CENTRAL VALLEY
FLOOD MANAGEMENT
PLANNING PROGRAM

FloodSAFE
CALIFORNIA

Public Draft

2012 Central Valley Flood Protection Plan

Attachment 9G: Regional Permitting Options

January 2012

STATE OF CALIFORNIA
THE NATURAL RESOURCES AGENCY
DEPARTMENT OF WATER RESOURCES

This page left blank intentionally.

Table of Contents

1.0 Introduction 1-1

2.0 Programmatic Permitting Needs and Objectives 2-1

3.0 Potential Flood Management Activities That May Be Covered by Regional or Project Permitting 3-1
- 3.1 Activities Suitable for Programmatic Permitting 3-1
- 3.2 Activities Requiring Additional Information to Determine Suitability for Programmatic Permitting 3-2

4.0 Summary of Possible Regulatory Tools to Provide Programmatic/Regional Authorizations 4-1
- 4.1 Federal Authorities 4-1
  - 4.1.1 U.S. Army Corps of Engineers 4-2
  - 4.1.2 U.S. Fish and Wildlife Service and National Marine Fisheries Service 4-3
- 4.2 State Authorities 4-7
  - 4.2.1 California Department of Fish and Game 4-9
  - 4.2.2 Central Valley Regional Water Quality Control Board 4-13
  - 4.2.3 State Historic Preservation Officer 4-13
  - 4.2.4 Central Valley Flood Protection Board 4-15
  - 4.2.5 California State Lands Commission 4-16
- 4.3 Memoranda of Understanding and Memoranda of Agreement to Support Regulatory Compliance 4-16

5.0 Linkage with Other Regional Permitting Efforts and Current Activities 5-1

6.0 Other Potentially Applicable Regulations for Which Programmatic Authorization May or May Not Be Available 6-1
- 6.1 Federal Authorizations 6-1
- 6.2 State Authorizations 6-1
- 6.3 Local Authorizations 6-2

7.0 References 7-1

8.0 Acronyms and Abbreviations 8-1

This page left blank intentionally.

1.0 Introduction

Programmatic approaches to permitting and other regulatory authorizations for flood management activities (e.g., regional permitting mechanisms) are an important part of improving and integrating flood management and ecosystem conservation in the Central Valley. To support both the development of the Central Valley Flood Protection Plan (CVFPP) and the linked Central Valley Flood System Conservation Strategy, this informational document does the following:

- Describes the benefits of programmatic authorizations (as compared to project-by-project permitting).
- Identifies the types of flood management activities that potentially could be covered by such programmatic authorizations.
- Describes and evaluates several options for developing programmatic authorization mechanisms for the flood management system, and identifies important environmental regulations that apply.
- Identifies potential overlaps and gaps with existing regulatory-based regional plans (e.g., Natural Community Conservation Plans (NCCP), Habitat Conservation Plans (HCP),) and with regional or programmatic authorizations (Regional General Permits (RGP), Routine Maintenance Agreements (RMA)).

This document does not provide guidance with regard to specific projects or propose an approach to programmatic permitting for flood management activities.

This page left blank intentionally.

2.0 Programmatic Permitting Needs and Objectives

The California Department of Water Resources (DWR) is integrating environmental stewardship into flood management activities. Environmental stewardship has a goal of improving ecological conditions and trends, and integration of this stewardship can improve conditions relative to the existing environmental baseline and will reduce the adverse effects of flood management activities. However, it will not eliminate the need for regulatory compliance, including compensatory mitigation for unavoidable impacts to the environment. With regard to regulatory permitting for flood management activities, DWR will make every effort to employ efficient and effective permitting approaches that support the Conservation Framework goals included in the 2012 CVFPP.

Traditional project-by-project environmental permitting has several shortcomings for project proponents, regulators, and conservation interests. These shortcomings can include time-consuming negotiations to identify suitable off-site mitigation areas as compensation for projects that result in habitat loss, project delays, establishing small isolated mitigation areas that are difficult and relatively costly to manage, and temporal losses in habitat functions while habitat is being restored at compensation sites.

During the past 20 years, several regional approaches have been developed to address these permitting challenges. Local governments in the State of California (State) have been using these regional approaches to both permit land development and maintain and improve functional ecosystems. These approaches are described in Section 4.0, “Summary of Possible Regulatory Tools to Provide Programmatic Authorizations,” and include programmatic section 7 consultations, regional HCPs, NCCPs, and RGPs. Additional approaches are being developed, including Regional Advance Mitigation Planning (RAMP) and Corridor Management Plans (CMP) (see Conservation Framework, Sections 5.4.6 and 5.4.4, respectively).

These regional approaches are being used by DWR and other state and local agencies, or could be used, to meet the collective permitting needs for multiple projects on a regional scale and for longer time periods (compared to project by project permitting), while also consolidating mitigation efforts into larger, more viable conservation areas that can be more effectively managed long-term.

DWR is evaluating how existing regional approaches (e.g., regional conservation plans) may be developed to help meet its flood management permitting needs. It is also working to identify other suitable regulatory tools (e.g. programmatic permitting) that can be used where existing regional approaches are not applicable. Several conservation planning efforts that overlap with the CVFPP Statewide Planning Area are listed in Attachment 9E: Existing Conservation Objectives from Other Plans.

3.0 Potential Flood Management Activities That May Be Covered by Regional or Project Permitting

Programmatic permitting can reduce the time required for agency coordination and review for projects with minimal environmental impacts. While these permits may take longer to develop initially, permitting multiple projects together results in improved overall efficiency when compared to the timelines typically associated with project by project permitting. Programmatic permits accomplish this by incorporating specific design requirements and conservation measures up front. Because the project design, construction methods, and associated conservation measures are generally in place, agency approvals can be processed promptly. This section identifies potential actions that are suitable for programmatic compliance with State and federal regulations and those actions that may qualify for programmatic permitting.

