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October 9, 2020

Governor's Office of Planning & Research

Oct 12 2020

STATE CLEARINGHOUSE

San Diego Unified Port District
 Attn: Lily Tsukayama,
 Planning Department,
 3165 Pacific Highway
 San Diego, CA 92101-1128
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Subject: San Diego Unified Port District Wetland Mitigation Bank at Pond 20 and PMPA (UPD #EIR-2019-010) (PROJECT) Draft Environmental Impact Report (DEIR), SCH# 2019060167

Dear Ms. Tsukayama:

The California Department of Fish and Wildlife (CDFW) received a Notice of Availability of a DEIR from the San Diego Unified Port District (District) 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.

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.

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

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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Proponent: San Diego Unified Port District

Objective: The Project has two main objectives: creation of a wetland mitigation bank within the District-owned portion of Pond 20 (Bank Parcel) and a Port Master Plan Amendment (PMPA). The PMPA proposes to incorporate the Bank Parcel and adjacent Parcels A, B, and C into the District's Port Master Plan (PMP) and assign commercial land use designations for Parcels A, B, and C.

The environmental analysis located in the DEIR for the Wetland Bank Parcel is project level, whereas the analysis for the incorporation of Parcels A, B, and C is at the programmatic level. Therefore, any development on Parcels A, B, C will undergo future CEQA analysis.

Location: The Project site consists of approximately 95 acres of San Diego Unified Port District-owned and federally-managed land located in the City of San Diego, east of the City of Imperial Beach and south of the confluences of Nestor Creek, Otay River, and San Diego Bay. The Project is located within the Imperial Beach United States Geological Survey (USGS) 7.5-minute quadrangle and is entirely within the Coastal Zone. There is no official address for the Project site. It is located immediately north of Palm Avenue (State Route [SR] 75), south of the San Diego Bay National Wildlife Refuge (NWR)), east of 13th Street, west of 16th Street, and southwest of Otay Valley Regional Park. Interstate-5 (I-5) is located approximately 1 mile east of the project. The Project is also immediately adjacent to the Otay River Estuary Restoration Project (ORERP) on NWR lands. The Project site is composed of six parcels of land identified as Assessor's Parcel Numbers 616-020-(08/12), 616-021-08, 616-021-09 (portion), 621-020-(04/08).

Biological Setting: Historically, the Bank Parcel was used as a salt evaporation pond. The Bank Parcel lies in the Otay River floodplain, more specifically along the south side of the current Otay River channel; however, it has been separated from tidal influence for decades due to historical use as a salt evaporation pond. Currently, the site is comprised of a salt flat and upland interior surrounded by a berm ranging in height from 12 to 18 feet Mean Lower Low Water (MLLW). Nestor Creek and an Otay River tributary are located outside of the berms along the eastern and western boundaries, respectively.

Creation of the mitigation bank will impact disturbed annual brome (*Bromus spp.*) grasslands (0.03 acre), pickleweed (*Salicornia subterminalis*) mats (0.04 acre), ice plant (*Mesembryanthemum spp.*) mats (41.72 acres), sweetclover (*Melilotus sp.*) fields (1.77 acres), upland mustards (*Hirschfeldia incana*; 5.65 acres), broom scrub (*Baccharis sarothroides*; 0.28 acre) shrublands, patches of coast cholla (*Cylindropuntia prolifera*; 0.05 acre), Menzie's goldenbush (*Isocoma menziesii*) scrub (15.75 acres), seablite (*Suaeda taxifolia*) scrub (2.14 acres), berm/roadway (3.53 acres), salt pan (6.74 acres), and open water (0.1 acre) for a total impact area of 76.24 acres of the 83.10-acre mitigation bank site. Vegetation communities on-site which will not be directly impacted by the bank project include ice plant (*Carpobrotus chilensis*; 0.09 acre), crown daisy (*Glebionis coronaria*; 0.02 acre), *Mesembryanthemum spp./Salicornia subterminalis* (3.0 acres); coast prickly pear (*Opuntia littoralis*) scrub (0.11 acre), and thickets of arroyo willow (*Salix lasiolepis*; 0.3 acre). The DEIR notes that Parcels B and C will be used for staging, and a temporary bridge would be required.

Impacts for the berm breach site, which is located partially within the Project area and partially within NWR lands, consists of pickleweed (*Salicornia subterminalis*; 0.16 acre), berm/roadway (0.12 acre), salt pan (0.01 acre), and open water (0.04 acre) for a total of 0.33 acre.

Impacts for Parcels A, B, and C have not been quantified due to the programmatic nature of the analysis in the DEIR. Habitats on Parcel A include disturbed annual brome grasslands (1.10

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acres), crown daisy (0.16 acre), ice plant (*Mesembryanthemum spp.*; 41.72 acres), pickleweed (*Salicornia subterminalis*; 0.3 acre), estuary seablite (*Suaeda taxifolia*; 0.54 acre), berm/roadway (0.13 acre), and salt pan (0.22 acre). Parcel B includes disturbed annual brome grasslands (0.67 acre), crown daisy (0.16 acre), ice plant (*Carpobrotus chilensis*; 0.06 acre) mats, berm/roadway (<0.001 acre), and developed (0.24 acre). Parcel C includes disturbed annual brome grasslands (2.20 acres), flats of saltgrass (*Distichlis spicata*; 1.07 acres), crown daisy (2.29 acres), ice plant mats (0.06 acre), berm/roadway (<0.001 acre), developed (0.24 acre), pickleweed mats (0.08 acre), patches of Russian thistle (*Salsola tragus*; 2.22 acres), and open water (0.002 acre).

Special status species noted on site within the Project area include CESA-listed Belding's savannah sparrow (*Passerculus sandwichensis beldingi*), and Federal Endangered Species Act (ESA)-listed western snowy plover (*Charadrius alexandrinus nivosus*). United States Fish and Wildlife Service (USFWS) Birds of Conservation Concern (BCC) and/or CDFW Species of Special Concern (SSC) noted on-site include: burrowing owl (*Athene cunicularia*), gull-billed tern (*Gelochelidon nilotica vanrossemi*), loggerhead shrike (*Lanius ludovicianus*), black skimmer (*Rynchops niger*), northern harrier (*Circus cyaneus hudsonius*), and San Diego black-tailed jackrabbit (*Lepus californicus bennettii*). Special status animal species which have potential to be on-site due to presence of suitable habitat, or known occurrences adjacent to the Project area include the California Fully Protected (FP) and dually CESA- and ESA-listed endangered light-footed Ridgway's rail (*Rallus obsoletus levipes*) and California least tern (*Sterna antillarum browni*), as well as the ESA-listed threatened coastal California gnatcatcher (*Poliophtila californica californica*).

Only one special status plant species was documented on-site, California boxthorn (*Lycium californicum*; California Native Plant Society (CNPS) List 4.2). Special status and sensitive plant species with the potential to occur due to the presence of suitable habitat include the dually CESA- and ESA-listed salt marsh bird's-beak (*Chloropyron maritimum ssp. maritimum*), ESA candidate Brand's star phacelia (*Phacelia stellaris*), Coulter's goldfields (*Lasthenia glabrata ssp. coulteri*; CNPS List 1B.1), beach goldenaster (*Heterotheca sessiliflora ssp. sessiliflora*; CNPS List 1B.1), Nuttall's acmispon (*Acmispon prostratus*; CNPS List 1B.1), estuary seablite (*Suaeda esteroa*; CNPS List 1B.2), Pacific saltbush (*Atriplex pacifica*; CNPS List 1B.2), aphanisma (*Aphanisma blitoides*; CNPS List 1B.2), and Lewis's evening primrose (*Camissoniopsis lewisii*; CNPS List 3).

Timeframe: Construction of the proposed Project is anticipated to take approximately 17 months, following certification of the Final EIR (FEIR) by the District and issuance of a FONSI by USFWS, final design engineering, and receipt of all applicable permits. It is anticipated these would be complete by early 2021 and construction would commence in 2021. Clearing and grubbing is anticipated to commence in April 2021. Mass grading would occur June through November. Fine grading would occur in December and January. Monitoring and maintenance activities would begin following completion of construction. Construction would occur during daytime hours, Monday through Saturday from 7 a.m. to 4 p.m. Work restrictions may occur because of exceptionally high tides or delays due to rain or following rain events until the ground is dry enough for earth-moving equipment to travel safely.

COMMENTS AND RECOMMENDATIONS

I. Project Description and Related Impact Shortcoming

Proposed Construction Schedule and Bird Breeding Season Overlap

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**Sections: DEIR Table ES-1, Project Description, 2 Construction Schedule and Workforce,
Pages: # ES-8, 2-33**

COMMENT # 1:

Issue: The Project is anticipated to start during April 2021, which is during the breeding season for most bird species, contrary to the recommended dates in mitigation measures (MM) BR-1 and BR-4.

Specific impacts: The proposed timing of clearing and grubbing for the Project occurs during the breeding season for CESA- and ESA-listed species, as well as species protected by the Migratory Bird Treaty Act (MBTA) and Fish and Game code Section 3503 *et. seq* and Section 3511. The EIR does not provide a rationale for a construction start date during the breeding season.

Why impact would occur: As proposed the Project may impact nesting birds resulting in take of active nests. Project activities (including, but not limited to, staging and disturbances to native and nonnative vegetation, structures, and substrates) should occur outside of the avian breeding season which generally runs from February 1 - September 1 (as early as January 1 for some raptors) to avoid take of birds or their eggs.

