

**RECORD OF DECISION  
for the Proposed Issuance  
of Section 10(a)(1)(B) Incidental Take Permits  
Associated with the  
East Contra Costa County Habitat Conservation Plan  
and Natural Community Conservation Plan**

**I. SUMMARY**

This Record of Decision (ROD) was developed by the U.S. Fish and Wildlife Service (Service) in compliance with the agency decision-making requirements of the National Environmental Policy Act of 1969, as amended (NEPA, 40 C.F.R. 1505.2). The purpose of this ROD is to document the decision of the Service in response to an application for an Incidental Take Permit (Permit) under section 10(a) of the Endangered Species Act of 1973, as amended (ESA). This decision is based on the submission of the East Contra Costa County Habitat Conservation Plan and Natural Community Conservation Plan (HCP/NCCP or Plan) by the City of Pittsburg, City of Brentwood, City of Clayton, City of Oakley (collectively referred to as “Cities”), Contra Costa County Flood Control and Water District (Flood Control District), East Bay Regional Park District (EBRPD), the East Contra Costa County Habitat Conservancy (Implementing Entity) and Contra Costa County (County) (collectively the Permittees or Applicants).

The Permittees are also seeking the issuance of a Natural Community Conservation Plan (NCCP) take permit from the California Department of Fish and Game (CDFG) under the authority of California Fish and Game Code section 2800 *et seq.* Thus, the Plan constitutes a Habitat Conservation Plan pursuant to the Act, and a NCCP pursuant to the California Natural Community Conservation Plan Act (NCCPA).

The NCCPA is broader in its objectives than either the Act or California Endangered Species Act (CESA). The primary objective of the NCCP program is to conserve natural communities at the ecosystem scale while accommodating compatible land use. An NCCP must provide for the conservation of species and protect natural communities within the 174,018-acre Inventory Area, which is a standard that goes beyond the requirement of the Act to mitigate to the maximum extent practicable for the impacts of projects on Covered Species. However, it is necessary to separate mitigation obligations of the Plan from the conservation components for two reasons. First, the Service and CDFG can only provide grant monies that contribute to the conservation component of the HCP/NCCP as neither agency can subsidize mitigation obligations. Second, as mentioned above, under the Act the Permittees are only required to minimize and mitigate the impacts of their projects on Covered Species to receive an incidental take permit. In order to resolve this issue, the land acquisition requirements for terrestrial land-cover types were assigned a mitigation component (i.e., acquisition required by the Plan resulting from Covered Activities) or a conservation component (i.e. acquisition required by the Plan to contribute to a species’ recovery) based on a “fair share” analysis found in Chapter 9 of the Plan. It was determined that new development is responsible

for 52% of the land acquisition requirements, and existing development (i.e. the public) is responsible for 48% of land acquisition under the MUDA scenario as shown in Tables 5-7 and 5-8 of the Plan. This fair-share analysis is not applied to wetland land cover types. Those impacts are separated by mitigation and conservation components based on other factors (Plan Tables 5-5, 5-16, and 5-17). For the purposes of conducting the analysis for these Findings and Recommendations, terrestrial land-cover types were calculated using the 52% for the land acquisition requirement. This explains why there appears to be a discrepancy in the acreage calculations as seen in the Plan and the acreage calculations in this document. However, it is anticipated that the HCP/NCCP will be carried out as a single Plan that is implemented as a whole.

The proposed issuance of a Permit is a federal action subject to review under NEPA. The Service, at the direction of the Secretary of the Interior, prepared a draft and final Environmental Impact Statement (EIS) in compliance with NEPA. The Service prepared these documents jointly with the Cities and County in fulfillment of their responsibilities under the California Environmental Quality Act (CEQA). The joint final "Environmental Impact Statement/Environmental Impact Report (FEIS/FEIR) and the HCP/NCCP describes in detail the proposed action by the Service, and the Permittees, and alternatives to those actions.

The Service intends to achieve the following objectives with this Plan: to protect 28 species (Covered Species) and their habitats that occur or may occur in the future in East Contra Costa County in accordance with the ESA and California Endangered Species Act (CESA); to allow incidental take of eight animal species either currently listed as threatened or endangered under the ESA or that may become listed during the 30-year permit term; and to provide assurances to the permit applicants under the Service's "No Surprises" rule codified at 50 C.F.R. 17.22(b)(5) and 17.32(b)(5) for each of the 28 Covered Species.

This ROD: a) provides background information about the development of the HCP/NCCP; b) briefly describes the proposed Project; c) describes the process for obtaining, reviewing and responding to the public comments on the draft HCP/NCCP; d) explains changes made between the draft and final versions of the HCP/NCCP; e) describes alternatives to the project considered in the FEIS/FEIR; f) states the Secretary's decision; g) presents the rationale for the decision and describes its implementation; and h) states whether all practical means to avoid or minimize environmental harm from implementation of the selected alternative have been adopted (40 CFR 1505.2).

