

Special Study: Implementation of the Santa Clara Valley Habitat Plan

Prepared for the
Board of
Supervisors of
the County of
Santa Clara by
the Management
Audit Division

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September 8, 2011

County of Santa Clara

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September 8, 2011

Supervisor Ken Yeager, Chair
Supervisor Dave Cortese, Member
Board of Supervisors Finance and Government Operations Committee
70 West Hedding Street
San Jose, CA 95110

Dear Supervisors Yeager and Cortese:

Pursuant to the direction of the Board of Supervisors, we have completed a *Special Study of the Implementation of the Santa Clara Valley Habitat Plan*. As you know, a draft version of the \$938 million, 50-year plan was issued for public comment in December 2010. Based on comments received, a proposal to revise and downsize the plan to \$660 million was issued on August 31, 2011, the same day that a draft version of this report was issued to the County Executive's Office for their review and comment.

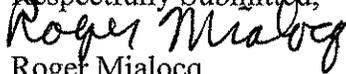
This report provides 19 recommendations intended to safeguard the County's interests in the event that a final plan is implemented. They are summarized here as follows:

- Ensuring that the County does not absorb other agencies' costs for development of the plan and that such costs are appropriately reconciled;
- Ensuring that, if the plan is implemented, the County neither subsidizes nor inappropriately benefits from its provision of services to the plan;
- Ensuring that, if the plan is implemented, that funds restricted by the County Charter for County Park purposes are not used as in lieu payment for unrelated County Roads and Airport Department costs;
- Ensuring that the County's permanent commitment of at least 18,000 acres of Park property to the plan's Reserve System is consistent with County Park purposes, and reasonable in light of the overall benefits the County will receive from the plan;
- Ensuring that any restrictive easements placed on those acres will be consistent with County Park purposes and goals;

- Ensuring that since voter-approved Parks funds are the sole identified source of payment for the County's long-term financial obligations to the plan, and that source could "sunset" decades prior to the fulfillment of the County's required commitments, that potential alternative funding sources are identified in advance;
- Ensuring that the County's financial and land commitments to the plan are not "open ended" and subject to unlimited expansion;
- Ensuring that County funds are maximized by setting land-acquisition goals in the final plan in terms of dollars spent, rather than acres purchased;
- Ensuring that the plan's final governance structure, as defined in the plan's Joint Powers Agreement, is adequate to sufficiently represent the County's interests in the plan;
- Ensuring that costs that were to be borne by the Santa Clara Valley Habitat Agency in the draft plan do not become County expenses in the final plan;
- Ensuring that the final plan budget contains adequate resources to reimburse the County for public safety services, such as Sheriff's Deputies, Park Rangers and firefighters, for their provision of services to the plan.

Most of these recommendations relate to changes Auditors believe the County should ensure are incorporated into a final plan and related legal agreements, if a final plan is developed. Doing so would provide greater security over County assets and interests if the plan is implemented. We would like to thank the Office of the County Executive, the Department of Parks and Recreation, the Department of Planning and Development, the Department of Roads and Airports, the Office of the County Counsel, and the Santa Clara Valley Habitat Plan Project Manager for their assistance with this report.

Respectfully Submitted,



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Board of Supervisors Management Audit Manager

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Introduction

This review of the Public Draft Santa Clara Valley Habitat Conservation Plan/Natural Community Conservation Plan (HCP/NCCP), also known as the Santa Clara Valley Habitat Plan, and referenced here as the “draft plan,” was prepared at the request of the Board of Supervisors of the County of Santa Clara. This report presents the Auditors’ understanding of the draft plan and its effects, and potential proposed changes to that plan. This report is organized around the draft plan, as it was issued in December. A proposal to revise the plan was issued on August 31, 2011. Because the proposed changes are subject to further adjustment, and some of the information was not available until September 7, 2011, the report provides footnotes to track the proposed changes. The report is based on the following research:

- Review of the draft plan and associated documents
- Review of memos and the August 31, 2011 “Framework for Preparing a Final Plan” report describing potential changes to the plan
- Attendance at one of the public hearings on the draft plan
- Discussions at the Board of Supervisors’ meetings, and meetings and materials from other partner agencies
- Attendance at various Liaison Group meetings regarding the draft plan and potential revisions to it
- Interviews with various plan participants internal and external to the County, including federal and state officials
- Review of existing and potential future legal agreements made for the plan’s preparation or implementation
- Review of biological opinions from which the plan originated
- Interviews with consultants working on the draft plan, and review of additional materials they provided beyond the publicly available plan materials
- Review of expenditure and revenue records in the County’s financial system and interviews with County personnel who track these amounts
- Review of a wide variety of transmittals, budget records and other materials associated with the plan or its development, including letters of support and opposition to the draft plan
- Review of associated background materials such as the federal Endangered Species Act, the state Natural Community Conservation Planning Act and the federal database of HCPs
- Review of annual reports and other records produced by other, selected active HCPs in California
- Interviews with personnel involved with other selected California HCPs

This report is organized in four parts, and each part addresses specific questions, as described on the following page.

**Part I:
History, Features and Status of the Santa Clara Valley Habitat Plan**

What is an HCP/NCCP, what laws govern such plans and why were they created? How would the draft plan interact with other environmental regulations? How did the County get involved in the development of an HCP/NCCP? How was its development funded and carried out? Which agencies are involved and what are their financial and governance relationships? Does the County have to adopt an HCP/NCCP at all? What are the alternatives? What are the basic features of the draft plan, and what global changes would have occurred in the County if it had been implemented as drafted? What is the status of the plan now, and what is the focus of the other sections of this report? What are the auditors' recommendations from Part I?

**Part II:
Implementation Effects on County Costs, Services and Interests**

What would have been the effect of implementation of the draft plan on County departments, including Parks and Recreation, Planning and Development, Roads and Airports? What would have been the effect on the cost of County operations? The plan would create a new governing body – how would the County have been represented on that body? What are the auditors' recommendations from Part II?

**Part III:
Cost/Benefit Issues, and Overall County Costs and Benefits**

What are the issues associated with understanding the costs and benefits of the draft plan and a revised plan that might be put forth? Would it be more cost effective to carry out a plan or to complete individual HCPs for individual projects? How do the HCP and the NCCP relate? What is the County contributing to each? What is the basis for those contributions? Overall, based on the draft plan, what would have been the County's costs and benefits? What are the auditors' recommendations from Part III?

**Part IV:
Lessons Learned from Selected Existing Large HCPs in California**

How many other HCPs are there in California, and how many are like the draft Santa Clara Valley Habitat Plan? How does the draft plan compare to other plans? In other active plans, what has occurred with regard to fees, development, and land acquisition? How are other plans governed? What are auditors' recommendations from Part IV?

Part I: History, Features and Status of the Draft Santa Clara Valley Habitat Plan

The draft Santa Clara Valley Habitat Plan was issued for public review and comment in December 2010. Part I of this report briefly summarizes how the County came to be involved in developing the draft plan, and the history and purpose of such plans. This section discusses the relationships and contributions of the County, other local agencies, the federal government, and, if applicable, future private developers to the efforts and costs to develop the draft plan.

This section describes the County's legal and practical obligations with regard to the plan itself as well as the Endangered Species Act and the Natural Community Conservation Planning Act, in general, and briefly discusses alternatives to plan implementation. This section also provides a high-level overview of the basic features, estimated costs, and revenues of the draft plan that was developed and issued for public comment. Lastly, this section describes the status of that plan as of August 2011, and includes notations regarding proposed revisions to the plan, and briefly discusses the scope and focus of the remainder of this report. A summary of recommendations for this section is provided on page 30 and included in Attachment E of this report

THE ENDANGERED SPECIES ACT AND THE DEVELOPMENT OF HCPS

Alarmed by the extinction of fish, plants and animals as well as the decline in the numbers of many other species as a result of development, Congress in 1973 passed the Endangered Species Act (ESA). Section 9 of the ESA prohibits “take,” of endangered species, which the Act defines as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Persons knowingly engaging in such activities are subject to civil and criminal penalties pursuant to Section 11 of the ESA.¹

Congress made significant amendments to the law in 1978, 1982, 1988 and 2004.² The changes adopted in 1982 included creation of exemptions, specified in Section 10, to allow killing or harming (“taking”) of endangered species in certain circumstances. The

¹ The entire text of the Endangered Species Act including amendments is available at:

<http://www.fws.gov/endangered/esa-library/pdf/ESAall.pdf>.

² The history of the Endangered Species Act and its revisions is available at: http://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf

1982 exceptions included “any taking otherwise prohibited ... if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”

This provision allowed the U.S. Fish and Wildlife Service (USFWS), and other federal agencies responsible for enforcing the ESA, to issue permits for such “incidental taking.” Obtaining a permit requires an applicant to submit a Habitat Conservation Plan (HCP). The required components of the plan, and the findings that the USFWS must make about the plan in order to issue a “take” permit, are specified in the ESA.



HCPs are simply planning documents required as part of an application for the permit. They describe the anticipated effects of the proposed taking, how those impacts will be minimized or mitigated, and how the HCP is to be funded. Prior to the establishment of the HCP exception process, some critics of the ESA argued that the Act amounted to the government depriving citizens of the use of their own land if the property happened to be home to endangered species.

In essence, an HCP facilitates development by enabling project proponents to legally kill or harm endangered species while engaged in otherwise lawful activity in exchange for implementing a pre-approved plan to mitigate the habitat losses caused by the development. Obtaining a permit through an approved HCP *is the only legal means* for a non-federal development project to kill or harm endangered species. (Federal projects are covered under Section 7 of the ESA, which establishes a separate approval process, as discussed later in this section.)

Whether the County and the other agencies implement the Santa Clara Valley Habitat Plan or not, the County and its constituents must still comply with the ESA, which requires extensive mitigation of damage to endangered species habitats caused by development. Attachment A of this report provides examples of past public and private projects in the County and the expense, efforts and time required to comply with the law.

At the end of 1994, there were just 39 HCPs nationwide. After the Republican sweep of Congress in the 1994 mid-term elections, however, the Clinton administration sought to appease Republican opposition to the Endangered Species Act. Toward that end, Interior Secretary Bruce Babbitt devised what came to be known as the “no surprises” rule, which ensured that, no matter what happens with regard to the initial covered species, there would be no new demands placed on permittees.³

³ No surprises is discussed in more detail at: http://training.fws.gov/EC/Resources/ES_Listing_and_Candidate_Assessment/ESA%20Folder/nosurpr.htm

The guarantee that there would be no new requirements for additional land, water or money for mitigations that might otherwise have been mandated for the benefit of the species made the development of HCPs more attractive and encouraged their expansion. A group of environmentalists and scientists sued over the “no surprises” provision, which critics argued amounted to a gutting of the Endangered Species Act. After many years of litigation, “no surprises” was upheld in federal court in 2007.

HCPs are not panaceas. In fact, some of the early HCPs struggled to reach their intended conservation and mitigation goals. Scientific studies about these early plans raised questions about whether the HCPs benefitted or harmed endangered species. Some early plans were poorly designed, and suffered from a variety of problems, including reductions of numbers of protected species that were supposed to be preserved, and lack of funds to manage lands acquired for conservation. According to state and federal officials working on the draft Santa Clara Valley Habitat Plan, that plan is a “model” plan. Many environmental organizations support the draft plan and its proposed revisions. It should be noted that the County’s Management Audit staff is not qualified to assess the “science” of the plan. Therefore, Auditors did not attempt to determine whether the proposed efforts on behalf of species would be adequate or appropriate, and do not express any opinion regarding the plan’s biological elements, which would provide coverage for 10 plant species and 11 animal species.⁴

THE NATURAL COMMUNITY CONSERVATION PLANNING ACT

In 1991, California’s NCCP Act (California Fish and Game Code, Section 2800 *et seq.*) was enacted to implement broad-based planning that balances appropriate development and growth with conservation of wildlife and habitat. Pursuant to the NCCP Act, local, state and federal agencies are encouraged to prepare NCCPs to provide comprehensive management and conservation of multiple species and their habitats under a single plan, rather than through preparation of numerous individual plans on a project-by-project basis. The NCCP Act is broader in its orientation and objectives than the Endangered Species Act and preparation of an NCCP is *voluntary*. The primary objective of the NCCP program is to conserve natural communities at the ecosystem scale while accommodating compatible land use. To be approved, an NCCP must provide for the conservation of species and protection and management of natural communities in perpetuity within the area covered by permits. Conservation is defined by the NCCP Act and the California Fish and Game Code as actions that result in the delisting of state-listed species. Thus, NCCPs must contribute to the recovery of listed species or prevent the listing of non-listed species rather than just mitigate the effects of covered activities.

⁴ The proposed revision to the plan issued August 31, 2011 would cover 10 plant species and 9 animal species.

This recovery standard is one of the major differences between an NCCP and a straight HCP.⁵

An expanded NCCP Act took effect on January 1, 2003. The revised NCCP Act established new standards and guidance on many facets of the program, including scientific information, public participation, biological goals, interim project review, and approval criteria. To approve an NCCP under the current NCCP Act, the California Department of Fish and Game must make a series of findings, all of which are essentially that the plan will in fact contribute to species recovery.

As an NCCP, the Santa Clara Valley Habitat Plan not only addresses impact mitigation, but would also contribute to the recovery and delisting of listed species and help preclude the need to list additional species in the future. According to the draft plan document, the local partners, including the County, enter into the NCCP portion of the plan *voluntarily* “to provide a higher level of conservation for the benefit of natural resources in Santa Clara County than is strictly required for ESA compliance.” An NCCP also provides greater regulatory benefits and greater opportunities for state and federal funding than do other permitting options under state law.⁶

INTERACTION BETWEEN THE PLAN AND OTHER UNRELATED REGULATORY REQUIREMENTS

It should also be noted that the draft plan would only provide permits under the state and federal species protection laws for the covered species. Most covered activities would also require additional local authorization (e.g., CEQA), and some would also require additional state or federal authorization. Subsequent to the issuance of the draft plan, the USFWS was working with other agencies in an effort to develop efficiencies for project proponents who may be required to obtain unrelated project permits from other federal agencies. Specifically, USFWS has held meetings with the U.S. Army Corps of Engineers to discuss using an adopted Santa Clara Valley Habitat Plan as the basis for the Corps to issue a Regional General Permit for the plan. That process would run concurrently with development of a final plan, according to USFWS, and would be coordinated with the Regional Water Quality Control Board to facilitate future RWQCB permitting.⁷ There are additional expenses that would result from pursuit of the Corps permit. These expenses were estimated at \$175,000 to \$225,000 as of late August 2011.

⁵ Note, however, that the NCCP portion of the plan would provide “take” authorization for covered state listed species per section 2835 of the California Fish and Game Code. Therefore, the NCCP would preclude a project proponent from having to obtain a separate take permit from the state. Additionally, the NCCP also provides state “no surprises” guarantees.

⁶ The source of this information is page 1-3 of the draft public plan.

⁷ This account is contained in an August 18, 2011 memo from the Santa Clara Valley Habitat Plan Management Team to the Governing Body Liaison Group.

According to USFWS, the Santa Clara Valley Habitat Plan might be eligible for a federal grant for some or all of that expense; however, the grant application deadline is in October 2011. If the plan were to be coordinated with the Corps, RWQCB or other agencies, it could result in streamlining project permitting, beyond the streamlining of ESA permitting that the plan alone would provide.

THE ORIGIN OF THE DEVELOPMENT OF THE SANTA CLARA VALLEY HABITAT PLAN

As previously described, Section 7 of the Endangered Species Act established a separate process for exceptions for federal projects. This process may culminate in the issuance of a biological opinion by the USFWS that allows for the killing or harming of species and habitat at a specified level, contingent on the applicant's carrying out various mitigations required in the opinion.

On July 31, 2001, the USFWS issued a biological opinion covering various projects, including the widening of U.S. Highway 101, Route 85/U.S. 101 South Interchange, Bailey Avenue Extension/U.S. 101 Interchange, and Coyote Valley Research Park Projects.



That opinion allowed the projects to proceed, including activities that would harm certain protected species, in exchange for carrying out a long list of mitigations. One of the required mitigation activities was the collaboration of the City of San Jose, County of Santa Clara, the Santa Clara Valley Water District (SCVWD) and the Santa Clara Valley Transportation Authority (VTA) in the development of an HCP/NCCP.⁸

Original Partner Agencies



The opinion required the City, County and Water District to “contribute approximately \$1,000,000 to support the preparation” of the HCP/NCCP. On page 7 of the opinion memo, the VTA was required to provide “funding and staff support for and develop and implement a countywide, multi-species habitat conservation plan...”. The opinion stated

⁸ Per page 13 of the biological opinion memo, USFWS also required development of an NCCP, which is a State conservation tool administered by the State Department of Fish and Game. This provides for conservation independent of mitigation that is required under federal law to offset development damage.

that “as part of this commitment, VTA will provide approximately \$4,400,000 to support the preparation of the HCP/NCCP and [other mitigations]. Funding will be contributed by participating local agencies.”

DOES THE COUNTY HAVE TO IMPLEMENT THE HABITAT PLAN?

According to County Counsel, the County of Santa Clara’s legal obligations with respect to the biological opinion’s requirements were fulfilled by the County’s financial and staff contributions toward the development of the draft plan. In other words, the County Counsel’s office has stated that the County has no legal obligation to complete or implement the Santa Clara Valley Habitat Plan.

Assuming that neither the federal agencies nor the local partners or others could successfully sue the County to force it to implement the plan, the County nonetheless could be compelled by USFWS to mitigate its past and future development impacts that the draft plan and proposed revisions would otherwise have mitigated. The Highway 101 biological opinion states that failure to carry out the required mitigations could result in “lapse” of the exemption from the Endangered Species Act that the opinion provided in exchange for the mitigations. Although a number of separate mitigations were required, damage to certain species and their habitats was to be mitigated solely by the implementation of the plan. Officials at USFWS have stated that the agency will re-open the opinions and require new mitigations if the plan is not implemented.

In other words, while the County may not be legally obligated to implement the plan, it still must comply with the federal Endangered Species Act, which requires mitigation of development impacts. If the plan is not available for use as a means to mitigate the loss of species and habitats caused by various existing projects, those projects may lose their exception from the Endangered Species Act, thus triggering the imposition of other mitigations in order to bring the projects into compliance with federal law.

In addition to whatever mitigations might be required for the Highway 101 development, there could be other mitigations required for other projects that were subsequently approved. This is because the USFWS approved additional projects subsequent to the Highway 101 work with the understanding the plan would be available to mitigate those impacts. If no plan is implemented, those projects could be re-opened by USFWS and as-yet-unknown mitigations could be required.

THE DEVELOPMENT AND FUNDING OF THE DRAFT PLAN ISSUED IN DECEMBER 2010

On September 9, 2003, the County, VTA, the City of San Jose and SCVWD entered into a Memorandum of Understanding (MOU) to develop an HCP/NCCP. Section 13 of the MOU specified an estimated budget of \$6 million for development of the plan and related documents. The agreement required that project funding be “equitably split” among the partners. A great deal of discussion ensued among the partners regarding how to divide the costs “equitably,” finally resulting in each of the four agencies paying one-quarter of the project’s contract expenses. As of June 30, 2011, communal project expenses amounted to nearly \$6 million, including about \$1.1 million in federal funds, as described in detail later in this section.

Subsequent to the development of the 2003 MOU between the four original partners, the cities of Morgan Hill and Gilroy joined the effort to develop the plan and obtain coverage for public projects and private development within their jurisdictions.

Subsequent Partners



The cities of Morgan Hill and Gilroy entered into the partnership on September 20, 2005. However, because of their comparably limited land area and development impacts in the proposed plan, those cities joined as non-voting members of the partnership, and each was responsible to contribute only half of the regular members’ share of costs for non-personnel expenses. Also, in September 2005, the six partners entered into a Planning Agreement with the State Department of Fish and Game and the Federal Fish and Wildlife Service.

With the addition of the new cities, the draft plan was produced as a formal partnership between six local agencies. In addition to the monetary contributions that each of the six agencies made to pay for the contractors hired to carry out various tasks required for development of the draft plan and associated documents, each agency individually funded its own staff members, such as planners, attorneys and elected officials who were involved in developing the plan.

In the County’s case, staff assigned to the project at any given time have included at least one Senior Planner, at least one Attorney from the County Counsel’s office, and various employees or contractors assigned to serve as liaisons or coordinators. Other County

personnel resources have included members of the Board of Supervisors, who have served as liaisons to the plan, and their staff.

Additionally, the County has also operated as “the banker” for the project, providing at least \$280,019 to the other agencies, as shown in Exhibit 1 on the next page.

The County and other agencies agreed to an original estimated budget of \$6,000,000 in September 2003. According to page 9-30 of the draft plan, \$3.8 million⁹ of the expense to develop the plan was intended to be reimbursed to the local partners, including the County, over the 50-year term via a development fee charged to private developers solely for this purpose.¹⁰ As of June 30, 2011, shared plan expenses totaled \$5,836,434 based on actual costs in the County’s accounting system, SAP. Federal grants covered \$1,107,648 of the expense, while the other local partners contributed \$3,502,768, or 60 percent of the total. The remaining \$1,225,716 was expended by the County even though its share up to that point was only \$945,697, for the difference of \$280,019.

⁹ The August 31, 2011 proposed revision also includes this amount.

¹⁰ The fee could not be charged at a higher rate over a shorter period in order to reimburse the partner agencies more quickly out of concern for fairness and a desire to ensure that like developments were not subjected to different fees.

**Exhibit 1
Actual and Budgeted Expenditures to Develop the Plan**

	Actual Revenues and Expenditures through 6/30/11	Expenses Re- appropriated to FY 2011-12 ²	Repayments Budgeted in FY 2011-12	New Costs Budgeted in FY 2011-12 ³	Total Actual and Budgeted
REVENUES					
Federal Grant	\$1,107,648	\$0	\$0	\$0	\$1,107,648
<i>Local Contributions:</i>					
Gilroy	\$416,246	\$0	\$57,000	\$36,800	\$510,046
Morgan Hill	\$416,246	\$0	\$57,000	\$36,800	\$510,046
San Jose ¹	\$890,092	\$0	\$56,400	\$73,600	\$1,020,092
SCVWD ¹	\$890,092	\$0	\$56,400	\$73,600	\$1,020,092
VTA	\$890,092	\$0	\$56,400	\$73,600	\$1,020,092
<i>Total Local Contributions</i>	<i>\$3,502,768</i>	<i>\$0</i>	<i>\$283,200</i>	<i>\$294,400</i>	<i>\$4,080,368</i>
Other Revenue	\$303	\$0	\$0	\$0	\$303
Total Revenues	\$4,610,719	\$0	\$283,200	\$294,400	\$5,188,319
EXPENSES					
Professional and Specialized Services	\$130,901	\$0	\$0	\$0	\$130,901
One-time Funded Project	\$5,701,634	\$95,571	\$0	\$368,000	\$6,165,205
Miscellaneous Expenses	\$3,900	\$0	\$0	\$0	\$3,900
Total Expenses	\$5,836,434	\$95,571	\$0	\$368,000	\$6,300,005
Expenses Net of Grant/Other Revenue	\$4,728,484	\$95,571	\$0	\$368,000	\$5,192,055
Partners' Share of Net Costs (80%)	\$3,782,787	\$76,457	\$0	\$294,400	\$4,153,644
Amount Paid by Partners	\$3,502,768	\$0	\$283,200	\$294,400	\$4,080,368
Amount of Underpayment	-\$280,019	-\$76,457	\$283,200	\$0	-\$73,276
County's Share of Net Costs (20%)	\$945,697	\$19,114	\$0	\$73,600	\$1,038,411
Amount Paid by County	\$1,225,716	\$95,571	-\$283,200	\$73,600	\$1,111,687
Amount of Overpayment	\$280,019	\$76,457	-\$283,200	\$0	\$73,276

Notes:

- In 2003, San Jose and SCVWD provided funding of \$10,000 and \$50,000, respectively, by contracting with a facilitator and civil engineer, which have been recognized as HCP contributions. The corresponding expenses have been included under one-time funded project.
- A total of \$302,609 is being rolled over to FY 2011-12. However, only \$95,571 could be verified as a communal HCP expense, rather than a County expense.
- The Board of Supervisors capped expenditure of new plan costs at \$175,000 until September 30, 2011 for development of a new framework. Additional expenses of \$193,000, if spent, include costs for finalizing the plan.

To reimburse the County for prior year expenses, the other agencies are scheduled to provide repayments totaling \$283,200 in FY 2011-12.¹¹ This will cover the \$280,019 owed to the County for actual expenses through June 30, 2011 and leave a balance of \$3,181 that could be credited towards future expenses.

However, \$302,609 in project and contract expenses for FY 2010-11 and prior years was never spent. As part of its annual “roll over” of County-wide unexpended funds, the Board of Supervisors re-appropriated this money to the FY 2011-12 plan budget, from which the County makes payment for *communal* plan costs. Of this amount, only \$95,571 is shown in Exhibit 1 because only that portion has been deemed by County staff to be a communal plan expense. The intended purpose of the remaining \$207,038 is unknown; it may be for communal expenses or it could be for the County’s own, un-reimbursable costs for the plan. The two types of costs have been co-mingled in the County’s plan fund. The County has paid some of its own internal costs, and it has paid all of the communal costs, from the same account. For past expenses, Auditors have separated all costs that were not communal costs from the analysis.

Assuming that the scheduled reimbursements occur during FY 2011-12, and the additional “roll over” money is not spent, the County and its partners will be approximately even in terms of sharing the communal consultant and printing costs for developing the plan.

However, to the extent that any of the \$302,609 is spent in FY 2011-12 for *communal* plan expenses, as opposed to an expense that is the County’s own non-reimbursable expense, there is presently no plan to allocate shares of this potential outlay to the other partners. In other words, the budget agreed to by the partner agencies does not include expenditure of any of that \$302,609 in FY 2011-12. If those funds are spent for purposes other than the County’s own costs, the County would need to seek reimbursement above and beyond the already-scheduled reimbursement payments. Based on the \$95,571 that staff has indicated is not for any County-only cost, if that amount is spent, the other partners would owe the County \$73,296, as shown in the table.

Auditors met with the staff responsible for spending from this fund, and they have indicated that they are taking pains to minimize outlays. However, the Board of Supervisors should freeze the expenditure of the roll-over monies until they can be accounted for as either a County-only or a communal plan expense. If they are an expense related to communal development of the plan, the other agencies would owe the County for their share of actual costs, and the communal plan budget should be modified.

¹¹ This includes repayment of two “bridge” loans of \$28,800 for costs in FY 2010-11 that the County made to both Gilroy and Morgan Hill to assist with their budget difficulties.

New plan costs in FY 2011-12 have been fully apportioned to the County and other agencies. The Board approved a budget of \$368,000 for new costs in FY 2011-12 with expenditures capped at \$175,000 through September 30, 2011. If the \$302,609 of re-appropriation and \$368,000 of new costs are spent in FY 2011-12, the total expenditures for the year would be \$670,609, of which only \$294,400 is included in the FY 2011-12 budget to be reimbursed. The County would be owed \$242,087 by the other agencies. In addition, the “Framework for Preparing a Final Plan” estimates that an additional \$268,745 would be needed to prepare and process the final plan and \$225,000 would be needed to prepare the regional general permit. These costs would likewise need to be shared among the local partners.

In addition to freezing plan expenses at the \$368,000 that was budgeted as a communal expense for FY 2011-12, the Board of Supervisors should direct staff to reconcile actual plan revenues and expenses at the end of FY 2011-12 and seek reimbursement for any amounts owed.

BRIEF DESCRIPTION OF THE DRAFT PLAN AND SUMMARY OF ITS STATUS AS OF AUGUST 2011

On December 17, 2010, the Draft Santa Clara Valley Habitat Plan, the Draft Environmental Impact Report (EIR)/Environmental Impact Statement (EIS), and the Draft Implementing Agreement were issued for public comment.¹² The 120-day, federally noticed public comment period closed on April 18, 2011. Public hearings on the plan were held on February 9 and 15, 2011.

However, as will be illustrated in Part IV of this report, the draft plan was large and ambitious, particularly compared to the rest of California’s estimated 136 existing HCPs. The plan itself, including attachments such as the draft implementing agreement, plus the environmental impact document, span 2,475 pages. Much of the information is detailed and complex, while some information is vague or not included in the plan. It is therefore not surprising that there have been many questions regarding the plan’s features and effects.

A proposal to revise the draft plan to address a variety of concerns was issued on August 31, 2011. That proposal describes a “smaller,” less expensive plan that also provides fewer benefits.¹³

¹² All of these documents and related materials are available at: <http://www.scv-habitatplan.org/www/default.aspx>.

¹³ Primary concerns included the overall scale and cost-effectiveness of the plan, the size and equitability of fees, questions about the economic effects of the plan, the absence of coordination of other environmental permits, concerns of ranch owners, and concerns about creation of a new governmental entity.

