



# United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Ventura Fish and Wildlife Office  
2493 Portola Road, Suite B  
Ventura, California 93003



IN REPLY REFER TO:  
2009-FA-0048

January 29, 2009

RECEIVED

FEB - 2 2009

COUNTY OF SAN LUIS OBISPO  
DEPARTMENT OF PUBLIC WORKS

Mark Hutchinson  
Environmental Programs Manager  
San Luis Obispo County Department of Public Works  
County Government Center, Room 207  
San Luis Obispo, California 93408

Subject: Comments on the Draft Environmental Impact Report, County of San Luis Obispo, Los Osos Wastewater Project, SCH No. 2007121034

Dear Mr. Hutchinson:

This letter conveys the U.S. Fish and Wildlife Service's (Service) comments on the draft environmental impact report (DEIR) prepared for the proposed Los Osos Wastewater Project (LOWWP; MBA 2008). The DEIR, without appendices, was received in the Ventura Fish and Wildlife Office on December 4, 2008.

The Service's responsibilities include administering the Endangered Species Act of 1973, as amended (Act), including sections 7, 9, and 10. Section 9 of the Act prohibits the taking of any federally listed endangered or threatened species. Section 3(18) of the Act defines "take" to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations (50 CFR 17.3) further define harm to include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. Harassment is defined by the Service as an intentional or negligent act or omission that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. The Act provides for civil and criminal penalties for the unlawful taking of listed species. Exemptions to the prohibitions against take may be obtained through coordination with the Service in two ways. If a project is to be funded, authorized, or carried out by a Federal agency and may affect a listed species, the Federal agency must consult with the Service, pursuant to section 7(a)(2) of the Act. If a proposed project does not involve a Federal agency but may result in take of a listed animal species, the project proponent should apply to the Service for an incidental take permit, pursuant to section 10(a)(1)(B) of the Act.

The LOWWP DEIR is intended to evaluate the potential environmental impacts associated with a wastewater collection, treatment, and disposal system for the community of Los Osos and includes an equal level of environmental analysis for four (4) preliminary project alternatives at a conceptual design level of construction. Facility operational impacts for each are also provided

to the degree that they are known. The preferred LOWWP alternative selected could be any one of the four alternatives or an alternative combination of project components. Current wastewater treatment for the community consists of individual septic systems serving each developed property, or in some cases multiple properties. The County of San Luis Obispo (County) is the lead agency for the preparation of this DEIR pursuant to the California Environmental Quality Act (CEQA).

The project is located within, and at the outskirts, of the community of Los Osos. Los Osos is an unincorporated coastal community of about 15,000 residents located in San Luis Obispo County at the south end of Morro Bay, approximately about 12 miles west of the City of San Luis Obispo. The City of Morro Bay lies about two miles to the north. The majority of Los Osos has been built on an ancient dune system formed by centuries of wind-blown beach sand deposited along the south end of Morro Bay. As a result, the terrain consists of gently rolling hills and sandy soil substrates that support twelve vegetation communities/habitat types: non-native annual grassland, coastal sage scrub, central (Lucian) coastal scrub, coast live oak woodland, central coast live oak riparian forest, central coast arroyo willow riparian woodland, vernal marsh, freshwater marsh, eucalyptus woodland, agriculture, disturbed/ruderal, and urban/disturbed.

Based primarily on an assessment of those habitat types present within the project area, the DEIR and Appendix G (Biological Resources) identifies the following federally listed species as occurring, or having the potential to occur: the endangered Morro shoulderband snail (*Helminthoglypta walkeriana*; MSS), Morro Bay kangaroo rat (*Dipodomys heermanni morroensis*; MBKR), Indian Knob mountainbalm (*Eriodictyon altissimum*); and the threatened south/central coast steelhead (*Onchorynchus mykiss irideus*: steelhead), California red-legged frog (*Rana aurora draytonii*; CRLF), Monterey spineflower (*Chorizanthe pungens*), and Morro manzanita (*Arctostaphylos morroensis*). As the steelhead falls under the jurisdiction of the National Marine Fisheries Service (NMFS), it will not be further addressed.

We offer the following comments to aid the County in planning for the conservation of sensitive wildlife habitats and federally listed species that could occur in the project area and as a means to assist you in complying with pertinent Federal statutes. The following comments are prepared in accordance with Act and other authorities mandating Department of the Interior concern for environmental values. It is not our primary responsibility to comment on documents prepared pursuant to CEQA, so our comments on the DEIR do not constitute a full review of project impacts. Rather, they focus on the accuracy of information, the analysis of project activities relative to their potential to affect listed species and critical habitat, and regulatory implications in accordance with our mandates under the Act. Some redundancy is apparent throughout the DEIR and Appendix G so if a comment references a particular section, it should be considered relevant to the same issue anywhere else in the DEIR that issue may be discussed.

