State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Central Region
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GAVIN NEWSOM, Governor
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August 5, 2019

Israel Trejo
City of Fresno
Development and Resource Management Department
2600 Fresno Street, Room 3043
Fresno, California 93721

Subject: Notice of Preparation (NOP) for the Environmental Impact Report (EIR); Text Amendment No. P19-02978 – Evaluating the Proposed Regulation and Permitting of Commercial Cannabis (Project) SCH# 2019070123

Dear Mr. Trejo:

The California Department of Fish and Wildlife (CDFW) received a Request for Comments from the City of Fresno regarding a NOP for the EIR for Text Amendment No. P19-02978 – Evaluating the Proposed Regulation and Permitting of Commercial Cannabis 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, CDFW appreciates the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under the Fish and Game Code.

CDFW ROLE

CDFW is California's **Trustee Agency** for fish and wildlife resources and holds those resources in trust by statute for all the people of the State (Fish & G. Code, §§ 711.7, subd. (a) & 1802; Pub. Resources Code, § 21070; CEQA Guidelines § 15386, subd. (a)). CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (*Id.*, § 1802). Similarly, for purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public agency environmental review efforts, focusing specifically on projects and related activities that have the potential to adversely affect fish and wildlife resources.

[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. For example, as proposed, the Project may be subject to CDFW's lake and streambed alteration regulatory authority (Fish & Game 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 & Game Code, § 2050 et seq.), related authorization as provided by the Fish and Game Code will be required.

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 §§ 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).

PROJECT DESCRIPTION SUMMARY

Proponent: City of Fresno

Objective: The Project is to allow medicinal cannabis operations, cultivation, manufacturing, extraction, testing, distribution, delivery, and dispensaries within the City of Fresno.

Cultivation, Distribution, and Manufacturing

- 8 businesses would be permitted inside the Cannabis Innovation Zone, defined as the area bounded by State Route 41, Golden State Blvd., Church Ave., East Ave., and Parallel Ave.
- 8 businesses would be permitted within industrial zoned property within ½ mile of Highway 99 between Shaw and Clinton Aves., or within 1 mile of Highway 99 north of Shaw and south of Clinton Aves., or within 1 mile of Highway 180 west of Highway 99. All buildings in which a cultivator, distributor, or manufacturer shall be located no closer than one thousand (1,000) feet from any property boundary containing a residence, school, daycare, or youth center.

Testing Laboratories

- Testing laboratories may take place in a Commercial, Employment, or Downtown District. There is no limit on how many may be permitted.

Cannabis Retailers

- 21 total possible cannabis retail locations – this includes up to 14 medicinal and/or adult use cannabis retail locations (2 per Council District); with the

potential to add 7 additional retailers (1 additional per Council District) upon Council Resolution.

- Retailers would be restricted to the DTN (Downtown Neighborhood), DTG (Downtown General), CMS (Commercial Main Street), CC (Commercial Community), CR (Commercial Regional), CG (Commercial General), CH (Commercial Highway), NMX (Neighborhood Mixed-Use), CMX (Corridor/Center Mixed Use), or RMX (Regional Mixed-Use) zone districts. In addition, retailers would be required to maintain a minimum distance of 800 feet from any property boundary containing another cannabis retailer, school, daycare center, or youth center (i.e. parks, playgrounds, facilities hosting activities for minors)
- Hours of operation for retailers would be limited to 6:00 am to 10:00 pm
- Retail delivery allowed if part of store-front operation

Cannabis Cultivation

- The ordinance prohibiting all cultivation does not apply to private residence with 6 plants or less grown indoors or to any person/property that obtains a Fresno City commercial cannabis business permit.

Location: The Project site is within the City limits of Fresno, California in specific locations detailed within the Project description.

