

March 20, 2002

Richard Lashbrook, Agency Director
County of Riverside, T.L.M.A.
P.O. 1605
4080 Lemon Street
Riverside, California 92502-1605

Re: Preliminary Administrative Draft MSHCP, Volume 1, The Plan

Dear Mr. Lashbrook:

The Building Industry Association of Southern California, Inc. – Riverside County Chapter is pleased to provide initial commentary on referenced Draft MSHCP document dated March 7, 2002. As we were given less than two weeks to review this enormous document, we must reserve the right to provide additional comments in the weeks ahead. Additionally, and as the County advised us when the document was released, and we now concur, the draft MSHCP contains critical information gaps and a series of data and exhibit errors that make it near impossible to reach any substantive conclusions.

Foremost, we reviewed the draft document with one overriding purpose in mind. Would adoption of this program, as proposed, result in a process that is better than the current individual consultative process with the resource agencies? An affirmative answer is highly germane to our industry. Based on the current draft document we cannot yet make this finding, not unless the issues we raise in this letter are fully addressed. Before we provide the details of our findings and of our further informational needs, we make the following general observations:

- The draft document is highly reflective of the input of the resource agencies. With some exceptions, it is not the product of the stakeholders' group and the iterative process we have gone through.
- MSHCP Management and monitoring issues remain largely unaddressed.
- It remains unclear what will happen if acquisition funding falls through.
- The critical corridor alternatives to Orange County are not covered projects. The proposed Major Amendment process is too cumbersome.

Throughout this letter we introduce our comments by a section and/or page reference. In some cases this is followed by a "MAJOR ISSUE" designation. These designations call for special consideration and attention by the reader of this letter.

A. Comments on the Draft MSHCP Volume 1 Document.

Introduction: Pg. 1-14: This section says that CDFG prohibits take of listed species under Section 2080. This is misleading. The State does not necessarily regulate take of listed plants. Under the Native Plant Act, an applicant with a listed plant (and no mitigation measures specific to the listed plant) need only give 10 days notice that disturbance will occur. This is to allow biologists to salvage any plants if they so desire. There is not a blanket prohibition on taking of State-listed plants.

Section 2: Pg. 2-30: Table 2-4 includes land that is not located in the MSHCP preserve planning area. It is impossible to evaluate existing land uses against what will be taken for the preserve unless the table is changed to only include land within the preserve planning area.

Section 3: General: Please provide a summary table that lists each Area Plan with the target range by habitat type and total the amounts. This will give the reader a more complete picture of the size of the proposed preserve and the habitats that will be conserved. In discussions with Dudek, it was stated that this table does exist and has been given to the wildlife agencies. It should be a simple matter to include it in the MSHCP.

Pg. 3-28: What is the basis for the target acreages given for each Area Plan? Please explain how the biological issues identified for each Area Plan are addressed by the target acreages.

Pg. 3-32: MAJOR ISSUE: This section states that "...where the vegetation description does not match existing conditions at the time of reserve assembly, the generalized geographic descriptions for each cell should take precedence to ensure that the overall reserve ultimately assembled conforms with the target acreage and generalized configuration...". This must be changed. The vegetation base is very old, having been assembled in 1991-2. There have been changes ranging from minor clearing and habitat type conversion due to a fire up to major changes caused by construction of approved projects. (This is acknowledged on page 106) If a cell description states that the southern one-half of a cell must be conserved, and that portion of already built on, then the cell description cannot be implemented and a key link in the planned preserve may never be acquired. It is imperative that vegetation changes be considered as soon as possible and incorporated into the vegetation layer. Most programs include a period of time (1-3 months) where a landowner has an opportunity to provide recent accurate vegetation data that is incorporated into the vegetation date layer.

Relying on the amendment process will not work. That process states that one criterion for approval is that a preserve of equal or greater value must be the end result. This is not feasible when the underlying data has changed.

