

# Chapter 5

## Consultation and Coordination

### Introduction

This chapter describes the consultation and coordination associated with the Restoration Project. Public involvement, agency and PG&E<sup>1</sup> involvement, and environmental laws, regulations, and executive orders are discussed.

### Overview

Because of the federal and state actions associated with the Restoration Project, compliance with both NEPA (40 CFR 1500-1508) and CEQA (Public Resources Code §21000 *et seq.*) is required. As the federal lead agency, Reclamation is responsible for complying with all applicable environmental laws and regulations associated with the Restoration Project, including NEPA. FERC, a cooperating federal agency, is responsible for ensuring that the proposed modifications to the Hydroelectric Project associated with the Restoration Project comply with all applicable environmental laws and regulations, including NEPA, prior to issuing a license amendment for the Hydroelectric Project. Corps Individual and Nationwide Permits and FERC licensing actions in California, including new licenses, material license amendments, and relicensing, require CWA (33 USC 1251 *et seq.*) Section 401 water quality certification from the SWRCB. The SWRCB is the state lead agency for ensuring CEQA compliance. NEPA and CEQA compliance will be fulfilled through the preparation of a joint EIS/EIR.

### Public Involvement

#### Public Scoping

Public involvement is a vital and required component of the NEPA and CEQA processes. Scoping is a process to gather input from the public, including their

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<sup>1</sup> PG&E, the utility regulated by the California Public Utility Commission, owned the Battle Creek Hydroelectric Project (FERC Project No. 1121) at the time this document was prepared.

issues and concerns and, together with technical input and agency considerations, to define the significant issues to be addressed in the environmental document. NEPA regulations (40 CFR 1500 *et seq.*) define *scoping* as “an early and open process for determining the scope of issues to be addressed, and for identifying the significant issues related to the proposed action.” The CEQA guidelines (Title 14 CCR §§15000 *et seq.*) require scoping meetings under limited circumstances and encourages scoping activities; however, it is encouraged.

The main objectives of the scoping process are to:

- provide the public and potentially affected agencies with adequate information and time to review and provide oral and/or written comments on a project,
- help ensure that issues related to the project are identified early and properly studied,
- ensure that the project alternatives are balanced and thorough, and
- prepare the appropriate environmental documentation.

Reclamation placed a Notice of Intent to prepare an EIS/EIR and notice of a public scoping meeting in the *Federal Register* on January 12, 2000. A brief description of the proposed Restoration Project, a request for written comments, and details on the public scoping meeting were included in the notice.

A joint federal and state public scoping meeting was held on January 31, 2000, at the Manton School Gymnasium in Manton, California. During this meeting, the public was presented with an overview of the Restoration Project, including the purpose and need for the project, a project description, and the current project alternatives. In addition, written and oral comments were received from the public at this meeting.

The SWRCB issued a Notice of Preparation of a draft EIS/EIR for the Restoration Project on April 12, 2000. The notice was circulated through the State Clearinghouse for agency review and comment on April 13, 2000.

The Scoping Report<sup>2</sup> provides an overview of the Restoration Project; describes the environmental compliance process associated with the Restoration Project, including the role of public scoping; discusses the public scoping meeting; describes Restoration Project alternatives; and contains comments received throughout the scoping process.

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<sup>2</sup> The Scoping Report is available on Reclamation’s web site at <http://www.mp.usbr.gov/regional/battlecreek>.

## **Public Participation in Restoration Project Meetings**

In addition to the public scoping process, public participation has been encouraged and has occurred at Restoration Project meetings. The public input received at Restoration Project meetings, including the Battle Creek Working Group, Environmental and Design Technical Team, and Project Management Team meetings, has been used throughout the development of the EIS/EIR.

## **Public Review of the Draft Environmental Impact Statement/Environmental Impact Report**

The release of the draft EIS/EIR is another opportunity for the public to provide input on the analysis of the environmental effects of the proposed project and the other alternatives examined in the EIS/EIR. Responses to the comments received during the review of the draft document will be included in the final EIS/EIR.

## **Agency and PG&E Involvement**

### **U.S. Department of Interior, Bureau of Reclamation**

Reclamation is participating in the Restoration Project pursuant to the CVPIA (Title 34, Public Law 102-575) and the California Bay-Delta Environmental Enhancement Act (Title 11, Public Law 104-333). As the federal agency that will carry out the Restoration Project, Reclamation will act as the federal lead agency. Reclamation is responsible for complying with all applicable environmental laws and regulations associated with the Restoration Project, including NEPA, Section 106 of the National Historic Preservation Act (16 USC 470), the Fish and Wildlife Coordination Act (FWCA) (16 USC 661-667e), the ESA (16 USC 1531-1544), and the CWA (33 USC 1251-1376).

### **Federal Energy Regulatory Commission**

FERC is participating in the Restoration Project as the licensor of the Hydroelectric Project. As a cooperating federal agency, FERC is required to ensure that proposed changes in the Hydroelectric Project comply with NEPA, Section 7 of the ESA, Section 106 of the National Historic Preservation Act, the FWCA, and Section 401 of the CWA before issuing the license amendment.

