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Governor's Office of Planning & Research

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STATE CLEARINGHOUSE

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Comments on the Draft Mitigated Negative Declaration of Environmental Impact and Initial Study for Conditional Use Permit 2019-03/Inyo Farms, State Clearinghouse No. 2019109073

Dear Mr. Karamitros:

The California Department of Fish and Wildlife (CDFW) received a draft Mitigated Negative Declaration (MND) and Initial Study (IS) from Inyo County for the Conditional Use Permit (CUP) 2019-03/Inyo Farms (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

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.

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.

PROJECT DESCRIPTION SUMMARY

The Project proposes construction and operation of a commercial cannabis cultivation business on a 34.2-acre parcel located at the northern-most terminus of Enchanted Lakes Road, approximately 5 miles south of the community of Grant. The Project includes the construction of two metal buildings for outdoor cultivation (19,500 ft² and 24,000 ft²), one metal building for processing and packaging (4,000 ft²), one residence (1,500 ft²), and one fenced composting area (625 ft²). The business will utilize a preexisting well to supply both domestic and agricultural water.

COMMENTS AND RECOMMENDATIONS

CDFW has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of those species (i.e., biological resources). CDFW is concerned about the adequacy of the impact analysis and the mitigation measures proposed in the MND and the ability of the Project to mitigate the significant, or potentially significant, direct and indirect impacts to native habitats and species that rely on these habitats. CDFW offers the comments and recommendations below to assist Inyo County in adequately identifying and/or mitigating the impacts on fish and wildlife (biological) resources.

The MND/IS lacks sufficient, specific, and current biological information on the existing habitat and potential species at the Project site. It refers to the biological analysis conducted by Circle Mountain Biological Consultants, Inc. (CMBC), to explain the impacts to Biological Resources (checklist item a), but does not include the report itself, nor does it summarize the results of the report. Such supporting documents should be included with the MND/IS to assist with review and analysis, as they provide pertinent details that are not provided in the MND/IS. CDFW received a copy of CMBC's Focused Survey for Agassiz's Desert Tortoise, Habitat Assessments for Burrowing Owl and Mohave Ground Squirrel, and General Biological Resource Assessment report (August 2019) on September 18, 2019 and provides comments based on this report. Please note that while the biological analysis provided by CMBC may provide supplemental information (such as detailed study results) to back up conclusions in the MND/IS, it should not act as a substitute for information that is required to be included in the MND/IS to justify a less-than-significant finding. For example, the CMBC report includes focused surveys for desert tortoise (*Gopherus agassizii*), a species listed as Threatened under CESA, but the MND does not mention desert tortoise at all.

CDFW recommends that the following information provided in the CMBC report is incorporated into the MND:

- Summary of study methods and results of rare plant and wildlife surveys.
- Potential impacts to any special-status species and their habitat, and proposed avoidance and minimization measures.

Barstow woolly sunflower (*Eriophyllum mohavense*)

Barstow woolly sunflower (*Eriophyllum mohavense*) is a California endemic annual herb with a California Native Plant Society (CNPS) Rare Plant Rank 1B.2 designation. This rank identifies *E. mohavense* as rare throughout its range, eligible for listing under the California Endangered Species Act, and, at the time of the designation, moderately threatened in California (i.e. 20-80% occurrences threatened; CNPS, 2019). In April 2019, 1,253 individual *E. mohavense* plants were identified on site with 167 plants occurring within the direct impact footprint of the proposed facilities (CMBC, August 2019). Figure 6 of the CMBC Report shows an additional nine plants would be directly impacted by construction of the east greenhouse bringing the total estimated number of impacted individuals to 176 or an estimated 14% of the population that germinated in the spring of 2019.

The draft MND findings propose the use of Environmentally Sensitive Area (ESA) fencing during construction as the only mitigation measure for impacts to *E. mohavense*. The measure states fencing will be utilized to avoid the “major populations” of *E. mohavense* on site. CDFW agrees ESA fencing can be used in conjunction with other avoidance and minimization measures (e.g. biological monitoring) to avoid additional direct impacts to plants (and seedbank) outside of the immediate construction footprint. CDFW does not agree that the use of ESA fencing alone provides mitigation that is roughly proportional to the direct take of an estimated 14% of the population and an unknown proportion of the seedbank of *E. mohavense* on site. CEQA Guidelines section 15126.4, subdivision (a)(4)(B) specify mitigation should be roughly proportional to the level of impacts. CDFW recommends the County include specific and enforceable measures in the MND to mitigate the direct impact to *E. mohavense* as well as additional measures to minimize and avoid additional direct and indirect impacts.

