

State of California
Department of Fish and Wildlife



Memorandum

Date: December 29, 2021

Governor's Office of Planning & Research

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STATE CLEARINGHOUSE

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Melissa Parinha for Stephanie Fong

From: Stephanie Fong, Acting Regional Manager
California Department of Fish and Wildlife-Bay Delta Region, 2825 Cordelia Road, Suite 100, Fairfield, CA 94534

Subject: Delta Dam Rodent Burrow Remediation Project, Initial Study/Mitigated Negative Declaration, SCH No. 20201120060, County of Alameda and Contra Costa

The California Department of Fish and Wildlife (CDFW) has reviewed the Initial Study/Mitigated Negative Declaration (IS/MND) prepared by the California Department of Water Resources (DWR) for the Delta Dam Rodent Burrow Remediation Project (Project), located in the County of Alameda and Contra Costa. CDFW is submitting comments on the IS/MND regarding potentially significant impacts to biological resources associated with the Project.

CDFW ROLE

CDFW is a Trustee Agency with responsibility under the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) pursuant to CEQA Guidelines section 15386 for commenting on projects that could impact fish, plant, and wildlife resources (e.g., biological resources). CDFW is also considered a Responsible Agency if a project would require discretionary approval, such as permits issued under the California Endangered Species Act (CESA), the Native Plant Protection Act, the Lake and Streambed Alteration (LSA) Program, and other provisions of the Fish and Game Code that afford protection to the state's fish and wildlife trust resources.

PROJECT DESCRIPTION AND LOCATION

The Project will occur at three DWR facilities: Clifton Court Forebay, Dyer Reservoir, and Patterson Reservoir. The facilities are surrounded by an earthen dam that is subject to ongoing rodent burrowing that can lead to "piping" and internal erosion. "Piping" occurs when a burrow intercepts the water level within the dam and causes material from the dam embankment to migrate and be carried away. This "piping" progresses upstream, elongating the pipe, until it reaches the reservoir. Once connection is made to the reservoir, the "piping" can cause a dam breach and could lead to dam failure.

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The Project proposes to prevent dam failure by collapsing and/or excavating burrows, backfilling the dam surface, and compacting the soil. In some locations, wire and/or rock would be placed to provide permanent armoring to deter future rodent burrowing. Additional maintenance and repair measures include intake channel repair and removal of trees around a sump at Clifton Court Forebay; drainage ditch repair and remediation of erosion along the entrance road at Dyer Reservoir; and outlet drainage channel improvements at Patterson Reservoir.

The Clifton Court Forebay is located within the County of Contra Costa approximately 10 miles northwest from the City of Tracy, Dyer Dam is located within the County of Alameda approximately 13 miles west of the City of Tracy and 7 miles southeast of the City of Livermore, Patterson Reservoir is located within the County of Alameda approximately 1 mile east of the City of Livermore.

COMMENTS AND RECOMMENDATIONS

CDFW offers the following comments and recommendations to assist DWR in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on biological resources.

COMMENT 1: Mitigation Measure BIO-2 and BIO-11 – Deferred Mitigation

Issue: Mitigation Measure BIO-2 and BIO-11 states that the Project will have permanent and temporary impacts to long-styled sand-spurrey (California Rare Plant Rank [CRPR] 1B.2) and waters of the United States and that the impacts are significant and require mitigation. However, the IS/MND does not provide enforceable Project mitigation measures to reduce potential impacts to long-styled sand-spurrey and waters of the United States to less-than- significant levels. Instead, the IS/MND provides a list of mitigation options for compensation of permanent and temporary impacts without committing to any of the options.

Supporting evidence: CEQA Guidelines, section 15126.4, subd. (a)(1)(B) does not allow for mitigation measures to be developed at a later time.

Recommendation: CDFW recommends that to compensate for impacts to long-styled sand-spurrey and waters of the United States that DWR identifies specific enforceable mitigation measures that the Project will implement to compensate for the Project's permanent and temporary impacts to long-styled sand-spurrey and waters of the United States.

COMMENT 2: Mitigation Measure BIO-2 – Permanent Impact Mitigation Measure

Issue: The IS/MND provides various mitigation measure options to compensate for permanent impacts to long-styled sand-spurrey. One of the compensation options is the creation of a new long-styled sand-spurrey population.

