

## **Chapter 4. Permit and Environmental Review and Consultation Requirements**

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This chapter provides preliminary information on the major requirements for permitting and environmental review and consultation for implementation of the DW project. Certain state and federal regulations require issuance of permits prior to project implementation; other regulations require agency consultation but may not require issuance of any entitlements prior to project implementation. Some information in this chapter and the accompanying table has been updated based on comments received on the 1995 DEIR/EIS.

### **INTRODUCTION**

Table 4-1 provides a preliminary list of federal, state, and local permits and approvals that may be required for the DW project alternatives. Preparation of this document has proceeded concurrently with environmental review and consultation required by federal and state environmental laws other than NEPA and CEQA. Table 4-2 lists these environmental review and consultation requirements. The following sections describe the major state and federal laws that specify permitting and environmental review and consultation requirements. Not every permit or environmental review presented in Tables 4-1 and 4-2 is described.

#### **CLEAN WATER ACT, SECTION 404 (33 USC 1344)**

Under Section 404 of the Clean Water Act, a Department of the Army permit must be obtained from the Corps for the discharge of dredged or fill material into waters of the United States, including wetlands. The Corps reviews applications for permits in accordance with Section 404 guidelines, which have been established by the Corps and EPA. The guidelines require that “no discharge of dredged or fill materials shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative doesn’t have other significant adverse environmental consequences”. The Corps must also determine that the project is not contrary to the public interest (33 CFR 323.6).

An alternatives analysis was prepared and submitted to EPA and the Corps in partial compliance with EPA’s Section 404(b)(1) guidelines (40 CFR 230.10[a], [b], and [d]) (see Appendix 4, “Section 404[b][1] Alternatives Analysis for the Delta Wetlands Project”). The information from the 1995 DEIR/EIS was used to complete compliance with the Section 404(b)(1) requirements and will be used during the Corps’ public interest review.

To issue a permit under Section 404, the Corps must ensure that the discharge will not violate the state’s water quality standards. Therefore, in California, the proponent of any activity that may result in a discharge to a surface water of the United States must obtain water quality certification or a waiver of certification from SWRCB (pursuant to Section 401 of the Clean Water Act).

#### **RIVERS AND HARBORS ACT OF 1899, SECTION 10 (33 USC 403)**

Section 10 of the Rivers and Harbors Act of 1899 prohibits work affecting the course, location, conditions or capacity of navigable waters of the United States without a permit from the Corps. Examples of activities requiring a permit from the Corps are the construction of any structure in or over any navigable water; excavation or deposition of materials in such waters; and various types of work performed in such waters, including placement of fill and stream channelization.

The project applicant has submitted to the Corps a joint Department of the Army permit application

pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. The Corps' compliance with Section 404 of the Clean Water Act and NEPA will also satisfy requirements under Section 10 of the Rivers and Harbors Act.

### **ENDANGERED SPECIES ACT (16 USC 1531 ET SEQ.)**

Section 7 of the Endangered Species Act of 1973, as amended, requires federal agencies, in consultation with USFWS and 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 NMFS on the existence in a project area of listed species or species proposed for listing.
- # Following receipt of the USFWS/NMFS response to this request, agencies generally prepare a biological assessment (BA) to determine whether any listed species or species proposed for listing are likely to be affected by a proposed action.
- # Agencies must initiate formal consultation with USFWS and NMFS if the proposed action would affect listed species.
- # USFWS and NMFS must 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, USFWS and NMFS must recommend reasonable and prudent alternatives that would avoid jeopardy and the federal agency must modify project approval 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).

The Section 7 consultation process for the DW project has been completed with the Sacramento

Endangered Species Office of USFWS and with NMFS.

In 1997, the USFWS and NMFS issued no-jeopardy opinions regarding effects of the DW project on federally listed fish species. A thorough description of the process and outcome of the Section 7 consultation for the DW project is provided in the section entitled "Regulatory Compliance History" in Chapter 1 of this FEIS Volume.

