# APPENDIX B1

## *Biological Restraints Report*

LIVE OAK ASSOCIATES, INC.
an Ecological Consulting Firm

May 9, 2019

Robert Hencken
Hencken Development Consultants
1654 The Alameda, #200
San Jose, CA 95126

**Subject: Due Diligence Report for the Old Oakland site in the City of San Jose, Santa Clara County, California (PN 2361-01)**

Dear Mr. Hencken:

At your request, Live Oak Associates, Inc. (LOA), completed an analysis of potential biological constraints for the 2+-acre site at APN 237-03-044 on Oakland Road on the western side of the intersection of Oakland Road and McKay Drive in the City of San Jose, Santa Clara County, California. The site is currently undeveloped with some cement areas.

The primary objectives of this report are to: 1) identify habitats onsite, 2) review relevant background documentation and databases in order 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 2019), special status species lists prepared by the California Department of Fish and Wildlife (CDFW) and U.S. Fish and Wildlife Service, the Santa Clara Valley Habitat Plan (SCVHP), and manuals and references related to plants and animals found in and around Santa Clara County.

## EXISTING CONDITIONS

### Regional Setting

The approximately 2+-acre site is located at APN 237-03-044 on Oakland Road on the western side of the intersection of Oakland Road and McKay Drive in the City of San Jose, Santa Clara County, California. The project site is located in the Milpitas 7.5" U.S. Geological Survey (USGS) quadrangle and in Section 30 of Township 6 south, Range 1 east. The site is comprised of California annual grassland with some scattered trees and some cement pads. The site is bordered by a railroad and industrial development to the west, industrial development to the south, and residential development to the east and north. Development on the site is limited to a few areas of cemented areas. Topographically, the site is relatively flat. Surrounding land uses are primarily developed with a shopping center to the south, a railroad and industrial development to the west, residences to the north and east, and major and minor roads.

***Soils***
One soil type, *Urbanland-Elder complex, 0 to 2 percent slopes, protected* (very deep, well-drained soil formed of alluvium from mixed rock sources), was observed within the site (NRCS 2019). This soil type is not considered to be hydric, and the soil does not support other edaphic properties that would support status plant species (e.g., the soils of the site are neither serpentine nor alkaline).

***Habitats***
LOA ecologist Katrina Krakow conducted a walking inspection of the site on April 17, 2019. Two habitat/land use types – developed and California annual grassland– were identified onsite during the site visit. These habitats are described as follows.

*Developed* land-use of the site consists of cement pads where previous development may have occurred. Animals occurring in the California annual grassland would be expected to move through this habitat as well.

*California Annual Grassland* land- Current vegetation is largely made up of weedy non-native species, including, but not limited to wild oats (*Avena sp.*), black mustard (*Brassica nigra*), ripgut brome (*Bromus diandrus*), filaree (*Erodium sp.*), fescue (*Festuca myuros*), bedstraw (*Gallium sp.*), bristly ox-tongue (*Helminthotheca echioides*), barley (*Hordeum murinum*), prickly lettuce (*Lactuca serriola*), mallow (*Malva sp.*), burclover (*Medicago polymorpha*), smilo grass (*Piptatherum miliaceum*), wild radish (*Raphanus raphanistrum*), curly dock (*Rumex crispus*), sowthistle (*Sonchus sp.*), vetch (*Vicia sp.*), and grapes (*Vitis sp.*), with scattered coyote brush (*Baccharis pilularis*). The edge of the grassland supports some trees as well, including, but not limited to tree-of-heaven (*Ailanthus altissima*), ash (*Fraxinus sp.*), and fan palms (*Washingtonia sp.*) with skirts.

Animals observed in this habitat during the April 2019 site visit was limited to the American crow (*Corvus brachyrhynchos*) and striped skunk (*Mephitis mephitis*).

***Special Status Species***
A search of published accounts for all relevant special status plant and animal species was conducted for the Milpitas USGS 7.5" quadrangle in which the project site occurs and for the eight surrounding quadrangles (Newark, Niles, La Costa Valley, Mountain View, Calaveras Reservoir, Cupertino, San Jose West, San Jose East) using the California Natural Diversity Data Base (CNDDB) Rarefind (CDFW 2019). These species and their potential to occur in the study area are summarized in Appendix A. Species that may pose constraints to the proposed project are included in the discussion 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.

## BIOLOGICAL CONSTRAINTS AND OPPORTUNITIES

### *Special Status Plants*

The site and surrounding area have a history of development. It appears in 2011 and 2012 from aerial imagery that most of the site was used as a laydown yard or other construction purpose and the site was disturbed at that time. Therefore, the site does not support habitat suitable for special status plant species (see Table 1, Appendix A). Rare plant surveys are not warranted for this project.

