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**GAVIN NEWSOM, Governor**  
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Governor's Office of Planning & Research

January 11, 2024

**January 12 2024**

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## STATE CLEARINGHOUSE

Subject: Coyote Creek Flood Protection Project, Notice of Preparation of a Draft Environmental Impact Report, SCH No. 2023110513, Santa Clara County

Dear Andrew Martin:

The California Department of Fish and Wildlife (CDFW) received a Notice of Preparation (NOP) of a Draft Environmental Impact Report (EIR) from the Santa Clara Valley Water District (Valley Water) for the Coyote Creek Flood Protection Project (Project or CCFPP) pursuant to the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.; hereafter CEQA; Cal. Code Regs., § 15000 et seq.; hereafter CEQA Guidelines).

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 Fish and Game Code. In an email from you on November 22, 2023, CDFW received an extension to the deadline to provide comments from December 22, 2023 to January 15, 2024.

### CDFW ROLE

CDFW is California's **Trustee Agency** for fish and wildlife resources and holds those resources in trust by statute for all 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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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.

## **PROJECT DESCRIPTION SUMMARY**

**Proponent:** Valley Water

**Objective:** The proposed Project entails installation of flood risk reduction improvements along approximately nine miles of Coyote Creek to reduce flooding in urban areas. The primary objective of the proposed Project is to provide 20-year flood protection to homes, schools, businesses, and transportation infrastructure along Coyote Creek. Additional objectives of the Project include minimizing impacts to existing and planned recreation facilities and minimizing the need for future maintenance and operations. Proposed Project elements include, but are not limited to, construction of floodwalls, passive barriers, and earthen berms.

**Location:** The Project area is within the City of San Jose in Santa Clara County and comprises approximately nine miles of Coyote Creek from downstream of the Montague Expressway bridge to the upstream face of the Tully Road bridge. Coyote Creek is comprised of five reaches between Montague Expressway and Tully Road and proposed Project elements would be constructed within four of the five reaches (Reaches 4, 6, 7 and 8). Approximately 18,083 linear feet of improvements are proposed to be constructed along portions of these reaches at specific Project sites.

**Timeframe:** The Project intends to begin in 2025 and will take approximately 2 years to complete.

## **COMMENTS AND RECOMMENDATIONS**

CDFW offers the comments and recommendations below to assist Valley Water 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 the potential for the Project to have a significant impact on biological resources, CDFW concludes that a draft EIR is appropriate for the Project.

### **I. Project Description**

**COMMENT #1:** The CEQA Guidelines (§§15124 and 15378) require that the draft EIR incorporate a full Project description that contains sufficient information to evaluate and review the Project's environmental impact.

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**Issue:** Without a clear and concise description of the Project and potential foreseeable phases of the Project, it is challenging for CDFW to provide sufficient review of the NOP, assess all potential impacts of the Project, and provide adequate mitigation measures to offset the impacts. Temporary or permanent impacts from Project staging and construction and maintenance of flood protection infrastructure may cause increased turbidity, increased contaminants, disturbance or mortality of terrestrial and semi-aquatic species, loss of aquatic and terrestrial habitat, and disturbance to nesting birds and roosting bats.

**Recommendation 1:** The draft EIR should include a detailed description of each type or category of Project activities, including approximate number of projects per year, construction schedule, equipment, crew sizes, and operational features of the Project, including level of anticipated human presence (describe seasonal or daily peaks in activity, if relevant), artificial lighting/light reflection, noise, traffic generation, activities in stream and riparian habitats, and other features, in order for CDFW to evaluate and assess impacts that may occur from Project activities.

**Recommendation 2:** The Project is currently covered under the Santa Clara Valley Habitat Conservation Plan and Natural Community Conservation Plan (Habitat Plan), implemented by the Santa Clara Valley Habitat Agency. The Habitat Plan is currently undergoing a major amendment, expected to be finalized by 2025, to expand its coverage area as well as add covered wildlife species. As a co-Permittee of the Habitat Plan, Valley Water should discuss any additional wildlife species coverage of the Project under the future Habitat Plan amendment.

