

**SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**

FROM: Transportation and Land Management Agency **SUBMITTAL DATE:** March 13, 2001

SUBJECT: Policy Direction concerning MSHCP funding and implementation approach, selection of the project for purposes of environmental analysis and preparation of draft MSHCP, direction concerning inclusion of cities, and direction concerning conceptual public access plan.

RECOMMENDED MOTION: That the Board approve the staff recommendations in Attachments A and A-1.

Richard Lashbrook
TLMA Director

Attachments

FINANCIAL DATA:		
CURRENT YEAR COST	\$ -0-	ANNUAL COST \$ -0-
NET COUNTY COST	\$ -0-	IN CURRENT YEAR BUDGET:
YES/ NO/		

Department Recommendation: 9 Consent 9 Policy
Per Executive Office: 9 Consent 9 Policy

BUDGET ADJUSTMENT: YES/ NO/ FOR FY:

SOURCE OF FUNDS:

C.E.O. RECOMMENDATION:

County Executive Officer Signature

Prev. Agn. ref. 12-19-00 3.86

Dist. All

AGENDA NO.

Attachment A

1. Recommendation of MSHCP Advisory Committee:

Approve the draft Implementation Outline with the understanding that the document is a work in progress and will require additional discussions to resolve outstanding issues.

County staff's proposed alternative:

- a) *Approve in concept an implementation program predicated on land acquisition as the primary tool to achieve MSHCP conservation objectives. Such land acquisitions would occur with willing sellers pursuant to Section 10.7 of the Western Riverside Multiple Species Habitat Conservation Planning Agreement.*
- a) *Refer the MSHCP Advisory Committee's Funding and Implementation Outline to staff for further examination of policy and legal issues with County Counsel, USFWS, CDFG, and all western Riverside cities and direct staff to report back to the Board in 30 days;*

2. Recommendation of MSHCP Advisory Committee:

- That, for purposes of defining the project description for the MSHCP and defining the preferred project in the joint CEQA/NEPA document, the consultants analyze Alternative 1 consistent with the proposed Funding and Implementation Outline. Additionally, the environmental document may include an analysis of those alternatives considered in the October 4, 2000 Alternatives Development Document. Stakeholders reserve the opportunity to comment on other alternatives that might emerge in the course of the environmental review process.
- That the MSHCP environmental document evaluate a range of alternatives for the San Jacinto River.

County staff's proposed alternative:

Approve Alternative 1 as the project for purposes of preparing the draft MSHCP and issuing a NOP in accordance with CEQA;

- 3. Direct the project consultant to proceed with a conservation analysis that contemplates participation by all 14 western Riverside County cities but direct staff to continue discussions with Lake Elsinore to ascertain the city's preferred conservation approach and report back to the Board in 30 days; and,
- 4. Approve in concept the attached Parks and Open Space Concept Report as the basis for a public access plan and direct the RCIP Consultant to seek input from the MSHCP and General Plan Advisory Committees. Consultant will incorporate committee comments and comments received from the County Parks District and TLMA staff into a final product by April 15, 2001.

Attachment A-1

It is the desire of the Board of Supervisors that staff continue to work with the Resource Agencies, the cities, and the public to develop a draft Riverside County MSHCP based on the following policy direction:

1. Prepare an MSHCP and draft Implementation Agreement based on Alternative 1.
2. Includes a conservation analysis which anticipates the participation of all 14 western Riverside cities and which provides a breakdown of the conservation analysis of the 14 cities and the County.
3. Minimizes the need for new local ordinances to ensure its implementation.
4. Utilizes existing processes (including CEQA) to the maximum extent possible for its implementation.
5. Includes a range of incentives for land conservation to facilitate the development of the preserve system.
6. Identifies the number of acres of conservation that would be accomplished by state and federal agencies (primarily the U.S. Fish and Wildlife Service, California Department of Fish and Game, U.S. Bureau of Land Management, and California Department of Parks and Recreation).
7. Provides for a preserve system that will offer assurances that additional state and federal Endangered Species Act permits will not be needed for future infrastructure development during the term of the permit.
8. Includes an equitable apportionment of conservation actions among local, state and federal governments and new development. The obligation of new development shall be assigned in a manner that does not unnecessarily burden new housing and economic development in the Plan area.
9. Includes a process that allows farmers to be covered for incidental take of covered species associated with their ongoing agricultural activities.
10. Includes provisions that allow for the conversion of up to (to be determined) acres of uncultivated lands to cultivated lands in a manner consistent with achieving the conservation goals of the Plan.