### *Special Status Wildlife*

The development of the site would develop a small area of grassland in the middle of a densely developed urban area. Most special status animal species known to occur in the region would not constrain future site construction because habitats on the site are not suitable for them or the site is located outside of the species' known range (Appendix A). For a more detailed treatment of individual special status wildlife species that occur regionally, refer to Appendix A. Four of the twenty-four special status animal species that are known to occur in the region may occur onsite as the site provides potentially suitable habitat. These species include the white-tailed kite, American peregrine falcon, northern harrier, Townsend's big-eared bat, and pallid bat. In addition, other species of migratory birds may also nest in trees, shrubs, and buildings on the site and adjacent to the site and palm tree skirts may provide habitat for roosting bats onsite (see sections below). Construction of the site would result in a negligible decrease in foraging or breeding habitat for these species regionally. Therefore, impacts to habitat for special status animal species would be less-than-significant and no mitigations would appear to be warranted. Impacts to individual bats and nesting migratory birds, including raptors would be considered significant.

### *Nesting Raptors and Migratory Birds*

Grasslands, trees, shrubs, and buildings occurring on and adjacent to the site could be used by nesting raptors and other migratory birds for breeding. All nesting raptors, including the fully protected white-tailed kite, and migratory birds are protected by state and federal laws. Therefore, construction activities that adversely affect the nesting success of any raptors and migratory birds (i.e., activities that 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 any possible nesting activity. A construction-free buffer of suitable dimensions – to be determined by the biologist – must be established around any active raptor and migratory bird nests (e.g., up to 250 feet, depending on the location and species, for raptors and typically 50 to 100 feet for passerine type species) for the duration of the project or until it has been determined that the chicks have fledged and are independent of their parents.

### *Bats*

Potentially suitable bat habitat was identified within the site during the April 2019 site visit. Bat access points into the residence adjacent to the site were observed, and palm trees onsite have sufficient skirts to support roosting bats. As a result of these observations, we conclude that bats may utilize the site and/or could colonize the site in the future.

A survey for bats by a qualified biologist is recommended to determine if the potentially suitable habitat that was observed is occupied. For any areas that cannot be surveyed directly (e.g., palm tree skirts) an emergence survey may be required. Surveys would be conducted during times of the year when bats are volant (March 1 through October 15). If a maternity colony is located during the period of April 15 to August 15, the area should be avoided by construction activities, and a qualified biologist should establish an appropriately sized construction-free buffer, to be determined by the biologist depending on the type of proposed impact. This buffer should remain in place until the end of the maternity season. Should a colony or roosting bat be identified onsite outside of the maternity and overwintering seasons (i.e., March 1-April 15 and August 15-October 15, respectively), a two-step passive removal may occur under the supervision of and with instruction from a qualified biologist. The two-step removal would require that a qualified biologist direct specific demolition actions within the vicinity of the roosting bat/colony to safely render the roosting location less-suitable. One day after the partial demolition the biologist would return to the site to verify that the bat/colony has self-relocated off-site. Once such a verification is made, the construction crew would be required to complete the demolition effort immediately (within 24 hours) to ensure bats had are absent during demolition.

***Tree Removal***

A number of trees are present on the site. Should these trees be intended for removal as part of development of the site, permits would be required from the City of San Jose. As such, conditions of tree removal permits are likely to include payment of fees and/or tree mitigation in the form of replacement trees at ratios determined by the City of San Jose's Tree Ordinance. This ordinance is summarized in Appendix B.

***Santa Clara Valley Habitat Plan (SCVHP)***

The site is within the boundaries of the Santa Clara Valley Habitat Plan. The site is more than 2 acres in size, and the project has developed and California annual grassland habitats, and is considered to be therefore, an application to the SCVHP is required. The onsite portion of the development area is within Fee Zone C "Small Vacant Sites"; official acreage calculations would occur prior to the application. The 2018-2019 SCVHP fees for development of Zone C lands are $5,380 per acre. In addition, a Nitrogen Deposition Fee would also be required at $4.96 per new vehicle trip or $48.33 per new single-family residence. Temporary impact fees, are assessed at a fraction of these fees. Conditions 1 and 3 apply to the project as well (see Appendix B).

**CONCLUSION**

In summary, construction of the Old Oakland project could be constrained by the presence of special status wildlife species including bats and nesting migratory birds and raptors. Focused preconstruction surveys should be completed during the appropriate time of year to determine the extent to which bats and nesting migratory birds and raptors could constrain the project design or timing of construction. Reasonable measures could be taken that would avoid impacts to these species, if they are determined to be present on the site. A City tree removal permit, including implementation of mitigations, may also be required for the removal of existing trees. In addition, a SCVHP application is required, including paying appropriate fees prior to development and following the conditions of the SCVHP.

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.
Project Manager
Staff Ecologist

**References**

California Department of Fish and Wildlife. 2018. Special animals (November 2018). The Natural Resources Agency, Sacramento, CA.

_____. 2019. California natural diversity database. The Resources Agency, Sacramento, CA.

Natural Resource Conservation Service. 2019. Web Soil Survey, USDA. http://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx.

