



SIERRA CLUB

LOMA PRIETA

Serving San Mateo, Santa Clara and San Benito Counties

April 20, 2020

John Swiecki, AICP
Community Development Director
City of Brisbane
50 Park Place, Brisbane, CA 94005
Email: baylands@brisbaneca.org
Fax: (415) 467-5547

Baylands Specific Plan Scoping Comments

Dear Mr. Swiecki,

The Loma Prieta Chapter of the Sierra Club is pleased to submit the following comments on the Baylands Specific Plan.

Our organization and its thousands of members in the Bay Area are all working to protect the San Francisco Bay and its ecosystems and are greatly concerned with impacts of development in proximity to the Bay or to coastal streams on our natural resources. We have expressed concerns with this project in the past, and we remain concerned. Please accept the following comments.

Project description

Please make sure the project description describes any upgrades to utilities, service systems, and water supply infrastructure (including drinking water treatment and pumping/delivery) so the impacts of those upgrade projects will be analyzed. Include offsite as well and onsite upgrades that will be needed to support the development.

As much information as possible about the transfer agreement with Oakdale Irrigation District (OID) should be included as part of the EIR, so the impacts of that agreement can be analyzed. Analysis of impacts should not be piecemealed into a separate environmental document.

Some of the area is in the FEMA flood zone. In addition parts of the plan area are subject to inundation due to sea level rise within the life span of the proposed Development. Please include description of how the site will be raised and drained, without impact to the creek and the bay.

Regulatory Setting

- Please discuss how the Project will support the Delta Reform Act of 2009 (California Water Code Section 85021) policy to “reduce reliance on the Delta in meeting California's future water supply needs

through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency.”

- Please discuss the Project in the context of the latest applicable Urban Water Managements Plans (UWMPs), specifically the San Francisco Public Utility (SFPUC) UWMP, but also any other UWMPs that apply Brisbane’s water supply.

Approvals Needed

- In addition to the transfer agreement with OID, add the wheeling agreements that will be needed to transfer water through Modesto Irrigation District (MID) and the SFPUC.

Aesthetics

Since the new small city being conceived in this proposal will be within view of the residents of Brisbane and San Francisco, particularly housing developments on the hills surrounding the site, the greening of this new urban area is critical to the views of the site.

The Urban canopy of this development should be included as part of the description an mitigation for the Aesthetic degradation of what has essentially been an open space for over half a century

Green Roofs should be considered mandatory rather than optional and there should be no visible mechanical equipment on rooftops as these are particularly offensive viewed from above.

Biological Resources

Habitat:

Today, with ongoing fragmentation of habitat, small patches of remnant habitat have an increasingly important role in supporting the health of the larger ecosystems of the Bay Area and the species that comprise them. The San Francisco Estuary Institute has produced several recent reports highlighting the importance of small habitat patches in our regional ecological resilience, for example, see

https://www.sfei.org/sites/default/files/biblio_files/MarinBaylandsReport.pdf

Please evaluate habitat patches in detail and provide an EIR with comprehensive analysis of the importance of any habitat patch for the resilience of resident and migratory species.

In December 2019, the California Department of Fish and Wildlife (CDFW) and California Attorney General Xavier Becerra jointly provided an advisory to affirm that California law continues to provide robust protections for birds, including a prohibition on incidental take of migratory birds, notwithstanding the reinterpretation of the Migratory Bird Treaty Act (MBTA) by the U.S.

Department of the Interior (DOI)

Creek Setbacks

The biological consulting firm H.T. Harvey and Associates has recommended, in various cities, that no buildings taller than 55 be constructed within 300 feet of the top of bank along creeks. This distance is sufficiently broad to continue to allow adequate aerial movement space for birds that are entering, exiting, or flying in between creeks and buildings.

We suggest including wording for a height restriction zone, along the creek, be included to protect bird life along the waterway. Beyond this, taller buildings shall be allowed with bird-friendly design.

Water issues

- Analyze possible impacts of diverting additional water from stream sections in the Delta or its tributaries. Develop a baseline using information about where the 2,400 acre-feet of water annually Oakdale Irrigation District is offering is currently allocated.
- Include information on the locations of the interties between OID and MID and between MID and the Hetch Hetchy system so that impacts on instream flows, water temperature, and water quality can be evaluated. Specifically analyze these impacts on listed species such as Salmon and on water quality issues such as harmful algal blooms.

Bird-safe design

- Please study and discuss the glazing in terms of potential to cause bird collisions
- Please discuss light and glare in terms of bird collisions, and provide adequate mitigation to
- Reduce light pollution. For example, mitigations to prohibit uplighting, and provide a light-out program during bird migration periods.
- Please analyze avian flight patterns in the project area.

