

**BOARD OF DIRECTORS  
SANTA CLARA VALLEY WATER DISTRICT**

**RESOLUTION No. 17-\_\_\_\_\_**

**CERTIFYING THE FINAL ENVIRONMENTAL IMPACT REPORT, ADOPTING THE  
MITIGATION MONITORING AND REPORTING PROGRAM, FINDINGS OF FACT, AND  
STATEMENT OF OVERRIDING CONSIDERATIONS FOR THE LOWER PENITENCIA CREEK  
IMPROVEMENTS PROJECT**

WHEREAS, the Santa Clara Valley Water District (“SCVWD”), the lead agency under the California Environmental Quality Act (“CEQA”) §21067, has prepared a Final Environmental Impact Report (EIR) for the Lower Penitencia Creek Improvements Project (“Project”). The SCVWD is hereby certifying said EIR, issuing written findings regarding the potential for the Project to result in significant environmental effects, adopting a statement of overriding considerations, and adopting a mitigation monitoring and reporting program in accordance with CEQA Guidelines §15090, 15091, and 15093.

NOW THEREFORE BE IT RESOLVED by the Board of Directors of Santa Clara Valley Water District that:

1. The Board certifies the Final EIR, certifying that:
  - A. The Final EIR has been completed in compliance with CEQA and is adequate for Board consideration of the Project.
  - B. The Board of Directors has reviewed and considered the information contained in the Final EIR and the record including, but not limited to, technical reports, oral written comments provided by the public and state and local agencies; responses to said comments contained in the Final EIR; and other matters deemed material and relevant prior to making a decision on the Project.
  - C. The Final EIR reflects the independent judgement and analysis of the District.
2. Changes have been incorporated into the Project which avoid, and /or substantially lessen most of the significant environmental effects identified in the Final EIR. The District has responsibility for ensuring the implementation of such changes during implementation of the Project.
3. Specific economic, legal, social, technological, and other considerations make mitigation measure for certain significant environmental effects infeasible. The findings of fact contained in Exhibit 1 state the overriding considerations that support the Project described in the Final EIR.
4. The findings of fact and Statement of Overriding Considerations contained in Exhibit 1, attached hereto and incorporated by reference, are supported by substantial evidence in the record.

5. The Mitigation Monitoring and Reporting Program (MMRP), attached hereto as Appendix I in Volume 3 of the Final EIR, and incorporated herein by this reference, is hereby adopted. Implementation of the MMRP to avoid or substantially lessen significant environmental effects is required as a condition of approval of the Project.
6. The documents and materials which constitute the record of proceedings upon which this decision is based are available from the Clerk of the Board of the Santa Clara Valley Water District, 5750 Almaden Expressway, San Jose, CA 95118-3614.
7. The Chief Executive Officer is hereby authorized and directed, on behalf of the District's Board of Directors, to execute any such documents and to perform any such acts as may be deemed necessary or appropriate to accomplish the intent of this resolution.

PASSED AND ADOPTED by the Board of Directors of Santa Clara Valley Water District by the following vote on November 28, 2017:

AYES: Directors  
NOES: Directors  
ABSENT: Directors  
ABSTAIN: Directors

SANTA CLARA VALLEY WATER DISTRICT

By: \_\_\_\_\_  
JOHN L. VARELA  
Chair/Board of Directors

ATTEST: MICHELE L. KING, CMC

\_\_\_\_\_  
Clerk/Board of Directors

EXHIBIT 1 TO BOARD RESOLUTION 17-\_\_\_\_\_

# CEQA Findings of Fact and Statement of Overriding Considerations Approval of the Lower Penitencia Creek Improvements Project

Regarding the Final Environmental Impact Report for the  
Lower Penitencia Creek Improvements Project  
State Clearinghouse No. 2015062026

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This document presents Findings of Fact and a Statement of Overriding Considerations by the Board of Directors of the Santa Clara Valley Water District (Board) regarding the Final Environmental Impact Report (Final EIR) for the Lower Penitencia Creek Improvements Project, for which Santa Clara Valley District (District) is acting as CEQA lead agency. The Findings and Statement presented herein were prepared in compliance with the California Environmental Quality Act (CEQA) and the State's CEQA Guidelines. Substantial evidence supporting all findings made herein is contained in the Environmental Impact Report (EIR) and/or record of proceedings.

## 1. Project Background

### 1.1 Project Description Summary

The Lower Penitencia Creek Improvements Project (proposed project) includes several flood management improvements along four reaches of Lower Penitencia Creek (approximately one mile total), to increase the flow conveyance capacity of the channel. Key improvements include: sheetpile floodwalls, earthen fill, a wetland bench, a relocated and raised levee, bridge headwalls, sediment removal, maintenance road improvements, and revegetation. The proposed project is located along Lower Penitencia Creek within a developed area in the City of Milpitas. The project improvements are necessary to avoid flooding in the project area during the future 1-percent (or 100-year) flow. This is the streamflow event that has a 1-percent likelihood of occurring in any given year and the proposed project is estimated to accommodate 6,900 cubic feet per second (cfs) at the Lower Penitencia Creek channel. The proposed project extends from just upstream of the confluence with Berryessa Creek downstream to the confluence with Coyote Creek. The land surrounding the proposed project is a mix of residential and office park/commercial land uses.

The Lower Penitencia Creek Improvements Project is one of six elements evaluated in the *Lower Berryessa Creek Program Environmental Impact* (Program EIR), prepared in 2011. The Lower Penitencia Creek Project reach was evaluated at a programmatic level of detail. At the time the Program EIR was prepared, future water surface elevations and flow rates during the 1-percent flow on Lower Penitencia Creek Project could only be estimated at a general level of detail. Upstream improvement projects including the

District’s Lower Berryessa Creek and Lower Calera Creek Flood Protection Improvements Project and the USACE’s Upper Berryessa Creek Flood Risk Management Project are currently under construction and will increase the future 1-percent flow of Lower Penitencia Creek. Now that detailed designs have been developed, the future 1-percent flow and resulting surface elevation can be estimated. The proposed project would accommodate the increased 1-percent flow without overtopping the Lower Penitencia Creek banks.

Table 1 below summarizes the project elements proposed for each reach.

**Table 1.** Proposed Project Elements

Reach or Bridge	Project Elements
Reach 1: Coyote Creek to I-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	Sheetpile 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 Removal of about 1,500 cy of accumulated sediment from low-flow channel Maintenance road improvements
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 ft 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

Volume 2, Chapter 2 of the Final EIR (FEIR) provides a full description of the proposed project. Chapter 2 in Volume 2 also includes a table summarizing District Best Management Practices (BMPs) that would be applied during construction and operation of the project.

Santa Clara Valley Water District (District) is the lead agency for the proposed project. The District is a public agency and owns and maintains the flood control channel.

## 1.2 Type of EIR

The Lower Penitencia Creek Improvements Project EIR has been prepared in compliance with the California Environmental Quality Act (CEQA, Public Resources Code § 21000 et seq.). The proposed project has been evaluated in a project EIR as defined in CEQA Guidelines § 15161. The EIR focuses on potential changes to the environment that would result from the implementation of the proposed project, for both the nearer-term construction and longer-term operational phases.

## 1.3 Project Objectives

The proposed project would meet the following objectives:

- Convey the Lower Berryessa Creek 1-percent design flow (6,900 cfs) that is delivered to Lower Penitencia Creek;
- 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.

## 2. Environmental Review Process and the DEIR

A Notice of Preparation (NOP) for the Draft EIR (DEIR) was circulated to a project-specific mailing list and to the State Clearinghouse. The 30-day NOP comment period commenced on June 11, 2015 and ended on July 10, 2015. The NOP and written comments received are included in Volume 3, Appendix A of the FEIR. The District considered written comments received during the scoping period in preparing the DEIR. The District did not hold a public scoping meeting.

A public Notice of Availability of the DEIR was mailed to the State Clearinghouse; to federal, state, and local agencies; and to organizations and individuals that had expressed interest in receiving the DEIR. The DEIR public review period commenced on May 18, 2017 and ended on July 3, 2017. The District held a public hearing at Joseph Weller Elementary School in Milpitas to receive comments on the DEIR on May 22, 2017.

The District evaluated and considered all comments received from persons or agencies who reviewed the DEIR. The District has prepared written responses to all comments on the DEIR. In total, the District received five comment letters on the DEIR, containing 46 comments, from organizations and public agencies. The FEIR includes comments on the DEIR, responses to those comments, minor revisions to the DEIR text made in response to comments and other information, and a Mitigation Monitoring and Reporting Program (MMRP). The revisions shown in the FEIR include insertions shown as underlined text and deletions shown in strikethrough format.

On November 28, 2017, the District's Board of Directors (Board), at a public meeting considered the information contained in the FEIR as well as public comments, if any, on the proposed project during the public meeting.

### **3. Environmental Impacts and Findings of Fact**

Pursuant to Public Resources Code § 21081 and CEQA Guidelines § 15091, a public agency may not approve or carry out a project for which an EIR has been certified which identifies one or more significant effects on the environment unless the public agency makes one or more of the following findings with respect to each significant impact:

1. Changes or alterations have been required in, or incorporated into, the Project which avoid or substantially lessen the significant environmental effect as identified in the final EIR.
2. Such changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.
3. Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the final EIR. "Feasible" means "capable of being accomplished in a reasonable period of time taking into account economic, environmental, legal, social, and technological factors" (CEQA Guidelines § 15364). The concept of feasibility also encompasses whether a particular alternative or mitigation measure promotes the Project's underlying goals and objectives, and whether an alternative or mitigation measure is impractical or undesirable from a policy standpoint. See *City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 410; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957.

The Board has made one or more of these specific written findings regarding each significant impact associated with the proposed project. Those findings are presented below, together with the facts and reasons in support of the findings. The Board certifies these findings are based on full appraisal of all viewpoints, including all comments received up to the date of adoption of these findings, concerning the environmental issues identified and discussed in the FEIR.

#### **3.1 Environmental Impacts Found to have No Impact or be Less Than Significant**

Public Resources Code § 21081 and CEQA Guidelines § 15091 do not require findings of fact for impacts that are less than significant. Nevertheless, for the sake of completeness, the Board hereby determines that the proposed project will have no impact or less than significant impacts for the impacts listed in Table 2. For each impact, Table 2 presents a brief rationale for the determination, and a reference to the FEIR section that presents facts and reasons supporting the determination.

**Table 2. Effects Found to be Less than Significant or Have No Impact**

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
<i>Agriculture and Forestry Resources</i>			
N/A (see Section 3.1.3 of FEIR)	N/A	The project area is not used or zoned for agricultural or forestry activities. The proposed project would not alter land use designations or farmland/timberland classifications designated at either the local or state level. No Prime Farmland, Unique Farmland, Farmland of Statewide Importance, forest lands, or lands under a Williamson Act contract would be converted by or conflict with the proposed project. Therefore, no impact on agriculture or forestry resources would result.	FEIR, Volume 2, page 3.1-2
<i>Mineral Resources</i>			
N/A (see Section 3.1.3 of FEIR)	N/A	The project area does not have any designated mineral resources zones, nor does it contain any significant oil or gas resource-producing areas. According to the California Department of Conservation’s Division of Mines and Geology, the project area is classified as a mineral resource zone in which inadequate information indicates that no significant mineral deposits are present, or in which it is judged that little likelihood exists for their presence (Stinson et al. 1987). In addition, the proposed project would not involve any activities that could directly affect mineral production sites or prevent future availability of mineral resources. Therefore, no impact on mineral resources would result.	FEIR, Volume 2, page 3.1-3
<i>Population and Housing</i>			
N/A (see Section 3.1.3 of FEIR)	N/A	<p>Throughout the construction phase, approximately 40 workers would be employed. It is anticipated that the regional or local labor force could meet the project’s construction and workforce requirements. Some workers might temporarily relocate from other areas. Operation and maintenance activities of the proposed project would be conducted by the District’s existing workforce.</p> <p>The proposed project does not include construction of new homes or businesses, would not remove obstacles to growth, and would not displace any housing units or people. The proposed project would not induce substantial population growth. As such, there would be no impact on population and housing.</p>	FEIR, Volume 2, page 3.1-3
<i>Public Services</i>			
N/A (see Section 3.1.3 of FEIR)	N/A	The proposed would not increase the need for public services or government facilities. The project is located within an urbanized area of Milpitas and is currently served by existing public services (e.g., police and fire protection, schools, and parks). Operation and maintenance activities would not be substantially different from existing maintenance and operation activities; therefore, construction and	FEIR, Volume 2, page 3.1-3

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
		operation of the proposed project would not substantially affect public services. No impact would occur.	
<i>Aesthetics</i>			
AES-1	Have a substantial adverse effect on a scenic vista	There are no scenic vistas in the project area and the proposed project would have no impact on scenic vistas.	FEIR, Volume 2, page 3.2-16
AES-2	Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway	There are no state-designated scenic highways in the project vicinity, therefore, no impact would occur.	FEIR, Volume 2, page 3.2-16
AES-3	Substantially degrade the existing visual character or quality of the site and its surroundings	<p>Project construction could result in temporary impacts on the visual character and quality of the site and its immediate vicinity. Earth-moving activities and heavy equipment would be visible, and vehicles have potential to generate dust clouds, which could be distracting to nearby receptors. Implementation of District BMPs AQ-1 and WQ-11 would help reduce dust emitted from operating construction equipment and ensure work areas are kept tidy. Construction activities and construction traffic are common visual elements in urbanized areas, and would appear similar to existing construction activities and construction traffic from the nearby Waterstone and iStar development projects.</p> <p>Given the moderate visual sensitivity of pedestrians and low visual sensitivity from the perspective of motorists, the replacement levees would not have a substantial adverse effect on the site’s visual character or visual quality. The relocated levee would be hydroseeded with native and naturalized grass seeds and mulch. Implementation of District BMP BI-8 would require that a qualified biologist or vegetation specialist select ecologically appropriate seed control mixes, which would ensure that newly planted vegetation appears consistent with vegetation seen in the project vicinity and includes local native plant species. Although an estimated 33 trees with diameter breast height (dbh) of 6 inches or more would require removal, the trees would be replaced in compliance with the City of Milpitas Tree Maintenance and Protection ordinance. Floodwalls would be consistent with the linear form of the channel and adjacent levees. The District would select a color coating that blends in with the surrounding environment. For these reasons, the floodwalls would not substantially degrade the project area’s visual character and visual quality. The new concrete headwalls would be visible to motorists using North Abbott Avenue and San Andreas Drive, and to recreationists using the Penitencia</p>	FEIR, Volume 2, page 3.2-16

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
		Creek Trail/maintenance road. Given the low-to-moderate visual sensitivity of motorists, the short durations of views for motorists, and because recreationists would continue to have views of the creek channel, the headwalls would not result in a substantial adverse effect on the sites visual character or quality. This impact would be less than significant.	
AES-4	Create a new source of substantial light or glare which would adversely affect day or nighttime views in the area	<p>Project construction would generally occur between the hours of 7:00 A.M. and 7:00 P.M., Monday through Friday. Construction may occur infrequently on weekends. Because nighttime construction would occur infrequently and would be of short duration, adverse effects on nighttime views would be less than significant.</p> <p>No new lighting would be installed for the proposed project. The new headwalls at the San Andreas Drive bridge would be composed of concrete, which has a smooth finish and would not generate a substantial source of glare. The floodwalls would be composed of painted, smooth coated steel. Since the District would select neutral color and non-reflective coating for the sheet pile walls, the finish of the floodwalls would not generate a new substantial source of glare. This impact is less than significant.</p>	FEIR, Volume 2, page 3.2-23
<i>Air Quality</i>			
AQ-1	Conflict with or obstruct implementation of the applicable air quality plan	The proposed project would involve temporary construction emissions, would not result in induced growth, and would not result in a permanent new source of emissions. In addition, the proposed project would not affect land uses anticipated in the City of Milpitas General Plan for long-range air quality planning, and would not facilitate further growth. Because construction would occur during two four-month periods, construction emissions generated by the project would not conflict with applicable air quality plans, and this impact would be less than significant.	FEIR, Volume 2, page 3.3-14
AQ-4	Expose sensitive receptors to substantial pollutant concentrations	The pollutants of concern and toxic air contaminants (TACs) that would affect sensitive receptors are particulates, specifically particulate matter of aerodynamic radius of 10 microns or less (PM <sub>10</sub> ) and particulate matter of aerodynamic radius of 2.5 microns or less (PM <sub>2.5</sub> ) contained in fugitive dust, and diesel particulate matter (DPM) from construction equipment. Because construction would occur during two four-month periods, construction (8 months total over a two-year timeframe), and that construction activities occurring within a specific reach near a specific sensitive receptor would take place during only a portion of that period, project construction would not emit substantial quantities of DPM. DPM exposure for short durations is generally not quantified, as cancer potency factors are based on lifetime exposure and there is considerable uncertainty in trying to evaluate the cancer risk from project activities that would last only a small fraction of a lifetime (California Governor’s Office of Environmental Health Hazard Assessment 2015). With implementation of District BMP AQ-1, the	FEIR, Volume 2, page 3.3-19

