

Appendix B
Biological Evaluation



LIVE OAK ASSOCIATES, INC.

an Ecological Consulting Firm

March 8, 2022

Reyad Katwan
HawkStone Development
5655 Silver Creek Valley Road, #305
San Jose, CA 95138

Subject: Biological Evaluation Letter Report for the Evergreen Village site in the City of San Jose, Santa Clara County, California (PN 2676-01)

Dear Mr. Katwan:

At your request, Live Oak Associates, Inc. (LOA), completed the following biological evaluation letter report for the site located on the western side of Evergreen Village Square (APNs 659-57-015 and 659-84-093) in the City of San Jose, Santa Clara County, California. The site is currently supporting ruderal California annual grassland fields and is adjacent to Evergreen Valley Square which supports shops and residences; the Evergreen Village Duck Pond, a manmade water feature built in 2003, is adjacent and to the west of the project site.

The primary objectives of this report are to 1) identify habitats onsite, 2) review local documents to determine if additional biological constraints exist which have yet to be evaluated, and 3) recommend additional survey work, if necessary. Other sources of information used in the preparation of this analysis included the *California Natural Diversity Data Base* (CDFW 2022), special status species lists prepared by the California Department of Fish and Wildlife (CDFW) and U.S. Fish and Wildlife Service, and manuals and references related to plants and animals found in and around Santa Clara County. This site is not a covered project under the Santa Clara Valley Habitat Plan, as it is less than two acres and does not support special habitats.

EXISTING CONDITIONS

Regional Setting

The site is located on the western side of Evergreen Village Square in the City of San Jose, Santa Clara County, California. The project site is located in the San Jose East 7.5" U.S. Geological Survey (USGS) quadrangle and in Section 20 of Township 7 south Range 2 east and is surrounded by commercial and residential land use, parking lots, and major and minor roads; a

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Truckee: P.O. Box 8810 • Truckee, CA 96161 • Phone: (530) 214-8947

South Lake Tahoe: P.O. Box 7314 • South Lake Tahoe, CA 96158 • Phone: (408) 281-5885

large man-made duck pond also exists adjacent and to the west of the site. The property currently consists of ruderal California annual grassland.

Habitats

California Annual Grassland. This habitat type supports two parcels separated by a public pathway to the Evergreen Duck Pond. Both parcels are flat and level with Evergreen Valley Square with steep slopes down to the pathway around the pond. The southern parcel also has stockpiled soil in the center of the site, was previously under a plastic tarp which has since deteriorated. Coast redwood trees (*Sequoia sempervirens*) border both parcels between the parcel and the duck pond (it is not clear which property these trees are on). Other plant species observed during the March 2022 site visit included wild oats (*Avena* sp.), coyote brush (*Baccharis pilularis*), ripgut brome (*Bromus diandrus*), field marigold (*Calendula arvensis*), filaree (*Erodium* sp.), barley (*Hordeum murinum*), mallow (*Malva* sp.), burclover (*Medicago polymorpha*), sweet clover (*Melilotus officinalis*), smilo grass (*Piptatherum miliaceum*), wild radish (*Raphanus raphanistrum*), curly dock (*Rumex crispus*), and vicia (*Vicia* sp.).

Animals observed in this habitat during the March 2022 site visit included the California gull (*Larus californicus*), mallard (*Anas platyrhynchos*), Canada goose (*Branta canadensis*), American crow (*Corvus brachyrhynchos*), Anna's hummingbird (*Calypte anna*), black phoebe (*Sayornis nigricans*), house finch (*Haemorhous mexicanus*), and California ground squirrel (*Otospermophilus beecheyi*).

Special Status Species

The site was found to lack any suitable habitat for any special status plant species known to occur regional. Therefore, these plant species are presumed absent. A search of published accounts for all relevant special status animal species was conducted for the San Jose East USGS 7.5" quadrangle in which the project site occurs and for the eight surrounding quadrangles (Milpitas, Calaveras Reservoir, Mt. Day, San Jose West, Lick Observatory, Los Gatos, Santa Teresa Hills, and Morgan Hill) using the California Natural Diversity Data Base (CNDDB) Rarefind (CDFW 2022). The species and their potential to occur in the study area are summarized in Appendix A. All but three animal species listed in Appendix A would not be expected to occur on site. Marginal nesting habitat exist onsite for white-tailed kite marginal habitat (primarily non-breeding habitat) for the burrowing owl, and marginal foraging habitat exists for the Townsend's big-eared bat and pallid bat (see Appendix A). Discussions for these four species occur below.

Jurisdictional Waters

Jurisdictional waters include rivers, creeks, and drainages that have a defined bed and bank and which, at the very least, carry ephemeral flows. Jurisdictional waters also include lakes, ponds, reservoirs, and wetlands. Such waters may be subject to the regulatory authority of the U.S. Army Corps of Engineers (USACE), the California Department of Fish and Wildlife (CDFW), and the California Regional Water Quality Control Board (RWQCB). Potential wetlands and jurisdictional waters are absent from the site.

No regulated habitats occur on site.

POTENTIAL BIOLOGICAL IMPACTS

Special Status Plants

As the site has previously been entirely impacted as a laydown yard and stockpile area for soil, the site does not support habitat suitable for special status plant species. Rare plant surveys are not warranted for this project.

Special Status Wildlife

Twenty of the 24 species considered in Appendix A are considered absent from the site as it lacks suitable habitat for these species, or it is outside of the species' known range (Appendix A). As noted previously, only four of the 24 species that occur in the region may occur onsite; the site supports limited, but potential breeding and marginal foraging habitat for the white-tailed kite and marginal potential foraging habitat for the Townsend's big-eared bat and pallid bat; additionally, although unlikely to occur onsite, the burrowing owl has a small potential to occur onsite, and to be prudent, preconstruction surveys should occur for the burrowing owl as well.

