

# Compliance with Applicable Laws, Policies, Plans, and Regulatory Framework

## Introduction

Construction and operation of the Project would be subject to a variety of regulatory standards that are in place to safeguard the environment. This chapter provides preliminary information on the major requirements for potential permitting and environmental review and consultation for implementation of the Project alternatives. Table 7-1 lists the permit requirements and environmental review and consultation requirements that may be required for the Project. Certain local, state, and federal regulations require either the lead agency or project proponent to obtain applicable permits before project implementation; other regulations require agency consultation but may not require issuance of any authorization or entitlements before project implementation. Specific resource chapters contain a more detailed discussion of the regulatory setting and the applicability of these laws to the Project.

**Table 7-1. Permits, Approvals, and Other Environmental Review and Consultation Requirements That May Be Required for the Project**

Agency and Requirements	Agency Authority	Project Activities That Are Subject to Requirements and Initiate Review and Consultation Requirements
<b>Federal</b>		
<b>U.S. Army Corps of Engineers</b>		
Department of the Army permit pursuant to Section 404 of the Clean Water Act	The Corps issues permits for discharge of dredged or fill materials into waters of the United States, including wetlands; permits are issued following public interest review and analyses according to EPA's Section 404(b)(1) guidelines.	Construction activities; location of siphon, pump, and recreation facilities; and other activities requiring the discharge of dredged or fill material into waters of the United States, including wetlands. An Individual Permit was previously issued for the Project; authorization will be renewed under a new permit.
Department of the Army permit pursuant to Section 10 of the Rivers and Harbors Act of 1899	The Corps issues permits for activities in or affecting navigable waters of the United States.	Construction of intake structures, fish screens, discharge pumps, boat docks, or other facilities affecting navigable Delta waters. Section 10 authorization was previously issued for the Project and will be renewed in conjunction with Section 404.
<b>U.S. Fish and Wildlife Service</b>		
Consultation pursuant to Section 7 of the federal Endangered Species Act	Federal agencies must consult with USFWS when their actions may affect species listed under the ESA.	Corps approval of the Project because the Corps has determined that the Project may affect species listed under the ESA. The Corps will coordinate with USFWS to determine the extent to which reconsultation may be required.
Fish and Wildlife Coordination Act	Federal agencies must consult with USFWS when undertaking projects that control or modify surface water.	Corps approval of the Project; consultation will be achieved through the Corps' NEPA process in approving the project under a new Section 404 and Section 10 authorization.
<b>National Marine Fisheries Service</b>		
Consultation pursuant to Section 7 of the federal Endangered Species Act	Federal agencies must consult with NMFS when their actions may affect anadromous or marine species list under the ESA.	Corps approval of the Project because the Corps has determined that the Project may affect species listed under the ESA. The Corps will coordinate with NMFS to determine the extent to which reconsultation may be required.

Agency and Requirements	Agency Authority	Project Activities That Are Subject to Requirements and Initiate Review and Consultation Requirements
<b>U.S. Environmental Protection Agency</b>		
Clean Water Act and National Environmental Policy Act	EPA has oversight responsibility to ensure that federal and state agencies comply with the provisions of the Clean Water Act and NEPA	Need for a Department of the Army permit under Sections 404 and 401 of the Clean Water Act. The 2001 FEIS was prepared and certified under NEPA; NEPA review will be conducted as part of renewing authorization under the Clean Water Act.
Federal Clean Air Act	Federal agencies must consult with EPA and local air quality districts to ensure compliance with CAA.	Emission of air pollutants during Project construction and operation.
Farmland Protection Policy Act and Memoranda on Farmland Preservation	Federal agencies also must ensure that their programs are compatible with state, local, and private programs to protect farmland. NRCS is the federal agency responsible for ensuring that these laws and policies are followed.	The Project would result in loss of farmland.
<b>Federal Aviation Administration</b>		
Completion requirement of Form 7480-1 for change in use approval	FAA requires that all persons notify FAA prior to change in the status or use of a civil or joint-use airport.	Operation activities of the airport on Bouldin Island, including agricultural and private commercial activities.
<b>State</b>		
<b>California Department of Fish and Game</b>		
Section 1600 <i>et seq.</i> of the California Fish and Game Code - Streambed Alteration Agreement	DFG enters into agreements with project applicants proposing changes in conditions of rivers, streams, lakes, or other regulated areas.	Construction of intake structures, fish screens, discharge pumps, boat docks, or other facilities within regulated areas.
Consultation pursuant to the California Endangered Species Act	State lead agencies must consult with DFG when their actions may affect species listed under CESA.	State Water Board approval of the Project because State Water Board has determined that the Project may affect species only listed under CESA (Swainson’s hawk and greater sandhill crane). Consultation was previously completed for the Project. The lead agency will coordinate with DFG to determine the extent to which reconsultation may be required.

Agency and Requirements	Agency Authority	Project Activities That Are Subject to Requirements and Initiate Review and Consultation Requirements
California Fish and Game Code Section 3503 and 3503.5—Protection of Bird Nests and Raptors	Project applicants must not take, possess, or needlessly destroy the nest or eggs of any bird, or take, possess, or destroy any raptors, including their nests or eggs.	Project construction and operation will take place in proximity to nesting birds. Take of bird nests and raptors will be avoided.
California Fish and Game Code—Fully Protected Species	Non-federal agencies and private parties must avoid take of any fully protected species.	Greater sandhill crane, white-tailed kite, and California black rail occur in the Project vicinity. Take of these species will be avoided.
Fish and Wildlife Coordination Act	Federal agencies must consult with state fish and game agencies when undertaking projects that control or modify surface water.	Corps approval of the Project; consultation will be covered through Corps' NEPA process in renewing authorization for the Project.
<b>California Department of Water Resources, Division of Safety of Dams</b>		
Approval of plans and specifications	DSOD reviews and grants approval of plans and specifications for construction of reservoirs where the barrier will exceed 6 feet in height to ensure that no threat to life or property could occur because of seepage, earth movement, or other types of reservoir-induced dam failures.	Designing and constructing water impoundment facilities (on Bouldin Island for Alternative 3).
Notice of completion and statement of actual cost; certificate of approval to impound water	DSOD evaluates the safety of newly constructed reservoirs and grants approval to initiate storage operations.	Storage of water in a reservoir (on Bouldin Island for Alternative 3).
<b>California State Water Resources Control Board</b>		
Porter-Cologne Water Quality Control Act of 1969		
Created State Water Board and RWQCBs.		
Permit to appropriate and store water	State Water Board issues permits to allow the appropriation of unappropriated water from surface sources and grants approval to divert water to storage or for direct diversion and to change purpose of use.	Diversion of Delta water, storage of appropriated water, and later discharge of water for sale as export or outflow.
Statement of riparian water diversion and use	State Water Board requires submittal of a statement for applicants wishing to divert water under a riparian claim.	Diversion of Delta water for circulation on the islands to provide wetlands and wildlife habitat benefits.