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
		proposed project would not pose long-term or substantial health risks to nearby residents and workers in the vicinity of the project’s construction reaches. The impact on sensitive receptors from fugitive dust and other TACs would be less than significant.	
<i>Biological Resources</i>			
BIO-1b	Impacts on essential fish habitat	The proposed project contains essential fish habitat (EFH) associated with Pacific Coast Salmon, Pacific Groundfish, and Coastal Pelagics Fishery Management Plans. Proposed project activities would have limited effects on potential EFH, but such impacts may occur because of in-channel activities. Implementation of District BMPs HM-7, HM-10, WQ-1 through WQ-9, BI-2, BI-3, and BI-8 would reduce potential impacts to water quality and fish habitat. Due to the limited extent of impacts on tidal waters that could serve as EFH, the loss of EFH and associated effects on fish species regulated by FMPs would be very low. With implementation of these District BMPs, the proposed project would affect only a very small proportion of EFH and associated species in South San Francisco Bay. Therefore, project impacts on EFH are considered less than significant.	FEIR, Volume 2, page 3.4-39
BIO-1d	Impacts on burrowing owls	District levees do not provide important burrowing owl ( <i>Athene cunicularia</i> ) nesting or roosting habitat. Furthermore, no suitable breeding habitat (i.e., burrows) for the burrowing owl was detected within the project area during the reconnaissance survey, and previous surveys of the site have failed to find any burrowing owls at this location. Temporary impacts on potential foraging habitat are not expected to affect appreciably the regional populations of this species. Implementation of District BMP BI-11 would further reduce impacts on burrowing owls by removing trash from work areas and thereby reducing the attraction of burrowing owl predators to the area. For these reasons, this impact is considered less than significant.	FEIR, Volume 2, page 3.4-42
BIO-1f	Impacts on special-status birds	Special-status bird species including Bryant’s savannah sparrow, tricolored blackbird, white-tailed kite, golden eagle, and American peregrine falcon occur in the project area as non-breeding migrants, transients, or foragers. However, these species are not known or expected to breed or occur in large numbers in the project area due to a lack of suitable breeding habitat. Project construction might result in a temporary direct impact through the alteration of foraging patterns but would not result in loss of individuals. Implementation of District BMP BI-11 would also further reduce impacts on non-nesting special-status birds by minimizing attraction of predators. This impact would be less than significant.	FEIR Volume 2, page 3.4-45
BIO-1h	Impacts on special-status bats	Only two special-status bats have potential to occur in the project area: the pallid bat ( <i>Antrozous pallidus</i> ) and western red bat ( <i>Lasiurus blossevillii</i> ), both of which are California species of special concern. Pallid bats are not expected to roost in the project area but may occasionally occur in the	FEIR, Volume 2, page 3.4-49

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
		<p>project area as nonbreeding migrants, transients, or foragers, but they are expected to occur in low numbers, if at all. Western red bats do not breed in the project area, so no maternity roosts would be affected. This species roosts solitarily in foliage. Due to the limited project impacts on trees, it is unlikely that any red bat roosting sites would be affected; in the event that such an impact does occur, any roosting red bat would be able to flee before the tree is removed.</p> <p>Project activities may result in a temporary impact on foraging individuals through the alteration of foraging patterns (e.g., avoidance of work sites because of increased noise and activity levels during project activities). However, due to the abundance of suitable foraging habitat in the project area and the mobility of these bats, as well as the relatively low proportion of potential foraging habitat that would be disturbed due to the project, habitat impacts on bats would not be substantial. In addition, implementation of District BMP BI-11 would minimize the attraction of predators and bats to construction work areas. Impacts would be less than significant.</p>	
BIO-2	<p>Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations, or by the California Department of Fish and Wildlife or U.S. Fish and Wildlife Service</p>	<p>Willow riparian woodland was mapped within the project area above the ordinary high water mark (OHWM), the majority of which occurs on a berm that stretches from California Circle to Milmont Drive between the main channel and secondary channel in Reach 3. This berm would be used as Staging Area B during project construction but the proposed project would not result in removal or pruning of woody riparian vegetation such as trees. Temporary impacts due to staging of equipment and materials on the central berm would occur on up to approximately 1.93 acres of willow riparian woodland due to trampling of herbaceous vegetation. However, herbaceous vegetation that is disturbed by proposed project activities is expected to begin to regrow within one growing season. Additionally, the recent disturbance of herbaceous vegetation on the berm due to sediment removal activities (conducted in 2015) associated with the District’s Stream Maintenance Program further reduces its quality as habitat for wildlife. Compared to riparian vegetation dominated by trees and shrubs, herbaceous riparian vegetation provides relatively low functions and values for wildlife. The project would not result in removal or pruning of woody riparian vegetation, including trees, from the willow riparian woodland habitat on the berm.</p> <p>Implementation of District BMPs WQ-1, WQ-4, WQ-5, WQ-9, and BIO-8 would 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. As a result, impacts of project activities on riparian vegetation would not have substantial ecological effects and thus would be less than significant.</p>	<p>FEIR, Volume 2, page 3.4-52</p>

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
BIO-4	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	<p>Lower Penitencia Creek is expected to function as a wildlife movement corridor, connecting primarily urban-associated habitats with San Francisco Bay-associated habitats to the north. In the areas upstream of I-880, the Lower Penitencia Creek channel likely does not function as a high-quality movement corridor for most species, particularly special-status species. Nevertheless, the ruderal habitats present may represent the most feasible means of dispersal through the surrounding urban matrix for common urban-dwelling species in the project area, such as raccoons (<i>Procyon lotor</i>) and California ground squirrels (<i>Otospermophilus beecheyi</i>).</p> <p>Installation of new floodwalls has the potential to impede wildlife movement across the channel. However, the frequency of wildlife movement across the channel in Reaches 2, 3, and 4 is expected to be low as habitat values on both sides of the channel are similarly low. For animals that can swim the channel and thus cross perpendicular to the channel in its current condition, floodwalls could obstruct wildlife dispersing perpendicular to the channels, which would need to travel around the floodwalls. However, some of these animals (such as raccoons) can likely scale the new floodwalls. In addition, many terrestrial species are unlikely to swim the channel even in its existing condition. Rather, these species are expected to cross the channel at existing crossings. In addition, in the area downstream of I-880, no floodwalls are proposed, thus allowing terrestrial animals that currently cross the channel to be able to continue crossing in this location. Therefore, impacts on wildlife movement are considered less than significant.</p>	FEIR, Volume 2, page 3.4-57
BIO-5	Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance	<p>The City of Milpitas general plan outlines goals and objectives in preserving and protecting biological resources, including trees that are protected under the City of Milpitas tree ordinance within the District’s right-of-way (ROW). The project would conform with local policies to protect biological resources, which would be a less than significant impact.</p> <p>About 33 trees within the project area are of sufficient diameter to be protected by the City ordinance. However, no trees in the project area have been designated as heritage trees by the City of Milpitas. Implementation of District BMP WQ-4 would ensure staging and stockpiling areas are sited in disturbed areas away from vegetation and trees. Thus, many of the City-protected trees would be protected in place. The District would comply with the City Tree Protection Ordinance, including obtaining a permit from the City to remove protected trees, and planting replacement trees as required by the City permit. Because the District would comply with applicable city tree protection and the project would conform to city policies to protect biological resources, impacts related to conflicts with local policies or ordinances protecting biological resources would be less than significant.</p>	FEIR, Volume 2, page 3.4-58

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
BIO-6	Conflict with the provisions of an adopted habitat conservation plan, natural community conservation plan, or other approved local, regional, or state habitat conservation plan	The proposed project would not conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan. The project site is outside of the boundaries of the Santa Clara Valley Habitat Plan (VHP). There would be no impact.	FEIR, Volume 2, page 3.4-59
<i>Cultural Resources</i>			
CR-1	Cause a substantial adverse change in the significance of a historical resource as defined in Section 15064.5	No historical resources, as defined in Section 15064.5 of the State CEQA Guidelines, were identified within the project site. As a result, the proposed project would not cause a substantial adverse change to a historical resource and there would be no impact.	FEIR, Volume 2, page 3.5-16
CR-2	Cause a substantial adverse change in the significance of an archaeological resource pursuant to Section 15064.5	No archaeological resources were identified within the project site as a result of background research or the field survey. District BMP CU-1 requires that construction activities halt immediately within 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. 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.	FEIR, Volume 2, page 3.5-16
CR-3	Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature	Research indicates that the geological matrix of the project site has a low sensitivity for the presence of paleontological resources. The proposed project would not be anticipated to directly or indirectly destroy a unique paleontological resource or site or unique geological feature. Therefore, no impacts on paleontological resources or unique geologic features would result from the proposed project.	FEIR, Volume 2, page 3.5-17
CR-4	Disturb any human remains, including those interred outside of formal cemeteries	The project site is located in an area that is sensitive for the presence of Native American village sites, which often contain burials. As a result, disturbance of native ground during project construction has the potential to uncover human remains, although such remains were not identified during the field inventory. District BMP CU-1 requires that construction activities halt immediately within 100 feet of any buried human remains and that both the Santa Clara County Coroner and a qualified archaeologist	FEIR, Volume 2, page 3.5-17

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
		be contacted. Implementation of BMP CU-1 would ensure that disturbance to human remains is less than significant.	
CR-5	Cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code Section 21074	No Tribal Cultural Resources (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 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. With implementation of BMP CU-1, the proposed project would not cause a substantial adverse change to a TCR and be considered less than significant.	FEIR, Volume 2, page 3.5-17
<i>Geology, Soils, and Seismicity</i>			
GEO-1:	Expose people or structures to potential substantial adverse effects, including, the risk of loss, injury, or death involving: rupture of a known earthquake fault or strong seismic ground shaking	The proposed project is not located within an Alquist–Priolo zone and the possibility of ground rupture in the project area is considered low. The probability of strong seismic ground shaking in the project area is high and seismic ground shaking is an existing hazard for existing structures, roads, levees, and other related facilities. The proposed project incorporates recommendations from a project-specific geotechnical report and would be designed to withstand expected ground shaking during a major seismic event. Therefore, this impact would be less than significant.	FEIR, Volume 2, page 3.6-9
GEO-3:	Result in substantial soil erosion or the loss of topsoil	The proposed project would involve substantial earthwork activities that include ground disturbance, and the initial phases of construction, particularly site grading and soil stockpiling, as well as in-channel dewatering and sediment removal, could result in loose soil being exposed to erosive forces such as rainfall and high winds. Implementation of District BMPs AQ-1, BI-3, HM-7, WQ-1, WQ-2, WQ-4, WQ-5, WQ-7, WQ-9, WQ-10, and WQ-16 would reduce surface erosion and mitigate any loss of topsoil during construction-related activities. The District would implement a Stormwater Pollution Prevention Plan (SWPPP) to control stormwater runoff from the project area, which would minimize soil erosion and transport. Implementation of the above-mentioned BMPs and SWPPP would ensure that soil erosion and transport effects would be less than significant during construction.	FEIR, Volume 2, page 3.6-11
GEO-5:	Be located on expansive soil, as defined in Table 18-	A site-specific geotechnical investigation identified soils with expansive potential as occurring on site (Kleinfelder 2016). Proposed floodwalls would be composed of sheetpiles extending below the	FEIR, Volume 2, page 3.6-14

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
	1-B of the Uniform Building Code (1994), creating substantial risks to life or property	relatively shallow layer of expansive soils and would not be susceptible to damage caused by soil expansion. Levee fill material and other fill placed as part of the project would be low-plasticity material not subject to potentially harmful shrink-swell behavior. In addition, expansive soils would be removed and the ground surface compacted prior to placement of fills, substantially reducing the potential for expansive soils to damage project improvements. This impact is less than significant.	
GEO-6:	Have soils incapable of adequately supporting the use of septic tanks or alternative waste water disposal systems where sewers are not available for the disposal of waste water	The project would not involve removal, relocation, or construction of sewer, septic, or wastewater disposal systems. The project would have no impact.	FEIR, Volume 2, page 3.6-14
<i>Greenhouse Gas Emissions and Energy Use</i>			
GHG-1	Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment	Construction-related greenhouse gas (GHG) emissions would result from the combustion of fossil-fueled construction equipment, material hauling, and worker trips. The proposed project's anticipated combined annual emissions of 901 metric tons (MT) carbon dioxide equivalents (CO <sub>2</sub> e) would be less than the Sacramento Metropolitan Air Quality Management District's (SMAQMD's) and Bay Area Air Quality Management District's (BAAQMD's) annual threshold of 1,100 MT CO <sub>2</sub> e. Implementation of District BMP AQ-1 would further reduce GHG emissions generated by minimizing idling construction equipment, requiring proper maintenance and tuning of vehicles and equipment, and requiring proper inflation of tires. In addition, maintenance activities following project completion would be similar to current practice. Minor new maintenance activities involving periodic visual inspections along the floodwalls and repair of the floodwalls/headwalls if necessary would result in only minor amount of GHG emissions well below the operational threshold of 1,100 MT CO <sub>2</sub> e. This impact would be less than significant.	FEIR, Volume 2, page 3.7-8
GHG-2	Conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases	The proposed project would be consistent with the measures outlined in local general plans and climate action plans. The proposed project does not conflict with the most recent list of California Air Resources Board's early action strategies. The proposed project would minimize construction waste and implement other energy-reducing measures with consideration of other AB 32 target sectors such as natural resources, transportation, and land use. The project's operational and maintenance activities would be similar to that of other existing and ongoing activities. No impact would occur.	FEIR, Volume 2, page 3.7-9

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
GHG-3	Cause wasteful, inefficient, and unnecessary consumption of energy or cause a substantial increase in energy demand and increase the need for energy resources	<p>The proposed project’s construction activities would require the consumption of energy (fossil fuels) for construction equipment, worker vehicles, and truck trips. However, the consumption of energy for the project’s equipment and vehicles would be minimized by the reuse on site of excavated soils, minimization of vehicle idling, and short construction period duration. The proposed project’s effects on energy resources would be less than significant.</p> <p>Although no District BMPs are necessary to reduce this impact to a less-than-significant level, implementation of District BMP AQ-1 would reduce the project’s effect by requiring minimization of idling times and requiring that all equipment be maintained and tuned properly.</p>	FEIR, Volume 2, page 3.7-10
<i>Hazards and Hazardous Materials</i>			
HAZ-2	Create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment	<p>Construction of the proposed project would require the use of heavy equipment that require hazardous materials, such as oils, grease, or fuels, could accidentally spill during project construction. The handling, storage, and disposal of hazardous materials is subject to numerous regulations. Construction equipment and vehicles would be stored at designated staging areas throughout for the duration of construction activities. In addition, the proposed project would prepare and implement a SWPPP. Implementation of SWPPP measures and adherence to local, state, and federal hazardous materials regulations and implementation of District BMPs HM-7, HM-8, HM-9, and HM-10 would minimize the potential for impacts related to accidental release of hazardous materials associated with transport, use, or disposal of hazardous materials. This impact would be less than significant.</p>	FEIR, Volume 2, page 3.8-10
HAZ-3	Emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or wastes within one-quarter mile of an existing or proposed school	<p>Construction activities would be temporary and would involve the use of construction trucks and equipment. Hazardous materials used during construction would be limited to fuel associated with the equipment and would generally not involve substantial hazardous emissions of toxics that would be considered an acute health hazard. Health risks associated with construction air pollutant emissions would be less than significant. The handling, storage, and disposal of hazardous materials would be subject to local, state, and federal regulations pertaining to hazardous materials. While small quantities of hazardous materials could be released into the environment during project construction, implementation of District BMPs HM-7, HM-8, HM-9, and HM-10 would ensure that the potential for exposing individuals at nearby schools to hazardous materials used during construction would be less than significant.</p> <p>Maintenance activities would be similar to those that currently take place and could involve use of small quantities of hazardous materials. Similar to the construction phase, implementation of District BMPs HM-7, HM-8, HM-9, and HM-10 would ensure that the potential for exposing individuals at nearby schools to hazardous materials used during project operation would be less than significant.</p>	FEIR, Volume 2, page 3.8-11

