



STATE OF CALIFORNIA • NATURAL RESOURCES AGENCY

Gavin Newsom, Governor

DEPARTMENT OF FISH AND WILDLIFE

Charlton H. Bonham, Director

Bay Delta Region – 3

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707.428.2002 | AskBDR@wildlife.ca.gov | wildlife.ca.gov

August 25, 2023

Philip Choy, Senior Environmental Scientist (Supervisor)

Department of Water Resources

3500 Industrial Boulevard

West Sacramento, CA 95691

Philip.Choy@water.ca.gov

Subject: Incidental Take Permit Amendment No. 1 for 2081-2018-066-03 Winter Island Tidal Habitat Restoration Project, Contra Costa County

Dear Mr. Choy:

Enclosed you will find an electronic copy of the Incidental Take Permit Amendment for the above referenced Project, which has been digitally signed by the California Department of Fish and Wildlife (CDFW). Please read the permit carefully, sign the acknowledgement, and return the original **no later than 30 days from CDFW signature**, and prior to continuation of ground-disturbing activities. You may return an electronic copy of the permit with digital signature to CESA@wildlife.ca.gov. Digital signatures shall comply with Government Code section 16.5. Digital signatures facilitated by CDFW will be automatically returned. Alternatively, you may return a hard copy of the permit via mail to:

California Department of Fish and Wildlife
Habitat Conservation Planning Branch, CESA Permitting
Post Office Box 944209
Sacramento, CA 94244-2090

You are advised to keep the permit and amendment in a secure location and distribute copies to appropriate project staff responsible for ensuring compliance with the conditions of approval of the permit. Note that you are required to comply with certain conditions of approval prior to initiation of ground-disturbing activities. Additionally, a copy of the permit must be maintained at the project work site and made available for inspection by CDFW staff when requested.

The permit amendment will not take effect until the signed acknowledgement is received by CDFW. If you wish to discuss these instructions or have questions regarding the permit, please contact Andy Rockriver, Senior Environmental Scientist (Specialist), at

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(209) 234-3433 or Andy.Rockriver@wildlife.ca.gov; or Gina Van Klompenburg, Senior Environmental Scientist (Supervisory), at (209) 234-3432.

Sincerely,

DocuSigned by:
Erin Chappell
B77E9A6211EF486
Erin Chappell
Regional Manager
Bay Delta Region

cc: Dan Riordan, Department of Water Resources – Dan.Riordan@water.ca.gov
CDFW Habitat Conservation Planning Branch – CESA@wildlife.ca.gov

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
BAY DELTA REGION
2825 CORDELIA ROAD, SUITE 100
FAIRFIELD, CA 94534



**AMENDMENT NO. 1
(A Major Amendment)
California Endangered Species Act
Incidental Take Permit No. 2081-2081-2018-066-03
Department of Water Resources
Winter Island Tidal Habitat Restoration Project in Contra Costa County**

INTRODUCTION

On May 16, 2019, the California Department of Fish and Wildlife (CDFW) issued Incidental Take Permit No. 2081-2018-066-03 (ITP) to Department of Water Resources (Permittee) authorizing take of Mason's lilaopsis (*Lilaeopsis masonii*) (Covered Species) associated with and incidental to the Winter Island Tidal Habitat Restoration Project in Contra Costa County, California (Project). The Project as described in the ITP originally issued by CDFW includes restoring and permanently protecting 544 acres of tidal wetlands on Winter Island. Project activities include breaching the southern and northern levees; removing existing water control structures and other debris; widening of an eastern tidal channel; and the collection, handling, and transplanting of Covered Species. In issuing the ITP, CDFW found, among other things, that Permittee's compliance with the Conditions of Approval of the ITP would fully mitigate impacts to the Covered Species and would not jeopardize the continued existence of the Covered Species.