Agency and Requirements	Agency Authority	Project Activities That Are Subject to Requirements and Initiate Review and Consultation Requirements
Water quality certification pursuant to Section 401 of the Clean Water Act	State Water Board certifies that an applicant for a Department of the Army permit pursuant to Section 404 of the Clean Water Act complies with the state’s water quality standards.	Same as for Department of Army permit pursuant to Section 404 of the Clean Water Act, certification will be renewed.
<b>California Department of Conservation</b>		
California Surface Mining and Reclamation Act of 1975	State Mining and Geology Board monitors mining of minerals, gravel, and borrow material, and requires mitigation to reduce adverse impacts on public health, property, and the environment.	Because the Project would require borrow material for project construction, the Project applicant must comply with SMARA.
California Important Farmland Inventory System and Farmland Mapping and Monitoring Program	California Department of Conservation, Office of Land Conservation	System monitors farmland usage; Project would remove farmland from production.
California Land Conservation Act of 1965 (Williamson Act)	Counties may encourage the preservation of lands in agricultural use through voluntary restrictive contracts that offer property tax reductions.	Much of the Project lands are presently under Williamson Act contracts.
<b>Regional Water Quality Control Board</b>		
Issuance of or waiver from discharge requirements	RWQCB may set waste discharge requirements for any proposed activity that would discharge waste into surface waters, projects that affect groundwater quality, and projects from which waste would be discharge in a diffused manner; waivers are also granted based on project sponsor’s water quality control plans. (RWQCB waste discharge requirements constitute NPDES permits where such permits are required.)	Any earthmoving activities, such as grading, excavating, and other construction; discharge of water from dewatering activities into storm drains and creeks; and discharge of wastewater from conveyance cleaning.
California Toxics Rule and State Implementation Policy	RWQCB is responsible for monitoring discharges to Waters of the State.	Project agricultural operations create the potential for pollution from herbicides and pesticides, some of which may be in use or may be present on the Project islands.
Basin Plan for the Sacramento and San Joaquin River Basins	The Basin Plan describes the officially designated beneficial uses for specific surface water and groundwater resources and the enforceable water quality objectives necessary to protect those beneficial uses.	The Project islands are located within the Central Valley RWQCB jurisdiction and is subject to the Basin Plan.

Agency and Requirements	Agency Authority	Project Activities That Are Subject to Requirements and Initiate Review and Consultation Requirements
<b>State Lands Commission</b>		
Land use lease	The SLC grants a lease to use state-owned lands, including tidelands and submerged lands.	Use of state-owned land for construction or siting of project facilities, such as boat docks, in tidelands and submerged lands.
Dredging permit	The SLC issues a permit to parties proposing to dredge or deposit material on state-owned lands as elements of various projects.	Construction of diversion and discharge facilities, if state-owned lands are dredged or altered.
<b>California Department of Transportation</b>		
Encroachment permit	Caltrans issues encroachment permits for projects affecting areas within the rights-of-way (ROWs) of state-owned roadways.	Activities that may affect SR 12.
<b>California Department of Transportation, Division of Aeronautics</b>		
State airport permit	Caltrans issues special use airport permits for airports not open to the general public, access to which is controlled by the owner in support of commercial activities, public service operations, and/or personal use.	Operation activities of the airport on Bouldin Island that include agricultural and private commercial activities.
<b>Office of Historic Preservation and Advisory Council on Historic Preservation</b>		
Archaeological survey review (Archaeological Resource Protection Act, National Historic Preservation Act); PA for project effects on archaeological resources on the project site	The SHPO reviews and comments on any archaeological surveys; if resources are identified, the SHPO must be consulted to determine the eligibility for nomination to the National Register of Historic Places. The Advisory Council on Historic Preservation must concur with the PA.	Archaeological survey conducted and determination of eligibility and effect prepared; PA circulated and signed by the Project applicant. State Water Boards, the Corps, the SHPO, and the Advisory Council on Historic Preservation; need for reconsultation will be coordinated in conjunction with Corps permit.
California Register of Historic Resources	California's Office of Historic Preservation maintains the CRHP.	Project islands contain cultural resources that may be impacted by the Project construction and operations.
<b>Native American Heritage Commission</b>		
Consultation with certain Native Americans in compliance with California Public Resources Code Section 5097.98 and California Health and Safety Code Section 7050.5	The commission identifies persons who may be likely descendants of Native Americans whose remains may be found and requires that consultation with identified persons be initiated.	Plans for physical alteration of a known cultural resource site that has a likely potential for containing remains of Native Americans.

