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**GAVIN NEWSOM, Governor**  
**CHARLTON H. BONHAM, Director**



Governor's Office of Planning & Research

October 26, 2020

**Oct 27 2020**

## STATE CLEARINGHOUSE

Mr. Alex Hunt, Associate Environmental Planner  
Santa Clara Valley Water District  
5750 Almaden Expressway  
San Jose, CA 95118-3614  
[ahunt@valleywater.org](mailto:ahunt@valleywater.org)

Subject: Calabazas Creek Bank Rehabilitation Project, Mitigated Negative Declaration, SCH No. 2020090370, City of Cupertino, 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 Calabazas Creek Bank Rehabilitation Project (Project) pursuant 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 an extension to CDFW to submit comments on the MND by October 26, 2020 (via email on October 14, 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.

### **PROJECT DESCRIPTION SUMMARY**

**Proponent:** Valley Water

**Objective:** To repair and stabilize eroding channel banks at 10 locations that are considered a high priority for public safety concerns. The Project is not covered under the Santa Clara Valley Habitat Plan.

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**Location:** The Project is located along Calabazas Creek from Bollinger Road (upstream end) to Miller Avenue (downstream end) in the City of Cupertino, County of Santa Clara.

**Timeframe:** Construction is expected to begin April 2021 and end by October 2022. Activities are proposed to occur from April 15 to October 15.

## **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, San Francisco Dusky-Footed Woodrat, pg. 4-32**

The MND provides mitigation measures (MM-BIO-1 and MM-BIO-2) to minimize impacts to San Francisco dusky-footed woodrat (*Neotoma fuscipes annectens*), a State Species of Special Concern, which is known to occur on the Project site. MM-BIO-2 describes the potential for relocating woodrat nests, if there is potential for them to be disturbed by Project activities. CDFW recommends that this measure state that a woodrat nest relocation plan will be provided to CDFW for review and approval prior to the start of construction activities.

### **Comment 2: MND, Permanent and Temporary Impacts to Sensitive Natural Communities, pg.4-34**

Table 4-5 of the MND lists the permanent and temporary impacts to two habitat types, intermittent stream and riparian. A footnote for this table states that specific temporary impacts to intermittent stream habitat was not included in the table but does not provide the rationale. CDFW recommends that all impacts be included in the main section of Table 4-5. In Appendix C, Table 1 provides the summary of activities per site along with the work area in square feet. The work area included in Table 1 and the impacts listed in Table 4-5 do not coincide. It is unclear why some of the impacts in Table 4-5 do not add up to the work area in Table 1. CDFW recommends that clarification be provided.

The MND describes some habitat impacts such as permanent impacts to intermittent stream and riparian habitat. Temporary impacts to intermittent stream habitat are also described but it is not clear what activities are considered temporary impacts to riparian habitat. CDFW recommends that all impacts be clearly described in the MND and that these impacts be defined. Please note, that CDFW defines temporary impacts as those impacts where habitat at the impact site can be fully restored to pre-project conditions, values, and functions within one year of impact. CDFW defines semi-permanent impacts as those impacts where habitat at the impact site can be fully restored to pre-project conditions, values, and functions within two years of impact. CDFW defines permanent impacts as those impacts where habitat at the impact site either cannot be

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restored, due to permanent removal of habitat, or where habitat at the impact sure will require greater than two years to be restores to pre-project conditions, values, and functions relative to time of impact.

In Appendix C of the MND, approximately 32 trees are proposed for removal and Table 4 provides the range of sizes and species of trees. CDFW recommends that this Table be more detailed and include the size of each tree individually.

The MND, page 4-36, provides a mitigation measure, MM-BIO-4, to address impacts to riparian habitat. As part of this measure, a Habitat Mitigation and Monitoring Plan (HMMP) will be developed and Valley Water proposes to mitigate permanent impacts to riparian habitat with a ratio of 2:1 and temporary impacts are proposed to be mitigated with a 1:1 ratio. Considering that permanent impacts will include removal of various tree species of different sizes, such as Coast live oak (*Quercus agrifolia*) and other mature native oak trees, CDFW recommends higher mitigation ratios than what is currently proposed in the MND. Since the MND does not provide adequate compensation for the loss of oak species, the Project could substantially adversely affect an important biological resource for nesting birds and roosting bats. Additionally, oak trees provide a diversity of ecological benefits and have slow growth rates, therefore, it would take several decades for planted oaks to grow to a size that could provide the same ecological benefits. Therefore, CDFW recommends that the following mitigation ratios be included in the MND:

- Non-native trees
  - <15 inches (in) DBH: 1:1
  - 15 in DBH or greater: 2:1
- Native trees (not oaks)
  - <6 in DBH: 1:1
  - 6-12 in DBH: 3:1
- Oaks
  - <4 in DBH: 1:1
  - 4 to 10 in DBH: 4:1
  - 11 to 15 in DBH: 5:1
  - 15 in DBH or greater: 10:1

If insufficient space exists on-site or on nearby lands to adhere to these mitigation ratios and adequately compensate for loss of habitat, then Valley Water should provide an appropriate off-site location in consultation with CDFW. The MND should state that a

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mitigation plan will be developed and provided to CDFW, and that it will include, but not limited to, multi-story revegetation plans.

On page 4-37, the MND states that there may be risk of mortality through root pruning. CDFW recommends that if trees require root pruning that they be monitored and included in the HMMP. If the tree health declines, additional mitigation for impacts or loss of trees may be required.

Another measure that the MND includes to minimize impacts to trees is MM-BIO-5, which includes temporary construction fencing around an established tree protection zone (TPZ). If the fencing will be used as a visual aid, CDFW recommends that the fencing be installed in a way to provide space between the ground and fence in order to allow wildlife to move freely (e.g., reptiles, amphibians and small mammals).

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

### **Comment 3: MND, Reach-wide/Watershed-wide Approach to Address Erosion**

Although the Project proposes to address 10 high priority sites, bank erosion is occurring at other sites on Calabazas Creek. CDFW is concerned that in the future other sites may require additional hardscape to address bank erosion. CDFW recommends that Valley Water analyze sources and causes of erosional features within the Calabazas watershed and undertake a reach-wide or watershed-wide approach to address bank erosion that includes environmentally friendly methods, such as bio-engineering, rather than hardscape. Preferably, this reach- or watershed-wide analysis would be included in a revised and expanded CEQA document that includes the 10 high-priority sites. Alternatively, the MND would be revised to describe the pathway for future analyses under CEQA for the rest of the reaches in the Calabazas watershed.

### **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

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

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

Sincerely,

DocuSigned by:  
  
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Gregg Erickson  
Regional Manager  
Bay Delta Region

cc: State Clearinghouse (SCH# 2020090370)

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