

TO: James L. App, City Manager
FROM: Ron Whisenand
SUBJECT: Grant Authorization for Section 6, Habitat Conservation Plan Application
DATE: August 7, 2007

Needs: For the City Council to authorize partnering with the County of San Luis Obispo to apply for a Section 6 - Planning Grant from the U.S. Fish and Wildlife Service for preparation of a North County Habitat Conservation Plan.

- Facts:
1. The City's General Plan recognizes the need to provide special protection for unique or endangered natural resources in the Paso Robles Planning Area, including protection of wildlife, habitat areas, and vegetation.
 2. The General Plan also provides policy direction to take actions to retain open space/conservation areas around the City, and to develop strategies for pursuing federal, state and private funding for these open space/Purple Belt plan/programs.
 3. The 2006 Economic Strategy provides several community principles including support for environmental responsibility.
 4. There are several large scale projects and areas of potential future development in the City (and the County) that have sensitive habitats and protected environmental species located on them, most notably the San Joaquin Kit Fox.
 5. Complying with the Endangered Species Act (ESA), and addressing development impacts to natural resources can be achieved through several methods. One method is to develop a Habitat Conservation Plan (HCP). There are several benefits that could be gained through participating in an HCP for property owners, the City and County, and the affected agencies. Benefits and costs are discussed in detail below.
 6. HCPs are required when development may significantly impact endangered species and result a "take" of federally protected species.
 7. An opportunity has presented itself to collaborate with the County in applying for a planning grant ("Section 6" grant) that can be used for preparing an HCP. The grant application would have a greater potential for being successful if both agencies are involved since the primary species and habitats to be protected extend through both geographical boundaries.
 8. If the City chose to be a co-applicant for this planning grant, and the application is successful, the City would not be obligated to participate in the developing the HCP if the City subsequently changed priorities.

9. The Section 6 grant application is a request for up to \$500,000 to use towards preparing a regional HCP. Acceptance of this grant would require a 25 percent match of either funds and/or in-kind resources. If the application is successful, an analysis of benefit and matching share, given the geographical area, would need to be conducted as well as an analysis of matching fund sources prior to acceptance of the grant.
10. If an HCP for the North County was approved, it opens up additional opportunities to apply for other Federal grants including land conservation and acquisition grants, which could further implement many of the City's environmental resource management and open space protection goals in the General Plan.
11. The deadline for filing applications with the U.S. Fish and Wildlife Service is August 24, 2007. The County, with assistance from the California Department of Fish and Game and the U.S. Fish and Wildlife Service, are poised to submit the grant application, and are awaiting a determination of participation from the City. The San Luis Obispo County Board of Supervisors, who is aware that the City may be a partner in this grant application, authorized the County to apply for this grant on July 17, 2007. Supervisors Ovitt and Patterson voted in favor for authorizing this application.

Analysis
and
Conclusion:

As noted above, this is a request to authorize co-application with San Luis Obispo County to apply for a Federal planning grant to develop an HCP. Should the application be successful and the City participates in the HCP, the City, property owners, County, State and Federal agencies would receive several benefits. Benefits include, but are not limited to:

- More effective management, preservation and conservation of endangered species, habitats and their ecosystems on a regional scale that will ensure the long-term conservation of biological diversity, and compliance with the Endangered Species Act.
- Increased certainty and predictability for property owners and developers in the Northeast County area should an endangered, protected species be encountered, and/or result in an "incidental take" of the species. Having an adopted HCP would mean that unforeseen circumstances during development that would harm (or "take") a covered species will not incur additional mitigation requirements or the need to cease activities.
- Economic incentives for willing property owners interested in conservation easements for management of valuable natural resources on their property.
- Property owner options to meet the requirements of the ESA, either through participation in the HCP through implementation of one of the mitigation

strategies (noted below), or a choice to not participate in the HCP, and assume the potential “take” risks.

- Streamline the regulatory permitting process, since the HCP would have established mitigation and minimization measures in advance of development application requests.
- Participation of property owners and local agencies in an HCP would free up staff resources of the City, U.S. Fish and Wildlife Service and California Department of Fish and Game, that would otherwise be needed to evaluate each development project and associated resources, on a case-by-case basis.
- Preservation and conservation easements applied to land could dovetail with other on-going planning and open space projects the City is involved in, such as the Salinas River planning efforts, agriculture and open space Purple Belt goals, and protection of City gateways and visual resources such as views of open landscape areas and hillsides.
- Opportunities for the City to pursue other State and Federal grant opportunities to achieve environmental protection goals in the General Plan and Economic Strategy.
- Placing Paso Robles in a leadership role protecting the environment while continuing economic development.

