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March 21, 2019

Governor's Office of Planning & Research

MAR 29 2019

STATE CLEARINGHOUSE

Gary Brown, County Engineer
Mariposa County Department of Public Works
4639 Ben Hur Road
Mariposa, California 95338
GBrown@mariposacounty.org

**Subject: Oak Road Bridge (40C-0060) Over Bear Creek Replacement (Project)
MITIGATED NEGATIVE DECLARATION (MND)
SCH No.: 2019029139**

Dear Mr. Brown:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt an MND from the Mariposa County Department of Public Works for the 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, we appreciate 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 respectfully requests that the following comments be considered.

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.

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.

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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 (LSA) 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.

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 activities associated with construction of the Project could result in pollution of Waters of the State from storm runoff or construction-related erosion. Potential impacts to the wildlife resources that utilize these watercourses include the following: increased sediment input from road or structure runoff; toxic runoff associated with development activities and implementation; and/or impairment of wildlife movement along riparian corridors. The Regional Water Quality Control Board and the United States Army Corps of Engineers also has jurisdiction regarding discharge and pollution to Waters of the State.

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, 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., Title 14, Chapter 3, § 15380), CDFW recommends it be fully considered in the environmental analysis for the Project.

PROJECT DESCRIPTION SUMMARY

Proponent: Mariposa County Department of Public Works

Objective: The objective of the Project is to remove the existing 22-foot-long by 16.5-foot-wide one lane Oak Road Bridge and replace it with a new 20-foot-wide bridge.

The existing bridge, built in 1985, does not meet current County, American Association of State Highway and Transportation Officials, California Department of Forestry and Fire Protection's (CALFIRE), and the California Department of Transportation design criteria and standards. In addition, the existing bridge cannot pass the 50-year or 100-year storm flows.

Project activities for installing the new bridge include: vegetation removal; excavation and drilling for the new bridge foundations; constructing new approaches; grading and excavation in Mariposa Creek (It is assumed "Mariposa" Creek is a type-o, and should be "Bear" Creek) channel for the abutment walls and rock slope protection; utility relocation; and may require temporary dewatering the work site.

Location: The Project will occur over Bear Creek, on Oak Road, one mile north of the community of Midpines, adjacent to and west of Highway 140, within the southeastern portion of Section 25, Township 4 South, Range 18 East, Mount Diablo Baseline and Meridian, in Mariposa County.

Timeframe: Unspecified

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist Mariposa 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.

The Initial Study/Mitigated Negative Declaration (IS/MND) prepared for the Project indicates that the Project area has the potential to support sensitive biological resources. The Project therefore has the potential to impact these resources. CDFW recognizes that the IS/MND outlines mitigation measures to reduce impacts to biological resources. However, CDFW is concerned that, as currently drafted, these measures may not be adequate to reduce impacts to a level that is less than significant. Specifically, CDFW is concerned regarding adequacy of mitigation measures for the State Candidate threatened and species of special concern foothill yellow-legged frog (*Rana boylei*), special-status plants, and waterway and riparian resources.

I. Mitigation Measure or Alternative and Related Impact Shortcoming

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 (USFWS)?

COMMENT 1: Mitigation Measure (MM) BIO-1, Special-Status Plant Species

Section: Biological Resources, Page 19-22

Issue: The IS/MND indicates that the Project site contains suitable habitat for the State rare and California Native Plant Society (CNPS) 1B Rank Yosemite Onion (*Allium yosemitense*), Congdon's woolly sunflower (*Eriophyllum congdonii*), and Congdon's lewisia (*Lewisia congdonii*); and CNPS 1B Rank big-scale balsamorhiza (*Balsamorhiza macrolepis*), Mariposa clarkia (*Clarkia biloba ssp. australis*), Parry's horkelia (*Horkelia parryi*), and Madera leptosiphon (*Leptosiphon serrulatus*). MM BIO-1 proposes focused preconstruction surveys within 30 days prior to construction, and if special-status plant species are found in the Project site, CDFW would be notified 10 days prior to ground disturbing activities in accordance with the California Native Plant Protection Act of 1977 (Fish & G. Code, § 1900 - 1913).

Fish and Game Code Section 1913 states in part that "*the removal of endangered or rare native plants from a canal, lateral ditch, building site, or road, or other right-of-way by the owner of the land or his agent, or the performance by a public agency or a publicly or privately owned public utility of its obligation to provide service to the public shall not be restricted by this chapter because of the presence of rare or endangered plants...*". It appears that this section of the Fish and Game Code has been misinterpreted by the Project proponent and misapplied to this Project. Further, this Fish and Game Code Section only applies to State endangered and rare plants and would not apply to other special-status plant species. Additionally, although MM BIO-1 of the IS/MND requires a pre-activity survey and installation of high visibility protective fencing around special-status plants, it does not specify the protocol to be used or the areas where surveys will take place.

