



COUNCIL AGENDA: 03-09-10  
ITEM: 4.2

## Memorandum

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**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Lee Price, MMC  
City Clerk

**SUBJECT:** SANTA CLARA VALLEY  
HABITAT CONSERVATION  
PLAN

**DATE:** 02-24-10

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### RECOMMENDATION

As recommended by the Community and Economic Development Committee on February 22, 2010 and outlined in the attached memo previously submitted to the Community and Economic Development Committee, accept the status report and staff recommendations regarding the removal of fish from the covered species list, pursuit of alternatives to the Zone D Fee, preference for a Joint Powers Authority as the implementation governing body, and other elements of the Draft Santa Clara Valley Habitat Plan.



# Memorandum

**TO:** COMMUNITY & ECONOMIC  
DEVELOPMENT COMMITTEE

**FROM:** JOSEPH HORWEDEL

**SUBJECT:** SEE BELOW

**DATE:** February 5, 2010

Approved

*Paul Krutz*

Date

*2/9/10*

**COUNCIL DISTRICT:** City-Wide  
**SNI AREA:** All

**SUBJECT: SANTA CLARA VALLEY HABITAT CONSERVATION PLAN - STATUS  
REPORT**

## RECOMMENDATION

Staff recommends that the Committee accept the status report and staff recommendations regarding the removal of fish from the covered species list, pursuit of alternatives to the Zone D fee, preference for a Joint Powers Authority as the implementation governing body, and other elements of the Draft Santa Clara Valley Habitat Plan.

## OUTCOME

The Community and Economic Development Committee's and the City Council's comments and direction on the outstanding policy issues will allow staff and consultants to continue with the preparation of the Draft Santa Clara Valley Habitat Plan.

## BACKGROUND

To promote the recovery of endangered species while accommodating planned development, infrastructure and maintenance activities, the Local Partners, consisting of the City, Santa Clara Valley Transportation Authority, Santa Clara Valley Water District, Santa Clara County and the cities of Gilroy and Morgan Hill, are preparing a joint Habitat Conservation Plan/Natural Community Conservation Plan (HCP/NCCP). The Santa Clara Valley Habitat Plan (Plan) is being developed in association with the U.S. Fish & Wildlife Service (USFWS), California Department of Fish & Game (CDFG), and the National Marine Fisheries Service (NMFS) and in consultation with stakeholder groups and the general public to protect and enhance ecological diversity and function within more

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than 500,000 acres of southern Santa Clara County. The final Plan will provide a framework for the Local Partners and landowners to complete projects while protecting at-risk species and their essential habitats, some of which only occur in Santa Clara County.

In 2001, the USFWS and CDFG, as part of their approval of a series of local development projects, including the Coyote Valley Research Park project and the associated Highway 101 interchange at Bailey, required the then four Local Partners (County, VTA, SCVWD and City) to commit to undertake the habitat planning effort. The Plan was required so that local agencies could address the cumulative and indirect effects of future private and public sector development and operations projects on federal and state listed endangered species.

Subsequent discussions among the four Local Partner agencies led to a Memorandum of Understanding approved in 2004. The MOU establishes the organizational structure of the Plan effort, including the Management Team and the Governing Body Liaison Group. By 2005, the cities of Gilroy and Morgan Hill had joined, and the NMFS agreed to participate regarding endangered fish species that are under their jurisdiction. A Planning Agreement between the Local Partners and the USFWS and CDFG was approved in October 2005, at which time it was agreed that the Habitat Plan would be both a Habitat Conservation Plan under federal endangered species law and a Natural Community Conservation Plan under state law.

Detailed work on what has become known as the Santa Clara Valley Habitat Plan began in 2004 with the development of a work program and initial hiring of consultants. Jones & Stokes is the lead consultant for biological work and preparing the Plan. A 24-member Stakeholder Group, which includes, among others, landowners and representatives from environment, business, and agriculture, has been meeting monthly since November 2005. Representative Local Partner elected officials participate as part of the Governing Body Liaison Group, which meets every two months to review and provide guidance on issues to be acted on by the respective elected bodies. The Santa Clara County Open Space Authority joined the Local Partner team in 2009 and is represented on the Liaison Group and Management Team. The City has two positions on the Liaison Group, with one of those positions currently filled by Councilmember Chu, while the other is vacant. Councilmember Kalra represents the VTA Board. In addition, staff and legal counsel of the Local Partners participate in a Management Team, Advising Attorneys Group, and a combined Attorneys and Management Team.

The Santa Clara Valley Habitat Plan website is [www.scv-habitatplan.org](http://www.scv-habitatplan.org).

### **How does the Habitat Plan fit in San Jose's policy and development context?**

The Habitat Plan evaluates the likely biological impacts on special status species and their habitat from future public and private sector development activities, including operation and maintenance of public facilities. The Plan will facilitate compliance with federal and state endangered species regulations as part of future development review processes. It is important to note that the Habitat Plan does not eliminate the legal requirements for environmental review, approve any public or private development or projects, or impose any new land use regulations. Rather, in addition to identifying species that will be subject to protection under the Plan, the Plan would also provide adequate and suitable land within the County to mitigate the effects on the protected species from

new private and public projects, maintain such lands, and charge fees to new projects for habitat conservation and contribution to the recovery of species.

There are various linkages between the Plan and City of San Jose policies for land use planning and development, construction and operation of public infrastructure and parks, and other land use-related activities. The Plan's emerging Preferred Conservation Strategy is consistent with and supportive of the San Jose 2020 General Plan Greenline/Urban Growth Boundary and Natural Resources goals and policies. The implementation of a Habitat Reserve System will reinforce existing San Jose, Morgan Hill, and County policies to not allow the extension of urban/suburban development into hillside areas. City activities covered by the Plan include operation and maintenance work that has the potential for impacting endangered species (e.g., City road bridge repair and replacement work, roadside brush clearing, City Park trail work, etc.). These activities will not have to obtain individual project specific take permits from the Wildlife Agencies if the Plan is approved by all of the local partners and the Wildlife Agencies.

The potential biological impacts resulting from the covered activities of the Plan are defined more broadly than those typically identified for CEQA purposes and include habitat impacts. Habitat impacts are addressed in terms of acres of habitat negatively impacted. The Plan estimates the anticipated number of acres impacted by public and private development projects and operations over the 50-year life of the Plan. For all analyses, results were only considered to be impacts if the activity affected *natural* land covers (i.e., land covers not already developed), or agricultural and developed natural community land covers that may have some habitat value (i.e., golf courses/urban parks).

Urban development is one of the primary impact mechanisms considered in the Plan. The major impact of new urban development is conversion from natural to developed land covers. Urban development is assumed to result in permanent direct impacts because it is assumed that complete conversion of natural land covers would occur at project sites in urban areas. Urban development will also have indirect impacts on biological resources.

The impact analysis for urban development does not attempt to discern the impact of individual, separate activities, but rather assumes that all areas within the planning limits of urban growth (City's Urban Growth Boundary) for the three cities currently designated for urban development would be fully affected, with the exception of in-stream areas, over the 50 year permit term. The estimated combined total permanent impact from urban development activities for Gilroy, Morgan Hill and San Jose is approximately 15,000 acres. Of that total, San Jose has approximately 1,400 acres of urban development impacts.

## ANALYSIS

The purpose of this item is to provide a status update regarding Plan issues of particular importance to San Jose:

1. Fish species coverage,
2. Plan preparation schedule,
3. Nitrogen deposition intensification impact fees,
4. Development community opposition to Zone D fees,

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5. Burrowing Owl conservation strategy, and
6. Implementing Entity structure options.

The CED Committee's and the City Council's comments and direction on the outstanding policy issues will allow staff and consultants to continue with the preparation of the Draft Plan.

## 1. Fish Species Coverage

Planning staff supports the Wildlife Agency's recommendation to remove fish from the covered species list in the Santa Clara Valley Habitat Plan (Plan). On December 1, 2009, the Wildlife Agencies, represented by California Department of Fish and Game, U.S. Fish & Wildlife Service and National Marine Fisheries Service, issued a letter to the Santa Clara Valley Water District (District) and Plan Program Manager Ken Schreiber recommending that fish be removed from the Plan (see attachment 'A').

Although the Agencies were in support of the objective to cover the four fish species (Pacific Lamprey, South-Central California Coast Steelhead, Central California Coast Steelhead, and Central Valley fall-run Chinook Salmon), they noted several challenges with getting coverage for these species through the current integration approach for the Plan. This integration approach would require that the fish strategies for South County (Pajaro Watershed) and North County (3 Creeks Habitat Conservation Plan, formerly known as FACHE, Coyote and Guadalupe Watersheds) be resolved and documented prior to the release of the Public Draft Valley Habitat Plan. In particular, the Wildlife Agencies were concerned that the integration approach "is significantly slowing the progress" for release of the Public Draft because of "highly complex issues" in both strategies, which still require considerable time to resolve.