We maintain that the creek and its bank should be considered Riparian Habitat and an environmentally sensitive habitat.

Please also refer to the following resources:

Bird Friendly Design - Reduce building reflectivity, light pollution, transparency, etc. to prevent bird collisions with glazing in proposed commercial and residential buildings:

<https://www.go-gba.org/resources/green-building-methods/bird-friendly-design/>

References attached (or links):

1. List of references for bird safe design and the vulnerability of raptors, including Peregrine falcons, to collision with building and other man-made structures.
2. City of San Francisco Standards for Bird-Safe Buildings
3. Marine Baylands study - this is a link to a website:
https://drive.google.com/file/d/1DCP70OIB-j_dMKFPLV5u_q_ixrEIPFD8/view
4. California Dept. of Fish and Wildlife advisory
5. Letter from Dr. Christine Sheppard, Director, Glass Collisions Program, American Bird Conservancy
6. Santa Clara Valley Habitat Plan Riparian Setbacks

7. San Jose Riparian Corridor Policy Study

Tree Canopy:

Trees are a source of shade, air conditioning and other environmental benefits, providing quality of life and economic benefits to the community, residents and businesses.

Instead of the usual degraded ecology of standard mixed use high-density developments, please analyse the benefits to human and wildlife population. Use as a guideline the [Urban Habitat Design Guidelines](#) - and [Green Streets Guidelines](#) by Sierra Club Loma Prieta

Please consider including a requirement for a [Baylands Urban Forest Master Plan](#) to target an important area of environmental mitigation for GHG. The Urban Forest Master Plan's forest preservation goals will incorporate new landscape design requirements to address multiple goals including:

- Water Efficiency
- Native habitat for a healthy ecology
- Heat island effect mitigation
- Absorption of storm water
- Cleaner air
- Carbon sequestration
- Noise mitigation
- Soil improvement
- Climate mitigation
- Energy conservation thru shading
- Increase in walking and bicycling
- Mitigate GHGs

Land Use and Planning

The Brisbane Baylands Specific Plan proposes development of 2,200 residential units and 7 million square feet of commercial use (see Figure 4). Pursuant to the requirements of General Plan Amendment GP-1-18 and Measure JJ, residential uses would be limited to the northwestern portion of the site.

Three residential development types are proposed:

- High-density residential uses, which would consist of multi-family residential and mixed-use buildings that are generally 4 to 6 stories in height, with buildings up to 8 stories in specific locations to be identified in the Specific Plan.
- Medium-density residential uses, which would consist of townhomes 2 to 3 stories in height with rooftop decks.
- Low-density residential uses, which would consist of larger 3-story townhouse units.

Population & Housing

The bay area is in a profound housing crisis. Only a paltry amount of housing has been built in the Peninsula amid explosive job growth. From 2010 to 2017, San Mateo County added 83,000 new jobs, but only 7,100

new housing units — a 12-to-1 ratio. Housing experts say that a 2-to-1 ratio is needed to keep housing costs in check and 1-to-1 means balanced.

At the same time, developers added 7.34 million square feet of new commercial space in San Mateo County from 2008 to 2018, according to Yardi Matrix, a real estate data company. That's enough to house more than 30,000 workers. San Francisco Business Times, Oct 24, 2019

Particularly Problematic is the construction of enormous amounts of Office Space without the necessary increase in housing to balance to provide housing for the needed office workers and support staff.

On July 19, 2018, the City approved General Plan Amendment GP-1-18 permitting development of 1,800 to 2,200 dwelling units and up to 6.5 million square feet of non-residential use, with an additional 500,000 square feet of hotel use (total of 7.0 million square feet of non-residential development) within the Baylands Subarea.

Please analyze the environmental impact of the demand for more housing with a thoughtful and complete analysis of housing demand generated by the large amount of Office Space planned for this development.

Healthy Jobs / Housing Balance - According to the Building Industry Association and the California Department of Finance, a healthy jobs / housing balance is 1.5. (One full-time job and one part-time job per housing unit). Any ratio above 1.5 jobs per unit signifies there is an insufficient number of units to meet the needs of the local workforce. The EIR for the development should specify the anticipated number of jobs expected in the development and quantify the number of housing units expected to be needed to house those employees. Even if there is a numerical Jobs / Housing balance, there is often an imbalance in Jobs / Housing Fit (where employees have high enough income to afford the housing in their community). Jobs / Housing Fit should also be taken into consideration when reviewing new commercial developments.

Please also include the need for amount of low and very low income housing, in addition to moderate income housing that would be generated by this development.

