



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Inland Deserts Region
3602 Inland Empire Boulevard, Suite C-220
Ontario, CA 91764
www.wildlife.ca.gov

GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director



Governor's Office of Planning & Research

April 15 2024

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STATE CLEARINGHOUSE

Gabrielle Duff, Senior Environmental Planner
California Department of Transportation, District 8
464 West Fourth Street, Sixth Floor, MS 829
San Bernardino, CA 92401

Subject: Initial Study/Mitigated Negative Declaration, US-95 Pavement Rehabilitation (Project), State Clearinghouse No. 2024030440, County of San Bernardino

Dear Gabrielle Duff:

The California Department of Fish and Wildlife (CDFW) received an Initial Study/Mitigated Negative Declaration (IS/MND) from the California Department of Transportation (Caltrans) for the 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 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 their habitats 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.

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.

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 Fish and Game Code.

PROJECT DESCRIPTION SUMMARY

Proponent: Caltrans District 8

Objective: The objective of the Project is to restore, preserve, and extend the service life of the existing pavement, as well as other existing roadway infrastructure and improve deficiencies along United States Route 95 (US-95) in San Bernardino County.

Description: The Project will rehabilitate the pavement from Postmile (PM) R57.207 to PM 64.5. Primary Project activities include:

- Overlay on the existing paved mainline and shoulders.
- Mill at transition locations.
- Repair distressed areas with localized dig-outs.
- Replace asphalt concrete dikes.
- Restripe traffic lanes.
- Reinstall rumble strips.
- Place four feet wide shoulder backing.
- Replace one sign panel.
- Replace guardrails.
- Change portion of the existing centerline striping from passing to non-passing zones.

Location: The Project site is located along the US-95 northwest of the City of Needles, in an unincorporated section of San Bernardino County, California 92356; from PM R57.207 to PM 64.5; approximate center coordinate of Latitude 34.922687 and Longitude -114.778372.

Timeframe: An estimated timeline of construction or completion for the Project was not included within the IS/MND.

COMMENTS AND RECOMMENDATIONS

CDFW offers the following comments and recommendations below to assist Caltrans District 8 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 Final MND.

I. Mitigation Measure or Alternative and Related Impact Shortcoming

COMMENT 1: Special-status and Sensitive Plants, and Sensitive Natural Communities

Chapter 2, Section IV a), b); Pages 10, 11, 12, and 15

Issue: The Project has the potential to result in permanent and temporary impacts to special-status plants such as Spiny hair blazing-star (*Mentzelia tricuspis*) (California Rare Plant Rank (CRPR) 2B.1), Chaparral dodder (*Cuscuta californica* var. *apiculata*) (CRPR 3), Utah vine milkweed (*Funastrum utahense*) (CRPR 4.2), and Sensitive Natural Communities such as arrow weed thickets (State Rarity Rank (S) S3), and smoke tree woodland (S3), and the habitats thereof.

Specific impact: The Project, as described, will require vegetation removal in mass associated with grading and road construction in areas currently undeveloped where special-status plants, and/or Sensitive Natural Communities are potentially present. The Project as described holds the potential to take special-status plants, and Sensitive Natural Communities (*i.e.*, those with a rank of S1 through S3.2) through mortality by paving earthen road shoulders, the installation of Project materials such as shoulder backing and wildlife exclusion fencing, modifying hydrology, causing latent effects associated with introduction or proliferation of invasive species, and changing habitat composition.

Why impact would occur: The IS/MND indicates that special-status plants would be flagged for avoidance within the Project Impact Area (PIA) or within 50-feet of the PIA when found present during presence/absence surveys carried out within three-days prior to construction. Direct or indirect impacts to special-status plants may occur as a consequence of inadequate surveys. For instance, not all species may be detectable during a limited three-day survey period scheduled around a construction start date. Further, survey protocols were not provided for in the IS/MND, so it is unclear whether proposed surveys would be effective in identifying and avoiding impacts. Without special-status plant surveying periods indicated within the IS/MND as part of an approved protocol, individual plants, or locally significant populations thereof, may be impacted upon ground disturbance where their underground structures (*e.g.*, bulbs, corms, roots, *etc.*) may lay dormant underground, or in the case of annual species, the seed banks may be present in the PIA. Direct impacts to

special-status plants within the PIA include grading, vegetation removal, paving of an existing earthen shoulder, construction of a new four-foot-wide shoulder for the length of the Project which will include the use of shoulder backing, and ongoing road shoulder maintenance. Indirect impacts to special-status plants include modified hydrology, dust, increased risk of wildfire, and a reduction in pollinators associated with vehicle strike.

The IS/MND indicates that Sensitive Natural Communities would be potentially impacted. The IS/MND states on Page 11, “Indirect impacts may result to natural communities due to nonnative species introduction and increased dust, both of which could reduce the quality of habitat or affect the survival and reproductive fitness of the plant species comprising the community. Indirect impacts, such as water quality and litter control, are addressed through avoidance and minimization measures.” However, the IS/MND does not disclose any potential impacts to special-status plants. Whereas absence of two species of special-status plants is discussed on Page 11 (ribbed cryptantha (*Jonhstonella costata*) and spiny-hair blazing star), no further information regarding impacts to special-status plants is provided.

