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May 7, 2012

Board of Supervisors
County of El Dorado
330 Fair Lane
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**Re: Consideration of Alternative Courses of Action with Respect to Gabbro Soils
Rare Plants**

Honorable Supervisors:

Recommendation:

Staff recommends that the Board of Supervisors: (1) authorize staff to begin the process of analysis to support the eventual preparation of an application for a section 2081 Permit under the California Endangered Species Act (CESA) and an agreement with the California Department of Fish and Game (CDFG) to that complies with the Native Plant Protection Act; (2) approve, and authorize the Chair of the Board to execute, the attached consultant agreement with SAIC in an amount not to exceed \$190,634.00 (inclusive of about \$20,000.00 to continue work with the U.S. Fish and Wildlife Service on a Conservation Strategy) to prepare an Impact Analysis and Mitigation Plan for gabbro soils rare plants in support of that effort; (3) direct SAIC, to the extent feasible, to utilize biological information generated by the group formed by CDFG and the U.S. Fish and Wildlife Service (FWS) to work on a broad "Conservation Strategy" and to consider recommendations for mitigation made by that group; (4) approve, and authorize the Chair of the Board to execute, the attached Second Amendment to Agreement for Legal Services with Ebbin, Moser & Skaggs to increase the not-to-exceed amount of that agreement by

\$75,000.00 to \$125,000.00; and, (5) direct that these activities be funded out of the Rare Plant Mitigation Fund, with any fee schedule which results from the process to include a factor to reimburse the Rare Plant mitigation Fund for the expenditures.

Reasons for Recommendation:

Staff is recommending that the County assume the lead role in the regulatory process to comply with the CESA and the NPPA by becoming an applicant for a Section 2081 permit and for agreements under the Native Plant Protection Act to cover future development in the County, and, ultimately, to perform CEQA compliant analysis in connection with those applications. This should result in authorizations for individual projects to proceed without the need for further approvals from CDFG. We are recommending this course of action, rather than relying solely on the Conservation Strategy for several reasons: (1) the Conservation Strategy will have no binding effect as a regulatory approval, so either the County or individual property owners will still have to apply for Section 2081 permits for development in the gabbro soils areas, and comply with CEQA, notwithstanding the existence of the Conservation Strategy. All involved parties recognize this and anticipate filing(s) for Section 2081 permits; (2) a much more detailed level of analysis will be needed for the Section 2081 permit than will be provided by the Conservation Strategy; (3) it will probably take two years to obtain a Section 2081 permit, so that the sooner we get the process underway, the sooner we can have the permit available for landowners; (4) we can limit this aspect of our consideration to a mitigation plan for development, rather than delving into broader issues of plant recovery; and, (5) the mitigation plan we will develop will balance land use considerations with plant mitigation, an activity we, as the County are best suited to perform.

At the same time, we are not abandoning the joint effort to see if we can work out a broader Conservation Strategy for the rare plants. We are recommending that the consultant, SAIC, make use of the biological information which has come out of the Conservation Strategy efforts, and consider recommendations made by the working group in formulating the County's mitigation plan. In fact, the parties to the Conservation Strategy recognize the need for the County to go further and obtain the regulatory approvals for development either on a blanket basis or a project-by-project basis. Staff is also recommending that SAIC continue its participation with the Biological Technical Committee both to gather data and information relevant to its performance of the agreement and to assist in the further development of the Conservation Strategy.

a. **Background:**

For a number of years, the County has been engaged in discussions with FWS, CDFG, the U.S. Bureau of Land Management (BLM), several other federal agencies, the California Native Plant Society and the American River Conservancy over implementation of the County's mitigation efforts with respect to the gabbro soils rare plants. Initially, these discussions occurred under the auspices of the Cooperative Management Agreement (CMA) signed in 2001. At that time, the discussions focused on management practices for lands held in the preserves. Over time, the CMA talks continued, but there has developed a second line of talks aimed at the mitigation of

the loss of gabbro soils rare plants as a result of development in the County. This change was largely due to the Court of Appeal's decision, issued in the *California Native Plant Society, et al. v. County of El Dorado, et al.*, which decision held that the County's previously existing fee program and establishment of a preserve system could no longer be counted on to serve as full mitigation for rare plant impacts under CEQA due to the failure of that program itself to undergo CEQA review. The discussions have been fairly wide ranging covering issues such as the broad issue of the rare plant recovery plan, typical development mitigation (which has a narrower focus than the recovery plan) and water rights applications. Over the last almost two years, the talks have progressed at a programmatic level and have been largely focused on developing technical data for analysis through a Biological Technical Committee.