Condo conversion: if multi-unit ownership housing is being considered, please include requirement for condo conversions to include required percentage of affordable, moderate, low income, and very low income units

It is not acceptable to ignore the cumulative demand on Baylands Development for housing created by other office developments on the peninsula. Nor is it acceptable to dismiss this need by suggesting that the workers will live elsewhere in the bay area, and therefore the project will have no environmental impact.

Commercial

Three types of commercial uses are proposed:

- High-Tech Commercial would be the densest commercial use, with buildings up that range from 6 to 10 stories in height with floor plates appropriate for high-end office usage.

- Biotech Commercial would cater to companies looking to set up small campuses for their practices. This commercial type would include buildings that are 3 to 5 stories in height and provide adequate space for the various requirements of the biotech industry.
- Campus Commercial would consist of large, single-tenant parcels catering to tech companies that want to invest in larger office campuses. This commercial type would be characterized by buildings 1 to 2 stories in height.

No. of employees – Total gross area of Office Space divided by 250sf – 150 sf per employee. Tech jobs are closer to 150sf / employee e.g. Facebook. Employees would include service workers in the facility.

Healthy Jobs / Housing Balance - According to the Building Industry Association and the California Department of Finance, a healthy jobs / housing balance is 1.5. (One full-time job and one part-time job per housing unit). Any ratio above 1.5 jobs per unit signifies there is an insufficient number of units to meet the needs of the local workforce. The EIR for the development should specify the anticipated number of jobs expected in the development and quantify the number of housing units expected to be needed to house those employees. Even if there is a numerical Jobs / Housing balance, there is often an imbalance in Jobs / Housing Fit (where employees have high enough income to afford the housing in their community). Jobs / Housing Fit should also be taken into consideration when reviewing new commercial developments.

Amenities needed:

The proposed development will result in a more than doubling of the existing residential population, requiring an expansion or addition of civic amenities such as libraries, community centers, senior centers, post offices, animal shelters, city hall offices, fire department and police.

According to the Applicant, the “specific internal programming content of Roundhouse will be determined as part of the design review and approval process for this structure.” For purposes of environmental analysis, a mix of retail, office, restaurant uses, along with public gathering and activity space, will be assumed for the Roundhouse.

We specifically suggest use of the Station Area Plan Guidelines and TOD guidelines by Sierra Club Loma Prieta

We also request attention to “walk-score” which measures the walkability of a proposed neighborhood with reference to access to grocery stores, schools, parks, restaurants, coffee shops, hospitals and clinics, entertainment, and retail for the services of daily life such as hardware stores, drug stores, banks, hair and nail salons, pet stores, vets, child-care, cleaners, farmers markets. transit locations, farmer's markets, and other nearby businesses along with ease of accessibility to nearby jobs without a car.

Pedestrian friendliness metrics include population density, average block length, narrowness of auto traffic lanes (to reduce speed to 15-20mph) and prioritizing a pedestrian /bicycle network.

Many cities are recognizing the importance of additional space needed to encourage people to walk, while decreasing the dominance of cars on public rights of way. Some cities are converting streets to no auto streets. A simple approach to a connected pedestrian network is [the Green Streets guidelines](#) by Sierra Club Loma Prieta.

Transportation

7 million sf of new office space will generate an incredible amount of new traffic.

Traffic at 101 and its exits, and Bayshore will increase significantly and cannot be mitigated.

With COVID-19 experience, many businesses have developed robust systems for remote working. This should reduce the amount of office space required by businesses.

Transportation Demand Management (TDM) as mitigation: It appears clear that given the impact of other developments, that TDM would now be required as mitigation for any new large development, of this size, along the already impacted freeway 101.

- Please analyze in detail how these effects can be reduced, or mitigated
- Please establish funding sources for these efforts.
- Please analyses specific TDM mitigation strategies including Transportation Management Associations¹.
- Please include remote satellite workspaces, with robust internet, in all the mixed use and housing developments so that workers can work close to home and avoid commuting.

Satellite Parking – Some cities, such as Portland, Oregon have low or no parking requirements in downtown buildings because the city provides public parking structures, in preferred locations, using “in-lieu” developer fees

Green House Gas (GHG) Emissions & Climate Change

- Please analyze in detail, using a checklist, how this development would affect the City Climate Action Plan goals and how these will be met in the schedule laid out.
- Please analyze a variety of means to mitigate the GHG effects of additional traffic and additional buildings on climate change. Suggest possible mitigations for the GHG and climate change, including:

Forestation – Growing new trees and improving the management of existing nearby forests. As forests grow they absorb CO₂ from the atmosphere and store it in living biomass, dead organic matter and soils.

