



State of California – Natural Resources Agency
 DEPARTMENT OF FISH AND WILDLIFE
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September 26, 2024

Gloria Sciarac, Senior Planner
 City of Gilroy
 7351 Rosanna Street
 Gilroy, CA, 95030
Gloria.Sciara@cityofgilroy.org

Subject: Gilroy Data Center, Draft Environmental Impact Report,
 SCH No. 2022110127, City of Gilroy, Santa Clara County

Dear Gloria Sciarac:

The California Department of Fish and Wildlife (CDFW) received a Notice of Availability of a draft Environmental Impact Report (EIR) from the City of Gilroy (City) for the Gilroy Data Center (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.

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.

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 (LSA) 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.

REGULATORY REQUIREMENTS

California Endangered Species Act

A CESA Incidental Take Permit (ITP) must be obtained from CDFW if the Project has the potential to result in "take" of plants or animals listed under CESA, either during construction or over the life of the Project. Under CESA, "take" means "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." (Fish & G. Code, § 86). CDFW's issuance of an ITP is subject to CEQA and to facilitate permit issuance, any Project modifications and mitigation measures must be incorporated into

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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the CEQA document analysis, discussion, and mitigation monitoring and reporting program. If the Project will impact CESA listed species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain a CESA permit.

If the Project is covered by the Santa Clara Valley Habitat Plan (SCVHP), the habitat conservation plan and natural community conservation plan permits will only authorize the incidental take of covered species as listed in the SCVHP. A list of the 18 SCVHP covered species can be found in the *2012 Santa Clara Valley Habitat Plan, Chapter 1, Table 1-2. Species Proposed for Coverage in the Santa Clara Valley Habitat Plan.*

CEQA requires a mandatory finding of significance if a project is likely to substantially impact threatened or endangered species. Pub. Resources Code, §§ 21001, subd. (e) & 21083; CEQA Guidelines, §§ 15380, 15064 & 15065). In addition, pursuant to CEQA, the Lead Agency cannot approve a project unless all impacts to the environment are avoided or mitigated to less-than-significant levels, or the Lead Agency makes and supports Findings of Overriding Consideration (FOC) for impacts that remain significant despite the implementation of all feasible mitigation. FOC under CEQA, however, does not eliminate the Project proponent's obligation to comply with the Fish and Game Code.

Migratory Birds and Raptors

CDFW has authority over actions that may result in the disturbance or destruction of active bird nest sites or the unauthorized take of birds. Fish and Game Code sections protecting birds, their eggs, and nests include section 3503 (regarding unlawful take, possession, or needless destruction of the nests or eggs of any bird), section 3503.5 (regarding the take, possession, or destruction of any birds-of-prey or their nests or eggs), and section 3513 (regarding unlawful take of any migratory nongame bird). Migratory birds are also protected under the federal Migratory Bird Treaty Act (MBTA).

Fully Protected Species

Fully Protected Species (Fish & G. Code § 3511 and 4700) have 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 draft EIR should be designed to completely avoid any fully protected species that have the potential to be present within or adjacent to the Project area. Fully protected species may not be taken or possessed at any time and no licenses or permits may be issued for their take except as follows:

- Take is for necessary scientific research;
- Efforts to recover a fully protected, endangered, or threatened species, live capture, and relocation of a bird species for the protection of livestock; or
- They are a covered species whose conservation and management are provided for in a Natural Community Conservation Plan (Fish & G. Code, §§ 3511, 4700, 5050, & 5515).
- Specified types of infrastructure projects may be eligible for an ITP for unavoidable impacts to fully protected species if certain conditions are met (see Fish & G. Code §2081.15).

PROJECT DESCRIPTION SUMMARY

Proponent: City of Gilroy

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Objective: Phase I would include the first single-story (approximately 35-foot high) data center building of approximately 218,000 square feet (Building 1), a security building, a substation/switchyard, off-site transmission upgrades to the existing Pacific Gas and Electric Company (PG&E) transmission and distribution system, potentially a future Battery Energy Storage System of up to 50-megawatt (MW), and other utility interconnections. Building 1 would require a 49 MW connection to PG&E service and would be supported by twenty-five 2.5 MW emergency generators to power the servers in the event of an emergency, and one 600-kilowatt generator to power other essential building functions such as lighting, in case of a power outage.

Phase II would include a similar single-story, 35-foot-high data center building of 218,000 square feet (Building 2). Building 2 would not include diesel generators; instead, backup power would be provided via emerging battery or fuel cell technology in a standalone building constructed during Phase II.