Agency and Requirements	Agency Authority	Project Activities That Are Subject to Requirements and Initiate Review and Consultation Requirements
<b>California Air Resources Board</b>		
California Climate Solutions Act	Creates enforceable statewide cap on GHG emissions that will be phased in starting in 2012.	Project operations and construction will create air pollution emissions.
<b>Regional and Local Agencies and Utilities</b>		
<b>Bay Area Air Quality Management District</b>		
Authority to construct/permit to operate	BAAQMD issues permits based on emission estimates and subsequent tests performed at the construction facility.	Installation and subsequent operation of internal combustion equipment that generates any pollutant in excess of 150 pounds per day or is greater than 250 hp in size.
<b>San Joaquin Valley Air Pollution Control District</b>		
Authority to construct/permit to operate	SJVAPCD issues permits based on the size of stationary or portable internal combustion engines proposed for use.	Use, during construction and operation of the project, of stationary or portable internal combustion engines over 50 hp, if fueled by diesel or natural gas.
<b>Contra Costa and San Joaquin Counties</b>		
Building permit	County planning department issues permits for all permanent structures.	Construction of pump stations and recreation facilities.
Road encroachment permit and design approval	County public works department issues permits and approves designs for construction within the ROWs of any county-maintained roads.	Construction of conveyance facilities within the ROWs of county-maintained roads.
Grading permit	County planning department and public works department issues permits for grading activities associated with construction activities.	Grading of project site.
Conformance with general plan	County planning department reviews local agency projects for conformity with the general plan.	Project effects on land use.
<b>San Joaquin County</b>		
Minor Use permit	County issues permits for the opening of a new airport or modification of an existing airport.	Operational activities of the airport on Bouldin Island that include agricultural, recreational, and private commercial activities.

Agency and Requirements	Agency Authority	Project Activities That Are Subject to Requirements and Initiate Review and Consultation Requirements
<b>Reclamation Districts</b>		
Access easement and permission to cross levees	Individual Reclamation Districts grant easements and regulate access to levees under district jurisdiction.	Construction of conveyance and related facilities on Reclamation District lands.

# Regulatory Framework

## Federal Requirements

### National Environmental Policy Act

NEPA (found at 42 USC § 4321 *et seq.*) is the nation's broadest environmental law, applying to all federal agencies and most of the activities they manage, regulate, or fund that have the potential to affect the human environment. It requires federal agencies to disclose and consider the environmental implications of their proposed actions. NEPA establishes environmental policies for the nation, provides an interdisciplinary framework for federal agencies to prevent environmental damage, and contains action-forcing procedures to ensure that federal agency decision makers take environmental factors into account.

NEPA requires the preparation of an appropriate document to ensure that federal agencies accomplish the law's purposes. The President's Council on Environmental Quality (CEQ) has adopted regulations and other guidance that provide detailed procedures that federal agencies must follow to implement NEPA. In addition, each federal agency has adopted specific regulations to comply with NEPA and the CEQ regulations.

Based on application to the Corps for permit authorization under the Clean Water Act and Rivers and Harbors Act, an EIS was prepared for the Project and record of decision issued in 2002. This document is focused on CEQA compliance for the Project; however, the information and analysis may support any necessary additional NEPA compliance for a renewed application for CWA and Rivers and Harbors Act permit from the Corps or similar federal action.

### Federal Endangered Species Act

Section 7 of the ESA requires federal agencies, in consultation with USFWS and/or NMFS, to ensure that their actions do not jeopardize the continued existence of Endangered or Threatened species, or result in the destruction or adverse modification of the critical habitat of these species. The required steps in the Section 7 consultation process are as follows.

- Agencies must request information from USFWS and/or NMFS on the existence in a project area of special-status species or species proposed for listing.
- Agencies must initiate formal consultation with USFWS and/or NMFS if the proposed action may adversely affect special-status species.

ESA compliance also requires compliance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), which establishes a

management system for national marine and estuarine fishery resources. It also requires compliance with the Migratory Bird Treaty Act (MBTA), which regulates the taking of migratory birds. Because of overlapping requirements, compliance with the MBTA would be addressed through compliance with the ESA, CESA, and NEPA/CEQA. The Project incorporates mitigation measures required as part of these processes that would help ensure that construction and operational activities do not result in the take of migratory birds.

The Project has undergone prior consultation for ESA under Section 7, resulting in issuance of Biological Opinions from USFWS and NMFS to support issuance of a Clean Water Act permit from the Corps in 2001. The Corps will coordinate with USFWS and NMFS to determine the extent to which reconsultation may be required.

## Clean Water Act Section 404, 404(b)(1) Guidelines, and Section 401

### Section 404

Section 404 of the CWA requires that a permit be obtained from the Corps for the discharge of dredged or fill material into “waters of the United States, including wetlands.”

*Waters of the United States* include wetlands and lakes, rivers, streams, and their tributaries. *Waters of the United States* are defined for regulatory purposes, at 33 CFR § 328.3 as:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of tide;
- (2) All interstate waters, including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs 1–4 in this section;
- (6) The territorial seas; and
- (7) Wetlands adjacent to waters identified in paragraphs 1–6 in this section.

CWA Section 404(b) requires that the Corps process permits in compliance with guidelines developed by EPA. These guidelines (404[b][1] Guidelines) require that there be an analysis of alternatives available to meet the project purpose and need, including those that avoid and minimize discharges of dredged or fill materials in waters. Once this first test has been satisfied, the project that is permitted must be the least environmentally damaging practical alternative before the Corps may issue a permit for the proposed activity.

*(Note: Section 404 does not apply to authorities under the Rivers and Harbors Act of 1899, except that some of the same waters may be regulated under both*

*statutes; the Corps typically combines the permit requirements of Section 10 and Section 404 into one permitting process.)*

A prior CWA permit for the Project was authorized by the Corps. Coordination has been initiated with the Corps to renew Section 404 authorization as the prior permit has expired.

## **Section 401**

Under the CWA Section 401, applicants for a federal license or permit to conduct activities that may result in the discharge of a pollutant into waters of the United States must obtain certification from the state in which the discharge would originate. Therefore, all projects that have a federal component and may affect state water quality (including projects that require federal agency approval [such as issuance of a Section 404 permit]) must also comply with CWA Section 401. Water quality certification requires evaluation of potential impacts in light of water quality standards and CWA Section 404 criteria governing discharge of dredged and fill materials into waters of the United States.

