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November 24, 2005

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

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Dear Mr. Kopchik:

Enclosed please find some brief comments invited in the Federal Register on issues about the HCP for Eastern Contra Costa County.

These comments are submitted on behalf of the Contra Costa Taxpayers Association. We welcome the opportunity, when it is made available, to raise critical issues about costly government programs that risk adding to the large bureaucratically supported costs, fees and expenses that we are already burdened with in today's society.

Yours sincerely,



Henry A. Alker,  
President

# CONTRA COSTA **TAXPAYERS** ASSOCIATION

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## Executive Summary

The enclosed comments present five issues for further consideration in the draft Eastern Contra Costa Habitat Conservation Plan (HCP) as invited in the Federal Register.

- (1) Under what limiting economic conditions would the HCP become economically untenable? | I-1
- (2) What are the total habitat preserve and maintenance costs for Eastern Contra Costa County (including but not limited to the HCP)? Are these the most cost effective ways of achieving conservation goals? | I-2
- (3) What internal controls, if any, within the HCP can reliably prevent waste, duplication of effort and inefficiency for the roughly \$300,000,000 of planned, budgeted but off budget governmental funds in the HCP as well as the unestimated sums of private sector expense? | I-3
- (4) Given a wide range of specified constitutional issues with the Endangered Species Act (ESA) currently being litigated, and given that these aspects of the ESA appear to provide cornerstone foundations for the HCP, how will the HCP avoid spending much of its budget for legal costs? Would any major Supreme Court decision favoring property holders' rights make the HCP collapse? | I-4
- (5) Will current ESA reform before the U. S. Senate, after passing the House, cause significant revision of the HCP? Would a proposition on local funding for property value impairment caused by the HCP such as passed in Oregon, either eliminate this HCP or cause it to continue as an ineffective, dysfunctional and expensive bureaucracy? | I-5

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## Comments on Draft HCP Eastern Contra Costa County

1) Economic analysis of revenue provided by the plan makes the untested assumption that growth and development will continue to be viable no matter how many fees, mandated costs, and other expenses are imposed by this plan and all other governmental agencies throughout its life. A statement of the limiting economic conditions which could undermine the plan would help. If housing became so expensive that it discouraged the required growth, would the plan fail or just go on raising fees anyway? Is there is a large enough margin of safety under current economic conditions for the plan to remain economically viable for some or most economic futures? Each taxing authority that can raise taxes and regulatory agency that is able to mandate costs could be projected into the future using rates of growth from past periods. If that rate is accelerating, project that rate to continue. When, if ever, does the plan become uneconomic? For example, how many bonds for parks or preservation and maintenance are expected to be added in East County over the life of the plan and what impact would they have on property tax increases? What are projected transportation fees? What about affordable housing fees? (See Appendix A re: future housing and recent demographics). Any realistic decrease in costs of construction created by the plan could be included in this analysis.

I-1

Persons interested in how to do cost analysis of preserving an endangered species might consider the following article, "The Economics of the Endangered Species Act" in the Journal of Economic Perspectives, Summer 1998, Volume 12, No. 3.

In this study reported in a scholarly Journal the cost of preserving each member of an endangered bird species was \$9,000,000.00 per bird. That species is not, fortunately, on the list for the East County HCP.

2) While there is a discussion of other sources of additional revenue for preservation and maintenance costs, there is no overall analysis of the habitat preservation costs of other activity done by governments in the county. Staff time and the budget for activities such as zoning and revising general plans are extra costs that need to be valued. That part of the budget for East Bay Regional Park district ("EBRPD") that is or will be spent in East County for habitat creation, preservation and or maintenance all need to be identified and analyzed before the County can make the determination whether this plan is making a rational allocation of scarce resources. Who says we can have both guns and butter, good schools and so many flowers? Consider both private and public sector costs for CEQA compliance over the next 30 years. Is a billion dollars too much to spend on preserving habitat?

I-2

If central County is not going to go ahead with another regional HCP that could materially and possibly adversely impact this plan, what would that cost if it doesn't?