U. S. Fish and Wildlife Service. 2019. Endangered and threatened wildlife and plants.

## APPENDIX A:
## SPECIAL STATUS SPECIES

A search of published accounts for all relevant special status plant and animal species was conducted for the Milpitas USGS 7.5" quadrangle in which the project site occurs and for the eight surrounding quadrangles (Newark, Niles, La Costa Valley, Mountain View, Calaveras Reservoir, Cupertino, San Jose West, San Jose East) using the California Natural Diversity Data Base (CNDDB) Rarefind (CDFW 2019). 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., redwoods, riparian, marshes, coastal scrub, etc.) are considered absent from the site.

Plant and animal species that may more reasonably occur onsite are included in the Table 1 below.

**Table 1: Special status species that could occur in the project vicinity.**
**PLANTS (adapted from CDFW 2019 and CNPS 2019)**
***Other special status plants listed by CRPR***

| Common and scientific names | Status | General habitat description | *Occurrence in the study area |
|---|---|---|---|
| Robust Spineflower (*Chorizanthe robusta* var. *robusta*) | FE, CNPS 1B | Habitat: Occurs on sandy or gravelly soils in openings of cismontane woodlands, coastal dunes and coastal scrub. Elevation: 3-300 meters. Blooms: April – September. | **Absent.** Habitat for this species is absent from the site; the site and surrounding area have a history of development. It appears in 2011 and 2012 from aerial imagery that most of the site was used as a laydown yard or other construction purpose and the site was disturbed at that time. The nearest documented occurrence of this species is more than three miles from the site (CNDDB 2019). |
| Contra Costa Goldfields (*Lasthenia conjugens*) | FE | Habitat: Occurs in vernal pools and mesic areas of valley and foothill grasslands, typically alkaline. Elevation: 0-470 meters. Blooms: March-June. | **Absent.** Habitat for this species is absent from the site; the site and surrounding area have a history of development. It appears in 2011 and 2012 from aerial imagery that most of the site was used as a laydown yard or other construction purpose and the site was disturbed at that time. The nearest documented occurrence of this species is more than three miles from the site (CNDDB 2019). |

**Table 1: Special status species that could occur in the project vicinity.**
**ANIMALS (adapted from CDFW 2019 and USFWS 2019)**
***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 tiger salamander (*Ambystoma californiense*) | FT, CT | Breeds in vernal pools and stock ponds of central California. Adults aestivate in grassland habitats adjacent to the breeding sites. | **Absent.** Suitable breeding and upland habitat is absent from the site. The nearest recorded observance of the CTS is more than three miles from the site (CNDDB 2019). |
| California red-legged frog *Rana draytonii* | FT, CSC | Rivers, creeks and stock ponds of the Sierra foothills and coast range, preferring pools with overhanging vegetation. | **Absent.** Suitable habitat for the CRLF is absent from the site. No suitable aquatic habitats exist on the site. The nearest recorded observance of the CRLF is more than three miles from the site (CNDDB 2019). |
| Foothill yellow-legged frog (*Rana boylii*) | CCT, 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. No suitable aquatic habitats exist on the site. The nearest documented observation of this species is more than three miles from the site (CNDDB 2019). |
| Western yellow-billed cuckoo (nesting) (*Coccyzus americanus occidentalis*) | FC, 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. The nearest recorded observance of the western yellow-billed cuckoo is more than three miles from the site (CNDDB 2019). |
| California least tern (*Sterna antillarum browni*) | FE, CE, CP | Occurs in central to southern California April to November. Found in and near coastal habitat including coasts, beaches, bays, estuaries, lagoons, lakes, and rivers. | **Absent.** Suitable nesting and foraging habitat for this species is absent from the site. The nearest recorded observation of the California least tern is more than three miles from the site (CNDDB 2019). |
| Western snowy plover (nesting) (*Charadrius alexandrines nivosus*) | 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. The nearest recorded observation is more than three miles from the site (CNDDB 2019). |
| White-tailed Kite (nesting) (*Elanus leucurus*) | CP | Open grasslands and agricultural areas throughout central California. | **Possible.** The white-tailed kite may forage on or over the site from time to time. Potential breeding habitat is also present onsite. The nearest recorded observance of the white-tailed kite is more than three miles from the site (CNDDB 2019). |

