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November 20, 2020
Sent via email

Mr. Chuck Mercier
City of Ontario
303 E B St
Ontario, CA 91764
cmercier@ontarioca.gov

Subject: Draft Environmental Impact Report for the Merrill Commerce Center Specific Plan Project (SCH 2019049079)

Dear Mr. Mercier:

The California Department of Fish and Wildlife (CDFW) received the Draft Environmental Impact Report (DEIR) from the City of Ontario (City) for the Merrill Commerce Center Specific Plan 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

The Project proposes the development and operation of up to 7,014,000 square feet of fulfillment center warehouse uses and up to 1,441,000 square feet of business park uses along Merrill Avenue, between Grove Avenue and Carpenter Avenue, in the City of Ontario. Improvements to approximately 113.2 acres of off-site roadway and utility infrastructure will also occur in the Cities of Ontario and Chino, San Bernardino County.

PROJECT BACKGROUND

The Project is located within the former 'Dairy Preserve' that was formed in 1968 under the auspices of the California's Williamson Act. In 1988, voters passed Proposition 70, the California, Wildlife, Coastal, and Park Land Conservation Act (Act) to fund bonds for "the acquistion, development, rehabitation, protection, or restoration of park, wildlife, coastal, and natural lands in California, including lands supporting unique or endangered plants and animals". San Benardino County was awarded a $20 million grant under Proposition 70 and has since acquired nine dairy properties, or 366.6 acres, in the early 1990s with approximately 165.3 acres located in the City of Chino and the remaining 201.3 acres within the City of Ontario. The Project is immediately adjacent to, or within, many of these San Bernardino County Proposition 70 dairy parcels (refer to Figure 1).

The annexation of the Dairy Preserve between the Cities of Ontario and Chino have represented a dramatic increase in development and population growth. The City of Ontario prepared a master plan for the Dairy Preserve that spans over a 20-year period and includes the development of 8,200 acres of previous agricultural and dairy lands with 47,000 homes, 16 million square feet of retail, office, medical and residential space, and eight new schools. This master plan was formerly known as the New Model Colony (NMC) and is currently referred to as 'Ontario Ranch'.

Likewise, the City of Chino annexed the remaining portion of the Dairy Preserve, approximately 7,245 acres, into the City of Chino's Sphere of Influence where it was partitioned into a western and eastern section. The eastern portion, or what is now known as 'the Preserve', includes approximately 5,435 acres (8.15 square miles). For Subarea 2, the City adopted the Preserve – Chino Sphere of Influence – Sub-Area 2 Specific Plan (hereafter, "PSP") and certified the associated EIR (SCH #2000121036, hereafter, "PSP

EIR") on March 25, 2003. The PSP established the overall vision and development plan for the specific plan area and acted as a bridge between the City's General Plan and individual development proposals. An 'umbrella' General Plan Amendment, which linked the Specific Plan to the City's existing General Plan and satisfied the requirement for consistency with the General Plan (Government Code Sections 65301 (b) and 65303), was also prepared.

Portions of the Project are within both the Preserve and the Ontario Ranch (refer to Figure 1).

COMMENTS AND RECOMMENDATIONS

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

Assessment of Biological Resources

Section 15125(c) of the CEQA Guidelines states that knowledge of the regional setting of a project is critical to the assessment of environmental impacts and that special emphasis should be placed on environmental resources that are rare or unique to the region. Within the Project DEIR, eleven species were identified as having potential to occur or use the study area based on the literature review and field surveys, including: burrowing owl(s) (*Athene cunicularia*), yellow-headed blackbird(s) (*Xanthocephalus xanthocephalus*), yellow warbler(s) (*Setophaga petechia*), golden eagle(s) (*Aquila chrysaetos*), Swainson's hawk(s) (*Buteo swainsoni*), white-tailed kite(s) (*Elanus leucurus*), big free-tailed bat(s) (*Nyctinomops macrotis*), pallid bat(s) (*Antrozous pallidus*), western mastiff bat(s) (*Eumops perotis californicus*), western red bat(s) (*Lasiurus blossevillii*), and western yellow bat(s) (*Lasiurus xanthinus*) (DEIR Section 4.8.4.2 Impact Statements Special-Status Wildlife Species).

