



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



February 10, 2021

Governor's Office of Planning & Research

Feb 16 2021

STATE CLEARINGHOUSE

Anthony De Luca
County of San Bernardino
Land Use Services Department
385 N. Arrowhead Avenue, 1st Floor
San Bernardino, CA, 92415-0187

Subject: Arco AM/PM - Bloomington Project
Mitigated Negative Declaration
2021010107

Dear Mr. De Luca:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent (NOI) to Adopt a Mitigated Negative Declaration (MND) from the County of San Bernardino Land Use Services Department (County; Lead Agency) for the Arco AM/PM-Bloomington Project (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, we appreciate the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under the Fish and Game Code.

CDFW ROLE

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

¹ CEQA is codified in the California Public Resources Code in section 21000 et seq. The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

PROJECT DESCRIPTION SUMMARY

The Project is proposing to construct a 5,000 square-foot convenience store and service station with four fueling islands, a 4,370 square foot canopy, and a 2,634 square foot car wash within a 2.31-acre parcel. The Project also includes the construction of a 2,550 square foot drive-through restaurant and a 2,244 square foot storage building commercial center.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist County in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources. CDFW agrees that an MND could be appropriate for the Project with the addition and implementation of specific and enforceable avoidance and minimization measures and compensatory mitigation strategies, including those CDFW recommends within the body of this letter.

CEQA requires public agencies in California to analyze and disclose potential environmental impacts associated with a project that the public agency will carry out, fund, or approve.

Nesting Birds

It is the Project proponent's responsibility to comply with all applicable laws related to nesting birds and birds of prey. Fish and Game Code sections 3503, 3503.5, and 3513 afford protective measures as follows: Fish and Game Code section 3503 makes it unlawful to take, possess, or needlessly destroy the nest or eggs of any bird, except as otherwise provided by Fish and Game Code or any regulation made pursuant thereto. Fish and Game Code section 3503.5 makes it unlawful to take, possess, or destroy any birds in the orders Falconiformes or Strigiformes (birds-of-prey) to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by Fish and Game Code or any regulation adopted pursuant thereto. Fish and Game Code section 3513 makes it unlawful to take or possess any migratory nongame bird except as provided by the rules and regulations adopted by the Secretary of the Interior under provisions of the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. § 703 et seq.). CDFW appreciates the inclusion of MM BIO-1(b) and offers additional, detailed language on survey methods, monitoring, and minimization. CDFW recommends BIO-1(b) be revised as follows:

BIO-1(b) - Applicant shall ensure that impacts to nesting birds at the Project site are avoided through the implementation of pre-construction surveys, ongoing monitoring, and if necessary, establishment of minimization measures for burrowing owls and nesting birds protected under the Migratory Bird Treaty Act and Section 3503 and 3503.5 of the California Fish and Wildlife Game Code shall be conducted prior to the commencement of, and

during Project-related ground disturbance. Appropriate survey methods and timeframes shall be established, to ensure that chances of detecting the target species are maximized. In the event that listed species are encountered, authorization from the USFWS and CDFW must be obtained. If nesting birds are detected, avoidance measures shall be implemented to ensure that nests are not disturbed until after young have fledged. Preconstruction surveys shall encompass all areas within the potential footprint of disturbance for the project, as well as a reasonable buffer around these areas.

- 1. Applicant shall designate a biologist (Designated Biologist) experienced in: identifying local and migratory bird species; conducting bird surveys using appropriate survey methodology; nesting surveying techniques, recognizing breeding and nesting behaviors, locating nests and breeding territories, and identifying nesting stages and nest success; determining/establishing appropriate avoidance and minimization measures; and monitoring the efficacy of implemented avoidance and minimization measures.**
- 2. The Designated Biologist shall conduct nesting bird surveys at the appropriate time of day/night, during appropriate weather conditions, no more than 3 days prior to any disturbance of the site, including tree and shrub removal, diking, demolition activities, and grading. Surveys shall encompass all suitable areas including trees, shrubs, bare ground, burrows, cavities, and structures. Survey duration shall take into consideration the size of the project site; density, and complexity of the habitat; number of survey participants; survey techniques employed; and shall be sufficient to ensure the data collected is complete and accurate. If a nest is suspected, but not confirmed, the Designated Biologist shall establish a disturbance-free buffer until additional surveys can be completed, or until the location can be inferred based on observations. If a nest is observed, but thought to be inactive, the Designated Biologist shall monitor the nest for one hour (four hours for raptors during the non-breeding season) prior to approaching the nest to determine status. The Designated Biologist shall use their best professional judgement regarding the monitoring period and whether approaching the nest is appropriate.**
- 3. If active nests are identified, the Designated Biologist shall immediately establish conservative avoidance buffers around the nests based on their best professional judgement and experience, and on the level of activity within the buffer and**

species' observed tolerance. The buffer areas shall be avoided until the nests are no longer occupied and the juvenile birds can survive independently from the nests. Raptor species shall have an avoidance buffer of 500 feet and other bird species shall have an avoidance buffer of 300 feet. These buffers may be reduced at the discretion of the Designated Biologist. The Designated Biologist shall monitor the nest at the onset of Project activities, and at the onset of any changes in Project activities (e.g., increase in number or type of equipment, change in equipment usage, etc.) to determine the efficacy of the buffer. If the Designated Biologist determines that Project activities may be causing an adverse reaction, the Designated Biologist shall adjust the buffer accordingly or implement alternative avoidance and minimization measures, such as redirecting or rescheduling construction or erecting sound barriers. If active nests are not identified, vegetation clearing, and ground disturbing activities may commence.

