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March 21, 2024

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Governor's Office of Planning & Research

Mar 22 2024
STATE CLEARINGHOUSE

Subject: Borba Dairy Farms Expansion (Project)
DRAFT ENVIRONMENTAL IMPACT REPORT (DEIR)
SCH: 2022050451

Dear Tiffany Ho:

The California Department of Fish and Wildlife (CDFW) received a DEIR from the County of Merced Department of Community and Economic Development (Merced County) for the Project pursuant 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. While the comment period may have ended, CDFW respectfully requests that Merced County 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 of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (*Id.*, § 1802). Similarly, for purposes of CEQA,

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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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), the project proponent may seek related take authorization as provided by the Fish and Game Code.

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: Mike Borba

Objective: The Project proposes to modify and expand the existing dairy to house 2,000 milk cows, 350 dry cows, and 2,100 support stock. The Project would include construction of support buildings and features at the dairy facility, including four new free stall barns, a new milking parlor and replacement dairy well, two new wastewater storage ponds, and an agricultural storage barn. With construction of the proposed facilities, an existing shade barn, shop, hospital milking parlor, and free stall barn would be removed. Cropped acreage associated with the expanded dairy operations would include approximately 887 acres, including the addition of 404 acres. Conversion of the proposed facilities would result in the conversion of approximately 24.2 acres of cropland.

Location: The Project site is located in unincorporated Merced County at 5297 Kelley Road, in Hilmar.

Timeframe: Approximately 10 years.

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COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist Merced County 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 Project's DEIR.

Aerial imagery of the Project boundary and its surroundings show the area contains agricultural lands consisting of row crops, and is directly adjacent to the San Joaquin River, CDFW's West Hilmar Wildlife Area, and the George J. Hatfield State Recreation Area. Based on our familiarity with these areas, as well as a review of the Project description, California Natural Diversity Database (CNDDDB) records (CDFW 2024), and the surrounding habitat, several special-status species could potentially be impacted by Project activities.

Currently, the DEIR acknowledges that the Project area is within the geographic range of several special-status animal species and proposes specific mitigation measures to reduce impacts to less than significant. CDFW has concerns about the ability of some of the proposed mitigation measures to reduce impacts to less than significant and avoid unauthorized take for several special-status animal species, including the State threatened Swainson's hawk (*Buteo swainsoni*), the State threatened tricolored blackbird (*Agelaius tricolor*), and the State species of special concern burrowing owl (*Athene cunicularia*).

Swainson's Hawk

Mitigation Measure (MM) BIO-1b #1, states "No intensive new disturbances (for example, heavy equipment operation associated with construction, use of cranes or draglines, new rock crushing activities), habitat conversions, or other Project-related activities that may cause nest abandonment or forced fledging, should be initiated within 0.25 miles in urbanized areas of an active nest between March 1 and September 15 unless written CESA 2081 Management Authorization is obtained from CDFW prior to such disturbance." CDFW does not concur that this measure is sufficient to mitigate for potential impacts to Swainson's Hawk (SWHA) and instead recommends implementation of a minimum ½-mile no-disturbance buffer 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. CDFW would also like to note that "CESA 2081 Management Authorization" does not appear anywhere in Fish and Game Code 2081. If the intention was to obtain authorization for take, then CDFW recommends editing the language to "Incidental Take Permit (ITP), pursuant to Fish and Game Code section 2081 subdivision (b)". Additionally, CDFW recommends the following:

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Recommended Mitigation Measure 1: SWHA Take Authorization

CDFW recommends that in the event an active SWHA nest is detected, and maintaining a ½-mile no-disturbance buffer is not feasible, then the Project obtain an ITP, pursuant to Fish and Game Code section 2081 subdivision (b) prior to Project initiation.

Mitigation Measure (MM) BIO-1c, states, “The Project applicant shall consult with CDFW to determine if mitigation is necessary for the loss of approximately 26 acres of potential Swainson’s hawk foraging habitat, and implement measures as required.” CDFW agrees with mitigating for the loss of SWHA foraging habitat, and recommends the following:

Recommended Mitigation Measure 2: SWHA Foraging Habitat Mitigation

CDFW recommends compensation for the loss of SWHA foraging habitat as described in CDFW’s “Staff Report Regarding Mitigation for Impacts to Swainson's Hawks” (CDFG 1994) to reduce impacts to foraging habitat to less than significant. The Staff Report recommends that mitigation for habitat loss occur within a minimum distance of 10 miles from known nest sites. CDFW has the following recommendations based on the Staff Report:

- For projects within 1 mile of an active nest tree, a minimum of 1 acre of habitat management (HM) land for each acre of development is advised.
- For projects within 5 miles of an active nest but greater than 1 mile, a minimum of ¾ acre 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 ½ acre of HM land for each acre of development is advised.

