

Comment Letter BM



**PROPERTY
OWNERS
ASSOCIATION
OF
RIVERSIDE
COUNTY**

Executive Director
Bruce A. Colbert

**Comments on the
Recirculated Draft Coachella Valley
Multiple Species Habitat Conservation Plan
and Natural Community Conservation Plan,
Implementing Agreement, and
Recirculated Draft Environmental Impact Report/
Supplement to the Final Environmental Impact Statement**



Submitted to:

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May 28, 2007

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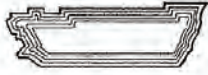
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Re: Comments on the Recirculated Draft Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan (MSHCP/Plan), Implementing Agreement (IA), and Recirculated Draft Environmental Impact Report/ Supplement to the Final Environmental Impact Statement (EIR/EIS)

Dear Ms. Barrows and Mr. Bartel:

The comments provided in this letter are intended to help correct current deficiencies we believe exist in the recirculated MSHCP, IA, EIR/EIS, and accompanying documents.

We include both new and expanded comments in a format similar to our January 28, 2005 comment letter, covering funding, takings, due process, air quality, environmental justice, and mandatory findings of significance.

The Property Owners Association of Riverside County is a nonprofit, public policy research, lobbying, and educational organization. We serve as an advocate for Riverside County property owners to ensure that the interests and private property rights of landowners are protected in the formation and implementation of public policies.

The proposed Plan has speculative and uncertain funding sources and would fail to provide adequate funding in violation of recent federal District Court precedents. The Plan would lead to economic hardship for landowners whose property would be devalued by the Plan, and would lead to the loss of local land use authority. The economic and social consequences for the Coachella Valley would be enormous.

The Property Owners Association of Riverside County incorporates herein by reference all other comments to the initial and the recirculated

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MSHCP/Plan, IA, and EIR/EIS (*Buckeye Cable Vision v. U.S.* (6th Cir. 1971) 438 F.2d. 948, 951).

It should be noted that the Coachella Valley Association of Governments (CVAG) sent a letter to Property Owners, dated March 21, 2007, specifying May 30, 2007 as the last day for submission of comments, as opposed to all other notices specifying May 29, 2007 as the deadline. Therefore, all comments submitted through May 30, 2007 must be considered.

Our comments are presented in five sections:

- I. Executive Summary, lists the principal inadequacies of the proposed Plan.
- II. Inadequacies of the MSHCP, covers the Plan document.
- III. Inadequacies of the EIR/EIS, encompasses the supporting environmental documents.
- IV. Inadequacies of the Implementing Agreement, addresses the agreement and fee.
- V. Conclusion, requests the remediation of inadequacies in the documents.

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I. EXECUTIVE SUMMARY

The principal inadequacies of the proposed Plan include:

- The land acquisition cost for the Plan has been greatly underestimated. The Plan would set aside only 24 percent of the revenue that is needed to complete the acquisition of conservation lands called for by the Plan (see p. 8). In addition, the Plan acknowledges speculative and uncertain funding from the Eagle Mountain Landfill Environmental Mitigation Trust Fund, accounting for forty one percent of the ongoing management and monitoring called for by the Plan. Therefore, the Plan would provide only 59 percent of the revenue that is needed for the operating cost of the Plan. The Plan needs to include clearly identified, secured sources of revenue for the Plan's implementation (p. 11).
- The inadequate funding for the Plan would violate the federal Endangered Species Act, Sections 10(a)(2)(A), 10(a)(2)(A)(ii), and 10(a)(2)(B)(iii), and the California Fish and Game Code, Section 2081(b)(4) requirements (pp. 6, 22).
- The inadequate funding for the Plan would prevent the Plan from acquiring the amount of conservation land required by the Plan. Therefore, the specific purpose of the Proposed Action cannot be accomplished by the Plan as it is currently drafted. Because the Plan would not achieve its stated objectives, the Plan is not reasonably related to a legitimate state interest, and would result in constitutional due process violations (pp. 24, 34).
- A substantial number of landowners in the Conservation Area would be denied the economic use of their property, and would lose the value of their investment-backed expectations, constituting a taking of private property for public use without just compensation, under the Fifth Amendment to the U.S. Constitution. The Plan's failure to consider the cost of regulatory takings is a significant omission (p. 34).
- The Plan's Market Study, which uses land values at only 37 percent of fair market value, provided the basis for the Plan's local Total Acquisition Cost. The Total Acquisition Cost is the estimated land acquisition purchase price for the Local Permittees, and is the value being used as the basis for the Nexus Study, which would determine the Local Development Mitigation Fee throughout the Coachella Valley. A flawed basis value would render the Nexus Study and the resulting impact fee invalid (p. 7).
- The Plan should expressly state that appraisals shall exclude consideration of the fact that a subject property is within a Conservation Area, and should further expressly set forth these Uniform Standards of Professional Appraisal Practice in the MSHCP, Section 6.1.2 (p. 35).
- Under the MSHCP, each City would collect the Local Development Mitigation Fee, and by transferring these funds to the Coachella Valley Conservation Commission (CVCC), would be illegally delegating their authority by allowing the CVCC to expend these fees outside the City's jurisdiction (p. 80).

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- The Plan would have environmental effects that would cause substantial adverse effects on human beings, either directly or indirectly. The Plan fails to adequately analyze the impacts on humans for air quality, and for affordable workforce housing as the supply of developable land would be severely reduced by the Plan. These impacts must be fully analyzed and mitigated. The EIR/EIS lacks the requisite in-depth analysis (p. 77).
- The Plan would violate air quality regulations (p.58).
- The Plan would create another bureaucracy reporting to the U.S. Fish and Wildlife Service to act as an oversight agency on local governments (p. 27).
- The Plan puts local jurisdictions under federal oversight. The cities are obligated to conserve 96,400 acres of private land, following a schedule in five-year increments over 30 years. If inadequate acquisition funding causes insufficient conservation of lands, then the U.S. Fish and Wildlife Service and the California Department of Fish and Game (Wildlife Agencies) could revoke the take permits for highway improvement projects needed by the cities (p. 28).
- By overestimating the costs associated with development, the fiscal impact analysis inaccurately projects that development would produce a negative fiscal impact for most jurisdictions in the Plan Area (p. 45).
- Under the Plan, 25 years from now, agricultural land would be the only vacant land available to accommodate future population growth in the Plan Area, due to the Plan's shifting of development from proposed habitat onto agricultural land. Under the MSHCP, agricultural land would be converted to other land uses, some of which require expenditures of public money to maintain (p. 41).
- The Plan fails to consider the impacts on the Coachella Valley's economy from the loss of agriculture, the Coachella Valley's third-largest industry, which generates essential income and jobs (p. 41).
- Under the MSHCP, within 25 years, decision makers of local jurisdictions would be faced with the choice of densifying their land uses to accommodate their regional share of future population growth or converting the agriculture industry, the third-largest industry in the Coachella Valley to development uses (p. 53).
- The Plan restricts public access on public lands. The recreational use restrictions on lands currently designated for recreational use are the exact opposite of the Plan's stated goal to provide recreational opportunities. No scientific basis is presented for the recreational use restrictions (p. 31).
- Hotel/amusement (travel) is the second-largest industry in the Coachella Valley. Closely related to the tourism industry is the largest job sector in the Coachella Valley, the retail

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industry. Together they provide employment for a significant number of the Valley's population. Yet, implementation of the MSHCP's recreational use restrictions would discourage visitors from coming to the Coachella Valley (p. 50).

- The Plan fails to consider the impacts of the recreational use restrictions on the largest and second-largest industries in the valley and that impact on the economy (p. 50).
- Recent scientific data shows that the Coachella Valley fringe-toed lizard is genetically and morphologically the same as the nearby Colorado Desert fringe-toed lizard and is not a subspecies or distinct population segment, and therefore should be de-listed as a threatened species at its next five-year status review by the U.S. Fish and Wildlife Service (p. 21).
- The Plan's failure to use "the best scientific and commercial data available" would violate the federal Endangered Species Act, Sections 7(a)(2) and 7(c)(1) requirements (p. 13).
- The Plan's failure to use "the best available science" would violate the California Fish and Game Code, Sections 2081(c), 2820(a)(6), and 2820(f)(1)(C) requirements (p. 22).
- The Plan does not ensure regulatory certainty to cities, landowners, growers, and developers. Although the No Surprises Rule currently remains in effect, and the U.S. Fish and Wildlife Service continues to issue permits with "No Surprises" assurances, in November 2005, the Spirit of the Sage Council again challenged the No Surprises Rule in the U.S. District Court for the District of Columbia. Oral argument has been scheduled for the end of May 2007. An appeal to the D.C. Circuit is anticipated in any event. The policy may be eliminated by the pending case. Without the regulatory certainty provided by the "No Surprises" policy, no property is exempt from potential land use restrictions (p. 30).
- The Plan should provide "take" permits for the operation and maintenance of existing legal private uses (p. 35).
- As more accurate, localized scientific data becomes available, Permittees should be allowed to make a decision about the conservation value of these lands on the basis of the more recent data. The Permittees should be allowed to alter the boundary of the Conservation Area on the basis of the recent data, without a Plan amendment (p. 20).
- The lack of information and analysis renders the EIR/EIS clearly inadequate for the purpose of enabling decision-makers to make an intelligently informed decision (p. 77).
- The MSHCP violates the Open Space Lands Act, Williamson Act, Right-To-Farm laws, Subdivision Map Act, Permit Streamlining Act, Local Government Reorganization Act, and Data Quality Act (pp. 43, 44, 82, 83, and 84).

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II. INADEQUACIES OF THE MSHCP

A. VIOLATIONS OF FEDERAL ENDANGERED SPECIES ACT

1. FAILURE TO PROVIDE ADEQUATE FUNDING FOR THE PLAN

The federal Endangered Species Act (ESA), Section 10(a)(2)(B)(iii) states, "the applicant will ensure that adequate funding for the plan will be provided."

ESA Sections 10(a)(2)(A) and 10(a)(2)(A)(ii) state, "No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefore submits to the Secretary a conservation plan that specifies - what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps."

a. Inadequate Funding to Acquire Conservation Land

According to the Recirculated Draft Coachella Valley MSHCP, February 2007, Section 5.1.1, 141,380 acres of private land within the Conservation Areas - subject to MSHCP land use restrictions and resulting land devaluation, are to be acquired for conservation (29,990 acres through Complementary Conservation, 21,390 acres by state and federal agencies, and 90,000 acres by Local Permittees). Federal agencies provide funding for Complementary Conservation.

Thirty six percent (51,380 acres/141,380 acres) of the private land to be acquired for conservation under the Plan is dependant on state and federal funding. The Plan should include a cost estimate for the acquisition cost of land to be acquired through state and federal funding. This would facilitate state and federal funds being programmed and allocated to the Plan. State and federal funding has been curtailed due to changed state and federal funding priorities. Currently, there are no state or federal funds allocated for the Plan. Draft MSHCP, Section 5.2.4 lists only speculative, potential state and federal funding sources. No state or federal project is accomplished using potential funding; money must be allocated for a project before the project may proceed. Therefore, the Plan starts with essentially a 36 percent acquisition-funding shortfall for conservation land.

Sixty four percent (90,000 acres/141,380 acres) of the private land to be acquired for conservation under the Plan is dependant on local funding, which appears to be greatly underestimated. For the local funding component, the Plan's estimate of land acquisition cost is based on *A Market Study of Land Values, Related to Several Areas of Prospective Acquisition, Associated with the Coachella Valley Multiple Species Habitat Conservation Plan* (Scarcella, July 2005) (Draft MSHCP, Section 5.1.2.1).

The study uses old data and does not include many transactions. To estimate overall land values within each Conservation Area, the study weights the land values based on the percentage of parcels that would be categorized as high land value, mid land value, or low land value, but notes, "that this method of allocation is very subjective..." (Scarcella, February 20, 2003). Due to these factors, the land acquisition cost has been greatly underestimated.

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Our Association's January 2006 analysis of land sales data provides values that better reflect the marketplace. A comparison of the Market Study land values to fair market values for land within the Conservation Area is presented as Table 1. The High-Range land values of the Market Study are shown in the column in the middle of the table; values that better reflect the marketplace are shown in the column on the right. Table 1 shows that the study is using land values that are 37 percent (36.8 percent) of the actual fair market value.

Table 1
Comparison of Market Study Land Values to Fair Market Value
for Land Within Conservation Areas

MSHCP Conservation Area	Market Study High-Range Value Per Acre	Fair Market Value Per Acre
Snow Creek / Windy Point	\$3,200	\$100,000
Highway 111 / I-10	\$18,750	\$50,000
Upper Mission Creek / Big Morongo Canyon	\$50,000	\$50,000
Willow Hole	\$40,000	\$100,000
Thousand Palms	\$70,000	\$100,000
Edom Hill	\$20,000	\$50,000
Indio Hills / JTNP Linkage	\$30,000	\$50,000
East Indio Hills	\$7,500	\$65,000
Santa Rosa and San Jacinto Mountains	\$50,000	\$166,700
Dos Palmas	\$2,500	\$5,000
Desert Tortoise and Linkage	\$2,000	\$65,000
Joshua Tree National Park	\$300	\$1,000
Mecca Hills / Orocopia Mountains	\$2,000	\$5,000
CV Stormwater Channel and Delta	\$30,000	\$80,000
MSHCP Market Study Percent of Fair Market Value: 37%		

The Plan is using land values that are 37 percent of fair market value for determining the amount of money to set aside for land acquisitions and for determining the Plan's development fee amount necessary to generate the funds for the acquisition program. The Market Study, which uses land values at only 37 percent of fair market value, provided the basis for the Plan's local Total Acquisition Cost of \$301,459,900. The fair market value for the Total Acquisition Cost would actually be \$819,184,500 (301,459,900/36.8 percent) (Draft MSHCP, Section 5.1.2.1 and Appendix I, Table A5-1).

Draft MSHCP, Appendix I, Table A5-1 calculates the land acquisition cost for 172,142 acres to be \$583,694,756 (Scarcella, September 2006). The Plan does not present how the Local Permittee's share for 90,000 acres (\$301,459,900) was derived from Table A5-1. Therefore, the Total Acquisition Cost of \$301,459,900 is unsupported in the Plan.

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Acquisitions would occur over a 30-year period, and the Market Study assumes an annual increase in land value of 3.29 percent, which produces the Total 30-year Acquisition Cost of \$526,705,000 (Draft MSHCP, Section 5.1.2.1 and Table 5-3c).

Draft MSHCP, Table 5-3c provides for the purchase of 88,900 acres over 30 years, not the 90,000 acres required of Permittees. The Plan gives no explanation for this disparity. Therefore, the Total 30-year Acquisition Cost of \$526,705,000 is unsupported in the Plan.

The Plan fails to take into account the effect of the Plan's reduction in the supply of developable land on land prices. The Plan assumes that land value will increase annually at a constant rate. The historic annual rate of increase in land value is based upon an unconstrained supply of land. As developable land becomes increasingly scarce due to the acquisition of developable land by the Plan, land prices would increase at a greater than historic rate due to the reduction in supply. As the supply of developable land is depleted over the life of the Plan, the remaining low value land would increase in value faster than the historic rate due to scarcity. The Plan should use an escalating annual rate of increase in land value to reflect the scarcity created by the Plan in the final years of land acquisitions. The ability of the Plan to conduct a new Nexus Study every five years or more does not justify the Plan beginning with an inaccurate basis for the Total 30-year Acquisition Cost.

The \$526,705,000 Total 30-year Acquisition Cost presented by the Plan pales in comparison to the \$1.4 billion Total 30-year Acquisition Cost actually needed by Local Permittees to acquire the private land at fair market value, shown Table 2.

Local funds account for only 64 percent of the funding needed for acquisition of all private lands in the Conservation Area. Therefore, in reality the Total 30-year Acquisition Cost to acquire the total 141,380 acres of private land within the Conservation Area would be \$2.2 billion (\$1,429,986,000/64 percent) from combined local, state, and federal sources.

Therefore it appears that the land acquisition cost for the Plan has been greatly underestimated, and that the Plan would set aside only 24 percent of the revenue that is needed to complete the acquisition of conservation lands called for by the Plan (\$526,705,000/\$2,234,353,125).

Table 2
Projected Acquisition Costs
for Land Within Conservation Areas

	CVAG Estimate	Fair Market Value
Total Acquisition Cost	\$301,459,900	\$819,184,500
Total 30-Year Acquisition Cost (local Permittees)	\$526,705,000	\$1,429,986,000
Total 30-Year Acquisition Cost (all private lands)	Not Given	\$2,234,353,125

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Cont.

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If the Plan were to receive federal Endangered Species Act Section 6 grants equal to those being awarded to habitat conservation plans in Western Riverside County and San Diego County (typically \$5 million each per year), \$146 million of the remaining land acquisition cost would not be funded. Using the CVAG's Total 30-year Acquisition Cost of \$526,705,000 for the local share, the state and federal share may cost \$296,271,600 ($\$526,705,000/64\% \times 36\%$). The state and federal share would still be underfunded by \$146,271,600 ($\$296,271,600 - \$150,000,000$).

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Cont.

The inadequate funding for the Plan would violate the federal Endangered Species Act, Sections 10(a)(2)(A), 10(a)(2)(A)(ii), and 10(a)(2)(B)(iii) requirements.

b. Failure to Comply with Recent Legal Precedent Rejecting Speculative and Uncertain Sources of Funding

Recent litigation has set legal precedent that has ramifications for the Plan. On October 13, 2006, a federal judge ruled that the U.S. Fish and Wildlife Service and the City of San Diego did not ensure adequate funding for the City of San Diego Multiple Species Conservation Program because the City relied on "undependable and speculative sources for the necessary funds." The judge called the funding for acquisition and maintenance costs "vague, non-committal, and referring to hopes and promises," and concluded that the City "cannot rely on speculative future actions of others." The judge sent the plan back to the Fish and Wildlife Service for revisions consistent with the ruling (*Southwest Center for Biological Diversity v. Bartel*, No. 98-2234 (S.D. Cal. Oct. 13, 2006, pp. 50-53)).

The Coachella Valley MSHCP would be funded by measures highly similar to those rejected by the federal district court, as illustrated in Figure 1:

Figure 1

Features of the City of San Diego Conservation Program	Features of the Coachella Valley MSHCP
1. Section 10 of the Endangered Species Act requires the U.S. Fish and Wildlife Service to find that the applicant "will ensure that funding for the plan will be provided." [citing Section 1539(a)(2)(B)(iii); <i>Southwest Center for Biological Diversity</i> , supra, 470 F.Supp.2d at 1155].	1. This provision of the Endangered Species Act is applicable to the MSHCP.
2. The City of San Diego bore two main categories of expense: 1) expenditure of money to acquire the land that it must contribute to the Preserve; and 2) the	2. These same two categories of expense are applicable to the MSHCP (Draft MSHCP, Section 5.1).

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funds required to administer the Conservation Program for the life of the incidental take permit. (Id.)		
3. For the land purchase, the City of San Diego estimated that it would need to acquire 2,400 acres from willing sellers at fair market costs. (Id.)		3. The Draft MSHCP specifies a purchase of 90,000 acres from willing sellers (Section 5.1.1).
4. The Conservation Program specified that the land acquisitions must be completed within 30 years. (Id.)		4. The Draft MSHCP likewise requires completion of land acquisition within 30 years (Section 5.1.2.1).
5. The City of San Diego would require continuous funding to manage the preserve, conduct biological monitoring and maintenance, and cover administration costs. (Id.)		5. The Draft MSHCP likewise requires continuous funding to manage the preserve, and conduct ongoing monitoring, maintenance, and administration (Sections 5.1.2.3 and 5.1.4).
6.A. The City of San Diego's funding was arbitrary because it identified "undependable and speculative sources for the necessary funds," in violation of the Endangered Species Act (Section 1539(a)(2)(B)(iii). (Id. at 1156.)		6.A. The Draft MSHCP has identified revenue from the Eagle Mountain Environmental Mitigation Trust Fund. However, the Draft MSHCP recognizes that "a lower court decision overturned the BLM land exchange on which the Eagle Mountain Landfill project depends, raising concern over whether the Environmental Mitigation Trust Fund can be relied upon as a revenue source for MSHCP implementation." (Section 5.2.2.4).
6.B. The City of San Diego "relied on future actions, such as a regional plan with other jurisdictions, a possible bond issue requiring voter approval, or raising the sales tax. The uncertainty of these ideas is readily apparent." (Id.)		6.B. The Draft MSHCP states, "Other potential funding sources that the Permittees could consider to substitute for future revenue not available from the Environmental Mitigation Trust Fund include: Sales tax revenues if Measure A is extended beyond 2038...Some of these funding sources would require voter approval." (Section 5.2.2.4).

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6.C. The City of San Diego was unable to "guarantee that funds for the purchase of lands in the preserve system will be available beyond those obtained through the mitigation process." (Id.)	6.C. The Draft MSHCP states, "Potential state and federal funding sources include, but are not limited to: State appropriations...State bond acts." (Section 5.2.4).
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The Plan cannot reasonably assume that a binding federal court order will be overturned, and rely upon the overturning of that federal court decision to provide adequate funding for the Plan. This method of funding by the Plan is precisely the type of speculation that resulted in the rejection of the City of San Diego's plan (Draft MSHCP, Section 5.2.2.4).

As in the federal district court case, the MSHCP cannot *ensure* adequate funding as required by the Endangered Species Act. Ensured funding is critical and mandatory (*National Wildlife Federation v. Babbitt* (E.D. Cal. 2000) 128 F.Supp.2d 1274).

The MSHCP lacks nearly half of the needed funding for implementation. Forty one percent of the \$610 million Management and Monitoring operating cost of the Plan is currently not funded. The Eagle Mountain Mitigation Trust Fund was supposed to provide operating revenue of \$247 million for the Plan. A 2005 federal court ruling has eliminated the use of Eagle Mountain Mitigation Trust Fund revenue. Yet, the Plan continues to include the revenue in funding calculations for the Plan. In reality, forty one percent (\$610,863,000/\$247,500,000) of the operating cost of the Plan is unfunded (Draft MSHCP, Section 5.2.4, Table 5-3b).

Revenue from the Eagle Mountain Environmental Mitigation Trust Fund is intended to be "used for monitoring and land management, adaptive management, plan administration, and establishment of the endowment fund." (Draft MSHCP, Section 5.2.2.4).

Thirty six percent of the land acquisition cost for the total 141,380 acres to be acquired by the Plan is unfunded – no state or federal funds are allocated for the approximately \$296 million cost. Thirty six percent (51,380 acres/141,380 acres) of the private land to be acquired for conservation under the Plan is dependant on potential state and federal funding. Using CVAG's Total 30-year Acquisition Cost of \$526,705,000 for the local share as a basis, the state and federal share may cost \$296,271,600 (\$526,705,000/64% x 36%) (Draft MSHCP, Sections 5.1.1 and 5.1.2.1).

If the Plan were to receive federal Endangered Species Act Section 6 grants equal to those being awarded to habitat conservation plans in Western Riverside County and San Diego County (typically \$5 million each per year), \$146 million of the state and federal share of the 30-year land acquisition cost would not be funded. Using the estimated state and federal cost of \$296,271,600, the state and federal share would still be underfunded by \$146,271,600 (\$296,271,600 - \$150,000,000).

For the Local Permittees' funding share, our Association's analysis of land sales data indicates that the market study used below-market land values to determine the funding for land acquisitions and for determining the development fee. The Plan is using land values that are 37

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percent of fair market value for determining the amount of money to set aside for land acquisitions and for determining the Plan's development fee amount necessary to generate the funds for the acquisition program.

Because the MSHCP presently lacks sufficient funding for implementation, the Plan would fail to meet the requirement for funding under Section 10 of the federal Endangered Species Act, and could not ensure that it would not reduce the likelihood of the survival and recovery of covered species. The MSHCP relies on speculative future actions for nearly half of the funding needed to implement the Plan. The Plan would fail to meet the requirements established by the court.

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The Plan needs to include clearly identified, secured sources of revenue for the Plan's implementation.

c. Flawed Basis of the Nexus Study for Calculation of the Development Mitigation Impact Fee

The Plan is using land values that are 37 percent of fair market value for identifying the Plan's Local Development Mitigation Fee amount necessary to generate the funds for the acquisition program. The Market Study, which uses land values at only 37 percent of fair market value, provided the basis for the Plan's local Total Acquisition Cost of \$301,459,900. The fair market value for the Total Acquisition Cost would actually be \$819,184,500 (Draft MSHCP, Section 5.1.2.1 and Appendix I, Table A5-1).

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The Total Acquisition Cost is the estimated land acquisition purchase price for the Local Permittees, and is the value being used as the basis for the Nexus Study, which would determine the development mitigation impact fee throughout the Coachella Valley. A flawed basis value would render the Nexus Study and the resulting impact fee invalid.

d. Failure to Anticipate the Cost of Regulatory Takings

The Plan unreasonably assumes that there would be no cost associated with regulatory takings. As described below in Section II.D, this assumption is based on a fundamentally flawed interpretation of U.S. Supreme Court takings jurisprudence. The Plan ignores the deprivation of the reasonable investment-backed expectations test, which does not require deprivation of all economically viable use (*Penn Central Transportation Company v. City of New York* (1978) 438 U.S. 104; *Palazzolo v. Rhode Island* (2001) 533 U.S. 606).

