

F. BIOLOGICAL RESOURCES

This section describes existing biological resources in the project area, the regulatory context for addressing biological resource issues on the site, and evaluates potential impacts to biological resources that could result from implementation of the proposed project. Mitigation measures are also recommended to avoid or minimize potential impacts.

1. Setting

This section discusses the existing vegetation and urban wildlife in and around the project site. The discussion includes: vegetation and habitats; wildlife values; potential wetlands; ordinance-size trees; sensitive communities; and special-status species. It begins with a brief summary of methods used and background materials relied upon.

2. Methods

To determine which special-status plant and animal species could potentially occur on or in vicinity of the Project, the California Natural Diversity Database (CNDDDB)¹ was searched for records of special-status species and sensitive communities in the San Jose East and San Jose West 7.5 minute U.S. Geological Survey quadrangles. The California Native Plant Society's (CNPS)² online database of special-status plants was also searched for special-status plant and sensitive plant community records in the selected quadrangles. Based on results of these database searches, a list of special-status plant (see Table V.F-1) and animal species (see Table V.F-2) that are known to occur in the general San Jose area were compiled. Tables V.F-1 and V.F-2 describe the species' status, habitat and potential for occurrence on the project site.

Field reconnaissance data were collected during a site visit on December 6, 2005.³ The site visit consisted of traversing the site while recording information on the vegetation communities and wildlife present, and searching for evidence of special-status species or habitats that could support them. Plants and animals observed during the survey were recorded in field notes. Additional sources of information include the following:

- *San Jose Downtown Strategy 2000 Environmental Impact Report*, City of San Jose, May 2005
- *San Jose MarketCenter Environmental Impact Report*, City of San Jose, December 2004

Plant taxonomy and nomenclature follows *The Jepson Manual*.⁴ Nomenclature for common amphibians and reptiles conforms to Crother et al.,⁵ while nomenclature for mammals conforms to Baker et

¹ California Natural Diversity Database (CNDDDB), 2005. Special-status species occurrences within the San Jose West and San Jose East 7.5-minute USGS quadrangles. Wildlife and Habitat Data Analysis Branch, California Department of Fish and Game, Sacramento.

² California Native Plant Society (CNPS), 2005. Inventory of Rare and Endangered Plants (online edition v. 6-05 9-28-05). California Native Plant Society, Sacramento. <http://www.cnps.org/inventory>.

³ LSA botanist/wetland ecologist Michele Lee and wildlife biologist Matt Ricketts.

⁴ Hickman, J.C., ed., 1993. *The Jepson Manual: Higher Plants of California*. University of California Press, Berkeley. 1400 pp.

⁵ Crother, B.I. et al., 2000. Scientific and Standard English Names of Amphibians and Reptiles of North American North of Mexico, with Comments Regarding Confidence in our Understanding. Herpetological Circular 29:1-82.

al.⁶ Scientific names for bird species are not provided in the text since common names of birds are standardized in the American Ornithologists' Union (AOU) *Check-list of North American Birds*⁷ and supplements.

a. Existing Conditions. The entire 23.1-acre site is developed for light industrial and commercial use, with two roads (Montgomery Street and Autumn Street) running through the northern part of the site. Landscaped trees and shrubs have been planted around most of the buildings. Most of the site is unvegetated and consists of asphalt pavement, concrete surfaces, or gravel parking lots. Los Gatos Creek flows south to north along the eastern and southeastern site boundary, with the Amtrak Railroad Yard forming the western site boundary.

(1) Vegetation and Habitats. Most of the site is developed and unvegetated except for ornamental trees and shrubs. A tree survey conducted on December 13, 2005⁸ compiled data on a total of 170 trees in the project area, 45 of which are ordinance-sized trees (Figure V.F-1). The results from the tree survey are summarized below in a separate discussion of ordinance-sized trees and a copy of the detailed Arborist Report is provided in Appendix F. Besides the landscaped trees and shrubs, the only vegetation observed in the project area was ruderal vegetation, including mallow (*Malva* sp.) and smilo grass (*Piptatherum miliaceum*) that grows in the cracks of pavement and in a small bare area near a group of trees in the northwestern portion of the site.

