

**FINDINGS AND RECOMMENDATIONS
FOR THE ISSUANCE OF ENDANGERED SPECIES ACT
SECTION 10(a)(1)(B) PERMIT TE134528-0
TO AUTHORIZE INCIDENTAL TAKE
OF THE DELHI SANDS FLOWER-LOVING FLY
ASSOCIATED WITH THE HABITAT CONSERVATION PLAN
FOR THE VALLEY BOULEVARD/PEPPER AVENUE INTERSECTION
REALIGNMENT AND IMPROVEMENT PROJECT, CITY OF COLTON, SAN
BERNARDINO COUNTY, CALIFORNIA**

I. DESCRIPTION OF PROPOSAL

The County of San Bernardino (Applicant or County) is seeking a ten-year incidental take permit (Permit) for the Delhi Sands flower-loving fly (*Rhaphiomidas terminatus abdominalis*; “DSF”) under section 10(a)(1)(B) of the Endangered Species Act of 1973 (Act), as amended. The Applicant is seeking an individual Incidental Take Permit in association with construction activities for the proposed realignment and improvement of the Valley Boulevard and Pepper Avenue intersection in the City of Colton, San Bernardino County, California. The Applicant has submitted a Habitat Conservation Plan (HCP). The HCP addresses the effects of the proposed project on the DSF and describes implementation of measures to minimize and mitigate the project’s effects to the DSF. The Permit would allow incidental take in the form of harm, including death or injury, of all DSF onsite as a result of construction activities.

The permit would allow incidental take in the form of harm, including death or injury, of all DSF on site as a result of the permanent removal of 1.84 acres of occupied DSF habitat. In addition, and consistent with the U. S. Department of the Interior’s “No Surprises” regulations [50 CFR 17.22 (b)(5) and 17.32 (b)(5)], the Applicant is seeking assurances that no further mitigation and minimization requirements for the DSF would be required while the permit is in effect and being implemented properly.

Documents used in the preparation of these findings and recommendations include: (1) the *Habitat Conservation Plan for the Issuance of an incidental take permit under section 10(a)(1)(B) of the Endangered Species Act for the Federally Endangered Delhi Sands Flower-Loving Fly for the Valley/Pepper Avenue Intersection Realignment and Improvement Project, City of Colton, San Bernardino County, California*, dated November January 26, 2006; (2) the Service’s Intra-Service Biological Opinion (FWS-SB-4142.3), dated August 31, 2006; and (3) the Recovery Plan for the DSF (Service 1997). These documents are herein incorporated by reference.

Project Description

The proposed action is the issuance of an incidental take permit under section 10(a)(1)(B) of the Act (permit) to the applicant. The incidental take is anticipated to occur in association with construction activities during the proposed realignment and

improvement of the Valley Boulevard and Pepper Avenue intersection in the City of Colton, San Bernardino County, California. The proposed project site consists of the 16.84 acres of mostly undeveloped land within Delhi Soils. Based on the proximity of the proposed project site to the Hospital Preserve and the contiguity of Delhi sands between the Hospital Preserve and the project site, an estimated 1.84 acres of DSF habitat would be affected by the proposed project. The proposed project would permanently impact the occupied habitat. The remainder of the project site is considered unoccupied based on habitat conditions and surveys by permitted DSF biologists.

The County proposes to mitigate impacts to the DSF either through acquisition and conservation of a 2.04-acre parcel adjacent to the proposed project (Hospital Preserve Extension Alternative) or purchase of 5 acres of credit within the Vulcan Materials Inc. Colton Dunes Conservation Bank (Conservation Bank Alternative). If the Hospital Preserve Extension Alternative is chosen, copies of the final management plan and conservation easement would be on file at the Carlsbad Fish and Wildlife Office before the permit is issued. If the Conservation Bank Alternative is chosen, the County would provide proof of purchase of credits toward conservation of 5 acres at the Conservation Bank prior to any ground disturbing activities. Vulcan Materials Inc. has provided assurances to the Service through a banking agreement that the Conservation Bank will be managed and monitored to ensure the long-term conservation of the DSF, and the County would be entitled to rely on these management and monitoring assurances [Intra-Service Section 7 Consultation for the Habitat Enhancement and Management Plan for the Colton Dunes Conservation Bank, City of Colton, San Bernardino County, California (1-6-05-F-3849.1)].

II. ANALYSIS OF EFFECTS

The proposed project would permanently impact approximately 1.84 acres of occupied DSF habitat and an additional 15 acres of disturbed, unoccupied DSF habitat. Grading and project construction could crush or displace DSF eggs, larvae and pupae within the occupied habitat. Permanent loss of habitat will be offset by either the Hospital Preserve Extension Alternative or the Conservation Bank Alternative.

