



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: November 13, 2012

Approved

Date

11/14/12

SUBJECT: PUBLIC HEARING ON THE APPEAL OF THE PLANNING COMMISSION'S CERTIFICATION OF THE ENVIRONMENTAL IMPACT REPORT FOR THE SANTA CLARA VALLEY HABITAT CONSERVATION PLAN/NATURAL COMMUNITY CONSERVATION PLAN.

RECOMMENDATION

Find that the Environmental Impact Report (EIR) for the proposed project, the Santa Clara Valley Habitat Conservation Plan/Natural Community Conservation Plan, is complete and in conformance with the requirements of the California Environmental Quality Act (CEQA) and uphold the Planning Commission's certification of the EIR.

OUTCOME

Certification of the Environmental Impact Report will allow the City Council to consider the approval of the Santa Clara Valley Habitat Conservation Plan/Natural Community Conservation Plan project, for which the EIR was prepared.

BACKGROUND

Overview of the Habitat Conservation Plan (HCP)/Natural Communities Conservation Plan (NCCP)

To promote the recovery of endangered species while accommodating both public and private development, infrastructure and maintenance activities, the City of San Jose in cooperation with the other Local Partners (City of Gilroy, City of Milpitas, Santa Clara County, Santa Clara Valley Water District and the Valley Transportation Agency) prepared a joint Habitat Conservation Plan (HCP)/Natural Communities Conservation Plan (NCCP). The HCP/NCCP

(collectively referred to as the Habitat Plan) is intended to provide a set of feasible mitigation measures for public and private projects which have the potential for impacts upon endangered animal and plant species. The HCP/NCCP is also intended to streamline the permit processes for those projects by allowing greater local jurisdictional control of the permitting process through agreements with the Wildlife Agencies (U.S. Fish and Wildlife Service, California Fish and Wildlife Department, National Marine Fisheries Service and potentially the Army Corps of Engineers and the Regional Water Quality Control Board) that are incorporated into the HCP/NCCP. The Santa Clara Valley Habitat Plan website is www.scv-habitatplan.org.

Recent Planning Commission and City Council Meetings

The City of San Jose has conducted a number of public meetings on the HCP/NCCP, with the most recent including a Planning Commission Study Session on September 12, 2012, Planning Commission public hearings on September 26, 2012 and October 10, 2012, and City Council study sessions held on September 25, 2012 and October 12, 2012 (see Attachment #1).

The Habitat Conservation Plan, Environmental Impact Report, and Implementation Mechanisms were discussed by the Planning Commission in a Study Session format on September 12, 2012. At the Planning Commission's September 26, 2012 hearing, a representative from YCS Investments spoke in opposition to certification of the Habitat Plan EIR, referencing a letter (see Attachments #2 and #3) that they had submitted prior to the hearing. The Commission continued the Habitat Plan item to its October 10, 2012 meeting to allow time for review and analysis of the YCS letter. At the October 10, 2012 meeting, the Commission considered the October 8, 2012 HCP/NCCP Local Partners' staff joint responses to the YCS letter along with staff's recommendation to certify the EIR and recommend approval of the Plan documents to the City Council. There was no public testimony on October 10, 2012.

At the October 10, 2012 Planning Commission hearing, the Commission voted 4-0-1-2 (O'Halloran recused, and Kamkar and Cahan absent) to certify the Habitat Plan Environmental Impact Report and to submit comments to the City Council regarding the Santa Clara Valley Habitat Conservation Plan documents. On October 15, 2012, Wayne Costa, representing YCS investments, filed an Appeal of the Planning Commission's certification of the EIR. Per Section 21.07 of the Municipal Code, the City Council considers such appeals and can either find that the EIR is complete and uphold the Planning Commission's certification of the EIR or find that the EIR is not complete and require revision of the EIR.

ANALYSIS

Environmental Impact Report (EIR)/Environmental Impact Statement (EIS) Prepared for the Habitat Plan

The Santa Clara Valley Habitat Plan Final Environmental Impact Report/Environmental Impact Statement (EIR/EIS) was prepared jointly by the Local Partners and the Wildlife Agencies. Habitat Plan implementation is a joint endeavor and the Local Partners will be considered co-

November 13, 2012

Subject: Santa Clara Valley Habitat Plan EIR Appeal

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permittees responsible for fulfilling the terms and conditions of the Habitat Plan and permit. The Local Partners agreed to be co-lead agencies for purposes of complying with the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) for the Project. As such, the City has evaluated the potential impacts of project alternatives in the EIR including no action, a reduced permit term alternative and the proposed action.

The project EIR describes project elements, assesses impacts and proposes mitigation and other standard measures designed to reduce such impacts. Feasible alternatives and the scope of the Final EIR are based on input from environmental assessments, the public participation process, and resource agencies. Public comment and the formal responses to comments from public review are found in EIR, Volume 2. The findings discuss potentially significant adverse impacts identified in the EIR. These impacts are associated with the acquisition and management of Reserve Area lands and include loss of prime farmland to habitat restoration; and construction-related impacts associated with restoration such as noise, need for traffic control during construction, and the discovery of hazardous materials or cultural resources on a restoration site. All of these impacts are rendered less-than-significant by the application of standard mitigation measures.

The proposed action alternative has been revised from that discussed in the DEIR to reflect the reduced extent of covered activities, the smaller reserve area and restoration actions that would be undertaken, thereby reducing the overall cumulative impact of the Plan. For any given restoration site, the potential specific environmental impacts of such action, as analyzed within the DEIR, remain the same and do not require further analysis.

The Habitat Plan is intended to result in a long-term environmental benefit by clearly identifying feasible mitigation measures for potential impacts upon biotic resources and to provide a mechanism for the implementation and ongoing monitoring of those measures.

Appeal of the EIR/EIS

In support of their appeal, the appellant, YCS, submitted a copy of the same letter previously submitted to the Planning Commission prior to their certification of the EIR. The appellant, YCS, is currently seeking approval for a proposed residential development on lands located partially within the jurisdiction of the Santa Clara County and partially within the jurisdiction of the City of San Jose. YCS has communicated verbally and in written correspondence to the County Board of Supervisors (see Attachment #4) that their primary objective is that the Habitat Plan and Habitat Plan EIR be revised to incorporate their proposed development project as a covered activity.

As the appellant has submitted a copy of their previous comment letter for the appeal of the Habitat Plan EIR, the previous HCP/NCCP Local Partners staff joint response to those issues, dated October 8, 2012, (see Attachment #5) fully addresses the objections raised in that letter. The HCP/NCCP Local Partners staff joint response was prepared by the City Attorney's Office, working with legal counsel and staff from each of the Local Partner agencies. At the request of

the appellant, the Local Partners have also executed a tolling agreement to preserve the appellant's ability to challenge the Habitat Plan EIR.

Conclusion

As discussed in detail in the attached Local Partner's response to the YCS appeal, the appellant has not identified any potential environmental impacts that were not adequately analyzed in the Habitat Plan EIR per the requirements of the California Environmental Quality Act (CEQA). Accordingly, staff recommends that the City Council find that the Habitat Plan EIR is complete and in compliance with the requirements of CEQA and that the City Council uphold the Planning Commission certification of the EIR.

EVALUATION AND FOLLOW-UP

If the City Council upholds the Planning Commission certification of the EIR, the Habitat Plan will be brought forward for consideration by the City Council at an upcoming City Council meeting. If the City Council does not uphold the Planning Commission certification of the EIR, staff will discuss with the Local Partners potential next steps for revision to and recirculation of the EIR in order to complete the CEQA process for preparation of the Habitat Plan. Revision and recirculation of the EIR will require commitment of additional staff time and consultant costs.

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. The Santa Clara Valley Habitat Plan was developed in participation with the U.S. Fish & Wildlife Service (USFWS), California Department of Fish & Game (CDFG), 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 southern Santa Clara County. In addition to monthly Stakeholder Group and bi-monthly Liaison Group meetings, several public meetings have been held since initiation of the Plan. Additional

outreach took place in conjunction with the public circulation of the Draft Habitat Plan and the accompanying EIR/EIS.

COORDINATION

The Draft Habitat Plan document, components of the Plan and associated documents have been referred to other City departments and public agencies at key stages in the Plan's preparation, including the Departments of Environmental Services; Parks, Recreation, and Neighborhood Services; Public Works; and Transportation; Office of the City Attorney; the Local Partners; and the Wildlife Agencies. Preparation of this memorandum was coordinated with the City Attorney's Office.

CEQA

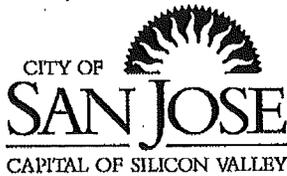
Resolution to be adopted.

/s/
JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

For questions, please contact Andrew Crabtree at (408) 535-7893.

Attachments:

- 1) Planning Commission October 12, 2012 Hearing Transmittal Memo
- 2) YCS October 15, 2012 Notice of Environmental Appeal
- 3) Bingham McCutchen September 25, 2012 letter on behalf of YCS to Planning Commission
- 4) Bingham McCutchen October 8, 2012 letter on behalf of YCS to Board of Supervisors
- 5) Local Partners October 8, 2012 response to Bingham McCutchen YCS Letter



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: HABITAT CONSERVATION PLAN

DATE: October 16, 2012

COUNCIL DISTRICT: Citywide

RECOMMENDATION

The Planning Commission voted 4-0-1-2 (O'Halloran recused, and Kamkar and Cahan absent) to certify the Environmental Impact Report and to submit comments to the City Council regarding the Santa Clara Valley Habitat Conservation Plan documents.

BACKGROUND

The Habitat Conservation Plan (HCP), Environmental Impact Report, and Implementation Mechanisms were discussed by the Planning Commission in a study session format on September 12, 2012. On September 26th meeting, public testimony was given by the Audobon Society in favor of the Plan and a representative from YCS Investments referenced their letter objecting to the EIR. The Commission continued the HCP item to its October 10th meeting. At the October 10th meeting, the Commission received staff's responses to the YCS letter and the recommendation to certify the EIR and recommend approval of the Plan documents to the City Council. There was no public testimony on October 10th.

ANALYSIS

Commissioner O'Halloran recused himself from the HCP item to avoid the appearance of a conflict of interest with his firm, CH2MHill.

The Planning Commission asked for clarification on their action in light of the Mayor's memorandum to the Council dated October 10, 2012. Staff responded to the issues raised in the memorandum to provide information to the Commission and was clear that the timing of the memorandum was not intended to suggest that the Commission act in a particular manner on the HCP. In particular, the Planning Commission's role to determine the adequacy of the Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA) and the Municipal Code was independent of other Plan issues. Staff also mentioned that additional written material was being prepared for the Council's HCP discussion on October 16. If the Plan were to change substantially after Council's action and the EIR needed to be recirculated, then PC would need to act on the recirculated EIR.

After additional clarifying questions and discussion, the Commission voted 4-0-1-2 (O'Halloran recused, and Kamkar and Cahan absent) to certify the Environmental Impact Report. The Commission acknowledged that this was an important step to allow the Council to do its decision-making on the Habitat Conservation Plan itself.

A motion was then made to recommend that the Council not to approve the HCP. This motion died for lack of a second.

A motion was made to recommend that the Council approve the HCP and its associated documents as recommended by staff. This motion received a second. The Commission discussed the motion:

- Commissioner Kline said that he would vote for the motion in order to bring the HCP before the Council, but that he opposed to the Joint Powers Authority (JPA). Specifically, he stated that:
 - The governance structure was not appropriate;
 - The complexity of two boards would challenge governance;
 - One board makes more sense;
 - He was concerned about non-elected persons from the Valley Transportation Authority sitting on the JPA;
 - He was uncertain about the Santa Clara Valley Water District's role on the JPA since they don't have land use permitting authority;
 - He was concerned about San Jose only having two votes on each board, while HCP's implementation would affect economic development in San Jose; and
 - This was a "great try" but it would be better to get the governance right for a "forever decision."
- Commissioner Abelite expressed his support of the motion due to the inter-agency cooperation on HCP.
- Commissioner Yob explained that she struggled with this item. She said that she would support the motion to get the HCP in the hands of Council but she was bothered by:
 - The competitive disadvantage for San Jose;
 - Other major cities of the County were not participants in the Plan; and
 - The uncertainty of costs to developers (i.e., how do the HCP fees compare to project-by-project mitigation).

Based on the discussion, a substitute motion was made and seconded to forward the Habitat Conservation Plan and Planning Commission comments to the Council without a specific recommendation on the proposed ordinance and associated documents. In making the motion, the Commission made it clear that this was not a "default" recommendation of denial of the Plan and associated documents.

In the discussion of the substitute motion, the Commission asked that all of the Commission comments be transmitted to the Council. Staff confirmed that this would happen in a transmittal

HONORABLE MAYOR AND CITY COUNCIL

October 16, 2012

Subject: **Habitat Conservation Plan**

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memorandum from the Secretary of the Commission. Additional comments were made for consideration by the City Council. Specifically, Chair Bit-Badal expressed that:

- o She wanted to be sure that the HCP incentivizes development in North San Jose to keep the City competitive in the region;
- o She agreed that riparian protection is paramount;
- o The City needs to consider the cumulative fee and taxes regionally including HCP fees now and in the future;
- o She liked the streamlining process elements of HCP; and
- o She appreciated the great staff work to address economic development questions.

The substitute motion was approved 4-0-1-2 (O'Halloran recused, and Kamkar and Cahan absent).

CEQA

Environmental Impact Report, resolution to be adopted by City Council.

/s/

JOSEPH HORWEDEL, SECRETARY
Planning Commission

For questions, please contact Joseph Horwedel at 408/535-7900.

appeal Rec'd 10/15/12
S. Walsh



CITY OF SAN JOSE

Planning, Building and Code Enforcement
200 East Santa Clara Street
San Jose, CA 95113-1908
tel (408) 535-3555 fax (408) 292-8088
Webster: www.sanjoseca.gov/planning

NOTICE OF ENVIRONMENTAL APPEAL

| TO BE COMPLETED BY PLANNING STAFF | | | |
|--|---------------------------------------|-------------------------------------|-------------------|
| FILE NUMBER PP 12-075 | RECEIPT # _____ | | |
| TYPE OF ENVIRONMENTAL DETERMINATION (EIR, MND, EX) EIR | AMOUNT 100.00 | | |
| | DATE 10/15/12 | | |
| | BY S. B. Walsh | | |
| TO BE COMPLETED BY PERSON FILING APPEAL | | | |
| PLEASE REFER TO ENVIRONMENTAL APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE. | | | |
| THE UNDERSIGNED RESPECTFULLY REQUESTS AN APPEAL FOR THE FOLLOWING ENVIRONMENTAL DETERMINATION: Approval of the Environmental Impact Report/Environmental Impact Statement for the Santa Clara Valley Habitat Plan | | | |
| REASON(S) FOR APPEAL (For additional comments, please attach a separate sheet.): Please see the attached letter. | | | |
| _____ | | | |
| _____ | | | |
| PERSON FILING APPEAL | | | |
| NAME YCS Investments | DAYTIME TELEPHONE (415) 781-1211 | | |
| ADDRESS 170 Malden Lane, Suite 800 | CITY San Francisco | STATE CA | ZIP CODE 94108 |
| SIGNATURE | DATE 10-15-2012 | | |
| CONTACT PERSON (IF DIFFERENT FROM PERSON FILING APPEAL) | | | |
| NAME Wayne E. Costa | | | |
| ADDRESS 170 Malden Lane, Suite 800 | CITY San Francisco | STATE CA | ZIP CODE 94108 |
| DAYTIME TELEPHONE (415) 781-1211, x 113 | FAX NUMBER (415) 781-1220 | E-MAIL ADDRESS wcosta@yosinv.com | |

PLEASE CALL THE APPOINTMENT DESK AT (408) 535-3555 FOR AN APPLICATION APPOINTMENT.



CITY OF SAN JOSE

Planning, Building and Code Enforcement
200 East Santa Clara Street
San José, CA 95113-1805
tel (408) 535-3555 fax (408) 292-6055
Website: www.sanjoseca.gov/planning

INSTRUCTIONS FOR FILING AN APPLICATION FOR APPEAL OF AN ENVIRONMENTAL DETERMINATION

WHO MAY APPEAL

Any person may file.

TIME LIMIT

A complete Notice of Environmental Appeal (see back page) must be filed in person at Development Services Center, City Hall, no later than 5 p.m. on the third business day following the day of the public hearing that relied upon the Environmental Determination.

APPEAL REQUIREMENTS

1. A complete Notice of Environmental Appeal including the following within the appropriate time limit:
 - a. Application filing fee, (see Filing Fee Schedule).
 - b. The appeal shall state with specificity the reasons that the Environmental Determination should be found not to be complete or not to have been prepared in compliance with the requirements of CEQA.
 - c. No appeal shall be considered unless it is based on issues which were raised at the public hearing either orally or in writing prior to the public hearing. (21.07.040C)

PROCESSING SCHEDULE

Planning Staff:

- Checks the application for completeness.
- Logs and collects fees.
- Sets a public hearing date before City Council and places the item in the agenda.
- Prepares a recommendation to the City Council.

City Council:

- considers and acts upon the appeal in a public hearing.

PLEASE CALL THE APPOINTMENT DESK AT (408) 535-3555 FOR AN APPLICATION APPOINTMENT.