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
HAZ-4	Be located on a site which is included on a list of hazardous materials sites compiled pursuant to government Code Section 65962.5 and, as a result, would it create a significant hazard to the public or the environment	There are no hazardous waste sites listed pursuant to California Government Code Section 65962.5 identified and the proposed project is not located on a Cortese list site. Therefore, there would be no impact.	FEIR, Volume 2, page 3.8-11
HAZ-5	For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, such that the project could result in a safety hazard for people residing or working in the project area	The project area is located more than 2 miles from an airport and would not involve construction of aboveground structures that could interfere with air traffic; therefore, impacts related to safety hazards in the vicinity of an airport are not applicable and there would be no impact.	FEIR, Volume 2, page 3.8-12
HAZ-6	Impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan	The Santa Clara County Operational Area Operations Plan does not include an adopted emergency response plan or emergency evacuation plan that specifies a specific emergency response or evacuation route within the project area. Therefore, this topic is not applicable to the proposed project and there would be no impact.	FEIR, Volume 2, page 3.8-12
HAZ-7	Expose people or structures to a significant risk of loss, injury, or death involving wildland fires, including where wildlands are adjacent to urbanized areas or where residences are intermixed with wildlands	The use of construction and maintenance equipment and possible fuel storage could pose a potential wildfire risk. This risk is especially high when vegetation is being cleared and workers and machines are operating among vegetative fuels that can be flammable. Any piling of cleared vegetation could also become a fire fuel, which is considered a fire risk. Implementation of District BMP HM-12 would ensure that construction and maintenance equipment is equipped with spark arrestors and that work crews have appropriate fire suppression equipment available when construction takes place during the high fire danger period. In addition, compliance with regulations within the Public Resources Codes (PRC) would further minimize the risk of wildfire hazards during project construction. Therefore, this impact would be less than significant.	FEIR, Volume 2, page 3.8-12

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
<i>Hydrology and Water Quality</i>			
HYD-1	Violate any water quality standards or waste discharge requirements; or otherwise substantially degrade water quality	The District would implement BMPs AQ-1, BI-3, WQ-1, WQ-4, WQ-5, WQ-6, WQ-7, WQ-9, WQ-10, WQ-11, WQ-15, WQ-16, HM-7, HM-8, HM-9, and HM-10 to meet water quality standards and not degrade water quality or substantially increase turbidity of the downstream receiving waters. The proposed project would be required to comply with applicable water quality permits such as the National Pollutant Discharge Elimination System (NPDES) Construction General Permit which requires that a stormwater pollution prevention plan (SWPPP) is prepared. The SWPPP would include appropriate erosion control, spill prevention, and other construction BMPs intended to prevent polluted dewatered surface water or groundwater from being discharged into waterbodies. Construction activities would be phased and only a portion of the channel would be dewatered at a given time within the four-month summer construction period of each construction year. All creek water in the dewatered areas would be removed and creek flows and runoff would be diverted around the work areas using water-tight coffer dams located at the upstream and downstream ends of the construction areas. Diversion of creek and runoff water would only occur during the summer dry season (June 15 through October 15). By limiting in-water construction work to the dry season, implementing appropriate BMPs, and adhering to the SWPPP and NPDES Construction General permit conditions, the project would minimize the potential for soil erosion at construction areas, and promote stabilization and revegetation of disturbed areas after construction is complete. Therefore, impacts to water quality associated with temporary soil discharges and increases in turbidity would be less than significant.	FEIR, Volume 2, page 3.9-12
HYD-2	Substantially deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level	Construction activities that involve excavation would likely encounter groundwater resources, and dewatering would be required. Given that dewatering activities would be temporary in nature, occur in a phased manner by channel reach, and would occur only during dry-season months (mid-June to mid-October), and that the zone of groundwater to be potentially affected is relatively shallow; adverse effects on groundwater levels would be less than significant.	FEIR, Volume 2, page 3.9-14
HYD-3	Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, in a manner which	Project construction activities are not expected to substantially alter existing drainage patterns. During the construction phase, on-site drainage would continue to flow towards Lower Penitencia Creek. Instream dewatering would occur in portions of the project area; however, diversions would be temporary and during the summer dry season, when creek flows are at their minimum. All material associated with dewatering activities would be removed upon completion of instream work. In addition, implementation of District BMPs, such as BMP BI-3, WQ-4, WQ-5, WQ-6, and WQ-8, would	FEIR, Volume 2, page 3.9-15

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
	would result in substantial erosion, or siltation on- or off-site	limit temporary changes to existing drainage patterns and surface runoff. The project would not substantially alter drainage patterns such that substantial changes in on- or off-site erosion and siltation would occur. This impact would be less than significant.	
HYD-4	Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner which would result in flooding, on- or off-site	<p>During construction activities, temporary instream dewatering would occur in portions of the project area. Implementation of District BMPs, such as BMP BI-3, WQ-4, and WQ-5, would limit temporary changes to existing drainage patterns and surface runoff. These BMPs would minimize effects on drainage patterns by ensuring proper removal of temporary diversion structures or cofferdams after work is complete, and staging equipment and construction materials away from the channels. As such, impacts on existing drainage patterns during project construction would be less than significant.</p> <p>After construction of the proposed project, the creek would continue to have capacity to convey the 100-year flow without overtopping of the creek banks at the two Caltrans bridges across Lower Penitencia Creek (I-880 and I-880 southbound ramps) and would not increase flood hazards to areas downstream of the Lower Penitencia Creek/Coyote Creek confluence. The proposed project would be beneficial by providing flood protection for Milpitas residents and businesses adjacent to the creek. Therefore, this impact would be less than significant.</p>	FEIR, Volume 2, page 3.9-16
HYD-5	Create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff	. 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 road/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. Due to the small amount of new impervious surface, the project is not subject to the source control, site design, and stormwater requirements specified in the San Francisco Bay RWQCB's Municipal Regional Permit (Order R2-2015-0049, NPDES Permit No. CAS612008). However, the project design would be consistent with the policies of the Municipal Regional Permit by minimizing runoff generation, promoting infiltration of storm water, and using vegetated areas to filter pollutants from the stormwater before it enters the creek. The project also includes landscaping consistent with the guidelines contained in Section C.3.a.i(8) of the Municipal Regional Permit. Native plants would be installed throughout the project site. This impact would be less than significant.	FEIR, Volume 2, page 3.9-17
HYD-6	Place housing within a 100-year flood hazard area as mapped on a federal Flood Hazard Boundary or Flood Insurance Rate Map or other flood hazard	The proposed project would not include the construction or modification of any homes in a flood hazard area. During construction, coffer dams would be temporarily installed within the channel to divert flows around the construction work areas. However, because construction activities would take place during the summer months when flood hazards are essentially non-existent, temporary use of cofferdams and staging of equipment and materials in Staging Area B are not anticipated to impede or redirect flood flows. In the long-term, the project would involve placement of new structures within	FEIR, Volume 2, page 3.9-18

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
	delineation map; or place structures within a 100-year flood hazard area structures which would impede or redirect flood flows	the 100-year flood hazard area (e.g., new levee, wetland bench, and floodwalls). However, because the purpose of the proposed project is to improve flood protection and because the new structures would be designed to accommodate 100-year flood flows, the proposed project would not be expected to impede or redirect those flows.	
HYD-7	Expose people or structures to a significant risk of loss, injury, or death involving flooding, including flooding as a result of the failure of a levee or dam	The proposed project would not increase the flood risks due to failure of any levee or upstream dams. The proposed project addresses issues of inadequate flood protection provided by the existing levees and would increase the conveyance and floodwater storage capacity of Lower Penitencia Creek, thereby reducing potential flood damage resulting from failure of the Coyote Creek levees. The potential effects of sea-level rise were taken into consideration as the proposed project was designed to accommodate an expected increase of 55 inches (2.59 feet) in sea level over the proposed project's 50-year design life. As such, the project's impact of reducing potential flooding would be beneficial.	FEIR, Volume 2, page 3.9-19
HYD-8	Inundation by seiche, tsunami, or mudflow	The project site is not located along the ocean coastline, adjacent to any large waterbodies, or within a tsunami hazard area. The project site is not adjacent to any steep slopes and would not be at risk for damage by mudflows. Inundation by seiche, tsunami, or mudflow would not occur; there would be no impact.	FEIR, Volume 2, page 3.9-19
<i>Land Use</i>			
LU-1	Physically divide an established community	Project construction and staging would generally occur within existing District ROW and easements along the channel. Following project construction, use of the trails and maintenance roads along both sides of the creek would be similar to existing conditions and project components would not preclude use or future development of trails. Project construction would not result in adverse effects related to physical division of an established community. This impact would be less than significant.	FEIR, Volume 2, page 3.10-3
LU-2	Conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project adopted for the purpose of avoiding or mitigating an environmental effect	The proposed project would not permanently alter existing land uses or introduce new land uses into the area. Additionally, the proposed project would not preclude future use and development of trails along Lower Penitencia Creek or prevent or substantially inhibit recreational use of the creek. The proposed project has been designed to retain existing recreational trails within the project site. Since existing and proposed recreational trails would be retained and there would be no conflicts with existing land use plans or policies, this impact would be less than significant.	FEIR, Volume 2, page 3.10-4

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
LU-3	Conflict with any applicable habitat conservation plan or natural community conservation plan	No habitat conservation plans or natural community conservation plans apply in the project area. Therefore, no impact related to conflicts with habitat conservation plans or natural community conservation plans would occur.	FEIR, Volume 2, page 3.10-5
<i>Noise</i>			
NOI-3	A substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the project	The proposed project would reduce the need for periodic sediment removal, while other maintenance activities in the project area would continue to be similar to current activities. I-880 would continue to be the dominant source of noise in the area and, given their placement, the floodwalls along Reaches 3 and 4 may help reduce highway-related noise levels for residences east of the project area. Thus, there would be no permanent increase in ambient noise levels. This impact would be less than significant.	FEIR, Volume 2, page 3.11-16
NOI-5	For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project expose people residing or working in the project area to excessive noise levels	The Mineta San Jose International Airport is the closest public airport to the project site and the noise contours from its master plan do not overlap the project area. Therefore, there would be no impact.	FEIR, Volume 2, page 3.11-17
NOI-6:	For a project within the vicinity of a private airstrip, would the project expose people residing or working in the project area to excessive noise levels	No private airports are located within 19 miles of the project site. Thus, the proposed project would not affect people residing or working within the vicinity of a private airstrip and there would be no impact.	FEIR, Volume 2, page 3.11-17
<i>Recreation</i>			
REC-1	Increase the use of existing neighborhood and regional parks or other recreational	Impacts related to increased use of other nearby recreational facilities would not be substantial and would not result in physical deterioration of these other recreational facilities. Once project	FEIR, Volume 2, page 3.12-4

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	facilities such that substantial physical deterioration of the facility would occur or be accelerated	construction is complete, the Penitencia Creek Trail would be re-open for public use. Therefore, the impact would be less than significant.	
REC-2	Include recreational facilities or require the construction or expansion of recreational facilities which might have an adverse physical effect on the environment	The proposed project involves construction of a pedestrian crossing over the Reach 3 floodwall to allow for continued use of the existing Penitencia Creek Trail. In most resource sections, the environmental effects of the pedestrian crossing 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 air quality, biological resources, geology, hydrology, noise, transportation, utilities, and hazardous materials. However, construction of the pedestrian crossing would not result in significant impact to these resources areas due to its small size and the limited scale of 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. 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. This impact would be considered less than significant.	FEIR, Volume 2, page 3.12-5
<i>Traffic</i>			
TRA-2	Conflict with an applicable congestion management program, including, but not limited to, LOS standards and travel demand measures, or other standards established by the county congestion management agency for designated roads or highways	The number of construction trips that the proposed project would add to the I-880 freeway would be less than 1 percent of its capacity in both directions in both the AM and PM peak hours. Based on this comparison, the proposed project would not result in a substantial impact on freeway segments, and no additional analysis is required. All signalized study intersections are projected to operate at an acceptable level of service (LOS) D or better during the AM and PM peak hours under both “Existing plus Project Conditions” and “Existing Conditions plus Approved and Pending Developments and Project” scenarios. Once construction is complete, maintenance activities would be similar to current practice with the exception of occasional repair and maintenance of the new floodwalls and headwalls, and thus only minimal truck trips would be generated for project’s maintenance. Therefore, the proposed project would not result in a substantial adverse effect at the study intersections. Conflicts with the Santa Clara Valley Transit Authority’s (VTA’s) Congestion Management Program or the City of Milpitas LOS standards would be less than significant.	FEIR, Volume 2, page 3.13-20

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TRA-3	Result in a change in air traffic patterns, including either an increase in traffic levels or a change in location that results in substantial safety risks	There are no airports in the project vicinity. As such, the proposed project would not affect existing air traffic patterns during construction or operation. There would be no impact.	FEIR, Volume 2, page 3.13-24
<i>Utilities and Service Systems</i>			
UTL-1	Exceed wastewater treatment requirements of the applicable Regional Water Quality Control Board	The proposed project would not generate wastewater during operation of the project and therefore would not require construction of any new wastewater treatment facilities. During the construction phase, the use of portable restrooms would generate a minimal volume of wastewater to be off-hauled by the contractor for disposal at the San Jose–Santa Clara Regional Wastewater Facility. This impact would be less than significant.	FEIR, Volume 2, page 3.14-6
UTL-2	Require or result in the construction of new water or wastewater treatment facilities or expansion of existing facilities, the construction of which could cause significant environmental effects	The proposed project would not require any new water supply or water treatment facilities. Project construction would require some amount of water for dust control purposes, but this amount of water would not be anticipated to be substantial and would be supplied by a water truck rather than the City of Milpitas’ municipal system. Therefore, no impact related to construction of new water treatment facilities or insufficient existing entitlements would occur.	FEIR, Volume 2, page 3.14-6
UTL-3	Require or result in the construction of new storm water drainage facilities or expansion of existing facilities, the construction of which could cause significant environmental effects	The proposed project would involve improvements to Lower Penitencia Creek, which collects and conveys flow from several local storm drain facilities and tributaries. Throughout construction, all local stormwater facilities would remain in operation. Portions of the creek would be dewatered during construction by diverting creek flow into pipes that would convey the flow around the construction area and back into the creek downstream from the construction area. Dewatering would only occur during summer dry season when flows in the storm drains would be minimal. In general, effects on any existing stormwater drainage facilities in or near the project area would not be substantial, and the proposed project would not require or result in the construction of additional stormwater drainage facilities. Finally, the proposed project would not substantially increase impervious areas or otherwise increase the generation of stormwater. This impact would be less than significant.	FEIR, Volume 2, page 3.14-7
UTL-4	Have sufficient water supplies available to serve	Project construction would use recycled water for dust control and street cleaning. The wetlands plantings in Reach 1 would be flooded during high tides on a daily basis and would not require	FEIR, Volume 2, page 3.14-8

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
	the project from existing entitlements and resources, or are new or expanded entitlements needed	irrigation. Once project is complete, water may be used to clean graffiti from structures, but that use would be infrequent and amount of water used would be negligible. Mitigation planting in upland areas would require watering to establish. To the extent possible, recycled water would be used for irrigation. Water use associated with the proposed project would be minimal. This impact would be less than significant.	
UTL-5	Result in a determination by the wastewater treatment provider which serves or may serve the project that it has adequate capacity to serve the project's projected demand in addition to the provider's existing commitments	The proposed project would not generate substantial volumes of wastewater that during construction or operation. Short-term increases in wastewater generated by construction workers would not substantially increase the volume of wastewater in the system such that treatment capacity would be an issue at the San Jose–Santa Clara Regional Wastewater Facility. Therefore, impacts regarding wastewater treatment capacity would be less than significant.	FEIR, Volume 2, page 3.14-8
UTL-6	Be served by a landfill with sufficient permitted capacity to accommodate the project's solid waste disposal needs	The total volume of excess soil or sediment requiring off-site disposal or re-use is estimated at 2,300 cubic yards with about 90 percent of the excavated soil and sediment to be reused on-site. Excess spoils would be sent to local landfills in Santa Clara County and Alameda County and would not result in a significant impact on existing capacity. This impact would be less than significant.	FEIR, Volume 2, page 3.14-8
UTL-7	Comply with federal, state, and local statutes and regulations related to solid waste	The proposed project would involve excavation and demolition of existing structures, which could generate relatively large volumes of construction waste. Excavated material would be reused when feasible. By using sheetpiles to construct the floodwalls instead of cast-in-place concrete piles, which are commonly used, the proposed project would generate substantially less construction waste. The proposed project would generate modest amounts of typical construction wastes, such as lumber, wire, metals, and plastics. All project-related waste would be handled, classified, temporarily stored, transported, and disposed of in conformance with applicable federal and state solid waste regulations. Once project is complete, maintenance activities such as trash removal, vegetation management, and maintenance road grading would continue as before, and new maintenance activities would involve periodic repair and maintenance of floodwalls and headwalls. However, these activities would only generate small amounts of solid waste. This impact would be less than significant.	FEIR, Volume 2, page 3.14-9