Two reaches of Los Gatos Creek are immediately adjacent to the eastern boundary of the project area (Figure V.F-1). The creekbed substrate consists of fines, gravel and cobbles. The channel from Ordinary High Water Mark to Ordinary High Water Mark is approximately 35 feet wide and water was flowing in it during the December site visit. The channel lacked any associated aquatic or emergent vegetation, but the creek supports a riparian corridor that is dominated by a fairly dense canopy cover of cottonwood trees (*Populus fremontii* ssp. *fremonti*). Other associated trees include red willow (*Salix laevigata*), arroyo willow (*Salix lasiolepis*), box elder (*Acer negundo* var. *californicum*), edible fig (*Ficus carica*), weeping willow (*Salix babylonica*) and Peruvian pepper tree (*Schinus molle*). The understory is primarily leaf litter where canopy cover is dense and more open areas support non-native species such as English ivy (*Hedra helix*), smilo grass, and small patches of Himalayan blackberry (*Rubus discolor*). Along the upland edges near the top of the bank were non-native grasses such as riggut brome (*Bromus diandrus*), foxtail barley (*Hordeum murinum* ssp. *leporinum*), fennel (*Foeniculum vulgare*), and mallow.

(2) Wildlife Values. Wildlife species that occur on the site are typical of urban areas and have adapted well to human-modified landscapes. Many of the bird species were observed in the riparian vegetation along Los Gatos Creek, which contains the best available habitat for urban wildlife in the site vicinity. Bird species observed during the field reconnaissance (on December 6, 2005) include the following: Cooper's hawk, California gull, rock pigeon, Anna's hummingbird, black

⁶ Baker, R.J., L.C. Bradley, R.D. Bradley, J.W. Dragoo, M.D. Engstrom, R.S. Hoffmann, C.A. Jones, F. Reid, D.W. Rice, and C. Jones. 2003. *Revised Checklist of North American Mammals North of Mexico, 2003*. Museum of Texas Tech University. Occasional Papers 229.

⁷ American Ornithologists' Union, 1998. A.O.U. *Checklist of North American Birds*, Seventh Edition. American Ornithologists' Union, Washington, D.C.

⁸ LSA botanist/arborist Tim Milliken.

Figure V.F-1: Ordinance Size Trees on the Project Site

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phoebe, western scrub-jay, chestnut-backed chickadee, bushtit, ruby-crowned kinglet, northern mockingbird, European starling, yellow-rumped warbler, Townsend's warbler, house finch, and house sparrow. Only two mammal species, fox squirrel (*Sciurus niger*) and eastern gray squirrel (*Sciurus carolinensis*), were observed in the site vicinity; both were observed in the trees along Los Gatos Creek. Black-tailed deer (*Odocoileus hemionus*), raccoon (*Procyon lotor*), and Virginia opossum (*Didelphis virginiana*) are other common mammals that likely occur within the riparian corridor. No amphibians or reptiles were observed during the site visit, although the riparian habitat along the creek likely supports common species such as California slender salamander (*Batrachoseps attenuatus*), arboreal salamander (*Aneides lugubris*), Pacific treefrog (*Pseudacris regilla*), American bullfrog (*Rana catesbeiana*), Pacific (western) pond turtle (*Actinemys marmorata*), western fence lizard (*Sceloporus occidentalis*), southern alligator lizard (*Elgaria multicarinatus*), and common gartersnake (*Thamnophis sirtalis*). With the exception of the ornamental trees and shrubs planted for landscaping, the developed portions of the site provide little habitat for native wildlife.

(3) Potential Jurisdictional Wetlands or Waters of the U.S. No potential jurisdictional wetlands or non-wetland waters of the United States were observed in the project area during the October 2005 reconnaissance survey. The channel of Los Gatos Creek is regulated by the Corps, RWQCB and CDFG. CDFG jurisdiction typically extends to the dripline of the riparian trees and vegetation along the creek. The proposed project would provide an average 50-foot setback from the top of the bank of Los Gatos Creek, which is outside the dripline of riparian vegetation and construction will be implemented according to Best Management Practices to protect the creek's water quality and riparian habitat; therefore, permits are not required from the Corps, RWQCB, or CDFG for impacts to jurisdictional features.

(4) Santa Clara Valley Water District. The proposed project would provide an average 50-foot setback from the top of the bank of Los Gatos Creek. A permit is required by the Water District to: place any structure within 50 feet of the top of a creek bank; trespass in any manner on district property; excavate, fill or grade within 50 feet of a creek bank; place an outlet for discharging drainage waters into a creek; or, landscape, remove plants, or irrigate next to a creek.

