

Comment Letter K



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November 30, 2005

John Kopchik  
Contra Costa County CD Dept.  
651 Pine St., 4<sup>th</sup> Floor NW  
Martinez, Ca. 94553

Lori Rinek, Division Chief  
US Fish and Wildlife Office  
2800 Cottage Way, W-2605  
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Dear Mr. Kopchik and Ms. Rinek:

Friends of the Swainson's Hawk has reviewed the draft East Contra Costa County HCP/NCCP and the draft EIR/EIS for the HCP/NCCP adoption. We have a number of concerns, some are generic and others relate specifically to the treatment of the Swainson's Hawk in these documents.

### Generic Problems.

**Fee Based Programs Fail.** The Conservation Program, Chapter 5, states: "Land preservation—in fee title or through establishment of conservation easements to create the HCP/NCCP Preserve System—is the foundation for conservation in this conservation strategy." ESA, CESA, NEPA and CEQA all require that the mitigation measure be capable of implementation and that adequate funding for the mitigation program be guaranteed.

The mitigation program for this HCP/NCCP however relies on fees. Fees are by their nature not adequate to guarantee mitigation. Ample empirical evidence exists to determine that a fee based program is not capable of implementation and that it does not guarantee that mitigation will be provided. Numerous examples exist today of fee based mitigation programs that have failed. Fees have been collected and unspent by diverse jurisdictions, including the city of Elk Grove, the City of Rancho Cordova, the County of Yolo and the County of San Joaquin. There is no basis for the regulatory agencies to consider that East Contra Costa County would have a different experience than these other jurisdictions.

K-1

Argument is made that the East Contra Costa HCP/NCCP is different because there is a

K-2

substantial contribution from public acquisition by entities with a strong track record of being able to acquire open space. We strongly object to a mitigation program that combines public acquisition with development mitigation obligations so that the legal obligations of the developer become blurred and incapable of enforcement. If private development is to mitigate its impacts as the law intends and requires, the mitigation measures must be capable of implementation and enforcement.

K-2 (Cont.)

**Land Acquisition Process Flawed.** Figure 8-4 describes the intended land acquisition process. This process has already been shown in other HCPs and interim mitigation programs, such as in Sacramento County's Elk Grove area, San Joaquin County HCP and Yolo County JPA, to be incapable of producing the desired mitigation land for the cost estimated in the fee program. Alternatively, the present City of Elk Grove, County of Sacramento and Natomas Basin HCP require that project proponents dedicate land that meets the qualifications established by the program as suitable and desirable preserve lands, and to pay fees to manage the preserve.

K-3

It is essential that the implementing entity upon which the whole process depends is up and running before the permit is operational. Does the permit prohibit the issuance of grading permits before the implementing entity has begun to function? As an example, the Natomas Basin Conservancy was not created until a year after the permit was issued. This late start on the important work of conservation seriously handicapped the new program. The regulatory agencies should not authorize jurisdictions to utilize their permits until the implementing entity has been fully formed and has staff and board appointed, and has held its first meeting.

K-4

**Stay Ahead Provision Faulty.** In order to address the issue that fee based programs fail, the HCP/NCCP includes a "Stay Ahead" provision and a mandatory "land instead of fee" where the "Stay Ahead" provision cannot be met. This is described as follows:

**"Stay-Ahead Provision**

As described in Chapter 5 (Conservation Measure 1.1), the Implementing Entity is required to ensure that progress towards assembling the Preserve System stays ahead of progress towards total impacts allowed under the permit. This Stay-Ahead provision applies after 1 year of Plan implementation to allow the Implementing Entity time to acquire sufficient funds and negotiate deals with willing sellers to acquire large blocks of land. To improve the chances of meeting this requirement, the Implementing Entity is encouraged to acquire land before permits are issued according to a Jump Start guideline (also described in Conservation Measure 1.1).

The Implementing Entity will report the status of the Stay Ahead provision in each annual report, beginning with the end of Year 2. If the Stay Ahead provision is not met for any land-cover type, the Implementing Entity, CDFG, and USFWS will meet and confer within thirty days of the annual report to develop and implement a mutually agreeable plan of action as described in Conservation Measure 1.1 and the Implementing Agreement to remedy the situation and achieve compliance with the Stay Ahead provision. If, after the exercise of all available authority and utilization of all available resources, the federal and state contribution committed to the Plan cannot be provided in order to meet the Stay-Ahead provision, the Plan and the Stay-Ahead provision will be reevaluated in light of these limitations, with possible adjustments made to the permit coverage and assurances, permit term, conservation obligations, or other

aspects of the Plan given the extent of the federal/state contribution. If the Stay-Ahead provision is not being met, the Implementing Entity through local land use agencies may also require that landowners provide land instead of paying a fee, as described below."

Delaying the Stay Ahead provision one year is both too risky and unnecessary. By requiring land dedications as a condition of grading permits, it is easy for the HCP/NCCP to stay ahead of habitat destruction. Clearly, the burden of staying ahead should work in the opposite direction established by this draft HCP/NCCP. Land meeting the requirements and needs identified by the Implementing Entity should be required in order for project developers to receive their grading permits. An exception can be made if the Implementing Entity is more than 200 acres ahead in its mitigation requirements and can make specific guarantees that the fees charged will acquire specific known properties. But in no case should permits be issued upon payment of fees in a grading season if there remain outstanding mitigation obligations from the prior grading season.

K-5

We also believe that the remedy set forth for managing the default on the Stay Ahead provision is very seriously flawed. The only valid remedy for a default is a moratorium on development permit until the short fall is cured. Meetings between local government and the agencies merely promise that the problem will get worse as more delay in addressing it occurs.

K-6

We also object to calculating the Stay Ahead provision using land acquired through public funds purchases. Such a provision simply masks and delays the inevitable breakdown of the development fee approach to habitat mitigation. Development impacts must by law be mitigated; any arrangement to allow fees to be collected, grading to occur, and mitigation lands to be acquired at some future date in an unknown location for an unknown price does not meet legal requirements. [See *NWF v. Babbitt*.]

K-7

No development being mitigated by the HCP/NCCP should receive permit to destroy habitat until suitable mitigation habitat is in possession of the Implementing Entity. Otherwise it is simply impossible to guarantee that the mitigation land will be acquired.

K-8

The mitigation program described does not assure that there is adequate funding for the required mitigation.

