

SANTA CLARA VALLEY
HABITAT CONSERVATION PLAN/NATURAL COMMUNITY CONSERVATION PLAN
Stakeholder Group Meeting | August 24, 2010 | San Jose Almaden Branch Library

IN ATTENDANCE:

Kevin Bryant (California Native Plant Society)
Jack Bohan (General Public)
Joanna Callenbach (YCS Investments)
Craig Edgerton (Silicon Valley Land Conservancy)
Justin Fields (Santa Clara County Cattlemen's Association)
Meg Giberson (Guadalupe-Coyote Resource Conservation District)
Jan Hintermeister (Santa Clara County Parks and Recreation Commission)
Virginia Holtz (League of Women Voters)
Don Long (Castro Valley Ranch)
Dan Olstein (the Nature Conservancy)
Bob Power (Santa Clara Valley Audubon Society)
Jerry Smith (Science Advisor)
Brian Schmidt (Committee for Green Foothills)
Dave Johnston (Fish and Game)
Jennifer Williams (Santa Clara County Farm Bureau)

I. WELCOME AND INTRODUCTIONS

Joan Chaplick welcomed the group after a 2-month hiatus in stakeholder discussions. She provided an overview of the afternoon's agenda and asked the group to do self-introductions. Several stakeholders had indicated in advance they would be unable to attend including: Carolyn Tognetti, David Collier, and Jack Sutcliff

II. SCV HCP/NCCP PLAN UPDATE

A. Plan Update and Schedule

Ken Schreiber shared that there are many plan-related issues where through additional discussion with key participants are starting to achieve closure. Review and refinement of these issues will continue over the next several months. Ken used the content of the packet from the August 16th Liaison Group meeting as the basis for the meeting agenda.

Ken shared a copy of a PowerPoint from a recent Liaison Group meeting, with key bullets outlining the program review timeline. The review includes the draft NOA and the draft environmental review. The draft NOA is one page and serves as formal notice in the federal Register that the document is available for review. This happens once Fish and Game (FGD) and Fish and Wildlife (FWS) state that it is ready to move forward in the public review process. The timeline for this review has slipped for a number of reasons.

A screen-checked draft of the plan must be ready by late September (electronic only) in order to meet the November deadline for a public review draft. The purpose of the screen check is to come to an understanding with the Wildlife Agencies that the plan is at a good point in terms of document consistency.

www.scv-habitatplan.org

One of the key tasks at this stage is to set aside the additional issues identified to be addressed separately and later in the process. After this Friday, new comments and issues that come up will go into a “parking lot” which will be dealt with next fall. A number of new issues in the screen-check draft will require further review, but there will be selected items that local partner staff, consultants, and Agencies will have to agree can be addressed following release of the public draft.

Partner review of the draft can begin after the start of the year. Management Team is asking each partner to identify what their review process is, as these processes will surely be a bit different. The result of this will lead to a proposed final habitat plan. The target for releasing this final plan is June 2011. This begins a whole separate round of review and comment. The goal is to bring that review process to a close by September 2011, with the end result being a final plan ready for adoption.

According to this schedule, biological findings and incidental take permits will be ready by the end of 2011 and the Implementing Entity (IE) will be up and running by 2012.

When asked for feedback, one of the first comments partners shared was a desire to bring this process to a close. Liaison Group members expressed the same desire. This was reflected in Supervisor Gage’s recent action to begin to request votes on certain plan-related issues during the Liaison Group meetings. Supervisor Gage’s term as a County Supervisor ends this December and he is running for the Water District Board.

B. Recent Issues Discussed by Liaison Group Members

Review of Alternatives

Ken then reviewed Item 3 on the August 19 Liaison Group agenda: review of alternatives and provided background on the topic. At a Management Team and attorney’s meeting involving various local partners, participants began asking questions related to the purpose of the plan. Participants delved a bit deeper into different plan elements and discussed the possibility of doing a Habitat Conservation Plan (HCP) and not a Natural Communities Conservation Plan (NCCP) (in other words, a plan that addresses mitigation only, and not enhancement).