On January 24, 2012, Cay Goode, of the FWS gave a presentation to the Board of Supervisors on the status of a "conservation strategy" being developed through these talks. She described a conservation strategy as "[a] plan that prescribes standards and guidelines which provide a high likelihood that the plant, animal, or ecosystem will continue to exist." All parties have done excellent work on this program and, in particular, the biological work is particularly useful and should help inform County land use decisions in the area. But, it should be recognized that the conservation strategy is designed only to serve certain purposes. According to the FWS presentation, the goal is:

"To achieve the long-term persistence of eight rare plant species associated with the gabbro soils in El Dorado County while allowing for planned development and the pursuit of a safe and reliable water supply within the County." (Slide 6)

This projected outcome provides for at least three different processes. The first is to achieve the long-term persistence of the plant species, which is the aim of the Recovery Plan issued by FWS in 2002 or an alternate strategy that provides for recovery. Recovery of species is a worthy goal, but beyond the obligations of the County or its landowners to implement. To the extent the conservation strategy is to be designed to have the County implementing a mitigation plan to achieve a recovery goal, it is probably more ambitious than what would be necessary to obtain regulatory authorizations. In addition, there may be a nexus problem in establishing the connection between the planned development and a broader recovery strategy. Of course, care must always be that any mitigation plan not reach beyond the County's land use authorities.

Second, the conservation strategy refers to allowing for planned development, presumably with mitigation for impacts on the Gabbro soils plants. This is the aspect of the conservation strategy with which the County is most directly involved. Whether the County seeks a blanket authorization from CDFG or individual landowners obtain permits on a project-by-project basis, the County will continue to be involved in ensuring that the impacts of development are appropriately mitigated. The federal Recovery Plan, however, does not control the nature or the extent of these mitigation obligations. Even if a conservation strategy is developed, the County should reserve its discretion to select among mitigation measures proposed and to propose its alternative mitigation measures in the context of mitigating for the impacts of developments.

The third issue is the development of a reliable water supply in the County. The County may choose to become involved in this issue, although it is primarily an issue for EID and the Water Agency. However, the FWS involvement with water rights applications, for example, seems to deal with the potential growth inducing impacts of these applications. It would appear that, to the extent we mitigate the actual impacts of the development itself, there should be little concern by FWS over the potential impacts of any such growth.

The conservation strategy was not designed to result in the issuance of any formal regulatory authorizations. It was designed as a potential platform for moving forward with various regulatory approvals. At most, it would constitute a broad understanding among the parties to conduct themselves in a certain way. But, it would have no binding effect on any of the agencies in the permit approval process. Furthermore, it would not have undergone any CEQA review at the time of its completion. Therefore, somebody coming forward for a permit approval would not have a CEQA compliant review to rely on or tier off. They would have to perform their own CEQA review which would be subject to challenge. The FWS presentation on January 24th seems to recognize this fact on slide 4 which says that:

“Strategy Provides for Assurances and Facilitates a Streamlined Process for:

- California Environmental Quality Act
- California Endangered Species Act
- National Environmental Policy Act
- Endangered Species Act”

Clearly, the FWS recognizes that any project in the vicinity of the Gabbro plants will have yet to go through one or more of these processes—the conservation strategy does not obviate the need for regulatory compliance. Of course, the information developed in the conservation strategy process will be of great assistance in all of these processes. It will provide a consistent scientific basis for the analysis. In this sense, it may facilitate these regulatory processes, but it will not provide “assurances” or a “streamlined process” for any of them. For example, the conservation strategy, not having gone through CEQA review itself, the CEQA process for any individual project would not necessarily be streamlined. Also, it should be noted that we have been talking as though the conservation strategy is an alternative to these regulatory processes. It is not. These regulatory approval processes are required irrespective of the conservation strategy. The conservation strategy provides information that may be useful in the process of complying with these regulatory processes.

