

Appendix A. Regulatory Setting

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1.0 Introduction

Section 7.0 of the Conservation Strategy describes regional permitting efforts that are being developed by the California Department of Water Resources (DWR) in various stages of implementation. This appendix provides a more thorough description of the State and federal regulatory approvals that will be required for implementation of the Central Valley Flood Protection Plan (CVFPP), including the Conservation Strategy. The descriptions below are general, because CVFPP implementation will involve diverse activities, and the specific regulatory requirements of each activity cannot be described in this volume.

2.0 Federal Authorities

The National Environmental Policy Act (NEPA) requires that federal agencies review their proposed actions through a process that evaluates the potential environmental effects of the proposed action and of reasonable and prudent alternatives that would avoid or minimize significant effects. The requirements for NEPA compliance are identified by NEPA, the guidelines of the Council on Environmental Quality, and the federal agency undertaking the action. NEPA grants considerable discretion to federal agencies regarding the procedures for NEPA review. Consequently, the timeline and requirements for NEPA compliance vary considerably among federal agencies and the various actions they undertake.

Federal agencies conduct NEPA reviews for their respective federal authorizations by preparing exemptions, categorical exclusions, or environmental assessments (EAs) as part of the agencies' internal authorization process. If an EA concludes with a finding of no significant impact, no further NEPA documentation is required. If the EA determines that the project may result in significant environmental effects, or if significant effects are presumed initially, preparation of an environmental impact statement (EIS) is required for NEPA compliance. In general, the significance of an action's effects is determined in terms of the actions context and intensity, but the federal agency's NEPA guidance may provide additional direction regarding significance determinations. An EIS evaluates the potential effects of both the proposed action and reasonable alternatives to the action; an EIS also discusses means to mitigate adverse effects. NEPA compliance with an EIS is completed with a record of decision regarding the proposed action.

2.1 U.S. Army Corps of Engineers

2.1.1 Section 404 of the Clean Water Act

The U.S. Army Corps of Engineers (USACE), through the Regulatory Program, administers and enforces Section 404 of the Clean Water Act. Under Section 404, a permit is required for the discharge of dredged or fill material into waters of the United States.

2.1.2 Section 9 of the Rivers and Harbors Act of 1899

Section 9 of the Rivers and Harbors Act of 1899 prohibits the construction of any dam or dike across any navigable water of the United States in the absence of congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the water body lie wholly within the limits of a single state, the structure may be built under authority of the legislature of that state, if the location and plans or any modification thereof are approved by the Chief of Engineers and by the Secretary of the Army. Section 9 also pertains to bridges and causeways, but the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation (U.S. Coast Guard) under the Department of Transportation Act of 15 October 1966.

2.1.3 Section 10 of the Rivers and Harbors Act of 1899

USACE, through the Regulatory Program, administers and enforces Section 10 of the Rivers and Harbors Act of 1899. Under Section 10, a permit is required for work or structures (e.g., a levee or pier) in, over, or under navigable waters of the United States.

2.1.4 Section 14 of the Rivers and Harbors Act of 1899

Section 14 of the Rivers and Harbors Act (33 U.S. Code 408, or “Section 408”) provides that the Secretary of the Army may, on recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation of a public work (e.g., a levee or dam) so long as that alteration or occupation is not injurious to the public interest and will not impair the usefulness of the work. Permission for certain alterations (which include changes to the authorized purpose, scope, or functioning of a project) must be granted by USACE Headquarters. The primary focus of USACE’s Section 408 review is to ensure that there will be no adverse impacts on the flood risk reduction system.

2.2 U.S. Fish and Wildlife Service and National Marine Fisheries Service

2.2.1 Endangered Species Act

Once a fish or wildlife species is listed as endangered or threatened under the federal Endangered Species Act (ESA), the act prohibits “take” of the species. To “take” a species means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Also, habitat modification or degradation that results in death or injury to listed species by impairing behavioral patterns constitutes take. In addition, Section 7 of the ESA prohibits the destruction or adverse modification of designated critical habitat. Designated critical habitat encompasses areas that are essential to the conservation of threatened and endangered species, and includes geographic areas “on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection” (ESA Section 3[5][A]). Generally, the U.S. Fish and Wildlife Service (USFWS) (under the U.S. Department of the Interior) administers the ESA for terrestrial and freshwater

species, and the National Marine Fisheries Service (NMFS) (under the U.S. Department of Commerce) administers the ESA for marine and anadromous species.

