



State of California – The Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Central Region
1234 East Shaw Avenue
Fresno, California 93710
(559) 243-4005
www.wildlife.ca.gov

GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director



Governor's Office of Planning & Research

DEC 16 2019

December 13, 2019

STATE CLEARINGHOUSE

Carlos E. Rojas
Kern County Planning and Natural Resources Department
2700 "M" Street, Suite 100
Bakersfield, California 93301

**Subject: 99 Houghton Industrial Park Project by McIntosh & Associates (Project),
Recirculated Draft Environmental Impact Report
SCH No. 2009051005**

Dear Mr. Rojas:

The California Department of Fish and Wildlife (CDFW) received a Recirculated Draft Environmental Impact Report (DEIR) from Kern County Planning and Natural Resources Department for the above-referenced 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, 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 exercise of its own regulatory authority under the Fish and Game Code.

CDFW ROLE

CDFW is California's **Trustee Agency** for fish and wildlife resources and holds those resources in trust by statute for all the people of the State (Fish & G. Code, §§ 711.7, subd. (a) & 1802; Pub. Resources Code, § 21070; CEQA Guidelines § 15386, subd. (a)). CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (*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.

CDFW is also submitting comments as a **Responsible Agency** under CEQA (Pub. Resources Code, § 21069; CEQA Guidelines, § 15381). CDFW expects that it may

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.

need to exercise regulatory authority as provided by the Fish and Game Code. As proposed, for example, construction associated with the Project may be subject to CDFW's lake and streambed alteration regulatory authority (Fish & G. Code, § 1600 *et seq.*). Likewise, to the extent implementation of the Project as proposed may result in "take" as defined by State law of any species protected under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 *et seq.*), related authorization as provided by the Fish and Game Code will be required.

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).

Fully Protected Species: CDFW has jurisdiction over fully protected species of birds, mammals, amphibians, reptiles, and fish, pursuant to Fish and Game Code sections 3511, 4700, 5050, and 5515. CDFW prohibits and cannot authorize take of any fully protected species.

PROJECT DESCRIPTION SUMMARY

Proponent: McIntosh and Associates

Objective: The proposed Project consists of medium to light industrial development of 314.3 acres of land. It includes several General Plan Amendments, zone classification changes, a Conditional Use Permit for construction of a Sewage Treatment Plant, and the Exclusion of Agricultural Preserve No. 13 to allow the development of an industrial park with a maximum of 4,613,004 square feet of net building area.

Location: The Project is located just south of Bakersfield, California in Kern County. It is bounded by South Union Avenue on the east, State Route 99 on the west, DiGiorgio Road to the north, and Houghton Road to the south; Assessor's Parcel No. 185-140-08.

Timeframe: Unspecified

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist Kern County 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 document.

Currently, the DEIR indicates that the Project's impacts would be less than significant with the implementation of mitigation measures described in the DEIR. However, as currently drafted, it is unclear whether the mitigation measures described will be enforceable or sufficient in reducing impacts to a level that is less than significant. In particular, CDFW is concerned regarding adequacy of mitigation measures for special-status animal species including, but not limited to, the State Threatened Swainson's hawk (*Buteo swainsoni*).

I. Environmental Setting and Related Impact

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 the United States Fish and Wildlife Service (USFWS)?

COMMENT 1: Swainson's Hawk (SWHA)

Section 4.4, Biological Resources, Mitigation Measure 4.4-3, page 4.4-26.

Issue: CDFW acknowledges that Mitigation Measure (MM) 4.4-3 includes a general pre-construction survey for all special-status species and establishes a ½-mile buffer around SWHA nests during the breeding season, but it does not specify survey methodology or include provisions for take. Table 4.4-2 on page 4.4-12 of the DEIR indicates that no impacts to SWHA are anticipated due to the lack of suitable nesting habitat in the vicinity of the Project but does acknowledge the presence of foraging habitat on-site. In the time since field surveys were conducted in 2016, several SWHA have been documented to occur in the vicinity of the Project area adjacent to the Project site along Houghton Road in 2017 and one mile north of the Project site along Highway 99 in 2019 (CDFW 2019a). Therefore, the Project has the potential to significantly impact both nesting and foraging SWHA. However, as currently drafted, the provisions described in MM 4.4-3 may not be enforceable or adequate in minimizing impacts to SWHA to a level that is less than significant.

Specific impact: Without appropriate avoidance and minimization measures for SWHA, potential significant impacts associated with the Project's construction include loss of foraging and/or nesting habitat, nest abandonment, reduced reproductive success, and reduced health and vigor of eggs and/or young.

