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Governor's Office of Planning & Research

September 13 2021

STATE CLEARINGHOUSE

September 13, 2021

Don Bunts
Santa Margarita Water District
26111 Antonio Parkway
Rancho Santa Margarita, CA 92688
DonB@smwd.com

Subject: Oso Creek Water Reclamation Plant Improvement Project (PROJECT), Mitigated Negative Declaration (MND), SCH #2021080237

Dear Mr. Bunts:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt an MND from the Santa Margarita Water District for the Project pursuant the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹

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 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 & G. Code, §§ 711.7, subd. (a) & 1802; Pub. Resources Code, § 21070; CEQA Guidelines § 15386, subd. (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 fish and wildlife resources.

CDFW is also submitting comments as a **Responsible Agency** under CEQA. (Pub. Resources Code, § 21069; CEQA Guidelines, § 15381.) CDFW expects that it may need to exercise regulatory authority as provided by the Fish and Game Code. 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 & G. Code, § 2050 et seq.), the Project proponent may seek related take authorization as provided by the Fish and Game Code.

¹ CEQA is codified in the California Public Resources Code in section 21000 et seq. The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

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PROJECT DESCRIPTION SUMMARY

Proponent: Santa Margarita Water District (SMWD)

Objective: The Project involves upgrade and rehabilitation of the Oso Creek Water Reclamation Plant (WRP). Project activities include demolition, excavation, grading, paving, and construction of a new WRP, Oso Barrier Urban Return Water Treatment Plant (URWTP), and an office building. The WRP will treat wastewater generated in the SMWD service area and produce recycled water that will be treated for reuse within the SMWD's existing recycled water distribution system. The URWTP will process urban runoff to be used for irrigation, lakefill, and potable reuse.

Location: The Project site is adjacent to Oso Creek within the City of Mission Viejo, Orange County. Surrounding land uses include residential and open space to the east and south, commercial use to the north, and Oso creek and a commercial strip mall to the west.

Biological Setting: The MND indicates that a reconnaissance-level survey of the Project site and a 300' buffer (collectively the Biological Study Area; BSA) was conducted on April 27, 2021. The Project footprint is currently occupied by the existing WRP, ornamental landscaping, and non-native vegetation. The buffer area of the BSA consists of southern willow scrub, coastal sage scrub, and developed land. Based on the reconnaissance survey and literature review presented in the MND, no special-status plant species were observed nor are expected to occur on the Project site. Four special-status wildlife species were determined to have low or low-to-moderate potential to occur within the BSA; species with a low potential to occur include the California Fully Protected white-tailed kite (*Elanus leucurus*) and California Species of Special Concern two-striped garter snake (*Thamnophis hammondi*). Species with a low-to-moderate potential to occur within the BSA include the federally threatened coastal California gnatcatcher (*Polioptila californica californica*) and the state and federally endangered least Bell's vireo (*Vireo bellii pusillus*; vireo).

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist SMWD in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources.

I. Mitigation Measure or Alternative and Related Impact Shortcoming

COMMENT #1: Impacts to Least Bell's Vireo

Section 3.4, Page 28

Issue: Mitigation Measure BIO-1 (MM BIO-1) does not adequately mitigate for potential impacts to least Bell's vireo. Vireo is CESA-listed; therefore, if impacts to vireo cannot be avoided, an Incidental Take Permit (ITP) may need to be secured from CDFW prior to Project activities.

Specific impact: MM BIO-1 indicates that, if vegetation clearing cannot occur outside of the bird nesting season (February 15 to August 31 for most birds, January 15 to June 31 for raptors), then a qualified biologist will conduct a nesting bird survey within 7 days prior to construction activities. Suitable buffers of 300'-500' will be established until the nests are no longer occupied and the juvenile birds have fledged. MM BIO-1 includes a provisional mitigation element that states:

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“...in case surveys identify California gnatcatcher or least Bell’s vireo in habitat within 500 feet of the limits of construction, such occurrence shall be documented and both USFWS and CDFW shall be notified. Although it is considered somewhat unlikely that either of these species may nest in the vicinity (due to low habitat quality, proximity to urban land use, and relative isolation from larger natural areas), if an active coastal California gnatcatcher or least Bell’s vireo nest is encountered, a minimum buffer of 500 feet shall be delineated, flagged, and avoided by construction activity until the nesting cycle is complete (i.e., the qualified biologist determines that the young have fledged or the nest has failed). A qualified biologist may recommend other measures as noted in Item B, above. However, USFWS and CDFW will be consulted prior to any reduction of avoidance buffers or implementation of other measures.”