Documents used in preparation of this ROD include: the June 2005 Draft HCP/NCCP and the October 2006 Final HCP/NCCP (HCPA 2005a, 2006b); the June 2006 Draft and October 2006 Final HCP/NCCP EIS/EIR (Service 2005a, 2006b); Implementing Agreement (IA) (HCPA 2006b); the Service's Biological/Conference Opinion on the Permit Application (Service 2007a); and, the Service's Findings on the Permit application (Service 2007b). All of these documents are incorporated by reference.

## **II. BACKGROUND**

During the 1990s, the County was one of the fastest developing areas in the country with the majority of the development occurring in the eastern portion of the County. In 1997, representatives of the Service and CDFG initiated discussions with the County, the Cities of Antioch, Brentwood, Clayton and Pittsburg, and the Contra Costa Water District (CCWD) regarding the possibility of a regional plan to address the conflicts of rapid urban development and the cumulative loss of habitat for federally listed species and native species. Proponents of public and private development are required to obtain a Permit from the Service and CDFG for impacts to endangered, threatened, and rare species and their habitats. The project-by-project regulatory process required significant time and added costs to public and private development projects. In addition, the compensation was resulting in an assemblage of protected but fragmented properties.

On January 25, 2000, the County Board of Supervisors declared its intent to work with other agencies to prepare an HCP for ECCC, and directed staff to work with the Cities, other local agencies, and stakeholder group to determine their willingness to work together. In April of 2000, CCWD committed to work with the local jurisdictions to develop, and agreed to provide funding for a regional HCP as a condition of future water deliveries to CCWD from U.S. Bureau of Reclamation (BOR). BOR made this commitment during consultation with the Service regarding CCWD's construction of a multi-purpose pipeline and the implementation of its future water supply program. The Service, BOR, and CCWD agreed that a regional HCP would offset the adverse growth-inducing effects of future water deliveries within CCWD's service area. CCWD must limit its water delivery to 148,000 acre/feet until an HCP is completed and a Permit issued.

Subsequently, six entities formed the Habitat Conservation Plan Association (HCPA), a Joint Powers Authority, consisting of the Cities of Brentwood, Clayton, Pittsburg, Oakley, CCWD, and EBRPD. The County joined the HCPA in 2001. The Flood Control District joined the planning effort in early 2004. The City of Antioch declined to participate.

## **III. PROJECT DESCRIPTION**

### **Issuance of Incidental Take Permit**

#### **Statutory Framework**

Section 10 of the ESA permits take (including harm, harassment, injury and/or mortality) of listed species incident to otherwise lawful activities provided the Applicant's activities "will not appreciably reduce the likelihood of the survival and recovery of the [covered] species in the wild" and the applicant "minimizes and mitigates to the maximum extent practicable" the impact of take likely to result from its activities. In order to obtain such permission, the Applicants must submit an HCP that, in the judgment of the Service,

meets these basic requirements as well as the other criteria stated in Section 10(a)(2)(B) of the ESA, including the requirement to ensure that adequate funding for the HCP will be provided.

Under the ESA and its implementing regulations, “take” of a listed species may arise from significant habitat modification that results in actual injury or death to the species. The Applicants’ covered activities would likely result in “take” of listed species. Therefore, the Applicants desire and need a Permit from the Service.

The Service has conducted a consultation and conference under Section 7 of the ESA on the proposed Permit, dated July 20, 2007. The Service has also adopted Findings on the proposed Permit on July 25, 2007. In accordance with the Service’s Section 7 biological opinion and conference opinion, Findings, and this ROD, the Service has decided to issue a Permit to the Applicants for a term of 30 years.

### **Summary of the Final HCP/NCCP - Project Description**

The Applicants have submitted applications for a Permit under Section 10(a)(1)(B) of the ESA. The Applicants requested coverage under the Permit for 28 species, eight of which are currently listed under the ESA. The Permit would cover incidental take for three endangered animal species [San Joaquin kit fox (*Vulpes macrotus mutica*), longhorn fairy shrimp (*Brachinecta longiantenna*), vernal pool tadpole shrimp (*Lepidurus packardii*)], and five threatened animal species [giant garter snake (*Thamnophis gigas*), Alameda whipsnake (*Masticophis lateralis euryxanthus*), California tiger salamander (*Ambystoma californiense*), California red-legged frog (*Rana aurora draytonii*), and vernal pool fairy shrimp (*Branchinecta lynchi*)].

