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 DEPARTMENT OF FISH AND WILDLIFE
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GAVIN NEWSOM, Governor
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December 30, 2022

Ms. Afshan Hamid
 Town of Moraga
 329 Rheem Boulevard
 Moraga, CA 94556
AHamid@moraga.ca.us

Subject: Town of Moraga Comprehensive Advanced Planning Initiative, Draft Environmental Impact Report, SCH No. 2022020106, Town of Moraga, Contra Costa County

Dear Ms. Hamid:

The California Department of Fish and Wildlife (CDFW) received a Notice of Availability of a draft Environmental Impact Report (EIR) from the Town of Moraga (Town) for the Town of Moraga Comprehensive Advanced Planning Initiative (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 Town, 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 & Game Code sections 711.7, subd. (a) & 1802; Pub. Resources Code, section 21070; CEQA Guidelines section 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. (Fish and Game Code, section 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, section 21069; CEQA Guidelines, section 15381). CDFW expects that it may need to exercise regulatory authority as provided by the Fish and Game Code.

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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As proposed, for example, the Project may be subject to CDFW's Lake and Streambed Alteration (LSA) regulatory authority. (Fish & Game Code, section 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 & Game Code, section 2050 *et seq.*), related authorization as provided by the Fish and Game Code will be required.

REGULATORY REQUIREMENTS

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 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 Alameda whipsnake (*Masticophis lateralis euryxanthus*, AWS), 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 & Game Code, sections 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,

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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).

PROJECT DESCRIPTION AND LOCATION

The Project is the proposed adoption of to the Town's Planning Initiative that addresses: the long-term economic growth in the Town; State mandated housing needs; amendments to the Town's 2002 General Plan; rezoning of areas within the Town's limits; and new zoning designations to the undeveloped area of the Town including Bollinger Canyon. The Project would be implemented from its adoption through the year 2031. The study area for the Project includes all portions of the Town's limits, a total of 9.54 square miles. All portions of the Project, including Town limits, are bordered by the City of Lafayette to the north, the City of Oakland to the south and southwest, and unincorporated Contra Costa County in the remaining directions.

ENVIRONMENTAL SETTING

CDFW recommends that the Bollinger Canyon Study Area's environmental setting explicitly discloses that endangered, rare, threatened, or other special-status species have the potential to occur, and have known adjacent records of positive occurrences (California Natural Diversity Database (CNDDDB), 2022). The Bollinger Canyon Study Area is mostly undeveloped land used primarily for seasonal livestock grazing that is surrounded by hills, including Las Trampas Peak and Las Trampas Ridge to the east. All of these areas support habitat for, and have positive occurrence records within a reasonable dispersal distance of, the following special-status species, including, but not limited to, AWS (CNDDDB, 2022); California red-legged frog (*Rana draytonii*) (CNDDDB, 2022); and San Francisco dusky-footed woodrat (*Neotoma fuscipes annectens*) (CNDDDB, 2022). The Bollinger Canyon Study Area consists of gentle to steeply sloping terrain, with areas in the western, southern, and far northeastern corner having grades more than 20%. The western and northern boundaries of the Bollinger Canyon Study Area include undulating hills that reach maximum elevations from 900 to 1,000 feet. The interior of the Bollinger Canyon Study Area ranges in elevation from 775 feet near the oak woodland to 900 feet toward the north. Undeveloped portions of the area feature Coast Live Oak Woodland, Central Coast riparian scrub, wetlands, coyote brush and sage scrub, and mostly non-native annual grasslands. Portions of the area have been historically used for cattle grazing. All of these areas hold potential habitat for the sensitive species discussed in this letter, and potentially others as well.

Neighboring areas to the east of the Bollinger Canyon Study Area are located within unincorporated Contra Costa County and are mostly open space or rural residential use. Open spaces to the east and south in Bollinger Canyon and Las Trampas Ridge are permanently protected as open space, owned and managed by East Bay Regional

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Parks District. Many of the parcels adjacent to the Bollinger Canyon Study Area are large and undeveloped and support habitat for special-status plant species, including, but not limited to: bent-flowered fiddleneck (*Amsinckia lunaris*) (CNDDDB, 2022) and Mt. Diablo helianthella (*Helianthella castanea*) (CNDDDB, 2022). These neighboring, adjacent, and public open space areas contain suitable special-status species habitat and habitat corridors.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the Town 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 does not appear to analyze or disclose impacts related to permanent loss of habitat for special-status species. Also absent are compensatory mitigation measures to reduce permanent loss of habitat 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 to include an analysis of permanent habitat loss impacts to special-status species and incorporate this analysis into the Lead Agency's significance determination. Based on this analysis, the Town should revise the draft EIR to incorporate compensatory mitigation measures such as purchase of credits from a mitigation bank, or require permanent protection and management of "like for like" habitats through a legal instrument, such as a conservation easement, with an endowment for habitat management in perpetuity. The revised impacts analysis and mitigation measures should then be incorporated into the Findings in the Final EIR.

