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March 20, 2002

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**HAND DELIVERY**

Ms. Kristi Lovelady  
County of Riverside  
Transportation and Land Management Agency  
4080 Lemon Street, 7<sup>th</sup> Floor  
Riverside, California 92502-1605

**Re: *Comments on the Preliminary Administrative Draft Multiple Species  
Habitat Conservation Plan and Administrative Draft Implementation  
Agreement***

Dear Ms. Lovelady:

The following comments are submitted on behalf of the Francis N. and Jean Domenigoni Family Trust, Domenigoni-Barton Properties, Domenigoni Brothers Ranch, Jean Domenigoni, and Andy and Cindy Domenigoni (collectively, the "Domenigonis") on Riverside County's (the "County") Preliminary Administrative Draft MSHCP and Implementation Agreement.

For the reasons discussed below, the Domenigonis cannot support the MSHCP in its present state and request significant redrafting. Adoption of the MSHCP as written would subject the Domenigonis and other landowners to onerous new restrictions and substantial delays in processing of entitlements. Instead of relieving landowners of regulatory burdens, the County would impose a regulatory expansion of jurisdiction otherwise not authorized by federal and state law.

Further, the MSHCP is still in state of flux as significant portions of the MSHCP and its related voluminous documents, including all but one of the maps, are incomplete or in error. The Preliminary Administrative Draft MSHCP was released for review by the Advisory Committee on March 7, 2002, for only a two week review period. Considering that the MSHCP

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and related documents comprise more than 2,400 pages, two weeks is not a sufficient period of time for the Advisory Committee members to review and comment on such a critically important document.

## I. INTRODUCTION

The Domenigonis own 1,735 acres of land in the Domenigoni Valley area of Riverside County straddling Highway 79/Winchester Road west of the Diamond Valley Reservoir project. The Domenigonis' have owned and farmed land in the Domenigoni Valley continuously for five generations. The Domenigonis' commercial agricultural operations include growing wheat, oats, corn, barley, alfalfa, turf grass, and other crops; cattle grazing; a cow-calf operation; and other agricultural activities.

In December 2001, the Domenigonis received approval of their Specific Plan by the County (Specific Plan No. 310) for a master-planned commercial, recreational, and residential project. This culminates over ten years of master planning for the Domenigonis' ranch. The final EIR for Specific Plan No. 310 was also certified by the County in December 2001. The MSHCP in its current form would impose substantial impediments to the Domenigonis' ability to develop the Specific Plan as approved. This is due to the MSHCP's extensive requirements for conservation setbacks and buffers on private land outside of Reserves, as well as extensive regulation of the placement of new roads and other infrastructure.

Cindy Domenigoni serves as a member of several Riverside County Integrated Project committees, including the MSHCP Advisory Committee. Ms. Domenigoni also served on the Riverside County Habitat Conservation Agency's Advisory Committee.

The Domenigonis have devoted significant time and resources to the MSHCP process. They have provided extensive comments and suggestions on the MSHCP Work Products in an effort to assist the County to develop a program that can receive broad-based support from private landowners necessary for the MSHCP to sustain the County for the years to come. (The Domenigonis' comment letters dated May 16, May 24, June 28, July 27, and November 30, 2001, are incorporated herein by reference.)

The Domenigonis were among the first to integrate MSHCP planning within their project planning. In connection with the Specific Plan, the Domenigonis and their consultants devoted substantial time and resources to meeting with representatives of the County, the U.S. Fish and Wildlife Service ("USFWS") and California Department of Fish and Game ("CDFG") to plan for linkages on the Domenigoni land above and beyond those called for in the MSHCP Reserve alternative previously approved for study by the Board of Supervisors. However, the MSHCP does not acknowledge or reflect the linkages resulting from those discussions that were included in the Specific Plan. Rather, the maps and the text of the SWAP and 74/79 Area Plans appear to require far greater dedications of their land for the Reserve (reference MSHCP at 3-311 *et seq.*, 3-325 *et seq.*, and Figures 3-8, 3-26). We understand that the Criteria Area maps are

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inaccurate and we assume that these errors will be rectified prior to public release of the Draft MSHCP. However, due to the errors and incomplete information in the MSHCP and related documents, the potential impacts of the MSHCP on the Domenigonis' existing commercial land uses and future master planned community cannot be determined at this time.

Unfortunately, the MSHCP does not address several significant issues raised in the early comments by the Domenigonis and other affected landowners throughout the MSHCP Advisory Committee's review process. We urge the County to revise the MSHCP and related documents in accordance with these comments prior to releasing the draft MSHCP for public review and comment. In particular, the MSHCP and related documents should be revised to:

- Relieve regulatory burdens to private property owners - not add new regulations beyond those that exist under State and federal laws as currently proposed;
- Streamline project approvals - not lengthen the regulatory processes beyond the existing time frames;
- Establish a voluntary, incentive-based program that rewards and compensates landowners who dedicate land to the MSHCP Reserve- not a regulatory quagmire as currently proposed that restricts the use of privately owned property and exacts it for the Reserve;
- Provide certainty of timely compensation to landowners whose land is needed for the Reserve - not impose a cloud on hundreds of thousands of acres of private property throughout the County; and,
- Rectify technical deficiencies of the MSHCP which have been criticized by the MSHCP Science Review Panel ("SRP"), among others.

