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**GAVIN NEWSOM, Governor**  
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Governor's Office of Planning & Research

**Dec 15 2021**

## STATE CLEARINGHOUSE

December 15, 2021

Matthew H. Hurley, General Manager  
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**Subject: McMullin On-Farm Flood Capture Expansion Project (Project)**  
**MITIGATED NEGATIVE DECLARATION (MND)**  
**SCH No.: 2021110218**

Dear Mr. Hurley:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt an MND from the McMullin Area Groundwater Sustainability Agency (MAGSA) for the above-referenced Project pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.<sup>1</sup>

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 the 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.

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<sup>1</sup> 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.

**Bird Protection:** CDFW has jurisdiction over actions that may 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 section 3503 (regarding unlawful take, possession, or needless destruction of the nest or eggs of any bird), section 3503.5 (regarding the take, possession, or destruction of any birds-of-prey or their nests or eggs), and section 3513 (regarding unlawful take of any migratory nongame bird).

**Water Rights:** The capture of unallocated stream flows to artificially recharge groundwater aquifers is subject to appropriation and approval by the State Water Resources Control Board (SWRCB) pursuant to Water Code section 1200 et seq. CDFW, as Trustee Agency, is consulted by SWRCB during the water rights process to provide terms and conditions designed to protect fish and wildlife prior to appropriation of the State's water resources. Certain fish and wildlife are reliant upon aquatic and riparian ecosystems, which in turn are reliant upon adequate flows of water. CDFW therefore has a material interest in assuring that adequate water flows within streams for the protection, maintenance, and proper stewardship of those resources. CDFW provides, as available, biological expertise to review and comment on environmental documents and impacts arising from Project activities.

## **PROJECT DESCRIPTION SUMMARY**

The Project is intended to build upon existing infrastructure to divert available flood water and stormwater flows from the Kings River that are intended to be released downstream of the James Weir. Diverted waters will be used for direct groundwater recharge, or for distribution to participating farmlands for in lieu recharge or direct groundwater recharge, an approach termed On-Farm Recharge (OFR). Diversion occurs on the southern end of the James Bypass, just upstream of the James Weir. Phase 1 of this program was constructed in 2020 and was designed to divert, distribute, and recharge flood water and stormwater flows at a rate of 150 cubic feet per second (cfs) from the Kings River upstream from James Weir to farmlands. The Project represents Phase 2 of this program, and will increase the current diversion rate from

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150 cfs to 450 cfs and deliver water to an area of approximately 40,400 acres to efficiently recharge critically overdrafted groundwater aquifers in the area.

Temporary ground disturbing activities will include staging, stockpile, and borrow areas. Permanent Project features will include construction of an 11.5-mile earthen main canal with a 300 cfs capacity, and up to four miles of lateral canals to be constructed during project implementation as needed. Other permanent construction will include road crossings and pump stations.

**Proponent:** MAGSA

**Location:** The project is located within the MAGSA boundary in unincorporated agricultural lands in Fresno County, approximately 20 miles southwest of Fresno, and south of Kerman. A primary intersection in the proposed project area is found at Mountain View Avenue and Jameson Avenue.

**Timeframe:** None given.

## COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist MAGSA in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife, i.e., biological resources. Editorial comments or other suggestions may also be included to improve the document.

Based on a review of the Project description, a review of California Natural Diversity Database (CNDDDB) records, and a review of aerial photographs of the Project and surrounding habitat, several special-status species could potentially be impacted by Project activities including but not limited to the State threatened and federal endangered San Joaquin kit fox (*Vulpes macrotis mutica*), the State and federal endangered Fresno kangaroo rat (*Dipodomys nitratoides exilis*), the State threatened Swainson's hawk (*Buteo swainsoni*), the State threatened tricolored blackbird (*Agelaius tricolor*), and the State species of special concern burrowing owl (*Athene cunicularia*). Fresno Slough provides crucial riparian and aquatic habitat for many species including the State and federal threatened giant garter snake (*Thamnophis gigas*), State species of special concern western pond turtle (*Emys marmorata*), and Swainson's hawk. Other species of birds, amphibians, reptiles, mammals, fish, and plants also compose the local ecosystem.