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
UTL-8	Potential disruption and/or relocation of existing utilities	<p>Buried underground utilities may be encountered during project construction</p> <p>Use of tall equipment under existing electric transmission lines would be a potential hazard as a contact between the equipment and power lines could disrupt operation of the powerlines. To avoid that hazard, the project design avoids locating floodwalls directly under the PG&amp;E transmission lines. A number of underground utility lines are present within the project area, including water supply, wastewater, natural gas, and power lines. The District will require the contractor to notify Underground Service Alert North prior to start of excavation or demolition activities and will coordinate with line utility owners and operators to ensure that project construction does not damage the lines or disrupt service. During project operation, the proposed project would not be anticipated to affect, or have the potential to affect, existing utilities. This impact would be less than significant.</p>	FEIR, Volume 2, page 3.14-10
<i>Cumulative Impacts</i>			
N/A (topic dismissed in Section 4.3.1, Table 4-1 of FEIR)	Aesthetics (cumulative)	<p>The geographic scope of the cumulative aesthetics evaluation is the project site and the nearby areas within visual sight lines. Because the topography of the project vicinity is relatively level and the area is mostly urbanized, proposed improvements would only be visible from nearby viewpoints. Nearby development would be similar to existing urban development in the area and would be guided by the City of Milpitas General Plan as to allowable uses and size and bulk of structures. Based on the above and given the existing urbanized appearance of the area, there would be no significant cumulative impact to aesthetics when considering the proposed project and other projects in the area. The proposed project and other projects would not result in adverse effects on scenic resources, or substantially alter the visual character of the area. When considering the proposed project along with other projects, there would not be a significant cumulative impact on aesthetics.</p>	FEIR, Volume 2, page 4-4
N/A (topic dismissed in Section 4.3.1, Table 4-1 of FEIR)	Cultural Resources (cumulative)	<p>The geographic scope of cumulative cultural resources evaluation includes the project area and immediate surroundings. Construction of the proposed project and other development projects in Milpitas could lead to cumulative loss of significant historic, archaeological, or paleontological resources. There are no historical resources and no known archaeological resources within the project site. The District would implement BMPs to ensure that archaeological resources, including Native American human remains are protected from damage and properly studied, recovered, and curated in the event that they are found during project construction. State law requires other development projects to similarly protect archaeological resources and human remains uncovered during construction of those projects. When considering the proposed project along with other projects, there would not be a significant cumulative impact on cultural resources.</p>	FEIR, Volume 2, page 4-4

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
N/A (topic dismissed in Section 4.3.1, Table 4-1 of FEIR)	Geology, Soils, and Seismicity (cumulative)	The geographic scope of geology, soils, and seismicity evaluation includes the project area and immediate surroundings. Other projects in Milpitas would be required to comply with California Building Code requirements. The proposed project and other developments would be designed to withstand seismic hazards (e.g., liquefaction) and expansive and corrosive soils. When considering the proposed project along with other projects, there would not be a significant cumulative impact to geology, soils, or seismicity.	FEIR, Volume 2, page 4-4
N/A (topic dismissed in Section 4.3.1, Table 4-1 of FEIR)	Hazards and Hazardous Materials (cumulative)	With the exception of activities conducted by the District’s SMP, there are no other cumulative projects that would be located within the same footprint as the proposed project. No known hazardous waste sites are located at the project site; however due to the urbanized nature of the area, potential exists for project excavations to encounter contaminated soil or groundwater. District BMPs would be implemented to ensure that contaminated media, if encountered, are handled in compliance with federal and state laws regarding hazardous wastes. Other nearby cumulative construction projects would also be required to follow federal and state laws regarding contaminated soil or groundwater. Based on the lack of the known contamination in the project area, and legal requirements for handling of contaminated media if encountered in the future, the potential for other nearby projects to contribute to cumulative impacts regarding hazardous materials is low. There would not be a significant cumulative impact to hazards or hazardous materials.	FEIR, Volume 2, page 4-4
N/A (topic dismissed in Section 4.3.1, Table 4-1 of FEIR)	Land Use (cumulative)	The proposed project would not divide an established community or change land use at the project site or vicinity. The proposed project would also not conflict with local plans such as the City of Milpitas General Plan, Milpitas Trails Master Plan or the City of Milpitas’ Bikeway Master Plan. Similar to the proposed project, other projects are subject to planning, environmental review, and permitting processes. Through those processes, inconsistencies with relevant plans and policies would be resolved before project implementation. There would not be a significant cumulative impact to land use.	FEIR, Volume 2, page 4-5
N/A (topic dismissed in Section 4.3.1, Table 4-1 of FEIR)	Recreation (cumulative)	Similar to the proposed project, other nearby projects including the Upper Berryessa Creek Flood Protection Project and the Upper Penitencia Creek Project have the potential to affect recreational trails in their respective project areas during construction. However, because these projects and the proposed project are in different stages of development, it is unlikely that they would be under construction simultaneously. The District’s Lower Berryessa Creek Flood Protection Improvement Project adjoins the proposed project area and would temporarily affect recreational trails during construction. However, construction of Phase 1 of the Lower Berryessa Creek project, which is closest to the Lower Penitencia Creek Improvements Project area, has been completed and will not occur concurrently with construction of the proposed project. Construction of Phase 2 of the Lower Berryessa Creek project may overlap construction of the proposed project, but would be over 0.5 mile	FEIR, Volume 2, page 4-5

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
		from the Lower Penitencia Creek project area. When considering the proposed project along with other projects, there would not be a significant cumulative impact to recreation.	
N/A (topic dismissed in Section 4.3.1, Table 4-1 of FEIR)	Utilities and Service Systems (cumulative)	For aboveground and belowground utilities, the geographic scope for evaluating cumulative impacts includes the project area and immediate surrounding areas. With regards to solid waste management, the geographic scope includes Santa Clara County. The Lower and Upper Berryessa Creek projects are under construction and include plans to relocate aboveground and underground utilities lines as necessary. Buried underground utilities may be encountered during project construction activities. To prevent significant disruption of service, affected parties will be notified in advance of possible service disruptions and safety protocols would be implemented to avoid damage, or potentially hazardous accident conditions (e.g., explosion from striking a natural gas pipeline). Other development projects would conform to the City of Milpitas General Plan and would not result in increased demand on utility and service systems beyond that which can be accommodated by existing and planned infrastructure. Milpitas is served by the San Jose/Santa Clara Water Pollution Control Plant, which has prepared a Master Plan to accommodate expected future increases in wastewater treatment growth in the plant's service area. Population growth within Santa Clara County would result in increased generation of solid waste; however, this would be offset by the requirements for increased re-use and diversion of solid waste included in the CIWMA. Existing solid waste facilities in the County have many years of estimated capacity to accommodate solid wastes, and overall capacity would be increased by the Newby Island Sanitary Landfill Rezoning and Recyclery Project. That project would provide 15.12 million cubic yards of additional landfill capacity. When considering the proposed project along with other projects, there would not be a significant cumulative impact to utilities and services systems.	FEIR, Volume 2, page 4-5
CUM-1	Cumulative Impacts on Air Quality	The impact analysis in FEIR Section 3.3.4 concluded that the project's NOx emissions would be reduced to a level of less-than-significant with the implementation of BMP AQ-1 and Mitigation Measure AQ-1. As a result, these measures would reduce the project's emissions to a level such that the project would not make a considerable contribution to cumulative air quality impacts even when considering the other projects occurring in the area.	FEIR Volume 2, page 4-15
CUM-2	Cumulative Impact on Biological Resources	As discussed in FEIR Section 3.4, <i>Biological Resources</i> , the proposed project could adversely affect special-status species or habitat used by special-status species including longfin smelt, Central California Coast steelhead, western pond turtles, burrowing owls, Alameda song sparrow and San Francisco common yellowthroat, salt marsh harvest mouse, special-status bats, and Congdon's tarplant. Implementation of various District BMPs (including HM-7, HM-8, HM-10, WQ-1 through WQ-9, WQ-11, WQ-15, WQ-16, BI-2, BI-3, BI-8, BI-10, BI-11) related	FEIR Volume 2, page 4-16

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
		<p>to water quality and biological resources would minimize the project’s potential impacts on those species. Other projects in close proximity could also result in impacts on western pond turtles and special-status birds and bats, resulting in a significant cumulative impact. Implementation of the District BMPs and Mitigation Measures BIO-1 through BIO-12 would ensure the project’s contribution to cumulative impacts on special-status species would not be cumulatively considerable.</p> <p>Similar to the proposed project, other projects such as the Lower Berryessa Creek Flood Protection Project and Upper Berryessa Creek Flood Protection Project would impact waters of the U.S./state. Collectively, these projects could result in significant cumulative impacts on waters of the U.S./state. Implementation of Mitigation Measure BIO-13 would ensure that the wetland bench supports ecological functions of wetland vegetation and the project’s contribution to cumulative impacts to jurisdictional wetlands and waters of the U.S./state would not be cumulatively considerable.</p>	
CUM-3	Cumulative Impacts on Hydrology and Water Quality	<p>As discussed in FEIR Volume 2, Section 3.8, <i>Hydrology and Water Quality</i>, the created wetland bench would provide storage for flood waters and increased areas of tidal wetlands that would benefit water quality. The project would continue existing drainage patterns while reducing flood risks. During in-water construction work, the District would divert creek water around work areas. A SWPPP would also be implemented to prevent discharge of pollutants from construction activities. A number of BMPs would also be implemented to prevent release of pollutants into the creek.</p> <p>Without the proposed project, the Lower Penitencia Creek would not have the capacity to convey the 1-percent flood event and flood hazards would increase once the Lower and Upper Berryessa flood protection projects are completed. The proposed project would increase the capacity of Lower Penitencia Creek to convey increased 1-percent flows from the improved Upper and Lower Berryessa Creek without overtopping of the Lower Penitencia Creek banks. Therefore, the proposed project would not increase downstream flood hazards and its contribution to cumulative hydrologic impacts would not be cumulatively considerable.</p>	FEIR Volume 2, Section 4.3.3, page 4-15
CUM-5	Cumulative Impacts on Traffic Patterns and Safety Hazards	There is a possibility that the presence of slow-moving vehicles and equipment associated with both the proposed project and other projects could result in temporary safety hazards on local roads. This would be a significant cumulative impact. Implementation of District BMP TR-1 and	FEIR Volume 2, pages 4-18 to 4-19

Impact Number	Impact Title	Rationale for No Impact or Less than Significant Impacts	Reference
		Mitigation Measure TRA-1 (Traffic Control Plan), would minimize traffic safety hazards on local roads, including San Andreas Drive, where capacity would be temporarily reduced during construction of the San Andreas Drive bridge headwall. With implementation of these measures, the proposed project's contribution to this cumulative impact would not be cumulatively considerable.	

## 3.2 Significant Environmental Impacts That Have Been Reduced to a Less than Significant Level

The District hereby finds that the following significant environmental impacts can and will be mitigated to a less-than-significant level based upon the implementation of the mitigation measures in the FEIR. These findings are based on the discussion of impacts in the detailed resource area impact analyses in Volume 2, Chapter 3 of the FEIR and the cumulative impacts discussed in Volume 2, Chapter 4 of the FEIR, as well as relevant responses to comments and revisions in the FEIR. For each impact, the following information is presented: the CEQA finding, the applicable mitigation measure(s), the rationale for the finding, and a reference to the FEIR section providing further facts and reasoning supporting the finding.

### 3.2.1 Air Quality

#### ***Impact AQ-2. Violate any air quality standard or contribute substantially to an existing or projected air quality violation.***

The proposed project would emit criteria pollutants through the combustion of fossil fuels by construction equipment, worker vehicles, and material hauling trucks. In addition, the proposed project's grading and excavation activities would disturb soils and generate fugitive dust (particulate matter emissions). The proposed project would result in construction emissions of nitrogen oxides (NO<sub>x</sub>) that exceed the BAAQMD thresholds for grading activities, if project construction activities were performed concurrently. The emissions would contribute to existing air quality impairments during the construction period. Implementation of District BMP AQ-1 would reduce NO<sub>x</sub> and other criteria pollutant emissions by minimizing idling times of construction equipment and requiring equipment to be properly maintained and tuned in accordance with manufacturer's specifications. In addition, BMP AQ-1 would also minimize fugitive dust emissions during construction. However, the proposed project's NO<sub>x</sub> emissions would still exceed the BAAQMD NO<sub>x</sub> significance criteria even with implementation of District BMP AQ-1, and thus this impact is significant. As discussed in Volume 2, Section 3.3 of the FEIR, implementation of Mitigation Measure AQ-1 would reduce this impact to a less-than-significant level.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, Mitigation Measure AQ-1 is feasible and is hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

***Mitigation Measure AQ-1: Implement Construction NO<sub>x</sub> 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 result in average daily NO<sub>x</sub> emissions of more than 54 pounds per day, which will require achieving a project-wide fleet-average of at least 22 percent NO<sub>x</sub> 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<sub>x</sub> emissions threshold will be met. This limit of 54 pounds per day of NO<sub>x</sub> 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.*

**Rationale for Finding.** Implementation of Mitigation Measure AQ-1 would ensure that emissions from individual construction phases for each reach and combined reach emissions would not exceed the BAAQMD's significance thresholds, particularly for NO<sub>x</sub>. Use of Tier 3 engines would be sufficient to reduce NO<sub>x</sub> emissions by at least 22 percent such that the average daily emissions were less than the BAAQMD threshold of 54 pounds per day. The proposed project would not violate any air quality standard or contribute substantially to an existing or projected air quality violation. Therefore, this impact would be less than significant with mitigation.

**Reference.** FEIR Volume 2, Section 3.3.4, page 3.3-14.

***Impact AQ-3: Result in a cumulatively considerable net increase of any criteria pollutant for which the project region is non-attainment under an applicable federal or state ambient air quality standard.***

As discussed in Volume 2, Section 3.3.2 of the FEIR, the BAAQMD has established significance thresholds that also apply to cumulative impacts; specifically, a project that does not exceed the significance thresholds established for any criteria pollutant would not considerably contribute to cumulative air quality impact. As discussed in Impact AQ-2 above, during construction of the proposed project, NO<sub>x</sub> emissions would exceed the BAAQMD threshold, even with implementation of District BMP AQ-1. This would be a significant impact. As discussed in Volume 2, Section 3.3 of the FEIR, implementation of Mitigation Measure AQ-1 would reduce this impact to a less-than-significant level.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, Mitigation Measure AQ-1 is feasible and is hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

***Mitigation Measure AQ-1: Implement Construction NO<sub>x</sub> Emission Reductions.*** See Impact AQ-2 above for full text.

**Rationale for Finding.** Implementation of Mitigation Measure AQ-1 would ensure the proposed project's emissions are reduced to a level such that it would not make a considerable contribution to cumulative air quality impacts even when considering the other projects occurring in the area. This impact would be less than cumulatively considerable with mitigation.

**Reference.** FEIR Volume 2, Section 3.3.4, page 3.3-18.

***Impact AQ-5: Create objectionable odors affecting a substantial number of people.***

Construction activities could generate odors related to excavated material and the operation of gasoline- or diesel-powered equipment. Odors may also be associated with decaying organic material contained in excavated or dredged material. The proposed project might cause odor impacts to nearby sensitive receptors if some excavated or dredged material is not immediately removed from the project site and is located in close proximity to sensitive receptors. Implementation of District BMP AQ-2 would reduce odor impact by requiring that potentially odorous materials be removed as soon as possible. However, it is possible that some excavated or dredged material could not be immediately removed from the project site and if such material is located near sensitive receptors, the impact would be significant. As discussed in Volume 2, Section 3.3 of the FEIR, implementation of Mitigation Measure AQ-2 would reduce this impact to a less-than-significant level.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, the Mitigation Measure AQ-2 is feasible and is hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

**Mitigation Measure 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.*

**Rationale for Finding.** Implementation of Mitigation Measure AQ-2 would ensure that any stockpiled material remaining on the project site would be placed at a distance as far as possible from sensitive receptors until they could be removed. Potential odors generated from operation of construction equipment would be temporary. Therefore, the potential for the proposed project to create objectionable odors that would affect a substantial number of people would be less than significant with mitigation.

**Reference.** FEIR Volume 2, Section 3.3.4, page 3.3-19.

### **3.2.2 Biological Resources**

**Impact BIO-1: Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special-status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Wildlife or U.S. Fish and Wildlife Service.**

The project has the potential for adverse effects on special-status species. The analysis is organized by sub-topics and species type (described below). Species listed in FEIR Table 3.2-4 as absent from the project area are not described herein as they would not be affected by the proposed project. All species listed in FEIR Table 3.2-4 as present, may be present, or absent as breeders could potentially be affected by the project and are analyzed in this section, except three bird species which have special status only when nesting and would not be expected to nest at the project site. The three bird species that have special status only when nesting are the Northern harrier, loggerhead shrike, and yellow warbler.

**Impact BIO-1a: Impacts on longfin smelt and steelhead.**

In-channel construction activities, including channel dewatering, would be limited to dry season to reduce the potential for longfin smelt and steelhead to be present in the project area. During project construction, longfin smelt (*Spirinchus thaleichthys*) (state listed as threatened) and Central California Coast steelhead (*Oncorhynchus mykiss*) (federally listed as threatened) could potentially occur, albeit infrequently and in low numbers, in the reach of Lower Penitencia Creek within the project boundary. Neither of these species is expected to spawn in the project area; however, small numbers of these species may occasionally stray into the project area.

