

State of California
Department of Fish and Wildlife



Memorandum

Date: May 22, 2023

To: Jacob McQuirk
California Department of Water Resources
1416 Ninth Street
Sacramento, CA 95814
Jacob.McQuirk@water.ca.gov

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: Incidental Take Permit for 2081-2021-041-03 2021 Emergency Drought Salinity Barrier Project, Contra Costa County, Amendment No. 2

Enclosed you will find an electronic copy of the Incidental Take Permit Amendment (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 and sign the acknowledgement on the permit **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. 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 a copy of the Amendment and the original permit 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 continuation of ground-disturbing activities. Additionally, a copy of the permit with the Amendment must be maintained at the project work site and made available for inspection by CDFW staff when requested.

The 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 Amendment, please contact Mia Bianchi, Senior Environmental Scientist (Specialist), at Mia.Bianchi@wildlife.ca.gov; or Melissa Farinha, Environmental Program Manager, at Melissa.Farinha@wildlife.ca.gov.

Enclosures

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



**AMENDMENT NO. 2
(A Minor Amendment)
California Endangered Species Act
Incidental Take Permit No. 2081-2021-041-03-A2
California Department of Water Resources
2021 Emergency Drought Salinity Barrier in Contra Costa County**

INTRODUCTION

On June 2, 2021, the California Department of Fish and Wildlife (CDFW) issued Incidental Take Permit No. 2081-2021-041-03 (ITP) to the California Department of Water Resources (Permittee) authorizing take of Delta smelt (*Hypomesus transpacificus*), longfin smelt (*Spirinchus thaleichthys*), Sacramento River winter-run Chinook salmon (*Oncorhynchus tshawytscha*), Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*), giant garter snake (*Thamnophis gigas*), and Swainson's hawk (*Buteo swainsonii*) (collectively, the Covered Species) associated with and incidental to the 2021 Emergency Drought Salinity Barrier in Contra Costa County, California (Project). The Project as described in the ITP originally issued by CDFW includes the installation and removal of one temporary rock barrier weir structure, spanning West False River, and installation of two water quality and/or flow monitoring stations. 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.

Under the ITP, the Permittee installed a rock barrier weir structure (barrier) from June 18 to June 23, 2021. Per the Project Description on page 3, and Condition of Approval 7.1 of the ITP, the barrier was originally to be removed by November 30, 2021. Due to the continued drought conditions within California and low water storage within Lake Oroville and Lake Shasta, Permittee submitted an amendment request to maintain the barrier in place until November 30, 2022. The Permittee proposed to maintain the barrier in place to prevent salinity from entering the Eastern Sacramento-San Joaquin Delta and maintain water storage in Lake Oroville and Lake Shasta. The Permittee additionally proposed to modify the rock weir structure to allow for fish passage through West False River and incorporate a rock weir structure removal plan. On November 30, 2021, CDFW issued Amendment No. 1 (2081-2021-041-03-A1) that authorized the requested changes. The 2021 Emergency Barrier was removed by November 30, 2022.

In a letter received on December 13, 2022, the Permittee requested a second amendment to the ITP due to the slow progress towards compliance with the

compensatory mitigation Conditions of Approval required by 2081-2021-041-03 ITP. The request was for: 1) a proposal to extend the ITP expiration date from December 31, 2022 to December 31, 2024, 2) a proposal of 1.51 acres of banking credits to replace 1.51 acres revegetation commitment at the Arundo removal site per Item 14 of Amendment No. 1 (ITP No. 2081-2021-041-03-A1), 3) a proposal to limit Arundo rhizome excavation to clumps that occur below the High Tide Line (HTL) with continued herbicide treatment of Arundo resprouts above the HTL per Condition of Approval 8.2 in the ITP that had been previously modified in Amendment No. 1.

This Minor Amendment No. 2 (Amendment) makes the following changes to the existing ITP:

First, this Amendment extends the term of the 2081-2021-041-03 ITP through December 31, 2024.

Second, this Amendment replaces the mitigation requirements for riparian revegetation from on-site restoration to purchasing habitat credits from a CDFW approved Bank. Credits required to purchase are increased to 1.89 acres (1.25:1) due to temporal loss of unsuccessful riparian habitat restoration.

Third, this Amendment updates the timeframes in which invasive species treatment must occur and requires an updated submittal *Invasive Vegetation Management, Revegetation, and Monitoring Plan (Plan)*.