Timeframe: Unknown

In review of the NOP for the EIR, CDFW provides the following comments as the project area is mainly developed but may contain areas of habitat for the below listed species. The Project area has the potential to support the State and federally listed threatened California Tiger Salamander (*Ambystoma californiense*), State listed threatened Swainson's hawk (*Buteo swainsoni*), the State species of special concern burrowing owl (*Athene cunicularia*), western mastiff bat (*Eumops perotis californicus*), and American badger (*Taxidea taxus*). Therefore, CDFW requests that the EIR fully identify potential impacts to biological resources and provide proper avoidance, minimization, and mitigation measures to address potential Project-related impacts to these species. CDFW recommends that additional biological surveys be conducted and that the results of these surveys be used to inform the analysis of impacts to resources and to provision suitable avoidance, minimization, and mitigation measures to reduce impacts to less than significant levels.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the City of Fresno 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 document.

Biological Assessment: In general, CDFW recommends a biological assessment survey be conducted on each subject parcel prior to new ground-disturbing Project activities to determine impacts to biological resources and to determine if focused biological surveys are warranted. Biological assessments are recommended to be conducted well in advance of any Project-related ground disturbance by qualified wildlife biologists and/or botanists during the appropriate survey periods. Survey results can then be used to identify existing conditions, including habitats and species, within the impact area and inform Project proponents of permitting needs.

California Tiger Salamander (CTS)

Issue: Recent CTS occurrences have been noted within the Project area (CDFW, 2019). CTS occur from the Central Valley floor near sea level up to approximately 3,940 feet in the Coastal Range (USFWS, 2017). CTS require both aquatic habitat for breeding and upland habitat for refuge where they spend most of their life and have been observed up to 1.24 miles from potential breeding ponds (USFWS, 2003). Breeding ponds for CTS include natural vernal pools, ponds, livestock ponds, and other modified permanent and ephemeral ponds (USFWS, 2017).

Specific impact: Without appropriate avoidance and minimization measures for CTS, potential significant impacts associated with the Project activities could include burrow collapse, inadvertent entrapment, reduced reproductive success, reduction in health and vigor of eggs, larvae and/or young, and direct mortality of individuals.

Evidence impact would be significant: The Project area is within the range of CTS and may contain suitable upland and breeding habitat. Decline in CTS populations is attributed to habitat loss and fragmentation; predation from, and competition with invasive species; hybridization; small mammal control; and contaminants (USFWS, 2017). Large tracts of upland habitat, preferably with multiple breeding ponds, are necessary for CTS to persist.

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Environmental Setting and Related Impact)

CDFW recommends conducting the following evaluation of the subject parcel and including the following measures in a CEQA document if there is the potential for CTS.

Focused CTS Surveys

Prior to ground-disturbing activities, CDFW recommends that a qualified wildlife biologist assess the Project site and vicinity (i.e. up to 1.3 miles, observed CTS dispersal distance) that contains potentially suitable habitat, to evaluate the potential for CTS. CDFW recommends site assessments follow the USFWS's "*Interim Guidance on Site Assessment and Field Surveys for Determining Presence or a Negative Finding of the California Tiger Salamander*" (USFW, 2003). CDFW advises the qualified biologist determine the impacts of Project-related activities to all CTS upland and breeding habitat features within and/or adjacent to the construction footprint.

If the site assessment determines there is suitable habitat present for breeding or refugia on the subject parcel, protocol level surveys are advised to be conducted in accordance with the Interim Guidance to determine presence or a negative finding for CTS. Please note that CTS surveys may need to be conducted during years with adequate precipitation to be acceptable.

CTS Avoidance

If the site assessment demonstrates upland burrow refugia or breeding wetland habitat features suitable for use by CTS are present within and/or adjacent to the Project route footprint, absent protocol level surveys, CDFW advises a minimum 50-foot no-disturbance buffer delineated around all small mammal burrows within suitable habitat. If burrow avoidance is not feasible, consultation with CDFW is warranted to determine if the Project can avoid take.

