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GAVIN NEWSOM, Governor
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January 9, 2020
Sent via email

Governor's Office of Planning & Research

JAN 09 2020

STATE CLEARINGHOUSE

Mr. Joseph Broadhead
Eastern Municipal Water District
PO Box 8300
Perris, CA 92572

Subject: Initial Study with Proposed Mitigated Negative Declaration
Murrieta Road Transmission Pipeline Project
State Clearinghouse No. 2019129034

Dear Mr. Broadhead:

The California Department of Fish and Wildlife (CDFW) received the Initial Study (IS) and proposed Mitigated Negative Declaration (MND) on December 12, 2019 from Eastern Municipal Water District (EMWD) for the Murrieta Road Transmission Pipeline Project (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.

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.

CDFW is also submitting comments as a Responsible Agency under CEQA. (Pub. Resources Code, § 21069; CEQA Guidelines, § 15381.) CDFW expects that it may need to exercise regulatory authority as provided by the Fish and Game Code. As proposed, for example, the Project may be subject to CDFW's lake and streambed alteration regulatory authority. (Fish & G. Code, § 1600 et seq.) Likewise, to the extent implementation of the Project as proposed may result in "take" as defined by State law of any species protected under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.), the Project proponent may seek related take authorization as provided by the Fish and Game Code.

PROJECT DESCRIPTION SUMMARY

Project Location

The proposed Project site is located west of Interstate 215 and east of Interstate 15 in the City of Menifee, Riverside County. The proposed Project site would be within the public right-of-way except for two site segments: one on the Sun City Regional Water Reclamation Facility property at the north end of the site; and a second possible segment along the east side of Murrieta Road extending 250 feet north from La Piedra Road.

Project Description

Eastern Municipal Water District (EMWD) proposes to implement the Murrieta Road Transmission Pipeline Project to construct and operate a 36- to 42-inch-diameter water transmission line from the Perris II Desalter Complex (Desalter) in the City of Menifee approximately 1.33 miles south, mostly in the Murrieta Road right-of-way, to La Piedra Road, where the proposed pipeline will connect to an existing 36-inch diameter water main in La Piedra Road about 250 feet east of its intersection with Murrieta Road. The proposed Project will provide capacity to transmit potable water from the Desalter to the existing main in La Piedra Road.

COMMENTS AND RECOMMENDATIONS

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. Following review of the Biological Resources section of the IS, CDFW offers the comments and recommendations presented below to assist EMWD in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources. The comments and recommendations are also offered to enable CDFW to adequately review and comment on the proposed Project with respect to the Project's consistency

with the Western Riverside County Multiple Species Habitat Conservation Plan. CDFW recommends that each of these be addressed prior to adoption of the MND.

Lake and Streambed Alteration Program

Fish and Game Code 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 your 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). Therefore, 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 the Department is recommended, since modification of the proposed project may be required to avoid or reduce impacts to fish and wildlife resources. To obtain a Lake or Streambed Alteration notification package, please go to <https://www.wildlife.ca.gov/Conservation/LSA/Forms>

Mitigation Measure (MM) BIO-1 indicates that the Project may or may not require notification to CDFW pursuant to Fish and Game Code section 1602, but fails to provide specific information pertaining to activities proposed as part of the Project. To avoid potential delays during Project implementation CDFW recommends that EMWD submit a Notification of Lake or Streambed Alteration (LSA) to CDFW's Ontario office for this Project, to cover the potential for access and excavation within Salt Creek. CDFW further recommends that impacts associated with access and potential excavation within Salt Creek be identified and analyzed in the MND.

To ensure compliance with Fish and Game Code section 1602, CDFW recommends that EMWD revise MM BIO-1 and condition the measure to include the following (edits are in ~~strikethrough~~ and additions in **bold**):

MM Bio-1. Use of the **both the** open-cut-trenching **and trenchless** method across Salt Creek requires acquisition of permits/ certifications/ agreements from

the USACE (404 Permit), the RWQCB (401 Water Quality Certification), and CDFW (1602 Streambed Alteration Agreement) prior to construction activities.

A pre-application meeting with these agencies is recommended prior to submittal of permit applications to discuss existing conditions; confirm the agencies' jurisdiction over water resources on the study area; discuss impacts to these resources that would result from the Project; discuss proposed avoidance, minimization, and mitigation measures to offset these impacts; and to discuss the regulatory permitting process. Following the pre-application meeting, EMWD would prepare and process the appropriate permits (e.g., a Section 404 Permit from the USACE in the form of a Nationwide Permit, a Section 401 Water Quality Certification from the RWQCB, and/or a CDFW Section 1602 Notification of Lake or Streambed Alteration). Permit conditions may be required by the resource agencies regarding impacts to areas under their respective jurisdictions.

In order to reduce impacts to Fish and Game Code section 1602 resources to a level that is less than significant, CDFW recommends that EMWD identify a specific and enforceable mitigation strategy in the MND. The mitigation strategy should identify the amount (acreage) and type of mitigation and should be commensurate with impacts. CDFW is available to assist EMWD in evaluating the proposed mitigation prior to adoption of the MND.