**Table 1: Special status species that could occur in the project vicinity.**
**ANIMALS (adapted from CDFW 2019 and USFWS 2019)**
***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 |
|---|---|---|---|
| Swainson's hawk (nesting) (Buteo swainsoni) | 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. | **Unlikely.** The closest occurrence of Swainson's hawk is more than 3.5 miles from the site, is a historical occurrence from 1889, and is presumed "possibly extripated" by the CNDDB (2019). The site is more than 10 miles to the north of the nearest recently recorded location (CNDDB 2019), which is in Coyote Valley. Although the Swainson's hawk's range appears to be expanding in this region, and Swainson's hawks are known to travel ten miles from a nest tree to forage, it is unlikely a Swainson's hawk would forage as far as the site. |
| American peregrine falcon (nesting) (*Falco peregrines anatum*) | CP | Individuals breed on cliffs in the Sierra or in coastal habitats; occurs in many habitats of the state during migration and winter. | **Possible.** Suitable habitat for this species is absent from the site, however, as this species is known to nest in tall buildings within San Jose and as the nearest recorded observance of the American peregrine falcon is more than three miles from the site (CNDDB 2019), this species may forage over the site (nesting habitat is absent from the site). |
| Golden Eagle (nesting & nonbreeding/wintering) (*Aquila chrysaetos*) | CP | Typically frequents rolling foothills, mountain areas, sage-juniper flats and desert. | **Unlikely.** Suitable breeding and foraging habitat is absent from the site. However, golden eagles may fly over the site from time to time. The nearest recorded observance of this species is more than three miles from the site (CNDDB 2019). |
| Bank Swallow (nesting) (*Riparia riparia*) | CT | Occurs in open areas near flowing water, nests in steep banks along inland water or coast. State-wide. | **Absent.** Suitable habitat for this species is absent from the site. The nearest recorded observance of this species is more than three miles from the site (CNDDB 2019). |
| Tricolored blackbird (*Agelaius tricolor*) | CCE, 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. However, tricolored blackbirds may fly over or stop on the site from time to time during migrations. The nearest recorded observance of this species is more than three miles from the site (CNDDB 2019). |

| **Table 1: Special status species that could occur in the project vicinity.**<br>**ANIMALS (adapted from CDFW 2019 and USFWS 2019)**<br>***Species Listed as Species of Special Concern*** | | | |
|---|---|---|---|
| **Common and scientific names** | **Status** | **General habitat description** | ***Occurrence in the study area** |
| Santa Cruz black salamander (*Aneides niger*) | CSC | Occurs in deciduous woodland, coniferous forests, and coastal grasslands around the Santa Cruz Mountains and foothills. This species is also known to occur on the developed flats in pockets within older developments. They can be found under rocks near streams, in talus, under damp logs, rotting wood, and other objects. This species is a terrestrial breeder. | **Absent.** The nearest recorded observance of this species is more than three miles from the site (CNDDB 2019). |
| California Giant Salamander (*Dicamptodon ensatus*) | CSC | Occurs in or adjacent to cold clear permanent to semi-permanent streams and seeps. | **Absent.** Habitat required by this species is absent from the site. The nearest recorded observance of this species is more than three miles from the site (CNDDB 2019). |
| Northern California legless lizard (*Anniella pulchra*) | 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 NCLL. |
| Western pond turtle (*Actinemys marmorata*) | 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.** The site lacks suitable habitat such as a creek or pond. The nearest documented occurrences of the WPT is more than three miles from the site (CNDDB 2019). |
| Northern harrier (*Circus cyaneus*) | CSC | Frequents meadows, grasslands, open rangelands, freshwater emergent wetlands; uncommon in wooded habitats. | **Possible.** Suitable foraging habitat for the northern harrier is present onsite; this species is known to occur along the San Francisco Bay and may fly over the site from time to time. The nearest recorded observance of this species is more than three miles from the site (CNDDB 2019). |

