

CHAPTER 3. MASTER RESPONSE TO COMMENTS

The master response presented in this chapter addresses comments related to topics that are common to several comment letters. The intent of a master response is to provide a comprehensive response to a topic in a coordinated, organized manner in one location that clarifies and elaborates on the analysis in the Draft EIS/EIR. The following master response is included in this chapter:

3.1 Master Response #1: Funding and Cost of Implementing the Draft HCP

3.1 MASTER RESPONSE #1: FUNDING AND COST OF IMPLEMENTING THE DRAFT HCP

This Master Response addresses (in whole or partially) the following comments: R-5, V-1, V-2, V-3, V-4, V-5, V-6, V-7, V-8, V-9, V-13, V-14, V-15, V-18, V-19, V-20, V-21, V-22, V-23, V-24, V-25, V-26, V-27, V-29, V-31, V-33, V-34, V-35, V-36, V-37, X-12, Y-4, and EE-4.

Several comments question whether the Draft HCP sets forth adequate funding mechanisms to meet mitigation requirements.

The Federal ESA provides the following guidance on funding HCPs:

- Section 10(a)(2)(A) requires that “the applicant therefore submits to the Secretary a conservation plan that specifies... (ii)... the funding that will be available to implement such steps.”
- Section 10(a)(2)(B) (iii) requires that “the applicant will ensure that adequate funding for the plan will be provided.”

The HCP Handbook provides guidance for how HCPs can provide adequate funding and assurances for providing that funding (Section 11.3, Funding Assurances, in the HCP Handbook). The HCP Handbook describes that sufficient methods to assure funding to implement avoidance, minimization, and mitigation measures for non-Federal, governmental HCPs such as the Fort Ord Multi-Species HCP, include assurances provided by stay-ahead provisions, conservation easements, and non-wasting-endowments. Municipalities generally have to demonstrate the authority and ability to collect fees.

As described on page 8-17 of the Draft HCP, Section 8.3, *Permittee Assurances*, the Permittees, as members of the Fort Ord Regional Habitat Cooperative (Cooperative), will establish long-term funding sources adequate to carry out their obligations under the HCP (see Section 9.3, *Funding Sources and Assurances*, for a full description). Development within the Plan Area that would result in take of HCP species or disturbance to their habitats will proceed in conformance with the HCP’s “stay-ahead provision” to ensure that incidental take of HCP species is roughly proportional to the implementation of the HCP’s conservation strategy. The Cooperative, its member agencies, and other participating entities shall implement, maintain, adhere to, and enforce the specific land use restrictions and other mitigation requirement and management and monitoring programs necessary and appropriate to implement the HCP. Where appropriate, the Cooperative and its member agencies shall exercise their land use authority through the adoption of ordinances, general plan amendments, or zoning designations to ensure that the HCP is fully implemented.

Section 7.7, *Assurances for Perpetual Mitigation*, in the Draft HCP describes how conservation easements, deed restrictions, and MOUs will be used to ensure that mitigation land is protected and managed in perpetuity. These mechanisms are legally-binding instruments that provide the Wildlife Agencies (i.e., the USFWS and CDFW) leverage to enforce commitments by the Permittees to sufficiently implement (and therefore fund) HCP required avoidance, minimization, and mitigation measures.

Chapter 9, *Cost and Funding*, Appendix M, Cost Model, and Appendix O, Habitat Conservation Plan Endowment Case Flow Strategy, of the Draft HCP explain how the Permittees will adequately fund plan implementation, including implementation of the conservation strategy described in Chapter 5 of the Draft HCP.

Cost Estimate

Chapter 9, *Cost and Funding*, of the Draft HCP provides a planning-level cost estimate for HCP implementation and identifies all necessary funds to pay for implementation. It includes a description of each of the cost categories and the general assumptions used to estimate HCP implementation costs.

As described in Section 9.1, *Cost Overview*, of the Draft HCP, the cost analysis was based on a number of assumptions regarding HCP implementation and the unit cost of many cost items. This planning-level cost

estimate was conservatively developed to estimate all HCP implementation expenses over the permit term so that overall costs are not underestimated. Each of the cost items identified in the cost model (Appendix M of the Draft HCP) are assumed to be needed to meet HCP required actions and maintain permit compliance. As part of the required annual report, the Cooperative will provide an evaluation of the economic assumptions in the cost model. Please refer to Section 9.1, *Cost Overview*, and Appendix M of the Draft HCP, for the detailed cost estimates, methodology, and assumptions.

