

## Notice of Determination

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**To:**

Office of Planning and Research  
For U.S. Mail:  
P.O. Box 3044  
Sacramento, CA 95812-3044

Street Address:  
1400 Tenth Street  
Sacramento, CA 95814

**From:**

California Department of Fish and Wildlife (CDFW)  
1416 9<sup>th</sup> Street, 12<sup>th</sup> Floor  
Sacramento, CA 95814  
Contact: Chad Dibble  
Phone: 916-653-6956

Lead Agency  
Department of Water Resources  
3500 Industrial Blvd  
West Sacramento, CA 95691  
Contact: Dean Messer  
Phone: 916-376-9700

**SUBJECT: Filing of Notice of Determination pursuant to Public Resources Code § 21108**  
State Clearinghouse Number: 2009012022)

Project Title: Minor Amendment to California Endangered Species Act Incidental Take Permit No. 2081-2009-001-03 (ITP)

Project Location: Sacramento-San Joaquin Delta and Suisun Marsh in Solano, Sacramento, Yolo, San Joaquin, and Contra Costa Counties.

Project Description: The discretionary approval by CDFW is the issuance of the ITP amendment identified above. The ongoing operations of the State Water Project in the Sacramento-San Joaquin Delta and Suisun Marsh as approved by the lead agency is expected to result in incidental take and impacts to habitat of longfin smelt (*Spirinchus thaleichthys*) which is designated as a threatened species under the California Endangered Species Act. The amendment to the ITP changes the expiration date to March 31, 2020 or upon the issuance by CDFW of an incidental take permit in response to the Department of Water Resources' December 13, 2019 application, whichever comes first. The ITP referenced above as issued and amended by CDFW authorizes incidental take of longfin smelt that may occur as a result of ongoing operations of the State Water Project facilities, as is more specifically described in the ITP.

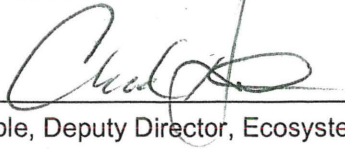
This is to advise that CDFW, acting as [ the lead agency /  a responsible agency] approved the above-described project on December 27, 2018 and made the following determinations regarding the above described project:

1. The project [ will /  will not] have a significant effect on the environment (This determination is limited to effects within CDFW's permitting jurisdiction as a responsible agency).
  2. [ An environmental impact report /  A negative declaration] was prepared by the lead agency for the original project.
  3. Additional mitigation measures [ were /  were not] made a condition of CDFW's approval of the project.
  4. A mitigation reporting or monitoring plan [ was /  was not] adopted by CDFW for this project.
  5. A Statement of Overriding Considerations [ was /  was not] adopted by CDFW for this project.
  6. Findings [ were /  were not] made by CDFW pursuant to Public Resources Code § 21081(a).
  7. Compliance with the environmental filing fee requirement at Fish and Game Code § 711.4 (check one):
    - Payment is submitted with this notice.
    - A copy of a receipt showing prior payment was previously submitted to CDFW, no additional fee required pursuant to Fish and Game Code § 711.4(g).
- Responsible Agency statement: The ND prepared by the lead agency for the Project is available to the general public at the office location listed above for the lead agency. CDFW's administrative record of proceedings related to the incidental take permit is available to the public for review at CDFW's Water Branch Office, 1010 Riverside Parkway, West Sacramento, CA 95605.

**Notice of Determination**

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Signature



Date: *December 20, 2019*

Chad Dibble, Deputy Director, Ecosystem Conservation Division

Date Received for filing at OPR: \_\_\_\_\_

Governor's Office of Planning & Research  
DEC 26 2019  
STATE CLEARINGHOUSE

**California Environmental Quality Act Findings**  
**Prepared by the California Department of Fish and Wildlife as a Responsible Agency**

for the

**Minor Amendment to Incidental Take Permit No. 2081-2009-001-03-A3, under Section 2081(b) of the California Fish and Game Code**

