



State of California – Natural Resources Agency

DEPARTMENT OF FISH AND WILDLIFE

Bay Delta Region

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October 30, 2020

Governor's Office of Planning & Research

**Oct 30 2020**

Mr. Adam Noelting

Metropolitan Transportation Commission

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**STATE CLEARINGHOUSE**

Subject: Plan Bay Area 2050 (Regional Transportation Plan/Sustainable Communities Strategy), Notice of Preparation of a Draft Environmental Impact Report, SCH No. 2020090519, Nine Counties of the San Francisco Bay Area

Dear Mr. Noelting:

The California Department of Fish and Wildlife (CDFW) has reviewed the Metropolitan Transportation Commission's (MTC) Notice of Preparation (NOP) of a draft Environmental Impact Report (EIR) for the Plan By Area 2050 (Regional Transportation Plan/Sustainable Communities Strategy) (Project), which encompasses all nine San Francisco Bay Area counties (Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma).

As stated in the NOP, MTC is required by state legislation (Government Code Section 65080 et seq.) and by federal regulation (Title 23 USC Section 134) to prepare a Regional Transportation Plan (RTP) for the San Francisco Bay Area region. Additionally, MTC is responsible for developing a Sustainable Communities Strategy per the Climate Protection Act (SB 375) signed into law in 2008.

The California Code of Regulations, title 14, section 1500 et seq. (California Environmental Quality Act (CEQA) Guidelines), specifically Section 15082, stipulates that the NOP shall provide the responsible and trustee agencies and the Office of Planning and Research with sufficient information describing the Project and potential environmental effects to enable such agencies to make a meaningful response. The NOP shall include a description of the project, specific location of the project, and probable environmental effects of the project. CEQA Guidelines section 15124 stipulates that the project description shall contain a description of the project's technical and environmental characteristics.

Because the NOP provides minimal information about the existing and future technical and environmental characteristics of the Project, our comments below offer guidance on how MTC should proceed in identifying, analyzing, and mitigating effects of the Project on environmental factors subject to CDFW's statutory authority. Specific recommendations to reduce or avoid potentially significant effects of the Project on fish,

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wildlife, plant, and habitat resources, will necessitate a draft EIR that details the Project's existing and future technical and environmental characteristics, including sufficient technical data to permit a full assessment of all significant environmental impacts (CEQA Guidelines, §15147).

CDFW has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and their habitats (i.e., biological resources). CDFW is a trustee agency with responsibility under CEQA for commenting on projects that could affect fish and wildlife resources (CEQA Guidelines, §15386). As a trustee agency, CDFW reviews and comments on environmental documents and impacts arising from project activities, as those terms are used under CEQA (Fish and Game Code, §1802).

CDFW is also considered a Responsible Agency if a project would require discretionary approval, such as the California Endangered Species Act (CESA) Permit, the Native Plant Protection Act (NPPA) Permit, or the Lake and Streambed Alteration (LSA) Agreement; and other provisions of the Fish and Game Code that afford protection to the State's fish and wildlife trust resources.

## **REGULATORY REQUIREMENTS**

### **California Endangered Species Act**

CDFW has discretionary authority over activities that could result in the take<sup>1</sup> of any species listed as candidate, threatened, or endangered pursuant to CESA (Fish and Game Code, Section 2050 et seq.). CDFW considers adverse impacts to CESA-listed species, for the purposes of CEQA, to be significant without mitigation. Take of any CESA-listed species is prohibited except as authorized by law (Fish and Game Code, §§ 2080 and 2085). If the Project, including Project construction or any Project-related activity during the life of the Project, will result in take of a CESA-listed species, CDFW recommends that the Project proponent seek appropriate authorization prior to Project implementation [e.g., CESA Incidental Take Permit (ITP)].

