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August 2, 2024

Brooke Gutierrez, Director of Parks
Merced Irrigation District
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Snelling, California 95369
RecreationCEQAInfo@mercedid.org

SUBJECT: Notice of Preparation (NOP) of a Draft Environmental Impact Report for the Merced Irrigation District Recreation Facilities Improvement Project (Project) at Lake McClure and McSwain Reservoir State Clearinghouse No. 2024051222

Dear Brooke Gutierrez:

The California Department of Fish and Wildlife (CDFW) received a NOP from Merced Irrigation District (Merced ID) for the above-referenced Project pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that may affect California fish and wildlife. Likewise, CDFW appreciates the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under Fish and Game Code.

CDFW ROLE

CDFW is California's **Trustee Agency** for fish and wildlife resources and holds those resources in trust by statute for all the people of the State (Fish & G. Code, §§ 711.7, subd. (a) & 1802; Pub. Resources Code, § 21070; CEQA Guidelines § 15386, subd. (a)). CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (*Id.*, § 1802). Similarly, for purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public 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.

Fully Protected Species: CDFW has jurisdiction over species of birds, mammals, amphibians, reptiles, and fish pursuant to Fish and Game Code sections 3511, 4700, 5050, and 5515. Take of any fully protected species is prohibited and CDFW cannot authorize their incidental take except as specifically provided for in Fish and Game Code; none of those specific exceptions are applicable to this project.

Bird Protection: 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).

Other Special Status Species: Species of plants and animals need not be officially listed as Endangered, Rare, or Threatened (E, R, or T) on any State or federal list to be considered E, R, or T under CEQA. If a species can be shown to meet the criteria for E, R, or T, as specified in the CEQA Guidelines (California Code of Regs tit. 14, Chapter 3, § 15380), CDFW recommends it be fully considered in the environmental analysis for the Project.

Federal Energy Regulatory Commission (FERC): CDFW is the appropriate State Fish and Wildlife agency for resource consultation and Federal Power Act (FPA) Section 10(j) (16 U.S.C. §803 (j)) purposes. The fish and wildlife resources of the State of California are held in trust for the people of the state by and through CDFW (Fish & G. Code § 711.7). CDFW has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of those species (Fish & G. Code § 1802). The mission of CDFW is to manage California's diverse fish, wildlife, and plant resources, and the habitats on which they depend, for their ecological values and for their use and enjoyment by the public. It is the goal of CDFW to preserve, protect, and as needed, to restore habitat necessary to support native fish, wildlife, and plant species within the FERC-designated boundaries of these Projects, as well as the areas adjacent to these Projects in which resources are affected by ongoing project operations and maintenance activities and recreational use.

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CDFW's coordination with the State Water Board and other resource agencies is an effective path to codifying our preferred conditions via certifications, because CDFW only has recommendation authority under the FPA. Along with federal land management agencies' mandatory 4(e) conditions and National Oceanic and Atmospheric Administration's (NMFS) Section 18 fishway prescriptions, Certification conditions can be used by state and federal agencies to help mitigate hydropower impacts on riverine ecosystems.

PROJECT DESCRIPTION SUMMARY

Proponent: Merced ID

Project Description/Objective: Merced ID, the CEQA lead agency, announced the availability of a NOP of a Draft Environmental Impact Report (EIR) for the proposed Project. The Draft EIR will describe the proposed Project and evaluate potential environmental impacts with the Project and its alternatives.

Completion of the two dams (New Exchequer and McSwain dams) in 1967 created two lakes, Lake McClure and the McSwain Reservoir, which generated many opportunities for public recreation. The lakes are in the foothills on the western slope of the Sierra Nevada Mountain range, approximately 23 miles northeast of Merced. Lake McClure has a storage capacity of about 1,025,000 acre-feet, while Lake McSwain has a storage capacity of 9,730 acre-feet. In total, the lakes combined include a total shoreline length of 94.5 miles.

This multi-purpose Project will maintain the flood control functions of both dams, while making the most of opportunities to protect and enhance environmental and recreational resources at the two lakes. The objectives of the proposed Project as stated by the Proponent include:

1. Replacing and expanding capacities of aging underground and subsurface water, sewer and electrical utilities infrastructure, including, as necessary, original equipment that dates back to the 1970's;
2. Continuing the Merced ID recreation legacy by providing upgrades to existing facilities to meet new and evolving recreation customer demands and upgrading facilities to meet new accommodation standards;
3. Expanding capacities at day use and camping areas, houseboat moorings and cabin rentals in response to recognized growth trends in recreation facilities' seasonal use, while minimizing potential recreation use impacts to natural, historic and prehistoric resources; and
4. Modernizing existing recreation areas with new and enhanced features, such as restrooms, adding electric car charging stations, upgrading boat ramps to allow more use during dryer water years, and adding in more fish cleaning and recycling stations.