**December 20, 2019**

**I. INTRODUCTION**

The California Department of Fish and Wildlife (CDFW) has prepared these findings to comply with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). CDFW is a responsible agency under CEQA with respect to Minor Amendment No. 3 to Incidental Take Permit No. 2081-2009-001-03, Minor Amendment No. 2 and Minor Amendment No. 1, extending the term of the permit until March 31, 2020 or until issuance by CDFW of an incidental take permit in response to the Department of Water Resources' (DWR) December 13, 2019 application, whichever comes first, because of its permitting authority under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.) and because of prior environmental review and approval of the Project by the DWR in its role as lead agency. (See generally Pub. Resources Code, § 21067; Cal. Code Regs., tit. 14, § 15367; Pub. Resources Code, §§ 21002.1, subd. (d), 21069; Cal. Code Regs., tit. 14, § 15381; see also Cal. Code Regs., tit. 14, § 783.3, subd. (a).)<sup>1</sup> As requested by DWR, the amendment extends the term of the existing permit by three months, in order for DWR to maintain its CESA coverage while DWR completes a final EIR for long-term operations of the State Water Project and CDFW processes DWR's Incidental Take Permit application for long-term CESA coverage for four CESA-listed aquatic species affected by the State Water Project's operations in the Sacramento-San Joaquin Delta and Suisun Marsh. By extending the time period of the authorization, this does modifies activities previously described and authorized through Incidental Take Permit No. 2081-2009-001-03, Minor Amendment No. 1 and Minor Amendment No. 2 issued by CDFW to DWR in 2009 for take associated with and incidental to the California State Water Project Delta Facilities and Operations in California (Project), and is therefore subject to CDFW's permitting jurisdiction under CESA.

CDFW prepared these findings, in particular, in response to the pending application by DWR (Permittee) for a minor amendment to ITP No. 2081-2009-001-03, Minor Amendment No. 1 and Minor Amendment No. 2 which authorizes take of longfin smelt

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<sup>1</sup> The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

(*Spirinchus thaleichthys*) (Covered Species). (See Cal. Code Regs., tit. 14, § 783.6, subd. (c).) These findings memorialize CDFW's consideration of various issues under CEQA that pertain to the incidental take of species protected by CESA, and addresses CDFW's obligations as a responsible agency under CEQA pursuant to CEQA Guidelines sections 15096 and 15164.

## II. OBLIGATIONS OF A RESPONSIBLE AGENCY

In general, a responsible agency complies with CEQA by considering the environmental analysis prepared by the lead agency, and by reaching its own conclusions on whether and how to approve the project involved. (Cal. Code Regs., tit. 14, § 15096, subd. (a).) In fulfilling its obligations as a responsible agency, CDFW's obligations under CEQA are more limited than the lead agency. By statute, a responsible agency is only required to consider the effects of those activities involved in a project which it is required by law to carry out or approve. (Pub. Resources Code, § 21002.1, subd. (d).) In the present case, because CDFW's exercise of discretion is limited to a minor amendment to an ITP, CDFW is responsible for considering only the environmental effects that fall within its permitting authority under CESA.

DWR, as the lead agency, prepared a Negative Declaration (ND) for the On-going California State Water Project Operations in the Sacramento-San Joaquin Delta for the Protection of Longfin Smelt. That ND was adopted by DWR on February 18, 2009. (SCH No. 2009012022.) In conjunction with its issuance of the ITP in 2009, CDFW also adopted an addendum to the ND, describing changes to the Project required by the ITP. In conjunction with its request for a minor amendment, on December 10, 2018, DWR prepared a second addendum to the 2009 ND, which concluded that the amendment request gave rise to no new or substantially or more severe significant environmental impacts, and that subsequent or supplemental environmental review was not warranted. In addition, on December 2, 2019, DWR prepared a third addendum to the 2009 ND, which concluded that the amendment request gave rise to no new or substantially or more severe significant environmental impacts, and that subsequent or supplemental environmental review is not warranted.

With respect to the proposed minor amendment, CDFW may proceed as a responsible agency, and not as a lead agency, as a matter of law. The CEQA Guidelines provide that a responsible agency shall assume the role of the lead agency when any one of three conditions occur. (Cal. Code Regs., tit. 14, § 15052, subd. (a); see also Cal. Code Regs., tit. 14, § 15096, subd. (e)(3)-(4).) First, CDFW must assume the role of lead agency if the lead agency itself did not prepare any environmental document for the project under CEQA, and the statute of limitations to challenge the lead agency's action has expired. (Cal. Code Regs., tit. 14, § 15052, subd. (a)(1).) As noted above, DWR prepared an ND in 2009, CDFW prepared a first addendum to the ND in 2009, DWR prepared an addendum to that ND in 2018, and DWR prepared a third addendum to that ND in 2019. Second, a responsible agency must assume the role of lead agency if (1) a subsequent EIR is required under CEQA Guidelines section 15162; (2) the lead agency has granted its final approval for the project; and (3) the statute of limitations for

challenging the lead agency's actions under CEQA has expired. (Cal. Code Regs., tit. 14, § 15052, subd. (a)(2).) As discussed below, the narrow scope of CDFW's approval in this instance results in there being no cognizable basis for a subsequent environmental review. Lastly, a responsible agency must assume the role of lead agency if the lead agency failed to consult with the responsible agency as required to do so by CEQA Guidelines sections 15072 and 15082. (Cal. Code Regs., tit. 14, §15052, subd. (a)(3).) As noted above, CDFW participated in the lead agency's environmental review of the Project to the extent required by CEQA, and has been provided a copy of DWR's addendum. (See, e.g., id., §§ 15082, 15096, subds. (b), (c), (d).) CDFW, accordingly, is not required to assume the role of lead agency under CEQA Guidelines section 15052, and may proceed as a responsible agency under CEQA for purposes of the minor amendment.

