Appendix D
Updates to 2016 Conservation Strategy Appendix A, "Regulatory Setting"

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APPENDIX D

Updates to 2016 Conservation Strategy Appendix A, "Regulatory Setting"

Acronym	Definition
BO	biological opinion
CDFW	California Department of Fish and Wildlife
CEQA	California Environmental Quality Act
CESA	California Endangered Species Act
CFR	Code of Federal Regulations
Conservation Strategy (or Strategy)	Central Valley Flood Protection Plan 2016 Conservation Strategy
CVFPB	Central Valley Flood Protection Board
CVFPP	Central Valley Flood Protection Plan
CWA	Clean Water Act
Delta Plan	long-term management plan for the Sacramento–San Joaquin Delta
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
FERC	Federal Energy Regulatory Commission
HCP	habitat conservation plan
MND	mitigated negative declaration
MOU	memorandum of understanding

Acronym	Definition
National Register	National Register of Historic Places
NCCP	natural community conservation plan
ND	negative declaration
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act of 1966
NMFS	National Marine Fisheries Service
NPDES	National Pollutant Discharge Elimination System
NPPA	Native Plant Protection Act
NWPR	Navigable Waters Protection Rule
regional water board	regional water quality control board
SHA	Safe Harbor Agreement
SHPO	State Historic Preservation Officer
SLC	California State Lands Commission
State	State of California
State Water Board	State Water Resources Control Board
Strategy (or Conservation Strategy)	Central Valley Flood Protection Plan 2016 Conservation Strategy
USACE	U.S. Army Corps of Engineers
USC	United States Code
USFWS	U.S. Fish and Wildlife Service
WDR	waste discharge requirements

Introduction

Appendix A, "Regulatory Setting," of the Central Valley Flood Protection Plan (CVFPP) 2016 Conservation Strategy (Conservation Strategy or Strategy) described the federal and state regulatory approvals required to implement the CVFPP, including the Conservation Strategy. This appendix provides an updated description of these regulatory approvals. Table D-1 lists these authorizations and approval actions by agency and statute, first for federal and then for state agencies.

Table D-1. Typical Authorizations Required by Multi-Benefit Flood Projects

Agency	Agency—Statute	Authorization or Approval Action
Federal agencies	Lead federal agency—NEPA	• Record of decision
	USACE— Section 404 of the CWA	• Individual (standard) permit • Letter of permission • General permit (nationwide, regional, or programmatic basis)
	USACE— Section 9 of the Rivers and Harbors Act of 1899	• Individual (standard) permit • General permit (nationwide, regional, or programmatic basis)
	USACE— Section 10 of the Rivers and Harbors Act of 1899	• Individual (standard) permit • Letter of permission • General permit (nationwide, regional, or programmatic basis)
	USACE— Section 14 of the Rivers and Harbors Act of 1899 (33 USC 408)	• Letter of permission
	USFWS/ NMFS— ESA, Section 7	• Biological opinion • Incidental take statement
	USFWS/NMFS— ESA, Section 10	• Incidental take permit • Enhancement of survival permit • Recovery and interstate commerce permit
	National Marine Fisheries Service—Magnuson-Stevens Fishery Conservation and Management Act[a]	• Consultation
State Agencies	Lead state or local agency—CEQA	• Notice of determination
	CDFW—Section 1600 of the California Fish and Game Code	• Lake and streambed alteration agreement • Master agreement • Routine maintenance agreement
	CDFW—CESA	• Section 2081(a) MOU • Section 2081(b) incidental take permit • Section 2080.1 consistency determination • Natural community conservation plan • Safe harbor agreement • Voluntary local program
	State Water Resources Control Board—Sections 1200 and 1201 of the California Water Code	• Water right permit

Agency	Agency—Statute	Authorization or Approval Action
State Agencies	Central Valley Regional Water Quality Control Board—Porter-Cologne Water Quality Control Act	• WDR
	Central Valley Regional Water Quality Control Board—CWA (Section 401)	• Water quality certification
	Central Valley Regional Water Quality Control Board—CWA Section 402	• NPDES permit and WDR
	California Office of Historic Preservation—Section 106 of the National Historic Preservation Act	• Consultation with the SHPO
	Central Valley Flood Protection Board—California Water Code Section 8608	• Encroachment permit
	California State Lands Commission—Public Resources Code Section 6009	• Lease
	Delta Stewardship Council —Sacramento–San Joaquin Delta Reform Act of 2009	• Certification of consistency[b]

[a] Consultations on actions that may adversely affect essential fish habitat (required by the Magnuson-Stevens Fishery Conservation and Management Act) may be conducted in conjunction with NEPA compliance, ESA compliance, USACE permitting, or as a separate consultation.