3.1 Activities Suitable for Programmatic Permitting

DWR will be evaluating and implementing a variety of flood management activities, including some of the actions listed below. Activities that have impacts on environmental resources that are negligible or consistently below a defined threshold may qualify for programmatic permitting, as described in the following sections. It should be noted that in some situations some of the bulleted items below, when conducted on a large scale, could result in impacts that are not negligible and not necessarily below a defined threshold and therefore may require further analysis to determine suitability for programmatic permitting.

Some facilities operations, maintenance, and construction activities may be suitable for programmatic permitting. These activities include the following:

- Channel clearing and obstacle removal (e.g., snags)
- Minor (i.e., limited in size) bank stabilization and erosion repairs, including rock slope placement

- Closure structure maintenance, operation, and rehabilitation
- Structure repair
- Manual and mechanical vegetation control (terrestrial and aquatic)
- Ground surface modification by grading
- Minor vegetation or tree removal
- Penetration gap grouting or filling (e.g., rodent burrow)
- Silt, sand, or sediment removal

Some habitat enhancement and restoration activities to improve ecosystem functions also may be suitable for programmatic permitting. These activities include the following:

- Management of runoff through watershed management
- Removal of unnatural hard points within and along channels
- Control of invasive species
- Removal of barriers to fish passage
- Restoration of historical channel alignment (i.e., conduct de-channelization)
- Planting of native vegetation

3.2 Activities Requiring Additional Information to Determine Suitability for Programmatic Permitting

Some flood management activities are likely to result in more extensive changes in the landscape, such as larger, new project footprints. Major activities, such as those listed below, will need to be coordinated with other land use planning and decisions, and may require more complex programmatic permitting approaches. DWR will work with regulatory agencies to assess the level of complexity these activities might entail for regional permitting. Flood management activities requiring additional information to determine suitability for programmatic permitting include:

- **Levee Improvements or Levee Construction** – Actions involving levee improvement and construction may not be suitable for programmatic permitting because they usually cause substantial, project-specific impacts that cannot be avoided or reduced to minimal levels through predetermined design and conservation measures. However, some minor levee improvement projects with minimal impacts could be suitable. If proposed changes are limited to restoring the authorized level of protection or improving the structural integrity of the protection system and do not change the authorized structural geometry or hydraulic capacity, they may be approved in accordance with 33 Code of Federal Regulations (CFR) 208.10 through submittal of an encroachment permit application by the Central Valley Flood Protection Board (Board) to the U.S. Army Corps of Engineers (USACE). Activities that result in more than minor modification of federal levees or channel conveyance require authorization under section 14 of the Rivers and Harbors Act of 1899 (33 U.S. Code 408), referred to as "section 408." Such authorizations must be sought on an individual project basis because there is no mechanism to achieve programmatic section 408 authorization. Levee improvement and construction activities include the following:

  - Raising levees to improve flood system performance
  - Remediating erosion damage into levee prism
  - Setting back levees to connect rivers to floodplains
  - Constructing new levees or bypasses to provide flood protection to additional areas potentially affected by flooding
  - Constructing ring levees
  - Constructing training levees or levees that subdivide larger basins

- **Floodplain Management Activities** – These activities would involve the following actions:

  - Using floodproofing measures
  - Removing disconnected, redundant, and nonfunctional facilities of the State Plan of Flood Control (SPFC)

This page left blank intentionally.

4.0 Summary of Possible Regulatory Tools to Provide Programmatic/Regional Authorizations

Agencies with regulatory authority include USACE Regulatory Division, Central Valley Regional Water Quality Control Board (RWQCB), California Department of Fish and Game (DFG), U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), State Historic Preservation Office (SHPO), California State Lands Commission (SLC), and the Board.

This section summarizes the regulatory mechanisms that could be used by the above agencies to provide programmatic authorizations for flood management activities. Different methods for attaining regulatory compliance are identified to facilitate discussions between DWR and regulatory agencies and determine the most appropriate permitting strategies. These permitting approaches have been developed based on review of existing permit programs and policies for comparable permitting efforts.

4.1 Federal Authorities

The National Environmental Policy Act (NEPA) requires that federal agencies review their proposed actions through a process that evaluates potential environmental effects of the proposed action and of reasonable and prudent alternatives that would avoid or minimize significant effects. Compliance with NEPA would be necessary for USACE, USFWS, NMFS, or other federal agencies providing authorization or funding for flood management activities. Requirements for compliance with NEPA are determined by NEPA and by guidelines of the Council of Environmental Quality and the federal agency undertaking the action. NEPA grants considerable discretion to federal agencies regarding the procedures for NEPA review. Consequently, timeline and requirements for NEPA compliance vary considerably among federal agencies and the various actions they undertake.

Federal agencies would conduct NEPA review for their respective federal authorizations through preparing Environmental Assessments (EA), and/or

Environmental Impact Statements (EIS) as part of the agencies' internal authorization process. If an EA concludes with a Finding of No Significant Impact (FONSI), no further NEPA documentation would be required. If the EA determines that the project may result in significant environmental effects, or if significant effects are presumed initially, preparation of an EIS would be required for NEPA compliance. In general, significance of an action's effects is determined in terms of the context and intensity of its effects, and 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; it also discusses means to mitigate adverse impacts. NEPA compliance with an EIS is completed with a Record of Decision (ROD) regarding the proposed action. NEPA compliance with an EIS generally takes more than 1 year and requires more time and expense than compliance with an EA. The duration and expense of NEPA compliance with an EA, although less than with an EIS, varies substantially among actions and agencies.