(5) Ordinance-Size Trees. A tree survey was conducted in the project area on December 13, 2005.⁹ The results from the tree survey are summarized below and a copy of the detailed Arborist Report is provided in Appendix F. A total of 170 trees are located in the project area, and 45 of these are ordinance-sized trees (Figure V.F-1). An ordinance-size tree is one that is equal to or greater than 18 inches in diameter (56-inch circumference) at 24 inches above the natural grade. Results from the tree survey indicate that 45 ordinance-size trees occur on the site, and include four Chinese pistachio (*Pistacia chinensis*), five California fan palm (*Washingtonia filifera*), four tree of heaven (*Ailanthus altissima*), four Peruvian pepper tree (*Schinus molle*), one box elder (*Acer negundo* var. *californicum*), one common olive (*Olea europaea*), one southern magnolia (*Magnolia grandiflora*), one black locust (*Robinia pseudoacacia*), one coast redwood (*Sequoia sempervirens*), two sweetgum (*Liquidambar styraciflua*), three red ironbark (*Eucalyptus sideroxylon*), one privet (*Ligustrum* sp.), one blue elderberry (*Sambucus mexicana*), three Chinese elm (*Ulmus parvifolia*), eight carob (*Ceratonia siliqua*), one Podocarpus (*Podocarpus* sp.), one Monterey pine (*Pinus radiata*), one Australian willow (*Geijera parviflora*), one Japanese maple (*Acer palmatum*), and one edible fig (*Ficus carica*). All of these ordinance-sized trees are non-native species or non-local native species

⁹ Ibid.

except for the one blue elderberry and one box elder. All 45 ordinance-size trees are listed for removal (see Arborist Report).

(6) Sensitive Terrestrial Natural Communities. The CNDDDB reports three sensitive habitats in the general San Jose area: serpentine bunchgrass, northern coastal salt marsh, and north central coast drainage Sacramento sucker/roach river. None of these sensitive communities occur within or adjacent to the project area.

(7) Special-Status Species. For the purpose of this EIR, special-status species are defined as follows:

- Species that are listed, formally proposed, or designated as candidates for listing as threatened or endangered under the Federal Endangered Species Act.
- Species that are listed, or designated as candidates for listing, as rare, threatened, or endangered under the California Endangered Species Act.
- Plant species on List 1A, List 1B, List 2, List 3 and List 4 in the CNPS *Inventory of Rare and Endangered Vascular Plants of California*.¹⁰
- Wildlife species listed by CDFG as Species of Special Concern, or as Fully Protected species.
- Species that meet the definition of rare, threatened, or endangered under Section 15380 of the *CEQA Guidelines*.
- Considered to be a taxon of special concern by local agencies.

Plants. A list was compiled of 15 special-status plant species that potentially occurring in the vicinity of the project area (Table V.F-1). All of these plants are unlikely to occur in the project area because of the lack of suitable habitat. The site is primarily paved and landscaped, with a few patches of ruderal plants in the cracks of paved surfaces. The adjacent creek corridor also lacks suitable habitat for special-status plants. It is disturbed and supports patches of ruderal plants and non-native grasses.

Animals. The CNDDDB contains records for six special-status animal species in the vicinity of downtown San Jose (Table V.F-2). Of these, Cooper's hawk is the only species expected to occur on the site. An immature Cooper's hawk was seen soaring over the intersection of Park Avenue and Montgomery/Autumn Streets during the December 6 site visit. No nest structures were seen in any of the trees along Los Gatos Creek, although they do provide suitable nest sites for this species, which is known to nest in urban landscapes throughout California.¹¹ In addition, Cooper's hawks were observed nesting in 2003 in an urban parking lot near the intersection of Bascom and Hamilton Avenues, approximately 2.5 miles southwest of the site.¹²

¹⁰ CNPS 2005, op. cit.

¹¹ Peeters, H. and P. Peeters, 2005. *Raptors of California: California Natural History Guide No. 82*. University of California Press, Berkeley.

¹² CNDDDB 2005, op. cit.