Endangered Species Act Section 7

ESA Section 7(a)(2) requires federal agencies that are undertaking, funding, permitting, or authorizing actions to consult with USFWS and/or NMFS to evaluate whether actions would affect listed species or designated critical habitat. The issuance of a permit by a federal agency provides a federal nexus for a State agency action or project (requiring ESA compliance through Section 7 consultation). For example, as part of issuing a Clean Water Act Section 404 permit, which may provide a federal nexus for at least a portion of a project, USACE would initiate Section 7 consultation with both USFWS and NMFS.

Section 7 consultations involve the following general components:

- If the action has no potential to affect species listed under the ESA or critical habitat, then a “no effect” determination is made by the federal agency undertaking or permitting an action and there is no obligation to contact USFWS and/or NMFS for concurrence. Concurrence letters from USFWS and/or NMFS are needed if the action may affect but is not likely to adversely affect ESA-listed species or critical habitat.
- If there is a potential to affect species listed under the ESA or critical habitat, then a biological assessment (BA) or equivalent document is prepared.
- If, based on the BA, the action is likely to adversely affect species listed under the ESA or critical habitat, then a formal consultation occurs between the federal agency proposing the action (e.g., USACE) and USFWS and/or NMFS. USFWS and/or NMFS issues a biological opinion (BO) within 45 days of the consultation.
- If the BO makes a “no jeopardy” finding for the ESA-listed species considered, then incidental take may be authorized. If the BO makes a “jeopardy” finding for the species, then the BO must identify “reasonable and prudent alternatives” (RPAs) to prevent jeopardy or state why there are no alternatives. The federal agency proposing the action must consider the RPAs. If there are no RPAs, then the federal agency with a nexus to the action or the project proponent may apply to the ESA Committee for an exemption. The ESA Committee is comprised of seven federal agency heads or appointees and can only allow for such an exemption if specific criteria are met. This exemption process is rarely used.

Endangered Species Act Section 10

Proponents of any activities that do not have a federal nexus (through USACE or another federal agency) cannot consult under Section 7 of the ESA. Instead, ESA compliance for incidental take needs to be achieved under ESA Section 10, primarily through preparation of a habitat conservation plan (HCP) and subsequent issuance of an incidental take authorization. An HCP is a planning document prepared by a nonfederal party as part of an application for incidental take authorization. An HCP assesses the impacts of a proposed action on species (both ESA-listed and nonlisted species); proposes measures to monitor, minimize, and mitigate these impacts; and identifies alternatives to the take being considered. On approval of an HCP, USFWS and/or NMFS

issues incidental take authorizations, which allow the nonfederal party to legally proceed with an activity that otherwise would result in unlawful take of a species listed under the ESA. In addition to issuing the incidental take authorizations, USFWS and NMFS complete a BO under Section 7 of the ESA and provide appropriate NEPA documentation.

Section 10 consultations involve the following general components:

- A permit application, an HCP, and NEPA documentation are prepared.
- The HCPs have the following components:
 - Description of covered species
 - Conservation goals and objectives
 - Assessment of take of species listed under the ESA
 - Alternatives to the take and reasons for rejecting these alternatives
 - Measures to minimize and mitigate take
 - Measures that will be taken in the event of changed or unforeseen circumstances
 - A monitoring and adaptive management plan
 - Funding assurances for implementation

2.2.2 Safe Harbor and Conservation Agreements

A safe harbor agreement (SHA) is a voluntary agreement between private or nonfederal landowners and USFWS. NMFS does not issue SHAs. Under an SHA, a landowner enhances the property in ways that benefit listed species and is issued an enhancement of survival permit under the authority of ESA Section 10(a)(1)(A). This permit authorizes incidental take of species that may result from actions undertaken by a landowner under the SHA, which could include returning the property to baseline conditions at the end of the agreement. Because an SHA can be entered into only by the landowner, an SHA cannot be obtained by a maintaining agency with an easement for maintenance (as is typical for DWR). The agreement has to be initiated by the landowner. An SHA typically takes 6–9 months to develop, although complex agreements may take longer.

A candidate conservation agreement with assurances is similar to an SHA in that it is an agreement between USFWS and a landowner. However, a candidate conservation agreement with assurances can cover species that are candidates for listing. As part of this agreement, the landowner voluntarily commits to actions to help stabilize or restore a species, with the goal that listing will become unnecessary. The agreement provides the landowner with an avenue for potentially sharing the costs of conservation actions with federal or State programs. Also, if the candidate species becomes listed, the agreement becomes a permit authorizing the landowner's incidental take of the species.

