



State of California – Natural Resources Agency
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GAVIN NEWSOM, Governor
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January 9, 2023

James Yoo, Associate Environmental Compliance Specialist
Alameda County Flood Control and Water Conservation District
399 Elmhurst Street
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Subject: Phases 2 and 3 of Ardenwood Creek (Zone 5 Line P) Flood Control Channel Improvement Project, Mitigated Negative Declaration, SCH No. 2022120141, City of Fremont, Alameda County

Dear James Yoo:

The California Department of Fish and Wildlife (CDFW) received a Notice of Completion of a Mitigated Negative Declaration (MND) from the Alameda County Flood Control and Water Conservation District (ACFCWCD) for the Phases 2 and 3 of Ardenwood Creek (Zone 5 Line P) Flood Control Channel Improvement Project (Project) pursuant the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹

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

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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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 (LSA) regulatory authority (Fish & G. Code, § 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 & G. Code, § 2050 et seq.), the Project proponent may seek related take authorization as provided by the Fish and Game Code.

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 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 Permit.

CEQA requires a Mandatory Finding of Significance if a project is likely to substantially restrict the range or reduce the population of a threatened, rare, 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 Fish and Game Code section 2080.

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, as a Responsible Agency under CEQA, 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.

PROJECT DESCRIPTION SUMMARY

Proponent: ACFCWCD

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Objectives: The objectives of the Project are to: 1) restore the flood control capacity of Ardenwood Creek between Tupelo Street and 2,000 feet downstream of Paseo Padre Parkway to Patterson Ranch Road; 2) provide habitat enhancement along the channel; 3) reduce the slow spread of the cattail marsh and encourage more desirable seasonal wetlands occupied by pickleweed and other desirable native plant species.

Primary Project activities will be conducted in two phases (Phase 1 was completed in 2016) as follows: 1) Phase 2 will restore positive drainage to the earth channel by desilting approximately 2,600 linear foot (LF) section from Patterson Ranch Road to 0.4 mile downstream of Paseo Padre Parkway; and 2) Phase 3, in 2024 or after, will remove the deteriorating culverts at Patterson Pass Road and the adjacent Tuibun Trail, and the Chochenyo trail crossing, and replace the D.U.S.T. Marsh trail crossing with new bridges.

Location: The Project is located in Alameda County, west of Paseo Padre Parkway, north and south of Patterson Ranch Road within Coyote Hills Regional Park in the City of Fremont.

Timeframe: Phase 2 is scheduled to occur in the summer of 2023 and will take three to three and a half months to complete. Work in environmentally sensitive areas or in the creek will not start earlier than September 1. The Phase 2 work, including mobilization, partial channel de-watering, channel excavation, and demobilization is anticipated to last four to six weeks. Vegetation clearing, site protection, cofferdam installation and fish relocation is expected to require two to four weeks to accomplish. Post-construction erosion control and revegetation is anticipated to require an additional two to three weeks following completion of channel excavation.

Phase 3 will likely begin in 2024. Phase 3 bridge and trail work will follow nesting bird and wet weather/creek flow restrictions on both ends of that general timeline. The anticipated construction window for Phase 3 is also September 1 through October 31, but could be extended until mid or late November, depending on rainfall occurrence during the construction period.

COMMENTS AND RECOMMENDATIONS

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

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

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special-status species in local or regional plans, policies, or regulations, or by CDFW or U.S. Fish and Wildlife Service (USFWS)?

COMMENT #1 – Channel Excavation Work and Vegetation Clearing

Issue: The MND discusses the Project will occur in sensitive wetland habitat known to support several special-status species and could have potentially significant impacts if adequate avoidance and minimization measures are not undertaken. Construction access will require removal of existing wetland vegetation over an estimated 3.56 acres during the course of construction along the Ardenwood Creek corridor. Existing aquatic habitat would be dredged affecting an estimated 2.1 acres of unvegetated waters, and construction equipment will move through sensitive habitat areas. These activities pose a risk of injury or loss of individual special-status species, or disruption of important nesting activity if careful construction restrictions are not followed. Of particular concern are potential impacts to State fully protected species such as salt marsh harvest mouse (*Reithrodontomys raviventris*), California Ridgway's rail (*Rallus obsoletus obsoletus*, formerly California clapper rail, hereafter California Ridgway's Rail) and California black rail (*Laterallus jamaicensis coturniculus*, Species of Special Concern (SSC), salt marsh wandering shrew (*Sorex vagrans halicoetes*), among other special-status species.

Specific impact: Direct mortality through crushing of adults or young or individuals within nests, loss of nests, capture, nest abandonment, loss of potential nesting habitat, loss of potential foraging habitat resulting in reduced reproductive success (loss or reduced health or vigor of eggs or young), inadvertent entrapment or entrainment, impingement, lack of water resulting in reduced reproductive success or desiccation of eggs.

