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June 10, 2020

By E-mail
Board of Directors
Fort Ord Reuse Authority
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Re: **Certification of FEIR for the Fort Ord Multi-Species Habitat Conservation Plan**

Dear Members of the Board:

The FORA Board should not certify the Final EIR for the Fort Ord Multi-Species Habitat Conservation Plan. FORA cannot certify a valid EIR because it is not the lead agency. A lead agency must have the responsibility to carry out or approve the HCP, but FORA does not have either responsibility**.**

Furthermore, the EIS/EIR is inadequate because it was prepared for an HCP that will not be adopted by any agency. It is predicated on development assumptions that the land use agencies have now repudiated, and the EIS/EIR fails adequately to describe or assess the last-minute Alternative 4.

The EIS/EIR is also inadequate because it fails to propose enforceable and feasible mitigation and avoidance measures. As the land use agencies have concluded, and the FEIR admits, "the cost of the Draft HCP is too high and not feasible." (FEIR, p. 5-1.) The FEIR also fails to respond adequately to LandWatch's comments challenging the HCP's funding assumptions. Nor does the FEIR provide any evidence that Alternative 4 can be funded or that there are or can be any enforceable measures to ensure this. Finally, the EIR fails adequately to assess water supply impacts.

FORA need not take the risk of certifying this flawed FEIR because FORA does not intend to adopt an HCP. As LAFCO has explained, approving this EIR will add one more potential lawsuit to the litigation FORA leaves in its wake. The duty or interest to defend this lawsuit would fall on LAFCO and/or FORA's member agencies and would further deplete the resources FORA might otherwise pass on to benefit its member agencies.

A. FORA cannot certify a valid EIR because it is not the lead agency. It has no responsibility to carry out or approve the HCP.

FORA should not act to certify the HCP EIR because it is not the lead agency. "CEQA defines a lead agency as 'the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.' (Pub. Resources Code, § 21067.)" (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 905.) The draft EIS/EIR describes the project as follows:

> The Proposed Action is the issuance of ITPs by the USFWS and CDFW, and approval and implementation of the Draft Fort Ord HCP by the Permittees. The project addressed in the Draft Fort Ord HCP is the reuse and development of the former Fort Ord military base as presented in the HMP (Section 7 requirement of the Biological and Conference Opinion [USFWS, 1997]), Reuse Plan (EMC and EDAW, 1997), and subsequent updates.

(DEIS/EIR, p. 2-7.) FORA will have no responsibility for *carrying out* this project because it will no longer exist after June 30, 2020. Furthermore, FORA will have no responsibility for *approving* this project because FORA does not intend to approve *any* HCP project before it sunsets. Indeed, there is no longer any agreed plan for an HCP.

The project described in the October 2019 draft EIS/EIR is the September 2019 Draft HCP. When the land use agencies realized that the September 2019 Draft HCP was infeasible and unrealistic, a Habitat Working Group ("HWG") was formed in January 2020 to consider alternatives to that HCP. The HWG met from January to March 2020 and reported back to the FORA Board that the HCP reviewed in the draft EIS/EIR is neither realistic nor feasible because it does not reflect the land use agencies' Fort Ord development projections; because the agencies that were supposed to form a JPA to implement the HCP will not do so; and because these agencies want FORA to return to them the CFD taxes funds that FORA had sequestered to implement the HCP. The HWG's conclusions and recommendations were as follows:

> During its 11 meetings and culminating in its last meeting on March 27, 2020, the HWG determined that:
>
> 1. The Draft HCP as currently drafted does not reflect recent development projections, and as such, should no longer be proposed as a component of the Federal and State ITP applications.
>
> 2. If the Permittees desired to move forward with an ITP application at the Federal and/or State level, either individually or in some combination of the jurisdictions, the HCP should be revised to reflect a reduced and/or phased development approach, and not full build-out of the former Fort Ord as currently drafted. A reduced and/or phased development approach is anticipated to reduce