The Permit would also authorize the incidental take of golden eagle (*Aquila chrysaetos*), which is currently protected under the Bald and Golden Eagle Protection Act, and eight currently unlisted animal species: Swainson’s hawk (*Buteo swainsoni*); tricolored blackbird (*Agelaius tricolor*); western burrowing owl (*Athene cunicularia hypugea*); Townsend’s western big-eared bat (*Corynorhinus townsendii townsendii*); western pond turtle (*Clemmys marmorata marmorata*); silvery legless lizard (*Anniella pulchra pulchra*); foothill yellow-legged frog (*Rana boylei*); and midvalley fairy shrimp (*Branchinecta mesovallensis*); should they become listed in the future during the term of the Permit. The Permit would become effective to authorize take of the currently unlisted covered animal species concurrent with their listing under the ESA.

Eleven currently unlisted plant species Mount Diablo manzanita (*Arctostaphylos auriculata*), brittlescale (*Atriplex depressa*), San Joaquin spearscale (*Atriplex joanquiniana*), big tarplant (*Blepharizonia plumosa*), Mount Diablo fairy lantern (*Calochortus pulchellus*), recurved larkspur (*Delphinium recurvatum*), round-leaved filaree (*Erodium macrophyllum*), Diablo helianthella (*Helianthella castanea*), Brewer’s dwarf flax (*Hesperolinon breweri*), showy madia (*Madia radiata*), and adobe navarretia (*Navarretia nigelliformis* ssp. *nigelliformis*) would also be considered Covered Species and included on the Permit. Although take of plant species is not prohibited under the ESA and, therefore cannot be authorized under a Permit, the plant species would be

included on the Permit in recognition of the conservation benefits provided to the species under the HCP/NCCP. Assurances provided under the “No Surprises” rule at 50 CFR 17.3, 17.22(b)(5) and 17.32(b)(5) would extend to all Covered Species. The Applicants have also requested incidental take authorization from the CDFG for a total of 28 species protected under CESA and/or CEQA.

Actions conducted under the HCP/NCCP and IA are designed and conditioned to comply with the provisions of the Migratory Bird Treaty Act (MBTA) with strict avoidance measures for actions affecting the MBTA-Covered Species (Swainson’s hawk, tricolored blackbird, and golden eagle). The MBTA prohibits the taking, killing, or possessing of migratory birds. The MBTA identifies a variety of prohibited actions including the taking of individual birds, young, feathers, eggs, nests, etc. There are currently no MBTA Covered Species listed under the ESA and subject to a Special Purpose Permit at this time. Should any of the MBTA covered species become listed under the ESA during the life of the Permit, the Permit would also constitute an MBTA Special Purpose Permit for that species for a three-year term as specified under 50 C.F.R.10, subject to renewal by the Applicants.

The 175,018-acre inventory area is located in eastern Contra Costa County and comprises approximately one-third of the County. The Permit Area lies within the inventory area and is the area in which the Permittees are requesting authorization from the Service and CDFG for covered activities (see below) that may result in take of Covered Species. For a period of 30 years, the Permit would authorize the incidental take of Covered Species associated with the conversion of up to 13,029 acres of habitat types including, but not limited to: grassland; alkali grassland; alkali wetlands; seasonal marsh; riparian; oak woodland; oak savannah; and agricultural or ruderal lands that currently, or in the future, could provide habitat for the Covered Species within the Permit Area. The Permit Area is land within the inventory area, and is defined by the following parameters:

1. The Urban Limit Line (ULL) of Contra Costa County or the city limits of the participating Cities of Pittsburg, Clayton, Oakley, and Brentwood, whichever is largest. This portion of the Permit Area is referred to in the Plan as the urban development area (UDA).
2. The footprint of the specific rural infrastructure projects or activities that are outside the UDA as described in Chapter 2 of the Plan.
3. The boundary of any land acquired in fee title or conservation easement and managed under the Plan.

Two *urban development areas* are defined for the purposes of the Plan and analysis. The *initial urban development area* (IUDA) is most of the area within the County ULL and city limits at the time the HCP/NCCP was released for public review. Urban development within the IUDA will impact up to 8,670 acres of various land-cover types that may support Covered Species. The *maximum urban development area* (MUDA) is the largest area to which urban development could expand under the terms of the HCP/NCCP. Urban development within the MUDA may impact up to 11,853 acres of

various land cover types that may support Covered Species. With either urban development area, another 1,126 acres of impact may result from rural infrastructure projects and activities within HCP/NCCP preserves. Thus, total impacts allowed under the Plan are 9,796 acres and 13,029 acres with the IUDA and MUDA, respectively. The expansion to the MUDA is predicated upon the following conditions: it must not preclude achieving the biological goals and objectives of the HCP/NCCP; the impact has been evaluated in the HCP/NCCP; and it is consistent with the amount of take coverage assumed for projects or activities; and a sufficient amount of take coverage under the Permit remains. In addition, the Permit would authorize incidental take resulting from the implementation of management activities on established Preserves.

