

CALIFORNIA STATE LANDS COMMISSION

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Established in 1938

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May 17, 2021

File Ref: SCH #2020100145

Ms. Karen Dulik
California Department of Water Resources
South Central Region Office
3374 E. Shields Avenue
Fresno, CA 93726

Governor's Office of Planning & Research

May 17 2021

STATE CLEARINGHOUSE

SENT VIA ELECTRONIC MAIL ONLY (Karen.Dulik@water.ca.gov)

Subject: Comments on Draft Environmental Impact Report (EIR) for the Milburn Pond Isolation Project, Fresno County

Dear Ms. Dulik:

The California State Lands Commission (Commission) staff has reviewed the Draft EIR for the Milburn 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 State sovereign land and their accompanying Public Trust resources or uses. Additionally, because the Project involves work on State sovereign land, the Commission will act as a responsible agency. A letter was previously submitted to the Department on the Project's Notice of Preparation on November 6, 2020, and Commission staff requested consultation on preparation of the Draft EIR as required by CEQA section 21153, subdivision (a), and the State CEQA Guidelines section 15086, subdivisions (a)(1) and (a)(2). No such consultation occurred.

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 ordinary high water mark, as generally measured by 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.

The modification of existing berms along the northeastern portion of Milburn Pond and both adjacent to and within 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. The lease application is available online at <https://www.slc.ca.gov/leases-permits>. If you have any questions specific to jurisdiction or lease, please contact Kelly Connor, Public Land Management Specialist II (contact information provided below).

Project Description

The Department proposes to isolate the abandoned gravel pit known as Milburn 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 these activities would occur along the north side of Milburn Pond, Pond 1, and Pond 2.
- **High Flow Channel Alignment**. The side channel would be 2,000 feet long and 150 feet wide, beginning inundation when the San Joaquin river flows exceed 4,000 cubic feet per second.
- **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.

The Draft EIR identifies the proposed Project as the Environmentally Superior Alternative.

Environmental Review

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

General Comments

1. Public Agency Approvals: Please have the Final EIR identify the Commission as both a CEQA responsible agency and a trustee agency. The DEIR only identifies the Commission as a trustee agency.
2. Deferred Mitigation: In order to avoid the improper deferral of mitigation, mitigation measures (MMs) must be specific, feasible, and fully enforceable to minimize significant adverse impacts from a project, and "shall not be deferred until some future time." (State CEQA Guidelines, §15126.4, subd. (a)). When it is impractical or infeasible to develop the specific details of a mitigation measure during the EIR review process, the EIR should explain the reasons why it is impractical or infeasible, and the lead agency should commit to implement the mitigation, adopt a specified performance standard to be achieved by the mitigation, and identify the types of actions that may achieve compliance with the performance standard (State CEQA Guidelines, §15126.4, subd. (a)(1)(B)). For example, MM 3.5.1 requires the preparation of a relocation and monitoring plan to reduce the potential impact to Sanford's arrowhead plant, without identifying a performance standard or clearly identified metrics that will be included in the plan to measure the efficacy of the measure in reducing the particular impact to a less than significant level. Recent case law continues to spotlight the importance of performance standards in properly formulated mitigation (*Save the Agoura Cornell Knoll et al. v. City of Agoura Hills et al.* (2020) 46 Cal.App.5th 665).

Commission staff requests that more specific information be provided in MMs 3.5.1, 3.5.3a, and 3.5.7 to demonstrate how the measures are going to mitigate potential significant impacts to less than significant.

Air Quality

3. Criteria Pollutant Mitigation: Mitigation Measure 3.4.2a requires the Department to reduce criteria pollutants for specific construction equipment and account for the reduction via San Joaquin Valley Air Pollution Control District's (SJVAPCD) Rule 9510. However, the MM is lacking information as to how the reductions will occur.

This information is needed so that the public and other agencies can see if the proposed measure would be feasible mitigation. Mitigation Measure 3.4.2b is a good example of the level of appropriate detail.

Commission staff also recommends that MM 3.4.2b, a bulleted list of all SJVAPCD actions required under Regulation VIII for fugitive dust, be revised to clearly identify those measures that are related to the Project activities.

Biological Resources

4. Western Pond Turtle: Mitigation Measure 3.5.2 requires pre-construction surveys for aquatic, basking, and if relevant, nesting habitat for Western pond turtles that would occur 10 days before construction activities begin. Commission staff notes that Western pond turtles may come into the Project area from the adjacent river or other portions of Milburn Pond at any point during the 10-day period or even overnight during construction. Staff therefore recommends that MM 3.5.2 also include daily morning surveys prior to construction activities to ensure a less-than-significant impact.
5. Burrowing Owl: Mitigation Measure 3.5.3a establishes pre-construction surveys for burrowing owl burrows. If an occupied burrow is found, appropriate buffers would be set in consultation with the California Department of Fish and Wildlife (CDFW). However, the Draft EIR does not discuss what happens if an occupied burrow is discovered, and the Project cannot establish adequate buffer distances as required by CDFW. MM 3.5.3a notes that “[i]f it is not feasible to implement a buffer of adequate size and it is determined, in consultation with CDFW, that passive exclusion of owls from the area of direct disturbance is an appropriate means of minimizing impacts, an exclusion and passive relocation plan shall be developed and implemented in coordination with CDFW.” Please see Commission staff’s comment 2, above, regarding plan development without specific activities or performance criteria. Finally, Commission staff recommends that the last sentence in MM 3.5.3a be revised so that passive exclusion will NOT be conducted during the breeding season unless the birds have not begun egg laying or juveniles from the burrows are foraging and capable of independent survival.
6. In-Water Work Impacts: Page 3-69 acknowledges that various special-status species have the potential to occur in the Project area segment of the San Joaquin River, but that the impact is less than significant because: 1) the Project would occur during the dry season, 2) the disturbance acreage is small, and 3) in-water work associated with the upstream and downstream high-flow side channel connections would be minimized. However, the Draft EIR fails to provide further information or designs to demonstrate that having special-status species present would still result in a less than significant impact. Please clarify the types of activities occurring within the San Joaquin River to confirm the document’s impact determination.
7. Riparian Vegetation Removal: Mitigation Measure 3.5.7 would develop a Habitat Restoration and Enhancement Plan in coordination with CDFW. Offsite