Habitat restoration – Restoration of peatlands and coastal wetlands to increase their ability to store carbon. This also prevents carbon release through further degradation, often providing a number of other co-benefits

¹ Traffic Management Association – is a non-profit, member-controlled organization that provides transportation services in a particular area, such as a commercial district, mall, medical center or industrial park. They are generally public-private partnerships, consisting primarily of area businesses with local government support. 20 Way-finding System- Signage and other visual cues to help people move through a city and feel comfortable doing that because of the way-finding design 21 Bulk Transit Passes – Caltrain “Go Pass”
http://www.caltrain.com/Fares/tickettypes/GO_Pass.html ; SamTrans “Way2Go”
http://www.samtrans.com/fares/faretypes/Way2Go_Program.html 22 Community Benefit District - Established to monitor and enforce a Community Benefit

Carbon neutral concrete
Green roofs
Bioswales planting
Walking and bicycling networks & fewer fatalities
Decrease speeds of autos as GHG reductions are related to reduced speeds
Longer lifespans - reduction in asthma and pollution related diseases such as COPD
Working from home - provide broadband internet equipped satellite work centers in each block
Safe Routes to Schools – can remove up to 10% of morning traffic during commute hours.
and other strategies

Energy Resources

- Office buildings have moved to having a larger percentage of glass than would probably be allowed under new energy codes that went into effect on January 1, 2020. The project will need to comply with the new code and the building “skins” should comply with the revised energy requirements.
- Include in the energy analysis any energy needed to transfer, deliver and treat additional water required for this project, including energy to move water from OID to MID and from MID to SFPUC’s Hetch Hetchy system.
- Include the energy consumption of a Recycled Water facility including energy usage for the facility as well as energy required to transport the water back to the users for irrigation water. Note that not all plants can be watered with recycled water, as some are sensitive to the elevated levels of certain chemicals, such as salts.

Noise

Since the proposed development is in a “bowl” with residential development around on hill slopes, noise generated by this new use of the land, which has been essentially vacant for over half a century, will be very significant.

In the world today, noise has become one of the most pervasive forms of environmental pollution. Noise is everywhere. It affects our lives at home, at work, and at play. Wherever people live there is noise. Noise, by definition, is any unwanted or excessive sound. It can be a nuisance, interfering with sleep, work, or recreation.

There is one type of noise that can be effectively treated at its source: road noise. By paving roads and highways with quiet asphalt pavement, noise experienced both inside and outside homes and businesses can be significantly reduced.

Please analyze strategies to reduce noise both during construction but, more importantly, during the life of the project.

Roadway noise: Use sound absorbing asphalt to keep noise down into the surrounding hillside residential areas. **Rubberized asphalt concrete (RAC)**, also known as **asphalt rubber** or just **rubberized asphalt**, is noise reducing [pavement](#) material that consists of regular [asphalt concrete](#) mixed with [crumb rubber](#) made from [recycled tires](#).

Noise ordinances are starting to gain traction as urban noise increases to the detriment of human health and bird songs. Noise mitigation and Noise Standards – <http://www.governing.com/topics/urban/sl-noise-pollution.html>

Utilities, Service Systems, and Water

SEA LEVEL RISE

The recent BCDC study, on Sea Level Rise, by a consortium of state and local agencies states, “The findings in this report may cause some alarm.” But it argues that coordinated action is needed sooner rather than later — unlike how the Bay Area neglected its housing needs for decades, creating today’s high rents and mortgages that are driving lower-income residents out of the region.

“The Bay Area is at a tipping point, poised between a growing body of information ... and the beginnings of irreversible impacts,” the report states. “We know that rising sea levels are coming. And we know what the potential impacts will be.”

But much of the emphasis is on a raised water level of 48 inches, a number that corresponds to the “likely” amount of sea level rise forecast in the Bay Area for 2120 by the California Ocean Protection Council. More ominously, it’s an average level that could arrive as early as 2060 under the council’s “highest risk and least likely” model.

Please include analysis for sea level rise taking recent estimates by BCDC, released this year, into account.

Analyze water recycling vs reduced water usage at source: While water recycling may be useful, it is a highly energy intensive use. Energy is required for cleaning and filtering the wastewater and even more energy is required for pumping the water back to the buildings where it will be used in purple pipes for irrigation. A recycled water facility should only be considered after all waste water reduction strategies are in place – for example a greywater ordinance requiring greywater to be used at the source rather than going into the sewer system

Analyze the elimination of all storm drains: Some of the area is in the FEMA flood zone. In addition to the area is subject to inundation due to sea level rise within the life span of the proposed Development. Please include detail on how the site will be drained, without impact to the creek and the bay.

Analyze the elimination of storm drains and use, instead, bioswales associated with a systematic program of associated street tree planting, using high-habitat value trees and natives, instead.

