

## MEMORANDUM

To: Greg Fuz  
Steve Hust  
Larry Appel

From: Marc Ebbin  
Sean Skaggs  
Paul Cylinder (SAIC)

Re: Options for Compliance with State and Federal Laws Regarding Eight Plant Species

Date: April 5, 2007

You have requested an analysis of the various options available for resolving issues regarding compliance with state and federal conservation laws for eight plant species located on gabbroic soils in El Dorado County. Five of the eight plant species at issue, Stebbins' morning glory, Pine Hill ceanothus, Pine Hill flannelbush, El Dorado bedstraw, and Layne's butterweed, are listed under the federal Endangered Species Act (ESA) as threatened or endangered species. Only one of the plant species, the Stebbins' morning glory, is listed under the California Endangered Species Act (CESA), while the other four federally listed species are listed as rare under California's Native Plant Protection Act (NPPA). Three of the eight species, the Red Hills soaproot, El Dorado mule-ears, and Bisbee Peak rush-rose, are not listed under the ESA, CESA, or the NPPA, but are considered sensitive species for purposes of environmental review under the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA).

### **State and Federal Conservation Laws Applicable to the Eight Plant Species**

The existing legal framework of the ESA, CESA, and NPPA, as well as agency practice and policy, limit the potential options for a focused approach to obtaining regulatory coverage for all eight plant species.

Under the federal ESA, technically either the section 10 habitat conservation planning (HCP) process or the section 7 consultation process could be used to obtain regulatory coverage for impacts to listed plant species. There are limited circumstances, however, under which the ESA requires a take permit for plants. Because these circumstances rarely occur, the U.S. Fish and Wildlife Service (Service) has not typically utilized the HCP process in situations where the only species to be covered are plants. As a result, options for obtaining compliance under the ESA for the plant species tend to be focused on the section 7 consultation process. The Service does not have the authority under section 7, however, to authorize impacts to unlisted species. Coverage under section 7 could therefore only be obtained for the five federally listed species.

Options for obtaining coverage for the plant species under CESA are limited because the California Department of Fish and Game (CDFG) is not authorized to issue a take permit under CESA for unlisted species. See *Environmental Protection Information Center v. California Department of Forestry and Fire Protection*, 37 Cal. Rptr.3d 31, Cal. App.1 Dist., 2005. As a result, coverage under CESA can only be obtained for the CESA-listed endangered Stebbins' morning glory and not for the seven other plant species. Coverage for the Stebbins' morning glory could be obtained through a section 2081 permit or, because the Stebbins' morning glory is also federally listed, coverage could alternatively be obtained under CESA through a request for a consistency determination under section 2080.1. Although CDFG has authority to permit take of unlisted species under the Natural Community Conservation Planning Act (NCCPA), it may be difficult for a focused plan addressing only the eight plant species to meet the NCCPA's requirement for conservation planning at an ecosystem or regional landscape level. A larger El Dorado County NCCP could, however, provide take authorization for all of the plant species under section 2835 of the NCCPA.

With respect to the four rare plant species, the NPPA does not provide a permit process to cover impacts to rare plants, but instead sets out broad exemptions from the NPPA's take prohibition for many types of activities. Although CDFG does not have explicit authority under the NPPA to permit take of rare plants, as a matter of policy the agency will enter into formal agreements with project proponents to address rare plant protection issues. Such agreements presumably serve to provide a safe harbor in the event that the broad exemptions in the NPPA do not apply to a particular covered activity.

### **Approaches to Compliance**

Three approaches to state and federal endangered species compliance are discussed in this section:

- Joint INRMP/HCP/NCCP
- INRMP followed by HCP to support ESA section 10/CESA section 2081 permits
- INRMP with separate state and federal ESA compliance for Pine Hill plants based on a section 7 biological opinion and a section 2081 permit

#### *Joint INRMP/HCP/NCCP*

The preparation of an INRMP that also provides all of the information and processes necessary to comply with section 10 and the NCCPA would result in a joint INRMP/HCP/NCCP and state and federal permit authorizations for take of listed and other covered species. This approach is described in SAIC's Work Plan presented to the Board of Supervisors (Board) on March 6, 2007. This approach would provide maximum regulatory compliance under the ESA and NCCPA by authorizing incidental take of numerous listed and unlisted wildlife and plant species for a wide range of activities across the western County.

Benefits:

- Take authorization for all covered species, including listed and unlisted plant and animal species
- No surprises assurances under the ESA and the NCCPA

Constraints:

- Longer time to complete final documents due to the need to go through state and federal approval processes
- More expensive because of a greater amount of information and level of public involvement needed to satisfy the HCP and NCCP requirements
- Greater involvement of the Service and CDFG in plan contents and approval

*INRMP Followed by an HCP to Support ESA Section 10 and CESA Section 2081 Permits*

This approach would involve preparation of the INRMP under the County's General Plan requirements. Subsequent to completion of the INRMP, the County would prepare an HCP to support permits under ESA section 10 and CESA section 2081. This approach was discussed at the November 6, 2006 Board Workshop. Preparation of the HCP following completion of the INRMP would require more time at greater cost than the Joint INRMP/HCP/NCCP approach. Additional time would be required because of the sequential approach. Additional costs would result from the longer time frame and the need to prepare separate compliance documents following the INRMP document.

