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<b>Document Title:</b>	NOP Comments from California Department of Fish and Wildlife Service, Bay Delta Region
<b>Description:</b>	N/A
<b>Filer:</b>	Lisa Worrall
<b>Organization:</b>	California Energy Commission
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State of California  
Department of Fish and Wildlife



## Memorandum

Date: February 25, 2021

To: Ms. Lisa Worrall  
California Energy Commission  
1516 Ninth Street  
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[Lisa.worrall@energy.ca.gov](mailto:Lisa.worrall@energy.ca.gov)

DocuSigned by:

*Gregg Erickson*

From: Mr. Gregg Erickson, Regional Manager

California Department of Fish and Wildlife-Bay Delta Region, 2825 Cordelia Road, Suite 100, Fairfield, CA 94534

Subject: San Jose Data Center, Notice of Preparation of a Draft Environmental Impact Report, SCH No. 2021020002, Santa Clara County

The California Department of Fish and Wildlife (CDFW) received the Notice of Preparation (NOP) of a Draft Environmental Impact Report (EIR) from the California Energy Commission (CEC) for the San Jose Data Center (Project) pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.<sup>1</sup>

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that may affect California fish and wildlife resources. 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.

### CDFW ROLE

CDFW is a Trustee Agency with responsibility under CEQA §15386 for commenting on projects that could impact fish, plant and wildlife resources. CDFW is also considered a Responsible Agency if a project would require discretionary approval, such as permits issued under the California Endangered Species Act (CESA), the Native Plant Protection Act, the Lake and Streambed Alteration (LSA) Program and other provisions of the Fish and Game Code that afford protection to the State's fish and wildlife trust resources. Pursuant to our jurisdiction, CDFW has the following concerns, comments, and recommendations regarding the Project.

### PROJECT DESCRIPTION SUMMARY

**Proponent:** Microsoft Corporation

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<sup>1</sup> 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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**Objective:** The Project includes construction of two single-story data center buildings, with associated utility extensions to the site.

**Location:** The Project is located at 1657 Alviso Milpitas Road, San Jose, CA 95134. The Assessor's Parcel Number is 015-31-054.

## COMMENTS AND RECOMMENDATIONS

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

### Western Burrowing Owl Measures

The NOP does not discuss the existing conditions within the Project area. In review of Google Maps aeriels, the existing conditions seem to consist of open land with ruderal grass and herbaceous vegetation. Please be advised that there are known western burrowing owl (*Athene cunicularia*, State Species of Special Concern) occurrences within 0.2 miles of the site (CDFW 2020), and the site could potentially contain western burrowing owl foraging and/or nesting habitat.

Specific information on habitat assessment, burrowing owl survey methods, buffer distances, relocation, and mitigation is provided in the *CDFW Staff Report on Burrowing Owl Mitigation*, dated March 7, 2012, and available at <https://wildlife.ca.gov/Conservation/Survey-Protocols#377281284-birds>.

To reduce potential impacts to burrowing owls within or adjacent to the Project area to less than significant levels, CDFW recommends the following mitigation measures be included in the draft EIR:

1. **Habitat Assessment:** A qualified biologist will conduct a literature search for information on burrowing owl occurrences in and near the Project site. The qualified biologist will conduct a habitat assessment that includes all areas that will be directly or indirectly impacted by the Project and will include collection of data such as vegetation type, vegetation structure, and presence of burrows.
2. **Burrowing Owl Surveys:** If western burrowing owl habitat is present within, and surrounding, the Project area, the qualified biologist will conduct burrowing owl presence surveys. Appropriate surveys should be conducted during both the nesting season (February 1 to August 31) and overwintering period. Burrowing owl surveys will follow protocol-level survey methodologies.
3. **Burrowing Owl Avoidance:** A protective buffer in which construction activities would not occur should be established. Appropriate buffers typically have a 50 to 500-meter radius and vary depending on the level of disturbance and timing of construction. If the burrowing owls show signs of distress (e.g., defensive vocalizations and/or flying away from the nest), buffer distance should be increased.

4. Compensatory Mitigation: If permanent or temporary impacts of the proposed Project to burrowing owl foraging and/or nesting habitat cannot be completely avoided, measures to minimize the impacts of construction on the burrowing owl, and effective compensatory mitigation to offset habitat loss will be implemented. A mitigation plan will be prepared in consultation with CDFW.