The HCP/NCCP includes a provision for landowners who own land within one mile of the Preserve System, to obtain take authorization for impacts to Covered Species resulting from routine agricultural activities. Take authorization is provided only for impacts to Covered Species above that which would have occurred prior to the time the nearby Preserve was established (i.e., those greater than baseline conditions). Neighboring Landowner Assurances provide incidental take permit coverage on an “opt-in” basis for all agricultural lands within one mile of lands that become part of the Preserve System. This opt-in approach allows landowners to participate willingly in this provision. Landowners that do not seek to participate would not be required to do so. Subsequently, they would not receive the assurances provided by this provision for their ongoing agricultural activities.

### **HCP/NCCP Conservation Strategy**

The proposed HCP/NCCP would provide for the creation of a Preserve System that, in addition to approximately 45,000 acres of already protected lands (i.e., East Bay Regional Park System and Los Vaqueros watershed) would acquire, preserve, and enhance 7,039 acres under the IUDA and 10,562 acres under the MUDA, and restore approximately 361 to 535 acres (mitigation acres only) under the IUDA or the MUDA, respectively. Preserved lands will be specifically managed in perpetuity for the Covered Species. The Plan also includes avoidance and minimization measures to reduce impacts on Covered Species resulting from Covered Activities. As discussed above, the Plan is also an NCCP and includes additional land acquisition provisions beyond those required for mitigation under ESA. The Plan’s conservation strategy would provide an additional 8,955 acres under the IUDA and 9,471 acres under the MUDA. Land acquisition is likely to be greater, because the Plan includes connectivity and other requirements that will likely result in additional acquisition to meet these targets. For example, parcels purchased to meet a specific requirement will contain additional acres of non-target land cover types.

The Implementing Entity (IE) will be formed to manage the Preserve System and ensure compliance with all terms of the HCP/NCCP, Permits, and IA. The IE will be run by a Governing Board of Representatives from each Permittee agency and an Executive Director. The IE will be advised by representatives of the Service, CDFG, local land management agencies, a pool of Science Advisors, and a public advisory committee. It is

anticipated that the IE will partner with existing agencies and organizations to share a significant portion of its responsibilities.

The proposed area to be conserved under the Preserve System has been divided into zones and subzones. Acquisition targets have been developed for both zones and subzones in order to meet biological goals and objectives; provide habitat corridors; and acquire specific habitat types for Covered Species (i.e. agricultural lands for Swainson's hawk). However, as lands will be purchased under a "willing seller/willing buyer" provision the acquisition targets may be modified if willing sellers cannot be found. It is anticipated that most, if not all, lands will be purchased in fee title.

The conservation strategy is designed to create a Preserve System that will:

1. Protect in perpetuity, approximately 23,800 acres of land under the IUDA or approximately 30,300 acres of land under the MUDA for the benefit of Covered Species, natural communities, biological diversity, and ecosystem function, as well as restore approximately 436 to 598 acres under the IUDA or the MUDA, respectively.
2. Preserve major habitat connections linking existing protected lands.
3. Manage habitat to enhance populations of Covered Species and maintain ecosystem processes.

The Plan's conservation strategy is comprised of the following: (1) identification and implementation of incidental take avoidance and minimization measures to minimize impacts to species covered by the HCP/NCCP; (2) establishment, enhancement, restoration, and management of up to 30,300 acres of Preserves lands in perpetuity for the Covered Species; and (3) establishment of a monitoring and reporting plan to gauge the anticipated biological success of the HCP/NCCP and to provide information for the Adaptive Management Plan. The Adaptive Management Plan will identify measures that may be taken to improve the biological success of the HCP/NCCP.

The effectiveness of the conservation strategy to adequately minimize and mitigate the effects of take of the Covered Species is dependent upon the Plan being carried out as described in the HCP/NCCP. Approval by the Permittees of future urban development beyond the MUDA and the limitations stated above are not covered by this HCP/NCCP. Impacts of such development proposals, should they be proposed in the future, will be addressed outside of the HCP on a project-by-project basis unless the Plan was amended to include them.

The measures specified under the HCP/NCCP are designed to minimize and mitigate the impacts of take of the Covered Species and contribute to their conservation. The adequacy of the mitigation is explained in detail in the Findings document (Service 2007b) and the Biological/Conference Opinion (Service 2007a). The Cities, County, CDFG, EBRPD, Flood Control District, IE, and the Service will each sign the Implementing Agreement (IA), a formal agreement among the parties that binds each party to carry out the HCP/NCCP and provides recourse and remedies should any party

fail to perform its obligations under the Plan. The IA will further ensure that the HCP/NCCP will be fully implemented.

