



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Central Region
1234 East Shaw Avenue
Fresno, California 93710
(559) 243-4005
www.wildlife.ca.gov

GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director



October 23, 2019

Governor's Office of Planning & Research

OCT 23 2019

STATE CLEARINGHOUSE

Stephanie Tadlock
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, California 95670

**Subject: Bobcat Flat Phase III Salmon Habitat Restoration Tuolumne River
(Project)
Mitigated Negative Declaration (MND)
State Clearinghouse No. 2019099079**

Dear Ms. Tadlock:

The California Department of Fish and Wildlife (CDFW) received a Mitigated Negative Declaration from the Central Valley Regional Water Quality Control Board for the above-referenced Project pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that may affect California fish and wildlife. Likewise, CDFW appreciates the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under Fish and Game Code.

CDFW ROLE

CDFW is California's **Trustee Agency** for fish and wildlife resources and holds those resources in trust by statute for all the people of the State (Fish and Game Code, §§ 711.7, subd. (a) & 1802; Pub. Resources Code, § 21070; CEQA Guidelines § 15386, subd. (a)). CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (*Id.*, § 1802). Similarly, for purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public agency environmental review efforts, focusing specifically on projects and related activities that have the potential to adversely affect fish and wildlife resources.

¹ CEQA is codified in the California Public Resources Code in section 21000 et seq. The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

CDFW is also submitting comments as a **Responsible Agency** under CEQA (Pub. Resources Code, § 21069; CEQA Guidelines, § 15381). CDFW expects that it may need to exercise regulatory authority as provided by the Fish and Game Code. As proposed, for example, the Project may be subject to CDFW's lake and streambed alteration regulatory authority (Fish & Game Code, § 1600 et seq.). Likewise, to the extent implementation of the Project as proposed may result in "take" as defined by State law of any species protected under the California Endangered Species Act (CESA) (Fish & Game Code, § 2050 et seq.), related authorization as provided by the Fish and Game Code will be required.

Nesting Birds: CDFW has jurisdiction over actions with potential to result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections that protect birds, their eggs and nests include sections 3503 (regarding unlawful take, possession or needless destruction of the nest or eggs of any bird), 3503.5 (regarding the take, possession or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful take of any migratory nongame bird).

Water Pollution: Pursuant to Fish and Game Code Section 5650, it is unlawful to deposit in, permit to pass into, or place where it can pass into "Waters of the State" any substance or material deleterious to fish, plant life, or bird life, including non-native species. It is possible that without mitigation measures, implementation of the Project could result in pollution of Waters of the State from storm water runoff or Project-related erosion. Potential impacts to the wildlife resources that utilize the Tuolumne River include the following: increased sediment input from road or structure runoff; and toxic runoff associated with development activities and implementation. The United States Army Corps of Engineers also have jurisdiction regarding discharge and pollution to Waters of the State.

In this role, CDFW is responsible for providing, as available, biological expertise during public agency environmental review efforts (e.g., CEQA), focusing specifically on project activities that have the potential to adversely affect fish and wildlife resources. CDFW provides recommendations to identify potential impacts and possible measures to avoid or reduce those impacts.

PROJECT DESCRIPTION SUMMARY

Proponent: Central Valley Regional Water Quality Control Board

Objective: The Project proposes to restore, increase, and enhance the quantity and quality of salmonid (Central Valley fall run Chinook salmon (*Oncorhynchus tshawytscha*) and Central Valley steelhead (*Oncorhynchus mykiss*)) spawning and rearing habitat and improve habitat for waterfowl and other aquatic and terrestrial species between River Miles 43.5 to 44.5 within and adjacent to the Tuolumne River by:

- Reestablishing natural floodplain processes through channel contouring and connections;
- Replenishing spawning gravel through augmentation; and
- Bank re-vegetation and riparian habitat preservation activities promoting both wetland and upland native plant communities.

Location: The Project site is located approximately 11 miles east from Waterford, between River Miles 43.5 to 44.5 of the Tuolumne River.

Timeframe: Unspecified.

COMMENTS AND RECOMMENDATIONS

CDFW offers the following comments and recommendations to assist Central Valley Regional Water Quality Control Board in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources. Editorial comments or other suggestions may also be included to improve the document.

