Lower Penitencia Creek Improvements Project

Final Environmental Impact Report

State Clearinghouse No. 2015062026

VOLUME 1: RESPONSE TO COMMENTS ON THE DRAFT EIR

October 2017

Horizon WATER and ENVIRONMENT

Santa Clara Valley Water District

SANTA CLARA VALLEY WATER DISTRICT

Lower Penitencia Creek Improvements Project
Milpitas, California

Final Environmental Impact Report

Volume 1 – Response to Comments on the Draft EIR

State Clearinghouse No. 2015062026

Prepared for:

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October 2017

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Chapter 1
INTRODUCTION

The Santa Clara Valley Water District (District) as lead agency, has prepared this Final Environmental Impact Report (FEIR) to provide other responsible agencies and the public with information about the potential environmental effects of the proposed Lower Penitencia Creek Improvements Project (proposed project). This FEIR was prepared in compliance with the California Environmental Quality Act (CEQA) of 1970 (as amended) and the State CEQA Guidelines (California Code of Regulations [CCR] title 14, Section 15000 et seq.).

1.1 FEIR Context

The District's Board of Directors is considering the proposed project which involves constructing a series of infrastructure upgrades to provide additional flood protection within the city of Milpitas. The proposed project is intended to meet the following objectives:

- Convey the Lower Berryessa Creek 1-percent design flow;
- Meet required water surface elevations at the confluences of Lower Penitencia Creek with Coyote Creek and Berryessa Creek;
- Minimize the need for seasonal removal of sediment and non-woody vegetation;
- Maintain existing FEMA accreditation of the east levee located between California Circle and Berryessa Creek; and
- Ensure the project improvements meet FEMA certification requirements.

The proposed project was evaluated in a draft environmental impact report (DEIR) in accordance with CEQA and the State CEQA Guidelines, and was circulated for a 47-day public review period.

CEQA requires the lead agency to prepare a FEIR, addressing all substantive comments received on the DEIR before approving a project. The FEIR must include a list of all individuals, organizations, and agencies that provided comments on the DEIR, and must contain copies of all comments received during the public review period along with the lead agency's responses. This FEIR also incorporates all changes to the DEIR from public and agency input, as well as staff-initiated text changes. Additions to the main body of the EIR are presented in Volume 2 of this FEIR and shown as <u>underlined</u> text, while deleted text is shown in ~~strikethrough~~ text.

The FEIR will be distributed to public agencies that provided comments 10 days prior to certifying the FEIR. The District's Board of Directors will review the FEIR, consider District staff recommendations and public testimony, and decide whether to certify the FEIR and approve or deny the proposed project.

Upon certification of the FEIR and approval of the proposed project, the District will file a Notice of Determination with the State Office of Planning and Research (OPR) and at the office of the Santa Clara County Clerk (14 CCR 15093[c]).

1.2 Comments on the DEIR

The DEIR was submitted to the State Clearinghouse for distribution to state agencies and was available to agencies and the public for review and comment for 47 days between May 18 and July 3, 2017. A public meeting was conducted on May 22, 2017 to discuss the proposed project and DEIR. Three members of the public attended the meeting. Letters of comment were received from federal and state agencies; one regional agency, and an organization.

1.3 Organization and Contents of the Response to Comments Document

The following text describes how this Response to Comments on the Draft EIR document (Volume 1 of the FEIR) was organized. Volume 2 consists of the main body of the EIR with text revisions made in response to comments and staff-initiated revisions incorporated. Volume 3 includes appendices to the EIR.

Chapter 1, *Introduction*. This chapter presents the FEIR context and its objectives, summarizes the public review period for the DEIR, and describes the organization and contents of the FEIR.

Chapter 2, *Summary of Public Participation*. This chapter summarizes the environmental and public review process, pursuant to CEQA.

Chapter 3, *Comment Letters and Responses to Comments*. This chapter lists and gives identifiers to agencies, organizations, and members of the public who commented on the DEIR during the public review process, replicates in full the comments received, and gives responses to those comments. Comments within each letter are numbered sequentially. Excerpts of text from the DEIR that have changed as a result of the comment/response are shown within the response, for ease of reference.

Chapter 4, *Revisions to the DEIR*. This chapter provides excerpts of all text from the DEIR that have changed as a result of the comment/response are shown within the response, for ease of reference. Revisions are shown with strikethrough text for deletions and underlined text for additions.

Chapter 5, *Report Preparation.* This chapter lists authors of this Response to Comments on the Draft EIR document.

Chapter 6, *References.* This chapter includes a list of all references cited in this volume of the FEIR.

Chapter 2
SUMMARY OF PUBLIC PARTICIPATION

Public disclosure and informed decision-making are priorities under CEQA. CEQA mandates two periods during the EIR process when public and agency comments on the impacts of a proposed project are solicited: 1) during the scoping comment period, and 2) for a DEIR, during the public review period. This chapter summarizes the District's efforts to comply with CEQA mandates for public disclosure.

2.1 Notice of Preparation and Public Scoping

Scoping refers to the public outreach process used under CEQA to determine the coverage and content of an EIR. The scoping comment period offers an important early opportunity for public review and comment on the focus of the CEQA analysis. The scoping process for an EIR is initiated by publication of the Notice of Preparation (NOP), as required by CEQA, which provides formal notice to the public and to interested agencies and organizations that a DEIR is in preparation. During the scoping period, agencies and the public are invited to comment on the project, the approach to environmental analysis, and any issues of concern to be discussed in the DEIR. Scoping also can assist the lead agency with identification of project alternatives and mitigation measures. CEQA does not require public meetings during the scoping phase.

In accordance with State CEQA Guidelines (14 CCR 15082[a], 15103, 15375), the District circulated an NOP for the proposed project on June 11, 2015 (Volume 3, Appendix A of this FEIR). The NOP, in which the District was identified as lead agency for the proposed project, was circulated to the public; to local, state, and federal agencies; and to other interested parties. The purpose of the NOP was to inform responsible agencies and the public that the proposed project could have significant effects on the environment and to solicit their comments so that any concerns raised could be considered during the preparation of the DEIR. In addition, the District held a public community meeting on June 5, 2014 to discuss the proposed project and answer questions of concerned citizens. A public scoping meeting for the project was not held for the project. Comments received in response to the NOP are included in Volume 3, Appendix B of this FEIR, and the preparers of the DEIR considered these comments.

2.2 Notice of Availability and DEIR and Public Review

After the DEIR was completed, the District issued a notice of availability (Appendix A of this FEIR), providing agencies and the public with formal notification that the document was available for review. The notice was sent to the State CEQA Clearinghouse, all responsible and trustee agencies, persons and organizations requesting a copy, and the County Clerk's office for posting. The notice also was published in the San Jose Mercury News. These actions

triggered a 47-day public review period (May 18 through July 3, 2017), during which the District received public and agency comments on the project and the document.

The District hosted a public meeting after release of the document on May 22, 2017, at Joseph Weller Elementary School in Milpitas. The purpose of public circulation and the public meeting was to provide agencies and interested individuals with opportunities to comment on or express concerns regarding the contents of the DEIR.

Written comments or questions concerning the DEIR could be submitted within the review period and directed to the name and address listed below. Submittal of written comments via e-mail was encouraged.

Santa Clara Valley Water District
Attention: Michael F. Coleman, AICP
5750 Almaden Expressway
San Jose, CA 95118-3686
E-mail: mcoleman@valleywater.org

During the review period for the DEIR, all documents related to the proposed project were available for review on any District business day between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday at the District headquarters, located at the address shown above. The document was also available for public review at the Milpitas Library (160 North Main Street, Milpitas, CA 95035) and at the Milpitas City Hall (455 East Calaveras Boulevard, Milpitas, CA 95035). In addition, the document was available on the District's website at http://www.valleywater.org/PublicReviewDocuments.aspx.

2.3 Preparation of the FEIR and Consideration/Approval of Project

CEQA requires the lead agency to prepare an FEIR, addressing all substantive comments received on the DEIR before approving a project. The FEIR must include a list of all individuals, organizations, and agencies that provided comments on the DEIR, and must contain copies of all comments received during the public review period along with the lead agency's responses.

After preparation of the FEIR, the District staff will recommend to the District's Board of Directors whether to approve or deny the proposed project. This governing body then will review the FEIR, consider the District staff recommendations and public testimony, and decide whether to certify the FEIR and approve or deny the proposed project.

If significant impacts are identified in the FEIR that cannot be mitigated, a statement of overriding considerations must be included in the record of the proposed project approval and mentioned in the Notice of Determination, to be filed with the State Office of Planning and Research and at the office of the County Clerk (14 CCR 15093[c]).

Chapter 3
COMMENT LETTERS AND RESPONSE TO COMMENTS

3.1 Comments Introduction

Comments provided on the DEIR by agencies, organizations, and individuals during the public review period are documented in this chapter. Comments were submitted by letter and email. A list of all commenters is provided in Section 3.2. The District received comments from six individuals containing a total of 47 comments. Copies of comment letters and other public input and responses to all comments are presented in Section 3.3.

3.2 List of Comment Letters Received

The comment letters received on the DEIR were sorted by date. The letters were assigned a letter designation on this basis. The commenters and identifiers are presented in order of the date of receiving the comments as listed below.

Table 3-1. Commenters on the DEIR (numerical by alpha-letter number)

Letter No. (# of Comments)	Commenter	Date of Comment
A (4)	Native American Heritage Commission, Gayle Totton	June 28, 2017
B (9)	California Department of Fish and Wildlife, Scott Wilson	June 29, 2017
C (19)	San Francisco Bay Regional Water Quality Control Board, Susan Glendening	July 3, 2017
D (14)	Citizens Committee to Complete the Refuge, Eileen McLaughlin	July 3, 2017
E (1)	Santa Clara Valley Transportation Authority, Roy Molseed	July 3, 2017
F (1)	State Clearinghouse, Governor's Office of Planning and Research, Scott Morgan	July 5, 2017
G (1)	State Clearinghouse, Governor's Office of Planning and Research, Scott Morgan	July 6, 2017

3.3 Comments and Responses to Comments

This section presents a copy of each comment letter that was received on the DEIR during the review period, bracketing the individual comments in alpha and numeric order. Responses to issues raised in each letter follow immediately after the letter, sequentially.

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Letter A

STATE OF CALIFORNIA
NATIVE AMERICAN HERITAGE COMMISSION
Environmental and Cultural Department
1550 Harbor Blvd., Suite 100
West Sacramento, CA 95691
Phone (916) 373-3710

Edmund G. Brown Jr., Governor

June 28, 2017

Michael Coleman
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118

sent via e-mail: mcoleman@valleywater.org

Re: SCH# 2015062026, Lower Penitencia Creek Improvements Project, City of Milpitas; Santa Clara County, California

Dear Mr. Coleman:

The Native American Heritage Commission (NAHC) has reviewed the Draft Environmental Impact Report prepared for the project referenced above. The review included the Introduction and Project Description, the Summary of Environmental Impacts and Mitigation Measures, the Environmental Impact Analysis, section 4.5, Cultural Resources, and Appendix C, NOP Comments prepared by the California State Lands Commission. We have the following concerns:

1. A determination of "no impact" for Tribal Cultural Resources is in error. The determination should be similar to that of Archaeological resources as inadvertent finds are possible. If groundbreaking activities are included in the project, Mitigation for inadvertent finds of Tribal Cultural Resources are appropriate and the determination should be categorized as "less than significant with mitigation". A-1

2. Mitigation for inadvertent finds of human remains is incomplete. District BMP CU-1 stops work for inadvertent finds but does not specify the process outlined in Health and Safety Code § 7050.5 and Public Resources Code § 5097.98. The complete process for inadvertent finds of human remains should be documented. A-2

3. Mitigation recommendations by tribes in consultation are not included in proposed mitigation. A-3

The California Environmental Quality Act (CEQA)[1], specifically Public Resources Code section 21084.1, states that a project that may cause a substantial adverse change in the significance of a historical resource is a project that may have a significant effect on the environment.[2] If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, an environmental impact report (EIR) shall be prepared.[3] In order to determine whether a project will cause a substantial adverse change in the significance of a historical resource, a lead agency will need to determine whether there are historical resources with the area of project effect (APE).

CEQA was amended in 2014 by Assembly Bill 52. (AB 52).[4] **AB 52 applies to any project for which a notice of preparation or a notice of negative declaration or mitigated negative declaration is filed on or after July 1, 2015.** AB 52 created a separate category for "tribal cultural resources"[5], that now includes "a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment.[6] Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.[7] Your project may also be subject to **Senate Bill 18 (SB 18)** (Burton, Chapter 905, Statutes of 2004), Government Code 65352.3, if it also involves the adoption of or amendment to a general plan or a specific plan, or the designation or proposed designation of open space. **Both SB 18 and AB 52 have tribal consultation requirements.** Additionally, if your project is also subject to the federal National Environmental Policy Act (42 U.S.C. § 4321 et seq.) (NEPA), the tribal consultation requirements of Section 106 of the National Historic Preservation Act of 1966[8] may also apply. A-4

Consult your legal counsel about compliance with AB 52 and SB 18 as well as compliance with any other applicable laws.

[1] Pub. Resources Code § 21000 et seq.
[2] Pub. Resources Code § 21084.1; Cal. Code Regs., tit.14, § 15064.5 (b); CEQA Guidelines Section 15064.5 (b)
[3] Pub. Resources Code § 21080 (d); Cal. Code Regs., tit. 14, § 15064 subd.(a)(1); CEQA Guidelines § 15064 (a)(1)
[4] Government Code 65352.3
[5] Pub. Resources Code § 21074
[6] Pub. Resources Code § 21084.2
[7] Pub. Resources Code § 21084.3 (a)
[8] 154 U.S.C. 300101, 36 C.F.R. § 800 et seq.

Agencies should be aware that AB 52 does not preclude agencies from initiating tribal consultation with tribes that are traditionally and culturally affiliated with their jurisdictions before the timeframes provided in AB 52. For that reason, we urge you to continue to request Native American Tribal Consultation Lists and Sacred Lands File searches from the NAHC. The request forms can be found online at: http://nahc.ca.gov/resources/forms/. Additional information regarding AB 52 can be found online at http://nahc.ca.gov/wp-content/uploads/2015/10/AB52TribalConsultation_CalEPAPDF.pdf, entitled "Tribal Consultation Under AB 52: Requirements and Best Practices".

The NAHC recommends lead agencies consult with all California Native American tribes that are traditionally and culturally affiliated with the geographic area of your proposed project as early as possible in order to avoid inadvertent discoveries of Native American human remains and best protect tribal cultural resources.

A brief summary of portions of AB 52 and SB 18 as well as the NAHC's recommendations for conducting cultural resources assessments is also attached.

A-4
Cont.

Please contact me at gayle.totton@nahc.ca.gov or call (916) 373-3710 if you have any questions.

Sincerely,

Gayle Totton, B.S., M.A., Ph.D
Associate Governmental Project Analyst

Attachment

cc: State Clearinghouse

Pertinent Statutory Information:

Under AB 52:

AB 52 has added to CEQA the additional requirements listed below, along with many other requirements:

Within fourteen (14) days of determining that an application for a project is complete or of a decision by a public agency to undertake a project, a **lead agency** shall provide formal notification to a designated contact of, or tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice.

A **lead agency** shall begin the consultation process within 30 days of receiving a request for consultation from a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project.[9] and **prior to the release of a negative declaration, mitigated negative declaration or environmental impact report**. For purposes of AB 52, "consultation shall have the same meaning as provided in Gov. Code § 65352.4 (SB 18).[10]

The following topics of consultation, if a tribe requests to discuss them, are mandatory topics of consultation:

a. Alternatives to the project.
b. Recommended mitigation measures.
c. Significant effects.[11]

1. The following topics are discretionary topics of consultation:
   a. Type of environmental review necessary.
   b. Significance of the tribal cultural resources.
   c. Significance of the project's impacts on tribal cultural resources.

If necessary, project alternatives or appropriate measures for preservation or mitigation that the tribe may recommend to the lead agency.[12]

With some exceptions, any information, including but not limited to, the location, description, and use of tribal cultural resources submitted by a California Native American tribe during the environmental review process **shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public, consistent with Government Code sections 6254 (r) and 6254.10.** Any information submitted by a California Native American tribe during the consultation or environmental review process shall be published in a confidential appendix to the environmental document unless the tribe that provided the information consents, in writing, to the disclosure of some or all of the information to the public.[13]

If a project may have a significant impact on a tribal cultural resource, **the lead agency's environmental document shall discuss** both of the following:

a. Whether the proposed project has a significant impact on an identified tribal cultural resource.
b. Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to Public Resources Code section 21082.3, subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource.[14]

Consultation with a tribe shall be considered concluded when either of the following occurs:

a. The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource; or
b. A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.[15]

Any mitigation measures agreed upon in the consultation conducted pursuant to Public Resources Code section 21080.3.2 **shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program**, if determined to avoid or lessen the impact pursuant to Public Resources Code section 21082.3, subdivision (b), paragraph 2, and shall be fully enforceable.[16]

If mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document or if there are no agreed upon mitigation measures at the conclusion of consultation, or if consultation does not occur, and if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, **the lead agency shall consider feasible mitigation** pursuant to Public Resources Code section 21084.3 (b).[17]

An environmental impact report **may not be certified**, nor may a mitigated negative declaration or a negative declaration be adopted unless one of the following occurs:

a. The consultation process between the tribes and the lead agency has occurred as provided in Public Resources Code sections 21080.3.1 and 21080.3.2 and concluded pursuant to Public Resources Code section 21080.3.2.
b. The tribe that requested consultation failed to provide comments to the lead agency or otherwise failed to engage in the consultation process.

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[9] Pub. Resources Code § 21080.3.1, subds. (d) and (e)
[10] Pub. Resources Code § 21080.3.1 (b)
[11] Pub. Resources Code § 21080.3.2 (a)
[12] Pub. Resources Code § 21080.3.2 (a)
[13] Pub. Resources Code § 21082.3 (c)(1)
[14] Pub. Resources Code § 21082.3 (b)
[15] Pub. Resources Code § 21080.3.2 (b)
[16] Pub. Resources Code § 21082.3 (a)
[17] Pub. Resources Code § 21082.3 (e)

c. The lead agency provided notice of the project to the tribe in compliance with Public Resources Code section 21080.3.1 (d) and the tribe failed to request consultation within 30 days.[18]

This process should be documented in the Tribal Cultural Resources section of your environmental document.

Under SB 18:

Government Code § 65352.3 (a) (1) requires consultation with Native Americans on general plan proposals for the purposes of "preserving or mitigating impacts to places, features, and objects described § 5097.9 and § 5091.993 of the Public Resources Code that are located within the city or county's jurisdiction. Government Code § 65560 (a), (b), and (c) provides for consultation with Native American tribes on the open-space element of a county or city general plan for the purposes of protecting places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code.

- SB 18 applies to **local governments** and requires them to contact, provide notice to, refer plans to, and consult with tribes prior to the adoption or amendment of a general plan or a specific plan, or the designation of open space. Local governments should consult the Governor's Office of Planning and Research's "Tribal Consultation Guidelines," which can be found online at: https://www.opr.ca.gov/docs/09_14_05_Updated_Guidelines_922.pdf
- Tribal Consultation: If a local government considers a proposal to adopt or amend a general plan or a specific plan, or to designate open space it is required to contact the appropriate tribes identified by the NAHC by requesting a "Tribal Consultation List." If a tribe, once contacted, requests consultation the local government must consult with the tribe on the plan proposal. **A tribe has 90 days from the date of receipt of notification to request consultation unless a shorter timeframe has been agreed to by the tribe.**[19]
- There is no Statutory Time Limit on Tribal Consultation under the law.
- Confidentiality: Consistent with the guidelines developed and adopted by the Office of Planning and Research,[20] the city or county shall protect the confidentiality of the information concerning the specific identity, location, character, and use of places, features and objects described in Public Resources Code sections 5097.9 and 5097.993 that are within the city's or county's jurisdiction.[21]
- Conclusion Tribal Consultation: Consultation should be concluded at the point in which:
    - The parties to the consultation come to a mutual agreement concerning the appropriate measures for preservation or mitigation; or
    - Either the local government or the tribe, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning the appropriate measures of preservation or mitigation.[22]

NAHC Recommendations for Cultural Resources Assessments:

- Contact the NAHC for:
    - A Sacred Lands File search. Remember that tribes do not always record their sacred sites in the Sacred Lands File, nor are they required to do so. A Sacred Lands File search is not a substitute for consultation with tribes that are traditionally and culturally affiliated with the geographic area of the project's APE.
    - A Native American Tribal Contact List of appropriate tribes for consultation concerning the project site and to assist in planning for avoidance, preservation in place, or, failing both, mitigation measures.
        - The request form can be found at http://nahc.ca.gov/resources/forms/.
- Contact the appropriate regional California Historical Research Information System (CHRIS) Center (http://ohp.parks.ca.gov/?page_id=1068) for an archaeological records search. The records search will determine:
    - If part or the entire APE has been previously surveyed for cultural resources.
    - If any known cultural resources have been already been recorded on or adjacent to the APE.
    - If the probability is low, moderate, or high that cultural resources are located in the APE.
    - If a survey is required to determine whether previously unrecorded cultural resources are present.
- If an archaeological inventory survey is required, the final stage is the preparation of a professional report detailing the findings and recommendations of the records search and field survey.
    - The final report containing site forms, site significance, and mitigation measures should be submitted immediately to the planning department. All information regarding site locations, Native American human remains, and associated funerary objects should be in a separate confidential addendum and not be made available for public disclosure.
    - The final written report should be submitted within 3 months after work has been completed to the appropriate regional CHRIS center.

[18] Pub. Resources Code § 21082.3 (d)
[19] (Gov. Code § 65352.3 (a)(2)).
[20] pursuant to Gov. Code section 65040.2,
[21] (Gov. Code § 65352.3 (b)).
[22] (Tribal Consultation Guidelines, Governor's Office of Planning and Research (2005) at p. 18).

Examples of Mitigation Measures That May Be Considered to Avoid or Minimize Significant Adverse Impacts to Tribal Cultural Resources:

- Avoidance and preservation of the resources in place, including, but not limited to:
  - Planning and construction to avoid the resources and protect the cultural and natural context.
  - Planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.
- Treating the resource with culturally appropriate dignity, taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:
  - Protecting the cultural character and integrity of the resource.
  - Protecting the traditional use of the resource.
  - Protecting the confidentiality of the resource.
- Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.
- Please note that a federally recognized California Native American tribe or a non-federally recognized California Native American tribe that is on the contact list maintained by the NAHC to protect a California prehistoric, archaeological, cultural, spiritual, or ceremonial place may acquire and hold conservation easements if the conservation easement is voluntarily conveyed.[23]
- Please note that it is the policy of the state that Native American remains and associated grave artifacts shall be repatriated.[24]

The lack of surface evidence of archaeological resources (including tribal cultural resources) does not preclude their subsurface existence.

- Lead agencies should include in their mitigation and monitoring reporting program plan provisions for the identification and evaluation of inadvertently discovered archaeological resources.[25] In areas of identified archaeological sensitivity, a certified archaeologist and a culturally affiliated Native American with knowledge of cultural resources should monitor all ground-disturbing activities.
- Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the disposition of recovered cultural items that are not burial associated in consultation with culturally affiliated Native Americans.
- Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the treatment and disposition of inadvertently discovered Native American human remains. Health and Safety Code section 7050.5, Public Resources Code section 5097.98, and Cal. Code Regs., tit. 14, section 15064.5, subdivisions (d) and (e) (CEQA Guidelines section 15064.5, subds. (d) and (e)) address the processes to be followed in the event of an inadvertent discovery of any Native American human remains and associated grave goods in a location other than a dedicated cemetery.

[23] (Civ. Code § 815.3 (c)).
[24] (Pub. Resources Code § 5097.991).
[25] per Cal. Code Regs., tit. 14, section 15064.5(f) (CEQA Guidelines section 15064.5(f)).

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Response to Comment A-1

The comment states that the determination of "no impact" for Tribal Cultural Resources (TCRs) is in error and recommends that the determination be similar to that of archaeological resources since inadvertent finds are possible. If groundbreaking activities are included in the project, the comment recommends that mitigation for inadvertent finds are appropriate and the determination should be categorized as "less than significant with mitigation."

In response to this comment, note that the Notice of Preparation (NOP) was issued in June 2015. Assembly Bill (AB) 52 is applicable to any project for which a NOP or a notice of a negative declaration or mitigated negative declaration is filed on or after July 1, 2015. Changes to the CEQA Appendix G Guidelines were approved by the Office of the Administrative Law on September 27, 2016 to include questions and language regarding potential TCRs. Since the DEIR was underway at this time, the District considered potential impacts on TCRS in the DEIR.

As described on page 3.5-14 of the DEIR, the District was not required to formally consult with tribes under Public Resources Code 21080.3.1 and, therefore, TCRs were not identified through such a consultation process. Note that throughout the informal Native American consultation process, which was conducted to determine whether any Native Americans had knowledge of unrecorded Native American cultural resources in the project area (separate from the AB 52 process), no Native Americans identified TCRs in the Area of Potential Effects (APE). Similarly, the District identified no TCRs within the project site. As noted under Impact CU-1 (pages 3.5-17 and 3.5-18 of the DEIR), in the event that unknown historical or unique archaeological artifacts are discovered during construction, which may include TCRs, District BMP CU-1 (Accidental Discovery of Archaeological Artifacts or Burial Remains) would be implemented to address any potential discoveries.

To respond to this comment and specifically address inadvertent impacts to unknown TCRs, BMP CU-1 has been revised to address inadvertent finds of TCRS (see DEIR page 2-29). In addition, after the release of the DEIR, the District has since revised BMP CU-1 to require construction to be halted immediately within 100 feet (previously 30 feet) of any accidental discovery of cultural resources.

Cultural Resources	
CU-1: Accidental Discovery of Archaeological Artifacts, Tribal Cultural Resources, or Burial Remains	If historical or unique archaeological artifacts, or tribal cultural resources, are accidentally discovered during construction, work in affected areas will be restricted or stopped until proper protocols are met. Work at the location of the find will halt immediately within 100~~30~~ feet of the find. A "no work" zone shall be established utilizing appropriate flagging to delineate the boundary of this zone. A Consulting Archaeologist will visit the discovery site as soon as practicable for identification and evaluation pursuant to Section 21083.2 of the Public Resources Code and Section 15126.4 of the California Code of Regulations. If the archaeologist determines that the artifact is not significant, construction may resume. If the archaeologist determines that

	the artifact or resource is significant, the archaeologist will determine if the artifact or resource can be avoided and, if so, will detail avoidance procedures. If the artifact cannot be avoided, the archaeologist will develop within 48 hours an Action Plan which will include provisions to minimize impacts and, if required, a Data Recovery Plan for recovery of artifacts in accordance with Public Resources Code Section 21083.2 and Section 15126.4 of the CEQA Guidelines. If a tribal cultural resource cannot be avoided, the Action Plan will include notification of the appropriate Native American tribe, and consultation with the tribe regarding acceptable recovery options. If burial finds are accidentally discovered during construction, work in affected areas will be restricted or stopped until proper protocols are met. Upon discovering any burial site as evidenced by human skeletal remains, the County Coroner will be immediately notified and the field crew supervisor shall take immediate steps to secure and protect such remains from vandalism during periods when work crews are absent. No further excavation or disturbance within ~~30~~100 feet of the site or any nearby area reasonably suspected to overlie adjacent remains may be made except as authorized by the County Coroner, California Native American Heritage Commission, and/or the County Coordinator of Indian Affairs.

In addition, to respond to this comment, the impact statement for Impact CR-5 has been adjusted as shown below. The impact description has also been revised to clarify that the District is not required to formally consult with tribes under AB 52 to determine impacts on TCRs but that such effects have been evaluated consistent with the CEQA Guidelines, respond to the comment's concern regarding inadvertent finds, and describe how BMP CU-1 addresses such situations. The following text on DEIR page 3.5-17 has been revised as follows:

Impact CR-5: Cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code Section 21074 (~~No Impact~~Less than Significant)

As described in the environmental setting, the NOP for this EIR was issued prior to July 1, 2015, and as a result, the District is not required to formally consult with local tribes under PRC 21080.3.1. Regardless, this topic is addressed since questions relating to TCRs was recently added to the State CEQA Guidelines Appendix G environmental checklist in July 2016. This evaluation is based on the literature and record search and District's Native American consultation process described in the setting section. No TCRs, as defined in PRC Section 21074, were identified within the project site. In the event of an accidental discovery of a TCR that is also a historical or

unique archaeological artifact, BMP CU-1 (see Chapter 2, *Project Description*) would be implemented to ensure that construction activities halt and that a qualified archaeologist is contacted. If a tribal cultural resource cannot be avoided, an Action Plan will include notification of the appropriate Native American tribe, and consultation with the tribe regarding acceptable recovery options. ~~As a result~~ With implementation of BMP CU-1, the proposed project would not cause a substantial adverse change to a TCR and the~~re would~~ impact would be ~~no impact~~less than significant.

Response to Comment A-2

Comment A-2 states that mitigation for inadvertent finds for human remains is incomplete as District BMP CU-1 stops work but does not specify the process outlined in Health and Safety Code Section 7050.5 and Public Resources Code Section 5097.98. The comment recommends that the complete process for inadvertent finds of human remains be documented.

In response to this comment, please note that the majority of ground-disturbing activities would occur on the levee banks along Lower Penitencia Creek. These levees are engineered structures composed of artificial fill that were built to design standards. According to a geotechnical study completed by Kleinfelder, the depths of artificial fill present along the project alignment range between 4.5 feet to 13 feet (Kleinfelder 2017). The majority of floodwall construction activities would affect artificially filled embankment levees using a Giken sheetpile driver, which involves virtually no excavation. The possibility of encountering unknown human remains within Reach 1 is still very low due to the highly modified land use history around the construction of the Lower Penitencia channel and Interstate 880, but would be somewhat greater since construction of the vegetated bench and replacement levee would involve more earth movement than the project areas involving sheet pile installation. The District will follow the processes outlined in Health and Safety Code Section 7050.5 and Public Resources Code 5097.98. In response to this comment, the following text under Impact CR-2 has been revised on DEIR page 3.5-17:

> District BMP CU-1 requires that construction activities halt immediately within ~~30~~100 feet of a find and that both the Santa Clara County Coroner and a qualified archaeologist be contacted to evaluate the discovery site and determine whether construction may resume. In addition, the District would comply with the processes outlined in Health and Safety Code Section 7050.5, which requires the Coroner to contact the NAHC within 24 hours of determining whether the remains of a Native American and that the NAHC identify a Most Likely Descendent (MLD). Pursuant to the provisions of Public Resources Code 5097.98, the MLD designated has at least 48 hours to inspect the site and propose treatment and disposition of the remains and any associated grave goods. The District would work with the MLD to ensure that the remains are removed to a protected location and treated with dignity. Implementation of BMP CU-1 and compliance with Health and Safety Code Section 7050.5 and Public Resources Code 5097.98 would ensure that construction-related impacts on archaeological resources are less than significant. ~~Applicable District BMPs, as provided in Chapter 2, include the following:~~

In addition, the following text under Impact CR-4 has been revised on DEIR page 3.5-17:

> District BMP CU-1 requires that construction activities halt immediately within ~~30~~100 feet of any buried human remains and that both the Santa Clara County Coroner and a qualified archaeologist be contacted. As described in Impact CR-2, the District would comply with the processes outlined in Health and Safety Code Section 7050.5, which requires the Coroner to contact the NAHC within 24 hours of determining whether the remains of a Native American and that the NAHC identify a MLD. Per Public Resources Code 5097.98, the MLD designated has at least 48 hours to inspect the site and propose treatment and disposition of the remains and any associated grave goods. The District would work with the MLD to ensure that the remains are removed to a protected location and treated with dignity. Implementation of BMP CU-1 and compliance with Health and Safety Code Section 7050.5 and Public Resources Code 5097.98 would ensure that disturbance to human remains is less than significant.

Response to Comment A-3

The comment notes that mitigation recommendations provided by tribes during the consultation process were not included in cultural resources mitigation measures.

As described on page 3.5-13 of the DEIR, the chairpersons of the Muwekma Ohlone Indian Tribe of the San Francisco Bay Area and Indian Canyon Mutsun Band of Costanoan were contacted; both requested that work stop in the vicinity of any cultural resources discovered during construction. They also requested that the District consult with the tribe about the treatment of the resources. The chairperson of the Indian Canyon Mutsun Band of Costanoan recommended that Native American and archaeological monitors be present during any ground disturbing project activities since work near a creek is sensitive for cultural resources.

In response to this comment and Comment A-2, the District has revised text under Impacts CR-2 and CR-4 in DEIR Section 3.5, *Cultural Resources,* to ensure that construction activities are halted in the event that cultural resources or human remains are discovered during ground-disturbing activities and that the District would comply with Health and Safety Code Section 7050.5 and Public Resources Code 5097.98. Please see Response to Comment A-2, above, for revisions made to Impacts CR-2 and CR-4. These revisions are also presented in strikethrough and underlined text in Chapter 4, *Revisions to the DEIR,* of this document.

The proper procedures that will be followed in accordance with Health and Safety Code Section 7050.5 and Public Resources Code 5097.98 are outlined in Response to Comment A-2, above. As stated in Response to Comment A-2, floodwall installation would primarily affect the embankment levees which are comprised of artificial fill. As such, the likelihood of encountering unknown archaeological resources would be low during floodwall construction. While construction work within Reach 1 has a somewhat higher potential for encountering unknown resources due to excavation of the vegetated bench, based on review of background studies and an archaeological survey, the likelihood of encountering archaeological remains is sufficiently low such that an archaeological monitor is not needed

during earth-moving activities. Implementation of the revised District BMP CU-1, which is prescribed under Impact CR-2 (DEIR page 3.5-17) and compliance with Health and Safety Code Section 7050.5 and Public Resources Code 5097.98 would ensure that proper procedures are followed in the event that human remains are discovered. Also, in response to this comment and Comment A-1, revised BMP CU-1 provides that if impacts to an advertently discovered tribal cultural resource cannot be avoided, an Action Plan will include notification of the appropriate Native American tribe, and consultation with the tribe regarding acceptable recovery options. Refer to Response to Comment A-1, above, or Chapter 4, *Revisions to the DEIR,* for an overview of text revisions made to BMP CU-1.

Response to Comment A-4

The comment summarizing Public Resources Code Section 21084.1, AB 52, and SB 13 is acknowledged. An evaluation of the project's effects on historical resources is presented under Impact CR-1 of the DEIR (page 3.5-16). Refer to Response to Comment A-2 above for discussion about the applicability of AB 52 to the project. Because the project does not involve adoption of or amendment to a general plan or specific plan, the project is not subject to SB 18.

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State of California – The Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Bay Delta Region
7329 Silverado Trail
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EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director

June 29, 2017

Letter B

Mr. Michael Coleman
Environmental Planner II
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118

Dear Mr. Coleman:

Subject: Lower Penitencia Creek Improvements Project and Draft Environmental Impact Report, SCH #2015062026, Santa Clara County

The California Department of Fish and Wildlife (CDFW) received a draft Environmental Impact Report (EIR) from the Santa Clara Valley Water District (District) for the Lower Penitencia Creek Improvements Project (Project) on June 5, 2017, pursuant to the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.; hereafter CEQA; Cal. Code Regs., § 15000 et seq.; hereafter CEQA Guidelines).

CDFW thanks you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that are within CDFW's area of expertise and relevant to its statutory responsibilities (Fish and Game Code, § 1802), and/or which are required to be approved by CDFW (CEQA Guidelines, §§ 15086, 15096 and 15204).

CDFW ROLE

CDFW is a Trustee Agency with responsibility pursuant to CEQA for commenting on projects that could directly or indirectly impact biological resources. CDFW has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (i.e., biological resources). As a Trustee Agency, CDFW is responsible for providing, as available, biological expertise to review and comment upon environmental documents and impacts arising from project activities (CEQA Guidelines, § 15386; Fish and Game Code, § 1802).

CDFW is also considered a Responsible Agency under CEQA §15381 if a project requires discretionary approval, such as under the California Endangered Species Act (CESA), the Native Plant Protection Act, the Lake and Streambed Alteration Agreement (LSAA), or other provisions of the Fish and Game Code that afford protection to the State's fish and wildlife trust resources. CDFW will act as a Responsible Agency because it anticipates issuing an LSAA for Project activities that impact a stream (Fish and Game Code, §§ 1600 – 1616), specifically Lower Penitencia Creek. CDFW may also act as a Responsible Agency in issuing an Incidental Take Permit (ITP) if Project activities result in "take" of any species listed as candidate, threatened, or endangered pursuant to CESA (Fish and Game Code, § 2050 et seq.).

PROJECT DESCRIPTION

Background: The proposed Project is one of six elements evaluated in the *Lower Berryessa Creek Program Environmental Impact Report* (Program EIR) which was prepared by the District,

as the lead agency, in 2011. The Program EIR evaluated the proposed Project reach at a programmatic level of detail. Now that the detailed designs of several flood protection improvement projects located upstream of the proposed Project are known, future water surface elevations and flow rates (during the 1-percent flow) on the proposed Project can be precisely estimated.

Objective: The primary objective of the proposed Project is to convey the increased 1-percent (or 100-year) flows from the improved Upper and Lower Berryessa creeks to Coyote Creek without overtopping the Lower Penitencia Creek banks. The Project would provide flood protection along 5,000 linear feet along the Lower Penitencia Creek, and subsequently extend the flood protection benefits from the upper watershed projects downstream to the Coyote Creek/Lower Penitencia Creek confluence.

The Project components would be implemented along the following four reaches:

- Reach 1 (Coyote Creek to I-880) – relocate and raise south bank levee with maintenance road on crest; create a wetland bench on south bank;
- Reach 2 (I-880 to California Circle) – install sheetpile floodwall on top of existing south/west bank levee; remove approximately 70 cubic yards (cy) of sediment from the concrete-lined channel; relocate access ramp to the City of Milpitas pump station; conduct maintenance road improvements;
- Reach 3 (California Circle to Milmont Drive) – install sheetpile floodwalls on top of existing west and east bank levees, and earthen fill to floodwall to allow the existing Penitencia Creek Trail to cross over the new floodwall; remove approximately 1500 cy of sediment from low-flow earthen channel; conduct maintenance road improvements; and
- Reach 4 (Milmont Drive to San Andreas Bridge) – install sheetpile floodwalls on top of existing west bank levee; raise the existing east bank levee by up to 6 feet (ft); remove approximately 730 cy of sediment from the concrete-lined channel; conduct maintenance road improvements; install headwalls on the downstream and upstream faces of San Andreas Drive bridge.

The draft EIR indicates that in-channel work would occur between June 15 and October 15 when channel flow is the lowest. Dewatering would occur throughout the Project area during construction, but would be temporary. Water would be diverted into pipes and routed around the work areas by a temporary cofferdam. Diverted water would be returned to the creek downstream of the Project area. At the end of each construction season, disturbed areas would be hydroseeded to provide erosion protection.

Location: The proposed Project area extends from upstream of the San Andreas Drive bridge and downstream at the confluence with Coyote Creek near Highway I-880, in the City of Milpitas (City), Santa Clara County. The Project is specifically located on Lower Penitencia Creek, which extends from upstream of the confluence with Berryessa Creek to the downstream confluence with Coyote Creek, within a developed area of the City. The land surrounding the proposed Project is a mix of residential and office park/commercial land uses.

Timeframe: The draft EIR indicates that most of the Project construction work would occur between June 15 and October 15 of years 2018 and 2019. Some work that could occur before June 15 includes site preparation (vegetation clearing), staging of construction equipment and material, and some earthwork outside of the channel (e.g. grading of maintenance roads).

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations presented below primarily to assist the District in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on biological resources. These comments and recommendations are based on the requirement for the environmental document to include the following information:

Project Description

Section 2.7.3, Page 2-21 – Staging Area and Stockpiling. The draft EIR states that Staging Area B will be located between the primary and secondary channels in Reach 3. Please clarify the proximity of this staging area to the stream channels and whether water will be present on the access road that leads to the staging area. Please clarify whether this staging area is proposed to be used during the wet season and whether it could be subject to inundation. If there is a potential for inundation of the staging area and/or sediment runoff to the creek, the EIR should include an evaluation of potential impacts of the staging area to fish and wildlife resources, and measures to avoid or minimize those impacts, including use of alternate staging areas, especially during the wet season and/or effective erosion control. The draft EIR also does not clearly describe any impacts to vegetation (upland, riparian or wetland) from using Staging Area B for storage of equipment and materials. B-1

Biological Resources

Page 3.4-32, 36 – Impact Analysis and Figure 3.4-4- Habitat Impacts Map. The draft EIR indicates that the Project will result in impacts to several habitat types, including, tidal aquatic, coastal brackish marsh, seasonal saline wetland and willow riparian. The *Habitat Impacts Map* shows the amounts (in acres) of both temporary and permanent impacts to these habitat types. However, the draft EIR does not clearly define temporary and permanent impacts nor explain how some of these habitat types could meet the criteria of a temporary impact, which includes complete restoration of the impact area to pre-Project conditions within one year of the impact. Habitat types such as seasonal wetland or willow riparian typically cannot be fully restored to their pre-Project value or function within one year of removal or other disturbance. Please be advised that if a habitat type cannot be fully restored to pre-Project conditions within one year, CDFW considers this impact as either semi-permanent (restoration within two years) or permanent (more than two years). CDFW recommends that the EIR fully evaluate the type and duration of impacts for each habitat type within the Project area, and provide compensatory mitigation appropriate for each type of impact. For example, mitigation for semi-permanent impacts should be higher than those for temporary impacts in order to offset the temporal loss of habitat functions and values to fish and wildlife species. B-2

Pages 3.4-35, 38 – Longfin smelt and Steelhead. The draft EIR states that the longfin smelt (*Spirinchus thaleichthys*) and Central California Coast steelhead (*Oncorhynchus mykiss*) could occur within the reach of Lower Penitencia Creek, which is tidally influenced, albeit likely B-3

infrequently and in small numbers and only from fall to early spring (Table 3.4-2). However, the draft EIR also states that small numbers of longfin smelt and steelhead may stray into the Project area.

Project activities such as dewatering and installation of sheet piles by pile driving could result in take of longfin smelt, which is listed as threatened under CESA, and steelhead, which is federally-listed and a State Species of Special Concern.

Mitigation Measure BIO-1: *Exclude Fish Prior to Dewatering Activities*, describes the use of block and seine nets by a qualified biologist to exclude fish from the construction area. While the draft EIR includes measures and best management practices to minimize impacts to both longfin smelt and steelhead, these measures do not completely avoid the potential for either direct or indirect take (Fish and Game Code section 86; "take" means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill). CDFW therefore recommends that take authorization for the longfin smelt be obtained through an ITP issued by CDFW under CESA (see *Regulatory Requirements* below). The District should also consult the National Fisheries Marine Service, in coordination with CDFW, for activities that could impact steelhead.

B-3 Cont.

Pages 3.4-40, 41, 42 – Western Pond Turtle. As acknowledged on Page 3.4-40 of the draft EIR, the western pond turtle (*Actinemys marmorata*) is not abundant in the region, and low recruitment may lead to substantial population declines. The western pond turtle is designated by CDFW as a Species of Special Concern. Also, within the document on Page 3.4-32, one of the criteria to determine significance is if the Project would have a substantial adverse effect either directly or through habitat modification. While the draft EIR indicates that the Project would not result in permanent impacts to western pond turtle habitat, as CDFW described above, the duration of impacts to habitat should be re-evaluated. If impacts to western pond turtle habitat are determined to be semi-permanent or permanent, then the EIR should include appropriate and effective mitigation for loss of this species' habitat.

B-4

Pages 3.4-43, 44 – Nesting Bird Surveys. Mitigation Measure BIO-3 states that surveys will be conducted no more than two weeks prior to the initiation of construction activities in any given area. CDFW recommends that this measure be revised to include a second nesting bird survey within seven days prior to Project activities in order to ensure detection of nesting birds that may have occupied the area after the first survey.

