



**Contra
Costa
County**

To: Board of Supervisors

From: John Kopchik, Director, Conservation & Development Department

Date: August 3, 2021

Subject: Ordinance No. 2021-25, to update mitigation fees imposed to implement the East Contra Costa County HCP/NCCP

RECOMMENDATION(S):

1. OPEN the public hearing on Ordinance No. 2021-25; RECEIVE testimony; CLOSE the public hearing.
2. DETERMINE that the adoption of Ordinance No. 2021-25 is not a project under the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines section 15378(b)(4) (governmental fiscal activity).
3. ADOPT Ordinance No. 2021-25 to update mitigation fees imposed to implement the East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan.
4. DIRECT the Director of Conservation and Development, or designee, to file a notice of exemption with the County Clerk-Recorder.
5. APPROVE and AUTHORIZE the County Counsel, or her designee, to execute a Defense and Indemnification Agreement with the East Contra Costa County Habitat Conservancy and the Cities of Brentwood, Clayton, Oakley, and Pittsburg, without any changes to the substantive terms of the attached agreement.

☒ APPROVE

☐ OTHER

☒ RECOMMENDATION OF CNTY
ADMINISTRATOR

☐ RECOMMENDATION OF BOARD
COMMITTEE

Action of Board On: **08/03/2021** ☒ APPROVED AS RECOMMENDED ☐ OTHER

Clerks Notes:

VOTE OF SUPERVISORS

AYE: John Gioia, District I Supervisor
Candace Andersen, District II Supervisor
Diane Burgis, District III Supervisor
Karen Mitchoff, District IV Supervisor
Federal D. Glover, District V Supervisor

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Supervisors on the date shown.

ATTESTED: August 3, 2021

Monica Nino, County Administrator and Clerk of the Board of Supervisors

By: June McHuen, Deputy

Contact: Abigail Fateman,
925-655-2908

cc:

FISCAL IMPACT:

The proposed fee update will result in the County collecting additional revenues that can be used only for public facilities related to the conservation of covered species, as set forth in the HCP/NCCP and the proposed ordinance. Conservation and Development Department staff time to administer the ordinance will be reimbursed through the Department's existing process of tracking time spent to review development applications and charging applicants for the cost of the staff time actually spent to review the applications. The proposed defense and indemnification agreement reduces the County's financial exposure in the event it is sued after it adopts or imposes the HCP/NCCP fees and fee adjustments recommended by the Conservancy.

BACKGROUND:

Ordinance No. 2021-25 updates mitigation fees imposed to implement the East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan ("HCP/NCCP" or "Plan"). The fees are used for the conservation of habitat for covered species in mitigation of the impacts of development in eastern Contra Costa County.

The County originally approved the HCP/NCCP in December 2006. Under the HCP/NCCP, the County and the other participating local agencies were issued state and federal permits for impacts to endangered species and their habitats, also referred to as take permits. This enables the County and the other participating local agencies to control endangered species permitting for activities and projects in the region that they perform or approve. The East Contra Costa County Habitat Conservancy, a joint powers authority composed of the County and the Cities of Brentwood, Clayton, Oakley, and Pittsburg, was formed in February 2007 for the purpose of implementing the HCP/NCCP. Among other responsibilities, the Conservancy conducts periodic fee audits and refers the results to the participating cities and the County.

In October 2007, the County adopted Ordinance No. 2007-53 to originally establish the mitigation fees and procedures to implement the HCP/NCCP within the portion of the unincorporated County covered by the Plan. Two types of mitigation fees were established: the Development Fee (calculated by multiplying the acreage of the site permanently disturbed by development projects subject to the fee by the fee rate applicable in the zone in which the projects are located), and the Wetland Mitigation Fee (applicable to the wetland, aquatic, or riparian portions of a development project). The Conservancy and participating cities each separately adopted the mitigation fees and procedures to implement the HCP/NCCP.

The HCP/NCCP requires automatic annual adjustments to the mitigation fees based on economic indices. The HCP/NCCP also requires periodic audits in years 3, 6, 10, 15, 20, and 25 of the Plan's implementation. The periodic audits are conducted to assess whether changes in HCP/NCCP implementation costs over time require adjustment of the fees. Per HCP/NCCP requirements, the Conservancy hired an outside, independent financial auditor to conduct a fee analysis. The 2017 East Contra Costa County HCP/NCCP

Mitigation Fee Audit and Nexus Study (“Fee Study”) was prepared to comply with the requirement of a fully funded mitigation strategy.

Other than the automatic annual adjustments approved for the fees, the County has not updated its HCP/NCCP mitigation fees since their initial adoption in 2007. The fee update based on the 2017 Fee Study has been delayed due to pending litigation between the Conservancy and a private third-party. The litigation was settled in January 2021. In February 2021, the Conservancy adopted the updated fee schedule based on the 2017 Fees Study and now the participating cities and the County need to take action to adopt the updated fee schedule. The proposed Ordinance 2021-25 updates mitigation fee schedule to reflect the 2017 Fee Study. The procedures included in the proposed ordinance for implementing the HCP/NCCP are unchanged from those adopted by the County in 2007.