Currently, the MND indicates that the Project's impacts would be less than significant with the implementation of mitigation measures described in the MND. As currently drafted, the mitigation measures described are insufficient in reducing impacts to a level that is less than significant. In particular, CDFW is concerned regarding the adequacy of mitigation measures for special-status species including, but not limited to, the State threatened Swainson's hawk (*Buteo swainsoni*), the State fully protected white-tailed kite (*Elanus leucurus*), the State endangered and fully protected bald eagle (*Haliaeetus leucocephalus*), and the State species of special concern western pond turtle (*Actinemys marmorata*). CDFW recommends that the CEQA document provide quantifiable and enforceable measures, as needed, that will reduce impacts to less than significant levels.

I. Environmental Setting and Related Impact

Would the Project 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 CDFW or the United States Fish and Wildlife Service?

COMMENT 1: Swainson's Hawk (SWHA)

Issue: SWHA have the potential to nest within and near the Project site (CDFW 2019). The proposed Project will involve activities near large trees that may serve as potential nest sites.

Specific impacts: Without appropriate avoidance and minimization measures for SWHA, potential significant impacts that may result from Project activities include: nest abandonment, loss of nest trees, loss of foraging habitat that would reduce nesting success (loss or reduced health or vigor of eggs or young), and direct mortality. Any take of SWHA without appropriate incidental take authorization would be a violation of Fish and Game Code.

Evidence impact is potentially significant: SWHA exhibit high nest-site fidelity year after year and lack of suitable nesting habitat in the San Joaquin Valley limits their local distribution and abundance (CDFW 2016). Approval of the Project may lead to ground-disturbing activities that will involve noise, groundwork, and movement of workers that could affect nests and has the potential to result in nest abandonment, significantly impacting local nesting SWHA.

Recommended Potentially Feasible Mitigation Measure(s)

Because suitable habitat for SWHA is present throughout the Project site, CDFW recommends conducting the following evaluation of the Project site, editing the MND to include the following measures specific to SWHA, and that these measures be made conditions of approval for the Project.

Recommended Mitigation Measure 1: SWHA Surveys

To evaluate potential impacts, CDFW recommends that a qualified wildlife biologist conduct surveys for nesting SWHA following the survey methods developed by the Swainson's Hawk Technical Advisory Committee (SWHA TAC, 2000) prior to project implementation. The survey protocol includes early season surveys to assist the project proponent in implementing necessary avoidance and minimization measures, and in identifying active nest sites prior to initiating ground-disturbing activities.

Recommended Mitigation Measure 2: No-disturbance Buffer

The MND has indicated that a 300-foot buffer will be implemented around active raptor nests. If ground-disturbing activities are to take place during the normal bird breeding season (February 1 through September 15), CDFW recommends that additional pre-activity surveys for active nests be conducted by a qualified biologist no more than 10 days prior to the start of Project implementation. CDFW recommends a minimum no-disturbance buffer of ½-mile be delineated around active SWHA nests until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or parental care for survival.

Recommended Mitigation Measure 3: SWHA Take Authorization

CDFW recommends that in the event an active SWHA nest is detected during surveys and implementation of a ½-mile no-disturbance buffer is not feasible, consultation with CDFW is warranted to discuss how to implement the project and avoid take. If take cannot be avoided, take authorization through the issuance of an Incidental Take Permit, pursuant to Fish and Game Code Section 2081(b) is necessary to comply with CESA.

COMMENT 2: Fully Protected Raptors

Issue: The State fully protected white-tailed kite and the State endangered and fully protected bald eagle have the potential to nest and/or forage in the vicinity of the Project site (CDFW 2019). Without appropriate mitigation measures, Project activities conducted within occupied territories have the potential to significantly impact these species.

Specific Impacts: Potentially significant impacts that may result from Project activities include nest abandonment, loss of nest trees, and/or loss of foraging habitat that would reduce nesting success (loss or reduced health or vigor of eggs or young), and direct mortality.

Evidence impact would be significant: The Project will involve noise, groundwork, and movement of workers that may occur directly adjacent to large trees and other features with potential to serve as nest sites along the Tuolumne River and thus have the potential to significantly impact fully protected raptor populations.

Recommended Potentially Feasible Mitigation Measure(s)

To evaluate potential impacts to fully protected raptors, CDFW recommends conducting the following evaluation of the Project site(s) and editing the initial study/mitigated negative declaration (IS/MND) to include the following.