4.1.1 U.S. Army Corps of Engineers

This section summarizes the regulatory mechanisms that could be used by USACE to provide programmatic authorizations for flood management activities under section 404 of the Clean Water Act (CWA) and section 10 of the Rivers and Harbors Act of 1899 (RHA) including RGPs, and PGPs.

Clean Water Act Section 404 and Rivers and Harbors Act Section 10

Section 404 of the CWA prohibits the discharge of dredged or fill materials into waters of the United States, and section 10 of the RHA prohibits obstruction or alteration of navigable waters of the United States without prior USACE authorization. Two potential programmatic approaches are available for compliance with these statutes: an RGP and a Programmatic General Permit (PGP). USACE could develop an RGP or PGP for activities within the planning area of the CVFPP (i.e., the Systemwide Planning Area (SPA)) under the authority of section 404 (33 United States Code (USC) section 1344) and section 10 (33 USC section 403), in accordance with provisions of Regulatory Programs of the Corps of Engineers, 33 CFR section 323.2(h), for activities that are substantially similar in nature and that cause only minimal individual and cumulative environmental impacts. RGPs and PGPs are generally valid for 5 years from the date of issuance and may be renewed at USACE's discretion.

Regional General Permit

An RGP is issued by a USACE district or division and authorizes a class of activities within a geographic region that are similar in nature and have minimal individual and cumulative environmental impacts. Overall, RGPs increase the efficiency of the USACE permitting process by avoiding the

need to obtain separate permits on a project-by-project basis. To qualify for authorization under an RGP permit, applicants must meet general and special conditions established for that RGP. Once an RGP is issued, applicants can use the permit if the stated conditions are met. RGPs typically require project-by-project notification to USACE, and USACE issues a Notice to Proceed if the terms of the RGP are met. RGP processing timelines are difficult to anticipate and are based on agency coordination and workloads; however, a 1- to 2-year time frame from preapplication coordination to RGP issuance is a reasonable expectation.

Programmatic General Permit

A PGP may be issued by a USACE division where a local, state, or other federal program provides protections for the aquatic environment that are at least equivalent to the protections provided by USACE's Regulatory Program. The PGP is a mechanism available to local, tribal State, and federal regulatory authorities (other regulatory authorities (ORA)). A PGP provides the written vehicle that identifies the terms, limitations, and conditions under which specific projects regulated by an ORA program may be authorized by a regulator under USACE's Regulatory Program with a more efficient and abbreviated review by USACE. Under a PGP, USACE may delegate parts of its administrative authority to allow the ORA, in this case DWR, to review project-specific PGP notifications and issue Notices to Proceed. PGPs may thus simplify the evaluation process and facilitate a "one-stop-shopping" permitting approach. RGP processing timelines are difficult to anticipate and are based on agency coordination and workloads; it would be reasonable to anticipate a 2- to 5-year time frame from preapplication coordination to PGP issuance.

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

This section summarizes the regulatory mechanisms that could be used by USFWS to provide programmatic authorizations for flood management activities under the Endangered Species Act of 1973, as amended (16 USC 1531 et. seq.) (ESA) including Biological Opinions (BOs) and Programmatic Biological Opinions (PBOs) under section 7; HCPs under section 10; and Safe Harbor Agreements (SHAs) under the authority of section 10(a)(1)(A).

Endangered Species Act Section 7

Once a fish or wildlife species is listed as endangered or threatened under 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, 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." Generally, USFWS (under the Department of the Interior) administers the ESA for terrestrial and freshwater species, and NMFS (under the Department of Commerce) administers the ESA for marine and anadromous species.

Section 7(a)(2) of the ESA requires federal agencies that are undertaking funding, permitting, or authorizing actions to consult with USFWS and/or NMFS to evaluate whether these actions would affect listed species or designated critical habitat. The issuance of a permit by a federal agency (federal action agency) provides a federal nexus for a State agency action or project for ESA compliance through section 7 consultation. For example, as part of issuing a 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.

Based on this consultation, USFWS and NMFS may issue a BO, which states whether or not the federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Non-jeopardy BOs include an incidental take statement, describing the amount of "take" that is allowed to occur for otherwise lawful activities. BOs also include "reasonable and prudent measures" that USFWS and NMFS believe are necessary and appropriate to minimize the effects of a project, as well as terms and conditions to minimize incidental take or avoid take altogether. The formal section 7 consultation period is 135 days (beginning only after the USFWS has determined the application is complete); however, this time frame may vary based on agency workload.

A State agency may engage directly with the USFWS and/or NMFS through a technical assistance request, however, under section 7, a BO cannot be issued to a State agency directly. A BO can only be issued to the federal action agency.

Federal action agencies may request multiaction, or "ecosystem-based," programmatic consultations. Programmatic consultations evaluate the potential for related agency actions to affect listed and proposed species and designated and proposed critical habitat. Programmatic consultations are often based on a federal agency's proposal to apply specified standards or design criteria to future proposed actions. Programmatic consultations

can increase the efficiency of the section 7 consultation process because much of the effects analysis is completed one time, up front, rather than repeatedly for each separate action. Further, because programmatic analysis incorporates anticipated effects of a federal agency's future projects, the process for completing consultation for future actions proposed under the programmatic consultation can be shortened. Based on similar program-level authorizations throughout the state of California for efforts comparable in scale and complexity to the flood management activities considered by the CVFPP, it is anticipated that some future flood management projects would be addressed by the USFWS and NMFS in PBOs, or a combined PBO/a not-likely-to-adversely-affect letters from each of these agencies.

