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**GAVIN NEWSOM, Governor**  
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Governor's Office of Planning & Research

April 6, 2020

**APR 06 2020**

**STATE CLEARINGHOUSE**

Shawn Nevill  
 Principal Planner  
 Orange County Water District  
 18700 Ward Street  
 Fountain Valley, CA 92708

**Subject: Smith Basin Improvement Project (PROJECT) Mitigated Negative Declaration (MND) SCH# 2018061058**

Dear Mr. Nevill:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt an MND from Orange County Water District for the Project pursuant the California Environmental Quality Act (CEQA) and CEQA Guidelines.<sup>1</sup> CDFW previously submitted comments in response to the Notice of Preparation (NOP) of a Draft Environmental Impact Report (DEIR), in a letter dated July 24, 2018.

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.

**PROJECT DESCRIPTION SUMMARY**

**Proponent:** Orange County Water District (OCWD)

**Objective:** The objective of the Project is to improve the geotechnical stability of the Smith Basin embankment slopes. The MND indicates that the proposed Project evaluated represents a substantial reduction in the overall improvements in comparison to the components identified in the 2018 NOP, which involved improvements along embankment slopes in six areas under the first alternative. The second alternative included reestablishing Santiago Creek along the toe of the slopes in its current alignment and protecting the width and depth in place with riprap. The MND

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<sup>1</sup> 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.

indicates that the proposed Project was revised; limits were placed on improvements, the proposed stabilization areas were reduced from six to three, and the Santiago Creek will be realigned to its prior alignment instead of being stabilized in its current location. Current Project activities also include re-establishing the historical access road on the north side, regrading the bottom of Smith Basin to restore Santiago Creek in its former alignment nearer the middle of the basin, repairing and reconstructing the slopes in the basin, construction six groins to slow water flow along the southern slope, and restoration of removed vegetation.

**Location:** The project area is located in the City of Orange, north of Villa Park Road, between Lemon Street and Santiago Boulevard. Native riparian and coastal sage scrub communities persist within the project area, and the MND notes that least Bell's vireo (*Vireo bellii pusillus*; CESA and federal Endangered Species Act (ESA) listed- endangered), and coastal California gnatcatcher (*Poliioptila californica californica*; ESA listed- threatened) have been observed during on-site biological surveys. White-tailed kite (*Elanus leucurus*; a state Fully Protected species) has been observed flying above Santiago Basin.

**Timeframe:** The MND indicates that construction activities would take approximately two months.

## **COMMENTS AND RECOMMENDATIONS**

CDFW offers the comments and recommendations below to assist OCWD 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.

### **I. CDFW Prior Project and Mitigation Comments**

In 2018, CDFW issued a letter in response to the NOP of a DEIR for the Smith Basin Improvement Project. The original NOP described two alternatives for erosion repair and prevention in Smith Basin: Alternative 1 would realign Santiago Creek to its original pre-1980 alignment, while Alternative 2 would reinforce the existing alignment with additional fill and riprap at the toe of the slope. CDFW supported adoption of Alternative 1, which would require fewer structural reinforcements to prevent additional erosion, provide a more natural aesthetic, and potentially foster a higher quality of riparian and upland habitats. CDFW supports the revised Project presented in the MND with the reduction to three stabilization areas and historical realignment of Santiago Creek instead of stabilizing it in its current location.

The MND indicates that a CDFW Section 1600 Streambed Alteration Agreement will be obtained. We look forward to receiving OCWD's notification for the above-referenced wetland impact activities. More information about the Department's Lake and Streambed Alteration Program can be found on CDFW's website at <https://wildlife.ca.gov/Conservation/LSA>.

### **II. Special Status Species**

**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 USFWS?**

**COMMENT #1: Least Bell's vireo**

**MND, P. 54**

**Issue:** The MND notes that least Bell's vireos were observed during on-site biological surveys in 2019.

**Specific impact:** The MND describes Project impacts to 7.56 acres of least Bell's vireo habitat. Mitigation Measure BIO-1 requires that vegetation removal and clearing activities shall be conducted outside of bird nesting season. The MND indicates that in the event avoidance of the nesting season is not feasible, the project site would be required to be surveyed by a qualified biologist prior to vegetation removal activities to ensure no vireos are present. In the event the species is present, the qualified biologist shall establish suitable buffers around the nests to be avoided by construction personnel until the qualified biologist determines that no nests are occupied and that any juvenile birds can survive independently from the nest.

Preconstruction surveys of occupied vireo habitat during vireo nesting season are not sufficient to make Project impacts to this species less than significant. CDFW recommends complete avoidance of occupied vireo habitat during nesting season in order to avoid take of vireo under CESA. Any adverse impacts to least Bell's vireo, for the purposes of CEQA, are considered significant without sufficient mitigation. As to CESA, 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, the Department recommends that the project proponent seek appropriate take authorization under CESA prior to implementing the project. Appropriate authorization from the Department 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 the Department 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.

CDFW also encourages OCWD to consult as soon as possible with the United States Fish and Wildlife Service (Service), as informal or formal consultation may be appropriate in order to address impacts to least Bell's vireo.

