



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
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GAVIN NEWSOM, Governor
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Governor's Office of Planning & Research

October 26, 2023

October 26 2023

STATE CLEARINGHOUSE

C. Scott Guidi
District 10 Environmental Office Chief
California Department of Transportation
1976 East Dr. Martin Luther King Junior Boulevard
Stockton, California 95205

**Subject: Highway 59 Phase 1 Widening and Widening Over Black Rascal Creek
(Project)
Notice of Completion with Mitigation Negative Declaration
State Clearinghouse No. 2023090577**

Dear Scott Guidi:

The California Department of Fish and Wildlife (CDFW) received an Initial Study with Proposed Mitigation Negative Declaration (ISMND) prepared by the California Department of Transportation (Caltrans) for the above-referenced Project pursuant to 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, 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 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 and 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

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.

C. Scott Guidi
California Department of Transportation, District 10
October 26, 2023
Page 2

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.), related authorization as provided by the Fish and Game Code will be required.

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, 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: Caltrans and the City of Merced

Objective: Caltrans and the City of Merced propose to widen and improve State Route 59 from a two-lane roadway to four lanes, including replacing the Black Rascal Creek Bridge and the South Fork Black Rascal Creek Bridge. Additional Project features include standard shoulders, intersection improvements, Class 2 bicycle lanes, a striped two-way left-turn lane and median, and sidewalks. Both bridge structures are within the regulatory floodway of Black Rascal Creek and are overtopped in large storm events. To correct this overtopping and improve the hydraulics, the main creek channel would be realigned to flow beneath the Black Rascal Creek Bridge crossing. The existing South Fork Black Rascal Creek Bridge would be replaced with culverts, which would then serve to allow for continued water flow and function as an emergency bypass during heavy creek flows. Minimal right-of-way acquisition would be required to accommodate the widened roadway and may also be needed for potential utility relocations. Temporary construction easements and encroachment permits would also be required to accommodate project construction. The project would be built in stages to maintain traffic flow through the area.

Location: State Route 59 where it intersects at 16th Street to approximately 600 feet south of the Buena Vista Drive intersection, in the City of Merced.

C. Scott Guidi
California Department of Transportation, District 10
October 26, 2023
Page 3

Timeframe: Not provided.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist Caltrans in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources. The attached Mitigation and Monitoring and Reporting Program (MMRP) provides a summary of CDFW's additional impact minimization, mitigation, and monitoring recommendations that are described below. Editorial comments or other suggestions may also be included to improve the document.

Based on a review of the Project description, a review of California Natural Diversity Database (CNDDDB) records, and a review of aerial imagery of the Project and surrounding habitat, several special-status species could potentially be impacted. In particular, CDFW is concerned regarding potential impacts to the following special status wildlife species and habitats known to occupy the Project vicinity: the State threatened Swainson's hawk (*Buteo swainsoni*); the State candidate Crotch's bumble bee (*Bombus crotchii*); the State species of special concern pallid bat (*Antrozous pallidus*), spotted bat (*Euderma maculatum*), and western mastiff bat (*Eumops perotis californicus*); and Black Rascal Creek and its riparian corridor.

CDFW recommends that the following modifications and/or edits be incorporated into the MND, including proposed avoidance, minimization, and compensatory measures, prior to its adoption by Caltrans.

COMMENT 1: Swainson's Hawk (SWHA)

Issue: SWHA occurrences have been documented within the Project vicinity (CDFW 2023) and suitable nesting and foraging habitat occur within the Project site. SWHA exhibit high nest-site fidelity year after year and lack of suitable nesting habitat in the San Joaquin Valley limits their local distribution and abundance (CDFW 2016). Approval of the Project may lead to subsequent ground-disturbing activities that involve noise, groundwork, and movement of workers that could affect nests and has the potential to result in nest abandonment and loss of foraging habitat, significantly impacting local nesting SWHA. The ISMND acknowledges approximately 44 eucalyptus trees, which provide potential nest sites, within the riparian corridor will be removed but does not state whether surveys for SWHA were conducted at the site. Without appropriate avoidance and minimization measures for SWHA, potential significant impacts that may result from Project activities include nest abandonment, loss of nest trees, loss of foraging habitat that would reduce nesting success (loss or reduced health or vigor of eggs or young), and direct mortality. Any take of SWHA without appropriate incidental take authorization would be a violation of Fish and Game Code.