The Plan does not contemplate the very real possibility that large numbers of private property owners will not be "willing sellers," and will wish to develop their land for commercial or residential purposes. If these lands are now inside the Conservation Area, the full array of constitutional takings tests will be triggered, including diminution in value, denial of investment-backed expectations, and imposition of exactions, dedications and fee requirements without sufficient nexus (*Nollan v. California Coastal Commission* (1987) 483 U. 825). There is no analysis of the economic effect of the Plan on the value of this privately held land. Any attempt to impose exactions, dedications, or fee requirements on private lands outside the Conservation

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Area would be particularly susceptible to constitutional challenges. Takings would likely occur on the 51,380 acres of private land to be conserved through the use of speculative funding.

The Plan's assumption that "land in the Conservation Areas may be conserved through dedication, deed restriction, or granting of a conservation easement in conjunction with Development approvals and conservation incentives" without addressing the risk of viable constitutional takings and due process challenges, is unreasonable and renders the Plan defective (Draft MSHCP, Section E.S.4, p. ES-11).

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2. FAILURE TO USE THE BEST SCIENTIFIC AND COMMERCIAL DATA AVAILABLE

ESA Section 7(a)(2) states, "In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

ESA Section 7(c)(1) states, "If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action."

In addition to the comments herein, the Association incorporates by reference all other comment letters addressing the Plan's failure to use the best scientific and commercial data available, including but not limited to correspondence dated March 3, 2005 from Dr. Rob Roy Ramey, Ph.D. [Final MSHCP, February 2006, Comments and Responses, N09]; correspondence dated March 7, 2006 from the firm of Cox, Castle and Nicholson on behalf of the Palm Hills Land Corporation [I09]; correspondence dated March 7, 2005 from the Center for Biological Diversity [J02]; correspondence dated January 26, 2005 from the Coachella Valley Hiking Club [K02]; and correspondence dated March 6, 2005 from the Desert Riders [S02A].

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a. No Scientific Basis For Recreational Use Restrictions

An example of the Plan's failure to use "the best scientific and commercial data available" is the data used to support the Plan's current proposed restrictions on recreational use to ostensibly protect bighorn sheep.

When the human disturbance of bighorn sheep is defined as hikers on trails, available research is limited to five studies. All five studies find little to no impact of hikers upon bighorn sheep. None of these five studies provide support for the recreational use restrictions proposed in the Plan.

These studies find no incompatibility between trail users and bighorn sheep. The studies did not find that trail users adversely affect bighorn sheep. These studies found no link between trail users and the population of bighorn sheep. The studies found that sheep adapt and/or habituate to the incidence of regular and expected trail users. All five studies are summarized below as Table 3.

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Table 3
Studies on Impact of Hikers Upon Bighorn Sheep

Wehausen et al., 1977

"Bighorn Sheep Management in the Sierra Nevada," Desert Bighorn Council Transactions

Study area: California -- May-August 1976

Methods: Bighorn and hikers on Baxter Pass were observed with spotting scope and binoculars from a rock blind so that neither was aware of the observers. Also, hikers were interviewed.

Findings: First hypothesis tested: bighorn cannot tolerate repeated human presence and abandon use of areas receiving regular human use. No permanent special displacement among the sheep was found. The first hypothesis was refuted. Second hypothesis tested: frequent human encounters significantly affect the yearly nutrient budget of a bighorn due to the disruption of feeding patterns. Bighorn reaction to humans generally found to be mild. The energy cost was insignificant. The population was increasing. These findings refuted the second hypothesis.

Hicks and Elder, 1979

"Human Disturbance of Sierra Nevada Bighorn Sheep," Journal of Wildlife Management

Study area: California -- May-August 1976

Methods: Bighorn and hikers on Baxter Pass were observed with spotting scope and binoculars from a rock blind so that neither was aware of the observers. Also, hiker interviews and pellet transects.

Findings: "Foot- trails through areas of the Mt. Baxter summer range did not adversely affect sheep movements." "Bighorn-human encounters were limited to specific locations and were not adversely affecting the bighorn population." "The herd is not declining due to recreational use of the area." "Overall distribution of bighorn was related positively to food resources and not negatively to human presence and use." "Bighorn continue to return to Baxter Pass despite repeated encounters with humans, and have become conditioned to hikers on the Baxter Pass trail."

Purdy and Shaw, 1981

"An Analysis of Recreational Use Patterns in Desert Bighorn Habitat: The Pusch Ridge Wilderness Case," Desert Bighorn Council Transactions

Study area: Arizona -- Sept 1979 -- Sept 1980

Methods: photoelectric trail traffic counters, unmanned survey stations, self-administered questionnaires, telephone surveys and direct observation

Findings: Estimated average daily trail use was 72, 18 and 6 people. The majority of trail users appear to present little threat of bighorn disturbances. Most use was limited to hiking on or near trails. "desert bighorn sightings by PRW users appear to be rare occurrences."

Hamilton et al., 1982

"An Evaluation of The Effects of Recreational Activity on Bighorn Sheep in the San Gabriel Mountains, California," Desert Bighorn Council Transactions

Study area: California -- summer 1981

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Methods: Bighorn use of the mineral licks was monitored by direct observation from behind natural blinds and with the use of time-lapsed cameras. Hiker use of trails was determined from Wilderness Permits and compared with bighorn sightings recorded on topographic maps.

Findings: Study tested the hypothesis that bighorn were abandoning habitat receiving high levels of human use. "the presence of large numbers of hikers located in sheep summer range, did not cause sheep to abandon adjacent habitat." "there was no correlation between number of people using the canyon and numbers of bighorn using the mineral lick." The three most popular trails averaged 40 hikers a day. Less than 1 percent saw bighorn sheep

Wchausen, 2000

"Locations of Human Interface with Sierra Nevada Bighorn Sheep," (unpublished paper)

Study area: California – mid 70's to present

Methods: personal observation and evaluation of five Sierra Nevada herds since the 1970's.

Findings: Is human use limiting sheep population growth? "Efforts to recover these sheep need to focus on the primary factors affecting population dynamics and not place emphasis on factors like human disturbance that appear to be at most very minor influences." Sheep show a high degree of habituation to humans in predictable places. Sheep have not been displaced from their habitat. No evident conflict between human use (hikers/backpackers) and the sheep.

The Plan relies on flawed science for the Plan's proposed recreational use restrictions. The following five articles are often cited as studies on the impact of hiking upon bighorn sheep or comparing hiking versus other forms of recreational use. The Papouchis et al. 1999 and 2001 article was referenced six times (p. 14, 39, 43, 45, 83, 84) in *Recovery Plan* as an example of "human disturbance" that is detrimental to bighorn sheep

Unfortunately, these five articles adopted a methodology that can best be described as "intentional researcher/observer harassment." Harassment for research purposes is defined as intentional human disturbance, where the researcher/observer stalks or walks directly at bighorn sheep until the sheep respond, usually by fleeing their previous undisturbed location. The Researcher/Observer then records the flight behavior response of the sheep.

These articles fail to study the effect of "recreational trail users" upon bighorn sheep. The articles do confirm that when researchers intentionally stalk bighorn by walking directly at them via a cross country route, the sheep do respond. Three of the studies were conducted in areas of hunted sheep populations. The Peninsular bighorn sheep do not live in such hunted areas. Researchers agree that sheep in hunted areas have a stronger reaction to humans than sheep in non-hunted areas. These five studies are summarized below as Table 4.

Table 4
Studies Using Intentional Researcher/Observer Harassment of Bighorn Sheep

MacArthur, et al., 1979 - Canada

Title: "Factors Influencing Heart Rate in Free-Ranging Bighorn Sheep: A Physiological Approach to the Study of Wildlife Harassment,"

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Research/observer travels cross country directly stalking sheep to gage their reaction and measure heart rate response.

Research project undertaken on a hunted sheep population.

Author refers to their methodology as "standardized harassment trials"

Response of sheep greatest with appearance of free ranging dog and man with leashed dog.

MacArthur, et al., 1982 -- Canada

Title: "Cardiac and Behavioral Responses of Mountain Sheep to Human Disturbance"

Researcher/observer travels cross country directly stalking sheep to gage their reaction

Research project undertaken on a hunted sheep population.

Authors refer to their methodology as "standardized harassment trials" when field assistants directly approach sheep to gage their response. Response of sheep greatest when approached from over a ridge.

Miller and Smith, 1985 -- Arizona --

Title: "Human Activity in Desert Bighorn Habitat: What Disturbs Sheep?"

Researcher/observer travel cross country directly stalking sheep to gage their reaction.

Research project undertaken on a hunted sheep population.

Human activity consisted of one or two researcher/observers sighting sheep and then directly approaching the sheep and recording the reaction of the sheep. This is not how recreational trail users encounter sheep. Rarely will it be reported that hikers were proceeding along and there ahead of them on the trail were bighorn sheep. Instead, in rare instances, trail users might see sheep off to the side crossing a ridge line or coming down a steep cliff to drink at a watering site or stopping to watch a group of hikers pass in the dry wash below. When this happens educated trail users don't leave the trail and walk directly at the sheep, but typically stop dead in their tracks, remain quiet in hopes of soaking in a few minutes of these magnificent creatures. Walking directly at sheep is a form of harassment intent upon scaring them away. In the region of Western Arizona, the authors acknowledged hunting is an important disturbance to sheep and that walking directly at the sheep may remind sheep of hunters. This article provides no insights into recreational disturbance.

King and Workman, 1986 -- Utah --

Title: "Response of Desert Bighorn Sheep to Human Harassment: Management Implications"

Researcher/observer travel cross country directly stalking sheep to gage their reaction

Research project undertaken on a hunted sheep population.

More heavily hunted sheep responded more than less heavily hunted. Higher percentage responded, fled greater distances, were more wary and spent less time feeding.

Papouchis, C. M., et al. 1999 and 2001, -- (same article) Utah --

Title: "Responses of Desert Bighorn Sheep to Human Recreation"

Researcher/observer travel cross country directly stalking sheep to gage their reaction

Sheep were located electronically, then "field assistants" were sent off cross country directly at the sheep. This study makes the illegitimate comparison of mountain bikers and vehicles that used only park roads with "field assistants" who walked cross country directly stalking bighorn sheep. These "field assistants" were called hikers. Thus, "hikers (field assistants) surprised

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bighorns," whereas mountain bikers and vehicle did not surprise sheep. Thus, road users were compared with non-trail/road users. Sheep response was greatest when approached directly in comparison to from below or above because sheep were surprised. Authors recommend ban on "cross country hiking" which was adopted by CVAG's "trails plan."

If bighorn sheep were truly bothered by human use, then the City of Rancho Mirage would not have had to install a five-mile long fence to keep bighorn sheep from coming into the city. "We began a lamb mortality study that showed us most of the deaths were taking place in the urban areas," said Jim DeForge, founder and director of the Bighorn Institute in Palm Desert ("Bighorns Being Fenced Out To Save Their Lives," *Los Angeles Times*, January 2, 2002).

There is no controversy among the scientific studies. Controversy arises only for the trail restrictions that prove to be unsupportable by scientific data.

The precautionary approach used by the Draft Trails Plan of restricting recreation during biologically sensitive periods (e.g., lambing season and the hot season) is no more supported by scientific data than the previous trail rationing approach of restricting recreation. This precautionary approach in the revised plan amounts to no more than unscientific speculation.

The Wehausen et al., 1977 study "Bighorn Sheep Management in the Sierra Nevada," *Desert Bighorn Council Transactions* refutes both the hypotheses that "frequent human encounters significantly affect the yearly nutrient budget of bighorn due to disrupted feeding patterns and energy expended in flight" and the "precautionary" restrictions during lambing season. Data obtained on reproductive success suggested that the energetic costs associated with responding to human disturbance did not affect bighorn sheep reproductive success. While Wehausen et al. cautioned that results from this study could not be extrapolated to a situation of substantial increase in human use, records for Peninsular bighorn sheep in the Santa Rosa and San Jacinto Mountains indicate that increases in the population number of sheep have occurred in conjunction with increases in the number of hikers in the area (Draft MSHCP, Section 9.8.4.5).

The Plan should have compared the trail use data from Bureau of Land Management to the sheep population data from CVAG. This information was available to the Terra Nova consultants who wrote the EIR/EIS. Between 2001 and 2003, the estimated trail users in the Santa Rosa Mountains increased from 3,136 to 4,312 (38 percent). Over that same period in the same area, the estimated population numbers of bighorn sheep increased from 102 to 148 (45 percent). Between 2001 and 2003 - 38 percent more trail users; 45 percent more bighorn sheep. Although there is a direct correlation between trail use and bighorn population numbers, we do not suggest that hiking, recreation, and mountain biking caused the increase in bighorn sheep (Charles Nisbet, Ph.D., The Coachella Valley Hiking Club, comment letter, January 15, 2005, p. 81).

The Hicks and Elder, 1979 study "Human Disturbance of Sierra Nevada Bighorn Sheep," *Journal of Wildlife Management* was conducted from May to August 1976. The study found "Bighorns continued to return to Baxter Pass despite repeated encounters with humans, and have become conditioned to hikers..." In addition, "the overall distribution of bighorns was related

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positively to food resources and not negatively to human presence and use.” This refutes the “precautionary” restrictions during the “hot season” and helps to explain why bighorns are seen on golf courses in the Coachella Valley.

The Wehausen, 2000 study “Locations of Human Interface with Sierra Nevada Bighorn Sheep” should not be removed from the Draft Trails Plan. The study provides the basis for hypotheses to test in the Trails Plan’s adaptive management approach in the Santa Rosa and San Jacinto Mountains, given their validity in the Sierra Nevada Mountains. For example, “Efforts to recover these sheep need to focus on the primary factors affecting population dynamics and not place emphasis on factors like human disturbance that appear to be at most very minor influences. A useful exercise relative to the question of human disturbance would be to map human use patterns by intensity and changes over time to look for areas that might be of concern because of increasing trends.”

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The MSHCP must not reduce the likelihood of the survival and recovery of covered species, such as the Peninsular bighorn sheep. Management activities need to be based on scientific data, so that management activities focus on actions that actually minimize and mitigate impacts on the sheep population, such as control of mountain lion predation, rather than speculative restrictions of recreational use.

b. Flawed Basis For Habitat Distribution Models

Much of the conservation by the Plan is based on modeling of where the species likely may occur, not on actual observations of the species (Draft MSHCP, pp. ES-2, ES-5, and ES-12). The Plan uses habitat distribution models to assign theoretical habitat to private properties throughout the Plan Area. The Plan would regulate non-habitat private lands that are simply called habitat by the habitat distribution models for the Plan.

Numerous recent biological studies have been conducted on properties in the Conservation Area. These studies found that the biological conditions of these properties do not match the conditions presented by the Plan. The more landowners have biological studies prepared, the more invalid, arbitrary, and capricious the Plan’s biological modeling appears.

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For example:

Timothy and Edra Blixseth retained a team of nationally recognized experts to prepare biological assessment reports on their 2,365-acre property. These experts included: Brian W. Arnold; Steven W. Carothers, Ph.D.; Peter Woodman; Jack Turner, Ph.D.; and Robert Riha, RG, CEG. The Plan identifies the property as within planned conservation areas for Peninsular bighorn sheep and LeConte’s thrasher, prohibit development of their land. There is no property specific scientific evidence to support the conservation designations. Based upon site-specific scientific evidence, there is no evidence that the land constitutes a habitat for either the bighorn sheep or the LeConte’s thrasher, or that the land is occupied by, or exhibits use by, the bighorn sheep or the LeConte’s thrasher (Timothy and Edra Blixseth comment letter, March 4, 2005).

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Wind Energy Partnership, L.P. completed a biological study of 2,400 acres of their property in the Conservation Area (L&L Study 2005). Regarding species modeled to be on the property by the Plan, the study found, "No threatened or endangered plant or animal species were detected during the present study. With the exception of the desert tortoise, no federal or state listed endangered or threatened species have a high, moderate or low-moderate potential to occupy the site." One borrowing owl was found on the 2,400 acres (Wind Energy Partnership, L.P. comment letter, March 1, 2005).

Kent Seatech Corp. retained Thomas Leslie Corporation to conduct a Biological Constraints Analysis ("BCA") for their 320-acre "Expansion Property" on January 25, 2005. The BCA concludes that the Coachella Valley Stormwater Channel and Delta Conservation Area's conservation goals are infeasible, due to the fact that no listed threatened or endangered or unlisted special-status plant species, or CV-MSHCP Covered Species are recorded on, or were observed onsite. "None are expected to occur onsite due to the absence of suitable habitat." (Kent Seatech Corp. comment letter, March 7, 2005).

Bruce E. Nott retained JWC Ecological Consultants to perform an objective and impartial biological study of his 80-acre parcel, using on-the-ground surveys. He concluded that the parcels did not warrant inclusion within the Coachella Valley Stormwater Channel and Delta Conservation Area because the parcel did not harbor or support any special status species or Covered Species, nor did it contain any rare or important habitat types, only alkali scrub community (Bruce E. Nott, comment letter, February 17, 2005).

A-1 Aggregates funded numerous biological studies of an adjacent 45-acre property leased from the Bureau of Land Management. The Thousand Palms Conservation Area shows the property as Core Habitat for the Palm Springs pocket mouse. The studies found no indication that the area is habitat for the Palm Springs pocket mouse. Also, the Coachella Valley fringe-toed lizard, Flat-tailed horned lizard, and the Coachella Valley milk vetch were determined to be absent from the site (A-1 Aggregates comment letter, January 15, 2005).

The Galway Trust's on the ground observations of their 500-acre property indicates that the property is not used by bighorn sheep or any of the other covered species. Yet, the San Jacinto and Santa Rosa Mountains Conservation Area shows the property as bighorn sheep habitat (The Galway Trust comment letter, February 3, 2005).

The *HCP Handbook* states that habitat conservation plan boundaries should be as exact as possible: "Delineation of HCP Boundaries. HCP boundaries should encompass all areas within the applicant's project, land use area, or jurisdiction within which any permit or planned activities likely to result in incidental take are expected to occur. HCP boundaries should also be as exact as possible to avoid later uncertainty about where the permit applies or where permittees have responsibilities under the HCP." (HCP Handbook, p. 3-11).

A natural community conservation plan is required to show that its determination is based on localized conditions.

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The Plan's habitat distribution models are not supported by localized scientific data. Rather, the recent localized scientific studies cited above, conducted on more than 5,000 acres, without exception, prove the models to be invalid.

As more accurate, localized scientific data becomes available, Permittees should be allowed to make a decision about the conservation value of these lands on the basis of the more recent data. The Permittees should be allowed to alter the boundary of the Conservation Area on the basis of the recent data, without a Plan amendment.

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c. No Scientific Basis for the Size of the Reserve

The reserve design process was developed to include habitat representing the full range of environmental conditions that could be occupied by each covered species with the Plan Area. The habitat distribution models were developed to include occupied as well as potential habitat to provide flexibility in the face of changing environmental conditions (Draft MSHCP, Section 9.1.1).

The reserve design process has lost site of the purpose of habitat conservation plans. Habitat conservation plans are not recovery plans. The standard for their approval is not a contribution toward recovery, but rather requires minimization and mitigation of permitted "take" of the species and avoidance of jeopardy to the species. The reserve design functions as a recovery plan. The reserve design should be developed based on scientifically supportable localized data to mitigate permitted "take."

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The Plan lacks biological data to justify the size of the Conservation Area/Reserve. The Cities of Palm Springs, La Quinta, and Cathedral City, and the City of Desert Hot Springs in letters to the Coachella Valley Association of Governments dated June 21, 2002 and June 3, 2002 respectively, have expressed concern that additional lands are being designated for conservation without a scientific basis.

d. Use of Old and Outdated Data

The data used to construct the Conservation Areas does not appear to be the best available scientific data, but rather data that is more than ten years old. For example, initial biological surveys, which were used to develop the initial Natural Communities Map, were conducted in 1995 through 1996. The Natural Communities Map was refined and the initial Habitat Distribution Models developed in 1997 through 1998 (Draft MSHCP, p. 3-5).

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e. Failure to Use Peer-Review Studies

Stringent new peer-review requirements have been imposed on federal agencies, including the U.S. Fish and Wildlife Service, and are applicable to the Plan. However, the Plan fails to acknowledge significant peer-review studies, including "Determination of Critical Habitat for the Endangered Bighorn Sheep in Southern California," by Drs. Turner, Douglas, Hallum, Krausman

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and Ramey, as well as metadata files from the California Department of Fish and Game regarding Peninsular bighorn sheep.

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f. Failure to Use the Best Scientific and Commercial Data Available for the Coachella Valley Fringe-toed Lizard

Recent scientific data shows that the Coachella Valley fringe-toed lizard is genetically and morphologically the same as the nearby Colorado Desert fringe-toed lizard and is not a subspecies or distinct population segment, and therefore should be de-listed as a federal threatened and state endangered species.

It is likely that if the available scientific data is considered when the Coachella Valley fringe-toed lizard receives a five-year review by the U.S. Fish and Wildlife Service on the status of the species, that the species would no longer be regarded as a subspecies or distinct population segment. The scientific data that has not been considered regarding the status of the Coachella Valley fringe-toed lizard is summarized below as Table 5.

Table 5
Studies of Coachella Valley Fringe-Toed Lizard

Cornett, 1982

"Interbreeding Between *Uma Inornata* and *Uma Notata*," The Southwestern Naturalist, Vol. 27, No. 2, May 1982, p. 223.

Study area: California – May 5, 1980

Methods: A captive male Coachella Valley fringe-toed lizard (*Uma Inornata*) was observed breeding with a captive female Colorado Desert fringe-toed lizard (*Uma Notata*).

Findings: "This observation suggests a lack of behavioral isolating mechanisms between these two species and tends to support the conclusions of Adest (1977) and Zalusky (1980) that [the Colorado Desert fringe-toed lizard] *U. notata* and [the Coachella Valley fringe-toed lizard] *U. inornata* are the same species [Adest, Copeia, 1977:47-52, 1977; Zalusky et al. Copeia, 1980:296-310, 1980]."

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Trépanier and Murphy, 2001

"The Coachella Valley Fringe-Toed Lizard (*Uma inornata*): Genetic Diversity and Phylogenetic Relationships of an Endangered Species," Molecular Polygenetics and Evolution, Vol. 18, No. 3, March 2001, p. 327-334.

Study: Centre for Biodiversity and Conservation Biology, Royal Ontario Museum, 100 Queen's Park, Toronto, Ontario, M5S 2C6, Canada and Department of Zoology, University of Toronto, 25 Harbord Street, Toronto, Ontario, M5S 3G5, Canada

Methods: Evaluation of 1630 combined nucleotide sequence from the mitochondrial genes ATPase 6 and cytochrome *b* yielded 10 most parsimonious trees. Reweighting the characters using the rescaled consistency index eliminated eight of these trees. The remaining two trees differ only in the placement of two individuals.

Findings: "The preferred phylogeny, one more consistent with geography, had two primary clades: [A clade is "a monophyletic taxon; a group of organisms which includes the most recent

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common ancestor of all of its members and all of the descendants of that most recent common ancestor. From the Greek word 'klados,' meaning branch or twig." one consisting of *U. scoparia* and the other placing [the Coachella Valley fringe-toed lizard] *U. inornata* inside the clade [group] containing [the Colorado Desert fringe-toed lizard] *U. notata*. In the two species classification, [the Coachella Valley fringe-toed lizard] *U. inornata* would not be recognized as species. *Uma inornata* was most closely related to nearby *U. notata notata* as opposed to the more distant *U. notata rufopunctata*." Personal communication from Cameron Barrows, Preserve Manager of the Coachella Valley Preserve for the Coachella Valley fringe-toed lizard, was the "scientific" basis given for keeping the Coachella Valley fringe-toed lizard a separate species.

Ventrolateral pigmentation bars or spots are present in some individuals of Coachella Valley fringe-toed lizard. Such variation seems to be common. Norris (1958) concluded that dorsal color was a response to sand color (Trépanier, T.L. and Murphy, R.W., "The Coachella Valley Fringe-Toed Lizard (*Uma inornata*): Genetic Diversity and Phylogenetic Relationships of an Endangered Species," *Molecular Polygenetics and Evolution*, Vol. 18, No. 3, March 2001, p. 332).

Additional studies include evidence in the following fields: morphological (Zalusky 1980); biochemical (Adest 1977) and deQueiroz (1992); and behavioral (Carpenter 1967).

The Plan's failure to use "the best scientific and commercial data available" would violate the federal Endangered Species Act, Sections 7(a)(2) and 7(c)(1) requirements.

B. VIOLATIONS OF CALIFORNIA FISH AND GAME CODE

1. FAILURE TO PROVIDE ADEQUATE FUNDING FOR THE PLAN

The California Fish and Game Code, Section 2081(b)(4) states, "The applicant shall ensure adequate funding to implement the measures required by paragraph (2), and for monitoring compliance with, and effectiveness of, those measures."

The inadequate funding discussed above in Section II.A.1.a, would violate the California Fish and Game Code, Section 2081(b)(4) requirement.

2. FAILURE TO USE THE BEST AVAILABLE SCIENCE

The California Fish and Game Code, Section 2081(c) states, "The department shall make this determination based on the best scientific and other information that is reasonably available..."

The California Fish and Game Code, Sections 2820(a) and 2820(a)(6) state, "The department shall approve a natural community conservation plan for implementation after making the following findings, based upon substantial evidence in the record: The plan contains specific conservation measures that meet the biological needs of covered species and that are based upon

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the best available scientific information regarding the status of covered species and the impacts of permitted activities on those species.”

The California Fish and Game Code, Section 2820(f)(1)(C) states, “The use of the best available science to make assessments about the impacts of take, the reliability of mitigation strategies, and the appropriateness of monitoring techniques.”

The Plan’s failure to use “the best available science” discussed above in Section II.A.2 would violate the California Fish and Game Code, Sections 2081(c), 2820(a)(6), and 2820(f)(1)(C) requirements.

