

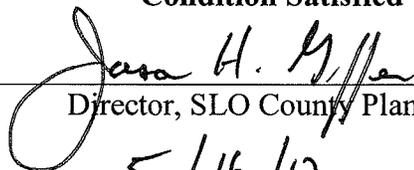
Condition 56**CDFG "No Take Agreement"**

Prior to the initiation of any vegetation clearing, soil disruption, grading, or any other construction related activities, the County shall formalize a "no take agreement" with the CDFG for the Morro Bay kangaroo rat. The "no take agreement" shall outline a monitoring and contingency plan for the Broderson leach field, as on-going maintenance of the leach field may create suitable Morro Bay kangaroo rat habitat.

Evidence of compliance:

The attached May 15, 2012 Board of Supervisors item includes the "no take" memorandum of agreement between the CDFG and the County. The MOA has been signed by Dr. Jeffrey R. Single, CDFG Regional Manager and was approved by the Board of Supervisors on May 15, 2012. A copy of the action from the May 15, 2012 Board proceedings is on file with the Department of Planning and Building.

Condition Satisfied



Director, SLO County Planning
5 / 16 / 12

Date

County of San Luis Obispo



TO: Board of Supervisors

FROM: Public Works

Mark Hutchinson, Environmental Programs Manager

John Waddell, Los Osos Wastewater Project Manager

VIA: Dave Flynn, Deputy Director of Public Works

DATE: 5/15/2012

SUBJECT: Consideration of items for compliance with the Coastal Development Permit on the Los Osos Wastewater Project including deed restriction documents for Project properties and a Memorandum of Agreement with the California Department of Fish and Game.

RECOMMENDATION

It is our recommendation that your Honorable Board:

1. Approve and execute the attached deed restrictions for the Santa Ysabel, Sunny Oaks, Midtown, and Broderson properties in Los Osos; and
2. Approve and execute the attached Memorandum of Agreement with the California Department of Fish and Game for mitigation measures designed to protect the Morro Bay kangaroo rat.

DISCUSSION

On September 20, 2006, California State Governor Arnold Schwarzenegger signed Assembly Bill 2701 (Blakeslee) which allows the County, at the Board's discretion, to assume responsibility for development of a wastewater project for the community of Los Osos. The project requires the completion of a community wastewater collection system and a wastewater treatment facility.

The Conditions of Approval for the project's Coastal Development Permit require deed restrictions to be recorded against six parcels.

Condition 3a (part): "The Habitat Management Plan shall require and provide for the use of the Broderson, Giacomazzi, Midtown, and Pump Station sites [Solano, Sunny Oaks & East Santa Ysabel] each to be restricted through recordation of a deed restriction, prohibiting all non resource-dependent development on each site, other than that associated with the approved project and consistent with the approved Habitat Management Plan."

Your Board's action on February 28, 2012 to approve the Real Property Transfer Agreement for the BSR Property (Solano Pump Station) already satisfied condition 3a for that parcel. This action will address the condition of approval for four additional parcels. The necessary deed restriction for the Giacomazzi treatment plant site will be processed after acquisition activities on that parcel are completed.

Because the listed sites contain Environmentally Sensitive Habitat (ESHA), the deed restrictions are intended to document that future uses of the sites are limited to those already approved with the wastewater project, unless those uses are first approved by the Coastal Commission and meet the Coastal Act definition of resource dependent.

The Conditions of Approval for the project's Coastal Development Permit also require the execution of a "No Take" agreement with the Department of Fish and Game to avoid any impacts to the endangered Morro Bay kangaroo rat. The attached Memorandum of Agreement will satisfy the conditions of approval and contains measures to conduct extensive protocol surveys both before project construction and before any site disturbance related to future maintenance of the leach field site on the Broderson site. Although discovery of a Morro Bay kangaroo rat would delay construction in the vicinity of the find, it is worth noting that the species has not been observed in the wild since 1986 despite many trapping efforts, and the last individual in captivity died in 1993. Both the U.S. Fish and Wildlife Service and Department of Fish and Game consider the species as possibly extinct; however, the Department of Fish and Game believes that the measures listed in the MOA are still appropriate.

OTHER AGENCY INVOLVEMENT/IMPACT

The Office of County Counsel is providing legal guidance on all aspects of the Project and has reviewed and approved the deed restrictions. Many agencies have been involved with the project and the necessary project permits and approvals have been received or are being processed from the following: Coastal Commission, County Planning & Building, Regional Water Quality Control Board, California Department of Fish and Game, United States Department of Agriculture, U.S. Fish and Wildlife Service, Air Pollution Control District, State Water Resources Control Board.

FINANCIAL CONSIDERATIONS

Because the deed restrictions are being filed against property already owned by the project, no additional right-of-way costs are involved. Costs for condition compliance activities are included in the overall project construction budget. The project is funded under a combination of Federal (USDA), State, and Local funds and assessments budgeted under the Los Osos Wastewater Project (WBS 300448). The estimated costs for protocol surveys related to the MOA are \$25,000 and are also included in the overall Project budget approved by your Board on May 17, 2011.