Fourth, this Amendment increases the cost estimates and total performance security required due to purchasing habitat credits in place of onsite riparian restoration.

Fifth, this Amendment incorporates Figure 4 to the ITP, titled *Sacramento River Arundo Removal*, prepared by Department of Water Resources, dated April 25, 2023.

AMENDMENT

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

1. Effective Date and Expiration Date of this ITP, page 1, shall be amended to read:

This ITP shall be executed in duplicate original form and shall become effective once a duplicate original is acknowledged by signature of the Permittee on the last page of this ITP and returned to CDFW's Habitat Conservation Planning Branch at the address listed in the Notices section of this ITP. Unless renewed by CDFW, this ITP's authorization to take the Covered Species shall expire on ***December 31, 2024***.

2. Condition of Approval 8.2 in ITP, page 15 shall be amended to read:

Permittee shall mitigate the remaining 1.24 acres of temporary impacts to aquatic habitat by purchasing 1.24 acres of salmonid credits from a CDFW-approved mitigation or conservation bank. **Additionally, Permittee shall also purchase 1.89 acres of habitat or species credits, with prior approval from CDFW, from a CDFW-approved mitigation or conservation bank in lieu of planting 1.51 acres of riparian habitat as originally proposed. Permittee shall also developing and implementing an Invasive Vegetation Management, Revegetation, and Monitoring Plan (Plan), which the Permittee shall develop under CDFW's direction and guidance and subject to CDFW's prior, written approval, to manage non-native invasive vegetation at 1.85 acres of sand bar locations for five *total* years (2021-2025). *Root masses shall be removed below the Mean Higher High Watermark (MHHW) and managed via herbicide treatment above the MHHW. Total acreage of Arundo management shall be 0.29 acres of root mass removal below the MHHW and 0.41 acres herbicide treatment above the MHHW within the defined 1.85-acre Arundo management area (See Figure 5).* and plant native vegetation on 1.51 acres of adjacent riparian upland habitat or as otherwise approved by CDFW. The locations of the sandbar non-native vegetation treatment and riparian upland habitat replanting shall be subject to CDFW approval. The goal of the Plan shall be to expose sand bar habitat, increase smelt egg deposition habitat, and establish native plants to provide ongoing habitat benefits for aquatic Covered Species. The Plan shall include the success criteria and ongoing maintenance and monitoring requirements. **The final Plan including all invasive species treatment activities, timelines for completion of activities, success criteria, and maps delineating specific treatment areas shall be submitted for review and approval to CDFW within 30 days of CDFW executing Amendment No. 2. Treatment activities addressed in the final Plan shall occur every year for the remaining three years: August 1 November 1, 2023 and October 1 December 1, 2023; August 1 November 1, 2024 and October 31 December 1, 2024; and August November 1, 2025 and through October 31 December 1, 2025. If Permittee fails to meet all success criteria within a given year, Permittee shall be required to perform an additional year of invasive species management and monitoring of the Arundo management area. If Permittee fails to complete activities in any given year, an additional year of invasive species management and monitoring shall be required.** to sandbars in shallow water habitat shall occur be completed between November 1, 2021 and December 1, 2021. The second treatment shall be completed between November 1, 2022 and December 1, 2022. Native plant revegetation shall be monitored for a minimum of five years after initial plantings.**

3. ITP Condition of Approval 8.5, Cost Estimates, page 16, shall be amended to read:

Cost Estimates. CDFW has estimated the cost of Covered Species **and Habitat** credits and restoration of temporarily disturbed habitat as follows:

8.5.1 The cost of implementation of an Invasive Vegetation Management, Revegetation, and Monitoring Plan identified in Condition of Approval 8.2 is estimated at \$100,000/acre for initial treatment and \$50,000/acre for a second year of treatment for 1.85 acres: \$277,500. ~~Revegetation of 1.51 acres is estimated at \$75,000.~~

8.5.2 The cost of salmonid credits identified in Condition of Approval 8.2 is estimated at \$175,000/acre for 1.24 acres: \$217,000.