[b] Filed by the lead State or local agency.

Notes:
CDFW = California Department of Fish and Wildlife
CEQA = California Environmental Quality Act
CESA = California Endangered Species Act
CFR = Code of Federal Regulations
CWA = Clean Water Act
ESA = Endangered Species Act
MOU = memorandum of understanding
NEPA = National Environmental Policy Act
NMFS = National Marine Fisheries Service
NPDES = National Pollutant Discharge Elimination System
SHPO = State Historic Preservation Officer
USACE = U.S. Army Corps of Engineers
USC = United States Code
USFWS = U.S. Fish and Wildlife Service
WDR = waste discharge requirements

Federal Authorizations

National Environmental Policy Act

The NEPA requires federal agencies to assess the environmental effects of their proposed actions before making decisions. The NEPA process involves three levels of analysis: categorical exemption, environmental assessment (EA), and environmental impact statement (EIS). Unless a federal action is determined to be categorically excluded, federal agencies are required to prepare an EA assessing the environmental impacts and related social and economic effects of the proposed action and alternatives. If an EA concludes with a finding of no significant impact, no further NEPA documentation is required. If the EA determines the project may result in significant environmental effects, or if significant effects are presumed initially, an EIS must be prepared to achieve NEPA compliance. The EIS process also provides opportunities for public review and comment. The EIS process ends with the issuance of a Record of Decision by the lead federal agency. Specific procedures for NEPA compliance vary by lead agency because many federal agencies have developed their own supplemental procedures that support the agency's specific mission and activities.

U.S. Army Corps of Engineers

Section 404 of the Clean Water Act

Through its regulatory program, USACE administers and enforces Section 404 of the CWA. Under Section 404, a permit must be obtained to discharge dredged or fill material into waters of the United States, unless the activity is exempt (e.g., some agricultural activities).

The Navigable Waters Protection Rule (NWPR) became effective in 2020 and established the scope of federal regulatory authority under the CWA. The NWPR included four simple categories of jurisdictional waters, and provided specific exclusions for many water features that have not traditionally been regulated. In June 2021, the U.S. Environmental Protection Agency (EPA) and Department of the Army announced their intent to revise the definition of "waters of the United States" to better protect our nation's vital water resources that support public health, environmental protection, agricultural activity, and economic growth. In September 2021, the NWPR was vacated and remanded in the case of *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*. In light of this order, EPA and USACE have halted implementation of the NWPR and are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime until the definition of "waters of the United States" is revised.

USACE regulations provide for the issuance of general (nationwide, regional, or programmatic basis) and individual permits. General permits may be issued to authorize specific types of activities that would have minimal individual and cumulative adverse environmental effects or would avoid the unnecessary duplication of the regulatory control exercised by another federal, state, or local agency, provided it has been determined that the environmental consequences of the action are individually and cumulatively minor. General permits can be issued for a period of no more than five years. A letter of permission is a type of individual permit issued through an abbreviated processing procedure that includes coordination with relevant federal and state agencies. An individual (standard) permit must be obtained for a specific proposed activity that cannot be authorized under a general permit or letter of permission. These activities may have more than minimal individual or cumulative environmental impacts.

Related EPA and USACE regulations require the filling of wetlands and other waters of the United States to be avoided and minimized to the maximum extent practicable. Compensatory mitigation is required for unavoidable impacts to the waters of the United States. EPA and USACE have adopted regulations and guidelines that define compensatory mitigation and required mitigation plan contents, guide the determination of mitigation amounts, and address the timing of mitigation relative to impacts (33 CFR 332, Final Regional Compensatory Mitigation and Monitoring Guidelines of the South Pacific Division, January 12, 2015).

These regulations define “compensatory mitigation” as “the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, or, in certain circumstances, preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.” Mitigation options are preferred in the following order, from most preferred to least: mitigation bank credits, in-lieu fee program credits, and permit-responsible mitigation in consideration of a watershed approach. Compensatory mitigation should be commensurate with the amount and type of impact, and should be sufficient to replace the lost aquatic resource functions.

Mitigation plans must describe objectives, site selection criteria, site protection instruments, baseline information, credit determinations, mitigation work plan, maintenance plan, ecological performance standards, monitoring requirements, long-term management plan, adaptive management plan, and financial assurances. Generally, financial assurances are provided as either bonds or letters of credit, although other types may be acceptable. Financial assurances should in place before the permitted activity begins.