Recommended Mitigation Measure 4: Fully Protected Raptor Habitat Assessment

CDFW recommends that a qualified biologist conduct a habitat assessment in advance of Project implementation, to determine if the Project site or its vicinity (within ½-mile) contains suitable habitat for fully protected raptors.

Recommended Mitigation Measure 5: Fully Protected Raptor Surveys

CDFW recommends that focused surveys be conducted by experienced biologists at the Project site prior to Project implementation. To avoid impacts to these species, CDFW recommends conducting these surveys in accordance with protocols developed by CDFW (CDFG 2010). If Project activities are to take place during the typical bird breeding season (February 1 through September 15), CDFW recommends that additional pre-activity surveys for active nests be conducted by a qualified biologist no more than 10 days prior to the start of Project activity.

Recommended Mitigation Measure 6: Fully Protected Raptor Avoidance

In the event a fully protected raptor species is found within ½-mile of the Project site, implementation of avoidance measures is warranted. CDFW recommends that a qualified wildlife biologist be on-site during all Project-related activities and that a ½-mile no-disturbance buffer be implemented. If the ½-mile no-disturbance buffer cannot feasibly be implemented, contacting CDFW for assistance with additional avoidance measures is recommended. Fully addressing potential impacts to fully protected raptor species and requiring measurable and enforceable mitigation in the IS/MND is recommended.

COMMENT 3: Western pond turtle (WPT)

Issue: WPT have the potential to occur in the Project site. WPT are known to nest in the spring or early summer within 100 meters of a water body, although nest sites as far away as 500 meter have also been reported (Thomson et al. 2016).

Specific impact: Without appropriate avoidance and minimization measures for WPT, potentially significant impacts associated with Project activities could include nest reduction, inadvertent entrapment, reduced reproductive success, reduction in health or vigor of eggs and/or young, and direct mortality.

Evidence impact is potentially significant: The Project involves ground-disturbing activities in and adjacent to the Tuolumne River. Additionally, noise, vegetation removal, movement of workers, and ground disturbance as a result of Project activities have the potential to significantly impact WPT populations.

Recommended Potentially Feasible Mitigation Measure(s)

To evaluate potential impacts to WPT, CDFW recommends conducting the following evaluation of the Project site, editing the MND to include the following measures specific to WPT, and that these measures be made conditions of approval for the Project.

Recommended Mitigation Measure 7: WPT Surveys

CDFW recommends that a qualified biologist conduct focused surveys for WPT no more than ten days prior to Project implementation. In addition, CDFW recommends that focused surveys for nests occur during the egg-laying season (March through August) and that any nests discovered remain undisturbed until the eggs have hatched.

Recommended Mitigation Measure 8: WPT Relocation

CDFW agrees with Mitigation Measure BIO-7 in the MND that any WPT discovered at the Project site immediately prior to or during Project activities will be allowed to move out of the area on their own.

COMMENT 4: Lake and Streambed Alteration

Issue: The Project will involve ground-disturbing activities in and adjacent to the Tuolumne River. Project-related activities that have the potential to change the bed, bank, and channel of streams and other waterways or alter riparian habitat, may be subject to CDFW's regulatory authority pursuant Fish and Game Code Section 1600 *et seq.*

Specific impact: Work within or adjacent to stream channels has the potential to result in substantial change or use of material from the bed, bank, or channel (including removal of riparian vegetation); deposition of debris, waste, sediment, toxic runoff or other materials into water may cause water pollution and degradation of water quality.

Evidence impact is potentially significant:

Lake and Streambed Alteration (LSA)

Project activities have the potential to impact the Tuolumne River may be subject to CDFW's LSA regulatory authority. Streams function in the collection of water from rainfall, storage of various amounts of water and sediment, discharge of water as runoff and the transport of sediment, and they provide diverse sites and pathways in which chemical reactions take place and provide habitat for fish and wildlife species. Disruption of stream systems due to potential impacts (e.g., ground-disturbing activities) from the Project site can have significant physical, biological, and chemical impacts that can extend into the adjacent properties, thereby adversely affecting the flora and fauna in the adjacent habitat.

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Environmental Setting)

CDFW recommends conducting the following evaluation of the Project site and implementing the following mitigation measures.

