



State of California – Natural Resources Agency  
DEPARTMENT OF FISH AND WILDLIFE  
South Coast Region  
3883 Ruffin Road  
San Diego, CA 92123  
(858) 467-4201  
[www.wildlife.ca.gov](http://www.wildlife.ca.gov)

**GAVIN NEWSOM, Governor**  
**CHARLTON H. BONHAM, Director**



Governor's Office of Planning & Research

**June 18 2021**

## **STATE CLEARINGHOUSE**

June 18, 2021

Mr. Randall McInvale  
United Water Conservation District  
1701 N. Lombard Street, Suite 200  
Oxnard, CA 93030  
[RandallM@UnitedWater.org](mailto:RandallM@UnitedWater.org)

**Subject: Freeman Diversion Fish Passage Facility Geotechnical Exploration Project,  
Mitigated Negative Declaration, SCH #2021050414, Ventura County**

Dear Mr. McInvale:

The California Department of Fish and Wildlife (CDFW) has reviewed United Water Conservation District's (District; Lead Agency) Mitigated Negative Declaration (MND) for the Freeman Diversion Fish Passage Facility Geotechnical Exploration Project (Project).

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that may affect California fish and wildlife. Likewise, we appreciate the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under the Fish and Game Code.

### **CDFW's Role**

CDFW is California's Trustee Agency for fish and wildlife resources and holds those resources in trust by statute for all the people of the State [Fish & Game Code, §§ 711.7, subdivision (a) & 1802; Public Resources Code, § 21070; California Environmental Quality Act (CEQA) Guidelines, [§ 15386, subdivision (a)]. CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (Id., § 1802). Similarly, for purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public agency environmental review efforts, focusing specifically on projects and related activities that have the potential to adversely affect state fish and wildlife resources.

CDFW is also submitting comments as a Responsible Agency under CEQA (Public Resources Code, § 21069; CEQA Guidelines, § 15381). CDFW expects that it may need to exercise regulatory authority as provided by the Fish and Game Code, including lake and streambed alteration regulatory authority (Fish & Game Code, § 1600 *et seq.*). Likewise, to the extent implementation of the Project as proposed may result in "take", as defined by State law, of any species protected under the California Endangered Species Act (CESA) (Fish & Game Code, § 2050 *et seq.*), or CESA-listed rare plant pursuant to the Native Plant Protection Act (NPPA; Fish & Game Code, §1900 *et seq.*), CDFW recommends the Project proponent obtain appropriate authorization under the Fish and Game Code.

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## Project Description and Summary

**Objective:** The District is considering two alternatives for a new fish passage facility at the Vern-Freeman Diversion Dam (VFD): a hardened ramp and a vertical slot. The proposed geotechnical explorations would inform the design and construction of either fish passage facility alternative.

The Project consists of the following exploration activities: collecting soil and rock core samples from 13 geotechnical boring, excavating six test pits, and conducting seismic refraction traverses. Geotechnical explorations would occur after September 1, 2021. Work within the Santa Clara River (SCR) would occur between September 16, 2021 and October 3, 2021. The duration of field work is approximately 4 weeks.

The proposed Project is expected to impact the SCR, which contains habitat for multiple Endangered Species Act (ESA) and CESA-listed species as well as California Species of Special Concern (SSC), including, but not limited to, least Bell's vireo (*Vireo bellii pusillus*), yellow warbler (*Setophaga petechia*), and western pond turtle (*Actinemys marmorata*). The acreage of boring holes is expected to be approximately 0.05 acre. However, the acreage of indirect impacts that would result from site access/egress was not provided.

**Location:** The Project is located within the immediate vicinity of the VFD, along and in the SCR. The VFD is four miles southwest of the city center of Santa Paula, Ventura County, California.

## Comments and Recommendations

CDFW offers the comments and recommendations below to assist the District in adequately identifying, avoiding, and/or mitigating the Project's significant, or potentially significant, direct, and indirect impacts on fish and wildlife (biological) resources. CDFW recommends the measures or revisions below be included in a science-based monitoring program that contains adaptive management strategies as part of the Project's CEQA mitigation, monitoring and reporting program (Public Resources Code, § 21081.6; CEQA Guidelines, § 15097).