ESA Section 10 Habitat Conservation Plans

Any CVFPP activities that do not have a federal nexus (USACE or other federal agency) cannot consult under section 7 of the ESA. Instead, ESA compliance needs to be achieved under section 10 of ESA, through preparation of an HCP. HCPs are planning documents prepared by nonfederal parties as part of an application for an incidental take permit. An HCP assesses the impacts of a proposed action on species (which may include federally listed and state-listed species and candidate species), proposes measures to monitor, minimize, and mitigate these impacts, and analyzes action alternatives. On approval of an HCP, USFWS and NMFS issue incidental take permits, which allow the nonfederal party to legally proceed with an activity that otherwise would result in unlawful take of a protected species. In addition to the incidental take permit, USFWS and NMFS complete a BO under section 7 of the ESA and finalize the NEPA analysis documents.

Although HCPs vary in scale and scope, they provide an approach to addressing a set of actions across a broad geographic region that evaluates impacts on a range of ecosystems, habitats, and species. Just as the size, configuration, and location of HCPs varies, so does the permit duration. Permit duration takes into account both the biological impacts resulting from the proposed land use and economic developmental differences. HCP development and permit processing phases do not have statutory time frames but can be roughly estimated as taking 1 year to 5 years to complete in the Sacramento region.

Some flood management activities may qualify for a low-effect HCP. To enable the formal screening process for a low-effect HCP, DWR would need to provide to USFWS and NMFS a list of flood management activities proposed for coverage. Determination of whether an HCP qualifies for the low-effect category is based on anticipated impacts by activities covered in the HCP before implementation of mitigation. Low-effect HCPs are those

involving (1) minor or negligible effects on federally listed, proposed, or candidate species and their habitats covered under the HCP, and (2) minor or negligible effects on other environmental values or resources. "Low-effect HCP" incidental take permits are permits that, despite their authorization of some small level of incidental take, individually and cumulatively have a minor or negligible effect on the species covered in the HCP. A timeline for low-effect HCPs is difficult to estimate but is expected to require less time for HCP development and permit processing relative to a standard HCP.

DFG works with applicants to develop NCCPs (see below) jointly with USFWS HCPs to provide one planning process and document. However, in some cases, a local government may decide not to pursue an NCCP to accompany the federal HCP. Thus, not all HCPs comply with NCCP standards.

Whenever practical, USFWS and NMFS give consideration to programmatic or ecoregion consultation with federal agencies having major programs in HCP areas to facilitate overall consultation and recovery actions for the species involved. This type of consultation would involve programmatic review of the agencies' activities and would be most effective if conducted simultaneously with development of the HCP. Such simultaneous consideration of both federal and nonfederal programs could (1) assist in assessing overall effects on a species/group of species/ecosystem from multiple actions, (2) result in a better determination of the respective roles of all parties in conserving the species/ecosystem, (3) assist in determining the priority of all proposed actions for use of any "resource cushion" that may exist, and (4) demonstrate that all parties are being provided equal consideration at equal speed (programmatic consultations do not have applicants and are subject to mutually agreed-on time frames).

Safe Harbor Agreement

An SHA is a voluntary agreement between private or nonfederal landowners and USFWS. NMFS does not issue SHAs. Under an SHA, a landowner enhances their property in ways that benefit listed species, and is issued an Enhancement of Survival Permit under the authority of section 10(a)(1)(A) of the ESA. 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. Obtaining permits using an SHA is of limited applicability for DWR. Because an SHA can be entered into only by the landowner, a maintaining agency with an easement for maintenance (typical for DWR) cannot obtain an SHA. The agreement has to be initiated

by the landowner. An SHA typically takes 6 months to 9 months to develop, although complex agreements may take longer.

4.2 State Authorities

Projects by public agencies and private entities 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 any activity that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" (Public Resources Code section 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.

Consequently, a certified CEQA document is required for issuance of a section 401 water quality certification by RWQCB or the State Water Resources Control Board (SWRCB), a Lake and Streambed Alteration Agreement (LSAA) by DFG, a Master Lease from the SLC, and a National Pollutant Discharge Elimination System (NPDES) permit or waiver from the RWQCB. A CEQA document is also required prior to DFG approval of an NCCP. Therefore, regional/programmatic permitting is greatly facilitated by related CEQA documents providing well-substantiated impact analyses and clearly defined and implementable avoidance, minimization, and mitigation measures. Flood management projects may quality for CEQA exemptions under two categories: statutory exemptions (Title 14 of the California Code of Regulations (CCR), Article 18, sections 15260 to 15285), or categorical exemptions (Title 14 of the CCR, Article 19, sections 15300 to 15332). A full description of all exemptions and the requirements to qualify for the exemptions is listed in the CCR. Types of projects that may be exempt include, but are not limited to:

- 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 general types are the Negative Declaration (ND) or Mitigated Negative Declaration (MND) and the Environmental Impact Report (EIR). An ND or MND is prepared when there is no substantial evidence that a significant impact may occur, which, in the case of an MND, is determined after revisions to a project (e.g., 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.

An EIR may be prepared for a plan, policy, or program (e.g., a Program EIR (PEIR)) or for a specific project. When prepared for a plan, policy, or program, the level of detail in the EIR can correspond to the degree of specificity involved in the underlying activity. An EIR on a construction project will necessarily be more detailed about the specific effects of the project than will an EIR on the adoption of a plan or policy. An EIR on the adoption or amendment of a plan, policy, or program should focus on the secondary effects that can be expected to follow from the adoption or amendment, but need not be as detailed as an EIR on specific construction projects that might follow. A subsequent ND/MND or EIR would address environmental impacts specific to the individual projects implemented as part of the plan, policy, or program. In some cases, if the project specific impacts and effects are adequately described and are entirely within the scope of and addressed by an EIR for a plan, policy, or program, no additional ND/MND or EIR is required. This multilayered approach to CEQA compliance is referred to as tiering, and results in a more efficient CEQA process because CEQA review for projects tiering from a certified EIR can be limited to issues not sufficiently evaluated in the “first-tier” document.

