



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Bay Delta Region
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GAVIN NEWSOM, Governor
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May 1, 2025

Albert Enault, Senior Planner
City of Vacaville
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**Subject: McMurtry Creek Estates Project, Environmental Impact Report,
SCH No. 2024051142, Solano County**

Dear Mr. Enault:

The California Department of Fish and Wildlife (CDFW) received a draft Environmental Impact Report (EIR) from the City of Vacaville (City) for the McMurtry Creek Estates Project (Project) pursuant the California Environmental Quality Act (CEQA) and CEQA Guidelines. CDFW previously provided comments in response to the Notice of Preparation (NOP) of the EIR in a letter dated June 20, 2024.

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

CDFW ROLE

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

PROJECT DESCRIPTION SUMMARY

Proponent: Tom Phillippi, Phillippi Engineering (Sponsor)

Objective: The Project would annex 15.73 acres of land from Solano County into the City of Vacaville to develop a subdivision consisting of 20 single-family residential estate lots, along with associated roadway and utility improvements and a new multi-use path. The residential estate lots would accommodate executive-style custom homes ranging in lot area from 12,412 to 63,749 square feet. The Project would require a General Plan Amendment to change the General Plan designation from Hillside Agriculture (HA) to

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Residential Estates (RE) and apply the Residential Estate (RE-12) pre-zoning district to the Project site.

Location: The Project site is located at approximately 38.40217° N and -121.98848° W at the northern terminus of McMurtry Lane, Vacaville, CA 95688 in Solano County and on Assessor's Parcel Numbers 0105-200-150 and 0105-200-140.

REGULATORY REQUIREMENTS

California Endangered Species Act

Please be advised that a CESA Incidental Take Permit (ITP) must be obtained if the Project has the potential to result in "take" of plants or animals listed or candidate species under CESA, either during construction or over the life of the Project. **The Project has the potential to impact Swainson's hawk (*Buteo swainsoni*), a state threatened species; and burrowing owl (*Athene cunicularia*) a state candidate species, as further described below.** Issuance of an ITP is subject to CEQA documentation; the CEQA document must specify impacts, mitigation measures, and a mitigation monitoring and reporting program. If the Project will impact CESA listed species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain an ITP.

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

Raptors and Other Nesting Birds

CDFW has jurisdiction over actions that may result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections protecting birds, their eggs, and nests include sections 3503 (regarding unlawful take, possession or needless destruction of the nests 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). Migratory birds are also protected under the federal Migratory Bird Treaty Act.

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COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below and in **Attachment 1** to assist the City in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources.

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

And,

Would the Project have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by CDFW or United States Fish and Wildlife Service?

Mitigation Measures and Related Impact Shortcomings

COMMENT 1: Swainson's hawk

Issues, specific impacts, why they may occur and be potentially significant: Mitigation Measure (MM) BIO-17 specifies a minimum avoidance buffer of 500 feet for nesting Swainson's hawk (SWHA) detected during ongoing construction activities; however, this distance may not be sufficient to avoid impacts to nesting SWHA, which is a state listed as threatened species. Therefore, if the Project impacts nesting SWHA, impacts would be considered a *mandatory finding of significance* (CEQA Guidelines, §§ 15065 & 15380).

Recommended Mitigation Measure: To reduce potential impacts to SWHA to less-than-significant and comply with CESA and Fish and Game Code 3500 et seq., please remove MM BIO-17 to allow for an evaluation of sufficient avoidance buffers for any detected nesting SWHA as prescribed in MM BIO-16. Additionally, please add to MM BIO-16 that if the Project cannot avoid take of SWHA, the Project shall obtain a CESA ITP from CDFW.

COMMENT 2: Burrowing owl

Issues, specific impacts, why they may occur and be potentially significant: The Initial Study, prepared by LSA and dated March 2025, identifies burrowing owl as a state listed candidate species with the potential to be impacted by the Project (page 4-19). As explained above, impacts to a CESA candidate species require that the Project obtains a CESA ITP. However, the MM's provided in the EIR, including MM BIO-5, 6, and 7, may not be sufficient to avoid impacts to BUOW as they are inconsistent with

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CDFW's 2012 Staff Report on Burrowing Owl Mitigation (CDFW 2012) survey methodology and buffer distances and do not include surveys for wintering owls, and MMs BIO-6 BIO-7 discusses relocation and translocation of burrowing owl which would be a violation of CESA. Therefore, if the Project impacts burrowing owl, impacts would be considered a *mandatory finding of significance* (CEQA Guidelines, §§ 15065 & 15380).