Evidence impact would be significant: The Project as described may result in direct take of special-status plants and parts thereof, and would result in the loss of the habitats on which they depend on. The IS/MND indicates that botanical surveys were conducted on January 4th, 5th, 6th, 10th, 11th, and 12th of 2023 for the Project’s proposed area and a 20-foot buffer. These surveys were conducted outside of the identification and flowering period for many of the CRPR-listed plants with the potential to occur within the PIA, and the IS/MND’s Natural Environmental Survey – (Minimal Impacts) (NESMI) acknowledged the limitations and shortcoming of the survey timing on Page 8 of the Botanical Survey held within. Further, surveying was not conducted in total for the PIA, as the surveying team declined to survey areas due to road shoulder constraints. Surveying was additionally performed through the use of binoculars in some circumstances. For these reasons, the results of the Botanical Survey are unlikely to fully disclose impacts to special-status plants, and as such, the proposed mitigation of the IS/MND is likely insufficient in mitigating the impacts to special-status plants to a level of less than significant.

San Diego State University (Howe, 1969) and the University of California (Hoover, 1968) hold records, including isotypes, of spiny-hair blazing star growing within and adjacent to the PIA, or within a reasonable dispersal distance for the species. A recent observation of the species was made in 2019 adjacent to the PIA (Ramirez, 2019). The IS/MND’s NESMI recognizes that special-status species are known to occur within the Project Area, but the Mitigation Measures of the IS/MND (e.g., BIO-Plant-1: Rare Plant Surveys, Flagging, and Fencing) do not include conducting floristic field surveys in accordance with an accepted protocol for special-status plants, and instead proposes a pre-construction presence/absence survey to be performed within three days of construction to flag or fence for avoidance special-

status plants in the Project site and within 50 feet. Additionally, a time of year, or season is not provided for this survey period.

With the large acreage and linear footprint of the Project, and with the Project's area being subject to unpredictable weather patterns that may not align with the expected flowering period of special-status plants, the use of presence/absence surveys alone as proposed in the IS/MND would not be appropriate to detect special-status plants, and thus Mitigation Measure BIO-10 (BIO-Plant-1) would not mitigate the impacts to special-status plants to a level of less than significant. Moreover, special-status plants with the potential to occur within and adjacent to the PIA hold propagule vectoring habits that exceed 50 feet in dispersal (e.g., Utah vine milkweed), and as such, the proposed 50-foot buffer would be insufficient at adequately being able to detect special-status plants. Thus, the Project would not mitigate to a level of less than significant. The IS/MND also does not propose compensatory mitigation for any permanent impacts to special-status plants, their habitats, or for Sensitive Natural Communities. Additionally, the IS/MND does not propose mitigation for any temporary impacts to special-status plants and their habitats, and/or Sensitive Natural Communities, for example restoration and/or monitoring for success. CDFW considers the take of special-status plants, the loss of their habitats, and the loss of Sensitive Natural Communities as a significant impact, unless mitigated to a level of less than significant.

Recommended Potentially Feasible Mitigation Measure(s): CDFW recommends the inclusion of the below revisions to BIO-10 (edits are in ~~strikethrough~~ and additions are in ***bold italics***) and the adoption of BIO-10.1 in the Final MND to ensure impacts to special-status plants and the habitats thereof, and Sensitive Natural Communities, are mitigated to a level of less than significant.

BIO-10 (BIO-Plant-1: Rare *Special-status* Plant and Sensitive Natural Communities Surveys, Flagging, and Fencing) (Revised):

Within ***the appropriate identification periods for special-status plants and Sensitive Natural Communities, surveys shall be conducted according to the CDFW 2018 Protocols for Surveying and Evaluating Impacts to Special-status Plant Populations and Sensitive Natural Communities (found at: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=18959>)***. In addition, three days prior to construction, ~~a~~ preconstruction surveys must be conducted by a ***CDFW approved*** Qualified Biologist ***with a minimum of five years of professional experience surveying*** for special-status plant species ***and Sensitive Natural Communities in Californian desert environments. Surveys shall be conducted*** within the PIA and 150 feet of the PIA. Special-status species ***and Sensitive Natural Communities*** must be flagged for visual identification to construction personnel for work avoidance. Special-status plant species detected that feature multiple plants in a single location must be fenced ***off*** with Environmentally Sensitive

Area (ESA) high visibility fencing. ***Sensitive Natural Communities detected shall be flagged or fenced off with ESA high visibility fencing. If non CESA-listed special-status plants and/or Sensitive Natural Communities are impacted by Project activities, or if protocol level surveys are not able to be conducted due to Project contracting constraints, cyclical weather constraints (i.e., drought, flooding, etc.), or other reasons conflicting with the Project's build timeline, non CESA-listed special-status plants shall be assumed present in the Project area, and mitigated by acreage in accordance with BIO-Plant-2. If complete avoidance of CESA-listed plants cannot be achieved, CDFW recommends that Project activities be postponed until appropriate authorization (i.e., a finalized CESA ITP under Fish and Game Code section 2081) is obtained.***

BIO-10.1 (BIO-Plant-2: Compensatory Mitigation to Non CESA-listed Special-status Plants and Sensitive Natural Communities) (New):

Permanent impacts (i.e., areas slated for road infrastructure development such as pavement, shoulders, or shoulder backing, or areas that will not return to their baseline ecological state and form within one-calendar-year of occurring impacts) (hereafter as, 'permanent impacts') to non-CESA-listed special-status plants, shall be mitigated at a minimum 3:1 (mitigated to impacted) ratio by acreage area. Temporary impacts (i.e., areas that will return to their baseline ecological state and form within one-calendar-year of occurring impacts) (hereafter as, 'temporary impacts') to non-CESA-listed special-status plants and their habitats, and Sensitive Natural Communities, shall be restored onsite at a 1:1 (mitigated to impacted) ratio by acreage area. Compensatory mitigation for non-CESA-listed special-status plant species and Sensitive Natural Communities impacts by total area (i.e., the combined total acreage of permanent and temporary impacts calculated post-ratios) shall be conducted either on-site through restoration activities, or through purchase of mitigation credits from a CDFW-approved bank and/or land acquisition, or a combination of both, in coordination with CDFW.