In California, the authority to grant water quality certification has been delegated to the State Water Board. Although applications for water quality certification under CWA Section 401 are typically processed by the RWQCB with local jurisdiction, the prior permit issued under Section 404 received 401 certification directly from the State Water Board.

As part of the process to renew the prior Section 404 authorization by the Corps for the Project, a Section 401 certification will be similarly renewed.

## **River and Harbors Act of 1899**

The River and Harbors Act of 1899 addresses activities that involve the construction of dams, bridges, dikes, and other structures across any navigable water, or that place obstructions to navigation outside established federal lines and excavate from or deposit material in such waters. Such activities require permits from the Corps. *Navigable waters* are defined in Section 329.4 of the act as:

Those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.

## Section 10

Section 10 (33 USC § 403) prohibits the unauthorized obstruction or alteration of any navigable water of the United States. This section provides that the construction of any structure in or over any navigable water of the United States, or the accomplishment of any other work affecting the course, location, condition, or physical capacity of such waters, is unlawful unless the work has been authorized by the Chief of Engineers.

Compliance with the Rivers and Harbors Act of 1899 would be conducted as part of the CWA Section 404 permit renewal from the Corps.

## Farmland Protection Policy Act and Memoranda on Farmland Preservation

Two policies require federal agencies to include assessments of the potential effects of a proposed project on prime and unique farmland. These policies are the FPPA and the Memoranda on Farmland Preservation, dated August 30, 1976, and August 11, 1980, respectively, from the CEQ. Under requirements set forth in these policies, federal agencies must determine these effects before taking any action that could result in converting designated prime or unique farmland for non-agricultural purposes. If implementing a project would adversely affect farmland preservation, the agencies must consider alternative actions to lessen those effects. Federal agencies also must ensure that their programs, to the extent practicable, are compatible with state, local, and private programs to protect farmland. NRCS is the federal agency responsible for ensuring that these laws and policies are followed.

The Project would result in loss of farmland. This issue is addressed in Section 4.8, Land Use and Agriculture, of this EIR.

## National Historic Preservation Act

Section 106 of the NHPA requires federal agencies to evaluate the effects of their undertakings on historic properties, which are those properties listed or eligible for listing on the NRHP. Implementing regulations at 36 CFR Part 800 require that federal agencies, in consultation with SHPO, identify historic properties within the APE of the proposed project and make an assessment of adverse effects if any are identified. If the project is determined to have an adverse effect on historic properties, the federal agency is required to consult further with SHPO and the Advisory Council on Historic Preservation to develop methods to resolve the adverse effects. The Section 106 process has four basic steps.

1. Initiation of the Section 106 process (define the APE and scope of identification efforts).
2. Evaluation of historic properties.

3. Determination of adverse effects to historic properties.
4. Resolution of adverse effects to historic properties.

The Corps will coordinate with SHPO as part of the CWA Section 404 permit renewal process to determine the extent to which reconsultation may be required.

## **American Indian Religious Freedom Act**

The American Indian Religious Freedom Act of 1978 is also applicable to federal undertakings. This act established “the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites” (Public Law 95-431).

It is not anticipated that actions related to the Project will conflict with the American Indian Religious Freedom Act.

## **Executive Order 11990 (Protection of Wetlands)**

Executive Order 11990 (May 24, 1977) requires federal agencies to prepare wetland assessments for proposed actions located in or affecting wetlands. Agencies must avoid undertaking new construction in wetlands unless no practicable alternative is available and the proposed action includes all practicable measures to minimize harm to wetlands. Wetland resources will be address as part of the CWA Section 404 permit renewal.

## **Executive Order 12898 (Environmental Justice)**

Executive Order 12898 (February 11, 1994) requires federal agencies to identify and address adverse human health or environmental effects of federal programs, policies, and activities that could be disproportionately high on minority and low-income populations. Federal agencies must ensure that federal programs or activities do not directly or indirectly result in discrimination on the basis of race, color, or national origin. Federal agencies must provide opportunities for input into the NEPA process by affected communities and must evaluate the potentially significant and adverse environmental effects of proposed actions on minority and low-income communities during environmental document preparation. Even if a proposed federal project would not result in significant adverse impacts on minority and low-income populations, the environmental document must describe how Executive Order 12898 was addressed during the NEPA process.

Executive Order 12898 is addressed in Chapter 3K of the 2001 FEIR, “Economic Conditions and Effects.”

## **Executive Order 13007 (Indian Sacred Sites) and April 29, 1994, Executive Memorandum**

Executive Order 13007 (May 24, 1996) requires federal agencies with land management responsibilities to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies are to maintain the confidentiality of sacred sites. Among other things, federal agencies must provide reasonable notice of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. The agencies must comply with the April 29, 1994, Executive Memorandum, *Government-to-Government Relations with Native American Tribal Governments*.

Sacred sites will be addressed through the CWA Section 404 renewal process.

## **Federal Clean Air Act**

The federal CAA was enacted to protect and enhance the nation's air quality in order to promote public health and welfare and the productive capacity of the nation's population. The CAA requires an evaluation of any federal action to determine its potential impact on air quality in the project region. California has a corresponding law, which also must be considered during the EIR process.

For specific projects, federal agencies must coordinate with the appropriate air quality management district as well as with EPA. This coordination would determine whether the project conforms to the CAA and the State Implementation Plan (SIP).

Section 176 of the CAA prohibits federal agencies from engaging in or supporting in any way an action or activity that does not conform to an applicable SIP. Actions and activities must conform to a SIP's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and in attaining those standards expeditiously. EPA promulgated conformity regulations (codified in 40 CFR § 93.150 *et seq.*).

The potential air quality impacts of the Project resulting from construction (such as equipment emissions and fugitive dust) are discussed in Section 4.13, Air Quality, of this EIR, which analyzes and documents compliance with the CAA.