B-5

Page 3.4-50 – Congdon's tarplant. As acknowledged in the draft EIR, Congdon's tarplant (*Centromadia parryi Congdonii*) is a species that has the potential to occur within the Project area, and could be affected by Project construction. Congdon's tarplant is designated by the California Native Plant Society as a 1B.1 species (rare or endangered in California and elsewhere). Mitigation Measure BIO-10 involves compensating Project impacts to the species by preserving an existing population or establishing a new population. The draft EIR states that this native plant species tolerates both non-native plant associates and disturbance, but does not specify whether suitable habitat occurs within or near the Project area. CDFW recommends that the EIR provide an assessment of suitable habitat within the Project area or surrounding areas that could be used for reseeding or replanting of Congdon's tarplant, and clarification on whether offsite translocation will be necessary. If the Project will negatively affect Congdon's

B-6

tarplant, then a long-term management plan for the replanting site should be prepared to effectively protect and manage the population. B-6 Cont.

Page 3.4-57 Tree Removals. The draft EIR states that approximately 22 trees with diameter at breast height (dbh) of six inches or more will be removed during Project construction. However, the draft EIR does not clearly identify the species and size of trees proposed to be removed. It is also not clear whether these trees correspond to the <0.01 acres of permanent impacts to willow riparian woodland shown in Figure 3.4-4- *Habitat Impacts Map*. Please clarify and provide the species and size of trees that will be removed, and appropriate mitigation for loss of trees based on species and size of trees. B-7

In addition, please see the following minor comments: regarding Table ES-2 *Summary of Impacts and Mitigation Measures for the Proposed Project*, unless it is a typo please clarify what "B" stands for, for HYD-7. Similarly, please clarify what "SU" stands for, for NOI-1, 2, and 4. Also, please note that although no suitable habitat is present within the Project area for California Foothill yellow-legged frog (*Rana boylii*), the species status should be changed in the EIR from a Species of Special Concern to a candidate species under CESA due to the recent listing of the species by the Fish and Game Commission. B-8

REGULATORY REQUIREMENTS

California Endangered Species Act

Please be advised that a CESA permit must be obtained if the Project has the potential to result in "take" of plants or animals listed under CESA, either during construction or over the life of the Project. Issuance of a CESA Permit is subject to CEQA documentation; the CEQA document must specify impacts, mitigation measures, and a mitigation monitoring and reporting program. If the Project will impact CESA listed species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain a CESA Permit. For more information on CESA and the ITP application process, please visit our website at: http://www.wildlife.ca.gov/Conservation/CESA.

CEQA requires a Mandatory Finding of Significance if a project is likely to substantially impact threatened or endangered species (CEQA §§ 21001(c), 21083, and CEQA Guidelines §§ 15380, 15064, 15065). Impacts must be avoided or mitigated to less-than-significant levels unless the CEQA Lead Agency makes and supports Findings of Overriding Consideration (FOC). The CEQA Lead Agency's FOC does not eliminate the Project proponent's obligation to comply with Fish and Game Code § 2080. B-9

Lake and Streambed Alteration Agreement

CDFW will require an LSAA, pursuant to Fish and Game Code §§ 1600 et. seq. for Project-related activities within Lower Penitencia Creek and any other 1600-jurisdictional waters within the proposed Project area. Notification is required for any activity that will substantially divert or obstruct the natural flow; change or use material from the bed, channel, or bank including associated riparian or wetland resources; or deposit or dispose of material where it may pass into a river, lake or stream. Work within ephemeral streams, washes, watercourses with a subsurface flow, and floodplains are subject to notification requirements. CDFW, as a Responsible Agency under CEQA, will consider the EIR for the Project. CDFW may not execute

the final LSAA until it has complied with CEQA (Public Resources Code § 21000 et seq.) as the responsible agency.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database, which may be used to make subsequent or supplemental environmental determinations [Pub. Resources Code, § 21003, subd. (e)]. Accordingly, please report any special-status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDB). The CNNDB field survey form can be found at the following link: http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/CNDDB_FieldSurveyForm.pdf. The completed form can be mailed electronically to CNDDB at the following email address: CNDDB@dfg.ca.gov. The types of information reported to CNDDB can be found at the following link: http://www.dfg.ca.gov/biogeodata/cnddb/plants_and_animals.asp.

B-9
Cont.

FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of filing fees is necessary (Fish and Game Code, § 711.4; Pub. Resources Code, § 21089). Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW.

CONCLUSION AND FUTURE COORDINATION

CDFW appreciates the opportunity to comment on the draft EIR to assist the District in identifying and mitigating Project impacts on biological resources. Questions regarding this letter or further coordination should be directed to Ms. Mayra Molina, Environmental Scientist, at (707) 944-5596 or Mayra.Molina@wildlife.ca.gov; or Ms. Brenda Blinn, Senior Environmental Scientist (Supervisory), at (707) 944-5541 or Brenda.Blinn@wildlife.ca.gov.

Sincerely,

Scott Wilson
Regional Manager
Bay Delta Region

Response to Comment B-1

The comment requests clarification regarding the proximity of Staging Area B to the stream channels and asks whether water will be present on the access road leading to the staging area. The comment further states that the EIR should evaluate potential impacts of the staging area on fish and wildlife resources if there is potential for inundation of the staging area and/or sediment runoff to the creek. Lastly, the comment notes that the DEIR does not clearly describe impacts to vegetation due to use of Staging Area B for storage of equipment and materials.

Staging Area B is located within the central earthen berm in the middle of Reach 3 which divides the primary and secondary channels. As described in the DEIR (page 2-20), this staging area would only be used during the dry season between mid-June and mid-October when channel flows are lowest and would not be subject to inundation. Reach 3 would be dewatered prior to use of this staging area; therefore, no impacts on fish species are likely to occur during use of Staging Area B. In addition, as described in DEIR Chapter 3.4, *Biological Resources,* implementation of Mitigation Measure BIO-1 would ensure that fish are properly excluded from the construction area prior to dewatering activities. Impact HYD-1 in Section 3.9, *Hydrology and Water Quality,* also addresses potential water quality effects due to sediment runoff and describes specific District BMPs that would be implemented to prevent and control erosion and sediment transport (see pages 3.9-13 and 3.9-14 of the DEIR). To clarify that the channel would be dewatered prior to use of Staging Area B, the second paragraph in DEIR Chapter 2, Section 2.7.3 (page 2-21) has been revised as follows:

> Staging may also occur at the central berm between the primary and secondary channels in Reach 3 (Staging Area B) <u>during floodwall construction and sediment removal activities</u>. <u>Prior to use of this staging area, the channel would be dewatered and water would be routed around the extent of Reach 3.</u> Within Staging Area B, equipment and materials would be stored on the flat portions of the berm. The central berm is accessible via two existing concrete-lined ramps located at the northern and southern end of Reach 3. These ramps both connect to the levee crest road on the west bank in Reach 3.

With respect to impacts to vegetation associated with use of Staging Area B, please refer to Impact BIO-2 on DEIR page 3.4-52, which addresses the project's potential impacts on herbaceous riparian vegetation including during the use of Staging Area B. As described in the DEIR, no removal or pruning of woody riparian vegetation is anticipated to occur during use of Staging Area B.

It is noted that vegetation management and sediment removal activities are routinely conducted by the District as part of the District's Stream Maintenance Program (SMP). Vegetation management and sediment removal activities under the SMP were last conducted in this reach in late 2015, including the removal of herbaceous plants. Since sediment removal work was completed, herbaceous riparian vegetation on the berm has regrown and the proposed project could impact up to approximately 1.93 acres of willow riparian woodland due to trampling of vegetation. Routine SMP maintenance work has impacted the herbaceous riparian vegetation on this berm several times previously, and in 2015 as described above.

Therefore, the habitat on this constructed earthen berm provides relatively low functions and values for wildlife. Implementation of District BMPs identified in Impact BIO-2 would further minimize the project's effects on riparian vegetation by limiting disturbance, preventing erosion and sedimentation, and minimizing the introduction or spread of invasive weeds within the understory.

Response to Comment B-2

The comment requests clarification regarding how temporary versus permanent impacts were defined for habitat types, including tidal aquatic, coastal brackish marsh, seasonal saline wetland and willow riparian habitats, as well as an explanation of how impacts determined to be temporary would meet the criteria for a temporary impact. The comment also recommends that the EIR provide compensatory mitigation appropriate for each type of impact.

The District understands that the CDFW considers impacts to be temporary only if the project site recovers or is restored to pre-project conditions (or better) within one year. However, there is no single universally agreed-upon scientific definition of what constitutes a "temporary" biological resources impact.

The District expects habitat functions and values in affected wetlands (including coastal brackish marsh and seasonal saline wetland), aquatic, and riparian habitats on the project site to be restored to pre-project conditions within one to two years following construction, and considers this a temporary impact. The District's determination is based on a study conducted by District biologists (Rankin and Hillman 2000) that investigated the nature of wetland impacts resulting from the District's sediment removal projects in flood control channels in 1997 and 1998. The study measured vegetation regrowth after sediment removal. At 1998 excavation sites, total nontidal and tidal regrowth surpassed pre-excavation amounts within one to two years. At the 1997 excavation sites, nontidal wetland regrowth approached or surpassed pre-excavation amounts within two years; although tidal regrowth remained lower than the pre-excavation amount. Vegetation dominance and quality at regrowth sites had similarities to reference sites, with most differences being either neutral or positive (e.g., full or partial transition from one native-dominated vegetation type to another; disappearance of a non-native vegetation type; increased total percent cover). The substantial regrowth amounts on study sites indicate that instream wetlands can and do re-establish relatively quickly after sediment removal activities, taking 1-2 years to reach pre-project levels. This study is directly applicable to Lower Penitencia Creek because of the dominance of this channel by herbaceous (rather than woody) vegetation and, in most places, the relatively low quality of habitat provided by this vegetation due to necessary ongoing maintenance. Further, the project would not result in the removal or pruning of any of the scattered trees within the willow riparian woodland habitat in the project area. Rather, the 1.93 acres of temporary impact to willow riparian woodland indicated in the newly added table (Table 3.4-4), below, would involve impacts only to herbaceous species growing within the area mapped as willow riparian woodland. These impacts are associated with using the central berm in Reach 3 as a construction staging area. In addition, the proposed project's temporary impacts on non-tidal seasonal saline wetland (0.03 acre) would occur due to staging and other construction activities, and the project's temporary impacts on coastal

brackish marsh habitat in Reach 1 would occur due to construction dewatering during construction of the vegetated wetland. As observed in the affected project reach, herbaceous species are expected to reestablish relatively quickly.

With respect to the proposed project's temporary impacts on tidal aquatic habitat (8.84 acres), those estimated impacts would occur as a result of dewatering the channel throughout the construction phase. Such effects would be limited to the dry season of each construction year (June 15 through October 15). As discussed in DEIR Section 3.4, once in-channel construction and dewatering is complete in a specific project reach, the channel would operate similar to existing conditions and tidal aquatic habitat is expected to reestablish rapidly following the completion of construction.

In conclusion, it is the District's judgment based on substantial evidence that temporarily impacted wetlands (coastal brackish marsh and non-tidal seasonal saline wetland), willow riparian woodland, and aquatic habitat will restore to pre-existing conditions within one to two years, and such impacts should be considered temporary.

For the convenience of the reader, in response to this comment, Impact BIO-1 of the DEIR has been amended to include the following table summarizing temporary and permanent impacts on habitats described in the EIR. The following text on page 3.4-35 of the DEIR (second paragraph) has been revised to include this new table:

> As shown in **Figure 3.4-4**, up to approximately ~~9.71 acres of aquatic habitat, including~~ 0.87 acre of coastal brackish marsh and 8.84 acres of tidal aquatic habitat~~,~~ would be temporarily affected as a result of dewatering. **Table 3.4-4** summarizes temporary and permanent habitat impacts that would occur in the project area.

Table 3.4-4. Temporary and Permanent Habitat Impacts in the Project Area

Habitat	Impacts (acres)	
	Temporary	Permanent
Tidal aquatic (open water)	8.84	0.01
Willow riparian woodland	1.93	<0.01
*Wetlands**		
Coastal brackish marsh	0.87	<0.01
Non-tidal seasonal saline wetland	0.03	0.13
Other		
Ruderal grassland	5.82	0.65
Developed/Landscaped	5.35	0.20
Total	***22.85***	***0.98***

**0.08 acre of the permanent impact on wetlands results from conversion of non-tidal seasonal saline wetland to coastal brackish marsh (i.e., a permanent change in wetland type but not the overall amount of wetlands on the site).*

The District expects water quality and habitat values in unvegetated aquatic habitats (i.e., tidal aquatic) subject to temporary disturbance to quickly return to pre-construction conditions following the completion of project activities (in less than one year). Thus, no mitigation is considered necessary for temporary impacts on unvegetated tidal aquatic habitat.

As shown in the new Table 3.4-4, the proposed project would result in temporary impacts on 0.90 acre of wetlands (i.e., coastal brackish marsh and non-tidal seasonal saline wetlands) and permanent impacts on 0.14 acre of wetlands. However, 0.08 acre of the permanent impact would result from the conversion of non-tidal seasonal saline wetland to coastal brackish marsh due to the newly created wetland bench. Thus, the proposed project's net permanent removal of wetland habitat would be 0.06 acre.

The 0.29-acre of wetland habitat created by the wetland bench in Reach 1 would offset the project's permanent (0.06 acre) and temporary (0.90 acre) removal of wetland habitat as well as the conversion of 0.08 acre due to the conversion of non-tidal seasonal saline wetland to coastal brackish marsh.

Among the 0.29-acre wetland habitat to be established, 0.12 acre would offset the net permanent removal of 0.06 acre of wetland habitat at a ratio of 2:1 (created wetland: permanently removed wetland), which would be appropriate for addressing permanent impacts. In addition, the created wetlands would provide higher quality habitat than the permanently impacted wetlands, which under existing conditions are not highly functioning wetlands with high ecosystem value. No further mitigation would be required to compensate for permanent impacts on wetlands.

Regarding the project's temporary impact on wetlands, temporarily impacted wetland habitat is expected to quickly (i.e., within one to two years) return to pre-construction conditions following the completion of project activities. Nevertheless, the remaining 0.17 acre of the overall 0.29-acre wetland bench to be created along with the return of the temporarily impacted wetland habitat would offset the 0.98-acre temporary impact at roughly a 1.2:1 ratio (created/restored wetland:temporarily impacted wetland). Thus, following project completion, the 0.98 acre of temporarily impacted habitat would be restored and the project would have created up to an additional 0.17 acre of wetlands, the equivalent of roughly a mitigation ratio of 1.2:1 for temporary impacts. No further mitigation would be required to compensate for temporary impacts on wetlands.

To incorporate the above-described rationale as to how the wetland bench would provide sufficient compensatory mitigation for the project's temporary and permanent impacts on wetlands and other waters of the U.S. and state, the last paragraph under Impact BIO-3 has been modified on DEIR page 3.4-54:

> <u>The 0.29 acre of habitat to be created by the wetland bench would offset the proposed project's permanent (0.06 acre) and temporary (0.90 acre) removal of wetland habitat as well as the conversion of 0.08 acre due to conversion of non-tidal seasonal saline wetland to coastal brackish marsh. Among the 0.29-acre wetland habitat to be established, 0.12 acre would offset the net permanent removal of 0.06 acre of wetland</u>

habitat at a 2:1 ratio (created wetland: permanently removed wetland), which would be appropriate for addressing permanent impacts. In addition, the created wetland would provide higher quality habitat than the permanently removed wetlands. Regarding the project's temporary impact on wetlands, temporarily impacted wetland habitat is expected to return to pre-construction conditions within one to two years; nevertheless, the remaining 0.17 acre of the overall 0.29-acre wetland bench would offset the 0.98-acre temporary impact at a roughly 2:1 ratio (created/restored wetland: temporarily impacted wetland). However, ~~permanent and temporary impacts on wetlands would be considered significant unless mitigated. Although the District proposes to create marsh habitat on the new bench in Reach 1, the project is in the preliminary design phase and measures have not yet been developed to ensure~~ if the wetland bench does not successfully establish~~ment of~~ a vegetated wetland ~~on the created bench~~ as expected, ~~. Therefore, this~~the impact on wetlands and other waters of the U.S. and state is considered significant. Mitigation Measure BIO-13 would be implemented to address this impact.

Response to Comment B-3

The CDFW has expressed concern that longfin smelt and the Central California Coast steelhead could be present in the project area during construction despite implementation of Mitigation Measure BIO-1 (Exclude Fish Prior to Dewatering Activities). The commenter recommended that take authorization for the longfin smelt be obtained from the CDFW and that the District coordinate with the CDFW and National Marine Fisheries Service (NMFS) regarding activities that could affect steelhead.

The District notes that the NMFS was provided with a copy of the DEIR and did not return any comments. The District expects Section 7 consultation with NFMS to be initiated during the project's 404 permit process with the U.S. Army Corps of Engineers, and the District will coordinate with NMFS regarding potential project effects on steelhead.

Longfin smelt are not expected to occur in the project area during the period when in-channel project activities will occur (i.e., June 15 through October 15). Longfin smelt occur in the South Bay primarily from late fall into spring. During the summer and early fall, they retreat to cooler, usually deeper water due to their low tolerance for higher temperatures.

Adult longfin smelt prefer water temperatures of 16 to 18 °C or below but will occupy waters as warm as 20 °C in the summer (Baxter 1999, Robinson and Greenfield 2011). Moyle (2002) reports that longfin smelt are not commonly found in waters above 20 °C. In regards to suitable temperatures for spawning, Moyle (2002) reports spawning occurring at temperatures between 7 and 14.5 °C, while the California Department of Fish and Wildlife reports that spawning begins when water temperatures drop below 16 °C and becomes consistent when water temperatures drop below 13 °C (CDFG 2009).

Water quality sampling was conducted for both the District's Lower Berryessa Creek Flood Protection Project and the Stream Maintenance Program. The results of both efforts show that water temperatures in the project area (including Lower Penitencia Creek and Lower Berryessa Creek) are typically above the longfin smelt's range during afternoon hours when

the majority of project construction would occur. The following paragraphs summarize water quality temperatures collected for the two District projects in 2015 and 2016.

Water Quality Sampling Results for Lower Berryessa Creek Flood Protection. On behalf of the District, Brosamer & Wall, Inc. conducted water quality sampling for the Lower Berryessa Creek Flood Protection Project between July 28 and September 9, 2015, and between June 9 and October 14, 2016. As part of the 2015 sampling effort, water temperature data were recorded twice daily at three sampling locations – along Lower Penitencia Creek at California Circle, which is located within the Lower Penitencia Creek project site; at the Calera Creek confluence, just upstream from the Lower Penitencia Creek project area; and along Berryessa Creek at Abel Street.

As part of the 2016 sampling effort, water temperature data were recorded twice daily at the following three sampling locations – along Lower Penitencia Creek at California Circle; along Berryessa Creek at Coyote Street; and at the Calera Creek confluence. Sampling was conducted each weekday during the study period. During sampling conducted in June 2016, the minimum-recorded temperature was 17.9 °C and the maximum temperature was 33.6 °C. Temperatures below 20 °C, which has been identified as the maximum water temperature typically occupied by longfin smelt, occurred on 6 sampling days and afternoon sampling data always exceeded 20 °C. In July 2016, the minimum-recorded temperature was 18.3 °C and the maximum temperature was 31.8 °C. Temperatures below 20 °C occurred only 5 of the 16 sampling days. In August 2015 and 2016, the minimum-recorded temperature was 18.1 °C and the maximum temperature was 29.3°C. Temperatures below 20 °C occurred only 5 of 37 sampling days. Further, temperatures below 20 °C were recorded only during the morning sampling period while afternoon sampling data always exceeded 20 °C. In September 2015 and 2016, temperatures ranged from 16.7 °C to 27.8 °C. Temperatures regularly dipped below 20 °C during the morning sampling period, but afternoon temperatures were consistently above 20 °C. During October 2016, temperatures ranged from 16.2 °C to 23.2 °C. Similar to the September data, temperatures regularly dipped below 20 °C during the morning sampling period, but afternoon temperatures were consistently above 20 °C. **Table 3-1,** below, summarizes the maximum and minimum recorded temperatures and the number sampling days that temperatures were below and above 20 °C.

Table 3-1. Summary of Water Temperature Data for Lower Berryessa Creek and Lower Penitencia Creek (collected for Lower Berryessa Creek Flood Protection Project)

Month and Year	Minimum Recorded Temperature (°C)	Maximum Recorded Temperature (°C)	No. Sampling Days Temperature below 20°C (Morning)	No. Sampling Days Temperature Above 20 °C (Afternoon)
June 2016	17.9	33.6	6 of 23	23 of 23
July 2016	18.3	31.8	5 of 16	16 of 16
August 2015 and 2016	18.1	29.3	5 of 37	37 of 37

September 2015 and 2016	16.7	27.8	17 of 26	26 of 26
October 2016	16.2	23.2	10 of 10	10 of 10

Source: SCVWD 2015a and 2016a

Water Quality Sampling Results for Stream Maintenance Program. Water quality sampling was also conducted for the District's Stream Maintenance Program between September 17, 2015 and October 26, 2015 for sediment removal work in Lower Penitencia Creek, which overlaps the project site. Water quality samples were collected twice daily at Lower Penitencia Creek downstream of the I-880 bridge crossing and near its confluence with Lower Berryessa Creek prior to and during the maintenance period. **Table 3-2** summarizes the maximum and minimum recorded temperatures and the number sampling days that temperatures were below and above 20 °C. The results of that monitoring effort were consistent with the Lower Berryessa Creek Flood Protection Project monitoring data in confirming that, nearly every day, temperatures in the creek rose to levels above the tolerance of longfin smelt. In September 2015, the minimum-recorded temperature was 16.1 °C and the maximum temperature was 26.5 °C. Temperatures below 20°C occurred on 7 of 14 sampling days; however, temperatures below 20°C were typically recorded only during the morning sampling period, whereas by the afternoon, temperatures exceeded 20 °C with the exception of one sampling day. In October 2015, temperatures ranged from 14.7 °C to 24.1 °C. Temperatures typically dipped below 20°C during the morning sampling period but were mostly above 20°C in the afternoon.

Table 3-2. Summary of Water Temperature Data for Lower Penitencia Creek (collected for the Stream Maintenance Program)

Month and Year	Minimum Recorded Temperature (°C)	Maximum Recorded Temperature (°C)	No. Sampling Days Temperature below 20°C (Morning)	No. Sampling Days Temperature Above 20 °C (Afternoon)
September 2015	16.1	26.5	7 of 14	13 of 14
October 2015	14.7	24.1	18 of 26	22 of 26

Source: SCVWD 2015b

When considering the water sampling data for both the Lower Berryessa Creek Flood Protection Project and Stream Maintenance Program, the average temperatures for Lower Penitencia Creek were 20.7 °C in the morning and 25.2 °C in the afternoon. The average temperatures for Lower Berryessa Creek were 20.4 °C in the morning and 25.2 °C in the afternoon. In summary, temperatures in Lower Penitencia Creek within the project area, and in Berryessa Creek just upstream from the project area, exceeded the maximum threshold identified for longfin smelt nearly each day of the sampling period. Longfin smelt would not be able to tolerate the temperature conditions within Lower Penitencia Creek and are thus not expected to occupy the project area, during the mid-June through mid-October construction period.

Although construction of the project will span two years, no work will occur between October 16 and June 16, which will limit the potential for take of longfin smelt. Longfin smelt spend their adult life in bays, estuaries, and nearshore coastal areas in temperatures that rarely exceed 22°C. As described above, recent temperature monitoring conducted in the project vicinity indicate temperatures commonly exceed the upper threshold for longfin smelt. Longfin smelt typically do not migrate upstream during spawning, which occurs January through April, but has been recorded as early as November. Larval longfin smelt are buoyant and quickly after emerging, move into the upper portions of the water column. This causes the fish to be transported downstream into the more brackish Bay during winter high flow events. Fisheries sampling in Lower Coyote Creek (approximately 2 miles downstream of the project area) captured longfin smelt in October through March with peak numbers occurring in December (Hobbs et al. 2012). The specific history, species requirements, and habitat conditions present indicate a low risk of longfin smelt occurring during the project construction window of June 15 to October 15. Therefore, no take of longfin smelt is expected to occur due to this project.

Notwithstanding the above analysis, the District understands that the decision to apply or not apply for a longfin smelt incidental take permit is up to the District. The District understands that the take prohibitions in the California Endangered Species Act (CESA) is not to be taken lightly and will comply with CESA requirements including applying for an incidental take permit if needed.

Response to Comment B-4

The comment expresses concern regarding the assessment of the duration of impacts on western pond turtles and whether those impacts necessitate habitat mitigation.

The proposed project would not result in the permanent or, as CDFW has defined it, "semipermanent" loss of suitable aquatic habitat for turtles in the project area (i.e., coastal brackish marsh and tidal aquatic habitat within the Lower Penitencia Creek channel). As described under Impact BIO-1c (page 3.40 of the DEIR), up to 9.71 acres of aquatic and brackish marsh habitat that provides suitable foraging habitat and escape cover for turtles would be temporarily affected due to levee relocation, bench excavation, sediment removal, and dewatering activities. The District understands that the CDFW considers impacts to be temporary only if the project site is restored to pre-project conditions (or better) within one year. However, the District considers impacts on wetlands and other waters to be temporary if habitat functions and values are restored to pre-project conditions within two years following construction (see Response to Comment B-2). Impacted aquatic habitat for turtles will be restored to pre-existing conditions within one to two years, and, therefore impacts would be temporary.

Up to 1.93 acres of willow riparian woodland and 5.82 acres of ruderal grassland that could potentially be used by small numbers of turtles for dispersal and nesting may also be temporarily disturbed by project construction activities. However, the project would not result in the removal or trimming of any woody riparian vegetation and herbaceous willow riparian woodland vegetation is expected to begin to regrow within one growing season. Ruderal grassland habitat disturbed during project construction would be revegetated

following completion of project activities and is expected to return to pre-project conditions within one year. Therefore, impacts on these habitats are considered temporary.

Finally, up to 0.29 acre of ruderal grassland that could be used by small numbers of turtles would be converted to coastal brackish marsh habitat as a result of the project. However, this is not expected to result in a loss of habitat for turtles but rather a conversion of suitable upland dispersal and nesting habitat to suitable aquatic dispersal and escape cover habitat. Therefore, this impact is considered temporary.

In summary, the functions currently provided by both aquatic and upland/wetland habitat for western pond turtles will be restored within one year or less following impacts. All impacts on western pond turtle habitat are therefore considered temporary, and no habitat mitigation is necessary.

Response to Comment B-5

The commenter requests that Mitigation Measure BIO-3 be revised to include a second nesting bird survey within seven days prior to the start of project activities.

The District does not agree that more than one survey is necessary to prevent significant impacts to nesting birds. However, the District agrees that a survey conducted closer to the time of construction would be appropriate and has thus revised Mitigation Measure BIO-3 (page 3.4-44 of DEIR) to incorporate the CDFW's suggestion that the survey be conducted within seven days prior to the start of work, as follows. The mitigation measure has also been revised to include the nesting bird season:

Mitigation Measure BIO-3: Conduct Preconstruction Surveys for Nesting Birds

~~The District will hire a~~A qualified biologist ~~who~~ will conduct preconstruction surveys for nesting birds. Surveys will be conducted no more than ~~2 weeks~~ 7 days prior to the initiation of construction activities during the bird nesting season (January 15 through August 31) in any given area. The survey will cover the portions of the project work area where construction activities will occur as well as a 250-foot buffer for raptors and a 50-foot buffer for non-raptors. During each survey, the biologist will inspect all trees and other potential nesting habitats (e.g., shrubs, ruderal grasslands, wetlands, and buildings) in and immediately adjacent to the impact areas for nests. If a lapse in project-related work of ~~2~~1 week~~s~~ or longer occurs, another focused survey will be conducted before project work can be reinitiated.

Response to Comment B-6

In regards to the proposed mitigation for impacts on the Congdon's tarplant (Mitigation Measure BIO-10), the CDFW requested that the EIR be amended to include a discussion of whether habitat suitable for reseeding or replanting of Congdon's tarplant occurs within the project area or surrounding areas. The commenter further requested that a long-term management plan for the replanting site be prepared.

The DEIR described that Congdon's tarplant could occur on the project site and proposed Mitigation Measure BIO-9 (DEIR page 3.4-49) to require a focused preconstruction survey prior to construction to determine whether any Congdon's tarplant population would be present in the project area, and if the project would result in loss of a plant, the District would implement Mitigation Measure BIO-10 to compensate for the loss. At the request of the District, and in an effort to further assess whether impacts on the species would occur, H. T. Harvey & Associates' botanists conducted a focused survey for the species throughout the project area on August 7, 2017. This survey was conducted using a methodology consistent with the survey approach described in Mitigation Measure BIO-9 during the species' published blooming period. No individuals of Congdon's tarplant were detected during the focused survey. Generally, these survey results are valid for about three years,[1] meaning that once Congdon's tarplant has been determined to be absent from a project site, it is unlikely for the plant to be established between August 7, 2017 and the time at which the proposed project construction would commence in 2018. As such, the project would likely have no impact on the species, and implementation of Mitigation Measure BIO-10 (Compensate for Congdon's Tarplant Impacts) should not be necessary. However, in the event that construction is delayed and occurs after August 2020, the District would implement Mitigation Measures BIO-9 and BIO-10.

In response to this comment and to incorporate results from the recent Congdon's tarplant survey, the following text on DEIR pages 3.4-49 to 3.4-50 has been revised:

> Implementation of District BMPs BI-7, BI-8, and WQ-4 would minimize impacts on Congdon's tarplant from survey work, erosion and non-native competition, and staging and stockpiling. Nevertheless, the proposed project may result in residual impacts on this species because complete avoidance of individuals may not be possible. Since publication of the DEIR, a focused survey for Congdon's tarplant was completed throughout the project site on August 7, 2017, during the species' published blooming period. No individuals of Congdon's tarplant were detected during the survey. Typically, focused plant survey results are valid for three years, meaning that once Congdon's tarplant has been determined to be absent from a project site, it is unlikely for the plant to be established within the next three years. It is likely the proposed project would not result in impacts on Congdon's tarplant if construction would occur before August 2020. However, since construction delays can occur, in the event that construction occurs after August 2020, there is a possibility that Congdon's tarplant could establish within the project site ~~As a result~~, and damage to the species from construction would be ~~this impact is~~ considered significant. If construction commences after August 2020, Mitigation Measures BIO-9 and BIO-10 would be implemented to address this significant impact.

[1] This assumption is based on the District's biological resources consultant's recent experience working on other projects that involved focused plant surveys.

Mitigation Measures

Mitigation Measure BIO-9: Conduct Focused Preconstruction Survey for Congdon's Tarplant

~~Prior to construction~~In the event that project construction starts after August 2020, ~~the District will hire~~ a qualified biologist ~~who~~ will conduct a focused survey for Congdon's tarplant in the ruderal grassland habitat within the project area. The survey will be conducted during the species' blooming period (May-November). If a population of Congdon's tarplant is identified in the project area, the District will implement Mitigation Measure BIO-10 (Compensate for Congdon's Tarplant Impacts).

Response to Comment B-7

In regards to Impact BIO-5, the CDFW has requested clarification as to whether any trees would be removed from the willow riparian habitat, as well as additional information regarding the species and size of trees proposed for removal as part of the project. Further, the CDFW has requested that appropriate mitigation for loss of trees be provided based on tree species and size.

Impact BIO-5 focuses on addressing potential conflicts with local plans or polices focused on protecting biological resources, consistent with Appendix G of the CEQA Guidelines. It is not necessary to provide a complete inventory of the number and sizes of trees to be removed to assess the significance of this impact. The impact discussion on page 3.4-57 of the DEIR adequately characterizes this impact by describing the most common tree species (the majority of which are ornamental) in the project area and their size range. The District will comply with the City of Milpitas' Tree Protection Ordinance and other tree protection policies for all trees removed. Further, the District will comply with the requirements of the CDFW's 1602 permit for the project.

In response to the request for clarification of impacts on trees in the willow riparian habitat, the District has revised the second paragraph under Impact BIO-2 (page 3.4-52 of the DEIR) to clarify that no trees would be removed from the willow riparian habitat.

> The proposed project would not result in removal or pruning of woody riparian vegetation, including trees, from the willow riparian woodland habitat in the project area. ~~d~~During the use of Staging Area B~~.~~, ~~E~~equipment and materials would be stored on flat portions of the berm where no willows are present.

Response to Comment B-8

The comment requests additional clarification as to what "B" stands for in Table ES-2 under Impact HYD-7 and what "SU" stands for under NOI-1, 2, and 4. The comment also asks that the species status for California Foothill yellow-legged frog be changed in the EIR from a Species of Special Concern to a candidate species under CESA due to the recent listing of the species by the Fish and Game Commission.

In response to the first part of the comment, "B" in Table ES-2 represents a "Beneficial" impact, and "SU" stands for "Significant and Unavoidable." The definition of these acronyms were accidentally omitted from the note at the bottom of Table ES-2. In response to this comment, the note at the bottom of Table ES-2 (page ES-20 of the DEIR) has been revised as follows:

> **Notes:**
> LS = Less than Significant; LM = Less than Significant with Mitigation; N/A = Not Applicable; CC = Cumulatively Considerable Contribution; NCC = Not Cumulatively Considerably; B = Beneficial; NI = No Impact; S = Significant; SU = Significant and Unavoidable

The District appreciates CDFW noting the change in species status for California Foothill yellow-legged frog. In response, the following text in the third to last row of Table 3.4-2 has been revised (DEIR page 3.4-26):

~~CSSC~~SC

Response to Comment B-9

See Response to Comment B-3 regarding CESA compliance. The District will be obtaining a Lake or Streambed Alteration Agreement (LSAA) as shown in Table 2-3 of DEIR (page 2-24).

Letter C

Sent via electronic mail: no hard copy to follow

July 3, 2017
CIWQS Place ID: 836394

Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118
Email: MColeman@valleywater.org

Subject: Comments on Draft Environmental Impact Report for the Lower Penitencia Creek Improvements Project, Milpitas, Santa Clara County (SCH #2015062026)

Dear Mr. Coleman:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff has reviewed the Public Review Draft Environmental Impact Report (DEIR) for the Lower Penitencia Creek Improvements Project (Project) (State Clearinghouse No. 2015062026) prepared by the Santa Clara Valley Water District (District) pursuant to the California Environmental Quality Act (CEQA). Under CEQA, the Water Board is a Responsible Agency with permitting authority for the Project under the federal Clean Water Act and California Porter-Cologne Act regulating discharges of dredge and fill materials in waters of the U.S. and waters of the State. As described further below, we provide the following comments on the DEIR, including, but not limited to:

- The DEIR lacks information for us to determine whether the preferred alternative (or any of the alternatives) would meet the San Francisco Bay Water Quality Control Plan (Basin Plan) requirement that impacts to wetlands and other waters of the State be avoided and minimized to the maximum extent practicable; and **C-1**
- The DEIR does not clearly identify the potential impacts in jurisdictional waters. Thus, we are unable to determine whether mitigation for impacts on waters of the U.S. and waters of the State would comply with the State and Regional Water Board regulations and policies. **C-2**

Project Overview

The proposed Project is located in the City of Milpitas. Lower Penitencia Creek is an open trapezoidal channel with both earth- and concrete-lined sections. The purpose of the Project is to increase Lower Penitencia Creek capacity to contain the future 100-year flow event, while accommodating daily tidal fluctuations and expected sea-level rise over the life of the Project, expected to be 50 years. The downstream limit of the proposed project is at the Lower Penitencia Creek's confluence with Coyote **C-3**

Creek, and the upstream limit is just upstream of the San Andreas Drive Bridge.

The DEIR preferred alternative has the following Project components, from downstream to upstream:

Reach 1 – Coyote Creek to I-880

- Relocate and raise south bank levee
- Create a wetland bench on south bank
- Construct maintenance road on crest of south bank levee

Reach 2 – I-880 to California Circle

- Construct sheet pile floodwall on top of existing south/west bank levee
- Remove about 70 cubic yards (cy) of sediment from the concrete-lined channel
- Relocate access ramp to City's pump station
- Maintenance road improvements

Reach 3 – California Circle to Milmont Drive

- Construct sheet pile floodwalls on top of existing west and east bank levees
- Construct earthen fill to floodwall to allow the existing Penitencia Creek Trail cross over the new floodwall
- Remove about 1,500 cy of sediment from low-flow earthen channel
- Maintenance road improvements

Reach 4 – Milmont Drive to San Andreas Bridge

- Construct sheet pile floodwalls on top of existing west bank levee
- Raise the existing east bank levee by up to 6 ft
- Remove about 730 cy of sediment from the concrete-lined channel
- Maintenance road improvements
- Construct headwalls on the downstream and upstream faces of San Andreas Drive bridge

C-3 Cont.

Comments

1. **Impacts to Federal and State Jurisdictional Wetlands and Other Waters, Impact BIO-3.**
   The DEIR indicates that the Project would result in impacts to aquatic resources including wetland habitat, streams or tributaries, or other waters of the State (BIO-3). Please note that both a Clean Water Act (CWA) Section 401 water quality certification (401 Certification) and a CWA Section 404 Permit from the U.S. Army Corps of Engineers may be necessary if the Project impacts waters of the U.S. Additionally, the District may need to file a Report of Waste Discharge under the Porter-Cologne Water Quality Control Act (Porter- Cologne) if the Project may result in a discharge of pollutants, including but not limited to sediment, to waters of the State. Work involving stream channels may require a Stream Bed Alteration Agreement from the California Department of Fish and Wildlife (CDFW).

C-4

Also, for the Water Board to permit the proposed Project pursuant to the Clean Water Act, Section 401, we require a project proponent to conduct an alternatives analysis consistent with the U.S. Environmental Protection Agency's 404(b)(1) Guidelines. The Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) incorporates the 404(b)(1) Guidelines by reference to determine the circumstances under which filling of wetlands, streams or other waters of the U.S. and/or the State may be permitted. In accordance with the Basin Plan, filling, dredging, excavating and discharging into a wetland or water of the state is prohibited unless the project meets the least environmentally damaging practicable alternative (LEDPA) standard as determined through the 404(b)(1) alternatives analysis. Although the LEDPA analysis is not required by CEQA, a project proponent may tailor their alternative analysis to fulfill both the CEQA and 404(b)(1) requirements to help expedite the Water Board's issuance of a 401 Certification and/or waste discharge requirements under Porter-Cologne. Accordingly, we recommend the District prepare and analyze alternatives in the DEIR that would meet the LEDPA standard to help expedite future Water Board actions, and avoid the potential need for an EIR supplement or amendment. **C-5**

The Guidelines sequence the order in which proposals should be approached: 1) Avoid - avoid impacts to waters; 2) Minimize - modify project to minimize impacts to waters; and, 3) Compensate – once impacts have been fully minimized, compensate for unavoidable impacts to waters. When it is not possible to avoid impacts to water bodies, disturbance should be minimized. Compensatory mitigation for lost water body acreage and functions through enhancement, restoration, and/or creation should only be considered after disturbance has been minimized. Where impacts cannot be avoided, the enhancement, restoration, and/or creation of adequate mitigation habitat to compensate for the loss of water body acreage, functions and values must be provided pursuant to the California Wetland Conservation Policy (also known as the "no net loss" policy; Executive Order W-59-93). **C-6**

We also recommend that the DEIR be revised to clearly and fully describe the Project's temporary and permanent impacts to waters of the U.S. and waters of the State. We recognize that the *Habitat Impacts Map* (Figure 3.4-4) shows the impacted areas, but these impacts are not clearly described or summarized in the DEIR. For example, the DEIR states there will be gain of tidal brackish wetland due to the creation of the wetland bench in Reach 1 (0.29 acres). However, the *Habitat Impacts Map* (Figure 3.4-4) 0.98 acres of permanent impacts but this acreage is not mentioned in the narrative, except that "… up to 0.29 acres of ruderal grassland would be permanently converted to coastal brackish marsh and small areas of ruderal grassland would be converted to developed habitat" (pg. 3.4-41). Based on the visual presentation in the map, additional permanent impacts appear to be due to the extensive floodwalls in the proposed Project, but this is not expressly mentioned. We would also expect permanent impacts due to the concrete fill in the proposed Project (3,500 cubic yards), such as for the headwalls to be constructed in one of the creek crossings in the southern section of the Project, but this is not mentioned in the DEIR. **C-7**

Further, although the DEIR states there would be 14,400 cubic yards of sediment excavated and reused onsite and 6,700 cubic yards hauled offsite, those volumes are not associated with any particular activity, or temporary and permanent impacts. The Impacts Map shows the entire Project footprint as temporarily impacted (22.85 acres) due to construction activities (e.g., creek dewatering), but the full 22.85 acres of temporary impacts is not described in the DEIR. Please revise the DEIR to more clearly describe the Project's temporary and permanent impacts from dredging, excavation, and filling of waters of the U.S. and waters of the State. C-8

Finally, regarding LEDPA, please update the DEIR's "State Laws, Regulations, and Policies" section (pg. 3.4-3) to address the LEDPA requirement. We also recommend that the section pertaining to the 401 Certification be included in the Clean Water Act section (though we would not object for it to be repeated under the Porter-Cologne Act section where it is currently mentioned). C-9

2. **Conflict with…Tree Preservation Policy or Ordinance, Impact BIO-5**
The DEIR sates the removal of 22 trees from the riparian habitat will be replaced, consistent with the City of Milpitas tree ordinance. However, simply replacing one tree for another may not fully compensate for the loss in the water quality functions and values that a currently provided by the riparian trees proposed for removal. We require the mitigation and monitoring plan to address the need for compensatory mitigation to offset potential unavoidable water quality impacts from the removal of riparian trees. C-10

3. **Mitigation Measure BIO-1**
The DEIR states the Project has potential to impact several listed species that may occur in the Project site, including (but not limited to), Western pond turtle, steelhead, green sturgeon, and longfin smelt (see Impactss BIO-1a, 1c, 1e, 1g, and 1i). We appreciate the DEIR includes Mitigation Measure BIO-1-*Exclude Fish from Dewatering*. However, we recommend the District consult with the CDFW, and National Marine Fisheries Service, and to determine the need for any "take" permits for listed species. Please also note that impacts to special status species habitat are impacts to the Basin Plan's Preservation of Rare and Endangered Species Beneficial Use. As such, potential impacts to special status species habitat are potentially significant impacts under the HYD-1 criterion, which pertains to impacts that could violate any water quality standards or waste discharge requirements, or substantially degrade water quality. As we evaluate impacts of a project on water quality standards, we evaluate its impacts the beneficial uses of jurisdictional waters in the project. Although RARE is not specifically listed in the Basin Plan for Lower Penitencia Creek, the Project reach is tributary to Coyote Creek, which does have RARE among its designated beneficial uses. Pursuant to the Tributary Rule, and given the stated potential for presence of certain special-status aquatic species, we recommend the DEIR be revised to indicate the HYD-1 impacts are significant, and include appropriate mitigation measures for impacts on HYD-1. C-11

In addition, please note that creek dewatering has the potential to adversely affect water quality by altering dissolved oxygen, turbidity, and temperature. The DEIR should be revised to address these potential effects of creek dewatering. A complete dewatering plan will be required as part of the water quality certification application before we can authorize dewatering activities to proceed. The plan should include elements to contain, monitor, and treat the water, as appropriate, to prevent adverse water quality impacts in the Project and to maintain normal conditions both upstream and downstream of the dewatered areas. C-12

4. Mitigation Measure BIO-13

We appreciate the inclusion of Mitigation Measure BIO-13 to avoid, minimize and compensate for impacts by creating 0.29 acres of new tidal wetland habitat, designated as the "wetland bench" to be constructed in Reach 1. Please note, however, that BIO-13 does not avoid or minimize impacts, but rather compensates for impacts. As mentioned in Comment 1, our Basin Plan requires that dredge, excavation, and fill impacts to waters of the State first be avoided and then minimized to the maximum extent practicable prior to compensating for unavoidable impacts. C-13

We also appreciate that BIO-13 includes the details that will be included in the mitigation plan; e.g., a grading plan, planting plan, monitoring plan with success criteria, etc. However, as presented in the DEIR, Mitigation Measure BIO-13 is still only a concept. We require the mitigation plan to be fully developed to ensure that the proposed mitigation will meet the State's no net loss policy prior to our issuance of a 401 Certification and/or waste discharge requirements (see also Comment 1). C-14

Lastly, BIO-13 indicates that revegetation will be undertaken to mitigate for the Project's potentially significant impacts to waters of the State. BIO-13, however, does not include measures to prevent to introduction and/or spread of *Phytophthora spp.* Given that the District has developed standard BMPs for preventing the introduction and spread of these plant pathogens, the DEIR should include the BMPs as part of BIO-13. C-15

5. Sediment Maintenance

Minimizing the need for seasonal removal of sediment and non-woody vegetation is one of the five stated objectives of the proposed Project. The DEIR states: "Once constructed, the proposed project would reduce the need for routine sediment removal in the channel." However, the Project description has no information to substantiate this. The DEIR further states:

> The proposed project would be designed so that sediment build-up can occur up to the mean high water mark and still ensure sufficient flow capacity to convey the 1-percent flow. During low tide, the majority of accumulated sediment would settle in the Reach 3 low-flow channel. Future sediment removal work in the channel would occur under the District's SMP and would be triggered once sediment accumulation exceeds design standards. Localized sediment removal work may be

C-16

needed to keep culverts and ramps clear. Other post-construction maintenance activities in the project area would also continue under the District's SMP similar to current channel maintenance efforts.