COMMENT 2: Desert Tortoise (*Gopherus agassizii*)

Chapter 2, Section IV a); Page 12, 13, and elsewhere

Issue: The Project has the potential to result in permanent and temporary loss, degradation, and impacts to desert tortoise habitat. Direct take of desert tortoise may occur during the course of Project activities and for the life of the Project, such as equipment crushing during road maintenance and civilian vehicle strike after the Project's construction is complete.

Specific impact: The Project includes the potential for collapsing of desert tortoise burrows, entombment, direct take associated with vehicle and equipment strike,

indirect take associated with Project operations, reduction of habitat associated with road infrastructure expansion, and reduction of species movement.

Why impact would occur: The IS/MND indicates that desert tortoise could be directly impacted during construction and for the life of the Project, including the collapsing of burrows as part of Project activities in addition to loss and/or degradation of habitat. The IS/MND also indicates that permanent and temporary impacts associated with the Project's construction would occur to desert tortoise habitat. The IS/MND notes on Pages 12, "There is suitable habitat in the form of Mojavean desert scrub throughout the Biological Study Area (BSA) and PIA. This species [desert tortoise] is not anticipated to be burrowing in the PIA due to disturbance. However, individuals may still be found in the PIA as they search for food and water. Furthermore, this project is partially within Desert Tortoise Critical Habitat from PM 61.4 to PM 64.5." Impacts to desert tortoise are further discussed on Page 12 and 13 as, "Impacts to desert tortoise resulting from project activities include direct and indirect impacts. Desert tortoise may be removed or crushed from equipment, leading to mortality or decreased fitness, and thus is considered a direct impact that could be permanent if individuals are not able to recover. Loss of vegetation or degradation of vegetation, even temporarily, may indirectly impact the desert tortoises. Permanent impacts are analyzed as portions of the PIA where shoulder backing occurs. Temporary impacts are analyzed as portions of the PIA that will contain no permanent structures or materials and are planned to be restored to pre project conditions. Temporary impacts that were evaluated include staging areas, limits of ground disturbance, and vegetation removal."

Evidence impact would be significant: The IS/MND indicates that desert tortoise was not found during the January 2023 surveys and is not expected to occur within the PIA due to baseline disturbance, yet the species could enter the Project area at any time. Thirty-two unprocessed records for the species are found within CDFW's Biogeographic Information and Observation System (BIOS) adjacent to the Project site within three miles or within the same watershed with unimpeded habitat (Robinson, & others, 2014-2024). All of these records occur within a continuous band of unimpeded habitat for which desert tortoise could be moving through and into the Project site in search for mates, food, water, or habitat. In addition, the Project, as described, would remove potential habitat for desert tortoise. CDFW considers the take of desert tortoise and the loss of the species' habitat as a significant impact, unless mitigated to a level of less than significant.

The IS/MND's BIO-16 (BIO-Reptile-4: Authorized Biologist Clearance Surveys) includes that desert tortoise individuals, if found on site, would be moved out of harm's way following the most recent CDFW and USFWS guidelines. Mitigation Measure BIO-16 (BIO-Reptile-4) suggests handling of CESA-listed species, which constitutes take under CESA in the form of catch, pursue, capture, and/or attempting to catch, pursue, and/or capture. The IS/MND indicates on page 18, "A CDFW 2081

permit [ITP] will be required if a desert tortoise is handled,” but does not include that an ITP would be sought prior to the implementation of Project activities.

Recommended Potentially Feasible Mitigation Measure(s): CDFW recommends the inclusion of the below revisions to BIO-14, BIO-15, and BIO-16 (edits are in ~~strikethrough~~ and additions are in ***bold italics***), and the adoption of BIO 20.1 in the Final MND to ensure impacts to desert tortoise, and the habitats thereof, are mitigated to a level of less than significant.

BIO-14 (Bio-Reptile-14 Pre-Project Surveys) (Revised):

To assess the number of listed reptile species that may be potentially impacted, pre-project surveys for desert tortoise must be conducted within ~~the shoulder widening and culvert drainage project impact area~~ ***the PIA, and adjacent to the PIA where Project activities could affect desert tortoise*** according to the current protocol provided by the USFW. ***Desert tortoise surveys shall be conducted in accordance with the U.S. Fish and Wildlife Service’s 2009 desert tortoise survey methodology (see: <https://www.fws.gov/sites/default/files/documents/Desert-Tortoise-Field-Manual.pdf>). The survey shall utilize perpendicular survey routes and 100-percent visual coverage for desert tortoise and their sign. Results of the survey shall be submitted to CDFW prior to the start of Project activities. If the survey confirms desert tortoise absence, the CDFW-approved biologist shall ensure desert tortoise does not enter the Project area. A CDFW-approved biologist shall be present to monitor construction at all times when and where desert tortoise has the potential to enter an active construction area of the Project. If the survey confirms presence of desert tortoise, or if a desert tortoise is observed at any time, Caltrans shall submit to CDFW for review and approval a desert tortoise specific avoidance plan detailing the protective avoidance measures to be implemented to ensure complete avoidance of take to desert tortoise. If complete avoidance of desert tortoise cannot be achieved, CDFW recommends that Project activities be postponed until appropriate authorization (i.e., a finalized CESA ITP under Fish and Game Code section 2081) is obtained.***

BIO-15 (BIO-Reptile-3: Construction Monitoring) (Revised):

Project activities must be monitored by USFWS authorized ***and CDFW approved qualified*** biologist ***during the course of Project activities that could impact desert tortoise*** weekly to ensure that measures are being implemented and documented.