The decision was made to move forward with the Plan as is, and that taking an “HCP only” approach would actually be more costly from a mitigation perspective. The group estimated a four-year process to do an HCP only, with perhaps a \$1.0 - \$1.5 million budget. It simply is not possible to edit the current plan to create an “HCP only” document. In addition, in taking this approach, the HCP would surely lose much of its existing support from the Wildlife Agencies. An HCP only would have a 25-30 year permit term, as opposed to the 50-year permit term it has currently. The plan would also lose coverage of various species, “no surprises” assurances, and topics of importance.

This discussion and process was beneficial in that there is now a common set of information to share with elected decision-making bodies that provides some notable analysis on this topic.

Craige Edgerton asked how we might increase mitigation fees if the approach to the plan changed. Ken explained that there is a current synergy between the HCP and NCCP. FWS approaches this as a unified plan, so they are not addressing detailed mitigation ratios (with the exception of wetland impacts). To do an “HCP only”, the plan term and number of covered activities would be cut. However, the size of the Reserve System would not be cut by the same percentage. Rather, cuts would be less, resulting in more mitigation per impact. Because of the shorter time-frame for plan implementation, we would need millions more in the time needed. There would be the need to charge more money in order to meet mitigation goals in the shorter time frame.

Dave Johnston added that DFG would not provide money if the Plan was only an HCP. The Agency has claimed Section 6 funding and it would lose much of the unclaimed money that is allotted for projects that have yet to be done if this change were made.

The plan has mitigation funding and it has conservation funding. The difference is not as clean because the conservation funding for land does not include money to manage the land. This essentially means the need to use some of the mitigation funds to pay for land management required for land conservation. This throws into question the relationship between the HCP and NCCP elements.

From a budget standpoint (i.e. tracking the dollars), the mitigation share of the dollars covers the mitigation impacts. About 60 percent of the plan is mitigation, and approximately 40 percent is conservation (land acquisition funding). However, this does not work so cleanly when you break this down by acreage.

There have been a number of conversations with the County Parks office about the intended use of the County park funds, and they are comfortable with the way the Plan is structured. However, this can be confusing.

Park funds and County grants cannot be used for mitigation. They can only be used to purchase land. Ongoing management and monitoring can be a very expensive part of the program. Developers will get credit for putting money towards the plan, which will be used for management of conservation land. The total given by the developer will cover the total cost of mitigation needed as a result of the development impact.

Brian Schmidt shared that he has encountered some opposition and that concerns are being voiced about the use of mitigation funds to manage conservation lands.

Brian noted that the standard set by the habitat plan is a higher level of management than is often the case. He asked if local partners are putting money towards enhancement of conservation lands.

Ken explained that the bulk of this money comes from:

- Development fees
- State grants
- Federal grants
- Park charter fund
- Open Space Authority (OSA)

State and federal grants have restrictions disallowing use of funds for conservation. Development fees are the primary source for management of lands.

Dave Johnston asked Brian for more detail related to the concern he says has been voiced among the environmental community. Brian stated that there is some suspicion that government monies are going to somehow make up for mitigation of private development impacts. Developers would get credit for mitigation funded by the public.

Craige commented that Park charter funds were designed for a specific purpose: to build parks, not to mitigate development impacts. He agreed that the use of this money for mitigation seems wrong for a number of reasons. In terms of state and federal grants and specific mitigation funds, The OSA may be coming up against this same issue.

Dave expressed that this is really a perception issue because there is no evidence that this is actually occurring. To prove or disprove this, it would be necessary to calculate which conservation strategy is actually mitigation. This is a circular exercise in a way. Under this plan, mitigation is what is paid for by the mitigation fees. The plan is designed to work this way (not based on ratios). One way the plan addresses this is that the amount of impact is assumed to be fairly substantial. In a lot of ways, the plan actually overestimates in order to get away from the specific issue Brian is addressing. At the end of the day, doing this will never result in 60,000 acres. However, the economy of scale for unified management of the whole Reserve System is priceless.

