



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Central Region
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GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director



Governor's Office of Planning & Research

Jun 08 2020

June 8, 2020

STATE CLEARINGHOUSE

Israel Trejo
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Development and Resource Management Department
2600 Fresno Street, Room 3043
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Subject: Draft Impact Report (EIR); Text Amendment No. P19-02978 – Evaluating the Proposed Regulation and Permitting of Commercial Cannabis Activities (Project)
SCH No.: 2019070123

Dear Mr. Trejo:

The California Department of Fish and Wildlife (CDFW) received a Request for Comments from the City of Fresno regarding a draft EIR for Text Amendment No. P19-02978 – Evaluating the Proposed Regulation and Permitting of Commercial Cannabis Activities pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹ CDFW previously submitted comments in a letter dated August 5, 2019 in response to a Notice of Preparation (NOP) for the Project.

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,

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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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. 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 & 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.), related authorization as provided by the Fish and Game Code will be required.

Bird Protection: 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).

PROJECT DESCRIPTION SUMMARY

Proponent: City of Fresno

Objective: The City of Fresno is proposing an amendment to Sections 15-2739 and 15-2739.1 of the Fresno Municipal Code, Article 33 to Chapter 9 of the Fresno Municipal Code, and Article 21 to Chapter 12 of the Fresno Municipal Code, relating to adult use and medicinal cannabis retail business and commercial cannabis business.

Cultivation, Distribution, and Manufacturing

- Eight (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.
- Eight (8) businesses would be permitted within industrial zoned property within one-half mile of Highway 99 between Shaw and Clinton Aves., or within one (1) mile of Highway 99 north of Shaw and south of Clinton Aves., or within one (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.

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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

- Twenty-one (21) total possible cannabis retail locations – this includes up to fourteen (14) medicinal and/or adult use cannabis retail locations (two per Council District); with the potential to add seven (7) additional retailers (one additional per Council District) upon Council Resolution.
- Retailers would be restricted to the Downtown Neighborhood (DTN), Downtown General (DTG), Commercial Main Street (CMS), Commercial Community (CC), Commercial Regional (CR), Commercial General (CG), Commercial Highway (CH), Neighborhood Mixed-Use (NMX), Corridor/Center Mixed Use (CMX), or Regional Mixed-Use (RMX) 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 a.m. to 10:00 p.m.
- Retail delivery allowed if part of store-front operation.

Cannabis Cultivation

- The ordinance prohibiting all cultivation does not apply to private residence with six (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

COMMENTS AND RECOMMENDATIONS

In review of the draft 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 threatened and federally endangered San Joaquin kit fox (*Vulpes macrotis mutica*); 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*). CDFW is concerned that future cultivation, distribution, manufacturing, testing laboratories, and retailer activities could result in impacts to nesting birds and special status species known to occur in the Project area. Therefore, CDFW requests that the EIR fully identify potential impacts to biological resources and

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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.

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.

Project-related activities that result in land conversion may also result in habitat loss for special-status species or fragmentation of sensitive habitat. Loss of habitat to development and agriculture are contributing factors to the decline of special-status species. CDFW recommends new cannabis cultivation sites be restricted to existing facilities, previously developed sites, or existing industrial warehouses.. Furthermore, CDFW recommends distribution, manufacturing, testing laboratories, and cannabis retailers be located in established urban areas.

Mitigation Measures, San Joaquin Kit Fox (SJKF), American Badger, and Burrowing Owl (BUOW) MM 4.4-2. Page 4.4-29.

As currently drafted Mitigation Measure 4.4-2 applies to undeveloped parcels and requires within 14 days and no more than 30 days prior to the start of construction activities a pre-construction clearance survey shall be conducted by a qualified biologist, multiple surveys may be needed, which would be phased with construction of the Project. The measure also includes avoidance buffer zones for burrowing owls (active burrows) as 500 feet for April 1 – October 15 and 100 feet for October – March 31.

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).

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

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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)

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.

Mitigation Measures, Nesting Birds MM 4.4-4. Page 4.4-32.

As currently drafted MM 4.4-4 applies to undeveloped parcels and states if construction activities must occur during the nesting season (February 15 to August 31), pre-activity nesting bird surveys shall be conducted within seven days prior to the start of construction at the construction site plus a 250-foot buffer for songbirds and a 500-foot buffer for raptors (other than Swainson's hawk). If active nests are found during the survey or at any time during construction of the Project, an avoidance buffer ranging from 50 feet to 350 feet may be required, as determined by a qualified biologist.

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 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

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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.

CDFW recommends 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.

Mitigation Measures, Swainson's Hawk (SWHA) MM 4.4-6. Page 4.4-33-4.4-34.