A PEIR or Master EIR could be an appropriate CEQA document for some flood management actions. The PEIR or Master EIR would guide and inform preparation of the appropriate subsequent CEQA documents that would identify the scope of projects and probable environmental impacts associated with proposed maintenance and habitat restoration activities, as well as the aggregate and cumulative impact of the project to the extent that these impacts can be defined and are not speculative. In addition to providing CEQA coverage for 401 certification, LSAA, ITP, Master Lease, and NPDES permits, issuing such a CEQA document would provide an avenue for integrating management of cultural resources required for section 106 of the National Historic Preservation Act (NHPA) and would address potential program-level impacts to State-listed species, water quality, and lands within the extended Systemwide Planning Area.

4.2.1 California Department of Fish and Game

This section summarizes the regulatory mechanisms that could be used by DFG to provide programmatic authorizations for flood management activities. Under section 1600 of the California Fish and Game Code, these mechanisms include a Master LSAA, a Long-Term LSAA, or an RMA. Though not discussed in the 1600 code, a Memorandum of Understanding (MOU) or a Memorandum of Agreement (MOA) between DFG and DWR can also be used to increase the efficiency for compliance under section 1600. Thus, this approach is also described below. Other regulatory mechanisms described include an ITP, consistency determination (only applicable where state-listed species are not present, or covered by the USFWS BO) or NCCP pursuant to California Fish and Game Code section 2081(b) and 2081(c) and CCR 14(6)(1); and Safe Harbor Agreements (SHA) pursuant to section 2089.2 of the California Fish and Game Code.

Lake and Streambed Alteration Agreement

Section 1600 of the California Fish and Game Code requires notification to DFG before conducting activities that will substantially obstruct or divert the natural flow of State waters; substantially change or use materials from a bed, bank, or channel; or deposit materials into a river, stream, or lake. Potential mechanisms for authorizing DWR's flood management activities under section 1600 include development of a Master LSAA, a Long-Term LSAA, an MOU or MOA between DFG and DWR.

Yard efforts for the limited levees of the State-maintained areas in the Sacramento Basin, include a 2006 MOU between DFG and the Division of Flood Management of DWR for maintenance of State-maintained flood control projects in the Sacramento River and Feather River Wildlife Areas (DFG and DWR 2006) and a Streambed Alteration Agreement for routine maintenance of flood control projects by the DWR Sacramento and Sutter Maintenance Yards (RMA) that became effective on January 6, 2011 (DFG 2011). There are no State-maintained areas in the San Joaquin Basin. The 2011 RMA (the RMA is a type of MOA) requires that DWR provide detailed notification to DFG prior to conducting routing maintenance so that DFG can confirm that the work does not adversely affect fish and wildlife resources, and is covered under the RMA. Additionally, an annual report is submitted to DFG summarizing the work completed that year. An MOU or MOA could be used to increase the efficiency of the process for CVFPP compliance with section 1602 of the California Fish and Game Code using the current routine maintenance LSAA as a reference.

Another vehicle for flood management activities to comply with section 1602 would be a Master LSAA. Under this type of agreement, DFG would maintain authority over the LSAA process and be notified prior to the

beginning of a new project under the agreement. A Master LSAA allows DFG to assess the potential impacts of a project on a case-by-case basis and determine the specific avoidance and minimization measures for the species that may be present in the location of the project. In addition, conditions may change on an annual basis, such as occupation by nesting raptors that were previously absent from a project area. It also allows DFG to regularly ensure that conditions of the Master LSAA are being implemented.

DFG jurisdiction is divided into seven regions that cover portion of the State. The SPA covers four of these regions and, therefore, will have varying avoidance and minimization measures depending on the region. With DFG maintaining authority over issuing project specific LSAA's under a Master LSAA, each region affected by a particular project, will be able to include avoidance and minimization measures that are applicable for their specific area.

The timeline for executing a Master LSAA, a Long-Term LSAA, an RMA, or an MOU or MOA between DFG and DWR is difficult to anticipate, but can be roughly estimated to take approximately 12 months to 18 months, depending on DFG and DWR workloads.

Executing a California Fish and Game Code section 1602 authorization mechanism would require certification of CEQA compliance; DFG would be a responsible agency for CEQA compliance. In acting on issuing a section 1600 authorization, DFG would rely on the CEQA document to prepare and issue its own findings regarding the project, and to decide whether or not to grant section 1600 authorization.

California Endangered Species Act

The California Endangered Species Act (CESA) prohibits activities that will result in “take” of State-listed and candidate species without prior DFG authorization through an ITP. Section 86 of the California Fish and Game Code defines “take” as the act or attempt to “hunt, pursue, catch, capture, or kill or attempt to hunt, pursue, catch, capture, or kill.” DFG may authorize take of State-listed and candidate species through the issuance of an ITP, pursuant to California Fish and Game Code section 2081(b) and 2081(c) and CCR 14(6)(1).

A 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.

DFG has 30 days to determine whether a 2081(b) permit application is complete. DFG then has another 90 to 120 days (depending on whether DFG is a responsible or lead agency under CEQA) to complete a substantive review of the permit application; these time frames are extendable for 150 days (if DFG is responsible agency) to 180 days (if DFG is a lead agency) with written notice. However, these times frames are discretionary. If DFG does not act within this time frame, CESA's take prohibition is not suspended, and proposed permits do not become effective by operation of law.

