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February 19, 2004

S. F. Public Utilities Commission
1155 Market Street, 4th Floor
San Francisco, CA 94103

Re: Alameda Watershed Habitat Conservation Plan

The purpose of this letter is to provide the thoughts of the Alameda Creek Alliance (“ACA”) on crafting a Habitat Conservation Plan (“HCP”) for San Francisco Public Utilities Commission (“SFPUC”) lands within the Alameda Creek watershed. This letter is provided in the spirit of cooperation and constructive participation in the SFPUC’s HCP process. We are dedicated to working closely with the SFPUC and state and federal regulatory agencies to achieve long-term conservation measures for imperiled wildlife within the SFPUC Alameda Creek watershed lands.

The HCP should cover all of the special status plant and animal species potentially occurring in the watershed, as listed in Tables III.E.1 and III.E.3 in the SFPUC Final EIR for the Alameda Watershed Management Plan.

The following special-status fish species should also be covered under the HCP: Central California Coast ESU steelhead trout (*Oncorhynchus mykiss*), Pacific lamprey (*Lampetra tridentata*), River lamprey (*Lampetra ayersi*), and Sacramento perch (*Archoplites interruptus*). Central California Coast ESU steelhead trout are a federally threatened species and Pacific lamprey are a federal species of concern. The rationale for including these species is detailed in the ACA’s comments on the draft Environmental Impact Report for the SFPUC Alameda Watershed Management Plan (www.alamedacreek.org/Reports_Data/DEIRcomments.pdf) . The rationale for including the river lamprey and Sacramento perch is detailed in the 1995 Department of Fish and Game publication “Fish Species of Special Concern in California” (www.dfg.ca.gov/hcpb/info/fish_ssc.pdf) and the 1996 U.S. Fish and Wildlife Service publication “Recovery Plan for the Sacramento/San Joaquin Delta Native Fishes.” All of these species have occurred in the past, currently occur, or have the potential to occur in the near future within the HCP coverage area.

The HCP should also cover the California horned lizard (*Phrynosoma coronatum frontale*) and Berkeley kangaroo rat (*Dipodomys heermanni berkeleyensis*), for the reasons outlined in the ACA comments on the Alameda Watershed Management Plan EIR. For additional special status plants that could occur within the covered HCP lands, the SFPUC should consult Appendix B of the East Bay Regional Park District’s draft Land Use Plan for Sunol and Ohlone Wilderness Regional Preserves (www.ebparks.org/resources/pdf/land_stew/sunohl_draft_lup.pdf).

The attachment to this letter provides an overview of our position on the regulatory requirements of HCPs. These requirements provide that an HCP must:

- minimize and mitigate take of covered species to the maximum extent practicable;
- ensure survival of and contribute to recovery of covered species;
- include detailed, measurable biological goals and objectives for all covered species;
- provide a higher standard of conservation for the rarest covered species than more common, wider ranging species;
- include a conservation management and monitoring program;
- ensure take of covered species is commensurate with implementation of promised conservation;
- provide contingency funding and management planning;
- not credit existing preserve lands towards HCP conservation goals absent improved conservation management;
- free HCP preserve lands from all harmful land use;
- provide for independent scientific and legal review of HCP and supporting documents;
- release draft biological opinions, Section 10 findings, and implementing agreements for public review and comment;
- assure HCP implementation funding;
- specify any harmful effects of permitted take;
- monitor HCP compliance so that the take permit can be revoked in the event of non-compliance; and
- ensure the permitted activities are incidental to otherwise lawful activities.

Sincerely,

Jeff Miller
Director, ACA

cc: U. S. Fish and Wildlife Service
National Marine Fisheries Service
California Department of Fish and Game

Regulatory background

Section 10 of the Endangered Species Act, 16 U.S.C. §§ 1531 et seq. (“ESA”) authorizes the Secretary of the Interior or the Secretary of Commerce (“Secretary”) to permit activities otherwise prohibited under the ESA’s Section 9 “take” provisions under certain very limited circumstances.

Take may be authorized under Section 10 through issuance of an incidental take permit for activities carried out in accord with an approved Habitat Conservation Plan (“HCP”). 16 U.S.C. § 1539(a). Before issuing a take permit, the Secretary must make findings including: (1) the taking will be incidental to an otherwise lawful activity; (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impact of such taking; (3) the applicant will insure that adequate funding for the conservation plan will be provided; (4) the taking will not appreciably reduce the likelihood of the survival and recovery in the wild, (5) any and all other measures required by the Secretary have been met; (6) the Secretary has received the necessary assurances that the Plan will be implemented. 16 § U.S.C. 1539(a)(2)(B); 50 C.F.R. 17.22(b)(2). The Secretary must also prepare a biological opinion for any HCP to ensure that issuance of an take permit will not jeopardize listed species or adversely modify critical habitat, and will actually conserve affected listed species. 16 § U.S.C. 1536(a)(1); 1536(a)(2).

