



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Bay Delta Region
2825 Cordelia Road, Suite 100
Fairfield, CA 94534
(707) 428-2002
www.wildlife.ca.gov

GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director



June 14, 2023

Emily Hedge, Planner III
County of Napa
1195 Third Street
Napa, CA 94559
Emily.Hedge@countyofnapa.org

Subject: Rutherford Winery Major Modification P19-00126 Exception to the Conservation Regulations P23-00145, Negative Declaration, SCH No. 2023050520, Napa County

Dear Ms. Hedge:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt a Negative Declaration (ND) from Napa County (County) for the Rutherford Ranch Winery Major Modification #P19-00126-MOD and Use Permit Exception to the Conservation Regulations #P23-00145 (Project) pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹

CDFW is submitting comments on the ND to inform the County, as the Lead Agency, of potentially significant impacts to biological resources associated with the Project.

CDFW ROLE

CDFW is a **Trustee Agency** with responsibility under CEQA pursuant to CEQA Guidelines section 15386 for commenting on projects that could impact fish, plant, and wildlife resources. CDFW is also considered a **Responsible Agency** if a project would require discretionary approval, such as permits issued under the California Endangered Species Act (CESA), the Lake and Streambed (LSA) Alteration Program, or other provisions of the Fish and Game Code that afford protection to the state's fish and wildlife trust resources.

PROJECT DESCRIPTION SUMMARY

Proponent: Katherine Philippakis, Farella Braun + Martel LLP

Objective: Remedy existing violations of the Napa County Code Compliance Program, obtain approval for expansion beyond existing entitlements, and obtain a Use Permit

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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Exception to the County's Conservation Regulations related to existing and proposed disturbance within the setback zone of a stream within the Project footprint.

Project actions include recognition and retention, or relocation of seven existing, unpermitted improvements and structures located within the stream setback required by the Conservation Regulations; repaving the roadway shoulder along the Project's frontage; resurfacing a parking area; removal of unpermitted structures within the setback and adjacent to the stream; and restoration and revegetation of approximately 200 linear feet along the stream.

Location: The Project is located on a 17.37-acre parcel within the Agricultural Watershed (AW) zoning district. The parcel is located at the intersection of Silverado Trail and Rutherford Hill Road, with the private driveway off Silverado Trail. Project address: 1680 Silverado Trail South, Street Helena; Assessor's Parcel Number (APN): 030-300-030.

REGULATORY REQUIREMENTS

Lake and Streambed Alteration

Notification, pursuant to Fish and Game Code sections 1600 et. seq. is required for any activity that will substantially divert or obstruct the natural flow; change or use material from the bed, channel, or bank including associated riparian or wetland resources; or deposit or dispose of material where it may pass into a river, lake or stream. Work within ephemeral streams, washes, watercourses with a subsurface flow, and floodplains are subject to notification requirements. **Project activities would remove structures immediately adjacent to an unnamed stream and restore riparian habitat. Additionally, previous Project-related activities may have impacted the stream. Therefore, Project activities would likely be subject to LSA notification requirements, as further described below.** CDFW, as a Responsible Agency under CEQA, will consider the CEQA document for the Project. CDFW may not execute the final LSA Agreement until it has complied with CEQA as a Responsible Agency.

California Endangered Species Act

Although the Project footprint includes developed and disturbed areas, the Project has the potential to impact nesting Swainson's hawk (*Buteo swainsoni*), CESA listed as threatened species, through potential auditory or visual disturbances above ambient levels. **CDFW recommends surveys and avoidance of Swainson's hawk, as further described below.** If avoidance is not feasible, please be advised that a CESA Incidental Take Permit (ITP) must be obtained. Issuance of an ITP is subject to CEQA documentation; the CEQA document must specify impacts, mitigation measures, and a mitigation monitoring and reporting program. If the Project will impact CESA listed

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species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain an ITP.

CEQA requires a Mandatory Finding of Significance if a project is likely to substantially restrict the range or reduce the population of a threatened or endangered species. (Pub. Resources Code, §§ 21001, subd. (c) & 21083; CEQA Guidelines, §§ 15380, 15064, & 15065). Impacts must be avoided or mitigated to less-than-significant levels unless the CEQA Lead Agency makes and supports Findings of Overriding Consideration (FOC). The CEQA Lead Agency's FOC does not eliminate the Project proponent's obligation to comply with CESA.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the County in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources. Based on the potential for the Project to have a significant impact on biological resources, CDFW concludes that a **Mitigated Negative Declaration** is more appropriate for the Project and the below recommended mitigation measures should be implemented. The recommended mitigation measures are also included in **Attachment A: Draft Mitigation Monitoring and Reporting Program**.