Funding Sources

Chapter 9, *Cost and Funding*, of the Draft HCP describes HCP funding sources, management, and assurances. As stated in Section 9.3, *Funding Sources and Assurances*, of the Draft HCP, the cost of HCP required actions will be funded through a number of sources. The Permittees, through implementation of the HCP and subject to the HCP Joint Powers Authority (JPA) Agreement and the limitations of the Anti-Deficiency Act (Title 31 USC Sections 1341 and 1717), will commit to adequately funding all HCP required actions. Funding for HCP required actions will be provided from three primary sources: Community Facilities District (CFD) Special Tax, annual state budget appropriations, and federal budget appropriations. Other funding sources (e.g., grants) could also be available. It should be noted that grants, while likely a source of funding, are not relied upon for funding HCP required actions (Section 9.3.4.3, *Grants*). The HCP required actions are identified in Chapter 5 of the Draft HCP, but generally are those avoidance, minimization measures, and mitigation measures required by the HCP (see below for further discussion). Regarding use of General Funds, the HCP does not require nor compel any Permittee, other than the California Department of Parks and Recreation (State Parks) and Monterey Peninsula Regional Parks District (MPRPD), to use General Funds. As noted below, in the event funding shortfalls are projected or stay-ahead provisions cannot be maintained, additional take beyond that already incurred under the HCP would pause (i.e., a temporary halt) until the shortfalls and/or stay-ahead provisions were met. However, at such point, any Permittee may elect to use General Funds to temporarily remedy the shortfall to avoid a temporary halt in incidental take authorization.

HCP funding sources will be used for HCP required action implementation during the permit term and in perpetuity. The CFD Special Tax, or replacement funding mechanism (see discussion below), will be used to annually fund HCP required actions and two separate endowment funds: Fort Ord Natural Reserve (FONR) Endowment Fund and the Cooperative Endowment Fund. The Cooperative Endowment Fund will consist of three accounts: the HCP Fund, the Implementation Assurances Fund (IAF), and the Borderlands Fund. The Cooperative Endowment Fund will pool its three accounts, accounting for each separately. The Cooperative Endowment Fund holder may reallocate funding between the three accounts as long as the principal necessary to achieve the determined annual payout rates is maintained in each account. Details regarding these endowments can be found in Section 9.3.1.1, *Endowment Funds*. Section 9.3.4, *Other Funding Sources*, describes other mechanisms to fund HCP required actions, including revenue bonds, grants, and volunteers. While the Draft HCP identifies other potential funding sources and options for cost savings, the Draft HCP does not rely on these mechanisms to fund the HCP required actions, but rather identifies these sources to supplement the replacement funding mechanism.

The endowments must be fully funded by the end of the 50-year permit term, but they are estimated to be fully funded before this deadline. Appendix P, which contains the memorandum “Habitat Conservation Plan Endowment Case Flow Strategy,” provides a detailed description of expected annual HCP CFD Special Tax payments, costs, and cash flow performance by endowment fund.

On May 22, 2002, FORA recorded the FORA CFD Special Tax on former Fort Ord lands. FORA’s Mello-Roos CFD allows FORA to collect special tax payment from development on the former Fort Ord. The FORA CFD Special Tax was established with the purpose of paying for certain base-wide improvements, including roadway improvements, transit improvements and vehicles, water and storm drain improvements, habitat management, other public facilities, public safety, and administrative expenses of the CFD. Special taxes are levied by the CFD on new development, of which a portion will be used to fund the HCP. The

CFD Special Tax payments will build the Cooperative Endowment Fund and the FONR Endowment Fund until sufficient funds are available to fund average annual costs over the permit term (Table 9-8 of the Draft HCP). Costs borne by each fund are mutually exclusive; however, moneys can be transferred from one fund to another to meet the HCP's biological goals and objectives, after approval of the Cooperative Governing Board.

As described on page 9-19 of the Draft HCP, FORA will collect the CFD Special Tax to fund the HCP until its sunset on June 30, 2020. Additionally, FORA has already collected and set aside over 16 million dollars of CFD Special Taxes for HCP implementation (see additional discussion below of these existing funds). If the endowments are not fully funded by FORA's sunset, which they are not expected to be, the underlying jurisdictions, County of Monterey, City of Marina, City of Seaside, City of Del Rey Oaks, and City of Monterey, will collect the FORA CFD Special Tax or an equivalent replacement funding mechanism, meaning an alternative assessment or assessments, after FORA's sunset to complete full funding of the HCP endowments.