Virginia Holtz spoke further to the issue of public perception. In the mind of the public, when you say “developers” that means private development. In reality, this plan is addressing public development needs. The public does not realize that they will benefit from these developments. She does not think that this message has gotten out as well as it should have.

Jan Hintermeister agreed that much of the impacts will be from public development. However, looking at fees, the mitigation funds are coming from Parks when parks are not creating these impacts. He stated that he has never seen a chart or set of tables that have helped him understand clearly what the mitigation impacts are for the HCP, compared to the NCCP (costs compared to funding sources).

Ken referred to a June 17 Liaison group PowerPoint meeting (agenda item #3). Management Team asked ICF to break down the total budget (NCP v. NCCP).

Joanna Callenbach referred to item # 3 on page 5 of the Liaison packet. About \$78 million is dedicated to wetland mitigation. This is the one mitigation component in that is clearly linked in the plan to mitigating impacts, getting fees and doing the work. There is also incidental acquisition of a considerable length of streams as part of purchasing the Reserve System that is separate from wetland mitigation fees.

Ken noted that it is in the plan’s best interest to create some basic presentation or summary demonstrating where plan funding comes from, where it works and how it is used. Ken suggested meeting with ICF in September following release of the screen-check draft and attempting a good explanation of this to test during a future stakeholder meeting.

Brian suggested that the Team look at the beginning, on-the-ground conditions and the final, anticipated conditions.

Ken explained that, right now, relatively few public developments become ensnared in species mitigation. This process has created a database which shows that far more land is important to species that we realized before. For projects in the past, if you didn’t have the actual species on the site, you seldom got caught into the Endangered Species Act (ESA) process. At this point, even if there are no species on site there is a greater assumption that the land does have habitat value.

Dave stated that this is not so much a question of whether you see the species. Rather, if a project proponent sees the species on site, they are more likely to tell the Wildlife Agencies about the project. For the Agencies to address the project they 1) need to know about the project; and 2) need to have time to spend on it. This eliminates 95 percent of projects. The standard approach has been to assume that if you are in an area of value then you have the species on site.

Dave continued: project proponents have calculated that this plan may cost them more, but getting rid of the “hassle factor” is worth it. It’s becoming more and more difficult for big, visible projects to find land of value to mitigate.

Jennifer Williams, a representative from the Santa Clara County Farm Bureau, asked if developers have the option to opt out of the project. Ken and Dave described the opt-out process: the project proponent would need to clearly demonstrate that they have an endangered species permit in hand, or they need a letter from DFG and FWS stating that the project is not subject to the Plan. They stated that they cannot imagine a situation in which this will happen, given the fact that the agencies are operating based on information in the database which shows value for at least one -- if not multiple -- species for each type of land. As an example, the fact that species “may show up” is a standard that has been recently applied to a Water District project on Calabasas Creek, and one that the District was not able to move away from.

Don Long commented that the ESA is site-specific, and asked how one reconciles this plan’s approach to that idea. Ken explained that the site-specific approach is a matter of assessing the value of that property for listed and other species. What we have found in this study area is that land does have value for the species and thus would require a permit. This is a site-specific determination.

Don stated that he can see where this plan could be very helpful. However, he said that when it comes to wetlands he is not so sure. Ken spoke briefly of the benefits of the plan as it relates to wetland impacts. If you have a wetland you need a permit from at least the regional water quality control board, and, if under the jurisdiction of the Army Corps of Engineers, you need a permit from them as well. The habitat plan does not grant those permits. The value of the plan is that the Wildlife Agencies are tied to determining their biological opinion via the plan, and if you need a permit they refer to the FWS for its biological opinion. This means that if you comply with the Plan then there is great benefit.

Dave added that the real advantage is that there will be more mitigation opportunities via the Plan. If you have to find your own wetland for mitigation you will have great trouble. However, if you have a centralized reserve system it will have wetlands somewhere and you simply have to pay a fee and you’re done. To the extent that the regional water quality control board buys into the concept will have to do with the Board’s idea of how important the reserve wetland is compared to the wetland being impacted. They will want to see the correlation.