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, without congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single state, the structure may be built under the authority of that state’s legislature, if the Chief of Engineers and the Secretary of the Army approve the location and plans or any modifications. Section 9 also pertains to

bridges and causeways, but the authority of the Secretary of the Army and Chief of Engineers over bridges and causeways was transferred to the Secretary of Transportation (U.S. Coast Guard) under the Department of Transportation Act of October 15, 1966.

Section 10 of the Rivers and Harbors Act of 1899

Through the regulatory program, USACE 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., levees or piers) in, over, or under navigable waters of the United States. Navigable waters of the United States are defined as waters that have been used in the past, are now used, or are susceptible to use for the transportation of interstate or foreign commerce up to the head of navigation. Typical activities requiring a permit include the installations of piers, docks, and other structures; dredging and excavation; and bank stabilization.

Section 14 of the Rivers and Harbors Act of 1899

Section 14 of the Rivers and Harbors Act (USC Title 33, Section 408 [33 USC 408], or "Section 408") states 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) as 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 obtained from USACE Headquarters. The primary focus of USACE's Section 408 review is to ensure there will be no impacts to the flood risk reduction system. For USACE projects with a nonfederal sponsor, that sponsor must provide a written Statement of No Objection if they are not the requester. Nonfederal sponsors typically have operations and maintenance responsibilities; have a cost-share investment in the USACE project; or hold the real property for the USACE project (or a combination).

In 2019, the USACE Sacramento District established 25 "categorical permissions" to expedite the review of Section 408 requests that are similar in nature and have similar impacts. Examples of these categorical permissions include wells, ditches and canals, bridges, roads, borrow areas, seepage and stability berms, and environmental restoration (e.g., plantings or placement of spawning gravels). For an alteration to be approved through a categorical permission, it must be consistent with the category's description, have no disqualifying circumstances (e.g., inducing floodplain development or causing a net loss in riparian habitat), and adhere to a set of standard engineering and environmental conditions.

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

Endangered Species Act

The purpose of the ESA is to protect and recover imperiled species and the ecosystems they depend on. Under the ESA, species may be listed as either endangered or threatened. Once a fish or wildlife species is listed as endangered or threatened under the federal 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." "Harm" is

defined as an act that actually kills or injures wildlife, and can include significant habitat modification or degradation that results in death or injury to listed species by impairing behavioral patterns. Listed plants are not protected from 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" (ESA Section 3[5][A]). Generally, the USFWS (under the U.S. Department of the Interior) administers the ESA for terrestrial and freshwater species, and the 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 or NMFS, or both, to ensure the action is not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of designated critical habitat of such species. The issuance of a permit by a federal agency provides a federal nexus for a nonfederal agency action or project thus allowing ESA compliance through Section 7 consultation. For example, when issuing a CWA 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 lead to the following general outcomes:

- If an action has no potential to affect species listed under the ESA or critical habitat, the federal agency undertaking or permitting the action makes a "no effect" determination and is not obligated to contact USFWS or NMFS for concurrence.

- Informal consultation and a concurrence letter 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.

- Formal consultation is required if adverse effects to listed species or critical habitat are expected. If based on a biological assessment or equivalent document, the action is likely to adversely affect species listed under the ESA or critical habitat, a formal consultation occurs between the federal agency proposing the action (e.g., USACE) and USFWS and/or NMFS. Formal consultation concludes within 90 calendar days after all required information is provided unless the process is extended. USFWS or NMFS issues a biological opinion (BO) within 45 calendar days of the formal consultation's completion.

  - If the BO makes a "no jeopardy" finding for the ESA-listed species considered, incidental take may be authorized through an incidental take statement that sets forth "reasonable and prudent measures" and terms and conditions to minimize the potential take. Measures are considered reasonable and prudent when they are consistent with

the proposed action's basic design, location, scope, duration, and timing (50 CFR 402.14[i][v][2]).

- If the BO makes a "jeopardy" finding for the species, the BO must identify "reasonable and prudent alternatives" to prevent jeopardy or state why there are no alternatives. The federal agency proposing the action must consider the reasonable and prudent alternatives. If no reasonable and prudent alternatives exist, the federal agency with a nexus to the action or the project proponent may apply for an exemption from the Endangered Species Committee.

A consultation can be programmatic and lead to a programmatic BO. A programmatic consultation addresses an agency's multiple actions on a program or regional basis. A programmatic approach streamlines the procedures and time involved in consultations for broad agency programs or multiple similar, frequently occurring, or routine actions with predictable effects on listed species and/or critical habitat, thus reducing the amount of time spent on individual project-by-project consultations.