CDFW agrees that these special-status wildlife species have the potential to occur within the Project, and suggests that the Project footprint, or the immediate surrounding area, may also support the western pond turtle (*Actinemys marmorata*), a California Species of Special Concern and the tricolored blackbird (*Agelaius tricolor*), a California Threatened Species.

Western Pond Turtles

Agricultural areas within the Project consist of active dairy operations and row crops. Areas associated with the dairy operations include corrals, pastures, and treatment basins designed to retain all runoff from the associated facilities (DEIR, section 4.8.2.1, Vegetation Communities/Habitat Types). Pond turtles are habitat generalists and can occupy a wide range of aquatic habitats, with a wide variety of aquatic niches in rivers, streams, ponds, vernal pools, and estuaries, as well as, human-impacted environments, such as agricultural ditches and sewage treatment ponds (Holland 1992; Stebbins 2003;

Germano, 2010) and livestock ponds (Tu, 2019). Thus, the most limiting factor of habitat suitability is the presence of water. CDFW recommends that the following measures be added to the DEIR prior to certification to require focused surveys and mitigation, should western pond turtles be identified onsite.

> *4.8.6*: *Within the breeding season (May-July) prior to the onset of construction activities, a CDFW-approved qualified biologist shall conduct pre-construction trapping surveys, following U.S. Geological Survey trapping protocol, for western pond turtle within all areas of any suitable aquatic habitat for this species (e.g., retention and treatment ponds). If western pond turtles are observed or trapped during the pre-construction survey, the Applicant shall prepare for CDFW review and approval, a translocation plan identifying proposed protocol for trapping and relocating turtles, including identifying potential, appropriate receiver sites to relocate western pond turtles to. If no western pond turtles are observed during the pre-construction survey, then construction activities may begin. If construction is delayed or halted for more than 30 days, another pre-construction survey for western pond turtle shall be conducted. Within seven days of the pre-construction survey, a report of findings from the survey shall be submitted to the CDFW. During construction, a qualified biological monitor who has been approved by the CDFW to relocate western pond turtles shall be onsite to ensure that no western pond turtles are harmed. If western pond turtles are observed in the construction area at any time during construction, the onsite biological monitor shall be notified and construction in the vicinity of the sighting shall be halted until such a time as a turtle has been removed from the construction zone, and relocated by an approved biologist. If a sighting occurs during construction, the biologist shall prepare a report of the event and submit it to CDFW***.***

> *4.8.7: If western pond turtle are identified, the Applicant shall mitigate impacts to western pond turtle by creating suitable, breeding, and foraging habitat at a minimum 2:1 replacement to impact ratio at a CDFW-approved location within southwest San Bernardino County. Habitat shall be conserved in perpetuity via conveyance of a conservation easement to a CDFW-approved conservation entity and a management fund (endowment) shall be established by the Applicant consisting of an interest-bearing account with the amount of capital necessary to generate sufficient interest and/or income to fund all monitoring, management, and protection of the conservation area(s), including but not limited to, reasonable administrative overhead, biological monitoring, invasive species and trash removal, fencing and signage replacement and repair, law enforcement measures, long-term management reporting (as described below), and other actions designed to maintain and improve the habitat of the conserved land(s), in perpetuity. A Property Analysis Record, or substantially equivalent analysis, shall be conducted to determine the management needs and costs described above, which then will be used to calculate the capital needed for the management of the fund. Except for uses appropriate to a habitat conservation area, the public shall not have access to the mitigation area(s), and no activities shall be permitted within*

the site, except maintenance of habitat, including the removal of nonnative plant species, trash, and debris, and the installation of native plant materials.

Tricolored Blackbirds

The Project DEIR documented yellow-headed blackbirds foraging within the Project (Section 4.8.4.2, Impact Statements Special-Status Wildlife Species), but made no observation of tricolored blackbirds. Based on database searches, CDFW identified three separate observations of individual tricolored blackbirds or colonies near the Project, with 2 individuals observed at dairy ponds near Merrill Avenue and Grove Avenue (Ebird; April 26, 2015), 30 individuals at ponds located at Carpenter Avenue (Ebird March 2015); and fluctuating numbers of nesting and foraging tricolored birds at the managed wetlands at Kimball/Bickmore Avenue and surrounding fields, including approximately 500 individuals in 2011, approximately 100 individuals in 2012, and approximately 500 individuals in 2014 and 2016 (California Natural Diversity Data Base [CNDDB]). These known tricolored blackbird occurrences are either within (e.g. Carpenter Avenue), immediately adjacent (e.g. Merrill Avenue and Grove Avenue), or a short distance (< 2 kilometer) from the Project (e.g. Kimball Avenue).