CDFW faces an additional obligation under CEQA as a responsible agency with respect to the proposed minor amendment to the ITP. First, as noted above, CDFW must consider the environmental effects of the Project as shown in DWR's 2009 ND, 2018 addendum, and 2019 addendum. (Cal. Code Regs., tit. 14, § 15096, subd. (f).) In so doing, CDFW is bound in the first instance by the presumption that DWR's substantive determinations regarding Project-related environmental impacts are adequate. (*Laurel Heights Improvement Association, supra*, 6 Cal.4th at 1130; *River Valley, supra*, 37 Cal. App. 4th at 166-67; *San Diego Navy, supra*, 185 Cal. App. 4th at 934) It must also consider whether in light of a propose change to the original project, the lead agency's document retains some informational value. (*Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 951.) If the agency answers that in the affirmative, CEQA Guidelines section 15164, subdivision (b), provides that a "an addendum to an adopted negative declaration may be prepared if only minor technical changes or additions are necessary or none of the conditions described in section 15162 calling for preparation of a subsequent EIR or negative declaration have occurred."

### **III. CONSIDERATION OF PROJECT CHANGES, CHANGED CIRCUMSTANCES, AND POTENTIALLY SIGNIFICANT NEW INFORMATION**

Pursuant to section 15096 of the CEQA Guidelines, CDFW has considered the environmental effects of the proposed minor amendment and Project as addressed by DWR. CDFW has determined that the 2009 ND retains informational value because the three-month extension is a minor change from the Project operations evaluated in 2009. Notwithstanding CDFW's obligation to make independent findings under CEQA as highlighted above, CDFW's consideration of the 2009 ND and 2019 addendum is constrained by a legal presumption of adequacy. (*Laurel Heights Improvement Association, supra*, 6 Cal.4th at p. 1130.) That presumption is tempered, however, by changes to the project, changed circumstances, or potentially significant new information. (Pub. Resources Code, § 21166; Cal. Code Regs., tit. 14, § 15162, subd. (a).) At the same time, in considering whether subsequent or supplemental

environmental review is required due to such changes or new information, an agency is bound to consideration of environmental issues over which its discretionary authority extends. (*San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal. App. 4th 924, 938-939.)

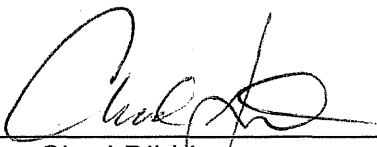
For the purposes of CEQA, as well as CESA, the scope of the current modification is narrow, minor, and technical in relation to the activities considered in the 2009 ND and authorized by the 2009 ITP. With respect to the permit extension, DWR has committed in its request to maintain operations in compliance with all existing regulatory requirements, including the 2009 ITP and the terms of the 2009 National Marine Fisheries Services (NMFS) and the 2008 United States Fish and Wildlife Services (USFWS) Biological Opinions, and pursuant to the Consistency Determinations issued under section 2080.1 of the California Fish and Game Code. The continuation of DWR's current baseline operations for a three-month period, at levels established and existing for the past ten years, gives rise to no cognizable new environmental impacts.

CDFW has determined that the amendment would not significantly modify the scope or nature of the Project or the minimization, mitigation or monitoring measures required in the ITP, indeed all conditions of approval of the ITP remain unchanged. (Cal. Code Regs., tit. 14, § 783.6, subd. (c)(4).) Thus for the purpose of this narrowly focused, minor amendment there is no new significant impact, or increase in the severity of an impact previously disclosed, subject to CDFW's jurisdictional authority.

#### IV. FINDING

CDFW finds that issuance of the minor amendment to the ITP will not result in any previously undisclosed potentially significant effects on the environment or a substantial increase in the severity of any potentially significant environmental effects previously disclosed by the lead agency. CDFW has determined that the CEQA review as previously conducted by DWR is sufficient for CDFW's needs and will not require preparation of a subsequent or supplemental negative declaration.

December 20, 2019  
Date

  
By: Chad Dibble  
Deputy Director  
Ecosystem Conservation Division  
California Department of Fish and Wildlife