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STATE CLEARINGHOUSE

From: Oswalt, Caitlyn@Wildlife
Sent: Monday, February 12, 2024 4:56 PM
To: Jon Balzer
Cc: Wildlife R2 CEQA; Wilson, Billie@Wildlife; OPR State Clearinghouse
Subject: Comment Letter for El Dorado County Department of Transportation Routine Maintenance Agreement Project; IS-MND; SCH# 2024010560

Dear Jon Balzer,

The California Department of Fish and Wildlife (CDFW) received and reviewed the Notice of Intent to Adopt of an MND from the County of El Dorado for the El Dorado County Department of Transportation (Department) Routine Maintenance Agreement Project (Project) pursuant the California Environmental Quality Act (CEQA) statute and guidelines.

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that may affect California fish, wildlife, native plants, and their habitat. Likewise, we appreciate the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may need to exercise 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. (Fish & G. Code., § 1802.) Similarly for purposes of CEQA, CDFW provides, 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 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. CDFW also administers the Native Plant Protection Act, Natural Community Conservation Act, and other provisions of the Fish and Game Code that afford protection to California's fish and wildlife resources.

PROJECT DESCRIPTION SUMMARY

The Project area covers unincorporated El Dorado County, spans 44 U.S. Geological Survey (USGS) topographic quads, and includes the census designated communities of El Dorado Hills, Cameron

Park, Diamond Springs, Pollock Pines, Shingle Springs, Auburn Lake Trails, Georgetown, Camino, Tahoma, Grizzly Flats, Coloma, and Cold Springs.

The Department intends to enter into a 12-year RMA with the CDFW to conduct routine maintenance of the private and public facilities integral to the El Dorado County Road System. The routine maintenance work is divided into the following 10 categories,

- (1) Removal, Replacement, or Repair of Facilities
- (2) Debris and Obstruction Removal (including Beaver Dams)
- (3) Vegetation Control in Channels or on Banks
- (4) Repair of Previous Erosion Control Work
- (5) Minor Erosion Control Work
- (6) Channel Alignment Maintenance
- (7) Road Maintenance and Storm Water Runoff Systems (MS-4) Maintenance
- (8) Minor Bridge Maintenance
- (9) Silt, Sand, or Sediment Removal
- (10) Maintenance of Existing Recreational Facilities.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the Department in adequately identifying and, where appropriate, mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources.

COMMENTS

1. In the Minor Bridge Maintenance section on page 15, it reads:
"Containment measures, including drop cloths and spill containment measures, will be used to prevent deleterious material from entering state waters and avoid adverse impacts to fish and wildlife resources."
Please specify the water contaminant containment measures that will be implemented as referenced above. Will the IS/MND require the placement of silt fencing, coir logs, coir rolls, straw bale dikes, or other siltation barriers so that silt and/or other deleterious materials will not pass downstream? Keep in mind that fiber rolls, straw wattles, and/or hay bales utilized within and adjacent to the project site should be free of non-native plant materials and plastic monofilament such as found in straw wattles/fiber rolls and some erosion control blankets, because this may cause entrapment of wildlife.
2. CDFW recommends adding the underlined language to the below sentence on page 19 under the *Maintenance Work That Would Increase the Water Supply Capacity of a Facility Beyond the Designed (As-Built) Capacity* section:
 - a. *"Activities that increase facility capacity include replacement of culverts, pipes, or other conveyance structures over 36 inches in diameter and within larger facilities/structures typically require a standalone Section 1602 Streambed Alteration Agreement from the CDFW."*
3. Foothill yellow-legged frog (*Rana boylei*) and Sierra Nevada yellow-legged frog (*Rana sierrae*)
 - a. The IS/MND indicates five occurrences have been recorded along with potential habitat for the State Endangered foothill yellow-legged frog (FYLF, *Rana boylei*), along with two areas of critical habitat with several occurrences of the State Threatened Sierra Nevada yellow-legged frog (SNYP, *Rana sierrae*). A season of operation that completely avoids FYLF and SNYP presence does not exist; if frogs are present and breeding, they may be encountered

in various life stages year-round. However, in locations having periodic dry conditions, especially prolonged dry conditions, FYLF are unlikely to be encountered. Under dry conditions, FYLF seek refuge in wetted tributaries (or any wetted feature), and cooler riparian habitat, and may be capable of aestivation. Any form of surface water will likely attract FYLF. Conducting surveys prior to maintenance work may allow avoidance of incidental take. If frogs in any life stage are found during inspections, work should be suspended, and the project proponent should notify CDFW and demonstrate compliance with CESA.

