



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

GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director



October 31, 2022

Governor's Office of Planning & Research

OCT 31 2022

Ms. Winnie Mui
 City of Orinda
 22 Orinda Way
 Orinda, CA 94563
PlanOrindaEIR@cityoforinda.org

STATE CLEARINGHOUSE

Subject: Plan Orinda, Draft Environmental Impact Report, SCH No. 2022010392,
 City of Orinda, Contra Costa County

Dear Ms. Mui:

The California Department of Fish and Wildlife (CDFW) received a Notice of Availability of a draft Environmental Impact Report (EIR) from the City of Orinda (City) for the Plan Orinda (Project) pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹ CDFW previously submitted comments in response to the Notice of Preparation (NOP).

CDFW is submitting comments on the draft EIR to inform the City, as the Lead Agency, of potentially significant impacts to biological and natural resources associated with the Project.

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

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.

Ms. Winnie Mui
City of Orinda
October 31, 2022
Page 2

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.), related authorization as provided by the Fish and Game Code will be required.

PROJECT DESCRIPTION AND LOCATION

The Project is an amendment to the City’s General Plan to address: state mandated housing needs; the rezoning of a portion of the City’s downtown to mixed residential and commercial space; and revisions to the Environmental Resources Chapter of the General Plan to reduce potential impacts related to the Project. The Project would be implemented from its adoption through 2031. The Project is located within City limits regarding areas of the Housing Element Update (HE) (see figure 1) and the Downtown Precise Plan (see figure 2). The HE Update portion of the Project encompasses approximately 74.59 acres. The Downtown Precise Plan Update portion of the Project encompasses approximately 60 acres. The study area for the Project includes all portions of City limits, a total of 12.7 square miles. The Project area, including City limits, is bordered by the City of Lafayette to the east, the Town of Moraga to the southeast, and unincorporated Contra Costa County in the remaining directions.

ENVIRONMENTAL SETTING

The HE areas of the Project covers approximately 74.59 acres cumulatively across five separate areas (see figure 1). HE-1 consists of 3.22 acres of developed land which currently holds a building utilized as a place of worship. HE-2 and HE-3 consists of 4.48 acres, and 4.94 acres respectively, of partially developed land which currently hold buildings utilized as places of worship and undeveloped hillslopes containing native and non-native trees and vegetation. HE-4 consists of 51.95 acres of undeveloped open space containing native and non-native trees and vegetation. HE-5 consists of 10 acres of public/semipublic undeveloped open space containing native and non-native trees and vegetation. The HE areas open space features are comprised of annual grasslands, oak savannah, mixed oak woodlands, and scrubland; all of which are adjacent to lands where positive occurrence records of Alameda whipsnake (AWS) (*Masticophis lateralis euryxanthus*; Swaim, 2006 and 2010) are located and are within dispersal distance. In addition to AWS, the Project areas contains habitat for nesting birds, fossorial mammals, roosting bats, and rare plants such as the California Native Plant Society’s (CNPS) Rare Plant Rank 1.B2 species: bent-flowered fiddleneck (*Amsinckia lunaris*; East Bay Municipal Utility District (EBMUD), 2018), western leatherwood (*Dirca occidentalis*; EBMUD, 2021), and Diablo helianthella (*Helianthella castanea*; EBMUD, 2015). The topography of the Project sites holds features which contain contributing tributaries to, or are directly adjacent to, San Pablo Creek.

Ms. Winnie Mui
City of Orinda
October 31, 2022
Page 3

The Downtown Precise Plan area consists of approximately 60 acres of urban development adjacent to San Pablo creek which includes native and non-native trees and vegetation. The Downtown Precise Plan area also includes sites proposed for future riparian restoration areas and a creek side trail. San Pablo Creek historically and currently holds records of California red-legged frog (CRLF) (*Rana draytonii*; Beeman, 2007).

The immediate neighboring parcels to HE 1 through 4 and Downtown Precise Plan areas are comprised of suburban development and mixed open space that contain native and ornamental trees, and other vegetation or infrastructure, that provide potential nesting habitat for birds and potential roosting habitat for bats. The parcels immediately neighboring HE-5 are comprised primarily of undeveloped open space with the exception of a municipal park development to the southeast. Within a two-mile radius are designated open space areas including portions of EBMUD-owned watershed areas, East Bay Regional Parks District-managed lands, and privately held open space. These neighboring, adjacent, private and public open space areas hold potential habitat, habitat corridors. Within a 2-mile radius of these areas, there are positive occurrence records of special-status species, including but not limited to, AWS, CRLF, San Francisco dusky-footed woodrat (*Neotoma fuscipes annectens*), and the above listed CNPS-listed rare plants.

