



State of California
Department of Fish and Wildlife

Memorandum

Governor's Office of Planning & Research

Date: March 24, 2022

Mar 25 2022

To: Dr. Anitra Pawley
Department of Water Resources
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STATE CLEARINGHOUSE

DocuSigned by:

Erin Chappell

From: Erin Chappell, Regional Manager

California Department of Fish and Wildlife-Bay Delta Region, 2825 Cordelia Road, Suite 100, Fairfield, CA 94534

Subject: McCormack Williamson Tract Levee Modification and Habitat Restoration Project-Phase B, Supplemental Environmental Impact Report, SCH No. 2003012112, Sacramento County

The California Department of Fish and Wildlife (CDFW) has received a Notice of Availability for a draft Supplemental Environmental Impact Report (SEIR) from Reclamation District 2110 (RD), McCormack Williamson Tract for the McCormack Williamson Tract Levee Modification and Habitat Restoration Project-Phase B Project (Project) pursuant 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, 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 and Game Code, §§ 711.7, subd. (a) and 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

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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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.

REGULATORY REQUIREMENTS

Lake and Streambed Alteration Program

Notification is required, pursuant to CDFW's Lake and Streambed Alteration (LSA) Program (Fish and Game Code § 1600 et. seq.) for any Project-related activities 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.

California Endangered Species Act

Please be advised that a CESA Incidental Take Permit (ITP) must be obtained if the Project has the potential to result in take of species of plants or animals listed or a candidate under CESA, either during construction or over the life of the Project. Under CESA, take is defined as "to hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture or kill." Issuance of an ITP is subject to CEQA documentation. If the Project will impact CESA-listed species, early consultation with CDFW is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain a CESA Permit.

PROJECT DESCRIPTION SUMMARY

Proponent: Reclamation District 2110, Department of Water Resources

Objective: The objective of the Project is to implement flood control improvements in the North Delta Region in a manner that benefits aquatic and terrestrial habitats, species, and ecological processes, and incorporates landscape scale restoration of Delta habitat. The SEIR provides updated information and analyzes Project-specific

impacts not previously addressed in the North Delta Environmental Impact Report, finalized in 2010.

The Phase B project, a continuation of Phase A which was completed in 2019, consists of implementing the remaining Project components of the larger habitat restoration Project. The Project consists of the degrading of one section of levee, and breaching of two sections to allow for improved flood control and for the creation of subtidal, intertidal, and tidal marsh habitats. The first location is near levee station 27+00 on the Mokelumne River and consists of degrading a 300-foot-long section of levee to elevation seven (7.0) feet. The second location is near levee station 190+00 on Dead Horse Cut and consists of a full breach to zero elevation to allow for daily tidal inundation and is between approximately 1,000 feet to 1,500 feet in length. The third levee degrade featuring a drivable weir will occur on Lost Slough. This feature will be approximately 900 feet long with an elevation of 11.1 feet at levee station 440+00.

The Project will include re-sloping the interior levee to include a 30-foot-wide bench below the levee crest. Slopes on the interior levee will range from 2:1 to 7:1. The current Phase B design proposes re-sloping approximately 2,650 feet of the McCormack Williamson Tract (MWT) East Levee with widths (including the bench and slopes) ranging from 35 to 85 feet and re-sloping approximately 2,230 feet of the MWT Southwest Levee with widths ranging from 80 to 115 feet. The Project involves extensive interior landform grading to construct a mosaic of tidal channels, riparian berms, and riparian floodplains, and the degrading and breaching of the levee segments. Rock Slope Protection (RSP) will be placed at the finished breach sections and weir as armament for scouring and slope protection. As a component of Phase B, a partially repaired section of levee that breached during a 2017 flood will be repaired.

Any levee construction activities and in-water work will be conducted at Mean Lower Low Water during the dry season, typically April or May through October, upon onset of rainfall. The Project is expected to create approximately 400 to 600 acres of subtidal open water habitat, 600 to 900 acres of tidal marsh habitat, and approximately 175 to 250 acres of riparian scrub/mixed riparian woodland/Valley oak woodland habitat.

Location: McCormack Williamson Tract, located downstream of the confluence of the Cosumnes and Mokelumne Rivers, east of Snodgrass Slough and the Delta Cross Channel. Sacramento County, 0.5 miles west of I-5.

Timeframe: The Project is anticipated to require up to three years to complete. In addition to construction of the Project, this also includes acquisition of State and federal permits, the drafting, submittal, and approval of a Project Funding Agreement for the construction work, and resolution of any issues that are posed in this SEIR.