K-9

**Swainson's Hawk.** FOSH's comments specifically regarding Swainson's Hawk mitigation are the following.

1) HCP/NCCP Chapter 4 "**Impact Assessment and Levels of Take**:" does not estimate take of Swainson's Hawk. There is therefore no demonstration that take is less than significant or that it will be mitigated to the maximum extent practicable. The EIR/EIS does not even address these core issues. How do the permitting agencies establish that a reasonable basis exists to make these findings?

K-10

2) HCP/NCCP Chapter 5 **Conservation strategy fails to establish any goal for maintaining foraging habitat** for Swainson's Hawk adequate to maintain existing

K-11

population and to contribute proportionately to the state's goals for maintaining the state's population and contributing to recovery of the species. None of the documents identifies the foraging habitat needed in the HCP/NCCP area to maintain the SWH population.

K-11 (Cont.)

3) The Swainson's Hawk **census** for Eastern Contra Costa County that is used in the HCP/NCCP is **out of date, incomplete and inadequate**. The preparers did not adequately consult the key experts and reasonably recent records of the Department of Fish and Game. We incorporate by reference any comments submitted by species experts regarding the inadequacies of the data used in preparing this HCP/NCCP and estimates made based on these data.

K-12

We are especially concerned about this issue after having witnessed the same pattern in the preparation of the Natomas Basin HCP (1997). The preparers [including California Department of Fish and Game] claimed that there were no Swainson's Hawks nesting in the Basin, only on its edge along the Sacramento River. After the HCP was approved by the regulatory agencies, independent biologists did annual surveys demonstrating significant nesting activity in the Basin. Ultimately at least as many nesting sites were identified in the area where the agencies had claimed no nesting occurred as were in the public record as existing on the Sacramento River. The HCP (as does this one) permitted destruction of nesting sites. These nest site destructions were not mitigated because the HCP erroneously said they did not exist and did not include mitigation measures. How do the agencies propose to prevent the same thing from happening in East Contra Costa County?

K-13

The cumulative impacts of the federal and state regulatory agencies approving permits where the estimated impacts are poorly done is a serious and unmitigated reduction in an already threatened population of rare hawks.

K-14

The HCP/NCCP estimates 20 acres of nesting habitat will be impacted by urban development permitted under the plan. Given the poor level of data used in the plan, it is unlikely that this is a reasonable estimate.

K-15

The HCP/NCCP estimates no impacts of rural infrastructure on Swainson's Hawk nesting habitat. Yet rural roadside trees are among the typical nesting sites in other counties. Why has the HCP/NCCP estimated no impact of rural infrastructure on SWH nesting habitat?

K-16

4) The California Fish and Game Department has not conducted a cumulative impact analysis to understand the species impact of this HCP/NCCP in combination with all other development and development mitigation programs in the Swainson's Hawk range. Therefore, the HCP/NCCP and its DEIR/EIS do not adequately assess the impacts of the program on the Swainson's Hawk as a state listed species. It has been our experience that multi-species federal/state HCP/NCCPs ultimately treat the Swainson's Hawk as a second class species, less important than the federally protected species, and little habitat protection is guaranteed for the Swainson's Hawk in these large plans. Higher mitigation requirements occur under CEQA project by project mitigation for Swainson's Hawk impacts. As a consequence, the cumulative impact of approving multiple large multi-species HCPs could well be a detrimental effect on the

K-17

habitat needed to maintain the Swainson's Hawk in California. The Department of Fish and Game has the obligation as the trustee agency to conduct the cumulative impact analysis and defend its approvals under CEQA and CESA in public review. How will Fish and Game address these cumulative impact issues?

K-17 (Cont.)

5) The Conservation Strategy has almost **no land acquisition criteria to benefit Swainson's Hawks**. Given the many species needs to be covered by the HCP/NCCP, the lack of measureable goals for Swainson's Hawk means that the habitat needs of the Swainson's Hawk will not be met by the Plan. The Plan does not explain how the Plan will result in no take or in take mitigated to the maximum practical.

The only criteria for land acquisition affecting Swainson's Hawk protection are described on page 5-42 and reprinted below:

"Acquisition of cultivated agriculture in Zone 6 is limited to 250 acres for several reasons. First, as of 2004, there has been little history in Zone 6 of successful purchase of conservation easements on irrigated agricultural land. Because landowners have had limited exposure to conservation easements, finding willing sellers is expected to be difficult. Second, in order to meeting biological goals and objectives, land acquired through conservation easements must be conditioned to prohibit conversion to vineyards or orchards. This limit on crop type will further reduce the pool of willing sellers in Zone 6. Lastly, the primary function for covered species of cropland and pasture in Zone 6 is as foraging habitat for Swainson's hawk. (Acquisition of cropland or pasture near Dutch Slough will also provide habitat and restoration opportunities for giant garter snake.) Approximately 6,000 acres of cropland and pasture is expected to be lost to covered activities during the permit term (Table 4-3). However, the vast majority of the remaining 18,782 acres of these land-cover types is already protected by strong zoning in Contra Costa County. For example, the entire approximately 6,000 acres of cropland in Subzone 6b is within the Agricultural Core designation in the County General Plan, which strictly limits development. Assuming much of this habitat remains cropland or pasture, it will remain foraging habitat for Swainson's hawk (some will also remain upland habitat for giant garter snake) whether or not the Implementing Entity acquires it. Acquisition of cropland and pasture in Zone 6 is focused on creating opportunities for riparian restoration to expand cottonwood and other riparian forest types that are very rare and underprotected in the San Francisco Bay Area (Wild 2002).

K-18

If conservation easements are used, these easements will require that all enrolled agricultural lands be managed to support new foraging habitat or to improve existing foraging habitat for tricolored blackbird, golden eagle, western burrowing owl, or Swainson's hawk. Management that will be required under the easements will be compatible with an ongoing economically viable agricultural operation. Agricultural conservation easements will be in perpetuity. Conservation easements in Zone 6 are not subject to the Stay-Ahead provisions of the Plan in order to allow time for the Implementing Entity to develop relationships with landowners in this area and slowly assemble the agricultural conservation easements.

In the event that cropland or pasture cannot be acquired in Zone 6 or within the ULL along Marsh Creek to meet land acquisition requirements (e.g., due to a lack of willing sellers), a contingency is provided:

Preservation of cropland or pasture in Zone 6 can be substituted for preservation of grassland habitat that is suitable foraging habitat for Swainson's hawk (see species habitat model in Appendix D for suitable

habitat in Subzones 5a and 5c) on an acre-for-acre basis.

Preservation of cropland or pasture in Zone 6 can also be substituted for preservation of riparian woodland/scrub at a 5:1 ratio (i.e., 5 acres of cropland preservation can be substituted for 1 acre of riparian woodland/scrub preservation)."