In rendering their opinion, the Wildlife Agencies recommended that the Local Partners proceed with the Valley Habitat Plan and 3 Creeks Habitat Conservation Plan as follows:

- The Valley Habitat Plan move forward to address only non-fish species. The Plan would address all current covered activities for all Local Partners and retain the current conservation strategy with the exception of flow and range expansion measures previously proposed for fish species.
- The 3 Creeks Habitat Conservation Plan move forward to address all fish and non-fish species in the North County planning area.
- Separate conservation measures for fish for the Pajaro Watershed be developed which could be integrated into the Plan at a later date through a permit amendment, after the outstanding issues have been resolved.

The highly complex issues that remain unresolved relate to fish passage needs within the Pajaro (Uvas, Llagas and Pacheco) and Coyote Creek watersheds, as well as monitoring costs. A related concern is whether or not to seek State Fish and Game coverage for fish through a Natural Communities Conservation Plan, which requires a higher level of implementation measures for species recovery. These unresolved issues are detailed in a January 19, 2010 Report from Scott Wilson of the California Department of Fish and Game (see attachment 'B').

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Since the latter part of 2009, the fish strategy issues have been a topic of much discussion by the Liaison Group and Management Team. While the Liaison Group has expressed conceptual support for retaining fish in the Plan, some concern has been expressed regarding the on-going lack of resolution to the fish strategy issues. If fish are removed from the HCP, there remains a future option to include fish through a future Plan amendment process.

The Water District Board has voted twice to keep fish in the Plan (December 9, 2009 and January 20, 2010 actions). The District Board will examine the issue again on February 9, 2010 and the District staff recommendation is to remove both fish strategies from the Plan as described in attachment 'C'. An update of the District Board's action will be presented at the Committee meeting.

On February 19, 2010, the Management Team (staff representatives) will discuss the District Board's action on fish inclusion in the HCP and may vote on the matter at their meeting. If the District decided to remove fish from the HCP and the Management Team reaches consensus on this issue, then a record of decision will be made and the Plan will move forward without fish coverage. If the District votes to retain fish in the HCP and the Management Team does not reach consensus (as is required to decide the matter at the Management Team level), the issue would be forwarded to the elected bodies of VTA, County of Santa Clara and the City of San Jose for action. If this scenario should occur, the City Council would likely take action on this decision at its March 9, 2010 meeting.

## **2. Plan Preparation Schedule**

The Second Administrative Draft Habitat Plan, released June 2, 2009, incorporates the resolution of many technical issues raised by the Wildlife Agencies. The Second Administrative Draft Habitat Plan is available at <http://www.scv-habitatplan.org/www/default.aspx>. Local Partner staff and consultants have continued to collaboratively work with Wildlife Agency staff to address and resolve significant issues identified during review of the Habitat Plan Administrative Drafts. A number of lengthy and productive working meetings occurred last year and more are scheduled over the course of this spring.

The Liaison Group was advised in December 2009 that the timeline for Plan adoption has lengthened by several months to mid-2011 under any scenario because fish-related issues have not been resolved. Adoption could be extended to late-2011 or longer if fish coverage is retained. The additional time is needed primarily to allow for fish strategy related revisions, completion of information on the preferred conservation strategy, completion of environmental review documents that must address fish-related issues and the approach to funding Plan implementation. With respect to the schedule, Jones & Stokes has estimated that if a decision to remove both North and South County fish conservation strategies is made shortly, the likely release of the public Draft Plan and EIR would be by early to mid-fall (Sept/October) this year with final approvals in mid-2011. This schedule would allow the Local Partners to review the Draft Plan and Draft EIR/EIS in 2010. More work will be required into 2011 to finalize the wildlife agencies' biological findings and to secure the wildlife agency permits.

If the desire is to keep the North County fish strategy in the Plan, the best case scenario is that the Valley Plan public draft/EIR could be released in early 2011. However, it would likely take longer given there are some critical lingering issues for 3 Creeks that will take more time to resolve, as noted

in the District's February 9th staff report (especially for the Almaden dam passage work), as well as the longer time identified in the January 19, 2010 memo from State Fish and Game. A further complication is that work on the Valley Habitat Plan EIR/EIS can not resume until the fish-related conservation strategy is confirmed. The consultant is not able to provide an estimate for how much time would be required to work out the details for South County fish strategy given the Uvas dam passage is still a major issue.

### 3. Nitrogen Deposition Intensification Impact Fee

An unresolved key issue for the City and the development industry is that the overall approach to funding the implementation of the Plan includes the collection of an impact fee. The fee is proposed to be levied on urban infill projects that may not have direct sensitive species impacts, or otherwise require approval from one or more of the Wildlife Agencies for impacts to a sensitive species, a process known as 'take authorization.' The Draft Plan identifies different impact fee zones that vary based on their relative habitat value to the Plan's covered plant and animal species (see Attachment 'D').

**Zone A: Natural Land.** Land is strongly dominated by natural land cover types including grassland, oak woodland, and chaparral. Zone A occurs outside the Santa Clara Valley floor within the Diablo Range and the Santa Cruz Mountains and adjacent foothills. Development in this zone is expected to have, on average, notably greater effects on covered species and natural communities than in other zones. (current estimate \$18,500 per acre fee)

**Zone B: Agricultural and Rural Residential Lands.** Land is strongly dominated by currently or formerly cultivated agricultural land. Zone B includes much of the Valley floor, lower-elevation rural residential land, and small adjacent valleys such as the Almaden Valley. In general, covered activities that occur in this area have less effect on covered species and natural communities than do activities in Zone A. (current estimate \$12,900 per acre)

**Zone C: Small Vacant Sites.** Zone C comprises specific sites that meet all the following criteria.

- Undeveloped.
- 1.0–10.0 acres in size.
- Surrounded on four sides by one or more of the following land cover types: urban/suburban, landfill, or agriculture developed/covered agricultural.

Development of these areas will result in loss of open space and some habitat values, but impacts will be substantially less than those in Zone A and Zone B because these areas are already surrounded by development. (current estimate \$4,600 per acre)

**Zone D: Urban Intensification/Infill.** The large majority of the City of San Jose is in Zone D. While the Zone A, Zone B, and Zone C development fees are based on mitigation of new development's direct impacts on specific habitat(s) (referred to as land-cover) at the site of the development project, the Zone D intensification fee is based on the indirect air pollution (nitrogen deposition) impacts of new development in urban intensification areas on sensitive land types elsewhere in the Plan area, such as Coyote Ridge east of Freeway 101.

Serpentine land covers in the Plan area are particularly sensitive to deposition of airborne nitrogen compounds generated by vehicle emissions and other sources. These nitrogen compounds enter ecosystems as nitrogen fertilizer. This increased soil fertility can favor non-native annual grasses over native plant species found in serpentine soils. One native serpentine plant species, the dwarf plantain (*Plantago erecta*) is the host plant for the Bay checkerspot butterfly, a key covered species in the Habitat Plan. Additional native plants found in serpentine soils would be covered by the Habitat Plan (e.g., Metcalf Canyon jewelflower [*Streptanthus albidus* ssp. *albidus*], most beautiful jewelflower [*Streptanthus albidus* subsp. *peramoenus*], and fragrant fritillary [*Fritillaria liliacea*]). The fees would be used to acquire and actively manage serpentine-related habitat to mitigate the effects of increased nitrogen deposition from growth occurring within the Plan area.

Jones & Stokes completed air pollution simulation modeling to estimate the percentage of nitrogen deposition in the Plan habitat areas that results from air pollution emissions within the Plan area, as opposed to air pollution that is transported from other regions to the Plan area. The modeling estimated that 46% of nitrogen deposition on habitat areas comes from existing development and vehicle traffic generated locally. The Plan area share of nitrogen deposition on habitat areas is estimated to increase to 49% in 2035 and 51% by the end of the permit term in 2060.<sup>1</sup> Based on these figures, 50% of the Habitat Plan costs related to mitigating nitrogen deposition impacts are allocated to development in the Plan area through the Zone D intensification fee. Other funding sources will have to be found to deal with the air pollution that is transported from other regions to the Plan area.

