



November 16, 2020

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Re: San Jose Flea Market Planned Development Rezoning Project Draft Environmental Impact Report

The Santa Clara Valley Audubon Society (SCVAS) and the Sierra Club Loma Prieta Chapter thank you for the opportunity to provide comment on the Draft Environmental Impact Report (DEIR) for the Planned Development Rezoning of the southern 61.5-acre portion of the Flea Market site from the A(PD) Planned Development Zoning District to a new A(PD) Planned Development Zoning District (PDC17-051). SCVAS was founded in 1926, and is one of the largest National Audubon Society chapters in California. SCVAS' mission is to promote the enjoyment, understanding, and protection of birds and other wildlife by engaging people of all ages in birding, education, and conservation. SCVAS has engaged in the protection of riparian and aquatic ecosystems in Santa Clara Valley for decades. Our members have a strong interest in projects that could impact creeks, rivers, and other biological resources. The Sierra Club Loma Prieta Chapter has adopted protection of creeks and riparian ecosystems and preservation of wildlife linkages as advocacy priorities. For example, the Chapter advocates for riparian setbacks, bird-safe design, minimization of light pollution, and fish passage and habitat improvements.

Here are our comments:

1) Conflict with Santa Clara Valley Habitat Plan/ Native Communities Conservation Plan (VHP)

The project proposes: "Project development under both Option 1 and Option 2 would encroach into and impact the minimum 35-foot Habitat Plan allowable setback of the Coyote Creek and Upper Penitencia Creek riparian corridors." There is no defensible rationale for the City to request such a significant exception to the VHP, which was approved and adopted after a long and difficult process, and which the City participated in as a Local Partner.

The VHP designates Coyote Creek and Upper Penitencia Creek as category 1 streams, requiring 100-ft setback from the riparian corridor/top of the bank. Condition 11 of the VHP provides a process for allowing reduced setbacks, but cautions and stipulates, ***"Regardless of project location, stream setback exceptions may not reduce a Category 1 stream setback to less than a distance of 50 feet for new development or 35 feet for existing or previously developed sites with legal buildings and uses"***. This includes roads and most structures.

Thus, the project is inconsistent with the adopted Santa Clara Valley VHP – a significant and unavoidable impact, and an unjustifiable breach of the VHP multi-agency agreement. The proposed mitigation (MM BIO-2.1) seeks to bypass VHP requirements and is thus flawed and unacceptable. The City of San Jose should not be permitted to adhere to the VHP when it is convenient, and to ignore it when it is inconvenient. The project must be redesigned to comply with the VHP and adhere to the 100-ft setback, or apply for an exemption to allow a 35-ft setback, no less.

2) The proposed project does not follow the City of San Jose's General Plan Riparian Corridor Protection and Bird-Safe Design Policy 6-34.

Policy 6-34 provides that a reduced setback may be considered under limited circumstances such as "There is no reasonable alternative for the proposed Riparian Project that avoids or reduces the encroachment into the Setback Area." We are familiar with the site and we are confident that reasonable alternatives that maintain a minimum of 35-ft from the waterways can be designed.

3) The proposed project is in conflict with multiple policies from the Envision 2040 General Plan.

- Chapter 1 – Living Amidst Abundant Natural Resources
- Goal ER-2 – Riparian Corridors "Preserve, protect, and restore the City's riparian resources in an environmentally responsible manner to protect them for habitat value and recreational purposes."
 - Policy ER-2.1. – Ensure new public and private development adjacent to riparian corridors...consistent with SCVHCP and SJ riparian policy
 - Policy ER-2.2. – Ensure that a 100-foot setback from riparian habitat is the standard to be achieved in all but a limited number of instances, only where no significant environmental impacts would occur.
 - Policy ER-2.3. – Protect riparian corridors from encroachment of lighting

4) Artificial Light at Night and Bird Collisions

The incremental and cumulative impacts of Artificial Light at Night on all living organisms and on ecosystems are not disputable (see references¹ and attached bibliographies) and it is increasingly evident that lights attract birds to areas where they are vulnerable to collision with man made structures. The risk is substantial at all building heights, and increases with proximity to waterways.

The creek corridors at the project site are relatively dark at night at the time this letter is written. Due to street lighting and urban development, the project will increase ambient light all along the creek corridors, within the 100-ft setback and beyond. To mitigate the risk, all buildings and

¹ Sanders, D., Frago, E., Kehoe, R. et al. A meta-analysis of biological impacts of artificial light at night. *Nat Ecol Evol* (2020). <https://doi.org/10.1038/s41559-020-01322-x>

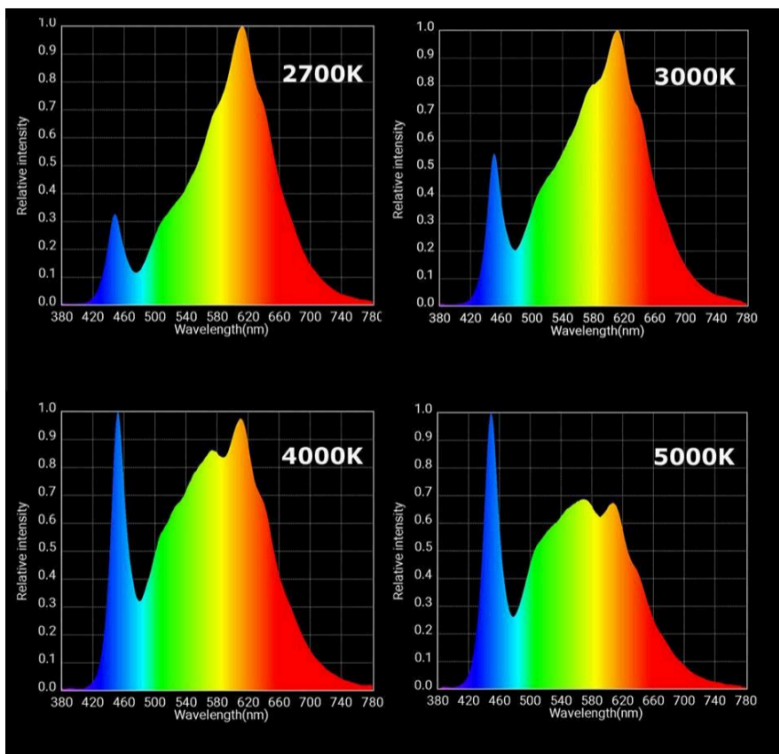
Elizabeth Perkin et al. The influence of artificial light on stream and riparian ecosystems: questions, challenges, and perspectives. 2011. <https://esajournals.onlinelibrary.wiley.com/doi/10.1890/ES11-00241.1>