Recommended Mitigation Measure: To reduce potential impacts to burrowing owl to less-than-significant and comply with CESA and Fish and Game Code 3500 et seq., CDFW recommends removing MMs BIO-5, BIO-6, and BIO-7 from the EIR and replacing them with the following MM.

MM BIO-5: Burrowing Owl Habitat Assessment and Surveys. A qualified biologist shall conduct a habitat assessment and surveys, if habitat is present, for wintering burrowing owl prior to construction if construction starts during the burrowing owl wintering season (September 1 to January 31). Surveys for breeding burrowing owl shall be conducted during the breeding season if construction starts during the breeding season, February 1 to August 31. The habitat assessment and surveys shall follow the *Department of Fish and Game Staff Report on Burrowing Owl Mitigation* (2012) methodology (<https://wildlife.ca.gov/Conservation/Survey-Protocols#377281284-birds>) and the qualified biologist shall prepare a report documenting the survey results, and submit the report to CDFW, and obtain CDFW's written approval of the report prior to Project construction. The habitat assessment and surveys shall encompass the Project site and a sufficient buffer zone to detect owls nearby that may be impacted, which is up to 500 meters (1,640 feet) around the Project site pursuant to the above methodology. Habitat assessments and surveys shall occur annually for the duration of the Project, unless otherwise approved in writing by CDFW, as conditions may change annually and suitable refugia for burrowing owl, such as small mammal burrows, can be created within a few hours or days. Surveys for either non-breeding or breeding burrowing owl shall be spread over four visits during the nonbreeding and breeding season (September 1 to January 31 and February 1 to August 31, respectively). Time lapses between surveys or Project activities shall trigger subsequent surveys including, but not limited to, a final survey within 24 hours prior to ground disturbance. If the habitat assessment does not identify suitable habitat and surveys are not conducted, an additional habitat assessment should be conducted within 14 days prior to construction. If new refugia are present, surveys should be conducted as described above, unless otherwise approved in writing by CDFW. The qualified biologist shall have a minimum of two years of experience implementing the above methodology. The Project shall immediately notify CDFW if burrowing owl is detected and implement a construction avoidance buffer around any detected burrowing owl pursuant to the buffer distances outlined in the *Department of Fish and Game Staff Report on Burrowing Owl Mitigation* (2012), which may be up to 500 meters (1,640

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feet). Any detected owl shall be monitored by the qualified biologist to ensure it is not disturbed during construction activities.

If the Project cannot ensure burrowing owl and their burrows are fully avoided, the Project shall consult with CDFW and obtain a CESA ITP or otherwise demonstrate compliance with CESA prior to Project construction. Take is likely to occur and the Project shall obtain an ITP if: 1) burrowing owl surveys of the Project site detect burrowing owl occupancy of burrows or burrow surrogates, or 2) there is sign of burrowing owl occupancy on the Project site within the past three years and habitat has not had any substantial change. Occupancy means a site that is assumed occupied if at least one burrowing owl has been observed occupying a burrow or burrow surrogate within the last three years. Occupancy of suitable burrowing owl habitat may also be indicated by burrowing owl sign including its molted feathers, cast pellets, prey remains, eggshell fragments, or excrement at or near a burrow entrance or perch site. If burrowing owl, or their burrows or burrow surrogates, are detected within 500 meters (1,640 feet) of the Project site during burrowing owl surveys, but not on the Project site, the Project shall consult with CDFW to determine if avoidance is feasible or an ITP is warranted.

ENVIRONMENTAL DATA

CEQA requires that information developed in EIRs and negative declarations be incorporated into a database which may be used to make subsequent or supplemental environmental determinations (Pub. Resources Code, § 21003, subd. (e)). Accordingly, please report any special-status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDDB). The CNDDDB online field survey form and other methods for submitting data can be found 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://wildlife.ca.gov/Data/CNDDDB/Plantsand-Animals>.

FILING FEES

CDFW anticipates that the Project will have an impact on fish and/or wildlife, and assessment of filing fees is necessary (Fish & G. Code, § 711.4; Pub. Resources Code, § 21089). 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.


CONCLUSION

CDFW appreciates the opportunity to comment on the EIR to assist the City in identifying and mitigating Project impacts on biological resources.

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If you have any questions, please contact Nicholas Magnuson, Environmental Scientist, at (707) 815-4166 or by email at Nicholas.Magnuson@wildlife.ca.gov; or Melanie Day, Senior Environmental Scientist (Supervisory), at (707) 210-4415 or by email at Melanie.Day@wildlife.ca.gov.

