



State of California – Natural Resources Agency  
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GAVIN NEWSOM, Governor  
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December 27, 2022

Claudia Tenorio  
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 Santa Ana Regional Water Quality Control Board  
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**Subject: OC Reclamation Inert Waste Disposal Operation (OC Reclamation Mine Project) (Project), Mitigated Negative Declaration (MND), SCH #2022120035**

Dear Ms. Tenorio:

The California Department of Fish and Wildlife (CDFW) has reviewed the above-referenced MND for the Project pursuant the California Environmental Quality Act (CEQA) and CEQA Guidelines.<sup>1</sup>

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.

## 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 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.

<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.

Claudia Tenorio, Senior Environmental Scientist (Supervisory)  
Santa Ana Regional Water Quality Control Board  
December 27, 2022  
Page 2 of 10

CDFW also administers the Natural Community Conservation Planning (NCCP) program. The Project is within the plan area for the Orange County Central and Coastal Subregion NCCP/Habitat Conservation Plan (HCP). The California Regional Water Quality Control Board (RWQCB) is not signatory to the Orange County Central/Coastal NCCP/HCP.

## **PROJECT DESCRIPTION SUMMARY**

**Proponent:** California Regional Water Quality Control Board, Santa Ana Region 8 (RWQCB; Lead Agency); OC Reclamation, LLC (Applicant)

**Objective:** OC Reclamation, LLC, proposes to fill an abandoned open pit mine with inert material and grade the site to an elevation equal with the adjacent parcels. The purpose of this is to address the current hazard to adjacent parcels due to erosion. No further development of the approximately 14-acre Project site is proposed at this time.

The proposed Project will occur in two phases over approximately 4.5 years. During the first phase, the applicant will clear and grade the property. A steep, unvegetated slope currently descends to the bank of Santiago Creek. This slope will be relocated from its current location, and an elevated bench with shallow ponds would be created to allow for a wider riparian and wetland habitat adjacent to Santiago Creek. The clearing and grading effort will last approximately two months. Habitat restoration and creation along Santiago Creek will begin following the grading of the Project site. Non-native plants will be removed from Santiago Creek and throughout the Project. The second phase of the Project will include depositing inert fill material into the pit over a 4.5-year period.

**Location:** The Project site is located in the City of Orange, northwest of the intersection of East Santiago Canyon Road and Cannon Street. Santiago Creek borders the Project site to the north. Commercial and residential development is located further to the north of the creek, and to the south and west of the Project. Disturbed open space is to the west of the Project, and east past Cannon Street.

**Biological Setting:** The Project site operated as an open sand and gravel mine for several decades, stopping in the 1960s. The site was most recently cleared of vegetation in 2008, and native vegetation has regrown. Santiago Creek connects open space to the east (Santa Ana Mountains) with open space downstream to the west (Santiago Creek Recharge Basin) then merges with the Santa Ana River which empties into the Pacific Ocean. The disturbed open space to the east of the Project site connects to a portion of the Orange County Central and Coastal Reserve.

A Biological Resources Assessment (BRA) was performed for the Project, formerly referred to as "Chandler's Orange Mine" in 2016. The BRA identifies the following vegetation communities on site: two acres disturbed black willow thickets, one-acre disturbed California sagebrush, one acre eucalyptus woodland, nine acres disturbed (pit slopes and graded access roads), and one acre developed. The Project proposes 5.89 acres of on-and off-site mitigation for the loss of riparian habitat and 1.77 acres of mitigation for the loss of coastal sage scrub (CSS).

Sensitive plants with potential to occur on site include southern tarplant (*Centromadia parryi* ssp. *australis*; California Native Plant Society Rare Plant Rank 1B.1). This species was not observed during focused surveys. However, these surveys were conducted over six years ago.

Claudia Tenorio, Senior Environmental Scientist (Supervisory)  
Santa Ana Regional Water Quality Control Board  
December 27, 2022  
Page 3 of 10

Special-status wildlife confirmed to occur on site include least Bell's vireo (*Vireo bellii pusillus*; Federal Endangered Species Act (ESA)-listed endangered, California Endangered Species Act (CESA)-listed endangered), coastal California gnatcatcher (*Polioptila californica californica*; ESA-listed threatened, California Species of Special Concern). Orange-throated whiptail (*Aspidoscelis hyperythra*; Watch List) has potential to occur on site.

## COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the Applicant in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources

### COMMENT #1: Prior Coordination

Thank you for your previous coordination with CDFW regarding the Project. Prior coordination efforts are summarized below.

