

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
ECOSYSTEM CONSERVATION DIVISION
P.O. Box 944209
SACRAMENTO, CA, 94244-2090



AMENDMENT NO. 3
(A Minor Amendment)
California Endangered Species Act
Incidental Take Permit No. 2081-2019-066-00
California Department of Water Resources
Long-Term Operation of the State Water Project in the Sacramento-San Joaquin Delta

INTRODUCTION

On March 31, 2020, the California Department of Fish and Wildlife (CDFW) issued Incidental Take Permit No. 2081-2019-066-00 (ITP) to California Department of Water Resources (Permittee), authorizing take of Longfin Smelt (LFS, *Spirinchus thaleichthys*), Delta Smelt (DS, *Hypomesus transpacificus*), spring-run Chinook salmon (CHNSR, *Oncorhynchus tshawytscha*), and winter-run Chinook salmon (CHNWR, *Oncorhynchus tshawytscha*) (collectively, the Covered Species) associated with and incidental to the long-term operations of the State Water Project in the Sacramento San Joaquin Delta (Project).

The Project as described in the ITP as originally issued by CDFW includes continued operation of the State Water Project (SWP) facilities in the Sacramento-San Joaquin Delta (Delta) and Suisun Marsh. The SWP includes water, power, and conveyance systems, conveying an annual average of 2.9 million acre-feet of water. The principal components of the Project are operations of the Harvey O. Banks Pumping Plant (Banks Pumping Plant), the Clifton Court Forebay, the John E. Skinner Delta Fish Protective Facility, the Barker Slough Pumping Plant, the South Delta Temporary Barriers, San Luis Reservoir, the Delta Mendota Canal/California Aqueduct Intertie, the Georgiana Slough Migratory Barrier, and Suisun Marsh facilities including the Suisun Marsh Salinity Control Gates, Roaring River Distribution System, Morrow Island Distribution System, and Goodyear Slough Outfall. Permittee holds contracts with 29 public agencies in northern, central, and southern California for water supplies from the SWP. Water stored in the Oroville facilities, along with water available in the Delta (consistent with applicable regulations) is captured in the Delta and conveyed through several facilities to SWP contractors. The SWP is operated to provide flood control and water for agricultural, municipal, industrial, recreational, and environmental purposes. In issuing the ITP, CDFW found, among other things, that Permittee's compliance with the Conditions of Approval of the ITP would fully mitigate Project impacts of the taking on the Covered Species and that issuance of the ITP would not jeopardize the continued existence of the Covered Species.

The Project includes technical teams that meet on a weekly basis for a portion of each year to assess the risk of entrainment of Covered Species in the south Delta, including the Smelt and Salmon Monitoring Teams, and ensure that minimization measures that require reductions in exports at the Banks Pumping Plant are implemented.

In a letter dated September 30, 2020, Permittee requested changes to Conditions of Approval 8.1.1, 8.1.4, 8.3.1, 8.5.1, 9.1.3, and 9.2.1. Specifically, Permittee requested to change the start date for the Smelt Monitoring Team in Condition of Approval 8.1.1 and 8.1.4 to begin no later than November 1 each year to ensure consistency throughout the ITP. Permittee also asked to change the units used to report turbidity in Conditions of Approval 8.3.1, 8.5.1, and 9.1.3 from Nephelometric Turbidity Units (NTU) to Formazin Turbidity Units (FNU). Finally, Permittee requested an extension in the deadline for the first funding milestone required in Condition of Approval 9.2.1 to April 1, 2021 and clarifications to the requirements of that condition for funding restoration actions in the Sacramento River. These clarifications allow individual projects that receive funding to benefit either CHNWR or CHNSR, or both species, and allow Permittee to fund larger projects that extend over multiple years. On October 16, 2021 CDFW issued minor amendment 2018-2019-066-00-A1, including the requested changes to Conditions of Approval 8.1.1, 8.1.4, 8.3.1, 8.5.1, 9.1.3, and 9.2.1.

In a letter dated May 18, 2021, Permittee requested changes to Section 2.2 of the Project Description. Specifically, Permittee requested to change the description of Project operations for the June 1 – August 15, 2021 time period to incorporate modifications to Water Rights Decision 1641 (D-1641) included in the 2021 Temporary Urgency Change Petition Regarding Delta Water Quality (TUCP) submitted to the State Water Resources Control Board (SWRCB) by Permittee and the U.S. Bureau and Reclamation (Reclamation) on May 17, 2021, as subsequently approved by the SWRCB on June 1, 2021. Changes to D-1641 approved by the SWRCB included modifications to Delta outflow and salinity standards between June 1 and August 15, 2021, requirements to reduce SWP and Central Valley Project (CVP) exports from June 1 – August 15, 2021, and requirements to conduct new data analyses and synthesis to better understand impacts of critically dry years on fish species in the Delta. On June 2, 2021 CDFW issued minor amendment 2018-2019-066-00-A2, including changes to Section 2.2 of the Project Description reflective of the TUCP approval by the SWRCB.