The reason why these larger scale and scope cost analyses need to be done is that they could show that this plan is wasting many millions of dollars, both on budget and off budget because other, more cost effective strategies were not considered. For example, one could change zoning of the planned areas outside urban limit lines from one house

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every 5 or every 20 acres, to one house every 160 acres or even 320 acres. Following that step one could identify smaller preserve areas with absolutely no building allowed and compensate landowners for loss of value created by that restriction given the relevant zoning. Organizations, both public and private, could submit competitive bids to maintain or facilitate plant and animal activities by the significant species on preserve lands. Reinventing governmental approaches to habitat preservation could save many millions.

I-2 (Cont.)

3) One could say that the goal of an HCP is to reduce moderately the compliance costs of some developers with regard to some species and some regulatory agencies. Therefore focus on whether the overall activity of habitat preservation is done in a cost effective fashion is irrelevant or outside the scope of the HCP. That line of reasoning, if valid, does not prevent examination of the question of cost effective operations within this HCP.

There are safeguards within this plan for regulatory agencies to correct failures of the plan to protect a species of plant or animal. Ultimately, the Department of Fish and Game and the Department of Fish and Wildlife are not surrendering their ability to correct failures of preservation. They can withdraw their required approval or force correction at somebody else's expense. Where are strong checks and balances so that available procedures could be called into play to address waste of money within the plan?

For example, rather than developing new preservation infrastructure and a new bureaucracy, what if just expanding the EBRPD, which already does these activities, would be cheaper? It might actually be more expensive but, the point is, how would this alternative be decided? Why isn't this general issue, and for that matter this particular example, given serious attention under this plan? Why isn't this plan creating an opportunity for EBRPD to get funding off budget for projects voters have already rejected as on budget activity?

I-3

A sociologist might note that the bulk of the participants actually participating in this planning process and attending almost endless hours of meetings are taxpayer supported governmental agencies. Private sector participation was limited to two land user groups, two land developer groups and private sector conservation groups. These groups more or less cancelled each other out. That leaves an obvious risk that such governmental agencies who benefit from the plan might abuse the power given them by the Plan. The Plan simplifies and codifies the often arbitrary decisions regulators otherwise have to make, and provides them with substantial off budget funding. Those funds also might help create new job opportunities for existing staff creating another possible conflict of interest. Who is watching the regulatory agencies in this plan and, who has the power to prevent wasteful spending? Off budget funding for such large amounts as \$300,000,000 needs better controls.

Will these agencies be able to respond judiciously if, for example, the Kit Fox is recovered from conservation activities in San Joaquin County and is no longer an adequate justification for some of the plans activities, maps and fees? There needs to be a check and balance in place when the fees generated by the fund, in part, fund the salaries of regulators or their employing agencies.

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4) The main justification for this plan's particular form and intent is its intended compliance with the current version of the Endangered Species Act ("ESA"), both Federal and State versions. At the Federal level major litigation is under way, and has been for many years, questioning many features of this law. Property rights organizations such as the Pacific Legal Foundation persistently and in a wide variety of venues are attacking many key assumptions that are used throughout this HCP.

a) Does ESA apply to habitat that is not occupied by a specific endangered species which might be suitable for habitation and might be necessary for species recovery?

b) Does ESA have the right to improve costly migrations when it has no good scientific data that prove the migrations are proportional to the damage exerted by a proposed development on a critical habitat?

c) Can ESA regulate small seasonal ponds or creeks many miles from navigable waters of the United States?

d) Does enforcement of ESA in this or any HCP constitute condemnation without compensation? More specifically, is a \$160,000+ mitigation fee for one acre essentially condemning it by making any reasonable development prohibitively expensive? And, more specifically, in this HCP, thousands of acres are presumed to be of preserve quality. Are those lands which do not have the "privilege" of applying for development by paying all of the required fees, being condemned without compensation?

The point is that if any of this litigation defending the property rights being severely limited, if not destroyed by ESA actually succeeds, what happens to this HCP? Does it collapse like a house of cards? Or does it need another costly revision involving expensive consultants, many hours of staff time and lots of clever lawyers? This litigation, incidentally, also is attacking the Clean Water Act for its own brand of attack on property rights and is moving towards Supreme Court attention in the near future.

Surely some limiting conditions about legal assumptions should be spelled out. The plan should be a lot clearer than it is now regarding how much money will be needed, from whom, if any major property rights attack on ESA achieves final success before the Supreme Court? How much litigation cost under this particular plan is specifically buried within the administrative budget? What is to prevent endless litigation with encouragement from relevant Supreme Court decisions eating up the operating budget for many years? One thinks of well-intended Super Fund clean up funding that spent billions on litigation before a nickel was spent on actually cleaning up a site. Why won't a similar problem happen here?

