Comment Letter G

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& WILDLIFE OFFICE

November 29, 2005

Ms. Sheila Larson
Conservation Planning
U.S. Fish & Wildlife Service
Sacramento Fish & Wildlife Office
2800 Cottage Way W-2605
Sacramento, CA 95825

Re: City of Concord's Comments on Draft EIS/EIR for Issuance of Incidental Take Permits Associated with Habitat Conservation Plan for East Contra Costa County, California

Dear Ms. Larson:

The City of Concord submits the following comments with respect to the above-referenced EIS/EIR. The City seeks clarification of the proposed boundaries of the HCP area and inventory area.

The NOP issued under CEQA states that part of the area "is from the peak of Mt. Diablo to the north, the western boundary follows the Mt. Diablo meridian to the City of Clayton sphere of influence to include the entirety of the City of Clayton sphere of influence within the plan area." The NOP further states, "The northwestern boundary follows the watershed line in the hills between Pittsburg and Concord, but excludes the City of Concord and Concord Naval Weapons Station."

The NOI description under NEPA is more generalized insofar as it describes the project area in part, as "the Solano/Contra Costa County line to the north and the eastern flanks of Mt. Diablo and adjacent foothills in the Diablo range."

The City of Concord seeks clarification of the HCP and inventory area boundaries insofar as a statement made in the Federal Register Volume 70, Number 162, dated August 23, 2005, contains certain statements with respect to Fish and Wildlife designation of critical habitat for the California tiger salamander central population. The Final Rule became final on September 22, 2005. In the Final Rule, there is extensive discussion at pages 49409 through 49410 of the East Contra Costa County HCP and its relationship to the designation of critical habitat under the Endangered Species Act. Specifically, there is a statement in the Final Rule, a copy of which is enclosed, that reads as follows, "The draft ECCHCP encompasses the eastern portion of Contra Costa County from approximately west of Concord to Sand Mound Slough and Clifton Forebay

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on the east." Also at page 49388 of the Final Rule, there is the following statement, "The Naval Weapons Station at Concord has also been identified as an area with increased economic costs and would be covered under the draft East Contra Costa County Habitat Conservation Plan should this military facility be subject to closure." A copy of this portion of the Final Rule is enclosed. G-1 (Cont.)

Figure 1.1 contained within the draft HCP shows the defined inventory area. According to that figure, it would appear that the Concord Naval Weapons Station is excluded from the inventory area. The City would like confirmation that this figure is accurate and that the Concord Weapons Station is not included within the inventory area or otherwise included within the HCP project area.

Because of the conflicting statements regarding whether or not the Concord Naval Weapons Station is included within the boundaries of the proposed HCP and inventory area, the City seeks clarification or confirmation from the Fish & Wildlife Service (FWS) that the Concord Naval Weapons Station is not included within the HCP or inventory area. G-2

Please be advised that the City of Concord objects to having any portion of the Concord Naval Weapons Station included within the proposed HCP project or inventory area at this time.

Thank you for accepting these comments on this project.

Very truly yours,

CRAIG LABADIE
City Attorney

BY: MARK T. BOEHME
Assistant City Attorney

MTB:vld

Enclosure

I of the SMUD Cosumnes power plant expansion, while ignoring the effects of Phase II.

Our Response: The Phase I and Phase II of the Cosumnes power plant have been removed from the designation based the PCEs not being present and the area not meeting our criteria for designation (see ``Criteria Used To Identify Critical Habitat'').

Comment: A commenter has asserted that there may be a conflict of interest, because we have contracted with Dr. David Sunding and CRA International to develop the economic analysis of this designation of critical habitat for the Central population of the CTS because he previously conducted a study of critical habitat economics funded by the building industry and other commercial interests. The commenter suggests that the use of an economic model originally developed in the course of this study is inappropriate.

Our Response: We do not believe that hiring Dr. David Sunding and CRA International to conduct the economic impact analysis of this critical habitat designation, considering his prior receipt of research funding from the building industry, establishes a conflict of interest. CRA International performed a conflict check prior to initiating work on the current study and no conflicts were discovered. Neither CRA nor Dr. Sunding holds any financial interests that would be benefited as an outcome of the analysis and subsequent critical habitat designation.

