EAST CONTRA COSTA COUNTY
HABITAT CONSERVANCY

DATE: April 4, 2013

TO: Governing Board

FROM: Conservancy Staff

SUBJECT: **Periodic Fee Audit**

RECOMMENDATION

a) DETERMINE development fee and wetland mitigation fee amounts ("fee amounts") to recommend to participating cities and the County, on the basis of the East Contra Costa County HCP/NCCP Mitigation Fee Audit And Nexus Study dated March 2013 ("2013 Fee Report"), consistent with requirements in the HCP/NCCP for periodic review of HCP/NCCP mitigation fees.

b) PROVIDE the 2013 Fee Report and the Board's recommendation on fee amounts to participating cities and the County so that they that they may consider adjusting their fees and making necessary findings.

c) DIRECT staff to apply the revised fee amounts in future agreements between the Conservancy and Participating Special Entities.

d) ACCEPT update from staff on issues raised at the October 2 public workshop.

DISCUSSION

1) Background

The Board has considered the matter of periodic fee audit and adjustment of the HCP/NCCP mitigation fees at a number of meetings over the prior two years. The Board originally approved a recommendation related to changes to HCP/NCCP mitigation fees on July 22, 2011, after first considering the item on March 21, 2011. On May 10, 2012, after Pittsburg City Council consideration of the Conservancy's 2011 fee recommendations generated concern and comment, the Conservancy Board considered detailed, critical comments on fee changes and a response from staff and the original economic team. On July 26, 2012, the Conservancy Board determined to commission a new Periodic Fee Audit and directed staff to solicit proposals. On August 20,

CONTINUED ON ATTACHMENT: Yes
ACTION OF BOARD ON: April 4, 2013 APPROVED AS RECOMMENDED:______________________
OTHER:____

VOTE OF BOARD MEMBERS
__UNANIMOUS
AYES:____________________________
NOES:____________________________
ABSENT:____ ______________________
ABSTAIN:__________________________

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

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

BY:____, DEPUTY

2012, the Board approved the selection of a team assembled by Willdan Financial Services to perform the Periodic Fee Audit, including the information necessary to support the nexus findings the participating cities and the County may make under the Mitigation Fee Act and a fee burden analysis. At the October 22, 2012 Board meeting, the Board received an update from Robert Spencer of Urban Economics, who is leading the Willdan team. The Willdan team completed the East Contra Costa County HCP/NCCP Mitigation Fee Audit (December 2012) and HCP Fee Burden Analysis (December 2012). Staff posted these materials on the Conservancy website and notified the Conservancy mailing list on December 22, 2012.

On January 23, 2013, the Board considered the fee item and received a presentation on it from Mr. Spencer. The Board received public comment on the matter and scheduled action on it for the next meeting (April 4). The Board also authorized staff to perform additional work in the interim, including:

- Further discussion with stakeholders and interested public agencies;
- Additional analysis on the policy implications of the conclusion in the Audit that the development fees under the Maximum Urban Development Area Scenario are significantly less than the fees calculated for the Initial scenario. There was a minor difference in fees for the two scenarios in the HCP. The HCP identified the higher of the two fees (the fee for the Initial Scenario) as the appropriate fee to use because that way adequate funding would be assured (a requirement for permit issuance) and because the reason for having two scenarios is that there is uncertainty that the Maximum scenario will be reached. This was a minor point before when the fee difference was small but is more significant now.
- Continued review of the issues raised at the October 2 workshop regarding ideas for Plan Amendment. The Fee Audit is a starting point for responding to these issues, but additional work remains.

2) Updated Report

Mr. Spencer has prepared an updated version of the fee audit report entitled, East Contra Costa County HCP/NCCP Mitigation Fee Audit and Nexus Study, Final Report, March 2013 (“March 2013 Report”), which is attached. The March 2013 Report includes an Executive Summary which provides a concise summary of the results of the analysis. Mr. Spencer will be present at the April 4 Board meeting to present the updated report and answer questions.