RESULTS

The intended result of this recommendation is to comply with the Coastal Development Permit Conditions of Approval for the project. Approval of the proposed deed restrictions and the MOA will allow for the project to be constructed on schedule. This project is a key element in the plan to address the wastewater issues of the community. An additional result of the recommended action will be to improve water quality in this area.

Reference: 12MAY15-C-13

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ATTACHMENTS

1. Deed Restriction Sites - Map
2. MidTown Deed Restriction
3. Exhibit A to MidTown Deed Restriction
4. Broderson Deed Restriction
5. Exhibit A to Broderson Deed Restriction
6. Santa Ysabel Deed Restriction
7. Exhibit A to Santa Ysabel Deed Restriction
8. Sunny Oaks Deed Restriction
9. Exhibit A to Sunny Oaks Deed Restriction
10. Memorandum of Agreement between the California Department of Fish and Game and the County of San Luis Obispo
11. Exhibit A to Memorandum of Agreement

**MEMORANDUM OF AGREEMENT
BETWEEN THE CALIFORNIA DEPARTMENT OF FISH AND GAME
AND
THE COUNTY OF SAN LUIS OBISPO
REGARDING MORRO BAY KANGAROO RAT
ON THE LOS OSOS WASTEWATER PROJECT,
SAN LUIS OBISPO COUNTY, CALIFORNIA**

Whereas the County of San Luis Obispo ("County") is developing the Los Osos Wastewater Project ("Project"), and

Whereas the Project is of State and National importance as evidenced by the extraordinary actions of the California Legislature, the Governor of the State of California, the Congress of the United States, the United States Department of Agriculture, and numerous other State and Federal agencies to advance the implementation of the Project, and

Whereas the habitat conditions at the Broderson leach field component of the Project are considered to be "potentially suitable" for Morro Bay kangaroo rat (*Dipodomys heermanni morroensis*; MBKR), and

Whereas Morro Bay kangaroo rat is listed as endangered pursuant to the federal Endangered Species Act of 1973 (ESA) and the California Endangered Species Act (CESA), and

Whereas Section 2080 of the Fish and Game Code prohibits "take" of any species that the California Fish and Game Commission determines to be an endangered species or a threatened species, and

Whereas "take" is defined in Section 86 of the Fish and Game Code as "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill," and

Whereas the Morro Bay kangaroo rat is a "fully protected" species pursuant to California Fish and Game Code section 4700, and

Whereas the California Department of Fish and Game ("Department") is unable to authorize incidental take of "fully protected" species when activities are proposed in areas inhabited by those species, except for necessary scientific research, including efforts to recover fully protected, threatened, or endangered species, and

Whereas "scientific research" does not include any actions taken as part of specified mitigation for a project, as defined in Section 21065 of the Public Resources Code, and

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Whereas the County of San Luis Obispo imposed conditions of approval on the Project intended to protect the endangered MBKR, including Condition #56, which states: *Prior to the initiation of any vegetation clearing, soil disruption, grading, or any other construction related activities, the County shall formalize a "no take agreement" with the CDFG for the Morro Bay kangaroo rat. The "no take agreement" shall outline a monitoring and contingency plan for the Broderson leach field, as on-going maintenance of the leach field may create suitable Morro Bay kangaroo rat habitat.*

Therefore, the County shall implement the following avoidance measures in areas which are identified as potential habitat for MBKR habitat:

1. A protocol survey will be conducted by a qualified surveyor prior to any disturbance in order to determine the status of MBKR on the project site per **Exhibit A and Exhibit B**. If the survey fails to detect Morro Bay kangaroo rat, development may proceed.
2. If MBKR is detected during pre-construction protocol surveys, the Department and U.S. Fish and Wildlife Service ("Service") will be notified immediately. No further disturbance or development will occur until either: 1) subsequent protocol surveys demonstrate absence, or 2) an alternative course of action is agreeable to the County, the Service, and the Department.
3. Prior to any significant maintenance of the leach field or other areas of potential habitat (e.g. vegetation removal, replacement of leach lines), a protocol survey per **Exhibits A and B** will be conducted prior to any disturbance in order to determine the status of MBKR on the site. If the survey fails to detect MBKR, maintenance may proceed.
4. If MBKR is detected during pre-maintenance protocol surveys, the Department and Service will be notified immediately. No further disturbance or development will occur until either: 1) subsequent protocol surveys demonstrate absence, or 2) an alternative course of action that is agreeable to the County, the Service and the Department is developed and implemented.
5. Other avoidance measures which shall be implemented in construction sites which are in proximity to MBKR habitat:
 - a. During the construction period, a biological monitor shall be on the project site while ground-disturbing activities are taking place.
 - b. Prior to commencement of any grading or construction activities, all personnel associated with the project shall attend a worker education training program, conducted by the biological monitor or other expert who is deemed qualified by both the Service and the Department,

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explaining the steps to be taken to avoid or reduce impacts to MBKR. At a minimum, as the program relates to the MBKR, the training shall include the MBKR's life history, the laws and regulations which pertain to the species, and all mitigation measures required by the County's permits and biological opinion 8-8-11-F-5R.

