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July 30, 2012

Scott Hatton, WRCE
Central Valley Regional Water Quality Control Board
1685 E Street
Fresno, California 93706

**Subject: initial Study/Mitigated Negative Declaration
Adoption of Waste Discharge Requirements Order for
POM Wonderful, LLC (Project)
Fresno County
SCH No. 2012061095**

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RWQCB-CVR
FRESNO, CALIF.

Dear Mr. Hatton:

The California Department of Fish and Game (Department) has reviewed the Initial Study (IS) prepared by the Central Valley Regional Water Quality Control Board (CVRWQCB) for the Project referenced above. Based on the IS findings, the CVRWQCB will consider adoption of a Mitigated Negative Declaration (MND) for the Project in a public hearing in early October 2012. As the Department understands the Project, POM Wonderful, LLC (POM) plans to increase their fruit processing capacity at their existing facility near the community of Del Rey in Fresno County. To support increased production, POM plans to: construct a new processing building within the existing facility footprint; expand the capacity of the process wastewater management system by constructing two additional process wastewater lagoons; and increase the landbase available for wastewater application.

In the IS/MND, CVRWQCB staff indicates that the Project would result in **no impacts** to biological resources in the area. However, the Department has identified areas where biological resources could potentially be impacted by the Project. Specifically, the Department is concerned with the potential Project-related impacts to the State-listed threatened Swainson's hawk (*Buteo swainsoni*), and other birds which may utilize the large on-site eucalyptus trees for nesting and roosting. These trees exist on-site within ½ mile of the where the new processing structure will be built and, although not detailed in the Project description presented in the IS, CVRWQCB staff indicated in an e-mail that POM plans to remove these trees. The Department recommends that bird surveys be conducted at the site by a qualified wildlife biologist during the appropriate timing to assess whether birds are utilizing the on-site eucalyptus trees and would therefore be impacted by removal of the trees, or by the nearby construction activities. The survey

results can then be used to identify any mitigation, minimization, and avoidance measures that should be included in the final California Environmental Quality Act (CEQA) document, and to inform any permitting needs. These identified measures should be made enforceable by inclusion in the final MND and made conditions of Project approval. Our specific comments follow.

Department Jurisdiction

Trustee Agency Authority: The Department is a Trustee Agency with responsibility under CEQA for commenting on projects that could impact plant and wildlife resources. Pursuant to Fish and Game Code Section 1802, the Department has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of those species. As a Trustee Agency for fish and wildlife resources, the Department is responsible for providing, as available, biological expertise to review and comment upon environmental documents and impacts arising from project activities, as those terms are used under CEQA (Division 13 [commencing with Section 21000] of the Public Resources Code).

Responsible Agency Authority: The Department also has regulatory authority over projects that could result in the "take" of any species listed by the State as threatened or endangered, pursuant to Fish and Game Code Section 2081. If the Project could result in the "take" of any species listed as threatened or endangered under the California Endangered Species Act (CESA), the Department may need to issue an Incidental Take Permit (ITP) for the Project. CEQA requires a Mandatory Finding of Significance if a project is likely to substantially impact threatened or endangered species (sections 21001{c}, 21083, Guidelines sections 15380, 15064, 15065). Impacts must be avoided or mitigated to less than significant levels unless the CEQA Lead Agency makes and supports Statement of Overriding Consideration (SOC). The CEQA Lead Agency's SOC does not eliminate the Project proponent's obligation to comply with Fish and Game Code Section 2080. The Project has the potential to reduce the number or restrict the range of endangered, rare, or threatened species (as defined in Section 15380 of CEQA).

Bird Protection: The Department has jurisdiction over actions which may result in the disturbance or destruction of active nest sites or the unauthorized "take" of birds. Sections of the Fish and Game Code that protect birds, their eggs and nests include Sections 3503 (regarding unlawful "take," possession or needless destruction of the nest or eggs of any bird), 3503.5 (regarding the "take," possession or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful "take" of any migratory non-game bird). The environmental document for the Project should include

a discussion of how the Project related activities (tree removal, construction, etc.) would avoid impacts to birds, their eggs, and their nests at and near the site.