Summary of Changes From Proposed Rule

In preparing the final critical habitat designation for the Central population of the CTS, we reviewed comments received on the proposed designation. In addition to minor clarifications in the text pertaining to the geographic regions, we made changes to our proposed designation, as follows:

(1) We revised the proposed critical habitat units based on comments and biological information received during the public comment periods.

(2) Under section 4(a)(3) of the Act, we did not designate DOD lands that have approved INRMPs in place which benefit the species. Under sections 3(5)(a) and 4(b)(2) of the Act, we excluded properties with adequate management plans that cover the CTS and its habitat. For more information, refer to ``Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act'' below.

(3) We adjusted the boundaries of the proposed units as feasible to remove areas that do not contain the primary constituent elements or were included in the proposed rule as a result of a mapping error.

(4) Collectively, we excluded or removed a total of approximately 183,556 ac (74,284 ha), of land from this final critical habitat designation.

(a) The San Francisco Bay National Wildlife Refuge (East Bay Region, Unit 4) is excluded from critical habit since it is actively managed for the conservation of the species. The San Luis National Wildlife Refuge Complex (Central Valley Region, Units 12 and 13) is also excluded from critical habitat (see ``Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act'' below) for the same reason.

(b) Fort Hunter-Liggett (Central Coast Region, Unit 5a and 5b), portions of Camp Parks (East Bay Region, Unit 18), and the **Naval Weapons Station** at **Concord** (Central Valley Region, Unit 14) are excluded from critical habitat units due to reasons of national security and training mission readiness purposes. The **Naval Weapons Station** at **Concord** has also been identified as an area with increased economic costs and would be covered under the Draft East Contra Costa Habitat Conservation Plan should this military facility be subject to

base closure.

(c) California Department of Fish and Game's Stone Corral Ecological Reserve, Tulare Co. (Southern San Joaquin, Units 4 and 5b), and Calhoun Cut Ecological Reserve in Solano Co. (portion of Central Valley, Unit 2) are excluded from critical habitat based on management plans and management practices being implemented for the areas. Additionally, a portion of East Bay Region Unit 10 was excluded based on an existing management plan for portions of the unit.

(d) Central Valley Units 14, 15, 16 and portions of Unit 17 (Contra Costa Co.) were excluded based on the Draft East Contra Costa Habitat Conservation Plan.

(e) The Southern San Joaquin Units 1, 2 and 3, Central Valley Unit 3, and East Bay Unit 10 were refined based on information received.

Please refer to Table 1 for the amount of area changed from proposed to final. For a detailed discussion of all exclusions and exemptions, please refer to ``Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act'' below.

(5) We adjusted the Geographic Region boundary as a result of published scientific literature (Shaffer et al. 2004). The boundary identified in the proposed rule was based on the unpublished manuscript (Shaffer et al. unpublished data) from which the final published literature was developed. The resulting change in the boundary adjusted the number of units in the Central Valley Region, the East Bay Region, and the Central Coast Region. Unit 1 of East Bay Region (as identified in the proposed rule) is now Unit 19 of the Central Valley Region and Unit 4 of Central Coast Region (as identified in the proposed rule) is now Unit 17 of the East Bay Region.

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Table 1.--Proposed and Final Critical Habitat Changes

Geographic region	Federal lands		State lands		Other
	ac	ha	ac	ha	ac
Central Valley:					
Proposed	14,708	5,952	2,416	978	172,013
Final	17	7	0	0	97,028
Southern San Joaquin:					
Proposed	0	0	5,386	2,180	27,239
Final	0	0	0	0	20,293
East Bay:					
Proposed	691	280	9,350	3,784	105,831
Final	20	8	2,767	1,120	66,086
Central Coast:					
Proposed	23,633	9,564	110	45	21,288
Final	0	0	110	45	12,788
Grand Totals:					
Proposed	39,032	15,796	17,262	6,986	326,371
Final	37	15	2,877	1,164	196,195
Change	39,002	15,781	14,385	5,822	130,176

Critical Habitat

Critical habitat is defined in section 3 of the Act as--(i) the specific areas within the geographic area occupied by a species, at the

salamander on the Calhoun Cut and Stone Corral Ecological Reserves already are publicly owned and managed for targeted listed and sensitive species, including the California tiger salamander. In addition, the State has informed us that funds are available to properly manage the habitat; and to establish conservation objectives, adaptive management, monitoring and reporting processes to assure an effective management program as described above. The designation of critical habitat will not have any appreciable effect on the development or implementation of public education programs because these lands already are publicly owned and critical habitat designation provides little gain in the way of increased recognition for special habitat values on lands that are expressly managed to protect and enhance those values.

