

## **Water Code Section 85320 Requirements for Incorporation of BDCP into Delta Plan**

### **I. Requirements for Approval of BDCP as an NCCP under Natural Community Conservation Planning Act (Water Code § 85320(b)(1))<sup>1</sup>**

#### **A. Overall, Does the BDCP Meet the Definition of an NCCP?**

1. An NCCP must “identify and provide for those measures necessary to conserve and manage natural biological diversity within the plan area while allowing compatible and appropriate economic development, growth and other human uses.” (Fish & Game Code (FGC) § 2805(h).)

2. “Conserve” and “conservation” are defined broadly as “to use, and the use of, methods and procedures within the plan area that are necessary to bring any covered species to the point at which the measures provided pursuant to [the California Endangered Species Act -- CESA] are not necessary, and for covered species that are not listed pursuant to [CESA], to maintain or enhance the condition of the species so that listing pursuant to [CESA] will not become necessary.” (FGC § 2805(d).)

3. “Manage” and “management measures” are not defined.

#### **B. Does the BDCP Include Information Necessary to Support the List of Covered Species?**

1. “Covered species” are listed, unlisted and “fully protected” species that are to be “conserved and managed” under the approved plan and that are authorized for “take” under the plan pursuant to FGC section 2835.<sup>2</sup> (FGC § 2805(e).)

2. Is there information in the record to support a determination that each species is appropriately covered under the plan using one or more of the three criteria in FGC section 2821(a)? E.g.:

a. “Coverage is warranted based on regional or landscape level considerations, such as healthy population levels, widespread distribution throughout the plan area, and life history characteristics that respond to habitat-scale conservation and management actions.”

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<sup>1</sup> “BDCP” is the Bay Delta Conservation Plan, and “NCCP” is a natural community conservation plan prepared and approved pursuant to the Natural Community Conservation Planning Act, Fish and Game Code section 2800 *et seq.*

<sup>2</sup> “Take” is defined as to “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.” (FGC § 86.) See FGC sections 3511, 4700, 5050 and 5511 for provisions regarding, and lists of, fully protected species.

b. “Coverage is warranted based on regional or landscape level considerations, with site specific conservation and management requirements that are clearly identified in the plan for species that are generally well-distributed, but that have core habitats that must be conserved.”

c. “Coverage is warranted based upon site specific considerations and the identification of specific conservation and management conditions for species within a narrowly defined habitat or limited geographic area within the plan area.”

C. Does the BDCP Meet the Requirements for Approval Under FGC Section 2820(a)?

1. The BDCP must have been “developed consistent with the process identified in” the BDCP planning agreement (see FGC § 2810). (FGC § 2820(a)(1).)

2. Requirements for habitat reserves and equivalent conservation measures.

a. The plan must provide for the “protection of habitat, natural communities, and species diversity on a landscape or ecosystem level.” (FGC § 2820(a)(3).)

b. Such protection must be provided through “creation and long-term management” of a) habitat reserves; and/or b) “other measures that provide equivalent conservation of covered species appropriate for land, aquatic and marine habitats within the plan area.” (*Id.*)

c. In general, habitat reserves and conservation measures should promote “conservation of unfragmented habitat areas,” multispecies and multihabitat management and conservation,” and “conservation of broad-based natural communities and species diversity.” (FGC § 2801(d).)

d. Reserve systems and conservation measures in the plan area also must meet all of following specific criteria, as needed for the conservation of covered species in the plan area:

i. Must provide for the conservation, restoration and management of “representative natural and semi-natural landscapes to maintain the ecological integrity of large habitat blocks, ecosystem function, and biological diversity.” (FGC § 2820(a)(4)(A).)

ii. Must establish one or more habitat “reserves or other measures that provide equivalent conservation of covered species with the plan area,” and provide “linkages between” the reserves “and adjacent habitat areas outside of the plan area.” (FGC § 2820(a)(4)(B).)

iii. Must protect and maintain “habitat areas that are large enough to support sustainable populations of covered species.” (FGC § 2820(a)(4)(C).)

