



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



June 12, 2023

Lacie McBride
Merced Subbasin Groundwater Sustainability Agency
2222 M Street
Merced, California 95340
lacey.mcbride@countyofmerced.com

**Subject: Sandy Mush Mutual Water Company Reservoir Storage Project (Project)
NEGATIVE DECLARATION (ND)
State Clearinghouse No. 2023050183**

Dear Lacie McBride:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt an ND from the Merced Subbasin Groundwater Sustainability Agency (MSGSA) 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 the Fish and Game Code. While the comment period may have ended, CDFW would appreciate if you will still consider our comments.

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.

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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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

Location and Project Description

The Project includes construction of a storage reservoir on approximately 30 acres of land that is currently farmed in dairy feed crops. The reservoir will store up to 750 acre-feet annually (AFA) of flood flows diverted from existing irrigation diversions on Mariposa and Owens Creeks and store it for later use to meet crop demand irrigation. The reservoir will tie into existing pipelines and not create any new points of diversion or other disturbances in the creek or on the surrounding property. The stored water will be used for Flood-MAR and direct irrigation to 2,100 acres of farmland. The water right and diversion facilities are existing, and there will be no disturbance to the creeks or riparian habitat. The reservoir design will necessitate the construction of levees, control structures, and tie-ins to the existing pipeline and pumping facilities to divert the flow

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into the reservoirs, and to allow water to be re-diverted, as required, back into the existing irrigation delivery pipelines.

Proponent: MSGSA is the Lead Agency, the Project sponsor is Sandy Mush Mutual Water Company.

Location: The Project is located West of Highway 59, between Dickenson Ferry and McNamara roads in Merced County, California.

Timeframe: None given.

Comments and Recommendations

CDFW offers the comments and recommendations below to assist MSGSA 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 imagery of the Project and surrounding habitat, several special-status species could potentially be impacted.

In particular, CDFW is concerned regarding potential impacts for the following special status wildlife species and habitats known to occupy the Project vicinity: the State threatened Swainson's hawk (*Buteo swainsoni*) and tricolored blackbird (*Agelaius tricolor*) and the State and federal threatened California tiger salamander (*Ambystoma californiense* pop 1). Other species of birds, amphibians, reptiles, mammals, fish, invertebrates, and plants also compose the local ecosystem. CDFW recommends that the following modifications or edits be incorporated into the ND, including proposed avoidance, minimization, and compensatory measures, prior to its adoption by MSGSA.

COMMENT 1: Swainson's Hawk (SWHA)

SWHA occurrences have been documented in close proximity to the Project site (CDFW 2023) and suitable nesting and foraging habitat occur adjacent to the Project site. 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. 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

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young), and direct mortality. Any take of SWHA without appropriate incidental take authorization would be a violation of Fish and Game Code.

Recommended Mitigation Measure 1: 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.

Recommended Mitigation Measure 2: SWHA Focused Surveys and No-Disturbance Buffer

If ground-disturbing activities will take place during the species nesting season of March 1 through August 31, 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 3: 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 SWHA take. If take cannot be avoided, take authorization through the acquisition of an Incidental Take Permit pursuant to Fish and Game Code section 2081, subdivision (b) is necessary to comply with CESA.

COMMENT 2: Tricolored Blackbird (TRBL)

TRBL have been documented in the Project vicinity (CDFW 2023). Review of aerial imagery indicates that the Project area includes suitable habitat types including wetlands, ponds, and flood-irrigated agricultural land, which is an increasingly important nesting habitat type for TRBL (Meese et al. 2017). 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). TRBL have been forming larger colonies that contain progressively larger proportions of the species' total population (Kelsey 2008). Nesting can occur synchronously, with all eggs laid within one week (Orians 1961). For these reasons, disturbance to nesting colonies can cause entire nest colony site abandonment and loss of all unfledged nests, significantly impacting TRBL populations (Meese et al. 2014). Without appropriate avoidance and minimization measures for TRBL, potential significant impacts associated with the Project include nesting habitat loss, nest and/or colony abandonment, reduced reproductive success, and reduced health and vigor of eggs and/or young.

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Recommended Mitigation Measure 4: TRBL Surveys

CDFW recommends that Project activities be timed to avoid the avian nesting 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 5: 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 (2015a) *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 site for survival.

Recommended Mitigation Measure 6: 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 Incidental Take Permit for TRBL pursuant to Fish and Game Code section 2081, subdivision (b), prior to any Project activities.

