



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
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GAVIN NEWSOM, Governor
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November 6, 2020

Governor's Office of Planning & Research

Nov 06 2020

Karen Dulik, Environmental Program Manager
California Department of Water Resources
3374 East Shields Avenue
Fresno, California 93726

STATE CLEARINGHOUSE

**Subject: Milburn Pond Isolation Project
Notice of Preparation (NOP)
State Clearinghouse No. 2020100145**

Dear Ms. Dulik:

The California Department of Fish and Wildlife (CDFW) received a NOP for a draft Environmental Impact Report from the California Department of Water Resources 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 & G. 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.

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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 & G. 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 & G. 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).

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: California Department of Water Resources

Objective: The proposed project, comprised of 370 acres, would be the first phase of a potentially three-phase Milburn Habitat Restoration and Improvements Project (Project). The scope of this NOP focuses on the first initial phase of the Project because it has independent utility, must be completed prior to future phases, and its design has been funded and initiated. The later phases are conceptual, do not yet have funding, and may not necessarily be implemented.

The first phase of the Project would isolate the abandoned gravel pit known as Milburn Pond from the San Joaquin River channel to increase native fish survival by reducing movement of non-native warmwater fish species from the pond to the river and movement of native salmonids from the river to the pond. This would be accomplished by modifying the existing berm to fill existing breaches, strengthen weaker berm sections, and raise elevations of low-berm sections to minimize the potential for future breaches. Other improvements would include: constructing an equalization saddle with a modified French drain within the berm to equalize Milburn Pond with the river during flow fluctuations, creating a high-flow side channel, and planting trees and other

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vegetation. In addition, rock slope protection and biotechnical erosion protection would be installed to minimize erosion, and an existing access route along the southern and eastern boundary of Milburn Pond would be improved. Milburn Avenue is adjacent to the site and may need to be raised approximately 1 foot in low areas to avoid premature overtopping during flood releases from Friant Dam. Fencing, gates, and signage may also be installed along currently unfenced portions of the Milburn Pond. The Project will occur on a portion of the Milburn Pond, which is a unit of the California Department of Fish and Wildlife owned and managed San Joaquin River Ecological Reserve.

Location: The Project site is located in Fresno County and is bounded by the San Joaquin River to the north and the City of Fresno to the south. Privately owned agricultural land and the San Joaquin Country Club are adjacent to the upstream portion of the project site, and the San Joaquin River Conservancy (Conservancy) property currently leased to Bluff Pointe Golf Course and Learning Center is immediately downstream of the project site. Longitude/Latitude: 36°50'50"N/119°52'10"W, T12S, R19E, Sec 26, 27, 34, and 35. (APNs: 501-021-01T, 501-021-38ST, 502-020-11T, etc.).

Timeframe: Unspecified

COMMENTS AND RECOMMENDATIONS

CDFW offers the following comments and recommendations to assist the County of Fresno 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.

There are several special-status resources that may utilize the Project site, and these resources may need to be evaluated and addressed prior to any approvals that would allow ground-disturbing activities. CDFW is concerned regarding potential impacts to special-status species including, but not limited to, the State threatened Swainson's hawk (*Buteo swainsoni*), the State and federally threatened spring-run Chinook salmon (*Oncorhynchus tshawytscha*), the State species of special concern western pond turtle (*Emys marmorata*), and fall-run Chinook salmon.

COMMENT 1: Swainson's Hawk (SWHA)

Issue: SWHA have been documented to occur in the vicinity of the Project area (CDFW 2020). Review of aerial imagery indicates that large trees, which may support nesting SWHA, are present in the immediate vicinity of the Project area. In addition, habitat both within and surrounding the Project area may provide suitable foraging habitat for SWHA, increasing the likelihood of SWHA occurrence both within and in the immediate vicinity of the Project area.