Under the Hospital Preserve Extension Alternative, the County would establish an endowment with One Hundred Thousand Dollars (\$100,000.00) to be to be used by the County Service Area 70, Improvement Zone OS-2 (District) or other management entity accepted by the Service for management of the property. A Conservation Easement would be dedicated to the District or other management entity acceptable to the Service for the Acquisition Parcel. The 2.04-acre proposed conservation area would expand the existing Hospital Preserve, which includes some of the highest quality DSF habitat remaining and is known to be occupied at relatively high densities (Carlsbad Fish and Wildlife Office Listing and Recovery database 2004). Expansion of the Hospital Preserve would improve the likelihood of persistence for DSF at the site, which is becoming increasingly isolated through time due to surrounding development.

Under the Conservation Bank Alternative, the County would mitigate project impacts to the DSF through the purchase of 5 acres of high quality, occupied habitat with known long-term conservation value at the Colton Dunes Conservation Bank. The bank is within the largest remaining area known to support DSF, and conservation within this area is considered essential for DSF recovery. DSF have been observed throughout the majority of the Conservation Bank as recently as 2004 (Carlsbad Fish and Wildlife Office Listing and Recovery database 2004).

III. PUBLIC COMMENT

On April 21, 2006, the Service published a notice of the availability of, and solicited comments on, the application (71 FR 20716). Copies of the HCP and associated Low-Effect Screening Form and Environmental Action Statement were made available for public inspection at local libraries and the Carlsbad Fish and Wildlife Office in Carlsbad, California. The 30-day public comment period closed on May 22, 2006. We received one comment on the HCP during this public comment period. The commenter noted that a portion of the parcel proposed for conservation is not currently owned by the Applicant. We acknowledge that the proposed conservation has not been acquired at this time and note that a conservation easement will be established over the conservation parcel prior to groundbreaking activities under the Hospital Preserve Expansion Alternative.

This Findings and Recommendations document will be made available to all known interested parties. Following final action on the application, the Service will publish a notice of decision in the *Federal Register*.

IV. INCIDENTAL TAKE PERMIT CRITERIA: ANALYSIS AND FINDINGS

Section 10(a)(2)(A) of the Act specifically mandates that no permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the Applicant submits to the Secretary a conservation plan that specifies the following: (i) the impact which will likely result from such taking; (ii) what steps the Applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (iii) what alternative actions to such taking the Applicant considered and the reasons why such alternatives are not being utilized; and (iv) such other measures as the Secretary may require as being necessary or appropriate for the purposes of the plan.

Section 10(a)(2)(B) of the Act mandates that the Secretary shall issue a permit if "...after opportunity for public comment, with respect to a permit application and the related conservation plan that (i) the taking will be incidental; (ii) the Applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the Applicant will assure that adequate funding for the plan will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (v) the measures, if any, required under subparagraph (A)(iv) will be met; and [s]he has received such other assurances as [s]he may require that the plan will be implemented..."

With regard to this specific project, permit action, and section 10(a)(2)(B) requirements, the Service makes the following findings:

1. The taking will be incidental.

Any take of the DSF will be incidental to the otherwise lawful activities associated with ground disturbance (*e.g.*, grading, equipment and materials staging) related to construction of the project proposed by the Applicant as specified in the HCP.

2. The Permittee will, to the maximum extent practicable, minimize and mitigate the impacts of taking of covered animal species and the effects to other Covered Species that may occur within the Permit Areas.

The Service finds that the Permittee will minimize and mitigate the impacts of take of the DSF to the maximum extent practicable. The Permittee has developed the HCP pursuant to the incidental take permit requirements codified at 50 CFR 17.22(b)(2) and 50 CFR 17.32(b)(2), which require measures to minimize and mitigate the effects of issuing permits.

The Applicant proposes to implement measures as part of the proposed action to minimize and mitigate potential adverse effects of the project on the federally endangered DSF. In summary, of the 16.84-acre project site, only 1.84 acres are occupied by the DSF, and the remainder supports highly degraded, unoccupied habitat. Under the Hospital Preserve Extension Alternative, the applicant would substantially increase the long-term conservation value of the site that would be impacted by expanding the acreage conserved for the DSF. Under the Conservation Bank Alternative, the applicant would contribute to the protection of the largest potential conservation area known for the DSF.

The Applicant considered two alternatives to the proposed project to determine whether the proposed project has, to the maximum extent practicable, minimized and mitigated the impacts of the taking. The Applicant considered the following alternatives to the Proposed Action Alternative:

1. No Action Alternative. Existing conditions, the new hospital and proposed future development require upgrade to current roadway systems. The No Action Alternative would result in gridlock conditions inside the project area. Therefore, this alternative was not selected.
2. Alternative Site Layout. Studies undertaken by the County of San Bernardino indicate the need for the proposed improvements due to construction of the Arrowhead Regional Medical Center. The improvements would accommodate existing and ongoing development in the Hospital vicinity. Currently, stacking distance is severely limited between Valley Boulevard and the on-and off-ramps of I-10 freeway, which causes significant traffic congestion, resulting in "level of service" (LOS) of E and F (A being best and F being worst). Existing conditions, the new Hospital and proposed future development require upgrade to current

roadway systems. The No Action Alternative would result in gridlock conditions inside the project CAPE. Therefore, this alternative was not selected.

