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GAVIN NEWSOM, Governor
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June 1, 2022

Morgan Dresser
City of San Diego
1222 1st Avenue
San Diego, CA 92101
MDresser@sandiego.gov

Subject: El Capitan Dam Spillway (Project), Mitigated Negative Declaration (MND), SCH #2022050039

Dear Ms. Dresser:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt an MND from the City of San Diego (City) 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 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.*) that are not covered under the City's Multiple Species Conservation Program (MSCP), 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: City of San Diego

Objective: The objective of the Project is to remove vegetation and sediment from within the spillway of El Capitan Dam. The purpose of the project is to comply with a mandate from the Division of Safety of Dams (DSOD), part of the California Department of Water Resources. The DSOD has mandated that the City remove accumulated vegetation and debris from the spillway to allow for unimpeded spillway flow and completion of requisite annual assessments of the spillway by the DSOD. The project impact area is 9.8 acres and includes the removal of approximately 58,900 cubic yards of debris and approximately six acres of vegetation. Mitigation is proposed entirely off-site at City-owned and managed mitigation sites.

Location: El Capitan Dam occurs along the San Diego River at the western end of the El Capitan Reservoir within El Monte Valley and northwest of the community of Alpine in central San Diego County. The Project is located partially on City-owned land and partially on land owned by the U.S. Forest Service. The portion of the San Diego River channel just downstream of the dam and spillway supports mature riparian vegetation.

Biological Setting: The spillway consists of four distinct sections: the upper spillway, the spillway chute, the lower spillway, and the discharge channel. Differing amounts and characteristics of sediment and vegetation have accumulated in each section. The accumulated sediment includes soils, silt, rocks, landslide materials, and boulders. Vegetation, including mature trees, is established throughout the spillway. The proposed project will result in loss of 0.2 acre of coastal and valley freshwater marsh, 2.08 acres of southern cottonwood-willow riparian forest, 0.62 acre of disturbed southern cottonwood-willow riparian forest, 0.51 acre of southern riparian woodland, 0.2 acre of southern coast live oak riparian forest, 0.91 acre of Diegan coastal sage scrub, 0.45 acre of disturbed Diegan coastal sage scrub, 0.13 acres of eucalyptus woodland, 1.05 acres of disturbed land, and 3.65 acres of urban/developed land.

Special-status wildlife species observed during the biological surveys include: western spadefoot (*Spea hammondi*; California Species of Special Concern (SSC)), Belding's orange-throated whiptail (*Aspidoscelis hyperythra beldingi*; SSC and Multiple Species Conservation Plan (MSCP) covered), San Diegan tiger whiptail (*Aspidoscelis tigris stejnegeri*; SSC), red diamond rattlesnake (*Crotalis ruber*; SSC), Cooper's hawk (*Accipiter cooperii*; CDFW watch list and MSCP-covered), least Bell's vireo (*Vireo bellii pusillus*; federally and state-listed endangered and MSCP-covered), yellow warbler (*Setophaga petechia*; SSC), yellow-breasted chat (*Icteria virens auricollis*; SSC), southern California rufous-crowned sparrow (*Aimophila ruficeps canescens*; CDFW watch list and MSCP-covered), and southern mule deer (*Odocoileus hemionus fuliginata*; MSCP-covered).

Special-status wildlife species with moderate to high potential to occur in the Project site include: Coronado skink (*Plestiodon skiltonianus interparietalis*; SSC), San Diegan legless lizard (*Anniella stebbinsi*; SSC), San Diego ring-necked snake (*Diadophis punctatus similis*; U.S. Forest Service sensitive animal), white-tailed kite (*Elanus leucurus*; California fully protected species), western red bat (*Lasiurus blossevillii*; SSC), western yellow bat (*Lasiurus xanthinus*; SSC), western mastiff bat (*Eumops perotis californicus*; SSC), pocketed free-tailed bat (*Nyctinomops femorosaccus*; SSC), big free-tailed bat (*Nyctinomops macrotis*; SSC), Dulzura pocket mouse (*Chaetodipus californicus femoralis*; SSC), and mountain lion (*Puma concolor*; MSPC-covered).