Migratory birds (including special status species like the white-tailed kite and burrowing owl) may also nest in trees, shrubs, and grassland areas on the site (see section below). Construction of the site would result in a slight decrease in marginal foraging or breeding habitat for these species regionally. Therefore, impacts to habitat for birds would not be regionally significant and would not constrain construction activities, however, impacts to individual nesting migratory birds, including raptors such as the white-tailed kite and burrowing owl, would be considered significant (see below).

Bats

Trees along the border of the site appear to lack suitable cavities, crevices and/or dense foliage suitable for bats, therefore, bats may be expected to forage over the site, but would not be expected to roost onsite, therefore, preconstruction surveys for bats are not necessary for this site.

Nesting Raptors and Migratory Birds

Trees, shrubs, and grassland areas occurring on and adjacent to the site could be used by tree-nesting raptors, including the white-tailed kite, and other migratory birds for breeding. All nesting raptors and migratory birds, regardless of their status, are protected by state and federal laws. Therefore, construction activities that adversely affect the nesting success of raptors and migratory birds (i.e., lead to the abandonment of active nests) or result in mortality of individual birds constitute a violation of state and federal laws. Project-related activities that occur during the breeding season could be constrained in the vicinity of any active nests. If tree removal or ground disturbance activities are scheduled to commence during the breeding season (February 1 through August 31), pre-construction nesting bird surveys should be conducted by a qualified biologist in order to identify possible nesting activity. A construction-free buffer of suitable dimensions should be established around any active raptor and migratory bird nests (up to 250 feet, depending on the location and species) for the duration of the project or until it has been determined that the chicks have fledged and are independent of their parents. This would ensure impacts to migratory birds and raptors would be reduced to a less-than-significant level.

Tree Removal

Landscaped trees including coast redwoods border the site, and we assume trees will not be removed as a part of this project. Should trees be removed as a part of this project, a tree removal permit may be required from the City of San Jose.

Conclusion

In summary, special status wildlife species were not observed during the March 2022 site visit, and there are no records of special status species known to occur on the property. Additionally, habitats onsite are generally unsuitable for most special status species known to occur in the region. There is the potential for nesting raptors and migratory birds. Focused preconstruction surveys would need to be completed prior to the commencement of construction activities. Reasonable measures could be taken that would avoid impacts to nesting migratory birds and raptors if they are found onsite prior to construction. A permit from the City may also be required for the removal of existing trees, should this be a part of project activities, which may require fees and/or mitigations specified by the City.

If you have any questions regarding our conclusions, please contact me at kkrakow@loainc.com or (408) 281-5889 at your earliest convenience.