According to the Biological Technical Report for Merrill Commerce Center Specific Plan, (Glenn Lukos Associates, Inc., September 2019), it states "*The Project will remove 375.3 acres of potential raptor foraging habitat through development of the active agriculture. Although the agriculture may provide foraging habitat for raptors, it is not expected to be valuable, as the lands are actively maintained to minimize use by small mammals (prey for raptors)*" (5.10 Cumulative Impacts to Biological Resources).

Like raptors, tricolored blackbirds forage within agricultural fields. Tricolored blackbirds do not prey on small mammals, but rather, are known to forage for insects primarily in artificial habitats, including crops such as rice, alfalfa, irrigated pastures, and ripening or cut grain fields (e.g., oats, wheat, silage), as well as annual grasslands, cattle feedlots, and dairies (Beedy and Hamilton 1999). In addition, approximately 55 percent of all observed breeding colonies were associated with dairies (Hamilton et al. 1995, pp. 5, 64) and in some colonies, water source, nesting substrate, and foraging area were all available under the management of a single dairy operation. Most tricolored blackbirds forage within 5 kilometers (km) of their colony sites (rarely up to 13 km; Orians 1961, Beedy and Hamilton 1997). Similarly, a study using radio-telemetry documented tricolored blackbirds movements over relatively short distances of 3 to 11 km. These movements may be due to an inability to acquire sufficient resources at one colony site for the entire breeding season, prospecting among colonies to assess availability of nesting and foraging resources or access to mates, and/or the availability of multiple proximate nesting locations allows the species to compensate for early-season nesting failures and variation in habitat and forage conditions over time (Beedy and Hamilton 1997).

Given the Project and the adjacent lands contains suitable foraging and breeding habitat for blackbirds, has been occupied by yellow-headed blackbirds, and is within known

movement distances from documented tricolored blackbird occurrences, CDFW recommends the Project DEIR include the following measure to require focused surveys and mitigation, should tricolored blackbirds be identified using the Project area for nesting or foraging.

> *4.8.8: The Applicant shall conduct surveys for tricolored blackbird across all suitable breeding and foraging habitat with the Project area. If tricolored blackbirds are identified, the Applicant shall avoid and conserve all occupied habitat onsite. If onsite avoidance is infeasible, the Applicant shall apply for an incidental take permit (ITP) with California Department of Fish and Wildlife and shall mitigate for the loss of all habitat through the acquisition, conservation, and management of in-kind habitat at a minimum 3:1 ratio, or as approved by the final ITP. Habitat shall be conserved in perpetuity via conveyance of a conservation easement to a CDFW-approved conservation entity and a management fund (endowment) shall be established by the Applicant consisting of an interest-bearing account with the amount of capital necessary to generate sufficient interest and/or income to fund all monitoring, management, and protection of the conservation area(s), including but not limited to, reasonable administrative overhead, biological monitoring, invasive species and trash removal, fencing and signage replacement and repair, law enforcement measures, long-term management reporting (as described below), and other actions designed to maintain and improve the habitat of the conserved land(s), in perpetuity. A Property Analysis Record, or substantially equivalent analysis, shall be conducted to determine the management* needs *and costs described above, which then will be used to calculate the capital needed for the management of the fund. Except for uses appropriate to a habitat conservation area, the public shall not have access to the mitigation area(s), and no activities shall be permitted within the site, except maintenance of habitat, including the removal of nonnative plant species, trash, and debris, and the installation of native plant materials.*

Analysis of Direct, Indirect, and Cumulative Impacts to Biological Resources

The Project DEIR should provide a thorough discussion of the direct, indirect, and cumulative impacts expected to adversely affect biological resources as a result of the Project. CDFW suggests the following:

<u>Bats</u>

Despite the high diversity and sensitivity of bats in the south coast ecoregion, bats have been largely ignored during environmental review of proposed projects and in large planning efforts, including the Ontario Ranch and PSP DEIRs. This is primarily due to the lack of information on the distribution, seasonal habitat associations, and population status of bat fauna. The Project DEIR does include sensitive bat species that may occur (Section 6.4 *Special-Status Bats*) and minimization measures that includes the following:

> *"4.8.4 For large ornamental trees suitable for bat roosting/nursery, exit counts and acoustic surveys shall be performed prior to initial ground disturbance and vegetation removal to determine whether the Project footprint and a 300-foot buffer supports a nursery or roost, and by which species. This survey work will occur between late-spring and late summer and/or in the fall (generally mid-March through late April be developed to ensure mortality to bats does not occur. For each location confirmed to be occupied by bats, the plan will provide details both in text and graphically where exclusion devices/and or staged tree removal will need to occur, the timing for exclusion work, and the timeline and methodology needed to exclude the bats. The plan will need to be reviewed and approved by CDFW prior to disturbance of the roost* (DEIR 4.8.4.2 Impact Statements *Wildlife Sensitive Species*)".

While CDFW appreciates the measures to avoid direct take of roosting bats, there are other aspects of bat ecology that should be addressed. Recent research has shown that many tree roosting species will switch roosts every few days (Barclay and Brigham 1996), meaning that multiple roosts of varying temperature regimes may need to be available within appropriate habitat and flight distance of the species for a population to remain viable. Bats also need adequate foraging habitat within the nightly commute distance from a given roost. These distances vary among species (Pierson 1998) and seasonally (Brown and others 1995). Thus, CDFW strongly encourages the City to incorporate the following into measure 4.8.4 prior to certification of the DEIR to require mitigation for the loss of roosting and foraging opportunities for each bat species, and ensure the mitigation is roughly proportional to the level of impacts in accordance with the provisions of CEQA (CEQA Guidelines, §§ 15126.4(a)(4)(B), 15064, 15065, and 16355).

> *If surveys determine that roosts supporting special-status bats will be lost as a result of the Project, the Applicant shall mitigate the loss through the perpetual conservation and management of occupied habitat, approved by CDFW, at a minimum 1:1 ratio***.**

<u>Burrowing Owls</u>

For the Project, minimization and avoidance measures for burrowing owls (DEIR, section 4.8.4.2, Impact Statements, Mitigation Measure 4.8.1*)* include the following:

- If burrowing owl(s) is (are) absent, no additional mitigation is required;
- If burrowing owl(s) is (are) detected within the Project's disturbance footprint located within the City of Chino Preserve RMP [Resources Management Plan] boundary, the owl(s) are required to be handled as indicated by the RMP; and
- If burrowing owl(s) is (are) detected within the Project's proposed disturbance footprint outside of the RMP boundary: Prior to disturbance of the occupied burrows, suitable and unoccupied replacement burrows shall be provided at a ratio of 2:1 within designated offsite conserved lands to be identified through

coordination with CDFW and the City in which the burrowing owl(s) is (are) detected (either the City of Ontario or the City of Chino).

Although a portion of the Project occurs within the Ontario Ranch, the Project DEIR does not reference any burrowing owl mitigation measures or the cumulative impact review and conclusion from the Ontario Ranch DEIR.

The Ontario City Council approved a General Plan Amendment and associated Final Environmental Impact Report (EIR) for the Sphere of Influence for the Ontario Ranch (NMC) in January 1998. The NMC Final EIR assessed the impacts on biological resources of the conversion of the NMC from agricultural uses to develop urban and suburban uses. Before mitigation, it was determined that significant impacts would occur to waterfowl and waterfowl habitat; raptors and raptor habitat; and the Delhi Sands Flower-Loving Fly Ontario Recovery Unit. The mitigation measures to reduce impacts to less than significance included:

EIR Mitigation Measure BR-1 – 2:1 Mitigation Waterfowl Habitat Mitigation

- Modify the General Plan to require the creation of new waterfowl habitat and specified a mitigation ratio of 2:1 for each acre of such habitat lost. This is off-site mitigation in the Prado Basin.

EIR Mitigation Measure BR-2 – Waterfowl and Raptor Conservation Area

- The City of Ontario shall create a Waterfowl and Raptor Conservation Area (WRCA) off-site in the Prado Basin.

