



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Central Region
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GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director



Governor's Office of Planning & Research

July 30 2021

STATE CLEARINGHOUSE

July 30, 2021

Joseph C. McGahan, Drainage Coordinator
San Luis & Delta-Mendota Water Authority
P.O. Box 2157
Los Banos, California 93635
jmcgahan@summerseng.com

**Subject: Mud Slough Restoration Project (Project)
Mitigated Negative Declaration (MND)
State Clearinghouse No. 2021060585**

Dear Mr. McGahan:

The California Department of Fish and Wildlife (CDFW) received a MND from the San Luis & Delta-Mendota Water Authority 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

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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agency environmental review efforts, focusing specifically on projects and related activities that have the potential to adversely affect fish and wildlife resources.

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).

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 these watercourses include, but are not limited to, the following: increased sediment input from vegetation removal and ground disturbance causing increased erosion; toxic runoff associated with Project implementation; temporal loss of wildlife habitat; and/or impairment of wildlife movement along riparian corridors. The Regional Water Quality Control Board and U.S. Army Corps of Engineers also have jurisdiction regarding discharge and pollution to Waters of the State.

Fully Protected Species: CDFW has jurisdiction over fully protected species of birds, mammals, amphibians, reptiles, and fish, pursuant to Fish and Game Code sections 3511, 4700, 5050, and 5515. CDFW prohibits and cannot authorize take of any fully protected species.

PROJECT DESCRIPTION SUMMARY

Proponent: San Luis & Delta-Mendota Water Authority

Objective: The proposed Project objective is to restore and enhance wildlife habitat on the China Island Unit of the North Grasslands Wildlife Management Area and on the

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Newman Land Company property by reestablishing Mud Slough flows to portions of those lands that were isolated from Mud Slough as a result of the Grassland Bypass Project. The proposed Project would replace the water supplies to Newman Lake through the restoration of the hydrologic connection between Mud Slough and the Lake. Natural erosion effects of flow in Mud Slough have caused the normal water level to drop approximately four feet below the Newman Lake water level. Project activities include construction of a new diversion structure in Mud Slough, minimal channel excavation, and installment of a new culvert and road crossing. Additional activities include the removal of five abandoned water control structures within the China Island refuge and the reinforcement of the existing Newman dam at Mud Slough. The total construction footprint (including staging area) is estimated to be 1.4 acres.

Location: The proposed Project is located on the Newman Land Company property and on the State wildlife refuge known as the China Island Unit of the North Grasslands Wildlife Management Area, east of Route 33 and northwest of Highway 140. The Project area includes the area of evaluation for potential direct and indirect impacts, an area that includes approximately 368 acres, mostly in the China Island Unit of the North Grasslands Wildlife Management Area.

Timeframe: Unspecified.

COMMENTS AND RECOMMENDATIONS

CDFW offers the following comments and recommendations to assist the San Luis & Delta-Mendota Water Authority 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.

The San Luis & Delta-Mendota Water Authority proposes to adopt a MND for the Project which includes various mitigation measures for special-status species. However, the measures currently included in the MND may be inadequate to reduce impacts to less than significant. In particular, CDFW has concerns regarding measures specified for the State threatened Swainson's hawk (*Buteo swainsoni*), the State threatened tricolored blackbird (*Agelaius tricolor*), and the State fully protected white-tailed kite (*Elanus leucurus*). In addition, CDFW is concerned with Project activities which are subject to CDFW's lake and streambed alteration regulatory authority.

Swainson's Hawk (SWHA)

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). The

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California Natural Diversity Database (CNDDDB) show multiple SWHA occurrences adjacent to the Project site (CDFW 2021).

The Project as proposed 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. Without appropriate avoidance and minimization measures for SWHA, potential significant impacts that may result from Project activities include nest abandonment, reduced nesting success (loss or reduced health or vigor of eggs or young), and direct mortality.

As currently drafted, Mitigation Measure SWHA BIO-8 indicates that the size of no-disturbance buffers around active nests will be determined in cooperation with CDFW. CDFW recommends a minimum no-disturbance buffer of 0.5-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. If an active SWHA nest is detected during surveys, 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 (ITP), pursuant to Fish and Game Code section 2081 subdivision (b) is necessary to comply with CESA.

Tricolored Blackbird (TRBL)

TRBL aggregate and nest colonially, forming colonies of up to 100,000 nests (Meese et al. 2014). Approximately 86% of the global population is found in the San Joaquin Valley (Kelsey 2008, Weintraub et al. 2016). Increasingly, TRBL are forming larger colonies that contain progressively larger proportions of the species' total population (Kelsey 2008). In 2008, for example, 55% of the species' global population nested in only two colonies, which were located in silage fields (Kelsey 2008). In 2017, approximately 30,000 TRBL were distributed among only 16 colonies in Merced County (Meese 2017). Nesting can occur synchronously, with all eggs laid within one week (Orians 1961). For these reasons, depending on timing, disturbance to nesting colonies can cause abandonment, significantly impacting TRBL populations (Meese et al. 2014).

Records from the CNDDDB show that TRBL are present within and adjacent to the Project site (CDFW 2021). Without appropriate avoidance and minimization measures for TRBL, potential significant impacts include nest and/or colony abandonment, reduced reproductive success, and reduced health and vigor of eggs and/or young. The MND currently requires implementation of Mitigation Measure WTK BIO-10 to mitigate impacts to TRBL, however as currently drafted this measure is unclear regarding whether the 300-foot no-disturbance buffer would be applied around Project activities or whether the buffer would be applied around active TRBL nests.

