

## Dorman, April@Wildlife

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**From:** Tran, Harvey@Wildlife  
**Sent:** Wednesday, June 22, 2022 8:10 AM  
**To:** Thomas, John Q@DOT  
**Cc:** Wildlife R2 CEQA; Wilson, Billie@Wildlife; Garcia, Jennifer@Wildlife; Thomas, Kevin@Wildlife  
**Subject:** Caltrans 10-1M590 SR 88 Pavement Anchor Project - CDFW CEQA comments PT 2022-0205-0000-R2

**Follow Up Flag:** Follow up **Governor's Office of Planning & Research**  
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**Jun 22 2022**

### STATE CLEARINGHOUSE

Hi John,

The California Department of Fish and Wildlife (CDFW) appreciates the opportunity to comment on the proposed draft Initial Study with Proposed Mitigated Negative Declaration (MND) for the SR 88 Pavement Anchor Project (Project). CDFW is responding to the draft MND as a Trustee Agency for fish and wildlife resources (Fish & G. Code, §§ 711.7 & 1802, and CEQA Guidelines, §§ 15386), and as a Responsible Agency regarding any discretionary actions (CEQA Guidelines Section 15381), such as the issuance of a Lake or Streambed Alteration Agreement (California Fish and Game Code Sections 1600 et seq.) and/or a California Endangered Species Act (CESA) Permit for incidental take of endangered, threatened, and/or candidate species (California Fish and Game Code Sections 2080 and 2080.1).

This Project is located along State Routes 88 just east of Comstock Road (PM 5.0) to just east of the City of Lockeford (PM 16.4) in San Joaquin County. The Project proposes to repair the roadway pavement, comply with Americans with Disabilities Act requirements for pedestrians, improve highway operations and Transportation Management Systems, and replace sign panels on State Route 88 in San Joaquin County from post miles 5.1 to 16.4 to address the deteriorating pavement and other multi-objective assets. The Project will also add bike lanes and sidewalks for Complete Streets elements and add a drainage basin at the east end of Lockeford on Oak Road.

CDFW recommends the following items be addressed in the CEQA document:

#### **Comment 1: Migratory birds**

Please note that it is the Project proponent's responsibility to comply with all applicable laws related to nesting birds and birds of prey. Migratory non-game native bird species are protected by international treaty under the federal Migratory Bird Treaty Act (MBTA) of 1918, as amended (16 U.S.C. 703 et seq.). CDFW implemented the MBTA by adopting the Fish and Game Code section 3513. Fish and Game Code sections 3503, 3503.5 and 3800 provide additional protection to nongame birds, birds of prey, their nests, and eggs. Sections 3503, 3503.5, and 3513 of the Fish and Game Code afford protective measures as follows: section 3503 states that it is unlawful to take, possess, or needlessly destroy the nest or eggs of any bird, except as otherwise provided by the Fish and Game Code or any regulation made pursuant thereto; section 3503.5 states that it is unlawful to take, possess, or destroy any birds in the orders Falconiformes or Strigiformes (birds-of-prey) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by the Fish and Game Code or any regulation adopted pursuant thereto; and section 3513 states that it is unlawful to take or possess any migratory nongame bird as designated in the MBTA or any part of such migratory nongame bird except as provided by rules and regulations adopted by the Secretary of the Interior under provisions of the MBTA.

Potential habitat for nesting birds and birds of prey is present within the Project area and impacts to the nesting birds are not sufficiently addressed in the MND (e.g., how many potential nesting trees will be trimmed or removed, how many potential burrowing owl burrows will be lost, how much potential foraging habitat will be lost, etc.). The MND

should disclose all potential activities that may incur a direct or indirect take to nongame nesting birds within the Project footprint and its vicinity. Appropriate avoidance, minimization, and/or mitigation measures to avoid take must be included in the MND.

To address this comment, CDFW recommends the MND describe how the considerations identified below will be implemented and incorporated into the appropriate MND section(s):

CDFW recommends Project proponent add specific avoidance and minimization measures to the Avoidance, Minimization, and/or Mitigation Measures section. Project-specific avoidance and minimization measures may include, but not be limited to: Project phasing and timing, monitoring of Project-related noise (where applicable), sound walls, visual barriers, and buffers, where appropriate. The MND should also include specific avoidance and minimization measures that will be implemented should a nest be located within the Project site. One example is nest buffer radius which can be determined by monitoring the active nests and determining the distance that activities will disturb the nesting birds. CDFW recommends all measures to protect nesting birds should be performance-based. While some birds may tolerate disturbance within 250 feet of construction activities, other birds may have a different disturbance threshold and “take” could occur if the temporary disturbance buffers are not designed to reduce stress to that individual pair. CDFW recommends including performance-based protection measures for avoiding all nests protected under the Migratory Bird Treaty Act and Fish & G. Code. A 500-foot exclusion buffer may be sufficient; however, that buffer may need to be increased based on the birds’ tolerance level to the disturbance. It is the Project proponent's responsibility to confirm the buffer is sufficient to avoid take/nest failure. In addition to larger, protocol level survey efforts (e.g., Swainson’s hawk) and scientific assessments, CDFW recommends a final preconstruction survey be required no more than 14 calendar days prior to the start of vegetation clearing or ground disturbance activities, as instances of nesting could be missed if surveys are conducted earlier. Monitoring of potential nesting activities in the Project area should continue, at a minimum, until the end of the avian nesting season (September 1).