The existing 12-inch water main in Camino Arroyo would be extended approximately 135 linear feet to provide potable water to the Project site. The Project would provide approximately 115 parking spaces at full buildout. A total of 60 parking spaces would be provided during Phase I; the remaining parking spaces would be constructed during Phase II.

Location: The Project is located southeast end of Arroyo Circle, right before Arroyo Circle becomes Camino Arroyo, City of Gilroy, Santa Clara County (County). The coordinates for the approximate center of the Project are 37°01'03.1"N latitude 121°33'33.1"W longitude (WGS 84). The Assessor's Parcel Number is 841-69-044.

Timeframe: April 2024 is listed as the construction start date, but this date has passed. Construction of the Project would take place in two phases. Phase I would take approximately 3 years and 2 months (38 months), and Phase II would take approximately 6 years and 6 months (78 months).

SPECIES POTENTIAL

According to Biogeographic Information and Observation System (BIOS) records, threatened, endangered, and other special-status species that are known to occur or have the potential to occur in or near the Project site include but are not limited to those listed in Attachment 1.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the City 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 document.

I. Environmental Setting and Related Impact Shortcoming

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 U.S. Fish and Wildlife Service (USFWS)?

COMMENT # 1: Nesting Birds; Draft EIR Section 3.4.3, Pages 71-72

Issue: CDFW has authority over actions that may result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections protecting birds, their eggs, and nests include §§ 3503 (regarding unlawful take, possession, or needless destruction of the nests or eggs of any bird), 3503.5 (regarding the take, possession, or destruction of any birds-of-prey or their nests or

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eggs), and 3513 (regarding unlawful take of any migratory nongame bird). Migratory birds are also protected under the federal MBTA. White-tailed kite has been documented within four miles of the Project (California Natural Diversity Database [CNDDB] Occurrence Number 29610) and the Project is located within core connectivity for loggerhead shrike (*Lanius ludovicianus*) (BIOS).

Specific impact: Tree removal, construction activity, construction noise, and electrocution impacts may occur through direct damage or mortality to birds and nests if appropriate protocols for bird nest surveys and Avian Power Line Interaction Committee (APLIC) guidelines are not implemented.

Why impact would occur: The draft EIR states that the Project has the potential to disturb nesting habitat for birds and raptors and would result in the permanent loss of suitable nesting habitat including the removal of 50 trees (18 trees present at the Project site and 38 trees located within the proposed transmission line route). Additionally, the draft EIR states that a substation/switchyard will be built and offsite transmission upgrades to the existing PG&E transmission and distribution system but does not discuss avian-safe design components. Electric distribution lines are typically placed within the range of average bird flight level and are difficult for birds to see. Many birds, particularly raptors, seek out tall perches like distribution poles to hunt for food or perch and roost. Frequent use of poles increases the exposure to energized parts when flying on and off a pole. Nesting material may also cause an electrical connection, or the nest material could catch on fire, killing the bird and damaging the power structure.

Evidence impact would be significant: Impacts to birds and nests, including, but not limited to nest abandonment, nest failure, reduced availability of forage, chick mortality, electrocution, and resultant population decline would be significant.

Recommended Potentially Feasible Mitigation Measures to reduce impacts to less-than-significant:

Recommended Mitigation Measure # 1: Nesting Bird Surveys

CDFW recommends incorporating the following information for avoidance, nesting bird surveys, buffer zones, and reporting into BIO MM-1 as outlined below:

CDFW encourages tree removal and Project construction activities outside of the bird nesting season, typically February 15 to August 30 for small bird species such as passerines; January 15 to September 15 for owls; and February 15 to September 15 for other raptors.

If tree removal and Project construction activities are scheduled during the nesting season, CDFW recommends that a qualified biologist with applicable species and habitat experience should conduct **two surveys** for active nests. The first survey should be no more than 14 days prior to the start of tree removal, a qualified biologist shall conduct a survey to establish a behavioral baseline of all identified nests. A second survey shall be conducted 48 hours prior to Project activities to maximize the probability that nests that could potentially be impacted are detected. These surveys should cover a sufficient area where suitable nesting habitat is present as well as an appropriate buffer surrounding nesting habitat. A sufficient area means any area potentially affected by the Project. Surveys shall be conducted at the appropriate times of day and during appropriate nesting times.

If the qualified biologist documents active nests within the Project area or in nearby surrounding areas, an appropriate buffer between the nest and active construction should be established. CDFW typically 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

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biologist has determined that the birds have fledged and are no longer reliant upon the nest or on-site parental care for survival.

Prior to any tree removal and Project activities, the qualified biologist shall submit a report indicating the results of the survey and any designated buffer zones to CDFW.