The Zone D Intensification Fee of \$6.17 for each new average daily vehicle trip (ADT) has been included in the Plan. Zone D comprises expansion of existing public and private sector uses and all new development of undeveloped or vacant sites within urban/suburban areas that are less than 1.0 acre. Development on these sites is assumed to increase the number of vehicle trips, thereby increasing the amount of nitrogen-based pollution that affects natural habitat areas. The fee per vehicle trip was determined based on the Plan area's share of the total costs related to mitigating nitrogen deposition impacts and the projected growth in vehicle trips during the permit term. In the rare case that the Zone D fee, calculated on a per trip basis, would exceed the \$4,600 Zone C per acre fee, the impact fee will be capped at the Zone C level.

The fee, which is to be a one-time payment for this type of development, is to be based on the increase in average daily vehicle trips from the site. This fee would be approximately \$62 for a new single-family house and \$43 for a new multiple family unit. Non-residential uses (e.g., office, warehouses, public facilities, retail) would be less than \$0.10 per square foot for most uses and approximately \$0.40 per square foot for new retail uses.

Local jurisdictions would determine the number of vehicle trips, based on the average daily vehicle trip (ADT) rates used for traffic impact assessments, generated by each new development project and the resulting Zone D fee. Using average daily vehicle trips as the basis for calculating the fee is intended to insure that transit oriented development and other lower vehicle trip generating uses will

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<sup>1</sup> ICF Jones & Stokes. 2009. Estimation of Contributions to Deposition of Nitrogen in Santa Clara County for the Santa Clara Valley Habitat Plan. Draft. May. (ICF J&S 05489.05.) Sacramento, CA. (Appendix F, 2<sup>nd</sup> Admin Draft Plan)

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pay correspondingly lower fees. Over the 50 year Plan term, as cities adopt and implement new General Plans and Climate Action Plans that result in changing travel mode splits with an increasing share of non-auto trips, reductions in vehicle miles traveled (VMT) and ADT, cities will have the ability to adjust ADT rates for land uses accordingly.

Staff has conveyed to the Management Team and Liaison Group the City Council's previously stated concerns regarding such a proposed "intensification fee." Planning staff and the City Attorney's Office have reviewed and provided comments on the modeling that forms the basis for the proposed intensification fee and believes that in the current model there is a legal nexus to development in the City and throughout the County to support collection of the Zone D fee to fund the Plan's conservation activities related to serpentine land-cover habitat. In the absence of such a fee, it is unlikely the Plan could fund the conservation activities necessary to cover the serpentine-related plant and animal species and contributions to species recovery. If the Plan does not cover those endangered species, the Wildlife Agencies would expect new development to mitigate for nitrogen deposition impacts on a per project basis, which would be impractical in most instances. If not addressed in the Habitat Plan, the City can expect to face this issue as part of the Envision San Jose 2040 General Plan Update process. Staff believes it would be advantageous to have it dealt with as part of the Habitat Plan.

An additional reason for the collection of this fee is anticipation that State policies on climate change and sustainable development will likely include mitigation of impacts of new development on habitat and endangered species. Accordingly, the Zone D intensification fee could meet all or some of the mitigation requirements of future global warming policies and regulations. State policies and regulations have recently been adopted (e.g., California AB 32 and SB 375) or proposed (e.g., modifications of the California Environmental Quality Act) that encourage and in some cases require local jurisdictions to address land use development policies and project specific approvals in ways that minimize urban expansion and mitigate global warming-related impacts on the environment.

State officials have cited preparation of a Natural Community Conservation Plan (NCCP), which is part of the Habitat Plan, as a positive response to sustainable land use policies, as well as a source of mitigation for development impacts on species and natural habitats. Preparation of the Draft Habitat Plan will include and identify Plan elements that can be applied to broader State land use policies and regulations regarding climate change. Opportunities to use the Habitat Plan to address applicable Federal policies and regulations, in addition to the Endangered Species Act, will also be sought.

#### **4. Development Community Opposition to Zone D Fee**

On August 31, 2009, Paul Campos, on behalf of the Homebuilders' Association of Northern California (HBANC), expressed in an e-mail message, significant concerns about the Plan, particularly with respect to development projections and financial assumptions, the Zone D fee and excessive implementation costs (see attachment 'E'). Specifically, Mr. Campos wrote that the current economic market conditions are very different than the "economic era" upon which the Plan is based, and therefore the Plan is flawed. Planning staff does not dispute the significant change in economic conditions; however, the conservation strategies of the Plan are based on the implementation and build out of the City's General Plan over the 50-year permit term, not current or

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future market conditions. The HBANC's suggestion to include a financial feasibility analysis merits further consideration.

With regard to the excessive Plan implementation costs, Planning staff shares similar concerns; however, it is important to note the cost estimates are preliminary and continually being revised in accordance with changes in other aspects of the Plan. For instance, the Plan implementation costs will need to be adjusted based on the decisions made on the inclusion of fish coverage. If fish are not included, it is likely the Plan implementation cost estimates will decrease.

Finally, with respect to the Zone D fee, Planning staff also continues to be concerned with seemingly penalizing the very type of high-density, transit-supportive, infill development that is consistent with long standing City policies. A meeting with HBANC and other development representatives was held on January 29, 2010 to better understand their concerns and identify alternatives that might garner their support of the Plan. The meeting included management representatives from the USFWS, CDFG, County, City of San Jose, and the Plan Program Manager. The discussion centered around the implication of this Habitat Plan being the first to address substantially indirect air pollution impacts at a time when many other clean air efforts are underway, such as CEQA consideration of greenhouse gas emissions, Bay Area Air Quality Management District thresholds and Climate Action Plans. The development community has more objections to the principle of imposing such a fee than the actual cost of the fee itself, which is estimated to generate about \$500,000 per year for development in San Jose (assuming an 84% nitrogen deposition contribution). Another major objection is the fairness of charging new development for the air pollution "sins" of the past.

Four options were identified at the meeting.

1. Keep the Zone D fee in the plan.
2. Drop the fee and use other cost savings.
3. Drop the fee and absorb costs into other fees (increasing Zones A, B and C by approx. 8%).
4. Drop the fee in lieu of another source.

The development community is on record with strong opposition to option 1 to the point of actively opposing adoption of the Plan if it is included. Some of the other Local Partners are opposed to options 2 and 3 because of funding equity concerns. This leaves option 4 for which several ideas have been identified for further consideration, such as differentiating between types of development (e.g., transit-supportive, transit-adjacent and non-transit) to better target higher trip generating uses. Another approach might be to collect a nominal fee for all development permits, similar to the General Plan update fee, which the City would use to subsidize the Zone D fee. A third option would be to establish a more direct link between greenhouse gas emissions and a fee. Lastly, a specific serpentine impact fee might be considered. The Management Team and consultants will continue to evaluate these various options and report back at a future date. City Council action is not necessary at this time.

## 5. Burrowing Owl Conservation Strategy

A major issue for the City is the significant challenges around developing an acceptable and viable conservation strategy for the Western Burrowing owl (owl). The owl population in the South Bay has declined rapidly in the last several decades, and the species is anticipated to become listed under the California Endangered Species act in the foreseeable future. Including mitigation and coverage for the owl has been a goal of the City and the Wildlife Agencies, particularly CA Fish and Game, from the beginning of this planning effort. Unfortunately, because target conservation areas are relatively few in number and high in cost, their availability in the short term is questionable and present a high hurdle for provisions of the Plan which require that mitigation and conservation measures occur ahead of covered activities' impacts to ensure owl populations don't decline further.

The owl issue is significant to the City because the Mineta International Airport and the Water Pollution Control Plant (WPCP) buffer lands are the two remaining significant owl habitats present in San Jose. The development of a more viable and certain owl conservation strategy potentially utilizing the WPCP buffer lands is constrained by the master planning process that is in its relatively early stages. The situation is further complicated by the various competing visions for the long term use of the buffer lands. Neither the Airport Master Plan expansion project, nor the WPCP Master Plan expansion project are covered activities under the Habitat Plan. The achievement of a feasible owl conservation strategy continues to be a high priority as the Habitat Plan process continues. Since release of the 2<sup>nd</sup> Administrative Draft of the Habitat Plan a small technical team of burrowing owl biologists, California Department of Fish and Game personnel, and local planning staff have convened on several occasions to develop the burrowing owl conservation strategy. That strategy is in draft form and is currently undergoing review by the Wildlife Agencies. Following their review a revised conservation strategy will appear in the public draft of the Habitat Plan.