Evidence impact would be significant: Migratory nongame native bird species are protected by international treaty under the Federal MBTA of 1918 (Title 50, § 10.13, Code of Federal Regulations). Sections 3503.5 and 3513 of the California Fish and Game Code) prohibit take of all raptors and other migratory nongame birds and section 3503 prohibits take of the nests and eggs of all birds. Also, there are CESA- and ESA-listed species known to occur on-site. Direct and indirect impacts to these species, both inside and outside of the breeding season may be significant and could result in violation of either CESA or ESA without an Incidental Take Permit (ITP), or Section 3511 of the Fish and Game Code. Please see Comments numbers 5, 6, 7, and 9 for more information.

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Project Description and Related Impact Shortcoming)

Revise the EIR to reflect a clearing and grubbing start date that is outside of the avian breeding season. Also, revise letter subsection "e" in the list in MM BR-1, as recommended below, to reflect pre-construction surveys for *all* bird species, including raptors, during the breeding season from January 1 - September 15 within 500 feet of Project impacts, with a more detailed nest avoidance plan to ensure adequate avoidance of active bird nests.

Mitigation Measures (MM) CDFW-1a & MM CDFW-1b:

To reduce impacts to less than significant: Revise the construction schedule to reflect that clearing and grubbing shall occur outside of the breeding season, January 1 to September 15. Alternatively, the FEIR could require pre-construction surveys and ongoing monitoring to ensure that grubbing, grading, and ongoing construction activities do not result in the take of birds or their nests, as discussed below.

To reduce impacts to less than significant: If work is required during the breeding season, pre-construction surveys for all bird species shall be conducted during breeding season, from January 1 - September 15 to ensure adequate avoidance of active bird nests. In areas within

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500 feet of suitable adjacent habitat, a qualified biologist should conduct a survey prior to the start of construction activities. The pre-construction survey shall be conducted within three calendar days prior to the start of construction activities (including removal of vegetation). If an active bird nest is found, additional measures should be implemented to ensure that take of birds or eggs or disturbance of breeding activities is avoided. These measures shall consist of implementation of a nest avoidance plan created by the Project biologist that includes a no-work buffer around the nest (100-500 feet depending on the species), a biological monitor present during construction with the ability to halt construction if needed, and possibly the installation of a temporary noise barrier or other sound attenuation at the edge of the Project footprint to reduce noise levels below 60 dB LEQ or ambient (if ambient is greater than 60 dB LEQ).

COMMENT #2:

Berm Separating ORERP and the Project

Sections: 2.4.1 DEIR, Pages: 2-27-28

Issue: Both ORERP and the Project propose the creation of a berm between the Project and the ORERP on the NWR site to the north. Measures to avoid impacts to biological resources from berm construction and removal were not included in the impact analysis in the DEIR.

Specific impact: The DEIR notes that, approval of ORERP occurred in October 2018 but that construction has not yet started. Therefore, considering the unknown construction schedule of ORERP, if needed, the proposed project would construct an earthen berm on the southern edge of the ORERP site as part of the proposed project to ensure tidal separation of the project sites. This berm allows for grading and dredging activities to occur for both projects independently while significantly reducing any potential for inundation to occur on the site that is completed last. Once both projects are constructed, the berm may be removed or left in place. The wetlands would function as intended with or without the berm.

Although it is not clear at this juncture which project would be responsible for berm construction and or removal, possible construction and eventual removal should be analyzed as part of this Project to ensure that impacts are sufficiently mitigated. The DIER should include a discussion of impacts and measures related to construction and removal of the berm, and they should be analyzed in the EIR to ensure the impacts from the Project Description are fully addressed. Mitigation measures to reduce significant impacts related to this activity should be included, if appropriate.

Why impact would occur: This berm would create an artificial boundary between similar habitat types and may increase long-term flooding risk in the area, due to the added volume of the berm in between the marsh habitats. A commitment to remove the berm after both projects are complete was not included in the DEIR. Furthermore, construction and removal of the berm may have additional impacts that were not addressed in the DEIR. Coastal California gnatcatcher, a ESA-listed species, is known to inhabit patches of coastal sage scrub (CSS) adjacent to the berm location to the north, and once restored, there would be habitat for many CESA and ESA listed and Fully Protected species (please see comments #5, #6, #7, and #9 for more information); these species could be directly and indirectly impacted by construction and eventual removal of the berm.

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Evidence impact would be significant: Appendix G of CEQA guidelines states that an impact is significant if it will,

“...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 the California Department of Fish and Game or U.S. Fish and Wildlife Service.”

Impacts from the berm construction and removal may have a substantial impact on sensitive species located adjacent to the area. The Project does not propose any avoidance and minimization for coastal California gnatcatchers during construction or include measures to protect species during the removal of the berm once both projects are complete. Without specific mitigation measures to address these impacts, they may remain significant under CEQA.

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Mitigation Measure or Alternative and Related Impact Shortcoming)

To reduce impacts to less than significant: CDFW recommends that the Project description be revised to include eventual removal of the berm to better connect adjacent habitats, and that the impact analysis should include measures to avoid impacts to species during construction and removal of the berm.

Mitigation Measure MM CDFW-2:

Once both projects are constructed, the berm shall be removed between the restoration sites. See MMs CDFW-5, -6, -7, and -9 for measures to avoid and minimize impacts to species which may be impacted by this project activity. These measures shall be implemented both prior and during berm construction and removal.

COMMENT #3:

Inconsistency in Proposed Staging Areas and Lack of Temporary Impact Calculations for Staging

Sections: DEIR Project Description 2, 3.3.4, Biological Technical Report (BTR-1 2020) Wetland Mitigation Bank at Pond 20 and Port Master Plan Amendment 6.1.1 and 6.1.4 Jurisdictional Wetland Resource and Mitigation Bank Construction Activities, Pages: DEIR 2-33, 3.3-53, BTR-1 70 and 81-82

Issue: The DEIR states that parcels B and C would be used for staging, and would require a temporary bridge to the Bank Parcel, but the BTR is inconsistent and states that Parcels B and C would be used for staging in some sections, and A and C in others, which would require two temporary bridges. Overall, staging impacts were not fully analyzed in the DEIR.

Specific impact: The EIR states,

“[t]he proposed project includes the following two potential staging locations with associated truck haul routes to provide access to and from the project site. A temporary creek crossing

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is anticipated to involve a free span across the top of the bank. The staging locations include:

- **Staging Area #1 – Palm Avenue Staging Area (Parcel B).** No creek crossing or vertical clearance is required to access this staging area. This staging area would be accessed by Palm Avenue and utilize Route 1.
- **Staging Area #2 – Nestor Creek Staging Area (Parcel C).** A temporary crossing of Nestor Creek would be required for Staging Area #2. This would require a temporary bridge over Nestor Creek and vertical clearance to avoid existing overhead electric lines. This staging area would utilize Route 2.”

The BTR reflects the same on page 70, but in the discussion in 6.1.4 states,

“[c]onstruction of staging areas on Parcel A or Parcel C and the associated temporary span crossings over Otay River Tributary and Nestor Creek could also result in impacts to potential CDFW-regulated streambed, including riparian habitat. The project is not expected to result in the permanent loss of CDFW-regulated streambed; however, any unanticipated impacts that result in a permanent loss of CDFW-regulated streambed would be significant.”

It is unclear which staging configuration the environmental analysis is based on in the BTR.

Why impact would occur: If both Parcels A and C are used for construction staging, there would be additional impacts to CDFW regulated stream banks that have not been addressed in the DEIR. The BTR states,

“[t]he berm breach would temporarily impact 0.19 acre of potential CDFW-regulated streambed, including 0.15 acre of riparian habitat associated with the Otay River Tributary. The berm breach would temporarily impact 0.19 acre of CCC wetland. Additionally, if Parcel C is used as a staging area, the temporary span over Nestor Creek could result in temporary impacts of WOUS, including wetlands, potential CDFW-regulated streambed, including riparian habitat, and CCC wetland.”

Both the DEIR and the BTR state that at least one temporary bridge would span across the top of bank, but it is unclear from the information provided if, or how much of, the bank would be impacted by construction, and what habitats it would affect. Without full disclosure of temporary impacts due to staging, CDFW cannot ascertain if impacts have been fully analyzed.

Evidence impact would be significant: Appendix G of CEQA guidelines states, a project would be significant if it would,

“[h]ave a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the California Department of Fish and Game or US Fish and Wildlife Service.”

Although the Project acknowledges the existence of CDFW regulated habitats, it does not quantify all the potential temporary impacts proposed by the Project due to staging; therefore, CDFW cannot ascertain if impacts have been mitigated to below significant.

Recommended Potentially Feasible Mitigation Measure(s)

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Mitigation Measure MM CDFW-3:

To reduce impacts to less than significant: Please revise the BTR to clarify which parcels would be used for construction staging. Also, please quantify all potential impacts for staging to CDFW regulated habitats in the EIR.

II. Environmental Setting and Related Impact Shortcoming

COMMENT #4:

Belding's Savannah Sparrows are Known to Nest on Site and Geographic Information for Nesting Bird Species Were Not Provided in the DEIR or the Biological Resources Survey Report for Pond 20, San Diego, California (BTR-2 2018)

Sections: BTR 3.5.3 Special Status Wildlife Species Page # 3-25

Issue: Belding's savannah sparrow, a CESA-listed species, was documented in the DEIR as occurring on-site, but no spatial data for these occurrences was included with the document; instead, a habitat assessment was provided. The mitigation measures provided do not ensure complete avoidance of direct impacts to Belding's savannah sparrow or its suitable habitat (*Salicornia* or similar habitat) for foraging and nesting. Impacts to either would be considered significant by CDFW. CDFW recommends that the District pursue an Incidental Take Permit (ITP, refer section 2081 of DFG Code) from CDFW.

