

**CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
CALIFORNIA ENDANGERED SPECIES ACT
INCIDENTAL TAKE PERMIT
NO. 2081-2020-034-02**

**California Department of Water Resources
Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project**

CEQA FINDINGS

INTRODUCTION:

The California Department of Fish and Wildlife (CDFW) has prepared these findings to document its compliance with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 *et seq.*). CDFW is a responsible agency under CEQA with respect to the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (Project) because of its permitting authority under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 *et seq.*). (See generally Pub. Resources Code, §§ 21002.1, subd. (d), 21069; CEQA Guidelines, § 15381; see also Cal. Code Regs., tit. 14, § 783.3, subd. (a).)¹ CDFW makes these findings under CEQA as part of its discretionary decision to authorize the California Department of Water Resources (Permittee) to incidentally take Chinook salmon – Central Valley spring-run ESU (*Oncorhynchus tshawytscha*), Chinook salmon – Sacramento River winter-run ESU (*Oncorhynchus tshawytscha*), giant garter snake (GGS) (*Thamnophis gigas*), and Swainson’s hawk (SWHA) (*Buteo swainsoni*) (hereafter, collectively referred to as Covered Species) during implementation of the Project. (See generally Fish & G. Code, § 2081, subd. (b); Cal. Code Regs., tit. 14, § 783.4.) Chinook salmon – Central Valley spring-run ESU, giant garter snake, and Swainson’s hawk are designated as threatened species under CESA. (Cal. Code Regs., tit. 14, § 670.5, subd. (b)(2)(C), (b)(4)(E), and (b)(5)(A), respectively). Chinook salmon – Sacramento River winter-run ESU is designated as an endangered species under CESA. (Cal. Code Regs., tit. 14, § 670.5, subd. (a)(2)(M)).

CDFW is a responsible agency under CEQA with respect to the Project because of prior environmental review and approval of the Project by the lead agency, the California Department of Water Resources (DWR). (See generally Pub. Resources Code, § 21067; CEQA Guidelines, § 15367.) DWR analyzed the environmental impacts associated with implementation of the Project in an Environmental Impact Report [the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Final Environmental Impact Statement/Environmental Impact Report (EIR) (SCH No. 2013032004) and approved the Project on July 19, 2019. In so doing, DWR imposed various mitigation measures for impacts to the Covered Species as conditions of Project approval and concluded that Project-related impacts to the Covered Species could be substantially lessened with implementation of mitigation and avoidance measures, such that the impacts would be less than significant.

¹ The “CEQA Guidelines” are found in Title 14 of the California Code of Regulations, commencing with Section 15000.

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As approved by DWR, the Project involves the construction of several facilities in the Fremont Weir Wildlife Area with the intent to create a better hydraulic connection between the Sacramento River and the Yolo Bypass. The Project will allow increased flow from the Sacramento River to enter the Yolo Bypass through a gated notch on the east side of the Fremont Weir. The gated notch will create an opening in the Fremont Weir that is deeper than the Fremont Weir, with gates to control water going through the facility into the Yolo Bypass. The Project will connect the new gated notch to the existing Tule Pond with a channel that parallels the existing east levee of the Yolo Bypass. The Project will also include the construction of a supplemental fish passage facility on the west side of the Fremont Weir and improvements to allow fish to pass through an existing agricultural road crossing over Tule Canal south of Tule Pond. The Project includes the operation and maintenance of the constructed facilities. The Project site is within the range of the Covered Species and may support individuals of the species. Development of the Project site will permanently alter 21.60 acres of Chinook salmon habitat and result in the permanent loss of 14.7 acres of giant garter snake habitat, and take of the Covered Species as defined by Fish and Game Code is expected. (Fish & G. Code, § 86.) These impacts fall within CDFW's permitting jurisdiction under CESA. (*Id.*, §§ 2080, 2081, subd. (b).)

As a responsible agency, CDFW's CEQA obligations are more limited than those of the lead agency, in that CDFW is responsible for considering only the effects of those activities involved in the Project which it is required by law to carry out or approve. Thus, while CDFW must consider the environmental effects of the Project as set forth in DWR's EIR, CDFW has responsibility to mitigate or avoid only the direct or indirect environmental effects of those parts of the Project which it decides to carry out, finance, or approve. (Pub. Resources Code, § 21002.1, subd. (d); CEQA Guidelines, §§ 15041, subd. (b), 15096, subds. (f)-(g).) Accordingly, because CDFW's exercise of discretion is limited to issuance of an Incidental Take Permit (ITP) for the Project, CDFW is responsible for considering only the environmental effects that fall within its permitting authority under CESA. (See generally *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 935-941.) Indeed, with respect to all other effects associated with implementation of the Project, CDFW is bound by the legal presumption that the EIR fully complies with CEQA. (Pub. Resources Code, § 21167.3; *City of Redding v. Shasta County Local Agency Formation Commission* (1989) 209 Cal.App.3d 1169, 1178-1181; see also CEQA Guidelines, § 15096, subd. (e); Pub. Resources Code, § 21167.2; *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1130.)