Table V.F-1: Special-Status Plant Species in the Project Vicinity

Species	Status ^a	Habitat/Blooming Period	Potential For Occurrence On Project Site
Big scale balsamroot <i>Balsamorhiza macrolepis</i>	-/-1B	Valley and foothill grassland and cismontane woodland. Sometimes on serpentine. 35-1000 meters. March-June	<u>None</u> . Suitable habitat not present.
Congdon's tarplant <i>Centromadia parryi</i> ssp. <i>congdonii</i> [<i>Hemizonia parryi</i> ssp. <i>congdonii</i>]	-/-1B	In valley and foothill grassland on alkaline soils, sometimes described as heavy white clay. 1-230 meters. June-(November)	<u>None</u> . Suitable habitat not present.
Robust spineflower <i>Chorizanthe robusta</i> var. <i>robusta</i>	FE/-1B	Sandy terraces and bluffs or in loose sand in cismontane woodland, coastal dunes, and coastal scrub. 3-120 meters. April-September	<u>None</u> . Suitable habitat not present.
Mt. Hamilton thistle <i>Cirsium fontinale</i> var. <i>campylon</i>	-/-1B	Cismontane woodland, chaparral, and valley and foothill grassland. In seasonal and perennial drainages on serpentine. 95-890 meters. (February)-October	<u>None</u> . Suitable habitat not present.
San Francisco collinsia <i>Collinsia multicolor</i>	-/-1B	Closed-cone coniferous forest, coastal scrub. On decomposed shale (mudstone) mixed with humus. 30-250 meters. March-May	<u>None</u> . Suitable habitat not present.
Santa Clara Valley dudleya <i>Dudleya setchellii</i>	FE/-1B	Valley and foothill grassland and cismontane woodland. Endemic to serpentines of Santa Clara County. On rocky serpentine outcrops and on rocks within grassland or woodland. 80-335 meters. April-June	<u>None</u> . Suitable habitat not present.
Fragrant fritillary <i>Fritillaria liliacea</i>	-/-1B	Coastal scrub, valley and foothill grassland, and coastal prairie. Often on serpentine. Various soils reported though usually clay. 3-410 meters. February-April.	<u>None</u> . Suitable habitat not present.
Loma Prieta hoita <i>Hoita strobilinia</i>	-/-1B	On mesic, serpentine sites within chaparral, cismontane woodland, and riparian woodland habitats. 30-600 meters. May-October	<u>None</u> . Suitable habitat not present.
Contra Costa goldfields <i>Lasthenia conjugens</i>	FE/-1B	In vernal pools, swales, and low depressions, in open grassy areas within valley and foothill grassland and cismontane woodland. Extirpated from most of its range. 1-445 meters. March-June	<u>None</u> . Suitable habitat not present.
Arcuate bush mallow <i>Malacothamnus arcuatus</i>	-/-1B	Chaparral in gravelly alluvium. 80-355 meters. April-September	<u>None</u> . Suitable habitat not present.
Hall's bush mallow <i>Malacothamnus hallii</i>	-/-1B	Chaparral. Some populations on serpentine. 10-550 meters. May-September	<u>None</u> . Suitable habitat not present.
Hairless popcorn flower <i>Plabiobothrys glaber</i>	-/-1A	Coastal salt marshes and alkaline meadows. 5-180 meters. March-May	<u>None</u> . Suitable habitat not present.

Table V.F-1 *continued*

Species	Status ^a	Habitat/Blooming Period	Potential For Occurrence On Project Site
Rayless ragwort <i>Senecio aphanactis</i>	-/-/2	Drying alkaline flats in cismontane woodland and coastal scrub. 20-575 meters. January-April	<u>None</u> . Suitable habitat not present.
Metcalf canyon jewel-flower <i>Streptanthus albidus</i> ssp. <i>albidus</i>	FE/-/1B	Valley and foothill grassland in relatively open areas in dry grassy meadows on serpentine soils and on serpentine balds. Endemic to Santa Clara County. 45-245 meters. April-July	<u>None</u> . Suitable habitat not present.
Caper-fruited tropidocarpum <i>Tropidocarpum capparideum</i>	-/-/1B	Valley and foothill grassland in alkaline hills. 0-455 meters. March-April	<u>None</u> . Suitable habitat not present.

^a Status Codes (Federal/State/CNPS)

Federal

FE = Federally-listed as endangered

FT = Federally-listed as threatened

State

ST = State-listed as threatened

SR = State-listed as rare

CNPS (California Native Plant Society) List

1A = Presumed extinct in California

1B = Rare, threatened or endangered in California and elsewhere.

2 = Rare, threatened or endangered in California but common elsewhere.

3 = More information is needed for assignment to a list (review list).

4 = Limited distribution (watch list).

Source: LSA Associates, Inc., 2004.

