

Notice of Determination

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To:

☒ Office of Planning and Research
For U.S. Mail:
P.O. Box 3044

Sacramento, CA 95812-3044

Street Address:

1400 Tenth Street
Sacramento, CA 95814

From:

California Department of Fish and Wildlife (CDFW)
Inland Deserts Region
3602 Inland Empire Blvd., Suite C-220
Ontario, CA 91764
Contact: Ali Aghili
Phone: (760) 900-4448

RECEIVED

JAN 27 2020

DFG

California Department of Transportation District 8
464 West 4th Street, 6th Floor, MS 833
San Bernardino, CA 92401
Contact: Adam Compton
Phone: (909) 383-7555

Office of the General Counsel

SUBJECT: Filing of Notice of Determination pursuant to Public Resources Code § 21108

State Clearinghouse Number: 2018081100

Project Title: Interstate 40 Median Regrade Project (California Endangered Species Act Incidental Take Permit No. 2081-2019-006-06 (ITP))

Project Location (include county): The Project extends along a 29.6-miles distance between PM 125.0 to PM 154.6 on I-40 in the unincorporated territory of San Bernardino County, California.

Project Description: The Project includes re-grading the median cross slopes from the existing 6:1 or steeper gradients to 10:1 or flatter gradients. The Project will result in permanent impacts to 247 acres of Agassiz's desert tortoise (*Gopherus agassizii*) habitat. The Project is expected to result in incidental take of Agassiz's Desert Tortoise, which is designated as a threatened species under the California Endangered Species Act. The ITP referenced above as issued by CDFW authorizes incidental take of species listed under CESA that may occur as a result of Project implementation.

This is to advise that CDFW, acting as ☐ the lead agency / ☒ a responsible agency] approved the above-described project on 1/23/2020 and made the following determinations regarding the above described project:

1. The project ☐ will / ☒ will not] have a significant effect on the environment (This determination is limited to effects within CDFW's permitting jurisdiction as a responsible agency).
 2. ☐ An environmental impact report / ☒ A negative declaration] was prepared by the lead agency for the original project.
 3. Additional mitigation measures ☒ were / ☐ were not] made a condition of CDFW's approval of the project.
 4. A mitigation reporting or monitoring plan ☒ was / ☐ was not] adopted by CDFW for this project.
 5. A Statement of Overriding Considerations ☐ was / ☒ was not] adopted by CDFW for this project.
 6. Findings ☐ were / ☒ were not] made by CDFW pursuant to Public Resources Code § 21081(a). CDFW did, however, adopt findings to document its compliance with CEQA.
 7. Compliance with the environmental filing fee requirement at Fish and Game Code § 711.4 (check one):
 - ☐ Payment is submitted with this notice.
 - ☒ A copy of a receipt showing prior payment was submitted to CDFW.
- ☒ Responsible Agency statement: The Negative Declaration prepared by the lead agency for the Project is available to the general public at the office location listed above for the lead agency. CDFW's administrative record of proceedings related to the incidental take permit is available to the public for review at CDFW's regional office.

Signature

Leslie MacNair

Date:

1/23/2020

Leslie MacNair, Regional Manager

Governor's Office of Planning & Research

Date Received for filing at OPR: FEB 28 2020

STATE CLEARINGHOUSE

**CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
CALIFORNIA ENDANGERED SPECIES ACT
INCIDENTAL TAKE PERMIT
NO. 2081-2019-006-06**

**California Department of Transportation
Interstate 40 Regrade Existing Median Project (Post Mile 125.0 -154.6)**

CEQA FINDINGS

INTRODUCTION:

The California Department of Fish and Wildlife (CDFW) has prepared these findings to document its compliance with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 *et seq.*). CDFW is a responsible agency under CEQA with respect to the Interstate 40 Regrade Existing Median Project (Post Mile 125.0-154.6) (Project) because of its permitting authority under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 *et seq.*). (See generally Pub. Resources Code, §§ 21002.1, subd. (d), 21069; CEQA Guidelines, § 15381; see also Cal. Code Regs., tit. 14, § 783.3, subd. (a).)¹ CDFW makes these findings under CEQA as part of its discretionary decision to authorize California Department of Transportation, District 8 (Permittee) to incidentally take Agassiz's Desert Tortoise (*Gopherus agassizii*) during implementation of the Project. (See generally Fish & G. Code, § 2081, subd. (b); Cal. Code Regs., tit. 14, § 783.4.) The Agassiz's Desert Tortoise is designated as a threatened species under CESA. (Cal. Code Regs., tit. 14, § 670.5, subd. (b)(4)(A).

CDFW is a responsible agency under CEQA with respect to the Project because of prior environmental review and approval of the Project by the lead agency California Department of Transportation, District 8 (Caltrans). (See generally Pub. Resources Code, § 21067; CEQA Guidelines, § 15367.) Caltrans analyzed the environmental impacts associated with implementation of the Project in a Mitigated Negative Declaration Interstate 40 Regrade Median Cross Slopes (SCH No. 2018081100) and approved the Project on January 22, 2019. In so doing, Caltrans imposed various mitigation measures for impacts to the Covered Species as conditions of Project approval and concluded that Project-related impacts to the Covered Species could be substantially lessened with implementation of mitigation and avoidance measures, such that the impacts would be less than significant.