Sincerely,

DocuSigned by:

Erin Chappell
Regional Manager
Bay Delta Region

Attachment 1: Draft Mitigation and Monitoring Reporting Plan

ec: State Clearinghouse No. 2024051142

REFERENCES

CDFW. 2012. Department of Fish and Game Staff Report on Burrowing Owl Mitigation. State of California Natural Resources Agency, Sacramento, CA.

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ATTACHMENT 1

Draft Mitigation and Monitoring Reporting Plan

CDFW provides the following language to be incorporated into the Mitigation and Monitoring Program for the Project as examples of mitigation measures.

Biological Resources (BIO)			
Mitigation Measures	Description	Timing	Responsible Party
Remove BIO-17 and revise BIO-16	Remove MM BIO-17 to allow for an evaluation of sufficient avoidance buffers for any detected nesting SWHA as prescribed in MM BIO-16. Additionally, please add to MM BIO-16 that if the Project cannot avoid take of SWHA, the Project shall obtain a CESA ITP from CDFW.	Prior to the Lead Agency issuing construction related permits and ground disturbance, and during construction	Project Applicant
BIO-5	<u>Burrowing Owl Habitat Assessment and Surveys</u> . A qualified biologist shall conduct a habitat assessment and surveys, if habitat is present, for wintering burrowing owl prior to construction if construction starts during the burrowing owl wintering season (September 1 to January 31). Surveys for breeding burrowing owl shall be conducted during the breeding season if construction starts during the breeding season, February 1 to August 31. The habitat assessment and surveys shall follow the <i>Department of Fish and Game Staff Report on Burrowing Owl Mitigation</i> (2012) methodology (https://wildlife.ca.gov/Conservation/Survey-Protocols#377281284-birds) and the qualified biologist shall prepare a report documenting the survey results, and submit the report to CDFW, and obtain CDFW's written approval of the report prior to Project construction. The habitat assessment and surveys shall encompass the Project site and a sufficient buffer zone to detect owls nearby that may	Prior to the Lead Agency issuing construction related permits and ground disturbance, and during construction	Project Applicant

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	<p>be impacted, which is up to 500 meters (1,640 feet) around the Project site pursuant to the above methodology. <u>Habitat assessments and surveys shall occur annually for the duration of the Project</u>, unless otherwise approved in writing by CDFW, as conditions may change annually and suitable refugia for burrowing owl, such as small mammal burrows, can be created within a few hours or days. Surveys for either non-breeding or breeding burrowing owl shall be spread over four visits during the nonbreeding and breeding season (September 1 to January 31 and February 1 to August 31, respectively). Time lapses between surveys or Project activities shall trigger subsequent surveys including, but not limited to, a final survey within 24 hours prior to ground disturbance. If the habitat assessment does not identify suitable habitat and surveys are not conducted, an additional habitat assessment should be conducted within 14 days prior to construction. If new refugia are present, surveys should be conducted as described above, unless otherwise approved in writing by CDFW. The qualified biologist shall have a minimum of two years of experience implementing the above methodology. The Project shall immediately notify CDFW if burrowing owl is detected and implement a construction avoidance buffer around any detected burrowing owl pursuant to the buffer distances outlined in the <i>Department of Fish and Game Staff Report on Burrowing Owl Mitigation (2012)</i>, which may be up to 500 meters (1,640 feet). Any detected owl shall be monitored by the qualified biologist to ensure it is not disturbed during construction activities.</p> <p>If the Project cannot ensure burrowing owl and their burrows are fully avoided, the Project shall consult with CDFW and obtain a CESA ITP or otherwise demonstrate compliance with CESA prior to Project construction. Take is likely to occur and the Project shall obtain an ITP if: 1) burrowing owl surveys of the Project site detect burrowing owl occupancy of burrows or burrow surrogates, or 2) there is sign of burrowing owl occupancy on the Project site within the past three years and habitat has not had any substantial change. Occupancy means a site that is assumed occupied if at least one burrowing owl has</p>		
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	<p>been observed occupying a burrow or burrow surrogate within the last three years. Occupancy of suitable burrowing owl habitat may also be indicated by burrowing owl sign including its molted feathers, cast pellets, prey remains, eggshell fragments, or excrement at or near a burrow entrance or perch site. If burrowing owl, or their burrows or burrow surrogates, are detected within 500 meters (1,640 feet) of the Project site during burrowing owl surveys, but not on the Project site, the Project shall consult with CDFW to determine if avoidance is feasible or an ITP is warranted.</p>		
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