CTS Take Authorization

If full avoidance is not feasible or protocol level surveys do not yield a negative finding, acquisition of an Incidental Take Permit (ITP) pursuant to Fish and Game Code § 2081(b) would be warranted prior to Project implementation to comply with CESA. Alternatively, in the absence of protocol surveys, the applicant can assume presence of CTS within the Project area and obtain an ITP from CDFW.

Swainson's Hawk (SWHA)

Issue: The Project area includes areas of SWHA habitat and is within range of the species. Foraging habitat can include natural grasslands, pasture, hay crops and some irrigated crops (CDFW, 2016). SWHA nest in lone trees in agricultural fields or pastures, roadside trees adjacent to suitable foraging habitat, or within riparian trees (CDFW, 2016).

Specific Impact: Without appropriate avoidance and minimization measures for SWHA, potential significant impacts associated with the Project's construction could include nest abandonment, reduced reproductive success, and reduced health and vigor of eggs and/or young, indirect or direct mortality of individuals.

Evidence impact is potentially significant: The primary threat to SWHA in California continues to be habitat loss, both nesting and foraging habitat, due to urban development and incompatible agriculture (CDFW, 2016). Current surveys have indicated a smaller population of SWHA occupying a restricted range that includes the core habitat areas of the Central Valley and Great Basin (CDFW, 2016).

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Environmental Setting and Related Impact)

CDFW recommends conducting the following evaluation of the subject parcel and including the following measures in a CEQA document if there is the potential for SWHA.

SWHA Surveys

CDFW recommends that a qualified wildlife biologist conduct surveys for nesting raptors following the survey methodology developed by the SWHA Technical Advisory Committee (SWHA TAC, 2000) prior to ground-disturbing activities that have the potential to result from the Project. If ground-disturbing activities take place during the normal bird breeding season (February 1 through September 15), CDFW recommends that additional pre-construction surveys for active nest be conducted by a qualified biologist no more than 10 days prior to the start of construction.

SWHA Avoidance

If an active SWHA nest is found, CDFW recommends implementation of a minimum ½-mile no-disturbance buffer until the breeding season has ended or until a qualified biologist has determined that the young have fledged and are no longer reliant upon the nest or parental care for survival.

SWHA Nest Trees

CDFW recommends that impacts to known nest trees be avoided at all times of year. The removal of mature trees is a potentially significant impact to nesting birds of prey and CDFW advises mitigation of these impacts. Removal of known nest trees is a potentially significant impact under CEQA and could result in take under CESA. This is especially true with species such as SWHA, which exhibit high nest-site fidelity year after year. Regardless of nesting status, if potential or known

SWHA nesting tress are removed, CDFW recommends they be replaced with appropriate native tree species, planted at a ratio of 3:1 (replaced to removed).

SWHA Take Authorization

If the ½-mile no-disturbance nest buffer is not feasible, consultation with CDFW is warranted and acquisition of an ITP for SWHA may be necessary prior to project implementation, pursuant to Fish and Game Code § 2081 (b).

Burrowing Owl (BUOW)

Issue: The Project area is within BUOW range and there are California Natural Diversity Database (CNDDB) occurrences noted within the Project area (CDFW, 2019). BUOW habitat is primarily grassland, deserts, scrublands, with low-growing vegetation and BUOW can persist in human altered areas (Gervais et al., 2008, CBOC, 1993). Burrows are essential habitat for BUOW for protection, shelter and nesting (CBOC, 1993). BUOW utilize burrows created by fossorial mammals and may use man-made structures, such as cement culverts; cement, asphalt, or wood debris piles; or openings beneath cement or asphalt pavement (CBOC, 1993).

Specific impact: Without appropriate avoidance and minimization measures for BUOW, potential significant impacts include nest abandonment, which may result in reduced nesting success such as reduced health or vigor of eggs or young, in addition to direct mortality in violation of the Migratory Bird Treaty Act and Fish and Game Code.