Closely Related Past, Present, and Reasonably Foreseeable Probable Future Projects

The draft EIR acknowledges that the Project would contribute to the ongoing loss of partially and/or undeveloped lands and would cumulatively impact biological resources without implementation of the mitigation measures required by the draft EIR and other agency driven regulations. However, the draft EIR does not identify specific compensatory mitigation measures to permanently conserve and protect habitats for the impacted special-status species to reduce the impacts from permanent and cumulative loss of their habitats to a level of less-than-significant. Without modifications made to the provided mitigation measures described in this letter, the Project has the potential to result in cumulative impacts over time such as the permanent removal of existing open space, and vacant lands, as described in the draft EIR. Some land use changes appear to overlap with areas of the Project that have been mapped as sensitive natural communities, such as oak woodland, or hold critical habitat and/or connectivity for AWS and are within a reasonable dispersal distance for the species from known occurrences (Swaim, 2006 and 2010). The loss of sensitive natural communities and connectivity areas would be cumulatively considerable and could cause potentially significant impacts to the biological resources in and adjacent to the Project. To reduce these impacts to a level of less-than-significant, CDFW recommends that the draft EIR be revised to include the following:

Ms. Winnie Mui
City of Orinda
October 31, 2022
Page 4

1. Map of sensitive natural communities and connectivity areas for AWS, existing land use designations, and full buildout land use designations that clearly identifies the proposed loss of essential connectivity areas.
2. Include the modification to the mitigation measures provided for in this letter as recommended by CDFW.
3. Reduce, redesign, restrict, or remove portions of the HE areas that would specifically result in the loss of sensitive natural communities or connectivity areas for AWS.

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) and 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 or other aspects of Fish and Game Code.

COMMENTS AND RECOMMENDATIONS

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

Revision to Impacts Analysis and Findings

The draft EIR neglects to analyze or disclose permanent loss of habitat for special-status species, nor does it include mitigation measures to reduce this impact to a level of less-than-significant. Instead, the draft EIR limits the scope of its analysis to habitat conversion and is silent on when this conversion results in permanent loss of the habitat when it no longer is viable for use by special-status species. CDFW recommends that the draft EIR be revised and recirculated to include an analysis of permanent habitat loss impacts for special-status species and incorporate this analysis into the Lead Agency's significance determination. Based on this analysis the City should revise the draft EIR to also incorporate compensatory mitigation measures in the form of permanent protection and management of like for like habitats through a legal instrument, such as a conservation easement, with an endowment for habitat management. The revised impacts analysis and mitigation measures should then be incorporated into the Findings in the Final EIR.

Ms. Winnie Mui
City of Orinda
October 31, 2022
Page 5

Revisions to Proposed Mitigation Measures

The mitigation measures provided for in the draft EIR call out when the triggers for such measures will occur at HE areas 3 through 5, yet HE-2 holds undeveloped sections of oak savanna. CDFW recommends that HE-2 be included in mitigation measures BIO-1 through 7 and BIO-9 through 13. CDFW also recommends the following edits and additions to the provided mitigation measures found in the draft EIR below:

BIO-1: CDFW recommends that screening and assessments for special-status species include areas where a species has potential to occur. Due to decreasing amounts of what would normally be considered “suitable habitat”, wildlife is being forced to occupy sub-optimal, marginal habitat because that is all that is available to them. For example, AWS is known to utilize asphalt for basking, bats often utilize duff for roosting, and bent-flowered fiddleneck has been documented to occur in unimproved road turnouts.