Table 3-2: More specific criteria are needed for cell groupings. These often cover large areas. The objectives are often too vague to allow a preserve design to be written. Can these be revised to include more specific criteria, objectives or alternatives that would also result in an acceptable design?

Section 4: Pg. 4-4: It is misleading to state that public entities are contributing 313,800 acres to the preserve planning effort from past acquisitions. These areas were put into public ownership in many different ways. A significant portion of them was exacted from landowners during the entitlement process. It is similarly unfair to burden the remaining private landowners in the County with the task of providing 97,000 new acres through a variety of mechanisms. This section should be rewritten to more fairly identify what private landowners have provided in the past. The remaining portion of private property that needs to be acquired should be more equitably distributed among the various governmental agencies, the existing residents and private property owners.

It is also misleading to state that local governments will provide some portion of the preserve through various tools including development transfers, fees, negotiated development areas, and similar methods. These are thinly veiled means of using the entitlement process to get land from private landowners during the development entitlement process. Any land acquired through such "tools" should be more properly counted as being provided by the private sector.

Pg. 4-7: The statement is made that 112,000 acres of private property, subject to no more than a 10% fluctuation up or down, will need to be acquired to create the preserve. Elsewhere in the document, the figure of 97,000 acres is stated. Which is correct?

Pg. 4-21: This section does not summarize all of the impacts of this program. It should be noted that the direct impact of this program will be the densification of new neighborhoods in order to accommodate population demands and the preserve. This more compact development (smart growth) will have accompanying social and economic impacts that may be both negative and positive.

Section 5: General Comments: MAJOR ISSUE. This section describes the adaptive management program that is being proposed to ensure that the resources being conserved will continue to persist over the long term. It also includes an extensive monitoring program that consists of three tiers: the "big picture", habitat level management programs, and species-specific programs.

First, it is suggested that a clear definition of "monitoring" and "management" be given early in this section. Second, it is suggested that the Monitoring and Adaptive Management Subsections be reversed since the emphasis will be on monitoring for the first few years. Minor additions can be made to the

monitoring section to show how the monitoring program transitions into the management program.

BIA has serious concerns about the Adaptive Management Section. The success or failure of the program depends on management.

1. Management costs usually exceed the cost of land acquisition. Since financial resources over the long term are very scarce, it is imperative that money be spent wisely. Much information seems to be missing from this section. This is clearly stated on page 5-3, which says that there is a "paucity of concrete, comparable data on the species, natural communities and threats." With so little information, how can we be sure that the Covered Species are really "covered"? Is there enough information to ensure that jeopardy will not occur upon plan implementation? With so little information available, how can we be sure that the costs of management are not being wildly over or under estimated?
2. It is unclear how the three tiers of management will be coordinated to ensure that the big picture is not sacrificed to the species-by-species approach that seems to be emphasized. A program that considers the entire habitat must balance the wildlife agencies' concern about species. Only in this manner can we be sure that we are not managing the preserve in a way that will benefit one species while disadvantaging another. It is also likely that habitat management will be more cost effective than individual species management.

This section should also acknowledge that the original concept of adaptive management embodied a "hands off" approach. Management was only to be undertaken when it became clear that there was a decline. In this manner, natural processes (which may not be clearly understood) could continue and more knowledge could be gained. It is of great concern that management would be done to prevent type conversion (page 5-5). How will type conversion be distinguished from natural succession? How will a senescent habitat patch be re-invigorated to encourage species diversity? This type of management seems to be very close to meddling which may have very deleterious effects.

3. The preliminary adaptive management plans for species need to define management tasks. The tasks listed (preservation of large patches, population trend analysis, public education, etc.) do not seem to be management tasks.

It is suggested that the adaptive management section be re-vamped. The big picture should be emphasized and a framework provided for what this level of

management should include. This should then be done for the habitat and species levels. Activities that benefit a large number of species, such as invasives removal, should be included in the overall framework plan. For invasives, a subsection could be written that identifies how the problem should be dealt with. For example, it may be necessary to first determine where the problem is the worst and what species are involved. Methods of removal should be identified and areas that would benefit the most should be prioritized. In this manner, money would be spent where it would do the most good. Other management activities that will be done over the entire preserve include range management, control of public access, agricultural management and fire management. It should also be noted that some of the threats to certain species would be removed simply through the creation of the preserve. The threats of urbanization and further habitat fragmentation will be reduced to non-threatening levels through preserve creation. They are not management issues.