### **FISH AND WILDLIFE COORDINATION ACT (16 USC 661 ET SEQ.)**

The Fish and Wildlife Coordination Act requires federal agencies to consult with USFWS and state fish and game agencies before undertaking or approving projects that control or modify surface water (water projects). This consultation is intended both to promote the conservation of wildlife resources by preventing their loss or damage and to provide for the development and improvement of wildlife resources in connection with water projects. Federal agencies undertaking water projects are required to include recommendations made by USFWS and state fish and game agencies in project reports, give full consideration to these recommendations, and include in project plans measures to reduce impacts on wildlife.

The Corps' compliance with the Fish and Wildlife Coordination Act (for permit review) is achieved by USFWS and DFG comments being obtained and, where possible, concerns being resolved through the CEQA/NEPA process (Elder pers. comm.).

### **NATIONAL HISTORIC PRESERVATION ACT (16 USC 470 ET SEQ.)**

Section 106 of the National Historic Preservation Act requires federal agencies to evaluate the effects of federal undertakings on historical, archeological, and cultural resources. Agencies are required to identify historical or archeological properties near proposed project sites, including properties listed in the NRHP and those properties that the agency and the SHPO agree are eligible for listing in the NRHP. If the project is determined to have an adverse effect on NRHP-listed properties or those eligible for listing in the NRHP, the agencies are required to consult with the

SHPO and the ACHP to develop alternatives or mitigation measures to allow the project to proceed.

Section 106 consultation with the SHPO has been completed for the DW project. A programmatic agreement (PA) outlining the steps and timing of compliance with Section 106 and addressing the project's potential effect on cultural resources has been signed by the ACHP, the SHPO, the Corps, SWRCB, and the project applicant.

### **AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978**

This legislation sets forth the policy of the U.S. Department of the Interior to protect and preserve the observance of traditional Native American religions. The act requires federal agencies to evaluate their policies and procedures to ensure compliance with this policy.

Beginning in 1992 (before the beginning of any construction activities that could have project-related impacts on Native American resources), the Corps and SWRCB contacted local tribal representatives for input regarding the treatment of Native American cultural resources that may be affected by project construction and operation. This consultation process was coordinated with compliance with Section 106 of the NHPA.

### **FARMLANDS PROTECTION POLICY ACT**

Memoranda from the U.S. Council on Environmental Quality to heads of agencies dated August 30, 1976, and August 11, 1980, and the Farmlands Protection Policy Act of 1981 require agencies preparing EISs to include farmland assessments designed to minimize adverse impacts on prime and unique farmlands. As described in Chapter 3I, "Land Use and Agriculture", implementation of the DW project alternatives would cause losses of farmland acreage in areas in Contra Costa and San Joaquin Counties.

The environmental analysis of the DW project alternatives includes a thorough discussion of impacts on prime and unique farmlands. The analysis includes an evaluation of farmlands using CDC and NRCS

(formerly SCS) classifications and an evaluation of the project's effects on prime and unique farmlands as determined by the CDC's Farmland Mapping and Monitoring Program.

### **EXECUTIVE ORDERS 11988 (FLOODPLAIN MANAGEMENT) AND 11990 (PROTECTION OF WETLANDS)**

Executive Order 11988 requires federal agencies to prepare floodplain assessments for proposed actions located in or affecting floodplains. If an agency proposes to conduct an action in a floodplain, it must consider alternatives to avoid adverse effects and incompatible development in the floodplain. If the only practicable alternative involves siting in a floodplain, the agency must minimize potential harm to or in the floodplain and explain why the action is proposed in the floodplain. The DW project involves compatible construction in a floodplain.

Executive Order 11990 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. Chapter 3G, "Vegetation and Wetlands", and Appendix G5, "Summary of Jurisdictional Wetland Impacts and Mitigation", describe impacts on wetlands and mitigation measures for reducing significant impacts.