Sensitive plants observed within the survey area include Dean's milkvetch (*Astragalus deanei*; CRPR 1B.1), delicate clarkia (*Clarkia delicata*; CRPR 1B.2), Engelmann oak (*Quercus*

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engelmannii; CRPR 4.2), and rush-like bristleweed (*Xanthisma junceum*; CRPR 4.3). The MND indicates that a single Engelmann oak occurs in the Project impact area, but that it would be avoided during construction. The MND indicates that no direct impacts are expected to occur to the remaining Engelmann oaks or other sensitive plant species observed.

Timeframe: The Project is expected to span 18 months.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the City 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

Issue: Mitigation Measure BIO-4 of the MND (MM BIO-4) does not adequately mitigate for potential impacts to least Bell's vireo (vireo). MM BIO-4 indicates that no clearing, grubbing, or grading of occupied least Bell's vireo habitat shall be permitted between March 15 and September 15, but no buffer is described.

Why impact would occur: The Biological Survey Report (RECON 2021) indicates that vireo have been observed on the Project site, and that the site contains moderate to high quality habitat for least Bell's vireo. In addition to direct removal of habitat, construction noise, vibration, dust, or human disturbance could result in disturbance of nesting vireo on the Project site.

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

Mitigation Measure #1:

To minimize significant impacts: CDFW recommends complete avoidance of occupied vireo habitat and a 100-foot buffer during nesting season to avoid potential take of vireo. Any adverse impacts to vireo are considered significant without sufficient mitigation.

We recommend that MM BIO-4 be amended with the following language (changes in ~~strikethrough~~ and **bold**):

*"I. Between March 15 and September 15, no clearing, grubbing, or grading **within 100 feet** of occupied least Bell's vireo habitat shall be permitted. Areas restricted from such activities shall be staked or fenced under the supervision of a Qualified Biologist; and*

*II. Between March 15 and September 15, no construction activities shall occur within any portion of the site where construction activities would result in noise levels exceeding 60 dB(A) hourly average **within 100 feet at the edge** of occupied least Bell's vireo or habitat. An analysis showing that noise generated by construction activities would not exceed 60 dB(A) hourly average **within 100 feet at the edge** of occupied habitat must be completed by a qualified acoustician (possessing current noise engineer license or registration with monitoring noise level experience with listed animal species) and approved by the City Manager at least two weeks prior to the commencement of construction activities. Prior to the commencement of any construction activities during the breeding season, areas*

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restricted from such activities shall be staked or fenced under the supervision of a qualified biologist; or

*III. At least two weeks prior to the commencement of construction activities, under the direction of a qualified acoustician, noise attenuation measures (e.g., berms, walls) shall be implemented to ensure that noise levels resulting from construction activities will not exceed 60 dB(A) hourly average **within 100 feet** ~~at the edge of habitat~~ occupied by the least Bell's vireo. Concurrent with the commencement of construction activities and the construction of necessary noise attenuation facilities, noise monitoring* shall be conducted **within 100 feet** ~~at the edge~~ of the occupied habitat area to ensure that noise levels do not exceed 60 dB(A) hourly average. If the noise attenuation techniques implemented are determined to be inadequate by the qualified acoustician or biologist, then the associated construction activities shall cease until such time that adequate noise attenuation is achieved or until the end of the breeding season (September 16).*

Construction noise monitoring shall continue to be monitored at least twice weekly on varying days, or more frequently depending on the construction activity, to verify that noise levels **within 100 feet ~~at the edge~~ of occupied habitat are maintained below 60 dB(A) hourly average or to the ambient noise level if it already exceeds 60 dB (A) hourly average. If not, other measures shall be implemented in consultation with the biologist and the City Manager, as necessary, to reduce noise levels to below 60 dB(A) hourly average or to the ambient noise level if it already exceeds 60 dB(A) hourly average. Such measures may include, but are not limited to, limitations on the placement of construction equipment and the simultaneous use of equipment."*

COMMENT #2: Nesting Bird Impacts

Issue: Mitigation Measure BIO-1 of the MND (MM BIO-1) indicates that pre-construction nesting bird surveys will be conducted by a qualified biologist within 10 days prior to the start of construction activities, including vegetation removal; however, CDFW recommends that surveys be conducted no more than three days prior to vegetation removal, and buffer distances are not discussed.