Please note that the CNDDDB is populated by and records voluntary submissions of species detections. As a result, species may be present in locations not depicted in the

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CNDDDB but where there is suitable habitat and features capable of supporting species. A lack of an occurrence record in the CNDDDB does not mean a species is not present. In order to adequately assess any potential Project-related impacts to biological resources, surveys conducted by a qualified wildlife biologist/botanist during the appropriate survey period(s) and using the appropriate protocol survey methodology are warranted in order to determine whether or not any special status species are present at or near the Project area.

CDFW recommends that the following modifications and/or edits be incorporated into the MND, including proposed avoidance, minimization, and compensatory measures, prior to its adoption by MAGSA.

**Would the Project have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special-status species in local or regional plans, policies, or regulations, or by CDFW or United States Fish and Wildlife Service (USFWS)?**

**COMMENT 1: San Joaquin Kit Fox (SJKF)**

**Issues and Impacts:** SJKF occurrences have been documented within the vicinity of the Project boundary (CDFW 2021). The MND acknowledges the potential for the Project to temporarily disturb and permanently alter suitable habitat for special status species including SJKF, and to directly impact individuals if present during construction activities.

SJKF den in rights-of-way, agricultural and fallow/ruderal habitat, dry stream channels, and canal levees, etc., and populations can fluctuate over time. SJKF are also capable of occupying urban environments (Cypher and Frost 1999). SJKF may be attracted to Project areas due to the type and level of ground-disturbing activities and the loose, friable soils resulting from intensive ground disturbance. SJKF will forage in fallow and agricultural fields and utilize streams and canals as dispersal corridors. As a result, there is potential for SJKF to occupy all suitable habitat within the Project boundary and surrounding area. Without appropriate avoidance and minimization measures for SJKF, potential significant impacts associated with construction include habitat loss, den collapse, inadvertent entrapment, reduced reproductive success, reduction in health and vigor of young, and direct mortality of individuals.

**Evidence impact is potentially significant:** Habitat loss resulting from land conversion to agricultural, urban, and industrial development is the primary threat to SJKF, but the Project area is in the vicinity of areas of high and medium suitability SJKF habitat (Cypher et al. 2013). SJKF den in rights-of-way, vacant lots, and other

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disturbed areas in addition to undisturbed habitats, and populations can fluctuate over time. Absence in any one year is not necessarily a reliable predictor of future SJKF potential to occur on a site.

**Recommended Mitigation Measure 1: SJKF Habitat Assessment**

For all Project-specific components including construction and land conversion, CDFW recommends that a qualified biologist conduct a habitat assessment in advance of Project implementation, to determine if the Project area or its immediate vicinity contains suitable habitat for SJKF.

**Recommended Mitigation Measure 2: SJKF Surveys and Minimization**

CDFW recommends assessing presence or absence of SJKF by having qualified biologists conduct surveys of Project areas and a 500-foot buffer of Project areas to detect SJKF and their sign. CDFW recommends that presence/absence of SJKF be assessed by conducting surveys and that den avoidance buffers be implemented by following the USFWS “Standardized recommendations for protection of the San Joaquin kit fox prior to or during ground disturbance” (2011). Specifically, CDFW advises conducting surveys in all areas of potentially suitable habitat no less than 14 days and no more than 30 days prior to beginning of ground disturbing activities.

**Recommended Mitigation Measure 3: SJKF Take Authorization**

SJKF activity or detection warrants consultation with CDFW to discuss how to avoid take or, if avoidance is not feasible, to acquire an Incidental Take Permit (ITP) prior to any ground disturbing activities, pursuant to Fish and Game Code section 2081 subdivision (b).