The projected payments from the CFD Special Tax and/or replacement funding mechanism will be sufficient to create the endowments given the projected pace of development. The CFD Special Tax and/or replacement funding mechanism payments will be directed to the endowment funds, plus the amount necessary to fulfill the HCP obligations consistent with the stay-ahead provision. According to this structure, implementation of HCP required actions on the lands already transferred from the Army for habitat management will be funded as development occurs. Mitigation measure implementation will be scheduled as dictated by the results of the baseline surveys and in accordance with the stay-ahead provision.

Adequacy of Funding HCP Implementation

Section 1.7, *Decisions to be Made*, of the Draft EIS/EIR outlines the permit issuance criteria for ITPs under the ESA and CESA. As described, an applicant must demonstrate how funding will be assured before incidental take permits can be issued under the ESA and CESA.

Under the ESA, prior to approval of an HCP and permit issuance, the USFWS must make findings that funding sources and levels proposed by the Permittees are reliable and will meet the purposes of the HCP, and that measures to deal with unforeseen circumstances are adequately addressed. The HCP must provide details for the different types of costs in the HCP, identify sources of funding, and provide assurances for the identified funding sources. The applicant must assure that funding is available for HCP implementation and that avoidance, minimization, and mitigation measures can be implemented to avoid, reduce, and offset impacts to covered species from HCP covered activities. Funding assurances are also required to ensure that mitigation occurs and that it meets the performance standards for which it was implemented. Finally, the HCP needs to incorporate funding for monitoring and to ensure changed circumstances are adequately addressed. Without such funding assurances, the USFWS cannot issue an incidental take permit.

Similarly, issuance of Section 2081 ITP from CDFW requires that "adequate funding is provided to implement the required minimization and mitigation measures and to monitor compliance and the effectiveness of the measures." Following the approval of the HCP and related documents (e.g., CEQA compliance document), and assuming all permit criteria have been met, CDFW would issue a Section 2081 permit to the Permittees. However, CDFW may include additional measures and mitigation in order to meet its own permit issuance criteria.

While full funding of the two endowments is anticipated during the permit term, Section 9.3.5, *Funding Adequacy*, of the Draft HCP, discusses the adequacy of HCP funding and the contingencies that are in place to ensure that the HCP is fully funded and implemented.

The endowment strategy includes several mechanisms to enable funds to be flexibly allocated to costs when they are needed, as outlined on page 9-33 of the Draft HCP. Of note, the annual HCP required action costs and the CFD and/or equivalent replacement funding mechanism revenues are both triggered by land use development. The pace of development is highly variable because it is subject to the fluctuations in local

and regional markets and the interest of private developers to bring forth project proposals. If the pace of development slows, annual revenues would be generated at a slower rate. However, the timing of HCP required actions would also be delayed, consequently reducing annual HCP required action costs. If the pace of development slows to the point where revenues are below the levels needed for implementing time-sensitive mitigation measures (e.g., those that must be implemented within the first 10 or 15 years of the permit term), the Permittees can adjust the CFD (as allowed by State law) or the equivalent replacement funding mechanism to increase revenues (Section 9.3.5, *Funding Adequacy*) or seek out other funding sources (Section 9.3.4, *Other Funding Sources*). This relationship between annual plan implementation costs and revenues reduces the possibility of inordinate funding shortfalls during the permit and post-permit periods.

The stay-ahead provision requires HCP required action implementation to occur ahead of impacts. At their simplest, stay-ahead provisions are a commitment to initiate conservation actions before impacts that result in take occur. Stay-ahead provisions do not replace the need for identifying costs and assuring funding, but they do reduce the concerns that impacts will happen and conservation will not happen. By tracking compliance with and enforcing the stay-ahead provision, the Cooperative, USFWS, and CDFW will effectively require that HCP required avoidance, minimization, and mitigation measures are implemented (and therefore funded) before corresponding take of covered species can occur. Additionally, stay-ahead provisions, as well as other key components of the HCP, are typically incorporated as special terms and conditions on the USFWS ITP and mitigation measures on the CDFW ITP, and as such, are required in order for the Permittees to remain in compliance with the permit. Funding is available for management of approximately 3,702 out of 3,895 total non-Federal HMA acres, or conservation percentage of 95% for eight years without collection of additional taxes (please refer to Section 9.3.5.1 of the Draft HCP). During this time, Permittees' development impacts would be limited to an approximate take percentage of 75% to 90% depending on individual species distribution to maintain stay-ahead provision compliance (please refer to Table 7-5 of the Draft HCP).