**Least Bell's vireo and riparian habitat:** The U.S. Fish and Wildlife Service (USFWS) issued an Incidental Take Permit (ITP) in 2019, following the Applicant's submission of a Habitat Management Plan to address impacts to least Bell's vireo. The ITP states that, to offset permanent impacts to 2.00 acres of occupied riparian habitat, the applicant will fund the creation of 1.48 acres of riparian vegetation on site, enhancement of 1.88 acres on site, and enhancement of 2.53 acres off site. The ITP states that all restored habitat will be conserved and managed in perpetuity. The ITP contains additional conditions, including that clearing and grubbing of riparian vegetation will take place outside vireo nesting season (March 15 through September 15; Page 270). CDFW communicated through email to the applicant in 2019 that a state-issued ITP under CESA is not warranted, provided riparian vegetation is only cleared outside vireo nesting season.

**Coastal sage scrub:** CDFW and USFWS approved an in-lieu mitigation fee as mitigation for 1.77 acres of impact to coastal sage scrub, which the applicant paid on January 7, 2019. Pursuant to the Central/Coastal NCCP/HCP Implementation Agreement, payment of this fee satisfies mitigation requirements associated with the specified amount of coastal sage scrub. In addition to the payment of the fee, the Implementation Agreement requires construction and mitigation measures, including avoidance of occupied CSS during the gnatcatcher breeding season (February 15 to July 15).

**Streambed Alteration (LSA) Notifications:** Notifications per Fish and Game Code section 1600 et seq. were submitted in 2016 and, after further coordination meetings, in 2018. On November 18, 2016, and October 26, 2018, CDFW notified the applicant that the Project will not substantially adversely affect an existing fish or wildlife resource within a lake or stream. It was determined that the Project will not need a Streambed Alteration Agreement.

### COMMENT #2: Least Bell's Vireo and Riparian Habitat

**Issue:** The MND does not describe mitigation for impacts to least Bell's vireo and riparian habitat in sufficient detail, and CDFW is not included in future reviews of mitigation and restoration plans.

Claudia Tenorio, Senior Environmental Scientist (Supervisory)  
Santa Ana Regional Water Quality Control Board  
December 27, 2022  
Page 4 of 10

**Specific impact:** Least Bell's vireo is listed as an endangered species under CESA, and riparian habitats are essential for this species. Without sufficient details on mitigation plans, CDFW cannot determine whether planned compensatory mitigation and/or avoidance brings impacts of the Project on least Bell's vireo and two acres of riparian habitat to below significant. MM BIO-1 states that a restoration plan that satisfies the requirements set forth in the Biological Opinion issued by USFWS in 2019 will be approved by USFWS prior to the issuance of a grading permit. However, no details on this restoration plan are provided in the MND. Furthermore, CDFW is not designated as an entity to review and approve restoration plans prior to their implementation.

**Why impact would occur:** CEQA Guidelines section 15126.4 states that mitigation cannot be deferred and must have a nexus to and be roughly proportional to the impacts. Without a comprehensive plan for compensatory mitigation available during the MND's public review period, CDFW cannot ascertain as to whether this mitigation is roughly proportional to the biological impacts it is intended to reduce.

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

#### **Mitigation Measure #2**

**To minimize significant impacts:** The MND shall include a detailed plan that addresses impacts to least Bell's vireo and two acres of riparian habitat. The MND shall include, at minimum:

- a. plans for riparian vegetation clearing to only take place outside the vireo nesting season (March 15 through September 15);
- b. plans for barriers such as fences to be installed with a set buffer zone from riparian vegetation;
- c. pre-construction vireo surveys conducted by a qualified biologist;
- d. details on how noise will be monitored and minimized in riparian areas;
- e. details on where and how compensatory mitigation for permanent impacts to two acres of occupied riparian habitat will be accomplished; and,
- f. details on in-perpetuity preservation and management of mitigation lands.

All plans for restoration shall be reviewed and approved by CDFW as well as the USFWS prior to implementation.

### **COMMENT #3: Mitigation for Coastal Sage Scrub Species**

**Issue:** The MND does not describe mitigation for impacts to CSS species, such as coastal California gnatcatcher, in sufficient detail.

**Specific impact:** The project will result in the loss of one acre of coastal sage scrub. To compensate, the Applicant paid an in-lieu mitigation fee in 2019. A condition of the Central/Coastal NCCP/HCP Implementation Agreement associated with this fee is the inclusion of construction and mitigation measures, such as avoidance of occupied CSS during the gnatcatcher breeding season. However, the MND does not discuss any of these mitigation measures.

Claudia Tenorio, Senior Environmental Scientist (Supervisory)  
Santa Ana Regional Water Quality Control Board  
December 27, 2022  
Page 5 of 10

**Why impact would occur:** Without a comprehensive plan for mitigation and/or avoidance available during the MND's public review period, CDFW cannot determine whether impacts to species within CSS are adequately minimized.