> total costs of implementing an HCP which may result in a feasible, realistic funding scenario.
>
> 3. The jurisdictions are not interested in forming a JPA at this time and also do not think it would be feasible to do so before FORA's sunset in three months, particularly in light of the global pandemic we are all experiencing.
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> 4. The jurisdictions would like the CFD fees to be individually allocated to the jurisdictions to carry out habitat management requirements under the HMP. The HWG recommended an allocation formula and discussed various types of agreements that could be used to transfer the funds. The Board has since discussed and taken initial steps to approve an allocation formula for the CFD funds.
>
> 5. The HWG discussed that the jurisdictions could receive these funds and then still form a JPA and continue collective habitat management discussions and permitting options later, if the jurisdictions desired to do so.
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> 6. The jurisdictions are aware that they are required to implement the HMP and intend to do so with their allocated funds.
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> 7. The HWG felt that the objective of the HWG Committee (to continue discussions and determine path forward) had been accomplished and as a result, there will be no more HWG meetings. Concurrent with the HWG meetings, the Board, as CEQA Lead Agency, considered options to complete the EIR process. The HWG and Board discussed the potential that the Final EIR could be used to support future permitting efforts. On March 12, 2020, the Board voted to complete the EIR. Because the Draft HCP as currently proposed is no longer supported and in order to reduce the risk of litigation, the Board is considering not approving the proposed project (i.e., the Draft HCP).

(FORA Board Report, April 17, 2020, Agenda Number 6e, Draft Federal Wildlife Agency Notification Letter.)

The HWG advised the FORA Board that there is a "[l]ack of collective interest in forming a habitat related Joint Powers Authority ('JPA') prior to the FORA June 30, 2020 sunset." (FORA Board Report, April 17, 2020, Agenda Number 6e.) Yet the draft HCP is critically dependent on formation of a JPA to implement the HCP, whose members would include FORA and the twelve ITP permittee jurisdictions. (Draft HCP, section 1.9.1.) The draft HCP proposes a single non-severable federal ITP and a single non-severable state ITP covering all 12 permittees. (Id.) The draft HCP proposes that these permittees *and* FORA, as the members of the JPA, would act collectively to implement the HCP, which would provide ITP coverage for the full buildout of the Fort Ord Reuse Plan, attaining certain scale economies.

As the HWG recommended, FORA will now distribute to the land use jurisdictions the $17 million in sequestered CFD taxes that the draft HCP had assumed would be available to fund the HCP. There is no longer any assurance that this $17 million will be used to implement collective action on the draft HCP, or, indeed, on any joint HCP involving the 12 permittees under a single federal ITP and a single state ITP.

FORA will go out of existence in less than a month and there is no longer any expectation that the HCP it developed will ever be approved. Thus, FORA cannot act as lead agency because it can neither implement nor even approve the project described in the draft EIS/EIR. And, in fact, FORA has no intention of approving any HCP before it sunsets.

No future agency can rely on an EIR certified by FORA because an EIR must reflect the lead agency's independent judgment and analysis. (14 CCR, § 15090.) Any agency that intends to adopt an HCP for the Fort Ord area in the future must act independently as the lead agency to certify the necessary EIR.

FORA has not explained *why* it proposes to certify an EIR for a project it will not and cannot approve or carry out. As LandWatch objected in its February 10, 2020 letter, certifying the existing EIR/EIS without approving the HCP will *not* allow the agencies to proceed later with a subsequent EIR under CEQA section 21166 or to take advantage of the "prior project" baseline provisions applicable when an agency has already approved a project. Any agency acting to approve an HCP in the future will have to certify its own EIR for that HCP, not prepare an SEIR or addendum to this EIR.