Evidence impact would be significant: The primary threat to SWHA in California is loss of foraging and nesting habitat resulting from urban development and incompatible agriculture (CDFW 2016). Depending on the timing and proximity of construction, activities including noise, vibration, and movement of workers or

equipment could affect nests and have the potential to result in nest abandonment, significantly impacting local nesting SWHA.

Recommended Potentially Feasible Mitigation Measure(s)

Because suitable habitat for SWHA is present on and in the vicinity of the Project site, CDFW recommends editing the DEIR to include the following measures and that these be made conditions of approval for the Project.

Recommended Mitigation Measure 1: Focused SWHA Surveys

CDFW recommends that a qualified wildlife biologist conduct surveys for nesting SWHA following the survey methodology developed by the SWHA Technical Advisory Committee (SWHA TAC 2000) prior to project initiation. If ground-disturbing activities take place during the normal bird breeding season (February 1 through September 15), CDFW recommends that additional pre-construction 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 Avoidance

If an active SWHA nest is found, CDFW recommends implementation of a minimum ½-mile no-disturbance buffer 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.

Recommended Mitigation Measure 3: SWHA Take Authorization

If SWHA are detected and the ½-mile no-disturbance nest buffer is not feasible, consultation with CDFW is warranted to determine if the Project can avoid take. If SWHA take cannot be avoided, acquisition of an Incidental Take Permit, pursuant Fish and Game Code section 2081(b) prior to vegetation- or ground-disturbing activities may be necessary to comply with CESA.

Recommended Mitigation Measure 4: Compensation for Loss of Foraging Habitat

If Swainson's hawk nests occur in the vicinity of the Project site, CDFW recommends compensation for the loss of Swainson's hawk foraging habitat as described in CDFW's Staff Report Regarding Mitigation for Impacts to Swainson's Hawks (DFG, 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 one 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 0.75 acres 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 0.5 acres of HM land for each acre of development is advised.

II. Editorial Comments and/or Suggestions

Blunt-nosed leopard lizard (BNLL): CDFW acknowledges that MM 4.4-5 of the DEIR includes a protocol survey for BNLL within six months prior to commencement of construction activities. If BNLL surveys are warranted, limiting surveys to within six months may not provide adequate conditions to optimize BNLL detection. CDFW recommends extending the timeline so that surveys are conducted within one year of the start of construction activities or in consultation with CDFW. In addition, CDFW recommends conducting surveys in accordance with the updated version of the BNLL survey protocol (CDFW 2019b).

Nesting birds: CDFW acknowledges that the DEIR includes MM 4.4-11 to reduce impacts to nesting birds. However, CDFW recommends that a pre-construction survey be timed in closer proximity to the start of construction.

CDFW encourages Project implementation occur during the bird non-nesting season. However, if ground-disturbing activities must occur during the breeding season (February through mid-September), the Project's applicant 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 prevent 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 the Project. In addition to direct impacts (i.e. nest destruction), noise, vibration, 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 that may be used to make subsequent or supplemental environmental determinations (Pub. Resources Code, § 21003, subd. (e)). Accordingly, please report any special status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDDB). The CNDDDB field survey form can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The completed form can be 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, has the potential to impact fish and/or wildlife, and assessment of filing fees may be necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required in order for the underlying project approval to be operative, vested, and final (Cal. Code Regs, tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089).

CONCLUSION

CDFW appreciates the opportunity to comment on the DEIR to assist Kern County in identifying and mitigating subsequent project's impacts on biological resources.

Carlos E. Rojas
Kern County Planning and Natural Resources Department
December 13, 2019
Page 7

Questions regarding this letter or further coordination should be directed to Jennifer Giannetta, Environmental Scientist, at the address provided on this letterhead, by telephone at (559) 243-4014 extension 216, or by electronic mail at Jennifer.Giannetta@wildlife.ca.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "Julie A. Vance", with a stylized, flowing script.

Julie A. Vance
Regional Manager

REFERENCES

- California Department of Fish and Wildlife (CDFW), 2016. Status Review: Swainson's hawk (*Buteo swainsoni*) in California. Reported to California Fish and Game Commission. Five years status report.
- CDFW, 2019a. Biogeographic Information and Observation System (BIOS). <https://www.wildlife.ca.gov/Data/BIOS>. Accessed November 26, 2019.
- CDFW, 2019b. Approved Survey Methodology for the Blunt-nosed Leopard Lizard. California Department of Fish and Wildlife, October 2019 (revised).
- SWHA TAC, 2000. Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in the Central Valley of California. Swainson's Hawk Technical Advisory Committee. May 31, 2000.