The proposed Project design does very little to alter the existing geomorphic processes within the channel. As a result, we do not expect sediment maintenance to be reduced by the Project. Accordingly, we recommend that the DEIR be revised to clarify how the Project design is expected to reduce sediment maintenance. An example of how to demonstrate a reduction in sediment maintenance in a tidally influenced channel can be found on-line at http://www.marinwatersheds.org/documents/201611GWPFinalReport.pdf.

C-16 Cont.

6. Offsite Detention

In our comments on the Project NOP, we suggested the District analyze the potential for offsite detention. The DEIR indicates the District analyzed this but found offsite detention to be infeasible due in part to the unavailability of property. However, Figure 3.11-1-"Sensitive Receptors" shows two areas within the flood hazard zone that are slated for redevelopment (one of the sites, the "iStar" site, is about 9.5 acres). These properties were not slated for redevelopment at the time of the NOP, so we assume that they were available for conversion to flood control uses at the time the DEIR was being developed. This suggests that there were and are properties potentially available for conversion from industrial/commercial land uses to floodplain management uses in the future. In addition, the DEIR focuses on the infeasibility of identifying offsite storage for 650 acre-feet of water, but does not include an evaluation of smaller storage that could provide incremental flood control benefits. Lastly, the DEIR does not clearly explain the steps taken by the District to identify opportunities to convert existing developed properties into flood management facilities to ameliorate flooding either incrementally or fully. For the Napa River Project, the Water Board worked closely with the local agencies to expedite the conversion of industrial properties to flood management uses. Accordingly, we suggest that to improve the adequacy of the DEIR, revise the DEIR to include a description of the activities undertaken by the District to identify properties for offsite detention, even if those properties appear to have challenges, such as contamination, land use designations, etc.

C-17

7. New or Redeveloped Impervious Surfaces

The proposed Project would replace or restore maintenance roads in all four reaches, which will result in a certain amount of impervious surface. The DEIR should provide the lengths and widths of the new and redeveloped impervious surfaces in the Project to provide an adequate description of potential impacts. We also suggest incorporating measures into the design of the Project, such as pervious asphalt, to mitigate for impacts from new and replaced impervious surfaces. We look forward to reviewing these measures in more detail when receiving the 401 Application.

C-18

8. Floodwall Aesthetics

Floodwall aesthetics are within the Water Board's purview because the Project reach

C-19 Cont.

has the Non-Contact Recreation Beneficial Use, which includes sightseeing. As such, we recommend the District revise the DEIR to clearly show the floodwall heights from various perspectives, particularly since new housing to be developed west of the Project will be affected. We noted that the design flow of 8,720 cubic feet per second (cfs) as the 100-year flow event is based on the future flood control project in Berryessa Creek upstream of Interstate 680, though this upper watershed project is not anticipated to be constructed for at least 10 years. Without that project, the 100-year design flow would be 6,900 cfs. The DEIR states that the incremental height difference in floodwalls for 6,900 cfs versus 8,720 cfs is "minor." We recommend the District clearly state the floodwall heights and show accurate renderings of all floodwall scenarios in the DEIR to avoid any misunderstanding among community members and other stakeholders.

C-19 Cont.

Thank you for considering our comments on the DEIR. If you have any questions about our comments please contact Susan Glendening of my staff at (510) 622-2462 or susan.glendening@waterboard.ca.gov.

Sincerely,

Xavier Fernandez

Digitally signed by Xavier Fernandez
Date: 2017.07.03 16:46:33 -07'00'

Xavier Fernandez, Section Leader
Watershed Management Division

Cc: SCVWD, Rechelle Blank, RBlank@valleywater.org
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Response to Comment C-1

The comment states that the DEIR lacks sufficient information for the commenter to determine whether the preferred alternative (or any of the EIR alternatives) would meet the SF Bay Water Quality Control Plan (Basin Plan) requirement that impacts to wetlands and other waters of the State would be avoided and minimized to the maximum extent practicable.

As summarized in DEIR Chapter 2, Section 2.5, "Project Development", the District has developed and evaluated a number of conceptual design alternatives including different combinations of infrastructure upgrades to improve flood protection at Lower Penitencia Creek. Conceptual design alternatives were evaluated for their hydraulic and engineering conditions and were refined based on the District's Natural Flood Protection (NFP) evaluation process. Through the evaluation process, the District evaluated each design alternative based on its ability to meet project objectives (including avoiding and minimizing potential environmental effects) and technical feasibility. Through this evaluation and project refinement process, the District eliminated and revised these alternatives to eventually arrive at the project currently proposed. The project has been designed to avoid and minimize impacts to wetlands and waters of the State to the maximum extent practicable. Impact BIO-3 in DEIR Chapter 3.4, *Biological Resources,* describes the project's potential impacts on wetlands and waters of the U.S. and State in detail. In addition, a Section 404(b)(1) alternatives analysis will be conducted for the proposed project during the Section 404 permitting process in coordination with the USACE, in which the least environmentally damaging practicable alternative (LEDPA) will be identified. However, the remaining text in this response provides a brief summary supporting the District's initial analysis that the proposed Project would meet the LEDPA requirement pursuant to the federal regulations.

DEIR Chapter 5, *Alternatives*, identifies a reasonable range of alternatives to the proposed project, including the two alternatives identified by the RWQCB in their scoping letter dated July 28, 2015, which is included in Volume 3, Appendix A of this FEIR. Chapter 5 analyzes whether the alternatives would meet all or most of the project objectives and the feasibility and potential environmental consequences of each alternative. **Table 3-3** below lists these alternatives, including those recommended by RWQCB, and shows how they compare to the LEDPA requirements.

Table 3-3. LEDPA Analysis of Alternative Compared to the Project Alternatives

Alternative	Meets Project Objectives?	Least Environmentally Damaging?	Is it Practicable?	Is this Alternative the LEDPA?
Conceptual Design Alternative 7 – Off-Stream Detention Basin[a,b]	Yes	Reduces need for floodwalls but would result in substantial off-site construction impacts. Depending on the location of the detention basin, it could result in impacts on aquatic habitat, special-status species, and riparian habitat.	No, excessive implementation cost due to need for land acquisition (43-65 acres would be required).	No
Conceptual Design Alternative 8 – Bypass Channel to Coyote Creek[a]	Yes	No – Construction of this alternative would result in greater impacts to aquatic habitat and water quality.	No, excessive implementation cost due to need for land acquisition.	No
Conceptual Design Alternative 9 – Annual Sediment Removal[a]	No – would not provide 1% flow conveyance capacity	No - This alternative would result in greater long-term impacts to aquatic habitat and water quality.	Yes	No
Geomorphic Channel with Woody Trees and Reduced Channel Access Roads[a,b]	Uncertain	No- This alternative would result in greater construction period impacts (noise, vibration, air quality, water quality).	No, excessive implementation cost due to need for land acquisition.	No
No Project Alternative	No - would not provide 1% flow conveyance capacity	No – While this would avoid construction-related impacts on water quality and aquatic habitat, in the event of a 100-year flood event, it could result in severe damage to surrounding land uses including adverse effects on aquatic habitat, special-status species, and riparian habitat. Increased turbidity due to flooding could degrade water quality as well.	Yes	No

Alternative 1 (Reach 1 Raised Levee, Floodwalls, and Ongoing Sediment Removal)	Partially – more frequent sediment removal required	No- Similar construction period impacts (noise, vibration, air quality, water quality). Would require more frequent sediment removal and would thus result in greater operational/maintenance impacts on water quality and aquatic habitat.	Yes	No
Alternative 2 (Raised Setback Levee, Reaches 1 and 3 Wetland Benches, and Floodwalls)	Yes	No- This alternative would result in greater construction period impacts on water quality, aquatic habitats, and other resources including noise, vibration, and air quality.	Yes	No
Alternative 3 (Reach 1 Raised Levee, Reach 3 Concrete Channel Lining and Floodwalls)	Partially – more frequent sediment removal required	No – This alternative would result in greater construction period impacts (noise, vibration, air quality, water quality) and increased concrete channel lining would degrade aquatic habitat.	Yes	No

Notes: [a] Alternative was considered but dismissed for further analysis in DEIR Chapter 5, *Alternatives.*

[b] Alternative was recommended by RWQCB in scoping letter dated July 28, 2015, presented in Volume 3, Appendix A, of this FEIR.

Among the alternatives analyzed in the DEIR, several would not meet most project objectives and therefore cannot be the LEDPA. Among the alternatives that would or could meet most or all project objectives, several (Conceptual design alternatives 7 and 8, Geomorphic Channel with Woody Trees and Reduced Channel Access Roads) are not practicable due to excessive cost and/or logistical challenges (e.g., land acquisition). Alternative 2 would meet project objectives and appears to be practicable. Alternative 2 would also permanently create greater wetlands in the project area than the proposed project but would also result in permanent removal of more riparian habitat and creation of more in-stream hardscape than the proposed project. Alternative 2 would also result in greater construction-related impacts associated with traffic, noise, vibration, hazards and hazardous materials, utilities and service systems, and air quality. For the reasons listed above, the proposed project is considered the LEDPA.

Other comments in Letter C raise more detailed issues regarding the project's ability to meet Basin Plan requirements and impacts to wetlands and waters of the State. Please refer to Responses to Comments C-3 through C-19 for additional responses to that topic.

Response to Comment C-2

The comment states that the DEIR does not clearly identify the project's potential impacts on jurisdictional waters and therefore, the commenter was unable to clearly determine whether mitigation for impacts on waters of the U.S. and waters of the state would comply with State and RWQCB regulations and policies.

As noted in Response to Comment C-1, impacts to wetlands and waters of the U.S. and state were evaluated in detail under Impact BIO-3 in DEIR Chapter 3.4, *Biological Resources.* As discussed in Response to Comment B-2, above, the proposed project would result in 0.90 acre of temporary impacts on wetlands, and 0.14 acre of permanent impacts on wetlands. Of the project's 0.14 acre of permanent impacts, however, 0.08 acre would be converted from non-tidal seasonal saline wetland to coastal brackish marsh due to the newly created wetland bench. Thus, the proposed project's net permanent removal of wetland habitat would be 0.06 acre. To more clearly show the project's impacts on waters of the state and U.S., the following text in Impact BIO-3 (DEIR page 3.4-53) has been revised:

> As described above, construction activities could result in hydrologic interruption (e.g., dewatering or diversion), vegetation removal, degradation of water quality (e.g., increased sedimentation and turbidity), and other temporary direct impacts on wetlands and other waters. In addition, direct impacts would occur due to the conversion of wetlands and other waters to upland habitat. The project would impact wetlands and other waters. **Table 3.4-5** summarizes the project's estimated temporary and permanent impacts on wetlands, waters of the U.S., and waters of the state. The project would permanently convert 0.05 acre of non-tidal seasonal saline wetland and 0.01 acre of coastal brackish marsh to ruderal grassland due to the relocation of the levee in Reach 1, and would convert 0.08 acre of non-tidal saline wetland to coastal brackish marsh, a permanent change in wetland type but not the overall amount of wetlands on the site. As such, the project's net permanent impacts on wetlands of the U.S. and State would be 0.06 acre.
>
> In addition, about ~~9.7 ac~~8.84 acre of tidal aquatic and 0.87 acre of coastal brackish marsh habitat would be temporarily disturbed during construction (primarily due to dewatering), as well as 0.03 acre of non-tidal seasonal saline wetland, resulting in a

short-term loss of functions and values. The project's estimated temporary impacts on wetlands of the U.S. and state would be 0.90 acre. As shown in Table 3.4-5, the project would result in 8.84 acres of temporary impacts on waters of the U.S./waters of the state. However, these temporarily disturbed areas would remain wetlands and other waters habitat after the project is completed so that there would be no long-term loss of jurisdictional area, or functions and values.

Table 3.4-5. Project Impacts on Wetlands and Other Waters of the U.S. and State

Project Reach	Impacts on Wetlands and Other Waters of the U.S. and State (acres)			
	Temporary Impacts to Wetlands	Permanent Impacts to Wetlands	Temporary Impacts to Other Waters of U.S. and State	Permanent Impacts to Other Waters of U.S. and State
Reach 1	0.61	0.14	0.72	0.00
Reach 2	0.03	0.00	0.68	0.00
Reach 3	0.03	0.00	6.57	0.00
Reach 4	0.23	0.00	0.87	0.00
TOTAL	**0.90**	**0.14**	**8.84**	**0.00**

***Note**: * The California Water Code Section 13050(e) defines "waters of the state" as any surface water or groundwater within boundaries of the state.*

Other comments in Letter C provide more specific comments on the DEIR and specifically on impacts to wetlands and waters of the U.S. and state. Refer to Responses to Comments C-3 through C-9, particularly Response to Comment C-7, for additional response to this topic.

Response to Comment C-3

The commenter correctly summarizes characteristics of the proposed project. No additional response is needed.

Response to Comment C-4

The comment notes that both a Clean Water Act (CWA) Section 401 water quality certification (401 Certification) and a CWA Section 404 Permit from USACE may be necessary if the proposed project impacts waters of the U.S. A Report of Waste Discharge under the Porter-Cologne Water Quality Control Act may also be necessary if the proposed project results in a discharge of pollutants, including but not limited to sediment, to waters of the State. The comment further notes that a Streambed Alteration Agreement from CDFW may be needed if work occurs in stream channels.

This comment is acknowledged. As noted in DEIR Table 2-3 (page 2-4), the District intends to prepare and submit applications to both RWQCB and USACE to comply with the Clean Water Act and Porter-Cologne Act. The District also plans to submit a notification to CDFW for a Streambed Alteration Agreement.

Response to Comment C-5

The comment states that the District shall conduct an alternatives analysis consistent with the U.S. Environmental Protection Agency's (USEPA's) 404(b)(1) Guidelines and notes that the Basin Plan incorporates the 404(b)(1) Guidelines by reference to determine the circumstances under which filling of wetlands, streams, or other waters of the U.S. and/or State may be permitted. Per the Basin Plan, filling, dredging, excavating and discharging into a wetlands or water of the state is prohibited unless the project meets the LEDPA standard through the 404(b)(1) analysis. While not required under CEQA, the commenter recommends that the District evaluate alternatives that would meet both CEQA and LEDPA standards to assist with the RWQCB's future actions and avoid the need for a supplemental EIR or amendment.

This comment is appreciated. As correctly noted by the commenter, evaluation of the LEDPA alternative is not required under CEQA and need not be described in an EIR. Consistent with CEQA Guidelines Section 15126.6[a], DEIR Chapter 5, *Alternatives,* describes a range of reasonable alternatives of the proposed project that are feasible, would attain most of the basic project objectives, and would reduce or eliminate one or more of the significant impacts of the proposed project. DEIR Section 5.3 describes four alternatives including the No Project Alternative and includes a general evaluation of environmental impacts associated with each alternative. The alternatives analysis presented in the DEIR is intended to foster informed decision-making and public participation. As part of the 404 permit application process, the District plans to prepare a 404(b)(1) alternatives analysis that complies with the USEPA's Guidelines, which will be submitted to RWQCB along with the permit application. Please refer to Response to Comment C-1, above, which presents a preliminary LEDPA analysis for the proposed project.

Response to Comment C-6

The comment describes how the USEPA's 404(b)(1) Guidelines should be approached: (1) avoid impacts to waters; (2) minimize impacts to waters; and (3) compensate for unavoidable impacts to waters once impacts have been fully minimized. Compensatory mitigation should only be considered after disturbance has been minimized. The comment further notes that functions and values must be provided pursuant to the California Wetland Conservation Policy ("no net loss" policy; Executive Order W-59-93).

The proposed project has been designed to avoid and minimize impacts to waters and wetlands to the extent practicable. As noted in Response to Comment C-1, the project has a long history. The project planning process involved consideration of a variety of alternatives as documented in the District's Lower Penitencia Creek Planning Study Report (2016b). Alternatives were evaluated based on their ability to meet project objections, technical feasibility, ability to meet NFP criteria, and potential effects on the environment. Additionally, throughout the document, the DEIR identifies applicable District BMPs that would avoid and minimize potential adverse effects on environmental resources. Specifically, under Impact BIO-3, the DEIR identifies a suite of BMPs that would be implemented minimize impacts on wetlands functions during the construction phase by reducing the potential for water quality degradation (see DEIR page 3.4-53 to 3.4-54). The District is familiar with and understands the California Wetland Conservation Policy (also known as the "no net loss" policy). As part of the permitting process and consistent with Mitigation Measure BIO-13 (pp. 3.4-54 and 3.4-

55 of the DEIR), the District will compensate for unavoidable impacts to wetlands through enhancement, restoration, and/or creation.

Response to Comment C-7

The Regional Water Quality Control Board (RWQCB) has recommended the EIR be revised to more clearly and fully describe the project's impacts on waters of the U.S. and waters of the state, including impacts due to installation of floodwalls and headwalls at the Milmont Drive bridge crossing.

Figure 3.4-4 clearly shows that the vast majority of permanent impacts would occur in ruderal grasslands and non-tidal seasonal saline wetlands; less than 0.1 acre of coastal brackish marsh would be permanently impacted. Proposed floodwalls would be located wholly in developed/landscaped or ruderal grassland habitats and would not impact non-tidal seasonal saline wetlands, coastal brackish marsh, tidal aquatic, or willow riparian woodland habitats. Similarly, headwalls would be constructed and installed above the channel and would not impact waters or wetlands.

For clarification regarding the proposed project's temporary and permanent impacts on waters of the U.S. and waters of the state, refer to Responses to Comments B-2 and C-2 above, which addresses these topics.

Response to Comment C-8

The comment notes that the DEIR states that there would be 14,400 cubic yards of sediment excavated and reused onsite and 6,700 cubic yards hauled offsite. The commenter requests that the DEIR describe how these excavation, reuse, and off-hauling volumes are associated with temporary and permanent impacts. The comment requests that the DEIR be revised to more clearly describe the project's temporary and permanent impacts on waters of the U.S. and State due to sediment removal.

The comment correctly points out the off-haul and sediment reuse values stated on page 2-22 of the DEIR. For clarification, those values derive from the District's Planning Study Report (SCVWD 2016b) and were used to develop construction-related truck trip estimates for the DEIR's traffic, air quality, and greenhouse gas emissions analyses (see Sections 3.3, 3.7, and 3.13 of the DEIR). As stated on page 2-22 of the DEIR, since development of the Planning Study Report, the project design has advanced and the 14,400 cubic yards of sediment excavation and reuse and 6,700 cubic yards of off-hauled material are considered overly conservative as the project would actually require less earth movement. Since publication of the DEIR, project design has advanced further and the District estimates that only about 2,300 cubic yards of sediment would be removed from the channel and would off-hauled to the Newby Island Landfill. Approximately 4,600 cubic yards of soil would be excavated during construction of the vegetated bench. To the extent feasible, this soil would be used as fill for the replacement levee in Reach 1. An additional 3,430 cubic yards of soil would be hauled to the site for the replacement levee in Reach 1 and the raised levee in Reach 4. Note that the text in DEIR Chapter 2 and other relevant resource sections have been revised to reflect updated excavation and fill volumes; please refer to Chapter 4, *Revisions to the DEIR,* to review these text changes.

The discussion under Impact BIO-3 including the revisions specified in Response to Comment C-2 describes the proposed project's impacts on wetlands, waters of U.S., and waters of the State. Activities that would result in temporary impacts on waters include sediment removal in Reaches 2, 3, and 4, and dewatering of the channel throughout the entire project area (Reaches 1 through 4) which total about 5,100 linear feet of channel. As described in the DEIR, dewatering of the channel would be required for construction of the replacement levee and wetland bench in Reach 1, sediment removal within Reaches 2 and 3, construction of the headwalls to the San Andreas Drive bridge, and sediment removal in Reach 4. Reaches 1, 2, 3, and 4 would be temporarily dewatered to allow project construction. Sediment removal in Reaches 2, 3, 4 would occur entirely within the same area dewatered for overall project construction. Therefore, sediment removal would not result in an increase to the project's impacts on waters of the U.S. and state, beyond the temporary impacts associated with other project elements. Refer to Response to Comment C-2, above, for a more detailed breakdown of the project's impacts on wetlands and waters of the State.

In response to the request for clarification of impacts due to sediment removal, the District has revised the following paragraphs under Impact BIO-3 (DEIR pages 3.4-52 to 3.4-53).

> Proposed in-channel activities, including levee modification, sediment removal, and creation of an excavated bench in Reach 1, as well as the use of the off-channel area located between North McCarthy Boulevard and I-880 as Staging Area A, would result in the direct modification of wetland and aquatic communities in the project area, as well as indirect impacts on downstream wetlands and aquatic communities (also called "other waters"). Wetland vegetation may be lost due to mechanical or physical clearing (including at access and staging areas and at sediment removal locations), and damage to vegetation may occur due to crushing by equipment; trampling by personnel; and compaction of soil, which could result in damage to plant roots. Removal of wetland vegetation and sediment may result in the temporary reduction of clonal propagules for colonization of downstream areas. In addition, materials may fall into the channel (in Reach 4) during construction of the new headwalls at the San Andreas Drive bridge. Subsequent installation of erosion control materials, hydroseeding, and planting may also result in the deposit of materials into the channels.
>
> Levee modifications in Reaches 1 and 4~~,~~; bench excavation in Reach 1~~,~~; installation of sheetpile floodwalls in Reaches 1, 2, 3, and 4~~,~~; sediment removal in Reaches 2, 3, and 4; and construction of the new headwalls for the San Andreas Drive bridge in Reach 4 would require temporary dewatering of the affected channel. These activities may also necessitate the operation of heavy equipment within the streambed (after dewatering). Movement of heavy equipment may compact the substrate and damage vegetation, and the lack of water may result in changes to the extent of wetland communities present in the work site. Furthermore, because barren slopes are more susceptible to erosion from rainfall events, the loss of non-instream vegetation along stream banks following project activities may result in an increase in erosion and sedimentation. This may lead to the filling in of pools and damage to wetland vegetation. The proposed project's potential to cause soil erosion and loss of topsoil is evaluated in Impact GEO-3 in Section 3.6, *Geology, Soils, and Seismicity*.

Response to Comment C-9

The commenter requests that the DEIR's "State Laws, Regulations, and Policies" section (p. 3.4-3) describe the LEDPA requirement and that the section pertaining to the 401 Certification be included in the Clean Water Act section.

As described in Response to Comment C-5, the District understands the LEDPA requirement and will prepare a 404(b)(1) alternatives analysis as part of their permit application for a 404 permit. No revisions to the DEIR are required.

Response to Comment C-10

In regards to Impact BIO-5, the comment expresses concern about the removal of trees from riparian habitat and questions whether the replacement of one tree for another fully compensates for the loss in the water quality functions and values currently provided by riparian trees proposed for removal.

As described in the DEIR on page 3.4-57, Impact BIO-5 indicates that approximately 22 trees with a diameter-at-breast-height (dbh) of 6 inches would be removed from the project area. The impact statement includes a discussion of the most common tree species (the majority of which are ornamental) in the project area and their size range. Since publication of the DEIR, the project's landscaping plan has been further developed. The landscaping plan indicates removal of a total of 63 trees including 33 live trees with a dbh of 6 inches or more. All trees planned for removal are located at the top of bank outside the main channel. Consistent with the DEIR, no trees located in willow riparian habitat (primarily the central berm within Reach 3) would be removed. The District has revised the second paragraph from Impact BIO-2 to clarify that no trees would be removed from the willow riparian habitat area (DEIR page 3.4-52). This text has been revised to address comments raised in Comment B-7 as well; see Response to Comment B-7 for revised DEIR language.

In response to this comment and to include the updated number of trees planned for removal, the fourth sentence of the first full paragraph on DEIR page 3.4-57 has been revised as follows:

> In total, ~~about 22~~an estimated 33 live trees with a dbh of 6 inches or more would be removed during project construction.

Response to Comment C-11

The comment recommends that the District consult with CDFW and NMFS to determine the need for any "take" permits for listed species. The comment also notes that impacts to special-status species are impacts to the Basin Plan's Preservation of Rare and Endangered Species Beneficial Use and therefore recommends that such impacts and mitigation measures be addressed under Impact HYD-1 in Section 3.9, *Hydrology and Water Quality*. The comment further notes that while RARE is not listed in the Basin Plan for Lower Penitencia Creek, the project reach is just upstream of Coyote Creek which does have RARE among its designated beneficial uses.

The District intends to consult with CDFW throughout the permitting process regarding the potential need for a take permit for state-listed species prior to and upon submittal of the notification for a Streambed Alteration Agreement. The District expects that the USACE will initiate Section 7 consultation with NMFS through the project's Section 404 permitting process and that any potential take issues for steelhead would be addressed through that process.

In response to the commenter's second main point, please note that Impact HYD-1 focuses on addressing the following CEQA Guidelines Appendix G criterion: "Violate any water quality standards or waste discharge requirements". It would be unnecessary to describe the project's consistency with the Basin Plan's RARE Beneficial Use in this particular impact discussion since Impact HYD-1 focuses on the proposed project's effects on water quality. The DEIR properly addresses potential impacts on special-status species including but not limited to western pond turtle, steelhead, green sturgeon, and longfin smelt in Section 3.4, *Biological Resources.* The District acknowledges that protection of special-status species is also a beneficial use in the Basin Plan for which water quality objectives are set. For the purposes of the CEQA evaluation, no text revisions to the DEIR are warranted since the project's impacts on rare and special-status species are already addressed in the Section 3.4. Consistency with the Basin Plan standards will be addressed further in the project's application for a 401 Certification.

Response to Comment C-12

The commenter requests that the DEIR be revised to address potential water quality effects pertaining to altering dissolved oxygen, turbidity, and temperature. The commenter also requests that a dewatering plan be developed as part of the water quality certification application.

As noted in Response to comment C-11, impacts on water quality are addressed under Impact HYD-1 in Section 3.9, *Hydrology and Water Quality.* As noted on DEIR 3.13, the DEIR acknowledges that construction activities that would disturb the channel bank could increase turbidity, water temperature, and dissolved oxygen. While the DEIR does not specifically mention dewatering as an activity that would contribute to these water quality effects, the impact discussion is meant to factor in dewatering. To clarify this point, the following sentences on DEIR pages 3.9-12 and 3.9-13 are revised as follows:

> More specifically, construction activities that would disturb channel bank and bed material <u>(e.g., construction of the vegetated bench in Reach 1 and dewatering)</u> could cause erosion and sediment transport downstream. Increased suspended sediment loads could increase turbidity, water temperature, and dissolved oxygen.

Lastly, the District understands and that a dewatering plan will need to be developed as part of the 401 Certification application. The District will develop a dewatering plan as project design advances and will submit this to the RWQCB for review.

Response to Comment C-13

The comment points out that Mitigation Measure BIO-13 does not avoid or minimize impacts but compensates for impacts. The comment reiterates that the Basin Plan requires impacts

due to dredge, excavation, and fill of waters of the State first be avoided and then minimized to the maximum extent practicable prior to compensating for unavoidable impacts.

The District has designed the project to avoid and minimize waters and wetlands to the maximum extent practicable. Please see Response to Comment C-1 and C-6 for additional discussion regarding this topic.

Response to Comment C-14

The comment states that the mitigation plan described in Mitigation Measure BIO-13 is only a concept. The comment also states that the RWQCB will require the mitigation plan to be fully developed to ensure that it meets the State's no net loss policy prior to issuing a 401 Certification and/or waste discharge requirements.

This comment is appreciated. Mitigation Measure BIO-13's level of detail meets CEQA requirements for mitigation measures. The District will develop a more detailed mitigation plan pursuant to the 401 Certification application requirements.

Response to Comment C-15

The comment asserts that Mitigation Measure BIO-13 does not include standard BMPs for preventing the spread of *Phytophthora spp.* and requests that the DEIR include such BMPs developed by the District as part of Mitigation Measure BIO-13.

Please note that the District has not formally adopted any BMPs to address issues relating to spreading of *Phytophthora spp.* However, the District has been participating in research and management efforts through the *Phytophthoras* in Native Habitats Work Group, a coalition of California native plant nursery managers, land management agencies, researchers and non-profit organizations. The Work Group was created in 2015 to coordinate and develop a comprehensive program of management, monitoring, research, education and policy to minimize the spread of Phytophthora pathogens in restoration sites and native plant nurseries. Regulatory agencies that have interests in these issues and have participated in this Work Group include CDFW and USFWS. The Work Group effort is ongoing but it has developed regional guidelines to minimize *Phytophthora* pathogens in restoration projects and nurseries. The District will follow these guidelines when conducting revegetation activities for this project. Implementation of these guidelines would avoid/minimize impacts associated with spreading of the pathogens, and no additional mitigation would be required.

The following text on page 2-20 of the DEIR has been revised:

Hydroseeding and Slope Stabilization and Revegetation

Disturbed areas, including the side slopes of the setback replacement levee, maintenance road shoulders, and staging areas would be hydroseeded at the end of the dry-period construction season (likely in October) to provide erosion protection and prevent sediment erosion and transport to the channel. A hydroseed mix consisting of native and naturalized grass seeds, mulch, and tackifier would be sprayed onto the ground surface. In addition, biodegradable mats would be placed on

top of disturbed areas, such as on relatively steep levee-side slopes, where necessary to prevent erosion.

For revegetation activities, the District will follow regional guidelines developed by the *Phytophthoras* in Native Habitats Work Group. This Work Group is a coalition of California native plant nursery managers, land management agencies, researchers, and non-profit organizations, created for the purpose of coordinating and developing comprehensive program management, monitoring, research, education and policy to minimize the spread of *Phytophthora* pathogens in restoration sites and native plant nurseries. The full text of the guidelines can be found at http://www.suddenoakdeath.org/wp-content/uploads/2016/04/Restoration.Nsy .Guidelines.final .092216.pdf and http://www.suddenoakdeath.org/wp-content/uploads/2016/04/Restoration_guidance_FINAL-111716.pdf. Implementing the regional guidelines would require the District to follow sanitation, planting, and nursery guidelines through the following:

- If container plants are used for revegetation efforts, the District will require the nursery to implement the "Guidelines to Minimize Phytophthora Pathogens in Restoration Nurseries" (2016a).

- In preparation for and during restoration activities, the District and its contractors will follow the "Guidelines to Minimize Phytophthora Contamination in Restoration Projects" (2016b).

In addition, to the maximum extent practicable, the District will follow general site sanitation practices such as:

- The exterior and interior of all vehicles, construction equipment and tools should be clean and free of debris, soil and mud (including mud on tires, treads, wheel wells and undercarriage)

- Work shoes should be kept clean by inspection of shoe soles and removal of mud, debris, and soil off treads before moving to a new job site.

- Vehicles should stay on established roads whenever possible.

Response to Comment C-16

The comment states that the Project Description has no information substantiating why the proposed project would reduce the need for routine sediment removal in the channel. The comment states that the proposed design does little to alter the existing geomorphic processes within the channel and as a result, does not expect sediment maintenance to be reduced by the proposed project. The comment requests that the DEIR be revised to clarify how the project design would reduce sediment maintenance.

The existing channel of Lower Penitencia Creek has insufficient capacity to convey the 1% flow, which has resulted in a need for frequent removal of accumulated sediment from the channel to maximize conveyance capacity. During the period from 1983 to 2015, the District

removed sediment from the project area 10 times. The amount of sediment removed ranged from 2,460 cy to 33,300 cy. Without the proposed project, the flow conveyance capacity of the channel compared to the 1% flow will decrease over time

In contrast to the existing situation, the proposed project would provide 1% flow conveyance capacity and freeboard of 3.5 feet or more throughout the channel length, reducing the need for sediment removal. The design of the proposed project would reduce the need for future sediment removal below that of the existing Lower Penitencia Creek channel in three ways.

1) The design of the proposed project incorporates 2.59 feet of sea-level rise. In contrast, the existing creek channel was not designed to accommodate sea-level rise. Incorporating sea-level rise into the proposed design has the effect of increasing freeboard above the water surface elevation during that 100-year flow event. Current and future sediment removal under the District's SMP is designed to maintain channel flow conveyance capacity. Sediment is removed only when sediment accumulation reduces freeboard below pre-determined levels. Thus, greater freeboard will result in less frequent need for sediment removal. The amount of "added" freeboard provided by the proposed design will gradually decrease as sea levels rise over time. However, the projected sea level rise of 2.59 feet will not be realized until the end of the 50-year expected lifespan of the proposed Lower Penitencia Creek improvements. Thus, the "added" freeboard resulting from incorporating sea level rise into the project design would be present throughout the project lifespan and the need for sediment removal would be less frequent than under current conditions.

2) Lower Penitencia Creek channel is subject to ebb and flood tides, which results in sediment being brought in by the tides in addition to the sediment transported from upstream. As a result, sediment tends to accumulate up to the Mean Higher High Water (MHHW) level. The proposed project design considers the channel sediment conditions prior to the 2015 sediment removal work (which occurred through the District's Stream Maintenance Program) as the baseline channel condition. The 2015 baseline included sediment accumulated to only slightly below MHHW. The current channel design would not allow this level of sediment accumulation, thus the need for sediment removal in 2015. Compared to the existing channel, the flow capacity of the reconstructed channel would be less sensitive to sediment accumulation; therefore, sediment removal would be needed less frequently.

3) Reaches 2, 3, and 4 have a combined length of 4,300 feet, which represents 84% of the channel. In these three reaches, the proposed project would not expand the channel width or change the channel geomorphology. Permanent channel improvements would be limited to floodwalls on the crest of existing levees along Reaches 2 and 3, and the west bank of Reach 4, and raising the existing levee crest elevation at the east bank of Reach 4. The water surface elevation would reach the elevation of these improvements only during the 50+- year flow event. There would be no change in channel size for flow events smaller that 50+ flow event (including the channel-forming 1.5 year flow). These smaller flows are responsible for almost all sediment transport and deposition and the width, depth, and velocities of these flows will not change from the current situation. Thus, the project design would not change sedimentation rates within those three reaches. However, in Reach 1 (representing 16% of the project length), the proposed

project deign would setback the south bank levee to accommodate a wetlands bench, widening the creek channel. The surface of the wetlands bench would be at about the MHHW elevation and would be planted with wetlands vegetation to establish a dense vegetative growth. Although the surface of the bench would be above most creek flows (including most tidal flows) some sediment deposition would occur. The species planted on the bench would be adapted to growing in tidal depositional environmental, thus sediment removal would not be necessary at the wetlands bench in Reach 1. The deeper portion of the channel adjacent to the wetlands bench, which transports almost all of the creek and tidal flows, would retain its existing morphology with no change in width, depth, or flow velocities compared to the existing channel. No change in sedimentation rates is expected.

As described above, the proposed project design would have no effect on the rates of sediment deposition within the channel while reducing the sensitivity of the channel conveyance capacity to sediment accumulation (i.e., more sediment could accumulate before removal is needed to maintain flow conveyance capacity). After project implementation, sediment removal will be required less frequently than under current conditions.

Response to Comment C-17

The comment points out that Figure 3.11-1 of the DEIR shows two areas that are slated for redevelopment, and notes that these areas were not slated for redevelopment at the time the NOP was issued and assume that they were available for conversion to flood control uses at the time the DEIR was underway. The comment notes that the DEIR focuses on the infeasibility of identifying offsite storage for 650 acre-feet of water but does not include an evaluation of smaller storage that could provide incremental flood control benefits. The comment references the Water Board's past experience working on the Napa River Project, which involved converting large former agricultural and industrial properties to floodplain storage and flood management uses and thus, requests that the EIR be revised to include a description of activities undertaken by the District to identify properties for offsite detention.

In response to the first part of the comment, please note that Milpitas City Council approved a multi-unit residential development at 1210 California Circle (also referred to as the "iStar development") on November 18, 2014, which was eight months prior to issuance of the DEIR NOP on June 9, 2015. The City of Milpitas approved the Waterstone residential development in 2013. As such, these properties were not available for conversion to flood control uses at the time the DEIR was developed.

The District's Planning Study Report (2016b) evaluated a number of other design alternatives, some of which are described in DEIR Chapter 5, *Alternatives.* One of these design alternatives included an offsite detention storage option, which was a recommended approach by the RWQCB in their scoping letter. As described in DEIR Section 5.4, other conceptual design alternatives considered included a bypass channel to Coyote Creek, annual sediment removal, and construction of a geomorphic channel planted with woody riparian trees and reduced channel access roads. The District did not evaluate an alternative that included floodplain water storage that could provide incremental flood benefits because such an alternative, based on the availability of floodplain area to provide such benefits was not feasible and would not meet the basic project objectives including the ability to convey the future 1-percent design flow from Lower Berryessa Creek.

The Napa River Project referenced by the commenter is not comparable to the Lower Penitencia Creek Improvements Project. The two projects are in entirely different land-use settings, and this difference in land use is key. The Lower Penitencia Creek channel is an engineered channel, in a dense urban setting, near a major interstate highway surrounded by residential, commercial, and office/light industrial uses. Additionally, the Milpitas project setting occurs in a portion of Silicon Valley, which is in extremely short supply of housing, including affordable housing. As noted above, there currently are no vacant properties available for conversion to flood control purposes. In contrast, the more rural Napa example referenced in the comment occurred in a relatively under-developed floodplain setting that had a combination of agricultural open space and no longer active industrial land uses. The Napa floodplain setting was not zoned or designated for housing like the Milpitas project setting for the Lower Penitencia project. Given the high land costs and local planning policies, consideration of an alternative that involves converting adjacent industrial and residential uses for flood management would be infeasible.

Moreover, consistent with the CEQA Guidelines (Section 15126.6[a]), the DEIR evaluates a reasonable range of alternatives that are feasible and would meet most project objectives including:

- No Project Alternative
- Alternative 1: Reach 1 Raised Levee, Floodwalls, and Ongoing Sediment Removal
- Alternative 2: Reach 1 Raised Setback Levee, Reaches 1 and 3 Wetland Benches, and Floodwalls
- Alternative 3: Reach 1 Raised Levee, Reach 3 Concrete Channel Lining, and Floodwalls

These alternatives and the potential environmental effects associated with them are described in detail in Section 5.3 of the DEIR. In conclusion, the DEIR's Alternatives chapter adequately meets CEQA's requirements outlined in Section 15126.6 of the CEQA Guidelines. No text revisions to Chapter 5 of the DEIR are necessary.

Response to Comment C-18

The comment asks that the EIR provide the lengths and widths of new and redeveloped impervious surfaces created by the project. The comment also recommends incorporating measures into the project design, such as pervious asphalt, to mitigate for impacts from new and replaced impervious surfaces.

The discussion under Impact HYD-5 of DEIR Section 3.9, *Hydrology and Water Quality,* notes that the proposed project would not introduce substantial new impervious surfaces. The proposed project design minimizes the length, size, and number of new and redeveloped roads and uses permeable surfaces wherever possible to promote stormwater infiltration. In addition, stormwater running off the District's maintenance roads would be directed to vegetated areas located between the road and creek areas to promote infiltration and remove sediment and other pollutants from the runoff before it enters the creek. The proposed project does not change the size or location of storm drain outfalls within the project area,

but would increase channel flow conveyance capacity, thereby accommodating any increases in storm water flows resulting from increased urbanization of the project vicinity. **Table 3-4**, below, quantifies the existing impervious surface of channel access roads within the project area and the area of impervious surfaces after the proposed project is constructed. Most of surfaces would be retained in their existing condition or replaced with similar surfaces. In some areas, the existing maintenance roads would be widened, thereby increasing the amount of surface area, and in some areas existing impervious surface would be removed.

Table 3-4. Area of New and Redeveloped Roads in the Project Site

Reach	Existing Impervious Area within Project Site (sq. ft.)	Change in Impervious Area within Project Site (sq. ft.)*	Comments
1	0	0	All project roads would be surfaced with aggregate base.
2	6,185	0	New drive way to City pump station will be surfaced with aggregate base.
3	65,655	7,742	Paved Penitencia Creek Trail on east levee would be widened.
4	25,238	-1,112	Although the paved Penitencia Creek Trail on west levee would be widened, the existing concrete pavement on east levee at Milmont Drive access gate would be replaced with aggregate base.
TOTAL	**97,078**	**6,630**	

* Paved with asphalt or concrete

In Reach 1, the proposed project would include a replacement road on the crest of the setback levee which would replace the existing Reach 1 levee-crest road. Additionally, a road would be constructed at the inboard base of the setback levee to provide vehicle access for maintenance of the wetlands bench. The total length of the newly constructed roads would be 560 feet, compared to 480 feet for the existing levee-crest road which would be removed and replaced. The new roads would be 18 feet wide, which is the same width as the existing road to be removed. Similar to the existing maintenance road, the new maintenance roads would be surfaced with permeable aggregate and would not include impervious surfaces.

As described on DEIR page 3.9-17, the maintenance roads/trails in Reaches 2, 3, and 4 would be similar to the length of existing access roads and use similar surface materials to the existing conditions. These maintenance roads would be surfaced with permeable aggregate materials. The portions of the District's maintenance roads that are also part of the City's Penitencia Creek Trail (e.g., east side of Reach 3 and west bank levee along Reach 4) would be widened by two to four feet to extend to the base of the proposed floodwalls and would be repaved with asphalt.

The Water District is a co-permittee of the Municipal Regional Permit (MRP, NPDES No. CAS612008). Provision C.3 of the MRP requires a permittee to include appropriate source

control, site design, and stormwater treatment measures in new development and redevelopment projects to address stormwater runoff pollutant discharges and prevent increases in runoff flows, and this is generally accomplished through implementation of low impact development (LID) techniques. Projects that are subject to C.3 (referred to as "regulated projects") include certain road projects that create 10,000 square feet or more of newly constructed contiguous impervious surface (MRP Provision C.3.b.ii(4)). As described above, the project would create new impervious surfaces through widening of existing maintenance roads and trails, and removing existing impervious surfaces and replacing them with permeable surfaces. Table 3-4 shows the area of existing impervious surfaces at the project site, the area of created impervious surfaces, and the area of removed impervious surfaces. In Reaches 1 through 3, a total of 7,742 square feet of impervious surfaces would be created through widening of maintenance roads/trails paved with asphaltic concrete (AC). In Reach 4, a total of 1,112 square feet of existing road/trails paved with AC would be replaced with aggregate base. MRP Provision C.3.b.ii(4)(d) excludes "trails constructed with permeable surfaces" from the source control, site design, and stormwater treatment requirements. The MRP defines permeable surfaces to include "pervious concrete, porous asphalt unit pavers, and granular materials". Aggregate base is a granular material, and according to the MRP, road/trail surfaces with aggregate base are classified as permeable and excluded from the stormwater requirements for impervious surfaces. The net surface area of created impervious surface would be 6,630 square feet. Maintenance roads/trails along Reaches 2, 3, and 4 would be separated from each other by the California Circle and Milmont Drive bridges. Because the proposed project would not create 10,000 square feet or more of impervious surfaces and the fact that these impervious surfaces are not contiguous, it is not a regulated project subject to MRP Provision C.3 requirements. However, the design of the proposed project would be consistent with the policies contained in the Municipal Regional Permit by minimizing runoff generation, promoting infiltration of storm water, and using vegetated areas to filter pollutants from the storm water.