CDFW recommends the County include a mitigation measure consisting of either permanent conservation of on-site avoided areas through recordation of a conservation easement and long-term management of the conserved area to maintain conditions favorable to *E. mohavense* as human activities increase on site; or land acquisition for permanent conservation and long-term management of occupied habitat to mitigate direct and indirect impacts to *E. mohavense*. Any recorded conservation easement should be held by a land conservator with a demonstrable record of maintaining lands for biological resources. In addition, any habitat management activities should be carried out by qualified organization(s) with working knowledge of local biological resources. CDFW also recommends the County include a mitigation measure that implements an Invasive Plant Management Program to prevent nonnative and invasive

plant species from being introduced and allowed to proliferate on site. It is foreseeable that increased traffic and human presence may introduce and spread nonnative plant species to the site resulting in degradation of on site and adjacent habitat, and potentially causing further impacts to remaining *E. mohavense*.

CDFW further recommends the County's ESA fencing measure include the presence of a qualified biological monitor(s) during ground disturbance activities to ensure the implementation of ESA fencing is effective and limits of disturbance are minimized to the greatest extent practicable. Once ground disturbance activities are complete, the biological monitor should continue to check the fencing periodically to maintain the integrity of the fence and ensure that it does not become a danger to wildlife. CDFW also recommends the facility include signage that indicates the property is an 'Environmentally Sensitive Area', and that staff, vendors, and visitors should refrain from travelling off of established roads. Any signage should be posted either on the constructed facilities themselves or close to the ground to prevent creating artificial perches for predatory animals such as ravens.

The California Natural Diversity Database (CNDDB) and CNPS document the nearest occurrence of *E. mohavense* approximately 40 miles to the south near Freeman Junction in Kern County. Further, there are no other known occurrences of *E. mohavense* in Inyo County. It is possible the population of *E. mohavense* on the Project site may be one of the northernmost extant populations. Given the potential importance of this site, CDFW recommends the County include topsoil salvage for the areas surrounding the clusters of plants that will be directly impacted by construction. Salvaged topsoil that has been stored properly may be used to propagate *E. mohavense* in situ or ex situ. CDFW encourages the County to coordinate with Rancho Santa Ana Botanical Garden and CDFW's Native Plant Program to devise a specific topsoil salvage and propagation mitigation measure.

Burrowing Owl (*Athene cunicularia*)

The Project site has a high potential to support both nesting and foraging habitat for burrowing owl (*Athene cunicularia*), a California Species of Special Concern. CDFW recommends that the County follow the recommendations and guidelines provided in the *Staff Report on Burrowing Owl Mitigation* (California Department of Fish and Game [CDFG], 2012); available for download from CDFW's website at: <https://www.wildlife.ca.gov/Conservation/Survey-Protocols>

The *Staff Report on Burrowing Owl Mitigation* specifies that project impact evaluations include:

- a. A habitat assessment;
- b. Surveys; and
- c. An impact assessment

As stated in the *Staff Report on Burrowing Owl Mitigation*, the three progressive steps are effective in evaluating whether a project will result in impacts to burrowing owl, and

the information gained from the steps will inform any subsequent avoidance, minimization, and mitigation measures. Habitat assessments are conducted to evaluate the likelihood that a site supports burrowing owl. Burrowing owl surveys provide information needed to determine the potential effects of proposed projects and activities on burrowing owls, and to avoid take in accordance with Fish and Game Code sections 86, 3503, and 3503.5. Impact assessments evaluate the extent to which burrowing owls and their habitat may be impacted, directly or indirectly, on and within a reasonable distance of the proposed Project activity.