**Recommended Potentially Feasible Mitigation Measure(s) (Regarding least Bell's vireo)**

**Mitigation Measure #1:**

**To minimize significant impacts:**

To avoid and minimize impacts to least Bell's vireo, CDFW recommends that MM BIO-1 be amended to the following:

*“In order to avoid take of sensitive and migratory avian species, prior to the start of vegetation clearing activities, the OCWD Project Manager shall ensure that vegetation clearing and ground disturbing activities occur outside of the migratory bird nesting season (February 15 to September 15).”*

## **COMMENT #2: Coastal California gnatcatcher**

### **MND, P. 54**

**Issue:** The MND notes that coastal California gnatcatcher have been observed during on-site biological surveys.

**Specific impact:** The MND indicates that there is potential for direct and indirect impacts to nearby gnatcatcher due to construction noise. Mitigation Measure BIO-1 requires that vegetation removal and clearing activities shall be conducted outside of bird nesting season. In the event avoidance of the nesting season is not feasible, the project site would be required to be surveyed by a qualified biologist prior to vegetation removal activities to ensure no gnatcatchers are present. In the event the species is present, the qualified biologist shall establish suitable buffers around the nests to be avoided by construction personnel until the qualified biologist determines that no nests are occupied and that any juvenile birds can survive independently from the nest.

CDFW also encourages OCWD to consult as soon as possible with the Service, as informal or formal consultation may be appropriate in order to address impacts to coastal California gnatcatcher.

### **Recommended Potentially Feasible Mitigation Measure(s) (Regarding coastal California gnatcatcher)**

#### **Mitigation Measure #1:**

**To minimize significant impacts:** To avoid and minimize impacts to coastal California gnatcatcher, CDFW recommends that MM BIO-1 be amended to the following:

*“In order to avoid take of sensitive and migratory avian species, prior to the start of vegetation clearing activities, the OCWD Project Manager shall ensure that vegetation clearing and ground disturbing activities occur outside of the migratory bird nesting season (February 15 to September 15).”*

## **COMMENT #3: White-tailed kite**

### **MND, P. 54**

**Issue:** The MND indicates that white-tailed kites have been observed flying over the Santiago Basin, and the Project site has suitable white-tailed kite habitat.

**Specific impact:** White-tailed kite are classified by the state as Fully Protected species. Fully Protected species may not be taken or possessed at any time and no licenses or permits may be issued for their take except for collecting these species for necessary scientific research and

relocation of the bird species for the protection of livestock (Fish & G. Code § 3511 (a)(1)(b)(12)).

**Recommended Potentially Feasible Mitigation Measure(s) (Regarding white-tailed kite)**

**Mitigation Measure #2:**

**To minimize significant impacts:** To avoid impacts to white-tailed kite, CDFW recommends that Conservation Measure BIO-2 be amended to read as follows:

*“Tree removal activities which may impact raptor nests will be removed outside of the raptor nesting season (January 15 – September 15). Removal, relocation, or destruction of raptor nests will not be undertaken in association with Project activities.”*

**III. Conservation Measure BIO-2: Nesting Raptors**

**COMMENT #4:**

**MND, Appendix C, Page 39**

**Issue:** Mitigation Measure BIO-2 indicates that, “Prior to tree removal activities, specimen native trees that are planned for removal from the project site shall be inspected by the OCWD Project Biologist to determine if raptor nests are present. If nests are encountered, the nests shall either be relocated outside of the area of disturbance. If relocation is not feasible, the Project Biologist shall create a new substitute nesting site located outside of the construction activity impact area.”

**Specific impact:** CDFW does not support removal, relocation, or destruction of raptor nests as, “[i]t is unlawful to take, possess, or destroy any birds in the orders Falconiformes or Strigiformes (birds-of-prey) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by this code or any regulation adopted pursuant thereto. (FGC § 3503.5)” Actions carried out as described in MM BIO-2 would be a violation of the FGC.

**Recommended Potentially Feasible Mitigation Measure (Regarding nesting raptors)**

**Mitigation Measure #2:**

**To minimize significant impacts:** To avoid or minimize impacts to nesting raptors, CDFW recommends that Conservation Measure BIO-2 be amended to read as follows:

*“Tree removal activities which may impact raptor nests will be conducted outside of the raptor nesting season (January 15 – September 15). Removal, relocation, or destruction of raptor nests will not be undertaken in association with Project activities.”*

**IV. Conservation Measures BIO-3 and BIO-4: Revegetation**

**COMMENT #5:**

**Appendix C, P. 31**

**Issue:** Conservation Measure MM BIO-3 describes hydro-seeding and planting of native vegetation on slope areas disturbed by the Project and monitoring to ensure that non-native vegetation does not re-establish. MM BIO-3 indicates that 4.2 acres of upland California Coastal Sage habitat shall be planted. MM BIO-4 describes planting riparian habitat at the edge of the ordinary high-water mark within areas disturbed by grading activities and ongoing monitoring for non-native vegetation. MM BIO-4 indicates that 4.8 acres of riparian habitat shall be planted within the Project site and an additional 9.0 acres of bottom acres shall be managed to recruit using flood irrigation from annual inundation events and additional planting if needed.

