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DEPARTMENT OF FISH AND WILDLIFE
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GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director



Governor's Office of Planning & Research

Aug 04 2020

STATE CLEARINGHOUSE

August 4, 2020

Scott Guidi
California Department of Transportation, District 10
1976 East Dr. Martin Luther King Jr. Boulevard
Stockton, California 95205
scott.guidi@dot.ca.gov

Subject: Metal Beam Guardrail Upgrades Within Stanislaus and Tuolumne Counties Along State Route (SR) 108, SR 120, and SR 49 (Project) Initial Study with proposed Mitigated Negative Declaration State Clearinghouse No. 2020070118

Dear Mr. Guidi:

The California Department of Fish and Wildlife (CDFW) received a proposed Mitigated Negative Declaration (MND) and its supporting Initial Study (IS) prepared by the California Department of Transportation (Caltrans) for the above-referenced Project pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that may affect California fish and wildlife. Likewise, CDFW appreciates the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under 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

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

PROJECT DESCRIPTION SUMMARY

Proponent: Caltrans

Objective: Caltrans proposes to upgrade the existing guardrails at 23 identified locations in Stanislaus and Tuolumne Counties along SR 108, SR 120, and SR 49. All Project-related activities would be limited to the disturbed road shoulders and pullouts within Caltrans right-of-way. After completion of construction activities, temporarily disturbed areas would be restored to pre-project conditions. The guardrail upgrade work would include 21 locations where the existing metal beam guardrail system will be replaced with the Midwest guardrail system. Location 10 will have the existing flared Midwest guardrail system replaced in kind, and Location 11 will have the two existing flared terminal systems replaced with two in-line terminal systems. At Location 22, a standard end block extension will be constructed to connect the Midwest Guardrail System to the bridge rail.

Location: The Project site exists in Stanislaus County along SR 108 between post mile 28.5 and post mile 33.4, and along SR 120 at post mile 12.22; and in Tuolumne County along SR 108 between post mile 1.28 and post mile 53.03, along SR 120 at post mile 6.01 and at post mile 11.29, and along SR 49 at post mile 17.6.

Timeframe: Unspecified.

COMMENTS AND RECOMMENDATIONS

CDFW offers the following comments to assist Caltrans in adequately identifying and sufficiently reducing to less-than-significant the potentially significant, direct and indirect Project-related impacts to fish and wildlife (biological) resources. Editorial comments or other suggestions may also be included to improve the document.

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Currently, the proposed MND indicates that the Project-related impacts to Biological Resources would be less-than-significant with implementation of specific avoidance and minimization efforts. In particular, Caltrans concludes there will be less-than-significant impacts to the State threatened Swainson's hawk (*Buteo swainsoni*), the State endangered and State fully protected bald eagle (*Haliaeetus leucocephalus*), the State endangered great gray owl (*Strix nebulosa*), and migratory birds in general with implementation of proposed avoidance and minimization measures.

However, as currently drafted, it is unclear whether some of the species-specific and general migratory bird measures proposed in the IS sufficiently reduce, to less-than-significant, the potential Project-related impacts to those species. Therefore, CDFW does not agree with these conclusions and will herein suggest measures to survey for and avoid Project-related impacts to these species, thereby reducing to less-than-significant the Project-related impacts. CDFW also recommends that Caltrans identify a path forward in the event avoidance of two of the three species is not feasible.

I. Environmental Setting and Related Impact

Would the Project have a substantial adverse impact, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special-status species in local or regional plans, policies, or regulations, or by CDFW or the United States Fish and Wildlife Service (USFWS)?

COMMENT 1: Migratory Birds including Swainson's Hawk (SWHA), Bald Eagle (BAEA), and Great Gray Owl (GGOW)

Issue: Migratory birds, including SWHA, BAEA, and GGOW, could potentially nest in the vicinity of the Project. The Project activities will involve drilling or piledriving within the right-of-way and CDFW considers it possible that the Project-related activities would represent a novel stimulus which could result in nest abandonment to migratory birds and to SWHA, BAEA, and GGOW specifically if they occur within 1/2-mile of an active nest. This nest failure of the State threatened SWHA, the State endangered and State fully protected BAEA, and the State endangered GGOW would represent a significant impact to SWHA, BAEA, and GGOW and possibly take as it is defined in section 86 of Fish and Game Code.

Specific Impacts: In the IS, Caltrans addresses migratory birds in general, but does not specifically address the potential presence and/or Project-related impacts to SWHA, BAEA, and GGOW. Further, while Caltrans proposes maintaining no-disturbance buffers around active nests, Caltrans does not assign numeric parameters for these buffers in the event active nests occur near the Project site.