Preconstruction surveys in the absence of protocol-level surveys may not be sufficient to make Project impacts to vireo less than significant or to avoid take.

Why impact would occur: The Biological Resources Memorandum (Appendix B) indicates that the willow scrub vegetation to the west of the project site provides potentially suitable habitat for vireo and states that, “despite the relatively disturbed condition of the habitat and the widespread presence of exotic plant species, the potential for least Bell’s vireo to occur and possibly breed in this area next to the Project Site cannot be ruled out without conducting a focused protocol survey” (Appendix B, Page 12). Indirect impacts to vireo may occur from vibration, noise, dust, and increased human activity related to construction.

Evidence impact would be significant: Regarding CESA-listed species, take of any endangered, threatened, or candidate species that results from the Project is prohibited, except as authorized by state law (Fish and Game Code, §§ 2080, 2085). Consequently, if the Project, Project construction, or any Project-related activity during the life of the Project will result in take of a species designated as endangered or threatened, or a candidate for listing under CESA, CDFW recommends that the Project proponent seek appropriate take authorization under CESA prior to implementing the Project. Appropriate authorization from CDFW may include an incidental take permit (ITP) or a consistency determination in certain circumstances, among other options (Fish and Game Code §§ 2080.1, 2081, subds. (b), (c)). Early consultation is encouraged, as significant modification to a Project and mitigation measures may be required in order to obtain a CESA Permit. Revisions to the Fish and Game Code, effective January 1998, may require that CDFW issue a separate CEQA document for the issuance of an ITP unless the Project CEQA document addresses all Project impacts to CESA-listed species and specifies a mitigation, monitoring and reporting program that will meet the requirements of an ITP. For these reasons, biological mitigation, monitoring, and reporting proposals should be of sufficient detail and resolution to satisfy the requirements for a CESA ITP.

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Mitigation Measure or Alternative and Related Impact Shortcoming)

Mitigation Measure #1:

To reduce impacts to less than significant: CDFW recommends complete avoidance of suitable vireo habitat and a 100-foot buffer during the nesting season to ensure avoidance of take of vireo under CESA. Any adverse impacts to vireo are considered significant without sufficient mitigation. If construction activities will occur during nesting season, CDFW

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recommends vireo-specific protocol level surveys (United States Fish and Wildlife Service [USFWS] 2001), focusing on potential nesting sites within the Project area and a 500' buffer, prior to ground disturbance, construction activities, or vegetation clearing during vireo nesting season. If vireo territories or nests are identified, further consultation with CDFW is necessary and an Incidental Take Permit or Consistency Determination may be needed. CDFW also encourages SMWD to consult as soon as possible with the USFWS, as informal or formal consultation may be appropriate to address impacts to vireo.

CDFW recommends adding an additional vireo-specific mitigation measure that states:

“Vegetation clearing and construction activities shall occur outside of least Bell’s vireo (Vireo bellii pusillus; vireo) nesting season (March 15th to September 15th) as feasible to avoid impacts to vireo. Prior to initiation of construction activities within 500’ of suitable nesting or foraging habitat, a CDFW-approved biologist with experience surveying for and observing least Bell’s vireo shall conduct preconstruction surveys in accordance with established protocols to establish use of nesting habitat. Surveys shall be conducted within and adjacent to suitable habitat, where access allows, during the nesting season. If an active nest is found, no activity shall occur within a 300-foot buffer of the nest until a qualified biologist determines and CDFW confirms that all chicks have fledged and are no longer reliant on the nest site. If impacts to vireo cannot be avoided and take will occur, an Incidental Take Permit or Consistency Determination under CESA shall be required.”

COMMENT #2: Nesting Bird Impacts

Section 3.4, Page 28

Issue: MM BIO-1 does not adequately avoid or minimize impacts to nesting migratory birds.

Specific Impact: MM BIO-1 indicates that nesting bird surveys will be conducted by a qualified biologist if vegetation clearing for construction cannot occur outside of breeding bird season within seven days of construction. Pre-construction surveys should occur as close to the time of potential disruption as possible to minimize the Project’s impacts to nesting birds. To adequately identify nesting bird presence in the Project area, surveys should be conducted no more than 3 days prior to ground disturbance, vegetation removal, or construction activities.

Why impact would occur: Direct impacts to nesting birds may occur from vegetation removal; indirect impacts may occur from vibration, noise, dust, and increased human activity related to construction.

Evidence impact would be significant: California Fish and Game Code Sections 3503, 3503.5, and 3513 require the avoidance of the incidental loss of eggs or nestlings, or activities that lead to nest abandonment (Fish & G. Code, § 3503, 3503.5, and 3513 *et seq.*).