**COMMENT 2: Fresno Kangaroo Rat (FKR)**

**Issues and Impacts:** Past occurrence records document Fresno kangaroo rat within the Project area (CDFW 2021). Suitable FKR habitat includes areas of grassland and upland scrub that contain requisite habitat elements, such as small mammal burrows. Without appropriate avoidance and minimization measures, potentially significant impacts associated with Project activities include burrow collapse, reduced reproductive success, reduced health and vigor of young, and direct mortality.

**Evidence impact is potentially significant:** Habitat loss and fragmentation resulting from agricultural, intensive grazing, and other land conversion is the primary threat to FKR. Very little suitable habitat for this species remains along the western floor of Fresno County (ESRP 2021). Areas of suitable habitat within the Project Area vicinity represent some of the only remaining undeveloped land within the historical range of this species, which is otherwise intensively managed for

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agriculture, and ground-disturbing activities are anticipated during Project implementation.

**Recommended Mitigation Measure 4: FKR Surveys**

If suitable habitat is present, CDFW advises that focused protocol-level trapping surveys be conducted by a qualified biologist who is permitted to do so by both CDFW and USFWS. These surveys must be discussed with CDFW prior to implementation and conducted well in advance of ground-disturbing activities.

**Recommended Mitigation Measure 5: FKR Take Avoidance and Habitat Conservation**

If this species is detected during trapping surveys, immediate consultation with CDFW is warranted to determine if the project can proceed without the potential for take. In addition, due to the minimal amount of potential FKR habitat that remains, any occupied habitat must be completely avoided to avoid the potential for a Jeopardy Determination pursuant to the California Code of Regulations (14 CCR § 783.4). We recommend that any occupied habitat be permanently protected with conservation easements and provided for financially to ensure management in perpetuity. This would be consistent with FKR Recovery Action 6 of the Recovery Plan for Upland Species of the San Joaquin Valley (USFWS 1998). There may be state and or federal funding available to assist with permanent protection of occupied habitat if the species is detected and project impacts to the species are avoided.

**COMMENT 3: Swainson's Hawk (SWHA)**

**Issues and Impacts:** SWHA occurrences have been documented within and adjacent to the Project site (CDFW 2021). Without appropriate avoidance and minimization measures for SWHA, potential significant impacts that may result from 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 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 is potentially significant:** 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). Approval of the Project may lead to subsequent ground-disturbing activities that involve noise, groundwork, and movement of workers that could affect nests and has the potential to result in nest abandonment and loss of foraging habitat, significantly impacting local nesting SWHA.

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**Recommended Mitigation Measure 6: SWHA Surveys**

CDFW recommends that a qualified 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. Mitigation Measure SH#2 states that preconstruction surveys will be conducted within a ½-mile survey distance from the construction area. The SWHA TAC 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 7: SWHA No-Disturbance Buffer**

If ground-disturbing activities are to take place during the typical bird breeding season of 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 that 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.

**Recommended Mitigation Measure 8: SWHA Take Authorization**

CDFW recommends that in the event 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 ITP pursuant to Fish and Game Code section 2081, subdivision (b) is necessary to comply with CESA.

**COMMENT 4: Tricolored Blackbird (TRBL)**

**Issues and Impacts:** TRBL are known to occur in the Project vicinity (CDFW 2021, UC Davis 2021). Review of aerial imagery indicates that the Project area includes flood-irrigated agricultural land, which is an increasingly important nesting habitat type for TRBL (Meese et al. 2017). Without appropriate avoidance and minimization measures for TRBL, potential significant impacts associated subsequent development include nesting habitat loss, nest and/or colony abandonment, reduced reproductive success, and reduced health and vigor of eggs and/or young.

