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Governor's Office of Planning & Research

August 4, 2023

August 4 2023

STATE CLEARINGHOUSE

Ms. Kimberly Niemeyer
 State Water Resources Control Board
 P.O. Box 100
 Sacramento, CA 95812-0100

SUBJECT: ADOPTION OF A REGULATION FOR THE HEXAVALENT CHROMIUM
 MAXIMUM CONTAMINANT LEVEL (PROJECT)
 DRAFT ENVIRONMENTAL IMPACT REPORT (DEIR)
 SCH# 2021110099

Dear Ms. Niemeyer:

The California Department of Fish and Wildlife (CDFW) received a Notice of Availability of a DEIR from the State Water Resource Control Board (SWRCB) 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. As proposed, for example, the Project may be subject to CDFW's lake and streambed alteration regulatory authority. (Fish & G. 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 & 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: SWRCB

Objective: The objective of the Project is to propose adoption of a primary drinking water standard for hexavalent chromium under the California Safe Drinking Water Act. The proposed regulation includes setting maximum contaminant levels for hexavalent chromium. Primary Project activities include monitoring drinking water for levels of hexavalent chromium and public water systems will need to comply with the set standards for hexavalent chromium levels using the best available technologies such as reduction/coagulation/filtration, ion exchange, and reverse osmosis. However, water systems are not limited to using the best available technologies. Other methods of reducing the levels of hexavalent chromium may include, and is not limited to, blending, drilling new wells, utilizing surface water, purchasing water, consolidating with other water systems, or treating water with stannous chloride.

Location: Statewide

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the SWRCB in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources. Editorial comments or other suggestions may also be included to improve the document. Based on the potential for the Project to have a significant impact on biological resources, CDFW concludes that an Environmental Impact Report (EIR) is appropriate for the Project.

COMMENT 1:

Section 4.4.4 Impact 4-4 – Light or Glare, Page 4-4

Issue: Artificial nighttime lighting negatively impacts biological resources.

Specific impact: Mitigation Measure 4.4.4.1 is inadequate in scope to support future compliance projects in avoiding and minimizing impacts associated with artificial nighttime lighting.

Why impact would occur: Future compliance projects such as the installation of water treatment facilities may use artificial nighttime lighting for project construction activities and/or long-term operations.

Evidence impact would be significant: Artificial nighttime lighting often results in light pollution, which has the potential to significantly and adversely affect fish and wildlife. Artificial lighting alters ecological processes including, but not limited to, the temporal niches of species; the repair and recovery of physiological function; the measurement of time through interference with the detection of circadian and lunar and seasonal cycles; the detection of resources and natural enemies; and navigation (Gatson, et al. 2013). Many species use photoperiod cues for communication (e.g., bird song) (Miller, et al. 2006), determining when to begin foraging (Stone, et al. 2009), behavioral thermoregulation (Beiswenger, et al. 1977), and migration (Longcore, et al. 2004). Phototaxis, a phenomenon that results in attraction and movement towards light, can disorient, entrap, and temporarily blind wildlife species that experience it (Longcore, et al. 2004).

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Recommended Potentially Feasible Mitigation Measure(s) to reduce impacts to less than significant:

CDFW recommends that the SWRCB include the following mitigation measures to minimize impacts from lighting to Biological Resources:

During future compliance project construction and operations over the lifetime of the future compliance project, the future compliance project proponent shall eliminate all nonessential lighting throughout the future compliance project area and avoid or limit the use of artificial light at night during the hours of dawn and dusk when many wildlife species are most active. The future compliance project proponent shall ensure that all lighting for the future compliance project is fully shielded, cast downward, reduced in intensity to the greatest extent, and does not result in lighting trespass including glare into surrounding areas or upward into the night sky (see the [International Dark-Sky Association](#) standards). The future compliance project proponent shall ensure use of LED lighting with a correlated color temperature of 3,000 Kelvins or less, proper disposal of hazardous waste, and recycling of lighting that contains toxic compounds with a qualified recycler.