## II. AS DRAFTED, THE MSHCP IS NOT BETTER THAN THE "STATUS QUO"

The overriding purpose of the MSHCP is to provide a better alternative to the current state and federal permitting processes. Unfortunately, the MSHCP is not better than the current regulatory framework. In fact, instead of relieving or streamlining state and federal regulation of private property, the MSHCP imposes more complicated and onerous new regulations beyond the authority of the CDFG and the USFWS under existing state and federal laws.

The primary component of the MSHCP is the establishment of a Reserve of approximately 510,000 acres of land, consisting of approximately 357,000 acres owned by public/quasi-public agencies, and an additional 153,000 acres to be acquired from existing

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private landowners. MSHCP at 1-18. The stakeholders overwhelmingly supported an incentive-based program that compensates landowners who set aside and dedicate land for the Reserve. Instead, the MSHCP draws a line around private property and imposes burdensome land use restrictions as supported by the CDFG and USFWS.

The MSHCP also would impose additional restrictions on property outside the Reserve. MSHCP at 6-26, 6-35. In particular, although 153,000 acres would be "acquired from existing private landowners" as part of the MSHCP Reserve area, an unknown number of additional private acreage would be conserved under the MSHCP including land having slopes greater than 30% (MSHCP at 3-22), drainages and wetlands beyond those jurisdictional waters regulated under state and federal law (MSHCP at 6-18, 6-19), and land that supports or could support narrow endemic species (MSHCP at 6-24).

A. **The MSHCP's Repeats the Mistakes of the Stephens' Kangaroo Rat Habitat Conservation Plan**

The Stephens' kangaroo rat ("SKR") habitat conservation planning effort created such a groundswell of community opposition for an MSHCP planning process that the resource agencies, the County, and participating cities approved the 1998 Planning Agreement. Foundational MSHCP planning concepts were set forth in the Planning Agreement "[b]ased upon previous habitat conservation planning experiences, revenue limitations, and sentiments expressed by western Riverside County citizens and property owners . . ." The MSHCP fails to incorporate those foundational planning concepts. As a result, it is likely to engender broad-based public opposition if released for public review without significant redrafting.

1. **The MSHCP Establishes a de facto "Study Area"**

During the SKR habitat conservation planning process, privately-owned lands were included in a Study Area where land use restrictions were imposed for years in order to "save" that land until it could be acquired for the SKR Reserve. Many landowners testified before the Riverside County Habitat Conservation Agency about the financial hardships caused by the Study Area as well as the personal toll taken by their loss of land use and attendant loss of marketability of their land.

The Planning Agreement committed that the MSHCP will not incorporate Study Areas, development moratoria, or any other means of regulating private property for habitat or species protection purposes beyond that required by law (Planning Agreement section 10.4). Nevertheless, the MSHCP does so. Section 6.2.5 establishes "Interim Controls" on private land in order to "ensure that resources ultimately to be conveyed to the reserve system are maintained in their existing condition prior to conveyance to the reserve system." The MSHCP requires that the Interim Controls be implemented through the grading ordinances of the County and participating jurisdictions. Under the Interim Controls, all proposed activities on the 320,000 acres of private property within the Criteria Area "shall be reviewed for consistency with the

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MSHCP criteria and consistency findings shall be incorporated in the permit issued for the proposed activity.” The Criteria are nothing more than descriptions of geographical areas of land to be set aside and conserved as part of the Reserve. If the proposed activities cannot be altered or conditioned in a manner that achieves “consistency with the Criteria” (that is, setting aside the land described in the Criteria), then the landowner goes through the acquisition process and may receive payment some time in the future if and when adequate funding is available.

The burden placed on private property is at least as great under the MSHCP Interim Controls as it was under the SKR Study Area. As a result, we believe it will not be supported by the affected communities.

**2. The MSHCP imposes “buffers” on private land adjacent to the Reserve**

The Planning Agreement committed that MSHCP core reserves and linkages will be designed to include core habitat and buffer areas within their boundaries, and that such boundaries will be designed in a fashion which ensures that reserves and linkages include habitat necessary to mitigate for edge effect impacts (Planning Agreement section 10.6). Nevertheless, MSHCP Section 6 sets forth requirements for buffers on private land adjacent to reserves as well as 300-foot setbacks required around drainages and wetlands beyond those subject to the jurisdiction of the CDFG and USFWS. Section 6.2.4 describes the mandatory buffers, but calls them “Land Use Adjacency Guidelines.” Under those Guidelines, the burden for buffering the Reserve is imposed on adjacent property owners without compensation, instead of through acquiring the private land needed for buffer areas or through management of the Reserve.

