

### Nesting Birds

The project has the potential to impact special-status and non-special-status native nesting birds (i.e., Loggerhead shrike and White-tailed kites) protected by the Migratory Bird Treaty Act (MBTA) and/or California Fish and Game Code (CFGC). Baseline protections for most native birds under federal law and state codes include active nests (those with eggs or young).

Recently, the U.S. Department of the Interior issued guidance clarifying that the MBTA only applies to intentional/deliberate killing, harm, or collection of covered species (including active nests). According to the guidance, unintentional impacts to birds/nests that occur within the context of otherwise lawful activities are not violations of the MBTA. However, ambiguity remains regarding application of the CFGC, as well as the extent to which minimization and avoidance measures are still required under the MBTA. Therefore, avoidance of nesting birds is considered a “best practice” in the San Francisco Bay region and avoids potential enforcement action by the CDFW. Nesting bird pre-construction survey obligations are a common component of various permits and authorizations, including CEQA documents and even local grading permits, and as such may be deemed applicable to project activities within the project area.

Project activities, such as vegetation removal and ground disturbance associated with development, would have the potential to affect these species by causing direct mortality of eggs or young, or by causing auditory, vibratory, and/or visual disturbance of a sufficient level to cause abandonment of an active nest. If project activities occur during the nesting season, which extends from February 1 through August 31, nests of both special-status and non-special-status native birds could be impacted by construction and other ground disturbing activities. Implementation of **MM BIO-1.3: Nesting Bird Avoidance Measures** would reduce this potential impact to a less-than-significant level (Class II).

### Mitigation for Impact BIO-1

#### **MM BIO-1.1: Special-Status Plants Avoidance and Mitigation**

Prior to obtaining the first site grading, building or other permit for development activities involving ground disturbance, the project applicant shall prepare the documentation acceptable to the Community Development Department that demonstrates compliance with the following:

Prior to any vegetation removal or ground-disturbing activities, a focused survey shall be conducted to determine the presence of Congdon’s tarplant or other special-status species with potential to occur within the project area. Surveys shall be conducted in accordance with the Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities (CDFG 2009). These guidelines require rare plant surveys to be conducted at the proper time of year when rare or endangered species are both “evident” and identifiable. Field surveys shall be scheduled to coincide with known blooming periods, and/or during periods of physiological development that are necessary to identify the plant species of concern. If no special-status plant species are found, then the project will not have any impacts

to the species and no additional mitigation measures are necessary. If any of the species are found on-site and cannot be avoided, the following measures shall be required:

1. If the survey determines that Congdon's tarplant or other special-status species are present within or adjacent to the project site, direct and indirect impacts of the project on the species shall be avoided where feasible through the establishment of activity exclusion zones, where no ground-disturbing activities shall take place, including construction of new facilities, construction staging, or other temporary work areas. Activity exclusion zones for special-status plant species shall be established prior to construction activities around each occupied habitat site, the boundaries of which shall be clearly marked with standard orange plastic construction exclusion fencing or its equivalent. The establishment of activity exclusion zones shall not be required if no construction-related disturbances would occur within 250 feet of the occupied habitat site. The size of activity exclusion zones may be reduced through consultation with a qualified biologist and with concurrence from CDFW based on site-specific conditions.
2. If exclusion zones and avoidance of impacts on Congdon's tarplant or other special-status species within the project area are not feasible, then the loss of individuals or occupied habitat of special-status plants shall be compensated for through the acquisition, protection, and subsequent management of other existing occurrences. Before the implementation of compensation measures, the project's applicant shall provide detailed information to the CDFW and lead agency on the quality of preserved habitat, location of the preserved occurrences, provisions for protecting and managing the areas, the responsible parties involved, and other pertinent information that demonstrates that the feasibility of the compensation population will be properly preserved and managed. A mitigation plan identifying appropriate mitigation ratios at a minimum ratio of 1:1 [one preserved acre for each impacted acre] to ensure no net loss of acreage shall be developed in consultation with ~~and approved by~~ the CDFW and approved by the City prior to the commencement of any activities that would impact Congdon's tarplant or other species with potential to occur within the project area. A mitigation plan may include but is not limited to the following: the acquisition of off-site mitigation areas presently supporting the Congdon's tarplant or other special-status species, purchase of credits in a mitigation bank that is approved to sell credits for special-status plants, or payment of in-lieu fees to a public agency or conservation organization (e.g., a local land trust) for the preservation and management of existing populations of special-status plants.

#### MM BIO-1.2: Burrowing Owl Avoidance, ~~and~~ Exclusion and Required Measures

Prior to obtaining the first site grading, building or other permit for development activities involving ground disturbance, the project applicant shall prepare the documentation acceptable to the Community Development Department that demonstrates compliance with the following:

### Mitigate for Loss of Burrowing Owl Habitat

The majority of project site, with the exception of delineated wetlands, developed areas, and areas with tree cover (73.64 acres), has been determined to potentially provide habitat or foraging areas for burrowing owl. Therefore, the applicant shall implement compensatory mitigation for loss of owl habitat in accordance with the standards set forth in the Required Mitigation Plan section below.

Additional measures below will avoid direct impacts to individuals that may occupy the site during construction and implementation of the project.

#### *Conduct a Burrowing Owl Survey*

Prior to the first ground-disturbing activities, the project applicant shall retain a qualified biologist to conduct two pre-construction surveys for the Western burrowing owl on the project site.

The first survey shall be conducted no more than 14 days prior to ground-disturbing activities and the second survey within 48 hours of initial ground disturbance. The surveys shall be conducted in accordance with the 2012 CDFW Staff Report on Burrowing Owl Mitigation. If the surveys determine owls are present, then the measures set forth below shall be followed.

