



State of California – Natural Resources Agency

DEPARTMENT OF FISH AND WILDLIFE

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**GAVIN NEWSOM, Governor**

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November 26, 2024

Moses Tsang, Deputy Director

Alameda County Flood Control & Water Conservation District

399 Elmhurst Street #140

Hayward, CA 94544

[Moses@acpwa.org](mailto:Moses@acpwa.org)

Subject: Sulphur Creek Levee Restoration and Habitat Enhancement Project (Zone 2 Line K) Project, Mitigated Negative Declaration, SCH No. 2024101180, City of Hayward, Alameda County

Dear Moses Tsang:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt a Mitigated Negative Declaration (MND) ~~Choose an item.~~ from the Alameda County Flood Control and Water Conservation District (Lead Agency) for the Sulphur Creek Levee Restoration and Habitat Enhancement Project (Zone 2 Line K) Project (Project) pursuant 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.

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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.

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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.) 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.), related authorization as provided by the Fish and Game Code will be required.

## **PROJECT DESCRIPTION SUMMARY**

**Proponent:** Alameda County Flood Control & Water Conservation District (District)

**Objective:** The District is proposing to repair an existing severely eroding levee embankment and service road, and restore and enhance aquatic habitat along Sulphur Creek in the City of Hayward, with construction access from West Winton Avenue. The Project proposes to repair and restore the existing southern bank of Sulphur Creek from the San Francisco Bay to 2,800 feet upstream. The Project will repair slope failure along the levee, provide minor gravel replacement along the levee top to enable vehicle access, and restore disturbed wetlands adjacent to the levee. The ponded area south of the Project, known as Frank's Dump West (FDW) is owned by Hayward Area Recreation District (HARD) and has provided nesting habitat for the Federally listed as Threatened western snowy plover (*Charadrius nivosus nivosus*; snowy plover) when surface water elevations are low enough to allow for exposed islands. The pond is routinely monitored as part of the South Bay Restoration Project, which surveys managed ponds and other habitats for Snowy Plovers in the San Francisco Bay. If the Sulphur Creek levee fails, this ponded habitat will likely revert to open water fringed by tidal marsh along the levees and shoreline and would likely become unsuitable as a continuing high value Snowy Plover nesting and breeding habitat. The MND describes the proposed Project, analyzes whether the Project would result in any potential significant environmental impacts, describes measures that would avoid, minimize and mitigate any potential significant impacts to less-than-significant level, and determines that the Project, which incorporates a number of mitigation measures, will not have a significant adverse effect on the environment.

**Location:** The Project is located in the City Hayward along Sulphur Creek (Zone 2 Line K) and accessed via Cabot Road north of Winton Avenue. GPS coordinates are 37°39'23.0"N 122°09'20.2"W

**Timeframe:** To be determined.

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## **COMMENTS AND RECOMMENDATIONS**

CDFW offers the comments and recommendations below to assist the Lead Agency in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources. Editorial comments or other suggestions may also be included to improve the document.

### **I. Environmental Setting, Mitigation Measures and Related Impact Shortcoming**

#### **COMMENT #1: Project Design**

The Project includes placement of Rock Slope Protection (RSP) at the toe of the levee, earthwork to reconstruct the levee footprint and habitat restoration and enhancement planting including placement of woody debris at 17g locations along the reach, creation.

The estimated slope of the banks for the proposed ecotone habitat ranges from 1.5:1 to 4:1. According to the Geotechnical Report, the existing Sulphur Creek Levee includes fill soils over approximately 5 to 12 feet of Bay Mud. The report also states that proposed fill slope steepness should not exceed 3 horizontal to 1 vertical (3:1) if on-site soils are to be used due to potential instabilities associated with high plasticity soils and underlying Bay Mud. The report further states that if using imported fill, slopes up to 2:1 can be used. However, these thresholds are for geotechnical stability only, and do not address the ecological needs of wildlife and plant species in the area.