COMMENTS AND RECOMMENDATIONS

CDFW acting as a Responsible Agency, has discretionary approval under CESA through issuance of a CESA Incidental Take Permit and LSA Agreement, as well as

other provisions of the Fish and Game Code that afford protection to the State's fish and wildlife resources. CDFW offers the comments and recommendations below to assist Reclamation District 2110 in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct, and indirect impacts on biological resources.

Comment 1: Mitigation Measure VEG-1. "Replace Valley/Foothill Riparian Cover Types"

The SEIR describes that significant riparian habitat losses are expected to occur as a result of the proposed Project, and states "Compensation for temporal impacts will be primarily provided on MWT [McCormack-Williamson Tract] by passive restoration via natural recruitment of valley/foothill riparian cover types as part of the Phase B project, and active riparian plantings in these areas as needed."

Relying primarily on natural recruitment does not guarantee that the mitigation habitat will fully offset the functions, values, and diversity of the impacted habitat since the location, amounts, and types of habitats that may naturally recruit are unknown and somewhat unpredictable. Some amount of native riparian vegetation will likely establish on the Project site after introducing either tidal or spring-time flood waters; however, this type of habitat establishment typically occurs over decades, and occurs successionaly beginning with a lower level of diversity including pioneer shorter-lived species (i.e. cottonwoods and willows), possibly giving way to a greater diversity of longer lived species (i.e. oaks) over time. In addition, in order for a diverse riparian habitat stand to eventually get established through natural recruitment and to meet certain habitat establishment goals to reduce impacts to less-than-significance, significant management and funding is necessary. As the SEIR somewhat describes, constant expensive weed management is necessary to allow for adequate seed germination and reduce weed competition with native seedlings for successful establishment. This will need to occur while waiting for a random sufficient flood event to also occur at the time of year when native seeds are viable, thereby providing transportation and sufficient water for natural recruitment to work. All of these variables can take many years to eventually come together simultaneously to accommodate successful tree and shrub recruitment. CDFW questions whether relying largely on natural recruitment to offset these impacts ensures that adequate mitigation habitat will be established and whether this passive method will result in mitigation of impacts to a less-than-significant level. CDFW recommends that Mitigation Measure VEG-1 be revised to offset loss of Valley/Foothill Riparian habitat by relying largely on well-established restoration methods including actively planting trees, shrubs, and understory along with augmentation from natural recruitment to ensure that the functions, values, and diversity of the impacted habitat will be established. In addition, the plan should include a monitoring and replanting plan if success criteria are not met, coupled with protecting and maintaining the land and habitat values in perpetuity.

In addition, DWR has expressed to CDFW that the proposed Project is in-part funded by DWR's Delta Levees Program. Various water codes guide this program, and some require CDFW to ensure no net loss of riparian, fisheries, and wildlife habitat prior to approving projects that are funded by the program (CA Water Code § 12314 et seq). In

addition, in 1992 CDFW signed a Memorandum of Understanding between CDFW, the Reclamation Board, DWR, and the California Natural Resources Agency which requires us to enter into a legally enforceable agreement with project proponents for projects that will have habitat impacts to ensure that mitigation is adequately implemented. This MOU also requires that an adequate financing plan for the mitigation work be in place for projects funded by the Delta Levees Program. In this role, prior to approving a project, CDFW requires these mitigation lands and habitats to be established and protected, and a plan to manage the lands in perpetuity be in place (including a conservation easement, long-term management plan, and endowment) to ensure that habitat values offsetting the impacts are established and remain into the future.

Comment 2: Mitigation Measures VEG-7 “Conduct Pre-Construction Surveys for Special-Status Plants”.

The SEIR describes that surveys for special-status plants will be conducted, but does not state that these surveys will be conducted utilizing CDFW’s current methodology. Therefore, CDFW recommends revising the SEIR to state that the “Protocols for Surveying and Evaluating Impacts to Special-Status Native Plant Populations and Natural Communities (CDFW 2018)” will be utilized when surveying for special-status plants.

Comment 3: Mitigation Measure VEG-8 “Avoid and Minimize Impacts of Special-Status Species and Compensate for Special-Status Species Loss”.

The SEIR states that compensation for unavoidable loss of special-status plants identified during pre-construction surveys will in-part include salvage and relocation, which would be conducted in close coordination with CDFW. When mitigating for special status plants, CDFW does not recommend conducting salvage and relocation due to its low success rate. In addition, ‘take’ (Fish and Game Code § 86) authorization would be necessary in this case for species listed under CESA and the Native Plant Protection Act. Also, rigorous planning, monitoring, and contingency measures in the event that plants did not survive relocation would be necessary to ensure successful long-term survival of transplanted plant populations.