## **FERC Authority and Responsibilities for Hydroelectric Project License Amendment Approval or Denial**

The proposed federal action for FERC with regard to the Restoration Project is its decision whether to issue a license amendment for the Hydroelectric Project, and if so, what conditions should be placed in the amended license.

After receiving the license amendment application from PG&E, FERC will issue a public notice requesting any comments, protests, or motions to intervene concerning the proposed application. FERC intends to use this EIS/EIR and the biological opinion for the Restoration Project to fulfill NEPA and ESA compliance requirements when deciding whether to approve the license amendment request.

Subject to the comments received in response to the public notice, and CWA, NEPA, and ESA compliance, FERC may decide to amend the license and incorporate any terms and conditions that were required as part of NEPA mitigation, FWCA, CWA Section 401 water quality certification issued by the state, and any conditions resulting from the ESA consultation process.

## **National Marine Fisheries Service**

The National Oceanic and Atmospheric Administration, NOAA Fisheries, is participating in the Restoration Project pursuant to its jurisdiction over anadromous fish and its mandates under the ESA.

## **U.S. Department of the Interior, U.S. Fish and Wildlife Service**

(Per 1999 MOU, Section 1.10) The USFWS is participating in the Restoration Project pursuant to the CVPIA (Title 34, Public Law 102-575), the Endangered Species Act (16 USC 1531-1544, as amended), FWCA (16 USC 661-667e), and the Fishery Conservation and Management Act (16 USC Sections 1801-1882). A Draft Fish and Wildlife Coordination Act Report is provided in Appendix Q of this document, and can also be accessed on the web site of the Fish and Wildlife Service's Sacramento office (<http://sacramento.fws.gov>), under the section titled "Of Special Interest."

## **State Water Resources Control Board**

The SWRCB is responsible for administering surface water rights throughout California (Water Code §§1000–5976). Among other things, the SWRCB issues permits and licenses to appropriate water users; acts on petitions to change the

point of diversion, place of use, or purpose of use authorized under a permit or license; and investigates complaints against water users.

In addition, the SWRCB is charged with the prevention of the waste or unreasonable use of water, the conservation of beneficial uses of water, including instream beneficial uses, and the protection of the public interest (Cal. Const., Article X, §2; Water Code §§100, 275). The public trust doctrine imposes upon the SWRCB the affirmative duty to supervise the protection of public trust interests, including interests in commerce, fishery, recreation, and ecology in navigable water bodies (National Audubon Society v. Superior Court [1983] 33 Cal. 3d 419 [658 P.2d 709, 189 Cal. Rptr. 346]).

The federal CWA (33 USC 1251 *et seq.*) was enacted “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” (33 USC 1251[a]). Section 101(g) of the CWA (33 USC. 1251[g]) requires federal agencies to “cooperate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.” Section 401 of the CWA (33 USC 1341) requires every applicant for a federal license or permit to provide the responsible federal agency with certification that the project will be in compliance with specified provisions of the CWA, including Section 303 (Water Quality Standards and Implementation Plans, 33 USC §1313); directs the state agency responsible for certification to prescribe effluent limitations and other limitations necessary to ensure compliance with the CWA and with any other appropriate requirement of state law; and provides that state certification conditions shall become conditions of any federal license or permit for the project.

The SWRCB is the agency responsible for water quality certification in California (Water Code §13160); and has delegated this function to the Executive Director by regulation (Title 23 CCR §3838, subd. [a]).

The California RWQCBs have adopted and the SWRCB has approved Water Quality Control Plans for each watershed basin in accordance with provisions of Section 303 of the CWA related to the establishment of water quality standards and planning (33 USC 1313). These plans identify beneficial uses of the waters within each region.

The California CVRWQCB, in its Water Quality Control Plan for the Central Valley Region, Sacramento River and San Joaquin River Basins, has identified the beneficial uses of Battle Creek as irrigation, stock watering, hydropower generation, contact and noncontact recreation, canoeing and rafting, cold freshwater habitat, warm freshwater habitat, salmon and steelhead migration, warm and cold spawning, and wildlife habitat.

Protection of the chemical, physical, and biological integrity of waters of the state for instream beneficial uses identified in the Basin Plans requires the maintenance of adequate streamflows as well as effluent limitations and other limitations on discharges of pollutants from point and nonpoint sources to navigable waters and their tributaries.

The SWRCB is participating as the state lead agency for CEQA compliance. It is responsible for approving or denying the issuance of certifications of compliance with Section 401 of the CWA for any federal permits or license amendments necessary to carryout the Restoration Project. In addition, the SWRCB may be petitioned pursuant to Water Code Section 1707 (a)(1) to change the purpose of use of PG&E water rights that may be transferred as a result of the adoption of the proposed alternative. Water Code Section 1707 (a)(1) authorizes any person entitled to the use of water, whether based upon an appropriative, riparian, or other right, to petition the SWRCB for a change in purpose of use for preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in or on the water.