The Permittee completed construction of the Project in September 2019. Although the Permittee avoided direct construction-related take of the Covered Species (46.5 ft² was permitted) at the north breach, monitoring by the Permittee and CDFW revealed ongoing erosion of the north breach, specifically on the western bank of the breach, which resulted in take of the Covered Species. On June 23, 2021, CDFW staff visited the Project site and discovered that a large patch of Mason's lilaopsis had fallen off the western bank into the breach. CDFW met with the Permittee the following day to discuss salvage and transplanting options for the Covered Species. On June 25, 2021, CDFW, Permittee, and the Permittee's consultants salvaged approximately 14.1 ft² of Mason's lilaopsis from the eroded block of soil in the breach and transplanted the plants at two nearby locations. On January 26, 2022, CDFW visited the Project site and again discovered additional erosion along the north breach that resulted in additional take of Covered Species. On March 8, 2023, CDFW observed more erosion. Since construction, the north breach has doubled in size from approximately 28 ft to 65 ft wide.

To better understand the local population of Covered Species and erosion impacts to the plant, CDFW requested that the Permittee conduct an island-wide survey for

Covered Species. In August and September 2021, Permittee surveyed the entire island. Survey results documented a total of 177 patches of Covered Species with a total areal extent of 2,599 ft². Surveys on the adjacent Sechrest Property, which the Permittee also purchased with Winter Island, documented an additional 107 patches of Covered Species with a total areal extent of 23,916 ft². Post-construction surveys at the north breach also indicated that despite the erosion and subsequent transplant removal, there was still a net increase of 231% in gross patch size since levee breaching. This result is likely due to the dynamic and high energy forces at and near the breach which may have helped expand the occupied habitats of the Covered Species and created conditions favorable to the Covered Species.

Although CDFW and Permittee anticipated some minor erosion and take might occur at the north breach, the degree and extent of the post-construction erosion into the adjacent Mason's lilaepsis patch was not anticipated. To mitigate for 1) the 14.1 ft² of Covered Species that eroded into the Breach, 2) the additional take from bank erosion observed in January 2022 and March 2023, and 3) future take due to erosion at the site, CDFW proposes that the Permittee preserve, protect, and permanently manage 465 ft² of existing occupied Covered Species habitat on Winter Island. The 465 ft² mitigation requirement includes 141 ft² of mitigation for impacting 14.1 ft² of Covered Species that eroded into the north breach and the remaining 324 ft² mitigates for 32.4 ft² of additional take caused by the continual erosion of occupied Covered Species habitat at the breach. Therefore, preservation, permanent protection and management of 465 ft² of existing populations of Covered Species and associated habitats will mitigate for past, current, and future take of Covered Species, due to erosion, that was caused by Project activities, i.e., the breaching of the north levee. In addition, this form of mitigation will allow for natural expansion of the Covered Species into nearby intertidal habitats. Upon CDFW review and approval, the proposed preservation locations will become Habitat Management (HM) lands.

This Major Amendment No. 1 (Amendment) makes the following change to the existing ITP:

This Amendment clarifies the translocation requirement and changes the restoration of up to one acre of HM lands to preservation, permanent protection and management of 465 ft² of HM lands with existing Mason's lilaepsis. The original 46.5 ft² of authorized take will remain the same but shall be mitigated as on-site preservation.

AMENDMENT

The ITP is amended as follows (amended language in ***bold italics***; deleted language in ~~strikethrough~~):

1. The second paragraph in ITP Condition 8, page 8 (Habitat Management Land Acquisition and Restoration) shall be amended to read:

Major Amendment No. 1
Incidental Take Permit 2081-2018-066-03
DEPARTMENT OF WATER RESOURCES
Winter Island Tidal Habitat Restoration Project

To fully mitigate Project-related impacts to the taking of Covered Species, the Permittee shall ***translocate, monitor, and manage Covered Species that will be impacted by Covered Activities*** ~~provide vegetation monitoring and management of Covered Species on Winter Island for a seven-year period and restore~~ ***and preserve, permanently protect, and manage one acre 465 square feet of occupied Covered Species habitat on the Project site, which is currently owned by Permittee. This occupied Covered Species habitat is*** Habitat Management (HM) lands ***pursuant to Condition of Approval 8.2 below and the calculation and funding of management funds are subject to Condition of Approval 8.3 below.*** ~~in an appropriate intertidal area on the exterior of Winter Island pursuant to Condition of Approval 8.2 below.~~ ***The HM lands shall mitigate past, current, and future erosional take of Covered Species at the north breach. Permanent protection and funding for perpetual management of compensatory habitat must be completed within 18 months of the effective date of this ITP Amendment No. 1.***