Migratory Bird Treaty Act

The federal Migratory Bird Treaty Act makes it illegal to pursue, hunt, take, capture, kill, or sell birds that are listed in the act. There are certain circumstances in which a waiver can be obtained that allows for these actions (for example, for hunting, scientific collection and if required to address a health or public safety concern).

3.0 State Authorities

Projects by public agencies and private entities that are subject to discretionary approvals by government agencies must go through the environmental review process required by the California Environmental Quality Act (CEQA). CEQA defines a “project” as an activity or public action that “may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment” (Public Resources Code 21065). Projects potentially entailing discretionary approvals include activities directly undertaken by a public agency; activities supported, in whole or part, through financial assistance from public agencies; and activities that involve the issuance of a lease, permit, license, certificate, or other entitlement.

Flood management projects may qualify for CEQA exemptions under two categories: statutory exemptions (14 California Code of Regulations [CCR] 15260–15285) or categorical exemptions (14 CCR 15300–15332). Projects that are exempt from CEQA are not necessarily exempt from other federal, State, and local permits and authorizations. A full description of all exemptions, the requirements to qualify for exemptions, and the exceptions to them are listed in the CCR. The following types of projects are among those that may be exempt:

- Emergency repairs necessary to maintain service essential to the public health, safety, or welfare (Section 15269[b])
- Maintenance dredging where the spoil is deposited in a spoil area authorized by all applicable State and federal regulatory agencies (Section 15304[g])
- Repair, maintenance, or minor alteration of existing public structures that involve negligible or no expansion of an existing use (Section 15301)

Several specific types of CEQA documents can be adopted or certified, but the primary types are a negative declaration or mitigated negative declaration (MND) and an environmental impact report (EIR). A negative declaration or MND is prepared when there is no substantial evidence that a significant effect may occur, which, in the case of an MND, is determined after a project is revised (e.g., by incorporation of mitigation measures). An EIR is prepared when it may be fairly argued that, based on substantial evidence, a project may have a significant environmental effect.

3.1 California Department of Fish and Wildlife

3.1.1 Lake or Streambed Alteration Agreement

Section 1600 of the California Fish and Game Code requires that project proponents notify the California Department of Fish and Wildlife (CDFW) before conducting activities that will substantially obstruct or divert the natural flow of any river, stream, or lake; substantially change or use any material from the bed, channel, or bank of any river, stream, or lake; or deposit or dispose of debris, waste, or other material where it may pass into a river, stream, or lake. Following notification, CDFW determines whether the planned activities require a lake or streambed alteration agreement. An agreement will be required if implementing the project may substantially adversely affect an existing fish, wildlife, or plant resource.

3.1.2 Protection of Bird Nests, Eggs, and Birds of Prey

Under Sections 3503 and 3503.5 of the California Fish and Game Code, it is unlawful to take, possess, or needlessly destroy the nest or eggs of any bird; to take, possess, or destroy any birds in the orders Falconiformes or Strigiformes (birds of prey); or to take, possess, or destroy the nest or eggs of any such bird. CDFW frequently includes conditions in lake or streambed alteration agreements, or suggests specific language for a CEQA document, to protect bird nests, eggs, and birds of prey. This language usually includes avoidance and minimization measures, including specified timing of tree and shrub removal and maintenance of disturbance buffers, to protect all nesting raptors and birds.

3.1.3 California Endangered Species Act

The California Endangered Species Act prohibits activities that will result in take of State-listed and candidate species without prior authorization. Section 86 of the California Fish and Game Code defines “take” as “hunt, pursue, catch, capture, or kill or attempt to hunt, pursue, catch, capture, or kill.” CDFW may authorize take of State-listed and candidate species by issuing an incidental take permit (ITP) pursuant to California Fish and Game Code Section 2081. CDFW also may issue an ITP authorizing the take of species covered in a natural community conservation plan (NCCP), pursuant to Section 2835 of the California Fish and Game Code. Finally, CDFW may authorize incidental take through a voluntary local program that is similar to a federal SHA. These mechanisms for authorizing incidental take are described below.

Section 2081(b) Permit

A Section 2081(b) permit will authorize take that is incidental to an otherwise lawful activity as long as the impacts of the authorized take are minimized and fully mitigated. Measures to minimize and fully mitigate impacts must (1) be roughly proportional in extent when compared to the impact of the take on the species, (2) maintain the applicant’s objectives to the greatest extent possible, (3) be capable of successful implementation, and (4) have adequate funding to implement and monitor compliance.

