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GAVIN NEWSOM, Governor
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Governor's Office of Planning & Research

DEC 02 2019

November 22, 2019

STATE CLEARINGHOUSE

Hector Guerra, Chief Environmental Planner
County of Tulare Resource Management Agency
5961 South Mooney Boulevard
Visalia, California 93277
hguerra@co.tulare.ca.us

**Subject: Cross Creek Bend Subdivision (TSM 19-003 AND PZV 19-018) (Project),
MITIGATED NEGATIVE DECLARATION
SCH No. 2019109078**

Dear Mr. Guerra:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt a Mitigated Negative Declaration (MND) from the County of Tulare Resource Management Agency 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.

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.

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, 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 §§ 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).

PROJECT DESCRIPTION SUMMARY

Proponent: Smee Homes, Inc.

Objective: The Project will develop 405 single-family residences. The 69.13-acre site will have a density of 6.27 units per acre constructed on 64.5 acres (approximately 93% of the site). The remaining acreage will be utilized as open space in the form of a stormwater detention basin and roadways with curbs, gutters, and sidewalks. Residential parcels will be $\pm 4,700$ square feet on average. The proposed Project will be developed in four phases.

Location: The Project is located south of Avenue 308 and west of Road 64, within the Goshen Community Plan Urban Development Boundary area in Tulare County, California. Assessor's Parcel No. 073-060-032.

Timeframe: Unspecified

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist Tulare 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 MND indicates that the Project's impacts would be less than significant with the implementation of mitigation measures described in the MND. 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*), the State Species of Special Concern California burrowing owl (*Athene cunicularia*), and nesting birds.

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)

Issue: CDFW acknowledges that Mitigation Measures (MM) 4-1 through 4-4 include nesting surveys for SWHA, the establishment of buffers around active nests, and compensation for loss of foraging habitat. However, MM 4-1 does not include a pre-construction survey in closer proximity to the start of construction, and MM 4-3 does not define buffer distances to be used. For these reasons, as currently drafted, the provisions described in these measures 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)

CDFW recommends editing the MND 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 raptors 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.

COMMENT 2: Burrowing Owl (BUOW)

Issue: CDFW acknowledges that MM 4-10 through 4-12 include pre-construction surveys for BUOW, avoidance buffers and passive relocation during the non-breeding season. However, CDFW is concerned that the pre-construction survey is not timed close enough to the start of construction activities and that avoidance buffers are not large enough to avoid impacts to BUOW burrows. For these reasons, as currently drafted, the provisions described in these measures may not be enforceable or adequate in minimizing impacts to BUOW to a level that is less than significant.

Specific impact: Potentially significant direct impacts associated with the Project's construction include burrow collapse, inadvertent entrapment, nest abandonment, reduced reproductive success, reduction in health and vigor of eggs and/or young, and direct mortality of individuals.

Evidence impact is potentially significant: BUOW rely on burrow habitat year-round for their survival and reproduction. Habitat loss and degradation are considered the greatest threats to BUOW in California's Central Valley (Gervais et al. 2008). The Project area is within the range of BUOW and suitable burrow habitat is present on or in the vicinity of the Project area. Therefore, the Project has the potential to significantly impact local BUOW populations.

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Environmental Setting and Related Impact)

CDFW recommends editing the MND to include the following measures and that these be made conditions of approval for the Project.

Recommended Mitigation Measure 5: BUOW Surveys

CDFW recommends assessing presence/absence of BUOW by having a qualified biologist conduct surveys following the California Burrowing Owl Consortium's "*Burrowing Owl Survey Protocol and Mitigation Guidelines*" (CBOC 1993) and CDFW's *Staff Report on Burrowing Owl Mitigation*" (CDFG 2012). Specifically, CDFW recommends that a pre-construction survey be conducted within 14 days of Project construction.

Recommended Mitigation Measure 6: BUOW Avoidance

CDFW recommends no-disturbance buffers, as outlined in the “*Staff Report on Burrowing Owl Mitigation*” (CDFG 2012), be implemented prior to and during any ground-disturbing activities associated with Project implementation. Specifically, CDFW’s Staff Report recommends that impacts to occupied burrows be avoided in accordance with the following table unless a qualified biologist approved by CDFW verifies through non-invasive methods that either: 1) the birds have not begun egg laying and incubation; or 2) that juveniles from the occupied burrows are foraging independently and are capable of independent survival.

Location	Time of Year	Level of Disturbance		
		Low	Med	High
Nesting sites	April 1-Aug 15	200 m*	500 m	500 m
Nesting sites	Aug 16-Oct 15	200 m	200 m	500 m
Nesting sites	Oct 16-Mar 31	50 m	100 m	500 m

* meters (m)

Recommended Mitigation Measure 7: BUOW Passive Relocation and Mitigation

If BUOW are found to occupy the Project site and avoidance is not possible, it is important to note that according to the Staff Report (CDFG 2012), exclusion is not a minimization or mitigation method and is considered a potentially significant impact under CEQA. However, if necessary, CDFW recommends that burrow exclusion be conducted by qualified biologists and only during the non-breeding season, before breeding behavior is exhibited and after the burrow is confirmed empty through non-invasive methods, such as surveillance. CDFW recommends replacement of occupied burrows with artificial burrows at a ratio of 1 burrow collapsed to 1 artificial burrow constructed (1:1) as mitigation for the potentially significant impact of evicting BUOW. BUOW may attempt to colonize or re-colonize an area that will be impacted; thus, CDFW recommends ongoing surveillance of the Project site during Project activities, at a rate that is sufficient to detect BUOW if they return.

II. Editorial Comments and/or Suggestions

Nesting birds: CDFW acknowledges that the MND includes MM 4-15 through 4-17 to reduce impacts to nesting birds. However, CDFW recommends that a pre-construction survey be timed in closer proximity to the start of construction, and that avoidance buffers be clearly defined in the MND.

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

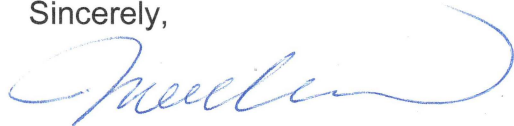
The Project, as proposed, has the potential to impact fish and/or wildlife, and assessment of filing fees may be necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required 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 MND to assist Tulare County in identifying and mitigating subsequent project's impacts on biological resources.

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,



Julie A. Vance
Regional Manager

REFERENCES

- California Burrowing Owl Consortium (CBOC), 1993. Burrowing owl survey protocol and mitigation guidelines. Pages 171-177 in Lincer, J. L. and K. Steenhof (editors). 1993. The burrowing owl, its biology and management. Raptor Research Report Number 9.
- California Department of Fish and Game (CDFG), 2012. Staff Report on Burrowing Owl Mitigation. California Department of Fish and Game. March 7, 2012.
- 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.
- Gervais, J. A., D. K. Rosenberg, and L. A. Comrack, 2008. Burrowing Owl (*Athene cunicularia*) In California Bird Species of Special Concern: A ranked assessment of species, subspecies, and distinct populations of birds of immediate conservation concern in California (W. D. Shuford and T. Gardali, editors). Studies of Western Birds 1. Western Field Ornithologists, Camarillo, California, and California Department of Fish and Game, Sacramento.
- 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.