State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Central Region
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Fresno, California 93710
www.wildlife.ca.gov

GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director

June 03, 2024

Kim Espinosa, Temporary Director of Development Services
City of Merced Planning Division
678 West 18th Street
Merced, California 95340
(209) 385-6858
espinosak@cityofmerced.org

Subject: **Branford Point Development Project (Project)**
Notice of Preparation (NOP)
SCH: 2024050041

Dear Kim Espinosa:

The California Department of Fish and Wildlife (CDFW) received an NOP of a Draft Environmental Impact Report (DEIR) from the City of Merced for the 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 the Fish and Game Code. While the comment period may have ended, CDFW respectfully requests that the City of Merced Planning Division still consider our comments.

CDFW ROLE

CDFW is California's **Trustee Agency** for fish and wildlife resources and holds those resources in trust by statute for all the people of the State (Fish & G. Code, §§ 711.7, subd. (a) & 1802; Pub. Resources Code, § 21070; CEQA Guidelines § 15386, subd. (a)). CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (*Id.*, § 1802). Similarly, for purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public agency environmental review efforts, focusing specifically on 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 the Fish and Game Code.

Fully Protected Species: CDFW has jurisdiction over fully protected species of birds, mammals, amphibians and reptiles, and fish, pursuant to Fish and Game Code sections 3511, 4700, 5050, and 5515. Fully protected species may not be taken or possessed at any time and no licenses or permits may be issued for their take except as follows:

- Take is for necessary scientific research,
- Efforts to recover a fully protected, endangered, or threatened species, live capture, and relocation of a bird species for the protection of livestock, or
- They are a covered species whose conservation and management are provided for in a Natural Community Conservation Plan (Fish & G. Code, §§ 3511, 4700, 5050, & 5515).

Additionally, specified types of infrastructure projects may be eligible for an Incidental Take Permit (ITP) for unavoidable impacts to fully protected species if certain conditions are met (see Fish & G. Code §2081.15). Project proponents should consult with CDFW early in the project planning process if an ITP may be pursued for the Project.

Nesting Birds: CDFW has jurisdiction over actions with potential to result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections that protect birds, their eggs and nests include sections 3503 (regarding unlawful take, possession, or needless destruction of the nest or eggs of any bird), 3503.5 (regarding the take, possession, or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful take of any migratory nongame bird).

Federally Listed Species: CDFW recommends consulting with the USFWS on potential impacts to Federally listed species. Take under the Federal Endangered Species Act (FESA) is more broadly defined than CESA; take under FESA also includes significant habitat modification or degradation that could result in death or injury to a listed species by interfering with essential behavioral patterns such as breeding, foraging, or nesting. Consultation with the USFWS to comply with FESA is advised well in advance of any ground disturbing activities.

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

PROJECT DESCRIPTION SUMMARY

Proponent: Bonique Emerson

Objective: The proposed Project includes the development of approximately 48 acres into a mixed-use development project. The Project will feature a variety of uses including, multi-family housing, commercial, hospitality and research and development office spaces. The proposed Project features several different types of housing for a total of up to 700 residential units at buildout and is broken down as follows: affordable housing – maximum of 98 units; apartments – maximum of 372 units; and townhomes – maximum of 230 units. The proposed Project also includes up to 16.1 acres of commercial development (for a total of approximately 778,853 square feet of commercial area). Various other infrastructure improvements (water, stormwater and wastewater infrastructure, roadway improvements, and related improvements) will be required by the Project.

Location: The Project is located in unincorporated Merced County, generally bounded by Lake Road to the east, La Loma Road to the south, Bellevue Road to the north and the Yosemite Lateral canal to the north and west. The site is comprised of one parcel: Assessor's Parcel Number (APN) 060-020-044.

Timeframe: N/A

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist City of Merced 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 DEIR prepared for this Project.

The Project site is located approximately ¾-mile south of Yosemite Lake, 2-miles east of Fairfield Canal and directly southwest from the UC Merced Campus and is comprised of agricultural lands including tilled row crops, and a wind row of blue gum eucalyptus (*Eucalyptus globulus*). The Project site is bordered by agricultural fields, a few rural residences, and annual grassland and vernal pool habitats. Based on a review of the Project description, California Natural Diversity Database (CNDDB) records, the

surrounding habitat, as well as CDFW's familiarity with the resources documented previously in the adjacent UC Merced footprint and adjacent Campus Natural reserve lands owned by UC Merced and The Nature Conservancy, several special-status species could potentially be impacted by Project activities.