The draft plan's basic features were as follows:

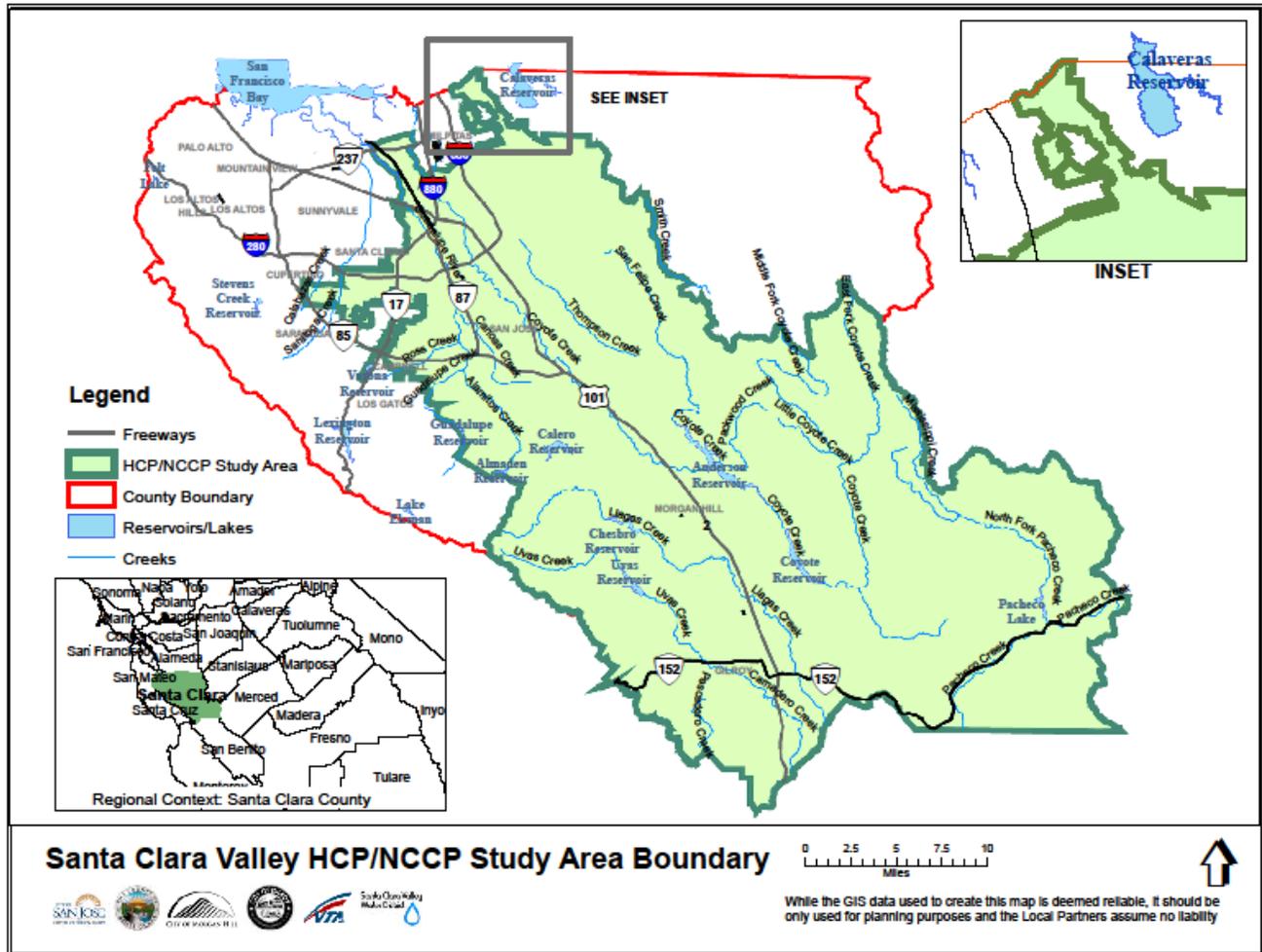
- Permits allowing harm, including killing, of 21 species¹⁴ protected or potentially protected by the federal Endangered Species Act and the State Natural Community Conservation Planning Act would have been issued to the partner agencies for their own projects in the coverage area, and those jurisdictions could have issued private permits for projects in their jurisdictions, for a term of 50 years.
- The state and federal agencies agreed to “no surprises” – that is, to accept only those mitigations agreed to at the time of the adoption of the plan as final mitigations required for harming the covered species, regardless of changes in circumstances over the 50-year term. No additional resources would be required.

This “coverage” was to span 62 percent of the County, or 519,506 acres¹⁵, as shown on the green area of the map on the following page. Note that the majority of this land (77 percent) is in the unincorporated area of the County.

¹⁴ These species were: the Loma Prieta hoita, Tuburon Indian Paintbrush, Coyote ceanothus, Mount Hamilton thistle, San Francisco collinsia, Santa Clara Valley Dudleya, Fragrant fritillary, Smooth lessingia, Metcalf Can yon jewelflower, Most beautiful jewelflower, Bay Checkerspot butterfly, California tiger salamander, California red-legged frog, Foothill yellow-legged frog, Western pond turtle, Golden eagle, Western burrowing owl, Least Bell's vireo, Tricolored blackbird, Pacific Townsend's (Western) big-eared bat, San Joaquin kit fox. As of August 16, 2011, the eagle and the bat were proposed to be excluded from the plan, meaning that “take” of those species would be illegal without separate approval and mitigations.

¹⁵ One acre is roughly the size of a football field.

Exhibit 2 Boundaries of the Draft Plan



Of this green area, about 25,864 acres (5 percent) were expected to be developed.¹⁶ Allowed development activities¹⁷ on that property would have included:

- Urban development
- In-stream capital projects

¹⁶ According to a June 14, 2011 memo to the Board of Supervisors from the County Executive’s Office, there is a proposal to remove rural development projects on the Valley Floor South of Coyote Valley from the plan’s coverage area. This includes rural residential and agricultural areas encompassing San Martin, the areas East and West of Morgan Hill, and the areas East of Gilroy. Areas that would remain in the plan include hillsides, the majority of Coyote and Almaden Valley, and projects of two+ acres. Additionally, the proposal was to allow some projects to “opt in” to the plan if necessary. As of August 31, 2011 the “scaled back” proposal is expected to permit about 18,075 acres of development.

¹⁷ Section 4 of the draft plan describes some of the public sector development projects anticipated during the 50-year term. This section is available at:

http://www.scvhabitatplan.org/www/Portals/_default/images/default/Public%20Draft/Chapters/Ch_04_Impacts.pdf

- In-stream operations and maintenance
- Rural capital projects
- Rural operations and maintenance
- Rural development
- Conservation strategy implementation

A description of these types of projects, and specific planned projects of particular importance to the County agency, are provided in Attachment B to this report. In all cases, conditions on development would have ensured that it occurred consistent with laws and setback requirements, and in such a way as to minimize impact on species and habitat, and impacts on water quality.

In exchange for development of the estimated 25,864 acres,¹⁸ another 58,747 acres,¹⁹ (about 11 percent of the green area on the map on page 15), including 100 miles of streams, would have been preserved. These acres, known as the Reserve, would have existed in perpetuity as conservation land. Potential areas that could be acquired for the Reserve are shown on the map on the following page. About 45,000 of those acres would have been newly acquired for this purpose from “willing sellers,”²⁰ either through outright purchases or through conservation easements. The plan envisioned acquiring about 1,000 acres per year for 45 years. Of the 45,000 acres, the County was to have purchased and committed²¹ through easements an estimated 8,150²² of those acres. The remaining 13,747²³ acres would have come from commitment of County park land to the Reserve through conservation easements. These Reserve lands were to have been acquired, managed and monitored by a newly created Implementing Entity to ensure the preservation of habitat and increase the populations of the 21 species²⁴. The Implementing Entity was to have been run by a Governing Board and Implementation Board made up of designated officials from the permittee agencies. The Implementing Entity and its governance are addressed in detail in Part II of this report.



In addition to conservation, the draft plan called for restoration of up to 566 acres of riparian woodland and scrub, wetlands and ponds, and up to 12.6 miles of streams to

¹⁸ As of August 31, 2011, there was a proposal to reduce this to about 18,075 acres.

¹⁹ As of August 31, 2011, there was a proposal to reduce this to 49,453 acres.

²⁰ The plan specified that eminent domain would not be used.

²¹ See Appendix D for an opinion by County Counsel regarding the proposed commitment of these lands for this purpose. Auditors’ use of the term “commitment” throughout this report is derived from that opinion.

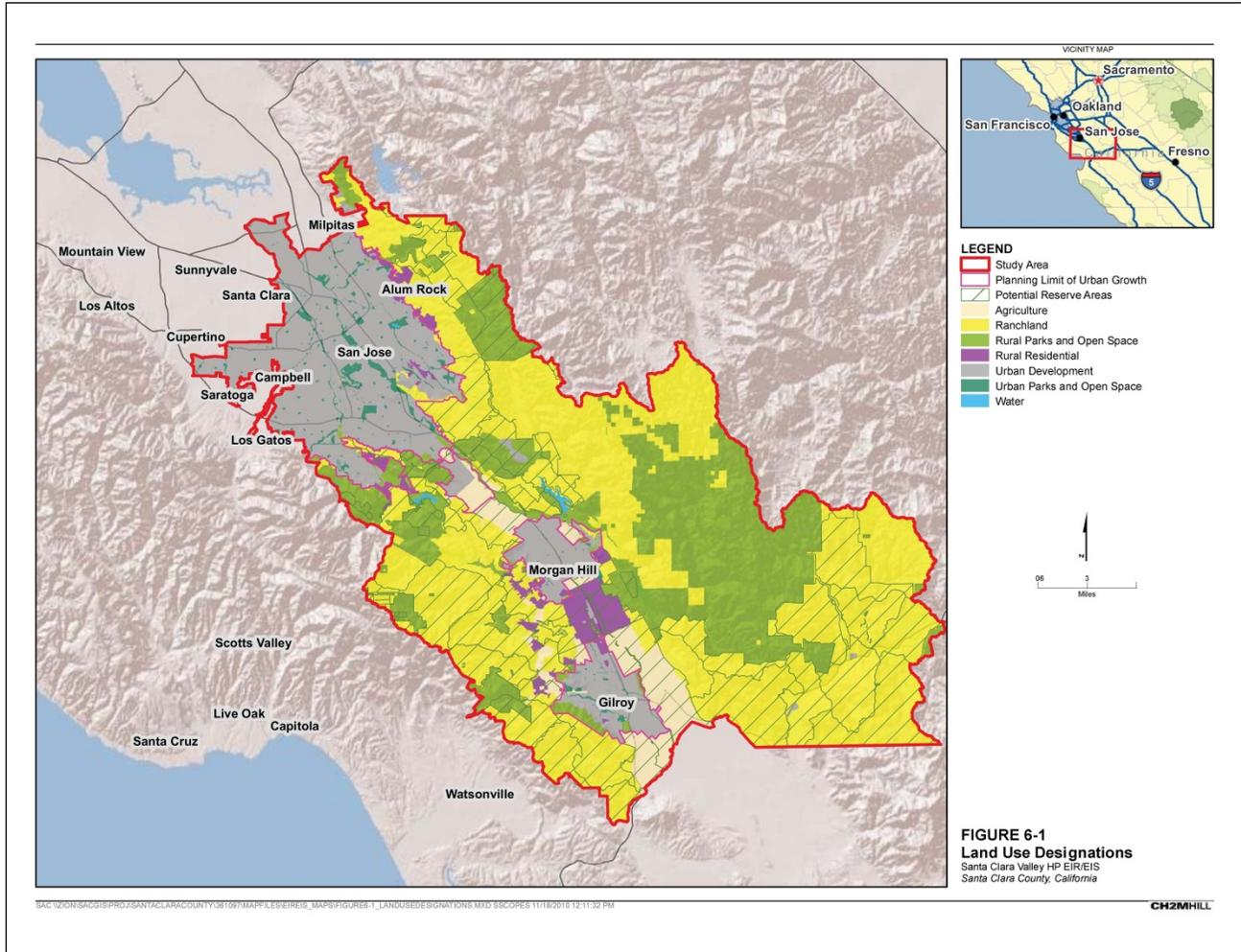
²² Per the August 31, 2011 “framework” for a reduced plan, this amount was estimated at 5,515 acres, based on the framework report’s estimated value of \$47.1 million.

²³ Per the August 31, 2011 “framework” for a reduced plan, this amount was proposed to be reduced to 12,291 acres.

²⁴ Per the August 31, 2011 “framework” for a reduced plan, this amount was proposed to be reduced to 19 species.

offset losses of these land cover types and to contribute to species recovery. The extent of restoration was dependent on the extent of development. The green hatched areas on the map on the below shows the potential reserve areas.

Exhibit 3 Potential Reserve Areas Identified in the Draft Plan



In essence, the draft plan would have covered an estimated 84,200 acres, of which, 31 percent would have been developed and 69 percent would have been preserved. The estimated cost that would have been incurred to implement the draft plan is detailed on the following page.

**Exhibit 4
Estimated Costs to Implement the Draft Plan**

Expense Type	Estimated Annual Cost in Millions	Percent of Total
Land acquisition	\$7.7	41.0%
Reserve management and monitoring	\$3.7	19.5%
Endowment	\$3.6	19.0%
Habitat restoration/creation	\$1.6	8.5%
Program administration	\$1.1	5.9%
Contingency and remedial measures	\$0.8	4.4%
Recreation/public access	\$0.3	1.7%
*Estimated Annual Cost	\$18.8	100.0%
*Estimated Cost Over 50 Years	\$938.0	100.0%
*Does not include inflation.		

Exhibit 4 shows the estimated implementation expenses as included in the draft plan. The estimates were developed by financial consultants hired by the partners and paid as part of the \$6 million in expenses required for development of the draft plan. Note that these expenses did not include the County’s commitment of 13,737 acres²⁵ of existing park land toward the Reserve system.

The estimated costs covered a wide variety of expenses, but, as the table shows, the bulk of the expense was estimated to have been for land acquisition (41 percent), management and monitoring²⁶ of that land and species during the project term (19.5 percent), and funding of an endowment to provide resources for management of the property in perpetuity after the permit term (19 percent).

²⁵ Per the proposed revisions as of August 31, 2011, these acres would be reduced to 12,291.

²⁶ Within the webpage at:

http://www.scvhabitatplan.org/www/Portals/default/images/default/Public%20Draft/Chapters/Ch_00_ExecutiveSummary.pdf, Table ES-2 provides a detailed summary of the intended land acquisition, the monitoring, mitigation and restoration efforts planned, and the assumed development impact on land and species.

The total cost for the 50-year project, inclusive of the funding of the perpetual endowment, was estimated to have been \$938,045,000,²⁷ in 2009 dollars. That is, the cost was estimated at about \$18.8 million per year, plus the cost of inflation. This cost does include the County's purchase and commitment of about 8,150 acres for the Reserve system, but it does NOT include the cost of the County's commitment of an additional 13,737 acres of existing land to the Reserve. As of August 31, 2011, there was a proposal to reduce this cost to \$660.1 million in 2010 dollars. Of this \$282 million reduction, about \$30.7 million was to have come from the reserve management and maintenance monies. This is important because part of the benefit that the County would have received from its commitment of land was the shift of land management costs to the plan. Based on the general nature of the "framework" document, Auditors assume that the overall 24 percent reduction in this expenditure would reduce the County's "benefit" by that same percentage. Part III of this report provides detail on this issue.

Importantly, the \$938 million (proposed to be \$660.1 million as of the issuance of this report) would have covered both future development, as well as met the requirements for mitigations of the Highway 101 projects, and mitigation for other, subsequent projects that were approved contingent on the implementation of a final plan.

Considering only future development, the estimated cost without inflation and excluding contribution of existing parkland, was, in terms of:

- Preserved land - about \$16,173 per acre, per year
- Developed land - about \$35,803 per acre, per year
- Total developed and preserved land - about \$11,141 per acre, per year

It should be noted that these draft plan expenses covered only mitigations associated with the 21²⁸ species covered by the draft plan. In the event that endangered species not covered by the plan were to be encountered by either a public or private project proponent, those species would have to be addressed separately with either a biological opinion for a federal project, or development of a plan for a project without a federal nexus.

Whether the draft plan's cost estimates were accurate is difficult to determine. For example, the plan estimated \$8,200 per acre for land acquisition, overall. That estimate was based on data from actual land purchases as detailed in the draft plan. Auditors received information from different, credible sources that substantiated²⁹ and refuted³⁰

²⁷ As of August 31, 2011, there was a proposal to reduce this cost to \$660.1 million in 2010 dollars.

²⁸ As of August 31, 2011, two species were proposed to be dropped: the golden eagle, and Townsend's big-eared bat. Assuming those reductions were to be implemented, the plan would permit "take" of 19 species.

²⁹ The County Parks and Recreation Department has asserted that this amount is consistent with actual average recent parkland purchases similar to the purchases that the plan envisioned.

that estimate. In the end, the actual cost of land acquisition would be dependent on when the land was acquired, what as-yet-unknowable changes may occur between the time the estimates were devised and the acquisition occurred, the nature of the actual property that is acquired,³¹ and whether the property was acquired through a conservation easement or fee title purchase. Information regarding the reliability of cost estimates in other sizable multi-species HCPs that have been implemented in California is provided in Part IV of this report.

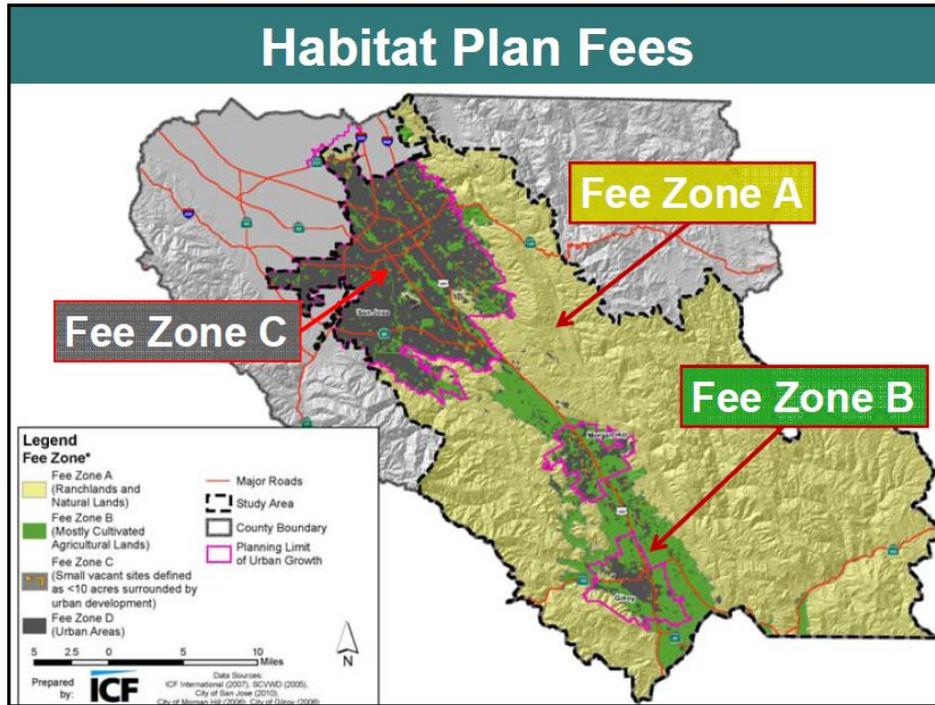
Furthermore, whether the cost per acre for developed land would have amounted to a savings or an extra cost for a project proponent depends on the specifics of the project, as shown in Attachment A of this report. In some cases, projects would be less expensive under the plan. In others, projects would have been more expensive. In particular, under the draft plan, many projects would have been required to pay fees for species mitigation that, in the absence of the plan, would not have been required. These and similar issues were factors in the failure of the draft plan to garner sufficient support for approval by the local agencies. As previously indicated, the “framework” of a proposed revised plan was issued on August 31, 2011. The proposed revisions would make many fee changes in an effort to address those concerns.

Development expenses for the County’s development activities are discussed in Part II of this report. The following page shows the fee “zones” and costs per acre that were proposed in the draft plan, as presented at the federal public hearings. The proposal for a revised plan envisioned reducing land cover fees by 16 percent. Additionally, many projects that under the draft plan would have been required to pay fees would not be required to pay fees under the August “scaled down” proposal, as shown in Attachment A of this report.

³⁰ The Santa Clara County Farm Bureau, which represents many of the owners of the land intended to be acquired, has asserted that the estimated cost per acre is too low.

³¹ The area in which the 58,000 acres could be acquired spans almost 520,000 acres, which the plan estimated ranged in value from \$6,000 to \$34,000 per acre.

**Exhibit 5
Plan Fee Zones and Amounts Per the Draft Plan**



**Exhibit 6
Plan Fee Amounts Per the Draft Plan**

Impact Fees

Zone Fees

- Zone A – Natural Lands – **\$19,720 per acre ***
- Zone B – Agricultural Land – **\$13,790 per acre ***
- Zone C – Small Vacant Sites - **\$4,930 per acre ***
- Zone D – Urban Sites not in Zones A, B or C – **No fee**

** Includes Post-Permit and Plan Preparation Cost Recovery fees*

Special Fees (in addition to Zone Fee)

- Vehicle Emission - \$7.29 per vehicle trip (~\$70/house)
- Serpentine Fee – \$64,810 per acre
- Western Burrowing Owl - \$25,120 per acre
- Riparian / Wetland Fees - \$100,000 to \$290,000 per acre

Santa Clara Valley Habitat Conservation Plan/Natural Community Conservation Plan

The proposed revisions to the plan include significant reductions to some of these fees. For example, the fees were proposed to be reduced to \$16,600 for Zone A, \$11,610 for Zone B, and \$4,140 for Zone C. Additionally, the proposal would reduce the trip fee to \$3.32. It should be noted that as the plan becomes less expensive, it also generates fewer benefits. Some of the funds raised by the original plan fees were envisioned in the draft plan to be used for recreational improvements in the Reserve System. These improvements have been eliminated in the proposed revision.

Excluding the value of an estimated 13,737³² park land acres committed to the Reserve through conservation easements, most of the money to pay for the plan was to have come from sources other than the local partners. These sources included private developers, state and federal monies, foundations, non-profits, and land agencies, and interest and investment earnings. The bulk of fee funding was to have come from fees assessed on the development of property. These fees included fees to cover the degradation of the land itself (land cover fees); fees to offset the damage caused by increased vehicle use as a result of the development (nitrogen deposition fees); fees to fund the endowment; and fees to mitigate damage to properties with special environmental value, including wetlands and serpentine land; fees to mitigate damage to Burrowing Owl species and habitat; and fees charged for temporary impacts, such as impacts that occur only during construction. In addition, there were fees to be assessed on non-permittee agencies, such as special districts, which might have development impacts. These sources are shown in Exhibit 7 on the following page. Note that the table excludes the value of the County's commitment of 13,747 acres of existing County park land through conservation easements. All of the amounts in the table were proposed to be changed as of August 31, 2011, as described later in this report. Attachment C provides a comparison of the approximate amounts in the draft plan compared to the amounts in the revisions proposed as of August 31, 2011.

³² Per the proposed revised plan as of August 31, 2011, this would be 12,921 acres.

**Exhibit 7
Funding Sources Per the Draft Plan³³**

Payer	Revenue Type	Expected 50-Year Revenue Amount	Percent of Total Revenue
Private development projects	Land Cover and Nitrogen Fees	\$279,700,000	29.8%
Valley Water District public projects	Land Cover and Nitrogen Fees	\$12,000,000	1.3%
City of San Jose public projects	Land Cover and Nitrogen Fees	\$2,300,000	0.2%
Valley Transportation Authority public projects	Land Cover and Nitrogen Fees	\$1,800,000	0.2%
City of Morgan Hill public projects	Land Cover and Nitrogen Fees	\$330,000	0.0%
City of Gilroy public projects	Land Cover and Nitrogen Fees	\$90,000	0.0%
All developers	Endowment Fees	\$106,930,000	11.4%
All developers (1)	Wetland Fees	\$81,700,000	8.7%
All developers	Serpentine Fees	\$35,400,000	3.8%
Public agencies	Temporary Impact Fees	\$17,200,000	1.8%
All developers	Burrowing Owl Fees	\$5,849,000	0.6%
Special districts, school districts, utilities, etc.	Special Entity Fees	\$5,000,000	0.5%
Total Fee Revenue		\$548,299,000	58.4%
Foundations, non-profits and land agencies	Purchase of about 10,000 acres	\$85,400,000	9.1%
<i>Santa Clara County Parks and Recreation Dept</i>	<i>Purchase of 8,150 acres</i>	<i>\$69,600,000</i>	<i>7.4%</i>
San Martin Airport	Purchase of about 167 acres	\$5,700,000	0.6%
Total Locally Funded Land-Donation Revenue		\$160,700,000	17.1%
Investment and Interest Income		\$73,760,000	7.9%
State and Federal Contributions	Land and cash	\$155,500,000	16.6%
Total Revenue All Sources (2)		\$938,259,000	100.0%
Note 1: The County Roads and Airports Department was expected to owe about \$6,813,790 for wetlands fees. The County Parks and Recreation Department was expected to owe about \$8,216,239 for wetlands fees. Overall, the County was expected to have paid about \$15 million for wetlands fees, based on records furnished by the plan's financial consultant. The consultant stated that the County was not expected to owe other types of fees, such as Owl fees.			
Note 2: This estimated revenue exceeds the estimated total expenses by \$214,000.			

The County of Santa Clara was to fund its own development impacts without directly paying development fees, except for wetland fees. Instead, the County's development mitigation costs were to have been funded through credits that the County would receive in exchange for buying and committing through conservation easements about 8,150³⁴ acres of new land, valued at an estimated \$70 million,³⁵ over 45

³³ Attachment C of this report provides a table comparing the December draft plan and the August proposed revised plan revenues.

years, plus committing an additional estimated 13,747 acres³⁶ of existing parkland to the Reserve through conservation easements.

Per the draft plan, the new land was to have been purchased using General Fund money that is transferred to the County Parks and Recreation Department and set aside pursuant to a special provision in the County Charter. Per the Charter, a portion of these funds are specifically earmarked (restricted) for the acquisition of land for “County park purposes.” These monies have been used since the early 1970s to purchase County park land.

The draft plan called for the use of a portion of this earmarked money to buy acreage that would be committed to the Santa Clara Valley Habitat Plan, thereby relieving the County of overt development fee expenses. As noted in Table 9-5 of the draft plan: “Land provided for Reserve System by County Parks is expected to more than offset development fees owed for Santa Clara County Parks and Santa Clara County Roads and Airports covered activities.”



That is, a portion of the land would have been used ultimately to mitigate Parks and Recreation development impacts (such as impacts caused by the development of new parks, new park facilities, and trails), and a portion would have been used to mitigate development impacts arising from Roads and Airports Department projects, such as replacement of County bridges on non-park land. Such Roads expenses are currently paid out of Roads funds. In addition, according to the draft plan, the amount that the County would have contributed exceeded the actual cost it would otherwise have been charged for its development. That is discussed in detail in Part II and Part III of this report.

The 8,150 acres³⁷ was to have been in addition to the commitment of existing property to Reserve land, through conservation easements, of an estimated 13,747 acres³⁸ of existing land in eight County parks. Therefore, the County was expected to commit about 21,900 acres of park land to the project. To provide a sense of the relative scale of this

³⁴ Per the proposed revisions as of August 31, 2011, Parks would dedicate an estimated 5,515 acres via conservation easements to the plan, based on the estimated value of \$47.1 million worth of newly purchased acres.

³⁵ Per the proposed revision as of August 31, 2011 this was proposed to be \$47.1 million.

³⁶ Per the proposed revision as of August 31, 2011, this was proposed to be 12,291 acres.

³⁷ Per the proposed revision as of August 31, 2011, this was proposed to be an estimated 5,515 acres.

³⁸ For details on this acreage, see Table 5-5, on page 283 of Section 5 of the draft plan, at http://www.scv-habitatplan.org/www/Portals/default/images/default/Public%20Draft/Chapters/Ch_05_ConservationStrategy.pdf

Also, for discussion on the County’s “credit” for this contribution, see page 8-40 of the draft plan. Again, this contribution is separate from the County’s purchase for the Reserve of another 8,150 acres of new land over 45 years at an estimated cost of nearly \$70 million.

commitment, this amount is equal to 53.2 percent of the County’s 41,141 acres of existing park land.³⁹ Over time, the County would also acquire additional park land that is not restricted by easements and is not in the Reserve System, so this percentage is not reflective of the proportion of park land that would be committed to the Reserve at the end of the permit term. The County Counsel’s office provided a written opinion regarding use of Parks and Recreation Department funds and land in the manner described in the draft plan and in the proposed revised plan. That opinion is provided as Attachment D of this report. It states that Park funds “may be used to purchase real property or a real property interest for ‘County park purposes,’ following a determination by the Board [of Supervisors] that the acquisition is in conformity with the adopted County Parks and Recreation Element of the General Plan. If these two thresholds are met (county park purpose and determination regarding conformity with the General Plan), other County purposes that may be served by the use of the Acquisition Funds, such as implementation of the Plan, would not render the acquisition non-compliant with the Charter’s requirements.” The opinion concludes that so long as the land “continues to be used for County park purposes and continues to conform to the parks and recreation element of the General Plan, Park Charter Acquisition Funds may be used to implement the plan.”

The use of Parks and Recreation funds and lands for the plan is described in detail in Parts II and III of this report.

LIKELY EFFECTS ON THE COUNTY IF THE DRAFT PLAN HAD BEEN IMPLEMENTED

If the draft plan that was issued in December 2010 had been implemented, several significant changes likely would have occurred that are of direct relevance to the County government. Some of these changes are briefly highlighted below. To reiterate, major revisions to the draft plan were proposed in August 2011. Some of the effects described below may or may not be applicable to subsequent revisions to the draft plan.

- Responsibility for “incidental take” permit issuance would have shifted from federal and state agencies to the planning departments of local agencies, including the County. Project proponents would have obtained federal endangered species permits from their local planning department, rather than the federal wildlife agencies. Local planning departments would most likely have charged new fees, and some may have hired additional staff and undertaken new training, to provide this new service. The extent of the effect on resources at the County Planning and Development Department would depend on the volume of new projects requiring

³⁹ Of the 41,141 acres the County owns, 596 are leased to other agencies. In addition, the County also leases additional land from other agencies, primarily the Santa Clara Valley Water District, which is operated as County park land. The total amount of land that the County owns or operates as park land is 46,422 acres.

permits and likely would vary over time as a function of peaks and valleys in demand for new projects.

- Over a few decades, thousands of acres of private property, particularly ranch and agricultural land in the southern portion of the County, would have been converted to publicly accessible land, likely resulting in some measure of new demand for County services on that land. Some plan documents and associated records indicated that the County would be reimbursed for those services. It is also likely that some County departments, particularly Parks and Recreation and the Controller-Treasurer's Office, would have established formal contracts or agreements with the Implementing Entity to provide services to the plan in exchange for full reimbursement. To the extent that land was converted from private to public, it also would have dropped from the tax roll. However, much of the land that the draft plan envisioned being acquired currently produces limited tax revenues⁴⁰ due to its Williamson Act status as farm or open space land.⁴¹
- Currently, the County Planning and Development Department refers about 10 percent of projects to federal wildlife agencies for endangered species permits. Had the draft plan been implemented, the Department estimates that at least 80 percent of projects would have paid plan fees, including some projects that previously would have required only a building permit. For projects that otherwise would not have been involved with endangered species permitting at all, the draft plan likely would have resulted in additional costs and possibly delays. In essence, the draft plan would have shifted some costs from one project - most likely large developments, to another - most likely small projects. Again, with the proposed revision as of August 2011, such shifts likely would have been reduced or eliminated, as illustrated in Attachment A to this report.
- The responsibility to locate, purchase or remediate lands to offset destruction of endangered species and their habitats would have shifted from project proponents, including County employees, to the plan's Implementing Entity, which would have carried out those activities using fees or "credits" paid by project proponents. Unless the land acquisition called for under the plan as it was envisioned failed to "keep up" with the permitted losses of endangered species and their habitats, the need for development proponents to themselves locate, purchase or remediate

⁴⁰ Williamson Act land property tax payments are between 20 and 75 percent lower than would be paid based on the fair market value of the land. There are 219,757 acres of Williamson Act land in the potential acquisition area, according to page 8-44 of the draft plan, which states that most of the land that would be acquired is currently under Williamson Act contract.

⁴¹ Historically, the State has backfilled an estimated 90 percent of Williamson Act revenue losses with subvention payments. The subvention payments to Santa Clara County totaled \$325,000 for more than 290,000 acres of Williamson Act land in 2009.

lands would have been eliminated for covered species.⁴² For projects that would have been large or would have required complex mitigation, the plan likely would have streamlined those projects, reducing the time and cost to complete them. See again Attachment A of this report for project examples.