The question is, what are the next steps in building on the work that has been done and achieving the County goal of obtaining relief from the onerous regulatory processes that property owners desiring to develop their property must go through. Largely as a result of the decision in the *California Native Plant Society v. County of El Dorado* case, the County’s mitigation program has been in limbo and property owners wishing to develop in the gabbro soils areas have been required to come up with their own separate mitigation program. Fortunately, from this perspective, due to the economy, there has not been much development in the area, so the issue has not come to a head. As the economy improves and development pressure increases, this will

increasingly become a problem if it cannot be addressed on a blanket level by the County. As such, there are two immediate needs of the County: (1) getting blanket regulatory approval from the appropriate agency for taking of rare plants in advance of development occurring; and, (2) providing CEQA analysis of our mitigation plan that will withstand judicial scrutiny to avoid each individual property owner from having to undergo substantial CEQA review at the time of project approval.

It should be noted that there are differing roles for the federal and state agencies in the regulatory process. It is the CDFG which has regulatory permitting authority over most development projects which might affect the rare plants. It has been recognized in the discussions among the various groups that the process will inevitably have to result in either a blanket permit being issued to the County or individual property owners seeking regulatory approvals from the CDFG. FWS would only gain jurisdiction if a federal action were required of a private development project, such as the issuance of a Section 404 permit by the Army Corps of Engineers for the filling of wetlands on a project, or if the project were a road project receiving federal money. With respect to certain water rights applications that involve the federal water project, FWS may also become involved in reviewing the application pursuant to the ESA because of the federal nexus.

Therefore, while continuing the more global discussions with the various agencies including FWS, staff believes that we should focus our attention on efforts to obtain regulatory approval from the CDFG for development in the County that may affect gabbro soils rare plants. There is a fundamental question to be answered. Should the County take the lead in applying for a blanket permit or should the County leave it to individual property owners to obtain permits? Thus far, it has been assumed that the County would apply for a blanket permit to relieve property owners of the burden of applying for individual permits. This would take the form of an application for a California Endangered Species Act (CESA) 2081 permit and approval under the Native Plant Protection Act (NPPA). Although the processes must be fleshed out, the CDFG has indicated preliminary approval of this approach. The objective would be to obtain blanket regulatory authorizations that cover all development in the County affecting the gabbro soils plants so that individual property owners would not have to seek approval on a project-by-project basis. Also, CEQA review would be done by the County on our mitigation plan associated with the regulatory approval so that subsequent development could tier off that CEQA review and do minimal, or no, CEQA review on a project-by-project basis. Much of the technical data generated in developing the conservation strategy would be utilized in the process of developing the County's mitigation plan and CESA 2081 permit application. Since the conservation strategy is a more comprehensive approach than would be required under CESA, we would review the mitigation measures that come out of the conservation strategy process and determine which are appropriate for our mitigation plan that would be incorporated in our CESA 2081 permit application, combined with mitigation measures we propose on our own.

The application process for a blanket CESA 2081 permit needs further scoping out with the CDFG. The process would presumably be conducted in four phases: (1) County preparation of an Impact Analysis and Mitigation Plan (this is required by CDFG before the filing of an application); (2) preparation of the funding mechanism for the Mitigation Plan (funding must be

identified in the permit application) and the CESA 2081 permit application itself; (3) preparation of CEQA documentation by the County; and 4) processing of the permit application by CDFG. The County would control the schedule of phases 1-3, but CDFG has control over phase 4 (though CESA has a 90 day timeframe for review of completed applications). The entire process would likely take up to two years and may be costly. The alternative would be to allow individual project proponents to apply for project specific permits. This would transfer the time commitment and costs to the individual developer and would certainly be more costly and time consuming in aggregate. On the other hand, it would largely take the County out of the middle of trying to develop a mitigation plan to provide for all development in the area, although the County would still be involved in CEQA review of each individual project.