Don asked if the County will be involved in peer review in terms of biological surveying of land. Who conducts the initial survey of the property in question? Does the Plan cover this? Ken explained that the key will be to establish the general existing condition of the area being impacted, and that may be a biologist or it may not. Because this analysis will be based on land cover, it may be able to be done by the architect or the landscape architect working with County staff, folded into site plan and CEQA review.

This will not be the case with wetlands. The San Francisco Corps of Engineers has historically expressed a disinterest in Habitat Conservation Plans. Recently, there has been a change in approach and an increased interest and willingness, perhaps due to direction from Washington. Currently, the East Contra Costa County HCP Team is trying to create a general permit the Corps will use to cover permitting needs in the area covered by the plan.

Dave added that the plan determination of habitat value is based on habitat type. Someone has to verify habitat type on the affected property. While it is true that the evaluation is done at a much looser level, in Dave’s estimation it does need to be done by a biologist. What is missing will be the endless “back and forth” related to surveys, what they mean, and so forth. In short, the Plan provides time and dollar certainty.

Don suggested creating some charts and some procedural direction for people who will need to go through the process.

New Plan Fees

Discussion then transitioned to the issue of plan fees. Ken explained that three types of fees came out of Management Team discussions that have not been part of discussion before.

- 1) *Plan preparation fee.* Recapturing local partners' plan preparation costs. The costs are spread out over 50 years and repaid to jurisdictions.
- 2) *Endowment.* This is a far bigger issue than the first. Right now for a specific site permit, the developer has to provide an endowment for the perpetual protection of the land. In the same way, the Plan has to have enough money set aside at the end of the 50-year permit term to manage the land. Initially, the Plan "ducked" the issue of endowment. The Liaison Group has now endorsed a fee that will go into a segregated endowment account sufficient to generate revenue to manage the entire Reserve System.
- 3) *Serpentine land.* This land type is more expensive to include in the plan because it tends to be worth more and because management is more expensive. We've recommended a serpentine surcharge. If these lands are developed there is a rather significant surcharge proposed.

Ken shared some fee zone charts showing that ballpark fee figures remain where they were before. There is one fee outstanding that needs to be determined, and that is related to the Western burrowing owl. In September, the Team will have established a fee related to impacts to rearing and nesting sites.

Joanna asked Ken to discuss how the serpentine fees were derived. Ken explained that the team looked at the total cost of serpentine. The IE is buying 6,000 acres for inclusion in the Reserve System. In addition, there are impacts to roughly 750 acres that we are allowed under the plan. We looked at these numbers and made certain assumptions based on impact and mitigation ratios.

Craige noted the increases in housing costs that will take place in the next fifty years, and asked how these increases will be accounted for in the plan fee system. Ken explained that there will be a major review of all fees by outside economists at least every five years. The fees will be reviewed every other year, and fees will be adjusted based on land values. Fees could go up or down as a result.

Open Space Authority as Plan Permittee

Virginia Holtz then spoke to the concern and question shared among Open Space Authority attorney, general manager, herself and Sequoia Hall about whether or not the OSA should be a plan permittee. The General Manager's final analysis is that the OSA does not need to be a permittee because it will be a rare occasion when it needs a permit.

The other issue for the OSA is the in-perpetuity clause for conservation easements. The organization's practice has been to hold easements for 25 to 30 years and then to review to determine if the land owner and the Authority wish to continue this arrangement. The plan says that once an entity takes on the management, they hold this in perpetuity. For the Authority, this is a matter of liability that could pose a major risk.

This recommendation was presented to the OSA Board during the last Board meeting. The Board has decided to defer its decision on this recommendation until a meeting with Management Team, the Agencies and relevant liaison group members.

Virginia continued, explaining the concern in greater detail. The Authority was identified as using some of its lands for mitigation that it would be purchasing in the future. It was the Authority's understanding that it would be receiving those lands already purchased through the IE and that, because of its expertise, it would

www.scv-habitatplan.org

be managing those lands. All along, the Open Space Board stated clearly that no acreage of open space land that it holds now will be used as part of the Reserve System. Virginia explained that OSA has a responsibility to its constituents to provide recreation, encourage agriculture and provide habitat. The Authority felt this agreement with the IE would create an imbalance in the amount of resources we had towards habitat.