CESA compliance may also be obtained through the use of Consistency Determinations. Consistency Determinations can only be used for species that are listed under the ESA and CESA, and cannot be extended to species that are listed by the State but are not afforded protection under the federal ESA. California Fish and Game Code section 2080.1 states the requirements and procedures for a 2080.1 Consistency Determination. A Consistency Determination may be obtained from DFG when a BO has been issued by USFWS and/or NMFS pursuant to an ESA section 7 consultation (incidental take statement) or ESA section 10(a) incidental take permit. DFG must determine that the conditions specified in the federal incidental take statement or permit are consistent with CESA for species that are listed under both the ESA and CESA. If it is determined that the federal incidental take statement or permit is not sufficient for compliance with CESA, then a State ITP under section 2081(b) of the California Fish and Game Code may be required. An ITP may also be obtained through an NCCP provided that both the species and the activity are covered by the NCCP (see Natural Community Conservation Planning below).

Because BOs issued by USFWS and/or NMFS do not allow DFG to add conditions to a federal incidental take statement/permit and BO, 2081(b) permits are often preferable to 2080.1 Consistency Determinations. However, if interagency coordination is effective and DFG can work with USFWS to provide input to the content of the BO, a consistency determination is both effective and efficient for DFG.

DFG must make determination as to consistency within 30 days of receipt of written request and copy of federal authorization or "no further authorization of approval is necessary" under CESA (California Fish and Game Code 2080.1(c)). A consistency determination is automatically repealed if there is an amendment to the federal permit that "alters the

requirement for issuing an incidental take statement or incidental take permit, as applicable" (section 2080.1(e)).

Protection of Bird Nests, Eggs, and Birds of Prey

Under California Department of Fish and Game Code sections 3503 and 3503.5, it is unlawful to take, possess, or needlessly destroy the nest or eggs of any bird, or 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. DFG frequently includes conditions in an LSAA or suggests specific language for a CEQA document to protect bird nests, eggs, and birds of prey. This usually includes avoidance and minimization measures, including work windows for tree and shrub removal and maintaining disturbance buffers to protect all nesting raptors and birds, including western burrowing owl.

Natural Community Conservation Planning

DFG administrates the NCCP program, pursuant to sections 2800-2835 of the California Fish and Game Code, with the primary objective of conserving natural communities at the ecosystem level while accommodating compatible land use. DFG may issue an ITP authorizing the take of species covered in an NCCP, pursuant to section 2835 of the NCCP Act of 2003.

As mentioned previously, DFG works with local governments and other applicants to develop NCCPs jointly with USFWS HCPs (see above) to provide one planning process and document. In some cases, local government decides not to pursue the higher conservation standard of NCCP and works with DFG to provide a State regional ITP to accompany the federal HCP. Thus, not all HCPs comply with NCCP standards. The NCCP development and permit processing phases do not have statutory time frames but can be roughly estimated as taking 1 year to 5 years in the Sacramento region to complete.

Safe Harbor Agreements

DFG operates the Safe Harbor Agreement Program pursuant to section 2089.2 of the California Fish and Game Code. The program is similar to the federal SHA program and encourages landowners to enhance habitat for threatened and endangered wildlife while providing incidental take coverage. Because DFG has issued few SHAs, it is difficult to provide a timeline for approval. The State SHA program has the same limitations for use by DWR as described above under the Federal SHA in Section 4.1.2 "U.S. Fish and Wildlife Service and National Marine Fisheries Service." Only the landowner, not an easement holder, can initiate an SHA.

4.2.2 Central Valley Regional Water Quality Control Board

This section summarizes the regulatory mechanisms that could be used by the RWQCB to provide programmatic authorizations for flood management activities that entail a federal action, such as issuance of a federal permit under section 404 of the CWA, and provides details regarding issuance of water quality certifications under section 401 of the Clean Water Act (CWA).

Clean Water Act Section 401

Applicants seeking a federal permit under section 404 of the CWA must also obtain a Water Quality Certification from RWQCB in accordance with section 401 of the Clean Water Act. In California, the U.S. Environmental Protection Agency (EPA) has delegated authority to the RWQCBs to issue 401 Water Quality Certifications. A section 401 Water Quality Certification of the 404 programmatic permit would provide another level of streamlining for flood management activities. However, if the 404 permit is not certified under section 401, each maintenance and restoration project carried out under the 404 permit would require separate section 401 certification before initiation of project activities.

The RWQCB could develop a 401 Water Quality Certification to authorize flood management activities under section 401 of the CWA concurrently with USACE's programmatic 404 permit. Issuance of the 401 Water Quality Certification would require adoption of a final CEQA document. The RWQCB or SWRCB would be a responsible agency under CEQA. In acting on issuance of the 401 certification, the RWQCB or SWRCB would rely on the CEQA document to prepare and issue its own findings regarding the project, and to then decide whether or not to issue a Water Quality Certification. A draft 401 certification would be circulated for 30 days to 60 days for public review and comment. An additional 60 days may be required to schedule an RWQCB meeting, if necessary. The 401 Certification would likely be effective for 5 years and may be renewed at the RWQCB or SWRCB's discretion concurrent with renewal of the 404 permit.

Time frames for 401Water Quality Certification vary but would be anticipated to coincide with the associated USACE 404 permit processing timelines.

4.2.3 State Historic Preservation Officer

This section summarizes the regulatory mechanisms that could be used by SHPO to provide programmatic authorizations for flood management

activities under section 106 of the NHPA. Programmatic authorization can be accomplished through a Programmatic Agreement (PA) using the process defined in 36 CFR Part 800.14 in consultation with USACE and is described in more detail below.