Evidence impact is potentially significant: The Project area is within the range of BUOW and BUOW may be found within Project sites. BUOW rely on burrow habitat year-round for their survival and reproduction. Threats to BUOW include habitat loss and degradation from urbanization of farmland, changes in agriculture practices, and loss of open lands (Gervais et al., 2008). In addition, activities including grading, disking, cultivation, earth moving, burrow blockage, heavy equipment compacting of burrows, and disturbance which may result in harassment of owls at occupied burrows have the potential to result in take of BUOW (CDFG, 2012). Activities that may impact BOUW populations include eradication of host burrowers, changes in vegetation management, and use of pesticides and rodenticides (CDFG, 2012).

Recommended Potentially Feasible Mitigation Measure(s)

CDFW recommends conducting the following evaluation of the subject parcel and including the following measures in a CEQA document if there is the potential for BUOW.

BUOW Surveys

CDFW recommends assessing presence/absence of BUOW by having a qualified biologist conduct surveys following the California Burrowing Owl Consortium's (CBOC) *"Burrowing Owl Survey Protocol and Mitigation Guidelines"* (CBOC, 1993) and CDFW's *Staff Report on Burrowing Owl Mitigation"* (CDFG, 2012). CDFW advises that surveys include a 500-foot buffer around the Project area. Please note the guidelines suggest three or more surveillance surveys be conducted during daylight with each visit occurring at least three weeks apart during the peak breeding season (April 15 to July 15), when BUOW are most detectable (CDFG, 2012).

BUOW Avoidance

If BUOW are found within the Project area, CDFW recommends implementing no-disturbance buffers, as outlined in the "*Staff Report on Burrowing Owl Mitigation"* (CDFG, 2012), prior to and during any ground-disturbing activities associated with Project implementation. 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 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)

BUOW Passive Relocation and Mitigation

If BUOW are found to occupy the Project site and avoidance is not possible, it is important to note that according to the Staff Report (CDFG, 2012), exclusion is not a take avoidance, minimization, or mitigation method and is considered a potentially significant impact under CEQA. However, if necessary, CDFW recommends that burrow exclusion be conducted by qualified biologists and only during the non-breeding season, 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 1 burrow collapsed to 1 artificial burrow constructed (1:1) as mitigation for the potentially significant impact of evicting BUOW. BUOW may attempt to colonize or

re-colonize an area that will be impacted; thus, CDFW recommends ongoing surveillance of the Project site during Project activities, at a rate that is sufficient to detect BUOW if they return.

Special Status Bat Surveys

If suitable roosting habitat is confirmed within 100 feet of Project activities, CDFW recommends that a qualified biologist conduct focused surveys to establish species and seasonal usage. CDFW recommends that individual project areas be assessed for potential to support roosting bats well in advance of Project activities and that pre-activity surveys occur within two weeks prior to the start of work.

Focused survey methodology is advised to include visual surveys of bats (observation of presence of bats during foraging period), inspection for suitable habitat or bat sign (guano) and use of ultrasonic detectors during all dusk emergence and pre-dawn re-entry. To maximize detectability, surveys should be conducted within one 24-hour period.

Avoidance

If bats are found to occupy the Project site, CDFW recommends establishing a 100-foot no-disturbance buffer around roost sites, installing temporary exclusionary devices at the appropriate time of year to avoid take, and installing new roost sites prior to initiation of Project-related activities to allow enough time for bats to relocate. CDFW recommends consultation and specific notice if bats may be disturbed by Project-related activities.

American Badger: American badger, a State Species of Special Concern, has been documented within Project area (CDFW, 2019). CDFW recommends species-specific focused surveys, conducted by qualified biologists, in advance of project implementation in order to evaluate if impacts to American badger could occur. Avoidance of American badger whenever possible is encouraged via delineation and observing appropriate no-disturbance buffers. In addition, CDFW recommends that if a badger is detected within a project work area during project activities, it be allowed to move out of the work area of its own volition. If an American badger is found denning on or immediately adjacent to a project work area, consultation with CDFW is advised to determine whether the animal(s) may be evicted from the den. CDFW recommends fully addressing avoidance, minimization, and mitigation measures for American badger and that these measures be included as enforceable mitigation in the EIR.