Specific impact: Table 3-4 of BTR-2, states that 57 Belding's savannah sparrows were identified on-site during the 2016-2017 surveys; however, approximate locations of these individuals or nests were not identified. Without access to this data CDFW cannot ascertain whether the occupied areas of the CESA-listed species have been adequately avoided by the Project, or if an ITP for impacts to the species would be advisable.

Why impact would occur: Figure 5-2 in the DEIR provides a habitat assessment for Belding's savannah sparrow, noting high quality nesting and foraging habitat in riparian areas associated with the tributary to the Otay River and Nestor Creek, and low quality roosting habitat that covers the rest of the bank parcel and Parcels A, B, and C. Although the Project does not propose permanent impacts to riparian areas regulated under 1600, it does propose temporary staging impacts in these areas, as well as a berm breach, and these areas overlap with the high-quality habitat for Belding's savannah sparrows. The Project does not propose acquiring an ITP for this work, and also proposes to start work during the breeding season for the species. Furthermore, the Belding's Savannah sparrow is one of few species of birds that reside year-round in the coastal salt marshes of southern California (Zemal 2010).

As proposed, Project construction could directly or indirectly impact CESA-listed species. MM-BR-4 only provides for protection of nests within a 100-foot buffer of Project construction, and if a CESA-listed species is taken by the Project without an ITP it would be in violation of Fish and Game Code Section 2080. Although the Project provided MM-BR-4 for listed species, the measures provided would not ensure complete avoidance of impacts to the species. CDFW recommends a 500-foot buffer from construction activities to ensure nesting impacts are avoided.

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Evidence impact would be significant: As described in Comment #2, Appendix G of the CEQA guidelines notes that impacts to sensitive species would be significant without mitigation.

Although the Project proposes avoidance of impacts through MM-BR-4, nests could still be impacted by temporary construction if they are located outside of the chosen minimum buffer (100 feet), but still within 500 feet of construction and/or staging. CDFW strongly recommends that the Project pursue an ITP to avoid violation of Section 2080, if direct impacts resulting in take cannot be completely avoided.

Additionally, MM-BR-1(q) states,

“[c]apture and relocation of trapped or injured wildlife listed under ESA or CESA can only be performed by personnel with appropriate state and/or federal permits. Any trapped or injured wildlife and any incidental take shall be reported to the District within 1 working day of the discovery including dates, locations, habitat description, and any corrective measures taken to assist the injured special status species encountered.”

This mitigation measure is not in alignment with Section 2080, as pursue, catch, and capture, as well as injury are defined as take under the Fish and Game Code, and the District is not proposing to obtain an ITP for the take of CESA-listed species. If nesting Belding’s savannah sparrows are found to be nesting adjacent to Project construction, CDFW should be notified immediately. An ITP would be required to implement MM BR-1(q).

In addition to acquiring an ITP, on-site biologists should be required to obtain, as applicable, Scientific Collecting Permits. In addition to CESA, CDFW currently implements its authority to issue permits for the take or possession of wildlife, including mammals, birds, and the nests and eggs thereof, reptiles, and amphibians, fish, certain plants, and invertebrates for scientific, educational, and propagation purposes through Section 650, Title 14, California Code of Regulations, by issuing Scientific Collecting Permits. If wildlife is to be physically touched and/or moved, the District should provide a Species Relocation Plan to CDFW for approval prior to the commencement of construction activities. CDFW generally does not support the use of relocation, salvage, and/or transplantation as mitigation for impacts to species, as studies have shown that these efforts are experimental in nature and largely unsuccessful.

Recommended Potentially Feasible Mitigation Measure(s)

Revise MM-BR-4 as written below. Also please remove measure 1(q), or clarify that early consultation with CDFW will occur regarding impacts to CESA-listed species, and an ITP and/or Scientific Collecting Permit will be acquired for the Project if there is a possibility of this to occur. Also, since staging for the Project is proposed adjacent to occupied nesting and foraging habitat, ensure any temporary habitat impacts are initiated outside of their breeding season (April through July).

Mitigation Measure MM CDFW-4:

To reduce impacts to less than significant: To avoid take, incidental or otherwise, of Belding’s savannah sparrow, the District shall implement the following measures when conducting work during the bird nesting season.

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- a. When initiating activities within 500 feet of Belding's savannah sparrow suitable habitat, the Project biologist shall conduct surveys prior to activity initiation. Surveys shall consist of three visits separated by two weeks starting April 1 prior to ground disturbance. The results of the surveys shall be reported to the District. If nesting Belding's savannah sparrow are noted on-site or immediately adjacent within 500 of Project impacts, CDFW will be contacted. No work shall begin until CDFW has been notified and appropriate buffers are established.
- b. When conducting work within suitable habitat the Project biologist or designated biological monitor shall be on-site during construction to ensure that any CESA-listed species and/or their nests are not agitated, killed, or injured. The monitoring schedule may be modified with CDFW approval.
- c. If nesting Belding's savannah sparrow is detected, the District shall implement one of the following:
 - i. Establish, flag, and implement a 500-foot no operations buffer around any active nest. The buffer shall remain in place until the nest has fledged or is no longer active; or,
 - ii. The District shall cease work within 500 feet of the active nest and consult with CDFW.

COMMENT #5:

Inconsistent Discussion of Nesting Western Snowy Plovers in DEIR and BTR-1 and BTR-2

Sections: 2.5, 3.3, 3.10-1 DEIR, and 3.4, 5.8 BTR, Pages: 2-37 3.3-2, 3.3-10, 3.3-37,

Issue: The discussion of western snowy plover is inconsistent throughout both the DEIR and BTR. In many sections, the documents state that nesting snowy plovers were observed on-site, and many other sections state that snowy plovers are not known to nest on-site, and that habitat on-site is of low quality.

Specific impact: The DEIR is unclear about the presence of nesting western snowy plovers on-site due to conflicting statements in the DEIR and in the BTR.

Table 3.3-2 of the DEIR states, "[e]ight individuals observed nesting within Pond 20 during 2016-2017 bay-wide avian surveys. Low potential for nesting and foraging in openings of iceplant mats and on bare berms."

The DEIR also states, on page 3.3-37,

"[a]s summarized in Table 3.3-9, project construction would impact approximately 13.5 acres of potential low-quality nesting habitat (sparsely vegetated ice plant mats and berms) for western snowy plover. However, as previously discussed, breeding and nesting has not been documented in the Bank Site, and western snowy plover exhibits high breeding site fidelity, so the probability of the site becoming occupied by breeding western snowy plover in the future when currently not utilized for breeding is low (Powell and Collier 2000)."

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The above two statements are conflicting, as the first states that western snowy plovers were observed nesting on-site, The next statement says the site is unoccupied and has low probability of being occupied.

The biological assessments provided in Appendix E are also inconsistent, in that the BTR-2 (August 2018) shows, “moderate” to, “moderately high quality habitat” for the majority of the Bank Parcel in Figure 3-7, whereas Figure 5.5 of BTR-1 (August of 2020) only identifies, “low quality habitat” on a small portion of the site. There is no discussion as to why the two assessments of the same habitat are different from one another.

Why impact would occur: Without access to spatial data and a consistent description of conditions on-site, CDFW cannot ascertain if impacts to western snowy plovers would be adequately avoided or mitigated below the level of significance. Furthermore, consultation is required under ESA for impacts to suitable habitat of listed species. Table 2-4 does not include consultation with USFWS for impacts to ESA-listed species.

Evidence impact would be significant: Appendix G of CEQA guidelines states that a project would be significant if it would have an adverse effect on special status species.

Although it is unclear from the information provided where exactly snowy plover nests were identified, they were observed nesting on-site in 2016-17 surveys. As proposed, the Project would directly impact habitat that is suitable for or is known to be previously occupied by nesting plovers. This is not adequately addressed in the analysis provided in the DEIR, due to the inconsistent information.

Loss of suitable nesting habitat, due to the type conversion of salt flat openings in the ice plant mats into salt marsh habitats, is also a concern. Although salt marsh is a desirable habitat for many species, the Table 3.3-9 of the DEIR states that Project would lead to a net loss of 13.5 acres of suitable nesting habitat for western snowy plovers. Loss of occupied or suitable habitat may affect and would likely adversely affect the species and therefore be considered take under ESA. CDFW recommends early consultation with USFWS to avoid violation of Section 9 of ESA. Take of an ESA-listed species would possibly be a significant impact under CEQA.

Mitigation Measure MM CDFW- 5a & CDFW-5b:

To reduce impacts to less than significant: Please clarify and align all statements, Tables, and Figures pertaining to nesting western snowy plovers in the DEIR and BTR, acknowledging that the species was observed nesting onsite in recent surveys. If possible, please provide spatial data, for breeding locations of sensitive species.

Please include consultation with USFWS for ESA-listed species in Table 2-4 of the FEIR.

To reduce impacts to less than significant: To avoid take, incidental or otherwise, of western snowy plover, the District shall implement the following measures when conducting work during the bird nesting season, or as required by USFWS during consultation for the species.

- a. When initiating activities within 500 feet of western snowy plover suitable habitat, a qualified Project biologist shall conduct surveys prior to activity initiation. Surveys shall consist of three visits separated by 2 weeks starting March 1 prior to ground disturbance. The results of the surveys shall be reported to the District. If nesting western snowy plover are noted

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on-site or immediately adjacent within 500 feet of Project impacts, Wildlife Agencies will be contacted; no work will shall begin until the Wildlife Agencies have been notified and appropriate buffers are established.

