

## **MODIFICATIONS TO THE MITIGATION MONITORING AND REPORTING PROGRAM FOR THE SOIL INVESTIGATIONS FOR DATA COLLECTION IN THE DELTA PROJECT**

This decision document was prepared in support of the adoption of the modifications to the Mitigation Monitoring and Reporting Program (MMRP) for the Soil Investigations for Data Collection in the Delta Project (SCH# 2019119073) (Project), as the implementing document for the approved IS/MND and associated addenda. The modifications to the MMRP consist of the following revisions to Mitigation Measure BIO-1b and BIO-1d<sup>1</sup>:

Mitigation Measure BIO-1b. As stated in the project description, all on-land soil investigation Impact Areas will be located outside of wetlands as defined in the Corps of Engineers Wetlands Delineation Manual (USACE 1987). Evaluation of conditions at each site will be conducted by a qualified wetland delineators. If after either review of applicable data sources (e.g. verified delineations and /or aerial imagery) or initial site reconnaissance, potential nearby aquatic resources including those that meet the Corps definition of wetlands or non-wetland waters are identified for on-land soil investigation sites within the Impact Area, including those that meet the Corps definition of wetlands or non-wetland waters, a wetland delineators will perform participate in the a site surveys for those that sites and relocate them outside of the Impact Area a minimum of 5 feet from the boundaries of observed aquatic resources. This distance exceeds the USACE Sacramento District's minimum standard for mapping accuracy (less than one meter) for delineation of aquatic resources and would ensure avoidance of impacts to the resource.

Mitigation Measure BIO-1d. A qualified team of biologists will conduct a habitat assessment and reconnaissance level surveys approximately two weeks prior to the onset of ground disturbing soil investigation activities for any special status plants and wildlife that have the potential to occur within the project area (see Appendix A-Wildlife and Plant Species List). If, based on the habitat assessment and reconnaissance level surveys, the biologists identify the potential for special status wildlife impacts within the Impact Area and associated standard species buffers based on the site reconnaissance, the location will be shifted to a suitable location as identified by the qualified team of biologists, which is defined as a location that achieves the following four performance standards: (1) satisfies the requirements of Mitigation Measures BIO 2 through BIO 20, AES-1, AES-2, HYD-1, and HAZ-1 through HAZ-4 (2) is the minimum distance necessary (informed by the mitigation measures cited in (1)) to ensure that no special status plants and wildlife with the potential to occur is disturbed during the work activities, (3) reduce the potential for biological impacts to a less than significant level without increasing does not increase impacts to other resources to above a level of

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<sup>1</sup> Underlined text indicates insertions and strikethrough text indicates deletions.

significance, and (4) the qualified biologist team must determine that commencing activities does not have the possibility to cause unpermitted take under federal or State law. If a suitable location, as defined above, cannot be determined within adjacent areas by the qualified team of biologists, then the soil investigation at that location will not be conducted.

Mitigation Measure BIO-1b requires that all on-land soil investigation Impacts Areas are located outside of wetlands. To ensure all on-land soil Impact Areas are located outside of wetlands, the measure has been clarified to provide that where potential aquatic resources are identified through data sources or initial reconnaissance level surveys, a wetland delineator must conduct a survey and confirm that the Impact Area is a minimum of 5 feet from the boundary of any observed aquatic resources. The USACE Sacramento District's minimum standard for mapping accuracy is one meter for delineation of aquatic resources. (USACE, Minimum Standards for Acceptance of Aquatic Resources Delineation Reports (January 2016), [https://www.spk.usace.army.mil/Portals/12/documents/regulatory/jd/minimum-standards/Minimum Standards for Delineation with Template-final.pdf](https://www.spk.usace.army.mil/Portals/12/documents/regulatory/jd/minimum-standards/Minimum_Standards_for_Delineation_with_Template-final.pdf).) As one meter is approximately 3.25 feet, Mitigation Measure BIO-1b conservatively requires Impact Areas to be located a minimum of 5 feet from the boundary of the nearest observed aquatic resource to account for variations in mapping accuracy and to ensure all on-land soil investigation Impact Areas are located outside of wetlands as required by Mitigation Measure BIO-1b.

Mitigation Measure BIO-1d requires a qualified team of biologists to conduct a habitat assessment and reconnaissance level surveys in order to confirm whether any special status plant and wildlife species have potential to occur in the project area for each soil investigation and requires the location for an investigation to be shifted to a suitable location or abandoned (if necessary) to avoid potentially significant impacts to any special status plant and wildlife species. The measure has been clarified to list the four criteria used by DWR to identify suitable locations. Specifically, to be suitable, a location must (1) satisfy the requirements of Mitigation Measures BIO-2 through BIO-20, AES-1, AES-2, HYD-1, and HAZ-1 through 4, (2) be the minimum distance necessary to ensure that no special status plant and wildlife with the potential to occur is disturbed during the work activities, (3) not increase impacts to other resources to above a level of significance, and (4) the qualified biologist team must determine that commencing activities does not have the possibility to cause unpermitted take under federal or State law. If a suitable location, as defined above, cannot be determined within adjacent areas by the qualified team of biologists, then the soil investigation at that location will not be conducted. The first performance criterion in Mitigation Measure BIO-1d is relevant to most special status wildlife and plant species with the potential to occur

