



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Inland Deserts Region
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Ontario, CA 91764
www.wildlife.ca.gov

GAVIN NEWSOM, Governor
VALERIE TERMINI, Acting Director



February 6, 2026
Sent via email

Leilani Henry
Associate Planner
City of Hesperia
9700 Seventh Avenue
Hesperia, California 92345
Elena.Barragan@lus.sbcounty.gov

Subject: Hesperia Phelan CUP24-00012 (Project)
Mitigated Negative Declaration (MND)
SCH# 2026010656

Dear Leilani Henry:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt an MND from City of Hesperia (City) for the 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, 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 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 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.), the Project proponent may seek related take authorization as provided by the Fish and Game Code.

PROJECT DESCRIPTION SUMMARY

Project Proponent: Au Energy, LLC

Objective: The Project proposes to construct and operate a 5,915-square-foot convenience store, five fuel islands (10 pumps total) beneath a 4,080-square-foot canopy, and a 1,968-square-foot automated car wash tunnel on an approximately 2.66-acre site. The entire 2.66-acre site will be developed with approximately 1.88 acres of paved surface area and 0.78-acres of landscaped area. Other Project elements include 40 parking spaces, two driveways both off U.S. Highway 395 (US-395) and Phelan Road, installation of traffic signals, widening of the southbound side of US-395 by 58-feet from centerline, and underground petroleum storage tanks.

Location: The Project is located in the City of Hesperia in the Mojave Desert of San Bernardino County, north of Phelan Road, west of US-395, and south of Yucca Terrace Dr. The Project is located on Accessor's Parcel Number (APN) 3064-401-10 with grading and landscaping extending onto APNs 3064-401-06 and 3064-401-09, and the proposed sewer line extending onto APN 3064-401-09. The Project site's latitude and longitude are 34.427541°N and -117.400975°W.

Timeframe: Undescribed

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the City 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. Please note that no biological studies were conducted for the Project prior to the circulation of the MND.

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COMMENT # 1: Burrowing Owl (*Athene cunicularia*)

Issue: The Project has the potential to result in permanent loss, degradation, and impacts to burrowing owl habitat. The Project may result in the take of burrowing owl, a candidate species under the CESA, during construction of the Project and the life of the Project. California Fish and Game Code Section 86 defines "take" as "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill".

Specific impact: Project related activities may result in direct or indirect take of burrowing owl by reducing/eliminating suitable habitat for the species, restricting species movement, or causing injury or mortality.

Why impact would occur: Mitigation Measure (MM) BIO-2 proposes to conduct a pre-construction survey to identify burrows of species with the potential to occur on the Project site. This general approach concerns CDFW, as surveys may not follow proper protocols and may miss sign or presence of burrowing owl. Additionally, no surveys for burrowing owl have been conducted consistent with Appendix D of the CDFW 2012 Staff Report on Burrowing Owl Mitigation (CDFG 2012) to properly assess whether burrowing owl may be present within the Project site or surrounding areas. Impacts to burrowing owl may be significant if burrowing owl is not properly identified on-site. Additionally, Mitigation Measure MM BIO-3 details actions to avoid and minimize impacts to burrowing owl; for example, buffers and a mortality reduction or avoidance plan. However, if surveys detect burrowing owl, the Project Applicant should fully avoid impacts to burrowing owl or obtain a CESA Incidental Take Permit (ITP).

Evidence impact would be significant: On October 10, 2024, the Fish and Game Commission determined that burrowing owl warrants protection as a candidate species under CESA (Fish & G. Code, § 2050 et seq.). During the candidacy period, burrowing owl is afforded the same protection as a threatened and endangered species under CESA. The Project, as described, may result in injury, direct mortality, indirect mortality, disruption of breeding behavior, and/or may reduce reproductive capacity of the species. CDFW considers the direct and indirect take of burrowing owl, and the loss of the species' habitat as a significant impact, unless mitigated to a level of less than significant and in compliance with State (*i.e.*, Fish and Game Code sections 3503.5, *etc.*) and Federal laws (*i.e.*, Migratory Bird Treaty Act). If Project activities could result in take, appropriate CESA authorization (*i.e.*, ITP under Fish and Game Code section 2081) should be obtained prior to commencement of Project activities.

Recommended Potentially Feasible Mitigation Measure(s) to Reduce Impacts to Less than Significant: CDFW appreciates that the MND provided mitigation measures, MM BIO-2 and MM BIO-3 to avoid and minimize the Project's impacts to burrowing owl. In consideration of the above-mentioned, CDFW offers the following revisions to MM BIO-2 and MM BIO-3 (edits are in ~~strike through~~ and **bold**) for inclusions in the final MND.