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If an active TRBL nesting colony is found during pre-activity surveys, CDFW recommends implementation of a minimum 300-foot no-disturbance buffer around the colony in accordance with CDFW's "*Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015*" (CDFW 2015). CDFW advises that this buffer remain in place until the breeding season has ended or until a qualified biologist has determined that nesting has ceased, the birds have fledged, and are no longer reliant upon the colony or parental care for survival. It is important to note that TRBL colonies can expand over time. For this reason, CDFW recommends conducting additional pre-activity surveys within 10 days prior of Project initiation to reassess the colony's areal extent. If a TRBL nesting colony is detected during surveys required by Mitigation Measure WTK BIO-10, consultation with CDFW is warranted to discuss how to implement the Project and avoid take, or if avoidance is not feasible, to acquire an ITP, pursuant to Fish and Game Code section 2081 subdivision (b), prior to any ground-disturbing activities.

Fully Protected Raptors:

White-tailed kite, a State fully protected species, have the potential to nest and/or forage in the vicinity of the Project site. The Project will involve noise, ground disturbance, and movement of workers. These activities may occur directly adjacent to large trees and other potentially suitable nest and roost sites. Therefore, Project activities may result in take of white-tailed kite resulting from nest abandonment and/or direct mortality.

To evaluate potential impacts to fully protected raptors (FPR), 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 FPR. If Project activities are to take place during the typical 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 activity. If a FPR 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 around active nests. If the ½-mile no-disturbance buffer cannot feasibly be implemented, consultation with CDFW is warranted to determine how the Project may avoid take of fully protected species.

Lake and Streambed Alteration

The description of the Project location includes restoration work activities within the bed and bank of Mud Slough, Los Banos Creek, and the San Joaquin River. Project-related activities that have the potential to change the bed, bank, and channel of streams or lakes, including but not limited to alterations to riparian vegetation, are subject to CDFW's regulatory authority pursuant Fish and Game Code section 1600 et seq.; therefore, Notification may be warranted. Fish & Game Code section 1600 et seq.

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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); and/or (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. It is important to note, CDFW is required to comply with CEQA, as a Responsible Agency, when issuing a Lake and Streambed Alteration Agreement (LSAA). If inadequate, or no environmental review, has occurred, for the Project activities that are subject to notification under Fish and Game Code section 1602, CDFW will not be able to issue the Final LSAA until CEQA analysis for the project is complete. This may lead to considerable Project delays. For additional information on notification requirements, please contact our staff in the Lake and Streambed Alteration Program at (559) 243-4593.

Wildlife Management Area Access:

The proposed Project will occur on the China Island Unit of CDFW's North Grasslands Wildlife Management Area. Access to CDFW properties is subject to limitations pursuant to California Code of Regulations, Title 14, Chapter 11 section 550. For this reason, in addition to consultation with CDFW's Regional staff, CDFW recommends consultation with CDFW's Wildlife and Lands Program staff well in advance of Project initiation to discuss and/or demonstrate access to the Project area where it intersects North Grasslands Wildlife Management Area. Please contact Sean Allen, Senior Fish and Wildlife Habitat Supervisor, Los Banos Wildlife Area Complex, at 18110 W. Henry Miller Road, Los Banos, CA 93635; via electronic email at Sean.Allen@wildlife.ca.gov; or via telephone at 559-341-2865.

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. 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 begin, CDFW recommends having a qualified biologist

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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 & G. Code, § 711.4; Pub. Resources Code, § 21089).

CDFW appreciates the opportunity to comment on the Project to assist the San Luis & Delta-Mendota Water Authority 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 Jim Vang, Environmental Scientist, at the address

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provided on this letterhead, by telephone at (559) 243-4014, extension 254, or by electronic mail at Jim.Vang@wildlife.ca.gov.

Sincerely,

DocuSigned by:

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Gerald Hatler for Julie A. Vance
Regional Manager

Attachment 1

cc: Regional Water Quality Control Board
Central Valley Region
1685 "E" Street
Fresno, California 93706-2020

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

ec: Sean Allen, Linda Connolly, Veronica Salazar
California Department of Fish and Wildlife

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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.
- CDFW. 2021. Biogeographic Information and Observation System (BIOS). <https://www.wildlife.ca.gov/Data/BIOS>.
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- Meese, R. J., E.C. Beedy, and W.J. Hamilton, III. 2014. Tricolored blackbird (*Agelaius tricolor*), *The Birds of North America* (P. G. Rodewald, Ed.). Ithaca: Cornell Lab of Ornithology; Retrieved from the Birds of North America: <https://birdsna-org.bnaproxy.birds.cornell.edu/Species-Account/bna/species/tribla>. Accessed December 15, 2017.
- Meese, R.J. 2017. Results of the 2017 Tricolored Blackbird Statewide Survey. California Department of Fish and Wildlife, Wildlife Branch, Nongame Wildlife Program Report 2017-04, Sacramento, CA. 27 pp. + appendices.
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- Weintraub, K., T.L. George, and S.J. Dinsmore. 2016. Nest survival of tricolored blackbirds in California's Central Valley. *The Condor* 118(4): 850–861.

Attachment 1

**CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
RECOMMENDED MITIGATION MONITORING AND REPORTING PROGRAM
(MMRP)**

PROJECT: Mud Slough Restoration Project

SCH No.: 2021060585

RECOMMENDED MITIGATION MEASURE	STATUS/DATE/INITIALS
<i>Before Disturbing Soil or Vegetation</i>	
Mitigation Measure: SWHA	
SWHA Take Authorization	
Mitigation Measure: TRBL	
TRBL Take Authorization	
<i>During Construction</i>	
Mitigation Measure: SWHA	
SWHA Avoidance	
Mitigation Measure: TRBL	
TRBL Avoidance	
Mitigation Measure: Fully Protected Raptors	
FPR Avoidance	