5) Serious attempts at legal reform of ESA are currently under way in the Congress. Should they succeed, and some have already passed the House, how would that impact this HCP? Who would pay for the revisions? Wouldn't there be drastic changes if the federal or State government actually had to compensate landowners for decreases in their property value? The legislation recently passed in Oregon, Proposition 37, makes this possibility more than remote. In that case, moreover, local governments have to pay the costs. The extent to which the current HCP is critically dependent on supportive legislation is neither identified nor discussed in this report. Several perspectives could be developed.

I-4

I-5

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It would behoove our local government to give the adverse impact on some property values created by this plan more respectful attention than is now provided. If it is very expensive to build new housing, of course, the value of existing housing owned by current constituents increases. And more property tax revenue becomes available. When regulatory and taxing authorities benefit from adding unnecessary costs that are "off budget", the need for checks and balances to prevent excessive costs should be a lot more evident than it has been to the authors of this HCP.

I-5 (Cont.)

## Appendix A

# Ahead Of the Tape

—Today's Market Forecast—

By JUSTIN LAHART

## Where the Heart Is

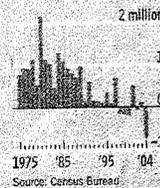
■ The demographic wave that the U.S. housing market is supposed to be riding may not be there anymore.

The managers of U.S. home-building companies love to tell the story of immigrants creating a powerful demand dynamic for new homes. The population is growing, yet America is building only as many houses as it was 30 years ago. No wonder home prices have surged.

But in the wake of restrictions on immigration following the Sept. 11, 2001, attacks,

## Boom and Bust

Annual change in the number of U.S. households with head of household aged 25-44



Source: Census Bureau.

the flow of immigrants into the U.S. has fallen sharply. In a recent paper, Jeffrey Passel and Roberto Suro of the Pew Hispanic Center found that all migration into the U.S. last year was 24% below the peak it hit in 2000.

That drop could have consequences for the housing market, which yesterday was rattled

by Toll Brothers Inc.'s disappointing outlook and 14% drop in its share price. Harvard's Joint Center for Housing Studies reckons that the foreign-born have been directly responsible for one-third of the U.S. households formed over the past decade. (Not all households are homeowners.) Goldman Sachs economist Sara Aronchick makes the further point that a higher share of today's immigrants are unauthorized, making them less likely to be homebuyers.

Meantime, another source of demand—children of baby boomers—may not be so strong either. The number of households whose heads are 25 years to 44 years old has stagnated in recent years, notes Merrill Lynch economist David Rosenberg, and is now at its lowest level since 1995.

Home-ownership growth among 25- to 44-year-olds was strongest in the 1970s, peaking in 1980. That increase was due not just to baby boomers coming into their own, but also to a rising divorce rate: Split-up couples form new households. Since 1981, the divorce rate has fallen.

If immigrants and echo boomers aren't behind the pickup in housing demand, there must be other things at work. Perhaps it is the boomers themselves—buying second homes, often for investment purposes. And then there are the throngs of speculators who have been active in the hottest markets.

Demand from these second-home and speculative buyers, who have no real need to be in the market, may be far more sensitive to rising rates than demand from the average home buyer.

# Response to Letter I, from the Contra Costa Taxpayers Association

## Response to Comment I-1

In response to the HCP/NCCP, the commenter asks under what limiting economic conditions would the HCP become economically untenable.

The proposed HCP/NCCP is essentially a streamlined endangered species permit program designed to maximize regional conservation goals for biological resources and sensitive species protections while providing a timely and efficient permit process to developers. The primary costs of the Plan, land acquisition and operations/maintenance, will be covered by revenues collected in association with development construction permits as well as existing sources of public revenues. The cost estimates for the Plan were carefully prepared using a detailed, itemized cost-estimation process that was developed through consultations with agencies and individuals with practical experience in acquiring and managing land for species. The funding strategy for the Plan was also carefully prepared through detailed discussions with property owners, developers, agency representative and others on the appropriate means for partitioning Plan costs between fee funding and non-fee public funding, the appropriate amount for mitigation fees, and the availability of non-fee public funding. Therefore, it is anticipated that the Plan will be adequately funded through its' thirty-year life. Chapter 9 of the HCP/NCCP evaluates funding adequacy and identifies possible actions to be taken should revenue collections or land acquisitions not keep up with funding projections or land development.