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Mitigation Measure or Alternative and Related Impact Shortcoming)

As discussed above, MM BIO-1 indicates that nesting bird surveys will be conducted within 7 days of construction related activities, should work be conducted during bird nesting season (February 15 to August 31 for most birds, January 15 to June 31 for raptors). Should active nests be identified during surveys, a buffer of 300’-500’ shall be delineated, flagged, and avoided until the nesting cycle is complete. To adequately identify nesting bird presence in the

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Project area, surveys should be conducted no more than three days prior to ground disturbance, vegetation removal, or construction activities. We recommend that MM BIO-1 A be amended to read as follows (changes in bold):

Mitigation Measure #2:

*“Prior to work during the bird nesting season (February 15 to August 31 for most birds, January 15 to June 31 for raptors), a qualified biologist shall conduct a pre-construction survey of all suitable habitat for the presence of nesting birds no more than **three (3)** days prior to construction activities. The results of the pre-construction survey shall be valid for **three (3)** days; if vegetation removal activities do not commence within 7 days following the survey or if activities cease for more than **three (3)** consecutive days, a new pre-construction nesting bird survey shall be conducted before construction resumes.”*

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database which may be used to make subsequent or supplemental environmental determinations. (Pub. Resources Code, § 21003, subd. (e).) Accordingly, please report any special status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDDB). The CNDDDB field survey form can be found at the following link:
http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/CNDDDB_FieldSurveyForm.pdf. The completed form can be mailed electronically to CNDDDB at the following email address: CNDDDB@wildlife.ca.gov. The types of information reported to CNDDDB can be found at the following link:
http://www.dfg.ca.gov/biogeodata/cnddb/plants_and_animals.asp.

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 Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required in order 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.)

CONCLUSION

CDFW appreciates the opportunity to comment on the MND to assist SMWD in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Jessie Lane, Environmental Scientist, at Jessie.Lane@wildlife.ca.gov.

Sincerely,

DocuSigned by:



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David Mayer
Environmental Program Manager I
South Coast Region

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Attachments

A. CDFW Comments and Recommendations

ec: CDFW

Susan Howell, San Diego – Susan.Howell@wildlife.ca.gov
Jennifer Ludovissy, San Diego – Jennifer.Ludovissy@wildlife.ca.gov
State Clearinghouse, Office of Planning and Research – State.Clearinghouse@opr.ca.gov
Jonathan Snyder, USFWS – Jonathan_d_Snyder@fws.gov

REFERENCES

United States Fish and Wildlife Service. 2001. Least Bell's Vireo Survey Guidelines. Available: https://www.fws.gov/pacific/ecoservices/endangered/recovery/documents/LBVireo.2001_protocol.pdf

United States Fish and Wildlife Service. 2006. Least Bell's Vireo (*Vireo bellii pusillus*) 5-Year Review Summary and Evaluation Report. Carlsbad, CA: U.S. Fish and Wildlife Service Office, Carlsbad Fish and Wildlife Office.

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Attachment A:

CDFW Draft Mitigation, Monitoring, and Reporting Plan and Associated Recommendations

	Mitigation Measures	Timing	Responsible Party
Mitigation Measure #1	Vegetation clearing and construction activities shall occur outside of least Bell's vireo (<i>Vireo bellii pusillus</i> ; vireo) nesting season (March 15 th to September 15 th) as feasible to avoid impacts to vireo. Prior to initiation of construction activities within 500' of suitable nesting or foraging habitat, a CDFW-approved biologist with experience surveying for and observing least Bell's vireo shall conduct preconstruction surveys in accordance with established protocols to establish use of nesting habitat. Surveys shall be conducted within and adjacent to suitable habitat, where access allows, during the nesting season. If a nest is found, no activity shall occur within a 300-foot buffer of the nest until a qualified biologist determines and CDFW confirms that all chicks have fledged and are no longer reliant on the nest site. If impacts to vireo cannot be avoided and take will occur, an Incidental Take Permit or Consistency Determination under CESA shall be required.	Prior to construction	SMWD
Mitigation Measure #2	Prior to work during the bird nesting season (February 15 to August 31 for most birds, January 15 to June 31 for raptors), a qualified biologist shall conduct a pre-construction survey of all suitable habitat for the presence of nesting birds no more than three (3) days prior to construction activities. The results of the pre-construction survey shall be valid for three (3) days; if vegetation removal activities do not commence within 7 days following the survey or if activities cease for more than three (3) consecutive days, a new pre-construction nesting bird survey shall be conducted before construction resumes.	Prior to construction	SMWD