



EAST CONTRA
COSTA COUNTY
HABITAT
CONSERVANCY

City of Brentwood

City of Clayton

City of Oakley

City of Pittsburg

Contra Costa County

GOVERNING BOARD

REGULAR MEETING

Wednesday, June 18, 2008

5:30 pm

City of Pittsburg City Hall
Council Chambers, 3rd Floor
65 Civic Center Drive, Pittsburg, CA

AGENDA

- 1) **Introductions**
- 2) **Public Comment** on items that are not on the agenda (public comment on items on the agenda will be taken with each agenda item).
- 3) **Consider approving the Meeting Record from the East Contra Costa County Habitat Conservancy (“Conservancy”) Governing Board Meeting of March 19, 2008**
- 4) **Consider accepting update on Conservancy staff support and general update from staff on implementation of the East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan.**
- 5) **Consider authorizing staff to execute a Participating Special Entity agreement with Ameresco Keller Canyon LLC to extend take coverage to the proposed landfill gas power plant (0.6 acres of temporary impact to grassland land cover).**
- 6) **Consider approving map providing guidance on the application of the stream setback provisions to streams within the inventory area.**
- 7) **Consider update and provide guidance and direction to staff on pursuit of grant funding.**
- 8) **Consider update on wetland restoration/creation projects planned for this year. Consider timeline and steps necessary to authorize the projects to move forward. Consider appropriate direction and authorization to staff.**
- 9) **Consider scheduling a special meeting of the Governing Board in July or August to address time sensitive items prior to the regular meeting on September 17, 2008.**
- 10) **Adjourn.**

If you have questions about this agenda or desire additional meeting materials, you may contact John Kopchik of the Contra Costa County Community Development Department at 925-335-1227.

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

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**EAST CONTRA COSTA COUNTY
HABITAT CONSERVANCY**

DATE: June 18, 2008
TO: Governing Board
FROM: Conservancy Staff
SUBJECT: Meeting Record for March 19, 2008 Governing Board Meeting

RECOMMENDATION

APPROVE approving the Meeting Record from the Conservancy Governing Board Meeting of March 19, 2008.

DISCUSSION

Please find the draft meeting record attached.

CONTINUED ON ATTACHMENT: X YES
ACTION OF BOARD ON _____ APPROVED AS RECOMMENDED _____
OTHER _____

VOTE OF BOARD MEMBERS

UNANIMOUS
AYES: _____
NOES: _____
ABSENT: _____
ABSTAIN: _____

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

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

BY: _____, DEPUTY

Draft Meeting Record

East Contra Costa County Habitat Conservancy
Governing Board Meeting
Wednesday, March 19, 2008

1) Introductions.

Governing Board members in attendance were:

Will Casey	Mayor, City of Pittsburg
Bruce Connelley	Mayor, City of Oakley
Greg Manning	Mayor, City of Clayton (Conservancy Chair)
Eric Stonebarger	Councilman, City of Brentwood

Other Attendees:

Liam Davis	California Department of Fish and Game
David Fraser	Office of CCC Supervisor Federal Glover
Jim Gwerder	Souza Reality and development
Mark Mueller	Contra Costa Water District
Ted Radke	East Bay Regional Park District (Board)
Winston Rhodes	City of Brentwood
Suzanne Gilmore	California Department of Fish and Game

Conservancy Staff members in attendance were:

Abby Fateman	Conservancy Staff
John Kopchik	Conservancy Staff
Chris Beale	Resources Law Group (Conservancy Counsel)

2) Public Comment. None.

3) Consider approving the Meeting Record from the East Contra Costa County Habitat Conservancy (“Conservancy”) Governing Board Meeting of February 6, 2008. Meeting record was approved without amendments.

4) Presentation by Ted Radke, Vice-President of the East Bay Regional Park District Board of Directors, on the proposal to renew Measure AA to continue funding for park acquisition and capital projects. Mr. Radke provided an informational presentation on the East Bay Regional Park District’s proposal to renew Measure AA, originally approved by the voters in 1988. Mr. Radke provided an overview of the Measure and highlighted areas where revenue from the proposed Measure could benefit the goals of the Conservancy. The comment period on the Measure will be open through April and there will be a number of public meetings hosted by EBRPD for input.

Mr. Connelley noticed that the “Bridge to Bridge” trail was missing from the map. He was advised to submit a comment to EBRPD staff. Mr. Kopchik noted that the description of the Clayton Ranch property was missing a mention of the Conservancy as a partner working in the region.

The Board accepted the presentation (4 ayes/0 no/1absent)

5) Accept update from staff on aspects of implementing the East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan (“HCP/NCCP”), including:

- **2008 Fee Adjustments**

Mr. Kopchik provided an update on the fee adjustments that became effective in March 2008. The development fees decreased while the wetland mitigation fees increased. Local agencies have been notified, and the new fees are posted to the Conservancy website. Mr. Connelley asked how the decrease in fees is expected to impact the Conservancy finances. Mr. Kopchik explained that he didn't anticipate the fees adjustments to negatively impact finances. The fees are adjusted based on indices that are related to the costs that the Conservancy will incur – so the fees have changed proportionally to the anticipated costs.

- **Initiation of Public Advisory Committee (PAC).** Mr. Kopchik reported on the highlights of the initial meeting of the PAC.
- **Extension of take coverage to covered activities.** Mr. Kopchik reported on the overall status of the take coverage issuance program and indicated that three applications for take coverage from Participating Special Entities were under development and would be presented to the Board in coming months.
- **Wetland restoration program.** Ms. Fateman reported on the two wetland restoration/creation projects proposed for construction later this year.

6) Closed Session: Conference With Real Property Negotiators

Property: APN#001-011-040 (commonly known as 6100 Armstrong Road, Byron, Contra Costa County)

Agency Negotiators: Dennis M. Barry and John Kopchik

Negotiating Parties: East Contra Costa County Habitat Conservancy, East Bay Regional Park District (EBRPD), Anthony F. Souza and Gloria P. Souza

Under negotiation: price and payment terms

Following the closed session, Chair Manning reported that the Governing Board had authorized the Conservancy Secretary to sign and transmit a letter to EBRPD expressing the Conservancy's interest and intention to participate in EBRPD's acquisition of the above-described property and summarizing the Conservancy's conditions for participating.

7) Adjourn to next Governing Board meeting on June 18, 2008.

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**EAST CONTRA COSTA COUNTY
HABITAT CONSERVANCY**

DATE: June 18, 2008
TO: Governing Board
FROM: Conservancy Staff
SUBJECT: Staffing Update and General Implementation Update

RECOMMENDATION

ACCEPT update on Conservancy staff support and general update from staff on implementation of the East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan.

DISCUSSION

Attached please find a memo from Dennis Barry describing staffing changes. Staff will provide a verbal presentation on the general status of HCP/NCCP implementation.

CONTINUED ON ATTACHMENT: X YES
ACTION OF BOARD ON _____ APPROVED AS RECOMMENDED _____
OTHER _____

VOTE OF BOARD MEMBERS

UNANIMOUS
AYES: _____
NOES: _____
ABSENT: _____
ABSTAIN: _____

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

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

BY: _____, DEPUTY



CONTRA COSTA COUNTY
DEPARTMENT OF CONSERVATION & DEVELOPMENT

651 Pine Street, North Wing - 4th Floor

Martinez, CA 94553-1229

Telephone: (925) 335-1290 **Fax:** (925) 335-1299

TO: **Governing Board, East Contra Costa County Habitat Conservancy**

FROM: **Dennis M. Barry, AICP, Interim Director**
Department of Conservation Development

DATE: **June 12, 2008**

SUBJECT: **Staff Support**

The purpose of this memorandum is to inform you of staffing changes with respect to the East Contra Costa County Habitat Conservancy (“Conservancy”). As you know, the joint exercise of powers agreement forming the Conservancy provides that the Contra Costa County Community Development Department is to provide general staff support to the Conservancy and that the Community Development Director is to serve as the Conservancy Secretary until such time as the Governing Board wishes to secure staff support from another source. On May 8, 2008, the Community Development Department (“CDD”) formally merged with the Building Inspection Department to form the Department of Conservation and Development (“DCD”). I was appointed as the Interim Director of the new Department of Conservation and Development. The ordinance adopted by the Board of Supervisors to effect this change specifies that the new Department will consist of a Community Development Division overseen by a Deputy Director. The ordinance further specifies that the Community Development Division and the Deputy Director overseeing it assume legal responsibility for all assignments of the Community Development Director.

I have appointed Catherine Kutsuris, formerly the Deputy Director of Current Planning for the Community Development Department, as the interim Deputy Director responsible for the Community Development Division within the new Department. Consequently, Ms. Kutsuris is the new Conservancy Secretary. I am sure that you will find her more than capable to serve the Conservancy in this capacity.

Furthermore, as I understand there has been interest expressed at past Governing Board meetings and by the wildlife agencies in having more clarity on who will provide day to day oversight of the Conservancy’s programs, while still acting as Conservancy Secretary, I designated John Kopchik as the Executive Director for the Conservancy. He has essentially been acting in this capacity already but without formal designation. Mr. Kopchik will report to Ms. Kutsuris and to the Conservancy Governing Board and will assume responsibility for the duties assigned to the Executive Director in the HCP/NCCP.

I believe that these staffing changes will continue to afford the Conservancy with professional and capable staff support.

C: Catherine Kutsuris
 John Kopchik

**EAST CONTRA COSTA COUNTY
HABITAT CONSERVANCY**

DATE: June 18, 2008
TO: Governing Board
FROM: Conservancy Staff
SUBJECT: Agreement with Ameresco Keller Canyon LLC to Extend Take Coverage

RECOMMENDATION

AUTHORIZE staff to execute a Participating Special Entity agreement with Ameresco Keller Canyon LLC to extend take coverage to the proposed landfill gas power plant.

DISCUSSION

Ameresco Keller Canyon LLC (Ameresco) is proposing to construct a gas power plant at the Keller Canyon Landfill. The proposed power plant would convert landfill gas (gas formed in the landfill during the decomposition of buried refuse) into electricity. The electricity generated by the plant will be sold and used offsite. The power plant itself will cover 0.2 acres and will be built on an existing asphalt and gravel pad at the north edge of the landfill. The power plant project also requires construction of underground electrical line from the plant to the PG&E power line near the west edge of the landfill and construction of a leach field for the bathroom to be constructed as part of the power plant. A portion of the underground power line will run through annual grassland on the north side of the landfill access road and the remainder will run under the road. The leach field will be built within annual grassland on the east side of power plant. These two appurtenant facilities involve excavation of trenches that will subsequently be filled and reseeded. The underground power line and the leach field will temporarily impact 0.6 acres of annual grassland. A more complete description of the project and a map summarizing key components are provided within Exhibit 1 to the attached agreement.

The proposed project is within habitat suitable for several species covered by the HCP/NCCP. Ameresco has requested take authorization for this project pursuant to the HCP/NCCP from the Conservancy as a Participating Special Entity. Chapter 8.4 of the East Contra Costa County Habitat Conservation / Natural Community Conservation Plan (HCP/NCCP) provides that

CONTINUED ON ATTACHMENT: <input checked="" type="checkbox"/> YES	
ACTION OF BOARD ON _____ APPROVED AS RECOMMENDED _____	
OTHER _____	
<u>VOTE OF BOARD MEMBERS</u>	
<input type="checkbox"/> UNANIMOUS	I HEARBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF AN ACTION TAKEN AND ENTERED ON THE MEETING RECORD OF THE CONSERVANCY GOVERNING BOARD ON THE DATE SHOWN. ATTESTED _____ <i>CATHERINE KUTSURIS, SECRETARY OF THE EAST CONTRA COSTA COUNTY HABITAT CONSERVANCY</i> BY: _____, DEPUTY
AYES: _____	
NOES: _____	
ABSENT: _____	
ABSTAIN: _____	

entities with projects not subject to the land use authority of one of the land use agencies participating in the HCP/NCCP may apply to the Conservancy for take coverage. Ameresco's gas power plant project is no longer subject to the land use authority of any land use jurisdictions participating in the HCP/NCCP as the land use permit authorizing the power plant was approved by the County in 2002. Therefore, to receive permit coverage under the HCP/NCCP, Ameresco must be bound to perform all applicable avoidance, minimization and mitigation measures through an agreement with the Conservancy.

