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Via E-mail

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Board of Directors
c/o Michael Houlemard
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Re: **Draft Fort Ord Habitat Conservation Plan (HCP) and Draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR)**

Dear Messrs. Henry and Houlemard and Members of the FORA Board:

We offer the following comments on the Fort Ord Multispecies Habitat Conservation Plan ("HCP" or "proposed HCP") and the Draft Environmental Impact Statement/Environmental Impact Report ("EIS/EIR").

Summary of key issues

FORA has not demonstrated that the proposed HCP is needed for ESA/CESA compliance, or that it is the best alternative, or even a viable alternative. FORA has not shown that the proposed HCP is financially feasible or that there is, or can be, a committed, enforceable, and adequate funding plan. The wildlife agencies cannot approve the HCP without this funding assurance. The 12 agencies expected to assume liability for the HCP should insist on an adequate legal and financial analysis of both the proposed HCP *and* of the no-action alternative.

The HCP proposed by FORA in the final hours of its 25-year existence would require formation of a new regional governance structure through a Joint Powers Agreement ("JPA") that would bind five Fort Ord land use jurisdictions and seven other agencies for 50+ years as the Permittees obligated to fund and fulfill habitat management activities for two Incidental Take Permits ("ITPs"). [1] Under this proposal, these 12 agencies and their JPA, and not the project developers, would be primarily liable as the ITP Permittees under the Federal and California Endangered Species Acts for all future Fort Ord development (the "covered activities").

The HCP and EIR/EIS do not provide the 12 agencies with the information they need to make such a commitment. Critically, the documents do not compare the liability and cost of the

[1] The agencies bound by the JPA would be the County, Marina, Seaside, Del Rey Oaks, Monterey, State Parks, UC, CSUMB, MPC, MPRPD, MCWD, and BLM.

proposed HCP to the no-action alternative. In the no-action alternative, the future developers, not the local agencies, would be liable for ESA/CESA compliance, would obtain their own project-specific ITPs, and would be directly responsible for the cost of compliance. Fort Ord development has proceeded for the past 23 years with such project-specific ITPs.

The proposed HCP is at bottom a vehicle to enable development that destroys habitat by imposing the direct cost and risk of ESA compliance on the agencies instead of the developer. The proposed HCP would also discourage redevelopment of previously developed land by taxing redevelopment to subsidize mitigation costs for habitat destruction on natural lands.

The EIR/EIS acknowledges that 4,241 acres, or 46% of the 9,292 acres of land designated for development in Fort Ord has been previously developed and can be redeveloped without an ITP because there are no covered species or habitat at risk. Twenty-five years after FORA's formation, vast areas of the former Fort Ord remains blighted with vacant buildings, empty asphalt parking lots, and disturbed lands. Before the land use agencies assume the cost to mitigate the destruction of the adjacent 5,051 acres of natural, vegetated lands designated as developable, they should determine whether they really need to permit development of these natural lands, and, if so, whether the land use agencies or the developers should assume the cost and risk of mitigation.

FORA has not answered basic questions about the no-action alternative. If the proposed HCP is not adopted, what is the continuing obligation to maintain the Habitat Management Areas ("HMAs") designated in the 1997 Habitat Management Plan ("HMP")? If there is an ongoing HMP obligation, who bears it and what is the cost? Can the HMP obligation be reduced by partnering with developers who need habitat mitigation land? By conveying the HMP HMA land to a resource agency? By negotiating revisions of the HMP? By simply making new findings under CEQA as to the availability of substitute mitigation for the HMP (e.g., project-specific ITPs) and/or new findings as to the infeasibility of a basewide HMP as mitigation?

Instead of answering these questions, the EIS/EIR stacks the deck in favor of the proposed HCP. The EIS/EIR assumes without any analysis that, unless the agencies adopt the proposed HCP, the agencies that hold the HMP's HMA lands would be obligated to manage those lands forever, *without any credit for ITP mitigation or funding from development activity*. The EIR/EIS assumes that unless the proposed HCP is adopted, only 25% of the 5,051 acres of the vegetated, natural land designated for development would be developable, because, the EIS/EIR assumes, without the availability of the HMP HMA areas for ITP mitigation, the developers would have to set aside the remaining 75% of the vegetated, natural land as ITP mitigation, even though these lands have been designated for development in the Base Reuse Plan. These assumptions cannot be consistent with the goal of the HMP, because the HMP's HMA areas have always been intended to support ITP mitigation for the developable areas of Fort Ord. Either the EIS/EIR is double counting the benefits of the HMP HMA land in its analysis of the proposed HCP, or it is ignoring those benefits in its analysis of the no-action alternative.

The HCP states that its program would require annual spending of $2.6 million for the next 50 years, of which $2.2 million is assumed to come from a $38 million endowment fund. That endowment fund is assumed to be accumulated *in the next eight years* by taxes or fees generated by payments of the FORA Community Facilities District ("CFD") tax or an unspecified "replacement funding mechanism" to be adopted by the five land use jurisdictions. Rapid accumulation of the endowment is critical to the financial viability of the HCP, because the funding analysis assumes that a long period of 4.5% annual investment returns on the accumulated endowment fund will pay for the ongoing HCP costs. To make this happen, *the HCP's financial analysis assumes the complete buildout of Fort Ord by 2030 – a buildout at the rate of 443 houses per year, 6.9 times faster than the historic rate of buildout of 64 units per year*.

FORA's estimates of the needed endowment continue to grow. A separate financial analysis prepared by the HCP consultant EPS in November, 2019 demonstrates that if buildout proceeds at a mere 4.3 times the historic rate, the endowment would have to be $43 million, not the $37 million assumed in the HCP, which would require higher fees and taxes, or recourse to the agencies' general funds. Contradicting both the HCP and the November, 2019 EPS memo, a December 13, 2019 FORA staff report admits that the "Endowments *were originally projected to be $9 million but are now expected to cost $48 to $66 million*."[2] In short, the actual funding obligation is unknown. The only certainty appears to be that FORA consistently underestimates the cost.

Critically, there is no analysis of the required endowment if development proceeds at a pace consistent with historical development activity, although such a pace would require a substantially larger endowment and correspondingly higher fees or taxes. The financial analyses also ignore the need to fund startup, capital, and restoration costs in the early years, which would further retard the endowment accumulation and require higher fees of taxes. There is also no acknowledgement of the risk of assuming 4.5% annual returns from inception of the endowment fund when money market funds today barely return 2%.

Funding the HCP is critical for two reasons. First, the agencies have to reach agreement on the cost-apportionment method and the financing mechanisms to replace the FORA CFD, which will not be collectible after 2020. Incredibly, the proposed JPA Agreement would simply defer the determination of cost apportionment and financing mechanisms until *after* the 12 agencies bind themselves to 50 years of liability for the HCP costs. Postponement of a cost-apportionment agreement would be fiscally imprudent. For example, even the incomplete EPS analysis provided in November demonstrates that the cost to some agencies could be 2.5 times higher depending on the apportionment method selected.

Second, HCP funding is critical because the ESA and CESA require that the applicants demonstrate that funding is assured. CEQA and NEPA do not permit reliance on mitigation to be funded by impact fees unless the funding is committed and enforceable. Good intentions

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[2] FORA staff report, Habitat Conservation Plan Update, Dec. 13, 2019, emphasis added, available at https://fora.org/Board/2019/Packet/121319BrdPacket.pdf.

without an adopted, enforceable impact fee program are insufficient. Thus, neither FORA nor USFWS, as lead agencies under CEQA and NEPA, could make the requisite findings that mitigation is sufficient, because there is no a committed, enforceable funding mechanism.

The HCP and the EIS/EIR do not disclose the unresolved difficulties of implementing a committed, enforceable funding mechanism. More than half of the future development of Fort Ord expected to fund the HCP is represented by six previously entitled development projects. Because these projects' entitlements are vested, these projects are subject only to the exactions in place when they were approved; they cannot legally be subjected to newly enacted fees or taxes once the FORA CFD becomes uncollectible in 2020. *Thus, there is no apparent legal means to collect funds for over half of the HCP cost.*

Even if this funding problem is resolved, there are others. If the agencies elect to use impact fees as a "replacement funding mechanism," they will need to support them with an analysis to show that those fees have nexus and proportionality. Nexus and proportionality would require that the HCP costs be apportioned to the projects that actually cause the incidental take that triggers the need for the HCP. But it is not clear that the HCP program would be viable without the subsidies from other development. Of course, this problem would not occur in the no-action alternative, because development project that cause incidental take would have to pay for the required mitigation, without depending on subsidies from other projects or the land use agencies.

Nor is it clear that the proposed funding would be viable if it relied on incremental assessment of development fees or taxes as building permits are pulled. The HCP's "stay-ahead" provision requires that the actively managed percentage of the total planned conservation acreage stay 5 or 20 percentage points ahead of the percentage of total baseline incidental take acreage. The HCP provides no analysis of the feasibility of meeting this stay-ahead provision; but there are several reasons why, and scenarios in which, it would not be feasible. For example, unless fees or taxes are directly related to a project's incidental take, there can be no assurance that the project would generate sufficient mitigation funding; but none of the proposed cost apportionment approaches do in fact relate fees or taxes to incidental take. Furthermore, the proposed endowment funding assumes that HCP costs would be incurred on a level basis from year to year, but that is not accurate. The lumpy startup, capital, and restoration costs essential to the stay-ahead goal would be incurred before sufficient funding were available.

Finally, the HCP does not provide an honest discussion of funding assurances in the event that Fort Ord is not built out by 2030. Even though the HCP assures the land use agencies that there would be no recourse to general funds, the HCP later proposes that the agencies that happen to own the habitat lands should incur the management cost for that land in the event of funding shortfalls. This arbitrary and inconsistent assignment of risk should not be palatable to those agencies. Nor are the proposals realistic that call for relying on volunteers or "prison crews" to manage HCP lands in the event of funding shortfalls. Like the financial assumptions, these operational proposals reveal magical thinking.

Our detailed comments follow.

A. The USFWS and FORA cannot certify the EIS/EIR and the USFWS and CDFG cannot issue ITPs without a committed, enforceable funding plan.

1. Federal and state regulations require that HCP funding be assured, which requires a decision about, and a commitment to, cost-apportionment and funding mechanisms.

The ESA requires that Permittees submit a conservation plan that specifies "the funding that *will* be available to implement" the plan. (16 USC, § 10(a)(2)(A) [emphasis added]; see also 17 CFR §§ 17.22(a)(2)(vi), (b)(2)(C), 17.32(a)(2)(vi), (b)(2)(C).) The ESA requires that the "the applicant *will* ensure that adequate funding for the plan will be provided." (16 USC, § 10(a)(2)(B) [emphasis added].) The USFWS explains:

> There must be funding for the implementation to be successful, *so the applicant must demonstrate how funding will be assured* before we can issue an incidental take permit. The applicant must develop a funding plan early in the planning process that will adequately cover all aspects (financial needs) of HCP implementation and *provide proof of the secured funding sources* before the plan is approved.

