

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

538



FROM: Transportation and Land  
Management Agency

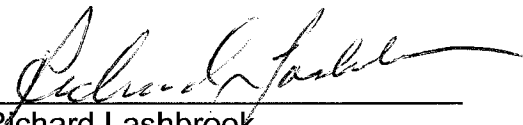
SUBMITTAL DATE: April 29, 2003

SUBJECT: Public Hearing concerning the Western Riverside County Multiple Species  
Habitat Conservation Plan, Draft Environmental Impact Report, and Draft  
Implementing Agreement.

**RECOMMENDED MOTION:** That the Board of Supervisors 1) open the public hearing and  
consider comments on the Draft Environmental Impact Report (EIR), Draft MSHCP and  
Draft Implementing Agreement (IA) and 2) close the public hearing on May 8, 2003 and  
direct staff to return on May 20, 2003 to receive Board direction concerning any  
modifications to and finalization of the MSHCP, EIR, and IA.

**BACKGROUND:** The Western Riverside County Multiple Species Habitat Conservation Plan  
(MSHCP) is a comprehensive, multi-jurisdictional effort that includes the County and  
fourteen cities. The Plan covers 146 species and addresses biological and ecological  
diversity within a 1.26 million acre (approximately 1,966.7 square miles) area of Western  
Riverside County.

(Continued)

  
Richard Lashbrook  
TLMA Director

Attachments

- Consent
- Policy
- Consent
- Policy

**FINANCIAL DATA:**

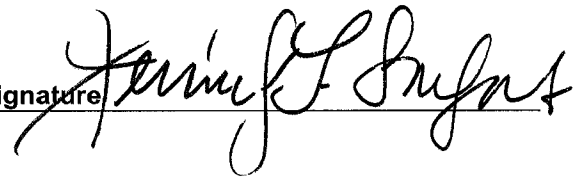
<b>CURRENT YEAR COST</b>	\$ -0-	<b>ANNUAL COST:</b>	-0-
<b>NET COUNTY COST</b>	\$ -0-	<b>IN CURRENT YEAR BUDGET:</b>	Yes/ No/
		<b>BUDGET ADJUSTMENT FY:</b>	Yes/ No/

**SOURCE OF FUNDS:**

**C.E.O. RECOMMENDATION:**

**APPROVE**

County Executive Officer Signature



Department Recommendation:

Per Executive Office:

Prev. Agn. ref.

Dist. 1-5

AGENDA NO.

1.0

**BACKGROUND:** (Continued)

The Western Riverside County MSHCP is one of the largest habitat conservation plans ever attempted. It proposes to cover the most species ever attempted throughout multiple habitat types within multiple jurisdictions. The development of the MSHCP has been a complex iterative process that includes more than 124 public meetings with local stakeholders, cities, local scientists, responsible agencies, and the Wildlife Agencies since the RCIP process began in May 1999. Countless volunteer hours were spent by stakeholders providing invaluable input into the planning process. The County has invested approximately \$4.2 million with an equivalent amount secured from federal funding programs designed to assist local governments to address endangered species issues through regional habitat conservation planning.

Implementation of the MSHCP will provide for and maintain biological diversity through assembly and management of a system of connected reserves. The Plan will provide for conservation of approximately 500,000 acres supporting the habitat and life history requirements of 146 species including 118 species for which Take Authorization would be granted upon initial permit issuance and an additional 28 species for which Take Authorization will be granted once species specific conservation objectives are met (see also Major Outstanding Issue 8). Approximately 347,000 acres of the 500,000 acre reserve system are already within public/quasi-public ownership. It is anticipated that 153,000 additional private acres will be purchased or otherwise conserved in conjunction with willing property owners.