BIO-16 (BIO-Reptile-4: Authorized Biologist Clearance Surveys) (Revised):

Clearance desert tortoise surveys must be conducted by a USFWS authorized **and CDFW approved qualified** biologist 3 days prior to project activities within the entire PIA. **Daily construction monitoring for desert tortoise shall occur, when applicable, in accordance with the species-specific measures of this document.** If a desert tortoise (**dead or alive**) is located, the Resident Engineer and Caltrans biologist must be contacted and additional measures and/or agency coordination ~~may be~~ **is** required. Desert tortoise **may be** removed from work areas ~~may be moved from~~ **and out of** harm's way to the nearest suitable habitat or translocated, following the most recent CDFW and USFWS guidelines **if authorized and in accordance with a CDFW ITP**. A CDFW **ITP 2084** permit will be required **and shall be obtained prior to any** if a desert tortoise is **being** handled.

BIO-20.1 (Bio-DT-2 Desert Tortoise Compensatory Mitigation) (New):

Permanent impacts to desert tortoise habitats shall be mitigated at a minimum 3:1 (mitigated to impacted) ratio by acreage area. Temporary impacts to desert tortoise habitats shall be restored onsite at a 1:1 (mitigated to impacted) ratio by acreage area. If areas temporarily impacted will not return to their baseline ecological state and form within one-calendar-year of occurring impacts, additional compensatory mitigation to address temporal losses of habitat shall occur. Compensatory mitigation for desert tortoise habitat impacts by total area (i.e., the combined total acreage of permanent and temporary impacts calculated post-ratios) shall be conducted either on-site through restoration activities, or through purchase of mitigation credits from a CDFW-approved bank and/or land acquisition, conservation, and management, or a combination of both, in coordination with CDFW.

COMMENT 4: Burrowing Owl (*Athene cunicularia*)

Chapter 2, Section IV a); Page 13, and elsewhere

Issue: The Project has the potential to result in permanent and temporary loss, degradation, and impacts to burrowing owl habitat. Direct take of burrowing owl may also occur during the course of Project activities and for the life of the Project.

Specific impact: The Project includes the potential for the collapsing of burrows, entombment, displacement, direct take associated with vehicle and equipment strike, indirect take associated with Project operations such as attracting predators, reduction of habitat and habitat quality associated with road infrastructure expansion. The Project as described will cause permanent and temporary impacts to burrowing owl foraging and nesting habitat.

Why impact would occur: Burrowing owl could be directly impacted during construction and for the life of the Project through the removal of potential foraging

habitat, and loss of habitat features caused by road widening and the installation of shoulder backing. Nest destruction, nest abandonment, disturbance from construction noise and activities, increased risk of predation and degradation of suitable habitat could also all lead to significant impacts to burrowing owl individuals and local populations. Habitat conversion may occur indirectly through the introduction of invasive species, which could also negatively affect burrowing owls. The IS/MND does not disclose the potential for burrowing owl impacts and the habitats thereof as the species was not assessed in the Biological Resources section or within the Project's NESMI. Burrowing owls are known to occur within a reasonable dispersal distance of the Project area (Davenport, 2005; Stratton, 2016; Wilkerson, *et al.*, 2006) and potential nesting and foraging habitat occurs within and adjacent to the Project area.

Evidence impact would be significant: Burrowing owls are regulated under Fish and Game Code section 3503.5, are a CDFW Species of Special Concern (SSC), and have recently been petitioned for consideration to be listed as Endangered or Threatened under CESA. The Project, as described, may result in injury, direct mortality, indirect mortality, disruption of breeding behavior, and/or may reduce reproductive capacity of the species. However, because the IS/MND does not include Mitigation Measures specific to burrowing owl, the IS/MND does not adequately mitigate the potential impacts to burrowing owl to a level of less than significant. CDFW considers the direct and indirect take of burrowing owl, and the loss of the species' habitat as a significant impact, unless mitigated to a level of less than significant and in compliance with State (*i.e.*, Fish and Game Code sections 3503.5, *etc.*) and Federal laws (*i.e.*, Migratory Bird Treaty Act). Furthermore, if burrowing owl becomes a State candidate threatened or endangered species under CESA, or later listed as threatened or endangered under CESA, and complete avoidance of burrowing owl cannot be achieved, CDFW considers the take of burrowing owl and the loss of the species' habitat as a significant impact, unless mitigated to a level of less than significant which may include that Project activities be postponed until appropriate authorization (*i.e.*, a finalized CESA ITP under Fish and Game Code section 2081) is obtained.

Recommended Potentially Feasible Mitigation Measure: CDFW recommends the adoption of BIO-22 below in the Final MND to ensure impacts to burrowing owl, and the habitats thereof, are mitigated to a level of less than significant.

BIO-22 (BIO-Avian-2 Pre-construction Burrowing Owl Surveys) (New):

The following burrowing owl preconstruction surveys must be performed: one survey 14 to 30 days prior to Project activities; one survey 24 hours prior to Project activities; and burrowing owl preconstruction surveys shall be conducted in accordance with the 2012 Staff Report on Burrowing Owl Mitigation (Staff Report) (See:

<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843&inline>) prior to vegetation removal or ground disturbing activities. If the preconstruction surveys confirm occupied burrowing owl habitat, Project activities shall be immediately halted. The Qualified Biologist shall coordinate with CDFW and prepare a Burrowing Owl Plan that shall be submitted to CDFW for review and approval prior to commencing Project activities and implementing the measures of the Burrowing Owl Plan.