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Evidence impact would be significant: The creation of a new population of special status plant species is difficult and most often fails to result in a new self-sustaining population.

Recommendation: CDFW recommends that the Project compensate for permanent impacts to long-styled sand-spurrey by acquiring and preserving lands that contain existing long-styled sand-spurrey populations instead of creating a new population. The land acquired should be preserved in perpetuity through a conservation easement.

Comment 3: California Tiger Salamander – Clifton Court Forebay Dam

Issue: The IS/MND states that there is a moderate probability of California tiger salamander (CTS) to be present at the Clifton Court Forebay; however, Mitigation Measure BIO-5, which is meant to avoid take of CTS, is not sufficient to avoid take. Note that in the event CTS are found on-site and a finalized CESA Incidental Take Permit has not been obtained to conduct the Project, significant project delays could occur. Therefore, CDFW recommends the Project apply for an Incidental Take Permit early on prior to Project implementation. If CTS are within the Project area, then it is questionable whether the Project could achieve complete take avoidance of the species. Only established protocol level surveys for CTS, that take up to two years to complete, would be sufficient to determine the species-status within the Project footprint.

Supporting Evidence: Grading, collapsing and filling rodent burrows will result in crushing and suffocation of CTS when they are present. These activities may also result in reducing or fragmenting breeding or non-breeding habitat.

Recommended Mitigation Measure 1: All Project activities shall begin on or after June 1 and all work activities shall be completed by October 31 of each year. All concrete or cementitious-soil slurry work shall be poured before September 15 of each year to ensure adequate curing time prior to precipitation events.

Recommended Mitigation Measure 2: Project activities shall be restricted to dry weather. Project activities shall be timed with awareness of precipitation forecasts and potential increases in stream flows. Work within the stream and riparian corridor shall cease when the National Weather Service (NWS) 24-hour weather forecast indicates a 40 percent chance or higher of precipitation of at least 0.10-inch of precipitation. All necessary erosion control measures shall be implemented prior to the onset of precipitation or inundation. Any construction equipment and materials shall be removed if inundation is likely. Work halted due to precipitation may resume after a dry out period of 24-hours and when the NWS 24-hour weather forecast indicates less than a 40 percent chance of precipitation. If the rain event is more than a 0.25-inch per 24-hour rain event, Project activities shall not recommence until there is a dry out period of 24 hours after the rain event ceases.

Recommended Mitigation Measure 3: A qualified biologist or biological monitor shall inspect the work area each day prior to mobilization of equipment and starting work. If the qualified biologist or biological monitor determines the work areas are not occupied by sensitive species, equipment may be moved into the work area under the observation of the qualified biologist or biological monitor and Project activities may begin.

Recommended Mitigation Measure 4: A qualified biologist shall inspect all ruts and holes, etc. for CTS immediately prior to and during burrow excavation or removal. The qualified biologist shall survey the open areas adjacent to ongoing construction. Multiple biologists may be necessary to survey the area appropriately. If CTS is observed, Project activities shall immediately stop and the Project shall contact U.S. Fish and Wildlife Service (USFWS) and CDFW. Project activities shall not reconvene until the Project has demonstrated compliance with the federal Endangered Species Act (ESA) and CESA.

Recommended Mitigation Measure 5: Permittee shall excavate all burrows by hand (e.g., shovels and non-powered hand-held tools) under the direction of a qualified biologist. If any CTS are found during excavation, Project activities shall immediately stop and the Project shall contact USFWS and CDFW. Project activities shall not reconvene until the Project has demonstrated compliance with ESA and CESA.

Recommended Mitigation Measure 6: After a burrow excavation is complete, the Project shall immediately fill the burrow that same day.

Comment 4: Mitigation Measure Bio-5

Issue: Mitigation Measure Bio-5 of the IS/MND states that within 30 days prior to clearing existing vegetation for staging areas south of the dam (i.e., between Skinner Fish Facility and intake channel), an approved biologist shall survey for the presence of potential underground refugia for CTS (i.e., small mammal burrows). If potential refugia are observed, they shall be covered with plywood to prevent collapse from temporary heavy equipment traffic. An approved biologist shall monitor and guide the placement of plywood over burrows. However, placing plywood over burrows could potentially cause take of CTS.