- Protection of the 21⁴³ covered species in the plan boundaries would shift from case-by-case arrangements, with small-scale and “piecemeal” mitigation efforts carried out by individual project proponents through individual HCPs, to a comprehensively planned, long-term effort to offset development effects. It is likely that the sheer scale of the mitigation effort under the multi-species plan would have provided far greater protection of species than would otherwise occur, and that other species that are not specifically covered by the plan would also have benefitted.
- Currently, when the County purchases park land with funds earmarked by the voters for land acquisition “for County park purposes,” the land remains under the unrestricted control of the Board of Supervisors and the County Parks and Recreation Department. Had the plan been implemented, it would have placed conservation easements on about 8,150 acres⁴⁴ of newly purchased land for the Implementing Entity, which would be required to manage the land consistent with the goals of the plan. In addition, about 13,747⁴⁵ acres of existing County parkland was to have been committed to Reserve land via conservation easements. Therefore, at least 21,900 acres⁴⁶ of County park land would have been committed to the Implementing Entity for 50 years, and then managed in perpetuity by the partner agencies. In addition, a portion of the 8,150 acres would have been committed by the County in lieu of Parks and Recreation Department development fees, and a portion would have been committed in lieu of Roads and Airports department development fees. In other words, the plan would have shifted some of the expense for endangered species expenses for County road and bridge work to the Parks and Recreation Department. The amount of the shift was potentially in the range of \$1.9 million.⁴⁷
- The plan would have created entirely new opportunities for conservation grants, which currently are not available in the absence of an NCCP. With the NCCP in

⁴² For species not covered by the plan, project proponents would still have been required independently to develop a separate HCP to address those particular species.

⁴³ Again, the August proposal calls for coverage of 19 species, eliminating coverage for the eagle and bat.

⁴⁴ Per the proposed revision as of August 31, 2011, this would be an estimated 5,515 acres.

⁴⁵ Per the proposed revision as of August 31, 2011, this would be 12,291 acres.

⁴⁶ Per the proposed revision as of August 31, 2011, this would be an estimated 17,806 acres.

⁴⁷ Different documents provide different estimates of County development expenses. In addition, Auditors estimate the August 31, 2011 proposed revision would result in this subsidy amount increasing to about \$6.7 million as a result of changes in the development expenses and loss of planned Roads commitment of land to the plan.

place, it is possible that considerable additional funding would have been available for conservation (but not mitigation) purposes.

STATUS OF THE DRAFT PLAN AS OF SEPTEMBER 2011 AND THE SCOPE OF THIS REPORT

As of the April 5, 2011 Santa Clara County Board of Supervisors meeting, numerous essential elements defining the draft plan came under review for probable amendment. These factors include:

- Distribution of costs among land owners/project proponents
- The governance structure and partnership members of the Implementing Entity
- General size and scope of the plan
- Who would pay which fees
- Overall costs

At one point, the City of Gilroy briefly withdrew from the partnership altogether, but promptly returned. On June 14, 2011, the Board of Supervisors approved funding⁴⁸ for its share of consultant costs to carry out the analysis required to develop a “framework” for a proposed revised plan, which would be available for consideration by the County and the other partners in September 2011. The County and other partner agencies as of September 8, 2011 had not authorized any expenditures for development of a revised plan, or for the previously described effort to “coordinate” additional development permitting with unrelated agencies.

The proposed revisions to the draft plan were issued on August 31, 2011 in a document entitled “Proposed Revisions to the Draft Santa Clara Valley Habitat Plan: A Framework for Preparing a Final Plan.” The major revisions are summarized on pages 4-7 of that document. Key proposed revisions affecting the County directly include:

- Reducing the plan budget by 30 percent, to \$660.1 million
- Reducing the size of the “reserve” system, eliminating recreation improvements within it, and reducing the amount of allowed development
- Reducing Parks and Recreation land cover impacts by 25 percent
- Removing the Golden Eagle and Townsend’s Big-eared Bat from the list of covered species
- Reducing land cover and nitrogen deposition fees
- Reducing the amount of existing and future County park land committed to the plan by 4,091 acres

⁴⁸ The County’s share was \$35,000.

- Making numerous adjustments to covered properties and projects
- Eliminating recreation improvements within the Reserve System
- Removal of Roads and Airports funds that would have funded most of Roads and Airports development impacts

Given that the most basic aspects of the plan were being revised while this report was being prepared, Auditors shifted focus from scrutinizing the specific details of the published plan to focusing on issues most likely to be present in any plan that may be proposed.

This shift resulted in Auditors evaluating 1) other existing plans generally to determine how they have fared, and 2) focusing on factors that are so central that they are unlikely to be materially changed in any revision. For example, since the published fee rates were proposed to be revised as of August 31, 2011, and the amounts that the County would be required to pay for development fees under a new plan were not available until September 7, 2011, Auditors ceased efforts to determine specifically whether the published fees and costs are adequate and sustainable and cost effective. Instead, Auditors reviewed financial aspects of other California plans to determine whether consultant cost estimates and fee structures generally have been adequate and viable in those plans. This analysis is presented in Part IV of this report. Some issues are so central to the plan's structure that future adjustments, if they occur, are unlikely to change those elements. For example, although specific amounts have changed, the proposal for a revised plan would include commitment of County park land for the purpose of obtaining "credits" in lieu of the County's development fees. Therefore, this report provides analysis of the commitment of park land for this purpose, with the understanding that final impacts would vary depending on the details of a final plan put forth.

As previously described, Auditors did not attempt to assess the merits of either the biological surveys and other scientific efforts that went into the development of the plan, or the adequacy or appropriateness of proposed efforts intended to mitigate habitat losses or improve species outcomes. Such issues are outside the expertise of the Auditors, and therefore, beyond the scope of this report.

Additionally, it should be noted that the draft plan itself is extraordinarily complex, and includes many features not described in this report. To detail all features and potential impacts would result in an enormous document, and the sheer vastness of that report would diminish its utility. While Auditors have deliberately focused the report on topics that appear to represent significant policy questions for the Board of Supervisors, there may be additional areas of concern that are not addressed. Furthermore, the combination of the plan's complexity and the vagueness with which important features are described (as detailed in later in this report), it is possible that there would be effects not anticipated by this report upon actual implementation of a specific plan.

Lastly, this report is not meant to address particular County constituents' concerns. Different constituents would be impacted differently by the plan, depending on whether and what type of plan would be adopted. Even within constituent groups (ranchers, environmentalists, housing developers, etc.), or even individual land owners, there may be variation in impacts depending on the circumstances of the land and species involved, the type of project involved, and the specifics of a future plan. Similarly, this report does not delve into the various potential impacts on other public or private entities, such as the cities, the Water District, the Open Space Authority, etc.

LIST OF AUDITORS' RECOMMENDATIONS FOR PART I

The Board of Supervisors should:

1. "Freeze" plan expenses at the \$368,000 that has been allocated equally to the six partner agencies for FY 2011-12 costs;
2. Direct staff to account for the roll-over monies, totaling \$302,609, as a County-only or a communal plan expense. If any expenses related to communal development of the plan are identified, staff should modify the communal plan budget and request reimbursement from the other agencies for their share of actual costs; and,
3. Direct staff to reconcile actual plan revenues and expenses at the end of FY 2011-12 and seek reimbursement if any amounts are due the County.

Part II: Plan Implementation Effects on County Services, Costs and Interests

This section addresses issues that Auditors believe would be significant considerations in any version of the Santa Clara Valley Habitat Plan put forward for the Board of Supervisors to consider. These include how the plan would affect County permitting of its own projects and non-County projects within its jurisdiction; how County staff, services and costs would be affected by the plan; how the plan would affect the financial relationship between the County, and in particular County Parks, and other entities; and how the County would be affected by a plan governance structure such as that proposed by the draft plan. Recommendations discussed in this section are summarized on page 56 and included in Attachment E of this report.

EFFECTS ON COUNTY DEPARTMENTS AND RECOVERY OF COUNTY COSTS

Implementation of the Santa Clara Valley Habitat Plan would have significant effects on County department operations and costs. Virtually any plan that might be implemented, regardless of its details, would especially affect:

- The Parks and Recreation Department
- The Planning and Development Department
- The Roads and Airports Department

Other departments that would be affected include County Counsel, the County Controller, the Sheriff's Office and, to a lesser extent, potentially other agencies, such as the County Fire Department. Effects on each of these agencies are described in turn.

Parks and Recreation

Based on the draft plan, the Parks and Recreation Department would be affected in at least five ways by the implementation of the plan. As discussed in this section, some of these effects raise legal questions about the use of Parks Department funds and assets. Auditors requested a written opinion from the County Counsel's office regarding those uses. That opinion is provided as Attachment D of this report.

Streamlining of State and Federal ESA Permits

First, the Department would have endangered species “coverage” for its development projects. It would be able to develop new parks, construct restrooms, trails or other facilities, and maintain parks without having to separately acquire state and federal permits for each impacted species or covered project. It would have assurance of “no surprises”¹ associated with its development activities for species covered by the plan² within the plan boundaries³ over the term of the permit. However, because Parks has many acres on which it can develop, it is able to avoid many endangered species impacts and therefore avoid permitting issues. That said, about 20 percent of its 2011 projects require permits. Most of this relates to development that impacts water sources. These types of water-related developments would require a variety of other permits from other agencies that are not covered through the plan. Attachment A of this report includes two examples of past Park projects, neither of which would result in savings of time or money had the draft plan or proposed revised plan been in place. Attachment B of this report details numerous Parks projects that would have been automatically permitted through the USFWS under the plan. Again, however, some of these also require permits that the plan would not provide. To the extent that development may impact endangered species covered by the plan, the plan would streamline permitting for those permits.



About a quarter of the Parks Department’s planned development was proposed to be reduced in the revised plan. Obtaining coverage for its development projects would have streamlined project permitting as it pertained to covered endangered species.

Expansion of Publicly Accessible Open Space

Second, the Parks and Recreation Department’s mission includes the acquisition of land for open space purposes. While the plan would not provide land for County Parks per se, it would attract substantial investment in land acquisition within the county for open space purposes from other entities. This land would be publicly accessible, and would augment Parks’ open space lands. The draft plan called for foundations, land agencies and non-profits to purchase about \$85.4 million⁴ worth of land (about 10,000 acres) for the Reserve System. In addition, state and federal agencies were expected to contribute land and cash worth about \$155.5 million⁵ to the plan. While these properties would not be part of the County Parks system, they would be part of the open

¹ See Part I of this report for discussion of the “no surprises” provision.

² The draft plan would have covered 21 species; the proposed revised would eliminate at least two animal species from coverage.

³ About 90 percent of the County’s existing park land is in the study area.

⁴ The proposed revised plan would provide about \$79.2 million worth of land.

⁵ This amount is proposed to be \$115 million per the August 2011 proposed plan.

space available to the public, in keeping with that aspect of the Parks and Recreation Department mission. Excluding acquisitions made by County Parks for the Reserve System, nearly 37,000 new acres⁶ of Reserve System land were expected to be provided through the plan by non-County entities. This is equal to about 90 percent⁷ of all of the land currently owned by County Parks. In other words, the plan would enable the County to effectively double, over 50 years, the amount of land available for passive public use without the direct acquisition expense. However, as will be described in detail below, this would occur in part due to the acquisition and commitment of a large amount of County Park land to the Reserve.

Department Involvement in Plan Operations

Third, the Parks and Recreation Department would likely be deeply involved in the acquisition and management of the Reserve land and other central aspects of plan implementation. Department personnel have indicated that Parks would require additional staff and/or contractors to carry out the work. Because the Reserve System would be open to the public, eventually, additional park rangers might also be required.

Department personnel have described various relationships with the Implementing Entity in which the Parks and Recreation Department would:

- Contract with the Implementing Entity to provide services that would be reimbursed in full by the Entity (that is, it would break even financially)⁸;
- Contract with the Implementing Entity to provide services, and that contract would also help to subsidize Parks Department expenses unrelated to the plan (that is, the Department would gain financially/the plan would subsidize the Department)⁹;
- Provide services to the Implementing Entity without a contract and without reimbursement (that is, the Department would lose financially/subsidize the plan).¹⁰

⁶Per the August 2011 proposed plan, this would be about 30,647 acres.

⁷About 75 percent per the August 2011 proposed plan.

⁸ Department staff indicated in interviews that they were establishing new processes to track some expenses for reimbursement.

⁹ For example, see page 3 of the April 5, 2011 transmittal to the Board of Supervisors for Agenda Item 12, regarding an estimated \$2 million in land management funding that “would be used to address currently unfunded or underfunded departmental objectives, as well as meeting the obligations of the Plan requirements.” This statement is consistent with interviews of department staff.

¹⁰ For example, see page 3 of the April 5, 2011 transmittal to the Board of Supervisors for Agenda Item 12, which states that “the plan acquisition program does not include a cost recovery component for the time that Parks staff would expend to negotiate a purpose of land for the Reserve System. Nor does the plan address staffing costs to coordinate the planning of the County park system in relation to those County lands enrolled into the Reserve System.”

Since it is not appropriate for the County's operations to either subsidize or be subsidized by the plan, Auditors recommend that a final plan, and all relevant associated agreements, MOUs or contracts, specify that County departments will only provide services to the Implementing Entity by contract or written agreement, and that all direct and indirect costs for those services will be promptly reimbursed by the Entity, and that the County will not charge the Implementing Entity more than its actual costs for services. Any services that the County provides to the Entity should be tracked explicitly and accounted for separately from general department operating expenses.

Use of Park Charter Funds

The fourth impact of the draft plan on the County Parks and Recreation Department would have been the utilization of its funds for expenses that would not otherwise be borne by the Parks and Recreation Department using funds that are restricted to Parks purposes.

Since 1972, the voters of the County of Santa Clara have chosen by wide margins to transfer a portion of County General Fund revenues into a County Parks Fund, and restrict the use of those monies to park purposes. The most recent vote on this annual transfer and set aside of funds, which is required by the County Charter, occurred in June 2006, and extended the authorization through FY 2020-21, at which time it sunsets unless re-authorized by voters. The amount of the transfer is calculated as \$0.01425 per each \$100 of the assessed value of all real and personal property situated within the County of Santa Clara. In addition, all Parks fees and all other Parks revenue, such as federal or state parks grants and the fund's interest earnings, also are transferred to the County Parks Fund.

The Charter states that the County Parks Fund monies are to be used "for the acquisition, development, or acquisition and development of real property for County park purposes and for the maintenance and operation of County parks." The Charter states that at least 15 percent of the funds transferred from the General Fund shall be set aside and used for the acquisition of real property for County park purposes and at least 5 percent used for park development for County park purposes, and the remaining funds shall be used for County park operations. The Charter does not define the phrase "County park purpose." The only other restriction placed on the acquisition of park property is that it must be "in conformity with the adopted County Parks and Recreation element of the General Plan." County Counsel provided a written opinion regarding use of park funds and property for plan purposes and that opinion is provided as Attachment D of this report.

As previously described, the County itself sometimes has projects, usually carried out by either the Parks and Recreation Department or the Roads and Airports Department, which incur mitigation expenses to comply with the Endangered Species Act. Such impacts may

be caused in Parks by the development of new parks, new park facilities, and trails, or in Roads by activities such as replacement of obsolete County bridges.

Currently, such expenses are paid by the department that incurred the expense, out of that department's funds. The primary source of County Parks and Recreation Department monies is the special transfer of General Fund money, as described above. The principal sources of money for the Roads and Airports Department are fuel taxes and grants. Exhibits 8 and 9 show the amounts that County Parks and County Roads, respectively, were expected to owe under the draft HCP for their covered development projects, based on the analysis by the Plan's financial consultant.¹¹ The estimates are not contained in the plan itself. The amounts represent what the County Parks department would owe under the plan for its actual development impact mitigation expenses. These estimates were prepared by the consultant as of October 18, 2010.¹² These amounts exclude approximately \$15 million worth of wetland fees, which would be also owed by the County for its development fees. These wetland fees would be paid by both the Roads and Parks departments.

Exhibit 8
Actual Estimated Fees Due from County Parks
for County Parks Project Impact Mitigation¹³

Permanent Land Cover Fees ¹⁴	\$29,745,355
Temporary Land Cover Fees	\$ 2,977,309
Endowment ¹⁵	\$ 9,162,346
Total	\$41,885,010

Auditors received an email from the County Administration on September 7, 2011 indicating that under the August 31, 2011 proposed plan revision, the new amount of Parks development fees, excluding wetland fees, was estimated at \$25,929,400, rather than the \$41.9 million of the draft plan as shown above.

Rather than paying these fees directly, as it would today, Parks would have been credited as having paid these fees in exchange for its purchase of an estimated 8,150 acres¹⁶ of

¹¹ Willdan Financial Services.

¹² On August 19 and 22, 2011, Auditors requested a revised version of this estimate to reflect the County's estimated development impacts based on the proposed "scaled back" plan under discussion as of late August, but it was not available as of August 31.

¹³ This table excludes wetland fees, which were estimated at \$8.2 million for Parks. Land contributions cannot be used to offset wetland fees.

¹⁴ Land cover fees would be used by the Implementing Entity to purchase and remediate land to offset the destruction of habitat caused by development.

¹⁵ The endowment would provide funding for management of the land after the permit term, in perpetuity.

new park land, which it would commit to the plan Reserve System by placing conservation easements on the property. The County would still own the land, but its uses would be restricted by the legally binding easements.

In exchange for this \$41.9 million “credit,” County Parks would have purchased and committed land valued at an estimated \$69.6 million¹⁷ over the permit term, as discussed in more detail later in this section. The “excess” payment per the draft plan was therefore about \$27.7 million, which equates to about 3,240 acres. A portion of this amount would have covered a portion of Roads and Airports development fee expenses. In the absence of the plan, those expenses would have been paid by Roads, rather than Parks. Exhibit 9 below shows the amount “due” from County Roads for its actual impacts over the permit term.

Exhibit 9
Actual Estimated Fees Due from County Roads
for County Roads Project Impact Mitigation¹⁸

Permanent Land Cover Fees	\$ 2,714,844
Temporary Land Cover Fees	\$ 3,278,439
Endowment	\$ 1,678,119
Total	\$ 7,671,402

Auditors received an email from the County Administration on September 7, 2011 indicating that the proposed revised plan as of August 31, 2011 put the Roads development fee expense at \$6.72 million, rather than the \$7.7 million in the draft plan.

In the draft plan, in exchange for a “credit” for the \$7.7 million worth of development fees, County Roads would have purchased land valued at an estimated \$5.7 million over the permit term. The remaining amount of almost \$2 million would have been covered by \$2 million of the “excess” \$27.7 million of Parks commitments, as discussed on the previous page. Therefore, the Parks land purchase expense would have covered the Parks development fees (excluding wetland fees), plus a portion of Roads development fees (excluding wetland fees), plus provided additional funding to the plan. These amounts are proposed to be revised, as shown in Exhibit 10 on the following page. In the proposed revised plan, Roads would contribute no monies toward the land purchase envisioned in the draft plan. Therefore, it would have no “credit” for its development expenses. All of

¹⁶ Auditors requested the amount that was being proposed as of late August, 2011 but this was not made available as of August 31.

¹⁷ As of the August 2011 proposed plan, this amount would be \$47.1 million.

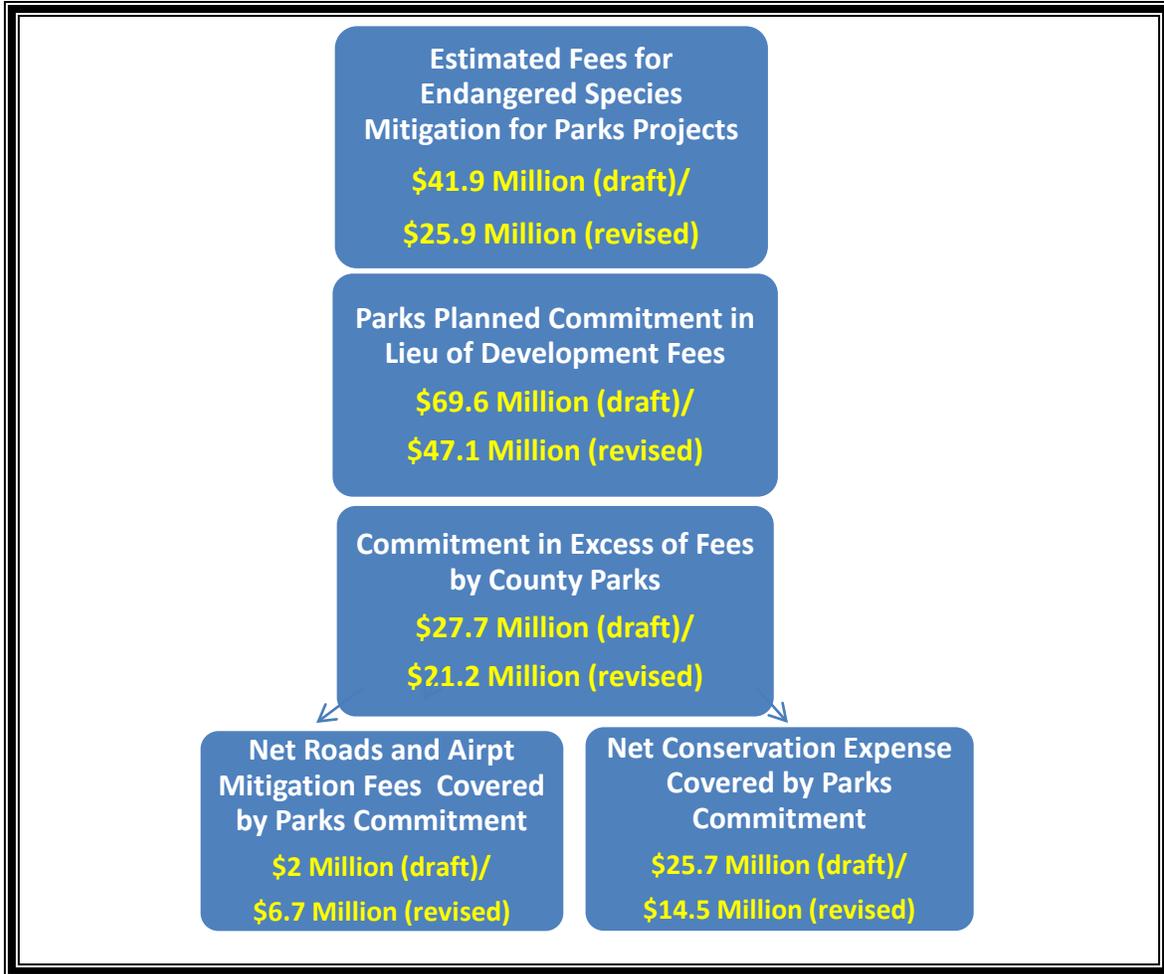
¹⁸ This table excludes wetland fees, which were estimated at \$6.8 million for Roads. Land contributions cannot be used to offset wetland fees.

its development fees, which are estimated at \$6.7 million in the proposed revision to the plan, would be covered by the Parks' commitments.

The financial consultant's records state: *"It is assumed that Santa Clara County will contribute a greater value of land to the plan than the County Roads and Airports and County Parks fee obligation, and will receive credits fully offsetting its fee obligation."* In other words, not only is County Parks contributing funds in lieu of some of the County Roads development fees, it is also contributing additional amounts.

The plan document also discloses this fact. Table 9-5 of the draft plan states: *"Land provided for Reserve System by County Parks is expected to more than offset development fees owed for Santa Clara County Parks and Santa Clara County Roads and Airports covered activities."* The additional amount is construed as a portion of the County's contribution for conservation purposes. This is summarized in Exhibit 10 on the following page.

Exhibit 10
County Parks Fund Development Fee Expenditures
Under the Draft Plan and the Revised Proposal



As discussed in Part III of this report, the plan project manager has stated that this excess is a portion of the County’s contribution to the conservation (NCCP) element of the plan. County Parks would also have contributed to that element of the plan through the commitment of an additional estimated 13,747 acres¹⁹ of existing park land also for conservation purposes. Unlike the mitigation fees, which are based on the County’s actual development impacts, the conservation amounts are derived from the professional judgment of biologists attempting to ensure compliance with the NCCP law’s requirement that the plan ensure the recovery of species. The law does not define that

¹⁹ Per the August 2011 proposed plan, the amount acres would be 12,291.

requirement specifically.²⁰ Also as described in Part III of this report, removal of the County's commitment of new land from the plan would result in the state's refusal to issue a "take" permit to the plan.

County Park Land

An estimated 13,747²¹ acres of *existing* County park land was proposed to be committed to the Reserve System land via conservation easements. All of these lands would be for the "conservation" portion of the plan. Although the County would still own that property, and would still have to pay for law enforcement services for it, its use of the property would be restricted by the easements. Those lands were proposed to have come from the following parks:²²

- Almaden Quicksilver County Park – 653 acres
- Anderson Lake County Park – 486 acres
- Calero County Park – 1,690 acres
- Coyote Lake-Harvey Bea Ranch County Park – 825 acres
- Joseph D. Grant County Park – 7,760 acres
- Mount Madonna County Park – 1,244 acres
- Santa Teresa County Park – 877 acres
- Uvas Canyon County Park – 212 acres

For the purchase of the estimated 8,150²³ acres, the plan called for the Department to use nearly \$69.6 million²⁴ in funds specially designated in the County Charter for acquisition of land for "County park purposes." Combined, these 21,900 acres²⁵, when compiled over 45 years, would have equaled 53 percent²⁶ of the County's 41,141 acres of existing park land.²⁷ This figure is provided for reference purposes; the proportion of committed park land to uncommitted park land would be less at the end of the permit term because

²⁰ For example, California Fish and Game Code Section 2820(a)(4)(C) specifies that the CDFG must ensure that the NCCP will protect and maintain "habitat areas that are large enough to support sustainable populations of covered species." It is up to the Department to determine what is "large enough."

²¹ As of late August, 2011, the proposal was to provide 12,291 acres of land for this purpose for the "scaled back" plan.

²² See Table 5-5 of the draft plan for more detail on these properties. Based on the table on page 133 of the 2007 Management Audit of the Parks and Recreation Department, at least 415 acres of Santa Teresa Park and 2,939 acres of Mt. Madonna Park was purchased prior to the initial Charter amendment. Therefore, Auditors surmise that most of the acreage identified above was purchased with Park Charter money.

²³ Per the August 2011 proposed plan, this amount would be an estimated 5,515 acres.

²⁴ This amount was estimated at \$47.1 million per the August 2011 proposed plan.

²⁵ This amount is estimated to be 17,806 acres per the August 2011 proposed plan.

²⁶ About 43 percent based on the August 2011 proposed plan.

²⁷ Of the 41,141 acres the County owns, 596 are leased to other agencies. In addition, the County also leases additional land from other agencies, primarily the Santa Clara Valley Water District, which is operated as County park land. The total amount of land that the County owns or operates as park land is 46,422 acres.

Parks would continue to buy thousands of acres of uncommitted park land over the same time period.

These funding issues raise five important questions about the use of Parks funds, which are derived primarily from the special transfer and set aside of General Fund money, as previously described.

Total Contributions for Conservation

The first is, because there is not a specifically defined basis for the total “conservation” land that Parks would provide to the draft plan, it raises questions about whether County Parks is contributing amounts that effectively subsidize non-County development. County Parks would have contributed \$25.7 million to the draft plan for “conservation” in the form of new land purchases, plus the value of the commitment of an additional 13,747 acres²⁸ of existing County park land. The value of this commitment is undetermined, as discussed in Part III of this report. The draft plan does not place a value on the commitment of this land. The true value of that commitment would require an appraisal of the properties. Assuming commitment of the land is worth at least \$50 million²⁹, the County’s “conservation” commitment exceeds \$75 million. The County’s total estimated development fees in the draft plan were estimated at \$64.6 million, including wetland expenses, for both Parks and Roads projects. Therefore, the County’s contributions for “conservation” exceed its actual development costs. However, as detailed in Part III of this section, the development fee amounts, and the amounts provided for “conservation,” are so intertwined that they cannot be separated in any meaningful way.

It should be noted that the plan document itself specifically states that the County will not subsidize non-County development. Specifically, page 9-48 of the draft plan states:

“The value of County Parks land contributions to the Habitat Plan could be used to offset any fees that the County would owe to the Habitat Plan for projects undertaken by the County. County Parks’ acquisitions would also be used to contribute to the recovery of the covered species; they cannot mitigate the impacts of non-County projects. Wetland fees will not be offset by land acquisition. Habitat Plan fees that would be owed by the County have been estimated at \$56 million³⁰ (\$46 million by County Parks and \$10

²⁸ Per the August 2011 proposed plan, this amount would be 12,291 acres.

²⁹ See Part III of this report regarding commitment of these acres for discussion of the estimated valuation of this land.

³⁰ The amounts in the text on page 9-48 are not consistent with the breakdown of expenses provided by the financial consultant. Auditors have assumed that the more detailed information dated October 18, 2010 is more accurate. Auditors have noted that estimates have been “fluid” across various records. Regardless of the specific amounts that have been identified in various records, the concept of the County paying more than its actual development fees has been consistently represented.

million by County Roads and Airports), all of which would be offset by the contribution of land to the Plan by County Parks.”

The fact is that County Parks would pay far more than its mitigation costs, resulting in a surplus of monies in the fund from which the Implementing Entity would pay the communal plan expenses, including for the conservation of species. Excess funding would result in reduction of the amount required to be collected from other contributing parties, including County Roads, for plan costs. Since the County’s contribution to the conservation component was not based on its share of development or other specific factors, the contribution in excess of the County’s mitigation costs is indirectly subsidizing other private and public development with Parks dollars.

Subsidizing Roads Projects with Parks Money

Second, the use of Parks funds to subsidize about \$2 million³¹ worth of County Roads and Airports Department projects is inappropriate, since Roads has its own funds for this purpose, and Parks funds are restricted for Parks purposes by the County Charter.

Auditors requested and received a written opinion from County Counsel regarding commitment of existing and future park land into the Reserve system. The County Counsel’s office provided an opinion, which is appended to this report as Attachment D. It states, in part:

“Park Charter Acquisition Funds may be used to purchase real property or a real property interest for ‘county park purposes,’ following a determination by the Board [of Supervisors] that the acquisition is in conformity with the adopted County Parks and Recreation Element of the General Plan. If these two thresholds are met (county park purpose and determination regarding conformity with the General Plan), other County purposes that may be served by the use of the Acquisition Funds, such as implementation of the Plan, would not render the acquisition non-compliant with the Charter’s requirements.”

The commitment of Parks assets to the Reserve System was discussed at the May 6, 2008 meeting of the Board of Supervisors. The minutes of that meeting indicate that Counsel told the Board, in response to a Board Member’s question, that such use is in conformance with the Charter. The minutes also indicate that a supervisor questioned “Habitat Plan funding relating to a recommendation to use some County park land acquisitions to offset non-park habitat impact fees.” The minutes indicate that the matter was discussed, including “the need for continued discussion of expectations relating to

³¹ Per the August proposed revision, \$6.7 million.