because, as demonstrated in the attached Appendix A,<sup>2</sup> most special status wildlife species and all special status plant species with the potential to occur are covered by Mitigation Measures BIO-1 as well as one or more of Mitigation Measures BIO-2 through BIO-20, AES-1, AES-2, HYD-1, or HAZ-1 through 4. For species covered by BIO-1 in addition to other measures as identified in the attached Appendix A, a soil investigation site must satisfy the requirements of each of the applicable mitigation measures before soil investigation activities may commence. The second and third criteria are relevant to all special status plant and wildlife species with the potential to occur and ensure no special status plant and wildlife with the potential to occur is disturbed while taking into consideration all other resources. Furthermore, for all special status wildlife species, criteria four would also ensure that the qualified team of biologists must confirm the location for the soil investigation will not disturb any special status plant and wildlife species or cause an unpermitted take. Finally, the qualified team of biologists must also confirm that any adjustment in the site location required to comply with Mitigation Measure BIO-1d does not increase impacts to any other resources above the level of significance.

This decision document was prepared in response to the Ruling on the Petition for Writ of Mandate in *Central Delta Water Agency et al v. California Department of Water Resources*, Sacramento Superior Court Case No. 34-2020-80003457 (Ruling). In the Ruling, the Court found that DWR must modify subdivisions (b) and (d) of Mitigation Measure BIO-1 to identify the performance standards applied by DWR in implementing these subdivisions of BIO-1. Otherwise, “[a]s detailed throughout th[e] ruling, the Court f[ound] substantial evidence support[ed] the agency’s conclusion that there is *not* substantial evidence of a fair argument that the proposed plan might have a significant adverse environmental effect after mitigation.” (Ruling, p. 10 (original emphasis).) In adopting the approved IS/MND and addenda, DWR adopted an MMRP, consistent with CEQA Guidelines section 15097, to implement, monitor and report compliance with the Project’s mitigation requirements. Modification of the MMRP to include the performance standards set forth above for subdivisions (b) and (d) of Mitigation Measure BIO-1 will (1) ensure Mitigation Measure BIO-1 is implemented as intended in the IS/MND and addenda and (2) require that DWR report and monitor compliance.

As demonstrated below, the modified MMRP does not require recirculation of the previously adopted IS/MND pursuant to CEQA Guidelines section 15073.5 or subsequent review pursuant to CEQA Guidelines section 15162.

A lead agency is required to recirculate a negative declaration or mitigated negative declaration when the document must be substantially revised after public notice of its availability has previously been given pursuant to CEQA Guidelines section 15072, but

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<sup>2</sup> The attached Appendix A (Wildlife and Plant Species List) is identical to the IS/MND Appendix A except it includes a final column that identifies each of the mitigation measures that are applicable to ensuring that the project will result in a less-than-significant impact to all special status wildlife species with the potential to occur.

prior to its adoption. (CEQA Guidelines, § 15073.5(a).) Here, DWR adopted the IS/MND in July of 2020 and modification to Mitigation Measure BIO-1b and 1d only requires approval of a modified MMRP. Therefore, as this decision to adopt a modified MMRP is made after adoption of the IS/MND, this action is not subject to CEQA’s recirculation test pursuant to CEQA Guidelines section 15073.5 and is instead subject to CEQA’s subsequent review test pursuant to CEQA Guidelines section 15162. However, even if CEQA Guidelines section 15073.5 applied to approval of the modified MMRP, “[r]ecirculation is not required... [where] [n]ew information is added to the negative declaration which merely clarifies, amplifies, or makes insignificant modifications to the negative declaration.” (CEQA Guidelines, § 15073.5(c)(4).) The modifications to Mitigation Measure BIO-1b and 1d merely clarify how the subdivisions of Mitigation Measure BIO-1, as included in the adopted IS/MND and addenda, will be implemented by DWR. Except for providing such clarifications, the “Court f[ound] substantial evidence support[ed] the agency’s conclusion that there is *not* substantial evidence of a fair argument that the proposed plan might have a significant adverse environmental effect after mitigation.” (Ruling, p. 10 (original emphasis).) Therefore, the modifications to Mitigation Measure BIO-1b and 1d do not constitute a “substantial revision” requiring recirculation as defined in CEQA Guidelines section 15073.5(b).

To evaluate the criteria for subsequent review set forth in Public Resources Code section 21166 and CEQA Guidelines sections 15162 and 15164, as interpreted in *Friends of Coll. of San Mateo Gardens v. San Mateo Cnty. Cmty. Coll. Dist.* (2016) 1 Cal.5th 937 (*Friends I*) and *Friends of Coll. of San Mateo Gardens v. San Mateo Cnty. Cmty. Coll. Dist.* (2017) 11 Cal.App.5th 596 (*Friends II*). The proposed modifications to the MMRP are necessary, but those changes do not create new potentially significant environmental impacts that warrant major revisions to the previous document (CEQA Guidelines §§ 15162(a)(1), 15164(a); *Friends II, supra*, 11 Cal.App.5th at pp. 607-608).

