



State of California – Natural Resources Agency
 DEPARTMENT OF FISH AND WILDLIFE
 Central Region
 1234 East Shaw Avenue
 Fresno, California 93710
 (559) 243-4005
www.wildlife.ca.gov

GAVIN NEWSOM, Governor
 CHARLTON H. BONHAM, Director



May 25, 2023

Governor's Office of Planning & Research

May 25 2023

Chris Carr, Environmental Scientist
 Division of Water Rights Mail Room
 Attn: San Joaquin Unit
 State Water Resources Control Board
 Post Office Box 100
 Sacramento, California 95812-2000
 E-mail: LSJR-SD-Comments@waterboards.ca.gov

STATE CLEARING HOUSE

POSSIBLE ADMENDMENT OF THE WATER QUALITY CONTROL PLAN FOR THE SAN FRANCISCO BAY/SACRAMENTO-SAN JOAQUIN DELTA ESTAURY TO INCORPORATE TUOLUMNE RIVER VOLUNTARY AGREEMENT

NOTICE OF PREPARATION OF ENVIRONMENTAL DOCUMENTATION AND SCOPING MEETINGS
 STATE CLEARINGHOUSE NO. 2023040428

Dear Chris Carr:

The California Department of Fish and Wildlife (CDFW) received a Notice of Preparation (NOP) of a Substitute Environmental Document (SED) from the State Water Resources Control Board (SWRCB) for a possible amendment of the water quality control plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary to incorporate a Tuolumne River Voluntary Agreement pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines¹.

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, we appreciate 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.

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.), the project proponent may seek related take authorization as provided by the Fish and Game Code.

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.

Chris Carr, Environmental Scientist
State Water Resources Control Board
May 25, 2023
Page 2

Water Rights: 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

Proponent: SWRCB

Objective: The Project includes possible updates to the Lower San Joaquin River (LSJR) flow components of the Bay-Delta Plan to incorporate the Tuolumne River Voluntary Agreement (hereafter, Voluntary Agreement). Currently, the LSJR flow objectives and program of implementation include a narrative objective that requires inflow conditions from the San Joaquin River watershed to the Delta at Vernalis sufficient to support and maintain the natural production of viable native San Joaquin River fish populations migrating through the Delta and a numeric objective from February through June, that requires 40 percent of the unimpaired flow be maintained in the Stanislaus, Tuolumne, and Merced Rivers, within an adaptive range of 30 to 50 percent of the unimpaired flow, inclusive. In addition, during February through June, the flow at Vernalis as provided by the percent of unimpaired flow objective, shall be no lower than the base flow value of 1,000 cubic feet per second (cfs) with an adaptive management range between 800 and 1,200 cfs, inclusive. This means that if the percent of unimpaired flow is being met but flows are insufficient to achieve the base flow at Vernalis, then additional flows from each tributary will be necessary (Table 3, Bay-Delta Plan, p. 15 and p. 25). During the month of October, the LSJR flow objectives and program of implementation also require the maintenance of a minimum baseflow, as measured at Vernalis on the San Joaquin River, of 1,000 cfs, plus an additional 28,000 acre-feet pulse flow or a minimum monthly average flow of 2,000 cfs, whichever is less (Table 3, Bay-Delta Plan, Footnote 13). The Bay-Delta Plan provides pathways for voluntary agreements to implement the LSJR flow portions of the Bay-Delta Plan for the "[t]ributaries as a whole, an individual tributary, or some combination thereof." The proposal for the Voluntary Agreement does not fully conform to the current Bay-Delta Plan, including the required percent of unimpaired flow level. Accordingly, the Bay-Delta Plan would need to be updated to allow for the Voluntary Agreement. Specifically, it is anticipated that the program of implementation would be modified to allow for the Voluntary Agreement to be implemented for the proposed 8-year period, with the possibility of extension.

Location: Possible updates to the Bay-Delta Plan to incorporate the Voluntary Agreement would cover the geographic area of the Tuolumne River watershed as well as the LSJR and through the Bay-Delta. The project area also covers areas receiving water exported from the Tuolumne River watershed, LSJR, and Bay-Delta that could be impacted by implementation of the Voluntary Agreement.

COMMENTS AND RECOMMENDATIONS

The current state of the rivers in the Project area calls for immediate action to improve conditions for fish and wildlife. CDFW recognizes that an alternative path to implementation of the 2018 Bay-Delta Plan could be achieved through Voluntary Agreements. CDFW supports such a pathway provided that implementation of voluntary solutions results in equal or better outcomes for fish and wildlife in the Project areas as those resulting from the 2018 Bay-Delta Plan. CDFW offers the comments and recommendations below to assist SWRCB in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources.