In addition, an annual report will also be required as a part of the endowment funding strategy. The annual report will include an accounting of all revenues received by type, assessment of progress toward total revenue goals, evaluation of the economic assumptions on which the HCP was based (e.g., HCP costs, revenue rates), and an assessment of progress toward a complete funding strategy for implementation after the permit term. This allows an annual evaluation of funding adequacy of all HCP required action. This approach will ensure that costs are being met and resources are allocated per HCP specifications.

A thorough economic analysis of the HCP budget will be conducted periodically during the permit term. The first will occur after five years of implementation or at the time the three estimated endowments are fully funded, whichever occurs first. At this time, the cost model assumptions will be compared to actual expenditures and predicted future expenditures. All endowments will be evaluated to ensure that HCP requirement can be funded during the permit term and in perpetuity. This process will occur, at a minimum, two additional times during the permit term, at Year 10 and five years after the Army transfer of HMA lands is complete. Additional economic analyses will be conducted if determined necessary. The results of the economic analysis shall be included in the annual report.

To date, FORA has collected and set aside over \$16 million of CFD Special Taxes for habitat management within the Plan Area. These funds would be available for HCP required action implementation upon permit issuance, including startup, capital, and restoration costs. The funding strategy in the Draft HCP allocates two-thirds of these existing funds to the Cooperative Endowment Fund and the remaining one-third to the FONR Endowment Fund to fund start-up costs. This allocation provides coverage for the initial costs assumed to be incurred during the first three years of the permit term.

Section 9.3, *Funding Sources and Assurances*, in the Draft HCP explains how the FONR Endowment Fund and the Cooperative Endowment Fund will be used to fund post-permit term reserve management in perpetuity. Because FORA sunsets June 30, 2020, the endowments (and HCP implementation) will be

funded by a CFD Special Tax replacement funding mechanism. This replacement funding mechanism could be another CFD Special Tax, developer fee, in-lieu fee, or similar funding mechanism, as determined by the Permittees. As described in Section 9.3.1, *CFD Special Tax*, in the Draft HCP, “[t]he HCP JPA Agreement and Implementing Ordinances and Policies associated with this HCP ensures that the Permittees will continue to collect these payments after FORA’s sunset.” These ordinances, and the demonstrated ability to collect CFD Special Taxes on the former Fort Ord lands, sufficiently demonstrate that the Permittees have the authority and ability to collect fees. The Draft Implementing Ordinance and Policies were included in the Draft HCP in Appendix K, which could be used by each of the Permittees to pass their own CFD and collect those fees on projects subject to their own individual jurisdictions.

Because no new taxes or impact fees can be imposed on entitled development projects with vested rights, the underlying jurisdictions will rely on future developments that are not entitled and, for those projects that have already received their local entitlements, in order for the project to receive incidental take coverage under the HCP the project proponent would have to agree to comply with the conditions of the HCP, including the funding requirements of HCP, such as through a certificate of inclusion. The City of Marina, for example, has worked with entitled developments to continue the payment of fees equivalent to the CFD tax. In addition, the County is working with the East Garrison Project developers to continue their payment of fees equivalent to the CFD tax. The Wildlife Agencies will review the applications and determine funding adequacy prior to approval of the HCP and permit issuance.

The HCP’s CFD tax is tied to size and timing of individual projects and would be related to the amount of habitat disturbed/removed by various types of covered activities. Table 9-7 (Fort Ord Base-Wide CFD Special Tax and Estimated Funding for HCP) includes a per acre assessment for office, industrial, and retail, a per unit assessment for new and existing residential, and a separate category “hotel” based on number of rooms. The majority of funding is estimated to come from new residential development.