## **California Department of Fish and Game**

The DFG participation in the Restoration Project is based on its responsibilities as trustee agency for the fish and wildlife resources of California and its jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (Fish and Game Code §§1801-1802), the CESA (Fish & Game Code §§2050-2068) and other applicable state and federal laws.

## **Pacific Gas and Electric Company**

PG&E is participating in the Restoration Project as the owner and operator of the Hydroelectric Project. As PG&E, it is responsible for submitting a license amendment application to FERC for the modifications to the Hydroelectric Project associated with the Restoration Project.

## **Hydroelectric Project License Amendment Application**

To implement changes to the Hydroelectric Project, PG&E is required by the Federal Power Act (FPA) (16 USC 791-828c) to submit a license amendment application to FERC and obtain its concurrence. PG&E proposes to use a hybrid of the consultation requirements specified in 18 CFR 4.38 for its license amendment application for the Hydroelectric Project. In addition to the requirements in 18 CFR 4.38, PG&E proposes to use a hybrid process that incorporates elements of the alternative licensing and amendment procedures described in FERC Order 596, including public outreach and participation.<sup>3</sup>

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<sup>3</sup> The alternative process is voluntary. Applicants may use the standard seven-step process.

## Process Protocol

As part of its use of a hybrid process, PG&E has prepared a communications protocol entitled, “Communications Protocol for Preparing NEPA/CEQA Documents, the FERC License Amendment Application, and Other Related Documents for the Battle Creek Salmon and Steelhead Restoration Project, Battle Creek Hydroelectric Project, FERC Project No. 1121” (PG&E 1999) (Communications Protocol). The Communications Protocol reviews general distribution methods for documenting communication and consultation among parties during the preparation of environmental compliance documents and the license amendment application. It also includes relevant background information regarding ongoing cooperation between PG&E and federal and state regulatory agencies interested in fishery restoration in Battle Creek, participants in the compliance documents process, public reference files for the Restoration Project, and specific information regarding written communications, telephone conversations, and public meetings and notices consistent with the Communications Protocol.

## Consultation on Restoration Project and License Amendment

In the summer of 1999, several technical teams studied and reviewed the construction and environmental impacts of the project alternatives and developed a draft Adaptive Management Plan (Appendix D) for the Proposed Action Alternative. Members of the teams included Reclamation, USFWS, NOAA Fisheries, FERC, DFG, SWRCB, California Department of Water Resources, PG&E, Battle Creek Working Group, Battle Creek Watershed Conservancy, Friends of the River, and others. The teams were:

- **Project Management Team:** The Project Management Team assessed progress and addressed issues that arose in the broad range of concurrent efforts associated with the implementation of the Restoration Project.
- **Adaptive Management Policy and Technical Teams:** The Adaptive Management Policy and Technical Teams developed a draft Adaptive Management Plan for the Proposed Action Alternative.
- **Design Technical Team:** The Design Technical Team met with the Fish Passage Technical Team as design work evolved for various proposed Restoration Project features.
- **Environmental Technical Team:** The Environmental Technical Team has worked to identify the environmental compliance requirements for the Restoration Project and supported the development of documentation to meet these requirements.
- **Fish Passage Technical Team:** The Fish Passage Technical Team evaluated options to improve or restore fish passage as part of the Restoration Project.

- **Real Estate Team:** The Real Estate Team has met with property owners and has prepared surveys of lands within the Restoration Project.

Most of the teams met monthly; meetings were open to the public. The meetings were announced on Reclamation's web page for the Restoration Project (Reclamation n.d.) for the Restoration Project. In addition, email notices of meetings were distributed to the team participants. Anyone could request to be included on the email list.

## Laws, Regulations, and Executive Orders

The following sections briefly describe each law, regulation, and executive order as they are understood and interpreted by the applicable regulating agency. Federal, state, and local environmental laws, regulations, and executive orders that may be applicable to the Restoration Project are reviewed briefly below:

### National Environmental Policy Act

Funding and implementation of the Restoration Project qualifies as a major federal action under NEPA (42 USC 4321-4347). NEPA regulations (40 CFR 1508.18) define a *major federal action* to include actions that may be major and that are potentially subject to federal control and responsibility. Such actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies (40 CFR 1508.18[a]). The Restoration Project also qualifies as a federal action because it involves federal approval of specific projects, such as construction or management activities located in a defined geographic area, and includes actions approved by permit or other regulatory decision as well as federal and federally assisted activities (40 CFR 1508.18[b][4]).

The Proposed Action and other alternatives analyzed in this EIS/EIR account for these other essential considerations through the carefully developed balancing of fishery restoration measures and the preservation of an economically valuable source of clean, renewable hydropower.

### Federal Power Act

Originally enacted in 1920, the FPA (16 USC 791-828c) provided for cooperation between FERC and other federal agencies, including resource agencies, in licensing and relicensing power projects. The FPA provides FERC the exclusive authority to license non-federal hydroelectric power projects on navigable waterways and federal lands. Many of the subsequent amendments have not involved resource issues; however, the 1935 and 1986 amendments



added new requirements to incorporate fish and wildlife concerns in licensing, relicensing, and exemption procedures.