Subsequent to the adoption of the EIR, a lawsuit was filed against the City of Ontario by the Endangered Habitats League, Inc. and Sierra Club challenging the City's CEQA compliance and approval of the General Plan Amendment. A settlement agreement was reached and agreed to by all parties that set forth revised mitigation measures for potential impacts in the NMC (referred to as Annexation Area 163). Because state law requires that local jurisdictions update their General Plans every 10 years, an Ontario Plan Draft EIR (DEIR SCH # 2008101140) was prepared by the Planning Center (April 2009) and finalized in July 2009. Measures from the settlement agreement were detailed within the Ontario Plan DEIR Section 5 *Environmental Analysis* and included the following:

DEIR Mitigation Measure 1- Mitigation Fees

- Prior to issuance of grading permits, Ontario shall impose a $4,320 per acre Mitigation Fee on proposed developments in Annexation Area 163 that require discretionary approval or permitting from the City.

DEIR Mitigation Measure 2 – On Site Land Conservation or Owl Relocation

- Ontario, in consultation with the Department, will identify through CEQA review, lands occupied by burrowing owl and suitable as long-term habitat. The City will require avoidance of those lands to maintain a viable territory and require long-term maintenance through dedication in fee or grant of easement to the Land Trust. If the site is not viable long-term habitat, the developer shall pay the mitigation fee and make provisions for relocation of the owls.

DEIR Mitigation Measure 3 – Land Conservation

- All mitigation fees collected shall be used for the above-described purposes and may be used to purchase property, conservation easements, or other land with long-term conservation value for the environmental impacts; enhance/restore lands with such values; maintain and operates these lands; and pay for related administrative costs (not to exceed 10 percent of the total fees).

DEIR Mitigation Measure 4 - Land Easements

- Land/easements dedicated, conveyed, or purchased to benefit wildlife, waterfowl, raptors/and or burrowing owl must have long-term conservation value for those species and must be managed by the Land Trust. The parcels must be located within the Habitat Area designated as part of the settlement agreement. Unacceptable properties are those that would otherwise by purchased by another entity or group as open space mitigation for environmental impacts.

Table 1 and Figure 2 lists past and upcoming projects and the potential fees that were, or will be, collected within the Ontario Ranch.

Although the DEIR does reference PSP-related measures, CDFW has significant concerns regarding the efficacy of these measures at mitigating burrowing owl impacts. Within the City of Chino, mitigation measures identified in the Preserve (PSP DEIR Section 5.4.6 *Mitigation Measures*) to eliminate or reduce potentially significant impacts to burrowing owls included the following:

1) All areas below the 566-foot Prado Dam inundation line, except such areas located north of Pine Avenue, will be retained within an open space or agricultural land use designation in order to provide protection for existing wildlife habitat values, as well as to avoid any new impacts.
2) A biological assessment of each specific project site will be conducted to characterize the habitat types and the potential for the site to support any sensitive species or habitat.

3) Where a sensitive species has the potential to occur, the level of potential for occurrence as low, moderate, or high will be determined and scientific justification provided for this determination.
4) If the potential for occurrence is moderate or high (e.g., the required habitat elements for this species are present and/or there has been a sighting of this species in the vicinity of the project site), focused surveys will be conducted within suitable habitat to determine the presence or absence of the species on the project site.
5) Any surveys deemed necessary must be conducted by a biologist qualified to perform the needed survey(s). The City of Chino, or its consultant, will review and approve the personnel and methodology for any such proposed surveys.
6) If a sensitive species or habitat is found to occur on a proposed project site or occupies habitat that may be impacted directly or indirectly by the proposed project, this must be called to the City's immediate attention and documented in the biological assessment for the project.
7) Mitigation measures to offset any potential impact to sensitive species and habitats must comply with the Resources Management Plan (RMP) and shall be included in the biological assessment.
8) All lands set aside for conservation and/or other mitigation measures must be clearly documented in the final biological assessment.

The RMP (Michael Brandman Associates, 2003) was prepared to address the impacts of development of the Preserve through the implementation of land conservation, burrowing owl relocation, and mitigation fees, including:

1) Providing the creation, enhancement, expansion and perpetuation of high quality wildlife habitat in a 300-acre Conservation Area to be located generally below the 566-foot inundation line and within the PSP boundaries. The more specific location of the Conservation Area depends on availability of lands for mitigation purposes, and the suitability of land for the enhancements envisioned. If the City is unable, or it is infeasible, to obtain the onsite mitigation agreements from property owners for all, or a portion of the 300-acre Conservation Area, the City of Chino can potentially acquire and enhance, or make other arrangements to secure the right to permanently protect/preserve and enhance, land off-site within the Prado Basin (including Chino Hills), so long as it has similar biological value to land on-site within the areas planned for urban development (generally above the 566-foot elevation line). The Natural Treatment System (NTS) facilities (referred to as Drainage Area "B" in the PSP EIR and RMP) may potentially represent partial regional mitigation for the loss of burrowing owl habitat.