The ESA prohibits any “person” from “taking” threatened and endangered species. 16 U.S.C. § 1538, 50 C.F.R. § 17.31. The definition of “take”, found at 16 U.S.C. § 1532(19), states,

The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

The term “person” is defined in the ESA to include “any officer, employee, agent, department, or instrumentality...of any State, municipality, or political subdivision of a State...(or) any State, municipality, or political subdivision of a State...” 16 U.S.C. § 1532(13). Numerous cases have confirmed that government entities are responsible and liable for violations of the ESA, including Sierra Club v. Yeutter,¹ Defenders of Wildlife v. EPA,² Palila v. Hawaii Department of Land and Natural Resources,³ and Loggerhead Turtle, et. al, v County Council of Volusia County, Florida.⁴ In another relevant case dealing with state regulated fisheries, the Court ruled

¹ 926 F.2d 429, 43-39 (5th Cir. 1991)

² 882 F.2d 1294, 1301 (8th Cir. 1989)

³ 639 F.2d 495, 497-98 (9th Cir. 1981)

⁴ (11th Cir. 1998)

...the statute not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking. We believe that...a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.

Strahan v. Coxe, et al.⁵

The preceding requirements, along with agency regulations, policy guidance, and case law interpreting them, provide the basis for the concepts and standards set forth in these comments. While the body of case law interpreting the requirements for take permits and HCP's is still relatively small, the case law that exists strongly supports a strict interpretation of the requirements in favor of conservation of covered species.

Applicants for take permits and the Secretary must follow certain principles in order to craft sound HCPs. These principles are set forth below.

a. HCPs must minimize and mitigate take of covered species to the maximum extent practicable

One of the most important requirements of ESA Section 10 is that HCPs must identify steps to both minimize and mitigate take of covered species to the maximum extent practicable. [See 16 U.S.C. § 1539(a)(2)(B)(ii): "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking."]

HCPs must objectively and independently evaluate any assertions by agency participants or beneficiaries that certain mitigation measures are "impracticable" or "infeasible." Such assertions must be supported by reliable and specific documentation of impracticability or infeasibility. [See U.S. Fish and Wildlife Service Habitat Conservation Planning Handbook at page 7-3.] The alternatives analysis must not be constrained by what the take permit applicant or beneficiaries deem economically "practicable" or "feasible." [HCP Handbook at page 3-35.]

Courts have struck down HCPs and take permits for failing to ensure that their effects had been minimized and mitigated to the maximum extent practical. National Wildlife Federation, et al. v. Babbitt,⁶ Sierra Club et al. v. Bruce Babbitt et al.⁷ In National Wildlife Federation, the Court stated "...the statutory phrase "maximum extent practicable" nonetheless requires the Service to consider an alternative involving

⁵ 127 F.3d 155 (1st Cir. 1997)

⁶ 128 F. Supp. 2d 1274 (E.D.Cal. 2000)

⁷ 15 F. Supp. 2d 1274 (S.D.Ala.1998)

greater mitigation.... The plain language of the [statute]...is not satisfied by a fee set, as here, at the minimum amount necessary to meet the minimum biological necessities of the covered species.”⁸

Certain principles must be followed to ensure that take of covered species is minimized and mitigated to the maximum extent practicable. Adherence to these same principles is also necessary to ensure no appreciable reduction in the likelihood of survival and recovery, or “conservation” of HCP covered species, as discussed under Section b. below.

b. HCPs must ensure survival and contribute to recovery of covered species

HCPs must not appreciably reduce the likelihood of the survival and recovery of covered species in the wild. 16 U.S.C. §1539(a)(2)(B)(iv). But HCPs must also go one step further and provide a net benefit, or “conserve” covered species.

The Secretary must comply with ESA Section 7 conservation standards for all covered species when approving the HCP and issuing an incidental take permit. Congress titled Section 10 “conservation plans” consistent with the ESA Section 3 definition of the term “conservation” to include all measures necessary to bring federally listed species to a point at which ESA protections are no longer necessary. 16 U.S.C. §1532(3). “[A]ll measures necessary...” includes consistency with any recovery plans prepared pursuant to Section 4(f) of the ESA. HCPs must therefore be consistent with available recovery plans, and move beyond the status quo to actively improve the conservation status of all covered species, especially the rarest species. HCPs must provide a net benefit to covered species even if the planning area is just a portion of the species’ range. HCPs must also ensure survival and contribute to recovery of plants for these same reasons.

HCPs must abide by the following principles to minimize and mitigate take of covered species to the maximum extent practicable, and to ensure the program will not appreciably reduce the likelihood of survival and recovery of covered species.

1. HCPs must minimize and mitigate take

HCPs must identify steps to both minimize and mitigate take of covered species. Despite this, HCPs often greatly emphasize mitigation instead of minimization by establishing mitigation standards while excluding controversial standards for avoidance.