Nesting Birds: The trees, shrubs, and grasses within and in the vicinity of the Project area likely provides nesting habitat for songbirds and raptors. CDFW encourages Project implementation to occur during the bird non-nesting season. In addition to direct

impacts, such as nest destruction, nests might be affected by noise, vibration, odors, and movement of workers or equipment. If Project activities must occur during the breeding season (February through mid-September), the Project proponent is responsible for ensuring that implementation of the Project does not result in any violation of the Migratory Bird Treaty Act or relevant Fish and Game Code Sections.

Prior to work commencing, including staging, clearing, and grubbing, surveys for active nests should be conducted by a qualified wildlife biologist no more than 10 days prior to Project commencement and that the surveys be conducted in a sufficient area around the work site to identify any nests that are present and to determine their status. A sufficient area means any nest within an area that could potentially be affected by the Project. Identified nests should be continuously surveyed for the first 24 hours prior to any construction-related activities to establish a behavioral baseline. Once work commences, all nests should be continuously monitored to detect any behavioral changes as a result of the Project. If behavioral changes are observed, the work causing that change should cease and CDFW consulted for additional avoidance and minimization measures.

If active nests are found and a monitor is not feasible, CDFW recommends implementing a minimum 250-foot no-disturbance buffer around active nests of non-listed bird species and a 500-foot no-disturbance buffer around the nests of non-listed raptors 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. Variance from these no-disturbance buffers may be implemented when there is compelling biological or ecological reason to do so, such as when the Project area would be concealed from a nest site by topography. Any variance from these buffers is advised to be supported by a qualified wildlife biologist and it is recommended CDFW be notified in advance of implementation of a no-disturbance buffer variance.

Lake and Streambed Alteration: CDFW also has regulatory authority with regard to activities occurring in streams, including ephemeral streams, and/or lakes that could adversely affect any fish or wildlife resource, pursuant to Fish and Game Code §§ 1600 et seq. Work within or adjacent to stream channels has the potential to result in substantial diversion or obstruction of natural flows; substantial change or use of material from the bed, bank, or channel; deposition of debris, waste, sediment, toxic runoff or other materials into water causing water pollution and degradation of water quality.

If a Project could 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 or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake, notification of Lake or Streambed Alteration to CDFW is required.

Business and Professions Code 26060.1 (b)(3) includes a requirement that California Department of Food and Agriculture cannabis cultivation licensees demonstrate compliance with Fish and Game Code § 1602 through written verification from CDFW. CDFW recommends project proponents submit of a Lake and Streambed Alteration Notification to CDFW for the proposed Project prior to initiation of any cultivation activities. As such, CDFW recommends that the City of Fresno EIR inform Project proponents of this responsibility. It is important to note that CDFW is required to comply with CEQA in the issuance or the renewal of an Lake or Streambed Alteration Agreement. Additional information be found here: https://www.wildlife.ca.gov/Conservation/Cannabis/Permitting

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 CNDDB. The CNNDB field survey form can be found at the following link: https://www.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://www.wildlife.ca.gov/Data/CNDDB/Plants-and-Animals.

FILING FEES

If it is determined the Project would have an impact on fish and/or wildlife, an 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 NOP for the EIR for Text Amendment No. P19-02978 – Evaluating the Proposed Regulation and Permitting of Commercial Cannabis to assist the City of Fresno in identifying and mitigating Project impacts on biological resources.

More information on survey and monitoring protocols for sensitive species can be found at the CDFW's website (https://www.wildlife.ca.gov/Conservation/Survey-Protocols). Questions regarding this letter or further coordination should be directed to Benessa Galvan, Environmental Scientist, at the address provided on this letterhead, by telephone at (559) 243-8152, or by email at benessa.galvan@wildlife.ca.gov.

Sincerely,

for Julie Vance

Julie A. Vance
Regional Manager

REFERENCES

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