



## I. REGULATORY FRAMEWORK



FINAL BIDWELL PARK MASTER MANAGEMENT PLAN UPDATE

# APPENDIX I REGULATORY FRAMEWORK

## STATE AND FEDERAL RULES AND REGULATIONS

Many resources in California are protected by Federal and State laws and regulations. During the project planning and pre-implementation process, focused resource surveys and other assessments may be needed to determine site sensitivities and develop appropriate avoidance and protection measures to minimize environmental impacts or effects on protected resources. Key environmental regulatory requirements and permits applicable to implementation of the Bidwell Park Master Management Plan (BPMMP) are discussed below.

### FEDERAL REGULATIONS

#### ENDANGERED SPECIES ACT

Pursuant to the federal Endangered Species Act (ESA), the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) Fisheries Divisions (former National Oceanic and Atmospheric Administration [NOAA]) have authority over projects that may result in take of federally listed species. Under the ESA, the definition of “take” is to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” USFWS has also interpreted the definition of “harm” to include significant habitat modification that could result in take. If a project has a reasonable likelihood to result in take of a federally listed species, either one of two take approvals is required: an incidental take permit, under Section 10(a) of the ESA (if no other federal action is involved), or a federal interagency consultation and Biological Opinion, under Section 7 of the ESA (if another federal approval is needed).

#### MIGRATORY BIRD TREATY ACT

The Migratory Bird Treaty Act (MBTA), first enacted in 1918, implements a series of treaties that provide international migratory bird protection, and authorize the Secretary of the Interior to regulate the taking of migratory birds. The MBTA states it shall be unlawful, except as permitted by regulations, “to pursue, take, or kill ... any migratory bird, or any part, nest or egg of any such bird, included in the terms of conventions” with certain other countries (16 U.S. Code [USC] 703). The current list of species protected by the MBTA contains several hundred species and essentially includes all native birds. Section 3513 of the California Fish and Game Code provides for adoption of the MBTA’s provisions. Although neither the MBTA nor this state code offers statutory or regulatory mechanisms for obtaining an incidental take permit for the loss of non-game migratory birds, a Section 10(a) permit issued under the ESA may constitute a special purpose permit for the take of a listed species that is also covered by the MBTA. Sometimes California Department of Fish and Game (CDFG) and USFWS seek measures that demonstrate avoidance of loss of MBTA-covered species. USFWS and CDFG have discretion whether or not to pursue an MBTA action, if some migratory birds would be lost, but have decided not to pursue action when agencies demonstrate that all reasonable loss avoidance measures have been incorporated into a project.

#### SECTION 404 OF THE CLEAN WATER ACT

Section 404 of the Clean Water Act (CWA) establishes a requirement to obtain a permit from U.S. Army Corps of Engineers (USACE) prior to initiating any activity that involves any discharge of dredged or fill material into “waters of the United States,” including wetlands. Waters of the United States include navigable waters of the United States, interstate waters, all other waters where the use or degradation or destruction of the waters could affect interstate or foreign commerce, tributaries to any of these waters, and wetlands that meet any of these criteria or that are adjacent to any of these waters or their tributaries. Wetlands are defined as those areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and

under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Jurisdictional wetlands must meet three wetland delineation criteria: hydrophytic vegetation, hydric soil types, and wetland hydrology. Many surface waters and wetlands in California meet the criteria for waters of the United States, including intermittent streams and seasonal lakes and wetlands.

Pursuant to Section 404 of the CWA, the USACE regulates and issues permits for activities that involve the discharge of dredged or fill materials into waters of the United States. In addition, under Section 10 of the Rivers and Harbors Act, USACE issues permits for structures and/or work in or affecting navigable waters of the United States. Fills of less than 1/2 acre of non-tidal waters of the United States for residential, commercial, or institutional development projects can generally be authorized under the USACE's nationwide permit (NWP) program, provided the project satisfies the terms and conditions of the particular NWP. Fills that do not qualify for a NWP require a Letter of Permission or an individual permit.

## **STATE REGULATIONS**

### **CALIFORNIA ENDANGERED SPECIES ACT**

Pursuant to the California Endangered Species Act (CESA) and Section 2081 of the Fish and Game Code, an incidental take permit from the CDFG is required for projects that could result in the take of a state-listed Threatened or Endangered species. Under CESA, "take" is defined as an activity that would directly or indirectly kill an individual of a species, but the definition does not include "harm" or "harass," as the federal act does. As a result, the threshold for a take under the CESA is higher than that under the ESA.

### **CALIFORNIA ENVIRONMENTAL QUALITY ACT**

The California Environmental Quality Act (CEQA) was enacted in 1970 to require state and local agencies to identify the significant environmental impacts of their actions and to avoid or mitigate those impacts, if feasible. CEQA applies to state and local public agencies undertaking a project that requires discretionary approval from a government agency which may cause either a direct physical change in the environment or a reasonably foreseeable indirect change in the environment. Most proposals for physical development in California are subject to the provisions of CEQA, as are many governmental decisions which do not immediately result in physical development (such as adoption of a general or community plan). Every development project which requires a discretionary governmental approval will require at least some environmental review pursuant to CEQA, unless an exemption applies.

### **SECTION 401 OF THE CLEAN WATER ACT**

Section 401(a)(1) of the CWA specifies 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 federal licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable water at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of the Clean Water Act. Succinctly, this means that in California, the Regional Board must certify that the project will comply with water quality standards (defined below). In some instances, the need for certification may be waived if the action is shown to have minimal water quality effects.

### **PORTER COLOGNE WATER QUALITY CONTROL ACT**

Each of the nine Regional Water Quality Control Boards (RWQCB) in California exerts jurisdiction over "waters of the State" through the Porter Cologne Water Quality Control Act. Under this act, the RWQCBs must prepare

and periodically update water quality control basin plans. Each basin plan sets forth water quality standards for surface water and groundwater, as well as actions to control non-point and point sources of pollution to achieve and maintain these standards. Projects that affect wetlands or waters must meet waste discharge requirements of the RWQCB which may be issued in addition to a water quality certification or waiver under Section 401 of the CWA.

### **SECTION 3503.5 OF THE CALIFORNIA FISH AND GAME CODE – PROTECTION OF RAPTORS**

Section 3503.5 of the Fish and Game Code 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. Violations include destruction of active raptor nests as a result of tree removal and disturbance to nesting pairs by nearby human activity that causes nest abandonment and reproductive failure.

### **SECTION 1602 OF THE CALIFORNIA FISH AND GAME CODE**

All diversions, obstructions, or changes to the natural flow or bed, channel, or bank of any river, stream, or lake in California that supports wildlife resources are subject to regulation by CDFG under Section 1602 of the California Fish and Game Code. Under Section 1602, it is unlawful for any person to substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank of any river, stream, or lake designated by CDFG, or use any material from the streambeds, without first notifying CDFG of such activity. “Stream” is defined as a body of water that flows at least periodically or intermittently through a bed or channel having banks and that supports fish or other aquatic life. This includes watercourses having a surface or subsurface flow that supports or has supported riparian vegetation. CDFG’s jurisdiction within altered or artificial waterways is based on the value of those waterways to fish and wildlife. A CDFG Streambed Alteration Agreement must be obtained for any project that would result in an impact on a river, stream, or lake.