The draft burrowing owl conservation strategy is comprised of three primary components:

- 1) The area has been expanded in which burrowing owl conservation could occur from the Habitat Plan study area to the greater South Bay Area. This will increase the flexibility of how burrowing owl conservation initiative can be implemented during the permit term. One of the difficulties that the burrowing owl presents is that very few nesting burrowing owls occur in areas where the Habitat Plan can influence their conservation. By broadening that area of interest it increases the probability of success of this strategy and ultimately is a more biologically sound approach to conserving this species. Broadening the owl impact area also will facilitate multi-jurisdiction owl conservation measures, including State Fish and Game owl mitigation requirements on future projects located outside the Valley Habitat Plan area.
- 2) The study area has been divided into four burrowing owl conservation areas: North San Jose/Baylands, South San Jose, Morgan Hill, and Gilroy. The conservation goals are different for each region as are the ultimate burrowing owl population targets. This allows for a much more prescriptive conservation strategy for the burrowing owl and better expectations for an increase in the burrowing owl population during the permit term.
- 3) The draft conservation strategy sets burrowing owl population targets for the entire South Bay Area, including the Habitat Plan study area. The Habitat Plan will contribute to a portion of

those population goals. The burrowing owl technical team is in the process of completing a Population Viability Analysis for this species to true up those numbers using a scientifically accepted approach.

Planning Staff are supportive of this direction because it is biologically sound, provides long-term Plan implementation flexibility, and has better expectations for population increases.

#### **5. Implementing Entity Structure**

The June 22, 2009 status report included a list of five options for the Implementing Entity structure, including one local partner, a special district, a joint powers authority, two joint powers authorities (JPA) with differing functions, a private non-profit, or a state chartered conservancy. Based on a number of subsequent discussions among Local Partners staff and attorneys with the Liaison Group, the majority of the Liaison Group expressed a preference for the creation of a single JPA. Because only some of the Local Partners have the authority to impose development related fees, those entities (county and cities), would need to manage the JPA, with the other local partners having a more limited role yet to be determined. Discussions about the specifics of how the JPA would function remain to be negotiated among the group and include concerns about shared liability and fulfilling the continuing contractual and permit obligations that the JPA will undertake as the implementing entity for the HCP/NCCP.

Progress on drafting the Implementing Entity formation agreement has been slowed due to the need to address more immediately pressing issues, such as making a decision on fish coverage, so that the project description can be finalized for the environmental documents. The major next step is to draft the initial JPA formation documents and partner agreement. The Implementing Entity will need to approve the Habitat Plan and related documents in the late 2010 or early 2011. Thus the Implementing Entity should be formed and functioning before then. To retain these desired timelines, it is recommended that organizational decisions by all of the Local Partners be made prior to the circulation of the public Draft Plan and EIR/EIS. Staff is seeking confirmation that the formation of a JPA continues to be the Council's preference for the Plan implementation governing body

#### **EVALUATION AND FOLLOW-UP**

In early Fall 2010, the Draft Habitat Plan and Environmental Impact Report/Environmental Impact Statement (EIR/EIS) are expected to be released for public review and comment. Discussion of this status report before full City Council is anticipated in early August 2010. Additional progress reports to the Council may be provided as necessary and prudent for the timely public release of the draft documents. Staff will keep the Council informed about the status of on-going Zone D fee analysis and discussions prior to the circulation of a public draft of the Plan.

#### **POLICY ALTERNATIVES**

Not applicable.

### **PUBLIC OUTREACH/INTEREST**

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

Although this item does not meet any of the above criteria, the Habitat Plan's public outreach program has been thorough. In addition to monthly Stakeholder Group and bi-monthly Liaison Group meetings, several public meetings have been held since initiation of the Plan. Additional extensive outreach will be undertaken in conjunction with the public circulation of the Draft Habitat Plan and the accompanying EIR/EIS in Fall 2010. Future opportunities for community involvement will be posted at [www.scv-habitatplan.org](http://www.scv-habitatplan.org).

### **COORDINATION**

The Valley Habitat Plan is being coordinated with the Departments of Environmental Services, Parks, Recreation and Neighborhood Services, Public Works, Aviation, and Transportation, City Attorney, County of Santa Clara, Santa Clara Valley Transportation Authority, Santa Clara Valley Water District, the cities of Morgan Hill and Gilroy, USFWS, NMFS, and CDFG. This memorandum was coordinated with the City Attorney's Office.

### **FISCAL/POLICY ALIGNMENT**

The Valley Habitat Plan is consistent with applicable San Jose 2020 General Plan policies, particularly the Greenline/Urban Growth Boundary Major Strategy and the Natural Resources goals and policies.

### **COST SUMMARY/IMPLICATIONS**

Per the Local Partner MOU, the City is responsible for a 20% cost share to prepare the Plan. Since the June update, the City's share of the projected consultant costs for the remaining process to complete the Plan has increased by \$71,819, specifically \$89,631 in FY09/10, \$101,995 (previously \$58,070) in FY10/11, and \$19,894 in FY11/12 (a new addition) assuming Plan adoption by the end

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of 2011. Additionally, PBCE devotes staff time equivalent to a 0.5 FTE Planner I/II position to participate in Plan preparation process, with an annual cost of \$67,230.

The primary reason for schedule and budget creep is the result of lack of resolution on the fish coverage issues which affects the project description. The EIR/EIS work has not been able to proceed without the correct project description. An updated plan preparation cost estimate will be prepared when the decision on fish coverage has been made. In either case additional plan preparation costs will likely be incurred to remove fish from the current draft or include additional analysis if fish continue to be covered.

**CEQA**

This "status report" is not a project under CEQA. An Environmental Impact Report/Environmental Impact Statement is being prepared for the Habitat Plan and will be publicly circulated in late 2010 in conjunction with public review of the Draft Habitat Plan. Consultant work on the EIR/EIS has been temporarily suspended pending resolution of the project description.

  
JOSEPH HORWEDEL, DIRECTOR  
Planning, Building and Code Enforcement

For questions please contact Darryl Boyd, Principal Planner, at 408-535-7898.

**Attachments:**

- A - Joint Wildlife Agency Letter
- B - CDFG Report
- C - SCVWD Board Memo
- D - Impact Fee Zone Map
- E - Paul Campos E-mail



U. S. Fish & Wildlife Service  
Sacramento Fish and Wildlife Office  
2800 Cottage Way, Room W-2605  
Sacramento, California 95825-1846



National Oceanic and Atmospheric Administration  
National Marine Fisheries Service  
Southwest Region  
777 Sonoma Avenue, Room 325  
Santa Rosa, California 95404-6528



California Department of Fish and Game  
Bay Delta Region  
Post Office Box 47  
Yountville, California 94599

December 1, 2009

Mr. Beau Goldie  
Santa Clara Valley Water District, CEO  
5750 Almaden Expressway  
San Jose, CA 95118

Mr. Ken Schreiber  
Program Manager, SCVHP  
Santa Clara County  
Office of Planning and Development  
County Government Center, East Wing, 7<sup>th</sup> Floor  
70 West Hedding Street  
San Jose, CA 95110

Subject: Wildlife Agency Recommendation Regarding the Santa Clara Valley Habitat Plan  
and the Three Creeks Habitat Conservation Plan

Dear Messrs Goldie and Schreiber:

As you are aware, for many years the Wildlife Agencies [California Department of Fish and Game (CDFG), National Marine Fisheries Service (NMFS), and United States Fish and Wildlife Service (USFWS)] have been working with the Santa Clara Valley Water District (SCVWD) on the Three Creeks Habitat Conservation Plan (3CHCP) and with local Santa Clara County partners (Local Partners) (County of Santa Clara, cities of San Jose, Morgan Hill and Gilroy, SCVWD, Santa Clara Valley Transportation Authority and the Santa Clara Open Space Authority) on the Santa Clara Valley Habitat Plan (SCVHP), which is both a Habitat Conservation Plan and Natural Communities Conservation Plan (NCCP). These planning efforts have involved substantial effort and commitment of resources and staff by the SCVWD, Local Partners and the Wildlife Agencies and tremendous progress has been made in both planning efforts due to the high level of effort and commitment. We are writing to you now to provide the Wildlife Agencies' recommendation on how to continue to move both planning efforts forward most expeditiously and why we believe this is a critical time to evaluate and decide how best to complete these two important planning and conservation efforts. Our hope is that you will provide this recommendation to those people involved in decision making for SCVHP and 3CHCP.

The Wildlife Agencies recommend the SCVWD and Local Partners proceed with the SCVHP and 3CHCP as follows:

- The SCVHP move forward addressing only non-fish species. The SCVHP would address all current covered activities for all Local Partners and retain the current conservation strategy with the exception of flow and range expansion measures previously proposed for fish species.
- The 3CHCP move forward addressing all fish and non-fish species in the north county planning area, as the 3CHCP is currently drafted.
- The SCVHP planning process concurrently continues separate development of conservation measures for fish in the south county area. Fish addressed in 3CHCP or south county conservation measures could be integrated later into the SCVHP through a permit amendment.