The conservation strategy includes measures are designed to carry out the 33 biological goals and 91 biological objectives developed for the HCP/NCCP that will provide guidance for the enhancement, restoration and management of the Preserve System. The biological goals and objectives, as well as the overall conservation strategy, function at three scales: landscape; natural community; and species. Where appropriate, the biological goals and objectives for Covered Species are addressed within the context of natural community and no additional species-specific goals were needed. However, this approach was not adequate for some species and species-specific goals were developed for those species.

### **Enforcement, Monitoring and Adaptive Management**

The HCP/NCCP, IA, and the Permit, as well as the Service's permit administrative regulations at 50 CFR Parts 13 and 17 identify monitoring obligations and enforcement mechanisms to ensure the Plan is properly implemented. Monitoring of the Preserve System will be performed by the IE, with oversight and direction by biological experts, including Service and CDFG representatives. Monitoring will be funded by mitigation fees.

Adaptive management is a process that allows the Plan's Preserve management, conservation strategy, and monitoring to be adjusted during the life of the Permit to ensure that the most up-to-date information is being utilized, that the Plan's biological goals and objectives are being achieved, and in response to changing conditions. Adaptive management will allow the IE to address and respond to these uncertainties over time. As discussed in Section 7.2 of the Plan, designing a biological monitoring and adaptive monitoring program is an extremely complex task that will take some time, as the Preserve System has not yet been acquired. Chapter 7 of the HCP/NCCP provides a framework, guidelines, and specific suggestions that will enable the IE to develop a detailed monitoring program from the initial years of the HCP/NCCP through long-term management.

### **Activities Covered by the Permit**

Activities proposed to be covered under the Permit are the otherwise lawful activities which are described in detail in Chapter 2 of the HCP/NCCP and the Biological/Conference Opinion (Service 2007a) (Covered Activities). These activities generally consist of urban development that converts undeveloped land or agricultural land to residential, commercial, and industrial uses, such as: new road construction, road widening, flood control activities, and related public and private infrastructure development. The Permittees are seeking incidental take coverage for a maximum of 13,029 acres of authorized development located within the proposed Permit Area, including private and public urban development projects and associated infrastructure.

Covered Activities also include activities conducted on the Preserve lands including the construction and maintenance of recreational facilities, wildlife observation platforms, and parking lots. Management activities related to the restoration, creation, and enhancement of habitat on the Preserves are also Covered Activities. These activities include, but are not limited to: fencing; pond clearing and deepening; prescribed burns; fire management; non-native species control; and monitoring activities related to determining the HCP/NCCP's success in meeting its biological goals and objectives that are conducted on Preserves for the benefit of Covered Species and their habitat.

### **Activities Not Covered by the Permit**

The HCP/NCCP specifically excludes the following (see Section 2.4 of the HCP/NCCP):

1. Los Vaqueros Reservoir Expansion Project. This project is not covered by the HCP/NCCP because it will require a separate permit process under Section 7 of the ESA and section 2081 of the California Fish and Game Code. Although the project has not occurred at this time, because of its potential impact to Covered Species it was evaluated as a cumulative impact in the inventory area in Chapter 4 of the Plan.
2. Agriculture. Except as provided for in the IE's Preserve management, routine and ongoing agricultural activities on existing irrigated agricultural and rangeland are not covered under this HCP/NCCP as the agricultural community declined to include them in this Plan. Routine and ongoing agricultural activities on lands neighboring HCP/NCCP Preserves are covered by this Plan under the terms described under Section 10.2.9 (Neighboring Landowner Assurances) of the Plan.
3. New Irrigated Agriculture. The inventory area has experienced a significant decline in irrigated agricultural lands due largely to the conversion of land to urban uses. Poor soil, steep topography, and access to water limit opportunities for conversion of rangeland to irrigated agriculture. Little conversion of rangeland to irrigated agriculture is expected to occur and is not a Covered Activity.
4. Wind Turbine Expansion or Operation. These activities are not covered by this HCP/NCCP because this activity has unique and substantial impacts on raptor species that are both covered and not covered by this HCP/NCCP. Golden eagles are fully protected under the California Fish and Game Code (Section 3511) and Covered Activities may not result in death.
5. Activities within Seal Beach Naval Weapons Station, Detachment Concord. Although a portion of Detachment Concord is within the inventory area, no activities on this federal facility are covered by this HCP/NCCP. Incidental take authorization needed by this facility would be covered under Section 7 of the ESA.
6. Construction of Rural Infrastructure Projects not Listed as Covered Activities. Rural infrastructure projects that are not described in Chapter 2 of the HCP/NCCP, such as major road or flood control project outside the ULL, are not Covered Activities.