Potential Project Impacts and Recommendations

Other Nesting Bird Species: Raptors and other species of nesting birds have the potential to exist on the Project site. Project activities including disturbances near, or the removal of, trees being utilized by nesting birds, should take place outside of the breeding bird season which generally runs from February 15 to August 31 to avoid "take" (including disturbances which would cause abandonment of active nests containing eggs and/or young). "Take" means to hunt, pursue, catch, capture, or kill, or to attempt to hunt, pursue, catch, capture, or kill (Fish and Game Code, Section 86).

If the Project activities cannot feasibly avoid the breeding bird season, the Department recommends that beginning no more than 15 days prior to construction or tree removal, bird surveys should be conducted to detect any protected native birds utilizing the trees. The surveys should be conducted by a qualified wildlife biologist with experience in conducting breeding bird surveys. A no-disturbance buffer should be clearly delineated on the ground around active bird nests. The Department recommends buffers of at least ½ mile around active nests of listed species, 500 feet around active nests of non-listed raptors and migratory bird species, and 250 feet around active nests of other bird species until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or parental care for survival.

Swainson's Hawk (SWHA): One of the raptors which are known to nest and forage in the area is the State-listed threatened SWHA. If ground-disturbing or construction activities are to occur in association with the Project during the breeding season (February 1 through September 15), the Department recommends that a qualified wildlife biologist conduct surveys for nesting SWHA following the survey method developed by the Swainson's Hawk Technical Advisory Committee (SWHA TAC, 2000) prior to commencing Project-related activities. Additional pre-construction surveys for active nests should be conducted by a qualified biologist no more than 10 days prior to the start of construction and during the appropriate timing to maximize detectability. Should an active nest be found, a minimum no-disturbance buffer of ½ mile should be observed until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or parental care for survival.

The Department considers removal of known raptor nest trees, even outside of the nesting season, to be a significant impact under CEQA, and in the case of SWHA could

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also result in "take" under CESA. This is especially true with species such as SWHA that exhibit high site fidelity to their nest and nest trees year after year. Impacts to known nest trees should be avoided at all times of year. If avoidance of a known nest tree is not feasible, the acquisition of an ITP pursuant to Section 2081(b) of the Fish and Game Code may be warranted and consultation with the Department should occur well in advance of ground-disturbing activities.

Regardless of nesting status, trees that must be removed should be replaced with an appropriate native tree species planting at a ratio of 3:1 that will be protected in perpetuity. This mitigation is needed to offset impacts to the loss of potential nesting habitat as nest trees are an extremely limited resource in the western central portion of the southern San Joaquin Valley. Funding of a sufficient long-term endowment for the management of the protected properties should be paid by the Project sponsors. In addition to fee title acquisition of SWHA nesting habitat, mitigation could occur by the purchase of conservation or suitable easements. The Department recommends that lands protected as nesting habitat for SWHA are located no more than 10 miles from suitable foraging habitat in order to be beneficial to the species. Mitigation measures for SWHA should be fully addressed in the CEQA document.

We recommend that a thorough analysis be conducted of the potential Project-related impacts to birds which may utilize the on-site eucalyptus trees. This is necessary to ensure the CEQA document prepared for the Project will adequately address all impacts to biological resources, and include the appropriate avoidance, minimization, and mitigation measures to reduce those impacts to less than significant. Additionally, we recommend that the Project-related documents be circulated through the State Clearinghouse.

We appreciate the opportunity to provide guidance on this Project. If you have any questions on these issues, please contact Steven Hulbert, Environmental Scientist, at the address provided on this letterhead or by telephone at (559) 243-4014, extension 289.

Sincerely,


Jeffrey R. Single, Ph.D.
Regional Manager

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Literature Cited

SWHA TAC, 2000. Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley. Swainson's Hawk Technical Advisory Committee, May 31, 2000