

**CALIFORNIA STATE LANDS COMMISSION**  
100 Howe Avenue, Suite 100-South  
Sacramento, CA 95825-8202



*Established in 1938*

JENNIFER LUCCHESI, *Executive Officer*  
(916) 574-1800 Fax (916) 574-1810  
California Relay Service TDD Phone 1-800-735-2929  
from Voice Phone 1-800-735-2922

Governor's Office of Planning & Research

**Nov 06 2020**

## STATE CLEARINGHOUSE

November 6, 2020

**Contact Phone: (916) 574-1890**

File Ref: SCH # 2020100145

Karen Dulik, Environmental Program Manager  
California Department of Water Resources  
South Central Region Office  
3374 E. Shields Ave., Fresno, CA 93726

VIA ELECTRONIC MAIL ONLY ([Karen.Dulik@water.ca.gov](mailto:Karen.Dulik@water.ca.gov))

### **Subject: Notice of Preparation (NOP) for an Environmental Impact Report (EIR) for the Millburn Pond Isolation Project, Fresno County**

Dear Ms. Dulik:

The California State Lands Commission (Commission) staff has reviewed the subject NOP for an EIR for the Millburn Pond Isolation Project (Project), which is being prepared by the Department of Water Resources (Department). The Department, as the public agency proposing to carry out the Project, is the lead agency under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) The Commission is a trustee agency for projects that could directly or indirectly affect sovereign land and accompanying Public Trust resources or uses. Additionally, because the Project involves work on sovereign land, the Commission will act as a responsible agency. Commission staff requests that the Department consult with us on preparation of the Draft EIR as required by CEQA section 21104, subdivision (a), and the State CEQA Guidelines section 15086, subdivisions (a)(1) and (a)(2).

### **Commission Jurisdiction and Public Trust Lands**

The Commission has jurisdiction and management authority over all ungranted tidelands, submerged lands, and the beds of navigable lakes and waterways. The Commission also has certain residual and review authority for tidelands and submerged lands legislatively granted in trust to local jurisdictions (Pub. Resources Code, §§ 6009, subd. (c); 6009.1; 6301; 6306). All tidelands and submerged lands, granted or ungranted, as well as navigable lakes and waterways, are subject to the protections of the common law Public Trust Doctrine.

As general background, the State of California acquired sovereign ownership of all tidelands and submerged lands and beds of navigable lakes and waterways upon its admission to the United States in 1850. The state holds these lands for the benefit of all people of the state for statewide Public Trust purposes, which include but are not limited to waterborne commerce, navigation, fisheries, water-related recreation, habitat preservation, and open space. On tidal waterways, the State's sovereign fee ownership extends landward to the mean high tide line, except for areas of fill or artificial accretion or where the boundary has been fixed by agreement or a court. On navigable non-tidal waterways, including lakes, the state holds fee ownership of the bed of the waterway landward to the ordinary low-water mark and a Public Trust easement landward to the ordinary high-water mark, except where the boundary has been fixed by agreement or a court. Such boundaries may not be readily apparent from present day site inspections.

Based on Commission staff's preliminary review of the submitted information contained in the NOP, in-house records, and information available to staff at this time, the project appears to encroach onto sovereign land. The modification of existing berms along the northern portion of Millburn Pond and adjacent to the River appear to be within Commission jurisdiction and will require a lease with the Commission. These comments are made without prejudice to any future assertion of State ownership or public rights, should circumstances change, or should additional information become available, and are not intended, nor should they be construed as a waiver or limitation of any right, title, or interest of the State of California in any lands under its jurisdiction. Please contact Kelly Connor, Public Land Management Specialist (see contact information below), for any specific jurisdiction-related questions.

### **Project Description**

The Department proposes to isolate the abandoned gravel pit known as Millburn Pond to reduce the movement of non-native warmwater fish species into the San Joaquin River and to reduce the movement of native salmonids into the pond.

From the Project Description, Commission staff understands that the Project would include the following components that have potential to affect State sovereign land:

- **Berm Modifications**. The Project would fill existing berm breaches, strengthen weaker sections, raise the elevation of low-berm sections, and construct an equalization saddle. All of these activities would occur along the north side of Millburn Pond.
- **High Flow Channel Alignment**. The NOP provides no specific information regarding the purpose of this component and its associated activities. However, the alignment will impact the San Joaquin River and could involve in-water construction.
- **Erosion Measures**. The Project would include rock slope protection and biotechnical measures.
- **Delineation Measures**. The Project could include fencing, signage, and gates along currently unfenced portions of the San Joaquin River Ecological Reserve.

## Environmental Review

Commission staff requests that the Department consider the following comments when preparing the Draft EIR, to ensure that impacts to State sovereign land are adequately analyzed for the Commission's use of the Final EIR to support a future lease approval for the Project.

### General Comments

1. Project Description: A thorough and complete Project Description should be included in the Draft EIR to facilitate meaningful environmental review of potential impacts, mitigation measures, and alternatives. The Project Description should be as precise as possible in describing the details of all allowable activities (e.g., types of equipment or methods that may be used, maximum area of impact or volume of sediment removed or disturbed from the San Joaquin River, seasonal work windows, locations for material disposal, origin of any imported material for berm construction, etc.), as well as the details of the timing and length of activities. In particular, Commission staff requests that the Department illustrate on figures and engineering plans and provide written description of activities occurring below the ordinary high-water mark and ordinary low-water mark of the San Joaquin River. Thorough descriptions will facilitate Commission staff's determination of the extent and locations of its leasing jurisdiction, make for a more robust analysis of the work that may be performed, and minimize the potential need for subsequent environmental analysis.