Specific impact: Without appropriate avoidance and minimization measures for special-status plants, potential significant impacts resulting from ground- and vegetation-disturbing activities associated with Project construction include inability to reproduce and direct mortality.

Evidence impact would be significant: Special-status plants identified in the IS/MND are threatened by recreational activities, road maintenance, erosion, illegal dumping, foot traffic, vehicles, development, and non-native plants, (CNPS 2019).

Recommended Potentially Feasible Mitigation Measure(s) 1:

To evaluate potential impacts to special-status plants, CDFW recommends conducting the following evaluation of the entire Project area, including staging areas, and editing MM BIO-1 to include the following measures.

Focused Botanical Surveys

CDFW recommends that the Project site be surveyed for special-status plants by a qualified botanist following the "Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities" (CDFW 2018). This protocol, which is intended to maximize detectability, includes the identification of reference populations to facilitate the likelihood of field investigations occurring during the appropriate floristic period. Further, if a State rare or State or federally listed plant species is identified during the botanical surveys, then consultation with CDFW and/or USFWS should be conducted.

Special-Status Plant Avoidance

CDFW recommends that special-status plant species be avoided whenever possible by delineating and observing a no-disturbance buffer of at least 50 feet from the outer edge of the plant population(s) or specific habitat type(s) required by special-status plant species. If buffers cannot be maintained, then CDFW recommends providing greater detail regarding alternate minimization and compensatory mitigation measures, such as reduced buffers, describing the intent and anticipated success of transplanting, and specifying success criteria for transplanted plants and related long-term protection and management that would occur under a conservation easement. In addition, please be advised that transplantation of a special-status plant species may require other authorization such as a Scientific Collecting Permit. Furthermore, transplantation of a State rare or listed plant species such as Yosemite onion cannot occur absent the acquisition of an Incidental Take Permit (ITP), pursuant to Fish and Game Code Section 2081(b). ***Transplantation of a State rare or listed species without securing a CDFW issued ITP would constitute unauthorized take and be considered a violation of Fish and Game Code and CESA.***

COMMENT 2: MM BIO-2, Foothill yellow-legged frog (FYLF)(*Rana boylei*)

Section: 4.4 Biological Resources, page 19 - 23

Issue: The IS/MND identifies the potential for FYLF to occur within the Project area. The IS/MND states Bear Creek is unlikely to provide adequate ponding depth and duration to support metamorphosis, however, it could provide a potential dispersal corridor. On July 7, 2017, the Fish and Game Commission published its acceptance of a petition for consideration and designation of the FYLF as a candidate species. Pursuant to Fish and Game Code Section 2074.6, CDFW has initiated a status review report to inform the Commission's decision on whether listing of FYLF, pursuant to CESA, is warranted. During the candidacy period, consistent with CEQA Guidelines, Section 15380, the status of the FYLF as a threatened candidate species under

CESA (Fish & G. Code, § 2050 et seq.) qualifies it as an E, R, or T species under CEQA. It is unlawful to import into California, export out of California or take, possess, purchase, or sell within California, FYLF and any part or product thereof, or attempt any of those acts, except as authorized pursuant to CESA. Under Fish and Game Code Section 86, take means to hunt, pursue, catch, capture, or kill, or to attempt to hunt pursue, catch, capture, or kill. Consequently, take of FYLF during the status review period is prohibited unless authorization to Fish and Game Code Section 2081(b) is obtained.

Specific impact: FYLF are found in the vicinity of streams in a variety of habitats. Potentially significant impacts associated with Project activities include inadvertent entrapment, destruction of eggs and oviposition (i.e., egg-laying) sites, degradation of water quality, reduced reproductive success, reduction in health and vigor of eggs and/or young, and direct mortality of individuals.

Evidence impact would be significant: The Project sites within Mariposa County are within the range of the FYLF, and FYLF are known to occur in the vicinity of the Project. In the Sierra Nevada, FYLF have disappeared from approximately 66% of locations historically documented as occupied (Thomson et al. 2016). Land use changes that result in degradation or destruction of riparian habitat; road development and use; urbanization, and water diversion are among proximate factors contributing to local declines of FYLF (Thomson et al. 2016, USDA 2016). In the context of the proposed Project's activities and declining population trend, impacts of the Project on local and regional populations of FYLF, if present, may be significant

Recommended Potentially Feasible Mitigation Measure(s) 2:

Because the IS/MND identifies the potential for FYLF to occur on Project sites, CDFW recommends conducting the following evaluation of individual Project sites, editing the IS/MND to include the following measures, and that these measures be made conditions of approval for the Project.

