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



Governor's Office of Planning & Research

**Dec 12 2022**

## STATE CLEARINGHOUSE

December 12, 2022

Reema Mahamood, Planner III Environmental Review  
City of San Jose  
200 East Santa Clara Street, 3rd Floor Tower  
San José, CA 95113-1905  
[reema.mahamood@sanjoseca.gov](mailto:reema.mahamood@sanjoseca.gov)

Subject: City of San Jose 2023-2031 Housing Element Update, Notice of Preparation of a Supplemental Environmental Impact Report, SCH No. 2022110256, City of San Jose, Santa Clara County

Dear Reema Mahamood:

The California Department of Fish and Wildlife (CDFW) received a Notice of Preparation (NOP) of a Supplemental Environmental Impact Report (SEIR) from the City of San Jose (City) for the City of San Jose 2023-2031 Housing Element Update (Project) pursuant to 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. 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 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

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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.

Reema Mahamood, Planner III Environmental Review  
City of San Jose  
December 12, 2022  
Page 2

proposed, for example, the Project may be subject to CDFW's Lake and Streambed Alteration regulatory authority (Fish & G. Code, § 1600 et seq.).

## **PROJECT DESCRIPTION SUMMARY**

**Proponent:** City of San Jose

**Objective:** Update the City General Plan, including rezoning, to increase the housing available in the City by 20,399 units. The Project will facilitate the development of housing units already planned for as part of the 2040 General Plan and would not increase the residential development capacity beyond what is within in the 2040 General Plan.

**Location:** Planned Growth Areas within the City of San Jose, Santa Clara County, California.

## **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 and wildlife (biological) resources. Based on potential for the Project to have a significant impact on biological resources, CDFW concludes that an Environmental Impact Report is appropriate for the Project.

### **I. Mitigation Measures and Impacts**

**Would the Project have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special-status species in local or regional plans, policies, or regulations, or by CDFW or U.S. Fish and Wildlife Service?**

**COMMENT #1:** 4 Probable Environmental Impacts Of The Project, Page 11.

**Issue:** In review of Google Earth aerials, the Project area includes riparian habitat, parks, and urban areas with trees, shrubs, and grassland. The NOP designates growth areas where residential development could occur. However, the NOP does not discuss potential impacts to biological resources, such as nesting birds, related to these land use designations and resulting from implementation of the Project. Furthermore, the General Plan does not have specific measures to mitigate impacts to nesting birds.

**Specific impact:** Direct mortality, nest abandonment, reduced reproductive success, and loss or reduced health or vigor of eggs or young.

Reema Mahamood, Planner III Environmental Review  
City of San Jose  
December 12, 2022  
Page 3

**Why impact would occur:** The physical change in relation to the residential development may include the construction of buildings, parking lots, and other permanent structures. Construction may result in complete removal of nesting habitat. The Project may also include impacts such as noise, groundwork, and movement of workers adjacent to nesting habitat that may potentially significantly impact nesting birds.

**Evidence impact would be significant:** Take of nesting birds, birds in the orders Falconiformes or Strigiformes, and migratory nongame bird as designated in the Migratory Bird Treaty Act is a violation of Fish and Game Code (§ 3503, 3503.5, 3513).

**Recommended Potentially Feasible Mitigation Measures to reduce impacts to less-than-significant:**

**Mitigation Measure #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 15 for other raptors), a qualified biologist shall conduct a minimum of 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. However, species-specific survey protocols may be available and should be followed. 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 shall be conducted at the appropriate times of day and during appropriate nesting times.

**Mitigation Measure #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 shall be established. The buffer shall be clearly marked and maintained until the young have fledged and are foraging independently. Prior to construction, the qualified biologist shall 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 shall 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 shall have the authority

Reema Mahamood, Planner III Environmental Review  
City of San Jose  
December 12, 2022  
Page 4

to cease all construction work in the area until the young have fledged and the nest is no longer active.

**Would the Project interfere substantially with movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede use of native wildlife nursery sites?**

**COMMENT #2:** 4 Probable Environmental Impacts Of The Project, Page 11. Figure 1 Planned Growth Area, page 3. Table 2 Planned and Projected Housing Units, page 4.

**Issue:** Based on Figure 1 Planned Growth Area, Planned Growth Areas consist of buildings and related hardscape (e.g., parking lots and streets). The NOP, Table 2, discusses a 20,399 increase in residential dwelling units. The NOP does not discuss if this proposed increase involves changes to the current building height levels or other design or planning changes, especially adjacent to riparian areas. The tall buildings located near riparian habitat could result in avian collisions with the buildings. The current General Plan includes Goal ER-7 – Wildlife Movement that includes design and construction of buildings and structures using bird-friendly design. However, the Goal only applies to buildings in the area north of Highway 237.

**Specific impact:** Direct mortality or injury and potential inability to reproduce or reduced reproductive success due to injury.

**Why impact would occur:** The presence of buildings, including glass windows, close to riparian movement corridors may result in avian collision with the buildings.

**Evidence impact would be significant:** Project impacts may potentially substantially reduce the abundance and diversity of avian species within the riparian corridors.

**Recommended Potentially Feasible Mitigation Measures to reduce impacts to less-than-significant:**

**Mitigation Measure #1:** Assessment of Building Height and Location

CDFW recommends that the SDEIR include building height and location alternatives that reduce environmental impacts such as locating tall buildings at a biologically appropriate distance away from the riparian areas.

**Mitigation Measure #2:** Building Design Assessment

The SDEIR should analyze, for all City Planned Growth Areas including riparian areas, potential impacts on avian species resulting from building height, types of materials used on the exterior façade of buildings, and other design features, and

Reema Mahamood, Planner III Environmental Review  
City of San Jose  
December 12, 2022  
Page 5

include avoidance and minimization measures that reduce those impacts to a less-than-significant level.

## 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 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).

## CONCLUSION

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

Questions regarding this letter or further coordination should be directed to Kristin Garrison, Environmental Scientist, at (707) 944-5534 or by email at [Kristin.Garrison@wildlife.ca.gov](mailto:Kristin.Garrison@wildlife.ca.gov); or Brenda Blinn, Senior Environmental Scientist (Supervisory), at (707) 339-0334 or [Brenda.Blinn@wildlife.ca.gov](mailto:Brenda.Blinn@wildlife.ca.gov).

Sincerely,

DocuSigned by:  
*Erin Chappell*  
B77E9A6211EF486  
Erin Chappell  
Regional Manager  
Bay Delta Region

ec: Office of Planning and Research, State Clearinghouse, Sacramento