Table V.F-2: Special-Status Animal Species in the Project Vicinity

Species	Status ^a	Habitat	Potential for Occurrence On Project Site
Steelhead (Central California Coast ESU) ^b <i>Oncorhynchus mykiss</i>	FT/--	Clear, cool streams with pools and riffles, with coarse gravel beds for spawning.	<u>None</u> . Suitable habitat not present, although known to occur in Los Gatos Creek.
Chinook salmon <i>Oncorhynchus tshawytscha</i>	FC/--	Clear, cool streams with pools and riffles, with coarse gravel beds for spawning.	<u>None</u> . Suitable habitat not present, although known to occur in Los Gatos Creek.
Bay checkerspot butterfly <i>Euphydryas editha bayensis</i>	FT/--	Native grasslands with serpentine rock outcrops. <i>Plantago erecta</i> is primary host plant.	<u>None</u> . Suitable habitat not present
California tiger salamander <i>Ambystome californiense</i>	FT/--SC	Grasslands and foothills that contain small mammal burrows (for dry-season retreats) and seasonal ponds and pools (for breeding during the rainy season).	<u>None</u> . Suitable habitat not present
Pacific (western) pond turtle <i>Actinemys marmorata</i>	--/SC	Ponds, streams, drainages and associated uplands	<u>None</u> . Suitable habitat not present. Species likely occurs within Los Gatos Creek, however.
Cooper's hawk (nesting) <i>Accipiter cooperi</i>	--/SC	Woodlands and riparian areas. Usually nests in dense live oak or riparian stands.	<u>High</u> . Suitable nest trees along Los Gatos Creek. Species observed during site visit.
Burrowing owl <i>Athene cunicularia</i>	--/SC	Open, dry grasslands that contain abundant ground squirrel burrows.	<u>None</u> . Suitable habitat not present
San Joaquin kit fox <i>Vulpes macrotis mutica</i>	FE/ST--	Annual grasslands with scattered shrubby vegetation. Loose-textured soils required for digging burrows.	<u>None</u> . Suitable habitat not present

^a Status Codes (Federal/State/CDFG)
FE = Federally-listed as endangered.
FT = Federally-listed as threatened.
ST = State-listed as threatened.
SC = California Species of Special Concern.

^b ESU = Evolutionarily Significant Unit.

Source: LSA Associates, Inc., 2004.

Although not documented in the CNDDDB, steelhead (*Oncorhynchus mykiss*; federally threatened) and chinook salmon (*O. tshawytscha*; candidate for federal listing) are known to occur in Los Gatos Creek.¹³ In 1997, 1998, and 1999, spawning adult chinook salmon and steelhead were observed in Los Gatos Creek near Hamilton and Meridian Avenues,¹⁴ approximately 2.8 and 1.4 miles upstream of the site, respectively. Steelhead and chinook salmon require highly specific conditions for migration, spawning, and rearing young. Important factors associated with preferred stream channel conditions include temperature, velocity, depth, gravel substrate, and water quality. Shaded banks with overhanging riparian vegetation (termed “shaded riverine aquatic cover” by the USFWS) are also beneficial to salmonids, providing foraging habitat and cover from predators. High water temperatures, low surface flow of water, low levels of dissolved oxygen, and low sediment input can be detrimental to steelhead and chinook salmon populations. The section of Los Gatos Creek that flows adjacent to the eastern site boundary is characterized by shallow pools and riffles, with the majority of the channel substrate comprised of cobbles interspersed with small patches of gravel. Although the creek is well-shaded by the trees that grow along its banks, shaded riverine aquatic cover is lacking and the channel is largely devoid of woody debris and other features that contribute to habitat diversity. Trash has also accumulated in the creek in the vicinity of the site, resulting in lowered water quality. As such, the stream habitat adjacent to the site is not suitable for spawning or rearing of salmonids, although they undoubtedly move through the area while migrating to the known spawning areas further upstream.

Los Gatos Creek also provides suitable habitat for Pacific pond turtles (*Actinemys marmorata*), a California Species of Special Concern. Formerly known as western pond turtle (*Clemmys marmorata*), both the genus and common name of this species has recently been updated.¹⁵ Pond turtle occur in ponds, marshes, rivers, streams, and irrigation ditches that typically have a rocky or muddy bottom, in a wide variety of habitats.¹⁶

None of the remaining special-status animal species are expected to occur on the site due to a lack of suitable habitat. Although burrowing owls (*Athene cunicularia*) have been recorded at San Jose International Airport and at other locations southeast of the City, they are not expected to occur on the site due to its location within a heavily urbanized area and complete absence of suitable burrows or open foraging habitat. Likewise, the absence of open grasslands, small mammal burrows, and other natural habitats precludes the occurrence of Bay checkerspot butterfly (*Euphydryas editha bayensis*), California tiger salamander (*Ambystoma californiense*), and San Joaquin kit fox (*Vulpes macrotis mutica*).

3. Regulatory Context

The regulatory context for biological resources on and around the project site is discussed below.

¹³ Leidy, R.A., G.S. Becker, and B.N. Harvey, 2003. *Historical Distribution and Current Status of Steelhead (Oncorhynchus mykiss), Coho Salmon (O. kisutch), and Chinook Salmon (O. tshawytscha) in Streams of the San Francisco Estuary, California*. Unpubl. report, October 2003.