iv. Must incorporate “a range of environmental gradients (such as slope, elevation, aspect and coastal or inland characteristics) and high habitat diversity to provide for shifting species distribution due to changed circumstances.” (FGC § 2820(a)(4)(D).) “Changed circumstances” are “reasonably foreseeable circumstances that could affect a covered species or geographic area covered by the plan.” (FGC § 2805(c).)

v. Must sustain the effective movement and interchange of organisms between habitat areas in a manner that maintains the ecological integrity of the habitat areas within the plan area.” (FGC § 2820(a)(4)(E).)

e. The plan must identify “activities, and any restrictions on those activities, allowed within reserve areas that are compatible with the conservation of species, habitats, natural communities and their associated ecological functions.” (FGC § 2820(a)(5).)

f. The plan must include “an estimated time frame and process by which the reserves or other conservation measures are to be implemented, including obligations of landowners and plan signatories.” (FGC § 2820(a)(9).)

g. The plan must also specify the “consequences of the failure to acquire lands in a timely manner.” (*Id.*)

4. Requirements for other species conservation measures.

a. The plan must contain other conservation measures that are specific to, and “meet the biological needs of,” covered species. (FGC § 2820(a)(6).)

b. Such measures must be “based upon the best available scientific information regarding the status of the covered species and the impacts of permitted activities on those species.” (*Id.*)

5. Plan mitigation measures must:

a. Be roughly proportional to the impacts on fish and wildlife species. (FGC §§ 2805(d), 2821(b).)

b. See mitigation requirements for implementation agreement, FGC section 2820(b)(9), discussed in section I.D below.

6. Plan must contain an adequate adaptive management program. (FGC § 2820(a)(8).)

a. Defined as the use of “the results of new information gathered through the monitoring program of the plan and from other sources to adjust management strategies and practices to assist in providing for the conservation of covered species.” (FGC § 2805(a).)

b. The plan must “integrate[] adaptive management strategies that are periodically evaluated and modified based on the information from the monitoring program and other sources.” (FGC § 2820(a)(2).) The adaptive management strategy must be designed “to assist in providing for the conservation of covered species and ecosystems within the plan area.” (*Id.*)

7. Plan must contain an adequate monitoring program. (FGC § 2820(a)(7).) Monitoring program must meet all of the following requirements (FGC § 2805(g)):

a. Provide for “periodic evaluations of monitoring results to assess the adequacy of the mitigation and conservation strategies or activities.”

b. Provide “information to direct the adaptive management program.”

c. Be sufficient to meet the mitigation monitoring requirements of CEQA, Public Resources Code section 21081.6, to the extent practicable.

d. Include all of the following components:

i. “Surveys to determine the status of” covered species and other “biological resources addressed by the plan.”

ii. “Periodic accountings and assessment of authorized take.”

iii. “A schedule for conducting monitoring activities.”

iv. “Progress reports on all of the following matters:”

aa. Establishment of habitat reserves or other equivalent conservation measures.

bb. Status of funding for establishing habitat reserves or equivalent measures.

cc. Compliance with the plan and implementation agreement by wildlife agencies, local governments and landowners “who have responsibilities under the plan.”

dd. “Measurements to determine if mitigation and conservation measures are being implemented roughly proportional in time and extent to the impact on habitat or covered species authorized under the plan.”

ee. Evaluation of the plan’s effectiveness in meeting the plan’s conservation objectives.

ff. Maps of land use changes in the plan area that may affect habitat values or covered species. (*Id.*)

e. All monitoring data and reports must be made available for public review. (FGC § 2820(d).)

f. Entity managing the plan must conduct annual public workshops “to provide information and evaluate progress towards attaining the conservation objectives of the plan.” (*Id.*)

8. Plan must be supported by adequate funding – e.g. must “contain provisions that ensure adequate funding to carry out the conservation actions identified in the plan.” (FGC § 2820(a)(10).) (Note: see Appendix A for discussion of federal and state case law interpreting analogous requirements in the federal ESA and CESA.)