The Project area is within the geographic range of several special status animals species, including but not limited to, the State endangered and fully protected bald eagle (*Haliaeetus* leucocephalus), the State fully protected golden eagle (*Aquila chrysaetos*), the State threatened Swainson's hawk (*Buteo swainsoni*), the State threatened tricolored blackbird (*Agelaius tricolor*), the State and federally threatened California tiger salamander (*Ambystoma californiense*), the State candidate endangered Crotch's bumble bee (*Bombus crotchii*), the State species of special concern burrowing owl (*Athene cunicularia*), and the State species of special concern and federally proposed threatened western spadefoot (*Spea hammondii*). The Project site is also within the geographic range of several special-status plant species including, but not limited to, the State endangered and California Rare Plant Rank (CRPR) 1B.1, and federally threatened Colusa grass (*Neostapfia colusana*), the federally endangered and 1B.1 Keck's checkerbloom (*Sidalcea keckii*), the State endangered, CRPR 1B.1, and federally threatened San Joaquin Valley Orcutt grass (*Orcuttia inaequalis*), and the State endangered, CRPR 1B.2, and federally threatened succulent owls-clover (*Castilleja campestris var. succulenta*). The Project area also has potential habitat for migratory and non-migratory nesting bird species.

In order to adequately assess potential impacts to biological resources, CDFW recommends a qualified biologist review the Project area and conduct habitat assessments and/or focused biological surveys during the appropriate survey period(s) in order to determine whether any special-status species may be present within the Project site. This information should be used to inform the need for additional protocol surveys, assist with the development of avoidance, minimization, and/or mitigation measures, and when developing project alternatives to avoid and minimize potentially significant biological impacts.

Fully Protected Raptors

The Project site is within the known geographic range of bald eagle (BAEA) and golden eagle (GOEA), and a BAEA historical occurrence was documented at Lake Yosemite, ¾-mile north of the Project site (CDFW 2024). BAEA require large bodies of water with hunting perches of large limbed trees to pounce on fish or small mammals and GOEA are known to inhabit open areas with large trees and cliffs for nesting. These habitat features are present within the Project vicinity, and as such, CDFW recommends that a qualified biologist conduct focused BAEA and GOEA surveys as part of the biological studies conducted in support of the DEIR. To avoid Project related impacts to these species, CDFW recommends incorporating survey methods outlined in the Protocol for

Evaluating Bald Eagle Habitat and Populations in California (Jackman and Jenkins 2004) and the Interim Golden Eagle Inventory and Monitoring Protocols; and Other Recommendations guidelines (USFWS 2010). If surveys indicate the presence or potential presence of BAEA or GOEA, consultation with the CDFW is recommended for guidance on the development of take avoidance measures.

Swainson's hawk

The Project site is within the known geographic range of Swainson's hawk (SWHA), the species is known to occur within the adjacent UC Merced footprint and Campus Natural reserve lands, and there are historical occurrences documented within 1 mile of the Project site (CDFW 2024). SWHA are known to breed within the Central Valley of California and prefer to nest and forage in alfalfa, fallow fields, field crops, and grassland habitats with a sufficient source of small mammals (CDFG 1994). Based on aerial imagery, most of the Project site contains suitable habitat for SWHA foraging. In addition, there are trees and structures located within the vicinity of the Project area that may provide suitable nesting habitat. Therefore, CDFW recommends that a qualified biologist conduct surveys for nesting SWHA following the entire survey methodology developed by the SWHA Technical Advisory Committee (SWHA TAC 2000) as part of the biological technical studies conducted in support of the DEIR.

In addition to conducting SWHA surveys, CDFW recommends the DEIR include the following measures:

Recommended Mitigation Measure 1: SWHA Surveys Prior to Construction

Depending on the time between the initial survey efforts conducted in support of the DEIR and Project construction, CDFW recommends that additional surveys, following the survey methodology developed by the SWHA Technical Advisory Committee, be repeated the survey season immediately prior to construction.

