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Governor's Office of Planning & Research

October 24, 2022

Oct 24 2022

STATE CLEARINGHOUSE

John Gies
Madera Water District
16943 Road 26, Suite 103
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jgies@mwdistrict.com

**Subject: Madera Lake Pump & Pipeline Project (Project)
Draft Mitigated Negative Declaration (MND)
State Clearinghouse No. 2022090367**

Dear Mr. Gies:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt an MND from the Madera Water District (MWD) for the above-referenced 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, CDFW appreciates 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. While the comment period may have ended, CDFW would appreciate if you will still consider our comments

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.

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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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.), related authorization as provided by the Fish and Game Code will be required.

Bird Protection: CDFW has jurisdiction over actions that may result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections that protect birds, their eggs, and nests include section 3503 (regarding unlawful take, possession, or needless destruction of the nest or eggs of any bird), section 3503.5 (regarding the take, possession, or destruction of any birds-of-prey or their nests or eggs), and section 3513 (regarding unlawful take of any migratory nongame bird).

PROJECT DESCRIPTION SUMMARY

MWD is the Lead agency for the purpose of CEQA and Merced Irrigation District (MID) is a responsible agency. The Project includes the installation of a siphon in Madera Lake, siphon inlet channel, booster pump, pipelines, sump and grower turnout to obtain a flowrate of up to 8,000 gallons per minute (gpm) from Madera Lake, with up to 6,000 gpm delivered into MWD and up to 2,000 gpm delivered to the neighboring grower property from MID or other outside water supplies.

Project Proponent: MWD.

Location: The Project components will be implemented in Madera Lake and the surrounding area, on Madera County Assessor's Parcel Numbers (APN) 031-151-010, 131-151-002, 031-191-001, 031-192-001, 031-151-013 and 031-151-014, Madera County.

Timeframe: None given.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist MWD in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (i.e., biological) resources. Editorial comments or other suggestions may also be included to improve the document. Based on a review of the Project description, a review of California Natural Diversity Database (CNDDDB) records, and a review of aerial photographs of the Project and surrounding habitat, several special status species could potentially be impacted by Project activities.

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In particular, CDFW is concerned regarding potential impacts to the State threatened Swainson's hawk (*Buteo swainsoni*), the State candidate for listing Crotch's Bumble Bee (*Bombus crotchii*) and the State species of special concern burrowing owl (*Athene cunicularia*), western pond turtle (*Emys marmorata*), American badger (*Taxidea taxus*), and western spadefoot (*Spea hammondi*). Other species of birds, amphibians, reptiles, mammals, fish, invertebrates, and plants also compose the local ecosystem within the Project boundary. The draft MND indicates that the Project is designed to minimize impacts to the federally and state threatened California tiger salamander (*Ambystoma californiense*) but that take is possible; therefore, an Incidental Take Permit (ITP) from CDFW will be acquired for the Project.

CDFW recommends that the following modifications and/or edits be incorporated into the draft MND, including proposed avoidance, minimization, and compensatory measures, prior to its adoption by MWD.

Would the Project have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special-status species in local or regional plans, policies, or regulations, or by CDFW or United States Fish and Wildlife Service (USFWS)?

COMMENT 1: Swainson's Hawk (SWHA)

Issues and Impacts: The draft MND acknowledges that SWHA are known to the Project area and have the potential to nest in riparian habitat and other mature trees located within the Project site and within ½ mile of the Project. Suitable foraging habitat for these species exists within the vicinity of the Project site, including annual grassland, alfalfa or grain fields, and livestock pasture. In addition, conversion of undeveloped and agricultural land can directly influence distribution and abundance of SWHA, due to the reduction in foraging habitat. Groundwater pumping, surface water diversion, and habitat conversion may result in degradation or loss of riparian habitat and subsequent loss of nesting habitat. Without appropriate avoidance and minimization measures for SWHA, potential significant impacts include loss of nesting substrate, nest abandonment, and reduced reproductive success, including mortality of young and reduced health and vigor of eggs and/or young.

