



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



February 24, 2022

Stacy Souza Elms, Community & Economic Development Director
City of Los Banos Community & Economic Development Department
520 J Street
Los Banos, California 93635
stacy.souza@losbanos.org

**Subject: Los Banos General Plan 2042 (Project)
Notice of Preparation (NOP)
State Clearinghouse No. 2022010254**

Dear Ms. Elms:

The California Department of Fish and Wildlife (CDFW) received an NOP from the City of Los Banos Community & Economic Development Department 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.

While the comment period may have ended, CDFW would appreciate if you will still consider our comments.

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

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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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. 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.

Nesting Birds: 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 Los Banos Community & Economic Development Department

Objective: The Project is a targeted update to the current General Plan 2030 and will bring the general plan up to date with the latest State and federal legislation around urban development, transportation, climate resilience, and safety and address the city's growth, economic development, sustainability, and conservation of open space and land resources. The Project intends to respond to local and regional housing needs, promote economic growth, foster local job creation, enhance quality of life, and protect natural and agricultural resources. In addition to citywide planning issues, the Project will provide goals and policies for enhancing downtown Los Banos as the vibrant center of the city and community.

Location: The Project encompasses all land within the city limits, urban growth boundary, and adjacent land of Los Banos.

Timeframe: Until 2042.

COMMENTS AND RECOMMENDATIONS

CDFW offers the following comments and recommendations to assist the City of Los Banos Community & Economic Development Department in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on

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fish and wildlife (biological) resources. Editorial comments or other suggestions may also be included to improve the subsequent Program EIR.

The Program-level EIR that will be prepared will determine the likely environmental impacts associated with subsequent projects. Given the city-wide implications of the Project, CDFW is concerned that subsequent projects (hereafter, "projects") tiering from the subsequent Program EIR could impact special-status species including, but not limited to, the State threatened and federally endangered San Joaquin kit fox (*Vulpes macrotis mutica*), the State threatened Swainson's hawk (*Buteo swainsoni*), the State threatened tricolored blackbird (*Agelaius tricolor*), and the species of special concern burrowing owl (*Athene cunicularia*).

San Joaquin Kit Fox (SJKF)

Very little habitat considered highly suitable for SJKF remains in Merced County (Cypher et al. 2013). Undeveloped land in western Merced County, spanning the area from around Los Banos Reservoir to north of San Luis Reservoir, has been identified by CDFW and the United States Fish and Wildlife Service (USFWS) as a movement corridor critical to the continued existence and genetic diversity of the northern SJKF population. The Santa Nella area in particular has been identified as a critical SJKF movement "pinch-point". The creation of the San Luis Reservoir and O'Neil Forebay resulted in a large movement barrier to the north-south migration of SJKF, and busy highways in the area such as State Routes 152 and 33 and Interstate 5, as well as existing urban development in the vicinity, further compounded this problem (HT Harvey and Associates 2004). As a result, any upland habitat in this area that could serve as movement or rest areas for SJKF has very high conservation values for this species.

SJKF den in right-of-ways, vacant lots, etc., and populations can fluctuate over time. It is important to note that SJKF populations are known to fluctuate and a negative finding from biological surveys in any one year does not necessarily demonstrate absence of kit fox on a site. In addition, SJKF may be attracted to both construction materials (pipes, etc.) and construction footprints due to the type and level of activity (excavation, etc.) and the loose, friable soils that are created as a result of intensive ground disturbance.

CDFW recommends the Program EIR quantify and describe the potential for subsequent projects to result in direct and indirect impacts to SJKF, including SJKF dispersal and habitat connectivity. The evaluation should include the cumulative impacts to SJKF from other existing, planned, and potential development in the Project vicinity that may contribute to habitat fragmentation. This information, in addition to adequate description of habitat features on individual projects sites, is essential to adequately assess project impacts.

To assess individual Project sites, CDFW recommends that a qualified wildlife biologist assess individual project sites to determine if habitat suitable to support SJKF is present prior to ground- or vegetation-disturbing activities. If suitable habitat is present, CDFW recommends that a qualified biologist assess presence/absence of SJKF by conducting surveys following the USFWS's "Standardized recommendations for protection of the San

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Joaquin kit fox prior to or during ground disturbance” (2011) and implementing no-disturbance buffers around den sites, as described in the USFWS document. SJKF detection warrants consultation with CDFW to discuss how to avoid take, or if avoidance is not feasible, to acquire an ITP prior to ground-disturbing activities, pursuant to Fish and Game Code section 2081 subdivision (b).