| **Table 1: Special status species that could occur in the project vicinity.<br>ANIMALS (adapted from CDFW 2019 and USFWS 2019)<br>*Species Listed as Species of Special Concern*** | | | |
|---|---|---|---|
| **Common and scientific names** | **Status** | **General habitat description** | ***Occurrence in the study area** |
| Burrowing owl<br>(*Athene cunicularia*) | CSC | Open, dry grasslands, deserts and ruderal areas. Requires suitable burrows. Often associated with California ground squirrels. | **Unlikely.** Although suitable grassland habitat exists onsite, it is currently devoid of burrows and supports tall weedy species; the site is surrounded by development, it is unlikely ground squirrels would move onto the site to create burrows for the BUOW. The nearest recorded observance of the BUOW is within one mile to the south of the site (CNDDB 2019). As the surrounding area is fully developed, burrowing species such as ground squirrels are unlikely to move onto the site. |
| Yellow warbler<br>(*Dendroica petechia brewsteri*) | CSC | Nests in riparian thickets, especially in willows. Also frequents shrubby areas and old fields. | **Absent.** Potentially suitable breeding and foraging habitat for the yellow warbler in the form of riparian habitat is absent from the site. The nearest recorded observance of this species is more than three miles from the site (CNDDB 2019). |
| Saltmarsh Common Yellowthroat<br>(*Geothlypis trichas sinuosa*) | CSC | Breeds in herbaceous wetlands and salt marshes of the San Francisco Bay area, can also be found in non-breeding along the California Coast. Nests in thick herbaceous vegetation up to one meter above the ground or over water | **Absent.** Potentially suitable breeding and foraging habitat for the saltmarsh common yellowthroat in the form of riparian habitat is absent from the site. The nearest recorded observance of this species is more than three miles from the site (CNDDB 2019). |
| Alameda song sparrow<br>(*Melospiza melodia pusillula*) | CSC | Found in tidal salt marsh habitat with exposed ground for foraging with no more than 2-5 cm between bases of plants. Current range is generally only along the San Francisco Bay. | **Absent.** Suitable habitat for the Alameda song sparrow is absent from the site. There are no tidally influenced creeks on or adjacent to the site and salt marshes are absent from the vicinity of the site. They are found along San Francisco Bay with the nearest record more than three miles from the site (CNDDB 2019). |
| Pallid bat<br>(*Antrozous pallidus*) | CSC | Grasslands, chaparral, woodlands, and forests of California; most common in dry rocky open areas that provide roosting opportunities. | **Possible.** Foraging habitat is available onsite, and although roosting habitat is absent from the site, roosting habitat is present within buildings adjacent to the site. The nearest recorded observance of this species is more than three miles from the site (CNDDB 2019). |
| Townsend's Big-eared bat<br>(*Corynorhinus townsendii*) | CSC | Primarily a cave-dwelling bat that may also roost in buildings. Occurs in a variety of habitats. | **Possible.** Foraging habitat is available onsite, and although roosting habitat is absent from the site, roosting habitat is present within buildings adjacent to the site. The nearest recorded observance of this species is more than three miles from the site (CNDDB 2019). |

| **Table 1: Special status species that could occur in the project vicinity.<br>ANIMALS (adapted from CDFW 2019 and USFWS 2019)<br>*Species Listed as Species of Special Concern*** | | | |
|---|---|---|---|
| **Common and scientific names** | **Status** | **General habitat description** | ***Occurrence in the study area** |
| San Francisco Dusky-Footed Woodrat (*Neotoma fuscipes annectens*) | CSC | Found in hardwood forests, oak riparian and shrub habitats. | **Absent.** Riparian habitat and woodland habitat is absent from the site, in addition, woodrat nests were not observed during the site visit. The nearest recorded observance of the SFDFW is more than three miles from the site (CNDDB 2019). |

***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 |

| | |
|---|---|
| CE | California Endangered |
| CT | California Threatened |
| CR | California Rare |
| CP | California Protected |
| CSC | California Species of Special Concern |

| | |
|---|---|
| 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***

Approval of general plans, area plans, and specific projects is subject to the provisions of the California Environmental Quality Act (CEQA). The purpose of CEQA is to assess the significance of a proposed project's impacts on the environment before they are carried out. Whenever possible, public agencies are required to avoid or minimize environmental impacts by implementing practical alternatives or mitigation measures.

According to Section 15382 of the CEQA Guidelines, a 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 would:

- 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 federally protected wetlands as defined by Section 404 of the Clean Water Act (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; or
- Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan.

Furthermore, CEQA Guidelines Section 15065(a) states that a project may trigger the requirement to make a "mandatory findings of significance" if the project has the potential to "substantially degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, reduce the number or restrict the range of an endangered, rare or threatened species, or eliminate important examples of the major periods of California history or prehistory."

***Relevant Goals, Policies, and Laws***

Threatened and Endangered Species

State and federal "endangered species" legislation has provided the California Department of Fish and Wildlife (CDFW) and the U.S. Fish and Wildlife Service (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. "Take" is defined by the state of California as "to hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture or kill" (California Fish and Wildlife Code, Section 86). "Take" is more broadly defined by the federal Endangered Species Act to include "harm" (16 USC, Section 1532(19), 50 CFR, Section 17.3). Furthermore, the CDFW and the USFWS are responding agencies under the California Environmental Quality Act (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

Most birds are also protected by state and federal law. The Federal Migratory Bird Treaty Act (FMBTA: 16 U.S.C., sec. 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 also protected in California under provisions of the State Fish and Wildlife Code, Section 3503.5, 1992), 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.

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.

Wetlands and Other Jurisdictional Waters

The USACE regulates the filling or grading of Waters of the U.S. under the authority of Section 404 of the Clean Water Act. Natural 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.