The Burrowing Owl Plan shall describe proposed avoidance, monitoring, relocation, minimization, and/or mitigation actions. The Burrowing Owl Plan shall include the number and location of occupied burrow sites, acres of burrowing owl habitat that will be impacted, details of site monitoring, and details on proposed buffers and other avoidance measures if avoidance is proposed. If impacts to occupied burrowing owl habitat or burrows cannot be avoided, the Burrowing Owl Plan shall also describe minimization and compensatory mitigation actions that will be implemented. Proposed implementation of burrow exclusion (i.e., passive relocation) and closure shall only be considered as a last resort, after all other options have been evaluated as exclusion is not in itself an avoidance, minimization, or mitigation method and has the possibility to result in take. The Burrowing Owl Plan shall identify compensatory mitigation for the temporary or permanent loss of occupied burrow(s) and habitat consistent with the "Mitigation Impacts" section of the 2012 Staff Report and Caltrans shall implement CDFW approved mitigation prior to the initiation of Project activities. If impacts to occupied burrows cannot be avoided, information shall be provided regarding adjacent or nearby suitable habitat available to burrowing owls. If no suitable habitat is available nearby, details regarding the creation and funding of artificial burrows (numbers, location, and type of burrows) and management activities for relocated burrowing owls shall also be included in the Burrowing Owl Plan.

COMMENT 5: Nesting Birds

Chapter 2 Section IV a); Page 13, 19, and elsewhere

Issue: The Project as described will cause impacts to avian species, including CDFW SSC such as Bendire's thrasher (*Toxostoma bendirei*), CESA-listed species such as the gilded flicker (*Colaptes chrysoides*), along with common birds that are subject to Fish and Game Code sections 3503, 3503.5, 3513, and the Migratory Bird Treaty Act of 1918.

Specific impact: The Project as described could result in direct take associated with vehicle and equipment strike, indirect take associated with Project operations such as attracting predators, displacement, reduction of habitat and habitat quality associated with road infrastructure expansion. The Project as described would

cause permanent and temporary impacts to avian species' foraging and nesting habitat.

Why impact would occur: Nesting avian species could be directly impacted during construction and for the life of the Project through the removal of potential foraging habitat, and loss of habitat features caused by road widening and the installation of shoulder backing. Nest destruction, nest abandonment, disturbance from construction noise and activities, increased risk of predation and degradation of suitable habitat could also lead to significant impacts to nesting avian species and local populations. The IS/MND acknowledges that there is potential habitat for nesting birds, and the Project description includes activities that would impact habitats and habitat features utilized by nesting birds. This is primarily noted on Page 13 of the IS/MND, which is solely directed towards Costa's hummingbird (*Calypte costae*) and Lawrence's goldfinch (*Carduelis lawrencei*) as, "There is suitable habitat within the BSA, however, and could be affected by auditory or visual disturbance. They may occur in the BSA and may be indirectly affected by project activities. Temporary impacts involving ground disturbance and vegetation removal could impact species in the area...[continued later]. There could be temporary impacts on these species if nesting occurs within the BSA, including loss of nesting habitat, nest destruction, nest abandonment, disturbance from construction noise and activities, increased risk of predation, and degradation of suitable habitat. However, nesting bird species are not anticipated to nest within the PIA due to disturbance."

Evidence impact would be significant: Fish and Game Code section 3503 makes it unlawful to take, possess, or needlessly destroy the nest or eggs of any bird, except as otherwise provided by Fish and Game Code or any regulation made pursuant thereto. Fish and Game Code section 3513 makes it unlawful to take or possess any migratory nongame bird except as provided by the rules and regulations adopted by the Secretary of the Interior under provisions of the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. § 703 et seq.). Fish and Game Code section 3503.5 makes it unlawful to take, possess, or destroy any birds in the orders Falconiformes or Strigiformes (birds-of-prey) to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by Fish and Game Code or any regulation adopted pursuant thereto.

The IS/MND anticipates there to be no nesting avian species within the PIA due to baseline disturbances, such as but not limited to routine road maintenance activities and ambient noise levels associated with adjacent non-Project related activities. Yet the Project as described holds the potential to affect nesting avian species within and beyond the PIA through construction impacts, vegetation removal, and road infrastructure development. Local bird species have the potential to occur within the PIA and/or adjacent to the PIA and could be affected by Project activities regardless of baseline disturbance as the project contains habitat for nesting birds. CDFW

considers the take of any avian species nests and eggs regulated under Fish and Game Code as a result of Project activities a potentially significant impact, unless mitigated to a level of less than significant and in compliance with State (*i.e.*, Fish and Game Code sections 3503.5, *etc.*) and Federal laws (*i.e.*, Migratory Bird Treaty Act).

Recommended Potentially Feasible Mitigation Measure: CDFW recommends the inclusion of the below revisions to BIO-21 (edits are in ~~strikethrough~~ and additions are in ***bold italics***) in the Final MND to ensure impacts to common and special-status nesting birds, and the habitats thereof, are mitigated to a level of less than significant.