FERC is authorized to issue licenses to construct, operate, and maintain dams, water conduits, reservoirs, and transmission lines to improve navigation and to develop power from any streams or other bodies of water over which it has jurisdiction (16 USC 797[e]). Navigable waters (for which FERC has jurisdiction under the Commerce Clause) are defined to include “streams or other bodies of water over which Congress has jurisdiction to regulate commerce among foreign nations and among the States” (16 USC 796). Any license application for a project must contain conditions deemed necessary by the federal department that has jurisdiction to protect the resources (16 USC 797[e]).

The FPA requires PG&E to file an application with FERC for an amendment to the existing license to operate the hydroelectric facilities. Licenses are normally issued for terms of 30 years but may be issued for terms of up to 50 years (16 USC 799). The selected project must be the project best adapted to a comprehensive plan for improving or developing a waterway for several public benefits, including the “adequate protection, mitigation and enhancement of fish and wildlife” (16 USC 803[a]). These conditions are to be based on recommendations received pursuant to the FWCA from the USFWS, NOAA Fisheries, and state fish and wildlife agencies (16 USC 803[j][1]). The FPA empowers FERC to resolve any instances in which such recommendations are viewed as inconsistent, while according “due weight to the recommendations, expertise, and statutory responsibilities” of the resource agencies.

## Clean Water Act

### Section 401, Water Quality Certification

Section 401 of the CWA (33 USC 1251 *et seq.*) requires that proposed actions with federal agency involvement, including actions requiring federal agency approvals of a license or permit, that may result in a discharge of a pollutant into waters of the United States must not violate state or federal water quality standards. Section 401 also requires that any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities that may result in any discharge into navigable waters shall provide the licensing or permitting agency a certification from the state in which the discharge originates. The certification shall state that any such discharge will comply with the applicable provisions of the following CWA sections:

- 301: Effluent Limitations
- 302: Water Quality Related Effluent Limitations
- 303: Water Quality Standards and Implementation Plans
- 306: National Standards of Performance

- 307: Toxic and Pretreatment Effluent Standards

The SWRCB must issue its water quality certification before FERC can approve PG&E's license amendment for the Hydroelectric Project. Similarly, CWA Section 401 water quality certification is needed before the Corps can issue Section 404 permits for the discharge of dredged or fill material.

## **Section 402, National Pollutant Discharge Elimination System**

In 1972, the CWA was amended to provide that the discharge of pollutants to waters of the United States from any point source is unlawful unless the discharge is in compliance with a National Pollutant Discharge Elimination System (NPDES) permit. The 1987 amendments to the CWA, which added Section 402(p), established a framework for regulating municipal and industrial stormwater discharges under the NPDES program.

The CWA, therefore, requires that all point sources that discharge pollutants into waters of the United States must obtain an NPDES permit. The NPDES program controls direct discharges into navigable waters. Direct discharges, or point source discharges, are from discrete conveyances such as pipes or human-made ditches and sewers. NPDES permits, which are issued by the state, contain industry-specific, technology-based, and/or water quality-based limits and establish pollutant monitoring and reporting requirements.

The regulations provide that discharges of stormwater to waters of the United States from construction projects that encompass 1 or more acres of soil disturbance are effectively prohibited unless the discharge is in compliance with an NPDES Permit. A permit applicant must provide quantitative analytical data identifying the types of pollutants present in the facility's effluent. The permit will then set forth the conditions and effluent limitations under which a facility may make a discharge.

While federal regulations allow two permitting options for stormwater discharges (individual permits and general permits), the SWRCB may elect to adopt the statewide General Permit. The General Permit requires all discharges whose construction activity disturbs 1 acre or more to:

- develop and implement a SWPPP that specifies BMPs to minimize accelerated erosion and prevent all construction pollutants from contacting stormwater;
- eliminate or reduce nonstormwater discharges to storm sewer systems and other waters of the nation; and
- perform inspections of all BMPs.

The California Central Valley RWQCB will enforce any General Permit issued for the Restoration Project. Restoration Project construction activity subject to a General Permit would include clearing, grading, disturbances to the ground such as stockpiling, or excavation that results in soil disturbances of at least 5 acres of total land area. Construction activity resulting in soil disturbances of less than 5 acres is subject to a General Permit if it is part of a larger common plan of development that encompasses 5 or more acres of soil disturbance or if it results in significant water quality impairment. The SWPPP for the Restoration Project will apply to all construction clearing, grading, or disturbances to the ground such as stockpiling or to excavation that results in soil disturbance. The SWPPP will also address construction-related nonstormwater discharges and hazardous material spill prevention and recovery.

## 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. The Corps has jurisdictional authority to regulate all activities that dredge, dam, or divert navigable waters or that result in the deposit of dredged and fill material into waters of the United States, which includes perennial and intermittent streams, lakes, ponds, and nonisolated wetlands.