The changes made to the Report were minor. No changes were made to the recommended fee amounts or to any numbers used to calculate the recommended fees. Changes that were made include:

- Updating the amounts of the HCP/NCCP fees currently in effect for comparison purposes. The HCP/NCCP requires that the fees be adjustment according to prescribed indices on March 15 of every year. Development Fees are adjusted according to a formula that includes both a Home Price Index (HPI) and a Consumer Price Index (CPI). The Wetland Mitigation Fees are adjusted according to a CPI. For 2012, the change in the HPI was 4.26% and the change in the CPI was 2.22%. Consequently, on March 15, 2013 the Wetland Mitigation Fees increased by 2.22% and Development Fees increased by 3.21%. The latest fees were inserted in the Report in the various tables where

recommended fees are compared to current and prior fees, but the recommended fees were not changed.
- Changing the title of the report to include the words "Nexus Study" and made minor edits in background sections to improve accuracy.

3) Determining Fee Amounts:

The participating cities and the County have the responsibility and authority to adjust the fees in effect for their jurisdictions. The role of the Conservancy is to conduct the periodic fee audits, determine fees to be charged to Participating Special Entities[1] and refer the results of the audit to the participating cities and the County. Adjustments made pursuant to the March 2013 Report would serve as the Year 6 periodic fee audit under the HCP/NCCP.

3a) Wetland Mitigation Fee: The March 2013 Report provides recommendations on changes to the Wetland Mitigation Fees, as summarized in the Executive Summary in Table E.3. For the Wetland Mitigation Fees, the auditors recommended substantial increases in the non-stream wetland fees (6% to 65%) and substantial decreases in the stream fees (decreases of 38% to 39%), relative to current fee amounts. The recommended changes are similar to those approved in July, 2011, based on the earlier fee review, except the current review recommends more dramatic increases and decreases.

Table E.4 provides additional context. The stream fees have been a larger cost component for covered projects thus far than the other wetland fees combined. Using the history of covered projects as a baseline, the recommended decrease in the stream fees would more than offset the recommended increases in the other wetland fees, resulting in less Wetland Mitigation Fees overall. Based on staff's knowledge of projects in the pipeline as well as impact projections performed for the HCP/NCCP, the past trend is not an anomaly. Stream impacts and stream fees are expected to be a bigger driver of fee burden than the other wetland fees combined. Wetland mitigation fees as whole compose a small portion of the HCP/NCCP fees paid. The development fees compose a far larger share (about 80%, so far) and are discussed in the next section below.

Staff has reviewed the cost and Wetland Mitigation Fee calculation information in the March 2013 Report. In the view of staff, the recommended fee amounts accurately reflect the costs of implementing wetland and stream restoration. For the non-stream wetlands, the costs of restoration are substantially higher than originally estimated under the HCP/NCCP. The opposite is the case for streams. As stated in the March 2013 Report, the reason for these changes is that estimates developed for the Plan did not have the benefit of actual project cost experience in eastern Contra Costa County gained since year 1.

For these reasons and based on the March 2013 report, <u>staff recommends Wetland Mitigation Fee amounts set forth in the March 2013 Report (Table E.3) for referral to the cities and the County and for future Participating Special Entity Agreements</u>.

[1] Participating Special Entities are organizations with projects not subject to the land use authority of the cities or the County who opt into coverage under the HCP/NCCP through agreements with the Conservancy.

3b) Development Fees: The March 2013 Report provides recommendations on changes to the Development Fees, as summarized in Table E.2. In Table E.2, the Report presents the recommended fee for the Initial Urban Development Area Scenario. However, as was done for the original HCP/NCCP, the Report also analyzes the Maximum Urban Development Area Scenario, which differs from the Initial Scenario by assuming maximum development impact levels are reached and the largest preserve system is assembled. This Scenario has a higher total cost but also a larger total area of impact over which the fees are distributed. The HCP/NCCP identified the higher of the two fees (the fee for the Initial Scenario) as the appropriate fee to use because that way adequate funding would be assured (a requirement for permit issuance) and because the reason for having two scenarios is that there is uncertainty that the Maximum Scenario will be reached. The March 2013 Report notes this reasoning from the HCP/NCCP and focuses on displaying the results of Initial Scenario.