Fish and Game Code Section 2080.1: Consistency Determination

Fish and Game Code Section 2080.1 is applicable to threatened and endangered species, and proposed or candidate species, listed under both CESA and ESA. Under this Section, the Director

of CDFW can make a finding that the federal document is consistent with CESA. If this finding is made, then take can be authorized without the need to develop a specific plan to address CESA.

Natural Community Conservation Plan

CDFW administrates the NCCP program, pursuant to Sections 2800–2835 of the California Fish and Game Code (i.e., the Natural Community Conservation Planning Act of 2003), with the primary objective of conserving natural communities at the ecosystem level while accommodating compatible land use. CDFW may issue an ITP authorizing the take of species covered in an NCCP, pursuant to Section 2835. The NCCP development and permit processing phases do not have statutory time frames, but the length of time required to complete NCCPs in the Sacramento region is approximately 1–5 years. NCCPs are developed in coordination with HCPs that cover the same projects.

Voluntary Local Program

CDFW operates a Voluntary Local Program pursuant to Section 2089.2 of the California Fish and Game Code. The program is similar to the federal SHA program; it encourages landowners to enhance habitat for threatened and endangered wildlife while providing incidental take authorization. The State program has the same limitations for use by DWR as described for the federal program above, under “Safe Harbor and Conservation Agreements.” Only a private landowner, not an easement holder, can initiate participation in the Voluntary Local Program.

3.2 State Water Resources Control Board and Regional Water Quality Control Boards

3.2.1 Water Rights

In California, water rights are administered by the State Water Resources Control Board (SWRCB), Division of Water Rights. Under Sections 1200 and 1201 of the California Water Code, diversion of surface water for a beneficial use is an appropriation of water and requires a water right permit. An application must be filed with the Division of Water Rights to appropriate water and obtain a water right permit. Additionally, any applicants proposing changes to current water right permits or licenses must submit a change petition to the Division of Water Rights. Some diverters claim rights to divert independent of a permit, license, registration, or certification issued by SWRCB, such as diversions under riparian or pre-1914 rights. With limited exceptions, Section 5101 of the California Water Code requires that a statement of water diversion and use be filed for these diversions.

Information on the various requirements for appropriative water right applications and change petitions must meet the requirements outlined in 23 CCR Division 3, Chapter 2. Information regarding the requirements for a statement of water diversion and use can be found in 23 CCR Division 3, Chapter 2.7.

3.2.2 Porter-Cologne Water Quality Control Act and Clean Water Act

The Porter-Cologne Water Quality Control Act (Porter-Cologne Act) is administered regionally, through the SWRCB and nine regional water quality control boards (RWQCBs) (known collectively as the Water Boards). SWRCB is responsible for water rights and statewide water quality control plans and policies, whereas the RWQCBs develop and enforce water quality control plans, called “basin plans,” within their boundaries. The Systemwide Planning Area (SPA) for the CVFPP falls within the Central Valley RWQCB’s authority.

Permitting authority under the Porter-Cologne Act extends to any activity or factor that may affect water quality, and all discharges to waters of the State are subject to regulation under the Porter-Cologne Act. In addition, the Water Boards have been delegated permitting authority for the National Pollutant Discharge Elimination System permit program, which includes stormwater permits for construction projects.

The Water Boards also issue Clean Water Act Section 401 water quality certifications to ensure that permits issued by USACE and other federal permits and licenses meet State water quality standards. Applications for water quality certification must be submitted to SWRCB for projects that (1) fall under the jurisdiction of more than one RWQCB; (2) involve or are associated with an appropriation of water (see Part 2 of Division 2 of the California Water Code, commencing with Section 1200); (3) involve or are associated with a hydroelectric facility and the proposed activity requires a Federal Energy Regulatory Commission (FERC) license or amendment to a FERC license; or (4) involve or are associated with any other diversion of water for domestic, irrigation, power, municipal, industrial, or other beneficial use. Applications for all other water quality certifications should be submitted to the RWQCB.

The Water Boards also designate beneficial uses for water bodies and establish water quality standards to protect those uses. The Water Boards assess water quality monitoring data for California’s surface waters every 2 years to determine whether they contain pollutants at levels that violate protective water quality standards. If a pollutant exceeds the standard threshold, the water body and pollutant is placed on the 303(d) list. When a water body and pollutant is placed on the 303(d) list, a total maximum daily load is developed to address the impairment. Projects that may affect the total maximum daily load may have to comply with a regulatory program for that water body and pollutants. The SPA includes water bodies on the 303(d) list.