## II. Environmental Setting

**COMMENT #1:** The Project location covers a geographic area within Santa Clara County, where various special-status species, nesting birds, and rare plants may occur.

**Issue:** Special-status species, nesting birds, and rare plants may occur within the Project area and without appropriate mitigation measures, the Project could potentially have a significant impact on these species. Special-status species that may be present within the Project area, include, but is not limited to, those listed below:

- White-tailed kite (*Elanus leucurus*) - State Fully Protected
- Tricolored blackbird (*Agelaius tricolor*) - State Threatened
- Western burrowing owl (*Athene cunicularia*) - State Species of Special Concern
- Northwestern pond turtle (*Actinemys marmorata*) - State Species of Special Concern and Federally Threatened

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- Central California Coast steelhead (*Oncorhynchus mykiss*) - Federally Threatened
- Central Valley fall-run Chinook salmon (*Oncorhynchus tshawytscha*) - State Species of Special Concern
- Pacific lamprey (*Entosphenus tridentatus*) – State Species of Special Concern
- California red-legged frog (*Rana draytonii*) - Federally Threatened and State Species of Special Concern
- California tiger salamander (*Ambystoma californiense*) – State Threatened, Federally Threatened
- Pallid bat (*Antrozous pallidus*) - State Species of Special Concern
- Townsend’s big eared bat (*Corynorhinus townsendii*) – State Species of Special Concern
- Yellow rail (*Coturnicops noveboracensis*) - State Species of Special Concern
- American badger (*Taxidea taxus*) – State Species of Special Concern
- California legless lizard (*Aniella* ssp.) – State Species of Special Concern
- San Francisco dusky-footed woodrat (*Neotoma fuscipes annectens*) – State Species of Special Concern
- Least Bell’s vireo (*Vireo bellii pusillus*) – State Endangered, Federally Endangered
- Northern Harrier (*Circus hudsonius*) – State Species of Special Concern
- Foothill yellow-legged frog Central Coast DPS (*Rana boylei*) – State Endangered, Federally Endangered
- Crotch’s bumble bee (*Bombus crotchii*) – State Candidate as Endangered
- Congdon’s tarplant (*Centromadia parryi* ssp. *congdonii*) - California Rare Plant Rank 1B.2
- Robust spineflower (*Chorizanthe robusta* var. *robusta*) – California Rare Plant rank 1B.1, Federally Endangered

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The proposed Project includes activities for flood protection such as installing floodwalls, passive barriers and berms which may cause negative environmental impacts to aquatic, semiaquatic, and terrestrial species, and their habitats. Without appropriate avoidance measures for special-status species, potentially significant impacts associated with Project activities may include reduced reproductive success; reduced health and vigor; nest abandonment; loss of nest trees, and/or loss of foraging habitat that would reduce nesting success (loss or reduced health or vigor of eggs or young); burrow/den collapse; crushing as a result of burrow collapse; inadvertent entrapment or entrainment; impingement; strandings; habitat loss; introduction of non-native species; turbidity; introduction of debris and/or deleterious materials into stream habitats; and direct mortality. Unauthorized take of species listed as threatened, endangered or candidate species for listing pursuant to CESA or the Native Plant Protection Act is a violation of Fish and Game Code.

### **Recommended Potentially Feasible Mitigation Measures**

CDFW recommends that the draft EIR include the following mitigation measures to reduce impacts to less-than-significant levels:

#### **Mitigation Measure #1: Habitat Assessment**

A qualified biologist should conduct a habitat assessment in advance of Project implementation, to determine if the Project site or its vicinity contains suitable habitat for special-status species. For species in which habitat corridors are crucial, the habitat assessment should include review of habitat available within the specific Project location and adjacent habitats. If the Project may result in fragmentation of habitat, Project design(s) should be altered to prevent this fragmentation. If fragmentation cannot be avoided, structures should be designed to allow wildlife movement.