(USFWS, Habitat Conservation Plan Handbook, Dec. 6, 2018, p. 11-1, emphasis added.)

State regulations also require that CESA compliance funding be described and assured. (14 CCR §§ 783.2(a)(10), 783.4(a)(4).)

Here, the USFWS has previously warned FORA that an adequate HCP must actually set out the substance of the local ordinances that would be used to implement the HCP:

> Ordinances that will be used to implement the HCP's requirements should be enacted before permit issuance to allow public comment on them during the permitting process. If this is not feasible, then the essential required elements of the ordinances should be described in the HCP and take of listed species under the permit should be deferred until the ordinances are in place.

(USFWS, letter to Houlemard, July 29, 2016.)

As a practical matter, the choice of funding mechanism is critical because it is inextricably linked to the apportionment of costs among the Permittees.

Choice of funding mechanism will also be constrained by the HCP's stay ahead provision (HCP, section 7.6), a provision that can only be met if funding is *timely*. As discussed below, timely funding requires that there be a close relation between the development activity that causes incidental take and the funding.

2. CEQA requires that there be a committed, enforceable funding mechanism for the HCP.

The HCP proposes that the FORA "CFD [Mello-Roos Act Community Facilities District] Special Tax and/or a replacement funding mechanism" be levied on future development to provide funding assurances; and it states that this "will be sufficient to create the endowments given the expected pace of development (i.e., as development occurs the CFD Tax payments are collected.)." (HCP, section 9.3, p. 9-19.) The HCP provides that, other than the State Parks Department and Monterey Peninsula Regional Parks Department "no Permittee may be compelled to obligate its General Fund to satisfy its financial obligations under the HCP." (HCP, p. 9-15.) Thus, the HCP relies on the CFD Tax or some replacement funding mechanism that does not obligate the Permittees general funds. The EIS/EIR concludes that impacts to protected species and their habitat will be less than significant because the HCP will avoid and mitigate the impact. (EIR/EIS, section 4.4.)

When a mitigation system relies on payment of impact fees, the record must demonstrate that the necessary mitigation will actually be provided. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 728.) "A commitment to pay fees without any evidence that mitigation will actually occur is inadequate." (*Save Our Peninsula Comm. v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 140.) Impact fee mitigation is acceptable only if fees will demonstrably be used to implement a "reasonable, enforceable plan or program that the relevant agency commits itself to implementing." (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188.) In *Anderson First*, conditions required a project to pay 16.87% of the cost of Phase I improvements to an interchange and "to participate in the program" to provide Phase II improvements to that interchange. (*Id.* at 1188.) Even though the agency stated that "it is preparing an update to the Traffic Impact Fee Program to include the I-5 interchange" and "condition 16 requires payment of the impact fee," the court found that this provision was too vague and speculative to constitute a "reasonable, enforceable plan or program." (*Id.* at 1189.) The court rejected the agency's argument that it planned to update its fee program in the future to include the needed improvements. (*Id.* at 1188-1189.) The Court emphasized that actual construction of the improvements must be "fully enforceable," i.e., part of a fee program that has actually been adopted. (*Id.*)

In *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, the court rejected a mitigation scheme as legally inadequate because neither the agency nor Caltrans had adopted a specific plan for necessary improvements – even though the agency had announced an intent to complete some form of improvements and had a clear methodology for collecting impact fees. (*Gray, supra*, 167 Cal.App.4th at 1122.) The mitigation was deficient because the EIR did not discuss how or when the fees would be collected and spent or whether the agency could ensure funding for necessary improvements.

Regardless of the reasonableness of a developer's contribution, payment into a fee program is insufficient mitigation where the agency will not have sufficient funds to construct the improvements the program is intended to implement. (*Napa Citizens for Honest Government*

v. Napa County Board of Supervisors (2001) 91 Cal.App.4th 342, 364; *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 785.)

The failure to identify the relevant improvements and impact fee programs violates CEQA: cumulative impacts are not mitigated by "paying an unspecified amount of money at an unspecified time in compliance with an as yet unenforced or unspecified transit funding mechanism." (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79.) Case law specifically rejects the notion that "any fee program is necessarily or presumptively 'full' mitigation." (*California Native Plant Society v. County of Eldorado* (2009) 170 Cal.App.4th 1026, 1055.) Good intentions and "recommendations" for improvements do not count: impact fee mitigation must be part of a committed, funded program when the project is approved. (*Anderson First, supra*, 130 Cal.App.4th 1188; *Gray, supra*, 167 Cal.App.4th at 1121-1122.)

Mitigation fees paid must actually constitute a fair share of all needed projects; if the impact fee program does not actually include a fair share of all of the necessary facilities to mitigate cumulative impacts, even the fact that the agency may plan to increase the impact fee to cover them is not sufficient. (*Anderson First, supra*,130 Cal.App.4th 1173, 1188.) Where, as here, the impact fee has not even been calculated or mandated, the deficiency is greater. (*California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 197–198.)

3. NEPA requires funding assurances if the agency finds impacts would be mitigated under an environmentally preferred alternative.

Unlike CEQA, NEPA does not contain a substantive mandate that an agency adopt all feasible mitigation. However, NEPA does require that an EIS include mitigation measures among the alternatives compared. (40 CFR, §§ 1502.14(f), 1508.25((b)(3).)

And NEPA requires that when an agency relies on mitigation to identify the environmentally preferable alternative, as it has done here, that mitigation must be legally feasible and there must be sufficient resources to implement it:

> When a Federal agency identifies a mitigation alternative in an EA or an EIS, it may commit to implement that mitigation to achieve an environmentally-preferable outcome. Agencies should not commit to mitigation measures considered and analyzed in an EIS or EA if there are insufficient legal authorities, or it is not reasonable to foresee the availability of sufficient resources, to perform or ensure the performance of the mitigation.[3]

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[3] Nancy Sutley, Chair, Council on Environmental Quality, Memorandum for Heads of Federal Departments and Agencies, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact; Jan. 14, 2011, p. 6, available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.

B. The HCP's proposed funding, which relies on the FORA CFD and an unspecified "replacement funding mechanism," does not amount to a committed, enforceable plan because (1) the current CFD is not collectible after 2020, (2) there is no legal authority to collect replacement fees from the already-entitled development projects, and (3) no replacement funding mechanism is identified, committed, or enforceable for other future projects.

1. The FORA CFD will not be collectible after 2020 by FORA or by any other entity.

The current FORA CFD does not amount to a committed, enforceable plan for funding the HCP because it will not be collectible from already entitled development projects when FORA sunsets in June 2020 and will not be applicable to newly entitled development after that point.

The HCP relies on the collection of the current FORA CFD or an unspecified "replacement funding mechanism" to fund the endowment:

> FORA will collect the CFD Special Tax to fund the HCP until its sunset. FORA is expected to sunset during the permit term. If the endowments are not fully funded by FORA's sunset, FORA's underlying jurisdictions[], County of Monterey, City of Marina, City of Seaside, City of Del Rey Oaks, and City of Monterey will collect the FORA CFD Special Tax or a replacement funding mechanism, meaning an alternative assessment or assessments, after FORA's sunset (June 30, 2020) to complete full funding of the HCP endowments.

(HCP, p. 9-19, footnote omitted.) FORA has relied on Mello-Roos Community Facilities District (CFD) taxes to raise revenues for transportation, habitat, and water supply projects. The one-time FORA CFD tax becomes due when a project is issued a building permit.

The Mello-Roos Act requires that there be a sponsoring legislative body with governance authority. (Gov. Code, §§ 53311 *et seq*.) When FORA sunsets, there will be no such body. When FORA sunsets, there will no longer be any agency with the power to levy or collect the FORA CFD tax from either the development projects already entitled but not yet built or from development projects entitled in the future. As FORA acknowledges, the FORA CFD will not be collectible after FORA sunsets without legislation to extend FORA.[4] Proposed legislation that some thought might address this problem, SB 189, did not pass.[5] So the HCP's conclusion

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[4] *See, e.g.*, FORA Board Report, April 12, 2019, Attachment #2 to Item 5b, FORA Workshop, 5/18/19, p. 2 [FORA CFD "requires legislation to extend beyond June 30, 2020"], available at https://www.fora.org/Board/2019/Packet/050819BrdPacket_Special.pdf.

[5] Monterey Herald, "Fort Ord Reuse Authority extension legislation held in committee, Sept. 4, 2019, available at https://www.montereyherald.com/2019/09/04/fort-ord-reuse-authority-extension-legislation-held-in-committee/ ; SB189 available at

that FORA's underlying jurisdictions could collect the FORA CFD tax after FORA sunsets is erroneous.

2. There is no funding mechanism that *could* collect the CFD or a "replacement funding mechanism" from already entitled development projects, and revenues from this entitled development represents the majority of the needed HCP funding.

While a land use jurisdiction could impose a "replacement funding mechanism" on a *future* project that does not yet have vested entitlements, it would not be possible to impose a "replacement funding mechanism" on those projects that *already have vested entitlements* but for which a building permit has not yet been issued. The very point of vested entitlements is that they are not subject to exactions adopted after the vested entitlement is granted.

As FORA has repeatedly acknowledged in its transition planning, the *ability to raise revenues from projects that already have development entitlements will terminate when FORA sunsets, because no new taxes or impact fees can be imposed on entitled development projects with vested rights*.[6]

FORA has projected that post-2020 CFD taxes on the six already-entitled development projects would have totaled $72.2 million.[7] FORA staff projects post-2020 CFD taxes would have been $14 million for the County's single project; $55 million for Marina's three projects; $2.6 million for Seaside's single project; and $42,370 for Del Rey Oaks' single project.[8] While FORA projected $72.2 million in CFD taxes from these six entitled projects, it projected only $55.2 million in CFD taxes from the future projects for which no entitlements have been issued.

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https://legiscan.com/CA/votes/SB189/2019. Proposed section 67700(d) of SB189 would have permitted the County to distribute previously *accumulated* CFD revenues upon dissolution of FORA, but it would not have permitted the County to collect or distribute the FORA CFD taxes *after* dissolution.

[6] *See, e.g.*, FORA Resolution No. 18-11, Dec. 19, 2018, Recital M ["Collecting taxes or fees on developments that have already been entitled will require each jurisdiction to obtain agreements from each developer of an entitled project to pay development fees that the developer would not otherwise be obligated to pay. Those fees are estimated to be $72 million for entitled projects, if all entitled developments are fully completed"], available at https://www.fora.org/Board/2019/Packet/050819BrdPacket_Special.pdf, pdf page 6.