We have several concerns with the lack of land acquisition criteria for the benefit of the Swainson's Hawk, and the inclusion of the above criteria related to Zone 6.

K-18 (Cont.)

First of all, we understand that the county is rezoning large areas of Swainson's Hawk foraging habitat into 40 acre ranchettes. There will be very significant reductions in habitat value that are not considered nor mitigated in this HCP/NCCP. The HCP/NCCP and EIR/EIS should address the impacts of county zoning policy changes affecting Swainson's Hawk habitat.

**The 6,000 acres of impacted Swainson's Hawk foraging habitat must be mitigated.** If the Plan relies on Contra Costa County land use restrictions, then at minimum, these must become a permit condition for both the federal and state permits, a permit condition that binds all the parties. This means that should any change in that condition occur, the permit is revoked and development ceases until the mitigation obligation is met. Certainly the permit should make clear that the regulatory agencies will not approve future permits for development in the area they now rely upon in order to issue a permit for this HCP/NCCP. Only if the zoning restrictions are permanent and enforceable can the plan take credit for this mitigation measure.

K-19

It is not acceptable under the law to say that mitigation won't be required because we don't know how to persuade local landowners to sell title or easement. The burden of mitigation is on the developer. There is ample land available for purchase in the target area. Again, if the HCP/NCCP requires land dedications by developers, the difficulties in acquiring lands in Zone 6 will likely be overcome. Experience in other jurisdictions demonstrates that developers are able to acquire suitable mitigation lands when that is the requirement for the grading permit.

K-20

6) In this HCP/NCCP, there are **no specific mitigation requirements for removal of a known Swainson's Hawk nesting tree.** Nor does the HCP/NCCP require that such a removal be approved by the Department of Fish and Game. We request that any nest tree removal be required to obtain approval from California Fish and Game in writing in order to ensure that the tree removals are done in accordance with the requirements of the HCP/NCCP. We also recommend that any nest tree removals be mitigated with acquisition of 200 acres of suitable Swainson's Hawk foraging habitat, approved by California Department of Fish and Game, and production of 30 suitable nesting trees on that property. This is the mitigation required in the Metro AirPark HCP. It is essential that any "breeding" habitat that is removed be fully mitigated.

K-21

**Conclusion.** Given the poor scientific treatment of Swainson's Hawk population, needs and mitigation requirements in this HCP/NCCP, we believe that, if the recommendations we have made are not followed, the Swainson's Hawk should be removed from the HCP/NCCP and should be mitigated on a project by project basis using standard Fish and Game mitigation formulas. We do not see that there is a

K-22

benefit for Swainson's Hawks under the proposed HCP/NCCP, but rather that the permit will allow unmitigated take to occur for the duration of the permit period.

K-22 (Cont.)

Please include Friends of the Swainson's Hawk at the above address in any further public notices regarding the HCP/NCCP, DEIR/DEIS and public hearing notices, as well as notification of the availability of the FEIR/FEIS.

Thank you for this opportunity to comment.

Sincerely,



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## Response to Letter K, from Friends of Swainson's Hawk

### Response to Comment K-1

In response to the HCP/NCCP, the commenter states that fee-based mitigation programs fail and that the ECC HCP/NCCP relies on fees.

While some fee-based mitigation programs have encountered delays in the expenditure of fee revenues and conservation actions have not proceeded as rapidly as anticipated, others have worked well. The ECC HCP/NCCP contains a variety of provisions to ensure that planned conservation actions are performed effectively and promptly and that problems encountered by some fee-based programs are not repeated in the implementation of the fee-based aspects of the ECC HCP/NCCP. Inclusion of fee-based provisions in the ECC HCP/NCCP provide a variety of benefits, including habitat conservation at a scale and quality that could not be achieved without the HCP/NCCP.

Fee-based habitat mitigation programs do have a track record of success. The Metropolitan Bakersfield HCP, the Clark County (Nevada) HCP, and the Balcones Canyonlands (Texas) HCP all employ fee-based habitat mitigation provisions and have been achieving conservation requirements effectively and efficiently. Nearly all local governments in the state employ similar fee programs to acquire and improve park land under the Quimby Act (Government Code Section 66477) to address the demand for additional park facilities created by new residential development. These Quimby Act fee programs have generally been successful and provide the same function as habitat mitigation fees and other impact fees employed throughout California to offset the impact of new development on public resources: they provide a means for local governments to apportion the costs of impacts caused by new development in a fair, equitable and practical manner.

The ECC HCP/NCCP contains a number of provisions to ensure that problems that can occur with fee-based habitat mitigation programs do not occur. As described in Section 9.3.1, the ECC HCP/NCCP contains a variety of provisions to ensure that fee amounts reflect changing costs. For example, automatic annual fee adjustments are required and the adjustments are linked to a consumer price index and home price index to reflect the disparate cost pressures associated with the land acquisition and other costs of implementing the HCP/NCCP. In years 3, 6, 10, 15, 20, and 25, a comprehensive fee audit is required, involving recalculation of estimated costs based on new information on comparable sales of habitat land and on other costs. If despite these fiscal safeguards the ECC HCP/NCCP is not achieving specified conservation requirements, Section 8.6.1 of the Plan requires that applicants provide land in lieu of paying a fee. This option is always available to applicants, but is required when certain performance objectives are not being met.

There are many benefits to including a fee-based component in the HCP/NCCP. These include:

- Greater flexibility for the Implementing Entity in directing resources to the most urgent conservation need;
- Ability to manage preserve assembly in a logical and coordinated manner;
- Ability to achieve more conservation with limited financial resources by enabling preserve assembly, management and monitoring to be performed in a coordinated and cost-effective manner;

- Greater flexibility for applicants in fulfilling their mitigation opportunities;
- Fee-based programs enable small developers to mitigate at a cost proportionate to their impact, whereas a land-based program may not because mitigation land of appropriate acreage may not be available and because the due diligence and processing costs of locating and acquiring land does not depend to a significant degree on the amount of mitigation land to be acquired.

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

## **Response to Comment K-2**

In response to the HCP/NCCP, the commenter states an objection to a blending of a mitigation program and a publicly funded conservation program that prevents enforcement of mitigation obligations.