Mitigation is an important component of HCPs, but this must be preceded by earlier, project-level steps to minimize permitted take, including measures such as consideration of less harmful alternative

⁸ 128 F. Supp. 2d 1292-93

projects, project redesign, project re-location and reduction of project footprint among others. HCPs must articulate those limited circumstances under which un-avoidable impacts will be authorized as permitted activities proceed.

In-kind, on-the-ground mitigation is also necessary to mitigate take of covered species to the maximum extent practicable. Some HCPs have unfortunately authorized out-of-kind mitigation, whereby destruction of one type of vegetation or species is allowed in exchange for conservation of an entirely different type of vegetation or species. Some HCPs have also unfortunately authorized substitution of monetary compensation for actual land acquisition. In one example, the City of San Diego Multiple Species Conservation Program Subarea Plan allows developers to mitigate the loss of imperiled southern maritime chaparral vegetation with compensation elsewhere of native grasslands or oak woodlands and others, or the payment of a mitigation fee. Fees charged are far below the amount necessary to purchase compensation southern maritime chaparral due to extremely high costs for coastal property. These techniques remove the ability of the San Diego MSCP to minimize and mitigate take to the maximum extent practicable, and to ensure that permitted activities will not appreciably reduce the likelihood of survival and recovery of southern maritime chaparral-dependent covered species.

2. HCPs must include detailed, measurable biological goals and objectives for all covered species

Detailed measurable biological goals and objectives for all covered species are essential to ensure HCPs will minimize and mitigate take to the maximum extent practicable, and to ensure that permitted activities will not appreciably reduce the likelihood of survival and recovery of covered species.

A clearly articulated set of biological goals and objectives for the overall program and each covered species are essential to the success of HCPs. Biological goals and objectives are necessary to guide implementation of the HCP and to provide a transparent process of HCP planning and implementation to maintain public trust. The primary purpose of HCPs is to authorize take of species covered by the program, so biological goals and objectives must also be established as conditions for coverage of the target species and to justify the take permit.

HCP biological goals should be prepared by an independent body of scientists with proven expertise with the covered species, made available for public review and comment, and subsequently finalized prior to approval of the HCP. Biological goals should be established in consideration of the rarity, endemism, population viability and connectivity needs for each covered species.

HCPs must contain biological goals and objectives according to the U.S. Department of Interior and Commerce's Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process ("five-point policy"). Federal Register 65 at 35250-35252, June 1, 2000. According to the policy,

Determination of the biological goals and objectives is integral to the development of the operating conservation program.

In the context of HCPs, biological goals are the broad, guiding principles for the operating conservation program. They are the rationale behind the minimization and mitigation strategies.

For more complex HCPs, biological objectives can be used to step down the biological goals into manageable, and, therefore, more understandable units.

...the biological goals and objectives of HCPs covering [species with recovery plan goals] should support the recovery goals and conservation.

Id. at 35251.

Biological goals and objectives must address each species covered by a HCP. Landscape or habitat-level goals and objectives alone are not adequate to provide for a successful HCP.

...each covered species must be addressed as if it were listed and named on the permit. Although the goals and objectives may be stated in habitat terms, each covered species that falls under that goal or objective must be accounted for individually as it relates to that habitat.

Id. at 35251.

Biological objectives must include species- and preserve area-specific conservation management and monitoring measures, as discussed in the five-point policy. Id. at 35251. These must include objectives for how many populations, or the amount of habitat that will be protected over the life of the permit. Objectives for the program must also clearly articulate those limited circumstances under which unavoidable impacts will be authorized as permitted activities proceed.

After establishment of the goals and objectives, HCPs must also undergo analysis to determine whether the program will actually conserve the species. According to the five-point policy,

Regardless of the type of goal used, at some point, all HCPs must undergo a species by species analysis. If an HCP is planned on a habitat basis, a species-by-species analysis must be made to determine if the HCP adequately covers the species.

Id. at 35244.

3. The rarest covered species require a higher standard of conservation than more common, wider ranging species

There is a tendency among HCPs to treat all covered species as if they are of similar conservation status. Yet the rarest covered species will inevitably need greater and more specific conservation measures than others, and so must be provided more rigorous biological goals and objectives and HCP standards to ensure minimization and mitigation and no appreciable reduction of survival and recovery of covered species.

Many multiple species HCPs operate under the mistaken assumption that general habitat protection will automatically result in conservation of all covered species. This may be true for more common, wider ranging species, but general habitat protection alone will not make a successful HCP. According to the five-point policy,

...populations of a narrow endemic species that occur within a wider ranging habitat type may not be adequately covered by an HCP that depends solely on amount of habitat conserved in a broad general area and does not specify particular locations where the habitat for that species is conserved.

Id. at 35245.

The range and distribution of the rarest covered species may be so reduced that protection and management biological objectives must provide for protection of all known population locations, including those discovered through future project-level surveys, at least until such time that restoration and enhancement measures under the HCP have greatly improved the species' status. All impacts to these species must be avoided, and criteria must be crafted identifying the very narrow circumstances when impacts will be authorized, such as in the case of removal of all economic property use or essential public health and safety projects.