FORA's counsel, Holland & Knight, has suggested that the lead agency may change over the course of project approval, citing *Gentry v. Murietta* (1995) 36 Cal.App.4th 1359, 1383. However in *Gentry*, after it became apparent that the City rather than the County would have to act approve the project, the County "deferred further consideration of the Project to the City" a*nd did not certify an environmental document for it.* (*Id.* at 1369.) Thus, the City, as the agency to approve the project, was required to act as a lead agency to certify the environmental document. *Gentry* does not consider or uphold the validity of a CEQA document certified by an agency that is not the lead agency. Here, if some other entity decides in the future to approve an HCP, it will have to act as a lead agency to certify the EIR. It may not simply act as a responsible agency.

In sum, there is simply no point in certifying the EIR without also approving a project. Because FORA cannot and will not approve an HCP, it should not vote on certification.

B. The EIR fails to provide an adequate description of any HCP project that is likely to be approved.

CEQA requires that a draft EIR provide a stable and complete project description with a level of detail adequate to enable analysis of environmental impacts. (14 CCR, § 15124.) The project described in the Draft EIS/EIR is the September 2019 Draft HCP, developed over a twenty year period and set out in a 600+ page document with 17 appendices. The September 2019 Draft HCP provides a project description that is required to assess impacts, including

- the expected location and intensity of future development, based on full buildout of the Fort Ord Reuse Plan;
- the expected location and intensity of other activities covered by the ITPs, based on full buildout;
- the expected levels of habitat impact and take, based on full buildout in specified locations;
- conservation strategies, based on full buildout and on the use of BLM land (Fort Ord National Monument) for mitigation;
- a plan for monitoring and adaptive management, based on full buildout;
- an implementation plan for the HCP by a JPA that includes FORA and twelve permittees subject to a single non-severable federal ITP and a single non-severable state ITP;
- an analysis of costs and funding, based on a detailed cost model and endowment funding analysis, that assumed (1) the rapid and complete buildout of the Fort Ord Reuse Plan, (2) continued collection of existing CFD taxes or equivalent amounts, and (3) attainment of scale economies from complete buildout and economies from use of BLM land for mitigation.

Consistent with the draft EIS/EIR, the proposed CEQA findings describe the project under CEQA review as "approval and implementation of the Draft Fort Ord HCP." However, neither FORA nor any other agency intends to approve the September 2019 Draft HCP for two reasons. First, the land use jurisdictions have concluded and advised FORA that the September 2019 Draft HCP was based on unrealistic development projections and was not financially feasible. Second, CDFW advised FORA that an ITP could not rely on mitigation using BLM lands, as is proposed in the September 2019 Draft HCP.

So after over twenty years of work to develop the September 2019 Draft HCP, the EIR consultants cobbled together a sketch of a new alternative, Alternative 4, which was

not discussed in the draft EIS/EIR. The description of Alternative 4 is materially incomplete as a basis for disclosing and mitigating project impacts, and this violates CEQA. (14 CCR, § 15126.6(d).) For example, the FEIR purports to quantify a reduced-scale projection of development and take by jurisdiction and total acreage, but it does not map these areas to be developed or identify the habitat and species present in the reduced-scale development areas. (FEIR, Table 5-1.)

The FEIR states that the future development for Alternative 4 will be "consistent with the development assumptions contained in the relevant land use plans of the affected land use jurisdictions." (FEIR, p. 5-2.) However, those land use plans, which FORA was required to find consistent with the Fort Ord Reuse Plan, all assume the complete buildout of the Fort Ord Reuse Plan. Indeed, the intensity and scale of future development described in the September 2019 Draft HCP are *also* consistent with these land use plans. So mere consistency with land use plans does not inform the public where the Alternative 4 development would take place, what type of development it would include, or when it would occur.