The MSHCP also addresses one of the Board's key objectives when the Riverside County Integrated Project was initiated—namely, obtaining state and federal Take Authorization for species that would otherwise be impacted by the construction of essential regional transportation facilities and other key public infrastructure projects that serve existing and future development in western Riverside County. Such planned facilities include but are not limited to the County's General Plan Circulation Element, CETAP, SR-79, Cajalco Road Realignment, Caltrans facilities, numerous City infrastructure projects, flood control facilities, etc. The MSHCP also allows for public access to and enjoyment of the reserves through trails, state and local parks, visitor/nature centers, staging areas, etc. In the absence of the MSHCP, public and private development projects would be subject to negotiating species mitigation requirements on a project-by-project basis with the U.S. Fish and Wildlife Service and/or the California Department of Fish and Game (collectively, the Wildlife Agencies).

Staff estimates that the local costs of the program will exceed \$1 billion dollars over the 75 year permit period, State and Federal contributions to the MSHCP may also approach a like amount. Of the total 153,000 acres of Additional Reserve Lands, State and Federal sources will acquire and manage 56,000 acres and the local Permittees would acquire and manage 97,000 acres—approximately 56,000 acres through acquisitions and 41,000

through standard mitigation measures and incentives applied during the land use entitlement process (see also Section 8 of the Draft MSHCP).

The MSHCP take authorization allows for development of single family homes within the Criteria Area on existing legal lots. Also included are protections for on-going agricultural activities and an agricultural conversion allowance of up to 10,000 acres within the Criteria Area and unlimited agricultural conversions outside the Criteria Area. Issues pertaining to agriculture are further addressed below in the discussion of Major Outstanding Issue #6.

During the past four years, the Board has provided staff with policy direction on various MSHCP related elements during the planning process. Salient dates and decisions are as follows:

**October 5, 1999** - Board of Supervisors decided to proceed with the development of an MSHCP based upon the August 1999 Draft MSHCP Proposal from the MSHCP consultant—informally referred to as the “Go/No-Go” decision.

**December 19, 2000** - Board of Supervisors provided direction to staff to proceed with MSHCP Alternative 1 which was one of a list of alternatives that were developed and refined by the MSHCP Advisory Committee and described in the October 4, 2000 Alternatives Development Document. The selected alternative anticipated coverage of approximately 164 species and described a reserve design that would include acquisition of approximately 150,000 acres of Additional Reserve Lands. This alternative focused on addressing key elements of the Western Riverside County MSHCP Agreement (Planning Agreement) and the broad-based biological tenets of the state’s Natural Communities Conservation Planning (NCCP) Act.

**May 8, 2001** - The Board of Supervisors concluded discussion and provided direction on 28 Policy Planning Principles forwarded by staff, County Counsel, and the MSHCP Advisory Committee.

**April 9, 2002** - Board of Supervisors decision to submit an application for a Section 10(a) permit application that would formally initiate the USFWS review of a Draft MSHCP which was subsequently released on November 15, 2003.

The County of Riverside in cooperation with the Wildlife Agencies and participating local governments, prepared a joint Environmental Impact Report/Environmental Impact Statement (EIR/EIS) for the proposed MSHCP. The County is the lead agency for the EIR and the USFWS is the lead agency under NEPA for purposes of the EIS. The Draft MSHCP, Draft EIR/EIS, Draft IA, and technical appendices were released on November 15, 2003 for public review and comment. By the close of the public comment period on March 14, 2003, the Lead Agencies received 109 comment letters. Attached for your review, as

Exhibit A, is a complete set of the 109 comment letters that contain over 2,500 individual comments. Also contained in Exhibit A are the corresponding **draft** responses to these comments. It should be noted that the last seven of the 109 comment letters were only recently forwarded to County staff and the consultants. Therefore, responses to the comments contained within these letters and the letter (P2) from Hackman Capital Partners are still being drafted. The responses will be part of the Final EIR/EIS.

Staff would respectfully request that you entertain public comment on the draft documents; close the public hearing on May 8, 2003; continue your deliberations on May 20, 2003, and provide direction to staff concerning the Final MSHCP, Final EIR, and Final IA.