D. Does the BDCP Implementation Agreement Meet the Requirements of FGC Section 2820(b)?

Implementation agreement must include all of the following:

1. Provisions defining species coverage, and any conditions of coverage (FGC § 2820(b)(1).)

2. Provisions for establishing the long-term protection of habitat reserves or equivalent conservation measures (FGC § 2820(b)(2).)

3. “Specific terms and conditions which, if violated, would result in suspension or revocation of the [take] permit, in whole or in part.” (FGC § 2820(b)(3).)

a. The terms and conditions must, at a minimum, specify the actions DFW must take under each of the following circumstances:

i. If a plan participant “fails to provide adequate funding.”

ii. If a plan participant “fails to maintain the rough proportionality between impacts on habitat or covered species and conservation measures.”

iii. If a plan participant “adopts, amends or approves any plan or project” without DFW’s concurrence “that is inconsistent with the objectives and requirements of the approved plan.”

iv. “If the level of take exceeds that authorized by the permit.”<sup>3</sup> (*Id.*)

b. Terms and conditions must “include a provision requiring notification to the plan participants of a specified period of time to cure any default prior to suspension or revocation of the permit in whole or in part.” (FGC § 2820(b)(3).)

4. Procedures for amending the plan and implementation agreement. (FGC § 2820(b)(4).)

5. Provisions to ensure implementation of the monitoring and adaptive management programs. (FGC § 2820(b)(5).)

6. “Provisions for oversight of plan implementation” in order to assess “mitigation performance, funding, and habitat protection measures.” (FGC § 2820(b)(6).)

7. Provisions for periodic reporting to DFW and the public for informational purposes and to evaluate plan progress. (FGC § 2820(b)(7).)

8. “Mechanisms to ensure adequate funding to carry out the conservation actions identified in the plan.” (FGC § 2820(b)(8).)

9. “Provisions to ensure that implementation of mitigation and conservation measures on a plan basis is roughly proportional in time and extent to the impact on habitat or covered species authorized under the plan.” (FGC § 2820(b)(9).)

a. These provisions “must identify the conservation measures, including assembly of reserves” and “monitoring and management activities that will be maintained or carried out in rough proportion to the impact on habitat or covered species.”

b. These provisions must also identify “the measurements that will be used to determine if [the above] is occurring.” (*Id.*)

c. If a plan participant does not maintain the proportionality between take and conservation measures, the implementation agreement must provide that the plan participant must either cure the default within 45 days, or enter into an agreement with the Department of Fish and Wildlife (DFW) in 45 days to “expeditiously” cure the default. If the plan participant does not do so, DFW must suspend or revoke the permit in whole or in part. (FGC § 2820(c).)

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<sup>3</sup> After approval of an NCCP, “plan participant” refers to the permittee(s) and any local agency that is a signatory to the implementation agreement. (FGC § 2805(j)(2).)

E. Do the Regulatory Assurances Meet the Requirements of FGC Section 2820(f)?

DFW may provide regulatory assurances (typically provided in the implementation agreement) to plan participants only if the following requirements are met:

1. The regulatory assurances are “commensurate with long-term conservation assurances and associated implementation measures pursuant to the approved plan.”
2. DFW’s determination of the level of regulatory assurances and time limits therefor “may be based on localized conditions” and shall be based on a consideration of all the following:
  - a. “The level of knowledge of the status of the covered species and natural communities.”
  - b. “The adequacy of the analysis of the impacts of take on covered species.”
  - c. The use of best available science to assess the impacts of take, “the reliability of mitigation strategies and the appropriateness of monitoring techniques.”
  - d. “The appropriateness of the size and duration of the plan with respect to the quality and amount of data.”
  - e. “The sufficiency of mechanisms for long-term funding of all components of the plan and contingencies.”
  - f. “The degree of coordination and accessibility of centralized data for analysis and evaluation of the effectiveness of the plan.”
  - g. “The degree to which a thorough range of foreseeable circumstances are considered and provided for under the adaptive management program.”
  - h. “The size and duration of the plan.” (FGC § 2820(f)(1).)

