



State of California – Natural Resources Agency
 DEPARTMENT OF FISH AND WILDLIFE
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GAVIN NEWSOM, Governor
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September 20, 2023

Nhu Nguyen, Environmental Project Manager
 City of San José
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 San José, CA 95113-1905
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Dear Nhu Nguyen:

Subject: General Plan Amendment and Planned Development Rezoning for the Coleman and Heading Commercial Development Project, Notice of Preparation of a Draft Environmental Impact Report, SCH No. 2023080477, City of San José, Santa Clara County

The California Department of Fish and Wildlife (CDFW) received a Notice of Preparation (NOP) of a draft Environmental Impact Report (EIR) from the City of San José (City) for the General Plan Amendment and Planned Development Rezoning for the Coleman and Heading Commercial Development 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 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.). If 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.

PROJECT DESCRIPTION SUMMARY

Proponent: City of San José

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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Objective: The Project includes a General Plan Amendment to change land use designations and zoning on seven parcels, totaling 11.37 acres, from Open Space Parks Habitat to Combined Industrial Commercial.

Location: City of San José, Santa Clara County. The coordinates for the approximate center of the Project are 37.346° N latitude and -121.911 W longitude (NAD 83 or WGS 84). The Assessor's Parcel Numbers are 259-02-130, 259-02-131, 259-08-072, 259-08-101, 259-08-102, 230-38-076, and 230-38-092.

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 EIR 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 (USFWS)?

COMMENT 1: Biological Resources, page 15

Issue: Crotch's bumble bee (*Bombus crotchii*) is currently a Candidate Endangered species under CESA. The NOP does not address whether the proposed Project could result in impacts to Crotch's bumble bee. Crotch's bumble bee occurrences have been documented within the vicinity of the Project area and historic observations occur elsewhere in Santa Clara County (CDFW 2023, County). Absence of or lack of specificity in occurrence locations should not be interpreted as absence of the species at or near a given site. The Project location is within the Crotch's bumble bee range (<https://wildlife.ca.gov/Conservation/CESA>) and grassland within and adjacent to the Project site may contain potential habitat for Crotch's bumble bees.

Why impact would occur: The proposed Project includes a change in land use and zoning from Open Space Parks Habitat to Combined Industrial Commercial. Typical commercial development includes the construction of buildings, parking lots, and other permanent structures. This type of development would occur within ruderal grass and herbaceous vegetation that may be potential Crotch's bumble bee nesting and foraging habitat.

Specific impact: Direct mortality through crushing or filling of active bee colonies and hibernating bee cavities, reduced reproductive success, loss of suitable breeding and foraging habitats, loss of native vegetation that may support essential foraging habitat.

Evidence impact would be significant: Bumble bees are critically important because they pollinate a wide range of plants over the lifecycles of their colonies, which typically live longer than most native solitary bee species. Crotch's bumble bees are candidate species under CESA (CEQA Guidelines, §15380, subds. (c)(1)). Unauthorized take of this species pursuant to CESA is a violation of California Fish and Game Code § 2080 et seq.

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

Mitigation Measure 1: Habitat Assessment

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A habitat assessment should be conducted prior to development of the draft EIR, results of the assessment should be discussed in the draft EIR, and mitigation measures (if habitat is present) should be developed and included in the draft EIR to avoid or minimize impacts of the proposed Project to the Crotch's bumble bee and/or the species' habitats.

The habitat assessment should be conducted by a qualified entomologist knowledgeable with the life history and ecological requirements of Crotch's bumble bee. The habitat assessment should include all suitable nesting, overwintering, and foraging habitats within the Project area and surrounding areas. Potential nest habitat (February through October) could include that of other *Bombus* species such as bare ground, thatched grasses, abandoned rodent burrows or bird nests, brush piles, rock piles, and fallen logs. Overwintering habitat (November through January) could include that of other *Bombus* species such as soft and disturbed soil or under leaf litter or other debris. The habitat assessment should be conducted during peak bloom period for floral resources on which Crotch's bumble bees feed. Further guidance on habitat surveys can be found within Survey Considerations for CESA Candidate Bumble Bee Species (<https://wildlife.ca.gov/Conservation/CESA>).

Mitigation Measure 2: Survey Plan

If Crotch's bumble bee habitat is present within the Project area, the draft EIR should include a pre-construction survey plan as a mitigation measure. The survey plan should be submitted to CDFW for review. Surveys should be conducted by a qualified entomologist familiar with the behavior and life history of Crotch's bumble bees. If CESA candidate bumble bees will be captured or handled, surveyors should obtain a 2081(a) Memorandum of Understanding from CDFW.

Surveys should be conducted during the colony active period (i.e. April through August) and when floral resources are in peak bloom. Bumble bees move nests sites each year, therefore, surveys should be conducted each year that Project work activities will occur. Further guidance on presence surveys can be found within Survey Considerations for CESA Candidate Bumble Bee Species (<https://wildlife.ca.gov/Conservation/CESA>).

Mitigation Measure 3: Crotch's Bumble Bee Avoidance or Take Authorization

If Crotch's bumble bees are detected during pre-construction surveys, a Crotch's bumble bee avoidance plan should be developed and provided to CDFW for review prior to work activities involving ground disturbance or vegetation removal.

If full take avoidance is not feasible, CDFW strongly recommends that the draft EIR state that the Project proponent will apply to CDFW for take authorization under an Incidental Take Permit (ITP).