7. Rural Residential Development and Urban Development Outside the UDA. Rural residential development and urban development outside the UDA are not Covered Activities.
8. New Rural Landfills. New landfills in the inventory area outside the UDA are not Covered Activities.
9. Mining. There are three mining operations within the inventory area: two in Clayton (Clayton Quarry [Hanson Aggregates]; and Mitchell Canyon Quarry [RMC Pacific Materials]) and one near Byron (Unamin Quarry [Unamin Corporation]). Plans for these operations are unknown, and are not Covered Activities.

#### **Additional Limitations**

1. Pesticide Use. The Permit issued under the Section 10(a)(1)(B) of the ESA does not allow the permitting of incidental take of Covered Species that result from the use of pesticides. Under the NCCPA, the use of pesticides is allowed; however, all applications must comply with all state and local laws.
2. Other Federal, State and Local Laws and Regulations. In addition to the Section 10(a)(1)(B) and CDFG Section 2081 permit the Cities and County shall comply with all other applicable local, state and federal regulations, law or ordinances. This includes, but is not limited to the following: U.S. Army Corps of Engineers Clean Water Act Section 404 permits; State Water Quality Control Board/Regional Water Quality Control Board Section 401 water quality certification and/or waste discharge requirements; CDFG Streambed Alteration Agreements pursuant to Fish and Game Code Division 2, Chapter 6, Section 1600 *et. seq.*; State and Federal Departments of Transportation; and the U.S. Environmental Protection Agency and Department of Pesticide Regulation.

#### **Relationship of Plan to Section 7 Consultations**

The HCP/NCCP is not intended to alter the obligation of a federal agency to consult with the Service pursuant to Section 7 of the ESA. Unless otherwise required by law or regulation, the Service will ensure that the biological opinion for projects that are Covered Activities under the Plan and require a Section 7 consultation is consistent with the biological opinion issued for the HCP/NCCP and the federal permit. Section 7 consultations only apply to federally listed species, so only those Covered Species that are federally listed at the time of consultation need be included in the consultation. Unless otherwise required by law or regulation, the Service will not impose measures on applicants for Covered Species in excess of those that have been or will be required by the IA, the HCP/NCCP, and the Permits.

#### **Permit Term**

The HCP/NCCP is a 30-year plan intended to address the need to protect and conserve Covered Species and other biological resources within the Permit Area while

accommodating urban development permitted by the Cities' and County's land use plans and policies.

#### **IV. PUBLIC COMMENT**

A Notice of Intent to prepare an EIS for the Federal action associated with the project was published in the Federal Register on June 5, 2003 (68 FR 33736). Public comments on the scope of the alternatives and environmental effects to be examined for the proposed project were requested by August 4, 2003. Three comment letters were received from agencies and organizations.

A Notice of Availability of the Draft EIR/EIS, with a public review period of 60 days, was published in the Federal Register on September 2, 2005 (70 FR 52434). Comments were requested by December 1, 2005. Eighteen comments letters were received. The comments and responses are found in Chapter 2 of Volume II of the FEIS.

A Notice of Availability of a Final EIR/EIS was published in the Federal Register on March 9, 2006 (72 FR 10781). Two comment letters were received. One letter was in support of the Plan, and the other requested clarification on what mitigation is being provided to reduce impacts to San Joaquin kit fox from recreation activities on Preserve lands.

The HCP/NCCP will minimize impacts to San Joaquin kit fox and other biological resources found on Preserves by adhering to the following guidelines found on pages 5-64 and 5-68 of the HCP/NCCP. The following are examples of measures taken to San Joaquin kit fox and other biological resources:

Recreation is of secondary importance in all Preserves and must defer to the biological goals and objectives set for in the HCP/NCCP.

Recreation will only be allowed on Preserves where it is compatible with the biological goals of the HCP/NCCP and has less-than significant impacts on biological resources after implementation of necessary mitigation measures. Such measures include restricting covered activities in a Preserve during the breeding season. For example, Preserves could be closed or access restricted for recreational activities if natal dens are occupied or may be occupied during the breeding and pupping season.

Recreation use and impacts will be monitored by the IE to ensure that uses do not adversely affect biological resources. If uses are found to be adversely affecting biological resources, the use will be discontinued until adjustments in the use can be made to reduce or eliminate impacts.

Recreation activities are limited to hiking, non-motorized bicycle riding, walking, horseback riding, wildlife observation and photography, and environmental education and interpretation on designated trails at appropriate sites.

Additional information on allowable recreational uses and limitations are found on pages 5-64 through 5-68 of the HCP/NCCP. The Service believes that these measures will reduce or eliminate potential impacts to San Joaquin kit fox from recreational activities.