Endangered Species Act Section 10

Proponents of any activity without a federal nexus (e.g., 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(a)(1)(B), primarily through the preparation of a habitat conservation plan (HCP) and subsequent issuance of an incidental take permit. An HCP is a planning document prepared by a nonfederal party as part of an incidental take permit application for incidental take authorization. An HCP must include an assessment of impacts likely to result from the proposed taking of one or more federally listed species; measures to monitor, minimize, and mitigate impacts; funding for the proposed measures; and alternatives to the take being considered.

Upon an HCP's approval, USFWS or NMFS issues an incidental take permit. In addition to issuing the incidental take permit, USFWS and NMFS prepare a BO and provide appropriate NEPA documentation. HCPs can vary in their scale and complexity, from regional conservation plans for multiple parties and projects to Low-Effect HCPs for projects involving minor or negligible direct, indirect, and cumulative effects. Low-Effect HCPs do not require a NEPA document because the project must qualify for a categorical exclusion under NEPA. Unlike the Section 7 consultation process, there are no statutory limits on the duration of steps in the HCP development process.

Safe Harbor and Conservation Agreements

A Safe Harbor Agreement (SHA) is a tool available under the ESA. An SHA is a voluntary agreement between private or nonfederal landowners whose actions contribute to the recovery of listed species and USFWS or NMFS. Because only the landowner can enter into an SHA, a maintaining agency cannot obtain such an agreement with an easement for maintenance (as is typical for the California Department of Water Resources [DWR]).

Under an SHA, participating private and nonfederal property landowners voluntarily undertake activities on their property to enhance, restore, or maintain habitat benefiting listed species. SHAs and the subsequent enhancement of survival permits that are issued encourage property owners to implement conservation efforts for listed species. They are assured they will not be subjected to increased land use restrictions as a result of their efforts to attract listed species to their property or to increase the numbers or distribution of listed species already on their property. In 2016, NMFS completed its first SHA in the United States in the Dry Creek watershed. This was a partnership among NMFS, USACE, Sonoma County Water Agency, CDFW, and private landowners in the Dry Creek Valley, and supports the recovery of endangered coho salmon, and threatened Chinook salmon and steelhead.

A candidate conservation agreement is an agreement between landowners (including federal land management agencies) and USFWS or NMFS. A candidate conservation agreement covers species that are candidates for listing or are otherwise at risk. As part of this agreement, the landowner voluntarily commits to actions to reduce threats and help stabilize or restore a species, with the goal that listing will become unnecessary. A candidate conservation agreement with assurances provides regulatory assurances that if the candidate species becomes listed, the agreement becomes a permit authorizing the landowner's incidental take of the species. In 2016, USFWS and NMFS revised the candidate conservation agreement with assurances policy, to be clearer and more transparent about the level of conservation effort required for each candidate conservation agreement, and with assurances to be approved and be consistent with the criteria used for SHAs.

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. Under certain circumstances, 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.

State Authorizations

California Environmental Quality Act

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 CEQA. CEQA defines a "project" as a "whole action" that may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. "Projects" consist of discretionary activity by a public agency, a private activity that receives public funding, or activities that involve the public agency's issuance of a discretionary approval and is not statutorily or categorically exempt (Public Resources Code Section 21065).

Flood management projects may qualify for CEQA exemptions under two categories: statutory exemptions or categorical exemptions. Statutory exemptions are created by the Legislature, and projects that fall under these are generally not subject to CEQA, regardless of their impact on the environment. Categorical exemptions are created through the regulatory process and will not apply if one of three conditions exist: there is a reasonable possibility of a significant effect on the environment; significant cumulative impacts from projects of the same type will result; or the project will impact a uniquely sensitive environment (CEQA Guidelines Sections 15300 to 15333). Projects that are exempt from CEQA are not necessarily exempt from other federal, state, or local permits and authorizations.

The following types of projects may be exempt from CEQA:

- 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 federal and state regulatory agencies (Section 15304[g]).
- Repairs, maintenance, or minor alterations of existing public structures that involve negligible or no expansion of an existing use (Section 15301).

If a project does not qualify for an exemption, an initial study is initiated. The initial study is prepared by the lead agency (usually the city or county with primary jurisdiction over the project, but this may also be state agencies) to determine whether there may be a significant environmental impact. Depending on the initial study, a negative declaration (ND), mitigated negative declaration (MND), or environmental impact report (EIR) may be required. An ND is prepared when there is no substantial evidence that a significant effect on the environment will occur. An MND is prepared when conditions are attached to an ND stating revisions were made to the project to avoid potentially significant impacts, and there is no substantial evidence that the revised project will have a significant effect on the environment. An EIR is prepared when, based on substantial evidence, a project may have a significant environmental effect.