COMMENT 2:

Section 7.4.1.1, Mitigation Measure 7-1(a), Page 7-10

Issue: Mitigation Measure 7-1 (a) requires surveys for special status species but does not include requirements on appropriate timing of surveys.

Specific impact: While specific impacts will vary based on future compliance project type and location, mistimed surveys may result in the unmitigated take of special status species.

Why impact would occur: If surveys are completed inappropriately, special status species located onsite might not be detected resulting in future compliance projects impacting special status species.

Evidence impact would be significant: Inappropriate survey methods may result in special status species that are present on a project site going undetected. As a result, appropriate avoidance and minimization measures to protect special status species may not be implemented, which could result in the unmitigated take of special status species.

Recommended Potentially Feasible Mitigation Measure(s) to reduce impacts to less than significant:

CDFW recommends that the SWRCB revise Mitigation Measure 7-1 (a) with the following additions in **bold**.

Mitigation Measure 7-1(a): Identify special status species protected by federal, state, and local laws, regulations, policies, and ordinances that may be within the area where the site-specific compliance project would be located by querying the [California Natural Diversity Database \(CNDDDB\)](#) and conducting a project site survey. If special status species or their habitats have been identified in the project area during biological inventory of the compliance project site by a qualified biologist prior to construction, comply with applicable federal and state endangered species acts and regulations, and any local requirements, such as tree preservation policies. Ensure that important fish or wildlife movement corridors or nursery sites are not impeded by project activities. **Surveys shall be conducted at the appropriate time of year and time of day when the sensitive species are**

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active or otherwise identifiable. Some aspects of the future compliance projects may warrant periodic updated surveys for certain sensitive taxa, particularly if the future compliance project is proposed to occur over a protracted time frame, in phases, or if surveys are completed during periods of drought.

COMMENT 3:

Section 7.4.1.1, Mitigation Measure 7-1(e), Page 7-10

Issue: It is possible for birds to nest on project sites at any time during the year; therefore, CDFW recommends that appropriate nesting bird surveys are conducted prior to project construction activities regardless of the time of year.

Specific impact: Nesting birds and their nest and eggs might be impacted by project construction activities if they are not detected during nesting bird surveys.

Why impact would occur: Future compliance projects, such as the installation of treatment facilities or construction of additional water reservoirs, may result in ground disturbance or vegetation removal that may impact nesting birds. If surveys are not completed for nesting birds, the project may result in unmitigated impacts to nesting birds, nests, or eggs.

Evidence impact would be significant: Take of nesting birds, nests, and eggs are prohibited by sections Fish and Game Code sections 3503, 3503.5 and 3513.

Recommended Potentially Feasible Mitigation Measure(s) to reduce impacts to less than significant:

CDFW recommends that the SWRCB revise Mitigation Measure 7-1 (e) with the following additions in **bold** and removals in ~~strike through~~:

Mitigation Measure 7-1 (e): ~~Limit construction to a seasonal window outside of the time of potential impact. For example, construct the project outside of nesting bird season (March 1st to September 30th)~~ **Regardless of the time of year, nesting bird surveys shall be performed by a qualified avian biologist no more than 3 days prior to vegetation removal or ground-disturbing activities. Pre-construction surveys shall focus on both direct and indirect evidence of nesting, including nest locations and nesting behavior. The qualified avian biologist shall incorporate measures to avoid potential nest predation as a result of survey and monitoring efforts. If active nests are found during the pre-construction nesting bird surveys, a qualified biologist shall implement a plan to avoid disturbing nesting birds. The plan should include measures such as establishing an appropriate no-disturbance nest buffer to be marked on the ground and monitoring. Nest buffers are species and project specific and shall be at least 300 feet for passerines and 500 feet for raptors. Nest buffers may need to be increased during vulnerable nesting stages or if parents show distress. A nest buffer shall be determined by the qualified biologist familiar with the nesting phenology of the nesting species and based on nest and buffer monitoring results. The qualified biologist shall monitor active nests and adequacy of the nest buffers daily and established buffers shall remain in place until a qualified biologist determines the young have fledged, are feeding independently, and are no longer using the nest or the compliance project has been completed. The qualified biologist shall have the authority to stop work if nesting pairs exhibit signs of disturbance.**

