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GAVIN NEWSOM, Governor
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October 19, 2020

Governor's Office of Planning & Research

Oct 20 2020

Mr. Alex Hunt, Associate Environmental Planner
Santa Clara Valley Water District
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STATE CLEARINGHOUSE

Subject: Palo Alto Flood Basin Tide Gate Structure Replacement Project, Mitigated Negative Declaration, SCH No. 2020090237, City of Palo Alto, Santa Clara County

Dear Mr. Hunt:

The California Department of Fish and Wildlife (CDFW) received a draft Mitigated Negative Declaration (MND) from the Santa Clara Valley Water District (Valley Water) for the Palo Alto Flood Basin Tide Gate Structure Replacement Project (Project) pursuant to the California Environmental Quality Act (CEQA).

CDFW is submitting comments on the MND to inform Valley Water, as the Lead Agency, of our concerns regarding potentially significant impacts to sensitive resources associated with the proposed Project. Valley Water granted CDFW an extension (via email on October 13, 2020) to submit comments by October 20, 2020.

CDFW ROLE

CDFW is a Trustee Agency with responsibility under CEQA (Pub. Resources Code, § 21000 et seq.) pursuant to CEQA Guidelines section 15386 for commenting on projects that could impact fish, plant, and wildlife resources. CDFW is also considered a Responsible Agency if a project would require discretionary approval, such as permits issued under the California Endangered Species Act (CESA), the Lake and Streambed Alteration (LSA) Program, or other provisions of the Fish and Game Code that afford protection to the state's fish and wildlife trust resources.

REGULATORY REQUIREMENTS

California Endangered Species Act

Please be advised that a CESA Incidental Take Permit (ITP) must be obtained if the Project has the potential to result in "take" of plants or animals listed under CESA, either during construction or over the life of the Project. Issuance of a CESA Permit is subject to CEQA documentation; the CEQA document must specify impacts, mitigation measures, and a mitigation monitoring and reporting program. If the Project will impact

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CESA listed species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain a CESA ITP.

CEQA requires a Mandatory Finding of Significance if a project is likely to substantially restrict the range or reduce the population of a threatened or endangered species. (Pub. Resources Code, §§ 21001, subd. (c), 21083; CEQA Guidelines, §§ 15380, 15064, and 15065). Impacts must be avoided or mitigated to less-than-significant levels unless the CEQA Lead Agency makes and supports Findings of Overriding Consideration (FOC). The CEQA Lead Agency's FOC does not eliminate the project proponent's obligation to comply with CESA.

Lake and Streambed Alteration

CDFW requires an LSA Notification, pursuant to Fish and Game Code section 1600 et. seq., for Project activities affecting lakes or streams and associated riparian habitat. Notification is required for any activity that may substantially divert or obstruct the natural flow; change or use material from the bed, channel, or bank including associated riparian or wetland resources; or deposit or dispose of material where it may pass into a river, lake or stream. Work within ephemeral streams, washes, watercourses with a subsurface flow, and floodplains are subject to notification requirements. CDFW will consider the CEQA document for the Project and may issue an LSA Agreement. CDFW may not execute the final LSA Agreement (or ITP) until it has complied with CEQA as a Responsible Agency.

Migratory Birds and Raptors

CDFW also has jurisdiction over actions that may result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code Sections protecting birds, their eggs, and nests include 3503 (regarding unlawful take, possession or needless destruction of the nests or eggs of any bird), 3503.5 (regarding the take, possession or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful take of any migratory nongame bird). Fully protected species may not be taken or possessed at any time (Fish and Game Code Section 3511). Migratory birds are also protected under the federal Migratory Bird Treaty Act (MBTA).

PROJECT DESCRIPTION SUMMARY

Proponent: Valley Water

Objective: To prevent the failure of an existing 113-foot-wide tide gate structure, the Project proposes to construct a new 132-wide tide gate structure southeast of the existing one. Portions of an existing levee will also be removed, and a new levee will be constructed to tie into the new tide gate structure. The Project is not covered under the Santa Clara Valley Habitat Plan.

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Location: The Project is located along the San Francisco Bay shoreline in the City of Palo Alto, east of the Palo Alto Municipal Airport and Byxbee Park. The Project is within the Mayfield Slough and at the confluence of Matadero Creek and Adobe Creek.

Timeframe: Construction is expected to require four or five work seasons beginning in 2021 and ending in 2025. The work is proposed to occur from September 1 through January 31.