Sincerely,



Katrina Krakow, M.S.
Senior Project Manager
Staff Ecologist

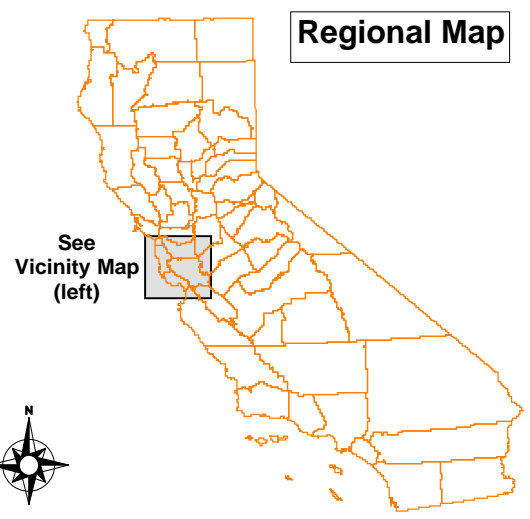
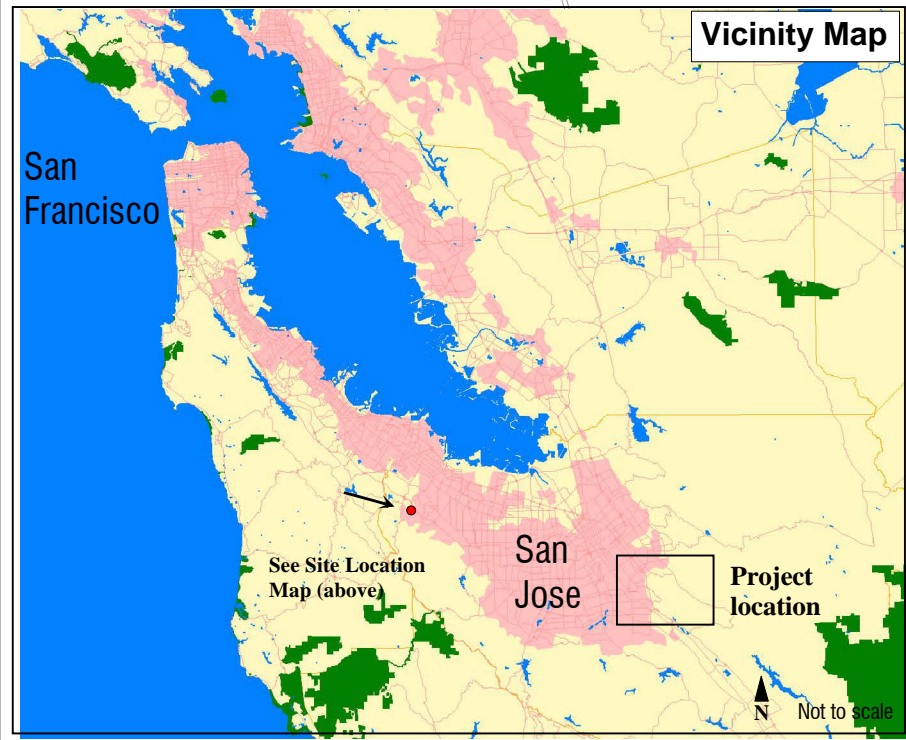
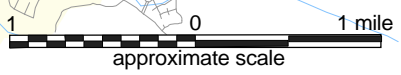
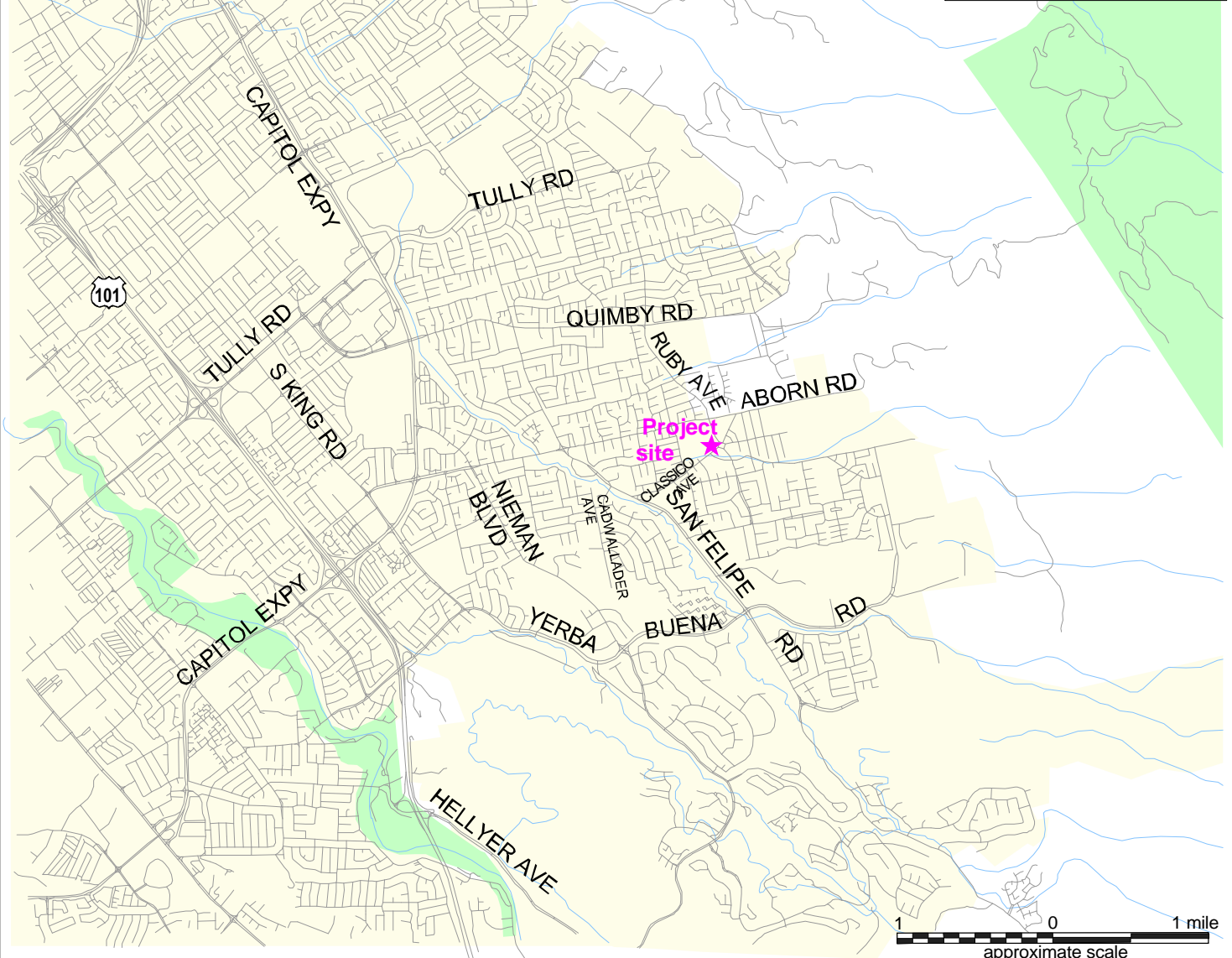
References


California Department of Fish and Wildlife. 2022. Special animals (January 2022). The Natural Resources Agency, Sacramento, CA.

_____. 2022. California natural diversity database. The Resources Agency, Sacramento, CA.

U. S. Fish and Wildlife Service. 2022. Endangered and threatened wildlife and plants.

Site Location Map



 Live Oak Associates, Inc.		
Evergreen Village BE Site / Vicinity Map		
Date	Project #	Figure #
3/04/2022	2676-01	1

Not to scale



Altamira Ave

Ruby Ave

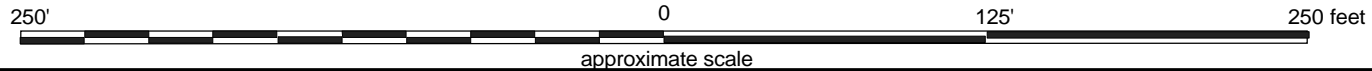
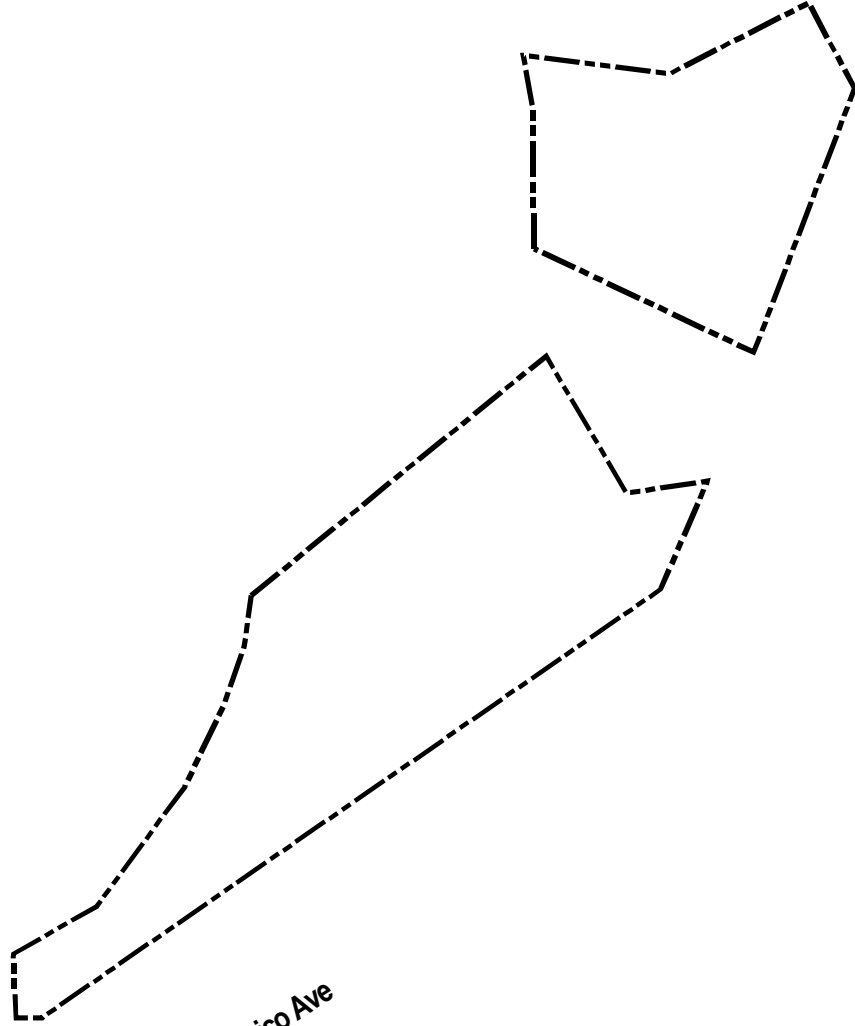
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Cortona Dr