MM BIO-2: Pre-Construction Burrow Surveys (Revised)

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A qualified biologist will perform **breeding season and non-breeding season burrowing owl** pre-construction burrow surveys of the Project work area **according to the CDFW Staff Report on Burrowing Owl Mitigation (2012 or most recent version)** ~~no more than 14 days prior to ground-disturbing activities, and a second pre-construction burrow survey within 24 hours of ground-disturbing activities.~~ **If performing both breeding season and non-breeding season surveys is infeasible, Project Proponent shall coordinate with CDFW regarding whether to proceed with either breeding season surveys or non-breeding season surveys, which will be determined by CDFW and depend on Project timelines.** The qualified biologist **conducting the surveys** will identify, flag, and map all burrows potentially occupied by burrowing owl and then confirm occupation of all potential burrows for buffers and avoidance. Methods of determining burrow occupancy may include, but will not be limited to, visual observations of scat or tracks outside burrow entrances, dusting burrow entrances with a tracking medium for a period of 3 days, installing trail cameras for nocturnal observations, ~~small mammal trapping,~~ or a combination of these methods as appropriate. If burrows occupied by burrowing owl **or sign is** are identified, ~~they will be avoided in accordance with MM BIO-3~~ **shall apply.**

Mitigation Measure MM BIO-3: Burrow Avoidance

If burrows occupied by burrowing owl are found during pre-construction burrow surveys, adequate buffers will be established around burrows. Adequate buffers will be determined by a qualified biologist based on field conditions and the CDFW Staff Report on Burrowing Owl Mitigation (2012). **However, the Project Proponent shall ensure full avoidance of impacts to burrowing owl occurs.** If occupied burrows cannot be avoided **or if any other impact to burrowing owl cannot be fully avoided,** the CDFW will be consulted **and a CESA ITP shall be obtained,** ~~and a burrowing owl-specific mortality reduction or avoidance plan will be developed.~~ This plan may include, but will not be limited to the following:

- ~~• Detailed description of trapping methodology,~~
- ~~• Detailed burrow excavation methods,~~
- ~~• Release location(s), Detailed release methods,~~
- ~~• Artificial burrow design and installation methods,~~
- ~~• Description of exclusion fencing type and implementation, and~~
- ~~• Identification of a wildlife rehabilitation center or veterinary facility capable of and willing to treat injured burrowing owl.~~

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~~Any other construction activities that may impact burrows occupied by burrowing owl (including movement of construction equipment and other activities outside of the fenced/paved areas within wildlife habitat) will be monitored by a qualified biologist. The monitor/inspector will have the authority to stop work activities upon the discovery of burrowing owl sign and allow construction to proceed after the identification and implementation of steps required to avoid or minimize impacts to burrowing owl.~~

COMMENT #2: Nesting Birds

Issue: The Project may have impacts on nesting birds, including CESA-listed birds, Species of Special Concern (SSC), and birds that are subject to Fish and Game Code Sections 3503, 3503.5, and 3513, and the Migratory Bird Treaty Act of 1918.

Specific impact: The Project could result in direct take of birds associated with grading, vegetation removal, and vehicle and equipment strike and indirect take associated with Project operations such as attracting predators and displacement. Further, the Project may lead to the reduction of habitat and habitat quality. For example, the Project is likely to permanently remove foraging and nesting habitat for avian species, such as but not limited to grey vireo (*Vireo vicinor*) (SSC), Cooper's hawk (*Accipiter cooperii*) (SSC), loggerhead shrike (*Lanius ludovicianus*) (SSC), and LeConte's thrasher (*Toxostoma lecontei*) (SSC).

Why impact would occur: MM BIO-4 of the MND proposes to conduct pre-construction surveys for nesting birds; however, MM BIO-4 limits pre-construction surveys for nesting birds to the typical bird nesting season (i.e., February to August). CDFW recommends that disturbance to occupied nests of non-migratory passerine birds, migratory birds, and raptors within the Project site and surrounding area be avoided *any time* birds are nesting onsite. This is in consideration that studies have shown that migratory bird species arrive earlier in the season partially in response to higher temperatures influenced by climate change (Usui et. al. 2016). In addition, in response to warming, birds have been reported to breed earlier and CDFW staff have observed that climate change conditions may result in nesting bird season occurring earlier and later in the year than historical nesting season dates.

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Evidence impact would be significant: It is the Project Proponent's responsibility to avoid take of all nesting birds. Fish & G. Code § 3503 makes it unlawful to take, possess, or needlessly destroy the nest or eggs of any bird, except as otherwise provided by Fish and Game Code or any regulation made pursuant thereto. Fish & G. Code § 3513 makes it unlawful to take or possess any migratory nongame bird except as provided by the rules and regulations adopted by the Secretary of the Interior under provisions of the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. § 703 et seq.). Fish & G. Code § 3503.5 makes it unlawful to take, possess, or destroy any birds in the orders Falconiformes or Strigiformes (birds of prey) to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by Fish and Game Code or any regulation adopted pursuant thereto.