### **Advisory Committee comments on Draft MSHCP, Draft EIR/EIS, and Draft IA**

Despite several months of discussion the MSHCP Advisory Committee could only reach general agreement on three issues pertaining to the Draft MSHCP, Draft EIR/EIS, or Draft IA. However it should be noted that no formal vote of consensus could be achieved due to lack of quorum. The three points of agreement are identified below:

- 1) Preference was expressed for the RCHCA rather than WRCOG to act as the Regional Conservation Authority (RCA).
- 2) The Advisory Committee supported its Chair in urging all cities to reconsider the Habitat Acquisition and Negotiation Strategy (HANS) and adopt it as the mechanism by which all the Cities and the County implement the MSHCP. (See also Major Outstanding Issue #3)
- 3) While the Committee entertained discussion on the Endangered Habitats League's proposed alternative reserve design (EHL Proposal) (see also Comment Letter L<sup>4</sup>), no action was taken and the Committee members that were present agreed that this proposal should be considered by the Board along with all other comment letters that proposed modifications to the reserve design.

### **Scientific Review Panel response to Draft MSHCP**

On October 26, 1999, the Board contracted with UCR to assemble a panel of independent scientists to provide formal review of the science used in documents pertaining to the MSHCP. The SRP has provided constructive comments and recommendations that have assisted in MSHCP development for the past four years. Most recently, staff requested

that the SRP provide a final review of the Draft MSHCP. A copy of this report is attached as Exhibit B and the salient conclusions are presented below:

- 1) The best available data were utilized in the preparation of the MSHCP
- 2) The MSHCP design may well approach as “good as it gets” given the constraints important to modeling long-range protection to both individual species of concern and to protecting natural communities in the face of the intensive and rapid development of the region.
- 3) It would take a large amount of land to obtain the same level of connectivity as provided by the existing reserve design. A small increase in land area would have little impact on connectivity, especially if the purchases did not focus on connecting units. It may take more than an additional 250,000 acres (60% of the plan area) of land purchases to measurably improve the MSHCP’s fractal geometry (ability of material and energy to flow between cells across a fragmented area) if connectivity were lost as a focus. If land acquisitions declined from 153,000 acres (40%) to 70,000 acres (35%) or less, the fractal geometry drops precipitously.
- 4) While new information (e.g. additional surveys and data collection) would not dramatically change the Reserve design, the plan would benefit from continued scientific input in the form of independent scientists working with the reserve management teams and assisting in providing vital input into the Adaptive Management of the reserve system.

### **Major Outstanding Issues**

Identified below are Major Outstanding Issues that emerged during the MSHCP team’s review of the comment letters received on the Draft MSHCP and Draft EIR/EIS. The Draft Responses to Comment volume provides additional detail than what is captured below. It is likely that the following outstanding issues will be among many that are raised during the course of public testimony on the MSHCP. For this reason, staff has attempted to synthesize the key issues and provide background information. However, there may be slight variations to each issue depending on the particular commentor.

#### **1. Best Scientific and Commercially Available Data**

Issue: Several commentors have asserted that the data used in the MSHCP are inaccurate, outdated, and incomplete. Some commentors assert that the MSHCP’s database should be augmented by collecting and/or incorporating new data.

The MSHCP is based on the most accurate and complete scientific data available. The development of the MSHCP was predicated on the use of this information, as specified in the Planning Agreement that initiated the planning effort. In addition, the adaptive management and vegetation data base update provisions of the MSHCP will allow for additional scientific data collection and integration in the Reserve Assembly and management process.

The MSHCP SRP correspondence (April 17, 2003) concerning their review of the draft MSHCP confirms that the planning approach for the MSHCP used the best available data. The SRP also acknowledges that the demand for housing, roads and infrastructure requires the creation of a plan dependent on the data that are available today, and does not support delay of the planning effort to collect additional data.

Identification of the Criteria Area in the MSHCP was the result of an iterative conservation planning process that began with assembly and review of a variety of data including vegetation mapping. These data included species occurrence data, a coastal sage scrub quality model, digitized select soils data, elevation data, wetlands mapping from a variety of sources, bioregions identification and mapping, and evaluation of existing edge conditions and fragmentation based on the existing landscape. The iterative process included a series of habitat assessment workshops with local biologists and a daylong workshop of local biologists sponsored by UCR, as well as review of species accounts and the MSHCP Alternatives Development document by the Scientific Review Panel (SRP). Wildlife Agencies' biologists also participated in the iterative conservation planning process as the initial narrative Conceptual Conservation Scenario evolved into mapped schematic Conservation Analysis Units (see March 9, 2000 Technical Memorandum, DUDEK) and then into the schematic alternatives maps (see October 4, 2000 Alternatives Development Document, DUDEK). These iterations were subject to ongoing refinement and resulted in the Criteria Area identified in the Draft MSHCP.