LEGEND

 Property Boundary

 California Annual Grassland



Live Oak Associates, Inc.

Evergreen Village BE
Biotic Habitats

Date

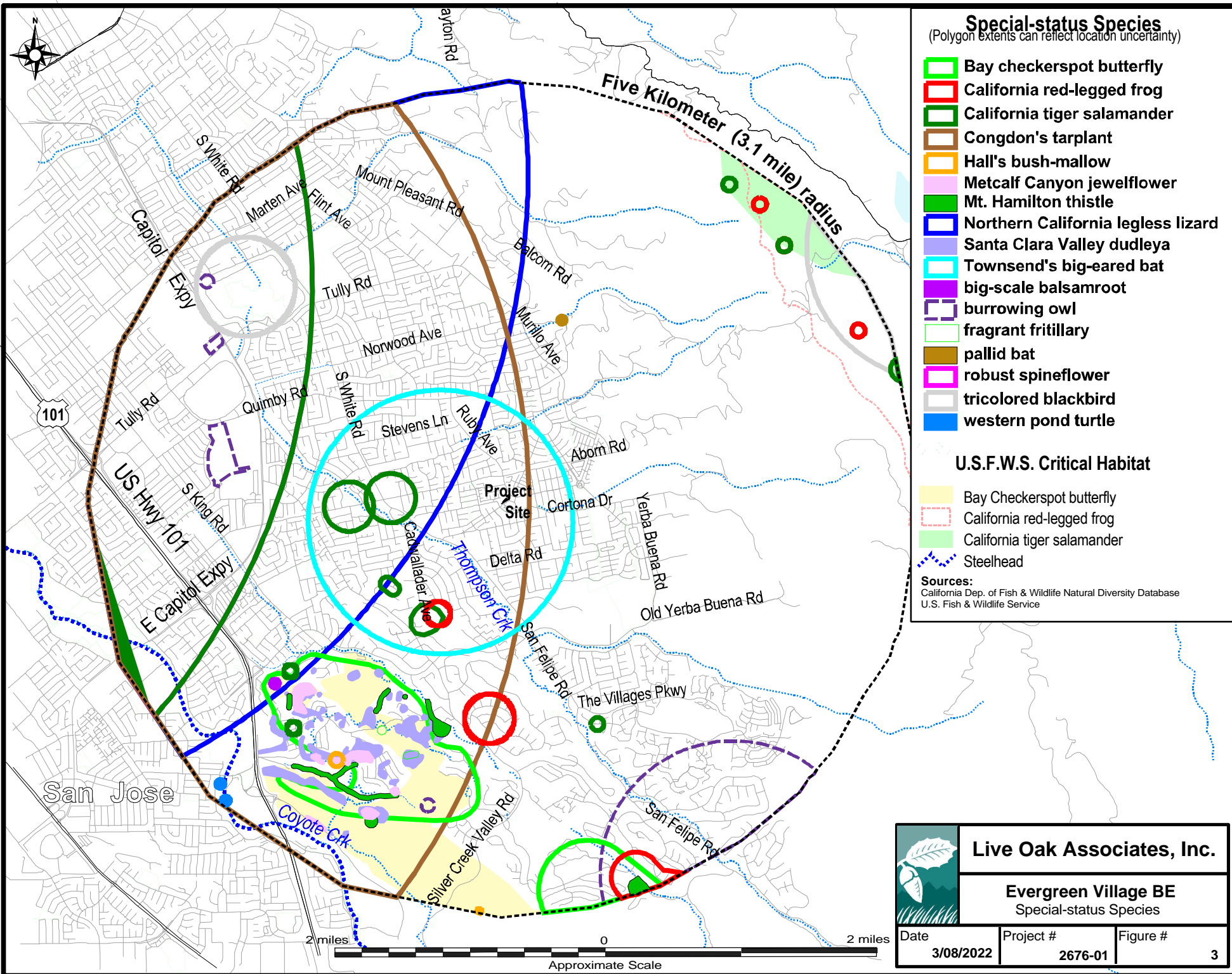
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Project #

2676-01

Figure #

2



Special-status Species

(Polygon extents can reflect location uncertainty)

- Bay checkerspot butterfly
- California red-legged frog
- California tiger salamander
- Congdon's tarplant
- Hall's bush-mallow
- Metcalf Canyon jewelflower
- Mt. Hamilton thistle
- Northern California legless lizard
- Santa Clara Valley dudleya
- Townsend's big-eared bat
- big-scale balsamroot
- burrowing owl
- fragrant fritillary
- pallid bat
- robust spineflower
- tricolored blackbird
- western pond turtle

U.S.F.W.S. Critical Habitat

- Bay Checkerspot butterfly
- California red-legged frog
- California tiger salamander
- Steelhead

Sources:
 California Dep. of Fish & Wildlife Natural Diversity Database
 U.S. Fish & Wildlife Service

Live Oak Associates, Inc.