Therefore, CDFW recommends revising the SEIR to state that compensatory mitigation for impacts to any special-status plant species will be planted back on-site or as close as feasible, with environmental conditions similar to the location the impacts occurred, and at a minimum of 3:1 mitigation ratio for permanent impacts. This may include collecting seeds, growing them at a nursery, and replanting back at the Project site. Mitigation plantings will need an approved mitigation and monitoring plan, which will include monitoring for a minimum of three years, and replacement for any plants that do not meet success criteria.

CDFW also recommends including language in the SEIR describing the Project’s obligation to obtain CESA-listed plant take coverage through an ITP issued by CDFW when take of Rare, Threatened, or Endangered plants cannot be fully avoided, which

will include the need for permanent protection and funding for perpetual maintenance and management.

Comment 4: Mitigation Measure WILD-14: “Avoid and Minimize Construction-related Disturbances within 0.5 Mile of Active Swainson’s (SWHA) Hawk Nest Sites”

The SEIR states “To the greatest extent practicable, major construction activities that would occur within 0.5 mile of an active SWHA nest will be avoided during the breeding season. If practicable, construction that would result in the greatest disturbance to an active nest site will be deferred until after or as late in the breeding season as possible.” The SEIR also describes several actions to reduce disturbance of nesting SWHA including but not limited to nest specific no-disturbance buffers, biological monitoring, rescheduling project activities around sensitive periods for the species, implementing construction best practices such as staging equipment out of the line of sight from the nest tree, etc. The SEIR further states that “DWR/RD 2110 will immediately cease work if a young bird becomes agitated as a result of project-related construction or maintenance activities. CDFW will be contacted if the biologist determines there is potential for a bird to prematurely leave its nest as a result of project related construction or maintenance activities.”

Although it’s important to ensure that young SWHA are not agitated by Project related activities, it’s also important to ensure that adults are also not agitated and leave or abandon the nest (particularly adult females) since young hawks are dependent on adult SWHA to aid in proper thermoregulation from elements, defend against other predators, and provide food when juveniles are most vulnerable. Therefore, CDFW suggests revising the SEIR to include adults as well as juveniles when monitoring for disturbance behavior in SWHA leading up to stopping work when necessary.

Lastly, the SEIR does not state that take authorization for SWHA from CDFW is expected to be obtained. Since project-related activities have the potential to occur within close proximity of active nests, and even though the SEIR contains many good measures designed to avoid nest disturbance, there is no guarantee that these measures will ultimately avoid take of hawks. Therefore, CDFW recommends revising the SIER to include language describing the Project’s obligation to obtain take coverage through an ITP issued by CDFW when take of SWHA cannot be fully avoided.

Comment 5: Section 2.3 Phase B Construction. Relocation of SMUD Distribution Lines.

The SEIR identifies three potential locations for the relocation of existing SMUD distribution lines off MWT, and further describes that the locations of these relocation sites are not yet finalized. The SEIR is not clear if relocation of these lines will be subject to special-status species biological surveys and appropriate avoidance and minimization measures.

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Therefore, CDFW recommends that the SEIR be revised to describe that special-status species surveys will be conducted for this relocation activity and include appropriate measures to avoid and minimize impacts to these species.

Comment 6: Mitigation Measure VEG-6: “Avoid Introduction and Spread of New Noxious Weeds During and After Project Construction”.

The SEIR states that the introduction and spread of aquatic weeds will be minimized in-part by the California Division of Boating and Waterways’ (CDBW) management under their existing practices.

CDFW believes that the on-going long-term management of submersed and floating aquatic weeds is an important component for this project to avoid allowing non-native predatory fish from becoming established and avoid increases in water temperatures. Areas such as Decker Island Wildlife Area and Liberty Island have become filled with submersed aquatic weeds and dominated largely by non-native fishes. As this vegetation continues to expand and more restoration occurs within the Delta, CDBW’s workload for managing submersed and floating aquatic vegetation increases and they may not feasibly be able to control aquatic weeds within McCormack-Williamson Tract regularly and in-perpetuity.

Therefore, CDFW recommends revising the SEIR to include a contingency plan to manage aquatic weeds in the event that CDBW cannot manage McCormack-Williamson Tract regularly and in perpetuity.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a data base 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 CNDDDB. The CNDDDB field survey form can be found 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>.

ENVIRONMENTAL DOCUMENT 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 and Game Code, § 711.4; Pub. Resources Code, § 21089).

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CONCLUSION

CDFW appreciates the opportunity to comment on the SEIR to assist Reclamation District 2110 in identifying and mitigating significant Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Ms. Cristina Autry, Environmental Scientist, at (209) 234-3453 or Cristina.Autry@wildlife.ca.gov; or Mr. Todd Gardner, Senior Environmental Scientist (Supervisory), at (209) 234-3441 or Todd.Gardner@wildlife.ca.gov.

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