C. Scott Guidi
California Department of Transportation, District 10
October 26, 2023
Page 4

Recommended Mitigation Measure: SWHA Surveys

CDFW recommends that a qualified biologist conducts surveys for nesting SWHA following the survey methods developed by the Swainson's Hawk Technical Advisory Committee (SWHA TAC 2000) both to inform the ISMND and subsequently prior to Project implementation. Mitigation Measure BIO-14 states that surveys will be conducted according to SWHA TAC (2000) guidelines but does not specifically address that these surveys are to be conducted within a ½-mile survey distance from the construction area. The survey protocol includes early season surveys to assist the Project proponent in implementing necessary avoidance and minimization measures, and in identifying active nest sites prior to initiating ground-disturbing activities.

Recommended Mitigation Measure: SWHA No-Disturbance Buffer

Ground-disturbing activities are proposed to take place during the nesting season of March 1 through August 31, therefore CDFW recommends that additional pre-activity surveys for active nests be conducted by a qualified biologist no more than 10 days prior to the start of Project implementation. Mitigation Measure BIO-14 states if a SWHA nest is discovered 1/4-mile from the project area, a 500-foot no-work buffer would be implemented around the nest. CDFW recommends if a SWHA nest is discovered within 1/2-mile from the project area that a minimum no-disturbance buffer of 1/2-mile be delineated around active nests 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.

Recommended Mitigation Measure: SWHA Take Authorization

CDFW recommends that in the event an active SWHA nest is detected during surveys, 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 ITP pursuant to Fish and Game Code section 2081, subdivision (b) is necessary to comply with CESA.

COMMENT 2: Crotch's Bumble Bee (CBB)

Issue: The ISMND does not address CBB. 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. CBB was once common throughout most of central and southern California. However, it now appears to be absent from most of their range, especially in the central portion of its historic range within California's Central Valley (Hatfield et al. 2015). Analyses by the Xerces Society for Invertebrate Conservation, Defenders of Wildlife, Center for Food Safety

C. Scott Guidi
California Department of Transportation, District 10
October 26, 2023
Page 5

(2018) suggest there have been sharp declines in relative abundance by 98% and persistence by 80% over the last ten years. As noted in the ISMND, the Project site contains California annual grassland and as such, CBB could potentially be present within the Project site.

CBB primarily nest in late February through late October underground in abandoned small mammal burrows but may also nest under perennial bunch grasses or thatched annual grasses, under piles of brush, in old bird nests, and in dead trees or hollow logs (Williams et al. 2014; Hatfield et al. 2015). Overwintering sites utilized by CBB mated queens include soft, disturbed soil (Goulson 2010), or under leaf litter or other debris (Williams et al. 2014). Therefore, ground disturbance and vegetation removal associated with Project activities has the potential to significantly impact local CBB populations. As a state candidate species, take of CBB without appropriate incidental take authorization from CDFW would be a violation of Fish and Game Code.

Recommended Mitigation Measure: CBB Surveys and Take Authorization

CDFW recommends a qualified biologist conduct focused surveys for CBB and potential nesting sites (small mammal burrows, perennial bunch grasses, thatched annual grasses, brush piles, old bird nests, dead trees, and hollow logs) following the methodology outlined in the Survey Considerations for California Endangered Species Act Candidate Bumble Bee Species (CDFW 2023) in the appropriate survey season prior to construction. 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 survey. If candidate bumble bees will be captured or handled, a 2081(a) Memorandum of Understanding with CDFW would be required. If CBB is observed in the Project site, consultation with CDFW is warranted to determine if the Project can avoid take. If take cannot be avoided, take authorization prior to any ground-disturbing activities may be warranted. Take authorization would occur through issuance of an Incidental Take Permit by CDFW, pursuant to Fish and Game Code section 2081, subdivision (b).