11. Focuses the acquisition of lands in a manner consistent with achieving the conservation goals of the Plan.
12. Demonstrates in a clear way, the linkage between conservation, infrastructure, economic development, housing, and job creation within the County
13. Includes measurable goals, criteria and safety nets that are easily administered by the local jurisdictions and understood by the public
14. Includes implementing mechanisms that:
 - X provide incentives for land owner conservation;
 - X minimize the potential for the wildlife agencies to suspend or terminate the County's permit as a result of local jurisdiction action on an individual project;
 - X minimize the role of the wildlife agencies in future decisions regarding individual projects; and,
 - X do not imply that the program would result in regulatory takings of property or other 5th amendment violations of the Constitution.
15. Provides clear guidance to incorporate public use of preserves consistent with achieving the conservation goals of the plan
16. Ensures that local land use decisions are made by the local jurisdictions
17. Clearly defines the monitoring and management of the participants including the associated costs.

BACKGROUND: On December 19, 2000 your Board directed staff and the MSHCP consultant to proceed with the conservation analysis for Alternative 1 as described in the October 4, 2000 Alternatives Development Document and incorporate the recommendations of the MSHCP Advisory Committee and—to the extent feasible—written comments received by the USFWS, CDFG, WRCOG, individual Advisory Committee members and other interested parties. It was understood that, if the Committee could not achieve agreement on a preferred alternative by March 1, 2001, the County would have to either delay the project, thereby resulting in impacts to the RCIP schedule and budget, or obtain Board direction to proceed with developing the environmental documentation pursuant to CEQA and NEPA.

Alternative 1 considers a conservation scenario that would protect approximately 164 species and provide for the viability and recovery of Western Riverside County ecosystems, habitats, and species through a 510,000 acre network of reserves and linkages. Of that 510,000 acres, approximately 350,000 acres are already within public ownership and 153,202 acres would be acquired or otherwise conserved through negotiations with private property owners. This alternative is based upon the draft Western Riverside County Multiple Species Habitat Planning Agreement (Planning Agreement) and the broad-based biological tenets of the state's Natural Communities Conservation Planning (NCCP) Act.

A. Funding and Implementation Program

Since December 19, 2000 representatives of the MSHCP Advisory Committee worked together to develop a draft Funding and Implementation Outline (Outline) for your consideration (Attachment B). County staff, representatives of the U.S. Fish and Wildlife Service (USFWS), and California Department of Fish and Game (CDFG) provided initial input into this process. Salient features of the Outline are listed below:

1. Local funding would be derived from a development mitigation fee, development incentives, landfill tipping fee revenues, infrastructure mitigation funds, and other funding sources with a fair share land acquisition contribution by the state and federal governments.
1. Landowners shall be provided a pre-development conference in which prospective subdivision and development projects shall meet to confer on project design, incentives, and acquisition alternatives. The purpose of this conference is to allow for an opportunity whereby the County and the project proponent apply MSHCP conservation criteria and where appropriate, negotiate the parameters of conservation and/or acquisition, and development.
1. A Conservation Planning Area (CPA) overlay that shall not apply any new standards or criteria for land use but rather facilitate information by which the County evaluates land for inclusion within the MSHCP reserve system.
1. An incentive program designed to actively encourage, reward, and compensate landowners within the CPA who conserve all or a portion of their property consistent with the MSHCP.
1. Landowners shall be provided the opportunity to invoke a conflict resolution process should there be an impasse between the County and the property owner concerning the value of the land necessary for conservation. Such a process relies on property owner initiated condemnation as a potential final outcome.
1. Safety nets and annual reviews.

The MSHCP Advisory Committee unanimously approved the draft Implementation Outline during their March 1, 2001 meeting with the understanding that the document is a work in progress and will require additional discussions to resolve several outstanding such as mitigation, communication with cities, safety nets/assurances to resource agencies, wetland/streambed protection, management, and funding mechanisms.

