



State of California – Natural Resources Agency  
DEPARTMENT OF FISH AND WILDLIFE  
Bay Delta Region  
2825 Cordelia Road, Suite 100  
Fairfield, CA 94534  
(707) 428-2002  
[www.wildlife.ca.gov](http://www.wildlife.ca.gov)

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



Governor's Office of Planning & Research

May 13, 2021

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Mr. Robert Salisbury  
County of Santa Clara  
70 West Hedding, 7th Floor, East Wing  
San Jose CA 95110  
[Robert.Salisbury@pln.sccgov.org](mailto:Robert.Salisbury@pln.sccgov.org)

## STATE CLEARINGHOUSE

Subject: Permanente Creek Restoration Project, Notice of Preparation of a Supplemental Draft Environmental Impact Report, SCH No. 2021040331, Santa Clara County

Dear Mr. Salisbury:

The California Department of Fish and Wildlife (CDFW) received the Notice of Preparation (NOP) of a Supplemental Draft Environmental Impact Report (SDEIR) from the County of Santa Clara (County) for the Permanente Creek Restoration Project (Project) pursuant the California Environmental Quality Act (CEQA) and CEQA Guidelines.<sup>1</sup>

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that may affect California fish and wildlife resources. Likewise, we appreciate the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under the Fish and Game Code.

### CDFW ROLE

CDFW is a Trustee Agency with responsibility under CEQA §15386 for commenting on projects that could impact fish, plant and wildlife resources. CDFW is also considered a Responsible Agency if a project would require discretionary approval, such as permits issued under the California Endangered Species Act (CESA), the Native Plant Protection Act, the Lake and Streambed Alteration (LSA) Program and other provisions of the Fish and Game Code that afford protection to the State's fish and wildlife trust resources. Pursuant to our jurisdiction, CDFW has the following concerns, comments, and recommendations regarding the Project.

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<sup>1</sup> CEQA is codified in the California Public Resources Code in section 21000 et seq. The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

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## **PROJECT DESCRIPTION SUMMARY**

**Proponent:** Lehigh Southwest Cement Company

**Objective:** Specific reaches of Permanente Creek within the Project proponents land ownership will be restored. This includes activities such as removal of roads or reduction in the size of roads, removal of culverts, sediment, rock and concrete debris, construction of floodplain, restoration of creek channel, installation of large woody debris, removal of invasive plants, and planting native vegetation.

**Location:** The Project is located at the Permanente Quarry, west of the City of Cupertino, in Santa Clara County. The Assessor's Parcel Numbers are 351-10-038, 351-09-022, 342-64-003, 351-10-033, 351-10-035, 351-10-034, 351-10-008, 351-10-011, 351-11-001.

## **COMMENTS AND RECOMMENDATIONS**

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

### **Project Description**

The NOP, on page 2, in the Project Description, does not discuss the nexus of the proposed Project to the proposed amendment to the Lehigh Permanente Quarry Reclamation Plan (Reclamation Plan), currently dated May 2019. CEQA guidelines §15124(d)(1)(C) state that an EIR Project Description should list related environmental review and consultation requirements required by state laws, regulations, or policies, which may apply to this issue. CDFW reviewed and provided comments on the proposed May 2019 Reclamation Plan amendment, however, the proposed Project was not discussed in the amendment. CDFW recommends that the DSEIR for the proposed Project discuss the association between the proposed Project and the Reclamation Plan and explain whether the proposed Project will be further described and analyzed in any future CEQA documentation for the Reclamation Plan.

### **Biological Resources, Long-term Impacts to Riparian Sensitive Community**

#### *Stability of Permanente Creek Bed and Bank*

CEQA Guidelines Section 15126.2(a) state that long-term significant effects of a project should be considered and discussed. CDFW engineering staff reviewed and provided comments on the revised 90% engineering designs and supporting documents for the Project. CDFW engineering staff determined that implementation of the Project as designed could potentially result in post-construction instability of the creek bed and

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bank. For example, unstable conditions may occur due to steep 1.5:1 or 1:1 creek bank slopes, lack of in-channel sub-surface geologic investigation, lack of rock weirs in reaches with very steep gradients, and inclusion of large woody debris in reaches where it could become dislodged due to steep gradients. Creek bed and bank instability could result in significant impacts to the sensitive riparian community and special-status species habitat. The SDEIR should therefore include a thorough analysis of the current designs, and any necessary modifications to the designs to prevent adverse effects to the sensitive habitat types. To avoid or reduce potential long-term impacts of the Project to a less-than-significant level, CDFW recommends that a long-term (e.g., 10-year) post-construction monitoring and adaptive management plan be developed and described in the SDEIR. The SDEIR should include monitoring of the creek geomorphology, consultation with CDFW and other resource agencies and identification of corrective and remediation actions in the event that creek bed or bank instability is detected.