#### **Recommended Mitigation Measure 1: Coordination and Design Modifications**

CDFW recommends coordination with regional CDFW and Conservation Engineering staff on the design. To provide sufficient habitat width for special-status species such as marsh birds and mammals, we suggest maximizing the slope to 10:1 where possible. While this may be difficult due to the presence of other ponds on each side of the levee, managed for special-status-species, coordination with adjacent property owners may support a more effective ecotone structure. Additionally, large woody debris placement could impact or accelerate erosion and/or woody debris could sink into bay mud. Design considerations should take this into account for a range of water elevations.

- II. 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?**

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### **COMMENT #2: Salt Marsh Harvest Mouse and Salt Marsh Wandering Shrew**

Salt marsh harvest mouse (*Reithrodontomys raviventris*) and salt marsh wandering shrew (*Sorex vagrans halicoetes*) are present in and adjacent to the Project area. The MND states that narrow patches of pickleweed provide little habitat for Salt marsh harvest mouse and salt marsh wandering shrew. Since salt marsh harvest mouse often reside in the intertidal zone, they may require refuge during high tides, benefiting from high tide escape vegetation (Aylward et.al, 2023). Flooding can force salt marsh harvest mouse to take temporary refuge either in emergent vegetation (Johnston 1957; Smith et al. 2014) or by movement to non-inundated habitat (Hadaway and Newman 1971), including habitat approaching urbanized areas and road (Marcot et al., 2020). Even though pickleweed coverage is limited, the levee provides connectivity between adjacent habitats.

### **Recommended Mitigation Measure 2: Monitoring**

Salt marsh harvest mouse is a challenge to contain given its ability to navigate through small spaces, especially given they are present on both sides of the Project area. The Project design refers to the use of an exit funnel, however we are unclear if this design has been successfully used in the past. The use of the exit funnel should be monitored for use with a camera trap during the Project period, and a final report submitted to CDFW, regarding its use. If the funnel is unsuccessful during the Project period, CDFW should be consulted on the redesign.

### **COMMENT #3: State Listed Fish Species**

The MND includes steelhead (*Oncorhynchus mykiss*), green sturgeon (*Acipenser medirostris*), and longfin smelt (*Spirinchus thaleichthys*), but does not include white sturgeon (*Acipenser transmontanus*). The white sturgeon is currently a candidate species under CESA and is afforded the same protection as a CESA-listed species (CEQA Guidelines, §15380, subds.(b)). Unauthorized take of this species pursuant to CESA is a violation of Fish and Game Code section 2080 et seq.

White sturgeon are commonly caught in marshes in the south bay. They occasionally are found in tidal riverine and estuarine habitats of larger tributary streams such as Coyote Creek and Guadalupe River in the South Bay and Napa and Petaluma Rivers and Sonoma Creek in the North Bay (Leidy 2007). These habitats consist primarily of shallow water habitats that provide opportunities for benthic feeding on opossum shrimp and amphipods. Foraging movements are presumably in response to salinity changes (Moyle 2002) associated with tides and seasonal outflow. In dry years, white sturgeon follow brackish waters upstream and the opposite occurs in wet years (Kohlhorst et al. 1991). Adults tend to concentrate in deep areas with soft bottoms and often move into intertidal or shallow subtidal areas to feed during high tides (Moyle 2002).

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Project impacts could occur as direct and indirect impacts from construction equipment, dredging, stranding from water diversion, and erosion impacts to water quality

### **Recommended Mitigation Measure 3: Construction Activities and Work Windows**

The existing Project proposes use of a turbidity curtain. Work below mean high water (MHW) should be constrained to low tides. In-water construction shall only occur during the CDFW approved work window of June 1 through November 30.