COMMENT 2: Biological Resources, page 15

Issue: The NOP does not discuss potential impacts of the Project to western burrowing owl (*Athene cunicularia*, State Species of Special Concern (SSC)). In review of Google Earth aerials, the Project site and surrounding areas include grassland and herbaceous vegetation. Please be advised that there are known western burrowing owl occurrences within 0.5 miles of the Project site (CDFW 2023) and the Project site and adjacent grassland areas could potentially support western burrowing owl foraging and/or nesting habitat. The Project is also located within the Santa Clara Valley Habitat Plan Natural Community Conservation Plan/Habitat Conservation Plan (SCVHP) permit boundary. However, the NOP does not state if the Project will be covered by the SCVHP.

Specific impact: Direct mortality through crushing of adults or young within burrows, loss of nesting burrows, loss of nesting habitat, loss of foraging habitat resulting in reduced nesting success (loss or reduced health or vigor of eggs or

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young), nest abandonment, and reduced frequency or duration of care for young resulting in reduced health or vigor of young. Project construction would include impacts such as noise, groundwork, and movement of workers that would have the potential to significantly impact nesting or overwintering owls.

Why impact would occur: The proposed Project includes a change in land use and zoning from Open Space Parks Habitat to Combined Industrial Commercial. Typical commercial development includes the construction of buildings, parking lots, and other permanent structures. This type of development would occur within ruderal grass and herbaceous vegetation that is potential burrowing owl nesting and foraging habitat.

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 (MBTA) is a violation of Fish and Game Code § 3503, 3503.5, 3513. Burrowing owl is designated by CDFW as a California SSC due to population decline and breeding range retraction. The species has also experienced a severe population decline in the County. Project impacts may result in take of burrowing owls, resulting in further species population decline and cumulative impacts resulting in the restriction in the range of the species.

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

Mitigation Measure 1: Habitat Assessment and Surveys

The draft EIR should include a thorough habitat assessment of potential burrowing owl habitat within and adjacent to the Project area. A qualified biologist should conduct a field assessment that includes all areas that could be directly or indirectly impacted by the Project and include data such as vegetation type, vegetation structure and presence of burrows.

A qualified biologist should conduct protocol-level surveys in all suitable burrowing owl habitat within the Project area and surrounding areas where Project activities could adversely affect burrowing owls during both the nesting (February 1 to August 31) or overwintering season.

Specific information on habitat assessment, burrowing owl survey methods, buffer distances and mitigation is provided in the CDFW Staff Report on Burrowing Owl Mitigation, dated March 7, 2012, and available at <https://wildlife.ca.gov/Conservation/Survey-Protocols#377281284-birds>.

Mitigation Measure 2: Burrowing Owl Avoidance

The draft EIR should state that if burrowing owls are detected during surveys within or near the Project area, a protective buffer in which construction activities will be avoided, will be established. Appropriate buffers typically have a 50 to 500-meter radius and vary depending on the level of disturbance and timing of construction. If the burrowing owls show signs of distress (e.g., defensive vocalizations and/or flying away from the nest), the buffer distance should be increased.

Mitigation Measure 3: Compensatory Mitigation

If permanent or temporary impacts of the proposed Project to burrowing owl foraging and/or nesting habitat cannot be completely avoided, the draft EIR should include measures to minimize the impacts of construction on owls and their habitat, and effective compensatory mitigation to off-set all habitat loss. A mitigation plan should be prepared in consultation with CDFW.

Mitigation Measure 4: SCVHP Burrowing Owl Compliance

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The City should determine if the Project would be covered by the SCVHP. If the Project is expected to be covered under the SCVHP, the draft EIR should state that payment of appropriate SCVHP impact fees will be made to the Santa Clara Valley Habitat Agency, which is the entity implementing the SCVHP, and that all SCVHP burrowing owl conditions will be followed.

COMMENT 3: Biological Resources, page 15

Issue: Commercial development may include removal of trees within the Project site. The NOP does not discuss potential impacts to nesting birds.

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

Why impact would occur: The Project may result in removal of trees. Commercial development could include impacts such as noise, groundwork, and movement of workers 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 MBTA 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 should 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 should 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 should be established. The buffer should be clearly marked and maintained until the young have fledged and are foraging independently. Prior to construction, the qualified biologist should 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 should 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 should have the authority 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 4:

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Issue: The NOP discusses that the Project area will consist of commercial development. The NOP does not indicate the proposed height of buildings to be located near the Guadalupe River riparian area. Tall buildings located near the Guadalupe River riparian area could result in avian collisions with such structures.

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, near the Guadalupe River riparian movement corridor 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 Guadalupe River riparian corridor.

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 draft EIR include building height and location alternatives that reduce environmental impacts such as locating tall buildings at a biologically appropriate distance away from the riparian area.

Mitigation Measure 2: Building Design Assessment

The draft EIR should analyze all potential impacts on avian species resulting from building height, types of materials used on the exterior façade of buildings, and other design features, and include avoidance and minimization measures that reduce those impacts to a less-than-significant level.

ENVIRONMENTAL DATA

CEQA requires that information developed in EIRs 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

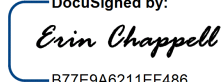
CDFW appreciates the opportunity to comment on the NOP to assist the City in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Kristin Garrison, Environmental Scientist at (707) 944-5534 or

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Kristen.Garrison@wildlife.ca.gov or Brenda Blinn, Senior Environmental Scientist (Supervisory) at (707) 339-0334 or Brenda.Blinn@wildlife.ca.gov.

Sincerely,

DocuSigned by:

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Erin Chappell
Regional Manager
Bay Delta Region

ec: Office of Planning and Research, State Clearinghouse (SCH No. 2023080477)
Craig Weightman, CDFW Bay Delta Region - Craig.Weightman@wildlife.ca.gov

REFERENCES

California Department of Fish and Wildlife (CDFW). 2023. Biogeographic Information and Observation System (BIOS). <https://www.wildlife.ca.gov/Data/BIOS>. Accessed September 7, 2023.