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February 10, 2020

**By E-mail**
Board of Directors
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Re: Agenda Item 8d, contract amendment for completion of HCP EIR/EIS

Dear Members of the Board:

In its most recent meeting, the Habitat Working Group (HWG) developed a consensus that the initially proposed Habitat Conservation Plan should not be approved and that the parties should instead develop and evaluate alternatives, including a scaled-back HCP and the no-project alternative. LandWatch Monterey County ("LandWatch") supports this approach

However, the HWG also proposes that the agencies complete and certify the EIR/EIS for the initially proposed HCP, but without adopting an HCP at the time of certification. One rationale suggested for this approach was to establish a higher impact "baseline" for some eventual scaled-back HCP. However, as explained below, certifying an EIR without approving a project does not establish a new baseline. Another suggested rationale was to salvage the sunk costs already invested in the HCP's environmental review. However, that rationale does not justify sinking more costs into review of the wrong project. Thus, because the agencies are not now planning to adopt the HCP as described in the EIR/EIS, they should cease spending on the environmental document until they develop a revised HCP.

**Accordingly, LandWatch asks that Board not approve the proposed $224,252 contract amendment with Denise Duffy & Associates (DDA) to complete the EIR/EIS for an HCP that the agencies do not now plan to adopt**. In addition, the Board should ask ICF to revise its proposed $68,470 contract amendment to eliminate tasks associated with completion of the current EIR/EIS and to include only tasks associated with supporting the Habitat Working Group.

**1. Certifying the HCP's EIR/EIS now but without approving the HCP will not establish the "baseline" for environmental review of a future HCP.**

Where an agency has certified an EIR and approved a specific project, it may sometimes take advantage of CEQA's provision for a "subsequent EIR" (SEIR) in which the scope of review is limited to the effects of the changes to the project. (CEQA, § 21166.) In effect, the "baseline" for the SEIR would not be existing environmental conditions, as is typical for an EIR, but the conditions that would have obtained if the prior project were implemented. However, using a "prior project" baseline instead of the "existing conditions" baseline would not be an option for a future HCP if the agencies do not actually adopt the proposed HCP when they certify the EIR/EIS. This is because CEQA's section 21166 SEIR provisions do not come into play unless the agency has approved the prior project and the time period for challenging the initial EIR under CEQA section 21177 has run.[1] Thus, completing the existing EIR/EIS without approving the HCP it describes will not allow the agencies to proceed later with an SEIR.

Furthermore, when an agency makes changes to a plan, unlike when it approves changes to a previously approved development project, the revised plan must be evaluated with an "existing conditions" baseline, not with a "prior project" baseline.[2]

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[1] *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1544 holds: "'[S]ection 21166 comes into play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired (§ 21167, subd. (c)), and the question is whether circumstances have *changed* enough to justify *repeating* a substantial portion of the process.'"

And *Temecula Band of Luiseno Mission Indians v. Rancho California Water Dist.* (1996) 43 Cal.App.4th 425, 437 holds: "'[i]f the statute of limitations has run on the previous approval, any challenge to the determination to change the project is limited to the legality of the agency's decision about whether to require a subsequent or supplemental EIR, or subsequent negative declaration, and the underlying EIR or negative declaration may not be attacked. (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 1993) § 23.26, p. 942).'"

[2] *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 351 [error to conclude there would be no impacts simply because new plan permits less development than old plan]; *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 190–191 [comparison of what was possible under old plan and amended plan is "illusory"]; *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 707 [error to use prior plan as baseline for review of new plan; baseline for revised plan must be existing conditions]; *City of Carmel–by–the–Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246; ; *St. Vincent's School for Boys, Catholic Charities CYO v. City of San Rafael* (2008) 161 Cal.App.4th 989, 1005–1006.

CEQA allows agencies to use the "approved project" baseline only if the previous EIR was for a specific development project, typically where development rights had vested.[3] The HCP EIR/EIS is a "plan" or "program" EIR, not a "project" EIR. So even if the agencies adopted the proposed HCP now, they would still need to use an existing conditions baseline if they later approve a revised HCP.

**2. If the agencies change the HCP, they will need to revise the current EIR/EIS, so there is no point in completing it now.**

An EIR must accurately and consistently describe the project under review.[4] If the agencies decide to adopt an HCP that differs from the currently proposed HCP, they will likely need to revise the project description and recirculate the revised EIR/EIS for public comments.[5] There is no point in completing responses to comments on the current HCP if the agencies will ultimately have to respond to a different set of comments about a different HCP.

Even if the agencies decide to adopt the currently proposed HCP with only minor modifications that do not trigger recirculation, it will still be necessary to reflect those modifications in the EIR/EIS before certifying it. In short, there is no point in completing a final EIR/EIS for the currently proposed HCP.

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[3] *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1477 distinguishes *Christward Ministry, City of Carmel-by-the-Sea, and Environmental Planning and Information Center*: "In none of the cited cases had the projects in question undergone an earlier, final CEQA review. None involved permits that had already been issued or rights that had vested by the time the board made its decision. These cases do not involve the modification of an earlier permit which had become final, and on which CEQA review had been completed. In our case, the actual physical environment includes that which Whitbread has a legal right to build under permits which have already been issued and on which construction has already begun." (*See also, Temecula Band of Luiseno Mission Indians v. Rancho California Water Dist.* (1996) 43 Cal.App.4th 425, 437 [approving 21166 review for previously approved water supply project, citing with approval *Benton's* discussion of the limited circumstances in which 21166 applies]; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 543 [allowing 21166 "with-project" baseline only for the parcel SH2PC on which development of a planned community had already been approved after a project-level EIR, citing *Benton* and *Temecula*].

[4] *Washoe Meadows Community v. Department of Parks & Recreation* (2017) 17 Cal.App.5th 277 [setting aside EIR for failure to identify the project actually proposed, even though the final EIR identified that project]; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192–193 [project description must be accurate and stable].

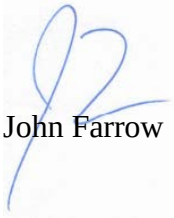
[5] 14 CCR §15088.5(a) [recirculation required for significant new information].

Furthermore, the agencies need not complete the EIR/EIS now to reuse portions of it later. Portions of the draft EIR/EIS might be revised and reused for a revised HCP, but that material already exists. The new material for the final EIR for which the consultants now seek contract amendments – responses to comments and revisions to the EIR/EIS – will have no utility if the agencies materially revise the HCP itself. And even if the agencies eventually decide not to make material changes to the HCP, there is no need to incur the cost to complete the EIR/EIS until that decision is made.

LandWatch asks that the FORA Board not commit almost $300,000 to completion of an EIR/EIS for an HCP that the Habitat Working Group is now revising. Committing more resources to the environmental review of a plan that has not yet been defined is premature and wasteful.

Yours sincerely,

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



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