CDFW's more limited obligations as a responsible agency affect the scope of, but not the obligation to adopt, findings required by CEQA. Findings are required under CEQA by each public agency that approves a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment. (Pub. Resources Code, § 21081, subd. (a); CEQA Guidelines, § 15091, subd. (a); see also Pub. Resources Code, § 21068 (significant effect on the environment defined); CEQA Guidelines, § 15382.) Because the EIR certified by DWR for the Project identifies potentially significant impacts on the Covered Species, CDFW adopts the findings set

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forth below to fulfill its obligations as a responsible agency under CEQA. (CEQA Guidelines, § 15096, subd. (h); *Resource Defense Fund. V. Local Agency Formation Comm. of Santa Cruz County* (1987) 191 Cal.App.3d 886, 896-898.)

FINDINGS:

CDFW has considered the EIR adopted by DWR as the lead agency for the Project.

CDFW finds that the mitigation measures imposed as conditions of Project approval by DWR, along with the mitigation measures and Conditions of Approval set forth in CDFW's ITP for the Project, will ensure that all Project-related impacts on the Covered Species are mitigated to below a level of significance under CEQA.

CDFW finds that issuance of 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. Furthermore, to the extent the potential for such effects exists, CDFW finds adherence to and implementation of the conditions of Project approval adopted by the lead agency, as well as adherence to and implementation of the Conditions of Approval imposed by CDFW through the issuance of the ITP, will avoid or reduce such potential effects to below a level of significance.

The following measures and others set forth in CDFW's ITP for the Project will avoid to the extent feasible and mitigate to below a level of significance all Project-related impacts on the Covered Species:

- A. Permittee shall submit to CDFW in writing the name, qualifications, business address, and contact information of one or more biological monitors (Designated Biologists) at least 30 days before starting Covered Activities. Permittee shall ensure that the Designated Biologist(s) are knowledgeable and experienced in the biology and natural history of the Covered Species. The Designated Biologist(s) shall be responsible for monitoring Covered Activities to help minimize and fully mitigate or avoid the incidental take of individual Covered Species and to minimize disturbance of Covered Species' habitat. Permittee shall obtain CDFW approval of the Designated Biologist(s) in writing before starting Covered Activities and shall also obtain approval in advance in writing if the Designated Biologist(s) must be changed. If a Covered Species needs to be captured and relocated, the Designated Biologist(s) will notify the Capture and Handling Designated Biologist(s) and will stop work until the Covered Species either leaves the construction area on its own, or the Capture and Handling Biologist(s) performs the capture and relocation.
- B. The Designated Biologist(s) shall be on-site daily when Covered Activities associated with Project construction or maintenance occur. The Designated Biologist(s) shall conduct compliance inspections to (1) minimize incidental take of the Covered Species; (2) prevent unlawful take of species; (3) check for

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compliance with all measures of this ITP; (4) check all exclusion zones; and (5) ensure that signs, stakes, and fencing are intact, and that Covered Activities are only occurring in the Project Area. The Designated Representative or Designated Biologist(s) shall prepare daily written observation and inspection records summarizing: oversight activities and compliance inspections, observations of Covered Species or any sign of their presence, survey results, and monitoring activities required by this ITP. While the Project is in its construction phase, the Designated Biologist(s) shall conduct compliance inspections a minimum of weekly during periods of inactivity during each construction season or stationary maintenance project.

- C. As flows in channels constructed for the Project subside such that pools become isolated, the Permittee shall visually inspect the Fremont Weir stilling basin, the deep pond, Tule Pond, Tule Canal downstream to Agricultural Road Crossing 3, Oxbow Pond, and all channels constructed for the Project for stranded fish (see Figure 1 of the ITP for the locations of the channels constructed for the Project and Figure 6 for the locations of the Fremont Weir stilling basin, the deep pond, Tule Pond, Tule Canal downstream to Agricultural Road Crossing 3, and Oxbow Pond). If stranded fish are present in Fremont Weir stilling basin, the deep pond, Tule Pond, Tule Canal downstream to Agricultural Road Crossing 1, and all channels constructed for the Project, the Permittee shall coordinate with CDFW to move fish out of harm's way. Permittee shall ensure that fish rescue personnel have the necessary expertise, permits, and experience to successfully conduct fish rescue. To the greatest extent possible and as applicable, fish rescues shall be conducted in accordance with the Fish Rescue and Relocation Plan (Condition of Approval 8.2). Every 10 years, as part of the Project's 10-year compliance report, Permittee shall submit a summary of the results of fish rescues associated with Project Operations over the prior 10-year period, including the number and location(s) of spring- and/or winter-run Chinook salmon encountered (if any) during these fish rescues, and an assessment of whether monitoring and fish rescues are likely to be necessary during the next 10 years. Based on the information provided in the report, CDFW may determine that monitoring is no longer needed.
- D. Prior to the start of Covered Activities, Permittee shall develop and obtain CDFW's written approval of a Giant Garter Snake Capture and Relocation Plan describing how and where GGS will be captured and relocated if it becomes necessary to move them to avoid injury or mortality. All GGS capturing and handling shall be conducted by a Capture Biologist(s) with experience and expertise in handling GGS. The Giant Garter Snake Capture and Relocation Plan shall include the name and qualifications of the Capture Biologist(s) responsible for capturing and handling GGS, the methods that will be used to capture and relocate GGS, and a map showing where GGS will be released. Permittee shall quantify the amount, relative location, and quality of suitable habitat (aquatic and terrestrial) for relocation areas, including invasive and non-native species present, available upland burrows, suitable prey items, and potential barriers for movement. Permittee shall also identify a wildlife rehabilitation or veterinary facility that will be used if any captured