F. Miscellaneous Provisions.

1. Does the plan “promote coordination and cooperation among public agencies, landowners and other private interests”? (FGC § 2801(d).)
2. Does the plan provide a mechanism “to effectively address cumulative impact concerns” for “landowners and development proponents”? (*Id.*)

## **II. Requirements for BDCP EIR/EIS under California Environmental Quality Act (Water Code section 85320(b)(2))**

### **A. Does the BDCP EIR/EIS Satisfy the Basic Requirements for a Legally Adequate EIR? An EIR must meet the following requirements:**

1. Project description which meets the requirements of CEQA Guidelines section 15124.<sup>4</sup> Must include a statement of project objectives. (§ 15124(b).)

2. Discussion of environmental setting which meets the requirements of sections 15125 and 15360. The EIR generally must use an “environmental baseline” of environmental conditions as they existed as of the date of the Notice of Preparation. (§ 15125(a).)

3. Consideration and discussion of environmental impacts which meets the following requirements:

a. Significant environmental effects of the proposed project. (See §§ 15126.2(a), 15358, 15382.)

b. Significant environmental effects which cannot be avoided if the proposed project is implemented. (See § 15126.2(b).)

c. Significant irreversible changes which would be caused by the proposed project. (See § 15126.2(c).) [Required for an EIR on a public agency’s proposed adoption of a plan or policy. (§ 15127(a).)]

d. Growth-inducing impacts of the proposed project. (See § 15126.2(d).)

e. Cumulative impacts. (§§ 15130, 15355.)

f. Effects found not to be significant. (§ 15128.)

4. Consideration and discussion of mitigation measures proposed to minimize significant effects.

a. Discussion must meet the requirements of sections 15126.4, 15364, 15370.

b. Requirements for mitigation monitoring or reporting programs: Public Resources Code, § 21081.6 and CEQA Guidelines § 15097.

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<sup>4</sup> The CEQA Guidelines are found at Cal. Code Regs., tit. 14, § 15000 *et seq.* Unless otherwise noted, all references in this Section II are to the CEQA Guidelines.

5. Consideration and discussion of alternatives to the proposed project which meets the requirements of section 15126.6.

a. EIR must evaluate a reasonable range of alternatives to the project or to the location of the project “that could feasibly accomplish most of the basic objectives of the project *and could avoid or substantially lessen one or more of the significant effects*” of the project, “*even if* these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.” (§ 15126.6(a), (c), emphasis added.)

b. “EIR shall include sufficient information about each alternative to allow meaningful evaluation, analysis and comparison with the proposed project.” (§ 15126.6(d).) Must include reasons for selecting alternatives. (§ 15126.6(a).)

c. Must include the “no project” alternative. “No project” is not the same as the environmental baseline. (See § 15126.6(e).)

B. Does the BDCP EIR/EIS Include Mandatory Findings of Significance? (§ 15065.)

Mandatory findings of significance are required when:

1. “The project has the potential to:
  - a. Substantially degrade the quality of the environment;
  - b. Substantially reduce the habitat of a fish or wildlife species;
  - c. Cause a fish or wildlife population to drop below self-sustaining levels;
  - d. Threaten to eliminate a plant or animal community;
  - e. Substantially reduce the number or restrict the range of an endangered, rare or threatened species [note definition of “endangered, rare or threatened species” in section 15380 which includes more than just species that are formally listed under the state and/or federal ESAs];
  - f. Eliminate important examples of the major periods of California history or pre-history;
  - g. Achieve short-term environmental goals to the disadvantage of long-term environmental goals.” (§ 15065(a)(1), (2).)

2. “The project has possible environmental effects that are individually limited but cumulatively considerable. ‘Cumulatively considerable’ means that the

incremental effects of an individual project are significant when viewed in connection with the effects of” past, current and probable future projects. (§ 15065(a)(3).)

3. “The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.” (§ 15065(a)(4).)

### **III. Requirements for BDCP and EIR/EIS Under Delta Reform Act (Water Code Sections 85320(b)(2), 85321)**

A. Does the BDCP and EIR/EIS Meet the BDCP-Specific Requirements of the Delta Reform Act? In addition to meeting all of the foregoing requirements of the NCCPA and CEQA, the BDCP and/or EIR/EIS (as appropriate) must include “a comprehensive review and analysis of all of the following”:

1. “A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval” of an NCCP under FGC section 2820(a) (see section I.C above; BDCP).