As approved by Caltrans, the Project involves the re-grading the median cross slopes from the existing 6:1 or steeper gradients to 10:1 or flatter gradients. The Project site is within the range of the Covered Species and may support individuals of the species. Development of the Project site will result in the permanent loss of 247 acres of habitat for the Covered Species and take of the Covered Species as defined by Fish and Game

¹ The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with Section 15000.

Code is expected. (Fish & G. Code, § 86.) These impacts fall within CDFW's permitting jurisdiction under CESA. (*Id.*, §§ 2080, 2081, subd. (b).)

As a responsible agency, CDFW's CEQA obligations are more limited than those of the lead agency, in that CDFW is responsible for considering only the effects of those activities involved in the Project which it is required by law to carry out or approve. Thus, while CDFW must consider the environmental effects of the Project as set forth in Caltrans prior analysis, CDFW has responsibility to mitigate or avoid only the direct or indirect environmental effects of those parts of the Project which it decides to carry out, finance, or approve. (Pub. Resources Code, § 21002.1, subd. (d); CEQA Guidelines, §§ 15041, subd. (b), 15096, subds. (f)-(g).) Accordingly, because CDFW's exercise of discretion is limited to issuance of an Incidental Take Permit (ITP) for the Project, CDFW is responsible for considering only the environmental effects that fall within its permitting authority under CESA. (See generally *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 935-941.) Indeed, with respect to all other effects associated with implementation of the Project, CDFW is bound by the legal presumption that the Mitigated Negative Declaration fully complies with CEQA. (Pub. Resources Code, § 21167.3; *City of Redding v. Shasta County Local Agency Formation Commission* (1989) 209 Cal.App.3d 1169, 1178-1181; see also CEQA Guidelines, § 15096, subd. (e); Pub. Resources Code, § 21167.2; *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1130.)

FINDINGS:

CDFW has considered the Mitigated Negative Declaration adopted by Caltrans as the lead agency for the Project.

CDFW finds that the mitigation measures imposed as conditions of Project approval by Caltrans, along with the mitigation measures and Conditions of Approval set forth in CDFW's ITP for the Project, will ensure that all Project-related impacts on the Covered Species are mitigated to below a level of significance under CEQA.

CDFW finds that issuance of the ITP will not result in any previously undisclosed potentially significant effects on the environment or a substantial increase in the severity of any potentially significant environmental effects previously disclosed by the lead agency. Furthermore, to the extent the potential for such effects exists, CDFW finds adherence to and implementation of the conditions of Project approval adopted by the lead agency, as well as adherence to and implementation of the Conditions of Approval imposed by CDFW through the issuance of the ITP, will avoid or reduce such potential effects to below a level of significance.

The following measures and others set forth in CDFW's ITP for the Project will avoid to the extent feasible and mitigate to below a level of significance all Project-related impacts on the Covered Species:

- A. The Permittee will purchase 741 acres of Covered Species credits from a CDFW-approved mitigation or conservation bank or acquire and permanently preserve 741 acres of Covered Species' habitat and provide for the maintenance and management of the habitat in perpetuity.
- B. Compliance monitoring will be reported monthly and annual reports will be sent to CDFW by January 31 of each year.
- C. Non-compliance with the ITP shall be reported to CDFW immediately.
- D. Covered Species found on the Project site shall be relocated in accordance with the Desert Tortoise Translocation Plan.
- E. Permittee will prepare and submit a final mitigation report within 45 days following completion of the Project to notify CDFW of the success and effectiveness of required mitigation measures.

CDFW finds that the Mitigation Monitoring and Reporting Program in Attachment 1 of CDFW's ITP for the Project will ensure compliance with mitigation measures by requiring the Permittee to monitor and report progress in implementing those measures for review by CDFW staff.

The Mitigation Monitoring and Reporting Program is adopted.

The Project is approved.

DATE: 1/23/2020

By: Leslie MacNair

Leslie MacNair, Regional Manager
INLAND DESERTS REGION
DEPARTMENT OF FISH AND WILDLIFE

**CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
CALIFORNIA ENDANGERED SPECIES ACT
INCIDENTAL TAKE PERMIT
NO. 2081-2019-032-06**

**California Department of Transportation
Interstate 10 Repaving Project (Post Mile 104.90 -134.00)**

CEQA FINDINGS

INTRODUCTION:

The California Department of Fish and Wildlife (CDFW) has prepared these findings to document its compliance with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 *et seq.*). CDFW is a responsible agency under CEQA with respect to the Interstate 10 Repaving Project (Post Mile 104.90 -134.00) (Project) because of its permitting authority under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 *et seq.*). (See generally Pub. Resources Code, §§ 21002.1, subd. (d), 21069; CEQA Guidelines, § 15381; see also Cal. Code Regs., tit. 14, § 783.3, subd. (a).)¹ CDFW makes these findings under CEQA as part of its discretionary decision to authorize California Department of Transportation, District 8 (Permittee) to incidentally take Agassiz's Desert Tortoise (*Gopherus agassizii*) during implementation of the Project. (See generally Fish & G. Code, § 2081, subd. (b); Cal. Code Regs., tit. 14, § 783.4.) The Agassiz's Desert Tortoise is designated as a threatened species under CESA. (Cal. Code Regs., tit. 14, § 670.5, subd. (b)(4)(A).