Mitigation Measure BIO-3b of the draft MND states that a qualified biologist will conduct a survey for SWHA nesting within the Project area and a ½-mile buffer within 10 days of starting work. Mitigation Measure BIO-3c states that if an active nest is observed, the biologist would establish a buffer around the nest. The draft MND does not provide a biological basis of how a no-disturbance buffer will be determined as adequate to avoid significant impacts, including but not limited to take of individuals through nest failure or other means, as a result of Project implementation. Depending on the timing of construction, activities including noise, vibration, and movement of workers or equipment could affect nests and have the potential to result in nest abandonment, significantly impacting local nesting SWHA.

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In the San Joaquin Valley, suitable nest trees may be a limiting factor for SWHA productivity. The loss of suitable nest trees, particularly in proximity to foraging habitat, has the potential to significantly impact local SWHA (CDFW 2016). CDFW considers removal of known bird-of-prey nest trees, even outside of the nesting season, a potentially significant impact under CEQA, and, in the case of SWHA, it could also result in take under CESA. Project activities near the nest that differ from baseline disturbance regimes in type, timing, and/or magnitude can affect adults caring for eggs and young in the nest, and can affect nestling behavior. Project activities including noise, vibration, odors, visual disturbance, and movement of workers or equipment could affect nesting individuals and have the potential to result in nest abandonment or reduced nesting success, significantly impacting local nesting SWHA.

Recommended Mitigation Measure 1: SWHA Nest Tree Avoidance and Mitigation

In addition to avoiding occupied nest trees, CDFW recommends that impacts to known nest trees be avoided at all times of year, or that mitigation occurs for these impacts. Regardless of nesting status, if potential or known SWHA nesting trees are removed, CDFW recommends they be replaced with an appropriate native tree species, planted at a ratio of 3:1 (replaced to removed), in an area that will be protected in perpetuity. This mitigation will offset potential impacts of the loss of nesting habitat.

Recommended Mitigation Measure 2: Focused SWHA Surveys

To reduce potential Project-related impacts to SWHA, CDFW recommends that a qualified biologist conduct surveys for nesting birds of prey, including SWHA, following the survey methodology developed by the SWHA Technical Advisory Committee (SWHA TAC 2000) during the nesting season or prior to Project initiation, within the Project area and a ½-mile buffer around the Project area. In addition, if Project activities will take place during the species nesting season (i.e., March 1 through September 15), CDFW recommends that additional preconstruction surveys for active nests be conducted by a qualified biologist no more than 10 days prior to the start of construction.

Recommended Mitigation Measure 3: SWHA Buffers

If an active SWHA nest is found during preconstruction surveys, CDFW recommends implementing a minimum ½-mile no-disturbance buffer until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest site or parental care for survival.

Recommended Mitigation Measure 4: SWHA Take Authorization

If a ½-mile no-disturbance nest buffer is not feasible, consultation with CDFW is warranted, and an ITP for SWHA may be necessary prior to project implementation

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to avoid unauthorized take, pursuant to Fish and Game Code section 2081, subdivision (b).

Comment 2: Crotch's Bumble Bee (CBB)

Issues and Impacts: On June 28, 2019, the Fish and Game Commission published findings of its decision to advance CBB to candidacy as endangered. Candidacy for CBB was subsequently withdrawn, but on September 30, 2022, candidacy for CBB was reinstated Pursuant to Fish and Game Code section 2074.6, CDFW has initiated a status review report to inform the Commission's decision on whether listing of CBB, pursuant to CESA, is warranted. During the candidacy period, consistent with CEQA Guidelines, Section 15380, the status of the CBB as an endangered candidate species under CESA (Fish & G. Code, § 2050 et seq.) qualifies it as an endangered, rare, or threatened species under CEQA. It is unlawful to import into California, export out of California or take, possess, purchase, or sell within California, CBB and any part or product thereof, or attempt any of those acts, except as authorized pursuant to CESA. Under Fish and Game Code Section 86, take means to hunt, pursue, catch, capture, or kill, or to attempt to hunt pursue, catch, capture, or kill. Consequently, take of CBB during the status review period is prohibited unless authorization pursuant to CESA is obtained.

CBB was once common throughout most of the central and southern California; however, it now appears to be absent from most of it, especially in the central portion of its historic range within California's Central Valley (Hatfield et al. 2014). Analyses by the Xerces Society et al. (2018) suggest there have been sharp declines in relative abundance by 98% and persistence by 80% over the last ten years.