### **Lake and Streambed Alteration**

Per Fish and Game Code, Section 1602(a), an entity may not substantially diver or obstruct the natural flow of; substantially change or use material from the bed, bank, or channel of; or dispose of any debris, waste, or other material, into any river, stream, or

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<sup>1</sup> Fish and Game Code, Section 86: "Take" is defined as hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.

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lake unless 1) the entity provides written notification to CDFW, and 2) CDFW issue an LSA Agreement, or determines that an LSA Agreement is not necessary for the Project.

Ephemeral and/or intermittent streams and drainages (i.e., drainages that are dry for periods of time or only flow during periods of rainfall) are also subject to the notification requires in Fish and Game Code section 1602(a).

CDFW must comply with CEQA prior to issuance of an ITP or LSA Agreement for a project. As such, CDFW may consider the lead agency's (i.e., MTC's) CEQA documentation for the Project. To minimize additional requirements by CDFW and/or under CEQA, the draft EIR should fully disclose potential Project impacts on CESA-listed species and any river, lake, or stream, and provide adequate avoidance, minimization, mitigation, monitoring and reporting measures for issuance of the ITP or LSA Agreement.

### **Fully Protected Species**

CDFW has jurisdiction over fully protected species of birds, mammals, amphibians, reptiles, and fish pursuant to Fish and Game Code sections 3511, 4700, 5050, and 5515. Take of any fully protected species is prohibited and CDFW cannot authorize take except in limited circumstances.

### **State Rare Plants**

CDFW also has jurisdiction over plants designated as 'rare' under the NPPA (Fish and Game Code, §1900 et seq.). The NPPA prohibits the take of rare plants, and includes exceptions to some activities.

### **Migratory Birds**

CDFW has jurisdiction over actions that may result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code section 3503, 3503.5, and 2513 prohibit the following: unlawful take, possession or needless destruction of the nest or eggs of any bird; unlawful take, possession, or destruction of any birds-of-prey or their nests or eggs; and unlawful take of any migratory nongame bird.

### **Furbearing and Nongame Mammals**

CDFW has jurisdiction over furbearing mammals pursuant to California Code of Regulations, title 14, section 460. This section states, "fisher, marten, river otter, desert kit fox, and red fox may not be taken at any time," and therefore CDFW cannot authorize their take. Additionally, nongame mammals, such as bats, cannot be taken or

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possessed except as provided in the Fish and Game Code or in accordance with regulations adopted by the Commission (Fish and Game Code, §4150).

### **Fish Passage**

Per Fish and Game Code section 5901, it is unlawful to construct or maintain in any streams any device or contrivance that prevents, impedes, or tends to prevent or impede, the passing of fish up and down stream. Please also note that Fish and Game Code section 45 defines “fish” to include a wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals.

### **Water Pollution**

It is unlawful to deposit in, permit to pass into, or place where it can pass into the waters of this state any substance or material deleterious to fish, plant life, mammals, or bird life (Fish and Game Code, §5650). Additionally, per Fish and Game Code section 5652, it is unlawful to deposit, permit to pass into, or place where it can pass into the waters of the state, or to abandon, dispose of, or throw away within 150 feet of the high water mark of the waters of state, any cans, bottle, garbage, motor vehicle or parts thereof, rubbish, litter, refuse, waste, debris, or the viscera or carcass of any dead mammal, or the carcass of any dead bird.

## **SCOPE AND CONTENT OF ENVIRONMENTAL INFORMATION**

CDFW offers the following comments and recommendations below to assist MTC 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.

### **Intended Uses of the EIR and CDFW’s Role as a Responsible Agency**

The draft EIR should articulate the intended uses of the EIR and specify whether CDFW is anticipated to be one of the responsible agencies that will use the EIR in its decision making for subsequent Project activities (CEQA Guidelines, §15124). Additionally, the draft EIR should clearly state whether it is intended to be a final comprehensive document, for which all subsequent projects will utilize, or whether tiered documents will be prepared for individual projects.