## General Comments

1. Nowhere in the DEIR is the period of public review specifically defined. The only date provided is that for the close of the comment period: January 20, 2009. While it was announced that the DEIR was available on the County's website as of November 19, 2008, we do not consider this to be the commencement of our review period as we did not receive the DEIR until December 4, 2008, despite our request to be able to pick up a copy of the DEIR and Appendix G (Biological Resources) on November 21, 2009. We were told that this was not possible as the official letter necessary to accompany the documents had yet to be completed. When we received the DEIR on December 4, 2009, Appendix G was not included. As such, we had to assume the responsibility of printing out the 1,008-page document, inclusive of many over-sized color graphics. Given the complexity of the project, the size of the documents, and our role as a responsible agency under CEQA, we requested a two-week time extension for submittal of our comments on January 13, 2009. This request was denied on January 16, 2009.
2. The discussion of project impacts to biological (and other) resources through the analysis and evaluation of how each of the proposed alternative related to the six questions posed in the thresholds of significance was repetitive and difficult to navigate. It would have been much easier to understand and review had an analysis of effects been provided for each project alternative
3. While the DEIR mentions that a Federal nexus would be established by the disbursement of State Revolving Funds channeled to the County from U.S. Environmental Protection Agency (EPA) via the California State Water Board, it is our understanding that this has yet to be determined. Assuming that this would be the case, we have concerns that the all of the mitigation for impacts to federally-listed species and critical habitat are being deferred to some point in the future and that the Services would bear the majority of the responsibility as part of an interagency consultation process. During DEIR preparation, time would have been well-spent coordinating with the Services to identify avoidance and minimization measures as well as compensation to help offset impacts to listed species and critical habitat such that they could have been presented in the document and available for public review.
4. Mitigation measure 5.5-A1 states that prior to project approval, the County shall enter into formal consultation with the Service and NMFS (Services); however, the Services would consult with the Federal action agency who, in this case, may be the EPA and not the County. The measure goes on to state that "Pending the derminations made by the USFWS and NMFS in a forthcoming BO, the proposed project will be required to fulfill all mitigation obligations and conservation measures conditions in the BO regarding federally-listed species and their habitat." What is intended by this statement is not clear.
5. No matter the project alternative selected, raw wastewater collection and treated effluent conveyance pipelines would cross Los Osos and Warden Creeks and associated, adjacent

wetlands. Information in the DEIR indicates that these will likely require U.S. Army Corps of Engineers (Corps) permits. Adverse effects and take of listed species would require Corps consultation with the Services as part of their permit process; however, it is unlikely that the Services would engage in two interagency consultations for the same project. The EPA and Corps would have to determine between them which agency has the lead for any consultation based upon the level of discretionary authority each has in the project.

6. It should be noted that mitigation measures from the final EIR for the Los Osos Community Services District Wastewater Facilities Project (SCH# 9911103 certified March 1, 2001) and the Coastal Development Permit (A-3-SLO-03-113) were incorporated into the project description for biological opinion 1-8-04-F-48; however, some of these conditions remain unfulfilled. Two are of particular relevance: the 72 acres of the Broderon property not proposed for use as leach fields were never granted to an appropriate agency or conservation organization in perpetuity with deed guarantees of non-development or transfer and the \$10,000 per year that was to be allocated for the long-term management and monitoring of the Broderon parcel has yet to be set aside. Both the Final EIR and the CDP contain specific conditions to this effect. These conditions should be fulfilled prior to the approval of the current project.
7. The DEIR appears to conclude that the 72 acres of land not needed for leach fields at Broderon are still available to provide mitigation opportunities to compensate for biological impacts associated with this currently proposed project. We disagree. These lands at Broderon constitute the mitigation required for take of MSS, as well as impacts to other state-listed and special status species and their habitats, that resulted from the clearing and grading of the Mid-Town site, clearing and use of staging and collection areas, and installation of pipelines that occurred in 2005 as part of the former project. Mitigation lands cannot be used to compensate for the impacts of multiple projects.
8. The discussion of the draft Los Osos Habitat Conservation Plan (LOHCP) in section 3.5.2 of Appendix G-2 should clearly state that this document was an internal agency review draft and not circulated for public review and comment. The draft was prepared by Crawford, Multari & Clark on behalf of the Los Osos Community Services District. The County was not a participant in this process. The draft was reviewed by both the California Department of Fish and Game (CDFG) and the Service. Our comments, provided on November 29, 2005, have yet to be addressed and a number of significant issues remain outstanding. Any reference to compatibility or consistency of the proposed project with the LOHCP, or conclusionary statements regarding adequacy of mitigation or any other thing, should be removed. It should also be noted that this draft plan was not prepared pursuant to the Natural Community Conservation Planning Act.
9. The discussion regarding wildlife agency consultation provided in section 4.1 of Appendix G-2 appears confused about how take/exemption of listed species would be authorized or exempted pursuant to the Act. The project does not enter into formal