COMMENTS AND RECOMMENDATIONS

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

Comment 1: MND, California Ridgway's Rail and California Black Rail

Issue: Land adjacent to the Project area provides potentially suitable habitat for California Ridgway's rail (*Rallus obsoletus obsoletus*), a Federally and State Endangered species as well as a State Fully Protected Species, and California black rail (*Laterallus jamaicensis coturniculus*), a State Threatened and Fully Protected species. The MND indicates that it is unlikely for rails to nest or forage within the Project footprint. Per the MND, California Ridgway's rail was "detected at the Harriet Mundy Marsh, Byxbee Park, Hooks Island, and downstream of the Charleston Slough tide gate (Olofson Environmental 2020)." Similarly, California black rail was "detected in mid-March 2008 just east of the Palo Alto airport in the Palo Alto Baylands Preserve." Therefore, due to the habitat adjacent to the Project area, these rail species may be impacted.

Specific impacts and why they would occur: The Project may result in impacts to California Ridgway's rail and California black rail including nest abandonment, loss of young, and reduced health and vigor of adults or young from audio and visual disturbances caused by construction activities (including vehicles along the access roads).

Recommended Minimization Measure: California Black Rail and California Ridgway's Rail Surveys

Please be advised that impacts to California black rail (CBR) and California Ridgway's rail (CRR) must be fully avoided. In addition to the measures included in the MND that may minimize impacts, CDFW recommends that a survey be conducted on January 15 (or at least within two days of this date) if Project activities occur within 700 feet of CBR/CRR habitat during the rail breeding seasons which are from February 1 to September 1 for CBR and CRR. The listening stations should be established at 150-meter intervals along road, trails, and levees that will be affected by Project implementation. CBR and CRR vocalization recordings should be played at each

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station. If there is a lapse in work of more than 24 hours, another pre-construction callback survey should be conducted.

For CBR, each listening station should be occupied for one minute of passive listening, one minute of “grr” calls followed by 30 seconds of “ki-ki-krrr” calls, then followed by another 3.5 minutes of passive listening.

For CRR, each listening station should be occupied for a period of 10 minutes, followed by one minute of playing CRR vocalization recordings, then followed by one additional minute of listening. Sunrise surveys should begin 60 minutes before sunrise and conclude 75 minutes after sunrise (or until presence is detected). Sunset surveys should begin 75 minutes before sunset and conclude 60 minutes after sunset (or until presence is detected). Surveys should not be conducted when tides are greater than 4.5 NGVD. A GPS receiver should be used to identify call location and distance. The call type, location, distance, and time should be recorded on a data sheet.

If CBR/CRR are detected through surveys, then Project activities should not occur within 700 feet of an identified calling center. If the activity occurs where the Project site is across a major channel or slough from the Project site greater than 700 feet in distance, the activity may continue. If bird activity is surveyed or discovered within the buffer limits immediate consultation with CDFW is required. If a CRR or CBR is observed within the Project area at any time, work should be stopped immediately by a qualified biologist and the rail species should be allowed to leave the area on its own. If the rail species does not leave the area, then no work should commence until CDFW has made a determination on how to proceed with work activities.

Daily monitoring surveys of Project sites should occur for CRR and CBR until the Project is complete. If an injured or dead CCR or CBR is discovered at the Project sites, consultation with CDFW is required immediately.

Comment 2: MND, Western Burrowing Owl

Issue: Land adjacent to the Project area includes nonnative grassland habitat that is potentially suitable for foraging, overwintering, and nesting burrowing owls (*Athene cunicularia*), a California Species of Special Concern and also protected under Fish and Game Code section 3503.5 and the federal MBTA. The MND indicates that there is no potential for impacts to burrowing owl due to lack of suitable burrows. Per the MND, Appendix B, “eight to ten pairs were known at the ITT property and Byxbee Park (AECOM 2017)” prior to 2005 and although the immediate Project area lacks ground squirrel burrows “individuals are still observed in Byxbee Park and burrowing owls could occur as a forager in the study area.”

Specific impacts and why they would occur: The Project may result in burrowing owl nest or wintering burrow abandonment, loss of young, and reduced health and vigor of

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adults or young from audio and visual disturbances caused by construction activities.

Evidence impact would be significant: The burrowing owl is experiencing a population decline and breeding range retraction. Based on the foregoing, Project impacts would potentially substantially adversely affect burrowing owl. Therefore, Project impacts to burrowing owl would be potentially significant.