**B. The MSHCP Lacks Any Basis for Covering Numerous Species.**

The MSHCP uses the County’s and cities’ land use authority to require set-aside private land for species that do not occur on that land, species that are not listed, plant species that do not require take permits, and physical features that are exempt or not regulated under state or federal law.

Even after a reduction in the number of species to be studied in the MSHCP, the number of targeted species is staggering. Presently, 142 species are being considered for conservation. MSHCP at 2-2, 2-19<sup>1</sup>. The advantage of conserving as many species as possible is

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<sup>1</sup> The MSHCP is internally inconsistent in regard to the number of species to be conserved. For example, the MSHCP at 1-6 indicates that 143 species will be conserved. However, the MSHCP at 1-18 indicates that 164 species will be conserved. Further, the MSHCP at 2-19 indicates the 164 species identified in the August 9, 1999 Draft Proposal has been reduced to 142 species after further review and analysis. These inconsistencies must be corrected.

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to provide certainty that the MSHCP will already provide the mitigation required if additional covered species are listed. However, the MSHCP states that new listings constitute "changed circumstances" requiring additional mitigation measures. MSHCP at 1-14, 6-58. As a result, certainty is not achieved by including additional species in the MSHCP.

There have been significant critiques of the science allegedly supporting the rationale for inclusion of so many species in the MSHCP proposal and relationship between those species and the land proposed to be included in the Reserve, but these critiques still have not been addressed.

For example, the MSHCP's Science Review Panel ("SRP") criticized the MSHCP on numerous grounds of technical deficiency, including failure to justify the reasons for including in reserves one land unit versus another and failure to identify the criteria for including or excluding species and areas. Importantly, as noted by the SRP, these are the same questions asked by the public. Yet, the MSHCP fails to rectify the shortcomings noted by the SRP. Likewise, deficiencies in the PSBS vegetation mapping report were identified over six years ago by the then-existing Advisory Committee in a position statement advising the Riverside County Habitat Conservation Agency to: (1) establish a biological technical committee comprised of agencies, private interests and conservation interests to peer review the PSBS report; (2) circulate the report to regulatory agencies and responsible local agencies for comment and evaluation of the methods used in the PSBS report; and (3) based on the results of steps (1) and (2), incorporate into the data base those parts of the document that are accurate. (See RCHCA Advisory Committee Minutes dated May 25, 1995.) No such peer review or public agency analysis were conducted.

There is simply no strategic or scientific basis for the MSHCP's proposal to set aside hundreds of thousands of acres of land to protect the vast majority of the species proposed to be covered by the MSHCP, especially without providing a mechanism to timely acquire those lands and relieve the tremendous burden that would be placed on the affected landowners. Prior to being released for public comment, the breadth of the MSHCP should be reevaluated in light of practical considerations and sound science, and not based on work products that are known to be flawed.

### **C. MSHCP Regulation of Non-Jurisdictional Waters**

The Reserve area will include USGS blue-line streams (whether actually existing or not), isolated and non-isolated wetlands and streams, including vernal pools, alkali playas, and drainages that are not within the jurisdiction of the CDFG or the Army Corps of Engineers ("Corps"). MSHCP at 2-4, 3-29, 6-18, 6-19. Also, such features must be preserved outside Reserve area throughout the MSHCP Criteria Area. MSHCP at 6-26. The MSHCP also will establish a 300 foot setback from such drainages.

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Additionally, beyond what is currently required under state or federal law, public and private projects within the MSHCP Criteria Area, would be required to undertake surveying, mapping, and analytical documentation of drainages and/or wetlands on the project site. MSHCP at 6-19. Such site surveying, mapping, and documentation will be required to include identification and mapping of riparian, riverine, and vernal pool systems, areas that would be identified as jurisdictional under the Corps and CDFG wetland and streambed regulations, species composition, topography/hydrology, and soil analysis, where necessary. MSHCP at 6-19. The tremendous costs of such analyses would be borne by the landowners and proponents of projects on the 320,000 acres of private land within the Criteria Area<sup>2</sup>.

**D. The MSHCP Would Require Surveys and Conservation of Narrow Endemic Plant Species Beyond the Requirements of Existing Law**

Beyond what is currently required under state or federal law, public and private projects within the MSHCP Criteria Area, would be required to undertake surveys for "narrow endemic" plant species. MSHCP at 6-21, 6-24. Even if such plants are not found possibly due to prior land disturbances, the MSHCP apparently provides that soil surveys may be required to determine whether such property would support these narrow endemic plant species. MSHCP at 6-24. The vast majority of these narrow endemic plants are not listed.