CMBC conducted a burrowing owl habitat assessment on March 29, 2019. As mentioned above, the purpose of a burrowing owl habitat assessment is to determine whether burrowing owl sign or suitable habitat for burrowing owl exists on site, and whether breeding season surveys are appropriate (page 5 of *Staff Report*). CMBC did not detect burrowing owl sign during the habitat assessment. CDFW has determined CMBC prematurely concluded burrowing owl are not present on the site without completing breeding season surveys as described in the *Staff Report on Burrowing Owl Mitigation*. Due to the presence of suitable habitat on the Project site (compatible vegetation, presence of burrows, and fossorial mammals), breeding season surveys should be conducted prior to making the determination burrowing owl are absent from the Project site and that no impacts to burrowing owl are anticipated. Breeding surveys include three or more visits, at least three weeks apart, between the peak breeding season (April 15 and July 15). CDFW recommends the County include the results of breeding season surveys in the revised MND. If burrowing owl are found to be on or adjacent to the Project site, the revised MND should include an impact assessment as specified in the *Staff Report on Burrowing Owl Mitigation*. Regardless of the results from breeding season surveys, the County should still include a take avoidance (pre-construction) burrowing owl survey be conducted no less than 14 days prior to the start of Project-related activities and within 24 hours prior to ground disturbance because burrowing owl may occupy the site or adjacent areas at any time.

California Endangered Species Act

CDFW is responsible for ensuring appropriate conservation of fish and wildlife resources including threatened, endangered, and/or candidate plant and animal species, pursuant to CESA. CDFW recommends that a CESA incidental Take Permit (ITP) be obtained if the Project has the potential to result in "take" (California Fish and Game Code section 86 defines "take" as hunt, pursue, catch, capture or kill or attempt to hunt, pursue, catch, capture or kill") of state-listed CESA species, either through construction or over the life of the Project. CESA ITPs are issued to conserve protect, enhance, and restore state-listed CESA species and their habitats.

Mohave ground squirrel (*Spermophilus mohavensis*)

Mohave ground squirrel (MGS) is listed as Threatened under CESA. A juvenile female MGS was trapped on July 1, 2019 near the southwest corner of the site (CMBC, August

2019). The MND findings propose the biologist apply for an ITP as mitigation for the assumed presence of MGS, and suggests that environmental impacts will be mitigated through the ITP process. CDFW agrees that an ITP is warranted, but would like to clarify that the Project proponent, not the biologist, is responsible for applying for and complying with the terms in the ITP (CEQA Guidelines, § 15126.4 subd. (a)(1)(B)). Further, it is important to note that the action of applying for an ITP does not in and of itself mitigate for impacts. While compensatory habitat requirements and corresponding ratios are ITP driven and will be identified through the ITP process, specific measures to avoid and minimize take should not be deferred to a future action, such as the issuance of an ITP. CEQA Guidelines section 15126.2, subdivision (a)(1)(B) states that formulation of feasible mitigation measures should not be deferred until some future time. Please also note that issuance of an ITP is subject to CEQA documentation; therefore, CDFW recommends that the CEQA document identify and analyze potentially significant impacts, propose measures to mitigate impacts to less than significant levels, and include a mitigation and monitoring reporting program. CDFW recommends the MND be revised to specify avoidance and minimization measures, which may include but not be limited to pre-construction surveys, trench inspection, and burrow excavation by a CDFW-approved biologist, and mitigation including the permanent conservation and management of occupied habitat. Please also include a copy of the MGS trapping results and any other biological reports in the revised MND.

CDFW encourages early consultation in the ITP application process, as significant modification to the proposed Project and mitigation measures may be required to obtain an ITP. More information on the CESA permitting process can be found on the CDFW website:

<https://www.wildlife.ca.gov/Conservation/CESA/Permitting/Incidental-Take-Permits>.

Desert tortoise (*Gopherus agassizii*)

Desert tortoise is listed as Threatened under CESA. Protocol-level surveys for desert tortoise were performed by CMBC on March 29, 2019 and no evidence of living tortoises was detected at that time (CMBC, August 2019). One tortoise shell fragment was found on site and was estimated to be over 4 years of age by CMBC. The average temperature in March and April 2019 was 48 and 60 degrees Fahrenheit, respectively. Given the low temperatures it is likely that desert tortoise may not have been active in the weeks prior to March 29, 2019. The U.S. Fish and Wildlife Service (USFWS) *Small Projects Survey* protocol allows for surveys at any time of year, however this may not be appropriate given the local conditions and is generally not recommended by CDFW. The most recent update to the USFWS protocol available prior to March 2019, states, "The most effective way to estimate abundance for tortoises is to conduct surveys when tortoises are most active" (USFWS, October 2018). The nearest known occurrences of desert tortoise occur within a mile north of the Project site (Caltrans, 2014). CDFW strongly urges the County and Project proponent to include desert tortoise as a covered species in the aforementioned ITP application due to high potential for desert tortoise to be found on site during the life of the Project.