In theory, the purpose of the conservation strategy is to make it quicker and easier for an individual to obtain a project specific CESA 2081 permit. There are three concerns with this. One is that the County would be required to buy into the entirety of the conservation measures in the conservation strategy, which may go well beyond what the County would be required to provide in terms of mitigation for development (i.e., providing for measures that address species recovery). Secondly, as stated above, the conservation strategy does not constitute or provide for regulatory approval. While it may serve as an understanding between the parties, it would have no binding effect with respect to any regulatory processes. There would be no CEQA review undertaken as part of the conservation strategy, leaving that to the County or individual project applicants. Finally, the mitigation measures proposed must be determined to be consistent with the desires of the Board of Supervisors and the public, and free of any regulatory takings issue.

b. Summary of SAIC Scope of Work for Phase 1 of CESA 2081 Permit Application - Impact Analysis and Mitigation Plan:

The following is a summary of Phase 1 of the work to be undertaken by SAIC, which includes preparation of the Impact Analysis and Mitigation Plan. Phase 2 (preparation of the funding mechanism, permit application, and NPPA agreement) and Phase 3 (preparation of CEQA documentation) are not part of this contract and would be included in subsequent contracts. A full description of all three phases is contained in the letter proposal from SAIC attached as Exhibit A. The contract for Phase one of the work is attached as Exhibit B and includes the full scope of work, schedule and cost details. A summary of the scope of work follows. In performing the work, SAIC will utilize the work completed in preparation of the conservation strategy, especially the biological work.

SAIC will work with County staff, the Board of Supervisors (Board), CDFG, legal counsel for the County, and other appropriate parties to develop materials in support of a CESA 2081 Permit Application for gabbro rare plants and for compliance with the NPPA. SAIC will prepare the description of ecological conditions supporting the gabbro rare plants, an assessment of the impacts of planned future development on the species, and a mitigation plan that includes

monitoring and adaptive management. SAIC will perform the tasks described below to produce these work products.

Task 1. Manage Project and Coordinate with County and Agencies

SAIC will coordinate via telephone and email with County staff, attorneys, CDFG, and other appropriate parties while developing the work products described in the tasks below.

Task 2. Attend Meetings and Workshops

To ensure clear and coordinated communication among the appropriate parties on various elements of the impact analysis and mitigation plan SAIC will attend meetings with the County, CDFG, and other appropriate parties. SAIC will attend meetings (in person or via conference call) during development of deliverables. This task will include meetings with County staff, the Board, CDFG, and other interested parties in Placerville or Sacramento, CA. SAIC will attend meetings of the Biological Technical Committee to gather information from participants on the progress of their process and on potential actions that could be used in developing the mitigation plan and to continue participation in the development of the conservation strategy. SAIC will support the County at public workshops that present information on the development and content of planning activities for gabbro rare plants.

Task 3. Prepare Draft and Final Impact Analysis

SAIC will gather existing, available information on the ecological requirements, status, and distribution of gabbro rare plants. SAIC will gather existing geographic information system (GIS) data on vegetation, soils, gabbro rare plants distributions, and planned future development for use in the Impact Analysis. SAIC will conduct an analysis that assesses the direct and indirect impacts of planned future development on each of the eight gabbro rare plant species. SAIC will describe in text, tables, and figures the direct and indirect impacts for each species and relate those impacts to the ecological context of the species overall distribution.

Deliverables for Task 3:

- Draft Impact Analysis
- Final Impact Analysis

Task 4. Prepare Draft Mitigation Plan

SAIC will prepare a Draft Mitigation Plan for the gabbro rare plants based on the level of impacts on plants from planned future development identified in the Impact Analysis. The Draft Mitigation Plan will be designed to achieve the CESA Section 2081 requirement for fully mitigating impacts and/or the CEQA requirement for reducing impacts to less-than-significant levels for each of the eight gabbro rare plants. (Actually, we would receive CESA coverage for only the one plant listed by the State. We would receive approval under the NPPA for several other plants, and would have completed CEQA on the remaining plants. The Draft Mitigation Plan will include the following elements:

- Biological goals and objectives for each species

- Habitat protection mitigation measures
- Habitat enhancement and management mitigation measures
- Monitoring and adaptive management plan

During preparation of the Draft Mitigation Plan, SAIC will solicit input from County staff, CDFG, FWS, botanists, and soil scientists with specific knowledge of the gabbro rare plants and specific land ownership, species and vegetation management, and land use issues to identify appropriate mitigation measures and monitoring actions. Mitigation requirements will be based on the outcome of the impact analysis and on the context and setting information for each of the plant species.

