

**CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
CALIFORNIA ENDANGERED SPECIES ACT
INCIDENTAL TAKE PERMIT
NO. 2081-2019-063-02**

**California Department of Water Resources
Lower Elkhorn Basin Levee Setback**

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 Lower Elkhorn Basin Levee Setback (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 Giant garter snake (*Thamnophis gigas*) and Swainson's hawk (*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.) The Covered Species are designated as threatened species under CESA. (Cal. Code Regs., tit. 14, § 670.5, subd. (b)(4)(E) and Cal. Code Regs., tit. 14, § 670.5, subd. (b)(5)(A) respectively).

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, 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 Lower Elkhorn Basin Levee Setback Project Environmental Impact Report (LEBLS EIR) (SCH No. 2016092015) and approved the Project on 03/18/2019. 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.

As approved by DWR, the Project involves the set back of levees protecting the Lower Elkhorn Basin, including the Sacramento Bypass North Levee and a portion of the Yolo Bypass East Levee, thereby increasing the capacity of the Yolo and Sacramento Bypasses and reducing flood risk on the upper Yolo Bypass and Sacramento River. The Project would also implement several ecosystem elements that have been designed to

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

CEQA Findings

Lower Elkhorn Basin Levee Setback Project: 2081-2019-063-02

offset effects to biological resources resulting from LEBLS project activities, through the enhancement of features for sensitive species. The Project site is within the range of the Covered Species and is known to support individuals of the species. Development of the Project site will result in the permanent loss of 11.86 acres (6.59 acres aquatic and 5.27 acres upland) of habitat for the Covered Species 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 the DWR's LEBLS 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 LEBLS 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 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 LEBLS EIR adopted by DWR as the lead agency for the Project.

CEQA Findings

Lower Elkhorn Basin Levee Setback Project: 2081-2019-063-02

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 a biologist (Designated Biologist) at least 30 days before starting Covered Activities. Permittee shall ensure that the Designated Biologist(s) is 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. CDFW will provide written response within 15 business days of submittal.
- B. Permittee shall conduct an education program for all persons employed or otherwise working in the Project Area before performing any work. Additionally, Permittee shall conduct this training at least once annually for long-term and/or permanent employees that will be conducting work in the Project Area. The program shall consist of a presentation from the Designated Biologist(s) that includes a discussion of the biology and general behavior of the Covered Species, information about the distribution and habitat needs of the Covered Species, sensitivity of the Covered Species to human activities, its status pursuant to CESA including legal protection, recovery efforts, penalties for violations and Project-specific protective measures described in this ITP. The Program shall also inform all participants on weed biology, identification, and invasive plant prevention. Permittee shall provide interpretation for non-English speaking workers, and the same instruction shall be provided to any new workers before they are authorized to perform work in the Project Area. Permittee shall prepare and make available a fact sheet containing this information for workers to reference in the Project Area.

CEQA Findings

Lower Elkhorn Basin Levee Setback Project: 2081-2019-063-02

Upon completion of the program, employees shall sign a form stating they attended the program and understand all protection measures. Prior to the start of Covered Activities, Permittee shall provide copies of environmental permits and training materials to the Permittee's construction lead, construction foreman, crew leader and any contractors participating in Project activities.

- C. For Construction and stationary O&M Covered Activities, Permittee shall establish ESAs in the Project Area, by installing orange construction barrier fencing or other delineation method, to prevent encroachment of construction or maintenance personnel and equipment into areas of Covered Species habitat that will not be impacted. Permittee shall delineate ESAs no more than five (5) days prior to the commencement of Covered Activities. All potential Covered Species habitat that can be reasonably avoided during construction activities shall be identified as ESAs. All construction and maintenance personnel shall avoid ESAs. The Permittee shall avoid ESAs when siting all Staging Areas, spoils disposal areas, and construction equipment access routes. The Designated Biologist shall inspect the ESA limits before the start of each workday and the Permittee shall maintain the ESA limits until the completion of the Project. Permittee shall remove all delineation materials upon completion of the Construction-related Covered Activities and any applicable O&M Covered Activities.
- D. The Designated Representative shall immediately notify CDFW in writing if it determines that the Permittee is not in compliance with any Condition of Approval of this ITP, including but not limited to any actual or anticipated failure to implement measures within the time periods indicated in this ITP and/or the MMRP. The Designated Representative shall report any non-compliance with this ITP to CDFW within 24 hours.
- E. 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 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 and their signs of presence, survey results, and monitoring activities required by this ITP. The Designated Biologist(s) shall conduct compliance inspections as described in Conditions of Approval 8.5, 8.6, and 8.19. Permittee shall submit daily monitoring reports once per week with a summary of the week's monitoring activities, unless another schedule is proposed by the Permittee and approved in writing by CDFW.
- F. No more than 24 hours prior to commencement of Covered Activities within 200 feet of Covered Species aquatic habitat, the Project Area shall be surveyed for the Covered Species by the Designated Biologist(s). The Designated Biologist(s) shall

CEQA Findings

Lower Elkhorn Basin Levee Setback Project: 2081-2019-063-02

survey all upland habitat within 200 feet of Covered Species aquatic habitat for burrows, soil cracks, and crevices that may be suitable for use by Covered Species. Any identified burrows, soil cracks, crevices, or other habitat features that are outside of the area planned for direct disturbance (e.g. grading, excavation, etc.) shall be flagged or marked by the Designated Biologist(s). Permittee shall avoid flagged locations during Covered Activities to the maximum extent feasible. In areas planned for direct disturbance, a Designated Biologist(s) shall be onsite to monitor during ground disturbing activities. If Covered Activities stop for more than 14 calendar days, the Designated Biologist shall repeat surveys for burrows, soil cracks and similar features as described above, prior to resuming the Covered Activity.

- G. If a Covered Species nest has been identified by a Designated Biologist in or adjacent to the Project Area, the Permittee shall initially establish a no-disturbance buffer with a 0.25-mile radius for Covered Activities that would potentially affect the nesting bird(s). The appropriate size and shape of the buffer shall be determined by a Designated Biologist(s), in coordination with CDFW, and may vary, depending on the nest location, nest stage, and Covered Activities. Permittee shall not conduct Covered Activities within the buffer, and any variance to the buffer shall be established by the Designated Biologist(s), in consultation with CDFW. Buffers shall be marked in the field by a Designated Biologist(s) using temporary fencing, high-visibility flagging, or other means that are equally effective in clearly delineating the buffers. Permittee shall maintain buffers until young have fledged, are feeding independently, and the Covered Species are no longer dependent on the nest, as determined by a Designated Biologist(s).
- H. If the Permittee causes abandonment of one Swainson's hawk nest during Construction or takes two (2) GGS during Construction and/or O&M, reinitiation with CDFW is required to ensure that all prudent and feasible measures have been implemented to minimize and fully mitigate the take that has occurred or will likely continue to occur. Permittee shall notify the CDFW Regional Representative at R2CESA@wildlife.ca.gov to request reinitiation.
- I. No later than 60 days after completion of all mitigation measures, Permittee shall provide CDFW with a Final Mitigation Report. The Designated Biologist(s) shall prepare the Final Mitigation Report which shall include, at a minimum: (1) a summary of all Monthly Compliance Reports and all ASRs; (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

CEQA Findings

Lower Elkhorn Basin Levee Setback Project: 2081-2019-063-02


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 2 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: 5/19/2020

By: 
Kevin Thomas, Regional Manager
North Central Region