Appeal of ED.pim65/Applications Rev. 6/28/2000

BINGHAM

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September 25, 2012

Chairperson Hope Cahan
And Fellow Planning Commissioners
City of San Jose
Planning Commission
3rd Floor Tower
200 East Santa Clara St.,
San Jose, CA 95113

Re: September 26, 2012 Agenda, Item 3.c: Comments on the Final
Environmental Impact Report for the Santa Clara Valley Habitat Plan

Dear Chairperson Cahan and Fellow Planning Commissioners:

This letter provides the comments of YCS Investments, Inc. on the Final Environmental Impact Report/Environmental Impact Statement ("the EIR") prepared for the Santa Clara Valley Habitat Plan ("Habitat Plan" or "Plan") pursuant to the California Environmental Quality Act ("CEQA").¹ YCS owns the 2,150-acre Young Ranch, which is located within the Habitat Plan's Permit Area. YCS proposes to develop 87 rural home sites on 200 acres in the north of the property and to preserve the remaining 1,950 acres for habitat in perpetuity. YCS believes that its proposal will be critical to the success of any large-scale habitat plan in Santa Clara County that attempts to preserve Bay Checkerspot Butterfly habitat and serpentine grassland. YCS wants to support the Habitat Plan, but must object to approval of the Plan in its current form.

To participate in the development of a clear Plan capable of reasonable interpretation and implementation by decision-makers, the public and potential applicants, YCS submitted comments on the December 2010 version of the Habitat Plan and on the Draft EIR for the Plan.² While the Final EIR purports to address these comments, as explained below, YCS continues to have concerns regarding the scope and ambiguity of the Plan, and the resulting environmental analysis. YCS also has concerns regarding the process the Local

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¹ Public Resources Code § 21000 et seq. CEQA is implemented through the State CEQA Guidelines ("Guidelines") found at 14 Cal. Code Regs. § 15000 et seq. This letter sets forth YCS's CEQA comments on the Habitat Plan and its EIR. YCS will comment separately to USFWS on the NEPA issues raised by the documents. Because this letter focuses on issues under CEQA, we refer to the joint EIR/BIS as the EIR for ease of reference.

² Those comments, included as Comment Letter No. 50 in Volume II of the Final EIR, are fully incorporated herein by this reference.

Partners³ have followed and are currently following in preparing and finalizing the Plan since that process directly affects the public's right and ability to be fully informed about the decision-making process. We turn to these procedural issues first, and then provide our comments on the substantive analysis of the Plan and EIR.

I. THE LOCAL PARTNERS HAVE NOT COMPLIED WITH THE PROCEDURAL REQUIREMENTS OF CEQA.

A. The Local Partners Did Not Comply With CEQA Because They Did Not Designate A Single Lead Agency For Purposes Of Preparing And Certifying the EIR.

Although the Habitat Plan states that the County is the CEQA lead agency⁴, the EIR repeatedly asserts that the Local Partners constitute six "CEQA Lead Agencies" for the Habitat Plan. See e.g., Final EIR, p. 1-3 ("The County facilitated preparation of the Habitat Plan and shares the CEQA Lead Agency role with the five other Local Partners."). In addition, schedules recently issued by the Local Partners indicate that all six of them, plus the Implementing Entity, plan to independently "certify" the Habitat Plan EIR.

All of these statements are inconsistent with CEQA, which provides that there can be only one lead agency and one EIR certification. The lead agency must be identified at the beginning of the CEQA process. Every local or state agency that is not the lead agency must act on the project as a "responsible agency" after the lead agency has acted (Pub. Res. Code § 21069; Guidelines § 15381) and, with limited exceptions, must accept the EIR as certified by the lead agency.

CEQA's clear delineation of agency roles and action sequences benefits the decision-making process and the public. It forces one agency to take responsibility for the EIR, lets the public know where to look for the administrative record underlying the EIR's analysis, and notifies the public concerning which agency's actions, taken at what time, will trigger CEQA's very short statute of limitations. By rejecting CEQA's fundamental distinction between the lead agency and the responsible agencies, the six agencies here have deprived the public of these benefits.

³ As provided in the Plan, the "Local Partners" are the County of Santa Clara; the Cities of Gilroy, Morgan Hill, and San Jose; the Santa Clara Valley Water District ("Water District" or "SCVWD"); and the Santa Clara Valley Transportation Authority ("VTA"). In addition, the Plan will be implemented by a yet-to-be formed joint powers agency referred to as the "Implementing Entity."

⁴ CEQA defines "lead agency" as "the public agency which has the principal responsibility for carrying out or approving a project." Guidelines § 15367. The criteria for determining the appropriate lead agency are set forth in Guidelines § 15051.

1. One Lead Agency Must Be Identified At The Beginning Of The CEQA Process.

Under CEQA, where more than one public agency is to approve a project, only one of them can be the "lead agency" that prepares and certifies the EIR. Pub. Res. Code § 21165(a). Section 15050 of the CEQA Guidelines, entitled "Lead Agency Concept," begins: "Where a project is to be carried out or approved by more than one public agency, *one agency shall be responsible for preparing an EIR or negative declaration for the project. This agency shall be called the lead agency.*" Guidelines § 15050(a) (emphasis added).

Under CEQA, the "lead agency, with responsibility for the process by which the EIR is written, approved and certified, plays a crucial role." *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 903. The lead agency decides whether an EIR will be prepared and issues the Notice of Preparation of the EIR. Pub. Res. Code § 21080.4(a). The lead agency may obtain the assistance of other agencies and individuals in preparing the EIR, but the lead agency takes responsibility for its contents, issuing draft and final EIRs, the contents of which represent the lead agency's independent judgment. Pub. Res. Code § 21082.1. The lead agency responds to comments on the draft EIR. Pub. Res. Code § 21092.5. The lead agency, and only the lead agency, certifies the EIR. Guidelines § 15090. "In sum, the lead agency plays a pivotal role in defining the scope of environmental review, lending its expertise in areas within its particular domain, and in ultimately recommending the most environmentally sound alternative." *Planning and Conservation League*, 83 Cal.App.4th at 904.

If at the beginning of the CEQA process it is unclear to the various public agencies which should be the lead agency, the solution under CEQA is not to describe the various agencies as co-lead agencies. CEQA includes detailed provisions for identifying one lead agency in these circumstances precisely because the identification of one lead agency is crucial to the CEQA process. Thus various public agencies can agree that one of them will serve as the lead agency. Guidelines § 15051(d). If the various agencies cannot agree, they can ask the Governor's Office of Planning and Research to identify the lead agency. Pub. Res. Code § 21165(a); Guidelines § 15023(f). If the various public agencies agree that one of them will serve as lead agency but their agreement does not comply with CEQA's standards for identifying the lead agency, the judicial solution is not to identify multiple lead agencies, but rather to require the correct agency to act as the sole lead agency. *Planning and Conservation League, supra*.

2. Agencies Other Than The Lead Agency Must Act As Responsible Agencies.

All agencies other than the lead agency are "responsible agencies": "'Responsible agency' means a public agency, other than the lead agency which has responsibility for carrying out or approving a project." Pub. Res. Code § 21069. Responsible agencies must rely on the lead agency's certified EIR unless a specified exception applies.

Guidelines §§ 15096, 15052. Under certain circumstances a responsible agency can replace the lead agency, but there is only one lead agency at a given time. Guidelines § 15052 ("Shift in Lead Agency Designation").

3. CEQA Requires That The Statutory Roles Be Respected.

Here, the process the Local Partners have followed bears no resemblance to the orderly process required by CEQA. The Habitat Plan states that Santa Clara County is the CEQA lead agency. (Habitat Plan p. 1-27). The State Clearinghouse believes that Santa Clara County is the CEQA lead agency. *See* <http://www.ceqanet.ca.gov/DocDescription.asp?DocPK=64841> (last visited September 20, 2012). To members of the public, the County appears to have acted most like the CEQA lead agency because it has collected comments on the Draft EIR and because a County representative is identified in the document as the Program Manager.

Yet the EIR asserts that there are six lead agencies, and according to recent notices, two of those agencies, including the City of San Jose, plan to "certify" the EIR before the County does. Because the lead agency must certify the EIR before any responsible agency can act on the proposed Habitat Plan, the public is forced to guess that the first agency to act will spring into the CEQA lead agency role, and to guess which agency that will be, based on shifting meeting schedules. The public has no idea whether that agency will in fact be the one that was "responsible for preparing" the Habitat Plan EIR, whether that agency has the complete administrative record, and whether the other Local Partners will purport to certify the EIR or will instead fulfill their statutory role as responsible agencies, relying on the certified EIR and issuing responsible agency findings.⁵ CEQA prohibits public agencies from forcing the public to participate in such a guessing game.

⁵ The proposal for all six Local Partners to certify the EIR also carries with it the presumption that each Local Partner will file a separate Notice of Determination as if it were the lead agency. Guidelines § 15075. Since the filing of a Notice of Determination triggers the CEQA statute of limitations (Pub. Res. Code § 21167(c)), the Local Partners have created a scenario whereby any party wishing to challenge certification of the EIR or adoption of the Plan would have to file separate lawsuits against each of the six Local Partners *and* the Implementing Entity, which will also certify the EIR and adopt the Plan. CEQA's single lead agency concept is designed to avoid a situation such as this where seven lawsuits would need to be filed in order to challenge one EIR and one Plan. In any event, YCS intends to appear at each agency hearing in order to exhaust its administrative remedies, but in doing so does not imply agreement with the EIR certification and Plan approval process being followed by Local Partners, or otherwise waive any procedural argument raised herein.

B. The Notice Of Preparation Of The EIR Should Have Been Filed With The State Clearinghouse So That State Responsible And Trustee Agencies Could Fulfill Their Legal Obligations.

It appears that the Notice of Preparation ("NOP") of the Habitat Plan EIR was not properly sent to the State Clearinghouse at the Office of Planning and Research, in violation of CEQA's requirements. The EIR states that the September 7, 2007 NOP of the EIR was sent to the State Clearinghouse. But the State Clearinghouse has no record of having received the NOP, there is no evidence in the EIR -- such as the typical stamped copy of the NOP -- to indicate that the NOP was sent to the Clearinghouse, and the project's State Clearinghouse number, 2010122059, indicates that the State Clearinghouse was not notified of the EIR process until 2010.

CEQA requires that all notices of preparation of EIRs be sent to the State Clearinghouse so that the Clearinghouse can fulfill its statutory role of ensuring that state responsible and trustee agencies provide the necessary information to the lead agency for preparation of the EIR. The statute requires that when a lead agency determines that an EIR is required, the lead agency "shall immediately send notice of that determination by certified mail or an equivalent procedure" to the Office of Planning and Research. The agencies notified by the State Clearinghouse are in turn required, within 30 days, to "specify to the lead agency the scope and content of the environmental information that is germane to" their statutory responsibilities in connection with the proposed project "and which, pursuant to the requirements of this division, shall be included in the environmental impact report." Pub. Res. Code § 21080.4(a).

As discussed in YCS's April 2011 comment letter and in section II.D below, the EIR's analysis of only one action alternative to the proposed Habitat Plan does not meet CEQA's requirement that a reasonable range of alternatives be studied. The September 7, 2007 NOP indicated that a reasonable range of alternatives would be developed and included in the EIR. Had the NOP been sent to the State Clearinghouse, and had it elicited comments from state responsible and trustee agencies, it is possible that their comments would have suggested project alternatives or led to the lead agency's development of such alternatives before the Draft EIR was issued.

II. THE FINAL EIR IS INADEQUATE PURSUANT TO CEQA.

The primary purpose of an EIR is to serve as an informational document that discloses the significant environmental effects of, mitigation measures for, and alternatives to a proposed action to decision-makers, other public agencies, and the public. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412. An EIR provides the information necessary to weigh competing policies and interests and enables the public to determine the environmental and economic values of the decision-makers and hold those decision-makers accountable. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576.

The core components of an EIR are the project description, the discussion and analysis of the potentially significant environmental effects of the project (which is dependent on a stable project description and identifying the correct environmental baseline), and the consideration of a reasonable range of alternatives to the proposed project. Here, the Habitat Plan EIR's project description, environmental baseline, and alternatives analysis are insufficient as a matter of law. In addition, the EIR's analysis of and conclusions regarding the Plan's impacts on agriculture, recreation, and cultural resources, as well as impacts from the potential increased use of herbicides and pesticides, are not supported by substantial evidence.

A. The Habitat Plan And The Related Project Description Are Vague And Uncertain, And Thus Fail To Satisfy CEQA.

As YCS has stated during the Habitat Plan process, YCS wants to be able to support and participate in the Habitat Plan. With the Plan in its current form, however, YCS cannot determine whether its proposed rural development on 200 acres and its proposed 1,950-acre Young Ranch preserve, which would include much of the serpentine grassland and Bay Checkerspot Butterfly habitat required for the Habitat Plan's success, could be implemented. A habitat plan that leaves such fundamental questions unanswered is not ready to be approved from either a habitat planning or a CEQA perspective.

"An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199. "Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal ... and weigh other alternatives in the balance." *Id.*; see also *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26 (to be adequate, an EIR must be "prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences.").

Here, the EIR incorporates the Habitat Plan as the "project," such that the Plan itself is the "project description." The ambiguity of various components of the Plan therefore translates to, and ultimately creates concerns with, the analysis in the EIR. For example, the Plan includes 21 "Goals," 86 "Objectives," and more than 100 discrete proposed "Conservation Actions," not including the 17 additional studies that are required to be performed in order to determine how these various Goals, Objectives, and Conservation Actions will be applied. See Habitat Plan, Tables 5-1a - 5-1d. Inclusion of these wide-ranging and diverse Biological Goals and Objectives has created a situation where the scope and application of the Plan simply cannot be ascertained as described. This is particularly problematic for private projects seeking take authorization because such projects are required to obtain a written consistency determination from the Local Partner with jurisdiction over the project. Most of the Plan's Biological Goals and Objectives require some interpretation as to how they will be applied, both generally and to specific

properties. While it may be normal for a plan to invest some interpretive discretion in future decision-makers, here, where the meaning and application of entire components of the Plan are left undefined, it is virtually impossible to determine how the Plan will be implemented, and whether a private project is consistent with the Plan. The EIR's project description reflects this uncertainty, therefore undermining the validity of the impact analysis, especially with regard to the effect Plan implementation will have on properties such as Young Ranch that include significant natural resources subject to the Plan's regulations.

By way of example, the Plan proposes to "[p]rotect and enhance important habitat linkage for covered species and other native species" (Final Habitat Plan, Table 5-1a, Objective 2.2) through, among other things, acquisition of "2,900 acres of serpentine grassland along Coyote Ridge to link existing protected areas and to create a large core reserve for serpentine grassland species to move within ..." (*id.*, Conservation Action LAND-L5). According to the Plan, these linkages are "areas that allow for the movement of species from one area of suitable habitat to another," which can vary from a narrow strip of habitat that functions as a conduit of movement (i.e., a corridor) to a large area of intact habitat that is used for movement, dispersal, and other life functions such as foraging and breeding. The Plan also notes that the linkages will vary by species. However, the Plan provides no species-appropriate dimensional guidelines. Absent more specific definitions and guidelines, it is impossible to ascertain from the Plan how a property such as Young Ranch, which is shown on Figure 5-8 as being bisected by a proposed "Primarily Terrestrial Linkage," will be affected, and whether the Young Ranch project will be able to obtain a consistency determination. In other words, depending on how these Biological Goals and Objectives are interpreted in the future, the Plan could permit no development⁶, full development consistent with existing standards, or some arbitrary combination of these scenarios.

The potential environmental effects of these scenarios are vastly different, yet the EIR's analysis fails to take this into account because the project description merely incorporates and restates portions of the Habitat Plan as the "project", which is too vague and uncertain to legitimately ascertain the potentially significant effects of the Plan.⁷ This is inadequate under CEQA, which requires that a project description be finite so that "an intelligent evaluation of the potential environmental effects" can be undertaken. *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 730.

⁶ The failure of the Habitat Plan to provide just compensation to landowners within the Study Area would render the Plan unconstitutional. U.S. Const. amend. V, XIV; *Penn Central Transportation Company v. City of New York* (1978) 438 U.S. 104, 124.

⁷ The ambiguity of the Plan also suggests that adoption of the Plan is arbitrary and capricious (*see e.g., Arnel Dev. Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 336) and violates potential project applicants' due process rights (*Lingle v. Chevron USA, Inc.* (2005) 544 U.S. 528).

B. The Project Description Has Been Changed Between Publication Of The Draft And Final EIR, Which Is Not Permitted.

As noted above, a stable and finite project description is paramount to CEQA's role as an informational statute. "Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefits against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the "no project" alternative), and weigh other alternatives in the balance." *County of Inyo*, supra, 71 Cal.App.3d at 192-193. While CEQA is flexible in terms of allowing an agency to approve a modified project resulting from the public review process, this step is taken *after* certification of the EIR as part of an agency's consideration of the project and adoption of findings. See, e.g., *River Valley Preservation Project v. Metropolitan Transit Development Board* (1995) 37 Cal.App.4th 154, 168. But the project description must remain finite in order for the public to understand the scope of the impact analysis in the EIR, and whether the potential impacts of the ultimately-approved project fall within the scope of that analysis.