2. The first paragraph in ITP Condition 8.2.1, page 9 (Fee Title/Conservation Easement) shall be amended to read:

~~Maintain ownership of the HM lands, up to one acre intertidal area on the exterior of Winter Island, in fee title and shall convey a conservation easement to CDFW over the HM lands. Any transfer of fee title ownership shall be pursuant to terms approved in writing by CDFW and in compliance with state law.~~ ***Transfer fee title of the HM lands to CDFW pursuant to terms approved in writing by CDFW. Alternatively, CDFW, in its sole discretion, may authorize a governmental entity, special district, non-profit organization, for-profit entity, person, or another entity to hold title to and manage the property provided that the district, organization, entity, or person meets the requirements of Government Code sections 65965-65968, as amended. If CDFW does not hold fee title to the HM lands, CDFW shall act as grantee for a conservation easement over the HM lands or shall, in its sole discretion, approve a non-profit entity, public agency, or Native American tribe to act as grantee for a conservation easement over the HM lands provided that the entity, agency, or tribe meets the requirements of Civil Code section 815.3. If CDFW does not hold the conservation easement, CDFW shall be expressly named in the conservation easement as a third-party beneficiary.*** The Permittee shall obtain CDFW written approval of any conservation easement before its execution or recordation. No conservation easement shall be approved by CDFW unless it complies with Government Code sections 65965-65968, as amended and includes provisions expressly addressing Government Code sections 65966(j) and 65967(e);

3. The first paragraph in ITP Condition 8.2.6.3, page 11 shall be amended to read:

Permittee shall ensure that the approved MLMMP is fully implemented over a seven-year term beginning from the issuance date of this ITP. ***Permittee shall monitor, manage, and maintain any translocated Covered Species for a full seven years from the date of translocation, regardless of when the MLMMP was implemented. HM lands shall be managed and monitored in perpetuity.***

The corresponding MMRP measures shall be amended to read the same as above and a new MMRP Mitigation Measure 42 (See Attachment 1A) shall be attached to the end of the MMRP, page 10.

All terms and conditions of the ITP and MMRP that are not expressly amended herein remain in effect and must be implemented and adhered to by the Permittee.

FINDINGS

Issuance of this Amendment will increase the amount of post-construction take of the Covered Species compared to the Project as originally approved; however, by implementing a revised mitigation requirement to translocate post-construction impacted plants and preserve, permanently protect and manage Covered Species on the Project site, it is not expected that this Amendment will increase Project impacts on the species (i.e., "impacts of taking" as used in Fish and Game Code Section 2081, subd. (b)(2)).

Discussion: This Amendment reflects a change in the number of individuals which will be impacted by post-construction erosion that was a result of Project activities, specifically the removal of the northern water control structure which resulted in a breach that is eroding into an existing patch of Covered Species. The amount of authorized take will remain the same, 46.5 ft², but take will be shifted to post-construction impacts. This Amendment also clarifies the translocating requirement and changes the mitigation method for post-construction impacts from creation of habitat to preservation of occupied Covered Species habitat. This change in take assessment and mitigation is based on (1) annual post-construction surveys and monitoring of the north breach by Permittee and CDFW; (2) translocation of impacted plants; (3) a revised approach for mitigation that preserves, permanently protects, and manages in perpetuity existing occupied Covered Species habitat on the Project site; and (4) an accounting of the HM lands for mitigating past, current, and future erosion take at the north breach. This Amendment will not increase other Project impacts on the Covered Species because all Project construction activities are completed.

Issuance of this Amendment does not affect CDFW's previous determination that issuance of the ITP meets and is otherwise consistent with the permitting criteria set forth in Fish and Game Code section 2081, subdivisions (b) and (c).