BIO-2: CDFW recommends that project-specific special-status plant surveys be conducted for the species with the potential to occur within HE areas 2 through 5. To ensure impacts to special-status plants are mitigated to a level of less-than-significant, CDFW recommends that the Project area be surveyed for special-status plants by a qualified botanist following the Protocols for Surveying and Evaluating Impacts to Special-status Native Plant Populations and Sensitive Natural Communities (<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=18959&inline>). This protocol includes the identification of reference populations and adjacent potential habitat areas, to assist in the accuracy and timing of a Project area’s floristic surveys. The results of surveys following the protocol should be summarized into Botanical Survey Reports, as found on page nine of the protocol, and be incorporated into a revised Draft EIR other subsequent environmental documents as necessary. In the absence of protocol-level surveys being performed, additional surveys may be necessary. Additionally, annual weather variance, including, but not limited to, drought conditions when a Project’s biological survey was conducted, may result in the need for additional floristic surveys to be performed.

BIO-4: The proposed 1:1 (mitigation to impact) ratio does not meet the minimum standard for replacement, given loss of habitat over the course of time, and recovery. Moreover, the proposed 80% success criteria for restoration plantings could result in a net loss, and therefore failure to achieve even the proposed 1:1 ratio. To reduce the Project’s potentially significant impacts to special-status plants to a level of less-than-significant, CDFW recommends that BIO-4 be revised to provide compensatory mitigation at a minimum of a 3:1 (mitigation to impact) ratio for permanent impacts, and a 1.1:1 (mitigation to impact) ratio for temporary impacts to special-status plants and their habitats. Revisions may include, but are not limited to, the preservation and enhancement of on-site and/or adjacent populations, seed collection or transplanting of

Ms. Winnie Mui
City of Orinda
October 31, 2022
Page 6

on-site individuals/populations, and preservation of occupied habitat on-site or off-site adjacent to a Project-impacted area.

BIO-5: CDFW recommends the following edits to BIO-5:

“If the results of the project-specific biological analysis, for projects within **any** Housing Element site sites ~~HE-3, 4, and 5~~ determine that suitable **potential** habitat is present for any federal or State listed species **or other special-status species**, a qualified biologist shall complete protocol habitat assessments/surveys in accordance with CDFW and/or USFWS protocols prior to issuance of any construction permits.”

BIO-6: CDFW recommends that any Project activities occurring within or adjacent to riparian areas are conducted and completed between June 1 and October 15 of any work year to reduce impacts not only to sensitive aquatic species, but all species that utilize riparian areas and the habitat that supports them.

BIO-7: The survival rate of evicted or excluded bats through the use of exclusion measures, such as one-way valves, is unknown. All possible avoidance and minimization measures should be considered before temporary or permanent exclusion and closure of roosting areas is implemented in order to avoid take of bats. Passive relocation is not considered take avoidance, minimization, or mitigation. If complete avoidance of impacts to bats is not possible, or cannot be confirmed as in the case of passive relocation then CDFW recommends that replacement artificial bat roosts (e.g., bat houses, or equivalent) be installed, monitored, and managed by a qualified biologist.

BIO-8: CDFW recommends the following language be used to replace existing language in BIO-8 regarding nesting birds:

Birds. Project Proponents are responsible for ensuring that the work activities do not result in any violation of Fish and Game Code. If activities will occur during nesting bird season (February 15 to September 15), a qualified biologist will conduct focused surveys for active nests within 5 days prior to the initiation of said activities that could impact nesting birds. Surveys will be conducted in all potential habitat located at, and adjacent to, project work sites and in staging and storage areas. The minimum survey radii surrounding the work area will be the following: (1) 250 feet for non-raptors, and (2) 1,000 feet for raptors. If a lapse in project-related activities of 7 days or longer occurs, another focused survey will be required before Project activities can be reinitiated.

Active Nests. A qualified biologist will observe any identified active nests prior to the start of any construction-related activities to establish a behavioral baseline of the adults and any nestlings. Once work commences, all active nests should be continuously monitored by a qualified biologist to detect any

Ms. Winnie Mui
City of Orinda
October 31, 2022
Page 7

signs of disturbance and behavioral changes as a result of Project activities. In addition to direct impacts, such as nest destruction, nesting birds might be affected by noise, vibration, odors and movement of workers or equipment. If signs of disturbance and behavioral changes are observed, a qualified biologist will be responsible to cease work causing that change, and may elect to contact CDFW for guidance prior to the recommencement of activities.