¹⁴ J. Abel, Biologist, Santa Clara Valley Water District. 2003. Personal Communication with Gordon Becker et. al, October. Ibid.

¹⁵ Crother, B.I. et al., 2003. *Scientific and Standard English Names of Amphibians and Reptiles of North America North of Mexico: Update*. Herpetological Review 34(3):196–203.

¹⁶ Stebbins, R.C., 2003. *A Field Guide to Western Amphibians and Reptiles*. 3rd ed. Houghton Mifflin Co., Boston, Massachusetts.

a. Federal Endangered Species Act. The federal Endangered Species Act (FESA) protects listed species from harm or “take” which is broadly defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct. Take can also include habitat modification or degradation that results in death or injury to a listed species. An activity can be defined as “take” even if it is unintentional or accidental. Listed plant species are provided less protection than listed wildlife species. Listed plant species are legally protected from take under FESA if they occur on federal lands or if the project requires a federal action, such as a Section 404 fill permit. The United States Fish and Wildlife Service (USFWS) has jurisdiction over federally-listed threatened and endangered wildlife and plant species under the FESA. The USFWS also maintains lists of proposed and candidate species. Species on these lists are not legally protected under the FESA, but which may become listed in the near future and are often included in their review of a project.

b. California Endangered Species Act. The California Endangered Species Act (CESA) prohibits the take of any plant or animal listed or proposed for listing as rare (plants only), threatened, or endangered. In accordance with the CESA, California Department of Fish and Game (CDFG) has jurisdiction over state-listed species. Additionally, the CDFG maintains a list of California Species of Special Concern, defined as species that appear to be vulnerable to extinction because of declining populations, limited ranges, and/or continuing threats.

c. California Environmental Quality Act (CEQA). Section 15380(b) of the *CEQA Guidelines* provides that a species not listed on the federal or state lists of protected species may be considered rare or endangered if the species can be shown to meet certain specified criteria. These criteria have been modeled after the definitions in FESA and CESA and the section of the California Fish and Game Code dealing with rare or endangered plants or animals. This section was included in the *CEQA Guidelines* primarily to deal with situations in which a public agency is reviewing a project that may have a significant effect on a species that has not yet been listed by either the USFWS or CDFG.

d. Clean Water Act. Under Section 404 of the Clean Water Act, the U.S. Army Corps of Engineers (Corps) is responsible for regulating the discharge of fill material into waters of the United States. Waters of the U.S. and their lateral limits are defined in 33 CFR Part 328.3(a) and include streams that are tributary to navigable waters and their adjacent wetlands.

In general, a Corps permit must be obtained before placing fill in wetlands or other waters of the U.S. The type of permit depends on the acreage involved and the purpose of the proposed fill. Minor amounts of fill can be covered by a Nationwide Permit. An Individual Permit is required for projects that result in more than a “minimal” impact on jurisdictional areas. Individual Permits require evidence that jurisdictional fill has been avoided to the extent possible and a review of the project by the public.

e. California Water Quality and Waterbody Regulatory Programs. Under Section 401 of the federal Clean Water Act and the Porter-Cologne Water Quality Control Act, the Regional Water Quality Control Board (RWQCB) regulates the discharge of fill and dredged material into wetlands and others waters. Applicants must obtain a Water Quality Certification or Waste Discharge Requirements from the RWQCB. This certification ensures that the project will uphold state water quality standards. The RWQCB may regulate areas that the Corps does not regulate or they may impose mitigation requirements even if the Corps does not require them.

The CDFG exerts jurisdiction over the bed and banks of watercourses and waterbodies according to provisions of Section 1601 to 1603 of the Fish and Game Code. The Fish and Game Code requires a Streambed Alteration Agreement for the fill or removal of material within the bed and banks of a watercourse or waterbody.

f. City of San Jose 2020 General Plan. The City's General Plan includes the following policy related to riparian corridors.

Riparian Corridors and Upland Wetlands

- *Policy 4:* New development should be designed to protect adjacent riparian corridors from encroachment of lighting, exotic landscaping, noise, and toxic substances into the riparian zone.

g. City of San Jose Tree Removal Controls. The City of San Jose Tree Removal Controls Ordinance¹⁷ is intended to protect all trees having a trunk that measure 56 inches or more in circumference (18 inches in diameter) at the height of 24 inches above natural grade slope. A multiple-trunk tree is considered a single tree and the measurement of the tree is the sum of the circumference of all the trunks at 2 feet above natural grade slope. The ordinance protects both native and non-native tree species.