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Cont.

C. NOT REASONABLY RELATED TO A LEGITIMATE STATE INTEREST

A project description must state the objectives sought by the proposed project. The statement of objectives should include the underlying purpose, and should be clearly written to guide the selection of alternatives to be evaluated in the EIR (CEQA Guidelines Section 15124(b)).

The EIR/EIS, p. 1-4 states, “The specific purpose of the Proposed Action:

- To protect, conserve, and enhance species and associated habitats for the continuing benefit of the people of the United States.
- To provide a means and take steps to conserve the ecosystems depended on by species.
- To ensure the long-term survival of species thorough protection and management of the species and associated habitats.
- To ensure compliance with the FESA, NEPA, and other applicable Federal laws and regulations.”

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The EIR/EIS, p. 1-6 states, “The primary goals and objectives of the MSHCP are to:

- Obtain permits from the Wildlife Agencies to Authorize take for the Covered Activities.
- Protect Core and Other Conserved Habitat for 27 proposed Covered Species and 27 natural communities, maintain the Ecological Processes to keep the Core Habitat viable and link core habitat to maximize the conservation value of the land within the Coachella Valley.
- Improve the future economic development in the Plan Area by providing an efficient, streamlined regulatory process through which development can proceed in an efficient way. The proposed Plan is intended to provide a means to standardize mitigation/compensation measures for the Covered Species so that, with respect to public and private development actions, mitigation/compensation measures established by the

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Plan will concurrently satisfy applicable provisions of Federal and State laws pertaining to species protection.

- Provide for permanent open space, community edges, and recreational opportunities, which contribute to maintaining the community character of the Coachella Valley."

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Cont.

1. THE PURPOSE OF THE PROPOSED ACTION CANNOT BE ACCOMPLISHED BY THE PLAN

As shown above in Section II.A.1., the inadequate funding for the Plan would prevent the Plan from acquiring the conservation land required by the Plan to conserve and enhance species and associated habitats or to protect habitat for 27 proposed covered species and 27 natural communities.

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Therefore, the specific purpose of the Proposed Action cannot be accomplished by the Plan as it is currently drafted.

2. LOSS OF PERMITS FROM THE WILDLIFE AGENCIES

Furthermore, MSHCP Section 6.7 states, "If the Local Permittees do not maintain 'rough proportionality' between Development and Conservation, the Wildlife Agencies, CVCC and other applicable Local Permittees shall meet to discuss potential actions to meet the Plan's Rough Proportionality requirements. In the event that these Parties do not reach agreement on such potential actions, the Wildlife Agencies may initiate revocation or suspension of all or part of the Permits as set forth in Section 23.5 of the IA [Implementing Agreement]."

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Because the Plan fails to provide sufficient funding for land acquisitions, it appears unlikely that most conservation lands would ever be acquired by the Plan. If conservation of lands is insufficient, then the U.S. Fish and Wildlife Service and the California Department of Fish and Game (Wildlife Agencies) could revoke the take permits sought by the Plan for Covered Activities.

3. HARM TO FUTURE ECONOMIC DEVELOPMENT IN THE PLAN AREA

The Plan would harm future economic development in the Plan Area through the creation of a burdensome regulatory process within the Conservation Area, the creation of an additional bureaucracy further complicating project review, and the imposition of a substantial development mitigation fee of \$5,730 per acre outside the Conservation Area. The uncertainty from the potential revocation of take permits for Covered Activities would be worse for business planning than the status quo, which currently has no such encumbrance.

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a. Burdensome Regulatory Process

Landowners processing development applications in portions of the Santa Rosa and San Jacinto Mountains Conservation Area would be subject to the proposed Habitat Evaluation and

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Acquisition Negotiation Strategy (IANS) process. A flow chart of the project approval process on lands within portions of the Santa Rosa and San Jacinto Mountains Conservation Area is shown as Figure 2. If the property involves a dispute between the landowner and the local jurisdiction, the HANS process can take up to 5½-years.

If the HANS process involves the acquisition of private land for conservation, at the end of the HANS process, landowners are merely placed on a waiting list indefinitely until funding for the acquisition of private land may become available. There is no assurance that sufficient funds would ever become available. The Plan establishes a process that exempts the Cities and County from the consequences of a lack of funding, so they lack an incentive to ensure that funds would ever become available for landowners. The Plan is designed to allow the government to outwait landowners (Draft MSHCP, p. 6-30).

Instead of waiting indefinitely for acquisition of their properties, landowners may process a development application that, ultimately, may be unacceptable to the Wildlife Agencies, resulting in the loss of the permits for the project, rendering the Cities' or County's development approvals useless (Draft MSHCP, p. 6-30).

The Plan requires numerous species surveys for development within Conservation Areas (Draft MSHCP, Section 4.4). For example:

- "Prior to Development, the construction area and adjacent areas...will be surveyed by an Acceptable Biologist for burrows that could be used by burrowing owl" (Draft MSHCP, p. 4-195).
- "If surveys conducted during the nesting season [for riparian bird species] document that Covered nesting riparian bird Species are not present, the project may proceed" (Draft MSHCP, p. 4-197).
- "In modeled crissal thrasher Habitat...surveys will be conducted by an Acceptable Biologist prior to the start of construction activities" (Draft MSHCP, p. 4-197).
- Within Conservation Areas, the Permittees will require surveys for desert tortoise for Development in modeled desert tortoise Habitat" (Draft MSHCP, p. 4-189).
- "In modeled Le Conte's thrasher Habitat in all the Conservation Areas...prior to the start of construction activities, surveys will be conducted by an Acceptable Biologist." (Draft MSHCP, p. 4-202).
- "For Covered Activities within modeled triple-ribbed milkvetch Habitat...surveys by an Acceptable Biologist will be required." (Draft MSHCP, p. 4-203).

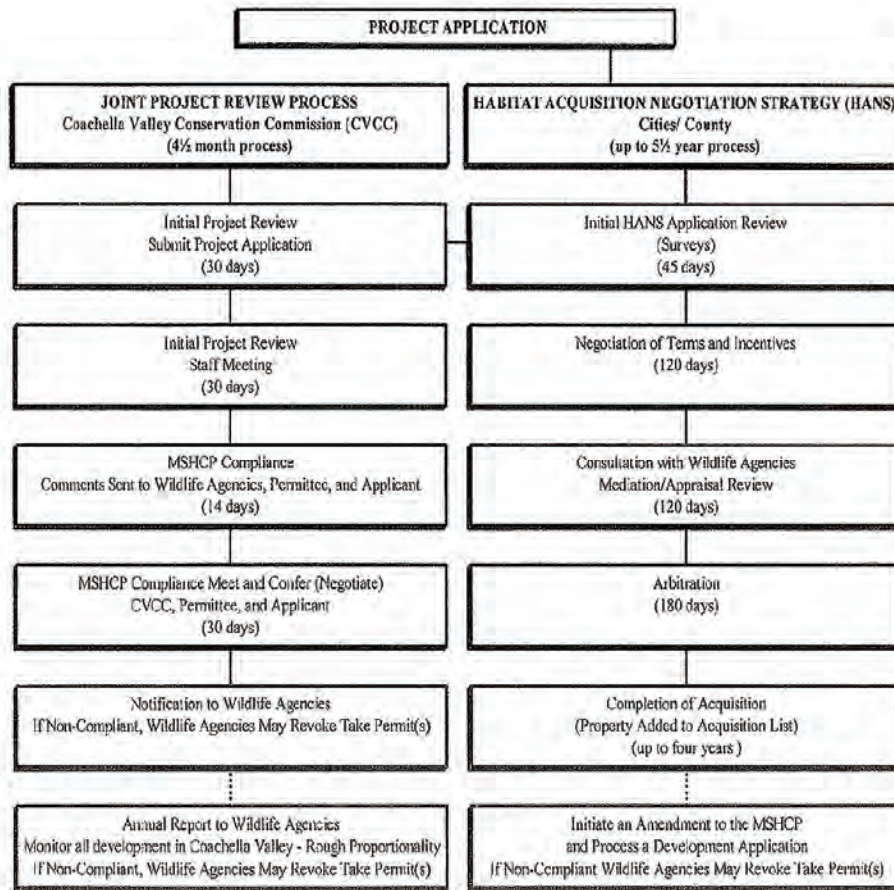
The Plan requires projects to conform to land use adjacency guidelines (Draft MSHCP, Section 4.5). The purpose of the land use adjacency guidelines is to avoid or minimize indirect effects of development adjacent to or within the Conservation Areas. These indirect effects are commonly referred to as edge effects, which include: noise, lighting, drainage, intrusion of people, and the introduction of non-native plants and non-native predators such as dogs and cats.

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Figure 2

PROJECT APPROVAL PROCESS
COACHELLA VALLEY MSHCP
SANTA ROSA AND SAN JACINTO MOUNTAINS CONSERVATION AREA



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b. New Bureaucracy Reporting to the Wildlife Agencies

When a project falls within a Conservation Area, it is subject to review by the Joint Powers Authority termed the Coachella Valley Conservation Commission (CVCC) (Draft MSHCP, Section 6.6.1.1). The CVCC would act as an oversight agency on local governments, and would report to the U.S. Fish and Wildlife Service and the California Department of Fish and Game (Wildlife Agencies). The CVCC would function as an additional bureaucracy further complicating project review.

A copy of the project application would be forwarded to the CVCC for their review under the Joint Project Review Process, shown as Figure 2 above. The CVCC staff would provide comments to the: applicant; local jurisdiction; and Wildlife Agencies within 30 days, stating whether the project is consistent with the Conservation Objectives. If the project is not deemed consistent by the end of the CVCC's review process, then the CVCC would notify the Wildlife Agencies that the project is noncompliant with the MSHCP. The Wildlife Agencies could then revoke the "take" permit for the specified covered activity (Draft MSHCP Implementing Agreement, Section 23.5).

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The CVCC would administer the Plan, and would notify the Wildlife Agencies of proposed infrastructure projects. The CVCC would review all of the city's and County's (Local Permittees) proposed infrastructure projects that have the potential to affect connectivity of habitat within the Conservation Areas. The Plan thereby would create an additional bureaucracy to review the decisions of cities, adding additional layers of governmental reviews to the infrastructure project approval process. The Reserve Management Oversight Committee would coordinate implementation of the Plan (Draft MSHCP, Section 6.1.3).

c. Wildlife Agencies Oversight of Cities

Under the Plan, local jurisdictions would be held accountable to the terms of the MSHCP and the MSHCP Implementing Agreement by the Wildlife Agencies. The very purpose of the MSHCP Implementing Agreement is to assure the Wildlife Agencies that the cities or County are not free to implement the Plan any way they want. The Plan is written in such a manner as to make the Wildlife Agencies the ultimate land use authority in the Coachella Valley.

The Wildlife Agencies would be active participants in the infrastructure project approval process. The proposed infrastructure project review process would begin and end with the Wildlife Agencies. The terms of the proposed review process, enforced by the Wildlife Agencies, include:

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- "within fourteen (14) calendar days after an initial project review meeting...CVCC staff shall prepare and distribute comments that address the proposed project's consistency with the Conservation Area Conservation Objectives. The comments shall be sent to the...Wildlife Agencies. CVCC shall also send the Wildlife Agencies a copy of the project application" (MSHCP, p. 6-20).

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- "If the inconsistencies cannot be resolved, CVCC will provide written notice to... the Wildlife Agencies" (MSHCP, p. 6-21). The Wildlife Agencies shall then have the right to revoke or suspend all or portions of the Permits as set forth in Section 23.5 of the Implementing Agreement.

Revocation of the take permits by the Wildlife Agencies may be triggered by approval of a proposed development or public project that significantly compromises the viability of the Conservation Area or if the action fails to substantially comply with the terms of the Plan.

The proposed project review process constitutes an enormous overreach by the Wildlife Agencies, and appears to be an attempt by the Wildlife Agencies to acquire power over local governments.

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Cont.

d. Loss of Local Land Use Authority

The Plan puts local jurisdictions under federal oversight. The Wildlife Agencies would monitor development in the Coachella Valley to impose a "rough proportionality" ratio of conserved land to developed land on the Plan Area. If the Coachella Valley does not grow in the manner that the Wildlife Agencies wish, the Agencies can revoke the "take" permits needed by local jurisdictions, overriding the Cities' or County's (Local Permittees) land use authority. The Wildlife Agencies would monitor development in the Coachella Valley through the CVCC's GIS database. The CVCC would give their GIS database to the Wildlife Agencies annually.

"Rough proportionality" is defined in MSHCP Section 5.2.2.3, which states that acreage developed in the Plan Area must be roughly proportional to the acreage conserved. The cities are obligated to conserve 96,400 acres within 30 years.

The way the term rough proportionality is used in the Plan, it amounts to a conservation acreage quota that the cities must meet every five years as shown in Table 6. To derive the conservation acreage quota for each five-year period, multiply each of the percentages shown by the 96,400-acre conservation obligation (MSHCP Section 5.2.2.3). For example, half of the land is to be acquired within 15 years, and the remainder within 30 years.

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Table 6
Rough Proportionality/ Conservation Quota

Year	Test for Rough Proportionality – Percent of Conservation Obligation Conserved	Conservation Quota Acres
5	17%	16,388
10	33%	31,812
15	50%	48,200
20	67%	64,588
25	83%	80,012
30	100%	96,400

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Section 5.2.2.3 states, "If at the end of any five (5) year period the rough proportionality test has not been met, the Permittees and the Wildlife Agencies will meet within 90 days to begin to develop a strategy to address the need for a balance between Conservation and Development."

MSHCP Section 6.7 states, "If the Local Permittees do not maintain 'rough proportionality' between Development and Conservation, the Wildlife Agencies, CVCC and other applicable Local Permittees shall meet to discuss potential actions to meet the Plan's Rough Proportionality requirements. In the event that these Parties do not reach agreement on such potential actions, the Wildlife Agencies may initiate revocation or suspension of all or part of the Permits as set forth in Section 23.5 of the IA [Implementing Agreement]." Revocation of the take permits may also be triggered by approval of a proposed project that significantly compromises the viability of the Conservation Area.

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e. Loss of Needed Local Infrastructure Projects

The cities have numerous highway improvement projects covered by the Plan. The Plan states that in order to maintain coverage for the projects, "The Local Permittees must also comply with all other terms and conditions of the MSHCP...including, but not limited to: Ensure that habitat preservation is occurring in rough proportionality with Development" (Draft MSHCP Sections 7.2.3 and 6.6.1). "If the Local Permittees do not maintain 'rough proportionality' between Development and Conservation...the Wildlife Agencies may initiate revocation or suspension of all or part of the Permits" (Draft MSHCP Section 6.7). If the cities don't meet their conservation acreage quota, they can lose their permits.

Because the Plan fails to provide adequate funding for land acquisitions, conservation lands might not be acquired by the Local Permittees for the Plan. Yet, the Plan's "rough proportionality" test permits development and infrastructure projects only in proportion to the amount of land conserved by the Plan.

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If conservation of lands is insufficient, then the Wildlife Agencies could revoke the take permits for highway improvement projects needed by the cities.

If conservation of lands is inadequate, then the proposed development and infrastructure projects would fail to substantially comply with the terms of the MSHCP, and the Wildlife Agencies could revoke the take permits for infrastructure projects needed in the Coachella Valley. The Plan could result in needed infrastructure projects being denied by the Wildlife Agencies.

If the Wildlife Agencies do not plan to hold Local Permittees to the terms of the MSHCP and Implementing Agreement, then the Agencies should agree to a change in the wording of these documents, and the documents should first be revised before jurisdictions are asked to comply with the documents.

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f. No Regulatory Certainty

The Wall Street Journal October 25, 1999 article "Truth in Economics," discusses 1999 Nobel Prize winning economist Robert Mundell's understanding that the less people are forced to contend with meddling by governments and the more they are allowed to plan securely and keep the proceeds of their own work, the more innovative and productive they will become – and the more prosperous the world will be. Stability, certainty, and the rule of law allow businesses to plan securely.

The Secretary of the Interior issued a "No Surprises" policy in 1994, which was intended to assure landowners participating in a habitat conservation plan that no additional land, land use restrictions, or financial compensation will be required from them in connection with their lawful land development activities so long as the habitat conservation plan is properly functioning.

The reason for voluntary participation by landowners and cities in a habitat conservation plan for proposed projects is the regulatory certainty regarding environmental requirements provided by the No Surprises policy.

The environmental organization, Spirit of the Sage Council, filed a lawsuit against the Department of the Interior, challenging the No Surprises policy as a violation of the Endangered Species Act, saying that the policy offers no protection for threatened or endangered species (*Spirit of the Sage Council, et al. v. Norton*, (D.C. Cir. 2003)).

On May 31, 2005, the U.S. Court of Appeals for the D.C. Circuit decided that the appeals filed by the Federal Government and the National Association of Homebuilders (NAHB) were moot, because the government complied with and completed the mandated public comment process. The D.C. Circuit also vacated all of Judge Sullivan's prior rulings. The slate is now wiped clean; both the No Surprises Rule and the Permit Revocation Rule currently remain in effect, and the U.S. Fish and Wildlife Service will continue to issue permits with the valuable no surprises assurances.

However, in November 2005, the Spirit of the Sage Council again challenged the No Surprises Rule in the U.S. District Court for the District of Columbia. Their principal argument is that the rules are not consistent with the core objective of the Endangered Species Act to further the recovery of listed species. NAHB completed its briefing defending the merits of the No Surprises Rule in September 2006. Oral argument has been scheduled for the end of May 2007. An appeal to the D.C. Circuit is anticipated in any event (National Association of Homebuilders, *Spirit of the Sage Council v. Norton*, May 2007 and Meyer Glitzenstein & Crystal, "No Surprises" Rule, May 2007).

The No Surprises policy may be eliminated by the pending case – "We'll be looking at other legal options on how to best address the latest version," stated Leona Klippstein, Executive Director of the Spirit of the Sage Council ("Federal Government Rules on Assurances for Endangered Species," *World-Wire*, December 13, 2004).

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Without the regulatory certainty provided by the No Surprises policy, no property is exempt from potential land use restrictions. Without the No Surprises policy, if an activist group files a lawsuit on a project or an agricultural land conversion on the basis of "unforeseen circumstances" in the Plan, the project or land conversion could be denied a "take" permit, or could be required to provide additional land or financial compensation, or could be subject to land use restrictions. Lands presently designated agriculture outside the Conservation Area could be re-designated conservation habitat and added to the Conservation Area lands, exposing growers to the taking of private property. Private lands could be taken due to "unforeseen circumstances" for theoretical habitat corridors that would require no current mitigation if the Plan did not exist.

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Without the regulatory certainty provided by the No Surprises policy, cities, landowners, growers, developers, and builders would be better off under current regulations than under the proposed MSHCP.

4. REDUCED RECREATIONAL OPPORTUNITIES

The Plan restricts public access on public lands that have been designated for recreational use, through restrictions on trail use, cross-country travel, mountain biking, and camping. Some trails are closed by the Plan and others are subject to seasonal closures (Draft MSHCP p. ES-27).

The federal Santa Rosa and San Jacinto Mountains National Monument Act of 2000, authorizing the creation of the Santa Rosa and San Jacinto Mountains National Monument states that "the management plan...shall include provisions to continue to authorize the recreational use of the Monument, including such recreational uses as hiking, camping, mountain biking, sightseeing, and horseback riding..."

Yet the Plan contains restrictions on trail use, purportedly to protect bighorn sheep, but offers no scientific justification (Draft MSHCP, Section 7.3.3).

The Purpose Statement for Joshua Tree National Park states, "Joshua Tree National Park's purpose is to preserve the character and values of wilderness while providing recreational opportunities..."

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Yet the Plan restricts access into the Joshua Tree National Park Conservation Area, and requires hikers to stay on designated trails (Draft MSHCP, Sections 4.1.1, 7.3.3, and 7.3.4). Joshua Tree National Park would have to implement the Plan's restrictions.

The recreational use restrictions on lands currently designated for recreational use are the exact opposite of the Plan's stated goal to provide recreational opportunities. No scientific basis is presented for the recreational use restrictions.

Rather than serving as open space, the Conservation Area functions as Closed Space.

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D. TAKING OF PRIVATE PROPERTY AND DUE PROCESS VIOLATIONS

1. CONSTITUTIONAL PROTECTION

The Fifth Amendment to the U.S. Constitution states "...nor shall private property be taken for public use, without just compensation."

When an owner of private property is called upon to leave property economically idle and to sacrifice all economically beneficial use of the property in the name of the common good, there is a taking of private property, requiring just compensation (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003).

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In addition, the imposition of a mitigation fee or dedication of land as a precondition to development is invalid if not substantially related to the impact created by the development (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825). The Plan's development mitigation fee is described in Section IV. A.5 and IV. A.6 below.

2. LANDOWNERS' ECONOMIC LOSSES

a. Devaluing of Private Property

The Plan would designate 220,890 acres of private property as habitat – an area nearly the size of the City of Los Angeles. The total Conservation Area would cover 747,600 acres – an area the size of Orange County and the City of Los Angeles combined. Ultimately, development and other productive land uses would be prohibited on 220,890 acres of private property, which would be designated as a Conservation Area for wildlife habitat.

The Plan would restrict the ability of property owners to use their land, which would devalue their property. The Plan would prohibit development and other productive land uses on land designated for habitat conservation, regardless of existing zoning or land use entitlements. Land designated for habitat conservation would be restricted to uses compatible with habitat, impairing its marketability, and causing its value to plummet from its zoned value to the value of wildlife habitat. Private lands that would have had a much higher value in other uses would only have a fraction of that value by being designated as habitat.

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Unless the Coachella Valley Conservation Commission (CVCC), which would oversee the implementation of the Plan, would acquire private lands at fair market value, the economic losses to landowners, caused by having private property designated as habitat for public use, would be borne by landowners.

b. Failure to Provide Just Compensation

Thirty six percent (51,380 acres/141,380 acres) of the private land yet to be acquired for conservation under the Plan is dependant on state and federal funding. Currently, there are no state or federal funds allocated for the Plan. Therefore, the Plan starts with essentially a 36

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percent acquisition-funding shortfall. So for the 36 percent of lands to be acquired through state and federal funding, landowners could expect to have their land investments completely wiped out, which for many is their retirement.

Sixty four percent of the private land to be acquired for conservation is dependant on local funding. However, the Plan fails to accurately estimate land acquisition costs, and therefore fails to set aside the revenue needed by Local Permittees to acquire private lands for conservation. The Market Study land values used to estimate the acquisition cost of land appear to be 37 percent of the actual fair market values.

The \$526.7 million Total 30-year Acquisition Cost presented by the Plan pales in comparison to the \$2.2 billion Total 30-year Acquisition Cost actually needed for acquisition of all private land within the Conservation Area.

Therefore it appears that the land acquisition cost for the Plan has been greatly underestimated, and that the Plan would set aside only 24 percent of the revenue that is needed to complete the acquisition of private lands for conservation called for by the Plan.

Landowners processing development applications in portions of the Santa Rosa and San Jacinto Mountains Conservation Area would be subject to the proposed Habitat Evaluation and Acquisition Negotiation Strategy (HANS) process. A flow chart of the project approval process on lands within portions of the Santa Rosa and San Jacinto Mountains Conservation Area is shown above as Figure 2. If the property involves a dispute between the landowner and the local jurisdiction, the HANS process can take up to 5½-years.

If the HANS process involves the acquisition of private land for conservation, at the end of the HANS process, landowners are merely placed on a waiting list indefinitely until funding for the acquisition of private land may become available. There is no assurance that sufficient funds would ever become available. The Plan establishes a process that exempts the Cities and County from the consequences of a lack of funding, so they lack an incentive to ensure that funds would ever become available for landowners (Draft MSHCP, p. 6-30).

Instead of waiting indefinitely for acquisition of their properties, landowners may process a development application that, ultimately, may be unacceptable to the Wildlife Agencies, resulting in the loss of the permits for the project, rendering the Cities' or County's development approvals useless (Draft MSHCP, p. 6-30).

Landowners who bought property in the proposed Conservation Area at fair market value would have it devalued by the Plan. The money people expended to acquire their lands may never be recouped, leaving people far worse off financially. Should landowners simply abandon their properties and default on their taxes, the County Economic Development Agency has established a process by which these properties can be dedicated for habitat conservation. The Plan is designed to allow the government to outwait landowners. The Plan would cause a regulatory taking of private property and inverse condemnation for landowners in the Conservation Area on its face and as-applied.

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There is no rational nexus between the required mitigation and the impacts of new development in the Plan Area. The amount of required mitigation is not roughly proportional to the impacts. This is a violation of long standing U.S. Supreme Court precedent (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374, 114 S.Ct. 2309).

It is well settled that a governmental entity is liable for a taking, even if the taking is only "temporary" (*First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 U.S. 304). Prohibiting development of a property with no certainty of acquisition would constitute a development moratorium on the landowner. State law authorizes the imposition of a moratorium, but it must be adopted by four-fifths vote of the legislative body, and at a maximum, may only have a duration of two years (Govt. Code Section 65858).

In addition, a substantial number of landowners in the Conservation Area would be denied the economic use of their property, and would lose the value of their investment-backed expectations, constituting a taking of private property for public use without just compensation. There need not be a complete deprivation of value for a taking to occur. Factors set forth in a U.S. Supreme Court precedent, *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, are relevant to a regulatory taking analysis.

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The Court in *Penn Central* identified several factors that had particular significance for evaluating regulatory takings claims. Primary among these factors are the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with distinct investment-backed expectations.