California Department of Fish and Wildlife

Lake and Streambed Alteration Agreement

Section 1600 of the California Fish and Game Code requires that project proponents (any person, state or local governmental agency, or public utility) notify the 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 the notification, CDFW determines whether the planned activities require a lake or streambed alteration agreement (agreement) as described in California Fish and Game Code Sections 1600 to 1616. An agreement will be required if the project may substantially adversely affect an existing fish, wildlife, or plant resource, and will include measures necessary to protect those resources. There are different types of

agreements depending on the type of project and duration of the agreement (e.g., standard; long-term; gravel, sand, or rock extraction; routine maintenance). A master agreement covers multiple projects where specific detailed plans have not been prepared at the time of the original notification, and describes a procedure the entity must follow for construction, maintenance, or other covered projects.

The required content of a notification (i.e., application) includes the location (including site maps and aerial photos); a detailed description of the project (including timing and duration; construction equipment, plans, and specifications; volume and area of alterations such as material fill or removal; and permanent and temporary impacts to the waterway and associated habitats and vegetation); measures to protect fish, wildlife, and plant resources (including erosion control, avoidance and minimization measures, and compensatory measures); and a copy of the project's CEQA document and any other relevant biological resource documents or permits. CDFW may also require additional information and suggest ways to modify the project that would eliminate or reduce harmful effects to fish, wildlife, and plant resources.

Statutory requirements limit the duration of standard agreement development. Once a notification and the applicable fees have been received, CDFW has 30 calendar days to determine whether it is complete and to notify the applicant either that the application is complete or that additional information is required. Upon receipt of a complete application, CDFW provides the applicant with a draft agreement within 60 calendar days (California Fish and Game Code Section 1603[a]). The applicant then has 30 calendar days to accept, reject, or negotiate revisions to the draft agreement. If CDFW determines an activity may substantially adversely affect an existing fish or wildlife resource, an agreement will include reasonable measures to protect these resources. Reasonable measures can include best management practices and avoidance, minimization, and compensatory mitigation measures.

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, or to do so to any birds in the orders Falconiformes or Strigiformes (birds of prey). CDFW frequently includes conditions in lake and 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 for tree and shrub removal and maintenance of no disturbance buffers, to protect all nesting birds.

Fully Protected Species

The California Fish and Game Code designates 37 fully protected species and prohibits the take or possession at any time of such species, with certain limited exceptions. State law defines "take" as "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill" (California Fish and Game Code Section 86). This definition of take does not include habitat modification, harm, or harassment.

Fully protected species are described in California Fish and Game Code Sections 3511 (birds), 4700 (mammals), 5050 (reptiles and amphibians), and 5515 (fish). These code sections state that "…no provision of this code or any other law shall be construed to authorize the issuance of permits or licenses to take any fully protected [bird], [mammal], [reptile or amphibian], [fish]." Fully protected species in the Central Valley include the blunt-nosed leopard lizard, golden eagle, white-tailed kite, American peregrine falcon, bald eagle, California black rail, greater sandhill crane, and ring-tailed cat.

California Endangered Species Act

The CESA states that "all native species of fishes, amphibians, reptiles, birds, mammals, invertebrates, and plants, and their habitats, threatened with extinction and those experiencing a significant decline which, if not halted, would lead to a threatened or endangered designation, will be protected or preserved." CDFW works with all interested persons, agencies, and organizations to protect and preserve such sensitive resources and their habitats, and-prohibits activities that will result in take of State-of-California (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 the take of any such species if certain conditions are met.

CDFW may authorize take of State-listed and candidate species by issuing an MOU, SHA, voluntary local program, incidental take permit, consistency determination, or natural community conservation plan (NCCP). These mechanisms for authorizing incidental take are described below.

Native Plant Protection Act

In addition to CESA, plants designated as endangered are also protected under the Native Plant Protection Act (NPPA). The NPPA protects plants designated as endangered or rare. There are currently 64 species, subspecies, and varieties of plants that are protected as rare under the NPPA. The NPPA prohibits the take, possession, propagation, transportation, exportation, importation, or sale of endangered or rare native plants. However, it includes some exceptions for agricultural and nursery operations, emergencies, and in certain other situations. CDFW may authorize the take of any such species by permit pursuant to the conditions set forth in Fish and Game Code Section 2081, subdivisions (b) and (c) for endangered plants or California Code of Regulations, Title 14, Section 786.9, subdivision (b) for rare plants.