Staff commends the dedicated efforts of MSHCP Advisory Committee members to fashion the draft Implementation Outline. However, there are issues that appear problematic and will require further input from legal counsel and the Resource Agencies. Preliminary comments expressed by staff, County Counsel, and the Resource Agencies are identified below.

Staff Comments:

1. The Outline proposes an implementation program that relies on voluntary condemnation as a method for resolving disputes concerning property value. This program was proposed by property owners to assure fair and equitable valuation of their property. The use of this concept needs additional work to assure adequate protection for the property owner, county, state, and federal interests.
1. The MSHCP implementation program should encourage property owners to offer their property for sale and negotiate terms that are consistent with available funding and appraised value as determined by local, state, and federal appraisal standards and acquisition programs. Greater consideration should be given to landowners who are willing to negotiate a mutually agreeable acquisition strategy rather than to those who are pursuing condemnation as a method to receive priority processing and pricing.
1. Despite the County's aggressive campaign for funding that resulted in recent state and federal conservation money coming to Riverside County, there are limited dollars immediately available to acquire all the land that could be submitted for conflict resolution. Therefore, consideration should be given to a phased acquisition program for those projects that utilize the proposed conflict resolution process. Either payment over time or an allowance should be made for a specified time window in which to complete acquisitions.
1. There appears to be a local preference for creating an implementation mechanism that utilizes land acquisition as the primary tool to achieve the conservation objectives of the MSHCP rather than deriving conservation through land use policy.
1. Standard project design requirements should be factored into the habitat acquisition negotiation process (see flow chart in Attachment B). Under normal development conditions, development projects might be required to set aside land or provide a certain amount of open space mitigation in conjunction with otherwise lawful development pursuant to existing local, state, or federal regulations. While conservation of that land may be considered during the habitat acquisition negotiation process, the expectation should not be that a property owner/developer would be compensated for lands that would otherwise be restricted if the project was outside of the Conservation Planning Area.
1. Staff recognizes that there is a desire to avoid new regulatory requirements but new laws are enacted regularly. While the plan would seek to minimize the effects of new regulations to the greatest extent possible, we should be mindful of the instances where the conservation benefits of such regulations exceed the impacts and thus be open to utilizing such regulations where practicable. Controls based on wetlands, flood management, steep slopes, seismic faults, and other conditions covered by existing law, regulations, or by policies relative to public health and safety issues can help to implement the MSHCP without adding unreasonable burden to property owners/developers. To that end, the Implementation Outline should recognize the use of minimally intrusive land use policies that would otherwise apply to project development in Riverside County.
1. Essential to obtaining state and federal incidental take permits is the ability of the County and other implementing jurisdictions to provide assurances that the reserve system proposed in the MSHCP can be achieved. Since the County is pursuing a criteria-based plan that provides for a 153,202 acre reserve system to be assembled within a Conservation Planning Area of approximately 250,000 acres, assurances would take the form of "safety nets." Safety nets are measurable/quantifiable conditions linked to MSHCP criteria that—if not achieved—trigger incremental increases in certain pressure mechanisms designed to achieve MSHCP compliance. Safety nets and their associated triggering mechanisms will need to be defined in the coming months. However, it will be easier for all parties if they are designed around a series of steps that could be taken short of revoking the incidental take permits.
1. MSHCP assurance mechanisms should include project-level review pursuant to the California

Environmental Quality Act (CEQA). If CEQA analysis discloses that approval of a project would trigger a MSHCP safety net, then the Board would need to make an overriding finding. If--in the opinion of the Resource Agencies--such an action precluded reserve assembly, then the agencies could revoke the incidental take permits.

1. The MSHCP must be acceptable to the Regulatory Agencies and legally defensible. This does not imply that the County should stop short of proposing our locally preferred implementation strategy. However, we may approach a point at which the MSHCP would require revisions to reflect vital input from the state and federal permitting agencies. Preliminary remarks from the USFWS are provided below.