In a letter dated March 18, 2022, Permittee requested changes to Condition of Approval 8.12 (Barker Slough Pumping Plant Longfin and Delta Smelt Protection). Specifically, Permittee requested the ability to meet and confer with CDFW regarding required export restrictions at the Barker Slough Pumping Plant (BSPP) if a larval DS were detected at Station 716 from April 1 – June 30, 2022. This request was made as a result of the ongoing drought, to implement the directive in the October 19, 2021 Executive Order to the Permittee to proactively prevent situations where a community runs out of drinking

water by assisting local agencies with identifying acute drinking water shortages in domestic water supplies, and working with local agencies in implementing solutions to those water shortages. The October 2021 Executive Order was maintained in full force and effect by a subsequent Executive Order issued on March 28, 2022 by the Governor. Permittee requested the ability to establish a maximum diversion rate at the BSPP based on diversion rates needed to provide minimum health and safety deliveries to customers of the North Bay Aqueduct and proactively ensure that no community within the North Bay Aqueduct service area runs out of drinking water.

This Minor Amendment No. 3 (Amendment) makes the following changes to the existing ITP:

1. This Amendment modifies Condition of Approval 8.12.
2. This Amendment modifies Condition of Approval 9.1.1
3. This Amendment revises the MMRP (ITP Attachment 1) for consistency with changes 1 and 2.

AMENDMENT

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

1. Condition of Approval 8.12, Barker Slough Pumping Plant Longfin and Delta Smelt Protection, ITP page 98-99 shall be amended to read:

8.12 ***Barker Slough Pumping Plant Longfin and Delta Smelt Protection.***

Permittee shall operate the BSPP to protect larval LFS from January 15 through March 31 of dry and critical water years. Permittee shall operate to protect larval DS from March 1 through June 30 of dry and critical years. If the water year type changes after January 1 to below normal, above normal or wet, this action will be suspended. If the water year type changes after January to dry or critical, Permittee shall operate according to this Condition of Approval.

From January 15 through March 31 of dry and critical water years, Permittee shall reduce the maximum seven-day average diversion rate at BSPP to less than 60 cfs when larval LFS are detected at Station 716. In addition, in its weekly meetings from January 15 through March 31, the Smelt Monitoring Team shall review LFS abundance and distribution survey data and other pertinent abiotic and biotic factors that influence the entrainment risk of larval LFS at the BSPP. When recommended by the Smelt Monitoring Team, and as approved through the

decision-making processes described in Conditions of Approval 8.1.3 and 8.1.4, Permittee shall reduce the maximum seven-day average diversion rate at BSPP according to the advice provided by the Smelt Monitoring Team.

From March 1 through June 30 of dry and critical water years, Permittee shall reduce the maximum seven-day average diversion rate at BSPP to less than 60 cfs when larval DS are detected at Station 716. In addition, in its weekly meetings from March 1 through June 30, the Smelt Monitoring Team shall review DS abundance and distribution survey data and other pertinent abiotic and biotic factors that influence the entrainment risk of larval DS at the BSPP (including temperature and turbidity). When recommended by the Smelt Monitoring Team, and as approved through the decision-making processes described in Conditions of Approval 8.1.3 and 8.1.4, Permittee shall reduce the maximum seven-day average diversion rate at BSPP to less than 60 cfs.

From April 1 through June 30, 2022 Permittee shall meet and confer with CDFW when larval DS are detected at Station 716 to determine a maximum diversion rate between 60 – 100 cfs at the BSPP that would serve to 1) minimize the entrainment risk of larval DS and 2) allow deliveries to customers that would support their minimum health and safety requirements and proactively prevent a situation where a community within the North Bay Aqueduct service area runs out of drinking water. During the meet and confer process Permittee and CDFW will review the most recent available hydrological data, storage levels and other information regarding any alternative water sources available to customers of the North Bay Aqueduct, as well as DS survey data and other pertinent abiotic and biotic factors that influence the entrainment risk of larval DS at the BSPP (including temperature and turbidity), informed by recent risk assessments by the SMT. The final maximum diversion rate shall be subject to CDFW approval. Permittee and CDFW shall meet and confer every two weeks through June 30 if larval DS continue to be detected at Station 716 to identify any updated information and consider adjustments to the maximum diversion rate, within the 60-100 cfs range and subject to CDFW approval.

The DS requirements described in this condition may be adjusted to align with USFWS requirements to minimize take of DS through an amendment to this ITP.