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Specific impact: Without appropriate avoidance and minimization measures for SWHA, potential significant impacts associated with 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 and/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 would be significant: SWHA exhibit high nest-site fidelity year after year and lack of suitable nesting habitat in the San Joaquin Valley limits the local distribution and abundance of SWHA (CDFW 2016). Depending on the timing of construction, activities including noise, vibration, and movement of workers or equipment that could affect nests present within the vicinity of the Project area and have the potential to result in nest abandonment and loss of foraging habitat, significantly impacting local nesting SWHA.

Recommended Potentially Feasible Mitigation Measure(s)

Because suitable nesting and foraging habitat for SWHA is present in the Project area, CDFW recommends conducting the following evaluation of the Project site, incorporating the following mitigation measures into any CEQA document prepared for this Project, and that these measures be made conditions of approval for the Project.

Recommended Mitigation Measure 1: Focused 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: SWHA Avoidance

If ground-disturbing Project activities are to take place during the normal bird breeding season (March 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 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.

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Recommended Mitigation Measure 3: SWHA Take Authorization

CDFW recommends that in the event an active SWHA nest is detected during surveys and the ½-mile no-disturbance buffer around the nest cannot feasibly be implemented, 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 ITP, pursuant to Fish and Game Code section 2081(b) is necessary to comply with CESA.

Recommended Mitigation Measure 4: Loss of SWHA Foraging Habitat

CDFW recommends compensation for the loss of SWHA foraging habitat to reduce impacts to SWHA foraging habitat to less than significant based on CDFW's "*Staff Report Regarding Mitigation for Impacts to Swainson's Hawks*" (CDFG, 1994), which recommends that mitigation for habitat loss occur within a minimum distance of 10 miles from known nest sites and the amount of habitat compensation is dependent on nest proximity. In addition to fee title acquisition or conservation easement recorded on property with suitable grassland habitat features, mitigation may occur by the purchase of conservation or suitable agricultural easements. Suitable agricultural easements would include areas limited to production of crops such as alfalfa, dry land and irrigated pasture, and cereal grain crops. Vineyards, orchards, cotton fields, and other dense vegetation do not provide adequate foraging habitat.

Recommended Mitigation Measure 5: SWHA Nest Trees

CDFW recommends that the removal of known raptor nest trees, even outside of the nesting season, be replaced with an appropriate native tree species planting at a ratio of 3:1 at or near the Project area or in another area that will be protected in perpetuity to reduce impacts resulting from the loss of nesting habitat.

COMMENT 2: Western Pond Turtle (WPT)

Issue: Suitable habitat features for WPT occur in the Project area. 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 meters 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.

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Evidence impact is potentially significant: The Project site is in close proximity of known WPT habitat. 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 CEQA document to include the following measures specific to WPT, and that these measures be made conditions of approval for the Project.

Recommended Mitigation Measure 6: WPT Surveys

CDFW recommends a qualified biologist determine if suitable habitat for WPT occurs at an individual Project site. If suitable habitat is determined to occur on an individual Project site, CDFW recommends that a qualified biologist conduct focused surveys for WPT 10 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 7: WPT Relocation

CDFW recommends that if any WPT are discovered at the site immediately prior to or during Project activities, they be allowed to move out of the area on their own.

COMMENT 3: Spring and Fall-Run Chinook Salmon

Issue: Activities such as vegetation removal within the riparian zone, landscaping, access roads, etc., could impact the San Joaquin River and adjacent riparian habitat, especially in areas that are seasonally flooded away from the main stem of the river. These floodplain areas provide seasonal habitat for rearing and holding of juvenile spring- and fall-run Chinook salmon and are potential breeding habitat for spring- and fall-run Chinook salmon.

Specific impact: Without appropriate avoidance and minimization measures, potential impacts to Chinook salmon include disrupted spawning behavior, reduced reproductive success, and inability to reproduce.