California Fish and Game Code Section 2081(a): Memorandums of Understanding

California Fish and Game Code Section 2081(a) includes MOUs. An MOU authorizes individuals, public agencies, universities, zoological gardens, and scientific or educational institutions to import, export, take, or possess endangered, threatened, or candidate species for scientific, educational, or management purposes.

California Fish and Game Code Section 2089.2–2089.26 Safe Harbor Agreements

SHAs authorize the incidental take of a species listed as endangered, threatened, candidate, or a rare plant, if the agreement is reasonably expected to provide a net conservation benefit to the species, among other provisions. SHAs are intended to encourage landowners to voluntarily manage their lands to benefit CESA-listed species. California SHAs are analogous to the federal SHA program, and CDFW has the authority to issue a consistency determination based on a federal SHA. The State program has the same limitations for use by DWR as described for the federal program ("Safe Harbor and Conservation Agreements" provides more details). Only a private landowner, not an easement holder, can initiate participation in the SHA program.

California Fish and Game Code Section 2081(b): Incidental Take Permit

A California Fish and Game Code Section 2081(b) incidental take permit may authorize the take of endangered, threatened, or candidate species if all of the following conditions are met:

> *"(1) the take is incidental to an otherwise lawful activity;*
>
> *(2) the impacts of the authorized take shall be minimized and fully mitigated. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species, maintain the applicant's objectives to the greatest extent possible, and be capable of successful implementation;*
>
> *(3) the applicant shall ensure adequate funding to implement the minimization and mitigation measures and to monitor compliance with and effectiveness of those measures; and*
>
> *(4) [the] issuance of the permit will not jeopardize the continued existence of the species.*"

CDFW may determine that permanent protection and perpetual management of compensatory habitat is necessary and required, pursuant to CESA, to fully mitigate project-related impacts of the taking on the covered species. Determinations are based on factors such as the importance of that habitat in the project area, the extent to which covered activities will impact the habitat, and CDFW's estimate of the acreage required to provide to adequately mitigate the impacts of the taking. Compensatory habitat requirements may be met by purchasing species credits from a CDFW-approved conservation bank or through purchase, transfer, and/or permanent protection of habitat lands (including funding for monitoring and management in perpetuity).

If mitigation will not be completed before the start of activities that will affect CESA-listed species, a trust account or other form of security acceptable to CDFW must be established to ensure funding is available to carry out mitigation measures and monitoring requirements in case the applicant fails to complete these activities. CDFW generally requires the performance security to be in the form of an irrevocable letter of credit, surety bond, bank trust (or escrow) account, or another form of security approved in writing in advance by CDFW's Office of General Counsel.

Once an application and the applicable fees have been received, CDFW has 30 calendar days to determine whether it is complete and notify the applicant either that the application is complete or that additional information is required. If CDFW takes no action within 30 days of receipt, the application is deemed complete. CDFW may require supplementary information during the application review process after the application is determined to be complete, or is deemed complete. Upon receipt of a complete application, CDFW issues the permit either 90 calendar days from the lead agency's approval of the activity or 90 calendar days from the time the application was deemed complete, whichever is later (14 CCR Section 783.5[c][1]). CDFW may extend application processing an additional 60 calendar days from the later of the two dates as necessary, for 150 days total from the date of a complete application. Pursuant to State Bill (SB) 473 (Hertzberg, Ch. 329, Stats. 2018; Fish and Game Code Section 2081[e]), commencing January 1, 2019, CDFW is required to post each new incidental take permit issued on CDFW's website on the CESA Incidental Take Permitting Documents page.

California Fish and Game Code Section 2080.1: Consistency Determination

If a species is listed by both the federal ESA and CESA, Fish and Game Code Section 2080.1 allows an applicant who has obtained a federal incidental take statement (federal Section 7 consultation) or a federal incidental take permit (federal Section 10(a)(1)(B)) to request that the Director of CDFW find the federal documents consistent with CESA. If the federal documents are found to be consistent with CESA, a consistency determination is issued and no further authorization or approval is necessary under CESA.

Natural Community Conservation Plan

CDFW administrates the NCCP program pursuant to Sections 2800 to 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 incidental take permit authorizing the take of species covered in an NCCP, pursuant to California Fish and Game Code Section 2835. The NCCP development and permit processing phases do not have statutory timeframes, but the time required to complete NCCPs in the Sacramento region has been longer than five years. NCCPs are developed in coordination with HCPs that authorize the same covered activities.