Swainson’s Hawk (SWHA)

Projects tiering from the Program EIR have the potential to impact SWHA. Without appropriate avoidance and minimization measures for SWHA, potential significant impacts that may result from subsequent project activities include nest abandonment, reduced nesting success (loss or reduced health or vigor of eggs or young), and loss of foraging habitat.

To avoid impacts to nesting SWHA, CDFW recommends that subsequent project’s ground-disturbing activities be timed to avoid the normal bird breeding season (February 1 through September 15). However, if ground-disturbing activities must take place during that time, CDFW recommends that a qualified wildlife biologist determine if suitable habitat is present on or adjacent to individual project sites. If suitable habitat is present, CDFW recommends a qualified wildlife biologist conduct surveys following the survey methods developed by the Swainson’s Hawk Technical Advisory Committee (SWHA TAC 2000) prior to project implementation. If active nests are detected, CDFW recommends a minimum no-disturbance buffer of 0.5-mile be delineated around them 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. If an active SWHA nest is detected during surveys and a 0.5-mile buffer is not feasible, consultation with CDFW is warranted to discuss how to implement the project and avoid take. If take cannot be avoided, take authorization through the acquisition of an ITP, pursuant to Fish and Game Code section 2081 subdivision (b) is necessary to comply with CESA.

If known SWHA nest trees will be removed as part of Project activities, CDFW recommends that the removal of known SWHA nest trees, even outside of the nesting season, be replaced with an appropriate native tree species planting at a ratio of 3:1 at or near the Project area or in another area that will be protected in perpetuity. This mitigation would offset the impacts of nesting habitat loss.

SWHA will forage in mixed agricultural lands that support irrigated hay crops (e.g., alfalfa), as well as dryland pasture, grassy ruderal lots, and some irrigated crops. To reduce impacts to SWHA foraging habitat to less than significant, CDFW recommends compensation of its loss as described in the Staff Report Regarding Mitigation for Impacts to Swainson’s Hawks (CDFG 1994). Specifically, the Staff Report recommends that mitigation for foraging habitat loss occur within a minimum distance of 10 miles from known nest sites using the following criteria:

- For projects within 1 mile of an active nest tree, a minimum of one acre of habitat management (HM) land for each acre of development is advised.

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- For projects within 5 miles of an active nest tree but greater than 1 mile, a minimum of 0.75 acres of HM land for each acre of development is advised.
- For projects within 10 miles of an active nest tree but greater than 5 miles from an active nest tree, a minimum of 0.5 acres of HM land for each acre of development is advised.

Tricolored Blackbird (TRBL)

TRBL are known to nest in alfalfa, wheat, and other low agricultural crop fields. TRBL aggregate and nest colonially, forming colonies of up to 100,000 nests (Meese et al. 2014). Approximately 86% of the global population is found in the San Joaquin Valley (Kelsey 2008, Weintraub et al. 2016). Increasingly, TRBL are forming larger colonies that contain progressively larger proportions of the species' total population (Kelsey 2008). In 2008, for example, 55% of the species' global population nested in only two colonies, which were located in silage fields (Kelsey 2008). In 2017, approximately 30,000 TRBL were distributed among only 16 colonies in Merced County (Meese 2017). Nesting can occur synchronously, with all eggs laid within one week (Orians 1961). For these reasons, depending on timing, disturbance to nesting colonies can cause abandonment, significantly impacting TRBL populations (Meese et al. 2014).