For these covered species, all known populations must be included within preserve system boundaries. In the alternative, protection and management biological objectives and HCP implementation standards must apply to these species both inside and outside of the preserve system.

Multiple species HCPs often identify the amount of habitat which will be saved for each of the rarest species, but the plans should also clearly identify the worst case take scenario, e.g. what is the maximum loss of habitat for each covered species that will be allowed, what is the quality of habitat where losses will be allowed, how many losses of major known populations and roosting sites will be permitted and how will their importance be determined, etc?

The rarest covered species must also be the subject of intensive, seasonally appropriate surveys either through the planning process for single / few-property- or multiple species HCPs, or as projects come forward over the life of the permit for multiple species HCPs. Either way, there must be a concerted effort

to improve the knowledge of the range and distribution of such species and to ensure conservation of important populations be they known now or discovered in the future.

4. HCPs must include a conservation management and monitoring program

A conservation management and monitoring program is an essential component of any HCP, and is indispensable in ensuring full minimization and mitigation of all impacts from permitted activities and that permitted activities will not appreciably reduce the likelihood of survival and recovery of covered species. Species- and preserve area-specific conservation management planning is essential to the success of HCPs. Monitoring also is a mandatory element of all HCPs (See 50 C.F.R. 17.22, 17.32, and 222.307), according to the five-point policy. Federal Register 65 at 35251.

The monitoring program plays as essential role of determining whether the chosen strategy(ies) is providing the desired outcome (i.e. achieving the biological goals of the HCP).

Id. at 35253. The monitoring plan should be a component of the HCP's conservation management program.

Many HCPs lack detailed conservation management-related biological objectives or monitoring plans at the time of approval, despite their importance and in violation of the ESA and implementing regulations.

The conservation management and monitoring plan must provide many of the essential details identifying specifically how and when biological goals and objectives will be accomplished. The plan must address conservation management of all known covered species populations and each portion of the preserve for the life of the permit, with an amendment process as new populations are discovered and additional preserve lands acquired. The management and monitoring plan should provide extensive detail on the following topics and others:

Management agency

Fire management, including emergency response and prescribed fire

Fencing

Signing

Minimization of edge effects, including exotic species control, lighting, noise, trashing dumping and others

Restoration

Seed banking

Authorized preserve uses

Public access points

Preserve staff duties

Education, including neighborhood and school programs

Monitoring of covered species populations
Monitoring of segments of the preserve
Management adjustments in response to monitoring

The conservation management and monitoring plan should be prepared early, prior to approval of the program and distributed for public review and comment as a part of the total draft HCP package. The benefits of early preparation – sound science, certainty and public trust – by far outweigh any burden of increased initial HCP preparation costs.

Early preparation of the conservation management and monitoring plan means it will only specifically address known covered species populations and existing preserve lands, with a general outline of how imperiled species populations subsequently discovered or acquired preserve areas will be managed and monitored. The plan should therefore be amended as new information is received, and re-opened for public and agency review and comment at least once every 3 years.

Funding for implementation of conservation management-related biological goals and objectives and monitoring under the plan must be assured for all HCPs as discussed in section c below.

5. Take of covered species must be commensurate with implementation of promised conservation

The purpose of HCPs is to ensure conservation of covered species while allowing otherwise harmful activities to proceed. Yet harmful activities and resulting take are often permitted by participating agencies at a rate far exceeding promised conservation measures, under many HCPs.

Take of covered species under HCPs must be commensurate with funding and implementation of conservation commitments to ensure full minimization and mitigation of all impacts from permitted activities and that permitted activities will not appreciably reduce the likelihood of survival and recovery of covered species. Specifically, take of covered species and habitat must only proceed as conservation commitments are fulfilled, including land acquisitions per mitigation ratios or other HCP standards, conservation management and monitoring, and others. Accomplishing HCP goals and objectives must be a condition of the HCP and section 10 permit. Permittees must be held liable for all conservation commitments under milestones envisioned in the program once any contemplated take has occurred under a particular milestone segment.

6. HCPs must provide contingency funding and management planning

“No Surprises” assurances are now granted as a matter of routine for all new HCPs. These assurances greatly limit permittee’s liability for commitments of additional land, water, or funding, or future restrictions

on use of land or water after approval of an HCP, in violation of the ESA. Worse, HCPs rarely provide similar stringent, legal assurances for planned conservation activities.

As long as no surprises assurances continue to be granted, HCPs must always provide assured contingency funding and management planning (e.g. additional land preservation) for all changed circumstances to ensure full minimization and mitigation of all impacts from permitted activities and that permitted activities will not appreciably reduce the likelihood of survival and recovery of covered species. According to the Secretary's Habitat Conservation Plan Assurances ("No Surprises") Rule,

Many changes in circumstances during the course of an HCP can reasonably be anticipated and planned for in the conservation plan ... and the plans should describe the modifications in the project or activity that will be implemented if these circumstances arise.