consultation with the Services as this is the responsibility of the Federal action agency. Consultation is that specific process associated with section 7 of the Act and does not apply to section 10. It should be noted that there is no take prohibition for habitat, only species. Again, the discussion of what type and extent of mitigation/compensation would be assigned to the project is deferred to a later date and made the responsibility of the Services absent any prior coordination or initiation of informal consultation. In a number of locations throughout the documents, take of plant species is mentioned. Please note that while the Act and its implementing regulations prohibit the take of listed animal species, neither prohibits take of listed plant species unless removal constitutes a knowing violation of state law. Similarly, neither the Act nor its implementing regulations address take of habitat.

10. Pre-construction surveys do not constitute mitigation. Species-specific surveys should be conducted such that the information can be provided for review in the DEIR and relevant appendices.

### Species-Specific Comments

The background information for each of the federally-listed species discussed in the DEIR (except the CRLF) needs to be expanded to include greater detail regarding the status of the species and its current distribution within the region and project area. The following species-specific comments represent those compiled after our review of the information contained in Appendix G and carried forward into the DEIR.

1. Morro Shoulderband Snail: Information in Section 5.5-4 and Table 5.5-2 should provide a more comprehensive picture regarding the presence of this species within the project area. Morro shoulderband snails are not restricted to coastal sage or coastal dune scrub habitat, having been discovered persisting in disturbed habitat and horticultural plantings. Both the Mid-Town and Broderson sites are currently occupied by MSS and, in 2005, the species (along with Chorro shoulderband snail; *Helminthoglypta morroensis*) was identified along Warden Creek near several of the proposed project alternative locations. As such, its potential for the occurrence of MSS in these areas should be included in the DEIR. It is also premature to assume that all MSS identified within the project area would be subject to relocation as the number of individuals is unknown but could be much higher than that associated with the previous project.
2. Morro Bay Kangaroo Rat: The discussion regarding the potential presence of this critically endangered species within the project area is extremely brief and does not appear to consider the extremely imperiled nature of its status. It is possible that the Service would not be able to exempt or authorize any take of MBKR as it could trigger a jeopardy determination. Rather, we would recommend that the County work with us to develop a project that would avoid all effects on this species.

Table 5.5-2 concludes that the MBKR has a high potential to occur, noting that suitable habitat occurs on both the Broderson property and Mid-Town site. Text in section 5.5 of Appendix G-1 states that the species “has a high potential to occur within the coastal sage scrub habitat on the Broderson property.” While it is stated that no MBKR have been trapped since 1985, it does not include the caveat that there have been few, if any, protocol-level survey efforts since that time. Nowhere does the DEIR or Appendix G discuss that lands on, or surrounding, the Tonini and Branin parcels contain habitat that could be occupied by MBKR. Rather, on page 5.5-15 of the DEIR, it states that MBKR “is not likely to occur within any portions of the impact areas for all Proposed Projects 1 through 4.” We disagree. Based on the existence of a historic record for MBKR for lands on or contiguous with Tonini, and the presence of habitat characteristics (ranging from high to fair quality) suitable for kangaroo rats, these areas (e.g., Tonini, Branin, Lee) have been targeted in 2008 by Dr. Francis Villablanca and the Service for spot-trapping. These efforts began in 2008 and are anticipated to continue in 2009 pending the availability of funding. To propose that, prior to construction, protocol trapping for this species would be done and all trapped specimens retained for consideration of captive breeding does not consider how significant would be the discovery of MBKR. Protocol-level trapping for MBKR is a two-year process that requires prior approval by the Service and the CDFG. It does not appear that such an effort would likely to fit with the project’s projected construction timeline. More importantly, there are no facilities currently established to conduct captive breeding activities for this species and the last time this was attempted, the program was not successful. To determine the fate of any trapped individuals would require us to convene the recovery team (inclusive of CDFG) to discuss all available options.