Without appropriate avoidance and minimization measures for TRBL, potential significant impacts of projects tiering from the Program EIR include nest and/or colony abandonment, reduced reproductive success, and reduced health and vigor of eggs and/or young. CDFW recommends that project ground-disturbing activities be timed to avoid the normal bird breeding season (February 1 through September 15). However, if ground-disturbing activities must take place during that time, CDFW recommends that a qualified wildlife biologist determine if suitable habitat is present on or adjacent to individual project sites. If suitable habitat is present, CDFW recommends a qualified wildlife biologist conduct surveys for nesting TRBL no more than 10 days prior to the start of ground-disturbing activities. If an active TRBL nesting colony is found during pre-activity surveys, CDFW recommends implementation of a minimum 300-foot no-disturbance buffer around the colony in accordance with CDFW's "*Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015*" (CDFW 2015). CDFW advises that this buffer remain in place until the breeding season has ended or until a qualified biologist has determined that nesting has ceased, the birds have fledged, and are no longer reliant upon the colony or parental care for survival. It is important to note that TRBL colonies can expand over time. For this reason, CDFW recommends conducting additional pre-activity surveys within 10 days prior of project initiation to reassess the colony's areal extent. If a TRBL nesting colony is detected during surveys, consultation with CDFW is warranted to discuss how to implement the project and avoid take, or if avoidance is not feasible, to acquire an ITP, pursuant to Fish and Game Code section 2081 subdivision (b), prior to any ground-disturbing activities.

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Burrowing Owl (BUOW)

BUOW use small mammal burrows for nesting and cover. Dispersing juveniles, migrants, transients, or new colonizers may occur in the Project site year-round. Therefore, project activities could impact this species. CDFW recommends that a qualified biologist conduct a habitat assessment in advance of project implementation, to determine if individual project sites or their immediate vicinity contain suitable habitat for BUOW. If suitable habitat is present, CDFW recommends that a qualified biologist determine if species-specific surveys are necessary to determine if BUOW may be impacted by project activities. CDFW recommends the survey methods described in the Staff Report on Burrowing Owl Mitigation (CDFG 2012) be followed before beginning ground disturbing activities. In the event that BUOW are found, CDFW's Staff Report on Burrowing Owl Mitigation (CDFG 2012) recommends that impacts to occupied burrows be avoided in accordance with the following table unless a qualified biologist 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)

Editorial Comments and Suggestions

Nesting birds

CDFW encourages project activities occur during the bird non-nesting season; however, if ground-disturbing or vegetation-disturbing activities must occur during the breeding season (February through mid-September), individual project proponents are responsible for ensuring that implementation of a project does not result in violation of the Migratory Bird Treaty Act or relevant Fish and Game Codes as referenced above.

To evaluate project-related impacts on nesting birds, CDFW recommends that a qualified wildlife biologist conduct pre-activity surveys for active nests no more than 10 days prior to the start of ground or vegetation disturbance to maximize the probability that nests that could potentially be impacted are detected. CDFW also recommends that surveys cover a sufficient area around individual project sites to identify nests and determine their status. A sufficient area means any area potentially affected by a project. In addition to direct impacts (i.e. nest destruction), noise, vibration, and movement of workers or equipment could also affect nests. Prior to initiation of project ground-disturbing activities, CDFW recommends that a qualified biologist conduct a survey to establish a behavioral baseline of all identified nests. Once ground-disturbing activities begin, CDFW recommends having a qualified biologist continuously monitor nests to detect behavioral changes resulting from

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the project. If behavioral changes occur, CDFW recommends halting the work causing that change and consulting with CDFW for additional avoidance and minimization measures.

If continuous monitoring of identified nests by a qualified wildlife biologist is not feasible, CDFW recommends a minimum no-disturbance buffer of 250 feet around active nests of non-listed 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 on-site 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 wildlife biologist advise and support any variance from these buffers and notify CDFW in advance of implementing a variance.

Lake and Streambed Alteration: Projects tiering from the Program EIR may involve activities that have the potential to impact streams within the Project site and may be subject to CDFW's regulatory authority pursuant Fish and Game Code section 1600 et seq. Fish and Game Code section 1600 et seq. requires an entity to notify CDFW prior to commencing any activity that may (a) substantially divert or obstruct the natural flow of any river, stream, or lake; (b) substantially change or use any material from the bed, bank, or channel of any river, stream, or lake (including the removal of riparian vegetation); or (c) deposit debris, waste or other materials that could pass into any river, stream, or lake. "Any river, stream, or lake" includes those that are ephemeral or intermittent as well as those that are perennial. CDFW is required to comply with CEQA in the issuance of a Lake or Streambed Alteration Agreement. For additional information on notification requirements, please contact our staff in the LSA Program at (559) 243-4593.