Section 6: General: MAJOR ISSUE: No where in the document is it mentioned how take authority will be conveyed to individual landowners. The County holds the 10(a) permit, and must convey that authority to allow individual projects to be constructed. How will this be done?

Sub-section 6.2.2: Is it the policy of Riverside County to duplicate regulations that are already being enforced by the State and Federal governments? That is the impact of this chapter: the County will be enforcing new regulations on wetlands that duplicate those already covered by the State Department of Fish and Game, Regional Water Quality Control Board, U.S. Fish and Wildlife Service and Army Corps of Engineers. This will only harm landowners. First, they will need to negotiate wetland preservation and mitigation requirements with the County. Then, landowners will need to seek permits from the state and federal agencies. No credit will be given for what has been negotiated with the County. Landowners will need to negotiate a second set of mitigation with these other agencies. Is this the intent of the County Board of Supervisors?

This section also establishes a double standard for wetlands depending upon location. If outside of the CA, a landowner needs to meet a "no net loss" standard and obtain permits from the appropriate state and federal agencies. If inside the CA, they need to go through the double process of negotiating with the County and then with the agencies. This is completely unnecessary. If a wetland is needed for the preserve, then it is preserved. If a wetland is not necessary to the preserve, then a wetland should be handled as if it were not in the CA, and the landowner should only need to obtain the appropriate permits.

Please revise this section.

Section 6.2.3: Requirements that narrow endemics be avoided will result in the creation of many very small areas that are preserved outside of the preserve. They will not necessarily be connected to other open space, and will be difficult

and expensive to defend. Several species on the narrow endemic list respond well to transplant. It is suggested that this section be revised to add provisions encouraging transplantation into the preserve for these species.

In addition, requirements that alternatives for narrow endemics be biologically superior are unnecessary and draconian. The preserve that is being created by this process must meet the "no jeopardy" provisions of the Federal Endangered Species Act (FESA). If this standard is met, then that is the only standard that any alternative must also meet. Otherwise, the 10(a) permit for the MSHCP could be invalidated. In addition, the term "biologically superior" is undefined and is a litigation handle for environmental groups seeking only to stop growth in Riverside County.

Pg. 6-48: Isn't fire management a management issue?

Pg. 6-50: Among the findings required for an amendment is that the preserve will be functionally equivalent to that which would otherwise result from the criteria as proposed. How will this be done when the underlying database is completely inaccurate? Is it the intent of the County to stop projects that are already underway? Is the intent of the County to require mitigation for impacts that have already been mitigated under previous environmental review? How can a landowner create a functionally equivalent preserve when it is impossible to implement the criteria because of changes in the 1991 database? Given the amount of development that has occurred since 1991, it would seem that several thousand acres might be caught in a situation that cannot be fixed.

As previously suggested, landowners should be given a finite amount of time to submit updates to the database. The criteria should then be adjusted so they are realistic.

Section 6.7: MAJOR ISSUE: This section creates an entirely new bureaucracy whose purpose is to administer the acquisition and management of the preserve. Has the cost of this new agency been accounted for in the cost estimates given in Section 9?

Please revise this section to better explain the relationship between the Regional Authority (RA), the Contract Manager (CM), the Management Oversight Committee (MOC), and the Scientific Advisory Committee (SAC).

Who will hire the CM?

The CM creates the MOC which can vote and direct management actions, but which does not appear to answer in any way to the RA. Is this correct?

The CM creates the SAC which may coordinate with preserve managers and monitors. Is this done ad hoc or with direction from the CM or the MOC? How will conflicts between the recommendations of the MOC and SAC be resolved?