COMMENT 4:

Section 7.4.1.1, Mitigation Measure 7-1(g), Page 7-11

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Issue: Mitigation Measure 7-1 (g) indicates that purchasing mitigation bank credits will compensate for unavoidable habitat losses in advance of development actions. In some areas of California, including the Whitewater River Watershed, mitigation banks are unavailable or do not have appropriate credits available to offset the impacts of a future compliance project. CDFW recommends that offsite permittee-responsible mitigation is also included as an option to offset unavoidable habitat losses.

Specific impact: Future compliance projects associated with the Project, such as construction of new treatment facilities or water storage reservoirs, may result in unavoidable habitat loss that needs to be compensated through the purchase of credits at a mitigation bank or implementation of offsite permittee-responsible mitigation.

Why impact would occur: Future compliance projects may result in unavoidable habitat losses and those impacts should be offset through appropriate compensatory mitigation that may include offsite permittee-responsible mitigation.

Evidence impact would be significant: The significance of impacts would be determined on a project-by-project basis through regulatory processes like the Lake and Streambed Alteration (LSA) Program, CESA take authorization, or a Natural Community Conservation Plan.

Recommended Potentially Feasible Mitigation Measure(s) to reduce impacts to less than significant:

CDFW recommends that the SWRCB revise Mitigation Measure 7-1 (g) with the following additions in **bold** and removals in ~~strike through~~:

Implement mitigation banking consisting of the restoration or creation of habitat undertaken expressly for the purpose of compensating for unavoidable habitat losses (species and wetlands) in advance of development actions. The U.S. Army Corps of Engineers (USACE) has published guidance for determining compensatory mitigation ratios as required for processing of the USACE permits under Section 404 of the Clean Water Act, Section 10 of the Rivers, and Harbors Act; and Section 103 of the Marine Protection, Research, and Sanctuaries Act. Mitigation ratios and credits requirements are also ~~established~~ **included in permits issued** by the CDFW and the U.S. Fish and Wildlife Service (USFWS), to compensate for loss of habitat of federal and state listed species. **Alternatively, to compensate for unavoidable habitat losses, implement offsite permittee-responsible mitigation, including the protection of land under a conservation easement or other appropriate legal instrument and provision of endowments to cover the costs of long-term management and monitoring of biological resources on that land, as well as conservation easement monitoring.**

COMMENT 5:

Section 7.4.3 Impact 7-3 – Protected Wetlands, Page 7-12

Issue: Section 7.4.3 does not describe requirements to notify CDFW per Fish and Game Code section 1602.

Specific impact: Future compliance projects, such as construction of treatment facilities or water reservoirs, have the potential to impact fish and wildlife resources subject to Fish and Game Code section 1600 et seq.

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Why impact would occur: Future compliance projects, such as construction of treatment facilities or water reservoirs, may be required based on the Project as discussed in this DEIR.

Evidence impact would be significant: Fish and Game Code section 1602 identifies the impacts to any river, lake, or stream that would require an entity to notify CDFW.

Recommended Potentially Feasible Mitigation Measure(s) to reduce impacts to less than significant:

CDFW recommends that the SWRCB revise Section 7.4.3 with the following additions in **bold**:

For reasons similar to those stated in Impact 7-1, compliance with the Proposed Regulations by public water systems may have the potential to have a substantial adverse effect on state or federally protected wetlands (including, but not limited to marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means. Because future compliance projects are unknown at this time, the State Water Board cannot predict what exactly those projects' impacts will be or the precise mitigation measures that will be required to reduce potential impacts to less than significant. Project-level impacts and mitigation measures will be addressed in future site-specific environmental analyses conducted by CEQA lead agencies approving those projects. Mitigation Measures 7-1 and 13-3 may reduce the significance of Impact 7-3 to less than significant. The ability to implement Mitigation Measures 7-1, Mitigation Measures 13-3, or other equally effective and feasible measures, is within the purview of the CEQA lead agencies and responsible agencies approving or permitting future compliance projects, not the State Water Board currently. Consequently, there is inherent uncertainty in the degree of mitigation that may ultimately be implemented to reduce potentially significant impacts from future compliance projects. This EIR therefore takes a conservative approach in its post-mitigation significance conclusion and discloses, for CEQA compliance purposes, that Impact 7-3 is potentially significant and unavoidable. **Fish and Game Code section 1602 requires an entity to notify CDFW prior to commencing any activity that may do one or more of the following: Substantially divert or obstruct the natural flow of any river, stream or lake; Substantially change or use any material from the bed, channel or bank of any river, stream, or lake; or Deposit debris, waste or other materials that could pass into any river, stream or lake. Please note that "any river, stream or lake" includes those that are episodic (i.e., those that are dry for periods of time) as well as those that are perennial (i.e., those that flow year-round). This includes ephemeral streams, desert washes, and watercourses with a subsurface flow. It may also apply to work undertaken within the flood plain of a body of water. Project proponents that submit a notification to CDFW per Fish and Game Code section 1602, prior to construction and issuance of any grading permit shall either obtain written correspondence from CDFW stating that notification under section 1602 of the Fish and Game Code is not required for their specific project or if the project requires notification under section 1602 of the Fish and Game Code and CDFW determines the project may substantially adversely affect fish and wildlife resources, the project proponent shall obtain a CDFW executed LSA Agreement, authorizing impacts to Fish and Game Code section 1602 resources associated with the Project.**

COMMENT 6:

Section 7.4.6 Impact 7-6 – Habitat Conservation Plans, Page 7-13

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Issue: Future compliance projects and their consistency with Habitat Conservation Plans.

Specific impact: Section 7.4.6 does not adequately describe processes to ensure that future compliance projects will be consistent with requirements of Habitat Conservation Plans, Natural Community Conservation Plans, and Regional Conservation Investment Strategies.

Why impact would occur: Future compliance projects need to discuss any inconsistencies with applicable approved Habitat Conservation Plans, Natural Community Conservation Plans, and Regional Conservation Investment Strategies. Future compliance projects that are inconsistent with approved Habitat Conservation Plans, Natural Community Conservation Plans, and Regional Conservation Investment Strategies may result in unauthorized impacts to special status species, vegetation communities, and ecological processes among other wildlife resources that are protected under Habitat Conservation Plans, Natural Community Conservation Plans, and Regional Conservation Investment Strategies. This could result in an impact to a Plan or Strategy's ability to implement its biological goals and objectives as required by the permits.

Evidence impact would be significant: Future compliance project may not be in consistent with a Habitat Conservation Plans, Natural Community Conservation Plans, and Regional Conservation Investment Strategies.

Recommended Potentially Feasible Mitigation Measure(s) to reduce impacts to less than significant:

CDFW recommends that the SWRCB revise Section 7.4.6 Impact 7-6 – Habitat Conservation Plans with the following additions in **bold**:

For reasons like those in Impact 7-1, compliance with the Proposed Regulations by public water systems may have the potential to conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, **Regional Conservation Investment Strategies**, or other approved local, regional, or state Habitat Conservation Plan. Because future compliance projects are unknown at this time, the State Water Board cannot predict what exactly those projects' impacts will be or the precise mitigation measures that will be required to reduce potential impacts to less than significant. Project-level impacts and mitigation measures will be addressed in future site-specific environmental analyses conducted by CEQA lead agencies approving those projects. Mitigation Measures 7-1 may reduce the significance of Impact 7-6 to less than significant. The ability to implement Mitigation Measures 7-1, or equally effective and feasible measures, is within the purview of the CEQA lead agencies and responsible agencies approving or permitting future compliance projects, not the State Water Board currently. Consequently, there is inherent uncertainty in the degree of mitigation that may ultimately be implemented to reduce potentially significant impacts from future compliance projects. This EIR therefore takes a conservative approach in its post-mitigation significance conclusion and discloses, for CEQA compliance purposes, that Impact 7-6 is potentially significant and unavoidable. **Section 15125(d) of the CEQA Guidelines requires that the CEQA document discuss any inconsistencies between a proposed project and applicable general plans and regional plans, including Habitat Conservation Plans, Natural Community Conservation Plans, and Regional Conservation Investment Strategies. An assessment of the impacts to the Habitat Conservation Plans, Natural Community Conservation Plans, and Regional Conservation Investment Strategies as a result of future compliance projects is necessary to address CEQA requirements and will be**