Although we support the integration of these two HCPs, the current integration approach is significantly slowing the progress of the SCVHP. We believe this recommendation will allow both the SCVHP and 3CHCP to move forward more rapidly and will benefit all parties.

The conservation strategy for fish in both the SCVHP and 3CHCP involve highly complex issues and additional time is required to describe and develop effective and sufficient conservation measures. In addition, the issues involved in continued direct integration of the two planning efforts where each affects the other has slowed progress on the SCVHP dramatically. The Wildlife Agencies believe a SCVHP that addresses non-fish species can rapidly move to a public draft stage, while maintaining its momentum and focus among the Wildlife Agencies, Local Partners, stakeholders and other parties, and can achieve significant beneficial species and habitat conservation while providing assurances and consistency for the Local Partners. We believe our recommendation will also maintain momentum for 3CHCP and will ensure that neither planning process is unnecessarily delayed further due to the complexities of maintaining complete integration of SCVHP and 3CHCP.

The Wildlife Agencies are committed to the outcome of this recommendation and, if implemented, will continue staff and management participation in both planning efforts with the goal of completing both the SCVHP and 3CHCP expeditiously through the development of measures that conserve both fish and non-fish species and habitats. The conservation strategy in the SCVHP, once adopted, can be utilized as a mechanism to more easily address some non-fish mitigation requirements from the 3CHCP. The Wildlife Agencies, Local Partners for the SCVHP, and SCVWD for the 3CHCP can effectively coordinate meeting schedules, document reviews, and work to complete the development of effective approaches to conserve fish and non-fish species, while meeting local agencies needs.

At the November 19, 2009 SCVHP Liaison Group meeting, the Wildlife Agencies were asked to provide information regarding the time frame and necessary components to complete the SCVHP and 3CHCP planning efforts. Regarding the SCVHP, the Wildlife Agencies believe that if our recommendations are implemented, the proposed schedule developed by the Local Partners for release of the public draft SCVHP by mid-2010 is achievable and that all significant conservation components can be incorporated.

For the 3CHCP and recommended SCVHP process to continue development of fish conservation measures, the Wildlife Agencies have provided written and verbal guidance to SCVWD and the Local Partners on all major fish conservation issues and will continue to work with the SCVWD and Local Partners to develop effective fish conservation measures. In addition, USFWS has provided comments on the 3CHCP regarding non-fish issues. CDFG has provided guidance on fish conservation measures necessary for the NCCP portion of the SCVHP, but has not received concurrence from the Local Partners. As an example, the following is a brief summary of three of the necessary fish conservation measures for which CDFG needs concurrence from the Local Partners and SCVWD:

- Expand the range of steelhead as a conservation action in both north and south Santa Clara County.
- Agree on sufficient and appropriate natural and reservoir release flows for steelhead in Upper Penitencia Creek and Coyote Creek.
- Conduct effective steelhead monitoring program using life cycle stations and other monitoring techniques sufficient to ensure conservation of steelhead is achieved.

NMFS has provided detailed guidance on all aspects of covered activities and will continue to have both technical and management staff involved in the on-going planning process. In addition to the CDFG issues identified above, NMFS is looking for concurrence from the Local Partners and SCVWD on the following conservation actions:

- Providing sufficient and appropriate conditions for steelhead and Chinook salmon during groundwater recharge operations.
- Providing sufficient and appropriate bypass flows for native fish downstream of water diversions.
- Incorporating appropriate design features and mitigation for future flood control projects.
- Incorporating appropriate measures and mitigation for future seismic retrofit projects at dams.

The time frame necessary to complete the 3CHCP and SCVHP planning efforts for fish depends on a number of factors including: (1) the timing and content of revisions to the 3CHCP currently in process by SCVWD, (2) Wildlife Agency review of draft conservation measures and draft documents, and (3) agreement on fish conservation measures already proposed and others in development by SCVWD and the Local Partners. We believe continued coordination among all parties and both plans is essential to completing these

Mr. Beau Goldie and Mr. Ken Schreiber

December 1, 2009

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plans. The Wildlife Agencies would like to have agreement with SCVWD and the Local Partners on fish conservation measures in early 2010, but many decision points and document development are led by SCVWD and the Local Partners. Therefore, all parties working diligently together is needed to develop timely public draft documents.

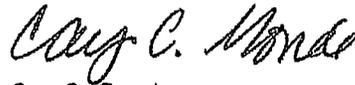
The Wildlife Agencies thank you for consideration of our recommendation and request that this recommendation be implemented as soon as possible to move the conservation planning processes forward.

We look forward to completing the SCVHP and 3CHCP with the Local Partners and SCVWD and the implementation of conservation actions that benefit all of us. If you have any questions, please contact Mr. Scott Wilson, CDFG Environmental Program Manager at (707) 944-5584; Mr. Gary Stern, NMFS San Francisco Bay Team Supervisor at (707) 575-6060; or Ms. Cay Goude, USFWS Assistant Field Supervisor at (916) 414-6648.

Sincerely,



Charles Armor  
Regional Manager  
Bay Delta Region  
California Department of Fish and Game



Cay C. Goude  
Assistant Field Supervisor  
Endangered Species Program  
Sacramento Fish and Wildlife Office  
U. S. Fish and Wildlife Service



Richard Butler  
Supervisor  
Protected Resources Division  
Santa Rosa Area Office  
National Marine Fisheries Service

**DFG Review of Steelhead Conservation Actions and Documentation Process  
for Santa Clara Valley Habitat Plan (SCVHP) and 3 Creeks HCP (3CHCP)  
January 19, 2010**

**Status of progress on major conservation actions for steelhead.**

DFG has provided guidance to local Santa Clara agencies on steelhead conservation measures for the past 2 years. The challenge has been developing measures that will actually result in species conservation and also be feasible to the local agencies. After looking at a variety of options, many options discussed were deemed not feasible by the local agencies.

Following the 2009 release of drafts of SCVHP and 3CHCP, DFG provided significant guidance between June 2009 and September 2009. This included general guidance on flows, diversions, passage to increase steelhead range, and other minimization, mitigation and conservation measures. Specific DFG guidance recommendations included 1) north county range expansion as a conservation measure, 2) Upper Penitencia Creek diversion, discharge and mitigation, 3) Coyote Creek flow and diversions, 4) monitoring and adaptive management, and 5) biological goals and compliance measurement.

DFG believes that while some progress has been made in the past 2 months on major conservation actions; that progress has come largely from partial agreement by the local agencies with the above described guidance recommendations presented by DFG several months earlier. However, since these partial agreements have not been presented in writing as complete proposals, DFG is not certain if the local agencies' proposals may include conditions such as funding caps, limited seasonal implementation, or changes to flows, diversions or other project descriptions, which could nullify the benefit of the actions, such as has been previously proposed.

Reaching clear agreement on these still outstanding conservation actions is a critical step toward a public draft SCVHP or 3CHCP that addresses steelhead. DFG cannot predict how long it will take to reach agreement on all remaining conservation actions, since the local agencies have not indicated when or if they will respond to DFG's recommendations and the recent tentative agreements were reached more than 3 months after DFG provided the recommendations.

A south county Uvas passage recommendation made by DFG in September was rejected in a SCVWD letter. DFG therefore is of the understanding that the SCVHP will not be requesting NCCP coverage for steelhead. We believe that without increased steelhead range past Uvas dam, conservation of the species cannot be achieved and we can not make the necessary findings for an NCCP permit, even with the other proposed conservation measures. The species has an extremely limited current distribution, has experienced dramatic reductions in population and face on-going significant disturbances to flow regimes and habitat quality that the proposed conservation strategy will not sufficiently ameliorate to achieve a conservation standard. DFG is available to discuss Uvas passage issues and develop with the local agencies a method most likely to achieve increasing smolt outmigrant numbers and conservation of the species within the Plan area necessary for NCCP coverage.

One south county alternative is to implement the existing conservation strategy as proposed with no passage, and no take coverage for S-CCC steelhead would be provided by DFG at permit issuance. Once the Plan and the monitoring program is implemented, if monitoring several age class cycles shows increasing smolt production/outmigration per adult returning, then take authorization would be provided at that time.

### **Timing and Documentation**

Following tentative agreement on any draft conservation actions, DFG would review a revised draft of the 3CHCP and SCVHP fish information. Review and incorporation of edits into the next draft of SCVHP or 3CHCP is likely to take 6 months even under the best of circumstances. The latest draft of the 3CHCP needed substantial editing and revision to be accurate, internally consistent and reflect a clear understanding of covered activities, impacts and conservation actions. DFG has not seen all revisions to the April 2009 draft to see how our comments were addressed, so it is not certain how much revision the next draft of fish information for 3CHCP or the SCVHP may take. Given the difficulties with multiple drafted versions over the past several months, DFG remains concerned that the process of documenting, reviewing and incorporating fish information into the SCVHP and 3CHCP may well take another year or more to produce a public draft document.