Here, the project has been modified between publication of the Draft and Final EIR, and the Final EIR includes a modified project description.⁸ However, the Final EIR fails to delineate the project changes in any discernible way, fails to explain what, if any, changes have been made to the impact analysis as a result of the modifications to the project description, and fails to modify the alternatives analysis to reflect the new project scope. In short, the decision-makers and public are left to guess whether the analysis in the EIR reflects the potential impacts of the original Habitat Plan discussed in the Draft EIR, or whether the analysis reflects the potential impacts of the revised Habitat Plan now being considered, and what the difference between the two might be.⁹ This

⁸ A further procedural complication to understanding the changes to the project description is the Local Partners' failure to provide a redline version of the Final EIR showing the changes made from the Draft EIR, or at least provide a separate summary detailing the staff-initiated text changes. Failure to do so has made public review of the Final EIR and revised Habitat Plan, which total more than 3,000 pages, extremely difficult, especially given the Local Partners' accelerated hearing schedule.

⁹ A further example of the "shifting" nature of the project description is the Plan's treatment of the County's and the Cities' General Plans. The Habitat Plan purports to base its take analysis and related environmental effects on the growth assumptions contained in the General Plans in existence at the time Plan development began. Since that time, however, San Jose has updated its General Plan, and it is not clear whether and how the Habitat Plan modified its analysis to incorporate any revised growth assumptions from the *Envision San Jose 2040 General Plan*. Further, the idea that the land use and growth assumptions in the County's and Cities' current General Plans are somehow "frozen" in time for the 50-year planning window of the Habitat Plan clearly runs counter to the long-established principle that public agencies may not bind the hands of future legislative decision-makers who may wish to change policy and direction. See, e.g., *St. Vincent's School for Boys v. City of San Rafael* (2008) 161 Cal. App. 4th 989.

confusion is precisely the reason why CEQA demands a stable and finite project description, and why the EIR fails to satisfy that requirement.

C. The EIR's Use Of The No Project Alternative As The Baseline For Analysis Of The Habitat Plan's Impacts Is Incorrect.

YCS has previously commented on the EIR's erroneous use of the No Project Alternative as the baseline for its analysis of the environmental impacts of the Habitat Plan. See Final EIR, Vol. II, Comment No. 50-37. The Final EIR responds that: 1) a lead agency has discretion to decide how existing environmental conditions can most realistically be measured; 2) recent case law allows the use of a future baseline; 3) a habitat plan "differs from the typical project evaluated under CEQA, which involves approving or implementing a development project that would itself cause physical changes to the environment"; and 4) for a long-term habitat plan, "the relevant baseline for evaluating the project's environmental impacts is what would occur if the Habitat Plan was not adopted." *Id.*, Response to Comment 50-37. None of these arguments supports the EIR's use of a No Project Alternative as its sole baseline for environmental analysis of the Habitat Plan.

First, although a lead agency has some discretion to determine how existing physical conditions in an EIR can most realistically be described, that discretion is constrained by specific CEQA requirements. Guidelines § 15125 provides that the existing physical conditions "will normally constitute the baseline physical conditions," and Guidelines § 15125(e) provides that, when a proposed project is compared with an adopted plan (as is the case here, where the Habitat Plan is being compared to the development permitted under the County's and the Cities' respective General Plans), the analysis in the EIR "shall examine the existing physical conditions at the time the notice of preparation is published" (emphasis added). In such situations, CEQA specifically provides that the "future conditions" envisioned in the plans to which the project is being compared shall be set forth as the "no project alternative," not the environmental baseline, and CEQA unequivocally differentiates between these two concepts. Guidelines § 15126.6(e)(3)(A); see also *Woodward Park Homeowners Ass'n v. City of Fresno* (2007) 150 Cal.App.4th 683, 707. If a lead agency decides to exercise its discretion to deviate from this prescribed baseline, it must support such deviation with substantial evidence. *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 328. Here, not only is there no substantial evidence in the record supporting a deviation from the requirements of Guidelines § 15125, as discussed in Section I.A above, we do not know which "lead agency" allegedly has exercised such discretion.

Second, courts have approved the use of a future baseline year for the analysis of things like traffic and air quality impacts where a development project will not be completed until sometime in the future. These cases recognize that existing traffic and air quality numbers will certainly have changed by, and can be projected for, the future time in which project development is contemplated. See, e.g., *Pfeiffer v. City of Sunnyvale* (2011)

200 Cal.App.4th 1552; *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, Case No. B232655 (2d Dist. Apr. 17, 2012), *rev. granted* August 8, 2012 (Cal. Supreme Ct. Case No. S202828). But the Habitat Plan EIR does not identify or apply a future baseline year and does not suggest that inevitable changes in background conditions such as traffic or air quality necessitate the use of a future baseline. Instead, the Habitat Plan EIR simply assumes that future development within the Habitat Plan Permit Area would proceed to the same extent with or without the Habitat Plan, and applies that assumption not only to the alternatives analysis but also to the analysis of the Habitat Plan's environmental impacts compared to the baseline. No decision authorizes this approach, which is incorrect under CEQA: "The no project alternative analysis is *not the baseline* for determining whether the proposed project's environmental impacts may be significant, *unless it is identical to the existing environmental setting analysis* which does establish that baseline (see Section 15125)." Guidelines § 15126.6(e)(1) (emphasis added).

The error of the EIR's approach is further demonstrated by the fact that the Final EIR *changes* the No Project Alternative from the No Project Alternative as described in the Draft EIR. The crucial baseline for CEQA review should not change between the draft and the final EIR. It is possible for an EIR to explain that its baseline might be calculated using different methodologies and to leave the final methodological selection to the lead agency's decision-making body. But in such a case "the EIR must set forth any analysis of alternative methodologies early enough in the environmental review process to allow for public comment and response." *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 120 (invalidating an "elastic" baseline water use determination that the lead agency modified at the end of the environmental review process). Here, no "alternative methodologies" have been presented.

Instead, the Final EIR reflects the decision to scale back the Habitat Plan due to funding concerns. See Master Response 1, Final EIR, Vol. II, pp. 4-5. The logic of changing the No Project Alternative – *i.e.*, what the EIR assumes would occur in the absence of the Habitat Plan – primarily because of funding constraints affecting the Habitat Plan itself is very questionable. But in no event can such a change alter the *baseline* against which the Habitat Plan's impacts are to be assessed. The EIR's insistence on using a No Project Alternative as its baseline, even after the No Project Alternative has changed, is inconsistent with basic CEQA precepts.

Third, Response to Comment 50-37 argues that the Habitat Plan, because its primary goal is to provide environmental benefits, should be subject to different CEQA rules than a "typical" project that "that would itself cause physical changes to the environment." As the EIR itself demonstrates, the Habitat Plan would in fact cause physical changes to the environment. The basic function of CEQA is to identify the unintended environmental side effects of all types of projects, regardless of whether the intended benefits of those projects are to provide housing, jobs, or habitat preservation. It is just as important that a habitat preservation project receive thorough environmental review, using a proper

baseline, as any other type of project. See *California Farm Bureau Federation v. California Wildlife Conservation Board* (2006) 143 Cal.App.4th 17.

Finally, Response to Comment 50-37 suggests that a long-term Habitat Plan can only be analyzed using a No Project Alternative baseline. This, too, is incorrect. Numerous EIRs for Natural Community Conservation Plans such as this Habitat Plan have been prepared using the existing condition baseline, resulting in the stable comparison that CEQA requires. See, e.g., *East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan EIS/EIR* (Contra Costa County 2006).

D. The EIR Fails To Identify A Reasonable Range Of Alternatives To The Project Or To Adequately Analyze The Alternatives Presented.

CEQA requires that an EIR identify and analyze a reasonable range of project alternatives. YCS has previously commented that the EIR's analysis of only one action alternative does not meet this requirement. The Final EIR responds by citing the "underlying context of the purpose and need and goals and objectives developed for the EIR/EIS" and the "seven other alternatives considered but not carried forward for detailed consideration." *Id.*, Response to Comment 50-36.

The Final EIR's explanations do not withstand scrutiny. The purpose and need, and goals and objectives, of the Habitat Plan were known when the Notice of Preparation for the EIR was issued. At that time the NOP "anticipated that several alternatives will be developed, which may vary by the level of conservation, impacts caused by the proposed activities, permit area, covered species, or a combination of these factors." NOP, p. 3 (included in Appendix B to the Final EIR). The EIR does not deliver the full alternatives analysis promised by the NOP. Instead it provides one action alternative and a list of seven single-purpose "alternatives" that the EIR declines to analyze. These rejected alternatives are only rejected concepts (more acquisition, more enhancement, reduced take, coverage for fish species, expansion into a state park, expansion into a different county, and rural clustering). None resembles a fully formed project alternative that would have allowed the Local Partners or the public to truly consider their options.

The inadequacy of the EIR's analysis of alternatives is demonstrated by the changes to the Plan that have appeared for the first time in the August 29, 2012 Final Habitat Plan and EIR. Among other things, the revised Habitat Plan reduces the Permit Area, reduces certain "habitat caps," reduces assumed development impacts (e.g., assumed rural residential development impacts are reduced from 3 to 2 acres), and completely modifies the proposed Land Cover fee schedule. Thus, the Final Habitat Plan is a classic "reduced project alternative" such as those routinely included and analyzed in the alternatives analysis of EIRs. The Draft EIR clearly could have identified the original proposed project, the Reduced Permit Term alternative (Alternative A), and the "reduced project alternative" that is now being propose for approval. This would have provided the agencies and members of the public the opportunity to weigh the benefits and disadvantages of the various alternatives, and suggest improvements to them, during the

course of the CEQA review process. Instead, the Final EIR presents the revisions to the Plan as *fait accompli* without having compared the potential environmental effects of the revised Habitat Plan to the original Plan.

Further evidence of the EIR's failure to seriously address project alternatives is the EIR's treatment of "Reduced Take." The EIR disposes of this purported "alternative" in three sentences, as follows:

Another alternative considered was one that reduced the expected amount of incidental take by reducing the extent of the Covered Activities. For example, urban and rural development would be reduced to levels below that anticipated under the existing General Plans. This alternative was determined to not be reasonable because there would be significantly less incentive for the Local Partners to pursue the Habitat Plan without having incidental take coverage to fully execute their adopted development plans. Final EIR, p. 2-50.

The new Final Habitat Plan now incorporates the Reduced Take concept as originally described in the rejected "Reduced Take" alternative. This demonstrates that a full-fledged project alternative including Reduced Take could and should have been developed and included in the Draft EIR's analysis. Failure to do so here was an abuse of discretion.

An additional problem in the Final EIR's discussion of project alternatives is that the description of the No Project Alternative includes unexplained changes to that alternative that should have been explained. For example, whereas the Draft EIR stated that 100 rural development projects per year, or approximately 5,000 projects over 50 years, would occur within the Study Area under the No Project Alternative, the Final EIR provides that only 20 rural development projects per year, or 1,000 projects over 50 years, would occur. There appears to be no explanation for this change in the No Project Alternative. The Final EIR clearly states that the changed assumptions for rural development in the Proposed Project are primarily the result of funding constraints, not changed assumptions regarding future growth in the Permit Area. See Final EIR, Vol. II, pp. 4-5 (Master Response 1). The EIR must explain why the No Project Alternative, which must describe "what would reasonably be expected to occur in the foreseeable future if the project were not approved" (14 Cal. Code Regs. § 15126.6(e)(2)), reflects an 80% decrease in rural development projections from the December 2010 Draft EIR's projection of the same type of development.

E. The EIR's Selection Of The Environmentally Superior Alternative Is Flawed.

CEQA requires that an EIR identify an "environmentally superior alternative" from among the other project alternatives. Guidelines § 15126.6(e)(2). As noted above, the

Habitat Plan has changed between publication of the Draft and Final EIR, resulting in the permit area and other components of the Plan being altered. The Final EIR selects this revised Habitat Plan as the environmentally superior alternative. Had the EIR properly identified a reasonable range of alternatives at the beginning of the preparation process, the "reduced project alternative" that is being put forth now as the final Habitat Plan could have been evaluated and compared to the original draft Plan. Under such a scenario, the original Plan, as opposed to the revised Plan, might well be considered the "environmentally superior alternative." This is not an empty distinction or pure semantics. The purpose of the alternatives analysis is to compare the merits of the various proposed alternatives taking into consideration economic, environmental, legal, social and technological factors (Guidelines § 15126.6(a)), and explain why one is selected over another, in particular when approving a project that is not considered "environmentally superior" (Guidelines § 15126.6(c)). The Local Partners have shortchanged this process, to the detriment of public participation and informed decision making.

F. The EIR's Analysis Of Agricultural Resources Is Invalid In The City Of San Jose And Potentially In Other Permit Area Jurisdictions.

The EIR identifies conversion of prime farmland to other uses as a significant impact of the Habitat Plan. The EIR asserts that this significant impact will be mitigated to less-than-significant by requiring purchase of other agricultural land or conservation easements at a 1:1 ratio. Final EIR, Vol. I, p. 7-7. The question whether the preservation of agriculture on one parcel of land can be considered mitigation for the permanent conversion of another parcel of agricultural land, much less whether such preservation could mitigate a significant agricultural impact to less-than-significant, remains widely debated amongst governmental entities and proponents of agriculture preservation. The question has, however, been answered in the City of San Jose: the City does not consider creation of agricultural easements sufficient to mitigate significant agriculture impacts to a less-than-significant level. See Resolution of the City Council of the City of San Jose Making Certain Findings Concerning Mitigation Measures and Making Findings Concerning Alternatives All in Accordance with the California Environmental Quality Act In Connection with the *Envision San Jose 2040 General Plan* for Which a Program Environmental Impact Report Has Been Prepared (Nov. 1, 2011, pp. 3-4). In San Jose, any Habitat Plan activity that would convert prime farmland to other uses would be a significant unavoidable impact, not a less-than-significant impact as the Habitat Plan EIR states. *Id.* Either the Habitat Plan must be amended to prohibit conversion of prime farmland in San Jose, or the Habitat Plan must be revised and recirculated to reflect its significant unavoidable impact on agricultural land in San Jose.

We have not reviewed other Local Partners' General Plans and General Plan EIRs; it is possible that the Habitat Plan or its EIR will require revision in light of their policies as well.

G. The EIR's Analysis Of Recreation Impacts Is Inadequate.

The core conservation component of the Habitat Plan is the acquisition and implementation of the Reserve System, which will include acquisition of at least 33,205 acres of land and incorporation of 13,291 acres of existing County parks and open space. Based exclusively on these proposed land acquisitions, the Final EIR concludes that "[r]ecreational use of lands within the Study Area is expected to increase with implementation of the Proposed Action." Final EIR, Vol. I, p. 9-10. In other words, the Final EIR concludes that adoption of the Habitat Plan will benefit recreation in the Study Area because "public access, consistent with the biological goals and objectives [of the Habitat Plan], would be provided on all Reserve System lands owned by the public agency." *Id.* The analysis in the Final EIR does not support this conclusion.

Fundamentally, the assumption in the Final EIR that the acquisition of land will *ipso facto* guarantee public access for recreational purposes is not supported by any analysis. The Plan proposes to acquire at least 33,025 acres of land for the Reserve System in some combination of fee title and conservation easements. As to land to be acquired in fee title, the Plan provides that "[p]ublic access ... will be provided on all reserves owned in fee title by a public agency" (Final Habitat Plan, p. 6-37), but only if public access and recreation opportunities are consistent with the Plan's habitat conservation goals. See Final Habitat Plan, 6-38 ("recreation plan will address lands that are acquired for or incorporated into a reserve unit where ... recreational and educational uses are compatible with the conservation strategy of this Plan."); see also Final EIR, Vol. II, p. 13 (Master Response 11) ("all recreation in the Reserve System must be consistent with the requirement of the Habitat Plan related to recreation."). For land to be protected via conservation easement, there are further restrictions still, as "[p]ublic access to privately owned land under conservation easement will only be permitted with the landowner's consent." Final Habitat Plan, p. 6-37. And, even if the private land owner agrees to allow public access, the conservation easement must be in the substantial form of the template provided in Appendix H to the Plan and must "confine the allowable uses of the property to those activities that do not interfere with the preservation or enhancement of those conservation values consistent with the Plan, and prevent any use of the property that would impair or interfere with the conservation values of the property." Final Habitat Plan, p. 8-35.

Given the emphasis on conservation over recreation, it seems likely that recreational opportunities will be limited by the Plan. As the Plan states, "[i]ncreased human use within the permit area may have adverse effects on biological resources in the form of collection and harassment of native species, introduction or spread of diseases, competition from or predation by nonnative species, trash dumping, higher noise levels, increased light pollution at night, spills of hazardous materials, water quality degradation from road runoff, and increased frequency of wildfire ignitions." Final Habitat Plan, p. 4-4. Thus, the Plan acknowledges that even the passive recreation uses contemplated (e.g., walking, hiking, running (Final Habitat Plan, p. 6-39)) have the potential to negatively

impact habitat conservation, and therefore would have to give way to conservation. The EIR simply fails to take the obvious scope of this potential conflict into account.

Even if one assumes that the provision of recreational access to any of the lands acquired for the Reserve System is a net benefit, the Final EIR must still provide analysis "sufficient to enable" decision-makers and the public "to understand and to consider meaningfully the issues raised by the proposed project." *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 405. Here, the Final EIR fails to do so because it overstates the purported benefits to recreation that would result from implementation of the Plan. The Final EIR simply concludes that at least 33,025 acres will be acquired and public access will generally be available, giving the impression that the Plan will provide a significant amount of new recreational opportunities. However, given the requirement to prioritize conservation values and the fact that the conservation easements will likely severely limit recreational access and use, the amount of land that will actually be available for recreational use is likely to be significantly less than 33,025 acres. The Final EIR should therefore be revised in order to undertake a more realistic, fact-based analysis of projected recreational opportunities.