Recommended Position: No further action is recommended at this time.

## **2. Funding**

Issue: Several of the comments focused on how the Plan will be funded. Additionally there have been concerns that even if the Plan can be funded over the 75 year life of the permit, will there be insufficient funds to meet the obligations in the early years when most of the acquisition of new conservation lands will likely occur.

The Funding strategy described in Chapter 8 of the Plan utilizes a variety of funding sources to both spread the costs of the plan equitably and to reduce reliance on a single source of funding. The funding plan utilizes a Development Mitigation Fee

(DMF), landfill fees from the out of County waste going to El Sobrante, a portion of Measure "A", mitigation from future transportation projects, and density bonus fees. The combination of these sources is anticipated to generate over \$1 Billion in funding over the first 25 years of plan implementation. Additional funding sources may contribute to Plan implementation but are not assumed. Funding will continue past year 25. Through the use of financing mechanisms, it may be possible to leverage some of the funding from years 25 to 75 to help support land acquisitions during the first 25 years.

The Plan acknowledges that each funding source has associated risks and uncertainties. Section 8.6 recognizes this and provides that the local Permittees would take steps that could include increasing fees (as allowed by law) or identifying new funding sources or financing strategies should the funding not be sufficient.

In response to the issue of "cash flow" in the early years, the HANS process provides a window of up to four years to complete individual acquisitions once agreement on a purchase is achieved. The Plan also calls for a new Regional Conservation Authority (RCA), that is charged with implementing the Plan, to develop a financing mechanism to address potential cash flow needs. A federal or state loan guarantee might be one example of a financing mechanism that could assist in meeting cash flow needs.

The adequacy of funding must meet three tests: (1) will it meet the issuance criteria for a Section 10(a) permit; (2) will it withstand legal challenge; (3) will it work to successfully implement the Plan.

The funding strategy was developed in cooperation with the Wildlife Agencies. Our legal counsel has opined it meets the legal standards set to date by the Courts. With the exception of the Density Bonus fees, the Plan utilizes sources that have funded major programs in the past; are to some degree under the control of the Permittees; and can be revised to meet changing circumstances.

The Board will need to provide direction on how Density Bonus Fees and landfill tipping fees may be utilized. If none of these funds are allocated to MSHCP implementation, other funding sources will need to be increased to offset the reduction in this funding source.

The funding strategy is also based on 41,000 acres being conserved through the use of incentives and normal development dedications. Should this approach not result in the anticipated conservation, additional lands would need to be acquired which could increase the costs of the plan and require a revision of the funding strategy.

Recommended Position: A key component of the funding strategy is the imposition of a Development Mitigation Fee (DMF). The nexus study required by Section 66000 of the government code is almost complete. At the close of this public hearing, it is recommended that the Board direct staff to bring forward an ordinance to implement a Development Mitigation Fee for the unincorporated area and encourage the Cities to adopt a similar ordinance for their jurisdiction.

Provide direction to staff on the use of Density Bonus Fees and the use of incentives to support implementation of the MSHCP.

That the County work with the Regional Authority (as soon as it is formed) to develop financing mechanisms to address the potential for “cash flow” shortages in the early years of Plan implementation.

### **3. Habitat Acquisition and Negotiation Strategy (HANS)**

Issue: In addition to individualized concerns regarding various elements of the HANS process, several stakeholders have expressed concern about the fact that not all Permittees will be utilizing the HANS process. Several of the diverse stakeholder groups involved in the development of HANS over the past 2 years, believe that—despite its perceived shortcomings—HANS is the most fair and equitable implementation process available to deal with land owners. While five Cities have tentatively expressed their intent to use HANS, three have indicated they will not and six are either undecided or have not yet indicated their intent.