These new regulations also would apply to development outside the Criteria Area throughout the MSHCP area. MSHCP at 6-27. The MSHCP also provides limitations on development if impacts to such plant species are unavoidable. For example, the MSHCP requires that 90% of those portions of the property identified for narrow endemic plant species shall be conserved until it is demonstrated that conservation goals for the particular species are met. MSHCP at 6-25. Findings of equivalency are required to demonstrate that the 90% standard has been met. *Id.*

However, if it is determined that the 90% conservation standard cannot be met and achievement of overall MSHCP conservation goals for the particular species have not yet been demonstrated, the MSHCP requires the County or participating jurisdiction to make a determination of biologically superior preservation, which entails consultation, review, and approval by the Wildlife Agencies. *Id.* (emphasis added.) A determination of biologically superior preservation by the County or participating jurisdiction must be based upon the criteria for findings of equivalency and an expanded written description of the project that demonstrates that although the proposed project would exceed the 10% narrow endemic plant species impact threshold, with proposed design and compensation measures, it would result in an overall reserve

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<sup>2</sup> The Domenigonis understand that approximately 320,000 acres of privately owned lands fall within the Criteria Area. This is estimated by multiplying 1,987 private property quarter-section "cells" by 160 acres per cell. MSHCP at 3-19.

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system design and configuration biologically superior to that which would occur under a project alternative within the impact threshold without these measures. MSHCP at 6-26.

Again, the tremendous costs of the new survey and conservation requirements established by the MSHCP would be borne by landowners and project proponents.

**E. The MSHCP Exceeds Federal Endangered Species Act Requirements**

The MSHCP requires dedication of private land regardless of the actual conditions on the property. The Criteria simply describe the proposed Reserve area in words instead of a map. They require conservation of the described geographical areas of land. In the notes following the Criteria tables, the MSHCP requires that the area described in the Criteria are to take precedence over the actual conditions on the land. *See e.g.*, MSHCP at 3-57.

Ironically, the MSHCP places the County in a worse position with regard to the scope of the USFWS's regulatory authority under the Federal Endangered Species Act of 1973 ("FESA"). As discussed in the MSHCP, the MSHCP is to serve as an HCP, pursuant to FESA Section 10(a)(1)(B), as well as a Natural Communities Conservation Plan ("NCCP") under the NCCP Act of 1991. MSHCP at 1-1. Section 9 of FESA makes it unlawful to "take" any fish or wildlife species listed as endangered. FESA defines the term "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or attempt to engage in any such conduct." 16 U.S.C. § 1532 (19). In order to authorize an incidental take of an endangered animal, a landowner is required to obtain a Section 10 Take Permit along with an IICP.

Cases interpreting FESA have held that there needs to be an actual "take" in order to trigger Section 9, even when it is claimed that a project may affect the habitat of endangered species. In *Babbitt v. Sweet Home Chapter of Community for a Greater Oregon*, 515 U.S. 687 (1995) ("*Sweet Home*"), the Supreme Court upheld a regulation of including habitat modification within the definition of "take," but strictly construed it to require substantial habitat modification which results in (1) death or actual injury, (2) to an identifiable member of a listed wildlife species, and (3) that is proximately caused by the action in question. *Sweet Home, supra*, 515 U.S. at 708-709 (Justice O'Connor concurrence); *See also Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9<sup>th</sup> Cir. 2000).

Under the FESA, therefore, a landowner need not obtain a Section 10 Incidental Take Permit if there is no actual "take" of an endangered animal or its habitat. Additionally, pending litigation may remove significant acreage within the County from USFWS's critical habitat designations. Nevertheless, the MSHCP would prohibit the County from approving productive use of 153,000 acres of private property within the Reserve, additional acreage throughout the Criteria Area, and land outside the Criteria Area, even though the vast majority of this property is not actually occupied or habitat of any endangered animals.



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The MSHCP also would conserve 59 plants. MSHCP at 2-22, 2-23, Table 2-1. Of these 59 plants, only 10 of them are federally-designated as endangered or threatened. *Id.* The limitations on the taking of endangered plants, pursuant to FESA, is much less strict than for animals. Section 9 of FESA makes it unlawful to remove and reduce to possession any endangered plant from land under federal jurisdiction. 16 U.S.C. § 1538(a)(2). Unless the land which has the federally-listed plants is subject to federal jurisdiction, it is not unlawful for a land developer to remove such plants. The MSHCP attempts to enlarge regulatory authority to include numerous plants which are not federally or state-listed, and to provide further regulation for endangered plants.

Another important component of traditional HCPs is their voluntary nature. The MSIICP is not voluntary. The MSIICP is proposed to be integrated into the County General Plan. MSHCP at 1-8. It is unclear what is meant by "integrating" the MSHCP into the General Plan. If it is included as part of the General Plan, then, of course, the MSHCP no longer is a voluntary program, but is mandatory, as California law prohibits the issuance of approvals that are inconsistent with a general plan. *See Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553 (1990).