8.5.3 The cost of GGS credit identified in Condition of Approval 8.3 is estimated at \$75,000/acre for 0.3 acre: \$22,500. Credit acquisition costs are estimated using local fair market current value for lands with habitat values meeting mitigation requirements. 8.5.4. The cost of Swainson's hawk nesting buffer credit identified in Condition of Approval 8.4 is estimated at \$170,000.00/acre for 1 acre: \$170,000. Credit acquisition costs are estimated using local fair market current value for lands with habitat values meeting mitigation requirements.

8.5.4 The cost of Swainson's hawk nesting buffer credit identified in Condition of Approval 8.4 is estimated at \$170,000.00/acre for 1 acre: \$170,000. Credit acquisition costs are estimated using local fair market current value for lands with habitat values meeting mitigation requirements.

8.5.5 *The cost of habitat or species credits identified in Condition of Approval 8.2 is estimated at \$175,000/acre for 1.89 acres: \$330,750.*

4. ITP Condition of Approval 9, Performance Security, Pages 15-16 shall be amended to read:

9. Performance Security: In light of the specific and immediate Emergency Proclamation to which this Project responds, discussions of Permittee's ensured funding sources for the Project, and need for expedited permitting, the Permittee may proceed with Covered Activities upon the effective date of this ITP but shall provide further documentation to ensure funding (Security) to complete any activity required by Condition of Approval 8 that has not been completed before Covered Activities begin within 14 days after the effective date of this ITP. Permittee shall provide Security as follows:

9.1. Security Amount. The Security shall be in the amount of ~~\$687,000~~ **\$801,000**. This amount is based on the cost estimates identified in Condition of Approval 8.1 above.

9.2. Security Form. The Security shall be in the form of an irrevocable letter of credit (see Attachment 6) or another form of Security approved in advance in writing by CDFW's Office of the General Counsel.

9.3. Security Timeline. The Security shall be provided to CDFW within 14 days after the effective date of this ITP.

9.4. Security Holder. The Security shall be held by CDFW or in a manner approved in advance in writing by CDFW.

9.5. Security Transmittal. If CDFW holds the Security, Permittee shall transmit it to CDFW with a completed Mitigation Payment Transmittal Form (see Attachment 7) or by way of an approved instrument such as escrow, irrevocable letter of credit, or other.

9.6. Security Drawing. The Security shall allow CDFW to draw on the principal sum if CDFW, in its sole discretion, determines that the Permittee has failed to comply with the Conditions of Approval of this ITP.

9.7. Security Release. The Security (or any portion of the Security then remaining) shall be released to the Permittee after CDFW has conducted an on-site inspection and received confirmation that all secured requirements have been satisfied, as evidenced by:

- Written documentation of the acquisition of the salmonid, GGS, and Swainson's hawk credits.
- Completion of the Invasive Vegetation Management, **Revegetation** and Monitoring Plan;
- Timely submission of all required reports. Even if Security is provided, the Permittee must complete the required **purchase of appropriate habitat credits and timely submission of reports, including the Invasive Vegetation Management, Revegetation and Monitoring Plan**, acquisition, protection and transfer of all HM lands and record any required conservation easements no later than 18 months from the effective date of **Amendment No. 2** to this ITP. CDFW may require the Permittee to provide additional HM lands **mitigation** and/or additional funding to ensure the impacts of the taking are minimized and fully mitigated, as required by law, if the Permittee does not complete these requirements within the specified timeframe.

5. ITP Attachments, page 20, shall be amended to read:

Attachments:

- FIGURE 1 Location of Emergency Drought Salinity Barrier
- FIGURE 2 Footprint of West False River Barrier
- FIGURE 3 Monitoring Station and Stockpile Locations
- FIGURE 4 *Sacramento River Arundo Removal, prepared by Department of Water Resources, dated April 25, 2023***
- ATTACHMENT 1 Mitigation Monitoring and Reporting Program
- ATTACHMENT 2 *Giant Garter Snake Relocation Plan for the Emergency Drought Barriers Project, prepared by the California Department of Water Resources*
- ATTACHMENT 3 *Draft 2021 Emergency Drought Salinity Barrier Monitoring Plan, prepared by the California Department of Water Resources; dated May 2021*
- ATTACHMENT 4 Liberty Island Credit Confirmation
- ATTACHMENT 5 Letter of Credit Form
- ATTACHMENT 6 Mitigation Payment Transmittal Form

6. MMRP: The corresponding MMRP measures shall be amended to read the same as above. 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 not increase the amount of take of the Covered Species compared to the Project as originally approved, nor will this Amendment increase other Project impacts on the Covered Species (i.e., "impacts of taking" as used in Fish and Game Code Section 2081, subd. (b)(2)).