- c. To prevent entrapment of the MBKR during the construction phase of the project, the biological monitor shall ensure that all excavation, steep-walled holes or trenches in excess of 6 inches in depth are covered at the close of each working day by plywood or similar materials, or provided with one or more escape ramps constructed of earth fill or wooden planks.
- d. To prevent entrapment of the MBKR during construction, the biological monitor shall inspect the site for the presence of any entrapped MBKR each morning prior to onset of field activities and immediately prior to covering with plywood at the end of each working day. Before such holes or trenches are filled, they shall be thoroughly inspected for any entrapped MBKR. Any MBKR so discovered shall be allowed to escape and the Department and Service will be notified immediately per (5.) (h.) below.
- e. During the construction phase, any pipes, culverts, or similar structures with a diameter of two inches or greater, that are stored overnight at the project site, shall be thoroughly inspected by the biological monitor for trapped MBKR before the subject pipe is subsequently buried, capped, or otherwise used or moved in any way. If during the construction phase a MBKR is discovered inside a pipe, that section of pipe will not be moved until the MBKR has escaped and the Department and Service will be notified immediately per (5.) (h.) below.
- f. During the construction phase, the on-site project manager or biological monitor shall be responsible for ensuring that all cans, bottles, and food scraps generated shall be disposed of in closed containers only and regularly removed from the site. Food items may attract red fox, coyotes, or domestic dogs or cats to the area, and/or MBKR onto the project site, consequently exposing MBKR to increased risk of injury or mortality. No deliberate feeding of wildlife or pets shall be allowed.
- g. To prevent primary or secondary poisoning of endangered species utilizing the construction site or adjacent habitat, the use of rodenticides is strictly prohibited. Use of any other pesticides shall be in compliance with all local, state and federal regulations.
- h. During the construction phase, any contractor or employee that inadvertently kills or injures a MBKR or who finds any such animal either

dead, injured, or entrapped shall be required to report the incident immediately to the on-site project manager and the biological monitor. The biological monitor shall then notify the County, Service, and Department by telephone within 4 hours, or in the case of entrapped animals, immediately.

In addition, formal notification shall be provided in writing within three working days of the finding of any such animal(s). Notification shall include the date, time, location and circumstances of the incident. Any threatened or endangered species found dead or injured shall be turned over immediately to the Department for care, analysis, or disposition.

- i. In the event that a MBKR is observed on site during any phase of construction, all construction activity within 200 yards of the MBKR observation shall cease and both the Department and Service shall be contacted as per 5 (h) above. Construction activities shall only be allowed to proceed after the Department, Service, and County have formally agreed to any and all additional measures necessary to prevent take of MBKR.
- j. During the construction period, construction zone fencing shall be established and maintained around the leach field area, as well as any construction sites, access roads, and staging areas with adjacent suitable habitat. Should diagnostic sign of MBKR be identified within 200 yards of any construction site, the County shall coordinate with the Department and the Service on modifications to the design of the fence and/or suitable protocols to prevent MBKR from entering the site during the construction period. The County shall ensure that the fencing is maintained throughout the active construction period.

6. To compensate for the temporary and permanent loss of habitat for MBKR, the County will be protecting under conservation ownership (in fee or by way of a Conservation Easement) approximately 72 acres of habitat outside of the leach field area of the 80-acres property known as the "Broderon" parcel (**Exhibit C**), pursuant to the requirements of the Project's Coastal Development Permit as administered by the California Coastal Commission and the Terms and Conditions of the Section 7 consultation between the United States Department of Agriculture and the U.S. Fish and Wildlife Service. In the event that the County decides to not retain conservation ownership, the title or easement may be transferred to an agency or private non-profit conservation organization approved by the Department and Service.

The County fully understands that it does not have, and this agreement does not provide, State or Federal "incidental take" authority for Morro Bay kangaroo rat. Liability for any "take" or "incidental take" of listed species remains the separate responsibility of the County.

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Exhibits:

- Exhibit A** Survey Protocol for the Morro Bay Kangaroo Rat, April 3, 1996
- Exhibit B** Project-specific Survey Protocol for Morro Bay kangaroo rat
- Exhibit C** Map of the Broderson property including leachfield location [to be provided by County]

IN WITNESS THEREOF, the parties hereto have executed this Agreement, and this Agreement shall become effective on the date shown signed by the County of San Luis Obispo.

Date: May 2, 2012

CALIFORNIA DEPARTMENT OF FISH AND GAME

By: [Signature]
Regional Manager

Date: _____

COUNTY OF SAN LUIS OBISPO

By: _____
Chairperson of the Board
County of San Luis Obispo
State of California

APPROVED AS TO FORM AND LEGAL EFFECT:
WARREN R. JENSEN
County Counsel

By: Warren Jensen
~~Deputy~~ County Counsel

Date: May 3, 2012