[7] These six projects are identified by FORA staff as The Dunes, Seahaven, and Cypress Knolls in Marina; East Garrison in the County; Seaside Resort in Seaside; and the RV Resort in Del Rey Oaks. (See Draft Transition Plan Study Session, presentation to FORA Board, page 12, June 8, 2018, available at http://fora.org/Board/2018/Presentations/06/TAC-Board_StudySession_060818.pdf.)

[8] *Id.* at 13.

The assumed 30% share of that $72.2 million allocable to the HCP would come to $21.7 million, more than half of the proposed HCP endowment fund. (HCP, pp. 9-18 [Table 9-7], 9-33 [Table 9-12].) There is no committed, enforceable mechanism to replace this CFD tax revenue.

Remarkably, although FORA knew that it was statutorily mandated to sunset when it adopted the CFD tax, FORA made no provision to collect or replace CFD taxes for entitled projects after it sunsets.

Some land use jurisdictions may be in discussion with entitled developers seeking some voluntary agreement to replace the CFD taxes that cannot be collected after FORA sunsets. However, unless and until there are such legally binding agreements in place, the HCP cannot rely on future payments from these projects as a source of funding.

3. There are no committed, enforceable funding mechanisms for future projects that do not yet have entitlements.

Where there are no vested entitlements in place yet, the land use jurisdictions do have the power to replace the expected CFD tax revenues from unentitled future projects by creating their own funding mechanisms. These mechanisms might include nexus-based development impact fees, new CFDs, or ad hoc impact fees negotiated through development agreements. However, as discussed below, since there are no currently committed or enforceable fee or tax programs in place for future projects, or even any concrete proposals for such "replacement funding mechanism," neither the HCP nor the EIS/EIR identifies any assured funding.

Furthermore, there are fundamental issues of equity and efficacy that should be negotiated and that must be resolved before the agencies adopt new funding mechanisms. These issues are also discussed below.

C. Permittee agencies should not agree to a JPA without a committed, enforceable funding plan. Permittees should understand the cost of the HCP *and its alternatives*, reach agreement on cost-apportionment, and commit to enforceable funding mechanisms *before* joining a JPA.

Even if the CFD funding problems could be resolved and the agencies were free to impose taxes or fees on all development projects, the agencies should not agree to join a JPA unless and until there is agreement that apportions costs and that ensures enforceable, committed funding mechanisms.

1. As a matter of prudent fiscal management, the Permittees should know their future costs for the proposed HCP *and for alternative compliance* before they make a 50-year commitment to the proposed HCP by joining a JPA.

The proposed HCP would require the 12 agencies to form a JPA that would be liable for the implementation and funding of the HCP/ITP conditions for 50+ years. As a Permittee under

the ITP, each agency would be jointly liable for the ITP costs incurred as a result of development decisions made by the other Permittees, and would also be liable for the permitted and unpermitted actions of developers in Fort Ord, both within and outside their own land use jurisdictions. (See, e.g., JPA Agreement sections 6.2 [Responsibility to Wildlife Agencies], 8.0 [Funding of Endowments]; 3.2 [Withdrawal]; HCP section 9.3.5 [Funding Adequacy].) Incentives to minimize overall costs and liability are weakened when those costs and liability can be shifted to other parties, a situation referred to as "moral hazard."

By contrast, under the no-project alternative, the developers, not the agencies, would be the permittees and would directly bear the costs and liabilities for ESA compliance. Developers would have incentives to avoid development of greenfield land, to minimize incidental take, and to minimize overall HCP compliance cost.

FORA has suggested that there are economies of scale in the joint-HCP approach. However, FORA has not quantified those scale economies or provided a comparison of the habitat management and ESA compliance costs for the project and no-project alternatives. *Before making a decision to join the HCP JPA and to assume liability for 50 years of Permittee costs, the agencies should know the costs and benefits of both alternatives.*

For the proposed HCP: the agencies should know the total cost and their own shares of the total costs. As discussed below, each agency's cost for the proposed HCP would depend on a number of factors, including the total cost of the HCP; the cost-apportionment method; the sites and pace of development that determines the cost to meet the stay-ahead provision; the funding mechanisms that would provide an endowment; and the rate of return on that endowment. As discussed below, the HCP and the analysis provides by FORA to date are not sufficient to provide this information.

For the no-action alternative, agencies should know the following:

About the *agency's own costs and obligations* for the no-action alternative, the agencies should know:

- What liability would the agency retain for fulfilling obligations under the existing HMP?
- What is, and who bears, the obligation for ongoing management activity for HMP's HMA acres (e.g., controlled burns, access limitation, any mandated restoration or enhancement)?
    - Note that HMP's HMA acreage is held as follows: State Parks (979 acres), UC/NRS (606 acres), County (1,849 acres), Marina (236 acres), MPC (206 acres), and MPRPD (19 acres).
- What is the cost for that management activity if it is mandatory?
- Will the ongoing management activity for its portion of the HMP's HMA acres require the agency itself to obtain individual HCP/ITP? If so, at what cost?
- Could the agency reduce or offset its management costs for its portion of the HMP's HMA acres by partnering with a private developer or group of developers who need mitigation land and will pay for its management?

- Could the agency reduce or offset its management costs for its portion of the HMP's HMA acres by conveying the HMA land to another agency with a habitat/recreation mission, e.g., BLM, State Parks, UC/NRS?
- Could the agency reduce or avoid its management costs for its portion of the HMP's HMA acres by obtaining revisions to the HMP based on changes in land use plans or other conditions?
    - Note that the HMP indicates that changes may be negotiated with the USFWS. (HMP, p. 1-14.)
    - Agencies have negotiated changes to the HMP in the past, e.g., by swapping mitigation and development land designations.
    - Whose permission would be required to revise the HMP?
- The HMP is apparently not sufficient to provide ESA compliance for ITPs without more actions.[9] It appears that the HMP adoption has been relied on only to fulfill mitigation obligations under CEQA and NEPA, with the understanding that the HMP may *facilitate* later ESA compliance.[10] If the HMP is mandatory only as a form of CEQA/NEPA mitigation, *can the agencies alter the HMP obligation if they make findings of adequate substitute mitigation and/or infeasibility*? (*See Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 359 [mitigation may be modified or deleted with stated rationale supported with substantial evidence]; *see also Lincoln Place Tenants Association v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508; *Katzeff v. Department of Forestry & Fire Protection* (2010) 181 Cal.App.4th 601, 614.)

About the *agency's developers' costs and obligations* for the no-action alternative, the agencies should know:

- For the development areas within an agency's jurisdiction, what would be the approximate cost of future ESA/CESA compliance that would be born directly by developer-permittees in their project-specific HCPs/ITPs? How would that cost compare to the jurisdiction's share of the cost of the proposed HCP?
- Assuming that developers bear the cost of ESA compliance directly, how much less greenfield development would occur under the no-project alternative than under the proposed HCP?
    - Note that the proposed cost apportionment in the HCP document call for assessing costs based on CFD replacement revenues. This cost apportionment would not create *any* incentive for a private developer to avoid take and minimize ESA compliance costs by developing on unvegetated, previously developed land rather than on vegetated land providing habitat, because CFD taxes would be the same either way.

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[9] See Base Reuse Plan EIR, p. 4-164.

[10] *Ibid*; see Robert Walker, Assistant Secretary of the Army, Fort Ord, California, Disposal and Reuse, Supplemental Environmental Impact Statement, Record of Decision, June 18, 1997, available at http://docs.fortordcleanup.com/ar_pdfs/AR-BW-1790/bw-1790.pdf.

For the no-action alternative, it is particularly important that the agencies clarify the continuing obligations under the HMP *and* the ability to coordinate the management of the HMP's habitat management areas with project-specific ITPs. As discussed below, the EIS/EIR assumes for the no-action alternative that HMP obligations cannot be coordinated with project-specific ITPs; but this assumption is not supported with any actual analysis.

2. Formation of JPA should not occur until the HCP is finalized and there is agreement on, and commitment to, enforceable cost-apportionment and funding mechanisms.

The HCP contemplates that the JPA will be formed prior to the implementation of the HCP and permit issuance. (HCP, pp. ES-10, 7-1.) This is apparently required by the USFWS. (Stephen Henry, USFWS, letter to Michael Houlemard, FORA, July 29, 2016, p. 5, point # 6.) The draft JPA Agreement provides that the "final HCP" is incorporated by reference and that conflicting provisions in the HCP will supersede the JPA Agreement. It is unclear how many changes need to be made to the HCP to make it "final" or whether future changes to the HCP would be binding on each JPA member.[11]

The cost apportionment and the funding mechanisms are critical questions that remain unresolved in the JPA Agreement. Section 8 of the JPA Agreement mentions an array of *possible* alternative funding mechanisms (e.g., CFD Taxes, developer impact fees, lump sum or annual payments by Permittees, state and federal grants and appropriations) and *possible* alternative cost-apportionment methods (e.g., apportionment based on acreage, developable acreage, market value of acreage, habitat value of acreage, previous funding commitments). Section 8 provides that *after* the JPA is formed, the parties will "cooperatively develop" both the "funding mechanisms" and the "methods of apportioning funding responsibility among the Parties." Even if it were not dictated by the ESA, CESA, CEQA, and NEPA, it would be prudent for the agencies to reach agreement on cost-apportionment and funding mechanisms *before* committing themselves to a 50-year liability.

In contrast to the JPA Agreement, the draft HCP appears to have settled that the funding mechanism and cost apportionment *will be* based on the CFD Tax and some replacement funding mechanism that is equivalent to the current CFD tax, to be developed by the land use jurisdictions, without any use of the General Funds of the land use jurisdictions. (HCP, section 9-3.)

Despite the HCP's apparent commitment to this approach, a November 13, 2019 EPS memo refers to the CFD-based cost apportionment method assumed in the HCP as the "baseline analysis" and then discusses several alternative cost and funding scenarios.

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[11] If substantial changes are made to the proposed HCP circulated for public review and comment, the revised HCP and a revised EIS/EIR should be recirculated for additional review and comment.

In short, the cost-apportionment method and funding mechanism are neither adopted, nor even agreed. Accordingly, the HCP does not meet the federal or state requirements for assured funding or the CEQA and NEPA requirements for committed, enforceable mitigation financing.

In light of the JPA's provision that the final HCP is controlling over the JPA (JPA, section 4.0) and the fact that the HCP assumes a cost-apportionment and funding mechanism but the JPA does not, each jurisdiction should require that the HCP be in "final" form at the time that the JPA Agreement is signed and that funding mechanisms and cost-apportionment be agreed, committed, and consistently spelled out in both the HCP and the JPA. The JPA Agreement should also provide an acceptable mechanism to negotiate future changes to the final HCP document.