- b. When conducting work within suitable habitat the Project biologist or designated biological monitor shall be on-site during construction to ensure that any listed species and/or their nests are not agitated, killed, or injured. The monitoring schedule may be modified with Wildlife Agency approval.
- c. If nesting western snowy plovers are detected, the District shall implement one of the following:
 - i. Establish, flag, and implement a 500-foot no operations buffer around any active nest. The buffer shall remain in place until the nest has fledged or is no longer active; or,
 - ii. The District shall cease work within 500 feet of the active nest and consult with the Wildlife Agencies.

COMMENT #6:

Gnatcatchers Have Been Observed on the NWR Site Adjacent to the Project, and Lack of Identification of Diegan Coastal Sage Scrub (CSS) and Maritime Succulent Scrub (MSS) as Sensitive Habitat Types

Section: DEIR 3.3.2 Special Status Wildlife Species Observed or Potential to Occur and BTR-1 Executive Summary (ES) Table 5.1, 5.5.1 and Appendix E, Page: DEIR 3.3-10, BTR-1 ES vii, 35, 43

Issue: The DEIR and the BTRs do not address impacts to coastal California gnatcatchers, although suitable CSS habitat and individual observations have been documented on the NWR site directly to the north of the Project area. Additional indirect impacts may also occur through berm construction or removal (see Comment #2). The presence of CSS and MSS were not clearly addressed in neither the DEIR nor the BTR, which further complicates analysis of impacts to coastal California gnatcatcher.

Specific impact: Although the Executive Summary notes the presence of CSS and MSS, the BTR and DEIR use specific plant assemblages per the California Vegetation Classification and Mapping Program to describe the vegetation communities. Table 5.1 of the BTR includes a column which also notes the relevant Oberbauer habitat classification system, which is commonly used for describing habitats of animal species.

The BTR states, “[n]o special status vegetation communities (S1-S3) occur within the study area,” and the variation of Menzie’s goldenbush on-site was not identified in the BTR. Decumbent goldenbush (*Isocoma menziesii* var. *decumbens*) is known adjacent to the Project as has global, state, and rare plant rank of G3G5T2T3, S2, 1B.2, respectively (CNDDDB, 2020). The DEIR and BTR also identify coast prickly pear scrub and coastal cholla patches, which are considered MSS, as noted in the cross walk. MSS has a global rank of 2 and State rank of S1.1. The documents do not address these habitats as rare due to the differences in terminology between the vegetation classification and habitat rarity ranking systems used.

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Broom baccharis and Menzie's goldenbush are both considered to be CSS species, and CSS is the primary habitat type for coastal California gnatcatchers.

Why impact would occur: Coastal California gnatcatchers, an ESA-listed species, and its preferred habitat, CSS, occur on-site; neither is discussed in either report. Furthermore, incidental observations of gnatcatchers have been identified on the NWR site to the north (Robert Patton, consulting biologist, pers comm). Without suitable avoidance and/or minimization measures, gnatcatchers could be impacted by the Project, especially during berm construction/removal on the northern boundary of the Project.

MSS and CSS, including the area likely dominated decumbent goldenbush, are all considered sensitive habitats in regional planning and based on State rank. The Project proposes to impact 16.03 acres of CSS and 0.16 acre of MSS, if the habitat types are identified by the relevant Oberbauer classification.

Evidence impact would be significant: CEQA Guidelines Appendix G (b) states an impact would be significant if it would, "...have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the California Department of Fish and Game or US Fish and Wildlife Service."

Direct, indirect, or cumulative impacts to listed species, without mitigation, would be significant. No avoidance, minimization or mitigation measures were provided for the coastal California gnatcatcher.

The project will also have a substantial adverse effect on CSS and MSS, which are considered sensitive natural communities. Impacts to these species should be considered significant without mitigation.

Recommended Potentially Feasible Mitigation Measure(s)

Mitigation Measures MM CDFW-6a & MM-CDFW-6b

To reduce impacts to less than significant: The DEIR should have included a discussion of coastal California gnatcatcher. Also, the FEIR should reflect the sensitive natural communities on-site and provide mitigation measures when appropriate. Also, include consultation with USFWS for ESA-listed species in Table 2-4 of the FEIR.

To reduce impacts to less than significant: To avoid take, incidental or otherwise, of coastal California gnatcatcher, the District shall implement the following measures when conducting work during the bird nesting season, or as required by USFWS during consultation for the species.

- a. When initiating activities within 500 feet of coastal California gnatcatcher suitable habitat, a qualified Project biologist shall conduct surveys prior to activity initiation. Surveys shall consist of three visits separated by 2 weeks starting March 1 prior to ground disturbance. The results of the surveys shall be reported to the District. If nesting coastal California gnatcatcher are noted on-site or immediately adjacent within 500 feet of Project impacts, Wildlife Agencies will be contacted; no work will begin until the Wildlife Agencies have been notified and appropriate buffers are established.

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- b. When conducting work within suitable habitat the Project biologist or designated biological monitor shall be on-site during construction to ensure that any listed species and/or their nests are not agitated, killed, or injured. The monitoring schedule may be modified with Wildlife Agency approval.
- c. If nesting coastal California gnatcatcher are detected, the District shall implement one of the following:
 - i. Establish, flag, and implement a 500-foot no operations buffer around any active nest. The buffer shall remain in place until the nest has fledged or is no longer active; or,
 - ii. The District shall cease work within 500 feet of the active nest and consult with the Wildlife Agencies.

III. Mitigation Measures or Alternative Related Impact Shortcoming

MM BR-2 Does Not Ensure Compliance with CESA for Listed Plant Species.

COMMENT # 7:

Section: DEIR 3.3, Page; DEIR 3.3-36

Issue: MM BR-2 allows for direct impacts to listed plant species, if they are subsequently found, without requiring consultation with CDFW. This would be in violation of Section 2080 of Fish and Game Code (i.e.,CESA).

Specific potential impact: Salt marsh bird's beak is CESA- and ESA-listed and Brand's star phacelia is a candidate ESA species. Although these sensitive plant species were not identified on-site, suitable habitat is present, and they have the potential to occur within the Project area. The mitigation measure provided for impacts to sensitive plant species, MM BR-2, would not ensure that a significant impact to a CESA- and ESA-listed species has been reduced to below a level of significance.

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Mitigation Measure or Alternative and Related Impact Shortcoming)

Please revise MM BR-2 as written below.

Mitigation Measure MM CDFW-7:

To reduce impacts to less than significant: Should a population (>1 individual) of any state-listed species (e.g. salt marsh bird's-beak) or Brand's star phacelia be identified, the District shall consult with the Wildlife Agencies and determine if further permitting and/or coordination will be required.

COMMENT #8:

Compliance with Fish and Game Code Section 3511

A. Light-footed Ridgway's Rail

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Sections: DEIR 3.3 Table 3.3-2, 3.3.3 Pages: DEIR 3.3-12, 3.3-28

Issue: The Project proposes MM-BR-4 to avoid impacts to light-footed Ridgway's rail (rail(s)), but the measure does not provide adequate avoidance. Furthermore, acquisition of an ITP for take is not available for Fully Protected species, such as Ridgway's rail. Complete avoidance of take is required.

Specific impact: The DEIR states in Table 3.3-2,

"[L]ow potential to occur for nesting and foraging in salt marsh habitats along Nestor Creek and the Otay River Tributary. Very little cordgrass present except at north terminus of the Otay River Tributary. Individual observed in Otay River north and outside of the study area during surveys for ORERP."

Although there is a low potential for rails to be on-site during construction due to the small amount of nesting habitat, this section of habitat is adjacent to the berm breach and could be impacted by construction if sufficient avoidance measures are not employed. Rails are also known to occupy the restored NWR lands to the north and could be impacted by the berm breach if done during the nesting season.

Why impact would occur: As written, MM-BR-4 is not sufficient to ensure that rails, if present, would be completely avoided by the Project. Due to the Fully Protected status of rails, a minimum 500-foot buffer is recommended to ensure avoidance.

Evidence impact would be significant: Appendix G of CEQA guidelines states impacts to listed species would be considered significant. Light-footed Ridgway's rails are both ESA- and CESA-listed, as well as Fully Protected per Section 3511 of the Fish and Game Code. Although the DEIR addresses Fully Protected Species on page 3.3-28, this description is incorrect in that it refers to Section 3503 *et seq.*, but does not discuss Section 3511. Although the Project proposes measures to reduce impacts to rails, these measures are not appropriate given that the species is Fully Protected.

Recommended Potentially Feasible Mitigation Measure(s)

Please revise MM-BR-4 as written below to ensure that impacts to light-footed Ridgway's rail are adequately avoided.

Avoidance Measures AM CDFW-8a:

To reduce impacts to less than significant: To avoid take, incidental or otherwise, of light-footed Ridgway's rail, the District shall implement the following measures when conducting work during the bird nesting season, or as required by USFWS during consultation for the species.

- a. When initiating activities within 500 feet of light-footed Ridgway's rail suitable habitat, a qualified biologist shall conduct surveys prior to activity initiation. Surveys shall consist of three visits separated by 2 weeks starting March 1 prior to ground disturbance. The results of the surveys shall be reported to the District. If light-footed Ridgway's rail is noted on-site or immediately adjacent within 500 of Project impacts, the Wildlife Agencies will be

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contacted; no work will shall begin until the Wildlife Agencies have been notified and appropriate buffers are established.