I. Stream Alteration

Comment 1: Lake and Streambed Alteration Notification

Issue: The Project includes restoration along approximately 200 linear feet of the stream and indicates that structures directly adjacent to a stream will be removed. The ND indicates that work done to remove structures within the stream setback will be conducted during the dry season in a manner that minimizes impacts to the bank and setback, and that the Project will be required to provide documentation from permitting agencies that any necessary permits have been issued or that the work has been reviewed and permits are not required. It is unclear if previously installing the structures and fire protection storage pipes adjacent to and across the stream, or removing the structures or installing new structures, impacted or will impact the stream bed, bank, channel, or associated riparian habitat and if these activities are subject to LSA notification requirements (note that impacts that occurred to stream habitat without LSA notification may be considered a violation of Fish and Game Code section 1600 et seq.). It is also unclear if an LSA notification for the fire protection storage pipes across the stream was previously submitted. CDFW appreciates that restoration of stream habitat will occur, however, please be advised that restoration may require LSA notification.

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The California Natural Diversity Database (CNDDDB) documents special-status species that may be present within and adjacent to the stream such as multiple foothill yellow-legged frog (*Rana boylei*, California Species of Special Concern [SSC]) occurrences within 5 miles of the Project, including one occurrence at Conn Creek at Highway 128, and a western pond turtle (*Emys marmorata*, SSC) occurrence associated with Conn Creek in the Project vicinity. Unprocessed CNDDDB data identifies a California red-legged frog (*Rana draytonii*, SSC) occurrence approximately 3.5 miles away in Chiles Creek.

Recommended Mitigation Measure: To comply with Fish and Game Code section 1600 et seq. and reduce impacts to riparian habitat and associated special-status species to less-than-significant, CDFW recommends including the below mitigation measure.

Mitigation Measure (MM) Bio-1 Lake and Streambed Alteration: The Project shall consult with CDFW to determine if an LSA notification is required and comply with the LSA Agreement, if issued. As part of the consultation, the Project shall: 1) evaluate if previous installation of structures and fire protection storage pipes, or removal or installation of structures, across and adjacent to the stream impacted or will impact the stream bed, bank, channel, or associated riparian habitat, 2) identify if an LSA notification for the fire protection storage pipes across the stream was previously submitted and the associated notification number, and 3) provide restoration details to CDFW. Based on the consultation, the Project shall submit an LSA notification to CDFW for any activities CDFW determines are subject to notification requirements. The LSA Agreement may include measures to avoid and minimize impacts to special-status species and other wildlife, including but not limited to, the recommended mitigation measures in this letter and those listed below:

- Surveys for foothill yellow-legged frog, western pond turtle, and other special-status herpetofauna;
- CDFW approval of the restoration plan; and
- Implementation of a minimum 5-year monitoring and maintenance plan of the revegetation area.

II. Mandatory Findings of Significance: Does the Project have the potential to substantially reduce the number or restrict the range of an endangered, rare, or threatened species?

COMMENT 2: Swainson's Hawk – Environmental Setting Shortcoming

Issue: As indicated above, although the Project footprint includes developed and disturbed areas, the Project has the potential to impact nesting Swainson's hawk

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through potential auditory or visual disturbances above ambient levels associated with Project activities. The CNDDDB documents a Swainson's hawk nesting occurrence approximately 2.5 miles south of the Project site, along the Napa River. There have also been several documented occurrences of the species reported to eBird occurring approximately one mile south of the Project site during the breeding season within the last few years, and based on Google Earth aerial imagery it appears that potential nest trees exist on and adjacent to the Project site, and within 0.5 miles from the Project site, the distance at which the species could be disturbed during nesting season.

Specific impacts and why they may occur and be significant: Nesting Swainson's hawk could experience auditory and visual disturbances from Project activities resulting in nest abandonment and loss of eggs or reduced health and vigor and loss of young. Swainson's hawk is CESA listed as a threatened species and; therefore, is considered to be a threatened species pursuant to CEQA Guidelines section 15380. Therefore, if an active Swainson's hawk nest is disturbed by the Project, the Project may result in a substantial reduction in the number of a threatened species, which is considered a Mandatory Finding of Significance pursuant to CEQA Guidelines section 15065, subdivision (a)(1).

Recommended Mitigation Measure: For an accurate environmental setting, to reduce impacts to Swainson's hawk to less-than-significant, and to comply with CESA, CDFW recommends adding the following mitigation measure.