D. Permittees should evaluate a range of cost-apportionment methods and funding mechanisms if they intend to pursue the proposed HCP.

1. The September 2019 HCP assumes that endowment funding will come from the FORA CFD or an equivalent but unspecified "replacement funding mechanism" after FORA sunsets.

The JPA Agreement leaves the choice of cost apportionment as a matter to be decided after the jurisdictions join the JPA and after the HCP is adopted. (JPA Agreement, section 8 [cost apportionment method to be determined], section 4 [HCP to be incorporated by reference; its provisions supersede the JPA Agreement].)

However, the HCP states that HCP endowment funding will come from the CFD Special Tax and from state and federal budget appropriations and that no Permittees other than State Parks and MPRPD would be required to obligate its General Fund to satisfy its financial obligations. (HCP, p. 9-15.) Since budget appropriations are uncertain and outside the control of the Permittees, and since the proposed endowment funds would provide essentially all of the HCP funding, financial assurances will rely on Permittees' ability to raise revenues through the FORA CFD or an unspecified "replacement funding mechanism" that would generate the same revenue stream as the existing CFD tax. Thus, the HCP assumes that the HCP endowment will be funded by a CFD Special Tax revenue stream and will be apportioned among the Permittees based on their collection of CFD tax revenues. (HCP, section 9.3.1.)

2. The November 2019 EPS memo discusses alternative funding-mechanisms.

Although the information is not in the HCP, the HCP consultant EPS modeled cost-apportionment based on several different funding mechanisms in a memorandum captioned "Financial Model Sensitivity Analysis and Cost Allocation Alternatives." (EPS, letter to FORA Administrative Committee, Nov. 13, 2019 ("EPS2").) These included apportioning cost based on CFD Replacement Revenues, on short and long-term developable acres, and on water allocations. Allocation Alternative 1 in the EPS Sensitivity Analysis, which is based on "CFD Replacement Revenues," is the cost allocation method used in the HCP document.

3. **The agencies should consider appropriate criteria and options for adequate cost-apportionment methods and funding mechanisms.**

Criteria for adequate cost-apportionment methods and funding mechanisms might include the following:

- Funding should be sufficiently proportionate to incidental take that the stay-ahead provision can be met.
- Funding should be feasible, committed, and enforceable.
- Funding should be equitable among the Permittees and among the types of development (e.g., residential, office, commercial, industrial, retail)

Options for cost-apportionment methods and funding mechanisms might include:

- The FORA CFD tax, as long as it can legally be collected,
- A new CFD tax enacted and levied by the JPA, applicable to all development within the HCP,
- A local CFD tax enacted and levied by an individual Permittee that is a land use jurisdiction, applicable only to development within that jurisdiction,
- A development impact fee enacted and levied by the JPA, applicable to all development within the HCP,
- A local development impact fee enacted and levied by an individual Permittee that is a land use jurisdiction, applicable only to development within that jurisdiction,
- Ad hoc fees imposed through development agreements,
- General fund revenues of the Permittees,
- Grants and appropriations.

4. **The choice of funding mechanisms should matter to agency/Permittees because it is likely to determine the cost-apportionment of the HCP. There are *substantial* differences in each Permittee's funding obligations depending on the choice of cost-apportionment and funding mechanism**.

The choice of funding mechanism would likely be allowed to determine the cost-apportionment among the Permittees. For example, if development impact fees or CFD taxes are the primary funding mechanism, cost would likely be apportioned among Permittees in proportion to the fees or taxes raised in each Permittee's jurisdiction. The HCP and the EPS Sensitivity Analysis memorandum (EPS2) assume this to be the case under normal conditions. Uncoupling the funding mechanism from the cost-apportionment could be accomplished, e.g., through side-payments among Permittees, but this would introduce complexities that should be avoided absent good reason.

Note, however, that the HCP does propose that funding and cost apportionment be at least temporarily uncoupled in the event that CFD payments were insufficient to pay for HCP required actions on all HMAs: in that event the HCP proposes that the owner of the HMA land

incur the cost and seek reimbursement from the other Permittees later. (HCP, section 9.3.5.1, p. 9-35.)

Impact fees, CFD taxes, and development agreement fees can be levied on various bases. The current CFD levies fees based on type of development and number of units. Impact fees can do the same. But CFD taxes and impact fees could also be based on the developed acres, or the vegetated developed acres, or based on the amount of incidental take caused by development.

The choice of the fee or tax basis can make a large difference in cost apportionment. EPS's Sensitivity Analysis memorandum modeled cost-apportionment based on the existing CFD taxes, on short and long-term developable acres, and on water allocations. Allocation Alternatives 2a and 2b in the EPS Sensitivity Analysis are based on developable acres. Alternative 2a is based on short-term development in the planning pipeline and Alternative 2B is based on the total buildout acres over the 50-year HCP permit term. (EPS2, Tables 6 and 7, D-1 [long-term developable acres by jurisdiction].)

EPS's modelling demonstrates that costs could be 2.5 times higher for some land use jurisdictions, depending on the basis of apportionment. (EPS2, Table 7 [Marina Alt. 1 cost of $18.7m vs. Alt 2B cost of $10.1m; DRO Alt. 1 cost of $4.2m vs. Alt. 2B cost of $5.6m; County Alt. 1 cost of $4.5m vs. Alt 2B cost of $1.8m].) Given the amounts at issue, the land use jurisdictions should resolve the basis of cost apportionment before entering into a JPA that binds them to an unfavorable or inequitable cost-apportionment method, not to mention the joint and several liability. (JPA Agreement, sections 8.0, 6.2, 3.2.)

E. Even if a funding mechanism identical in the amount and apportionment to the current CFD tax could somehow be imposed, it would not demonstrably assure adequate funding for the HCP because there is no assurance that this revenue stream could meet the stay-ahead provision and because such a cost-apportionment is likely to be rejected as inequitable.

The HCP provides no actual analysis to demonstrate the feasibility of the "stay ahead" provision and there are reasons to doubt it will be feasible.

1. The HCP does not actually match the schedule of habitat maintenance, enhancement, and restoration to the build-out assumed to occur in order to show that the HCP can in fact stay ahead.

HCP Section 7.6 provides a stay-ahead rule, but without an analysis to demonstrate that it will work within the funding constraints.

The HCP defines "take percentage" as the impact on each species in acres of take divided by baseline acres. The HCP defines "conservation percentage" as the acreage actively managed and commensurately funded divided by total protected acreage for each species habitat required by the HCP. The stay-ahead rule requires that the conservation percentage must be 5 percentage points greater than the take percentage for most fauna habitat. For the CTS and CRLF, the

conservation percentage must be 20 percentage points greater than the take percentage until successful completion of aquatic restoration projects, which would require that the HCP incur the front-loaded costs of restoration. Similarly, for HCP plant species, the conservation percentage must be 20 percentage points greater than the take percentage until successful completion of restoration and seeding projects, which must occur "as early as possible in the permit term." (HCP, p. 7-17.)

The HCP presents two examples of the calculation.[12] But the examples of the *application* of the stay-ahead rule does not constitute any evidence that *attaining* the stay-ahead provision would be feasible.

2. The HCP does not actually match the schedule of habitat maintenance, enhancement, and restoration to the build-out assumed to occur in order to show that the HCP can in fact stay ahead.

The HCP acknowledges that a slower pace of development than it assumes is a critical risk to meeting the stay-ahead provision. However, HCP section 9.3.5 provides only a qualitative discussion of that risk, a discussion that does not demonstrate that conservation will in fact stay ahead of incidental take in the event that full Fort Ord buildout does not occur by 2030 as the HCP assumes:

> Annual HCP required action costs and CFD Special Tax revenues are both triggered by FORA's land use development. If the pace of development slows, annual CFD Special Tax revenues would be generated at a slower rate. However, the timing of HCP required actions would also be delayed, consequently reducing annual HCP required action costs. This relation between annual endowment costs and revenues reduces the possibility of inordinate funding shortfalls being experienced during the permit and post-permit periods. Section 7.6, Stay-Ahead Provision, describes in further detail how HMA funding is an integral part of how preserved acres are counted toward the stay-ahead provision."

(HCP, p. 9-33.) While this relation between endowment revenues collection and the pace at which costs are incurred might, under some circumstances, "reduce" the possibility of a funding mismatch, it does not eliminate it.

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[12] Example: if a developer seeks development that impacts 50% of Sand Gilia (756 acres of 1511 acres baseline acres) then 55% of conservation goal would have to be met before take was allowed (839 acres of the required 1,525 acres). This example assumes that required Gilia restoration and seeding has already occurred so that the stay ahead percentage is only 5%, not the 20% required before restoration is deemed successful.

3. Mismatches in conservation funding and incidental take are likely to prevent meeting the stay-ahead provision.

The HCP's cost and funding analysis simply assumes that the incidental take caused by development projects and the funding contributed by those projects toward the HCP would remain proportionate and that this proportionality would ensure that the stay-ahead provision could be met. However, the CFD-based cost-apportionment method assumed in the HCP does not actually ensure that funding would be generated in proportion to incidental take from development. Thus, it cannot assure that the HCP would be adequately funded to meet the stay-ahead provision.

There are a number of reasons that attaining the stay-ahead provision may not be feasible.

a. A CFD-like tax collection does not materially precede incidental take.

First, the CFD payments are not due until a building permit is issued, at which time the developer may immediately begin causing take. Conservation funding could therefore lag behind take. Conservation funding should be required sufficiently before construction to ensure that the required stay-ahead habitat acreage is maintained, enhanced, and restored.

b. A CFD-like tax may not cover fixed initial costs for startup, capital, and restoration.

Second, the cash flow analysis assumes constant annual costs of $2.2 million will be paid for through the endowment. (HCP, App. O, Tables 8 and 13.) The constant cost assumption does not provide for the needed front-loading of costs for start-up, capital, and habitat restoration. (See HCP, Table 9-1a.)

The 20% stay ahead for plants and the CTS and CRLF will be particularly difficult to attain because the 20% stay-ahead mandate applies until the front-loaded costs are incurred for successful habitat restoration and enhancement.

c. CFD-like taxes may be insufficient if early projects occur disproportionately in incidental take areas.

Third, early projects may be in sensitive areas and therefore make larger contributions to take percentage than the conservation percentage that their CFD payments can fund.