On June 29, 2015, the Environmental Protection Agency and USACE jointly issued the Clean Water Rule as a synthesis of statute, science, and U.S. Supreme Court decisions. The Clean Water Rule defines Waters of the U.S. to include the following:

1. All waters used in interstate or foreign commerce (also known as traditional navigable waters), including all waters subject to the ebb and flow of the tide;
2. All interstate waters including interstate wetlands;
3. The territorial seas;
4. All impoundments of Waters of the U.S.;
5. All tributaries of waters defined in Nos. 1 through 4 above, where "tributary" refers to a water (natural or constructed) that contributes flow to another water and is characterized by the physical indicators of a bed and bank and an ordinary high water (OHW) mark;
6. Adjacent waters, defined as either (a) located in whole or in part within 100 feet of the OHW mark of waters defined in Nos. 1 through 5 above, or (b) located in whole or in part within the 100-year floodplain and within 1,500 feet of the OHW mark of waters defined in Nos. 1 through 5 above;
7. Western vernal pools, prairie potholes, Carolina bays and Delmarva bays, pocosins, and Texas coastal prairie wetlands, if determined on a case-specific basis to have a significant nexus to waters defined in Nos. 1 through 3 above;
8. Waters that do not meet the definition of adjacency, but are determined on a case-specific basis to have a significant nexus to waters defined in Nos. 1 through 3 above, and are either (a) located in whole or in part within the 100-year floodplain of waters defined in Nos. 1 through 3 above, or (b) located within 4,000 feet of the OHW mark of waters defined in Nos. 1 through 5 above.

The 2015 rule also redefines exclusions from jurisdiction, which include:

1. Waste treatment systems;
2. Prior converted cropland;
3. Artificially irrigated areas that would revert to dry land should application of irrigation water to the area cease;
4. Groundwater;
5. Stormwater control features constructed to convey treat or store stormwater created in dry land; and
6. Three types of ditches: (a) ditches with ephemeral flow that are not a relocated or excavated tributary, (b) ditches with intermittent flow that are not a relocated or excavated tributary or that do not drain wetlands, and (c) ditches that do not flow, either directly or through another water, to a traditional navigable water.

A ditch may be a water of the U.S. only it if meets the definition of "tributary" and is not otherwise excluded under the provision.

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. 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 until the RWQCB issues a Section 401 Water

Quality Certification (or waiver of such certification) verifying that the proposed activity will meet state water quality standards.

Under the Porter-Cologne Water Quality Control Act of 1969, the State Water Resources Control Board has regulatory authority to protect the water quality of all surface water and groundwater in the State of California ("Waters of the State"). Nine RWQCBs oversee water quality at the local and regional level. 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. Discharges into Waters of the State that are also Waters of the U.S. require a Section 401 Water Quality Certification from the RWQCB as a prerequisite to obtaining certain federal permits, such as a Section 404 Clean Water Act permit. Discharges into all Waters of the State, even those that are not also Waters of the U.S., require Waste Discharge Requirements (WDRs), or waivers of WDRs, from the RWQCB.

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.

CDFW has jurisdiction over the bed and bank of natural drainages and lakes according to provisions of Section 1601 and 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 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.

Local Ordinances

*City of San Jose's Tree Ordinance:* The City of San Jose has a Tree Ordinance (Chapter 13.32 of the Municipal Code), which regulates the removal of trees. The City's Tree Ordinance seeks to:

> Promote the health, safety, and welfare of the city by controlling the removal of trees in the city, as trees enhance the scenic beauty of the city, significantly reduce the erosion of topsoil, contribute to increased storm water quality, reduce flood hazards and risks of landslides, increase property values, reduce the cost of construction and maintenance of draining systems through the reduction of flow and the need to divert surface waters, contribute to energy efficiency and the reduction of urban temperatures, serve as windbreaks and are prime oxygen producers and air purification systems.

An "ordinance-size tree" is defined as any native or non-native tree with a circumference of 56 inches (diameter of 18 inches) at 24 inches above the natural grade of slope. For multi-trunk trees, the circumference is measured as the sum of the circumferences of all trunks at 24 inches above the natural grade of slope. The ordinance covers both native and non-native species. A tree removal permit is required from the City prior to the removal of any trees covered under the ordinance. Prior to the issuance of a removal permit, the City requires that a formal tree survey

be conducted which indicates the number, species, trunk circumference and location of all trees which will be removed or impacted by the project.

Should mitigation be required to replace ordinance-sized trees, mitigation trees should be ecologically equivalent species where native trees are impacted (e.g., Mexican elderberry, coast live oak, valley oak, blue oak, toyon, and buckeye). For non-native trees, native replacement trees are recommended, but at a minimum they should be species that are not considered to be invasive by the California Invasive Plant Council (Cal-IPC) and species that are generally drought tolerant and suited to the planting location. Street trees required for project planning do not count toward this tree mitigation. The exact number and species of trees to be utilized for the mitigation will be determined based on consultation with the City Arborist and with the Director of the Department of Planning, Building and Code Enforcement.

If it is determined that the site lacks sufficient areas to accommodate all of the replacement plantings, one or more of the following measures will be implemented:

- Replacement tree plantings may be accommodated at an alternative site(s). An alternative site may include local parks or schools, or an adjacent property where such plantings may be utilized for screening purposes. However, any alternatively proposed site will be pursuant to agreement with the Director of the Department of Planning, Building and Code Enforcement.
- A donation may be made to an appropriate program that focuses on preservation of the City of San Jose's urban forest. Such donation will be equal to the cost of the required replacement trees, including associated installation costs, for off-site tree planting in the local community. A receipt for any such donation will be provided to the City of San Jose Planning Project Manager prior to the removal of the trees.

