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**RECORD OF DECISION
SECTION 408 PERMISSION NUMBER 18980
CENTRAL VALLEY FLOOD PROTECTION PROJECT
for the
RECLAMATION DISTRICT (RD) 17 LEVEE SEEPAGE AREA PROJECT
SAN JOAQUIN COUNTY, CA**

The proposed RD 17 Levee Seepage Area Project (LSAP) would occur along the Lower San Joaquin River and Tributaries Project, a U.S. Army Corps of Engineers federal flood risk management project originally authorized by the Flood Control Act of 1944 (Pub. L. No. 78-534, § 10, 58 Stat. 887, 901 (1944)). The requester for permission to alter the Lower San Joaquin River and Tributaries Project is the Reclamation District 17, who has submitted their request through the non-federal sponsor, the State of California Central Valley Flood Protection Board (CVFPB). The Secretary of the Army has delegated approval authority to the Chief of Engineers for USACE to issue permission to proceed with the proposed construction pursuant to 33 U.S.C. § 408 (Section 408) based on finding that the proposed alterations are not injurious to the public interest and will not impair the usefulness of the flood risk management project. Approval authority for certain categories of proposed alterations, was further delegated to Division Commanders. The Lower San Joaquin River and Tributaries Project falls within categories of proposed alterations for which approval authority has been delegated to the Division Commander.

The purpose of the RD 17 LSAP is to implement repairs to the San Joaquin River East Levee in an effort to reduce flood risk to the cities of Stockton, Lathrop, and Manteca. The proposed work includes repair of the existing deficient levee segments and construction of a setback levee with the following features: seepage berm, under-seepage cutoff wall, and through-seepage chimney drain.

The Record of Decision (ROD) constitutes USACE's determination to grant permission under 33 U.S.C. 408 to the CVFPB to implement the RD 17 LSAP, as described in the Requester's Preferred Alternative, a combination of the other two alternatives evaluated in the DEIS, and described in Section 2.4 in the Final EIS for the RD 17 LSAP (April 2021), and as defined below.

Requester's Preferred Alternative

The Requester's Preferred Alternative includes reparation of eleven (11) elements not previously constructed as part of the 2017 Emergency Flood Response Construction Project and the 2019 Categorical Permission Construction Project, along approximately 5 miles of RD 17 levees. The proposed project includes construction of a 1,100-foot setback levee, 1,315 feet of seepage berms, over 18,000 feet of under-seepage cutoff walls ranging from 40-120 feet deep, and roughly 665 feet of through-seepage chimney drains. Work would begin just south of Mathews Road near the city of Stockton and would affect approximately 60 acres at the eleven

(11) specified element locations. The final element of the proposed work would be completed between Oakwood Lake and Weatherbee Lake adjacent to the city of Manteca.

The Requester's Preferred Alternative is the environmentally preferable alternative following consideration of seven distinct environmental effects, including: Permanent Conversion of Important Farmland, Potential Permanent Loss of Habitat, Potential Permanent Loss of Waters of the United States, Potential Traffic Increases, Potential Temporary Traffic Increases, Potential Temporary Annual Air Pollutant Emissions, and Potential Greenhouse Gas Effects – as described in Table 3.1-2 of the FEIS. The Requester's Preferred Alternative would result in the least potential impact with regard to each of the seven aforementioned, distinct environmental effects.

Other Alternatives Considered

In addition to the No-Action Alternative and the Requester's Preferred Alternative, the following alternatives were evaluated.

Alternative 1: Minimum Footprint Alternative. Alternative 1 addresses under seepage and through seepage along approximately 7 miles of the RD 17 levee system, including portions of the San Joaquin River east levee and portions of the levee along the north bank of Walthall Slough. This alternative would include repairs to the 19 levee elements and would affect a total of approximately 82 acres. Alternative 1 would use the seepage remediation options with the minimum footprint at the eight elements where the methods for reducing flood damage risk would differ from those proposed for use in Alternative 2. Alternative 1 would include construction of seepage berms or fill, some with and some without chimney drains, along the landside of 11 levee elements; installation of chimney or blanket drains in existing seepage berms at two levee elements, construction of cutoff walls through the levee prism at four elements, and construction of cutoff walls through the levee prism at two elements.