In summary, the proposed action is the most feasible alternative for the Applicant while, at the same time, providing the most beneficial mitigation and conservation measures for the DSF.

Based on the minimization and mitigation measures listed above, we conclude that the Applicant has minimized and mitigated the impacts of take to the maximum extent practicable. These conclusions were reached in recognition of the following considerations: (1) effects of the action, including conservation measures proposed as part of the project description; (2) the importance of the conservation measures defined in the HCP to the survival and recovery of the DSF; 3) the location of either offsite conservation alternative will provide for long-term conservation of the DSF; and 4) the practicability of alternatives considered.

3. The applicant(s) will ensure that adequate funding for the plan and procedures to deal with unforeseen circumstances will be provided.

Prior to any ground-disturbing activities, the County would provide to the CFWO either 1) a final conservation easement for the Acquisition Parcel and proof that a \$100,000 endowment has been established, or 2) proof of purchase towards conservation of 5 acres at the Conservation Bank.

Pursuant to the Service's "No Surprises" regulations [50 CFR 17.22(b)(5) and 17.32(b)(5)], the HCP (section 5) includes procedures to deal with unforeseen circumstances. Provided that the Permittee has complied with its obligations under the HCP and the Permit, the Service can require the Permittee to provide mitigation beyond that provided in the HCP only under Unforeseen Circumstances, and only in accordance with the "No Surprises" regulations. Notwithstanding the foregoing, in the event that the "No Surprises" regulations are vacated, unenforceable, or enjoined for any reason, or to any extent, those procedures identified in the Director's November 4, 2003, memorandum (titled "Update Concerning "No Surprises" Litigation") will be followed.

The HCP (section 4) also identifies a single changed circumstance that can reasonably be anticipated: the listing of new species. The HCP also describes the responses to such change that will be carried out by the Applicant.

In the event that a non-Covered Species that may be affected by Covered Activities becomes listed under the Act, the Permittee will implement the "no take/no jeopardy/no adverse modification" measures identified by the Service until the Permit is amended to include such species, or until the Service notifies the Permittee that such measures are no longer needed to avoid jeopardy to, take of, or adverse modification of the critical habitat of, the non-Covered Species.

4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

The Act's legislative history establishes the intent of Congress that this issuance criteria be based on a finding of "not likely to jeopardize" under section 7(a)(2) (50 CFR § 402.02). As a result, approval of the Applicant's permit application has also been reviewed by the Service under section 7 of the Act. In our biological opinion (FWS-SB-4142.3), we concluded that issuance of the Permit to the Applicant would not likely jeopardize the continued existence of the DSF. We reached this conclusion because the proposed project will result in the loss of only 1.84 acres of currently occupied habitat. The remaining 15 acres of the project site supports only degraded, unoccupied habitat for the DSF. The loss of habitat will be offset by the permanent conservation of DSF habitat with long-term conservation value.

5. Other measures, as required by the Director of the Fish and Wildlife Service, as necessary or appropriate for purposes of the plan will be met.

The Valley/Pepper Realignment HCP incorporates all elements determined by the Service to be necessary for approval of the HCP and issuance of the Permit to the Applicant.

6. The Service has received the necessary assurances that the plan will be implemented.

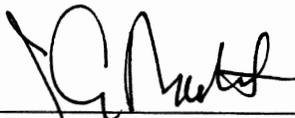
Prior to any ground-disturbing activities, the County would provide to the CFWO either 1) a final conservation easement for the Acquisition Parcel and proof that a \$100,000 endowment has been established, or 2) proof of purchase towards conservation of 5 acres at the Conservation Bank. As a Service-approved bank, the County is entitled to rely on the management and monitoring assurances.

V. GENERAL CRITERIA AND DISQUALIFYING FACTORS

The Service has no evidence that the Permit should be denied on the basis of the criteria and conditions set forth in 50 CFR § 13.21(b) and (c). The Applicant has met the criteria for the issuance of the Permit and no disqualifying factor exists that would prevent the Permit from being issued under current regulations.

VI. RECOMMENDATION ON PERMIT ISSUANCE

Based on these findings with respect to the proposed action, the Service recommends issuance of section 10(a)(1)(B) incidental take number TE134528-0 to the Applicant for incidental take of the DSF in accordance with the HCP.



Field Supervisor
Carlsbad Fish and Wildlife Office

August 31, 2006
Date