### **UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT (42 USC 4601 ET SEQ.)**

This act provides for a uniform policy and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal Agency. Under the provisions of this act, displaced individuals shall be reimbursed and provided with relocation planning assistance coordination, and advisory services. This reimbursement may consist of reasonable moving expenses, costs incurred to search for a replacement business or farm, and actual reasonable expenses necessary to reestablish a displaced farm.

Implementation of Delta Wetlands Project would require the relocation of 20 residences and six farm worker barracks on Bacon Island and three trailers and one residence on Webb Tract. Bacon Island's farm worker camps are used by employees of the three farm operations that lease land on the islands. The tenants on the Delta Wetlands Project islands are aware of the proposed project and have been kept informed throughout the NEPA/CEQA process. Delta Wetlands would give tenants no less than 6 months after the project is approved to find new housing. These individuals may be eligible for some form of assistance provided under this act.

**WATER COMMISSION ACT  
(CALIFORNIA WATER CODE  
SECTION 1000 ET SEQ.)**

The Water Commission Act establishes a system of state-issued permits and licenses to appropriate water. SWRCB is responsible for administering appropriate water rights. Within its authority, SWRCB approves diversions of water to beneficial uses and changes in the purpose of use, points of diversion, and places of use of water.

**CALIFORNIA ENDANGERED SPECIES ACT  
(CALIFORNIA FISH AND GAME  
CODE SECS. 2050 ET SEQ.)**

The California Endangered Species Act requires a state lead agency to consult formally with DFG when a proposed action may affect state-listed endangered or threatened species. The provisions of the California Endangered Species Act and the federal Endangered Species Act will often be activated simultaneously. The assessment of project effects on species listed under both the California and federal Endangered Species Acts is addressed in USFWS's and NMFS's biological opinions. However, for those species listed only under the California Endangered Species Act, SWRCB must formally consult with DFG, and DFG must issue a biological opinion separate from USFWS's biological opinion. For this project, there are two species (Swainson's hawk and greater sandhill crane) listed only under the California Endangered Species Act. A separate BA was prepared for these species. DFG issued a no-jeopardy opinion in 1998 on project effects on state-listed fish, wildlife, and plant species. As a private applicant, DW must also comply

with the take prohibitions of the California Endangered Species Act by obtaining an "incidental take" management permit pursuant to Section 2081. DW has requested that DFG issue a Section 2081 agreement for the DW project. A thorough description of the California Endangered Species Act consultation process for the DW project is provided in the section entitled "Regulatory Compliance History" in Chapter 1 of this FEIS Volume.

**CITATIONS**

*References to the Code of Federal Regulations (CFR) and the U.S. Government Code (USC) are not included in this list. CFR and USC citations in text refer to title and section (e.g., 33 CFR 323.6 refers to Title 33 of the CFR, Section 323.6).*

Elder, Jean. Project manager. U.S. Army Corps of Engineers, Sacramento, CA. January 27, 1993—telephone conversation.

White, Wayne S. Field supervisor. Fish and Wildlife Enhancement, Sacramento Field Office, U.S. Fish and Wildlife Service, Sacramento, CA. November 12, 1992—letter regarding updated species list for the proposed Delta Wetlands' Delta Island Project, Lafayette, Contra Costa County, California.