**Comment 2: Swainson’s hawk, Page 34.**

The avian species mentioned in Comment #1 above may also include Swainson’s hawk (SWHA) which is a species listed as a threatened under the California Endangered Species Act (CESA). Besides the suitable nesting trees around the Project area, there is also suitable foraging habitat around the Project area. California Natural Diversity Database (CNDDDB) has records of at least three previous SWHA occurrences within five (5) miles of the Project area.

If the Project is to occur, CDFW recommends a qualified biologist conduct a Swainson’s hawk (*Buteo swainsoni*) survey within a minimum 1/2-mile radius around the Project area. Surveys should be conducted according to the following the five-period schedule in accordance with the “Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley (Swainson's Hawk Tech. Advis. Comm., 5/2000)”:

- January to March 20- One (1) Survey, All Day
- March 20 to April 5- Three (3) Surveys, Sunrise to 1000 / 1600 to Sunset
- April 5 to April 20- Three (3) Surveys, Sunrise to 1200 / 1630 to Sunset
- April 21 to June 10- Monitoring
- June 10 to July 30- Three (3) Surveys, Sunrise to 1200 / 1600 to Sunset

If an occupied nest is found, the Project proponent should consult with CDFW and demonstrate compliance with CESA. CDFW is responsible for ensuring appropriate conservation of fish and wildlife resources including threatened, endangered, and/or candidate plant and animal species, pursuant to the CESA. CDFW recommends that a CESA Incidental Take Permit (ITP) be obtained if the Project has the potential to result in “take” (Fish & G. Code § 86 defines “take” as “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill”) of CESA-listed species, either through construction or over the life of the Project.

**Comment 3: White-tailed kite, Page 35**

As stated in the MND, a Fully Protected Species (Fish & G. Code § 3511) has the potential to occur within or adjacent to the Project area, including, but not limited to: white-tailed kite (*Elanus leucurus*). Project activities described in the MND

should be designed to completely avoid any fully protected species that have the potential to be present within or adjacent to the Project area.

To address this comment, CDFW recommends the MND fully analyze potential adverse impacts to fully protected species due to habitat modification, loss of foraging habitat, and/or interruption of migratory and breeding behaviors. CDFW also recommends Project proponent include in the analysis how appropriate avoidance, minimization, and mitigation measures will avoid direct impacts and reduce indirect impacts to fully protected species.

**Comment 4: Western pond turtles (WPT), Page 35**

The Project site is in proximity of known WPT habitat. Additionally, noise, vegetation removal, movement of workers, and ground disturbance as a result of Project activities have the potential to significantly impact WPT populations. Without appropriate avoidance and minimization measures for WPT, potentially significant impacts associated with Project activities could include nest reduction, inadvertent entrapment, reduced reproductive success, reduction in health or vigor of eggs and/or young, and direct mortality.

CDFW recommends that if any WPT are discovered at the site immediately prior to or during Project activities, they be allowed to move out of the area on their own or be moved by a qualified biologist with appropriate take authorization. For example, this measure can be:

*If WPT is encountered during the course of the Project, then the WPT shall be allowed to leave the Project area unharmed. If the WPT is not able to leave the Project area, then a qualified biologist with the appropriate permit can transport the WPT outside the Project area to a suitable release area.*

**Comment 5: California tiger salamander survey and presence, Pages 40-41**

The MND states that a qualified biologist(s) will conduct a pre-construction survey of the Project site no more than 14 days prior to the beginning of ground disturbance or other general construction actions that could affect the California tiger salamander. CDFW recommends a shorter survey window of five days prior to ground disturbance to increase the accuracy of the survey effort.

CDFW recommends adding the text below into the MND:

*Project proponent shall retain a Designated Biologist to survey the Project area where suitable habitat occurs for California tiger salamander (*Ambystoma californiense*) (CTS). Surveys shall be performed no later than five (5) calendar days prior to starting Project activities and shall be performed within 500 feet of the Project area that can be accessed by the Project proponent. If CTS are identified during surveys or during construction activities, work shall be suspended, and CDFW notified. Work may not start or re-initiate until the Project proponent has consulted with CDFW and can demonstrate compliance with CESA.*

Please note that when acting as a responsible agency, CEQA guidelines section 15096, subdivision (f) requires CDFW to consider the CEQA environmental document prepared by the lead agency prior to reaching a decision on the Project. Addressing CDFW's comments and disclosing potential Project impacts on CESA-listed species and any river, lake, or stream, and provide adequate avoidance, minimization, mitigation, monitoring, and reporting measures; will assist CDFW with the consideration of the MND.

Thanks,

**Harvey Tran**

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