2. “Other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions.” (BDCP and EIR/EIS)

3. An identification of “the remaining water available for export and other beneficial uses” of Delta water supplies. (BDCP)

4. “A reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, an unlined canal, and pipelines.” (EIR/EIS)

5. “The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the [EIR].” (EIR/EIS)

6. “The potential effects on migratory fish and aquatic resources.” (EIR/EIS)

7. “The potential effects on Sacramento River and San Joaquin River flood management.” (EIR/EIS)

8. “The resilience and recovery of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood or other natural disaster.” (BDCP and EIR/EIS)

9. “The potential effects of each Delta conveyance alternative on Delta water quality.” (EIR/EIS)

B. “The BDCP shall include a transparent, real-time operational decisionmaking process in which fishery agencies ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations.” (Water Code § 85321.)

**IV. Requirements for Approval of BDCP as an HCP Under the Federal ESA (Water Code § 85320(e))<sup>5</sup>**

A. Required Contents of an HCP. The BDCP and/or EIS/EIR must specify:

1. “The impact that will likely result from the taking”;<sup>6</sup>
2. “What steps the [permit] applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps” and “the procedures that to be used to deal with unforeseen circumstances”;
3. “What alternative actions to such taking the applicant considered and the reasons why such alternatives are not being considered”;
4. “Such other measures” as the USFWS and NMFS specify “as being necessary or appropriate for purposes of the plan.”

(16 U.S.C. § 1539(a)(2)(A); 50 C.F.R. §§ 17.22(b)(1), § 222.307(b).)

5. Note that NMFS regulations require additional details to be provided in an HCP. (See 50 C.F.R. § 222.307(b).)

B. HCP Approval and Incidental Take Permit Issuance Criteria. The USFWS and NMFS cannot approve, or issue an incidental take permit for, the BDCP unless the USFWS and NMFS find that it meets all of the following criteria:

1. The taking will be “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” (16 U.S.C. § 1539(a)(1)(B), (a)(2)(B)(i); 50 C.F.R. §§ 17.22(b)(2)(i)(A), 222.307(c)(2)(i).)

2. “The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.” (16 U.S.C. § 1539(a)(2)(B)(ii); 50 C.F.R. §§ 17.22(b)(2)(i)(B), 222.307(c)(2)(ii) [also requires monitoring].)

3. “The applicant will ensure that adequate funding for the plan” and “procedures to deal with unforeseen circumstances” will be provided. (16 U.S.C. §

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<sup>5</sup> “HCP” is a habitat conservation plan prepared and approved pursuant to section 10 of the federal Endangered Species Act (ESA), 16 U.S.C. § 1539(a).

<sup>6</sup> The federal ESA defines “take” as to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.” (16 U.S.C. § 1532(19).)

1539(a)(2)(B)(iii); 50 C.F.R. §§ 17.22(b)(2)(i)(C), 222.307(b)(2)(v).) (See Appendix A for a summary of judicial interpretations of the ensured funding requirement.)

4. “The taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild.” (16 U.S.C. § 1539(a)(2)(B)(iv); 50 C.F.R. §§ 17.22(b)(2)(i)(D), 222.307(b)(2)(iii).)

5. Any other required measures will be met. (16 U.S.C. § 1539(a)(2)(B)(v); 50 C.F.R. §§ 17.22(b)(2)(i)(E), 222.307(c)(2)(iv).)

6. The USFWS and NMFS have received “assurances” that the plan will be implemented. (16 U.S.C. § 1539(a)(2)(B); 50 C.F.R. §§ 17.22(b)(2)(i)(F), 222.307(c)(2)(v).)

7. The plan must contain “such terms and conditions” as the USFWS and NMFS “deem appropriate to carry out” this section. (16 U.S.C. § 1539(a)(2)(B); 50 C.F.R. §§ 17.22(b)(3), 222.307(d).) Such terms and conditions include reporting requirements the USFWS and NMFS “deem[] necessary for determining whether such terms and conditions are being complied with.” (*Id.*) NMFS regulations specify certain minimum terms and conditions that must be included. (See 50 C.F.R. § 222.307(d).)