In response to this comment, the following text on DEIR pages 3.9-17 to 3.9-18 has been revised:

> After project construction is complete, the top-of-bank maintenance roads in Reaches 2, 3, and 4 of the Lower Penitencia Creek channel would be similar to existing maintenance roads in length, and surfacing materials. Because the Reach 2 floodwall would displace the existing paved access driveway to the City of Milpitas pump station located south of Reach 2, a new driveway connecting to California Circle would be built. The new drive would be surfaced with permeable aggregate base.
>
> In portions of Reaches 3 and 4, some sections of the existing maintenance roads/trails on the levee crests would be widened by ~~two~~ up to four feet to extend to the base of the newly installed floodwalls, which would result in a minor increase in road surface area. Road/trail widths would increase from the current width of 10 feet to 14 feet. The road, including the widened areas, would be surfaced with permeable aggregate, which would be similar to the existing road surface. In Reach 4, existing roads/trails paved with concrete on the east levee would be replaced with roads/trails surfaced with permeable aggregate base rock. In Reaches 1 through 3, a total of 7,742 square feet of impervious surfaces would be created through widening of maintenance roads/trails paved with asphaltic concrete. In Reach 4, a total of 1,112 square feet of

existing roads/trails paved with asphaltic concrete would be replaced with aggregate base. As a result, the project would result in a net increase of 6,630 square feet of new impervious surfaces.

~~The existing depressed maintenance road in Reach 3 would not be modified. the existing levee crest maintenance road would be removed when the levee is demolished and replaced by a new maintenance road on the crest of the newly constructed setback levee. The new levee crest road would be surfaced with compacted aggregate, similar to the road it would replace. Overall, post-construction maintenance roads would similar in area and surface materials as the existing channel maintenance roads.~~

~~The proposed headwalls on the San Andreas Drive Bridge would be located on the bridge deck, an existing impervious surface. The headwalls would not result in increased impervious surface area and would not affect runoff rates.~~

~~The project floodwalls would be composed of coated steel and would be impervious. The proposed project would include about 7,000 linear ft. of floodwalls, topped by a 1 ft. wide coated steel cap. The total impervious surface area would be about 7,000 sf (0.16 ac), which would represent less than one percent of the total project area of 25.47 acres. That change would not substantially affect storm runoff rates. The floodwalls would be located at or near the cress of existing levees, which serve as existing local runoff divides; thus, they would not change runoff flow directions from existing conditions.~~

~~The proposed project would not substantially increase the number of impervious surfaces at the project site or otherwise substantially affect stormwater runoff rates or volumes. After construction, storm runoff from the project area would not exceed the capacity of existing stormwater drainage systems. The proposed project would not generate new sources of polluted runoff. After project construction is complete, the top-of-bank maintenance roads in Reaches 2, 3, and 4 of the Lower Penitencia Creek channel would be similar to existing maintenance roads in length, and surfacing materials. In portions of Reaches 3 and 4, some section of the existing maintenance roads on the levee crests would be widened by two to four feet to extend to the base of the newly installed floodwalls, which would result in a minor increase in road surface area.~~

~~The proposed project would include resurfacing or widening of over 10,000 square feet of the District's existing maintenance roads and the District would be required to comply with Provision C.3. of the Municipal Regional Permit, which encourages source control measures that limit pollutant generation, discharge and runoff (e.g., bioswales, bioretention units, and other low impact development options).~~ Although this project is not subject to the source control, site design, and stormwater requirements pursuant to the Municipal Regional Stormwater Permit (NPDES No. CAS612008), the design of the proposed project would be consistent with the policies contained in the Municipal Regional Permit by minimizing runoff generation, promoting infiltration of storm water, and using vegetated areas to filter pollutants from the storm water before it enters the creek. The project would minimize

generation of stormwater by surfacing new and existing roads with permeable material wherever possible and removing existing impervious pavement where possible. The maintenance roads in Reaches 1 and 3 would have cross-slopes directing stormwater runoff from the roads to vegetated areas on the banks of the creek, including the wetlands bench and transitional vegetated areas in Reach 1. This would promote infiltration of stormwater into the soil. The vegetated areas receiving stormwater would filter sediment and other pollutants from the stormwater, reducing the amount of pollutants reaching the creek channel. Additionally, the project design would include landscaping consistent with the guidelines referenced in section C.3.a.i(8) of the Municipal Regional Permit. Revegetation at the project area would use native plants that are adopted to the local climate. No irrigation systems would be installed and artificial watering would be limited to the minimum necessary to establish the plants. After the establishment period is complete, no irrigation or artificial watering would be required. ~~Compliance with applicable provisions in the~~The project would be furthering stormwater policies in the Municipal Regional Permit and prevent stormwater pollution; therefore~~would ensure that~~ this impact would be less than significant.

Response to Comment C-19

The comment recommends that the District revise the EIR to clearly show the floodwall heights from various perspectives, particularly the new housing development to be constructed west of the project. The comment recommends that the EIR clearly state the floodwall heights and show renderings of all floodwall scenarios in the DEIR.

In response to this comment, please refer to the simulations presented in DEIR Figure 3.2-3 in Section 3.2, *Aesthetics.* These simulations show renderings of the proposed floodwalls from various perspectives including those from the Waterstone development that is currently being constructed west of Reach 3 (see Simulations 3 and 4). Other simulations show the floodwalls from the perspective of residents at the Mill Creek Apartments and from the Penitencia Creek Trail on the east side of Reach 3. In addition, the heights of the floodwalls are clearly described on DEIR page 2-13 in Chapter 2, *Project Description,* and on DEIR page 3.2-18 in Section 3.2.

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Letter D

CITIZENS COMMITTEE TO COMPLETE THE REFUGE

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July 3, 2017 ***Via Email***

Michael Coleman, Environmental Planner II
Santa Clara Valley Water District
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RE: Draft Environmental Impact Report for the Lower Penitencia Creek Improvements Project

Dear Michael:

The Citizens Committee to Complete the Refuge (CCCR) appreciates this opportunity to provide comments regarding the Draft Environmental Impact Report (DEIR) prepared for the Lower Penitencia Creek Improvements Project (Project) of the Santa Clara Valley Water District (District).

CCCR has its roots in the citizens who led the campaign that founded the Don Edwards San Francisco Bay National Wildlife Refuge (Refuge) in 1972. For the decades since, we have been active pursuing Refuge expansion and protection of the Refuge and of habitats, wildlife, watersheds and the threatened and rare wetlands of the Bay. We have been a stakeholder of the South Bay Salt Pond Restoration Project since its inception. Our interests have prompted us to review and comment on countless shoreline and watershed projects throughout the South San Francisco Bay.

Project Overview: The Project is the most downstream element of the Lower Berryessa Creek Program (Program), a set of six creek elements, together intended to improve flood protection in the City of Milpitas. Lower Penitencia Creek (Creek) is by location the single element carrying flows of the entire 28.2 square mile Berryessa Watershed into lower Coyote Creek where that channel approaches South San Francisco Bay. The Creek is tidal in its entirety, located throughout its length on lands that were, historically, tidal marsh and are underlain by alluvial soils built up over millenia. Today, the Creek flows through lands that are extensively filled and developed for residential, commercial and transportation purposes. The Creek currently has existing flood protection structures all along its length managing fluvial flow and drainage of municipal stormwater systems.

In its existing condition, the Creek is described as having a 100-year flow design capacity of 4,830 cfs. The Project's purpose is to improve the 100-year flow design capacity to ~6,900 cfs, a 42% increase, in response to increased flows expected from upstream channel changes, underway and proposed, of both the Program and the Upper Berryessa Flood Risk Management Project. The Project design capacity is not intended to be sufficient to provide for the estimated 8,720 cfs Watershed flow that may be produced by a future Upper Berryessa Creek project *above* I-280.

D-1

The DEIR addresses actions that will take place on four reaches of the Creek roughly defined as:

Reach 1: Coyote Creek to I-880
Reach 2: I-880 to California Circle
Reach 3: California Circle to Milmont Drive
Reach 4: Milmont Drive/Bridge to San Andreas Drive/Bridge

Comments about DEIR Content

General Concern

In discussion below, CCCR comments will address a number of topics of concern. In those comments, on multiple topics, there will be examples of inadequacy in information discussed and/or provided in support documents. A DEIR is a document to inform and, in examples we will identify, this DEIR is inadequate under CEQA, as stated by the Guidelines:

15002. General Concepts

(a) Basic Purposes of CEQA. The basic purposes of CEQA are to:
(1) Inform governmental decision-makers and the public about the potential, significant environmental effects of proposed activities.

D-2

Project Design

The Project, in its preferred alternative, proposes Reach 1 actions at the confluence with Coyote Creek that include the removal of the south levee, removal of substantial brackish marsh, construction of a setback levee, construction of a maintenance road on top of the levee, construction of a wetland bench extending from the setback levee and revegetation of the bench and the new levee. The outcome of these actions would widen the channel at the point of confluence, increase the height of the levee and create 0.29 acres of bench marsh that may be beneficial to the federally-endangered salt marsh harvest mouse. While this proposal seems ecologically attractive, the DEIR leaves many questions unanswered.

Coyote Creek is flowing downstream at the location where the levee will be setback and the wetland bench constructed. The DEIR is silent on modelling detail that would demonstrate the benefit of widening the mouth of the Creek as proposed. The DEIR is also silent on questions about how the confluence dynamics (Coyote Creek flow, the approximately right-angle discharge from the Creek and tide patterns) will affect the structural stability of the new levee and bench and of the widened mouth itself. This analysis also needs to incorporate the ~42% increase in Creek flow. There is also the question of analyzing how and if sediment transported by either creek or the tides may be a complicating factor for the Project-altered confluence. The DEIR needs to provide the analysis as part of the justification of removal of the existing levee and brackish marsh and the construction of the setback levee and bench. We ask that it do so.

D-3

Biological Resources

• Bald and Golden Eagle Protection Act, p. 3.4-2: It appears the preparer of this part of the document hasn't been following local news about nesting bald eagles or the DEIR would not include the statement: "Suitable nesting habitat for bald and golden eagles is not present in the project area." In fact, there is an active bald eagle nest about a half mile upstream of the San Andreas Bridge at the Curtner Elementary School. The DEIR should be corrected, even if this fact has no further relevance to the DEIR. It is a delightful statement of the wildlife vitality that exists in developed areas surrounding our creeks.

D-4

• Wetland Mitigation Determination, BIO-3 and MM BIO-13: The DEIR analysis and resulting mitigation of temporary and permanent wetland loss is, at best, murky, making certain mitigation determinations impossible to assess. It does not help that the discussion and proposed mitigation places extensive

D-5 Cont.

emphasis on use of District BMPs but does not provide the text of those BMPS nor provide access to the BMP manual. That needs to be done. There should also be a figure that would lay out the type of wetland with the respective estimate of temporary loss and permanent loss of habitat. Given that each Reach can be characterized with different natural communities and location does affect species utilization, it would be helpful to identify the wetland loss data by Reach. For instance, coastal brackish marsh in Reach 1 may well be transitional habitat for the salt marsh harvest mouse (SMHM) while the coastal brackish marsh in Reach 4, isolated and close to a mile upstream, is unlikely to ever be used by the endangered mouse.

D-5 Cont.

• Mitigation measures MM BiO-5, MM BIO-6, MM BIO-7 and MM BIO-8, all are intended to mitigate for impacts to the SMHM. But the discussion does not cite, nor does Chapter 7 (References) list, the US Fish & Wildlife Service, Recovery Plan for Tidal Marsh Ecosystems of Northern and Central California, 2013. https://www.fws.gov/sacramento/es/recovery-planning/tidal-marsh/es_recovery_tidal-marsh-recovery.htm This document is the ESA recovery guidance for the SMHM. How can MM BIO-8 propose a SMHM Habitat Monitoring Plan, including the design of suitable tidal marsh habitat but not even consider the guidance of the responsible agency? As the Recovery Plan is approved and recorded, it should be an information tool of this Project, used in Biological Resources impact analysis and mitigation. The DEIR needs be revised to do so. Further, mitigation measures regarding the mouse *all* need to include the requirement to consult with the US Fish & Wildlife Service for any mitigation proposed or as applies to implementation of the proposed SMHM Mitigation and Monitoring Plan. These mitigation requirements need to be added.

D-6

• Impact BIO-1j, Introduction of invasive species: The DEIR goes to some length to talk about appropriate construction procedures to prevent the introduction of invasive species. While doing so, it fails to identify water mold pathogens, Phytophthora spp., as a significant plant contagion locally and about which the District has substantial expertise, inclusive of development of best management practices that have been adopted by agencies and plant nurseries. See Project D2 and D3 reports, Safe, Clean Water and Natural Flood Protection Fiscal Year 2015-2016/Year 3. To avoid spread of this pathogen, as might occur during revegetation, the water mold BMPs need to be included as mitigation in the DEIR and applied in implementation. We ask that the Project do so.

D-7

• Plant Selection: An omission of the DEIR is discussion and requirements of plant selection. This is relevant because the Project plans to revegetate the wetland bench and also hydroseed levees but provides no plant guidance to promote a locally beneficial result. One helpful resource is another outcome of the Safe, Clean Water Program in Project D2. That project, working with local ecological resources, prepared and posted a number of local-ecological-niche plant palettes, including one labelled: Native tidal marsh and transition or ecotone plants of the South San Francisco Bay. See: http://www.valleywater.org/SCW-D2.aspx We ask that you add this mitigation guidance to the DEIR.

D-8

• Additional SMHM Mitigation: The DEIR lacks and needs to add a mitigation requirement that standard hydroseeding should not be used on the new, setback levee in Reach 1 if the objective is to make the wetland bench more valuable as habitat for SMHM. The mouse, and other species living in tidal marshes need high-tide upland refugia as safety above the water line and while hidden from predators under suitable native plant species. Hydroseeded grasses will not be sufficient. The plant palette mentioned above can provide appropriate plant choices, in conjunction with guidance from the US FWS. We ask that you add this requirement.

D-9

• Impact BIO-4, Wildlife corridors: Discussion of this impact, pp. 3.4-55 and -56, correctly identifies the value of creeks as wildlife corridors. They are critical pathways allowing native wildlife to migrate to forage or to find new locations to nest or den. Indeed, on the edge of the Bay in Mountain View, mud prints of a beaver's tail confirmed that that species uses the Bay's edge to find new creeks. Likewise, coyotes are now observed frequently amidst dense residential neighborhoods not far from creeks, often to the misfortune of pet cats allowed to roam outdoors.

It is true that bridges in the Project area will be significant pathways for many animals to use to cross the Creek. However flood walls are human-created, artificial elements such that flood events could trap wildlife in Creek locations with no escape route, a death trap for those animals that don't swim or fly, have no ability to climb vertically or would be overwhelmed by the power of extreme flows. As this is a flood improvement project, we ask that there be additional wildlife corridor analysis including identification of locations where wildlife may be trapped by flood waters but there also may be aided if some form of wildlife ladder were installed. An important consideration is that the Project intends to install a new type of floodwall, vertical sheet pile, which may not be scalable by even the most athletic squirrel, opossum, raccoon or other creature. The DEIR discussion assumes that the floodwalls will be scalable for certain species. But will they be? The DEIR instead can provide mitigation for all species by including wildlife escape ladders at critical junctures. This action would, minimally, reduce the instances of substantial interference with movement of native wildlife within the Creek corridor. Not doing so would produce, during flood events, a significant impact. We ask the DEIR to reevaluate Impact BIO-4. **D-10**

<u>Concerns other than Biological Resources</u>

• Section 2.10 of the Project Description: This section provides Table 2-3 summarizing applicable permits and regulatory requirements. The Table needs to be amended to include Biological Opinions of the US Fish and Wildlife Service and the National Marine Fisheries Service, given that impacts identified in the Biological Resources analysis will require Section 7 consultation. It is customary for the US Army Corps of Engineers to request that these agencies comment on any CWA Section 404 Permit but, for completeness, the DEIR should state that these agency actions are anticipated for this Project. **D-11**

• Omission of technical analysis and reports: In analysis of technical design topics, the DEIR repeatedly obscures its decisions by failing to make pertinent documents available. The Project acknowledges using sea level rise (SLR) as a design factor for its height decisions i.e. using 2.59' SLR in determining floodwalls and freeboard height. However, the DEIR does not discuss nor provide design documents that demonstrate how these height decisions were made nor how it was decided to use 2.59' SLR. The DEIR, optimally, will include the information in text, charts or graphics such that the rationale that is behind differences in floodwall height in different Reaches or sides of the Creek is evident. But that information is not in the DEIR, nor are analysis documents included in an appendix or even listed in the References chapter. Similarly, DEIR discussion of Geology, Soils and Seismicity references a Geotechnical Design Report and even incorporates that report in MM GEO-1. However that Report is not available to agencies or the public. Unless detailed information on specific actions is explicitly provided in the DEIR, the DEIR must identify both the document source and the access to it. Please do so. **D-12**

• LEDPA Alternative: The DEIR findings are that the Project will need a CWA 404 Permit from the US Army Corps of Engineers. To do so, the Alternative submitted with the application will need to meet the National Environmental Protection Act (NEPA) environmental standard of "Least Environmentally-Damaging Practicable Alternative (LEDPA)." The Project proposes Design Alternative 2a in this DEIR and **D-13**

also considers it, using CEQA standards, as the Environmentally Superior Alternative. NEPA and CEQA standards for alternatives differ. Given the need for a 404 Permit, we wonder if the Project has determined if the proposed Alternative can also be the LEDPA or, if the District Board approves the proposed project as a Final EIR, might changes be needed subsequently to the proposed Alternative to secure the Permit. Has the Project done that analysis?

D-13 Cont.

Summary

We ask that the Project act on the recommendations we have made here. Importantly, and as noted, we hope the DEIR will be improved and fulfill the District's responsibility under CEQA to inform.

CCCR is a 501(c)(3) nonprofit corporation that is fully volunteer-run, acts to ensure that the Refuge fulfills its Congressional acquisition authority to expand its land holdings and to protect special and sensitive habitats and wildlife along the South Bay's shores and in transitions with our Watersheds.

D-14

Truly yours,

Eileen McLaughlin
Board Member, CCCR

CC: Carin High, Co-Chair, CCCR
Gail Raabe, Co-Chair, CCCR

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Response to Comment D-1

This comment summarizing the basic elements of the proposed project is mostly accurate with the exception of the reference to "Interstate 280" which isn't the correct highway reference. For clarification, the design capacity of the project reach will be sufficient to convey 8,720 cfs, which is equivalent to future 1-percent flows in the event that additional flood control improvements are completed in Upper Berryessa Creek upstream of Interstate 680.

Response to Comment D-2

The comment states that the EIR contains several examples of inadequacy, and states that the DEIR is inadequate as stated by Guidelines Section 15002(a)(1).

The District disagrees with this comment. The DEIR was prepared in conformance with CEQA and the CEQA Guidelines. For additional response to concerns raised by the commenter, please refer Responses to Comment D-3 thru D-19.

Response to Comment D-3

The comment states that the DEIR is silent on modeling detail that would demonstrate the benefit of widening the mouth of Coyote Creek. The comment also questions how and if sediment transported by either the creek or tides may be a complicating factor at the confluence of the two creeks. Lastly, the comment requests the DEIR to provide justification for removal of the existing levee and brackish marsh and the construction of the setback levee and bench.

While hydraulic modeling was conducted during the project development and design process to guide the District's understanding of needed channel capacity, projected water surface elevations, the potential need for bridge modifications, as well as, inform other topics; the CEQA Guidelines do not require modelling detail to be described in the project description. (Per CEQA Guidelines Section 15124, the project description shall include a "general" description of the project's characteristics without unneeded "extensive detail.") Section 3.9, *Hydrology and Water Quality,* describes the project's downstream effects on Coyote Creek in a few places. Under Impact HYD-4 (DEIR page 3.9-16), the DEIR states that based on hydraulic analysis completed for the project used for the project design, flow capacity of Coyote Creek was found to be adequate to convey the combined flows during a 100-year flood event while maintaining freeboard. The DEIR concluded that the project would not increase flood hazards to areas downstream of the Lower Penitencia Creek and Coyote Creek confluence. Furthermore, under Impact HYD-7, the DEIR states that the project would not increase the risk of Coyote Creek levee failure.

Regarding the last part of the comment, the District does not believe the proposed setback levee and bench requires additional justification beyond what is already provided in the DEIR. As noted in Response to Comment C-6, the project has a long planning history and the District evaluated multiple components and design alternatives. The proposed wetland bench and setback levee in addition to other proposed project components would meet the project objectives states in Chapter 2, *Project Description,* including providing flow capacity and environmental benefits*.* Namely, the proposed project would convey the future Lower Berryessa Creek 1-percent design flow and meet required water surface elevations at the

confluences of Lower Penitencia Creek with Coyote Creek and Berryessa Creek. For these stated reasons, no revisions to the DEIR are required.

Response to Comment D-4

The commenter indicates that the DEIR should be revised to acknowledge the presence of an active bald eagle nest in the project area at the Curtner Elementary School approximately 0.5 mile upstream of the San Andreas Drive bridge.

The District acknowledges the presence of an active bald eagle nest at the location specified and was aware of this nest. However, for the purposes of the DEIR, the term "project area" is defined to extend from just upstream of the confluence with Berryessa Creek downstream to the confluence with Coyote Creek (see page ES-1). Suitable nesting habitat for the bald and golden eagle is not present in the defined area. Further, because the nest at the Curtner Elementary School is located over 1,600 feet from the southern-most extent of the project area, project activities are not expected to result in adverse effects on the nest. Therefore, revision of the DEIR to mention the presence of this nest is not warranted.

Response to Comment D-5

In regards to Impact BIO-3 and Mitigation Measure BIO-13, the commenter requests that the DEIR provide the full text of District BMPs. The commenter further requests that wetland loss and impacts be summarized by project reach to facilitate analysis of impacts on wetland-associated species such as the salt marsh harvest mouse.

In response to the request to provide the full text of the BMPs, please refer to Table 2-4 of the DEIR (pages 2-26 through 2-36) which provides the text of the BMPs relevant to the proposed project.

The District appreciates the commenter's concern regarding the potential for impacts on wetlands and their associated species to vary by reach. As indicated in Response to Comment C-2, information regarding the types of impacts that would occur on wetlands, waters of the U.S. and waters of the state in each of the project reaches has been more clearly described in the revised text of Impact BIO-3. Further, Appendix F and Impact BIO-1g clearly indicate that coastal brackish marsh habitat suitable to support the salt marsh harvest mouse is limited to Reach 1. See also Responses to Comments C-1 and C-7.

Response to Comment D-6

In regards to Impact BIO-1g, the commenter states that the DEIR should cite the Recovery Plan for Tidal Marsh Ecosystems of Northern and Central California (USFWS 2013). The commenter further indicates that Mitigation Measure BIO-8 should be revised to include the requirement to consult with the USFWS.

Mitigation Measures BIO-5, BIO-6, BIO-7, and BIO-8 are consistent with the Recovery Plan for Tidal Marsh Ecosystems of Northern and Central California. Per the Recovery Plan, the basic strategy for recovery of the salt marsh harvest mouse is the protection, enhancement, and restoration of extensive, well-distributed habitat suitable for the species. Implementation of project Mitigation Measures BIO-5, BIO-6, and BIO-7 would include pre-construction

environmental awareness trainings, hand removal of vegetation in Reach 1 and Staging Area A, pre-construction surveys and installation of exclusion barriers, which would avoid and minimize impacts on individual salt marsh harvest mouse during construction. Mitigation Measure BIO-8, which requires development and implementation of a salt marsh harvest mouse habitat monitoring plan, would ensure that the created wetland bench in Reach 1 provides suitable habitat for salt marsh harvest mouse. Following project completion, the amount of suitable salt marsh harvest mouse wetland habitat on the site will increase by up to 0.23 acre, which accounts for the project's permanent removal of 0.06 acre of wetland habitat. In addition, the created wetland will provide higher quality habitat than that impacted by the project. Thus, the District expects the implementation of mitigation measures to reduce the effects of the project on salt marsh harvest mice to less-than-significant levels.

In response to the last portion of the comment, the District notes that the USFWS was provided with a copy of the DEIR and did not return any comments. Through the project's CWA 404 permit process, the USACE will conduct ESA Section 7 consultation (formal or informal) with the USFWS.

Response to Comment D-7

This comment raises similar issues regarding plant pathogens such as *Phytophthora spp.* as comment C-15. Please refer to Response to Comment C-15.

Response to Comment D-8

The commenter requests additional guidance to address the selection of appropriate plants for use in wetland bench revegetation and levee hydroseeding (Mitigation Measure BIO-13).

The levee slope itself will be composed of soil at 95% compaction to ensure levee stability and prevent scour during flood conditions. The levee seed mix that the District has developed over the years for its levees is designed to grow under those soil conditions, and to thrive under the District's maintenance regime, and is the best choice for ensuring long-term stability, which is essential for effective flood protection. Therefore, no changes to the hydroseeding specifications are necessary or appropriate.

In response to the commenter's request to provide additional guidance regarding the appropriate plant species for the wetland bench, the District has revised Mitigation Measure BIO-13 (DEIR pages 3.4-54 to 3.4-55) as follows:

> **Mitigation Measure BIO-13: Wetlands ~~and Jurisdictional Waters~~ Mitigation and Monitoring Plan ~~and Contingency Actions~~**
>
> As described in Section 2.6.1, the proposed project includes the creation of a wetland bench on the south bank of Reach 1. The bench would be planted with native species to vegetated wetland habitat.
>
> To ensure that vegetated wetlands successfully establish on the bench, the District will develop a Wetlands Mitigation and Monitoring Plan, which will contain the following components:

- Summary of habitat impacts and acreage of wetland creation
- Location of wetland creation site(s) and description of existing site conditions
- Mitigation design, including the following:
  - Existing and proposed site hydrology
  - Grading plan if appropriate, including bank stabilization or other site stabilization features
  - Soil amendments and other site preparation elements as appropriate
  - Planting plan to establish the target coastal brackish marsh habitat. Species composition will be determined by hydrology and soils but is anticipated to be similar to adjacent wetlands. Dominant species may include: alkali bulrush, hardstem bulrush, California bulrush, and broadfruit bur reed. Temporarily impacted non-tidal seasonal saline wetlands will be replanted. Dominant species may include: creeping wild-rye, alkali heath, California gray rush, and pickleweed.
  - Maintenance plan
  - Remedial measures/adaptive management, etc.
- Monitoring plan (including ~~final and~~ performance criteria, monitoring methods, data analysis, reporting requirements, monitoring schedule, etc.).

The District will implement the Wetlands Mitigation and ~~Jurisdictional Waters~~ Monitoring Plan.

Response to Comment D-9

In regards to Impact BIO-1g, the commenter indicates that an additional mitigation measure prohibiting the use of standard hydroseeding on the proposed new levee in Reach 1, should be considered if the objective is to make the proposed wetland bench valuable as habitat for the salt marsh harvest mouse. The commenter indicates that hydroseeded grasses will not be sufficient to provide high-tide upland refugia for the salt marsh harvest mouse.

The District expects that implementation of Mitigation Measures BIO-6 through BIO-9 to reduce the effects of the project on salt marsh harvest mouse habitat to less-than-significant levels, as required by CEQA. Thus, additional mitigation measures are not warranted. The project design includes a planted area between the levee and newly created wetlands in Reach 1 that will provide upland refugia for the salt marsh harvest mouse. The levee slope itself will be composed of soil at 95% compaction to ensure levee stability and prevent scour during flood conditions. Thus, the levee slope will not support the type of vegetation suggested by the commenter. The levee seed mix is designed to grow under those soil conditions and is the best choice for ensuring long-term stability, which is essential for effective flood protection.

Response to Comment D-10

The commenter requests that the District reevaluate the impact of the project, and particularly the construction of floodwalls, on native wildlife within the creek corridor during flood events and consider including the installation of wildlife escape ladders as a mitigation measure.

As discussed under Impact BIO-4 (pages 3.4-55 to 3.4-56 of the DEIR), the frequency of wildlife movement across the channel is expected to be low in the reaches where new floodwalls are proposed as habitat values on both sides of the channel are similarly low. Animals are expected to be able to continue to access or leave the channel by (1) using existing crossings such as the Milmont Drive or California Circle Bridges, (2) scaling the floodwall, or (3) moving upstream or downstream to locations without floodwalls. While project activities are expected to impact wildlife movement along the creek corridor, for the reasons stated above, the project is not expected to interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors. Therefore, project impacts on wildlife movement not rise to the CEQA standard of having a substantial adverse effect, and would not constitute a significant impact requiring mitigation under the CEQA.

Response to Comment D-11

The comment requests that Table 2-3, which summarizes applicable permits and regulatory requirements, be amended to include Biological Opinions of USFWS and NMFS.

The District appreciates this comment. The impact analysis presented in Section 3.4.4 in Section 3.4, *Biological Resources,* identifies potential impacts and mitigation measures that would reduce impacts on special-status species and their habitats to less than significant levels. The District sent copies of the DEIR to both the USFWS and NMFS for their review and no comments were received from either agency. Regardless, the District will follow the lead of these agencies as to whether USACE issuance of a Section 404 permit will require formal Endangered Species Act consultation and Biological Opinions.

In response to this comment, the following text has been revised in Table 2-3 (DEIR page 2-24) to acknowledge that Section 7 consultation would occur through the CWA 404 permit process.

Table 2-3. ~~Applicable~~Anticipated Permit and Regulatory Requirements for Project

Regulatory Agency	Law/Regulation	Purpose	Permit/Authorization Type
U.S. Army Corps of Engineers (USACE)	Clean Water Act (CWA) Section 404/Rivers and Harbor Act Section 10	Regulates placement of dredge and fill materials into waters of the U.S., including wetlands	Individual Permit

U.S. Fish and Wildlife Service (USFWS) / National Marine Fisheries Service (NMFS)	Endangered Species Act Section 7 / Magnuson-Stevens Fishery Conservation and Management Act	Potential Consultation between USACE and USFWS and/or NMFS if threatened or endangered species might be affected by the project	ESA Section 7 Consultation (likely informal consultation for project)

Response to Comment D-12

The commenter states that the analysis obscures its decisions by failing to make pertinent technical documents available. The comment asserts that the DEIR does not discuss nor provide design documents that demonstrate how the heights of the floodwalls accounted for sea level rise or expected increase of 2.59 feet. The comment also mentions that the DEIR references recommendations from the Geotechnical Design Report, but that the report is not available to agencies or the general public. The commenter requests that the DEIR identify both document sources and provide access to them.

For clarification, the DEIR cites the District's Planning Study Report (2016b), the original source used to support the statement regarding the project elements being designed to accommodate the expected increase of 2.59 feet in sea level rise. Please see the third sentence in Section 2.6, page 2-9 of the DEIR. To address the commenter's concerns, sea level rise scenarios were based on the U.S. Army Corps of Engineers South San Francisco Bay Shoreline Protection Study, which was completed by the District and Coastal Conservancy. Predicted sea level rise levels through 2067 were used to develop the project's 50-year design life (USACE 2015).

Regarding the commenter's second point about the Geotechnical Design Report, this document which was prepared by Kleinfelder and is cited in Section 3.6, *Geology, Soils, and Seismicity.* The document is listed in DEIR Chapter 7, *References,* on page 7-13.

Consistent with CEQA Guidelines Section 15148, the District's Planning Study Report and Kleinfelder document, along with all other technical documents cited in the DEIR, are listed in Chapter 7 of the DEIR. These documents are part of the project's administrative record and can be provided to the commenter for review upon request.

Response to Comment D-13

The comment asks whether the District has completed the LEDPA analysis and whether the proposed Alternative can also be the LEDPA. The comment also questions if the District Board approves the project as described in the Final EIR, whether changes may be needed subsequently to the proposed Alternative to secure the CWA Section 404 permit.

This comment raises similar concerns noted in Letter C. Please refer to Responses to Comments C-5 and C-9.

Response to Comment D-14

The commenter requests that the recommendations summarized in letter be made. This comment is acknowledged by the District. Please refer to Responses D-1 through D-13, above.

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From: Molseed, Roy <Roy.Molseed@VTA.ORG>
Sent: Monday, July 03, 2017 9:01 AM
To: Mike Coleman
Subject: Lower Penitencia Creek Improvements

Michael,

VTA has no comments on the Draft EIR for the project above. Thanks. E-1

Roy Molseed
Senior Environmental Planner

Santa Clara Valley Transportation Authority
3331 North First Street, Building B-2
San Jose, CA 95134-1927
Phone 408-321-5784

Santa Clara Valley Transportation Authority
Solutions that move you

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Response to Comment E-1

Comment E-1 states that the Santa Clara Valley Transportation Authority has no comments on the DEIR. The District acknowledges this comment and since it does not raise any issues regarding the DEIR, no revisions to the DEIR are necessary.

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STATE OF CALIFORNIA

Governor's Office of Planning and Research

State Clearinghouse and Planning Unit

Edmund G. Brown Jr.
Governor

Ken Alex
Director

Letter F

July 5, 2017

Michael Coleman
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118-3614

Subject: Lower Penitencia Creek Improvements Project
SCH#: 2015062026

Dear Michael Coleman:

The State Clearinghouse submitted the above named Draft EIR to selected state agencies for review. On the enclosed Document Details Report please note that the Clearinghouse has listed the state agencies that reviewed your document. The review period closed on July 3, 2017, and the comments from the responding agency (ies) is (are) enclosed. If this comment package is not in order, please notify the State Clearinghouse immediately. Please refer to the project's ten-digit State Clearinghouse number in future correspondence so that we may respond promptly.

Please note that Section 21104(c) of the California Public Resources Code states that:

> "A responsible or other public agency shall only make substantive comments regarding those activities involved in a project which are within an area of expertise of the agency or which are required to be carried out or approved by the agency. Those comments shall be supported by specific documentation."

F-1

These comments are forwarded for use in preparing your final environmental document. Should you need more information or clarification of the enclosed comments, we recommend that you contact the commenting agency directly.

This letter acknowledges that you have complied with the State Clearinghouse review requirements for draft environmental documents, pursuant to the California Environmental Quality Act. Please contact the State Clearinghouse at (916) 445-0613 if you have any questions regarding the environmental review process.

Sincerely,

Scott Morgan
Director, State Clearinghouse

Enclosures
cc: Resources Agency

Document Details Report
State Clearinghouse Data Base

SCH# 2015062026
Project Title Lower Penitencia Creek Improvements Project
Lead Agency Santa Clara Valley Water District

Type EIR Draft EIR

Description The proposed Lower Penitencia Improvements Project would improve flood protection for residents, businesses, and infrastructure along approx one mile of the Lower Penitencia Creek Channel in the city of Milpitas. The District is currently constructing the Lower Berryessa Creek Flood Protection Project upstream. The US Army Corps of Engineers is constructing the Upper Berryessa Creek Flood Risk Management Project, which is also upstream of the project and the Lower Berryessa Creek Project. The project at Lower Penitencia Creek consists of developing new flood protection infrastructure necessary to convey increased flows (the future one-percent flood event or 100-year event) that will be delivered from the completion of the two upstream projects on Berryessa Creek. The project would expand the channel conveyance capacity at Lower Penitencia Creek through development of: floodwalls, earthen ramps at the Reach 3 floodwall, a vegetated bench , a relocated and raised levee, bridge headwalls, sediment removal, and revegetation.

Lead Agency Contact

Name Michael Coleman
Agency Santa Clara Valley Water District
Phone 408 630 3096 **Fax**
email
Address 5750 Almaden Expressway
City San Jose **State** CA **Zip** 95118-3614

Project Location

County Santa Clara
City Milpitas
Region
Lat / Long 37° 27' .15" N / 121° 55' 2.3" W
Cross Streets San Andreas Dr., California Circle, and Milmont Dr. (all cross Lower Penitencia Creek)
Parcel No. various
Township 5S **Range** 1W **Section** **Base**

Proximity to:

Highways I-880, SR 237, I-680
Airports
Railways UPRR
Waterways Wrigley-Ford, Coyote, Berryessa, Calera Creeks
Schools Joseph Weller ES, Milpitas HS, Curtner ES
Land Use GPD & Z: Parks and Open Space

Project Issues Aesthetic/Visual; Air Quality; Archaeologic-Historic; Biological Resources; Flood Plain/Flooding; Forest Land/Fire Hazard; Geologic/Seismic; Minerals; Noise; Population/Housing Balance; Public Services; Recreation/Parks; Schools/Universities; Soil Erosion/Compaction/Grading; Solid Waste; Toxic/Hazardous; Traffic/Circulation; Vegetation; Water Quality; Water Supply; Wetland/Riparian; Growth Inducing; Landuse; Cumulative Effects

Reviewing Agencies Resources Agency; Department of Fish and Wildlife, Region 3; Department of Boating and Waterways; Office of Historic Preservation; Department of Parks and Recreation; San Francisco Bay Conservation and Development Commission; California Highway Patrol; Caltrans, District 4; Office of Emergency Services, California; State Water Resources Control Board, Division of Drinking Water; State Water Resources Control Board, Division of Water Rights; Regional Water Quality Control Board, Region 2; Department of Toxic Substances Control; Native American Heritage Commission; Public Utilities Commission

Note: Blanks in data fields result from insufficient information provided by lead agency.

Document Details Report
State Clearinghouse Data Base

Date Received 05/18/2017 ***Start of Review*** 05/18/2017 ***End of Review*** 07/03/2017

Note: Blanks in data fields result from insufficient information provided by lead agency.

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Sent via electronic mail: no hard copy to follow

July 3, 2017
CIWQS Place ID: 836394

Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118
Email: MColeman@valleywater.org

Subject: Comments on Draft Environmental Impact Report for the Lower Penitencia Creek Improvements Project, Milpitas, Santa Clara County (SCH #2015062026)

Dear Mr. Coleman:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff has reviewed the Public Review Draft Environmental Impact Report (DEIR) for the Lower Penitencia Creek Improvements Project (Project) (State Clearinghouse No. 2015062026) prepared by the Santa Clara Valley Water District (District) pursuant to the California Environmental Quality Act (CEQA). Under CEQA, the Water Board is a Responsible Agency with permitting authority for the Project under the federal Clean Water Act and California Porter-Cologne Act regulating discharges of dredge and fill materials in waters of the U.S. and waters of the State. As described further below, we provide the following comments on the DEIR, including, but not limited to:

- The DEIR lacks information for us to determine whether the preferred alternative (or any of the alternatives) would meet the San Francisco Bay Water Quality Control Plan (Basin Plan) requirement that impacts to wetlands and other waters of the State be avoided and minimized to the maximum extent practicable; and
- The DEIR does not clearly identify the potential impacts in jurisdictional waters. Thus, we are unable to determine whether mitigation for impacts on waters of the U.S. and waters of the State would comply with the State and Regional Water Board regulations and policies.

Project Overview

The proposed Project is located in the City of Milpitas. Lower Penitencia Creek is an open trapezoidal channel with both earth- and concrete-lined sections. The purpose of the Project is to increase Lower Penitencia Creek capacity to contain the future 100-year flow event, while accommodating daily tidal fluctuations and expected sea-level rise over the life of the Project, expected to be 50 years. The downstream limit of the proposed project is at the Lower Penitencia Creek's confluence with Coyote

Also, for the Water Board to permit the proposed Project pursuant to the Clean Water Act, Section 401, we require a project proponent to conduct an alternatives analysis consistent with the U.S. Environmental Protection Agency's 404(b)(1) Guidelines. The Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) incorporates the 404(b)(1) Guidelines by reference to determine the circumstances under which filling of wetlands, streams or other waters of the U.S. and/or the State may be permitted. In accordance with the Basin Plan, filling, dredging, excavating and discharging into a wetland or water of the state is prohibited unless the project meets the least environmentally damaging practicable alternative (LEDPA) standard as determined through the 404(b)(1) alternatives analysis. Although the LEDPA analysis is not required by CEQA, a project proponent may tailor their alternative analysis to fulfill both the CEQA and 404(b)(1) requirements to help expedite the Water Board's issuance of a 401 Certification and/or waste discharge requirements under Porter-Cologne. Accordingly, we recommend the District prepare and analyze alternatives in the DEIR that would meet the LEDPA standard to help expedite future Water Board actions, and avoid the potential need for an EIR supplement or amendment.

The Guidelines sequence the order in which proposals should be approached: 1) Avoid - avoid impacts to waters; 2) Minimize - modify project to minimize impacts to waters; and, 3) Compensate – once impacts have been fully minimized, compensate for unavoidable impacts to waters. When it is not possible to avoid impacts to water bodies, disturbance should be minimized. Compensatory mitigation for lost water body acreage and functions through enhancement, restoration, and/or creation should only be considered after disturbance has been minimized. Where impacts cannot be avoided, the enhancement, restoration, and/or creation of adequate mitigation habitat to compensate for the loss of water body acreage, functions and values must be provided pursuant to the California Wetland Conservation Policy (also known as the "no net loss" policy; Executive Order W-59-93).

We also recommend that the DEIR be revised to clearly and fully describe the Project's temporary and permanent impacts to waters of the U.S. and waters of the State. We recognize that the *Habitat Impacts Map* (Figure 3.4-4) shows the impacted areas, but these impacts are not clearly described or summarized in the DEIR. For example, the DEIR states there will be gain of tidal brackish wetland due to the creation of the wetland bench in Reach 1 (0.29 acres). However, the *Habitat Impacts Map* (Figure 3.4-4) 0.98 acres of permanent impacts but this acreage is not mentioned in the narrative, except that "… up to 0.29 acres of ruderal grassland would be permanently converted to coastal brackish marsh and small areas of ruderal grassland would be converted to developed habitat" (pg. 3.4-41). Based on the visual presentation in the map, additional permanent impacts appear to be due to the extensive floodwalls in the proposed Project, but this is not expressly mentioned. We would also expect permanent impacts due to the concrete fill in the proposed Project (3,500 cubic yards), such as for the headwalls to be constructed in one of the creek crossings in the southern section of the Project, but this is not mentioned in the DEIR.

In addition, please note that creek dewatering has the potential to adversely affect water quality by altering dissolved oxygen, turbidity, and temperature. The DEIR should be revised to address these potential effects of creek dewatering. A complete dewatering plan will be required as part of the water quality certification application before we can authorize dewatering activities to proceed. The plan should include elements to contain, monitor, and treat the water, as appropriate, to prevent adverse water quality impacts in the Project and to maintain normal conditions both upstream and downstream of the dewatered areas.

4. **Mitigation Measure BIO-13**
We appreciate the inclusion of Mitigation Measure BIO-13 to avoid, minimize and compensate for impacts by creating 0.29 acres of new tidal wetland habitat, designated as the "wetland bench" to be constructed in Reach 1. Please note, however, that BIO-13 does not avoid or minimize impacts, but rather compensates for impacts. As mentioned in Comment 1, our Basin Plan requires that dredge, excavation, and fill impacts to waters of the State first be avoided and then minimized to the maximum extent practicable prior to compensating for unavoidable impacts.

We also appreciate that BIO-13 includes the details that will be included in the mitigation plan; e.g., a grading plan, planting plan, monitoring plan with success criteria, etc. However, as presented in the DEIR, Mitigation Measure BIO-13 is still only a concept. We require the mitigation plan to be fully developed to ensure that the proposed mitigation will meet the State's no net loss policy prior to our issuance of a 401 Certification and/or waste discharge requirements (see also Comment 1).

Lastly, BIO-13 indicates that revegetation will be undertaken to mitigate for the Project's potentially significant impacts to waters of the State. BIO-13, however, does not include measures to prevent to introduction and/or spread of *Phytophthora spp.* Given that the District has developed standard BMPs for preventing the introduction and spread of these plant pathogens, the DEIR should include the BMPs as part of BIO-13.

5. **Sediment Maintenance**
Minimizing the need for seasonal removal of sediment and non-woody vegetation is one of the five stated objectives of the proposed Project. The DEIR states: "Once constructed, the proposed project would reduce the need for routine sediment removal in the channel." However, the Project description has no information to substantiate this. The DEIR further states:

> The proposed project would be designed so that sediment build-up can occur up to the mean high water mark and still ensure sufficient flow capacity to convey the 1-percent flow. During low tide, the majority of accumulated sediment would settle in the Reach 3 low-flow channel. Future sediment removal work in the channel would occur under the District's SMP and would be triggered once sediment accumulation exceeds design standards. Localized sediment removal work may be

has the Non-Contact Recreation Beneficial Use, which includes sightseeing. As such, we recommend the District revise the DEIR to clearly show the floodwall heights from various perspectives, particularly since new housing to be developed west of the Project will be affected. We noted that the design flow of 8,720 cubic feet per second (cfs) as the 100-year flow event is based on the future flood control project in Berryessa Creek upstream of Interstate 680, though this upper watershed project is not anticipated to be constructed for at least 10 years. Without that project, the 100-year design flow would be 6,900 cfs. The DEIR states that the incremental height difference in floodwalls for 6,900 cfs versus 8,720 cfs is "minor." We recommend the District clearly state the floodwall heights and show accurate renderings of all floodwall scenarios in the DEIR to avoid any misunderstanding among community members and other stakeholders.