The difference in fee levels for the two scenarios was more minor at the time of the HCP/NCCP (less than 2%). The difference is more significant in the March 2013 Report (more than 8%). The primary reason for the change is that the type of land that must be acquired in larger amounts under the Maximum Scenario, relative to the Initial Scenario, is estimated to decrease in cost more than the other types of land that must be acquired in either scenario, according to the March 2013 Report. The fee amounts for both Scenarios are supported by the analysis in the March 2013 Report. The question is what development fee level is appropriate given broader public policy considerations and the constraints and requirements of the HCP/NCCP?

Staff prepared the following table to provide the Board with development fee adjustment options and assist with comparing and contrasting these options.

Development Fee Comparison: Three Options Compared to Current and Prior Fees

	Plan 2006	Initial Adopted 2007	Current 2013	Fee Adjustment Options 2013	Fee Adjustment Options 2013 Compared to:		
					Plan 2006	Adopted 2007	Current 2013
Option 1: Initial Urban Development Area Scenario from March 2013 Report							
Zone 1	$11,919	$12,457	$10,924	$10,526	-12%	-16%	-4%
Zone 2	$23,838	$24,914	$21,848	$21,052	-12%	-16%	-4%
Zone 3	$5,960	$6,229	$5,463	$5,263	-12%	-16%	-4%
Option 2: Maximum Urban Development Area Scenario from March 2013 Report							
Zone 1	$11,919	$12,457	$10,924	$9,626	-19%	-23%	-12%
Zone 2	$23,838	$24,914	$21,848	$19,252	-19%	-23%	-12%
Zone 3	$5,960	$6,229	$5,463	$4,813	-19%	-23%	-12%
Option 3: Average of Options 1 and 2							
Zone 1	$11,919	$12,457	$10,924	$10,076	-15%	-19%	-8%
Zone 2	$23,838	$24,914	$21,848	$20,152	-15%	-19%	-8%
Zone 3	$5,960	$6,229	$5,463	$5,038	-15%	-19%	-8%

The above table presents three sets of development fee adjustment options in the pink highlighted column and compares these options to current and prior fee levels. Option 1 is the Initial Urban Development Area Scenario from the March 2013 Report and is the highest of the three options. Option 2 is the Maximum Urban Development Area Scenario from the March 2013 Report and is the lowest of three options. Option 3 is the average of Options 1 and 2. All of these options would reduce the development fees from their current levels. Option 1 would be a 4% reduction in current fees, Option 2 would be a 12% reduction in current fees and Option 3 would be an 8% reduction in current fees.

None of these options considers the costs of post-permit funding: The March 2013 Report contains the following note in each table that presents development fees: "Fees exclude post-permit costs. Fees would be higher if these costs were included in the analysis." As was the case in the HCP/NCCP, the March 2013 Report does not consider Preserve System management and monitoring costs beyond the 30-year term of the HCP/NCCP in the development fee calculations. This was a major policy consideration during the development of the Plan. At the time of drafting the HCP/NCCP, there was more uncertainty on the costs of post-permit funding relative to other costs, in-part because it was not known at that time how much partners such as East Bay Regional Park District ("EBRPD") might be involved in assembling the Preserve System and how that would affect post-permit costs. Likewise, there was an interest in minimizing development fees. Consequently, costs beyond year 30 were not included in the development fee calculations and a section entitled "Funding for Post-Permit Management and Monitoring" was included in Chapter 9 of the Plan (beginning on page 9-40). The provisions of that section are summarized below.

In the HCP/NCCP, annual costs to operate and maintain the Preserve System in perpetuity are estimated to be slightly less than the annual cost for program administration, preserve management, and monitoring estimated during the final funding period of the Plan, or approximately $3.0 million or $3.3 million annually under the initial or Maximum Urban Development Area[2], respectively. Actual long-term costs may be lower if the Conservancy can develop streamlined procedures for management and monitoring during the permit term, secure partners, or if the Conservancy can reduce administrative costs. Responsibility for funding long-term management and monitoring rests solely with the local agencies that are Permittees under the Plan. The Conservancy is required to develop a detailed plan for the long-term funding of operation and maintenance and to secure all necessary commitments to implement this Plan before using 50% of all authorized take under the Maximum Urban Development Area (= 50% of 12,704 acres, or 6,352 acres) or at the end of year 15 of implementation, whichever occurs first.

