

September 24, 1993

REPORT TO THE COMMITTEE
ON PUBLIC FACILITIES AND RECREATION
MULTIPLE SPECIES CONSERVATION PROGRAM

At the August 11, 1993, meeting of the Public Facilities and Recreation ("PF&R") Committee of the San Diego City Council, the members of the Committee received a copy of a memorandum dated August 10, 1993, from Mr. Charles L. Birke to Mr. Leonard Frank. (A copy of the memorandum is attached for your reference.) Mr. Birke is an attorney with the law firm of Sandler and Rosen and drafted the memorandum in his capacity as counsel to Pardee Construction Company.

The subject of the memorandum is the City's Multiple Species Conservation Program ("MSCP") and its Subarea Planning and Public Input Process. Mr. Birke takes issue with several aspects of the program. The purpose of this report is to address the issues raised by Mr. Birke, as well as the issue raised by the Committee regarding what impact the MSCP has on the City's land use authority.

The first issue raised in Mr. Birke's memorandum concerns the authority of the United States Fish and Wildlife Service and the California Department of Fish and Game to issue a "resource permit" to the City upon completion and approval of an MSCP Subarea Plan. It should be noted here that the phrase "resource permit" is a general reference to the end result of the MSCP subarea process, and is intended to describe some form of authority to "take" species without the project-by-project approval required now by the resource agencies. While federal regulations governing the Endangered Species Act do not refer to a "resource permit," we believe there is sufficient authority for the Service and the Department to enter into such an agreement with The City of San Diego. What is proposed under the MSCP is an "Implementing Agreement."

For listed endangered species, such an agreement is entered into by the federal authorities under the standard Habitat Conservation Plan ("HCP") procedures and is provided for in the Natural Community Conservation Planning ("NCCP") process guidelines for the California gnatcatcher. With respect to unlisted, or candidate species, such an agreement would be

comparable to a "Prelisting Agreement." Moreover, the proposed Implementing Agreement is wholly consistent with the purposes of the Endangered Species Act. Specifically, section 1531(b) of the United States Code, which states that:

The purposes of the Endangered Species Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

16 U.S.C. Section 1531(b) (1984).

The section further provides that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. Section 1531(c) (1984) (emphasis added).

The Southern California Coastal Sage Scrub Natural Community Conservation Planning Process Guidelines ("NCCP Process Guidelines") also contain support for this position. The NCCP Process Guidelines provide that "participating local governments and agencies will enter into a Planning Agreement with California Department of Fish and Game and U.S. Fish and Wildlife Service to establish a coordinated subregional NCCP preparation and decision-making process" California Department of Fish and Game, NCCP Process Guidelines, as amended July 1993, at 15. The NCCP Process Guidelines also allow for local governments and agencies to enter into an Implementing Agreement with the Department and the Service, which specifies all terms and conditions of activities under the NCCP plan. *Id.* at 17.

From the foregoing, we believe there is sufficient authority and precedent for the U.S. Fish and Wildlife Service, and the California Department of Fish and Game to enter into the Implementing Agreement proposed by the MSCP.

Mr. Birke implies in his memorandum that the MSCP Subarea Plan purports to allow the destruction of critical habitat or the taking of threatened or endangered species in circumvention of the Endangered Species Act permitting process. Such is not the case. The City anticipates it will obtain any permits required

by the Act. Protection of critical habitat and threatened or endangered species is the goal of the Subarea Plan; therefore, the necessary permits will be obtained in order to be in conformance with the Act. Moreover, as the name implies, it is a "multiple" species program whose primary goal is to protect a number of endangered and threatened species and their habitats, not just a single species.

Mr. Birke also expresses concern over the viability of the MSCP in light of the length of time generally required for National Environmental Policy Act ("NEPA") review. He also questions the likelihood of the Fish and Wildlife Service recognizing a multi-species plan such as the MSCP in light of the "Draft Environmental Assessment of the Proposed Section 4 (d) Rule to Authorize Incidental Take of the Coastal California Gnat-catcher for Activities Conducted Under the Authority of the State of California's Natural Community Conservation Planning Act" ("Draft Assessment").

The Draft Assessment provides that "the purpose of the NCCP Program is to provide long-term, regional protection of natural wildlife diversity while allowing appropriate and compatible land development and implementation of Natural Community Conservation Plans." United States Fish and Wildlife Service, Draft Assessment, August 2, 1993, at 1. It further states that such a plan is "intended to provide for the establishment of permanent multi-species preserves, including corridors and linkages with other natural lands, as well as allow for compatible and appropriate land development and economic growth" Id. (Emphasis added.) The Draft Assessment therefore supports a multi-species plan such as the MSCP. Moreover, the MSCP is not in variance with the criteria necessary to obtain a Section 10(a)(1)(b) permit. See, Id. at 19. While it is recognized that both NEPA and the California Environmental Quality Act ("CEQA") require an extensive review and documentation process, it is anticipated that this process will be completed in phases. Additionally, it logically follows that the more habitat the City preserves, the greater the number of viable animal and plant species that will be protected.

Mr. Birke also asserts that there is a "catch 22" in the MSCP in that the Fish and Wildlife Service will not approve the MSCP subarea plans unless and until General Plan Amendments are in place. We do not see this as a "catch 22," nor as an insurmountable legal hurdle. It is anticipated that amendment of the General Plan to reflect the overall MSCP would occur with plan adoption. Further amendments to the Community Plans (and General Plan, as necessary) would occur simultaneously with the approval of the MSCP Subarea Plans.

With regard to Mr. Birke's comments regarding the Service's commitment in writing to MSCP, we have not received any written commitments from the Service at this time, but are continuing to work cooperatively together to develop the MSCP. Moreover, we have forwarded his memorandum to them for review and response, and anticipate a response by the end of this month.

Finally, the Committee expressed a concern that the MSCP delegates the City's land use authority to federal and state agencies. We believe that it does not give the federal or state government any more authority than they currently have to regulate City land use planning pursuant to the Endangered Species Act, NEPA and CEQA. These Acts presently give the federal and state agencies review authority over the City's land use planning. 16 U.S.C. Section 1531 et seq.; 50 C.F.R. pt. 424 et seq.; 42 U.S.C. Section 4321 et seq.; 18 C.F.R. pt. 380; 16 C.F.R. Section 1.83 et seq.; Cal. Pub. Resources Code Section 21000 et seq.

In summary, we believe the U.S. Fish and Wildlife Service and the California Department of Fish and Game have the authority to enter into an Implementing Agreement for the MSCP with the City of San Diego. It is anticipated that the MSCP will be a multi-species, multi-habitat program. Both NEPA and CEQA requirements will be met, with the type of documentation needed dependent upon the level of detail provided with each action and level of habitat preservation committed. The General Plan can be amended concurrently with overall MSCP adoption. Approval of the subarea plans can occur simultaneously with Community Plan Amendments. Lastly, the MSCP does not give the Fish and Wildlife Service or the Department of Fish and Game any more authority over the City's land use planning than they currently have.

We hope this information addresses the Committee's questions.

Respectfully submitted,
JOHN W. WITT
City Attorney

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Attachment

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