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GAVIN NEWSOM, Governor
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Via Electronic Mail

June 29, 2021

Governor's Office of Planning & Research

June 29 2021

STATE CLEARINGHOUSE

Mr. Lonn Maier, Environmental Program Manager
California Department of Water Resources
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Subject: CDFW Response Comments on the Initial Study and Mitigated Negative Declaration for the South State Water Project Hydropower Relicensing Project, FERC Project No. 2426, Los Angeles County (SCH #2021030471)

Dear Mr. Maier:

The California Department of Fish and Wildlife (CDFW) is providing the following comments for the administrative record to follow-up on the California Department of Water Resources' (DWR) response to CDFW comments on the Initial Study and Mitigated Negative Declaration (IS/MND) for the South State Water Project (SWP) Hydropower Relicensing Project, Federal Energy Regulatory Commission (FERC) Project No. 2426 (Project) in Los Angeles County. The IS/MND was prepared pursuant to the California Environmental Quality Act (CEQA; Public Resources Code § 21000 et seq.) and its administrative regulations (CEQA Guidelines)¹ with DWR acting as lead agency.

General Comment: Potential for Southern California Steelhead to be Listed Under the California Endangered Species Act

CDFW is informing DWR that pursuant to Fish and Game Code (FGC) section 2073.3, on June 14, 2021, the California Fish and Game Commission (Commission) received a petition from California Trout to list southern California steelhead (*Oncorhynchus mykiss*) as an endangered species under the California Endangered Species Act (CESA). Pursuant to FGC section 2073.5, on June 23, 2021, Commission staff transmitted the petition to CDFW, which initiated our 90-day review timeline. CDFW will continue to update DWR as the petition process moves forward.

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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Comment ID: CDFW-1; Subject Area: Fish Passage Barriers

The following is DWR's Response to CDFW Comments on Fish Passage Barriers:

In accordance with CEQA Guidelines Section 15125, the impacts of a proposed project must be evaluated by comparing expected environmental conditions after project implementation to conditions at a point in time, generally at the time of when CEQA analysis begins, referred to as the baseline or current conditions. For changes to an existing operation or an existing facility, ongoing activities occurring at the time CEQA review begins are treated as a component of the existing conditions baseline (*Communities for a Better Environment v. South Coast Air Quality Management Dist. et al.* [2010] 48 Cal.4th 310). In such cases, the baseline may reasonably include the facility's established levels of permitted use that are representative of the facility's actual operations (*Fairview Neighbors et al. v. County of Ventura et al.* [1999] 70 Cal.App.4th 238). The expected changes to the baseline or current environmental conditions after project implementation represent the environmental impacts of the proposed Project.

For clarification, the fish passage study cited from 2005 (Stoecker and Kelley 2005) coupled with more current information (United Water Conservation District [UWCD] 2020) indicate that fish passage facilities at Santa Felicia Dam are not anticipated in the reasonably foreseeable future as the Federal Energy Regulatory Commission (FERC) has not issued a schedule for UWCD to institute a fish passage program. Additionally, while the UWCD has completed and submitted a fish passage feasibility report to FERC (Santa Felicia Dam Fish Passage Panel 2013), the report "conveys the UWCD's intent regarding a preferred long-term solution on fish passage at the Santa Felicia Project that is contingent on resolution of certain outstanding issues" (UWCD 2020). Given that anadromous fish located at the base of Pyramid Dam is currently a hypothetical future condition, it was not baseline for the purposes of the proposed Project CEQA analysis (CEQA Guidelines Section 15125).

Therefore, as disclosed in Sections 2.3.1.2 and 2.4.2 and analyzed for potential impacts to biological resources, including aquatic resources in Section 3.5.3 (a f), the proposed Project does not entail a change to the baseline.

Regarding CDFW's statement that FGC Section 5901 applies to the proposed Project: (1) refer to the response above regarding anadromous fisheries, (2) native fish which are not migratory have sufficient habitat above and below dams to complete their lifecycle, (3) the Licensees are not proposing any significant changes from current operations, and (4) Project facilities operations and maintenance of diversion structures are mandated by FERC under the Federal Power Act (FPA), which occupies the field of hydropower regulation (*Karuk Tribe of N. California v. California Reg'l Water Quality Control Bd., N. Coast Region* [2010] 183 Cal.App.4th 330, 359). Hence, no mitigation measures are proposed.