#### **Mitigation Measure #2: Special-Status Plant Surveys**

The Project area should be surveyed for special-status plant species, including those with a California Rare Plant Rank (<http://www.cnps.org/cnps/rareplants/inventory/>), by a qualified biologist following protocol-level surveys. Protocol-level surveys, which are intended to maximize detectability, may include identification of reference populations to facilitate the likelihood of field investigations occurring during the appropriate floristic period. Please refer to CDFW protocols for surveying and evaluating impacts to rare plants, and survey report requirements, available at: <https://wildlife.ca.gov/Conservation/Plants>.

#### **Mitigation Measure #3: Special-Status Wildlife Species Surveys and Bird Nest Surveys**

The Project area should be surveyed for special-status wildlife species by a qualified biologist following protocol-level surveys. Protocol-level surveys are intended to

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maximize detectability. In the absence of protocol-level surveys being performed, focused surveys for special-status wildlife species presence, nests, or indicators of presence (e.g., bat guano and acoustic surveys) should be conducted. Survey and monitoring protocols and guidelines are available at:  
<https://wildlife.ca.gov/Conservation/Survey-Protocols>.

If Project activities are to take place during the avian nesting season, CDFW recommends protocol-level surveys following established methodologies (e.g., point counts, area searches, etc.) be conducted within the Project area by a qualified biologist throughout the nesting season. These surveys should cover a sufficient area where suitable nesting habitat is present as well as an appropriate buffer surrounding nesting habitat. Surveys should be conducted prior to the start of any work that could result in loss of habitat or disturbance to nesting birds. As part of protocol-level surveys, pre-construction surveys should include a minimum of two surveys for active nests with the first survey conducted no more than seven days prior to the start of Project activities, and the second survey conducted 48 hours prior to the start of Project activities.

#### **Mitigation Measure #4: Impact Analysis**

The draft EIR should include complete descriptions of permanent and temporary impacts to both aquatic and terrestrial species and their habitats associated with staging, construction in and around stream and riparian habitat, ground disturbance, noise, lighting, reflection, air pollution, traffic, and/or human presence. The draft EIR should also include appropriate and effective mitigation measures to completely avoid impacts to special-status species and other native plant and wildlife species and natural communities. If complete avoidance is not feasible, the draft EIR should include minimization measures, and compensatory mitigation to offset all potential impacts.

#### **Mitigation Measure #5: Special-Status Plant Avoidance**

Special-status plant species should be avoided through delineation and establishment of a no-disturbance buffer of at least 50 feet from the outer edge of the plant population or specific habitat type required by special-status plant species.

#### **Mitigation Measure #6: Special-Status Wildlife Species and Nesting Bird Avoidance**

If special-status wildlife species such as small mammals, amphibians or reptiles are found, work activities should stop, and the individual should be allowed to leave the site through its own volition. If Species of Special Concern wildlife species or active bird nests are found within or adjacent to the Project site, the qualified biologist should establish a no-disturbance buffer appropriate for the species and conduct on-site monitoring during all Project-related activities. For nesting birds, the qualified biologist should increase the buffer if the birds are showing signs of unusual or distressed behavior such as defensive flights/vocalizations, standing up from a brooding position,

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or flying away from the nest. Buffers should be maintained until the eggs have hatched and young have fledged and are completely independent of the nest or roost site.

**Mitigation Measure #7: State-listed Species Take Authorization**

If state-listed species that are not covered species under the Habitat Plan are identified during surveys and full avoidance of take is not feasible, Valley Water should consult with CDFW and obtain take authorization through issuance of an Incidental Take Permit (ITP).

**Mitigation Measure #8: Federally listed Species Consultation**

CDFW recommends consulting with the U.S. Fish and Wildlife Service (USFWS), and National Marine Fisheries Service (NMFS) if the Project will impact federally listed species. Consultation with the USFWS and NMFS in order to comply with the federal Endangered Species Act (ESA) is advised well in advance of Project implementation.