As currently drafted MM 4.4-6 applies to undeveloped parcels and states for construction activities conducted during the breeding season (March 1 through August 31), the applicant shall retain a qualified biologist to conduct preconstruction surveys and identify active nests on and within 0.5 mile of the project site to avoid, minimize, and mitigate potential impacts on SWHA nesting adjacent to the project site. If active SWHA nests are found within the nest survey area, the construction contractor shall avoid impacts on such nests by establishing appropriate buffers around active nest sites identified during preconstruction raptor surveys. CDFW guidelines recommend implementation of 0.5-mile-wide buffers for SWHA's nests, but the size of the buffer may be decreased if a qualified biologist and the applicant, in consultation with CDFW, determine that such an adjustment would not be likely to adversely affect the nest.

CDFW recommends that a qualified wildlife biologist conduct surveys for nesting raptors following the survey methodology developed by the SWHA Technical Advisory

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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.

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.

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

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

Mitigation Measures, Worker Environmental Awareness Training (WEAT) MM 4.4-8. Page 4.4-35.

Mitigation Measure 4.4-8 applies to construction activities on an undeveloped parcel and requires all personnel to attend a WEAT. The program shall include information on the life history of all of the special status species determine herein to have potential to occur onsite, including migratory birds and raptors.

CDFW recommends California tiger salamander be included in the WEAT. The analysis of potential impacts and recommended mitigation measures for California tiger salamander is provided below.

COMMENT 1: 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

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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)

CDFW recommends conducting the following evaluation of the subject parcel and including the following measures in the EIR.

Mitigation Measure 1: 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.

Mitigation Measure 2: 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

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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.

Mitigation Measure 3: CTS Take Authorization

If full avoidance is not feasible or protocol-level surveys do not yield a negative finding, acquisition of a State ITP pursuant to Fish and Game Code section 2081 subdivision (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 a State ITP from CDFW.

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 sections 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.

Additionally, 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 section 1602 through written verification from CDFW. CDFW recommends project proponents for commercial cannabis cultivation submit 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 a Lake or Streambed Alteration Agreement. Additional information be found here: <https://www.wildlife.ca.gov/Conservation/Cannabis/Permitting>

Cannabis Water Use: Water use estimates for cannabis plants are not well established in literature and estimates from published and unpublished sources range between 3.8-liters and 56.8-liters per plant per day. Based on research and observations made by CDFW in northern California, cannabis grow sites have

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significantly impacted streams through water diversions resulting in reduced flows and dewatered streams (Bauer et al., 2015). Groundwater use for clandestine cannabis cultivation activities have resulted in lowering the groundwater water table and have impacted water supplies to streams in northern California. CDFW recommends that CEQA documents address the impacts to groundwater and surface water that may occur from Project activities.

Light Pollution: Cannabis cultivation operations often use artificial lighting or “mixed-light” techniques in both greenhouse structures as well as indoor operations to increase yields. Night lighting can disrupt the circadian rhythms of many wildlife species. Many species use photoperiod cues for communication (i.e., bird song; Miller, 2006), determining when to begin foraging (Stone et al., 2009), behavior thermoregulation (Beiswenger, 1977), and migration (Longcore & Rich, 2004). Even aquatic species can be affected; migration of salmonids can be slowed or halted by the presence of artificial lighting (Tabor et al., 2004; Nightingale et al., 2006). Phototaxis, a phenomenon which results in attraction and movement towards light, can disorient, entrap, and temporarily blind wildlife species that experience it (Longcore and Rich, 2004). CDFW recommends CEQA documents address light pollution in the analysis of impacts.

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 found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The completed form can be mailed electronically to CNDDDB at the following email address: CNDDDB@wildlife.ca.gov. 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

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).

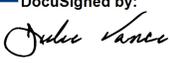
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CONCLUSION

CDFW appreciates the opportunity to comment on the EIR for Text Amendment No. P19-02978 – Evaluating the Proposed Regulation and Permitting of Commercial Cannabis Activities 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 Kelley Aubushon, Senior Environmental Scientist (Specialist), at the address provided on this letterhead, by telephone at (559) 573-6117, or by email at kelley.aubushon@wildlife.ca.gov.

Sincerely,

DocuSigned by:

FA83F09FE08945A...
Julie A. Vance
Regional Manager

Attachment A

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Attachment A

**CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
RECOMMENDED MITIGATION MONITORING AND REPORTING PROGRAM
(MMRP)**

**PROJECT: Text Amendment No. P19-02978 – Evaluating the
Proposed Regulation and Permitting of Commercial
Cannabis Activities**

SCH No.: 2019070123

RECOMMENDED MITIGATION MEASURE	STATUS/DATE/INITIALS
<i>Before Disturbing Soil or Vegetation</i>	
Mitigation Measure 1: California Tiger Salamander Surveys	
<i>During Construction</i>	
Mitigation Measure 2: California Tiger Salamander Avoidance	
Mitigation Measure 3: California Tiger Salamander Take Authorization	