### Specific Comments

#### Comment #1: Impacts to Aquatic and Riparian Resources; Lake and Streambed Alteration Agreement (LSAA)

**Issue #1:** On page 3-19 of the MND, the District states "Santa Ana sucker (*Catostomus santaanae*) is not discussed because the SCR populations are not included in the federal listing (USFWS 2017) or any state listings of special-status species. However, the state does regulate Santa Ana sucker as a native species, affording it, as well as other native species, protection under [FGC]." This statement is insufficient because CEQA requires consideration of locally significant species as well as listed species (CEQA Guidelines, § 15380).

**Issue #2:** The MND lacks sufficient avoidance, minimization, and mitigation measures to avoid impacts to locally significant native fish species (including, but not limited to, Santa Ana sucker).

**Issue #3:** Project activities are expected to occur within the SCR, a stream subject to FGC, section 1600 *et. seq.*

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**Issue #4:** The MND suggests only 0.05 acre of impact to the SCR. However, this only accounts for drilling areas and does not include impacts that could result from accessing/egressing each site.

**Specific Impact:** The Project proposes to modify the SCR. Modification of the SCR may result in the loss of streams and associated watershed function and biological diversity. Frequent drilling activities (including access and egress) on or near streams is likely to diminish onsite and downstream water quality. Project activities may also alter natural hydrologic and geomorphic processes of the SCR.

**Why Impact Would Occur:** The Project will impact the SCR, which is expected to result in loss of natural drainage patterns, soils, and associated vegetation. These actions may also result in changes to the streams, altering hydrologic and geomorphic processes that may impact plant and wildlife species.

**Evidence Impact Would Be Significant:** The Project may substantially adversely affect the existing stream, which absent specific mitigation, could result in substantial erosion or siltation on site or off site of the Project. Debris, soil, silt, sawdust, rubbish, raw cement/concrete, or washings thereof, asphalt, paint or other coating material, oil or other petroleum products, or any other substances which could be hazardous or deleterious to aquatic life, wildlife, or riparian habitat resulting from Project related activities may enter the stream.

#### **Recommended potentially feasible mitigation measure(s)**

**Mitigation Measure #1:** The Project applicant (or "entity") must provide written notification to CDFW pursuant to section 1600 *et seq.* of the FGC. Based on this notification and other information, CDFW shall determine whether a Lake and Streambed Alteration (LSA) Agreement is required prior to conducting the proposed activities. A notification package for a LSA may be obtained by accessing CDFW's web site at <https://www.wildlife.ca.gov/conservation/lisa>.

CDFW's issuance of an LSA Agreement for a Project that is subject to CEQA will require CEQA compliance actions by CDFW as a Responsible Agency. As a Responsible Agency, CDFW may consider the CEQA document of the Lead Agency for the Project. To minimize additional requirements by CDFW pursuant to section 1600 *et seq.* and/or under CEQA, the CEQA document should fully identify the potential impacts to streams or riparian resources and provide adequate avoidance, mitigation, monitoring, and reporting commitments for issuance of the LSA Agreement.

**Mitigation Measure #2:** Any LSA Agreement issued for the Project by CDFW may include additional measures protective of streambeds on and downstream of the Project such as additional erosion and pollution control measures. To compensate for any on-site and off-site impacts to riparian resources, additional mitigation conditioned in any LSA Agreement may include the following: avoidance of resources, on-site or off-site creation, enhancement, or restoration, and/or protection and management of mitigation lands in perpetuity.

**Mitigation Measure #3:** CDFW recommends fully avoiding impacts to waters and riparian/wetland vegetation communities when accessing/egressing the boring and test pit sites. If feasible, CDFW recommends redesigning the Project to avoid impacts to the existing drainage

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features that support sensitive vegetation communities. Design alternatives should attempt to retain as much surface flow and natural hydrologic processes as possible.

**Mitigation Measure #4:** If impacts to riparian habitat, such as arroyo willow thicket, mulefat thicket, and cattail marshes cannot be avoided, CDFW suggests mitigation should be achieved entirely on site if possible. CDFW recommends that impacts be mitigated at no less than 3:1. CDFW recommends that an on-site Habitat Mitigation and Monitoring Plan (HMMP) be developed. An HMMP should provide specific, detailed, and enforceable measures.

