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**GAVIN NEWSOM, Governor**  
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August 30, 2024

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**Subject: Merced Intermodal Track Connection Project (Project)  
Draft Environmental Impact Report (DEIR)  
SCH: 2023010061**

Dear Dan Leavitt:

The California Department of Fish and Wildlife (CDFW) received a DEIR from the San Joaquin Joint Powers Authority (SJJPA) for the Project pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.<sup>1</sup>

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 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

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<sup>1</sup> 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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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.

**Unlisted Species:** Species of plants and animals need not be officially listed as Endangered, Rare, or Threatened (E, R, or T) on any State or federal list to be considered E, R, or T under CEQA. If a species can be shown to meet the criteria for E, R, or T, as specified in the CEQA Guidelines section 15380, CDFW recommends it be fully considered in the environmental analysis for the Project.

**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:** San Joaquin Joint Powers Authority (SJJPA)

**Objective:** The Project includes a new track connection from the Burlington Northern Santa Fe (BNSF) corridor to the proposed integrated station in downtown Merced between R and O Streets, in addition to a new platform that will allow for a cross-platform transfer between the San Joaquin and High-Speed Rail (HSR). The Project only includes the construction of the track connection and the San Joaquin platforms; it does not include the construction of the rest of the integrated stations. The Project would consist of the following: new passenger rail connection for the San Joaquin from BNSF north of State Route (SR) 59, running along the SR 59 corridor and immediately west of the Altamont corridor Express (ACE)/Union Pacific Railroad (UPRR) corridor, to the southern terminus at the proposed integrated station; shifting ACE/UPRR spur track that accesses industrial area north of SR 59; new aerial guideway on the west side of the ACE/UPRR corridor that would connect into the east side of the HSR platform (which would be shared with the San Joaquin); and expansion of the approved ACE

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Merced Layover and Maintenance Facility to include new and upgraded tracks for San Joaquin trains and joint use of the initial facility for both ACE and the San Joaquin trains.

**Location:** The Project site is located entirely within Merced County and almost entirely within the Merced city limits. A small portion of the Project near Ashby Road and Miles Court is outside the city limits of Merced within Merced County. The new track for the Project would run from the BNSF corridor just north of where it crosses Snelling Highway (SR 59) to a station platform at the proposed integrated Merced HSR Station located between O and R Streets in downtown Merced, parallel to 16th Street.

## **COMMENTS AND RECOMMENDATIONS**

CDFW offers the comments and recommendations below to assist SJPPA 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 EIR prepared for the Project.

CDFW submitted a Notice of Preparation (NOP) comment letter to SJPPA for the Project on February 17, 2023, with recommendations for special-status species with the potential to be impacted by the Project. 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 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 candidate endangered Crotch's bumble bee (*Bombus crotchii*), and the State species of special concern burrowing owl (*Athene cunicularia*).

### **Swainson's Hawk**

Mitigation Measures (MM) BIO-2.7 and BIO-2.8 provides measures to mitigate for impacts to Swainson's hawk (SWHA). CDFW concurs with these measures and recommends that in the event an active SWHA nest is detected, and a ½-mile no-disturbance 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 Incidental Take Permit (ITP), pursuant to Fish and Game Code section 2081 subdivision (b) is necessary to comply with CESA.

### **Burrowing Owl**

The DEIR notes that the Project could potentially impact burrowing owl (BUOW) and MM BIO-2.9 is provided to mitigate for potential impacts. MM BIO-2.9 states that, "If the

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biologist identifies the presence of a burrowing owl nest in an area scheduled to be disturbed by construction, a 660-foot (~200-meter) no-activity buffer will be established and maintained around the nest while it is active.” CDFW does not concur that this buffer distance is sufficient to adequately mitigate for potential impacts to BUOW and recommends that no-disturbance buffers be implemented as outlined in CDFW’s Staff Report on Burrowing Owl Mitigation (CDFG 2012), and detailed below:

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)

**Crotch’s Bumble Bee**

CDFW would like to note that it does not appear that Crotch’s bumble bee (CBB) was included in the DEIR, and as such, no measures were proposed to mitigate for potential impacts to the species. CBB are known to inhabit areas of grasslands and scrub that contain requisite habitat elements for nesting, such as small mammal burrows and bunch/thatched grasses. These habitat features appear to be present within the Project vicinity (CDFW 2024) based on the DEIR. As such, CDFW recommends the following:

**Recommended Mitigation Measure 1: CBB Habitat Assessment**

CDFW recommends a qualified biologist conduct a habitat assessment to determine if the Project area and the immediate surrounding vicinity contain habitat suitable to support CBB. Potential nesting sites, which include all small mammal burrows, perennial bunch grasses, thatched annual grasses, brush piles, old bird nests, dead trees, and hollow logs would need to be documented as part of the assessment.