Mitigation Measure (MM) Bio-2 Swainson's Hawk Surveys and Avoidance: If Project activities are scheduled during the nesting season for Swainson's hawks (March 1 to August 31) and the Project will result in noise and visual disturbance to potential Swainson's hawk nesting habitat above ambient levels, then prior to beginning work on this Project, Swainson's hawk surveys shall be conducted by a qualified biologist with experience surveying for and detecting the species pursuant to the *Recommended timing and methodology for Swainson's Hawk Nesting Surveys in California's Central Valley Swainson's Hawk* (2000) survey protocol, within 0.5 mile of the Project (see: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83990&inline>). Pursuant to the above survey protocol, surveys shall be completed for at least the two survey periods immediately prior to a Project's initiation. The Project shall obtain CDFW's written acceptance of the qualified biologist and survey report prior to Project construction occurring between March 1 and August 31 each year. If the qualified biologist identifies nesting Swainson's hawks, the Project shall implement a 0.5 mile no disturbance buffer zone around the nest, unless otherwise approved in writing by CDFW. Project activities shall be prohibited within the buffer zone between March 1 and August 31, unless otherwise approved in writing by CDFW. If take of Swainson's hawk cannot be avoided, the Project shall consult with CDFW pursuant to CESA and obtain an ITP.

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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. (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 ND to assist the County in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Sara Keeler, Environmental Scientist, at (916) 594-4485 or Sara.Keeler@wildlife.ca.gov; or Melanie Day, Senior Environmental Scientist (Supervisory), at (707) 210-4415 or Melanie.Day@wildlife.ca.gov.

Sincerely,

DocuSigned by:

Erin Chappell
Regional Manager
Bay Delta Region

Attachment A: Draft Mitigation Monitoring and Reporting Program

ec: Office of Planning and Research, State Clearinghouse (SCH No. 2023050520)

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ATTACHMENT A

Draft Mitigation Monitoring and Reporting Program (MMRP)

CDFW provides the following language to be incorporated into the MMRP for the Project.

Biological Resources (BIO)			
Mitigation Measure (MM)	Description	Timing	Responsible Party
MM Bio-1	<p>Lake and Streambed Alteration. The Project shall consult with CDFW to determine if an LSA notification is required and comply with the LSA Agreement, if issued. As part of the consultation, the Project shall: 1) evaluate if previous installation of structures and fire protection storage pipes, or removal or installation of structures, across and adjacent to the stream impacted or will impact the stream bed, bank, channel, or associated riparian habitat, 2) identify if an LSA notification for the fire protection storage pipes across the stream was previously submitted and the associated notification number, and 3) provide restoration details to CDFW. Based on the consultation, the Project shall submit an LSA notification to CDFW for any activities CDFW determines are subject to notification requirements. The LSA Agreement may include measures to avoid and minimize impacts to special-status species and other wildlife, including, but not limited to, the recommended mitigation measures in this letter and those listed below:</p> <ul style="list-style-type: none"> • Surveys for foothill yellow-legged frog, western pond turtle, and other special status herpetofauna; • CDFW approval of the restoration plan; and • Implementation of a minimum 5-year monitoring and maintenance plan of the revegetation area. 	<p>Prior to Ground Disturbance and continuing over the course of the Project</p>	<p>Project Applicant</p>
MM Bio-2	<p>Swainson's Hawk Surveys and Avoidance. If Project activities are scheduled during the nesting season for Swainson's hawks (March 1 to August 31), prior to beginning work on this Project, Swainson's hawk</p>	<p>Prior to Ground Disturbance and</p>	<p>Project Applicant</p>

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	<p>surveys shall be conducted by a qualified biologist with experience surveying for and detecting the species pursuant to the Recommended timing and methodology for Swainson’s Hawk Nesting Surveys in California’s Central Valley Swainson’s Hawk (2000) survey protocol, within 0.5 mile of the Project site each year that Project activities occur (see https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83990&inline). Pursuant to the above survey protocol, surveys shall be completed for at least the two survey periods immediately prior to a Project’s initiation. The Project shall obtain CDFW’s written acceptance of the qualified biologist and survey report prior to Project construction occurring between March 1 and August 31 each year. If the qualified biologist identifies nesting Swainson’s hawks, the Project shall implement a 0.5 mile no disturbance buffer zone around the nest, unless otherwise approved in writing by CDFW. Project activities shall be prohibited within the buffer zone between March 1 and August 31, unless otherwise approved in writing by CDFW. If take of Swainson’s hawk cannot be avoided, the Project shall consult with CDFW pursuant to CESA and obtain an ITP.</p>	<p>continuing over the course of the Project</p>	
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