



State of California – 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

June 08 2021

June 7, 2021

STATE CLEARINGHOUSE

Dan Leavitt
San Joaquin Regional Rail Commission
949 East Channel Street
Stockton, California 95202
MercedEXTComments@acerail.com

**Subject: Altamont Corridor Express (ACE) Ceres-Merced Extension Project
(Project)
Draft Environmental Impact Report (DEIR)
State Clearinghouse No. 2018012014**

Dear Mr. Leavitt:

The California Department of Fish and Wildlife (CDFW) received a draft Environmental Impact Report (DEIR) from the San Joaquin Regional Rail Commission for the above-referenced 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 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 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

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.

Dan Leavitt
San Joaquin Regional Rail Commission
June 7, 2021
Page 2

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 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.), 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).

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.

PROJECT DESCRIPTION SUMMARY

Proponent: San Joaquin Regional Rail Commission

Objective: The San Joaquin Regional Rail Commission previously prepared an EIR for the ACE Extension Lathrop to Ceres/Merced Project; the project consisted of analysis of rail service extension from Lathrop to Merced that would occur in 2 phases. This DEIR updates the programmatic analysis previously analyzed for the ACE Extension Ceres to Merced (i.e. Phase II) and includes project-level details that were not previously available.

The proposed Project is the Phase II extension of ACE service from Ceres to Merced and includes the development of the following facilities:

- The Ceres to Merced Extension Alignment, which consists of upgrades to track, new track, and bridges within the Union Pacific Railroad (UPRR) Fresno Subdivision between Ceres and Merced.

Dan Leavitt
San Joaquin Regional Rail Commission
June 7, 2021
Page 3

- New Turlock, Livingston, and Merced Facility, which are located along the Ceres to Merced Extension Alignment.
- The Merced Layover & Maintenance Facility, which is located in north Merced to support extension operations.

In addition, the San Joaquin Regional Rail Commission has identified the Atwater Station Alternative as an alternative to the Livingston Station. Only one station would be implemented in either Livingston or Atwater; both stations are equally analyzed in the EIR.

Location: The limits of the Project span Stanislaus and Merced Counties. The San Joaquin Rail Commission proposes to extend ACE passenger rail service from Ceres to Merced by constructing and upgrading tracks within the existing UPRR Fresno Subdivision ROW, a distance of approximately 34 miles.

Timeframe: n/a

COMMENTS AND RECOMMENDATIONS

CDFW previously commented on the Notice of Preparation for the ACE Extension Lathrop to Ceres/Merced Project in a letter dated February 27, 2018. Our February 27, 2018 letter (Attachment 1) provided specific recommendations for the State threatened Swainson's hawk (*Buteo swainsoni*; SWHA), and for avoiding potential impacts to various waterways along the Project route, including but not limited to the Stanislaus, Tuolumne, and Merced Rivers. CDFW recognizes that some of the recommendations from that letter were included in the DEIR for the Project. CDFW maintains the same recommendations for advised survey methods and mitigations measures that are not included in the DEIR. In addition, CDFW has the following recommendations on specific mitigation measures included in the DEIR.

Mitigation Measure BIO-2.8 and BIO-2.9

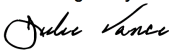
Mitigation Measures BIO-2.8 in the DEIR requires pre-construction nesting raptor and a 0.5-mile no-disturbance buffer around active SWHA nest. Mitigation Measure BIO-2.9 indicates requires compensatory mitigation for loss of foraging habitat. However, compensatory mitigation for loss of known nest trees was not addressed.

As stated in our February 27, 2018 comment letter, SWHA exhibit high nest-site fidelity year after year and CDFW considers removal of known SWHA nest trees, even outside of the nesting season, a potentially significant impact under CEQA. Regardless of nesting status, known raptor nest trees, CDFW recommends they be replaced with an appropriate native tree species, planted at a ratio of 3:1, in an area that will be protected in perpetuity, to reduce impacts to SWHA from the loss of nesting habitat features.

Dan Leavitt
San Joaquin Regional Rail Commission
June 7, 2021
Page 4

CDFW appreciates the opportunity to comment on the Project to assist the San Joaquin Regional Rail Commission in identifying and mitigating the Project's impacts on biological resources. If you have any questions, please contact Jim Vang, Environmental Scientist, at the address provided on this letterhead, by telephone at (559) 243-4014 extension 254, or by electronic mail at Jim.Vang@wildlife.ca.gov.

Sincerely,

DocuSigned by:

FA83F09FE08945A...

Julie A. Vance
Regional Manager

ec: Veronica Salazar
Jim Vang
California Department of Fish and Wildlife



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Central Region
1234 East Shaw Avenue
Fresno, California 93710
www.wildlife.ca.gov

EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director



February 27, 2018

Matt Hertel
San Joaquin Regional Rail Commission
949 East Channel Street
Stockton, California 95202

Subject: ACE Extension Lathrop to Ceres/Merced Project; SCH#: 2018012014

Dear Mr. Hertel:

The California Department of Fish and Wildlife (CDFW) received a Notice of Preparation (NOP) from the San Joaquin Regional Rail Commission (SJRRRC) 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 the exercise of its own regulatory authority under the Fish and Game Code. Although the comment period for your request has passed, CDFW would appreciate if you would still consider the following 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.