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GGs are injured. Relocation areas should be within the same watershed as the Project Area.

- E. Prior to the start of any construction ground disturbance, Permittee shall install exclusion fencing around the perimeter of all work areas that include or fall within 200 feet of identified potential GGS aquatic habitat. Vegetation removal or excavation needed to install the exclusion fencing may occur first. The Designated Biologist(s) shall survey the areas to be fenced to ensure that no GGS are present and become trapped within the fenced area. The bottom edge of the fencing shall be installed at least six inches below the ground surface to prevent snakes from entering the project area under the fence. The Designated Biologist(s) shall ensure that the exclusion fencing is maintained and that any necessary repairs are implemented immediately. If exclusion fencing is found to be compromised, construction within the fenced area shall immediately stop and the Designated Biologist(s) shall survey the fenced area for GGS. Any GGS found within the fenced area shall be allowed to leave on their own or captured and relocated following the methods described in the Giant Garter Snake Capture and Relocation Plan described in Condition of Approval 8.8. Pre-construction tree removal is not confined to this measure.
- F. If Project construction or maintenance work is scheduled between February 1 and August 31, the Designated Biologist(s) shall conduct a series of focused surveys for active SWHA nests prior to beginning Covered Activities. The Designated Biologist(s) shall follow the timing and methodology described in the Swainson's hawk Technical Advisory Committee's Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley, which is available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83990&inline>. The surveys shall be conducted in all suitable SWHA nesting habitat within a minimum 0.25-mile of the project area. Areas that are not accessible without trespassing shall be surveyed as thoroughly as possible from accessible areas using binoculars and spotting scopes. Results of the surveys shall be submitted to CDFW.
- G. If a nesting SWHA is found at or within 0.25-mile of the Project Area either during initial surveys or at any time during Covered Activities, the Designated Biologist(s) shall monitor the active nest(s) to confirm Covered Activities are not resulting in detectable adverse effects on SWHA or their active nest(s). The Designated Biologist(s) shall monitor either continuously or periodically depending on the Covered Activities and level of disturbance until young have fledged, are feeding independently and the SWHA are no longer dependent on the nest. The Designated Biologist(s) shall have authority to stop Covered Activities that, in the Designated Biologist's opinion, threaten to cause unanticipated and/or unpermitted adverse effects on nesting SWHA (e.g., nest abandonment beyond the one nest covered by this ITP). The Designated Biologist(s) shall have the authority to stop work if any Covered Activities cause the bird(s) to exhibit distress and/or abnormal nesting behavior (swooping/stooping, excessive vocalization (e.g., distress calls), agitation, failure to remain on nest, failure to deliver prey items for an extended

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time period, failure to maintain nest, etc.) which may cause reproductive failure (nest abandonment and loss of eggs and/or young). If Covered Activities are stopped, the Designated Biologist(s) shall consult with CDFW to determine appropriate measures the Permittee shall implement to avoid adverse effects. Permittee shall not resume any ceased Covered Activities without approval from CDFW.

- H. No later than 60 days after completion of all mitigation measures, Permittee shall provide CDFW with a Final Mitigation Report. The Final Mitigation Report shall include, at a minimum: (1) a copy of the Post-Construction Mitigation Report (see Condition of Approval 7.8); (2) a copy of the table in the MMRP with notes showing when each of the mitigation measures was implemented; (3) all available information about Project-related incidental take of the Covered Species; (4) information about other Project impacts on the Covered Species; (5) beginning and ending dates of Covered Activities; (6) an assessment of the effectiveness of this ITP's Conditions of Approval in minimizing and fully mitigating Project impacts of the taking on Covered Species; (7) recommendations on how mitigation measures might be changed to more effectively minimize take and mitigate the impacts of future projects on the Covered Species; and (8) any other pertinent information.

CDFW finds that the Mitigation Monitoring and Reporting Program in Attachment 1 of CDFW's ITP for the Project will ensure compliance with mitigation measures by requiring the Permittee to monitor and report progress in implementing those measures for review by CDFW staff.

The Mitigation Monitoring and Reporting Program is adopted.

The Project is approved.

DATE: 7/20/2021

By: 
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North Central Region
DEPARTMENT OF FISH AND WILDLIFE