EPS's Sensitivity Analysis memorandum identifies development projects that are in the "short-term planning pipeline" that reflects "a market and resource constrained scenario whereby only portions of the total developable areas are anticipated to develop." (EPS2, pp. 7-8.) EPS sets out the projects expected to develop in the short-term in Tables C1 through C6. (EPS2, Appendix C, "Projected Replacement CFD Special Tax Revenue"].) Many of these short term projects will result in substantial incidental take because they are located in natural, vegetated land on which the HCP identifies the presence of multiple protected species.

For example:

- Table C-1 identifies 148.5 acres of short-term development in Del Rey Oaks. (EPS2, Table C-1.) According to the HCP, the developable Del Rey Oaks land contains Seaside Bird's Beak, Monterey Spineflower, Yadon's Pioperia, and habitat for the California Red Legged Frog ("CRLF") and the California Tiger Salamander ("CTF"). (HCP, Appendix A, Figures A-8, A-7, A-4, A-3a, A-2a.)

- Table C-3 identifies 59.7 acres of short-term development in the City of Monterey. (EPS2, Table C-3.) According to the HCP, the developable City of Monterey land contains Seaside Bird's Beak, Monterey Spineflower, Yadon's Pioperia, and habitat for the California Red Legged Frog ("CRLF") and the California Tiger Salamander ("CTF"). (HCP, Appendix A, Figures A-8, A-7, A-4, A-3a, A-2a.)

Other early development projects in EPS's Sensitivity Analysis memorandum would occur on natural, vegetated land on which protected species are located. The disproportionate need for mitigation funding may prevent attainment of the stay-ahead provision if early development projects occur on lands rich in protected species and habitat, rather than on the already developed land on which no protected species or habitat are present.

d. <u>CFD-like taxes may not be sufficient if early projects are disproportionately non-residential</u>.

Fourth, the relative underfunding of mitigation by non-residential projects may preclude meeting the stay-ahead provision. Allocation Alternative 1 in the EPS Sensitivity Analysis, based on CFD Replacement Revenues, is used in the HCP document. This allocation method skews the lion's share of total HCP cost to residential units and away from non-residential development. For example, the CFD cost for residential development in the County would be $152,000 per acre, compared to $3,327 per acre for office or industrial development acre. (EPS2, Table C-4.)

Again, a CFD-like cost apportionment method cannot assure funding of the stay-ahead provision if funding is not sufficiently related to incidental take impact. For example, funding would not match stay-ahead costs if substantial development of office or industrial projects occurred before residential development, especially if that development were sited on vegetated development land with HCP habitat so as to result in incidental take.

An historical example of such development was the MST/Whispering Oaks project. Although the project approvals were ultimately rescinded in the face of fierce community opposition, this 115-acre project would have removed 3,400 oak trees to construct a bus maintenance project and a business park. CFD fees from the project based on the CFD tax rate for industrial and office use would have been minimal. The HCP indicates that the site contains Monterey Spineflower and upland habitat for CRLF and CTS. (HCP, Appendix A, Figures A-3a, A7, A-8.)

The general plans of the land use jurisdictions identify a number of areas designated for office and industrial uses that are located in areas that the HCP identifies as rich in protected species. For example:

- The City of Marina has designated a number of parcels south and southeast of the Marina Municipal Airport as "Office/Research."[13] The HCP indicates that this area contains Sand Gilia, Monterey Spineflower, Seaside Bird's Beak, and Smith's Blue Butterfly. (HCP, Appendix A, Figures A-1, A-3a, A-4, A05e.)

- The County of Monterey has designated land east of Gigling and Eighth as Business Park/Light Industrial Office/R & D.[14] The HCP indicates that the site contains Monterey Spineflower and upland habitat for CRLF and CTS. (HCP, Appendix A, Figures A-3a, A7, A-8.)

- The Fort Ord Reuse Plan designates most of the parcels within the jurisdiction of the City of Monterey and Del Rey Oaks as "Business Park/Light Industrial Office/R & D." (Fort Ord Reuse Plan, Figure 3.2-1 [Proposed Project Land Use Concept].) The City of Monterey has designated this land as "Industrial" in its General Plan land use map.[15] Del Rey Oaks has designated portions of this land a "General Commercial/Office-Professional."[16] As noted above, the HCP indicates that this land contains Seaside Bird's Beak, Monterey Spineflower, Yadon's Pioperia, and habitat for the California Red Legged Frog ("CRLF") and the California Tiger Salamander ("CTF"). (HCP, Appendix A, Figures A-8, A-7, A-4, A-3a, A-2a.)

In addition, other parcels designated as "Commercial" or "Mixed Use" within the Fort Ord land use jurisdictions could be developed with office or industrial uses and be subject to the low CFD tax rate for those uses.

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[13] City of Marina, General Plan Land Use Map, updated May 27, 2011, available at https://cityofmarina.org/DocumentCenter/View/1421/Figure-2-2---5-27-2011?bidId=.

[14] 2010 Monterey County General Plan, Figure LU6a, Monterey County Land Use Plan, Fort Ord Master Plan, Oct. 24, 2006, available at https://www.co.monterey.ca.us/home/showdocument?id=45966.

[15] City of Monterey, General Plan, Map 3, Nov. 2, 2010, available at https://monterey.org/Portals/0/Policies-Procedures/Planning/GeneralPlan/3-Land-Use.pdf.

[16] City of Del Rey Oaks, General Plan Update, January 1997, p. 30, Figure 2, Land Use Map, available at https://www.delreyoaks.org/sites/default/files/fileattachments/city_manager/page/1506/1997_generalplanupdate.pdf.

Relying disproportionately on residential development for HCP funding would also make the stay-ahead provision much more difficult to attain even under the alternative, slower development scenario modeled in the EPS Sensitivity Analysis memorandum. EPS provides two development scenarios. The "baseline" scenario, based on the FORA CIP, assumes complete buildout of the Base Reuse Plan by 2030 at 433 residential units per yeqar, which is completely inconsistent with historic buildout rates. (EPS2, Table 2.) This is the scenario assumed in the HCP document. The slightly slower paced "Delayed Revenues and Costs" scenario spreads residential development over 16 years at 300 units per year, but still assumes that *non*-residential buildout is largely complete by 2030. (EPS2, Table 3.) Under this "Delayed Revenues and Costs" scenario, the non-residential development occurs earlier than the residential development and pays much less per acre toward the HCP. Thus, there would be less funding available per developed acre, rendering the stay-ahead provision more difficult to attain.

Although EPS acknowledges its scenarios are hypothetical, the earlier development of the lower taxed non-residential uses is likely because land use jurisdictions tend to favor non-residential development in order to obtain its higher local property and sales tax revenues. Indeed, that is why the CFD taxes for non-residential uses are lower.

4. **The CFD-based cost-apportionment is likely to be viewed as inequitable because it is not based on incidental take impac**t.

In addition to the risk that the CFD-based cost-apportionment method would fail to assure the stay-ahead provision, it is unlikely that this system would be viewed as an equitable apportionment by Permittees or developers. There appears to be no principled rationale for assessing residential development at a rate of $152,000 per acre and office development at $3,327 per acres. And jurisdictions that have planned relatively more residential than non-residential development would likely object to being required to provide disproportionate funding.

5. **The CFD-based cost-apportionment is likely to be viewed as inequitable because it would exact habitat fees from previously permitted projects that have already funded independent ITPs**.

The CFD-based cost allocation (EPS 2, Alternative 1) is also likely to be viewed as inequitable because it assumes that the already-entitled development *that has obtained an independent HCP/ITP* will still have to make contributions to the new HCP. (EPS2, Table C-2 [counting $23m in total CFD revenues from 920 units at Seahaven, of which 30% or $7m would be used to fund the new HCP].)

Furthermore, as discussed, there is no legal way to compel new exactions from projects like Seahaven that have vested entitlements.

F. FORA has not provided sufficient analysis of the efficacy of alternative cost-apportionment methods in the HCP or elsewhere.

As explained, the proposed CFD-based cost-apportionment cannot *assure* funding sufficient for the stay-ahead provision and would not likely be viewed as equitable. Equity and the stay-ahead provision dictate a closer relation between incidental take and funding.

Allocation Alternatives 2a and 2b in the EPS Sensitivity Analysis are based on "developable acres." Alternative 2a is based on short-term development in the planning pipeline and Alternative 2B is based on the total buildout acres over the 50-year HCP permit term. (EPS2, Tables 6 and 7, D-1 [long-term developable acres by jurisdiction].) These allocations are somewhat more equitable than the Alternative 1, CFD-based allocation, and they may be less risky with respect to meeting the stay ahead provision. *However, the use of "developable acres" does not assure an adequate relation between funding and incidental take because not all developable acres would result in similar incidental take and thus trigger similar stay-ahead cost obligations.*

The EIS/EIR explains that the 9,292 developable areas consist of 4,242 acres of previously developed land and 5,051 acres of natural or vegetated land. (EIS/EIR, p. 2-12.) The EIS/EIR states that an HCP/ITP is not required in order to develop those 4,241 acres of designated development areas within Fort Ord that were previously developed, because that land is devoid of vegetation and habitat for listed species. (EIS/EIR, p. 2-3.) The only incidental take that would occur on land designated for development is on the 5,051 acres of natural, vegetated land. The development of this vegetated acreage, not the redevelopment of previously developed land, should bear the cost of the HCP so that the cost apportionment is based on the actual incidental take impact.

If funding were based on developable acres regardless whether those acres contain habitat, there could be no assurance that funding would match stay-ahead costs. Stay-ahead cost would not be met if substantial development occurred on vegetated or natural lands *before* redevelopment occurred on previously developed land. If the development on vegetated land were not paying the full cost of incidental take mitigation (because part of that cost was apportioned to disturbed land), incidental take would occur sooner than the collection of funds needed to mitigate it, and it would be more difficult to meet the stay-ahead provision.

It is foreseeable that development may in fact occur earlier on vegetated land rather than disturbed land. As discussed above, the EPS Sensitivity Analysis identifies substantial acreage of short-term development in the planning pipeline that is located on parcels containing protected species and habitat.

It is also foreseeable that development will occur disproportionately on vegetated land that is subject to incidental take rather than on previously developed land in which take would not occur. Indeed, the EIS/EIR establishes that the vegetated, natural land in which development is permitted and take will occur comprise 5,051 acres. (EIS/EIR, p. ES-2.) This compares to

only 4,241 acres of previously developed land in which redevelopment will occur and in which there would be no take. (*Ibid*.)

In short, there can be no adequate assurance that funding would be sufficient to meet the stay-ahead provision unless the source of funding is closely tied to incidental take impacts. Ideally, the funding exacted from development projects would be directly proportionate to take impacts. *This is the system that would in fact be used in the event that the proposed HCP were not adopted and each development project were required to fund its own ITP*.

