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July 10, 2024

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**Subject: Yosemite Avenue-Gardner Avenue to Hatch Road Annexation and Mixed-Use Project (Project)
Notice of Preparation (NOP) for a Partially Recirculated Draft Environmental Impact Report (DEIR)
SCH: 2016121029**

Dear Francisco Mendoza:

The California Department of Fish and Wildlife (CDFW) received a Notice of Preparation (NOP) for a Partially Recirculated Draft Environmental Impact Report (DEIR) from the City of Merced for the Yosemite Avenue-Gardner Avenue to Hatch Road Annexation and Mixed-Use Project (Project) pursuant to 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, 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, sections 711.7, subd. (a) & 1802; Pub. Resources Code, section 21070; CEQA Guidelines section 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.*, section 1802).

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.

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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, section 21069; CEQA Guidelines, section 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, section 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, section 2050 et seq.), the Project proponent may seek related take authorization as provided by the Fish and Game Code.

Nesting Birds

CDFW has jurisdiction over actions with potential to result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections 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 nongame bird).

Unlisted Species: Species of plants and animals need not be officially listed as Endangered, Rare, or Threatened (E, R, or T) on any State or Federal list to be considered E, R, or T under CEQA. If a species can be shown to meet the criteria for E, R, or T, as specified in the CEQA Guidelines section 15380, CDFW recommends it be fully considered in the environmental analysis for the Project.

PROJECT DESCRIPTION SUMMARY

Proponent: The Heritage Group

Objective: The Project proposes a 70-acre site including 30 acres for multi-family housing and commercial retail use and no development planned for the remaining 40 acres.

Location: The Project is located in Merced County on the north side of East Yosemite Avenue between Gardner Avenue and Hatch Road. The Assessor's Parcel Numbers associated with the Project site are 060-570-009, -010, -011, -012, -013, -014, -056, -058, -059, -097, -098.

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Timeframe: N/A

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist City of Merced in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources. Editorial comments or other suggestions may also be included to improve the CEQA document prepared for this Project. This NOP states that the current DEIR will mostly be a recirculated version of the September 2021 report with necessary updated revisions and additions. As for Biological Resources, "This update found that implementation of the currently proposed project would not result in any new or more severe impacts to biological resources than were identified in the 2021 Draft EIR." Therefore, the comments provided will be recommendations on the 2021 DEIR, specifically Table ES-1 Summary of Impacts and Mitigation Measures, and when noted the 2024 NOP.

Aerial imagery of the Project site shows it bordered by residential infrastructure to the west and south, agricultural lands to the north and southeast, and rural residences to the east and northeast. A review of the California Natural Diversity Database (CDFW 2024) shows the Project site, and its surroundings, are within suitable habitat of the following special-status species: the State threatened Swainson's hawk (*Buteo swainsoni*; SWHA), the State candidate endangered Crotch's bumble bee (*Bombus crotchii*; CBB), the State and federally threatened California tiger salamander (*Ambystoma californiense*; CTS), and the State species of special concern burrowing owl (*Athene cunicularia*; BUOW). CDFW also has concerns with potential impacts to migratory and non-migratory nesting birds.

In order to adequately assess potential impacts to biological resources, CDFW recommends a qualified biologist perform a database search and other research of the Project site and vicinity, then conduct focused habitat assessments and/or focused biological surveys during the appropriate survey period(s) in order to determine whether any special-status species may be present within the Project site. This information and analysis may then be used to inform the need for additional protocol surveys, assist with the development of avoidance, minimization, and/or mitigation measures, and developing Project alternatives to avoid and minimize potentially significant biological impacts. This information is critical to make an informed decision during the CEQA process and to ensure Project compliance with CESA, Fish and Game Code, and other applicable State and federal laws and regulations.

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Swainson's Hawk

The Project site is within the known geographic range of SWHA and there are historical occurrences documented within 2 ½-miles of the Project site (CDFW 2024). CDFW concurs with the mitigation measures provided in the September 2021 DEIR. However, CDFW recommends adding a mitigation measure in the event an active SWHA nest is detected, and a ½-mile no-disturbance buffer is not feasible, consultation with CDFW is warranted to discuss how to implement the Project and avoid take. If take cannot be avoided, take authorization through the acquisition of an Incidental Take Permit (ITP), pursuant to Fish and Game Code section 2081 subdivision (b) is necessary to comply with CESA.