The proposed project would not result in the permanent loss of aquatic habitat for fish. However, temporary dewatering of portions of the project area would occur. The loss of instream cover, such as vegetation, due to dewatering may adversely affect fish. Removal of vegetation could also result in loss of substrate used by fish for foraging. However, Lower Penitencia Creek provides relatively low-quality habitat for fish species due to its channelized nature, lack of high-quality habitat complexity, and regular disturbance of habitats due to frequent maintenance. Furthermore, the habitat is expected to reestablish

rapidly following completion of construction. The project activities are not expected to result in a substantial long term change in the amount or suitability of aquatic habitat available to steelhead and longfin smelt.

Potential increases in erosion and sedimentation and other water quality impacts may result from the project construction activities. The construction of floodwalls would require the installation of sheet piles. Sounds generated by pile driving have the potential to adversely affect fish. However, the proposed project's use of a Giken silent piler would reduce effects of pile driving to levels that are not expected to cause injury or mortality of fish. Additionally, minor spills of petrochemicals, hydraulic fluids, and solvents may occur during vehicle and equipment refueling.

Implementation of District BMPs BI-3, BI-8, HM-7, HM-8, HM-10, WQ-1 through WQ-9, WQ-11, WQ-15, and WQ-16 would minimize adverse effects in water quality. These BMPs include numerous preventive measures to reduce erosion, control sediment, prevent spills, and protect water quality. By implementing these BMPs, impacts on longfin smelt and steelhead would be minimized. Nevertheless, the proposed project could result in residual impacts on these species because complete avoidance of individuals may not be accomplished while still meeting the proposed project goals. As a result, impacts on special-status fish are conservatively considered significant. As discussed in Volume 2, Section 3.4 of the FEIR, implementation of Mitigation Measure BIO-1 would reduce this impact to a less-than-significant level.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, Mitigation Measure BIO-1 is feasible and is hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

**Mitigation Measure BIO-1: Exclude Fish Prior to Dewatering Activities.** *Prior to conducting dewatering activities, a qualified biologist 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.*

**Rationale for Finding.** Implementation of this mitigation measure would reduce significant impacts on longfin smelt or steelhead by excluding fish from the project area prior to dewatering activities.

**Reference.** FEIR Volume 2, Section 3.4.4, page 3.4-35.

**Impact BIO-1c: Impacts on western pond turtles.**

Suitable habitat for western pond turtle is present in the proposed project. Project construction may affect aquatic habitat used by western pond turtles for foraging or dispersal, upland habitat used for nesting, and/or individuals. Implementation of District BMPs BI-3, BI-8, BI-10, HM-7, HM-8, HM-10, WQ-1 through WQ-9, WQ-11, WQ-15, and WQ-16 would minimize temporary impacts on western pond turtles during project construction by minimizing the potential for water quality degradation that could impact the species and minimizing the potential for entrapment of individuals. However, should construction activities occur when turtles are present, injury or mortality of individuals could result. Construction-

related impacts on individual western pond turtles could have a significant impact on the local population and are considered significant. As discussed in Volume 2, Section 3.4 of the FEIR, implementation of Mitigation Measure BIO-2 would reduce impacts on western pond turtle to a less-than-significant level.

The proposed project would not result in the permanent loss of aquatic habitat for turtles. Temporary impacts on aquatic and brackish marsh habitat that provides potential foraging habitat for turtles would be temporarily affected during levee relocation, bench excavation, and dewatering activities. In addition, grassland and willow riparian woodland habitat that could be used by small numbers of western pond turtles for dispersal and nesting would be temporarily disturbed during project construction. Some ruderal grassland would be converted to coastal brackish marsh which would provide greater habitat value for western pond turtle. The temporary loss of aquatic, brackish marsh, willow riparian woodland, and upland dispersal habitat during construction is not expected to result in a substantial adverse effect as this habitat is infrequently used by a small number of turtles. Dewatering activities would temporarily restrict in-channel movement by western pond turtles but given that the affected area is relatively small and limited to turtle movement, this impact would be less than significant.

Lastly, the floodwalls could create barriers to dispersal of turtles, which may increase their vulnerability to predation as they traverse the floodwalls. However, upstream from California Circle, western pond turtles are not currently able to disperse overland between the creek and other water bodies due to existing urban development along both side of the channel. And, along Reach 2, the floodwalls would not substantially affect overland movement due to the presence of an existing chain-link fence surrounding the adjacent California Circle stormwater pond and pump station. Thus, for these reasons, the floodwalls would not substantially affect overland movement by western pond turtles; this impact would be less than significant.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, Mitigation Measure BIO-2 is feasible and is hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

***Mitigation Measure BIO-2: Conduct Preconstruction Surveys for Western Pond Turtles and Relocate if Necessary.*** A qualified biologist 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 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.

**Rationale for Finding.** Implementation of Mitigation Measure BIO-2 would identify and relocate any western pond turtles present in the project area before the start of construction. This measure would minimize the potential for harm to or loss of individual western pond turtles and their nests and would reduce this impact to less than significant.

**Reference.** FEIR Volume 2, Section 3.4.4, page 3.4-40.

***Impact BIO-1e: Impacts on the Alameda song sparrow and San Francisco common yellowthroat.***

The Alameda song sparrow (*Melospiza melodia pusillula*) and San Francisco common yellowthroat

(*Geothlypis trichas sinuosa*) (both California species of special concern) are associated with marsh habitats, and both are known to nest in the project area. The project is expected to result in temporary impacts on 0.87 acre of coastal brackish marsh, the highest quality habitat for the species in the project area. Heavy ground disturbance, noise, and vibrations caused construction activities in the project area could disturb foraging or roosting individual Alameda song sparrows and San Francisco common yellowthroats, cause them to move away from work areas, or otherwise affect their behavior.

Implementation of District BMPs BI-5, BI-6, and BI-11 would identify active nests prior to the start of construction, reduce construction-related disturbances to nests, and minimize the attraction of nest predators. However, if preconstruction surveys are conducted too far in advance of the onset of construction activities, active nests may be established and subsequently disturbed when construction activities are initiated. Similarly, if there is an extended break in construction activities at a site, active nests may become established in the project work area and subsequently be disturbed when project activities resume. The loss of active nests of Alameda song sparrows or San Francisco common yellowthroats would be a significant impact because a relatively large number of breeding birds could be affected. This could result in a substantial effect on local and regional populations, which would be a significant impact. As discussed in Volume 2, Section 3.4 of the FEIR, implementation of Mitigation Measures BIO-3 and BIO-4 would reduce this impact to a less-than-significant level.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, the Mitigation Measures BIO-3 and BIO-4 are feasible and are hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

**Mitigation Measure BIO-3: Conduct Preconstruction Surveys for Nesting Birds.** *A qualified biologist will conduct preconstruction surveys for nesting birds. Surveys will be conducted no more than 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 1 week or longer occurs, another focused survey will be conducted before project work can be reinitiated.*

**Mitigation Measure 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 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 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.*

**Rationale for Finding.** With the implementation of Mitigation Measures BIO-3 and BIO-4, disturbance of the nests of Alameda song sparrows and San Francisco common yellowthroats would be avoided to the extent feasible, and this impact would be reduced to less than significant.

**Reference.** FEIR Volume 2, Section 3.4.4, page 3.4-43.

***Impact BIO-1g: Impacts on salt marsh harvest mouse.***

Small areas of suitable habitat for salt marsh harvest mouse (*Reithrodontomys raviventris*), a federally listed and state-listed endangered species and a state-designated fully protected species exists in the project area. Suitable habitat for the salt marsh harvest mouse is present in the form of a small patch of pickleweed and alkali bulrush located between North McCarthy Boulevard and I-880 and a small patch of brackish marsh between I-880 and Coyote Creek. This habitat is, however, located at the margins of the species' known occupied habitat around the Bay, the low quality of habitat (i.e., small patch of pickleweed and alkali bulrush vegetation), and the species is unlikely to occur in the project area due to the limited extent of suitable habitat within the project area and the isolation of these small patches of suitable habitat from larger expanses of more suitable habitat. For these reasons, the project site does not provide sufficient habitat to support a sustained salt marsh harvest mouse population. If salt marsh harvest mice are present during construction of the replacement levee and use of Staging Area A, they may be crushed or injured by personnel or equipment. Individuals that vacate the area because of increased levels of noise and disturbance might be exposed to increased competition from conspecifics already occupying the area to which they are displaced and to increased levels of predation because of unfamiliarity with the new area or lack of sufficient cover. Removal of vegetation might expose individual mice to predation. During construction, implementation of District BMPs BI-10 and BI-11 would reduce impacts on this species by avoiding entrapment of mice and minimizing predation. Project construction activities would result in temporary impacts to vegetated wetland habitat, which is considered salt marsh harvest mouse habitat. As discussed under Impact BIO-1a, temporarily impacted vegetated wetland habitat is expected to re-establish within 1 to 2 years after construction is completed. In addition, the proposed wetland bench would provide approximately 0.29 acre of additional tidal habitat for the species. Despite implementation of BMPs BI-10 and BI-11 and the proposed creation of additional habitat through the wetland bench, if a transient mouse evades the mouse exclusion fence and is seriously harmed or injured, or if the wetland bench does not successfully establish suitable salt marsh harvest mouse habitat, the impact would be significant. As discussed in Volume 2, Section 3.4 of the FEIR, implementation of Mitigation Measures BIO-5, BIO-6, BIO-7, and BIO-8 would reduce this impact to a less-than-significant level.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, Mitigation Measures BIO-5, BIO-6, BIO-7, and BIO-8 are feasible and are hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

***Mitigation Measure 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.

***Mitigation Measure BIO-6: Implement Hand Removal of Vegetation in 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.

**Mitigation Measure 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.

**Mitigation Measure 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 performance criteria, monitoring methods, data analysis, reporting requirements, monitoring schedule, etc.). At a minimum, success criteria will include 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.*

**Rationale for Finding.** Implementation of Mitigation Measures BIO-5, BIO-6, and BIO-7 would reduce impacts associated with loss of salt marsh harvest mouse individuals due to project-related construction activities, through worker training, hand removal of vegetation, and exclusion of known individuals, and implementation of Mitigation Measure BIO-8 would ensure that the project wetland bench results in suitable habitat for the salt marsh harvest mouse. Due to the low quality of salt marsh harvest mouse habitat within the project area, the low potential for (and magnitude of) project impacts to this species, and the predominantly temporary nature of the impacts, the creation of up to 0.29 acre of additional habitat would adequately compensate for impacts to this species and its habitats. Therefore, with these measures implemented, project-related impacts would be reduced to a less than significant level.

**Reference.** FEIR Volume 2, Section 3.4.4, page 3.4-46.

***Impact BIO-1i: Impacts on Congdon's tarplant.***

Ruderal grasslands in the project area provide marginally suitable habitat for Congdon's tarplant (*Centromadia parryi* ssp. *congdonii*), a California Rare Plant Rank (CRPR) 1B.1 species, and two populations of Congdon's tarplant have been documented by the California Natural Diversity Database (CNDDDB) in the project vicinity (CNDDDB 2016). If Congdon's tarplant is present within the project work area, construction activities, such as grading, bench excavation, and floodwall construction could affect the plants through direct or indirect disturbance of populations and disturbance, modification, or destruction of suitable habitat. 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. Since publication of the DEIR, a focused survey for Congdon's tarplant was completed for the project on August 7, 2017 during the species' blooming period. No individuals of Congdon's tarplant were detected during the survey. Typically these survey results are valid for a 3-year timeframe, 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, in the event construction commences after August 2020, there is a possibility that Congdon's tarplant could establish within the project site and damage to the species from construction would be significant. As discussed in Volume 2, Section 3.4 of the FEIR, Mitigation Measures BIO-9 and BIO-10 would be implemented to address this significant impact if construction commences after August 2020.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project

which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, Mitigation Measures BIO-9 and BIO-10 are feasible and are hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

**Mitigation Measure BIO-9: Conduct Focused Preconstruction Survey for Congdon's Tarplant.** *In the event that project construction starts after August 2020, a qualified biologist 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).*

**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 will conduct an impact assessment to determine if project impacts would be expected to cause 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*

**Rationale for Finding.** Implementation of Mitigation Measures BIO-9 and BIO-10 would identify and compensate for the loss of any occurrences of Congdon's tarplant present in the project area and would thereby reduce the significant impact on the species to less than significant.

**Reference.** FEIR Volume 2, Section 3.4.4, page 3.4-49.

**Impact BIO-1j: Introduction of invasive species.**

The project area contains several invasive plant species. Project construction activities, such as grading and soil disturbance, may create conditions suitable for additional spreading of invasive plant species, and weed propagules may be spread on ground-disturbing equipment to the project area or from the project area to other sites. Furthermore, bare upland soils left after construction of temporary access roads and relocation of the levee may encourage growth of weedy species, and mulching or erosion control mixes

may include and thus introduce invasive, non-native species. In addition to the introduction of invasive plant species, without proper procedures, mitten crabs (*Eriocheir sinensis*) and other aquatic invasive invertebrates, such as the New Zealand mud snail (*Potamopyrgus antipodarum*), Quagga mussel (*Dreissena bugensis*), or zebra mussel (*Dreissena polymorpha*), could inadvertently be introduced into or spread within the project area. The spread of these and other non-native invasive species into areas formerly unoccupied could result in a significant impact on special-status species, native habitats, and communities. Implementation of District BMPs BI-1, BI-8, HM-7, and WQ-9 would reduce the potential for infestation of natural areas by invasive species by protecting local ecotypes and avoiding the spread of non-native species. However, District BMPs may not be sufficient to avoid new invasions or the spread of invasive species. Because of the potential for degradation of a wide variety of natural communities and effects on native populations and special-status species that could occur because of such invasions, this impact would be significant. As discussed in Volume 2, Section 3.4 of the FEIR, Mitigation Measures BIO-11 and BIO-12 would be implemented to address this significant impact.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, the Mitigation Measures BIO-11 and BIO-12 are feasible and are hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

**Mitigation Measure 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.*

**Mitigation Measure BIO-12: Dispose of Invasive Plants.** *The District will require that any invasive plants found within the project area 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.*

**Rationale for Finding.** Implementation of Mitigation Measures BIO-11 and BIO-12 would minimize the potential for introduction or spread of non-native species and would thereby reduce this impact to less than significant with mitigation.

**Reference.** FEIR Volume 2, Section 3.4.4, page 3.4-51.

**Impact BIO-3: Have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.), waters of the U.S., and waters of the state through direct removal, filling, hydrological interruption, or other means.**

Construction activities associated with the proposed project would result in both temporary and permanent disturbance of wetland and aquatic communities representing jurisdictional wetlands and other waters of the U.S./state. During project construction, implementation of District BMPs BI-2, BI-3, BI-8, BI-10, BI-11, HM-7, HM-8, HM-10, WQ-1 through WQ-9, WQ-11, WQ-15, and WQ-16 would minimize impacts on wetlands functions during project construction by minimizing the potential for water quality degradation.

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. FEIR Table 3.4-5 summarizes the project's estimated temporary and permanent impacts on waters and wetlands of the U.S. and waters of the State. The project would result in 0.14 acre of permanent impacts to wetlands of the U.S. and State, and 0.90 acre of temporary impacts to wetlands of the U.S. and State. Since the created wetland bench would convert 0.08 acre of non-tidal saline wetland to coastal brackish marsh habitat, the net permanent impact on wetlands would be 0.06 acre. The project's estimated temporary and permanent impacts on waters of the State take into consideration effects within the channel's riparian zone. After construction is complete, the newly created bench is expected to create up to 0.29 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. Nevertheless, the proposed project would result in temporary loss of habitat functions and values, particularly those provided by vegetated wetlands, such as sediment stabilization, sediment/toxicant retention, nutrient removal/transformation, and aquatic and terrestrial wildlife species habitat. Thus, the project would result in temporary loss of ecologically valuable wetlands.

Impacts to other waters of the U.S. and State are considered less than significant because there would be no permanent loss of this habitat; the habitat would re-establish similar functions and values to existing immediately after construction; BMPs will prevent deleterious water quality impacts.

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, if the wetland bench does not successfully establish a vegetated wetland as expected, the impact on wetland is considered significant. As discussed in Volume 2, Section 3.4 of the FEIR, Mitigation Measure BIO-13 would be implemented to address this impact and reduce it to a less-than-significant level.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, the Mitigation Measure BIO-13 is feasible and is hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

**Mitigation Measure BIO-13: Wetlands Mitigation and Monitoring Plan.** As described in Section 2.6.1, the proposed project includes the creation of a wetland bench on the south bank of Reach 1.

