



State of California – Natural Resources Agency
 DEPARTMENT OF FISH AND WILDLIFE
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EDMUND G. BROWN JR., Governor
 CHARLTON H. BONHAM, Director



November 26, 2018

Kristin Gaspar, Chair
 District 3
 San Diego County Board of Supervisors
 1600 Pacific Highway
 San Diego, CA 92101

Dear Ms. Gaspar and the Board of Supervisors:

RE: Requested Written Response Regarding Incidental Take Authority Conditional Approval for Otay Ranch Village 14 and Planning Areas 16/19 Project (SCH# 2016121042)

This letter is in response to letters dated September 27 and October 5, 2018, from the County of San Diego (County) Planning and Development Services requesting the California Department of Fish and Wildlife (Department) provide a written analysis regarding proposed options for the County's conditional approval of Otay Ranch Village 14 and Planning Areas 16/19 Project (Village 14 Project), including the areas known as Proctor Valley (PV) 1, PV 2, and PV 3. The October 5, 2018, letter specifically requests a written determination from the Department's Director, which is why I am responding directly to you. This response builds on the Department's April 16, 2018, comment letter on the Draft Environmental Impact Report (DEIR) for the Village 14 Project that included analysis of these issues and the position relayed by Department staff to County staff at their October 1, 2018, meeting.

The Department administers the Natural Community Conservation Planning (NCCP) program. The County participates in the NCCP program by implementing its approved Multiple Species Conservation Program Subregional Plan (MSCP) through the County's MSCP Subarea Plan, the associated Implementing Agreement, and the NCCP Approval and Authorization (NCCP Authorization). The MSCP is a comprehensive, long-term habitat conservation planning program that addresses the needs of multiple species and the preservation of natural vegetation communities within the southwestern subregion of San Diego County and authorizes the County to grant incidental take authority for certain development. The MSCP also addresses the loss of covered species and their habitats due to the direct, indirect, and cumulative impacts associated with land development. The MSCP, County Subarea Plan, Implementing Agreement, and corresponding NCCP Authorization are the means by which the Department authorized the incidental take of covered species by the County as permittee, streamlining development approvals under the County's jurisdiction.

The Department is providing this written response and supporting analysis detailing why the County is obligated to follow the rules and procedures it agreed to in the MSCP and Subarea Plan for any conditional approval of the Village 14 Project.

The Department and County have been performing under these agreed-upon MSCP rules for the past two decades, facilitating nearly 12,000 acres of development in the southwestern portion of the County while conserving 78,000 acres of natural habitats and the numerous species they support. For projects that fall within the boundary of the County Subarea Plan, the County committed to only approve a project if it was in conformance with the MSCP and Subarea Plan. As explained below, the MSCP and Subarea Plan do not authorize the County to conditionally approve development of the Village 14 Project and PV 1, PV 2, and PV 3 through a non-MSCP process. However, the County may seek to amend the Subarea Plan to allow for Village 14 Project development with the concurrence of the Department.

Overview

For the reasons stated in the Department's April 16, 2018, comment letter, the Department considers PV 1, PV 2, and PV 3 to be preserve. The County disagrees. The respective positions of the Department and the County regarding the preserve status of these areas appear to stem from our disparate views of whether the discussions among the Baldwin Company, the County, the City of Chula Vista, the Department, and the U.S. Fish and Wildlife Service resulted in an agreement or merely an offer to include PV 1, PV 2, and PV 3 within the MSCP preserve. The Department contends that various records from multiple parties leading up to and over the decades since the adoption of the Subarea Plan demonstrate the parties have been implementing the Baldwin Agreement. The County maintains, based in part on language in the Implementing Agreement section 10.5, that the 1995 proposal by the Baldwin Company was never finalized or executed.

The Department for purposes of the Village 14 Project specific plan approval is not seeking to resolve the status of the 1995 Baldwin negotiations nor the preserve status of PV 1, PV 2, and PV 3. The Department as the NCCP regulating entity relies on the MSCP, the Subarea Plan, and the Implementing Agreement, which the County voluntarily agreed to, to regulate and enforce NCCP requirements. Both the Department and the County agree that PV 1, PV 2, and PV 3 are designated "No Take Authorized" under the MSCP Subarea Plan. (See Implementing Agreement Exh. F and Subarea Plan Figs. 1-1, 1-2, and 1-3 [identifying PV 1, PV 2, and PV 3 as "No Take Authorized" and "Otay Ranch Areas Where No 'Take Permits' Will Be Issued"].) The primary issue is what the MSCP allows or requires for any potential development of these "No Take Authorized" areas.