Tricolored Blackbird

Mitigation Measure (MM) BIO-3 #2, states, “If a TCBB nest colony is discovered during pre-construction surveys, CDFW will be consulted prior to ground disturbing activities to determine the appropriate actions or required mitigation. Avoidance and minimization measures are likely to include the delayed harvest of silage until the TCBB young have fledged.” CDFW does not concur that this measure is sufficient to mitigate for impacts to nesting tricolored blackbird (TRBL) and instead recommends the following:

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Recommended Mitigation Measure 3: TRBL Avoidance Buffer

CDFW recommends that construction be timed to avoid the normal bird breeding season (February 1 through September 15). However, if construction must take place during the breeding season, then CDFW recommends a qualified biologist conduct focused surveys for nesting TRBL and then repeat those surveys no more than 10 days prior to the start of ground-disturbing activities. If an active TRBL nesting colony is found during the pre-construction 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 recommends 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 also recommends conducting pre-construction surveys of an identified nesting colony within 10 days prior to the start of ground or vegetation disturbing activities to reassess the colony's real extent.

Recommended Mitigation Measure 4: TRBL Take Authorization

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.

Burrowing Owl

The DEIR states, "A reconnaissance-level biological survey of the project site was conducted on June 28, 2022, to assess existing biological conditions" and "The survey was conducted during the day between 8:30 am and 12:30 p.m." and "Berms along roadsides and ditches were surveyed for signs of use by burrowing owl, American badger, and/or San Joaquin kit fox." As it appears from the DEIR that focused burrowing owl (BUOW) surveys were not conducted, CDFW recommends the following:

Recommended Mitigation Measure 5: BUOW Surveys

CDFW recommends assessing presence/absence of BUOW by having a qualified biologist conduct surveys following the California Burrowing Owl Consortium's "Burrowing Owl Survey Protocol and Mitigation Guidelines" (CBOC 1993) and CDFW's Staff Report on Burrowing Owl Mitigation" (Staff Report) (CDFG 2012) prior

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to construction. Specifically, CBOC and CDFW's Staff Report suggest three or more surveillance surveys conducted during daylight with each visit occurring at least three weeks apart during the peak breeding season (April 15 to July 15), when BUOW are most detectable.

Mitigation Measure BIO-2 states, "Construction shall not occur within a 500-foot buffer surrounding nests of raptors (**including burrowing owls**) or a 100-foot buffer surrounding nests of migratory birds (including killdeer, house finch, mourning dove, etc.)." CDFW does not concur that this measure is sufficient to mitigate for impacts to BUOW and recommends the following measures outlined below:

Recommended Mitigation Measure 6: BUOW Avoidance Buffer

CDFW's Staff Report recommends that impacts to occupied burrows be avoided in accordance with the following table unless a qualified biologist approved by CDFW 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)

Recommended Mitigation Measure 7: BUOW Passive Relocation and Mitigation

If BUOW are found within these recommended buffers and avoidance is not possible, it is important to note that according to the Staff Report (CDFG 2012), excluding birds from burrows is not a take avoidance, minimization, or mitigation method and is instead considered a potentially significant impact under CEQA. However, avoidance of direct impacts to BUOW and BUOW eggs and chicks is necessary to avoid violations of Fish and Game Code Sections 3503 (taking or destroying nests or eggs), 3503.5 (take of birds of prey or their eggs), and/or 3513 (take of migratory nongame birds). However, if it is necessary for Project implementation, CDFW recommends that burrow exclusion be conducted by qualified biologists and only during the non-breeding season, by a qualified biologist, before breeding behavior is exhibited and after the burrow is confirmed empty through non-invasive methods, such as surveillance. CDFW recommends replacement of occupied burrows with artificial burrows at a ratio of one (1) burrow collapsed to one (1) artificial burrow constructed (1:1) to mitigate for evicting BUOW and the loss of burrows. BUOW may attempt to colonize or re-colonize an area that

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will be impacted; thus, CDFW recommends ongoing surveillance at a rate that is sufficient to detect BUOW if they return.

Editorial Comments and/or Suggestions

Lake and Streambed Alteration: The Project site is bordered by the San Joaquin River to the west and a tributary of the Merced River to the south. Therefore, Project activities may be subject to notification under Fish and Game Code section 1602. Fish and Game Code Section 1602 requires the Project proponent 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; 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 in nature. If a Lake or Streambed Alteration Agreement (LSA) is needed, CDFW is required to comply with CEQA in the issuance of an LSA. For additional information on notification requirements, please contact our staff in the LSA Program at (559) 243-4593, or by electronic mail at R4LSA@wildlife.gov.