County staff worked with stakeholders to develop an acceptable implementation program that would give assurances to land owners concerning how the MSHCP review and potential negotiations. Following the presentation of HANS to the cities, it was apparent that several cities believe that the MSHCP criteria could better be achieved in their jurisdictions through city land use policies. Therefore, the Draft Implementing Agreement was written in such a way that allows the local Permittees the opportunity of adopting the HANS process or another appropriate alternative method to ensure compliance with the MSHCP criteria. Either process is sufficient for permit issuance.

While County staff believes that the HANS process is the optimal solution for fair and timely negotiations with property owners, we acknowledge that Cities have the latitude to determine if such is the case for their respective jurisdictions.

Recommended Position: No further action is recommended at this time.

#### **4. Development Mitigation Fee (DMF)**

Issue: As part of adopting the final plan and executing the IA, the Permittees are required to adopt a uniform DMF that would contribute to the local funding share of the MSHCP. The Administrative Draft MSHCP Mitigation Fee Nexus Report (Nexus Study) was recently circulated to the Board, the WRCOG Cities, and stakeholders for comment. The DMF would be one component of the local funding program described in Section 8 of the MSHCP.

The Nexus Study projects that the local share of the MSHCP costs would be approximately \$946,910,119. The document identifies approximately \$461,000,000 in local revenue sources available to off-set the local MSHCP costs. Therefore, the difference in the total local program costs versus the expected revenues for the first 25 years of the Plan is approximately \$676,100,000.

The Nexus Study evaluates three different methodologies upon which to base the DMF. These methodologies are: per acre, equivalent benefit unit (EBU), and equivalent dwelling unit (EDU). One of these methodologies would need to emerge as the preferred approach to assessing and collecting developer mitigation fees.

Recommended Position: A key component of the funding strategy is the imposition of a Development Mitigation Fee. The final Nexus Study required by Section 66000 of the Government Code is almost complete. At the close of this public hearing, it is recommended that the Board direct staff to bring forward an ordinance to implement the DMF for the unincorporated County area and encourage the Cities to adopt at their a similar ordinance for their jurisdiction.

#### **5. Scope and cost of management, monitoring, and adaptive management program**

Issue: Commentors opine that management cost estimates are too high while others claim that management costs are too low.

There are varying opinions concerning the approach to costing out management and its funding. Additionally, concerns have been expressed by stakeholders concerning the absence of a definite cap to the Adaptive Management funding.

While Sections 5 and 8 of the MSHCP were under development, two reputable land management entities were asked to develop preliminary estimates of management costs and resources that would be required to address the management responsibilities that were evolving through the plan. Land management entities consulted for this work effort were the Center for Natural Lands Management and the Riverside County Park and Open Space District—entities that continue to manage

large conservation areas within Riverside County. Estimates provided by the two management entities took into consideration expenses and resource allocations both during and after reserve assembly. While each entity offered their unique approach based on their professional experience, the fundamental objectives were similar. It is interesting to note that one proposed a figure lower than what was ultimately reflected in the Draft MSHCP while the other proposed a higher figure. It is staff's opinion that the management and adaptive management costs anticipated in the Draft MSHCP are adequate based on the experience of those who provided input into the planning process.

Subsequent to the publication of the Draft MSHCP, County staff engaged the Wildlife Agencies in a discussion concerning the estimated costs of management, monitoring, and adaptive management. There is agreement that the Plan does not anticipate the cost of the program to significantly exceed the estimates provided in Table 8-2 except to adjust for the cost of inflation.

Recommended Position: No further action is recommended at this time.

## **6. Agriculture**

Issue: The Farm Bureau has indicated a list of 12 of remaining issues that are identified in Exhibit C. The Plan provides significant benefits to Agriculture. It is unlikely that all issues identified by the Farm Bureau can be resolved to their satisfaction and still meet issuance criteria for a Section 10(a) and NCCP Permits.

Recommended Position: That the Board direct staff and Board representatives to meet with the Farm to resolve these outstanding issues.