As discussed in Chapters 1 and 5 of the HCP/NCCP, the Plan is intended to comply with California's Natural Community Conservation Planning Act (NCCPA). The NCCPA requires that conservation performed under an NCCP exceed mitigation requirements and include actions that contribute to species recovery. However, the HCP/NCCP clearly differentiates the mitigation and the contribution to species recovery (also referred to as "conservation") components (see the "Mitigation and Conservation Components" section in Chapter 5 of the HCP/NCCP (pages 5-50 to 5-51 of the Draft HCP/NCCP)).

The Plan determines that 52% of the land acquisition required under the Maximum Urban Development Area (UDA) scenario is required for mitigation purposes and 48% is required for conservation purposes. Under the Initial UDA, the mitigation requirement is lower because the amount of development is lower. Of the land acquisition requirements for the Initial UDA, 43% is required for mitigation purposes and 57% is required for conservation purposes. The origin of these percentages is thoroughly explained in Appendix H.

For conservation actions related to wetlands, the mitigation and conservation actions are clearly distinguished by other means. The HCP/NCCP establishes mitigation ratios for the preservation and for the restoration/creation of wetland resources. Preservation or restoration/creation of wetlands in excess of what is required by the mitigation ratios are conservation actions.

When clearly differentiated, as is the case with this HCP/NCCP, the combination of mitigation and conservation actions under a single plan holds a number of benefits. When described under one plan, mitigation actions and publicly-funded conservation actions can be effectively coordinated, ensuring that mitigation acquisitions complement and build on past and future conservation efforts. Such coordination also supports more effective and efficient preserve management and monitoring.

*No changes to the HCP/NCCP are necessary.*

## **Response to Comment K-3**

In response to the HCP/NCCP, the commenter states that the intended land acquisition process described in Figure 8-4 is flawed and the HCP/NCCP should instead require project proponents to dedicate suitable land and pay a fee for preserve management.

The basis for this comment is the same as for Comment K-1. Please see the response to Comment K-1.

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

## **Response to Comment K-4**

In response to the HCP/NCCP, the commenter states that the Implementing Entity should be constituted and operational before a permit is issued.

The draft HCP/NCCP and draft IA were silent about when the IE must be formed, though the IA makes constant reference to the duties of the IE and the IE is a party to the IA. The Final IA makes it clear that the IE has to be formed before the permit is issued.

*Revisions to the HCP/NCCP*

The IA has been revised to clarify the timing for formation of the IE.

## **Response to Comment K-5**

In response to the HCP/NCCP, the commenter states that the Stay Ahead provision should not be delayed one year and that land should be dedicated at the time grading permits are issued.

The Stay Ahead provision was developed closely with CDFG and USFWS (the Wildlife Agencies) to comply with the requirements of the Natural Community Conservation Planning Act (NCCPA) to maintain rough proportionality between impacts and conservation, and to provide a requirement that was feasible. Similar provisions are found in many other NCCPs in California, including the Western Riverside County HCP/NCCP (approved) and the Coachella Valley HCP/NCCP (public draft). It is not feasible for land dedication to be required at the time of grading because the Implementing Entity must accumulate enough funds to buy the land. Development fees will be collected at the time of grading, and other funding sources from local, state, and federal agencies will be secured periodically and at unpredictable times. The Implementing Entity will make every effort to acquire land ahead of impacts, but this may not be feasible at all times. It takes months of due diligence to investigate and negotiate land deals. For example, the Implementing Entity must conduct pre-acquisition surveys at the proper time of year to determine that land's suitability for covered species. Land acquisition will depend on the availability of willing sellers, the timing of which cannot be predicted. Because of these uncertainties and the time required to secure land deals, measuring Stay Ahead on an annual basis balances feasibility with the need to have relatively aggressive targets to ensure the Implementing Entity keeps pace with impacts.

As described in Section 8.6.1, the Stay Ahead provision will apply after year 1 and be measured by the Implementing Entity first at the end of the second full year of implementation. The Stay Ahead provision does not take effect immediately in order to, in part, give the Implementing Entity enough time to become established, accumulate enough funds to buy significant blocks of land, and conduct several land acquisitions. As documented in Table 5-21 and Figure 5-12 of the HCP/NCCP, 2,383 acres of land have been acquired or preserved during development of the HCP/NCCP that may be counted toward fulfilling the requirements of the HCP/NCCP once management is ensured. This is equivalent to almost 10% of the total acres projected to be acquired under the initial urban development area during the 30 year term of the permits. Additional acquisitions are in progress.

Likewise, the Department of the Interior announced in September 2006 that more \$6.5 million had been awarded through the Cooperative Endangered Species Conservation Fund to acquire lands in Eastern Contra Costa County that would complement the existing approved HCP in San Joaquin County. These funds would be spent within with the inventory area of the East Contra Costa County HCP/NCCP. The U.S. Bureau of Reclamation and the U.S. Fish and Wildlife Service have also approved a \$991,000 grant to support land acquisition consistent with the HP/NCCP through the Central Valley Project Conservation Plan. The HCPA and the Wildlife Agencies believe that the Stay Ahead provision is achievable. The significant amount of land acquisition that has occurred already and the allocation of substantial initial land acquisition funds support this assertion.

With respect to requiring land dedications at the time of grading, see the response to comment K-1 above. Furthermore, a land-based mitigation program that required land dedications at the time of grading would carrying the risk of skewing the real estate market in favor of sellers, driving up the cost of acquiring land both for mitigation and contribution to recovery.

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

## **Response to Comment K-6**

In response to the HCP/NCCP, the commenter states that the remedy for managing problems with the Stay Ahead provision is flawed and that the only remedy allowable is to establish a moratorium on development.

The Wildlife Agencies and the Implementing Entity considered a moratorium on development as a remedy to failure to satisfy the Stay Ahead provision but rejected it as the sole remedy for a variety of reasons. First, land acquisitions take time to secure and cannot be predicted over the short-term. The pace of land acquisition will depend on a variety of factors including the availability of willing sellers, the pace of development fee revenue, and the pace of non-fee revenue. The Implementing Entity will likely have many land acquisition negotiations in process at any one time. Therefore, it is expected that land additions to the Preserve System will come in large blocks at unpredictable intervals. Because of this non-linear pattern of preserve assembly, it is expected that at times land acquisition will be well ahead of covered activities and at times it will be slightly behind. Overall, however, when measured on an annual basis, land acquisition must be well ahead of development.

In order to meet the requirements of rough proportionality according to the Natural Community Conservation Planning Act (NCCPA) and as described on page 5-53, in the Preserve System the *proportion of total acquisition* must be within 10% of the proportion of total impacts. For example, when 25% of the expected impacts to grassland of 4,152 acres occurs (or 1,038 acres), 25% of the total required acquisition of grassland of 16,500 acres must have occurred (4,125 acres). This example illustrates that Preserve System assembly will quickly outpace impacts from covered activities within the first several years of implementation in order to meet the NCCPA requirements for rough proportionality because the acquisition requirements are high relative to allowed impacts.