Initial Concerns Expressed by County Counsel:

1. The conflict resolution process appears to be problematic as the process relies quite heavily on eminent domain proceedings to determine the cost of land should there be an impasse between the County and the landowner with respect to land values. As a result of the eminent domain process, the cost of acquiring land may increase substantially due to attorneys' fees, lengthy trials, jury decisions, etc. Should this process be overused early in the implementation program, the County's General Fund monies could be depleted and its ability to fund the MSHCP jeopardized. Eminent domain should be a tool of last resort, used sparingly, and only at the County's discretion. In short, the conflict resolution process could have **serious unintended consequences.**
1. If a landowner chose to obtain their own ESA permits outside the scope of the MSHCP as provided in the Outline, it is unclear how the County would have the authority to require compliance with the MSHCP.

2. There are significant legal implications associated with identifying all landowners and other land development project proponents within the MSHCP boundary as third party beneficiaries of the incidental take permits.
1. Given the fact that the latest version of the draft Outline was submitted to County Counsel on March 9, 2001, County Counsel requests additional time to assess more fully the legal implications of the proposed implementation program.

Initial Concerns Expressed by the USFWS and CDFG:

1. The conflict resolution process requires additional discussion and legal review, specifically the issue of condemnation. USFWS staff indicated that condemnation should not be part of the MSHCP Implementation Agreement. CDFG staff noted that a court might not judge for appraised value, yet state and federal standards only provide for acquisitions at appraised value.
2. Quantifiable and measurable safety nets and triggers need to be refined in conjunction with MSHCP criteria.
3. Monitoring of preservation and loss should occur outside as well as inside the CPAs.
4. The MSHCP implementation program must provide assurances with respect to funding and plan development/reserve assembly.
5. Additional clarification is needed concerning the mechanism that would provide greater certainty concerning how the plan is implemented (e.g. through policy or through ordinance). Although there was general agreement amongst the MSHCP Funding and Implementation Subcommittee members that the MSHCP could be adopted through ordinance, more discussion is needed to determine the nature of such an ordinance.
5. More investigation is required to determine if Safe Harbor agreements and deed restrictions provide long-term conservation assurances.
5. USFWS and CDFG staff have indicated that they would not seek any change in tax law to achieve the objectives of the MSHCP. They recommended that Section 7 (g) (vi) of the Outline be revised accordingly.

5. Further consideration of the issue of conservation of streams and wetlands (Section 8 in Outline). While it is the intent of the MSHCP to cover take of wetland species, there is some expectation that the biological functions of streams/wetlands outside the CPAs will continue as a result of existing regulations (e.g. Army Corps processes). Resource agencies advise that the plan needs to demonstrate an ability to maintain function of watersheds such that persistence of covered species will be assured.
5. Agricultural coverage under the MSHCP requires additional discussion. Resource agencies have expressed concern regarding the statement that existing/ongoing agricultural activities would be "automatically covered." The MSHCP will be required to analyze the impacts of agricultural activities (including use of herbicides and pesticides) and provide for incidental take expected to occur as a result of such activities. The plan must also address how agricultural activities are enrolled in and/or covered by the MSHCP. Additional consideration must be given to how new agricultural activities are covered by the MSHCP.
5. State and federal staff have indicated that their implementation obligation should be represented in terms of acres rather than dollars.
5. Requests were made by USFWS and CDFG staff that subsequent versions of this document include items relating to MSHCP management and monitoring, and city participation (e.g., mechanisms, costs, adaptive management objectives).

B. Definition of "the project" for purposes of the draft MSHCP and CEQA Documentation

The County will be preparing a joint draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) for the MSHCP pursuant to the CEQA and National Environmental Policy Act (NEPA). For purposes of CEQA, the County acts as the lead agency. Similarly, the USFWS is considered the lead agency for purposes of NEPA. While the EIR/EIS will evaluate a range of alternatives, Section 15082 of CEQA stipulates that--for purposes of a Notice of Preparation (NOP)--the lead agency must provide a description of a project to be analyzed in the EIR. In order to maintain the production schedule established for the MSHCP and the RCIP, the County must--at this time--identify "the project" and issue a NOP to initiate the CEQA review process.

Federal regulations stipulate that the draft EIS must identify the lead agency's "preferred alternative" *if one exists* (emphasis added). However, the final EIS must identify the preferred alternative (40 C.F.R. 1502.14(e); Forty Questions No. 4(b)). USFWS staff informed the County that they are not prepared to identify the preferred alternative at this juncture.