Discussion: CDFW determined in May 2019 that the Project, as approved, met the standards for issuance of an ITP under CESA. This determination included findings that, among other things, the impacts of the taking would be minimized and fully mitigated and

that the Project would not jeopardize the continued existence of the Covered Species. Those findings are unchanged with respect to this Amendment because the Project and ITP as amended: (1) will have no effect on the amount or severity of unmitigated Project impacts on the Covered Species, as discussed above, and (2) does not substantively alter the measures that will be undertaken to minimize and mitigate previously authorized impacts on the Covered Species. Permittee's continued adherence to and implementation of the avoidance and minimization measures set forth in the ITP's Conditions of Approval and MMRP will minimize and fully mitigate impacts of the taking on the Covered Species.

None of the factors that would trigger the need for subsequent or supplemental environmental analysis of the Project under Public Resources Code section 21166 or California Code of Regulations, title 14, sections 15162 and 15163, exist as a result of this Amendment.

Discussion: CDFW issued the ITP in May 2019 as a responsible agency under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) after, among other things, considering the mitigated negative declaration adopted by Department of Water Resources as the lead agency for the Project. As explained in the findings below, CDFW finds for purposes of CESA that this Amendment represents a major change in the Project as originally approved. However, for the reasons explained above, CDFW concludes this Amendment is not a change in the Project that has the potential to create a new significant effect not previously analyzed, a substantial change in the circumstances under which the Project is being undertaken requiring major revisions to previous CEQA documents, or new information of substantial importance. As a result, CDFW finds that no additional subsequent or supplemental environmental review is required by CEQA as part of CDFW's approval of this Amendment.

CDFW finds that this Amendment is a Major Amendment, as defined in California Code of Regulations, title 14, section 783.6, subdivision (c)(5).

Discussion: This Amendment adjusts the amount of authorized take and habitat impacts for post-construction-related impacts and modifies the mitigation requirement, constituting a significant change in the scope of Project. However, by requiring translocation and preserving existing Mason's lilaepsis patches on the Project site and not increasing the overall take authorization, it is not expected that this Amendment will increase Project take on this species over the long term. As described above, this Amendment implements mitigation for post-construction take from erosion of Covered Species at the north breach thereby limiting the amount of unmitigated impacts to Mason's lilaepsis. Therefore, this Amendment will significantly modify the scope or nature of the permitted Project or activity, or the minimization, mitigation, or monitoring measures in the ITP. CDFW has determined that the change to the ITP constitutes a

Major Amendment as defined in California Code of Regulations, title 14, section 783.6, subdivision (c)(5).

Attachment

Attachment 1A MMRP Mitigation Measure 42

The authorization provided by this Amendment is not valid until Permittee signs and dates the acknowledgement below, and returns one of the duplicate originals of this Amendment by registered first class mail to CDFW at:

California Department of Fish and Wildlife
Habitat Conservation Planning Branch
Attention: CESA Permitting Program
Post Office Box 944209
Sacramento, CA 94244-2090

Alternatively, the Permittee shall email the digitally signed ITP to CESA@wildlife.ca.gov. Digital signatures shall comply with Government Code section 16.5. Digital signatures facilitated by CDFW will be automatically returned.

APPROVED BY THE CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE

on 8/25/2023.

DocuSigned by:
Erin Chappell
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Erin Chappell, Regional Manager
Bay Delta Region

ACKNOWLEDGMENT

The undersigned: (1) warrants that he or she is acting as a duly authorized representative of the Permittee, (2) acknowledges receipt of the original ITP and this Amendment, and (3) agrees on behalf of the Permittee to comply with all terms and conditions of the ITP as amended.