2) If burrowing owls are found on an individual development site, development, including the expansion of existing land uses or other land use activities that could disrupt the owls, will be required to follow the CDFW burrowing owl relocation protocol. In addition, unavoidable occupied burrows must be mitigated at a minimum 2:1 ratio, either through the enhancement of existing natural burrows, or through the creation of new artificial burrows. In order to provide supplemental

mitigation beyond the standard CDFW protocol requirements for relocation of owls, the 300-acre Conservation Area will be made available for the relocation of burrowing owls that would be displaced by development, including the creation of 20 artificial burrows. The feasibility of relocating owls from development sites to the Conservation Area will be reviewed on a case-by-case basis for individual development projects, subject to the evaluation and recommendations of the biological study prepared for a given site.

3) A RMP Mitigation Fee (3801000-56640) of $5,596 per adjusted gross acre for new residential, commercial, office, industrial development, or public facilities will be paid prior to the issuance of grading permits. Refer to Table 2 and Figure 3 that identifies past and future projects, along with the associated mitigation fees from development within the Preserve. The funds collected are to provide for the following:

   - Costs associated with obtaining agreements for the 300-acre Conservation Area with landowners in the form of conservation easements or other legally enforceable instruments.
   - Costs associated with the design, installation, and maintenance of the various enhancements and improvements, including such appropriate refinements/ adjustments as may be identified by the RMP.
   - Administration, management and monitoring of the 300-acre Conservation Area and other mitigation measures as appropriate, including adaptive management.

CDFW is extremely concerned that the mitigation measures provided by the Cities are insufficient to offset the loss of burrowing owl habitat because: 1) burrowing owl mitigation below the Prado Dam inundation line may only be available when habitat is not under several feet of water; 2) potential conservation properties may not support burrowing owls (e.g. Chino Hills), be large enough to support the number of owls being displaced (e.g. NTS), or have since been developed (e.g. Miramonte Development), indicating either a lack of interest, or an inability to acquire properties; and 3) mitigation fees that have been collected have yet to be spent to acquire and conserve mitigation properties, resulting in years of lost mitigation and rapidly declining availability of suitable properties to conserve within the City's sphere.

Further, the City of Chino's continued use of the RMP, and conclusion that the NTS may be used to represent partial regional mitigation for the loss of burrowing owl habitat within the Preserve is troubling and inappropriate as this existing, failed mitigation site has not been viable burrowing owl habitat for years. A Lake and Streambed Alteration Agreement (LSA 1600-2004-0056-R6) was issued in September 2004 for the City of Chino Subarea 2-NTS Project. To mitigate for burrowing owls impacted by the construction of the NTS, Lewis Operating Corporation was to develop a Burrowing Owl Conservation Area, as well as, include a non-wasting endowment account for the long-term management of the preservation site for burrowing owls (LSA, Burrowing Owl Mitigation Measures, Condition

6. D). Shortly after the construction of the NTS, the burrowing owl population began to decline, with breeding owls not being observed over several years. Because it was speculated that the burrowing owls may have declined from the lack of maintenance of the slopes and artificial burrows, remediation measures occurred in October 2016. A conservation deed was executed for 17.11 acres by Chino Development Corporation and Rivers Lands Conservancy (May 15, 2018) and included 6.5 acres on the slopes (pursuant to the NTS LSA) and 10.61 acres of wetland habitat. Therefore, the NTS is inappropriate given the land has already been committed for conservation; portions of the facility requires maintenance that is incompatible with burrowing owl usage (e.g. water treatment, forebay); and/or no owls have been observed using it in over a decade.