During its March 1, 2001 meeting, the MSHCP Advisory Committee offered the following recommendations:

1. That, for purposes of defining the project description for the MSHCP and defining the preferred project in the joint CEQA/NEPA document, the consultants analyze Alternative 1 consistent with the proposed Funding and Implementation Outline. Additionally, the environmental document may include an analysis of those alternatives considered in the October 4, 2000 Alternatives Development Document. Stakeholders reserve the opportunity to comment on other alternatives that might emerge in the course of the environmental review process.

Recommendation passed with 11 members in favor; Andy Domenigoni (on behalf of Cindy Domenigoni), Farm Bureau, Elsinore-Murrieta-Anza Resource Conservation District, Lockheed Corporation, and the Riverside County Property Owners Association against; and Ed Sauls abstaining.

1. That the MSHCP environmental document evaluate a range of alternatives for the San Jacinto River.

Recommendation passed with 14 members in favor; Sierra Club against; and Edison, Elsinore-Murrieta-Anza Resource Conservation District, and Lockheed Corporation abstaining.

C. City Participation

Confirmation of city participation is integral to further MSHCP development and conservation analyses. The draft MSHCP must consider which jurisdictions would be covered by the incidental take permits and how conservation assurances could be achieved.

If DUDEK were to prepare a MSHCP that contemplates the participation of all 14 western Riverside County cities, and one or more cities opted out at a later date, then the County would have to revise the MSHCP and re-run the conservation analysis to address the loss of the subject jurisdiction(s). This could only be accomplished at substantial cost to the County and would result in significant disruption to the RCIP schedule. Conversely, the County could proceed with MSHCP development, giving direction to the consultant that a certain jurisdiction(s) be excluded from further consideration due to irreconcilable approaches to implementing the state and federal endangered species acts. Should that jurisdiction(s) later decide to re-enter the planning process and receive coverage under the MSHCP permits, then the cost of revising the plan would fall to the jurisdiction(s).

At present, staff is aware of MSHCP concerns expressed by the cities of Murrieta, San Jacinto, Perris, and Beaumont. We are engaged in discussions with representatives of those jurisdictions in an attempt to address their respective issues. However, during a January 25, 2001 Lake Elsinore City council meeting, council members expressed dismay with the species and habitat conservation levels identified within their jurisdictional boundaries. Ensuing discussion focused on the inequity of species and habitat distribution, perceived impacts to the city's economy, and general dissatisfaction with the ESA. Rather than participate in the County's MSHCP, the Lake Elsinore City Council indicated its preference for approving development projects and conditioning them to pursue incidental take permits directly from the USFWS and CDFG or pursue an independent habitat conservation planning effort.

Staff intends to meet again with city officials from Lake Elsinore to discuss conservation options. A status report will be presented to the Board in 30 days.

C. Public Access Plan

On March 22, 2000, your Board authorized a contract amendment with Sverdrup to proceed with development of draft text and maps for compatible integration of recreation/public use in reserve areas for integration into the General Plan and the MSHCP. On February 8, 2001, staff received the attached Parks and Open Space Concept Report (Attachment C) which provides an initial assessment of open space/urban edge, opportunity site and opportunity access types, and potential cost reduction and revenue generating concepts.

It is staff's opinion that the report provides a basis for a public access plan that would integrate with the MSHCP and General Plan elements of the RCIP. However, the report requires additional work. It should be reviewed by the MSHCP and General Plan Advisory Committees and County Park and Open Space District staff. The final report should be updated with comments from those entities and TLMA staff.

C. Conclusions

The MSHCP preparation proceeds along a critical path. Today, it is important that the County provide policy direction concerning a MSHCP implementation program, "the project," city participation, and public access in order that the RCIP consultant team may proceed with developing the draft MSHCP and initiate CEQA/NEPA review. Without such policy direction, we run the risk of severely impacting time lines for the MSHCP, the General Plan, and CETAP.

**ATTACHMENT B
MSHCP ADVISORY COMMITTEE'S PROPOSED
FUNDING AND IMPLEMENTATION PROGRAM**

**ATTACHMENT C
DANGERMOND REPORT**