As described on pages 9-30 and 9-31, contingencies are in place in the event that funding or land acquisition cannot keep pace with covered activities. Options considered by the Wildlife Agencies and Implementing Entity will include

- changes to the manner in which the Plan is implemented (e.g., more direct acquisition of land by the Implementing Entity rather than relying on partnerships, shifting the Implementing Entity's budget allocations to place a higher priority on land acquisition, or accelerating the

- process for being able to count land already acquired against Stay-Ahead requirements by, for example, recording easements more quickly),
- making it a requirement that project proponents provide land in lieu of fees,
  - temporarily or permanently adjusting certain Plan provisions through an amendment or other process (e.g., the method for measuring compliance with the Stay-Ahead provision), or
  - slowing or stopping permit issuance until land acquisition catches up with impacts.

The HCP/NCCP provides that the land in lieu of fee alternative is a mandatory measure in the Stay Ahead provision is not satisfied unless the wildlife agencies determine that other measures are sufficient to correct the deficit.

The Wildlife Agencies and the HCPA believe that these contingencies will be adequate to address any shortfalls in land acquisition as a result of slow state/federal funding or a lack of willing sellers.

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

## **Response to Comment K-7**

In response to the HCP/NCCP, the commenter objects to using land acquired using public funds to calculate the Stay Ahead requirement.

As discussed above in response to comment K-6 and as described on Section 8.6.1 of the HCP/NCCP, the Stay Ahead requirement is intended to ensure that the Implementing Entity is always making steady progress towards full assembly of the Preserve System by the end of the permit term (i.e., the NCCPA standard of rough proportionality). Rough proportionality applies to the total Preserve System, not just the portion of the Preserve System that mitigates for impacts of covered activities (i.e., including the portion of the Preserve System that contributes to the recovery of covered species). Because the rough proportionality standard applies to the entire Preserve System, land acquired with all sources of funds is used to calculate Stay Ahead.

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

## **Response to Comment K-8**

In response to the HCP/NCCP, the commenter states that no development should receive permits to destroy habitat until suitable mitigation habitat has been acquired by the Implementing Entity.

See responses to comments K-5 and K-6 above.

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

## **Response to Comment K-9**

In response to the HCP/NCCP, the commenter states that the mitigation program does not assure adequate funding for the required mitigation.

The costs of the Plan and the required funding for the Plan were not divided into mitigation and non-mitigation components. Because this Plan is an NCCP, it is required to contribute to species recovery

beyond mitigation requirements. In order to achieve this, the HCPA decided early in the planning process to develop a single Plan, one that both mitigates impacts and contributes to species recovery. As described in Chapter 9 and Appendix G of the HCP/NCCP, the costs of the entire HCP/NCCP program were estimated in detail. These costs include land acquisition, program administration, preserve management, habitat restoration, habitat and species monitoring, and a contingency.

The funding strategy for this Plan is presented on pages 9-15 to 9-33. Funding will come from a variety of sources, including fees on development, fees on rural roads, partnerships with local land acquisition organizations, state funding, federal funding, and other sources. A complete list of possible funding sources is shown on Table 9-3 and a summary of expected funding is shown in Table 9-8. There are several important provisions of the Plan that help to ensure adequate funding that should avoid the problems experienced by several other regional HCPs in northern California:

- A highly detailed cost estimate for Plan implementation that included a spatially-explicit land acquisition model using GIS and more detail and refined assumptions for operations and maintenance than used in any other regional HCP in northern California, approved or in preparation (see Appendix G).
- A conservative cost estimate that assumes an entirely new organization will be created to implement the Plan (rather than relying on existing organizations for some or all functions).
- A contingency of 5% build into the cost model (see Tables 9-1 and 9-2).
- An aggressive and regular fee adjustment program to keep pace with the expected increases in land costs and with inflation for operations (see pages 9-23 to 9-25 and Table 9-7).
- Reliance on a wide variety of funding sources (see Table 9-3), without any deferral to unspecified funding sources (as has been done in other regional HCPs).
- Reliance on a substantial portion of funding (28%) from organizations in the inventory area that are already active in land acquisition (e.g., East Bay Regional Park District, Save Mount Diablo) and will continue to do so during the permit term to support the HCP/NCCP (this is not the case with other approved regional HCPs in northern California that did not have any active conservation organizations in their area).
- Reliance on new state and federal funds for only a modest portion of HCP/NCCP funding (19.3%, see Table 9-8).

The Wildlife Agencies and the HCPA have spent a great deal of time developing the detailed funding strategy for this Plan.

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

## **Response to Comment K-10**

In response to the HCP/NCCP, the commenter states that chapter 4 of the HCP/NCCP does not demonstrate that take of Swainson's hawk is less than significant or that it will be mitigated to the maximum extent practicable.

Chapter 4 of the HCP/NCCP described impacts to covered birds in general terms in the text. Details of estimated impacts are found in Table 4-4 for the initial UDA and Table 4-5 for the maximum UDA. As shown in these tables, impacts to Swainson's hawk were estimated for the draft

HCP/NCCP at 20 acres of breeding habitat under either UDA and 4,661-5,897 acres of foraging habitat. This represents 11% of available breeding habitat in the inventory area and 15-18% of available foraging habitat in the inventory area.

In January 2006, HCPA staff, representatives of USFWS and CDFG, and the Jones & Stokes project manager for the Plan met with the Swainson's Hawk Technical Advisory Committee (TAC) in Sacramento to review their concerns about the Plan related to Swainson's hawk (see comment letter P) and discuss possible revisions to the Plan. The HCPA also received new data from Michael Bradbury of the TAC on his recent Swainson's hawk observations. Based on these discussions, new data, and a site visit with TAC member Waldo Holt and CDFG and USFWS staff in February, the HCP/NCCP species habitat model, impact analysis, and conservation strategy for Swainson's hawk has been substantially revised.