Funding for initial conservation actions needed in the first few years of HCP implementation is expected to come from the approximately \$16 million CFD funds already collected; this will provide time for new CFD fees to be generated, either through a replacement CFD or other secured funding mechanism. Incidental take authorization for individual projects would not be authorized unless the HCP’s conservation actions are “at least 5%” higher than the take percentage for both the State and Federal permits (Section 7.6, *Stay-Ahead Provision*); additional stay-ahead requirements are in place for select species (such as plants) up to 20% to account for restoration activities associated with those species. In order to be counted as conserved, HMA lands must have sufficient funding to implement the conservation strategy. The HCP’s incidental take amounts are primarily identified in acres of habitat (please refer to Tables 4-5a, 4-5b, 4-6a, 4-6b, 4-7a, and 4-7b in the Draft HCP). Tables 4-8a and 4-8b in the Draft HCP summarize the amount of impacts and conservation for HCP covered plans and wildlife species in terms of acreages.

As discussed in Section 9.3.5.4, *Permit Suspension and Funding*, of the Draft HCP, HCP compliance monitoring will track permit compliance and ensure HCP required actions are adequately funded. The Permittees will follow the process outlined under HCP compliance monitoring prior to consulting with the Wildlife Agencies. The Wildlife Agencies will use the annual report for compliance monitoring to ensure program funding continues to meet the requirements of the HCP. If the Wildlife Agencies determine that any component of funding falls below anticipated levels, the parties will meet and confer in good faith to cooperatively develop a strategy to address the potential funding shortfall and discuss corrective actions to address the potential funding shortfall while maintaining the level of conservation and take authorization afforded by the ITPs until adequate funding is restored.

It is also important to note that the HCP or Section 2081 permit can be modified in accordance with USFWS and CDFW regulations and the terms and conditions of the permits and any associated documents (e.g., NEPA/CEQA documents). Modifications can occur in the form of minor and major amendments. Changes in funding sources, for example, could be processed through major amendment (please refer to Section

8.4.2, *Major Amendments of Draft HCP* and Section 8.4.4, *Amending the Section 10(a)(1)(B) and Section 2081 Permits*).

CEQA/NEPA Requirements

As described in Chapter 1, *Introduction*, on page 1-1 of the Draft EIS/EIR, the EIS/EIR analyzes the potential impacts of the Proposed Action (the “project” under CEQA, as defined in the Draft EIS/EIR; please refer to Section 1.5.3, *Joint NEPA/CEQA Document*, for an overview of the terminology in the Draft EIS/EIR), which includes the issuance of the ITPs by the USFWS and CDFW and approval and implementation of the Draft HCP, and analyzes a reasonable range of alternatives. As described in Section 4.1.1.3, *Approach to Analysis of Resources Considered*, the Proposed Action is clearly defined and summarized into two categories: Category 1 – Development activities, and Category 2 – Habitat management activities. This section specifies that development activities on the former Fort Ord are analyzed in the Draft EIS/EIR at a program level, and that habitat management activities are analyzed in the Draft EIS/EIR at a project level. Thus, the EIS/EIR “project” under CEQA and “action” under NEPA consists of the approval and implementation of the Draft HCP and issuance of the associated take permits.

As discussed in 4.4.1.1, *Approach to Impact Analysis*, on pages 4.4-2 – 4.4-3, the Draft Fort Ord HCP contains AMMs and MMs, which were developed to avoid and minimize impacts from covered activities (i.e., the development activities and the habitat management activities) and mitigate for impacts from covered activities that cannot be avoided. AMMs are actions associated with covered activities that avoid and/or minimize impacts on the covered species (HCP species). The implementation of AMMs is directly tied to take authorizations under the ESA and the CESA. These actions are typically “best management practices” (BMPs) to implement the covered activities. AMMs are detailed in Section 5.4, *Measures to Avoid and Minimize Impacts*, of the Draft Fort Ord HCP. MMs are conservation actions designed to restore, enhance, preserve, and/or compensate for any residual impacts on HCP species. MMs are detailed in Section 5.5, *Measures to Mitigate Unavoidable Impacts*, of the Draft Fort Ord HCP. Both AMMs and MMs are required to meet the criteria for issuance of Federal and State ITPs to authorize take of the HCP species. Chapter 5 of the Draft HCP contains tables that identify and summarize:

- Relationship between Biological Goals and Objectives and AMMs (Table 5-1);
- HCP Required Actions – AMMs and Species Benefited (Table 5-2);
- Relationship between Biological Goals and Objectives and Mitigation Measures (Table 5-4); and
- HCP Required Actions – Mitigation Measures and Species Benefited (Table 5-5).