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Location: The proposed Project is in the Merced River watershed in the western foothills of the Sierra Nevada, in Merced and Mariposa counties, California. Facilities are located on the mainstem of the Merced River, about 23 miles northeast of the city of Merced, California. The proposed Project ranges in elevation from approximately 880 feet (ft) at the upstream end of Lake McClure to 320 ft at McSwain Reservoir. A portion of the Project is on federal land managed by United States (U.S.) Department of the Interior, Bureau of Land Management.

Timeframe: Unspecified

COMMENTS AND RECOMMENDATIONS

The comments and recommendations offered below are limited in scope and content to the environmental information relevant to our statutory responsibilities in connection with the proposed recreation facilities project.

General Scope: On May 24, 2024, the Project Proponent filed a “*Notice of Availability (NOA) for Notice of Intent to Rely on FERC Final Environmental Impact Statement [EIS], With Mandatory Conditions in Combination with a Supplemental Analysis, To Satisfy CEQA for the Merced River Hydroelectric Project and Merced Falls Hydroelectric Project Relicensings*”. That NOA informed CDFW about the Proponent’s intention to prepare a CEQA Supplemental Analysis to FERC’s 2015 Final EIS for the relicensing of the Merced River Hydroelectric Project (FERC Project No. 2179) and Merced Falls Hydroelectric Project (FERC Project No. 2467). As described, the CEQA Supplemental Analysis will follow the standard CEQA Initial Study format as a guideline. In addition, a separate Merced ID CEQA Programmatic Environmental Impact Report (PEIR) is under development for all of Merced ID’s recreational facilities at the Projects.

The scope of the proposed Draft EIR does not include recreational facilities at Merced Falls Hydroelectric Project. Merced ID should clarify if there are any plans to improve, upgrade or conduct other types of work at the recreational facilities at Merced Falls. If so, CDFW recommends that Merced Falls should also be considered in this Draft EIR. If the proposed recreation improvements will only occur within the Merced River Hydroelectric Project (FERC Project No. 2179) boundary, it should not be assumed that this CEQA analysis contributes to satisfy the CEQA requirements under the Merced Falls Hydroelectric Project (P-2467) as well. In that case, Merced Falls recreation facilities would require a separate environmental analysis. As described in the NOP, FERC issued a final EIS for the Merced River Hydroelectric project, including the Amended Recreation Facilities Project Plan, in compliance with the National Environmental Policy Act (NEPA). This final EIS was not responsive to the Merced Falls project, which was previously owned by the Pacific Gas & Electric Company (PG&E).

The NOP states that: “[i]f the Merced ID Board approves the proposed Project and certifies the Recreation Facilities Project EIR, the analyses, findings, and mitigation measures corresponding to recreation improvements included in the 2015 FERC

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Recreation Facilities Project Plan will be incorporated by reference into the Final CEQA compliance documentation for the Merced River Hydroelectric Project and Merced Falls Hydroelectric Project, a draft of which is being developed separately and concurrently.” Again, this statement implies that the results of the proposed Draft EIR will also provide CEQA compliance documentation for Merced Falls hydroelectric project. Merced ID needs to clarify if the scope of this DEIR pertains only to the Merced River project and if another DEIR is being developed separately and concurrently for the Merced Falls River project.

Fish Stocking: One of the broader purposes of the Project is to continue to offer opportunities for public recreational use, including fishing. The Proponent should consider that the adequacy of the EIR will make it more useful as a basis to issue any permits or project approvals in the future. As such, the EIR should consider the importance of fish stocking to support or mitigate the loss of recreational fishing opportunities in the Merced River and Merced Falls after the improvement of fishing access as well as the potential construction, enhancement, repair, and maintenance of infrastructure (e.g., boat-launch facilities, boat docks, fishing ponds).

The proposed Project objective of “upgrading boat ramps to allow more use during dryer [sic] water years and adding in more fish cleaning and recycling stations” is consistent with supporting fish stocking activities that provide recreational opportunities to the public.

The description of projects specific to individual recreation areas, specifically, the McSwain Recreation Area, includes the construction of a “fishing pond for children and/or trout farm [which] would also be installed to be stocked seasonally.” CDFW requests that Merced ID provides details about the proposed “trout farm”, or species for stocking and consult with our agency scientists regarding appropriate species and numbers for the proposed project.