Given that several desert tortoise sightings and burrows occur in the immediate vicinity of the Project site (not all of which are recorded in the CNDDDB) CDFW recommends the County include, at minimum, pre-construction surveys as well as temporary and permanent desert tortoise exclusionary fencing in the likely event desert tortoise move onto the site.

Crotch Bumble Bee (*Bombus crotchii*)

Crotch bumble bee (*Bombus crotchii*) is a Candidate Endangered species under CESA. As a Candidate species, *B. crotchii* receives the same legal protection as Endangered or Threatened species under CESA (Fish & G. Code, § 2085). CNDDDB shows an occurrence in the Haiwee Reservoirs USGS quadrangle as well as several occurrences east of the site in the Coso Range. The MND/IS fails to analyze potential impacts to *B. crotchii*. CDFW recommends the County include the results of the focused survey for *B. crotchii* in the revised MND. Special focus should be placed on identifying potential nest and overwintering sites as any ground disturbance may lead to take of adults, eggs, or larvae that are in the ground. Further, because the Project's location and proposed outdoor growing operation, CDFW recommends the County include a measure that mitigates for pesticide use on site. Pesticides have been showed to have significantly reduced *Bombus* growth rates and queen production, colony founding, and reproductive success (Whitehorn et. al 2012, Woodcock et. al 2017, Baron et. al 2017, Siviter et. al 2018). If focused surveys show *B. crotchii* is present on site, CDFW strongly urges the County and Project proponent to include *B. crotchii* as a covered species in the aforementioned ITP application. If focused surveys do not detect *B. crotchii*, the Project proponent should still consider including *B. crotchii* as a covered species in the ITP application due to the potential for *B. crotchii* to be found on site during the life of the Project.

Lake and Streambed Alteration Program

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.

Upon receipt of a complete notification, CDFW determines if the proposed project activities may substantially adversely affect existing fish and wildlife resources and whether a Lake and Streambed Alteration (LSA) Agreement is required. An LSA Agreement includes measures necessary to protect existing fish and wildlife resources.

CDFW may suggest ways to modify the Project that would eliminate or reduce harmful impacts to fish and wildlife resources.

CDFW's issuance of an LSA Agreement is a "project" subject to CEQA (see Pub. Resources Code § 21065). To facilitate issuance of an LSA Agreement, if necessary, the MND should fully identify the potential impacts to the lake, stream, or riparian resources, and provide adequate avoidance, mitigation, and monitoring and reporting commitments. Early consultation with CDFW is recommended, since modification of the proposed project may be required to avoid or reduce impacts to fish and wildlife resources. To submit a Lake or Streambed Alteration notification, visit <https://www.wildlife.ca.gov/Conservation/Cannabis/Permitting#53542627-standard-agreement>.

Aerial photography shows several ephemeral streams occur on site. The draft site plan (May 2018) identifies several Class II and III streams but does not identify all areas that are subject to Notification under Fish and Game Code section 1602. CDFW recommends the County include the results of a jurisdictional delineation and condition the Project to comply with the Lake and Streambed Alteration Program prior to the issuance of a grading permit. CDFW also recommends the revised MND include an updated site plan that shows all access roads leading to the facilities and residence as well as clarification on the location of the solar panels referenced in Figure 3 of the CMBC report (August 2019). The site plan should also include the location of the septic system, including the leach field location. Please note, the California Department of Food and Agriculture requires Cannabis cultivators to demonstrate compliance with Fish and Game Code section 1602 prior to issuing a cultivation license (Business and Professions Code § 26060.1).

Nesting Birds

It is the project proponent's responsibility to comply with all applicable laws related to nesting birds and birds of prey. Sections 3503, 3503.5, and 3513 of the Fish and Game Code afford the following protective measures: section 3503 states that it is unlawful to take, possess, or needlessly destroy the nest or eggs of any bird, except as otherwise provided by Fish and Game Code or any regulation made pursuant thereto; section 3503.5 states that it 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 Fish and Game Code or any regulation adopted pursuant thereto; and section 3513 states that it is unlawful to take or possess any migratory nongame bird as designated in the Migratory Bird Treaty Act or any part of such migratory nongame bird except as provided by rules and regulations adopted by the Secretary of the Interior under provisions of the Migratory Bird Treaty Act.