Besides overstating the Plan's purported benefits to recreation, the Final EIR also fails to acknowledge or analyze the Plan's potentially significant impacts to existing recreation resources. Specifically, the Plan would incorporate up to 13,291 acres of existing parks and open space into the Reserve System, subject to permanent conservation easements that will allow recreational uses provided such uses are "compatible with the conservation strategy of the Plan" Final Habitat Plan, p. 8-38. However, neither the Plan nor the Final EIR analyzes how the imposition of conservation easements on these lands will affect existing recreational opportunities.

For example, 1,690 of 4,455 acres (~40%) of Calero County Park and 7,760 of 9,560 acres (~81%) of Joseph D. Grant County Park will be incorporated into the Reserve System and subject to conservation easements and management plans. Final Habitat Plan, Table 5-5. These two parks include extensive existing recreational opportunities, some of which may well be inconsistent with the conservation objectives of the Habitat Plan. See, e.g., Final EIR, Vol. I, p. 9-6 (Joseph D. Grant County Park includes an "extensive 52-mile trail system" that hosts "large-scale organized trail events such as equestrian endurance rides, mountain bike events, and foot races ..."). Similar recreation opportunities are provided at other parks and open space areas that will be at least partially included in the Reserve System and therefore burdened by conservation easements. The Final EIR has not sufficiently analyzed whether these existing recreational opportunities will be impacted by the Habitat Plan, instead reaching the general conclusion that this "impact is expected to be negligible ... because existing open space areas most likely to be added to the Reserve System ... were chosen, in part, because existing recreational uses are generally consistent with the Habitat Plan biological goals and objectives." *Id.* at 9-11. As discussed above, this is not accurate, and the conclusory nature of the analysis is inadequate under CEQA. *Citizens of Goleta*

Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 568 (EIR must contain facts and analysis, and not just bare conclusions or opinions).

H. The EIR Does Not Adequately Address The Environmental Impacts Of Increased Herbicide And Pesticide Use.

The EIR acknowledges that the Implementing Entity could use potentially hazardous materials, including pesticides and herbicides, in the Habitat Plan's new Reserve System for vegetation or fuel management. Final EIR, Vol. I, p. 11-7. The EIR states that these pesticides and herbicides "would only be applied by certified personnel in accordance with label instructions," and relies on this statement to conclude that the use of hazardous materials is not expected to create a hazard to the public or the environment." *Id.*, pp. 11-7 - 11-8. Under CEQA, such reliance is not a substitute for analysis of the potential environmental impacts of increased herbicide and pesticide use. *Californians for Alternatives to Toxics v. Department of Food and Agriculture* (2005) 136 Cal. App. 4th 1 (EIR for agency's program to control agricultural disease invalidated for failure to analyze potential impacts of pesticides approved for use by the state Department of Pesticide Regulation). Thus, the EIR should have analyzed the potential environmental effect of potential increased use of herbicides and pesticides.

I. The EIR's Analysis Of Impacts To Cultural Resources Is Incorrect And Its Conclusion That Impacts Will Be Reduced To Less-than-Significant By Mitigation Is Not Supported.

Chapter 13 of the Final EIR correctly states that the Habitat Plan activities could cause significant impacts to culturally significant resources. The chapter does not, however, correctly identify key CEQA requirements for addressing impacts to historical archeological resources. In addition, the EIR incorrectly concludes that relocation, recordation, data recovery anduration would mitigate significant impacts to such resources to a level of less than significant. See Final EIR, Vol. I, pp. 13-8 -- 13-9.

Under CEQA, where an archaeological resource qualifies as a historical resources -- as most do -- specific requirements apply. The first and foremost, nowhere mentioned in the EIR, is the preference for preservation in place. CEQA Guidelines section 15126.4(b)(3) provides:

- (3) Public agencies should, whenever feasible, seek to avoid damaging effects on any historical resource of an archaeological nature. The following factors *shall be considered and discussed in an EIR* for a project involving such an archaeological site:
 - (A) *Preservation in place is the preferred manner of mitigating impacts to archaeological sites.* Preservation in place maintains the relationship between artifacts and the archaeological context. Preservation may also avoid

conflict with religious or cultural values of groups associated with the site.

- (B) Preservation in place may be accomplished by, but is not limited to the following:
1. Planning construction to avoid archaeological sites;
 2. Incorporation of sites within parks, greenspace, or other open space;
 3. Covering the archaeological sites with a layer of chemically stable soil before building tennis courts, parking lots, or similar facilities on the site.
 4. Deeding the site into a permanent conservation easement.

(Emphasis added.) A recent court decision interprets section 15126.4(b)(3) as follows:

[W]e interpret "preferred manner" to mean that feasible preservation in place must be adopted to mitigate impacts to historical resources of an archaeological nature unless the lead agency determines that another form of mitigation is available and provides superior mitigation of the impacts. Furthermore, we interpret the regulatory language that includes preservation in place among the factors that "shall be considered and discussed in an EIR" (Guidelines, § 15126.4, subd. (b)(3)) to mean that, when the preference is not followed, the EIR shall state why another type of mitigation serves the interests protected by CEQA better than preservation in place.

Madera Oversight Coalition v. County of Madera (2011) 199 Cal. App. 4th 48, 87.

Here, the EIR includes no mention of CEQA's preference for preservation in place and makes no effort to explain why its selected mitigation measures – relocation, recordation, data recovery and curation – would be superior to preservation in place and would mitigate significant impacts to archaeological historical resources to less-than-significant.

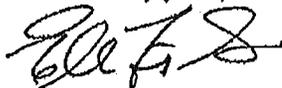
III. CONCLUSION

YCS remains committed to working with the Local Partners to achieve a sensible and clear Habitat Plan for the Santa Clara Valley. As provided above, however, we continue to have concerns regarding the EIR and the Plan that we believe need to be addressed before any of the Local Partners or the Implementing Entity can move forward with

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approval and implementation of the Plan. We look forward to continuing to work with the Local Partners to resolve these issues.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Ella Foley Gannon', written in a cursive style.

Ella Foley Gannon

BINGHAM**Facsimile**

DATE 10/8/2012 4:06:12 PM

| | | FAX | PHONE |
|-------|--|----------------|--------------|
| TO | Clerk, Board of Supervisors County of Santa Clara | 1.408.938.4525 | |
| FROM | Margaret Pavao | 415 393-2286 | 415 393-2424 |
| PAGES | 26 (including this cover page) | | |

MESSAGE**Please see attached re Agend Item No. 12, Board of Superivors Meeting October 9, 2012**

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October 8, 2012

Via Facsimile

Board of Supervisors
 County of Santa Clara
 70 West Hedding Street, 10th Floor
 San Jose, CA 95110

Re: Agenda Item No. 12: Santa Clara Valley Habitat Plan

Dear President Shirakawa and members of the Board:

The County of Santa Clara, along with its Local Partners,¹ is in the process of considering adoption of a Santa Clara Valley Habitat Plan ("Habitat Plan" or "Plan"), which will significantly shape and affect development in the Santa Clara Valley over the proposed fifty-year term of the Plan.² If approved by the Local Partners and the two Wildlife Agencies,³ the Habitat Plan would extend "take" authorization for certain species to public and private projects covered by and developed consistent with the Plan.

YCS Investments is the owner of the 2,150-acre property known as Young Ranch, located in southeastern Santa Clara Valley on parcels located in unincorporated Santa Clara County and the City of San Jose. Of the six parcels that comprise Young Ranch, the two most northerly parcels are in the County, and the four most southerly parcels are in the City of San Jose. YCS has filed an application with the County for a rural residential community that will be processed in two phases that will ultimately total 87 units. The first phase application is for 37 units. The project would be developed solely in the two parcels located in the County, clustered on 200 of the 2,150 acres of Young Ranch. Pursuant to its application, YCS would preserve in perpetuity the remaining 1,950 acres of Young Ranch, which includes highly valuable habitat, particularly for the threatened Bay checkerspot butterfly, as open space.

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¹ In addition to the County, the "Local Partners," also referred to herein as "Permittees," are the Cities of San Jose, Gilroy and Morgan Hill, the Santa Clara Valley Water District ("Water District"), and the Santa Clara Valley Transportation Authority ("VTA"). In addition, the Plan will be implemented by a yet-to-be formed joint powers agency referred to as the "Implementing Entity."

² The Plan has been prepared pursuant to the federal Endangered Species Act ("ESA"), the California Endangered Species Act ("CESA"), and the California Natural Conservation Planning Act (the "NCCP Act") to, among other things, authorize the incidental take of protected species.

³ The "Wildlife Agencies" are the United States Fish & Wildlife Service ("FWS") and the California Department of Fish & Game ("DFG").

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YCS has objected to the vagueness and uncertainty of many important provisions of the Habitat Plan in its current form. As discussed in detail below, however, YCS's proposed development and preservation plan for Young Ranch (the "Young Ranch Project" or "Project") has been specifically designed to be consistent with the Habitat Plan to the extent YCS understands that Plan, and the Project certainly would go a long way towards advancing the Plan's stated regional planning and preservation goals and objectives. As such, YCS believes the County would be well served to consider the Project as a vital part of the final Habitat Plan's implementation and potential success.

I. THE YOUNG RANCH PROJECT

On September 5, 2012, YCS submitted an application to the County for the first phase of the Young Ranch Project, which includes 37 units and 7 secondary units affordable to very low income families.⁴ With phase 2, the Project will include a total of 87 executive homes and 16 secondary units permanently preserved for very low income families. The Project has been designed to preserve 90 percent of Young Ranch as open space, with 1,950 total acres preserved in perpetuity, no more than 10 percent of the site would be used for rural residential development. A modest community center will serve as a local gathering place. *See* Application, Item No. 2.

The limited rural development at Young Ranch has been sited and will be constructed to avoid indirect impacts to the preserve and its resident plant and animal species, consistent with the Plan's directives. The proposed home sites, clustered on two-acre minimum lots, deliberately preserve movement corridors for the BCB between its primary habitat in the southeastern portion of the property and other habitat onsite and nearby, including existing habitat to the southeast (Kirby Canyon), the southwest (Tulare Hill), the northeast (San Felipe area), and the northwest (across Silver Creek Valley Road to Silver Creek Hills).

Your approval of the entire Project would place approximately 1,950 acres of Young Ranch in an open space preserve, including approximately 700 acres of serpentine grassland. These 700 acres represent 35 percent of the proposed Habitat Plan's stated goal of protecting 2,900 acres of serpentine grassland on Coyote Ridge, and would therefore reduce the expense the Habitat Plan otherwise incur to acquire privately-held serpentine habitat. Habitat Plan, p. 5-136. The Project avoids all serpentine grassland and all Bay checkerspot butterfly ("BCB") habitat on site. The Project also avoids wetlands, steep slopes, trees, plants, and other features, providing for limited development to occur only in the least sensitive areas. *See* Application, Item No. 7.

⁴ In addition to the Santa Clara County Planning Development Application, the application materials (hereinafter, collectively, the "Application"), included 25 supporting plans, documents, and reports. When referred to in this letter, those materials are cited as "Application, Item No. ___", which corresponds to the "Index of Application Documents" submitted with the Application.

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II. THE YOUNG RANCH PROJECT HAS BEEN DESIGNED TO BE CONSISTENT WITH THE HABITAT PLAN.

Pursuant to the proposed Habitat Plan, “[b]efore take authorization is granted, Permittees must prepare a written determination of the project’s consistency with the Plan.” Habitat Plan, p. 6-83. While the Plan lacks specificity and defers development of the template for this consistency determination to the Implementing Entity, the Plan does provide that, in order to be consistent with the Plan, a private project must comply with “all relevant avoidance, minimization, surveys, monitoring, and conservation measures determined by the local jurisdiction to apply to the project ...”. *Id.* As discussed below, the Young Ranch Project is a “Covered Activity” that is not only consistent with, but directly advances the goals of, the Habitat Plan.

III. THE PROPOSED PROJECT IS A COVERED ACTIVITY UNDER THE HABITAT PLAN.

Private development that will occur in rural areas in accordance with existing general plans at the time of permit issuance is considered “Rural development” and is a “covered activity” under the proposed Habitat Plan. Habitat Plan, p. 2-104. Specifically, “rural development activities covered by the Plan” include:

- Rural residential development (e.g., single family homes, subdivisions) consistent with the County General Plan (County of Santa Clara 1994). This may include privately owned bridges, driveways, access roads, vineyards or orchards, and other features commonly associated with rural dwelling units.

The Young Ranch Project proposes rural residential development in the County consistent with the County’s General Plan. Specifically, the Project is seeking a cluster permit to place homes on the two parcels within the County. All six of the Young Ranch parcels have a General Plan designation of “Hillsides,” and the two County parcels have a zoning designation of HS-d1 (Hillsides with a design review overlay for the Santa Clara Valley Viewshed). As required by the County’s cluster development policies, the homes would be on two-acre minimum lots.⁵ Thus, the Young Ranch Project is “covered activity” pursuant to the Habitat Plan.

⁵ The General Plan consistency analysis also includes consideration of state-mandated density bonuses since the Project includes an affordable housing component, as well as slope density calculations. These issues are analyzed in further detail in Application Item Nos. 2 and 8.

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A. The Young Ranch Project Has Been Designed To Be Consistent With All Applicable Conditions In the Habitat Plan.

Pursuant to the proposed Habitat Plan, "all covered activities must incorporate the relevant conditions on covered activities described in Chapter 6 in order to avoid or minimize impacts to covered species and natural communities." Habitat Plan, p. 2-36. The Project was designed with the Plan's overall conservation goals, and the specific conditions, in mind. Thus, the clustered development and open space design of the Project not only "avoid direct impacts on legally protected plant and wildlife species" (Habitat Plan, p. 6-7 - 6-8 (Condition 1)) but were designed consistent with "rural development design and construction requirements" (*id.* p. 6-28 (Condition 7)) and in order to comply with "serpentine and associated covered species avoidance and minimization" measures (*id.* p. 6-58 - 6-60 (Condition 13)). In each case, the design of the Project as a development *and* preservation plan not only results in the Project being consistent with the Habitat Plan, but also assists in advancing the Plan's overall conservation goals.

For example, Condition 1 requires covered projects to avoid direct impacts to legally protected species. Here, the Young Ranch Project is designed to avoid direct impacts on protected species by clustering development away from all occupied BCB habitat, as well as potential and known breeding sites for California tiger salamander and California red-legged frog, and all occurrences of listed plant species. *See* Application, Item Nos. 2, 15.

Condition 7 includes numerous design criteria, including minimizing habitat fragmentation and degradation of landscape linkages and minimizing the loss of sensitive land cover types. Habitat Plan, p. 6-30. Again, by clustering development and protecting 1,950 acres of open space, the Young Ranch Project purposefully minimizes impacts to habitat linkages and sensitive land cover types. *See* Application, Item Nos. 2, 15. Further, minimal new roads are being introduced, and the development plan avoids all streams. These same factors result in the Project being consistent with Condition 13 (avoid and minimize impacts to serpentine land covers and related species) because, as noted, serpentine grasslands are not only generally avoided, but 700 acres of serpentine grassland are preserved in perpetuity.

While we have not restated and analyzed each applicable Condition on Covered Activities in this letter, the attached Consistency Determination Table does so, and clearly demonstrates that, as designed, the Young Ranch Project should not only be consistent with all requirements of the Habitat Plan, but helps advance the Plan's conservation goals.

B. The Young Ranch Project Would Help Implement The Plan's Conservation Strategy.

The proposed Habitat Plan's conservation strategy provides mitigation for impacts on covered species on the basis of species and habitat needs, and also contributes to species

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recovery to help to delist the listed species and prevent the listing of non-listed species through the protection, restoration, and enhancement of natural communities and species habitat. Key objectives include:

- Conservation and restoration of representative natural and semi-natural landscapes;
- Establishment of "reserves" that provide conservation of covered species within the study area (i.e., contributes to species recovery) and linkages to adjacent habitat outside the study area;
- Protection and maintenance of habitat areas large enough to support sustainable populations of covered species; and
- Incorporation into the reserves of a range of environmental gradients and high habitat diversity to provide for shifting species distributions in response to changing circumstances.

The Young Ranch Project is consistent with the Habitat Plan's conservation strategy. Development will avoid impacts to covered species and covered plants through clustering and protection of 90 percent of the project site as open space. This is an essential component of the Project design because all known occurrences of covered plants are located in the open space, which has been designed to conserve natural landscapes and will be managed in perpetuity. Portions of the open space would likely be included in the Reserve System being established by the Plan, thus significantly contributing to the preservation and recovery of listed species in the region and possibly contributing to the prevention of listing of non-listed species through protection, restoration and enhancement of natural communities and habitat.

More specifically, the Habitat Plan's conservation strategy for the BCB includes the acquisition (in fee title or via conservation easement) and management of a substantial portion of the core habitats on Coyote Ridge and the Silver Creek Hills. Habitat Plan, § 5.4.1 *Bay Checkerspot Butterfly*. The Young Ranch Project is consistent with this strategy because it has been designed to avoid all BCB habitat and serpentine grassland on site and 1,950 acres, including all of the on-site BCB habitat and serpentine grassland, will be protected as open space and may be included in the Reserve System. Preservation of this open space as part of the Young Ranch Project is not only consistent with, but will substantially contribute to, the conservation strategy. Similarly, the Plan focuses on acquisition of key habitat along the Coyote Ridge (Habitat Plan, Biological Goals and Objectives, Coyote-4, 5, and 6), and the Project's preservation of open space along the Coyote Ridge would contribute to these goals.