Suitable CBB habitat includes areas of grasslands and upland scrub that contain requisite habitat elements, such as small mammal burrows. CBB primarily nest in late February through late October underground in abandoned small mammal burrows, but may also nest under perennial bunch grasses or thatched annual grasses, under brush piles, in old bird nests, and in dead trees or hollow logs (Williams et al. 2014, Hatfield et al. 2015). Overwintering sites utilized by CBB mated queens include soft, disturbed soil (Goulson 2010), or under leaf litter or other debris (Williams et al. 2014). Therefore, ground disturbance and vegetation removal associated with Project implementation has the potential to significantly impact local CBB populations.

Recommended Measure 5: Surveys, Avoidance, and Take Authorization

CDFW recommends that a qualified biologist conduct focused surveys for CBB and their requisite habitat features to evaluate potential impacts resulting from ground- and vegetation-disturbance associated with the Project, and potential impacts resulting from vegetation removal and discing. If surveys cannot be completed, CDFW recommends that all small mammal burrows and thatched/bunch grasses be

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avoided by a minimum of 50 feet to avoid take and potentially significant impacts. Alternatively, the applicant can assume presence of CBB within suitable habitat of the Project site and obtain from CDFW an ITP in accordance with Fish and Game Code section 2081, subdivision (b).

If CBB is identified during surveys, consultation with CDFW is warranted to determine if the Project can avoid take. If take cannot be avoided, take authorization prior to any ground-disturbing activities may be warranted. Take authorization would occur through issuance of an ITP by CDFW, pursuant to Fish and Game Code section 2081, subdivision (b).

Comment 3: Burrowing Owl (BUOW)

Issues and Impacts: BUOW has the potential to be present on and adjacent to the property. It is possible that ground-disturbing activities could impact the species. BUOW have the potential to be year-round residents, and dispersing individuals, migrants, transients or new colonizers can utilize the site year-round.

Recommend Mitigation Measure 6: BUOW Surveys

CDFW's staff report CDFW recommends assessing presence or absence of BUOW by having a qualified biologist conduct surveys following the California Burrowing Owl Consortium's (CBOC 1993) *Burrowing Owl Survey Protocol and Mitigation Guidelines* and CDFW's *Staff Report on Burrowing Owl Mitigation* (CDFG 2012). CDFW advises that surveys include a 500-foot buffer around the Project site. Please note the guidelines suggest three or more surveys be conducted during the peak breeding season (April 15 to July 15) to determine presence (CDFG 2012).

Recommend Mitigation Measure 7: BUOW Avoidance and Mitigation

In the event that BUOW are found, the CDFW's *Staff Report on Burrowing Owl Mitigation* (CDFG 2012) recommends that impacts to occupied burrows be avoided in accordance with the following table unless a qualified biologist verifies through non-invasive methods that either: 1) the birds have not begun egg laying and incubation; or 2) that juveniles from the occupied burrows are foraging independently and are capable of independent survival.

Location	Time of Year	Level of Disturbance		
		Low	Med	High
Nesting	April 1-Aug 15	200 m*	500 m	500 m
Nesting	Aug 16-Oct 15	200 m	200 m	500 m
Nesting	Oct 16-Mar 31	50 m	100 m	500 m

* meters (m)

Failure to implement the recommended buffer zones could cause adult BUOW to abandon the nest, cause eggs or young to be directly impacted (crushed), and/or

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result in reproductive failure, in violation of Fish and Game Code and the Migratory Bird Treaty Act.

Recommended Mitigation Measure 8: BUOW Eviction and Mitigation

If BUOW are found to occupy the Project site and avoidance is not possible, it is important to note that according to the *Staff Report on Burrowing Owl Mitigation* (CDFG 2012), exclusion is not a take avoidance, minimization, or mitigation method and is considered a potentially significant impact under CEQA. However, if necessary, CDFW recommends that burrow exclusion be conducted by qualified biologists and only during the non-breeding season, before breeding behavior is exhibited and after the burrow is confirmed empty through non-invasive methods, such as surveillance. CDFW recommends replacement of occupied burrows with artificial burrows at a ratio of 1 burrow collapsed to 1 artificial burrow constructed (1:1) as mitigation for the potentially significant impact of evicting BUOW. BUOW may attempt to colonize or re-colonize an area that will be impacted; thus, CDFW recommends ongoing surveillance of the Project site during Project activities, at a rate that is sufficient to detect BUOW if they return.