## V. THE ALTERNATIVES

Four alternatives including the HCP/NCCP were identified and analyzed in the Draft and Final EIS/EIR. These included: (1) Proposed Plan (Conservation Strategy A), (2) Conservation Strategy B, (3) Reduced Development Area, and (4) No Action/No Project.

The following is a brief description of the preferred Proposed Plan (Conservation Strategy A) alternative, and the three additional alternatives. A detailed description of the alternatives appears in the Chapter 2 of the FEIS/FEIR.

### 1. Proposed Plan, Environmentally Preferred and NEPA Preferred Alternative:

Under this alternative, the proposed HCP/NCCP described above (see Project Description) would be implemented. This alternative established a comprehensive multi-species conservation program that minimizes incidental take of the covered animal species and loss of covered plant species in the Permit Area and provides mitigation for the impacts of Covered Activities on the Covered Species and their habitat. The goal of the conservation strategy is to protect 30,300 acres (mitigation and land contributing to the recovery of Covered Species) and create habitat corridors linking existing and future Preserves. As described more fully in the HCP/NCCP, goals for habitat acquisition would target acquisitions according to zones and habitat type. During the 30-year Permit term, take of Covered Species would be authorized up to 11,853 acres under the MUDA, and an additional 1,126 acres of rural infrastructure for a maximum total of 13,029 acres of habitat impact. In addition, incidental take is authorized for the construction and maintenance of recreational or management facilities; habitat enhancement, restoration, and creation; and habitat management activities on the Preserve System. The regional, multiple species approach eliminates the fragmented, inefficient process of project-by-project review, processing of permits for species as they become listed, and relatively smaller scale, less comprehensive, implementation of mitigation measures. The HCP/NCCP meets the statutory requirements for issuance of a Permit under the ESA as discussed further in the Service's Findings.

### 2. Conservation Strategy B:

Conservation Strategy B is similar to the Proposed Plan (Conservation Strategy A) and differs only in the amount and location of land acquisition and habitat restoration. The conservation related to land management, principles of habitat restoration, and avoidance and minimization are the same between the two strategies. Under Conservation Strategy B, acquisitions in some zones would be reduced while other zones may increase slightly. This reduction in acquisitions would reduce alkali wetland conservation by approximately 40 acres. In zone 6, more agricultural land would be acquired for

Swainson's hawk foraging, but riparian restoration to provide nesting habitat would be reduced. Conservation Strategy B's acquisition strategy does not match watershed boundaries as well as the Proposed Plan. There would be less wetland restoration than proposed under the Proposed Plan

3. Reduced Development Area:

This alternative would provide for a reduced level of take due to a reduced permit area. The permit area would be reduced to lands within the city limits that are designated for development, and lands in unincorporated areas with a development land use designation in the County General Plan. Rural infrastructure projects and activities within the Preserves, as described for the Proposed Plan would be covered under this alternative. Under this alternative, the permit area would be 6,991 acres, which are approximately 3,260 less than the IUDA and 7,527 acres less than the MUDA. Land acquisition and restoration of wetland land cover types would be reduced under this Alternative because these requirements would be scaled according to the level of development. Land acquisition priorities developed for the IUDA under the Preferred Project represent the minimum acquisition standard to offset impacts to Covered Species as a result of development. Therefore, under the Reduced Development Area the minimum requirements would still need to be met. The HCPA has incorporated all feasible funding measures it could identify. This alternative would necessitate an increase in the fee for development to offset the funding gap that would occur because of fewer development acres.

4. No Action/No Project:

Under the No Action/No Project alternative, no Section 10(a)(1)(B) permit would be issued for the take of listed species as a result of urban development and other Covered Activities in the plan area and no comprehensive HCP/NCCP would be implemented. In the absence of a comprehensive HCP/NCCP, the needs of listed species would be addressed on a project-by-project basis, resulting in piecemeal planning that would likely establish smaller and more widely isolated patches of mitigation land scattered in the inventory area or outside the County itself. This alternative would not provide for the establishment and management of a Preserve System designed to conserve habitat, provide habitat linkages, restore, and improve habitat for listed species in perpetuity. Unlisted species would not derive the benefits of a regionally based approach that would be developed under the HCP/NCCP.

## **VI. DECISION**

NEPA requires federal agency disclosure of the environmental effects of major federal actions significantly affecting the quality of the human environment. At the time of a decision, a federal agency is required to prepare a Record of Decision stating what the decision was, identifying the alternatives considered in reaching its decision, specifying the alternative which was considered to be environmental preferable, discussing all relevant factors the agency used in making its decision, and stating whether all

practicable means to avoid or minimize environmental harm from the selected alternative have been adopted, and if not, why not.