The agencies listed as possible members of the MOC do not necessarily have management expertise. For example, CDFG and USFWS have management sections and regulatory sections. Please add requirements for the MOC members that include active management of large acreages for a specific number of years. Similarly, there are no requirements listed for members of the SAC. Again, such participants must have active, "on-the-ground" management experience. Please add requirements for members of the SAC.

Can the MOC or SAC find that the conditions of the MSHCP 10(a) permit are being violated if their recommendations are not followed? Is it the intent of the County to create a voting body that can make such decisions?

MAJOR ISSUE: What are the requirements for members of the Acquisition Committee? Hands-on real estate experience would be very helpful. Also, please include a requirement that the RA establish policies under which the Acquisition Committee would make recommendations. BIA strongly recommends that a policy be added now that the Acquisition Committee could only recommend the acquisition of land within the CA that meets approved criteria. This will avoid the unnecessary expenditure of scarce financial resources on land that will not contribute to the completion of the preserve.

Section 6.9.2: Pg. 6-58: **MAJOR ISSUE:** Add "Changes in state or federal regulations" to the list of Unforeseen Circumstances.

Please define "extraordinary circumstances" and explain how it differs from "Unforeseen Circumstances" and "Changed Circumstances".

Section 6.9.3: Pg. 6-64: Under "Drought", will private revegetation efforts required as mitigation be delayed during a drought or will supplemental water be required?

Under "Invasion by Exotic Species", it should be specified that any determinations of "inundation" be based on existing levels.

Pg. 6-66: Given that the definition of "Changed Circumstances" generally includes natural processes, it should be specified that no additional land is necessary to respond to these natural processes.

Section 6.10: **MAJOR ISSUE:** As written, the County is getting no relief from the undetermined impacts of Critical Habitat. Depending upon the resolution of lawsuits in process, the entire MSHCP could be rendered invalid. BIA recommends that the County make it a condition of approval that USFWS will immediately undertake to remove any Critical Habitat Designations for Covered Species with the issuance of the Biological Opinion for the MSHCP.

Section 7: General: Is the County or USFWS and CDFG the final decision-maker for approval of any facilities located in the CA?

Table 7-16: MAJOR ISSUE: Have all participating jurisdictions provided their lists of covered facilities?

Several times the table states that road improvements should be limited to the existing ROW, or that river/creek crossings be eliminated, or that a road be realigned. Are these recommendations feasible in all cases? Does this conflict with the Circulation Element designation?

MAJOR ISSUE: General: BIA is very concerned that the out of county CETAP corridors to Orange County and elsewhere are not covered projects. These have long been considered to be a major benefit and critical component of the MSHCP. To suddenly have them designated as Major Amendments is completely unsatisfactory. The document should be revised to include these corridors as covered projects with a provision that the final alignment will require its own CEQA analysis, and with the provision that if the alignment is different from that included in the MSHCP, it will be approved as a Minor Amendment assuming a functional equivalency finding can be made.

Section 8.0: General: MAJOR ISSUE: Why are jurisdictions be penalized by possible reduced MSHCP coverage because the State and Federal governments cannot live up to their obligations?

Pg. 8-3: The statement is made that 112,000 acres of private land will be necessary for the preserve. Is this correct or is the figure 97,000 acres as stated elsewhere in the document?

Section 8.3: MAJOR ISSUE: Will the wildlife agencies approve a plan that only guarantees one-half of the necessary funding for management?

What is the Preserve Management Committee and how does it differ from the MOC?

The per acre preserve management costs seem to be very high, especially when you consider what other preserves are spending. Many existing smaller preserves are spending a total of \$60 per acre for everything. Why are these so high?

How can management costs even be estimated when the management program is not defined?

What provisions are included to reduce the County's funding obligation if the actual costs are less than projected?

How will the County assemble the \$100,000,000 endowment? Will the County require the few remaining landowners to pay for the acquisition of land within the CA, and then require them to pay even more to fund this endowment? The remaining landowners in Riverside County did not create the endangered species issues. Every resident in the County bears some responsibility for this.