4. Mitigation Measure Bio-1 states: "If required by the CDFW, surveys for special-status species and habitats will be conducted by a qualified biologist." CDFW recommends that pre-construction surveys be done before vegetation clearing or any other project activity in all areas where special status species may be present. Surveys should be conducted by a qualified biologist who is knowledgeable and experienced in the biology and natural history of local fish and wildlife resources present and has the necessary handling permits as appropriate. If the qualified biologist encounters any special-status species during project activities, work shall be suspended, CDFW notified. Work may not re-initiate until CESA compliance can be demonstrated.

Additionally, Mitigation Measure Bio-1 states: "If required by the CDFW, the Department will obtain a biological monitor to ensure impacts to special-status species are avoided or minimized. The biological monitor will be authorized to stop work, if necessary, to protect special-status species or habitats. The CDFW will be notified of all work stoppages or occurrences of special-status species during monitoring. If necessary, the biologist may assist in the relocation of special-status species following CDFW approval."

If the Department is relying on the qualified biologist to avoid and minimize impacts to fish, wildlife, or their habitats, it should be a requirement in the MND and not deferred to an agency approval. Furthermore, no relocation shall be done for special status species or CESA listed species without the proper handling permits and/or CESA take coverage (e.g., an ITP).

5. Mitigation Measure BIO-2 states: "Work will be scheduled between 1 September and 14 February, if possible, to avoid bird nesting, bloom period of special-status plants, and mammal denning seasons."

Please note, the Native Plant Protection Act (NPPA) (Fish & G. Code §1900 et seq.) prohibits the take or possession of State-listed rare and endangered plants, including any part or product thereof, unless authorized by CDFW or in certain limited circumstances. Take of state-listed rare and/or endangered plants due to Project activities may only be permitted through an Incidental Take Permit (ITP) or other authorization issued by CDFW pursuant to California Code of Regulations, Title 14, section 786.9 subdivision (b). Plant species not listed as rare, threatened, endangered, or candidates for listing under CESA or NPPA may nevertheless meet the definition of rare or endangered provided in CEQA (Cal. Code Regs., tit. 14, § 15380, subd. (b).). CDFW recommends the IS/MND include species specific measures to minimize and fully mitigate the impacts to any state-listed species the Project has potential to take.

6. Mitigation Measures Bio-5 and Bio-6 (pg. 50 & 51) both indicate surveys may be done if work activities are conducted between July 1 and October 15 for California red-legged frog (CRLF), foothill yellow-legged frog (FYLF), and western pond turtle (WPT), and between October 16 and June 30 for mountain yellow-legged frog (MYLF), Sierra Nevada yellow-legged frog (SNYLF), and southern long-toed salamander (SLTS). CDFW recommends that surveys be conducted in all

suitable habitats regardless of time of year. As stated in comment 3a above, a season of operation that completely avoids FYLF and SNYF presence does not exist.

“If the biologist discovers any life stage of CRLF, FYLF, or WPT, a biological monitor will be contracted to monitor work so that these species are not harmed. The CDFW will be contacted for approval prior to any relocation of CRLF, FYLF, and WPT.”

No relocation shall be done for special status species or CESA listed species without the proper handling permits and/or CESA take coverage (e.g., an ITP).

CDFW recommends FYLF surveys and habitat assessments be conducted throughout the Project Area and include the results in the MND. CDFW recommends the Department review CDFW’s *Considerations for Conserving the Foothill Yellow-Legged Frog* (2018), available here: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=157562&inline>. CDFW recommends the following survey and species considerations be incorporated into the MND for Project implementation:

- a. As described in the CDFW’s *Considerations for Conserving the Foothill Yellow-Legged Frog* (2018) document, VES conducted during the late summer are often the easiest method for determining presence; subadults and occasionally adults are often observed along river margins, and subadult and adult frogs will likely also be observed in tributary streams (Crump and Scott 1994).
- b. To increase the likelihood of detection, surveys should include at least one VES during the breeding and/or oviposition period (generally April – June), a tadpole survey four to eight weeks after the breeding survey(s), a subadult survey in late summer/early fall (generally late August to early October), and a final VES within 3 to 5 days prior to starting work.
 - i. It is important to understand that frogs are ectothermic, so ambient temperature affects the likelihood of detection. Whether the life form is larval or subadult, both stages will shelter in place under substrate and emerge and become active with warmth (i.e., detection probability increases with temperature).
- c. If a survey fails to detect foothill yellow-legged frogs within suitable habitat, a follow-up survey should be conducted two to four weeks after the initial survey.
- d. Develop measures to avoid incidental take on a site- and project-specific basis.
 - i. For example, measures may vary based on the type and extent of disturbance, duration and timing of disturbance, and influence of environmental factors. A season of operation that completely avoids foothill yellow-legged frog presence does not exist; if frogs are present and breeding, they may be encountered in various life stages year-round. However, in locations having periodic dry conditions, especially prolonged dry conditions, foothill yellow-legged frogs are unlikely to be encountered. Under dry conditions, foothill yellow-legged frogs usually seek refuge in wetted tributaries (or any wetted feature).