Federally Listed Species

CDFW recommends consulting with the USFWS on potential impacts to federally listed species including, but not limited to SJKF. Take under the Federal Endangered Species Act (FESA) is more broadly defined than CESA; take under FESA also includes significant habitat modification or degradation that could result in death or injury to a listed species by interfering with essential behavioral patterns such as breeding, foraging, or nesting. Consultation with the USFWS in order to comply with FESA is advised well in advance of any ground disturbing activities.

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

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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 the City of Los Banos Community & Economic Development Department in identifying and mitigating 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 Jim Vang, Environmental Scientist, at the address provided on this letterhead, by telephone at (559) 580-3203, or by electronic mail at Jim.Vang@wildlife.ca.gov.

Sincerely,

DocuSigned by:

FA83F09FE08945A...
Julie A. Vance
Regional Manager

Attachment 1

ec: R4 LSA
R4LSA@wildlife.ca.gov

Patricia Cole, USFWS
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LITERATURE CITED

- California Department of Fish and Game (CDFG). 1994. Staff Report Regarding Mitigation for Impacts to Swainson's Hawks (*Buteo Swainsoni*) in the Central Valley of California. California Department of Fish and Game.
- CDFG. 2012. Staff Report on Burrowing Owl Mitigation. California Department of Fish and Game.
- California Department of Fish and Wildlife (CDFW). 2015. Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015. March 19, 2015.
- Cypher, B. L., S. E. Phillips, 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.
- H.T. Harvey and Associates. 2004. Habitat Conservation Plan for the San Joaquin kit fox at the Arnaudo Brothers, Wathen-Castanos, and River East Holdings sites within, and adjacent to, the Santa Nella Community Specific Plan area. Prepared for Wathen Castanos, Arnaudo Brothers, and River East Holdings June 14, 2004.
- Kelsey, R. 2008. Results of the tricolored blackbird 2008 census. Report submitted to U.S. Fish and Wildlife Service, Portland, OR, USA.
- Meese, R. J., E.C. Beedy, and W.J. Hamilton, III. 2014. Tricolored blackbird (*Agelaius tricolor*), *The Birds of North America* (P. G. Rodewald, Ed.). Ithaca: Cornell Lab of Ornithology; Retrieved from the Birds of North America: <https://birdsna-org.bnaproxy.birds.cornell.edu/Species-Account/bna/species/tribla>.
- Meese, R.J. 2017. Results of the 2017 Tricolored Blackbird Statewide Survey. California Department of Fish and Wildlife, Wildlife Branch, Nongame Wildlife Program Report 2017-04, Sacramento, CA. 27 pp. + appendices.
- Orians, G.H. 1961. The ecology of blackbird (*Agelaius*) social systems. *Ecol. Monogr.* 31:285-312.
- Swainson's Hawk Technical Advisory Committee (SWHA TAC). 2000. Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley. Swainson's Hawk Technical Advisory Committee, May 31, 2000.
- USFWS. 2011. Standard Recommendations for the Protection of the San Joaquin Kit Fox Prior to or During Ground Disturbance. United States Fish and Wildlife Service, January 2011.

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Weintraub, K., T.L. George, and S.J. Dinsmore. 2016. Nest survival of tricolored blackbirds in California's Central Valley. *The Condor* 118(4): 850–861.

Attachment 1

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

PROJECT: Los Banos General Plan 2042

SCH No.: 2022010254

RECOMMENDED MITIGATION MEASURE	STATUS/DATE/INITIALS
<i>Before Disturbing Soil or Vegetation</i>	
Mitigation Measure: SJKF	
SJKF Habitat Assessment	
SJKF Surveys	
SJKF Take Authorization	
Mitigation Measure: SWHA	
SWHA Habitat Assessment (Nesting and Foraging)	
SWHA Surveys	
SWHA Foraging Habitat Mitigation	
SWHA Take Authorization	
Mitigation Measure: TRBL	
TRBL Habitat Assessment	
TRBL Surveys	
TRBL Take Authorization	
Mitigation Measure: BUOW	
BUOW Habitat Assessment	
BUOW Surveys	
<i>During Construction</i>	
Mitigation Measure: SJKF	
SJKF Avoidance	
Mitigation Measure: SWHA	
SWHA Avoidance	
Mitigation Measure: TRBL	
TRBL Avoidance	
Mitigation Measure: BUOW	
BUOW Avoidance	