Deferred Biological Impacts and Mitigation

The IS/MND and MM BIO-1 indicates that impacts are "Less than significant with Mitigation" because the project mitigation will be done through permitting agencies such as CDFW, Regional Water Control Board and U.S. Army Corps of Engineers. However, because the IS/MND does not specify commitments to mitigate and implement specific study and mitigation performance standards CDFW is concerned that EMWD is inappropriately deferring mitigation measures. CEQA Guidelines §15126.4, subdivision (a)(1)(8) states that formulation of feasible mitigation measures should not be deferred until some future date. Deferral may be permissible, but an agency must commit itself to mitigation and either adopt a performance standard on which future approvals are contingent or consider and analyze specific alternatives. (*Endangered Habitat League, Inc. v. County of Orange* (2005) 131 Cal. App. 4th 777.) Courts have rejected the conclusion that impacts are not significant when the success of mitigation is uncertain or when the development and implementation of concrete mitigation measures would happen after project approval. (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d. 296.) The Court of Appeal in *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 struck down mitigation measures which depended for their success on the development of management plans in consultation with State and Federal wildlife agencies after Project approval. Even if an impact is determined to be significant, it must be accompanied by an analysis of the impact. (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344.)

Nesting Birds and Migratory Bird Treaty Act

The project is near Salt Creek which supports resident and migratory birds, including burrowing owl. Please note that it is the project proponent's responsibility to comply with all applicable laws related to nesting birds and birds of prey. Fish and Game Code sections 3503, 3503.5, and 3513 afford protective measures as follows: Fish and Game Code section 3503 makes it 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. Fish and Game Code section 3503.5 makes it unlawful to take, possess, or destroy any birds in the orders Falconiformes or Strigiformes (birds-of-prey) 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. Fish and Game Code section 3513 makes it unlawful to take or possess any migratory nongame bird except as provided by the rules and regulations adopted by the Secretary of the Interior under provisions of the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. § 703 et seq.).

MM BIO-2 defines the peak avian breeding season as February 14 to September 16. Because instances of nesting have been documented outside of this date range CDFW does not recommend relying on seasonal restrictions alone to avoid impacts to nesting birds, as nesting dates vary from year to year and some species may nest year-round. Instead, we recommend that a qualified ornithologist conduct nesting surveys prior to initiating vegetation removal and/or ground disturbing activities even outside of the peak nesting season. Because some species of bird nest directly on the ground CDFW also recommends that surveys be conducted across the entirety of the Project site, and not be limited to only those areas supporting vegetation. Preconstruction nest surveys should be conducted within three days prior to initiating project activities, as instances of nesting may otherwise be missed.

CDFW recommends that the EMWD revise MM BIO-2 and condition the measure to include the following (edits are in **bold** and ~~strikethrough~~):

MM Bio-2. To ensure compliance with Fish and Game Code sections 3503, 3503.5, and 3513 no direct impacts shall occur to any nesting birds, their eggs, chicks, or nests. In order to avoid impacts on nesting birds, ~~vegetation removal~~ **Project activities** should be scheduled between September 16 and February 14, which is outside the peak nesting season. If ~~vegetation removal~~ **Project activities** must occur during the peak nesting season (i.e., **typically** February 15 to September 15), a pre-construction nesting bird survey shall be conducted by a qualified Biologist within three days prior to ~~vegetation removal~~ **ground disturbing** activities.

If the Biologist finds an active nest within or adjacent to the construction area, the

Biologist shall identify an appropriate protective buffer zone around the nest depending on the sensitivity of the species, the nature of the construction activity, and the amount of existing disturbance in the vicinity. In general, the Biologist shall designate a buffer of 50 to 200 feet for common nesting birds and 200 to 500 feet for special status nesting birds and nesting raptors. No construction activities shall be allowed within the buffer until nesting activity has ended to ensure compliance with *California Fish and Game Code*. **Avoidance and minimization measures shall be maintained until the young have fledged, and no further nesting is detected.**

Burrowing Owl

Though the Biological Resources Assessment (Appendix B) indicates that no suitable habitat for burrowing owl was found within the project vicinity, burrowing owls are found within the general vicinity of the Project site, and in CDFW's opinion have the potential to forage and nest within the vicinity of Salt Creek. Take of individual burrowing owls and their nests are prohibited under Fish and Game Code; therefore, to ensure compliance with all applicable laws pertaining to birds of prey, CDFW recommends that EMWD include a new mitigation measure for burrowing owls in the MND. If burrowing owl are detected, CDFW requests notification within seven (7 days) of detection and consultation on impact assessment with a specific and enforceable mitigation plan. CDFW recommends the new mitigation measure include the text below, as a minimum, to address potential detection of burrowing owl.

MM Bio-[new number]. To ensure compliance with Fish and Game Code sections 86, 3503, and 3503.5, an appropriately qualified biologist shall conduct a burrowing owl preconstruction survey of the Project area no more than 30 days prior to Project activities to confirm absence of this species. If burrowing owls are detected during preconstruction surveys EMWD shall notify CDFW within seven (7) days of detection and shall prepare an impact assessment to submit to CDFW for review following the recommendations and guidelines provided in CDFW's Staff Report on Burrowing Owl Mitigation (Department of Fish and Game, March 2012).

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 California Natural Diversity Database (CNDDDB). Information can be submitted online or via completion of the CNDDDB field survey form at the following link:
<https://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://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 IS/MND for the Murrieta Road Transmission Pipeline Project (State Clearinghouse No. 2019129034), and recommends that EMWD address CDFW's comments and concerns prior to adoption of the MND. If you should have any questions pertaining to the comments provided in this letter, please contact Eric Chan at (909) 483-6317 or at Eric.Chan@wildlife.ca.gov.

Sincerely,



Scott Wilson
Environmental Program Manager

ec: Heather Pert, CDFW
State Clearinghouse

Literature Cited

California Department of Fish and Game. (CDFG). 2012. Staff report on burrowing owl mitigation. State of California, Natural Resources Agency. Available for download at: https://www.dfg.ca.gov/wildlife/nongame/survey_monitor.html