BIO-21 (BIO-Avian-1: Preconstruction Nesting Bird Survey) (Revised):

Project activities shall not result in impacts to nesting birds, or result in the take or removal of nests or eggs in accordance with CDFW and USFWS regulations. ~~If project activities cannot avoid the nesting season, generally regarded as February 1—September 30, then~~ ***Preconstruction nesting bird surveys must be conducted within and adjacent to the PIA where Project activities have the potential to affect nesting birds up to the limit of the BSA no later than 3 days prior to construction by a qualified biologist experienced with: identifying local and migratory bird species; conducting bird surveys using appropriate survey methodology; nesting surveying techniques, recognizing breeding and nesting behaviors, locating nests and breeding territories, and identifying nesting stages and nest success; determining/establishing appropriate avoidance and minimization measures; and monitoring the efficacy of implemented avoidance and minimization measures, in order to locate and avoid nesting birds. Concurrent and additional surveys shall occur as Project construction progresses, as the nature of the Project is linear in fashion.*** ~~If an active avian nest is located, a no disturbance construction buffer (100 feet for non-passerine, 300 feet for passerine, and 500 feet for raptors) shall~~ ***may be established and monitored by the qualified biologist based on the professional judgement of the Qualified Biologist, and on any nesting bird behavioral response associated with Project related activities including any synergistic responses of ambient baseline disturbances compounding with Project related activities. Any active nests shall be continuously monitored by a Qualified Biologist or biological monitor during the course of Project activities that have the potential to cause disturbance to any nesting birds to ensure avoidance buffers are effective. Avoidance buffers shall be expanded and/or modified as needed by the Qualified Biologist if any nesting bird shows behavioral responses resulting from Project related activities.***

II. Lake and Streambed Alteration Program

COMMENT 6: Lake and Streambed Alteration

Chapter 2, Section IV b); Pages 15, 16, and elsewhere

Issue: The IS/MND does not fully consider all areas subject to Fish and Game Code section 1602, nor does it consider notification of Lake and Streambed Alteration (LSA) for those resources identified as subject to Fish and Game Code section 1602. The IS/MND should also address Fish and Game Code section 5650.

Specific impact: The Project as described would include: substantial diversion or obstruction of natural flow of a stream; substantial change in the bed, bank, and channel of a stream; or deposition of debris or other materials containing ground pavement where they may pass into a stream.

Why impact would occur: Based on the review of the materials submitted with the IS/MND, and review of aerial photography, the Project as described will have impacts to Fish and Game Code section 1602 resources within the Project Area.

Evidence impact would be significant: Fish and Game Code section 1602 requires an entity to notify CDFW prior to commencing any activity that may do one or more of the following: substantially divert or obstruct the natural flow of any river, stream, or lake; substantially change or use any material from the bed, channel or bank of any river, stream, or lake; or deposit debris, waste or other materials that could 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, desert washes, and watercourses with subsurface flow, and the hyporheic zones thereof. The Project, as described in the IS/MND will be subject to Notification under 1602. CDFW considers substantial adverse impacts and the deposition of materials where they may pass into streams as a significant impact, unless mitigated to a level of less than significant.

Recommended Potentially Feasible Mitigation Measure: CDFW recommends the adoption of BIO-23 below in the Final MND to ensure impacts to Fish and Game Code section 1602 resources are mitigated to a level of less than significant.

BIO-23: Notification to CDFW (New):

Caltrans shall notify CDFW under Fish and Game Code section 1600 et seq. for all portions of the Project that will substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake. Shoulder backing that is planned to be placed in or near channel areas that are subject to Fish and Game Code

section 1600 notification shall not consist of asphalt, bitumen, or any other substance or material that is deleterious to fish, plant life, mammals, or bird life in accordance with Fish and Game Code 5650 et seq.

To minimize significant impacts:

To ensure that any LSA notification will meet the threshold of completeness review and not generate an incomplete letter, CDFW recommends Caltrans conduct a new analysis of the Project area for where 1602 resources could be affected by the Project, including the placement of materials where they have the potential to pass into channel areas. CDFW is available for coordination and review of areas where Fish and Game Code section 1602 resources occur within the Project area. This may include site visits and analysis prior to the submittal of any LSA notification.

III. Editorial Comments and/or Suggestions

CDFW has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species, whereas enforcement of this jurisdiction occurs within the entirety of the State of California, and 200 miles off of California's coastline. Within Fish and Game Code section 1600 et seq., CDFW regulates activities that affect streams, as stated, "An entity may not substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake, unless... [followed by the LSA notification process]." CDFW's jurisdiction, and Fish and Game Code section 1602 language is either quoted incorrectly, or quoted in partial, within the IS/MND, including within the NESMI, and the Jurisdictional Delineation Report (JD) produced for the Project.

CDFW recommends that the Final MND consider analysis for areas where materials will be deposited that have the potential to pass into a river, stream, or lake. CDFW recommends that all temporary and permanent impacts to fish and wildlife resources be reevaluated and included in the Final MND, including those regulated under Fish and Game Code section 1602, for which it is expected that the impact areas mapped in Appendix E will increase.

Lastly, The JD incorrectly states that "Stream" is defined by CDFW regarding Streambed Alteration under California Code of Regulations (CCR) Title 14 Section 1.72. Please note that CCR Title 14 section 1 et seq. addresses sport fishing regulations adopted by the Fish and Game Commission, and as such shall not be misconstrued to apply to CDFW's Lake and Streambed Alteration Program. The JD also states that "Riparian Habitat" is defined under Fish and Game Code section 2785. Please note that the definition of "Riparian Habitat" included in this section of Fish and Game Code solely

governs the construction of the chapter of the California Wildlife Protection Act of 1990 and shall not be misconstrued to apply to CDFW's Lake and Streambed Alteration Program.

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 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 IS/MND to assist Caltrans District 8 in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to CDFW Senior Environmental Scientist (Specialist), Andrew Chambers, at (909) 354-0919, or by email at Andrew.Chambers@wildlife.ca.gov.