**F. The MSHCP Exceeds the California Endangered Species Act Requirements**

The California Endangered Species Act ("CESA") prohibits the "take" of species listed as threatened or endangered. Fish & Game Code § 2080. California Fish & Game Code § 86 defines "take" as meaning "hunt, pursue, catch, capture or kill" or to attempt any of these acts. With respect to habitat modification, the California Attorney General concluded in a May 15, 1995, opinion that in contrast to FESA, CESA does not prohibit indirect harm to CESA-listed species through habitat modification. 78 Ops. Cal. Atty. Gen. 137 (May 15, 1995). The MSHCP purports to create new regulation to freeze or limit development of property, both inside and outside the Reserve area, which is not authorized under CESA.

**G. Since the MSHCP, as Proposed, is not a Voluntary Program, it Exceeds the Requirements of the NCCP Program**

NCCPs are authorized by the NCCP Act of 1991 (Fish & Game Code §§ 2800 *et seq.*). As is the case with an HCP, the NCCP program is a voluntary plan. Yet, here, where the MSHCP imposes mandatory land use restrictions through ordinances or is made a part of the General Plan, it no longer serves as a voluntary arrangement for landowners within the County and participating cities.

**H. The MSHCP Exceeds the Requirements of the Clean Water Act and the Fish & Game Code By Requiring Conservation of Non-Jurisdictional Waters**

The MSHCP would put the County and participating cities in a worse position with regard to the extent of the Army Corps of Engineers' ("Corps") jurisdiction over wetlands

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and waters. The MSHCP includes as criteria to determine Reserve areas wetlands, whether or not they are isolated, vernal pools, alkali playas, stockponds, etc., and includes restriction both inside and outside the Criteria Area through "edge treatments." MSHCP at 6-20, 6-27. If an avoidance alternative of these wetlands is not feasible, a practicable alternative to minimize direct and indirect effects to wetlands and associated functions and values to the greatest extent shall be selected, in accordance with the "no net loss" policy of federal and state wetlands regulations. MSHCP at 6-19, 6-20.

The MSHCP is attempting to impose jurisdiction which otherwise would not exist. The U.S. Supreme Court greatly limited the ability of the Corps to exert jurisdiction over isolated waters and wetlands. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"), the Supreme Court held that the Clear Water Act did not vest the Corps with jurisdiction over isolated waters, such as wetlands, because the use, degradation or destruction of such waters does not affect foreign or interstate commerce. Today, numerous isolated drainages and wetlands throughout the County are not subject to Corps regulation. However, the MSHCP would prohibit the County from approving projects within those areas.

Under the Fish & Game Code, state jurisdiction is limited to activities which substantially divert, alter or obstruct the natural flow or substantially changes the bed, channel or banks of any river, stream or lake. Fish & Game Code § 1603. The Department of Fish and Game is not authorized to regulate wetlands because they are not rivers, streams or lakes. Since regulation of isolated wetlands is not allowed under federal or state law, it should not be allowed in the MSHCP.

**I. The MSHCP Restricts the County's and Cities' Discretion Under the California Environmental Quality Act.**

The MSHCP violates three fundamental precepts of the California Environmental Quality Act, Public Resources Code §§ 21000 *et seq.* ("CEQA"):

- i. CEQA mandates project modification only when feasible. Title 14, California Code of Regulations ("CEQA Guidelines") § 15091;
- ii. For projects where significant impacts are not avoided or substantially lessened, a lead agency still may approve a project if it adopts a statement of overriding considerations (CEQA Guidelines §§ 15043, 15093); and
- iii. A project's expected environmental impacts are compared with the environmental baseline, the environmental setting for the project at the time the notice of preparation is issued. CEQA Guidelines § 15125.

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The MSHCP provides that projects within the MSHCP study area are expected to be designed and implemented in accordance with the criteria of each area plan of the MSHCP. Consistency findings with these criteria must be made in conjunction with individual project approvals within the MSHCP study area. *Id.* Deviations from the criteria may be made based upon a completion of an equivalency analysis, to conclude that the proposed project is to be considered biologically equivalent or superior to a project on the same site not deviating from the MSHCP. MSHCP at 6-50. If a project is determined not to be biologically equivalent or superior, then, ostensibly, the project could be denied because the MSHCP would require an amendment pursuant to Section 6.11 of the MSHCP.

This framework significantly restricts the County's discretion under the first two cited CEQA principals because it deprives the County or the Cities from approving a project if it deviates from MSHCP criteria. *See* CEQA Guidelines §§ 15091, 15902, 15903.