The proposed modifications to the MMRP, do not create any new potentially significant impacts or a substantial increase in the severity of previously identified potentially significant impact. DWR finds no substantial evidence to the contrary. Nor are there any new circumstances or new information that could create potentially significant impacts or require more robust analysis (CEQA Guidelines § 15162(a)(2)-(3); *Friends I, supra*, at p. 953). Thus, neither a subsequent MND nor an EIR is warranted (CEQA Guidelines, § 15164(e); *Friends II, supra*, 11 Cal.App.5th at pp. 607-608).

These criteria are individually examined below to demonstrate that no conditions triggering a subsequent MND or EIR are present.

- 1. No substantial changes are proposed that will require major revisions to the MND because of new potentially significant environmental effects or a substantial increase in the severity of previously identified potentially significant impact (CEQA Guidelines §§ 15162(a)(1), 15164(b); *Friends II*).**

It has been determined that the previous analysis of effects remains valid and the proposed modifications to the MMRP would not result in any new potentially significant environmental impacts that were not previously examined in the 2020 Final IS/MND and 2021 or 2022 Addenda; would not impact the feasibility of other mitigation measures adopted in the 2020 MMRP or their ability to reduce the significance of effects; and would not result in the need to adopt additional mitigation measures. DWR has not identified any substantial evidence supporting a contrary conclusion with respect to the possibility of new potentially significant impacts or a substantial increase in the severity of previously identified potentially significant impact that was reduced to a less than significant level in the IS/MND due to the proposed modifications of the MMRP.

The approved Project is currently being implemented as described in the previously approved Project's 2020 Final IS/MND and 2021 and 2022 Addenda. Implementation of the approved Project components, in conjunction with the adopted mitigation measures, have been effective in reducing potential impacts to less than significant. DWR presumes that implementation of the mitigation measures as revised to clarify the performance criteria currently being used by DWR in its ongoing implementation of the measures would have the same effectiveness, with no known evidence to the contrary.

2. **No new substantial changes in circumstances under which the Project will be undertaken which will require major revisions of the MND due to involvement of new potentially significant environmental effects or a substantial increase in the severity of previously identified potentially significant impact (CEQA Guidelines §§ 15162(a)(2), 15164(b); *Friends II*).**

The approved Project has been consistently implemented since 2020 in accordance with the 2020 Final IS/MND, 2021 and 2022 Addenda. The circumstances under which the approved Project was approved and implemented have remained largely unchanged. There is no reason to believe that implementation of the proposed modifications to the MMRP will encounter or otherwise involve a substantial change in circumstances. As stated above, the approved Project has been implemented effectively, and DWR presumes that implementation of the MMRP as modified to clarify the performance criteria currently being used by DWR in its ongoing implementation of the measures would have the same effective results, with no known evidence to the contrary.

3. **No new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the MND was adopted, shows: (A) the Project may have one or more new potentially significant effects not discussed in the MND; (B) mitigation measures previously found not to be feasible would in fact be feasible and would substantially reduce one or more potentially significant effects of the Project; (C) mitigation measures which are considerably different from those analyzed in the MND would**

**substantially reduce one or more potentially significant effects on the environment. (CEQA Guidelines §§ 15162(a)(3), 15164(b); *Friends II*).**

DWR is not aware of any new information of substantial importance that would alter the above determination that the proposed modifications to the MMRP would not result in the need to adopt additional mitigation measures considerably different from those previously adopted, would not result in any new potentially significant environmental effects that were not previously examined in the 2020 Final IS/MND, 2021 or 2022 Addenda; and would not impact the feasibility of other mitigation measures adopted in the 2020 MMRP or their ability to reduce the significance of effects.

Mitigation measures that were previously adopted and made a part of the approved Project would continue to be implemented as modified, to avoid, minimize, and mitigate potential impacts to environmentally sensitive resources because of the approved Project. These Mitigation Measures are currently being implemented on previously approved activities and have been effective in avoiding, minimizing, and mitigating potential impacts to less than significant.

The analysis supports the determination that neither a subsequent MND nor an EIR is required because none of the conditions described in CEQA Guidelines sections 15162 would be triggered by the proposed modifications to the MMRP.

The proposed modifications to the MMRP (consisting of revisions to mitigation measure BIO-1b and 1d) for the 2021 and 2022 Addenda and 2020 Final IS/MND have been considered and based on this supporting information, DWR has adopted the modified MMRP which supersedes the 2020 MMRP.



January 9, 2023

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Delta Conveyance, Environmental Program Manager

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Date

Attachments:

Appendix A: Special Status Plant Species List (as revised December 2022)

Appendix A: Special Status Wildlife Species List (as revised December 2022)

Soil Investigations for Data Collection in the Delta, Mitigation and Monitoring Reporting Program (MMRP) Modified, December 2022