

Appendix BIO-1

Biological Resources Regulatory Framework

REGULATORY FRAMEWORK

Biological Resources

Federal Endangered Species Act

The United States Congress passed the Federal Endangered Species Act (FESA) in 1973 to protect those species that are endangered or threatened with extinction. FESA is intended to operate in conjunction with the National Environmental Policy Act to help protect the ecosystems upon which endangered and threatened species depend. FESA prohibits the “take” of endangered or threatened wildlife species. “Take” is defined to include harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting wildlife species or any attempt to engage in such conduct (FESA Section 3 [(3)(19)]). Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns (50 Code of Federal Regulations [CFR] Section 17.3). “Harass” is defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns (50 CFR Section 17.3). Actions that result in take can result in civil or criminal penalties.

Migratory Bird Treaty Act

The Migratory Bird Treaty Act (MBTA) generally prohibits the killing, possessing, or trading of migratory birds, bird parts, eggs, and nests, except as provided by the statute. The MBTA authorizes the Secretary of the Interior to regulate the taking of migratory birds. It further provides that it is unlawful, except as permitted by regulations, “to pursue, take, or kill any migratory bird, or any part, nest or egg of any such bird...” (16 United States Code [USC] 703).

The MBTA, first enacted in 1916, prohibits any person, unless permitted by regulations, to “pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention...for the protection of migratory birds...or any part, nest, or egg of any such bird” (16 U.S. Code 703).

Clean Water Act

Pursuant to Section 404 of the Clean Water Act (CWA), the U.S. Army Corps of Engineers (USACE) is authorized to regulate any activity that would result in the discharge of dredged or fill material into jurisdictional waters of the United States, which include those waters listed in 33 CFR Part 328

(Definitions). USACE, with oversight by the U.S. Environmental Protection Agency (USEPA), has the principal authority to issue CWA Section 404 Permits.

Pursuant to Section 401 of the CWA, the Colorado River Basin Regional Water Quality Control Board (RWQCB), Region 7, certifies that any discharge into jurisdictional waters of the United States will comply with state water quality standards. The RWQCB, as delegated by USEPA, has the principal authority to issue a CWA Section 401 water quality certification or waiver. Based on the literature and database review and biological resources assessment, the project site does not support waters that would be subject to the CWA.

Bald and Golden Eagle Protection Act

The Bald and Golden Eagle Protection Act was originally enacted in 1940 as the Bald Eagle Protection Act to protect bald eagles and was later amended to include golden eagles. The Act prohibits the taking, possession, or commerce of bald and golden eagles, parts, feathers, nests, or eggs with limited exceptions. Take is defined as “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb”, and includes both direct taking of individuals and take due to disturbance. “Disturb” is defined as (50 CFR 22.3):

“to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, 1) injury to any eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.”

The definition of “disturb” is further defined by USFWS (2007) as follows:

“In addition to immediate impacts, this definition also covers impacts that result from human-caused alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagles return, such alterations agitate or bother an eagle to a degree that injures an eagle or substantially interferes with normal breeding, feeding, or sheltering.”

Bald eagles may not be taken for any purpose unless a permit is issued prior to the taking. Activities which can be authorized by permit include scientific collection/research, exhibition, tribal religious, depredation, falconry, and the taking of inactive golden eagle nests, which interfere with resource development or recovery operations. Currently, USFWS has a permitting process proposed for other activities that would allow disturbance to bald eagles or take of an eagle nest where their location poses a risk to human or eagle safety.

California Fish and Game Code §§ 1600-1616

Pursuant to Section 1600 et seq. of the CFGC, the CDFW regulates activities of an applicant’s project that would substantially alter the flow, bed, channel, or banks of streams or lakes, unless certain conditions outlined by CDFW are met by the applicant. The limits of CDFW jurisdiction are defined in CFGC Section 1600 et seq. as the “bed, channel, or bank of any river, stream, or lake designated by CDFW in which there is at any time an existing fish or wildlife resource or from which these resources derive

benefit¹ However, in practice, CDFW usually extends its jurisdictional limit and assertion to the top of a bank of a stream, the bank of a lake, or outer edge of the riparian vegetation, whichever is wider. No stream banks or other CFGC Section 1600 resources occur within the construction limits; therefore, this regulation is not applicable to the project.

California State Fish and Game Code §§ 3503, 3503.5 and 3513

Under these sections of the CFGC, the project operator is not allowed to conduct activities that would result in the taking, possessing, or destroying of any birds of prey; the taking or possessing of any migratory nongame bird; the taking, possessing, or needlessly destroying of the nest or eggs of any raptors or nongame birds; or the taking of any nongame bird pursuant to CFGC Section 3800. CFGC §3513 adopts the federal migratory bird take provisions under the MBTA that prohibit the intentional take or possession of birds designated by the MBTA as migratory nongame birds except as allowed by federal rules and regulations pursuant to the MBTA. CFGC Section 3513 does not prohibit the incidental take of birds if the underlying purpose of the activity is not to take birds.

Native Plant Protection Act (California Fish and Game Code §§ 1900 et seq.)