The attached agreement was adapted by Conservancy staff and the Conservancy attorney from the template presented to the Governing Board in February. The agreement describes the actions Ameresco must take to be covered under the HCP/NCCP permit by the Conservancy. Attached as Exhibit 1 to the agreement is the completed Application and Planning Survey Report for the project. Exhibit 1 documents the results of the planning-level surveys performed at the project site and describes the specific pre-construction surveys, avoidance measures and mitigation measures that are required for the project to be covered. Ameresco has signed the agreement.

Key provisions of the agreement:

- Payment of temporary impact fees in the amount of \$14,493. These fees cover the 0.6 acres of temporary impacts to non-urban land cover types from the underground powerline and leach field. The HCP/NCCP provides an option to pay the full development fee amount for the footprint of a temporary impact project in rural areas in lieu of working with the Conservancy, U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG) to define the "impact area" for the project¹ and paying the lower temporary impact fee for the impact area. Ameresco selected this option. No fees are due for the permanent impacts associated with the power plant because it is located on urban land cover that is exempt from fees under the HCP/NCCP.
- The agreement provides that Ameresco will reimburse the Conservancy for staff and consultant costs associated with processing Ameresco's request for take coverage, up to a maximum reimbursement of \$5,000. Staff estimates that these costs will be well under \$5,000.
- The agreement does not require a contribution to recovery from Ameresco. The HCP/NCCP provides that the Conservancy may, at its discretion, require Participating Special Entities to pay an amount over and above required fees in order to contribute to recovery of covered species. Staff does not recommend requiring such a contribution in this instance. The impacts of the proposed project are small and temporary. Temporary impacts do not count against the take limits in the HCP for permanent impacts, so covering this project will not add to the Conservancy's mitigation obligations. Therefore, staff does not believe such a contribution is warranted in this circumstance.
- Ameresco previously requested a 'no-effect' letter from USFWS but were denied. USFWS directed Ameresco to the HCP/NCCP as means to receive take coverage. Ameresco's original proposal to USFWS included no fees or offsite mitigation but did include a fairly comprehensive array of avoidance measures, including a full-time biological monitor for construction activities, examination of all burrows and crevices

¹ The impact area could include areas outside the project footprint that where covered species would be affected. For instance, it could include areas outside the footprint that are severed from other habitat areas by the project.

for California tiger salamander and other substantive avoidance measures. Under the HCP/NCCP and the proposed agreement, the extent of avoidance measures is significantly reduced (e.g., no full-time construction monitor and no pre-construction surveys for tiger salamander) but a mitigation fee obligation is imposed that will be used to acquire and maintain habitat offsite. This type of trade-off is consistent with the goals of the HCP.

California Environmental Quality Act (CEQA): The County adopted the “Keller Canyon Landfill Gas Power Plant (LUP 012115) Initial Study & Negative Declaration”, dated October 1, 2001, on June 25, 2002. This document fully analyzed the environmental impacts of the proposed project and determined there would be no significant impacts. No additional CEQA review is required of the Conservancy.

Next steps: If the Conservancy Board authorizes staff to sign the Agreement, key next steps in granting take coverage would be as follows:

- Wildlife agencies review the agreement and are asked to concur with the Conservancy’s determination that the agreement imposes all applicable conditions of the HCP/NCCP on the project. Participating Special Entity agreements, unlike the granting of take by cities and the County, require wildlife agency concurrence.
- Ameresco pays all required fees.
- Conservancy issues Ameresco a Certificate of Inclusion notifying Ameresco that its take coverage is in effect subject to the terms of the agreement.
- Ameresco conducts preconstruction surveys and avoidance measures and constructs the project.

Attachments:

- Agreement with Ameresco

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**AGREEMENT IMPLEMENTING THE EAST CONTRA COSTA COUNTY
HABITAT CONSERVATION PLAN/NATURAL COMMUNITY
CONSERVATION PLAN AND GRANTING TAKE AUTHORIZATION**

BETWEEN

**EAST CONTRA COSTA COUNTY HABITAT CONSERVANCY, Implementing
Entity, and AMERESCO KELLER CANYON LLC, a Participating Special Entity**

1.0 PARTIES

This Agreement is made and entered into by the East Contra Costa County Habitat Conservancy (“Conservancy”) and Ameresco Keller Canyon LLC (“Participating Special Entity” or “PSE”) as of the Effective Date.

2.0 RECITALS

The Parties have entered into this Agreement in consideration of the following facts:

- 2.1** The East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan (“HCP/NCCP,” or “Plan”) is intended to provide a comprehensive framework to protect natural resources in eastern Contra Costa County, while improving and streamlining the environmental permitting process for certain projects that would cause impacts on endangered and threatened species. The primary policy priority of the Plan is to provide comprehensive species, wetlands, and ecosystem conservation and contribute to recovery of endangered and threatened species within East Contra Costa County while balancing open space, habitat, agriculture, and urban development. To that end, the Plan describes how to avoid, minimize, and mitigate, to the maximum extent practicable, impacts on Covered Species and their habitats while allowing for certain development and other activities in selected regions of the County and the Cities of Pittsburg, Clayton, Oakley, and Brentwood.
- 2.2** The Conservancy is a joint powers authority formed by its members, the County of Contra Costa (“County”), the City of Pittsburg (“Pittsburg”), the City of Clayton (“Clayton”), the City of Oakley (“Oakley”) and the City of Brentwood (“Brentwood”), to implement the HCP/NCCP.
- 2.3** The HCP/NCCP covers approximately one-third of the County, or 174,082 acres, all in East Contra Costa County, in which impacts from certain development and other activities are evaluated, and in which conservation will occur.
- 2.4** The area covered by the HCP/NCCP has been determined to provide, or potentially provide, habitat for twenty-eight (28) species that are listed as endangered or threatened, that could in the future be listed as endangered or threatened, or that have some other special status under federal or state laws.

- 2.5 The Conservancy has received authorization from the United States Fish and Wildlife Service (“USFWS”) under incidental take permit TE 160958-0, and the California Department of Fish and Game (“CDFG”), under incidental take permit 2835-2007-01-03, for the Take of the twenty-eight (28) special-status species and certain other species, as take is defined respectively under federal and state law, while carrying out certain development and other activities.
- 2.6 The Conservancy may enter into agreements with participating special entities that allow certain activities of theirs to be covered by the Federal Permit and the State Permit, subject to the conditions in the Implementing Agreement (“IA”), the HCP/NCCP and the Permits.
- 2.7 PSE has been authorized by the owner and operator of the Keller Canyon Landfill to construct a gas power plant at the facility and seeks extension of the Conservancy’s permit coverage for construction of the power plant, an underground electrical line and a leach field.
- 2.8 The Conservancy has concluded, based on the terms of this Agreement and the application submitted by PSE (the “Application”), that PSE has provided adequate assurances that it will comply with all applicable terms and conditions of the IA, the HCP/NCCP, and the Permits. The Application is attached hereto as Exhibit 1 and is hereby incorporated into this Agreement by reference

3.0 DEFINITIONS

The following terms as used in this Agreement will have the meanings set forth below. Terms specifically defined in FESA, CESA or NCCPA or the regulations adopted by USFWS and DFG under those statutes shall have the same meaning when used in this Agreement. Definitions used in this Agreement may elaborate on, but are not intended to conflict with, such statutory or regulatory definitions.

- 3.1 **“Agreement”** means this Agreement, which incorporates the IA, the HCP/NCCP, the Permits, and the Application by reference.
- 3.2 **“Application”** means the application submitted by the PSE in accordance with Chapter 8.4 of the HCP/NCCP, and which is attached hereto as Exhibit 1. The Application contains a cover sheet, the results of required planning surveys and the avoidance, minimization and mitigation measures that will be a condition of the PSE using Conservancy’s Permits.
- 3.3 **“Authorized Take”** means the extent of incidental Take of Covered Species authorized by the USFWS in the Federal Permit issued to the Conservancy pursuant to Section 10(a)(1)(B) of FESA, and the extent of Take of Covered Species authorized by CDFG in the State Permit issued to the Conservancy pursuant to California Fish and Game Code section 2835.
- 3.4 **“CDFG”** means the California Department of Fish and Game, a department of the California Resources Agency.

- 3.5 “CESA” means the California Endangered Species Act (Fish & G. Code, § 2050 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.6 “**Changed Circumstances**” means changes in circumstances affecting a Covered Species or the geographic area covered by the HCP/NCCP that can reasonably be anticipated by the Parties and that can reasonably be planned for in the HCP/NCCP. Changed Circumstances and planned responses to Changed Circumstances are more particularly defined in Section 12.2 of the IA and Chapter 10.2.1 of the HCP/NCCP. Changed Circumstances do not include Unforeseen Circumstances.
- 3.7 “**Covered Activities**” means those land uses and conservation and other activities described in Chapter 2.3 of the HCP/NCCP to be carried out by the Conservancy or its agents that may result in Authorized Take of Covered Species during the term of the HCP/NCCP, and that are otherwise lawful.
- 3.8 “**Covered Species**” means the species, listed and non-listed, whose conservation and management are provided for by the HCP/NCCP and for which limited Take is authorized by the Wildlife Agencies pursuant to the Permits. The Take of Fully Protected Species is not allowed. The Take of extremely rare plants that are Covered Species is allowed only as described in Section 6.3 and the IA.
- 3.9 “**Effective Date**” means the date when this Agreement is fully executed.
- 3.10 “**Federal Listed Species**” means the Covered Species which are listed as threatened or endangered species under FESA as of the Effective Date, and the Covered Species which are listed as threatened or endangered pursuant to FESA during the term of the HCP/NCCP as of the date of such listing.
- 3.11 “**Federal Permit**” means the federal incidental Take permit issued by USFWS to the Conservancy and other local agencies pursuant to Section 10(a)(1)(B) of FESA (permit number TE 160958-0), as it may be amended from time to time.
- 3.12 “**FESA**” means the Federal Endangered Species Act of 1973, as amended (16 U.S.C § 1531 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.13 “**Fully Protected Species**” means any species identified in California Fish and Game Code sections 3511, 4700, 4800, 5050 or 5515 that occur within the Plan Area.
- 3.14 “**HCP/NCCP**” or “**Plan**” means the East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan.
- 3.15 “**Implementing Agreement**” or “**IA**” means that document attached as Appendix B to the HCP/PCCP.
- 3.16 “**Jurisdictional Wetlands and Waters**” means State and federally regulated wetlands and other water bodies that cannot be filled or altered without permits from either the U.S. Army Corps of Engineers under section 404 of the Clean Water Act or, from the State Water Resources Control Boards under either section 401 of the Clean Water Act or the

Porter-Cologne Water Quality Act, or CDFG under section 1602 of the Fish and Game Code, as further explained in Chapter 1.3.5 of the HCP/NCCP.

- 3.17 **“Listed Species”** means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is listed as endangered or threatened under FESA or CESA.
- 3.18 **“Non-listed Species”** means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is not listed as endangered or threatened under FESA or CESA.
- 3.19 **“Party”** or **“Parties”** means any or all of the signatories to this Agreement.
- 3.20 **“Permit Area”** means the area within the Plan Area where the Conservancy has received authorization from the Wildlife Agencies for the Authorized Take of Covered Species while carrying out Covered Activities.
- 3.21 **“Permits”** means the Federal Permit and the State Permit.
- 3.22 **“Plan Area”** means the geographic area analyzed in the HCP/NCCP, located in the eastern portion of Contra Costa County, as depicted in Figure 1-1 of the HCP/NCCP. The Plan Area is further described in detail in Chapter 1.2.1 of the HCP/NCCP. The Plan Area is also referred to as the “Inventory Area” in the HCP/NCCP.
- 3.23 **“Preserve System”** means the land acquired and dedicated in perpetuity through either a fee interest or conservation easement intended to meet the preservation, conservation, enhancement and restoration objectives of the HCP/NCCP.
- 3.24 **“Proposed Activities”** means the activities described in Exhibit 1 that will be covered by the extension of the Conservancy’s take authorization.
- 3.25 **“State Permit”** means the state Take permit issued to the Conservancy and other local agencies pursuant to Section 2835 of the California Fish and Game Code (permit number 2835-2007-01-03), as it may be amended from time to time.
- 3.26 **“Take”** has the same meaning provided by FESA and its implementing regulations with regard to activities subject to FESA, and also has the same meaning provided in the California Fish and Game Code with regard to activities subject to CESA and NCCPA.
- 3.27 **“Unforeseen Circumstances”** under the Federal Permit means changes in circumstances affecting a Covered Species or geographic area covered by the HCP/NCCP that could not reasonably have been anticipated by the Plan developers and USFWS at the time of the Plan’s negotiation and development, and that result in a substantial and adverse change in the status of a Covered Species. **“Unforeseen Circumstances”** under the State Permit means changes affecting one or more species, habitat, natural community, or the geographic area covered by the Plan that could not reasonably have been anticipated at the time of Plan development, and that result in a substantial adverse change in the status of one or more Covered Species.