8. In making its decision whether to approve an HCP, the USFWS must consider “the anticipated duration and geographic scope of the applicant’s planned activities, including the amount of listed species habitat that is involved and the degree to which listed species and their habitat are affected.” (50 C.F.R. § 17.22(b)(2)(ii).)

9. Note that NMFS regulations set forth additional approval criteria for an HCP and additional findings NMFS must make. (See 50 C.F.R. § 222.307(c).)

C. Duration of Incidental Take Permit. See 50 C.F.R. § 17.22(b)(4) and 222.307(d) re criteria for determining the appropriate duration of an incidental take permit issued in conjunction with approval of an HCP.

D. Regulatory Assurances for Incidental Take Permit. Only apply to HCPs that “are being properly implemented” and “to species adequately covered by” the HCP. (50 C.F.R. §§ 17.22(b)(5); 222.307(g).) Regulatory assurances cannot be provided to federal agencies. (*Id.*) Criteria for regulatory assurances are set forth in sections 17.22(b)(5) and 222.307(g).

E. Section 7 Consultation for HCP and Incidental Take Permit. The USFWS and NMFS must also prepare legally adequate biological opinions on the BDCP pursuant to section 7 and its implementing regulations. (16 U.S.C. § 1536; see 50 C.F.R. Part 402.)

## **APPENDIX A: Requirements for Ensured Funding Under the Federal ESA and CESA**

Although there are no cases interpreting the “ensured funding” requirement under the NCCPA (see FGC §§ 2820(a)(10), (b)(3)(A)-(B), (b)(6), (b)(8), (b)(9)), there are a number of federal cases, and one state case, interpreting the very similar ensured funding requirements for issuance of incidental take permits under the federal ESA (16 U.S.C. § 1539(a)(2)(B)(iii)) and CESA (FGC § 2081(b)(4)).<sup>7</sup> These cases hold that:

a. “The applicant cannot rely on speculative future actions of others.” *Southwest Center for Biological Diversity v. Bartel*, 470 F.Supp.2d 1118, 1155 (S.D. Cal. 2006); see also *National Wildlife Fedn. v. Babbitt*, 128 F.Supp.2d 1274, 1294-95 (E.D. Cal. 2000). “[U]ndependable and speculative sources for the necessary funds” will not suffice, nor will a “shaky pledge to make an effort to find funding.” (*Southwest Center*, 470 F.Supp.2d at 1156.)

b. In *Southwest Center*, 470 F.Supp.2d 1118, the court invalidated the permit applicant City of San Diego’s promise to use “best efforts” to find funding for the San Diego Multi-Species Conservation Plan’s conservation measures in the future, and its reliance on speculative future actions, such as a possible amendment to another jurisdiction’s regional plan, raising the sales tax and a possible bond measure requiring voter approval. (*Id.* at 1156.) The City also expressly refused to “guarantee that funds for the purchase of lands in the Preserve System will be available beyond those obtained through the mitigation process.” (*Id.*) The court found the City’s assurances primarily “relied on speculative future actions by unnamed parties, namely, the voters, for the majority of money needed to implement the conservation plan” and were “vague, non-committal, and referring to hopes and promises.” (*Id.* at 1156-57.) The court also found the City’s reliance on the participation of other jurisdictions to be “extremely unreliable.” (*Id.*) Therefore, they did not satisfy the ESA’s requirement to ensure funding for the plan. (*Id.*)

c. In *National Wildlife Fedn.*, 128 F.Supp.2d 1274, the court held a funding program for the Natomas Basin HCP (NBHCP) in Sacramento County inadequate based on the applicant City of Sacramento’s “explicit refusal to ‘ensure’ funding” for the mitigation in the event of a shortfall” in mitigation fees, and the facts that the NBHCP prohibited retroactive increases in mitigation fees, “the adequacy of funding depends on whether third parties decide to participate,” “no entity will be responsible for making up the funding shortfall,” and “there may not be any future permittee to whom increased costs may be shifted.” (*Id.* at 1294-95.) The court stated that “[i]t is not clear that a funding mechanism that is not backed by the applicant’s guarantee could ever satisfy the [ESA’s] requirement . . . that the applicant ‘ensure’ funding for the Plan,” but “where the adequacy of funding depends on whether third