## **7. Endangered Habitats League - Alternative Reserve Design Proposal (EHL Proposal)**

Issue: In their comment letter dated March 13, 2003 (EHL Proposal), the Endangered Habitat's League offered an alternative conceptual reserve design that would significantly modify the MSHCP reserve design and possibly require other modifications to elements of the MSHCP such as the implementation strategy. While the complete EHL Proposal and draft responses to same are found in Exhibit A (Comment Letter L<sup>4</sup> and Response to L<sup>4</sup>), below are the salient features of the EHL proposal and a brief response to several of these features:

Eliminate Core Reserve 2 and a primary landscape linkage that would connect the Lake Mathews Core Reserve to the Southwest Riverside County Multiple Species Reserve. Instead, EHL would propose to a) create larger blocks of reserve lands

than what is currently proposed at Lake Mathews and the SWRCMSR, b) provide a stepping-stone linkage through the Sedco Hills and French Valley to Johnson Ranch, and c) consolidate conservation in the Harford Springs area.

The EHL Proposal claims to assure the conservation objectives of the Plan, eliminate fragmentation, reduce acquisition and management cost, minimize edge effect, and lower the number of lawsuits.

The EHL Proposal states that it would assure conservation objectives of the Plan. This is offered without analysis of the individual objectives for each of the Covered Species contained in the species analyses in the MSHCP (Volume II). The EHL Proposal would eliminate Conservation in one Proposed Core area and several Proposed Linkages, but does not provide information regarding the Covered Species for which these areas are proposed to provide Conservation. Therefore, it is not clear how a supportable conclusion can be reached that the EHL Proposal would "assure MSHCP conservation objectives are met" without the requisite analysis. The MSHCP provides a detailed analysis of Covered Species based on the configuration of the MSHCP Conservation Area as proposed. No such analysis of Covered Species is provided in support of the EHL Proposal. Any reasonable comparison would require such an analysis.

Staff and the Wildlife Agencies do not agree that simply because areas are fragmented they do not provide conservation value, and therefore should be dismissed. The MSHCP recognizes that Western Riverside County is already a highly fragmented landscape that may not function in the future without human intervention through land-based management and Adaptive Management. (Draft MSHCP, Section 5.0, pg. 5-1). The Applicable Conservation Biology Principles presented in Section 3.1.4 of the MSHCP reflect the issues raised by EHL with respect to fragmentation and reserve design. As stated in the MSHCP, the Plan addressed conservation biology principles and incorporated these features in the MSHCP to address fragmentation. The conservation planning process also addressed the requirements of Covered Species and determined that meeting these requirements included protection of lands throughout the Plan Area, including more highly developed areas currently subject to development pressure.

The EHL Proposal provides no analysis of, or supporting documentation for, the assertion that management costs would be reduced under the Proposal. In contrast, the MSHCP provides a detailed analysis of capital costs and management costs (MSHCP Section 8.0), based on reasonable estimates of acreage to be acquired and associated land values, as well as management cost estimates that are based on actual management experience, and a detailed assessment of proposed management activities, as outlined in Section 5.0 of the Plan.

Based on the information in the EHL Comment Letter, staff has conducted a preliminary evaluation on the differential costs of the EHL Proposal and the proposed MSHCP. This evaluation indicates that the EHL Proposal could require conservation of an additional net 8,000 acres of Additional Reserve Lands. An estimate prepared by the consultants working on the nexus study for the MSHCP Development Mitigation Fee indicates that the EHL Proposal could possibly reduce the acquisition cost of the MSHCP by approximately \$18 million dollars rather than the \$100 million suggested by EHL. Thus, given the information provided in the comment and review of that information by the County, it cannot be concluded that the cost reductions for land acquisition noted in the comment would be fully realized under the EHL Proposal.

The EHL Proposal letter suggests that "adoption" of the EHL Proposal would reduce litigation risks. There is no assurance provided in the comment that the EHL Proposal would eliminate the potential for litigation. In addition, as noted in their comment, the EHL Proposal would need to be refined; the "strategies behind it" would need to be applied "to other MSHCP areas"; and the Criteria Area "expanded" in certain areas. Given these features of the Proposal, it appears that the EHL Proposal could result in substantial delays in the processing of the MSHCP.