### **Program EIR and Tiering**

A program EIR is written so subsequent Project activities within the scope of the program EIR would not require preparation of an additional environmental document (CEQA Guidelines, § 15168). CDFW is pleased to provide guidance to MTC in support of the preparation of a draft EIR that, pursuant to Section 15168, *deals with the effects*

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*of the program as specifically and comprehensively as possible.* Based on the large scale and scope of the Project and anticipated preparation of a program EIR, additional environmental documents will most likely need to be prepared and tiered from the EIR for certain subsequent Project activities (CEQA Guidelines, §§ 15152 and 15162).

The draft EIR should clearly establish a procedure for determining if subsequent Project activities are within the scope of the EIR, or require an additional environmental document. This will be critical to ensuring adequate analysis of Project activity effects on biological resources. CEQA Guidelines section 15168(c)(4) states, *“Where the subsequent activities involve site-specific operations, the agency should use a written checklist or similar device to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were covered in the program EIR.”* CDFW recommends developing the checklist with this draft EIR to guide the appropriate CEQA review level for future projects as an attachment to the draft EIR. A procedure or checklist will be critical to ensuring adequate analysis of Project effects on biological resources. CDFW recommends using the procedure and checklist developed for infill projects as a model; it can be found in CEQA Guidelines Section 15183.3 and Appendix N. The checklist should also outline how habitat will be analyzed per species or habitat type, how impacts will be assessed, and whether any mitigation is necessary.

When used appropriately, the checklist should be accompanied by enough relevant information and reasonable inferences to support “within the scope” of the EIR conclusion. For subsequent Project activities that may affect sensitive biological resources, a site-specific analysis should be prepared, from which the supporting information would be derived (see additional guidance regarding site-specific analyses below). The checklist should cite the specific portions of the EIR, including page and section references, containing the analysis of the subsequent Project activities significant effects and indicate whether it incorporates all applicable mitigation measures from the EIR.

The EIR should state that as soon as the lead agency has determined an additional environmental document will be required for a subsequent Project activity, it shall consult with all responsible and trustee agencies, including CDFW, to obtain recommendations as to whether an additional EIR or negative declaration should be prepared (CEQA Guidelines, § 15063).

### **Project Description**

The draft EIR must include a Project description, including reasonably foreseeable future phases of the proposed Project, which contains sufficient information to evaluate and review the Project’s environmental effects. To evaluate Project effects on biological

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resources, it will be necessary to include all Project activities that may result in a potentially significant effect in the draft EIR.

The Project description should detail activities that result in any type of ground disturbance, including even minor disturbances (e.g., trampling, soil erosion, runoff, and sedimentation), visual disturbance (e.g., light sources that may result in phototaxis), and auditory disturbance (i.e., noise). Detailed information about facilities/infrastructure and related construction, operation, maintenance, and decommissioning should be included.

The Project description should also identify setback distances from flood zones, wetlands, streams, and lakes, including perennial, intermittent, or ephemeral channels, and ponds.

### **Biological Expertise**

Project applicants often engage the services of a biologist experienced in conducting CEQA analysis to develop a Project description that contains sufficient information to evaluate impacts on biological resources. CDFW strongly recommends this approach and encourages MTC to ensure that Project engineering and construction experts are available to support biologists in preparing a complete and accurate Project description.

### **Environmental Setting**

An EIR must include a description of the environmental setting (i.e., physical conditions) that contains sufficient information to understand the significant effects of the proposed Project and its alternatives (CEQA Guidelines, §15125 and 15360).

### **Program Level Detail**

CDFW recommends that the draft EIR include the following information at the level of detail that is feasible at the “program level” to avoid siting subsequent Project activities where sensitive biological resources occur and to target areas that may require additional analysis.