Why impact would occur: Direct impacts to nesting birds may occur from vegetation removal; indirect impacts may occur from increased human activity or vibration and noise from equipment.

Evidence impact would be significant: In addition to the Federal Migratory Bird Treaty Act of 1918 (50 C.F.R. Section 10.13), the 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)

Mitigation Measure #2:

To minimize significant impacts: To adequately identify nesting bird presence in the Project area, surveys should be conducted by a qualified biologist no more than three days prior to vegetation removal. If vegetation removal must occur during avian breeding season, avoidance buffers of 100-300 feet should be established by the Project biologist. Reductions in the nest buffer distance may be appropriate depending on the avian species involved, ambient levels of human activity, screening vegetation, or possibly other factors. The nests should be monitored by the

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Project biologist until the young have fledged or the nest is no longer active. Also, please note that the Cooper's hawk is a covered species under the MSCP, and the Conditions of Coverage for this species requires a 300-foot buffer be provided between construction activities and an active nest.

We recommend that the MM BIO-1 be amended with the following language (changes in ~~strikethrough~~ and **bold**):

*“Avian Protection Requirements - To avoid any direct impacts to Cooper’s Hawk, Yellow Warbler, Yellow-breasted Chat, Southern California Rufous Crowned Sparrow, and White-tailed Kite and any species identified as a listed, candidate, sensitive, or special status species in the MSCP, removal of habitat that supports active nests in the proposed area of disturbance should occur outside of the breeding season for these species (February 1 to September 15). If removal of habitat in the proposed area of disturbance must occur during the breeding season, the Qualified Biologist shall conduct a pre-construction survey to determine the presence or absence of nesting birds on the proposed area of disturbance. **The survey shall be completed no more than three days prior to Project activities to ensure that birds are not engaged in active nesting within the Project site and a 100-foot buffer.** ~~The pre-construction survey shall be conducted within 10 calendar days prior to the start of construction activities (including removal of vegetation).~~ The applicant shall submit the results of the pre-construction survey to City DSD for review and approval prior to initiating any construction activities. If nesting Cooper’s Hawk, Yellow Warbler, Yellow-breasted Chat, Southern California Rufous Crowned Sparrow, and White-tailed Kite, sensitive or MSCP-covered birds are detected, a letter report in conformance with the City’s Biology Guidelines and applicable State and Federal Law (i.e. appropriate follow up surveys, monitoring schedules, construction and noise barriers/buffers, etc.) shall be prepared and include proposed measures to be implemented to ensure that take of birds or eggs or disturbance of breeding activities is avoided. The report shall be submitted to the City for review and approval and implemented to the satisfaction of the City. The City’s MMC Section and Biologist shall verify and approve that all measures identified in the report are in place prior to and/or during construction. **If any birds are nesting on the site, then Project activities will be postponed until nesting is completed, or the Qualified Biologist shall designate appropriate avoidance buffers around nests to protect nesting birds. The width of the buffer will be determined by the Qualified Biologist and should be approved by the City. Typically, this is a minimum of 100-300 feet from the nest site in all directions, species dependent, and up to 500 feet for raptors. No Project related disturbance shall be allowed within these buffers until the Qualified Biologist has confirmed that the juveniles have fledged and there has been no evidence of a second attempt at nesting.**”*

COMMENT #3: Impacts to Western Spadefoot

Issue: Mitigation Measure BIO-5 of the MND (MM BIO-5) proposes that if construction or maintenance must occur during a time when the site may support the breeding of western spadefoot, a Qualified Biologist shall conduct a survey of all potential western spadefoot breeding areas within three days prior to construction impacts. If any areas are determined to be occupied by western spadefoot, these areas shall be staked or fenced by, or under the supervision of, a Qualified Biologist. However, no buffer is described.