Loggerhead shrike (*Lanius ludovicianus*) is a California Species of Special Concern and has high potential to occur onsite. Loggerhead shrike have been observed within 2.5 miles of the Project site near the communities of Grant and Olancho (CNDDDB and

Caltrans, 2014). CDFW recommends the County include in the revised MND a measure that requires pre-construction nesting bird surveys within 3 days prior to commencement of Project activities and the implementation of appropriate avoidance measures (e.g. disturbance buffers, biological monitoring) to protect against impacts to nesting birds.

Wildland-Urban Interface

CMBC's report describes the project site as "very diverse for the Mojave desert" and in "relatively pristine condition". The draft MND/IS fails to analyze how the construction and operating activities will potentially degrade the surrounding habitat via spread of nonnative species, noise and light pollution, pesticide use, and increase in trash and opportunistic predators on the site through increased human presence. CDFW recommends the County include in the MND/IS an analysis of the significant or potentially significant impacts of the construction and operation of the cannabis cultivation business on sensitive and CESA-listed species (i.e. Mohave ground squirrel, desert tortoise, loggerhead shrike, American badger, Barstow woolly sunflower, crotch bumble bee, desert kit fox, burrowing owl).

Groundwater

CDFW recommends the County include a thorough analysis of the potential impacts to biological resources by the Projects' groundwater use in the revised MND. The Hydrology and Water Quality section of the Environmental Checklist (item b) identifies the Project occurs in the Middle Amargosa Valley rather than the Owen's Valley Groundwater Basin which may be incorrect (California Department of Water Resources, 2019). Further, the County selected "Less than Significant Impact" for item b without including data from groundwater levels (current and historical) or demonstrating that the groundwater basin's current usage is sustainable and would remain sustainable with the new proposed usage.

Additional Coordination and Recommendations

CMBC's report (2019) shows several American badger (*Taxidea taxus*) digs within and adjacent to the Project site. American badger is a California Species of Special Concern. CMBC's report (2019) identified a desert kit fox (*Vulpes macrotis*) den adjacent to the Project site. California Code of Regulations Title 14 section 460 prohibits the take of desert kit fox. CDFW recommends the County include the formulation and implementation of a Monitoring and Management Plan to protect against direct and indirect impacts to both badger and kit fox. The plan should include measures such as speeding limits, trench and pipe protection, biological monitoring, Worker Environmental Awareness Program, and restrictions on pets on site to avoid the spread of canine distemper virus which has been shown to cause mortality in kit fox. CDFW encourages the County to coordinate with CDFW for review and approval of the Monitoring and Management Plan prior to implementation.

CMBC's report (2019) states burrowing owl and desert tortoise sign was surveyed for concurrently. CDFW does not recommend biologists or surveyors conduct surveys for multiple species simultaneously. Furthermore, it is unclear what protocol was used during the survey for *E. mohavense*. CDFW's Protocol for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities is found at: <https://www.wildlife.ca.gov/Conservation/Survey-Protocols#377281280-plants>.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database which may be used to make subsequent or supplemental environmental determinations. (Pub. Resources Code, § 21003, subd. (e).) Accordingly, please report any special status species and natural communities detected during Project surveys to the CNDDDB. The CNDDDB online field survey form can be found at the following link:

<https://www.wildlife.ca.gov/Data/CNDDDB/Submitting-Data#44524419-online-field-survey-form>. 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 Mitigated Negative Declaration for the CUP 2019-03/Inyo Farms. Due to the issues presented in this letter, CDFW concludes that the MND does not adequately identify or mitigate the Project's significant, or potentially significant, impacts on biological resources. Deficiencies in the County's CEQA document can affect later project approvals by CDFW in its role as a Responsible Agency. In addition, because of these issues, CDFW has concerns that the County may not have the basis to approve the project or make "findings" as required by CEQA unless the environmental document is modified to eliminate and/or mitigate significant impacts, as reasonably feasible (CEQA Guidelines, §§ 15074, 15091 & 15092). The revised MND should include updated site conditions; thorough and detailed analysis of the Project's potential impacts on biological resources, in particular Mohave ground squirrel and desert tortoise; avoidance and minimization measures; and appropriate and enforceable mitigation measures to reduce the potential impacts to a level that is less than significant if impacts cannot be avoided.

Steve Karamitros, Senior Planner
December 2, 2019
Page 11 of 12

Questions regarding this letter or further coordination should be directed to Edith Martinez, Senior Environmental Scientist (Specialist) at 909-944-0187 or edith.martinez@wildlife.ca.gov.

Sincerely,



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REFERENCES

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