

# **Multiple Species Conservation Program**

## **County of San Diego**

**A Case Study in Environmental Planning & The Economic Value of Open Space**

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“The MSCP preserve will protect biodiversity, enhance the quality of life in the San Diego region, and enhance the region’s attractiveness as a location for business.”

- *San Diego County Department of Planning and Land Use. Multiple Species Conservation Program Plan, Volume I. August, 1996.*

### **Introduction**

On yet another sunny afternoon in the city of San Diego, Robert Asher, Chief of San Diego County’s Department of Planning and Land Use, calls a staff meeting for the planners in his department. As a chief planner for San Diego County, Robert is faced with difficult land use questions everyday, but today he is overwhelmed: After working on San Diego County’s Multiple Species Conservation Program (MSCP) for over four years, Robert has just received a phone call from a member of the San Diego County Board of Supervisors who is demanding answers. The San Diego Taxpayers Association has recently issued a critical report on the MSCP, claiming that the adoption of the proposed MSCP will cause San Diego to lose big money – \$1.5 billion over a 30 year period – more than twice the amount estimated in the MSCP draft plan written by Robert and his staff. Robert’s staff will now have to answer to the accusations that the MSCP was detrimental to San Diego County’s economy, and Robert knows that the economy in San Diego is a subject that County Board of Supervisors care much about. His answer to the issue of economic costs will need to be very good in order to get the MSCP recommended for approval by the Planning Commission, and ultimately approved by the San Diego County Board of Supervisors.

### **MSCP Purpose: Helping the Environment and the Economy of San Diego County**

The original idea behind the MSCP was that it would be a comprehensive land use plan that would help both the business community and the natural environment of San Diego County. San Diego is a unique county -- its population is growing at unprecedented rates while the economy of the area has experienced some depression due to recent military base conversion projects. Real estate development, however, continues

to be a strong industry, and most San Diegans want to allow for some growth in the area. The MSCP seemed to be the perfect answer: its overall goal being to allow for urban growth and real estate development that would otherwise be precluded by federal and state environmental laws protecting endangered species and habitat of San Diego County. Successful implementation of the MSCP would allow land development to proceed in San Diego County in a “streamlined” manner, while complying with federal and state endangered species law.

### **MSCP and the Endangered Species Act**

The Endangered Species Act can alter or halt development that threatens a plant or wildlife species listed by the Secretary of the Interior as threatened or endangered. The Act’s stated purpose is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend are conserved.”<sup>1</sup> The land use element in the ESA is Section 4, which authorizes the Secretary of Interior to designate areas of “critical habitat” for specified species.

Section 9: “Takes”. Section 9 acts as the triggering mechanism of the ESA and prohibits the taking of any protected species by federal or private parties. Section 3 of the Act defines “take” as “to harass, harm pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.” The Secretary defines “harm” as an act which “kills or injures wildlife [and] may include significant habitat modification.”

Section 10: “Incidental Takes”. Sections 7(b)(4) and 10(a) of the ESA allow for incidental takings of protected species. An incidental taking is defined as a taking that is “otherwise prohibited, if such taking is incidental to, and not the purpose of, carrying out of an otherwise lawful activity”. The process of attaining an incidental take permit differs slightly between a taking involving a federal action and a taking involving a private action. For a private action (as is the concern of the MSCP), Section 10 of the ESA requires a Habitat Conservation Plan (HCP) first be prepared and submitted to the Secretary before an incidental take permit is granted. The HCP must show the expected impacts, the steps that will be taken to minimize and mitigate any takings, show that the taking will not appreciably reduce the likelihood of the survival of the species, and what

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<sup>1</sup> 16 USCA §1531(b).

alternative actions were considered and why they were not utilized. The Secretary must also be assured that there will be adequate funding for the conservation plan. The permit may be issued subject to terms and conditions that the Secretary deems necessary. Furthermore, the Secretary may revoke the take permit if the permittee is not complying with the terms and conditions of the permit.