Federal Register 63 at page 8868. Further, according to the Secretary's five-point policy,

The No Surprises assurances encourage contingency planning. Changes in circumstances that can be reasonably anticipated during the implementation of an HCP can be planned for in the HCP. ...Precisely because nature is so dynamic, planning for changes circumstances and adopting adaptive management strategies within the HCP, permit, or [implementing agreement], if used, will better serve both the needs of the permittees and endangered species conservation.

Federal Register 65 at page 35243.

Assured contingency funding must also be provided for unforeseen circumstances. Take permit applicants must be extremely diligent and anticipate and include as many possible changed circumstances scenarios in the HCP, as well as the anticipated costs, management planning, and conservation commitments necessary to address these circumstances.

7. Existing preserve lands must not be credited towards HCP conservation goals absent improved conservation management

In many cases, participating agencies in multiple species HCPs seek to reduce expenses by counting existing public lands towards the total amount of land "protected" under the new HCP. Existing public lands must only be counted towards HCP conservation goals when these areas are re-dedicated to the HCP biological goals and objectives and as part of the HCP preserve system, and substantial new conservation management and monitoring is provided. This means that these lands must be formally re-dedicated, and detailed preserve- and species-specific conservation management plans must be in place with a commitment to necessary yearly implementation budgets for all such lands at the time of program approval, subject to amendment as additional lands are brought into the preserve.

It is essential that all lands included in any HCP preserve actually be important for the covered species so as to further the biological goals and objectives, maintain public trust, ensure full minimization and mitigation of all impacts from permitted activities, and ensure that permitted activities will not appreciably reduce the likelihood of survival and recovery of covered species.

8. HCP preserve lands must be free from all harmful land use

Conservation management of covered species should be the primary purpose of any preserves established under HCPs. Activities harmful to covered species must be excluded from HCP preserve lands. Compatible, low-impact uses like hiking, bird-watching and photography may be appropriate on preserve lands. But these lands should not be subject to “multiple use”-type management, such as that practiced by the U.S. Bureau of Land Management or Forest Service whose mission throughout the entirety of their non-wilderness holdings is to balance resource conservation with continuing exploitation. A balance between conservation of covered species and urban development or other permitted activities should be struck under HCPs, but by a different means whereby preserve areas are off-limits to harmful uses, and conservation restrictions are reduced on remaining lands.

9. Take permit applicants must provide for independent scientific and legal review of HCPs and supporting documents

Take permit applicants should provide for independent scientific and legal review of important HCP documents prior to program approval to ensure sound science, legal compliance, and to build and maintain public trust. Independent expert review should also be conducted periodically after approval of HCPs.

HCPs often involve very complex conservation and policy strategies, addressing numerous covered species with widely varying conservation needs. Because of this, HCP documents will only benefit from independent scientific and legal review. Documents which should be subject to expert review include those addressing biological goals and objectives, preserve design, conservation management and monitoring, and species-by-species coverage review. Documents common to most HCPs should also be subject to independent expert and public review, including the draft biological opinion, draft section 10 findings, and draft implementing agreement, among others.

HCPs must minimize and mitigate take, ensure survival, and contribute to recovery of covered species, among other ESA section 10 and 7 mandates. The Secretary must prepare a ESA Section 7 biological opinion for any HCP to ensure that the granting of an incidental take permit will not jeopardize listed species or adversely modify critical habitat. The Secretary must also prepare a set of findings on whether the HCP meets all ESA Section 10 standards. And the Secretary and take permit applicant often craft an

implementing agreement whereby participants enter into a formal contract to carry out HCP obligations. The Secretary must ultimately show that the implementing agreement incorporates all HCP conditions.

HCPs and supporting documents often fall short of necessary section 7 and 10 standards, for example, because they are prepared by one consulting firm— in the employ of take permit applicants – that may lack the expertise or political independence necessary to craft a complex and sound conservation plan. Also, Fish and Wildlife Service staff responsible for writing the biological opinion and section 10 findings, or reviewing the applicant’s implementing agreement often have little prior knowledge of a given HCP strategy, only general knowledge of covered species biology and may not recognize the failure, for example, of a complicated, legalistic implementing agreement to ensure the applicant remains responsible for all HCP conservation commitments.

Independent scientific and legal review of an HCP, both before and after program approval is likely to reduce these problems and contribute significantly to the building of public trust by ensuring the program has followed a rigorous scientific process, is consistent with legal requirements, and will accomplish stated goals.

The results of the pre-program approval independent review should be provided as part of the public review package of the draft HCP. A post-approval, periodic review and report to the public should be provided at least once every 3 years and examine implementation of all HCP components, progress towards program goals and objectives, and provide recommendations for improvement.