Evergreen Village BE
Special-status Species

Date	Project #	Figure #
3/08/2022	2676-01	3



**APPENDIX A:
SPECIAL STATUS SPECIES**

A search of published accounts for all relevant special status plant and animal species was conducted for the San Jose East USGS 7.5” quadrangles in which the project site occurs and for the eight surrounding quadrangles (Milpitas, Calaveras Reservoir, Mt. Day, San Jose West, Lick Observatory, Los Gatos, Santa Teresa Hills, and Morgan Hill) using the California Natural Diversity Data Base (CNDDB) Rarefind (CDFW 2022). These species and their potential to occur in the study area are summarized in Table 1 below.

Because serpentine and alkaline soils are absent from the site, those species that are uniquely adapted to serpentine or alkaline conditions are considered absent from the site. Other plant species occur in habitats not present in the study area (e.g., brackish and freshwater marshes, coastal scrub, etc.) or are outside the elevation range of the site and, therefore, are also considered absent from the site. Special status plant species are considered absent from the site.

Animals with a range that occurs outside of the site or in habitats not present on the site (e.g., serpentine, forest, marshes, coastal scrub, streams, etc.) are considered absent from the site.

Animal species that may more reasonably occur onsite or the vicinity of the site are included in the Table 1 below.

TABLE 1: SPECIAL STATUS SPECIES THAT COULD OCCUR IN THE PROJECT VICINITY.			
ANIMALS (adapted from CDFW 2022 and USFWS 2022)			
Species Listed as Threatened or Endangered under the State and/or Federal Endangered Species Acts			
Common and scientific names			*Occurrence in the study area
California tiger salamander <i>Ambystoma californiense</i>	FT, CT	Breeds in vernal pools and stock ponds of central California. Adults aestivate in grassland habitats adjacent to the breeding sites.	Absent. Habitats required by this species are absent. The only water feature in the vicinity is the man-made duck pond adjacent to the site which did not replace a natural water body and a high amount of development exists between the duck pond and the nearest water body.
Foothill yellow-legged frog <i>Rana boylei</i>	CE, CSC	Occurs in swiftly flowing streams and rivers with rocky substrate with open, sunny banks in forest, chaparral, and woodland habitats, and can sometimes be found in isolated pools and ponds.	Absent. Habitats required by this species are absent. The only water feature in the vicinity is the man-made duck pond adjacent to the site which did not replace a natural water body and a high amount of development exists between the duck pond and the nearest water body.

**TABLE 1: SPECIAL STATUS SPECIES THAT COULD OCCUR IN THE PROJECT VICINITY.
ANIMALS (adapted from CDFW 2022 and USFWS 2022)**

Species Listed as Threatened or Endangered under the State and/or Federal Endangered Species Acts

Common and scientific names	Status	General habitat description	*Occurrence in the study area
California red-legged frog <i>Rana draytonii</i>	FT, CSC	Rivers, creeks and stock ponds of the Sierra foothills and coast range, preferring pools with overhanging vegetation.	Absent. Habitats required by this species are absent. The only water feature in the vicinity is the man-made duck pond adjacent to the site which did not replace a natural water body and a high amount of development exists between the duck pond and the nearest water body.
Western snowy plover <i>Charadrius alexandrinus nivosus</i>	FT, CSC	Uses man-made agricultural wastewater ponds and reservoir margins. Breeds on barren to sparsely vegetated ground at alkaline or saline lakes, reservoirs, ponds, and riverine sand bar.	Absent. Breeding and foraging habitat is absent from the site and the vicinity of the site.
White-tailed Kite <i>Elanus leucurus</i>	CP	Open grasslands and agricultural areas throughout central California. Also known to nest in developed areas.	Possible. The white-tailed kite may forage on or over the site or nest in the large trees on the border of the site or just off-site.
Swainson’s hawk <i>Buteo swainsoni</i>	CT	Breeds in stands with few trees in juniper-sage flats, riparian areas, and in oak savannah. Requires adjacent suitable foraging areas such as grasslands or alfalfa fields supporting rodent populations.	Absent. Swainson’s hawks are not known from the vicinity of the site. The nearest known recent location of Swainson’s hawks is from south of San Jose near the Bailey Avenue-Highway 101 interchange.
American peregrine falcon <i>Falco peregrines anatum</i>	CP	Individuals breed on cliffs in the Sierra or in coastal habitats; occurs in many habitats of the state during migration and winter.	Absent. Suitable habitat for this species is absent from the site.
Golden Eagle <i>Aquila chrysaetos</i>	CP	Typically frequents rolling foothills, mountain areas, sage-juniper flats and desert.	Absent. Suitable breeding and foraging habitat is absent from the site. Golden eagles may fly over the site from time to time.
Western, yellow-billed cuckoo <i>Coccyzus americanus occidentalis</i>	FT, CE	Breed in large blocks of riparian habitats, particularly cottonwoods and willows.	Absent. Dense riparian habitat required by the western yellow-billed cuckoo is absent from the site.
Tricolored blackbird <i>Agelaius tricolor</i>	FT, CSC	Breeds near fresh water, primarily emergent wetlands, with tall thickets. Forages in grassland and cropland habitats.	Absent. Breeding and foraging habitat is absent from the site and the vicinity of the site.

TABLE 1: SPECIAL STATUS SPECIES THAT COULD OCCUR IN THE PROJECT VICINITY.