The FEIR states that future development under Alternative 4 would "likely" be "concentrated in the 4,241 acres of developed/disturbed areas to keep within the reduced level of incidental take," instead of the 5,051 acres of natural lands that contain habitat and species; but there is no assurance of this. (FEIR, p. 5-2.) This conclusion is based on the assumption that the 3:1 mitigation ratio would be attained only by using the non-Federal areas, consisting of the 3,304 acres of habitat management areas and the 5,051 acres of natural lands now designated as development areas that are within the Fort Ord Reuse Plan area but outside the BLM's FONM. Despite its reference to a "take 'limit' or 'cap'," the EIR does not describe an enforceable measure that would prevent a jurisdiction from permitting, or even concentrating, its future development in the 5,051 acres of natural lands. (FEIR, p. 5-1.) Indeed, it would be inconsistent with the land use jurisdictions' general plans to assume that they would *not* permit development in the 5,051 acres of natural lands that they have designated for development. Furthermore, even if the 3:1 mitigation ratio must be met, mitigation land may in fact be available in the BLM FONM areas or in other off-site areas, and, if so, this would permit development of all of the natural areas. It would also have potential impacts to off-site mitigation lands, which have not been disclosed because the EIR assumes without evidence that mitigation would not occur off-site.

In sum, the description of Alternative 4 does not provide the most basic information about the proposed alternative that is required for impact assessment: where it would be located and what resources it would affect.

The FEIR states that there "may be a reduction in the required AMMs and MMs" for Alternative 4, but it does not identify those reductions. (FEIR, p. 5-9.) The project description and the FEIR are inadequate because the FEIR fails to specify the "reduced" avoidance and mitigation measures that would be included in the Alternative 4 HCP project or the "reduced" mitigation measures from the EIS/EIR that would be required for

Alternative 4. The public has no way to determine what AMMs or MMs would be included and enforceable as part of the project or its CEQA mitigation.

The FEIR's cursory and qualitative discussion of the impacts from Alternative 4 (FEIR, pp. 5-9 to 5-13) is not adequate to support approval of Alternative 4 because it is not specific enough to enable informed decision making. (*Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 404.) For example, without knowing where the development would occur, what species and habitat resources it would affect, and what mitigation and avoidance measures would actually be imposed, there can be no adequate assessment of impacts or specification of mitigation. Furthermore, as discussed below, the EIR fails to demonstrate the feasibility of the mitigation and avoidance measures proposed in the September 2019 Draft HCP because there is insufficient evidence that the agencies can fund the needed endowment. *There is even less evidence that the agencies can fund whatever endowment would be needed for Alternative 4* because there has been no quantification of its cost and no projection of the available funds that might be raised through taxes or impact fees.

While CEQA may permit an agency to approve an alternative to the project proposed, it does not permit an agency to approve a project for which the EIR fails to provide an adequate description, impact analysis, or specification of mitigation. This EIR would not provide a sufficient basis to approve Alternative 4.

Furthermore, CEQA does not contemplate that an agency approve an EIR without the intention to approve a specific project, whether that project be the project proposed in the draft EIR or an alternative to it. Thus, CEQA requires that findings be made with reference to the impacts and mitigation for a specific project. (14 CCR, §§ 15091, 15092.) Here, there is no intention to adopt the September 2019 Draft HCP, even though that is the project that is identified in the proposed findings. The last-minute Alternative 4, disclosed to the public only ten days before FORA's hearing to certify the EIR, is neither adequately described nor evaluated in the EIR, and the proposed findings are silent as to Alternative 4.

If FORA or any other agency does intend that the EIR support future approval of Alternative 4 in lieu of the September 2019 Draft HCP, it must revise and recirculate the draft EIS/EIR to provide an adequate description and analysis of Alternative 4. Recirculation is required because significant new information has disclosed that the draft EIS/EIR was so inadequate that it denied the public opportunity for meaningful comment. 14 CCR, § 15088.5(a)(4).) Furthermore, the likely infeasibility of funding Alternative 4 or concentrating development under Alternative 4 in the already disturbed lands will result in new or more substantial significant impacts, which also mandates recirculation. (14 CCR, § 15088.5(a)(1), (2).)

C. Avoidance and mitigation measures for the September 2019 Draft HCP are not enforceable or feasible because there are no programs to fund them and because there is no evidence that they can be funded at the necessary level.