## **Comment #2: Impacts to Least Bell's Vireo**

**Issue:** The District is proposing to perform Project activities that would occur in the SCR, outside of the nesting bird season. CDFW agrees with this approach. However, Project activities, such as drilling boreholes, vegetation crushing/clearing, and frequent trips to the Project locations, may result in the destruction of least Bell's vireo nests. A search of the California Natural Diversity Database (CNDDDB) indicates Least Bell's vireo are known to occur within the immediate vicinity of the proposed Project (CDFWb). In addition, recent studies performed by Griffith Wildlife Biology indicate several least Bell's vireo nests have been observed within the immediate vicinity of the proposed Project (Griffith Wildlife Biology 2019). Impacts to least Bell's vireo nests is an issue because they are known to have high levels of site fidelity (Salata 1983b).

**Specific impact:** Project construction and related activities may result in the destruction of nesting habitat, which may result in temporal or permanent loss of bird nesting habitat.

**Why impacts would occur:** The Project as proposed would clear/trim vegetation that could provide bird nesting habitat (e.g., ground cover and shrubs). The temporal or permanent loss of vegetation may substantially impact birds that could return to the Project site year after year (Figueira et al. 2020; Haas 1998). Site fidelity exhibited across the avian taxa reflects the benefits associated with previous knowledge of a particular location, likely improving territory acquisition, foraging efficiency, potential breeding partners, and predator avoidance (Figueira et al. 2020). Least Bell's vireo exhibit especially high rates of site fidelity, with many birds not only returning to the same territory but placing nests in the same shrub used the previous year (Salata 1983b).

**Evidence impacts would be significant:** Nests of all birds and raptors are protected under State laws and regulations, including Fish and Game Code, sections 3503 and 3503.5. Take or possession of migratory nongame birds designated in the Federal Migratory Bird Treaty Act of 1918 (Code of Federal Regulations, Title 50, § 10.13) is prohibited under Fish and Game Code section 3513. The loss of occupied habitat or reductions in the number of sensitive and special status bird species, either directly or indirectly through nest abandonment or reproductive suppression, would constitute a significant impact absent appropriate mitigation.

## **Recommended Potentially Feasible Mitigation Measure(s)**

**Mitigation Measure #1:** CDFW recommends that a qualified avian biologist familiar with least Bell's vireo nests conduct a thorough assessment of all suitable nesting areas and known nesting sites that could be impacted by Project activities (including site access/egress). Surveys should be conducted in the immediate work/disturbance area plus a 25-foot buffer. Positive

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detections of known nests should be recorded with Geographic Information Systems (GIS) in the field.

**Mitigation Measure #2:** If least Bell's vireo nests are identified in the project area, a qualified biologist should mark the location and determine an appropriate buffer for protecting nest habitat from impacts related to construction activities including site access/egress. Temporary fencing and signage delineating nesting habitat should be maintained for the duration of the Project as determined by the qualified biologist. A qualified biologist should advise workers of the sensitivity of the buffered areas. Workers should be advised not to work, trespass, or engage in activities inside the buffer.

Additional mitigation, separate from impacts to vegetation communities, would be necessary to compensate for the temporal or permanent loss of occupied nesting habitat within the Project site. CDFW recommends the qualified biologist/District consult with CDFW to determine proper mitigation for impacts to occupied habitat. Mitigation would be based on acreage of impact and vegetation composition. Depending on the status of the bird species impacted, replacement of habitat acres should increase with the occurrence of an SSC. Replacement acres would further increase with the occurrence of a CESA-listed species.

**Recommendation #1:** Take under the ESA is more broadly defined than CESA; take under ESA also includes significant habitat modification or degradation that could result in death or injury to a listed species by interfering with essential behavioral patterns such as breeding, foraging, or nesting.

### **Additional Recommendations**

**Native Plants:** On page MND-3, the District states, "if no further grading or excavation operations are planned for the area, disturbed areas should be seeded with a native seed mix and watered until grass growth is evident [...]." Grass growth is not clearly indicative of successful native plant establishment. As a suggestion, the sentence should read, "if no further grading or excavation operations are planned for the area, disturbed areas should be seeded with a native seed mix and watered until native plants (including native grasses) growth is evident [...]."