Thank you for considering our comments on the DEIR. If you have any questions about our comments please contact Susan Glendening of my staff at (510) 622-2462 or susan.glendening@waterboard.ca.gov.

Sincerely,

Xavier Fernandez

Digitally signed by Xavier Fernandez
Date: 2017.07.03 16:46:33 -07'00'

Xavier Fernandez, Section Leader
Watershed Management Division

Cc: SCVWD, Rechelle Blank, RBlank@valleywater.org
CDFW, Mayra Molina, Mayra.Molina@Wildlife.ca.gov
Horizon Water and Environment, LLC, info@horizonh2o.com
State Clearinghouse, state.clearinghouse@opr.ca.gov

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Response to Comment F-1

This comment notes that the State Clearinghouse submitted the DEIR to selected agencies indicated on the Notice of Completion form. The comment letter also services as a transmittal for the San Francisco RWQCB comment letter, provided as an attachment. Refer to Responses to Comments C-1 through C-19 for responses to concerned raised by the San Francisco RWQCB.

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STATE OF CALIFORNIA

Governor's Office of Planning and Research

State Clearinghouse and Planning Unit

Edmund G. Brown Jr.
Governor

Ken Alex
Director

Letter G

July 6, 2017

Michael Coleman
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118-3614

Subject: Lower Penitencia Creek Improvements Project
SCH#: 2015062026

Dear Michael Coleman:

The enclosed comment (s) on your Draft EIR was (were) received by the State Clearinghouse after the end of the state review period, which closed on July 3, 2017. We are forwarding these comments to you because they provide information or raise issues that should be addressed in your final environmental document.

The California Environmental Quality Act does not require Lead Agencies to respond to late comments. However, we encourage you to incorporate these additional comments into your final environmental document and to consider them prior to taking final action on the proposed project. **G-1**

Please contact the State Clearinghouse at (916) 445-0613 if you have any questions concerning the environmental review process. If you have a question regarding the above-named project, please refer to the ten-digit State Clearinghouse number (2015062026) when contacting this office.

Sincerely,

Scott Morgan
Director, State Clearinghouse

Enclosures
cc: Resources Agency

STATE OF CALIFORNIA
NATIVE AMERICAN HERITAGE COMMISSION
Environmental and Cultural Department
1550 Harbor Blvd., Suite 100
West Sacramento, CA 95691
Phone (916) 373-3710

Edmund G. Brown Jr., Governor

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7-3-17
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June 28, 2017

Michael Coleman
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118

sent via e-mail: mcoleman@valleywater.org

Re: SCH# 2015062026, Lower Penitencia Creek Improvements Project, City of Milpitas; Santa Clara County, California

Dear Mr. Coleman:

The Native American Heritage Commission (NAHC) has reviewed the Draft Environmental Impact Report prepared for the project referenced above. The review included the Introduction and Project Description, the Summary of Environmental Impacts and Mitigation Measures, the Environmental Impact Analysis, section 4.5, Cultural Resources, and Appendix C, NOP Comments prepared by the California State Lands Commission. We have the following concerns:

1. A determination of "no impact" for Tribal Cultural Resources is in error. The determination should be similar to that of Archaeological resources as inadvertent finds are possible. If groundbreaking activities are included in the project, Mitigation for inadvertent finds of Tribal Cultural Resources are appropriate and the determination should be categorized as "less than significant with mitigation".

2. Mitigation for inadvertent finds of human remains is incomplete. District BMP CU-1 stops work for inadvertent finds but does not specify the process outlined in Health and Safety Code § 7050.5 and Public Resources Code § 5097.98. The complete process for inadvertent finds of human remains should be documented.

3. Mitigation recommendations by tribes in consultation are not included in proposed mitigation.

The California Environmental Quality Act (CEQA)[1], specifically Public Resources Code section 21084.1, states that a project that may cause a substantial adverse change in the significance of a historical resource is a project that may have a significant effect on the environment.[2] If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, an environmental impact report (EIR) shall be prepared.[3] In order to determine whether a project will cause a substantial adverse change in the significance of a historical resource, a lead agency will need to determine whether there are historical resources with the area of project effect (APE).

CEQA was amended in 2014 by Assembly Bill 52. (AB 52).[4] **AB 52 applies to any project for which a notice of preparation or a notice of negative declaration or mitigated negative declaration is filed on or after July 1, 2015.** AB 52 created a separate category for "tribal cultural resources"[5], that now includes "a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment.[6] Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.[7] Your project may also be subject to **Senate Bill 18 (SB 18)** (Burton, Chapter 905, Statutes of 2004), Government Code 65352.3, if it also involves the adoption of or amendment to a general plan or a specific plan, or the designation or proposed designation of open space. **Both SB 18 and AB 52 have tribal consultation requirements.** Additionally, if your project is also subject to the federal National Environmental Policy Act (42 U.S.C. § 4321 et seq.) (NEPA), the tribal consultation requirements of Section 106 of the National Historic Preservation Act of 1966[8] may also apply.

Consult your legal counsel about compliance with AB 52 and SB 18 as well as compliance with any other applicable laws.

[1] Pub. Resources Code § 21000 et seq.
[2] Pub. Resources Code § 21084.1; Cal. Code Regs., tit.14, § 15064.5 (b); CEQA Guidelines Section 15064.5 (b)
[3] Pub. Resources Code § 21080 (d); Cal. Code Regs., tit. 14, § 15064 subd.(a)(1); CEQA Guidelines § 15064 (a)(1)
[4] Government Code 65352.3
[5] Pub. Resources Code § 21074
[6] Pub. Resources Code § 21084.2
[7] Pub. Resources Code § 21084.3 (a)
[8] 154 U.S.C. 300101, 36 C.F.R. § 800 et seq.

Agencies should be aware that AB 52 does not preclude agencies from initiating tribal consultation with tribes that are traditionally and culturally affiliated with their jurisdictions before the timeframes provided in AB 52. For that reason, we urge you to continue to request Native American Tribal Consultation Lists and Sacred Lands File searches from the NAHC. The request forms can be found online at: http://nahc.ca.gov/resources/forms/. Additional information regarding AB 52 can be found online at http://nahc.ca.gov/wp-content/uploads/2015/10/AB52TribalConsultation_CalEPAPDF.pdf, entitled "Tribal Consultation Under AB 52: Requirements and Best Practices".

The NAHC recommends lead agencies consult with all California Native American tribes that are traditionally and culturally affiliated with the geographic area of your proposed project as early as possible in order to avoid inadvertent discoveries of Native American human remains and best protect tribal cultural resources.

A brief summary of portions of AB 52 and SB 18 as well as the NAHC's recommendations for conducting cultural resources assessments is also attached.

Please contact me at gayle.totton@nahc.ca.gov or call (916) 373-3710 if you have any questions.

Sincerely,

Gayle Totton, B.S., M.A., Ph.D
Associate Governmental Project Analyst

Attachment

cc: State Clearinghouse

Pertinent Statutory Information:

Under AB 52:

AB 52 has added to CEQA the additional requirements listed below, along with many other requirements:

Within fourteen (14) days of determining that an application for a project is complete or of a decision by a public agency to undertake a project, a **lead agency** shall provide formal notification to a designated contact of, or tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice.

A **lead agency** shall begin the consultation process within 30 days of receiving a request for consultation from a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project.[9] and **prior to the release of a negative declaration, mitigated negative declaration or environmental impact report**. For purposes of AB 52, "consultation shall have the same meaning as provided in Gov. Code § 65352.4 (SB 18).[10]

The following topics of consultation, if a tribe requests to discuss them, are mandatory topics of consultation:

a. Alternatives to the project.
b. Recommended mitigation measures.
c. Significant effects.[11]

1. The following topics are discretionary topics of consultation:
   a. Type of environmental review necessary.
   b. Significance of the tribal cultural resources.
   c. Significance of the project's impacts on tribal cultural resources.

If necessary, project alternatives or appropriate measures for preservation or mitigation that the tribe may recommend to the lead agency.[12]

With some exceptions, any information, including but not limited to, the location, description, and use of tribal cultural resources submitted by a California Native American tribe during the environmental review process **shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public, consistent with Government Code sections 6254 (r) and 6254.10.** Any information submitted by a California Native American tribe during the consultation or environmental review process shall be published in a confidential appendix to the environmental document unless the tribe that provided the information consents, in writing, to the disclosure of some or all of the information to the public.[13]

If a project may have a significant impact on a tribal cultural resource, **the lead agency's environmental document shall discuss** both of the following:

a. Whether the proposed project has a significant impact on an identified tribal cultural resource.
b. Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to Public Resources Code section 21082.3, subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource.[14]

Consultation with a tribe shall be considered concluded when either of the following occurs:

a. The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource; or
b. A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.[15]

Any mitigation measures agreed upon in the consultation conducted pursuant to Public Resources Code section 21080.3.2 **shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program**, if determined to avoid or lessen the impact pursuant to Public Resources Code section 21082.3, subdivision (b), paragraph 2, and shall be fully enforceable.[16]

If mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document or if there are no agreed upon mitigation measures at the conclusion of consultation, or if consultation does not occur, and if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, **the lead agency shall consider feasible mitigation** pursuant to Public Resources Code section 21084.3 (b).[17]

An environmental impact report **may not be certified**, nor may a mitigated negative declaration or a negative declaration be adopted unless one of the following occurs:

a. The consultation process between the tribes and the lead agency has occurred as provided in Public Resources Code sections 21080.3.1 and 21080.3.2 and concluded pursuant to Public Resources Code section 21080.3.2.
b. The tribe that requested consultation failed to provide comments to the lead agency or otherwise failed to engage in the consultation process.

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[9] Pub. Resources Code § 21080.3.1, subds. (d) and (e)
[10] Pub. Resources Code § 21080.3.1 (b)
[11] Pub. Resources Code § 21080.3.2 (a)
[12] Pub. Resources Code § 21080.3.2 (a)
[13] Pub. Resources Code § 21082.3 (c)(1)
[14] Pub. Resources Code § 21082.3 (b)
[15] Pub. Resources Code § 21080.3.2 (b)
[16] Pub. Resources Code § 21082.3 (a)
[17] Pub. Resources Code § 21082.3 (e)

c. The lead agency provided notice of the project to the tribe in compliance with Public Resources Code section 21080.3.1 (d) and the tribe failed to request consultation within 30 days.[18]

This process should be documented in the Tribal Cultural Resources section of your environmental document.

Under SB 18:

Government Code § 65352.3 (a) (1) requires consultation with Native Americans on general plan proposals for the purposes of "preserving or mitigating impacts to places, features, and objects described § 5097.9 and § 5091.993 of the Public Resources Code that are located within the city or county's jurisdiction. Government Code § 65560 (a), (b), and (c) provides for consultation with Native American tribes on the open-space element of a county or city general plan for the purposes of protecting places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code.

- SB 18 applies to **local governments** and requires them to contact, provide notice to, refer plans to, and consult with tribes prior to the adoption or amendment of a general plan or a specific plan, or the designation of open space. Local governments should consult the Governor's Office of Planning and Research's "Tribal Consultation Guidelines," which can be found online at: https://www.opr.ca.gov/docs/09_14_05_Updated_Guidelines_922.pdf
- Tribal Consultation: If a local government considers a proposal to adopt or amend a general plan or a specific plan, or to designate open space it is required to contact the appropriate tribes identified by the NAHC by requesting a "Tribal Consultation List." If a tribe, once contacted, requests consultation the local government must consult with the tribe on the plan proposal. **A tribe has 90 days from the date of receipt of notification to request consultation unless a shorter timeframe has been agreed to by the tribe.**[19]
- There is no Statutory Time Limit on Tribal Consultation under the law.
- Confidentiality: Consistent with the guidelines developed and adopted by the Office of Planning and Research,[20] the city or county shall protect the confidentiality of the information concerning the specific identity, location, character, and use of places, features and objects described in Public Resources Code sections 5097.9 and 5097.993 that are within the city's or county's jurisdiction.[21]
- Conclusion Tribal Consultation: Consultation should be concluded at the point in which:
    - The parties to the consultation come to a mutual agreement concerning the appropriate measures for preservation or mitigation; or
    - Either the local government or the tribe, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning the appropriate measures of preservation or mitigation.[22]

NAHC Recommendations for Cultural Resources Assessments:

- Contact the NAHC for:
    - A Sacred Lands File search. Remember that tribes do not always record their sacred sites in the Sacred Lands File, nor are they required to do so. A Sacred Lands File search is not a substitute for consultation with tribes that are traditionally and culturally affiliated with the geographic area of the project's APE.
    - A Native American Tribal Contact List of appropriate tribes for consultation concerning the project site and to assist in planning for avoidance, preservation in place, or, failing both, mitigation measures.
        - The request form can be found at http://nahc.ca.gov/resources/forms/.
- Contact the appropriate regional California Historical Research Information System (CHRIS) Center (http://ohp.parks.ca.gov/?page_id=1068) for an archaeological records search. The records search will determine:
    - If part or the entire APE has been previously surveyed for cultural resources.
    - If any known cultural resources have been already been recorded on or adjacent to the APE.
    - If the probability is low, moderate, or high that cultural resources are located in the APE.
    - If a survey is required to determine whether previously unrecorded cultural resources are present.
- If an archaeological inventory survey is required, the final stage is the preparation of a professional report detailing the findings and recommendations of the records search and field survey.
    - The final report containing site forms, site significance, and mitigation measures should be submitted immediately to the planning department. All information regarding site locations, Native American human remains, and associated funerary objects should be in a separate confidential addendum and not be made available for public disclosure.
    - The final written report should be submitted within 3 months after work has been completed to the appropriate regional CHRIS center.

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[18] Pub. Resources Code § 21082.3 (d)
[19] (Gov. Code § 65352.3 (a)(2)).
[20] pursuant to Gov. Code section 65040.2,
[21] (Gov. Code § 65352.3 (b)).
[22] (Tribal Consultation Guidelines, Governor's Office of Planning and Research (2005) at p. 18).

Examples of Mitigation Measures That May Be Considered to Avoid or Minimize Significant Adverse Impacts to Tribal Cultural Resources:

- Avoidance and preservation of the resources in place, including, but not limited to:
  - Planning and construction to avoid the resources and protect the cultural and natural context.
  - Planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.
- Treating the resource with culturally appropriate dignity, taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:
  - Protecting the cultural character and integrity of the resource.
  - Protecting the traditional use of the resource.
  - Protecting the confidentiality of the resource.
- Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.
- Please note that a federally recognized California Native American tribe or a non-federally recognized California Native American tribe that is on the contact list maintained by the NAHC to protect a California prehistoric, archaeological, cultural, spiritual, or ceremonial place may acquire and hold conservation easements if the conservation easement is voluntarily conveyed.[23]
- Please note that it is the policy of the state that Native American remains and associated grave artifacts shall be repatriated.[24]

The lack of surface evidence of archaeological resources (including tribal cultural resources) does not preclude their subsurface existence.

- Lead agencies should include in their mitigation and monitoring reporting program plan provisions for the identification and evaluation of inadvertently discovered archaeological resources.[25] In areas of identified archaeological sensitivity, a certified archaeologist and a culturally affiliated Native American with knowledge of cultural resources should monitor all ground-disturbing activities.
- Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the disposition of recovered cultural items that are not burial associated in consultation with culturally affiliated Native Americans.
- Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the treatment and disposition of inadvertently discovered Native American human remains. Health and Safety Code section 7050.5, Public Resources Code section 5097.98, and Cal. Code Regs., tit. 14, section 15064.5, subdivisions (d) and (e) (CEQA Guidelines section 15064.5, subds. (d) and (e)) address the processes to be followed in the event of an inadvertent discovery of any Native American human remains and associated grave goods in a location other than a dedicated cemetery.

[23] (Civ. Code § 815.3 (c)).
[24] (Pub. Resources Code § 5097.991).
[25] per Cal. Code Regs., tit. 14, section 15064.5(f) (CEQA Guidelines section 15064.5(f)).

State of California – The Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Bay Delta Region
7329 Silverado Trail
Napa, CA 94558
(707) 944-5500
www.wildlife.ca.gov

EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director

late
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June 29, 2017

Mr. Michael Coleman
Environmental Planner II
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118

Dear Mr. Coleman:

Subject: Lower Penitencia Creek Improvements Project and Draft Environmental Impact Report, SCH #2015062026, Santa Clara County

The California Department of Fish and Wildlife (CDFW) received a draft Environmental Impact Report (EIR) from the Santa Clara Valley Water District (District) for the Lower Penitencia Creek Improvements Project (Project) on June 5, 2017, pursuant to the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.; hereafter CEQA; Cal. Code Regs., § 15000 et seq.; hereafter CEQA Guidelines).

CDFW thanks you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that are within CDFW's area of expertise and relevant to its statutory responsibilities (Fish and Game Code, § 1802), and/or which are required to be approved by CDFW (CEQA Guidelines, §§ 15086, 15096 and 15204).

CDFW ROLE

CDFW is a Trustee Agency with responsibility pursuant to CEQA for commenting on projects that could directly or indirectly impact biological resources. CDFW has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (i.e., biological resources). As a Trustee Agency, CDFW is responsible for providing, as available, biological expertise to review and comment upon environmental documents and impacts arising from project activities (CEQA Guidelines, § 15386; Fish and Game Code, § 1802).

CDFW is also considered a Responsible Agency under CEQA §15381 if a project requires discretionary approval, such as under the California Endangered Species Act (CESA), the Native Plant Protection Act, the Lake and Streambed Alteration Agreement (LSAA), or other provisions of the Fish and Game Code that afford protection to the State's fish and wildlife trust resources. CDFW will act as a Responsible Agency because it anticipates issuing an LSAA for Project activities that impact a stream (Fish and Game Code, §§ 1600 – 1616), specifically Lower Penitencia Creek. CDFW may also act as a Responsible Agency in issuing an Incidental Take Permit (ITP) if Project activities result in "take" of any species listed as candidate, threatened, or endangered pursuant to CESA (Fish and Game Code, § 2050 et seq.).

PROJECT DESCRIPTION

Background: The proposed Project is one of six elements evaluated in the *Lower Berryessa Creek Program Environmental Impact Report* (Program EIR) which was prepared by the District,

as the lead agency, in 2011. The Program EIR evaluated the proposed Project reach at a programmatic level of detail. Now that the detailed designs of several flood protection improvement projects located upstream of the proposed Project are known, future water surface elevations and flow rates (during the 1-percent flow) on the proposed Project can be precisely estimated.

Objective: The primary objective of the proposed Project is to convey the increased 1-percent (or 100-year) flows from the improved Upper and Lower Berryessa creeks to Coyote Creek without overtopping the Lower Penitencia Creek banks. The Project would provide flood protection along 5,000 linear feet along the Lower Penitencia Creek, and subsequently extend the flood protection benefits from the upper watershed projects downstream to the Coyote Creek/Lower Penitencia Creek confluence.

The Project components would be implemented along the following four reaches:

- Reach 1 (Coyote Creek to I-880) – relocate and raise south bank levee with maintenance road on crest; create a wetland bench on south bank;
- Reach 2 (I-880 to California Circle) – install sheetpile floodwall on top of existing south/west bank levee; remove approximately 70 cubic yards (cy) of sediment from the concrete-lined channel; relocate access ramp to the City of Milpitas pump station; conduct maintenance road improvements;
- Reach 3 (California Circle to Milmont Drive) – install sheetpile floodwalls on top of existing west and east bank levees, and earthen fill to floodwall to allow the existing Penitencia Creek Trail to cross over the new floodwall; remove approximately 1500 cy of sediment from low-flow earthen channel; conduct maintenance road improvements; and
- Reach 4 (Milmont Drive to San Andreas Bridge) – install sheetpile floodwalls on top of existing west bank levee; raise the existing east bank levee by up to 6 feet (ft); remove approximately 730 cy of sediment from the concrete-lined channel; conduct maintenance road improvements; install headwalls on the downstream and upstream faces of San Andreas Drive bridge.

The draft EIR indicates that in-channel work would occur between June 15 and October 15 when channel flow is the lowest. Dewatering would occur throughout the Project area during construction, but would be temporary. Water would be diverted into pipes and routed around the work areas by a temporary cofferdam. Diverted water would be returned to the creek downstream of the Project area. At the end of each construction season, disturbed areas would be hydroseeded to provide erosion protection.

Location: The proposed Project area extends from upstream of the San Andreas Drive bridge and downstream at the confluence with Coyote Creek near Highway I-880, in the City of Milpitas (City), Santa Clara County. The Project is specifically located on Lower Penitencia Creek, which extends from upstream of the confluence with Berryessa Creek to the downstream confluence with Coyote Creek, within a developed area of the City. The land surrounding the proposed Project is a mix of residential and office park/commercial land uses.

Timeframe: The draft EIR indicates that most of the Project construction work would occur between June 15 and October 15 of years 2018 and 2019. Some work that could occur before June 15 includes site preparation (vegetation clearing), staging of construction equipment and material, and some earthwork outside of the channel (e.g. grading of maintenance roads).

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations presented below primarily to assist the District in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on biological resources. These comments and recommendations are based on the requirement for the environmental document to include the following information:

Project Description

Section 2.7.3, Page 2-21 – Staging Area and Stockpiling. The draft EIR states that Staging Area B will be located between the primary and secondary channels in Reach 3. Please clarify the proximity of this staging area to the stream channels and whether water will be present on the access road that leads to the staging area. Please clarify whether this staging area is proposed to be used during the wet season and whether it could be subject to inundation. If there is a potential for inundation of the staging area and/or sediment runoff to the creek, the EIR should include an evaluation of potential impacts of the staging area to fish and wildlife resources, and measures to avoid or minimize those impacts, including use of alternate staging areas, especially during the wet season and/or effective erosion control. The draft EIR also does not clearly describe any impacts to vegetation (upland, riparian or wetland) from using Staging Area B for storage of equipment and materials.

Biological Resources

Page 3.4-32, 36 – Impact Analysis and Figure 3.4-4- Habitat Impacts Map. The draft EIR indicates that the Project will result in impacts to several habitat types, including, tidal aquatic, coastal brackish marsh, seasonal saline wetland and willow riparian. The *Habitat Impacts Map* shows the amounts (in acres) of both temporary and permanent impacts to these habitat types. However, the draft EIR does not clearly define temporary and permanent impacts nor explain how some of these habitat types could meet the criteria of a temporary impact, which includes complete restoration of the impact area to pre-Project conditions within one year of the impact. Habitat types such as seasonal wetland or willow riparian typically cannot be fully restored to their pre-Project value or function within one year of removal or other disturbance. Please be advised that if a habitat type cannot be fully restored to pre-Project conditions within one year, CDFW considers this impact as either semi-permanent (restoration within two years) or permanent (more than two years). CDFW recommends that the EIR fully evaluate the type and duration of impacts for each habitat type within the Project area, and provide compensatory mitigation appropriate for each type of impact. For example, mitigation for semi-permanent impacts should be higher than those for temporary impacts in order to offset the temporal loss of habitat functions and values to fish and wildlife species.

Pages 3.4-35, 38 – Longfin smelt and Steelhead. The draft EIR states that the longfin smelt (*Spirinchus thaleichthys*) and Central California Coast steelhead (*Oncorhynchus mykiss*) could occur within the reach of Lower Penitencia Creek, which is tidally influenced, albeit likely

infrequently and in small numbers and only from fall to early spring (Table 3.4-2). However, the draft EIR also states that small numbers of longfin smelt and steelhead may stray into the Project area.

Project activities such as dewatering and installation of sheet piles by pile driving could result in take of longfin smelt, which is listed as threatened under CESA, and steelhead, which is federally-listed and a State Species of Special Concern.

Mitigation Measure BIO-1: *Exclude Fish Prior to Dewatering Activities*, describes the use of block and seine nets by a qualified biologist to exclude fish from the construction area. While the draft EIR includes measures and best management practices to minimize impacts to both longfin smelt and steelhead, these measures do not completely avoid the potential for either direct or indirect take (Fish and Game Code section 86; "take" means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill). CDFW therefore recommends that take authorization for the longfin smelt be obtained through an ITP issued by CDFW under CESA (see *Regulatory Requirements* below). The District should also consult the National Fisheries Marine Service, in coordination with CDFW, for activities that could impact steelhead.

Pages 3.4-40, 41, 42 – Western Pond Turtle. As acknowledged on Page 3.4-40 of the draft EIR, the western pond turtle (*Actinemys marmorata*) is not abundant in the region, and low recruitment may lead to substantial population declines. The western pond turtle is designated by CDFW as a Species of Special Concern. Also, within the document on Page 3.4-32, one of the criteria to determine significance is if the Project would have a substantial adverse effect either directly or through habitat modification. While the draft EIR indicates that the Project would not result in permanent impacts to western pond turtle habitat, as CDFW described above, the duration of impacts to habitat should be re-evaluated. If impacts to western pond turtle habitat are determined to be semi-permanent or permanent, then the EIR should include appropriate and effective mitigation for loss of this species' habitat.

Pages 3.4-43, 44 – Nesting Bird Surveys. Mitigation Measure BIO-3 states that surveys will be conducted no more than two weeks prior to the initiation of construction activities in any given area. CDFW recommends that this measure be revised to include a second nesting bird survey within seven days prior to Project activities in order to ensure detection of nesting birds that may have occupied the area after the first survey.

Page 3.4-50 – Congdon's tarplant. As acknowledged in the draft EIR, Congdon's tarplant (*Centromadia parryi Congdonii*) is a species that has the potential to occur within the Project area, and could be affected by Project construction. Congdon's tarplant is designated by the California Native Plant Society as a 1B.1 species (rare or endangered in California and elsewhere). Mitigation Measure BIO-10 involves compensating Project impacts to the species by preserving an existing population or establishing a new population. The draft EIR states that this native plant species tolerates both non-native plant associates and disturbance, but does not specify whether suitable habitat occurs within or near the Project area. CDFW recommends that the EIR provide an assessment of suitable habitat within the Project area or surrounding areas that could be used for reseeding or replanting of Congdon's tarplant, and clarification on whether offsite translocation will be necessary. If the Project will negatively affect Congdon's

tarplant, then a long-term management plan for the replanting site should be prepared to effectively protect and manage the population.

Page 3.4-57 Tree Removals. The draft EIR states that approximately 22 trees with diameter at breast height (dbh) of six inches or more will be removed during Project construction. However, the draft EIR does not clearly identify the species and size of trees proposed to be removed. It is also not clear whether these trees correspond to the <0.01 acres of permanent impacts to willow riparian woodland shown in Figure 3.4-4- *Habitat Impacts Map*. Please clarify and provide the species and size of trees that will be removed, and appropriate mitigation for loss of trees based on species and size of trees.

In addition, please see the following minor comments: regarding Table ES-2 *Summary of Impacts and Mitigation Measures for the Proposed Project*, unless it is a typo please clarify what "B" stands for, for HYD-7. Similarly, please clarify what "SU" stands for, for NOI-1, 2, and 4. Also, please note that although no suitable habitat is present within the Project area for California Foothill yellow-legged frog (*Rana boylii*), the species status should be changed in the EIR from a Species of Special Concern to a candidate species under CESA due to the recent listing of the species by the Fish and Game Commission.

REGULATORY REQUIREMENTS

California Endangered Species Act

Please be advised that a CESA permit must be obtained if the Project has the potential to result in "take" of plants or animals listed under CESA, either during construction or over the life of the Project. Issuance of a CESA Permit is subject to CEQA documentation; the CEQA document must specify impacts, mitigation measures, and a mitigation monitoring and reporting program. If the Project will impact CESA listed species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain a CESA Permit. For more information on CESA and the ITP application process, please visit our website at: http://www.wildlife.ca.gov/Conservation/CESA.

CEQA requires a Mandatory Finding of Significance if a project is likely to substantially impact threatened or endangered species (CEQA §§ 21001(c), 21083, and CEQA Guidelines §§ 15380, 15064, 15065). Impacts must be avoided or mitigated to less-than-significant levels unless the CEQA Lead Agency makes and supports Findings of Overriding Consideration (FOC). The CEQA Lead Agency's FOC does not eliminate the Project proponent's obligation to comply with Fish and Game Code § 2080.

Lake and Streambed Alteration Agreement

CDFW will require an LSAA, pursuant to Fish and Game Code §§ 1600 et. seq. for Project-related activities within Lower Penitencia Creek and any other 1600-jurisdictional waters within the proposed Project area. Notification is required for any activity that will substantially divert or obstruct the natural flow; change or use material from the bed, channel, or bank including associated riparian or wetland resources; or deposit or dispose of material where it may pass into a river, lake or stream. Work within ephemeral streams, washes, watercourses with a subsurface flow, and floodplains are subject to notification requirements. CDFW, as a Responsible Agency under CEQA, will consider the EIR for the Project. CDFW may not execute

the final LSAA until it has complied with CEQA (Public Resources Code § 21000 et seq.) as the responsible agency.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database, which may be used to make subsequent or supplemental environmental determinations [Pub. Resources Code, § 21003, subd. (e)]. Accordingly, please report any special-status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDB). The CNNDB field survey form can be found at the following link: http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/CNDDB_FieldSurveyForm.pdf. The completed form can be mailed electronically to CNDDB at the following email address: CNDDB@dfg.ca.gov. The types of information reported to CNDDB can be found at the following link: http://www.dfg.ca.gov/biogeodata/cnddb/plants_and_animals.asp.

FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of filing fees is necessary (Fish and Game Code, § 711.4; Pub. Resources Code, § 21089). Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW.

CONCLUSION AND FUTURE COORDINATION

CDFW appreciates the opportunity to comment on the draft EIR to assist the District in identifying and mitigating Project impacts on biological resources. Questions regarding this letter or further coordination should be directed to Ms. Mayra Molina, Environmental Scientist, at (707) 944-5596 or Mayra.Molina@wildlife.ca.gov; or Ms. Brenda Blinn, Senior Environmental Scientist (Supervisory), at (707) 944-5541 or Brenda.Blinn@wildlife.ca.gov.

Sincerely,

Scott Wilson
Regional Manager
Bay Delta Region

Response to Comment G-1

This comment notes that the State Clearinghouse has forwarded comment letters received during the public review period. Letter G also serves as a transmittal for the attached comment letters received from CDFW and NAHC. Please refer to Responses A-1 through A-4 for detailed responses to the NAHC letter, and to Responses B-1 through B-9 for responses to concerns raised by CDFW.

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Chapter 4
REVISIONS TO THE DEIR

This chapter presents text changes to the DEIR in response to the public review and comment process. Changes made in response to comments are identified in Chapter 3 and reproduced in Section 4.1, *Changes and Corrections to the DEIR Initiated by Public Comments.* DEIR changes are presented in the order they would appear in the DEIR, and page numbers are provided to assist in identifying the location of the revisions. Additional changes to the DEIR to correct other errors in the document are presented in Section 4.2, *DEIR Changes Initiated by Lead Agency.*

The chapter provides excerpts of all text from the DEIR that have changed as a result of the comment and responses identified in Chapter 3. DEIR revisions are shown with ~~strikethrough~~ text for deletions and <u>underlined</u> text for additions. DEIR page numbers are also identified for ease of reference.

4.1 Changes and Corrections to the DEIR Initiated by Public Comments

Revisions to Executive Summary

In response to Comment B-8, the following note at the bottom of Table ES-2 has been revised to clarify what "B" and "SU" represent (DEIR page ES-20):

Notes:

LS = Less than Significant; LM = Less than Significant with Mitigation; N/A = Not Applicable; CC = Cumulatively Considerable Contribution; NCC = Not Cumulatively Considerably; <u>B = Beneficial;</u> NI = No Impact; S = Significant<u>; SU = Significant and Unavoidable</u>

Revisions to Chapter 2, "Project Description"

In response to Comment C-15, the last paragraph on DEIR page 2-20 has been revised:

Hydroseeding and Slope Stabilization <u>and Revegetation</u>

Disturbed areas, including the side slopes of the setback replacement levee, maintenance road shoulders, and staging areas would be hydroseeded at the end of the dry-period construction season (likely in October) to provide erosion protection and prevent sediment erosion and transport to the channel. A hydroseed mix consisting of native and naturalized grass seeds, mulch, and tackifier would be sprayed onto the ground surface. In addition, biodegradable mats would be placed on top of disturbed areas, such as on relatively steep levee-side slopes, where necessary to prevent erosion.

For revegetation activities, the District will follow regional guidelines developed by the Phytophthoras in Native Habitats Work Group. This Work Group is a coalition of California native plant nursery managers, land management agencies, researchers, and non-profit organizations, created for the purpose of coordinating and developing comprehensive program of management, monitoring, research, education and policy to minimize the spread of Phytophthora pathogens in restoration sites and native plant nurseries. The full text of the guidelines can be found at www.suddenoakdeath.org/wp-content/uploads/2016/04/Restoration.Nsy_. Guidelines.final .092216.pdf and www.suddenoakdeath.org/wp-content/uploads/2016/04/Restoration guidance FINAL-111716.pdf. Implementing the regional guidelines would require the District to follow sanitation, planting, and nursery guidelines through the following:

- If container plants are used for revegetation efforts, the District will require the nursery to implement the "Guidelines to Minimize Phytophthora Pathogens in Restoration Nurseries" (2016a).

- In preparation for and during restoration activities, the District and its contractors will follow the "Guidelines to Minimize Phytophthora Contamination in Restoration Projects" (2016b).

In addition, to the maximum extent practicable, the District will follow general site sanitation practices such as:

- The exterior and interior of all vehicles, construction equipment and tools should be clean and free of debris, soil and mud (including mud on tires, treads, wheel wells and undercarriage)

- Work shoes should be kept clean by inspection of shoe soles and removal of mud, debris, and soil off treads before moving to a new job site.

- Vehicles should stay on established roads whenever possible.

In response to Comment B-1, the following text has been revised to clarify that the channel would be dewatered prior to use of Staging Area B (DEIR page 2-21):

Staging may also occur at the central berm between the primary and secondary channels in Reach 3 (Staging Area B) during floodwall construction and sediment removal activities. Prior to use of this staging area, the channel would be dewatered and water would be routed around the extent of Reach 3. Within Staging Area B, equipment and materials would be stored on the flat portions of the berm. The central berm is accessible via two existing concrete-lined ramps located at the northern and southern end of Reach 3. These ramps both connect to the levee crest road on the west bank in Reach 3.

In response to Comment D-11, the following text has been revised in Table 2-3 (DEIR page 2-24):

Table 2-3. ~~Applicable~~Anticipated Permit and Regulatory Requirements for Project

Regulatory Agency	Law/Regulation	Purpose	Permit/Authorization Type
U.S. Army Corps of Engineers (USACE)	Clean Water Act (CWA) Section 404/Rivers and Harbor Act Section 10	Regulates placement of dredge and fill materials into waters of the U.S., including wetlands	Individual Permit
U.S. Fish and Wildlife Service (USFWS) / National Marine Fisheries Service (NMFS)	Endangered Species Act Section 7 / Magnuson-Stevens Fishery Conservation and Management Act	Potential Consultation between USACE and USFWS and/or NMFS if threatened or endangered species might be affected by the project	ESA Section 7 Consultation (likely informal consultation for project)

In response to Comment A-1, BMP CU-1 in Table 2-4 (DEIR page 2-29) would be revised to address inadvertent finds of tribal cultural resources as follows:

Cultural Resources	
CU-1: Accidental Discovery of Archaeological Artifacts, Tribal Cultural Resources, or Burial Remains	If historical or unique archaeological artifacts, or tribal cultural resources, are accidentally discovered during construction, work in affected areas will be restricted or stopped until proper protocols are met. Work at the location of the find will halt immediately within ~~30~~100 feet of the find. A "no work" zone shall be established utilizing appropriate flagging to delineate the boundary of this zone. A Consulting Archaeologist will visit the discovery site as soon as practicable for identification and evaluation pursuant to Section 21083.2 of the Public Resources Code and Section 15126.4 of the California Code of Regulations. If the archaeologist determines that the artifact is not significant, construction may resume. If the archaeologist determines that the artifact or resource is significant, the archaeologist will determine if the artifact or resource can be avoided and, if so, will detail avoidance procedures. If the artifact cannot be avoided, the archaeologist will develop within 48 hours an Action Plan which will include provisions to minimize impacts and, if required, a Data Recovery Plan for recovery of artifacts in accordance with Public Resources Code Section 21083.2 and Section 15126.4 of the CEQA Guidelines. If a tribal cultural resource cannot be avoided, the Action Plan will include notification of the appropriate Native American tribe, and consultation with the tribe regarding acceptable recovery options. If burial finds are accidentally discovered during construction, work in affected areas will be restricted or stopped until proper

	protocols are met. Upon discovering any burial site as evidenced by human skeletal remains, the County Coroner will be immediately notified and the field crew supervisor shall take immediate steps to secure and protect such remains from vandalism during periods when work crews are absent. No further excavation or disturbance within ~~30~~100 feet of the site or any nearby area reasonably suspected to overlie adjacent remains may be made except as authorized by the County Coroner, California Native American Heritage Commission, and/or the County Coordinator of Indian Affairs.

Revisions to Chapter 3, "Environmental Setting and Impact Analysis"

Section 3.4, "Biological Resources"

In response to Comment B-8, the following text in the third to last row of Table 3.4-2 (DEIR page 3.4-26) has been revised to note the change in species status for California Foothill yellow-legged frog:

~~CSSC~~SC

In response to Comment B-2, the following text has been revised to include a new table summarizing temporary and permanent habitat impacts that would occur in the project area (DEIR page 3.4-35):

As shown in **Figure 3.4-4**, up to approximately ~~9.71 acres of aquatic habitat, including~~ 0.87 acre of coastal brackish marsh and 8.84 acres of tidal aquatic habitat~~,~~ would be temporarily affected as a result of dewatering. **Table 3.4-4** summarizes temporary and permanent habitat impacts that would occur in the project area.

Table 3.4-4. Temporary and Permanent Habitat Impacts in the Project Area

Habitat	Impacts (acres)	
	Temporary	Permanent
Tidal aquatic	8.84	0.01
Willow riparian woodland	1.93	<0.01
*Wetlands**		
Coastal brackish marsh	0.87	<0.01
Non-tidal seasonal saline wetland	0.03	0.13
Other		
Ruderal grassland	5.82	0.65
Developed/Landscaped	5.35	0.20
Total	***22.85***	***0.98***

**0.08 acre of the permanent impact on wetlands results from conversion of non-tidal seasonal saline wetland to coastal brackish marsh (i.e., a permanent change in wetland type but not the overall amount of wetlands on the site).*

In response to Comment B-5, the following text has been revised to incorporate CDFW's suggestion that the preconstruction nesting bird survey be conducted within seven days prior to the start of work and to include the nesting bird season (DEIR page 3.4-44):

Mitigation Measure BIO-3: Conduct Preconstruction Surveys for Nesting Birds

~~The District will hire a~~A qualified biologist ~~who~~ will conduct preconstruction surveys for nesting birds. Surveys will be conducted no more than ~~2 weeks~~ 7 days prior to the initiation of construction activities during the bird nesting season (January 15 through August 31) in any given area. The survey will cover the portions of the project work area where construction activities will occur as well as a 250-foot buffer for raptors and a 50-foot buffer for non-raptors. During each survey, the biologist will inspect all trees and other potential nesting habitats (e.g., shrubs, ruderal grasslands, wetlands, and buildings) in and immediately adjacent to the impact areas for nests. If a lapse in project-related work of ~~2~~1 week~~s~~ or longer occurs, another focused survey will be conducted before project work can be reinitiated.

In response to Comment B-6 and to incorporate recent survey results for Congdon's tarplant, the following text on DEIR pages 3.4-49 to 3.4-50 has been revised:

Implementation of District BMPs BI-7, BI-8, and WQ-4 would minimize impacts on Congdon's tarplant from survey work, erosion and non-native competition, and staging and stockpiling. Nevertheless, the proposed project may result in residual impacts on this species because complete avoidance of individuals may not be possible. Since publication of the DEIR, a focused survey for Congdon's tarplant was completed throughout the project site on August 7, 2017, during the species' published blooming period. No individuals of Congdon's tarplant were detected during the survey. Typically, focused plant survey results are valid for three years, meaning that once Congdon's tarplant has been determined to be absent from a project site, it is unlikely for the plant to be established within the next three years. It is likely the proposed project would not result in impacts on Congdon's tarplant if construction would occur before August 2020. However, since construction delays can occur, in the event that construction occurs after August 2020, there is a possibility that Congdon's tarplant could establish within the project site ~~As a result~~, and damage to the species from construction would be ~~this impact is~~ considered significant. If construction commences after August 2020, Mitigation Measures BIO-9 and BIO-10 would be implemented to address this significant impact.

Mitigation Measures

Mitigation Measure BIO-9: Conduct Focused Preconstruction Survey for Congdon's Tarplant

~~Prior to construction~~In the event that project construction starts after August 2020, ~~the District will hire~~ a qualified biologist ~~who~~ will conduct a focused survey for Congdon's tarplant in the ruderal grassland habitat within the project area. The survey will be conducted during the species' blooming period (May-November). If a

population of Congdon's tarplant is identified in the project area, the District will implement Mitigation Measure BIO-10 (Compensate for Congdon's Tarplant Impacts).

In response to Comments B-7 and C-10, the second paragraph under Impact BIO-2 has been revised to clarify that no trees would be removed from the willow riparian habitat (DEIR page 3.4-52).

The proposed project would not result in removal or pruning of woody riparian vegetation, including trees, from the willow riparian woodland habitat in the project area. ~~d~~During the use of Staging Area B~~,~~ ~~E~~equipment and materials would be stored on flat portions of the berm where no willows are present.

In response to Comment C-8, the second and third paragraphs under Impact BIO-3 have been revised to clarify that sediment removal would contribute to the project's impacts on waters of the U.S. and state (DEIR pages 3.4-52 to 3.4-53) as follows:

Proposed in-channel activities, including levee modification, sediment removal, and creation of an excavated bench in Reach 1, as well as the use of the off-channel area located between North McCarthy Boulevard and I-880 as Staging Area A, would result in the direct modification of wetland and aquatic communities in the project area, as well as indirect impacts on downstream wetlands and aquatic communities (also called "other waters"). Wetland vegetation may be lost due to mechanical or physical clearing (including at access and staging areas and at sediment removal locations), and damage to vegetation may occur due to crushing by equipment; trampling by personnel; and compaction of soil, which could result in damage to plant roots. Removal of wetland vegetation and sediment may result in the temporary reduction of clonal propagules for colonization of downstream areas. In addition, materials may fall into the channel (in Reach 4) during construction of the new headwalls at the San Andreas Drive bridge. Subsequent installation of erosion control materials, hydroseeding, and planting may also result in the deposit of materials into the channels.

Levee modifications in Reaches 1 and 4~~,~~; bench excavation in Reach 1~~,~~; installation of sheetpile floodwalls in Reaches 1, 2, 3, and 4~~,~~ sediment removal in Reaches 2, 3, and 4; and construction of the new headwalls for the San Andreas Drive bridge in Reach 4 would require temporary dewatering of the affected channel. These activities may also necessitate the operation of heavy equipment within the streambed (after dewatering). Movement of heavy equipment may compact the substrate and damage vegetation, and the lack of water may result in changes to the extent of wetland communities present in the work site. Furthermore, because barren slopes are more susceptible to erosion from rainfall events, the loss of non-instream vegetation along stream banks following project activities may result in an increase in erosion and sedimentation. This may lead to the filling in of pools and damage to wetland vegetation. The proposed project's potential to cause soil erosion and loss of topsoil is evaluated in Impact GEO-3 in Section 3.6, *Geology, Soils, and Seismicity*.