September 27, 2018, County Letter and Options for Take Authority under the MSCP, Subarea Plan, and Implementing Agreement

The Department's April 16, 2018, Village 14 Project comment letter included a discussion of parcels PV 1, PV 2, and PV 3. Any development that includes these "No Take Authorized" areas must be consistent with the MSCP and the Subarea Plan. The County may approve development on PV 1, PV 2, and PV 3 after completing a major amendment under the MSCP. PV 1, PV 2, and PV 3 are not major amendment areas, which

are areas specifically mapped in Figure 1-2 and must go through the major amendment process defined in section 1.14.2 of the Subarea Plan. Nevertheless, Subarea Plan section 1.14.2 allows the Department and the U.S. Fish and Wildlife Service (collectively, the Wildlife Agencies) to process major amendment requests by the County. Consequently, the County may request a major amendment of the Subarea Plan to extend incidental take authorization and allow development on PV 1, PV 2, and PV 3.

Alternatively, a boundary line adjustment is an acceptable approach for modifying preserve boundaries under the Implementing Agreement section 10.11. In the County's view, the use of a boundary line adjustment would mean that the County is acceding to PV 1, PV 2, and PV 3 being preserve, which it is not willing to do. Acknowledging the County's concern, the Department does not explore that option in this letter.

The County proposes use of its Biological Mitigation Ordinance (BMO) analysis under the Implementing Agreement section 9.16 to satisfy MSCP requirements. In the South County Segment of the MSCP Subarea Plan, which is where Village 14 is located, the BMO analysis applies only to major and minor amendment areas. (Subarea Plan, § 1.8.) It does not apply to PV 1, PV 2, and PV 3 because they are not identified as major or minor amendment areas in the Subarea Plan Figure 1-2. The Implementing Agreement section 9.16 and its authorized use of the BMO applies to projects that had received their discretionary approvals prior to the Implementing Agreement's March 17, 1998, effective date. The Village 14 Project is currently seeking its discretionary approvals as evidenced by the DEIR. Consequently, the Implementing Agreement section 9.16 is inapplicable. The DEIR's BMO analysis for impacts to PV 1, PV 2, and PV 3, though perhaps necessary for the County's needs pursuant to the terms of the BMO, is not an appropriate process under the Subarea Plan to authorize development of PV 1, PV 2, or PV 3.

The County's second preferred alternative is to deem PV 1, PV 2, and PV 3 as minor amendment areas. The County argues this approach would be consistent with the Subarea Plan section 1.14.1 and incidental take authority can be granted through the MSCP minor amendment process. As proposed by the County, the Wildlife Agencies would have to make a finding that habitat contained by PV 1, PV 2, and PV 3 can be eliminated with mitigation without significantly affecting the overall Subarea Plan goals.

The Department concurs that this is an acceptable approach with further clarification. Subarea Plan section 1.14.1, in addition to the language noted by the County, states that the minor amendment properties must meet the goals for linkages and corridors described in the Subarea Plan sections 4.2.1 and 4.2.2 and must have the approval of the Department. While section 4.2.2 applies only to the Metro-Lakeside-Jamul Segment, section 4.2.1 details specific goals and criteria to maximize habitat structural diversity, conserve spatially representative examples of extensive patches of coastal sage scrub, create significant blocks of habitat to reduce edge effects and maximize the ratio of surface area to the perimeter of conserved habitats, and preserve the biological integrity of linkages. These considerations will be critical in any review of PV 1, PV 2, and PV 3, which are identified within the potential preserve area as private land with a 100 percent conservation target. (See MSCP Figs. 3-2, 3-3.) A minor amendment request by the County to allow

development on PV 1, PV 2, and PV 3 is an authorized process under the MSCP and Subarea Plan to the extent the amendment meets Subarea Plan section 4.2.1 linkage and corridor goals. Consequently, the County may seek a minor amendment for PV 1, PV 2, and PV 3 to eliminate the current "No Take Authorized" status. If the Department concurs the proposed minor amendment satisfies the Subarea Plan conservation goals, then the County's development approval for the Village 14 Project could proceed in conformance with the Subarea Plan.