At this time, development in areas of sensitive habitats and potential endangered species mitigate impacts to these resources on a case-by-case basis. Typically developers pay in-lieu fees to various agencies that are required to use the money for purchasing land in permanent nature preserves or land banks. If an HCP were established those fees could potentially be used more locally to preserve and conserve land, or projects could be designed in compliance with specific HCP standards, and/or encumber portions of their property in managed conservation easements, and not be required to pay additional mitigation fees. The City would take leadership in determining the development standards in the HCP.

If the County and City were successful in receiving the grant then the actual preparation of an HCP would commit staff resources to develop the Plan. There would also be a financial matching requirement. The amount is not known at this time. The City would need to negotiate a fair share of financial commitment with the County, which would likely be based on the ratio of land in the City and land in the County covered by the HCP. The Council would need to authorize any financial commitment. The City could opt out of the HCP process should the costs be too high.

Policy

Reference: 2003 General Plan Update, 2006 Economic Strategy

Fiscal Impact: If the City and County are successful in competing for the Section 6 Planning Grant, there will be an opportunity to evaluate the funding opportunities and budgetary impacts before accepting the grant.

- Options:
- a) For the City Council to adopt the attached Resolution 07-XXX authorizing the City to be a co-applicant with the County of San Luis Obispo for a Section 6 Planning Grant Application with the U.S. Fish and Wildlife Service, to secure funding to develop a North County Habitat Conservation Plan.
 - b) Amend, modify, or reject the forgoing options.

Attachments:

1. Resolution 07-XXX authorizing grant application
2. Federal "No Surprises" Regulations for landowners

RESOLUTION NO. 07-XXX

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PASO ROBLES
AUTHORIZING CO-APPLICATION OF A GRANT APPLICATION WITH
SAN LUIS OBISPO COUNTY FOR A SECTION 6 – PLANNING GRANT
FROM THE U.S. FISH AND WILDLIFE SERVICE

WHEREAS, the General Plan includes policies related to the need to provide special protection for unique or endangered natural resources in the Paso Robles Planning Area including protection of wildlife, habitat areas, and vegetation; and

WHEREAS, the General Plan provides policy direction to take actions to retain open space/conservation areas around the City, and to develop strategies for pursuing federal, state and private funding for these resources; and

WHEREAS, the Economic Strategy provides several community principles including support for environmental responsibility; and

WHEREAS, the City Council understand the benefits of participating with San Luis Obispo County in co-applying for a planning grant (Section 6 Grant) to pursue development of a Habitat Conservation Plan (HCP) with the County; and

WHEREAS, the City Council recognizes the potential benefits that could result from the preparation of an HCP to protect natural resources in compliance with the Endangered Species Act, including species recovery and permit streamlining; and

WHEREAS, should the Section 6 Grant application be successful, the City Council shall authorize a funding analysis to be prepared by City staff to determine funding sources for the required 25 percent matching fund, prior to grant acceptance by the City; and

WHEREAS, the filing deadline for an application for this Section 6 Grant with the U.S. Fish and Wildlife Service is August 24, 2007.

THEREFORE BE IT HEREBY RESOLVED by the City Council of the City of El Paso de Robles, to authorize the filing of a Section 6 Grant Application in collaboration with the San Luis Obispo County, with the U.S. Fish and Wildlife Service for \$500,000 in funding to prepare a North County Habitat Conservation Plan.

THEREFORE BE IT FURTHER RESOLVED, to authorize city staff resources to work on project development related to this application.

ADOPTED by the City Council of the City of El Paso de Robles at a regular meeting of said Council held on the 7th day of August 2007 by the following vote:

AYES:
NOES:
ABSTAIN:
ABSENT:

Frank R. Mecham, Mayor

ATTEST:

Deborah Robinson, Deputy City Clerk

**U.S. Fish & Wildlife Service**

"No Surprises" Questions and Answers

Q. What is a Habitat Conservation Plan and Incidental Take Permit?

A. In the 1982 amendments to the Endangered Species Act, Congress established a mechanism under section 10(a)(1)(B) that authorizes the Services to issue to non-Federal entities a permit for the "incidental take" of endangered and threatened wildlife species. This permit allows a non-Federal landowner to proceed with an activity that is legal in all other respects, but that results in the "incidental" taking of a listed species. The ESA defines incidental take as take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."

