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Governor's Office of Planning & Research

Dec 30 2021

December 29, 2021

STATE CLEARINGHOUSE

Juergen Vespermann
California Department of Transportation, District 6
855 M Street, Suite 200
Fresno, California 93721

**Subject: Delano 3R Rehabilitation Project (Project)
Initial Study (IS) with proposed Mitigated Negative Declaration
State Clearinghouse No. 2021120064**

Dear Mr. Vespermann:

The California Department of Fish and Wildlife (CDFW) received a proposed Mitigated Negative Declaration (MND) and its supporting 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 and 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

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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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. 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 rehabilitate an approximately 1.3-mile segment of State Route 155 between Fremont Street to the west and Browning Road on the east (Project). All Project-related activities will occur within the existing right-of-way either within the paved travel lanes, paved shoulders adjoining the travel lanes, unpaved but compacted and engineered shoulder backing, or within the ruderal areas beyond the travel lanes and shoulder backing. The rehabilitation work would include rehabilitation of the existing pavement, utility relocation, and drainage improvements. The work will necessitate lane closures, vegetation removal, and right-of-way acquisition.

Location: The 1.3-mile segment of State Route 155 (SR 155) which will be rehabilitated exists between post mile 0.04 and post mile 1.33 in the city of Delano in Kern County. The Project segment of SR 155 is bound by urban and agricultural development along its length.

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 are also included to improve the document.

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. However, as currently drafted, it is unclear: 1) whether some of the

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species-specific measures proposed in the IS sufficiently reduce to less-than-significant the potential Project-related impacts to those species, and 2) how Caltrans concluded that there will be no impacts to the State threatened Swainson's hawk (*Buteo swainsoni*) which CDFW considers potentially present in the vicinity of the Project.

In particular, Caltrans does not address the possible presence of Swainson's hawk in the vicinity of the Project and concludes that the proposed pre-construction environmental awareness training by a qualified biologist is sufficient to reduce to less-than-significant the Project-related impacts on the State threatened and federally endangered San Joaquin kit fox (*Vulpes mutica macrotis*). Caltrans also considers pre-construction surveys sufficient to reduce to less-than-significant the Project-related impacts on nesting birds. CDFW does not agree with these conclusions and herein suggests measures to completely avoid Project-related impacts on these species, thereby reducing to less-than-significant Project-related impacts on them. CDFW also recommends a path forward for Caltrans in the event avoidance of either San Joaquin kit fox or listed birds is not feasible.

I. Environmental Setting and Related Impact

Would the Project have a substantial adverse effect, 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: San Joaquin Kit Fox (SJKF)

Issue: The Project activities will involve varying degrees of ground disturbance and the staging and laydown of equipment and materials at discreet locations along the 1.3-mile segment of SR 155. Some of the Project activities may constitute a novel disturbance sufficient to provoke denning SJKF to abandon their dens causing increased susceptibility to predation and potentially resulting in abandoned pups during the pupping season. Caltrans proposes pre-construction environmental awareness training by a qualified biologist for SJKF but does not propose: surveys for or monitoring of potential SJKF dens, avoidance buffers around any dens at or near the Project, measures to prevent entrapment at the Project, or the potential need for incidental take coverage in the event take of individual SJKF cannot be avoided.

Specific Impacts: CDFW agrees with Caltrans' plans to conduct pre-construction environmental awareness training in advance of commencing Project activities. However, to reduce to less-than-significant the potential Project-related impacts on the species, CDFW recommends that pre-activity surveys be done to detect individuals and dens at and near the Project footprint, implementation of no-

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disturbance buffers around those dens which are identified during the survey, and the daily inspection of pipes, excavations, and trenches which could entrap a SJKF. Additionally, CDFW recommends Caltrans consult with CDFW in the event individual SJKF or SJKF dens are detected during the surveys and/or inspections. If avoidance of take of individual SJKF is not feasible, incidental take authorization under section 2081 of Fish and Game Code may be needed.

Evidence impact would be significant: While habitat loss resulting from agricultural, urban, and industrial development is the primary threat to SJKF (Cypher et al., 2013), disturbance in proximity to a den can result in unsuccessful pupping and cause individuals to become more susceptible to predation. Both results of the Project-related disturbance could constitute significant impacts to the species.

Recommended Potentially Feasible Avoidance and Mitigation Measure(s)
Because SJKF are known to occur in the general vicinity of the Project footprint and because dens could be present outside the Project footprint but sufficiently near the Project footprint to be affected by the Project-related activities, CDFW recommends the following edits to the SJKF avoidance and minimization measure section of the IS. Further, CDFW recommends these revised measures be made conditions of Project approval.

Recommended Edits to Avoidance and Minimization Measures for SJKF on page 13 of the IS.

CDFW recommends the pre-activity clearance surveys for SJKF be conducted to identify SJKF dens at **and within 250 feet of the Project footprint**, and that Caltrans coordinate with USFWS and CDFW in the event that individuals and/or dens are detected during these surveys. These surveys can be limited to 100 feet beyond the Project footprint if work commences outside the pupping season. CDFW further recommends a 250-foot no disturbance buffer around natal dens, a 100-foot no disturbance buffer around known dens, and a 50-foot no-disturbance buffer around potential or atypical dens, and absolutely no disturbance to the dens within the above buffers without contacting CDFW and obtaining written authorization to do so. If the aforementioned edits to the existing avoidance and minimization measures are not made, and/or the aforementioned buffers are not feasible, CDFW recommends Caltrans obtain incidental take coverage under section 2081 subdivision (b) of Fish and Game Code and that the acquisition of an Incidental Take Permit (ITP) will be specified in the revised IS. In summary, if the edited avoidance measure is not feasible, mitigation (take authorization) would be required to reduce to less-than-significant the unavoidable Project-related impacts on SJKF.