Exclusion of these lands will not increase the likelihood that management activities would be proposed which would appreciably diminish the value of the habitat for conservation of the Central population of the California tiger salamander. Thus, designation of critical habitat on the Calhoun Cut and Stone Corral Ecological Reserves provides redundant, but no additional increment of conservation value for the California tiger salamander in terms of management emphasis or public recognition than currently exists. We therefore conclude that the benefits of excluding the Calhoun Cut and Stone Corral Ecological Reserves and from the final critical habitat designation outweigh the benefits of including them. Further, such exclusion will not result in the extinction of the California tiger salamander. In accordance with section 4(b)(2) of the Act, we have excluded California Department of Fish and Game owned lands within the Calhoun Cut and Stone Corral Ecological Reserves in portions of Unit 2 (Central Valley Region) and Unit 4 (Southern San Joaquin Region). The total amount of State-owned lands excluded within ecological reserves is approximately 1,289 ac (522 ha).

Relationship of Critical Habitat to Habitat Conservation Plan Lands--Exclusions Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic impacts, when designating critical habitat. Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed wildlife species incidental to otherwise lawful activities. Development of an HCP is a prerequisite for the issuance of an incidental take permit pursuant to section 10(a)(1)(B) of the Act. An incidental take permit application must be supported by an HCP that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take. HCPs vary in size and may provide for incidental take coverage and conservation management for one or many federally-listed species. Additionally, more than one applicant may participate in the development and implementation of an HCP. Large regional HCPs expand upon the basic requirements set forth in section 10(a)(1)(B) of the Act because they reflect a voluntary, cooperative approach to large-scale habitat and species conservation planning. Many of the large regional HCPs in southern California have been, or are being, developed to provide for the conservation of numerous federally-listed species and unlisted sensitive species and the habitat that provides for their biological needs. These HCPs are designed to proactively implement conservation actions to address future projects that are anticipated to occur

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within the planning area of the HCP. However, given the broad scope of these regional HCPs, not all projects envisioned to potentially occur may actually take place. The State of California also has a NCCP process that is very similar to the federal HCP process and is often completed in conjunction with the HCP process. We recognize that many of the projects with HCPs also have State-issued NCCPs. In the case of approved regional HCPs and accompanying Implementing Agreements (IAs) (e.g., those sponsored by cities, counties, or other local jurisdictions) that provide for incidental take coverage, a primary goal of these regional plans is to provide for the protection and management of habitat essential for species conservation, while directing development to other areas. We considered, but did not designate as critical habitat, on lands within the Draft East Contra Costa County HCP under section 4(b)(2) of the Act. This draft HCP includes Central Valley Region Units 14, 15, 16, and a portion of Unit 17. We believe the benefits of excluding lands within this draft HCP from the final critical habitat designation will outweigh the benefits of including them. The following represents our rationale for excluding these areas.

Draft East Contra Costa County Habitat Conservation Plan (ECCHCP)

The draft ECCHCP has been drafted and we expect it to be available for public review and comment in the fall of 2005. We expect a finalized plan before the end of 2006. Participants in this HCP include the County of Contra Costa; the cities of Brentwood, Clayton, Oakley, and Pittsburg, California; the Contra Costa Water District; and the East Bay Regional Park District. The draft ECCHCP encompasses the eastern portion of Contra Costa County from approximately west of **Concord** to Sand Mound Slough and Clifton Court Forebay on the east. The draft ECCHCP is also a subregional plan under the State's Natural Community Conservation Planning (NCCP) process and was developed in cooperation with the California Department of Fish and Game. The draft ECCHCP identifies the California tiger salamander as a covered species and has identified areas where growth and development are expected to occur, as well as several conservation measures, including (1) preserving between 24,100-28,800 ac and restoring between 116-118 ac of California tiger salamander habitat; (2) preserving major habitat connections linking existing public lands; (3) incorporating a range of habitat and population management and enhancement measures including monitoring; (4) fully mitigating the impacts to covered species; (5) maintaining ecosystem processes; and, (6) contributing to the recovery of covered species. When the conservation measures are implemented they will benefit California tiger salamander conservation by preserving and restoring existing wetland and upland habitat and creating new wetland habitat for the species. We expect that the draft ECCHCP will provide substantial protection for all three of the primary constituent elements for the Central population of the California tiger salamander, and that protected lands will receive special management they require through funding mechanisms that will be implemented under the ECCHCP.