Deliverables for Task 4:

- Draft Mitigation Plan

Task 5. Prepare Final Gabbro Rare Plants Impact Analysis and Mitigation Plan

Following review of the Draft Mitigation Plan, SAIC will prepare the Final Gabbro Rare Plants Impact Analysis and Mitigation Plan document. SAIC will incorporate comments on the Draft Mitigation Plan into this final document as directed by the County. SAIC will prepare a presentation in MS PowerPoint that summarizes the methods and results of the impact analysis and the primary components of the mitigation plan as per the Final Gabbro Rare Plants Impact Analysis and Mitigation Plan. The presentation will be suitable for delivery to the County Board of Supervisors.

Deliverables for Task 5:

- Final Gabbro Rare Plants Impact Analysis and Mitigation Plan
- Presentation Final Gabbro Rare Plants Impact Analysis and Mitigation Plan in MS PowerPoint

The cost of the Phase 1 work, if the assumptions are met (*e.g.* GIS information is available from the County, there is adequate biological information available from the County, FWS, CDFG and other agencies to support the work without the need for SAIC to generate base data, no undue delays not due to SAIC actions) is One Hundred Ninety Thousand and Six Hundred Thirty Four Dollars (\$190,634.00). This includes the sum of approximately \$20,000.00 to provide funding for SAIC to continue participating with the Biological Technical Committee to monitor the information generated by the Committee and to continue to participate in the development of the conservation strategy. The schedule for accomplishing the work is approximately 8 months from the time SAIC is given a Notice to Proceed. It is anticipated that it will take a couple of months of preparation to get to the point of issuing the Notice to Proceed.

These costs only include the cost of Phase 1 (preparation of Impact Analysis and Mitigation Plan. The cost for phases 2 (preparation of funding mechanism, permit application, and NPPA Agreement) and 3 (preparation of CEQA documentation) are uncertain. However, preliminary estimates are that the combined cost for Phases 2 and 3 will be in the ballpark of approximately \$375,000.00.

Staff is recommending that this project be funded out of the Rare Plant Mitigation Fund. The cost of the project will be factored into the fee that will be developed which will allow the rare plant mitigation fund to recoup the money.

c. Amendment to Ebbin, Moser and Skaggs Agreement for Legal Services to Support the County and SAIC in the Regulatory Process:

Staff and SAIC will need the input of legal counsel in this process to ensure we comply with CESA, the NPPA and CEQA, and to help guide us through the regulatory process. The law firm of Ebbin, Moser and Skaggs is expert in the field and has been under contract with the County for the provision of general legal services associated with the rare plant issues since 2007. The original “not to exceed” amount of the contract was \$50,000.00 and has been mostly exhausted over the last 5 years. Staff is recommending that the Board amend the contract with Ebbin, Moser and Skaggs to increase the not-to-exceed amount by \$75,000.00, to a total of \$125,000.00. The exact cost of legal services is unknown. The \$75,000.00 should be enough to provide legal services through Phase 1 of SAIC’s scope of services. Ebbin, Moser and Skaggs has also requested an increase in their hourly rates of \$35 per hour. Their rates have remained unchanged since 2007. The Scope of Services has also been amended to specifically include work on this project. An amendment to the Legal Services Agreement is attached as Exhibit C. Staff is recommending that the Board approve the amendment and authorize the Chair of the Board to execute it.

As with the SAIC costs, staff is recommending that the Rare Plant Mitigation Fund be used to fund these expenses with reimbursement to be built into any fee program which results from the effort.

Alternatives:

1. Approve the contract with SAIC, and the contract amendment with Ebbin, Moser and Skaggs, and move forward with the development of an application for a blanket CESA 2081 permit and approvals under the NPPA, to be followed by CEQA process and documentation.
2. Wait for presentation of the completed conservation strategy to decide on new steps. This is supposed to be accomplished within a few months, but no firm date set by FWS. Make clear that the Board does not accept the conservation strategy until there is a full opportunity for public input and a decision by the Board.
3. Elect not to adopt a mitigation program and allow individual developers to apply for project specific CESA 2081 permits and undertake CEQA review of impacts to the plants on a project-by-project basis.

Fiscal Impact:

The total cost of staff's recommendation for completion of Phase 1 of the project (not Phases 2 and 3) is estimated at up to \$265,634.00. If the Board accepts staff's recommendation to use the Rare Plant Mitigation Fund as the source of money for this project, it would have no Net County Cost. The Rare Plant Mitigation Fund would be reimbursed out of the fee program to be developed.

We would be pleased to answer any questions the Board might have.

Respectfully submitted,



Louis B. Green
County Counsel

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Att.