**Evidence impact would be significant:** Flood-irrigated agricultural land providing potential nesting habitat for TRBL is present within the Project vicinity. TRBL aggregate and nest colonially, forming colonies of up to 100,000 nests (Meese et al. 2014), and approximately 86% of the global population is found in the San Joaquin Valley (Kelsey 2008, Weintraub et al. 2016). In addition, TRBL have been forming

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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). 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 nest entire colony site abandonment and loss of all unfledged nests, significantly impacting TRBL populations (Meese et al. 2014).

**Recommended Mitigation Measure 9: TRBL Surveys**

CDFW recommends that Project activities be timed to avoid the typical bird-breeding season of February 1 through September 15. If Project activity that could disrupt nesting must take place during that time, CDFW recommends that a qualified biologist conduct surveys for nesting TRBL no more than 10 days prior to the start of implementation to evaluate presence or absence of TRBL nesting colonies in proximity to Project activities and to evaluate potential Project-related impacts.

**Recommended Mitigation Measure 10: TRBL Colony Avoidance**

If an active TRBL nesting colony is found during surveys, CDFW recommends implementation of a minimum 300-foot no-disturbance buffer, in accordance with CDFW's (2015) "Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015", until the breeding season has ended or until a qualified biologist has determined that nesting has ceased and the young have fledged and are no longer reliant upon the colony or parental care for survival.

**Recommended Mitigation Measure 11: TRBL Take Authorization**

In the event that a TRBL nesting colony is detected during surveys, consultation with CDFW is warranted to discuss whether the Project can avoid take and, if take avoidance is not feasible, to acquire an ITP pursuant to Fish and Game Code section 2081, subdivision (b), prior to any Project activities.

**COMMENT 5: Burrowing Owl (BUOW)**

**Issues and Impacts:** BUOW inhabit open grassland containing small mammal burrows, a requisite habitat feature used by BUOW for nesting and cover. BUOW may also occur in some agricultural areas, ruderal grassy fields, vacant lots, and pastures if the vegetation structure is suitable and there are useable burrows and foraging habitat in the area (Gervais et al. 2008). Habitat both within and bordering the Project site supports suitable habitat for BUOW (CDFW 2021). Potentially significant impacts to nesting and non-nesting BUOW can occur as a result of ground-impacting activity, such as grading and flooding within active and fallow agricultural areas, and as a result of noise, vibration, and other disturbance caused



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by equipment and crews. Potential impacts associated with Project activities and land conversion include habitat loss, burrow collapse, inadvertent entrapment, nest abandonment, reduced reproductive success, reduction in health and vigor of eggs and/or young, and direct mortality of individuals.

**Evidence impact is potentially significant:** BUOW rely on burrow habitat year-round for their survival and reproduction. The Project and surrounding area contain remnant undeveloped land but is otherwise intensively managed for agriculture; therefore, subsequent ground-disturbing activities associated with subsequent constructions have the potential to significantly impact local BUOW populations. In addition, and as described in CDFW's "Staff Report on Burrowing Owl Mitigation" (CDFG 2012), excluding and/or evicting BUOW from their burrows is considered a potentially significant impact under CEQA.

**Recommended Mitigation Measure 12: BUOW Habitat Assessment**

CDFW recommends that a qualified biologist conduct a habitat assessment in advance of implementation of Project activities, to determine if the Project area or its vicinity contains suitable habitat for BUOW.

**Recommended Mitigation Measure 13: BUOW Surveys**

Where suitable habitat is present on or in the vicinity of the Project area, CDFW recommends assessing presence or absence of BUOW by having a qualified biologist conduct surveys following the California Burrowing Owl Consortium (1993) "Burrowing Owl Survey Protocol and Mitigation Guidelines" and the CDFG (2012) "Staff Report on Burrowing Owl Mitigation". Specifically, these documents suggest three or more surveillance surveys conducted during daylight, with each visit occurring at least three weeks apart during the peak breeding season of April 15 to July 15, when BUOW are most detectable. In addition, CDFW advises that surveys include a minimum 500-foot survey radius around the Project area.