Under the Corps's evaluation, an analysis of practicable alternatives is a screening mechanism used to determine the appropriateness of permitting a discharge (CWA Section 404[b][1]). The Corps's evaluation also includes an analysis of compliance with other requirements of EPA guidelines, a public interest review, and an evaluation of potential impacts on the environment in compliance with NEPA.

General Nationwide Permits may be issued for similar actions with similar environmental effects, or individual permits may be issued for separate actions. Permit requirements for Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403) are less extensive and prohibit the unauthorized obstruction or alteration of any navigable waters of the United States without a permit from the Corps. Where applicable, the Corps combines the permit requirements of Section 10 with those of Section 404 under one permit application. Restoration actions, except water acquisitions, water allocations, and water rights adjudications, may require successfully completing the Section 404 and Section 10 compliance process.

To issue a Nationwide Permit under Section 404, the Corps must ensure that the discharge will not violate the state's water quality standards. In California, all Nationwide Permits related to FERC project activities that may result in a discharge to a surface water of the United States must obtain an individual 404 permit, which requires a Section 401 water quality certification or a waiver of certification from the SWRCB. Additionally, the Corps must comply with the requirements of Section 7 of the ESA (16 USC 1531-1544) and Section 106 of the National Historic Preservation Act (NHPA) (16 USC 470). The Restoration

Project, if approved, will likely be authorized under Section 404 by the use of several Nationwide Permits and Letter of Permission (LOP). The Corps uses an abbreviated process to issue Letters of Permission for individual actions that have minimal adverse environmental effects.

An LOP is a type of Standard Permit issued through an abbreviated processing procedure, which includes coordination with federal and state fish and wildlife agencies as required by the FWCA, and a public interest evaluation, but without publishing of an individual public notice. Activities that qualify for processing through LOP procedures are fill activities that do not qualify for existing nationwide permit(s) or other general permit. These fill activities have minor impacts and therefore do not warrant more detailed processing. The LOP will be used only for those projects where the applicant performs a thorough pre-application coordination among the regulatory and resource agencies.

The LOP is an expedited process for an individual permit, where a decision to issue authorization is made within 45 days. (CWA 33 USC 1344; 33 CFR 325.2(e)(1)(ii).)

## Federal Endangered Species Act

Section 7 of the ESA of 1973 (16 USC 1531-1544, as amended) requires federal agencies, in consultation with the USFWS and the NOAA Fisheries, 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 request information from the USFWS and NOAA Fisheries regarding the existence of listed species or species proposed for listing in a project area.
- Following receipt of the USFWS and NOAA Fisheries responses to this request, lead agencies generally prepare a biological assessment to determine whether any listed species or species proposed for listing are likely to be affected by a proposed action.
- Lead agencies initiate formal consultation with the USFWS and NOAA Fisheries if the proposed action would affect listed species.
- The USFWS and NOAA Fisheries prepare a biological opinion to determine whether the action would jeopardize the continued existence of listed species or adversely modify their critical habitat.
- If a finding of jeopardy or adverse modifications is made in the biological opinion, the USFWS and NOAA Fisheries recommend reasonable and prudent alternatives that would avoid jeopardy, and the lead agency must modify the project to ensure that listed species are not jeopardized and that

their critical habitat is not adversely modified, unless an exemption from this requirement is granted.

Because the Restoration Project is a CALFED action that could result in the destruction or adverse modification of the critical habitat of one or more species, Reclamation, as the federal lead agency, must comply with Section 7 of the federal ESA. In addition, the FERC license amendment approval process and the Corps Section 404 authorization, as federal actions, also will require compliance with Section 7 of the ESA.

The Restoration Project is funded by CALFED, and therefore, it is required, as a condition of several CALFED agreements, that an Action Specific Implementation Plan (ASIP) be prepared. An ASIP serves as a single document for entities implementing CALFED actions to simultaneously fulfill the requirements of the federal ESA, the California ESA, and the NCCPA. ASIPs provide project-level compliance with these acts and tier from the CALFED Multi-Species Conservation Strategy, which served as the CALFED programmatic biological assessment and NCCP and the CALFED programmatic biological opinions and NCCP determination. In the context of compliance with Section 7 of the federal ESA, the ASIP will serve as the biological assessment for the Restoration Project.

An ASIP will be prepared to assess the effect of the Restoration Project on the species listed or proposed for listing that are covered in the CALFED programmatic biological opinions. Although it is not anticipated, listed or proposed species that could be affected by the Restoration Project, but which are not covered under the CALFED programmatic biological opinions, will also be evaluated in the ASIP. The ASIP will be submitted with a request for formal Section 7 consultation with the USFWS and NOAA Fisheries. The formal consultation concludes within 90 days of the request for consultation being submitted to the USFWS and NOAA Fisheries. During consultation, the ASIP findings are reviewed. Based on that review, discussions may take place to modify the proposed action's features, designs, mitigation measures, and management plans to protect listed species while satisfying project objectives to the extent practicable. Within 135 days of beginning formal consultation, the USFWS and NOAA Fisheries must prepare biological opinions to determine whether the Restoration Project would jeopardize the continued existence of listed species or adversely modify or destroy their critical habitat.