Table 4-1. Permits and Approvals That May Be Required for the Delta Wetlands Project Alternatives

Agency and Requirements	Agency Authority	Project Activities Subject to 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
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
<b>STATE</b>		
<b>California Department of Fish and Game</b>		
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
<b>California Department of Water Resources, Division of Safety of Dams</b>		
Approval of plans and specifications	DOSD 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	DOSD 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>		
Permit to appropriate and store water	SWRCB issues permit 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	SWRCB 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
Water quality certification pursuant to Section 401 of the Clean Water Act	SWRCB 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

Agency and Requirements	Agency Authority	Project Activities Subject to Requirements
<b>Regional Water Quality Control Board</b>		
Construction Storm Water Permit (Order No. 99-08-DWQ)	The RWQCB, under the SWRCB, ensures compliance with National Pollutant Discharge Elimination System requirements pursuant to Section 402 of the Clean Water Act	Clearing, grading, filling, and excavation activities extending over 5 acres or more
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 discharged 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
<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>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	Operational activities of the airport on Bouldin Island that include agricultural and private commercial activities
<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/day or is greater than 250 hp in size
<b>San Joaquin Valley Unified Air Pollution Control District</b>		
Authority to construct/permit to operate	SJVUAPCD 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

Agency and Requirements	Agency Authority	Project Activities Subject to Requirements
<b>Contra Costa County</b>		
Sewer permit	The sanitary district approves and issues permits to ensure conformance with sanitary standards and sanitary sewer work related to the repair, construction, reconstruction, or abandonment of any building sewers, connections, or discharge to a district sewer system.	Construction of recreation facilities
Land use permit	The community development department issues permits to allow special zoning considerations or waive existing zoning regulations regarding the way that a property is to be used.	Construction of Delta Wetlands reservoir islands and recreation facilities
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
<b>San Joaquin County</b>		
Use permit	The county issues permits for construction of recreation facilities and for the opening of a new airport or the modification of an existing airport.	Construction of recreation facilities and the operational activities of the airport on Bouldin Island that include agricultural, recreational, and private commercial activities
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
<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

Agency and Requirements	Agency Authority	Project Activities Initiating Review and Consultation Requirements
<b>FEDERAL</b>		
<b>U.S. Fish and Wildlife Service</b>		
Consultation pursuant to Section 7 of the Endangered Species Act	Federal agencies must consult with USFWS when their actions may affect species listed under the Endangered Species Act	Corps approval of the project because the Corps has determined that the project may affect species listed under the Endangered Species Act
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
<b>National Marine Fisheries Service</b>		
Consultation pursuant to Section 7 of the Endangered Species Act	Federal agencies must consult with NMFS when their actions may affect anadromous or marine species listed under the Endangered Species Act	Corps approval of the project because the Corps has determined that the project may affect species listed under the Endangered Species Act
<b>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 Section 404 of the Clean Water Act and for preparation of an EIS under NEPA
<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	Operational activities of the airport on Bouldin Island, including agricultural and private commercial activities
<b>STATE</b>		
<b>California Department of Fish and Game</b>		
Consultation pursuant to the California Endangered Species Act	State lead agencies must consult with DFG when their actions may affect species listed under the California Endangered Species Act	SWRCB approval of the project because SWRCB has determined that the project may affect species only listed under the California Endangered Species Act (Swainson's hawk and greater sandhill crane)
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 the Corps' NEPA and SWRCB's CEQA process in approving the project

Agency and Requirements	Agency Authority	Project Activities Initiating Review and Consultation Requirements
<p><b>Office of Historic Preservation and Advisory Council on Historic Preservation</b></p>	<p>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.</p>	<p>Archaeological survey conducted and determinations of eligibility and effect prepared; PA circulated and signed by the project applicant, SWRCB, the Corps, the SHPO, and the Advisory Council on Historic Preservation</p>
<p><b>Native American Heritage Commission</b></p> <p>Consultation with certain Native Americans in compliance with California Public Resources Code Section 5097.98 and California Health and Safety Code Section 7050.5</p>	<p>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</p>	<p>Plans for physical alteration of a known cultural resource site that has a likely potential for containing remains of Native Americans</p>
<p><b>REGIONAL AND LOCAL AGENCIES</b></p>		
<p><b>Contra Costa and San Joaquin Counties</b></p>		
<p>Conformance with general plan</p>	<p>County planning department reviews local agency projects for conformity with the general plan</p>	<p>Project effects on land use</p>