Again, the attached Consistency Determination Table delineates the Project's consistency with each of the Plan's individual conservation strategies. It is clear, however, that, if

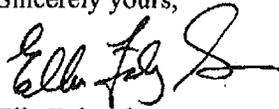
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approved, the Young Ranch Project can significantly advance the Plan's overall conservation strategy.

IV. CONCLUSION

As discussed above, the Young Ranch Plan has been designed not only to meet the Habitat Plan's requirements, but to advance the Plan's conservation goals. Thus, we think the County should consider the Young Ranch Project not simply as a development project, but as a vitally important component of the final Habitat Plan's successful implementation.

Sincerely yours,



Ella Foley Gannon

Enclosure

YOUNG RANCH PROJECT CONSISTENCY DETERMINATION TABLE

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
|---|------------|---|
| Covered Activity | | |
| <p>A described activity or project will be covered under the Plan if:</p> <ul style="list-style-type: none"> a. the activity or project does not preclude achieving the biological goals and objectives of the Plan (see Chapter 5 <i>Conservation Strategy</i>); b. the activity or project is conducted by, or is subject to the jurisdiction of, one of the Permittees (see Chapter 8 <i>Plan Implementation</i> for a mechanism for a non-permittee to receive coverage under the Plan); c. the activity or project is a type of impact evaluated in Chapter 4 of the Plan; and d. adequate take coverage under the permits remains available for other covered activities. | Yes | <ul style="list-style-type: none"> a. The Young Ranch Project has been designed to be consistent with the conservation strategy of the Habitat Plan by avoiding critical habitat and preserving 1,950 acres of open space, including critical Bay checkerspot butterfly (BCB) habitat and serpentine grassland. b. The Young Ranch site is located with the County and the City of San Jose, both of which are Permittees under the Plan. c. Young Ranch is a “rural development” as contemplated and evaluated in Chapter 4 d. Adequate take coverage will remain available for other covered activities as Young Ranch is designed to avoid and minimize impacts. |
| <p>“Rural development activities covered by the Plan” include:</p> <p>Rural residential development (e.g., single family homes, subdivisions) consistent with the County General Plan (County of Santa Clara 1994). This may include privately owned</p> | Yes | <p>The Young Ranch Project proposes rural residential development in the County consistent with the County’s General Plan. Specifically, the Project is seeking a cluster permit to place homes on the two parcels within the County. These parcels have a</p> |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| bridges, driveways, access roads, vineyards or orchards, and other features commonly associated with rural dwelling units. | | General Plan designation of "Hillsides," and a zoning designation of HS-d1 (Hillsides with a design review overlay for the Santa Clara Valley Viewshed). |
| Covered Activities: General Plan Consistency | | |
| Rural development includes private development that will occur in accordance with existing general plans at the time of permit issuance. This includes activities that are subject to both ministerial and discretionary approval by the County or cities. | Yes | Development of the Young Ranch Project will occur on parcels located in the County, which have a zoning designation of HS-d1 (Hillsides with a design review overlay for the Santa Clara Valley Viewshed) and a General Plan designation of Hillsides. Proposed development of 87 units is consistent with these designations. |
| Under County General Plan, the maximum development density is one residence per 20 to 160 acres. | Yes | County zoning permits a cluster subdivision within the HS zone to have a minimum lot size of 2 acres per lot, which is met here by the Project. |
| Under County policies, most subdivision proposals for Hillside parcels are required to cluster future development and preserve 90% of the site as open space. | Yes | The Project clusters 87 units on 200 acres and preserves approximately 1,900 acres, or 90% of the site, as open space. |
| Applicable Conditions | | |
| Condition 1: Avoid Direct Impacts on Legally Protected Plant and Wildlife Species | Yes | The Project has been designed to avoid all occupied BCB habitat, potential and known breeding sites for |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| | | California tiger salamander and California red-legged frog, and all occurrences of listed plant species. |
| Condition 3: Maintain Hydrologic Conditions and Protect Water Quality. To support the listed goals, implement requirements listed in Table 6-2. | Yes | The Young Ranch Project will implement the preconstruction, construction site and post-construction requirements. |
| Condition 4: Stream Avoidance and Minimization for In-Stream Projects. | Yes | The Young Ranch Project avoids impacts to streambeds, banks and adjacent riparian corridors. |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| <p>Condition 7: Rural Development Design and Construction requirements.</p> <p><u>Goals</u></p> <ul style="list-style-type: none"> a. Minimize potential direct and indirect impacts of rural development on covered species and natural communities most likely to be affected by rural development. b. Minimize habitat fragmentation and degradation of landscape linkages (e.g., wildlife corridors), including maintaining connectivity between aquatic, riparian, and upland habitats. c. Minimize loss of sensitive land cover types and natural communities including but not limited to riparian woodlands, seasonal wetlands, freshwater marsh, ponds, serpentine grassland, valley oak woodland, knobcone pine woodland, and ponderosa pine woodland. d. Reduce the extent of new roads in remote rural areas in order to reduce negative impacts on species. e. Minimize degradation of streams and maintain the hydrograph to the baseline (defined as the existing conditions at the time of Plan approval), or adjust the hydrograph toward predevelopment conditions. f. Minimize construction-related impacts, including noise; air emissions; erosion and sedimentation; disturbance of native vegetation; and introduction of nonnative, invasive species. g. When designing or retrofitting County facilities, evaluate whether the project can be designed to reduce impervious surfaces to less than pre-project conditions. | <p>Yes</p> | <p><u>Goals</u></p> <ul style="list-style-type: none"> a. Potential impacts are minimized by clustering development, protecting 1900 acres of project site as open space and avoiding Bay checkerspot butterfly habitat and serpentine grasslands and other sensitive resources such as special status plant species and aquatic features. b. Young Ranch is designed to provide landscape linkage for Bay checkerspot butterfly. c. Development will avoid all serpentine grassland on site, which can be included in the Reserve System. d. The design of Young Ranch introduces minimal new roads and the small number of houses will result in minimal impact to species. e. Development will avoid all streams and the minimal amount of hardscape on site will not result in a change in the baseline hydrograph on the site. f. Young Ranch will use BMPs to minimize construction-related impacts. g. While Young Ranch will not be designing and retrofitting County facilities, Young Ranch will be designed to reduce impervious surfaces, to the extent feasible. |

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| <p>Condition 7: Rural Development Design and Construction requirements.</p> <p><u>Design and Construction Requirements</u></p> <ul style="list-style-type: none"> a. Identify the proposed impact area and general location of site design features. b. Show all improvements that will result in permanent land cover impacts (e.g., home, driveway, barn, pool, patio, landscaping, and utilities, etc.), including a 50-foot buffer around all proposed site improvements. c. Show all site improvements that will result in temporary land cover impacts during construction but that will be returned to the pre-project land-cover type within 1 year of completing construction (e.g., leach fields outside the drip line of trees, well pipelines), including a 10-foot buffer around the proposed footprint of the site improvements. d. Build close to, and utilize to the extent practicable, existing infrastructure (e.g., existing driveways, utility lines). | <p>Yes</p> | <p>The Project design drawings will satisfy these requirements, as demonstrated in part by the Conceptual Master Plan and Cluster and Homesite Key Plan submitted as Item Nos. 4 and 5 to the Project Application accepted by the County of Santa Clara on September 11, 2012.</p> |
| <p>Condition 7: Rural Development Design and Construction requirements.</p> <p><u>Site Hydrology</u></p> <ul style="list-style-type: none"> a. Develop only the minimum number of stream crossings | <p>Yes</p> | <p>As demonstrated in the materials submitted in support of the Project Application accepted by the County on September 11, 2012:</p> <ul style="list-style-type: none"> a. The Project will have no stream crossings. |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| <p>necessary to access the property.</p> <ul style="list-style-type: none"> b. At project sites that are adjacent to any drainage, natural or manmade, exposed soils must be stabilized or otherwise contained on site to prevent excessive sediment from entering a waterway. c. Use of impermeable surfaces surrounding structures must be minimized to the greatest extent possible through the use of alternative design treatments, such as low impact development methods, including but not limited to, permeable pavers, green roofs, and rainwater catchments so that natural infiltration is facilitated and runoff is reduced. d. Consistent with State and Regional Water Quality Control Board regulations, runoff from impermeable surfaces must be directed to natural or landscaped areas, or to designed swales or detention/retention basins to encourage natural filtration and infiltration. Diversion to a cistern or other onsite stormwater management technique is also allowed and encouraged. e. Avoid altering natural drainages and contours on the project site. If the site is graded, blend grading into the existing landform as much as possible. f. Leach fields must be sited away from creeks in accordance with the County septic ordinances, as well as at least 100 feet from the reserve boundary unless site-specific conditions (i.e., topography) adequately minimize effects with a less than 100 foot buffer, or adequate space is not available to site the field elsewhere (i.e., the parcel is too small). This may prevent changes in localized soil moisture content and groundwater levels that may have adverse effects on | | <ul style="list-style-type: none"> b. Project design will prevent excessive sediment from entering a waterway. c. The Project will be designed to reduce impervious surfaces, to the extent feasible. d. The Project will have a SWPPP that satisfies these regulations. e. The Project will incorporate the natural topography into the design as much as feasible. The vast majority of the natural drainages will not be impacted by the development and the development area will ensure that the overall pre-development drainage pattern is maintained. f. Leach fields will be sited away from creeks and streams. g. As discussed under relevant provisions, the Project will adhere to Conditions 3, 4, 5 and 11. |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| sensitive plants or plant communities in the Reserve System. g. Adhere to Conditions 3, 4, 5, and 11. | | |
| Condition 7: Rural Development Design and Construction requirements. <u>Private Rural Roads</u> a. Minimize to the maximum extent possible the amount of ground disturbance when constructing roads. b. Ground-disturbing activities associated with road construction should be timed to occur during dry weather months to reduce the possibility of sediment being transported to local streams during wet weather. c. If construction extends into wet weather, the road bed will be surfaced with 6–18 inches of base rock or other appropriate surfacing material to prevent erosion of the exposed roadbed (Pacific Watershed Associates 1994). d. Avoid to the extent possible constructing roads on steep slopes (over 25%) or on unstable slopes. If construction on steep slopes is required, construction will be timed for dry weather months to reduce the potential for landslides (Pacific Watershed Associates 1994). e. Adhere to avoidance and minimization measures for dirt road construction in Condition 6. | Yes | As demonstrated in the materials submitted in support of the Project Application accepted by the County on September 11, 2012: a. Ground disturbance will be minimized to the extent possible. b. Ground-disturbing activities will be times to occur during dry weather, to the extent feasible. c. To the extent feasible and permissible under local standards and regulations, the Project will implement these surfacing requirements, if applicable. d. The Project is designed to avoid steep slopes to the extent possible and any construction necessary on steep slopes will occur during dry weather months. e. No direct roads are included in the project design. |
| Condition 7: Rural Development Design and Construction | Yes | As demonstrated in the materials submitted in |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| <p>requirements.</p> <p><u>Other Requirements</u></p> <ol style="list-style-type: none"> a. Maintain as much natural vegetation as possible, consistent with fuel management standards, on the project site. b. Maintain County-mandated fuel buffer (variable width by slope conditions). c. On sites adjacent to reserves, locate the proposed development as far from the reserve boundary as possible consistent with other onsite conditions and constraints d. All temporarily disturbed soils will be revegetated with native plants and/or grasses or sterile nonnative species suitable for the altered soil conditions upon completion of construction. Local watershed native plants will be used if available. If sterile nonnative species are used for temporary erosion control, native seed mixtures must be used in subsequent treatments to provide long-term erosion control and slow colonization by invasive nonnatives. All disturbed areas that have been compacted shall be ripped or otherwise de-compacted prior to planting or seeding. e. All temporarily disturbed areas, such as staging areas, will be returned to preproject or ecologically improved conditions within 1 year of completing construction or the impact will be considered permanent. f. <i>No plants</i> identified by the California Invasive Plant Council as invasive will be planted on the project site. Planting with watershed local native and/or drought- | | <p>support of the Project Application accepted by the County on September 11, 2012:</p> <p>The vast majority of the site, including the preserved acres and a significant portion of the 200 acre development area, will maintain its natural vegetation. The preserve area will be grazed to maintain the Bay checkerspot butterfly habitat, which will also ensure that fuel management standards are met. The homes and other improvements will be located as far away from the proposed 1,900 acre preserve area as possible. The landscaping plans and lighting plans will satisfy these requirements.</p> |