## **Federal Water Project Recreation Act**

The federal Water Project Recreation Act requires federal agencies with authority to approve water projects to include recreation development as a condition of approving permits. Recreation development must be considered along with any

navigation, flood control, reclamation, hydroelectric, or multipurpose water resource project. The act states that,

consideration should be given to opportunities for outdoor recreation and fish and wildlife enhancement whenever any such project can reasonably serve either or both purposes consistently.

The Project proposes new water-based recreation facilities and features. Recreation effects are discussed in Section 4.9, Recreation and Visual Resources.

## Sustainable Fisheries Act

In response to growing concern about the status of United States fisheries, Congress passed the Sustainable Fisheries Act of 1996 (PL 104-297) to amend the Magnuson-Stevens Fishery Conservation and Management Act (PL 94-265), the primary law governing marine fisheries management in the federal waters of the United State. Under the Sustainable Fisheries Act, consultation is required by NMFS on any activity that might adversely affect EFH. EFH includes those habitats that fish rely on throughout their life cycles. It encompasses habitats necessary to allow sufficient production of commercially valuable aquatic species to support a long-term sustainable fishery and contribute to a healthy ecosystem.

The extent to which additional compliance is required will be addressed through the ESA process as part of the CWA Section 404 renewal process.

## State Requirements

### California Environmental Quality Act

CEQA (Public Resources Code § 21000 *et seq.*) requires state and local agencies to identify the significant adverse environmental impacts of their actions and to avoid or mitigate those impacts, if feasible. The environmental review required imposes both procedural and substantive requirements. At a minimum, an initial review of the project and its potential environmental effects must be conducted. CEQA's primary objectives are to:

- disclose to decision makers and the public the significant environmental effects of proposed activities,
- identify ways to avoid or reduce environmental damage,
- prevent environmental damage by requiring implementation of feasible alternatives or mitigation measures,
- disclose to the public reasons for agency approval of projects with significant environmental effects,
- foster interagency coordination in the review of projects, and

- enhance public participation in the planning process.

CEQA applies to all discretionary activities proposed to be carried out or approved by California public agencies, including state, regional, county, and local agencies, unless an exemption applies. The act requires that public agencies comply with both procedural and substantive requirements. Procedural requirements include the preparation of the appropriate public notices (including notices of preparation), scoping documents, alternatives, environmental documents (including mitigation measures, mitigation monitoring plans, responses to comments, findings, and statements of overriding considerations), completion of agency consultation and State Clearinghouse review, and provisions for legal enforcement and citizen access to the courts.

CEQA's substantive provisions require agencies to disclose environmental impacts in an appropriate document. When avoiding or minimizing environmental damage is not feasible, CEQA requires agencies to prepare a written statement of overriding considerations when they decide to approve a project that will cause one or more significant effects on the environment that cannot be mitigated. CEQA establishes a series of action-forcing procedures to ensure that agencies accomplish the purposes of the law. In addition, under the direction of CEQA, the California Resources Agency has adopted regulations, known as the State CEQA Guidelines (CCR 14 §15000 *et seq.*), which provide detailed procedures that agencies must follow to implement the law.

This document is the instrument for CEQA compliance for the Project.

## California Endangered Species Act

CESA is similar to ESA but pertains only to state-listed Endangered and Threatened species. CESA requires state agencies to consult with DFG when preparing documents under CEQA to ensure that the actions of the state lead agency do not jeopardize the continued existence of listed species. CESA directs agencies to consult with DFG on projects or actions that could affect listed species, directs DFG to determine whether there would be jeopardy to listed species, and allows DFG to identify "reasonable and prudent alternatives" to the project consistent with conserving the species. Agencies can approve a project that affects a listed species if the agency determines that there are "overriding considerations;" however, the agencies are prohibited from approving projects that would cause the extinction of a listed species.

Mitigating impacts on state-listed species involves avoidance, minimization, and compensation (listed in order of preference). Unavoidable impacts on state-listed species are typically addressed in a detailed mitigation plan prepared in accordance with DFG guidelines. DFG exercises authority over mitigation projects involving state-listed species, including those resulting from CEQA mitigation requirements.

CESA prohibits the “take” of plant and wildlife species state-listed as Endangered or Threatened. DFG may authorize take if through either an incidental take permit or as part of a natural communities conservation plan, or if take authorization has been obtained under the ESA and DFG determines that the authorization is consistent with the Fish & Game Code requirements.

Take of state-listed species or substantial degradation of habitat will be addressed through consultation with DFG, consistent with prior Project authorization.

## **Section 1600 *et seq.* of the California Fish and Game Code**

DFG regulates work that will substantially affect resources associated with rivers, streams, and lakes in California, pursuant to Fish and Game Code Sections 1600 to 1607. Any action from a public project that substantially diverts or obstructs the natural flow or changes the bed, channel, or bank of any river, stream, or lake, or uses material from a streambed must be previously authorized by DFG in a lake or streambed alteration agreement under Section 1602 of the Fish and Game Code. This requirement may in some cases apply to any work undertaken within the 100-year floodplain of a body of water or its tributaries, including intermittent streams and desert washes. As a general rule, however, it applies to any work done within the annual high-water mark of a wash, stream, or lake that contains or once contained fish and wildlife, or that supports or once supported riparian vegetation.

A Streambed Alteration Agreement will be obtained from DFG to authorize the Project.

## **Porter-Cologne Water Quality Control Act of 1969**

In 1967, the Porter-Cologne Act established the State Water Board and nine RWQCBs as the primary state agencies with regulatory authority over California water quality and appropriative surface water rights allocations. Under this act (and the CWA), the state is required to adopt a water quality control policy and WDRs to be implemented by the State Water Board and nine RWQCBs. The State Water Board also establishes Basin Plans and statewide plans. The RWQCBs carry out State Water Board policies and procedures throughout the state.

Basin Plans designate beneficial uses for specific surface water and groundwater resources and establish water quality objectives to protect those uses. The Project has the potential to affect water quality in surface water or groundwater within the Project area that is governed by the Central Valley RWQCB. Effects are analyzed in Section 4.2, Water Quality.