Put simply, there are two issues at hand. First, OSA cannot count its existing lands as part of the Reserve System. Second, it would be a burden to use its purchasing power to match with funds for mitigation. The Authority operates on roughly \$4 million a year. Of that, over \$2 million is used for management of its existing lands, \$500,000 goes to jurisdictions, and approximately \$1.5 million goes to the purchase of land and to work on new projects such as building new trails.

Don then asked Ken who will manage the Reserve System land. Ken confirmed that this will be the responsibility of the IE. The operating assumption is that the IE will use existing local resources to the extent it is efficient to do so. County Parks and OSA are examples of existing local resources.

In response to a question of how mitigation banks might relate to the plan and the Reserve, Ken explained that, currently, there are no approved mitigation banks in the County. Gaining approval to create a bank is a long and difficult process. There is no obstacle to having a bank in the County, but to be able to sell credit in relation to the Plan would require stringent thought and process.

Dave affirmed that it is very unclear as to how the plan and a mitigation bank would operate concurrently. In one way, it may not be economically viable. In order to sell credits, it would have to be economically viable for a bank to do so. It is unlikely that a bank would be able to achieve the economy of scale that the plan would have. It is possible that a bank could sell credits for mitigation of a rare type of habitat.

Brian stated that as an environmental representative, he feels indifferent about whether or not the OSA lands are part of the Reserve System.

Conversation about the value of OSA inclusion in the plan continued. The habitat plan can leverage the remaining land purchase funds with grants, making it possible to double or triple its impact. Second, the Plan is responsible for managing all land in the RS. This includes OSA land. As an example, if Don Ranch were part of the Reserve System, the IE would pay the management costs, which would relieve the authority and free up money for other activities. These management costs include activities consistent with the Reserve System management approach, such as fencing where necessary, etc.

Western Burrowing Owl

Ken described a Western burrowing owl map showing the three areas where owl habitat has been found within the last year or two (nesting habitat and not overwintering habitat). The key is to design a conservation strategy for a species that is declining substantially and that, if left to its own devices, will likely disappear.

Ken shared that public sector land is being considered for the burrowing owl expanded study area and conservation strategy (private sites are too expensive to purchase). This would establish a mechanism to bring agencies together on a very regular basis, so that when projects come forward there would be an expectation and effort to mitigate in the expanded area and stabilize and grow the population in this area over time. Dave Johnston has been working extensively with ICF staff and the owl strategy is not yet final. However, a strategy should be ready for the screen-check draft and to include in the final draft.

Justin Fields asked, what is required for management of the species? Dave replied that lots of ground squirrels and keeping the grass low (mowing or grazing) are required. They tend not to like slopes for breeding.

Burrowing owls here have their own minds, implying that they are an isolated species because they do have unique behavior that you don't see elsewhere.

Once nested in a geographically isolated area, it is very difficult to move burrowing owls. They lay a lot of eggs – up to 11 – but have a very high mortality rate. Sheer lack of individuals may be the reason for why there are not owls on sites in the area that are considered ideal for the species.

Dog and cat predation are not a significant factor, unless perhaps the populations begin to expand. Jan noted that where owls historically existed near Bay lands seemed very productive. This is anecdotal. Dave added that the strategy would not work without the expansion of the area. For the first two tiers, we need to stabilize the existing core populations. Then it will be necessary to expand them within the 7.5 mile flight distance. The only land that exists within 7.5 miles is very expensive private land or the lands in the group.

III. PUBLIC COMMENT AND NEXT STEPS

Joan agreed to work with Ken to deliver the entire August 19 Liaison group packet – including missing slides – to the stakeholder group.

The screen check version of the plan will be available electronically to stakeholders for review. (Note: this was discussed, but upon further review, it will not happen due to timing and an extremely limited ability to respond to comments provided by additional reviewers.)

The next meeting will take place on Tuesday, September 28th from 4:00pm to 6:30pm at the Biblioteca Latinoamericana Branch Library located at 921 South First Street, San Jose, CA.