The Applicant's final HCP/NCCP and alternatives have been fully described and evaluated in the EIS/EIR. The Service considered the following in making its decision: the review of the alternatives and their environmental consequences described in the FEIR; the Applicants' Final HCP/NCCP; the IA between the Service, Cities, County, EBRPD, Flood Control, and CDFG; the Service's Biological/Conference Opinion; and the Service's Finding (all incorporated herein by reference). The Service has decided to adopt the HCP/NCCP alternative (Proposed Plan/Conservation Strategy A) and issue a Permit to the Applicants pursuant to Section 10(a)(1)(B) of the ESA for the take of endangered San Joaquin kit fox, longhorn fairy shrimp, vernal pool tadpole shrimp; and threatened giant garter snake, Alameda whipsnake, California tiger salamander, California red-legged frog, and vernal pool fairy shrimp; and nine unlisted animal species and 11 unlisted plant species in the event they become listed during the 30-year term of the Permit, and to extend assurances provided under the "No Surprises" rule at 50 C.F.R. 17.3, 17.22(b)(5) and 17.32(b)(5) to all Covered Species.

## **VIIIX. RATIONALE FOR DECISION**

The Service is adopting the final HCP/NCCP alternative because it best meets the statutory criteria for issuance of a Section 10(a)(1)(B) ITP under the ESA as explained in detail in the Service's Findings (Service 2007b). Implementation of the HCP/NCCP will contribute to the maintenance of viable populations of the San Joaquin kit fox, California red-legged frog, California tiger salamander, vernal pool crustaceans, Alameda whipsnake, and Swainson's hawk in the inventory area for the foreseeable future, will contribute to the conservation of the other 22 species covered by the HCP/NCCP, and the alternatives against the No Action Alternative. Of the four alternatives analyzed in the FEIR/FEIS, the Service believes that the combination of land acquisition and habitat enhancement, management, and monitoring provided under the preferred alternative most effectively offsets the anticipated levels of take and the impacts of that take on the Covered Species and can be feasibly implemented by the Permit Applicants. Conservation Strategy B would provide the same amount of conservation necessary under Conservation Strategy A. The acquisition zones and subzones are slightly different, with more acquisition in some zones and reduced acquisitions in other zones. The primary difference is in the reduction in the amount of conservation of alkali wetlands by approximately 40 acres, the reduction in riparian restoration for Swainson's hawk nesting, and a reduced amount of wetland restoration. The Reduced Development Area would have a reduced permit area, but would still have to meet the minimum acquisition standards under the IUDA as those standards were determined to be necessary to offset impacts to Covered Species as a result of development. This alternative would significantly drive up the costs of plan implementation to a level likely to render the plan economically infeasible to implement. The No Action alternative would result in piecemeal, scattered mitigation of far less value to the covered species than the interconnected system of managed, high quality habitat reserves to be established under

the HCP/NCCP. The Service believes minimization and mitigation provided under the proposed alternative accurately reflects the level of take anticipated from Covered Activities analyzed in the FEIS/FEIR and the Biological/Conference Opinion, most effectively minimizes and mitigates the impacts of that take, and does so in a manner that can be feasibly implemented by both the Permittees and IE. For these reasons, the Service's decision is to issue a Section 10(a)(1)(B) permit to the Cities, County, EBRPD, Flood Control District, and IE in accordance with the Final HCP/NCCP and IA.

This analysis evaluated the relative effects of the alternatives on other resources in the inventory area, including biological resources; land use and planning; agriculture; public services; hydrology and water quality; socioeconomics and environmental justice; geology, soils, and seismicity; cultural resources; transportation; noise; air quality; and mineral resources. The degree to which these resources would be adversely affected was determined to be the same for the three alternatives as compared to the No Action Alternative.

Loss of up to 13,029 acres of existing or potential habitat will occur within the Permit Area as grassland, agricultural, and vacant lands are converted to urban uses over the 30-year life of the ITPs. The Service has determined that the Final HCP/NCCP will effectively minimize and mitigate the direct and indirect adverse effects through the implementation of on-site minimization measures during project construction, and funding for the establishment of a Preserve System of up to 30,300 acres in perpetuity (both mitigation and recovery lands) to be restored, enhanced, managed and monitored to benefit the Covered Species.

Conservation Strategy A is the NEPA Preferred Alternative because this alternative effectively minimizes and mitigates the impacts of take of the Covered Species resulting from development of up to 13,029 acres of land within the Permit Area currently planned for urban development and rural infrastructure projects by the Applicants. While the proposed alternative would result in mitigation fees near the upper level of feasibility, the other alternatives result in estimated fees that are even higher and would likely render the planned urban development infeasible or would not provide the level of conservation that the HCP/NCCP does. By adopting the HCP/NCCP alternative with the minimization and mitigation measures, all practical means to avoid or minimize environmental harm from implementation of the selected alternative have been adopted.

  
Deputy Manager  
California-Nevada Operations Office

Dated: 7-24-07