2. Condition of Approval 9.1.1, Tidal Habitat Restoration for Delta Smelt, ITP page 112 shall be amended to read:

Permittee shall site, design, restore, and conserve an additional ~~396.3~~ **401.25** acres of DS tidal wetland habitat as compensatory mitigation for increased diversions at the BSPP. ***If CDFW does not approve an increase in the maximum diversion rate at BSPP in Water Year 2022, the total number of additional DS tidal wetland acres required to be sited, designed, restored, and conserved by Permittee shall be 396.3.***

3. This Amendment revises the MMRP for consistency with the changes above. A revised MMRP is attached to this Amendment.

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 incorporates two changes to the Permit during the April 1 – June 30, 2022 time frame: 1) modifies Condition of Approval 8.12 to establish a meet and confer process if a larval DS is detected at Station 716 between April 1 – June 30, 2022 and 2) requires Permittee to site, design, restore and conserve an additional 4.95 acres of DS tidal wetland habitat as compensatory mitigation for increased diversions at the BSPP if the meet and confer process allows for a maximum diversion rate at BSPP greater than 60 cfs to meet minimum health and safety requirements for water supply.

CDFW has determined that changes to the ITP 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 described in this Amendment that establish a meet and confer process if larval DS are detected at Station 716 from April 1 – June 30, 2022 are not likely to increase impacts of the Project to the Covered Species.

If changes to BSPP operations are approved by CDFW through a meet and confer process to ensure human health and safety deliveries to North Bay Aqueduct customers can be made, it may result in small increases in take of DS during the April 1 through June 30, 2022 time period. However, the meet and confer process and ongoing

consideration of updated information will ensure CDFW is closely evaluating changes to minimize impacts. In addition, habitat restoration requirements included in the amendment are complementary to, and consistent with, existing requirements to expand the diversity, quantity, and quality of DS rearing and refuge habitat in the tidal portions of the Delta and Suisun Marsh. The amendment's requirements are a minor addition to the 396.3 acres of DS tidal wetland habitat required by the ITP as originally issued as compensatory mitigation for increased diversions at the BSPP. The requirements of this amendment relate solely to the amendment and are expected to result in benefits to DS and other 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 March 2020 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) are unlikely to have an effect on the amount or severity of Project impacts on the Covered Species, as discussed above, (2) includes changes allowing Permittee to request a temporary and targeted change to the measures that will be undertaken to minimize take of Covered Species at the BSPP and 3) increases required mitigation to benefit the Covered Species if changes to BSPP operations are made following a meet and confer process.

The amendment's changes to the Conditions of Approval ensure that customers of the North Bay Aqueduct will have access to minimum health and safety water supplies, and contributes to proactively preventing a situation where communities in the North Bay Aqueduct service area run out of drinking water during the declared drought state of emergency. The Amendment requires Permittee to site, design, restore, and conserve an additional 4.95 acres of DS tidal wetland habitat to offset potential impacts associated with increased diversions at the BSPP.

Permittee's continued adherence to and implementation of the avoidance, minimization and mitigation 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 March 2020 as a responsible agency under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) after, among other things, considering the Environmental Impact Report (EIR) certified by Permittee as the lead agency for the Project. In conjunction with its request for this minor amendment, Permittee noted that Directives 7 and 12 of the Emergency Proclamation issued by the Governor on October 19, 2021 suspends CEQA for permits necessary to carry out actions to proactively prevent situations where a community runs out of drinking water, including Permittee's request for a minor amendment. The Emergency Proclamation issued by the Governor in October 2021 was maintained in full force and effect by a subsequent Emergency Proclamation issued on March 28, 2022. CDFW finds that the need to evaluate potential impacts to human health and safety water supplies for customers of the North Bay Aqueduct is contemplated by Directive 7 of the October 19, 2021 Emergency Proclamation, and that the CEQA suspension in Directive 12 applies for the purpose of carrying out or approving specified directives, including through issuance of permits necessary to address the potential risk to drinking water supplies. 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 Minor Amendment, as defined in California Code of Regulations, title 14, section 783.6, subdivision (c)(4).

Discussion: This Amendment makes two changes to the Conditions of Approval in the ITP to 1) allow Permittee to meet and confer with CDFW and request a minimum health and safety diversion rate at BSPP to ensure customers of the North Bay Aqueduct have access to minimum health and safety drinking water supplies from April 1 – June 30, 2022 during the declared drought emergency and 2) requires Permittee to site, design, restore and conserve and additional 4.95 acres of DS tidal marsh habitat if changes to the maximum diversion rate for BSPP are approved in WY 2022. 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 affect Permittee's substantive mitigation obligations under the ITP, (3) require further environmental review under CEQA, or (4) 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 signed by all parties and returned to CDFW. Digital signatures facilitated by CDFW will be automatically returned

and shall comply with Government Code section 16.5. Wet signatures on duplicate original paper copies shall be returned by the Permittee via registered first-class mail or overnight delivery to the following address:

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

APPROVED BY THE CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE

on 3/31/2022

DocuSigned by:

Chad Dibble

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Chad Dibble
Deputy Director
Ecosystem Conservation Division

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: _____ Date: _____

Printed Name: _____ Title: _____