



State of California – The Natural Resources Agency

DEPARTMENT OF FISH AND WILDLIFE

Central Region

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September 27, 2024

Charles Bergson, P.E.
Public Works Director/ City Engineer
City of Los Banos
520 J Street
Los Banos, California 93635

**Subject: City of Los Banos Basins and Stormwater Capture (Project)
Mitigated Negative Declaration (MND)
SCH Number: 2024081193**

Dear Charles Bergson:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt an Initial Study (IS)/MND from City of Los Banos for the Project pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹

Thank you for the opportunity to provide recommendations regarding the activities proposed at the Project site that may affect California fish and wildlife. Likewise, CDFW appreciates the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under Fish and Game Code.

CDFW ROLE

CDFW is California's **Trustee Agency** for fish and wildlife resources and holds those resources in trust by statute for all the people of the State (Fish and Game 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

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.

Charles Bergson
City of Los Banos
September 27, 2024
Page 2

projects and related activities that have the potential to adversely affect fish and wildlife resources.

CDFW is also submitting comments as a **Responsible Agency** under CEQA (Pub. Resources Code, § 21069; CEQA Guidelines, § 15381). CDFW expects that it may need to exercise regulatory authority as provided by the Fish and Game Code. As proposed, for example, the Project may be subject to CDFW's lake and streambed alteration regulatory authority (Fish & G. Code, § 1600 et seq.). Likewise, to the extent implementation of the Project as proposed may result in "take" as defined by State law of any species protected under the California Endangered Species Act (CESA) (Fish & Game Code, § 2050 et seq.), related authorized as provided by the Fish and Game Code will be required.

In this role, CDFW is responsible for providing, as available, biological expertise during public agency environmental review efforts (e.g., CEQA), focusing specifically on project activities that have the potential to adversely affect fish and wildlife resources. CDFW provides recommendations to identify potential impacts and possible measures to avoid or reduce those impacts.

Cumulative Impacts: General impacts from Projects include habitat fragmentation, degradation, habitat loss, migration/movement corridor limitations, and potential loss of individuals to the population. CDFW recommends the lead agency consider all approved and future projects when determining impact significance to biological resources.

Water Pollution: Pursuant to Fish and Game Code section 5650, it is unlawful to deposit in, permit to pass into, or place where it can pass into "Waters of the State" any substance or material deleterious to fish, plant life, or bird life, including non-native species. It is possible that without mitigation measures this Project could result in pollution of Waters of the State from storm water runoff or construction-related erosion. Potential impacts to the wildlife resources that utilize watercourses in the Project area include the following: increased sediment input from road or structure runoff; toxic runoff associated with Project-related activities and implementation; and/or impairment of wildlife movement. The Regional Water Quality Control Board and United States Army Corps of Engineers also have jurisdiction regarding discharge and pollution to Waters of the State.

Water Rights: The capture of unallocated stream flows to artificially recharge groundwater aquifers is subject to appropriation and approval by the State Water Resources Control Board (SWRCB) pursuant to Water Code section 1200 et seq. CDFW, as Trustee Agency, is consulted by SWRCB during the water rights process to provide terms and conditions designed to protect fish and wildlife prior to appropriation of the State's water resources. Certain fish and wildlife are reliant upon aquatic and

Charles Bergson
City of Los Banos
September 27, 2024
Page 3

riparian ecosystems, which in turn are reliant upon adequate flows of water. CDFW, therefore, has a material interest in assuring that adequate water flows within streams for the protection, maintenance, and proper stewardship of those resources. CDFW provides, as available, biological expertise to review and comment on environmental documents and impacts arising from Project activities.

Bird Protection: 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 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).

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 (Cal. Code Regs, tit. 14, § 15380), CDFW recommends it be fully considered in the environmental analysis for this Project.

PROJECT DESCRIPTION SUMMARY

Proponent: City of Los Banos

Objective: The City of Los Banos, Grasslands Water District, Grasslands Groundwater Sustainability Agency, and the City of Los Banos Groundwater Sustainability Agency (GSA) are proposing to construct a roughly 160-acre multi-celled groundwater detention basin, with a storage capacity of approximately 500 acre feet, for the purpose of stormwater capture, flood protection, and groundwater recharge with the intent of providing wildlife refuge water supply flexibility and groundwater quality and availability for the City of Los Banos. Water would be temporarily diverted from the San Luis Canal and Santa Fe Canal when there are capacity limitations in the canals or extra water supplies. The multi-celled detention basin would consist of three cells separated by levees, with interconnections between the cells. Other aspects of the Project include installing two turnouts (concrete structures, pumping plants, discharge pipeline, metering, and outlet structure), increasing embankment heights, and return flow structure and pipeline to the San Luis Canal.