### **COMMENT #4: Special-Status Plant Species**

The Native Plant Protection Act (NPPA) (Fish & G. Code §1900 *et seq.*) prohibits the take or possession of state-listed rare and endangered plants, including any part or product thereof, unless authorized by CDFW or in certain limited circumstances. Take of state-listed rare and/or endangered plants due to Project activities may only be permitted through an Incidental Take Permit (ITP) or other authorization issued by CDFW pursuant to California Code of Regulations, Title 14, section 786.9 subdivision (b).

Impacts to special-status plant species should be considered significant under CEQA unless they are clearly mitigated below a level of significance. CDFW considers plant communities, alliances, and associations with a statewide ranking of S1, S2, S3, and S4 as sensitive and declining at the local and regional level (Sawyer 2009).

Additionally, plants that have a California Native Plant Society (CNPS) California Rare Plant Rank (CRPR) of 1A, 1B, 2A, and 2B are rare throughout their range, endemic to California, and are seriously or moderately threatened in California. All plants constituting CRPR 1A, 1B, 2A, and 2B are eligible for State listing. Impacts to these species or their habitat must be analyzed during preparation of environmental documents relating to CEQA, as they meet the definition of rare or endangered (CEQA Guidelines, § 15380). Please see CNPS Rare Plant Ranks (<https://www.cnps.org/rare-plants/california-rare-plant-ranks>, CNPS 2022) page for additional rank definitions.

Rare plant species likely to occur in the Project area include Alkali milkvetch (*Astragalus tener var. tener*), California seablite (*Suaeda californica*), and Congdon's tarplant (*Centromadia parryi ssp. Congdonii*).

Alkali milkvetch is an annual herb inhabiting playas, clay soils supporting valley and foothill grasslands, and alkaline, vernal pools. It occurs in open, alkaline and vernal moist meadows from sea level to 200 feet in elevation. Very little is known about the Alkali milkvetch and Baye et al. (2000) report it was rediscovered near the historic Bay shoreline in the city of Fremont. As an annual species that tends to flower from March to June, it may not be found in every year it is surveyed.

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California seablite grows in a restricted area within the intertidal zone of salt marshes. It is threatened by anything that alters the hydrology of the area, such as changes in sedimentation, including dredging, erosion, and recreation. It requires a porous substrate high in nitrogen, which may come from decaying plant matter and bird droppings. All of these conditions are present in the Project area.

Congdon's tarplant was found at Oro Loma, within 0.8 miles of the site and could occur in the Project area. It blooms from May to November. It typically occurs on alkaline soils and sea level grasslands.

The Project could impact rare plants through additional grading, earth movement and degraded habitat. In addition to direct impacts, indirect impacts to special-status species could also occur, including habitat degradation as a result of impacts to water quality, competition from added vegetation, introduction of non-native species, and increased human presence.

#### **Recommended Mitigation Measure 4: Surveys and Buffers**

Measure should include multiple surveys and buffers. According to CDFW's *Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Sensitive Natural Communities* the protocol botanical field surveys should be conducted in the field at the times of year when plants will be both evident and identifiable. Usually this is during flowering or fruiting. Space botanical field survey visits throughout the growing season to accurately determine what plants exist in the Project area. This usually involves multiple visits to the project area (e.g., in early, mid, and late-season) to capture the floristic diversity at a level necessary to determine if special-status plants are present. The timing and number of visits necessary to determine if special-status plants are present is determined by geographic location, the natural communities present, and the weather patterns of the year(s) in which botanical field surveys are conducted.

To avoid indirect impacts to special-status plants, an appropriate buffer distance should be established between the special-status plant occurrence and the Project impact areas. Appropriate buffer distance should be based upon review of site-specific conditions (e.g. special-status plants located downstream or in lower elevational areas in relation to the impact location, special-status plants being down wind of earth moving activities, and other conditions).

#### **Recommended Mitigation Measure 5: Compensatory Mitigation and Revegetation**

A review of protocol-level survey results should be conducted to establish appropriate compensatory mitigation ratios specific to each special-status plant species. Compensatory mitigation ratios should be developed based on the biological factors specific to each species and should be sufficient to compensate for the loss of those species.