Recommended Mitigation Measure 2: SWHA Avoidance Buffer

If Project-specific activities will take place during the SWHA nesting season (i.e., March 1 through September 15), and active SWHA nests are present, CDFW recommends a minimum ½-mile no-disturbance buffer be delineated and maintained around each nest, regardless of whether it was detected by surveys or observed incidentally. These buffers would 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 parental care for survival, to prevent nest abandonment and other take of SWHA as a result of Project activities.

Recommended Mitigation Measure 3: SWHA Take Authorization

CDFW also recommends that in the event an active SWHA nest is detected, and a ½-mile no-disturbance buffer is not feasible, consultation with CDFW is warranted to discuss how to implement the Project and avoid take. If take cannot be avoided, take authorization through the acquisition of an ITP, pursuant to Fish and Game Code section 2081 subdivision (b) is necessary to comply with CESA.

Recommended Mitigation Measure 4: SWHA Foraging Habitat Mitigation

Finally, CDFW recommends compensation for the loss of SWHA foraging habitat as described in CDFW's "Staff Report Regarding Mitigation for Impacts to Swainson's Hawks" (CDFG 1994) to reduce impacts to foraging habitat to less than significant. The Staff Report recommends that mitigation for habitat loss occur within a minimum distance of 10 miles from known nest sites. CDFW has the following recommendations based on the Staff Report:

- For projects within 1 mile of an active nest tree, a minimum of 1 acre of habitat management (HM) land for each acre of development is advised.
- For projects within 5 miles of an active nest but greater than 1 mile, a minimum of ¾ acre of HM land for each acre of development is advised.
- For projects within 10 miles of an active nest tree but greater than 5 miles from an active nest tree, a minimum of ½ acre of HM land for each acre of development is advised.

Tricolored blackbird

The Project site is within the known geographic range of tricolored blackbird (TRBL) and there are historical occurrences documented within 1 ½-miles of the Project site (CDFW 2024). TRBL breed within the vicinity of fresh water and are known to breed in alfalfa, wheat, and other low agricultural crop fields, and these fields are becoming an increasingly important nesting habitat type, particularly in the San Joaquin Valley (Beedy et al. 2023). Based on aerial imagery, it appears the Project site and vicinity may contain suitable habitat for TRBL foraging and nesting. In 2017, approximately 30,000 TRBL were distributed among 16 colonies in Merced County (Meese 2017). Nesting can occur synchronously, with all eggs laid within one week (Orians 1961). For these reasons, depending on timing, disturbance to nesting colonies can cause abandonment, significantly impacting TRBL populations (Beedy et al. 2020).

As the Project site is within the known geographic range of TRBL and suitable foraging and nesting habitat may be present, CDFW recommends that a qualified biologist conduct a habitat assessment as part of the biological technical studies conducted in

support of the DEIR. If potentially suitable habitat is identified, consultation with CDFW is recommended for guidance on focused survey methods and mitigation measures such as avoidance, take authorization, and mitigation.

California Tiger Salamander

The Project site is within the known geographic range of California tiger salamander (CTS), the species is known to occur within the adjacent UC Merced footprint and Campus Natural reserve lands, and a historical occurrence was documented ½-mile north of the Project site (CDFW 2024). CTS breed and develop in vernal and seasonal pools and stock ponds in grassland, woodland, and scrub habitat types and have been determined to be physiologically capable of dispersing up to approximately 1 ½-miles from seasonally flooded wetlands (Searcy and Shaffer 2011). These habitat features are present within the Project vicinity, and, as such, CDFW recommends a qualified biologist conduct protocol-level surveys in accordance with the USFWS "Interim Guidance on Site Assessment and Field Surveys for Determining Presence or a Negative Finding of the California Tiger Salamander" (USFWS CTS Protocol) (USFWS 2003) as part of the biological technical studies conducted in support of the DEIR. If surveys indicate the presence or potential presence of CTS, consultation with the CDFW is recommended for guidance on the development of mitigation measures such as take avoidance, minimization, and mitigation.