Alternative 2: Maximum Footprint Alternative. Alternative 2 addresses under seepage and through seepage along the same approximately 7 miles of the RD 17 levee system as Alternative 1 but proposes levee improvement options with the greatest disturbance footprint at the eight elements where the methods for reducing flood damage risk would differ from those proposed for use in Alternative 1. Alternative 2 would use the same methods for reducing flood damage risk as Alternative 1 at the other 11 of the 19 elements. Up to approximately 176 acres would be affected under Alternative 2.

Final EIS Comments

USACE issued the Final EIS and published the Notice of Availability in the Federal Register on April 30, 2021. One comment letter was received (May 27, 2021), from the EPA, expressing appreciation toward the joint efforts between USACE and RD17 and that the concerns expressed in the Draft EIS have been addressed. Additionally, the EPA requested a copy of the ROD when completed.

Other Applicable Laws and Policies

National Environmental Policy Act (NEPA) of 1969, as Amended: The Proposed Action is considered a major Federal action. USACE determined the Proposed Action has the potential to significantly affect the quality of the human environment. Scoping for the EIS/EIR began on April 23, 2010, when a Notice of Intent to prepare a joint EIS/EIR and announce a public scoping meeting (held May 11, 2010) was published in the Federal Register and distributed to a large mailing list. On September 09, 2011, USACE issued the Draft EIS/EIR and the Notice of Availability was also published in the Federal Register. A joint public meeting was held on October 13, 2011, to update the public about the project, present conclusions of the Draft EIS/EIR analysis, and receive comments on the Draft EIS/EIR. A total of thirteen (13) comment letters were received from the public, including: National Marine Fisheries Service (NMFS), United States Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (USFWS), California Department of Transportation, California Governor's Office of Planning and Research, California State Lands Commission, CVFPB, Central Valley Regional Water Quality Control Board (CVRWQCB), Native American Heritage Commission, Oakwood Lake Water District, San Joaquin County Environmental Health Department, San Joaquin Valley Air Pollution Control District (SJVAPCD), and Stanislaus County Environmental Review Committee. The major area of controversy associated with the comments was regarding Project Authority and compliance with Executive Order 11988 – Floodplain Management. All comments received were incorporated in the development of the final EIS.

Federal Clean Water Act (CWA) of 1972, as Amended: Coordination between RD17 and USACE regulatory staff regarding the presence of waters in the United States in the RD 17 LSAP area is complete. The first wetland delineation was submitted for verification and jurisdictional determination on November 03, 2009. A preliminary jurisdictional determination form was issued by USACE on November 10, 2009. A supplemental wetland delineation was submitted by RD 17 on January 22, 2010. A second preliminary jurisdictional determination form was issued on April 09, 2010 and reverified on October 21, 2010. A supplemental wetland delineation was submitted to USACE on April 04, 2014. The final preliminary jurisdictional determination form was issued by USACE on April 07, 2014, indicating that the RD 17 LSAP will affect waters of the United States, and that a CWA Section 404 permit will be required.

RD17 submitted a Department of the Army CWA Section 404 permit application, signed April 02, 2019, and resubmitted an updated application, signed April 01, 2020. The LSAP is being covered under a Regulatory Division Nationwide Permit 13 – Bank Stabilization.

USACE and RD17 will ensure that the project complies with the CWA, including Section 401, 402, and 404. Placement of fill within jurisdictional wetlands and waters of the United States is required for the project, under USACE's jurisdiction for Section 404 compliance. This is detailed in Section 3.6, "Biological Resources". A Section 401 State Water Quality Certification for activities associated with implementation of the proposed project was issued by the CVRWQCB on October 20, 2014.

Rivers and Harbors Act of 1899, as Amended: On behalf of RD17, CVFPB is requesting permission from USACE under 33 U.S.C § 408 to alter a USACE project. The proposed project does not require authorization under Section 10 (33 USC § 403).