By: Philip Choy Date: 8/29/2023
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Printed Name: Philip Choy Title: Senior Environmental Scientist (supervisor)

Major Amendment No. 1
Incidental Take Permit 2081-2018-066-03
DEPARTMENT OF WATER RESOURCES
Winter Island Tidal Habitat Restoration Project

Attachment 1A – Mitigation Measure 42

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE MITIGATION MONITORING AND REPORTING PROGRAM (MMRP) CALIFORNIA ENDANGERED SPECIES ACT INCIDENTAL TAKE PERMIT NO. 2081-2018-066-03

PERMITTEE: Department of Water Resources

PROJECT: Winter Island Tidal Habitat Restoration Project

PURPOSE OF THE MMRP ATTACHMENT 1A

The purpose of this attachment is to add Mitigation Measure 42 to the existing MMRP to ensure that the impact minimization and mitigation measures required by the California Department of Fish and Wildlife (CDFW) for the above-referenced Project are properly implemented, and thereby to ensure compliance with section 2081(b) of the Fish and Game Code and section 21081.6 of the Public Resources Code. A table with the additional mitigation measure required by CDFW is attached. This table is a tool for use in monitoring and reporting on implementation of mitigation measures, but the descriptions in the table do not supersede the mitigation measures set forth in the California Incidental Take Permit (ITP), Amendment, and in attachments to the ITP and Amendments, and the omission of a permit requirement from the attached table does not relieve the Permittee of the obligation to ensure the requirement is performed.

OBLIGATIONS OF PERMITTEE

Mitigation measures must be implemented within the time periods indicated in the table that appears below. Permittee has the primary responsibility for monitoring compliance with all mitigation measures and for reporting to CDFW on the progress in implementing those measures. These monitoring and reporting requirements are set forth in the ITP and Amendment and are summarized at the front of the original MMRP table and the attached table for Mitigation Measure 42.

VERIFICATION OF COMPLIANCE, EFFECTIVENESS

CDFW may, at its sole discretion, verify compliance with any mitigation measure or independently assess the effectiveness of any mitigation measure.

TABLE OF MITIGATION MEASURES

The following items are identified for each mitigation measure: Mitigation Measure, Source, Implementation Schedule, Responsible Party, and Status/Date/Initials. The Mitigation Measure column summarizes the mitigation requirements of the ITP. The Source column identifies the ITP condition that sets forth the mitigation measure. The Implementation Schedule column shows the date or phase when each mitigation measure will be implemented. The Responsible Party column identifies the person or agency that is primarily responsible for implementing the mitigation measure. The Status/Date/Initials column shall be completed by the Permittee during preparation of each Status Report and the Final Mitigation Report must identify the implementation status of each mitigation measure, the date that status was determined, and the initials of the person determining the status.

	Mitigation Measure	Source	Implementation Schedule	Responsible Party	Status / Date / Initials
POST-CONSTRUCTION					
42	<p><u>Habitat Management Land Acquisition and Restoration</u>. CDFW has determined that this restoration Project will directly benefit longfin smelt (<i>Spirinchus thaleichthys</i>), Delta smelt (<i>Hypomesus transpacificus</i>), spring-run Chinook salmon (<i>Oncorhynchus tshawytscha</i>), and winter-run Chinook salmon (<i>O. tshawytscha</i>), through the restoration and enhancement of 544 acres of tidal wetland habitat and 17 acres of transitional upland habitat. In addition, the enhancement of the existing muted tidal habitat and transitional upland will benefit the Covered Species by greatly reducing levee maintenance and hardscaping, and by restoring the natural ecological processes that occurs in the Covered Species preferred intertidal habitat. This determination is based on factors including an assessment of the importance of the habitat in the Project Area and the extent to which the Covered Activities will impact the habitat.</p> <p>To fully mitigate Project-related impacts to the taking of Covered Species, the Permittee shall translocate, monitor, and manage Covered Species that will be impacted by Covered Activities and preserve, permanently protect, and manage 465 square feet of occupied Covered Species habitat on the Project site, which is currently owned by Permittee. This occupied Covered Species habitat is Habitat Management (HM) lands pursuant to Condition of Approval 8.2 below and the calculation and funding of management funds are subject to Condition of Approval 8.3 below. The HM lands shall mitigate past, current, and future erosional take of Covered Species at the north breach. Permanent protection and funding for perpetual management of compensatory habitat must be completed within 18 months of the effective date of this ITP Amendment No. 1.</p>	ITP Condition # 8	Within 18 months of issuance of ITP Amendment No. 1	Permittee	