COMMENT 3: California Tiger Salamander (CTS)

CTS have been documented in the Project area (CDFW 2023). Review of aerial imagery indicates the presence of several wetland features in the Project's vicinity that have the potential to support breeding CTS, and the Project area or its immediate surroundings may support small mammal burrows, a requisite upland habitat feature for CTS. Up to 75% of historic CTS habitat has been lost to development (Shaffer et al. 2013). Loss, degradation, and fragmentation of habitat are among the primary threats to CTS (CDFW 2015b, USFWS 2017). The Project area is within the range of CTS and is both composed of and bordered by suitable upland habitat that could be occupied or colonized by CTS. Without appropriate avoidance and minimization measures for CTS, potential significant impacts associated with any construction or ground disturbing activity include burrow collapse; inadvertent entrapment; reduced reproductive success; reduction in health and vigor of eggs, larvae and/or young; and direct mortality of individuals. In addition, depending on the design of any activity, the Project has the potential to result in creation of barriers to dispersal.

Recommended Mitigation Measure 7: Focused CTS Surveys

CDFW recommends that a qualified biologist evaluate potential Project-related impacts to CTS prior to ground-disturbing activities using the United States Fish and

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Wildlife Service (2003) *Interim Guidance on Site Assessment and Field Surveys for Determining Presence or a Negative Finding of the California Tiger Salamander*, in areas providing suitable upland or breeding habitat for CTS. CDFW advises that the survey include a 100-foot buffer around the Project area in all areas of wetland and upland habitat that could support CTS.

Recommended Mitigation Measure 8: CTS Avoidance

CDFW advises that avoidance for CTS include a minimum 50-foot no disturbance buffer delineated around all small mammal burrows and a minimum 250-foot no disturbance buffer around potential breeding pools within and adjacent to the Project area. CDFW also recommends avoiding any impacts that could alter the hydrology or result in sedimentation of breeding pools. If avoidance is not feasible, consultation with CDFW is warranted to determine if the Project can avoid take.

Recommended Mitigation Measure 9: CTS Take Authorization

If through surveys it is determined that CTS occupy the Project area and if take cannot be avoided, take authorization would be warranted prior to initiating Project activities by acquiring an Incidental Take Permit for CTS pursuant to Fish and Game Code section 2081, subdivision (b) before Project activities occur. Alternatively, in the absence of protocol surveys, the applicant can assume presence of CTS within the Project area and obtain an Incidental Take Permit.

Editorial Comments and/or Suggestions

Water Rights and Impacts from Surface Water Diversion: The ND states that the water right and diversion facilities are existing; however, the Project description in the ND is not clear in describing whether the Project will result in the diversion of unallocated surface flow for the purpose of groundwater storage. As stated previously, the capture of unallocated surface flows to artificially recharge groundwater aquifers is subject to appropriation and approval by the SWRCB pursuant to Water Code section 1200 et seq. 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. CDFW also recommends that the ND 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 may be filed.

Lake and Streambed Alteration: Project activities that have the potential to substantially change the bed, bank, and channel of streams and associated riparian and wetland habitat that are subject to CDFW's regulatory authority pursuant Fish and Game Code section 1600 et seq. Fish and Game Code section 1602 requires an entity

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

Nesting Birds: 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 500-feet around active nests of non-listed raptors and a no-disturbance buffer of 250 feet around active nests of other non-listed bird species. 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. CDFW recommends that a qualified wildlife biologist advise and support any variance from these buffers.

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Endangered Species Act Consultation: CDFW recommends consultation with the United States Fish and Wildlife Service prior to Project ground disturbance, due to potential impacts to Federal listed species. Take under the ESA is more broadly 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.

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. 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 ND to assist MSGSA 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.

Sincerely,

DocuSigned by:
Bob Stafford
5343A684FF02469...

Bob Stafford for Julie A. Vance
Regional Manager

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Attachment

ec: Office of Planning and Research
State Clearinghouse

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California Department of Fish and Wildlife

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Attachment 1

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

PROJECT: Sandy Mush Mutual Water Company Reservoir Storage Project

STATE CLEARINGHOUSE No. 2023050183

RECOMMENDED MITIGATION MEASURES	STATUS/DATE/INITIALS
<i>Before Project Activity</i>	
Recommended Mitigation Measure 1: SWHA Surveys	
Recommended Mitigation Measure 2: SWHA Focused Surveys and No Disturbance Buffer	
Recommended Mitigation Measure 3: Focused SWHA Take Authorization	
Recommended Mitigation Measure 4: TRBL Surveys	
Recommended Mitigation Measure 5: TRBL Colony Avoidance	
Recommended Mitigation Measure 6: TRBL Take Authorization	
Recommended Mitigation Measure 7: Focused CTS Surveys	
Recommended Mitigation Measure 8: CTS Avoidance	
Recommended Mitigation Measure 9: CTS Take Authorization	
<i>During Project Activity</i>	
Recommended Mitigation Measure 1: SWHA Surveys	
Recommended Mitigation Measure 2: SWHA Focused Surveys and No Disturbance Buffer	
Recommended Mitigation Measure 5: TRBL Colony Avoidance	
Recommended Mitigation Measure 8: CTS Avoidance	