CDFW recommends the inclusion of fish stocking as a recreation measure in this Project. This measure can be developed based on a previous Memorandum of Understanding (MOU) between CDFW and Merced ID regarding fish stocking at McClure and McSwain reservoirs. Moreover, fish stocking had been included in FERC’s final EIS for Merced River and Merced Falls including a recommendation to “[a]nnually stock rainbow trout, fingerling kokanee, and Chinook salmon in Lake McClure and McSwain reservoir for recreational fishing.”

Special-Status Species: Special-status species are known to exist in the vicinity of the Project Site and there is the potential for the Project to impact State and federally listed species. Records from the California Natural Diversity Database (CNDDDB) show that the following special-status species, including State and federally listed species (CDFW 2024), could be impacted by construction and operation of the Project: the State threatened and fully protected limestone salamander (*Hydromantes brunus*); the State

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and federally endangered foothill yellow-legged frog (*Rana boylei*); the State species of special concern and federally threatened California red-legged frog (*Rana draytonii*); the State species of special concern and federally proposed threatened western spadefoot (*Spea hammondi*); the State species of special concern and federally proposed threatened western pond turtle (*Actinemys marmorata*); the State endangered and fully protected bald eagle (*Haliaeetus leucocephalus*); State fully protected golden eagle (*Aquila chrysaetos*); the State threatened Swainson's hawk (*Buteo swainsoni*) and the State threatened tricolored blackbird (*Agelaius tricolor*); the State fully protected ringtail (*Bassariscus astutus*); the State species of special concern American badger (*Taxidea taxus*), pallid bat (*Antrozous pallidus*), spotted bat (*Euderma maculatum*), Townsend's big-eared bat (*Corynorhinus townsendii*), western mastiff bat (*Eumpos perotis*), western red bat (*Lasiurus blossevillii*); coast horned lizard (*Phrynosoma cronatum*), American white pelican (*Pelecanus erythrorhynchos*), burrowing owl (*Athene cunicularia*), loggerhead shrike (*Lanius ludovicianus*), long-eared owl (*Asio otus*), short-eared owl (*Asio flammeus*), northern harrier (*Circus cyaneus*), purple martin (*Progne subis*), yellow-breasted chat (*Icteria virens*), yellow warbler (*Setophaga petechia*).

CDFW recommends that a habitat assessment be conducted at and in the vicinity of the Project Site for the aforementioned plant and animal species (hereafter, special status species). The assessment should be conducted by a qualified biologist knowledgeable with the species and any potentially suitable habitat identified should be surveyed by a qualified biologist for the potential presence of these species as part of the biological technical studies conducted in support of the EIR. If the surveys detect presence of special status species at and/or near the Project Site, the EIR should include measures to minimize, mitigate, and avoid impacts to those species, or require the Project proponent to obtain incidental take authorization under Section 2081 of Fish and Game Code if take avoidance of species listed pursuant to CESA is infeasible. Similarly, if the biological surveys detect the presence of special status species, the EIR should require that the Project proponent consult with CDFW prior to commencing the Project, to identify and implement appropriate measures to avoid or minimize impacts to those species. It should be noted that when a species, such as ringtail, is State fully protected, no "take", incidental or otherwise, can be authorized by CDFW; complete avoidance of this species is required to comply with State law.

CDFW recommends that the Proponent conduct surveys for limestone salamander. In addition, CDFW recommends that the surveys for foothill yellow-legged frog, and California red-legged frog, and burrowing owl be conducted in accordance with the species-specific protocols which can be found here: <https://wildlife.ca.gov/Conservation/Survey-Protocols>. CDFW recommends that the special status species plant surveys be surveyed for by a qualified botanist following the "Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Sensitive Natural Communities" which can also be found at: <https://wildlife.ca.gov/Conservation/Survey-Protocols>. This protocol, which is intended to maximize detectability, includes identification of reference populations to facilitate the

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likelihood of field investigations occurring during the appropriate floristic period. In the absence of protocol-level surveys being performed, additional surveys may be necessary. If take could occur as a result of Project-related activities, consultation with CDFW may be warranted.

Bird Protection: CDFW recommends that Project ground-disturbing activities occur during the bird non-nesting season; however, if ground-disturbing or vegetation-disturbing activities must occur during the nesting season (February 1 through September 15), CDFW recommends the EIR commit the Project applicant to being responsible for ensuring that implementation does not result in violation of the Migratory Bird Treaty Act or relevant Fish and Game Codes as referenced above.