Fish and Wildlife Coordination Act (FWCA) of 1934, as Amended: USFWS, NMFS, and California Department of Fish and Wildlife (CDFW) have provided input on the RD 17 LSAP and specifically the Proposed Action. USFWS and NMFS are Cooperating Agencies under NEPA for this project, and USACE has engaged USFWS and NMFS throughout development of the EIS. CDFW was involved in the Draft EIS/EIR and in discussions regarding mitigation for project

impacts on state-listed species. USFWS, NMFS, and CDFW was provided with a copy of the FEIS/FEIR for review and comment. Recommendations provided by USFWS, NMFS, and CDFW have been considered and incorporated in the FEIS. The Proposed Action is compliant with the FWCA.

Endangered Species Act (ESA) of 1973, as Amended: ESA Section 7 consultation with NMFS and USFWS has been completed. USACE originally requested to initiate formal Section 7 consultation with USFWS on February 27, 2015. USFWS responded in a letter, dated October 02, 2015, and requested additional information. In a letter dated March 08, 2017, USACE transmitted the requested information. USFWS issued a Biological Opinion on April 16, 2019. USACE originally requested to initiate formal consultation with NMFS on March 27, 2015. NMFS responded in a letter, dated July 07, 2015, and requested additional information. In a letter dated March 08, 2017, USACE transmitted the requested information. NMFS issued a Biological Opinion on February 21, 2019. The Biological Opinions include required terms and conditions and will be incorporated into the 33 USC 408 Letter of Permission as a special condition(s).

Magnuson-Stevens Fishery Conservation and Management Act (MSA) of 1976, as Amended: NMFS concluded that the action would adversely affect essential fish habitat (EFH). NMFS included EFH Conservation Recommendations to offset these adverse effects.

Migratory Bird Treaty Act (MBTA) of 1918: Compliance with the MBTA is being addressed through compliance with ESA, FWCA, and RD 17's compliance with the California Endangered Species Act (CESA).

Clean Air Act (CAA) of 1963, as Amended: The Proposed LSAP Action has been analyzed for conformity applicability pursuant to regulations to regulations implementing Section 176(c) of the CAA. Based on updated air quality modeling and LSAP project design refinements completed by RD17 during the NEPA process, estimated air emissions have been substantially reduced. With implementation of on- and off-site mitigation measures identified in Section 3.9 of the Final EIS, emissions are expected to be below EPA's general conformity *de minimis* thresholds. Any later indirect emissions associated with operations and maintenance are generally not within the USACE continuing program responsibility and generally cannot be practicably controlled by USACE. For these reasons, a conformity determination is not required for this 408 request. Although the LSAP Action emissions are below the *de minimis* thresholds for Particulate Matter (PM₁₀ and PM_{2.5}) and would not exceed the SJVAPCD regional thresholds, temporary and short-term construction-related emissions could contribute significantly to an already adverse air quality condition with respect to Particulate Matter (PM) emissions. As a result, the effect from annual construction emissions would be significant without mitigation. Implementation of a Dust Control Plan and Fleetwide Exhaust Emissions Reduction Mitigation Measures would reduce potentially significant adverse effects under the Requester's Preferred Alternative from temporary and short-term construction-related emissions of PM₁₀ and PM_{2.5} to a less-than significant level. Therefore, no residual significant adverse effects would occur.

National Historic Preservation Act (NHPA) of 1966, as Amended: The RD 17 LSAP is in compliance with Section 106 of the NHPA. USACE has completed Section 106 consultation with the State Historic Preservation Officer (SHPO) and the appropriate Tribes. All evaluations or resource identification, determinations of significance, and determinations of project effects and mitigation/treatment measures will meet the requirements of 36 CFR Part 800 (procedures for implementing Section 106).