#### *Riparian Vegetation Impacts*

The revised 90% engineering designs appear to indicate that approximately 30 trees will be removed during Project construction. However, only larger trees to be removed were included in the designs (e.g., non-oak trees equal to or greater than 12-inch diameter). Sapling (1-inch to 4-inch diameter) and pole sized (5-inch to 11-inch diameter) trees are important to riparian vegetation structural complexity and habitat succession. Based on the current designs, impacts of the Project to riparian habitat may be underestimated. CDFW recommends that analysis of riparian vegetation impacts include trees less than 12 inches in diameter or based on area calculations for seedlings and saplings and understory vegetation. As discussed in the previous section of this letter, the long-term (e.g., 10-year) post-construction monitoring and adaptive management plan should include monitoring of revegetated areas and include performance standards to ensure establishment or maintenance of riparian habitat.

#### **Biological Resources, Impacts to Special-Status Species**

The revised 90% engineering designs appear to indicate that the treated water outfall located at Pond 1250 may be moved to a different location, however, the alternate location was not described in the NOP. Changing the outfall location could potentially result in significant hydrological impacts to stream reaches that would no longer receive water, and consequently adversely impact riparian vegetation or aquatic special-status species (e.g., California giant salamander (*Dicamptodon ensatus*, State Species of Special Concern) and California red-legged frog [CRLF, *Rana draytonii*, Federally Threatened and State Species of Special Concern]). CDFW recommends that the SDEIR clearly demarcate the proposed new outfall location on a map and discuss the significance of the treated water contribution from the outfall to this stream reach, and any potential effects on riparian habitat and special-status species resulting from relocation of the outfall. The SDEIR should discuss design modifications or alternate

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outfall sites to ensure the Project results in less-than-significant impacts to aquatic and riparian habitats from either direct or indirect changes in creek hydrology.

The NOP does not discuss potential occurrences of special-status and sensitive bat species within the Project area. As discussed in the *Riparian Vegetation Impacts* section above, the revised 90% engineering designs did appear to indicate the removal of approximately 30 trees. Removal of trees could impact special-status and sensitive bat species such as Pallid bat (*Antrozous pallidus*, State Species of Special Concern) and Hoary bat (*Lasiurus cinereus*) that may roost in woodland and riparian habitats.

The California Natural Diversity Database (CDFW 2021) shows occurrences of CRLF, California giant salamander, and Santa Cruz black salamander (*Aneides niger*, State Species of Special Concern) within the Project area. There may also be potential presence of San Francisco dusky-footed woodrat (SFDWR, *Neotoma fuscipes annectens*, State Species of Special Concern).

To reduce impacts to less-than-significant levels, CDFW recommends the measures below be included in the SDEIR.

1. Focused Surveys: The Project location and tree removal locations should be surveyed for Species of Special Concern and sensitive bat species by a qualified biologist following protocol-level surveys. In the absence of protocol-level surveys being performed, focused surveys for Species of Special Concern presence or indicators of presence (e.g., bat guano and acoustic surveys) should be conducted.
2. Avoidance, Minimization, and Mitigation: If Species of Special Concern or sensitive bat species are found within or adjacent to the Project site, the qualified biologist should establish a no-disturbance buffer appropriate for the species and conduct on-site monitoring during all Project-related activities. The SDEIR should include additional minimization and mitigation measures for each species that could be potentially impacted by Project activities.