10. Draft biological opinions, section 10 findings and implementing agreements must be released for public review and comment

Take permit applicants and the Service should consent to public review of important draft HCP documents to build and maintain public trust. Draft documents which should be subject to public review include those addressing biological goals and objectives, preserve design, adaptive management and monitoring, and species-by-species coverage review. Documents common to most HCPs should also be subject to public review, including the draft biological opinion, draft section 10 findings, and draft implementing agreement, among others.

Draft HCP biological opinions and Section 10 findings are sometimes released to permit applicants, but almost never to the public, expert scientists or others. Public review of these documents is in no way prohibited by the ESA, and will serve to improve the final documents.

c. HCP implementation funding must be assured

HCPs must include an assured funding source for program implementation. 16 U.S.C. §1539(a)(2)(A)(iii). This requirement is obviously central to the success of the conservation strategy. In

National Wildlife Federation, a Court invalidated a take permit for failing to ensure that promised conservation actions would be funded.⁹ Yet many HCPs rely on uncertain funding sources such as allocations in future state or federal budgets, grants and future bond measures. HCPs also often fail to articulate specific funding goals and objectives.

It is essential that all funding needs be clearly and specifically identified in HCP documents so that the amount of funding necessary to carry out promised measures may be assured. Assured funding will be necessary to carry out the following HCP components and others over the life of the program:

New land acquisitions and other similar protections
Conservation management and monitoring
Contingency funding for changed or unforeseen circumstances
Periodic independent review
Administration

Funding must be provided up-front for all HCP components, prior to program approval. Where the amount of funding necessary for conservation obligations exceeds that available at the time of permitting, funding may be tiered to phases of development, with funding provided ahead of construction of each phase. Funding for any long-term conservation obligations should be placed in a trust for that specific purpose.

d. HCPs must specify any harmful effects of permitted take

HCPs must specify all harmful impacts which will likely result from permitted take of covered species. 16 U.S.C. § 1539(a)(2)(A)(i). For each species, the HCP must: 1) specifically disclose how each aspect of the HCP will affect species' survival and recovery prospects; 2) describe activities that may result in take of covered species; and (3) quantify the anticipated level of take resulting from all activities authorized under the plans. U.S. Fish and Wildlife Service Habitat Conservation Planning Handbook at pages 3-12 - 3-14, 3-20. This analysis must include an evaluation of the HCP's consistency with any draft and final recovery plans and designated critical habitat for covered species.

This analysis must also evaluate the likely short-term and long-term effectiveness of each of the HCP's proposed measures to minimize and mitigate incidental take of covered species and provide scientific support for why and how these measures will mitigate any significant adverse impacts to species to a level of insignificance. HCP Handbook at page 3-19

⁹ 128 F. Supp. 2d 1293-95

The analysis must be supported by complete and accurate baseline data including wildlife and plant field surveys, biology and hydrology scientific studies, population viability analyses, and other information to provide scientific support for the environmental impact analysis. HCP Handbook at page 3-10.

Currently, however, even the most detailed multiple species HCPs only include percentages of the amount of habitat which will be saved for a particular covered species. A few multiple species HCPs go so far as to include a rough estimate of the amount of covered species habitat which will be lost under the plan, but few present specific information on the number of covered species' populations or individuals to be lost.

Quantifying the extent of take of covered species under HCPs can be difficult. But it is entirely possible to specify the amount of take that will occur on single or few-property HCPs, as required by the ESA. For multiple species programs where quantifying take may be most difficult, HCPs must identify the amount of habitat which will be saved for each species, but should also clearly identify the worst case take scenario, e.g. what is the maximum loss of habitat for each covered species that will be allowed, what is the quality of habitat where losses will be allowed, how many losses of major known populations and roosting sites will be permitted and how will their importance be determined, etc? A clear articulation of those limited circumstances under which un-avoidable impacts will be authorized as permitted activities proceed must also be included.

e. **HCP compliance must be monitored and the take permit revoked in the event of non-compliance**

The Secretary has a mandatory, non-discretionary duty to revoke any take permit where the terms and conditions of the permit have not been met. 16 U.S.C. § 1539(2)(C). This is a vital part of the Secretary's obligation to ensure conservation of the covered species.

A clear, enforceable, mechanism for monitoring compliance must be established and provided for public review as part of the draft HCP. Part of the compliance monitoring process should include a free flow of information to the interested public. Nonetheless, the ultimate responsibility for implementation of compliance monitoring falls solely with the Secretary. The Secretary must discontinue issuance of take permits if the level of compliance monitoring for existing permits exceeds available resources.

f. **The permitted activity must be incidental to an otherwise lawful activity**

Take permits can only be issued for activities that are incidental to an otherwise lawful activity. 16 U.S.C. § 1539(a)(1)(B). This means that the Secretary cannot issue a take permit for any activity that is in violation of any other law, including, but not limited to, the National Environmental Policy Act, Clean Water Act, Clean Air Act, Migratory Bird Treaty Act, Porter-Cologne Water Quality Act or any state statutes. The Secretary and take permit applicant must carefully review the legality of the permitted action

to ensure that this requirement is met. If at any point the permitted activity violates the provision of any law, the Secretary has a non-discretionary duty to revoke the take permit. 16 U.S.C. § 1539(2)(C).