Fish and Game Code Section § 2086: Voluntary Local Program

This program is designed to encourage farmers and ranchers that are engaged in agricultural activities to voluntarily enhance and maintain habitat for State-listed endangered, threatened, and candidate species. The regulations for implementing Voluntary Local Programs can be found in the California Code of Regulations Title 14 Section 786. The program was authorized by Senate Bill 231 (Costa 1997), which required CDFW, in cooperation with the California Department of Food and Agriculture, to adopt regulations to create locally designed voluntary programs for routine and ongoing agricultural activities on farms or ranches that will encourage habitat conservation and minimize the take of threatened, endangered, and candidate species, and wildlife in general. Farmers and ranchers who follow the wildlife-friendly agricultural practices prescribed by a voluntary local program receive an exemption from CESA's prohibition

against the take of certain State-listed endangered or threatened species. They may also withdraw from the program without penalty.

State Water Resources Control Board and Regional Water Quality Control Boards

Water Rights

A water right is a legal entitlement authorizing water to be diverted from a specified source and put to beneficial, nonwasteful use. Under Sections 1200 and 1201 of the California Water Code, the diversion of surface water for a beneficial use is an appropriation of water and requires a water right permit. In California, water right permits or licenses are administered by the State Water Resources Control Board (State Water Board) Division of Water Rights. An application must be filed with the Division of Water Rights specifying the proposed project's course, place of use, purpose, and point(s) of diversion, as well as the quantity to be diverted. Additionally, 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 the State Water Board, such as diversions under riparian or pre-1914 rights. These types of water rights can only be confirmed by the courts.

Porter-Cologne Water Quality Control Act

The Porter-Cologne Water Quality Control Act governs water quality regulation in California. It is administered regionally, through the State Water Board and California's nine regional water quality control boards (regional water boards). The State Water Board is responsible for water rights and statewide water quality control plans and policies, whereas the regional water boards develop and enforce water quality control plans, called "Basin Plans," within their boundaries. The Systemwide Planning Area for the CVFPP falls within the Central Valley Regional Water Board's authority. The regional water boards have the authority to enforce the Basin Plan objectives by issuing and enforcing permits containing WDRs, which decide when the discharge is to take place, for how long, and how much waste is released into the water. WDRs under the Porter-Cologne Water Quality Control Act are issued for discharges of dredged or fill material to waters of the state.

Clean Water Act Section 401 and Section 402

The State Water Board and the regional water boards issue CWA Section 401 water quality certifications to applicants for a federal license or permit for activities that may result in a discharge into waters of the United States, including but not limited to the discharge or dredged or fill material, to ensure that State water quality standards are met. Applications for a water quality certification must be submitted to the State Water Board for projects that meet any of the following criteria:

- Fall under the jurisdiction of more than one regional water board.
- Involve or are associated with an appropriation of water (California Water Code Part 2, Division 2, Section 1200 et seq.).

- 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.
- 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 are submitted to the regional water boards.

In April 2019, the State Water Board adopted the State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (formally known as the Wetland Riparian Area Protection Policy). These procedures went into effect in May 2020. The procedures consist of four major elements, including a wetland definition; a framework to determine whether a feature that meets the wetland definition is a water of the state; wetland delineation procedures; and procedures for the submittal, review, and approval of applications for water quality certifications and WDRs for dredge or fill activities.

In addition, the regional water boards have been delegated permitting authority for the NPDES permit program (i.e., CWA Section 402), which regulates point-source discharges to waters of the United States and State. "Point sources" are discrete conveyances, such as pipes or human-made ditches. Examples of pollutants include rock, sand, dirt, and agricultural, industrial, and municipal waste discharged into waters of the United States. Discharges regulated by the NPDES program include drinking water systems; stormwater discharges; sanitary sewer systems; pesticide applications; vessel discharges; and others. In California, NPDES permits are also referred to as WDRs that regulate discharges to waters of the United States.

The State Water Board also designates beneficial uses for water bodies and establishes water quality standards to protect those uses. Water quality monitoring data for California's surface waters is assessed every two years to determine whether pollutant levels violate protective water quality standards. If a pollutant exceeds the standard threshold, the waterbody and pollutant are placed on the 303(d) list. When a waterbody and pollutant are 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 waterbody and pollutants. The Systemwide Planning Area includes water bodies on the 303(d) list.

State Office of Historic Preservation

National Historic Preservation Act

Historic properties are considered through the National Historic Preservation Act of 1966 (NHPA), as amended through 2016, and its implementing regulations. The NHPA establishes the federal government's policy on historic preservation and the programs, including the National Register of Historic Places (National Register), through which that policy is implemented. Under the NHPA, historic properties include "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on, the National Register" (54 USC

300308). Types of cultural resources that may qualify as historic properties include artifacts, records, and material remains relating to the district, site, building, structure, or object.