The Native Plant Protection Act (NPPA) was enacted in 1977 and allows the Fish and Game Commission to designate plants as rare or endangered. There are 64 species, subspecies, and varieties of plants that are protected as rare under the NPPA. The NPPA prohibits take of endangered or rare native plants but includes some exceptions for agricultural and nursery operations; emergencies; and after properly notifying CDFW for vegetation removal from canals, roads, and other sites, changes in land use, and in certain other situations.

California Endangered Species Act (California Fish and Game Code §§ 2050 et seq.)

CESA establishes the policy of the state to conserve, protect, restore, and enhance threatened or endangered species and their habitats. CESA mandates that state agencies should not approve projects that would jeopardize the continued existence of threatened or endangered species if reasonable and prudent alternatives are available that would avoid jeopardy. There are no state agency consultation procedures under CESA. For projects that would affect a listed species under both CESA and FESA, compliance with FESA would satisfy CESA if CDFW determines that the federal incidental take authorization is “consistent” with CESA under CFGC Section 2080.1. For projects that would result in take of a species listed under the CESA only, the project operator would have to apply for a take permit under Section 2081(b).

¹ This also includes the habitat upon which they depend for continued viability (CFGC Division 5, Chapter 1, Section 45, and Division 2, Chapter 1, Section 711.2[a]).

California Fish and Game Code 2080 and 2081

Section 2080 of the CFGC states that “No person shall import into this state [California], export out of this state, or take, possess, purchase, or sell within this state, any species, or any part or product thereof, that the Commission [State Fish and Game Commission] determines to be an endangered species or threatened species, or attempt any of those acts, except as otherwise provided in this chapter, or the Native Plant Protection Act, or the California Desert Native Plants Act.” Pursuant to Section 2081, CDFW may authorize individuals or public agencies to import, export, take, or possess state-listed endangered, threatened, or candidate species. These otherwise prohibited acts may be authorized through Incidental Take permits or Memoranda of Understanding if the take is incidental to an otherwise lawful activity, impacts of the authorized take are minimized and fully mitigated, the permit is consistent with any regulations adopted pursuant to any recovery plan for the species, and the project operator ensures adequate funding to implement the measures required by CDFW, which makes this determination based on available scientific information and considers the ability of the species to survive and reproduce.

California Fish and Game Code 3503, 3503.5, and 3513

Under Sections 3503, 3503.5, and 3513 of the CFGC, the project operator is not allowed to conduct activities that would result in the taking, possessing, or destroying of any birds of prey; the taking or possessing of any migratory nongame bird; the taking, possessing, or needlessly destroying of the nest or eggs of any raptors or nongame birds; or the taking of any nongame bird pursuant to CFGC Section 3800. CFGC Section 3513 adopts the federal migratory bird take provisions under the MBTA that prohibit the intentional take or possession of birds designated by the MBTA as migratory nongame birds except as allowed by federal rules and regulations pursuant to the MBTA. CFGC Section 3513 does not prohibit the incidental take of birds if the underlying purpose of the activity is not to take birds.

California Environmental Quality Act Guidelines, Section 15380

Although threatened and endangered species are protected by specific federal and state statutes, California Environmental Quality Act (CEQA) Guidelines Section 15380(b) provides that a species not listed on the federal or state list of protected species may be considered rare or endangered if the species can be shown to meet certain specified criteria. These criteria have been modeled after the definition in FESA and the section of the CFGC dealing with rare or endangered plants or animals. This section was included in CEQA primarily to deal with situations in which a public agency is reviewing a project that may have a significant effect on, for example, a candidate species that has not been listed by either USFWS or CDFW. Thus, CEQA provides an agency with the ability to protect a species from the potential impacts of a project until the respective government agencies have an opportunity to designate the species as protected, if warranted. CEQA also calls for the protection of other locally or regionally significant resources, including natural communities. Although natural communities do not at present have legal protection of any kind, CEQA calls for an assessment of whether any such resources would be affected and requires findings of significance if there would be substantial losses. Natural communities listed by CNDDDB as sensitive are considered by CDFW to be significant resources and fall under the State CEQA Guidelines for addressing impacts. Local planning documents such as General Plans often identify these resources as well.

Porter-Cologne Water Quality Control Act (California Water Code Section 13000 et seq)

The State Water Resources Control Board (SWRCB) and the RWQCB (together “Boards”) are the principal State agencies with primary responsibility for the coordination and control of water quality. The Boards regulate activities pursuant to Section 401(a)(1) of the federal CWA as well as the Porter-Cologne Water Quality Control Act (Porter-Cologne) (Water Code Section 13260). Section 401 of the CWA specifies that certification from the State is required for any applicant requesting 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. The certification shall originate 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. Any such discharge will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of the CWA.

In Porter-Cologne, the Legislature declared that the “State must be prepared to exercise its full power and jurisdiction to protect the quality of the waters in the State from degradation...” (California Water Code Section 13000). Porter-Cologne grants the Boards the authority to implement and enforce the water quality laws, regulations, policies and plans to protect the groundwater and surface waters of the State. It is important to note that enforcement of the State's water quality requirements is not solely in the purview of the Boards and their staff. Other agencies (e.g., CDFW) have the ability to enforce certain water quality provisions in state law.