3.2.3 Wetland and Riparian Area Protection Policy

SWRCB is proposing to implement the Wetland and Riparian Area Protection Policy. This new policy would be designed to protect and enhance California’s wetlands, bring consistency to regulatory efforts by SWRCB and the Water Boards, and provide a common framework for monitoring and reporting water quality. SWRCB is considering the policy for several reasons. First, certain waters of the State have lost protection under the federal Clean Water Act because U.S. Supreme Court decisions have reduced the scope of federal jurisdiction. Second, the Water Boards do not have a single accepted definition of wetlands that would capture the diversity of wetland types present throughout the state. This has led to a lack of consistency in wetland regulation and management. Finally, current regulation of wetlands has not prevented loss in the quantity and quality of wetlands. A policy goal of SWRCB is to achieve no overall net loss and a

long-term net gain in the quantity, quality, and diversity of waters of the State, including wetlands. The timeframe for adoption and implementation of this policy is unknown.

3.3 State Office of Historic Preservation

3.3.1 National Historic Preservation Act

For compliance with Section 106 of the National Historic Preservation Act, the identification of historic resources and the effects on historic resources of projects with federal lead agencies are reviewed by the State Historic Preservation Officer. Section 106 requires federal agencies to take into account the effects of their undertakings on historic properties and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment.

3.4 Central Valley Flood Protection Board

3.4.1 Encroachment Permit Program

The Central Valley Flood Protection Board (CVFPB) is an independent State agency required to enforce, on behalf of the State, the erection, maintenance, and protection of the levees, embankments, and channel rectification. In accordance with California Water Code Section 8608, CVFPB is charged with establishing and enforcing standards for the system performance, maintenance, and operation of levees, channels, and other flood control works of an authorized project or an adopted plan of flood control, including standards for encroachment, construction, vegetation, and erosion control. The jurisdiction of CVFPB encompasses the Central Valley, including all tributaries and distributaries of the Sacramento River, the San Joaquin River, and designated floodways.

A CVFPB permit is required before the following types of work occur in CVFPB's jurisdiction: placement, construction, reconstruction, removal, or abandonment of any landscaping, culvert, bridge, conduit, fence, projection, fill, embankment, building, structure, obstruction, encroachment or works of any kind, including the planting, excavation, or removal of vegetation and any repair or maintenance within the State Plan of Flood Control (23 CCR 6).

3.5 California State Lands Commission

The California State Lands Commission has jurisdiction and management control over certain public lands that were received by the State from the United States. When California became a state in 1850, it acquired approximately 4 million acres of land underlying its navigable and tidal waterways. Known as "sovereign lands," these lands include the beds of California's navigable rivers, lakes, and streams, as well as the State's tidal and submerged lands along California's more than 1,100 miles of coastline and offshore islands, from the mean high-tide line to 3 nautical miles offshore.

Issuance by the State Lands Commission of any lease, or other entitlement for use of State lands, is reviewed for compliance with CEQA. Additionally, if the application involves lands found to contain “significant environmental values” within the meaning of Public Resources Code 6370 et seq., consistency of the proposed use with the identified values must also be determined through the CEQA review process. Pursuant to its regulations, the State Lands Commission may not issue a lease for use of “significant lands” if such proposed use is detrimental to the identified values.

3.6 Delta Stewardship Council

The Delta Plan is a long-term management plan for the Sacramento–San Joaquin Delta (Delta), required by the Sacramento–San Joaquin Delta Reform Act of 2009 that was adopted by the Delta Stewardship Council in 2013. Through adoption of the Delta Plan, the Delta Stewardship Council provides direction for the State’s management of important water and other environmental resources in the Delta. The council ensures coherent and integrated implementation of that direction through coordination and oversight of State and local agencies proposing to fund, carry out, and approve Delta-related activities.

The Delta Stewardship Council has the authority to implement the Delta Plan, in part by enforcing the consistency of covered actions with the Delta Plan upon appeal. The Delta Reform Act also gave the Delta Stewardship Council a specific appellate role with respect to the Bay Delta Conservation Plan and its future incorporation into the Delta Plan.

3.7 Other State Authorization

In addition to obtaining State permits under the programs listed above, future projects may also need to comply with other permitting requirements, including those listed below:

- Surface Mining and Reclamation Act
- California Wild and Scenic River Act
- California air pollution control laws

3.8 Local Authorizations

Flood management activities may also require local authorizations, including the following:

- Grading permits
- Tree removal permits
- Burning permits

However, flood management projects undertaken by federal or State entities generally are not subject to local authorizations.