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| resistant plants is highly encouraged. This reduces the need for watering as well as the need for fertilizers and pesticides. g. Outdoor lighting will be of low intensity and will utilize downward-facing fixtures to reduce light pollution of the surrounding natural areas. | | |
| Condition 10: Fuel Buffer. In accordance with state law, all applicable covered activities will remove all brush, flammable vegetation or combustible growth within at least 30 feet and up to 100 feet of occupied dwellings or structures. | Yes | The Project will comply with all fuel buffer requirements. |
| Condition 11: Stream and Riparian Setbacks | Yes | The Project avoids impacts to streambeds, banks and adjacent riparian corridors and is consistent with all stream setback requirements. |
| Condition 13: Serpentine Avoidance and Minimization | Yes | See below for specifics. |
| Because of the high importance and rarity of serpentine soils and their habitats, these areas will be avoided whenever feasible during project planning. The project will be designed to preserve larger patches of serpentine within the development area and limit impacts to the smallest patches feasible and to the edges of serpentine patches regardless of their size. The length of the edge of the serpentine patch that is directly adjacent to the developed area will be minimized and will include as large a buffer as possible between the serpentine | Yes | Young Ranch has been specifically designed to avoid serpentine grassland and to include the avoided high-quality serpentine habitat areas into the Reserve System. Young Ranch avoids impacting all serpentine grassland on site and will be designed to create a buffer between serpentine grassland and the developed area. |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| edge and the developed area. | | |
| <p>Landscaping will not be planted on serpentine areas except as needed to reduce fire hazards adjacent to structures consistent with County fire hazard reduction regulations (see also Condition 10). Plantings will not include species that are known or suspected to invade serpentine habitats or crosspollinate with endemic serpentine plant species or other native plants.</p> | Yes | All surveyed serpentine grassland on-site will be preserved as open space. Landscaping on serpentine areas is not anticipated. |
| <p>Where serpentine cannot be avoided:</p> <ul style="list-style-type: none"> • Conduct surveys of the serpentine vegetation to inventory for covered species and evaluate habitat quality for covered species. • Conduct surveys for Bay checkerspot butterfly in serpentine patches outside of Bay checkerspot butterfly habitat units (Appendix D and Table 5-7). Survey the site for the presence of larval host plants. If larval host plants are found, conduct reconnaissance level surveys for adult butterflies during the peak of the flight period to determine species presence or absence. • Locate the project footprint as far from the covered species or the highest quality serpentine habitat as is feasible. Utilize applicable buffers as identified in this chapter. • If covered plants occur on the site and cannot be avoided, notify the Implementing Entity of the construction schedule so that plant salvage can be considered and potentially implemented (see Condition 21). | Yes | The development footprint will avoid serpentine grasslands. Design of the project includes an appropriate buffer between development and serpentine grassland. Covered plants will also be avoided. Additionally, Young Ranch has already conducted multi-year detailed surveys of the site and extensive documentation regarding the site's resources has been submitted to the wildlife agencies. |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| <p>Condition 21: Plant Salvage when Impacts Are Unavoidable. Where impacts on covered plant species cannot be avoided and plants will be removed by approved covered activities, the Implementing Entity has the option of salvaging the covered plants.</p> | <p>Yes</p> | <p>Young Ranch has been designed to avoid all covered plant species. If a covered plant cannot be avoided, Young Ranch will follow applicable regulations.</p> |
| <p>Condition 22: Avoid and Minimize Impacts to Covered Plant Occurrences</p> | <p>Yes</p> | <p>Young Ranch has been designed to avoid all covered plant species and to include a setback from the covered plants to adequately prevent impacts to the covered plants during or after project construction.</p> |
| <p>Conservation Strategy</p> | | |
| <p>The conservation strategy provides mitigation for impacts on covered species on the basis of species and habitat needs. The conservation strategy mitigates all of the impacts described in Chapter 4, including direct, indirect, temporary, and permanent impacts. To meet the NCCP Act permit standards, the conservation strategy also contributes to species recovery to help to delist the listed species and prevent the listing of non-listed species through the protection, restoration, and enhancement of natural communities and species habitat. The conservation strategy also achieves the objectives listed below, pursuant to the NCCP Act (Section 2820).</p> <ul style="list-style-type: none"> • Conserves, restores, and provides for the management of representative natural and semi-natural landscapes. | <p>Yes</p> | <p>Young Ranch is consistent with the HCP's conservation strategy. Development will avoid impacts to covered species and covered plants. Young Ranch will protect 90% of its site as open space. All occupied and potential Bay checkerspot butterfly habitat and all serpentine grasslands on site are located within this 90% open space. Also, all known occurrences of covered plants are located in the 90% open space. Some or all of this open space may be included in the Reserve System and would significantly contribute to the preservation and recovery of listed species in the study area. The 90% open space may also contribute to the prevention of listing of non-listed species through</p> |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| <ul style="list-style-type: none"> Establishes reserves that provide conservation of covered species within the study area (i.e., contributes to species recovery) and linkages to adjacent habitat outside the study area. Protects and maintains habitat areas that are large enough to support sustainable populations of covered species. Incorporates in the reserves a range of environmental gradients and high habitat diversity to provide for shifting species distributions in response to changing circumstances. Sustains the effective movement and interchange of organisms between habitat areas in a manner that maintains the ecological integrity of the Reserve System. | | <p>protection, restoration and enhancement or natural communities and habitat.</p> <ul style="list-style-type: none"> The 90% open space will conserve natural landscapes and will be managed in perpetuity. The 90% open space may be included within the Reserve System to conserve covered species and to provide linkages within the study area. The 90% open space will cover 1,900 acres, including all Bay checkerspot butterfly habitat and serpentine grassland on site, which would be sufficient to support sustainable populations of covered species. The 90% open space includes a range of habitat diversity, including landscape linkage areas. The 90% open space would provide sufficient landscape linkage areas to contribute to the sustenance of the movement and interchange of organisms. |
| <p>The conservation strategy for the Bay checkerspot butterfly includes the acquisition, in fee title or conservation easement, and management of a substantial portion of the core habitats on Coyote Ridge and the Silver Creek Hills (see Chapter 5 Section 5.4.1 <i>Bay Checkerspot Butterfly</i> for details). This acquisition will include most of the core habitat along the ridge tops, which provides high quality habitat for Bay checkerspot butterfly and have historically (since 1984) supported the densest populations of Bay checkerspot butterfly (see Appendix D). Development on the ridge top would be</p> | <p>Yes</p> | <p>Young Ranch is consistent with the conservation strategies for the Bay checkerspot butterfly. Project design avoids all Bay checkerspot butterfly habitat and serpentine grassland on site. 90% of the site, including all of the on-site Bay checkerspot butterfly habitat and serpentine grassland, will be protected as open space and may be included in the Reserve System. Preservation of 1,900 acres along Coyote Ridge will substantially contribute to the conservation strategy. Development will occur</p> |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| <p>incompatible with the conservation strategy. The lower elevation areas are warmer and drier, and slopes tend to be south and west-facing, with small areas of north-facing slopes in canyons. As a result, these areas have been occupied by far lower densities of Bay checkerspot butterfly than on the ridge top.</p> | | <p>neither on high quality habitat nor on the crest of the ridge line and will be setback __ feet from this crest. Landscape linkages will remain open as a movement corridor for Bay checkerspot butterflies to move between the Metcalf unit and the Silver Creek unit.</p> |
| <p>Covered activities that facilitate increased vehicular use or electricity generation in the study area will contribute to increased rate of nitrogen deposition on Bay checkerspot habitat, especially on Coyote Ridge.</p> | <p>Yes</p> | <p>Due to the small number of houses included in the project, Young Ranch does not anticipate increasing vehicular use or electricity generation in the study area and therefore will not contribute to increased rate of nitrogen deposition on Bay checkerspot habitat, especially on Coyote Ridge.</p> |
| <p>Vehicular strikes have a greater impact on adult butterflies dispersing between habitat patches. Existing roads where an increase in vehicle traffic is expected as a result of covered activities and where vehicle strikes with Bay checkerspot butterfly are most likely due to road location, road configuration, and traffic patterns are:</p> <p>Metcalf Road Silver Creek Valley Road</p> | <p>Yes</p> | <p>The vehicular use associated with the Young Ranch development will be relatively minimal and is not anticipated to result in an increase in vehicular strikes on either of the identified roads.</p> |
| <p>In order for a plant occurrence to count as protected under the Plan, there will be a buffer of at least 500 feet between the occurrence and adverse land uses.</p> | <p>Yes</p> | <p>All covered plants on site will be avoided and an adequate buffer will be included in the design of the development.</p> |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| <p>Almost all known occurrences of covered plants in the study area are found outside the planning limit of urban growth and away from the footprint of covered activities.</p> | <p>Yes</p> | <p>No covered plants are located within the development footprint of Young Ranch. All covered plants on site will be avoided and protected in the 90% open space.</p> |
| <p>Provide landscape linkage across Coyote Ridge (Linkage 6 in Table 5-9 and Figure 5-6).</p> | <p>Yes</p> | <p>The 90% open space, which will be protected on site, may be included in the Reserve System. This area will include a landscape linkage across Coyote Ridge, particularly between the Metcalf unit and the Silver Creek unit.</p> |
| <p>Land acquisition in Coyote-5 and 6 conservation analysis zones will protect and provide the opportunity to enhance 81% of the remaining suitable and occupied habitat for Bay checkerspot butterfly in the study area.</p> | <p>Yes</p> | <p>The 90% of the site protected as open space will include all of the Bay checkerspot butterfly habitat on site. Some or all of the 90% open space may be included in the Reserve System and would significantly contribute to the preservation of Bay checkerspot butterfly habitat in the study area.</p> |
| <p>Coyote Ridge. While most of Coyote Ridge is targeted for land acquisition (see Coyote-4, 5, and 6), parcels with no or lower-quality habitat for Bay checkerspot butterfly and serpentine covered plants would not be included in the Reserve System. Additional land acquisition in Coyote Ridge, particularly in the northwest, would provide additional covered species habitat and important buffers between the Reserve System and existing urban development.</p> | <p>Yes</p> | <p>Young Ranch proposes to cluster development on 200 acres of the site, which does not include any Bay checkerspot butterfly habitat. The 90% open space, which includes all of the Bay checkerspot butterfly habitat and serpentine grasslands on site may be included in the Reserve System. This 90% open space would include adequate buffers between high-quality habitat and development.</p> |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| <p>Acquisition of serpentine grassland will occur primarily on Coyote Ridge from Silver Creek south to Anderson Reservoir ... Land acquisition targets for serpentine grassland that are geographically specific (see Table 5-18) will ensure that the most valuable stands are acquired to support the covered species.</p> | <p>Yes</p> | <p>The 90% open space, which will be protected on site, may be included in the Reserve System. This open space includes all of the surveyed serpentine grassland on site.</p> |
| <p>The conservation strategy for the Bay checkerspot butterfly, in combination with existing Type 1 open space, protects over 95% of the core habitat on Coyote Ridge, extending from north of Metcalf Road south to Anderson Dam. This acquisition will include the core habitats along the ridge tops, which have historically (since 1984) supported the densest populations of Bay checkerspot butterfly. Of the 4,600 acres of serpentine grassland to be preserved, the proposal is to acquire up to 3,400 acres located on Coyote Ridge (LAND-L5). Extensive land acquisition will occur in all four of the core habitat areas as defined in the recovery plan for the species (U.S. Fish and Wildlife Service 1998a): Kirby, Metcalf, San Felipe, and Silver Creek Hills (see Table 5-7 for a cross-walk of site names between this Plan and the recovery plan). The primary focus of land acquisition will be Coyote Ridge.</p> | <p>Yes</p> | <p>Young Ranch's 90% open space includes all of the Bay checkerspot butterfly habitat and serpentine grasslands on site. Some or all of this open space may be included in the Reserve System and would significantly contribute to the preservation of Bay checkerspot butterfly habitat and serpentine grasslands in the study area. If Young Ranch property is not acquired as part of the Reserve System, the HCP will not meet its acreage preservation goals.</p> |
| <p>Protection of the linkage between the Silver Creek and Metcalf populations (LAND-9*, LAND-L4) and the linkage between Coyote Ridge and Tulare Hill is critical for the species and will be necessary to meet the biological goals and objectives for this species.</p> | <p>Yes</p> | <p>The 90% open space, which will be protected on site, may be included in the Reserve System. This area will include a landscape linkage across Coyote Ridge, particularly between the Metcalf unit and the Silver Creek unit.</p> |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| <p>Habitat protection will occur on Coyote Ridge (northwest and southeast of Motorcycle County Park; Units 5 and 13),</p> | <p>Yes</p> | <p>Some or all of the 90% open space, which includes all of the surveyed Bay checkerspot butterfly habitat on site, may be included in the Reserve System.</p> |
| <p>Most new occurrences of Mt. Hamilton Thistle are located on the serpentine areas in and around Coyote Ridge on the east side of U.S. 101. The occurrences on the east side of the valley follow a network of drainages unique to Coyote Ridge. These drainages do not occur on the west side of the valley. As such, the Plan will focus conservation efforts for Mt. Hamilton thistle on acquiring occurrences along Coyote Ridge on the eastside of the valley (J. Hillman pers. comm. and Hillman 2007)....Target acquisitions include known occurrences of Mt. Hamilton Thistle along Coyote Ridge (an estimated 9 of 22 occurrences).</p> | <p>Yes</p> | <p>All of the known Mt. Hamilton Thistle occurrences on site are located in the 90% open space and will be protected. Some or all of the 90% open space may be included in the Reserve System.</p> |
| <p>Santa Clara Valley dudleya is expected to benefit from the acquisition and enhancement of those grasslands (see Section 5.3.3 <i>Grassland Conservation and Management</i>) and oak woodlands that include serpentine rock outcrops (see Section 5.3.5 <i>Oak and Conifer Woodland Conservation and Management</i>).... Regardless of the level of impact, the Implementing Entity will acquire (through acquisition or conservation easement) lands that support 55 extant occurrences of Santa Clara Valley dudleya (LAND-P2). The Implementing Entity will stratify protection and acquire sites</p> | <p>Yes</p> | <p>All of the known dudleya occurrences on site are located in the 90% open space and will be protected. Some or all of the 90% open space may be included in the Reserve System.</p> |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| <p>in the study area on both sides of Coyote Valley to ensure geographic diversity in protected occurrences. The majority of the known occurrences will be acquired, enhanced through improved management, and monitored along Coyote Ridge in Coyote-4, 5, and 6.</p> | | |
| <p>Metcalf Canyon Jewelflower is expected to benefit from acquisition and enhancement of grassland natural communities that serve as its primary habitat, contain known occurrences, and/or provide suitable habitat for occurrence creation (see Section 5.3.3 <i>Grassland Conservation and Management</i>). The Implementing Entity will acquire and enhance at least three known occurrences in the permit area (Table 5-16). The Implementing Entity will also protect 10 new occurrences through two possible methods, in order of priority: (1) acquire land for the Reserve System that supports new or rediscovered historical occurrences by Year 45, or (2) create new occurrences within the Reserve System by Year 40.</p> | Yes | <p>All of the known Metcalf Canyon Jewelflower occurrences on site are located in the 90% open space and will be protected. Some or all of the 90% open space may be included in the Reserve System.</p> |
| <p>Most beautiful jewelflower is expected to benefit from acquisition and enhancement of natural communities that serve as its primary or secondary habitat and/or contain known extant occurrences, including grasslands (see Section 5.3.3 <i>Grassland Conservation and Management</i>) and chaparral and coastal scrub (see Section 5.3.4 <i>Chaparral and Northern Coastal Scrub Conservation and Management</i>). The Implementing Entity will protect, maintain the viability of, and increase the number and size of populations of most beautiful jewelflower by acquiring and enhancing 17 known extant</p> | Yes | <p>All of the known Most Beautiful Jewelflower occurrences on site are located in the 90% open space and will be protected. Some or all of the 90% open space may be included in the Reserve System.</p> |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| occurrences in the permit area, if no additional occurrences are discovered during the permit term (Table 5-16). | | |
| Biological goals and objectives. The biological goals apply only to the Reserve System unless stated otherwise. Though most conservation actions will occur within the Reserve System, similar conservation approaches on private lands outside of the Reserve System will be encouraged during implementation. | Yes | Covered activities must not preclude achieving the biological goals and objectives of the Plan. Young Ranch does not preclude any of the HCP's goals and objectives. As set forth below, Young Ranch could contribute to several of the biological goals and objectives, particularly those related to acquisition of property on Coyote Ridge. |
| LAND-L5. Acquire in fee title or obtain easements on 3,400 acres of serpentine grassland along Coyote Ridge to link existing protected areas and to create a large core reserve for serpentine grassland species to move within (Linkage 6 in Table 5-9 and Figure 5-6). These acreages are inclusive of, not in addition to, acquisition targets set in LAND-G3. | Yes | Young Ranch will allow for preservation of 1,900 acres along Coyote Ridge, including 674 acres of serpentine grassland. This would allow for preservation of Linkage 6. |
| LAND-L10. Acquire in fee title or obtain easements on serpentine grassland along Coyote Ridge to protect the connection between Silver Creek and Kirby Canyon (Linkage 6 in Table 5-9 and Figure 5-6) as part of the acquisition targets set in LAND-G3. | Yes | The 90% open space, which includes the 674 acres of serpentine grassland on site, may be included in the Reserve System. The preserved areas would protect the connection between Silver Creek and Kirby Canyon. |
| Objective 11.1. Protect 5,154 acres of modeled Bay Checkerspot butterfly habitat, including 4,600 acres of serpentine grasslands in core populations of Bay checkerspot butterfly, to protect a range of slopes, aspects, and microhabitats | Yes | The 90% open space includes all on-site Bay checkerspot butterfly habitat and serpentine grassland that may be included in the Reserve System. Inclusion of this open space in the Reserve |

| HABITAT PLAN REQUIREMENT | CONSISTENT | CONSISTENCY ANALYSIS |
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| as part of the Reserve System within the study area. | | System would contribute to the protection of a range of habitat qualities within the study area. |
| <p>LAND-G3. Acquire in fee title or obtain conservation easements on 4,600 acres of suitable serpentine grassland habitat along ridges for Bay checkerspot butterfly on Silver Creek Hills, Coyote Ridge, Pigeon Point, Tulare Hill, Santa Theresa Hills, areas west of Calero Reservoir, and the Kalanas, and Hale/Falcon Crest in fee title or conservation easement. Habitat acquisition on Coyote Ridge and Tulare Hill is top priority. For other sites totaling 554 acres, prioritize sites, threat, patch size, current occupancy and prevalence of cool microsites for Bay checkerspot butterflies.</p> | Yes | The 90% open space includes all the serpentine grassland on site. This open space may be included in the Reserve System. |
| <p>Coyote Ridge from Silver Creek Hills to Anderson Dam (9.5 miles)</p> <p>-Provide connectivity for serpentine species within core habitat along Coyote Ridge. Link patches of protected lands along the ridge.</p> <p>-Covered species likely to use linkage: Bay checkerspot butterfly</p> | Yes | The 90% open space, which includes all the surveyed Bay checkerspot butterfly habitat and surveyed serpentine grassland on site, may be included in the Reserve System. Development would be designed to create a landscape linkage to promote movement of Bay checkerspot butterflies between the Metcalf unit and the Silver Creek unit. |



Santa Clara Valley
Habitat Conservation Plan/Natural Community Conservation Plan

Date: October 8, 2012
 TO: HCP/NCCP Local Partner Governing Boards and Councils
 FROM: HCP/NCCP Local Partner Staff
 SUBJECT: Response to YCS Comment Letter

This memorandum is the initial response of the Santa Clara Valley Habitat Plan¹ Local Partners/Joint Lead Agencies, including the County of Santa Clara, Cities of Gilroy, Morgan Hill and San Jose, Santa Clara Valley Water District, and Santa Clara Valley Transportation Authority, to the September 24, 2012 letter from Ella Foley Gannon to the Santa Clara Valley Water District Board, as submitted in substantially similar form to the San Jose Planning Commission on September 25, 2012 (hereinafter collectively "YCS Letter.")² The responses below address each of the contentions in the YCS letter in the order they were presented by YCS.

A. CO-LEAD AGENCIES

YCS alleges that the local partners have not complied with the procedural requirements of CEQA because:

1. They did not designate a single lead agency for preparation and certification of the EIR;
2. A single lead agency must be identified at the beginning of the CEQA process; and
3. Agencies other than the lead agency must act as responsible agencies.

However, both CEQA and NEPA authorize the preparation of an EIR/EIS by more than one lead agency. CEQA Guidelines section 15051(d) provides:

"Where the provisions of Subdivisions (a), (b) and (c) leave two or more public agencies with a substantial claim to be a lead agency, the public agencies *may* by

¹ The Santa Clara Valley Habitat Plan is referred to herein as the "HCCP/NCCP" or the "Plan."

² The Local Partners may respond to YCS's issues in greater detail in the future depending on the comments and submissions received at the various board, council, and commission meetings of the Local Partner agencies and as more information develops.

agreement designate an agency as the lead agency. *An agreement may also provide for cooperative efforts by two or more agencies by joint exercise of powers, or similar devices.*" (Emphases added.)

CEQA Guidelines section 15051(d) does not mandate the designation of a single lead agency when two or more public agencies have a substantial claim to be a lead agency. Two or more public agencies with a substantial interest in a project "may" designate a single lead agency but, in the alternative, where more than one public agency has a substantial claim to be lead agency, the agencies may cooperate by agreement in the preparation of an EIR and there is nothing in Section 15051 prohibiting them from doing so as joint lead agencies by agreement. In fact, the reference to "joint exercise of powers, or similar devices" in Section 15051(d) contemplates that more than one agency could act as joint lead agencies.

In the instant case, the County of Santa Clara, Cities of Morgan Hill, Gilroy and San Jose, the Santa Clara Valley Water District, and the Santa Clara Valley Transportation Authority each have a substantial claim to be lead agency. Each of these public agencies has public projects that require Plan permit coverage for federal and state wildlife agencies and they have all worked together cooperatively on a Plan that would conserve habitat over much of Santa Clara County encompassing the jurisdictional boundaries of each of the partner agencies.