### Biological Resources

2. Sensitive Species and Habitats: For land under the Commission's jurisdiction, the Draft EIR should disclose and analyze all potentially significant effects on sensitive species and habitats in and around the Project area, including special-status wildlife, fish, and plants, and if appropriate, identify feasible mitigation measures to reduce those impacts. The Department should conduct queries of the California Department of Fish and Wildlife's (CDFW) California Natural Diversity Database and U.S. Fish and Wildlife Service's (USFWS) Special Status Species Database to identify any special-status plant or wildlife species that may occur in the Project area. The Draft EIR should also include a discussion of consultation with the CDFW, USFWS, and National Marine Fisheries Service (NMFS) as applicable, including any recommended mitigation measures and potentially required permits identified by these agencies.
3. Invasive Species: One of the major stressors in California waterways is introduced species. Therefore, the Draft EIR should consider the Project's potential to encourage the establishment or proliferation of aquatic invasive species (AIS) such as the quagga mussel, or other nonindigenous, invasive species including aquatic and terrestrial plants. For example, construction boats and barges brought in from long stays at distant projects may transport new species to the Project area via hull biofouling, wherein marine and aquatic organisms attach to and accumulate on the

hull and other submerged parts of a vessel. If the analysis in the Draft EIR finds potentially significant AIS impacts, possible mitigation could include contracting vessels and barges from nearby or requiring contractors to perform hull cleaning prior to arrival at the project area. The Commission's Marine Invasive Species Program and the CDFW's Invasive Species Program could assist with this analysis as well as with the development of appropriate mitigation (information at <https://www.wildlife.ca.gov/Conservation/Invasives>).

4. Construction Noise: The Draft EIR should also evaluate noise and vibration impacts on fish and birds from construction, restoration, or flood control activities in the water if they are applicable to the proposed high flow channel alignment construction activities. Mitigation measures could include species-specific work windows as defined by CDFW, USFWS, and NMFS. Again, staff recommends early consultation with these agencies to minimize the impacts of the Project on sensitive species.

#### Climate Change

5. Greenhouse Gas (GHG): A GHG emissions analysis consistent with the California Global Warming Solutions Act (Assembly Bill [AB] 32) and required by the State CEQA Guidelines should be included in the Draft EIR. The NOP notes that GHG emissions will be evaluated in the Draft EIR. This analysis should identify a threshold for significance for GHG emissions, calculate the level of GHGs that will be emitted as a result of Project construction activities, determine the significance of the impacts of those emissions, and, if impacts are significant, identify mitigation measures that would reduce them to the extent feasible. In particular, Commission staff recommends that the Department identify a quantitative threshold if the regional air quality management district has not done so.

#### Cultural Resources

6. Submerged Resources: The Draft EIR should evaluate potential impacts to submerged cultural resources in the Project area. The Commission maintains a shipwrecks database that can assist with this analysis. Commission staff requests that the Department contact Staff Attorney Jamie Garrett (see contact information below) to obtain shipwrecks data from the database and Commission records for the Project site. The database includes known and potential vessels located on the State's tide and submerged lands; however, the locations of many shipwrecks remain unknown. Please note that any submerged archaeological site or submerged historic resource that has remained in state waters for more than 50 years is presumed to be significant. Because of this possibility, please add a mitigation measure requiring that in the event cultural resources are discovered during any construction activities, Project personnel shall halt all activities in the immediate area and notify a qualified archaeologist to determine the appropriate course of action.
7. Title to Resources: The Draft EIR should also mention that the title to all abandoned shipwrecks, archaeological sites, and historic or cultural resources on or in the tide and submerged lands of California is vested in the state and under the jurisdiction of

the Commission (Pub. Resources Code, § 6313). Commission staff requests that the Department consult with Staff Attorney Jamie Garrett, should any cultural resources on state lands be discovered during construction of the proposed Project. In addition, Commission staff requests that the following statement be included in the EIR's Mitigation and Monitoring Plan: "The final disposition of archaeological, historical, and paleontological resources recovered on state lands under the jurisdiction of the Commission must be approved by the Commission."

### Alternatives

8. Alternatives: In addition to describing mitigation measures that would avoid or reduce the potentially significant impacts of the Project, the Department should identify and analyze a range of reasonable alternatives to the proposed Project that would attain most of the Project objectives while avoiding or reducing one or more of the potentially significant impacts (see State CEQA Guidelines, § 15126.6).

Thank you for the opportunity to comment on the NOP for the Project. As a trustee and responsible agency, Commission staff requests that you consult with us on this Project and keep us advised of changes to the Project Description and all other important developments. Please send additional information on the Project to the Commission staff listed below as the Draft EIR is being prepared:

- Please refer questions concerning environmental review to Alexandra Borack, Senior Environmental Scientist, at [Alexandra.Borack@slc.ca.gov](mailto:Alexandra.Borack@slc.ca.gov).
- For questions concerning archaeological or historic resources under Commission jurisdiction, please contact Staff Attorney Jamie Garrett at [Jamie.Garrett@slc.ca.gov](mailto:Jamie.Garrett@slc.ca.gov).
- For questions concerning Commission leasing jurisdiction, please contact Kelly Connor, Public Lands Management Specialist, at [Kelly.Connor@slc.ca.gov](mailto:Kelly.Connor@slc.ca.gov).

Sincerely,



Nicole Dobroski, Chief  
Division of Environmental Planning  
and Management

cc: Office of Planning and Research  
A. Borack, Commission  
K. Connor, Commission  
J. Garrett, Commission  
L. Calvo, Commission