Active Nest Buffers. Active nest sites and protective buffer zones shall be designated as "Ecologically Sensitive Areas" where no project-related activities or personnel may enter. These designated areas shall be protected during project activities with the establishment of a fence barrier or flagging surrounding the nest site. A qualified biologist shall determine the necessary buffer to protect nesting birds based on existing site conditions, such as construction activity and line of sight, and shall increase buffers if needed to provide sufficient protection of nesting birds and their natural behaviors.

BIO-12: CDFW recommends that nursery plants selected for restoration be purchased from a source nursery that is in compliance with annual inspections under 7 CFR 301.92, et seq. for sudden oak death. A qualified biologist shall check the California Department of Food and Agriculture's website to view the most recent list of approved nurseries from quarantined and regulated counties, found at: <https://www.cdfa.ca.gov/plant/pe/InteriorExclusion/SuddenOakDeath/>. Sudden oak death may not be detectable by visual inspection alone, thus Project Proponents should utilize clean nursery stock available from a certified nursery to avoid transmitting the disease.

BIO-13: CDFW recommends deletion of language that delegates responsibility to a qualified biologist to determine whether a project will have the potential to impact a river, lake or stream and instead require projects to notify CDFW for a formal determination of whether the project requires a Lake and Streambed Alteration (LSA) Agreement.

REGULATORY AUTHORITY

Lake and Streambed Alteration

CDFW requires a 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. In this case, CDFW would consider the CEQA document for the Project and may issue an LSA

Ms. Winnie Mui
City of Orinda
October 31, 2022
Page 8

Agreement. CDFW may not execute the final LSA Agreement until it has complied with CEQA as a Responsible Agency.

California Endangered Species Act

Please be advised that CDFW recommends that a CESA Incidental Take Permit (ITP) should be obtained if the Project has the potential to result in “take” of plants or animals listed under CESA, such as AWS or pallid manzanita (*Arctostaphylos pallida*), either as a result of construction or over the life of the Project. Issuance of an ITP 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 CESA-listed species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain an ITP.

Fully Protected Species

Fully Protected species such as golden eagle, and white-tailed kite, may not be taken or possessed at any time (Fish & G. Code, §§ 3511, 4700, 5050, & 5515).

Raptors and Other Nesting Birds

CDFW 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 sections 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).

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 filled out and submitted online 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://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

ENVIRONMENTAL DOCUMENT FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of environmental document filing fees is necessary. Fees are payable upon filing of the

Ms. Winnie Mui
City of Orinda
October 31, 2022
Page 9

Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the environmental document filing 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).

CDFW appreciates the opportunity to comment on the draft EIR to assist the City in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Andrew Chambers, Environmental Scientist, at (707) 266-2878 or Andrew.Chambers@wildlife.ca.gov; or Michelle Battaglia, Senior Environmental Scientist (Supervisory), at Michelle.Battaglia@wildlife.ca.gov.

Sincerely,

DocuSigned by:

Erin Chappell
Regional Manager
Bay Delta Region

ec: Office of Planning and Research, State Clearinghouse (SCH No. 2022010392)

ATTACHMENTS

Figure 1 – Housing Element Areas Map (City of Orinda, 2022)

Figure 2 – Downtown Precise Plan Map (City of Orinda, 2022)

LITERATURE CITED

Beeman, G.A. (2007). California red-legged frog [ds45]. Calif. Dept. of Fish and Wildlife. Biogeographic Information and Observation System (BIOS). Retrieved October 5, 2022, from <https://wildlife.ca.gov/Data/BIOS>.

East Bay Municipal Utility District. (2018). Bent-flowered fiddleneck [ds45]. Calif. Dept. of Fish and Wildlife. Biogeographic Information and Observation System (BIOS). Retrieved October 5, 2022, from <https://wildlife.ca.gov/Data/BIOS>.