Crotch's Bumble Bee

The Project site is within the known geographic range of Crotch's bumble bee (CBB) (CDFW 2024). 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 et al. (2018) suggest there have been sharp declines in relative abundance by 98% and persistence by 80% over the last ten years.

CDFW recommends a qualified biologist conduct a habitat assessment as part of the biological technical studies conducted in support of the DEIR to determine if the Project site or its immediate vicinity contain habitat suitable to support CBB. Potential nesting sites, which include all small mammal burrows, perennial bunch grasses, thatched annual grasses, brush piles, old bird nests, dead trees, and hollow logs would need to be documented as part of the assessment. If potentially suitable habitat is identified, CDFW recommends that a qualified biologist conduct focused surveys for CBB, and their requisite habitat features following the methodology outlined in the Survey Considerations for California Endangered Species Act Candidate Bumble Bee Species

(CDFW 2023) as part of the biological technical studies conducted in support of the DEIR. If surveys indicate the presence or potential presence of CBB, consultation with the CDFW is recommended for guidance on the development of mitigation measures such as take avoidance, minimization, and mitigation.

Burrowing Owl

The Project site is within the known geographic range of burrowing owl (BUOW) and there is a documented historical occurrence ½-mile from the Project site. BUOW inhabit open grasslands containing small mammal burrows, a requisite habitat feature used for nesting and cover. These habitat features are present within the Project vicinity, and as such, CDFW recommends assessing presence/absence of BUOW by having a qualified biologist conduct surveys following the California Burrowing Owl Consortium's (CBOC) "Burrowing Owl Survey Protocol and Mitigation Guidelines" (CBOC 1993) and CDFW's "Staff Report on Burrowing Owl Mitigation" (CDFG 2012) as part of the biological studies conducted in support of the DEIR. If surveys indicate the presence or potential presence of BUOW, consultation with the CDFW is recommended for guidance on mitigation measures such as avoidance, minimization, and mitigation.

Western Spadefoot

The Project site is within the known geographic range of western spadefoot (WESP) and there is a documented historical occurrence 4 miles from the Project site. WESP occurs primarily in grasslands and seasonal wetlands with appropriate upland habitat. These habitat features may be present within the Project site and Project vicinity and, as such, CDFW recommends that a general habitat assessment be conducted as part of the biological technical studies conducted in support of the DEIR. If the habitat assessment indicates the presence or potential presence of WESP, consultation with the CDFW is recommended for guidance on surveys and mitigation measures such as avoidance, minimization, and mitigation.

Special-Status Plants

The Project site is within the known geographic range of several special status plant species and several species have been documented within the adjacent UC Merced footprint and Campus Natural reserve lands, including succulent owl's clover, Colusa grass, and San Joaquin Valley orcutt grass. Special-status plant species are threatened with habitat loss and habitat fragmentation resulting from development, vehicle and foot traffic, and introduction of non-native plant species (California Native Plant Society 2018), all of which may be unintended impacts of the Project. Therefore, CDFW recommends that the Project site(s) conduct a habitat assessment to determine whether there is suitable habitat for special-status plants. If there is suitable habitat, CDFW recommends the Project site be surveyed for special status plants by a qualified

botanist following the “Protocols for Surveying and Evaluating Impacts to Special-Status Native Plant Populations and Natural Communities” (CDFW 2018) as part of the biological technical studies conducted in support of the DEIR. This protocol, which is intended to maximize detectability, includes the identification of reference populations to facilitate the likelihood of field investigations occurring during the appropriate floristic period. If surveys indicate the presence or potential presence of special status plants, consultation with CDFW is recommended for guidance on mitigation measures such as avoidance, minimization, and mitigation. Please note, if State-listed plant species are identified during botanical surveys, consultation with CDFW is warranted to determine if the Project can avoid take of that species. If take cannot be avoided, take authorization would need to occur through issuance of a State ITP to comply with CESA and/or Fish and Game Code section 1900 and California Code of Regulations, title 14, section 786.9, subdivision (b).

Nesting birds

The Project site is within the known geographic range of several species of migratory and non-migratory birds and may contain suitable habitat for an abundance of nesting bird species. To evaluate Project-related impacts on migratory and non-migratory birds, CDFW recommends that a general habitat assessment for nesting and foraging birds be conducted as part of the biological technical studies conducted in support of the DEIR.