## **Fish and Wildlife Coordination Act**

The FWCA (16 USC 661 et seq.) requires federal agencies to consult with the USFWS, NOAA Fisheries, and the state fish and wildlife resource agency (in this instance, the DFG) before undertaking or approving water projects that control or modify surface water. Under Subsection 2(a) of the FWCA, federal agencies are responsible for consulting with the USFWS for the purpose of conserving wildlife resources by preventing their loss and damage and providing for their

development and improvement in connection with water resource projects. Also, under Subsection 2(b), the USFWS is required to report its recommendations for wildlife conservation and development and the results expected and to describe the potential damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for this damage. Federal agencies undertaking water projects are required to fully consider recommendations made by the USFWS, NOAA Fisheries, and the state fish and wildlife resource agency in project reports, such as the NEPA and CEQA documents, and to include measures to reduce impacts on wildlife in project plans. A Draft Fish and Wildlife Coordination Act Report is provided in Appendix Q of this document, and can also be accessed on the web site for the USFWS's Sacramento Office (<http://sacramento.fws.gov>), under the section titled "Of Special Interest."

## Federal Clean Air Act

The federal Clean Air Act, promulgated in 1970 and amended twice thereafter (including the 1990 amendment), establishes the framework for modern air pollution control. The purpose of the federal Clean Air Act (42 USC 7401-7661) is to protect and enhance the quality of the nation's air resources and, thereby, to promote the public health and welfare and the productive capacity of its population. The Clean Air Act requires that any federal action be evaluated to determine its potential impact on air quality in the project region. Specifically, the federal agency must make a conformity determination.

The Clean Air Act directs the EPA to establish ambient air standards for six pollutants: ozone, carbon monoxide, lead, nitrogen dioxide, particulate matter, and sulfur dioxide. The standards are divided into primary and secondary standards; the former are set to protect human health within an adequate margin of safety and the latter to protect environmental values, such as plant and animal life.

The primary legislation that governs federal air quality regulations is the Clean Air Act Amendments of 1990 (CAAA). The CAAA delegates primary responsibility for clean air to the EPA. The EPA develops rules and regulations to preserve and improve air quality, as well as delegating specific responsibilities to state and local agencies.

The EPA has established NAAQS for criteria pollutants (Table 4.13-3). Criteria pollutants include CO, NO<sub>2</sub>, SO<sub>2</sub>, ozone, PM10, and lead.

Areas that do not meet the federal NAAQS shown in Table 4.13-3 are called *nonattainment* areas. For these nonattainment areas, the federal Clean Air Act requires states to develop and adopt SIPs, which are air quality plans showing how air quality standards will be attained. The SIP, which is reviewed and approved by the EPA, must demonstrate how federal standards will be achieved. Failing to submit a plan or secure approval could lead to denial of federal funding and permits for improvements such as highway construction and sewage

treatment plants. In cases where the SIP is submitted by the state but fails to demonstrate achievement of the standards, the EPA is directed to prepare a Federal Implementation Plan. In California, the EPA has delegated authority to prepare SIPs to the California Air Resources Board, which, in turn, has delegated that authority to individual air districts.

## National Historic Preservation Act

Section 106 of the NHPA (16 USC 470 *et seq.*) requires federal agencies to evaluate the effects of federal undertakings on significant cultural resources, termed historic properties. It requires federal agencies to coordinate with the SHPO and possibly the Advisory Council on Historic Preservation (ACHP) regarding the effects an undertaking may have on historic properties. Reclamation, FERC, and Corps involvement in implementing the Restoration Project activities and in authorizing federal licenses and permits triggers the need to comply with Section 106.

Section 106 defines the purpose and requirements of the federal review process to ensure that historic properties are considered during federal project planning and execution under the administration of the ACHP. The federal agency involved in a proposed project is responsible for initiating and completing the Section 106 review process. In general, Section 106 requires the federal agency to consult with the SHPO regarding a proposed project's effect on properties listed or eligible for listing on the NRHP. Other agencies may work with the SHPO and the ACHP throughout the process and may include other participants (e.g., federal and nonfederal agencies, Native American tribes, or applicants for federal grants, licenses, or permits) when proposed actions may affect their interests or activities.

Compliance with Section 106 will follow these steps:

- Historic or archaeological properties in the Restoration Project area, including properties listed on the NRHP and those properties that Reclamation and the SHPO agree are eligible for listing on the NRHP, are identified.
- If the Restoration Project is determined to have an adverse effect on historic properties, consultation with the SHPO and possibly the ACHP occurs to develop alternatives or mitigation measures to allow the project to proceed.

## American Indian Religious Freedom Act of 1978

The American Indian Religious Freedom Act of 1978 (42 USC 1996 *et seq.*) sets forth the policy of the U.S. Department of the Interior for protecting and preserving the observance of traditional Native American religions. The act requires that federal agencies evaluate their policies and procedures to ensure

compliance with the act. This consultation process will be coordinated with compliance with Section 106 of the NHPA.