Sincerely,

DocuSigned by:

84F92FFEEFD24C8...

Kim Freeburn
Environmental Program Manager

ec: Office of Planning and Research, State Clearinghouse, Sacramento
state.clearinghouse@opr.ca.gov.

REFERENCES

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Attachment A: Mitigation and Monitoring Reporting Plan

CDFW recommends the following language to be incorporated into the Final MND for the Project.

| Biological Resources (BIO) | | | |
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| Mitigation Measure (MM) | | Timing | Responsible Party |
| BIO-Plant-1 | <p>Within the appropriate identification periods for special-status plants and Sensitive Natural Communities, surveys shall be conducted according to the CDFW 2018 Protocols for Surveying and Evaluating Impacts to Special-status Plant Populations and Sensitive Natural Communities (found at: https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=18959). In addition, three days prior to construction, preconstruction surveys must be conducted by a CDFW approved Qualified Biologist with a minimum of five years of professional experience surveying for special-status plant species and Sensitive Natural Communities in Californian desert environments. Surveys shall be conducted within the PIA and 150 feet of the PIA. Special-status species and Sensitive Natural Communities must be flagged for visual identification to construction personnel for work avoidance. Special-status plant species detected that feature multiple plants in a single location must be fenced off with Environmentally Sensitive Area (ESA) high visibility fencing. Sensitive Natural Communities detected shall be flagged or fenced off with ESA high visibility fencing. If non CESA-listed special-status plants and/or Sensitive Natural Communities are impacted by Project activities, or if protocol level surveys are not able to be conducted due to Project contracting constraints, cyclical weather constraints (i.e., drought, flooding, etc.), or other reasons conflicting with the Project's build timeline, non CESA-listed special-status plants shall be assumed present in the Project area, and mitigated</p> | <p>Prior to commencing ground- or vegetation disturbing activities</p> | <p>Project proponent</p> |

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| | by acreage in accordance with BIO-Plant-2. If complete avoidance of CESA-listed plants cannot be achieved, CDFW recommends that Project activities be postponed until appropriate authorization (i.e., a finalized CESA ITP under Fish and Game Code section 2081) is obtained. | | |
| BIO-Plant-2 | Permanent impacts (i.e., areas slated for road infrastructure development such as pavement, shoulders, or shoulder backing, or areas that will not return to their baseline ecological state and form within one-calendar-year of occurring impacts) (hereafter as, 'permanent impacts') to non-CESA-listed special-status plants, shall be mitigated at a minimum 3:1 (mitigated to impacted) ratio by acreage area. Temporary impacts (i.e., areas that will return to their baseline ecological state and form within one-calendar-year of occurring impacts) (hereafter as, 'temporary impacts') to non-CESA-listed special-status plants and their habitats, and Sensitive Natural Communities, shall be restored onsite at a 1:1 (mitigated to impacted) ratio by acreage area. Compensatory mitigation for non-CESA-listed special-status plant species and Sensitive Natural Communities impacts by total area (i.e., the combined total acreage of permanent and temporary impacts calculated post-ratios) shall be conducted either on-site through restoration activities, or through purchase of mitigation credits from a CDFW-approved bank and/or land acquisition, or a combination of both, in coordination with CDFW. | Prior to commencing ground- or vegetation disturbing activities | Project Proponent |
| Bio-Reptile-14 | To assess the number of listed reptile species that may be potentially impacted, pre-project surveys for desert tortoise must be conducted within the PIA, and adjacent to the PIA where Project activities could affect desert tortoise. Desert tortoise surveys shall be conducted in accordance with the U.S. Fish and Wildlife Service's 2009 desert tortoise survey methodology (see: https://www.fws.gov/sites/default/files/documents/ | Prior to commencing ground- or vegetation disturbing activities | Project proponent |

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| | <p>Desert-Tortoise-Field-Manual.pdf). The survey shall utilize perpendicular survey routes and 100-percent visual coverage for desert tortoise and their sign. Results of the survey shall be submitted to CDFW prior to the start of Project activities. If the survey confirms desert tortoise absence, the CDFW-approved biologist shall ensure desert tortoise does not enter the Project area. A CDFW-approved biologist shall be present to monitor construction at all times when and where desert tortoise has the potential to enter an active construction area of the Project. If the survey confirms presence of desert tortoise, or if a desert tortoise is observed at any time, Caltrans shall submit to CDFW for review and approval a desert tortoise specific avoidance plan detailing the protective avoidance measures to be implemented to ensure complete avoidance of take to desert tortoise. If complete avoidance of desert tortoise cannot be achieved, CDFW recommends that Project activities be postponed until appropriate authorization (i.e., a finalized CESA ITP under Fish and Game Code section 2081) is obtained.</p> | | |
| <p>BIO-Reptile -3</p> | <p>Project activities must be monitored by USFWS authorized and CDFW approved qualified biologist during the course of Project activities that could impact desert tortoise to ensure that measures are being implemented and documented.</p> | <p>Prior to commencing ground- or vegetation disturbing activities</p> | <p>Project proponent</p> |
| <p>BIO-Reptile -4</p> | <p>Clearance desert tortoise surveys must be conducted by a USFWS authorized and CDFW approved qualified biologist 3 days prior to project activities within the entire PIA. Daily construction monitoring for desert tortoise shall occur, when applicable, in accordance with the species-specific measures of this document. If a desert tortoise (dead or alive) is located, the Resident Engineer and Caltrans biologist must be contacted and additional measures and agency coordination is required. Desert tortoise may be removed from work areas and out of harm's way to the nearest</p> | <p>Prior to commencing ground- or vegetation disturbing activities</p> | <p>Project Proponent</p> |