COMMENT 4: Western Pond Turtle (WPT)

Issues and Impacts: The Project area has potentially suitable habitat for WPT. WPT are known to nest in the spring or early summer within 100 meters of a water body, although nest sites as far away as 500 meters have also been reported (Thomson et al. 2016). Noise, vegetation removal, movement of workers, construction and ground disturbance as a result of Project activities have the potential to significantly impact WPT populations. Without appropriate avoidance and minimization measures for WPT, potentially significant impacts associated with Project activities could include nest reduction, inadvertent entrapment, reduced reproductive success, reduction in health or vigor of eggs and/or young, and direct mortality.

Recommended Mitigation Measure 9: WPT Surveys

CDFW recommends that a qualified biologist conduct focused surveys for WPT within 10 days prior to Project implementation. In addition, CDFW recommends that focused surveys for nests occur during the egg-laying season of March through August.

Recommended Mitigation Measure 10: WPT Avoidance and Minimization

CDFW recommends that any WPT nests that are discovered remain undisturbed with a no-disturbance buffer maintained around the nest until the eggs have hatched and neonates are no longer in the nest or Project areas. If WPT individuals are discovered at the site during surveys or Project activities, CDFW recommends that they be allowed to move out of the area of their own volition without disturbance.

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COMMENT 5: Other State Species of Special Concern

Issues and Impacts: American badger and western spadefoot are known to inhabit grassland and upland shrub areas with friable soils (Williams 1986, Thomson et al. 2016). The MND documents western spadefoot in the Project area, and American badger occurs in the vicinity of the Project (CDFW 2022), and habitat loss threatens these species (Williams 1986, Thomson et al. 2016). Habitat within and adjacent to the Project represents some of the only remaining undeveloped land in the vicinity, which is otherwise intensively managed for agriculture. Without appropriate avoidance and minimization measures for these species, potentially significant impacts associated with ground disturbance include habitat loss, nest/den/burrow abandonment, which may result in reduced health or vigor of young, and direct mortality.

Recommended Mitigation Measure 11: Habitat Assessment

CDFW recommends that a qualified biologist conduct a habitat assessment in advance of project implementation, to determine all Project areas with suitable habitat for these species.

Recommended Mitigation Measure 12: Surveys

In suitable habitat, CDFW recommends that a qualified biologist conduct focused surveys for the species and their requisite habitat features to evaluate potential impacts resulting from ground and vegetation disturbance.

Recommended Mitigation Measure 13: Avoidance

Avoidance whenever possible is encouraged via delineation and observance of a 50-foot no-disturbance buffer around dens of mammals like the American badger as well as the entrances of burrows that can provide refuge for small mammals, reptiles, and amphibians.

Editorial Comments and/or Suggestions

Lake and Streambed Alteration: Project activities that have the potential to substantially change the bed, bank, and channel of streams and associated wetlands may be subject to CDFW's regulatory authority pursuant Fish and Game Code section 1600 et seq. Fish and Game Code section 1602 requires an entity to notify CDFW prior to commencing any activity that may (a) substantially divert or obstruct the natural flow of any river, stream, or lake; (b) substantially change or use any material from the bed, bank, or channel of any river, stream, or lake (including the removal of riparian vegetation); (c) deposit debris, waste or other materials that could pass into any river, stream, or lake. "Any river, stream, or lake" includes those that are ephemeral or intermittent as well as those that are perennial. CDFW is required to comply with CEQA in the issuance of a Lake or Streambed Alteration (LSA) Agreement; therefore, if the CEQA document approved for the Project does not adequately describe the Project and its impacts, a subsequent CEQA analysis may be necessary for LSA Agreement

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issuance. Additional information on notification requirements is available through the Central Region LSA Program at (559) 243-4593 or R4LSA@wildlife.ca.gov, and the CDFW website: <https://wildlife.ca.gov/Conservation/LSA> .

Nesting birds: CDFW encourages that Project implementation occur during the bird non-nesting season; however, if Project activities must occur during the breeding season (i.e., February through August), the Project applicant is responsible for ensuring that implementation of the Project does not result in violation of the Migratory Bird Treaty Act or relevant Fish and Game Codes as referenced above.