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 performance criteria, monitoring methods, data analysis, reporting requirements, monitoring schedule, etc.).*

*The District will implement the Wetlands Mitigation and Monitoring Plan.*

**Rationale for Finding.** Implementation of Mitigation Measure BIO-13 would ensure that the created bench supports vegetated wetlands following the completion of the project. Due to the low quality of the wetlands that would be impacted, the predominately temporary nature of the impacts, and the relative speed at which temporarily impacted wetlands are expected to regenerate, the creation of up to 0.29 acre of additional wetland habitat on the bench in Reach 1 would adequately compensate for impacts to this habitat. Therefore, project-related impacts would be less than significant with mitigation.

**Reference.** FEIR Volume 2, Section 3.4.4, page 3.4-53.

### **3.2.3 Geology, Soils, and Seismicity**

***Impact GEO-2: Expose people or structures to potential substantial adverse effects, including, the risk of loss, injury, or death involving: seismic-related ground failure, including liquefaction; or landslides.***

A project-specific geotechnical investigation identified subsurface layers of clay and alluvium occurring throughout the project area; soil conditions and the high groundwater table increase the potential for seismically induced liquefaction to occur at the project site. Therefore, this impact is considered significant. As discussed in Volume 2, Section 3.6 of the FEIR, Mitigation Measure GEO-1 would be implemented to reduce this impact to a less-than-significant level.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, Mitigation Measure GEO-1 is feasible and is hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

**Mitigation Measure GEO-1: Incorporate the 2017 Geotechnical Design Report Recommendations into the Final Design and Construction of the Proposed Project.** 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 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 into the existing levee slope, or benched into existing levee material after scarification and recompaction of existing fill occurs.*

**Rationale for Finding.** To meet or exceed safety standards, the proposed project would be designed and constructed in accordance with Mitigation Measure GEO-1. The mitigation measure requires implementation of design and/or construction measures to ensure that new levees and structures minimize the potential risk of structural failure resulting from seismically induced liquefaction or ground failure. Implementation of Mitigation Measure GEO-1 would reduce potential hazards from on-site ground failure, liquefaction, or landslide during construction and operation to a level that is less than significant.

**Reference.** FEIR Volume 2, Section 3.6.4, page 3.6-10.

**Impact GEO-4: Be located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction, or collapse.**

Within the project area, underlying soils and levee material have been augmented with fill of mixed

composition with alluvium layers below. Given the shallow groundwater table within the project area, some soils may be subject to liquefaction, which could pose a significant impact on the structural stability and strength of the project components. Smaller scale slumps or lateral spreading may occur on more gradually sloped topographic features, such as channel banks, if underlain by liquefiable or inadequately compacted soils. During construction, ground-disturbing and excavation activities and placement of new soils would temporarily create potentially unstable slopes. Therefore, the potential for unstable soils as a result of the project are significant. As discussed in Volume 2, Section 3.6 of the FEIR, Mitigation Measure GEO-1 would be implemented to reduce this impact to a less-than-significant level.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, Mitigation Measure GEO-1 is feasible and is hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

**Mitigation Measure GEO-1: Incorporate 2017 Geotechnical Design Report Recommendations into the Final Design and Construction of the Proposed Project.** See Impact GEO-1 above for full text.

**Rationale for Finding.** Any areas at risk of liquefaction and slope instability would be identified and the risk would be abated by implementing design criteria and recommendations provided in the Geotechnical Report, as required by Mitigation Measure GEO-1. The geotechnical report provides detailed recommendations for site preparation, removal of deleterious materials, the degree of compaction and stability for slopes, design loads for floodwalls, physical characteristics of fill material, and methods for placement of fills. Implementation of Mitigation Measure GEO-1 would reduce potential liquefaction and slope instability risks to a level that is less than significant.

**Reference.** FEIR Volume 2, Section 3.6.4, page 3.6-12.

### **3.2.4 Hazards and Hazardous Materials**

**Impact HAZ-1: Create a significant hazard to the public or the environment through the routine transport, use, or disposal of hazardous materials.**

The potential exists for encountering contaminated soil during excavation of the levees along Lower Penitencia Creek and contaminated groundwater during dewatering work. The District would implement 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. If hazardous materials were present in excavated soil or groundwater during excavation and sediment removal activities, 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. This impact is considered significant. As discussed in Volume 2, Section 3.8 of the FEIR, Mitigation Measure HAZ-1 would be implemented to reduce this impact to a less-than-significant level.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, Mitigation Measure HAZ-1 is feasible and is hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

**Mitigation Measure 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 Division, the plan will be incorporated in the construction specifications for the proposed project.*

**Rationale for Finding.** With implementation of Mitigation Measure HAZ-1, the District would be required to prepare and implement a soil and groundwater management plan. The plan would include a health and safety plan and protocols for appropriate disposal of contaminated soil or groundwater if encountered. Implementation of Mitigation Measure HAZ-1 would reduce this impact to a less-than-significant level.

**Reference.** FEIR Volume 2, Section 3.8.4, page 3.8-8.

### **3.2.5 Traffic and Transportation**

**Impact TRA-1: Conflict with an applicable plan, ordinance or policy establishing measures of effectiveness for the performance of the circulation system, taking into account all modes of transportation including mass transit and non-motorized travel and relevant components of the circulation system, including but not limited to intersections, streets, highways and freeways, pedestrian and bicycle paths, and mass transit.**

Traffic generated by construction vehicles could result in a substantial traffic increases due to the relatively small traffic volume on Milmont Drive and San Andreas Drive and would constitute a significant impact. In addition, the Penitencia Creek Trail runs along the east side of the channel from the California Circle bridge and ends on the north side of the Milmont Drive bridge. Temporary closure of this trail during construction activities would result in temporary conflicts with the City of Milpitas Trail Master Plan and City of Milpitas Bikeway Master Plan. Implementation of BMP TR-1, which requires that fences, barriers, lights, flagging, guards, and signs be installed around the work areas, would help increase public awareness and minimize traffic safety impacts on pedestrians and bicyclists but would not effectively avoid that conflict. The effects on pedestrian and bicycle mobility, and temporary conflicts with goals and objectives established in the City of Milpitas General Plan, Trail Master Plan, and Bikeway Master Plan are considered significant. As discussed in Volume 2, Section 3.13 of the FEIR, Mitigation Measure TRA-1 would be implemented to reduce this impact to a less-than-significant level.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, the Mitigation Measure TRA-1 is feasible and is hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

**Mitigation Measure TRA-1: Traffic Control Plan.** *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 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 shall be prepared and implemented in accordance with Caltrans and California Manual on Uniform Traffic Control Devices (MUTCD) standards. The traffic handling plans shall 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.*

**Rationale for Finding.** Implementation of Mitigation Measure TRA-1 would ensure that a traffic control plan is developed and implemented to minimize effects related to truck traffic on residential streets and minimize pedestrian and bicycle safety impacts during construction. This measure would reduce temporary conflicts with goals and objectives, including measures of effectiveness, outlined in the City of Milpitas General Plan, City of Milpitas Trail Master Plan, City of Milpitas Bikeway Master Plan, and VTA's Transportation Impact Analysis Guidelines. This impact would be less than significant with mitigation.

**Reference.** FEIR Volume 2, Section 3.13.4, page 3.13-18.

***Impact TRA-4: Substantially increase hazards due to a design feature or incompatible uses.***

The presence of large, slow-moving construction-related vehicles and equipment among the general-purpose traffic on roadways in the project area could result in substantial safety hazards, especially on nearby residential streets. In addition, construction of the proposed headwalls at the San Andreas Drive

bridge may require temporary lane closures or narrowing of travel lanes creating potential traffic safety hazards near the corner of San Andreas Drive and North Abbott Avenue (approximately 50 feet west of the bridge) as there would be limited space at this sharp turn and driver visibility may be somewhat limited. As a result, construction at this location may temporarily increase vehicular safety hazards and pose a significant impact related to traffic safety. Implementation of BMP TR-1, which requires that fences, barriers, lights, flagging, guards, and signs be installed around work areas, would help increase public awareness and minimize traffic safety impacts on pedestrians and bicyclists. However, the presence of construction vehicles and equipment would still pose a significant impact related to traffic safety. As discussed in Volume 2, Section 3.13 of the FEIR, Mitigation Measure TRA-1 would be implemented to reduce this impact to a less-than-significant level.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, Mitigation Measure TRA-1 is feasible and is hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

**Mitigation Measure TRA-1: Traffic Control Plan.** See Impact TRA-1 above for full text.

**Rationale for Finding.** The presence of slow-moving construction vehicles and equipment would pose a significant impact related to traffic safety. Implementation of Mitigation Measure TRA-1 would reduce this impact by requiring development of a traffic control plan that would account for movement of construction vehicles and equipment and recommend warnings devices, signage, and traffic controls to prevent hazards to other road users. The District would require the contractor to implement the traffic control plan during construction, which would reduce this impact to less than significant with mitigation.

**Reference.** FEIR Volume 2, Section 3.13.4, page 3.13-24.

**Impact TRA-5: Result in inadequate emergency access.**

The presence of slow-moving construction trucks and vehicles could delay or obstruct the movement of emergency vehicles on local roads in the project vicinity. Additionally, the temporary lane reduction at the San Andreas Drive bridge crossing would reduce roadway capacity and could substantially increase the response time for emergency vehicles traveling through the work area. This impact is considered significant. As discussed in Volume 2, Section 3.13 of the FEIR, Mitigation Measure TRA-1 would be implemented to reduce this impact to a less-than-significant level.

**Finding.** The District finds that changes or alterations have been required in, or incorporated into, the Project which mitigate or avoid the significant effects on the environment from the above stated Impact. Specifically, Mitigation Measure TRA-1 is feasible and is hereby adopted to mitigate significant effects from the above stated Impact to a less-than-significant level.

**Mitigation Measure TRA-1: Traffic Control Plan.** See Impact TRA-1 above for full text.

**Rationale for Finding.** Mitigation Measure TRA-1 requires the preparation and implementation of a construction-period traffic control plan. The plan would identify effects on traffic flow from construction activities and traffic, and specify measures to ensure that affected roadways remain open for use by emergency responders at all times. The District would require the construction contractor to adhere to the plan throughout construction. This measure would reduce this impact to less than significant with mitigation.

**Reference.** FEIR Volume 2, Section 3.13.4, page 3.13-25.

### **3.3 Significant Environmental Impacts That Cannot Be Avoided or Reduced to a Less than Significant Level**

#### **3.3.1 Introduction**

The Board hereby finds that the following significant environmental impacts cannot feasibly be mitigated to a less-than-significant level. These findings are based on the discussion of impacts in the detailed resource area impact analyses in Volume 2, Chapter 3 of the FEIR and cumulative impacts discussed in Volume 2, Chapter 4 of the FEIR. For each impact, the following information is presented: the CEQA finding, feasible mitigation measure(s) that would reduce the severity of the impact (but not to a level that is less-than-significant), the rationale for the finding, and a reference to the FEIR section providing further facts and reasoning supporting the finding.

#### **3.3.2 Noise and Vibration**

***Impact NOI-1: Exposure of persons to or generation of noise levels in excess of standards established in the local general plan or noise ordinance or, in the applicable standards of other agencies.***

During project construction, heavy equipment would be operating in the project area and could generate noise levels affecting residences and other sensitive receptors near the construction work areas. The noises associated with construction activities would be temporary and would cease once construction is complete. If scrapers and trucks were operated together in close proximity, this equipment would generate combined noise levels of 106 A-weighted decibels (dBA) at the nearest sensitive receptor (residences) at a distance of 10 feet from Reach 3 of the project site. If operated simultaneously, residences located within 50 feet could experience noise levels at 91.5 dBA. These levels would exceed the Federal Transit Authority's (FTA) significance threshold of 90 dBA. Construction activities temporarily exposing nearby residences to noise levels exceeding the FTA standards would be a significant impact.

When averaged over 24 hours, construction noise would likely result in a 3 decibel (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.

As discussed in Section 3.11 of the FEIR, Mitigation Measure NOI-1 would reduce this Impact, but not to a less-than-significant level.

**Finding.** The Board finds that changes or alterations have been required in, or incorporated into, the Project to reduce this Impact. Specifically, the following mitigation measure is feasible and is hereby adopted to reduce this Impact. However, the application of this mitigation measure does not reduce this impact to a less-than-significant level. No other feasible mitigation is available to reduce this Impact to a less-than-significant level.

**Mitigation Measure 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.*
- *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 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.*

**Rationale for Finding.** Mitigation Measure NOI-1 requires the District and its construction contractor to implement several strategies aimed at minimizing the noise and vibration levels experienced by nearby sensitive receptors. This mitigation measure also requires installation of temporary noise barriers, which

would be anticipated to attenuate noise levels at the receptor by 5 to 15 dB (FTA 2006). Despite implementation of these strategies, there would still be a potential for construction activities near sensitive receptors to result in noise levels that exceed the 90 dBA FTA threshold. Residences located within 50 feet of construction activities may experience noise levels that exceed the FTA threshold. In addition, even after implementation of Mitigation Measure NOI-1, construction noise could temporarily cause a 3 dB day-night average sound level ( $L_{dn}$ ) 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.

**Conclusion.** For the above reasons, the construction noise impacts associated with the Project would remain significant and unavoidable. This impact would be a short-term significant unavoidable impact for nearby residential parcels.

**Reference.** FEIR Volume 2, Section 3.11, page 3.11-11.

***Impact NOI-2: Exposure of persons to or generation of excessive groundborne vibration or groundborne noise levels.***

During construction, heavy machinery operating in the project area would generate ground-borne vibration. Table 3.11-5 in the FEIR presents distances at which vibration levels would reach damage thresholds (based on Caltrans guideline) and annoyance levels (based on FTA guidelines).

The Waterstone and iStar residential developments would be sufficiently close to the project site that residents would perceive vibrations caused by project construction and would be annoyed by those vibrations. The annoyance thresholds would be temporarily exceeded for the short period of time when heavy construction equipment operates near the buildings and residents.

Based on its distance from the project area, the BAPS Shri Swaminarayan Mandir religious institution would experience vibration levels of 69 vibration decibels (VdB), which is above the perception threshold, but below the annoyance level threshold of 75 VdB for institutional uses. Some commercial buildings located on California Circle or Fairview Way may experience vibrations above the 65 VdB level threshold, which could affect sensitive equipment such as electron microscopes, lithographic equipment, and optical microscopes (if present). Vibrations-produced by construction equipment operating near buildings containing equipment sensitive to vibrations could temporarily interfere with operation of the sensitive equipment. Based on this information, construction-related vibration impacts would have a significant impact. As discussed in Section 3.11 of the FEIR, Mitigation Measure NOI-1 would reduce this impact, but not to a less-than-significant level.

**Finding.** The Board finds that changes or alterations have been required in, or incorporated into, the Project to reduce this Impact. Specifically, the following mitigation measure is feasible and is hereby adopted to reduce the severity of this Impact. However, the application of this mitigation measure does not reduce this impact to a less-than-significant level. but not to a less-than-significant level. No other feasible mitigation is available to reduce this Impact to a less-than-significant level.

***Mitigation Measure NOI-1: Implement Noise- and Vibration-reducing Measures.*** See full text of measure in Impact NOI-1 analysis above.

**Rationale for Finding.** Implementation of Mitigation Measure NOI-1 would ensure that occupants of

nearby residences and buildings are contacted prior to the initiation of construction activities. This measure also contains several measures that would reduce the amount of ground-borne vibration that occurs. However, due to the proximity of nearby institutional uses and the limits on how much vibration dampening can be achieved, Mitigation Measure NOI-1 would not reduce all construction-related vibration to below the annoyance level for institutional uses or below levels that could temporarily interfere with operation of sensitive equipment in nearby buildings. Even after implementation of these measures, vibration impacts may still exceed the vibration annoyance thresholds for sensitive receptors or interference thresholds for sensitive equipment. Even with implementation of Mitigation Measure NOI-1, this vibration impact would be significant and unavoidable during project construction.

**Conclusion.** For the above reasons, the construction groundborne vibration and groundborne noise impacts associated with the Project would remain significant and unavoidable. This impact would be a short-term significant unavoidable impact for nearby residential parcels, an institution, and commercial buildings.

**Reference.** FEIR Volume 2, Section 3.11, page 3.11-14.

***Impact NOI-4: Substantial temporary or periodic increase in ambient noise levels in the project vicinity above levels existing without the project.***

As discussed in Section 3.11.3 of the FEIR, there are multiple existing residences within 10-120 feet of the project area and other sensitive receptors, including a daycare, hotel, and religious institution, within 550 feet. Residences at the Waterstone and iStar developments would be located within 10 feet of the project area. According to noise contours in the City of Milpitas General Plan Noise Element, the project area currently experiences ambient noise levels of 65+ to 70+ dB, mainly due to the proximity of transportation infrastructure, including I-880 and an active railroad corridor. 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 (see Table 3.11-2 of the FEIR) 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.