CDFW has significant concerns with the DEIR's approach to mitigating impacts to burrowing owls and urges the City to coordinate with CDFW on the establishment of appropriate measures prior to the certification of the DEIR. At a minimum, CDFW recommends the Project DEIR not include: 1) measures that defer identification of mitigation, including appropriate conservation properties, to future actions; 2) mitigation lands that depend on the payment to, and expenditure by, funds by the Cities; and 3) measures that, to-date, has been ineffective at conserving and maintaining burrowing owl habitat.

Current scientific literature supports the conclusion that mitigation for permanent burrowing owl habitat loss necessitates replacement with an equivalent or greater habitat area for breeding, foraging, wintering, dispersal, presence of burrows, burrow surrogates, presence of fossorial mammal dens, well drained soils, and abundant and available prey within close proximity to the burrow (CDFW, 2012). Projects impacting owls and owl habitat should mitigate all project-specific and cumulative impacts to nesting, foraging, wintering, dispersal, and migration habitat (i.e., breeding and non-breeding season) under CEQA, to below a level of significance. Case-by-case impact analyses for CEQA and any other purpose should consider the full extent of owl habitat use (home range) on and off the project site, as well as demographic connectivity among local and regional populations. As development continues to displace owls, available suitable habitat is needed to support these individuals. This should include permanent conservation of similar vegetation communities (grassland, urban, and agriculture) and be comparable to, or better than, that of the impact area. Suitable mitigation lands should also be based on a comparison of the habitat attributes of the impacted and conserved lands, including but not limited to: type and structure of habitat being impacted or conserved; density of burrowing owls in impacted and conserved habitat; and significance of impacted or conserved habitat to the species range-wide. CDFW strongly suggests that the Cities of Ontario and Chino maintain an interactive mapping and current inventory of burrowing owl occurrences (Refer to Figure 3), ensure adequate land is available and conserved **before** owls are passively relocated, and provide compensation for loss of all aspects of habitat types used (e.g., foraging, wintering, migratory stopovers, and breeding).

Under Section 15355 of the CEQA Guidelines, cumulative effects refers to "two or more individual effects which, when considered together, are considerable or which compound

or increase other environmental impacts". Physical changes caused by a project can contribute incrementally to cumulative effects that are significant, even if individual changes resulting from a project are limited. The Lead Agency must determine whether the cumulative impact is significant, as well as whether an individual effect is "cumulatively considerable." This means "the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects" (Guidelines Section 15064(h)(1)).

Within the Preserve, CDFW estimates that 1,174 acres of suitable burrowing owl habitat has been removed and another 729 acres are proposed for future development. The City of Chino concluded that implementing mitigation measures would reduce, avoid, lessen, or compensate for some, but not all, of the adverse impacts to burrowing owl habitat. Nevertheless, the City Council determined that the remaining unavoidable effects were acceptable and issued a Statement of Overriding Considerations. For the Ontario Ranch, approximately 1,425 acres of 3,562 acres potential owl habitat has already been removed. With the collection of the mitigation fees for the acquisition and management of habitat, the City determined that implementation of the proposed Ontario Plan would not have substantial adverse impacts on sensitive animal species, including the burrowing owl (Ontario Ranch DEIR Chapter 6 Significant Unavoidable Adverse Impacts). In addition to these existing planned developments, and passed developments not mentioned within this letter, the DEIR adds new impacts to an already significant loss of habitat.

Again, CDFW has significant concerns with the DEIR's approach to mitigating direct, indirect, and cumulative impacts to burrowing owls and urges the City to coordinate with CDFW on the establishment of appropriate measures prior to the certification of the DEIR.

Foraging Raptors

The Project has the potential to support foraging habitat for the bald eagle, golden eagle, Swainson's hawk, and American peregrine falcon. However, the Project DEIR concluded that, "*these species are not expected to nest within the Study Area, as it is located outside of the known nesting range and/or does not contain suitable nesting habitat. With regard to potential foraging impacts, based on the level of ongoing human disturbance within the Project study area, and the regional availability of foraging habitat in the vicinity of the Project site, such as the Prado Basin, Chino Hills State Park, and the Santa Ana Mountains, the loss of low-quality potential foraging habitat resulting from development of the Project is considered less than-significant*" (Section 4.8.4.2, Impact Statements *Special-Status Wildlife Species*).