The conservation strategy of the Draft HCP (i.e., the project) is designed to achieve the biological goals and objectives for each natural community and for the HCP species associated with those natural communities (page 4.4-14 of the Draft EIS/EIR). The conservation strategy in the Draft HCP provides for the establishment, enhancement, and long-term management of natural communities that support HCP species in order to protect and enhance populations of these species and ensure their long-term viability. As discussed in Section 4.4.2.2., *Alternative 2: Proposed Action – Draft Fort Ord HCP*, on page 4.4.-6, the Proposed Action includes the adoption and implementation of the Draft HCP, including its conservation strategy as well as the required AMMs and MMs during the implementation of covered activities. All covered activities implemented under the Proposed Action, including both development and habitat management activities, would be subject to applicable AMMs and MMs required by the HCP, and, thus, are considered part of the project. As noted above, Chapter 5 of the Draft HCP contains tables that identify and summarize these AMMs and MMs.

As described in Section 4.1.2., *Thresholds of Significance and Level of Affect*, pages 4.1-8 through 4.1-10 of the Draft EIS/EIR, the Draft EIS/EIR uses the term “mitigation” consistent with Section 15126.4(a)(1)(A) of the CEQA Guidelines, which states that an EIR shall “distinguish between measures which are proposed by the project proponents to be included in the project, and other measures proposed

the lead, responsible or trustee agency or other persons which are not included but the lead agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project. This discussion shall identify mitigation measures for each significant environmental effect identified in the EIR.” The Draft Fort Ord HCP’s conservation strategy contains AMMs and MMs, which are included as part of the project (i.e., are part of the Proposed Action) (please refer to Chapter 5, *Conservation Strategy*, of the Draft Fort Ord HCP). In each environmental resource section, AMMs and MMs from the Draft Fort Ord HCP that would reduce adverse impacts to environmental resources are identified when applicable. If no AMMs or MMs are applicable, or if additional measures are required to reduce impacts to a less-than-significant level beyond the implementation of AMMs or MMs, “Additional Mitigation” measures are identified. Table ES-1, *Summary of Impacts and Mitigation Measures*, provides a summary of the impacts and mitigation measures for each significant environmental effect identified in the Draft EIS/EIR.

For example, the Draft EIS/EIR found that impacts to HCP species and their habitat would be less-than-significant with the implementation of the AMMs and MMs identified in the Draft HCP because, by design and consistent with the requirements of ESA and CESA, the Draft HCP imposes AMMs and MMs to avoid and minimize impacts to HCP species. The purpose of the Draft HCP is to provide a basis for permits and authorizations necessary to lawfully take certain native species of plants and wildlife, including species that are listed as threatened or endangered pursuant to the terms of ESA and/or CESA (please refer to Section 1.6, *Purpose & Need and Goals & Objectives*, of the Draft EIS/EIR).

An example where additional measures were required to reduce potentially significant impacts can be found in the discussion of Impact BIO-1b, *Impacts to Non-HCP Special-Status Species and Habitat under the Draft HCP*. As described above, the Draft Fort Ord HCP’s conservation strategy contains AMMs and MMs, which are included as part of the project (i.e., is part of the Proposed Action). Although the implementation of the AMMs and MMs would avoid and minimize impacts on non-HCP special-status species under the Proposed Action, the Draft EIS/EIR found that impacts to these species would remain potentially significant after implementation of AMMs and MMs, and additional mitigation is required. The Draft EIS/EIR identified nine additional mitigation measures (Mitigation Measures BIO-1 through BIO-9) to reduce potentially significant impacts to non-HCP species and habitat to a less-than-significant level.

In *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1035–1036 (*Environmental Council*), the court stated: “If, as so many courts have said, the EIR is the heart of CEQA, then to continue the anatomical metaphor, mitigation is the teeth of the EIR...CEQA requires project proponents to mitigate all significant environmental impacts of their project (Pub. Resources Code, §§ 21002, 21002.1, subds. (a), (b); CEQA Guidelines, §§ 15126.4, 15370), and CESA compels applicants to “fully mitigate” the take of threatened or endangered species (Fish & Game Code, § 2081, subd. (b)(2)).” In accordance with these statutes, as well as NEPA and ESA statutes, the USFWS, CDFW, FORA, and the Permittees developed an enormously comprehensive and integrated mitigation plan: the Draft Fort Ord HCP.