Evidence impact would be significant: Placing plywood over burrows can result in trapping CTS within the burrows.

Recommendation: To avoid take of CTS, CDFW recommends that plywood not be placed over burrows to provide a staging area between the Skinner Fish Facility and intake channel. CDFW recommends having an approved qualified biologist survey the staging area at least seven days prior to staging area establishment to identify and flag all burrows located within the staging area. The qualified biologist shall then establish a staging area where no burrows are located and would not be impacted by the Project.

Comment 5: Mitigation Measure Bio-7

Issue: Mitigation Measure Bio-7 of the IS/MND states that nesting bird season is from March 15 to August 31 and that nesting bird surveys will be conducted within seven days prior construction activities involving vegetation removal. However, birds, such as raptors, have been found to nest from February 1 to September 15 and could be impacted by other Project activities not associated with vegetation removal.

Evidence impact would be significant: If nesting bird surveys are not conducted during the entire range of the nesting bird season for all Project activities, the Project can result in destruction of an active bird nest and cause avoidable disturbances to nesting birds.

Recommended Revised Mitigation Measure BIO-7: A qualified biologist shall conduct pre-construction surveys for nesting birds and bird nests no more than seven days prior to any construction activity and shall resurvey if there is a four day or more lapse in construction activities. Surveys shall occur during the nesting season (February 1 to September 15). Surveys shall cover the Project footprint and potential nest habitat and features within 250 feet for all birds, and 1,000 feet for raptors and tri-colored blackbird. If the biologist does not find any nests but potential habitat would be removed, the biologist shall conduct a final nesting survey within the habitat to be removed and within 250 feet of the habitat within 48 hours of the activity to confirm the absence of nests. Any construction activity that occurs from September 15 to October 15, outside the nesting season, shall not require pre-construction nesting bird surveys.

Comment 6: Mitigation Measure Bio-7 – Swainson’s Hawk

Issue: Mitigation Measure Bio-7 of the IS/MND states that a qualified biologist shall conduct pre-construction surveys for nesting birds, including Swainson’s hawk, no more than seven days prior to any construction activity involving vegetation removal during the nesting season (March 15 to September 15). However, CDFW’s species-specific protocol-level surveys that were developed to maximize the probability of locating a Swainson’s hawk nest should be required to reduce impacts to a level of less-than-significant.

Evidence impact would be significant: Conducting non protocol level surveys for Swainson’s hawk would decrease the probability of locating and avoiding impacts to nesting Swainson’s hawks. Not following established survey protocols could result in failure to identify a nest, cause failure of unidentified nests, and reduce the nesting success rates of nesting Swainson’s hawks.

Recommended Mitigation Measure 8: If Project activities will occur during the Swainson’s hawk nesting season (March 15 to September 15), a qualified biologist shall conduct protocol level nesting surveys for Swainson’s hawk within a 0.5-mile

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radius of the Project site. Surveys shall follow the *Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley* (2000), available online here: <https://www.wildlife.ca.gov/Conservation/Survey-Protocols#377281284-birds>. After surveys, if a Swainson's hawk nest is identified, no Project activities shall occur within 0.5-mile of the nest.

Comment 7: Mitigation Measure BIO-8 – Avoid and Minimize Impacts to Burrowing Owl

Issue: Mitigation Measure BIO-8 of the IS/MND states that a qualified biologist shall conduct pre-construction surveys for burrowing owls, no more than 14 days prior to initiation of any construction activity within burrowing owl habitat areas during nesting bird season (March 15 to August 31). However, protocol surveys that have been developed to maximize the probability of locating nesting burrowing owls and reduce the potential for burrowing owl nest failure as a result of the Project require a minimum of four surveys to be conducted prior to construction activities and identifies that the breeding season in California is from February 1 to August 31. Mitigation Measure BIO-8 goes on to state that if a no-activity zone cannot be established a qualified biologist will develop a site-specific plan to minimize the potential to affect the reproductive success of the owls but does not identify specific enforceable measures.