The Swainson's hawk model in the draft HCP/NCCP took an overly conservative approach to defining suitable habitat for this species. The new model eliminates land within dense urban areas as suitable foraging habitat consistent with the recommendations of the Swainson's hawk TAC. The western range boundary within the inventory area was also revised to better coincide with the occurrence records assumed to be still extant (e.g., the westernmost occurrence record along Sand Creek is thought to be erroneous). In addition, annual grassland above 150 feet was considered suitable foraging habitat if that grassland is contiguous with grassland below 150 feet and within the expected line-of-sight of foraging birds. These changes resulted in a net reduction of 664 acres (2%) of modeled suitable foraging habitat and a net reduction of 95 acres (54%) of modeled breeding habitat in the inventory area. The revised habitat model is found in Appendix D of the Final HCP/NCCP. The revised model also includes the additional breeding and foraging occurrence records provided by the Swainson's hawk TAC.

The estimated impacts to Swainson's hawk from covered activities have declined for the final HCP/NCCP as a result of changes in the habitat model and urban development that has occurred in Oakley and Brentwood since the draft HCP/NCCP was released. Estimated impacts to Swainson's hawk foraging habitat are now estimated to be 3,782 acres under the initial urban development area (UDA) (a reduction of 879 acres, or 19%) and 4,743 acres under the maximum UDA (a reduction of 1,154 acres, or 20%). Estimated impacts to breeding habitat have also declined, to 16 acres under each urban development scenario (a reduction of 4 acres, or 20%). The magnitude of the impact to foraging and breeding habitat as a proportion of the habitat available outside parks and open space has increased in all cases. For example, under the maximum urban development area, impacts to foraging habitat have increased to 15% of unprotected foraging habitat (from 9%) and impacts to breeding habitat have increased to 27% (from 16%).

Conservation of suitable Swainson's hawk habitat in the final HCP/NCCP has been increased substantially. An additional 1,000 acres of annual grassland and other land cover types suitable for Swainson's hawk foraging will be acquired in Subzone 5c near Vasco Road. This and other changes result in protection of at least 3,614 acres under the initial UDA (a net increase of 1,518 acres over the draft HCP/NCCP, or 72% more land) and at least 4,451 acres (a net increase of 1,694 acres, or 61% more land) under the maximum UDA. The additional conservation of foraging habitat results in a nearly 1:1 ratio of expected impacts of foraging habitat to conservation, which is consistent with the guidelines established by the Swainson's Hawk TAC for Swainson's hawk mitigation throughout northern California.

The estimated conservation of breeding habitat is unchanged from the draft HCP/NCCP (12 and 16 acres under the initial and maximum UDA, respectively). The final conservation strategy also

continues to include the restoration of an expected 50-55 acres of riparian woodland that will provide suitable breeding habitat for Swainson's hawk. This would now increase available nesting habitat in larger stands by 61-67% (up from 35%).

Greater preservation of foraging habitat in the inventory area is not practicable because it would be prohibitively expensive. For example, preservation of cropland or pasture at a ratio of 2:1 would require an additional 3,950 - 5,035 acres of the same habitat. Assuming a per acre cost of \$20,000/acre (see Appendix G memo on land cost estimates), the cost of this additional conservation would be \$79 million to \$101 million in land acquisition costs only, or 27-29% of the total estimated cost of the HCP/NCCP. This preserved land would not substantially benefit any other covered species.

The Wildlife Agencies believe that the revised conservation strategy represents a cost-effective method of preserving and enhancing Swainson's hawk in the inventory area by investing in a combination of foraging habitat preservation at approximately 1:1 and riparian woodland restoration to increase nesting opportunities. The Wildlife Agencies believe that the combination of foraging habitat preservation, riparian woodland preservation, and riparian woodland restoration proposed in the Plan will adequately mitigate and conserve Swainson's hawk in the inventory area, that this mitigation is the maximum extent practicable, and that the impacts to the species are reduced to a level below significance.

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

## Response to Comment K-11

In response to the HCP/NCCP, the commenter states that the conservation strategy fails to establish any goal for maintaining foraging habitat for Swainson's hawk to maintain the existing population and contribute proportionately to the state's goal of maintaining the population.

The biological goals and objectives of the conservation strategy, listed in Table 5-1, are mostly habitat based. As such, they only reference a covered species when the goal or objective is specifically targeting a covered species. Habitat-based objectives that support the conservation of the local population of Swainson's hawk include:

- **Objective 10.1.** Preserve 13,000 acres of annual grassland and 900 acres of alkali grassland
- **Objective 28.2.** Acquire riparian/scrub at a ratio of 2:1 (estimated to be 70 acres for maximum urban development area) and protect as part of the Preserve System
- **Objective 29.1.** Maintain or increase the cover, width, and connectivity of existing riparian vegetation consistent with current stream and habitat function
- **Objective 31.1.** Restore at least 20 acres of riparian woodland/scrub in addition to that required above as compensation for habitat loss.
- **Objective 31.2.** Replace riparian woodland/scrub at a ratio of 1:1 in the Preserve System to compensate for its loss from covered activities (estimated to be 30 acres with maximum urban development area)
- **Objective 31.3.** Restore species richness and diversity, vegetative cover, wildlife habitat function and hydrologic function

Goal 32 is specific to Swainson's hawk: "Maintain or increase population size and distribution of Swainson's hawk in the inventory area." This goal has the following two objectives:

- **Objective 32.1.** Acquire land in the Preserve System that includes occupied nests and suitable nest sites
- **Objective 32.2.** Acquire 250 acres of cropland or pasture for Swainson's Hawk foraging along Kellogg Creek, Marsh Creek, or adjacent to Dutch Slough that is suitable for riparian restoration within 1 mile of the Zone 6 boundary

As shown above, the HCP/NCCP has concrete biological goals and objectives to meet the conservation needs of the species in the inventory area.

The commenter also states that nothing in the document identifies the foraging habitat requirements of the species. The species account in Appendix D describes the foraging requirements for Swainson's hawk in habitat and acreage terms. There are no specific data on the habitat requirements of Swainson's hawk in the inventory area, and they are assumed to be similar to the rest of the species' range.

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

## **Response to Comment K-12**

In response to the HCP/NCCP, the commenter states that the Swainson's hawk census for eastern Contra Costa County used in the HCP/NCCP is incomplete.

See response to comment P-1.

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

## **Response to Comment K-13**

In response to the HCP/NCCP, the commenter states that the HCP/NCCP makes the same mistake about nest site occurrence, as did the 1997 Natomas Basin HCP in making assumptions based on a lack of data.

Additional occurrence data from the Swainson's Hawk TAC have been incorporated into the final HCP/NCCP (see response to comment K-10 above and P-1 below). These new occurrence data are shown in the revised species habitat model in Appendix D of the HCP/NCCP. The Wildlife Agencies believe that the amount and type of data used to develop the species habitat model is adequate for regional conservation planning at the scale of this HCP/NCCP. The habitat requirements of this species are generally well understood, so a reasonably accurate habitat model could be created to estimate the species' occurrence in the inventory area. Occurrence records were used to verify the accuracy of the model, not to generate the model itself. This approach limits the influence of incomplete survey data on the habitat model itself.

