



State of California – Natural Resources Agency  
DEPARTMENT OF FISH AND WILDLIFE  
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**GAVIN NEWSOM, Governor**  
**CHARLTON H. BONHAM, Director**



Governor's Office of Planning & Research

September 22, 2021

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## **STATE CLEARINGHOUSE**

Thai-Chau Le  
City of San Jose  
200 East Santa Clara Street, 3rd Floor Tower  
San Jose CA 95113-1905  
[Thai-Chau.Le@sanjoseca.gov](mailto:Thai-Chau.Le@sanjoseca.gov)

Subject: Milligan Parking Lot Project, Notice of Preparation of a Supplemental Draft Environmental Impact Report, SCH No. 2003042127, Santa Clara County

Dear Thai-Chau Le:

The California Department of Fish and Wildlife (CDFW) received the Notice of Preparation (NOP) of a Supplemental Draft Environmental Impact Report (SDEIR) to the Downtown Strategy Environmental Impact Report from the City of San Jose (City) for the Milligan Parking Lot Project (Project) pursuant 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 the California Endangered Species Act (CESA) Permit, the Native Plant Protection Act Permit, the Lake and Streambed Alteration (LSA) Agreement 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:** City of San Jose

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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:** Within 2.6 acres, all existing buildings will be demolished and a new parking lot will be constructed.

**Location:** The Project site is bordered by North Autumn Street to the west, West St. John Street to the south, the Guadalupe River to the east, and existing residential development to the north. Assessor's Parcel Numbers are 259-29-032, 259-29-033, 259-29-071, 259-29-072, and 259-29-102.

## **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.

### **Impacts to Riparian Habitat**

The NOP, Figure 4 Conceptual Site Plan, shows that the Project site is located immediately adjacent to Guadalupe River. The NOP, page 2, states that a Biological Resources Report will be written that will, in part, describe anticipated regulatory requirements, including those under the Santa Clara Valley Habitat Plan (SCVHP). The Santa Clara Valley Habitat Agency Geobrowser (SCVHA 2021) shows that the reach of Guadalupe River adjacent to the Project site is a Category 1 stream and a setback as wide as 150 feet may be required. As a co-permittee to the SCVHP, the City should analyze the specific criteria for setback requirements as it applies to the Project location, parcel slope, land use, and other factors that may determine setback requirements. The existing condition of the parcel includes an undeveloped portion in the northeast corner, measured in Google Earth to be approximately 0.17 acres. SCVHP Section 6.5 Conditions to Minimize Impacts on Natural Communities, page 6-54, states that, regardless of project location, stream setback exceptions may not reduce a Category 1 stream setback to less than a distance of 50 feet for new development or 35 feet for existing or previously developed sites. If a stream setback exception is anticipated, the City should consider this undeveloped area in determining the appropriate stream setback distance. Without appropriate setbacks from Guadalupe River, Project activities such as building demolition and parking lot construction could potentially result in direct or indirect impacts to riparian and/or wetland habitats, and fish and wildlife species. The SDEIR should therefore describe the appropriate setback distance or any anticipated setback exception request following the protocol for determining appropriate setbacks per the SCVHP requirements and process. The SDEIR should also include any additional measures to avoid, minimize, or mitigate for impacts to aquatic, riparian and/or wetland habitats, and the species that depend on -these habitats, to less-than-significant levels.

Fish and Game Code §1602 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; (c) deposit debris, waste or other materials that could pass

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into any river, stream, or lake. Project activities near Guadalupe River may require that the Project proponent submit an LSA notification to CDFW. CDFW is required to comply with CEQA in the issuance of an LSA Agreement. Additional information can be found at <https://www.wildlife.ca.gov/Conservation/LSA>.

### **Avian Nest Measures**

The NOP does not discuss whether implantation of the Project will result in tree removals within the Project area or impacts to avian nesting habitat in the adjacent riparian area. In order to avoid significant impacts to avian species potentially nesting within or adjacent to the Project area, CDFW recommends that the following protective measures be included in the SDEIR:

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.
3. **Qualified Biologist:** A qualified biologist is an individual who has a degree in biological sciences or related resource management with a minimum of two seasonal years post-degree experience conducting bird nest surveys. During or following academic training, a qualified biologist will have achieved a high level of professional experience and knowledge in biological sciences and special-status species identification, ecology and habitat requirements.

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## 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 California Natural Diversity Database (CNDDDB). The CNDDDB field survey form, online field survey form, and contact information for CNDDDB staff can be found 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://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 City in identifying and mitigating Project impacts on biological resources.

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

Sincerely,

DocuSigned by:

*Stephanie Fong*

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Stephanie Fong  
Acting Regional Manager  
Bay Delta Region

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

## LITERATURE CITED

Santa Clara Valley Habitat Agency (SCVHA). 2020. Santa Clara Valley Habitat Agency Geobrowser. <http://www.hcpmaps.com/habitat/>. Accessed September 15, 2021.