If development in eastern Contra Costa County were to slow due to land use restrictions, housing prices, development fee burden or other cause, less conservation for mitigation purposes would be required and the costs of implementing the Plan would be reduced relative to a scenario with more development. The Plan was constructed with a flexible permit area for urban development for the reason that the amount of future growth in the area is uncertain.

The imposition of the HCP/NCCP mitigation fees is very unlikely to be the cause of such a slow-down. The amount of other non-endangered species fees required by local jurisdictions in the HCP/NCCP inventory area varies, but the highest development fee under the HCP/NCCP represents less than 10% of \$60,000 per unit, which was the low end of the estimated range of total fee burden in the HCP/NCCP area in 2003. Furthermore, to understand the economic impacts of the HCP/NCCP fees, one must consider the cost-savings provided by the HCP. Compliance with endangered species regulations is a current cost for project proponents. Direct costs under the current project-by-project approach to compliance include the costs of detailed species surveys to determine presence/absence at certain specified times of the year, time-consuming consultations with wildlife agency staff, loss of project area to avoid sensitive resources on site, identification and acquisition of off-site mitigation lands, identification of a steward for the off-site mitigation land and the development and recording of a conservation easement on that land, and funding an endowment to pay for perpetual monitoring and management on the mitigation lands. Indirect costs of the current approach include the cost of project delays and the cost of general uncertainty with endangered species permit conditions and permit schedule.

The HCP/NCCP replaces the direct costs of individual compliance with one or more pre-determined fees (and as some more narrowly defined and simplified survey and avoidance requirements) and

eliminates the indirect costs of delay and uncertainty. While it is not possible to precisely quantify for comparison purposes the direct and indirect costs of the current approach to compliance, one of the goals of the HCP/NCCP has been to improve for project proponents the process for seeking and obtaining endangered species permits. From a project proponents' perspective, cost is a key consideration. HCP/NCCP fees were set according to a formula and a fair-share apportionment approach that were discussed in detail by a range of stakeholders, including developer representatives, and ultimately recommended for inclusion in the HCP/NCCP by the HCPA Coordination Group, the official stakeholder committee for the HCPA.

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

## **Response to Comment I-2**

In response to the HCP/NCCP, the commenter requests an analysis of the total habitat preserve and maintenance costs for eastern Contra Costa County (including, but not limited to the HCP/NCCP). The commenter also seeks a determination of whether or not these are the most cost effective ways to achieve conservation goals.

The request to analyze total habitat and preserve maintenance for eastern Contra Costa County is beyond the scope of this project. It is not a requirement of either the HCP/NCCP or the EIS/EIR to consider the costs of habitat preserve and maintenance activities beyond those associated with the Plan itself.

With respect to the comment about whether the approach to achieving the conservation goals of the HCP/NCCP is the most cost effective approach, the HCP/NCCP does not strictly prescribe how implementation will occur. This flexibility was maintained to enable the Implementing Entity to choose the most efficient and effective approach. For example, the Implementing Entity will retain the flexibility to perform conservation actions such as land acquisition, habitat restoration, preserve management and monitoring itself or to contract these duties out to other organizations. Other organizations may be able to perform such duties more efficiently and effectively due to a number of factors, including greater experience and economy of scale considerations.

Since publication of the Draft HCP/NCCP, EBRPD has become a proposed signatory to the Implementing Agreement and is expected to become a significant partner in implementing the HCP/NCCP if it is approved. Including EBRPD in the HCP/NCCP and Implementing Agreement will facilitate future partnerships between the Implementing Entity and EBRPD related to land acquisition, land management and other HCP/NCCP tasks, but does not specify the extent of the partnership. If EBRPD can provide certain HCP/NCCP services in certain areas more efficiently and effectively than other service providers available to the Implementing Entity, then it is likely the Implementing Entity would select EBRPD to provide these services. Including EBRPD in the Implementing Agreement and the HCP/NCCP also has the advantage of facilitating coordination between the on-going activities of EBRPD to acquire and maintain land for park and recreation purposes and the activities of the HCP/NCCP to acquire and maintain land for habitat purposes. It may be quite cost effective for all parties if some new EBRPD parks can also function as HCP/NCCP preserves and some new HCP/NCCP preserves function as EBRPD parks.