FYLF Habitat Assessment

CDFW recommends that a qualified biologist conduct a habitat assessment of individual Project areas in advance of Project implementation, to determine if the Project area or its vicinity contains suitable habitat for FYLF.

FYLF Surveys

MM BIO-2 describes preconstruction surveys for FYLF no more than 24 hours prior to construction activities. Since take of FYLF during the status review will be prohibited unless authorization pursuant to CESA is obtained, CDFW recommends that a

qualified biologist assess the Project area for potential FYLF occupancy well in advance of construction activities to evaluate potential permitting needs. CDFW recommends that focused visual encounter surveys be conducted by a qualified biologist during appropriate survey period(s) (April through October) in areas where potential habitat exists. CDFW advises that these surveys generally follow the methodology described in pages 5–7 of "*Considerations for Conserving the Foothill Yellow-Legged Frog*" (CDFW 2018a). In addition, CDFW advises surveyors to adhere to "*The Declining Amphibian Task Force Fieldwork Code of Practice*" (Declining Amphibian Task Force 1998). If any life stage of the FYLF (adult, metamorph, larvae, egg mass) is found, CDFW recommends consulting with CDFW to develop avoidance measures and evaluate permitting needs.

Reporting Survey Results

Submission of survey results to CDFW is recommended. In the event of negative findings, CDFW recommends that consultation with CDFW include documentation demonstrating FYLF are unlikely to be present in the vicinity of the Project site. Information submitted may include, but is not limited to, a full habitat assessment and survey results. If any life stage of FYLF is detected, consultation with CDFW is advised to determine if an ITP is necessary to comply with CESA.

Take Authorization

CDFW recognizes there may be circumstances where take of FYLF during candidacy may be unavoidable. If surveys find that FYLF are occupying the Project area and cannot be avoided, CDFW may issue an ITP authorizing take of FYLF, pursuant to Fish and Game Code Section 2081(b). Take authorization is issued only when take is incidental to an otherwise lawful activity, the impacts of the take are minimized and fully mitigated, the applicant ensures there is adequate funding to implement any required measures, and take is not likely to jeopardize the continued existence of the species.

COMMENT 3: Lake and Streambed Alteration

Section: 4.4 Biological Resources, pages 18 – 27

Issue: The IS/MND Project's descriptions includes activities within the bed, bank, and channel of Bear Creek, and acknowledges the presence of riparian habitat at Project site. While the IS/MND states that the Project will be designed to avoid impacts to these resources, where feasible, it also acknowledges that the Project could result in both direct and indirect impacts to them. Several mitigation measures are proposed; however, these measures do not specifically require Notification to CDFW if it is

determined that Project activities are subject to CDFW's regulatory authority. In addition, the Project description includes the option of the diversion of water around work site but does not provide any guidance or impose any requirements for conducting water diversions.

Specific impact: Work within stream channels has the potential to result in substantial diversion or obstruction of natural flows; substantial change or use of material from the bed, bank, or channel (including removal of riparian vegetation); deposition of debris, waste, sediment, toxic runoff or other materials into water causing water pollution and degradation of water quality.

Evidence impact is potentially significant:

Lake and Streambed Alteration

The Project includes activities within the bed, bank, and channel of Bear Creek. Activities within this feature are subject to CDFW's LSA regulatory authority. Construction activities within these features have the potential to impact downstream waters. Streams function in the collection of water from rainfall, storage of various amounts of water and sediment, discharge of water as runoff and the transport of sediment, and they provide diverse sites and pathways in which chemical reactions take place and provide habitat for fish and wildlife species. Disruption of stream systems such as these can have significant physical, biological, and chemical impacts that can extend into the adjacent uplands adversely affecting not only the fish and wildlife species dependent on the stream itself, but also the flora and fauna dependent on the adjacent upland habitat for feeding, reproduction, and shelter.

Water Diversion

Water diversions can impact flow regimes. Prolonged low flows can cause streams to become degraded and cause channels to become disconnected from floodplains (Poff et al. 1997). Amphibians can be sensitive to decreased flows; plethodontid salamanders are intolerant to desiccation and thus vulnerable to headwater stream diversions (Ray 1958). Kupferberg et al. (2012) reported that low flows were strongly correlated with early life stage mortality and decreased adult densities of FYLF (*Rana boylei*). Plant cover and diversity can also be decreased by reduced flows (Busch and Smith 1995), likely as a result of physiological stress leading to reduced growth rates and recruitment, (Fenner et al. 1985, Kondolf and Curry 1986, Rood and Mahoney 1990).