Benefits:

- County retains control of INRMP process without the involvement of state and federal wildlife agencies
- The INRMP can be completed more quickly if it is not joined with the state and federal incidental take authorization processes

Constraints:

- Additional cost to achieve state and federal authorization for incidental take
- Additional time to achieve state and federal authorization for incidental take
- Coverage for unlisted species is likely unavailable under state law without an NCCP
- The INRMP may be inconsistent with the outcome of the HCP process, leading to additional delays and costs associated with rectifying the inconsistencies

*INRMP with Separate State and Federal Compliance for Pine Hill Plants*

Under this approach, the INRMP would be developed following the County's General Plan requirements, and state and federal compliance would be achieved separately for the Pine Hill plants only through a memorandum of understanding (MOU) or a similar type of agreement.

## *INRMP*

The INRMP would be prepared following County General Plan Requirements. The process of developing the INRMP would not include an effort to achieve compliance with the ESA or CESA.

INRMP development would include the required General Plan processes:

- Public participation
- Coordination with CDFG and the Service
- Coordination with PWTAC

The INRMP document would contain the following components as required by the General Plan:

- Habitat inventory
- Habitat protection strategy
- Mitigation assistance program
- Habitat acquisition program
- Habitat management program
- Monitoring program
- Funding strategy

Preparation of the INRMP without the joint components and processes required for an ESA section 10 and NCCP or section 2081 permit would result in completion of the INRMP with less time and cost. The components required for the INRMP are largely similar to the HCP and NCCP components except that the description of covered activities and the assessment of impacts is less rigorous. As such, the main saving in time and cost for the development of the INRMP would come as a result of the County's ability to approve a final plan without the extended permit review and approval process associated with an HCP or NCCP.

### *Separate Compliance for the Eight Pine Hill Plant Species*

A focused approach for obtaining compliance for the eight plant species could be through a written agreement, such as a memorandum of understanding (MOU), that forms the basis for a comprehensive section 7 consultation, a CESA permit or CESA consistency determination, a formal agreement under the NPPA, and impact evaluations under NEPA and CEQA. Under this approach, El Dorado County would develop a voluntary plant conservation strategy that would ensure that impacts of covered activities would be appropriately minimized and mitigated and would contribute to the conservation of the plant species. The plant conservation strategy could form the basis for an MOU between the County and the wildlife agencies. Under the MOU, the County would review development projects as part of their land use approval process and ensure that the minimization and mitigation measures required under the plant conservation strategy would be required as a condition of development.

*Coverage Under the Federal ESA* - The MOU would be used to create a federal nexus for the purpose of triggering the consultation provisions of section 7 and authorizing impacts to the five federally listed plant species for otherwise non-federal actions. This approach is permissible under the ESA and it serves as an effective mechanism for providing regulatory coverage to both federal and non-federal activities under a single agreement. In the event that any of the three unlisted species become listed under the ESA in the future, the MOU could provide a basis for expanding the coverage of the biological opinion to the newly listed species.

The commitments contained in the plant conservation strategy would be memorialized in an MOU entered into by the County, CDFG, and the Service. To address actions in the County by other federal agencies, the U.S. Army Corps of Engineers (Corps) and the U.S. Bureau of Reclamation (Reclamation) could also be included in the MOU. The section 7 consultation would enable the Service to provide regulatory coverage under the ESA for activities covered by the plant conservation strategy through a biological opinion. Once the Service issues a biological opinion on implementation of the MOU, future federal actions, such as the issuance of wetland permits by the Corps, or water-related actions by Reclamation, could be analyzed in the context of the MOU and existing biological opinion. As such, the federal agency could rely on the MOU and biological opinion to conclude that its action would not likely adversely affect the plant species.

*Coverage Under CESA* - Because permits are unavailable for the take of unlisted species, coverage under CESA would only be available for the Stebbins' morning glory. The plant conservation strategy in the MOU could form the basis for an application for a section 2081 take permit for the Stebbins' morning glory. Alternatively, the County could use the FWS biological opinion issued on the MOU as the basis for requesting coverage for the Stebbins' morning glory through a CESA consistency determination.

*Coverage Under the NPPA* - The MOU could serve as a formal agreement with CDFG regarding protection for the four plant species listed as rare under the NPPA. The agreement would presumably serve as a safe harbor against enforcement actions.

*Compliance with NEPA and CEQA* - The MOU's plant conservation strategy could also form the basis for analyzing impacts to all eight plant species during environmental review conducted under NEPA and CEQA. It is expected that the plant conservation strategy would provide sufficient protection and conservation benefits for the eight plant species such that potential impacts from covered activities would have less than significant effects.

*Benefits and Constraints of the MOU Approach* - The MOU approach would provide a streamlined and efficient process for addressing compliance issues under the ESA, CESA, the NPPA, and NEPA and CEQA. This approach allows for the potential indirect effects of federal actions, such as water-related actions by Reclamation, to be addressed up front in a comprehensive manner in a single section 7 consultation, and would avoid the piecemeal and time-consuming process of addressing indirect effects in

individual consultations. The plant conservation strategy could later be integrated into the County's INRMP or be incorporated into a regional HCP and NCCP, should the County elect to develop such plans in the future.

The MOU approach is based on section 7 and would therefore not provide the regulatory assurances that are normally obtained through an ESA section 10 permit. This approach envisions compliance with state law through CESA. The authority of CDFG to provide regulatory assurances under CESA is currently at issue in a case pending before the California Supreme Court. As a result, regulatory assurances under CESA may not be available.