Closely Related Past, Present, and Reasonably Foreseeable 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

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to overlap with areas of the Project that have been mapped as sensitive natural communities, such as Coast Live Oak Woodland, or provide critical habitat and/or connectivity for AWS and are within a reasonable dispersal distance for the species from known occurrences (CNDDDB, 2022). 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.

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, sections 21001, subd. (c) and 21083; CEQA Guidelines, sections 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. The CEQA Lead Agency's Findings of Overriding Consideration does not eliminate the Project proponent's obligation to comply with CESA or other aspects of Fish and Game Code. To reduce the cumulative impacts described above to a level of less-than-significant, CDFW recommends that the draft EIR be revised to address the following:

1. Include a 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 revisions to the mitigation measures recommended by CDFW.
3. Reduce, redesign, restrict, or remove portions of the Bollinger Canyon area that would specifically result in the loss of sensitive natural communities, and/or connectivity areas for AWS including potential habitat for the species.

Revisions to Proposed Mitigation Measures

CDFW recommends the following edits and additions to the provided mitigation measures found in the draft EIR below:

CDFW recommends that any qualified biologist conducting surveys default to the species-specific protocols found at: <https://wildlife.ca.gov/Conservation/Survey-Protocols>. These protocols include special-status plants be surveyed for 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. Results of surveys performed according to the protocol should be summarized into Botanical Survey Reports, as indicated on page 9 of the Protocol, and be incorporated into a revised draft EIR and other subsequent environmental documents as necessary. In the

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absence of protocol-level surveys being performed, additional surveys may be necessary. Additionally, annual weather variations including, but not limited to, drought conditions occurring at the time that a project's biological survey was conducted, may result in the need for additional surveys to be performed. This is especially pertinent when conducting surveys for special-status species such as California red-legged frog or special-status plants.

BIO-2: CDFW recommends the following language be used to replace existing language in BIO-2 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 1 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 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 and/or United States Fish and Wildlife Service (USFWS) 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.

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BIO-3: The draft EIR describes the Plan area as containing a variety of vegetation communities, including coast live oak woodland and forest, a sensitive natural community. BIO-3 describes procedures for tree removal during bat roosting season, implying tree removal is planned within the scope of Project activities. However, the draft EIR does not include compensatory mitigation for temporary or permanent loss of this sensitive natural community. Removal of large trees in particular without adequate compensatory mitigation should be considered a substantial adverse change in the physical conditions within the areas affected by the Project.

CDFW recommends the Project avoid large diameter tree removal to the greatest extent feasible. If loss of Coast Live Oak Woodland and forest cannot be avoided, then CDFW recommends that mitigation include in-kind preservation of this sensitive natural community in perpetuity to offset this impact.

CDFW is available to work with the Town to develop a mitigation plan that reduces impacts to a level of less-than-significant.

BIO-4: Due to the cryptic behavioral habits of the species, and given the lack of protocol level surveys adopted by the scientific community to determine presence or absence, AWS should be assumed present in the Bollinger Canyon Study Area (CNDDDB, and any other area where either a positive occurrence record exists within a reasonable dispersal distance for AWS, and/or where potential habitat for AWS occurs. The draft EIR acknowledges that the Project will cause temporary and permanent impacts to AWS habitat, yet does not offset this potentially significant impact through compensatory mitigation measures. Instead, the draft EIR defers this matter to CDFW and/or USFWS to address at a later date. CDFW recommends that the draft EIR be revised to conform to CEQA Guidelines section 15126.4 and identify an enforceable mitigation measure to offset temporary and permanent habitat loss impacts.

To ensure the temporary and permanent impacts to potential AWS habitats are mitigated to a level of less-than-significant, CDFW recommends the Project formulate, and incorporate, enforceable and quantifiable compensatory measures to address these impacts in the draft EIR (CEQA Guidelines section 15126.4). These compensatory measures should include restoring, and/or protecting in perpetuity, areas where AWS is known to occur under a conservation easement. A Project proponent may elect to purchase AWS mitigation bank credits from a CDFW-approved mitigation bank as an alternative to protecting occupied AWS habitat under a conservation easement. CDFW recommends that compensatory mitigation be, in terms of acreage, calculated at a ratio of 3:1 (conserved habitat to impacted habitat) for permanent impacts, 5:1 for the construction of new roads, and 1.1:1 for temporary impacts lasting under a one-year period. These ratios should be calculated after surveying and disclosing the total area of anticipated disturbance caused by the Project.

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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, section 21003, subd. (e)). Accordingly, please report any special-status species and natural communities detected during Project surveys to the 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>.

CDFW appreciates the opportunity to comment on the draft EIR to assist the Town 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 by email at 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. 2022020106)

CITATIONS

California Native Diversity Database (CNDDDB) (2022). [ds45]. Calif. Dept. of Fish and Wildlife. Biogeographic Information and Observation System (BIOS). Retrieved November 22, 2022, from <https://wildlife.ca.gov/Data/BIOS>.