Various MSHCP provisions also violate principal iii, by focusing on what may have existed historically, rather than what exists presently, contrary to CEQA. An example of this is found in the MSHCP requirements concerning narrow endemic plant species. Rather than comparing the present environmental setting with what impacts are expected upon project approval, as required under CEQA, the MSHCP apparently requires soils surveys to be done which could require preservation of such land, even if the land is disturbed. MSHCP at 6-21, 6-22, 6-24. Even if conservation is not required, the MSHCP requires the landowner to engage in costly soils and habitat surveys which could delay development, because these surveys must be conducted in the appropriate season, in accordance with established protocols. *Id.*, 6-41, 6-42, 6-43, 6-46.

#### **J. The MSHCP Restricts Existing and Planned Roads and Infrastructure**

The MSHCP calls for closing existing roads, imposes significant restrictions on existing roads, and dictates criteria for siting new flood control and water infrastructure without consideration of the land uses that those facilities are to serve. *See* MSHCP at 7-17 *et seq.*, 7-46 *et seq.* As a result, the MSHCP will significantly impact development within the MSHCP Plan Area regardless of whether that development takes place within or outside of the Criteria Area.

We also note that the transportation corridor from Riverside County to Orange County is not included among the covered road improvements. If not included as a project covered under the MSHCP, its construction will require further, substantial mitigation beyond that provided in the MSHCP.

### **III. THE MSHCP SHOULD IDENTIFY ADEQUATE INCENTIVES AND FINANCES PRIOR TO PUBLIC REVIEW**

As discussed below and in the Domenigoni's previous comments, which are incorporated by reference, it is critical to obtain broad-based support for the MSHCP. As set

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forth in the principles established in the 1998 Planning Agreement, the most assured way to do so is through a program that compensates landowners instead of restricting use of their land. The MSHCP is heavily regulatory. As a result, without significant modifications that have repeatedly been called for by the Domenigonis and other affected landowners throughout the MSHCP Advisory Committee's review process, the MSHCP is unlikely to garner the public support necessary to sustain a program of its scope and duration. The Domenigonis request that the MSHCP be revised to address these shortcomings prior to its final approval.

**A. The Economic Impacts of Implementing the MSHCP is Not Clearly Defined**

The Advisory Committee has repeatedly recommended the need for a comprehensive economic analysis analyzing the availability of funding and the impacts of the MSHCP on the local economy. Yet, no economic analysis has been undertaken. We can only imagine that the economic impact of taking hundreds of thousands of acres of land out of productive use will be staggering.

The MSHCP should at least provide an estimate of its economic impacts relative to the benefits anticipated to be realized by the MSHCP. Only with such an analysis can the community and the Board of Supervisors make an informed decision whether it makes sense to adopt the MSHCP.

**B. The MSHCP Acquisition Process Takes too Long and must Be Revised<sup>3</sup>**

As currently drafted, the MSHCP imposes a cloud on land within the Criteria Area by singling it out for increased regulatory restrictions and requirements and burdensome administrative processes with no assurance of just compensation. This is evidenced by the onerous restrictions and the substantial delays in processing development entitlements that will be created by the MSHCP's Habitat Evaluation and Acquisition Process ("Acquisition Process").

The Acquisition Process, a critical component of the MSHCP program, was not intended to impose land use restrictions on private property. MSHCP at 6-1. However, private property that falls within the Criteria Area of the Acquisition Process and those that are adjacent to the Criteria Area would be subject to a lengthy review and negotiation process with no assurance of compensation or removal from the Criteria Area at the end of the process. Neither the MSHCP nor the Acquisition Process provides any information concerning how much land will be designated "Criteria Area," other than it is "significantly larger" than the Reserve area. MSHCP at 6-2.

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<sup>3</sup> Please note that the Domenigoni's comments in this section apply equally to the Implementation Agreement. For all intensive purposes, the Implementation Agreement is a restatement of Chapter 6 of the MSHCP.

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The Acquisition Process will apply to property which may be needed for inclusion in the MSHCP Reserve or subjected to other MSHCP criteria. MSHCP at 6-1. To determine which property is subject to the Acquisition Process, Criteria Area boundaries are established. MSHCP at 6-2. According to the MSHCP, the Criteria Area is intended to facilitate the process by which the County or a participating city will evaluate property that may be needed for inclusion in the MSHCP Reserve. *Id.* All proposed discretionary development projects within Criteria Area boundaries shall be subject to review under the Acquisition Process. *Id.*

The stated purpose of the Acquisition Process is to ensure that an early determination will be made of what properties are needed for the MSHCP Reserve, that the owners of property needed for the MSHCP Reserve are compensated, and that owners of land not needed for the MSHCP Reserve will be covered for incidental take of covered listed species and their habitat through permits issued to the County and participating cities pursuant to the MSHCP. *Id.* Unfortunately, the Acquisition Process as currently proposed falls far short of these goals and completely undermines an incentive-based MSHCP program.