The commenter also expresses concern about nest site destruction being allowed by the HCP/NCCP. Impacts to active Swainson's hawk nests must be avoided according to page 6-36 and 6-37 of the Plan. This section has been clarified to ensure that these avoidance measures also apply to

Swainson's hawk nest trees that have been occupied in the past but may not be occupied the year the planning survey is conducted.

Any loss of riparian woodland, which likely provides the majority of nest sites for Swainson's hawk in the inventory area, will be mitigated on a per-acre basis at a ratio of 2:1 preservation (see Table 5-5) and 1:1 restoration (see Table 5-16 and 5-17). (In addition, the Implementing Entity will restore 20 acres of riparian woodland regardless of the amount of impact.) This per-acre mitigation will ensure that lost riparian nesting trees are replaced. This measure, however, does not mitigate for the loss of non-riparian nesting trees. A new measure has been added to Chapter 6 of the HCP/NCCP modeled after a similar measure in the 2002 Natomas Basin HCP to address this gap in mitigation.

#### *Revisions to the HCP/NCCP*

The HCP/NCCP requirements for planning and preconstruction surveys, avoidance and minimization measures, and mitigation for loss of non-riparian trees have been revised as noted above in response to this comment.

### **Response to Comment K-14**

In response to the HCP/NCCP, the commenter states that the cumulative impacts of the HCP/NCCP to Swainson's hawk are a serious and unmitigated reduction in the species' population.

As described in response to comment K-10, the estimated impacts to foraging habitat of covered activities will be 3,782 -4,743 acres of foraging habitat under the initial and maximum UDA, respectively, or 12-15% of the available foraging habitat in the inventory area. The HCPA and the Wildlife Agencies consider this loss to be adequately mitigated by the permanent protection of 3,614 acres of foraging habitat under the initial UDA and at least 4,451 acres under the maximum UDA. Similarly, the expected impacts to breeding habitat will be adequately mitigated and offset by the protection of 12-16 acres of riparian woodland, the restoration of 50-55 acres of riparian woodland, and the replanting at 15:1 of nest trees lost on project sites (see response to comment K-13 above). Because the HCP/NCCP will result in a net increase in riparian nesting habitat (50-55 acres restored for up to 20 acres lost) and non-riparian nest trees (see response to comment K-13), the loss of foraging habitat may not affect the local population size of Swainson's hawk. Even if there is an effect to the local Swainson's hawk population, the effects is expected to be very low relative to the total estimated population of the species in Central Valley of 900 pairs (Jones & Stokes 2005<sup>1</sup>). This potential loss is not a significant direct or cumulative impact to the species' population.

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

### **Response to Comment K-15**

In response to the HCP/NCCP, the commenter questions the accuracy of the estimate of 20 acres of impacts to nesting habitat.

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<sup>1</sup> Jones & Stokes. 2005. Modeling Swainson's Hawk Habitat Suitability in South Sacramento County. Prepared for the City of Elk Grove. February. (J&S 04-369.) Sacramento, CA.

As described on page 3-3, land cover mapping was conducted using high-resolution aerial photographs and field reconnaissance conducted in 2001, 2002, and 2003. Because the air photo signature of riparian woodland was very distinct and the minimum mapping unit used was the smallest possible (0.25 acres), the HCPA and the Wildlife Agencies are confident that the vast majority of riparian woodland land cover in the inventory was mapped.

The revised estimated impact to Swainson's hawk breeding habitat of 16 acres is likely an overestimate. As described on page 4-11, approximately 56 acres of riparian woodland/scrub occurs within the ULL outside urban parks (only a small portion of this is suitable for breeding by Swainson's hawk because most of it is outside the species' range). A literal interpretation of the GIS analysis leads to the conclusion that 40 acres of this habitat would be removed by build-out within the UDA. Instead, urban streams are expected to be retained even with additional development. To account for this, the GIS estimate of impacts on riparian woodland/scrub was revised to 20 and 25 acres within the ULL under the initial and maximum urban development areas, respectively. These numbers may still overestimate the actual impacts to this land cover type. Despite the fact that not all riparian woodland is suitable for Swainson's hawk, 16 acres of impacts were assumed to occur to suitable Swainson's hawk habitat. Therefore, the estimate of 16 acres of impact to Swainson's hawk habitat is likely an overestimate. Impacts to this land cover type are capped at 16 acres under the Plan, so the estimate cannot be an underestimate (i.e., impacts beyond this amount are not allowed under the Plan).

As described on page 4-2, the GIS estimates of impacts on streams and wetlands are meant only as a means to estimate the rough impacts and to determine if enough acreage and sites are available for wetland and stream preservation and restoration to meet the conservation needs of the Plan. Because of the uncertainty in estimates of impacts on wetlands and other aquatic habitats, actual impacts will be determined in the field during implementation. All applicants for HCP/NCCP coverage will be required to conduct planning surveys, including jurisdictional wetland delineations, to determine the amount of wetlands and aquatic resources that occur on their property and the impacts that will affect these resources. (See Chapter 6 for a description of these planning surveys.) Required mitigation will be based on the results of these field surveys. Because of this process, successful implementation of the Plan will not rely on the uncertain impact estimates on streams and wetlands developed through GIS analysis.

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

## **Response to Comment K-16**

In response to the HCP/NCCP, the commenter questions the estimate of no impact to Swainson's hawk nesting habitat as a result of rural road construction.

The impact estimates for rural road construction are based on a GIS overlay of mapped land cover with the estimated footprint of rural road projects. The land cover mapping did not include identification of individual trees or small clusters of trees. There may be impacts to such trees from construction of covered rural road projects but these impacts will be addressed by the condition on covered activities for Swainson's hawk. See response to comment K-13 for an addition to this measure to include mitigation for loss of non-riparian nest trees. This mitigation measure applies to all covered activities, including rural road projects.

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

## Response to Comment K-17

In response to the HCP/NCCP, the commenter states that the HCP/NCCP should include a cumulative analysis of the impacts of other regional HCPs throughout the range of the Swainson's hawk.