**TABLE 2. TREE REPLACEMENT-TO-REMOVAL RATIOS (CITY OF SAN JOSE 2006).**

| Diameter of Tree to be Removed | Native | Non-native | Orchard | Minimum Size of Replacement Trees |
|---|---|---|---|---|
| ≥ 18" | 5:1 | 4:1 | 3:1 | 24" box |
| ≥ 12" but < 18" | 3:1 | 2:1 | none | 24" box |
| < 12" | 1:1 | 1:1 | none | 15-gallon container |

x:x = tree replacement to tree loss ratio

**Note:** Trees greater than 18" diameter shall not be removed unless a Tree Removal Permit, or equivalent, has been approved for the removal of such trees.

Santa Clara Valley Habitat Plan

The project is currently planned for more than 2 acres and includes developed and California annual grassland habitats. Therefore, the project is considered to be a covered activity under the Santa Clara Valley Habitat Plan (SCVHP). We have included the following information for how the SCVHP applies to the project below:

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 (the California Department of Fish and Wildlife and the U.S. Fish and Wildlife Service) 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 considered a covered project under the SCVHP. As a result, the project would be subject to conditions and fees of the SCVHP.

*SCVHP Fees*

Chapter 9 of the SCVHP identifies fees that would be required by this project. Fees are calculated at the time the project submits the SCVHP application, which corresponds to application timing of grading and/or building permits. Thus, the following numbers are provided for a sense of magnitude and should be considered approximate.

The onsite portion of the development area is within Fee Zone C "Small Vacant Sites"; official acreage calculations would occur prior to the application. The 2018-2019 SCVHP fees for development of Zone C lands are $5,380 per acre. In addition, a Nitrogen Deposition Fee would also be required at $4.96 per new vehicle trip or $48.33 per new single-family residence. Temporary impact fees, are assessed at a fraction of these fees.

*Conditions on Covered Activities*

The SCVHP provides several conditions for covered activities under the SCVHP. These conditions can be found in Chapter 6 of the SCVHP and are summarized below. While all conditions are summarized, Conditions 1 and 3 would apply to the proposed Old Oakland Project:

- **Condition 1 (page 6-7). Avoid Direct Impacts on Legally Protected Plant and Wildlife Species-** Condition 1 instructs developers to avoid direct impacts on legally protected plant and wildlife species, including federally endangered Contra Costa goldfields and fully protected wildlife species including the golden eagle, bald eagle, American peregrine falcon, southern bald eagle, white-tailed kite, California condor, and ring-tailed cat. Several of these species are likely to occur on or forage over the site (golden eagle, bald eagle, white-tailed kite, and ringtail). Condition 1 also protects bird species and their nests that are protected under the Migratory Bird Treaty Act (MBTA); additionally, golden eagles and bald eagles are protected under

the Bald and Golden Eagle Protection Act. Additionally, page 6-94 and Table 6-8 identify required surveys for breeding habitat of select covered wildlife species.

- ***Condition 1 would apply to project.***

- **Condition 2 (page 6-9). Incorporate Urban-Reserve System Interface Design Requirements-** Condition 2 provides design requirements for the urban-reserve system interface. Some of the design requirements included in Condition 2 are installing non-permeable fences between urban and reserve areas, fencing public roads that run adjacent to reserve areas, minimizing the length of shared boundaries between urban and reserve areas, outdoor lighting limitations, and landscaping requirements.
  - ***Not applicable to the project.***

- **Condition 3 (page 6-12). Maintain Hydrologic Conditions and Protect Water Quality- (Condition applies to project)-** Condition 3 is for all projects due to the fact that implementation of projects could result in impacts on watershed health, including impacts to aquatic habitat for species, through changes in hydrology and water quality. This condition incorporates all of the most important measures for water quality protection of the National Pollutant Discharge Elimination System (NPDES) Program of the Clean Water Act. Required measures of Condition 3 are located in Table 6-2 of the SCVHP, which is attached below (Appendix B); these measures relate to water quality and habitat protection during and after project construction. They include measures typically included in a Storm Water Pollution Prevention Plan (SWPPP) but may include measures that are in addition to such plans.
  - ***Condition 3 would apply to the project.***

- **Condition 4 (page 6-14). Avoidance and Minimization for In-Stream Projects-** Condition 4 minimizes impacts on riparian and aquatic habitat through appropriate design requirements and construction practices and provides avoidance and minimization measures for in-stream projects that may impact stream morphology, aquatic and riparian habitat, flow conditions, covered species, natural communities, and wildlife movement.
  - ***Not applicable to the project.***