Location: The Project is located between the San Luis and Santa Fe Canals in the City of Los Banos, on Assessor's Parcel Number (APN) 082-020-024, 424-010-003, 424-010-004, and 073-220-014, in Merced County.

Timeframe: Construction is projected to take approximately nine to 12 months with an undetermined start date.

Charles Bergson
City of Los Banos
September 27, 2024
Page 4

COMMENTS AND RECOMMENDATIONS

CDFW offers the following recommendations to assist the City of Los Banos in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct, indirect, and cumulative impacts on fish and wildlife resources. Editorial comments or other suggestions may also be included to improve the document.

Currently, the IS/MND acknowledges that the Project site is within the geographic range of several special-status and review of the California Natural Diversity Database (CNDDDB) reveals records for several special-status species within the vicinity of the Project area including, but not limited to the State threatened and federally endangered Swainson's hawk (*Buteo swainsoni*), the federally threatened vernal pool fairy shrimp (*Lepidurus packardii*), and the State species of special concern burrowing owl (*Athene cunicularia*).

The Project has the potential to impact biological resources, and the IS/MND proposes specific mitigation measures to reduce impacts to less than significant. CDFW has concerns about the ability of these measures to reduce impacts to less than significant and avoid unauthorized take for special-status animal species listed above. If significant environmental impacts will occur as a result of Project implementation and cannot be mitigated to less than significant levels, an IS/MND would not be appropriate. When an Environmental Impact Report (EIR) is prepared, the specifics of mitigation measures may be deferred, provided the lead agency commits to mitigation and establishes performance standards for implementation. CDFW recommends that the CEQA document provide quantifiable and enforceable measures as needed that will reduce impacts to less than significant levels. CDFW recommends that the following modifications and/or edits be incorporated into the IS/MND, including proposed avoidance, minimization, and compensatory measures, prior to its adoption by City of Los Banos.

Swainson's Hawk (SWHA)

The IS/MND states that Swainson's hawks are frequently observed within the vicinity of the Project area and have the potential to nest in trees outside of the Project area (CDFW 2024). Impacts to nesting Swainson's hawks can occur through disturbance related to Project activities. The IS/MND acknowledges that suitable nesting habitat occurs within the Project area and Mitigation Measure 4.2.B requires a survey for hawks within 10 days prior to construction during the nesting season. Mitigation Measure 4.2.2C requires that should any nests be detected during surveys that avoidance buffers will be put into place until a qualified biologist has determined that the young have fledged and are capable of foraging independently. However, specific avoidance buffer distances are not included in the IS/MND. Without appropriate avoidance and

Charles Bergson
City of Los Banos
September 27, 2024
Page 5

minimization measures for SWHA, potential significant impacts associated with Project activities include loss of foraging and/or nesting habitat, nest abandonment, reduced reproductive success, and reduced health and vigor of eggs and/or young. To evaluate potential impacts to SWHA, CDFW recommends conducting the following evaluation and including the following mitigation measures in the IS/MND.

- **Recommended Mitigation Measure 1: SWHA Surveys and Avoidance Buffers:** To reduce potential Project-related impacts to SWHA, CDFW recommends that a qualified biologist conduct surveys for nesting SWHA following the survey methodology developed by the SWHA Technical Advisory Committee (SWHA TAC 2000) during the nesting season of or prior to Project initiation, within the Project area and a ½-mile buffer around the Project area. In addition, if Project activities will take place during the species nesting season (i.e., March 1 through September 15), CDFW recommends that additional preconstruction surveys for active nests be conducted by a qualified biologist no more than 10 days prior to the start of construction.
- **Recommended Mitigation Measure 2: SWHA Take Authorization:** If a ½-mile buffer is not feasible, consultation with CDFW is warranted to the Project can avoid take of SWHA. If avoidance is not feasible, take authorization through the issuance of an ITP, pursuant to Fish and Game Code section 2081 subdivision (b), is necessary to comply with CESA.

Vernal Pool Fairy Shrimp

The MND provides a table of potential special-status species and includes Vernal Pool Fairy Shrimp (VPFS); however, VPFS is not discussed within the MND, and no mitigation measures are provided. As such, CDFW recommends the following:

- **Recommended Mitigation Measure 3: VPFS Surveys and Discussion with CDFW:** CDFW recommends that a qualified biologist conduct protocol level surveys in accordance with the U.S. Fish and Wildlife Service “Survey Guidelines for the Listed Large Branchiopods” (USFWS 2017) during the survey season prior to construction. These surveys would need to be conducted at the appropriate time of year to determine the existence and extent of VPFS. If through surveys it is determined that VPFS are occupying or have the potential to occupy the Project site, discussion with CDFW is recommended well in advance of any planned vegetation- or ground-disturbing activities to determine appropriate avoidance and minimization measures including adequate implementation of no-disturbance buffers. Additionally, consultation with USFWS may be necessary to minimize the potential for federal “take” and/or mitigate for potential impacts.