In response to Comment C-2, the third full paragraph on DEIR page 3.4-53 has been revised and a new Table 3.4-5 has been added:

As described above, construction activities could result in hydrologic interruption (e.g., dewatering or diversion), vegetation removal, degradation of water quality (e.g., increased sedimentation and turbidity), and other temporary direct impacts on wetlands and other waters. In addition, direct impacts would occur due to the conversion of wetlands and other waters to upland habitat. The project would impact wetlands and other waters. **Table 3.4-5** summarizes the project's estimated temporary and permanent impacts on wetlands, waters of the U.S., and waters of the state. The project would permanently convert 0.05 acre of non-tidal seasonal saline wetland and 0.01 acre of coastal brackish marsh to ruderal grassland due to the relocation of the levee in Reach 1, and would convert 0.08 acre of non-tidal saline wetland to coastal brackish marsh, a permanent change in wetland type but not the overall amount of wetlands on the site. As such, the project's net permanent impacts on wetlands of the U.S. and State would be 0.06 acre.

In addition, about ~~9.7 ac~~8.84 acre of tidal aquatic and 0.87 acre of coastal brackish marsh habitat would be temporarily disturbed during construction (primarily due to dewatering), as well as 0.03 acre of non-tidal seasonal saline wetland, resulting in a short-term loss of functions and values. The project's estimated temporary impacts on wetlands of the U.S. and state would be 0.90 acre. As shown in Table 3.4-5, the project would result in 8.84 acres of temporary impacts on waters of the U.S./waters of the state. However, these temporarily disturbed areas would remain wetlands and other waters habitat after the project is completed so that there would be no long-term loss of jurisdictional area, or functions and values.

Table 3.4-5. Project Impacts on Wetlands and Other Waters of the U.S. and State

Project Reach	Impacts on Wetlands and Other Waters of the U.S. and State (acres)			
	Temporary Impacts to Wetlands	Permanent Impacts to Wetlands	Temporary Impacts to Other Waters of U.S. and State	Permanent Impacts to Other Waters of U.S. and State
Reach 1	0.61	0.14	0.72	0.00
Reach 2	0.03	0.00	0.68	0.00
Reach 3	0.03	0.00	6.57	0.00
Reach 4	0.23	0.00	0.87	0.00
TOTAL	**0.90**	**0.14**	**8.84**	**0.00**

***Note**: * The California Water Code Section 13050(e) defines "waters of the state" as any surface water or groundwater within boundaries of the state.*

In response to Comment B-2, the last paragraph under Impact BIO-3 has been revised (DEIR page 3.4-54):

> The 0.29 acre of habitat to be created by the wetland bench would offset the proposed project's permanent (0.06 acre) and temporary (0.90 acre) removal of wetland habitat as well as the conversion of 0.08 acre due to conversion of non-tidal seasonal saline wetland to coastal brackish marsh. Among the 0.29-acre wetland habitat to be established, 0.12 acre would offset the net permanent removal of 0.06 acre of wetland habitat at a 2:1 ratio (created wetland: permanently removed wetland), which would be appropriate for addressing permanent impacts. In addition, the created wetland would provide higher quality habitat than the permanently removed wetlands. Regarding the project's temporary impact on wetlands, temporarily impacted wetland habitat is expected to return to pre-construction conditions within one to two years; nevertheless, the remaining 0.17 acre of the overall 0.29-acre wetland bench would offset the 0.98-acre temporary impact at a roughly 2:1 ratio (created/restored wetland: temporarily impacted wetland). However, ~~permanent and temporary impacts on wetlands would be considered significant unless mitigated. Although the District proposes to create marsh habitat on the new bench in Reach 1, the project is in the preliminary design phase and measures have not yet been developed to ensure~~ if the wetland bench does not successfully establish~~ment of~~ a vegetated wetland ~~on the created bench~~ as expected, ~~. Therefore, this~~the impact on wetlands and other waters of the U.S. and state is considered significant. Mitigation Measure BIO-13 would be implemented to address this impact.

In response to Comment D-8, Mitigation Measure BIO-13 has been revised to describe the types of plant species that will be planted at the proposed wetland bench (DEIR pages 3.4-54 to 3.4-55):

> **Mitigation Measure BIO-13: Wetlands ~~and Jurisdictional Waters~~ Mitigation and Monitoring Plan ~~and Contingency Actions~~**
>
> As described in Section 2.6.1, the proposed project includes the creation of a wetland bench on the south bank of Reach 1. The bench would be planted with native species to vegetated wetland habitat.
>
> To ensure that vegetated wetlands successfully establish on the bench, the District will develop a Wetlands Mitigation and Monitoring Plan, which will contain the following components:
>
> - Summary of habitat impacts and acreage of wetland creation
> - Location of wetland creation site(s) and description of existing site conditions
> - Mitigation design, including the following:
>   - Existing and proposed site hydrology
>   - Grading plan if appropriate, including bank stabilization or other site stabilization features
>   - Soil amendments and other site preparation elements as appropriate

- Planting plan to establish the target coastal brackish marsh habitat. Species composition will be determined by hydrology and soils but is anticipated to be similar to adjacent wetlands. Dominant species may include: alkali bulrush, hardstem bulrush, California bulrush, and broadfruit bur reed. Temporarily impacted non-tidal seasonal saline wetlands will be replanted. Dominant species may include: creeping wild-rye, alkali heath, California gray rush, and pickleweed.
- Maintenance plan
- Remedial measures/adaptive management, etc.

▪ Monitoring plan (including ~~final and~~ performance criteria, monitoring methods, data analysis, reporting requirements, monitoring schedule, etc.).

The District will implement the Wetlands Mitigation and ~~Jurisdictional Waters~~ Monitoring Plan.

In response to Comment C-10, the fourth sentence of the first full paragraph on DEIR page 3.4-57 has been revised to include the updated number of trees planned for removal.

In total, ~~about 22~~an estimated 33 live trees with a dbh of 6 inches or more would be removed during project construction.

Section 3.5, "Cultural Resources"

In response to Comment A-2, the following text under Impact CR-2 has been revised to clarify that the District would comply with processes outlined in Health and Safety Code Section 7050.5 and Public Resources Code 5097.98 (DEIR page 3.5-17):

District BMP CU-1 requires that construction activities halt immediately within ~~30~~100 feet of a find and that both the Santa Clara County Coroner and a qualified archaeologist be contacted to evaluate the discovery site and determine whether construction may resume. In addition, the District would comply with the processes outlined in Health and Safety Code Section 7050.5, which requires the Coroner to contact the NAHC within 24 hours of determining whether the remains of a Native American and that the NAHC identify a Most Likely Descendent (MLD). Pursuant to the provisions of Public Resources Code 5097.98, the MLD designated has at least 48 hours to inspect the site and propose treatment and disposition of the remains and any associated grave goods. The District would work with the MLD to ensure that the remains are removed to a protected location and treated with dignity. Implementation of BMP CU-1 and compliance with Health and Safety Code Section 7050.5 and Public Resources Code 5097.98 would ensure that construction-related impacts on archaeological resources are less than significant. ~~Applicable District BMPs, as provided in Chapter 2, include the following:~~

In response to Comment A-2, the following text under Impact CR-4 has been revised to clarify that the District would comply with processes outlined in Health and Safety Code Section 7050.5 and Public Resources Code 5097.98 (DEIR page 3.5-17):

District BMP CU-1 requires that construction activities halt immediately within ~~30~~100 feet of any buried human remains and that both the Santa Clara County

Coroner and a qualified archaeologist be contacted. As described in Impact CR-2, the District would comply with the processes outlined in Health and Safety Code Section 7050.5, which requires the Coroner to contact the NAHC within 24 hours of determining whether the remains of a Native American and that the NAHC identify a MLD. Per Public Resources Code 5097.98, the MLD designated has at least 48 hours to inspect the site and propose treatment and disposition of the remains and any associated grave goods. The District would work with the MLD to ensure that the remains are removed to a protected location and treated with dignity. Implementation of BMP CU-1 and compliance with Health and Safety Code Section 7050.5 and Public Resources Code 5097.98 would ensure that disturbance to human remains is less than significant.

In response to Comment A-1, the following text has been revised to clarify that the District is not required to evaluate potential impacts on TCRs and that implementation of BMP CU-1 would ensure that inadvertent discoveries of TCRs (which are also archaeological resources) are addressed appropriately (DEIR page 3.5-17):

Impact CR-5: Cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code Section 21074 (~~No Impact~~Less than Significant)

As described in the environmental setting, the NOP for this EIR was issued prior to July 1, 2015, and as a result, the District is not required to formally consult with local tribes under PRC 21080.3.1. Regardless, this topic is addressed since questions relating to TCRs was recently added to the State CEQA Guidelines Appendix G environmental checklist in July 2016. This evaluation is based on the literature and record search and District's Native American consultation process described in the setting section. No TCRs, as defined in PRC Section 21074, were identified within the project site. In the event of an accidental discovery of a TCR that is also a historical or unique archaeological artifact, BMP CU-1 (see Chapter 2, *Project Description*) would be implemented to ensure that construction activities halt and that a qualified archaeologist is contacted. If a tribal cultural resource cannot be avoided, an Action Plan will include notification of the appropriate Native American tribe, and consultation with the tribe regarding acceptable recovery options. ~~As a result~~ With implementation of BMP CU-1, the proposed project would not cause a substantial adverse change to a TCR and the~~re would~~ impact would be ~~no impact~~less than significant.

Section 3.9, "Hydrology and Water Quality"

In response to Comment C-12, the following text under Impact HYD-1 has been revised to clarify that dewatering is a construction activity that was factored in the project's evaluation of construction-related effects on water quality (DEIR pages 3.9-12 to 3.9-13):

More specifically, construction activities that would disturb channel bank and bed material (e.g., construction of the vegetated bench in Reach 1 and dewatering) could cause erosion and sediment transport downstream. Increased suspended sediment loads could increase turbidity, water temperature, and dissolved oxygen.

In response to Comment C-18, the following text under Impact HYD-5 has been revised to clarify the area of new impervious surfaces created by the project (DEIR pages 3.9-17 to 3.9-18).

After project construction is complete, the top-of-bank maintenance roads in Reaches 2, 3, and 4 of the Lower Penitencia Creek channel would be similar to existing maintenance roads in length, and surfacing materials. Because the Reach 2 floodwall would displace the existing paved access driveway to the City of Milpitas pump station located south of Reach 2, a new driveway connecting to California Circle would be built. The new drive would be surfaced with permeable aggregate base.

In portions of Reaches 3 and 4, some sections of the existing maintenance roads/trails on the levee crests would be widened by ~~two~~ up to four feet to extend to the base of the newly installed floodwalls, which would result in a minor increase in road surface area. Road/trail widths would increase from the current width of 10 feet to 14 feet. The road, including the widened areas, would be surfaced with permeable aggregate, which would be similar to the existing road surface. In Reach 4, existing roads/trails paved with concrete on the east levee would be replaced with roads/trails surfaced with permeable aggregate base rock. In Reaches 1 through 3, a total of 7,742 square feet of impervious surfaces would be created through widening of maintenance roads/trails paved with asphaltic concrete. In Reach 4, a total of 1,112 square feet of existing roads/trails paved with asphaltic concrete would be replaced with aggregate base. As a result, the project would result in a net increase of 6,630 square feet of new impervious surfaces.

~~The existing depressed maintenance road in Reach 3 would not be modified. the existing levee crest maintenance road would be removed when the levee is demolished and replaced by a new maintenance road on the crest of the newly constructed setback levee. The new levee crest road would be surfaced with compacted aggregate, similar to the road it would replace. Overall, post-construction maintenance roads would similar in area and surface materials as the existing channel maintenance roads.~~

~~The proposed headwalls on the San Andreas Drive Bridge would be located on the bridge deck, an existing impervious surface. The headwalls would not result in increased impervious surface area and would not affect runoff rates.~~

~~The project floodwalls would be composed of coated steel and would be impervious. The proposed project would include about 7,000 linear ft. of floodwalls, topped by a 1 ft. wide coated steel cap. The total impervious surface area would be about 7,000 sf (0.16 ac), which would represent less than one percent of the total project area of 25.47 acres. That change would not substantially affect storm runoff rates. The floodwalls would be located at or near the cress of existing levees, which serve as existing local runoff divides; thus, they would not change runoff flow directions from existing conditions.~~

~~The proposed project would not substantially increase the number of impervious surfaces at the project site or otherwise substantially affect stormwater runoff rates or volumes. After construction, storm runoff from the project area would not exceed the capacity of existing stormwater drainage systems. The proposed project would not generate new sources of polluted runoff. After project construction is complete,~~

~~the top-of-bank maintenance roads in Reaches 2, 3, and 4 of the Lower Penitencia Creek channel would be similar to existing maintenance roads in length, and surfacing materials. In portions of Reaches 3 and 4, some section of the existing maintenance roads on the levee crests would be widened by two to four feet to extend to the base of the newly installed floodwalls, which would result in a minor increase in road surface area.~~

~~The proposed project would include resurfacing or widening of over 10,000 square feet of the District's existing maintenance roads and the District would be required to comply with Provision C.3. of the Municipal Regional Permit, which encourages source control measures that limit pollutant generation, discharge and runoff (e.g., bioswales, bioretention units, and other low impact development options).~~ Although this project is not subject to the source control, site design, and stormwater requirements pursuant to the Municipal Regional Stormwater Permit (NPDES No. CAS612008), the design of the proposed project would be consistent with the policies contained in the Municipal Regional Permit by minimizing runoff generation, promoting infiltration of storm water, and using vegetated areas to filter pollutants from the storm water before it enters the creek. The project would minimize generation of stormwater by surfacing new and existing roads with permeable material wherever possible and removing existing impervious pavement where possible. The maintenance roads in Reaches 1 and 3 would have cross-slopes directing stormwater runoff from the roads to vegetated areas on the banks of the creek, including the wetlands bench and transitional vegetated areas in Reach 1. This would promote infiltration of stormwater into the soil. The vegetated areas receiving stormwater would filter sediment and other pollutants from the stormwater, reducing the amount of pollutants reaching the creek channel. Additionally, the project design would include landscaping consistent with the guidelines referenced in section C.3.a.i(8) of the Municipal Regional Permit. Revegetation at the project area would use native plants that are adopted to the local climate. No irrigation systems would be installed and artificial watering would be limited to the minimum necessary to establish the plants. After the establishment period is complete, no irrigation or artificial watering would be required. ~~Compliance with applicable provisions in the~~The project would be furthering stormwater policies in the Municipal Regional Permit and prevent stormwater pollution; therefore~~would ensure that~~ this impact would be less than significant.

4.2 DEIR Changes Initiated by Lead Agency

Revisions to Table of Contents

Because the DEIR is a component of this FEIR, all cross-references to the DEIR should be revised. The title of Section 1.4 has been revised in the Table of Contents (DEIR page i) as follows:

1.4 Organization of this ~~D~~EIR

Since the appendices are now a part of Volume 3 of the FEIR, the following text on DEIR page iv of the Table of Contents has been revised:

~~Appendices~~

~~Appendix A~~	~~Scoping Summary Report~~
~~Appendix B~~	~~Local Plans and Policies~~
~~Appendix C~~	~~Air Quality and Greenhouse Gas Emissions Calculations~~
~~Appendix D~~	~~Preliminary Wetland Delineation~~
~~Appendix E~~	~~Special-Status Plant Species Analyzed for Potential Occurrence in the Project Area~~
~~Appendix F~~	~~Detailed Descriptions of Special-Status Animal Species Potentially Occurring in the Project Area~~
~~Appendix G~~	~~Noise Calculations~~
~~Appendix H~~	~~Traffic Memorandum~~
~~Appendix I~~	~~Mitigation Monitoring and Reporting Program~~

To correct the revised title of updated DEIR Table 2-3, the following title of this table has been revised in the Table of Contents (DEIR page v):

Table 2-3. ~~Applicable~~Anticipated Permit and Regulatory Requirements for Project

To incorporate reference to the newly added Tables 3.4-4 and 3.4-5, the title and page numbers for these tables have been added to the Table of Contents (DEIR page vi):

Revisions to Executive Summary

Because the DEIR is a component of this FEIR, all cross-references to the DEIR should be revised. The first paragraph under the heading "Introduction" has been revised as follows on DEIR page ES-1:

> The Santa Clara Valley Water District (District) prepared this ~~Draft~~ Environmental Impact Report (~~D~~EIR) to provide the public, responsible agencies, and trustee agencies with information about the environmental effects of the proposed Lower Penitencia Creek Improvements Project (proposed project). This ~~D~~EIR was prepared in compliance with the California Environmental Quality Act (CEQA) of 1970 (as amended) and the State CEQA Guidelines (California Code of Regulations [CCR] Title 14, Section 15000 et seq.).

Since the DEIR was published, project design has advanced and the District has determined that a few minor changes to the proposed project should be reflected in the FEIR. Within Reach 1, the

District plans to construct a 50-foot-long sheetpile floodwall to the north of the channel in an upland area near I-880. In addition, an approximately 25-foot-long segment of sheetpile floodwall would be installed on top of the existing north/east bank levee to the east of I-880 in Reach 2.

As a result of these changes, Table ES-1 on DEIR page ES-5 has been revised as follows:

Table ES-1. Proposed Project Elements

Reach or Bridge	Project Elements
Reach 1 Coyote Creek to Highway 880	Relocated and raised south bank levee with maintenance road on crest Wetland bench on south bank <u>Approximately 50 feet of sheetpile floodwall to the north of channel</u>
Reach 2 I-880 to California Circle	Sheetpile floodwall on top of existing south/west bank levee <u>Approximately 25 feet of sheetpile floodwall on top of existing north/east bank levee near I-880</u> Removal of about 70 cy of sediment from the concrete-lined channel Relocated access ramp to City's pump station Maintenance road improvements
Reach 3 California Circle to Milmont Drive	Sheet pile floodwalls on top of existing west and east bank levees Earthen fill to floodwall to allow the existing Penitencia Creek Trail to cross over the new floodwall Maintenance road improvements Removal of accumulated sediment from low-flow channel
Reach 4 Milmont Drive to San Andreas Drive	Sheetpile floodwalls on top of existing west bank levee Raising of existing east bank levee by up to 6 feet Removal of about 730 cy of sediment from the concrete-lined channel Maintenance road improvements
San Andreas Drive Bridge	Headwalls on the downstream and upstream faces of San Andreas Drive bridge

Since the DEIR was published, project design has advanced further and the excavation and fill volumes have been updated. To reflect these updates and to correct a typographical error, the following text on DEIR page E-6 has been revised:

Construction Workers and On-haul and Off-haul Estimates

The proposed project would require up to 40 construction workers on site, although less than 20 workers would likely be on site on a typical workday. It is expected that all excavated soil would be reused on site, and approximately 3,4303~~,500~~ cubic yards (cy) of fill~~concrete~~ would be delivered and placed on site. About 2,300 cy of sediment would be removed from the low-flow channel for disposal off-site.

Because the EIR public comment period has been completed since publication of the DEIR, the following text under the "Draft EIR Public Comment Period" has been revised on DEIR page ES-7 as follows:

The District ~~is circulating this~~ circulated the DEIR for a 45-day public review and comment period.

Interested parties ~~are~~were encouraged to submit written comments on ~~this~~the DEIR. All comments ~~must be received~~were due by 5:00 p.m. on July 3, 2017 and directed to:

Michael Coleman, Environmental Planner II
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95115
mcoleman@valleywater.org

Written comments on the DEIR received by the Distirict during the public review period ~~will be~~were addressed in ~~the~~this Final EIR (Volume 1, Response to Comments on the Draft EIR).

Because the DEIR is a component of this consolidated FEIR, all cross-references to the DEIR have been revised. The last sentence under the heading "Significant Impacts" has been revised on DEIR page ES-8 as follows:

Sections 3.2 through 3.14 of this ~~D~~EIR address each of these environmental resource topics and the environmental consequences of the proposed project in more detail.

To ensure consistency with text revisions made in Response to Comment A-1 and revisions made to the significance determination under Impact CR-5, the tenth row of Table ES-2 (DEIR page ES-14) has been revised as follows:

Impact	Significance Level Before Mitigation	Applicable Mitigation Measures	Significance Level After Mitigation
CR-5: Cause a substantial adverse change in the significance of a tribal cultural resource as defined in public resources code Section 21074	~~NI~~LS	None	~~NI~~LS

Revisions to Chapter 1, "Introduction"

As the DEIR is a component of this consolidated FEIR, all cross-references to the DEIR have been revised. The first sentence in Chapter 1 (DEIR page 1-1) has been revised as follows:

> The Santa Clara Valley Water District (District) prepared this ~~draft~~ environmental impact report (~~D~~EIR) to provide the public, responsible agencies, and trustee agencies with information about the potential environmental effects of implementing the proposed Lower Penitencia Creek Improvements Project (proposed project).

The first sentence under Section 1.1, Project Background, has been revised to clarify the proposed project's relation to other projects upstream of Lower Penitencia Creek (DEIR page 1-1):

> ~~The District has approved and is planning~~This project relates to capital improvements to Lower Penitencia Creek and several of its tributaries.

To clarify what was covered under the Lower Berryessa Creek Program EIR, the first sentence of the last paragraph on DEIR page 1-1 has been revised:

> In 2011, the District prepared the *Lower Berryessa Creek Program Environmental Impact Report* (Program EIR); this ~~was a program-level~~ EIR ~~covering~~ covers all capital improvements on the four creeks.

As the DEIR is a component of this consolidated FEIR, all cross-references to the DEIR have been revised. The following cross-reference to the "DEIR" has been revised on page 1-3 as follows:

> This ~~D~~EIR analyzes proposed improvements to Lower Penitencia Creek, the downstream-most element of the Program, which receives water conveyed by the upstream Program elements.

As the DEIR is a component of this consolidated FEIR, all cross-references to the DEIR have been revised. The following cross-reference to the "DEIR" on page 1-4 as follows:

> In proposing to construct and operate the project as identified in Chapter 2, *Project Description,* of this ~~D~~EIR, the District is proposing to carry out and approve a discretionary project subject to CEQA (14 CCR Section 15378).

As the DEIR is a component of this consolidated FEIR, all cross-references to the DEIR have been revised. The second sentence under the heading "Baseline Conditions" has been revised on DEIR page 1-4 as follows:

> In accordance with State CEQA Guidelines Section 15125, for purposes of this ~~D~~EIR, the environmental setting is the existing physical conditions at the time the Notice of Preparation of an EIR (NOP) was published (June 11, 2015).

As the DEIR is a component of this consolidated FEIR, all cross-references to the DEIR have been revised. The first two sentences of the last paragraph on page 1-4 has been revised as follows:

Please note, that since the NOP was published, two residential development projects, just west of Reach 3 (Waterstone and iStar), have been under construction during the preparation of this ~~Draft~~ EIR document. While no residents were living in the new townhomes at the time the ~~Draft~~ EIR was prepared, given the high housing demands in the Milpitas and South Bay Area, these developments will likely be inhabited by the time construction of the Lower Penitencia Creek Improvements Project begins.

Because the DEIR is a component of this consolidated FEIR, all cross-references to the DEIR have been revised. The first sentence in Section 1.3.4 (DEIR page 1-5) has been revised as follows:

The District ~~has~~ prepared the~~is~~ DEIR, as informed by public and agency input received during the scoping period, to disclose potentially significant environmental impacts associated with the proposed project.

Because the EIR public comment period has been completed since publication of the DEIR, the following text in Section 1.3.5 (DEIR page 1-5) has been revised as follows:

The DEIR ~~is currently undergoing~~was available for public review for 45 days. The public review period provide~~s~~d the public an opportunity to comment on the DEIR to the lead agency. During the public review period, the District ~~will hold~~held a public meeting. The meeting ~~will begin~~began with a brief overview of the proposed project and the analysis and conclusions set forth in the DEIR. This introductory presentation ~~will then be~~was followed by the opportunity for interested members of the public to provide oral and written comments to the District regarding the proposed project and the DEIR.

This information ~~is~~was also included in the Notice of Availability of ~~this~~the DEIR.

Because the EIR public comment period has been completed since publication of the DEIR, the following text in Section 1.3.6 (DEIR page 1-6) has been revised as follows:

Written and oral comments received in response to the DEIR ~~will be~~were addressed in a Response to Comments document that, together with the DEIR and any related changes to the substantive discussion in the DEIR, ~~will~~ constitute ~~the~~this Final EIR (FEIR). The Response to Comments document is presented in Volume 1 of this FEIR. ~~The~~This FEIR, in turn, will inform the District's exercise of its discretion as a lead agency under CEQA in deciding whether or how to approve the proposed project.

Because the DEIR is a component of this FEIR and constitutes as Volume 2 of the FEIR, all cross-references to the DEIR have been revised. The title of Section 1.4 and the first sentence in this section has been revised as follows on DEIR page 1-6:

1.4 Organization of this ~~D~~EIR

This ~~D~~volume of the EIR contains the following components:

To clarify that the appendices are part of Volume 3 of this FEIR, the following sentence has been added to DEIR page 1-7 before the list of appendices:

Volume 3 of this FEIR is organized as follows:

Appendix A is the Scoping Summary Report, which includes the NOP issued by the District, a summary of the scoping process, comments received during the scoping period, and copies of comments received.

Since publication of the DEIR, two new appendices have been added to the FEIR. Therefore, the following text has been added to the end of Section 1.4 (DEIR page 1-7):

Appendix J contains the Notice of Availability and DEIR distribution list.

Appendix K includes the public meeting presentation and sign-in sheet.

Since the public comment period has been completed since publication of the DEIR, the following text in Section 1.5 has been revised as follows (DEIR pages 1-7 to 1-8):

The District ~~is circulating~~circulated the DEIR for a 45-day public review and comment period, as identified in the Notice of Availability. As discussed in Section 1.2.4 above, the District ~~will~~hosted a public meeting during this period at which oral and written comments will be received. The purpose of public circulation and the public meeting ~~is~~was to provide agencies and interested individuals with opportunities to comment on or express concerns regarding the contents of the~~is~~ DEIR.

Meeting attendees were allowed to submit ~~W~~written and oral comments concerning ~~this~~the DEIR ~~may be submitted~~ at the public meeting described above, and written comments ~~can be provided at any time~~were submitted during the DEIR public review period. ~~All written comments must be received by 5:00 p.m. on the final date of public review, as identified in the Notice of Availability.~~ Written comments ~~should be~~were directed to the name and address listed below:

Michael Coleman, Environmental Planner II
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118
mcoleman@valleywater.org

Submittal of written comments via e-mail (Microsoft Word or Adobe PDF format) ~~is~~was preferred. Written and oral comments received in response to ~~this~~the DEIR during the public review period w~~ill be~~ere addressed in ~~a~~ the Response to Comments section of the FEIR (Volume 1).

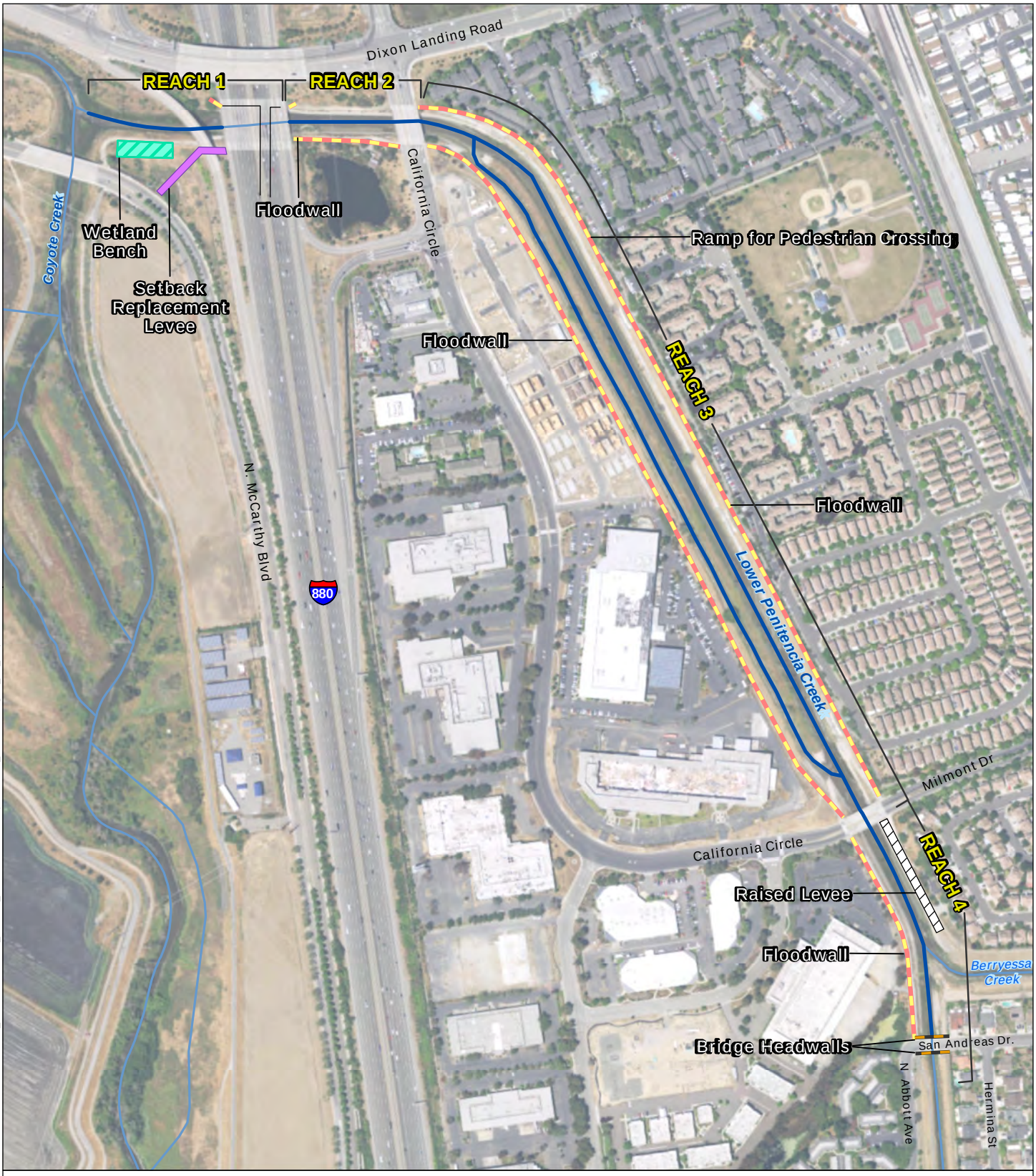
Revisions to Chapter 2, "Project Description"

To incorporate the project description changes described above under the heading "Revisions to Executive Summary," Table 2-1 on DEIR page 2-10 has been revised as follows:

Table 2-1. Proposed Project Elements Considered for Reach and Bridge Locations

Reach or Bridge	Project Elements
Reach 1 Coyote Creek to Highway 880	Relocated and raised south bank levee with maintenance road on crest Wetland bench on south bank Approximately 50 feet of sheetpile floodwall to the north of channel
Reach 2 I-880 to California Circle	Sheetpile floodwall on top of existing south/west bank levee Approximately 25 feet of sheetpile floodwall on top of existing north/east bank levee near I-880 Removal of about 70 cy of sediment from the concrete-lined channel Relocated access ramp to City's pump station Maintenance road improvements
Reach 3 California Circle to Milmont Drive	Sheet pile floodwalls on top of existing west and east bank levees Earthen fill to floodwall to allow the existing Penitencia Creek Trail to cross over the new floodwall Maintenance road improvements Removal of accumulated sediment from low-flow channel
Reach 4 Milmont Drive to San Andreas Drive	Sheetpile floodwalls on top of existing west bank levee Raising of existing east bank levee by up to 6 feet Removal of about 730 cy of sediment from the concrete-lined channel Maintenance road improvements
San Andreas Drive Bridge	Headwalls on the downstream and upstream faces of San Andreas Drive bridge

To incorporate the project description changes described above under the heading "Revisions to Executive Summary," Figure 2-4 on DEIR page 2-11 has been revised to show the two new segments of floodwall near I-880. The revised figure is shown on the following page.



C:\Users\GIS\Documents\ArcGIS_PROJECTS\15005_SCVWD_LowerPenitenciaCEQA\mxd\EIR_PublicDraft\Figure_2-4_ProposedElements.mxd 8/11/2017 PG

N

0 100 200 400
Feet

Proposed Elements
- Raised Levee
- Setback Replacement Levee
- Wetland Bench
- Bridge Headwall
- Floodwall

Prepared by:
Horizon
WATER and ENVIRONMENT

Figure 2-4
Proposed Project Elements

Lower Penitencia Creek Improvements Project

To acknowledge that vertical sheet pile floodwalls would be installed along all four reaches of the channel, the following revisions to the DEIR have been made on page 2-13 under the heading "Floodwalls."

> New vertical sheet pile floodwalls would be constructed on top of the existing levees parallel to the creek channel in all four ~~R~~reaches ~~2, 3, and 4~~.

To accommodate these changes to the project, the following revisions to the DEIR have been made on page 2-13:

> **Reach 1.** An approximately 50-foot-long section of floodwall would be constructed on the north/east levee near I-880.
>
> **Reach 2**. A floodwall would be constructed on the outboard side of the south/west levee in Reach 2. To accommodate access to the California Circle Pump Station, which is located just south of the District's this levee, an 18-foot-wide ramp accessible from California Circle would be constructed behind the floodwall. A 26-foot-long segment of floodwall would be constructed on the north/east levee near I-880.

Because the District plans to install floodwalls along all reaches of the project area, the following heading under Section 2.7.1 has been revised as follows on DEIR page 2-18:

> ### ~~*Reach 2, 3, and 4*~~ *Floodwalls*

Since the DEIR was published, project design has advanced further. To incorporate the latest excavation volumes associated with the proposed wetland bench, the following sentence has been added to the first incomplete paragraph on DEIR page 2-19:

> The existing levee would be removed down to grade level. The new levee would be set back from the creek channel and constructed using stockpiled soils, imported fill, or a combination of the two. Approximately 4,600 cubic yards would be excavated and ~~T~~to the extent feasible, material excavated from the existing levee would be used to reconstruct the new levees. The newly placed fill would be contoured and compacted to ensure the levees' structural stability. The levee slopes would be hydroseeded[1] with native grasses for erosion protection.

To correct an error regarding the future disposition of sediment removed from the channel, the last sentence of the third full paragraph on DEIR page 2-19 has been revised. All sediment removed from the channel would be removed and would not be suitable for re-use on the project site.

> This sediment would ~~either~~ be ~~reused on site or~~ off-hauled to the Newby Island Landfill, located just northwest of the project site.

[1] Hydroseeding is a planting process that uses a slurry of seed and mulch; it is often used as an erosion control technique on construction sites to stabilize bare soil and prevent erosion.

Since the DEIR was published, project design has advanced further. Therefore, to incorporate the latest excavation and fill volumes, the following text has been added at the end of the first full paragraph on DEIR page 2-22:

> **Table 2-2** summarizes the anticipated number of potential worker trips and construction-related trips for the proposed project. The proposed project would require up to 40 construction workers on site, although 20 workers would likely be on site on a typical work day. The construction-related trip estimates are based on the District's Planning Study Report, which assumed that approximately 14,400 cubic yards of excavated soil would be reused on site, approximately 6,700 cubic yards of soil would be off-hauled, and approximately 3,500 cubic yards of concrete would be delivered and placed on site (SCVWD 2016). About 2,300 cubic yards of sediment would be removed from the low-flow channel for disposal off-site. The Planning Study Report estimates are conservative and it is likely that the project would actually require somewhat less concrete and earth movement. Since the DEIR was published, project design has advanced and the total volume of soil that would be excavated would be approximately 4,600 cubic yards. Assuming that this material would be reused for new levee construction, an additional 3,430 cubic yards of fill material would be imported to the project site for new levee construction. These excavation and fill quantities were not available at the time the DEIR was published; ~~T~~therefore, the construction-related trip estimates presented in Table 2-2 are overestimated and considered conservative.

To acknowledge that construction delays could occur, the following text in Section 2.7.4 on DEIR page 2-22 has been revised:

2.7.4 Construction Schedule

The District intends to construct the proposed project over 2 years, during 2018 and 2019. In-channel construction activities, including channel dewatering, would occur between June 15 and October 15 each year, although some work outside the creek channel and revegetation planting may occur before June 15 or after October 15. Construction activities that could occur prior to June 15 include site preparation (e.g. vegetation clearing), staging of construction equipment and materials, and some earthwork outside of the channel (e.g. grading of maintenance roads). For the purposes of the EIR, it is assumed that the total number of work days would be equivalent to 4 months total each year. Although the phasing of construction has not yet been determined, for the purposes of this analysis, it is assumed that the first half of the construction activities would take place in 2018 and the second half would occur in 2019. While there is a possibility that construction delays could occur, the EIR analysis conservatively assumes a worse-case scenario that construction activities would be condensed within a 2-year timeframe.

Revisions to Chapter 3, Section 3.1, "Environmental Setting, Impacts, and Mitigation Measures"

As the DEIR is a component of this FEIR and constitutes as Volume 2 of the FEIR, all cross-references to the DEIR have been revised. The first sentence in Section 3.1.1 has been revised as follows (DEIR page 3.1-1):

Chapter 3, *Environmental Setting, Impacts, and Mitigation Measures,* of this ~~D~~EIR contains 13 sections that describe the environmental resources and environmental impacts of the proposed project.

As the DEIR is a component of this FEIR and constitutes as Volume 2 of the FEIR, all cross-references to the DEIR have been revised. The last two sentences in Section 3.1.3 (DEIR page 3.1-2) have been revised as follows:

Where impacts are significant, feasible mitigation measures are presented. The ~~D~~EIR evaluates the effectiveness of identified mitigation measures to reduce significant impact to less-than-significant levels.

In some cases, when impacts are not significant and thus no mitigation is required, the ~~D~~EIR nevertheless discusses mitigation measures developed to address other significant impacts but would also reduce a less-than-significant impact in another topic area.

Revisions to Chapter 3, Section 3.2, "Aesthetics"

Since publication of the DEIR, the District has determined that tree and shrub removal would be necessary along all four project reaches. To reflect this change, the third sentence of the third full paragraph on DEIR page 3.2-17 has been revised:

Tree and shrub removal would also occur along Reaches 1, 2 ~~and~~ 3, and 4 to accommodate the new replacement levee and floodwalls.

Since publication of the DEIR, project design has advanced and the number of trees planned for removal has changed. To reflect this change, the last two paragraphs on DEIR page 3.2-22 have been revised as follows:

Tree and Shrub Removal. As noted above, tree and shrub removal would occur along portions of Reaches 1, 2, 3, and 4 to accommodate the replacement levee and new floodwalls. An estimated total of 33~~22~~ live trees with diameter at breast height (dbh) of 6 inches or more would be removed during project construction.

In particular, in Reach 1, some vegetation located at the proposed locations of the setback levee and wetland bench would be removed during construction. This vegetation consists primarily of low ground cover, with scattered small shrubs. One~~No~~ tree~~s~~ with a dbh of 6 inches or more would be removed in Reach 1. ~~Five~~Four live trees with dbh of 6 inches or more located on the south bank of Reach 2 would be removed to accommodate the ramp that would be constructed behind the floodwall. One tree with dbh of 6 inches or more would be removed on the north bank of Reach 2. In Reach 3, existing primarily non-native trees and shrubs would be removed along the outboard sides of the east bank and west bank levees. In Reach 3, 17 live trees with dbh of 6 inches or more would be removed. In Reach 4, ten live trees with dbh of 6 inches or more would be removed~~a small number of trees and shrubs~~ on the east bank south of Milmont Drive would be removed during construction of the raised levee in this area. ~~None of the trees that would be removed in Reach 4 have dbh exceeding 6 inches.~~ From the perspective of recreationists using the Penitencia Creek Trail, removal of trees and vegetation along in Reach 1 and on the outboard levee

slopes in Reaches 2, 3, and 4 would be noticeable. This vegetation provides a pleasing visual contrast to the surrounding urban development. The vegetation to be removed at Reach 1 consists primarily of non-native of low ground cover and the creation of a wetland bench vegetated with native plants in this reach would improve the overall esthetics of this Reach 1. Trees would be removed in Reaches 1, 2, 3, and 4; however, they would be replaced in compliance with the City of Milpitas Tree Maintenance and Protection ordinance, which is described in more detail in Section 3.4, *Biological Resources*.

Revisions to Chapter 3, Section 3.3, "Air Quality"

As described above, project design has advanced further. While the updated excavation and fill volumes were not used to re-run the air quality model, the following on DEIR page 3.3-11 has been incorporated to acknowledge this project update.

During construction of the proposed project, the combustion of fossil fuels for operation of fossil-fueled construction equipment, material hauling, and worker commute vehicles would result in construction-related emissions of criteria air pollutants. These emissions were estimated using the California Emissions Estimator Model (CalEEMod) version 2013.2.2 and based on the construction equipment, phasing, duration, and worker quantities summarized in **Appendix C** (Air Quality and Greenhouse Gas Emissions). These assumptions were generally based on similar project types and the excavation and fill volumes presented in the District's Planning Study Report (SCVWD 2016). Since publication of the DEIR, project design has advanced and the excavation and fill volumes have been reduced; mainly the net import value would be about 3,430 cy and all excavated soil would be reused on-site. As such, the assumptions used to estimate the project's construction emissions are overestimated and the calculated emissions in Appendix C are considered conservative.

In May 2017, the Bay Area Air Quality Management District (BAAQMD) initiated an effort to update the CEQA Guidelines to incorporate new and/or revised requirements, recent court decisions, improved methodologies, and new mitigation strategies. To incorporate the latest updates to the BAAQMD thresholds, the following text has been revised on DEIR page 3.3-12:

BAAQMD Thresholds

The BAAQMD has established mass emission thresholds of significance (BAAQMD 2010b) to determine if air emissions would contribute to an existing or projected air quality violation, result in a cumulatively considerable contribution to an existing air quality violation, or result in a cumulatively considerable net increase of a criteria pollutant such that the air basin would be in nonattainment for CAAQS or NAAQS. Although the BAAQMD established significance thresholds for construction- and operation-related emissions previously (BAAQMD 1999), the 2010 thresholds were selected for this analysis since the 1999 construction-related significance thresholds were primarily limited to PM_{10} emissions. ~~At the time of Draft EIR preparation, the BAAQMD was not recommending use of these construction thresholds due to ongoing litigation on unrelated thresholds.~~ In May 2017, the BAAQMD initiated an effort to update its CEQA Guidelines including release of a May 2017 version of the guidelines. The May 2017 Guidelines Update includes revisions made to the 2010

Guidelines to incorporate the California Supreme Court's opinion in California Building Industry Association v. Bay Area Air Quality Management District, 62 Cal. 4th 369. The BAAQMD is currently working to update outdated references, links, analytical methodologies or other technical information in the May 2017 Guidelines Update. The thresholds in the May 2017 Guidelines Update remain the same as those shown in the 2010 Guidelines. In view of the Supreme Court's opinion, local agencies may continue to rely on the BAAQMD thresholds after determining that those thresholds reflect an appropriate measure of a project's impacts. ~~However, the~~The District considers ~~these~~the BAAQMD thresholds (presented in **Table 3.3-5**) to be appropriate for use in this analysis because they are based on substantial evidence developed by the BAAQMD as the level to ensure attainment of air quality standards.

The following text under Impact AQ-3 has been modified to incorporate minor editorial revisions (DEIR page 3.3-18):

~~The nonattainment status of ozone, PM_{10}, and $PM_{2.5}$ is considered a significant cumulative impact.~~ The BAAQMD has established significance thresholds that also apply to cumulative impacts, which were developed considering the other sources of air pollutants and growth of emissions in the air basin. Specifically, a~~A~~ project that does not exceed these significance thresholds would not considerably contribute to any cumulative air quality impacts. As discussed in Impact AQ-2 above, ~~D~~during construction of the proposed project, NO_X emissions would exceed the BAAQMD threshold and thus would result in~~would be~~ a cumulatively considerable net increase of criteria pollutants. This would be a significant impact.

The proposed project's cumulative operation-related criteria for air pollutants and precursor emissions are identical to the thresholds listed in Table 3.3-5 above. ~~These thresholds represent the levels at which a project's individual emissions of criteria air pollutants or precursors would result in a cumulatively considerable contribution to the air basin's existing air quality conditions.~~ As discussed in Impact AQ-2 above, ~~T~~the project's operational emissions be minimal and would not exceed the thresholds listed in Table 3.3-5; therefore, the project's operational impacts relating to cumulative air quality effects would be less than significant.