Updated 2021 Fee Schedule:

In addition to the periodic fee audit, the mitigation fees are automatically adjusted annually based on the Consumer Price Index (CPI) and the Home Price Index (HPI) using a formula in the HCP/NCCP. The fees calculated in the Fee Study are for 2017. These have further been updated to reflect the annual adjustments made in 2018 through 2021. The updated mitigation fee schedule, calculated as of 2021, is shown in the table below. The table also shows the percent change from the 2021 fee calculated under the current fee schedule compared to the corresponding updated fee.

2021 Mitigation Fee Schedule Based On 2017 Fee Study

Land Cover	Fee Basis	Current 2021 Fee	Updated 2021 Fee Based On 2017 Fee Study	Change from Current 2021 Fee
Development Fee				
Zone 1	per acre	\$17,602	\$16,890.46	-4.04%
Zone 2	per acre	\$35,204	\$33,780.93	-4.04%
Zone 3	per acre	\$8,801	\$8,445.23	-4.04%
Wetland Mitigation Fee				
Riparian	per acre	\$85,924	\$101,220.24	17.80%
Perennial Wetland	per acre	\$117,581	\$153,401.41	30.46%
Seasonal Wetland	per acre	\$254,759	\$358,985.11	40.91%
Alkali Wetland	per acre	\$241,192	\$362,908.51	50.46%
Ponds	per acre	\$128,133	\$197,540.18	54.17%
Aquatic (Open Water)	per acre	\$64,820	\$98,770.65	52.38%
Slough / Channel	per acre	\$146,222	\$141,043.28	-3.54%
Streams (<=25 ft. wide)	per ln ft.	\$700	\$520.50	-25.71%
Streams (>25 ft. wide)	per ln ft.	\$1,055	\$781.31	-25.97%

The updated Development Fees reflect an approximate 4% decrease from those currently

charged by the County. For the non-stream wetlands, the costs of restoration are substantially higher than those originally estimated when the HCP/NCCP and the mitigation fees were originally adopted. The opposite is the case for streams. The changes in the Wetland Mitigation Fees are due to the fact that estimates of restoration costs developed for the Plan did not have the benefit of actual project cost experience in eastern Contra Costa County. But that experience has been gained since Plan adoption and is reflected in the proposed updates under the Fee Study.

Defense and Indemnification Agreement:

Staff recommends that the Board of Supervisors approve a Defense and Indemnification Agreement (“Proposed Agreement”) with the Conservancy and the Cities of Brentwood, Clayton, Oakley and Pittsburg, to establish cooperative procedures in the event there is litigation on the matter of fees collected pursuant to the East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan.

The Proposed Agreement requires the Conservancy to defend, indemnify, and hold harmless the other parties to the Proposed Agreement from claims made against any of them related to the adoption and imposition of the HCP/NCCP fees, the fee adjustments made pursuant to the 2017 Fee Study and recommended by the Conservancy on February 22, 2021, and future fee adjustments made pursuant to the fee audit scheduled for 2022 and to be recommended by the Conservancy (the “Fees”). The Proposed Agreement also authorizes each party’s attorneys to participate in that party’s defense, and it describes each party’s rights and responsibilities regarding settlement of any litigation.

The Fees are required to ensure that the Conservancy has funding necessary to meet its obligations under state and federal law. Although each city and the County adopts and imposes the Fees within its jurisdiction, Fee revenue is used to fund the Conservancy’s activities required under the HCP/NCCP. As a joint exercise of powers authority created by the participating cities and the County to serve as the Implementing Entity for the HCP/NCCP and to coordinate the successful implementation of the HCP/NCCP, the Conservancy is the most appropriate agency to support its member agencies if there is litigation regarding the Fees. The Conservancy also is best-suited to provide a coordinated legal defense of its member agencies.

The substantive terms of the Proposed Agreement have been negotiated. Although editorial and non-substantive changes may be required or requested by a party, no substantive changes will be made without the approval of the Board of Supervisors. For these reasons, staff recommends that the Board of Supervisors approve the above-stated recommendation.

CONSEQUENCE OF NEGATIVE ACTION:

Ordinance No. 2021-25 would not be adopted, and the mitigation fees imposed to implement the HCP/NCCP would not be updated consistent with the 2017 Fee Study. With respect to the proposed defense and indemnification agreement, the County would bear its own attorney's fees and costs if a party were to sue the County after it adopts or imposes the HCP/NCCP fees and fee adjustments.

ATTACHMENTS

Ordinance No. 2021-25 HCP/NCCP Fee Update

East Contra Costa County HCP/NCCP Mitigation Fee Audit and Nexus Study, (Draft June 2017, Final February 2020)

Memo: From Bob Spencer to Conservancy RE: Updated 2020 Fees (February 16, 2020)

Index Fee Data

Defense and Indemnification Agreement, dated April 5, 2021 ("Proposed Agreement")