Park Charter funds.” The three present Board members voted unanimously to continue development of the plan. At a meeting on August 12, 2008, the Board of Supervisors voted three-to-two in support of the Administration’s recommendation to “use the Park Charter Fund to acquire land in lieu of paying impact fees for anticipated County impacts, including County non-parks impacts,” according to the minutes of that meeting.

Even assuming subsidies are consistent with the County Charter, the State Constitution³² and any other legal restrictions that may be applicable, the question remains whether it is in the best interests of the County, given that 1) Roads has its own funds for this purpose, and there are unmet needs for County park services, and 2) subsidizing non-County projects with Parks funds may not be consistent with the intent of voters when they earmarked a portion of General Fund dollars for “County park purposes.” The County Administration has stated that such uses of Parks funds would be legal in part because the land would still be owned by the Parks and Recreation Department, and no Parks funds would be transferred to the Implementing Entity. However, the easements would result in significant restrictions on the County’s use of the property, in perpetuity.

Auditors recommend against using Parks funds for Roads and Airports development expenses. All such costs should be paid by Roads and Airports funds, which come primarily from fuel taxes and grants, rather than from the County General Fund, which is the ultimate source of most Parks and Recreation Department revenue. This would enable the restricted Parks dollars to pay for additional uncommitted park land, as opposed to being committed in order to pay for Roads development fees. This would not increase the County’s total cost to the plan, but rather would reduce the cost for Parks, and increase the cost for Roads by an equal amount, for a net zero change in overall County costs.

Open-Ended County Contributions

Third, the draft plan indicates that the County’s commitment of both park land amounts – the 8,150 acres³³ of new land and the 13,747 acres³⁴ of existing land – are “estimated.” The draft plan indicates that the actual amounts could be more than estimated. Furthermore, if the County spends \$69.6 million³⁵ on fewer acres, it is unclear whether the County would have satisfied its obligations to the plan for the new land purchases, or whether it would be required to continue to buy land. Because of the poorly defined, “open-ended” nature of these significant commitments, Auditors recommend that if the Board of Supervisors enters into a revised plan, that the County’s

³² The California Constitution prohibits “gifts” of public funds. However, many transactions that have been questioned in legal proceedings have been deemed constitutional by the state Attorney General and the courts on the basis that the expenditures were for a “public purpose.”

³³ Per the August 2011 proposed plan, this amount is estimated to be about 5,515 acres.

³⁴ Per the August 2011 proposed plan, this amount is proposed to be 12, 291 acres.

³⁵ Per the August 2011 proposed plan, this amount is estimated to be \$47.1 million.

commitments are either capped at the outset or that there is some mechanism for the Board to review and adjust actual contributions over the life of the plan.

Similarly, not only does the proposed revision of the draft plan call for less Park development, the proposal removes funding for public access and recreation. The initial proposal was to shift a planned \$16 million³⁶ worth of Reserve public access and recreation costs to unspecified “non-Habitat sources.”³⁷ The August 31, 2011 proposed revision “framework” document simply states that those resources have been “eliminated” from the plan. It is not clear whether the planned improvements themselves are to be eliminated or whether there may be some alternative source of funds for that purpose. Auditors recommend that prior to approval of the plan, the Board of Supervisors ensure that this and other potential shifts of costs that may emerge from the effort to trim the plan down are not intended to be picked up directly or indirectly by the County.

Potential Shortfall of Park Charter Funds

Next, the funds that would be used for the acquisition of new park land that would be committed to the plan come from voter approval. The funds themselves have only been earmarked by voters for the past 39 years. The present authorization for commitment of these General Fund dollars for park purposes sunsets in about nine years. If voters did not renew the funding transfer, or if the funds were to be otherwise restricted or unavailable for some unforeseen reason, the County would still be obligated to make the land purchases on behalf of the plan if approved. No alternate funding sources have been identified to date. Although the draft plan documents state that the County’s general fund would not be impacted by the plan’s operations, the fact that Park Charter funds are the sole source of identified cash to pay the County’s cash obligation to the plan, the potential for this source to be affected by forces beyond the County’s control raises the possibility that the General Fund could be tapped for this expense. The Board of Supervisors may wish to identify potential sources of funds in the event that there is a loss of some or all of the Park Charter dollars over the permit term.

Restrictions on County Park Land

Although the County would still own all of the property it would commit to the Reserve, use of the property would be restricted by the easements. Combined, these 21,900 acres³⁸, when compiled over 45 years, would have equaled 53

³⁶ About \$320,000 per year. The public draft plan called for recreational uses, including up to eight staging areas, eight small day-use picnic areas, and three small backpack camps and their associated staging areas.

³⁷ August 18, 2011 memo from the plan Management Team to the plan Governing Board Liaison Group. The memo does not specify where these monies would instead come from.

³⁸ Per the August 2011 proposed plan, the amount would be about 17,806 acres.

percent³⁹ of the County's 41,141 acres of existing park land. ⁴⁰ At that point, the County Parks system would also be larger, but this provides a frame of reference for the reader regarding the scale of the commitment.

Although these lands were proposed to have been made accessible to the public by the Implementing Entity for "passive recreation," the County itself would no longer have unrestricted control of the property.

The County has a strong interest in preserving and protecting land for current and future generations. Permanent preservation of County park land would protect forever the natural beauty of those lands for County residents and visitors. In some cases, the habitats and the species on that land are found nowhere else on Earth. Undeveloped land is critically important to the health of the environment, and improves the water and air quality for all County residents. And, as the County becomes more and more developed to accommodate an ever-growing population,⁴¹ open space will become more precious.

The General Plan reflects this high priority. It states:

Recreation facilities and activities within regional parks and public open space lands should be located and designed to be compatible with the long term sustainability of each site's natural and cultural resources, with particular attention to the preservation of unique, rare, or endangered resources (including historic and archeological sites, plant and animal species, special geologic formations, etc.).

However, future generations may have other needs or desires with regard to the use of park funds and resources. The General Plan also states the importance of:

Sufficient urban open space and parks to provide opportunities for intensive recreation, leisure activities, and scenic enhancement of urbanized areas.

Future Parks and Recreation Directors, and future Boards of Supervisors, would not be permitted to establish non-passive uses of the 21,900 acres⁴². For example, the County would no longer have the right to build on the land or use it for other purposes. According to the County Executive's Office, in a June 14, 2011 memo to the Board of

³⁹ Per the August 2011 proposed plan, the amount would be about 43 percent.

⁴⁰ Of the 41,141 acres the County owns, 596 are leased to other agencies. In addition, the County also leases additional land from other agencies, primarily the Santa Clara Valley Water District, which is operated as County park land. The total amount of land that the County owns or operates as park land is 46,422 acres.

⁴¹ The State of California, Department of Finance, *Population Projections for California and Its Counties 2000-2050, by Age, Gender and Race/Ethnicity*, (July 2007) projected that the County of Santa Clara will be home to 2.6 million people by 2050. That's a 47 percent increase over the 1.8 million people counted in the 2010 Census in less than 40 years.

⁴² See footnote 41.

Supervisors, all of the committed land would be “backcountry” areas of the Parks system, and would be managed according to the “natural area” designation in the Parks Department’s Strategic Plan, which encourages low-intensity recreation. The document states that more intensive uses of the proposed land would not be proposed in the future for that land because it lacks “favorable characteristics” for more intensive use.

Even though the park land planned for commitment to the Reserve would not be appropriate for more intensive uses, it is possible that more intensive uses could be of higher value to future Boards of Supervisors. But with easements placed on the property, the County could not sell the land for its unrestricted market value and use the funds for other park purposes. In particular, as the population expands, there may be additional need for more accessible parks that may not be adjacent to existing open space. Future Boards of Supervisors may wish to shift resources from open space that is of high habitat value to other areas with less habitat value. Two members of the current Board of Supervisors have sought to expand acquisition of “public parks and recreational facilities in urban, suburban and rural areas, particularly in those areas that are park deficient.”⁴³ Additionally, uses of the land would ultimately be subject to USFWS approval. If protected species were to be damaged as a result of public access, it is possible that the USFWS would limit public access to Reserve land.⁴⁴

If the Board of Supervisors elects to implement the plan, it should ensure that the terms of the conservation easements it will be required to enter into are reviewed and that the terms are consistent with County Parks goals, the County General Plan, and the County Charter’s requirement that earmarked funds are used for “County park purposes.”

Planning and Development

Currently, the County Planning and Development Department issues a variety of permits for development projects. It does not currently issue permits for “incidental take”⁴⁵ of endangered species pursuant to Section 10 of the Endangered Species Act. Instead, the Department refers project proponents with endangered species impacts to the federal wildlife agencies, such as the USFWS, which enforce the Act and issue “take” permits. According to Department personnel, such referrals occur for about 10 percent of projects currently. Importantly, at present, the County’s own staff must negotiate directly with the federal agencies to obtain permits for the County’s own affected projects. The same is true of other local agencies within the County.

⁴³ See the March 1, 2011 memo from District Three regarding policy recommendations related to the County of Santa Clara Parkland Acquisition Plan: 2011 update.

⁴⁴ The permits specifically exempt off-trail uses in the Reserve.

⁴⁵ See Part I of this report for discussion of the Endangered Species Act and “incidental take.”

Under the draft and proposed revised plans, responsibility to issue “incidental take” permits for the County’s own development projects as well as private development projects within the County’s jurisdiction, would have shifted from the state and federal wildlife agencies to County staff planners. This shift would also have occurred for other local agencies within the County. For instance, planners employed by the City of San Jose would have issued “take” permits for affected projects carried out by both the City of San Jose and private parties within the city. These permits would have been issued under the oversight of the federal agencies, and would have had to be consistent with federal requirements.



Importantly, according to County Planning staff, the plan as proposed would have greatly increased the number of affected projects under the County’s jurisdiction. Instead of affecting about 10 percent of projects, the plan would have affected at least 80 percent of projects. According to staff, some projects that would have been required to pay fees for the plan would currently require nothing more than a building permit. It appears likely that the proportion of affected projects would be less than that 80 percent estimate in the proposed revision, as illustrated by the examples in Attachment A of this report.

To the extent that County planning staff would be required to provide additional permitting and guidance to project proponents, the Department may require additional resources. The cost of these extra resources would be passed on to project proponents in the form of new fees. There is no intent for the County to absorb those costs. Such fees would be entirely separate from the development fees charged by the Implementing Entity for mitigation and amounts contributed for conservation.

Auditors spoke with personnel working for the East Contra Costa County Habitat Conservancy⁴⁶ about this issue, and were told that completion of records required for issuance of the “take” permits necessitates skills not typically required of local planning offices. The knowledge and skills required to ensure compliance with the Endangered Species Act require considerable biological expertise, for example. In addition, because different projects trigger different types of requirements, experienced staff may continue to face challenges for a long period of time. Furthermore, there may not be enough development projects requiring take permits to enable staff to “practice” enough to retain skills developed in permitting some projects. Lastly, training must be repeated for new employees following staff turnover. Due to the specialized knowledge required, Contra Costa County’s own planners usually refer applications to the

⁴⁶ Contra Costa County’s HCP. That plan’s website is at: <http://www.co.contra-costa.ca.us/depart/cd/water/HCP/>

Conservancy’s staff for processing. This suggests that planning staff in Santa Clara County may need additional training and/or additional staff if the plan is implemented.⁴⁷

To provide the Board of Supervisors with a sense of the scale of fees charged by planning agencies as a result of implementing a multi-species HCP, Auditors contacted the City of Brentwood in the Contra Costa HCP to determine what fees they implemented and how the process has gone over the first three years.⁴⁸ Brentwood reported that, due to the poor economy, it has had only a handful of applications. Its inflation-adjusted application fee is \$1,238, which is based on an estimated 7.5 hours of planning staff time and 1.5 hours of non-planning staff time per application.⁴⁹ In the event of a particularly complex application, the City will also require a \$3,000 deposit, but this has not occurred yet. According to the Principal Planner we spoke with, the handful of affected project proponents were pleased with the new process because it reduced project delays and improved certainty. The City of Pittsburg also implemented an HCP “administrative” fee for processing applications. These fees range from \$1,000 to \$2,000, depending on the location (i.e., development fee zone) of the proposed project.

The County Planning and Development Department anticipates needing some additional resources to process applications related to the plan, but the level of resources needed cannot be predicted at this time. Cost-recovery fees would be developed and enacted if and when the plan is adopted, based on an assessment of the resources needed.

Roads and Airports

Implementation of the plan would have significant implications for the County Roads and Airports Department. That Department is sometimes a proponent of development projects on behalf of the County that require exceptions to the Endangered Species Act to proceed. When these projects go forward, Department staff is required to carry out a variety of mitigation efforts in order to proceed with the project.



⁴⁷ The Santa Clara Valley draft plan included one full-time-equivalent staff person in the role of “Conservation Planner.” To what extent, if any, this employee might be able to either process day-to-day County applications or relieve County staff of the need to perform general administrative tasks such as meeting with federal agencies regarding permitting issues, is unknown.

⁴⁸ Implementation of the plan began in January, 2008, with the passage of implementing ordinances by the County and covered cities.

⁴⁹ Listed tasks consuming the nine hours are: 1) determine completeness of application, 2) review the biological survey, 3) assess site conditions and prepare conditions of approval, 4) determine fee or land contribution requirements, 5) verify that conditions have been followed and species impacts minimized, 6) verify that adequate fees have been collected or the proper amount of land has been provided, 7) record receipt of development fees and disburse the fees to the plan.

For example, the County completed construction of the replacement of the 1928 Uvas Creek Bridge on July 1, 2009.⁵⁰ The biological surveys, reports, permits, habitat restoration, and mitigation expenses solely for endangered species compliance cost about \$547,600,⁵¹ which was approximately 14 percent⁵² of the total project cost. This total does not include the time (about a year) spent by County staff negotiating with the wildlife agencies regarding mitigation and permitting, nor does it include land costs.

According to the County Planning and Development Department, the County's cost for the same components would have been \$28,599, plus undetermined stream fees, if the draft plan had been in place when the project began. Whether these estimates would be similar for the proposed revised plan of August 31, 2011 could not be determined in time for this report. Auditors assume a similar level of benefit would occur under the proposed revised plan. Staff estimated that a year would still have been required to obtain project clearances unrelated to endangered species, such as from the Army Corps of Engineers, the Regional Water Quality Control Board, and the State Department of Fish and Game, and to obtain review for fish species not covered by the draft plan.⁵³ According to Roads and Airports management, the "real costs" of such projects is the hassle, time and difficulty of negotiating mitigations with the wildlife agencies and implementing those mitigations. Some County staff have expressed concern about the ability to mitigate certain developments at all. In some cases, required mitigations may be very difficult to achieve. For example, it may be difficult and time-consuming for County staff to locate and purchase required land.

To the extent that the County has a plan in place that would cover future Roads and Airports projects, the department would be able to carry out covered projects with less effort on the part of department staff, and likely at less cost. For discussion of the effects of an active California HCP on its jurisdiction's transportation projects, see Part IV of this report.

The second effect of a plan on the Roads and Airports Department would be, as previously described in this section of the report, a potential coverage of project expenses to the Parks and Recreation Department. The extent of Roads development fees that may

⁵⁰ This project required a biological opinion, rather than an HCP, because it was partially federally funded, and therefore was able to obtain exemption under Section 7 of the Endangered Species Act.

⁵¹ Surveys, training, biological monitoring, bat mitigation, mitigation design, planting trees, construction mitigation, engineering and inspection, and ten years of monitoring and reporting to wildlife agencies. This total does not include staff costs or land costs.

⁵² Department staff indicated that endangered species expenses run about 10 to 15 percent for typical affected developments.

⁵³ It should be noted that this is a single example from the draft plan. It is therefore not necessarily representative of other past projects, or projects the County might have over the coming decades, nor is it necessarily representative of the effects of the proposed revised plan, should one be developed, on like projects in the future. Examples of project impacts and costs under the draft plan vs. development of individual mitigation efforts for the same projects are provided in Attachment A to this report.

be covered by Parks' commitment of land to the plan ranges from an estimated \$2 million in the December 2010 draft plan to an estimated \$6.7 million in the August 2011 proposed revision. Auditors recommend that Roads pay these costs from Roads funds, thereby reducing the level of commitment required of Parks.

Other County Departments

Other departments that would be affected include County Counsel, the County Controller, the Sheriff's Office and, to a lesser extent, potentially other agencies, such as County Fire. The Board of Supervisors should be aware of these effects, and potential General Fund exposure.

Because the draft and proposed revised plans are complex, span many years, make shifts in land use and expenditures, involve multiple local, state and federal agencies, create new agreements, contracts and responsibilities, are governed by state and federal laws, and are controversial devices that affect very diverse and sometimes competing interests, it is likely to generate many legal questions for the Implementing Entity, the partner agencies, and affected parties.



The County Counsel's office has indicated that it does not expect large impacts on its resources, and would not anticipate needing to hire additional staff. However, the plan could generate a need for considerable legal research, and could result in litigation involving the County.⁵⁴ It is therefore possible that the County would ultimately expend additional General Fund resources on staff or contract legal services related to the plan.

In regards to the County Controller's Office, pursuant to the draft Joint Powers Agreement for the draft plan, the County Controller was to have provided financial services to the Implementing Entity. It is unknown whether a future draft plan would carry this planned service forward or not, but Auditors are unaware of any discussion regarding changing that feature of the draft plan. Unlike for other services that the County would have provided to the Implementing Entity, the draft agreement specified that the direct and indirect costs for the Controller's services were to be fully reimbursed by the Implementing Entity. Although the services were to be reimbursed, the provision of additional services would still extend the Department's responsibilities, duties and possibly resource needs. It would also further the County's potential involvement if the Implementing Entity were to be sued over financial matters for which the County was the source of the accounting records, etc.

⁵⁴ Note, however, that one of the benefits of creating the Implementing Entity is that it, rather than the County or other partner agencies, would be liable for the plan's operations and expenditures.

The creation of additional publicly accessible lands over the course of a few decades could result in a need for additional staff in the Sheriff's Office. According to the draft plan, but not the draft Implementing Agreement, law enforcement, fire services and additional patrols by Park Rangers that might be needed on the newly accessible lands would have been reimbursed by the Implementing Entity using development fee funds. However, the plan envisioned that such expenses would be minimal, and that the County would continue to fund at its own expense law enforcement services on the 13,747 acres⁵⁵ of existing park land that would be committed to the Reserve System.⁵⁶ The plan envisioned a maximum expense of \$187,000 (in 2009 dollars) a year for law enforcement on nearly 45,000 acres.

Auditors contacted the Sheriff's Office regarding its assessment of service provision on those acres. In a written response, the Sheriff's Office stated that "lawful public access to these reserves will present an increased likelihood for additional illegal marijuana gardens requiring enforcement and investigation from our Marijuana Eradication Team detectives. Additionally, this will present an increased risk to public safety as visitors to these reserves may potentially encounter armed suspects tending these illegal gardens."



The Sheriff's Office estimates that the actual staffing need to protect the completed Reserve would be two additional Sheriff's deputies at a cost of about \$350,000 per year, in current dollars. Obviously, this issue would not have been of much concern initially, as the acreage was anticipated to be added at an average rate of about 1,000 acres per year over the course of 45 years. That is, five years after implementation of the plan, the Reserve was expected to span about 5,000 acres. Note that this count does not include the additional 13,747 of existing County park land that was to be added to the Reserve. That land is of course already publicly accessible.

Similar impacts could occur with regard to fire services, as described by the draft plan's EIR/EIS document: "Increased demands for fire services also could result from fire management practices on the Reserve System, either by resulting in increased wildfire [as a result of encroachment of development into areas that highly prone to wildfires] or by requiring increased service by local fire departments to participate in controlled burns. With regard to controlled burns, it is expected that fire department costs would be offset by in-lieu fee payments." It states that increased demands are expected to be "small" and would not necessitate new fire stations.



⁵⁵ The August 2011 proposed plan reduced this amount to 12,291 acres.

⁵⁶ See Table G-1 of Appendix G of the Draft Plan: http://www.scv-habitatplan.org/www/Portals/default/images/default/Public%20Draft/Appendices/App_G_CostModel.pdf

Any future plan that may be developed for the Board’s consideration should ensure that adequate resources are available for public safety services, including Sheriff’s Deputies, Park Rangers, and firefighters, and that the County will have in place written agreements or contracts that ensure full reimbursement of the cost of those services. For example, while the draft Joint Powers Agreement specified that the Controller’s services to the plan would be fully reimbursed, it does not mention public safety services. Reimbursement was envisioned by the draft plan, but because the planned resources were most likely inadequate, and because there was no formal agreement proposed to guarantee reimbursement, Auditors recommend that this be remedied in any future plan that might be adopted.

GOVERNANCE OF THE IMPLEMENTING ENTITY

As described in Part I of this report, six agencies collaborated on and funded the development of the draft plan and its proposed revisions. These are the City of San Jose, the Santa Clara Valley Water District (SCVWD), the County of Santa Clara and the Valley Transportation Authority (VTA) as full partners, and the cities of Morgan Hill and Gilroy as half partners. That is, Gilroy and Morgan Hill, because they had much less development (benefit) from the plan, they each paid only half of the plan set-up costs paid by the full partners.

The amount of development the plan allows a given jurisdiction drives the fees paid for development within that jurisdiction. According to the financial consultant that prepared the plan’s fee estimates by public payer, the development costs by participating agency would have been as shown in Exhibit 11 on the following page.

Exhibit 11
50-Year Development Fees
By Public Agency

Agency	Development Fees (in Millions)	Percent of Fees
County	64.6 ⁵⁷	40.7%
SCVWD	63.2	39.8%
San Jose	20.9	13.1%
VTA	4.3	2.7%
Gilroy	3.1	2.0%
Morgan Hill	2.8	1.8%
Total	\$158.9	100.0%

As this table shows, the total fee cost to all public agencies within the County of Santa Clara over the course of 50 years was estimated to be \$158.9 million (an average of \$3.1 million annually).⁵⁸ Therefore, County agencies would have owed an estimated 16.9 percent⁵⁹ of the plan’s estimated total expense of \$938 million. This means that the majority of costs for the plan, as previously described, were to have been paid by state and federal agencies, foundations and non-profits, and private development. These fees related to the amount and type of land that each agency was anticipated to have developed over the course of the five decades. To be clear, this table does not represent private development that might occur within these agencies’ jurisdictions. In addition, these amounts would be different under the proposed revised plan as described in the “framework” report issued on August 31, 2011. The details of these differences were not available in time for inclusion in this report.

As shown in the table, the County and the SCVWD had the most planned development expenses, followed by San Jose, VTA and then Gilroy and Morgan Hill. Gilroy was projected to owe an average of \$62,000 a year, not including inflation, for mitigation of its development. Morgan Hill was expected to owe an average of \$56,000 annually for its “take” permits. By comparison, the County’s development fee expense was estimated at \$1.3 million annually. Additionally, since the boundaries of the draft plan encompassed primarily unincorporated land, the County’s unincorporated constituents, particularly

⁵⁷ This amount is estimated at \$32.6 million in the August 31, 2011 proposed revision according to September 7, 2011 emails from County Administration.

⁵⁸ Note that this, as previously described, does not reflect the County’s actual commitment of existing and newly purchased land, which, as previously discussed, was to be worth well in excess of what it would owe in actual development fees.

⁵⁹ This excludes the “conservation” amounts that County Parks is committing.

those residing in the southern portion of the County, would be far more likely to be affected/covered by the plan than residents of the south-county municipalities.⁶⁰

Despite the intensive effects that the draft plan would have had on County staff and services, County resources, and residents of its unincorporated areas, the proposed governance structure would have provided a modest level of County authority on the governing body.

As previously described, implementation of the draft plan would have created a new agency, which the draft plan calls the Implementing Entity. That agency would have been responsible for mitigating the impact of covered development and conserving species by using the fees and lands contributed for the various affected developments. This would represent a significant change for affected project proponents, including the County, that currently are responsible for negotiating and implementing mitigations themselves.

The Implementing Entity would have been established through enactment of a Joint Exercise of Powers Agreement (JPA), a structure authorized by California Government Code § 6500 *et seq.* That document refers calls the Implementing Entity the Santa Clara Valley Habitat Agency. Auditors reviewed draft versions of this agreement. The most recent draft version reviewed was dated January 6, 2011. Critical aspects of the draft agreement were as follows:

- The Habitat Agency would be responsible for implementing the Habitat Plan. Key functions of the JPA would have been to approve the Habitat Agency’s budget, and set fees at a level sufficient to fund the Agency’s federally required mitigations on behalf of the paying projects. However, under State law, a JPA can only “jointly exercise” powers common to each of its parties. Since neither the Transportation Authority nor the Water District possess authority to charge development fees,⁶¹ neither is able to be party to the JPA. Therefore, the JPA would have been between the County, San Jose, Morgan Hill and Gilroy. The Water District and the Transportation Authority would not have been parties to the agreement.
- Two elected representatives from each of the three cities and the County would have made up the “Governing Board” of the JPA. The Governing Board would have had exclusive authority to approve the Implementing Entity’s budget and set development fees sufficient to fund the agency’s operations. Its actions generally would have required an affirmative vote from at least one representative of each

⁶⁰ As previously noted, however, there is a proposal to remove certain south-county land from the plan.

⁶¹ Per the Mitigation Fee Act, Government Code § 66000 *et seq.*

party agency. Fee amounts would have been set by a two-thirds (6/8) vote⁶², and at least one affirmative vote from each of the four represented agencies.

- The agreement would have established an Implementation Board. That body would have been made up of two representatives each of the County, San Jose, Gilroy, Morgan Hill and SCVWD, and one representative from VTA. These representatives would have been appointed by the Governing Board, and at least one party from each agency, except the VTA representative, would be an elected official.
- The Implementing Board would have been responsible for making recommendations to the Governing Board regarding the adoption or modification of fees, and making decisions regarding appointment of the Executive Officer and other agency personnel, the purchase of services and equipment, the acquisition of land. It would have made recommendations to the Executive Officer regarding grants and other funding opportunities, and carried out any other duties delegated by the Governing Board.⁶³
- The Implementing Board would have been invested with the authority to contract for services from partner agencies, including the County, or other entities.

The proposed governing authority relative to proposed plan development, based on planned development fees in the draft plan, is shown in Exhibit 12 on the following page.

⁶² This is the language in the actual draft JPA. Auditors assume the vote is required to be three-fourths, not two-thirds.

⁶³ Pursuant to state law, the draft agreement prohibits the Governing Board from delegating the authority for adoption of fees or the agency's budget to the Implementing Board.

**Exhibit 12
Governance Authority Relative to
Draft Plan Impacts**

	Percent of Jurisdiction Land Covered by the Plan	Percent of Public Agency Fees Owed	Percent of Governing Board Votes
Three Cities	>23%*	16.9%	75%
County	77%	40.7%	25%
Total	100%	57.6%	100%

*Some land is under the jurisdiction of VTA/SCVWD.
Sources: December 2010 Draft HCP EIR-EIS, page 6-2; January 2011
Draft Joint Powers agreement.

As the table shows, the eight-member Governing Board would include just two members from the County, which represents about 77 percent of the covered land area, and 41 percent of County-wide proposed public agency fees, based on the draft plan. Note that the impacts of all agencies would be different under the proposed plan revisions of August 31, 2011. The remaining 75 percent of representatives would come from the three municipalities, two of which would have comparatively small fee obligations.⁶⁴ The power to establish fees is important as the fees will be adjusted throughout the life of the plan. Part IV of this report provides information on how fees have changed over time in other California HCPs and HCP/NCCPs. Although there are automatic fee adjustments that would have occurred in the draft Santa Clara plan, the governing body would have periodically reviewed the fees and made changes as needed. As discussed in Part IV of this report, fees in some other HCPs have varied considerably from the initial plan estimates.

Although Morgan Hill and Gilroy jointly would pay just 3.8 percent of the total public-agency development fees, based on their comparatively limited development in the draft plan, they would have jointly represented half of the votes responsible to set fees paid by all public and private developers. In short, the municipalities would have had greater representation on the body that sets the fees that would primarily be paid by the County, the County’s unincorporated constituents and developers, and the Water District. However, the mismatch is mitigated by the requirement that the budget and supporting fees *could not be enacted without the approval of at least one of the Governing Board’s two County representatives*. This feature may provide ample protection for the County and the unincorporated residents it serves, but Auditors recommend that the Board of

⁶⁴ The true differences are even greater than depicted here, since, as described earlier in this section of this report, the proposal called for the County to commit significantly more than its actual fee expenses to the plan.

Supervisors generally assure itself that its representation will be adequate if and when a final JPA is developed.

Other large, multi-species HCPs in California have structured their governance in a variety of ways. For example, the Western Riverside County plan includes all five County Supervisors and a representative from each affected city on the governing Board. Details of other plans' governance structures are provided in Part IV of this report.

LIST OF AUDITORS' RECOMMENDATIONS IN PART II

If the Board of Supervisors elects to enter into the Santa Clara Valley Habitat Plan, it should ensure that:

1. General operating costs of County departments will not be comingled with plan operating costs;
2. The County will be reimbursed according to written agreements for all direct and indirect services that it may provide to the plan;
3. County policies require departments to accurately track these costs separately from their regular operating costs;
4. The County will not extract funds from the plan's operating budget for the purpose of funding its own departmental operations;
5. The Parks and Recreation Department does not subsidize Roads and Airports Department Development fees and that Roads and Airports continues to pay development fees from its project funds, as it does today;
6. The use of Park Charter funds for the purchase of new land committed to the plan in excess of Parks' actual development fees is for "County park purposes," and otherwise appropriate and consistent with voters' intent when they approved the Charter provision that earmarked funds for Parks;
7. Sources of funds have been identified to meet the County's obligations for new land purchases in the event that Park Charter funds sunset or are otherwise unavailable for that purpose;

8. If it wishes to periodically review or cap open-ended Park Charter contributions over the life of the plan, that mechanisms for such reviews or caps are included in the final plan and/or written agreements;
9. The commitment of 13,747 acres⁶⁵ based on the December 2010 draft plan of existing County Park property to the plan is for a “County park purpose” and otherwise appropriate considering some of this land was purchased with restricted Park Charter funds;
10. The conservation easements it will be required to enter into are reviewed in advance and that the terms are consistent with County Park goals and the County Charter;
11. The final JPA’s governance structure provides adequate County representation on the Implementing Entity’s governing board;
12. The plan has adequate resources available for public safety services, including Sheriff’s Deputies, Park Rangers, and firefighters, and that the County will have in place written agreements or contracts that ensure full reimbursement of the cost of those services; and,
13. Costs previously planned to be paid by the plan per the draft plan, such as “public access and recreation,” are not shifted directly or indirectly to the County in the final plan.

⁶⁵ The August 2011 proposal includes 12,291 acres.