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<sup>7</sup> FGC section 2081(b)(4) provides that the permit “applicant shall ensure adequate funding to implement the measures required by paragraph (2) [to minimize and fully mitigate the impacts of the authorized take], and for monitoring compliance with, and the effectiveness of, those measures.”

parties decide to participate in the Plan, the statute requires the applicant’s guarantee.” (*Id.* at p. 1295.) Moreover, the USFWS’ discretion to revoke the permit did not “satisfy the statute’s requirement that the *applicant* ensure the adequacy of funding.” (*Id.*, emphasis in original.)

(i) Both the federal and California courts upheld a revised version of the NBHCP under the federal ESA’s and CESA’s very similar ensured funding requirements for incidental take permits.

(ii) In *National Wildlife Fedn. v. Norton*, 2005 WL 2175874 (E.D. Cal. 2005) (not reported F.Supp.), the federal district court upheld the revised NBHCP under the federal ESA because it contained “several fail-safe provisions to protect against rising land costs during the period between collection of fees and acquisition of reserve lands. First, the NBHCP requires the [Natomas Basin Conservancy] to maintain a 200-acre “cushion” of reserve lands, so that development will not outpace the acquisition of mitigation land. [Record citation.] Second, if land acquisition costs increase before the City and Sutter have an opportunity to adjust the mitigation fees, the developer can be required to dedicate land rather than paying the fee. . . . Third, the “catch-up” fee ordinances further protect against rising land costs, as they narrow the window between fee payment and acquisition of mitigation land. [Record citation.] Finally, unlike the funding mechanism found inadequate in *Natomas I*, the mitigation fees are not capped under the NBHCP, so that fees can be increased to compensate for rising land costs.” (Slip Op. at 19.)

(iii) In *Environmental Council of Sacramento v. City of Sacramento*, 142 Cal.App.4th 1018 (2006), the Third District California Court of Appeal likewise upheld the revised NBHCP under Fish and Game Code § 2081(b), based on a very similar analysis. The court reasoned that “[m]itigation fees will be imposed on developers, and these fees will be reviewed annually and adjusted to reflect the actual costs of the Conservation Plan. Unlike the 1997 Conservation Plan, there is no cap on the mitigation fees, so the fees can be increased whenever necessary. Moreover, even if the cost of the land causes the mitigation fees to become exorbitant, the Conservation Plan allows the City and Sutter to accept land dedications from developers in lieu of the mitigation fee devoted to land acquisition. And finally, the Conservation Plan prohibits issuance of grading permits until the Conservancy establishes a 200–acre cushion of mitigation lands to ensure adequate habitat precedes development. The Department relied on economic analyses that indicated these funding mechanisms, farming revenues, hunting revenues, endowments, and contingency funds would adequately fund the implementation of the mitigation plan. Nothing more is necessary.” (*Id.* at 1044.)

d. In *National Wildlife Fedn. v. Norton*, 306 F.Supp.2d 920 (E.D. Cal. 2004), the federal district court upheld another HCP funding plan program (for the Sacramento Metro Air Park) that gave the permit applicant “the authority to impose any necessary supplemental fees on already-developed parcels—such that the first developers may yet be liable for an additional assessment if future land costs soar” and that also required the applicant “to impose supplemental fees if necessary to fully implement the

Plan.” (*Id.* at 926.) Further, the plan required a “mid-point review” and required “that all mitigation lands be purchased before the final 10% of the Plan site is developed,” which the court found provided “additional assurances” that adequate funding would be ensured. (*Id.*)

e. See also *Loggerhead Turtle v. County Council of Volusia County*, 120 F.Supp.2d 1005, 1021 (M.D. Fla. 2000) [upholding HCP that ensured funding through annual budget appropriations].