At minimum, FORA should be required to demonstrate that the HCP funding mechanism would in fact generate sufficient funds in time to meet the stay-ahead provision.

Unfortunately, neither EPS nor FORA have discussed or modeled apportionment of HCP costs based on vegetated acreage much less on actual incidental take impacts. FORA should, at minimum, prepare an analysis of the allocation of HCP cost based on each jurisdiction's share of vegetated development acres. The wildlife agencies must be satisfied that the proposed cost-apportionment will in fact assure that the stay-ahead provision can be met before FORA and USFWS certify the EIS/EIR and the wildlife agencies issue ITPs. Each Permittee should also want to be satisfied that the proposed cost-apportionment would be equitable to the Permittees and equitable to the future redevelopers of the previously disturbed areas whose projects would not cause any incidental take.

In sum, take-based cost-apportionment would be likely to be viewed as more equitable because it would match the benefits and costs of the proposed HCP. Take-based cost-apportionment would also be more efficient because it would tend to discourage greenfield development that causes take and incurs additional costs for take mitigation. To the extent that the cost-apportionment diverges from a take-based approach, it would penalize development that does not cause take, subsidize development that does causes take, and thereby increase the overall cost of HCP compliance. Divergence from a take-based cost apportionment also increases the risk that the Permittees could not attain the stay-ahead provision.

G. FORA cannot demonstrate that CFD "replacement funding mechanisms" are committed, enforceable, or even feasible.

As noted, the HCP relies on the FORA CFD tax and/or an unspecified "replacement funding mechanism" after FORA sunsets. (HCP, p. 9-19.) None of these mechanisms are committed or enforceable, or even described in the HCP. Accordingly, they do not meet the requirements of the ESA, the CESA, CEQA, or NEPA that an HCP application and its environmental review demonstrate an assured funding source.

The USFWS explained that an adequate HCP must set out the substance of the local ordinances that would be used to implement the HCP. (USFWS, letter to Houlemard, July 29, 2016.) Instead, the HCP states that the Permittees would develop implementing ordinances within 120 days of permit issuance, and merely includes a "model" ordinance. (HCP, section 7.4, p. 7-10; HCP, App. J.) The model ordinance provides that, after FORA sunsets, the

Permittee will somehow "ensure collection of the Special Tax," i.e., the 2002 FORA CFD tax, and then disburse it to the JPA. (HCP, App. J, Section VII.A.4.) As discussed, FORA has previously acknowledged that the CFD will not be collectible from any project when FORA sunsets and there is no legal authority to collect and disburse the new exactions from development entitled in the past.

Adequate new mechanisms for fees or taxes to replace the FORA CFD tax may be infeasible. As discussed above, no new fees can be imposed on development that is already entitled. Even if that problem could be solved, for the reasons discussed below there is no assurance that other funding mechanisms are committed, enforceable, or feasible, as required for an adequate HCP and its environmental review.

1. **Impact fees may not be feasible because the nexus and proportionality requirements may preclude adequate funding, and there has been no analysis of nexus and proportionality**. **In addition, they are not committed and enforceable**.

Development impact fees must meet the nexus and proportionality mandates under case law and the Mitigation Fee Act. (Gov. Code, §§ 66000 et seq.) If development impact fees are proposed, they may not be legally imposed on the 4,241 acres of previously developed areas that do not actually require an ITP because there would be no nexus or proportionality. If the entire cost of the HCP were to be borne by the 5,051 vegetated acres, or the subset of those acres with actual incidental take impacts, the cost per acre for the HCP endowment would be 185% higher, based on the ratio of vegetated to total developable acreage. This exaction might inhibit development of the vegetated acres, and result in a much smaller HCP requirement. It is not clear that a smaller HCP could feasibly cover the scale of the proposed costs for startup, capital, and restoration.

If the JPA were to impose a development impact fee, it would need to prepare an analysis to justify nexus and proportionality. This has not been done.

The HCP implies that each Permittee might be free to select its own funding mechanism. If some local jurisdictions were to impose their own development impact fees, each would need to prepare an analysis that demonstrates nexus and proportionality for the land to be assessed within that jurisdiction. This has not been done.

Demonstrating nexus and proportionality would require a realistic appraisal of both the fixed and variable costs of the likely scope of the HCP needed to cover foreseeable development. Despite the HCP's implication, the HCP is not fully scalable. (HCP, section 9.7.) The HCP cost analysis assumes that the entire Base Reuse Plan will be developed within the 50-year permit period. The overall scale of the HCP has been designed and negotiated to provide an ITP that would cover this ultimate level of development. If this level of development is not certain to occur, it would be unreasonable to exact the fixed costs of an HCP designed to accommodate it.

Although certain variable costs might be scalable, and would not be incurred unless and until development occurs, the capital and habitat restoration costs are based on full buildout and

would be incurred regardless of the level of ultimate development. HCP Table 9-1a indicates that 50% of capital costs would be incurred in years 1-10 and 75% by year 20. Essentially all of the habitat restoration costs would be incurred in years 1-20, with 78% incurred in years 1-10. These spending commitments would have to be incurred in the early years of the HCP, before the total scope of covered activities would be known. Imposing almost $10 million in fixed costs on development before the scale of these costs has been justified by actual development applications would not meet nexus and proportionality requirements. The HCP has not considered this issue or provided any analysis to support a nexus and proportionality determination.

2. **Replacement CFD taxes are not committed or enforceable, and there is no analysis to assure that they could meet the stay-ahead provision.**

Permittees might consider a new CFD, sponsored by the JPA, or separate CFDs, sponsored by each Permittee that is a land use jurisdiction as the "replacement funding mechanism" mentioned in the HCP. (HCP, p. 9-19.)

A CFD tax need not have nexus and proportionality. Indeed, this opportunity to impose subsidization of non-residential development through a skewed tax assessment was a key reason that FORA chose CFD taxes rather than development impact fees to finance the Base Reuse Plan infrastructure. However, unless a replacement CFD tax did in fact have nexus and proportionality, i.e., a close relation between the tax on a development project and the incidental take caused by that project, there would be no assurance that the CFD tax could meet the stay-ahead provision. Again, as discussed above, FORA simply has not done the analysis to propose such a tax and to show that it feasibly meets the stay-ahead provision.

And, again, a replacement CFD tax is currently neither committed nor enforceable.

3. **Ad hoc funding via development agreement exactions are not committed or enforceable, and there is no analysis to assure that they could meet the stay-ahead provision**.

Like CFD taxes, exactions via development agreements are not required to have nexus and proportionality. However, as for hypothetical replacement CFD taxes, there is no analysis to propose such exactions and to show that they would feasibly meet the stay-ahead provision. And since development agreement exactions must be negotiated project-by-project, they are intrinsically speculative, and there could be no present assurance that they are committed or enforceable.

4. **Grants and appropriations are not committed or enforceable.**

The HCP suggests that grants, appropriations, and/or volunteer labor might be used as partial funding. (HCP, pp. 9-29 to 9-9-32.) The amounts of the appropriations would be limited to the relatively small portion of the overall HCP funding represented by the assumed obligations of MPC, CSUMP, and State Parks. There is no suggestion that appropriations would be

available to fund the HCP activities related to private development. Furthermore, the HCP does not demonstrate that appropriations, grants, or volunteer labor is part of a committed enforceable plan.

A "plan" to seek funding from other government agencies in the future is not sufficient mitigation. (*Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 103-104.) An agency may not simply assume that grants or appropriations will be available. (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 364 ["there simply was no reason to assume that funding was or would be available"].)

5. The HCP equivocates on use of Permittee general funds; Permittees should insist that this equivocation be resolved and that there be a cost-apportionment agreement.

The HCP states: "no Permittee may be compelled to obligate its General Fund to satisfy its financial obligations under the HCP." (HCP, section 9.3, p. 9-15.) However, the HCP's discussion of funding assurances equivocates on this principal because it proposes to "[h]ave Permittees pay for HCP required actions on HMAs under their ownership" in the event that funding is insufficient to meet the stay-ahead provision. (HCP, section 9.3.5.1, p. 9-35.) This provision would obligate the Permittees that happen to own HMA land to bear the cost of HCP implementation, subject to possible reimbursement from the JPA at some point in the future.[17]

Furthermore, the JPA Agreement unequivocally imposes the funding obligation on the Permittees. (JPA Agreement sections 6.2 [Responsibility to Wildlife Agencies], 8.0 [Funding of Endowments]; 3.2 [Withdrawal].) If the Permittees were unable to collect funds from third party developers, they would have no alternative but recourse to their general funds.

However, it is unclear that Permittees are willing to fund the HCP from general fund revenue. At any rate, the HCP cannot provide adequate funding assurances as long as this remains unresolved.

Even if Permittees are willing to encumber their general funds, the HCP or the JPA Agreement should specify how the cost would be apportioned. The default cost-apportionment assumption in the HCP is that costs would be apportioned in proportion to FORA CFD-like tax revenues collected by each jurisdiction. If the funding mechanism does not in fact use the CFD tax rates or if those revenues are insufficient, the HCP should set out the actual cost-apportionment (and funding mechanisms) that would be in place after 2020, particularly the apportionment of revenue shortfalls.

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[17] HMA lands under the HMP include: BLM (14,645 acres), State Parks (979 acres), UC/NRS (606 acres), County (1,849 acres), Marina (236 acres), MPC (206 acres), and MPRPD (19 acres)

H. The HCP's assumptions for endowment accumulation and for endowment funded costs are unrealistic.

1. The HCP makes specific assumptions about buildout, tax revenues, the timing of costs, and endowment fund accumulation.

The HCP assumes that the cost to implement the HCP on non-federal land (i.e., the cost exclusive of BLM costs to fulfill its FONM obligations) would be $2.6 million per year during the 50-year permit term and a $1.4 million per year thereafter. (HCP, Table 9-1a, p. 9-4.) The HCP proposes that this be funded through endowment funds created from CFD taxes (and small one-time payments from MPC, CSUMB, and MPRPD) and from an annual $518,000 allocation of state budget appropriations for State Parks. (HCP, pp. 9-15 to 9-31.) Thus, about 80% of the non-federal funding would come from CFD taxes and about 20% from the state budget.

The HCP assumes that all of the Fort Ord development for the next 50 years will occur by 2030, i.e., the complete build-out of the Fort Ord Reuse Plan including:

- 4,878 new residential units
- 47 existing unit replacements
- 177.1 acres of office
- 81.3 acres of industrial
- 69.7 acres of retail
- 1,342 hotel rooms
-

(HCP, App. O, Table 6.) The HCP assumes that this projected development will generate $137 million in CFD taxes with $41 million (30.2%) going to HCP funding. (HCP, Table 9-7, page 9-18.) The HCP assumes that these CFD taxes will be sufficient to fund the annually required HCP actions for the first 7 years of the HCP and to fund two endowment funds that will be sufficient to fund $2.2 million of the $2.6 million annual cost to manage the non-federal HMA areas. (See HCP, Tables 9-6 and 9-7, pp. 9-17, 9-18.) The HCP assumes that the endowment will be fully funded by the end of year 8, and that endowment funds will earn returns of 4.2% and 4.5%. (HCP, Table 9-6, p. 9-17; HCP, p. 9-20.)