To evaluate Project-related impacts on nesting birds, CDFW recommends that a qualified biologist conduct pre-activity surveys for active nests no more than 10 days prior to the start of ground disturbance to maximize the probability that nests that could potentially be impacted by the Project are detected. CDFW also recommends that surveys cover a sufficient area around the work site to identify nests and determine their status. A sufficient area means any area potentially affected by the Project. In addition to direct impacts (i.e. nest destruction), noise, vibration, and movement of workers or equipment could also affect nests. Prior to initiation of construction activities, CDFW recommends that a qualified biologist conduct a survey to establish a behavioral baseline of all identified nests. Once construction begins, CDFW recommends that a qualified biologist continuously monitor nests to detect behavioral changes resulting from the Project. If behavioral changes occur, CDFW recommends that the work causing that change cease and that CDFW be consulted for additional avoidance and minimization measures.

If continuous monitoring of identified nests by a qualified biologist is not feasible, CDFW recommends a minimum no-disturbance buffer of 250 feet around active nests of non-listed bird species and a 500-foot no-disturbance buffer around active nests of non-listed raptors. These buffers are advised to remain in place until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or parental care for survival. Variance from these no-disturbance buffers is possible when there is compelling biological or ecological reason to do so, such as when the construction area would be concealed from a nest site by topography. CDFW recommends that a qualified biologist advise and support any variance from these buffers.

Endangered Species Act Consultation: CDFW recommends consultation with the USFWS prior to Project ground disturbance, due to potential impacts to Federal listed species. Take under the Federal Endangered Species Act (FESA) is more stringently defined than under CESA; take under FESA may also include 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. Consultation with the USFWS in order to comply with FESA is advised well in advance of Project implementation.

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ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database that 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 obtained at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. 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: <https://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>

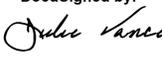
FILING FEES

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 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 draft MND to assist MWD in identifying and mitigating Project impacts on biological resources. If you have questions regarding this letter, please contact Clint Stevens, Environmental Scientist, at (559) 578-0837 or by email at Clint.Stevens@wildlife.ca.gov.

Sincerely,

DocuSigned by:

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Xerces Society for Invertebrate Conservation, Defenders of Wildlife, and Center for Food Safety. 2018. A petition to the State of California Fish and Game Commission to list the Crotch bumble bee (*Bombus crotchii*), Franklin's bumble bee (*Bombus franklini*), Suckley cuckoo bumble bee (*Bombus suckleyi*), and western bumble bee (*Bombus occidentalis occidentalis*) as Endangered under the California Endangered Species Act. October 2018.

Attachment 1

**CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
RECOMMENDED MITIGATION MONITORING AND REPORTING PROGRAM
(MMRP)**

PROJECT: Madera Lake Pump & Pipeline Project

STATE CLEARINGHOUSE No. 2022090367

RECOMMENDED MITIGATION MEASURES	STATUS/DATE/INITIALS
<i>Before Project Activity</i>	
Recommended Mitigation Measure 1: SWHA Nest Tree Avoidance and Mitigation	
Recommended Mitigation Measure 2: Focused SWHA Surveys	
Recommended Mitigation Measure 4: SWHA Take Authorization	
Recommended Mitigation Measure 5: Crotch's Bumble Bee Surveys, Avoidance, and Take Authorization	
Recommended Mitigation Measure 6: BUOW Surveys	
Recommended Mitigation Measure 7: BUOW Avoidance and Mitigation	
Recommended Mitigation Measure 8: BUOW Eviction and Mitigation	
Recommended Mitigation Measure 9: WPT Surveys	
Recommended Mitigation Measure 11: American Badger and Western Spadefoot Habitat Assessment	
Recommended Mitigation Measure 12: American Badger and Western Spadefoot Surveys	
<i>During Project Activity</i>	
Recommended Mitigation Measure 3: SWHA Buffers	
Recommended Mitigation Measure 5: Crotch's Bumble Bee Surveys, Avoidance, and Take Authorization	
Recommended Mitigation Measure 8: BUOW Avoidance and Mitigation	
Recommended Mitigation Measure 10: WPT Avoidance and Minimization	

RECOMMENDED MITIGATION MEASURES	STATUS/DATE/INITIALS
Recommended Mitigation Measure 12: American Badger and Western Spadefoot Avoidance	