The HCP/NCCP and related environmental documents are prepared by the Local Partners cooperatively in accordance with two agreements. The September 9, 2003 Memorandum of Understanding among the City of San Jose, the County of Santa Clara, the Santa Clara Valley Water District, and the Santa Clara Valley Transportation Authority authorizes such collective cooperation on the HCCP/NCCP and related environmental documents. In late 2005, the Cities of Gilroy and Morgan Hill were added to this joint effort by agreement.

Also, one of the purposes of the September 2005 Planning Agreement by and among the County of Santa Clara, the Santa Clara Valley Water District, the City of Gilroy, the City of Morgan Hill, the City of San Jose, the Santa Clara Valley Transportation Authority, the California Department of Fish and Game, and the United States Fish and Wildlife Service was to "ensure coordination among the Local Agencies and Wildlife Agencies" with respect to preparation of the HCP/NCCP. The Planning Agreement also includes as a planning goal in Section 2.3 to "[p]rovide a comprehensive means to coordinate and standardize mitigation and compensation requirements of FESA, CEQA, NEPA, NCCPA and other applicable laws and regulations relating to biological and natural resources within the Planning area so that public and private actions will be governed equally and consistently, thus reducing delays, expenses and regulatory duplication." Section 2.3.2 of the Planning Agreement explains that "[a] successful Plan will also provide a method for less expensive and more efficient environmental review process for NEPA and CEQA."

All of the local public agencies who are drafting the HCP/NCCP and related environmental documents are doing so through this cooperative effort and are referred to in Plan documents as "the Local Partners." (See, e.g., Planning Agreement, §§ 1.10, 5.1.6.1, 5.1.6.2.) The Local Partners have hired consultants together, jointly financed Plan preparation, worked closely with the U.S Fish and Wildlife Service and the California

Department of Fish and Game in the drafting of the Plan to ensure it complies with regulatory requirements (the Wildlife Service is the lead agency for NEPA purposes, while Fish and Game is a responsible agency under CEQA), and have distributed and held public meetings together to solicit comments on the Plan and related environmental documents. The desired end result of this effort is that the Local Partners will receive endangered species permits from both Wildlife Agencies for activities and projects they conduct and for private projects under their jurisdiction. In fact, the Plan would not be effective without the participation and agreement of all of the Local Partners. If any of the Local Partners/Lead Agencies does not approve the HCP/NCCP, the remaining agencies would need to consider, in consultation with the Wildlife Agencies, whether the Plan can be revised and implemented with the remaining agencies.

The HCP/NCCP provides a layer of regulation and permits that require adherence to and administration by each respective agency as well as by a joint powers agency that is contemplated to be formed by the Local Partners. So, all of these factors, including the sheer scope of the project, inform us that each of the Local Partners has a substantial claim to be a lead agency and that the joint lead agency method is more appropriate for this project than the designation of a single lead agency.

Nor could any of the Local Partners make a Lead Agency determination based upon the criterion in CEQA Guidelines section 15051(c) designating the agency that will be first in time to make its determination to certify the EIR/EIS and adopt the Plan as the sole Lead Agency. None of the Local Partners could determine which Local Partner would be the first to certify and approve. There is nothing in the law requiring one Local Partner to act before any of the other Local Partners. Rather, the timing of the environmental and Plan approvals is primarily a function of scheduling public hearings on each of the Local Partners' respective Board and Council agendas.

Not only is the joint lead agency approach authorized in the CEQA Guidelines where each agency has a "substantial claim to be lead agency," this approach is also authorized under NEPA. 40 U.S.C. §1501.5(b) authorizes federal, state, or local agencies to act as joint lead agencies, along with at least one federal agency, in the preparation of an EIS. California law uses the term "substantial claim to be lead agency" to determine whether there should be one or multiple lead agencies. Federal law looks at similar factors -- to determine lead agency or multiple lead agency status, including:

- magnitude of involvement
- approval or disapproval authority
- expertise on environmental effects
- duration of involvement
- sequence of involvement (40 CFR § 1501.5(c).)

40 U.S.C. § 1506.2 also strongly urges state and local agencies and the relevant federal agencies to cooperate fully with each other. This cooperation involves joint research and studies, planning activities, public hearings, environmental assessments and the joint preparation of environmental clearance documents so that one document will satisfy both state and federal laws. Here, the Wildlife Agencies have participated in all of these

processes and the EIR/EIS is designed for approval by the U.S. Fish and Wildlife Service as federal lead agency as well. The EIR/EIS lists all of the Local Partners as joint lead agencies, lists the NEPA lead agency as the U.S. Fish and Wildlife Service, and the CEQA Responsible Agency as the California Department of Fish and Game.

The joint lead agency approach is authorized by both federal and state law. YCS claims that there must be only one lead agency and that all other Local Partners must be designated as responsible agencies. However, it became clear to the Local Partners early in the planning process that because of the scope of the Plan and the necessity for close cooperation among the Local Partners, it was not advisable to attempt to designate a single lead agency. Pursuant to CEQA, lead agencies are responsible for considering the effects, both individual and collective, of all activities involved in a project. In contrast, responsible agencies only consider the effects of those activities involved in a project which it is required by law to carry out or approve. California Public Resources Code section 21002(d). Here, each Local Partner has an integral role in Plan preparation, evaluation, and adoption.

YCS attempts to describe speculative harm arising from the joint lead agency approach. However, it is clear that YCS has not suffered any such harm. No one has been excluded from the CEQA/NEPA process through the joint lead agency approach. Chapter 22 of the EIR/EIS lists all document recipients, including responsible and trustee agencies. Section 1.6 of the EIR/EIS describes public outreach through a number of various mechanisms as well as public and agency involvement in the preparation of the EIR/EIS.

Rather than suffering any harm, YCS (and numerous others) have made voluminous comments of the EIR/EIS which have been considered and responded to by the Local Partners. The Local Partners have listed both federal and state contacts for the submission of comments on the EIR/EIS (the U.S Fish and Wildlife Service serves this purpose, along with the local Program Manager for CEQA purposes).

Additionally, with the EIR certification process of each Local Partner, interested parties and the public actually have several opportunities to comment on the document through the adoption process for each of these jurisdictions. For example, a comment to any one Local Partner is a comment to the Joint Lead Agency. Rather than reducing the opportunity for public comment, the joint lead agency approach here results in much more opportunity for public comment.

In sum, the joint lead agency approach is authorized by both state and federal law. The Local Partners have complied with all requirements to engage in such an approach. No interested party has been harmed by this joint lead agency approach. Joint lead agency status has provided more opportunity for effective public comment than would have occurred had a single lead agency been designated by the Local Partners.

B. NOTICE OF PREPARATION

YCS asserts that the Notice of Preparation (NOP) was not properly sent to the State Clearinghouse and thus the state responsible and trustee agencies did not have the

opportunity to comment on and suggest additional project alternatives for the HCP/NCCP project.

The courts have held that noncompliance with CEQA's notice requirements is not per se reversible and that prejudice must be shown. *Schenck v. County of Sonoma* (2011) 198 Cal. App.4th 949, 959 (holding that the County's failure to give notice to the air district of its intent to adopt a revised mitigated negative declaration was not prejudicial); see also *Oceanside Marina Towers Association v. Oceanside Community Development Commission* (1986) 187 Cal. App.3d 735, 740-742 (ruling that the City's Notice of Determination was effective to start the running of statute of limitations even though the notice was not filed by the Commission, which was designated as lead agency). The court in *Schenck* noted that an error is prejudicial only when the failure to comply with the law subverts the purposes of CEQA by omitting material necessary to informed decisionmaking and public participation. *Schenck*, 198 Cal.App.4th at 959-960.

In this case, in order to include the responsible/trustee agencies' and the general public's input in the planning and development of the HCP/NCCP, the Local Partners engaged in extensive public outreach efforts including the CEQA scoping process. During the scoping process, the NOP was published in several newspapers; posted on the project website (www.scv-habitatplan.org) and the Sacramento U.S. Fish and Wildlife Office website; and distributed to a mailing list of 543 recipients in and around Santa Clara County. The mailing list included participants from past planning projects in the area, from ongoing stakeholder meetings, and from local and state agencies. Similarly, in December 2010, when the local partners released the Draft EIR/EIS for public review, it published a Notice of Availability in the Federal Register and sent a Notice of Compliance to the Office of Planning and Research (OPR) recommending to the OPR a list of recipients for the Draft EIR/EIS.

In addition, throughout the plan development and environmental review process, the project website was regularly updated to keep the public apprised of the plan development and environmental review process. Elected officials representing each Local Partner met regularly to discuss policy issues relating to the plan, and these meetings were noticed and open to the public. Similarly, a stakeholder group which included conservation organizations, business and development interests, landowners, agricultural interests, open-space land-management organizations, and the general public convened monthly to review plan components and policies and provide input to the Local Partners.

It is important to note that the state responsible and trustee agency most relevant in this case, the California Department of Fish and Game, has been involved from the beginning and provided input along the way before the Local Partners finalized the HCP/NCCP and the EIR/EIS. More importantly, the public and state and local agencies that might have an interest in or jurisdiction over the project were not deprived of the opportunity to raise issues and provide input in the process. Indeed, during the scoping period, a total of 126 individuals or groups, including Cal Fire, a state agency, submitted 25 letters.³ Further, during the HCP/NCCP and Draft EIR/EIS public review process, interested parties (agencies including

³ The written comments received during the scoping period are located in Appendix D of the Santa Clara Valley Habitat Plan Environmental Impact Report/Environmental Impact Statement Scoping Report, available on the project website (www.scv-habitatplan.org).

USEPA and the Central Coast Regional Water Quality Control Board, other stakeholders, and the general public) submitted a total of 794 comments in 53 letters or other written communications.⁴ Based on the above, there is no subversion of the purposes of CEQA and the error is not prejudicial.

In any event, as described below, a reasonable range of alternatives were analyzed and discussed in the Final EIR.

C. PROJECT DESCRIPTION

YCS asserts that the project description has changed since the Draft EIR/EIS was published, and that this is not allowed by CEQA.

The principle that a project description should be consistent throughout an EIR is not intended to freeze a project in place and prevent any modifications to the project as it progresses through the review and approval process. See, e.g., *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 284-285; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 533; *Western Placer Citizens for an Agricultural and Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 902-903; *Dusek v. Redevelopment Agency* (1985) 173 Cal.App.3d 1029, 1041; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199-200. The fact that the project that is ultimately approved may differ from what was analyzed in the draft EIR is expressly recognized by the CEQA Guidelines:

A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification. As used in this section, the term "information" can include changes in the project or environmental setting as well as additional data or other information. New information added to an EIR is not "significant" unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement.

CEQA Guidelines, § 15088.5(a) (emphasis added).

As the court acknowledged in *Dusek*: "CEQA does not handcuff decisionmakers in the manner proposed by the [plaintiffs]. The action approved need not be a blanket approval of the entire project initially described in the EIR. If that were the case, the informational value of the document would be sacrificed. Decisionmakers should have the flexibility to implement that portion of a project which satisfies their environmental concerns." 173 Cal.App.3d at p. 1041.

In *Sierra Club*, the EIR evaluated the annexation and development of approximately 6,800 acres. The city acknowledged in the draft EIR that the exact boundaries had not yet

⁴ Comments received on the public draft HCP/NCCP and EIR/EIS are contained in Volume 2 of the Santa Clara Valley Habitat Plan Final Environmental Impact Report/Environmental Impact Statement.

been determined. The plaintiff claimed this rendered the EIR deficient. The court rejected the plaintiff's argument, which it characterized as an attack on the EIR's project description, for the following reasons:

Since the SEIR/EIR reviews the entire project area, the mere fact defendant may eventually annex only a portion of it does not render the approval an abuse of its discretion under CEQA. 'The action approved need not be a blanket approval of the entire project initially described in the EIR. If that were the case, the informational value of the document would be sacrificed. Decisionmakers should have the flexibility to implement that portion of a project which satisfies their environmental concerns.' 163 Cal.App.4th at p. 533, *quoting Dusek*.

The DEIR/EIS prepared for the Santa Clara Valley Habitat Plan described natural land preservation requirements totaling 45,000 acres and additional requirements for restoring, enhancing and managing an additional 13,000 acres of existing open space and park lands consistent with the Plan. This project description was based on impacts to what was originally calculated to be approximately 9,000 acres of natural lands:

Based on input from the public that the scope of the Plan as proposed in the DEIR/EIS was too large and costly, further analysis of the amount of covered activities expected to occur during the 50-year period term was undertaken. The result was a reduction of the amount of covered activities expected to occur. More scrutiny was also given to the estimates of actual impacts to natural lands that would result from the covered activities. For example, impacts to lands that were considered to have no or very little habitat value were eliminated. Thus, the reduced-scale Plan estimates that impacts to natural lands over the 50-year permit term will be approximately 6,000 acres. Consequently, preservation requirements were reduced to 33,629 acres, with similar reductions in restoration, enhancement, and management requirements as described in the DEIR/EIS. The reduced-scale project is clearly described in section 2.4 of the FEIR/EIS.⁵

Implementing the reduced-scale project would not result in greater impacts to species and their habitats as a result of the reductions in estimated levels of covered activities and impacts associated with those activities. The reduced-scale project would have fewer environmental impacts than the original project because the Reserve System would be smaller. Overall benefits to species and their habitats from the Project would remain similar because the mitigation remains proportionate to the estimated impacts. Projects excluded from coverage in the reduced-scale Plan because they are expected to affect lands that have little or no habitat value would still be subject to the normal prohibitions on incidental take and additional protections provided by state and federal laws and regulations.

⁵ Contrary to YCS' assertions, the reduced-scale Plan is not the same as the "Reduced Take" alternative. The Reduced Take alternative called for obtaining take coverage for and mitigating only a portion of the impacts assumed to occur from full implementation of the Local Partners' adopted General Plans and infrastructure projects. The reduced-scale Plan did not reduce the scope of the "covered activities," but rather was the result of revised assumptions about the amount of covered activities and take that would occur over the 50-year permit term. These revised assumptions also triggered revisions to the description and analysis of the "No Project Alternative" in the FEIR/EIS.

This is not a situation where a shifting project description obfuscated the true nature of the project and denied the public the right to understand and comment on the project. To the contrary, the Plan was revised in response to concerns expressed during the public comment period. This reshaping of a project in response to public comment is precisely what CEQA envisions. See, e.g., *Western Placer Citizens*, 144 Cal.App.4th at pp. 905-906.

D. "NO PROJECT" BASELINE

Although the CEQA "baseline" is normally the existing environment when the Notice of Preparation is issued (Guidelines § 15126.2), there is no uniform, inflexible rule regarding establishment of this baseline, and a lead agency has discretion to decide how the existing physical conditions without the project can most realistically be measured. See *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 328. There the court explained:

"Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations for support by substantial evidence. See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412."

The primary purpose of CEQA is to provide information to the public and decision-makers regarding the environmental consequences of a proposed course of action as well as alternatives to that proposed course of action that might mitigate or avoid its significant avoidable impacts. See *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247.

In this case, the consequence of the project is not to *cause* development to occur; rather it is to alter the mechanism by which certain types of permits are issued for that development, and to create the reserve system as a different form of mitigation for biological impacts of the development. Thus, the EIR analyzes in great detail in its consideration of the No Action Alternative the expected impacts of development that would occur anyway in the absence of the adoption of the HCP (for example, see land cover changes in EIR/EIS Tables 5-5 through 5-22 and Table 6-2). This EIR/EIS is not for the purpose of analyzing the environmental effects of such development, which generally speaking is and will be analyzed in relevant general plans, but rather to analyze the impact of the implementation of the HCP and NCCP.

This approach is explained in Section 6.4 of the EIR/EIS as follows:

"Under the Proposed Action, the Covered Activities would be implemented, including the Habitat Plan conservation strategy. With regard to land use, the effects of implementing the Covered Activities associated with urban development, instream capital projects, rural capital projects, and rural development would be the same as described above for the No Action Alternative (i.e., Table 6-2). Instead of habitat mitigation on a project-by-project

basis, however, the Reserve System conservation strategy would result in acquisition of at least 33,205 acres, enhancement of up to 13,291 acres of existing open space lands, and protection of 100 stream miles. ... More acreage would be dedicated to habitat conservation under the Proposed Action than under the No Action Alternative because the Reserve System commitment in the Habitat Plan is expected to be greater than mitigation requirements based on impacts to listed species.”

As the comment letter notes, courts also allow future conditions to be used as a baseline where environmental conditions will change over the lengthy period of time of project implementation, as is described in the EIR/EIS (see “typical activities” described in EIR/EIS Section 2.3.1). See *Pfeiffer v. City of Sunnyvale* (2011) 200 Cal.App.4th 1552. Those existing and future conditions are described throughout the impact analysis of the No Action Alternative.

The proposed action is the issuance of an incidental take permit and implementation of a Habitat Plan to mitigate impacts of private development and private infrastructure projects on covered species and to conserve natural communities. Thus, in this case, the EIR/EIS properly analyzes the changes caused by the new and different mitigation conditions that will be applied to development over the 50-year permit term. It does not independently authorize such development, but to the extent the creation of the reserve system itself causes environmental impacts, those are analyzed. See for example, EIR/EIS Section 14.4.1 (traffic impacts and mitigation for construction activities for stream restoration); Section 15.4.1 (noise impacts and mitigation for construction activities).

In summary, the criticism of the commenter with regard to the choice of baseline is misplaced. The methodology used in the EIR/EIS to analyze the impacts of the project, including the choice of baseline, properly results in an analysis that is informative and will be the most helpful to the public and the decision-makers. This use of this methodology is sound and is supported by substantial evidence in the EIR/EIS itself.