7. Mitigation Measure BIO-7 – *Swainson’s Hawk & Nesting Birds*, states: *“If work must be conducted between 1 March and 15 September, preconstruction surveys for Swainson’s hawk will be conducted and include all potential nesting habitat within a 500-foot radius around the proposed*

work area. Surveys will follow timing and methodology for Swainson's hawk nesting surveys in the Central Valley (Swainson's Hawk Technical Advisory Committee 2000). A minimum 300-foot buffer will be established around active nests, but final distances will be determined through coordination with the CDFW."

CDFW recommends that a qualified biologist conduct Swainson's hawk protocol-level surveys during all survey periods throughout the nesting season prior to the commencement of all construction activities, regardless of potential vegetation removal. Protocol-level surveys should be conducted within a minimum 1/2-mile radius around the project area in accordance with Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley (Swainson's Hawk Technical Advisory Committee, 2000) as follows:

- 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

Nests found within 0.50 miles should be monitored either continuously or periodically depending on the construction or maintenance activities and level of disturbance until young have fledged, are feeding independently and are no longer dependent on the nest. Additionally, CDFW recommends on-site monitoring by a designated biologist familiar with the species, as buffers may need to be increased based on the birds' tolerance level to the disturbance as activities change and as the birds' transition through different stages of the nesting cycle.

Migratory nongame native bird species are protected by international treaty under the Federal Migratory Bird Treaty Act (MBTA) (16 U.S.C., §§ 703-712). CDFW implemented the MBTA by adopting the Fish & G. Code section 3513. Fish & G. Code sections 3503, 3503.5 and 3800 provide additional protection to nongame birds, birds of prey, their nests and eggs. Potential habitat for nesting birds and birds of prey is present within the Project area. The proposed Project should disclose all potential activities that may incur a direct or indirect take to nongame nesting birds within the Project footprint and its close vicinity. Appropriate avoidance, minimization, and/or mitigation measures to avoid take must be included in the environmental document. Measures to avoid the impacts should include species specific work windows, biological monitoring, installation of noise attenuation barriers, etc.

All measures to protect nesting birds should be performance-based. While some birds may tolerate disturbance within 300 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 300-foot exclusion buffer may be sufficient; however, that buffer, determined by the qualified biologist, may need to be increased based on the birds' tolerance level to the disturbance. Below is an example of a performance-based protection measure:

Should construction activities cause the nesting migratory bird or raptor to vocalize, make defensive flights at intruders, get up from a brooding position, or fly off the nest, then increase

the exclusionary buffer such that activities are far enough from the nest to stop this agitated behavior by the migratory bird or raptor. The exclusionary buffer should remain in place until the chicks have fledged or as otherwise determined by a qualified biologist.

8. Mitigation Measure Bio-10 Roosting Bats: CDFW recommends adding the underlined language to the below sentence.

“If it is determined that bats are using the bridge as a maternity or hibernation roost, the qualified biologist CDFW shall be contacted to determine an appropriate avoidance buffer and submit the buffer and avoidance plan to CDFW for review.”

9. Section 3.3.2. Removal, Repair, or Replacement of Facilities in Non-CDFW Jurisdiction, states: *“Stormwater run-off and/or sheet flow from pervious and impervious surfaces that does not convey into intermittent or perennial streams or lakes is not habitat for fish or wildlife and does not fall under CDFW jurisdiction. For example, work to remove, replace, or repair small (12- to 36-inch diameter) culverts and/or pipes conveying stormwater run-off and/or sheet flow of waters, or located in uplands and/or developed areas, are not subject to CDFW approval under this RMA or a separate Section 1602 Streambed Alteration Agreement. In the event that the existing culverts and/or pipes require modification of size and/or alignment, or if the drainage location resides within a potential CDFW jurisdictional area, additional site assessment and coordination with the CDFW may apply.”*

Although the IS/MND has identified Project activities that will require notification to CDFW pursuant to Section 1602 of the Fish and Game Code, please be aware that notification is required for any activity that may do one or more of the following:

- a. Substantially divert or obstruct the natural flow of any river, stream, or lake;
- b. Substantially change or use any material from the bed, channel or bank of any river, stream, or lake; or
- c. Deposit debris, waste, or other materials where it may pass into any river, stream, or lake.