### **Federal and State Requirements of the MSCP**

Under the County of San Diego's larger plan, local jurisdictions (incorporated cities located within San Diego County) and special districts (such as military areas and water districts) will implement their respective portions of the MSCP through subarea plans, which describe specific implementing mechanisms for the MSCP. The MSCP subarea plans contribute collectively to the conservation of vegetation communities and species in the MSCP study area. The combination of the subregional MSCP Plan and subarea plans will serve as a multiple species HCP pursuant to Section 10(a)(1)(B) of the federal Endangered Species Act and a Natural Community Conservation Plan (NCCP) pursuant to the California NCCP Act of 1991 and the state Endangered Species Act. The participating jurisdictions and special districts are submitting these plans to the U.S. Fish and Wildlife Service (USFWS) and to the California Department of Fish and Game (CDFG) in support of applications for permits for development in the area and management authorizations for management plans, respectively, to impact listed species and other species of concern. The conservation and management responsibilities, guarantees of implementation, and corresponding authorizations for all parties are contained in the Implementing Agreement (See generally <http://www.co.san-diego.ca.us/cnty/cntydepts/landuse/planning/mscp/index.html>; see also <http://www.co.san-diego.ca.us/cnty/cntydepts/landuse/planning/mscp/IA.pdf> to view Implementing Agreement) between the entity responsible for each subarea plan and the wildlife agencies (USFWS and CDFG).

*Federal Requirements.* Each subarea plan prepared in compliance with San Diego County's subregional plan fulfills the mandatory requirements of a HCP pursuant to Section 10(a)(1)(B) of the federal Endangered Species Act. Specifically, Section

10(a) allows the issuance of permits for the incidental take of threatened or endangered species and allows the inclusion of unlisted species in the permit so long as conservation actions for these species treat them as if they were listed. To fulfill the requirements of a HCP, each subarea plan must include the following information:

- Impacts likely to result from the proposed taking of one or more federally listed wildlife species;
- Measures the applicant will undertake to monitor, minimize, and mitigate such impacts; the funding that will be made available to undertake such measures; and the procedures to deal with unforeseen circumstances;
- Alternative actions the applicant considered that would not result in take, and the reasons why such alternatives are not being utilized; and
- Additional measures the USFWS may require as necessary or appropriate for purposes of the plan.

*State Requirements.* The State of California may authorize for management purposes the take of a species listed by the state as rare, threatened, or endangered under Section 2081 of the California Fish and Game Code. The state also can authorize the take of unlisted species under Section 2835 of the California Fish and Game Code. Requirements of state management authorizations are similar to those required for a federal HCP.

The CDFG and California Resources Agency prepared Natural Community Conservation Planning (NCCP) guidelines for the southern California coastal sage scrub region, which guidelines were recognized and incorporated by the USFWS for listing the California gnatcatcher as threatened (under special rule in Section 4(d) of the federal Endangered Species Act). San Diego County's MSCP, as well as the subarea plans in other areas of San Diego were prepared pursuant to the NCCP guidelines and meet requirements of the NCCP Act.

### **San Diego County's MSCP Subarea Plan: A General Description**

The MSCP plan addresses the potential impacts of urban growth, natural habitat loss and species endangerment and creates a plan to mitigate for the potential loss of "Covered Species" and their habitat due to the direct impacts of future development of both public and private lands within the MSCP area. A subregional plan under the Natural Communities Conservation Program, San Diego's MSCP will be implemented

through local subarea plans. San Diego County's Subarea Plan and its associated Implementing Agreement establish the conditions under which the County, for the benefit of itself and of public and private landowners and other land development projects proponents within its Subarea boundaries, will receive from the U.S. Fish and Wildlife Service and California Department of Fish and Game certain long-term Take Authorizations (and acknowledgment that the MSCP satisfies conditions established in the Section 4(d) Special Rule for the coastal California gnatcatcher) which will allow the taking of certain Covered Species incidental to land development and other lawful land uses which are authorized by the County.