The Plan fails to acknowledge the very real possibility that a number of affected property owners would have viable Fifth Amendment takings claims, even if these property owners do not suffer a total and complete diminution in value. Complete diminution in value is arguably only one narrow takings test, and has no relevance to the takings analyses in *Penn Central*. The Plan's failure to budget any cost for regulatory takings is a paramount defect in the total anticipated cost of the Plan, and is a further deficiency in the funding program for the Plan.

c. Due Process Violations

The Plan is not reasonably related to a legitimate governmental interest, as discussed above in Section II.C. The Plan is subject to constitutional substantive and procedural due process challenges. Recently, the U.S. Supreme Court confirmed the constitutional viability of due process challenges, and recognized that "if a government action is found to be impermissible – for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action." (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528). In addition, there is no rational nexus between the impacts of new development from individual landowners and the required mitigation.

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The Plan fails to address the very real possibility that the entire Plan would be invalidated, as it is not reasonably related to a legitimate state interest, independent of the traditional takings analysis.

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d. Boundary for Inclusion of Private Properties in the Conservation Area is Arbitrary and Capricious

Much of the conservation by the Plan is based on modeling of where the species likely may occur, not on actual observations of the species (Draft MSHCP, pp. ES-2, ES-5, and ES-12). The Plan uses habitat distribution models to assign theoretical habitat to private properties throughout the Plan Area. The Plan would regulate non-habitat private lands that are simply called habitat by the habitat distribution models for the Plan.

Numerous recent biological studies have been conducted on properties in the Conservation Area. These studies, cited above, found that the biological conditions of these properties do not match the conditions presented by the Plan. The more landowners have biological studies prepared, the more invalid, arbitrary, and capricious the Plan's biological modeling appears.

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The inaccurate habitat distribution descriptions in the Plan must be revised to accurately reflect the current conditions. Otherwise, private property owners and decision makers would be basing their decisions on inaccurate information. The Plan must present actual evidence that a species is likely to be harmed and a rational basis (*National Association of Home Builders v. Norton*, 340 F. 3d 835, 852 (9th Cir. 2003), *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947), and *Idaho Watersheds Project v. Jones* C.A.9 (Idaho) 127 Fed.Appx. 976 (2005) unpublished opinion).

e. Designation of the Conservation Area Causes Pre-Condensation Blight

Property owners whose land is designated as part of the Conservation Area, meaning it cannot be developed, would effectively have their land taken by the Local Permittees, and just compensation would have to be provided. It is unconstitutional for a government to undertake activities to depress the value of property before condemning it, to lower the amount of just compensation that would have to be paid upon condemnation of the property (*Klopping v. City of Whittier* 8 Cal. 3d 39 (1979)).

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f. Operation and Maintenance of Existing Legal Uses Should be Covered Activities

Draft MSHCP, Section 7.3.1 should include the strikeout text to provide "take" permits for operation and maintenance of existing legal private uses as of the date of Plan approval.

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g. The Plan Must Expressly State that Fair Market Appraisals Will Not Take into Account the Fact that Private Property is Within a Conservation Area

Section 6.1.2. of the MSHCP states that "Acquisitions will be only from a willing seller. All appraisals to be used for the Local Permittees' acquisition program must be prepared to the

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Uniform Standards of Professional Appraisal Practice. CVCC will develop a process to resolve differences concerning the valuation of property."

In light of the paramount importance of the purchase of land from willing sellers, the Uniform Standards of Professional Appraisal Practice should be specified and set forth in detail in the Plan so there is no ambiguity as to its provisions. Furthermore, the Plan should expressly state that any appraisal will not take into account the fact that private property is within a Conservation Area, independent of any provision of the Uniform Standards of Professional Appraisal Practice.

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Cont.

E. GENERAL PLAN CONSISTENCY REQUIREMENTS

1. THE MSHCP MUST BE CONSISTENT WITH EACH CITY'S GENERAL PLAN

The MSHCP is subject to General Plan "consistency requirements." Since the General Plan is the constitution for all future development, any decision of the city affecting land use and development must be consistent with the General Plan (*Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3^d 553, 570 (1990) and *DeVita v. County of Napa* 9 Cal. 4th 763, 772 (1995)). Because the MSHCP is a land use document affecting the future development of cities, the MSHCP must be consistent with each city's General Plan, before each city could adopt the MSHCP.

The MSHCP clearly is a land use document subject to General Plan "consistency requirements" as illustrated from the following sections of the MSHCP documents. The very purpose of the MSHCP is to dictate where development land use will not occur in order to preserve habitat conservation land use.

- The Fiscal Impact Analysis for the Coachella Valley MSHCP, p. I-1 states, "approximately 17.7% (200,536 acres) of the Plan area consists of vacant land proposed for conservation which is currently under private or public non-conservation ownership. These lands are currently available for urban development, in a manner consistent with each jurisdiction's General Plan. Implementation of the proposed MSHCP would result in the conversion of these lands to conservation."
- The MSHCP EIR/EIS Section 4, p. 4-230 states, "In all cases, minor modifications to the densities or intensities of lands not in Conservation Areas would recoup the number of dwelling units that might otherwise develop in Conservation Areas."
- The MSHCP EIR/EIS Section 9, p. 9-15 states, "It is conceivable that some Development in Conservation Areas inconsistent with the Conservation Goals and Objectives in the proposed Plan would shift to urban areas already planned for more intense Development. While the roadway agencies would need to monitor this effect as part of their ongoing monitoring of traffic in their jurisdiction, this potential shifting of Development intensities is not expected to be significant. In fact, any resulting intensification of land

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use may have the indirect benefit of encouraging the use of mass transit, and is consistent with 'Smart Growth' policies endorsed by many urban planners."

The long-standing legal standard for consistency is that if a land use decision presents a single inconsistency with a goal or policy in the general plan, the whole project is invalid and void on its face (*Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Supervisors* (1998) 62 Cal. App. 4th 1332, 1341; *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal. App. 3d 738, 753).

Before each city could approve and adopt the MSHCP and Implementing Agreement, a general plan analysis must be undertaken to determine whether adoption of the MSHCP is consistent with its general plan. If the MSHCP is not consistent, then the city would have to process a general plan amendment to ensure that the MSHCP is consistent with its general plan.

A city cannot adopt the MSHCP and Implementing Agreement now, and later adopt a general plan amendment to attempt to rectify the inconsistency. The California Supreme Court ruled that general plans cannot be amended to conform to inconsistent projects (*Leshner Communications, Inc. v. City of Walnut* (1990) 52 Cal. 3d 531). "The tail does not wag the dog" (*Leshner Communications, Inc. v. City of Walnut* (1990) 52 Cal. 3d 541).

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2. A GENERAL PLAN MUST BE INTERNALLY CONSISTENT

A general plan must be integrated and internally consistent, both among the elements and within each element (Government Code, Section 65300.5). This applies to any optional elements adopted by the city as well as the mandatory elements. This requirement also applies to charter cities.

If the MSHCP is to be incorporated in the cities' general plans, and if there is internal inconsistency in any of the optional or mandatory elements, the general plan is rendered legally inadequate due to consistency requirements.

In the case *Sierra Club*, 126 Cal. App. 3d at 708, the court ruled that the Kern County General Plan was not internally consistent because the land use and open-space elements designated conflicting land uses for the same property.

As stated above, "Approximately 17.7% (200,536 acres) of the Plan area consists of vacant land proposed for conservation which is currently under private or public non-conservation ownership. These lands are currently available for urban development, in a manner consistent with each jurisdiction's General Plan. Implementation of the proposed MSHCP would result in the conversion of these lands to conservation."

Some cities would need to amend their general plans to bring the land uses in their land use elements into consistency with land uses allowed by the MSHCP before adopting the MSHCP.

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III. INADEQUACIES OF THE EIR/EIS

A. ECONOMIC AND SOCIAL IMPACTS

Section 15131 Economic and Social Effects of the *Guidelines for Implementation of the California Environmental Quality Act* states, "In *Citizens Association for Sensible Development of Bishop Area v. Inyo* (1985) 172 Cal. App. 3d 151, the court held that 'economic or social change may be used to determine that a physical change shall be regarded as a significant effect on the environment. Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project. Alternatively, economic and social effects of a physical change may be used to determine that the physical change is a significant effect on the environment.'"

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When an EIS is prepared, the economic and social effects must be discussed if they are interrelated to the natural or physical environmental effects (40 CFR Sec. 1508.8).

1. INADEQUATE THRESHOLDS OF SIGNIFICANCE

CEQA Guidelines Section 15064.7(a) Thresholds of Significance states, (a) "A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant."

The thresholds of significance in EIR/EIS Section 4.15.2 fail to provide any "identifiable quantitative, qualitative or performance level of a particular environmental effect." Section 4.15.2 states:

"The Plan and the Alternatives would have a significant effect on Population, Housing and Employment if they would:

- a.) Cause a significant adverse socio-economic effect on communities located within the project planning Area.
- b.) Create a substantial adverse fiscal effect on local governments as a consequence of the loss of public revenues or in association with the provision of governmental infrastructure (staff and facilities) associated with Plan implementation.
- c.) Create a substantial adverse economic effect on an important sector of the planning area's economy."

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The EIR/EIS fails to provide any standards to determine at what level a threshold exists and at what point non-compliance means the effect will be determined to be significant. The thresholds

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of significance need to be presented as thresholds, and need to be supported with concrete, substantial evidence for the EIR to be considered adequate.

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Cont.

2. IMPACTS ASSOCIATED WITH THE COST OF DEVELOPMENT

The conclusions in the EIR/EIS regarding impacts associated with the cost of development are insufficient. EIR/EIS Section 4.15.3, p. 4-231 presents the following table, Table 4-27, which states, "Based on the table above, the developer of the hypothetical parcel would typically incur considerably higher costs to resolve biological resource issues without the implementation of the Plan." The assertion that a "hypothetical" parcel outside the Conservation Areas would incur higher costs to resolve biological resource issues is factually unsupported and is baseless. An independent economic study should have been done. The table needs to be amended to accurately present development costs.

Table 4-27
Private Land Permitting Costs For a Typical 10-acre Parcel

	Without MSHCP	With MSHCP
Presence-Absence Survey	\$2,000 - \$6,000	\$0
Individual Permits Drafted		
• Cost	\$5,000 - \$65,000	\$0
• Time Frame	1 - 5 years (3 years average)	No Delay
Other Surveys		
• Pre-Construction Survey	\$250 - \$2,500	\$0
• Construction Monitoring	\$1,400 - 2,000	\$0
Compensation		
Mitigation Fee:		
CVFTL	\$6,000	\$52,800
Other species	\$0 - 70,000±	
Total Costs	\$14,650-151,500	\$52,800

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A number of large projects, including the Ritz-Carlton hotel, have been approved under the ESA without the Plan in effect. In short, there is a lack of evidence to support the assumption that costs would be greater outside of the Conservation Area.

3. EXTINCTION OF AGRICULTURE INDUSTRY

EIR/EIS Section 3, p. 3-147 to p. 3-150, states that in 1999, the region's largest employment sector was retail trade (22,219 jobs), followed by hotel and amusement (15,973), and agriculture (12,379), making agriculture the third-largest employment sector in the region. Agricultural employment grew 7.5 percent between 1991 and 1999.

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Between 1987 and 1997, the acreage being farmed in Riverside County increased by 3.6 percent, and the number of cropland acres harvested increased by 12.6 percent. More importantly, the

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market value of agricultural products sold by Riverside County farms increased by \$320 million or 44.1 percent during this ten-year period. Major Coachella Valley products include dates, grapes, citrus, and a variety of other fruits and vegetables.

Despite the significant urban growth that has occurred in the Coachella Valley over the past century, agriculture remains a mainstay of the broader Riverside County economy. In 2001, Riverside County ranked ninth among California counties for total value of agricultural production and its agricultural production was valued at approximately \$1.1 billion and represented 4.0 percent of the State's total production.

EIR/EIS Section 4, p. 4-209 states that Coachella Valley farmland totals about 84,852 acres or about 7.5 percent of the MSHCP Plan Area. Most of these lands are designated as "Prime Farmland," "Farmland of Statewide Importance," "Unique Farmland," and "Farmland of Local Importance."

a. Shifting Development From Vacant Lands to Agriculture Lands

EIR/EIS Section 4, p. 4-44 states that the MSHCP would designate approximately 1,070 acres of farmland as habitat conservation land. The California Department of Conservation categorizes this farmland as Farmland of Local Importance. The proposed conservation would reduce the Coachella Valley farmland total to about 83,782 acres.

EIR/EIS Section 4, p. 4-209 states that lands are considered developable if they are below 25 percent slope and vacant or in use for agriculture.

EIR/EIS Section 4, p. 4-215 states that of the total acreage within the Plan Area, approximately 200,536 acres with development potential lie inside the Conservation Areas, and approximately 155,431 acres with development potential lie outside the Conservation Areas. The 155,431 acres with development potential is composed of the 83,782 acres of farmland and 71,649 acres of non-farmland.

The Fiscal Impact Analysis for the Coachella Valley MSHCP, p. I-1 states, "200,536 acres of the Plan area consists of vacant land proposed for conservation which is currently under private or public non-conservation ownership. These lands are currently available for urban development, in a manner consistent with each jurisdiction's General Plan. Implementation of the proposed MSHCP would result in the conversion of these lands to conservation." Development that could have occurred on these lands without the MSHCP, would now be shifted by the MSHCP onto the 155,431 acres outside the Conservation Areas, such as onto Agriculture lands.

EIR/EIS Section 3, Table 3-19 and Section 3, Table 3-3 show that presently, roughly 332,800 people live on 67,364 urban acres in the Plan Area. The Southern California Association of Governments 2004 RTP Growth Forecast Report, p. 43 projects that by 2030, the population of the Coachella Valley will experience "a 106 percent increase from its 2000 population. The population is projected to grow at an annual rate of 3.5 percent." Therefore, by 2030, at least another 67,364 urban acres in the Plan Area would be developed; a 106 percent increase in the

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Cont.

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urban acreage would be 71,406 acres. Under the Plan, this would use up all but 373 acres of the available non-farmland land with development potential.

Under the MSHCP, within 25 years, all of the available non-agricultural land in the Plan Area would be developed. Under the Plan, 25 years from now, agricultural land would be the only vacant land available to accommodate future population growth in the Plan Area.

MSHCP Section 4, Table 4-7 shows that 2,954 acres that are presently designated as Agriculture land use by the general plans of local jurisdictions are included in the Conservation Area. The 2,954 acres of Agriculture land would be converted by the MSHCP to conservation land.

MSHCP p. ES-20 states, "The Permits will be for a 75-year term." Over the duration of the Plan, all of the agricultural land in the Coachella Valley would be subject to pressure to convert to other land uses through the implementation of the MSHCP policies.

MSHCP Section 4.5.2, Toxics, specifies that land uses proposed adjacent to or within a Conservation Area that use chemicals or generate bioproducts such as manure that are potentially toxic or may adversely affect wildlife or plant species, Habitat, or water quality shall incorporate measures to ensure that application of such chemicals does not result in any discharge to a Conservation Area (such as the Coachella Valley Stormwater Channel and Delta Conservation Area). These restrictions would disrupt or prohibit normal and customary farming activities including: irrigation, controlling pests, growing crops, and raising farm animals. The MSHCP would curtail some agricultural operations, discourage investment into farm improvements, and discourage efficient agricultural production in that the MSHCP would permit the imposition of these restrictions.

While the Plan envisions higher density residential development to increase land use efficiency, development densities have been low in the Coachella Valley because most people moved to the desert to avoid higher density development. The higher densities envisioned by the Plan are speculative.

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Cont.

b. The Agricultural Resources Impact Analysis is Inadequate

Agriculture is not only a land use category in the MSHCP; it is also an existing economic resource. According to the EIR, agriculture is the third-largest industry in the Coachella Valley, providing employment for a significant number of the Valley's population. Yet, through the MSHCP, the agriculture industry, which generates income and jobs, would be converted to other land uses, some of which require expenditures of public money to maintain.

The EIR fails to consider the impacts on the Coachella Valley's economy from the loss of its third-largest industry, and fails to consider the impacts of land use decisions that would necessitate increased expenditures of public funds. The EIR violates the California Environmental Quality Act (CEQA) by failing to analyze the number of existing jobs and future jobs that would be lost, the additional costs, the income lost, and the resulting effect on the

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economy resulting from MSHCP adoption. In addition, expansion of agriculture and new agriculture would be prevented by the Plan.

It is State policy that land use decisions be made with full knowledge of their economic and fiscal implications, giving consideration to short-term costs and benefits, and their relationship to long-term environmental impact as well as long-term costs and benefits. Due to the inadequate socioeconomic analysis, the EIR inadequately analyzes the economic and fiscal implications of the MSHCP.

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Cont.

A reduction in the size of the agricultural industry resulting from the MSHCP's vast conversion of agriculture would also cause indirect impacts that should be analyzed under CEQA. The EIR must consider the indirect impacts to public services as a result of these fiscal impacts (including the lost revenues from the agriculture industry) and the new costs that would be incurred as a result of the MSHCP.

The EIR did not use the correct significance standard required by CEQA. The EIR imposes a higher "certainty standard" that the MSHCP will have a significant effect on agricultural resources. CEQA requires that significance be based on whether there is "a substantial or potentially substantial adverse change in the environment." However, the MSHCP did not apply this standard in the EIR. Accordingly, the EIR concludes that the impacts on agriculture are "less than significant," even though the data in the EIR indicates otherwise.

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The EIR's use of an improper significance standard, erroneous analysis, and failure to consider all direct and indirect impacts severely underestimates the true impacts of the MSHCP on agriculture. This results in a wrong conclusion that the impacts on agriculture are not significant.

The EIR lists the following Thresholds of Significance. Yet the EIR fails to provide any analysis or application of these thresholds to the loss of the agriculture industry.

- Convert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland), as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency [EIR Exhibit 4-4, Coachella Valley MSHCP Important Farmlands], to non-agricultural use.
- Conflict with actively cultivated farmlands, a Williamson Act contract or existing zoning for agricultural uses.
- Involve other changes in the existing environment, which, due to their location or nature, could result in conversion of Farmland to non-agricultural use.

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The EIR conclusions that Impact Issues, such as: "convert prime/unique/other important farmland;" "conflict with active cultivation or Williamson Act contracts;" or "induce changes in environment due to proximity to agriculture" would be "less than significant" and would require "no mitigation" and that "no unavoidable significant adverse impacts to socio-economic resources are expected to result from the Plan's approval and implementation" are likewise

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wrong (EIR/EIS Table of Contents, Table E-1, Coachella Valley MSHCP EIR/EIS, Environmental Summary / Matrix, Section 4.6.4, and Section 6.5).

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Cont.

c. Violation of the Open Space Lands Act – Government Code section 65561(b)

Agriculture is a resource that the State discourages premature and unnecessary conversion to other uses. As such, Government Code section 65561(b) requires the avoidance or minimization of impacts to agriculture.

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However, the MSHCP's vast conversion of agriculture does not minimize or avoid impacts to agricultural land. As a result, the MSHCP violates the Open Space Lands Act.

d. Violation of the Williamson Act – Government Code section 51200

The policy of the Williamson Act is to preserve the maximum amount of agricultural land and discourage premature and unnecessary conversion of agricultural land. The MSHCP conflicts with this objective.

The Legislature adopted the Williamson Act to preserve the maximum amount of agricultural land and discourage premature and unnecessary conversion of agricultural land.

The MSHCP calls for siting species reserves and implementing activities for the purpose of proliferating species protected under the state and federal ESAs on land that is currently farmed, land that is adjacent to farmland, and land zoned for agricultural uses. As such, the MSHCP would establish a highly sensitive land use incompatible with agricultural operations in close proximity to farms and ranches, thereby increasing agricultural owners' and operators' risk of illegal "take" of protected species.

The MSHCP conflicts with and contradicts California laws in that it:

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- impairs the Williamson Act and compatible uses;
- limits the scope of allowable activities on land under Williamson Act contracts;
- increases the exposure of growers to "take" violations of the State and Federal Endangered Species Act;
- fails to make any provisions for land within a preserve or covered by a Williamson Act Contract to be exempted from the application of MSHCP land use restrictions and mitigation obligations mandated by the MSHCP in exchange for incidental take authorization; and
- increases the risk of premature and unnecessary conversion of agricultural land to other uses.

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Article XI, section 7 of the California Constitution prohibits a local agency from enacting local laws which conflict with general or state laws.

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Cont.

e. Violation of Right-To-Farm Laws – County Ordinance No. 625.1 and Civil Code section 3482.5

In 1981, the state of California adopted what is now Civil Code section 3482.5. This statute provides for, among other things, the protection of “agricultural activity, operation, or facility, or appurtenances thereof” which include the “cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural commodity including timber, viticulture, apiculture, or horticulture, the raising of livestock, fur bearing animals, fish, or poultry, and any practices performed by a farmer or on a farm as incident to or in conjunction with those farming operations, including preparation for market, delivery to storage or to market, or delivery to carriers for transportation to market.” Civil Code section 3482.5, subd. (d) expressly preempts “any contrary provision of any ordinance or regulation of any city, county, or other political subdivision of the state.”

Similarly, in 1986, the County adopted Ordinance No. 625.1 providing in part the necessity of the ordinance due to the extension of non-agricultural land uses into agricultural areas which leads to: the ceasing or curtailing of some agricultural operations; discouragement from investments into farm improvements; and discouragement of the efficient agricultural production due to burdensome litigation against farmers.

The MSHCP calls for siting species reserves and implementing activities for the purpose of proliferating species protected under the state and federal ESAs on land that is currently farmed, land that is adjacent to farmland, and land zoned for agricultural uses. As such, the MSHCP would establish a highly sensitive land use incompatible with agricultural operations in close proximity to farms and ranches, thereby increasing agricultural owners' and operators' risk of illegal “take” of protected species.

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The MSHCP conflicts with and contradicts California law and County ordinances in that it:

- increases the exposure of agricultural landowners and operators to “take” violations of the Endangered Species Act;
- increases the exposure of agricultural landowners and operators to nuisance claims;
- limits the allowable scope of normal and customary agricultural activities; and
- increases the risk of premature and unnecessary conversion of agricultural land to other uses.

Article XI, section 7 of the California Constitution prohibits a local agency from enacting local laws which conflict with general or state laws.

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4. FISCAL IMPACT

The Plan would eliminate development of areas designated for development by the General Plans of each city. If lands proposed for conservation by the MSHCP were instead allowed to develop according to the General Plans of local jurisdictions, the development would generate additional revenues and additional municipal costs for each jurisdiction.

The Fiscal Impact Analysis projects the effect of the MSHCP on future revenues and costs for local governments.

Implementation of the MSHCP would result in a reduction of tax revenues on lands in the Conservation Area.

The Fiscal Impact Analysis for the Coachella Valley MSHCP, p. IV-12 states that fiscal model uses the Per Capita Multiplier Method for projecting general government costs under the MSHCP. General government costs represent the costs of providing a city's employee salaries and benefits, postage, printing, travel, equipment maintenance and repairs, contract services, computers, vehicles and other items necessary for the day-to-day functioning of city government. These items are typically funded through the jurisdiction's General Fund.

The fiscal model translates total General Fund expenditures into a per capita factor for each city, and applies that amount to the anticipated buildout population. The result is the estimated cost of providing general government costs to future residents.

a. Wrong Method Used to Project Potential Government Costs

The Per Capita Multiplier Method fails to take into account economies of scale that occur as cities increase in population. Certain general government costs would not increase on a per capita basis. For example, unless there is a real reason to believe that added population would increase the cost of the City Council and City Clerk, these costs should not be projected on a per capita basis. Projecting these types of costs on a per capita basis overestimates future general government costs.

According to the fiscal model, general government costs for cities in the Coachella Valley would average 50 percent of total annual costs at buildout (Fiscal Impact Analysis for the Coachella Valley MSHCP, Total Potential Costs Associated with Development of Conservation Lands Summary, Table VII-13, Table VIII-16, Table IX-19, Table X-14, Table XI-14, Table XII-13, Table XIII-14, Table XIV-16, Table XV-19).

By overestimating the government costs associated with development, the fiscal impact analysis inaccurately projects that if lands proposed for conservation by the MSHCP were instead allowed to develop according to the General Plans of local jurisdictions, such development would produce a negative fiscal impact for most jurisdictions in the Plan Area.

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The Comparable City Method of fiscal impact analysis should be used for growth taking place in locations of population and growth extreme, such as where small cities are gaining population at significant rates, as is occurring in the Coachella Valley. The Comparable Cities Method uses expenditure ratios by population size and growth rate, and is sensitive to economies of scale as well as expenditure variations that are a function of the direction and pace of growth. It is ideal for projections involving a significant change in population size or growth rate, such as when planning for the ultimate buildout of a city (Robert W. Burchell and David Listokin, *The Fiscal Impact Handbook*, Center for Urban Policy Research, 1983).

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Cont.

The Service Standard Method also could be used. This method presents staffing levels by population size and geographic region, and is sensitive to economies of scale and geographic differentials in the quantity of public services provided. This method is most appropriate where there are significant changes in planned population, particularly when planning for the ultimate buildout of a city (Robert W. Burchell and David Listokin, *The Fiscal Impact Handbook*, Center for Urban Policy Research, 1983).

b. Use of Unsubstantiated Opinion in the EIR Analysis

EIR/EIS Section 4, pp. 4-229 states that the analysis of future growth in the Plan Area through buildout, is based on an estimated annual development rate from "Jim Sullivan, Coachella Valley Association of Governments, personal communication, November 12, 2003." This estimate needs to be substantiated by rigorous analysis and concrete evidence for the EIR to be considered adequate.