3.28 “USFWS” means the United States Fish and Wildlife Service, an agency of the United States Department of Interior.

3.29 “Wildlife Agencies” means USFWS and CDFG.

4.0 PURPOSES

This Agreement defines the Parties’ roles and responsibilities and provides a common understanding of actions that will be undertaken to avoid, minimize and mitigate the effects on the Covered Species caused by the Proposed Activities, and to provide for the conservation of the Covered Species within the Plan Area. The purposes of this Agreement are to ensure implementation of each of the terms and conditions of this Agreement, and the relevant terms of the IA, the HCP/NCCP, and the Permits, and to describe remedies and recourse should either Party fail to perform its obligations as set forth in this Agreement.

5.0 AVOIDANCE, MINIMIZATION AND MITIGATION OF IMPACTS

5.1 General Framework

As required by FESA and NCCPA, the HCP/NCCP includes measures to avoid and minimize take of Covered Species and to conserve natural communities and Covered Species at the landscape-, habitat- and species-level. Chapter 6 of the HCP/NCCP provides further instructions to determine which avoidance and minimization measures are applicable to particular Covered Activities. PSE shall implement all applicable avoidance and minimization measures as required by the HCP/NCCP, including but not limited to those identified in Chapter 6, as described in the Application and this Agreement.

5.2 Surveys and Avoidance Measures

Planning surveys are required prior to carrying out any Covered Activity for which a fee is collected or land in lieu of a fee is provided. PSE has submitted a planning survey report for approval by the Conservancy in accordance with Chapter 6.2.1 of the HCP/NCCP. This planning survey report is contained within the Application, which describes the results of the planning survey and describes in detail the pre-construction surveys, construction monitoring, avoidance measures and mitigation measures that apply to the Proposed Activities and shall be performed by PSE. Based on the Application, the Conservancy has determined that PSE will implement and comply with all applicable preconstruction surveys and construction monitoring requirements described in Chapters 6.2.2 and 6.2.3 of the HCP/NCCP.

5.3 No Take of Extremely Rare Plants or Fully Protected Species

Nothing in this Agreement, the HCP/NCCP or the Permits shall be construed to allow the Take of extremely rare plant species listed in Table 6-5 of the HCP/NCCP (“No-Take

Plant Population”) or any Fully Protected Species under California Fish and Game Code sections 3511, 4700, 4800, 5050 or 5515. PSE shall avoid Take of these species.

5.3.1. Golden Eagle

The Permits do not authorize Take of the golden eagle and PSE shall avoid Take of any golden eagle. The avoidance measures set forth in the HCP/PCCP, including but not limited to Conservation Measure 1.11, should be adequate to prevent Take of golden eagles, but the Conservancy shall notify PSE in writing of any additional or different conservation measures that are designed to avoid Take of these species and that apply to PSE. PSE shall implement all such avoidance measures to avoid Take of golden eagles.

5.4 Fees and Dedications

As set forth in the Application, PSE agrees to pay the Conservancy Fourteen Thousand, Four Hundred and Ninety Three Dollars and zero cents (\$14,493.00), which amount includes all HCP/NCCP mitigation fees necessary for the Proposed Activities and is based on the HCP/NCCP mitigation fee amounts in effect for 2008. The overall fee amount is based on a summation of individual HCP/NCCP mitigation fees as follows:

Development fees: \$0

Wetland mitigation fees: \$0

Temporary impact fees: \$14,493

All fees must be paid in full before any ground-disturbance associated with the Proposed Activities occurs. If any fee is not paid in full during the current calendar year (2008), the amount of all fees will be increased or decreased each following year, beginning in 2009, until such time as all fees are paid in full. All fees will be increased or decreased according to the fee adjustment provisions of Chapter 9.3.1 of the HCP/NCCP. Fee amounts will be adjusted annually on March 15, beginning in 2009. If PSE pays all fees and the contribution to recovery during the period from January 1 to March 14, all fee amounts will be subject to the March 15 fee adjustments unless construction of the Proposed Activities has commenced by March 14. If payment is made during this period and construction does not commence before March 15, PSE will be required to submit an additional payment for any increases to fees and will be entitled to a refund without interest for any decreases to fees or the contribution to recovery.

6.0 TAKE AUTHORIZATION

6.1 Extension of Take Authorization to PSE

As provided in Chapter 8.4 of the HCP/NCCP, after execution of this Agreement, payment of fees or dedication of land as set forth in Section 5.6, and receipt of the Wildlife Agencies’ written concurrence that the Proposed Activity complies with the HCP/NCCP, the Permits and the IA, the Conservancy shall issue a Certificate of Inclusion to PSE that specifically describes the Authorized Take and required conservation measures and extends Take authorization under the Permits to PSE. PSE is

ultimately responsible for compliance with all applicable terms and conditions of this Agreement, the IA, the HCP/NCCP and the Permits.

6.2 Duration of Take Authorization

Once the Take authorization has been extended to the Proposed Activities, it shall remain in effect for a period of 15 years, unless and until the Permits are revoked by USFWS or CDFG, in which case the Take authorization may also be suspended or terminated.

7.0 RIGHTS AND OBLIGATIONS OF PSE

7.1 Rights

Upon the Conservancy's issuance of a Certificate of Inclusion to PSE, PSE may Take the Covered Species while carrying out the Proposed Activities in the Permit Area, as further authorized by and subject to the conditions of this Agreement, the IA, the HCP/NCCP, and the Permits. The authority issued to PSE applies to all of the elected officials, officers, directors, employees, agents, subsidiaries, contractors, and subcontractors, and their officers, directors, employees and agents who engage in any Proposed Activity. PSE shall periodically conduct an educational program to fully inform all such persons and entities of the terms and conditions of the Permits, and PSE shall be responsible for supervising their compliance with those terms and conditions. All contracts between PSE and such persons and entities shall require their compliance with the Permits.

7.2 General Obligations

The PSE will fully and faithfully perform all obligations assigned to it under this Agreement, the IA, the HCP/NCCP, the Permits, including but not limited to the obligations assigned in the following chapters of the HCP/NCCP: Chapter 6.0 (Conditions on Covered Activities), Chapter 8.4 (Participating Special Entities), and Chapter 9.0 (Funding). PSE shall ensure that all mitigation, conservation, monitoring, reporting and adaptive management measures required of it are adequately funded throughout the term of this Agreement, and that monitoring, reporting and adaptive management measures are adequately funded in perpetuity as further described in the Application. PSE will promptly notify the Conservancy of any material change in its financial ability to fulfill its obligations under this Agreement.

7.3 Obligations In The Event of Suspension or Revocation

In the event that USFWS and/or CDFG suspend or revoke the Permits pursuant to Sections 19.0 and 21.0 of the IA, PSE will remain obligated to fulfill its mitigation, enforcement, management, and monitoring obligations, and its other HCP/NCCP obligations, in accordance with this Agreement and applicable statutory and regulatory requirements for all Proposed Activities implemented prior to the suspension or revocation.

7.4 Interim Obligations upon a Finding of Unforeseen Circumstances

If the Wildlife Agencies make a finding of Unforeseen Circumstances with regard to a Federal Listed Covered Species, during the period necessary to determine the nature and location of additional or modified mitigation, PSE will avoid contributing to an appreciable reduction in the likelihood of the survival and recovery of the affected species. As described below at Section 15.2.2 and Section 15.3.2, the Wildlife Agencies shall be responsible for implementing such additional measures or modifications, unless PSE consents to do so.

7.5 Obligations In The Event Of Changed Circumstances

Changed Circumstances, as described in 50 Code of Federal Regulations section 17.22(b)(5)(i), are adequately addressed in Chapter 7 and Chapter 10 of the HCP/NCCP, and PSE shall implement any measures for such circumstances as called for in the HCP/NCCP, as described in Section 12.2 of this Agreement.

7.6 Obligation to Compensate Conservancy for Expenses Incurred

PSE shall compensate the Conservancy for its direct costs associated with this Agreement, including but not limited to, staff, consultant and legal costs incurred as a result of the review of the Application, drafting and negotiating this Agreement, monitoring and enforcement of this Agreement, and meetings and communications with PSE (collectively, Conservancy's "Administrative Costs"). Conservancy's Administrative Costs shall not exceed \$5,000. Conservancy shall provide PSE with invoices detailing its Administrative Costs monthly or quarterly, at Conservancy's discretion. PSE shall remit payment of each invoice within thirty (30) days of receiving it.

8.0 REMEDIES AND ENFORCEMENT

If PSE fails to comply with the terms of this Agreement, the IA, the HCP/NCCP, or the Permits, the Conservancy may withdraw the Certificate of Inclusion and terminate any Take authorization extended to PSE. The Conservancy shall also have all of the remedies available in equity (including specific performance and injunctive relief) and at law to enforce the terms of this Agreement, the IA, the HCP/NCCP and the Permits, and to seek redress and compensation for any breach or violation thereof. PSE shall defend, indemnify, protect, and hold harmless the Conservancy from and against any claim, loss, damage, cost, expense, or liability directly or indirectly arising out of or resulting from (i) PSE's breach of this Agreement or the inaccuracy of any representation or warranty made by PSE in this Agreement, or (ii) PSE's, performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement, including without limitation claims caused by or arising out of the negligence, recklessness, or intentional misconduct of any representative, employee, or agent of PSE. The Parties acknowledge that the Covered Species are unique and that their loss as species would be irreparable and that

therefore injunctive and temporary relief may be appropriate in certain instances involving a breach of this Agreement.

9.0 FORCE MAJEURE

In the event that a Party is wholly or partially prevented from performing obligations under this Agreement because of unforeseeable causes beyond the reasonable control of and without the fault or negligence of Party (“Force Majeure”), including, but not limited to, acts of God, labor disputes, sudden actions of the elements not identified as Changed Circumstances, or actions of non-participating federal or state agencies or local jurisdictions, the Party shall be excused from whatever performance is affected by such unforeseeable cause to the extent so affected, and such failure to perform shall not be considered a material violation or breach, provided that nothing in this section shall be deemed to authorize either Party to violate FESA, CESA or NCCPA, and provided further that:

- The suspension of performance is of no greater scope and no longer duration than is required by the Force Majeure;
- Within seven (7) days after the occurrence of the Force Majeure, the Party invoking this section shall give the Conservancy written notice describing the particulars of the occurrence;
- The Party shall use best efforts to remedy its inability to perform (however, this paragraph shall not require the settlement of any strike, walk-out, lock-out or other labor dispute on terms which in the sole judgment of the Party is contrary to its interest); and
- When the Party is able to resume performance of their obligations, it shall give the other Party written notice to that effect.

10.0 MISCELLANEOUS PROVISIONS

10.1 Calendar Days

Throughout this Agreement and the HCP/NCCP, the use of the term “day” or “days” means calendar days, unless otherwise specified.