Why impact would occur: Construction in areas occupied by western spadefoot could result in direct impacts through incidental mortality of adults and/or tadpoles due to factors such as vehicle strike and crushing or altered hydrology.

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Evidence impact would be significant: Per the Biological Survey Report, western spadefoot has been found during surveys, and has potential to use the Project area for foraging and breeding.

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

Mitigation Measure #3:

To minimize significant impacts: Avoidance whenever possible is encouraged via delineation and observance of a 50-foot no-disturbance buffer from any western spadefoot. If western spadefoot are observed on the Project site, CDFW recommends that Project activities in their immediate vicinity cease and individuals be allowed to leave the Project site on their own accord. Alternatively, a Qualified Biologist with appropriate take authorization can move them out of harm's way and to a suitable location.

We recommend that MM BIO-5 be amended with the following language (changes in ~~strikethrough~~ and **bold**):

*Initial construction activities and any future maintenance of the spillway within the project impact area shall occur during the dry season when no portions of the project impact area contain areas of ponded or flowing water with the potential to support the breeding of western spadefoot. If construction or maintenance must occur during a time when portions of the site may support the breeding of this species, a Qualified Biologist shall conduct a survey of all potential western spadefoot breeding areas no more than 3 days prior to construction impacts within these areas. If any areas are determined to be occupied by western spadefoot, these areas shall be staked or fenced by, or under the supervision of, a Qualified Biologist, **with a minimum 50-foot buffer**. No construction/maintenance activities shall occur within these avoidance areas ~~unless authorized by the Qualified Biologist or~~ until the western spadefoot individuals and/or larvae have left of their own accord, **or a Qualified Biologist with appropriate take authorization has moved them out of harm's way and to a suitable location.***

II. Additional Comments

COMMENT #4: Lake and Streambed Alteration Agreement

CDFW has regulatory authority over activities in streams that will divert or obstruct the natural flow, or change the bed, channel, or bank (which may include associated riparian resources) of any river, stream, or lake or use material from a river, stream, or lake. For any such activities, the project applicant (or "entity") must provide written notification to CDFW pursuant to section 1600 *et seq.* of the Fish and Game Code. Based on this notification and other information, CDFW determines whether a Lake and Streambed Alteration Agreement (LSAA) with the applicant is required prior to conducting the proposed activities. CDFW's issuance of a LSAA for a project that is subject to CEQA will require CEQA compliance actions by CDFW as a Responsible Agency. Given that the proposed Project would result in direct impacts to the El Capitan Dam Spillway, which occurs along the San Diego River, we strongly encourage the City to consider submittal of a streambed notification package to the Lake and Streambed Alteration Program. A Notification package for a LSAA may be obtained by accessing CDFW's web site at <http://www.wildlife.ca.gov/Conservation/LSA>.

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ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a data base 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: <https://wildlife.ca.gov/Data/CNDDDB/Submitting-Data#44524419-online-field-survey>. The form can be completed online, or a completed PDF 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: <https://wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

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 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 the City in identifying and mitigating Project impacts on biological resources.

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

Sincerely,

DocuSigned by:

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David Mayer
Environmental Program Manager
South Coast Region

ec: CDFW

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REFERENCES

California Environmental Quality Act (CEQA). 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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California Office of Planning and Research. 2009 or current version. CEQA: California Environmental Quality Act. Statutes and Guidelines, § 21081.6 and CEQA Guidelines, § 15097, §15126.4(2)

Federal Migratory Bird Treaty Act (MBTA) of 1918 (50 C.F.R. Section 10.13)

Fish & Game Code §3503

RECON Environmental, Inc. (RECON). 2021. Biological Survey Report for the El Capitan Dam Spillway Vegetation Removal Project, San Diego, California.