As flow rates are reduced by diversion, water temperature increases. When water temperatures increase they hold less dissolved oxygen and increase in pH; reduction

in dissolved oxygen can decrease survival of juvenile salmonids (Selong et al. 2001, Martins et al. 2011). Diversions can also be barriers to fish passage if they are not properly designed.

Recommended Potentially Feasible Mitigation Measure(s) 3:

CDFW recommends editing IS/MND to include the following measures as conditions of Project approval and conducting the following evaluation of the Project area prior to implementation of Project activities.

Notification of Lake or Streambed Alteration

Project-related activities that have the potential to change the bed, bank, and channel of streams or lakes, including but not requiring alterations to riparian vegetation, are subject to CDFW's LSA regulatory authority pursuant to Fish and Game Code Section 1600 et seq.; therefore, Notification may be warranted. Fish and Game Code Section 1600 et seq. 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); or (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. CDFW is required to comply with CEQA in the issuance of an LSA Agreement. For additional information on notification requirements, please contact our staff in the LSA Program at (559) 243-4593.

Water Diversion

In the event that stream diversion is necessary, CDFW advises that diversions (a) be conducted in a manner that prevents pollution and/or siltation; (b) provides flows to downstream reaches during all times that the natural flow would support aquatic life; (c) that said flows are of sufficient quality and quantity, and of appropriate temperature to support aquatic life, both above and below the diversion; and (d) that normal flows be restored to the affected stream immediately upon completion of work. With regards to cofferdams, CDFW recommends that they not be made of silt, sand and gravel, or other substances subject to erosion unless first enclosed by protective material and that the enclosure and supportive material be removed as soon as the work is completed. With regards to dewatering, CDFW recommends (a) that water pumped from the Project site be discharged to a location outside the wetted channel to allow sediment to drop out; (b) water be allowed to return to the stream below the Project site to maintain water flow; (c) temporary diversion structures used to isolate the Project site be constructed in a manner that prevents seepage into the Project

site; and (d) the structure, including all fill, enclosure material, and trapped sediments, be removed when the Project is completed.

If it is necessary to dewater the Project site, either by pump or gravity flow, CDFW recommends that the suction end of the intake pipe be fitted with fish screens meeting CDFW and National Marine Fisheries Service (NMFS) criteria, as outlined in the NMFS (1997) "*Fish Screening Criteria for Anadromous Salmonids*," to prevent entrainment or impingement of small fish and other wildlife. CDFW recommends development of a wildlife removal and rescue plan and that this plan be submitted to CDFW for approval prior to the start of Project activities. As part of the wildlife removal and rescue plan, CDFW recommends that a record be maintained of all wildlife rescued and moved, including information on the date of capture and relocation, the method of capture, location of relocation in relation to the Project site, and the number and type of wildlife captured and relocated.

Please note that implementation of the above recommendations does not eliminate the need to obtain the appropriate permitting prior to the start of stream diversion or dewatering activities.

II. Editorial Comments and/or Suggestions

Project Description:

There is a type-o on page seven (7) of the IS/MND. The last bullet under Construction Activities list grading and excavation work in Mariposa Creek. Based on the IS/MND, it appears this is type-o and should be Bear Creek.

Nesting Birds:

Habitat within the Project area likely provides nesting habitat for birds. MM BIO-5a includes conducting general pre-construction nesting bird surveys no less than 14 days and not more than 30 days prior to the commencement of construction activities within 250 feet of suitable habitat, and if active nests are found a 500-foot buffer will be used when possible, and the Project proponent would consult with CDFW.

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 the 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. The Project 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.

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 the California Natural Diversity Database (CNDDDB). The CNDDDB field survey form can be found at the following link: http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/CNDDDB_FieldSurveyForm.pdf. The completed form can be emailed 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: http://www.dfg.ca.gov/biogeodata/cnddb/plants_and_animals.asp.

FILING FEES

If it is determined that the Project has the potential to impact biological resources, an assessment of filing fees will 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).

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CONCLUSION

CDFW appreciates the opportunity to comment on the IS/MND to assist the Mariposa County Department of Public Works in identifying and mitigating Project impacts on biological resources.

More information on survey and monitoring protocols for sensitive species can be found at CDFW's website (<https://www.wildlife.ca.gov/Conservation/Survey-Protocols>). Questions regarding this letter or further coordination should be directed to Margarita Gordus, Senior Environmental Scientist (Specialist) at (559) 243-4014 extension 236, or by email at Margarita.Gordus@wildlife.ca.gov.

Sincerely,



 Julie A. Vance
Regional Manager

ec: Office of Planning and Research, State Clearinghouse, Sacramento
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