EIR/EIS Section 4, p. 4-239 states, "As discussed in the Fiscal Impact Analysis, implementation of the MSHCP would have an overall beneficial economic impact for most of the jurisdictions in the Plan Area. This is due to the fact that lands in Conservation Areas in these cities are primarily designated for residential development. Residentially developed lands generally do not generate sufficient tax revenues to cover associated governmental costs."

These statements run counter to the results of numerous fiscal impact studies for residential development projects throughout Riverside County, which show that higher-end residential development does in fact cover associated governmental costs. One need only observe how the Coachella Valley has grown to its present residential size without bankrupting the cities. Tax revenues have accompanied residential growth as the populations of the cities have grown.

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Using such inaccurate data in the EIR, is contrary to the CEQA requirement for "substantial evidence," as it is clear that the use of such data in an EIR/EIS would amount to "argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate" (CEQA Guidelines Section 15384 (a)).

"Drafting an EIR or preparing a Negative Declaration necessarily involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can" (CEQA Guidelines Section 15144).

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c. Inadequacy of EIR Analysis

CEQA Guidelines Section 15151, Standards for Adequacy of an EIR, states, "An EIR should be prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences."

Decision-makers are being called on to evaluate the impacts and consequences of a Plan that would determine the ultimate buildout of each city in the Coachella Valley. The Plan would impact highway improvement projects in the Coachella Valley for the next 75 years, the economic well-being of agriculture – the third-largest industry in the Coachella Valley, and the economic health of builders and landowners in the Plan Area. This Plan is extremely far-reaching.

The Fiscal Impact Analysis for the Coachella Valley MSHCP, p. III-2 states, "Cost/revenue projections are cumulative and include the costs/revenues incurred during all previous phases."

Yet, the Fiscal Impact Analysis fails to provide any cumulative impact analysis over the duration of the Plan, which is needed to provide a sense of the magnitude of the fiscal impacts of the Plan on local jurisdictions.

In addition, the Fiscal Impact Analysis fails to include any analysis of the fiscal impact of the MSHCP on lands within the cities' Spheres of Influence.

An inaccurate fiscal impact analysis means that the cities may be losing tax revenues that they would have received from development of properties within the MSHCP and that could have funded city services or provided improvements needed by the community.

These lost tax revenues could lead to an adverse shortfall in funding for future public services in the Plan Area, causing a significant deterioration of the physical environment.

If impacts are considered to be less than significant, that conclusion needs to be supported with rigorous analysis and concrete, substantial evidence for an EIR to be considered adequate.

The lack of information and analysis renders the EIR/FIS clearly inadequate for the purpose of enabling decision-makers to make an intelligently informed decision.

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d. Excessive Land Set Aside Burden

The MSHCP would require cities to set aside far more land for conservation than would be required under current regulations. The MSHCP would provide the means for the Wildlife Agencies – U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG) – to expand their oversight and exceed the requirements of current regulations when identifying land to be set aside for the protection of endangered species.

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Without the proposed MSHCP, public and private projects would follow current regulations to determine the amount of land they would be required to set aside. These regulations, under the state and federal Endangered Species Acts (ESA), call for the set aside or replacement of land, only when:

- 1) endangered species are found to occupy a project area; or
- 2) when a project triggers the need for a Section 7 Consultation – such as when a project involves federal funding or requires a federal permit such as a Section 404 permit, in which the federal agency must consult with the USFWS – and the project contains “critical habitat” identified for an endangered species, where modifying the species’ habitat would kill or injure the species.

Therefore, under the existing ESA regulations, developable land within the cities could be required to be set aside only where endangered species are present or in areas that are currently designated as critical habitat where a Section 7 Consultation is required and where modifying the species’ habitat would kill or injure the species.

Much of the conservation by the Plan is based on modeling of where the species likely may occur, not on actual observations of the species (Draft MSHCP, pp. ES-2, ES-5, and ES-12). This allows a much greater area to be designated as habitat than would otherwise be required under current regulations.

The Plan uses an arbitrary approach that is not based on the presence of endangered species or critical habitat to determine the amount of land to be set aside. The Plan arbitrarily identifies large geographic areas to be set aside for conservation. These large geographic areas include lands where species are not present, and are not based on best available science.

The Plan would set aside land for non-endangered species such as crickets and bats. The Plan also would restrict non-habitat private lands that are simply called habitat by the habitat distribution models for the Plan.

The Plan would devise theoretical Biological Corridors for non-endangered species such as coyotes, bobcats, and foxes. The inclusion of non-endangered species such as coyotes in the Plan serves only to extend the regulatory authority of the Wildlife Agencies, not to preserve endangered species.

Presently, projects do not have to mitigate for non-habitat areas that are called habitat by the MSHCP models. Nor do projects currently have to mitigate for non-listed species such as crickets, bats, and coyotes.

5. REDUCED TOURISM

EIR/EIS Section 3, pp. 3-149 to 3-154 states that as early as the 1920’s, equestrian camps and resort hotels were constructed in the lower valley. Over the past three decades, the Coachella

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Valley has expanded to become one of the premier destination resorts in the country. The valley attracts approximately 3 million overnight visitors annually, generating approximately \$1.5 billion in annual revenues to the region.

The hotel/amusement (travel) sector is the second-largest job sector in the valley, providing 17,180 jobs in 2001 (EIR/EIS Section 4, p. 4-208). The Hotel and Amusement industry was the fastest growing employment sector in the Coachella Valley during the 1990's.

The retail industry, which is closely related to the tourism industry, is the largest job sector in the valley, providing 23,765 jobs in 2001. Since 1991, Coachella Valley retail sales have risen \$1.3 billion, or 64 percent. Retail sales account for approximately \$2.45 billion in revenues annually (EIR/EIS Section 4, p. 4-209).

EIR/EIS Section 6, p. 6-5 states, "It is clear that the strength of the regional economy is directly dependent upon the preservation of the unique, finite, and marketable open space." Recreational venues include numerous parks and trails (EIR/EIS Section 3, p. 3-154).

a. Recreational Use Restrictions

The Plan restricts public access on public lands that have been designated for recreational use, through restrictions on trail use, cross-country travel, mountain biking, and camping. Some trails are closed by the Plan and others are subject to seasonal closures (Draft MSHCP p. ES-27).

The federal Santa Rosa and San Jacinto Mountains National Monument Act of 2000, authorizing the creation of the Santa Rosa and San Jacinto Mountains National Monument states that "the management plan...shall include provisions to continue to authorize the recreational use of the Monument, including such recreational uses as hiking, camping, mountain biking, sightseeing, and horseback riding..."

Yet the Plan contains restrictions on trail use, purportedly to protect bighorn sheep, but offers no scientific justification (Draft MSHCP, Section 7.3.3).

The Purpose Statement for Joshua Tree National Park states, "Joshua Tree National Park's purpose is to preserve the character and values of wilderness while providing recreational opportunities..."

Yet the Plan restricts access into the Joshua Tree National Park Conservation Area, and requires hikers to stay on designated trails (Draft MSHCP, Sections 4.1.1, 7.3.3, and 7.3.4). Joshua Tree National Park would have to implement the Plan's restrictions.

Rather than serving as open space, the Conservation Area functions as Closed Space.

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b. Discouraging Recreational Visitors

These recreational use restrictions would discourage visitors from coming to the Coachella Valley for recreational opportunities related to trails.

Visitors would be less likely than residents to be aware of the trail restrictions, such as closed trails and seasonal closures, before attempting to use the trails, and would be the most put off by the restrictions.

Open space that is closed to the public is not marketable, and would hurt the regional economy.

Rather than serving as open space, the Conservation Area functions as Closed Space.

The recreational use restrictions on lands currently designated for recreational use are the exact opposite of the Plan's stated goal to provide recreational opportunities.

No scientific basis is presented for the recreational use restrictions.

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c. The Impacts to Employment Analysis is Inadequate

According to the EIR, hotel/amusement (travel) is the second-largest industry in the Coachella Valley. Closely related to the tourism industry is the largest job sector in the valley, the retail industry. Together they provide employment for a significant number of the valley's population. Yet, implementation of the MSHCP's recreational use restrictions would discourage visitors from coming to the Coachella Valley.

The Plan fails to consider the impacts of the recreational use restrictions on the largest and second-largest industries in the Coachella Valley. The EIR violates CEQA by failing to analyze the number of existing jobs and future jobs that would be lost, the additional costs, the income lost, and the resulting effect on the economy resulting from MSHCP adoption.

It is State policy that land use decisions be made with full knowledge of their economic and fiscal implications, giving consideration to short-term costs and benefits, and their relationship to long-term environmental impact as well as long-term costs and benefits. Due to the inadequate socioeconomic analysis, the EIR inadequately analyzes the economic and fiscal implications of the MSHCP.

A reduction in the size of the hotel/amusement (travel) industry would also cause indirect impacts that should be analyzed under CEQA. The EIR must consider the indirect impacts to public services as a result of these fiscal impacts, including the lost revenues from the hotel/amusement (travel) industry.

The EIR's erroneous analysis and failure to consider all direct and indirect impacts severely underestimates the true impacts of the MSHCP on the hotel/amusement (travel) industry. This results in a wrong conclusion that the impacts to employment are not significant.

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6. INCONSISTENCIES WITHIN THE MSHCP AND EIR/EIS

a. Inconsistent Time Frame and Fiscal Impact Analysis

MSHCP p. ES-19 states, "The Permits will be for a 75-year term." Yet, the Fiscal Impact Analysis for the Coachella Valley MSHCP, p. III-2 states, "The proposed MSHCP is a long-range plan that is expected to be in effect for 50 years." The duration of the Fiscal Impact Analysis must be consistent with the duration of the Plan for the EIR to be considered adequate.

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The Fiscal Impact Analysis for the Coachella Valley MSHCP, p. III-2 states, "Cost/revenue projections are cumulative and include the costs/revenues incurred during all previous phases." Yet, the Fiscal Impact Analysis fails to provide any impact analysis covering the overall duration of the Plan, which is needed to provide a sense of the magnitude of the fiscal impacts of the Plan on local jurisdictions.

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b. Inconsistent Acreage for Conservation of Agricultural Lands

MSHCP Section 4, Table 4-7 shows that 2,954 acres that are presently designated as Agriculture land use by the general plans of local jurisdictions are included in the Conservation Area, but EIR/EIS Section 4, p. 4-44 states that the MSHCP would designate approximately 1,070 acres of farmland as habitat conservation land. This inconsistency must be corrected.

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B. INADEQUATE CUMULATIVE IMPACTS ANALYSIS

CEQA requires a finding that a project may have a significant effect on the environment if the possible effects of a project are individually limited but cumulatively considerable where cumulatively considerable means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, current projects, and probable future projects. Projects currently under environmental review unequivocally qualify as reasonably probable future projects to be considered in a cumulative impacts analysis. Projects anticipated beyond the near future should be analyzed for their cumulative effect if they are reasonably foreseeable (CEQA Guidelines §§ 15065, 15130, 15355) and NEPA (at 40 CFR § 1502.14).

The cumulative impacts concept recognizes that the full environmental impact of a proposed action cannot be gauged in a vacuum. An EIR must examine not only the anticipated cumulative impacts, but also reasonable options for mitigating or avoiding the project's contribution to significant cumulative impacts. The EIR does not meet these requirements.

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The level of analysis in the EIR's cumulative impacts analysis is too cursory. An EIR must include objective measurements of a cumulative impact when such data are available or can be produced by further study and are necessary to ensure disclosure of the impact. Despite this mandate, the EIR fails to analyze adequately a number of cumulative impacts, including, but not limited to: agricultural lands and activities; air quality; biological resources; cultural resources and Native American concerns; environmental justice and children; hazards and hazardous

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materials; hydrology and water quality; land use compatibility; mineral, energy and timber resources; noise; parks, trails and recreation; socio-economic resources: population, housing and employment; soils and geology; transportation, traffic and circulation; utilities, public services and facilities; and visual/scenic resources.

The cumulative impacts analysis of: agricultural lands and activities; air quality; biological resources; cultural resources and Native American concerns; environmental justice and children; hazards and hazardous materials; hydrology and water quality; land use compatibility; mineral, energy and timber resources; noise; parks, trails and recreation; socio-economic resources: population, housing and employment; soils and geology; transportation, traffic and circulation; utilities, public services and facilities; and visual/scenic resources fails to quantify the cumulative MSHCP contribution due the shifting of development from the MSHCP Conservation Area to land outside the Conservation Area. The relocation-domino effect would cumulatively cause a change in the distribution, density, or pattern of growth in the MSHCP Plan Area. The resulting intensification of residential and commercial uses in lands outside the Conservation Area would potentially create an increase in environmental impacts in these areas.

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The EIR/EIS assumes unquantified rates of growth based upon "trends in land conversion" and unquantified "water availability" (EIR/EIS, p. 9-3). Therefore, the EIR/EIS is a qualitative document, not quantitative, in its cumulative impacts analysis. This is not allowed under CEQA or the National Environmental Policy Act (NEPA).

1. IMPACTS ON HOUSING AND DENSITY

EIR/EIS Section 4, p. 4-215 states that of the total acreage within the Plan Area, approximately 200,536 acres with development potential lie inside the Conservation Areas, and approximately 155,431 acres with development potential lie outside the Conservation Areas. The 155,431 acres with development potential is composed of the 83,782 acres of farmland and 71,649 acres of non-farmland.

The Fiscal Impact Analysis for the Coachella Valley MSHCP, p. I-1 states, "200,536 acres of the Plan area consists of vacant land proposed for conservation which is currently under private or public non-conservation ownership. These lands are currently available for urban development, in a manner consistent with each jurisdiction's General Plan. Implementation of the proposed MSHCP would result in the conversion of these lands to conservation." Development that could have occurred on these lands without the MSHCP, would now be shifted by the MSHCP onto the 155,431 acres outside the Conservation Areas.

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MSHCP Section 2, Table 2-1 and Section 3, Table 3-3 show that presently, roughly 332,800 people live on 67,364 urban acres in the Plan Area. The Southern California Association of Governments 2004 RTP Growth Forecast Report, p. 43 projects that by 2030, the population of the Coachella Valley will experience "a 106 percent increase from its 2000 population. The population is projected to grow at an annual rate of 3.5 percent." Therefore, by 2030, at least another 67,364 urban acres in the Plan Area would be developed; a 106 percent increase in the

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urban acreage would be 71,406 acres. Under the Plan, this would use up all but 373 acres of the available non-farmland land with development potential.

Under the MSHCP, within 25 years, all of the available non-agricultural land in the Plan Area would be developed. Under the Plan, 25 years from now, agricultural land would be the only vacant land available to accommodate future population growth in the Plan Area.

Under the MSHCP, within 25 years, decision makers of local jurisdictions would be faced with the choice of densifying their land uses to accommodate their regional share of future population growth or converting the agriculture industry, the third-largest industry in the Coachella Valley to development uses.

MSHCP p. ES-19 states, "The Permits will be for a 75-year term." If agricultural land is developed, over the duration of the Plan, all of the 83,782 acres of farmland with development potential would be used up.

Implementation of the MSHCP policies would then force the cities to densify their land uses to accommodate their regional share of future population growth.

EIR/EIS Section 4, p. 4-234 states, "the individual jurisdictions would continue to have the ability to change their General Plans to accommodate either increased density or increased acreage in more dense land uses to accommodate market pressures..."

MSHCP EIR/EIS Section 4, p. 4-230 states, "In all cases, minor modifications to the densities or intensities of lands not in Conservation Areas would recoup the number of dwelling units that might otherwise develop in Conservation Areas."

EIR/EIS Section 9, p. 9-15 states, "It is conceivable that some Development in Conservation Areas inconsistent with the Conservation Goals and Objectives in the proposed Plan would shift to urban areas already planned for more intense Development. While the roadway agencies would need to monitor this effect as part of their ongoing monitoring of traffic in their jurisdiction, this potential shifting of Development intensities is not expected to be significant. In fact, any resulting intensification of land use may have the indirect benefit of encouraging the use of mass transit, and is consistent with 'Smart Growth' policies endorsed by many urban planners."

The EIR/EIS fails to analyze or provide any mitigation measures for this increased density or intensity of land use.

The assertion that the Plan's Smart Growth strategies which encourage higher densities will lead to more efficient use of land in the Plan Area is speculation. The reality is that higher densities, a central principle of Smart Growth, remain unpopular, even in a New Urbanist development (Yan Song and Gerrit-Jan Knaap, "New urbanism and housing values: a disaggregate assessment," *Journal of Urban Economics*, Vol. 54, Issue 2, pp. 218-238).

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In addition, the Plan ignores California Government Code Section 65580 et seq., which sets forth policies for the protection of the development of housing.

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a. The Impacts to Housing Analysis is Inadequate

MSHCP p. ES-20 states, "The Permits will be for a 75-year term." Over the duration of the Plan, all of the land with development potential would be used up. Implementation of the MSHCP policies would then force the cities to densify their land uses to accommodate their regional share of future population growth.

For communities bearing the impacts of the shifted future development and land use intensification, it is apparent that impacts could be significant. Yet EIR/EIS Section 4, p. 4-234 states that for the increased land use density, "Impacts overall would be expected to be less than significant." If impacts are considered to be less than significant, that conclusion needs to be supported with rigorous analysis and concrete, substantial evidence for an EIR to be considered adequate.

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The EIR violates CEQA by failing to analyze the impacts of this increased densification and intensification of land use resulting from MSHCP adoption.

The EIR's erroneous analysis and failure to consider all direct and indirect impacts severely underestimates the true impacts of the MSHCP. This results in a wrong conclusion that the cumulative impacts are less than significant.

The EIR/EIS fails to provide mitigation measures for the increased densification or intensification of land use. These omissions render the EIR/EIS inadequate.

2. CUMULATIVE IMPACTS OF REGIONAL HABITAT CONSERVATION PLANS

The MSHCP involves planning on a regional level for the ultimate buildout of regions. Therefore the cumulative impacts must be evaluated at the same level by analyzing the cumulative impacts of implementing similar regional habitat conservation plans and special area management plans within the surrounding region.

Numerous regional habitat conservation plans and special area management plans, covering several million acres are occurring within the vicinity of the MSHCP. These include the:

- City of Rancho Palos Verdes HCP
- Orange County So. Region NCCP
- Orange County Central Coastl NCCP
- San Juan Creek SAMP
- San Diego Creek SAMP
- San Bernardino Valley MSCP
- San Diego County MSCP
- San Diego County MHCP
- MSCP North County Subarea
- San Diego County MHCOSP
- Otay River SAMP
- Western Riverside County MSHCP
- Western Riverside County SAMP
- West Mojave Plan

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The cumulative impact of the MSHCP when combined with the above plans would make the supply of residential land increasingly scarce, driving up the cost of land, making housing less affordable and homeownership less attainable for an increasing number of residents. As homes become more expensive, an increasing number of homebuyers may not be able to qualify for financing as large a home as they might want, and an increasing number of people on the entry level of the housing market may be driven into rental units.

The mitigation often given in these plans for the scarcity of residential land and the need for affordable housing for an increasing population is to force the densification of existing urban areas – to attempt to squeeze even more people into already overcrowded and congested cities. The popular term for this type of regulated development planning is “Smart Growth.”

Published studies show that intensification of development and higher densities lead to more traffic congestion – more vehicle miles traveled per square mile – and to more severe air pollution, as stated in *A Guide to Smart Growth: Shattering Myths, Providing Solutions*, The Heritage Foundation, p. 44. As traffic congestion reduces average vehicle speed, air pollution increases. Homeownership is lower where densities are higher (*Testimony on Smart Growth and Public Transit by Wendell Cox Before the United States Senate Committee on Environment and Public Works*, May 15, 2002). By driving people out of homeownership, these plans reduce housing options. Retrofitting of roadways and utilities to accommodate increased densities is very costly.

The City of Los Angeles has already developed almost all of its available land. Orange County is expected to run out of developable land by 2010, San Diego and Ventura counties will run out by 2020, and Riverside County will run out by 2040 (Negative Population Growth, *State Population Facts – California*; Riverside County General Plan Environmental Impact Report).

The HCPs, NCCPs, and SAMPs, including the MSHCP, would prevent outlying areas from accommodating future population growth unless development became high-density, which would largely prevent future generations from owning a home and enjoying the quality of life we now take for granted.

These plans serve as densification plans, yet they fail to provide mitigation measures for the increased urbanization or intensification of land use in the cities and the impacts of concentrating substantial numbers of housing units and employment facilities within communities.

A common cliché is that urban sprawl may pave over the County. In actuality, the urbanized area of Riverside County consumes less than five percent of the total land area. Yet the Plan serves as a boundary for future growth.

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C. TRANSPORTATION IMPACTS

1. LOSS OF NEEDED LOCAL INFRASTRUCTURE PROJECTS

The cities have numerous highway improvement projects covered by the Plan. The Plan states that in order to maintain coverage for the projects, "The Local Permittees must also comply with all other terms and conditions of the MSHCP...including, but not limited to: Ensure that habitat preservation is occurring in rough proportionality with Development" (Draft MSHCP Sections 7.2.3 and 6.6.1). "If the Local Permittees do not maintain 'rough proportionality' between Development and Conservation...the Wildlife Agencies may initiate revocation or suspension of all or part of the Permits" (Draft MSHCP Section 6.7). If the cities don't meet their conservation acreage quota, they can lose their permits.

Because the Plan fails to provide adequate funding for land acquisitions, conservation lands might not be acquired by the Local Permittees for the Plan. Yet, the Plan's "rough proportionality" test permits development and infrastructure projects only in proportion to the amount of land conserved by the Plan.

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If conservation of lands is insufficient, then the Wildlife Agencies could revoke the take permits for highway improvement projects needed by the cities.

If conservation of lands is inadequate, then the proposed development and infrastructure projects would fail to substantially comply with the terms of the MSHCP, and the Wildlife Agencies could revoke the take permits for infrastructure projects needed in the Coachella Valley. The Plan could result in needed infrastructure projects being denied by the Wildlife Agencies.

If the Wildlife Agencies do not plan to hold Local Permittees to the terms of the MSHCP and Implementing Agreement, then the Agencies should agree to a change in the wording of these documents, and the documents should first be revised before jurisdictions are asked to comply with the documents.

a. The Transportation, Traffic, and Circulation Analysis is Inadequate

MSHCP p. ES-20 states, "The Permits will be for a 75-year term." Over the duration of the Plan, the Coachella Valley and supporting transportation network would be built out.

The way the Plan is designed now, it could result in the loss of planned, needed highway improvement projects.

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The EIR's erroneous analysis and failure to consider all direct and indirect impacts severely underestimates the true impacts of the MSHCP. This results in a wrong conclusion that the transportation impacts are less than significant.

These omissions render the EIR/EIS inadequate.

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D. AIR QUALITY IMPACTS

1. PM10 IMPACTS

a. Public Health Standards

The Clean Air Act requires the U.S. Environmental Protection Agency (EPA) to set National Ambient Air Quality Standards (NAAQS) for six criteria pollutants; particle pollution (also known as particulate matter (PM)) is one of these. The Clean Air Act established two types of national air quality standards for particle pollution. Primary standards set limits to protect public health, including the health of "sensitive" populations, such as asthmatics, children, and the elderly. Secondary standards set limits to protect public welfare, including protection against visibility impairment, damage to animals, crops, vegetation, and buildings.

The PM10 standard is intended to regulate "inhalable coarse particles" that range from 2.5 to 10 micrometers in diameter. (The diameter of a human hair is about 70 microns). PM10 measurements contain both fine and coarse particles. Sources of coarse particles include crushing or grinding operations, and dust.

EPA revised the air quality standards for particle pollution in 2006. The 2006 standards retain the existing 24-hour PM10 standard of 150 µg/m³. This standard is not to be exceeded more than once per year on average over 3 years.

PM is associated with a host of human health impacts including asthma, decreased lung capacity in children, bronchitis, emphysema, and premature death. The health impacts of air pollution are felt most strongly by children, individuals suffering from asthma, and the elderly.

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The EIR/EIS fails to identify sensitive receptors within the Plan Area to meet primary standards for air quality. The impacts of the Plan on sensitive receptors in the Plan Area need to be addressed in the EIR/EIS. For example, directly east and adjacent to the Coachella Valley Preserve is Sun City Palm Desert. Sun City Palm Desert is a community for people 55 years of age and older. The community has about 5,000 homes, and a population of about 10,000 residents. Failing to identify 10,000 sensitive receptors, and failing to analyze the impacts of air pollution associated with the Plan/project on these sensitive receptors is unacceptable.

To the north of Sun City Palm Desert is the 490-acre Indian Trails planned community, which will include 220 acres for residential use. The impacts of the Plan on this planned community also must be analyzed in the Plan.

The Plan Area/Coachella Valley population is expected to increase to 518,481 in 2020 from 332,794 in 2000 (Draft MSHCP, Section 2.2). Indio's population will increase by 6,000 every five years, doubling in size over the span of nearly 30 years (Riverside County Center for Demographic Research, *Riverside County Projections 2006*).

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The EPA lists the Coachella Valley as a Serious PM10 Non Attainment Area, as it fails to meet this federal ambient air quality standard. The Coachella Valley was to have developed an attainment plan by December 31, 2006 to bring the Valley into compliance.

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b. The Plan Harms Human Health

The Plan would alter development patterns in the Coachella Valley to enhance the transport of wind-borne sand and dust throughout the Coachella Valley. This goal of the Plan would add significant quantities of PM10 to an existing Serious PM10 Non Attainment Area. These impacts must be identified and mitigated. Further, these impacts must be compared to the No Project alternative in which development would be allowed to stabilize and reduce these sand and dust sources in the Coachella Valley as development is completed.