Any funding of the cost of acquisition and management of the preserve should be very broadly based. Please explain how this is being done.

Section 9: General: MAJOR ISSUE: Please provide a better explanation of the difference between "Covered Species" and "Covered Species Subject to Incidental Take". It seems that the difference is the need for special conditions, although this does not seem to be carried into the Implementation Agreement.

What are the special conditions? Will the wildlife agencies have the final say in land use decisions regarding these species?

Table 9.0 provides take estimates for each species, but a rationale for why the species is covered. Instead, this section groups species together and relies on very brief general descriptions of why these groups of species are covered. BIA is very concerned that this method of describing why a species is covered is too brief, and is overshadowed by the take estimates. It is recommended that a coverage rationale be included in this table for each species that includes an estimate of the amount of habitat that is also being preserved.

B. Comments on Draft Implementation Agreement.

2.0 Recitals and 4.0 Purposes. One or both of these sections should specify the mitigation and minimization activities to be undertaken by the permittees, and the landowners as permit beneficiaries, and by stating that the permittees have agreed to undertake these actions in reliance on the assurances and commitments of FWS and CDFG.

Section 4.3 currently provides that "no additional mitigation will be required of Permittee, with respect to Covered Species, except as provided for in this Agreement or as required by law" (emphasis added). The term "or required by law" may result in future disputes over whether changes in the law can obligate the permittee to provide additional mitigation, regardless of the "No Surprises" assurances contained in the IA. The phrase should be deleted.

3.19/3.20 Covered Species/Covered Species Subject to Incidental Take. Apparently the IA incorporates the unusual idea that not all Covered Species will be included in the authorization to take species provided by the Section 10(a) Permit and NCCP Take Authorization. This seems problematic, since the IA states that "Covered Species" are those "that will be adequately covered by the MSHCP" while "Covered Species Subject to Incidental Take" are those "that are adequately conserved by the MSHCP." The difference is not well defined, but clearly serves to limit the coverage of the IA and permits to the smaller list of species. Although section 3.20 contemplates that some species will shift from "Covered Species" to "Covered Species Subject to Incidental Take" after

the IA is effective, there is no assurance that any additional species will be added to the “take” list.

11.1 Implementation Mechanisms. This key section is not provided, although it notes possible implementation approaches such as adoption of new ordinances. The precise format of implementation could have a substantial effect on the burden for landowners.

11.2 Cooperative Institutional Structure for Implementation and Management of the MSHCP. This section calls for the creation of a “joint regional authority” to manage the MSHCP process. The structure of the authority is not specified (the section says only “pursuant to the requirements of the California Government Code and other appropriate legal authorities”), which leaves open the actual implementation and enforcement powers of the “authority”. The IA should be more specific about the formation, structure and legal powers of this new entity.

This section also calls for no less than five separate committees or management bodies to implement the MSHCP land acquisition and management program. This is in addition to the implementation of other portions of the MSHCP program by cities and the County. Use of so many oversight groups is likely to result in significant delays in implementing the MSHCP which could jeopardize the effectiveness of the program and therefore the status of the permits. It would be helpful to streamline this set of oversight groups and to establish specific duties and timelines for each remaining entity.

11.3 Property Owner Initiated Habitat Evaluation and Acquisition Negotiation Process. Since this process of compensating landowners whose property is needed for the reserve is such a central part of the MSHCP effort, the IA should include a more detailed description.

11.6 Interim Controls. The section does not specify which lands will be subject to interim controls, or what those controls will require. Even land far from the anticipated reserve area, or with low habitat values, could be constrained.

11.7/11.8 Projects Within the MSHCP Criteria Area/Activities Outside the MSHCP Criteria Area. Although these sections appear consistent with the project specific approach of the MSHCP, the need for a variety of findings for each project approval risks substantial delays in the local project approval process. One possible improvement would be to establish timelines for local action on these findings.