CEQA Guidelines § 15126.4(a)(2) require that mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments. In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design. The Draft Fort Ord HCP’s conservation strategy contains AMMs and MMs, which are included as part of the project (i.e., are part of the Proposed Action). As state above, the Draft EIS/EIR distinguishes between measures which are proposed to be included in the project, and other measures proposed that could reasonably be expected to reduce adverse impacts if required as conditions of approving the project. In each environmental resource section, AMMs and MMs from the Draft Fort Ord HCP that would reduce adverse impacts to environmental resources are identified when applicable. If no AMMs or MMs are applicable, or if additional measures are required to reduce impacts to a less-than-significant level beyond the implementation of AMMs or MMs, “Additional Mitigation” measures are

identified. Table ES-1, *Summary of Impacts and Mitigation Measures*, provides a summary of the impacts and mitigation measures for each significant environmental effect identified in the Draft EIS/EIR.

Similar to the facts in *Environmental Council*, the commenter is mistaking baseline assumptions about project conditions for mitigation measures. In *Environmental Council*, the plaintiffs contended that the mitigation measures include in the Final EIR were “underfunded, voluntary, and unenforceable.” In *Environmental Council*, the court stated that the HCP “is a project within the meaning of CEQA” and that the plaintiff “confuses the agencies’ assumptions about baseline conditions with necessary mitigation measures under CESA and CEQA.” The court noted that this also occurred in *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal. App. 3d 1022, 185 Cal. Rptr. 41 (*Village Laguna*). The court wrote: “Appellants are asking more of the EIR than is legally required. The ‘assumptions’ referred to are actually integral portions of the proposed project. If they fail to become reality...we are dealing with a different project. However, CEQA only requires that an EIR discuss ‘[the] significant environmental effects of *the proposed project*.’ ([Pub. Resources Code,] § 21100, subd. (a), *italics added*.)” FORA has fully accounted for the environmental consequences of the implementation of the Draft HCP in the Draft EIS/EIR.

The Draft HCP is not static, nor is it confined to its initial assumptions. Recognizing that many factors might change during the 50-year life of the HCP, the public agencies designed an adaptive management program. In other words, both compliance monitoring and biological effectiveness monitoring may reveal ineffective management of the reserves or that the assumptions upon which the HCP was predicated have not held true over time. The Cooperative can respond to the deficiencies revealed by monitoring or periodic reviews. If unable to protect the species with these measures, the plan can be amended or revised, or the permits can be suspended or revoked. The HCP contains several provisions designed to ensure that its environmental objectives will be achieved and that development does not out pace conservation. The amount of preservation and mitigation is related to the development rate, which will fluctuate over time. Since impacts will not occur until development occurs, the low development rates will result in the avoidance of impacts rather than unmitigated impacts as implied. Ultimately, if the adaptive management measures fail and continued use of the permits jeopardizes the existence of a covered species, the Wildlife Agencies can revise the permits.

As described in this Master Response, Chapter 9 of the Draft HCP identifies the estimated costs of implementing the HCP, funding sources, and assurances to support permit issuance from the Wildlife Agencies. The HCP discusses how and when the fees would be collected and spent and how the Cooperative will ensure funding for mitigation. As stated above, the equivalent replacement funding mechanism along with the other available sources of funding would be sufficient to fund implementation of the HCP.

As cited in Letter V, impact fee mitigation is acceptable only if fees will demonstrably be used to implement a “reasonable, enforceable plan or project that the relevant agency commits itself to implementing” (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188). The Draft HCP is a reasonable, enforceable plan and collection of fees to implement the conservation actions is a mechanism that has been widely used throughout California in numerous HCPs as well as joint HCP and Natural Community Conservation Plans (the California equivalent of an HCP). The AMMs and MMs identified in the Draft HCP to be monitored or the subject of reporting would be fully enforceable through permit conditions, agreements, or other measures. Approving the HCP and issuance of the ITPs would be a commitment by the Permittees to implement identified mitigation and enforceable through permit requirements. Courts have also found that a reasonable commitment to mitigation was demonstrated when using previously adopted fees, as well as ad-hoc fees imposed as part of the project approval, constituted effective mitigation (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99). The funding of the Draft HCP would consist of utilizing the CFD taxes collected prior to FORA’s sunset, in addition to the equivalent replacement funding mechanism and other funding sources as identified in the Draft HCP.