Recommended Position: Staff does not recommend that the Board accept the EHL Proposal as an alternative reserve design proposal.

## **8. Number of Covered Species**

Issue: The MSHCP was designed to cover the broadest range of species possible to provide the greatest certainty to property owners and Permittees that no new regulation will impose additional burdens to maximize the benefits of the land conserved. In the early stages of MSHCP development, stakeholders and City representatives were clear that they desired the MSHCP to cover the maximum number of species possible to avoid having to repeat the expensive and lengthy process of developing subsequent habitat conservation plans for newly listed species and to assure that the MSHCP was comprehensive enough to ensure the protection of key habitats, core reserves, and linkages. Coverage for the greatest number of species has remained a constant objective of staff, stakeholders, and the consultants to the extent that enough information is available to assure such coverage.

As stated in Section 2.1.4 of the Draft MSHCP, the initial list of species considered for Conservation included 247 species. These 247 species were those for which the Wildlife Agencies, working with the MSHCP Advisory Committee initially determined could potentially exist within the MSHCP Plan Area, based on the best available species occurrence data and habitat information at that time. Early in the planning

process, it was determined that sufficient information did not exist for many of these species to proceed with conservation planning. The initial list of 247 species was reduced to 165 species as a result of extensive analysis of all 247 species conducted as a part of the *August 9, 1999 Draft MSHCP Proposal* prepared by DUDEK. The list was further refined to 146 species as the MSHCP planning process proceeded and research determined that sufficient information needed to proceed with conservation planning could not be obtained for certain species. Information used to determine species coverage throughout the Draft MSHCP planning process represents the best scientific and commercial data available for those species.

The Draft MSHCP released for public review contemplated an MSHCP Conservation Area that would address the needs of 146 Covered Species. These species are grouped into two categories: Covered Species and Covered Species Adequately Conserved as discussed in Section 2.1.4 and 9.2 of the MSHCP.

- Covered Species - The full list of 146 species that will be conserved by the MSHCP when the MSHCP is implemented. The list includes Covered Species Adequately Conserved as noted below and additional species for which Take Authorization will be granted when certain species-specific objectives are met.
- Covered Species Adequately Conserved - The list of species that will be granted Take Authorization at the time of permit issuance. The Draft MSHCP includes 130 species in this category.

Since the publication of the Draft MSHCP, the Wildlife Agencies have informed the County that an additional 12 species would need to move from the list of Covered Species Adequately Conserved to those that require certain species-specific conservation objectives conservation measures. These species primarily occur on U.S. Forest Service (USFS) lands. We have been informed by the Wildlife Agencies that the 12 species may move to the list of Covered Species Adequately Conserved when the County executes an MOU with the USFS which would address management activities that would be taken on USFS land to ensure the conservation of these species.

Recommended Position: That the Board adopt the modified species list and direct staff to pursue an MOU with the USFS.

## **9. Mitigation Banks/Conservation Areas**

Issue: Commentors suggest that the MSHCP will take away the market for private mitigation banks and conservation areas and land owners would be forced to

liquidate. Some commentors suggest that the MSHCP should prioritize the acquisition of mitigation banks/conservation areas and ensure the flow of development mitigation fees to their acquisition. Several commentors assert that the EIR/EIS neglects to analyze the effect of the MSHCP on these banks.

Staff believes that the MSHCP is not in conflict with bankers ability to sell land, conservation easements, or environmental credits. The banks were created as a business venture and they can continue to operate as a business. Entities such as school districts, water districts or utilities, which are not Permittees under the MSHCP, could continue to purchase credits. Additionally, a bank could, as a willing seller, pursue the sale of its land through the HANS process. Recognizing the long-term conservation value of the conservation banks/mitigation areas, it is anticipated that these lands, if proposed for acquisition, would be among the priority acquisitions of the RCA.