- b. When conducting work within suitable habitat the Project biologist or designated biological monitor shall be on-site during construction to ensure that any CESA-listed species and/or their nests are not agitated, killed, or injured. The monitoring schedule may be modified with Wildlife Agency approval.
- c. If nesting light-footed Ridgway's rail are detected, the District shall implement the following:
 - i. Establish, flag, and implement a 500-foot no operations buffer around any active nest. The buffer shall remain in place until the nest has fledged or is no longer active.

B. California Least Tern

Sections: DEIR 3.3 Page: DEIR 3.3-13

Issue: California least terns are a Fully Protected species that is not adequately addressed in MM BR-4 or MM BR-8.

Specific impact: Although California least tern typically nests on open beaches, it has been documented using salt evaporation pond berms, salt pans, and open areas in sparsely vegetated areas such as the openings in the ice plant mat community mapped within the study area (Burger and Gochfeld 1990; Powell and Collier 2000). This latter habitat was mapped as potential nesting habitat for least terns, albeit of low quality. The Nestor Creek and Otay River tributary channels on either side of the Pond 20 berms further offer potential low-quality foraging habitat.

Although there is a low potential for least terns to be on-site during construction due to the small amount of preferable nesting habitat, there is a known breeding colony on the NWR site to the north (Barr 2019). This area could be impacted by construction if sufficient avoidance measures are not employed.

Why impact would occur: As written, MM BR-4 is not sufficient to ensure that least terns, if present, would be avoided by the Project. A minimum of 500-foot buffer is recommended to ensure avoidance. CDFW does not recommend further reduction due to the Fully Protected status of this species.

Evidence impact would be significant: Appendix G of CEQA guidelines states impacts to listed species would be considered significant. California least terns are both ESA and CESA-listed, as well as Fully Protected per Section 3511 of the Fish and Game Code. Although the Project proposes measures to reduce potential impacts to least terns, it does not ensure that the project would avoid take.

Recommended Potentially Feasible Mitigation Measure(s)

Please revise MM-BR-4 as written below to ensure that impacts to California least terns are adequately avoided.

Avoidance Measure AM CDFW-8b:

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To reduce impacts to less than significant: To avoid take, incidental or otherwise, of California least terns, the District shall implement the following measures when conducting work during the bird nesting season.

- a. When initiating activities within 500 feet California least tern suitable habitat, a qualified Project biologist shall conduct surveys prior to activity initiation. Surveys shall consist of three visits separated by 2 weeks starting April 1 prior to ground disturbance. The results of the surveys shall be reported to the District. If nesting least terns are noted on-site or immediately adjacent within 500 feet of Project impacts, the Wildlife Agencies will be contacted. No work shall begin until the Wildlife Agencies have been notified and appropriate buffers are established.
- b. When conducting work within suitable habitat the Project biologist or designated biological monitor shall be on-site during construction to ensure that any CESA-listed species and/or their nests are not agitated, killed, or injured. The monitoring schedule may be modified with Wildlife Agencies' approval.
- c. If nesting California least terns are detected, the District shall implement the following:
 - i. Establish, flag, and implement a 500-foot no operations buffer around any active nest. The buffer shall remain in place until the nest has fledged or is no longer active.

COMMENT #9:

No Compensatory Mitigation was Provided for Impacts Associated with the Mitigation Bank

Section: DEIR Table 3.3-9, Page: DEIR 3.3-36

Issue: The Project proposes impacts to sensitive plants, sensitive animals, habitats, and sensitive natural communities; however, the DEIR does not propose listed species permitting/consultation with the Wildlife Agencies, nor does it provide compensatory mitigation for permanent impacts to ESA-listed species' habitat from the construction of the Bank Parcel.

Specific impact: The Project proposes permanent impacts to habitats suitable for ESA-listed western snowy plover (13.5 acres), coastal California gnatcatcher (16.03 acres), and light-footed Ridgway's rail (0.24 acre). Consultation is recommended for impacts to listed species for compliance with CESA and ESA. Compensatory mitigation for permanent impacts to ESA-listed species' habitat will likely be required to mitigate impacts to below significant.

Why impact would occur: The Project would result in the net loss of suitable habitat for these species but does not propose mitigation to reduce the impacts to less than significant.

Evidence impact would be significant: Impacts to listed species are considered significant under CEQA. Since mitigation was not provided for habitat loss due to the Bank Parcel construction, adverse impacts to species may occur as result of the Project.

Recommended Potentially Feasible Mitigation Measure(s)

Mitigation Measure MM CDFW-9:

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To reduce impacts to less than significant: Prior to ground disturbance the District will consult with the Wildlife Agencies for potential impacts to CESA-and ESA-listed species. Compensatory mitigation as determined through the consultation process shall be provided for permanent impacts to listed species habitats.

COMMENT #10:

MM BR-8 Is Not Consistent with CESA, ESA, and Section 3511 of the Fish and Game Code

Sections: DEIR 3.3 Page: DEIR 3.3-50

Issue: MM BR-8 is not sufficient to reduce impacts below the level of significance as the MM BR-8 does provide for compliance with CESA, ESA, and Section 3511 of the Fish and Game Code.

Specific impact: Although further environmental analysis would be required for development of Parcels A, B, and C, the mitigation provided in the DEIR in MM BR-8 would not ensure compliance with regulations stated above, for the same reasons noted in the above comments. If permanent impacts to species or their occupied habitats are proposed for future development, listed species permitting and/or consultation would be required with the Wildlife Agencies, and mitigation would likely be required through those processes. CDFW cannot authorize impacts to Fully Protected Species such as light-footed Ridgway's rail or California least tern.

Evidence impact would be significant: Under CEQA, impacts to ESA- and CESA-listed species and Species of Special Concern would be considered significant without mitigation. Direct and indirect impacts to Fully Protected species must also be avoided. MM BR-8, as proposed, is not adequate because it lacks consultation with the Wildlife Agencies, which is recommended to ensure compliance with ESA and CESA if the Project would result in impacts to listed species and their habitat.

Recommended Potentially Feasible Mitigation Measure

Mitigation Measure MM CDFW-10:

Please revise MM BR-8 as written below.

To reduce impacts to less than significant: To the extent practicable, ground disturbance located in and within 500 feet of suitable habitat will occur outside of nesting season (January 1 - September 15). If work is required within 500 feet of suitable habitat during the breeding season, wildlife surveys will be conducted for Parcels A, B, and C prior to Project initiation in these areas during breeding season. The District shall conduct nesting season surveys, as noted in the recommended avoidance and mitigation measures.

If Belding's savannah sparrow occupied habitat is proposed for permanent impact, the District shall consult with CDFW. If direct impacts to individual Belding's or their nests are anticipated, it is recommended that the District obtain an ITP. Mitigation would be determined through the ITP process, and would have to meet the fully mitigated standard required by CESA.

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If the site is occupied by western snowy plover or suitable habitat is proposed for permanent impact, the District shall consult with USFWS. Mitigation would be determined through the consultation process.

If the site is occupied by Ridgway's rail or California least tern or their habitat are proposed for permanent impact, the District shall consult with USFWS for habitat impacts and provide complete avoidance of impacts to individuals and nests to ensure compliance with Fish and Game Code Section 3511. Mitigation for habitat impacts would be determined through the consultation process with USFWS.

Should habitat occupied by a breeding pair of burrowing owls be proposed for permanent impact, the District shall provide mitigation based on the mitigation methods section of the Staff Report on Burrowing Owl Mitigation (California Department of Fish and Game 2012). A Burrowing Owl Plan shall be developed by the District and approved by the Wildlife Agencies to address potential mitigation, exclusion methods, and possibly other owl-related issues.

COMMENT #11:

Mitigation Measure MM BR-5 is Not Sufficient to Ensure Take of Burrowing Owls is Avoided

Sections: Table ES-1, 3.3, Page: # ES-5,

Issue: The MM BR-5 is not sufficient to ensure avoidance of take for burrowing owls, since it does not provide for a Burrowing Owl Artificial Burrow and Exclusion Plan, which is required to ensure that there is not take of burrowing owls during the exclusion process.

Specific impact: The DEIR states that the Project will follow the 2012 Staff Report on Burrowing Owl Mitigation, but the mitigation measure does not provide for an Exclusion Plan, or similar purposed product, which is required by the report.

Why impact would occur: Without an Exclusion Plan, burrowing owls may be evicted from their burrows, without having suitable nearby habitat to which they can move.

Evidence impact would be significant: As noted in the 2012 CDFW Staff Report, "[e]xclusion in and of itself is not a take avoidance, minimization or mitigation method. Eviction of burrowing owls is a potentially significant impact under CEQA."

CDFW recommends avoidance of impacts through the implementation of the required buffer if BUOW are found on-site. If avoidance is not possible a Burrowing Owl Plan shall be developed by the District and shall be approved by CDFW prior to Project construction within the buffer area. CDFW recommends that if exclusion is required, that mitigation be located off-site away from on-site or adjacent sensitive nesting bird species.

Recommended Potentially Feasible Mitigation Measure

Please revise MM BR-5 as written below.

Mitigation Measure MM CDFW-11:

To reduce impacts to less than significant: If burrowing owls are found on-site during pre-construction surveys the District shall implement avoidance measures through the delineation

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of an appropriate buffer as noted below. A construction avoidance buffer shall be placed around occupied burrows. Preliminary recommended buffer distances are based on time of year (i.e., breeding season) and level of disturbance:

- April 1– August 15: Low disturbance 656 feet, medium and high disturbance 1,640 feet;
- August 16 – October 15: Low and medium disturbance 656 feet, high disturbance 1,640 feet; and
- October 16 – March 31: Low disturbance 164 feet, medium disturbance 328 feet, high disturbance 1,640 feet.
- If avoidance of impacts is not practicable, the District shall create a Burrow Exclusion Plan that will be approved by CDFW. The plan shall follow Appendix E of the 2012 Staff Report on Burrowing Mitigation.