(1) Benefits of Inclusion

The primary benefit to designation of critical habitat is the requirement that federal agencies consult with the Service to ensure that their actions are not likely to result in the destruction or adverse modification of critical habitat. If critical habitat were designated in these areas, primary constituent elements in these areas would be protected from destruction or adverse modification by federal actions using a conservation standard based on the Ninth Circuit's decision in Gifford Pinchot. This requirement would be in addition to the requirement that proposed Federal actions would not be likely to

jeopardize the species' continued existence. However, inasmuch as these areas currently are occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of ``harm'' at 50 CFR 17.3) would be required, even without the critical habitat designation. The requirement to conduct such consultation would occur regardless of whether the authorization for incidental take occurs under either section 7 or section 10 of the Act.

As discussed above, we expect the ECCHCP to provide substantial protection of the PCEs and special management of essential habitat for the Central population of the California tiger salamander on ECCHCP conservation lands. We expect the ECCHCP to provide a greater level of management for the Central population of the California tiger salamander on private lands than would designation of critical habitat on private lands. Moreover, inclusion of these non-Federal lands as critical habitat would not necessitate additional management and conservation activities that would exceed the approved ECCHCP and its implementing agreement. As a result, we do not anticipate any action on these lands would destroy or adversely modify the areas proposed as critical habitat. Therefore, we do not expect that including those areas in the final designation will lead to any changes to actions on the conservation lands to avoid destroying or adversely modifying that habitat.

A benefit of including an area as critical habitat designation is the education of landowners and the public regarding the potential conservation value of these areas. The inclusion of an area as critical habitat may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation values for certain species. However, we believe that this conservation benefit has largely been achieved for the California tiger salamander through the hearings and workshops that have been held in the East Bay area associated with the listing of the species and subsequent proposal to designate critical habitat.

(2) Benefits of Exclusion

The benefits of excluding lands within HCPs from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by a critical habitat designation. Many HCPs, particularly large regional HCPs such as the ECCHCP, take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. In fact, designating critical habitat in areas covered by a pending HCP could result in the loss of species' benefits if participants abandon the voluntary HCP process, in part because of the strength of the perceived additional regulatory compliance that such designation would entail. The time and cost of regulatory compliance for a critical habitat designation do not have to be quantified for them to be perceived as additional Federal regulatory burden sufficient to discourage continued voluntary participation in plans targeting listed species conservation.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon. Such a consultation would review the effects of all activities covered by the HCP which might adversely impact the species, including possibly significant habitat modification (see definition of ``harm'' at 50 CFR 17.3), even without the critical habitat designation. In addition, Federal actions

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not covered by the HCP in areas occupied by listed species would still

Response to Letter G, from the City of Concord

Response to Comment G-1

In response to the HCP/NCCP, the commenter seeks clarification that the Concord Naval Weapons Station (CNWS) is not within the HCP/NCCP area as stated in the Federal Register for California tiger salamander critical habitat.

The USFWS was incorrect in stating that the CNWS would be covered under the HCP/NCCP if it were subject to closure in the future. The CNWS was excluded from California tiger salamander critical habitat designation under section 4(a)(3) of the Endangered Species Act of 1973, as amended. Furthermore, the CNWS would still be excluded from critical habitat under section 4(b)(2) of the Act due to disproportionately high economic costs.

No changes to the HCP/NCCP or EIS/EIR are required.

Response to Comment G-2

In response to the HCP/NCCP, the commenter seeks clarification that Figure 1.1 of the HCP/NCCP accurately portrays that the Concord Naval Weapons Station (CNWS) is not within the HCP/NCCP area.

Figure 1.1 is accurate. The Concord Naval Weapons Station is excluded from the HCP/NCCP inventory area.

No changes to the HCP/NCCP or EIS/EIR are required.