The HCP/NCCP identifies a number of potential approaches, funding sources, and opportunities for funding post permit management and monitoring. Opportunities identified and analyzed in the Plan include the following:

- Securing partnerships with and commitments from existing organizations to assist with purchase and full operation and maintenance of HCP/NCCP preserves during and after

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[2] This is equivalent to approximately $125 per acre per year or $110 per acre per year in operational and capital costs for Preserve System operation under the initial or Maximum Urban Development Areas, respectively.

the permit term. Such partnerships could help address the issue by securing matching funds and by reducing costs through greater efficiency and economy of scale.

- Local tax or other funding measure for operations and maintenance of open space.
- Assessments on new development covered by the HCP/NCCP that can contribute to long-term operations and maintenance as a substitute for up to 1/3 of the development fee.
- Grant funding for long-term management.
- Reduction of the required frequency or intensity of monitoring or adaptive management actions after the permit term based on monitoring results during the permit term, and development of more streamlined monitoring and management procedures, thereby reducing post permit costs.
- Preserve System revenues, including lease revenues and use fees.

During the initial five-years of HCP/NCCP implementation, the Conservancy has managed to partner extensively EBRPD. All of the lands acquired to date for the Preserve System were acquired by EBRPD. The Conservancy and EBRPD are developing experience in cooperatively managing and monitoring the acquired properties. Substantial new information should be available within the next few years on costs and cost-share for post permit management and monitoring.

Each of the development fee options presented above would reduce these fees from current levels and from levels set forth in the original HCP/NCCP (the three options are between 12% and 19% below the fee levels established in the HCP/NCCP). The reduced fee levels are a result of cost-savings and estimated future cost-savings relative to the cost estimates in the HCP/NCCP. As discussed above, redirecting cost-savings toward post permit management and monitoring is one of the primary methods outlined in the HCP/NCCP for addressing post permit costs. An argument could be made for not reducing the development fees at this time and instead beginning to build an endowment for post permit funding needs. Reducing the fees now would increase the risk of a need for a significant fee increase later. However it should be noted that the automatic fee adjustments made each year on the basis of indices have already reduced the fees by more than 8% relative to levels in the HCP/NCCP. Also, economic conditions for many of the development activities covered by the Plan are significantly worse now than they were in 2006 and there is some rationale for a lower the fee burden at this time while still adhering to the funding assurances required by the HCP/NCCP and associated state and federal permits. While local agency participants in the HCP/NCCP must assure funding for implementing the HCP/NCCP, the Plan does provide some flexibility on how and when post permit costs are funded.

<u>On the basis of the considerations described above, staff is recommending that the Board select one of the reduced fee levels described below and determine to complete a post permit funding plan in advance of the next periodic fee audit (Year 10).</u> The arguments for the three options are presented below.

Arguments for Selecting Option 1 (4% decrease in development fees)

- Initial Urban Development Area Scenario was the Scenario selected in the HCP/NCCP because the fee was slightly higher (providing greater financial assurances) and because there was uncertainty that the amount of growth contemplated under the Maximum Scenario would occur.

- The pace of development has been slow. Less than 200 acres of permanent impacts have been covered under the Plan to date. The cumulative estimated impacts over 30 years for the Initial and Maximum scenarios are approximately 10,000 acres and 13,000 acres, respectively). Though development is highly cyclical, the amount of impacts to date does not provide a basis for concluding that there is now a greater likelihood for Maximum impacts occurring.
- Least risk of a significant shortfall in post permit funding.