Under Section 106 of the NHPA (Section 106), before implementing an undertaking (e.g., issuing a federal permit), federal agencies must consider the effects of the undertaking on historic properties, in consultation with the SHPO, Native American Tribes, and other interested parties (e.g., historical societies or groups with potential ties to historic properties that could be affected by an undertaking). Section 106 applies when two thresholds are met: there is a federal or federally licensed action, including grants, licenses and permits; and the action has the potential to affect properties listed on or eligible for listing on the National Register.

In addition, the agencies must also afford the Advisory Council on Historic Preservation and the SHPO a reasonable opportunity to comment on any undertaking that would adversely affect properties eligible for listing in the National Register. Section 101(d)(6)(A) of the NHPA allows properties of traditional religious and cultural importance to a Native American Tribe or Native Hawaiian organization to be determined eligible for inclusion in the National Register.

Central Valley Flood Protection Board

Encroachment Permit Program

The Central Valley Flood Protection Board (CVFPB) is the regulatory agency responsible for ensuring the State and federal levees and the facilities of the State Plan of Flood Control are operated and maintained in a manner that reduces the risk of catastrophic flooding. The CVFPB is required to enforce, on behalf of the State, the erection, maintenance, and protection of levees, embankments, and channel rectification. In accordance with California Water Code Section 8608, the CVFPB is charged with establishing and enforcing standards for the operations and maintenance of levees, channels, and other flood control works of an authorized project or an adopted plan, including standards for encroachment, construction, vegetation, and erosion control.

An encroachment permit is required for any work to be done in or near a regulated stream, designated floodway, or on any federal flood control project levee to include the area 10 feet landward of the landside levee toe. As part of the permitting process, letters are sent to adjacent landowners to ensure there are no flood control concerns related to the proposed project. In addition, the permit application is sent to the USACE Levees and Channels Branch (Section 408) for their review and comment. Encroachment permits are subject to conditions the CVFPB deems reasonable and appropriate, and conditions requested by USACE or the local maintaining agency. The issuance of an encroachment permit requires review for compliance with CEQA, and no proposed project or work will be approved and issued an encroachment permit until the requirements of CEQA have been met.

California State Lands Commission

The California State Lands Commission (SLC) has jurisdiction and management control over certain public lands the State received 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 or Public Trust lands, these lands include the beds of California's navigable natural rivers, lakes, streams, bays, estuaries, inlets, and straits, 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 three nautical miles offshore. A lease from the SLC is required if an action plans to use or construct any type of structure on lands under the SLC's jurisdiction, or develop any resources or minerals located on, or otherwise occupying any lands under the SLC's jurisdiction.

The issuance of any SLC lease, permit, 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 Section 6370 et seq., the consistency of the proposed use with the identified values must also be determined through the CEQA review process. Pursuant to its regulations, the SLC may not issue a lease for use of "significant lands" if such proposed use is detrimental to the identified values. In 2018, the SLC adopted a comprehensive environmental justice policy intended to improve public access to open space and recreation for disadvantaged or marginalized communities, achieve more equity in the distribution of environmental benefits and burdens, and increase inclusive decision-making.

Delta Stewardship Council

The Delta Stewardship Council is a state agency established by the Sacramento–San Joaquin Delta Reform Act of 2009 to create a comprehensive, long-term management plan for the Sacramento–San Joaquin Delta (Delta Plan), which was formally adopted by the Delta Stewardship Council in 2013. The Delta Plan has two co-equal goals: providing a more reliable water supply for California; and protecting, restoring, and enhancing the Delta ecosystem. The Delta Plan includes policies, recommendations, and performance measures that are enforceable through regulatory authority in the Delta Reform Act of 2009, which requires state and local agencies to be consistent with the Delta Plan. State and local agencies proposing to undertake a project covered by the Delta Plan must prepare and file a consistency determination with the Delta Stewardship Council demonstrating the project is consistent with requirements in the Delta Plan. Any person may challenge a consistency determination by bringing an appeal to the Delta Stewardship Council no later than 30 calendar days after the submission of the certification of consistency. If there are no appeals, the State or local public agency may proceed to implement the covered action.

Other StateAuthorization

In addition to obtaining state permits under the programs listed here, future projects may need to comply with other permitting requirements, including the following:

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

Flood management projects undertaken by federal entities generally are not subject to state authorizations.

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.