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Part III: Cost/Benefit Issues, the Relationship between the HCP and the NCCP, and County Costs, in a Nutshell

This section summarizes questions of costs and benefits generally, the County's own contributions and offsets within the draft plan, and the relationship between the HCP and NCCP portions of the plan. Note again that as of August 31, 2011, a new proposal had been developed that would change the costs presented here. To the extent that information was available regarding those revised proposed costs, they have been noted. The costs and benefits are broken into four major components that Auditors identified in the plan. The recommendation from this section is listed on page 76 and included in Attachment E of this report.

WOULD IT BE MORE COST EFFECTIVE TO IMPLEMENT THE PLAN OR INDIVIDUAL HCPs FOR COUNTY PROJECTS?

Auditors asked the USFWS to provide a listing of mitigations that would be required for the Highway 101 and subsequent projects in the absence of the Santa Clara Valley Habitat Plan. Auditors hoped to get a sense of the cost of those mitigations on an individual basis, compared to having those costs covered as part of future development had the draft plan been implemented. The costs in the draft plan were proposed to have covered the development that occurred over the past decade, as well as future development over the 50-year term of the plan.

The agency replied that development of such a list would require considerable research to determine every project that had gone forward over the last decade for which the plan was expected to provide some mitigation, and that such research was not feasible in time for this report.

If the County elected to proceed without the plan, federal law also would still require mitigation of future affected development projects. Instead of implementing the plan, the County and its partners could choose to:

- Carry out whatever mitigations would be required for past projects for which mitigation was expected to have been met by the plan, and,
- Develop, seek approval for, and implement individual HCPs (or mitigations defined by biological opinions for federal projects) for each future development project that would impact endangered species.

Private developers and land owners also would have to develop, seek approval for, and implement individual HCPs for their impacted projects in the absence of the Santa Clara Valley Habitat Plan. In some cases, projects are difficult to mitigate, particularly with regard to requirements for acquisition of certain types of land. In such cases, public or private projects could be delayed or denied.¹

There is no credible way to estimate the cost of developing individual HCPs for affected public and private projects, and carrying out their mitigations, over the next 50 years. Nor is there a means to estimate the cost of mitigation of projects over the last decade that could require as-yet-undefined mitigations.

For example, the draft plan cost about \$229 per proposed developed acre, including federal funds. This figure does not include the cost of staff time for the six agencies. The average mitigation and conservation cost to develop an affected acre of land under the draft plan was to be about \$35,800, plus any fees that might be imposed by the local planning agency for issuance of the permit. Because the plan would have received extensive grants and land donations by various agencies, foundations and nonprofits, which would have been placed into the “mix” to cover mitigation and conservation requirements, it is reasonable to assume that individual projects, which would not have the benefit of such donations, would pay more for mitigation on a per-acre basis.

There is no way for Auditors to determine if an individual HCP for a future 10-acre development could be completed for \$2,300, plus the cost of attorneys and other professional staff. Further, the expense of the mitigations that might be required by that future HCP is impossible to estimate. Whether an average future 10-acre development could be permitted for \$358,000 worth of mitigations cannot be determined. Much of the cost would depend on the amount and type of land that the USFWS determined would be required to offset the loss of the developed acres. For example, if the USFWS required the proponent to purchase 20 acres that cost an average of \$8,000 per acre, the land acquisition expense would be \$160,000. If the required land cost \$20,000 per acre, the land acquisition expense would be \$400,000. Since there is no way to predict the amount and type of land and other costs that would be required for mitigation of almost 26,000 acres of future projects, there is no way to reasonably estimate whether the draft plan is more expensive or less expensive than development and implementation of individual HCPs for each project.

To further complicate the question, because of the development of the Santa Clara Valley Habitat Plan, the habitat and species issues are well documented within the plan area, and therefore more extensive mitigations and conditions of approval would likely be required of a proponent seeking to develop a single-project HCP in that area. As previously

¹ Examples of project costs and timelines with and without the Santa Clara Valley Habitat Plan are provided as Attachment A to this report.

mentioned, although the overall plan also includes expenditures for conservation efforts that would not be required of an individual HCP, those funds effectively subsidize at least some plan costs, and therefore are effectively a plan expense, at least some of which would otherwise be borne by an individual HCP applicant.

In the case of the County itself, the cost of developing individual HCPs would also have to take into account the loss of monies that the plan would have provided to manage almost 21,900 acres of park land in perpetuity². Although an exact amount is not specified in the plan, the draft plan's proposed land management budget for a subset of that land amounted to \$57.95 per acre, which equates to about \$1.3 million per year for the 21,900 acres.³ Some or all of that expense would be borne by the Parks and Recreation Department in the absence of the Santa Clara Valley Habitat Plan.

In any case, it is probable that some projects would pay more under the plan, and others would pay less. That is, it is possible that the plan would shift costs from one project to another relative to what each project expense would have been without the plan. As shown in Attachment A of this report, such shifts were significant in the draft plan, but at least some of those shifts as of August 2011 were proposed to be eliminated.

It is possible that overall expenses would be lower without the overarching plan because:

- There might be less development without a plan,
- Projects that would not otherwise require an HCP would not have to pay plan expenses,
- Optional developments might occur on less sensitive land in order to avoid the need for HCPs,
- The Endangered Species Act could be weakened by future court rulings, or changes to the law itself, resulting in fewer mitigation requirements in the coming decades.

Alternatively, it is possible that overall expenses would be higher without the plan because:

- As the number of endangered species increases over the coming decades, land available for mitigation could become scarcer and more expensive,
- Court rulings or changes to the Endangered Species Act or state laws protecting species could result in increased mitigation requirements,
- In the absence of an overall plan, greater mitigation would likely be required on a case-by-case basis in an effort to fully offset the impact of a given development,

² This amount in the August 31, 2011 proposed revisions is about 17,806 acres: an estimated 5,515 acres of new land, plus 12,291 acres of existing land.

³ Auditors estimate that the land management amounts are about 24 percent less in the August plan.

- The mitigations required for multiple previous developments that the draft plan would have effectively “grandfathered in” could be expensive,
- Time and money spent to develop individual HCPs, and each project proponent’s time spent locating, buying and remediating land, planting trees, etc. for each project could slow projects down and increase their costs irrespective of the actual mitigation expenses.

Issues of cost, including examples of actual costs for mitigation of recent projects, are discussed in Attachment A to this report.

THE DISTINCTION AND RELATIONSHIP BETWEEN “REQUIRED” (HCP) AND “VOLUNTARY” (NCCP) EFFORTS

Because mitigation of species impacts is required under federal law for applicable projects and would be undertaken for affected projects with or without the availability of the Santa Clara Valley Habitat Plan as a means for obtaining permits, the distinction between the activities and costs *required* to mitigate development versus the *voluntary* activities and costs intended to result in species recovery (NCCP) is important. As will be described later in this report, however, the County’s commitments to the two different components is not clearly specified in either the draft plan document or the August proposed revision report

According to the draft plan, about half of newly acquired land system-wide was to have been for conservation (NCCP) and about half was to have been for mitigation (HCP). Although the mitigation and conservation efforts are technically independent of each other, the two elements are so financially and practically intertwined as to make the distinction largely irrelevant. Under the plan, mitigation may be made by a project proponent by paying development fees to the plan, which then would use the funds to purchase land and carry out other efforts to mitigate habitat damage caused by the development. Although the conservation land is technically not for mitigation of development but rather is to assist in the regrowth of struggling species, the two efforts are interrelated in the draft and proposed revised plan.

Specifically, when models were developed by the management team and consultants to explore the possibility of removing some “conservation” land from the plan, the ratio of acres of habitat destroyed by development to the land provided for mitigation was no longer adequate to meet the Endangered Species Act requirements.

A memo dated August 19, 2010 that was issued to the Governing Body Liaison Group, which is a group of the various partners’ elected officials established to oversee the development of the plan, describes the results of this analysis. According to the memo, reducing the NCCP (conservation) portion of new land acquisition for the plan would

result in large increases in development fees for mitigation. For instance, to shift from 49 percent of newly acquired land purchased for conservation to 35 percent of newly acquired land purchased for “conservation” would have resulted in \$67,162,000 worth of new development fees that would have had to be distributed to project proponents for “mitigation.”

Based on the analysis as described in the staff memo, therefore, each acre purchased for “conservation” under the public draft plan reduced the plan’s endangered species impact “mitigation” fees by an estimated average \$10,661 per acre.⁴ As described in detail in Part II of this report, the County would commit both newly acquired land and existing land to the plan, via conservation easements,⁵ for both mitigation of its own development projects⁶ pursuant to federal law, and for the purpose of conservation efforts pursuant to the NCCP. Although the August 2010 memo does not address the County’s contribution of *existing* land to the plan for conservation efforts, Auditors assume that those acres are similarly valuable and that they ultimately result in lower development fees for project proponents throughout the plan area. In summary, although the “conservation” contributions are not legally required and are not technically part of the HCP, those contributions would in practice be counted toward, and therefore effectively subsidize, the HCP efforts.

For more information on how the two elements are financially intertwined, Part IV of this report details how development fees have remained stable or declined in two other HCP plans that were also NCCPs, but have increased dramatically in two different plans that are HCP-only plans.

How the Conservation Amounts Were Determined

On August 25, 2011, an Auditor spoke with the plan’s official liaison from the California Department of Fish and Game (CDFG) regarding the various land commitments planned from the County. The Auditor asked: Why does the draft plan call for the County to buy and commit 8,150⁷ acres of new land for the plan, rather than 5,000 acres or 15,000 acres; and why does the draft plan call for the County to commit 13,747⁸ acres, rather than 20,000, 5,000 or no existing acres? According to

⁴ Again, this illustrates how Endangered Species Act costs without the Santa Clara Valley Habitat Plan may be higher, since an individual development would not benefit from the commitment of land from various non-profits and agencies.

⁵ A conservation easement enables a land owner to continue to own and use property, but places legally binding, permanent restrictions on the uses or development of the property. Easements are perpetual and stay with the property even if it is sold or donated to another party.

⁶ With the exception of “wetland” fees, the County would get “credits” for mitigation as a result of its land contributions and would not owe development fees for its development projects.

⁷ A portion of this land was to cover the County’s development fees based on its actual planned development projects. The basis for the remaining amount is the general amount needed to ensure species growth.

⁸ The August 31 2011 proposed revision is for 12, 291 acres.

CDFG, there is no specific basis for the specific amount of County land committed to the plan that is for the NCCP. Rather, those amounts contribute to the overall requirement under the NCCP law that the species be conserved. The total lands committed by all of the various entities were reviewed in total by biologists and deemed sufficient to meet that legal standard. The County's committed amounts are simply part of the overall mix, which has been deemed sufficient for the species.⁹ The CDFG official also stated that the local contributions are required in order to draw down the \$155.5 million¹⁰ worth of state and federal grant and land contributions that the draft plan had budgeted. As shown in Exhibit 7 of Part I of this report, these contributions would have funded 16.6 percent of total project costs. According to CDFG, removal of the County's committed land contributions would result in the State's refusal to issue the NCCP "take" permit.

Further complicating the question of the County's costs and benefits from its land contributions is the fact that the expense of management of the committed land would then be borne by the plan, rather than the County Parks and Recreation Department. For example, the draft plan budget calls for annual expenditures of an estimated \$796,040¹¹ for management of an estimated 13,747¹² of existing County park land.¹³ If County Parks did not commit the land, presumably it would then owe more for its mitigation expenses, as described above, and it would bear ongoing land management costs. The County's costs are further discussed on the next page.

THE COUNTY'S OVERALL COSTS AND BENEFITS, IN A NUTSHELL

This portion of the report provides a high-level overview of the cost and benefits of the draft plan from the County's perspective, using the amounts identified in the draft plan. Actual costs and benefits may vary depending on the details of the final plan, should one be implemented, and the accuracy of estimates in the plan. This review also assumes that 100 percent of planned development would occur, and that development costs would not be higher or lower without the draft plan. The analysis is provided based on the draft plan issued in December 2010. On August 31, 2011, a "framework" for proposed revisions to the plan was issued. Auditors have noted these potential changes to the extent that information was available through September 7, 2011.

⁹ According to the HCP/NCCP project manager, the amounts were "negotiated" over time with the wildlife agencies.

¹⁰ Per the August 31, 2011 proposed revision, this amount is estimated at \$115 million as shown in Attachment C.

¹¹ This level of detail was not in the proposed revision; however, on a global basis, the proposed revision would reduce land management expenses by the Implementing Entity by 24 percent. This value would be roughly \$604,990, assuming a proportionate reduction in the land-management budget for this particular property.

¹² The August 31 proposed revision was for 12,291 acres.

¹³ Page 14 of Santa Clara Valley Habitat Plan Appendix G.

The costs and benefits are broken into four major components that Auditors identified in the draft plan. These costs are the purchase of new land by the County's Parks and Recreation Department, the commitment of existing park land, the purchase of new land by the County's Roads and Airports Department, and the payment of wetland fees. As this review will illustrate, the valuation of a given transaction even with the assumptions above is not straightforward.

Purchase of New Park Land in Exchange for Development Fee Credits

The draft plan envisioned that County Parks would purchase, over the course of about 45 years, an estimated 8,150 acres valued at about \$69.6 million.¹⁴ These acres would have been committed to the Reserve System through conservation easements. Because the County is required by the Charter to expend 15 percent of its parks revenues for land acquisition, these funds would be spent on some type of land acquisition in any case, unless the Charter provision were to sunset.¹⁵ However, the funds could have been spent to acquire other land with little or no habitat value.¹⁶ The plan does not delineate what portion of this land is technically for "conservation" or "mitigation." Auditors assume the amount is exclusively for mitigation, but the plan project manager has stated that it is for mitigation and a portion is for conservation.¹⁷ In exchange for this commitment of land, the County would not have paid development fees¹⁸ for its own projects. Those development fees were estimated at \$41.9 million for the Parks and Recreation Department and \$7.8 million for Roads and Airports.¹⁹ These types of fees would be required for the County's development projects with or without a plan. In addition, the cost to manage that land would have been borne by the Implementing Entity. Auditors estimate this would save the County Parks and Recreation Department about \$500,000 per year by year 45 of implementation.²⁰ Services such as law enforcement on the newly acquired Reserve properties would be paid by the Implementing Entity.

There are different ways to characterize these costs and benefits depending on whether the outlay of funds for the land purchase is considered entirely a new expense for the plan, a partial expense for the plan, or not a plan-driven expense. Models with each of these three perspectives are presented in three exhibits on the following pages. Assuming the entire outlay of Park Charter funds for the land that would be committed to the plan is a plan-driven expense yields the costs and benefits shown on the following page. All of

¹⁴ The August 31, 2011 proposed revision called for 47.1 million of expenditures, which auditors estimate is equal to about 5,515 acres, based on the draft plan acreage valuation.

¹⁵ See Part II for details on the Charter's requirements and the Park Fund.

¹⁶ See Part II of this report for discussion of the varying interests and priorities associated with use of Park funds.

¹⁷ Again, this distinction is important since the County must pay mitigation expenses anyway. Conversely, as previously described, removing "conservation" expenditures from the plan merely increases the mitigation costs.

¹⁸ Wetland fees would still be required to be paid by the County Roads and Parks departments.

¹⁹ These amounts as of August 31, 2011 were proposed to be \$25.9 million for Parks, and \$6.7 million for Roads, based on emails received from the County Administration on September 7, 2011.

²⁰ Estimated at \$380,000 per year per the proposed revision. See footnote 22 for more description.

these amounts are based on the publicly issued draft plan. Proposed changes envisioned as of August 31, 2011 are footnoted.

**Exhibit 13
Estimated Costs and Benefits of Land Purchase/Model #1**

Contribution/Outlay Description	Estimated Costs through Year 50	Cost Savings/Revenue Description	Estimated Savings through Year 50
Parks Dept. New Land Purchase	\$69,600,000 ²¹	Annual land management by HCP	(\$2,500,000) ²²
		Development Fee Credits - Parks	(41,900,000) ²³
		Development Fee Credits - Roads	(7,800,000) ²⁴
Total	\$69,600,000		(\$52,200,000)²⁵
Net Cost			\$17,400,000²⁶

This table includes as a plan expense the full estimated value of the new land to be purchased. This perspective assumes, for example, that the funds used to purchase the plan acres could be used elsewhere in the County, for example, to buy other land that might not have significant habitat value but that might be of value to County residents for other purposes. Although the County Charter requires that land be purchased for park purposes, it does not require that the land be conserved or restricted by easements. Therefore, the above model construes the entire purchase as a pure plan expense. In this representation, the net cost to the County would be about \$17.4 million over 50 years based on the draft plan. Per the August proposed revisions to the plan, this net would be about \$12.6 million.

²¹ The cost of the County's new land purchase is proposed to be \$47.1 million in the proposed revised plan of August 31, 2011.

²² Per the August 31, 2011 proposed revisions, the land management costs borne by the plan were proposed to be reduced by 24 percent. Auditors assume this reduction would apply to this amount, resulting in a benefit of \$1.87 million, or about \$625,000 less.

²³ This amount is estimated at \$25.9 million in the August 31, 2011 proposed revision, according to an email from County Administration on September 7, 2011.

²⁴ This amount is estimated at \$6.72 million in the August 31, 2011 proposed revision, according to an email from County Administration on September 7, 2011.

²⁵ This amount would be (\$34.5) million per the proposed plan revisions.

²⁶ This amount would be about \$12.6 million per the proposed plan revisions.

Exhibit 14
Estimated Costs and Benefits of Land Purchase/Model #2²⁷

Commitment/Outlay Description	Estimated Costs through Year 50	Cost Savings/Revenue Description	Estimated Savings through Year 50
Parks Dept. New Land Purchase	\$0 as the outlay is required by the Charter with or without the plan	Annual land management by the Plan	(\$2,500,000)
		Development Fee Credits - Parks	(41,900,000)
		Development Fee Credits - Roads	(7,800,000)
Total	\$0		(\$52,200,000)²⁸
Net Benefit			(\$52,200,000)

However, because the County is required by the Charter to expend 15 percent of its parks revenues for land acquisition, all of these funds would be spent on some type of land acquisition in any case. If one assumes that the expenditure would occur on similarly remote, habitat-rich land anyway, none of the \$69.6 million is a “new” plan expense, and is a cost that would be paid under any circumstance. From that perspective, the expenditure is not for the plan per se, but yet it precludes the County from paying development fees it otherwise would pay. Exhibit 14 above reflects this perspective, in which there is no new cost, but a net benefit valued at \$52.2 million based on the draft plan. Per the August proposed revisions to the plan, this amount would be about \$34.5 million.

²⁷ See footnotes for Exhibit 13.

²⁸ Per the proposed plan revision, this amount would be about \$34.5 million.

**Exhibit 15
Estimated Costs and Benefits of Land Purchase/Model #3²⁹**

Commitment/Outlay Description	Estimated Costs through Year 50	Cost Savings/Revenue Description	Estimated Savings through Year 50
Parks Dept. New Land Purchase	Estimated \$34,800,000 ³⁰ , assuming half of the value is lost to the commitment of land through conservation easements	Annual land management by HCP	(\$2,500,000)
		Development Fee Credits - Parks	(41,900,000)
		Development Fee Credits - Roads	(7,800,000)
Total	\$34,800,000		(\$52,200,000)³¹
Net Benefit			(\$17,400,000)

Yet a third perspective on the net costs versus benefits of the commitment of this land purchase can be made, if it is assumed that the County would otherwise have purchased similar land anyway due to the Charter requirement, but that the placement of a conservation easement on that land diminishes its market value and therefore represents a “cost” to the County it would not incur without the plan. According to the draft plan, the cost to acquire land via conservation easement is estimated at about half of the cost to purchase the land outright. Assuming a 50 percent diminishment of value due to the placement of restrictions on the County’s land, the cost/benefit of the transaction appears as shown in Exhibit 15 above. From this perspective, there is a net benefit to the County estimated at \$17.4 million based on the draft plan. Based on the proposed revisions to the plan as of August 31, 2011, the net benefit would be almost \$11 million under this perspective.

²⁹ See footnotes for Exhibit 13.

³⁰ This amount is estimated to be \$23.6 million based on the August proposed revisions to the plan.

³¹ This amount is estimated to be about \$10.9 million based on the August proposed revisions to the plan.

Commitment through Conservation Easements of an Estimated 13,747 Acres of Existing County Park Land

The monetary value of the commitment of existing land is not estimated in either the draft plan or the proposed revision. The value of this land is not included in either the draft plan or the proposed revised plan as either revenue to the plan or a cost to the County. That is, the \$938 million figure in the draft plan and the \$660.1 million figure in the proposed revised plan both exclude the proposed commitment of this property to the plan. As previously indicated, the basis for this particular amount of acreage is undetermined, other than it completes the mix of resources believed by the biologists to be sufficient to meet the legal standard of species conservation imposed by the NCCP law.

The Implementing Entity would spend an estimated \$796,000³² per year to manage this land, starting in the sixth year of implementation, thereby reducing the land management expenses for the Parks Department by an estimated \$35.8 million³³ through the end of the permit term, assuming that Parks would have invested similar management funds. The County would continue to be responsible for law enforcement on that property.

Determining the value of this existing land that the County would commit to the plan would require an appraisal. An appraisal would take into account the market value of the land without easements, and the market value of the land with easements. The difference between these two amounts is the value that the County would commit to the plan.

However, for purposes of this review, Auditors have attempted to monetize the land value. This effort to monetize the value of the land is not based on an appraisal of the actual land value. The actual value of the County's commitment of easements on this property could be much higher or much lower than this estimate. Auditors based this estimate on two figures from the draft plan, as follows:

- First, the draft plan estimates that the cost to acquire land through conservation easements at 50 percent of the cost to purchase the land outright. Therefore, Auditors assumed that placing easements on County land would reduce the value of land by 50 percent.
- Second, the draft plan estimates that the 8,150 acres³⁴ could be acquired for about \$8,540 an acre. This figure includes acquisition expenses above the actual value of the land itself. Therefore, Auditors assumed that the existing land was of similar

³² This amount per the proposed revised plan is estimated to be 24 percent less or about \$604,960.

³³ This amount per the proposed revised plan is estimated to be about \$27.2 million.

³⁴ Proposed as of August 31, 2011 to be an estimated 5,515 acres.

value, around \$8,500 an acre. This estimate³⁵ is reflected as a cost to the County in the table below.

According to the draft plan, the Implementing Entity would spend about \$796,040³⁶ per year on management of the land, beginning in year six of implementation. This benefit³⁷ is reflected in Exhibit 16 below.

**Exhibit 16
Estimated Costs and Benefits of Commitment of Existing Park Land**

Commitment/Outlay Description	Estimated Costs through Year 50	Cost Savings/Revenue Description	Estimated Savings through Year 50
Commit 13,747 ³⁸ acres of park land	\$58,424,750 ³⁹	Annual land management by the plan	(\$35,821,800) ⁴⁰
Total	\$58,424,750		(\$35,821,800)
Net Cost			\$22,602,905⁴¹

Based on this “ballpark” estimate, this individual transaction would be a net loss to the County, estimated at \$22.6 million, based on the draft plan. Note that this calculation does not reflect the value associated with permitting projects that this contribution would facilitate. Again, the value of this land could be much higher or lower than shown here. This is not based on an appraisal.

³⁵ \$8,500/2=\$4,250 * 13,747 acres = \$58.4 million.

³⁶ As of the August 31, 2011 proposed revised plan, this figure is estimated to be \$605,000. See footnote 7.

³⁷ \$796,040 * 45 years = \$35.8 million.

³⁸ As of the August 31 proposed revised plan, this commitment is proposed to be 12,291 acres.

³⁹ Estimated at \$54,914,250 under the proposed revised plan.

⁴⁰ As of the August 31 proposed revised plan, this is estimated to be worth about 24 percent less, or about \$27.2 million.

⁴¹ Estimated to be \$8.6 million based on the proposed revised plan.

Purchase of New Land by the Roads and Airports Department

County Roads and Airports would expend an estimated \$5.7 million for new land per the draft plan. This would facilitate drawdown of an estimated \$5.5 million in federal funds, all of which would be used to permit development of South County Airport improvements. These amounts are shown in Exhibit 17 below.

Exhibit 17⁴²

Estimated Costs and Benefits of New Land Purchased by Roads & Airports

Commitment/Outlay Description	Estimated Costs through Year 50	Cost Savings/Revenue Description	Estimated Savings through Year 50
Roads and Airports Land Purchase	\$5,700,000	Federal Grant	(\$5,500,000)
Total	\$5,700,000		(\$5,500,000)
Net Cost			\$200,000

All of these expenditures and grant funds were eliminated in the proposed revised plan. Under the revised plan, the small net benefit in this table based on the draft plan is therefore zero.

The \$5.7 million that Roads was originally planned to commit would not be committed and therefore, would not offset any of Roads’ development fees. Those fees were expected to be \$6.7 million per the proposed revised plan. Per the proposed revised plan, both the grant funds and the land purchase would be eliminated. This would result in Parks’ land commitments covering 100 percent of Roads’ proposed \$6.7 million of development fees..

⁴² This is proposed to be eliminated per the proposed revised plan.

Payment of Wetland Fees

Lastly, the County would continue to pay, as it otherwise would, wetland fees for its own development. These fees were estimated by the plan’s financial consultant based on the actual development that the County planned.

The Parks and Recreation Department would be responsible for an estimated \$8.2 million for wetland fees. These types of fees would typically be paid anyway as part of project development costs. Similarly, the Roads and Airports Department wetland fees would be about \$6.8 million, for a total of \$15 million for the County. These expenses are not described in the plan, but were obtained from the plan’s financial consultant. Like the development fees, the County would likely have paid similar amounts anyway in order to comply with federal law in carrying out its development projects. Because these expenses are not waived by the provision of land to the plan, Auditors construe these fees, even though they would otherwise be paid, as an additional expense. This is shown in Exhibit 18 below. These fee estimates are based on the County’s probable development projects in the draft plan. Because the proposed revised plan reduces planned development for the County, Auditors assume that the wetland fees would be reduced by some amount in a final plan. These amounts were not specified in the proposed revised plan document issued on August 31, 2011.

**Exhibit 18
Estimated Costs and Benefits of Wetland Fees**

Contribution/Outlay Description	Estimated Costs through Year 50	Cost Savings/Revenue Description	Estimated Savings through Year 50
Wetland Fees, Parks	\$8,216,239		
Wetland Fees, Roads	6,813,790		
Total	\$15,030,029		\$0
Net Cost			\$15,030,029

Summary of Costs and Benefits

Draft Plan

In total, then, the County would lay out about \$90.3 million for the draft plan, over 50 years, including property that it would otherwise most likely have purchased, and development and wetland fees that it otherwise would most likely have paid. This total excludes the value of the County's commitment of conservation easements for an estimated 13,747 acres of existing park land.

Auditors estimate that the benefits that the County would incur over that period at about \$93.5 million. Of that, \$49.7 million would be in the form of development fee credits, and \$38.3 million in the form of shifting the County's land management expenses for committed land to the plan.

Assuming the County's costs to be \$90.3 million, plus assuming the value of its - committed park land to be \$58.4 million, the County's total commitment is roughly estimated at \$148.8 million, of which \$93.5 million would be generated in return in the form of direct financial benefits. This benefit estimate does not reflect the benefits of the plan itself, such as streamlined permitting of County projects, or potentially reduced development fees. As a result, while the County's direct net cost is estimated at \$55.2 million, there would be additional benefits and costs. Exhibit 19 on the following page summarizes this review, with all costs represented as plan expenses. Again, all of these amounts would be different under the proposed revised plan, and the final "bottom line" for the County would depend on the actual costs in the final plan, should one be adopted.

**Exhibit 19
Total Estimated Costs and Benefits**

Contribution/Outlay Description	Estimated Costs through Year 50	Cost Savings/Revenue Description	Estimated Savings through Year 50
Parks Dept. Commit New Land Purchase	\$69,600,000 ⁴³	Annual land management by the Plan	(\$2,500,000) ⁴⁴
		Development Fee Credits - Parks	(\$41,900,000) ⁴⁵
		Development Fee Credits - Roads	(\$7,800,000) ⁴⁶
Commit 13,747 ⁴⁷ acres of current park land	\$58,424,750 ⁴⁸	Annual land management by the Plan	(\$35,821,800) ⁴⁹
Roads and Airports Land Purchase	\$5,700,000 ⁵⁰	Federal Grant	(\$5,500,000) ⁵¹
Wetland Fees, Roads	\$6,813,790 ⁵²		
Wetland Fees, Parks	\$8,216,239 ⁵³		
Total	\$148,754,779		(\$93,521,800)
Net Cost			\$55,232,979
Total Less Commitment of Existing Acres	\$90,330,029		(\$57,500,000)
Net Cost Without Existing Acres			\$32,800,029

⁴³ Estimated at \$47.1 million per the proposed revised plan as of August 31, 2011.

⁴⁴ Estimated to be \$1.9 million per the proposed revised plan as of August 31, 2011.

⁴⁵ Estimated to be \$25.9 million per the proposed revised plan as of August 31, 2011.

⁴⁶ Estimated to be \$6.72 million per the proposed revised plan as of August 31, 2011.

⁴⁷ Estimated to be 12,291 acres per the proposed revised plan as of August 31, 2011.

⁴⁸ Estimated at \$52,236,750 based on the proposed revised plan as of August 31, 2011.

⁴⁹ Estimated to be \$27.2 million based on the proposed revised plan as of August 31, 2011.

⁵⁰ This expense of Roads funds was eliminated in the August 31, 2011 proposed revised plan.

⁵¹ This grant for County Roads expenses was eliminated in the August 31, 2011 proposed revised plan.

⁵² This amount could be lower under the proposed revised plan of August 31, 2011.

⁵³ This amount could be lower under the proposed revised plan of August 31, 2011.

This table includes the total cost with and without the “ballpark” estimated value of the commitment of existing park land to the plan. The amount without that value reflected is included here for two reasons. First, the “ballpark” estimate may be much higher or much lower than the actual value of the land. Second, the total outlay without that estimated value represents an actual future expenditure of County funds in the amount of \$90.3 million, as estimated by the plan’s financial consultants. The commitment of existing land has a value of some amount, but it is not an actual future outlay of funds because the property is already owned by the County. The estimates in the table represent all new outlays as -plan costs. As previously described, some of these costs in fact would be incurred with or without the -plan. Also, as previously stated, this estimate assumes that development expenses would be equal with or without the plan. If the plan resulted in lower overall development fees or more rapid project completion, such events cannot be quantified, and are not reflected in this table. In addition, the amount that the County might owe for mitigation of projects subsequent to 2001 – or the potential increased cost of future development projects carried out on a piecemeal basis – if the plan were not to be in place cannot be quantified and is therefore not included in the table. In addition, this table omits the value of the contributions by entities other than the County to the Reserve System that would be available for the County’s residents to use for passive recreation. This contribution is estimated at 36,850 acres⁵⁴ and is likely worth hundreds of millions of dollars. If those acres were construed by the reader as a direct financial benefit to the County, there would be a net positive benefit to the County.