Arguments for Selecting Option 2 (12% decrease in development fees)

- The pace of land acquisition has been good, significantly in excess of the pace required to assemble the Preserve System required for the Maximum Scenario during the permit term. Total acres acquired to date is more than 7,200 acres. The estimated total size of the required Preserve System by Year 30 for the Initial and Maximum Scenarios is 24,000 acres and 30,000 acres, respectively.
- Lands meeting some of the Maximum Scenario requirements have already been acquired.
- Local agencies have a variety of options for utilizing acreage acquired in excess of Initial Scenario requirements even if Initial Scenario impact limits are not exceeded during the term of the HCP/NCCP. Options include, seeking to extend the term of the HCP/NCCP and utilizing some of the acquired lands as mitigation for non-covered activities.
- Provides the greatest reduction in fees during times of challenging economic conditions.

Arguments for Selecting Option 3 (8% decrease in development fees)

- Balances the benefits and risks of Options 1 and 2.

Recommendation: <u>Each of the three options is supported by the March 2013 Report and would meet the requirements of the HCP/NCCP and associated state and federal permits. The Board should discuss the options and make a policy decision. Staff recommends Option 3. Whichever option is selected, staff recommends that the Board determine to complete a post permit funding plan in advance of the next periodic fee audit (Year 10).</u>

4**) Issues Raised at October 2 Workshop**

On October 2, 2012, the Conservancy held a public workshop to solicit input on possible modifications to the HCP/NCCP. This workshop was convened in response to a request from Discovery Builders. At the workshop, three representatives of Discovery Builders made presentations about their concerns with and suggestions to modify the Plan. Some of the concerns related to amount of fees and the methods for calculating them. Representatives from the California Department of Fish and Wildlife (CDFW; formerly California Department of Fish and Game) and the U.S. Fish and Wildlife Service (USFWS; collectively, the Wildlife Agencies) spoke in support of the plan and cautioned that many of the changes being proposed amount to major changes to fundamental underpinnings of the approved Plan. Speakers from conservation organizations also spoke in favor of the plan as written, indicating that if amendments were contemplated they would seek changes to tighten conservation requirements. The Board received a detailed report on the workshop at their October 22, 2012 meeting.

Since this workshop, Conservancy staff has met with Discovery Builders several times to better understand their concerns and to try to address them. A topic of these conversations has been whether utilizing the option in the HCP/NCCP of mitigating for impacts with land in lieu of fees could be productive means for addressing concerns. Following the most recent meeting, Discovery Builders sent the Conservancy a letter dated March 26, 2012 (attached) which summarizes its position on these matters.

The Board may wish to further consider the concerns raised and what actions could or should be taken to try to address them. To facilitate this consideration, below please find very brief and preliminary staff analysis of the five primary concerns raised by Discovery Builders, as categorized in the October 22, 2012, Conservancy Board meeting. The Board may wish to direct staff to provide additional analysis, recommendations or other work on this topic.

Categories of concerns raised and initial staff analysis:

1. Fees are too high and were not determined appropriately/correctly.

This comment was made before the latest periodic fee audit was conducted. The independent auditors who performed that audit were provided with a copy of all of the concerns that were raised at the workshop and on the earlier audit and were charged by the Conservancy with considering that information in their work. Discovery Builders has indicated that the latest audit does not provide necessary nexus information. The Board may wish to have additional information on the concerns and the auditor's thoughts on them. However, it is ultimately the responsibility of the participating cities and the County to consider and make any necessary nexus findings related to the fees.

2. Private applicants should be able to opt out of Plan compliance

The Plan currently requires all ground- or habitat-disturbing projects within the urban development area (a term defined in the HCP/NCCP) of participating jurisdictions to participate in the Plan, with some important exceptions. Projects that occur on already developed areas are not subject to the HCP because they are not removing land-cover types important to the covered species.

Discovery Builders expressed a desire to see the Plan amended to allow private applicants to opt out of the Plan. In this case, applicants would then seek endangered species take permits on their own with CDFW and USFWS. Such an amendment would be significant and would present challenges. CDFW and USFWS indicated during Plan development that compliance with the Plan needed to be mandatory because (in part), in order to issue the regional permits for the HCP/NCCP, they needed to be able to find that funding to implement the Plan was assured. Another reason these agencies urged development of the Plan and helped fund it was that they wanted the plan to reduce their permit-review obligations in the area. One of the challenges of implementing endangered species regulation project by project without the umbrella of an HCP is the challenge of resolving whether species are present or absent, with the wildlife agencies taking long-duration, landscape-level view of this topic and seeking mitigation for suitable habitat. By establishing a program that does not penalize species presence, delays and uncertainty are reduced and mitigation requirements are defined up-front and capped.