## **Indian Trust Assets**

Indian Trust Assets are legal interests in property rights held by the United States for Indian Tribes or individuals. Trust status originates from rights imparted by treaties, statutes, or executive orders. Indian Trust Assets are lands (including reservations and public domain allotments), minerals, water rights, hunting and fishing rights, other natural resources, money, or claims. Assets include real property, physical assets, or intangible property rights. Indian Trust Assets cannot be sold, leased, or otherwise alienated without federal approval. They do not include things in which a tribe or individuals have no legal interest, such as off-reservation sacred lands or archeological sites in which a tribe has no legal property interest. Reclamation requires that NEPA documents include a determination of whether a project will have any impacts on Indian Trust Assets.

## **Executive Order 11990, Protection of Wetlands**

Executive Order 11990 is an overall wetlands policy applicable to all agencies managing federal lands, sponsoring federal projects, or providing federal funds to state or local projects. It requires affected federal agencies to follow avoidance, mitigation, and preservation procedures and to obtain public input before proposing new construction in wetlands. Derived from Executive Order 11990 is the Corps's "no net loss" policy for wetlands, which requires that any loss of wetlands be compensated for by creating wetlands with the same or similar value at a minimum one-to-one compensation-to-loss ratio.

The Restoration Project must be consistent with the overall wetlands policy contained in Executive Order 11990 because of the CWA Section 404 compliance requirements.

## **Executive Order 12898, Environmental Justice**

Environmental justice refers to the fair treatment of people of all races, income, and cultures with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment implies that no person or group of people should shoulder a disproportionate share of negative environmental impacts resulting from the execution of environmental programs. Reclamation requires that NEPA documents include a determination of whether a project will have such negative impacts.



## California Water Code

Title 14 of the California Water Code is a body of law that among other things controls the appropriation and use of California’s surface waters and the protection of surface water and groundwater. A water right is a legal entitlement authorizing water to be diverted from a specified source and put to beneficial, nonwasteful use. Water rights are property rights, but their holders do not own the water itself—they possess the right to use it. The exercise of some water rights requires a permit or license from the SWRCB.

## California Environmental Quality Act

The Restoration Project is also subject to CEQA (Public Resources Code §21000 et seq.). SWRCB CEQA compliance is required as part of its responsibilities for implementing the provisions of the CWA (33 USC 1251 et seq.). Section 401 of the CWA requires that any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities that may result in any discharge into the navigable waters shall provide the licensing or permitting agency a certification from the state in which the discharge originates.

Section 13160 of the California Water Code designates the SWRCB as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act (33 USC 1251 et seq.) and any other federal act. The SWRCB’s issuance of the water quality certification is a “discretionary” project<sup>4</sup> subject to CEQA compliance. The SWRCB will use the EIS/EIR for CEQA compliance. Section 401 of the CWA is discussed in greater detail on page 5-9.

## California Endangered Species Act

The CESA (Fish and Game Code §§2050–2068) generally parallels the main provisions of the federal ESA (16 USC 1531–1544) and is administered by the DFG. A state lead agency is required to consult with the DFG to ensure that any action it undertakes is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of essential habitat.

The CESA prohibits the “taking” of listed species except as otherwise provided in state law. Unlike the federal ESA, CESA applies the take prohibitions to species under petition for listing (state candidates) in addition to listed species.

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<sup>4</sup> *Project* means the whole of an action that has a potential to result in either a direct or a reasonably foreseeable indirect physical change in the environment and that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies (CEQA Guidelines §15378).

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.”

Section 2081 of the California Fish and Game Code expressly allows the DFG to authorize the incidental take of endangered, threatened, and candidate species if all of the following conditions are met:

- the take is incidental to an otherwise lawful activity;
- the impacts of the authorized take are minimized and fully mitigated;
- the permit is consistent with any regulations adopted in accordance with Sections 2112 and 2114 (legislature-funded recovery strategy pilot programs in the affected area) and
- the applicant ensures that adequate funding is provided for implementing mitigation measures and monitoring compliance with these measures and their effectiveness.

The CESA provides that an incidental take permit obtained under the federal ESA may authorize the taking of endangered or threatened species listed under the CESA, with no further CESA authorization or approval (Fish and Game Code Section 2080.1).

## Natural Community Conservation Planning Act

The Natural Community Conservation Planning Act (Fish and Game Code Section 2800 et seq.) was passed in 1991 and added to the CESA. This act provides for voluntary cooperation among DFG, landowners, and other interested parties to develop natural community conservation plans (NCCPs) that provide for early coordination of efforts to conserve species listed under CESA and reduce the likelihood for new listings of species. The primary purpose of the act is to preserve species and their habitats while allowing reasonable and appropriate development to take place. In compliance with this act, the CALFED program prepared the MSCS that served as a programmatic NCCP. In July 2000, DFG approved the MSCS through its issuance of an NCCP Determination. In 2002, a new Natural Community Conservation Planning Act was signed into law that replaced the act of 1991. This new act included a clause that “grandfathered” all approved programmatic NCCPs (i.e., the CALFED MSCS and NCCP Determination) as continuing to be in affect (Section 2830[c]).