The cumulative impact analysis in the HCP/NCCP and the EIS/EIR evaluates impacts within the inventory area, not within the entire range of a species. Evaluating the cumulative impacts of issuance of all regional HCP and NCCP permits in northern California is beyond the required scope of cumulative impact analyses and beyond the scope of this HCP/NCCP and EIS/EIR. When making their findings under the federal Endangered Species Act (ESA) and the NCCPA, USFWS and CDFG will evaluate the impacts of permit issuance according to the net effects on Swainson's hawk from impacts and conservation under this Plan, and throughout the species' range. Both agencies are required to make findings that issuance of these permits will not jeopardize the continued existence of the covered species, including Swainson's hawk.

The intent of regional HCPs and NCCPs is to ensure that the mitigation and conservation of covered species is conducted more effectively and more efficiently than it would be under project-by-project mitigation. Currently in the inventory area, there is little or no mitigation required of project proponents from impacts to suitable habitat for Swainson's hawk. This HCP/NCCP will ensure that substantially more conservation is accomplished for this species than would occur without the Plan, and that the conservation will be coordinated and directed to the highest value areas in the inventory area and managed in perpetuity.

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

## Response to Comment K-18

In response to the HCP/NCCP, the commenter states that there are almost no land acquisition criteria to benefit Swainson's hawk in the Plan and that large areas of Swainson's hawk foraging habitat are being rezoned by Contra Costa County into 40 -acre ranchettes.

See responses to comments K-10 and K-11 for a discussion of the land acquisition criteria and quantitative and qualitative biological goals and objectives in the Plan that will benefit Swainson's hawk. Also see response to comment K-13 for a discussion of the avoidance and minimization measures that will minimize impacts to nesting habitat.

Regarding county zoning, 1990 Measure C mandated the Agriculture Core General Plan designation and required the area (11,000 acres) to be rezoned to a minimum parcel size of 40. This was, in general, an increase in the minimum parcel size from what existed before. Regarding potential rezoning into 40-acre ranchettes, the HCPA is unaware of any plan to overall rezone large areas of the Agriculture Core.

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

## Response to Comment K-19

In response to the HCP/NCCP, the commenter states that the impacts to 6,000 acres of Swainson's hawk foraging habitat should be mitigated and that county zoning restrictions in the Agricultural Core should become permanent.

As described in response to comment K-10, the revised estimated impacts to Swainson's hawk foraging habitat is 3,782 -4,743 acres under the initial and maximum UDA, respectively, not 6,000 acres. For a discussion of the mitigation and conservation provided by the Plan, see responses to comments K-10, K-11, and K-13.

The HCP/NCCP is not a land use plan and the HCPA does not have authority to restrict County zoning. The Agricultural Core and its zoning restrictions are under the jurisdiction of Contra Costa County. In general, it is infeasible to make zoning permanent, as doing so would deny the future jurisdiction (and the future voters) the sovereignty to exercise its legal land use authority.

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

## **Response to Comment K-20**

In response to the HCP/NCCP, the commenter expresses concern over the rationale for not requiring in-kind mitigation for loss of foraging habitat.

As stated on page 5-42, one of the reasons for choosing not to focus mitigation on acquiring substantial amounts of cropland or pasture was the lack of any history in the inventory area of acquiring conservation easements. The Agricultural Trust of Contra Costa County and the Brentwood Agricultural Land Trust has been active in the inventory area for a number of years, but collectively they have only acquired conservation easements on about 40 acres because of the difficulty in finding and negotiating with willing sellers. This significant challenge calls into the question the feasibility of acquiring large amounts of cropland or pasture, even by developers. Another reason to reduce the emphasis on cropland/pasture preservation was the expected high cost, low to moderate conservation benefit to Swainson's hawk, and the lack of substantial benefit to other covered species. See response to comment K-10 for a discussion of these costs and expected benefits.

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

## **Response to Comment K-21**

In response to the HCP/NCCP, the commenter states that the HCP/NCCP has no specific mitigation measure requirements for removal of known Swainson's hawk nesting trees. The commenter also recommends that any removal require approval of CDFG and that any nest tree be mitigated by the acquisition of 200 acres of suitable foraging habitat and production of 30 nest trees on that site.

See response to comment K-13 for a summary of the mitigation measures for removal of nest trees and an addition to the HCP/NCCP to address this concern. The species-level Conservation Measures for Swainson's hawk in Section 6.4.3 of HCP/NCCP has been changed to require replacement of 15 trees for every non-riparian nest tree removed. This requirement is consistent with the approved Natomas Basin HCP. The Wildlife Agencies and the HCPA do not believe that it is appropriate to mitigate the loss of nest trees with the purchase of foraging habitat. As discussed in Chapter 5 of the HCP/NCCP and in response to comment K-10, foraging habitat is not likely to be limiting to the local Swainson's hawk population and it is very expensive to acquire. The Wildlife Agencies and the

Science Advisory Panel felt that a more appropriate and cost-efficient use of mitigation funds for the loss of breeding habitat would be to protect and create breeding habitat.

The removal of nest trees will not be subject to approval by CDFG because this defeats one of the important purposes of the HCP/NCCP—to streamline regulatory approvals and minimize workload of Wildlife Agency staff in reviewing and approving projects case-by-case (instead, their workload will shift to helping to implement a successful HCP/NCCP). The revised HCP/NCCP provides sufficient guidance for project proponents to implement the mitigation measure or to pay the Implementing Entity to implement the mitigation measure. The status of all conservation measures will be reported to the Wildlife Agencies on an annual basis (see page 8-32) and periodically through public meetings of the Implementing Entity (see page 8-6 and 8-7).

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

## **Response to Comment K-22**

In response to the HCP/NCCP, the commenter states that the Swainson's hawk should be removed as a covered species and mitigation should occur in the inventory area on a project-by-project basis using standard Fish and Game mitigation formulas.

As stated in responses to comments K-10, K-11, K-13, and K-17, the HCPA and the Wildlife Agencies, including CDFG, believe that the mitigation and conservation provided in the HCP/NCCP is superior to the mitigation currently occurring at the project level in Contra Costa County. Currently in the inventory area, there is little or no mitigation required of project proponents from impacts to suitable habitat for Swainson's hawk. This HCP/NCCP will ensure that substantially more conservation is accomplished for this species than would occur without the Plan, and that the conservation will be coordinated and directed to the highest value areas in the inventory area and managed in perpetuity. CDFG also believes that the Plan will provide substantial benefit to Swainson's hawk at the western edge of their range in the Central Valley and will maintain or perhaps enhance the species in the area. The HCPA will continue to propose coverage for Swainson's hawk under the Plan, and the Wildlife Agencies expect to include this species on the final take permits.

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