Whether the County would be better off or not by participating in the plan primarily depends on 1) several factors that cannot be quantified, and 2) the relative values attributed to the commitment of various lands to the Reserve System.

Proposed Revisions

Based on the footnoted changes that were proposed as of August 31, 2011, Auditors’ very rough estimate is that the net commitment of the County would be around \$50 million, over 50 years, assuming valuation of the newly acquired lands per the “Model 1” perspective. To reiterate, whether the County would be better off or not by participating in the plan primarily depends on 1) several factors that cannot be quantified, and 2) the relative values attributed to the commitment of various lands to the Reserve System.

⁵⁴ Estimated based on the August 31, 2011 “framework” proposal to be 30,647 acres. That’s 36,162 newly acquired acres of reserve, less the County’s proposed new contribution of 5,515 acres.

**LIST OF AUDITORS’
RECOMMENDATIONS IN PART III**

If the Board of Supervisors elects to enter into the Santa Clara Valley Habitat Plan, it should ensure that:

1. The County’s overall commitments to the plan, including the commitment of more than 22,000 acres⁵⁵ valued at more than \$133.7 million of existing and new park and airport⁵⁶ land based on the December 2010 draft plan, are reasonable in light of expected benefits to the County government and its constituencies.

⁵⁵ The August 2011 proposal includes approximately 18,600 acres.

⁵⁶ The airport land has been removed from the August 2011 proposal.

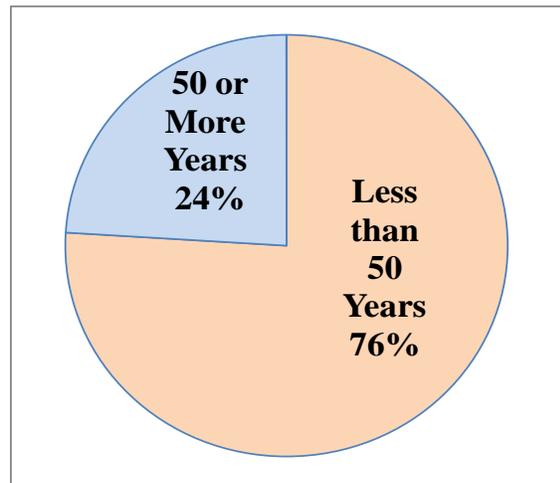
Part IV: Lessons Learned from Selected Existing Large HCPs in California

Auditors sought information on other HCPs in the State of California. Of the 136 California HCPs, information was obtained on six operable plans that bear at least some resemblance to the draft and the proposed revised Santa Clara Valley Habitat Plan. All of the selected plans are public, span at least 30 years, cover multiple species and affect at least 50,000 acres. This section describes various aspects of these six existing plans. Some of the plans are significantly shorter in duration or smaller in scale than the draft Santa Clara plan, and there are other significant differences as well. A review of the annual reports and other records associated with these plans, as well as a study of the implementation effects from one of the plans, revealed several important factors that the Santa Clara County Board of Supervisors should take into account as it considers potential revisions to the draft plan. Auditors' recommendations from Part IV are summarized on page 88 and included in Attachment E of this report.

CALIFORNIA'S HCPs AND THE DRAFT SANTA CLARA VALLEY HABITAT PLAN

According to the U.S. Fish and Wildlife Service's online *Conservation Plans and Agreements* database of HCPs for Region 8, which spans California and Nevada¹, there were approximately 136 approved HCPs in California as of April 15, 2011. Very few of the approved plans resemble the draft Santa Clara Valley Habitat Plan in terms of size, scope, public-sector involvement and 50-year term. For instance, as shown in the chart at right, only 32 of the 136 plans (less than 24 percent) span 50 or more years.

Of those plans that span 50 or more years, many cover comparatively small amounts of land, or are for private interests only. For



¹This database is accessible at: http://ecos.fws.gov/conserv_plans/public.jsp. It should be noted that this does not mean there are only 136 legal development projects in the state. Many developments are permitted through biological opinions, as the County's Highway 101 work was permitted as described in Part I of this report. That opinion enabled other HCP developments to also proceed, based on the assumption that they would be covered by the County's pending HCP/NCCP. Additionally, many HCPs are in the process of being developed and/or otherwise may not be captured in the database.

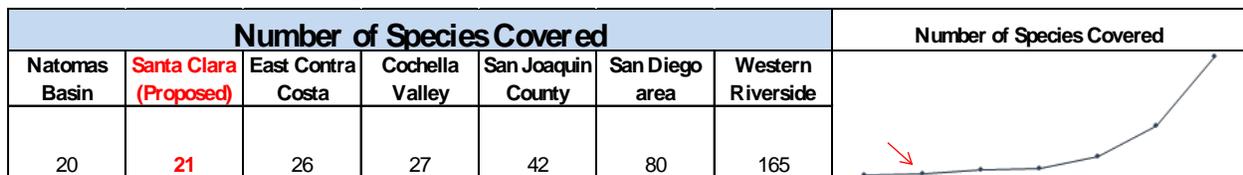
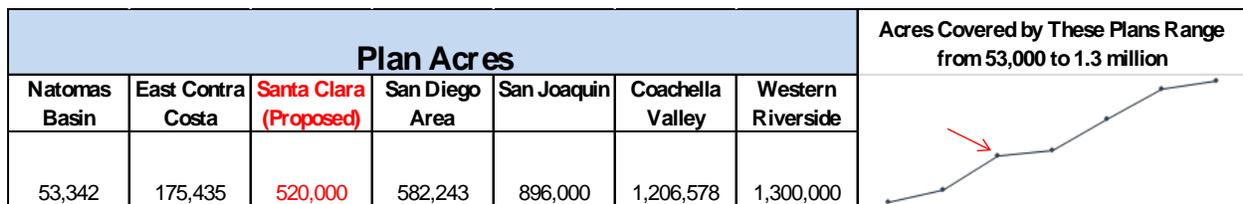
example, there is a 50-year plan for Delano State Prison, but it only covers 635 acres. There is also a 50-year plan covering 25.5 acres for a pipeline project for Chevron, a private oil company.

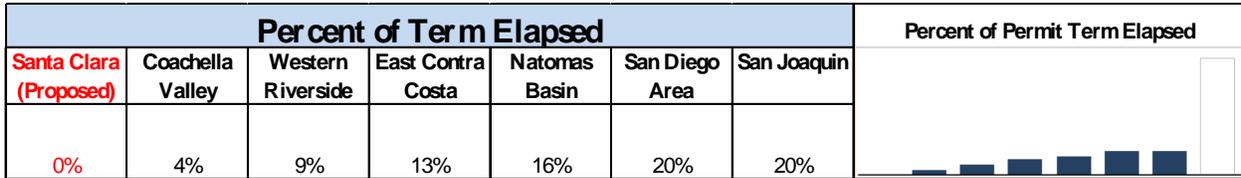
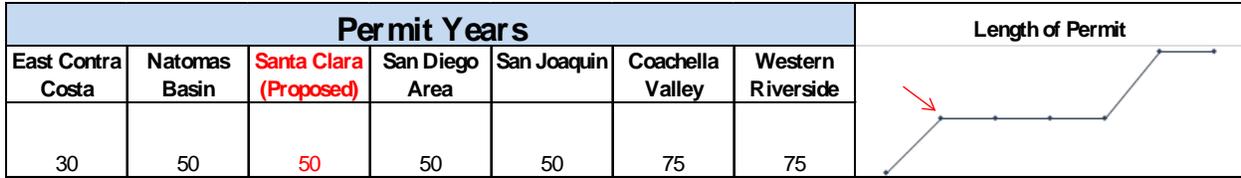
In the County of Santa Clara, there have been at least two approved plans, according to the federal database. The Pacific Gas & Electric utility company in 1998 received a three-year permit for a 4.2-acre plan covering the Bay Checkerspot Butterfly. Another three-year, 0.83-acre permit covering the Salt Marsh Harvest Mouse was issued in 1999 to Zanker Road Resource Management, Ltd., a privately owned solid waste and recycling company.

It is safe to say that there is no California plan that is truly comparable to the ambitiousness, scope, scale, longevity and commitment of public resources as the draft plan was.

As detailed below, large, long-term, public HCPs are fairly new in California, and are generally in their early stages of implementation. This fact is important, since it leaves County policy-makers and advisors with very little history to use as a guide for HCPs generally. Despite the freshness and lack of true comparability of the other California plans reviewed, Auditors found some general themes that members of the Board of Supervisors should keep in mind as they evaluate the elements of any revised proposed plan.

The following charts show the draft Santa Clara Valley Habitat Plan relative to the other plans reviewed in regards to number of acres, species covered, permit term and proportion of time that has passed since the permit was issued. Again, these charts reflect only the public draft plan, not any changes that may be included in a final plan. All data is from the U.S. Fish and Wildlife Service. For example, as of late August, there was a proposal to reduce the covered species from 21 to 19.





As the charts show, the Santa Clara Valley draft plan fell around the middle of other plans in terms of affected acres, but covered fewer species. They also show how little of the permit term has passed for these plans; all of these plans are in their early stages. The basics of the plans are as follows.

THE BASICS OF COMPARISON PLANS

The following is a brief summary of some of the basic components of the comparison plans, including the primary permit holders and date of permit issuance. In addition to the local permit holders, various federal and state agencies, including the California Department of Transportation or California Department of Parks and Recreation, may participate in some of these plans.

Coachella Valley Multi-Species HCP

This plan includes eight cities² within Coachella Valley in Central Riverside County. In addition to these jurisdictions, permit holders include the Coachella Valley Water District and Imperial Irrigation District. The plan is both an HCP and NCCP.³ The NCCP Permit was issued on September 9, 2008, and the final permit for the HCP was issued on October 1, 2008. This multi-species plan is not to be confused with a different plan that was for a single species, with a permit issued in 1986.⁴

East Contra Costa County HCP/NCCP

The East Contra Costa County HCP/NCCP was permitted on July 25, 2007. It is both an HCP and an NCCP, and covers Contra Costa County as well as the cities of Brentwood, Clayton, Oakley and Pittsburg. Permit holders also include the Contra Costa County

² They are the cities of Cathedral City, Coachella, Indian Wells, Indio, La Quinta, Palm Desert, Palm Springs and Rancho Mirage. The City of Desert springs is in the process of being added as a permit holder.

³ See Parts I and III of this report for discussion of the distinction between these plan types.

⁴ More information on the Coachella Valley plan is available at <http://www.cvmshcp.org/>.

Flood Control and Water Conservation District, East Bay Regional Park District, and the East Contra Costa County Habitat Conservancy.⁵

Natomas Basin HCP

This plan covers the northern portion of Sacramento County and the southern portion of Sutter County, and also contains incorporated and unincorporated areas within the jurisdiction of the City of Sacramento. Permit holders also include Reclamation District 1000, Natomas Mutual Water Company and The Natomas Basin Conservancy. Its permit was issued on June 27, 2003.⁶

San Diego County Multiple Species Conservation Program

The Multiple Species Conservation Program Plan involves multiple subarea plans in the San Diego area, with multiple permits issued between 1996 and 2005. The plans are both an HCP and NCCP, and they cover Southern San Diego County, and the cities of Chula Vista, La Mesa, Poway and San Diego. Subarea plans are in the process of being developed for the cities of Coronado, Del Mar, El Cajon and Santee, as well as Northern and Eastern San Diego County. The San Diego County Board of Supervisors approved the South County Subarea Plan on October 22, 1997, and the County of San Diego entered into an Implementing Agreement with the Wildlife Agencies for the South County Subarea Plan on March 17, 1998.⁷

San Joaquin County Multi-Species Habitat Conservation and Open Space Plan

This plan's permit was issued on May 31, 2001. It covers San Joaquin County, and the cities of Escalon, Lathrop, Lodi, Manteca, Ripon, Stockton and Tracy. These jurisdictions and the San Joaquin Council of Governments are permit holders. While the Stockton East Water District, East Bay Municipal Utility District, San Joaquin Area Flood Control Agency, and the South San Joaquin Irrigation District are not permit holders, they can apply for coverage under the plan.⁸

Western Riverside County Multiple Species HCP

This plan includes 22 permit holders. It was originally adopted by Riverside County and the cities of Banning, Beaumont, Calimesa, Canyon Lake, Corona, Hemet, Lake Elsinore,

⁵ More information on the East Contra Costa County plan is available at <http://www.co.contra-costa.ca.us/depart/cd/water/HCP/>.

⁶ More information on the Natomas Basin plan is available at <http://www.natomasbasin.org/>.

⁷ More information on the Multiple Species Conservation Program is available at <http://www.sdcountry.ca.gov/dplu/mscp/>.

⁸ More information on the San Joaquin County plan is available at http://www.sjcog.org/programs-projects/Habitat_files/Habitat-Main-page.htm.

Moreno Valley, Murrieta, Norco, Perris, Riverside, San Jacinto and Temecula. The Riverside County Flood Control and Water Conservation District, Riverside County Parks and Open Space District, and Riverside County Waste Management Department also participated in the original agreements. Its permit was issued on June 22, 2004.⁹

Auditors interviewed staff of these plans, and reviewed their annual reports and other records. Highlights of this review are presented below. It should be noted that Auditors focused primarily on the financial and practical elements of plan implementation, without evaluating species and habitat effects. Since these plans have been implemented fairly recently, the long-range effects of their implementation on habitats and species remains unknown. In other words, it is too soon to know whether and to what extent species and/or habitats may or may not benefit from implementation of the plan, particularly since some plans have suffered setbacks in implementation.

HOW ARE THESE OTHER HCPS GOVERNED?

Four of the six plans that were examined established a joint powers authority (JPA) to oversee implementation of the plan. Both the Natomas Basin plan and San Diego plan did not establish a JPA. Rather, the Natomas Basin plan created The Natomas Basin Conservancy (TNBC), an independent non-profit corporation, for implementing reserve acquisition and management activities. TNBC serves as the Plan Operator on behalf of permit holders, and its efforts are guided by a Board of Directors, with members of the Board appointed by agencies receiving permits under the NBHCP. In the County of San Diego, local jurisdictions, special purpose districts and regional public facility providers are responsible for implementing the Multiple Species Conservation Program based on their subarea plans and implementing agreements.

As discussed in Part II of this report, the draft Santa Clara Valley Habitat Plan establishes a JPA with an eight-member Governing Board that consists of two representatives from the County and each of the three cities that are adopting the plan. According to the draft Joint Exercise of Powers Agreement, “The JPA Act requires that a joint powers agency may only exercise those powers that are common to all parties.” The Agreement further states, “Only the County, San Jose, Morgan Hill and Gilroy have authority to adopt mitigation fees for development projects pursuant to the Mitigation Fee Act, Government Code § 66000 *et seq.* Therefore, only the County, San Jose, Morgan Hill and Gilroy are parties to this Agreement.” The other two “permittee” jurisdictions – the Santa Clara Valley Water District and Santa Clara Valley Transportation Authority – are not represented on the Governing Board, but they are members of an Implementation Board.

The County represents about 77 percent of the proposed covered land area and 41 percent of County-wide proposed public agency fees in the draft Santa Clara Valley HCP/NCCP.

⁹ More information on the Western Riverside County plan is available at <http://www.wrc-rca.org/>.

However, 75 percent of the plan’s Governing Board representatives would come from the three municipalities, two of which would have comparatively small fee obligations. Since the power to establish fees is important, as the fees will be adjusted throughout the life of the plan, the Board of Supervisors could consider supporting an alternative mix of representatives on the Governing Board.

Similar to the draft plan in the County of Santa Clara, the plans in East Contra Costa County, San Joaquin County and Western Riverside County created a JPA with representatives from the County and each of the cities that adopted the plan. However, unlike Santa Clara’s plan, not all plans provide jurisdictions with an equal number of representatives. For example, in San Joaquin County, the JPA consists of two representatives from the San Joaquin County Board of Supervisors, two representatives from the City of Stockton, and one representative from the other cities that adopted the plan. The Board of Directors for the Western Riverside County plan includes all five County Supervisors and a representative from each city, and the Third District Supervisor currently chairs the Board. Only the East Contra Costa County plan provides for two representatives from the County and each city, similar to Santa Clara’s plan. The JPA membership composition of these plans is summarized in Exhibit 20 below.

**Exhibit 20
Composition of JPA Governing Boards**

Plan	County	Cities	Special Districts
Coachella Valley	5 representatives	1 representative from each city	1 representative from each special district (water and irrigation)
East Contra Costa	2 representatives	2 representatives from each city	
San Joaquin	2 representatives	2 representatives from the City of Stockton and 1 representative from every other city	
Santa Clara	2 representatives	2 representatives from each city	
Western Riverside	5 representatives	1 representative from each city	

Source: Habitat Conservation Plan Documents

Furthermore, unlike Santa Clara’s plan and the other plans, the Coachella Valley Multi-Species HCP is overseen by a JPA formed by all local permit holders, including a water district and irrigation district in addition the County of Riverside and local cities. The JPA was established in the form of the Coachella Valley Conservation Commission (CVCC) in 2006, prior to permit issuance. The CVCC meets monthly and approves

acquisitions and budgets. Voting members of the CVCC include the five County Supervisors and a representative from each city and both special districts. Staff of the Coachella Valley Association of Governments, which supports the CVCC, were not aware that this governance structure was potentially in conflict with the JPA Act or Mitigation Fee Act.

As previously recommended, the Board of Supervisors should assure itself that its representation on the final JPA is adequate to serve the County's interests.

WHAT HAS OCCURRED WITH DEVELOPMENT IN OTHER HCP AREAS?

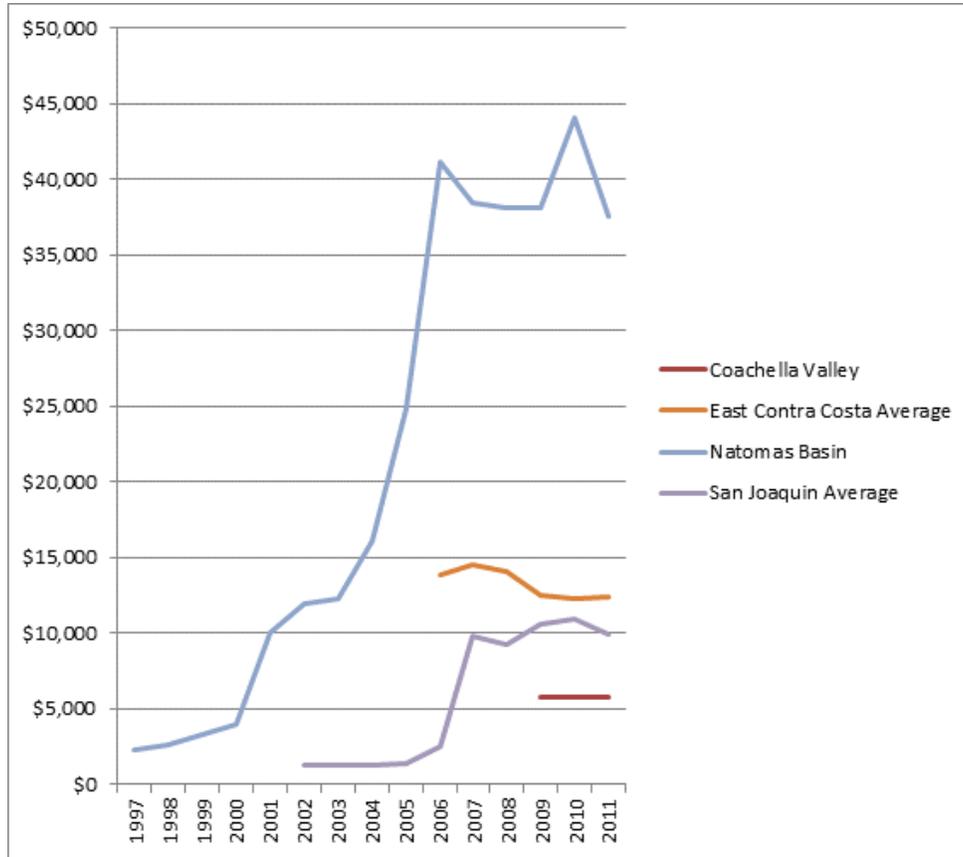
All of the other HCPs contacted reported that the downturn in the economy and the depressed real estate market were impacting development within the HCP areas. In addition, in the Natomas Basin, a required levee repair has resulted in a building moratorium, which has further impacted development. According to recent annual reports and audited financial statements, its fee revenues are lower than expected. In San Joaquin County, the Senior Habitat Planner reported that municipal projects comprise the majority of current development.

When the economic downturn hit Coachella Valley in 2008, many development projects were stalled at various stages of completion. On January 9, 2010 the CVCC temporarily exempted all projects issued any grading permit before October 1, 2008. The rate of development in 2010 for the Coachella Valley jurisdictions participating in the MSHCP was less than 20 percent of the expected rate for the permit approved in 2008; further, due to concerns over financial hardship for project proponents, about half of all projects in the period of January 1, 2010 through September 30, 2010 were granted exemptions from the development fees imposed by the HCP.

HAVE INITIAL PLAN FEES CHANGED UPON IMPLEMENTATION?

Auditors were able to obtain historical local development mitigation fee (LDMF) information for four of the six plans examined. For two of these plans, development fees have increased dramatically. For example, as shown in Exhibit 21 on the following page, the per-acre fee for the Natomas Basin plan was nearly 17 times higher in 2011 than in 1997. A large portion of this increase was the result of a settlement resulting from the litigation in *NWF v. Babbitt*, which added about \$4,000 to the fee in both 2001 and 2002 based on the court's ruling that the City of Sacramento had not ensured adequate funding to carry out the HCP as required by the Endangered Species Act.

**Exhibit 21
Mitigation Fee Changes in Four Major HCPs
Since Plan Implementation**



Source: Habitat Conservation Plan Documents

Mitigation fees also vary by zone in San Joaquin County but increased 685 percent in all categories between 2002 and 2011. Fee increases were present in most years except for 2008 and 2011. The largest single year increase was 276 percent in 2007 when a financial update was completed. According to the Senior Habitat Planner, in 2005, they realized they made a mistake basing the fees on the California Construction Cost Index. They subsequently obtained a financial update, and new fees went into effect in 2007. The fees are now tied to agriculture land sales for acquisition costs and the Consumer Price Index for land management, enhancement and administration.

In contrast, two other plans have had fee decreases. Those are East Contra Costa County and Coachella Valley. In East Contra Costa County, the fee varies by zone but has decreased by 10.5 percent between 2006 and 2011. On an annual basis, mitigation fees decreased by as much as 11.1 percent in 2009 and increased by as much as 4.5 percent in 2007. While Coachella Valley’s fee has remained the same since the fee went into effect on October 1, 2008, it is expected to decrease 2.3 percent (from \$5,730 to \$5,600) by Fall

2011. A Nexus Study and Revised Fee Ordinance have been completed and sent to the Coachella Valley cities and the County of Riverside for their action. The new fee incorporates monitoring and management costs but lengthens the acquisition period, resulting in a net decrease.

HOW MUCH OF PLAN REVENUE IS MADE UP OF DEVELOPMENT FEES?

An analysis conducted by the consulting firm MuniFinancial for the Santa Clara Valley HCP/NCCP Stakeholder Group in 2007 showed that the plans in East Contra Costa County and Coachella Valley are less reliant on mitigation fees for funding than the plans in Natomas Basin and San Joaquin County.¹⁰

Fee funding comprised no more than 50 percent of total funding in East Contra Costa County and Coachella Valley, where fees have decreased since inception, while 92.4 percent of Natomas Basin’s funding and 66.6 percent of San Joaquin County’s funding was generated from fees. In those plans, fees have increased markedly since the plans were implemented, as described earlier in this section. The plans in East Contra Costa County and Coachella Valley are also NCCPs, which results in “greater local and state contributions and a smaller proportion of development fees than HCP-only plans.” It thus seems that the plans with a greater mix of funding are able to minimize their fee increases. The fact that NCCP conservation contributions effectively subsidize or reduce development fees is detailed in Part III of this report.

The draft Santa Clara Valley Habitat Plan anticipated that fee funding would comprise 58.4 percent of total funding. Fees would represent about 55 percent of funding in the proposed revised plan. Both of these figures exclude the value of the County’s commitment of 13,747 acres in the draft plan (12,291 acres in the proposed revised plan.) This is a better level than was present in the Natomas Basin and San Joaquin County plans, but there could be some benefit in identifying another funding source to further reduce the Santa Clara Valley Habitat Plan’s reliance on mitigation fees.

WHAT HAS OCCURRED WITH LAND ACQUISITION AND IMPACT MITIGATION?

Due to the low level of development and minimal fee collection around the State, most plans acquired few acres in 2010. For example, the Natomas Basin plan had no land acquisitions in 2010. The decline in the real estate market ended the demand for mitigation land in the Natomas Basin beginning in 2006, and since then the

¹⁰ A summary of the analysis is available at: http://www.scv-habitatplan.org/www/Portals/_default/Documents/SCV%20HCP%20Funding%20Base%20-%204-24-07.pdf

land acquisition program has been inactive. When mitigation land was needed for public works projects, TNBC was able to provide land from its surplus land holdings.

During 2010, the County of San Diego and its private conservation partners acquired 392 acres for the MSCP South County Subarea Plan. The County and its partners are in much better shape than many other plans because they have acquired a total of 6,454 acres since 1998, or approximately 68.5 percent of the total acres required (9,425 acres). The plan receives nearly all of its funding from local and regional sources, rather than through mitigation fees.

In Coachella Valley, the permit holders acquired only 228 acres, for a total of 6,479 acres conserved, in 2010. This is only 6.4 percent of the total acreage required (100,600 acres). Staff to the plan said that they have identified priority conservation areas and generally set a budget for acquisition. The lead agency, the Coachella Valley Association of Governments, contributed \$30 million to the plan that has served as the primary source of funding.

In addition, the San Joaquin County plan acquired an additional 231 acres of land in 2010. This resulted in a cumulative total of nearly 8,942 acres since the plan was implemented in 2001. Unlike newer plans, San Joaquin's plan is on a pay-as-you-go basis. The plan has a two-year window to mitigate projects, so while they have an acquisition goal every year, mitigations may occur over 24 months. Staff to the plan said that they are continually attempting to comply with mitigation requirements and bring past mitigation into compliance, but they have never been in danger of losing their permit.

WHAT HAVE OTHER STUDIES FOUND REGARDING IMPLEMENTATION OF THESE PLANS?

The RAND firm was hired to evaluate the effects of the Western Riverside County plan after it was implemented. RAND's 272-page report, entitled "Balancing Environment and Development: Costs, Revenues and Benefits of the Western Riverside County Multiple Species Habitat Conservation Plan"¹¹ was issued in 2008. Among other things, the study evaluated whether the plan had in fact streamlined permitting, the effects of different land purchase strategies on land costs, and potential funding strategies. The study noted that the plan was still new, so true effects would not be known for a few more years as more projects went through the development process.

¹¹ The full report available at: <http://www.rand.org/pubs/monographs/MG816.html>

Permitting Time and Cost and Project Litigation

Road Projects

The study found that permitting efficiency was mixed. For some projects, permitting was much more efficient. For others, the HCP seemed to have actually made the permitting process worse. The study found that the greatest benefits in terms of streamlining project permitting was for road-transportation projects, especially federal projects, and road-safety and maintenance projects. According to the report: “Stakeholders [involved with road-transportation projects] indicated that the MSHCP had accelerated the permitting process for all such projects with which they were familiar that had completed major steps in the permitting process since the MSHCP was adopted.” For such projects, the time savings ranged from one to five years, and one project was believed to have gone forward which would not otherwise have proceeded at all. For road-safety projects and maintenance projects, the time savings was estimated at six months to a year per project. Some project stakeholders reported that the HCP had reduced litigation over road projects. RAND also reported that stakeholders indicated that some road project permitting costs were increased as a result of the HCP, while the cost of others were considered to have decreased. RAND’s analysis determined that if the HCP lost its permit for such projects, the end result would be lengthy delays in road projects, resulting in significant costs to drivers.

Commercial, Industrial and Residential Development Projects

Permitting effects on other types of projects were found to be mixed. Stakeholders reported that the HCP had increased the time needed to obtain required permits as often as it has reduced it for development projects on more than five acres. The findings suggest that the HCP has, on the whole, reduced the frequency and scope of lawsuits about development projects, but the magnitude of the effect is lower than for road projects.

Land Purchase Decisions and Financing the Plan

The study evaluated a variety of strategies to finance land acquisition. These strategies include:

- Setting annual land acquisition goals in terms of the dollar amount of land purchased is preferable to the number of acres purchased. This would result in more land being purchased when land prices are low than when they are high. The benefits of this strategy are greatest when assembling a reserve over a period of several decades.

- There are options for raising additional revenue from local sources. This includes property-based, development-based, transportation-based and sales tax-based revenue sources. There are advantages and disadvantages to each of these options and some have less political feasibility than others.

If a final Santa Clara Valley Habitat Plan is developed, the Board of Supervisors may wish to alter the land-acquisition goals from specific acres per year to particular dollar amounts in order to maximize use of County funds for such purposes. Based on the RAND study, this would potentially reduce the overall cost of the plan.

LIST OF AUDITORS’ RECOMMENDATIONS IN PART IV

If a final Santa Clara Valley Habitat Plan is developed, the Board of Supervisors should:

1. Assure itself that its representation on the Governing Board is adequate to serve the County’s needs, as previously recommended in Part II of this report; and,
2. Consider altering the land-acquisition goals from specific acres per year to particular dollar amounts in order to maximize use of County funds for such purposes.

Project Examples

This attachment provides examples of project costs and timelines under the public draft Santa Clara Valley Habitat Plan. These are examples that were made available to the Auditors. As examples based on a draft plan that will not be implemented, they are not necessarily representative of costs or benefits associated with a potential new draft plan. In fact, Auditors assume that impacts for the same development described here would be significantly different in any new plan that may be presented to the partner agencies for consideration.

This is because opposition to the distribution of costs was a driving factor in the lack of support for the draft plan. While a new plan may reduce overall costs, and potentially could reduce costs for many potential projects, reductions in cost for any given project would vary. In the event that the plan were to be adopted, the actual cost for a given project would depend on the new fee structure as it applied to the specific project.

The differences in proposed fees under 1) the public draft plan, 2) the previous administrative draft plan, and 3) the potential revised draft plan illustrate this principle. These different fee amounts, shown in the table on the following page, illustrate how the cost of certain projects may change dramatically based on different fee structures.¹ Auditors expect similar shifts in relative fee burdens in any new proposal that might be put forward.

Since costs are related to plan benefits, any new draft plan that would reduce costs overall would also likely reduce some of the plan's benefits, such as by reducing the number of species covered or by reducing the number of acres that may be developed. Both of these have been proposed as potential changes to the public draft plan. These changes may reduce plan costs, but may not reduce overall project costs over the long run.