The Plan's General Conservation measures include: "Conserve the sand source/transport systems to ensure sustainability of the sand dunes and sand fields. Maintain and enhance aeolian (wind-blown) and fluvial (water-borne) sand transport systems." (Draft MSHCP, Section 10.2).

Conflicts have arisen between the natural sand deposition process and human development. Developments that have been constructed within the valley's blowsand area cite the Coachella Valley Preserve's sand dunes as unacceptable sources of upwind sand. Sand collected on streets after major blowsand incidents is re-deposited by dump trucks in the westerly, upwind portion of the Coachella Valley Preserve. During 2000, approximately 200 tons of sand was re-deposited in the Preserve (EIR/EIS, Section 3.11, p. 121).

The EIR/EIS recognizes that blowsand and dust "have adverse environmental effects" to the human environment, including "reduced lung capacity and function" in humans (EIR/EIS, Section 3.1.1, p. 3-115).

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The Plan's assertion that unhealthful levels of PM10 are due to human disturbance of soils is unsupported by data in the Plan. Further, if the Plan seeks to limit human disturbance in order to enhance sand transport, it follows that sand transport must be less on disturbed lands.

One of the main components of EPA's natural events policy is for states to reduce particulate matter levels during natural events. "Dust concentrations caused by high winds can be lowered by reducing the amount of loose, uncovered soil..." (Environmental Protection Agency, Fact Sheet, EPA's Natural Events Policy for Particulate Matter, June 6, 1996).

Clearly, the MSHCP would prevent the Coachella Valley from demonstrating attainment of the PM10 standard, and would violate the federal PM10 air quality standard. Even though the 2002 Coachella Valley PM10 State Implementation Plan targets human disturbances rather than natural sand transport processes, a principal element of the Coachella Valley's PM10 control program enhancements should be the elimination of the MSHCP's measures that seek to "Maintain and enhance aeolian (wind-blown) and fluvial (water-borne) sand transport systems."

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c. The Plan Must Provide Air Quality Data and Analysis

The EIR/EIS is deficient in failing to adequately address the potential air quality impacts created by the MSHCP, which is within a Serious PM10 Non Attainment Area.

The EIR/EIS recognizes that blowsand and dust “have adverse environmental effects” to the human environment, including “reduced lung capacity and function” in humans (Section 3.1.1, p. 3-115).

The Plan must provide air quality data and analysis for the Plan – a project that enhances aeolian (wind-blown) and fluvial (water-borne) sand transport systems, and for the No Project alternative in which development would be allowed to stabilize and reduce these sand and dust sources in the Coachella Valley as development is completed.

The Plan must analyze the Plan/project’s impacts to sensitive receptors over the lifetime of the Plan. If the project will result in impacts to the sensitive receptors, those impacts must be identified and mitigated.

An EIR omits relevant information and is deficient when it fails to correlate identified adverse air impacts to resultant health effects (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Ca.4th 1184, 1219 – 1220).

The Plan/project cannot be approved based upon “no data.”

The Plan must conform with the Natural Ambient Air Quality Standards before it is approved (40 CFR part 93).

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d. The Plan’s Biased Use of Data

The Plan uses data in a biased approach to limit human use of land. For example, the Plan attempted to ration recreational use in the Santa Rosa and San Jacinto Mountains to supposedly protect bighorn sheep, although there are still no scientific studies to justify such restrictions. A further example is the restrictions of human use of sand source areas, which “enhances” the unhealthful PM10 concentrations in the Coachella Valley.

The confused use of data is apparent where the Plan states that urbanization has exacerbated the fugitive dust problem as development expanded into the central areas of the valley, where high winds, loose soils, and blowing sand predominate. Immediately following, the Plan states that the built environment can interrupt natural blowsand transport and reduce the amount of sand (EIR/EIS, Section 3.11, pp. 120-121).

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e. A Government Entity Can be Held Liable

A government entity can be held liable for air quality mitigation measures resulting from a public project. The Owens Valley provides one such example. Under Health and Safety Code

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Section 42316, enacted by the California Legislature in 1983, the Great Basin Unified Air Pollution Control District has authority to require the City of Los Angeles Department of Water and Power City to undertake reasonable measures at Owens Lake in order to address the impacts of its water diversion activities that cause or contribute to violations of federal and state air quality standards for PM10.

On May 4, 2006, the City of Los Angeles filed a petition for writ of mandate challenging the Air Pollution Control Officer of the District's April 4, 2006 Modified Supplemental Control Requirement determination (*City of Los Angeles Department of Water and Power v. Great Basin Unified Air Pollution Control District*, Kern County Superior Court Case No. S-1500-CV-258678, RJO). The Parties entered into a Settlement Agreement on April 4, 2006. The City remains responsible for mitigation of its activities.

Section 304(a) of the federal Clean Air Act authorizes citizen suits against any governmental instrumentality alleged to have violated an emission standard under this Act. In addition, the Act authorizes citizen suits against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator. The district courts have jurisdiction to enforce emission standards, or to order the Administrator to perform any act or duty under this Act, and to apply any appropriate civil penalties (42 U.S.C. 7603).

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South Coast Air Quality Management District Rule 403.1, which applies specifically to the Coachella Valley, currently prohibits fugitive dust mitigation actions that are in conflict with the Endangered Species Act, so that measures to control fugitive dust occur only in the urbanized areas. The court may find this rule to be in violation of the Clean Air Act by preventing the attainment of NAAQS. Federal activities may not worsen existing violations or interfere with timely attainment of any standard. Human health is not subordinate to public projects.

f. Background – Geophysical and Climatic Setting

From spring through fall, the desert floor heats up and the air expands and rises, resulting in surface air pressures being systematically lowered. This creates a vacuum-like effect, whereby cooler coastal air masses are drawn and funneled through the narrow San Geronio Pass and flow sometimes violently into the desert. These strong winds frequently exceed 40 miles per hour and flow generally southeast crossing eroded and highly exposed areas of the upper and central valley. This large-scale wind regime transports and deposits large quantities of blowing sand (blowsand) (EIR/EIS, Section 3.11).

The smallest and least compacted sediments are deposited in major active drainages that cross the valley floor. These drainages emanate from the surrounding mountains and extend in a generally southerly direction across the central axis of the valley floor, providing large cross-sections of deposition area exposed to the strongest regional winds.

If disturbed, the alluvial (stream-deposited) and aeolian (wind-deposited) sediments comprising much of the valley floor can be easily picked up and transported by prevailing winds. Flooding

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events are important precursors to the generation of fresh blowing sand, which must be brought to the surface and exposed to the wind. Sand transport generally requires wind speeds in excess of 14 mph, while the finer, silty components of flooding-exposed alluvial soils are easily lifted into the air by moderate breezes, as well as by the strong winds common to the region.

The mountains bordering the valley are aligned in a roughly northwest-southeast direction and act to contain and channel the flow of wind down the central axis of the Coachella Valley. The valley floor slopes gently to the southeast, with elevations ranging from about 1,200 feet at the San Geronio Pass, to about 228 feet below sea level at the Salton Sea. This sloping terrain allows air masses to move unrestricted down the central axis of the Coachella Valley, where loose sediments are episodically picked up and transported down valley.

Blowing sand and fugitive dust can reduce visibility from the typical 35+ miles in the desert to less than a mile and in severe cases to tens or hundreds of feet.

Natural sources of PM10 are discussed above, and are those responsible for the sorting and distribution of sand, silt and dust particles throughout the Coachella Valley. The rich, silty soils in the mid and eastern portions of the valley testify to the primary deposition areas for these materials, which has occurred over thousands of years. The silty soil in Thousand Palms is confirmed by a study by Simons, Li & Associates, Inc., "Sand Migration Impact Evaluation for Thousand Palms Flood Control Project," Vol. I: Data Collection and Review for the U.S. Army Corps of Engineers, Los Angeles District, December 1996.

Measurements of the number of PM10 samples exceeding the 24-hour standard at the Palm Springs and Indio monitoring stations show that the downwind monitoring station consistently records higher levels of PM10 than the upwind monitoring station, indicating that wind-borne dust is picked up within the Valley (EIR/EIS, Section 3.11, Table 3-16).

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Cont.

2. DENSIFICATION AND INTENSIFICATION IMPACTS

Published studies show that intensification of development and higher densities lead to more traffic congestion – more vehicle miles traveled per square mile – and to more severe air pollution, as stated in *A Guide to Smart Growth: Shattering Myths, Providing Solutions*, The Heritage Foundation, p. 44. As traffic congestion reduces average vehicle speed, air pollution increases.

For communities bearing the localized air quality impacts brought about through the higher densities encouraged by the Plan, it is apparent that the impacts could be significant. EIR/EIS Section 4.11.4 states, "As discussed in Section 4.11.3 above, none of the Alternatives would have a direct significant adverse impact on local or regional air quality, hamper or impede implementation of air quality management plans, or hamper the implementation of actions that protect sensitive receptors from impacts. No mitigation measures are required." If impacts are considered to be less than significant, that conclusion needs to be supported with rigorous analysis and concrete, substantial evidence for an EIR to be considered adequate.

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The EIR violates CEQA by failing to analyze these air quality impacts resulting from MSHCP adoption.

The EIR's erroneous analysis severely underestimates the true impacts of the MSHCP. This results in a wrong conclusion that the air quality impacts are less than significant.

The EIR/EIS fails to provide mitigation measures for the air quality impacts. These omissions render the EIR/EIS inadequate.

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Cont.

E. ENVIRONMENTAL JUSTICE IMPACTS

Environmental justice refers to the fair and equitable treatment of all individuals, regardless of race, ethnicity, or income level, in the development and implementation of environmental laws and policies.

1. REGULATIONS AND IMPLEMENTATION

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, is one of the principal mechanisms used to implement environmental justice at the federal level. Its fundamental objective is to require each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."

The Council on Environmental Quality (CEQ) oversees the federal government's compliance with Executive Order 12898 and NEPA. According to the CEQ, environmental justice issues may arise from a broad range of impacts on the natural and physical environment, including social, cultural, and economic effects, such as human health. Federal agencies are required to address these issues at each step of the NEPA process and identify disproportionately high and adverse effects on low income, minority, and Native American populations.

The CEQA Guidelines state that social and economic effects may be used to determine the significance of a physical change caused by a project (Section 15131(b)), and that any project that will cause substantial adverse effects on human beings, either directly or indirectly, shall be determined to have a significant impact on the environment (Section 15065(d)).

The Plan indicates that the greatest percentage of individuals identifying themselves as Hispanic or Latino resides in the southeasterly portion of the Coachella Valley, including Indio, Coachella, and Mecca. The communities with the greatest percentage of households in poverty include Mecca (45.4%), Coachella (28.9%), Desert Hot Springs (27.4%), and Indio (21.5%). One particular segment of the population that may qualify as low income, and which is generally more geographically concentrated than other low income groups in the Coachella Valley, is migrant farm workers. This population generally resides in the southeasterly portion of the

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valley, in the vicinity of Indio, Coachella and Mecca, where agricultural lands predominate (EIR/EIS, Sections 3.16 and 4.16).

The Plan's Thresholds of Significance state that the Plan would have a significant effect on Environmental Justice and Children if it:

- a.) Causes an adverse physical or socio-economic effect on low income or minority persons to a greater extent than the general population (Executive Order 12898).
- b.) Causes a disproportionate increase in the cost of housing or essential public services and facilities on low income or minority persons.

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Cont.

2. DISPROPORTIONATE AIR QUALITY IMPACTS

The Plan would cause disproportionate air quality impacts on minority populations in Indio, Coachella, and Mecca. The Plan states that natural sources of PM10 are those responsible for the sorting and distribution of sand, silt and dust particles throughout the Coachella Valley. The rich, silty soils in the mid and eastern portions of the valley testify to the primary deposition areas for these materials, which has occurred over thousands of years (EIR/EIS, Section 3.11).

Measurements of the number of PM10 samples exceeding the 24-hour standard at the Palm Springs and Indio monitoring stations show that the downwind monitoring station in Indio consistently records higher levels of PM10 than the upwind monitoring station, indicating that wind-borne dust is picked up within the valley and deposited in the eastern portions of the valley, which are home to minority populations (EIR/EIS, Section 3.11, Table 3-16).

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The Plan would alter development patterns in the Coachella Valley to enhance the transport of wind-borne sand and dust throughout the Coachella Valley. This goal of the Plan would add significant quantities of PM10 to an existing Serious PM10 Non Attainment Area. The Plan's General Conservation measures include: "Conserve the sand source/transport systems to ensure sustainability of the sand dunes and sand fields. Maintain and enhance aeolian (wind-blown) and fluvial (water-borne) sand transport systems." (Draft MSHCP, Section 10.2).

3. DISPROPORTIONATE WORKFORCE HOUSING AFFORDABILITY IMPACTS

The Plan would cause disproportionate workforce housing affordability impacts on low income populations in Mecca, Coachella, Desert Hot Springs, and Indio.

The Plan would make the supply of residential land increasingly scarce, driving up the cost of land, making housing less affordable and homeownership less attainable for an increasing number of residents. As homes become more expensive, an increasing number of homebuyers may not be able to qualify for financing a home, and an increasing number of people on the entry level of the housing market may be driven into rental units.

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The Plan would conserve 200,536 acres of vacant land under private or public non-conservation ownership that is currently available for urban development in the Plan, and would remove this land from the housing market, creating a Plan-induced scarcity of buildable land (EIR/EIS Section 4, p. 4-215).

Approximately 155,431 acres with development potential lie outside the Conservation Areas. The 155,431 acres with development potential is composed of the 83,782 acres of farmland and 71,649 acres of non-farmland (EIR/EIS Section 4, p. 4-215).

EIR/EIS Section 3, Table 3-19 and Section 3, Table 3-3 show that presently, roughly 332,800 people live on 67,364 urban acres in the Plan Area. The Southern California Association of Governments 2004 RTP Growth Forecast Report, p. 43 projects that by 2030, the population of the Coachella Valley will experience "a 106 percent increase from its 2000 population. The population is projected to grow at an annual rate of 3.5 percent." Therefore, by 2030, at least another 67,364 urban acres in the Plan Area would be developed; a 106 percent increase in the urban acreage would be 71,406 acres. Under the Plan, this would use up all but 373 acres of the available non-farmland land with development potential.

The mitigation given by the Plan for the need for affordable housing for an increasing population is to force the densification of existing urban areas – to attempt to squeeze even more people into already overcrowded and congested cities. The popular term for this type of regulated development planning is "Smart Growth."

This combination of forced densification and high housing costs produces squalor and slums, as attested to by accounts in Mecca, and in Monterey County which also is setting aside substantial developable land for species habitat (*The Press-Enterprise*, June 25, 2006, "Farmworkers' plight: hard labor, harder living" and *The Wall Street Journal*, August 26, 2006, "In Tony Monterey County, Slums and a Land War").

In Mecca, "Thousands of migrant workers who toil in Coachella Valley vineyards, citrus groves and vegetable fields each spring and summer have little choice but to sleep on the ground, in their cars, in dilapidated trailers or crammed together in dingy rooms. Housing in Mecca is so scarce that those who do not arrive early in the harvest are forced onto the streets, transforming the normally somnolent farming town near the Salton Sea into a giant labor camp. Everyone – the growers, the county, the state, farmworker advocacy groups – agrees that the situation is dire."

In Monterey County, "amid this land of plenty, there is squalor. Virtually beside the fields, in the city of Salinas, neighborhoods rival high-rise-jammed cities in population density. Multiple families occupy small houses; others live in converted garages. Fueling Salinas's troubles, many say, is a housing market that offers few affordable dwellings for the thousands of Hispanic immigrants who pick the area's crops."

The Plan would produce slums and squalor for low income residents and migrant farm workers.

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Cont.

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The environmental justice impacts above need to be identified, analyzed, and mitigated by the Plan in order for the Plan to be compliant with Executive Order 12898.

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Cont.

F. PUBLIC PARTICIPATION

I. LACK OF COMMUNITY SUPPORT

Surveys of Riverside County residents show a lack of support for the type of habitat planning being proposed by the MSHCP. A December 2000 study for the Riverside County Transportation Commission (RCTC) found that 61 percent of likely voters in Riverside County would not support a local tax increase to buy private land to pay for wildlife habitat.

Further, a June 1999 Public Opinion Survey of Riverside County, conducted for the Riverside County Integrated Project (RCIP), found that protecting open space is ranked eleventh in a listing of the most serious problems that the County faces – near the bottom of the list. The MSHCP is proposing to spend development fees on the least important issue to County residents – acquiring wildlife habitat.

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The EIR/EIS Section 4, p. 4-248 should be amended to include the public comments above that have been omitted from the EIR/EIS.

For the February 6, 2006 CVAG Executive Committee public hearing on Draft MSHCP approval, the U.S. Postal Service has confirmed that CVAG mailed a notice to Coachella Valley Property Owners after the date of the hearing. CVAG needs to more adequately notify landowners about the Plan.

G. BIOLOGICAL RESOURCES IMPACTS

I. INADEQUATE BASELINE/ SETTING INFORMATION

As shown above in Section II.A.2., Failure to Use the Best Scientific and Commercial Data Available, the MSHCP uses outdated and inaccurate data to describe its environmental setting.

The data used to construct the Conservation Areas does not appear to be the best available scientific data, but rather data that is more than ten years old. For example, initial biological surveys, which were used to develop the initial Natural Communities Map, were conducted in 1995 through 1996. The Natural Communities Map was refined and the initial Habitat Distribution Models developed in 1997 through 1998 (Draft MSHCP, p. 3-5).

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The use of outdated and inaccurate data in the MSHCP, among other things, renders its environmental setting for determining impacts inadequate.

Using such outdated and inaccurate data, is contrary to the National Environmental Policy Act (NEPA), which requires that “[a]gencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in the environmental impact statement” (40

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CFR Section 1502.24), and is contrary to the CEQA requirement for “substantial evidence,” as it is clear that the use of such data in an EIR/EIS would amount to “argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate” (CEQA Guidelines Section 15384 (a)).

Further, this “technical data” is not “sufficient to permit full assessment of the significant environmental impacts by reviewing agencies and members of the public” (CEQA Guidelines Section 15147).

NEPA Section 1500.1 (b) states that environmental information must be of high quality and that accurate scientific analysis is essential.

Yet, the EIR/EIS fails use the best scientific and commercial data available.

The EIR/EIS must correct the errors contained in the science database to be in compliance with NEPA (*Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988)).

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H. BEFORE ADOPTING THE MSHCP, CEQA ANALYSIS IS REQUIRED BY EACH CITY

EIR/EIS Section 1, p. 1-5 states that CVAG is the Lead Agency under CEQA and the USFWS is the Lead Agency under NEPA; the Cities are Responsible Agencies under the MSHCP.

Responsible Agencies cannot rely on the Lead Agency's findings, but must make their own findings supported by substantial evidence in the record, and reach their own conclusions on whether and how to approve the MSHCP (*Guidelines for Implementation of the California Environmental Quality Act*, Sections 15091 and 15096).

The EIR/EIS prepared by CVAG for the MSHCP is not adequate for use by the Cities/Responsible Agencies because the EIR/EIS fails to analyze the MSHCP's impacts to each individual city. The EIR/EIS section 1, p. 1-14 states that analysis of the proposed MSHCP is based on the existing, adopted general plans of the Cities and the County.

Public Resources Code, Section 21167.3 states, “A conditional approval shall constitute permission to proceed with a project when and only when such action or proceeding results in a final determination that the environmental impact report or negative declaration does comply with the provisions of this division.”

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I. INADEQUATE PROJECT DESCRIPTION

The description of the MSHCP is incomplete and misleading. It is impossible to determine many of the MSHCP's environmental impacts because the project description lacks or obfuscates details about the MSHCP that are critical to an adequate analysis of project-related and cumulative impacts. Such details include, but are not limited to: 1) failure to utilize updated and

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accurate science to create the MSHCP; 2) failure to meet the project objectives, and 3) failure to comply with state and federal laws, as well as constitutional rights.

CEQA mandates an accurate project description. A complete project description is necessary to assure that the project's environmental impacts are considered. A project description must include all relevant parts of a project, including reasonably foreseeable future expansion or other activities that are part of the project. The lack of a concrete project description violates CEQA in that it precludes the public from intelligent participation in the analysis of the project.

An accurate project description is necessary for an intelligent evaluation of the potential environmental effects of the project. A curtailed, enigmatic or unstable project description draws a red herring across the path of public input.

The defined project and not some other project must be the EIR's bona fide subject. An accurate and complete project description is indispensable because a curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected entities and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.

The description of the MSHCP is incomplete and misleading. The MSHCP's project description inadequacies include, but are not limited to, the following.

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1. OUTDATED AND INACCURATE SCIENCE

As shown above in Section II.A.2., Failure to Use the Best Scientific and Commercial Data Available, the MSHCP uses outdated and inaccurate data.

The data used to construct the Conservation Areas does not appear to be the best available scientific data, but rather data that is more than ten years old. For example, initial biological surveys, which were used to develop the initial Natural Communities Map, were conducted in 1995 through 1996. The Natural Communities Map was refined and the initial Habitat Distribution Models developed in 1997 through 1998 (Draft MSHCP, p. 3-5).

The use of outdated and inaccurate data in the MSHCP, among other things, renders the project description inadequate.

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This "technical data" is not "sufficient to permit full assessment of the significant environmental impacts by reviewing agencies and members of the public" (CEQA Guidelines Section 15147). Because of the use of this inaccurate and outdated scientific data, it is not possible for decision-makers to analyze the full extent of the MSHCP's biological resource impacts. Further, private property owners have no way of knowing the full extent of the MSHCP's impacts to their properties.

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Further, using such outdated and inaccurate data, is contrary to the National Environmental Policy Act (NEPA), which requires that “[a]gencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in the environmental impact statement” (40 CFR Section 1502.24), and is contrary to the CEQA requirement for “substantial evidence,” as it is clear that the use of such data in an EIR/EIS would amount to “argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate” (CEQA Guidelines Section 15384 (a)).

NEPA Section 1500.1 (b) states that environmental information must be of high quality and that accurate scientific analysis is essential.

Yet, the EIR/EIS fails to use the best scientific and commercial data available and the best available science.

The EIR/EIS must correct the errors contained in the science database to be in compliance with NEPA and CEQA.

It is likely that if “accurate” and “best scientific and commercial data available” were used, the Conservation Area would be smaller. As a result, the MSHCP’s conservation scheme would have to dramatically change (e.g., target less privately-owned property for conservation, target less number of species for conservation, etc.)

There is an abundance of new data available (i.e., numerous recent biological studies and surveys conducted for development projects as part of the County’s and cities’ development approval processes), but CVAG, in formulating the MSHCP, chose to use inaccurate and outdated scientific data.

The flawed science underlying the Plan raises serious questions about the purpose of the Plan. Numerous flaws include the defective science on bighorn sheep habitat, no scientific basis for the size of the habitat reserve, the inability of the state and federal wildlife agencies to answer basic scientific questions in negotiations about the Plan, the history of not correctly identifying the main source of sand for the Coachella Valley Preserve, and current biological field studies showing that species do not even exist on thousands of acres, proving the Plan’s theoretical habitat distribution models to be incorrect.

2. PROJECT OBJECTIVES

A project description must state the objectives sought by the proposed project. The statement of objectives should include the underlying purpose, and should be clearly written to guide the selection of alternatives to be evaluated in the EIR (CEQA Guidelines Section 15124(b)).

As shown above in Section II, C., Not Reasonably Related to a Legitimate State Interest, the MSHCP fails to meet its project objectives, rendering the project description inadequate.

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Cont.

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J. INADEQUATE PROJECT SETTING

The EIR fails to adequately and completely describe key elements of the project setting. Such elements include, but are not limited to: (1) the land use and planning setting; (2) the biological resources setting, especially considering CVAG's use of outdated and inaccurate scientific data; and (3) the traffic and circulation setting.

An EIR must describe the environmental setting of a project in terms of existing physical conditions of a project site and its surrounding. The environmental setting serves as the baseline against which project impacts are determined. Without such a description, analysis of impacts, mitigation measures, and project alternatives becomes impossible. An EIR must focus on impacts to the existing environment, not to an inaccurate and unsubstantiated setting.

BM-77

1. BIOLOGICAL RESOURCES ENVIRONMENTAL SETTING

The EIR fails to describe accurately and completely the biological resources environmental setting of the MSHCP at the time the Notice of Preparation (NOP) was released for public review and comment. The biological resources environmental setting is fundamentally flawed because it relies on outdated and inaccurate scientific data.

Much of the conservation by the Plan is based on modeling of where the species likely may occur, not on actual observations of the species (Draft MSHCP, pp. ES-2, ES-5, and ES-12). The Plan uses habitat distribution models to assign theoretical habitat to private properties throughout the Plan Area.

Numerous recent biological studies have been conducted on properties in the Conservation Area. These studies, cited above, found that the biological conditions of these properties do not match the conditions presented by the Plan. The more landowners have biological studies prepared, the more invalid, arbitrary, and capricious the Plan's biological modeling appears.

The Plan's habitat distribution models are not supported by localized scientific data. Rather, the recent localized scientific studies cited earlier, conducted on more than 5,000 acres, without exception, prove the models to be invalid.

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2. LAND USE ENVIRONMENTAL SETTING

The EIR fails to consider the conflicts of the MSHCP with applicable land use plans, policies, or regulations of other public agencies with jurisdiction affected by the project.

Draft MSHCP, Section 4.3, Table 4-7 summarizes the general plan land use designations on private, non-conserved lands in the Conservation Areas. The Conservation Areas include: 12,612 acres of land designated for residential use and 1,021 acres designated for commercial, industrial, and business park uses. Development of these lands conflicts with the Conservation Objectives of the Conservation Areas.