Discussion: This Amendment makes specific changes to the ITP as originally issued; including extending the term of the ITP to December 31, 2024, authorizing the Permittee to provide required mitigation through the purchase and acquisition of habitat credits at a CDFW-approved Bank, updating the timeframes for invasive species removal, and

requiring updates to the Invasive Vegetation Management, Revegetation and Monitoring Plan be provided within 30 days of CDFW execution of this Amendment, increasing the estimated costs and performance security due to credit purchase replacing on-site restoration costs, and incorporating Figure 4 to define Arundo removal areas along Sacramento River. The resulting impacts to the Covered Species, however, including the number of acres of habitat that will be lost as a result of the Project, will remain the same.

CDFW has determined that proposed changes to circumstances, project description, and conditions of approval will not increase the amount of take or the severity of other impacts of the taking on the Covered Species. Given the circumstances of this Project, CDFW believes that the changes to the Project or Conditions of the ITP described in this Amendment will not increase impacts to the Covered Species.

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 June 2021 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) project will minimize and fully mitigate for additional take of Covered Species 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's issuance of an ITP and subsequent amendments are generally subject to the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 2100 et seq.). However, the Governor's Proclamation of State of Emergency, dated May 10, 2021, in Paragraph 8 directed Permittee to undertake actions, if necessary, to implement plans that address potential Delta salinity issues, including the installation of Emergency Drought Salinity Barriers. Paragraph 8 of the Emergency Proclamation further directed CDFW to immediately consider any necessary regulatory approvals needed to install Emergency Drought Salinity Barriers. For purposes of carrying out this directive and other specified directives, Paragraph 11 the Proclamation of State of

Minor Amendment No. 2
Incidental Take Permit 2081-2021-041-03
CALIFORNIA DEPARTMENT OF WATER RESOURCES
2021 Emergency Drought Salinity Barrier

Emergency suspended the environmental review by state agencies required by CEQA. Consequently, CDFW has not reviewed a certified environmental impact report or adopted mitigated negative declaration evaluating this Project, nor has CDFW adopted related findings pursuant to CEQA. Similarly, in applying for this permit, Permittee relied on the CEQA suspension provided by Paragraphs 8 and 11 of the Emergency Proclamation.

Notwithstanding the CEQA suspension that is applicable to the Project, the Permittee's Project Description includes environmental commitments designed to avoid or minimize potential environmental impacts, including impacts to Covered Species and other biological resources. This ITP authorizes incidental take that may occur in the course of Covered Activities as described in the Project Description and implementation of these environmental commitments is required for permit compliance.

CDFW finds that this Amendment is a Minor Amendment, as defined in California Code of Regulations, title 14, section 783.6, subdivision (c)(4).

Discussion: This Amendment modifies the timing of mitigation required by the original ITP. This Amendment makes the following limited changes in the ITP; extending the term of the ITP to December 31, 2024, authorizing the Permittee to provide required mitigation through the purchase and acquisition of habitat credits at a CDFW-approved Bank, updating the timeframes for invasive species removal and requiring updates to the Plan be provided within 30 days of CDFW execution of this Amendment, and increasing the estimated costs and performance security due to credit purchase replacing on-site restoration costs. These changes to the ITP will not: (1) increase the level of take or other Project impacts on Covered Species previously analyzed and authorized by the ITP, (2) significantly impact Permittee's mitigation obligations under the ITP, (3) require further environmental review under CEQA, or (4) significantly increase temporal impacts on the Covered Species. Therefore, this Amendment will not 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 Minor Amendment as defined in California Code of Regulations, title 14, section 783.6, subdivision (c)(4).

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

Minor Amendment No. 2
Incidental Take Permit 2081-2021-041-03
CALIFORNIA DEPARTMENT OF WATER RESOURCES
2021 Emergency Drought Salinity Barrier

APPROVED BY THE CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE

on 5/22/2023 _____.

DocuSigned by:
Erin Chappell
B77E9A6211EE486

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: DocuSigned by:
Jacob McQuirk _____ Date: 7/21/2023
BD2128EE41D140C...

Printed Name: Jacob McQuirk Title: Principal Engineer