CDFW is a responsible agency under CEQA with respect to the Project because of prior environmental review and approval of the Project by the lead agency California Department of Transportation, District 8 (Caltrans). (See generally Pub. Resources Code, § 21067; CEQA Guidelines, § 15367.) Caltrans analyzed the environmental impacts associated with implementation of the Project in a Mitigated Negative Declaration Interstate 10 Pavement Rehabilitation Project (SCH No. 2019059099) and approved the Project on November 15, 2019. In so doing, Caltrans imposed various mitigation measures for impacts to the Covered Species as conditions of Project approval and concluded that Project-related impacts to the Covered Species could be substantially lessened with implementation of mitigation and avoidance measures, such that the impacts would be less than significant.

As approved by Caltrans, the Project involves the re-grading the median cross slopes from the existing 6:1 or steeper gradients to 10:1 or flatter gradients. The Project site is within the range of the Covered Species and may support individuals of the species. Development of the Project site will result in the permanent loss of **169.53 acres of critical habitat** for the Covered Species and take of the Covered Species as defined by

¹ The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with Section 15000.

Fish and Game Code is expected. (Fish & G. Code, § 86.) These impacts fall within CDFW's permitting jurisdiction under CESA. (*Id.*, §§ 2080, 2081, subd. (b).)

As a responsible agency, CDFW's CEQA obligations are more limited than those of the lead agency, in that CDFW is responsible for considering only the effects of those activities involved in the Project which it is required by law to carry out or approve. Thus, while CDFW must consider the environmental effects of the Project as set forth in Caltrans prior analysis, CDFW has responsibility to mitigate or avoid only the direct or indirect environmental effects of those parts of the Project which it decides to carry out, finance, or approve. (Pub. Resources Code, § 21002.1, subd. (d); CEQA Guidelines, §§ 15041, subd. (b), 15096, subds. (f)-(g).) Accordingly, because CDFW's exercise of discretion is limited to issuance of an Incidental Take Permit (ITP) for the Project, CDFW is responsible for considering only the environmental effects that fall within its permitting authority under CESA. (See generally *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 935-941.) Indeed, with respect to all other effects associated with implementation of the Project, CDFW is bound by the legal presumption that the Mitigated Negative Declaration fully complies with CEQA. (Pub. Resources Code, § 21167.3; *City of Redding v. Shasta County Local Agency Formation Commission* (1989) 209 Cal.App.3d 1169, 1178-1181; see also CEQA Guidelines, § 15096, subd. (e); Pub. Resources Code, § 21167.2; *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1130.)

FINDINGS:

CDFW has considered the Mitigated Negative Declaration adopted by Caltrans as the lead agency for the Project.

CDFW finds that the mitigation measures imposed as conditions of Project approval by Caltrans, along with the mitigation measures and Conditions of Approval set forth in CDFW's ITP for the Project, will ensure that all Project-related impacts on the Covered Species are mitigated to below a level of significance under CEQA.

CDFW finds that issuance of the ITP will not result in any previously undisclosed potentially significant effects on the environment or a substantial increase in the severity of any potentially significant environmental effects previously disclosed by the lead agency. Furthermore, to the extent the potential for such effects exists, CDFW finds adherence to and implementation of the conditions of Project approval adopted by the lead agency, as well as adherence to and implementation of the Conditions of Approval imposed by CDFW through the issuance of the ITP, will avoid or reduce such potential effects to below a level of significance.

The following measures and others set forth in CDFW's ITP for the Project will avoid to the extent feasible and mitigate to below a level of significance all Project-related impacts on the Covered Species:

- A. The Permittee will purchase **847.65** acres of Covered Species credits from a CDFW-approved mitigation or conservation bank or acquire and permanently preserve 847.65 acres of Covered Species' habitat and provide for the maintenance and management of the habitat in perpetuity.
- B. Compliance monitoring will be reported monthly and annual reports will be sent to CDFW by January 31 of each year.
- C. Non-compliance with the ITP shall be reported to CDFW immediately.
- D. Covered Species found on the Project site shall be relocated in accordance with the Desert Tortoise Translocation Plan.
- E. Permittee will prepare and submit a final mitigation report within 45 days following completion of the Project to notify CDFW of the success and effectiveness of required mitigation measures.

CDFW finds that the Mitigation Monitoring and Reporting Program in Attachment 1 of CDFW's ITP for the Project will ensure compliance with mitigation measures by requiring the Permittee to monitor and report progress in implementing those measures for review by CDFW staff.

The Mitigation Monitoring and Reporting Program is adopted.

The Project is approved.

DATE:

1/23/2020

By:

Leslie MacNair

Leslie MacNair, Regional Manager
INLAND DESERTS REGION
DEPARTMENT OF FISH AND WILDLIFE