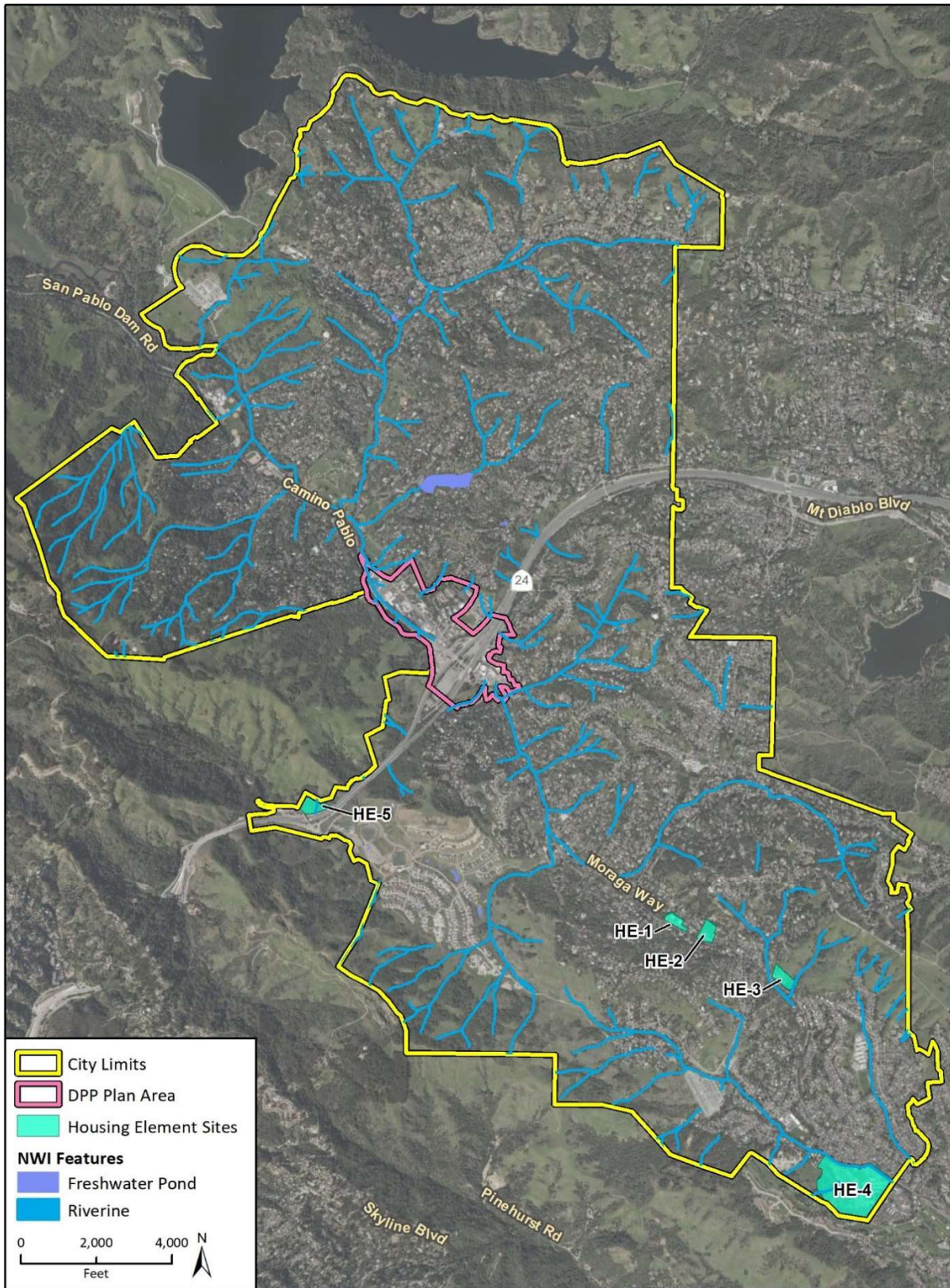
East Bay Municipal Utility District. (2018). Diablo helianthella [ds45]. Calif. Dept. of Fish and Wildlife. Biogeographic Information and Observation System (BIOS). Retrieved October 5, 2022, from <https://wildlife.ca.gov/Data/BIOS>.

Ms. Winnie Mui
City of Orinda
October 31, 2022
Page 10

East Bay Municipal Utility District. (2021). Western leatherwood [ds45]. Calif. Dept. of Fish and Wildlife. Biogeographic Information and Observation System (BIOS). Retrieved October 5, 2022, from <https://wildlife.ca.gov/Data/BIOS>.

Swaim, K. (2006 and 2010). Alameda whipsnake [ds45]. Calif. Dept. of Fish and Wildlife. Biogeographic Information and Observation System (BIOS). Retrieved October 5, 2022, from <https://wildlife.ca.gov/Data/BIOS>.