Please discuss in greater detail a specific proposal for how the project will cover the anticipated costs, or its portion of the cost, for upgrading aging infrastructure that it may connect to, in order to protect the environment.

Water Quality

- Please analyze the impacts on water quality in the Bay as a result of additional discharges of treated waste water from water treatment plants.

Water Supply

- Impact on water supply to Oakdale Irrigation District customers, especially during dry years, needs to be identified and analyzed.

- Any impacts on water supply to secondary water rights holders downstream of OID due to the new use (water transfer) need to be identified and analyzed.

Alternatives to the proposed project.

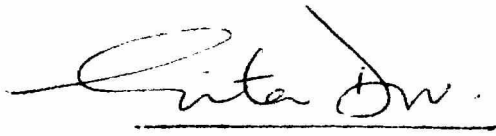
Consider a project with the proper jobs housing balance of 1.5 units/j to analyze what amount of office space is actually supported by the maximum 2,200 housing units.

Growth inducing effects.

Please analyze the effect on City of Brisbane and pressure to develop housing all over the hillsides currently open space.

Consider whether a measure is required to prevent decrease of open space and loss of the character of the City of Brisbane.

Respectfully Submitted

A handwritten signature in black ink, appearing to read "Gita Dev", is written over a horizontal line. The signature is cursive and includes a long, sweeping underline that extends to the right.

Gita Dev , FAIA
Sustainable Land Use Committee , Sierra Club Loma Prieta Chapter (SCLP)

&

Katja Irwin,
Conservation Committee Co-Chair, SCLP

CC James Eggers, Executive Director, SCLP

Raptor/Peregrine Collisions (Links to articles)

General Article

<https://goldengateaudubon.org/conservation/make-the-city-safe-for-wildlife/birds-and-collisions/>

Seattle

<https://urbanraptorconservancy.org/seattle-urban-raptors/threats-to-urban-raptors/collisions/>

GGRO

<https://www.parksconservancy.org/sites/default/files/PacificRaptor39.pdf>

Pg-25- Second paragraph below pic; Pg-26 – Table

The Peregrine Fund-Vision2050

<https://peregrinefund.org/sites/default/files/2019-12/Vision%202050.pdf>

Raptor Safe Initiative – Pg 217- Only focuses of Renewable Energy-Wind Turbine Effects

<https://www.fs.fed.us/database/feis/animals/bird/fape/all.html#Mortality>

General Hazards info- Mortality subheader- 3rd paragraph

<https://www.hawkmountain.org/raptors/peregrine-falcon>

General Note- Urban Area threats- Conservation Status Section of Article

Thesis- Assessment of Peregrine falcon Nesting Habitat in the SF Bay Area

https://scholarworks.sjsu.edu/cgi/viewcontent.cgi?article=8536&context=etd_theses

pg-93- Recommendations for Future Research

Bird-Friendly Building Designs

https://abcbirds.org/wp-content/uploads/2015/05/Bird-friendly-Building-Guide_20151.pdf

SF Planning Department -Bird Safe Designs

https://sfdbi.org/sites/default/files/Documents/Boards_and_Commissions/Green_Building_Subcommittee/Standards_for_Bird_Safe_Buildings_DRAFT_OCT2010.pdf



SAN FRANCISCO
PLANNING
DEPARTMENT

DESIGN GUIDE

Standards for Bird-Safe Buildings

THE FACTS

Over 100 million bird deaths annually

Reflective, transparent materials cause hazardous collisions

Birds attempt to reach shelter, food and migratory paths reflected in glass



THE CODE

Per San Francisco Planning Code Section 139, “Standards for Bird-Safe Buildings,” there are two types of bird hazards:

Location-Related Hazards: Buildings within 300 feet of an Urban Bird Refuge.

Building Feature-Related Hazards: Uninterrupted glazed segments 24 square feet or larger.

THE TRIGGERS

New Buildings

Additions

Alterations - replacing 50% or more of glazing

See back for treatment options >

Resources

Standards for Bird-Safe Buildings document
sfplanning.org/index.aspx?page=2506

Golden Gate Audubon
goldengateaudubon.org

American Bird Conservancy
abcbirdtape.org

U.S Fish and Wildlife Service
fws.gov

LEED Pilot Credit #55 Bird Façade
usgbc.org

Bird-Safe Building Treatments

Location-related hazards require facade treatment. Buildings with feature-related hazards are also required to treat hazards.