h. City of San Jose. Riparian Corridor Policy Study. The *Riparian Corridor Policy Study* was prepared for the City of San Jose in 1994, and revised in March 1999.¹⁸ The findings of this study were incorporated into the City's General Plan policies and *Residential Design Guidelines, Commercial Design Guidelines and Industrial Design Guidelines* regarding protection of riparian corridors. In this study, the riparian corridor is defined as any defined stream channel including the area up to the bank full-flow line, as well as riparian (streamside) vegetation in contiguous adjacent uplands. The study includes the following guidelines for construction in riparian corridors:

- In all new urban development areas, residences and other occupiable buildings, public use areas, and street patterns should be oriented to provide views of the corridor for visibility, for habitat protection and public safety (Guideline 1A).
- Development adjacent to riparian habitats should be setback at least 100 feet from the outside edge of the riparian habitat (or top of the bank, whichever is greater) (Guideline 1C). Exceptions to the 100-foot setback include locations in or near Downtown San Jose.
- During construction of sites adjacent to riparian corridors, temporary fencing or solid barriers should be placed outside the riparian habitat area to protect it from damage (Guideline 7E). Other Best Management Practices developed for Storm Water Pollution Prevention Permits should also be implemented.

i. Other Statutes, Codes, and Policies. The federal Migratory Bird Treaty Act¹⁹ prohibits killing, possessing, or trading in migratory birds except in accordance with regulations prescribed by the

¹⁷ San Jose Municipal Code, Sections 13.32.010 to 13.32.100.

¹⁸ The Habitat Restoration Group and Jones and Stokes Associates, Inc., 1999. City of San Jose Riparian Corridor Policy Study. Approved by City Council May 17, 1994, revised March 1999.

¹⁹ 16 U.S.C., Sec. 703, Supp. I, 1989.

Secretary of the Interior. This act encompasses whole birds, parts of birds, and bird nests and eggs. Most native bird species on the project site are covered by this Act.

j. California Native Plant Society. The California Native Plant Society (CNPS), a non-governmental conservation organization, has developed lists of plant species of concern in California.²⁰ Vascular plants included on these lists are defined as follows:

- List 1A Plants considered extinct.
- List 1B Plants rare, threatened, or endangered in California and elsewhere.
- List 2 Plants rare, threatened, or endangered in California but more common elsewhere.
- List 3 Plants about which more information is needed – review list.
- List 4 Plants of limited distribution – watch list.

Although the CNPS is not a regulatory agency and plants on these lists have no formal regulatory protection, plants appearing on List 1B or List 2 are, in general, considered to meet CEQA's Section 15380 criteria and adverse effects to these species are considered "significant."

4. Impacts and Mitigation Measures

This section analyzes impacts to biological resources that may result from implementation of the proposed project, and identifies mitigation measures, as necessary.

a. Criteria of Significance. The proposed project would have a significant impact on biological resources if it would:

- Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special-status species in local or regional plans, policies, regulations or by the CDFG or USFWS;
- Conflict with the provisions of approved local, regional, or State policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance;
- Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the CDFG or USFWS; or
- Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites.

b. Less-than-Significant Biological Resources Impacts. The loss of approximately 128 non-ordinance sized ornamental trees and shrubs is considered less than significant. These trees and shrubs would be replaced at a ratio of approximately 1:1 per the City's typical replacement ratios on the project site and in the project area. The site provides very limited habitat for plants and wildlife, especially special-status species. Common wildlife species that are adapted to urban environments will continue to use the site after construction of the project.

²⁰ California Native Plant Society. (CNPS). 2004. Inventory of Rare and Endangered Plants. On-line version 6.3, January 16, 2004. <http://www.northcoast.com/~cnps/cgi-bin/cnps/sensinv.cgi>.

Increased trash from stadium activities (i.e., food) and the open turf of the ball field will likely result in increased numbers of California and ring-billed gulls, both of which are common in urban environments. Given the relatively small number of urban bird species that currently use the site, this increase is not expected to significantly impact the existing wildlife community.

Construction of the stadium will result in increased shading of the Los Gatos Creek corridor. Figures V.L-1 – VL-4c show the degree of shading at 9:00 a.m., 12:00 p.m., and 3:00 p.m., for dates in March, June, September and December. South of Park Avenue, the creek corridor would experience increased shading in the afternoon, all year. North of Park Avenue, the creek corridor would experience increased shading in the afternoon in the winter and spring. The existing riparian vegetation is not expected to be significantly impacted by the increased afternoon shade because most of the vegetation, especially the riparian trees, are shade tolerant. The abundance of some of the non-native plants on the edge of the riparian corridor, such as fennel, mallow, ripgut brome and foxtail barley could be decreased by increased shade. The abundance of some species in the understory such as Himalayan blackberry and English ivy, which are invasive plants, could be somewhat increased by increased soil moisture in a shadier environment.