Crotch's Bumble Bee

CDFW would like to note that since the 2021 DEIR was circulated, CBB was listed as a State candidate endangered species on September 30, 2022. Therefore, CDFW recommends an impact evaluation on this special-status species as the Project site is within their known geographic range (CDFW 2024). CBB are known to inhabit areas of grasslands and scrub that contain requisite habitat elements for nesting, such as small mammal burrows and bunch/thatched grasses. These habitat features are present within the Project vicinity. CBB was once common throughout most of central and southern California. However, it now appears to be absent from most of their range, especially in the central portion of its historic range within California's Central Valley (Hatfield et al. 2014). Analyses by the Xerces Society et al. (2018) suggest there have been sharp declines in relative abundance by 98% and persistence by 80% over the last ten years.

CDFW recommends a qualified biologist conduct a habitat assessment as part of the biological technical studies conducted in support of the DEIR to determine if the Project site or its immediate vicinity contain habitat suitable to support CBB. Potential nesting sites, which include all small mammal burrows, perennial bunch grasses, thatched annual grasses, brush piles, old bird nests, dead trees, and hollow logs would need to be documented as part of the assessment. If potentially suitable habitat is identified, CDFW recommends that a qualified biologist conduct focused surveys for CBB, and their requisite habitat features following the methodology outlined in the Survey Considerations for California Endangered Species Act Candidate Bumble Bee Species (CDFW 2023) as part of the biological technical studies conducted in support of the DEIR. If surveys indicate the presence or potential presence of CBB, consultation with the CDFW is warranted to discuss how to implement the Project and avoid take. If take cannot be avoided, take authorization through the acquisition of an ITP, pursuant to Fish and Game Code section 2081 subdivision (b) is necessary to comply with CESA.

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California Tiger Salamander

The Project site is within the known geographic range of CTS and a historical occurrence was documented 1 ¼-miles northeast of the Project site (CDFW 2024). CTS breed and develop in vernal and seasonal pools and stock ponds in grassland, woodland, and scrub habitat types and have been determined to be physiologically capable of dispersing up to approximately 1 ½-miles from seasonally flooded wetlands (Searcy and Shaffer 2011). These habitat features are present within the Project vicinity.

CDFW concurs with the survey protocols described in the September 2021 DEIR but doesn't agree with the relocation measures provided. CDFW recommends if protocol-level surveys are not conducted, that a minimum 50-foot no-disturbance buffer be delineated around all small mammal burrows in suitable upland refugia habitat within and/or adjacent to the Project site. Further, CDFW recommends potential or known breeding habitat within and/or adjacent to the Project site be delineated with a minimum 250-foot no-disturbance buffer. Both upland burrow and wetland breeding no-disturbance buffers are intended to minimize impacts to CTS habitat and avoid take of individuals. If through surveys it is determined that CTS are occupying or have the potential to occupy the Project site, consultation with CDFW is warranted to discuss how to implement the Project and avoid take. If take cannot be avoided, take authorization through the acquisition of an ITP, pursuant to Fish and Game Code section 2081 subdivision (b) is necessary to comply with CESA.

Burrowing Owl

The Project site is within the known geographic range of BUOW and there is a documented historical occurrence 1 ½-mile from the Project site. BUOW inhabit open grasslands containing small mammal burrows, a requisite habitat feature used for nesting and cover. These habitat features are present within the Project vicinity.

CDFW concurs with the survey protocols described in the September 2021 DEIR but doesn't agree with the mitigation measures for burrow exclusion as described in that it includes both nesting and non-nesting BUOW. CDFW recommends the following mitigation measures to differentiate procedures between nesting and non-nesting BUOW.

Should a BUOW be detected, CDFW recommends that no-disturbance buffers, as outlined in the "Staff Report on Burrowing Owl Mitigation" (CDFG 2012), be implemented prior to and during any ground-disturbing activities. Specifically, CDFW's Staff Report recommends that impacts to occupied burrows be avoided in accordance with the following table unless a qualified biologist approved by CDFW verifies through non-invasive methods that either: 1) the birds have not begun egg laying and

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incubation; or 2) that juveniles from the occupied burrows are foraging independently and are capable of independent survival.