Recommended Mitigation Measure 9: Notification of Lake or Streambed Alteration

The Project may be subject to CDFW's regulatory authority pursuant to Fish and Game Code Section 1600 *et seq.*, because Project-related activities have the potential to substantially change the bed, bank, and channel of streams or alter riparian habitat. Therefore, Notification is recommended. Fish and Game Code Section 1600 *et seq.* requires an entity to notify CDFW prior to commencing any activity that may (a) substantially divert or obstruct the natural flow of any river, stream, or lake; (b) substantially change or use any material from the bed, bank, or channel of any river, stream, or lake (including the removal of riparian vegetation); (c) deposit debris, waste or other materials that could pass into any river, stream, or lake. "Any river, stream, or lake" includes those that are ephemeral or intermittent as well as those that are perennial. CDFW is required to comply with CEQA in the issuance of a Lake or Streambed Alteration Agreement. For additional information on notification requirements, please contact our staff in the LSA Program at (559) 243-4593.

II. Editorial Comments and/or Suggestions

Nesting birds: CDFW encourages that Project implementation occur during the bird non-nesting season; however, if ground-disturbing or vegetation-disturbing activities must occur during the breeding season (February through mid-September), the Project applicant is responsible for ensuring that implementation of the Project does not result in violation of the Migratory Bird Treaty Act or relevant Fish and Game Codes as referenced above.

To evaluate Project-related impacts on nesting birds, CDFW recommends that a qualified wildlife biologist conduct pre-activity surveys for active nests no more than 10 days prior to the start of ground or vegetation disturbance to maximize the probability that nests that could potentially be impacted are detected. CDFW also recommends that surveys cover a sufficient area around the Project site to identify nests and determine their status. A sufficient area means any area potentially affected by the Project. In addition to direct impacts (i.e. nest destruction), noise, vibration, and movement of workers or equipment could also affect nests. Prior to initiation of Project activities, CDFW recommends that a qualified biologist conduct a survey to establish a behavioral baseline of all identified nests. Once Project activities begins, CDFW recommends

having a qualified biologist continuously monitor nests to detect behavioral changes resulting from the Project. If behavioral changes occur, CDFW recommends halting the work causing that change and consulting with CDFW for additional avoidance and minimization measures.

If continuous monitoring of identified nests by a qualified wildlife biologist is not feasible, CDFW recommends a minimum no-disturbance buffer of 250 feet around active nests of non-listed bird species and a 500-foot no-disturbance buffer around active nests of non-listed raptors. These buffers are advised to remain in place until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or on-site parental care for survival. Variance from these no-disturbance buffers is possible when there is compelling biological or ecological reason to do so, such as when the Project site would be concealed from a nest site by topography. CDFW recommends that a qualified wildlife biologist advise and support any variance from these buffers and notify CDFW in advance of implementing a variance.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database which may be used to make subsequent or supplemental environmental determinations (Pub. Resources Code, § 21003, subd. (e)). Accordingly, please report any special status species and natural communities detected during Project surveys to CNDDDB. The CNDDDB field survey form can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The completed form can be mailed electronically to CNDDDB at the following email address: CNDDDB@wildlife.ca.gov. The types of information reported to CNDDDB can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

FILING FEES

If it is determined that the Project has the potential to impact biological resources, an assessment of filing fees will be necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required in order for the underlying project approval to be operative, vested, and final (Cal. Code Regs, tit. 14, § 753.5; Fish & Game Code, § 711.4; Pub. Resources Code, § 21089).

CDFW appreciates the opportunity to comment on the Project to assist Central Valley Regional Water Quality Control Board in identifying and mitigating the Project's impacts on biological resources.

Stephanie Tadlock
Central Valley Regional Water Quality Control Board
October 23, 2019
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More information on survey and monitoring protocols for sensitive species can be found at CDFW's website (<https://www.wildlife.ca.gov/Conservation/Survey-Protocols>). If you have any questions, please contact Jim Vang, Environmental Scientist, at the address provided on this letterhead, by telephone at (559) 243-4014, extension 254, or by electronic mail at Jim.Vang@wildlife.ca.gov.

Sincerely,



for Julie A. Vance
Regional Manager

cc: United States Army Corps of Engineers
San Joaquin Valley Office
1325 "J" Street, Suite #1350
Sacramento, California 95814-2928

ec: Office of Planning and Research
State.Clearinghouse@opr.ca.gov

Sarah Paulson, CDFW

Literature Cited

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CDFW. 2016. Five Year Status Review for Swainson's Hawk (*Buteo swainsoni*). California Department of Fish and Wildlife. April 11, 2016.

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