E. REASONABLE RANGE OF ALTERNATIVES

YCS claims that the EIR failed to identify and analyze a reasonable range of alternatives.

An EIR must “[d]escribe a range of reasonable alternatives to the project, or to the location of the project, which could feasibly attain the basic objectives of the project, and evaluate the comparative merits of the alternatives.” CEQA Guidelines, § 15126(d). The nature and scope of an alternatives analysis under CEQA is governed by a “rule of reason.” CEQA Guidelines, § 15126.6(f). What is reasonable must be determined based on the particular facts of the case and in light of the statutory purpose. *Citizens of Goleta Valley v. Board of Supervisors* (“*Goleta II*”) (1990) 52 Cal.3d 553, 566; *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 487. The California Supreme Court articulated the following reasonableness test in *Goleta II*:

[A]n EIR for any project subject to CEQA review must consider a reasonable range of alternatives to the project, or to the location of the project, which: (1) offer substantial environmental advantages over the project proposal (Pub. Resources Code, § 21002); and (2) may be “feasibly accomplished in a successful manner” considering the economic, environmental, social and technological factors involved. (Pub. Resources Code, § 21061.1; Guidelines, § 15364; *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167.) *Goleta II*, 52 Cal.3d at p. 566.

This test embodies the fundamental concept that the purpose of an alternatives analysis is to analyze project alternatives that minimize impacts to the environment. Where, as here, the purpose of the project is to protect natural resources and provide an overall environmental benefit, what constitutes a reasonable range of alternatives may be more limited. For example, in *Marin Municipal Water Dist. v. KG Land California Corp.* (1991) 235 Cal.App.3d 1652, the proposed project was a moratorium on new service connections in response to water supply shortages. The draft EIR discussed two possible alternatives: the “no project” alternative, and a form of mandatory conservation. The court found that this constituted a reasonable range of alternatives under the circumstances. *Id.* at pp. 1665-1666.

In the case of the Santa Clara Valley Habitat Plan, the project objectives are as follows:

- Provide a streamlined permitting process while ensuring improved conservation;
- Provide a comprehensive means to coordinate and standardize mitigation and compensation requirements of various state and federal laws and regulations related to biological and natural resources within the Study Area; and
- Assemble and maintain a reserve system within the Study Area that focuses on preservation and enhancement actions that provide for the protection of species, natural communities and ecosystems on a landscape level. (Draft EIR, p. 1-5.)

The relevant question was whether there were other feasible ways of accomplishing the project objectives that would “offer substantial environmental advantages over the project proposal.” *Goleta II*, 52 Cal.3d at p. 566 (emphasis added). “Absolute perfection is not required; what is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned.” *Foundation for San Francisco’s Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 910 (emphasis added).

All of the potentially significant environmental impacts associated with the Habitat Plan relate to the acquisition and management of the Reserve System and habitat restoration projects (e.g., noise and traffic impacts from construction activities). The size of the Reserve System for the proposed project evaluated in the EIR was 56,000-58,000 acres. Alternative A was a reduced-scale alternative that included a shorter permit term (30 vs. 50 years) and a commensurate reduction in Reserve System size (approximately 37,000 acres) and related impacts. The “No Project Alternative” analyzed the “business as usual” approach, whereby permitting would continue to occur on a project-by-project basis over the permit term.

The reduced-scale Plan being proposed for adoption includes a Reserve System of approximately 47,000 acres, roughly mid-way between the Plan as originally proposed and Alternative A. Therefore, the alternatives evaluated in the DEIR/EIS provided the public and agency decisionmakers with sufficient information about the boundaries of impacts associated with different Reserve System sizes. CEQA case law is clear that an EIR need not analyze multiple variations of the alternatives that it considers (e.g., multiple reduced-scale alternatives). See, e.g., *Mira Mar Mobile Community*, *supra*, 119 Cal.App.4th at p. 490.

The fact that the Habitat Plan ultimately proposed for adoption was modified to a different type of reduced-scale Plan in reaction to the public comment process is fully consistent with the goals of CEQA. "What is required is that the EIR give reasonable consideration to alternatives in light of the nature of the project and that those alternatives be described in sufficient detail to serve the informational purpose of the report to the governmental body which will act and the public which will respond to the action through the political process." *City of Rancho Palos Verdes v. City Council* (1976) 59 Cal.App.3d 869, 892; see also CEQA Guidelines, § 15126.6(f) (purpose of providing reasonable range of alternatives is to "foster meaningful public participation and informed decision making").

E. ENVIRONMENTALLY SUPERIOR ALTERNATIVE

YCS faults the conclusion in the FEIR/EIS that the reduced-scale Habitat Plan being proposed for adoption is the environmentally superior alternative. YCS posits that, had the reduced-scale Plan been analyzed in the DEIR/EIS, the original plan may have been deemed the environmentally superior alternative.

The Habitat Plan was reduced in scale because, based on public and decisionmaker comments, more scrutiny was given to the estimates of covered activities and their associated impacts on covered species over the 50-year permit term. Based on this additional analysis, the estimated impacts and the concomitant need for "take" coverage were reduced. Thus, the assumptions underlying the originally-proposed Habitat Plan were no longer valid.

F. AGRICULTURAL RESOURCES

YCS states that the Mitigation Monitoring and Reporting Program (MMRP) for the Final Program ("FPEIR") for the San Jose 2040 General Plan identifies the conversion of agricultural land to other uses as a significant and unavoidable impact of the General Plan. YCS states that the General Plan MMRP adopted by San Jose is inconsistent with the EIR/EIS for the HCP/NCCP because the HCP/NCCP provides that the conversion of agricultural land for habitat conservation purposes will be mitigated to a less than significant impact through the purchase of agricultural land or conservation easements at a ratio of 1:1.

YCS's arguments are misguided. The impacts and mitigation analyses for the San Jose 2040 General Plan is for a fundamentally different project than the HCP/NCCP and is not required to be consistent. YCS makes an 'apples to oranges' comparison of the two

environmental documents. The San Jose 2040 General Plan FPEIR MMRP is tailored to the General Plan project, which governs the development of a variety of land uses in San Jose, with a primary emphasis on new development. Conversely, the primary purpose of the HCP/NCCP is the conservation and management of endangered wildlife and plant species. In fact, the HCP/NCP only contemplates minor conversion of agricultural land to habitat conservation lands when large tracts of land will be purchased that may include small amounts of agricultural land. The purposes of the General Plan and the HCP/NCCP are fundamentally different. Additionally, the timing of both documents did not allow for the incorporation of the HCP/NCCP into the San Jose General Plan because absolute reliance on the HCP/NCCP measures would have been speculative.

However, there are numerous sections in the San Jose General Plan that contemplate potential adoption of the HCP/NCCP, but without reliance on HCP/NCCP adoption. The same is true for the MMRP.

The MMRP adopted by the San Jose City Council on November 1, 2011 with Resolution No. 76041 includes a summary of the significant impacts on agricultural land caused by the San Jose 2040 General Plan. Section I, entitled "Land Use," recognizes that the proposed General Plan will allow new development on several sites designated as Prime Farmland. Although lands within the San Jose's Urban Growth Boundary ("UGB") have been planned and designated for urban uses for a number of years, loss of the remaining Prime Farmland in these areas would be a significant impact.

Resolution No. 76041 states that General Plan Policy LU-12.3 requires the protection of agricultural lands not planned for urbanization in the timeframe of the 2040 General Plan, through the use of Williamson Act contracts, agricultural conservation easements, and transfers of development rights. The methods discussed in Section 3.1.4.1 of the FPEIR provide options for the implementation of this Policy. Resolution No. 76041 further states, "As an alternative to providing individual agricultural easements, the City may also consider participation in an appropriate agricultural mitigation program established for the purpose of mitigating or avoiding loss of at-risk agricultural land."

This General Plan mitigation is not inconsistent in any prohibited manner with the mitigation to a level of less than significant for agricultural land in the HCP/NCCP EIR/EIS. The MMRP for the San Jose General Plan project identifies that there may be other mitigation programs that are appropriate for mitigation of the loss of agricultural land. Additionally, the focus of the San Jose 2040 General Plan FPEIR – unlike the HCP/NCCP EIR/EIS -- is the impact from new development on agricultural land. Again, the HCP/NCP only contemplates minor conversion of agricultural land to habitat conservation lands when large tracts of land will be purchased that may include small amounts of agricultural land, and then requires the purchase of agricultural land or easements as mitigation.

The San Jose 2040 General Plan MMRP makes an important distinction between agricultural lands that are within the San Jose Urban Growth Boundary and those that lie outside that boundary, and between lands that are currently designated and zoned for new development and those that are not.

The relevant finding (A.(3)) in Resolution No. 76041 states, "Most of the existing agricultural land outside the UGB and inside the City's Sphere of Influence will not be approved for urban development by the City of San José, consistent with policies in the 2040 General Plan. Agricultural lands inside the UGB that are and have been designated for urban uses will likely be developed with urban uses during the lifetime of this 2040 General Plan. The impact to prime farmland *inside the UGB* will therefore be significant and unavoidable." (Emphasis added.) Because of the significant amount of land that will be required for the habitat reserve under the HCP/NCCP, it is extremely doubtful that any land within the highly populated San Jose Urban Growth Boundary is appropriate for that use. So, the habitat conservation program in the HCP/NCCP with the replacement of any affected agricultural land is appropriately deemed a less than significant impact and is not incompatible with the finding in the San Jose General Plan FPEIR MMRP regarding the impact to the particular prime farmland that lies inside the City's urban growth boundary.

Section A(4) of Resolution No. 76041 includes the following facts in support of the Finding above: "Any property inside the UGB on which development is proposed would be annexed into the City and will be subject to the City's design review process and additional CEQA analysis. Development outside the UGB will be required to adhere to the policy requirements listed above that minimize the developed and graded footprints of development proposed and avoids adverse effects on adjacent agricultural lands. Again, the San Jose 2040 General Plan MMRP contemplates new development and not the use of lands for habitat conservation.

The same is true for the MMRP's treatment of cumulative impacts. Section IX of the MMRP (A(2)) states that "[w]hile conservation easements or strengthened zoning protections for agriculture could be used to limit future loss of Prime Farmland in other parts of the County, no feasible mitigation measures are available to offset the cumulative loss of agricultural land, especially prime agricultural land, within areas previously planned and designated for development within the City's UGB or areas of the County already planned and approved for development." (Emphases added.)

It is also important to note that the HCP/NCCP recognizes grazing as a form of mitigation for the intrusion of invasive plant species in Bay Checkerspot butterfly habitat. The San Jose 2040 General Plan includes grazing as an activity that is defined as an allowed use within the agricultural land use designation. So, for example, where areas of San Jose – serpentine soils that are habitat for Bay Checkerspot butterfly -- are required to maintain that habitat through a conservation easement or through purchase of the land for habitat conservation, one of the methods of managing the habitat is to allow grazing to rid the habitat of invasive plant species. Such use of the land is consistent with the agricultural designation in the San Jose 2040 General Plan.

G. RECREATIONAL IMPACTS

Appendix G of the CEQA Guidelines requires that an EIR analyze impacts on recreation in evaluating whether the project may have a significant physical effect on the environment. YCS asserts that the project EIR inadequately analyzed recreation impacts of

the project by overstating the Plan's benefits to recreation, but this assertion is based upon a misreading of the Plan and EIR/EIS.

The EIR/EIS concluded, appropriately, that implementation of the Habitat Plan would have a net recreational benefit because it would result in public access to low intensity recreation on new public lands acquired for and enrolled in the Plan's Reserve System. This conclusion is based on lands acquired under the Plan and owned by a public agency, including the Implementing Entity, (see Section 9.4.1 of the Final EIR) and does not assume any change in public use of private lands that are enrolled in the Reserve via easement rather than fee acquisition. Thus, the multiple references in YCS's letter to the total new acreage likely to be brought into the Reserve (approximately 33,025 acres) are misplaced. The Plan for cost model purposes assumed that approximately 50% of the new land acquisitions would be in fee, and as to those lands, new opportunities for public access and low intensity recreation would be created.

County Parks is anticipated to enroll approximately 6,000 acres of newly-acquired Parkland in the Reserve through recordation of conservation easements. Conversion of those lands from private to public park use once County Parks has acquired and planned them will increase recreational opportunities within the Plan area (see Section 9.4.2 of the Habitat Plan), although if the lands are acquired using Park Charter funds, they would have been opened up to such recreational uses following acquisition and planning by the County with or without the Habitat Plan. Recreational uses on such lands must be consistent with the Plan's conservation strategy, but are nonetheless significant activities enjoyed by many when using regional parks such as those currently provided by the County: pedestrian use (walking, hiking, running), dogs on leash, backpacking, non-motorized bicycle riding on designated trails, horseback riding, wildlife observation and photography, environmental education and interpretation on designated trails.

The comment letter also asserts that the EIR/EIS inadequately analyzed the impacts of enrollment of existing County parklands on recreational opportunities. The comment does not indicate how such enrollment would affect the significance criteria set forth in the EIR/EIS for recreational impacts (see EIR/EIS Section 9.2). Those significance criteria, which are consistent with the criteria described in Appendix G of the State CEQA Guidelines, are as follows: (a) would the project increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial physical deterioration of the facility would occur or be accelerated?; (b) does the project include recreational facilities which might have an adverse physical effect on the environment?; and (c) would the project decrease access to existing recreational facilities?

The Habitat Plan (Section 6.4.6) reflects that the existing open space lands or portions of those lands identified for possible inclusion in the Reserve System were determined to support recreation compatible with the Conservation Strategy. Existing recreational uses on public lands incorporated into the Reserve System will continue (Habitat Plan, Section 6.4.6) until a reserve management plan and associated recreational plan are completed; lands will not be enrolled in the Reserve if they contain existing facilities that are planned for continued use, if those facilities are incompatible with the Reserve System.

In short, the Habitat Plan clearly provides that low-intensity recreational uses will continue on lands enrolled in the Reserve, similar to how the County would typically consider low-impact or restricted recreational uses in habitat-rich areas in County parklands, and the County would not propose enrollment of any portions of parklands on which more intensive uses are possible and desired. The Habitat Plan's Conservation Strategy states that the provision of public access and recreational uses in the Reserve System be planned and integrated with the site-specific conservation actions specified in the reserve management plans, thereby allowing recreational uses to be maximized and minimizing impacts to Covered Species. Thus the EIR/EIS appropriately concluded that no adverse physical impacts on the environment would result due to effects on recreation caused by Habitat Plan implementation.

H. HERBICIDES/PESTICIDES

The EIR/EIS acknowledges that some use of pesticides and herbicides could occur as part of managing the Habitat Plan reserve. The comment letter suggests that there is evidence that use of these chemicals would increase once lands are enrolled in the Reserve, and therefore could lead to adverse environmental consequences. The Habitat Plan itself makes clear that in fact use of such chemicals will be subject to new limitations under the Plan, and supports the EIR/EIS conclusion of no significant impact.

As stated in Chapter 2 of the Plan, pesticide use is permitted under the Plan only to achieve biological goals and objectives (e.g., invasive non-native plant or invasive non-native animal control), in accordance with label instructions, and in compliance with state and local laws. Pesticide use is covered only under the NCCP Act permit, not the ESA permit. Implementation of integrated pest management programs established by the local jurisdictions is only a covered activity if pesticides are used to achieve exotic plant or exotic animal control. Any pesticide use must also comply with all existing injunctions related to the use of pesticides within critical habitat areas for California red-legged frog, California tiger salamander, and Bay checkerspot butterfly.

The Habitat Plan proposes a variety of management techniques (e.g. prescribed burn, manual weed removal, biological control agents, livestock grazing, etc.) where herbicide use may be considered for instances where no other eradication techniques are found to be effective. The Plan also notes that the County's Integrated Pest Management ordinance restricts use of pesticides and herbicides on County-owned land. Chapter 6 of the Plan details conditions that will apply to projects in the Plan area to reduce the need for use of such chemicals (see, for example, Conditions 7 and 8). In light of these limitations, there is no evidence that use of pesticides and herbicides if the Plan is adopted would result in a significant adverse impact compared to baseline conditions.

I. CULTURAL RESOURCES

The comment letter states that the Final EIR/EIS does not accurately identify all required mitigation measures for preventing impacts to cultural resources through implementation of the Habitat Plan.

The EIR/EIS for the Habitat Plan discloses that habitat restoration and enhancement activities that will occur over the 50-year permit term may impact cultural resources, notably the exposure, damage, or crushing of surface and buried artifacts during construction. In order to address this potential impact, the EIR/EIS provides programmatic mitigation as specified under Mitigation Measure 13-1, requiring that a Cultural Resources Management Plan be prepared by the Implementing Entity. This Cultural Resources Management Plan will more specifically identify areas with potential historical resources that could be affected by specific restoration activities, and provide performance measures to prevent potential cultural resource impacts. The Cultural Resources Management Plan would be based on generally accepted practices for impacts to cultural resources, including those expressed in the CEQA Guidelines. This would include avoidance where feasible as recognized in CEQA Guidelines section 15126.4(b)(3).

The fact that Mitigation Measure 13-1 identifies certain methods of mitigating cultural resources impacts, such as data recovery and curation, does not mean the first priority would not be to attempt to avoid the resources, nor does it limit the types of methods that can be used to mitigate the impacts. Contrary to YCS' assertion, it is possible to mitigate impacts to historic resources to less-than-significant levels even where avoidance is not feasible. See CEQA Guidelines section 15126.4(b)(3)(C), (D).