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included in future site-specific environmental analysis conducted by CEQA lead agencies approving those projects.

COMMENT 7:

Section 7.4.7, Page 7-14

Issue: Discussion of cumulative impacts is inadequate.

Specific impact: Future compliance projects such as installation of treatment facilities or construction of water reservoirs have the potential to result in cumulative impacts on biological resources such as ephemeral stream habitats, wildlife corridors, sensitive species and natural communities.

Why impact would occur: The future compliance project may necessitate the installation of treatment facilities and/or construction of water reservoirs that may have significant and cumulative impacts on biological resources within a specific area such as Coachella Valley.

Evidence impact would be significant: Construction of treatment facilities, water reservoirs, and other reasonably foreseeable compliance projects may result in cumulative impacts to biological resources.

Recommended Potentially Feasible Mitigation Measure(s) to reduce impacts to less than significant:

CDFW recommends that the SWRCB revise Section 4.4.5 to include an analysis and discussion of the cumulative direct and indirect impacts of anticipated future compliance projects on riparian areas, wetlands, vernal pools, alluvial fan habitats, wildlife corridors or wildlife movement areas, habitat connectivity, aquatic habitats, sensitive species and other sensitive habitats, open lands, open space, and adjacent natural habitats. Section 4.4.5 currently does not include a discussion of any anticipated cumulative impacts despite the DEIR being able to anticipate the number of public water systems that may need to be modified. Specifically in Coachella Valley, future compliance projects may include the construction of multiple water reservoirs and/or treatment facilities to meet water quality standards addressed in the DEIR. The construction of these water reservoirs and treatment facilities may require the importation of additional water and potentially result in temporary and permanent impacts to biological resources associated with the construction of these facilities. Future compliance projects may also involve the construction of new wells, which have the potential to cause groundwater drawdown and can negatively impact special status species. For example, new wells may occur in or adjacent to USFWS critical habitat for Peninsular bighorn sheep (*Ovis canadensis*; Coachella Valley Multi-Species Habitat Conservation Plan [CVMSHCP] Covered Species, Fully Protected Species) and groundwater drawdown may result in fewer sources of forage plants that Peninsular bighorn sheep rely on especially during the summer months. Also, the tributaries to the Salton Sea in Coachella Valley contain some of the few remaining populations of desert pupfish (*Cyprinodon macularius*; CVMSHCP Covered Species; State and Federally Endangered). Groundwater declines associated with the construction of new wells have the potential to negatively impact desert pupfish populations and other groundwater-dependent special status species. The cumulative direct and indirect impacts of these future compliance projects in Coachella Valley, among other areas of the state addressed in this DEIR, need to be analyzed per CEQA Guidelines section 15130 and should be discussed in Section 4.4.5 of the DEIR.

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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 future compliance project surveys to the CNDDDB. The CNDDDB field survey form can be filled out and submitted online at the following link: <https://wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The types of information reported to CNDDDB can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

ENVIRONMENTAL DOCUMENT FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of environmental document 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 environmental document filing 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 DEIR to assist the SWRCB in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Karen Carpio at CEQA@wildlife.ca.gov.

Sincerely,

DocuSigned by:

Jeff Drongesen, Chief
Habitat Conservation Planning Branch

cc: Office of Planning and Research, State Clearinghouse, Sacramento

ec: Kim Freeburn
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REFERENCES

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