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COMMENT 2: Migratory Birds including Swainson's Hawk (SWHA)

Issue: SWHA are known to have nested in the vicinity of the Project. The Project activities will involve varying degrees of ground disturbance 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 if they occur within ½-mile of an active SWHA nest. This nest abandonment would represent a significant impact to SWHA as well as potentially resulting in 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. Caltrans indicates if the Project occurs during the nesting season, surveys for migratory birds will be performed no more than 30 days prior to commencing Project activities. However, Caltrans is not clear as to whether those surveys will include areas outside the Project footprint, and Caltrans does not propose no-disturbance buffers around active nests which may be identified during those surveys. Therefore, CDFW does not agree that the proposed pre-construction survey alone reduces to less-than-significant the potential Project-related impacts on nesting birds.

Evidence impact would be significant: SWHA exhibit high nest-site fidelity year after year and lack of suitable nesting habitat in the San Joaquin Valley limits their local distribution and abundance (CDFW 2016). Adoption of the MND as it is written will allow activities that will involve ground disturbance, grading, and excavation employing heavy equipment and work crews within ½-mile of active SWHA nests. These activities could negatively affect these nests and have the potential to result in nest abandonment, significantly affecting nesting SWHA.

Recommended Potentially Feasible Avoidance and Mitigation Measure(s)
Because the Project-related activities represent novel stimuli and threaten nest abandonment, CDFW recommends Caltrans propose surveying for, and maintaining a 250-foot no disturbance buffer around active passerine nests, a 500-foot no disturbance buffer around non-listed raptor nests, and a ½-mile no-disturbance buffer around listed raptor (e.g. SWHA) nests in order to reduce to less-than-significant the Project-related impacts to nesting birds. CDFW recommends edits to the Migratory Bird avoidance and minimization measures section of the IS. Further, CDFW recommends these revised measures be made quantifiable and enforceable conditions of Project approval.

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Recommended Edits to Avoidance and Minimization Measures to Specifically Address Migratory Birds and SWHA on page 20 of the IS.

Currently, under the avoidance and minimization measures section of the IS, Caltrans proposes conducting surveys for nesting birds if the Project occurs during the nesting season. CDFW recommends Caltrans propose a minimum no-disturbance buffer of 250 feet around active nests of non-listed passerine bird species, and a minimum no-disturbance buffer of 500 feet around active non-listed raptor nests. Further, CDFW recommends Caltrans edit this measure to include **protocol level surveys** for nesting SWHA if Project-related activities will occur during, or extend into, the SWHA nesting season (February through August). CDFW recommends Caltrans require an **unqualified ½-mile no-work buffer** around active SWHA nests until the young have fledged and are no longer reliant on parental care for survival. If the aforementioned edits to the existing avoidance and minimization measures are not made, and/or the aforementioned buffers are not feasible, CDFW recommends Caltrans obtain incidental take coverage under section 2081 subdivision (b) of Fish and Game Code and that the acquisition of an ITP be specified in the revised IS. In summary, if the edited avoidance measure is not feasible, mitigation (take authorization) would be required to reduce to less-than-significant the unavoidable Project-related impacts to SWHA.

II. EDITORIAL COMMENTS

One of the several bulleted items constituting the Avoidance, Minimization, and/or Mitigation Measure states, "Minimize night work to the extent practicable, if night work is required." However, night work is not mentioned anywhere else in the IS. Project related night work would present unique negative impacts on wildlife in general and the species mentioned above. **If night work is in fact anticipated**, Caltrans should revise the Project Description section of the IS to include a description of the extent (number of nights), nature (activities), and timing (season) of the night work. Additionally, the Environmental Consequences section should be revised to include an analysis of the potential impacts the obligate artificial lighting may have on wildlife in general and more specifically, the species mentioned above. Further, the Avoidance, Minimization, and or Mitigation Measure section should be revised to include measures Caltrans will implement to reduce the Project related impacts of that night work on wildlife in general and specifically, the species mentioned above. Some of those measures may involve efforts to ensure habitat beyond the Project footprint is not illuminated, a maximum number of consecutive nights separated by nights with no work, increased buffers around SJKF dens and active bird nests, etc.

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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, or by electronic mail at javier.mendez@wildlife.ca.gov.

Sincerely,

DocuSigned by:

041A77B10D78486...
Annee Ferranti for Julie A. Vance
Regional Manager

Attachment 1: Recommended Mitigation and Monitoring Reporting Program

cc: United States Fish and Wildlife Service
2800 Cottage Way, Suite W-2605
Sacramento, California 95825

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LITERATURE CITED

CDFW. 2016. Five Year Status Review for Swainson's Hawk (*Buteo swainsoni*).
California Department of Fish and Wildlife. April 11, 2016.

Cypher, B. L., S. E. Phillips, and P. A. Kelly. 2013. Quantity and distribution of suitable habitat for endangered San Joaquin kit foxes: conservation implications. *Canid Biology and Conservation* 16(7): 25–31.

Attachment 1

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

PROJECT: Delano 3R Rehabilitation Project (Project)

SCH No.: 2021120064

RECOMMENDED MITIGATION MEASURE	STATUS/DATE/INITIALS
<i>Before Disturbing Soil or Vegetation</i>	
Mitigation Measure 1: SJKF Avoidance	
Mitigation Measure 2: SJKF Take Authorization (if avoidance is not feasible)	
Mitigation Measure 3: Nesting Birds (including SWHA) Avoidance	
Mitigation Measure 4: SWHA Take Authorization (if avoidance is not feasible)	