On September 20, 2001, the Domenigoni-Barton family, together with the Riverside County Building Industry Association, Riverside County Farm Bureau, and Riverside County Property Owners Association jointly submitted two position papers: one discussing the deficiencies in the proposed Acquisition Process, and one discussing suggested solutions (the "Solutions Paper"). Although the revised Acquisition Process is an improvement over the prior draft, the time frames associated with the Acquisition Process are unworkable and illegal. A private property owner within the Criteria Area that is subject to an application for any discretionary land use approval could be in limbo for four years or longer, depending on the value of the property, with no assurance of ever receiving compensation for the land or the ability to economically use the land.

In the Solutions Paper, the Domenigonis jointly recommended that the Acquisition Process should determine what land is subject to the program's Conservation Criteria (e.g., what land is needed for the MSHCP Reserve) within 120 days after sufficient information is submitted. Thereafter, reserve acquisitions associated with project applications should be concluded within an additional 180 days, and acquisitions of non-development land should be concluded within 360 days.

Although the revised Acquisition Process does significantly reduce some of the time periods, it still does not achieve the expedited treatment that was jointly recommended. Currently as proposed, the Acquisition Process begins with a 45 day period to undertake a "initial application review" to determine how the property is to be classified under the MSHCP, through review of the MSHCP criteria to see how they affect development of the property. MSHCP at 6-3. However, this "initial application review" could take up to 120 days if it is determined that narrow endemic and other species surveys are required. MSHCP at 6-4.

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After the "initial application review" when it is determined that all or part of the property is needed for inclusion in the MSHCP reserve or subjected to MSHCP conservation criteria, the property owner and presumably the County or City enter into negotiations concerning the inclusion and the conservation of the property into the MSHCP. *Id.* The negotiation period can be up to 120 days or longer. *Id.*

If full inclusion of the property is required, the fair market price is determined by an appraisal. MSHCP at 6-5. However, the property owner the County or City are unable to reach agreement during the negotiation period, then the conflict resolution process may be commenced. MSHCP at 6-6, 6-6.

Mediation is initially required to resolve differences between the property owner and the County or City over the proposed development options for the property as well as differences regarding the application of MSHCP criteria. *Id.* If the dispute involves the application of MSIICP criteria, the initiating party must consult with the wildlife agencies concerning the application of the criteria prior to the initiation of mediation. *Id.* The consultation period could be 30 days or longer. *Id.* The mediation period could be 90 days or longer. *Id.*

However, if the Conflict Resolution Process is initiated as a result of the valuation of property, a second appraisal must be conducted, at the expense of the property owner. MSHCP at 6-9. If the County or City disagrees with the second appraisal, this appraisal and the appraisal previously prepared by the County or the participating City must be reviewed by a third appraiser, which may take up to 90 days. *Id.* Upon completion of this review, the appraiser shall make recommendations as to which appraisal should be approved. *Id.* If such a recommendation cannot be made, the third appraiser must within 90 days conduct an appraisal. *Id.*

Additionally, if the property owner and County or City are unable to resolve through mediation differences concerning the application of MSHCP conservation criteria, arbitration may be initiated. MSHCP at 6-10. The arbitration period could take up to 180 days or longer. *Id.*

Accordingly, under the Acquisition Process, assuming that the property is in the CA, it can take almost two years just to determine a purchase price for the property. However, this is just the beginning of the process. Following conclusion of successful negotiations or appraisal review under the Conflict Resolution Process and any necessary action by the Board of Supervisors or City Council, the MSHCP indicates that the property shall be promptly purchased provided sufficient MSHCP funds are available. *Id.* (emphasis added). Depending on the value of the property, it could take another year or four years for the property to be purchased even if funds are available. Otherwise, and project to be approval would require a major amendment to the MSHCP with its own separate approval process. MSHCP at 6-63, 6-68, 6-69.

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Accordingly, even if there is sufficient funding, land owners that are subject to the Acquisition Process, are essentially in a deep freeze during the proceedings, as the property owner is not allowed to submit any development applications. If funding is not available, the landowner is further burdened with having to prove that the MSHCP should be amended to accommodate the land use after the land was determined to be needed for the Reserve. This outcome is unfair.

The Acquisition Process is constitutionally and statutorily suspect. It is well settled that a governmental entity is liable for a taking, even if the taking is only "temporary". *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Certainly, up to four years is far too long for the property owner to await potential acquisition, especially, because at the end of the four year period, the County is under no legal obligation to actually buy the property if it does not have the money to buy it. The Acquisition Process' prohibition of development of the land, or even submitting a development application during the four year period would constitute a development moratorium on the land owner. The California Government Code authorizes the imposition of moratoria, but they must be adopted by four-fifths vote of the legislative body, and, at a maximum, may only have a duration of two years (Government Code § 65858), not up to the four years as set out in the Acquisition Process.

Further troubling is the fact that at the end of deep-freeze period, there is no guarantee that a private property owner can move forward with its development plans if there is insufficient funds to buy the property. Although the County or City must initiate an amendment to the MSHCP to remove the property from the Criteria Area boundaries, as with all discretionary approvals, the burden is on the property owner to shepherd the process. Additionally, the County or participating city still has the ability to deny the development application based on CEQA grounds, for example, inadequate biological resource mitigation.