#### *Implement Avoidance Measures*

If direct impacts to owls can be avoided, prior to the first ground-disturbing activities, the project applicant shall implement the following avoidance measures during all phases of construction to reduce or eliminate potential impacts to California burrowing owls.

- A pre-construction survey shall be performed prior to start of ground disturbance activities. This survey will occur regardless of the time of year, as burrowing owls may use the project site during the non-nesting season. The survey shall be performed according to the standards set forth by the Staff Report for Burrowing Owl Mitigation (CDFW 2012).
- The project site should be managed to prevent burrowing owl from occupying the site prior to any project activities
- All suitable burrows should be closed by hand once it has been determined that the burrow is unoccupied.
- Maintenance of the property to ensure burrows are not rebuilt will be necessary throughout the year to preclude the presence of burrowing owl and suitable burrowing owl habitat. Maintenance should occur approximately every 8 weeks, and burrows should be inspected prior to closure to ensure no burrowing owl are present. The frequency of burrow closure may be adjusted based upon ground squirrel and burrow reestablishment progress.

- The debris within the project site should be removed.
- If discing is chosen as a preferred method for burrow maintenance, it is recommended that any sensitive biological resources (populations of rare plants, wetland boundaries and any active bird nests, etc.) be flagged by a qualified biologist and avoided.

#### *Conduct Burrow Exclusion*

If avoidance of burrowing owl or their burrows is not possible, prior to the first ground-disturbing activities, the project applicant, in consultation with the CDFW, shall prepare a Burrowing Owl Relocation Plan as indicated and following the CDFW 2012 Staff Report on Burrowing Owl Mitigation. Monitoring of the excluded owls shall be carried out as per the California Department of Fish and Wildlife 2012 Staff Report.

#### *~~Prepare and Implement a~~Required Mitigation Plan*

~~If avoidance of burrowing owl or their burrows is not possible and project activities may result in impacts to nesting, occupied, and satellite burrows and/or burrowing owl habitat,~~ The project applicant shall consult with the CDFW and develop a detailed mitigation plan that shall include replacement of impacted habitat, number of burrows, and burrowing owl at a ratio approved by CDFW to ensure no net loss of species. The mitigation plan shall ~~be based on~~ comply with the requirements set forth in Appendix A of the CDFW 2012 Staff Report on Burrowing Owl Mitigation and the plan shall be reviewed and ~~accepted~~ approved by CDFW and the City prior to the first ground-disturbing activities.

#### **MM BIO-1.3: Nesting Bird Avoidance Measures**

Prior to obtaining the first site grading building or other permit for development activities from February 1 to August 31, the applicant shall prepare the documentation acceptable to the Community Development Department that demonstrates compliance with the following:

#### *Pre-construction Breeding Bird Surveys*

No more than 14 days prior to initial ground disturbance and vegetation removal during the nesting season (February 1 to August 31), the project applicant shall retain a qualified biologist to perform pre-construction breeding bird surveys. If any nests are found, they shall be flagged and protected with a suitable buffer based on the species. Buffer distance may vary based on species and conditions, but is typically at least 50 feet, and up to 250 feet for raptors. As used in this measure, "suitable" means the distance a qualified biologist determines is necessary to ensure no disturbance to nesting. The buffer distance is measured as the straight-line distance between an active nest and the activity, taking both horizontal and vertical distance into account. This mitigation measure does not apply to ground disturbance and vegetation removal activities that occur outside of the nesting season (September 1 to January 31).

[project site does not](#) support core, critical, or unique populations essential to recovery and long-term survival of these species.

**Impact BIO-6: Contribute to cumulatively considerable impacts on biological resources (Class II).**

As stated above, the project would not result in a net loss of riparian habitat and would not result in a loss of any heritage trees.

The project would affect 0.66 acres of seasonal wetlands, which would considerably contribute to the significant cumulative biological impacts associated with past, present, and reasonably future projects. Implementation of **MM BIO-3.1** would reduce the project's contribution to less-than-cumulatively considerable.

[The proposed project would have potentially significant impacts related to the loss of potential habitat for special-status species, including ~~The project's impacts to~~ Congdon's tarplant, San Joaquin spearscale, Saline clover, Western Burrowing Owl, Loggerhead shrike, and White-tailed kite. ~~These impacts would be reduced through adherence to~~ Implementation of \*\*MM BIO-1.1\*\*, \*\*MM BIO-1.2\*\*, and \*\*MM BIO-1.3\*\* ~~would reduce these impacts to less-than-significant levels. In addition, the revised MM BIO 1.3 would ensure mitigation for impacts to burrowing owl habitat, and would therefore reduce cumulative impacts to a less-than-significant level.~~](#)

[Project-related biological impacts are considered and mitigated consistent with local, state and federal regulations, which includes compliance with mitigation for loss of burrowing owl habitat and wetlands.](#) Although past, present, and reasonably foreseeable future projects may result in impacts to special-status plants and special-status wildlife, such impacts would be site-specific and could be mitigated through adherence to similar standard mitigation. The required mitigation would reduce the project's contribution to any significant cumulative impact on wetlands [and western burrowing owl habitat](#) to less than cumulatively considerable. As such, cumulative impacts to special-species plants and wildlife species would be less than significant.

### **7.5.5 Level of Significance after Mitigation**

Table 7-1: Summary of Impacts and Mitigation Measures – Biological Resources summarizes the environmental impacts, significance determinations, and mitigation measures for the project with regard to biological resources.