### **Recommended Potentially Feasible Mitigation Measure (Regarding Revegetation)**

#### **Mitigation Measure #5:**

**To minimize significant impacts:** We recommend that revegetation efforts be conducted in accordance with a Habitat Restoration and Monitoring Plan (HRMP). CDFW requests that we, as well as the Service (collectively referred to as the Wildlife Agencies), have the opportunity to review and approve the plan prior to it being finalized. This should be codified in an additional Mitigation Measure:

*“The actions described in MM BIO-3 and MM BIO-4 shall be described and carried out in accordance with a Habitat Restoration and Monitoring Plan (HRMP). A draft HRMP shall be provided to the Wildlife Agencies for review and approval prior to the start of construction.*

*Plans for restoration and revegetation will be prepared by persons with expertise in southern California ecosystems and native plant revegetation techniques. The HRMP shall include, at a minimum: (a) the location of the mitigation site; (b) the plant species to be used, container sizes, and seeding rates; (c) a schematic depicting the mitigation area; (d) planting schedule; (e) a description of the irrigation methodology; (f) measures to control exotic vegetation on site; (g) specific success criteria; (h) a detailed monitoring program; (i) contingency measures should the success criteria not be met; and (j) identification of the party responsible for meeting the success criteria and providing for conservation of the mitigation site in perpetuity.”*

Per CEQA Guidelines Section 21081.6(a)(1), CDFW has provided OCWD with a summary of our suggested mitigation measures and recommendations in the form of an attached Draft Mitigation and Monitoring Reporting Plan (MMRP; Attachment A).

### **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: [http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/CNDDDB\\_FieldSurveyForm.pdf](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](mailto: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](http://www.dfg.ca.gov/biogeodata/cnddb/plants_and_animals.asp).

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## **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 OCWD 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 (858) 636-3159 or [Jessie.Lane@wildlife.ca.gov](mailto:Jessie.Lane@wildlife.ca.gov).

Sincerely,



David Mayer  
Environmental Program Manager

## **Attachments**

- A. Draft MMRP (CDFW 2020)

ec: Christine Medak, U.S. Fish and Wildlife Service, Carlsbad  
Office of Planning and Research, State Clearinghouse, Sacramento

## **REFERENCES**

California Department of Fish and Wildlife. 2018. Comments on the Notice of Preparation of a Draft Environmental Impact Report (DEIR) for the Smith Basin Improvement Project, Orange, CA SCH# 2018061058.

**Attachment A:**

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

Biological Resources			
	Mitigation Measures	Timing	Responsible Party
MM BIO-1	In order to avoid take of sensitive and migratory avian species, prior to the start of vegetation clearing activities, the OCWD Project Manager shall ensure that vegetation clearing and ground disturbing activities occur outside of the migratory bird nesting season (February 15 to September 15).	During construction	OCWD
MM BIO-2	Tree removal activities which may impact raptor nests will be removed outside of the raptor nesting season (January 15 – September 15). Removal, relocation, or destruction of raptor nests will not be undertaken in association with Project activities.	During Construction	OCWD
MM BIO-3	Immediately after reconfiguring the slope areas, OCWD shall hydro-seed and plant riparian habitat at the edge of the ordinary high-water mark within the disturbance area. The Project Biologist shall manage the area to ensure that non-native vegetation does not re-establish. In total, 4.2 acres of upland California Coastal Sage habitat shall be planted. See Figure 9 for location of upland mitigation planting.	Post Construction	OCWD
MM BIO-4	Following the completion of grading activities, OCWD's Project Biologist shall plant riparian habitat at the edge of the ordinary high-water mark within the disturbance area. The Project Biologist shall manage the area to ensure that non-native vegetation does not re-establish. In total, 4.8 acres of riparian habitat shall be planted within the Project Site, and an additional 9.0 acres of bottom acres shall be managed to recruit using flood irrigation from annual inundation events and additional planting if	Post Construction	OCWD



	<p>needed per the determination of the Project Biologist. See Figure 9 for location of riparian mitigation planting.</p>		
<p>MM BIO-5</p>	<p>The actions described in MM BIO-3 and MM BIO-4 shall be described and carried out in accordance with a Habitat Restoration and Monitoring Plan (HRMP). A draft HRMP shall be provided to the Wildlife Agencies for review and approval prior to the start of construction.</p> <p>Plans for restoration and revegetation will should be prepared by persons with expertise in southern California ecosystems and native plant revegetation techniques. Each The HRMP shall plan should include, at a minimum: (a) the location of the mitigation site; (b) the plant species to be used, container sizes, and seeding rates; (c) a schematic depicting the mitigation area; (d) planting schedule; (e) a description of the irrigation methodology; (f) measures to control exotic vegetation on site; (g) specific success criteria; (h) a detailed monitoring program; (i) contingency measures should the success criteria not be met; and (j) identification of the party responsible for meeting the success criteria and providing for conservation of the mitigation site in perpetuity.</p>	<p>Prior and Post Construction</p>	<p>OCWD</p>