ANIMALS (adapted from CDFW 2022 and USFWS 2022)

Species Listed as Threatened or Endangered under the State and/or Federal Endangered Species Acts

Common and scientific names	Status	General habitat description	*Occurrence in the study area
Northern California legless lizard <i>Anniella pulchra</i>	CSC	The NCLL (previously called silvery legless lizard) occurs mostly underground in warm moist areas with loose soil and substrate. The NCLL occurs in habitats including sparsely vegetated areas of beach dunes, chaparral, pine-oak woodlands, desert scrub, sandy washes, and stream terraces with sycamores, cottonwoods, or oaks.	Absent. The site is not within the range of the northern California legless lizard.
Coast horned lizard <i>Phrynosoma blainvillii</i>	CSC	Occur in grasslands, scrublands, oak woodlands, etc. of central California. Common in sandy washes with scattered shrubs. Prefers open areas for sunning, bushes for cover, patches of loose soil for burial, and an abundant supply of ants and other insects.	Absent. Habitats required by coast horned lizards are absent because they have been heavily modified; additionally, the surrounding development would prevent this species from moving onto the site.
Western pond turtle <i>Actinemys marmorata</i>	CSC	An aquatic turtle of ponds, marshes, slow-moving rivers, streams, and irrigation ditches with aquatic vegetation. Needs basking sites and sandy banks or grassy open fields for egg laying.	Absent. Although the site is adjacent to a large pond which does have red-eared sliders and has signs posted warning about the presence of alligator snapping turtles, these are illegally released pet turtles, and the duck pond is a man-made pond which did not replace a natural ponding area; a large amount of development exists between this duck pond and other water features which potentially may support the western pond turtle.

**TABLE 1: SPECIAL STATUS SPECIES THAT COULD OCCUR IN THE PROJECT VICINITY.
ANIMALS (adapted from CDFW 2022 and USFWS 2022)****Species Listed as Species of Special Concern**

Common and scientific names	Status	General habitat description	*Occurrence in the study area
Burrowing owl <i>Athene cunicularia</i>	CSC	Open, dry grasslands, deserts, and ruderal areas. Requires suitable burrows. Often associated with California ground squirrels.	Possible. The site supports a few California ground squirrel burrows. Burrowing owls and their sign were not observed during the March 2022 site visit; the Evergreen area of San Jose is known to support burrowing owls on smaller parcels. Therefore, although breeding burrowing owls are not expected to occur onsite due to the size of the non-developed area, an errant burrowing owl may temporarily move onto the marginable suitable site, especially during the overwintering season.
Loggerhead Shrike <i>Lanius ludovicianus</i>	CSC	Frequents open habitats with sparse shrubs and trees, other suitable perches, bare ground, and low herbaceous cover. Nests in tall shrubs and dense trees. Forages in grasslands, marshes, and ruderal habitats. Can often be found in cropland.	Unlikely. Although this species may pass through the area, it is not expected to occur on the site due to the amount of development in the vicinity of the site.
Purple martin <i>Progne subis</i>	CSC	Cavity nester, nests widely in man-made birdhouses.	Absent. The site does not provide potential nesting habitat and human-provided birdhouses are not present. These birds are also known to nest near open water; however, suitable nesting habitat is not present onsite or in the vicinity of the site.
Black swift <i>Cypseloides niger</i>	CSC	Migrants found in many habitats of state; in Sierra nests are often associated with waterfalls.	Absent. The site does not provide suitable breeding or foraging habitat for this species.
Yellow-breasted chat <i>Icteria virens</i>	CSC	Frequently breeds in dense shrubs and blackberry thickets and uses areas of dense vegetation during migration.	Absent. Suitable habitat for this species is absent from the site.
Grasshopper sparrow <i>Ammodramus savannarum</i>	CSC	Occurs in California during spring and summer in open grasslands with scattered shrubs.	Absent. Suitable habitat for this species is absent from the site.
Pallid bat <i>Antrozous pallidus</i>	CSC	Grasslands, chaparral, woodlands, and forests of California; most common in dry rocky open areas that provide roosting opportunities.	Possible. Foraging habitat is present onsite; however, roosting habitat is absent from the site.
Townsend's Big-eared bat <i>Corynorhinus townsendii</i>	CSC	Primarily a cave-dwelling bat that may also roost in buildings. Occurs in a variety of habitats.	Possible. Foraging habitat is present onsite; however, roosting habitat for this species is absent from the site.

TABLE 1: SPECIAL STATUS SPECIES THAT COULD OCCUR IN THE PROJECT VICINITY. ANIMALS (adapted from CDFW 2022 and USFWS 2022)

Species Listed as Species of Special Concern

Common and scientific names			*Occurrence in the study area
San Francisco Dusky-Footed Woodrat <i>Neotoma fuscipes annectens</i>	CSC	Found in hardwood forests, oak riparian, and shrub habitats.	Absent. Suitable riparian habitat and woodland habitat are absent from the site, in addition, woodrat nests were not observed during the site visit.
American badger <i>Taxidea taxus</i>	CSC	Found in drier open stages of most shrub, forest, and herbaceous habitats with friable soils.	Absent. Suitable habitat for the badger is absent from the vicinity of the site due to the high amount of development.
Ringtail <i>Bassariscus astutus</i>	CP	Occurs in riparian and heavily wooded habitats near water.	Absent. Suitable riparian habitat is absent along the Duck Pond.

*Explanation of Occurrence Designations and Status Codes

Present: Species observed on the sites at time of field surveys or during recent past.

Likely: Species not observed on the site, but it may reasonably be expected to occur there on a regular basis.

Possible: Species not observed on the sites, but it could occur there from time to time.

Unlikely: Species not observed on the sites, and would not be expected to occur there except, perhaps, as a transient.

Absent: Species not observed on the sites and precluded from occurring there because habitat requirements not met.