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All revegetation/restoration areas that will serve as mitigation should include preparation of a restoration plan, to be approved by CDFW prior to any ground disturbance. The restoration plan should include restoration and monitoring methods; annual success criteria; contingency actions should success criteria not be met; long-term management and maintenance goals; and a funding mechanism for long-term management.

## **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: [http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/CNDDDB\\_FieldSurveyForm.pdf](http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/CNDDDB_FieldSurveyForm.pdf). The completed form can be mailed electronically to CNDDDB at the following email address: [CNDDDB@wildlife.ca.gov](mailto:CNDDDB@wildlife.ca.gov). The types of information reported to CNDDDB can be found at the following link: [http://www.dfg.ca.gov/biogeodata/cnddb/plants\\_and\\_animals.asp](http://www.dfg.ca.gov/biogeodata/cnddb/plants_and_animals.asp).

## **FILING FEES**

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of 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 fee is required in order for the underlying project approval to be operative, vested, and final. (See 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 Alameda County in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Marcus Griswold, Senior Environmental Scientist (Specialist), at (707) 815-6451 or [Marcus.Griswold@wildlife.ca.gov](mailto:Marcus.Griswold@wildlife.ca.gov).

Sincerely,

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

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ec: Office of Planning and Research, State Clearinghouse (SCH No. 2024101180)

Attachment 1: Special-Status Species and Commercially/Recreationally Important Species

## REFERENCES

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**ATTACHMENT 1: Special-Status Species**

Species	Status
<b>Fish and Invertebrates</b>	
green sturgeon – southern DPS ( <i>Acipenser medirostris</i> pop. 1)	Federally Threatened (FT), State Species of Special Concern (SSC)
steelhead - central California coast DPS ( <i>Oncorhynchus mykiss irideus</i> )	FT, SSC
longfin smelt ( <i>Spirinchus thaleichthys</i> )	Proposed FT, State Threatened (ST)
white sturgeon ( <i>Acipenser transmontanus</i> )	SC
<b>Birds</b>	
Cooper's hawk ( <i>Accipiter cooperii</i> )	State Watch List
Alameda song sparrow ( <i>Melospiza melodia pusillula</i> )	SSC
black skimmer ( <i>Rynchops niger</i> )	SSC
California least tern ( <i>Sternula antillarum browni</i> )	FE, State Fully Protected (FP)
California Ridgway's rail ( <i>Rallus obsoletus obsoletus</i> )	FE, State Endangered (SE), FP
California black rail ( <i>Laterallus jamaicensis coturniculus</i> )	ST, SSC
northern harrier ( <i>Circus hudsonius</i> )	SSC
saltmarsh common yellowthroat ( <i>Geothlypis trichas sinuosa</i> )	SSC
western snowy plover ( <i>Charadrius nivosus nivosus</i> )	FT, SSC
white-tailed kite ( <i>Elanus leucurus</i> )	FP
<b>Mammals</b>	
pallid bat ( <i>Antrozous pallidus</i> )	SSC

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Species	Status
salt-marsh harvest mouse ( <i>Reithrodontomys raviventris</i> )	Federal Endangered (FE), FP
salt-marsh wandering shrew ( <i>Sorex vagrans halicoetes</i> )	SSC
Plants	
Alkali milk-vetch ( <i>Astragalus tener var. tener</i> )	S1, 1B.2
California alkali grass ( <i>Puccinellia simplex</i> )	S2, 1B.2
Congdon's tarplant ( <i>Centromadia parryi ssp. congdonii</i> )	S2, 1B.1
Contra Costa Goldfields ( <i>Lasthenia conjugens</i> )	FE, S1, 1B.1
Point Reyes salty bird's-beak ( <i>Chloropyron maritimum ssp. palustre</i> )	S2, 1B.2
California seablite ( <i>Suaeda californica</i> )	FE, S1, 1B.1
saline clover ( <i>Trifolium hydrophilum</i> )	S2, 1B.2