## Central Valley Flood Protection Board Encroachment Permit

The Central Valley Flood Protection Board Encroachment Permit (CVFPB) (formerly The Reclamation Board) requires an encroachment permit for any non-federal activity along or near federal flood damage reduction project levees and floodways or in CVFPB-designated floodways to ensure that proposed local actions or projects do not impair the integrity of existing flood damage reduction systems to withstand flood conditions. The Project will not require a CVFPB Encroachment Permit, as the Project levees are not federal flood damage reduction project levees.

## California Surface Mining and Reclamation Act

The California Surface Mining and Reclamation Act of 1975 (PRC Section 2710 *et seq.*) (SMARA) addresses surface mining. Activities subject to SMARA include, but are not limited to, mining of minerals, gravel, and borrow material. SMARA applies to an individual or entity that would disturb more than 1 acre or remove more than 1,000 cubic yards of material through surface mining activities, including the excavation of borrow pits for soil material. SMARA is implemented through ordinances for permitting developed by local government “lead agencies” that provide the regulatory framework under which local mining and reclamation activities are conducted. The State Mining and Geology Board reviews the local ordinances to ensure that they meet the procedures established by SMARA.

The SMARA statute requires mitigation to reduce adverse impacts on public health, property, and the environment. Because the Project would require borrow material for project construction, the Project applicant must comply with SMARA.

## California Land Conservation Act (Williamson Act)

The California Land Conservation Act (California Government Code, beginning at Section 51200), also known as the Williamson Act, was adopted in 1965. The Williamson Act allows for the preservation of agricultural and open space lands through property tax incentives and voluntary restrictive use contracts. This Project allows property owners to have their property assessed on the basis of its agricultural production rather than at the current market value. The contract may be cancelled if the land is being converted to an incompatible use.

Generally, the anticipated Project land use changes are compatible with existing Williamson Act contracts covering Project lands. Williamson Act issues are addressed in Section 4.8, Land Use and Agriculture.

## California Fish and Game Code Section 3503 and 3503.5—Protection of Bird Nests and Raptors

Section 3503 of the California Fish and Game Code states that it is unlawful to take, possess, or needlessly destroy the nest or eggs of any bird. Section 3503.5 specifically states that it is unlawful to take, possess, or destroy any raptors (i.e., species in the orders *Falconiformes* and *Strigiformes*), including their nests or eggs. Typical violations of these codes include destruction of active nests resulting from removal of vegetation in which the nests are located. Violation of Section 3503.5 could also include failure of active raptor nests resulting from disturbance of nesting pairs by nearby project construction. This statute does not provide for the issuance of any type of incidental take permit. Per the environmental commitment discussed in Section 4.07, Wildlife, take of bird nests and raptors will be avoided.

## California Fish and Game Code—Fully Protected Species

Protection of fully protected species is described in Sections 3511, 4700, 5050, and 5515 of the California Fish and Game Code. These statutes prohibit take or possession of fully protected species and do not provide for authorization of incidental take of fully protected species. DFG has informed non-federal agencies and private parties that their actions must avoid take of any fully protected species. Fully protected species that have the potential to occur on the project site are greater sandhill crane, white-tailed kite, and California black rail. Per the environmental commitment discussed in Section 4.07, Wildlife, take of fully protected species will be avoided.

## Basin Plan

Pursuant to the Porter-Cologne Act, the Central Valley RWQCB prepares and updates the Basin Plan for the Sacramento and San Joaquin River Basins every 3 years; the most recent update was completed in September 2009 (Central Valley Regional Water Quality Control Board 2009). The Basin Plan describes the officially designated beneficial uses for specific surface water and groundwater resources and the enforceable water quality objectives necessary to protect those beneficial uses. The Project Islands are located within the Central Valley RWQCB jurisdiction and is subject to the Basin Plan.

The Basin Plan includes numerical and narrative water quality objectives for physical and chemical water quality constituents. Numerical objectives are set for temperature, DO, turbidity, and pH; TDS, electrical conductivity, bacterial content, and various specific ions; trace metals; and synthetic organic compounds. Narrative objectives are set for parameters such as suspended solids, biostimulatory substances (e.g., nitrogen and phosphorus), oil and grease, color, taste, odor, and aquatic toxicity. Narrative objectives are often precursors to

numeric objectives. The primary method used by the Central Valley RWQCB to ensure conformance with the Basin Plan's water quality objectives and implementation policies and procedures is to issue WDRs for projects that may discharge wastes to land or water. WDRs specify terms and conditions that must be followed during the implementation and operation of a project.

Section 4.2, Water Quality, addresses Basin Plan elements and compliance.

## California Toxics Rule and State Implementation Policy

The California Toxics Rule (CTR) was promulgated in 2000 in response to requirements of the EPA National Toxics Rule (NTR). The NTR and CTR criteria are regulatory criteria adopted for inland surface waters, enclosed bays, and estuaries in California that are subject to regulation pursuant to Section 303(c) of the CWA. The NTR and CTR include criteria for the protection of aquatic life and human health. Human health criteria (water and organisms) apply to all waters with a Municipal and Domestic Supply beneficial use designation as indicated in the RWQCBs' basin plans. The Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California, also known as the State Implementation Plan, was adopted by the State Water Board in 2000 to establish provisions for translating CTR criteria, NTR criteria, and basin plan water quality objectives for toxic pollutants into the following:

- NPDES permit effluent limits,
- Compliance determinations,
- monitoring for dioxin (2,3,7,8-TCDD) equivalents,
- chronic toxicity control provisions,
- initiating site-specific objective development, and
- granting exceptions.

The numeric toxics criteria of the CTR and the State Implementation Plan are relevant to the assessment of potential pollution from herbicides and pesticides, some of which may be in use or may be present on the Project islands. Section 4.2, Water Quality, further addresses water quality issues.