Recommended Potentially Feasible Mitigation Measure(s) to Reduce Impacts to Less than Significant: CDFW appreciates that the draft MND provided a mitigation measure, MM BIO-4, to minimize the Project's impacts to nesting birds. CDFW offers the following revisions to MM BIO-4 (edits are in ~~strike through~~ and bold) for inclusions in the final MND to avoid and minimize impacts to nesting birds.

Mitigation Measure: MM BIO-4: Nesting Bird Survey.

A pre-construction nesting bird survey will be conducted prior to vegetation removal or **initial Project ground disturbance** ~~relocation activities between the nesting bird season (i.e., February 15 through August 31).~~ If an active bird nest that may be impacted by Project-related activities is observed, AMMs, including delaying construction within the immediate vicinity of the active nest or establishing a nest buffer determined by a qualified biologist until the young have fledged or the nest has failed, will be implemented.

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 filled out and submitted online at the following link: <https://wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The types of information reported to CNDDDB can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

ENVIRONMENTAL DOCUMENT FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of environmental document 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

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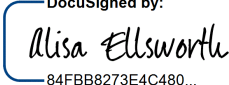
environmental review by CDFW. Payment of the environmental document filing fee is required in order for the underlying Project approval to be operative, vested, and final. (Cal. Code Regs, tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089.)

CONCLUSION

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

Questions regarding this letter or further coordination should be directed to Jason Bill, Senior Environmental Scientist (Specialist) at Christopher.Bill@wildlife.ca.gov

Sincerely,

DocuSigned by:

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ATTACHMENTS

Attachment A: Mitigation Monitoring and Reporting Plan

REFERENCES

California Department of Fish and Game (CDFG). 2012. Staff report on burrowing owl mitigation. State of California, Natural Resources Agency. Available for download at: [Microsoft Word - BUOW Staff Report_final_030712 REV 1.doc \(ca.gov\)](#)

Usui, T., Butchart, S.H.M., and Philmore A.B., (2016). Temporal Shifts and Temperature Sensitivity of Avian Spring Migratory Phenology: A Phylogenetic Meta-analysis. *Journal of Animal Ecology* 86(2): 250-261.

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Attachment A

Mitigation Monitoring and Reporting Plan

Biological Resources (BIO)		
Mitigation Measure (MM)	Implementation Schedule	Responsible Party
<p>MM BIO-2: Pre-Construction Surveys</p> <p>A qualified biologist will perform breeding season and non-breeding season burrowing owl pre-construction surveys of the Project work area according to the CDFW Staff Report on Burrowing Owl Mitigation (2012 or most recent version). If performing both breeding season and non-breeding season surveys is infeasible, Project Proponent shall coordinate with CDFW regarding whether to proceed with either breeding season surveys or non-breeding season surveys, which will be determined by CDFW and depend on Project timelines. The qualified biologist conducting the surveys will identify, flag, and map all burrows potentially occupied by burrowing owl and confirm occupation of all potential burrows. Methods of determining burrow occupancy may include, but will not be limited to, visual observations of scat or tracks outside burrow entrances, installing trail cameras for nocturnal observations, or a combination of these methods as appropriate. If burrows occupied by burrowing owl or sign is identified, MM BIO-3 shall apply.</p>	<p>Prior to initiation of all ground disturbing activities</p>	<p>Project proponent and Qualified Biologist</p>
<p>MM BIO-3: Burrow Avoidance</p> <p>If burrows occupied by burrowing owl are found during pre-construction surveys, adequate buffers will be established around burrows. Adequate buffers will be determined by a qualified biologist based on field conditions and the CDFW Staff Report on Burrowing Owl Mitigation (2012).</p>	<p>Prior to initiation of all ground disturbing activities</p>	<p>Project proponent and Qualified Biologist</p>

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<p>However, the Project Proponent shall ensure full avoidance of impacts to burrowing owl occurs. If occupied burrows cannot be avoided or if any other impact to burrowing owl cannot be fully avoided, the CDFW will be consulted and a CESA ITP shall be obtained.</p>		
<p>MM BIO 4: Nesting Bird Survey</p> <p>A pre-construction nesting bird survey will be conducted prior to vegetation removal or initial Project ground disturbance. If an active bird nest that may be impacted by Project-related activities is observed, AMMs, including delaying construction within the immediate vicinity of the active nest or establishing a nest buffer determined by a qualified biologist until the young have fledged or the nest has failed, will be implemented.</p>	<p>Prior to vegetation removal or initial ground disturbance</p>	<p>Project proponent and Qualified Biologist</p>