Riparian Habitat and Wetlands: The DEIR notes that, “No riparian habitats or other sensitive natural communities have been mapped or observed on the site. A small riparian area borders the southside of the dairy and a larger riparian zone is adjacent to the farm road connecting the main site of the dairy and the location of the proposed wastewater ponds. The smaller, closer riparian area south of the project site had, at the time of the field survey (June 2022), some standing water in areas of up to two feet deep. The larger riparian area that is adjacent to the west-most farm road is part of the floodplain of the San Joaquin River. At the time of the field survey, there was enough water present to support carp (*Cyprinus sp.*), river otter (*Lontra canadensis*), and several bird species.” CDFW would like to highlight that no formal stream or wetland delineation appears to have been conducted to inform the DEIR of the extent and boundaries of potential stream, wetland, and riparian habitat boundaries. As such, CDFW recommends delineating and implementing an adequate buffer to protect wetlands, riparian vegetation, and associated wildlife, including State- and federally-listed species. CDFW recommends delineating wetlands, vernal pools, and swales with an appropriate no-disturbance buffer. In addition, CDFW recommends delineation from the high-water mark of surface water channels and other blue-lined waterways that have no riparian vegetation to avoid impacts. Further, a wetland delineation may need to be conducted and submitted to the United States Army Corps of Engineers (ACOE) for verification.

Cumulative Impacts: Currently, the DEIR has a very broad analysis of cumulative impacts to biological resources and does not adequately evaluate impacts to specific resources but does state that “the conversion of 24.2 acres of the project site to a dairy facility would contribute to that cumulative loss. This loss of habitat is cumulatively

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significant, unavoidable, and unmitigable.” Ultimately, the conclusions reached in the cumulative impacts analysis are not supported by substantial evidence and the analysis lacks reasonable and feasible measures to reduce harm. To address this lack of evidence, CDFW recommends that a cumulative impact analysis be conducted for all biological resources that will either be significantly or potentially significantly impacted by implementation of the Project, including those whose impacts are determined to be less than significant with mitigation incorporated or for those resources that are rare or in poor or declining health and will be impacted by the Project, even if those impacts are relatively small (i.e., less than significant). CDFW recommends cumulative impacts be analyzed for the following species using an acceptable methodology to evaluate the impacts of past, present, and reasonably foreseeable future projects on resources and be focused specifically on the resource, not the Project. An appropriate resource study area should be identified and mapped for each resource being analyzed and utilized for this analysis. CDFW recommends a scientifically sound cumulative impacts analysis be conducted for the following species: SWHA, TRBL, and BUOW. CDFW staff is available for consultation in support of cumulative impacts analyses as a trustee and responsible agency under CEQA.

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 filled out and submitted online at the following link: <https://wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. 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

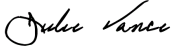
The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of filing fees is necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the environmental document filing 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).

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CONCLUSION

CDFW appreciates the opportunity to comment on the DEIR to assist Merced County in identifying and mitigating Project impacts on biological resources. Questions regarding this letter or further coordination should be directed to John Riedel, Environmental Scientist, at (559) 807-1453, or john.riedel@wildlife.ca.gov.

Sincerely,

DocuSigned by:

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Julie A. Vance
Regional Manager

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REFERENCES

California Burrowing Owl Consortium. 1993. Burrowing owl survey protocol and mitigation guidelines. Pages 171-177 *in* Lincer, J. and K. Steenhof (editors). 1993. The burrowing owl, its biology and management. Raptor Research Report Number 9.

California Department of Fish and Game. 1994. Staff report regarding mitigation for impacts to Swainson's hawks (*Buteo Swainsoni*) in the Central Valley of California. Sacramento, California, USA.

California Department of Fish and Game. 2012. Staff report on burrowing owl mitigation. Sacramento, California, USA.

California Department of Fish and Wildlife. 2015. Staff guidance regarding avoidance of impacts to tricolored blackbird breeding colonies on agricultural fields in 2015. Sacramento, California, USA.

California Department of Fish and Wildlife. 2024. Biogeographic information and observation system (BIOS). <https://www.wildlife.ca.gov/Data/BIOS>. Accessed 26 February, 2024.

Attachment 1

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

PROJECT: Borba Dairy Farms Expansion

SCH No.: 2022050451

RECOMMENDED MITIGATION MEASURE	STATUS/DATE/INITIALS
<i>Before Disturbing Soil or Vegetation</i>	
SWHA	
Recommended Mitigation Measure 1: SWHA take authorization	
Recommended Mitigation Measure 2: SWHA foraging habitat mitigation	
TRBL	
Recommended Mitigation Measure 4: TRBL take authorization	
BUOW	
Recommended Mitigation Measure 5: BUOW surveys	
Recommended Mitigation Measure 7: BUOW passive relocation and mitigation	
<i>During Construction</i>	
TRBL	
Recommended Mitigation Measure 3: TRBL avoidance buffer	
BUOW	
Recommended Mitigation Measure 6: BUOW avoidance buffer	