**COMMENT #2:** The Project occurs within Santa Clara County and activities may affect aquatic features and associated riparian habitat or other sensitive natural communities.

**Issue:** The Project area contains water features subject to CDFW's LSA authority, pursuant to Fish and Game Code § 1600 et seq. Project activities could result in temporary or permanent impacts to these features due to the construction of floodwalls, berms, and barriers. The Project may involve stream and ground-disturbing activities resulting in a substantial change of material from the bed, bank, or channel; and deposition of debris, waste, sediment, or other materials into water features causing water pollution that is deleterious to fish and wildlife. Project activities may also result in impacts to freshwater marsh, wetland, and riparian habitats.

**Recommended Potentially Feasible Mitigation Measures**

**Mitigation Measure #1: Habitat Assessment**

A qualified biologist should conduct a habitat assessment in advance of Project implementation, to determine if the Project area or its immediate vicinity supports freshwater marsh, wetland, and/or riparian communities. This survey should include, but not be limited to, sensitive habitats associated with rivers, creeks or streams, ponds and drainages.

**Mitigation Measure #2: Notification of Lake and Streambed Alteration**

Fish and Game Code §1602 requires an entity to notify CDFW prior to commencing any activity that may (a) substantially divert or obstruct the natural flow of any river, stream, or lake; (b) substantially change or use any material from the bed, bank, or channel of

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any river, stream, or lake: (c) deposit debris, waste or other materials that could pass into any river, stream, or lake. "Any river, stream, or lake" includes those that are ephemeral or intermittent, as well as those that are perennial in nature. CDFW is required to comply with CEQA in the issuance of an LSA Agreement. For additional information, please see <https://www.wildlife.ca.gov/Conservation/LSA>. For additional information on notification requirements in CDFW's Region 3 (Santa Clara County), please contact our staff in the LSA Program by electronic mail at [R3LSA@wildlife.ca.gov](mailto:R3LSA@wildlife.ca.gov).

### **COMMENT #3:** Potential Impacts to Crotch's bumble bee

**Issue:** Project activities, such as vegetation removal or ground-disturbing activities could result in permanent and/or temporary loss of floral resources for Crotch's bumble bee and other native pollinator species, loss of bumble bee nesting habitat, crushing, or filling of active bumble bee colonies and hibernating cavities, and reduced reproductive success. 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. Unauthorized take of Crotch's bumble bee pursuant to CESA is a violation of California Fish and Game Code section 2080 et seq.

**Recommendation:** Crotch's bumble bee is being considered as a Covered Species under the Habitat Plan amendment. As a co-permittee of the Habitat Plan, Valley Water could therefore, receive take authorization for Crotch's bumble bee under CESA for the Project. Given that the amendment is only expected to be finalized by 2025, the draft EIR should clarify if Project activities expected to result in take of Crotch's bumble bee would be initiated prior to finalization of the Habitat Plan amendment. If Project activities may commence prior to coverage under the Habitat Plan, the draft EIR should include measures to avoid take of Crotch's bumble bee or specify that Valley Water will obtain an ITP prior to commencement of any Project-related construction activities that cannot avoid take.

### **Recommended Potentially Feasible Mitigation Measures**

CDFW recommends that the draft EIR include the following mitigation measures to reduce impacts to less-than-significant levels:

**Mitigation Measure #1:** A habitat assessment should be conducted within areas of all Project components 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



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(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 the peak bloom period for floral resources on which Crotch's bumble bee feed. Further guidance on habitat surveys can be found within Survey Considerations for California Endangered Species (CESA) Candidate Bumble Bee Species (<https://wildlife.ca.gov/Conservation/CESA>).

The results of the assessment should be discussed in the draft EIR, and mitigation measures 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.