Recommended Mitigation Measure # 2: Avian Electrocutation Prevention

The City shall investigate methods to prevent bird nesting and perching on substation/switchyard infrastructure leading to potential electrocution through avian-safe design or installation of deterrents to the greatest extent feasible. The City shall also investigate incorporating avian-safe design or installation of deterrents to prevent bird nesting and perching during upgrades to the existing offsite PG&E transmission and distribution system. All aboveground lines should be fitted with bird flight diverters or visibility enhancement devices. When lines cannot be placed underground, appropriate avian-safe protection designs should be employed. As a minimum requirement, the substation/switchyard infrastructure and existing off-site PG&E transmission and distribution system should conform with the most current edition of the APLIC guidelines to prevent electrocutions. Resources may be found on the APLIC website at <https://www.aplic.org/mission>.

COMMENT # 2: Western Burrowing Owl; Draft EIR Section 3.4.2, Page 67

Issue: The Project is within the yearlong distribution of burrowing owl (*Athene cunicularia*) (BIOS 2024) and is comprised of and adjacent to agricultural land that may be suitable habitat for the species. Burrowing owl live in wide-open, sparsely vegetated areas like agricultural fields and concentrate their hunting in uncultivated fields (USFWS 2024, SCVHP 2012, East Contra Costa County Habitat Conservation Plan/ Natural Community Conservation Plan 2002). Burrowing owl have been documented within four miles of the Project (CNDDDB Occurrence Number 45328). In California, distances of 53 km to roughly 150 km have been observed for adult and natal dispersal (Shuford et al 2008). Additionally, American badger (*Taxidea taxus*) can excavate suitable burrows in just one day (Brehme et al. 2015). American badger dens or holes are often utilized by burrowing owl for nesting and roosting (Shuford et al 2008, SCVHP 2012). Notably, American badger has been documented within two miles of the Project (CNDDDB Occurrence Number 101300).

The draft EIR states that Project construction would result in approximately 56 acres of disturbance of agricultural land which may be potential habitat for burrowing owl. The draft EIR indicates that burrowing owl would not be impacted by the Project because no burrowing owl habitats or burrows were observed at the Project. However, the natural resources assessment memo does not specify the type of survey (e.g. protocol, focused, reconnaissance) used to identify burrowing owl habitats or burrows at the Project. The Project is also located within the SCVHP Natural Community Conservation Plan/Habitat Conservation Plan (SCVHP) permit boundary. Additionally, the draft EIR states that the Project would comply with conditions outlined in the SCVHP.

Specific impact: Direct mortality through crushing of adults or young within burrows, loss of nesting burrows, loss of nesting habitat, loss of foraging habitat resulting in reduced nesting success (loss or reduced health or vigor of eggs or young), burrow abandonment, and reduced frequency or duration of care for young resulting in reduced health or vigor of young.

Why impact would occur: The proposed Project includes construction of buildings, parking lots, and other permanent structures in agricultural land that is potential burrowing owl nesting and foraging habitat. The Project would include impacts such as noise, groundwork, and movement of workers that would have the potential to significantly impact nesting or overwintering owls.

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Evidence impact would be significant: The species has experienced a severe population decline in the County. Project impacts may result in take of burrowing owl, habitat loss resulting in further species population decline, and cumulative impacts resulting in the restriction in the range of the species. Any of these impacts and the loss of any individual burrowing owl within the County population would be significant.

Recommended Potentially Feasible Mitigation Measures to reduce impacts to less-than-significant:

Recommended Mitigation Measure # 3: SCVHP Burrowing Owl Compliance

The City should determine if the Project would be covered by the SCVHP. If the Project is expected to be covered under the SCVHP, the draft EIR should state that payment of appropriate SCVHP impact fees will be made to the - (SCVHA), which is the entity implementing the SCVHP, and that all SCVHP burrowing owl conditions will be followed. If western burrowing owl is listed before Project activities begin, all Project activities should be coordinated with the SCVHA for the most current requirements.

Recommended Mitigation Measure # 4: Burrowing Owl Surveys

If the Project is not covered by the SCVHP, a qualified biologist should conduct protocol-level surveys in all suitable burrowing owl habitat within the Project area and surrounding areas where Project activities could adversely affect burrowing owl during both the nesting (February 1 to August 31) or overwintering season. Specific information on burrowing owl survey methods, buffer distances, and mitigation is provided in the CDFW Staff Report on Burrowing Owl Mitigation, dated March 7, 2012, and available at <https://wildlife.ca.gov/Conservation/Survey-Protocols#377281284-birds>.