There are several fundamental flaws in the HCP's case flow assumptions.

1. The assumption of level annual costs makes no provision for front-loaded startup, capital, and restoration costs.

The HCP's cash flow performance analysis assumes that the HCP costs to be funded by the endowment would be incurred on an absolutely level basis, at the rate of $2.2 million per year. (HCP, App. O, p. 6 and Tables 8 and 13 [showing no variation in annual costs incurred by the endowment funds] .) However, the HCP itself shows that significant capital and restoration costs would be incurred in early years:

- $6.2 million of the total $10.4m capital costs would be incurred in years 1-20

- $1.8 million in habitat restoration would be incurred in years 1-20, with none in later years.
- $1.4 million in "start-up costs" would be incurred in years 1 and 2.

(HCP, Table 9.1a, pp. 9-9-3 to 9-4.) Early implementation of these fixed costs is critical to the success of the stay-ahead provision. For example, the stay-ahead discussion emphasizes that Permittees will implement restoration and seeding as early as possible during the permit term. (HCP, p. 7-17.) Only by successful seeding and restoration can the requirement of a 20% stay-ahead for plants and the CRLF be reduced to 5%.

However, the cash flow analysis fails to reflect that a larger share of costs would be incurred in early years, and, thus, a larger endowment than assumed would be required to compensate for reduced long-term earnings on the endowment funds.

2. The HCP analysis is critically dependent on a wildly optimistic pace of development – full buildout by 2030.

The assumption that all remaining Fort Ord development will occur by 2030 is completely inconsistent with the historic rate of development in Fort Ord. The HCP admits that this rate of development is "uncertain." (HCP, p. 9-34.) In fact, it is wildly optimistic. The HCP projects 4,878 new residential units by 2030, built at a rate of 443 units per year. However, from 1997 to April 30, 2019, only 1,457 new residential units were constructed in Fort Ord, a rate of 64 units per year.[18] The HCP presents no evidence to support the assumption of such a substantial and sustained increase in market demand.

However, the unsupported assumption of an early, rapid, and complete build-out – *6.9 times faster than the historic rate of development* – is critical to the cash-flow analysis. Unless there is a rapid development to support rapid accumulation of the endowment fund, the earnings on the endowment fund over time will be substantially lessened, and a larger endowment fund would be required. The proposed current level of CFD taxes would not then be sufficient to fund the endowment.

3. Alternative scenarios evaluated by EPS show that the required endowment would increase substantially if buildout did not occur by 2030, but even these scenarios are remain problematic.

Although the HCP discusses the possibility that development might occur more slowly, the HCP does not analyze this scenario. The November 13, 2019 EPS Sensitivity Analysis does purport to analyze a slower development scenario, "Scenario 2: Delayed Revenues and Costs," which would increase the required endowment from $37.8 million to $43.6 million. But this scenario still assumes a build-out rate of 300 residential units per year, which is still *4.7 times*

[18] FORA, Annual Report, Fiscal Year 2018-2019, p. 6, available at https://www.fora.org/Reports/AR/AnnualReport2019-Full.pdf.

faster than the historic rate of 64 units per year. (EPS2, Table 3.) In short, EPS's analysis shows that the size of the required endowment is very sensitive to the assumed residential buildout rate, but EPS has still not evaluated a realistic buildout rate.

Furthermore, EPS's Delayed Revenues and Costs scenario does not materially slow the pace of *non*-residential development; it continues to assume that all of the non-residential development is essentially complete by 2030.

In addition, the Delayed Revenues and Costs scenario arbitrarily assumes 5%, 10%, and 20% reductions in early year costs. (EPS2, p. 5.) EPS admits that these arbitrary cost reductions "are not based on an analysis of the habitat management costs relative to anticipated development and are instead based on hypothetical cost reduction scenarios to illustrate the associated financial modeling dynamics." (EPS2, p. 7.) EPS admits that "[f]urther analysis on the part of the HCP consultants would be necessary to relate anticipated development timing to projected habitat management costs." (*Ibid*.) The HCP does not provide the further analysis.

However, there is reason to doubt that, even if development were to occur at a rate of 300 residential units per year instead of 443 units per year, the early year costs borne by the endowment funds would be materially reduced from assumed level cost of $2.2 million per year. (HCP, App. O, p. 6 and Table 8.) A material cost reduction is unlikely because, as discussed above, the $2.2 million level annual draw-down of the endowment fails to reflect the need for higher than average early year spending to cover capital and restoration costs.

Finally, even with its unsupported assumption that development would occur 4.7 times faster than historic rates, that early year HCP costs would be 5%, 10%, or even 15% less, and that costs would remain level from year to year, the Delayed Revenues and Costs scenario *still* projects that the level of required HCP endowment funding would increase. (EPS2, p. 5.)

In sum, unless the most wildly optimistic development scenario occurs with development at 6.9 times the historic development rate, the Permittees would have to assess fees or taxes greater than the current CFD tax.

4. **Endowment funding estimates are all over the map: FORA staff now reports that the endowment may need to be $48 to $66 million, not the $37 or $43 million reported in the HCP and the November EPS memorandum, much less the $9 million originally projected.**

The most recent FORA staff report on HCP funding acknowledges that FORA has consistently and substantially underestimated HCP funding needs, and that the HCP funding projections have grown astronomically over time. FORA's December 2019 estimates are now much higher than the $37 million and $43 million estimates in the HCP document and the November EPS Sensitivity Analysis:

The required Endowments *were originally projected to be $9 million but are now*

> *expected to cost $48 to $66 million.* By FORA sunset, about $17 million is expected to be collected for this use. FORA has set 30% of CFO [sic, CFD] funds aside for HCP funding. Given the June 30, 2020 FORA sunset, permittees/jurisdictions must determine how to generate the remaining $27 to $45 million required to demonstrate to USFWS/CDFW ("Wildlife Agencies") [sic, sentence fragment].[19]

The agencies should insist that FORA provide a credible and stable projection of required HCP funding.

5. **The HCP's analysis fails to assess the inhibition of development caused by higher fees and taxes.**

At a certain point, the cost of HCP fees will inhibit development. Lower long-term development would not require, and may not be able to fund, the HCP's initial fixed costs for capital and restoration that assume that full buildout will occur. Even though the EPS Sensitivity Analysis shows that higher fees or taxes would be necessary under slower development, the HCP does not consider the possible permanent reduction in Fort Ord development caused by higher development fees or taxes.

6. **The HCP's analysis fails to assess the effect of variation in assumed rates of return**.

The cash-flow analysis is critically dependent on the assumptions that the smaller endowment fund (the FONR Endowment Fund) would earn 4.2% annually and that the larger endowment fund (the Cooperative Endowment Fund) would earn 4.5% annually. (HCP, p. 9-20.) The analysis assumes these rates of return would occur constantly, year after year. Even if similar funds have had average long-term returns of that order of magnitude, there is a considerable risk to the endowment strategy if the rate of return is not constant. For example, even if a fund were able to attain a 4.5% return over a 50-year period, a lower rate of return in the early years would require the accumulation of a much larger endowment – and correspondingly higher fees or taxes – to cover all HCP costs. The HCP fails to assess the sensitivity of its funding strategy to variations in rates of return over time. It is relevant that current long-term interest rates on federal obligations are now below 2%.

7. **The EPS memorandum's scenario for lower overall HCP costs is purely speculative and therefore misleading**.

The EPS Sensitivity Analysis, which is not part of the HCP, evaluates a third scenario, "Delayed Revenues and Reduced Costs." (EPS2, p. 7.) In this scenario, EPS arbitrarily reduces the cost of HCP compliance by 15% and 25% overall, not just in the early years. As with Scenario 2, "Delayed Revenues and Costs," EPS admits that the Delayed Revenues and Reduced Costs scenario is "based on hypothetical cost reduction scenarios." (*Ibid*.)

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[19] FORA staff report, Habitat Conservation Plan Update, Dec. 13, 2019, emphasis added, available at https://fora.org/Board/2019/Packet/121319BrdPacket.pdf.

This scenario is entirely misleading. The HCP claims that its analysis of the cost of HCP compliance is based on a "detailed, custom cost model." (HCP, p. 9-8.) That model, set out in Appendix M, purports to provide realistic cost estimates for every aspect of the HCP implementation from office supplies to feral pig eradication. The cost model is the *only* available analysis of the HCP plan cost that contains any level of detail. The notion that this budget might magically be reduced by 15% or 25% is simply without any foundation.

I. The funding assurances in the event of "early implementation and uncertain timing in CFD tax payments" are inadequate.

The HCP contains a discussion captioned "Funding Assurances for Early Implementation and Uncertain Timing in CFD Special Tax Payments." (HCP, section 9.3.5.1, pp. 9-34 to 9-35.) As discussed above, there are a number of reasons that funding would not match the need for early implementation. These include the need for early spending for start-up, capital, and restoration and the potential that early development would have disproportionately large incidental take or small CFD taxes in light of the HCP's failure to match the incidental take from development to the funding actually provided by that development. The HCP's discussion of funding assurances to address these risks in inadequate for the reasons set out below.

1. The suggestion in HCP that funding may be adequate even if there is early implementation and/or shortfalls in CFD taxes is misleading because it fails to acknowledge that funding must be permanently endowed.

The HCP claims that the existing $15.9 million in seed money would fund *3 years* of the required actions under the HCP for which the JPA would be obligated. (HCP, p. 9-34.) The HCP also claims that "funding is available for management of 3,702 out of 3,895 total non-federal HMA acres, or conservation percentage of 95%, *for 8 years* without collection of additional taxes." (HCP, p. 9-35.) The HCP argues that "[d]uring this time, Permittees' development impacts would be limited to an approximate take percentage of 75% to 90% depending on individual species distribution to maintain stay-ahead provision compliance." (HCP, p. 9-35.)

These claims ignore the need for *permanent* endowment of HCP activities. To get stay-ahead credit, the funding must be available for management and maintenance of the conservation area *through the permit period and post-permit period*, not just for 3 or 8 years.