Contrary to this determination, the Ontario Ranch DEIR concluded that the loss of farmland would only become less than significant with the collection of mitigation fees to fund replacement habitat and must have long-term conservation value for raptors. Similarly, the City of Chino concluded that impacts within the Preserve could not be mitigated for the

cumulative loss of agricultural and open space below a level of significance for the direct loss of raptor foraging and migratory habitat (PSP Statement of Overriding Conditions).

CDFW is concerned that similar projects that have undergone prior environmental review (i.e., Ontario Ranch and PSP) could come to substantially different conclusions regarding the significance of impacts related to the loss of raptor foraging habitat. CDFW believes the loss of these areas for foraging, individually and cumulatively, is significant and should be mitigated. Thus, the Project DEIR should reassess its findings for the continued loss of raptor habitat within the Dairy Preserve, and provide appropriate mitigation in the form of habitat acquisition and preservation. Therefore, CDFW advises the City to integrate into the DEIR the following measure:

> *4.8.9 If surveys determine that the Project supports special-status raptors, the Applicant shall mitigate the loss through the perpetual conservation and management of foraging habitat, approved by CDFW, at a minimum 1:1 ratio.*

California Endangered Species Act

CDFW is responsible for ensuring appropriate conservation of fish and wildlife resources including threatened, endangered, and/or candidate plant and animal species, pursuant to the California Endangered Species Act (CESA). CDFW recommends that a CESA Incidental Take Permit (ITP) be obtained if the Project has the potential to result in "take" (California Fish and Game Code Section 86 defines "take" as "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill") of State-listed CESA species, either through construction or over the life of the project. CESA ITPs are issued to conserve, protect, enhance, and restore State-listed CESA species and their habitats.

CDFW encourages early consultation, as significant modification to the proposed Project and avoidance, minimization, and mitigation measures may be necessary to obtain a CESA ITP. The California Fish and Game Code requires that CDFW comply with CEQA for issuance of a CESA ITP. CDFW therefore recommends that the DEIR addresses all Project impacts to listed species and specifies a mitigation monitoring and reporting program that will meet the requirements of CESA.

Lake and Streambed Alteration Program

Fish and Game Code section 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). To facilitate issuance of an LSA Agreement, if necessary, the DEIR 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 CDFW 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.

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 (CNDDB). Information can be submitted online or via completion of the CNDDB field survey form at the following link: https://wildlife.ca.gov/Data/CNDDB/Submitting-Data. The completed form can be mailed electronically to CNDDB at the following email address: CNDDB@wildlife.ca.gov. The types of information reported to CNDDB can be found at the following link: https://wildlife.ca.gov/Data/CNDDB/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 DEIR for the Merrill Commerce Center Project Specific Plan Project (SCH No. 2019049079) and recommends that the City address the CDFW's comments prior to certifying the DEIR. If you should have

any questions pertaining to the comments provided in this letter, please contact Kim Romich, Senior Environmental Scientist, at Kimberly.Romich@wildlife.ca.gov.

Sincerely,

DocuSigned by:
Scott Wilson
8091B1A9242F49C...

Scott Wilson
Environmental Program Manager

Attachments

Tables

Table 1. Development that has, or will, occur(red) within the Ontario Ranch and the estimated mitigation fees that has/will be collected
Table 2. Development that has, or will, occur(red) within the Preserve and the estimated mitigation fees that has/will be collected
Table 3. Development within the Ontario Ranch and burrowing owls impacted.
Table 4. Development within the Preserve and burrowing owls impacted.

Figures

Figure 1. Portions of the Project adjacent to proposition 70 agricultural land and within the Ontario Ranch and Preserve
Figure 2. Development that has, or will, occur(red) within the Ontario Ranch and Preserve.
Figure 3. Burrowing owl occurrences surrounding the Project

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Habitat Conservation Planning Branch

Office of Planning and Research, State Clearinghouse, Sacramento
state.clearinghouse@opr.ca.gov

REFERENCES

Biological Technical Report for Merrill Commerce Center Specific Plan, Located in the City of Ontario, San Bernardino County, California with Off-Site Improvements Located in the Cities of Ontario and Chino, San Bernardino County, California (Glenn Lukos Associates, Inc.) September 19, 2019

California Department of Fish and Wildlife. 2012. Staff Report on Burrowing Owl Mitigation. Sacramento, CA, USA.

Tu, Billy. May 2019. Pond Occupancy by Western Pond Turtle in the Diablo Range of Santa Clara County, California.