10.2 Notices

Any notice permitted or required by this Agreement shall be in writing, and delivered personally, by overnight mail, or by United States mail, certified and postage prepaid, return receipt requested. Notices may be delivered by facsimile or electronic mail, provided they are also delivered by one of the means listed above. Delivery shall be to the name and address of the individual responsible for each of the Parties, as follows:

John Kopchik
East Contra Costa County Habitat Conservancy
c/o Contra Costa County Department of Conservation and Development

651 Pine Street, North Wing, 4th Floor
Martinez, CA 94553
Email: jkopc@cd.cccounty.us
Phone: 925-335-1227

Don Cleland PE, Manager, Design & Construction
Ameresco, Inc.
111 Speen Street, Suite 410
Framingham, MA 01701 Email: dcleland@ameresco.com
Phone 781-837-3719

Notices shall be transmitted so that they are received within the specified deadlines. Notices delivered personally shall be deemed received on the date they are delivered. Notices delivered via overnight delivery shall be deemed received on the next business day after deposit with the overnight mail delivery service. Notice delivered via certified mail, return receipt requested, shall be deemed received as of the date on the return receipt or five (5) days after deposit in the United States mail, whichever is sooner. Notices delivered by facsimile or other electronic means shall be deemed received on the date they are received.

10.3 Entire Agreement

This Agreement, together with the IA, the HCP/NCCP and the Permits, constitutes the entire agreement among the Parties. This Agreement supersedes any and all other agreements, either oral or in writing, between the Parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise of agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

10.4 Amendment

This Agreement may only be amended with the written consent of both Parties.

10.5 Attorneys' Fees

If any action at law or equity, including any action for declaratory relief is brought to enforce or interpret the provisions of this Agreement, the Conservancy shall be able to recover its attorneys' fees and costs if it prevails.

10.6 Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the United States and the State of California, as applicable.

10.7 Duplicate Originals

This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the Parties hereto.

10.8 Relationship to the FESA, CESA, NCCPA and Other Authorities

The terms of this Agreement are consistent with and shall be governed by and construed in accordance with FESA, CESA, NCCPA and other applicable state and federal law.

10.9 No Third Party Beneficiaries

Without limiting the applicability of rights granted to the public pursuant to FESA, CESA, NCCPA or other applicable law, this Agreement shall not create any right or interest in the public, or any member thereof, as a third party beneficiary thereof, nor shall it authorize anyone not a Party to this Agreement to maintain a suit for personal injuries or property damages under the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third party beneficiaries shall remain as imposed under existing state and federal law.

10.10 References to Regulations

Any reference in this Agreement, the IA, the HCP/NCCP, or the Permits to any regulation or rule of the Wildlife Agencies shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

10.11 Applicable Laws

All activities undertaken pursuant to this Agreement, the IA, the HCP/NCCP, or the Permits must be in compliance with all applicable local, state and federal laws and regulations.

10.12 Severability

In the event one or more of the provisions contained in this Agreement is held invalid, illegal or unenforceable by any court of competent jurisdiction, such portion shall be deemed severed from this Agreement and the remaining parts of this Agreement shall remain in full force and effect as though such invalid, illegal, or unenforceable portion had never been a part of this Agreement.

10.13 Due Authorization

Each Party represents and warrants that (1) the execution and delivery of this Agreement has been duly authorized and approved by all requisite action, (2) no other authorization or approval, whether of governmental bodies or otherwise, will be necessary in order to enable it to enter into and comply with the terms of this Agreement, and (3) the person executing this Agreement on behalf of each Party has the authority to bind that Party.

10.14 No Assignment

The Parties shall not assign their rights or obligations under this Agreement, the Permits, or the HCP/NCCP to any other individual or entity.

10.15 Headings

Headings are using in this Agreement for convenience only and do not affect or define the Agreement's terms and conditions.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement to be in effect as of the date last signed below.

EAST CONTRA COSTA COUNTY HABITAT CONSERVANCY

By: _____ Date: _____
John Kopchik, Program Manager

AMERESCO KELLER CANYON LLC
By Ameresco Inc., its' sole member;

By:  _____ Date: 6-12-2008
Joseph DeManche, Executive Vice President

**EAST CONTRA COSTA COUNTY
HABITAT CONSERVANCY**

DATE: June 18, 2008
TO: Governing Board
FROM: Conservancy Staff
SUBJECT: Map Illustrating Stream Setback Provisions

RECOMMENDATION

APPROVE map providing guidance on the application of the stream setback provisions to streams within the inventory area.

DISCUSSION

Conservation Measure 1.7 (attached) of the East Contra Costa County Habitat Conservation Plan / Natural Community Conservation Plan (“HCP/NCCP”) describes stream setback provisions that apply to activities covered by the HCP/NCCP. As described in Table 6-2 (attached), the setback provisions vary by type of stream and whether the stream is in an urban, agricultural or natural area. Stream types are distinguished on the basis of concrete banks, on whether the flow is ephemeral, intermittent or perennial and on stream order. Stream order is an indication of how far up or down a watershed a reach of stream is located (see additional background information below).

Conservation Measure 1.7 provides that the Implementing Entity (the Conservancy) should make available to local agencies for information purposes a map that categorizes stream reaches in the inventory area according to the criteria described in Conservation Measure 1.7 and Table 6-2. The attached draft map was created by Conservancy staff for this purpose. The draft map includes a note to users explaining the purpose and limitations of the map and explaining that the map is an information tool and not final arbiter of which provisions apply where (the land use agencies decide on a case-by-case basis). The map was created using the Geographic Information System (“GIS”) map data on creeks and land cover used in the HCP/NCCP. The land cover data was used to determine whether a stream reach was within an urban, agricultural or natural area. The creek data was used as a basis for the map and to distinguish stream order.

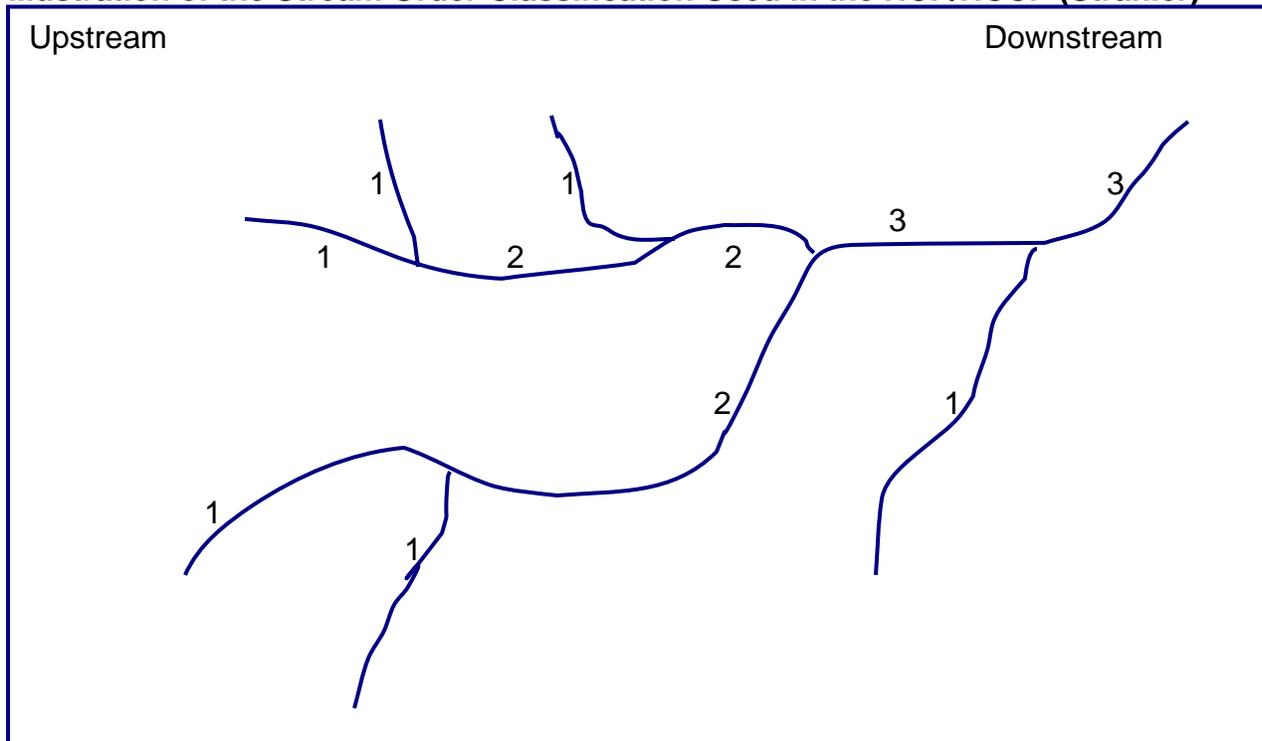
CONTINUED ON ATTACHMENT: <input checked="" type="checkbox"/> YES	
ACTION OF BOARD ON _____ APPROVED AS RECOMMENDED _____	
OTHER _____	
<u>VOTE OF BOARD MEMBERS</u>	
<input type="checkbox"/> UNANIMOUS	
AYES: _____	I HEARBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF AN ACTION TAKEN AND ENTERED ON THE MEETING RECORD OF THE CONSERVANCY GOVERNING BOARD ON THE DATE SHOWN. ATTESTED _____ <i>CATHERINE KUTSURIS, SECRETARY OF THE EAST CONTRA COSTA COUNTY HABITAT CONSERVANCY</i> BY: _____, DEPUTY
NOES: _____	
ABSENT: _____	
ABSTAIN: _____	

Staff presented an earlier draft of this map to the Public Advisory Committee in May. Participants asked a number of questions on the stream setback provisions. Potential revisions to the explanations on the map were discussed by staff, including the need to indicate that the map doesn't distinguish ephemeral stream from intermittent and perennial streams. These changes have been made. Subsequent to the meeting, staff received a comment letter from Albert D. Seeno III with several questions and comments on the map, including concern that the map exceeded HCP requirements and included streams not shown in the HCP. Staff discussed the matter with Mr. Seeno and indicated that the map was called for by the HCP to help explain applicability of the setback provisions and that the same stream data used in the HCP was used to generate the attached map.

If approved, staff will make the map available to city and County staff and to the public as an information tool. The map would be available on the Conservancy website.

A note on how stream order is determined: In the classification system used by the HCP/NCCP (Strahler), a stream reach with no tributaries is a 1st order stream. A reach with only 1st order tributaries is a 2nd order stream. A reach with only 1st and 2nd order tributaries is a 3rd order stream, and so on (please see illustration below). The stream setback provisions in the HCP/NCCP generally treat 1st and 2nd order ephemeral streams differently from perennial, intermittent and 3rd and higher order ephemeral streams.

Illustration of the Stream Order Classification Used in the HCP/NCCP (Strahler)



Attachments:

- Conservation Measure 1.7 from the HCP/NCCP (Stream Setbacks)
- Table 6-2 from the HCP/NCCP (Stream Setbacks)

for the preservation, enhancement, and restoration of areas with high biological value.

Project proponents are required to minimize their impacts on natural vegetation communities and covered species in order to meet the regulatory requirements of ESA. Although the Plan does this on a large scale, there are still opportunities to avoid and minimize impacts on a local scale when projects occur adjacent to existing or future open space. Good project design at these urban-wildland interfaces is critical to the success of the open space and to the HCP/NCCP preserves as part of that open space. This conservation measure is intended to help achieve compliance with the avoidance and minimization requirements of ESA and CWA. This measure is not intended to result in avoidance of small, isolated habitats on a project-by-project basis.

Conservation Measure 1.7. Establish Stream Setbacks

Measure

A stream setback will be applied to all development projects covered by the HCP/NCCP according to the stream types listed in Table 6-2. The setback is measured from the top of the stream bank in an aerial perspective (to eliminate differences in setbacks on different slopes). Where native woody riparian vegetation is present, setbacks will extend, at minimum, to the outer dripline of this vegetation. Stream setbacks will be established for all perennial, intermittent, and ephemeral streams for all covered activities within the UDA. Stream setback requirements have been developed on the basis of an extensive literature review of applicable research from both local and national sources (Table 6-3) and in consultation with USFWS, CDFG, USACE, SWRCB, RWQCBs, and EPA. For the purpose of determining required stream setbacks, streams will be assigned to one of five categories.

- Concrete channel.
- First and second order ephemeral reaches in urban and agricultural areas.
- First and second order ephemeral reaches in natural areas.
- Perennial, intermittent, or third or higher order ephemeral reaches in urban areas except Marsh Creek mainstem.
- Perennial, intermittent, or third or higher order ephemeral reaches in agricultural or natural areas and Marsh Creek mainstem.