COMMENT 3: Special Status Bats

Issue: The ISMND did not provide an assessment of potential impacts to special status or other bats with regard to potential roosting on bridges. Pallid, Townsend's big-eared, spotted and western red bats may roost in a variety of natural and man-made habitats that are present in the Project area, including trees, cliffs, and man-made structures such as buildings, bridges and culverts. Bats are particularly more likely to utilize man-made structures even near busy highways and urban areas when natural habitat is limited, such as in the Project vicinity. Without appropriate avoidance and minimization measures for bats, Project activities may result in

C. Scott Guidi
California Department of Transportation, District 10
October 26, 2023
Page 6

potentially significant impacts to roosting or maternal bats, including potential inadvertent entrapment, reduced reproductive success, reduction in health and vigor of eggs and/or young, and direct mortality of individuals.

Recommended Mitigation Measure: Bat Surveys and No-Disturbance Buffers

CDFW recommends that a qualified biologist conduct focused surveys for bats and potential roosting habitat within 400 feet of the Project site prior to Project activities. Avoidance whenever possible is encouraged via delineation and observance of no-disturbance buffers according to activity and species, as recommended in Table 7-1 of "Caltrans Bat Mitigation: A Guide to Developing Feasible and Effective Solutions" (H. T. Harvey & Associates 2021), ranging from 100 feet to 400 feet. If roosting bats are observed on the Project site and buffer areas, CDFW recommends that Caltrans stop work in the buffer area and coordinate with CDFW for site-specific impact minimization recommendations. To mitigate potential Project impacts on bats, CDFW encourages Caltrans to incorporate bat habitat into the Project design.

COMMENT 4: Black Rascal Creek

Issue: Modifications to the natural landform within which water and sediment flow can affect the physical, biological, and chemical processes of streams, both upstream and downstream from the modified area. The proposed realignment and culverting of (currently a bridge) the existing main channel of Black Rascal Creek has potential to have substantial impacts, including scour, erosion, and incision, to the Black Rascal Creek stream system. Additionally, impacts can extend into the adjacent uplands adversely affecting not only the fish and wildlife dependent on the stream itself, but also the flora and fauna dependent on the adjacent upland habitat for feeding, reproduction and shelter. Potential impacts were not analyzed and proposed avoidance, minimization, and mitigation measures were not identified in the ISMND.

Recommended Mitigation Measure: Black Rascal Creek Stream Avoidance and Mitigation

CDFW recommends Caltrans analyze the immediate and ongoing effects to Black Rascal Creek that construction of the Project would have and provide this analysis in a recirculated version of the ISMND. CDFW recommends Caltrans also reach out to CDFW to discuss proposed design and that Caltrans submit a Streambed Alteration Notification well in advance of proposed construction in an effort to identify and plan for minimization and mitigation measures needed to offset the impacts of stream alteration and loss or modification of stream function and value.

C. Scott Guidi
California Department of Transportation, District 10
October 26, 2023
Page 7

COMMENT 5: Eucalyptus Riparian Corridor

Issue: The ISMND states that approximately 44 eucalyptus riparian trees will be removed but that compensatory mitigation for the impact will not occur because they are non-native, and removal would benefit the corridor. Also, it's not clear if "BIO-27" proposes to plant trees to compensate for the eucalyptus tree removal. While they are not native to California, eucalyptus trees act as surrogate for native riparian trees and can provide ecological benefits to the stream system and the wildlife that use it.

Recommended Mitigation Measure: Eucalyptus Riparian Mitigation

CDFW recommends that Caltrans plant native replacement trees following construction to compensate for the loss, both actual and temporal, of the riparian habitat. CDFW recommends that Caltrans prepare a Revegetation Plan or Planting Plan and submit it in draft form with the Streambed Alteration Notification. The plan should identify the native and non-native trees and shrubs to be removed or trimmed, the native replacement species to be planted and monitored, and the location where the replacement plantings will occur.