SAN FRANCISCO PUBLIC UTILITIES COMMISSION



WATER ENTERPRISE

NATURAL RESOURCES AND LANDS MANAGEMENT DIVISION

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February 19, 2010

Jeff Miller
Executive Director
Alameda Creek Alliance
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Dear Mr. Miller:

As you know, the Alameda Watershed Habitat Conservation Plan (HCP) has changed substantially over the last several years in response to the needs of the SFPUC, public comments, and clarification of regulatory requirements. These revisions to the HCP include the addition of fish as covered species. These changes have resulted in revised draft chapters, the first three of which we have just posted to the SFPUC website (www.sfwater.org).

On June 30, 2004 you submitted a comment letter to the San Francisco Public Utilities Commission (SFPUC) regarding the HCP. In addition, you have provided comments at various HCP community meetings which resulted in constructive discussion. We appreciate your input and this letter is to provide an update on how some of the changes and suggestions have been incorporated into the revised draft chapters of the HCP. These changes include information you provided about documented occurrences and threats to some covered species. In this letter we respond to the main issues you described in your comment letter. Where appropriate, the comments you raised were incorporated into the revised draft chapters.

Please note that the SFPUC is currently in consultation with U.S. Fish and Wildlife Service, the National Marine Fisheries Service (collectively the Services), and the California Department of Fish and Game and anticipates presenting the draft HCP in its entirety through the public outreach process during the summer of 2010. The environmental review process (NEPA/CEQA) will also provide opportunities for formal public comment.

Covered Species

In your comment letter you suggested that we include additional species. We want to emphasize that this document is intended to facilitate SFPUC compliance with the federal Endangered Species Act (ESA) and the California Endangered Species Act (CESA). In order to receive coverage under the plan, species needed to meet four criteria: there must be an impact

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to the species from the covered activities; the species must occur in the covered area; the species must be likely to be listed during the permit term (30 years); and sufficient data must be available for the federal agencies to make their findings under section 10 and section 7 of the Endangered Species Act.

Regarding the Berkeley kangaroo rat (BKR), we agree that it is possible, although unlikely, that BKR may occur in the study area. In the fall of 2006, EDAW and Turnstone Joint Venture (ETJV) biologists conducted habitat assessment surveys for BKR for the Calaveras Dam Replacement Project. ETJV biologists conducted daytime and nighttime surveys for kangaroo rats within and near the study area. No Heermann's kangaroo rats were detected, and no burrows with characteristic Heermann's kangaroo rat signs were found (ETJV 2007). In addition, it is unlikely that the Services would issue a permit for impacts to BKR due to its extreme rarity. The SFPUC does not anticipate any impacts to BKR. It has been included as a no-take species under this HCP.

You also pointed out in your comment letter that the 2004 Bay checkerspot butterfly surveys may have missed a portion of the adult flight season. Subsequent surveys conducted by Dr. Arnold during the spring and early summer of 2005 for the Bay checkerspot butterfly concluded that suitable habitat within the study area was not present (Arnold 2004, 2005).

Regarding river lamprey, the majority of lamprey ammocoetes observed in reaches below Calaveras Dam have been positively identified as Pacific lamprey, although it is possible that river lamprey also inhabits the watershed. However, there is very little information regarding river lamprey in the study area. After discussion with the Services and the Department of Fish and Game, the river lamprey was not included in the list of covered species due to lack of data in the watershed. In addition, the conservation actions recommended under the HCP for Pacific lamprey are expected to benefit river lamprey under virtually all conditions. Because of the lack of information on the species, the fact that listing of the species is not imminent, and actions for Pacific lamprey will benefit river lamprey, river lamprey is not proposed for coverage.

Covered Activities

Concerning your suggestion to cover pesticide use, the USFWS will not give an ESA permit for pesticide use. It is therefore not possible to include pesticide use as a covered activity in the HCP. The EPA does provide a limited form of protection from take due to pesticide use through its Endangered Species Protection Program, which issues use guidelines for pesticides that are intended to prevent take of listed species. The SFPUC will

conform to the EPA's use guidelines in its use of pesticides. The SFPUC's use of pesticides is further restricted by ordinance (City and County of San Francisco, Pesticide Management Plan Ordinance No. 274-97), and the SFPUC's Alameda Watershed Management Plan includes policies and management actions to minimize impacts from pesticide use.