STATUS CODES

FE Federally Endangered

FT Federally Threatened

FPE Federally Endangered (Proposed)

FC Federal Candidate

CSC California Species of Special Concern

CE California Endangered

CT California Threatened

CR California Rare

CP California Protected

CRPR California Rare Plant Rank

1A Plants Presumed Extinct in California

1B Plants Rare, Threatened, or Endangered in California and elsewhere

2 Plants Rare, Threatened, or Endangered in California, but more common elsewhere

3 Plants about which we need more

information – a review list

4 Plants of limited distribution – a watch list

APPENDIX B: SIGNIFICANCE CRITERIA AND RELEVANT GOALS, POLICIES, AND LAWS

Significance Criteria

General plans, area plans, and specific projects are subject to the provisions of the California Environmental Quality Act. The purpose of CEQA is to assess the impacts of proposed projects on the environment before they are constructed. For example, site development may require the removal of some or all its existing vegetation. Animals associated with this vegetation could be destroyed or displaced. Animals adapted to humans, roads, buildings, pets, etc., may replace those species formerly occurring on a site. Plants and animals that are state and/or federally listed as threatened or endangered may be destroyed or displaced. Sensitive habitats such as wetlands and riparian woodlands may be altered or destroyed. These impacts may be considered significant. According to 2021 CEQA Status and Guidelines (2021), “Significant effect on the environment” means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic interest. Specific project impacts to biological resources may be considered “significant” if they will:

- 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 the California Department of Fish and Wildlife or U.S. Fish and Wildlife Service;
- Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the California Department of Fish and Wildlife or U.S. Fish and Wildlife Service;
- Have a substantial adverse effect on state or federally protected wetlands (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means;
- Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites;
- Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance; and

Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan.

Relevant Goals, Policies, and Laws

Threatened and Endangered Species

State and federal “endangered species” legislation has provided the CDFW and USFWS with a mechanism for conserving and protecting plant and animal species of limited distribution and/or low or declining populations. Species listed as threatened or endangered under provisions of the state and federal Endangered Species Acts, candidate species for such listing, state species of special concern, and some plants listed as endangered by the California Native Plant Society are

collectively referred to as “species of special status.” Permits may be required from both the CDFW and USFWS if activities associated with a proposed project will result in the take of a listed species. To “take” a listed species, as defined by the state of California, is “to hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture or kill” said species (California Fish and Game Code, Section 86). “Take” is more broadly defined by the federal Endangered Species Act to include “harm” of a listed species (16 USC, Section 1532(19), 50 CFR, Section 17.3). Furthermore, the CDFW and the USFWS are responding agencies under CEQA. Both agencies review CEQA documents in order to determine the adequacy of their treatment of endangered species issues and to make project-specific recommendations for their conservation.

Migratory Birds

State and federal laws also protect most bird species. The State of California signed Assembly Bill 454 into law in 2019, which clarifies native bird protection and increases protections where California law previously deferred to Federal law. The Federal Migratory Bird Treaty Act (FMBTA: 16 U.S.C., scc. 703, Supp. I, 1989) prohibits killing, possessing, or trading in migratory birds, except in accordance with regulations prescribed by the Secretary of the Interior. This act encompasses whole birds, parts of birds, and bird nests and eggs.

Birds of Prey

Birds of prey are protected in California under provisions of the State Fish and Game Code, Section 3503.5, which states that it is “unlawful to take, possess, or destroy any birds in the order Falconiformes or Strigiformes (birds of prey) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by this code or any regulation adopted pursuant thereto.” Construction disturbance during the breeding season could result in the incidental loss of fertile eggs or nestlings, or otherwise lead to nest abandonment. Disturbance that causes nest abandonment and/or loss of reproductive effort is considered “taking” by the CDFW.

Additionally, the Bald and Golden Eagle Protection Act (16 U.S.C., scc. 668-668c) prohibits anyone from taking bald or golden eagles, including their parts, nests, or eggs, unless authorized under a federal permit. The act prohibits any disturbance that directly affects an eagle or an active eagle nest as well as any disturbance caused by humans around a previously used nest site during a time when eagles are not present such that it agitates or bothers an eagle to a degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, and causes injury, death or nest abandonment.

Bats

Section 2000 and 4150 of the California Fish and Wildlife Code states that it is unlawful to take or possess a number of species, including bats, without a license or permit as required by Section 3007. Additionally, Title 14 of the California Code of Regulations states it is unlawful to harass, herd, or drive a number of species, including bats. To harass is defined as “an intentional act which disrupts an animal's normal behavior patterns, which includes, but is not limited to, breeding, feeding or sheltering.” For these reasons, bat colonies in particular are considered to be sensitive and therefore, disturbances that cause harm to bat colonies are unlawful.

Jurisdictional Waters

Jurisdictional waters include waters of the United States subject to the regulatory authority of the U.S. Army Corps of Engineers (USACE) and waters of the State of California subject to the regulatory authority of the California Department of Fish and Wildlife (CDFW) and the California Regional Water Quality Control Board (RWQCB).

Clean Water Act, Section 404. The USACE regulates the filling or grading of Waters of the U.S. under the authority of Section 404 of the Clean Water Act. Drainage channels and adjacent wetlands may be considered “waters of the United States” or “jurisdictional waters” subject to the jurisdiction of the USACE. The extent of jurisdiction has been defined in the Code of Federal Regulations and clarified in federal courts.

The definition of waters of the U.S. have changed several times in recent years. In January 2020, the Environmental Protection Agency (EPA) and USACE jointly issued the Navigable Waters Protection Rule. The new rule was published in the Federal Register on April 21, 2020, and took effect on June 22, 2020.

On August 30, 2021, the U.S. District Court for the District of Arizona issued an order vacating and remanding the Navigable Waters Protection Rule. In light of this order, the EPA and USACE have halted implementation of the Navigable Waters Protection Rule and are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime until further notice.

The pre-2015 regulatory regime defines waters of the U.S. as:

1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters including interstate wetlands;
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - a) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - b) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - c) Which are used or could be used for industrial purposes by industries in interstate commerce;
4. All impoundments of waters otherwise defined as waters of the United States under this definition;
5. Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
6. The territorial sea;
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

All activities that involve the discharge of dredge or fill material into waters of the U.S. are subject to the permit requirements of the USACE under Section 404 of the Clean Water Act. Such permits are typically issued on the condition that the applicant agrees to provide mitigation that result in no net loss of wetland functions or values. No permit can be issued without a CWA Section 401 Water Quality Certification (or waiver of such certification) verifying that the proposed activity will meet state water quality standards (Section 3.6.2).