We encourage the local agencies to reconsider the benefits of proceeding with the terrestrial conservation strategy in the SCVHP by moving that document as rapidly as possible to a public draft, while accepting our offer to continue to provide management and staff level support to continue development of fish conservation measures.

### **A few major conservation action issues previously raised and not yet completely addressed:**

#### **North County**

1. CCC steelhead need increased range to achieve sufficient habitat and conditions for conservation. DFG has determined that passage at Almaden or Stevens Creek Dams is necessary to meet the standard to get NCCP permit coverage. Has this conservation measure been agreed to with no cost cap or other conditions? When will this conservation measure be implemented?
2. SCVWD is still developing new proposals to address flows and diversions in Coyote Creek. This may result in the development of several new options that have not been previously presented. This will require additional fish agency review. Note that during the January 6, 2010 conference call, an idea was discussed to keep the percolation ponds on-channel in Coyote Creek, negating the need for fish ladders and diversions. DFG strongly feels that Coyote Creek should mimic a natural stream system, and that this would best be accomplished by taking the percolation ponds off-channel and utilizing pipelines (and the Coyote Canal) for delivery of diverted water.
3. The repair and reoperation of Coyote Canal has been the subject of discussion in recent meetings/conference calls, in terms of which plan (Three Creeks versus SCVHP) would cover the repair versus the operation. It was verbally agreed to

during the January 6, 2010 conference call that both plans will cover both activities. This should be provided in writing for documentation purposes. This will be important in examining options of how water may be delivered to the percolation ponds in Coyote Creek and how releases of flows from Anderson Dam will be managed.

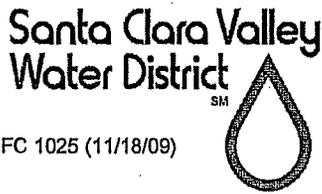
4. DFG is continuing to review with NMFS Upper Penitencia Creek temperature issues that relate to the recharge operations involving input from the South Bay Aqueduct. DFG will provide feedback to the SCVWD once this review is complete. This matter should not be considered resolved until that feedback is provided to SCVWD.

### **South County**

1. S-CCC steelhead need increased range to achieve sufficient habitat and conditions for conservation. DFG has determined that passage at Uvas Dam (either volitional or via trap and truck) is necessary to provide steelhead sufficient habitat to achieve a conservation standard for NCCP permit coverage. Has this conservation measure been agreed to with no cost cap or other conditions? When will this conservation measure be implemented?
2. The SCVWD has indicated that they are unwilling to provide a fish ladder at Uvas Dam due to cost and feasibility issues. However, they have recently decided to have a fish passage engineer examine the feasibility of providing passage via a fish ladder, with an expected range of costs. DFG needs an affirmative response from SCVWD as to whether they are willing to provide passage at Uvas Dam in order to get an NCCP permit for S-CCC steelhead. If an affirmative response is not possible, S-CCC steelhead should be removed from NCCP coverage.
3. It is unclear what the status of the reoperation strategy for Uvas and Chesbro Reservoirs will be if S-CCC steelhead are not included in the Plan for NCCP coverage.

### **Monitoring, Adaptive Management and Permit Compliance Issues**

1. Throughout the course of many meetings and conference calls, there has been much discussion of the need for a clear, detailed, unambiguous, strong adaptive management program. Specifically for steelhead, the adaptive management program will need additional development to address specific adaptive management needs and outcomes. This is an extremely important component of an NCCP, and this will need to be clearly defined before a permit can be issued. The fish agencies must be included in the determination of how and when adaptive management is implemented (the fish agencies cannot be restricted to an advisory role). Key triggers will need to be established that will identify when adaptive management actions will be implemented.
2. Conservation Compliance: During Plan implementation, permit compliance and continuation of take authorization for steelhead will be evaluated based on both an adequate monitoring program and achieving a measurable biological goal of increasing steelhead smolt production per returning adult. Therefore the monitoring program and biological goals for steelhead should be revisited to ensure they are sufficiently robust for the evaluation.



Meeting Date: 02/09/10  
 Agenda Item:  
 Unclassified Manager: Ann Draper  
 Extension: 2665  
 Director(s): All

## BOARD AGENDA MEMO

**SUBJECT:** Inclusion of Fisheries in Santa Clara Valley Habitat Plan

**RECOMMENDATION:**

Authorize each of the five recommended strategies which provide a coordinated approach to obtaining permit coverage for District activities.

- A. Provide direction to agree to remove fish as a covered species from the Valley Habitat Plan (Valley HP)
- B. Retain District covered activities in the Valley HP that have terrestrial species impacts.
- C. Advocate that the land use measures which benefit the quality of riparian area be retained within the Valley HP.
- D. Continue to finalize Three Creeks Habitat Conservation Plan.
- E. Return to the Board with a more detailed plan for regulatory coverage for fish in the south county.

**SUMMARY:**

SCVWD has a strong commitment to natural resource protection and the Board sustained its commitment with the adoption in December 2009 of a Water Resource Stewardship end policy aimed at protecting and enhancing watersheds and natural resources. With this in mind, staff recommends that the most efficient means to achieve this end, while protecting the integrity of the SCVWD's essential water supply and flood protection functions, is to agree with the recommendations of the wildlife agencies and Local Partners to remove fish from the Valley HP – both the north and south parts. The reasons for this recommendation and recommended next steps are as follows.

1. **Incongruent conservation models and complexity of integration of two plans:** The emphasis and structure of the Valley HP is for benefit of terrestrial species, although fish have been included as covered species throughout the plan area. The conservation model for terrestrial species impacts associated with future activities is to provide for the development of land preserves outside the urban area. Consequently, the Valley HP proposes a preserve system of about 48,000 acres to balance the anticipated development occurring within the jurisdictions of the local partners. Many of the implementation details of this – precise locations of the preserves, on-going management, etc. – are deferred for decisions and/or further negotiations in the future.

In contrast, the conservation program proposed for impacts to fish addresses continuing and anticipated future impacts *within* the species' existing habitat. The Resource agencies have

**SUBJECT:** Inclusion of Fisheries in Santa Clara Valley Habitat Plan

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insisted on significantly more detail for fisheries conservation in the aquatic conservation strategy for both the Valley HP and the District's separate Three Creeks Habitat Conservation Plan (Three Creeks HCP) , most of which cannot be deferred for future determination.

Many efforts have been made at integrating the terrestrial and fisheries models and all are lacking. Integration of the two plans, as well as the associated environmental analyses for each, has proven to be difficult and time-consuming. These complexities will continue throughout the permitting process, potentially slowing permit acquisition for the District's activities and operations as well as those of the HP partners, whether impacting terrestrial or aquatic species, or both. Significant additional time by all parties is anticipated should fish be retained in the Valley HP.

Given the complexity of the integration process, continued concerns about the schedule for completion of the two plans, and the commitment by the resource agencies to continue to work towards completion of plans that address impacts to fish, at this time, staff believes fish should be dropped from the Valley HP. Both the Valley HP and the Three Creeks HCP will then be able to be processed more effectively and efficiently resulting in faster permit issuance and implementation of the terrestrial and aquatic conservation strategies for the benefit of the covered species.

2. **Key Fishery Conservation Measures Require Further Deliberation:** The expansion of habitat suitable for fish passage within the watersheds has been a key conservation measure pursued by the resource agencies and the District has offered extensive measures to accomplish this objective. Additionally, the resource agencies have recently requested passage over two dams be added to the conservation measures – one in the north county (also covered by the Three Creeks HCP) and one in the south county (at Uvas dam).

To date, District staff has tentatively proposed inclusion of a significant upstream passage measure at Almaden Dam. However, on January 22, the District received a report from a fish passage expert who opined that fish passage over Almaden Dam may be significantly more difficult and expensive than anticipated to implement. Because the Almaden passage project is one of the key conservation and recovery elements of the north county aquatic strategy, and National Marine Fisheries Service (NMFS) has expressed a priority interest in the inclusion of this measure, additional time will be required to evaluate the feasibility and cost of the measure, together with any alternatives. Similarly, Staff is undergoing an intensive evaluation of the feasibility and alternatives of providing upstream passage at Uvas Dam. This work has been underway for many months and is very near complete. Similar constraints found at Almaden Dam are also present at Stevens Creek and Uvas dams.