**Mitigation Measure #2:** Survey Plan Surveys should be conducted by a qualified entomologist familiar with the behavior and life history of Crotch's bumble bee. The survey plan should be submitted to CDFW for review and approval. If CESA candidate bumble bees will be captured or handled, surveyors should obtain any necessary handling permits such as a 2081(a) Memorandum of Understanding from CDFW. Surveys should be conducted during the colony active period or gyne flight season (generally, April 1 to October 31). The survey should occur at least two hours after sunrise (greater than 60°F and less than 90°F with no rain) or two hours before sunset and the survey area should include all suitable habitat within each of the Project component areas and a surrounding 100-foot buffer area. The survey duration should be appropriate to the size of the Project site and buffer area based on the metric of a minimum of one person hour of searching per three acres of suitable habitat; this will be an approximately 0.5-hour survey for an average sized Project site. 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 California Endangered Species Act (CESA) Candidate Bumble Bee Species (<https://wildlife.ca.gov/Conservation/CESA>).

### **III. Closely Related Past, Present, and Reasonably Foreseeable Probable Future Projects**

**COMMENT #1:** Valley Water is a water district that implements and plans various projects within Santa Clara County.

**Issue:** The CCFPP is being proposed along Coyote Creek with several locations within Reaches 6 and 7 overlapping with the FERC Ordered Compliance Project Coyote Creek Flood Management Measures Project (CCFMMP) which is currently under construction and is subject to a statutory exemption under CEQA as an emergency (CEQA Guidelines Section 15269(c)). Activities under CCFMMP include installing seven spans of floodwalls in Reaches 5 to 7. Reaches 5 to 7 are directly upstream of Reach 4 and therefore, potential water quality impacts may directly affect water quality in Reach

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4 and further downstream in Coyote Creek. The Project also plans to implement repair and maintenance activities. The Project, along with CCFMMP and other future larger-scale projects such as further flood protection projects, maintenance projects, other capital projects etc. could further impact a variety of habitat types and species. Implementing both small and large-scale construction, repair and maintenance projects will or may result in impacts such as noise, groundwork, sediment, and deleterious material entering the stream, erosion, and other loss or modification of habitat that could significantly impact native species and their habitats.

**Recommendation 1:** Although considered independent projects, the draft EIR should specify activities to be conducted under the CCFPP and those under the CCFMMP in Reaches 5 to 7, especially with the overlap in activities in Reaches 6 and 7. The draft EIR should clearly describe the timing of construction activities in Reaches 5 to 7 to determine any temporal overlap between the two projects. The draft EIR should determine the significance of each cumulative impact and assess the significance of the Project's contribution to the impact (CEQA Guidelines § 15355). Although a project's impacts may be less-than-significant individually, its contributions to a cumulative impact may be considerable; a contribution to a significant cumulative impact, e.g., reduction of habitat for a special-status species should be considered cumulatively considerable. The draft EIR should also identify reasonably foreseeable future projects within the Project area and disclose any cumulative impacts associated with these projects.

**Recommendation 2:** The draft EIR should include appropriate mitigation measures to be implemented for Project activities, as well as specify mitigation for cumulative impacts from the CCFMMP and future maintenance activities. Because some reaches overlap, the Project should clearly differentiate between proposed compensatory mitigation for impacts of the Project and compensatory mitigation planned for the CCFMMP.

## 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 found 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 NOP to assist Valley Water in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed Alexandra Anstett, Environmental Scientist, at (707) 815-6427 or at [Alexandra.Anstett@wildlife.ca.gov](mailto:Alexandra.Anstett@wildlife.ca.gov); or Brenda Blinn, Senior Environmental Scientist (Supervisory), at (707) 339-0334 or at [Brenda.Blinn@wildlife.ca.gov](mailto:Brenda.Blinn@wildlife.ca.gov).

Sincerely,

DocuSigned by:  
  
Erin Chappell  
Regional Manager  
Bay Delta Region

## REFERENCE

California Department of Fish and Wildlife. 2018. Elk Conservation and Management Plan. California Department of Fish and Wildlife. December 2018.

ec: Office of Planning and Research, State Clearinghouse (SCH No. 2023110513)

### California Department of Fish and Wildlife

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