

Chapter 5. Permits and Technical Studies for Special Laws or Conditions

5.1 Regulatory Requirements

The following laws and regulations were identified as possible constraints to project development within the ESL based on the identified resources:

Federal Endangered Species Act

The USFWS and NOAA have jurisdiction over species listed as threatened or endangered under Section 9 of the federal ESA. The ESA protects listed species from harm, or take, which is broadly defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct,” Under section 7 of the ESA, a federal agency must consult with the USFWS and NOAA if the agency’s action may affect a threatened or endangered species and/or its critical habitat under the authority of each agency.

California Endangered Species Act

The CDFG has jurisdiction over species listed as threatened or endangered under Section 2080 of the Fish and Game Code. Section 2080 prohibits the take of a species listed by CDFG as threatened or endangered. The state definition of take is similar to the federal definition, except that Section 2080 does not prohibit indirect harm to listed species by way of habitat modification. To qualify as take under the state ESA, an action must have direct, demonstrable detrimental effect on individuals of the species. Impacts on habitat that may ultimately result in effects on individuals are not considered take under the state ESA but can be considered take under the federal ESA.

Proponents of a project affecting a state-listed species must consult with CDFG and enter into a management agreement and take permit under Section 2080. The state ESA consultation process is similar to the federal process. California ESA does not require preparation of a state biological assessment; the federal biological assessment and the CEQA analysis or any other relevant information can provide the basis for consultation. California ESA requires that CDFG coordinate consultation for joint federally listed and state-listed species to the extent possible; generally, the state opinion for the listed species is brief and references provisions under the federal opinion.

Projects that impact species that are both state and federally listed can apply for a consistency determination under Fish and Game Code Section 2080.1, which states the requirements and procedures for a 2080.1 Consistency Determination. Section 2080.1 allows an applicant who has obtained a federal incidental take statement

pursuant to a federal Section 7 consultation or a federal Section 10(a) incidental take permit to notify the Director in writing that the applicant has been issued an incidental take statement or an incidental take permit pursuant to the federal Endangered Species Act of 1973. The applicant must submit the federal opinion incidental take statement or permit to the Director of Fish and Game for a determination as to whether the federal document is "consistent" with CESA. Receipt of the application by the Director starts a 30-day clock for processing the Consistency Determination.

Clean Water Act, Section 404

The COE and the EPA regulate the placement of dredged or fill material into "Waters of the United States" under Section 404 of the Clean Water Act. Waters of the United States include lakes, rivers, streams, and their tributaries, and wetlands. Wetlands are defined for regulatory purposes as "areas inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions" (33 Code of Federal Regulations [CFR] 328.3, 40 CFR 230.3).

The COE may issue either individual permits on a case-by-case basis or general permits on a program level. General permits are pre-authorized and are issued to cover similar activities that are expected to cause only minimal adverse environmental effects. Nationwide permits (NWP's) are general permits issued to cover particular fill activities. All NWP's have general conditions that must be met for the permits to apply to a particular project, as well as specific conditions that apply to each NWP.

Clean Water Act, Section 401

Section 401 of the Clean Water Act requires water quality certification and authorization of placement of dredged or fill material in wetlands and Other Waters of the United States. In accordance with Section 401 of the Clean Water Act, criteria for allowable discharges into surface waters have been developed by the State Water Resources Control Board, Division of Water Quality. The resulting requirements are used as criteria in granting National Pollution Discharge Elimination System (NPDES) permits or waivers, which are obtained through the Central Valley Regional Water Quality Control Board (RWQCB). Any activity or facility that will discharge waste (such as soils from construction) into surface waters, or from which waste may be discharged, must obtain an NPDES permit or waiver from the RWQCB. The RWQCB evaluates an NPDES permit application to determine whether the proposed discharge is consistent with the adopted water quality objectives of the basin plan.

California Fish and Game Code, Sections 1600-1616

Under the Fish and Game Code, Sections 1600-1616, CDFG regulates projects that divert, obstruct, or change the natural flow or bed, channel, or bank of any river,

stream, or lake. Proponents of such projects must notify CDFG and enter into a streambed alteration agreement with them.

Sections 1600-1616 of the Fish and Game Code requires a state or local governmental agency or public utility to notify CDFG before it begins a construction project that will: (1) divert, obstruct, or change the natural flow or the bed, bank, channel, or bank of any river, stream, or lake; (2) use materials from a streambed; or (3) result in the disposal or deposition of debris, waste, or other material containing crumbled, flaked, or ground pavement where it can pass into any river, stream, or lake. Once the notification is filed and determined to be complete, CDFG issues a streambed alteration agreement that contains conditions for construction and operations of the proposed project.

California Fish and Game Code, Section 3503.5

Under the Fish and Game Code, Section 3503.5, it is unlawful to take, possess, or destroy any birds in the orders Falconiformes (hawks, eagles, and falcons) or Strigiformes (owls). Take will include the disturbance of an active nest resulting in the abandonment or loss of young.

Migratory Bird Treaty Act

The MBTA (16 United States Code [USC] 703) enacts the provisions of treaties between the United States, Canada, Mexico, Japan, and Russia and authorized the U.S. Secretary of the Interior to protect and regulate the taking of migratory birds. The MBTA sets seasons and bag limits for hunted species and protects migratory birds, their occupied nests, and their eggs (16 USC 703, 50 CFR 21, 50 CFR 10).

5.2 Permits and Consultation Requirements

U.S. Army Corps of Engineers: Clean Water Act (CWA) Section 404 permit. The project is anticipated to impact over 0.5 acre of jurisdictional wetlands but less than 300 linear feet of other waters of the United States.

U.S. Fish and Wildlife Service: Section 7 consultation with the U.S. Army Corps of Engineers for Threatened and Endangered Species (listed invertebrates, GGS and BCM).

State Historic Preservation Act: Section 106 consultation with the U.S. Army Corps of Engineers.

Central Valley RWQCB: All Section 404 permits require a CWA Section 401 water quality certification from the RWQCB, and a Storm Water Permit from the Central Valley RWQCB may also be required.

CDFG: A Section 1600-1616 streambed alteration agreement will be needed because the project requires construction in creeks and streams subject to CDFG jurisdiction (Dead Horse Slough and South Fork Dead Horse Slough).

CDFG: A consistency determination under section 2081 for impacts to BCM and GGS.

CDFG: Consultation to approve mitigation for impacts to Swainson's hawk foraging habitat.

State Reclamation Board: Based on review of creeks under the jurisdiction of the State Reclamation Board, Dead Horse Slough is under Reclamation Board jurisdiction, therefore, an encroachment permit is required. Title 23, Division 1, Chapter 1, Article 8, Section 112, Table 8.1.