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

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.

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.*), related authorization as provided by the Fish and Game Code will be required.

PROJECT DESCRIPTION SUMMARY

Proponent: San Joaquin Regional Rail Commission

Objective: In 2013, SJRRC identified and developed a suite of improvements, known as the ACEforward plan, to modernize the existing ACE service that would result in faster commuter and intercity train services and could establish a connection between the San Joaquin Valley and San Jose within the next 10 years. That plan proposed a suite of improvements that would support ACE service from San Jose to Stockton, and to extend ACE service to Manteca, Modesto, Ceres, Turlock, and Merced. Through the ACEforward project development and environmental review, substantial financial, environmental, and logistical challenges were identified. As a result, the feasible and fundable extension of service in the Central Valley is now the focus of the SJRRC vision for commuter and intercity passenger rail services for ACE. For this reason, SJRRC is rescinding the prior ACEforward NOP and draft Environmental Impact Report (EIR) and intends to prepare a new EIR for this ACE Extension Lathrop to Ceres/Merced Project.

The Project contains both Phase I and Phase II improvements. The Phase I improvements will be analyzed at a project level of detail based on preliminary engineering and Phase II improvements are analyzed at a programmatic, more conceptual level of detail because only conceptual engineering has been completed at this time. Phase I improvements would support the ACE service extension to Ceres and Phase II improvements would support the ACE service extension to Merced. No improvements are proposed along the existing ACE corridor between Stockton and San Jose.

The proposed Project consist of construction improvements including the following:

Phase I improvements:

- A new North Lathrop station and/or new relocated Lathrop/Manteca station and/or track improvements at the existing Lathrop/Manteca station;
- A new Oakland-Fresno subdivision connection, which would construct a new track connection between the Oakland and Fresno subdivisions;
- A Ceres extension alignment consisting of upgrades to track, new tracks and bridges within the Fresno subdivision between Lathrop and Ceres;

- New downtown Manteca, Ripon, Modesto, and Ceres stations along the extension alignment;
- A new temporary Ceres layover facility to support extension operations until the extension to Merced is constructed, at which time a permanent layover facility would be located in Merced; and
- An interim bus bridge between Merced and Ceres, with stops at the Turlock, Livingston, and Merced bus stops

Phase II improvements:

- A Merced extension alignment consisting of upgrades and new tracks and bridges within the Fresno subdivision between Ceres and Merced;
- New Turlock, Livingston or Atwater, and Merced stations along the extension alignment; and
- A new permanent Merced layover facility to support extension operations

Location: The Project spans San Joaquin, Stanislaus, and Merced Counties. SJRRC proposes to extend ACE passenger rail service from Lathrop to Ceres and Merced by constructing and upgrading tracks, a total distance of approximately 58 miles.

COMMENTS AND RECOMMENDATIONS

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

I. Environmental Setting and Related Impact

Based on a review of aerial imagery and Figure 1 of the NOP, the Project route follows along State Route 99 from Merced to Lathrop. Results from the California Natural Diversity Database (CNDDDB) show that special-status species are known to occur along the Project site. CDFW is concerned regarding potential impacts to the State threatened Swainson's hawk (*Buteo swainsoni*).

Prior to potential ground-disturbing activities, CDFW recommends that the Project site be assessed by a qualified biologist to determine if sensitive biological resources are present on or in the vicinity. The results of this assessment may be sent to CDFW in order to identify if species avoidance buffers and/or any potential permitting needs are warranted.

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)

Issue: SWHA are known to nest in large mature trees along State Route 99. SWHA usually arrive at their nesting grounds in early March after their migration from South America. Nest construction and courtship continues through April. The young fledge approximately 42-44 days after hatching and remain with their parents until they depart in the fall (CDFW, 1994).

Specific impact: Without appropriate avoidance and minimization measures for SWHA, potentially significant impacts associated with ground-disturbing and subsequent activities could cause nest abandonment, reduced nest success, reduced health and vigor of eggs and/or young, and direct mortality.

Evidence impact is potentially significant: Lack of suitable nesting habitat in the San Joaquin Valley limits the local distribution and abundance of SWHA (CDFW 2016). The trees within ½-mile of the Project area represent some of the only remaining suitable nesting habitat in the vicinity of the Project. Depending on the timing of construction, Project activities including noise, vibration, odors, and movement of workers or equipment could affect nests and have the potential to result in nest abandonment, significantly impacting local nesting SWHA. In addition, agricultural cropping patterns can directly influence distribution and abundance of SWHA. For example, SWHA can forage in grasslands, pasture, hay crops, and low growing irrigated crops. However, other agricultural crops such as orchards and vineyards are incompatible with SWHA foraging (Estep 2009, Swolgaard et al. 2008). Although SWHA can adapt to some types of regular disturbance (e.g., ongoing traffic associated with a highway), particularly if the disturbance is present before the nesting season, the species is less tolerant of people near their nest territory during the nesting season.