LandWatch reiterates its objections that the EIS/EIR does not identify enforceable, feasible mitigation and avoidance measures because there are no programs to fund them and because there is no evidence that they can be funded at the necessary level. *The FEIR admits that the very jurisdictions that would be responsible for funding the project described in the September 2019 Draft HCP have stated that "the cost of the Draft HCP is too high and not feasible."* (FEIR, p. 5-1.)

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. The rapid accumulation of the endowment in the next eight years 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. A separate financial analysis prepared by the HCP consultant EPS in November demonstrates that if buildout proceeds at a mere 4.3 times the historic rate, the endowment would have to be $43 million, requiring higher fees and taxes, or recourse to the agencies' general funds. Contradicting both the HCP and the November EPS memo, a December 13, 2019 FORA staff report states that the endowment fund "is expected to cost $48 to $66 million."

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 because investment returns on slower accumulation of fees and taxes would be substantially lower. 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 lower its investment returns, requiring higher fees or 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%.

In short, the actual endowment funding obligation is unknown. However, the analysis in the EIS/EIR makes unrealistic and aggressive assumptions, which the land use agencies have now repudiated, in order to minimize this obligation.

In response to LandWatch's objections that the EIR's reliance on rapid and complete buildout is unsupported and unsupportable, the Final EIR simply reiterates the

assumptions made in the EIR and references its appended "Habitat Conservation Plan Endowment Case Flow Strategy," the very document that LandWatch's comments challenge and that the land use agencies have found unrealistic. (FEIR, p. 3-3.)

The FEIR continues to assume that over $16 million of CFD taxes it previously set aside to implement the HCP will remain available, *even though FORA will now distribute this money to the land use agencies, who need not use it for this purpose or act cooperatively at all*. (FEIR, pp. 3-4, 3-5, 3-6.) For example, LandWatch objected that there is no evidence that funding can be ramped up fast enough to meet initial fixed costs, to accumulate an endowment that will earn needed returns, and to implement the stay-ahead provision. The FEIR cites HCP section 9.3.5.1 to argue that funding is available for the first eight years without collecting additional taxes. (FEIR, p. 3-5.) However, *Section 9.3.5.1 assumes that this funding will consist of the $16 million set aside by FORA, which FORA will now distribute to the land use agencies.*

The EIR assumes that revenues obtained from fees or taxes at the level of the existing CFD taxes would be sufficient to implement the HCP. The FEIR fails to address LandWatch's detailed comments seeking evidence that funding could be adequate to accumulate the needed endowment in time to earn the projected returns and to implement the stay-ahead provisions without substantially increasing the required fees or taxes, potentially to a level that would preclude development.

LandWatch objected that the cost analysis and financing projections are predicated on economies of scale and the assumption of rapid buildout of the entire Base Reuse Plan. The land use agencies have made it clear that this assumption is invalid. This is significant new information that requires revision and recirculation of the EIR.

The cost analysis also assumes scale economies from a single, coordinated HCP and the use of the Federal BLM FONM land for mitigation. The Habitat Working Group, the land use jurisdictions, and CDFW have made it clear that these assumptions are invalid. This is significant new information that requires revision and recirculation of the EIR.

The HCP and the EIS/EIR do not disclose or specify an enforceable solution to the unresolved problem 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*. The FEIR addresses this objection by simply assuming these developers will voluntarily make payments and that the wildlife agencies will somehow address the adequacy of funding in the future. (FEIR, p. 3-6.) This is not the enforceable, certain mitigation that CEQA requires.

Even if this funding problem is resolved, there are others. If the agencies elect to use impact fees instead of CFD taxes 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. The FEIR does not address LandWatch's comment that there is no assurance that the nexus and proportionality mismatch can be solved..

Nor is it clear that the proposed funding through incremental assessment of development fees or taxes would be viable. 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. The FEIR does not address this comment. And, again, there is no longer any assurance that the $16 million set aside by FORA would be available for startup costs.