Evidence impact would be significant: If burrowing owl protocol level surveys are not conducted during the appropriate time period, the Project can cause avoidable impacts to burrowing owl. In California, the burrowing owl breeding season extends from February 1 to August 31 (Haug et al. 1993, Thompsen 1971).

Recommended Mitigation Measure 9: If Project activities will occur during the burrowing owl breeding season (February 1 to August 31) or non-breeding season (September 1 to January 31) a qualified biologist (that is knowledgeable about the burrowing owl, including its natural history, habitat requirements, seasonal movements and range, to survey and monitor for burrowing owls) shall conduct complete necessary burrowing owl habitat surveys, impact assessments, and prepare associated reports within all locations subject to Project activities. Methodology shall follow the recommendations and guidelines provided within the 2012 Staff Report on Burrowing owl Mitigation, available online here: <https://wildlife.ca.gov/Conservation/Survey-Protocols#377281284-birds> and as described below.

Burrowing owl surveys shall be conducted by the qualified biologist in accordance with the Staff Report on Burrowing Owl Mitigation (2012). As such, the qualified biologist shall conduct four survey visits: 1) at least one site visit between 15 February and 15 April, and 2) a minimum of three survey visits, at least three weeks apart between 15 April and 15 July, with at least one visit after 15 June. If burrowing owls are identified during surveys, then DWR shall notify CDFW within three business days of determining that a burrowing owl is occupying the Project site to

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discuss the observed location, activities and behavior of the burrowing owl(s) and appropriate avoidance and minimization measures.

REGULATORY REQUIREMENTS

California Endangered Species Act

Please be advised that a CESA Permit must be obtained if the Project has the potential to result in “take” of plants or animals listed under CESA, either during construction or over the life of the Project. Issuance of a CESA Permit is subject to CEQA documentation; the CEQA document must specify impacts, mitigation measures, and a mitigation monitoring and reporting program. If the Project will impact CESA listed species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain a CESA Permit.

CEQA requires a Mandatory Finding of Significance if a project is likely to substantially impact threatened or endangered species [CEQA section 21001(c), 21083, & CEQA Guidelines section 15380, 15064, 15065]. Impacts must be avoided or mitigated to less-than-significant levels unless the CEQA Lead Agency makes and supports Findings of Overriding Consideration (FOC). The CEQA Lead Agency’s FOC does not eliminate the Project proponent’s obligation to comply with Fish and Game Code section 2080.

Lake and Streambed Alteration Program

Notification is required for any activity that will substantially divert or obstruct the natural flow; change or use material from the bed, channel, or bank including associated riparian or wetland resources; or deposit or dispose of material where it may pass into a river, lake or stream. Work within ephemeral streams, washes, watercourses with a subsurface flow, and floodplains are subject to notification requirements. CDFW, as a Responsible Agency under CEQA, will consider the CEQA document for the Project. CDFW may not execute the final LSA Agreement until it has complied with CEQA (Public Resources Code § 21000 et seq.) as the responsible agency.

FILING FEES

CDFW anticipates that the Project will have an impact on fish and/or wildlife, and assessment of filing fees is necessary (Fish and Game Code, section 711.4; Pub. Resources Code, section 21089). 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.

Thank you for the opportunity to comment on the Project’s IS/MND. If you have any questions regarding this letter or for further coordination with CDFW, please contact Monica Oey, Senior Environmental Scientist (Specialist), at (707) 428-2088 or Monica.Oey@wildlife.ca.gov regarding the Clifton Court Forebay; or Marcia Grefsrud, Environmental Scientist, at (707) 644-2812 or Marcia.Grefsud@wildlife.ca.gov regarding the Dyer Dam and Patterson Dam.

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REFERENCES

Haug, E. A., B. A. Millsap, and M. S. Martell. 1993. Burrowing owl (*Speotyto cunicularia*), in A. Poole and F. Gill, editors, The Birds of North America, The Academy of Natural Sciences, Philadelphia, Pennsylvania, and The American Ornithologists' Union, Washington, D.C., USA.

Thomsen, L. 1971. Behavior and ecology of burrowing owls on the Oakland Municipal Airport. Condor 73: 177-192.