Applied to 90% of glazing from grade up to 60 feet (Bird Collision Zone)

Applied to 100% of Building Feature-Related Hazard

2x4 Rule Required: Patterns smaller than 4" tall by 2" wide

Glazing Options

- ▶ Glass that reflects the ultraviolet light (which birds can see) such as 'Ornilux'
- ▶ Glass which has photovoltaic cells embedded such as 'IQ Glass', or 'Voltalux'
- ▶ Dichroic glass
- ▶ Fritted glass such as *Viracon Silk-screen*
- ▶ Etched Glass
- ▶ Translucent glass such as 'Profilit'
- ▶ Film

Building & Fenestration Strategies

- ▶ Layering and recessing glazed surfaces
- ▶ Louvers
- ▶ Overhangs and awnings
- ▶ Screening
- ▶ Netting
- ▶ Angled or faceted glazing - minimize reflectivity
- ▶ Opaque surfaces
- ▶ Structurally break-up large expanses of glass

Additional Precautions: Lighting & Wind Generators

- ▶ Avoid beacon effect and blind spots
- ▶ Minimal external lighting
- ▶ No uplighting
- ▶ Shielded lighting
- ▶ No event searchlights
- ▶ Wind Generators must appear solid



Comparison of Different Treatments

Treatment	Upkeep	Longevity	Application	Cost
NETTING	*****	****	**	\$
FILM	****	***	****	\$
FRITTED/ETCHED	*****	*****	***	\$\$\$
UV/PV	****	*****	***	\$\$\$\$
SCREENS	****	****	**	\$\$
LOUVERS	*****	****	***	\$\$\$
5 STARS/\$ =	MINIMAL	DURABLE	EASY	PRICEY

Source: American Bird Conservancy, San Francisco Planning Department

Exceptions: Zoning Administrator Waivers

- ▶ **Bird collision zone treatment exempt for:** residential-zoned buildings less than 45 feet tall with limited glass facade (less than 50% glazing); building feature-related treatment still required.
- ▶ **More treatment required (95%) for:** residential-zoned buildings less than 45 feet tall with substantial glass facade (more than 50% glazing).
- ▶ May waive or modify requirements per recommendation of qualified biologist.



California Department of Fish and Wildlife and California Attorney General Xavier Becerra Advisory

Affirming California's Protections for Migratory Birds

November 29, 2018

The California Department of Fish and Wildlife (CDFW) and California Attorney General Xavier Becerra jointly provide this advisory to affirm that California law continues to provide robust protections for birds, including a prohibition on incidental take of migratory birds, notwithstanding the recent reinterpretation of the Migratory Bird Treaty Act (MBTA) by the U.S. Department of the Interior (DOI).

The Federal Government's Reinterpretation of MBTA

Section 2 of the MBTA makes it "unlawful *at any time, by any means or in any manner*, to pursue, hunt, take, capture, [or] kill ..." a wide variety of migratory birds, except as permitted by regulations. (16 U.S.C. § 703, emphasis added.) A bipartisan coalition of seventeen former leaders of DOI and the U.S. Fish and Wildlife Service recently confirmed that, since at least the 1970s, both agencies have consistently interpreted Section 2 of the MBTA to prohibit incidental

take of migratory birds.¹ “Incidental take” is take that is incidental to but not the intended purpose of an otherwise lawful activity. (See 16 U.S.C. § 1539(a)(1)(B).) In January 2017, the DOI issued a memorandum affirming this longstanding interpretation.

In December 2017, the acting Solicitor of the DOI issued a new memorandum now disclaiming the DOI’s longstanding interpretation of the MBTA as prohibiting incidental take of migratory birds. While three separate lawsuits, including one joined by the Attorney General, challenge the legality of the new memorandum and its consistency with the requirements of the MBTA, California’s protections for migratory birds, including a prohibition against incidental take, remain clear and unchanged.

California Law’s Protection for Birds

The protection of birds is of critical importance to both CDFW, which holds fish and wildlife resources in California in trust for the people of the State and has jurisdiction over the conservation, protection, and management of those resources (Fish and Game Code §§ 711.7(a) and 1802), and to the Attorney General, who enforces state law, including statutes protecting birds. (Cal. Gov. Code §§ 12607 and 12511.) California courts have affirmed the “legitimate and, indeed, vital nature of a state’s interest in protecting its natural resources, including wildlife within the State,” stressing the State’s “obligation and duty to exercise supervision over such resources for the benefit of the public generally.” (*People v. Maikhio*, 51 Cal.4th 1074, 1093-95 (2011).)