No setbacks are required on irrigation ditches, underground stream reaches, or on drainages and swales that have neither defined bed and bank nor evidence of scour or sediment transport. It is anticipated that these features are likely to be filled in the course of covered development activities. However, where impacts to such features are sufficiently extensive to result in changes to the hydrograph of the watershed, measures will be implemented to maintain the baseline hydrograph, in keeping with requirements of the RWQCB (C3 provisions) and Conservation Measure 1.10 (Maintain Hydrologic Conditions and Minimize

Erosion). Irrigation ditches, underground stream reaches, and swales may provide important hydrologic/ecologic support functions for other downstream systems and features. Such support functions include being "catchment areas" or hydrologic source areas for surface flows or shallow subsurface flows that support downstream wetlands.

The stream categories above are designed to correlate with existing habitat quality for species covered by the HCP/NCCP and with potential impacts of development to stream functions. Stream setbacks are designed to protect existing habitat quality, to protect water quality and hydrologic processes through buffering, and allow for at least minimal restoration. For informational purposes, the Implementing Entity will create and make available to local jurisdictions digital and hardcopy maps categorizing stream reaches according to this system.

Local jurisdictions will ensure that project proponents seeking coverage under the HCP/NCCP adhere to setback requirements. Rare exceptions to the requirements may be granted by local jurisdictions according to the limitations on exceptions to setback requirements described in Table 6-2 if the local agency finds that complete adherence to the setback requirement is not practicable. Additional, site-specific exceptions will be considered case by case on the basis of factors such as unusual topography or reasonable economic use of a highly constrained site and shall require the approval of the Implementing Entity for projects within the UDA or the approval of CDFG and USFWS for projects outside the UDA (see Chapter 8, Section 8.7 for more information). Activities granted any such exception must mitigate these additional impacts as described below. Technical assistance will be provided by the Implementing Entity, if needed.

Project proponents are encouraged to site trails and access roads outside the required setback to reduce disturbance to wildlife that use adjacent streams and riparian habitats. When roads and trails cannot be sited outside the required setback, they must be sited as far from the stream channel as practicable, must adhere to limitations on exceptions to stream setback requirements described in Table 6-2, and must mitigate additional impacts as described below. Project proponents are encouraged to use permeable or semi-permeable surfaces on roads and trails within stream setbacks as long as they are consistent with safety and zoning limits. If such surfaces are used, the project may be eligible for fee reductions (see below).

Water quality treatment wetlands and grassy swales may be included within the setback if consistent with the biological goals and objectives of the Plan and the biological goals of the setback.

The HCP/NCCP development fee will not apply to the portions of the development project within the stream setback if the land in the stream setback is precluded from future development (including active recreational facilities such as turf) by restrictions placed in the deed (see Section 9.3.1). If the stream setback deed restriction exceeds the minimum required, the fee may be waived on the entire protected area provided that the Implementing Entity finds that the

entire protected area provides a stream buffer benefit. Roads or trails constructed in the outer third of the setback with permeable or semi-permeable surfaces may be accommodated within the deed restriction; projects with such features retain eligibility for the fee waiver.

If deed restrictions are not provided on the stream setback or if the development is granted an exception to the stream setback, the project proponent shall be charged the applicable HCP/NCCP development fee over the entire area (i.e., development area and the diminished setback). Development granted an exception to the stream setback shall also be required to mitigate for the loss of stream buffer by restoring riparian vegetation on site or off-site at a 0.5 to 1 ratio or to pay one half the riparian impact fee per acre of setback encroachment⁸. Development that causes fill of streams or other jurisdictional wetlands and waters shall also be subject to the wetland fee described in Section 9.3.1. All fee requirements described in this paragraph may also be satisfied with the applicable land-in-lieu of fee provisions described in Section 8.6.7 or with the applicable provisions in Section 9.3.1 for applicants to perform direct mitigation for impacts on jurisdictional wetlands and waters in lieu of paying a fee.

The required stream setbacks proposed by this measure are designed to maintain existing habitat value for covered species, which is generally low within the UDA. Existing habitat value is largely correlated with adjacent land use. While these setbacks are designed to maintain a limited restoration potential, this measure is not intended to be an urban creeks restoration program, which is outside the scope of the HCP/NCCP.

The stream setback measure is intended to achieve the following purposes.

- Maintain or improve water quality by filtering sediments and pollutants from urban runoff before they reach the stream.
- Allow for protection of preserved and restored riparian woodland and scrub within and adjacent to the stream channel.
- Maintain a buffer zone between urban development and existing and restored nesting habitat for Swainson's hawk and other bird species.
- Maintain and enhance the water quality of the stream to protect native fish populations, including populations of special-status species that occur in downstream reaches (e.g., fall-run Chinook salmon in Marsh Creek).
- Maintain a more viable wildlife corridor for some species (e.g., California red-legged frog, foothill yellow-legged frog) than would be present with a narrower buffer zone.
- Maximize the natural flood protection value of the floodplain.

⁸ Roads, trails, bridges, turf, and development of all kinds within the setback will be considered encroachments; roads and trails constructed with permeable and semi-permeable surfaces may have their mitigated acreage reduced by 50%.

- Provide for recreational trails along the corridor that are compatible with wildlife use.

Setback requirements that are larger or more restrictive than those described in this conservation measure and in Table 6-2 could accomplish additional goals or may be necessary to comply with other regulations, but are not required by this Plan. For example, a wider corridor could provide aesthetic benefits and could increase habitat values, water quality protection, and opportunities for recreation. A minimum stream setback of 100 feet has been recommended in Brentwood to achieve habitat protection and enhancement goals (Natural Heritage Institute 2002). This setback is based on an extensive review of existing conditions in Brentwood and published literature on stream setbacks (e.g., Young et al. 1980; Lynch et al. 1985; Magette et al. 1987; Herson-Jones et al. 1995; Spackman and Hughes 1995; Hagar 1999). Tables 6-3 and 6-4 summarize available data on buffers for a variety of purposes (including some that go beyond the purposes of this conservation measure), and provide examples of existing and proposed buffer requirements elsewhere in the greater San Francisco Bay Area.

Contra Costa County has policies encouraging stream setbacks from new development. The Conservation Element of the General Plan (Contra Costa County 1996b) states:

Setback areas shall be provided along natural creeks and streams in areas planned for urbanization. The setback areas shall be of a width adequate to allow maintenance and to prevent damage to adjacent structures, the natural channel and associated riparian vegetation. The setback area shall be a minimum of 100 feet; 50 feet on each side of the centerline of the creek (Policy 8-89).

The County also requires minimum setbacks to meet water quality and erosion-control goals through a stream ordinance for unimproved earthen channels. This ordinance requires a “structure setback line” that varies between 30 feet and 50 feet from top of bank depending on the height of top of bank above the channel invert (County Code Title 9, Division 914-14.012). Some participating cities have or will have their own similar setback ordinances. All covered activities must also meet County and city setback requirements, where applicable.

Conservation Measure 1.8. Establish Fuel Management Buffer to Protect Preserves and Property

Measure

When a project site is adjacent to HCP/NCCP preserves, likely HCP/NCCP acquisition sites (i.e., within the high or moderate priorities for conservation, See Figure 5-3), or existing public open space that is or will be linked to HCP/NCCP preserve, a fuel management buffer will be established between the project site and the boundary of the existing or future conservation area. The purpose of buffer zones is to provide a buffer between development and wildlands that

Table 6-2. Stream Setback Requirements for Streams within the Urban Development Area

Stream Reach Type and Location ¹	Buffer Objective/ Function (from Figure 5-11)	Example Sites in Inventory Area	Required Setback (from top of bank measured in aerial perspective ²)	Limitations On Exceptions To Setback Requirements That May Be Granted By Local Agencies			Comments
				Maximum Allowable Linear Impact to Streams ³ (per project)	Activities Eligible For Streams Impact Exception	Maximum Allowable Area of Impact Within Setback ⁴ (per project)	
1 st and 2 nd order ⁵ ephemeral reaches in urban and agricultural areas	N/A	Multiple unnamed tributaries to intermittent and perennial reaches	Avoidance and minimization measures for drainages must be documented but no setback is required	No limitations ³	Any activities	No limitations ⁴	These reaches are located in dense urban and intensive agricultural areas, and provide low habitat function for covered species. Avoidance and implementation of Conservation Measure 1.10 will minimize impacts to water quality and hydrologic functions.
Concrete-lined channels	Enhance water quality; retain restoration potential	Reaches of Kirker Creek	20 ft	No limitations ³	Any activities	No limitations ⁴	These reaches are located in dense urban areas and provide low habitat function for covered species. A minimal buffer width will reduce sediment and nutrient inputs from surface flows, retain some potential for stream restoration, and provide for recreational opportunities.
1 st and 2 nd order ⁵ ephemeral reaches in natural areas	Erosion and nutrient control;	Multiple unnamed tributaries to intermittent and perennial reaches	25 ft	No limitations ³	Any activities	No limitations ⁴	Although ephemeral streams play a limited role in providing habitat to covered species, these systems represent the first point of entry for sediment and other contaminants into downstream reaches. Thus, unlike the stream types below, the primary objective of the setback for ephemeral streams is to filter out sediment and contaminants before they degrade downstream habitat.

Stream Reach Type and Location ¹	Buffer Objective/ Function (from Figure 5-11)	Example Sites in Inventory Area	Required Setback (from top of bank measured in aerial perspective ²)	Limitations On Exceptions To Setback Requirements That May Be Granted By Local Agencies			Comments
				Maximum Allowable Linear Impact to Streams ³ (per project)	Activities Eligible For Streams Impact Exception	Maximum Allowable Area of Impact Within Setback ⁴ (per project)	
Perennial, intermittent, or 3 rd or higher order ⁵ ephemeral streams in urban areas except Marsh Creek mainstem	Enhance water quality; retain restoration potential	Lower Willow Creek, Lower Kirker Creek	50 ft	300 feet ³	Necessary bridges and outfalls	Up to 15% of setback area ⁴	These reaches are located mostly in dense urban areas and provide low habitat function for covered species. However, potential may exist for restoration of riparian vegetation and minimal floodplain areas. In addition, a minimal buffer width will reduce sediment and nutrient inputs from surface flows and provide for recreational opportunities.
Perennial, intermittent, or 3 rd or higher order ⁵ ephemeral streams in agricultural or natural areas and Marsh Creek mainstem	Enhance water quality; retain restoration potential	See examples below ⁶	75 ft	300 feet ³	Necessary bridges and outfalls	Up to 15% of setback area ⁴	These reaches retain the greatest habitat value and potential for restoration within the Urban Development Area. The buffer will filter sediment and other contaminants, maintain habitat for covered species, allow for restoration of riparian vegetation and some small floodplain areas, as well as providing recreation opportunities.

Notes:

- ¹ Location parameters (e.g., “agricultural areas”, “natural areas”, etc.) describe the setting of the stream at the time of completing this HCP/NCCP and refer to the fee zones and urban landcover shown in Figure 9-1.
- ² Where native woody riparian vegetation is present, minimum setbacks must extend to the outer dripline of the riparian vegetation or the specified number of feet measured from top of bank, whichever is greatest. Riparian vegetation is defined broadly to include oaks and other woody species that function as riparian corridors. Setbacks must also meet minimum setback requirements of the applicable local land use agency. Contra Costa County has an ordinance regulating impacts near unimproved earthen channels. This Ordinance requires a “structure setback line” that varies between approximately 30 feet and 50 feet from top of bank depending on the height of top of bank above the channel invert (County Code Title 9, Division 914-14.012).
- ³ Mitigation is required for all impacts to streams, as described in Chapter 5. Restoration requirements are summarized in Tables 5-16, 5-17, and 9-5. Preservation requirements are summarized in Tables 5-5a and 5-5b and may be accomplished through payment of the development fee described in Section 9.3.1 or through provision of land in lieu of fees.
- ⁴ Restrictions will be measured as a percentage of the setback area excluding the area the of the stream channel. Impacts within setbacks must be mitigated through: a) payment of the development fee described in Section 9.3.1 over the entire property including the setback and the stream channel; and b) through payment of the riparian impact fee (see Table 9-5) for every acre of impact within the setback or through direct performance of riparian restoration at a 0.5 to 1 ratio on-site or off-site.
- ⁵ Stream order refers to the numeric identification of the links within a stream network. This document follows the stream ordering system of Strahler (1964). In this system, a first order stream is a stream with an identifiable bed and bank, without any tributary streams. A second order stream is formed by the confluence of two first order streams. A third order stream is formed by the confluence of two second order streams, and so on. Addition of a lesser order stream does not change the stream order of the trunk stream.
- ⁶ Perennial streams in agricultural or natural areas within the Inventory Area consist of the following:
- Mount Diablo Creek, Russelman Creek, Peacock Creek upstream of the Oakhurst Country Club property, and tributaries to Mount Diablo Creek within Mount Diablo State Park;
 - Kellogg Creek in the Foothills/Upper Valley and Delta geomorphic zones;
 - Brushy Creek in the Delta and Lower Valley/Plain geomorphic zones;
 - Indian, Rock, Sand Mound, Dutch, Piper, and Taylor Sloughs, and False River (does not include reaches in concrete channels); and
 - Sand Creek and Oil Canyon Creek in the Montane geomorphic zone.
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**EAST CONTRA COSTA COUNTY
HABITAT CONSERVANCY**

DATE: June 18, 2008
TO: Governing Board
FROM: Conservancy Staff
SUBJECT: Grant Funding

RECOMMENDATION

ACCEPT update and PROVIDE policy direction to staff on pursuit of grant funding.