Porter-Cologne Water Quality Act/Clean Water Act, Section 401. There are nine Regional Water Quality Control Boards (RWQCB) statewide; collectively, they oversee regional and local water quality in California. The RWQCB administers Section 401 of the Clean Water Act and the Porter-Cologne Water Quality Control Act. The RWQCB for a given region regulates discharges of fill or pollutants into waters of the State through the issuance of various permits and orders.

Pursuant to Section 401 of the Clean Water Act, the RWQCB regulates waters of the State that are also waters of the U.S. Discharges into such waters require a Section 401 Water Quality Certification from the RWQCB as a condition to obtaining certain federal permits, such as a Clean Water Act Section 404 permit (Section 3.6.1). Discharges into all Waters of the State, even those that are not also Waters of the U.S., require Waste Discharge Requirements (WDRs), or a waiver of WDRs, from the RWQCB.

The Porter-Cologne Water Quality Control Act, Water Code Section 13260, requires that “any person discharging waste, or proposing to discharge waste, within any region that could affect the ‘waters of the State’ to file a report of discharge” with the RWQCB. Waters of the State as defined in the Porter-Cologne Act (Water Code Section 13050[e]) are “any surface water or groundwater, including saline waters, within the boundaries of the state.” This gives the RWQCB authority to regulate a broader set of waters than the Clean Water Act alone; specifically, in addition to regulating waters of the U.S. through the Section 401 Water Quality Certification process, the RWQCB also claims jurisdiction and exercises discretionary authority over “isolated waters,” or waters that are not themselves waters of the U.S. and are not hydrologically connected to waters of the U.S.

The RWQCB also administers the Construction Stormwater Program and the federal National Pollution Discharge Elimination System (NPDES) program. Projects that disturb one or more acres of soil must obtain a Construction General Permit under the Construction Stormwater Program. A prerequisite for this permit is the development of a Stormwater Pollution Prevention Plan (SWPPP) by a certified Qualified SWPPP Developer. Projects that discharge wastewater, stormwater, or other pollutants into a Water of the U.S. may require a NPDES permit.

California Department of Fish and Game Code, Section 1602. The CDFW has jurisdiction over the bed and bank of natural drainages and lakes according to provisions of Section 1602 of the California Fish and Game Code. Activities that may substantially modify such waters through the diversion or obstruction of their natural flow, change or use of any material from their bed or bank, or the deposition of debris require a Notification of Lake or Streambed Alteration. If the CDFW determines that the activity may adversely affect fish and wildlife resources, a Lake or Streambed Alteration Agreement will be prepared. Such an agreement typically stipulates that

certain measures will be implemented to protect the habitat values of the lake or drainage in question.

Envision San Jose 2040 General Plan

The 2040 Plan aims to protect biological resources when properties are developed. Generally, similar types of requirements occur in the 2040 Plan as in the SCVHP. Although the project must be consistent with all goals in the 2040 Plan, goals that apply or may apply specifically to this project from Chapter 3 of the 2040 Plan are listed and summarized below.

Chapter 3: Environmental Leadership

Goal MS-21-Community Forest (page 23)

Goal ER-1-Grassland, Oak Woodlands, Chaparral and Coast Scrub (page 26)

Goal ER-2-Riparian Corridors (page 27)

Goal ER-4-Special-Status Plants and Animals (page 29)

Goal ER-5-Migratory Birds (page 31)

Goal ER-7-Wildlife Movement (page 33)

Goal ER-8-Stormwater (page 34)

Goal ER-9-Water Resources (page 35)

The following are general measures to protect biological resources in the 2040 Plan.

1. Trees should be protected as a part of the Community Forest, and permits are required for tree removal (Goal MS-21). Avoidance and minimization measures are spelled out for sensitive plant communities (Goal ER-1). To be consistent with the 2040 Plan, tree permits must be obtained prior to removal of trees and avoidance and minimization measures in Goal ER-1 should be implemented.
2. Riparian setbacks of 100 feet are recommended along riparian corridors (Goal ER-2). Additionally, the 2040 Plan describes measures for stormwater/water quality (Goal ER-8 and 9).
3. Preconstruction surveys may be required to avoid direct impact to special status plant and animal species and migratory birds, including animals such as the burrowing owl and nesting birds (Goal ER-4 and 5). Goal ER-4 strives to “Preserve, manage, and restore habitat suitable for special-status species, including threatened and endangered species” and “incorporate mitigation measures to avoid and minimize impacts to individuals of special-status species.” Measures are provided to ensure wildlife movement corridors remain (Goal ER-7). The project must conduct pre-construction surveys and incorporate measures identified in Goal ER-7 such as wildlife-friendly culverts to be consistent with the 2040 Plan.

Santa Clara Valley Habitat Plan

Six local partners (i.e., County of Santa Clara, Santa Clara Valley Transportation Authority; Santa Clara Valley Water District; and the Cities of San Jose, Gilroy, and Morgan Hill) and two wildlife agencies (CDFW and USFWS) prepared and adopted this multi-species habitat conservation plan, which primarily covers southern Santa Clara County, as well as the City of San Jose with the exception of the bayland areas. The SCVHP addresses listed species and species that are likely to become listed during the plan's 50-year permit term. The eighteen covered species include nine plants and nine animals. The animal species covered include, but are not limited to, the California

tiger salamander, California red-legged frog, western pond turtle, and western burrowing owl. The SCVHP requires that the agencies comment on reportable interim projects and recommend mitigation measures or project alternatives that would help achieve the preliminary conservation objectives and not preclude important conservation planning options or connectivity between areas of high habitat value. Funding sources for the SCVHP include development fees based on land cover types (natural, agricultural, or small vacant sites surrounded by urban development). Additional fees are charged based on the occurrence of certain sensitive habitat types such as serpentine and wetlands.

The project is not considered a covered project under the SCVHP. Therefore, the project would not be subject to conditions and fees of the SCVHP.