For example, the new proposal under discussion may remove the Golden Eagle as a covered species, which would reduce mitigation costs and therefore plan costs. However, if a particular development were to be proposed on property that is home to that eagle, even though the project is otherwise covered by the plan, that development would have to go through a lengthy and potentially expensive process to develop a separate mitigations for the eagle, and the project proponent would be responsible for funding and carrying out whatever mitigations would then be required.

¹ These amounts were provided by the County Executive's Office on page 4 of the memo to the Board dated June 14, 2011.

Examples of Cost Shifting Based on Different Fee Structures and Plan Coverage

Example Project	Current ESA Costs	Admin Draft ESA Fees	2010 Public Draft ESA Fees	Proposed ESA Fees as of mid-2011
New single family house on serpentine land – Zone A, 1.5 acre development, 8.8 acre property	Unknown, potentially significant	\$29,580	\$126,865	\$115,410
1,000 SF addition to single family house - Zone A, 2.3 acre property (No ESA issue)	\$0	\$45,356	\$0	\$0
New 2,000 SF barn in San Martin – Zone B, 0.5 acre development, 2.39 acre property (No ESA issue)	\$0	\$32,958	\$5,764	\$0
New 5,000 SF single family house near Morgan Hill – Zone B, 1.3 acre development, 2.8 acre property (No ESA issue)	\$0	\$31,718	\$31,718	\$0

Examples of Endangered Species Act project impacts currently, and as projected under the public draft plan issued in December, 2010 for those same projects are shown on the following pages. Costs and time identified do not include non-ESA costs, such as permits required for other purposes or agencies (i.e, building permits, etc.) These examples were provided by the County Planning and Development Department.

Example Project 1: Uvas Creek Bridge

Cost/Time Without Plan: \$550,000/1 year

Cost/Time Per Draft Plan: \$28,600, plus possible "stream" fees/1 year

As described in Part III of this report, the County completed construction of the replacement of the 1928 Uvas Creek Bridge on July 1, 2009. The biological surveys, reports, permits, habitat restoration, and mitigation expenses solely for endangered species compliance cost about \$547,600, which was approximately 14 percent of the total project cost. This total does not include the time (about a year) spent by County staff negotiating with the wildlife agencies regarding mitigation and permitting, nor does it include land costs.

The nearly \$550,000 cost was for required surveys, training of construction crews, biological monitoring, the design of mitigation, bat mitigation, mitigation of construction impacts, the planting of trees, engineering and inspection, and a decade of monitoring and reporting to federal agencies.

According to the County Planning and Development Department, the County's cost for the same components would have been \$28,599, plus undetermined stream fees, if the draft plan had been in place when the project began. Staff estimated that a year would still have been required to obtain project clearances unrelated to endangered species, such as from the Army Corps of Engineers, the Regional Water Quality Control Board, and the State Department of Fish and Game, and to obtain review for fish species not covered by the draft plan.

Example Project 2: Construction of 76,897 square feet of commercial buildings on a 7.72 acre property in Morgan Hill off Cochrane Road

Current Cost/Time: \$10,362/minimal time

Cost/Time per Draft Plan: \$123,983/minimal time

The \$10,362 cost under the current process was for compliance with the Citywide Burrowing Owl Habitat Mitigation Plan, which requires payment of a \$1,029 per acre fee, plus the cost of pre-construction surveys.

Under the draft public plan, the project would have been charged \$123,983, which would include the cost for a \$13,790 per-acre land cover for Zone B (agricultural land) fee, plus nitrogen deposition fees.

Example Project 3: Four-acre, 20-lot subdivision in unincorporated east San Jose

Current Cost/Time: \$0/minimal time

Cost/Time Per Draft Plan: \$1,395/minimal time

The draft plan would require no new survey requirements. The additional cost reflects the cost of “nitrogen deposition” fees, which mitigate the damage to land and species due to nitrogen from vehicle exhaust.

Example Project 4: Subdivision of a 16.05 acre parcel into 12 residential lots in southwest Gilroy, adjacent to Santa Cruz foothills

Current Cost/Time: \$2,750,000/8 years+ ongoing monitoring

Cost/Time per Draft Plan: \$222,029/minimal time

This project required extensive endangered species surveys, mitigation and permits. Surveys identified endangered species on the property. Surveys and consultations with the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG) began in 1998. Initial acceptance of mitigation was given in 1999, with final approval by CDFG granted in 2005, and the permit issued by USFWS in 2006. The cost of biologists, mitigation expenses and land was approximately \$2.75 million.

Had the draft plan been in place, the project would have instead required no surveys. The project would have paid Zone B (agricultural land) fees of \$13,790 per acre, plus nitrogen deposition fees, for a total cost of \$222,029. The draft plan would have imposed restrictions on fencing, landscaping and lighting adjacent to potential reserve area.

Example 5: Three lots of between 1.7 and 4 acres with one single family home per lot, west of Morgan Hill. Improvements include a new bridge over Edmundson Creek to one building site.

Current Cost/Time: \$10,000/7 months

Cost/Time per Draft Plan: \$51,580/7 months

This project required about \$10,000 for biological surveys, which found no endangered species on site. Had the draft plan been in place, the project would have required a biologist to assess land types (determine if serpentine is present) and surveys for Least Bell’s Vireo, and a 35-foot creek setback, along with conditions to minimize riparian impacts. The project would have paid Zone B fees and nitrogen deposition fees. The cost estimate assumes avoidance of riparian and stream fees.

Example Project 6: New, 5600 square foot single family house on 6-acre property on Edmundson Avenue west of Morgan Hill.

Current Cost/Time: \$0/minimal

Cost/Time per Draft Plan: \$31,718/ one month

This project required about \$10,000 for biological surveys, which found no endangered species on site. Had the draft plan been in place, the project would have required a biologist to assess land types (determine if serpentine is present) and surveys for Least Bell's Vireo, and a 35-foot creek setback, along with conditions to minimize riparian impacts. The project would have paid Zone B fees and nitrogen deposition fees. The cost estimate assumes avoidance of riparian and stream fees.

Example Project 7²: A 12-foot-wide by 3,600 paved path through Uvas Creek Preserve.

Current Cost/Time: Forfeiture of \$520,000 grant/Unable to obtain permit

Cost/Time per Draft Plan: \$20,451-\$21,654/ minimal

This project would have constructed an access path for a Gilroy school. The school had a \$520,000 grant for the construction of the project. However, the grant was forfeited because the endangered species permitting requirements were so extensive that the school was unable to obtain a permit prior to the expiration of the grant.

Had the draft plan been in place, the school would have been able to buy a permit promptly for between \$20,451 and \$21,654. That expense was made up of \$19,248 worth of Zone B land cover fees and nitrogen deposition fees, plus temporary impact fees ranging from between about \$1,200 and \$2,400.

² This example project was provided by the plan consultants as part of the federally required public hearing held on February 9, 2011.

Example Project 8³: Alviso Marina Boat Ramp Project

Current Cost/Time: \$270,243/1.5 to 2 years for permit

Cost/Time per Draft Plan: No change

This project was in the Alviso Marina County Park in North San Jose, and was carried out by the County Parks and Recreation Department. It required numerous permits, including from the California Regional Water Quality Control Board, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, San Francisco Bay Conservation and Development Commission permit, and the California Department of Fish and Game (Section 1601 permit.) These permits were obtained through a Joint Aquatic Resource Permit Application (JARPA). The permits, biological assessments and mitigation plans and activities cost \$270,243, excluding staff time from both the County Parks and Planning departments. According to County Parks, the expense and timeline for this project would have been equal to the existing expense and time with or without the draft plan.

Example Project 9⁴: Madrone Landfill Closure project, Coyote Creek Parkway County Park in Morgan Hill

Current Cost/Time: \$28,299/six months

Cost/Time per Draft Plan: No change

This project was carried out by the County Parks and Recreation Department. It required numerous permits, including from the California Regional Water Quality Control Board (401 permit), wetland delineation and permit support (project was deemed not in the Army Corps of Engineers' jurisdiction) and the California Department of Fish and Game (Section 1601 permit.) The permits, biological study, and tree monitoring cost \$28,299, excluding staff time from both the County Parks and Planning departments. According to County Parks, the expense and timeline for this project would have been equal to the existing expense and time with or without the draft plan.

³ This example project was provided by the Parks and Recreation Department.

⁴ This example project was provided by the Parks and Recreation Department.

Selected Projects Permitted by the Plan

This attachment lists selected general and specific projects of particular interest to the County for which “incidental take” of 21 covered species would have been permitted under the public draft plan. Many other projects not listed here may also be of interest to the County and/or its constituents. Which of these projects would be covered under a “scaled back” plan would depend on the details of that plan. More details about these and other projects throughout the County are available beginning on page 36 of Section 2 of the draft plan at:

http://www.scvhabitatplan.org/www/Portals/_default/images/default/Public%20Draft/Chapters/Ch_02_LandUseCoveredActivities.pdf.

General County Operations and Maintenance

- Maintenance, repair, and rehabilitation of County roads and road shoulders, including pothole repairs, overlays, resurfacing of existing paved areas, construction of retaining walls to stabilize adjacent embankments, vegetation removal (e.g., overhanging bushes, trees), and re-grading to maintain a functional shoulder.
- Maintenance of infrastructure associated with roads including drainage ditches, culverts, and retaining walls.
- Operations, maintenance, and fire protection of rural juvenile detention facilities (e.g., James Ranch and Muriel Wright Center), medical treatment facilities (e.g., Mariposa Lodge), the Santa Clara County Justice Training Center (also known as Holden Ranch), and the Santa Clara County Weapons Training Center (also known as the Sheriff’s Firing Range).
- Operation, maintenance, and management of County parks including trail and road maintenance, facility maintenance, vegetation management around structures.
- County Parks management of natural resources including grassland, oak woodland, and riparian natural communities; protection and enhancement of freshwater resources; erosion control; sensitive species management and monitoring outside of the Reserve System. Management may include prescribed burns, mechanical fuel removal, invasive vegetation management, manual labor, herbicide use, bullfrog management, feral pig removal, management of other exotic nuisance species, and managed grazing.
- County Parks management and maintenance of ponds and spring boxes

including temporary draining for amphibian management, dredging or clearing of debris and sediment for water management for cattle, and rehabilitation due to erosion and/or pond or box failure.

- County Parks dam maintenance including burrow management, vegetation removal, dam repairs, and dam facility repairs.
- Removal of infrastructure (e.g., building structures, roads, trails, stock ponds) for public safety, resource protection, and park management.
- Vegetation management for exotic species removal and native vegetation plantings including the use of livestock grazing and prescribed burns.
- Trail maintenance including grading, clearing, brushing, erosion control, paving, re-paving, abandonment, and restoration.
- Pest abatement to manage rodents, insects, and disease, and weed abatement to manage fire hazards outside the Reserve System including removal of dead and dying wood, trees, and vegetation in agricultural areas. May include mowing or disking for weed abatement and spraying for insect and disease management. (Use of rodenticide is not covered.)
- Surveys and monitoring to support management decisions outside of the Reserve System.
- Enhancement and restoration projects outside of the Reserve System.
- Removal of fish barriers (such as low flow crossings) and installation of fish Screens.
- Maintenance of water delivery systems (e.g., at Jackson Ranch). This includes maintenance of in-stream structures that have a screened pipe that pulls water from a local stream into the property.
- Activities associated with the maintenance of large facilities including golf courses, large event facilities, and sports complexes.
- Equestrian facilities and uses including equestrian stables, equestrian centers, trails, manure management, and horse grazing activities.
- Minor remediation projects (less than 1.0 acre) for spills, illegal dumping, fuel/chemical storage, and firing ranges.

Flood Control

The draft plan would have permitted incidental take for many flood control, levee reconstruction, seismic dam retrofitting and related water projects that are of interest to the County, as generally described below. A map depicting these projects follows the list.

- Construction or reconstruction of flood protection projects and maintenance of associated access roads, including:
 - Re-grading of bank slopes
 - Realignment of the historic full channel or active low-flow channel
 - Installation of hardscape (concrete or riprap)
 - Installation of check dams to allow fish passage or other structural features to control erosion
 - Temporary stream diversion during construction
 - Planting
 - Channel widening
 - Installation of floodwalls and/or levees
 - Permanent bypass or diversion channel construction
 - Acquisition of right-of-way and maintenance road construction
 - Installation of culverts or outfall structures

- Reconstruction of levees
- Reconstruction, realignment, and decommissioning of Santa Clara Valley Water District canals
- Dam-related capital projects, including seismic retrofitting
- In-channel groundwater recharge facilities
- Culvert maintenance
- Creekside trail projects and associated bridges
- Implementation of SCVWD's Dam Instrumentation Project. Activities include a field geotechnical exploratory drilling program and providing a corresponding Automated Data Acquisition System for the eight SCVWD dams within the study area
- Fish passage barrier removals
- Sediment removal

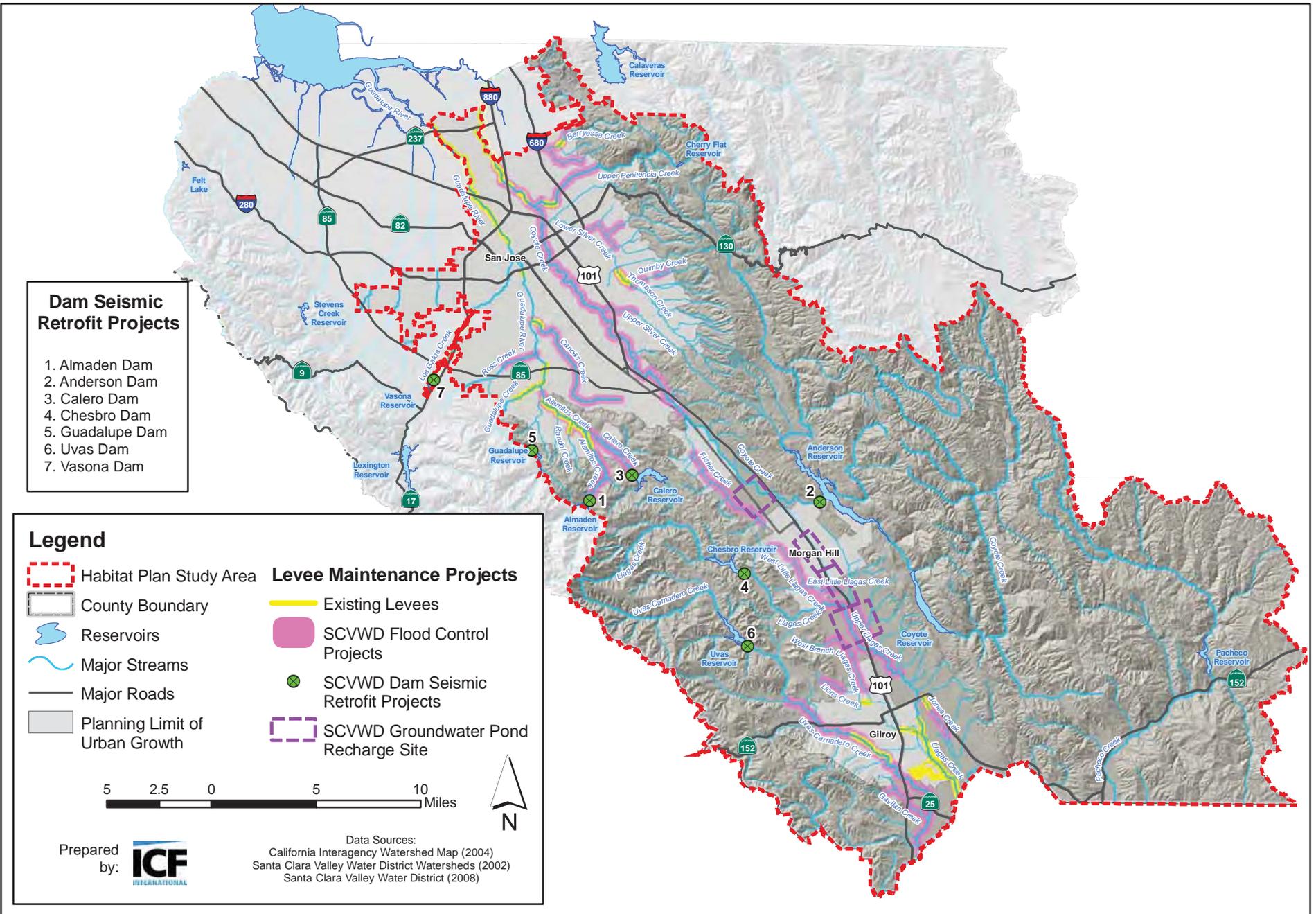


Figure 2-6
SCVWD Capital Projects

Bridge Projects

The draft plan would have permitted “incidental take” for many bridge projects under various jurisdictions, including County Roads and County Parks, including:

- Bridge construction, replacement, and major repair including vehicular, train, and pedestrian bridges.
- Bridge construction in County parks including vehicular bridges, multi-use bridges, footbridges, puncheons, and rock bridges (i.e., rocks placed across a small stream along a single-track trail).

County Roads

In addition to the bridge projects, the draft plan would have permitted “incidental take” for many non-bridge projects under the jurisdiction of County Roads. These include all of the projects listed on the following three pages, as well as the projects shown below. A map of projects follows the listing.

- 1.5 miles of improvements to roadway intersections and driveway entrances that include constructing new turning lanes, adding signals, and lengthening of existing turning lanes.
- 33 miles of safety and/or operational projects that require widening of the shoulder or minor straightening of curves.
- A connection of DeWitt Avenue to the West Edmundson Avenue / Sunnyside Avenue intersection near Morgan Hill.
- A connection on Center Avenue between Omar Avenue and Buena Vista Avenue near Gilroy (requires a new stream crossing).
- A connection between Center Avenue and Hill Road across Maple Avenue immediately south of Morgan Hill.
- An extension of McKean Road to Almaden Expressway near the South Almaden Urban Reserve.
- An extension on Hill Road from Half Road to East Main Avenue and new connection of Peet Road to Half Road.

Table 2-6. Specific Transportation Projects Outside of the Planning Limits of Urban Growth that are Covered by the Plan

Project	Approximate Length in Permit Area (miles)	Approximate Width of New Construction (feet)	Lead Agency
County Roadway Projects (includes extensions, new connections, realignments, and widenings)			
<i>Ferguson/New North-South Corridor</i>			
Ferguson Road widening (SR 152E to Leavesley Road)	1.8	24.0	Santa Clara County
New Avenue widening (Leavesley Road to Buena Vista Avenue)	1.4	24.0	Santa Clara County
New Avenue widening (Buena Vista to San Martin Avenue)	3.6	20.0	Santa Clara County
New Avenue realignment at approach to San Martin Avenue	0.2	46.0	Santa Clara County
<i>Marcella/Center/Hill/Peet North-South Corridor</i>			
Marcella Avenue widening and removal of short zig-zag in road (Leavesley Road to Buena Vista Avenue)	1.6	24.0	Santa Clara County
Center Avenue extension/new connection (Omar Avenue to Buena Vista Avenue; requires a new stream crossing)	0.2	92.0	Santa Clara County
Center Avenue widening (Omar Street to just south of Maple Avenue)	5.1	24.0	Santa Clara County
Center Avenue and Hill Road new connection at Maple Avenue	0.2	92.0	Santa Clara County
Hill Road widening (Dunne Avenue to E. Main Avenue) – along border of Morgan Hill planning limit of urban growth	1.2	24.0	Santa Clara County
Hill Road extension/new connection (East Main Avenue to Half Road and Peet Road new connection to Half Road – along border and inside of Morgan Hill planning limit of urban growth)	0.6	92.0	Santa Clara County
<i>Monterey Road North-South Corridor</i>			
Monterey Road widening (Watsonville Road to Masten Avenue/Fitzgerald Avenue)	4.4	24.0	Santa Clara County
<i>Santa Teresa/Hale Corridor (includes Sunnyside and DeWitt)</i>			
Santa Teresa Boulevard widening (Castro Valley Road to 10 th Street/Thomas Road) – along border of Gilroy planning limit of urban growth	1.3	24.0	Santa Clara County
Santa Teresa Boulevard widening (Day Road/Buena Vista Avenue to Watsonville Road)	5.0	24.0	Santa Clara County
DeWitt Avenue new connection to W. Edmundson Avenue and Sunnyside Avenue intersection	0.4	92.0	Santa Clara County

Project	Approximate Length in Permit Area (miles)	Approximate Width of New Construction (feet)	Lead Agency
DeWitt Avenue widening and removal of small "S" curve (North of W. Edmundson Avenue to Spring Avenue)	0.7	24.0	Santa Clara County
Hale Avenue widening (Morgan Hill planning limit of urban growth border [0.8 miles south of Tilton] to Palm Avenue)	3.3	24.0	Santa Clara County
<i>Uvas/McKean/Almaden North-South Corridor</i>			
Uvas widening – to vary between adding center turn lane and widening shoulders (Watsonville Avenue to McKean Road/Bailey Avenue)	9.8	8.0 to 20.0	Santa Clara County
McKean Road widening (Bailey Avenue to Almaden Road) includes curve realignment at Calero Reservoir Park	4.2	24.0	Santa Clara County
McKean Road extension/new connection to Almaden Expressway – along border and inside of San José planning limit of urban growth	0.2	92.0	Santa Clara County
<i>East-West Corridors</i>			
Leavesley Road Widening (Ferguson Road to Marcella Avenue) – along border of Gilroy planning limit of urban growth	1.3	24.0	Santa Clara County
Masten Avenue widening (U.S. 101 to Monterey Road) – along border of Gilroy planning limit of urban growth	0.7	24.0	Santa Clara County
Fitzgerald Avenue widening (Monterey Road to Santa Teresa Boulevard) – along border of Gilroy planning limit of urban growth	0.7	24.0	Santa Clara County
Fitzgerald Avenue approach to Monterey Road, realignment 30 feet north to create a perpendicular intersection – along border of Gilroy planning limit of urban growth	<0.1	30.0	Santa Clara County
San Martin Widening (U.S. 101 to Santa Teresa Boulevard)	1.4	24.0	Santa Clara County
Interchange Projects			
U.S. 101 at Buena Vista Interchange	0.4/0.3	700	Santa Clara Valley Transportation Authority
U.S. 101 at Coyote Valley Parkway Interchange	0.2/0.4	150	Santa Clara Valley Transportation Authority
U.S. 101 at East Middle Interchange	0.3/0.3	900	Santa Clara Valley Transportation Authority
SR 152 and SR 156 Interchange	0.3/1.0	100	Santa Clara Valley Transportation Authority

Project	Approximate Length in Permit Area (miles)	Approximate Width of New Construction (feet)	Lead Agency
Highway Projects			
U.S. 101 Improvement Project (Monterey Road to SR 129; VTA ID H101-22) includes extending Santa Teresa Boulevard from Castro Valley Road to U.S. 101 (requires a new stream crossing) ¹	12.9	100	Santa Clara Valley Transportation Authority
U.S. 101 widening between Cochrane Rd. and Monterey Hwy (VTA ID H101-23)	5.1	32	Santa Clara Valley Transportation Authority
U.S. 101 HOV/HOT lane (Cochrane Road to Masten Avenue; VTA ID H6) – includes converting the existing median to express lanes	7.5	32	Santa Clara Valley Transportation Authority
U.S. 101 HOV/HOT lane (Masten Avenue to 10 th Street; VTA ID H7) – includes converting the existing median to express lanes	4.2	32	Santa Clara Valley Transportation Authority
U.S. 101 HOV/HOT lane (10 th Street to SR 25; VTA ID H8) – includes converting the existing median to express lanes	3.0	32	Santa Clara Valley Transportation Authority
Mass Transit Projects			
Caltrain South County—double tracking from San José to Gilroy (VTA ID T6)	10.4	14	Santa Clara Valley Transportation Authority

¹ Only the portion of this project in Santa Clara County is covered by the Plan. Mitigation for the portion of the project in San Benito County could be accomplished through the Habitat Plan, consistent with the portion of the project in Santa Clara County. Mitigation required for the San Benito County portion of the project would be additive to the requirements of the Habitat Plan for the Santa Clara County portion.

Sources: Santa Clara Valley Transportation Authority 2009; D. Cameron pers. comm. b.

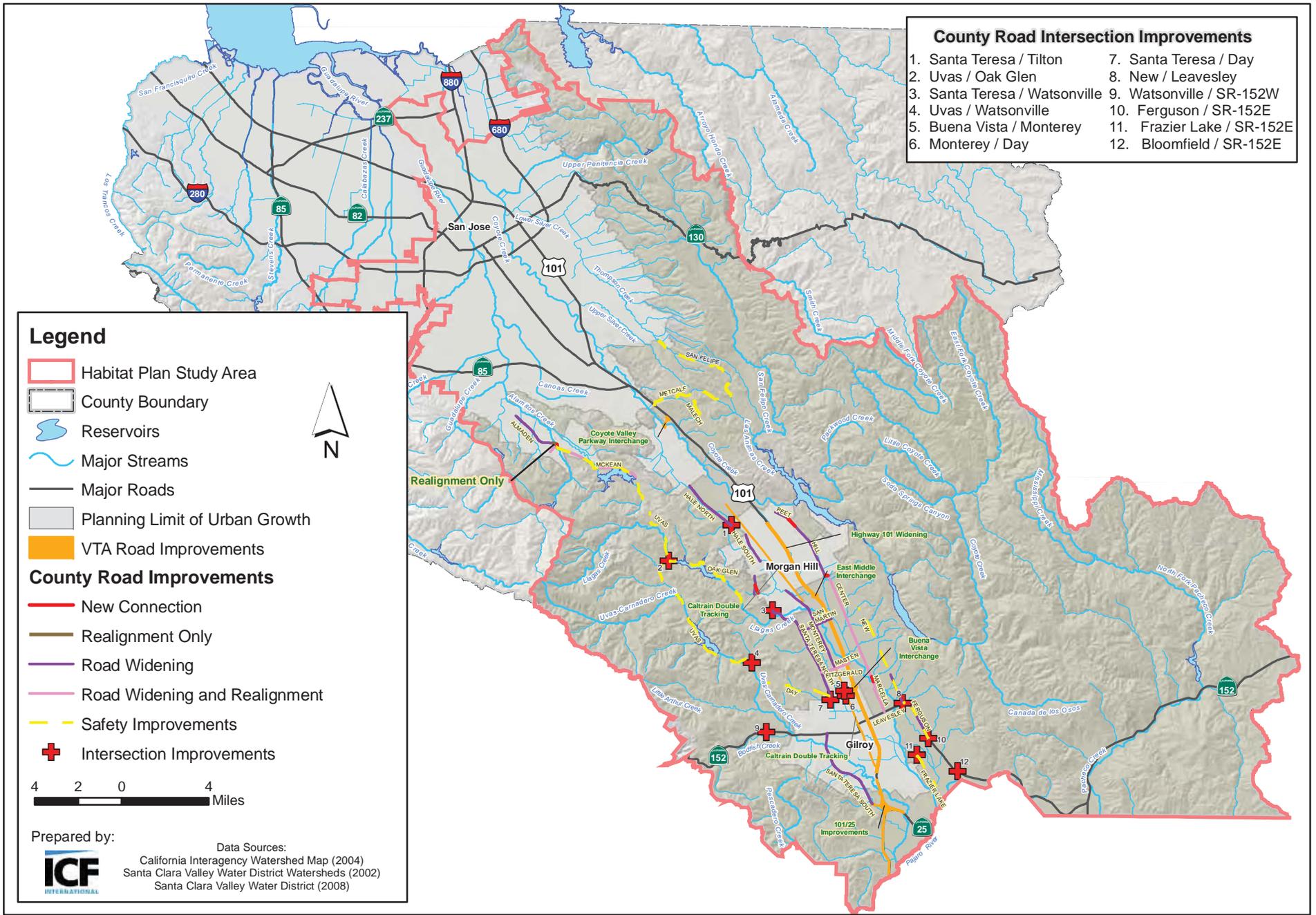


Figure 2-7
Rural Transportation Projects

Parks and Recreation

The draft plan would have permitted “incidental take” of covered species for the following Parks and Recreation Department projects:

- Park trail and fire road development, and installation of related infrastructure such as bridges, staging areas, restrooms, parking lots, and signage.
- Development of up to three acres of borrow sites for materials used for trail structures (e.g., rock) or restoration projects (e.g., clay for wetland substrate), within County Parks.
- Development of regional recreation opportunities and supporting infrastructure including:
 - Group and family picnic areas
 - Drive-in campgrounds
 - Back-country camp areas
 - A regional swimming facility
 - Nature/education centers
 - Historic and cultural resources
 - Disc golf courses
 - An 18-hole golf course and club house
 - Sport fields
 - Off-leash dog parks
 - Dog runs
 - Road and mountain bicycle park
 - Fishing ponds
 - Events pavilions
 - Shade structures
 - Hang gliding/paragliding landing sites
 - Urban edge farming
 - Agricultural marketing area (i.e., expanded produce stand, farmers market area, retail café, and parking)
 - Community gardens
 - Research and demonstration gardens
 - Youth agricultural areas
 - Staging areas including restrooms
 - Equestrian staging areas including water troughs
 - Parking
 - Operations and maintenance facilities and buildings
 - Ranger facilities
 - Multiple use areas

- Public art installations
 - Gateway sites (e.g., trailheads, park entrances, kiosks)
 - Paved and dirt roads
 - Seating (e.g., benches)
 - Landscaping, fencing, irrigation and water tanks
 - Interpretive signage
 - Sewer, water, and other utilities
- Capital improvements to existing systems including:
 - Trail reconstruction, realignment, restoration and addition of separate trails
 - Capital improvement expansion or rehabilitation of existing facilities including campgrounds, equestrian camping sites, day-use picnic sites, staging areas, parking, restrooms, entry and gateway sites (e.g., trailheads, park entrances, kiosks), buildings, landscaping, irrigation, fencing, interpretive signage, sewer, water, and other utilities
 - Restoration, enhancement, and/or rehabilitation of habitat including riparian, wetlands, ponds, grassland, and oak woodland natural communities outside of the Reserve System
 - Installation of fish screens at Parkway Lakes, Cottonwood Lake, and Spring Valley to prevent movement of fish in and out of these lakes and to support recreational fishing opportunities
 - Construction of stock ponds or spring boxes for cattle management
 - Installation of wells to supply stock ponds outside of the Reserve System
 - Reconstruction of pond dams or spring boxes to maintain water levels and facility functioning
 - Replacement of the water delivery system at Jackson Ranch. This includes excavation of the existing system.

County Parks had estimated it would construct outside of the planning limits of urban growth no more than 20 miles of fire road; 25 miles of unpaved, single-track trail; 3 miles of paved service roads; 7 miles of paved multi-use trail; and 10 miles of paved roads. This does not include roads and trails that are part of a larger site development (e.g., nature center, large picnic areas, pavilions, golf course, etc.). County Parks had estimated it would construct up to 300 non-bridge water crossings (e.g., single-track trail crossings), 20 large bridges (i.e., one-or two-way automotive use), and 30 small bridges and puncheons (i.e., footbridges). County Parks estimated it would have constructed larger-scale site development projects (e.g., nature center, large picnic areas, pavilions, golf course, etc.) requiring approximately 1,700 acres. Again, which of these projects would be permitted under a different plan would depend on the specifics of that plan.