DISCUSSION

A number of grants have been secured to help fund implementation of the HCP/NCCP, as more specifically shown in the attached table. These grants will fund a variety of implementation activities, from staffing to restoration to acquisition. The vast majority of the funds are for acquisition and the largest source of these funds is the federal Cooperative Endangered Species Conservation Fund, HCP Land Acquisition Program (also known as the Section 6 HCP Land Acquisition program because it is authorized by Section 6 of the Federal Endangered Species Act). These Section 6 grants will be a huge benefit to the implementation of the HCP/NCCP, but spending these funds will be a significant challenge. The purpose of this report is to summarize the key challenges that will be faced in making use of the Section 6 funds, describe what staff is doing to address these challenges and solicit guidance and input from the Governing Board.

Accessing the funds: Section 6 HCP Land Acquisition funds are typically granted to the states. The states administer the expenditure of the funds for specific land acquisition projects associated with the HCP named in the grant award. The Wildlife Conservation Board (WCB) is the state agency in California responsible administering for Section 6 Land Acquisition grants. Conservancy staff has been meeting with WCB staff since last summer to determine what needs to be done to access the funds and to take necessary steps to do so. Key developments include:

- Typically, the WCB disburses Section 6 funds acquisition by acquisition, with each acquisition requiring a separate grant agreement and separate approval by the WCB

CONTINUED ON ATTACHMENT: YES
 ACTION OF BOARD ON _____ APPROVED AS RECOMMENDED _____
 OTHER _____

VOTE OF BOARD MEMBERS

UNANIMOUS
 AYES: _____
 NOES: _____
 ABSENT: _____
 ABSTAIN: _____

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

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

BY: _____, DEPUTY

Governing Board. The WCB Board only meets quarterly. WCB staff has agreed to develop block grant agreements (also known as agreements to sub-grant) for the ECCC HCP/NCCP Section 6 grants, a device they have not used in some time. This approach is preferable, as the WCB Governing Board would only need to act one time to approve the agreements to sub-grant. Funds would still be disbursed by WCB acquisition by acquisition into escrow and each acquisition would still require WCB due diligence (appraisal review, etc.), but the process would be much simpler and quicker.

- The Section 6 grants for the ECCC HCP/NCCP require a 55% non-federal match (e.g., 45% of the cost may be covered by federal funds, but 55% must be covered with non-federal funds). The agreement to sub-grant will enable the Conservancy to demonstrate compliance with the required non-federal match on a running basis. Without the agreement to sub-grant, the match would need to be supplied acquisition by acquisition. So long as the Conservancy stays ahead of the match requirement on a running basis, there will be more flexibility on assembling funding for acquisitions.
- WCB staff had indicated earlier this year an intent to bring the agreement to sub-grant to the WCB Board in August. Recently, Conservancy staff were informed that the agreement to sub-grant would not be ready until the November WCB Governing Board meeting. The delay is frustrating because the Section 6 grants have a three year term and the first of these will have less than 18 months remaining by November. WCB staff have been made aware of the concern but have indicated that it won't be possible for their attorney to finish the work in time for the August meeting. Staff are developing strategies to ensure that the delay does not hinder the land acquisition process.

Mitigation Funding as Match: Conservancy staff recently learned that the administrators of the Section 6 grant program at the U.S. Fish and Wildlife Service (USFWS) in Washington D.C. have instituted a policy prohibiting the use of mitigation funds as match. This policy was not evident in the request for proposals for the grant and Conservancy staff had previously been informed that mitigation funds could be used as match. Conservancy staff traveled to Washington D.C. in April on a variety of policy matters, including this issue, and met with the administrator of the program to learn more. The rationale expressed for this policy is that mitigation funds are compulsory and don't leverage additional funds. Conservancy staff and others explained that this policy was not evident in the grant guidelines, did not seem logical for a grant program designed for HCPs and that the Section 6 grants do leverage huge amounts of conservation whether or not mitigation funds are used as match because the very existence of the Section 6 program has been an incentive to develop regional HCPs which are far better for conservation than project-by-project permitting. The Section 6 program administrator indicated that he would be willing to explore the issue further. Recently, the Director of the California Department of Fish and Game(CDFG) sent a letter to USFWS (attached) requesting that this policy be overturned and specifically mentioning the ECCC HCP/NCCP.

Assembling the required match: Staff are pursuing the following strategies to fulfill the match requirements of the approved Section 6 grants:

- Request matching funds from WCB. WCB administers various funding programs to benefit wildlife, including a funding program specifically for NCCPs. Proposition 84, approved by voters in 2006, included a \$90 million line-item for NCCPs. Of this

amount, approximately \$20 million has been appropriated to WCB so far. WCB staff has proposed an additional block grant consisting of state funds to the Conservancy's projects from this first appropriation. \$5 million has been mentioned as an amount. Conservancy staff plans to work with WCB staff to see if this amount can be increased and matched in future appropriation cycles such that the bulk of the non-federal match requirements of the Section 6 grants can be covered with Proposition 84 funds. This would require about \$20 million in Proposition 84 funds, more than 20% of the statewide allocation. Staff recommends that the Governing Board declare a policy position supporting this request for matching funds and directing staff to pursue it.

- Seek revision to the policy preventing mitigation funds from being counted as match. Staff recommends that the Board declare a policy position supporting mitigation funds as an appropriate source of match and direct staff to communicate this position to appropriate parties and attempt to have the federal policy prohibiting such match changed.
- Document match from prior acquisitions. Prior acquisitions compatible with the conservation goals of the HCP/NCCP may be credited as match so long as the properties are encumbered in a manner equivalent to future HCP/NCCP preserves. Several properties acquired during development of the HCP/NCCP by the East Bay Regional Park District could be credited in this way once encumbered. New or updated appraisals would be necessary as well as management funding and an agreement with EBRPD to encumber these properties.
- Seek additional non-federal matching funds for future acquisitions, including grants secured by the Conservancy and grants and other funds contributed by other acquisition partners. The HCP already has a \$750,000 grant from the Department of Water Resources and staff will continue to pursue such opportunities. Private foundations and other state agencies such as the Coastal Conservancy could be significant partners, as these parties have contributed significant funds to this area in the past. EBRPD's proposed Measure AA extension could be a substantial source of match in future years if approved.
- Document start-up management costs. A substantial amount (approximately \$1,000,000) of such costs can be credited toward the match requirements for the some of the Section 6 grants.

Securing the necessary match and spending the Section 6 and match funds by the required timelines will be a major challenge. Staff are devoting significant time to help ensure that we can meet the challenge. Policy guidance from the Board is welcomed.

Section 6 grant requests in the short term: The request for proposals for the next Section 6 grant cycle will be released soon. Staff intends to apply but intends to a request a smaller amount than in years passed (e.g. \$2 million). The rationale behind this approach is: a) Every increment on new funding helps; b) our long-term grant funding needs are large and we need to make these needs known by applying; and c) we should ask for a smaller amount this time to ensure that raising the required match will not be a huge challenge. Guidance from the Board is welcomed.

Growing the Section 6 HCP Land Acquisition funds over the long term and improving flexibility: The Governing Board has previously adopted a position of support for increasing the size of the Section 6 fund nationally. Staff worked with a coalition of other northern California HCPs to present this proposal to Congress and the Administration. Staff recommends that this position be continued in future years and will bring a specific recommendation for FY 2010 at a future meeting. In addition, the northern California coalition is seeking to reach out to proponents of HCPs in southern California. Staff is helping to propose a statewide meeting of proponents of local government HCPs to explore ways we can work together. The meeting may be held in southern California in September. This meeting may present a great opportunity to build a larger coalition around the effort to increase the Section 6 HCP Land Acquisition fund, as well as identifying other areas of common ground such as a coordinated effort on the issue of mitigation money as match. If this meeting happens, staff would hope to attend. The travel expenses associated with attending would be less than \$500 and would be covered by the approved Conservancy Budget.

Attachments:

- Table summarizing grants awarded
- Letter from CDFG to USFWS on the mitigation funds as match issue

Grants Awarded for ECCC HCP/NCCP Implementation

<i>Funding Source</i>	<i>Agency</i>	<i>Purpose</i>	<i>Amount</i>	<i>Match¹</i>	<i>Match non-federal?</i>	<i>Date Funds Available to Spend</i>	<i>Need to be used by...</i>
Section 6 (2006)	USFW	Acquisition	\$6,531,054	\$7,982,399	yes	November 2008	January 1, 2010
Section 6 (2007)	USFW	Acquisition	\$7,000,000	\$8,555,600	yes	November 2008	June 30, 2010
Section 6 (2008)	USFW	Acquisition	\$6,000,000	\$7,333,333	yes	November 2008	after May 2011
CVPIA - HRP	USBR	Acquisition	\$1,241,631	\$500,000	yes	September 2006	Sept 30, 2010
IRWMP - Prop 50	DWR	Acquisition	\$750,000	\$500,000	no	August 2008?	June 2012
NCCP Local Assistance Funds (2006)	CDFG	Start-up staffing	\$40,000	\$0	no	May 2006	June 2008 (has been invoiced)
NCCP Local Assistance Funds (2007)	CDFG	Start-up wetlands restoration	\$60,000	\$120,000	no	?	?
TOTAL			\$21,622,685	\$24,991,332			

Notes:

- 1) Since state grants may be used to match federal grants and vice-versa, the total match is somewhat irrelevant.

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DEPARTMENT OF FISH AND GAME

http://www.dfg.ca.gov
1416 Ninth Street
Sacramento, CA 95814
(916) 653-7667



May 23, 2008

Mr. Don Morgan
Endangered Species Program
US Fish and Wildlife Service
4401 North Fairfax Drive, MS 420
Arlington, VA 22203

Dear Mr. Morgan:

The California Department of Fish and Game (Department) greatly appreciates the opportunity to review and comment on the Draft-Internal U.S. Fish and Wildlife Service Cooperative Endangered Species Conservation Fund (Section 6 of the Endangered Species Act) Grant Program's fiscal year 2009 request for proposals. The Endangered Species Act Section 6 Grants to States significantly benefit sensitive species through land acquisition and habitat conservation planning. The Department is committed to our partnership to work toward recovery of sensitive species and their habitats, and we believe that an open, interactive process will facilitate our mutual goals.

First, we believe it is critical for our agencies to begin an immediate dialogue to address a substantial issue facing the conservation and recovery of species in California due to the application of a policy regarding use of mitigation funds as match for federal grant dollars as described in the draft FY09 request for proposals (RFP). We believe this policy has the potential to derail conservation planning in many parts of California and reverse the meaningful conservation work achieved through partnerships with local governments. Second, we wish to offer comments on other elements of the solicitation based on California's implementation of the program with the Service and provide some general editorial comments regarding the RFP process and information contained therein.