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| | <p>suitable habitat or translocated, following the most recent CDFW and USFWS guidelines if authorized and in accordance with a CDFW ITP. A CDFW ITP will be required and shall be obtained prior to any desert tortoise being handled.</p> | | |
| Bio-DT-2 | <p>Permanent impacts to desert tortoise habitats shall be mitigated at a minimum 3:1 (mitigated to impacted) ratio by acreage area. Temporary impacts to desert tortoise habitats shall be restored onsite at a 1:1 (mitigated to impacted) ratio by acreage area. If areas temporarily impacted will not return to their baseline ecological state and form within one-calendar-year of occurring impacts, additional compensatory mitigation to address temporal losses of habitat shall occur. Compensatory mitigation for desert tortoise habitat impacts by total area (i.e., the combined total acreage of permanent and temporary impacts calculated post-ratios) shall be conducted either on-site through restoration activities, or through purchase of mitigation credits from a CDFW-approved bank and/or land acquisition, conservation, and management, or a combination of both, in coordination with CDFW.</p> | <p>Prior to commencing ground- or vegetation disturbing activities</p> | <p>Project Proponent</p> |
| BIO-Avian-2 | <p>The following burrowing owl preconstruction surveys must be performed: one survey 14 to 30 days prior to Project activities; one survey 24 hours prior to Project activities; and burrowing owl preconstruction surveys shall be conducted in accordance with the 2012 Staff Report on Burrowing Owl Mitigation (Staff Report) (See: https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843&inline) prior to vegetation removal or ground disturbing activities. If the preconstruction surveys confirm occupied burrowing owl habitat, Project activities shall be immediately halted. The Qualified Biologist shall coordinate with CDFW and prepare a Burrowing Owl Plan that shall be submitted to CDFW for review and approval prior to commencing Project activities and implementing the measures of the Burrowing Owl Plan.</p> | <p>Prior to commencing ground- or vegetation disturbing activities</p> | <p>Project Proponent</p> |

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| | <p>The Burrowing Owl Plan shall describe proposed avoidance, monitoring, relocation, minimization, and/or mitigation actions. The Burrowing Owl Plan shall include the number and location of occupied burrow sites, acres of burrowing owl habitat that will be impacted, details of site monitoring, and details on proposed buffers and other avoidance measures if avoidance is proposed. If impacts to occupied burrowing owl habitat or burrows cannot be avoided, the Burrowing Owl Plan shall also describe minimization and compensatory mitigation actions that will be implemented. Proposed implementation of burrow exclusion (i.e., passive relocation) and closure shall only be considered as a last resort, after all other options have been evaluated as exclusion is not in itself an avoidance, minimization, or mitigation method and has the possibility to result in take. The Burrowing Owl Plan shall identify compensatory mitigation for the temporary or permanent loss of occupied burrow(s) and habitat consistent with the “Mitigation Impacts” section of the 2012 Staff Report and Caltrans shall implement CDFW approved mitigation prior to the initiation of Project activities. If impacts to occupied burrows cannot be avoided, information shall be provided regarding adjacent or nearby suitable habitat available to burrowing owls. If no suitable habitat is available nearby, details regarding the creation and funding of artificial burrows (numbers, location, and type of burrows) and management activities for relocated burrowing owls shall also be included in the Burrowing Owl Plan.</p> | | |
| <p>BIO- Avian- 1</p> | <p>Project activities shall not result in impacts to nesting birds, or result in the take or removal of nests or eggs in accordance with CDFW and USFWS regulations. Preconstruction nesting bird surveys must be conducted within and adjacent to the PIA where Project activities have the potential to affect nesting birds no later than 3 days prior to construction by a qualified biologist experienced with: identifying local and migratory bird species;</p> | <p>Prior to commencing ground- or vegetation disturbing activities</p> | <p>Project Proponent</p> |

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| | <p>conducting bird surveys using appropriate survey methodology; nesting surveying techniques, recognizing breeding and nesting behaviors, locating nests and breeding territories, and identifying nesting stages and nest success; determining/establishing appropriate avoidance and minimization measures; and monitoring the efficacy of implemented avoidance and minimization measures, in order to locate and avoid nesting birds. Concurrent and additional surveys shall occur as Project construction progresses, as the nature of the Project is linear in fashion. If an active avian nest is located, a no disturbance shall be established and monitored by the qualified biologist-based on the professional judgement of the Qualified Biologist, and on any nesting bird behavioral response associated with Project related activities including any synergistic responses of ambient baseline disturbances compounding with Project related activities. Any active nests shall be continuously monitored by a Qualified Biologist or biological monitor during the course of Project activities that have the potential to cause disturbance to any nesting birds to ensure avoidance buffers are effective. Avoidance buffers shall be expanded and/or modified as needed by the Qualified Biologist if any nesting bird shows behavioral responses resulting from Project related activities.</p> | | |
| <p>BIO-23</p> | <p>Caltrans shall notify CDFW under Fish and Game Code section 1600 et seq. for all portions of the Project that will substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake. Shoulder backing that is planned to be placed in or near channel areas that are subject to Fish and Game Code section 1600 notification shall not consist of asphalt, bitumen, or any other substance or</p> | <p>Prior to commencing ground- or vegetation disturbing activities</p> | <p>Project Proponent</p> |

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| | material that is deleterious to fish, plant life, mammals, or bird life in accordance with Fish and Game Code 5650 et seq. | | |
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