## California Register of Historic Resources

The CRHR includes resources that are listed in or formally determined eligible for listing in the NRHP (see Section 2.18, Cultural Resources) as well as some California State Landmarks and Points of Historical Interest (PRC Section 5024.1, 14, CCR Section 4850). Properties of local significance that have been designated under a local preservation ordinance (local landmarks or landmark districts) or that have been identified in a local historical resources inventory may be eligible for listing in the CRHR and are presumed to be significant resources for purposes of CEQA unless a preponderance of evidence indicates otherwise

(State CEQA Guidelines Section 15064.5[a][2]). The eligibility criteria for listing in the CRHR are similar to those for NRHP listing but focus on the importance of the resources to California history and heritage. A cultural resource may be eligible for listing in the CRHR if it:

1. is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage;
2. is associated with the lives of person important in our past;
3. embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important individual, or possesses high artistic values; or
4. has yielded, or may be likely to yield, information important in prehistory or history.

Historic resources are addressed in Section 4.11, Cultural Resources.

## **Native American Heritage Commission**

NAHC identifies and catalogs places of special religious or social significance to Native Americans and known graves and cemeteries of Native Americans on private lands, and performs other duties regarding the preservation and accessibility of sacred sites and burials and the disposition of Native American human remains and burial items.

Native American resources are discussed in Section 4.11, Cultural Resources.

## **California Climate Solutions Act**

In September 2006, Governor Arnold Schwarzenegger signed AB 32, the California Climate Solutions Act of 2006. AB 32 requires that statewide GHG emissions be reduced to 1990 levels by 2020. This reduction will be accomplished through an enforceable statewide cap on GHG emissions that will be phased in starting in 2012. To effectively implement the cap, AB 32 directs the California Air Resources Board (CARB) to develop and implement regulations to reduce statewide GHG emissions from stationary sources. AB 32 specifies that regulations adopted in response to AB 1493 should be used to address GHG emissions from vehicles. However, AB 32 also includes language stating that if the AB 1493 regulations cannot be implemented, then CARB should develop new regulations to control vehicle GHG emissions under the authorization of AB 32.

AB 32 requires that CARB adopt a quantified cap on GHG emissions representing 1990 emissions levels and disclose how it arrives at the cap; institute a schedule to meet the emissions cap; and develop tracking, reporting, and enforcement mechanisms to ensure that the state achieves the reductions in GHG emissions necessary to meet the cap. AB 32 also includes guidance to institute

emissions reductions in an economically efficient manner and conditions to ensure that businesses and consumers are not unfairly affected by the reductions.

Contributions of GHG emissions related to the Project are discussed in Section 4.14, Climate Change.

## California Regulations for Environmental Justice

Most state governments have plans and policies intended to protect and expand the local and regional economies affecting the communities within their jurisdictions. State plans and policies also frequently address other social and economic impact topics, including fiscal conditions and related public services that affect local residents' quality of life.

Within California, SB 115 (Chapter 690, Statutes of 1999) was signed into law in 1999. The legislation established OPR as the coordinating agency for state environmental justice programs (California Government Code, Section 65040.12[a]) and defined environmental justice in statute as “the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies” (Government Code Section 65040.12(e)). SB 115 further required the CalEPA to develop a model environmental justice mission statement for boards, departments, and offices within the agency by January 1, 2001 (Public Resources Code, Sections 72000–72001).

In 2000, SB 89 (Chapter 728, Statutes of 2000) was signed, which complemented SB 115 by requiring the creation of an environmental justice working group and an advisory group to assist CalEPA in developing an intra-agency environmental justice strategy (PRC Sections 72002–72003). SB 828 (Chapter 765, Statutes of 2001) added and modified due dates for the development of CalEPA's intra-agency environmental justice strategy and required each board, department, and office within CalEPA to identify and address, no later than January 1, 2004, any gaps in its existing programs, policies, and activities that may impede environmental justice (PRC, Sections 71114–71115).

Cal/EP A adopted its environmental justice policy in 2004 (California PRC, Sections 71110–71113). This policy (or strategy) provides guidance to its resource boards, departments, and offices. It is intended to help achieve the state's goal of “achieving fair treatment of people of all races, cultures and incomes with respect to the development, adoption, implementation and enforcement of environmental laws and policies.”

AB 1553 (Chapter 762, Statutes of 2001) required OPR to incorporate environmental justice considerations in the General Plan Guidelines. AB 1553 specified that the guidelines should propose methods for local governments to address the following:

- planning for the equitable distribution of new public facilities and services that increase and enhance community quality of life,

- providing for the location of industrial facilities and uses that pose a significant hazard to human health and safety in a manner that seeks to avoid over-concentrating these uses in proximity to schools or residential dwellings,
- providing for the location of new schools and residential dwellings in a manner that avoids proximity to industrial facilities and uses that pose a significant hazard to human health and safety, and
- promoting more livable communities by expanding opportunities for transit-oriented development.

Although environmental justice is not a mandatory topic in the general plan, OPR is required to provide guidance to cities and counties for integrating environmental justice into their general plans. The 2003 edition of the *General Plan Guidelines* included the contents required by AB 1553 (see pages 8, 12, 20–27, 40, 114, 142, 144, and 260 of the revised *General Plan Guidelines*).

The Project does not present conflicts with environmental justice objectives, as described in Chapter 3K of the 2001 FEIS, “Economic Conditions and Effects.”

## Water Use Efficiency

The California Constitution prohibits the waste or unreasonable use of water. Further, Water Code Section 275 directs DWR and the State Water Board to “take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste or unreasonable use of water.” Several legislative acts have been adopted to develop efficient use of water in the state:

- Urban Water Management Planning Act of 1985,
- Water Conservation in Landscaping Act of 1992,
- Agricultural Water Management Planning Act,
- Agricultural Water Suppliers Efficient Management Practices Act of 1990,
- Water Recycling Act of 1991, and
- Agricultural Water Conservation and Management Act of 1992.

The Project proposes to make more efficient use of existing water resources through capture of Delta flow during times of surplus, as described in Section 4.1, Water Supply.