You suggest adding gravel quarrying as a covered activity. Gravel quarrying was not included as a covered activity because, as you note in your letter, the quarrying activities on SFPUC property are permitted under separate processes. Since the time that your letter was written, the Alameda Creek Alliance has developed conservation measures in association with the new quarry operator (Oliver de Silva Inc.) at SMP 30 that we assume address your stated concerns. The operator of the Apperson Ridge Quarry (SMP 17, also Oliver de Silva Inc.) has voluntarily agreed to implement additional mitigation measures in a conservation plan to reduce impacts and improve habitat for species. The SFPUC has also committed to partner on restoration efforts and development of a restoration plan for the Sunol Valley. This plan will be funded in part by Oliver de Silva Inc. under the terms of their SMP 30 lease agreement.

You request that the study of the Alameda Creek Watershed's road system be made public. You also suggest closing unnecessary roads and reducing erosion and other impacts from existing roads. As described in the Alameda Watershed Management Plan, the SFPUC has developed a database for the main watershed roads (using GIS) that provides an assessment of road conditions, including culverts, landslides or other geologic hazards, and stream crossings. A report by CDM Consultants was recently prepared (Watershed Road Condition Assessment & Recommended Improvements, September 2009) that provides recommendations (engineering solutions, road closures or abandonment, and best management actions) for road management. These road assessments are available to the public upon request.

SFPUC estimates that it will construct approximately 20 miles of roads within the HCP plan area, in part to provide access to improvements related to habitat protection. For example, access to new large, enclosed water tanks for cattle- and fire-management purposes along Alameda Creek will be needed. New water tanks will direct cattle away from the creek in order to alleviate pressure on riparian areas. Though building roads will impact some natural vegetation it is also a way to control access to a location. Without a defined road, maintenance crews could access a pump or water tank from any direction, potentially expanding the disturbance area over time. Additional roads may be constructed to route around existing slide areas or to relocate old roads away from watercourses to reduce impacts to water quality.

Whatever specific proposals are made for additions to the exiting road system, these changes will be analyzed and mitigated for as appropriate in the HCP.

Regarding your concerns about Sunol Valley Water Treatment Plant (SVWTP) operations, the SFPUC regrets the construction-related accidental spill of chlorinated water into Alameda Creek during a plant upgrade. The SFPUC now has mechanisms in place to avoid accidental spills of this nature. These will continue to be in place during HCP implementation. Rare, discharges from the SVWTP are covered by the HCP (See Section 2.5.3). Avoidance and minimization measures will be included in the HCP to minimize the risk that chlorinated water is not released during these discharges.

You suggest that the impacts of grazing on covered species are not fully discussed in the HCP and propose additional analysis of grazing impacts in many places in the document, as well as linking additional infrastructure to grazing, such as fencing and roads to off-stream water sources. The HCP impact analysis (Chapter 4) is under development, and these issues will be addressed in that chapter. As a matter of document organization, impacts are not quantified or discussed in detail in Chapters 1-3.

Section 2.7.4 of the HCP discusses grazing as a covered activity and SFPUC's commitment to a grazing management plan. Properly managed grazing is an important tool for maintaining habitat for species covered by the HCP. When managed properly grazing can be beneficial to many species (Ford and Huntsinger 2004, Bush 2006).

Regarding your concerns about grazing impacts on riparian areas, the SFPUC agrees that heavy grazing of riparian areas can have negative impacts. For this reason, substantial fencing has already been installed to restrict livestock access to riparian areas. Approximately 2 miles of riparian fencing has been installed at Indian Creek, 3 miles at San Antonio Reservoir, and 2 miles at Haypress Canyon. Two miles of riparian management fence have been repaired in the Arroyo Hondo Canyon. Alameda Creek fencing completed to date also includes 3,000 feet at Welch Creek Road. In addition, ongoing work to provide off-stream water sources for cattle is expected to further reduce grazing impacts on streams. As the conservation measures are developed, addressing adverse impacts to riparian areas will be a high priority.

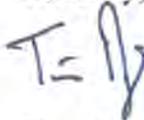
Impacts from grazing will be avoided and minimized through the use of Animal Unit Months (AUMs). The use of AUMs is to promote grazing management that is more beneficial for covered species. One of the key measures is already in place and involves ongoing monitoring of Residual Dry Matter (RDM) levels to ensure that they remain in an appropriate range.

Maintaining this level of RDM should minimize erosion and provide cover for wildlife. The SFPUC has completed and implemented a formal Rangeland Resource Monitoring Plan. Data collections to date includes RDM levels measured in the fall of 2007 and species composition analysis in the spring of 2009 at 92 permanent monitoring stations throughout the SFPUC Alameda watershed. These reports and data are available to the public on request.

Regarding your concerns about unnecessary additional fencing and roads, fencing and roads would be constructed in a gradual manner and would be consistent with the anticipated numbers of livestock on watershed lands. The miles of road and fence described in the plan are limits to what the HCP will permit. The SFPUC will not necessarily install this number of miles of roads or fences. Some new road miles would likely be replacements for roads relocated out of sensitive areas.

We appreciate your input and hope that we have responded to your concerns. We look forward to working with you and receiving additional comments when the public draft of the HCP is released later this year.

Sincerely,



Tim Ramirez, Manager
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cc:

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