Chris Carr, Environmental Scientist
 State Water Resources Control Board
 May 25, 2023
 Page 3

- The Tuolumne and San Joaquin Rivers support the federal threatened Central Valley steelhead Distinct Population Segment (DPS) (*Oncorhynchus mykiss irideus* pop.11) and the State species of special concern fall-run Central Valley Chinook salmon (*Oncorhynchus tshawytscha*). The San Joaquin River supports 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 fishery. CDFW documented the presence of the experimental spring-run Central Valley Chinook salmon in the Tuolumne River during the 2021 escapement surveys, establishing the San Joaquin River as both a migratory corridor for spring/fall Chinook and steelhead and as likely providing rearing habitat. Other special status fish species known to occur within one or more of the these river systems include the State species of special concern hardhead (*Mylopharodon conocephalus*), Kern brook lamprey (*Lampetra hubbsi*), white sturgeon (*Acipenser transmontanus*), and Pacific lamprey (*Entosphenus tridentatus*).
- Surface and ground water dependent ecosystems, including vernal pool, swale, riparian, wetland, and oak woodland habitats, are present in proximity to these river corridors. Sensitive habitats identified within or adjacent to these corridors include the State Rank S1.1 Great Valley oak riparian forest and Valley freshwater marsh; the State Rank S2.1 Great Valley cottonwood riparian forest, and the State Rank S3.1 Northern Hardpan Vernal Pool. These habitats within the Project area support additional special status aquatic and terrestrial species including the following:
 - The State and federally threatened giant garter snake (*Thamnophis gigas*); State threatened Swainson's hawk (*Buteo swainsoni*); and tricolored blackbird (*Agelaius tricolor*); the State and federal endangered least Bell's vireo (*Vireo bellii pusillus*); the State and federal threatened California tiger salamander – central California DPS (*Ambystoma californiense* pop. 1); the federal endangered vernal pool tadpole shrimp (*Lepidurus packardii*); the federal threatened vernal pool fairy shrimp (*Branchinecta lynchi*); the State and federal endangered, and California Rare Plant Rank (CRPR) 1B.1 hairy Orcutt grass (*Orcuttia pilosa*) and Hartweg's golden sunburst (*Pseudobahia bahifolia*); the State endangered, federal threatened, and CRPR 1B.1 Colusa grass (*Neostapfia colusana*); the federal endangered and CRPR 1B.1 Delta button-celery (*Eryngium racemosum*); the State endangered, federal threatened, and CRPR 1B.2 succulent owl's-clover (*Castilleja campestris* var. *succulenta*); the federal threatened and CRPR 1B.2 Hoover's spurge (*Euphorbia hooveri*); the CRPR 1A Hoover's cryptantha (*Cryptantha hooveri*); the CRPR 1B.2 spiny-sepaled button-celery (*Eryngium spinosepalum*); the CRPR 1B.3 Hoover's calycadenia (*Hoover's calycadenia*); the CRPR 2B.2 dwarf downingia (*Downingia pusilla*) and eel-grass pondweed (*Potamogeton zosteriformis*); and the State species of special concern burrowing owl (*Athene cunicularia*), American badger (*Taxidea taxus*), Merced kangaroo rat (*Dipodomys heermanni dixonii*), Townsend's big-eared bat (*Corynorhinus townsendii*), pallid bat (*Antrozous pallidus*), western mastiff bat (*Eumops perotis californicus*), western red bat (*Lasiurus blossevillii*), mountain plover (*Charadrius montanus*), western pond turtle (*Emys marmorata*), and western spadefoot (*Spea hammondi*), and, western ridged mussel (*Gonidea angulata*). Suitable habitat for the rare and endemic crotch bumble bee (*Bombus crotchii*), obscure bumble bee (*Bombus caliginosus*), and Morrison bumble bee (*Bombus morrisoni*) also occurs in the Project vicinity. Other species of birds, amphibians, reptiles, mammals, fish, and plants also compose the local ecosystem within the Project boundary.
- CDFW recommends that the Environmental Impact Report (EIR) fully identify potential impacts to biological resources, including but not limited to the

Chris Carr, Environmental Scientist
State Water Resources Control Board
May 25, 2023
Page 4

above-mentioned species and habitats. Based on those potential impacts, CDFW recommends that the EIR include measures to avoid, minimize, and/or mitigate those impacts.