COMMENT #12:

The District (or Project Proponent) in MM-BR-1 Leaves Responsibility Ambiguous

Sections: DEIR Table ES-1, 3.3, Pages: DEIR ES-5, 3.3-42

Issue: MM BR-1 states,

“[i]mplement Biological Resource Protection Measures During Construction. The District (or project proponent) shall implement the following BMPs during construction to minimize direct and indirect impacts on special status species and their habitats.”

The Notice of Availability for the DEIR states that the District is the project proponent, and no other Project proponent is listed.

Specific impact: Without clear understanding of who is responsible for the Project mitigation, measures may not be enforceable.

Why impact would occur: Clear responsibility for implementation of Project mitigation measures is required to ensure that they would be implemented appropriately.

Evidence impact would be significant: Section 15126.4 (2) of the CEQA Guidelines states that, “[m]itigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments.” As written, the mitigation measure is not enforceable because it is not clear who is responsible for implementation of the mitigation measures.

Recommended Potentially Feasible Mitigation Measure(s)

Mitigation Measure MM CDFW-12:

To reduce impacts to less than significant: Identify any additional Project proponents and what, if any, elements of the required mitigation they may be responsible to perform. For example, additional Project Proponents could be identified during further CEQA analysis. Alternatively, CDFW recommends that the words, “Project proponent” be removed from the EIR and replaced with “the District”.

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COMMENT #13:

Revise MM BR-3 to Include CDFW

Sections: DEIR ES-1, 3.3.4, Pages: DEIR ES- 3.3-34

Issue: The Project describes direct modification of habitats regulated under 1600 *et seq.*, and correctly identifies these areas as subject to regulation in Section 3.3 of the DEIR. MM-BR-3 incorrectly states that these areas, “may be subject to regulation by CDFW”.

Specific impact: MM BR-3 states,

“[t]o avoid or minimize the permanent loss of sensitive habitat resulting from temporary project features, any areas that are bridged, reinforced, or widened to accommodate construction equipment would be restored to preconstruction conditions and vegetated with appropriate native plant species once construction is complete. This includes potential impacts to seablite scrub, pickleweed mats, salt pan, and open water that are subject to regulation by CCC, ACOE, and RWQCB and may be subject to regulation by CDFW.”

In CDFW’s comments on the NOP (July 2019), we recommended that, “[t]o minimize additional requirements by the Department pursuant to section 1600 *et seq.* and/or under CEQA, the [EIR] should fully identify the potential impacts to the stream or riparian resources and provide adequate avoidance, mitigation, monitoring and reporting commitments for issuance of the LSAA.”

Why impact would occur: The Project proposes a berm breach/staging adjacent to, and requiring bridges over, habitats that are associated with riparian resources. Although the District responded to CDFW’s CEQA comments, it did not include CDFW 1600 staff in pre-project consultation. The District proposes 0.19 acre of impact to 1600 regulated resources, as well as additional temporary impacts due to staging, which have not been quantified. Therefore, the District acknowledges 1600 regulated impacts in the text of the DEIR, but then states, “...may be subject to regulation by CDFW” in the mitigation measure. As noted in the NOP comments, “[f]or any such activities, the project applicant (or “entity”) must provide written notification to the Department pursuant to section 1600 *et seq.* of the Fish and Game Code.”

Evidence impact would be significant: Impacts to riparian resources may be considered significant, and the mitigation measure, as written, does not ensure coordination with CDFW to either fully avoid impacts, or ensure that the District’s obligations under Section 1600 *et seq.* has been met.

Recommended Potentially Feasible Mitigation Measure(s)

Revise MM BR-3 to include CDFW with the other agencies that regulate riparian resources and have wetland permitting requirements.

Mitigation Measure MM CDFW-13:

To reduce impacts to less than significant: To avoid or minimize the permanent loss of sensitive habitat resulting from temporary project features, any areas that are bridged, reinforced, or widened to accommodate construction equipment would be restored to preconstruction conditions and vegetated with appropriate native plant species once

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construction is complete. This includes potential impacts to seablite scrub, pickleweed mats, salt pan, and open water that are subject to regulation by CCC, ACOE, RWQCB, and CDFW.

IV. Cumulative Impact Analysis and Related Impact Shortcoming

COMMENT #14:

Cumulative Hydrodynamic Analysis for the Project and ORERP and Potential for Increased Scour and Erosion to Habitat that was Not Fully Analyzed

Section: Appendix E Pond 20 Wetland Restoration Basis of Design Report and Appendix K: Wetland Restoration of Salt Pond 20 Hydrodynamic Modelling Report, Pages:22, and 1, 9

Issue: The technical appendices for the Project are inconsistent in the analysis of the hydrodynamic modelling in that some include the ORERP, but some do not. Including the ORERP is reasonable, as they are adjacent and are both using the Otay River as the water input. The DEIR does not sufficiently analyze the cumulative impacts of both projects on downstream scour and erosion of habitat.

Specific impact: Pond 20 Wetland Restoration Basis of Design Report, dated October of 2017 on page 22 states,

“[b]ased on the restored tidal prism and hydraulic geometry relationships (PWA 1995), it is estimated that the downstream channel bed will eventually deepen 3.1 feet and widen 60 feet after restoration of Pond 20 (Table 7). This is a very approximate estimate and assumes a natural, cohesive-bay-mud channel bed free of armoring or other obstructions. With the ORERP, the potential for channel erosion is much greater (Table 7). Assuming the ORERP is constructed first, the Pond 20 restoration is expected to deepen the channel by an extra 0.4 feet and widen it by 20 feet.”

In the Wetland Restoration of Salt Pond 20 Hydrodynamic Modelling Report dated June 2020 states on page 1,

“[a]s of July2019, the Final EIR for the ORERP is published and its Record of Decision signed and 30% complete drawings of the Otay River Floodplain Site are complete. At this point, it is assumed that this project will be constructed before the Pond 20 project.”

Page 9 the report proceeds with the model setup and analysis without the inclusion of the ORERP project:

“The model boundary includes the Otay River west of I-5, Nestor Creek, the full salt pond complex, and a portion of south San Diego Bay. Two model geometries were analyzed:

- **Existing Conditions:** this scenario includes the existing topography, bathymetry, and hydrologic connections without the project. It is also referred to as the no-project scenario in discussions related to sea-level rise (Section 3.5).
- **Project Conditions:** this scenario assumes the Pond 20 site is restored without (or before) the ORERP. This scenario includes a berm separating the two project sites, to reduce the flood risk to the Otay River Floodplain Site once Pond 20 is restored.”

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It is unclear why the ORERP project was not included in the more recent hydrodynamic analysis, given that the report itself acknowledges the likelihood of the ORERP being developed first, and would have additional cumulative impacts regardless of the order of the development. Also, the worst-case scenario of the highest prediction of sea level rise combined with the 100-year event and the Project was not included in the analysis.

Why impact would occur: Early analysis of both projects identified increased scour and widening and deepening of the Otay River channel. The more recent report in Figure 4-2, Difference in 100-Year Storm Event Velocities between Project and Existing Conditions, shows an increase in velocity of 2.5 ft/s in the area of the berm breach and the confluence of the tributary and the Otay River on Parcel A. Scour was analyzed for the bridge abutments and habitat projections within the Bank Parcel, but analysis of adjacent habitats was not included.

As noted above, this area contains habitats such as cordgrass and pickleweed mats for both CESA and ESA-listed and Fully Protected species, and the riparian habitats in the tributary and Nestor Creek may be impacted by the Project. This was not sufficiently analyzed in the technical appendices nor addressed in the DEIR.

Evidence impact would be significant: Impacts to listed species, sensitive natural communities, and riparian habitats are considered significant. No mitigation measures were provided to protect these habitats from erosion during and post construction; therefore, impacts would remain significant.

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Closely Related Past, Present, and Reasonably Foreseeable Probable Future Projects)

Mitigation Measure MM CDFW-14:

To minimize significant impacts: Include ORERP and adjacent habitats on Parcels A, B, and C in the hydrodynamic analysis. Potential impacts from habitat loss to species from the creation of the Bank Parcel shall be considered in section 3.3 and additional impacts from ORERP and future commercial development shall be discussed in the cumulative impact analysis in section 4.3.3 of the DEIR. Impacts to adjacent habitat from erosion due to increased velocity and scour shall be minimized to the greatest extent practicable in the final design of the Project. Changes in suitable habitats adjacent to the Project on Parcels A, B, and C shall be monitored annually over time, and loss of suitable habitat for listed species shall be mitigated as described above.

COMMENT #15:

CDFW Recommends Alternative 2, and the Inclusion and Analysis for an Alternative that Includes Restoration on All Parcels

Sections: 6.4.2, 6.5.2, Pages: 6-3, 6-9

Issue: CDFW recommends Alternative 2 for the Project due to the decreased impact it would have on sensitive species and habitats. CDFW does not concur with the conclusion that it would result in similar impacts to the proposed Project.

Specific impact: Section 6.4.2 identifies Alternative 2, which would allow for the development of the Bank Parcel, but would provide an open space designation for Parcels A, B, and C. In

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section 5.6.2, the DEIR makes the assessment that this alternative would have a similar impact.