3. California Red-Legged Frog: The Biological Resources section of the DEIR states that the project site is not within critical habitat designated for the California red-legged frog in 2006; however, it should be noted that while the critical habitat units designated in 2006 are still valid, critical habitat was re-proposed on September 16, 2008. Any discussion of critical habitat should include the relationship of the project site to newly proposed units as well. Several of the creeks and drainages within the project area support California red-legged frogs, and it is reasonable to expect that individual California red-legged frogs make overland excursions between the drainages in this region. Under such circumstances, it is likely that California red-legged frogs disperse through the proposed project area when they move overland between aquatic habitats. Accessibility to sheltering habitat is essential for the survival of California red-legged frogs within a watershed, and can be a factor limiting population numbers and distribution. Most of these overland movements occur at night. These behaviors need to be considered when assessing the project’s potential to impact this species. It is unclear how night lighting that could be associated with the project would affect CRLF and other nocturnal species.
4. Southwestern Willow Flycatcher and Least Bell’s vireo: Appendix G includes a discussion of southwestern willow flycatcher (*Empidonax traillii extimus*) (“moderate

potential to occur”); however does not discuss the potential for least Bell’s vireo (*Vireo bellii pusillus*), another riparian obligate species. This species has been expanding its range in recent years owing to the success of riparian restoration efforts and control of brown-headed cowbirds. As such, the potential for least Bell’s vireo to occur within riparian habitat within the proposed project area should be included. While the listed entity of willow flycatcher is not federally regulated north of Santa Barbara County, any detection of nesting willow flycatchers in this area would be noteworthy.

5. Indian Knob Mountainbalm: Text in Appendix G states that Indian knob mountainbalm is restricted to lands within and around the community of Los Osos; however, this is not the case. The largest stands of this species occur on tarsands in the vicinity of Indian Knob and Price/Baron Canyons south of the City of San Luis Obispo. This species is actually quite rare in the Los Osos area, being known from only five occurrences that likely total less than 100 individuals. In other sections of the document, it states that Indian knob mountainbalm is found as part of coastal sage scrub habitat; however, it is a species wholly associated with chaparral. As this species is a perennial shrub detectable year-round, surveys for this species should have been conducted at the Broderson property such that the question of its presence or absence could have been included in the DEIR.
6. Morro Manzanita: This species of manzanita does not have a burl and, as such, is not a likely candidate for salvage and transplant as part of any mitigation strategy.
7. Table 5.5-I states that the potential for the endangered marsh sandwort (*Arenaria paludicola*) to occur in the proposed project is low and that project alternatives avoid suitable habitat on the Branin property. It is likely that suitable habitat is present elsewhere within the proposed project area. The potential for the endangered Gambel’s watercress (*Rorippa gambelii*) to occur within the proposed project area was not addressed at all, despite the presence of suitable habitat. We recommend that the County review its determination for marsh sandwort and address the potential for impacts to Gambel’s watercress.

In summary, the DEIR and Appendix G do not, for the most part, provide a sufficient level of detail regarding the actual presence of federally listed species within each of the proposed project alternatives. The collection of this level of information is largely deferred pre-construction surveys that preclude the use of such information in the design and implementation of a project that can avoid or minimize impacts to federally-listed species and critical habitat. As such, it is impossible to determine true effect of any alternative on these species. The DEIR defers mitigation and assigns the majority of the responsibility for its development and implementation to the Services. It appears that the County believes that the next step in the process is to initiate formal consultation with the Services; however, we have not been involved in this current project process until now and were not contacted for our input during the preparation of the DEIR. Initiation of formal consultation is the responsibility of the Federal action agency; however, we caution the County not to consider that the DEIR contains sufficient information to provide the

basis for the biological assessment or to initiate formal consultation. Rather, we would encourage the County to work with the Federal action agency to request informal consultation with the Services such that we can provide technical assistance to help in the development of a project alternative that could, to the extent possible, maximize take avoidance and minimize impacts to listed species and critical habitat.

We appreciate the opportunity to provide comments on the proposed project and look forward to working with the County in the future. If you have any questions regarding these comments, please contact Julie M. Vanderwier of my staff at (805) 644-1766, extension 222.

Sincerely,

A handwritten signature in black ink, appearing to read "Roger P. Root". The signature is fluid and cursive, with a large initial "R" and "P".

for Roger P. Root  
Assistant Field Supervisor

cc:

Deborah Hillyard, California Department of Fish and Game  
Bob Stafford, California Department of Fish and Game  
Jonathan Bishop, California Coastal Commission  
Juanita Licata, U.S. Environmental Protection Agency  
Cookie Hirn, California State Water Board  
Greg Haas, District Representative for Congresswoman Lois Capps