Finally, the HCP and the EIS/EIR do 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 to rely on volunteers or "prison crews" to manage HCP lands realistic. Like the financial assumptions, these operational proposals reveal magical thinking.

The FEIR excuses this magical thinking by claiming that the LandWatch is confusing baseline conditions with mitigation measures, citing *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1037-1038. But the assumption of the complete and rapid buildout of the Base Reuse Plan within eight years is neither a baseline condition nor a mitigation measure. It is a critical assumption *about the future* on which the feasibility of mitigation depends. Rapid and complete buildout of the Base Reuse Plan cannot be assumed as a predicate for a mitigation measure because it depends on third parties and economic conditions and cannot be imposed by FORA or by any agency as an enforceable condition of the HCP. If the HCP is adopted, the ITP is issued, and the development does not occur as projected, the needed funding will not be

adequate, and the HCP implementation will fail. The HCP does not provide assurances that can avoid this outcome with any reasonable certainty.

Nor can the assumption that BLM land be used for mitigation be an enforceable condition. Nor can the assumption that all land use agencies participate in a single non-severable ITP be enforceable.

Thus, unlike the situation in *Environmental Council of Sacramento*, there is not "ample evidence" to support the critical assumptions that mitigation will be feasible under future conditions. To the contrary, here, the very agencies that would have to implement the HCP have already said that there will not be a rapid and complete buildout of the Base Reuse Plan and that the proposed "mitigation and preservation . . . are not certain," and the FEIR admits this. (FEIR, p. 5-1.) CDFW has indicated that it will not approve reliance on BLM land for mitigation. Thus, this EIR is akin to the EIR in *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261, which was invalid because the agency admitted that there was uncertainty whether the mitigation would be funded or implemented.

The FEIR claims that the mitigation in the draft EIS/EIR and the AMMs and MM in the HCP are adequately specified and would be enforceable through permit conditions, conditions of approval, adoption of implementing ordinances and policies, and adoption of a Mitigation Monitoring and Reporting Program. (FEIR, p. 3-10.) LandWatch's point in objecting to the analysis of funding assumptions is not that an agency would not implement mitigation in the EIS/EIR and the MMs and AMMs in the HCP *if it had the money to do so.* LandWatch's point is that neither the HCP nor the EIS/EIR demonstrate that there is any realistic expectation that there could be sufficient funding to implement the HCP as proposed. The mitigation measures in the EIS/EIR compel certain mitigation actions, but they do not specify or compel an assured funding mechanism. The purported funding mechanisms are discussed in the HCP document itself, but those mechanisms are not assured or enforceable, there is no evidence that they will be sufficient, and there is ample evidence that they will not be sufficient.

LandWatch's objections to the HCP's discussion of funding have simply not been addressed. The necessary fees and taxes are not in place and there is no specified mechanism that would compel the permittees to fund the HCP. Half of the needed revenues depend on voluntary payments from entitled developers, and there is no identified solution to this problem. The $16 million dollar reserve will no longer be available, and there is no identified solution to this problem. There is no evidence that the needed endowment can be collected, and there is substantial evidence to the contrary. There is no analysis supporting the contention that the stay-ahead provision could be met, despite LandWatch's request for this analysis and its identification of the specific factors that preclude meeting the stay-ahead condition. The FEIR's failure to provide reasoned good faith responses to LandWatch's comments on the validity of the funding assumptions violates CEQA. (14 CCR, § 15088.)

In light of the evidence of the infeasibility of funding the September 2019 Draft HCP, the specifics of enforceable mitigation measures, i.e., identification of specific funding mechanisms and ordinances, should not have been deferred.

In sum, neither FORA nor any agency seeking to approve an HCP in the future could make the requisite findings that mitigation is sufficient, because there is no committed, enforceable funding mechanism and no evidence that it is feasible.

D. Avoidance and mitigation measures for Alternative 4 are not enforceable or feasible because there are no programs to fund them and because there is no evidence that they can be funded at the necessary level.