Catherine Rich and Travis Longcore (Editors). *Ecological Consequences of Artificial Night Lighting*. 2006. <http://www.urbanwildlands.org/ecanlbook.html> and <http://urbanwildlands.org/Resources/LongcoreRich2004.pdf>

structures within 300-ft of the creek corridor must be retrofitted to provide visual cues and protect birds from collisions.

Mitigation for Impact BIO-4 should require all lighting in the project to be shielded from the dark sky and avoid spillover. In addition, within the 100-ft creek corridor the light fixtures should be adjustable and require dimming at midnight, and color temperature should not exceed 2700 Kelvin.

Probably the most important criteria for lighting is color temperature. This is important because LED lighting emits a pronounced peak of blue wavelength light. Research has shown that Blue light is the most damaging to circadian rhythms in organisms, and is one of the drivers of the "insect apocalypse"². For the entire project beyond the 100-ft riparian corridor, light temperature should not exceed 3000K.



LED emits a spike of blue wavelength light, which is more pronounced at temperature higher than 2700K.

5) Nesting birds

MM BIO-6.1 proposes, “to the extent feasible, construction activities shall be scheduled to avoid the nesting seasons...from February 1 through August 31, inclusive.” The most likely nesting area is the riparian corridors of both Coyote and Upper Penitencia Creeks. In the thick riparian forest on the site, identifying nests is not a feasible mitigation as it is simply not realistic. Thus, MM BIO-6.2 should not apply to in-channel construction. In-channel construction activities, including channel dewatering, would be limited to the dry season outside of the nesting season, thus it should occur only September 1 through October 15.

² <https://www.smithsonianmag.com/smart-news/light-pollution-contributes-insect-apocalypse-180973642/>

6) Construction dewatering and dewatering during occupancy

Because shallow groundwater on the project site is likely present at depths of approximately five to 15 feet, and excavation could extend to 25 feet below grade, project development will likely require groundwater pumping and dewatering both during construction and long-term. Please add additional analysis and mitigation measures to address the possible impacts on Coyote Creek and Penitencia Creek resulting from dewatering for underground construction.

Biological resources. Include a mitigation measure stipulating that, between March 1 and October 31, the discharge of water from the construction site into Coyote Creek shall be prohibited if the temperature of the water exceeds 72° F unless modeling studies and monitoring demonstrates that the volume of the discharge will not increase the maximum daily stream temperatures above 75.2° F. Prohibit discharges until the discharged water is cooled below the average daily stream temperature at the discharge point or maximum daily stream temperatures drop below 75° F.

Hazardous Materials. Please add more discussion about water quality impacts related to dewatering. Due to the potential hazardous soils on the site, release of toxic groundwater to Coyote Creek and Upper Penitencia Creek during construction dewatering is a reasonably foreseeable upset that may release hazardous materials into the environment. Please include a mitigation measure requiring approval of a groundwater management strategy for dewatering to be approved prior issuance of building permits. Also, stipulate that the required site-specific Health and Safety Plan be prepared by an environmental professional and include provisions for the on-site management and/or treatment of contaminated groundwater during extraction or dewatering activities. Please also show a proposed location for this treatment facility on one of the site plans provided with the DEIR.

7) Hydrology and Water Quality

Under Regulatory Framework, please include a discussion of the City of San Jose Green Stormwater Infrastructure Plan. Also, in order to evaluate the impacts of dewatering to allow for underground parking, please document the follow details in the DEIR:

1. The estimated amount of dewatering to be required for the project including the days and hours dewatering will take place, the number of months this will take place, the volume of water to be produced (discharge per minute) during dewatering, and total groundwater pumping in acre feet.
2. Include both groundwater dewatering and dewatering of rainwater accumulated at the bottom of the excavation site.
3. Describe where and how dewatering effluent will be contained prior to discharge, and where it will be discharged into the storm or sanitary sewer system once pollutant levels are deemed acceptable.
4. Include a mitigation measure to require periodic reports during dewatering documenting current groundwater levels, pumping rates, pumped water quantity, and adherence to water quality standards.
5. Include a mitigation measure to limit dewatering during the rainy season (between November and March) to minimize stream or storm drain capacity issues.
6. Under the NPDES permit, the project should maximize opportunities for infiltration and evapotranspiration, and use of stormwater as a resource. Add a mitigation measure to require use of stormwater as a resource to reduce runoff and restore natural hydrologic functions (rainwater harvesting for non-potable uses, installation of pervious paving, etc).

We thank you for the opportunity to provide comment



Shani Kleinhaus, Ph.D.,
Environmental Advocate



Katja Irvin, AICP
Conservation Committee Co-chair
Sierra Club Loma Prieta Chapter

Attachments:

1. Impact of lighting on bird navigation, orientation and mortality
2. Bird collisions with glass: an annotated bibliography