In compliance with CESA and NCCPA, an ASIP will be prepared that will serve as the project-level NCCP for the Restoration Project. As described above in the section on the federal ESA, the ASIP is a means for entities implementing CALFED actions to simultaneously fulfill the requirements of the federal ESA, CESA, and NCCPA. The ASIP will evaluate California-listed and unlisted species that are covered in the CALFED programmatic NCCP determination. Although it is not anticipated, California-listed species that could be affected by the Restoration Project, but which are not covered under the CALFED

programmatic NCCP determination, will also be evaluated in the ASIP and take authorization sought under CESA Section 2081.

## **Lake and Streambed Alteration Agreement Program**

Sections 1601 and 1603 of the California Fish and Game Code address permitting requirements for any action that alters a streambed and has a related potential to adversely affect fish and wildlife resources. If construction activity could potentially have a substantial adverse effect on fish or wildlife resources, reasonable modifications or measures to protect these resources are required. The DFG is empowered under these code sections to propose modifications or measures to protect fish and wildlife resources.

## **California Regulations for Environmental Justice**

Environmental justice is defined 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” (California Government Code Section 65040.12).

California State agencies are firmly committed to the achievement of environmental justice. Environmental justice for all Californians will be attained when all Californians, regardless of race, culture, or income, enjoy the same degree of protection from environmental and health hazards and equal access to decision-making processes.

## **California Clean Air Act**

The purpose of the California Clean Air Act (Stats 1988, ch 1568), as administered by the California Air Resources Board and the regional air quality management districts, is to protect and enhance the quality of California’s air resources and, thereby, to promote and protect ecological resources and public health and welfare through the effective and efficient reduction of air pollutants, while recognizing and considering the effects on California’s economy.

The California Clean Air Act of 1988 substantially added to the authority and responsibilities of air districts. The California Clean Air Act designates air districts as lead air quality planning agencies, requires air districts to prepare air quality plans, and grants air districts authority to implement transportation control measures. The California Clean Air Act focuses on attainment of the state ambient air quality standards, which, for certain pollutants and averaging periods, are more stringent than the comparable federal standards.

The California Clean Air Act requires designation of attainment and nonattainment areas with respect to state ambient air quality standards. The

California Clean Air Act also requires that local and regional air districts expeditiously adopt and prepare an air quality attainment plan if the district violates state air quality standards for carbon monoxide, sulfur dioxide, nitrogen dioxide, or ozone. These Clean Air Plans are specifically designed to attain these standards and must be designed to achieve an annual 5% reduction in district-wide emissions of each nonattainment pollutant or its precursors. No locally prepared attainment plans are required for areas that violate the state PM10 standards.

The California Clean Air Act requires that the state air quality standards be met as expeditiously as practicable, but, unlike the federal Clean Air Act, does not set precise attainment deadlines. Instead, the act establishes increasingly stringent requirements for areas that will require more time to achieve the standards.

The California Clean Air Act emphasizes the control of “indirect and area-wide sources” of air pollutant emissions. The California Clean Air Act gives local air pollution control districts explicit authority to regulate indirect sources of air pollution and to establish traffic control measures (TCM). The California Clean Air Act does not define indirect and area-wide sources. However, Section 110 of the federal Clean Air Act defines an indirect source as

“A facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply...”

TCMs are defined in the California Clean Air Act as “any strategy to reduce trips, vehicle use, vehicle miles traveled, vehicle idling, or traffic congestion for the purpose of reducing vehicle emissions.”

Recently enacted amendments to the California Clean Air act impose additional requirements designed to ensure an improvement in air quality within the next five years. More specifically, local districts with moderate air pollution that do not achieve “transitional nonattainment” status by December 31, 1997, must implement the more stringent measures applicable to districts with serious air pollution.

The effects of the Restoration Project on air quality must be considered during the EIR process. During construction, Reclamation may be required to consult with the California Air Resources Board or appropriate air quality management district to ensure that Restoration Project construction conforms to regulations contained in the federal Clean Air Act and California Clean Air Acts and their implementing regulations.

## Shasta County Permits

Reclamation will obtain all of the required permits for the Restoration Project from the appropriate Shasta County offices. Zoning, administrative, and user

permits will be obtained from the Department of Planning. Encroachment, transportation, and floodplain development permits will be obtained from the Department of Public Works. Grading and hazardous material permits will be obtained from the Department of Environmental Health. The permit to construct and operate, burning permit, and fugitive emission control permits will be obtained from the Air Quality Management District. Reclamation will submit device information sheets to the Air Quality Management District.

## **Tehama County Permits**

Reclamation will obtain all of the required permits for the Restoration Project from the appropriate Tehama County offices. Demolition and building permits and the floodplain development permit will be obtained from the Department of Building and Safety. County road encroachment permits will be obtained from the Department of Public Works. Hazardous materials applications will be filed with the Department of Environmental Health. The air pollution control district permit, fugitive dust permit, and agricultural burn permit will be obtained from the Tehama County Air Pollution Control District. Reclamation will submit device information sheets to the Tehama County Air Pollution Control District.