### **Bird Nest Measures**

NOP Figure 1-2 shows that the Project site is adjacent to Coyote Creek. The NOP does not include discussion of wildlife that may be present within Coyote Creek and associated habitats such as riparian and wetland. In review of the California Natural Diversity Database (CNDDDB, CDFW 2021), the Santa Clara Valley Habitat Agency Geobrowser (SCVHA 2021), and other sources, special-status avian species that may be present within the Coyote Creek riparian area include tricolored blackbird (*Agelaius tricolor*, State Threatened), white-tailed kite (*Elanus leucurus*, State Fully Protected), and San Francisco common yellowthroat (*Geothlypis trichas sinuosa*, State Species of Special Concern). In order to avoid significant impacts to special-status species and other avian species potentially nesting near the impact area, CDFW recommends that the following protective measures be included in the draft EIR:

1. Nesting Bird Surveys: If Project-related work is scheduled during the nesting season (typically February 15 to August 30 for small bird species such as passerines; January 15 to September 15 for owls; and February 15 to September 15 for other raptors), a qualified biologist will conduct two surveys for active nests of such birds within 14 days prior to the beginning of Project construction, with a final survey conducted within 48 hours prior to construction. Appropriate minimum survey radii surrounding the work area are typically the following: i) 250 feet for passerines; ii) 500 feet for small raptors such as accipiters; and iii) 1,000 feet for larger raptors such as buteos. Surveys will be conducted at the appropriate times of day and during appropriate nesting times.
2. Active Nest Buffers: If the qualified biologist documents active nests within the Project area or in nearby surrounding areas, an appropriate buffer between the nest and active construction will be established. The buffer will be clearly marked and maintained until the young have fledged and are foraging independently. Prior to construction, the qualified biologist will conduct baseline monitoring of the nest to characterize "normal" bird behavior and establish a buffer distance which allows the birds to exhibit normal behavior. The qualified biologist will monitor the nesting birds daily during construction activities and increase the buffer if the birds show signs of unusual or distressed behavior (e.g., defensive flights and vocalizations, standing up from a brooding position, and/or flying away from the nest). If buffer establishment is not possible, the qualified biologist or construction foreman will have the authority to cease all construction work in the area until the young have fledged and the nest is no longer active.

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## **Salt Marsh Harvest Mouse Measures**

The NOP does not describe the habitat located immediately north of the Project site. In review of Google Maps aeriels, a wetland complex that is contiguous to tidal wetlands is located immediately north of the Project site. Salt-marsh harvest mouse (SMHM; *Reithrodontomys raviventris*, State Endangered and Fully Protected, Federal Endangered) CNDDDB occurrences are located within 0.9 miles of this wetland complex, and these wetlands may also provide habitat for SMHM. If SMHM are present within these wetlands, they could potentially enter the Project work area. As a Fully Protected Species (Fish and Game Code section 4700), SMHM may not be taken or possessed at any time and no licenses or permits may be issued for their take except for collecting these species for necessary scientific research. CDFW therefore recommends that the draft EIR include a complete habitat assessment for SMHM within the proposed Project area and surrounding wetlands, and include appropriate and effective avoidance measures in the draft EIR if SMHM could be impacted by Project activities.

## **ENVIRONMENTAL DATA**

CEQA requires that information developed in draft environmental impact reports be incorporated into a data base 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 CNDDDB. The CNDDDB field survey form can be found at the following link: <https://wildlife.ca.gov/Data/CNDDDB/Submitting-Data#44524420-pdf-field-survey-form>. The completed form can be mailed electronically to CNDDDB at the following email address: [CNDDDB@wildlife.ca.gov](mailto:CNDDDB@wildlife.ca.gov). The types of information reported to CNDDDB can be found at the following link: <https://wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

## **FILING FEES**

CDFW anticipates that the Project will have an impact on fish and/or wildlife, and assessment of filing fees is necessary (Fish and Game Code, § 711.4; Pub. Resources Code, § 21089). 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.

## **CONCLUSION**

CDFW appreciates the opportunity to comment on the NOP to assist the CEC in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Ms. Kristin Garrison, Environmental Scientist, at (707) 944-5534 or by email at [Kristin.Garrison@wildlife.ca.gov](mailto:Kristin.Garrison@wildlife.ca.gov); or Ms. Brenda Blinn, Senior Environmental Scientist (Supervisory), at (707) 944-5541 or by email at [Brenda.Blinn@wildlife.ca.gov](mailto:Brenda.Blinn@wildlife.ca.gov).

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

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## LITERATURE CITED

California Department of Fish and Wildlife (CDFW). 2021. Biogeographic Information and Observation System (BIOS). <https://www.wildlife.ca.gov/Data/BIOS>. Accessed February 22, 2021.

Santa Clara Valley Habitat Agency (SCVHA). 2021. Santa Clara Valley Habitat Agency Geobrowser. <http://www.hcpmaps.com/habitat/>. Accessed February 22, 2021.