COMMENT 6: Nesting Birds

Issue: The ISMND Mitigation Measure BIO-30 states that a minimum 100-foot no-disturbance buffer be established around any active nest of migratory birds and a minimum 300-foot no-disturbance buffer be established around any nesting raptor species. CDFW does not agree that the buffer distances are appropriate for protection of nesting birds.

Recommended Mitigation Measure: Nesting Bird Surveys Prior to Construction

To evaluate Project-related impacts on nesting birds, CDFW recommends that a qualified wildlife biologist conduct pre-activity surveys 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 by the Project. In addition to direct impacts (i.e., nest destruction), noise, vibration, and movement of workers or equipment could also affect nests. Prior to initiation of construction activities, CDFW recommends that a qualified biologist conduct a survey to establish a behavioral baseline of all identified nests.

C. Scott Guidi
California Department of Transportation, District 10
October 26, 2023
Page 8

Recommended Mitigation Measure: Nesting Bird Monitoring and Avoidance Buffer

Once construction begins, 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 wildlife 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 that 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 compelling biological or ecological reason to do so, such as when the construction area would be concealed from a nest site by topography. CDFW recommends that a qualified wildlife biologist counsel and support any variance from these buffers and notify CDFW in advance of implementing a variance.

II. Editorial Comments and/or Suggestions

Project Alternatives Analysis: The Project Alternatives section of the ISMND identifies only one build alternative. CDFW recommends a more detailed alternatives analysis that includes an expansion of the biological technical surveys, studies, and impact analysis conducted in support of the ISMND. These should then be used to develop and modify the Project's alternatives to avoid and minimize impacts to biological resources, including Black Rascal Creek, to the maximum extent possible. When efforts to avoid and minimize have been exhausted, remaining impacts to sensitive biological resources should be mitigated to reduce impacts to a less than significant level, if feasible.

Cumulative Impacts: The ISMND does not include an analysis for cumulative impacts to specific biological resources. CDFW recommends that a cumulative impact analysis be conducted for all biological resources that will be 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 Black Rascal Creek 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 and the ISMND be recirculated with this updated analysis. CDFW staff is

C. Scott Guidi
California Department of Transportation, District 10
October 26, 2023
Page 9

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 CNDDDB. The CNDDDB field survey form can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The completed form can be mailed electronically to CNDDDB at the following email address: CNDDDB@wildlife.ca.gov. The types of information reported to CNDDDB can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

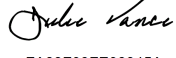
FILING FEES

If it is determined that the Project has the potential to impact biological resources, an assessment of filing fees will be 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 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).

CDFW appreciates the opportunity to comment on the Project to assist Caltrans in identifying and avoiding the Project's impacts on biological resources.

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>). If you have any questions, please contact Adam Thompson, Senior Environmental Scientist (Specialist), at the address provided on this letterhead, by telephone at (559) 801-1915, or by email at adam.thompson@wildlife.ca.gov.

Sincerely,

DocuSigned by:

FA83F09FE08945A...
Julie A. Vance
Regional Manager

C. Scott Guidi
California Department of Transportation, District 10
October 26, 2023
Page 10

LITERATURE CITED

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C. Scott Guidi
 California Department of Transportation, District 10
 October 26, 2023
 Page 11

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

**PROJECT: Highway 59 Phase 1 Widening
 and Widening Over Black Rascal Creek**

CDFW provides the following measures be incorporated into the MMRP for the Project:

RECOMMENDED MITIGATION MEASURE	STATUS/ DATE/ INITIALS
<i>As Part of Biological Studies in Support of the Initial Study</i>	
SWHA surveys	
Bat surveys	
Incorporate bat habitat into Project design	
Black Rascal Creek Impacts Analysis	
Project Alternatives Analysis	
Cumulative Impact Analysis	
<i>Before Disturbing Soil or Vegetation</i>	
SWHA surveys	
CBB surveys	
SWHA and CBB take authorization if needed	
Riparian Vegetation Planting Plan	
<i>During Construction</i>	
SWHA avoidance	
CBB avoidance	
Bat avoidance	