The total study area for the preparation of the MSCP plan encompasses 12 jurisdictions and consists of 582,243 acres, of which 43% (252,132 acres) is in unincorporated areas under the jurisdiction of San Diego County. The County Subarea is located mostly in the eastern part of the MSCP study area. Approximately 73% (approximately 184,000 acres) of the County Subarea provides habitat for native plants and wildlife. The remaining 27% (approximately 68,000 acres) is disturbed, developed or agricultural land that is considered to have little or no habitat value. The species analysis conducted for the entire MSCP study area identified known occurrences for 46 plants, 4 invertebrates, 2 amphibians, 3 reptiles, 27 birds, and 3 mammals. Of these 85 species, 57 are known to occur in the County Subarea and 14 occur *only* in the County Subarea.

The habitat conservation goals of San Diego County's MSCP are expected to be met through public land purchases from willing sellers and application of the requirements of the adopted Biological Mitigation Ordinance (BMO) (<http://www.co.san-diego.ca.us/cnty/cntydepts/landuse/planning/mscp/BIOMI.pdf>) The BMO, which is an outgrowth of San Diego County's existing Resource Protection Ordinance, requires mitigation for all projects proposed within the MSCP Subarea that require discretionary approval by the County of San Diego Planning Commission (such as subdivisions and developments over a certain size). For areas within the MSCP boundaries, the BMO eliminates the need for Habitat Loss Permits which were required for land development impacting the coastal

sage scrub vegetation community (<http://www.co.san-diego.ca.us/cnty/cntydepts/landuse/planning/mscp/HABLOSTA.pdf> ).<sup>2</sup>

In order to allow for the destruction, or “take”, of endangered species and habitat, the MSCP would require San Diego County to comply with federal and state laws by setting aside a specific contiguous area of habitat (large enough to support viable populations of the listed endangered species of San Diego County). Wildlife Agencies from the state and federal government were willing to work with San Diego County to make the plan a success by issuing San Diego County a “Take Permit” which would allow the County to approve development projects directly, rather than requiring the developer to go through the usual approval process for a Take Permit (a time consuming and expensive endeavor).

The issuance of a Take Permit to the County required that the County Department of Planning and Land Use develop a Habitat Conservation Plan (HCP) acceptable to the wildlife agencies, recommended by the Planning Commission, and ultimately adopted by the County of San Diego Board of Supervisors. Robert Asher had thus spent most of his time for the last five years on the MSCP plan. Robert also assigned a large number of his staff planners to the task of negotiating, mapping, and designing the MSCP plan for the County. If the MSCP plan that Robert’s staff produced was adopted by the County Board of Supervisors, the County of San Diego Department of Land Use and Planning would then apply for “Take Authorization” from the federal and state governments (To view the County’s application for a 10(a), or “Take Permit” see Exhibit A on reserve at the Stanford Law School Library). Once Take Authorizations are issued, compliance with the County ordinance would provide a property owner the benefits of a County permit to allow the loss, or take of habitat, even if it impacts rare and endangered species. Once such federal and state authority was given to the County of San Diego in the form of a take permit, Robert believed that development and growth in San Diego County would be

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<sup>2</sup> Under the MSCP, the has amended the Brushing and Clearing Ordinance (see <http://www.co.san-diego.ca.us/cnty/cntydepts/landuse/planning/mscp/BC2.pdf>; see <http://www.co.san-diego.ca.us/cnty/cntydepts/landuse/planning/mscp/AMENDK.pdf> to view amendment) to (1) require mitigation for agricultural clearing in portions of the MSCP considered critical to long-term preserve viability; and (2) allow exemptions for 10 acre parcels to no more than 2 acres of clearing on existing 10 acre parcels.

streamlined, benefiting the economy and community while preserving the habitat most valuable to the endangered species in the area.

### **Creating the Proposed Preserve: A Note on the MSCP Planning Process**

The MSCP in San Diego County began in July 1991 as a way to address the mitigation needs of the City of San Diego Metropolitan Wastewater Department (formerly the Clean Water Program) for planned improvements to the Metropolitan Sewerage System. From this initial project, the MSCP has evolved into a comprehensive plan to address the impacts of regional growth on native species and their habitats within the study area.