Principal Reason for Commenting

III. Eligibility Information, Item #3, Other Policy

California's Natural Communities Conservation Planning Act (NCCP) permit issuance standards require plans provide for the "conservation and management" of listed and non-listed species, by contributing to recovery of listed species and preventing declines in non-listed species populations that might result in their addition to threatened and endangered lists. In practice, this means that under an NCCP, project proponents (often local government) identify impacts to listed species within the NCCP area and fund minimization, avoidance, mitigation and monitoring efforts to offset these impacts. In addition, an NCCP is unique in that it provides for joint state and applicant contribution to funding for conservation and recovery of species within the Plan area. Whereas Section 10 of the Endangered Species Act (ESA) addresses incidental take of endangered and threatened species and requires avoidance, minimization, and mitigation for take, the NCCP Act goes further by emphasizing building reserve/conservation areas that will contribute to the recovery and conservation of species through a local, state, federal partnership arrangement. Rather than explicitly separating mitigation from conservation,

the NCCP Act blends these elements obligating the permittee to achieve the required mitigation, and the agencies to contribute to funding the additional conservation. For the last decade, the two Acts have been seamlessly blended and have complemented one another very well. NCCPs have effectively "raised the bar" on the standards for regional Habitat Conservation Plans (HCP) and exceed the protections afforded by an HCP alone. Thus, California HCP/NCCP plans have the highest standards for regional conservation plans in the nation.

The RFP emphasizes throughout the document that land acquisition grants should complement, but not replace, private mitigation responsibilities contained in a Habitat Conservation Plan. Further, it indicates that the Service does not intend to grant funding for projects that serve to satisfy regulatory requirements of ESA, including complying with a biological opinion (Section 7) or fulfilling commitments of an HCP (Section 10), or for projects that serve to satisfy other local, State, or Federal regulatory requirements (e.g., mitigation for local, State, or Federal permits).

The Department recognizes and agrees with the Services' concerns to ensure that grants awarded do not directly fund the mitigation responsibilities of the permittees, but instead, support recovery actions. However, the Department, and many of the local entities currently enrolled in existing HCP/NCCPs, believe that under an NCCP, federal funding could be combined with funding needed to satisfy regulatory requirements to result in conservation above and beyond that required to mitigate a project. We are concerned enforcement of this policy will seriously affect conservation planning in our State. The State has a similar policy; however, we do not understand how counting mitigation fees, which fund required mitigation purchases, as matching contribution for federal land acquisition funding violates the Service's policy, as the federal grant funds themselves would not pay for the mitigation required by the HCP/NCCP permits.

Policy Implications

The aforementioned policy has serious implications for the success of California's approved NCCPs in achieving their conservation goals and for future plan participation. Most, if not all, plans in California have been or are being developed where the only sources of non-mitigation monies are State and Federal sources. The local entities find it difficult to generate funding, other than development fees, for successful plan implementation. Two permitted plans affected by the policy would have an unanticipated additional \$34.5 million dollar burden if mitigation fees cannot be used as match for Section 6 land acquisition grants. There are 11 other permitted plans and 26 plans in the planning stages that may be affected by this policy. Hundreds of millions of dollars for local entities and the State are at stake.

For example, Service approved Section 6 land acquisition grants have already been used for a series of completed land acquisitions for the Western Riverside County HCP/NCCP. The local match for most of the acquisitions was a combination of Wildlife Conservation Board (State bond funds), local development (mitigation) fees, transportation mitigation, and county-wide assessment funding. Each acquisition and federal grant has been handled differently, but in each case the match was approximately 50%, these match funds were derived from local mitigation funds as

identified in the approved plan. If the policy contemplated by the Service were enforced, the State could be responsible for additional match funds up to \$10.5 million dollars for the completed acquisitions if the local match derived from mitigation fees is disallowed.

Similarly, local entities in the East Contra Costa County HCP/NCCP have been awarded three Service-approved Section 6 grants for HCP land acquisition, matched with local in-kind services. For future acquisitions, the locals may only have mitigation fees to offer for match, which would prohibit them from receiving future federal land acquisition grants under the proposed policy. The approved Plan does not require local agencies to contribute money over and above mitigation fees, specifically for land acquisition. The monies they have to draw from for land acquisition are a combination of "mitigation" fees money, State money, and federal grant money. Without federal grant money, the locals would not be able to implement the approved and permitted Plan.

Our interpretation of the policy presented in the RFP, is that the Service would not allow any of the "mitigation" fee money to be used as match for the Section 6 grants, so the only viable option for the East Contra Costa County Plans is to have State NCCP bond money be the match to the Section 6 federal money. As a result, it is not certain at this point whether the local entities will be able to utilize all of the Section 6 money, because they may not be able to generate enough match. Essentially, the State would be responsible for \$24 million that was the obligation of the local entities who applied for these funds through the Department of Fish and Game.

The local entities for all approved HCP/NCCPs will, as a result of the implementation of this policy, need to come up with a separate source of funds from the development fees to achieve the match needed to be eligible for Section 6 funds. If local applicants for permitted plans cannot identify an alternate funding source and are limited by match options, it may result in the State making up the difference and shouldering the match burden for plans unable to comply with their permit obligations. If the permittees are out of compliance, both of our agencies may be placed in the awkward position of being forced to revoke their permits.

This policy could also deter participation in currently developing plans and future plans due to the difficulty of finding and providing other reliable funding sources. Non-traditional Section 6 funding has been used successfully to "seed" or jumpstart the acquisitions prior to Plan approval and motivate and create incentive for plan completion. This was used as a major selling point with the local entities for the Western Riverside County Plan as well as East Contra Costa County and the Santa Clara Valley plan, which is currently in late planning stages. In all these cases, non-traditional Section 6 funding was used by the Department and the Service as a selling point to the local entities as a viable future funding source for acquisitions.

There is a positive incentive to local governments when State and federal governments cooperatively contribute acquisition monies to the overall conservation effort. It helps create a spirit of partnership and trust that is essential to the success of these programs. For approved Plans, this trust may be compromised and thereby may stall or discourage the development of future Plans. These Plans will also take a great deal more time to meet their conservation goals than anticipated, which would in essence stall the "in-step" permitting of development projects within the HCP/NCCP area.

Preferably, the Department would like to work with the Service to clarify these issues and recognize how unique and progressive the programs are in California that blend the State and federal Acts to achieve more effective conservation of the species and their habitats. Our significant collaboration warrants recognition and flexibility in the interpretation of this policy, or the development of a separate policy altogether. The equal partnership between the Department and the Service is critical to our mutual efforts for robust conservation, and we have accomplished more conservation together through these Acts than would ever have been accomplished alone. Alternatively, if the policy is to stay as currently described in the FY09 draft RFP, the Department recommends that the Service make it absolutely clear to local entities in the planning stages that mitigation funds cannot be used for match and that other non-mitigation funding sources will need to be identified accordingly to provide the required local match. As for approved Plans, since the policy was not made absolutely clear in the planning stages, we believe that the plans should be "grandfathered in" and be eligible for funding assistance without the limitations now being imposed.

Other Comments

Significant Changes to Non-Traditional Programs for Fiscal Year 2009 Summary

"A priority species ranking criterion has been added to the evaluation form for each of the programs. Projects that benefit more priority species will score higher."

Comment: How will this list of priority species be determined? At what level within the Service will this determination be made? The Department would like the opportunity to have a significant role in determining which species are priorities in California when these priority species lists are created. We recommend including a link to a website where the lists will be made available.

"A new process is being implemented providing the Service Regional Directors with 25 points total in each of the non-traditional programs to distribute among project proposals to reflect the collective priorities of the State and the Service."

Comment: The Department fully supports this idea. We have long wanted a way for state priorities to be taken into account, rather than the straight scoring implemented in the past.

III. Eligibility Information Item #2, Cost Sharing

General Comment: It would be helpful for the Service to develop and provide a list of acceptable forms of cost share/match for applicants to access on a website or make available to the states to share with applicants for determining if they are eligible when preparing a proposal.

Habitat Conservation Plan Land Acquisition Item #5

"if you submit more than one parcel for consideration in your proposal, you must include the relative acquisition priorities for each parcel, the price of each parcel, and the amount of the request (purchase price minus the non-Federal match) for each parcel."

Comment: The language above should be modified to reflect that the price information requested for the grant proposals should be reasonable estimates. The estimated price of each parcel and the amount requested per parcel should be used by the local Service office for grant application evaluation only. These amounts will very likely change prior to the acquisition transaction, and the state should not be held exactly to these amounts. Also, please provide an example priority list and cost calculation here for clarification.

IV. Application and Submission Information, Item #5 Funding Restrictions

"The project must involve voluntary conservation efforts within the United States, States and Territories. As a voluntary program, we will not grant funding for projects that serve to satisfy regulatory requirements of the Act, including complying with a biological opinion under section 7 of the Act or fulfilling commitments of a Habitat Conservation Plan under section 10 of the Act, or for projects that serve to satisfy other local, State, or Federal regulatory requirements (e.g., mitigation for local, State, or Federal permits)."

Comment: Similar to our comments regarding Section III, Eligibility, Item 3, the Department recommends adding the following statement to provide some flexibility to recognize the blending of conservation and mitigation in the NCCP Act, higher standards and more significant contribution to recovery achieved by plans in California:
"However, federal funding can be combined with funding needed to satisfy regulatory requirements to achieve a project where the federal funding would result in conservation above and beyond that required to mitigate the project."

This same comment also applies to the General Questions section answers to Items 1 and 3 (see below).

VI. Award Administration Information, Administrative and National Policy Requirements, Expenditure of Funds

The nontraditional section 6 program is one of the most complex grants programs to manage and implement. It is especially challenging in California due to the large number of listed species, complicated real estate processes, and a dynamic political climate. These challenges have led to a slower than desired obligation rate for this grants program.

The main challenge is spending the grant funds in an expedited manner due to the complexity of the land purchases and planning processes in California. The reality is between the evaluation, proposal review period and awarding of the funds it takes from 2 to 3 years before it is spent on the ground.

- Land values sometimes increase beyond the amount awarded prior to the money being obligated or the purchases being completed;
- Escalating land prices sometimes prevent the State and its partners from meeting the State and Federal requirements to only pay fair market value;
- Willing sellers have changed their minds about selling, because they can sell the property on the open market at higher prices;
- Overall workload at the State has increased due to recent bond acts and new grant funds which all compete for limited staff;
- Completing land acquisitions in California is a complex process requiring specialized expertise with local knowledge and relationships; and

- Older grants only considered a limited set of parcels for purchase, and amendments to grants have become necessary if these parcels become unavailable for the reasons described above. Amendment processes can take time and staff resources.

Given California's constraints, we ask that up to two 1-year extensions be allowed such that:

- If there is grant activity/progress within the three years, the grant can be extended for two more years;
- The maximum possible term for a Recovery Land or HCP Land Acquisition Grant would be five years, if progress is demonstrated as identified above and an extension is requested. At the end of five years, the grant would be closed and any remaining Federal funds would be reverted.

Questions and Answers Section

General Questions, Item 10, answer.

"This time frame begins with a signed award document (*i.e.*, obligation of funds) and ends with grant closeout."

Comment: This is critical information for knowing when the clock starts, and this description appears too vague. Please clarify what a signed award document is, who it goes to, and when it is provided.

Additionally, last year's (2007) awards were not announced until well into 2008. Projects that stated they could be completed within one year were counting on the awards being announced in October 2007 and having until December 2008 to finish. With the delay in award announcement, does that mean those projects now have until December 2009? Please clarify.

General Questions, Item 10, answer.

"Yes, provided that funds sufficient to cover the management costs for a specified time period are secured at the time the land or easement is purchased **AND** provided that the *proportion of Federal funding provided for management* does not exceed the proportion of Federal funding provided for the land or easement purchase.

Comment: Please clarify the use of Habitat Conservation Planning Land Acquisition (HCPLA) funds for management. If funds are available for management, there should be a discussion of this option earlier in this document where it is described for what HCPLA funds may be used. Also, we suggest providing a formula here for determining what the maximum federal share of management can be.

General Questions, Item 16, answer.

"It is the Service's policy that grants be funded prospectively; therefore, we will not accept proposals submitted for reimbursement of previously purchased land."