- **Condition 5 (page 6-18). Avoidance and Minimization Measures for In-Stream Operations and Maintenance-** Condition 5 provides avoidance and minimization measures for in-stream operations and maintenance activities, which includes, but is not limited to trail, bridge, road, and culvert maintenance, bank stabilization, removal of debris, and vegetation management.
  - ***Not applicable to the project.***

- **Condition 6 (Page 6-21). Design and Construction Requirements for Covered Transportation Projects-** Condition 6 provides requirements for rural development design, construction, and post-construction. Types of projects that Condition 6 includes highway projects, mass transit projects, roadway projects and interchange upgrades, road safety and operational improvements, and dirt road construction.
  - ***Not applicable to the project.***

- **Condition 7 (page 6-28). Rural Development Design and Construction Requirements-** Condition 7 provides requirements for development design and construction of new development outside of the urban service area including requirements relating to site hydrology, vineyards, private rural roads, vegetation management, soils, and lighting.
  - ***Not applicable to the project.***

- **Condition 8 (page 6-35). Implement Avoidance and Minimization Measures for Rural Road Maintenance-** Condition 8 provides requirements for rural roads, road median, and barrier maintenance including requirements regarding riparian setbacks, erosion measures, herbicide and pesticide use, seasonal restrictions, mower cleaning, revegetation, ground-disturbing road maintenance, and flow lines.
  - ***Not applicable to the project.***

- **Condition 9 (page 6-37). Prepare and Implement a Recreation Plan-** Condition 9 requires providing public access to all reserve lands owned by a public entity; each reserve land must provide a recreation plan.
  - ***Not applicable to the project.***

- **Condition 10 (page 6-42). Fuel Buffer-** Condition 10 provides requirements for fuel buffers between 30 and 100 feet of structures. Requirements include measures relating to fuel buffers near structures and on reserve lands; the most notable measure is the requirement for nesting bird surveys prior to any fuel buffer maintenance during the nesting season.
  - ***Not applicable to the project.***

- **Condition 11 (page 6-44). Stream and Riparian Setbacks-** Condition 11 provides requirements for stream and riparian setbacks; as the development area is within the Urban Service Area, stream setbacks measured from the top of the stream bank should be 35 to 150 feet depending on the category rating of the stream and the slope class. Setbacks for Category 1 streams with 0-30% slopes should be at least 100 feet, and with >30% slopes should be at least 150 feet. Category 2 streams should have a setback of 35 feet.
  - ***Not applicable to the project.***

- **Condition 12 (page 6-56). Wetland and Pond Avoidance and Minimization-** Condition 12 provides measures to protect wetlands and ponds, including planning actions, design, and construction actions.
  - ***Not applicable to the project.***

- **Condition 13 (page 6-58). Serpentine and Associated Covered Species Avoidance and Minimization-** Condition 13 requires surveys for special status plants and the Bay checkerspot butterfly as well as its larval host plant in areas that support serpentine bunchgrass grassland, serpentine rock outcrops, serpentine seeps, and serpentine chaparral. Fees apply for impacts to serpentine habitat.
  - ***Not applicable to the project.***

- **Condition 14 (page 6-60). Valley Oak and Blue Oak Woodland Avoidance and Minimization-** Condition 14 provides requirements for project planning and project construction, including avoidance of large oaks, guidance on irrigation near oak trees, and a buffer around the root protection zone, roads and pathways within 25 feet of the dripline of an oak tree, trenching, and pruning activities.
  - ***Not applicable to the project.***

- **Condition 15 (page 6-62). Western Burrowing Owl-** Condition 15 requires preconstruction surveys for burrowing owls in appropriate habitat prior to construction activities, provides avoidance measures for owls and nests in the breeding season and owls in the non-breeding season, and requirements for construction monitoring.
  - ***Not applicable to the project.***

- **Condition 16 (page 6-68) Least Bell's Vireo-** Condition 16 requires preconstruction surveys in appropriate habitat for the least Bell's vireo prior to construction activities, and provides avoidance and construction monitoring measures.
  - ***Not applicable to the project.***

- **Condition 17 (page 6-69) Tricolored Blackbird-** Condition 17 requires preconstruction surveys in appropriate habitat for the tricolored blackbird prior to construction activities, and provides avoidance and construction monitoring measures.
  - ***Not applicable to the project.***

- **Condition 18 (page 6-71) San Joaquin Kit Fox**- Condition 18 requires preconstruction surveys in appropriate habitat for the San Joaquin kit fox prior to construction activities, and provides avoidance and construction monitoring measures.
  - ***Not applicable to the project.***

- **Condition 19 (page 6-74). Plant Salvage when Impacts are Unavoidable-** Condition 19 provides salvage guidance and requirements for covered plants.
  - ***Not applicable to the project.***

- **Condition 20 (page 6-76). Avoid and Minimize Impacts to Covered Plant Occurrences-** Condition 20 provides requirements for preconstruction surveys for appropriate covered plants (per habitat).
  - ***Not applicable to the project.***