Cities and the County of San Diego, public facility providers, federal and state wildlife agencies, and representatives of the environmental and development communities and other interested parties formed the “MSCP Working Group”. The Working Group served as the focal point for discussion of proposed plan policies and as the vehicle for building consensus around the recommendations contained in San Diego County’s MSCP. The MSCP Policy Committee was made up of elected officials from jurisdictions throughout the county. The Policy Committee was formed to provide input on the preferred preserve design and fiscal policies, as well as to provide policy level review and coordination of MSCP plan development and adoption.

To develop the proposed preserve configuration in the County of San Diego’s MSCP Subarea Plan, a detailed analysis using a geographic information system (GIS) computer model was created.<sup>3</sup> The results of the GIS analysis were considered by the participating jurisdictions and special districts, along with the wildlife agencies, property owners, and environmental groups. In addition, many public hearings and workshops were held to review the proposed preserve.

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<sup>3</sup> To create this model, biological, land use, and ownership data were collected for the study area included in the adopted MSCP subarea plan for San Diego County. The data were input into a geographic information system database at a scale of 1:24,000. Biological resources were prioritized or ranked to maximize conservation efforts and use of acquisition funds, and a gap analysis was performed to identify existing protection of high priority resources, based on public ownership and planned land use information. Using this information, four sample focused planning area configurations were developed for the purposes of analyzing and comparing land acquisition costs and the level of biological conservation. These

## **MSCP Conservation Areas:**

### **Lake Hodges, South County, and Metro-Lakeside-Jamul**

The San Diego County portion is referred to as a Subarea Plan which has been divided into three segments: the Lake Hodges Segment; the South County Segment; and the Metro-Lakeside-Jamul Segment. The map located at <http://www.sangis.org/mapgal/dplu0007/index.html> depicts the portion of the County of San Diego included in the MSCP.<sup>4</sup>

The Lake Hodges and South County Segments were developed through negotiations between the landowners, the County, and the federal and state wildlife agencies. In these two segments, lands are either approved for development, or designed to be part of the habitat preserve. Maps located at <http://www.sangis.org/mapgal/dplu0009/index.html> and <http://www.sangis.org/mapgal/dplu0011/index.html> show the areas authorized for take.<sup>5</sup> In the areas shown as “take authorized areas,” no additional biological mitigation is required for development to occur. The Wildlife Agencies agreed to the conservation and development areas; accordingly, projects approved by the County consistent with these two segments of the Subarea Plan will not require additional approvals from the Wildlife Agencies. Maps located at <http://www.sangis.org/mapgal/dplu0008/index.html> and <http://www.sangis.org/mapgal/dplu0010/index.html> show the conservation areas including portions of the South County Segment which are conserved subject to special agreements with the Wildlife Agencies.

The Metro-Lakeside-Jamul Segment, which includes portions of a number of community and subregional planning areas, consists of habitat conservation goals (To view these a table of these conservation goals for each specie see Tables 1-2 and 1-3 on reserve at the Stanford Law School Library) rather than mapped preserve boundaries. In order to encourage mitigation that meets the anticipated conservation levels, the County has developed mitigation ratios with reduced requirements for projects that contribute to

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alternatives, along with the No Action/No Project alternative, are discussed in the Environmental Impact Report/Environmental Impact Statement for the MSCP Plan.

<sup>4</sup> Note that the incorporated areas of San Diego County are preparing or have prepared a separate habitat conservation plan, or MSCP plan in order to qualify for their “take permits”.

<sup>5</sup> The phrase “authorized for take” refers to those areas which will be eligible for development and habitat destruction (or “take”) under the County’s Take Permit once it is issued by the wildlife agencies.

meeting the conservation levels – namely mitigating within the preapproved mitigation area as delineated by the Wildlife Agencies. (To view a map of the biological resource core areas and the areas which the Wildlife Agencies have preapproved as meeting the County’s Subarea Plan conservation goals see Map “Figure 2-2” on reserve at the Stanford Law School Library). Biological mitigation within the preapproved areas qualifies for the reduced mitigation ratios without further analysis. The Wildlife Agencies have also agreed that the mitigation land outside the preapproved area could qualify for reduced mitigation ratios if project sponsor can demonstrate that the lands help achieve the conservation goals for the Metro-Lakeside-Jamul segment.