A habitat conservation plan, or *HCP*, must accompany an application for an incidental take permit. The purpose of the HCP is to ensure that the effects of the permitted action on listed species are adequately minimized and mitigated. The permit authorizes the incidental take, not the activity that results in take. The activity itself must comply with other applicable laws and regulations.

Q. What is the benefit of an Incidental Take Permit and Habitat Conservation Plan to a private landowner?

A. Prior to 1982, non-Federal landowners undertaking otherwise lawful activities that were likely to take listed species risked violating section 9 of the ESA, which prohibits the "taking" of an endangered species. The incidental take permit allows a non-Federal landowner to legally proceed with an activity that would otherwise result in the illegal take of a listed species.

Q. What are No Surprises assurances?

A. No Surprises assurances are provided by the government through the section 10(a)(1)(B) process to non-Federal landowners. Essentially, private landowners are assured that if "unforeseen circumstances" arise, the Services will not require the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed to in the HCP without the consent of the permittee. The government will honor these assurances as long as a permittee is implementing the terms and conditions of the HCP, permit,

and other associated documents in good faith. In affect, this regulation states that the government will honor its commitment as long as the HCP permittees honor theirs.

Q. Why are assurances provided to non-Federal landowners?

A. The Services believe that assurances should be provided to the private sector when economic development projects that provide long-term conservation benefits to species through implementation of HCPs. In order to provide sufficient incentives for the private sector to participate in the development of long-term conservation plans, adequate assurances must be made to the financial and development communities, that may be investing hundreds of thousands, if not millions, of dollars in a project, that a section 10 (a)(1)(B) permit can be made for the life of the project.

Q. How are the views of independent scientists used or sought, before and during development of an HCP? Please cite examples.

A. The views of independent scientists are important in the development of operating conservation program in nearly all HCPs. In many cases, these individuals are contacted by the applicant and are directly involved in discussions on the adequacy of possible mitigation and minimization measures. In other cases, the views of independent scientists are incorporated indirectly through their participation in other documents, such as listing documents, recovery plans, and conservation agreements, that are referenced by applicants as they develop their HCP. Additionally, input from independent scientists can occur during the HCP's public comment period.

Q. Aren't HCPs protecting landowners, not species?

A. HCPs benefit threatened and endangered species because they provide an incentive for landowners to integrate conservation measures into the day-to-day management of their lands. To proceed with their proposed activity under an incidental take permit, a landowner must provide a long-term commitment to species conservation through the development of an HCP.

As a result of the No Surprises rule and other improvements, HCPs have become a broad-based, landscape-level planning tool. In addition to conserving listed species, HCPs often include conservation measures for proposed and candidate species, as well as other rare or vulnerable species that live in the plan area. By adequately covering such unlisted species,

developers and landowners can also help prevent their decline. Thus, landowners have an incentive to conserve both listed and unlisted species . . . an incentive that in most cases does not exist outside of the HCP process.

Q. How are HCPs enforced to ensure that required mitigation is implemented?

A. There are a number of processes through which the Services ensure that terms of an HCP are being complied with. Among these are monitoring, development of annual reports by the permittee, and field inspections. On occasion, the Services may find that a permittee has violated conditions of the permit. Implementing Agreements sometimes contain provisions concerning the failure of signatory parties to perform their assigned responsibilities under an HCP. There is a process established that the Services follow in the event of a known or suspected permit violation. If the violation is deemed technical or inadvertent in nature, the Services may send a notice of noncompliance by certified mail or may recommend alternative action to regain compliance with the terms of the permit.

The Services may suspend or revoke all or part of the privileges authorized by a permit, if the permittee does not: comply with conditions of the permit or with applicable laws and regulations governing the permitted activity; or pay any fees, penalties, or costs owed to the government. If the permit is suspended or revoked, incidental take must cease and wildlife held under authority of the permit must be disposed of in accordance with the Services' instructions.

Q. Aren't HCPs in direct conflict with the actual purpose of the ESA, which is to conserve species and the habitat they depend upon?