## Public Trust Doctrine

When planning and allocating water resources, the State of California is required to consider the public trust and preserve for the public interest the uses protected by the trust. The public trust doctrine embodies the principle that certain

resources, including water, belong to all and, thus, are held in trust by the state for future generations.

In common law, the public trust doctrine protects navigation, commerce, and fisheries uses in navigable waterways. However, the courts have expanded the doctrine's application to include protecting tideland, wildlife, recreation, and other public trust resources in their natural state for recreational, ecological, and habitat purposes as they affect birds and marine life in navigable waters. *The National Audubon Society v. Superior Court of Alpine County* (1983) 33 Cal 3d 419 decision extended the public trust doctrine's limitations on private rights to appropriative water rights, and also ruled that longstanding water rights could be subject to reconsideration and could possibly be curtailed. The doctrine, however, generally requires the court and the State Water Board to perform a balancing test to weigh the potential value to society of a proposed or existing diversion against its impact on trust resources.

The 1986 Rancanelli decision applied the public trust doctrine to decisions by the State Water Board and held that this doctrine must be applied by the State Water Board in balancing all the competing interests in the uses of Bay-Delta waters (*United States v. State Water Resources Control Board* [1986] 182 Cal. App. 3d 82).

The Project is consistent with the public trust doctrine, as its primary objective is to improve water supply reliability through capture of Delta flow during times of surplus, and secondarily provides for enhanced fish and wildlife habitat. These objectives are discussed in Section 4.1, Water Supply; Section 4.5, Fishery Resources; and Section 4.7, Wildlife.

## Relocation Assistance and Property Acquisition

The State of California's Government Code Section 7260, *et seq.* brings the California Relocation Act into conformity with the federal Uniform Act. In the acquisition of real property by a public agency, both the federal and state acts seek to (1) ensure consistent and fair treatment of owners of real property, (2) encourage and expedite acquisition by agreement to avoid litigation and relieve congestion in the courts, and (3) promote confidence in public land acquisition.

The Relocation Assistance and Real Property Acquisition Guidelines were established by 25 CCR 1.6. The guidelines were developed to assist public entities with developing regulations and procedures implementing Title 42, Chapter 61 of the USC, the Uniform Act, for federal and federally assisted programs. The guidelines are designed to ensure that uniform, fair, and equitable treatment is given to people displaced from their homes, businesses, or farms as a result of the actions of a public entity. Under the act, persons required to relocate temporarily are not considered displaced, but must be treated fairly. Such persons have a right to temporary housing that is decent, safe, and sanitary, and must be reimbursed for all reasonable out-of-pocket expenses. In accordance with these

guidelines, people may not suffer disproportionate injury as a result of action taken for the benefit of the public as a whole. Additionally, public entities must ensure consistent and fair treatment of owners of such property, and encourage and expedite acquisitions by agreement with owners of displaced property to avoid litigation.

The Project proposes no acquisition of property or resulting relocations.

## State and Regional Plan Consistency

### Clean Water Act, Section 303(d)

Under CWA Section 303(d), the RWQCB and the State Water Board list water bodies as impaired when not in compliance with designated water quality objectives and standards. A TMDL program must be prepared for waters identified by the state as impaired. A TMDL is a quantitative assessment of a problem that affects water quality. The problem can include the presence of a pollutant, such as a heavy metal or a pesticide, or a change in the physical property of the water, such as DO or temperature. A TMDL specifies the allowable load of pollutants from individual sources to ensure compliance with water quality standards. Once the allowable load and existing source loads have been determined, reductions in allowable loads are allocated to individual pollutant sources.

The Project effects on water quality are addressed in Section 4.2, Water Quality.

### Water Rights

California employs a dual system of surface water rights that recognizes both appropriative and riparian rights. An appropriative water right consists of the right to divert a specified quantity of water for a reasonable, beneficial use. Under the riparian doctrine, the owner of land contiguous to a watercourse has the right to the reasonable, beneficial use of the natural flow of water on his or her land. A riparian user may not seasonally store water or use water outside the watershed.

The State Water Board administers the state's statutory water right permit and license system, which applies to appropriations of water from surface streams and subterranean streams flowing through known and definite channels. (Wat. Code, § 1200.) Since 1914, the permit and license system provides the exclusive means of acquiring a new appropriative water right. (*Id.*, § 1225.) To obtain a new appropriative water right, a person must file a water right application with the State Water Board to appropriate water for a reasonable and beneficial purpose. (Wat. Code, §§ 100, 1252.)

As discussed in Chapter 1, the Project applicant originally filed water right applications 29062, 29066, 30268, and 30270 with the State Water Board in 1987 for water rights to store water seasonally on all four of its Project islands and to sell that water to potential users in the CVP and SWP service areas. In 1993, the Project applicant revised the 1987 applications to accommodate the reduction from four to two storage islands and also filed new water right applications for direct diversion to the Project Reservoir Islands. The State Water Board issued D-1643 in February 2001 approving the Project applicant's water right applications and associated petitions to change these applications, subject to terms and conditions. CDWA brought a petition for a writ of mandate challenging the State Water Board's issuance of D-1643 and certification of the FEIR in Sacramento County Superior Court. In April 2002, the Sacramento County Superior Court rejected each cause of action brought by CDWA. The Third District Court of Appeal in *Central Delta Water Agency v. State Water Resources Control Board*, 124 Cal. App. 4th 245 (2004), affirmed the Superior Court decision in most respects, but set aside the water right permits for failure "to specify an actual use of and the amounts of water to be appropriated."

Consistent with the Project description given in Chapter 2, the Project applicant has filed petitions with the State Water Board to add places of use and places of underground storage to the Project water right applications and is seeking the reissuance of water right permits for the Project. This CEQA document is intended to support the State Water Board review and approval of the Project water right application.

## Local Plan Consistency and Regulatory Requirements

In addition to the federal and state regulatory and local plan requirements, the project may be subject to certain zoning or other ordinances and general plans of San Joaquin and Contra Costa Counties. For more discussion on local plans and requirements applicable to the project, refer to the specific resource sections of interest within this EIR.