The cost to implement Alternative 4 and the feasibility of generating needed revenues would vary from the HCP described in the September 2019 Draft HCP due to a number of factors. For example, unit costs would increase due to the reduction of economies of scale. Unit mitigation and avoidance costs may increase due to the inability to attain synergies in mitigation efforts through the use of BLM land. The relative size of the needed endowment as a percentage of total costs would increase, and the future investment returns on the endowment would decrease, because the entire endowment would not be collected in the next eight years under the realitic development scenario. The proportion of development generating relatively higher fees and taxes (e.g., residential development) may change under the Alternative 4 land use assumptions, which, in any event, are not identified in the EIS/EIR.

LandWatch's comments requested an analysis of the cost and funding effects of reduced and phased development and pointed out that the existing evidence indicates that the HCP would not be feasible with reduced or phased development because the endowment costs would be substantially increased. Although LandWatch requested an analysis of the cost and funding effects of reduced or phased development and an assessment of the feasibility of the avoidance and mitigation measures under such a scenario, the FEIR does not provide this information. This violates CEQA. (14 CCR, § 15088.)

Instead of evaluating the feasibility of the HCP for realistic development projections and in light of the uncertainty of BLM land for mitigation, the FEIR simply reiterates the cost and funding analysis for the full-scale rapid buildout of the entire Base Reuse Plan in the Draft HCP. For example, in responding to LandWatch's comments that the endowment funding estimates have varied from $9 million to $66 million, the FEIR defends the "detailed estimates of costs" in the Draft HCP. (FEIR, p. 4-142.) However, the EIS/EIR does not provide any analysis of the cost or feasibility to implement the mitigation and avoidance measures that would be required under Alternative 4. The information is not in the draft EIS/EIR because Alternative 4 was neither defined nor assessed there.

Nor does the EPS Sensitivity Analysis, which purports to evaluate reduced scale or phased development scenarios, provide any evidence that Alternative 4 can be funded. The FEIR states that the EPS Sensitivity Analysis "should not be construed as offering an alternative estimate of endowment requirements, as the sensitivity analysis was based on hypothetical cost and revenue scenarios." (FEIR, p. 4-143; see also 4-516 [EPS Sensitivity Analysis not intended to provide a more refined analysis of costs and its cost reduction assumptions are hypothetical].)

In sum, neither FORA nor any agency seeking to approve an HCP in the future for Alternative 4 could make the requisite findings that mitigation is sufficient, because there is no committed, enforceable funding mechanism and no evidence that it is feasible.

E. The FEIR fails to address the water supply impacts of the HCP.

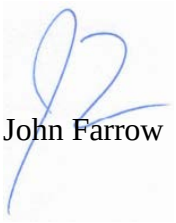
The FEIR fails to respond adequately to LandWatch's comments that the implementation of the HCP would result in significant impact to groundwater resources and would make a considerable contribution to significant cumulative impacts.

The FEIR defends its lack of analysis by claiming that the level and intensity of future development are speculative. Absurd. The EIS/EIR's analysis of the adequacy of avoidance and mitigation measures is premised on specific assumptions about future development based on existing general plans and the Base Reuse Plan. The same development assumptions determine water supply impacts. The EIR is inadequate because it failed adequately to evaluate the impacts of providing water for future development that would be enabled by the HCP as well as the water needed to implement mitigation measures for the HCP itself.

The FEIR also purports to rely on the water supply impact analysis in previous environmental documents. (*See, e.g.*, FEIR, p. 4-505.) LandWatch provided detailed comment explaining that these prior analyses are no longer adequate. LandWatch identified significant new information that requires a subsequent environmental review under CEQA section 21166, including changes to the Base Reuse Plan itself, changes in circumstances, and new information. This significant new information includes comments by hydrologist Timothy Parker. The FEIR simply ignores this information. The failure to provide a subsequent review in light of the significant new information and the failure to respond to LandWatch's comments violates CEQA.

Yours sincerely,

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



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