**Recommended Mitigation Measure 14: BUOW Avoidance**

CDFW recommends that no-disturbance buffers, as outlined by CDFG (2012), be implemented prior to and during any ground-disturbing activities, and specifically that impacts to occupied burrows be avoided in accordance with the following table unless a qualified biologist approved by CDFW verifies through non-invasive methods that either: 1) the birds have not begun egg laying and incubation; or 2) that juveniles from the occupied burrows are foraging independently and are capable of independent survival.

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Location	Time of Year	Level of Disturbance		
		Low	Med	High
Nesting sites	April 1-Aug 15	200 m*	500 m	500 m
Nesting sites	Aug 16-Oct 15	200 m	200 m	500 m
Nesting sites	Oct 16-Mar 31	50 m	100 m	500 m

\* meters (m)

### **Recommended Mitigation Measure15: BUOW Eviction and Mitigation**

If BUOW are found within these recommended buffers and avoidance is not possible, it is important to note that according to CDFG (2012), evicting birds from burrows is not a take avoidance, minimization, or mitigation method and is instead considered a potentially significant impact under CEQA. If it is necessary for Project implementation, CDFW recommends that burrow exclusion be conducted by qualified biologists and only during the non-breeding season, before breeding behavior is exhibited and after the burrow is confirmed empty through non-invasive methods, such as surveillance. CDFW then recommends mitigation in the form of replacement of occupied burrows with artificial burrows at a minimum ratio of one burrow collapsed to one artificial burrow constructed (1:1) to mitigate for evicting BUOW and the loss of burrows. BUOW may attempt to colonize or re-colonize an area that will be impacted; thus, CDFW recommends ongoing surveillance at a rate that is sufficient to detect BUOW if they return.

### **Editorial Comments and/or Suggestions**

**Riparian and Aquatic Impacts:** Watershed and habitat protection are vital to the management of California's diverse fish, wildlife, and plant resources. The Project may affect the aquatic and riparian habitat and associated species by reducing the amount of surface flow in the active stream channel and downstream, as well as reducing the amount of subsurface flow from percolation.

Fresno Slough is the only riparian corridor that conveys flows from the Kings River northward into the San Joaquin River, and thence to the San Francisco Bay Delta. The Fresno Slough historically conveyed Kings River surface flow to the San Joaquin River, but flood flow patterns have since been modified such that up to 4,750 cfs of flood flow releases are capable of being conveyed through Fresno Slough and James Bypass to the San Joaquin River via the Mendota Pool. This portion of the San Joaquin River supports spawning habitat for the Federal threatened Central Valley steelhead (*Oncorhynchus mykiss irideus*) and the State species of special concern fall/late fall-run Central Valley Chinook salmon (*Oncorhynchus tshawytscha*), in addition to the nonessential experimental population of spring run Central Valley Chinook salmon, for which the San Joaquin River Restoration Program goal is to restore a self-sustaining

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fishery. The addition of cool freshwater flood flows from the Kings River into the San Joaquin River system during the winter and spring months benefit both returning adult and outmigrating juvenile chinook salmon.

The remaining riparian vegetation in the lower Kings River and Fresno Slough provides crucial habitat for many species, including those with special status such as Swainson's hawk. Swainson's hawk was listed as threatened in 1983 based on loss of habitat and decreased numbers across the state. Swainson's hawk often nest in riparian vegetation located near high quality foraging habitat such as grasslands, pasture, and suitable agriculture crops such as alfalfa. Degradation and loss of riparian habitat due to insufficient instream flows pose a threat to the recovery of Swainson's hawk that occupy the lower Kings River and Fresno Slough during the nesting season.