Recommended Mitigation Measure: Burrowing Owl Surveys

Although the MND provides some measures to minimize impacts, CDFW recommends that a qualified biologist conduct surveys following the California Department of Fish and Game (now CDFW) 2012 *Staff Report on Burrowing Owl Mitigation* survey methodology (see <https://wildlife.ca.gov/Conservation/Survey-Protocols#377281284-birds>). Surveys should encompass the Project area and a sufficient buffer zone to detect owls nearby that may be impacted. Time lapses between surveys or Project activities should trigger subsequent surveys including but not limited to a final survey within 24 hours prior to ground disturbance before construction equipment mobilizes to the Project area. The qualified biologist should have a minimum of two years of experience implementing the CDFW 2012 survey methodology resulting in detections. Detected burrowing owls should be avoided pursuant to the buffer zone prescribed in the CDFW 2012 Staff Report, unless otherwise approved in writing by CDFW, and any eviction plan should be subject to CDFW review. Please be advised that CDFW does not consider eviction of burrowing owls (i.e., passive removal of an owl from its burrow or other shelter) as a “take” avoidance, minimization, or mitigation measure; therefore, off-site habitat compensation should be included in the eviction plan.

Comment 3: MND, Salt Marsh Harvest Mouse and Salt Marsh Wandering Shrew

In the MND, MM-BIO-7 is described as developing an avoidance and mitigation measure that would include preconstruction surveys and installation of Environmentally Sensitive Area (ESA) fencing. CDFW recommends that a fencing plan be submitted for review and approval prior to initiation of construction activities. Additionally, no Project activities should occur within 50 feet of suitable tidal marsh habitat for salt marsh harvest mouse (*Reithrodontomys raviventris*; SMHM) within 2 hours before and after an extreme high tide event (6.5 feet or higher measured at the Golden Gate Bridge and adjusted to the timing of local tides) or when adjacent marsh is flooded unless SMHM-proof exclusion fencing has been installed around the work area. Prior to impacting saltmarsh habitat, an approved qualified biologist familiar with SMHM, should walk through and inspect suitable habitat prior to vegetation removal and search for signs of harvest mice or other sensitive wildlife and plant species. Following inspection, personnel, under the supervision of the qualified biologist, should disturb (e.g., flush) vegetation to force movement of SMHM into adjacent marsh areas. Immediately following vegetation flushing, personnel, under the supervision of the qualified biologist

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should remove vegetation with hand tools (e.g., weed-eater, hoe, rake, trowel, shovel, grazing) so that vegetation is no taller than two inches. After vegetation removal, a mouse proof barrier should be placed along the edge of the area removed of vegetation to further reduce the likelihood of SMHM returning to the area prior to construction. The fence should be made of a heavy plastic sheeting material that does not allow SMHM to pass through or climb, and the bottom should be buried to a depth of four inches so that the SMHM cannot crawl under the fence. Fence height should be at least 12 inches higher than the highest adjacent vegetation with a maximum height of four feet. All supports for the exclusion fencing should be placed on the inside of the work area and an approximately 2- to 3- foot wide de-vegetated buffer should be created along the habitat side of the exclusion fence. The qualified biologist or biological monitor should daily inspect the integrity of the exclusion fencing to ensure that there are no gaps, tears, or damage. Maintenance of the fencing should be conducted as needed.

Comment 4: MND, Wetlands, MM-BIO-9, pg. 4-65

The MND states that Valley Water will “develop an aquatic resource mitigation plan, subject to approval by the USACE and RWQCB.” CDFW recommends that this measure be updated to include CDFW’s review and approval of the plan.

Comment 5: MND, Table 4-7 Special-Status Animal Species

Please note that Tricolored blackbird (*Agelaius tricolor*) is listed in the MND as State Candidate (SCE) species but should be listed as State Threatened (ST) in Table 4-7.

Please be advised that CDFW will likely include all of the above recommended mitigation measures in the LSA Agreement for the Project, as applicable.

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 and Game Code, § 711.4; Pub. Resources Code, § 21089).

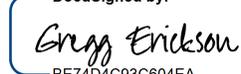
CONCLUSION

To ensure significant impacts are adequately mitigated to a level less-than-significant, CDFW recommends the feasible mitigation measures described above be incorporated as enforceable conditions into the final CEQA document for the Project. CDFW appreciates the opportunity to comment on the MND to assist Valley Water in identifying and mitigating Project impacts on biological resources.

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Questions regarding this letter or further coordination should be directed to Ms. Mayra Molina, Environmental Scientist, at Mayra.Molina@wildlife.ca.gov; or Ms. Brenda Blinn, Senior Environmental Scientist (Supervisory), at Brenda.Blinn@wildlife.ca.gov.

Sincerely,

DocuSigned by:

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Gregg Erickson
Regional Manager
Bay Delta Region

cc: State Clearinghouse (SCH# 2020090237)

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