As identified below, California law contains a number of provisions prohibiting “take” of migratory birds. The California Fish and Game Code defines “take” for purposes of all of these statutes as “to hunt, pursue, catch, capture, kill, or attempt to hunt, pursue, catch, capture, or kill.” (Fish and Game Code § 86.) California courts have held that take includes incidental take and is not limited to hunting and fishing and other activities that are specifically intended to kill protected fish and wildlife. (See *Dept. of Fish and Game v. Anderson Cottonwood Irrigation Dist.*, 8 Cal.App.4th 1554, 1563-64 (1992) (“take” includes the killing of endangered species in the course of lawful activity; in that case, via unscreened diversions of water), citing *Churchill v. Parnell*, 170 Cal.App.3d 1094, 1098 (1985) (“take” includes the application of pesticides in water that kills fish).) More recently, in *Center for Biological Diversity v. Department of Fish and Wildlife*, 62 Cal.4th 204, 235-36 (2015), the California Supreme Court specifically stated that:

The broad definition of “take” in Fish and Game Code section 86 ensures that DFW can maintain legal control over actions interfering with threatened, endangered and fully protected animals even where those actions may not have been intended to kill or hurt the animal.

¹ See: <https://apps.washingtonpost.com/g/documents/national/letter-from-17-former-interior-officials-to-secretary-ryan-zinke-on-new-migratory-bird-treaty-act-policy/2708/>.

Unless the Fish and Game Code or its implementing regulations provide otherwise, under California law it is unlawful to:

- Take a bird, mammal, fish, reptile, or amphibian (Fish and Game Code § 2000);
- Take, possess, or needlessly destroy the nest or eggs of any bird (Fish and Game Code § 3503);
- Take, possess, or destroy any bird of prey in the orders *Strigiformes* (owls) and *Falconiformes* (such as falcons, hawks and eagles) or the nests or eggs of such bird (Fish and Game Code § 3503.5);
- Take or possess any of the thirteen fully protected bird species listed in Fish and Game Code section 3511;
- Take any non-game bird (i.e., bird that is naturally occurring in California that is not a gamebird, migratory game bird, or fully protected bird) (Fish and Game Code § 3800);
- Take or possess any migratory non-game bird as designated in the MBTA² or any part of such bird, except as provided by rules or regulations adopted by the Secretary of the Interior under the MBTA (Fish and Game Code § 3513);
- Take, import, export, possess, purchase, or sell any bird (or products of a bird), listed as an endangered or threatened species under the California Endangered Species Act unless the person or entity possesses an Incidental Take Permit or equivalent authorization from CDFW (Fish and Game Code § 2050 et seq.).

California hosts an incredible diversity of bird species, and over 600 species of migratory birds live in or migrate through California. CDFW and the Attorney General will continue to implement and enforce California law to protect these birds.

For more information regarding permit requirements for activities that may affect bird species, please visit <https://www.wildlife.ca.gov/Conservation/Environmental-Review> or contact CDFW staff for your region. To report the illegal take of birds and other wildlife, please call the CalTIP hotline at 1-888-334-2258 or visit <https://www.wildlife.ca.gov/enforcement/caltip>.

² “Migratory bird” is defined in federal regulations implementing the MBTA at 50 C.F.R. § 10.12. The list of species protected under the MBTA is set forth at 50 C.F.R. § 10.13.

Table 6-6. Recommended Setbacks to Preserve Riparian and Stream Function (from studies throughout the United States since 1990)

	Function	Citation	Recommended Setback
Physical Properties	Sediment and Nutrient Reduction	Corley et al. 1999	>33 feet
		Nichols et al. 1998	>60 feet
		Woodward and Rock 1995	>50 feet
		Desbonnet et al. 1994	80 feet
Petersen et al. 1992		>33 feet	
Castelle et al. 1992		>50 feet	
Schellinger and Clausen 1992		75 feet	
	Welsch 1991	>85 feet	
	Removal of Fecal Coliform	Johnson and Ryba 1992*	75–300 feet
	Moderation of Stream Temperature/Microclimate	Lynch and Corbett 1990	100 feet
	Channel Complexity	Brosofske et al. 1997	>145 feet
		Chapel et al. 1991	135–220 feet
Biological Properties	Salmonid Habitat	Ligon et al. 1999	>150 feet
		Welsch 1991	>85 feet
	Reptile/Amphibian Habitat	Burbink et al. 1998	>325 feet
		Semlitsch 1998	540 feet
		Buhlmann 1998	440 feet
		Rudolph and Dickson 1990	98 feet
	Bird Habitat/Diversity	RHJV 2000	250 feet
		Whitaker and Montevechi 1999	>160 feet
Hagar 1999		>130 feet	
Kilgo et al. 1998		>1,600 feet	
Richardson and Miller 1997		>160 feet	
Mitchell 1996		>325 feet	
Hodges and Kremetz 1996	>325 feet		
Spackman and Hughes 1995	450 feet for 90% of species diversity		
Mammal Habitat/Diversity	Hilty et al. 2006	>1,000 feet	
Plant Diversity	Spackman and Hughes 1995	30–100 feet for 90% of species	
General Riparian/Ecosystem Function	NH FSSWT 2000	100 feet, 300 feet, 600 feet by stream order	
	Spence et al. 1996	98–145 feet	
	Johnson and Ryba 1992*	> 98 feet	
	Chapel et al. 1991	160–650 feet	
	Welsch 1991	>85 feet	

* Article does not present new data, but instead is a review of existing data.