- *Ecoregions*. An environmental setting that is also organized by the U.S. Department of Agriculture ecoregion section.
- *Species and Vegetation*. A description of the vegetation and natural communities (and mapping), fish, wildlife, and their habitats, including fully protected, rare, threatened, and endangered species, as these terms are defined in CEQA Guidelines section 15380, within the Project area of potential effect. This includes resources in the vicinity of the Project that may be significantly affected. Species with special designations; for example, California Species of Special Concern,

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federal agency species of concern, and California Native Plant Society (CNPS) Rare Plant Rank species, typically meet the section 15380 criteria.

- *Aquatic/Wetland Features.* A description and mapping of water features, including streams, lakes, riparian habitat, wetlands, groundwater and aquifer sources, seasonally and permanently wetted channels, sloughs, depressions, spring seeps, ponds, and flood zones.
- *Protected Habitat Areas.* A description and mapping of specially protected habitat areas and other sensitive biological features (e.g., conservation lands, CDFW-owned lands, Marine Protected Areas, and wildlife movement corridors).
- *Climate Change Projections.* A description and mapping of areas where future physical conditions are projected to be altered due to climate change. This will inform how the Project will affect such areas in the foreseeable future because of changing conditions, e.g., sea level rise.

### **Site Specific Detail**

For subsequent Project activities that may affect sensitive biological resources, the draft EIR should require the preparation of a site-specific analysis of biological resources to establish local baseline conditions that could not be described in the draft EIR at the program level. This may include, but should not be limited to,

- *Site-specific Environmental Data.* For example, soil, water table, and topographic data as may inform the occurrence of, and Project activity impacts on, sensitive biological resources.
- *Conserved Lands Spatial Data.* For regions with habitat conservation plans, databases and GIS layers that catalog existing conserved lands will help to direct the location of subsequent Project activities.
- *Rare Plants and Natural Communities.* A thorough assessment of rare plants and rare natural communities following CDFW's 2018 *Protocols for Surveying and Evaluating Impacts to Sensitive Native Plant Populations and Sensitive Natural Communities*, which can be found here: <https://wildlife.ca.gov/conservation/survey-protocols>.
- *Lake or Streambed Alterations.* A description of any Project activity-related alteration in the bed, channel, bank, and/or natural flow of the water features described above. These areas should be quantified by existing habitat type, management strategies and constraints, species presence, and ownership and/or agency responsible for the management and maintenance of the parcel.

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- *Rare, Threatened, Endangered Species Surveys.* Protocol-level survey results for any fully protected, rare, threatened, and endangered plants and animals, including species listed on CDFW's Special Vascular Plants, Bryophytes, and Lichens List (<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=109383&inline>). Surveys should be conducted in accordance with CDFW and U.S. Fish and Wildlife Service (USFWS) accepted protocols.
- *Wetland Delineations.* Delineations should be conducted to determine the boundaries of wetlands that may be impacted by the Project. Resource agencies do not necessarily use the same criteria to identify wetlands (e.g., California Coastal Commission, State Water Resources Control Board, U.S. Army Corps of Engineers). Therefore, prior to conducting any delineations, the applicant should consult with the resource agencies with jurisdiction over the Project activity to determine the appropriate criteria for identifying wetlands.

## **IMPACT ANALYSIS AND MITIGATION MEASURES**

The CEQA Guidelines section 15126.2 necessitates that a draft EIR discuss all direct and indirect impacts that may occur with implementation of the Project. This includes evaluating and describing impacts such as:

- Permanent and temporary habitat disturbances associated with ground disturbance, noise, lighting, reflection, air pollution, traffic or human presence;
- Obstruction of movement corridors, fish passage, or access to water sources and other core habitat features;
- Impacts to riparian areas, lakes, rivers, streams, and wetlands;
- Impacts to rare, threatened, and endangered species, including potential for "take" of special-status species;
- Loss or modification of breeding, nesting, dispersal and foraging habitat, including vegetation removal, alternation of soils and hydrology, and removal of habitat structural features (e.g. snags, roosts, overhanging banks including to mature trees/nesting habitat for migratory birds and raptors);
- Conflicts with the provisions of adopted Habitat Conservation Plan, Natural Community Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plans.