Recommended Potentially Feasible Mitigation Measure(s)

To evaluate potential impacts to SWHA, CDFW recommends conducting the following evaluation along the Project site and implementing the following mitigation measures.

Mitigation Measure 1: SWHA Surveys

To evaluate potential Project-related impacts, CDFW recommends that a qualified wildlife biologist conduct surveys for nesting SWHA following the survey methods developed by the Swainson's Hawk Technical Advisory Committee (SWHA TAC, 2000) prior to Project implementation. SWHA detection during protocol level surveys warrants consultation with CDFW to discuss how to implement ground-disturbing activities and avoid take.

Mitigation Measure 2: Avoidance Buffer

CDFW recommends that if Project activities will take place during the SWHA nesting season (March 1 through August 31), and active SWHA nests are present, a minimum no-disturbance buffer of 0.5 miles around each nest be implemented 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 avoid nest abandonment and other take of SWHA. If a 0.5-mile buffer is not feasible, consultation with CDFW is warranted to determine if a smaller buffer from Project activities will avoid take. If take cannot be avoided, take authorization through the issuance of an Incidental Take Permit, pursuant to Fish and Game Code § 2081(b) is necessary to comply with CESA.

Mitigation Measure 3: Compensation for Nest Tree Removal

CDFW recommends impacts to known nest trees be avoided at all times of the year. SWHA exhibit high nest-site fidelity year after year and CDFW considers removal of known SWHA nest trees, even outside of the nesting season, a potentially significant impact under CEQA. Regardless of nesting status, if potential or known SWHA nest trees are removed, CDFW recommends they be replaced with an appropriate native tree species, planted at a ratio of 3:1, in an area that will be protected in perpetuity, to reduce impacts to SWHA from the loss of nesting habitat features.

COMMENT 2: Aquatic Species, Exclusion from Contaminants

Issue: The Project route as proposed will transverse various waterways, including but not limited to the Stanislaus, Tuolumne, and Merced Rivers. Therefore, bridge improvements/installations are likely. Concrete is very alkaline and exposure of uncured concrete to waterways could result in increased water alkalinity, leading to death or injury to fish and other aquatic species. CDFW provides the following recommendations.

Specific impact: Without appropriate minimization measures, potential significant impacts involving bridge improvements/installations may cause increased water alkalinity, toxicity, low oxygen levels, and turbidity leading to death or injury of fish and other aquatic species.

Evidence impact is potentially significant: Fish and aquatic species are sensitive to changes in water quality. If bridge improvements/installations will be conducted during the low water period, fish and aquatic species are more vulnerable as there may be insufficient water to dilute washouts from bridge improvements/installations activities during this time.

Recommended Potentially Feasible Mitigation Measure(s)

To evaluate potential impacts to aquatic species, CDFW recommend implementing the following mitigation measures.

Mitigation Measure 4: Poured concrete structures are advised to be isolated from water and allowed to dry/cure for a minimum of 30 days. Concrete poured within the high flow line is recommended to be suspended if the 15-day weather forecast indicates any chance of rain greater than 20 percent. During the 30-day period, poured concrete needs to be kept moist, and runoff from the concrete be contained to preclude entrance into the streambed or channel.

Mitigation Measure 5: Commercial sealants or curing accelerant may be applied to the poured concrete surface where difficulty in excluding water flow for a long period may occur. If sealant is used, water is advised to be contained such that it will not come in contact with the concrete until the sealant is dry.

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 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, would have an impact on fish and/or wildlife, and 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 & G. Code, § 711.4; Pub. Resources Code, § 21089).

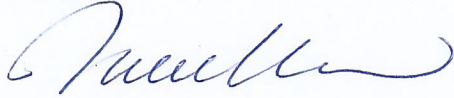
CONCLUSION

CDFW appreciates the opportunity to comment on the NOP to assist the San Joaquin Regional Rail Commission in identifying and mitigating Project impacts on biological resources.

Matt Hertel
San Joaquin Regional Rail Commission
February 27, 2018
Page 7

Questions regarding this letter or further coordination should be directed to Jim Vang, Environmental Scientist, at (559)243-4014 extension 254 or Jim.Vang@wildlife.ca.gov.

Sincerely,



Julie A. Vance
Regional Manager

cc: Dan Leavitt
San Joaquin Regional Rail Commission
949 East Channel Street
Stockton, California 95202

United States Fish and Wildlife Service
2800 Cottage Way, Suite W-2605
Sacramento, California 95825

Regional Water Quality Control Board
Central Valley Region
1685 "E" Street
Fresno, California 93706-2020

United States Army Corps of Engineers
San Joaquin Valley Office
1325 "J" Street, Suite #1350
Sacramento, California 95814-2928

ec: Linda Connolly, Senior Environmental Scientist
California Department of Fish and Wildlife

REFERENCES

CDFG, 1994. Staff Report Regarding Mitigation for Impacts to Swainson's Hawks (*Buteo Swainsoni*) in the Central Valley of California. California Department of Fish and Game.

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.