Location	Time of Year	Level of Disturbance		
		Low	Med	High
Nesting sites	April 1-Aug 15	200 m*	500 m	500 m
Nesting sites	Aug 16-Oct 15	200 m	200 m	500 m
Nesting sites	Oct 16-Mar 31	50 m	100 m	500 m

* meters (m)

If BUOW are found within these recommended buffers and avoidance is not possible, it is important to note that according to the Staff Report (CDFG 2012), excluding birds from burrows is not a take avoidance, minimization, or mitigation method and is instead considered a potentially significant impact under CEQA. However, avoidance of direct impacts to BUOW and BUOW eggs and chicks is necessary to avoid violations of Fish and Game Code Sections 3503 (taking or destroying nests or eggs, 3503.5 (take of birds of prey or their eggs), and/or 3513 (take of migratory nongame birds). However, if it is necessary for Project implementation, CDFW recommends that burrow exclusion be conducted by qualified biologists and only during the non-breeding season, by a qualified biologist, before breeding behavior is exhibited and after the burrow is confirmed empty through non-invasive methods, such as surveillance. CDFW recommends replacement of occupied burrows with artificial burrows at a ratio of one (1) burrow collapsed to one (1) artificial burrow constructed (1:1) to mitigate for evicting BUOW and the loss of burrows. BUOW may attempt to colonize or re-colonize an area that will be impacted; thus, CDFW recommends ongoing surveillance at a rate that is sufficient to detect BUOW if they return.

Nesting birds

CDFW encourages that Project ground-disturbing activities occur during the bird non-nesting season; however, if ground-disturbing or vegetation-disturbing activities must occur during the nesting season (February 1st through September 15th), the Project applicant is responsible for ensuring that implementation of the Project does not result in violation of the Migratory Bird Treaty Act or relevant Fish and Game Code sections as referenced above.

To evaluate Project-related impacts on nesting birds, CDFW recommends that a general habitat assessment for nesting birds be conducted as part of the biological technical studies conducted in support of the CEQA document. Depending on the results of that assessment, CDFW further recommends that the CEQA document for this Project include that a qualified biologist conduct a pre-construction survey for active nests no more than 10 days prior to the start of ground or vegetation disturbance to

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maximize the probability that nests that could potentially be impacted are detected. CDFW also recommends that surveys cover a sufficient area around the Project site to identify nests and determine their status. A sufficient area means any area potentially affected, either directly or indirectly, by the Project. In addition to direct impacts (i.e., nest destruction), noise, vibration, and movement of workers or equipment could also affect nests. CDFW recommends that a qualified biologist establish a behavioral baseline of all identified nests. Once Project activities begin, CDFW recommends having a qualified biologist continuously monitor nests to detect behavioral changes resulting from the Project. If behavioral changes occur, CDFW recommends halting the work causing that change and consulting with CDFW for additional avoidance and minimization measures.

If continuous monitoring of identified nests by a qualified biologist is not feasible, CDFW recommends a minimum no-disturbance buffer of 250 feet around active nests of non-listed bird species and a 500-foot no-disturbance buffer around active nests of non-listed raptors. These buffers are advised to remain in place until the breeding season has ended or until a qualified biologist has determined the birds have fledged and are no longer reliant upon the nest or on-site parental care for survival. Variance from these no-disturbance buffers is possible when there is a compelling biological or ecological reason to do so, such as when the Project site would be concealed from a nest site by topography. CDFW recommends that a qualified wildlife biologist advise and support any variance from these buffers and notifies CDFW in advance of implementing a variance.

Editorial Comments and/or Suggestions

Federally Listed Species

CDFW recommends consulting with the United States Fish and Wildlife Service (USFWS) regarding potential impacts to federally listed species including, but not limited to, the CTS. The Federal Endangered Species Act (FESA) is more broadly defined than CESA; take under FESA also includes significant habitat modification or degradation that could result in death or injury to a listed species by interfering with essential behavioral patterns such as breeding, foraging, or nesting. Consultation with the USFWS in order to comply with FESA is advised well in advance of any Project activities.

California Natural Diversity Database

Please note that the California Natural Diversity Database (CNDDDB) is populated by voluntary submissions of species detections. As a result, species may be present in locations not depicted in the CNDDDB but where there is suitable habitat and features

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capable of supporting species. A lack of an occurrence record, or lack of recent occurrence records, in the CNDDDB does not mean that a species is not present. In order to adequately assess any potential Project related impacts to biological resources, surveys conducted by a qualified biologist during the appropriate survey period(s) and using the appropriate protocol survey methodology are warranted in order to determine whether or not any special-status species are present.

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 field survey form can be filled out and submitted online at the following link: <https://wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. 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, could have an impact on fish and/or wildlife, and assessment of environmental document 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 environmental document filing 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 NOP to assist City of Merced in identifying and mitigating Project impacts on biological resources. Questions regarding this letter or further coordination should be directed to John Riedel, Environmental Scientist at (559) 807-1453 or john.riedel@wildlife.ca.gov.

Sincerely,

DocuSigned by:

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Julie A. Vance
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Acting for

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