that the HCP/NCCP does not require a wetland delineation be verified before a project is deemed complete and project review can proceed. In this case, he believed the issue was a CEQA issue related to whether a stream was present on the site or not.
- Many infrastructure projects are opting in to the Plan and paying fee surcharges though they are not required to participate in the Plan at all because they are not subject to City/County land use regulation (e.g., BART, Oakley Generating, Caltrans, PG&E). He believes they are doing this because they think the Plan is a better option. He stated he knows Discovery Builders perceives public infrastructure projects as having different needs than private projects, but would like to work with Discovery to address their issues and help make the Plan work for them.

Mack Casterman, California Native Plant Society

- Not recommending amendment to the Plan at this time. If amendment were considered, some considerations would be:
 - Major costs will be in future management and restoration. Habitat restoration is challenging and if the Plan were to be amended the restoration ratios should be increased
 - Permanent permit areas
 - Antioch joining the Plan

6) Wrap-up and next steps.

John Kopchik thanked everyone for attending and for sharing their concerns and perspectives. Consideration of the input received will take some time. The next step is a report to the Conservancy Board on October 22.

7) Adjourn

The meeting adjourned at approximately 3 pm.