National Historic Preservation Act Section 106

For compliance with this federal act, the identification of historic resources and effects on historic resources by federal lead agencies is reviewed by the SHPO. Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties, and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. USACE must comply with section 106 of the NHPA to issue a 404 permit, because this federal action constitutes an undertaking within the meaning of the implementing regulations for section 106 (Title 36, CFR Part 800.16(y)).

For the some flood management activities, USACE and the SHPO could execute a PA using the process defined in 36 CFR Part 800.14 to satisfy compliance with section 106. This process allows deferred identification and management of cultural resources under an agreement document (36 CFR Part 800.4(b)(2)). On execution (signing and approval) of the PA by the consulting parties, section 106 is deemed complete for the purpose of permits and authorizations dependent on the section 106 process (36 CFR Part 800.14(b)(2)(iii)). Therefore, execution of the programmatic agreement satisfies section 106 sufficiently to allow USACE to issue a 404 permit for a project and allows DWR and USACE to defer identification and management of historic properties until specific sites require maintenance or habitat restoration.

The PA would provide a process for performing an inventory of cultural resources at maintenance and restoration sites as they are identified, evaluating those resources, and resolving adverse effects on significant resources (historic properties). The Native American Heritage Commission, local Native American tribes, and the interested public (such as local historic preservation organizations) shall be consulted with to assist with cultural resources inventory and development of the PA. Coordination with other federal agencies providing permits and authorizations for the project would be performed so that the PA identifies these other undertakings, providing a unified compliance framework for section 106 for the project. The PA would be valid for 5 years and could be renewed at the discretion of USACE and the SHPO concurrent with renewal of the 404 permit.

Time frames for PA development vary depending on the level of agency and tribal coordination required but can generally be expected to be completed in 6 months to 2 years.

4.2.4 Central Valley Flood Protection Board

The Board has authority to enforce standards for the construction, maintenance, and protection of adopted flood control plans that will best protect the public from floods. These standards apply to the erection, maintenance, and operation of levees, channels, and other flood control works within its jurisdiction, including but not limited to standards for encroachments, construction, vegetation, and erosion control measures. The jurisdiction of the Board includes public and private lands protected by federal flood control works in the Sacramento and San Joaquin Drainage District.

A Board permit is required prior to starting the work within the Board's jurisdiction for the following:

> *The 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, and including the planting, excavation, or removal of vegetation, and any repair or maintenance that involves cutting into the levee, wholly or in part within any area for which there is an adopted plan of flood control, must be approved by the board prior to commencement of work (CCR section 6).*

Furthermore, restoration activities such as the installation of plants would be subject to, but not limited to, the following:

> *Any vegetation which interferes with the successful execution, functioning, maintenance or operation of the adopted plan of flood control, must be removed. If the owner does not remove such vegetation upon request, Board reserves the right to have the vegetation removed at the owner's expense (CCR section 131 (d)).*

Vegetation and vegetation maintenance standards for floodways and bypasses includes but is not limited to the following:

> *Invasive or difficult-to-control vegetation, whether naturally occurring or planted, that impedes or misdirects floodflows is not permitted to remain on a berm or within the floodway or bypass;*
>
> *The board may require clearing and/or pruning of trees and shrubs planted within floodways in order to minimize obstruction of floodflows;*

> *Trees and brush that have been cut down must be burned or removed from the floodway prior to the flood season (CCR section 131(g)).*

The state strategy to manage levee vegetation consistent with these and other CVFPB regulations is a component of the CVFPP.

As part of the permit application, the CVFPB requires documentation demonstrating that any downstream impacts (e.g., rise in water surface elevation) have been eliminated, and that no water rights are severed as a result of project construction. The Board has considered encroachment permit applications for projects in the context of a program. The permit application and Title 23 CCR can be found on the Central Valley Flood Protection Board's website (http://www.cvfpb.ca.gov/).

4.2.5 California State Lands Commission

The State Lands Commission (SLC) has jurisdiction and management control over certain public lands of the State 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 the State'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 SLC of any lease, permit, or other entitlement for use of State lands is reviewed for compliance with the provisions of CEQA. Additionally, if the application involves lands found to contain "Significant Environmental Values" within the meaning of Public Resources Code section 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, SLC may not issue a lease for use of "Significant Lands" if such proposed use is detrimental to the identified values.

Mechanisms available to increase the efficiency of obtaining SLC leases for flood management activities may include development of a maintenance MOU or of a long-term lease or Master Lease. DWR has an existing Master Lease with SLC that may be expandable to include proposed routine maintenance and restoration activities associated with flood management. The lease application process generally takes 3 to 6 months, and an approved CEQA document is required before lease issuance.

4.3 Memoranda of Understanding and Memoranda of Agreement to Support Regulatory Compliance

In addition to single-agency MOUs and MOAs that may be used to provide mechanisms to support programmatic authorization as described above, MOUs and MOAs have been used in the Sacramento area as an effective means of formally documenting interagency understandings and approaches to mutually manage, restore, and enhance lands that contain facilities that are both maintained for flood protection purposes, and managed for fish, wildlife, and plants. These MOUs confirm the agencies' approach to authorization strategies for ongoing flood facilities maintenance in a collaborative manner that both provides adequate protection for sensitive aquatic resources, sensitive habitats, and listed species, and minimizes flood-related risks to public safety. Importantly, these MOUs clarify the agencies' understandings regarding the resolution of land management issues in areas where the maintenance and management responsibilities of the agencies overlap. It is anticipated that agencies with regulatory authority over flood management activities could also use MOUs or MOAs as mechanisms to facilitate programmatic management and authorization strategies.