**Finding.** The Board finds that changes or alterations have been required in, or incorporated into, the Project to reduce this Impact. Specifically, the following mitigation measure is feasible and is hereby adopted to reduce the severity of this Impact. However, the application of this mitigation measure does not reduce this impact to a less-than-significant level. No other feasible mitigation is available to reduce this Impact to a less-than-significant level.

***Mitigation Measure NOI-1: Implement Noise- and Vibration-reducing Measures.*** See full text of measure in Impact NOI-1 analysis above.

**Rationale for Finding.** Implementation of Mitigation Measure NOI-1 would ensure that several noise-reduction measures are implemented. Although construction noise would be temporary and would be limited to daytime hours, it would still represent a substantial increase over ambient noise levels. Mitigation Measure NOI-1 would reduce the level of construction-generated noise by 5 to 15 dB (FTA 2006). However, construction activities would still result in temporary construction-period noise up to 85+ dB, which is substantially above existing ambient noise levels of 70+ dB. Despite implementation of these strategies, construction activities would still result in substantial temporary increase in ambient noise

levels experienced by nearby residences. This noise impact would be significant and unavoidable during the construction phase.

**Conclusion.** For the above reasons, the construction noise impacts associated with the proposed project would remain significant and unavoidable.

**Reference.** FEIR Volume 2, Section 3.11, page 3.11-16.

### **3.3.3 Cumulative Impacts**

#### ***Impact CUM-4: Cumulative Impacts on Noise and Vibration***

As described in FEIR Volume 2, 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. Construction would also cause vibration exceeding annoyance levels at nearby residences. 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 but would not reduce construction noise to a level below the FTA threshold for exposure of residential uses and the project would still likely result in a 3 dB  $L_{dn}$  or more increase in ambient noise levels at the property lines of nearby residential properties. 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.

**Finding.** The Board finds that changes or alterations have been required in, or incorporated into, the Project to reduce the severity of this Impact. Specifically, the following mitigation measure is feasible and is hereby adopted to reduce this Impact. However, the application of this mitigation measure does not reduce this impact to a less-than-significant level. No other feasible mitigation is available to reduce this Impact to a less-than-significant level.

**Mitigation Measure NOI-1: Implement Noise- and Vibration-reducing Measures.** See Impact NOI-1 above for text.

**Rationale for Finding.** Mitigation Measure NOI-1 would minimize noise and vibration impacts associated with construction of the proposed project through various measures such as equipping equipment engines with mufflers or other noise-reducing features, shutting off equipment and machinery when not in use, tuning vibration-causing equipment, using noise and/or vibration shields, and notifying residences and other sensitive receptors within 500 feet of the project site prior to construction activities. However, as described in FEIR Volume 2, Section 3.11, this mitigation measure would not minimize such levels below the FTA threshold for exposure of residences. Given the number of other development projects planned in close proximity to the proposed project, the proposed project's contribution to significant cumulative noise impacts would be cumulatively considerable.

**Reference.** FEIR Volume 2, Section 4.3.3, page 4-17.

## 4. Finding on Growth-Inducing Impacts

According to State CEQA Guidelines § 15126.2(d), an EIR must discuss the growth-inducing impacts of a project. Specifically, an EIR must discuss ways in which the project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. This discussion is presented in Volume 2, Section 4.2 of the FEIR.

**Finding.** The Board finds that the Project would not induce substantial unplanned population growth in the city of Milpitas, Santa Clara County, or other nearby cities, would not generate a substantial demand for new housing, and would not remove an obstacle to growth. Therefore, the proposed project would not be growth-inducing.

**Rationale for Finding.** A project may induce growth by creating jobs that attract economic or population growth to the area, promoting the construction of homes that would bring new residents to the area, or removing an existing obstacle that impedes growth in the area.

The proposed project would not involve new development or infrastructure that could directly induce substantial population growth in the project area. Construction-related jobs would increase in the Bay Area in the short term and would be anticipated to draw from the existing work force. The proposed project would not displace any existing housing units or persons, or create any housing units. Minimal, if any, job growth would be associated with operation of the proposed project, and would not generate sufficient economic activity to result in substantial population growth.

Adequate flood protection is one type of public service, though not the only, that is needed to support additional growth in the city of Milpitas. Other factors that influence residential, commercial or industrial growth in the region include the general plans and other policies of Milpitas, Santa Clara County, and other nearby cities, as well as the availability of water supply, wastewater treatment and disposal capacity, public schools, and transportation services. Economic factors also affect development rates and locations of development.

The proposed project would provide improved flood protection for existing residents and businesses and new residential developments that are currently being constructed near the Lower Penitencia Creek flood zone. Increased flood protection is necessary since future flows within Penitencia Creek are expected to increase as a result of upstream land use changes. The city of Milpitas is highly built out and the proposed project would not change current land uses in the project vicinity. Future and ongoing development in the city of Milpitas has been addressed in the City's general plan and other land use planning documents. As previously stated, the proposed project would not increase future density of local housing development or significantly increase economic activity.

**Reference:** FEIR Volume 2, Section 4.2, page 4-1.

## 5. Findings on Rejected Mitigation Measures Suggested in DEIR Comments

Comments on the DEIR suggested two additional mitigation measures should be provided in addition to those described in the DEIR. The Native American Heritage Commission (NAHC) (Comment A-1) suggested

that a mitigation measure for inadvertent finds of Tribal Cultural Resources (TCRs) should be added to Section 3.5, *Cultural Resources*, of the DEIR. The NAHC (Comment A-2) also suggested that a mitigation measure for inadvertent finds of human remains should be added to the Cultural Resources section.

**Finding/Rationale.** The Board finds that changes or alterations have been required in, or incorporated into, the Project to adequately reduce this Impact. Specifically, District BMP CU-1 was revised in the FEIR to address inadvertent impacts to unknown TCRs and inadvertent finds of human remains. In addition, the text under Impact CR-2 has been revised to acknowledge that the District will comply with the processes outlined in Health and Safety Code Section 7050.5 and Public Resources Code 5097.98 as requested by NAHC.

**Reference:** FEIR Volume 1, pages 3-9 to 3-12.

## 6. Findings on Project Alternatives

Public Resources Code § 21002 provides that “public agencies should not approve projects as proposed if there are feasible alternatives...which would substantially lessen the significant environmental effects of such projects.” As described in Section III, “feasible” means “capable of being accomplished in a reasonable period of time taking into account economic, environmental, legal, social, and technological factors” (CEQA Guidelines § 15364). The concept of feasibility also encompasses whether a particular alternative promotes the Project’s underlying goals and objectives, and whether an alternative is impractical or undesirable from a policy standpoint. See *City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 410; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957.

The issue of alternatives feasibility arises twice in the CEQA process, once when the EIR is prepared, and again when CEQA findings are adopted. When assessing feasibility in an EIR, the EIR preparer evaluates whether an alternative is “potentially” feasible. Potentially feasible alternatives are suggestions by the EIR preparers which may or may not be adopted by lead agency decision makers. When CEQA findings are made after EIR certification, the lead agency decision making body independently evaluates whether the alternatives are actually feasible, including whether an alternative is impractical or undesirable from a policy standpoint. See *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957.

If a significant impact can be substantially lessened (i.e., mitigated to a less than significant level) by adoption of mitigation measures, lead agency findings need not consider the feasibility of alternatives to reduce that same impact. See *Laurel Hills Homeowners Association v. City Council* (1978) 83 Cal.App.3d 515. Nevertheless, Chapter 6 of the Project EIR and these Findings of Fact do consider the ability of potentially feasible alternatives to substantially reduce all of the Project’s significant impacts, even those impacts reduced to less-than-significant levels through adoption of mitigation measures.

### 6.1 Alternatives Considered in Detail in the EIR

#### 6.1.1 No Project Alternative

**Description.** CEQA Guidelines § 15126.6(e)(1) requires that the no project alternative be described and analyzed “to allow decision makers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project.” The no project analysis is required to discuss “the existing conditions at the time the notice of preparation is published...as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and

consistent with available infrastructure and community services" (CEQA Guidelines § 15126.6[e][2]).

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 and headwalls would not be added to the San Andreas Drive bridge. Ongoing maintenance activities, including sediment removal and vegetation management currently ongoing under the District's SMP, would continue in the future. This alternative would not meet the proposed project's primary objective of conveying Lower Penitencia Creek's 1-percent design flow, would not meet the required water surface elevations at the confluences with Coyote and Lower Berryessa creeks, would not maintain certification of the east levee or meet FEMA certification standards. Additionally, the alternative would not minimize the need for removal of sediment and non-woody vegetation.

**Comparative Impacts.** The No Project Alternative would avoid all of the impacts associated with construction of the proposed project because no construction or ground disturbing activities would occur. Impacts that would be avoided include temporary noise and ground-borne vibrations in proximity to sensitive receptors (considered significant and unavoidable), air pollutant emissions from construction equipment and vehicles, temporary impacts on water quality, traffic delays, and effects on biological resources. Future maintenance of the channel would continue under the District's SMP and sediment removal would occur more frequently than under the proposed project, resulting in greater periodic disturbance of aquatic and riparian habitat.

The existing flood management infrastructure within Lower Penitencia Creek would continue to function and convey the current 1-percent (or 100-year) design discharge of 4,830 cfs. However, because USACE's Upper Berryessa Creek Flood Risk Management Project and the District's Lower Berryessa Creek Flood Protection Improvements Project will increase upstream conveyance capacity, greater flows will be conveyed to Lower Penitencia Creek after construction of those two projects is completed. Lower Penitencia Creek's 1-percent flow is projected to increase to an estimated 6,900 cfs after completion of the Lower and Upper Berryessa Creek projects. Lower Penitencia Creek would lack capacity to convey those increased flows during the 100-year discharge event under this alternative. In the event of a 100-year flood event, the No Project Alternative would likely result in substantial flood damage to nearby land uses, including residential, office space, the District's maintenance roads, nearby public roads, I-880, and the Penitencia Creek Trail. Flood damage and subsequent clean-up efforts could result in significant environmental effects, including erosion; adverse water quality effects; and impacts on biological resources, cultural resources, traffic and circulation, noise, air quality, recreational resources, and utilities and service systems.

**Finding/Rationale:** The Board hereby finds that specific economic, legal, social, or other considerations make this alternative infeasible. Specifically, the Board hereby finds that this alternative is infeasible because it would not meet the following basic Project objective of conveying Lower Penitencia Creek's 1-percent design flow, would not meet the required water surface elevations at the confluences of Coyote and Lower Berryessa creeks, and would not maintain certification of the east levee or meet FEMA certification standards. Additionally, in the event of a 100-year flood event, the No Project Alternative could result in severe flood damage affecting nearby residential and commercial uses, and could threaten the safety of human lives.

**Reference:** FEIR Volume 2, Section 5.3.1, page 5-6.

### **6.1.2 Alternative 1: Reach 1 Raised Levee, Floodwalls, and Ongoing Sediment Removal**

**Description.** Under this alternative, the south bank levee in Reach 1 would be raised by about 4 feet but would not be relocated and would not involve creation of a wetland bench in Reach 1. Like the proposed project, floodwalls would be constructed in Reaches 2, 3, and 4, and headwalls would be constructed on the downstream and upstream sides of the existing San Andreas Drive bridge. Maintenance for Alternative 1 would involve periodic sediment removal in Reaches 2 and 4, which would be more frequent than under the proposed project. As with the proposed project, other routine maintenance activities would involve vegetation management along the channel and periodic maintenance and repair for the floodwalls and San Andreas Drive bridge headwalls.

The primary difference between this alternative and the proposed project is that the Reach 1 replacement levee would not be setback from the creek and a wetlands bench would not be created in Reach 1. Alternative 1 would meet the primary objective of conveying Lower Penitencia Creek's 1-percent design flow, would meet the required water surface elevations at the confluences with Coyote and Lower Berryessa creeks, would maintain certification of the east levee, and would meet FEMA certification standards. However, this alternative would not minimize the need for removal of sediment and non-woody vegetation.

**Comparative Impacts.** Alternative 1 would have less severe construction impacts associated with relocating the replacement levee and constructing the wetland bench in Reach 1 than the proposed project. Alternative 1 would have less potential to disturb special-status species and habitat used by special-status species in this area. Temporary impacts on aquatic resources would also be reduced because Reach 1 construction would mostly or completely avoid disturbance of the seasonal wetlands on the south bank.

Alternative 1 would result in similar construction-related impacts as the proposed project, including temporary transportation and traffic impacts, use of hazardous materials, air emissions, noise and vibration, and impacts on hydrology and water quality. Alternative 1 also would increase operational impacts associated with increased sediment removal in Reaches 2 and 4 compared to the proposed project. These would include emissions from operation of excavation equipment and impacts on biological resources and water quality. Future maintenance of the channel would continue under the District's SMP and sediment removal would occur more frequently than under the proposed project because the project is designed to accommodate greater accumulation of sediment before removal is required. More frequent sediment removal would result in periodic disturbance of aquatic and riparian habitat that would be greater than if the proposed project were implemented. Additionally, the enhancements to Reach 1 tidal wetlands included in the proposed project would not be achieved, and the current degraded and isolated conditions of Reach 1 wetlands, which provide marginal habitat value, would continue indefinitely.

**Finding/Rationale:** The Board hereby finds that specific economic, legal, social, or other considerations make this alternative infeasible. Specifically, the Board hereby finds that this alternative is infeasible and rejects this alternative for the following separate and independent reasons:

- Compared to the proposed project, this alternative would not fully meet the project objectives as it would not minimize the need for removal of sediment and non-woody vegetation.

- This alternative is undesirable from a policy standpoint because it would require more frequent sediment removal work in Reaches 2 and 4, and therefore result in somewhat greater operational impacts on air quality, traffic, noise, biological resources, and water quality. It would also not avoid or reduce any other significant impacts associated with the Project.

**Reference:** FEIR Volume 2, Section 5.3.3, page 5-7.

### ***6.1.3 Alternative 2: Reach 1 Raised Setback Levee, Reaches 1 and 3 Wetland Benches, and Floodwalls***

**Description.** Under Alternative 2, the south bank levee in Reach 1 would be relocated and raised by about 4 feet and a 50-foot-wide wetland bench would be established immediately south of the existing channel. Floodwalls would be constructed in Reaches 2, 3, and 4. In Reach 3, the west bank floodwall would have a total height of 18.5 feet when viewed from inside the channel, but it would be partially below grade and extend about 4 feet above the existing levee. In Reach 3, the west bank levee would be removed and a new depressed maintenance road would be required within the creek channel and be surfaced with articulated concrete blocks, adding about 1.2 acres of new hardscape to the channel. In Reach 3, a 25- to 45-foot-wide wetland bench would be constructed within the west side of the channel adjacent to the new depressed maintenance road. Wetland vegetation would be planted in the bench. The channel access road would be located between the floodwall and the wetland bench.

The primary differences between Alternative 2 and the proposed project are as follows: (1) the west bank floodwall in Reach 3 for Alternative 2 would be substantially taller (when viewed from inside the channel) than the floodwall proposed as part of the project; (2) Alternative 2 would include a wetland bench in Reach 3, which is not part of the proposed project; and (3) an in-channel maintenance road would be built at the base of the west bank floodwall in Reach 3.

**Comparative Impacts.** Compared to the proposed project, Alternative 2 may result in similar or greater impacts to aesthetic resources due to the taller floodwall on the west bank of Reach 3. Although the Reach 3 floodwall would only be 4 feet tall when viewed from areas outside the channel, due to construction of the wetland bench and depressed access road, it would be about 18.5 feet tall when viewed from within the channel or from the Penitencia Creek Trail on the east bank of the creek. This could result in greater visual impacts compared to the proposed project. Recreationists using the Penitencia Creek Trail would have unobstructed views of the taller floodwall and armored maintenance road at its base. The vegetation in the Reach 3 wetland bench would contribute to the aesthetic enjoyment for recreationists using the Penitencia Creek Trail.

The increased hardscape in the channel due to the taller Reach 3 floodwall and depressed maintenance road of Alternative 2 could result in increased pollutant flows to the creek, adversely affecting water quality. This would be partially offset by the wetland bench between the road and the creek channel, which would help to filter pollutants from storm runoff before they reach the creek.

Alternative 2 also would have greater construction-related impacts than the proposed project due to construction of the depressed maintenance road and wetland bench in Reach 3 (due to greater excavation required). Because the Reach 3 floodwall would be much taller than the floodwall proposed as part of the project, it may require a pile foundation, which would increase the amount of construction noise and

vibration affecting residences to the west of Reach 3. Alternative 2 would exacerbate the significant and unavoidable construction-related noise and vibration impacts resulting from the proposed project. Construction of the taller floodwall and depressed maintenance road components would result in increased haul truck trips (due to greater excavation and importing of construction materials) and therefore greater traffic impacts during construction. The excess soil generated by this alternative would be greater than for the proposed project; therefore, this alternative would exacerbate project-related impacts with regard to solid waste disposal. This alternative would also result in greater air emissions and noise impacts from operating equipment and vehicles.