Please be advised that the western burrowing owl has been petitioned for listing, <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=221396&inline> under CESA and CDFW has determined that there is sufficient scientific information to indicate that the petitioned action to list the western burrowing owl as threatened or endangered under CESA may be warranted <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=225154&inline>. The California Fish and Game Commission will decide on the candidacy status of the western burrowing owl at an upcoming meeting. If western burrowing owl is listed before Project activities begin, all Project activities should be coordinated with CDFW for the most current requirements.

If burrowing owl are detected during surveys within or near the Project area, a protective buffer in which construction activities will be avoided will be established. Appropriate buffers typically have a 50- to 500-meter radius and vary depending on the level of disturbance and timing of construction. If the burrowing owl show signs of distress (e.g., defensive vocalizations and/or flying away from the nest), the buffer distance should be increased.

COMMENT # 3: American Badger

Issue: American badger has been documented within 2-miles of the Project (CNDDDB Occurrence Number 101300). American badger will use agricultural areas as many areas of traditional habitat have been converted to farmland (University of Wisconsin Milwaukee). The Project is comprised of, and adjacent to agricultural land that may be suitable habitat for the species. American badger prefer open habitats that are food for building such as fields and farmland (POST 2020). American badger home ranges are large and can range from 2 to 50 km² (Brehme et al. 2015). American badger can excavate suitable burrows in just one day (Brehme et al. 2015).

The draft EIR states that Project construction would result in approximately 56 acres of disturbance of agricultural land which may be potential habitat for the American badger. The draft EIR indicates that no burrows were observed at the Project. However, the

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natural resources assessment memo does not specify the type of survey (e.g. protocol, focused, reconnaissance) used to identify American badger habitats or burrows at the Project. The draft EIR does not fully analyze and evaluate Project impacts to American badger.

Specific impact: Project activities may result in the loss of suitable breeding habitat, loss of dens, den abandonment, and direct mortality through crushing of adults or young within dens.

Why impact would occur: The proposed Project includes construction of buildings, parking lots, and other permanent structures in agricultural land that is potential American badger den and foraging habitat. The Project would include impacts such as noise, groundwork, and movement of workers that would have the potential to significantly impact American badger.

Evidence impact would be significant: The American badger is designated by CDFW as a California Species of Special Concern (SSC). If American badger are present on the Project site, impacts to American badger would be significant.

Recommended Potentially Feasible Mitigation Measures to reduce impacts to less-than-significant:

Recommended Mitigation Measure # 5: Focused Den Survey and Buffers

A qualified biologist shall conduct focused den surveys (e.g. walking line transect surveys) within the Project area and within a 250-foot radius surrounding the work area at least 14 days prior to the start of work, as well as daily prior to beginning the ground-disturbing work for the day.

If American badger dens are found and Project work is to occur during the gestation and pup-rearing period (i.e. February 15 through July 1), a buffer of 250 feet around the den complex shall be established, and Project work shall not occur within the buffer. A qualified biologist shall monitor the den to detect when young are nearing independence (e.g., can be observed emerging from den opening or are located outside of the den) and disperse.

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 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>.

ENVIRONMENTAL DOCUMENT FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of environmental document 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. (See 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 draft EIR to assist the City in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Melony Wood, Environmental Scientist at (707) 428-2002 or Melony.Wood@Wildlife.ca.gov.

Sincerely,

DocuSigned by:

Erin Chappell
Regional Manager
Bay Delta Region

Attachment 1: Special-Status Species and Commercially/Recreationally Important Species

ec: Office of Planning and Research, State Clearinghouse, (SCH No. 2022110127)
Craig Weightman, CDFW Bay Delta Region – Craig.Weightman@wildlife.ca.gov
Jason Faridi, CDFW Bay Delta Region – Jason.Faridi@wildlife.ca.gov

REFERENCES

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- University of Wisconsin Milwaukee (UWM). n.d. Badger Facts. <https://sites.uwm.edu/badgerresearch/badger-facts/#:~:text=Although%20badgers%20prefer%20natural%20prairie,which%20is%20largely%20considered%20unsuitable>. Accessed September 18, 2024.

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ATTACHMENT 1: Special Status Species

Species	Status
Birds	
burrowing owl (<i>Athene cunicularia</i>)	Species of Special Concern (SSC)
Cooper's hawk (<i>Accipiter cooperii</i>)	State Watch List (SWL)
loggerhead shrike (<i>Lanius ludovicianus</i>)	SSC
northern harrier (<i>Circus hudsonius</i>)	SSC
tricolored blackbird (<i>Agelaius tricolor</i>)	State Threatened (ST), SSC
white-tailed kite (<i>Elanus leucurus</i>)	State Fully Protected (FP)
Mammals	
American badger (<i>Taxidea taxus</i>)	SSC
pallid bat (<i>Antrozous pallidus</i>)	SSC