This page left blank intentionally.

5.0 Linkage with Other Regional Permitting Efforts and Current Activities

Implementation of flood management activities considered by the CVFPP and the linked Central Valley Flood System Conservation Strategy would take place in a region that already contains several programmatic permitting and planning efforts. DWR is evaluating these efforts to identify opportunities for collaboration and to avoid unnecessary duplication of effort.

Current DWR programmatic permitting and planning efforts that are in progress include the following:

- Emergency Repairs MOU
- Small Erosion Repair Program (SERP)
- Regional Advance Mitigation Program (RAMP)
- Lower Feather River CMP

The following NCCPs and HCPS overlap with the SPA:

- Approved HCPs and HCP/NCCPs
  - East Contra Costa County HCP/NCCP
  - Natomas Regional HCP
  - San Joaquin County Regional HCP
  - South Sacramento HCP
- HCPs and HCP/NCCPs under development
  - Bay Delta Conservation Plan HCP/NCCP
  - Butte County HCP/NCCP
  - Placer County Conservation Plan, HCP/NCCP
  - Yolo Natural Heritage Program HCP/NCCP
  - Yuba and Sutter Counties HCP/NCCP
  - Solano County HCP

This page left blank intentionally.

6.0 Other Potentially Applicable Regulations for Which Programmatic Authorization May or May Not Be Available

In addition to obtaining permits under the programs listed previously, future projects also need to comply with other permitting requirements, including those listed below.

6.1 Federal Authorizations

Federal authorizations for which programmatic permitting mechanisms may be available only for flood management activities having a federal nexus include the following:

- Fish and Wildlife Coordination Act
- Magnuson-Stevens Fishery Conservation and Management Act for Essential Fish Habitat
- Marine Mammal Protection Act
- Migratory Bird Treaty Act
- Bald and Golden Eagle Protection Act
- Wild and Scenic Rivers Act

Federal authorizations for which programmatic permitting mechanisms may not be available include the following:

- Section 408 authorization for modification of the federal levee system

6.2 State Authorizations

Based on review of the regulations and preliminary conversations with agency staff, state authorizations for which programmatic permitting mechanisms may not be available for flood management activities include the following:

- Clean Water Act section 402 – Permit authority delegated to the Central Valley RWQCB
- Porter Cologne Water Quality Control Act
- California Department of Conservation and Surface Mining and Reclamation Act
- California Wild and Scenic River Act
- Encroachment permits from the CVFPB

6.3 Local Authorizations

Local authorizations for which it is uncertain whether programmatic permitting mechanisms may be available for flood management activities include the following:

- Grading permits
- Tree removal permits

However, flood management projects undertaken by federal or state entities will generally not be subject to local authorizations.

7.0 References

California Department of Fish and Game (DFG). 2011. Long-Term Streambed Alteration Agreement. January 6.

DFG and California Department of Water Resources, Division of Flood Management. 2006. Memorandum of Understanding for Maintenance of Flood Control Projects in the Sacramento River and Feather River Wildlife Areas. May 23.

DFG. *See* California Department of Fish and Game.

This page left blank intentionally.

8.0 Acronyms and Abbreviations

Board ..... Central Valley Flood Protection Board
CCR ..... California Code of Regulations
CEQA..... California Environmental Quality Act
CESA ..... California Endangered Species Act
CFR..... Code of Federal Regulations
CMP ..... Corridor Management Plan
CVFPP ..... Central Valley Flood Protection Plan
CWA..... Clean Water Act
DFG ..... California Department of Fish and Game
DWR ..... California Department of Water Resources
EA ..... Environmental Assessment
EIR..... Environmental Impact Report
EIS ..... Environmental Impact Statement
EPA..... U.S. Environmental Protection Agency
ESA..... Endangered Species Act
FONSI ..... Finding of No Significant Impact
HCP ..... Habitat Conservation Plan
ITP ..... Incidental Take Permit
LSAA..... Lake and Streambed Alteration Agreement
MND..... Mitigated Negative Declaration
MOA..... Memorandum of Agreement
MOU..... Memorandum of Understanding
NCCP..... Natural Community Conservation Plan
ND..... Negative Declaration
NEPA ..... National Environmental Policy Act
NHPA ..... National Historic Preservation Act
NMFS ..... National Marine Fisheries Service
NPDES..... National Pollutant Discharge Elimination System
ORA ..... other regulatory authority

PA ..... Programmatic Agreement
PBO ..... Programmatic Biological Opinion
PEIR..... Programmatic Environmental Impact Report
PGP ..... Programmatic General Permit
PSAA ..... Programmatic Streambed Alteration Agreement
RAMP..... Regional Advance Mitigation Planning
RGP ..... Regional General Permit
RHA ..... Rivers and Harbors Act of 1899
RMA ..... Routine Maintenance Agreement
ROD ..... Record of Decision
RWQCB ..... Regional Water Quality Control Board
SAA..... Streambed Alteration Agreement
SERP ..... Small Erosion Repair Program
SHA..... Safe Harbor Agreement
SHPO..... State Historic Preservation Officer
SLC ..... California State Lands Commission
SPA..... Systemwide Planning Area
SPFC ..... State Plan of Flood Control
State..... State of California
SWRCB..... State Water Resources Control Board
USACE..... U.S. Army Corps of Engineers
USC ..... United States Code
USFWS ..... U.S. Fish and Wildlife Service

STATE OF CALIFORNIA
THE NATURAL RESOURCES AGENCY
DEPARTMENT OF WATER RESOURCES