To evaluate Project-related impacts on nesting birds, CDFW recommends that a general habitat assessment for nesting birds be conducted as part of the biological technical studies conducted in support of the EIR. Depending on the results of that assessment, CDFW further recommends that the EIR for this Project require that a qualified biologist conduct a pre-construction survey for active nests no more than 10 days prior to the start of ground- or vegetation-disturbance to maximize the probability that nests that could potentially be impacted are detected. CDFW also recommends that surveys cover a sufficient area around the Project Site to identify nests and determine their status. A sufficient area means any area potentially affected, either directly or indirectly, by the Project. In addition to direct impacts (i.e. nest destruction), noise, vibration, and movement of workers or equipment could also affect nests. CDFW recommends that a qualified biologist establish a behavioral baseline of all identified nests. Once Project activities begin, CDFW recommends having a qualified biologist continuously monitor nests to detect behavioral changes resulting from the Project. If behavioral changes occur, CDFW recommends halting the work causing that change and consulting with CDFW for additional avoidance and minimization measures.

If continuous monitoring of identified nests by a qualified biologist is not feasible, CDFW recommends the EIR include a minimum no-disturbance buffer of 250 feet around active nests of non-listed bird species and a 500-foot no-disturbance buffer around active nests of non-listed raptors. These buffers are advised to remain in place until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or on-site parental care for survival. Variance from these no-disturbance buffers is possible when there is a compelling biological or ecological reason to do so, such as when the Project Site would be concealed from a nest site by topography. CDFW recommends that a qualified biologist advise and support any variance from these buffers and notify CDFW in advance of implementing a variance.

CNDDDB: 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 CNDDDB but where there is suitable habitat and features capable of

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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 biologist 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 Site.

Project Alternatives Analysis: CDFW recommends that the information and results obtained from the biological technical surveys, studies, and analysis conducted in support of the project's CEQA document be used to develop and modify the Project's alternatives to avoid and minimize impacts to biological resources to the maximum extent possible. When efforts to avoid and minimize have been exhausted, remaining impacts to sensitive biological resources may need to be mitigated to reduce impacts to a less than significant level, if feasible.

Cumulative Impacts: CDFW recommends that a cumulative impact analysis be conducted for all biological resources that will either be significantly or potentially significantly impacted by implementation of the Project, including those whose impacts are determined to be less than significant with mitigation incorporated or for those resources that are rare or in poor or declining health and will be impacted by the project, even if those impacts are relatively small (i.e., less than significant). CDFW recommends cumulative impacts be analyzed using an acceptable methodology to evaluate the impacts of past, present, and reasonably foreseeable future projects on resources and be focused specifically on the resource, not the Project. An appropriate resource study area identified and utilized for this analysis is advised. CDFW staff is available for consultation in support of cumulative impacts analyses as a trustee and responsible agency under CEQA.

Lake and Stream Alteration: The NOP includes a general description of the types of construction activities required to achieve the proposed project types common to multiple recreation areas. A preliminary evaluation of these types of activities suggests that portions of the Project may be subject to CDFW's regulatory authority pursuant to Fish and Game Code section 1600 et seq (e.g., In-Lake Work). Some types of projects that require in-lake work such as expanding and rehabilitating boat ramps, or adding sand for inland expansion of existing beach areas are important to support fish stocking activities in the Merced River and Merced Falls areas.

Fish and Game Code section 1602 requires the Project proponent 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; 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 in nature. The EIR should address the potential Project-related impacts to all streams at

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and near the Project Site. For additional information on notification requirements, please contact our staff in the Lake and Streambed Alteration (LSA) Program at (559) 243-4593 or R4LSA@willife.ca.gov.

CDFW is required to comply with CEQA in the issuance of an 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. For additional information on notification requirements, please contact staff in the Central Region LSA Program at (559) 243-4593 or R4LSA@willife.ca.gov, or visit the Lake and Streambed Alteration Program website at <https://wildlife.ca.gov/Conservation/LSA>.

Federally Listed Species: CDFW recommends consulting with the U.S. Fish and Wildlife Service (USFWS) on potential impacts to federally listed species including, but not limited to the aforementioned foothill yellow-legged frog, California red-legged frog, western spadefoot, and western pond turtle. Take under the Federal Endangered Species Act (FESA) is more broadly defined than CESA; take under FESA also includes 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. Consultation with the USFWS in order to comply with FESA is advised well in advance of any Project activities.

CDFW is available to meet with you ahead of Draft EIR preparation to discuss potential impacts and possible mitigation measures for some or all of the resources that may be analyzed in the EIR. If you have any questions, please address any questions or concerns regarding these comments to Abimael León, the Regional FERC Coordinator, at Abimael.Leon@wildlife.ca.gov.

Sincerely,

DocuSigned by:
Bob Stafford
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for Julie A. Vance
Regional Manager

ec: See Page Ten

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ec: Debbie-Anne A. Reese, Acting Secretary
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Via electronic submittal

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REFERENCES CITED

California Department of Fish and Wildlife. 2024. Biogeographic Information and Observation System (BIOS). <https://www.wildlife.ca.gov/Data/BIOS>. Accessed July 23, 2024.