3. Application of Plan to ruderal/disturbed/infill sites is not justified.

Discovery Builder's expressed concerns that the Plan applies to sites with no endangered species present and therefore these sites should not pay HCP fees or be subject to the Plan. An amendment to exempt ruderal properties would be significant and would present challenges. When the Plan was designed, the local agencies determined that the costs of the Plan should be spread widely so as to minimize the development fees charged to applicants. This approach was justified because all undeveloped sites in the Plan area have some value for the covered species. For example, burrowing owls often colonize and occupy disturbed or ruderal sites. Disturbed, ruderal, and infill sites can provide foraging habitat for golden eagles, Swainson's hawk, and other raptors. Some disturbed or ruderal sites may be valuable for restoration if they are on wetland, alkali, or sandy soils. Disturbed or ruderal sites at the edges of urban development sites can provide important buffers between development and more natural land-cover types, allowing covered species to thrive in these areas. Because of the long duration of the Plan, the biological value of each land-cover type was characterized based on habitat value, not necessarily whether a site supported a covered species at any particular point in time.

Based on the land cover mapping in the HCP/NCCP, approximately 10% of the covered impacts are to ruderal land cover types. To implement the conservation strategy and maintain funding assurances, if ruderal land cover types were exempted, fees on other land cover types would have to be increased substantially to make up the difference.

4. Inefficiencies in seeking and receiving take coverage.

Discovery Builders expressed concerns that there were inefficiencies in seeking and receiving take coverage under the plan. An important premise of the plan is that it takes a regional avoidance strategy by focusing conservation and mitigation in high-quality areas outside the urban areas. This approach allows project applicants to de-emphasize on-site avoidance of biological resources, allowing them to develop a larger portion of their sites. The Plan also balances the needs of project applicants with those of the state and federal endangered species regulations, which require that the Permittees measure the amount of take that occurs as a result of the covered activities. In some cases, this take is measured by the amount of each land-cover type removed at each site. In other cases, some surveys are needed to measure the amount of take (e.g., removal of plant occurrences) or to determine the application of limited avoidance and minimization measures on site, which are also required by regulation. However, the Plan minimizes the amount of surveys needed and limits requirements to those essential to measuring take and applying the limited avoidance and minimization measures. Many species surveys and avoidance measures typical of project-by-project permitting are absent from the plan (e.g., California tiger salamander or California red-legged frog surveys) because of the regional avoidance strategy built into the plan.

Many public and private applicants that have used the Plan to date and have expressed appreciation for the clarity and consistency that the plan brings, as well as its ability to greatly streamline their endangered species permit process. However, the Conservancy should continually strive to make the process as streamlined as possible while still complying with the requirements of the Plan. Approval of the Regional General Permit for the HCP/NCCP by the U.S. Army Corps of Engineers in 2012 significantly expands the streamlining offered by the Plan as approved. The Conservancy should continue to strive to extend this coordination and streamlining to the State and Regional Water Board permitting programs. The Conservancy should also continue to work directly with Discovery Builders to try to address their specific concerns.

5. Other miscellaneous concerns

Other concerns expressed by Discovery Builders included a desire to allow private parties to seek amendments to the Plan and a desire for greater flexibility in administering the Plan to address unique circumstances (as well as other specific concerns detailed in the powerpoint presentations from October 2). The Conservancy should always be open to suggestions of ways in which the Plan can be improved and streamlined administratively. The Conservancy has also been, and should continue to be, open to hearing from stakeholders on their thoughts for necessary amendments to the Plan.

Attachments:

- East Contra Costa County HCP/NCCP Mitigation Fee Audit and Nexus Study, Final Report (March 2013)
- Memorandum- HCP Fee Burden Analysis (December 2012)
- Letter from Discovery Builders dated March 26, 2013