Charles Bergson
City of Los Banos
September 27, 2024
Page 6

Burrowing Owl

The Project site is within the known geographic range of the burrowing owl (BUOW), and BUOW have been observed onsite. The IS/MND indicates that two BUOW were observed along the southeast edge of the Area of Potential Effect (APE) during reconnaissance-level field surveys in September 2023, and the IS/MND Appendix B Biological Evaluation states in part, on page 31, “. . .many ground squirrel burrows that could provide habitat for burrowing owls were observed along the dirt roads, canal berms, and along the edges of the agricultural fields within the APE.” The IS/MND includes specific BUOW mitigation measures during construction activities, Mitigation Measures 4.2.1A through 4.2.1C, which includes following the survey, avoidance, and passive relocation measures in the “Staff Report on Burrowing Owl Mitigation” (CDFG 2012). CDFW recommends in the event an active BUOW den is documented on the Project site and avoidance following the no-disturbance buffer recommendations outlined in the “Staff Report on Burrowing Owl Mitigation” (CDFG 2012) guidance document is not feasible, consultation with CDFW is recommended for guidance on the development of mitigation measures such as take avoidance, minimization, and mitigation.

Further, it is unclear what measures will be implemented during operation and maintenance activities to avoid BUOW. The Project includes the temporary storage of water, construction of levees (for the cell grid detention basin design), and increasing embankment heights. These areas may provide habitat for ground-dwelling small mammals, such as ground squirrels, when not inundated with water. These burrows may subsequently provide potential habitat for BUOW. As BUOW have been observed on the Project site and have the potential to nest and/or forage within the Project site after construction activities are completed, CDFW has concerns regarding the potential impacts to BUOW during on-going operation and maintenance activities of the detention basin.

- **Recommended Mitigation Measure 4: BUOW Consultation – Construction:** If BUOW are found within the no-disturbance buffer recommendations outlined in the “Staff Report on Burrowing Owl Mitigation” (CDFG 2012) and avoidance is not possible, consultation with the CDFW is recommended for guidance on the development of mitigation measures such as take avoidance, minimization, and mitigation.
- **Recommended Mitigation Measure 5: BUOW Consultation – Operation and Maintenance:** CDFW consultation is recommended for guidance on the development of mitigation measures such as take avoidance, minimization, and mitigation prior to detention basin operation and maintenance activities.

Charles Bergson
City of Los Banos
September 27, 2024
Page 7

EDITORIAL COMMENTS AND/OR SUGGESTIONS

Lake and Streambed Alteration: Project activities, including the diversion of flows, may be subject to the notification requirement in Fish and Game Code section 1602, which requires an entity to notify CDFW prior to commencing any activity that may (a) substantially divert or obstruct the natural flow of any river, stream, or lake; (b) substantially change or use any material from the bed, bank, or channel of any river, stream, or lake (including the removal of riparian vegetation); (c) deposit debris, waste or other materials that could pass into any river, stream, or lake. "Any river, stream, or lake" includes those that are ephemeral or intermittent as well as those that are perennial.

Future project operations and maintenance may involve activities that are jurisdictional under Fish and Game Code section 1602. CDFW recommends coordination with CDFW staff prior to ground-breaking activities on-site or submit a Lake or Streambed Alteration (LSA) Notification to determine if the activities proposed within the streams are subject to CDFW's jurisdiction. CDFW is required to comply with CEQA in the issuance of a LSA Agreement; therefore, if the CEQA document approved for this Project does not adequately describe the Project and its impacts, a subsequent CEQA analysis may be necessary for LSA Agreement issuance. For additional information on notification requirements, please contact staff in the Central Region Lake and Streambed Alteration Program at (559) 243-4593 or R4LSA@willife.ca.gov, or the Program website: <https://wildlife.ca.gov/Conservation/LSA>.

Water Rights: The Project description includes the diversion and storage of surface water for groundwater recharge. As stated previously, the capture of unallocated stream flows to artificially recharge groundwater aquifers is subject to appropriation and approval by the SWRCB pursuant to Water Code section 1200 et seq. CDFW recommends that the IS/MND include a detailed description of the water rights and water entitlements that would pertain specifically to the Project and address any applications or change petitions that may be filed. CDFW, as Trustee Agency, is consulted by the SWRCB during the water rights process to provide terms and conditions designed to protect fish and wildlife prior to appropriation of the State's water resources. Given the potential for impacts to special-status species and their habitats, it is advised that required consultation with CDFW occur well in advance of the SWRCB water right application process.