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References Cited:

Santa Felicia Dam Fish Passage Panel. 2013. Santa Felicia Dam Fish Passage Feasibility Assessment Study Plan. Available at: https://www.unitedwater.org/wpcontent/uploads/2020/09/Final_SF_Feasibility_StudyPlan_revised_2-12-13.pdf Accessed: May 3, 2021.

Stoecker M. and E. Kelley. 2005. Santa Clara River Steelhead Trout: Assessment and Recovery Opportunities. Ventura, CA. Available at: <http://parkway.scrwatershed.org/wkb/biblists/stoeckerkelley2005/index.html>.

United Water Conservation District (UWCD). 2020. Comprehensive Annual Financial Report For fiscal year ended June 30, 2020. Available at: <https://www.unitedwater.org/wp-content/uploads/2020/12/CAFR-FY-19-20-FINAL-2020-12-03.pdf>. Accessed: May 3, 2021

FGC section 5901 states that it is unlawful to construct or maintain in any stream any device or contrivance that prevents, impedes, or tends to prevent or impede, the passing of fish up and down stream.

FGC Application – Fish: DWR states that “(2) native fish which are not migratory have sufficient habitat above and below dams to complete their lifecycle...” However, FGC section 5901 applies to all fish (where fish is defined as “wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals” pursuant to FGC § 45). Therefore, all fish should be able to move unimpeded upstream and downstream of dams regardless of whether or not they have sufficient habitat above and below to complete their lifecycle.

FGC Application – Maintenance: DWR also acknowledges that Pyramid Dam will be continually maintained for the next 30 to 50 years. Consequently, FGC section 5901 applies to maintenance of any device or contrivance (i.e., Pyramid Dam) that would continue to prevent and impede the passing of fish. Pyramid Dam is considered a fish barrier for current native fish and for future southern California steelhead that gain access from Lower Piru Creek into Middle Piru Creek via the Santa Felicia Dam Project (FERC No. P-2153). Southern California steelhead that reaches Middle Piru Creek will not be able to pass over Pyramid Dam to suitable upstream habitat without a fishway prescription.

CDFW understands Project facilities operations and maintenance of diversion structures are mandated by FERC under the Federal Power Act (FPA). However, CDFW recommends the following as a good faith effort to comply with FGC section 5901:

Recommendation #1: To comply with FGC section 5901, CDFW recommends DWR perform fish passage studies over/around Pyramid Dam. Any fish passage studies should address the current obstruction of Pyramid Dam that is impeding native O. mykiss and other native fish species from accessing upstream habitat pursuant to FGC section 5901. Licensees should study and evaluate options for providing upstream volitional fish passage (per FGC § 5901) of native coastal rainbow trout, and adult and juvenile southern California steelhead around Pyramid Dam. Options may include fish ladders, locks, elevators, trap and haul, associated collection facilities, and upstream release sites. The study should evaluate options for providing

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downstream fish passage, such as an evaluation of all reservoir outlet works, bypass channels, in lake fish guidance devices, and downstream outlet sites.

Recommendation #2: CDFW recommends DWR prepare to implement any fish passage measures required by the National Marine Fisheries Service (NMFS).

Comment ID: CDFW-10; Subject Area: Tricolored Blackbirds (*Agelaius tricolor*)

The following is DWR's Response to CDFW Comments on Tricolored Blackbirds:

The proposed Project does not entail a change in current conditions. For clarification, potential habitat in the form of perennial wetlands (primarily cattails) exist in Quail Lake; however, there is no evidence that the Licensees are aware of that proposed ongoing Project maintenance activities are a "continued disturbance" to tricolored blackbird or their nesting. Project vegetation management is restricted to existing facilities and roads, along with a buffer, and vegetation within those areas is maintained in a consistent fashion to safely operate the proposed Project. Additionally, as disclosed in the Biological Resources Impact Analysis, Sections 2.4.5.4 and 3.5.3, the Integrated Vegetation Management Plan continues the currently practiced conservation of wetland resources, restrictions when herbicides are used, and adds "a requirement to perform nesting bird and/or roosting bat surveys prior to hazard tree removal." Moreover, the Integrated Vegetation Management Plan, as disclosed in Section 2.4.5.4, includes "already-practiced measures to protect known special-status plants and sensitive natural communities that could be affected by future activities, including the revegetation of natural landscapes, conservation of wetland resources, reduction of soil erosion, and herbicide application at appropriate locations. [...] Many activities included in this plan are in response to ground disturbance and focus on surveys, special-status plant and habitat protections such as buffers, site stabilization, revegetation, and exclusion fencing." Additionally, the Sensitive Aquatic and Terrestrial Wildlife Plan includes protections for sensitive species and nesting birds, as disclosed in Section 2.2 of the plan indicates, "for non-routine Project activities, the Licensees will conduct pre-construction surveys for sensitive habitat (including four-winged saltbrush) and sensitive species in and within a reasonable buffer of the proposed work area." Furthermore, the plan states that "to protect native breeding birds, the Licensees will generally avoid areas of breeding/nesting, and plan vegetation removal and other Project activities that could impact nesting birds outside of the general avian breeding season." Section 2.2 of the plan describes that, "if Project activities cannot be avoided during this time period...the Licensees will conduct a focused survey for active nests within the area proposed for work, plus a reasonable buffer around the area, prior to the commencement of Project activities."

Regarding FGC Section 1602, continued routine maintenance and operation does not include activities that would "substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake." As such, there is no anticipated trigger for a Lake and Streambed Alteration Agreement. Additionally, the proposed Project facilities operations and

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maintenance are authorized by FERC under the FPA, which occupies the field of hydropower regulation (*Karuk Tribe of N. California v. California Reg'l Water Quality Control Bd., N. Coast Region* [2010] 183 Cal.App.4th 330, 359). In the event facility activities that could impact the bed, channel, or bank of a waterbody are planned, compliance with CEQA and FGC Section 1602 will be adhered to by the Licensees where applicable.

CDFW appreciates DWR's proposal to generally avoid areas of tricolored blackbird (*Agelaius tricolor*) breeding or nesting during routine maintenance. However, vegetation removal in and along the banks of the lake has the potential to still impact nesting and wintering tricolored blackbirds, a CESA-listed species. The tricolored blackbird population is declining throughout the State due to historical and continuing loss of nesting substrate. Although DWR is proposing vegetation removal outside of the tricolored blackbird breeding season, the activity may have the potential to impact the nesting population density of tricolored blackbird colonies returning from the previous nesting year. Southern California populations of tricolored blackbirds, such as in Riverside County, are considered residential populations with similar numbers of birds observed in the winter in the same areas where they breed in the spring (Belenky 2015). CDFW is also concerned proposed maintenance activities may impact wintering tricolored blackbirds by flushing the species from the vegetation during any vegetation removal. These direct and indirect impacts to tricolored blackbirds are subject to FGC section 2081. Vegetation removal within the lake and along the banks of the lake is considered a substantial change, which may also be subject to FGC section 1602.

Recommendation: DWR should coordinate with CDFW prior to conducting routine maintenance activities to avoid, minimize, or mitigate for potential impact to tricolored blackbird and their habitat. Adequate nesting vegetation should be maintained for the species to compensate for the continued disturbance of maintenance activities in the area.

CONCLUSION

We appreciate the opportunity to comment on the IS/MND. For any questions regarding this letter and further coordination on these issues, please contact Mary Ngo at (562) 342-2140 and Mary.Ngo@wildlife.ca.gov.

Sincerely,

DocuSigned by:

Erinn Wilson-Olgin

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REFERENCES

Belenky, L. 2015. A Petition to List the Tricolored Blackbird (*Agelaius tricolor*) as Endangered under the California Endangered Species Act and Request for Emergency Action to Protect the Species.