Why impact would occur: The Project will include impacts such as noise, groundwork, and operation and movement of equipment and workers that would have the potential to disturb foraging, roosting, and nesting. Temporary water diversion structures may need to be constructed to dewater wetted areas of the Project.

Evidence impact would be significant: The species listed above are either fully protected species under California Fish and Game Code (§ 3511 or § 4700), listed under the federal Endangered Species Act (ESA) or CESA and may also be designated as rare, threatened or endangered under §15380, subds. (c)(1) and (c)(2), or designated by CDFW as SSC and are at conservation risk and may be experiencing serious population declines or range retractions. In addition, take of nesting birds, birds in the orders Falconiformes or Strigiformes, and migratory nongame birds as designated in the Migratory Bird Treaty Act is a violation of Fish and Game Code (§ 3503, § 3503.5, and § 3513).

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Recommended Potentially Feasible Mitigation Measures

Mitigation Measure #1: Special-Status Surveys

Focused surveys for special-status species using appropriate protocols should be conducted by qualified biologists at the Project site prior to any Project-related construction. If Project activities are to take place during the avian nesting season, an additional pre-Project activity survey for active nests should be conducted by a qualified biologist no more than seven days prior to the start of Project activity.

Mitigation Measure #2: Rail Surveys

A CDFW and USFWS-approved biologist should conduct protocol-level surveys of California Ridgway's rail in all suitable habitat adjacent to the Project using the 2015 California Clapper Rail Survey Protocol to determine where California Ridgway's rail are present in each year of construction. CDFW staff are available to work with you to incorporate calls of California black rail into the protocol to ensure that both the species are sufficiently surveyed.

Mitigation Measure #3: Seasonal Work Windows

The MND should include species-appropriate seasonal work windows to avoid impacts to fully protected species and avoid or minimize impacts to other special-status species.

Mitigation Measure #4: Buffers

The MND should incorporate species-appropriate buffers to avoid and minimize impacts to special-status species. For example, a 700-foot no-work buffer should be implemented between construction activities and any current-year breeding California Ridgway's rail and black rail detections if construction cannot be avoided during the rail breeding season. If establishing a 700-foot buffer around breeding rail detections is not feasible, noise reducing modifications to equipment as well as portable acoustic barriers/blankets placed near noise sources may be appropriate to reduce auditory and visual impacts to breeding rails. Note that these features may be appropriate regardless of time of year to minimize impacts to foraging rails as well.

For other species of nesting birds, CDFW recommends implementing appropriate buffers around active nests based on species, behavior of birds, ambient noise levels, type of construction activities, topography, and other site-specific factors that may affect nesting bird disturbance levels. It is advised that buffers remain in place until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or on-site parental

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care for survival. Variance from these buffers is possible when there is compelling biological or ecological reason to do so, such as when the Project site would be concealed from a nest site by topography. CDFW recommends that a qualified avian biologist advise and support any variance from established buffers in consultation with CDFW.

Mitigation Measure #5: Non-Mechanized Hand Tools

CDFW recommends the use of non-mechanized hand tools for any necessary vegetation removal activities in habitat suitable for salt-marsh harvest mouse to the maximum extent practicable. Please be advised that use of mechanized hand tools has resulted in mortality and/or injury to this and other species during vegetation removal for other projects in the Bay Area.

Mitigation Measure #7: Take Authorizations

Fully protected species may not be taken or possessed at any time, except for necessary scientific research, including efforts for recovery. In the event a fully protected species is found within or adjacent to the Project site, CDFW recommends that a qualified biologist develops an appropriate no-disturbance buffer to be implemented. The qualified biologist should also be on-site during all Project activities to ensure that the fully protected species are not being disturbed by Project activities.

Mitigation Measure 8: Pickleweed Removal and Replanting

CDFW recommends that prior to starting the channel excavation, pickleweed should be removed and salvaged. Pickleweed removal should include a minimum depth of 6 inches of native soil. Salvaged pickleweed should be stockpiled in a mound on site and kept moist. Salvaged pickleweed should be replanted at the general location from which it was excavated.

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>.

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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 MND to assist the ACFCWCD in identifying and mitigating Project impacts on biological resources.

If you have any questions regarding this letter, please contact Ms. Marcia Grefsrud, Environmental Scientist, at (707) 644-2812 or Marcia.Grefsrud@wildlife.ca.gov; or Ms. Brenda Blinn, Senior Environmental Scientist (Supervisory), at (707) 339-0334 or Brenda.Blinn@wildlife.ca.gov.

Sincerely,

DocuSigned by:

Erin Chappell
Regional Manager
Bay Delta Region

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