- CDFW recommends that the potential direct and indirect impacts to stream/riparian and wetland habitat be analyzed according to each Project activity proposed by the Voluntary Agreement. Based on those potential impacts, CDFW recommends that the EIR include measures to avoid, minimize, and/or mitigate those impacts. CDFW recommends that impacts to riparian habitat (i.e., biotic and abiotic features) take into account the effects to stream function and hydrology from riparian habitat loss or damage, as well as potential effects from the loss of riparian habitat to special-status species already identified herein. CDFW recommends that losses to stream and wetland habitats be offset with corresponding riparian and wetland habitat restoration incorporating native vegetation to replace the value to fish and wildlife provided by the habitats lost from Project implementation. If on-site restoration to replace habitats is not feasible, CDFW recommends offsite mitigation by restoring or enhancing in-kind riparian or wetland habitat and providing for the long-term management and protection of the mitigation area, to ensure its persistence.
- White sturgeon were included in the 2018 SED, but new information is available on their presence in the San Joaquin tributaries. In the spring of 2021, adult white sturgeon were found in the lower Tuolumne River. CDFW staff monitored these fish and river conditions throughout the spring and summer of 2021. Reduced river flows resulted in very low water levels in the lower Tuolumne River making it impossible for these fish to emigrate volitionally until flows increased. Although 2021 was a critically dry year, flows on the Tuolumne River were not below the minimum Federal Energy Regulatory Commission (FERC) requirements of 50 cfs at La Grange Dam. Considering this new information, CDFW recommends that the SED include an evaluation of the potential impacts of stranding to white sturgeon.
- Green sturgeon (*A. medirostris*) discussed in the 2018 SED but at that time there was very little evidence that they were present in the San Joaquin Basin. Green sturgeon should now be considered in the preparation of this SED based on new information on their presence in the San Joaquin Tributaries. In 2017 (Anderson et. al. 2018) and 2022 (SWT 2022), green sturgeon were identified in the Stanislaus River at approximately River Mile 53 and 51 respectively. The fact that Green sturgeon have been found in the Stanislaus River on two different occasions multiple years apart suggests that they may be present in the San Joaquin Tributaries more often than has been assumed in the past. There are currently no monitoring studies in the San Joaquin tributaries for sturgeon, and the Sturgeon Fishing Report Card does not include options to report fish in the tributaries. Although not yet reported on the Tuolumne River, impacts to green sturgeon should be considered.
- The NOP notes that the proposed Voluntary Agreement does not fully conform to the current Bay-Delta Plan. CDFW recommends that the SED provide an analysis of impacts, including beneficial impacts, to aquatic resources, including but not limited to those species listed above when analyzing the Voluntary Agreement. CDFW also recommends an evaluation and explanation of how these flows and timing of related flow releases from upstream dams will benefit aquatic resources and critical fish spawning and rearing reaches. In addition, CDFW recommends that the SED provide clarity on how implemented flows are accounted for and how they contribute not only to Tuolumne instream flow, but also San Joaquin flow at Vernalis, as well as Delta inflow and outflow.

Water Rights: CDFW recommends that the EIR include a detailed description of the water rights and water entitlements that would pertain to the Voluntary Agreement and related projects and address any applications or change petitions that may be filed.

Chris Carr, Environmental Scientist
State Water Resources Control Board
May 25, 2023
Page 5

Basin Plans: CDFW recommends that the EIR address whether incorporating the Voluntary Agreement into the Bay Delta Plan may affect the criteria or objectives within the Water Quality Control Plan for the San Joaquin River Basin.

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 to 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); 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. 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 and the CDFW website: <https://wildlife.ca.gov/Conservation/LSA>.

Endangered Species Act Consultation: CDFW recommends consultation with the United States Fish and Wildlife Service (USFWS) prior to Project ground disturbance, due to potential impacts to Federal-listed species. Take under the Endangered Species Act (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. Similarly, for potential effects to steelhead and its critical habitat, CDFW recommends consultation with the National Marine Fisheries Service (NMFS). Consultation with the USFWS and NMFS in order to comply with ESA is advised well in advance of Project implementation.

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 the California Natural Diversity Database (CNDDDB) The CNDDDB field survey form can be filled out and submitted online at the following link: <https://wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The types of information reported to CNDDDB can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Plantsand-Animals> .

ENVIRONMENTAL DOCUMENT FILING FEES

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

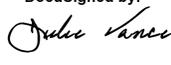
CONCLUSION

CDFW appreciates the opportunity to comment on the NOP and to assist SWRCB in identifying and mitigating project impacts on biological resources.

Chris Carr, Environmental Scientist
State Water Resources Control Board
May 25, 2023
Page 6

Questions regarding this letter or further coordination should be directed to Gretchen Murphey, Senior Environmental Scientist (Specialist), at (209) 853-2533 or Gretchen.Murphey@wildlife.ca.gov.

Sincerely,

DocuSigned by:

FA83F09FE08945A...

Julie A. Vance
Regional Manager

cc: Office of Planning and Research
State Clearinghouse, Sacramento
state.clearinghouse@opr.ca.gov

California Department of Fish and Wildlife
Gerald Hatler
Gerald.Hatler@wildlife.ca.gov

Annette Tenneboe
Annette.Tenneboe@wildlife.ca.gov

Brycen Swart
Brycen.Swart@wildlife.ca.gov

Bjarni Seurp
Bjarni.Seurp@wildlife.ca.gov

Brooke Jacobs
Brooke.Jacobs@wildlife.ca.gov

Chris Carr, Environmental Scientist
State Water Resources Control Board
May 25, 2023
Page 7

REFERENCES

Anderson JT, Schumer G, Anders PJ, Horvath K, Merz JE. 2018. Confirmed observation: a North American Green Sturgeon *Acipenser medirostris* recorded in the Stanislaus River, California. *Journal of Fish and Wildlife Management* 9(2):624–630; e1944-687X. doi:10.3996/012018-JFWM-006

[SWT] Stanislaus Watershed Team. 2022. Stanislaus Watershed Team (SWT) November 16,2022 Meeting Notes. Available online:
<https://www.usbr.gov/mp/bdo/docs/swt-meeting-packet-2022-11.pdf>