With respect to commentors' concerns regarding the EIR/EIS, it is legal counsel's opinion that the MSHCP acknowledges the existing conservation banks/mitigation areas and assumes that they will continue to operate. It is the County's understanding that the collective conservation banks/mitigation areas are informal conservation banks or mitigation areas, as binding legal agreements have not been executed, and that they have no formal legal status.

Recommended Position: No further action is recommended at this time.

#### **10. Regional Conservation Authority (RCA)**

Issue: The IA calls for the creation of a joint regional authority formed by the County and the Cities prior to issuance of the permits. The purpose of the RCA is to oversee, administer, and enforce the implementation of the MSHCP. The IA provides that the RCA may be formed either as new joint powers authority or as part of an existing joint powers authority. Both WRCOG and the RCHCA have expressed an interest in housing the RCA. Should either of these existing joint powers authorities undertake this task certain accommodations to their joint powers agreements would be required to accommodate the voting structure, complex series of duties, and timely consideration of the Joint Project/Acquisition Review Process (see Section 11.2 of Implementing Agreement).

Language in the IA concerning the RCA was developed through numerous meetings with the WRCOG Planning Directors' Technical Advisory Committee and their combined meetings with representatives of stakeholders. Further, the RCA language in the IA was considered at five meetings with the WRCOG MSHCP Ad-Hoc Group (planning directors and stakeholders) between April 2002 and August 2002, nine meetings with WRCOG Planning Director's TAC between July 2002 and

April 2003, and four meetings with the WRCOG City Managers TAC between April 2002 and October 2002, and a meeting with the WRCOG Executive Committee on February 3, 2003.

Recommended Position: That the Board provide direction to staff concerning the political structure that would be utilized for purposes of the RCA.

#### **11. Public/Quasi Public (P/QP) Lands**

Issue: Existing reserves are defined as “Public/Quasi-Public” (PQP) and include lands known to be in public ownership that are managed for conservation and/or open space value, or land contained in an existing reserve. Several commentors have expressed concern that the MSHCP inappropriately uses PQP lands to mitigate for private development. Additionally, commentors noted that the MSHCP does not provide sufficient certainty concerning management of the PQP lands and should not rely on these lands for species coverage where those public landowners are not managing or monitoring for the Covered Species pursuant to the MSHCP.

The MSHCP integrates PQP lands into the MSHCP Conservation Area and does not rely on those lands as mitigation for future development. Local Permittees and development projects that receive take authorization will contribute 97,000 acres to reserve system. With respect to concerns regarding management of PQP lands, the Permittees intend to enter into a Memorandum of Understanding (MOU) with non-Permittee PQP landowners in the Plan Area to address cooperation in terms of Plan implementation and species protection measures. Additionally, PQP landowners—by participating in the Reserve Management Oversight Committee—will be able to coordinate management and monitoring activities with the Permittees, thereby saving both time and money.

Recommended Position: That the Board direct staff to develop MOUs with non-Permittee PQP landowners. Such MOUs would address cooperation with MSHCP in terms of Plan implementation and species protection measures.

#### **12. Constitutional Issues**

Issue: Several of the commentors made allegations that the MSHCP and/or the HANS process could result in an unconstitutional “taking” of private property.

Our legal counsel believes that the procedures established under the MSHCP do not result in an unconstitutional “taking.” The United States Supreme Court held in the recent case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, (2002) 535 U.S. 302, that even a complete temporary building moratoria is not *per se* a “taking.” California courts have long held that planning functions are

within a local agency's police powers, and are not takings. The time it takes to make appropriate decisions under the MSHCP is simply a normal incident of the development process and property ownership and is not a "taking."

In the case of *Guinnane v. City and County of San Francisco*, (1987) 197 Cal. App.3<sup>rd</sup> 862, the court rejected a claim that the designation of property as open space, to be studied for possible acquisition as a public park, amounted to unreasonable pre-condemnation activity. The court held that mere planning activities of the city did not entitle the plaintiff to require the city to condemn the property in question and pay the landowner the market value of the property before the threat of condemnation arose. Based on these and other authorities, our legal counsel has concluded that neither the MSHCP generally, nor the HANS process specifically, results in a "taking."

Recommended Position: No further action is recommended at this time.