Recreation Projects with the Reserve System

The draft plan would have provided incidental take permits for covered species for:

- Construction of up to 150 miles of new trails and 30 new trail creek crossings within the Reserve System, with one trailhead facility, up to 5.0 acres each, is planned for every 5,000 acres of newly acquired lands in the Reserve System (not including existing open space incorporated into the Reserve System), resulting in approximately nine new trailhead facilities.
- Construction and maintenance of recreational facilities such as trails, creek crossings for trails, parking areas, gates, fencing, signage, restrooms, wildlife observation platforms, and educational kiosks.
- Appropriate public use of trails and parking lots within the permit area, inside or outside of the designated Reserve System.
- Up to eight staging areas, eight small day-use picnic areas including restrooms, and three small backpack camps including restrooms and their associated staging areas.

Notably, not only does the “scaled back” plan call for less Park development, the proposal is also likely to remove funding for public access and recreation. There is a proposal to shift a planned \$16 million¹ worth of public access and recreation costs to unspecified “non-Habitat sources.”²

Other Projects

The draft plan would have provided incidental take permits for covered species for many other projects throughout the County, including:

- Expansion and improvement of the South County Airport.
- Future development of Fill Areas 3 and 4 at Kirby Landfill (for species not covered under the present biological opinion.)

¹ About \$320,000 per year.

² August 18, 2011 memo from the HCP Management Team to the HCP Governing Board Liaison Group. The memo does not specify where these monies would instead come from.

Attachment C: Plan Funding

SANTA CLARA VALLEY HABITAT PLAN FUNDING

FUNDING SOURCE	DECEMBER 2010 DRAFT PLAN	AUGUST 2011 PROPOSED PLAN	% CHANGE
FEE FUNDING			
Development Fees			
Private Development	\$279,700,000	\$173,500,000	-38%
Public Development*	\$16,520,000	\$13,290,000	-20%
Endowment	\$106,930,000	\$36,000,000	-66%
Serpentine Impact Fees	\$35,400,000	\$28,600,000	-19%
Western Burrowing Owl Impact Fees	\$5,849,000	\$5,572,448	-5%
Wetland Impact Fees	\$81,700,000	\$76,900,000	-6%
Temporary Impact Fees	\$17,200,000	\$15,200,000	-6%
Participating Special Entity Fees	\$5,000,000	\$10,000,000	+100%
Plan Preparation Fee	\$3,833,882	\$3,833,882	0%
Total Fee Funding	\$552,132,882	\$362,896,330	-34%
NON-FEE FUNDING			
Local Funds			
County of Santa Clara Parks and Recreation Land Acquisition*	\$69,600,000	\$47,100,000	-32%
South County Airport Clear Zone	\$5,700,000	\$0	-100%
Local Land Agencies, Nonprofits and Foundations	\$85,400,000	\$79,200,000	-7%
Interest Income	\$2,600,000	\$2,200,000	-15%
Endowment Interest	\$74,160,000	\$52,900,000	-26%
<i>Total Local Funds</i>	<i>\$237,460,000</i>	<i>\$181,400,000</i>	<i>-23%</i>
State and Federal Funds			
South County Airport	\$5,500,000	\$0	-100%
State and Federal Wildlife Land Grants	\$150,000,000	\$115,000,000	-23%
<i>Total State and Federal Funds</i>	<i>\$155,500,000</i>	<i>\$115,000,000</i>	<i>-26%</i>
Total Non-Fee Funding	\$389,960,000	\$296,400,000	-24%
Total Plan Cost	\$763,788,882	\$571,260,539	-25%
Endowment Balance at End of Permit Term	\$178,090,000	\$88,900,000	-50%
TOTAL PLAN COST	\$941,878,882	\$660,160,539	-30%
<i>Difference</i>	<i>\$214,000</i>	<i>-\$864,209</i>	

*Santa Clara County development fees are provided through in lieu value of land that will be part of Reserve System.

Attachment D: Legal Opinion

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April 14, 2011

Cheryl Solov
Principal Management Auditor
Harvey M. Rose Associates, LLC
70 W. Hedding Street, 10th Floor
San Jose, CA 95110

RE: Use of Park Charter Acquisitions for Santa Clara Valley Habitat Plan

Dear Ms. Solov:

You requested an opinion regarding the use of Park Charter Acquisitions Funds in the implementation of the Santa Clara Valley Habitat Plan ("Plan").

Park Charter Acquisition Funds may be used to purchase real property or a real property interest for "county park purposes," following a determination by the Board that the acquisition is in conformity with the adopted County Parks and Recreation Element of the General Plan. If these two thresholds are met (county park purpose and determination regarding conformity with the General Plan), other County purposes that may be served by the use of the Acquisition Funds, such as implementation of the Plan, would not render the acquisition non-compliant with the Charter's requirements.

Park Charter Acquisition Fund

In 1972, voters adopted a Charter section requiring that the Board transfer a specified portion of the General Fund to the County Park fund ("Park Charter Fund") for acquisition and development of parks. In 1978, voters amended the Charter to allow a portion of Park Charter Funds to be used for park operations. The applicable Charter provisions have been amended several more times over the years to both renew and reallocate the percentage of funds that are divided among acquisition, development and operations. Section 604 of the Charter currently specifies that at least 15% of the Park Charter Fund is required to be spent on acquisitions, at least 5% on development, and the balance on operations.

The Santa Clara Valley Habitat Plan

Since 2005, the County and other local agency partners have worked with the U.S. Fish and Wildlife Service and the California Department of Fish and Game to prepare a Habitat Plan to facilitate planned development and maintenance activities in exchange for providing a comprehensive conservation strategy to address the impacts to natural resources from these activities. The Plan creates a reserve system for protected plants and animals identified in the Plan. The Plan is explained in more detail in the attached memorandum from Lisa Killough to the Board of Supervisors dated April 5, 2011. The salient points of the Plan pertinent to your inquiry are summarized below:

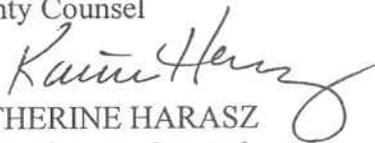
- The County and other local agency partners that will form a joint powers authority called the Implementing Entity have advanced Plan preparation costs to date. The County paid its share of Plan preparation costs from the General Fund. The Plan provides for repayment of these funds from development fees over the 50-year life of the Plan. Acquisition Funds were not used to pay for Plan preparation costs.
- The Plan does not require the transfer of Park Charter Acquisition Funds to the Implementing Entity.
- The Plan contemplates that the Implementing Entity would establish and maintain a reserve system for the preservation of endangered species and plants.
- The County would consider committing parkland to the reserve system that the County either already has acquired or would likely seek to acquire for its own park purposes.
- Under the Plan, the County would retain title to the land committed to the reserve system (both existing and newly acquired property); the County would commit the land to the reserve system by means of a conservation easement. A conservation easement is considered an interest in land. The transfer of the easement to the Implementing Entity would be a conveyance of certain property rights, but fee simple title would remain with the County. The easement would allow passive recreational use of the property, and provide for conservation and maintenance consistent with a management plan developed specifically for the property.
- The County's level of commitment is reflected in section 9.4.2 of the Plan, which provides that local partners are not "required" to use local General Funds for Plan implementation. Funding shortfalls are addressed in section 9.4.5, Funding Adequacy.

Letter to Cheryl Solov, Principal Management Auditor
Re: Use of Park Charter Acquisitions for Santa Clara Valley Habitat Plan
Date: April 14, 2011
Page 3 of 3

Taking these parameters into account, so long as parkland that is committed to the reserve system continues to be used for County park purposes and continues to conform to the parks and recreation element of the General Plan, Park Charter Acquisition Funds may be used to implement the Plan.

Sincerely,

MIGUEL MÁRQUEZ
County Counsel


KATHERINE HARASZ
Deputy County Counsel

Attachment: Transmittal from Lisa Killough to the Board of Supervisors, dated April 5, 2011
(without attachments)

c: Honorable Board of Supervisors
Jeffrey V. Smith, County Executive
Sylvia Gallegos, Deputy County Executive
Julie Mark, Acting Director, Parks and Recreation Department

398206

Attachment E: Recommendations

List of Recommendations

This attachment lists recommendations in this report, along with section of the report that directly discuss the basis for the recommendations.

Based on the Discussion in Part I, the Board of Supervisors should:

1. “Freeze” plan expenses at the \$368,000 that has been allocated equally to the six partner agencies for FY 2011-12 costs;
2. Direct staff to account for the roll-over monies, totaling \$302,609, as a County-only or a communal plan expense. If any expenses related to communal development of the plan are identified, staff should modify the communal plan budget and request reimbursement from the other agencies for their share of actual costs; and,
3. Direct staff to reconcile actual plan revenues and expenses at the end of FY 2011-12 and seek reimbursement if any amounts are due the County.

Based on the Discussion in Part II, if the Board of Supervisors elects to enter into the Santa Clara Valley Habitat Plan, it should ensure that:

1. General operating costs of County departments will not be comingled with plan operating costs;
2. The County will be reimbursed according to written agreements for all direct and indirect services that it may provide to the plan;
3. County policies require departments to accurately track these costs separately from their regular operating costs;
4. The County will not extract funds from the plan’s operating budget for the purpose of funding its own departmental operations;
5. The Parks and Recreation Department does not subsidize Roads and Airports Department Development fees and that Roads and Airports continues to pay development fees from its project funds, as it does today;

6. The use of Park Charter funds for the purchase of new land committed to the plan in excess of Parks' actual development fees is for "County park purposes," and otherwise appropriate and consistent with voters' intent when they approved the Charter provision that earmarked funds for Parks;
7. Sources of funds have been identified to meet the County's obligations for new land purchases in the event that Park Charter funds sunset or are otherwise unavailable for that purpose;
8. If it wishes to periodically review or cap open-ended Park Charter commitments over the life of the plan, that mechanisms for such reviews or caps are included in the final plan and/or written agreements;
9. The commitment of 13,747 acres¹ based on the December 2010 draft plan of existing County Park property to the plan is for a "County park purpose" and otherwise appropriate considering some of this land was purchased with restricted Park Charter funds;
10. The conservation easements it will be required to enter into are reviewed in advance and that the terms are consistent with County Park goals and the County Charter;
11. The final JPA's governance structure provides adequate County representation on the Implementing Entity's governing board;
12. The plan has adequate resources available for public safety services, including Sheriff's Deputies, Park Rangers, and firefighters, and that the County will have in place written agreements or contracts that ensure full reimbursement of the cost of those services; and,
13. Costs previously planned to be paid by the plan per the draft plan, such as "public access and recreation," are not shifted directly or indirectly to the County in the final plan.

¹ The August 2011 proposal includes 12,291 acres.

Based on the Discussion in Part III, if the Board of Supervisors elects to enter into the Santa Clara Valley Habitat Plan, it should ensure that:

1. The County's overall commitments to the plan, including the commitment of more than 22,000 acres² valued at more than \$133.7 million of existing and new park and airport³ land based on the December 2010 draft plan, are reasonable in light of expected benefits to the County government and its constituencies.

Based on the Discussion in Part IV, if a final Santa Clara Valley Habitat Plan is developed, the Board of Supervisors should:

1. Assure itself that its representation on the Governing Board is adequate to serve the County's needs, as previously recommended in Part II of this report; and,
2. Consider altering the land-acquisition goals from specific acres per year to particular dollar amounts in order to maximize use of County funds for such purposes.

² The August 2011 proposal includes approximately 18,600 acres.

³ The airport land has been removed from the August 2011 proposal.

Attachment F: Administration Response

County of Santa Clara

Office of the County Executive

County Government Center, East Wing
70 West Hedding Street
San Jose, California 95110
(408) 299-5105



DATE: September 8, 2011

TO: Ken Yeager
Chairperson, Finance and Government Operations Committee

Dave Cortese
Vice Chairperson, Finance and Government Operations Committee

FROM: Sylvia Gallegos 
Deputy County Executive

SUBJECT: Administration Response to the Management Audit Division's
Special Study: Implementation of the Santa Clara Valley Habitat Plan

The Administration has reviewed the special study report from Harvey M. Rose Associates, LLC, pertaining to possible Implementation of a Habitat Conservation Plan/Natural Community Conservation Plan (HCP/NCCP) in an area of Santa Clara. We appreciate that the management auditors did address some of our concerns discussed prior to issuance of their report. Our responses to the report's narrative and recommendations are set forth in this memorandum.

Part I: History, Status, and Features of the Draft Plan

Response to Narrative in Part I:

The Administration appreciates the efforts of the management auditors to summarize the purposes of HCP/NCCPs and the origin and content of the proposed Santa Clara Valley Habitat Plan (the "Plan"). As noted in the report, it was written at the same time that proposed modifications to the Plan were being developed, some references in the report are to information contained in the December 2010 Draft Plan, and some references relate to modifications to the Draft Plan that are proposed by staff of the six local partner agencies in response to comments on the Draft Plan. The reader is encouraged to reference the document entitled Proposed Revisions to the Draft Santa Clara Valley Habitat Plan: A Framework for Preparing a Final Plan, September 2011, for the most up-to-date information about key proposed changes to the Plan. The proposed modifications to the Draft Plan will be presented to the governing bodies of the local partners in September and October 2011, together with requests for the funding necessary to allow completion of a Final Plan. This will be agendized for consideration by the Board of

Supervisors on September 27, 2011. Should completion of the Final Plan and related documents be authorized, they should be ready for public review no later than April 2012, and decision-making by the Board of Supervisors and the other local partners during May through July 2012.

The report acknowledges that during FY 2011, the other five local partner agencies will complete repayment of their shares of joint Plan expenses incurred through FY 2011 that had previously been paid by the County on behalf of the partners. For FY 2012, the Administration will ensure that the current practice of requiring the partner agencies to remit their proportional share of joint costs in advance of Plan expenditures will continue. Total estimated costs to be shared by the local partners for FY 2012 cannot be determined until the governing bodies of the partners have determined whether or not to complete a Final Plan for possible adoption in mid-2012.

RECOMMENDATIONS AND RESPONSES – PART I

The Board of Supervisors should:

1. “Freeze” plan expenses at the \$368,000 that has been allocated equally to the six partner agencies for FY 2011-12 costs.

Disagree. The Board of Supervisors has already taken action to freeze allowable FY 2012 expenses at \$175,000, pending review and analysis of the proposed “reduced scale plan” information that is currently in preparation. It would not only be premature to take any further action at this time, but would cause unnecessary confusion in a complex review process. Once the Board has reviewed the policy information and taken action regarding Plan completion, the Administration will provide updated fiscal information, including information on shared expenses that may be incurred in FY 2012, to be reviewed by the Partners, if appropriate.

2. Direct staff to account for the roll-over monies, totaling \$302,609, as a County-only or a communal plan expense. If any expenses related to communal development of the plan are identified, staff should modify the communal plan budget and request reimbursement from the other agencies for their share of actual costs.

Agree. The Administration identified these funds for re-appropriation to FY 2012. Of this total \$302,609, \$95,571 represents the actual amount of contract encumbrances that were re-appropriated. Contract expenses have already been captured in prior year cost-sharing with the Partners. The remaining \$207,038 will be used for Final Plan preparation if approved by the Board on September 27 or revert to fund balance if the County does not proceed with the Plan.

3. Direct staff to reconcile actual plan revenues and expenses at the end of FY 2011-12 and seek reimbursement if any amounts are due the County.

Agree. As stated above, Administration is currently preparing additional information for the Board’s review regarding the next steps for the Plan. As part of any further action, all expenses and revenues will require updated calculations, and re-review by the Partners, with adjustments as necessary so that all costs are shared equally. If the Board decides not to complete the Plan, reconciliation of expenses and revenues to-date will occur, and the other Partners will receive refunds of the payments they have made to the extent they exceed joint costs.

Part II: Plan Implementation – County Services, Costs and Interests

Response to Narrative in Part II:

This Part of the report discusses possible effects on County services, costs, and interests if the Plan is ultimately adopted.

Parks and Recreation Department. The report appropriately highlights that the County's Parks and Recreation Department would play a major role in implementation of the Plan, if adopted. However, the report does not acknowledge that the Board of Supervisors has twice previously considered and endorsed the enrollment of existing County Park lands, and new Park lands to be acquired, into the Plan's Reserve System in order to fulfill most County responsibilities under the Plan if it is adopted. (Obligations to pay wetland impact fees, when incurred, would be paid by the Roads and Airports Department and the Parks and Recreation Department for their own respective projects). These responsibilities include mitigation of endangered species impacts arising from County projects, as well as contribution of resources to further the recovery of the species covered by the Plan. County Counsel has opined that it is legally permissible to enroll, through application of conservation easements, Park lands into the Plan's Reserve System, so long as those lands continue to be used for purposes authorized under the Park Charter. These lands would continue to be under the ownership and control of the County and used for park purposes, while subject to a conservation easement.

Overall, the report tends to look with a narrow focus at the impact of Plan adoption on the Parks and Recreation Department, at times to the detriment of a broader view of the costs and benefits of the Plan. For example, on page 34, the report suggests that if County Parks is not reimbursed by the Implementing Entity for Parks staff time negotiating acquisition of new Park land ultimately enrolled in the Reserve, this would constitute a "subsidy" to the Implementing Entity. In fact, County Parks staff will be engaged in these pre-acquisition activities whether or not the Plan is adopted. And in the absence of Plan implementation, County Parks would lose the opportunity to receive significant ongoing funds from the Implementing Entity for resource management on the existing and new Parks lands to be enrolled in the Reserve. County Parks would also lose the opportunity to receive state and federal grant funding to defray costs of land acquisition for conservation (not mitigation) purposes (see Section 9.4.3 of the Plan), as well as the opportunity for other grant funds from private foundations that support land and habitat conservation. For example, over the last two years the East Contra Costa County Habitat Conservancy received grants totaling \$2.38 million from the Moore Foundation for its HCP/NCCP implementation.

While it is appropriate to consider the extent to which the conservation easements applied to enrolled lands will constrain future use of those lands, the report does not present a balanced assessment of these constraints that takes into account both the types of Park land that would be eligible for enrollment in the Plan's Reserve System and the strong County policies, including as set forth in the County's General Plan, that favor protection and retention of park lands and conservation of habitat areas. The Habitat Plan requires that lands that are part of the Reserve, whether County lands or other lands acquired by the Implementing Entity or enrolled by another

public agency like the Open Space Authority, must meet a set of criteria (see Section 8.6) that make it unlikely such lands would be candidates for future development or for active (rather than passive) recreational use.

Department of Planning and Development. The report notes that the Department may require additional resources if the Plan is implemented. The Department does expect to require additional staffing resources and, in keeping with the County's policy of full cost recovery for development processing, will propose appropriate fees for Board consideration if the Plan is implemented next year. Processing fees charged by other agencies are not necessarily indicative of the fees that the Department will propose, once the final Plan is approved and the resources necessary to implement the Plan during the development process can be determined.

Roads and Airports Department. The report recommends that the development fees to which the Roads and Airports Department would be subject under the Plan should not be covered through in lieu credit for County Park lands to be enrolled in the Reserve system. The analysis does not consider the financial and operational impacts of this recommendation; that is, to what extent will capital and maintenance projects identified by the Roads Department not be implemented, or be delayed in implementation, as a result? The proposed Plan seeks to leverage Park acquisitions that would occur anyway (using only 25% of the Parks Charter funds reserved for acquisition during the life of the Plan) to serve as in lieu contribution for Roads fees other than wetland fees. By doing so, more Roads projects can be completed for the benefit of County residents.

Other County Departments. The potential for increased demand for public safety and fire services was previously identified in both the Draft Plan and the Environmental Impact Report/Environmental Impact Statement (EIR/EIS) for the project. As noted in the auditor's report, the Plan contemplates the need for enhanced services and the responsibility for the Implementing Entity to pay for them, to the extent the need would not exist but for Plan implementation.

RECOMMENDATIONS AND RESPONSES -- PART II

If the Board of Supervisors elects to enter into the Santa Clara Valley Habitat Plan, it should ensure that:

1. General operating costs of County departments will not be comingled with plan operating costs.

Agree.

2. The County will be reimbursed according to written agreements for all direct and indirect services that it may provide to the plan.

Agree.

3. County policies require departments to accurately track these costs separately from their regular operating costs.

Agree.

4. The County will not extract funds from the plan's operating budget for the purpose of funding its own departmental operations.

Agree. The Plan's Implementing Entity would be responsible for its own budget oversight, financial management, and accounting practices, although it may choose to use the County or another entity to provide those services by agreement. Whether or not fiscal services are contracted to the County, the County would not have the ability to access Plan funds for non-Plan expenses. The County would, however, be eligible to receive operating funds from the Plan budget only as specifically provided in the Plan. For example, the County's Parks and Recreation Department would receive funds from the Implementing Entity for conducting Plan Reserve management activities on County Park lands, and optionally as may be specified in an agreement for services to be provided on other Reserve lands.

5. The Parks and Recreation Department does not subsidize Roads and Airports Department Development Fees and that Roads and Airports continues to pay development fees from its project funds, as it does today.

The Board has considered this matter twice before — the first time at a Habitat Plan presentation to the Board on August 12, 2008 (Item #66) and a second time at the Parks Acquisition Plan Study Session on September 28, 2010 (Item #20) — and each time the Board has supported the Administration's position that the County should utilize the dollar value of our contribution of parkland to fully offset the costs of impacts from "covered activities" (new construction, maintenance, etc.) generated by the Parks and Recreation and Roads Departments over the fifty year life of the Plan.

The current draft Plan proposes to incorporate 12,291 acres of existing County parkland and 5,950 acres of new parkland into the Reserve System. The value of 5,950 acres of parkland is \$47.1 million (in today's dollars) over the 50-year term.

The Administration has consistently recommended, and the current Plan assumes, that the \$47.1 million of parkland that is incorporated into the Reserve System through conservation easements would be counted in lieu of the Parks and Roads Departments paying mitigation fees over the life of the Plan. It is estimated that Parks would produce impacts requiring \$25.9 million in fees and Roads would produce impacts triggering \$6.7 million in fees, for a total cost of \$32.6 million. The remaining value (\$47.1 million in parkland - \$32.6 million impacts = \$14.5 million) of County parkland would be used to fulfill the Natural Community Conservation Plan (NCCP) component of the Plan, which calls for not only mitigating impacts to covered species, but to also contribute to the recovery of the species in the study area.

The Management Audit Division's recommendation would result in increasing County costs by \$6.7 million when the Roads Department currently has a \$138 million maintenance shortfall and a \$463 million capital projects shortfall. To the extent the County can use the dollar value of our parkland contributions to offset what the Roads Department would otherwise pay for mitigation, we can put these resources toward the substantial maintenance and capital projects shortfall.

6. The use of Park Charter funds for the purchase of new land committed to the plan in excess of Parks' actual development fees is for "County Park purposes, and otherwise appropriate and consistent with voters' intent when they approved the Charter provision that earmarked funds for Parks.

Agree.

7. Sources of funds have been identified to meet the County's obligations for new land purchases in the event that Park Charter funds sunset or are otherwise unavailable for that purpose.

Disagree. This is unnecessary, and would be contrary to the Plan's intent that the General Funds of the local partner agencies not be used should future funding shortfalls occur. The Plan, and the Implementing Agreement that the County and other local partners will be required to sign in order to obtain permits from USFWS and CDFG, provides a variety of mechanisms to address unanticipated financial and other circumstances during the permit term. For example, if for any reason the County should be unable to use Park Charter funds to acquire the park land, options could include reasonable adjustments to expenditures to meet the obligations of the Plan. In consultation with the Implementing Entity and the Wildlife Agencies, adjustments may include Plan modification to reduce take authorization, remove certain County activities from coverage under the Plan, and/ or identification of other funding sources.

8. If it wishes to periodically review or cap open-ended Park Charter contributions over the life of the plan, that mechanisms for such reviews or caps are included in the final plan and/or written agreements.

Partially agree. If the Plan is approved by the County and the other local partners, and federal and state endangered species act permits are issued based on the Plan, the Implementing Entity will be required to conduct annual public reviews of the status of implementation of the Plan. The Board may wish to direct a more specific review, on the same cycle, of the status of Plan implementation as it relates to County departments. With respect to a "cap" on contributions, the County will not have the ability to unilaterally alter actions it commits to under the Plan and the Implementing Agreement, while retaining the benefits of the permits to be issued by USFWS and CDFG. As noted in the response to Recommendation 7, the Plan and the required Implementing Agreement describe the possible options for the County and other Plan participants if funding or other circumstances change during the life of the Plan and its associated permits.

9. The commitment of 13,747 acres based on the December 2010 draft plan of existing County Park property to the plan is for a "County park purpose" and otherwise appropriate considering some of this land was purchased with restricted Park Charter funds.

Agree. The Administration agrees that the Board should ensure that the enrollment of existing County Park lands into the Reserve System for the Plan is appropriate and for a County park purpose. Under the proposed modifications to the Plan, the number of acres of existing Park lands to be enrolled in the Reserve via conservation easement has been reduced to 12,291 acres. By this action, existing County Park lands would become eligible for Plan operational and

endowment funding, and other grant funding, to address currently unfunded or underfunded resource management needs.

10. The conservation easements it will be required to enter into are reviewed in advance and that the terms are consistent with County Park goals and the County Charter.

Agree.

11. The final JPA's governance structure provides adequate County representation on the Implementing Entity's governing board.

Agree.

12. The plan has adequate resources available for public safety services, including Sheriff's Deputies, Park Rangers, and firefighters, and that the County will have in place written agreements or contracts that ensure full reimbursement of the cost of those services.

Agree. The Plan should incorporate adequate resources for new or enhanced public safety services that are necessary due to Plan implementation. The Plan recognizes that the Reserve System will increase the need for law enforcement services and that the Implementing Entity will pay for Reserve-related public safety costs on an annual basis. Arrangements with the County or any other party for such services would be based upon written agreements specifying services to be provided and the payment to be made for the services.

13. Costs previously planned to be paid by the plan per the draft plan, such as "public access and recreation," are not shifted directly or indirectly to the County in the final plan.

Although most of the lands in the Reserve would be open to the public, the Draft Plan does not provide for the Implementing Entity to use development fees to pay for public access and recreation improvements with the exception of public access amenities (paths, fire roads) that are otherwise needed to operate and manage the Reserve lands. The draft Plan stated that recreation activities under the Plan would be funded by non-fee funding sources (excluding state and federal Section 6 grant funds), which could include County Parks funds to provide such amenities on County Parks lands enrolled in the Reserve, consistent with County Park purposes stated in the Park Charter and in conformance with the Parks and Recreation element of the County General Plan. This would not be a "shift" because the Parks and Recreation Department already bears these costs on County Parks lands. Receipt of funds from the Implementing Entity for activities related to Reserve management should free up some funds that would otherwise be used for those purposes.

PART III: Plan Cost/Benefit Issues, the HCP and NCCP, and County Costs

Response to Narrative in Part III:

This section of the report offers observations about the potential costs and benefits of adopting the Plan (which would serve as both a Habitat Conservation Plan (HCP) and Natural Community

Conservation Plan (NCCP)), compared to alternatives such as the status quo, or adopting individual HCPs for individual projects, or adopting only an HCP for the Plan area but dropping the NCCP component. Comparisons among these options have been the subject of numerous policy discussions by the Board, and in other forums, since the Plan was first conceived, and will certainly be the focus of Board consideration in mid-2012 when considering whether or not to adopt the final Plan (should completion of the Plan be authorized by the Board and the other local partners).

The report does not include in its cost/benefit analyses the fact that the local partners would, if the Plan is adopted and implemented, receive repayment from fees on private development of a significant portion of the costs (already incurred) of preparing the Plan. The County's share of reimbursement from the Plan Preparation Fees would be approximately \$776,776.

The report notes that whether or not the County would be better off adopting the Plan or not depends in part on factors that cannot be quantified. We agree. For example, it is not possible to fully capture the cost to a private developer or to a County department of the long delays that typically occur in obtaining endangered species permits (if they can be obtained) and the uncertainty about the time and cost involved to determine and implement mitigation on a case-by-case basis. Nor is it possible to fully quantify the benefit of spending mitigation and recovery dollars (both public and private) on implementation of a broad conservation strategy rather than piecemeal responses, so that covered species have a greater likelihood of not only being protected from the impacts of development, but also have a meaningful opportunity for recovery. The Administration and the staff of the other local partners will continue to strive for the goal that the Plan, if adopted, is as cost-effective as possible and that the identified benefits of the Plan are not outweighed by unnecessary expenses. Should the Board authorize completion of the Final Plan when the issue is considered on September 27, public review of and input on the benefits and costs of the Plan will continue until a Final Plan is presented for possible adoption in June 2012.

RECOMMENDATIONS AND RESPONSES – PART III

If the Board of Supervisors elects to enter into the Santa Clara Valley Habitat Plan, it should ensure that:

1. The County's overall contributions to the plan, including the commitment of more than 22,000 acres valued at more than \$133.7 million of existing and new park and airport land based on the December 2010 draft plan are reasonable in light of the expected benefits to the County government and its constituencies.

Agree. Note that the proposed modifications to the Plan delete the element of including future Airport lands into the Reserve.

PART IV: What Has Happened with Other Large HCPS?

Response to Narrative in Part IV:

The report reviews the status of implementation of Habitat Conservation Plans elsewhere in California, and the governance structures for those Plans. Four of the six plans reviewed in the report utilize the Joint Powers Authority (JPA) governance model. On May 6, 2008, the Board of Supervisors reviewed options for the governance structure for Plan implementation and approved the JPA model.

RECOMMENDATIONS AND RESPONSES – PART IV:

If a final Santa Clara Valley Habitat Plan is developed, the Board of Supervisors should:

1. Assure itself that its representation on the Governing Board is adequate to serve the County's needs, as previously recommended in Part II of this report

Agree.

2. Consider altering the land-acquisition goals from specific acres per year to particular dollar amounts in order to maximize the use of County funds.

Disagree. The Administration does not concur with this recommendation because it is not feasible. The US Fish and Wildlife Service and the California Department of Fish and Game will not/cannot approve ESA permits based upon the Plan unless they can make appropriate findings about the Plan's assurances for protection and conservation of the covered species. A performance standard based on the amount spent to buy land, rather than the location, quality, and quantity of land enrolled in the Reserve, does not address the required findings for permit issuance. The land-acquisition goals in the draft Plan are based upon "stay ahead" provisions that require conservation to always be implemented at or faster than the rate at which impacts on habitats or covered species occurs, in order to meet the legal requirements of state and federal law pertaining to the Plan. The stay ahead provision also includes requirements regarding creation, conservation, and restoration of land cover types in relation to the impacts on such land cover types, and also a requirement for acquisition of covered plant occurrences to stay ahead of impacts to those species.