Comment: This has been allowed in the past and the Service has previously approved the use of such lands as the non-federal match if they are appraised again. Will this no longer be allowed?

Habitat Conservation Planning Assistance Grants Questions and Answers

"One Year, for the purposes of this grant program, is defined as the close of the calendar year subsequent to the calendar year in which funding was appropriated."

Comment: Please clarify whether the funds would be appropriated in the same year as approved and in the following year. Also, please clarify the meaning of the terms appropriated and awarded.

In conclusion, the non-traditional Section 6 Program is one of the most complex grant programs to manage and implement. It is especially challenging in California due to the large number of listed species, the cooperative nature of the NCCP Act blended with the federal regional HCPs, complicated real estate processes, and a dynamic political climate. With all these innate challenges, we still continue to look forward to working cooperatively with the Service in our effort to conserve the precious natural resources found only within California. A flexible approach to funding sources is likely the best way to achieve our mutual goals. We feel optimistic that we can make this work, and thereby continue to be a leader in the nation for ingenuity and progress in the world of large-scale, regional natural community conservation.

Sincerely,



Donald Koch
Director

cc: Mr. Steve Thompson, Regional Director
Region 8 US Fish and Wildlife Service
2800 Cottage Way
Sacramento, CA 95825

Sonke Mastrup, Deputy Director
Kevin Hunting, Deputy Director
Gary Stacey, Regional Manger, Northern Region
Sandra Morey, Regional Manager, North Coast Region
Chuck Armor, Regional Manager, Bay Delta Region
Bill Loudermilk, Regional Manager, Central Region
Ed Pert, Regional Manager, South Coast Region
Curt Taucher, Regional Manger, Inland Deserts Region
Marija Vojkovich, Regional Manager, Marine Region

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**EAST CONTRA COSTA COUNTY
HABITAT CONSERVANCY**

DATE: June 18, 2008
TO: Governing Board
FROM: Conservancy Staff
SUBJECT: Wetland Creation/Restoration Activities Planned for this Year

RECOMMENDATION

ACCEPT update from staff on two wetland restoration/creation projects planned for this year pursuant to the East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan (“HCP/NCCP”) including timeline and steps necessary to authorize the projects to move forward.

SELECT one of the two options below to make it possible for the two wetland restoration/creation projects to proceed to construction this year:

- (1) AUTHORIZE and DIRECT Conservancy staff to:
 - a. Work with East Bay Regional Park District (EBRPD) staff and design consultants to develop final constructions plans and specifications and to solicit bids;
 - b. Develop one or more draft agreements with EBRPD for use of their lands and for reimbursement of construction and long term management costs;
 - c. Provide copies of the draft materials to the Conservancy Governing Board; and
 - d. Execute the agreements with EBRPD, award a construction contract (Vasco site only) and proceed with construction of the two described wetland projects, if and only if the Conservancy Chair and the Vice Chair approve and the construction and management costs are within the Conservancy’s 2008 Budget; OR
- (2) Convene a special meeting of the full Conservancy Governing Board in late July to review and approve agreements and contracting for the construction of the two described wetland projects.

DISCUSSION

Since the update provided at the last Conservancy Governing Board meeting, staff has continued to work with EBRPD staff and with consultants Jones and Stokes and Monk and Associates to pursue wetland restoration and creation opportunities that can be constructed this year. Projects

CONTINUED ON ATTACHMENT: <input checked="" type="checkbox"/> YES	
ACTION OF BOARD ON _____ APPROVED AS RECOMMENDED _____	
OTHER _____	
<u>VOTE OF BOARD MEMBERS</u>	
<input type="checkbox"/> UNANIMOUS	I HEARBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF AN ACTION TAKEN AND ENTERED ON THE MEETING RECORD OF THE CONSERVANCY GOVERNING BOARD ON THE DATE SHOWN. ATTESTED _____ <i>CATHERINE KUTSURIS, SECRETARY OF THE EAST CONTRA COSTA COUNTY HABITAT CONSERVANCY</i> BY: _____, DEPUTY
AYES: _____	
NOES: _____	
ABSENT: _____	
ABSTAIN: _____	

are moving forward with design and pre-construction activities on two parcels recently acquired by East Bay Regional Park District: the Lentzner property at the south end of the Black Diamond Mines Regional Preserve and a recent acquisition on the north side of the Vasco Caves property.

Significant planning and design work has already occurred on these projects and additional significant work is ongoing. Final plans are in development now and full costs will be known soon once bids are received and management plans and agreements are developed with EBRPD. This information will all be available in the next 45 to 60 days, but the next regular Conservancy Board meeting is not scheduled until September 17 and authorizations to proceed will be needed before that time for the projects to proceed this year. Therefore, staff recommends the Board select one of two approaches described above for providing such authorization.

There a number of reasons why it is critical to pursue pilot wetland restoration projects this year. Over the 30-year life of the HCP/NCCP, the Conservancy may be required to restore or create a large number of acres of various types of wetlands and waters. If impacts to wetlands and waters are substantial during those 30 years, the cumulative total restoration/creation acreage could exceed 500 acres. A more likely but still conservative¹ projection is 300 acres, which amounts to 10 acres of restoration/creation per year. By the end of the second year of implementing the HCP, the Conservancy must have caught up to the mitigation requirements of impacts that have occurred. At this point, no impacts have occurred, though fees have been paid in advance of the HCP for minor impacts to wetlands totaling much less than one acre. The Conservancy's intention as stated in the Work Plan is to be aggressive in its wetlands restoration and creation program and to initiate at least some pilot projects during the first year of implementation (2008 is officially the first year of implementation).

Over the past 9 months, Conservancy staff worked with EBRPD and consultants to identify suitable sites for wetland restoration. Due to the limited number of properties (Lentzner and Vasco Caves North) that are already in public ownership and can count toward the HCP preserve requirement², only two small restoration sites were selected for possible construction this year. Constructing these pilot projects not only helps the Conservancy begin to achieve wetland restoration/creation targets, but also allows the Conservancy to understand and define the key challenges associated with planning and implementing restoration/creation projects, test the abilities of new consultants and become familiar with EBRPD's restoration process. Staff anticipates that these projects will be much more expensive per acre than future restoration projects because they are small pilot projects and do not achieve an economy of scale. However, staff anticipates that these projects can be designed, constructed and maintained within the limits set by the Conservancy's approved Budget for these Budget categories.

Additional information on the two projects and their status is provided below.

¹ Creation/restoration needs could very likely be less than 300 acres, but 300 acres is a conservative projection in the sense that is prudent for the Conservancy not to under-plan.

² Unless special exceptions are granted, wetland restoration and creation must occur in HCP preserves and not in parks acquired before the HCP.

Lentzner property: The Lentzner wetland restoration project is located on the eastern end of the parcel in the upper part of a valley that drains to Sand Creek. The project takes advantage of the limited opportunities to increase alkali wetland features in the HCP/NCCP preserve system. Though the project area has a relatively small watershed, it also receives water from a salty spring. The project will restore approximately 0.2 acres of seasonal alkali wetland, and 0.2 acres of native annual grassland. A significant portion of the area to be restored is presently denuded, probably owing to soil compaction.

Additional activities associated with the project include removing debris (failed cattle trough and pipes), addressing soil compaction issues around the trough area, and repairing a head cut on a small tributary to the project site. The head cut is threatening the integrity of the dirt road on the property. Also, by repairing the head cut, slowing the movement of water through the drainage and realigning the road, the new wetland feature will be better protected from siltation. The preliminary estimated cost of materials and construction for the entire restoration and wetland creation project is approximately \$100,000. We are in the process of estimating long term management costs but estimate these will be well within the Conservancy’s approved Budget.

The Lentzner project has been designed by consultants at Jones and Stokes. EBRPD will be lead on selecting and managing a contractor to perform the restoration (with the Conservancy providing funding). The Lentzner wetland restoration activities are moving on an extremely expedited timeline and delays in any one of a number of components that needs to come together before construction could cause us to miss the construction window for this year. EBRPD’s assistance with the tight timeline is appreciated.

Work completed to date:

- Selection of site
- Additional consultation with staff from the California Department of Fish and Game and the U.S. Fish and Wildlife Service on design
- Testing of on-site spring water quality (it has a high salt and boron content that must be diluted with surface flows from the surrounding watershed to sustain alkali wetland vegetation)
- Development of 2 restoration concepts
- Acquisition of additional data (1-ft contour map of site)
- Draft site preparation, grading and planting plans for the project
- 50% design review meeting with EBRPD

Cooperation from EBRPD staff and committed consultants has made it possible to move from conceptual designs in March 2008 to possible construction in the late summer/early fall 2008 (ordinarily this a 12 or 18 month process). An approximate timeline for the Lentzner project is:

	Major Milestone Activities	Approximate Date
1	Bid Packages available	6/23/2008
2	Contractor Selection by EBRPD	7/24/2008
3	Conservancy Governing Board Meeting (tentative)	July/August
4	EBRPD Board Meeting (to award contract)	8/5/2008

* Could be slightly later, but all earthwork in creeks or wetland features needs to be complete by October

4	Pre construction meeting	Mid August	15, 2008 per CA Department of Fish and Game Regulations
5	All permits secured before construction	Mid August	
6	Primary construction (earth work)	9/1/08*	
7	Secondary construction (fencing, other improvements, etc)	9/20/2008	

Preliminary engineering and site designs are attached. Note that these are not the final construction designs and that adjustments will be made in response to additional studies and comments from wildlife agencies, Conservancy and East Bay Regional Park District staff.

Vasco Caves: The Vasco Caves wetland creation project is located on the western side of the parcel. The feature will collect water from an approximately 21-acre watershed and will create a little under an acre of pond and seasonal wetland in an area that currently supports annual grassland. The feature will be designed to provide breeding habitat for California tiger salamander as well as seasonal wetland vegetation. The design is currently being modified to create a pond with a depth that varies from three feet to one foot and preliminary cost estimates are not available. Staff anticipate these preliminary cost estimates for construction and materials will exceed \$150,000 but be under \$250,000. We are in the process of estimating long term management costs but estimate these will be well within the Conservancy’s approved Budget.

Work completed to date:

- Development of 6 different pond/wetland restoration concepts for the property
- Selection of site
- Additional consultation with staff from the California Department of Fish and Game and the U.S. Fish and Wildlife Service on design
- Investigation into effects on other species in the area (Burrowing owls)
- Acquisition of additional data (aerial photos, 1-ft contour map of site)
- Hydrologic study/modeling
- 50% design of selected concept (including engineering specifications and grading plan)
- 50% design review meeting with EBRPD and agreement to move from a 1 foot deep pond to a pond with depths that vary from 3 feet to one foot.

The Vasco Caves wetland creation project has been designed by Monk and Associates. Unlike the Lentzner project, the Conservancy will be the lead in selecting and managing a contractor to construct the project.

	Major Milestone Activities	Approximate Date
1	Bid Packages available	7/2/2008
2	Contractor Selection by Conservancy	July/August
3	Pre construction meeting	Mid August
4	All permits secured before construction	Late August
4	Primary construction (earth work)	9/15/2008*
5	Secondary construction (fencing, other improvements, etc)	10/5/2008

* Note that all earthwork in creeks or wetland features needs to be complete by October 15, 2008 per CA Department of Fish and Game Regulations

Preliminary engineering and site designs are attached for the Vasco Caves project. Note that these are not the final construction designs and that adjustments will be made in response to additional studies as well as comments from the wildlife agencies, Conservancy and East Bay Regional Park District staff. These designs show a one foot deep pond and the next iteration will show a variable depth pond.

Authorizations needed: There are numerous agreements and contracting activities that need to be approved during the next two months for the two restoration projects to proceed. The actions are identified (by project below):

Actions that need Board Authorization for the Lentzner wetland restoration project:

- Agreement with EBRPD to fund construction and on-going management of the wetland.

Actions that need Board Authorization for the Vasco Caves wetland creation project:

- Authorization to enter into a new contract for the construction of the project
- Agreement with EBRPD that the Conservancy can construct project on the selected site and that the Conservancy will cover ongoing costs associated with the management of the project

Attachments:

- Lentzner Wetland Preliminary Design
- Vasco Caves Wetland Preliminary Design

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