**Mitigation and Monitoring Reporting Plan:** Per Public Resources Code section 21081.6(a)(1), CDFW has provided the District with a summary of our suggested mitigation measures and recommendations in the form of an attached Draft Mitigation and Monitoring Reporting Plan (MMRP; Attachment A). A final MMRP shall reflect results following additional plant and wildlife surveys and the Project's final on and/or off-site mitigation plans.

### **Filing Fees**

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of filing fees is necessary. Fees are payable upon filing of the Notice of Determination by the District and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required for the underlying Project approval to be operative, vested, and final (Cal. Code Regs., tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089).

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## Conclusion

We appreciate the opportunity to comment on the Project to assist the District in adequately analyzing and minimizing/mitigating impacts to biological resources. CDFW requests an opportunity to review and comment on any response that the District has to our comments and to receive notification of any forthcoming hearing date(s) for the Project [CEQA Guidelines, § 15073(e)]. If you have any questions or comments regarding this letter, please contact Baron Barrera, Environmental Scientist, at [Baron.Barrera@wildlife.ca.gov](mailto:Baron.Barrera@wildlife.ca.gov).

Sincerely,

DocuSigned by:

*Erinn Wilson-Olgin*

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Erinn Wilson-Olgin  
Environmental Program Manager I  
South Coast Region

cc: CDFW

Steve Gibson, Los Alamitos – [Steve.Gibson@wildlife.ca.gov](mailto:Steve.Gibson@wildlife.ca.gov)  
Emily Galli, Fillmore – [Emily.Galli@wildlife.ca.gov](mailto:Emily.Galli@wildlife.ca.gov)  
Susan Howell, San Diego – [Susan.Howell@wildlife.ca.gov](mailto:Susan.Howell@wildlife.ca.gov)  
CEQA Program Coordinator, Sacramento – [CEQACommentLetters@wildlife.ca.gov](mailto:CEQACommentLetters@wildlife.ca.gov)  
State Clearinghouse, Sacramento – [State.Clearinghouse@opr.ca.gov](mailto:State.Clearinghouse@opr.ca.gov)  
Chris Delith, United States Fish and Wildlife Service – [Chris\\_Delith@fws.gov](mailto:Chris_Delith@fws.gov)  
Irma Muñoz, Santa Monica Mountains Conservancy – [Edelman@smmc.ca.gov](mailto:Edelman@smmc.ca.gov)  
Katherine Pease, Heal the Bay – [KPease@healthebay.org](mailto:KPease@healthebay.org)  
Snowdy Dodson, Los Angeles/Santa Monica Mountains Chapter, California Native  
Plant Society – [Snowdy.Dodson@csun.edu](mailto:Snowdy.Dodson@csun.edu)  
Frances Alet, The Calabasas Coalition – [FMAlet@sbcglobal.net](mailto:FMAlet@sbcglobal.net)

## References

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### Attachment A: Draft Mitigation and Monitoring Reporting Plan

CDFW recommends the following language to be incorporated into a future environmental document for the Project. A final MMRP shall reflect results following additional plant and wildlife surveys and the Project's final on and/or off-site mitigation plans.

<b>Biological Resources (BIO)</b>			
<b>Mitigation Measure (MM) or Recommendation (REC)</b>		<b>Timing</b>	<b>Responsible Party</b>
<b>MM-BIO-1- Impacts to Rare Plants – Consolidate Plant Studies</b>	<p>The Project applicant (or “entity”) must provide written notification to CDFW pursuant to section 1600 <i>et seq.</i> of the FGC. Based on this notification and other information, CDFW shall determine whether a Lake and Streambed Alteration (LSA) Agreement is required prior to conducting the proposed activities. A notification package for a LSA may be obtained by accessing CDFW’s web site at <a href="https://www.wildlife.ca.gov/conservation/lisa">https://www.wildlife.ca.gov/conservation/lisa</a>.</p> <p>CDFW’s issuance of an LSA Agreement for a Project that is subject to CEQA will require CEQA compliance actions by CDFW as a Responsible Agency. As a Responsible Agency, CDFW may consider the CEQA document of the Lead Agency for the Project. To minimize additional requirements by CDFW pursuant to section 1600 <i>et seq.</i> and/or under CEQA, the CEQA document should fully identify the potential impacts to streams or riparian resources and provide adequate avoidance, mitigation, monitoring, and reporting commitments for issuance of the LSA Agreement.</p>	Prior to Project construction and activities	District/Applicant
<b>MM-BIO-2- Impacts to Aquatic and Riparian</b>	Any LSA Agreement issued for the Project by CDFW may include additional measures protective of streambeds on and downstream of the Project such as additional erosion and pollution control measures. To compensate for any on-site and off-site impacts to	Prior to/During Project	District/Applicant