### **Biological Resources, Bird Nest Measures**

The NOP does not include a discussion of wildlife that may be present within the Permanente Creek riparian area. However, in CDFW review of aeriels, there is a potential for avian species to nest within the riparian area. In order to avoid significant impacts to nesting avian species, CDFW recommends that the following protective measures be included in the SDEIR:

1. Nesting Bird Surveys: If Project-related work is scheduled during the nesting season (typically February 15 to August 30 for small bird species such as passerines; January 15 to September 15 for owls; and February 15 to September

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15 for other raptors), a qualified biologist will conduct two surveys for active nests of such birds within 14 days prior to the beginning of Project construction, with a final survey conducted within 48 hours prior to construction. Appropriate minimum survey radii surrounding the work area are typically the following: i) 250 feet for passerines; ii) 500 feet for small raptors such as accipiters; and iii) 1,000 feet for larger raptors such as buteos. Surveys will be conducted at the appropriate times of day and during appropriate nesting times.

2. Active Nest Buffers: If the qualified biologist documents active nests within the Project area or in nearby surrounding areas, an appropriate buffer between the nest and active construction will be established. The buffer will be clearly marked and maintained until the young have fledged and are foraging independently. Prior to construction, the qualified biologist will conduct baseline monitoring of the nest to characterize “normal” bird behavior and establish a buffer distance which allows the birds to exhibit normal behavior. The qualified biologist will monitor the nesting birds daily during construction activities and increase the buffer if the birds show signs of unusual or distressed behavior (e.g., defensive flights and vocalizations, standing up from a brooding position, and/or flying away from the nest). If buffer establishment is not possible, the qualified biologist or construction foreman will have the authority to cease all construction work in the area until the young have fledged and the nest is no longer active.

### **Biological Resources, Rare Plant Species**

The NOP does not include a discussion of special-status or rare plants that may be present within the impact area. In review of the California Natural Diversity Database (CNDDDB, CDFW 2021), there are rare plant species that are located within 2 miles of the Project site, including woodland woollythreads (*Monolopia gracilens*, California Rare Plant Rank 1B.2) and western leatherwood (*Dirca occidentalis*, California Rare Plant Rank 1B.2). In order to avoid significant impacts to rare plant species within the impact area, CDFW recommends that the following protective measures be included in the SDEIR:

1. Special-Status Plant Habitat Assessment: A qualified botanist should conduct an assessment of the plant communities/land cover (e.g., chaparral, cismontane woodland, riparian forest) that provide habitat for these rare plant species.
2. Special-Status Plant Focused Surveys: If plant communities/land cover suitable for rare plants are determined to be present, the Project location should be surveyed for rare plant species by a qualified biologist following protocol-level surveys. Protocol-level surveys, which are intended to maximize detectability, may include identification of reference populations to facilitate the likelihood of field investigations occurring during the appropriate floristic period.

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3. Special-Status Plant Avoidance: Rare plant species should be avoided through delineation and establishment of a no-disturbance buffer of at least 50 feet from the outer edge of the plant population or specific habitat type required by rare plant species.

## ENVIRONMENTAL DATA

CEQA requires that information developed in draft environmental impact reports be incorporated into a data base which may be used to make subsequent or supplemental environmental determinations. [Pub. Resources Code, § 21003, subd. (e)]. Accordingly, please report any special-status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDDB). The CNDDDB field survey form, online field survey form, and contact information for CNDDDB staff can be found at the following link: <https://wildlife.ca.gov/data/CNDDDB/submitting-data>. The types of information reported to CNDDDB can be found at the following link: <https://wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

## FILING FEES

CDFW anticipates that the Project will have an impact on fish and/or wildlife, and assessment of filing fees is necessary (Fish and Game Code, § 711.4; Pub. Resources Code, § 21089). Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW.

## CONCLUSION

CDFW appreciates the opportunity to comment on the NOP to assist the County in identifying and mitigating Project impacts on biological resources. CDFW appreciates the County's past coordination on this Project and offers continued guidance on project design and environmental review.

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

Sincerely,

DocuSigned by:  
  
BE74D4C93C604EA...  
Gregg Erickson  
Regional Manager  
Bay Delta Region

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cc:

Office of Planning and Research, State Clearinghouse, Sacramento  
Brian Wines, Regional Water Quality Control Board, [brian.wines@waterboards.ca.gov](mailto:brian.wines@waterboards.ca.gov)  
Joseph Terry, US Fish and Wildlife Service, [Joseph\\_terry@fws.gov](mailto:Joseph_terry@fws.gov)

#### **LITERATURE CITED**

California Department of Fish and Wildlife (CDFW). 2021. Biogeographic Information and Observation System (BIOS). <https://www.wildlife.ca.gov/Data/BIOS>. Accessed May 5, 2021.