While Staff believes that assessment of the feasibility of the two proposed passage projects and development of necessary alternatives and implementation details can be done expeditiously, they cannot be completed in the very limited time frame that is desired by the other local partners in the Valley HP – by February 18.

**SUBJECT:** Inclusion of Fisheries in Santa Clara Valley Habitat Plan

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Due to the central importance of these projects to the District's conservation strategy, the significant cost factors associated with these measures, and the need to assess affects to water reliability, staff believes it is prudent to take the time needed to thoroughly discuss and evaluate the conservation measures as long as there is a commitment from the resource agencies to continue to support working together to complete the plan and issue permits.

### **Recommended Strategy**

- A. Provide direction to agree to remove fish as a covered species from the Valley Habitat Plan (Valley HP). By letter, the three resource agencies recommended that fish be removed from the Valley HP, but pledged to provide continuing staffing and agency resources to facilitate the permitting of the District's aquatic species impacts in both the north and south county. This pledge will allow the District to complete its development and permit processing of the Three Creeks HCP as soon as possible to resolve its water rights challenge and augment its present fishery conservation actions through the implementation of the Three Creeks Plan. The other local partners will need to make their own determination as to whether and when to obtain coverage for fish for any impacts they may have. If this strategy is approved, the Valley HP will need to be modified to remove fish as covered species from the Valley HP. This will entail the removal of the aquatic conservation strategy from the Valley HP – i.e., the conservation program would be included in the Three Creeks HCP only.
- B. Retain District covered activities in the Valley HP that have terrestrial species impacts. The District will be able to gain take permits for its terrestrial impacts and the conservation measures can be accomplished by the Valley HP implementing entity. With the removal of the District's impacts on fish from the Valley HP, recalculation of the District's impacts will be required. Staff anticipates continuing to include its terrestrial species impacts in the Three Creeks HCP as well – thereby providing the District with duplicative/redundant permits for its activities.
- C. Advocate that the land use measures which benefit the quality of riparian area be retained within the Valley HP. Riparian areas provide benefit not only to fish but to other endangered species as well. The Valley HP includes measures such as stream setbacks, erosion and storm water controls and other actions which benefit multiple species in riparian areas. These conservation measures should be retained.
- D. Continue to finalize Three Creeks Habitat Conservation Plan. District staff will continue to finalize Three Creeks HCP in an expedited way, with the committed assistance of management staff from all three resource agencies. This will provide the ability to gain permits for District activities and to petition the State Water Resources Control Board to settle the water rights challenge.
- E. Return to the Board with a more detailed plan for regulatory coverage for fish in the south county. If dropped from coverage from the Valley HP, the District will need to develop an alternative method to obtain Endangered Species Act-coverage for its impacts in South County. The District has several alternative permit options that it might pursue. Staff has begun an assessment of these options and will propose a plan for next steps in the near future.

**SUBJECT:** Inclusion of Fisheries in Santa Clara Valley Habitat Plan

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## **Background**

In 1996, a complaint challenging the District's water rights was filed with the State Water Resources Control Board. In response, a collaborative effort, called the Fish and Aquatic Habitat Collaborative Effort (FAHCE), was formed including The Santa Clara Valley Water District (SCVWD), complainants, resource agencies, the City of San Jose and other interested parties. The goal of this collaborative was to develop a mutually acceptable settlement for Stevens and Coyote Creek and the Guadalupe River. After several years of scientific investigations and discussions with all concerned parties, the "Proposed Draft Settlement Agreement Regarding Water Rights of the Santa Clara Valley Water District on Coyote, Guadalupe, and Stevens Creeks" (DSA) was drafted. All parties initialed the DSA on May 27, 2003. One of several conditions precedent to the DSA is development of a Habitat Conservation Plan (HCP) and issuance of incidental take permits from NMFS, United States Fish and Wildlife Service (USFWS) and Department of Fish and Game (DFG). A draft FAHCE HCP was prepared in 2004. In January 2005, resource agencies informed the District that the HCP would not be approved unless it was expanded to include all surface water operations. The FAHCE HCP was then modified to be the Three Creeks HCP and include all surface water operations, dam maintenance and seismic safety in Stevens and Coyote Creek and Guadalupe River.

Separately, SCVWD joined the County, the City of San Jose and the Valley Transportation Authority for the purpose of creating a conservation plan for the parts of the Guadalupe and Coyote waterways within San Jose, and the parts of the Pajaro watershed within the county. This plan is called the Valley HP. At a later date, the cities of Gilroy and Morgan Hill joined the effort. This plan contains the same water supply projects for the Coyote and Guadalupe rivers, adds the water supply projects in the Pajaro watershed and adds flood protection projects in all areas.

At the October 27, 2009, December 8, 2009 and January 20, 2010 Board meeting, staff updated the Board on the status of the Three Creeks HCP and the Valley HP. At issue, was the question of whether the Board should continue to support the inclusion of steelhead and salmon as covered species within the Valley HP. The District's Valley HP partners have communicated that they want to finalize the Valley HP as soon as possible, but they find that the conservation strategies for fisheries are very complex and may require significantly more time to resolve than some of the partners are willing to invest. At the December 8 Board meeting, staff also provided the Board with a letter from the three resource agencies recommending that steelhead and salmon be removed from the Valley HP and that the two Plans be prepared according to their own schedules.

On December 8, the Board directed that staff oppose removal of steelhead and salmon from the Valley HP. The Board's direction was communicated to the Valley HP management team and Liaison Group members. Since December 8, staff has continued to make significant progress in resolving the limited number of remaining fish species issues, however, it is clear that additional issues and uncertainties remain and that significant delays to the Valley HP would result if fish remain in the Valley HP. Both Directors Kamei and Wilson have participated in two issue resolution sessions. Of key importance is the Board's ongoing direction to assure a balance

**SUBJECT:** Inclusion of Fisheries in Santa Clara Valley Habitat Plan

02/09/10

among flood protection, water supply and resource protection objectives and to develop a legally, fiscally and operationally feasible plan.

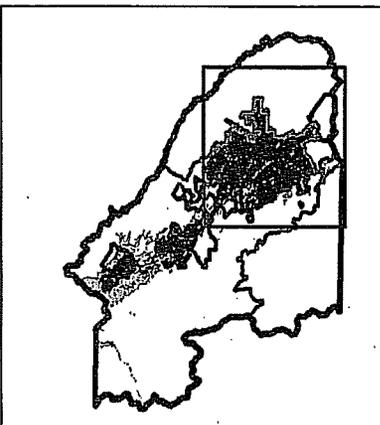
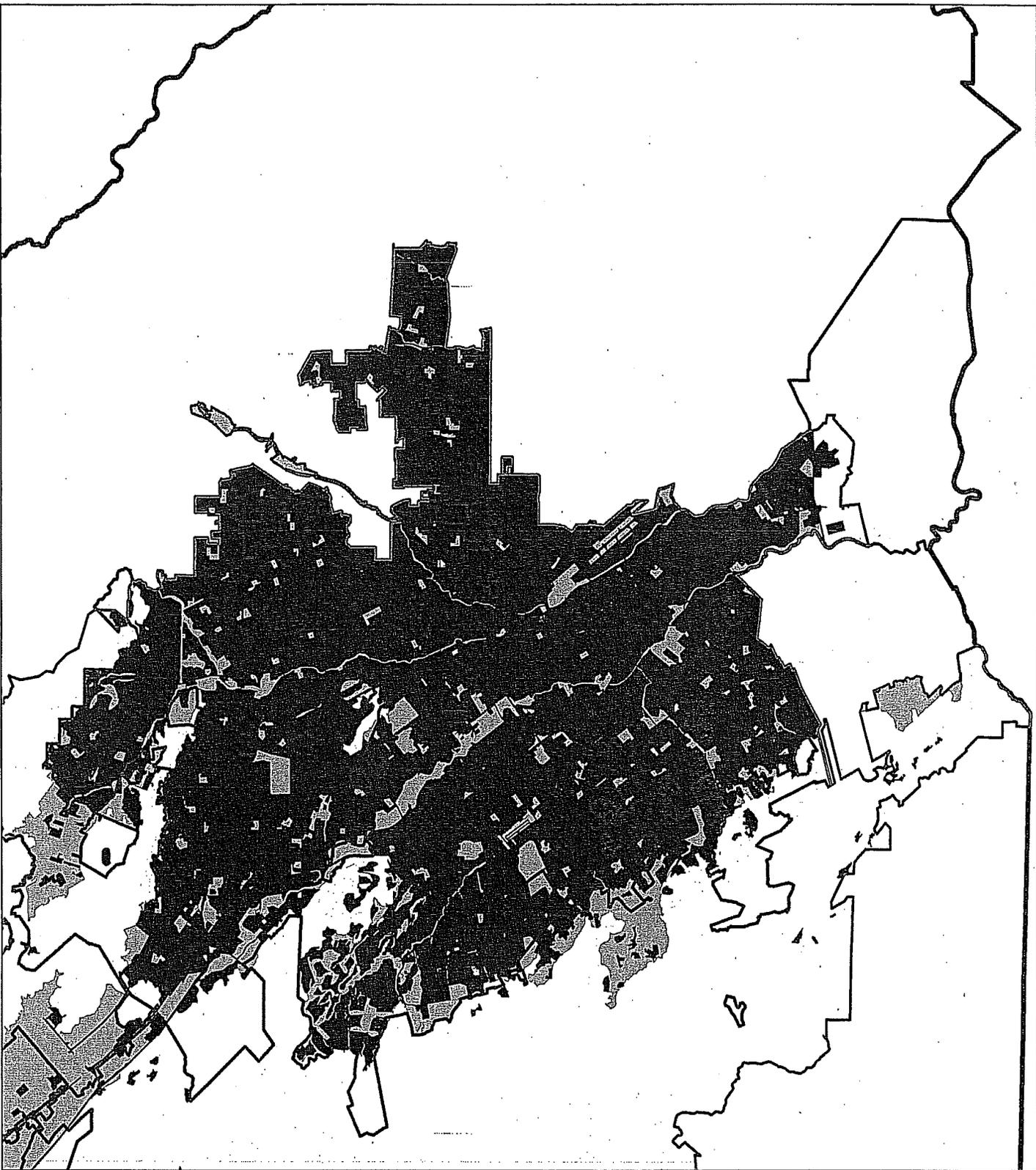
Because staff will continue to analyze the conservation measures and discuss the issues with the Valley HP partners and the resource agencies, supplemental information may be available by the meeting date.

