

Your Multiple-species Conservation Plan (MSCP) presentation last Friday to County staff was enlightening. Your handout noted the MSCP ‘will ensure that development-related activities comply with the Endangered Species Act through issuance of a Section 10 “incidental take” permit from the U.S. Fish and Wildlife Service’. During your presentation, you indicated the impacts sustained by the 36 covered species due to routine operations conducted by the County, for example maintenance, repair and construction activities performed by the County Public Works Departments (PWDs), would be covered with the Section 10 permit provided the MSCP document was in place.

We work with the County Regional Flood Control District (RFCD), a County PWD. Much of our maintenance, repair and construction activities are performed in accordance with the regulatory requirements of the Clean Water Act (CWA) Section 404 program, administered by the U.S. Army Corps of Engineers (Corps). The Corps 404 program review process for PWD project applications under the CWA includes the nexus requirements of additional federal resource programs, including the Endangered Species Act (ESA) and National Historic Preservation Act compliance.

As staff members of a PWD whose community improvement activities are regulated by the Corps 404 program, shouldn't the County Section 10 take permit, prepared in conjunction with the MSCP, also cover the ESA requirements stemming from projects requiring Corps Section 404 permits?

In light of the effort and costs associated with the institutionalization of the County MSCP (multi-year process with vast land purchases), it would appear appropriate to extend the benefits of this plan to Corps 404 nexus requirements. Section 404 CWA regulations appear to allow this action, as follows:

Reissuance of Nationwide Permits; Notice; Monday March 12, 2007
Federal Register Vol. 72, No. 47, page 11192, 17. Endangered Species, (e)

(e) Authorization of an activity by a NWP does not authorize the “take” of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g. an ESA Section 10 Permit, a Biological Opinion with “incidental take” provisions, etc.) from the U.S. FWS or the NMFS, both lethal and non-lethal “takes” of protected species are in violation of the ESA.

The RFCD is presently evaluating the use of a Regional General Permit (RGP) for complying with Corps 404 requirements related to routine maintenance, repair and construction activities. Coverage by a County MSCP for these RGP activities would be beneficial. EDAW, Inc. recently prepared a Programmatic Permitting Guide for related Public Works activities for 14 cities in San Diego County. In this August 2008 guide, EDAW specifically addresses the use of an MSCP to satisfy USFWS incidental take requirements related to activities covered under a Corps 404 RGP program. (attached).

We appreciate your consideration of this issue.

Mark Krieski, P.E.	Pima County Public Works – RFCD	243-1871
John Spiker, P.E.	Pima County Public Works – RFCD	243-1761