Why impact would occur: The analysis does not consider the cumulative impacts of encroachment of these already confined riparian corridors and breeding habitat for ESA- and CESA-listed and Fully Protected Species. Figure 3-5 of the recent hydrodynamic reports shows a model of existing flooding conditions and shows most of Parcel A and all of parcel C flooded within 25 hours of the 100-year flood event. Even the 10-year storm event “inundates the open space surrounding the channel,” (Figure 3-11). Parcels A and C are in the floodplain for both the Otay River and Nestor Creek, and impacts to these parcels would be regulated under Section 1600 *et seq.* of the Fish and Game Code.

Even without flooding, Parcel A is 2.67 acres and per the DEIR currently has 1.08 acres of 1600 regulated resources, which are also breeding habitats for listed species. As stated in our NOP comment letter,

“The Department has responsibility for wetland and riparian habitats. It is the policy of the Department to strongly discourage development in wetlands or conversion of wetlands to uplands. We oppose any development or conversion that would result in a reduction of wetland acreage or wetland habitat values, unless, at a minimum, project mitigation assures there will be “no net loss” of either wetland habitat values or acreage.”

Although further environmental analysis would be required to develop Parcel A, if riparian resources and listed species are avoided, mitigated for, and adequately buffered, there would not be much remaining area for commercial development.

The DEIR states that, “[i]mplementation of MM BR-8 would apply to this alternative in order to reduce significant impacts to less than significant.” As discussed above, this measure as proposed does not ensure compliance with CESA, ESA, and Section 3511 of the Fish and Game Code. Furthermore, MM BR-7 is intended to reduce long-term indirect impacts but does not ensure sufficient noise and lighting protection for migratory and listed bird species that are known to occupy Parcels A and C.

Evidence impact would be significant: The Project proposes a commercial designation of Parcels A, B, and C which would allow further encroachment of riparian resources and listed species habitat. This would not occur under an open space designation. This difference between the Project and Alternative 2 would have significant impacts on riparian resources and was not considered in the Alternatives analysis or Cumulative analysis. As noted above, the measures provided do not reduce potential impacts to less than significant, because they do not ensure compliance with relevant regulations.

Recommended Potentially Feasible Mitigation Measure(s)

Mitigation Measure MM CDFW-15:

To reduce impacts to less than significant: CDFW recommends Alternative 2 since it would significantly reduce the impacts to biological resources, while meeting similar goals to the Project and ensuring compliance with relevant laws.

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1. CDFW generally does not accept compensatory mitigation credits from mitigation banks for which we do not have a signed BEI. This includes projects where wetland permitting and mitigation requirements overlap from various agencies (i.e., ACOE, RWQCB). Since the District opted to not include CDFW in the mitigation banking process, CDFW may not recognize the sale of credits as compensatory mitigation for CDFW-jurisdictional impacts.
2. CDFW recommends early coordination with USFWS and the City of San Diego to ensure coordinated efforts to conserve sensitive species and habitats. Although not discussed in the DEIR, CDFW recommends the inclusion of a Restoration and Protection of All Parcels Alternative in FEIR, as that would provide the greatest benefit to the sensitive biological resources in the area.
3. CDFW requests to review and comment on the Long-Term Operations and Maintenance Management Plan, as it may impact CDFW-regulated resources.
4. CDFW recommends edits to the Regulatory section describing Fish and Game Code as discussed in Comment #9, including to clarify Fish and Game Code Section 3503 *et seq.* and Section 3511 Fully Protected Species.
5. CDFW recommends that a buffer greater than 50 feet be used for the environmental analysis, as sensitive species may be located outside of this buffer but may still be impacted by the project. A buffer of at least 500 feet is adequate to ensure thorough analysis of some sensitive resources.

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 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:
http://www.dfg.ca.gov/biogeodata/cnddb/plants_and_animals.asp.

FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of 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 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 DEIR to assist the District in identifying and mitigating Project impacts on biological resources.

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Questions regarding this letter or further coordination should be directed to Elyse Levy, Senior Environmental Scientist, at Elyse.Levy@wildlife.ca.gov.

Sincerely,

DocuSigned by:

D700B4520375406...
David A. Mayer
Environmental Program Manager
South Coast Region

Cc: Office of Planning and Research, State Clearinghouse, Sacramento
state.clearinghouse@opr.ca.gov

Attachment A: Recommended Mitigation Measures

REFERENCES

1. Barr, J. (2019, Mar. 8). California Least Tern Monitoring 2013-17 [ds1120]. Calif. Dept. of Fish and Wildlife. Biogeographic Information and Observation System (BIOS). Retrieved Sept. 22, 2020 from <http://bios.dfg.ca.gov>.
2. California Department of Fish and Game, 2012. Staff Report on Burrowing Owl Mitigation. California Natural Resources Agency.
3. California Office of Planning and Research. 2019 or current version. CEQA: California Environmental Quality Act. Statutes and Guidelines, CEQA Guidelines § 15126.4, § 15381, § 15386, Appendix G.
4. City of San Diego. 1997. Multiple Species Habitat Conservation Program MSCP Plan Subarea Plan. p 10-13.
5. Fish & Game Code §1600, §2080, §3503, §3511.
6. Nelson, M. (2020, Aug. 31). California Natural Diversity Database [ds45]. Calif. Dept. of Fish and Wildlife. Biogeographic Information and Observation System (BIOS). Retrieved Sept. 22, 2020 from <http://bios.dfg.ca.gov>.
7. Patton, Robert. Patton Biological LLC. 2020. Personal communication regarding coastal California gnatcatcher observations on the ORERP site. On file, California Department of Fish and Wildlife R5 Office. September 17, 2020.
8. Zembal and Hoffman. 2010. A Survey of the Belding's Savannah Sparrow (*Passerculus sandwichensis beldingi*) in California. State of California, The Resources Agency, Department of Fish and Game Wildlife Branch,
<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=24503&inline>.

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Attachment A: Recommendations and Mitigation Measures

MM CDFW-1a:	Please revise the construction schedule to reflect clearing and grubbing shall occur outside of breeding season, January 1 to September 15 to the extent practicable. If required, the FEIR should provide this rationale, as well as require implementation of pre-construction surveys as discussed below.
MM CDFW-1b:	If work is required during the breeding season, pre-construction surveys for all bird species shall be conducted during breeding season, from January 1 - September 15 to ensure adequate avoidance of active bird nests. In areas within 500 feet of suitable adjacent habitat, a qualified biologist should conduct a survey prior to the start of construction activities. The pre-construction survey shall be conducted within three calendar days prior to the start of construction activities (including removal of vegetation). If an active bird nest is found, additional measures should be implemented to ensure that take of birds or eggs or disturbance of breeding activities is avoided. These measures shall consist of implementation of a nest avoidance plan created by the Project biologist that includes a no-work buffer around the nest (100-500 feet depending on the species), a biological monitor present during construction with the ability to halt construction if needed, and possibly, the installation of a temporary noise barrier or other sound attenuation at the edge of the Project footprint to reduce noise levels below 60 dB LEQ or ambient (if ambient is greater than 60 dB LEQ), to the satisfaction of the District with concurrence from USFWS and CDFW (collectively known as the Wildlife Agencies).
MM CDFW-2:	Once both projects are constructed, the berm shall be removed between the restoration sites. See MMs CDFW-5, -6, -7, and -9 for measures to avoid and minimize impacts to species which may be impacted by this project activity. These measures shall be implemented both prior and during berm construction and removal.
MM CDFW-3:	Please revise the BTR to clarify which parcels would be used for construction staging. Also, please quantify all potential impacts for staging to CDFW regulated habitats in the EIR.
MM CDFW-4:	To avoid take, incidental or otherwise, of Belding's savannah sparrow, the District shall implement the following measures when conducting work during the bird nesting season.

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	<p>a. When initiating activities within 500 feet of Belding’s savannah sparrow suitable habitat, the Project biologist shall conduct surveys prior to activity initiation. Surveys shall consist of three visits separated by two weeks starting April 1 prior to ground disturbance. The results of the surveys shall be reported to the District. If nesting Belding’s savannah sparrow are noted on-site or immediately adjacent within 500 of Project impacts, CDFW will be contacted. No work shall begin until CDFW has been notified and appropriate buffers are established.</p> <p>b. When conducting work within suitable habitat the Project biologist or designated biological monitor shall be on-site during construction to ensure that any CESA-listed species and/or their nests are not agitated, killed, or injured. The monitoring schedule may be modified with CDFW approval.</p> <p>c. If nesting Belding’s savannah sparrow is detected, the District shall implement one of the following:</p> <p>i. Establish, flag, and implement a 500-foot no operations buffer around any active nest. The buffer shall remain in place until the nest has fledged or is no longer active; or,</p> <p>ii. The District shall cease work within 500 feet of the active nest and consult with CDFW.</p>
<p>MM CDFW-5a:</p>	<p>Clarify and align all statements, Tables, and Figures pertaining to nesting western snowy plovers in the DEIR, acknowledging that the species was observed nesting on-site in recent surveys. If possible, please provide spatial data for breeding locations of sensitive species.</p> <p>Include consultation with USFWS for ESA-listed species in Table 2-4 of the FEIR.</p>
<p>MM CDFW-5b:</p>	<p>To avoid take, incidental or otherwise, of western snowy plover, the District shall implement the following measures when conducting work during the bird nesting season, or as required by USFWS during consultation for the species.</p> <p>a. When initiating activities within 500 feet of western snowy plover suitable habitat, a qualified Project biologist shall conduct surveys prior to activity initiation. Surveys shall consist of three visits separated by 2 weeks starting March 1 prior to ground disturbance. The results of the surveys shall be reported to the District. If nesting western snowy plover are noted on-site or immediately adjacent</p>