**FINANCIAL IMPACT:**

There is no immediate financial impact associated with this agenda item. If conservation plans are developed, final documents will come to the Board for action that will include costs in the range outlined within the document.

**ATTACHMENTS:**

None.



**Legend**

-  HCP Study Area
-  SAN JOSE

**Habitat Plan Fee Zones**

- A 
- B 
- C 
- D 
-  County Boundary

**From:** Ken Schreiber [ken.schreiber@pln.sccgov.org]  
**Sent:** Thursday, February 04, 2010 2:53 PM  
**To:** Boyd, Darryl  
**Cc:** Kathryn Gaffney; David Zippin; Lisa Killough  
**Subject:** Fwd: HB Comments on Second Administrative Draft  
Darryl

I don't think the August 31 comments came as a letter.

Ken

Begin forwarded message:

**From:** Ken Schreiber <ken.schreiber@pln.sccgov.org>  
**Date:** September 1, 2009 8:52:40 AM PDT  
**To:** Paul Campos <pcampos@hbanc.org>  
**Subject:** Re: Comments on Second Administrative Draft

Thanks Paul---we will be getting back to you re the specifics.

Ken

On Aug 31, 2009, at 6:35 PM, Paul Campos wrote:

Dear Mr. Schreiber,

The Home Builders Association of Northern California (HBANC) appreciates the opportunity to comment on the second Administrative Draft of the Santa Clara Valley Habitat Conservation Plan (HCP). While we recognize that the HCP has been under development for several years, and is the product of long hours and hard work, we nonetheless must convey our view that the HCP suffers from serious enough fundamental flaws that approval and adoption in anything like its current form is untenable, and that a complete "rethink" of the HCP's basic purpose, goals, and cost is required. HBANC does not come to this conclusion lightly. We are, as a general matter, strong proponents of regional HCPs, having been active participants in the successful development and adoption of the east Contra Costa County HCP, as well as having testified in favor of regional HCPs before the U.S. Congress. However, for the reasons set forth below, we urge all of the participating agencies to reevaluate this planning effort.

- Flawed Development Projections

The overall goals, conservation requirements, conservation strategy, preserve design, etc. of the HCP were developed in what was literally a different economic era. The reasonably foreseeable amount, type, timing, price, and location of future development—especially new housing units—has changed so drastically in the last few years that the biological and financial assumptions underpinning the HCP are no longer valid. New housing starts in the region have plummeted and there is no evidence to suggest that they will return to anything near the level necessary to support the HCP's biological impact and financing elements. Put simply, the HCP's

projection of new development's impact on biological resources is vastly overstated, as is the projection of the amount of revenue that will be generated by fees imposed on new development. As it stands, the HCP cannot satisfy the Endangered Species Act's financial assurances provisions (as interpreted in *Natomas I*) because it is unreasonable to assume that new development will occur at anywhere near the rate necessary to generate the revenue to pay for the HCP's projected costs. Furthermore, the new development that does occur will be unable to bear the burden of the HCP's fees and exactions when combined with each participating local agency's own fees and exactions. Sales prices for new housing units have fallen roughly 50% from the levels on which the HCP's financial modeling is based. Yet there has been no analysis done to demonstrate that new housing units with these sales are economically feasible when the proposed HCP and other impact fees are imposed on them.

The east Contra Costa County HCP process included preparation of a financial feasibility analysis which assessed the relationship of the overall fee burden imposed by the HCP and local agency exactions to the projected sales prices of new homes in the HCP area. The basic premise of the analysis was that when the combined fee burden exceeded 15% of the sales price, financial feasibility is compromised. A similar analysis must be undertaken for this HCP, and is very likely to show that with respect to the amount of new housing that is likely to occur, as well as the fee level the new housing can sustain, the HCP is not based on credible or justifiable assumptions.

- Anti-Smart Growth Fee

The first draft of the HCP contained a proposal to levy an "urban intensification fee" on all residential projects "within urban/suburban areas that undergo any increase in residential density (additional dwelling units)." According to the initial draft, the fee was intended to mitigate the impact of vehicle miles traveled (VMT) and resulting nitrogen emissions on plants that are habitat for the Bay Checkerspot Butterfly. The initial proposed fee was \$100 per unit. HBANC immediately objected to a fee of this kind—in any amount. As we explained, this is a fee that penalizes precisely the kind of densification, infill, and transit corridor intensification that is necessary for California to meet its AB 32 and SB 375 climate change and greenhouse gas (GHG) emissions reduction targets. It is quintessentially an "anti-smart growth fee."

HBANC was expressly assured on several occasions that this ill-considered scheme would be dropped. However, the current draft of the HCP not only retains the densification fee, it dramatically increases the potential amount of the fee. Again, this fee is anti-infill, anti-density, and anti-smart growth. It is also fundamentally inconsistent with each of the general plan visions being considered by the participating local agencies—especially the Envision 2040 alternatives being considered by the City of San Jose. These agencies, like governmental agencies at the federal, state, and regional levels, are basing land use and transportation planning activities on the premise that higher density development *reduces* VMT and resulting carbon emissions and that California must dramatically increase residential density in order to combat global warming effectively. Yet the HCP proposes to create an

additional fee aimed squarely at increased density! This was a bad idea when first proposed and it remains so.

It also finds no support in the conservation biology contained in the HCP itself. Section 5.3.3 of the HCP discusses grassland conservation and management, including the relationship of nitrogen emissions to serpentine habitat. The discussion concludes as follows:

Continued active management using livestock grazing, prescribed or natural burning, and other methods will therefore be essential to offsetting the potentially increasing threat of nitrogen deposition in this community. The long-term effects of N-deposition are unknown, *but the working hypothesis is that existing grazing regimes will be able to maintain native biological diversity.*

In light of this conclusion, there is no basis for continuing to propose an intensification fee, and it should be dropped immediately. We also believe that the Nitrogen Study on which the proposed fee is based is scientifically flawed and inconsistent with current regulatory practice of the relevant agencies.

- Excessive Costs

The total cost of the HCP is projected to exceed \$1 billion. This represents a \$200 million increase from the initial draft that was released approximately one year ago. As noted above, however, the HCP's land acquisition and overall program costs were largely determined during an unprecedented housing boom. Neither the housing industry, the local agencies, the State of California, nor the federal government, can afford to spend \$ 1 billion to fund this HCP. Both the state and federal governments are slashing spending on vital social services, from education to health care. To put the proposed price tag of the HCP in perspective, \$ 1 billion would pay to insure over 1 million California children, pay for 370 million school lunches, cover 103,000 Cal-Grants for college tuition, or pay the salaries for over 16,000 California teachers.

The scientific, economic, and budget realities all point to the same conclusion: the HCP is fatally flawed and requires a fundamental revision.

Very truly yours,

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