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K. THE EIR FAILS TO IDENTIFY OR ANALYZE THE FULL EXTENT OF SIGNIFICANT ENVIRONMENTAL IMPACTS

The EIR analyzes 16 project-specific significant impacts that could result from the implementation of the MSHCP. According to the EIR, impacts will be less than significant. However, the EIR's conclusions that these impacts will be reduced to less than significant are unsupported by facts and analysis, especially due to outdated and inaccurate scientific data.

An EIR must address a proposed project's "significant effect on the environment." Direct and indirect significant effects of the project must be identified and described in the EIR, with consideration given to both short-term and long-term effects. Identification of a project's significant environmental effects is one of the primary purposes of an EIR and is necessary to implement the stated public policy that agencies should not approve projects if there are feasible mitigation measures or project alternatives available to reduce or avoid the environmental impacts.

BM-80

It is black-letter CEQA law that an EIR must analyze the potentially significant impacts of the whole project (CEQA Guidelines § 15378).

1. THE BIOLOGICAL RESOURCES IMPACTS ANALYSIS IS INADEQUATE

The biological resources analysis is fundamentally flawed because it relies on outdated and inaccurate data.

The data used to construct the Conservation Areas does not appear to be the best available scientific data, but rather data that is more than ten years old. For example, initial biological surveys, which were used to develop the initial Natural Communities Map, were conducted in 1995 through 1996. The Natural Communities Map was refined and the initial Habitat Distribution Models developed in 1997 through 1998 (Draft MSIICP, p. 3-5).

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Because of the use of this inaccurate and outdated science, it is impossible for decision-makers and the public to analyze the full extent of the MSHCP's biological resource impacts.

It is likely that if "accurate" and "best scientific and commercial data available" were used, the Conservation Area would be smaller. As a result, the MSHCP's conservation scheme would have been dramatically differently.

Based on the use of outdated and inaccurate science, the EIR does not accurately discuss the MSHCP's biological resources impacts.

2. THE POPULATION AND HOUSING IMPACTS ANALYSIS IS INADEQUATE

The EIR indicates that the implementation of the MSHCP will likely cause dwelling units previously planned for development within the Conservation Area to be shifted into areas that are not to be conserved. However, the EIR improperly speculatively explains that

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implementation of the proposed MSHCP will not impact (either reduce or increase) the amount of development (dwelling units) allowed pursuant to local land use controls. The EIR concludes that the MSHCP's indirect growth-inducing impacts are less than significant.

The EIR's conclusions regarding the MSHCP's population, housing, and employment impacts are understated and unsupported by facts and analysis.

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Cont.

3. THE TRANSPORTATION AND CIRCULATION IMPACTS ANALYSIS IS INADEQUATE

There is no proper traffic analysis presented in the EIR to demonstrate whether the MSHCP would create significant transportation and circulation impacts. As discussed above, the EIR indicates that implementation of the MSHCP will likely cause dwelling units previously planned for development within the Conservation Area to be shifted into areas that are not to be conserved. Further, the MSHCP would change the location of development and possibly site-specific density within the Coachella Valley.

Published studies show that intensification of development and higher densities lead to more traffic congestion – more vehicle miles traveled per square mile – and to more severe air pollution, as stated in *A Guide to Smart Growth: Shattering Myths, Providing Solutions*, The Heritage Foundation, p. 44.

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The EIR improperly fails to analyze the traffic impacts associated with the relocation and intensification of development outside the Conservation Area. This relocation and intensification is likely to occur in already developed areas and could lead to further traffic congestion as well as other impacts.

4. THE AGRICULTURAL RESOURCES IMPACTS ANALYSIS IS INADEQUATE

Agriculture is not only a land use category in the MSHCP; it is also an existing economic resource in the Coachella Valley. According to the EIR, agriculture is the third-largest industry in the Coachella Valley, providing employment for a significant number of the Valley's population. Yet, through the MSHCP, the agriculture industry, which generates income and jobs, would be converted to other land uses, some of which require expenditures of public money to maintain.

The EIR fails to consider the impacts on the Coachella Valley's economy from the loss of its third-largest industry, and fails to consider the impacts of land use decisions that would necessitate increased expenditures of public funds. The EIR violates the California Environmental Quality Act (CEQA) by failing to analyze the number of existing jobs and future jobs that would be lost, the additional costs, the income lost, and the resulting effect on the economy resulting from MSHCP adoption. In addition, expansion of agriculture and new agriculture would be prevented by the Plan.

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It is State policy that land use decisions be made with full knowledge of their economic and fiscal implications, giving consideration to short-term costs and benefits, and their relationship to long-term environmental impact as well as long-term costs and benefits. Due to the inadequate socioeconomic analysis, the EIR inadequately analyzes the economic and fiscal implications of the MSHCP.

BM-84
Cont.

A reduction in the size of the agricultural industry resulting from the MSHCP's vast conversion of agriculture on lands outside the conservation Area was described earlier and will also cause indirect impacts that should be analyzed under CEQA. The EIR must consider the indirect impacts to public services as a result of these fiscal impacts (including the lost revenues from the agriculture industry) and the new costs that will be incurred as a result of the MSHCP.

BM-85

The EIR did not use the correct significance standard required by CEQA. The EIR imposes a higher "certainty standard" that the MSHCP will have a significant effect on agricultural resources. CEQA requires that significance be based on whether there is "a substantial or potentially substantial adverse change in the environment." However, the MSHCP did not apply this standard in the EIR. Accordingly, the EIR concludes that the impacts on agriculture are "less than significant," even though the data in the EIR indicates otherwise.

The EIR's use of an improper significance standard, erroneous analysis, and failure to consider all direct and indirect impacts severely underestimates the true impacts of the MSHCP on agriculture. This results in a wrong conclusion that the impacts on agriculture are not significant.

The EIR lists the following Thresholds of Significance. Yet the EIR fails to provide any analysis or application of these thresholds to the loss of the agriculture industry.

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- Convert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland), as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency [EIR Exhibit 4-4, Coachella Valley MSHCP Important Farmlands], to non-agricultural use.
- Conflict with actively cultivated farmlands, a Williamson Act contract or existing zoning for agricultural uses.
- Involve other changes in the existing environment, which, due to their location or nature, could result in conversion of Farmland to non-agricultural use.

The EIR conclusions that Impact Issues, such as: "convert prime/unique/other important farmland;" "conflict with active cultivation or Williamson Act contracts;" or "induce changes in environment due to proximity to agriculture" would be "less than significant" and would require "no mitigation" and that "no unavoidable significant adverse impacts to socio-economic resources are expected to result from the Plan's approval and implementation" are likewise wrong (EIR/EIS Table of Contents, Table E-1, Coachella Valley MSHCP EIR/EIS, Environmental Summary / Matrix, Section 4.6.4, and Section 6.5).

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L. INADEQUATE GROWTH-INDUCING IMPACTS ANALYSIS

CVAG's failure to further analyze the potential impacts associated with the intensification of development outside the Conservation Area due to shifting of development violates CEQA.

The EIR must consider the growth-inducing potential of the MSHCP in areas outside the Conservation Area. CEQA requires that an EIR include a detailed statement setting forth the growth-inducing impacts of the proposed project. The statement must discuss the ways in which the proposed project could foster economic growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. It must also discuss how a project may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively or remove obstacles to population growth.

Despite the EIR's admissions that the MSHCP would result in changes to the regional pattern of land use, with possible increased development pressure and intensification of development outside the Conservation Area, and would remove existing impediments to growth outside the Conservation Area but within the MSHCP Plan Area, the EIR improperly fails to discuss how the shifting of development from within the MSHCP Conservation Area to areas outside will create a need for additional facilities (e.g., roads, sewer and water lines, and wastewater and water treatment facilities, etc.) and whether these facilities in turn would also induce growth. As a result, the EIR's growth-inducing conclusions are unsupported, and thus invalid under CEQA.

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Published studies show that intensification of development and higher densities lead to more traffic congestion – more vehicle miles traveled per square mile – and to more severe air pollution, as stated in *A Guide to Smart Growth: Shattering Myths, Providing Solutions*, The Heritage Foundation, p. 44

The EIR/EIS's growth inducing impacts conclusions are unsupported and thus inadequate (*Napa Citizens for Honest Government v. Napa County Board of Supervisors, supra*, 91 Cal.App.4th at 368).

The EIR also does not adequately consider feasible mitigation for the MSHCP's growth-inducing impacts and its incremental contribution to cumulative impacts associated with the intensification of development outside the Conservation Area.

M. THE EIR FAILS TO IDENTIFY FEASIBLE MITIGATION MEASURES

An EIR must propose and describe mitigation measures to minimize the significant environmental effects identified in the EIR. CEQA requires that mitigation measures be identified and analyzed. A mitigation measure must be designed to minimize, reduce, or avoid an identified environmental impact or to rectify or compensate for that impact.

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The mitigation and alternative sections of the EIR have been described as the "core" of the document. An EIR is inadequate if it fails to suggest mitigation measures, or if its suggested mitigation measures are so undefined that it is impossible to evaluate their effectiveness. An EIR

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may not use the inadequacy of its impacts review to avoid mitigation. Nor may a public agency use vague mitigation measures to avoid disclosing impacts.

CEQA mitigation measures must be specific, and contain appropriate and measurable criteria and performance standards (*Laurel Heights, supra*, 47 Cal.3d. at 376; *San Franciscans for Reasonable Growth v. City and County of San Francisco*, 151 Cal.App.3d. 61, 79 (1984)).

CEQA requires analysis of all direct or secondary impacts caused by mitigation measures (CEQA Guidelines § 15126.4(a)(D)).

Under NEPA, the mitigation measures discussed in an EIS must cover the entire range of impacts of the proposed project (40 CFR § 1508.20).

Changes in the regional pattern of land use brought about by the Plan, and the resulting intensification of development in localized areas, would produce localized impacts that must be mitigated by the Plan.

Because many of the impacts are not reviewed in detail in the EIR, and are actually significant, the EIR must identify and discuss mitigation measures for these improperly analyzed impacts.

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Cont.

N. THE EIR INAPPROPRIATELY DEFERS MITIGATION MEASURES AND ENVIRONMENTAL ANALYSIS

CEQA does not authorize the deferral of an analysis of reasonably foreseeable significant environmental impacts to a later stage of review in order to avoid addressing them in a first tier analysis. An environmental impact is ripe for review when it is a reasonable consequence of the approval and the agency considering it has sufficient reliable data to permit preparation of a meaningful and accurate report on the impact. The deferral of environmental assessment until after project approval violates CEQA, in that impacts must be identified before project momentum reduces or eliminates the agency's flexibility to subsequently change its course of action.

CEQA also specifically prohibits reliance on future studies to determine required mitigation at some unspecified time in the future. Under CEQA, an EIR may conclude that impacts are insignificant only if it provides an adequate analysis of the magnitude of the impacts and the degree to which they will be mitigated. If a public agency fails to investigate a potential impact, its finding of insignificance simply will not stand.

It is black-letter CEQA law that mitigation may not be deferred, vague, incomplete, or untested (*Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692 (1990); *Stanislaus Natural Heritage Project v. County of Stanislaus*, 48 Cal.App.4th 182 (1996)).

The EIR does not satisfy these basic CEQA requirements regarding mitigation of the MSHCP's impacts. The EIR improperly attempts to defer discussion and development of suitable

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mitigation measures until an undefined later date, when a property owner submits a development application.

The EIR's failure to analyze adequately potentially significant effects and to design proper mitigation measures before MSHCP approval renders the EIR inadequate.

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Cont.

O. INADEQUATE ALTERNATIVES ANALYSIS

"An EIR must '[d]escribe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project...and evaluate the comparative merits of the alternatives'" (CEQA Guidelines Section 15126.6(a), Public Resources Code §21002.)

"The discussion must focus on alternatives capable of eliminating any significant adverse environmental effects or reducing them to a level of insignificance, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly" (CEQA Guidelines Section 15126(d)(3)). A robust alternatives discussion is likewise required by NEPA (40 CFR Sections 1502.2(d), 1502.14, and 1502.16).

The Council on Environmental Quality (CEQ)'s Memorandum regarding analyzing impacts on prime and unique agricultural lands also states: "...when an agency begins planning any action, it should, in the development of alternative actions, assess whether the alternatives will affect prime or unique agricultural lands. Then recognizing the importance of these lands and any significant impacts that might affect them, it must study, develop, and describe appropriate alternative uses of available resources" (Section 1501.2(c), 45 Fed. Reg. 175,59189 (Sept. 8, 1980)).

The assessment of Alternatives in the EIR/EIS fails to evaluate the potential impacts on agriculture. As with the discussion in the EIR/EIS regarding impacts from the project, the conclusions in the alternatives analysis are also flawed by CVAG's and USFWS's failure to support their findings by substantial evidence in the record (CEQA Guidelines Section 15091(b) and a rigorously explored and objective analysis evaluating all reasonable alternatives (40 CFR Section 1502.14)). The alternatives analysis in the agricultural section (EIR/EIS, p. 9-19) is not based on facts, but rather on unsubstantiated opinion, and there is no analysis to provide the public with any indication as to how the impacted acreage was identified.

There are no alternatives cited in the Plan which are not based on the Federal Recovery Plan – despite many critiques. This is hardly a "rigorous" exploration of alternatives (40 CFR Section 1502.14(a)).

This lack of meaningful analysis violates CEQA's requirement that the evaluation of the alternatives include "sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project" (CEQA Guidelines Section 15126.6; NEPA, 40 CFR Section 1502.14); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d. 692). Further, the conclusory nature of the alternatives discussion does

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not constitute a fair argument supporting the EIR's determination that agricultural impacts are less than significant.

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Cont.

1. MANY MULTI-SPECIES CONSERVATION PLANS LACK SOUND SCIENCE

A study of 22 multi-species habitat conservation plans in California and five other states by researchers from San Diego State University and University of California, Davis found that, on average, 41 percent of plants and animals covered in such plans haven't been proven to exist in the designated areas. In addition, imperiled species covered under multi-species plans were generally less likely to be protected than species covered by their own specific plans.

The study shows that the USFWS needs to prepare scientific and legal standards for permitting species coverage under habitat conservation plans (*San Diego Union-Tribune*, July 15, 2006, "Helping species that may not be there: Popular urban conservation plans flawed, study finds" and *UC Davis News Service*, July 14, 2006, "Study Finds Many Multispecies Conservation Plans Lack Sound Science").

— **BM-92**

This study calls into question the validity of the Plan using a multi-species approach. Clearly, the Plan must include an alternative analyzing species conservation through individual habitat conservation plans for species.

P. THE EIR FAILS TO PROVIDE SUFFICIENT INFORMATION

An EIR is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return. An EIR must provide public agencies and the public with detailed information about the effect which a proposed project is likely to have on the environment, list ways which the significant effects of the project might be minimized, and discuss alternatives to the project.

CEQA prohibits approving a project unless all feasible mitigation has been required. CEQA mandates that environmental impacts be identified and analyzed in the EIR, not at a later date.

CEQA requires that an EIR must provide a degree of analysis and detail about the project's environmental impacts that will enable decision-makers to make intelligent judgments in light of the environmental consequences of their decisions. The lead agency must make a good faith effort at full disclosure of environmental impacts. In order to accomplish this requirement, it is essential that the project is adequately described and that existing setting information is complete.

— **BM-93**

Both the public and decision-makers need to fully understand the implications of the choices that are presented related to the project, mitigation measures, and alternatives. Accordingly, an EIR's purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. The EIR protects not only the environment but also informed self-government.

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The EIR fails to provide sufficient information to enable informed decision-making by the decision-makers and the public.

The EIR for the MSHCP fails to satisfy CEQA's requirements and is therefore legally inadequate.

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Cont.

Q. INADEQUATE ANALYSIS OF MANDATORY FINDINGS OF SIGNIFICANCE

"A lead agency shall find that a project may have a significant effect on the environment and thereby require an EIR to be prepared for the project where there is substantial evidence, in light of the whole record, that any of the following conditions may occur: ...

- (4) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly." (CEQA Guidelines, 15065(a)).

Once a determination of substantial adverse effects on human beings is made, the EIR must include the following:

- (1) the identification of effects to be analyzed in-depth in the EIR or the functional equivalent thereof,
- (2) the requirement to make detailed findings of the feasibility of alternatives or mitigation measures to substantially lessen or avoid the significant effects on the environment,
- (3) when found to be feasible, the making of changes in the project to substantially lessen or avoid the significant effects on the environment, and
- (4) where necessary, the requirement to adopt a statement of overriding considerations.

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In its discussion of air quality, the EIR/EIS recognizes the severe adverse health effects of dust in humans:

"Blowing sand (blowsand) and dust also have adverse environmental effects, especially to the human environment due to deposits on buildings, fabrics, automobiles, streets, and other structures, and can damage materials and coatings. Extensive wind-borne sediments can dirty streets, fill drainages and yards, pit windshields, damage landscaping, and limit visibility. Dust that remains on vegetation can interfere with plant respiration, damage foliage, and stunt plant growth. The adverse health effects of dust in humans, including reduced lung capacity and function, can be severe." (EIR/EIS, Section 3.11, p. 3-115, emphasis added).

The Plan would alter development patterns in the Coachella Valley to enhance the transport of wind-borne sand and dust throughout the Coachella Valley. This goal of the Plan would add significant quantities of PM10 to an existing Serious PM10 Non

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Attainment Area. The Plan's General Conservation measures include: "Conserve the sand source/transport systems to ensure sustainability of the sand dunes and sand fields. Maintain and enhance aeolian (wind-blown) and fluvial (water-borne) sand transport systems." (Draft MSHCP, Section 10.2).

Regarding workforce housing affordability impacts, EIR/EIS Section 9, p. 9-15 states,

"It is conceivable that some Development in Conservation Areas inconsistent with the Conservation Goals and Objectives in the proposed Plan would shift to urban areas already planned for more intense Development."

The Plan would conserve 200,536 acres of vacant land under private or public non-conservation ownership that is currently available for urban development in the Plan, and would remove this land from the housing market, creating a Plan-induced scarcity of buildable land, described above in Section III.E (EIR/EIS Section 4, p. 4-215).

The Plan would make the supply of residential land increasingly scarce, driving up the cost of land, making housing less affordable and homeownership less attainable for an increasing number of residents. As homes become more expensive, an increasing number of homebuyers may not be able to qualify for financing a home, and an increasing number of people on the entry level of the housing market may be driven into rental units.

This combination of forced densification and high housing costs produces squalor and slums, as attested to by accounts in Mecca, and in Monterey County which also is setting aside substantial developable land for species habitat (*The Press-Enterprise*, June 25, 2006, "Farmworkers' plight: hard labor, harder living" and *The Wall Street Journal*, August 26, 2006, "In Tony Monterey County, Slums and a Land War").

The Plan would produce slums and squalor for low income residents and migrant farm workers.

The Plan will have environmental effects that will cause substantial adverse effects on human beings, either directly or indirectly. The Plan fails to adequately analyze the impacts on humans for air quality and for affordable workforce housing. These impacts must be fully analyzed and mitigated. The EIR/EIS lacks the requisite in-depth analysis, in violation of 14 C.C.R. § 15065.

In light of the Plan's impacts given above, the EIR/EIS is defective in failing to "analyze in-depth" the full and complete impact on the health of humans. Further, the EIR/EIS fails to include detailed findings on the feasibility of alternatives or mitigation measures to avoid these adverse health effects. Also, the EIR/EIS fails to mention potential changes to the project to substantially lessen or avoid these effects on humans.

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Cont.

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IV. INADEQUACIES OF THE IMPLEMENTING AGREEMENT

A. ILLEGAL BASIS FOR THE DEVELOPMENT FEE

1. LEGAL BASIS FOR FEES AND EXACTIONS

The Constitutional police power is the legal basis that allows legislative bodies to impose fees and exactions. As such, the imposition of fees is a legislative action.

Local jurisdictions cannot delegate this power to non-legislative bodies (Government Code sections 66000 et seq.).

2. IMPOSITION OF DEVELOPMENT FEE BY MSHCP

The Implementing Agreement, Section 11.1.1 states, "The Cities shall adopt an ordinance imposing the Local Development Mitigation Fee as analyzed in the Nexus Fee Report. A model ordinance imposing such fees is attached to this Agreement as Exhibit 'D.' The Cities shall adopt ordinances in substantially the same form or at a minimum, containing similar requirements as the model ordinance."

The Implementing Agreement, Section 12.2.1 states, "The County and the Cities shall transmit all collected Local Development Mitigation Fees to the CVCC [Coachella Valley Conservation Commission], at least quarterly, to be expended to fulfill the terms of the MSHCP."

The Implementing Agreement, Section 2 states, "'CVCC' means the Coachella Valley Conservation Commission, a joint powers authority formed by the Local Permittees to provide primary policy direction for implementation of the MSHCP, as set forth in Section 6.1.1 of the MSHCP and Section 11.2.2 of this Agreement."

The Implementing Agreement, Section 13.3 and Section 13.3.B state, "CVCC has the following obligations under the MSHCP and this Agreement: Collect and expend Local Development Mitigation Fees and other applicable funds as described in Section 5 of the MSHCP."

The Implementing Agreement, Exhibit 'D', Model Ordinance, Section 9.B states, "Subject to the provisions of this section, all Fees collected pursuant to this Ordinance shall be remitted to the Coachella Valley Conservation Commission at least quarterly, and will be expended solely for the purpose of acquiring and preserving vegetation communities and natural areas within the City and the region which support species covered in the MSHCP in accordance with the provisions of the MSHCP."

The Implementing Agreement, Section 21.2 states, "In the event of termination...All Local Development Mitigation Fees that have been collected and held by the CVCC, the County and the Cities shall be placed in an interest bearing account governed by the CVCC, and shall be transferred to a professional land manager, the Wildlife Agencies directly, or other appropriate entity and/or entities acceptable to the Wildlife Agencies."

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3. ILLEGAL DELEGATION OF POLICE POWER

The CVCC is an administrative agency, not a legislative body. As such, the CVCC cannot adopt or increase a development mitigation fee. Administrative decisions by a non-legislative body do not have the police power.

The Cities decision to appoint representatives to the CVCC is an administrative decision.

The Cities cannot delegate or transfer their authority to collect and expend development mitigation fees to a non-legislative body (Government Code sections 66016(b) and 66001(c)).

The *Joint Powers Agreement Creating the Coachella Valley Conservation Commission* does not contain language expressly delegating the authority of Members, such as the Cities, to the CVCC. Rather, the Agreement reserves authority for Members:

Joint Powers Agreement, Article 6, Section 6.2(o) states, "...nothing in this Agreement shall limit the local land-use actions or powers granted to a Member under state law or charter and nothing in this Agreement shall be interpreted as a limitation on those local land-use actions or powers."

Joint Powers Agreement, Article 12, Section 12.1 states, "No Member shall be jointly or severally liable for any debt or obligation of CVCC or any of its Members."

Joint Powers Agreement, Article 13, Section 13.2 states, "After Permit issuance a Member may withdraw by delivering written notice to the Commission's secretary that the Member's legislative body has approved withdrawal and such withdrawal shall be effective 90 days thereafter."

Joint Powers Agreement, Article 15, Section 15.3 states, "...a Member is jointly and severally liable for the torts of the joint powers agency..."

Each City would need to establish its own separate interest-bearing account/fund for the Local Development Mitigation Fee to be collected and expended by each City, as Cities cannot co-mingle funds (Government Code section 66006(a)).

Under the Plan, each City would collect the Local Development Mitigation Fee, and by transferring these funds to the CVCC, would be illegally allowing the CVCC to expend these fees outside the City's jurisdiction (Government Code section 66016(b)).

It is well established that administrative law cannot prevail over legislative law.

The Local Development Mitigation Fee also may be considered a special tax for a specific purpose, requiring a two-thirds vote of the electorate in each jurisdiction.

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4. FEE DOES NOT ACCOMPLISH ITS PURPOSE

CEQA requires that a project show that it has mitigated its adverse and cumulative impacts of development. The Plan is required to demonstrate that the Local Development Mitigation Fee will accomplish its purpose. There needs to be a reasonable plan of action for mitigation of impacts (*Anderson First Coalition v. City of Anderson* 130 Cal.App. 4th 773 (2005)). In order for the Plan to be reasonably related to a public purpose, the Plan needs to show that all the sources of funding will be provided to accomplish the mitigation purpose of the Plan (Government Code section 66001(d)(1)(C)).

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As shown above in Section II.A.1., the inadequate funding for the Plan would prevent the Plan from acquiring the conservation land required by the Plan to conserve and enhance species and associated habitats or to protect habitat for 27 proposed covered species and 27 natural communities to mitigate for development occurring in the Plan Area.

Therefore, the specific purpose of the Proposed Action cannot be accomplished by the Plan as it is currently drafted, and the Local Development Mitigation Fee would be invalid.

5. NO REASONABLE RELATIONSHIP BETWEEN THE IMPACT AND THE FEE

The Local Development Mitigation Fee treats development properties which do not have a significant impact on species and do not require incidental take permits the same as properties which have a significant impact upon species and do require incidental take permits. The fee program assesses the same fee to both types of properties. Therefore, there is no reasonable relationship between the impact on species caused by the development of two different types of projects and the resulting mitigation fee that is assessed (Government Code section 66001(b)).

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Property that does not cause a significant impact should not be charged a fee. "In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed" (Government Code section 66001(b)).