CDFW is concerned that the proposed Project may result in direct and cumulative adverse impacts to the fish and wildlife and other public trust resources supported by the Fresno Slough and its associated riparian habitats, and that any proposed reduction in surface flow will affect the sustainability of the riparian woodland and aquatic habitats within the stream. CDFW recommends that the MND be amended and recirculated with a hydrologic study or other information that identifies and analyzes the impacts of surface and subsurface water reduction on the riparian woodland and aquatic habitats associated with the Fresno Slough and the species supported by these habitats, and includes appropriate measures to avoid, minimize, and mitigate potential biological impacts due to surface flow reduction.

**Fully Appropriated Stream Status (FASS) and Water Availability Analysis:** Each of the Fresno Slough/James Bypass, Kings River, and San Joaquin River, in whole or in part, has a FASS designation. Fresno Slough is Fully Appropriated all year from the confluence with the San Joaquin River upstream to the Kings River and including the upstream watershed of the Kings River, per SWRCB Water Right Order 98-08 Declaration of Fully Appropriated Stream Systems. The Kings River in Kings, Fresno, and Tulare Counties is Fully Appropriated all year from the Tulare Lake Basin upstream, including all tributaries where hydraulic continuity exists, per SWRCB Water Right Order 98-08 Declaration of Fully Appropriated Stream Systems. The San Joaquin River in Fresno County is Fully Appropriated all year from the confluence with Mendota Pool upstream, including all tributaries where hydraulic continuity exists, per SWRCB Water Right Order 98-08 Declaration of Fully Appropriated Stream Systems. Diversion of Kings River surface flows away from the Fresno Slough is anticipated to also impact the Fresno Slough and San Joaquin River, and it is not clear how the water rights or FASS statuses of those streams depend on the flow that is currently delivered.

CDFW recommends that the MND include an assessment of the FASS status of the San Joaquin and Kings River, acknowledge the current and ongoing hearing before the

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SWRCB Administrative Hearings Office concerning the Kings River FASS Declaration, and provide a completed water availability analysis.

**Water Rights:** Sections 6.10 (Hydrology and Water Quality) and 6.19 (Utilities and Service Systems) state that unallocated surface flows, meaning flood flows exceeding water right allocations, will be diverted from the James Bypass and there would be no need for new or revised water entitlements associated with the Project. As stated previously, the capture of unallocated stream flows to artificially recharge groundwater aquifers is subject to appropriation and approval by the SWRCB pursuant to Water Code section 1200 et seq. CDFW recommends that the MND include a detailed description of the water rights and water entitlements that would pertain to the Project and address any applications or change petitions that MAGSA will be filing. CDFW, as Trustee Agency, is consulted by the SWRCB during the water rights process to provide terms and conditions designed to protect fish and wildlife prior to appropriation of the State's water resources. Given the potential for impacts to sensitive species and their habitats, it is advised that required consultation with CDFW occur well in advance of the SWRCB water right application process.

**Lake and Streambed Alteration:** Project activities that have the potential to substantially change the bed, bank, and channel of streams and associated wetlands may be subject to CDFW's regulatory authority pursuant Fish and Game Code section 1600 et seq. Fish and Game Code section 1602 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); (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. CDFW is required to comply with CEQA in the issuance of a Lake or Streambed Alteration (LSA) Agreement; therefore, if the CEQA document approved for the Project does not adequately describe the Project and its impacts, a subsequent CEQA analysis may be necessary for LSA Agreement issuance. Additional information on notification requirements is available through the Central Region LSA Program at (559) 243-4593 or [R4LSA@wildlife.ca.gov](mailto:R4LSA@wildlife.ca.gov) and the CDFW website: <https://wildlife.ca.gov/Conservation/LSA>.

**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).

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CDFW encourages that Project implementation occur during the bird non-nesting season; however, if Project activities must occur during the breeding season (i.e., 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 Code sections as referenced above.