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	<p>within 500 feet of Project impacts, the Wildlife Agencies will be contacted. No work will shall begin until the Wildlife Agencies have been notified and appropriate buffers are established.</p> <p>b. When conducting work within suitable habitat the Project biologist or designated biological monitor shall be on-site during construction to ensure that any listed species and/or their nests are not agitated, killed, or injured. The monitoring schedule may be modified with Wildlife Agency approval.</p> <p>c. If nesting western snowy plovers are detected, the District shall implement one of the following:</p> <p>i. Establish, flag, and implement a 500-foot no operations buffer around any active nest. The buffer shall remain in place until the nest has fledged or is no longer active; or,</p> <p>ii. The District shall cease work within 500 feet of the active nest and consult with the Wildlife Agencies.</p>
<p>MM CDFW-6a:</p>	<p>Please include a discussion of coastal California gnatcatcher in the BTR and DEIR. Also revise the BTR and FEIR to reflect the sensitive natural communities on-site and provide mitigation measures when appropriate. Also, include consultation with USFWS for ESA-listed species in Table 2-4 of the FEIR.</p>
<p>MM CDFW-6b:</p>	<p>To avoid take, incidental or otherwise, of coastal California gnatcatcher, the District shall implement the following measures when conducting work during the bird nesting season, or as required by USFWS during consultation for the species.</p> <p>a. When initiating activities within 500 feet of coastal California gnatcatcher suitable habitat, a qualified Project biologist shall conduct surveys prior to activity initiation. Surveys shall consist of three visits separated by 2 weeks starting March 1 prior to ground disturbance. The results of the surveys shall be reported to the District. If nesting coastal California gnatcatcher are noted on-site or immediately adjacent within 500 feet of Project impacts, Wildlife Agencies will be contacted; no work will shall begin until the Wildlife Agencies have been notified and appropriate buffers are established.</p> <p>b. When conducting work within suitable habitat the Project biologist or designated biological monitor shall be on-site during construction to ensure that any listed species and/or their nests are not agitated, killed, or injured. The monitoring schedule may be modified with Wildlife Agency approval.</p>

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	<p>c. If nesting coastal California gnatcatcher are detected, the District shall implement one of the following:</p> <p>i. Establish, flag, and implement a 500-foot no operations buffer around any active nest. The buffer shall remain in place until the nest has fledged or is no longer active; or,</p> <p>ii. The District shall cease work within 500 feet of the active nest and consult with the Wildlife Agencies.</p>
MM CDFW-7:	<p>Should a population (>1 individual) of any state-listed species (e.g. salt marsh bird's-beak) or Brand's star phacelia be identified, the District shall consult with the Wildlife Agencies and determine if further permitting and/or coordination will be required.</p>
MM CDFW-8a	<p>To avoid take, incidental or otherwise, of light-footed Ridgway's rail, the District shall implement the following measures when conducting work during the bird nesting season, or as required by USFWS during consultation for the species.</p> <p>a. When initiating activities within 500 feet of light-footed Ridgway's rail suitable habitat, a qualified biologist shall conduct surveys prior to activity initiation. Surveys shall consist of three visits separated by 2 weeks starting March 1 prior to ground disturbance. The results of the surveys shall be reported to the District. If light-footed Ridgway's rail is noted on-site or immediately adjacent within 500 of Project impacts, the Wildlife Agencies will be contacted; no work will shall begin until the Wildlife Agencies have been notified and appropriate buffers are established.</p> <p>b. When conducting work within suitable habitat the Project biologist or designated biological monitor shall be on-site during construction to ensure that any CESA-listed species and/or their nests are not agitated, killed, or injured. The monitoring schedule may be modified with Wildlife Agency approval.</p> <p>c. If nesting light-footed Ridgway's rail are detected, the District shall implement the following:</p> <p>i. Establish, flag, and implement a 500-foot no operations buffer around any active nest. The buffer shall remain in place until the nest has fledged or is no longer active.</p>
MM CDFW-8b:	<p>To avoid take, incidental or otherwise, of California least terns, the District shall implement the following measures</p>

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	<p>when conducting work during the bird nesting season, or as required by USFWS during consultation for the species.</p> <p>a. When initiating activities within 500 feet California least tern suitable habitat, a qualified Project biologist shall conduct surveys prior to activity initiation. Surveys shall consist of three visits separated by 2 weeks starting April 1 prior to ground disturbance. The results of the surveys shall be reported to the District. If nesting least terns are noted on-site or immediately adjacent within 500 of Project impacts, Wildlife Agencies will be contacted. No work shall begin until the Wildlife Agencies have been notified and appropriate buffers are established.</p> <p>b. When conducting work within suitable habitat the Project biologist or designated biological monitor shall be on-site during construction to ensure that any CESA-listed species and/or their nests are not agitated, killed, or injured. The monitoring schedule may be modified with Wildlife Agency approval.</p> <p>c. If nesting California least terns are detected, the District shall implement the following:</p> <p>i. Establish, flag, and implement a 500-foot no operations buffer around any active nest. The buffer shall remain in place until the nest has fledged or is no longer active.</p>
<p>MM CDFW-9:</p>	<p>Prior to ground disturbance the District will consult with the Wildlife Agencies for potential impacts to CESA-and ESA-listed species. Compensatory mitigation as determined through the consultation process shall be provided for permanent impacts to listed species habitats.</p>
<p>MM CDFW-10:</p>	<p>To the extent practicable, ground disturbance located in and within 500 feet of suitable habitat will occur outside of nesting season (January 1 - September 15). If work is required within 500 feet of suitable habitat during the breeding season, wildlife surveys will be conducted for Parcels A, B, and C prior to Project initiation in these areas during breeding season. The District shall conduct nesting season surveys, as noted in the recommended avoidance and mitigation measures.</p> <p>If Belding’s savannah sparrow occupied habitat is proposed for permanent impact, the District shall consult with CDFW. If direct impacts to individual Belding’s or their nests are anticipated, it is recommended that the District obtain an ITP. Mitigation would be determined through the ITP process, and would have to meet the fully mitigated standard required by CESA.</p>

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	<p>If the site is occupied by western snowy plover or suitable habitat is proposed for permanent impact, the District shall consult with USFWS. Mitigation would be determined through the consultation process.</p> <p>If the site is occupied by Ridgway's rail or California least tern or their habitat are proposed for permanent impact, the District shall consult with USFWS for habitat impacts and provide complete avoidance of impacts to individuals and nests to ensure compliance with Fish and Game Code Section 3511. Mitigation for habitat impacts would be determined through the consultation process with USFWS.</p> <p>Should habitat occupied by a breeding pair of burrowing owls be proposed for permanent impact, the District shall provide mitigation based on the mitigation methods section of the Staff Report on Burrowing Owl Mitigation (California Department of Fish and Game 2012). A Burrowing Owl Plan shall be developed by the District and approved by the Wildlife Agencies to address potential mitigation, exclusion methods, and possibly other owl-related issues.</p>
MM CDFW-11:	<p>If burrowing owls are found on-site during pre-construction surveys the District shall implement avoidance measures through the delineation of an appropriate buffer as noted below. A construction avoidance buffer shall be placed around occupied burrows. Preliminary recommended buffer distances are based on time of year (i.e., breeding season) and level of disturbance:</p> <ul style="list-style-type: none"> • April 1– August 15: Low disturbance 656 feet, medium and high disturbance 1,640 feet; • August 16 – October 15: Low and medium disturbance 656 feet, high disturbance 1,640 feet; and • October 16 – March 31: Low disturbance 164 feet, medium disturbance 328 feet, high disturbance 1,640 feet. • If avoidance of impacts is not practicable, the District shall create a Burrow Exclusion Plan that will be approved by CDFW. The plan shall follow Appendix E of the 2012 Staff Report on Burrowing Mitigation.
MM CDFW-12:	<p>Identify any additional Project proponents and what, if any, elements of the required mitigation they may be responsible to perform. For example, additional Project</p>

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	Proponents could be identified during further CEQA analysis. Alternatively, CDFW recommends that the words, "Project proponent" be removed from the EIR and replaced with "the District".
MM CDFW-13:	To avoid or minimize the permanent loss of sensitive habitat resulting from temporary project features, any areas that are bridged, reinforced, or widened to accommodate construction equipment would be restored to preconstruction conditions and vegetated with appropriate native plant species once construction is complete. This includes potential impacts to seablite scrub, pickleweed mats, salt pan, and open water that are subject to regulation by CCC, ACOE, RWQCB, and CDFW.
MM CDFW-14:	Include ORERP and adjacent habitats on Parcels A, B, and C in the hydrodynamic analysis. Potential impacts from habitat loss to species from the creation of the Bank Parcel shall be considered in section 3.3 and additional impacts from ORERP and future commercial development shall be discussed in the cumulative impact analysis in section 4.3.3 of the DEIR. Impacts to adjacent habitat from erosion due to increased velocity and scour shall be minimized to the greatest extent practicable in the final design of the Project. Changes in suitable habitats adjacent to the Project on Parcels A, B, and C shall be monitored annually over time, and loss of suitable habitat for listed species shall be mitigated as described above.
MM CDFW-15:	CDFW recommends Alternative 2 since it would significantly reduce the impacts to biological resources, while meeting similar goals to the Project and ensuring compliance with relevant laws.