**Recommended Mitigation Measure 2: CBB Surveys**

If potentially suitable habitat is identified, CDFW recommends that a qualified biologist conduct focused surveys for CBB, and their requisite habitat features following the methodology outlined in the Survey Considerations for California Endangered Species Act Candidate Bumble Bee Species (CDFW 2023) and they be timed during the appropriate bloom periods for preferred plant forage species.

**Recommended Mitigation Measure 3: CBB Avoidance Buffers**

If CBB is detected, then CDFW recommends that all small mammal burrows and thatched/bunch grasses be avoided by a minimum of 50 feet to avoid take and potentially significant impacts. If ground-disturbing activities will occur during the overwintering period (October through February), consultation with CDFW is warranted

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to discuss how to implement Project activities and avoid take. Any detection of CBB prior to or during Project implementation warrants consultation with CDFW to discuss how to avoid take.

#### **Recommended Mitigation Measure 4: CBB Take Authorization**

If take cannot be avoided, CDFW recommends acquiring an ITP pursuant to Fish and Game Code section 2081(b), prior to initiating ground-disturbing activities.

#### **Editorial Comments and/or Suggestions**

**Nesting birds:** CDFW encourages that Project ground-disturbing activities occur during the bird non-nesting season; however, if ground-disturbing or vegetation-disturbing activities must occur during the nesting season (February 1st through September 15th), the Project applicant is responsible for ensuring that implementation of the Project does not result in violation of the Migratory Bird Treaty Act or relevant Fish and Game Code sections as referenced above.

To evaluate Project-related impacts on nesting birds, CDFW recommends that a qualified biologist conduct a pre-construction survey 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 the Project site to identify nests and determine their status. A sufficient area means any area potentially affected, either directly or indirectly, by the Project. In addition to direct impacts (i.e., nest destruction), noise, vibration, and movement of workers or equipment could also affect nests. CDFW recommends that a qualified biologist establish a behavioral baseline of all identified nests. Once Project activities begin, CDFW recommends having a qualified biologist continuously monitor nests to detect behavioral changes resulting from 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 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 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 a compelling biological or ecological reason to do so, such as when the Project site would be concealed from a nest site by topography. CDFW recommends that a qualified biologist advise and support any variance from these buffers and notify CDFW in advance of implementing a variance.

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**Lake and Streambed Alteration:** The DEIR notes that the Project site is adjacent to Bear Creek and Fahrens Creek/Black Rascal Creek and impacts to Bear Creek are anticipated during Project activities. As such, the Project is 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 Agreement) is needed, CDFW is required to comply with CEQA in the issuance of an LSA Agreement. 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](mailto:R4LSA@wildlife.gov).

**CNDDDB Positive Submission of Data:** Please note that the California Natural Diversity Database (CNDDDB) is populated by voluntary submissions of species detections. As a result, species may be present in locations not depicted in the CNDDDB but where there is suitable habitat and features capable of supporting species. A lack of an occurrence record, or lack of recent occurrence records, in the CNDDDB does not mean that a species is not present. In order to adequately assess any potential Project-related impacts to biological resources, surveys conducted by a qualified biologist during the appropriate survey period(s) and using the appropriate protocol survey methodology are warranted in order to determine whether or not any special-status species are present at or near the Project site.

## **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>.

## **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

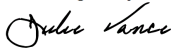
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environmental review by CDFW. Payment of the environmental document filing fee is required in order for the underlying project approval to be operative, vested, and final. (Cal. Code Regs, tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089).

## CONCLUSION

CDFW appreciates the opportunity to comment on the DEIR to assist SJJPA in identifying and mitigating Project impacts on biological resources. Please see the enclosed Mitigation Monitoring and Reporting Program (MMRP) table which corresponds with recommended mitigation measures in this comment letter. 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>). 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](mailto:john.riedel@wildlife.ca.gov).

Sincerely,

DocuSigned by:  
  
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## REFERENCES

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

California Department of Fish and Wildlife. 2023. Survey considerations for California Endangered Species Act candidate bumble bee species. California Department of Fish and Wildlife, Sacramento, California, USA.

California Department of Fish and Wildlife. 2024. Biogeographic information and observation system (BIOS). <https://www.wildlife.ca.gov/Data/BIOS>. Accessed 12 August 2024



**Attachment 1**

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

**PROJECT: Merced Intermodal Track Connection Project**

**SCH: 2023010061**

<b>RECOMMENDED MITIGATION MEASURE</b>	<b>STATUS/DATE/INITIALS</b>
<i>Before Disturbing Soil or Vegetation</i>	
Crotch's Bumble Bee	
<b>Recommended Mitigation Measure 1:</b> CBB habitat assessment	
<b>Recommended Mitigation Measure 2:</b> CBB surveys	
<b>Recommended Mitigation Measure 4:</b> CBB take authorization	
<i>During Construction</i>	
Crotch's Bumble Bee	
<b>Recommended Mitigation Measure 3:</b> CBB avoidance buffer	