Mitigation measures must be sufficiently detailed and provisions under the plan must be sufficiently regulatory to ensure that mitigation would be implemented (*Sierra Club v. County of Fresno (2018)* 6 Cal.5th 502). The mitigation measures identified in Table ES-1 of the Draft EIS/EIR and the AMMs and MMs in the Draft HCP are clearly identified and detailed, have been prepared in accordance with ESA, CESA, NEPA, and CEQA, and would be enforceable through permit requirements, conditions of approval, adoption of implementing ordinances and policies, and adoption of a Mitigation Monitoring and Reporting Program.

CEQA requires that an EIR be prepared with a sufficient degree of analysis to provide decision-makers with information that enables them to make an informed decision. An evaluation of the environmental effects of a proposed project under CEQA need not be exhaustive, but the sufficiency of an EIR is to be reviewed in light of what is reasonably feasible (CEQA Guidelines Section 15151). Section 15090(a) of the CEQA Guidelines requires that prior to approving a project, the lead agency shall certify that:

- The final EIR has been completed in compliance with CEQA;
- The final EIR was presented to the decision-making body of the lead agency, and that the decision-making body reviewed and considered the information contained in the final EIR prior to approving the project; and
- The final EIR reflects the lead agency's independent judgment and analysis.

The goal behind CEQA is "to compel government at all levels to make decisions with environmental consequences in mind." (*Laurel Heights Improvement Assn. v. Regents of University of California (1988)* 47 Cal.3d 376, 393, 253). FORA has fully accounted for the environmental consequences of the implementation of the Draft HCP in the Draft EIS/EIR. The EIS/EIR analyzes the effects of the Proposed Action and alternatives in compliance with NEPA and CEQA, and is not the document that presents all permit issuance criteria for the USFWS and CDFW permitting processes. The Draft EIS/EIR has been prepared in accordance with NEPA and CEQA and provides the decision-makers with sufficient information to enable an informed decision. The cost and funding strategy for the Draft HCP will be considered by the Wildlife Agencies and permit issuance will commit the Cooperative to implementing the mitigation.

Habitat Working Group

Several critical issues related to the Draft HCP were identified prior to, during, and after the public review period of the Draft EIS/EIR. Specifically, concerns have been raised regarding:

- the high cost and feasibility of funding the habitat management requirements as identified in the Draft HCP;
- the feasibility of being able to complete the NEPA/CEQA process in the allotted timeframe given FORA's sunset date of June 30, 2020;
- CDFW's uncertainty as to BLM's future role in providing mitigation lands (without the use of Federal lands as mitigation, impacts to state listed species may not be fully mitigated under the CESA, leaving the Permittees uncertain of potential additional mitigation requirements); and
- ITP implementation and requirements related to the formation and structure of a JPA and stay-ahead provision.

As a result, the FORA Board of Directors (Board) formed the Habitat Working Group (HWG), an ad-hoc committee to meet beginning January 10, 2020 to identify possible options for jurisdictions and local entities to revise the HCP to address the concerns listed above or to comply with habitat management requirements under the HMP in lieu of adopting an HCP.

To address these concerns and support discussions, FORA and its consultants prepared and provided materials to the HWG, including but not limited to: questions for the regulatory agencies; potential reduced and/or phased take approaches to address Permittee concerns while meeting regulatory agency requirements; a draft JPA agreement and overview of potential JPA structuring options; funding models under various development scenarios; a draft cost model for implementation of the HMP; a legal opinion on options related to the completion of the CEQA process; and an alternatives analysis of the allocation of the CFD funds collected by FORA for the purpose of funding habitat management activities.

The HWG discussions regarding potential reduced and/or phased take approaches, in addition to public comments received on the Draft EIS/EIR, provided the foundation for the Reduced/Phase HCP Alternative described and analyzed in Chapter 5 of this Final EIR.

The HWG held 11 meetings from January 10 to March 27 before sending recommendations to the Board. Specifically, the jurisdictions supported a recommendation for the CFD fees to be individually allocated to the jurisdictions to carry out habitat management requirements under the HMP. At the Board meeting on April 17, 2020, the Board discussed and approved an allocation formula for the CFD funds. The HWG and related Board meeting agendas, minutes, and materials are presented in **Appendix B** of this Final EIR, and can also be accessed at <https://fora.org/habitat.html> and <https://fora.org/HWG.html>.

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