Table 6-7. Required Stream Setback Distances¹

Stream Category	Category 1 Streams		Category 2 Streams
	Inside Existing Urban Service Area ²	Outside Existing Urban Service Area ²	
Slope Class			
0–30%	100 feet	150 feet	35 feet
> 30%	150 feet	200 feet	

¹ All distances measured from top of bank. For Category 1 streams, if the edge of riparian vegetation extends beyond setback, the riparian edge becomes the setback plus a 35-foot buffer from riparian edge inside or outside the Urban Service Area. For Category 2 streams, if the site supports riparian vegetation, the setback will extend from the riparian edge plus a 35-foot buffer.

² Urban service areas existing at the time of permit issuance for the Habitat Plan.

provide for recreational use, the City of San Jose commissioned this Riparian Policy Corridor Study in 1992.

THE DEFINITION OF RIPARIAN CORRIDOR

Any statement of policy needs to clearly define the extent to which it applies. The issue of riparian/stream corridor policy and policy guidelines is particularly complex because there is no accepted standard riparian corridor definition. Municipalities throughout California use several different approaches for defining riparian corridors; these range from physical attributes (i.e., diagnostic vegetation, stream morphology [physical form, shape, and size], or hydrology [capacity to convey floodwaters]), relative importance in relationship to arbitrary standard width, mapping approaches, and combinations, thereof.

"Riparian" is generally used as an adjective to modify other terms. Although it may be narrowly applied to refer to streambank areas only, it may be more broadly defined as

"pertaining to the banks and other adjacent terrestrial (as opposed to aquatic) environs of freshwater bodies, watercourses, estuaries, and surface-emergent aquifers (springs, seeps, oases), whose transported freshwaters provide soil moisture sufficiently in excess of that otherwise available through local precipitation to potentially support growth of mesic vegetation."
(Warner 1984)

In determining a suitable riparian corridor definition for the City of San Jose, a number of different approaches to the definition, as used by various jurisdictions, were reviewed. Based upon this review, coupled with the riparian corridor inventory conducted as part of this study, both a standard definition and a map-based delineation are provided (see

Figure 1 and the map set entitled *Riparian Corridor Policy Study - Resource Inventory*).

For purposes of this study, a riparian corridor includes any defined stream channels including the area up to the bank full-flow line, as well as all riparian (streamside) vegetation in contiguous adjacent uplands. Characteristic woody riparian vegetation species could include (but are not limited to): willow, *Salix* sp.; alder, *Alnus* sp.; box elder, *Acer negundo*; Fremont cottonwood, *Populus fremontii*; bigleaf maple, *Acer macrophyllum*; western sycamore, *Platanus racemosa*; and oaks, *Quercus* sp. Stream channels include all perennial and intermittent streams shown as a solid or dashed blue line on USGS topographic maps, and ephemeral streams or "arroyos" with well-defined channels and some evidence of scour or deposition.

Riparian corridors are often referred to as "sensitive resource areas" and/or "sensitive wildlife habitat". These terms are derived from state and federal Endangered Species Acts that protect species and their habitat that are listed as endangered or threatened, or proposed for such listing. The California Environmental Quality Act (CEQA) also recognizes "species of special concern" and their habitats; they are not specifically protected by the Endangered Species Act, but they are recognized as declining species. Since riparian corridors may provide habitat for endangered species and/or Species of Special Concern, they are often referred to as "sensitive resource/wildlife habitat areas".

A map-based riparian definition relies on the availability of inventory data and the ability of the City to refine and add to the mapped data base as staff time allows and/or development project applications are submitted to the City for review/approval. The riparian corridors within the City's Urban Service Area and Urban Reserves were mapped as part of this study and provide a baseline inventory of the City's riparian corridor resources (*Riparian Corridor Policy Study - Resource Inventory*).

Because of their size, the maps cannot be included in this document and are available for inspection in the Department of City Planning and Building. These maps are an integral part of the City's riparian policies and may be subject to more site-specific mapping and refinement dependent upon potential future development on affected properties and future studies that provide more detailed boundary delineation (e.g., riparian corridor inventory project currently funded by the EPA). With this approach the City can continue to refine its identification of riparian corridors, thus assisting both property owners and the City to make appropriate development decisions.