### **Fiscal Impacts of the MSCP**

Today Robert faced a difficult question: how could he and his staff objectively analyze the overall economic impacts of the MSCP (which he believed to be positive, because without the MSCP federal and state laws would probably preclude San Diego from accommodating its share of growth)? Robert thought that the real problem with the question of economic impacts is that the MSCP is a *plan*, and more specifically, a cutting-edge plan where the long term affects of its implementation are still unknown. There are many unanswered - and perhaps unanswerable - questions about the future impacts of an MSCP program on a County such as San Diego. Robert also knew that if adopted, the MSCP would provide a comprehensive, long-term habitat conservation planning program that would change the way land use is regulated in San Diego County, benefiting not only his planning department, but the County of San Diego as a whole. Robert needed to decide how to respond to concerns expressed to him about the fiscal impact of the MSCP on San Diego.

At the staff meeting Robert Asher had called earlier that afternoon, he assigned two of his staff members to explore the fiscal impacts of the MSCP. He asked for a report which analyzed the fiscal impacts of the MSCP especially as it relates to the loss of tax revenue for the County. The environmental planner assigned to the project proposed a scope of work which included a comparison of the tax revenues of San Diego County under two models: with the MSCP and without the MSCP. The other planner assigned to the project had designed the original GIS database that mapped the preapproved

mitigation area under the MSCP. Together, the planners produced a report which outlined two models under which San Diego County could develop: (1) with the MSCP in place, and (2) without the MSCP in place. The study found the fiscal impact of the MSCP preservation to be minimal. (The complete study written is on reserve at the Stanford Law School Library).

## **Conclusion**

Having reviewed the report given by Robert's staff on the fiscal impacts of the MSCP, and having received a recommendation of the plan from the County Planning Commission, the County Board of Supervisors approved the MSCP Subarea Plan for San Diego County on October 22, 1997. On December 4, 1997, the County of San Diego, applied for "Take Authorization" from the federal and state governments.

On March 17, 1998 the County was issued a 10(a) permit. To date, several development projects have been approved under the MSCP. In the first year of the MSCP's implementation approximately 9,000 acres of land were purchased for preservation. The majority of this land is within the preapproved mitigation area, and was purchased by Federal, State and Local governments. Approximately 500 acres of Coastal Sage Scrub habitat has been destroyed, or "taken". The County considers the first year of the MSCP to be a success, and Robert says "we (the MSCP planners) are a pocket of optimism in the County Planning Department".

**Discussion Questions:**

1. The MSCP's states that its goal is to protect sensitive plant and animal species in an interconnected preserve, while simultaneously encouraging urban growth and economic health for the region. Do you see those two goals in conflict or as simultaneously achievable?
2. Imagine you are a member of the County Board of Supervisors, would you have supported the MSPC plan? Why or why not? What questions would you have for Robert and his staff? Would you have other questions you would need answered before you approve the proposed MSCP plan?
3. Consider the broad questions of local vs. federal zoning initiatives. How does the "streamlining" of incidental take permits benefit and/or harm local planners, federal agencies, the environment, and the economy?
4. If you were a landowner in San Diego County, with your property located within the MSCP Subarea Plan in the Metro-Lakeside-Jamul Segment, how would you feel about the implementation of this plan?
5. Because the San Diego County area contains one of the highest concentrations of rare and endangered species in the nation, the urban growth that the region has experienced has created a conflict which the MSCP is designed to resolve. How do you think that a region such as San Diego could have avoided achieving this level of environmental degradation? Are there planning mechanisms that San Diego County could have employed at an earlier stage to avoid this?
6. Robert Asher has asked his planning staff to respond to accusations that the land to be placed in conservation under the MSCP plan is so large in acreage that the end result is huge economic loss to the County of San Diego. Without using numbers, thinking about land use regulation and environmental policy, what arguments can you make for or against this statement?
7. Think about being the planner assigned to the task of evaluating the fiscal impacts of the MSCP subarea plan. What scope of work would you develop for the project? What data would you want or need in order to be able to properly evaluate the fiscal impacts of the MSCP on the County of San Diego?