The CEQA document also should identify reasonably foreseeable future projects in the Project vicinity, disclose any cumulative impacts associated with these projects,

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determine the significance of each cumulative impact, and assess the significance of the Project's contribution to the impact (CEQA Guidelines, §15355). Although a project's impacts may be insignificant individually, its contributions to a cumulative impact may be considerable; a contribution to a significant cumulative impact – e.g., reduction of available habitat for a listed species – should be considered cumulatively considerable without mitigation to minimize or avoid the impact.

Based on the comprehensive analysis of the direct, indirect, and cumulative impacts of the Project, the CEQA Guidelines (§§ 15021, 15063, 15071, 15126.2, 15126.4 and 15370) direct the lead agency to consider and describe all feasible mitigation measures to avoid potentially significant impacts in the draft EIR, and/or mitigate significant impacts of the Project on the environment. This includes a discussion of take avoidance and minimization measures for special-status species, which are recommended to be developed in early consultation with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service and CDFW. These measures can then be incorporated as enforceable Project conditions to reduce potential impacts to biological resources to less-than-significant levels.

### **Light Impact Analysis and Discussion**

Artificial lighting has the potential to create a significant impact because unlike the natural brightness created by the monthly cycle of the moon, the permanent and continuously powered lighting fixtures create an unnatural light regime that produces a constant light output, 365 days a year that can have a cumulatively significant impact on fish and wildlife populations. The draft EIR should include a discussion in the Biological Resources section of the potentially significant impacts that could be created by increased permanent light installations or replacements or new installations to determine the extent of the impacts to fully protected, rare, threatened, endangered, nocturnal and migratory bird species known to occur within the Project vicinity.

### **Fish Passage Barriers**

Senate Bill 857, which amended Fish and Game Code 5901 and added section 156 to the Streets and Highways Code states in section 156.3, "For any project using state or federal transportation funds programmed after January 1, 2006, the MTC shall insure that, if the project affects a stream crossing on a stream where anadromous fish are, or historically were, found, an assessment of potential barriers to fish passage is done prior to commencing project design. The MTC shall submit the assessment to the California Department of Fish and Wildlife and add it to the CALFISH database. If any structural barrier to passage exists, remediation of the problem shall be designed into the project by the implementing agency. New projects shall be constructed so that they do not present a barrier to fish passage. When barriers to fish passage are being

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addressed, plans and projects shall be developed in consultation with the Department of Fish and Wildlife.”

**Wildlife Barriers and Connectivity.**

Existing wildlife studies and data should be reviewed and as necessary new studies should be conducted to identify the areas where wildlife crossing is most prevalent and to identify areas where wildlife crossing structure(s) installation(s) would result in the largest benefit to rare, threatened, and endangered species and serve to reduce vehicle strikes. Existing structures should be updated, and new structures should be installed to facilitate wildlife movement and increase overall connectivity in the Project area. Site selection criteria and design criteria for wildlife connectivity structures should be conducted in coordination with natural resources agencies.

**FILING FEES**

CDFW anticipates that the Project will have an impact on fish and/or wildlife, and assessment of filing fees is necessary (Fish and Game Code, § 711.4; Pub. Resources Code, § 21089). 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.

If you have any questions, please contact Mr. Garrett Allen, Environmental Scientist, at [garrett.allen@wildlife.ca.gov](mailto:garrett.allen@wildlife.ca.gov); or Ms. Karen Weiss, Senior Environmental Scientist (Supervisory), at [karen.weiss@wildlife.ca.gov](mailto:karen.weiss@wildlife.ca.gov).

Sincerely,

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Gregg Erickson  
Regional Manager  
Bay Delta Region

cc: State Clearinghouse