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

**Mitigation Measure #3**

**To minimize significant impacts:** The MND shall include a detailed plan to minimize Project-related impacts to CSS. The MND should include, at minimum:

- a. plans for CSS vegetation clearing to only take place outside the gnatcatcher nesting season (February 15 through July 15);
- b. plans for a qualified biologist to be on site during any clearing or disturbance of CSS to ensure wildlife is not directly impacted; and,
- c. details on barriers such as fences to be installed with a set buffer zone from CSS during nesting season.

**COMMENT #4: Impacts to Nesting Birds**

**Issue:** The MND may not adequately address impacts to nesting birds.

**Specific impact:** The BRA states that impacts to potential avian nesting habitat should be avoided during nesting season, and that if this is not feasible, pre-construction surveys should be conducted. However, there is no mitigation measure included in the MND to avoid nesting birds other than least Bell's vireo.

**Why impact would occur:** Per the BRA, suitable habitat for raptors and other bird species is located within the Project site. In addition to direct removal of habitat, construction noise, vibration, dust, or human disturbance could result in temporary or long-term disturbance of nesting birds on the Project site.

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

**Mitigation Measure #4**

**To minimize significant impacts:** We recommend adding the following mitigation measure to the MND:

*"If construction initiation occurs between January 15 and September 15, a preconstruction nesting bird and raptor survey of the project impact area shall be completed by a qualified biologist prior to vegetation removal. The pre-construction survey shall be conducted within three days prior to the start of construction activities (including removal of vegetation). If any active nests are detected, the area will be flagged and mapped along with a buffer as recommended by the qualified biologist. The buffer area(s) established by the qualified biologist will be avoided until the nesting cycle is complete or it is determined that the nest is no longer active. The qualified biologist shall be a person familiar with bird breeding behavior and capable of identifying the bird species of Orange County by sight and sound*

Claudia Tenorio, Senior Environmental Scientist (Supervisory)  
Santa Ana Regional Water Quality Control Board  
December 27, 2022  
Page 6 of 10

*and determining alterations of behavior as a result of human interaction. Buffers will be based on species-appropriate buffers and/or local topography and line of sight, species behavior and tolerance to disturbance, and existing disturbance levels, as determined appropriate by the qualified biologist. Typically, this is a minimum of 100-300 feet from the nest site in all directions, species dependent, and up to 500 feet for raptors.”*

#### **COMMENT #5: Impacts to Sensitive Plants**

**Issue:** The MND may not adequately address impacts to sensitive plant species, such as southern tarplant.

**Specific impact:** Focused plant surveys conducted in 2016 did not find any sensitive plant species. However, per the BRA, the Project site does have potential to support southern tarplant, and this survey is now over six years old.

**Why impact would occur:** In the absence of updated surveys, CDFW cannot determine whether sensitive species such as southern tarplant occur on site. Vegetation removal and grading may result in the loss of sensitive plant species.

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

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

**To minimize significant impacts:** The MND shall include updated, focused rare plant surveys conducted on the Project site. The surveys shall be conducted at a seasonally appropriate time of year by a qualified biologist with knowledge of rare plants in the area.

#### **COMMENT #6: Wildlife Pre-Construction Surveys**

**Issue:** Potential impacts to wildlife species may not be adequately minimized.

**Specific impact:** Due to an absence of wildlife pre-construction surveys, direct impacts to wildlife species such as small mammals and reptiles could result from vegetation clearing, grading, and construction.

**Why impact would occur:** Wildlife species may be crushed by construction equipment or buried during the process of filling the pit mine.

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

##### **Mitigation Measure #6**

**To minimize significant impacts:** A wildlife pre-construction survey should be conducted on the day that construction activities, including vegetation removal, occur within the Project site. Construction personnel should conduct inspections of trenches and holes for entrapped wildlife at the beginning and end of the day. If sensitive wildlife species are observed during the pre-construction survey, a qualified biologist shall require additional measures to reduce potential impacts, such as establishing an appropriate buffer or coordinating with CDFW and USFWS.

Claudia Tenorio, Senior Environmental Scientist (Supervisory)  
Santa Ana Regional Water Quality Control Board  
December 27, 2022  
Page 7 of 10

Speed limits should also be established for vehicles on site to lessen the chance of crushing wildlife.

## 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). 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).

## 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 to assist the RWQCB in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Brigid Moran at [Brigid.Moran@wildlife.ca.gov](mailto:Brigid.Moran@wildlife.ca.gov).

Sincerely,

DocuSigned by:

*Jennifer Turner*

C3D449ECB7C14DE...