The increased shade and increased light levels during night games in the riparian corridor are not expected to adversely impact wildlife use of the corridor, which will not be modified during or after project construction. Species that use the corridor are already adapted to the urban environment and are not likely to become deterred from doing so after the stadium is built, due to the existing cover provided by the trees and shrubs that grow along the creek. As long as adequate setbacks and other development guidelines from the City's *Riparian Corridor Policy Study*²¹ are incorporated into the project design, construction of the stadium should not impede wildlife use of the Los Gatos Creek corridor.

Potential adverse impacts on the water quality and aquatic wildlife (e.g., salmonids) of Los Gatos Creek would be avoided through contractor implementation of Best Management Practices (BMPs) during project construction. Mitigation Measure HYD-2, includes a discussion of the City of San Jose's Post Construction Urban Runoff Management Policy which implements BMS, as well as Treatment Control Measures (TCMs) and requires the preparation of a Storm Water Pollution Prevention Program. Examples of erosion control measures that may be used include straw wattles, bales, and/or silt fencing to prevent sediment and construction-related runoff from entering the creek. All BMPs will be designed to the maximum extent practicable treatment standards under the applicable National Pollution Discharge Elimination System (NPDES) permit. (See Chapter V.H., Hydrology and Water Quality, for detailed evaluation of potential water quality impacts.)

The proposed project includes an average 50-foot setback from the top of bank of Los Gatos Creek for any roadways or structures. Riparian-type landscaping would be planted in the area. A portion of Reach 5 of the Los Gatos Creek trail would be located within the stadium project area. The trail project is independent of the stadium project, but would utilize the riparian setback areas resulting from the removal of the commercial buildings and parking lots east of S. Autumn Street and from the development of the Fire Training Facility site. The trail will consist of a Class 1, 12-foot-wide paved path, with 2-foot-wide compacted base rock shoulders on each side where space allows. The proposed trail project would improve the environment of the riparian corridor over its existing condition.

²¹ The Habitat Restoration Group and Jones and Stokes Associates, Inc., 1999, op. cit.

The City of San Jose would apply for a permit from the Santa Clara Valley Water District for any work within 50 feet of Los Gatos Creek top of bank.

c. Significant Biological Resources Impacts. This section describes potential impacts to biological resources that are likely to occur within the project area or in the Los Gatos Creek corridor. Two such impacts are set forth below.

Impact BIO-1: Construction of the proposed project would result in the removal of 45 ordinance-size trees. (S)

All of the 45 ordinance-sized trees in the project area are listed for removal.

Mitigation Measure BIO-1: Loss of ordinance size trees will be mitigated by implementation of landscaping plans approved by the City of San Jose, in conformance with the City of San Jose Landscape and Irrigation Guidelines and City of San Jose Planning Department specifications. For private projects, the City of San Jose requires tree replacement for those trees greater than 18 inches in diameter with 24-inch box trees at a ratio of 4:1 (trees planted to trees removed). Trees planted within the riparian corridor shall be native trees grown from Los Gatos Creek watershed stock. As a City proposed project, the City would commit to meeting the tree replacement ratio, but given the footprint of redevelopment on the site, replacement trees may be planted beyond the project site in the project area. (LTS)

Impact BIO-2: Construction activities adjacent to the Los Gatos Creek riparian corridor may disturb nesting Cooper's hawks and other raptors. (S)

The numerous tall cottonwoods along Los Gatos Creek provide suitable nest sites for Cooper's hawks and other raptors such as red-shouldered hawk. Although none of the trees will be removed during construction of the stadium, construction activities adjacent to the riparian corridor (i.e., demolition of existing buildings, construction of new facilities) could disturb nesting pairs, causing nest abandonment, loss of young, or reduced nesting success.

Mitigation Measure BIO-2: Surveys to determine the presence of active raptor nests on or adjacent to (i.e., along Los Gatos Creek) to the construction area shall be conducted by a qualified biologist no more than 30 days prior to the initiation of construction-related activities, including removal of existing vegetation or facilities. If raptors are observed nesting on or near the site, exclusion zones will be established around all active nests. The size of the exclusion zone will be determined based on consultation with the CDFG, which typically requires a zone of 100 to 300 feet around the nest. No activity will be allowed inside the exclusion zone until a qualified biologist has determined that the young have successfully fledged from the nest or that the nest is no longer active. (LTS)