In summary, the County may authorize development of PV 1, PV 2, or PV 3 to proceed by means of a major amendment or minor amendment to the Subarea Plan that satisfies Subarea Plan corridor and linkage goals with the Department's concurrence. A BMO analysis, though perhaps informative and necessary for the County's own process, is not an authorized method under the Subarea Plan to allow development of PV 1, PV 2, and PV 3.

October 5, 2018, County Letter and the County's Proposed Condition of Approval

County staff have proposed a draft condition of approval for the Village 14 Project that would purport to authorize the applicant to seek incidental take authorization from the Department and U.S. Fish and Wildlife Service separate from and outside of the MSCP and Subarea Plan processes. This would entail the applicant pursuing separate federal Endangered Species Act and/or California Endangered Species Act permits in order to receive approval to develop PV 1, PV 2, and PV 3. This is inappropriate. The issue is not only the isolated take of listed species on these parcels, but also the spatial value of these properties within the matrix of conserved land near the Village 14 Project and the properties' importance to the design and function of the overall Subarea Plan preserve design goals. The Implementing Agreement generally requires the County to comply with and implement the MSCP and Subarea Plan, including the Subarea Plan amendment provisions. (Implementing Agreement, §§ 10.2, 10.6.) The MSCP section 5.2.1 and Subarea Plan section 1.2 require any project approved by the County within the Subarea Plan to conform to the MSCP and the Subarea Plan. County staff and the Department agree that the MSCP Subarea Plan map designates PV 1, PV 2, and PV 3 as "No Take Authorized." (See MSCP Subarea Plan, Figs. 1-2, 1-3.) County staff and the Department differ, however, on whether this status means that PV 1, PV 2, and PV 3 constitute part of the preserve.

Regardless of whether PV 1, PV 2, and PV 3 are developable or preserve, they are "No Take Authorized." The Implementing Agreement and Subarea Plan are consistent on this point. The Implementing Agreement includes a map as Exhibit F defining the area encompassed by the Subarea Plan. That map identifies PV 1, PV 2, and PV 3 in dark green as "Otay Ranch Areas Where No 'Take Permits' Will Be Issued." Exhibit F is the same map as Figure 1-1 of the Subarea Plan.

The County agreed through the Implementing Agreement and MSCP permitting documents that no incidental take is authorized for PV 1, PV 2, and PV 3. Consequently, the County is prohibited under the MSCP section 5.2.1 and Subarea Plan section 1.2 from approving the Village 14 Project without going through processes it agreed to in the MSCP and Subarea Plan to remove the "No Take Authorized" status of these areas. The Subarea Plan prevents

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the County from allowing the Village 14 Project applicant to seek incidental take authorization separate from a Subarea Plan amendment.

Conclusion

The Department has partnered with the County over the past 20 years to implement the MSCP and remains committed to working with the County to address the critical MSCP and Subarea Plan implementation issues associated with the Village 14 Project. The Village 14 Project is the only project I am aware of where the County proposes setting aside the rules it agreed to in the MSCP and Subarea Plan in approving a development. The Department wishes to ensure the County is fully informed before it decides to approve the Village 14 Project with an option inconsistent with the MSCP and Subarea Plan permitting requirements. Approving the Village 14 Project with an option for the applicant to seek take authorization separate from the required Subarea Plan process would likely result in a material breach of the MSCP, Subarea Plan, and Implementing Agreement and could result in suspension or revocation of the NCCP Authorization. This would jeopardize the County's incidental take authorization under the MSCP and the MSCP approach for streamlining developments across the County.

The Department and the County agreed to the MSCP and Subarea Plan. Those rules and processes have become a model for streamlining development across the County while also conserving unfragmented habitat areas and the sensitive species they support, promoting a multiple species and habitat management and monitoring program, and protecting broad-based natural communities and species diversity. The Department greatly values the decades-long MSCP partnership that it has developed with the County through MSCP planning and implementation and wants to continue to work with the County through those agreed-upon MSCP processes.

I am available to work with you to help resolve any outstanding issues.

Sincerely,



Charlton H. Bonham
Director

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