Jennifer Turner, signing for

David A. Mayer  
Environmental Program Manager  
South Coast Region

ec: CDFW

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Claudia Tenorio, Senior Environmental Scientist (Supervisory)  
Santa Ana Regional Water Quality Control Board  
December 27, 2022  
Page 8 of 10

## **REFERENCES**

California Environmental Quality Act (CEQA). California Public Resources Code in section 21000 et seq. The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

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

Claudia Tenorio, Senior Environmental Scientist (Supervisory)  
 Santa Ana Regional Water Quality Control Board  
 December 27, 2022  
 Page 9 of 10

### ATTACHMENT A: Draft Mitigation Monitoring and Reporting Program (MMRP)

CDFW provides the following language to be incorporated into the MMRP for the Project.

Biological Resources (BIO)		
Mitigation Measure (MM) Description	Implementation Schedule	Responsible Party
<p><b>MM-2: Least Bell's Vireo and Riparian Habitat:</b> The MND shall include a detailed plan that addresses impacts to least Bell's vireo and two acres of riparian habitat. The MND shall include, at minimum:</p> <ul style="list-style-type: none"> <li>a. plans for riparian vegetation clearing to only take place outside the vireo nesting season (March 15 through September 15);</li> <li>b. plans for barriers such as fences to be installed with a set buffer zone from riparian vegetation;</li> <li>c. pre-construction vireo surveys conducted by a qualified biologist;</li> <li>d. details on how noise will be monitored and minimized in riparian areas;</li> <li>e. details on where and how compensatory mitigation for permanent impacts to two acres of occupied riparian habitat will be accomplished; and,</li> <li>f. details on in-perpetuity preservation and management of mitigation lands.</li> </ul> <p>All plans for restoration shall be reviewed and approved by CDFW as well as the USFWS prior to implementation.</p>	Prior to Project activities	RWQCB
<p><b>MM-3: Mitigation for Coastal Sage Scrub Species:</b> The MND shall include a detailed plan to minimize Project-related impacts to CSS. The MND should include, at minimum:</p> <ul style="list-style-type: none"> <li>a. plans for CSS vegetation clearing to only take place outside the gnatcatcher nesting season (February 15 through July 15);</li> <li>b. plans for a qualified biologist to be on site during any clearing or disturbance of CSS to ensure wildlife is not directly impacted; and</li> <li>c. details on barriers such as fences to be installed with a set buffer zone from CSS during nesting season.</li> </ul>	Prior to Project activities	RWQCB
<p><b>MM-4: Impacts to Nesting Birds:</b> If construction initiation occurs between January 15 and September 15, a preconstruction nesting bird and raptor survey of the project impact area shall be completed by a qualified biologist prior to vegetation removal. The pre-construction survey shall be conducted within three days prior to the start of construction activities (including removal of vegetation). If any active nests are detected, the area will be flagged and mapped along with a buffer as recommended by the qualified biologist. The buffer area(s) established by the qualified biologist will be avoided until the nesting cycle is complete or it is determined that the nest is no longer active. The qualified</p>	During Project activities	RWQCB

Claudia Tenorio, Senior Environmental Scientist (Supervisory)  
 Santa Ana Regional Water Quality Control Board  
 December 27, 2022  
 Page 10 of 10

<p>biologist shall be a person familiar with bird breeding behavior and capable of identifying the bird species of San Diego County by sight and sound and determining alterations of behavior as a result of human interaction. Buffers will be based on species-appropriate buffers and/or local topography and line of sight, species behavior and tolerance to disturbance, and existing disturbance levels, as determined appropriate by the qualified biologist. Typically, this is a minimum of 100-300 feet from the nest site in all directions, species dependent, and up to 500 feet for raptors.</p>		
<p><b>MM-5: Impacts to Sensitive Plants:</b> The MND shall include updated, focused rare plant surveys conducted on the Project site. The surveys shall be conducted at a seasonally appropriate time of year by a qualified biologist with knowledge of rare plants in the area.</p>	<p>Prior to Project activities</p>	<p>RWQCB</p>
<p><b>MM-6: Wildlife Pre-Construction Surveys:</b> A wildlife pre-construction survey shall be conducted on the day that construction activities, including vegetation removal, occur within the Project site. Construction personnel shall conduct inspections of trenches and holes for entrapped wildlife at the beginning and end of the day. If sensitive wildlife species are observed during the pre-construction survey, a qualified biologist shall require additional measures to reduce potential impacts, such as establishing an appropriate buffer or coordinating with CDFW and USFWS. Speed limits shall also be established for vehicles on site to lessen the chance of crushing wildlife.</p>	<p>Prior to and during Project activities</p>	<p>RWQCB</p>