Editorial Comments and/or Suggestions

Federally Listed Species

CDFW recommends consulting with USFWS regarding potential impacts to federally listed species including, but not limited to, California tiger salamander, Colusa grass, Keck’s checkerbloom, San Joaquin Valley Orcutt grass, succulent owls-clover, vernal pool fairy shrimp (*Branchinecta lynchi*), and western spadefoot. FESA is more broadly defined than CESA; take under FESA also includes significant habitat modification or degradation that could result in death or injury to a listed species by interfering with essential behavioral patterns such as breeding, foraging, or nesting. Consultation with the USFWS in order to comply with FESA is advised well in advance of any Project activities.

California Natural Diversity Database

Please note that the CNDDB is populated by voluntary submissions of species detections. As a result, species may be present in locations not depicted in the CNDDB but where there is suitable habitat and features capable of supporting species. A lack of an occurrence record, or lack of recent occurrence records, in the CNDDB does not mean that a species is not present. In order to adequately assess any potential Project-

related impacts to biological resources, surveys conducted by a qualified biologist during the appropriate survey period(s) and using the appropriate protocol survey methodology are warranted in order to determine whether or not any special status species are present.

Project Alternatives Analysis

CDFW recommends that the information and results obtained from the biological technical surveys, studies, and analysis conducted in support of the Project's DEIR be used to develop and modify the Project's alternatives to avoid and minimize impacts to biological resources to the maximum extent possible. When efforts to avoid and minimize have been exhausted, CDFW advises that remaining impacts to sensitive biological resources be mitigated to reduce impacts to a less than significant level, if feasible.

Cumulative Impacts

CDFW recommends that a cumulative impact analysis be conducted for all biological resources that will either be significantly or 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). Cumulative impacts are recommended to be analyzed 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 also be identified and mapped for each resource being analyzed and utilized for this analysis. CDFW recommends closely evaluating the need for a cumulative impacts analysis for the following species as part of the DEIR due to these species being in poor or declining health or at risk: bald eagle, golden eagle, Swainson's hawk, tricolored blackbird, California tiger salamander, Crotch's bumble bee, burrowing owl, western spadefoot, Colusa grass, Keck's checkerbloom, San Joaquin Valley Orcutt grass, succulent owls-clover, and any impacted migratory or non-migratory nesting bird species. CDFW staff is 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, section 21003, subd. (e).) Accordingly, please report any special status species and natural communities detected during Project surveys to the CNDDB. The CNNDB field survey form can be filled out and submitted online at the following link: https://wildlife.ca.gov/Data/CNDDB/Submitting-Data. The types of information reported to CNDDB can be found at the following link: https://www.wildlife.ca.gov/Data/CNDDB/Plants-and-Animals.

FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of environmental document filing fees is necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of 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, section 753.5; Fish & G. Code, section 711.4; Pub. Resources Code, section 21089).

CONCLUSION

CDFW appreciates the opportunity to comment on the NOP to assist the City of Merced in identifying and mitigating Project 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). Please see the enclosed Mitigation Monitoring and Reporting Program (MMRP) table which corresponds with recommended mitigation measures in this comment letter. Questions regarding this letter or further coordination should be directed to John Riedel, Environmental Scientist, at (559) 807-1453 or john.riedel@wildlife.ca.gov.

Sincerely,

DocuSigned by:
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Julie A. Vance
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Attachment 1
CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
RECOMMENDED MITIGATION MONITORING AND REPORTING PROGRAM (MMRP)
PROJECT: Branford Point Development
SCH No.: 2024050041

RECOMMENDED MITIGATION MEASURE	**STATUS/DATE/INITIALS**
Before Disturbing Soil or Vegetation	
Swainson's hawk	
Recommended Mitigation Measure 1: **SWHA surveys prior to construction**	
Recommended Mitigation Measure 3: **SWHA take authorization**	
Recommended Mitigation Measure 4: **SWHA foraging habitat mitigation**	
During construction	
Swainson's hawk	
Recommended Mitigation Measure 2: **SWHA avoidance buffer**	