The necessary funding that is used to determine the maximum allowed take percentage in the stay-ahead determination must be permanently endowed. The HCP states that for an HMA area to be counted in the conservation percentage, "an HMA manager must have sufficient funding to implement the conservation strategy." (HCP, p. 7-16.) The conservation strategy can only be implemented if funding is available in perpetuity, i.e., endowed. If existing funds, e.g., the $15.9 million from FORA's account, are used to fund the first 8 years of HCP activity, those funds could not be used to fund the endowment for HCP activity after those 8 years. The cash flow analysis in HCP Appendix O assumes that the entire endowment will be created in the first

7 years. Any departure from that development pace would require a larger endowment fund, generated by higher fees or taxes.

2. The discussion of fallback funding assurances if there is early implementation and/or shortfalls in CFD taxes is not realistic.

The HCP identifies a number of "courses of action" to ensure that the stay-ahead provision is met even if there is early implementation and/or shortfalls in CFD taxes. (HCP, p. 9-35.) The discussion does not identify realistic options.

First, "[l]imiting implementation of flexible capital costs such as habitat restoration" is not feasible. The timing of these costs is not flexible. As discussed, the stay-ahead provision requires that restoration and seeding occur "as early as possible during the permit term," particularly because without restoration, the stay-ahead differential between the take and conservation percentages must be 20 rather than 5 percentage points. (HCP, p. 7-17.)

Second, the use of volunteers or other inexpensive labor is on its face unrealistic, especially given the prevailing wage rules in Fort Ord.

Third, the "temporary" use of State Parks staff or FORA staff is unrealistic. FORA will sunset in 2020. And State Parks has no authority to loan its resources.

Fourth, grant funding is uncertain.

Fifth, requiring that "Permittees pay for HCP costs on HMAs under their ownership" with some unspecified reimbursement agreement from the Cooperative would require those Permittees with HMA acreage to bankroll the HCP for the other Permittees. The major owners of non-federal HMA land are the County, State Parks, and UC/NRS, and Marina.[20] (HCP, Table 7-3, p. 7-19.) It is unlikely that these entities would be authorized or willing to pay for continued HCP management in the event of a funding shortfall. Furthermore, this provision directly conflicts with the HCP provision that "no Permittee may be compelled to obligate its General Fund to satisfy financial obligations under the HCP." (HCP, p. 9-15.)

Note that the provisions for assuring funding in the event that management or monitoring costs exceed projections also includes these unrealistic suggestions, including the use of volunteer labor or "prison crews," some form of ad hoc temporary increase in CFD tax rates or allocations to HCP endowments, or "other fees or fee appropriations available to the Permittees." (HCP, p. 9-36.) The discussion fails to establish the necessary funding assurances because the proposals are facially unrealistic, unquantified, inconsistent with other HCP provisions (no General Fund obligation), and because there is nothing about the proposals that is committed or enforceable.

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[20] HMA lands under the HMP include: BLM (14,645 acres), State Parks (979 acres), UC/NRS (606 acres), the County (1,849 acres), Marina (236 acres), MPC (206 acres), and MPRPD (19 acres).

3. The proposal that CDFG and USFWS could suspend the permits if the HCP is not a funding assurance.

In its section 9.3.5 discussion of funding assurances, the HCP notes that the Wildlife Agencies could suspend the ITPs in the event that funding constraints preclude meeting the HCP terms. (HCP, section 9.3.5.4, p. 9-36.) Suspension of the ITPs is not a funding assurance; it is an acknowledgement and consequence of the failure to fund the HCP. Once the development has occurred, the take will have occurred, and Permittees will find themselves liable for remedies that may be sought by the wildlife agencies or under the ESA's citizen suit provisions.

J. Permittees could not avoid future funding obligations through withdrawal from the JPA.

The option to withdraw from the JPA would not afford a Permittee protection from ongoing liability for the ITP. Section 3.2 of the JPA Agreement would obligate withdrawing agencies to contribute money to pay debts, liabilities, and obligations incurred by, arising from, or related to actions taken by the JPA while the withdrawing party was a member. The proposed HCP would result in one joint application of a federal ITP and one joint application for a state ITP. (HCP, section 1.9.) Once those two permits are issued, obligations would arise to fund permit activities triggered by development projects, including avoidance and minimization measures, mitigation measures, monitoring measures, program administration measures, reporting measures, and changed circumstances measures. (HCP, section 1.9.)

Because most of these activities are perpetual obligations undertaken and funded from a common set of endowments, it is not clear whether and how the costs could be allocated to permit activities triggered by covered activities approved "before withdrawal" and permit activities triggered by covered activities approved "after withdrawal" activities. It appears that under the JPA itself the withdrawing party would remain obligated to pay a share of the costs of the ongoing permit activities that had been necessitated by covered activities undertaken while the withdrawing member was a party. The obligation to undertake many of those covered activities would be incurred as soon as the Permits are issued because the covered activities are not dependent on particular development project approvals (e.g., management activities within HMA areas, resource management actions – see JPA Agreement, section 1.20.) It is unclear how, under the terms of the JPA, a withdrawing agency's share of that perpetual obligation would be determined or met in the event of withdrawal.

Furthermore, even if the JPA language were clear, the JPA would only govern the mutual obligations of the Permittees to each other. The liability to the Wildlife Agencies and the liability under the ESA's citizen suit provisions that a Permittee assumed by becoming a party to an ITP would remain, and this liability may not be avoided by withdrawal from the JPA.

K. The EIS/EIR's analysis and comparison of the no-action alternative is fundamentally flawed.

The analysis of the no-action alternative in the HCP's EIS/EIR unaccountably assumes that development in the no-action alternative would be limited to 25% of the 5,051 acres of vegetated development areas because of the need for a 3:1 mitigation – even though mitigation land is available in the HMP's Habitat Management Areas.

> While the extent and number of individual ITPs the USFWS and/or CDFW would approve is unknown, for the purpose of this analysis, it is assumed that approximately 25% of the vegetated development areas (1,263 acres) could be developed during the 50-year period and the remaining vegetated development areas (3,788 acres) would be suitable, available, and provide the mitigation lands required by ITPs, if needed.

(EIS/EIR, p. 2-6; *see also* EIS/EIR, p. 4.4-4). The EIS/EIR ignores the fact that development projects can mitigate and conserve off-site and outside the vegetated developable areas, e.g., in the existing areas designated as Habitat Management Areas under the HMP. HMA lands under the HMP are or will be owned by BLM (14,645 acres), State Parks (979 acres), UC/NRS (606 acres), the County (1,849 acres), Marina (236 acres), MPC (206 acres), and MPRPD (19 acres).

There are no reasons in principle that ITPs for individual projects in the no-action alternative could not rely on the same HMP HMA mitigation lands using the same management actions (conservation, restoration, enhancement, maintenance) that would be used in the proposed HCP. That land has been intended since 1997 to be managed as mitigation land to facilitate ITPs for future development.

Denying the use of that land in the event that the proposed base-wide HCP were not adopted would in effect mandate that the previously planned mitigation land set-aside be doubled. Under the EIS/EIR's analysis of the no-action alternative, the HMP management obligations, which are just short of ITP requirements, would presumably continue in the HMP's HMA areas. The purpose of that HMA land set-aside was to mitigate development impacts in the vegetated areas designated for development. However, under the EIS/EIR's analysis of the no-action alternative, the future ITP permittees would *also* be obligated to set aside *additional* mitigation land at a 3:1 mitigation ratio and therefore not to develop 75% of the vegetated land that was previously intended for development.

The EIS/EIR's assumption that the HMP's HMNA land would not be available to mitigate incidental take in development areas under the no-action alternative is inconsistent with past practice. The obligation to manage portions of the HMP's HMA land has already been identified as the basis of an individual ITP, the CDFW ITP for CTS for the East Garrison project. At its January 27, 2015 meeting, the Board of Supervisors considered the grant of a conservation easement deed to the CDFW over a 134-acre parcel in Parker Flats that had been designated as HMA land (Habitat Reserve) in the HMP. The purpose of the easement was to provide mitigation for an ITP for CTS through management activities paid for by the developer on an HMA parcel. Although the agreement provided that the management obligation for this

mitigation land could be assigned in the event a base-wide HCP were adopted, nothing in the agreement precludes the continued management of the mitigation land by the County or its designee as the basis for the CTS ITP if a basewide HCP is not adopted.

The EIS/EIR provides no explanation for its assumption that the full extent of the vegetated land designated for development could not be developed. The assumption that 75% of the vegetated development land could not be developed skews the analysis of impacts from the no-action alternative by understating the permitted extent of development. More problematically, the assumption that 75% of the vegetated development land could not be developed skews the analysis of the *feasibility* of the no-action alternative by implying that this alternative could not meet the project objective to enable the agencies to implement their development plans.

2. The analysis of the no-action alternative unaccountably assumes that no ITPs would be issued for "HMP-required habitat management activities" in the HMA areas.

The EIS/EIR states that, under the no-action alternative, the wildlife agencies would not issue ITPs for "HMP-required habitat management activities within the habitat reserve areas." (EIS/EIR, p. 4.4-4.) The rationale is that there is "limited availability of mitigation land in the area." (Ibid.)

As discussed, this assumption inexplicably rules out using the land the HMP has designated for ITP mitigation since 1997 for that very purpose. While using the HMP's HMA land for *development* might require additional mitigation land, there appears to be no principled or legal reason why the wildlife agencies could not count the enhancement, restoration, conservation, and maintenance of the HMP's HMA land as mitigation for development in the areas designated for development, as was always intended – without the enhancement, restoration, conservation, and maintenance of some *additional* "mitigation land in the area." Again, it appears that the EIS/EIR is somehow putting its thumb on the scale by doubling the required conservation land set-aside in the event that the agencies reject the proposed HCP.

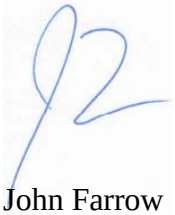
In the event that the a project-specific ITP for development of a parcel in the vegetated development area relies on enhancement, restoration, conservation, and maintenance of some mitigation land in the HMP's HMA, there appears to be no reason why that ITP would require *additional* mitigation land just to mitigate incidental take on the mitigation land. This would amount to an infinite regress of mitigation land set-asides.

Most perplexing is the Catch-22 suggestion that the wildlife agencies would not permit the owners of HMA land to continue their "*HMP-required* habitat management activities within the habitat reserve areas." (EIS/EIR, p. 4.4-4, emphasis added.) The implications of this statement are that (1) there are a set of mandatory HMP-required habitat management activities; (2) those activities themselves require an ITP – even if they are not being performed to support an ITP for development elsewhere; and (3) there is no way that the owners of these lands can obtain that ITP because that would require set-aside of additional mitigation land that is not

available. In effect the EIS/EIR implies that the owners of HMA land would inevitably have to violate the ESA and CESA unless the proposed HCP is adopted. This cannot be true.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.



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