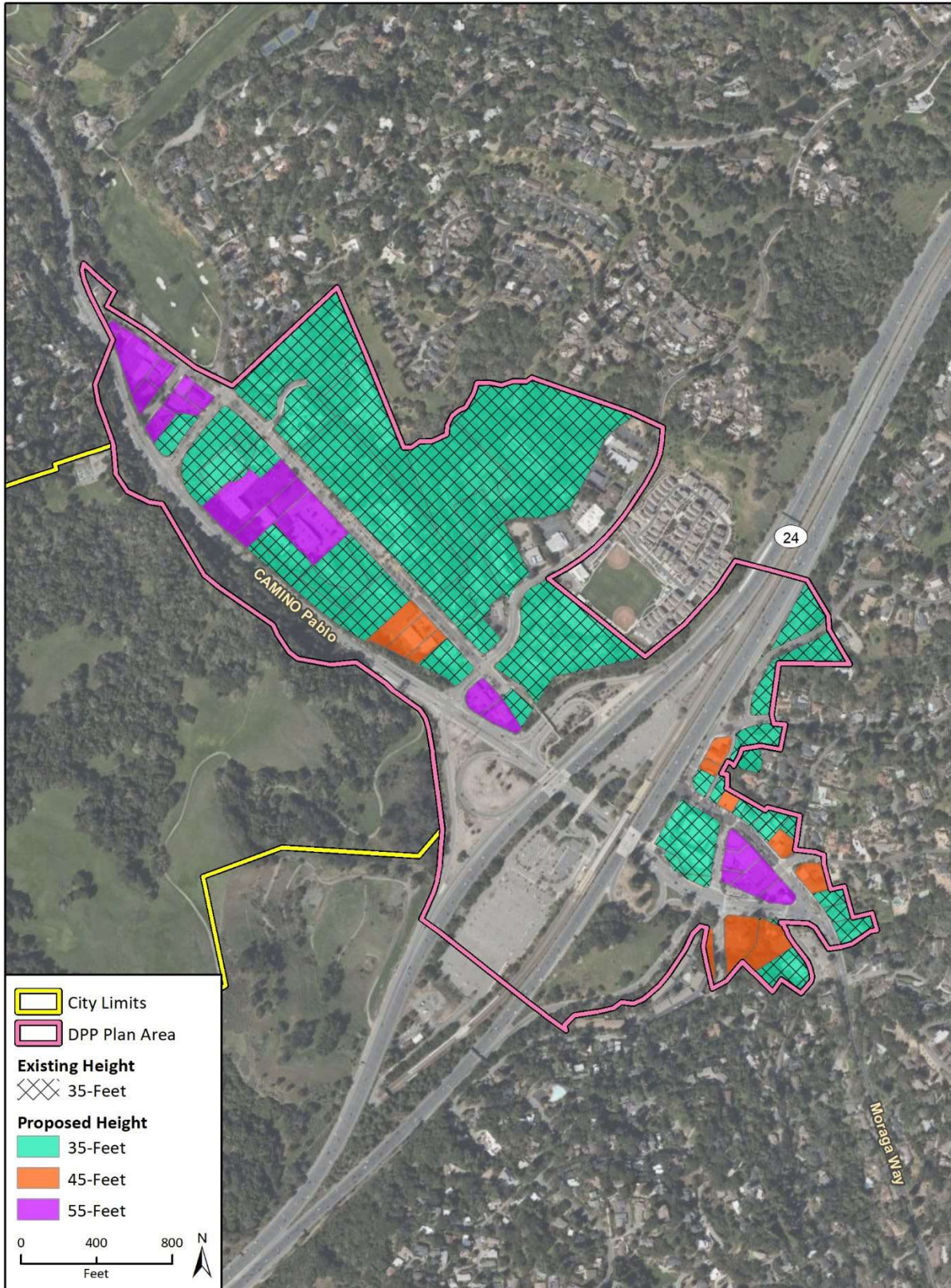
Figure 4.3-1 Wetlands and Aquatic Resources in Orinda



Imagery provided by Microsoft Bing and its licensors © 2022.
Additional data provided by USFWS, 2022, and City of Orinda, 2020.

Fig 4.3-2 Wetlands and Aquatic Resources

Figure 2-7 DPP Proposed Height Limits



Imagery provided by Microsoft Bing and its licensors © 2022.
Additional data provided by City of Orinda, 2020.

Fig. 2-7 DPP Site Height Changes