Endangered Species Act Consultation: CDFW recommends consultation with the USFWS prior to Project activities, due to potential impacts to federally listed species. Take under the ESA is more stringently defined than under CESA; take under the ESA may also include significant habitat modification or degradation that could result in death or injury to a listed species, by interfering with essential behavioral patterns such as

Charles Bergson
City of Los Banos
September 27, 2024
Page 8

breeding, foraging, or nesting. Consultation with the USFWS in order to comply with ESA is advised well in advance of Project implementation.

Nesting birds: CDFW encourages Project implementation to occur during the non-nesting bird season. However, if ground-disturbing activities must occur during the breeding season (February through mid-September), the Project proponent is responsible for ensuring that implementation of the Project does not result in violation of the Migratory Bird Treaty Act or relevant Fish and Game Codes as referenced above.

To evaluate Project-related impacts on nesting birds, CDFW recommends that a qualified wildlife biologist conduct pre-activity surveys for active nests no more than 10 days prior to the start of ground disturbance to maximize the probability that nests that could potentially be impacted are detected. CDFW also recommends that surveys cover a sufficient area around the work site to identify nests and determine their status. A sufficient area means any area potentially affected by a project. In addition to direct impacts (i.e. nest destruction), noise, vibration, odors, and movement of workers or equipment could also affect nests. Prior to initiation of construction activities, CDFW recommends a qualified biologist conduct a survey to establish a behavioral baseline of all identified nests. Once construction begins, CDFW recommends a qualified biologist continuously monitor nests to detect behavioral changes resulting from the project. If behavioral changes occur, CDFW recommends the work causing that change cease and CDFW consulted for additional avoidance and minimization measures.

If continuous monitoring of identified nests by a qualified wildlife biologist is not feasible, CDFW recommends a minimum no-disturbance buffer of 250 feet around active nests of non-listed bird species and a 500-foot no-disturbance buffer around active nests of non-listed raptors. These buffers are advised to remain in place until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or parental care for survival. Variance from these no-disturbance buffers is possible when there is compelling biological or ecological reason to do so, such as when the construction area would be concealed from a nest site by topography. CDFW recommends that a qualified wildlife biologist advise and support any variance from these buffers and notify CDFW in advance of implementing a variance.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database, which may be used to make subsequent or supplemental environmental determinations (Pub. Resources Code, § 21003, subd. (e)). Accordingly, please report any special-status species and natural communities detected during Project surveys to CNDDDB. The CNDDDB field survey form can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The

Charles Bergson
City of Los Banos
September 27, 2024
Page 9

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

FILING FEES

The Project, as proposed, would have an impact on biological resources, and an assessment of filing fees is necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required in order for the underlying project approval to be operative, vested, and final (Cal. Code Regs, tit. 14, § 753.5; Fish & Game Code, § 711.4; Pub. Resources Code, § 21089).

If you have any questions, please contact Jackson Powell, Environmental Scientist, at the (559) 899-9758 by electronic mail at Jackson.Powell@wildlife.ca.gov.

Sincerely,

DocuSigned by:
Bob Stafford
5343A684FF02469...

Bob Stafford For Julie A. Vance
Regional Manager

ec: Jackson Powell, Environmental Scientist,
California Department of Fish and Wildlife

State Clearinghouse
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Charles Bergson
City of Los Banos
September 27, 2024
Page 10

Literature Cited

- California Department of Fish and Game (CDFW). 2012. Staff report on burrowing owl mitigation. California Department of Fish and Game, Sacramento, California, USA.
- CDFW. 2024. Biogeographic Information and Observation System (BIOS). <https://www.wildlife.ca.gov/Data/BIOS>. Accessed September 17, 2024
- Swainson's Hawk Technical Advisory Council (SWHA TAC) 2000. Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley. Swainson's Hawk Technical Advisory Committee, May 31, 2000.
- U. S. Fish and Wildlife Service (USFWS). 2017. *Survey Guidelines for the Listed Large Branchiopods*. U. S. Fish and Wildlife Service, Pacific Southwest Region, Sacramento, California. Revised November 2017.

Attachment 1

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

PROJECT: Turnout on the Friant-Kern Canal at Big Dry Creek

STATE CLEARINGHOUSE No.: 2024061125

RECOMMENDED MITIGATION MEASURES	STATUS/DATE/INITIALS
<i>Before Project Activity</i>	
Recommended Mitigation Measure 1: SWHA Surveys and Avoidance Buffers	
Recommended Mitigation Measure 2: SWHA Take Authorization	
Recommended Mitigation Measure 3: VPFS Surveys and Discussion with CDFW	
Recommended Mitigation Measure 4: BUOW Consultation – Construction	
<i>Before Project Operation and Maintenance Activity</i>	
Recommended Mitigation Measure 5: BUOW Consultation – Operation and Maintenance	