Revisions to Chapter 3, Section 3.4, "Biological Resources"

To edit a cross-reference to the DEIR, the first bullet item shown on DEIR page 3.4-8 has been revised as follows:

- *Preliminary Delineation of Wetland and Other Waters for the Lower Penitencia Creek Improvements Project* (H. T. Harvey & Associates 2016; included as Appendix D of this ~~D~~EIR);

The first sentence of Mitigation Measure BIO-1 (DEIR page 3.4-38) has been modified to include a minor revision:

Mitigation Measure BIO-1: Exclude Fish Prior to Dewatering Activities

Prior to conducting dewatering activities, ~~the District will hire~~ a qualified biologist ~~who~~ will use nets to exclude fish from the construction area.

The last paragraph under Impact BIO-1g has been modified to incorporate clarifying language regarding the proposed project's impact on salt marsh harvest mouse. In addition, a cross-reference to Mitigation Measure BIO-8 was accidentally omitted from the last sentence in Impact BIO-1g. To correct this, the last fourth paragraph on DEIR page 3.4-46 has been revised:

> Despite implementation of District BMPs BI-10 and BI-11 and the proposed creation of additional habitat through the wetland bench, if the species is harmed during construction or if the wetland bench does not successfully establish suitable salt marsh harvest mouse habitat, the impact on the species would be significant.~~Although the proposed project would create about 0.29 ac of tidal marsh habitat that would be suitable for the salt marsh harvest mouse, the project is in the preliminary design phase and appropriate measures have not yet been developed to ensure the successful establishment of suitable harvest mouse habitat on the created bench. Therefore, temporary habitat loss for the salt marsh harvest mouse is considered a significant impact.~~ Mitigation Measures BIO-5, BIO-6, ~~and~~ BIO-7, and BIO-8 would be implemented to address this significant impact.

To correct two editorial errors in Mitigation Measure BIO-2, the following text on DEIR page 3.4-41 has been revised:

> **Mitigation Measure BIO-2: Conduct Preconstruction Surveys for Western Pond Turtles and Relocate if Necessary**
>
> ~~The District will hire a~~A qualified biologist ~~who~~ will conduct pre-construction surveys for western pond turtles and their nests. If an adult or juvenile western pond turtle is found, project activities near the turtle will not commence until the individual has left the area, or is captured and relocated to suitable habitat outside of the activity area by a qualified biologist. If an active western pond turtle nest is detected within the construction area, a 25-foot buffer zone around the nest will be established and maintained during the nesting season (April 1 through August 31). The buffer zone will remain in place until the young have left the nest, as determined by a qualified biologist.

To correct an error in the last paragraph of DEIR page 3.4-42, the following text has been revised:

> The project would affect 6.63 acres of foraging habitat (i.e., ruderal grassland and non-tidal seasonal saline wetland) potentially used by wintering burrowing owls. Impacts include the conversion of small areas of ruderal grassland to developed habitat, the conversion of ~~0.05~~0.08 acre of non-tidal seasonal saline wetlands to tidal marsh, and the conversion of ~~0.45~~ 0.29 acre of ruderal grassland to tidal marsh.

To correct a minor error in Mitigation Measure BIO-4, the first sentence of the measure on DEIR page 3.4-44 has been revised:

> **Mitigation Measure BIO-4: Implement Buffer Zones for Nesting Birds**
>
> If an active nest is found sufficiently close to the project work are (i.e., within 250 feet for raptors or 50 feet for non-raptors), a qualified biologist ~~hired by the District~~ will determine the extent of a disturbance-free buffer zone to be established around the next (typically 50 feet for non-raptors and 250 feet for raptors).

To eliminate unnecessary text from Mitigation Measure BIO-6, the following text has been deleted at the beginning of the measure on DEIR page 3.4-47:

Mitigation Measure BIO-6: Implement Hand Removal of Vegetation in Reach 1 and Staging Area A

~~The District will remove vegetation at marshes and high-water refugia habitat in Reach 1 (e.g., annual grasses and shrubs immediately adjacent to channels) by hand to the extent feasible. This measure applies to construction work at Reach 1 and Staging Area A.~~

A minor revision has been made to fourth bullet under Mitigation Measure BIO-8 (DEIR page 3.4-48):

- monitoring plan (including ~~final and~~ performance criteria, monitoring methods, data analysis, reporting requirements, monitoring schedule, etc.).

To correct a minor error, the following text in Mitigation Measure BIO-10 (DEIR page 3.4-50) has been revised:

Mitigation Measure BIO-10: Compensate for Congdon's Tarplant Impacts

If a population of Congdon's tarplant is identified in the project work area during the preconstruction survey (per Mitigation Measure BIO-9), a qualified biologist ~~hired by the District~~ will conduct an impact assessment to determine if project impacts would be expected to cause the loss of the occurrence.

To correct an editorial error, the following text in Mitigation Measure BIO-12 (DEIR page 3.4-51) has been revised:

Mitigation Measure BIO-12: Dispose of Invasive Plants

The District will require that any invasive plants found within the project area ~~d~~ be removed and disposed of in a sanitary landfill, incinerated off site, or disposed of in a high-temperature composting facility that can compost using methods known to kill weed seeds.

To correct an editorial error in the second to last paragraph of DEIR page 3.4-53, the following text has been revised:

~~However, a~~After construction is complete, the newly created bench is expected to create approximately 0.~~0.3~~29 acre of tidal marsh habitat. The new tidal and non-tidal wetlands habitat would be below the OHWM and would be considered water of the U.S. and State.

To correct a minor error, the last sentence of the first full paragraph on DEIR page 3.4-54 has been revised:

Thus, the project would result in temporary loss of ecologically valuable wetlands ~~and other waters~~.

Revisions to Chapter 3, Section 3.5, "Cultural Resources"

To ensure consistency with text revisions made in Response to Comment A-1 and revisions made to the significance determination under Impact CR-5, the last row of Table 3.5-4 has been revised on DEIR page 3.5-16:

CR-5: Cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code Section 21074	~~NI~~LS	None	~~NI~~LS

Revisions to Chapter 3, Section 3.6, "Geology, Soils and Seismicity"

Mitigation Measure GEO-1 has been revised to specify that the recommendations of the current geotechnical design report shall be incorporated into the project design, to eliminate redundant text, and to fix an editorial error. The following text has been revised on DEIR page 3.6-10:

Mitigation Measure GEO-1: Incorporate 2017 Geotechnical Design Report Recommendations into the Final Design and Construction of the Proposed Project.

~~The District or its design contractor will incorporate recommendations from the final Geotechnical Design Report.~~ Based on the draft Geotechnical Design Report (Kleinfelder 2017), the District will incorporate the following recommendations (or substantially similar recommendations) in the design plans and specifications:

- The sheet pile floodwalls will be designed to resist active lateral pressures based on an equivalent fluid weight of 45 pounds per cubic foot (pcf) above the groundwater table and 25 pcf for submerged conditions. If full drainage is not provided in the floodwalls, the sheet pile design would include hydrostatic pressure.

- The sheet pile floodwalls will be able to tolerate the total and differential seismic settlements, as estimated by reach in the final Geotechnical Design Report.

- Levee fill materials will not contain organic material and meet the gradation and plasticity specifications as defined in the final Geotechnical Design Report.

- Prior to general site grading, existing vegetation, organic topsoil, and any debris will be stripped and disposed of outside the construction limits. Stripping depths w be on the order of 3 to 6 inches (or as approved onsite by the geotechnical engineer). Topsoil or any other organic laden materials will not be incorporated into any levee embankment. Where applicable, the gravelly material of the levee maintenance road w be removed prior to placing levee embankment fill.

- All areas to receive engineered fill will be scarified to a depth of 8 inches, uniformly moisture conditioned to a range between one and four percent above optimum moisture content, and compacted to at least 90 percent of the maximum dry density as determined by ASTM Test Method D1557 (Modified Proctor).

- Existing abandoned utility lines, wells and/or foundations (including backfill material) encountered during project activities will be removed and disposed of offsite.

- New levee embankment fill slopes will be constructed at a slope no steeper than 2:1 (H:V). New embankment fill placed on top of the existing levee may require a key into the existing levee slope, or benched into existing levee material after scarification and recompaction of existing fill occurs.

A cross-reference to the title of Mitigation Measure GEO-1 has been revised for consistency purposes. The following text on DEIR page 3.6-13 has been revised:

Mitigation Measure GEO-1: Incorporate 2017 Geotechnical Design Report Recommendations into the Final Design and Construction of the Proposed Project (see full text of measure in Impact GEO-2 analysis above)

Revisions to Chapter 3, Section 3.7, "Greenhouse Gas Emissions"

As noted above, in May 2017, the BAAQMD initiated an effort to update the BAAQMD CEQA Guidelines to incorporate new and/or revised requirements, recent court decisions, improved methodologies, and new mitigation strategies. To incorporate the latest updates to the BAAQMD thresholds, the following text has been revised on DEIR page 3.7-7:

BAAQMD Significance Thresholds

The BAAQMD proposed significance thresholds for operation-related emissions of GHGs as either compliance with a qualified GHG reduction strategy or use of a "bright line" threshold of 1,100 MT CO_2e (BAAQMD 2010). A bright line threshold for projects is the level below which projects are not anticipated to result in a significant impact on global climate change or impede the goals of AB 32. The BAAQMD did not propose GHG thresholds for construction emissions. ~~At the time of Draft EIR preparation, the BAAQMD was not recommending use of the 2010 CEQA thresholds due to ongoing litigation on unrelated thresholds.~~ In May 2017, the BAAQMD initiated an effort to update its CEQA Guidelines including release of a May 2017 version of the guidelines. The May 2017 Guidelines Update includes revisions made to the 2010 Guidelines to incorporate the California Supreme Court's opinion in California Building Industry Association v. Bay Area Air Quality Management District, 62 Cal. 4th 369. The BAAQMD is currently working to update outdated references, links, analytical methodologies or other technical information in the May 2017 Guidelines Update. The operation-related thresholds in the May 2017 Guidelines Update remain the same as those shown in the 2010 Guidelines. In view of the Supreme Court's opinion, local agencies may continue to rely on the BAAQMD thresholds after determining that those thresholds reflect an appropriate measure of a project's impacts. ~~However, t~~The District considers the 2010 BAAQMD thresholds to be appropriate for use in this analysis because they are based on substantial evidence developed by the BAAQMD.

Revisions to Chapter 3, Section 3.8, "Hazards and Hazardous Materials"

To clarify the provisions in BMP HM-9 and to remove reference to BMP WQ-7 under Impact HAZ-1, the first paragraph on DEIR page 3.8-9 has been revised as follows:

If hazardous materials were present in excavated soil or groundwater, a release to the environment could occur and construction workers and the public could be exposed to hazardous materials in soil and groundwater during construction. ~~Implementation of~~The District would implement District BMP HM-9, which requires all field personnel to follow appropriate procedures regarding containment and storage of chemicals, and references applicable legal requirements relating to discharge of hazardous materials/wastes. This BMP would minimize the potential for release of hazardous materials during construction. ~~hazard of encountering hazardous materials during excavation and sediment removal work; it requires that all field personnel follow appropriate procedures if hazardous materials are encountered. Implementation of BMP WQ-7 would require that coffer dams are installed for dewatering work before in-channel construction activities begin.~~ However, ~~these BMPs do not provide details on the appropriate response~~ in the event that ~~suspected~~ contaminated soils or groundwater are encountered during excavation and sediment removal activities, a release to the environment could still occur and construction workers or the public may still be exposed to hazards and the impact would be considered significant. ~~For these reasons, the potential for mishandling discovered hazardous materials during excavation and sediment removal activities is considered significant.~~ Mitigation ~~m~~Measure HAZ-1 would be implemented to ~~address this impact~~provide more details on appropriate responses to address this impact.

Revisions to Chapter 3, Section 3.11, "Noise and Vibration"

To correct an error referencing the distance between a sensitive receptor and the project site, the last sentence of the second paragraph on DEIR page 3.11-6 has been revised:

A religious facility, the BAPS Shri Swaminarayan Mandir, and the Residence Inn Milpitas are located approximately 140 feet and ~~480~~550 feet west of Reach 3, respectively.

To eliminate unnecessary discussion regarding truck routes in the project vicinity and to clarify that the project would conform with the City's General Plan Policy 6-I-3, the following text on DEIR pages 3.11-12 to 3.11-13 has been revised:

~~Existing designated truck routes provide access to the project site, and most project construction traffic would be confined to those routes in conformance with General Plan Policy 6-I-9. However, construction of headwalls on the San Andreas Drive bridge would require trucks to travel on San Andreas Drive, which is not a designated truck route, during a portion of the construction period This would be a significant impact~~The proposed project would conform with City Policy 6-I-3 by installing sheet piles with a silent piler to construct foundations for floodwalls, which is a construction technique that minimizes noise generation compared to alternative construction techniques, such as driven or cast-in-place piles.

City Policy 6-I-1 calls for avoiding noise level increases of 3 dB or more L_{dn} or levels more than 65 dB dBL at residential property lines. Estimated year 2010 community noise levels in the project vicinity range from 65+ to 70+ dBL, which exceeds the city policies for residential community noise exposure (City of Milpitas 2002). Project construction would add to the existing noise levels. Individual daytime construction

noise events would generate noise levels up to 91.5 dbA at 50 feet from the source. Those noise events would be intermittent and sporadic, most of the time construction noise levels would be much lower. When averaged over 24 hours, construction noise would likely result in a 3 dB increase in community noise levels. Because the existing community noise levels in the project vicinity already exceed the residential community noise threshold in General Plan Policy G-I-1, additional noise generated by project construction would be inconsistent with Policy G-I-1. Although this impact would be temporary, occurring only during the two four-month construction periods, it would be significant.

~~Note that the proposed project would conform with City Policy 6-I-3 by installing sheet piles with a silent piler to construct foundations for floodwalls, which is a construction technique that minimizes noise generation compared to alternative construction techniques, such as driven or cast-in-place piles.~~Mitigation Measure NOI-1 would be implemented to reduce this significant impact.

To clarify that the proposed project would still exceed the FTA threshold and the City of Milpitas' noise thresholds after implementation of Mitigation Measure NOI-1, the last two sentences under the heading "Significance After Mitigation" under Impact NOI-1 has been revised on DEIR page 3.11-14:

Residences located within 50 feet of construction activities may experience noise levels that exceed the FTA threshold even after implementation of Mitigation Measure NOI-1. In addition, even with implementation of Mitigation Measure NOI-1, construction noise could temporarily cause a 3 dB L_{dn} or more increase in ambient noise levels at the property lines of nearby residential parcels. Based on this information, this noise impact would be significant and unavoidable during the construction phase.

To incorporate clarifying language about what the noise level of 70 dB represents, the following text under Impact NOI-4 has been modified on DEIR page 3.11-16:

Construction activities would temporarily and intermittently generate noise levels above 70 dB, the ambient noise level in the vicinity of I-880 and the maximum noise level considered conditionally acceptable (Table 3.11-2), for sensitive receptors near the project area and above 100 dB for the nearest residences. Because project construction would temporarily generate noise levels up to 100+ dBA, which would be substantially above existing ambient noise levels in the vicinity, this impact would be significant.

Revisions to Chapter 3, Section 3.12, "Recreation"

The following discussion under Impact REC-2 on DEIR page 3.12-5 has been modified to better describe why the pedestrian crossing would not result in a significant effect on the environment. These revisions do not result in a change to the impact determination.

As described in Chapter 2, the proposed project involves construction of a pedestrian crossing over the Reach 3 floodwall to ensure connectivity with the Penitencia Creek Trail. The ~~proposed project~~ pedestrian crossing would include earthen ramps on top of the east levee crossing over the floodwall. The slope of the trail would be increased

to meet the ramp, and would not be sloped greater than 1:12 to ensure compliance with the American with Disabilities Act. ~~As this element is part of the proposed project, the environmental impacts and mitigation measures associated with the proposed pedestrian crossing are described throughout this EIR.~~ In most resource sections, the environmental effects of the pedestrian crossing ~~project~~ are described collectively with other project components. Based on that approach, the proposed project was found to result in significant impacts in the area of pertaining to air quality, biological resources, geology and soils, hydrology and water quality, noise and vibration, transportation/traffic, utilities, and hazardous materials (see ~~Please refer to~~ Sections 3.2 through 3.11 and Section 3.13 through 3.14). ~~for a description of impacts and mitigation measures associated with construction and operation of the proposed pedestrian crossing and Reach 3 floodwalls. Implementation of Mitigation Measures AQ-1, AQ-2, BIO-1 through BIO-14, GEO-1, HYD-1, NOI-1, TRA-1, HAZ-1, and UTL-1 through UTL-5 would minimize adverse effects of the proposed project, including those associated with the pedestrian crossing at the Reach 3 floodwall.~~ Construction and operation of the pedestrian crossing would not result in a significant impact to these resources due to its small size and the limited scale of the potential effects. There are no sensitive resources at the pedestrian crossing work area and construction associated with this facility would be short in duration and thus generate minimal air pollutant emissions, greenhouse gas emissions, and noise and vibration. As discussed in Section 3.9, *Hydrology and Water Quality,* implementation of District BMPs AQ-1, BI-3, WQ-4, WQ-5, WQ-9, WQ-10, and WQ-16 would minimize the potential for soil erosion at construction areas, and promote stabilization and revegetation of disturbed areas after construction is complete. ~~With the exception of construction-related noise and vibration effects on nearby sensitive receptors, these mitigation measures would collectively reduce environmental effects of the proposed project to less-than-significant levels.~~ Construction of the proposed crossing ~~ramps~~ would not result in significant adverse physical effects to the environment.

Revisions to Chapter 3, Section 3.13, "Transportation and Traffic"

To correct an editorial error and to reflect the latest on-haul fill volumes, the second and third sentences of the second paragraph on DEIR page 3.13-8 has been revised as follows:

A maximum of 40 workers would be on site; it is anticipated that approximately 5,800~~00~~ cy of material would require trucking to or from the project site. As of May 2017, it is estimated that 2,300 cy would be off-hauled and 3,~~50~~460 cy would be on-hauled.

To edit a cross-reference to the DEIR, the first sentence of the first full paragraph shown on DEIR page 3.13-19 has been revised as follows:

As described in other sections of this ~~D~~EIR, the Penitencia Creek Trail runs along the east side of Reach 3.

Revisions to Chapter 3, Section 3.14, "Utilities and Service Systems"

To edit a cross-reference to the DEIR, the following sentence at the end of the section prior to the heading "Impact Summary" has been revised as follows on DEIR page 3.14-5:

Additionally, this ~~D~~EIR applies the following additional criterion and considers that the proposed project would have a significant effect on utilities and service systems if it would:

- Disrupt operation or require relocation of local utilities that results in substantial disruption of service.

Revisions to Chapter 4, "Other Statutory Considerations"

To edit a cross-reference to the DEIR, the second paragraph under the heading "Geographic Scope of Analysis" has been revised as follows on DEIR page 4-6:

The defined specific geographic scope for each environmental resource area analyzed in this ~~D~~EIR to which the proposed project could contribute to cumulative impacts is provided below in **Table 4-2**.

In May 2017, the BAAQMD updated the CEQA Guidelines to incorporate new and/or revised requirements, recent court decisions, improved methodologies, and new mitigation strategies. To remove discussion regarding the BAAQMD thresholds being underway at the time the DEIR was prepared, the second paragraph under Impact CUM-1 has been deleted on DEIR page 4-15. In addition, the impact discussion has been revised to clarify that the BAAQMD thresholds would be exceeded after implementation of applicable BMP AQ-1 and prior to Mitigation Measure AQ-1:

As described in Section 3.3.4, *Impact Analysis, ~~Air Quality~~*, emissions related to construction ~~and operation~~ of the proposed project would result in emissions of NO_x above the established BAAQMD thresholds. ~~not violate an air quality standard or make a substantial contribution to existing air pollution. According to the BAAQMD's established mass emissions thresholds of significance (BAAQMD 2010), projects emitting less than the project-level significance thresholds for construction and operational impacts (identified in Table 3.3-5) would not be expected to result in a considerable contribution to a significant cumulative impact (pertaining to existing regional ozone and PM issues). The significance thresholds that apply to cumulative impacts were developed considering other sources of air pollutants and overall growth of emissions in the air basin.~~

~~At the time of Draft EIR preparation, the BAAQMD was not recommending use of these construction thresholds due to ongoing litigation on unrelated thresholds. However, the District considers these thresholds to be appropriate for use in this analysis because they are based on substantial evidence developed by the BAAQMD as the level to ensure attainment of air quality standards.~~

~~The analysis of proposed project emissions presented in Section 3.3.4, *Impact Analysis*, shows that~~However, with implementation of BMP AQ-1 and Mitigation Measure AQ-1, the BAAQMD's significance thresholds would not be exceeded. Implementation of ~~Mitigation Measure AQ-1~~these measures would ~~further~~ reduce air emissions to ~~and ensure the proposed project's emissions would be reduced to~~ a level such that ~~it~~ the proposed project would not make a considerable contribution to cumulative air quality impacts even when considering the other projects occurring in the area.

Since the DEIR was published, the number of trees planned for removal has changed. To adjust this and to better describe the project's contribution to cumulative effects on locally protected trees, the first paragraph on DEIR page 4-17 has been revised:

> The project would remove about 33~~22~~ trees with dbh of 6 inches or greater from the ~~sparse riparian canopy~~top of bank along Reaches 2, 3, and 4 of the project area. The Lower and Upper Berryessa Creek projects would also remove a number of ~~riparian~~ trees, adding to the cumulative impact on ~~riparian habitat~~trees protected under the City's tree ordinance. The proposed project would plant replacement trees in conformance with the City's tree protection ordinance; thereby ensuring that the proposed project would not make a cumulatively considerable contribution to cumulative impacts on ~~riparian~~protected trees.

The following text under Impact CUM-4 (DEIR pages 4-17 to 4-18) has been modified to clarify that project construction would likely exceed standards established in the City's General Plan Policy 6-I-1. These revisions do not result in a change in the significance determination.

> As described in Section 3.11, *Noise,* project construction activities would generate noise that would exceed FTA noise exposure thresholds and the City's General Plan Policy (6-I-1) which calls for avoiding noise level increases of 3dB or more than 65 dB L_{dn} at residential property lines ~~for nearby residential uses~~. Noise generated during construction of the proposed project would also contribute to the ambient noise environment and would result in a temporary increase in community noise levels that would exceed the City's General Plan Policy G-I-1 for community noise exposure of residential uses. Construction would also cause vibration exceeding annoyance levels at nearby residences, but would not cause damage to those structures. Because noise and vibration impacts are localized, affecting only the receptors in the immediate vicinity, and because construction of the project would occur for a short duration (up to 4 months at a given location), no individual receptor would be exposed to excessive noise or vibration levels from construction for an extended period. The following projects would be located within 0.25 mile of the project site and could be under construction simultaneously with the proposed project: the Waterstone Residential Project, iStar Residential Project, Springhill Marriott, and Holiday Inn/ 1100 Cadillac Court. Construction of these projects would generate noise exceeding FTA thresholds and the City's thresholds for residential noise exposure and would result in significant temporary increases in ambient noise. Cumulative noise impacts would be significant. Implementation of Mitigation Measure NOI-1 (Implement Noise- and Vibration-reducing Measures) would minimize noise and vibration impacts associated with construction of the proposed project. However, because that measure would not reduce construction noise generated by the project to below the FTA threshold for exposure of residential uses, would likely cause a 3 dB L_{dn} or more increase in ambient noise levels at the property lines of nearby residential properties, and the project would temporarily result in a substantial increase in ambient noise levels above existing noise levels, construction of the proposed project would result in a temporary but cumulatively considerable contribution to significant cumulative noise impacts.

To correct an editorial error, the impact number of Impact CUM-6 has been revised on DEIR page 4-18 as follows:

Impact CUM-~~6~~5: Cumulative Impacts on Traffic Patterns and Safety Hazards (Not Cumulatively Considerable)

Revisions to Chapter 5, "Alternatives"

To edit a cross-reference to the DEIR, the last sentence in Section 5.2.2 has been revised as follows on DEIR page 5-2:

These impacts are listed in Table ES-1 in the *Executive Summary* of this ~~D~~EIR.

Because the District plans to install floodwalls along all reaches of the project area, the first row in Table 5-1 has been revised on DEIR page 5-4 as follows:

Table 5-1. Summary of Proposed Project and Characteristics of EIR Alternatives by Project Reach

Project/Alternative	Reach 1 Coyote Creek to I-880	Reach 2 I-880 to California Circle	Reach 3 California Circle to Milmont Drive	Reach 4 Milmont Drive to San Andreas Drive	San Andreas Drive Bridge
Proposed Project	▪ Relocate and raise south bank levee by up to 4 ft ▪ Wetland bench along south bank ▪ 50-foot-long section of floodwall on the north bank	▪ 6-ft-tall floodwall on south bank and a 25-foot-long section of floodwall on the north bank ▪ Removal of 70 cy of sediment during construction	▪ 5.5-ft-tall floodwalls on both banks ▪ Earthen ramps on top of levee that cross over floodwall and connect to existing Penitencia Creek Trail ▪ Removal of 1,500 cy of sediment during construction	▪ Up to 6-ft-tall floodwall on west bank ▪ Levee raised by up to 6 ft on east bank ▪ Removal of 730 cy of sediment during construction	▪ Headwalls on the downstream and upstream faces of bridge

As the proposed project has been revised to include a short section of floodwall along Reach 1, the third sentence under Section 5.3.1 on DEIR page 5-6 has been revised:

> Under the No Project Alternative, no new construction activities would occur. In Reach 1, the south levee would not be relocated or raised and no wetland bench would be constructed. Floodwalls would not be constructed in Reaches 1, 2, 3, or 4 and headwalls would not be added to the San Andreas Drive bridge.

The first bullet point on DEIR page 5-11 has been revised to substantiate why Conceptual Design Alternative 8 (Bypass Channel to Coyote Creek) would not be feasible.

- **Conceptual Design Alternative 8: Bypass Channel to Coyote Creek.** Under this alternative, a 2,500-foot-long bypass channel would be constructed across McCarthy Ranch Boulevard, I-880, and Cadillac Court. This bypass channel would also cross four privately owned parcels, three of which have been developed with commercial buildings and parking lots. Given the high value of land in Silicon Valley, it would be very costly for the District to successfully acquire these four parcels at a reasonable cost, which could possibly include relocating these businesses. This alternative would require breaching of the Coyote Creek and Lower Penitencia Creek levees. It would also require easements to tunnel below existing residential and industrial developments, as well as I-880. The feasibility of this alternative may also be constrained due the presence of important underground utility lines. Based on preliminary evaluation, this alternative could result in adverse thermal effects on fish habitat as water is discharged from a bypass to Coyote Creek (which has been designated as critical habitat for California Central Coast steelhead). For ~~this~~these reasons, and because this alternative would result in greater construction impacts (due to excavation) and potentially greater impacts on residential and commercial uses, the bypass channel alternative was dismissed from further consideration (SCVWD 2016).

The second sentence of the third paragraph on DEIR page 5-12 has been deleted to eliminate unnecessary text.

> As this alternative would require taller floodwalls than the proposed project, the floodwalls would result in substantially greater impacts than the project with respect to aesthetics, air quality, construction noise and vibration, and hazards and hazardous materials. ~~Because this alternative would increase the severity of significant and unavoidable noise and vibration impacts, this alternative would not meet the District's responsibility to reduce and/or eliminate significant environmental impacts and was rejected by the District.~~

Revisions to Chapter 7, "References"

To include two references to the Working Group for Phytophthoras in Native Habitats, the citations of which were added to DEIR Chapter 2 in response to Comment C-15, the following references have been added to the beginning of DEIR page 7-2:

> SCVWD. *See* Santa Clara Valley Water District.

U.S. Army Corps of Engineers. Final General Re-evaluation Report and Environmental Impact Statement, Berryessa Creek Element, Coyote and Berryessa Creek, California, Flood Control Project, Santa Clara County, California. March 2014.

Working Group for Phytophthoras in Native Habitats. 2016a. Guidelines to Minimize *Phytophthora* Pathogens in Restoration Nurseries. Available: http://www.suddenoakdeath.org/wp-content/uploads/2016/04/Restoration.Nsy_.Guidelines.final_.092216.pdf. Accessed August 24, 2017.

Working Group for Phytophthoras in Native Habitats. 2016b. Guidelines to Minimize *Phytophthora* Contamination in Restoration Projects. Available: http://www.suddenoakdeath.org/wp-content/uploads/2016/04/Restoration_guidance_FINAL-111716.pdf. Accessed August 24, 2017.

To correct an editorial error and include the full reference to "SCVWD 2016" which was added to DEIR Section 3.3, Air Quality, the following text on DEIR page 7-5 has been revised:

~~SCVWD 2012 SMP Subsequent EIR~~

Santa Clara Valley Water District. 2011. Stream Maintenance Program Update 2012-2022. Final Subsequent Environmental Impact Report. Volumes I and II. San Jose, California. Prepared by Horizon Water and Environment.

_____. 2016. Planning Study Report. Lower Penitencia Creek Improvements Project. Project No. 40334005. May.

Revisions to Appendix I, "Mitigation Monitoring and Reporting Program"

Since publication of the DEIR, the District has decided to include its BMPs in the Mitigation Monitoring and Reporting Program (MMRP) and reformat the last columns of the MMRP to indicate parties responsible for implementing and monitoring specific actions prescribed in District BMPs and the mitigation measures. In addition, this table has been updated to incorporate revisions made to various mitigation measures as described above, and to correct the list of acronyms and abbreviations used in the appendix. The following text on DEIR pages I-1 through I-20 have been revised:

The following mitigation monitoring and reporting program (MMRP) summary table includes the District's best management practices (BMPs) as well as mitigation measures identified in the Santa Clara Valley Water District (District) Lower Penitencia Creek Improvements Project Final~~Draft~~ Environmental Impact Report (F~~D~~EIR). For each BMP and mitigation measure, this table identifies monitoring and reporting actions that will be carried out and the monitoring schedule. This table also includes a column summarizing the entity/entities responsible for implementing actions prescribed in the measures ~~where responsible parties can check off monitoring and reporting actions as they are completed~~and another column summarizing the entity/entities responsible for monitoring/oversight of the measures.

~~As lead agency, the District will be responsible for ensuring that mitigation measures identified in this EIR are fully implemented. However, some mitigation measures would be implemented by the contractor(s) on behalf of the District. Contract documents for the design-build contractor for the proposed project will identify the obligations of the contractor, including relevant mitigation measures. The District will require that the contractor provide the District with documentation that it has adequately implemented its contractual obligations, including applicable mitigation measures.~~

~~Thus, in the descriptions of the mitigation measures provided in the table which follows, while the District may be the only party referenced in implementing a mitigation measure (i.e., the measure states "the District will"), this is intended to be inclusive of the contractor's role in implementing certain mitigation measures during construction or as part of design.~~

ACRONYMS AND ABBREVIATIONS (FOR APPENDIX I)

BAAQMD	Bay Area Air Quality Management District
BMPs	best management practices
Caltrans	CCalifornia Department of Transportation
Cal/OSHA	California Division of Occupational Safety and Health
~~CCR~~	~~California Code of Regulations~~
CDFW	California Department of Fish and Wildlife
~~CEQA~~	~~California Environmental Quality Act~~
~~CERCLA~~	~~Comprehensive Environmental Response, Compensation, and Liability Act of 1980~~
~~CRHR~~	~~California Register of Historical Resources~~
dBA	A-weighted decibels
~~DEIR~~	~~draft environmental impact report~~
District	Santa Clara Valley Water District
~~EIR~~	~~environmental impact report~~
~~EPA~~	~~Environmental Protection Agency~~
~~ESA~~	~~environmental site assessment~~
~~F&G Code~~	~~California Fish and Game Code~~
FEIR	final environmental impact report
~~MBTA~~	~~Migratory Bird Treaty Act~~
MLD	Most Likely Descendant
MMRP	mitigation monitoring and reporting program
mph	miles per hour
MUTCD	Manual on Uniform Traffic Control Devices
~~NAHC~~	~~Native American Heritage Commission~~
NO_x	oxides of nitrogen
~~Pub. Res. Code~~	~~Public Resources Code~~

RCRA	Resource Conservation and Recovery Act
~~RWQCB~~	~~Regional Water Quality Control Board~~
SCVWD	Santa Clara Valley Water District
~~SMP~~	~~Stream Maintenance Program~~
~~TCR~~	~~tribal cultural resource~~
~~USA~~	~~Underground Service Alert~~
USFWS	U.S. Fish and Wildlife Service

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
BMPs					
Air Quality					
AQ-1	**Use Dust Control Measures** The following Bay Area Air Quality Management District (BAAQMD) Dust Control Measures will be implemented: 1. All exposed surfaces (e.g., parking areas, staging areas, soil piles, graded areas, and unpaved access roads) shall be watered two times per day; 2. All haul trucks transporting soil, sand, or other loose material off-site shall be covered; 3. All visible mud or dirt track-out onto adjacent public roads shall be removed using wet power vacuum street sweepers at least once per day. The use of dry power sweeping is prohibited; 4. Water used to wash the various exposed surfaces (e.g., parking areas, staging areas, soil piles, graded areas, etc.) will not be allowed to enter waterways; 5. All vehicle speeds on unpaved roads shall be limited to 15 mph; 6. All roadways, driveways, and sidewalks to be paved shall be completed as soon as possible. Building pads shall be laid as soon as possible after grading unless seeding or soil binders are used; 7. Idling times shall be minimized either by shutting equipment off when not in use or reducing the maximum idling time to 5 minutes (as required by the California airborne toxics control measure Title	1. Confirm measures are included in contract documents 2. Confirm that measures are fully implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	13, Section 2485 of California Code of Regulations), and this requirement shall be clearly communicated to construction workers (such as verbiage in contracts and clear signage at all access points); 8. All construction equipment shall be maintained and properly tuned in accordance with manufacturer's specifications, and all equipment shall be checked by a certified visible emissions evaluator; 9. Correct tire inflation shall be maintained in accordance with manufacturer's specifications on wheeled equipment and vehicles to prevent excessive rolling resistance; and, 10. Post a publicly visible sign with a telephone number and contact person at the lead agency to address dust complaints; any complaints shall be responded to and take corrective action within 48 hours. In addition, a BAAQMD telephone number with any applicable regulations will be included.				
AQ-2	**Avoid Stockpiling Odorous Materials** Materials with decaying organic material, or other potentially odorous materials, will be handled in a manner that avoids impacting residential areas and other sensitive receptors, including:	1. Confirm measure is included in contract documents. 2. Confirm that measure is fully implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District

	BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	1. Avoid stockpiling potentially odorous materials within 1,000 feet of residential areas or other odor sensitive land uses; and 2. Odorous stockpiles will be disposed of at an appropriate landfill.				
Biological Resources					
BI-1	**Avoid Relocating Mitten Crabs** Sediment potentially containing Chinese Mitten Crabs will not be transported between San Francisco Bay Watersheds and Monterey Bay Watersheds, specifically: 1. Sediment removed from the San Francisco Bay watersheds will not be transported south of Coyote Creek Golf Drive in south San Jose, and the intersection of McKean and Casa Loma Roads; and, 2. Earth moving equipment used in the San Francisco Bay watershed will be cleaned before being moved to, and used in, the Pajaro Watershed.	1. Confirm measure is included in contract documents. 2. Confirm that measure is fully implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District
BI-2	**Minimize Impacts to Steelhead** Minimize potential impacts to salmonids by avoiding routine use of vehicles and equipment in salmonid streams between January 1 and June 15.	1. Confirm measure is included in contract documents. 2. Confirm that measure is fully implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District
BI-3	**Remove Temporary Fill** Temporary fill materials, such as for diversion structures or cofferdams, will be removed upon finishing the work	1. Confirm measure is included in contract documents.	1. During preparation of final	1. District 2. Contractor	1. District 2. District

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	or as appropriate. The creek channels and banks will be re-contoured to match pre-construction conditions to the extent possible. Low-flow channels within non-tidal streams will be contoured to facilitate fish passage and will emulate the preconstruction conditions as closely as possible, within the finished channel topography.	2. Confirm that measure is fully implemented; ensure corrective action if necessary.	construction plans and specifications. 2. During construction.		
BI-5	**Avoid Impacts to Nesting Migratory Birds** Nesting birds are protected by state and federal laws. The District will protect nesting birds and their nests from abandonment, loss, damage, or destruction. Nesting bird surveys will be performed by a qualified biologist prior to any activity that could result in the abandonment, loss, damage, or destruction of birds, bird nests, or nesting migratory birds. Inactive bird nests may be removed with the exception of raptor nests. Birds, nests with eggs, or nests with hatchlings will be left undisturbed.	1. Confirm measure is included in contract documents. 2. Retain qualified biologist to conduct nesting bird surveys. 3. Confirm that measure is fully implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction. 3. During construction.	1. District 2. Contractor 3. Contractor	1. District 2. District 3. District
BI-6	**Avoid Impacts to Nesting Migratory Birds from Pending Construction** Nesting exclusion devices may be installed to prevent potential establishment or occurrence of nests in areas where construction activities would occur. All nesting exclusion devices will be maintained throughout the nesting season or until completion of work in an area makes the devices unnecessary. All exclusion devices will be removed and disposed of when work in the area is complete.	1. Confirm measure is included in contract documents. 2. Confirm that measure is fully implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
BI-7	**Minimize Impacts to Vegetation from Survey Work** Survey cross-sections will be moved, within acceptable tolerances, to avoid cutting dense riparian vegetation and minimize cutting of woody vegetation, taking advantage of natural breaks in foliage. If the cross-section cannot be moved within the established acceptable tolerances to avoid impacts to dense riparian or woody vegetation, the survey section will be abandoned.	1. Confirm measure is included in contract documents. 2. Confirm that measure is fully implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District
BI-8	**Choose Local Ecotypes of Native Plants and Appropriate Erosion-Control Seed Mixes** Whenever native species are prescribed for installation the following steps will be taken by a qualified biologist or vegetation specialist: 1. Evaluate whether the plant species currently grows wild in Santa Clara County; and, 2. If so, the qualified biologist or vegetation specialist will determine if any need to be local natives, i.e., grown from propagules collected in the same or adjacent watershed, and as close to the project site as feasible. Also, consult a qualified biologist or vegetation specialist to determine which seeding option is ecologically appropriate and effective, specifically: 1. For areas that are disturbed, an erosion control seed mix may be used consistent with the SCVWD Guidelines and Standards for Land Use	1. Confirm measure is included in contract documents. 2. Retain qualified biologist or vegetation specialist to determine seed selection for revegetated areas within the project site. 3. Confirm that measure is adequately implemented.	1. During preparation of final construction plans and specifications. 2. Prior to construction. 3. During construction and post-construction.	1. District 2. District 3. Qualified biologist or vegetation specialist	1. District 2. District 3. District

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	Near Streams, Design Guide 5, 'Temporary Erosion Control Options.' 2. In areas with remnant native plants, the qualified biologist or vegetation specialist may choose an abiotic application instead, such as an erosion control blanket or seedless hydro-mulch and tackifier to facilitate passive revegetation of local native species. 3. Temporary earthen access roads may be seeded when site and horticultural conditions are suitable. 4. If a gravel or wood mulch has been used to prevent soil compaction, this material may be left in place [if ecologically appropriate] instead of seeding. 5. Seed selection shall be ecologically appropriate as determined by a qualified biologist, per Guidelines and Standards for Land Use Near Streams, Design Guide 2: Use of Local Native Species.				
BI-9	**Restore Riffle/Pool Configuration of Channel Bottom** The channel bottom shall be re-graded at the end of the work project to as close to original conditions as possible. In salmonid streams, restore pool and riffle configurations to emulate pre-project instream conditions, taking into account channel morphological features (i.e., slope), which affects riffle/pool sequence.	1. Confirm measure is included in contract documents. 2. Confirm that measure is fully implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. End of construction.	1. District 2. Contractor	1. District 2. District

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
BI-10	**Avoid Animal Entry and Entrapment** All pipes, hoses, or similar structures less than 12 inches diameter will be closed or covered to prevent animal entry. All construction pipes, culverts, or similar structures, greater than 2-inches diameter, stored at a construction site overnight, will be inspected thoroughly for wildlife by a qualified biologist or properly trained construction personnel before the pipe is buried, capped, used, or moved. If inspection indicates presence of sensitive or state- or federally-listed species inside stored materials or equipment, work on those materials will cease until a qualified biologist determines the appropriate course of action. To prevent entrapment of animals, all excavations, steep-walled holes or trenches more than 6-inches deep will be secured against animal entry at the close of each day. Any of the following measures may be employed, depending on the size of the hole and method feasibility: 1. Hole to be securely covered (no gaps) with plywood, or similar materials, at the close of each working day, or any time the opening will be left unattended for more than one hour; or 2. In the absence of covers, the excavation will be provided with escape ramps constructed of earth or untreated wood, sloped no steeper than 2:1, and located no farther than 15 feet apart; or 3. In situations where escape ramps are infeasible, the hole or trench will be surrounded by filter fabric	1. Confirm measure is included in contract documents. 2. Retain qualified biologist to inspect construction work areas. 3. Confirm that measure is fully implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. Prior to construction. 3. During construction.	1. District 2. Contractor 3. Contractor along with Qualified Biologist or Properly Trained Construction Personnel	1. District 2. District 3. District

	BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	fencing or a similar barrier with the bottom edge buried to prevent entry.				
BI-11	**Minimize Predator Attraction** Remove trash daily from the worksite to avoid attracting potential predators to the site.	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action as necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District
Cultural Resources					
CU-1	**Accidental Discovery of Archaeological Artifacts, Tribal Cultural Resources, or Burial Remains** If historical or unique archaeological artifacts are accidentally discovered during construction, or tribal cultural resources, work in affected areas will be restricted or stopped until proper protocols are met. Work at the location of the find will halt immediately within 100 feet of the find. A "no work" zone shall be established utilizing appropriate flagging to delineate the boundary of this zone. A Consulting Archaeologist will visit the discovery site as soon as practicable for identification and evaluation pursuant to Section 21083.2 of the Public Resources Code and Section 15126.4 of the California Code of Regulations. If the archaeologist determines that the artifact is not significant, construction may resume. If the archaeologist determines that the artifact or resource is significant, the archaeologist will determine if the artifact or resource can be avoided and, if so, will detail avoidance	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action as necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor in consultation with qualified archaeologist as needed	1. District 2. District

	BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	procedures. If the artifact cannot be avoided, the archaeologist will develop within 48 hours an Action Plan which will include provisions to minimize impacts and, if required, a Data Recovery Plan for recovery of artifacts in accordance with Public Resources Code Section 21083.2 and Section 15126.4 of the CEQA Guidelines. If a tribal cultural resource cannot be avoided, the Action Plan will include notification of the appropriate Native American tribe, and consultation with the tribe regarding acceptable recovery options. If burial finds are accidentally discovered during construction, work in affected areas will be restricted or stopped until proper protocols are met. Upon discovering any burial site as evidenced by human skeletal remains, the County Coroner will be immediately notified and the field crew supervisor shall take immediate steps to secure and protect such remains from vandalism during periods when work crews are absent. No further excavation or disturbance within 100 feet of the site or any nearby area reasonably suspected to overlie adjacent remains may be made except as authorized by the County Coroner, California Native American Heritage Commission, and/or the County Coordinator of Indian Affairs.				
Hazards and Hazardous Materials					
HM-7	**Restrict Vehicle and Equipment Cleaning to Appropriate Locations**	1. Confirm that measure is included in the contract documents.	1. During preparation of final	1. District 2. Contractor	1. District 2. District

	BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	Vehicles and equipment may be washed only at approved areas. No washing of vehicles or equipment will occur at job sites.	2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	construction plans and specifications. 2. During construction.		
HM-8	**Ensure Proper Vehicle and Equipment Fueling and Maintenance** No fueling or servicing will be done in a waterway or immediate flood plain, unless equipment stationed in these locations is not readily relocated (i.e., pumps, generators). 1. For stationary equipment that must be fueled or serviced on-site, containment will be provided in such a manner that any accidental spill will not be able to come in direct contact with soil, surface water, or the storm drainage system. 2. All fueling or servicing done at the job site will provide containment to the degree that any spill will be unable to enter any waterway or damage riparian vegetation. 3. All vehicles and equipment will be kept clean. Excessive build-up of oil and grease will be prevented. 4. All equipment used in the creek channel will be inspected for leaks each day prior to initiation of work. Maintenance, repairs, or other necessary	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	actions will be taken to prevent or repair leaks, prior to use. 5. If emergency repairs are required in the field, only those repairs necessary to move equipment to a more secure location will be done in a channel or flood plain.				
HM-9	**Ensure Proper Hazardous Materials Management** Measures will be implemented to ensure that hazardous materials are properly handled and the quality of water resources is protected by all reasonable means. 1. Prior to entering the work site, all field personnel will know how to respond when toxic materials are discovered. 2. Contact of chemicals with precipitation will be minimized by storing chemicals in watertight containers with appropriate secondary containment to prevent any spillage or leakage. 3. Petroleum products, chemicals, cement, fuels, lubricants, and non-storm drainage water or water contaminated with the aforementioned materials will not contact soil and not be allowed to enter surface waters or the storm drainage system. 4. All toxic materials, including waste disposal containers, will be covered when they are not in use, and located as far away as possible from a	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District

	BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	direct connection to the storm drainage system or surface water. 5. Quantities of toxic materials, such as equipment fuels and lubricants, will be stored with secondary containment that is capable of containing 110% of the primary container(s). 6. The discharge of any hazardous or non-hazardous waste as defined in Division 2, Subdivision 1, Chapter 2 of the California Code of Regulations will be conducted in accordance with applicable State and federal regulations. 7. In the event of any hazardous material emergencies or spills, personnel will call the Chemical Emergencies/Spills Hotline at 1-800-510-5151.				
HM-10	**Utilize Spill Prevention Measures** Prevent the accidental release of chemicals, fuels, lubricants, and non-storm drainage water following these measures: 1. Field personnel will be appropriately trained in spill prevention, hazardous material control, and clean-up of accidental spills; 2. Equipment and materials for cleanup of spills will be available on site, and spills and leaks will be cleaned up immediately and disposed of according to applicable regulatory requirements; 3. Field personnel will ensure that hazardous materials are properly handled and natural	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District

	BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	resources are protected by all reasonable means; 4. Spill prevention kits will always be in close proximity when using hazardous materials (e.g., at crew trucks and other logical locations), and all field personnel will be advised of these locations; and, 5. The work site will be routinely inspected to verify that spill prevention and response measures are properly implemented and maintained.				
HM-11	**Ensure Worker Safety in Areas with High Mercury Levels** To ensure worker safety is protected in areas with elevated mercury concentrations in exposed surfaces, personal protective equipment will be required during project construction to maintain exposure below levels established by the California Division of Occupational Safety and Health (Cal/OSHA).	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented if construction activities occur in areas with elevated mercury concentrations; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District
HM-12	**Incorporate Fire Prevention Measures**	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District

	BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	1. All earthmoving and portable equipment with internal combustion engines will be equipped with spark arrestors. 2. During the high fire danger period (April 1– December 1), work crews will have appropriate fire suppression equipment available at the work site. 3. An extinguisher shall be available at the project site at all times when welding or other repair activities that can generate sparks (such as metal grinding) is occurring. 4. Smoking shall be prohibited except in designated staging areas and at least 20 feet from any combustible chemicals or vegetation.				
Hydrology/Water Quality					
WQ-1	**Conduct Work from Top of Bank** For work activities that will occur in the channel, work will be conducted from the top of the bank if access is available and there are flows in the channel.	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District
WQ-2	**Evaluate Use of Wheel and Track Mounted Vehicles in Stream Bottoms** Field personnel will use the appropriate equipment for the job that minimizes disturbance to the stream bottom. Appropriately tired vehicles, either tracked or wheeled, will be used depending on the situation. Tracked vehicles (bulldozers, loaders) may cause	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District

	BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	scarification. Wheeled vehicles may cause compaction. Heavy equipment will not operate in the live stream.				
WQ-3	**Limit Impact of Pump and Generator Operation and Maintenance** Pumps and generators will be maintained and operated in a manner that minimizes impacts to water quality and aquatic species. 1. Pumps and generators will be maintained according to manufacturers' specifications to regulate flows to prevent dry-back or washout conditions. 2. Pumps will be operated and monitored to prevent low water conditions, which could pump muddy bottom water, or high water conditions, which creates ponding. 3. Pump intakes will be screened to prevent uptake of fish and other vertebrates. Pumps in steelhead creeks will be screened according to NMFS criteria. 4. Sufficient back-up pumps and generators will be onsite to replace defective or damaged pumps and generators.	1. Confirm that measure is included in the contract documents. 2. Confirm that any pumps used in water are screened in accordance with NMFS criteria. 3. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction. 3. During construction.	1. District 2. Contractor 3. Contractor	1. District 2. District 3. District
WQ-4	**Limit Impacts from Staging and Stockpiling Materials** 5. To protect on-site vegetation and water quality, staging areas should occur on access roads, surface streets, or other disturbed areas that are already compacted and only support ruderal vegetation. Similarly, all equipment and materials (e.g., road rock and project spoil) will be contained within the	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	existing service roads, paved roads, or other pre-determined staging areas. 6. Building materials and other project-related materials, including chemicals and sediment, will not be stockpiled or stored where they could spill into water bodies or storm drains. 7. No runoff from the staging areas may be allowed to enter water ways, including the creek channel or storm drains, without being subjected to adequate filtration (e.g., vegetated buffer, swale, hay wattles or bales, silt screens). 8. The discharge of decant water to water ways from any on-site temporary sediment stockpile or storage areas is prohibited. 9. During the wet season, no stockpiled soils will remain exposed, unless surrounded by properly installed and maintained silt fencing or other means of erosion control. During the dry season; exposed, dry stockpiles will be watered, enclosed, covered, or sprayed with non-toxic soil stabilizers.				
WQ-5	**Stabilize Construction Entrances and Exits** Measures will be implemented to minimize soil from being tracked onto streets near work sites: 1. Methods used to prevent mud from being tracked out of work sites onto roadways include installing a layer of geotextile mat, followed by a 4-inch thick	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	layer of 1 to 3-inch diameter gravel on unsurfaced access roads. 2. Access will be provided as close to the work area as possible, using existing ramps where available and planning work site access so as to minimize disturbance to the water body bed and banks, and the surrounding land uses.				
WQ-6	**Limit Impact of Concrete Near Waterways** Concrete that has not been cured is alkaline and can increase the pH of the water; fresh concrete will be isolated until it no longer poses a threat to water quality using the following appropriate measures: 1. Wet sacked concrete will be excluded from the wetted channel for a period of four weeks after installation. During that time, the wet sacked concrete will be kept moist (such as covering with wet carpet) and runoff from the wet sacked concrete will not be allowed to enter a live stream. 2. Poured concrete will be excluded from the wetted channel for a period of four weeks after it is poured. During that time, the poured concrete will be kept moist, and runoff from the wet concrete will not be allowed to enter a live stream. Commercial sealants (e.g., Deep Seal, Elasto-Deck Reservoir Grade) may be applied to the poured concrete surface where difficulty in excluding water flow for a long period	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	may occur. If a sealant is used, water will be excluded from the site until the sealant is dry. 3. Dry sacked concrete will not be used in any channel. 4. An area outside of the channel and floodplain will be designated to clean out concrete transit vehicles.				
WQ-7	**Isolate Work in Tidal Areas with Use of Coffer Dam** For work in tidal areas, it is preferable to isolate one side of the channel with a cofferdam and allow flows to continue on the other side of the creek. If downstream flows cannot be diverted around the project site, the creek waters will be transmitted around the site through cofferdam bypass pipes. By isolating the work area from tidal flows, water quality impacts are minimized. 1. Installation of coffer dams will begin at low tide. 2. Waters discharged through tidal coffer dam bypass pipes will not exceed 10 percent in areas where natural turbidity is greater than 50 Nephelometric Turbidity Units (NTU) over the background levels of the tidal waters into which they are discharged. 3. Coffer dams in tidal areas may be made from earthen or gravel material. If earth is used, the downstream and upstream faces will be covered by a protected covering (e.g., plastic or fabric) and anchored to minimize erosion. 4. Cofferdams and bypass pipes will be removed as soon as possible but no more than 72 hours after work is completed. Flows will be restored at a	1. Confirm that measure is included in the contract documents. 2. If bypass pipes are used, measure turbidity levels to ensure that levels do not exceed 10 percent in areas where natural turbidity is greater than 50 NTU over background levels. 3. Confirm that measure is adequately implemented; ensure corrective action if necessary. 4. Ensure that cofferdams and bypass pipes are removed within 72 hours after work is completed.	1. During preparation of final construction plans and specifications. 2. During construction. 3. During construction. 4. Within 72 hours of completing in-water construction activities.	1. District 2. Contractor and/or water quality specialist 3. Contractor and/or water quality specialist 4. Contractor and/or water quality specialist	1. District 2. District 3. District 4. District

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	reduced velocity to minimize erosion, turbidity, or harm to downstream habitat.				
WQ-8	**Minimize Hardscape in Bank Protection Design** Bank repair techniques appropriate to a given site based on hydraulic and other site conditions will be selected. 1. Biotechnical repair methods include construction with living materials; willow wattling; erosion control blankets; brush matting; and, installation of root wads and boulders in banks. 2. The repair will be designed and installed so that it will be self-sustaining and use vegetation that adds structural integrity to the stream bank.	1. Confirm that measure is included in the contract documents. 2. Prepare design plans for bank repair and ensure work is completed in accordance with the design plans; ensure corrective action as necessary.	1. During preparation of final construction plans and specifications. 2. Prior to construction and/or during construction.	1. District 2. Contractor and/or District in consultation with restoration specialist as needed	1. District 2. District
WQ-9	**Use Seeding for Erosion Control, Weed Suppression, and Site Improvement** Disturbed areas shall be seeded with native seed as soon as is appropriate after activities are complete. An erosion control seed mix will be applied to exposed soils down to the ordinary high water mark in streams. 1. The seed mix should consist of California native grasses, (for example *Hordeum brachyantherum*; *Elymus glaucus*; and annual *Vulpia microstachyes*) or annual, sterile hybrid seed mix (e.g., *Regreen*™, a wheat x wheatgrass hybrid). 2. Temporary earthen access roads may be seeded when site and horticultural conditions are suitable, or have other appropriate erosion control measures in place.	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor in consultation with qualified biologist as needed	1. District 2. District

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
WQ-10	**Prevent Scour Downstream of Sediment Removal** After sediment removal, the channel will be graded so that the transition between the existing channel both upstream and downstream of the work area is smooth, and continuous between the maintained and non-maintained areas, and does not present a sudden vertical transition (wall of sediment) or other blockage that could erode once flows are restored to the channel.	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction and operation.	1. District 2. Contractor	1. District 2. District
WQ-11	**Maintain Clean Conditions at Work Sites** The work site, areas adjacent to the work site, and access roads will be maintained in an orderly condition, free and clear from debris and discarded materials on a daily basis. Personnel will not sweep, grade, or flush surplus materials, rubbish, debris, or dust into storm drains or waterways. For activities that last more than one day, materials or equipment left on the site overnight will be stored as inconspicuously as possible, and will be neatly arranged. Any materials and equipment left on the site overnight will be stored to avoid erosion, leaks, or other potential impacts to water quality Upon completion of work, all building materials, debris, unused materials, concrete forms, and other construction-related materials will be removed from the work site.	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction and operation.	1. Contractor 2. Contractor or the District	1. District 2. District
WQ-12	**Manage Well or Exploratory Boring Materials** All materials or waters generated during drilling, well or exploratory boring construction, well development,	1. Confirm that measure is included in the contract documents.	1. During preparation of final	1. Contractor 2. Contractor	1. District 2. District

	BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	pump testing, or other activities associated with wells or exploratory borings, will be safely handled, properly managed, and disposed of according to all applicable federal, state, and local statutes regulating such. In no case will these materials and/or waters be allowed to enter, or potentially enter, on- or off-site storm sewers, dry wells, or waterways. Such materials/waters must not be allowed to move off the property where the work is being completed.	2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	construction plans and specifications. 2. During construction.		
WQ-13	**Protect Groundwater from Contaminates Via Wells or Exploratory Borings** Any substances or materials that may degrade groundwater quality will not be allowed to enter any well or boring. Lubricants used on drill bits, drill pipe, or tremie pipe will not be comprised of oily or greasy substances or other materials that may degrade groundwater quality. Well openings or entrances will be sealed or secured in such a way as to prevent the introduction of contaminants.	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of plans and specifications. 2. During construction.	1. Contractor 2. Contractor	1. District 2. District
WQ-15	**Prevent Water Pollution** Oily, greasy, or sediment laden substances or other material that originate from the project operations and may degrade the quality of surface water or adversely affect aquatic life, fish, or wildlife will not be allowed to enter, or be placed where they may later enter, any waterway.	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor in consultation with water quality specialist as needed	1. District 2. District

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	The project will not increase the turbidity of any watercourse flowing past the construction site by taking all necessary precautions to limit the increase in turbidity as follows: 1. where natural turbidity is between 0 and 50 NTU, increases will not exceed 5 percent; 2. where natural turbidity is greater than 50 NTU, increases will not exceed 10 percent; 3. where the receiving water body is a dry creek bed or storm drain, waters in excess of 50 NTU will not be discharged from the project. Water turbidity changes will be monitored. The discharge water measurements will be made at the point where the discharge water exits the water control system for tidal sites and 100 feet downstream of the discharge point for non-tidal sites. Natural watercourse turbidity measurements will be made in the receiving water 100 feet upstream of the discharge site. Natural watercourse turbidity measurements will be made prior to initiation of project discharges, preferably at least 2 days prior to commencement of operations.				
WQ-16	**Prevent Stormwater Pollution** To prevent stormwater pollution, the applicable measures from the following list will be implemented: 1. Soils exposed due to project activities will be seeded and stabilized using hydroseeding, straw placement, mulching, and/or erosion control fabric. These measures will be implemented such that the site is stabilized and water quality	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction and operation.	1. District 2. Contractor	1. District 2. District

	protected prior to significant rainfall. In creeks, the channel bed and areas below the Ordinary High Water Mark are exempt from this BMP. 2. The preference for erosion control fabrics will be to consist of natural fibers; however, steeper slopes and areas that are highly erodible may require more structured erosion control methods. No non-porous fabric will be used as part of a permanent erosion control approach. Plastic sheeting may be used to temporarily protect a slope from runoff, but only if there are no indications that special-status species would be impacted by the application. 3. Erosion control measures will be installed according to manufacturer's specifications. 4. To prevent stormwater pollution, the appropriate measures from, but not limited to, the following list will be implemented: ▪ Silt Fences ▪ Straw Bale Barriers ▪ Brush or Rock Filters ▪ Storm Drain Inlet Protection ▪ Sediment Traps or Sediment Basins ▪ Erosion Control Blankets and/or Mats ▪ Soil Stabilization (i.e., tackified straw with seed, jute or geotextile blankets, etc.) ▪ Straw mulch. 5. All temporary construction-related erosion control methods shall be removed at the completion of the project (e.g., silt fences). 6. Surface barrier applications installed as a method of animal conflict management, such as chain link fencing, woven geotextiles, and other similar				

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	materials, will be installed no longer than 300 feet, with at least an equal amount of open area prior to another linear installation.				
TR-1	**Use Suitable Public Safety Measures** Fences, barriers, lights, flagging, guards, and signs will be installed as determined appropriate by the public agency having jurisdiction, to give adequate warning to the public of the construction and of any dangerous condition to be encountered as a result thereof.	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary. Implementing this measure would require coordination with the City of Milpitas on the appropriate type of fencing, barriers, lights, flagging, guards, and signage to be used at the construction work site.	1. During preparation of final construction plans and specifications. 2. Prior to and during construction.	1. District 2. Contractor and/or District	1. District 2. District
Mitigation Measures					
Aesthetics					
None.					
Air Quality					
AQ-1	**Implement Construction NO_x Emission Reductions** The District or its contractor(s) will develop a construction plan demonstrating that off-road equipment (greater than 50 horsepower) and material hauling vehicles used during project construction (i.e., owned, leased, and subcontracted vehicles) will not	1. Develop construction NO_x emission reduction plan. 2. Once construction phasing and equipment list has been confirmed, conduct additional	1. Prior to construction. 2. Prior to construction.	1. Contractor 2. Air quality specialist 3. Contractor	1. District 2. District 3. District

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	result in average daily NO_X emissions of more than 54 pounds per day, which will require achieving a project-wide fleet-average of at least 22 percent NO_X reduction compared to unmitigated emissions. As part of developing this construction plan, the District or its contractor(s) will conduct additional air quality modeling to confirm that the NO_X emissions threshold will be met. This limit of 54 pounds per day of NO_x emissions shall be achieved through a combination of approaches, including phasing of construction activities in a manner that reduces the daily emissions generated from the proposed project; the use of late model engines (e.g., Tier 3 or 4 engines), low-emission diesel products, alternative fuels, engine retrofit technology, after-treatment products, and/or add-on devices such as particulate filters; and/or other options as such become available.	air quality modeling to confirm that NOx emissions are met. 3. Confirm measures identified in plan are implemented appropriately.	3. During construction.		
AQ-2	**Locate Stockpiles of Odorous Materials at a Distance from Sensitive Receptors** The District will require that contractors handle stockpiles of potentially odorous excavated or dredged material, or other potentially odorous materials, in a manner that avoids affecting residential areas or other sensitive receptors to the extent feasible. Stockpiles will be placed as far as possible from these receptors and will be covered if immediate off-site disposal is not feasible.	1. Ensure measure gets incorporated in the contract documents. 2. Ensure that stockpiled material is placed as far as possible from residences.	1. ~~Prior to construction~~ During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District

	BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
Biological Resources					
BIO-1	**Exclude Fish Prior to Dewatering Activities** Prior to conducting dewatering activities, ~~the District will hire~~ a qualified biologist ~~who~~ will use nets to exclude fish from the construction area. During a falling tide, a block net will be placed at the upper end of the reach to be dewatered. Subsequently, qualified biologists will walk from the upper to lower end of the reach with a seine stretched across the channel to encourage fish to move out of the construction area. When the lower end of the construction area is reached, a second block net will be installed to isolate the construction reach. This procedure will be repeated a minimum of three times on each dewatered reach to ensure that no longfin smelt or steelhead remain in the construction area. Mesh size will not exceed 9.5 millimeters to ensure that longfin smelt are adequately excluded from this area.	1. Retain a qualified biologist to conduct fish exclusion 2. Confirm fish exclusion techniques are performed adequately and fish are excluded from construction area.	1. Prior to construction dewatering activities. 2. During construction dewatering activities.	1. Contractor 2. Contractor and Qualified biologist	1. District 2. District
BIO-2	**Conduct Preconstruction Surveys for Western Pond Turtles and Relocate if Necessary** ~~The District will hire a~~A qualified biologist ~~who~~ will conduct pre-construction surveys for western pond turtles and their nests. If an adult or juvenile western pond turtle is found, project activities near the turtle will not commence until the individual has left the area, or is captured and relocated to suitable habitat outside of the activity area by a qualified biologist. If an active western pond turtle nest is detected within the construction area, a 25-foot buffer zone around the nest will be established and maintained during the nesting season (April 1	1. Retain a qualified biologist to conduct surveys. 2. Ensure surveys are conducted each morning prior to the scheduled work commencing. 3. If a turtle is found, ensure that work is ceased until the individual has left or been captured and relocated. 4. If an active turtle nest is detected with the activity, ensure	1. Prior to construction. 2. During construction. 3. During construction, if necessary. 4. During construction, if necessary.	1. Contractor 2. Contractor and Qualified biologist 3. Contractor and Qualified biologist 4. Contractor and Qualified biologist	1. District 2. District 3. District 4. District

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	through August 31). The buffer zone will remain in place until the young have left the nest, as determined by a qualified biologist.	a 25-foot buffer zone is established during the nesting season.			
BIO-3	**Conduct Preconstruction Surveys for Nesting Birds** ~~The District will hire a~~A qualified biologist ~~who~~ will conduct preconstruction surveys for nesting birds. Surveys will be conducted no more than ~~2 weeks~~7 days prior to the initiation of construction activities during the bird nesting season (January 15 through August 31) in any given area. The survey will cover the portions of the project work area where construction activities will occur as well as a 250-foot buffer for raptors and a 50-foot buffer for non-raptors. During each survey, the biologist will inspect all trees and other potential nesting habitats (e.g., shrubs, ruderal grasslands, wetlands, and buildings) in and immediately adjacent to the impact areas for nests. If a lapse in project-related work of ~~2~~21 week~~s~~ or longer occurs, another focused survey will be conducted before project work can be reinitiated.	1. Retain a qualified biologist to conduct surveys. 2. Ensure pre-construction surveys are conducted in accordance with measure.	1. Prior to construction. 2. Prior to construction, during survey period.	1. Contractor 2. Contractor and Qualified biologist	1. District 2. District
BIO-4	**Implement Buffer Zones for Nesting Birds** If an active nest is found sufficiently close to the project work area (i.e., within 250 feet for raptors or 50 feet for non-raptors), a qualified biologist ~~hired by the District~~ will determine the extent of a disturbance-free buffer zone to be established around the nest (typically 50 feet for non-raptors and 250 feet for raptors). No construction activities will be performed within the	1. Retain a qualified biologist to implement buffer zones, if needed. 2. If an active nest is found, ensure buffer zone is established and implemented in accordance with this measure.	1. Prior to and during construction. 2. During construction. 3. During construction.	1. Contractor and Qualified biologist 2. Contractor and Qualified biologist 3. Contractor and Qualified biologist	1. District 2. District 3. District 4. District

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	buffer until the young have fledged or the nest has been determined to be inactive by a qualified biologist. If the qualified biologist determines that a reduced buffer size is appropriate given conditions in the vicinity of the nest, type of construction activity that would occur near the nest, and the species of the nesting bird, the biologist will monitor bird behavior in relation to work activities. If the birds do not indicate that they are habituated to project activities during the initial 2 days of attempting work within a reduced buffer, the standard buffer will be implemented. Project activities within the reduced buffers will not resume until the District has consulted with CDFW and both the qualified biologist and CDFW confirm that the birds' behavior has normalized, or until the nest is no longer active.	3. If a reduced buffer is implemented, ensure biologist monitors bird behavior ~~prior to~~during construction. 4. If nesting bird is not habituated, prior to resuming construction within reduced buffer, the District to consult with CDFW and the qualified biologist to confirm that the birds' behavior has normalized or until ~~active~~ nest ~~has normalized~~is no longer active.	4. During construction.	4. District and qualified biologist	
BIO-5	**Develop and Conduct Worker Environmental Awareness Program** Before any construction activities begin, the District will conduct a training session for all construction personnel. At a minimum, the training will include descriptions of the salt marsh harvest mouse, its habitats, the importance of the species, the general measures that are being implemented to conserve this species as they relate to the proposed project, and the boundaries within which project activities may be accomplished.	1. Ensure training is conducted in accordance with this measure.	1. Prior to construction.	1. District and/or qualified biologist	1. District
BIO-6	**Implement Hand Removal of Vegetation in Reach 1 and Staging Area A** ~~The District will remove vegetation at marshes and high-water refugia habitat in Reach 1 (e.g., annual grasses and~~	1. ~~Retain qualified biologist to conduct salt marsh harvest mouse survey.~~ Ensure salt marsh harvest mouse survey be	~~1. Prior to construction.~~ Prior to vegetation removal in	1. Qualified biologist 2. Contractor (as monitored by	1. District 2. District 3. District

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	~~shrubs immediately adjacent to channels) by hand to the extent feasible. This measure applies to construction work at Reach 1 and Staging Area A.~~Prior to the start of project activities within Reach 1 and Staging Area A, herbaceous vegetation will be removed from work areas to eliminate cover for salt marsh harvest mice, thereby discouraging them from occurring in work areas. A qualified biologist familiar with salt marsh harvest mouse biology will conduct a preconstruction survey prior to vegetation removal and will monitor the vegetation removal process. Vegetation will be removed using hand-held equipment (e.g., weed-whackers). This will allow any small mammals, including salt marsh harvest mice, to escape the project area under the cover of vegetation, and will encourage movement of such small mammals toward available vegetated habitat outside the project area. All herbaceous vegetation that could potentially conceal a salt marsh harvest mouse within the work area will be removed. All vegetation that is removed will be hauled off site and will not be left on the site, as it could provide potential cover for small mammal species. The area of vegetation removal will extend approximately 2-3 feet beyond (downstream from) the boundary of the work area, to create an open area that discourages salt marsh harvest mice from approaching the exclusion barrier described in the Mitigation Measure BIO-7.	conducted prior to vegetation removal. 2. Ensure applicable vegetation is removed by hand. 3. Ensure that all vegetation that is removed is hauled off-site the day it is removed, and not left on-site.	Reach 1 and Staging Area A. 2. Prior to construction activities in Reach 1 and Staging Area A. 3. During vegetation removal; prior to construction activities in Reach 1 and Staging Area A.	Qualified biologist) 3. Contractor (as monitored by Qualified biologist)	

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
BIO-7	**Install Exclusion Barrier and Conduct Salt Marsh Harvest Mouse Preconstruction Survey** The District will install a barrier at the downstream-most limits of the work area to exclude salt marsh harvest mice from the work area. The barrier will be installed after vegetation clearing and prior to the start of earth movement. Barriers will be installed, perpendicular to the creek channel under the guidance of a qualified biologist. The barrier will consist of a 3-foot-tall fence of tight cloth, smooth plastic, or sheet-metal (or similar material approved by USFWS) toed into the soil at least 3 inches deep and supported with stakes placed on the inside of the barrier. A qualified biologist will conduct a preconstruction survey of the area from which vegetation was removed prior to construction access. The biologist will monitor installation of the barrier. If a salt marsh harvest mouse, or an animal that could be a harvest mouse (e.g., a similar species of mouse), is observed within the exclusion barrier during project activities, all work that could result in the injury or death of the individual will stop immediately and the qualified biologist will be notified immediately. The animal will be allowed to leave the area on its own and will not be handled.	1. ~~Retain qualified biologist to conduct survey and monitor barrier installation.2.~~ Install barrier at the downstream-most limits of the work area. ~~3~~2. Conduct preconstruction survey in accordance with measure and ~~I~~if a salt marsh harvest mouse or similar species is observed within the barrier, stop all work that could injure or kill the animal and notify qualified biologist.	1. ~~Prior to construction activities in Reach 1 and Staging Area A.~~ Prior to earth-moving construction activities and after vegetation clearing. 2. During construction activities, if necessary.	1. Contractor in consultation with Qualified biologist 2. Qualified biologist and contractor	1. District 2. District

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BIO-8	**Salt Marsh Harvest Mouse Habitat Monitoring Plan** To ensure that habitat created at the wetland bench on the south bank of Reach 1 will be suitable for the salt marsh harvest mouse, the District will hire a restoration ecologist and qualified salt marsh harvest mouse biologist to develop a Salt Marsh Harvest Mouse Habitat Monitoring Plan, which will contain the following components: ▪ summary of habitat impacts and proposed acres of habitat creation ▪ location of habitat creation site(s) and description of existing site conditions ▪ habitat design, including the following: – existing and proposed site hydrology – grading plan if appropriate, including bank stabilization or other site stabilization features – soil amendments and other site preparation elements as appropriate – planting plan – irrigation and maintenance plan – remedial measures/adaptive management, etc. ▪ monitoring plan (including ~~final and~~ performance criteria, monitoring methods, data analysis, reporting requirements, monitoring schedule, etc.). At a minimum, success criteria will include	1. ~~Retain qualified restoration ecologist/biologist.~~ ~~2.~~ Develop Salt Marsh Harvest Mouse Habitat Monitoring Plan and confirm that it contains the required components identified in measure. ~~3~~2. Implement Plan.	1. ~~Prior to construction.~~ ~~2.~~ Prior to construction. ~~3~~2. Post-construction.	1. Qualified restoration ecologist/biologist 2. Contractor	1. District 2. District

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	quantifiable measurements of wetland vegetation type (e.g., dominance by native hydrophytes). The District will implement the Salt Marsh Harvest Mouse Habitat Monitoring Plan. This mitigation measure will ensure the creation of tidal marsh and non-tidal wetland habitat suitable for the salt marsh harvest mouse, which will compensate for any permanent loss of habitat due to project implementation.				
BIO-9	**Conduct Focused Preconstruction Survey for Congdon's Tarplant** ~~Prior to construction~~In the event that project construction starts after August 2020, ~~the District will hire~~ a qualified biologist ~~who~~ will conduct a focused survey for Congdon's tarplant in the ruderal grassland habitat within the project area. The survey will be conducted during the species' blooming period (May-November). If a population of Congdon's tarplant is identified in the project area, the District will implement Mitigation Measure BIO-10 (Compensate for Congdon's Tarplant Impacts).	1. ~~Retain qualified biologist to conduct survey.~~ ~~2.~~ Confirm that survey is conducted in accordance with this mitigation measure. ~~3~~2. If a population of Congdon's tarplant is identified in the work area, ensure that Mitigation Measure BIO-10 is implemented.	1. ~~Prior to construction.~~ ~~2.~~ Prior to construction. ~~3~~2. Prior to construction, if necessary.	1. Qualified biologist 2. Qualified biologist and/or contractor	1. District 2. District
BIO-10	**Compensate for Congdon's Tarplant Impacts** If a population of Congdon's tarplant is identified in the project work area during the preconstruction survey (per Mitigation Measure BIO-9), a qualified biologist ~~hired by the District~~ will conduct an impact assessment to determine if project impacts would be expected to cause	1. If Congdon's tarplant is identified in the work area, per Mitigation Measure BIO-9, conduct impact assessment to determine extent of possible project impacts.	1. Prior to construction, if necessary. 2. Prior to construction, if necessary.	1. Qualified biologist 2. Qualified biologist 3. Qualified biologist	1. District 2. District 3. District 4. District 5. District

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	the loss of the occurrence. The entire occurrence, will be mapped and individuals counted. Mitigation will be achieved either by preserving an existing, similarly sized occurrence of Congdon's tarplant of similar quality under a conservation easement, or through collection of seed and establishment of a new population on suitable habitat. Congdon's tarplant is a species that tolerates both non-native plant associates and disturbance, and has shown success in transplant activities. If a new population is to be established, seed from the population to be affected will be collected, cleaned of extraneous plant material, and stratified by storage over the winter in cool temperatures. A qualified plant ecologist will identify a suitable relocation site that is mesic and underlain by alkaline soils, preferably as similar as possible to the soils where the seed was collected. The seed will be applied to the new habitat. A Congdon's Tarplant Management and Monitoring Plan will be prepared and approved by the District. The plan will provide monitoring and include the following information: ▪ Clear statement of population and management goals for the newly established population and surrounding habitat; ▪ Population success criteria for interim monitoring years; ▪ Final success criteria.	2. If avoidance/project alteration is infeasible, determine mitigation approach (i.e., preserving similar sized population under conservation easement or establishment of new population). 3. If a new population is to be established, retain qualified plant ecologist to identify suitable site for seed relocation. 4. Prepare management and monitoring plan in accordance with this mitigation measure. 5. Confirm that management and monitoring plan is implemented and success criteria ultimately achieved; follow monitoring requirements.	3. Prior to seed relocation; prior to construction. 4. Prior to seed relocation; prior to construction. 5. During and following seed relocation (for at least 5 years).	4. Qualified biologist 5. Qualified biologist and District	

	BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
BIO-11	**Clean Construction Equipment** The District will require that equipment used during project construction be cleaned of any visible sediment or vegetation clumps before being used in the project area, or before being used in a different watershed after use in the project area, to avoid spreading pathogens or exotic/invasive species.	1. Confirm measure is included in contract documents. 2. Confirm that measure is fully implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District
BIO-12	**Dispose of Invasive Plants** The District will require that any invasive plants found within the project area ~~d~~ be removed and disposed of in a sanitary landfill, incinerated off site, or disposed of in a high-temperature composting facility that can compost using methods known to kill weed seeds.	1. Confirm that measure is included in the contract documents. 2. Confirm that measure is adequately implemented; ensure corrective action if necessary.	1. During preparation of final construction plans and specifications. 2. During construction.	1. District 2. Contractor	1. District 2. District
BIO-13	**Wetlands ~~and Jurisdictional Waters~~ Mitigation and Monitoring Plan ~~and Contingency Actions~~** As described in Section 2.6.1, the proposed project includes the creation of a wetland bench on the south bank of Reach 1. The bench will be planted with native species to vegetated wetland habitat. To ensure that vegetated wetlands successfully establish on the bench, the District will develop a Wetlands Mitigation and Monitoring Plan, which will contain the following components:	~~1. If District elects to create wetlands on- or off-site for compensatory mitigation, retain a restoration ecologist or wetland biologist to develop a Wetland and Jurisdictional Waters Monitoring Plan.2~~1. Confirm Wetland and Jurisdictional Waters Monitoring Plan has all components identified in Mitigation Measure BIO-13.	~~1. Prior to construction.~~ ~~2~~1. Prior to construction. ~~3. Prior to construction.4~~2. Post-construction. ~~5. Annually during restoration period~~	1. District and/or Restoration ecologist/biologist 2. District and/or restoration ecologist/ biologist	1. District 2. District 3. District

BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
▪ Summary of habitat impacts and acreage of wetland creation ▪ Location of wetland creation site(s) and description of existing site conditions ▪ Mitigation design, including the following: – Existing and proposed site hydrology – Grading plan if appropriate, including bank stabilization or other site stabilization features – Soil amendments and other site preparation elements as appropriate – Planting plan to establish the target coastal brackish marsh habitat. Species composition will be determined by hydrology and soils but is anticipated to be similar to adjacent wetlands. Dominant species may include: alkali bulrush, hardstem bulrush, California bulrush, and broadfruit bur reed. Temporarily impacted non-tidal seasonal saline wetlands will be replanted. Dominant species may include: creeping wild-rye, alkali heath, California gray rush, and pickleweed. – Maintenance plan – Remedial measures/adaptive management, etc. – Monitoring plan (including ~~final and~~ performance criteria, monitoring methods, data analysis, reporting requirements, monitoring schedule, etc.).	~~3. Obtain USACE and RWQCB's approval of the Mitigation and Monitoring Plan.~~ 42. Implement Plan. 53. Conduct monitoring ~~annually~~ to document whether monitoring plan success criteria are achieved ~~per permit requirements~~, and if necessary, conduct remedial actions.	3. P(~~p~~ost-construction~~)~~.	3. District and/or Restoration ecologist/ biologist	

	BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	The District will implement the Wetlands Mitigation and ~~Jurisdictional Waters~~ Monitoring Plan.				
Cultural Resources					
None.					
Geology, Soils, and Seismicity					
GEO-1	**Incorporate 2017 Geotechnical Design Report Recommendations into the Final Design and Construction of the Proposed Project** ~~The District or its design contractor will incorporate recommendations from the final Geotechnical Design Report.~~ Based on the draft Geotechnical Design Report (Kleinfelder 2017), the District will incorporate the following recommendations (or substantially similar recommendations) in the design plans and specifications: ▪ The sheet pile floodwalls will be designed to resist active lateral pressures based on an equivalent fluid weight of 45 pounds per cubic foot (pcf) above the groundwater table and 25 pcf for submerged conditions. If full drainage is not provided in the floodwalls, the sheet pile design will include hydrostatic pressure. ▪ The sheet pile floodwalls will be able to tolerate the total and differential seismic settlements, as estimated by reach in the final Geotechnical Design Report.	1. Ensure that project plans and specifications include recommendations from the Geotechnical Design Report regarding design and construction of project facilities. ~~2. Confirm that recommendations are incorporated into the project plans and specifications.~~	1. During the design phase. ~~2. During preparation of plans and specifications.~~	1. District	1. District

BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
▪ Levee fill materials will not contain organic material and meet the gradation and plasticity specifications as defined in the final Geotechnical Design Report. ▪ Prior to general site grading, existing vegetation, organic topsoil, and any debris will be stripped and disposed of outside the construction limits. Stripping depths will be on the order of 3 to 6 inches (or as approved onsite by the geotechnical engineer). Topsoil or any other organic laden materials will not be incorporated into any levee embankment. Where applicable, the gravelly material of the levee maintenance road will be removed prior to placing levee embankment fill. ▪ All areas to receive engineered fill will be scarified to a depth of 8 inches, uniformly moisture conditioned to a range between one and four percent above optimum moisture content, and compacted to at least 90 percent of the maximum dry density as determined by ASTM Test Method D1557 (Modified Proctor). ▪ Existing abandoned utility lines, wells and/or foundations (including backfill material) encountered during project activities will be removed and disposed of offsite. ▪ New levee embankment fill slopes will be constructed at a slope no steeper than 2:1 (H:V). New embankment fill placed on top of the existing levee may require a key				

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	into the existing levee slope, or benched into existing levee material after scarification and recompaction of existing fill occurs.				
Greenhouse Gases					
None.					
Hazards and Hazardous Materials					
HAZ-1	**Develop and Implement Soil and Groundwater Management Plan** Prior to initiating ground-disturbing construction activities, the District will develop a Soil and Groundwater Management Plan, prepared by state registered hazardous waste investigation and remediation professionals. The plan will include a health and safety plan; emergency notification protocols; and handling and sampling procedures for site workers in accordance with OSHA and Santa Clara County Hazardous Materials Compliance Division requirements. The plan will describe protocols for offsite disposal of contaminated soils and disposal and/or treatment of contaminated groundwater. In addition, the plan will include coordination and notification protocols and requirements for any inadvertent releases of hazardous materials within the vicinity of any schools. Once complete and approved by the Santa Clara County Hazardous Materials Compliance	1. Retain state registered hazardous waste investigation and remediation professionals to develop a soil and groundwater management plan. 2. Ensure plan includes procedures that are ~~procedures that are~~ consistent with OSHA and Santa Clara County Hazardous Materials Compliance Division requirements. 3. Obtain plan approval from Santa Clara County Hazardous Materials Compliance Division. 4. ~~Incorporate plan in construction specifications.~~Ensure	1. Before construction. 2. Before construction. 3. Before construction. 4. ~~Before~~ During construction.	1. District 2. State registered hazardous waste investigation and remediation specialist 3. Hazardous waste investigation and remediation specialist and District 4. Contractor	1. District 2. District 3. District 4. District

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	Division, the plan will be incorporated in the construction specifications for the proposed project.	compliance with plan during construction.			
Hydrology and Water Quality					
None.					
Land Use and Planning					
None.					
Noise and Vibration					
NOI-1	**Implement Noise- and Vibration-reducing Measures** The District and construction contractor will implement the following noise- and vibration-reducing measures during all construction activities, unless as specified below, to minimize impacts on nearby sensitive receptors: ▪ All noise-producing project equipment and vehicles using internal combustion engines will be equipped with mufflers; air-inlet silencers, where appropriate; and any other shrouds, shields, or noise-reducing features in good operating condition that meet or exceed original factory specification. Mobile or fixed "package" equipment (e.g., arc-welders, air compressors) will be equipped with shrouds and noise control features that are readily available for those types of equipment.	1. ~~Confirm that measure is l~~included measures in plans and specifications. 2. ~~Confirm proper notification of~~Notify residents and sensitive receptors within 500 feet of project site. 3. Confirm equipment and vehicles are equipped with proper noise-reducing features, and are in good operating condition. 4. ~~Confirm that~~Use sound attenuation devices ~~are used~~	1. During preparation of final construction plans and specifications. 2. Prior to construction. 3. Prior to construction. 4. During construction. 5. During construction.	1. District 2. Contractor 3. Contractor 4. Contractor 5. Contractor	1. District 2. District 3. District 4. District 5. District

BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
▪ Mobile noise-generating equipment and machinery will be shut off when not in use. ▪ Ensure proper tuning of vibration-causing equipment. ▪ Vibration damping devices will be used to the extent feasible. ▪ Use of vibratory equipment will be limited to the extent feasible. ▪ Impact tools (e.g., jack hammers, pavement breakers, and rock drills) used for construction will be hydraulically or electrically powered wherever possible to avoid noise associated with compressed air exhaust from pneumatically powered tools. However, where use of pneumatic tools is unavoidable, an exhaust muffler on the compressed air exhaust will be used; this muffler can lower noise levels from the exhaust by up to about 10 dBA. External jackets on the tools themselves will be used where feasible, and this could achieve a reduction of 5 dBA. Quieter procedures will be used, such as drills rather than impact equipment, whenever feasible. ▪ Electric stationary equipment (e.g., generators) will be used where feasible. ▪ Noise and/or vibration shields, such as sound aprons or temporary enclosures with sound-absorbing material, will be used on or around construction equipment, particularly if construction activities are conducted after 7:00 pm. For all construction activities occurring within 60 feet of residences at any	in accordance with this~~e~~ measure. 5. Confirm that equipment is operated in accordance with this measure and ensure corrective action if necessary.			

	BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	time of day temporary noise and vibration barrier will be installed between the project site and the nearest sensitive receptors. Following the completion of construction activities within that distance, the barrier will be removed. ▪ The District will notify all residences and other sensitive receptors within 500 feet of the project site prior to the initiation of the proposed construction activities. The notification will provide the name and contact information, including a phone number, of a District representative for use before and during construction activities to address any questions or concerns regarding the project's construction activities or anticipated noise and vibration levels. If any occupants or other sensitive receptors report sensitive operations that could be affected, construction activities will be modified to minimize vibration near those buildings. Potential modifications include limiting the hours of operation for pieces of equipment that are major vibration sources and maximizing the distance between these pieces of equipment and sensitive buildings.				
Recreation					
None.					
Transportation and Traffic					
TRA-1	**Traffic Control Plan**	1. Review and approve construction plans and	1. During development of	1. District	1. District

BMP or Mitigation Measure		Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
	The District will develop a traffic control plan in accordance with professional traffic engineering standards to reduce the effects of project construction activities and traffic on surrounding local roads, bicycle and pedestrian facilities, and emergency access. The District and/or its contractor will coordinate development and implementation of this plan with the City of Milpitas. Components of the Traffic Control Plan will include, but not be limited to, the following: ▪ Restrict truck access to truck routes designated by the City. ▪ Confine heavy truck traffic such as material hauling to California Circle. ▪ Prohibit work-site access via residential streets (e.g., Milmont Drive and San Andreas Drive) to the extent feasible. Should construction staging require use of Milmont Drive and San Andreas Drive by heavy vehicles for brief periods, the District and/or its contractor will coordinate with the City of Milpitas to obtain approval. ▪ Provide advance construction warning signage for lane reduction at San Andreas Drive during headwall construction at the bridge. ▪ Provide advance notification of necessary closures of sidewalks on San Andreas Drive and maintain pedestrian access during construction of the headwalls where safe to do so. For the San Andreas Drive sidewalk closures, detour pedestrians away from construction activity to the sidewalk on the	specifications to confirm that measure is included. 2. Develop traffic control plan in accordance with Mitigation Measure TRA-1. 3. Review and coordinate development of plan with the City of Milpitas. 4. Implement plan.	final construction plans and specifications 2. Before start of construction 3. Before start of construction 4. During construction	2. Contractor and a licensed traffic engineer 3. Traffic engineer, contractor, and District 4. Contractor	2. District 3. District 4. District

BMP or Mitigation Measure	Monitoring and Reporting Action	Monitoring or Implementation Schedule	Responsibility for Implementation ~~Completion Date and Initials~~	Responsibility for Monitoring/ Oversight
opposite side of the street. For the Penitencia Creek Trail closure, route pedestrians along the existing sidewalks on California Circle and Milmont Drive, where appropriate. ▪ To accommodate the temporary closure of the Penitencia Creek Trail along Reach 3 and the narrowing of travel lanes on the San Andreas Drive bridge, provide signage that indicates where bicycles and motor vehicles should share the roadway, and detour bikes to Milmont Drive and California Circle, where appropriate. ▪ Traffic handling plans for San Andreas Drive will be prepared and implemented in accordance with Caltrans and *California Manual on Uniform Traffic Control Devices* (MUTCD) standards. The traffic handling plans will demonstrate how two-way traffic operations can be maintained during work hours (e.g., use of flaggers) and when construction activity ends each day. ▪ Notify and consult with emergency service providers such as police and fire stations, hospitals, and schools prior to the start of construction. The District will maintain emergency access at all times, by whatever means necessary, to expedite and facilitate the passage of emergency vehicles.				
Utilities and Service Systems				
None.				

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Chapter 5
REPORT PREPARATION

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Chapter 6
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No sources referenced.

CHAPTER 2. SUMMARY OF PUBLIC PARTICIPATION

No sources referenced.

CHAPTER 3. COMMENT LETTERS AND RESPONSE TO COMMENTS

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CHAPTER 4. REVISIONS TO THE DEIR

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