6. FEE CONSTITUTES A TAKING

The lack of a reasonable relationship or rough proportionality between the impact and the fee shown above would constitute a taking of private property. The fee program violates standards established by both the Federal Supreme Court and the Supreme Court of the State of California. (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 114 S.Ct. 2309 and *Ehrlich v. Culver City* (1996) 12 Cal. 4th 854, 911 P.2d 429).

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B. VIOLATION OF MORATORIUM REQUIREMENTS – GOVERNMENT CODE SECTION 65858

Government Code section 65858 authorizes the adoption of moratoria to stop the processing of development applications for a maximum period of two years.

Such interim ordinances cannot be adopted unless the ordinance contains a finding that the approval of development applications would result in a threat to the public health, safety, or welfare.

The HANS process constitutes a moratorium by prohibiting the processing of development applications during the HANS process, which can take up to five and one-half years. The HANS process therefore violates Government Code section 65858.

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C. VIOLATION OF SUBDIVISION MAP ACT

The Subdivision Map Act requires that development applications be approved or denied within certain periods of time. If a local agency does not comply, the project may be deemed approved, as long as proper notice was provided to the public. The Map Act provides that the local agency shall comply with the time periods provided in Public Resources Code section 21151.5 in processing tentative tract maps. The 50-day period for processing a tentative map shall commence upon the certification of the environmental impact report, adoption of a negative declaration, or a determination by the local agency that the project is exempt from the CEQA requirements. CEQA provides that the time limits for environmental documents shall not exceed one year for completing and certifying environmental impact reports or 180 days for completing and adopting negative declarations.

Because of the time needed to complete the Joint Project Review Process/HANS processes (i.e., potentially four and one-half months for the Joint Project Review Process and five and one-half years for the HANS process, or longer) for property that falls within portions of the Santa Rosa and San Jacinto Mountains Conservation Area, the County and participating cities will deem development applications incomplete to avoid triggering the mandatory processing deadlines of the Map Act.

This means that depending on the value of property, it could take over five and one-half years, or longer, to deem an application complete, and then only at this time would the County's or participating cities' development approval process commence (i.e., processing the development application and conducting the appropriate CEQA analysis). This process in and of itself could take one to two years to complete depending on the complexity and the environmental review associated with the project.

The mandatory Joint Project Review Process/HANS processes established in the MSHCP require the County and participating cities to circumvent the mandatory time frames established in the Map Act.

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The mandatory Joint Project Review Process/HANS processes established in the MSHCP turn the Map Act on its head by requiring the circumvention of the statutory time frames for the timely processing of development applications by local agencies.

Article XI, section 7 of the California Constitution prohibits a local agency from enacting local laws which conflict with general or state laws.

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D. VIOLATION OF PERMIT STREAMLINING ACT

In enacting the Permit Streamlining Act (PSA), the Legislature made clear that there is a statewide need to ensure that local agencies clearly understood the specific requirements which must be met in connection with the approval of development projects and to expedite decisions on such projects.

To ensure that this intent was understood by local agencies, the Legislature mandated in the PSA specific requirements that development applications were to be approved or denied by a local agency within certain periods of time. If a local agency does not comply with these mandatory time periods, the project may be deemed approved, as long as proper notice was provided to the public.

The time limits applicable under the PSA are mandatory and depend on the type of CEQA document required for the project:

- If an EIR is required, the local agency must approve or disapprove an application for a development permit within 180 days after the date on which the lead agency certifies the EIR.
- If a negative declaration is prepared or the project is exempt from CEQA, the local agency's approve time is reduced to 60 days after the negative declaration is adopted or the agency determines the project is exempt from CEQA.
- When a project requires a permit from a public agency other than the lead agency, that agency must approve or deny the permit within 180 days after the acceptance of the application to that agency as complete or within 180 days after the lead agency's approval, whichever is later.

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The PSA also mandates that a development application is "deemed complete" if a public agency fails to rule on its completeness within 30 days after submission, but only if the application includes a statement that it is an application for a development permit. The PSA also mandates that agencies cannot require the applicant to submit the informational equivalent of an EIR or otherwise require proof of CEQA compliance before determining that an application is complete.

Because of the time needed to complete the mandatory Joint Project Review Process/HANS processes (i.e., potentially four and one-half months for the Joint Project Review Process and five and one-half years for the HANS process, or longer) established in the MSHCP for property

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that falls within portions of the Santa Rosa and San Jacinto Mountains Conservation Area, the County and participating cities will deem development applications incomplete to avoid triggering the mandatory processing deadlines of the PSA.

This means that depending on the value of property, it could take over five and one-half years, or longer, to deem an application complete, and then only at this time would the County's or participating cities' development approval process commence (i.e., processing the development application and conducting the appropriate CEQA analysis). This process in and of itself could take one to two years to complete depending on the complexity and the environmental review associated with the project.

The Joint Project Review Process/HANS mandatory processes established in the MSHCP would require the County and participating cities to circumvent the mandatory statutory time frames for the processing of development applications by local agencies established in the PSA.

The mandatory Joint Project Review Process/HANS processes established in the MSHCP turn the PSA on its head and violate the intent of the PSA by requiring the circumvention of the statutory time frames for the timely processing of development applications by local agencies. This violates the intent of the PSA, which was enacted for the specific purpose to expedite decisions on development applications, not drag them out for potentially five and one-half years under the MSHCP.

The MSHCP also violates the PSA because it does not provide a list that specifies in detail the information that would be required from any applicant for a development application to be approved.

Article XI, section 7 of the California Constitution prohibits a local agency from enacting local laws which conflict with general or state laws.

**E. VIOLATION OF THE LOCAL GOVERNMENT REORGANIZATION ACT –
GOVERNMENT CODE SECTION 56000**

In approving an annexation proposal, the County Local Agency Formation Commission (LAFCO) cannot impose any conditions that would directly regulate land use density, property development, or subdivision requirements.

The Implementing Agreement Section 11.4 requires all annexations to be subject to the terms of the MSHCP, Permits, and Implementing Agreement. Because the MSHCP regulates land use by determining what land will be set aside for permanent open-space, particularly in the Conservation Area, and the Local Government Reorganization Act requires LAFCO to consider conversion of existing open-space lands to other uses, LAFCO would be forced to violate the Local Government Reorganization Act's prohibition against regulating land uses by illegally approving or denying annexation proposals based on compatibility with the MSHCP.

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Article XI, section 7 of the California Constitution prohibits a local agency from enacting local laws which conflict with general or state laws.

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F. VIOLATION OF DATA QUALITY ACT

The Data Quality Act (also referred to as the Information Quality Act) requires federal agencies to develop data quality guidelines, along with a procedure for stakeholders to challenge the quality of data those agencies disseminate, with the opportunity to seek correction of information at any time along the decision-making continuum (Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554).

The Plan is a planning effort by the U.S. Fish and Wildlife Service, and is therefore subject to the Data Quality Act.

Both the Data Quality Act and the Office of Management and Budget (OMB) Guidelines require agencies to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by federal agencies (Data Quality Act §515(a), OMB Guidelines, § 11(2), 67 Fed. Reg. at 8458) (Feb. 22, 2002). The OMB government-wide guidelines impose three core responsibilities on federal agencies:

- Agencies must meet a basic standard of “quality” as a performance goal, and agencies must incorporate quality into their information dissemination practices. OMB’s guidelines explain that “quality” encompasses “utility” (usefulness to its intended users, including the public), “integrity” (security), and “objectivity.” “Objectivity” includes a requirement that disseminated information be accurate, reliable and unbiased in presentation and substance.
- Agencies must develop information quality assurance procedures that are applied before information is disseminated.
- Each agency must develop an administrative mechanism whereby affected parties can request that agencies correct poor quality information that has been or is being disseminated. If one is dissatisfied with the initial agency response to a correction request he or she may file an administrative appeal.

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The Plan fails to meet the standards of quality, utility, and objectivity provided in the Data Quality Act. For example, the Plan fails to use the best scientific data available, as discussed above in Section II.A.2. The Plan uses the wrong methodology in its fiscal impact analysis, producing data of limited value, as discussed above in Section III.A.3. The Plan maintains a biased approach in its use of data, as discussed above in Section III.D.1.

G. VIOLATION OF EQUAL PROTECTION

The right to equal protection is guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 7 of the California Constitution.

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The MSHCP singles out properties within the Conservation Area for special and undue treatment. Such action is not reasonably related to any legitimate state interest, and is not substantially or reasonably related to the public health, safety, or general welfare.


The MSHCP's Conservation Area is de facto zoning; it operates as a zoning overlay. The Conservation Area is not based on updated or accurate scientific data and overreaches federal and state requirements without adequate justification. Adoption of the MSHCP constitutes arbitrary and capricious zoning.

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V. CONCLUSION

Thank you for the opportunity to submit comments. In order to remedy the deficiencies we have identified in the documents, we request that the MSHCP, IA, and EIR/EIS be redrafted so that they are adequate and recirculated for meaningful public review and comment.

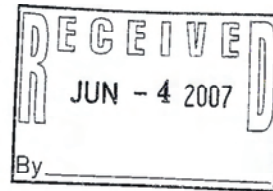
Sincerely,



Bruce Colbert, AICP
Executive Director

cc: Ronald A. Zumbrun, The Zumbrun Law Firm
Craig M. Collins, Esq., Blum Collins

Comment Letter BN



FACT/INFORMATION SHEET

JUNE 4, 2007

BY JON GORDON COACHELLS VALLEY RESIDENT AND
REPRESENTATIVE FOR LEONARD COYLE, APN NUMBERS:
651030001/651230009

1. I AM NOT AGAINST THE PRESERVATION OF ENDANGERED SPECIES. I AM AGAINST TAKING LAND WITHOUT COMPENSATION OR MAKING IT UNSALEABLE SO A SPECIAL INTEREST GROUP CAN ACCOMPLISH THEIR GOALS. BN-1
2. IN OCTOBER 2006, A FEDERAL JUDGE RULED THAT THE U.S. FISH AND WILDLIFE SERVICE AND THE CITY OF SAN DIEGO DID NOT ENSURE ADEQUATE FUNDING FOR THE CITY OF SAN DIEGO MULTIPLE SPECIES CONSERVATION PROGRAM BECAUSE IT RELIED ON "UNDEPENDABLE AND SPECULATIVE SOURCES FOR THE NECESSARY FUNDS. THE JUDGE CALLED THE FUNDING FOR ACQUISITION AND MAINTENANCE COSTS "VAGUE, NON COMMITTAL, AND REFERRING TO HOPES AND PROMISES," AND CONCLUDED THAT THE CITY "CANNOT RELY ON SPECULATIVE FUTURE ACTIONS OF OTHERS." (SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BARTEL, NO.98-2234 (S.D.CAL OCT 13, 2006.) THIS IS EXACTLY WHAT WILLHAPPEN IN THE COACHELLA VALLEY. BN-2
3. THE CVMSHCP IS NOT PROPERLY FUNDED AND ESTIMATES SHOW A LACK OF 100'S OF MILLIONS OF DOLLARS IN ALL CATEGORIES INCLUDING LAND ACQUSTION COSTS/MANAGEMENT AND MONITORING OF THE PLAN. BN-3
4. THREE (3) MINIMALLY ADVERTISED PUBLIC FORUMS WERE HELD FOR INFORMATIVE PURPOSES. NO PUBLICALLY ASKED QUESTIONS WERE PERMITTED AND ODDLY ENOUGH ONLY A TOTAL OF 13 PEOPLE ATTENDED THESE FORUMS OUT OF A POPULATION OF A COUPLE HUNDRED THOUSAND PEOPLE. BN-4
5. LAND IN THOUSAND PALMS WAS REZONED IN THE 90'S AND EARMARKED FOR DEVELOPMENT. AT ONE POINT, THE BIRCHER COMPANY HAD PLANS TO BUILD AFFORDABLE HOUSING AND MAKE IT THE SEVICE CENTER OF THE VALLEY. BN-5
6. ALL THE RESEARCH SHOWS THAT COACHELLA VALLEY IS IN DIRE NEED OF AFFORDABLE HOUSING. IN 2003, SUPERVISOR WILSON PUSHED FOR THE GENERAL PLAN AMENDMENT WHICH PUT ALL THE ZONING IN THOUSAND PALMS IN CONFLICT WITH THE GENNREAL PLAN AND BROUGHT A HALT TO ANY POSSIBILITY OF DEVELOPMENT. BN-6

7. MY CLIENT IS A 93 YEAR OLD MAN WHO OWNS 100 ACRES BORDERING ON RAMON ROAD LESS THAN 5 MINUTES AWAY FROM THE MONTERREY SERVICE CORRIDOR. FIVE(5) DEVELOPERS WERE RECENTLY TOLD BY THE COUNTY SUPERVISORS OFFICE AND AN AFFILIATE AGENCY AND ENVIRONMENTAL GROUPS THAT "NO WAY NO HOW WAS THIS LAND GOING TO BE BUILT ON." **THIS IS ANALAGOUS TO "TAKING LAND BY EMINENT DOMAIN ONLY HERE THE LAND OWNERS ARE NOT BEING PAID FOR THEIR LAND. UNSCRUPULOUSLY THE BOARD OF SUPERVISORS, SPECIFICALLY ROY WILSON MASTERFULLY AVOIDED INDIVIDUAL LAND OWNER LAWSUITS BY AMENDING THE GENERAL PLAN. THUS DEVALUING AND RENDERING THIS LAND AS USELESS FOR ANYTHING OTHER THAN PRESERVATION.**

BN-7

8. APPROXIMATELY 6 WEEKS AGO, I TRIED TO CONTACT ROY WILSON TO DISCUSS WHAT ONE OF MY CLIENTS POTENTIAL DEVELOPERS/BUYERS WERE TOLD BY HIERARCHY IN THE BOARD OF SUPERVISORS OFFICE. SPECIFICALLY AS STATED ABOVE THAT "NO WAY NO HOW WAS THIS LAND GOING TO BE BUILT ON." THREE ATTEMPTS WERE MADE TO REACH ROY WILSON, ON MY LAST ATTEMPT I TOLD HIS ASSISTANT THAT IF I DID NOT RECEIVE A CALL BACK THAT DAY I WAS GOING TO THE PRESS. DENNIS ARCURY TOOK THE CALL, SPOKE TO ME FOR QUITE SOME TIME AND THEN ASKED THAT I GIVE HIM A CHANCE TO GET BACK TO ME AND INVESTIGATE MY CLAIM. DENNIS ARCURY NEVER HAD THE COURTESY OF RETURNING MY CALL AND INFORMING ME OF HIS FINDINGS. WE CALL THIS LIP SERVICE, AND THAT IS EXACTLY WHAT ROY WILSON GIVES TO THE PUBLIC AT LARGE. HIS RECENT QUOTE IN THE NEWSPAPER FOLLOWING THE AFFORDABLE HOUSING SUMMIT, WE ALL NEED TO START GETTING INVOLVED AND SHARE IDEAS TO KEEP THIS FROM BECOMING A REAL CRISIS." **SUPERVISOR WILSON, LET ME INFORM YOU, THIS IS ALREADY A CRISIS!**

BN-8

9. THE LAND IS THOUSAND PALMS IS INCREDIBLY VALUABLE FOR AFFORDABLE HOUSING. WHY DOES THE COUNTY GOVERNMENT RUN DEVELOPERS OFF THE PROPERTIES THAT COULD BE SACRED GROUND FOR AFFORDABLE HOUSING?

BN-9

10. CVWD WAS A FORMER POTENTIAL BUYER OF MR. COYLE'S LAND IN THE FALL 2006. CVWD'S FLOOD PLAN WAS DEEMED UNWORTHY BY THE ARMY CORPS OF ENGINEERS IN NOVEMBER 2006. HENCE THEY HAVE REFUSED TO FUND EITHER CVWD'S PLAN AND OR FURTHER RESEARCH. (MOST OF THE ENTIRE VALLEY IS IN THE 100 YEAR FLOOD PLAIN.)

BN-10

11. **PM-10 WINDBREAKS:** AFTER READING EXTENSIVE REPORTS THAT ARE PUBLISHED FOR THE PUBLIC BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY AND AQMD IT IS APPARENT THAT THESE PM-10 AND SMALLER PARTICLES OF 2.5 MICROMETERS WINDBREAKS ARE INADEQUATE TO DETERMINE MUCH OF ANYTHING. PARTICULATE MATTER OF 10 OR 2.5 MICROMETERS ARE WIND BLOWN AT LEVELS WELL OVER 200-600 FEET IN

BN-11

THE AIR. THESE FENCES THAT WERE ERRECTED WERE NOTHING MORE SAND FENCES AND NOW BEING CALLED PM10 WINDBREAKS. FURTHER, WE ARE DEALING WITH NATURAL WIND AND WEATHER PATTERNS FOR THE COACHELLA VALLEY. HOW WILL IT BE POSSIBLE TO CHANGE WIND AND WEATHER? THE FRINGE TOED LIZARD FOR EXAMPLE HAS BEEN THRIVING WELL AT LEAST FOR THE PAST 27 YEARS SINCE BEING TRACKED IN 1980 IN ITS NATURAL HABITAT. FINALLY, IT BECOMES APPARENT TO ME AND JUST POSSIBLY I AM NOT THE ONLY PERSON THAT VIEWS THIS ISSUE THE SAME, BUT HOW WILL WE BE ABLE TO AVOID THE BLOWING SAND FROM THE FTL-PRESERVE AT ANY TIME? ARE WE PLANNING ON ERRECTING WINDBREAKS THAT GO 200-600 FEET IN THE AIR? WHAT ARE WE GOING TO DO FOR OURSELVES WITH REGARD TO BLOWING SAND WHICH CREATES MANY LUNG DISORDERS AMONGST OTHER PULMONARY PROBLEMS? WOULD DEVELOPMENT CURB THE AMOUNT OF BLOWING SAND? INTERSTING QUESTIONS, BUT NO SOLUTIONS.!

BN-11
Cont.

12. THE ENTIRE CVMSHCP SHOULD BE COMPLETELY WITHDRAWN AT THIS POINT IN TIME. MILLIONS OF DOLLARS OF TAXPAYER MONEY IS BEING SPENT AND WASTED ON THIS ILL FATED PLAN. MY SUGGESTION IS THAT ALL THE CITIES, ENVIRONMENTALISTS, BIOLOGISTS, COUNTY LEADERS AND LEADERS FROM THE DEVELOPMENT COMMUNITY REASSESS THE GOALS, STRATEGIES AND MOST IMPORTANTLY THE SOURCE OF FUNDS NECESSARY TO IMPLEMENT SUCH AS VAST AND COMPLEX PLAN. WHEN EVERYTHING IS IN PLACE, FUNDING AS THE TOP PRIORITY WITH TIME TABLES, AND CORRECT LAND VALUATIONS FOR PRIVATE LANDOWNERS THEN THE PLAN SHOULD BE RESUBMITTED.

BN-12

SINCERELY,



JON GORDON

DIRECTOR OF REAL ESTATE

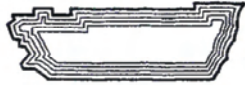
ROSENTHAL AND ASSOCIATES

DIRECT TELEPHONE 760-409-8122

DIRECT FAX 760-406-4061

EMAIL: jongordon@earthlink.net

November 17, 2006



**PROPERTY
OWNERS
ASSOCIATION
OF
RIVERSIDE
COUNTY**

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Executive Committee
Coachella Valley Association of Governments
73-710 Fred Waring Drive, Suite 200
Palm Desert, CA 92260

Re: Proposed Coachella Valley Multiple Species Habitat Conservation
Plan (MSHCP/Plan)

Dear Executive Committee Members:

We are writing to help you achieve a successful implementation of the MSHCP. Recent litigation has set legal precedent that has ramifications for the Plan. We would like to bring this to your attention.

In October 2006, a federal judge ruled that the U.S. Fish and Wildlife Service (FWS) and the City of San Diego did not ensure adequate funding for the City of San Diego Multiple Species Conservation Program because the City relied on "undependable and speculative sources for the necessary funds." The judge called the funding for acquisition and maintenance costs "vague, non-committal, and referring to hopes and promises," and concluded that the City "cannot rely on speculative future actions of others." The judge sent the plan back to the FWS for revisions consistent with the ruling (*Southwest Center for Biological Diversity v. Bartel*, No. 98-2234 (S.D. Cal. Oct. 13, 2006)).

The Coachella Valley MSHCP would be funded by measures similar to those rejected by the court. For example, the ruling states, "the City relied on future actions, such as a regional plan with other jurisdictions, a possible bond issue requiring voter approval, or raising the sales tax. The uncertainty of these ideas is readily apparent" (*Southwest Center for Biological Diversity*, p. 52).

The MSHCP states, "Since release of the Draft MSHCP, a lower court decision overturned the BLM land exchange on which the Eagle Mountain Landfill project depends, raising concern over whether the Environmental Mitigation Trust Fund can be relied upon as a revenue source for MSHCP implementation...Other potential funding sources that the Permittees could consider to substitute for future revenue not available from the Environmental Mitigation Trust Fund include: Sales tax revenues if Measure A is extended beyond 2038...Some of these funding sources would require voter approval." "Potential state and federal funding sources include, but are not limited to: State appropriations...State bond acts." (*Final Coachella Valley MSHCP*, Sections 5.2.2.4 and 5.2.4, February 2006).

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Executive Committee
November 17, 2006
Page 2

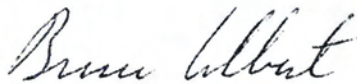
The Coachella Valley multi-species plan lacks approximately half of the needed funding for implementation. Fifty six percent of the \$418 million Management and Monitoring cost of the Plan is currently not funded because a court ruling has eliminated the use of Eagle Mountain Mitigation Trust Fund revenue. Forty five percent of the land acquisition cost for the total 182,740 acres to be acquired by the Plan is not funded – no state or federal funds are allocated for the approximately \$402 million cost. Our Association's analysis of land sales data indicates that the market study used below-market land values to determine the funding for land acquisitions and for determining the development fee.

If the Plan were to receive federal Section 6 grants equal to those being awarded to habitat conservation plans in Western Riverside County and San Diego County (typically \$5 million each per year), \$252 million of the remaining land acquisition cost would not be funded.

Because the MSHCP presently lacks sufficient funding for implementation, the Plan would fail to meet the requirement for funding under Section 10 of the federal Endangered Species Act, and could not ensure the recovery of covered species. The MSHCP relies on speculative future actions for approximately half of the funding needed to implement the Plan. The Plan would fail to meet the requirements established by the court.

In order to avoid potential protracted litigation that likely would ultimately lead to the invalidation of the Plan, the Executive Committee ought to direct staff to make the necessary modifications to the Plan being prepared, including clearly identified, secured sources of revenue for the Plan's implementation.

Sincerely,



Bruce Colbert, AICP
Executive Director

BN-13
Cont.

Comment Letter BO

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ARNOLD SCHWARZENEGGER
GOVERNOR

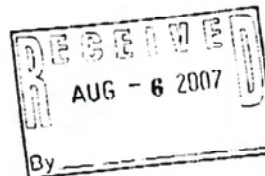
STATE OF CALIFORNIA
GOVERNOR'S OFFICE of PLANNING AND RESEARCH
STATE CLEARINGHOUSE AND PLANNING UNIT



CYNTHIA BRYANT
DIRECTOR

July 31, 2007

Katie Barrows
Coachella Valley Association of Governments
73-710 Fred Waring Drive, Suite 200
Palm Springs, CA 92260



Subject: Recirculated Draft Coachella Valley Multiple Species Habitat Conservation Plan and Natural
Community Conservation Plan
SCH#: 2000061079

Dear Katie Barrows:

The enclosed comment (s) on your Supplemental EIR was (were) received by the State Clearinghouse after the end of the state review period, which closed on May 9, 2007. We are forwarding these comments to you because they provide information or raise issues that should be addressed in your final environmental document.

The California Environmental Quality Act does not require Lead Agencies to respond to late comments. However, we encourage you to incorporate these additional comments into your final environmental document and to consider them prior to taking final action on the proposed project.

Please contact the State Clearinghouse at (916) 445-0613 if you have any questions concerning the environmental review process. If you have a question regarding the above-named project, please refer to the ten-digit State Clearinghouse number (2000061079) when contacting this office.

Sincerely,

Terry Roberts
Senior Planner, State Clearinghouse

Enclosures

cc: Resources Agency

BO-1

1400 10th Street P.O. Box 3044 Sacramento, California 95812-3044
(916) 445-0613 FAX (916) 323-3018 www.opr.ca.gov

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STATE OF CALIFORNIA - THE RESOURCES AGENCY

Arnold Schwarzenegger, Governor

COLORADO RIVER BOARD OF CALIFORNIA

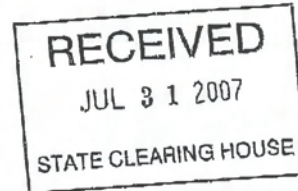
770 FAIRMONT AVENUE, SUITE 100
GLENDALE, CA 91203-1068
(818) 500-1625
(818) 543-4685 FAX



July 27, 2007

State Clearinghouse
1400 Tenth Street
P.O. Box 3044
Sacramento, CA 95812-3044

clear
5/9/07
late
e



Regarding: SCH# 2000-061-079, Notice of Completion & Environmental Document Transmittal for the Recirculated Draft Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan, Riverside County, California

To Whom It May Concern:

The Colorado River Board of California (CRB) has received a copy of Notice of Completion & Environmental Document Transmittal for the Recirculated Draft Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan, Riverside County, California.

At this juncture, the CRB has determined that it has no comments regarding the proposed project and supports the proposed project. If you have any questions, please contact me at (818) 500-1625.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gerald R. Zimmerman'.

Gerald R. Zimmerman
Executive Director

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Cont.