To evaluate Project-related impacts to 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 disturbance to maximize the probability that nests that could potentially be impacted by the Project are detected. CDFW also recommends that surveys cover a sufficient area around the work site to identify nests and determine their status. A sufficient area means any area potentially affected by the 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 that a qualified biologist continuously monitor nests to detect behavioral changes resulting from the Project. If behavioral changes occur, CDFW recommends that the work causing that change cease and that CDFW be consulted 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 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 area would be concealed from a nest site by topography. CDFW recommends that a qualified wildlife biologist advise and support any variance from these buffers.

**Endangered Species Act Consultation:** CDFW recommends consultation with the USFWS prior to Project ground disturbance, due to potential impacts to Federal listed species. Take under the ESA is more stringently defined than under CESA; take under ESA may also include significant habitat modification or degradation that could result in death or injury to a listed species, by interfering with essential behavioral patterns such as breeding, foraging, or nesting.

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## ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database that 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 obtained 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](mailto: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>.

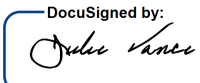
## FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of filing fees is 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).

## CONCLUSION

CDFW appreciates the opportunity to comment on the MND to assist MAGSA in identifying and mitigating Project impacts on biological resources. If you have questions regarding this letter, please contact Annette Tenneboe, Senior Environmental Scientist (Specialist), at (559) 580-3202 or by email at [Annette.Tenneboe@wildlife.ca.gov](mailto:Annette.Tenneboe@wildlife.ca.gov).

Sincerely,

DocuSigned by:  
  
FA83F09FE08945A...  
Julie A. Vance  
Regional Manager

Attachment

cc: Office of Planning and Research, State Clearinghouse, Sacramento

ec: Annette Tenneboe, California Department of Fish and Wildlife

Matthew H. Hurley  
General Manager  
McMullin Area Groundwater Sustainability Agency  
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Attachment 1

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

**PROJECT: McMullin On-Farm Capture Expansion Project  
SCH No.: 2021110218**

<b>RECOMMENDED MITIGATION MEASURES</b>	<b>STATUS/DATE/INITIALS</b>
<i>Before Project Activity</i>	
<b>Recommended Mitigation Measure 1: SJKF Habitat Assessment</b>	
<b>Recommended Mitigation Measure 2: SJKF Surveys and Minimization</b>	
<b>Recommended Mitigation Measure 3: SJKF Take Authorization</b>	
<b>Recommended Mitigation Measure 4: FKR Surveys</b>	
<b>Recommended Mitigation Measure 5: FKR Take Avoidance and Habitat Conservation</b>	
<b>Recommended Mitigation Measure 6: SWHA Surveys</b>	
<b>Recommended Mitigation Measure 7: SWHA No-disturbance Buffer</b>	
<b>Recommended Mitigation Measure 8: SWHA Take Authorization</b>	
<b>Recommended Mitigation Measure 9: TRBL Surveys</b>	
<b>Recommended Mitigation Measure 10: TRBL Colony Avoidance</b>	
<b>Recommended Mitigation Measure 11: TRBL Take Authorization</b>	
<b>Recommended Mitigation Measure 12: BUOW Habitat Assessment</b>	
<b>Recommended Mitigation Measure 13: BUOW Surveys</b>	
<b>Recommended Mitigation Measure 14: BUOW Avoidance</b>	
<b>Recommended Mitigation Measure 15: BUOW Eviction and Mitigation</b>	
<i>During Project Activity</i>	
<b>Recommended Mitigation Measure 2 SJKF Surveys and Minimization</b>	

<b>RECOMMENDED MITIGATION MEASURES</b>	<b>STATUS/DATE/INITIALS</b>
<b>Recommended Mitigation Measure 5: FKR Take Avoidance and Habitat Conservation</b>	
<b>Recommended Mitigation Measure 6: SWHA No-disturbance Buffers</b>	
<b>Recommended Mitigation Measure 10: TRBL Colony Avoidance</b>	
<b>Recommended Mitigation Measure 14: BUOW Avoidance</b>	