A. Section 10(a) of the ESA allows the Services to issue permits authorizing the incidental take of listed species in the course of otherwise lawful activities, provided that those activities were conducted according to an approved HCPs, and the issuance of the HCP permit would not jeopardize the continued existence of the species. Accordingly, these proposed HCPs must satisfy specific issuance criteria enumerated in section 10(a)(2)(B) of the ESA. In deciding whether these criteria have been satisfied and whether the permit should be issued for a given species, the Services consider, among other things, the extent to which the habitat of the affected species or its long-term survivability may be improved or enhanced.

Q. How do you monitor the HCPs that are in existence now?

A. Monitoring is a mandatory element of HCPs under the ESA and Federal regulation, and a crucial factor related to the success of HCPs. The section 10 permit must include reporting requirements necessary to track take levels occurring under the permit and to ensure the conservation program is being properly implemented. The HCP itself will often specify reporting requirements. Both the permittee and the Services are responsible for monitoring the success of the HCP, and the Services have the added responsibility of monitoring the permittee's implementation of the HCP in order to determine if the permittee is complying with its regulatory requirements. In addition to verifying the success of individual HCPs and the program, monitoring will allow the scientific data attained relative to the success of operating conservation program to be used for the development of future strategies that will help conserve listed species.

The Services have drafted additional monitoring guidance for HCPs, which will be published in the near future for public review. The Services are also developing a nationwide database for issuance and tracking of permits, including incidental take permits associated with HCPs. This new system will greatly improve the Services' ability to monitor HCP compliance. The Services are also strengthening the monitoring component of the HCP program to ensure the permittees' compliance with the terms of the HCP.

Q. Isn't science always a surprise, especially with species that are rare. Isn't it dangerous to lock into a long-term plan with a non-Federal landowner on a species you might know little to nothing about?

A. If there are significant biological data gaps associated with a species covered by an HCP's operating conservation program, adaptive management becomes an integral component of the HCP. Incorporating adaptive management provisions into the HCP becomes important to the planning process and the long-term interest of affected species when HCPs cover species with biological data gaps. In the HCP program, adaptive management is used to examine alternative strategies for meeting measurable biological goals and objectives through research and/or monitoring, and then, if necessary, to adjust future conservation management actions according to what is learned. Through adaptive management, the biological objectives of an operating conservation program are defined using techniques such as models of the ecological system that includes its components, interactions, and natural fluctuations. If existing data makes it difficult to predict exactly what conservation and mitigation measures are needed to achieve a biological objective, then an adaptive management approach will be used in the HCP. The primary reason for using adaptive management in HCPs is to allow for changes in the operating conservation program, which may be necessary to reach the biological objectives of the HCP.

Q. What will the Services do in the event of unforeseen circumstances that may jeopardize the species?

A. The Services believe that it will be rare for unforeseen circumstances to result in a jeopardy situation. However, in such cases, the Services will use all of their authorities and resources, will work with other Federal agencies to rectify the situation, and work with the permittee to redirect conservation and mitigation measures that remove the jeopardizing effects. The Services have significant resources and authorities that can be utilized to provide additional protection for threatened or endangered species that are the subject of a given HCP including land acquisition or exchange, habitat restoration or enhancement, translocation, and other management techniques. For example, lands managed by the Department of the Interior could be used to ensure listed species protection.

Q. How has the proposed rule changed?

A. The following information summarizes some of the revisions to the proposed rule as a result of the consideration of the public comments received during this rulemaking process.

- Definitions used in this rulemaking process will now be codified as definitions in 50 CFR. These definitions were concepts identified in the "Background" section of the proposed rule.
- The rule was revised so the Services can only provide assurances for species listed on a permit that are adequately covered in the conservation plan and specifically identified on the permit.
- The Services clarified that the duration of the assurances is the same as the length of the permit.
- The Services revised the rule so that there is only one level of assurances provided to permittees, instead of one level of assurances for standard HCPs and another level for HCPs that were developed to provide a "net benefit" for the covered species.
- The Services clarified the rule so that it is apparent that No Surprises assurances do not apply to Federal agencies who have a continuing obligation to contribute to the conservation of threatened and endangered species under section 7(a)(1) of the ESA.
- The Services eliminated the permit-shield provisions from the final rule.
- You can get more information from the **Final Rule notice** as published in the Federal Register.