compensatory mitigation would be considered if on-site riparian habitat could not have increased acreage or improved ecological function. Please see Commission staff's comment 2, above, regarding plan development without specific activities or performance criteria. In addition, the offsite compensatory mitigation includes the possibility of enhancing or preserving riparian habitat elsewhere. Commission staff recommends that MM 3.5.7 be revised to only include creation or restoration of other riparian habitat, in accordance with the Court's decision regarding agricultural conservation easements (another form of preservation) in *King and Gardiner Farms, LLC v. County of Kern et al.* (2020) 45 Cal.App.5th 814. The Court decided that "[e]ntering into a binding agricultural conservation easement does not create new agricultural land to replace the agricultural land being converted to other uses. . . . The absence of any offset means a project's significant impact on agricultural land would remain significant after the implementation of the agricultural conservation easement."

Tribal Cultural Resources

8. Tribal Outreach: The Draft EIR notes that the Department sent one letter to each potentially affected Tribe, as identified by the Native American Heritage Commission, and has received one response as of the document's publication. Commission staff notes that the letter was mailed during an escalating COVID-19 crisis when many businesses and other organizations were shut down under shelter-in-place orders, and recommends that the Department reach out once more prior to Final EIR certification. This would ensure that potentially affected Tribes have the opportunity to comment on potentially significant impacts or provide input on mitigation measures.
9. Unanticipated Discovery: Mitigation Measure 3.6.1a states that unanticipated discovery of historical or archaeological resources would require the Department to develop and implement "appropriate protection and avoidance measures, where feasible." This measure purports to address a potential impact but does not appear to create an enforceable condition that reduces the impact's severity. A mitigation measure must minimize significant adverse impacts and be fully enforceable through permit conditions, agreements, or other legally binding instruments (CEQA Guidelines, §15126.4, subds. (a)(1) and (a)(2)). By including the phrase "where feasible", MM 3.6.1a is no longer an enforceable condition that would minimize the adverse impact. Commission staff recommends that the Final EIR state objective standards to define what is or is not "feasible," present alternate mitigation that can be used when the primary mitigation is not feasible, or analyze the Project activities as if those measures were not implemented to ensure that the worst-case scenario is evaluated.

In addition, Commission staff requests that MM 3.6.1a require preparation of an Unanticipated Discoveries Evaluation and Treatment Plan that includes a process for determining what procedures would be implemented for discoveries that cannot be protected in place.

10. Tribal Monitoring: Mitigation Measure 3.6.1a requires the Department to retain an archaeologist to assess any unanticipated discovery. It appears that this archaeologist would determine whether the resource was of Native American origin, and then potentially affected Tribes would be contacted. Commission staff recommend that monitoring be provided during Project-related ground disturbance activities, and requests that MM 3.6.1a be modified to require an archeological and a Tribal monitor (if requested by a culturally affiliated Tribe) onsite.

Hazards and Hazardous Materials

11. Spill Prevention and Control: Please have MM 3.9.1 provide more information regarding the Spill Prevention Control and Countermeasures Plan as it relates to in-water activities and impacts to the San Joaquin River. The Final EIR should identify how the spill will be controlled or remediated and provide examples of the technology or activities to be used.

Thank you for the opportunity to comment on the Draft EIR for the Project. As a responsible and trustee agency, Commission staff will need to rely on the Final EIR for the issuance of any new lease as specified above and, therefore, we request that you consider our comments prior to certification of the EIR.

Please send copies of future Project-related documents, including electronic copies of the Final EIR, Mitigation Monitoring and Reporting Program, Notice of Determination, and CEQA Findings when they become available. Please refer questions concerning environmental review to Alexandra Borack, Senior Environmental Scientist, at (916) 574-2399 or Alexandra.Borack@slc.ca.gov. For questions concerning archaeological or historic resources under Commission jurisdiction, please contact Jamie Garrett, Staff Attorney, at (916) 574-0398 or Jamie.Garrett@slc.ca.gov. For questions concerning Commission leasing jurisdiction, please contact Mr. Kelly Connor, Public Land Management Specialist II, at (916) 574-0343 or Kelly.Connor@slc.ca.gov.

Sincerely,



Nicole Dobroski, Chief
Division of Environmental Planning
and Management

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