The increased hardscape of Alternative 2 would replace existing aquatic and riparian habitat located on the side slope and base of the existing earthen levee which would be removed. Once construction is complete, Alternative 2 would create more wetland habitat than the proposed project, though Alternative 2 would also result in more impacts to riparian habitat than the proposed project. The wetland bench in Reach 3 would be planted with native species adapted to tidal conditions and may provide habitat for common and special-status species. Up to 3 acres of wetland vegetation would be established in this reach. This would be partially offset by the elimination of the Reach 3 central berm, which provides existing riparian habitat and would be retained by the proposed project.

**Finding/Rationale:** The Board hereby finds that specific economic, legal, social, or other considerations make this alternative infeasible. Specifically, the Board hereby finds that although this alternative would create more wetland habitat than the proposed project, this alternative is infeasible and rejects this alternative for each of the following independent reasons:

- This alternative is undesirable from a policy standpoint because it would result in greater impacts on existing riparian habitat and would create more in-stream hardscape through development of the depressed maintenance road.
- This alternative would also result in more adverse construction-related impacts associated with traffic, noise, vibration, hazards and hazardous materials, utilities and services systems, and air quality.

**Reference:** FEIR Volume 2, Section 5.3.4, page 5-8.

#### ***6.1.4 Alternative 3: Reach 1 Raised Levee, Reach 3 Concrete Channel Lining, and Floodwalls***

**Description.** Under Alternative 3, the south levee in Reach 1 would be raised by up to 4 feet but would not be relocated. Floodwalls would be constructed in Reaches 2, 3, and 4; the floodwall in Reaches 3 and 4 would be substantially shorter than the proposed project floodwalls. In Reach 3, the central berm would be excavated and removed. Throughout the entire length of this reach, the channel would be lined with concrete (trapezoidal shape, 1:1 side slopes). Maintenance of activities such as graffiti removal would likely be greater due to the amount of concrete that would be exposed in Reach 3. However, this alternative would reduce vegetation management activities compared to the proposed project and existing conditions. Like the proposed project, headwalls would be constructed on the downstream and upstream sides of the existing San Andreas Drive bridge.

The primary differences between Alternative 3 and the proposed project are as follows: (1) the Reach 1

levee would not be relocated and a wetland bench would not be constructed for Alternative 3; (2) the central berm in Reach 3 would be removed and replaced by a concrete-lined channel. Alternative 3 would meet the primary objective of conveying Lower Penitencia Creek's 1-percent design flow, would meet the required water surface elevations at the confluences with Coyote and Lower Berryessa creeks, would maintain certification of the east levee, and would meet FEMA certification standards. This alternative would only partially meet objective to minimize the need for removal of sediment and non-woody vegetation. Alternative 2 would minimize vegetation removal because about 8 acres of vegetation would be permanently replaced with concrete lining, but the need for future sediment removal would not be minimized.

**Comparative Impacts.** This alternative would reduce project impacts associated with relocation of the replacement levee and construction of a wetland bench in Reach 1. Because Alternative 3 would not include these features, which would involve substantial excavation and ground disturbance, it would avoid impacts on buried cultural resources and biological resources, including aquatic habitats and special-status species. However, it also would not realize the beneficial biological resources impacts from creating wetland habitat within the Reach 1 wetland bench. Additionally, concrete lining of Reach 3 would replace about 8 acres of existing aquatic and riparian habitat with concrete lining. The 8-acre increase in hardscape within the channel would have adverse effects on water quality as the pollutant-filtering properties of a natural vegetated channel bottom would be eliminated. Increased concrete lining would tend to raise water temperatures, which would diminish the channel's habitat value for aquatic special-status species.

Alternative 3 would result in greater construction-related traffic, noise, vibration, and air quality impacts due to excavation and removal of the Reach 3 berm and installing concrete lining in the Reach 3 channel. These activities would require substantially more haul truck trips in comparison to the proposed project. Lining the channel with concrete also would result in loss of about 8 acres riparian and aquatic habitat throughout Reach 3, most of which occurs on the berm and some of which is used by special-status species; this would adversely affect the ecological functions the existing creek channel may provide.

**Finding/Rationale:** The Board hereby finds that specific economic, legal, social, or other considerations make this alternative infeasible. Specifically, the Board hereby finds that this alternative is infeasible and rejects this alternative for each of the following reason:

- This alternative is undesirable from a policy standpoint because it would not reduce any significant impacts associated with the project including those on air quality, traffic, noise, and biological resources. In comparison to the proposed project, concrete lining of the channel would require substantially more haul truck trips and would likely have greater impacts on air quality, traffic, hazards and hazardous materials, and noise and vibration impact. This alternative could also result in greater impacts on water quality such as increased water temperature due to concrete lining of the channel.

**Reference:** FEIR Volume 2, Section 5.3.4, page 5-9.

## 6.2 Alternatives Rejected as Infeasible in the EIR

In addition to the alternatives described above, the DEIR considered but dismissed the following alternatives: Off-stream Detention Basin alternative, Bypass Channel to Coyote Creek alternative, an annual sediment removal alternative, and a Geomorphic Channel Planted with Woody Riparian Trees and Reduced Channel Access Roads Alternative.

### **6.2.1 Off-Stream Detention Basin Alternative**

**Description.** This alternative was considered in the District’s Planning Study Report (2016) and would involve constructing an off-stream detention basin. Based on the future 1-percent design flow of approximately 6,900 cfs on Lower Penitencia Creek at the Lower Berryessa Creek confluence, approximately 650 acre-feet of water would need to be detained. The RWQCB suggested considering off-stream detention as a flood management strategy in comment 5 of its EIR scoping comment letter dated July 28, 2015 (see Volume 3, Appendix A of the FEIR).

This alternative would require 43-65 acres of land near the creek to create a detention basin with a depth of 10-15 feet that would contain 650 acre-feet of flood water. In addition, this alternative would require acquisition of substantial amount of land, demolition of large numbers of existing structures, and possibly relocation of residents and/or businesses.

**Finding/Rationale:** The Board hereby finds that specific economic, legal, social, or other considerations make this alternative infeasible. Specifically, the Board hereby finds that this alternative is infeasible and rejects this alternative for each of the following independent reasons:

- This alternative would require far more earth movement than the proposed project and would result in greater construction noise impacts than the proposed project. For both the proposed project and this alternative, construction noise impacts would be significant and unavoidable, but the impact would be more severe for this alternative. Similarly, this alternative would result in more significant impacts to air quality, and traffic that would be more severe than for the proposed project.
- Given the high housing demands in Milpitas and greater Silicon Valley, it would be highly unlikely for the District to successfully acquire areas adjacent to the creek channel in urbanized Milpitas at a reasonable cost, which possibly includes costs to relocate nearby residential uses and businesses..

**Reference:** FEIR Volume 2, Section 5.4, page 5-10.

### **6.2.2 Bypass Channel to Coyote Creek Alternative**

**Description.** This alternative was considered in the planning phase of the project and is described in the District’s Planning Study Report (2016). 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. While a feasibility analysis has not been completed for this alternative, it 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, and design of this alternative may be constrained due to the presence of critical underground utility lines.

**Finding/Rationale:** The Board hereby finds that specific economic, legal, social, or other considerations make this alternative infeasible. Specifically, the Board hereby finds that this alternative is infeasible and rejects this alternative for each of the following independent reasons:

- 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).
- This alternative would be very costly as it would require the District to successfully acquire private parcels affected, which could possibly include relocating existing businesses.
- This alternative would entail substantial excavation and would likely result in greater construction impacts than the proposed project related to traffic, noise, air pollutant emissions, and greenhouse gas emissions and potentially greater impacts on residential and commercial uses.

**Reference:** FEIR Volume 2, Section 5.4, page 5-11.

### ***6.2.3 Annual Sediment Removal Alternative***

**Description.** Under this alternative, an increased volume of sediment would be removed from the channel on an annual basis, which is more frequent than existing conditions.

**Finding/Rationale:** The Board hereby finds that specific economic, legal, social, or other considerations make this alternative infeasible. Specifically, the Board hereby finds that this alternative is infeasible and rejects this alternative for each of the following independent reasons:

- This alternative would not meet the primary objective of conveying Lower Penitencia Creek's 1-percent design flow, would not meet the required water surface elevations at the confluences with Coyote and Lower Berryessa creeks, would not maintain certification of the east levee, and would not meet FEMA certification standards. This alternative would also not meet the objective to minimize the need for removal of sediment and non-woody vegetation.
- This alternative is also undesirable from a policy standpoint. Dewatering of the creek during the dry season is required to remove sediment, and would dry out the creek for several months. The disruption and drying of the creek would stress the ecosystem. Full regrowth of vegetation generally takes more than one year, thus annual sediment removal would prevent full revegetation of the creek channel. By conducting such work on an annual basis, only poor-quality habitat would develop.

**Reference:** FEIR Volume 2, Section 5.4, page 5-11.

### ***6.2.4 Geomorphic Channel Alternative - Planted with Woody Riparian Trees and Reduced Channel Access Roads***

**Description.** The RWQCB suggested this approach in comment 6 of its EIR scoping comment letter of July 28, 2015 (see FEIR Volume 3, Appendix A). This alternative would result in a wooded stream channel with higher roughness coefficients than the existing channel or the channel that would be constructed by the proposed project. To accommodate the design 1-percent flow, this alternative would require either enlarging the channel or constructing substantially higher floodwalls to convey the design flow.

**Finding/Rationale:** The Board hereby finds that specific economic, legal, social, or other considerations make this alternative infeasible. Specifically, the Board hereby finds that this alternative is infeasible and rejects this alternative for each of the following independent reasons:

- It is uncertain if the channel could be enlarged sufficiently (due to limited space on either side of the channel) or if floodwalls could be constructed of sufficient height to meet the project objectives of conveying Lower Penitencia Creek’s 1-percent design flow and meeting the required water surface elevations at the confluences with Coyote and Lower Berryessa creeks.
- If the design flow cannot be met, this alternative would not fully meet project objectives as it would not maintain certification of the east levee, and would not meet FEMA certification standards. It is unlikely that this alternative would meet the project objective of minimizing the need for removal of sediment and non-woody vegetation, as the entire project reach is tidal and even a geomorphic channel would be subject to ongoing deposition of tidal sediment.
- Enlarging the channel in Reaches 2, 3, and 4 would require the acquisition of substantial amounts of existing developed real estate and would be cost-prohibitive.
- Enlarging the channel option would require substantially more earth movement than the proposed project and would result in greater construction noise impacts than the proposed project. Construction noise impacts would be more severe under this alternative. Similarly, this alternative would result in significant impacts to air quality, and traffic that would be more severe than for the proposed project.
- If taller floodwalls were constructed, 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.
- The floodwall option would cost more to implement than the proposed project because floodwalls are relatively expensive to construct and construction costs increase significantly with increased wall height.

**Reference:** FEIR Volume 2, Section 5.4, page 5-12.

### 6.3 Rejection of Alternative Proposed in Comments on the Draft EIR

Comments on the DEIR suggested one alternative in addition to those described in the DEIR. The RWQCB (Comment C-17) suggested that the EIR evaluate an alternative that provides incremental flood control benefits aside from the offsite storage for 650-acre-feet of water.

**Finding/Rationale.** The Board finds that specific economic, legal, social, technological, or other considerations make hydroelectric plants infeasible, and hereby rejects this alternative. Specifically, the Board hereby finds that this alternative is infeasible and rejects this alternative for each of the following independent reasons:

- Based on the limited availability of floodplain area to provide such incremental flood control benefits, the District determined that such an alternative was not feasible. The Milpitas area is in extremely short supply of housing, including affordable housing. As there are no vacant

properties available for conversion to flood control purposes, this alternative was not considered.

- Such an alternative would also not meet the basic project objectives including the ability to convey the future 1-percent design flow from Lower Berryessa Creek.

**Reference:** FEIR Volume 1, Response to Comment C-17, page 3-55.

## 7. Absence of Significant New Information

The FEIR consists of the following: Responses to Comments on the DEIR (Volume 1), Main Body of the EIR (Volume 2), and Appendices (Volume 3). The Responses to Comments include comments made on the DEIR, responses to those comments, and minor revisions to the DEIR text in response to comments and other staff-initiated changes.

In addition, the Board was provided with and considered the proposed project's Mitigation Monitoring and Reporting Program (also Appendix I in the FEIR).

The comments, responses, and minor revisions to the DEIR text do not amount to significant new information, because they do not include identification of new or worsened significant impacts associated with the proposed project or mitigation measures, or new potentially feasible Project alternatives or mitigation measures considerably different from others previously analyzed that warrant consideration.

The Board hereby finds that responses to comments made on the DEIR, and the minor revisions to the DEIR text, merely clarify, amplify, or make insignificant modifications in an adequate EIR, and that this information is not "significant" within the meaning of CEQA Guidelines §15088.5. The Board further finds that incorporating the responses to comments and the minor revisions to the DEIR text does not deprive the public of a meaningful opportunity to comment on the Project or its effects, and that no information has been added to the DEIR that would warrant recirculation of the DEIR pursuant to CEQA Guidelines §15088.5. This finding is based upon all the information presented in the FEIR and the record of proceedings.

## 8. Statement of Overriding Considerations

### 8.1 Introduction

Section 15093 of the CEQA Guidelines states:

- CEQA requires the decision-making agency to balance, as applicable, the economic, legal, social, technological, or other benefits of a proposed project against its unavoidable environmental risks when determining whether to approve the project. If the specific economic, legal, social, technological, or other benefits of a proposed project outweigh the unavoidable adverse environmental effects, the adverse environmental effects may be considered acceptable.
- When the lead agency approves a project which will result in the occurrence of significant effects which are identified in the Final EIR but are not avoided or substantially lessened, the agency shall state in writing the specific reason to support its actions based on the final EIR

and/or other information in the record. The statement of overriding considerations shall be supported by substantial evidence in the record.

- (c) If an agency makes a statement of overriding considerations, the statement should be included in the record of the project approval and should be mentioned in the notice of determination. This statement does not substitute for, and shall be in addition to, findings required pursuant to Section 15091.

This Statement of Overriding Considerations describes the anticipated economic, social, and other benefits or other considerations of the Project to support the decision to proceed with the Project even though not all of the identified impacts are mitigated to a less-than-significant level.

## 8.2 Impacts that Remain Significant

After implementation of the mitigation measures adopted above, most of the adverse effects associated with the Project would be reduced to a less-than-significant level. However, some impacts would remain significant and unavoidable following the implementation of identified mitigation measures. Unavoidable adverse impacts are listed below. Section 3.3 describes in detail each significant unavoidable impact, feasible mitigation measures, and why it cannot be reduced to less-than-significant levels.

**Impact NOI-1:** Exposure of persons to or generation of noise levels in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies

**Impact NOI-2:** Exposure of persons to or generation of excessive groundborne vibration or groundborne noise levels

**Impact NOI-4:** A substantial temporary or periodic increase in ambient noise levels in the project vicinity above levels existing without the project

**Impact CUM-4:** Cumulative Impacts on Noise and Vibration

## 8.3 Overriding Considerations Justifying Project Approval

Having adopted all feasible mitigation measures, rejected as infeasible alternatives to the Project discussed above, and identified all significant and unavoidable impacts, the Board hereby balances the benefits of the Project against its significant and unavoidable impacts, and hereby finds that the Project’s benefits outweigh and override its significant and unavoidable impacts. The Board finds that the following Project benefits set forth below outweighs the Project’s significant and unavoidable impacts.

### 8.3.1 Increased Flood Protection

Implementation of the proposed project would prevent unacceptable flood risks in the communities surrounding Lower Penitencia Creek. The District Act, which establishes the District, cites flood protection within several of its objectives and purposes (see Sections 4(c)(1) and 4(c)(2) of the Act). Similarly, the District’s Ends Policy No. E-3 discusses a healthy and safe environment for residents, businesses and visitors, and establishes goals of providing flood protection and reducing potential for flood damage. Failure to provide this flood protection would put hundreds of homes and business at risk, with a large cost of recovery in the event of a flood. Other impacts of flooding may include closure of essential transportation arteries, interruptions in emergency service, likely losses of instruction time at area public

and private schools, loss of use of affected public facilities such as parks, and at the extreme, loss of human life. The proposed project would minimize these risks while also reducing the impacts of channel maintenance (e.g., sediment removal).

In consideration of flood protection needs, and the analysis of proposed project outcomes presented in the FEIR, the Board finds that the economic, social, and environmental benefits of meeting the proposed project's goals and objectives outweigh the significant and unavoidable noise and cumulative noise impacts associated with the proposed project.

## **9. Custodian of Records**

The documents and other materials that constitute the record of proceedings on which the Project findings are based are available from the Clerk of the Board at the Santa Clara Valley Water District, 5750 Almaden Expressway, San Jose, CA 95118. This information is provided in compliance with Public Resources Code § 21081.6(a)(2) and CEQA Guidelines § 15091(e).