Evidence impact would be significant: Adoption of the MND as it is written will allow Project-related activities that will involve drilling or pile driving employing heavy equipment and work crews outside unquantified "no-work buffers" around nests.

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These activities occurring within ½-mile of active SWHA, BAEA, and GGOW nests have the potential to result in nest abandonment, significantly impacting nesting SWHA, BAEA, and GGOW.

Recommended Potentially Feasible Avoidance and Mitigation Measure(s)

Because the Project-related activities represent novel stimuli and threaten nest abandonment, CDFW recommends Caltrans propose a ½-mile no-disturbance buffer around active SWHA, BAEA, and GGOW nests in order to reduce to less-than-significant the Project-related impacts to the species. CDFW recommends edits to the Migratory Bird avoidance and minimization measures in the IS. Further, CDFW recommends these edited measures be made quantifiable and enforceable conditions of Project approval.

Recommended Edits to Migratory Bird Avoidance and Minimization Measures to specifically address SWHA, BAEA, and GGOW on page 33 of the IS/MND.

Currently, under the Migratory Bird avoidance and minimization measures section of the IS, Caltrans proposes a no-disturbance buffer around active migratory bird nests detected during preconstruction surveys. CDFW recommends Caltrans edit this measure to propose numeric no-work buffers for unlisted passerine, raptors, and listed raptors (including SWHA, BAEA, and GGOW). Alternatively, the species-specific measures for SWHA, BAEA, and GGOW could be focused and discussed outside the Migratory Bird section.

CDFW recommends Caltrans propose a minimum no-disturbance buffer of 250 feet around active nests of non-listed passerine bird species and a 500-foot no-disturbance buffer around active nests of non-listed raptors. These buffers are advised to remain in place until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or parental care for survival. Variance from these no-disturbance buffers is possible when there is compelling biological or ecological reason to do so, such as when the construction area would be concealed from a nest site by topography. CDFW recommends that a qualified biologist advise on any variance from these buffers and consult with CDFW in advance of implementing a variance.

For SWHA, BAEA, and GGOW specifically, CDFW recommends Caltrans require focused surveys for active nests and ½-mile no-disturbance buffers around any active nests until the young have fledged and are no longer reliant upon the nest or parental care for survival. If the ½-mile no-disturbance buffer is not feasible, CDFW recommends Caltrans propose obtaining take authorization for SWHA and GGOW through the acquisition of an Incidental Take Permit pursuant to section 2081(b) of Fish and Game Code and add this as a mitigation measure to the IS. CDFW cannot authorize Project-related take of BAEA due to its fully

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protected status. Therefore, take of the species must be completely avoided and the IS is advised to include measures for full species avoidance.

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 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 that the Project has the potential to impact biological resources, an assessment of filing fees will be 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).

CDFW appreciates the opportunity to comment on the Project to assist Caltrans in identifying and avoiding the Project's impacts on biological resources.

More information on survey and monitoring protocols for sensitive species can be found at CDFW's website (<https://www.wildlife.ca.gov/Conservation/Survey-Protocols>). If you have any questions, please contact Mr. Javier Mendez, Environmental Scientist, at the address provided on this letterhead, by telephone at (559) 243-8145, or by electronic mail at javier.mendez@wildlife.ca.gov.

Sincerely,

DocuSigned by:

37BF80A1646F41C...

for Julie A. Vance
Regional Manager

Attachment 1: Recommended Mitigation Monitoring and Reporting Program

cc: See Page Six

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cc: United States Fish and Wildlife Service
2800 Cottage Way, Suite W-2605
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ec: Office of Planning and Research, State Clearinghouse
state.clearinghouse@opr.ca.gov

California Department of Fish and Wildlife
Ferranti, Tomlinson, Hulbert, Mendez

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Attachment 1

Recommended Mitigation Monitoring and Reporting Program

Attachment 1

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

PROJECT: Metal Beam Guardrail Upgrades Within Stanislaus and Tuolumne Counties Along State Route (SR) 108, SR 120, and SR 49 Project

SCH No.: 2020070118

RECOMMENDED MITIGATION MEASURE	STATUS/DATE/INITIALS
<i>Before Disturbing Soil or Vegetation</i>	
Mitigation Measure 1: SWHA, BAEA, GGOW Avoidance	
Mitigation Measure 2: SWHA Take Authorization (if avoidance is not feasible)	
Mitigation Measure 3: BAEA Avoidance	
Mitigation Measure 4: GGOW Avoidance	
Mitigation Measure 5: GGOW Take Authorization (if avoidance is not feasible)	
<i>During Soil or Vegetation Disturbance</i>	
Mitigation Measure 6: BAEA Avoidance	