Evidence impact would be significant: The Project area contains a part of the San Joaquin River; ground-disturbing activities or in-water work have the potential to impact salmon. Spring-run Chinook salmon are believed to have been the more abundant run and once spawned as high in the watershed as Mammoth Pool, the

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San Joaquin River represents the southernmost extent of the spring-run Chinook salmon geographic range and was once the largest such population in California (SJRRP 2018).

Recommended Potentially Feasible Mitigation Measure(s)

To evaluate potential impacts to Chinook salmon associated with the Project, CDFW recommends conducting the following evaluation of Project sites, incorporating the following mitigation measures for this Project, and that these measures be made conditions of approval for the Project.

Recommended Mitigation Measure 8: Chinook Salmon Habitat Avoidance

CDFW recommends Project activities avoid work in water and floodplains whenever possible, conduct Project activities during less critical times of the year (late June through August), and avoid spawning riffles or holding pools.

Recommended Mitigation Measure 9: Tree Removal and Replacement

If Project activities will occur in the riparian environment, CDFW recommends avoidance of tree removal whenever possible. If tree removal avoidance is not feasible, CDFW recommends preparation of a revegetation plan that incorporates native tree plantings within the San Joaquin River Restoration Area to replace removed trees.

Recommended Mitigation Measure 10: Chinook Salmon Habitat Mitigation

If Project activities will occur in the Floodplain, CDFW advises consultation with us to determine how to minimize and mitigate impacts to juvenile salmon utilization.

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 sites to identify nests and determine their status. A sufficient area means any area potentially affected by the

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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 construction activities, CDFW recommends that a qualified biologist conduct a survey to establish a behavioral baseline of all identified nests. Once construction 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 construction areas 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 the California Natural Diversity Database (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 & G. Code, § 711.4; Pub. Resources Code, § 21089).

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CDFW appreciates the opportunity to comment on the Project to assist the City of Merced in identifying and mitigating the Project's impacts on biological resources.

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 Kelley Nelson, Environmental Scientist, at the address provided on this letterhead, or by electronic mail at Kelley.Nelson@wildlife.ca.gov

Sincerely,

DocuSigned by:

041A77B10D78486...

for Julie A. Vance
Regional Manager

Attachment

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Literature Cited

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

CDFW. 2020. Biogeographic Information and Observation System (BIOS). <https://www.wildlife.ca.gov/Data/BIOS>. Accessed 5 October July 2020.

Swainson's Hawk Technical Advisory Committee (SWHA TAC). 2000. Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley. Swainson's Hawk Technical Advisory Committee, May 31, 2000.

CDFW. 2020. Biogeographic Information and Observation System (BIOS). <https://www.wildlife.ca.gov/Data/BIOS>. Accessed October 16, 2020.

Thomson, R. C., A. N. Wright, and H. Bradley Shaffer, 2016. California Amphibian and Reptile Species of Special Concern. California Department of Fish and Wildlife and University of California Press.

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SJRRP. 2018. Fisheries framework: spring-run and fall-run Chinook salmon. San Joaquin River Restoration Program. June 2018. 29 pp.

Attachment 1**CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
RECOMMENDED MITIGATION MONITORING AND REPORTING PROGRAM
(MMRP)****PROJECT: Milburn Pond Isolation Project****SCH No. 2020100145**

RECOMMENDED MITIGATION MEASURE	STATUS/DATE/INITIALS
<i>Before Disturbing Soil or Vegetation</i>	
Mitigation Measure 1: Focused SWHA Surveys	
Mitigation Measure 3: SWHA Take Authorization	
Mitigation Measure 4: Loss of SWHA Foraging Habitat	
Mitigation Measure 6: WPT Surveys	
Mitigation Measure 7: WPT Relocation	
<i>During Construction</i>	
Mitigation Measure 2: SWHA Avoidance	
Mitigation Measure 5: SWHA Nest Trees	
Mitigation Measure 8: Chinook Salmon Habitat Avoidance	
Mitigation Measure 9: Tree Removal and Replacement	
Mitigation Measure 10: Chinook Salmon Habitat Mitigation	