11.18 Changed Circumstances Not Provided for in the MSHCP. This section is not provided in the current draft. The presence of the section, however, raises some concerns. This subject should be completely addressed by the provision of section 11.17.1 that “other changes not identified as Changed Circumstance will be treated as Unforeseen Circumstances.” Any modification of that

provisions which might be included in section 11.18 must not serve to weaken the Unforeseen Circumstances protections.

11.19.1 No Surprises Assurances. This section should be expanded to describe in detail the substance of the “no surprises” rule, which prevents the agencies from requiring the commitment of additional land, water, or financial compensation, or additional restrictions on the use of land, water, or other natural resources, under unforeseen circumstances.

Efforts should also be made to include procedural protections for the permittees, including requiring FWS to make specific findings of unforeseen circumstances with respect to specific species. The IA should incorporate the findings required under applicable law.

The IA should provide assurances to the permittees that compliance with its terms and with the terms of the HCP constitute compliance with FESA and with other specified environmental laws (e.g., CEQA, NEPA, the Migratory Bird Treaty Act, and other state and federal natural resource and pollution laws).

11.19.4 Assurance Limitation. This section properly excludes from the No Surprises protection those changes in the MSHCP which are needed to comply with the Changed Circumstances and Adaptive Management provisions of the MSHCP. As a result, the MSHCP and IA should provide specific actions, or a list of possible actions with a cost cap, for responses to defined changed circumstance or adaptive management requirements. Without such definition, costs of the MSHCP program could expand without the protections of the No Surprises provision.

13.1 Take Authority. This section allows the County and cities to “confer Take Authorization to those projects through the discretionary permits.” Section 11.23 indicates that public facility providers may be included in the incidental take authorization provided under the MSHCP through the use of a “certificate of inclusion.” No comparable process is provided in the IA for transferring take authority from the County or cities to landowners. The IA should specify how this is to occur. For example, a certificate of inclusion could be issued to landowners receiving permits from local agencies.

14.7 Critical Habitat Designation for Covered Species. It would be helpful if this section provided a discussion of the “physical and biological features” and “special management considerations” which are included in the MSHCP and justify treating the preserved land protected under the MSHCP as all critical habitat for the Covered Species.

15.1 Issuance of NCCP Authorization. The MSHCP contemplates issuance of state take authorization under the NCCP Act, and does not require issuance of an incidental take permit under Section 2081 of the California Endangered Species Act. The IA should specifically require issuance of a 2081 incidental

take permit as, or in addition to, the "NCCP Authorization" defined in this section.

21.6 Additional Remedies of the Wildlife Agencies. The IA currently provides that the permit may be revoked with minimal notice and discussion with the permittees or opportunity for the permittee to meet, confer, or be heard. The IA should include broader notice and hearing requirements.

This section currently provides that FWS and CDFG may suspend or revoke the Permits "in conformance with the provisions of applicable law and regulations in force at the time of such revocation or suspension." Again, this language should be modified to state that the laws and regulations must not conflict with the "no surprises" assurances provided in the IA.

The section defines the continued obligations of the Permittees in the event of full or partial suspension or revocation of the permits. This would be an appropriate place to include a parallel provision defining the surviving rights of landowners who have completed the development approval process. If a landowner has received the required MSHCP findings, or has agreed to a negotiated compensation package, as part of local approvals, their take authorization should survive the suspension or revocation of the permits.

This concludes our initial commentary on the Draft MSHCP document. We have made every attempt to provide these comments within an extremely short timeframe. We hope that these comments are useful and look forward to the critical debate that must now ensue before this Plan can be deemed complete and ready for public review. Thank you for allowing us the opportunity to input.

Very truly yours,

BUILDING INDUSTRY ASSOCIATION
OF SOUTHERN CALIFORNIA, INC. – Riverside County Chapter

Borre Winckel, Executive Director

Cc: Supervisor Tom Mullen, Co-Chair, RCIP Project
Supervisor Jim Venable, Co-Chair, RCIP Project.