Please note that "any river, stream or lake" includes those that are episodic (i.e., those that are dry for periods of time) as well as those that are perennial (i.e., those that flow year-round). This includes ephemeral streams and watercourses with a subsurface flow. It may also apply to work undertaken within the flood plain of a body of water. Upon receipt of a complete notification, CDFW will determine if the Project activities may substantially adversely affect existing fish and wildlife resources and whether a Lake and Streambed Alteration (LSA) Agreement is required. The Project as currently proposed in the IS/MND will require an LSA Agreement. An LSA Agreement will include measures necessary to protect existing fish and wildlife resources.

CDFW's issuance of an LSA Agreement is a "project" subject to CEQA (see Pub. Resources Code 21065). To facilitate issuance of an LSA Agreement, the IS/MND should fully identify the potential impacts to the lake, stream, or riparian resources, and provide adequate avoidance, minimization, mitigation, and monitoring and reporting commitments.

10. Overall Deferred Mitigation comment: CEQA Guidelines §15126.4 (a)(1)(B) states that formulation of mitigation measures should not be deferred until some future time. The MND lists a number of mitigation measures for biological resources that rely on future approvals or agreements as a means to bring identified significant environmental effects to below a level of significance. Because there is no guarantee that these approvals or cooperation with all of the involved entities will ultimately occur, the mitigation measures are unenforceable and do not reduce the impacts to biological resources to a less-than-significant level.

Mitigation measures should establish performance standards to evaluate the success of the proposed mitigation, provide a range of options to achieve the performance standards, and must commit the lead agency to successful completion of the mitigation. Mitigation measures should also describe when the mitigation measure will be implemented and explain why the measure is feasible. Therefore, the CDFW recommends that the MND include measures that are enforceable and do not defer the details of the mitigation to the future.

Additionally, the MND should cover a range of possibilities for mitigation. The use of relocation, salvage, and/or transplantation as the sole mitigation for impacts to rare, threatened, or endangered species are generally experimental in nature and largely unsuccessful. Therefore, the MND should describe additional mitigation measures utilizing habitat restoration, conservation, and/or preservation, in addition to avoidance and minimization measures, if it is determined that there may be impacts to rare, threatened, or endangered species.

11. CESA Take Coverage: CDFW is responsible for ensuring appropriate conservation of fish and wildlife resources including threatened, endangered, and/or candidate plant and animal species, pursuant to CESA. Take of state-listed rare and/or endangered species due to Project activities may only be permitted through an ITP or other authorization issued by CDFW. CDFW recommends that an ITP be obtained where the Project has the potential to result in take of a species state-listed as rare, candidate, threatened, or endangered under CESA or NPPA, and cannot be fully avoided, either through construction or over the life of the Project. Plant species not listed as rare, threatened, endangered, or candidates for listing under CESA or NPPA may nevertheless meet the definition of rare or endangered provided in CEQA (Cal. Code Regs., tit. 14, § 15380, subd. (b)). Please note that mitigation measures that are adequate to reduce impacts to a less-than significant level to meet CEQA requirements may not be enough for the issuance of an ITP. To issue an ITP, CDFW must demonstrate that the impacts of the authorized take will be minimized and fully mitigated (Fish & G. Code §2081 (b)). To facilitate the issuance of an ITP, CDFW recommends the IS/MND include species specific measures to minimize and fully mitigate the impacts to any state-listed species the Project has potential to take.

ENVIRONMENTAL DATA

CEQA requires that information developed in mitigated 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 California Natural Diversity Database (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 submitted online or mailed electronically to CNDDDB at the following email address: CNDDDB@wildlife.ca.gov.

FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of 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 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

Pursuant to Public Resources Code §21092 and §21092.2, CDFW requests written notification of proposed actions and pending decisions regarding the proposed Project. Written notifications shall be directed to: California Department of Fish and Wildlife North Central Region, 1701 Nimbus Road, Rancho Cordova, CA 95670 or emailed to R2CEQA@wildlife.ca.gov.

CDFW appreciates the opportunity to comment on the IS/MND to assist in identifying and mitigating Project impacts on biological resources. CDFW personnel are available for consultation regarding biological resources and strategies to minimize and/or mitigate impacts. Questions regarding this letter or further coordination should be directed to Caitlyn Oswald, Environmental Scientist at (916) 358-4315 or caitlyn.oswalt@wildlife.ca.gov.

Sincerely,

Caitlyn Oswald
Environmental Scientist
California Department of Fish and Wildlife
North Central Region