However, it should be noted that there are limitations on the degree of flexibility afforded to the Implementing Entity to conserve land. For example, the approach must enable the conserved land to be managed for habitat values. Without the ability to manage the conserved land, the HCP/NCCP could not achieve the goals set for it by the HCPA, would not comply with regulatory standards, and

would not receive regional permits from the wildlife agencies. Therefore, approaches such as rezoning land to lower densities are not feasible approaches to implementing the HCP/NCCP.

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

### **Response to Comment I-3**

In response to the HCP/NCCP, the commenter raises concerns about preventing wasteful spending and the need for identifying better internal controls within the HCP/NCCP to deal with duplication of effort and governmental inefficiencies and abuses of power, particularly as it relates to safeguards for the regulatory agencies to correct failures of the Plan to protect a species of plant or animal.

One of the primary purposes of the HCP/NCCP is to provide for the protection of covered species under the federal Endangered Species Act (ESA) and the Natural Community Conservation Planning Act (NCCPA) while streamlining the issuance of incident take permits under these Acts within areas designated in the Plan for development. This provides a timely and more cost-effective permit process for the development community than currently exists today. The HCP/NCCP includes safeguards for the regulatory agencies because, at the end of the day, these agencies must be assured that all Plan-related actions are lawfully committed in compliance with the ESA and NCCPA. An Independent Conservation Assessment Team and a committee of Science Advisors will provide guidance and accountability on the biological aspects of Plan implementation.

The HCP/NCCP also includes a number of fiscal safeguards and internal controls. The HCP/NCCP provides that the activities of the Implementing Entity will be managed by an Executive Director and overseen by a Governing Board made up of elected officials from the cities and the County. The responsibilities of the Governing Board will include overseeing the finances of the Implementing Entity. The HCP/NCCP also requires the establishment of Public Advisory Committee who will provide additional guidance and accountability on finances and other aspects of implementation. The Implementing Entity must prepare an Annual Report by March 15 of each full year of Plan implementation, and that Annual Report must include a broad assessment of the status of Plan Implementation, including an assessment of what is working well and what isn't. The Annual Report must also provide detailed information to support these assessments, including information on Plan finances. In addition, the HCP/NCCP requires that funding audits occur in years 3, 6, 10, 15, 20, and 25 to ensure that cost estimates and revenue projection are recalibrated with actual costs and revenues.

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

### **Response to Comment I-4**

In response to the HCP/NCCP, the commenter raises the question of whether or not the HCP would collapse in light of ongoing Endangered Species Act (ESA) litigation and potential future ESA reforms, noting specifically the potentially significant costs associated with ESA litigation.

Consideration of pending reform legislature at this time would be speculative. The HCP/NCCP was developed based on current ESA regulations. If ESA regulations change in the future, the HCP/NCCP will be reevaluated by the regulatory agencies and participating jurisdictions at such time, and modified as necessary.

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

## **Response to Comment I-5**

In response to the HCP/NCCP, the commenter again raises the question of whether or not ESA reform would cause significant revision of the HCP/NCCP. The commenter also raises the concern that the HCP would adversely impact property values and emphasizes the need for checks and balances.

As stated in the response to I-4 above, it would be speculative to evaluate the effects of potential ESA reforms on the HCP/NCCP. With respect to property values, there are numerous factors affecting the value of property beyond the HCP/NCCP and it is impossible to accurately project what effect, if any, is expected due to the HCP/NCCP. For example, a goal of the HCP/NCCP is to improve the process for developers to secure species permits. If the Plan achieves that goal, development land in the area might become more valuable. If it doesn't, the land might become less valuable. If the HCP/NCCP reduces delays and lowers the cost of the permitting process, new home prices could be reduced. If the HCP/NCCP fees raise the net cost of building a home, home prices could increase. If the HCP/NCCP increases the market for rural properties, the value of these properties may go up. If the HCP contributes to diminishing the speculative value of rural properties, the value of these properties may go down. See I-4 for a response on the checks and balances issue.

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