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<b>Resources – Lake and Streambed Alteration Agreement</b>	riparian resources, additional mitigation conditioned in any LSA Agreement may include the following: avoidance of resources, on-site or off-site creation, enhancement, or restoration, and/or protection and management of mitigation lands in perpetuity.	construction and activities	
<b>MM-BIO-3- Impacts to Aquatic and Riparian Resources – Replacement Habitat</b>	CDFW recommends fully avoiding impacts to waters and riparian/wetland vegetation communities when accessing/egressing the boring and test pit sites. If feasible, CDFW recommends redesigning the Project to avoid impacts to the existing drainage features that support sensitive vegetation communities. Design alternatives should attempt to retain as much surface flow and natural hydrologic processes as possible.	Prior to/After Project construction and activities	District/Applicant
<b>MM-BIO-4- Impacts to Aquatic and Riparian Resources – Interdisciplinary Approach</b>	If impacts to riparian habitat, such as arroyo willow thicket, mulefat thicket, and cattail marshes cannot be avoided, CDFW suggests mitigation should be achieved entirely on site if possible. CDFW recommends that impacts be mitigated at no less than 3:1. CDFW recommends that an on-site Habitat Mitigation and Monitoring Plan (HMMP) be developed. An HMMP should provide specific, detailed, and enforceable measures.	Prior to/After Project construction and activities	District/Applicant
<b>MM-BIO-5- Impacts to Aquatic and Riparian Resources – Replacement Habitat</b>	As part of the LSAA Notification process, CDFW requests a map showing features potentially subject to CDFW’s broad regulatory authority over streams. CDFW also requests a hydrological evaluation of the 200, 100, 50, 25, 10, 5, and 2-year frequency storm event for existing and proposed conditions.	Prior to/After Project construction and activities	District/Applicant
<b>MM-BIO-6- Impacts to Least Bell’s Vireo</b>	CDFW recommends that a qualified avian biologist familiar with least Bell’s vireo nests conduct a thorough assessment of all suitable nesting areas that could be impacted by Project activities (including site access/egress). Surveys should be conducted in the	Prior to/After Project construction and activities	District/Applicant



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	immediate work/disturbance area plus a 25-foot buffer. Positive detections should be reported to CDFW prior to any Project-related ground disturbing activities or vegetation removal.		
<b>MM-BIO-7- Impacts to Least Bell's Vireo</b>	<p>If least Bell's vireo nests are identified, a qualified biologist should determine an appropriate buffer for construction activities including site access/egress. Temporary fencing and signage should be maintained for the duration of the Project as determined by the qualified biologist. A qualified biologist should advise workers of the sensitivity of the buffered areas. Workers should be advised not to work, trespass, or engage in activities inside the buffer.</p> <p>Additional mitigation, separate from impacts to vegetation communities, would be necessary to compensate for the temporal or permanent loss of occupied nesting habitat within the Project site. CDFW recommends the qualified biologist/District consult with CDFW to determine proper mitigation for impacts to occupied habitat. Mitigation would be based on acreage of impact and vegetation composition. Depending on the status of the bird species impacted, replacement of habitat acres should increase with the occurrence of an SSC. Replacement acres would further increase with the occurrence of a CESA-listed species.</p>	Prior to/After Project construction and activities	District/Applicant
<b>MM-BIO-8- Impacts to Least Bell's Vireo</b>	Take under the ESA is more broadly defined than CESA; take under ESA also includes significant habitat modification or degradation that could result in death or injury to a listed species by interfering with essential behavioral patterns such as breeding, foraging, or nesting.	Prior to/After Project construction and activities	District/Applicant