Burrowing Owls

The MND states, "burrowing owls do not inhabit the site and are not expected to be impacted given the absence of any suitable burrows" (MND, pg 31). CDFW is unclear how the County came to this conclusion and finds the *General Biological Resources Assessment* for the Project confusing and somewhat contradictory. At first, the *General Biological Resources Assessment* states that, "Following completion of the habitat assessment, it was determined that the site does not support suitable habitat for the burrowing owl. Therefore, a focused survey (Phase II) does not need to be conducted for burrowing owls..." The *General Biological Resources Assessment* continues, "As part of the burrowing owl survey, transects were walked throughout the site during which any suitable burrows were evaluated for owls and owl sign," indicating the potential presence of suitable burrows on site. Finally, the *General Biological Resources Assessment* states, "The only sensitive species which could potentially occur on the site is the burrowing owl and no owls or owl sign were detected during the focused surveys conducted on the site." CDFW is confused as to whether a "focused survey" was conducted or whether the analysis was limited to a habitat assessment. Further, CDFW argues that if suitable burrows were surveyed for signs of presence in January, focused breeding season surveys should be conducted at the appropriate time of year before a presumption of absence is made.

While the MND does not include a description of the existing site conditions in the "Project Site Location and Existing Site Conditions" section, the Biological Resources Assessment states "the site does not support any communities of native vegetation due to the previous disturbance and grading" (pg 10), and "has a relatively flat topography" (pg 2). Based on this description, the Project site is likely suitable habitat and so has the potential to support burrowing owls. Additionally, on the California Natural Diversity

Database there are known occurrences of burrowing owls within 1-5 miles of the Project site that could utilize the Project site for foraging or future occupied habitat.

While the Biological Resources Assessment concludes that, “a focused survey (Phase 2) does not need to be conducted for burrowing owls” (pg 5), CDFW strongly disagrees. CDFW suggests the County complete further surveys per the Staff Report on Burrowing Owl Mitigation and that the following mitigation measure be included in the MND prior to adoption:

BIO-2 -The Applicant shall designate a burrowing owl biologist (Designated Biologist) that is knowledgeable about the burrowing owl, including its natural history, habitat requirements, seasonal movements and range, to survey and monitor for burrowing owls prior to Project activities. The Designated Biologist shall complete necessary burrowing owl habitat surveys, impact assessments, and associated reports within all locations subject to Project activities. Methodology shall follow the recommendations and guidelines provided within the Staff Report on Burrowing Owl Mitigation, as described below.

Burrowing owl surveys shall be conducted by the Designated Biologist in accordance with the Staff Report on Burrowing Owl Mitigation. As such, the Designated Biologist shall conduct four survey visits: 1) at least one site visit between 15 February and 15 April, and 2) a minimum of three survey visits, at least three weeks apart between 15 April and 15 July, with at least one visit after 15 June. If breeding season surveys confirm occupied burrowing owl habitat in or adjoining areas subject to Project activities, Applicant shall contact CDFW and conduct an impact assessment, in accordance with Staff Report on Burrowing Owl Mitigation prior to commencing project site activities, to assist in the development of avoidance, minimization, and mitigation measures. Occupied habitats that will be impacted by the Project shall be replaced through conservation of occupied habitat at a ratio determined appropriate based on habitat quality and use, and at a minimum of a 2:1 ratio.

To avoid direct impacts to burrowing owls, a qualified biologist(s) shall conduct a pre-construction presence/absence survey for burrowing owls at 14 days prior to ground disturbing activities and within 24 hours immediately before ground disturbing activities. If burrowing owls are documented on site, then a plan for avoidance or passive exclusion shall be made in coordination with CDFW.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database which may be used to make subsequent or supplemental environmental determinations. (Pub. Resources Code, §

21003, subd. (e).) Accordingly, please report any special status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDDB). The CNDDDB field survey form can be found at the following link: http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/CNDDDB_FieldSurveyForm.pdf. 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: http://www.dfg.ca.gov/biogeodata/cnddb/plants_and_animals.asp.

FILING FEES


The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of filing fees is necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required in order for the underlying project approval to be operative, vested, and final. (Cal. Code Regs, tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089.)

CONCLUSION

CDFW appreciates the opportunity to comment on the MND to assist the County in identifying and mitigating Project impacts on biological resources. The MND includes inadequate survey methods and minimization measures for burrowing owls and nesting birds and thus did not provide proper analysis that the Project would have less than significant impacts. As such, CDFW recommends the County perform the necessary surveys of the Project site and adopt the recommended measures provided by CDFW prior to adopting the MND.

Questions regarding this letter or further coordination should be directed to Marina Barton, Environmental Scientist at 909-948-9632 or marina.barton@wildlife.ca.gov.

Sincerely,

DocuSigned by:

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for

Scott Wilson
Environmental Program Manager

ec: Marina Barton, Environmental Scientist, CDFW Inland Deserts Region
Marina.Barton@wildlife.ca.gov

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HCPB CEQA Coordinator
Habitat Conservation Planning Branch

REFERENCES

California Department of Fish and Game (CDFG). 2012. Staff Report on Burrowing Owl Mitigation. (<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843&inline>)

California Natural Diversity Database (CNDDDB) Government [ds45]. 2020. Calif. Dept. of Fish and Wildlife. Biogeographic Information and Observation System.