On the whole, therefore, the Acquisition Process is unsatisfactory, illegal, and provides little or no incentive for a landowner to agree to its provisions.

C. **The MSHCP Acquisition Process Fails to Satisfy the Mandatory Time Frames Established under State Law**

The MSHCP will prevent County and affected cities from complying with the time frames established under state law to process development applications. For example, under CEQA, the lead agency is required to complete and approve a negative declaration within 180 days and an EIR within one year after the application is accepted as complete. CEQA Guidelines §§ 15107, 15108; Public Resources Code §§ 21100.2, 21151.5. These deadlines have been held to be mandatory, exposing a local government to liability if they are not met. *Sunset Drive Corp. v. City of Redlands*, 73 Cal. App. 4th 215 (1999).

The Permit Streamlining Act (Government Code §§ 65920 *et seq.*) and the Subdivision Map Act (Government Code §§ 66410 *et seq.*), also require development

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applications to be approved or denied within certain periods of time. Because of the time needed for conducting the MSHCP's narrow endemic and other species surveys, additional vegetation mapping, and the Acquisition Process, it is clear that the County and Cities will be forced to either not deem applications complete within the Criteria Area in a timely manner or else miss the deadlines pursuant to the Permit Streamlining Act and the Subdivision Map Act.

**D. The MSHCP Provides Inadequate Assurances to Landowners**

One of the primary reasons landowners would voluntarily agree to the MSHCP is to obtain certainty that if there is compliance with the MSHCP, the landowner would not be subject to further habitat regulatory risk in the future. Aside from the tremendous problems with the Acquisition Process, discussed above, another crucial issue is whether there are "unforeseen circumstances"<sup>4</sup>, i.e., a change in circumstances affecting a species or geographic area covered by the MSHCP that could not have reasonably been anticipated by the County and the wildlife agencies at the time the MSHCP is negotiated and adopted, which results in a substantial and adverse change in the status of the covered species. MSHCP at 6-57.

The MSHCP provides that a finding of "unforeseen circumstances" will not be grounds to suspend, terminate or revoke the take authorizations issued pursuant to the MSHCP, provided that the County and "affected beneficiaries" cooperate with the wildlife agencies to identify and implement reasonable necessary modifications. MSHCP at 6-58, 6-60. If, pursuant to a determination of the wildlife agency, that a "beneficiary" of the MSHCP is not cooperating (for example, a City refusing to agree to the MSHCP), and this is considered an "unforeseen circumstance" then the MSHCP provides for a revocation of the take authority, or an attempt to impose additional mitigation. MSHCP at 6-66.

The question then becomes who is responsible for additional mitigation? Is it the Regional Authority, the wildlife agencies, or more likely, the landowners? The MSHCP should provide additional information clarifying the extent of the "No Surprises" Policy and unforeseen circumstances. The MSHCP should be expanded to include the assurances of the "No Surprises" rule and to provide certainty that additional mitigation will not be required from the third party permittees under the applicable environmental laws.

**IV. CONCLUSION**

On behalf of the Domenigonis, we urge the County to revise the MSHCP to address landowner concerns, comply with the principles provided in the 1998 Planning

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<sup>4</sup> At times, the MSHCP uses the term "extraordinary" circumstances instead of "unforeseen" circumstances (MSHCP at 6-57); it is assumed that "extraordinary" was used in error.



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Agreement, and rectify technical deficiencies in the data that form the basis for the MSHCP. The MSHCP, as presently drafted, simply is too complicated and fails to incorporate the property owner protections and assurances as previously committed. Its negative impacts on landowners, the County, and affected cities are great, requiring additional study and input prior to release of the draft MSHCP for public review. Further, the MSHCP is still in state of flux as significant portions of the MSHCP and its related voluminous documents are incomplete. The Preliminary Administrative Draft MSHCP for the Advisory Committee's review was released on March 7, 2001 for only a two week review period. Upon distribution of the document, the Advisory Committee was told that the document is incomplete and that most of the maps included errors. Considering that the MSHCP and related documents comprise more than 2,400 pages, two weeks is not a sufficient period of time to allow review and comment on an incomplete document so important to the County's future.

We appreciate this opportunity to comment on the Preliminary Administrative Draft MSIICP and Implementation Agreement. We look forward to continuing to work with the County and the wildlife agencies to develop a model MSHCP that can receive the broad based community support necessary for the MSHCP to sustain County for the years to come.

Very truly yours,



Michele A. Staples

MAS:tms

cc: Board of Supervisors  
444239.2

cc: Richard Lashbrook, County of Riverside Transportation and Land Management Agency  
(via U.S. mail)  
Cindy and Andy Domenigoni (via U.S. mail)