Executive Order (EO) 11988 - Floodplain Management: Based on the analysis required for compliance with EO 11988 as discussed in Chapter 4 of the FEIS, the project would reduce flood risk which would likely induce growth in the floodplain by indirectly supporting

development. In addition, communities in the Central Valley are required to provide a plan for achieving 1/200 annual exceedance probability flood event level of protection for urban and urbanizing areas by 2016. The Phase 3 Repair Project would not be likely to meet this objective, because – 43,000 local inhabitants, 10,698 residential units, 182 nonresidential (commercial/industrial) properties, and critical infrastructure are currently at risk of flooding from a levee breach from seepage and under-seepage. No other practicable alternatives exist to the Phase 3 LSAP. The RD 17 LSAP will reduce flood risk to existing infrastructure and has mitigated for the loss by purchasing Floodplain Riparian Habitat credits at Cosumnes Floodplain Mitigation Bank.

EO 11990 - Protection of Wetlands: The Proposed Action includes all practicable measures to avoid loss of wetlands. RD17 has applied for a permit under CWA Section 404 and impacts to waters of the United States will be addressed as part of the USACE review to the permit application.

EO 12898 – Environmental Justice: In accordance with Title III of the Civil Rights Act of 1964 and Executive Order 12898, USACE has determined, in Section 3.16, that the proposed LSAP would not directly or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin nor would it have a disproportionate effect on minority or low-income communities.

Significant and Unavoidable Environmental Effects

Although all practicable means to avoid, minimize, and mitigate adverse effects on environmental resources have been incorporated into the RD 17 LSAP and specific mitigation measures have been adopted by RD 17 to further avoid, minimize, and mitigate adverse effects, the RD 17 LSAP would have several significant and unavoidable effects on the following resources. These effects are described in the Final EIS and summarized below.

Agricultural Resources: The LSAP would affect properties under Williamson Act contract, permanently affecting properties, or portions of properties, acquired for construction. If construction would not require acquisition of an entire parcel, the contract would be terminated only on the portion of the parcel required for the Phase 3 LSAP. The remainder of the parcel that would be unaffected by construction would remain under contract. The effect of termination of a Williamson Act contract to construct the proposed LSAP would be significant.

Biological Resources: The LSAP would result in removal of eight (8) elderberry shrubs which could result in a significant impact on the valley elderberry longhorn beetle. The Phase 3 LSAP could also restrict the range of the endangered riparian brush rabbit due to habitat loss. Therefore, the adverse effects are significant.

Cultural Resources: The LSAP would substantially alter the physical characteristics of Levee Unit 7 of the Lower San Joaquin River and Tributaries Project, which would be a significant effect on these historic resources. Mitigation measures will be implemented during project construction, but the impacts would remain potentially significant and unavoidable.

Noise: The LSAP would involve construction of a cutoff wall that would occur close to noise-sensitive receptors, and temporary, short-term, noise levels could exceed the applicable daytime or nighttime standards of San Joaquin County or the City of Lathrop. These potential noise levels could result in increased annoyance and/or disrupted sleep for occupants of residential dwellings. Therefore, adverse noise effects associated with levee construction would be significant.

Visual/Aesthetics: The LSAP would involve construction of a setback levee, cutoff wall, seepage berms, and appurtenant structures that would temporarily obstruct or damage scenic views. No feasible mitigation is available to reduce the adverse effect of temporary, short-term degradation of visual character of the RD 17 Levee System during construction to a less-than-significant level.

Consideration of Mitigation Measures

Environmental commitments are measures incorporated as part of the project description, meaning they are proposed as elements of the Proposed Action and have been considered in conducting the environmental analysis and determining effects and findings. To avoid and minimize construction-related effects, RD 17 would implement the environmental commitments and mitigation measures identified in the Final EIS (Chapter 3), and incorporated by reference herein, to reduce or off-set short-term, construction-related effects. In many instances, adherence to the environmental commitments equates to implementation of best management practices or statutory requirements. RD 17 will implement Best Management Practices (BMPs), a Riparian Restoration Plan (which incorporates a Mitigation and Monitoring Plan), and Annual Monitoring and Mitigation Compliance Reports; all to be prepared and adopted by RD 17 to ensure implementation of each mitigation measure specified in the Final EIS. ESA Section 7 and NHPA Section 106 compliance are key to USACE's decision with respect to its Section 408 regulatory authority and, therefore, are summarized below.

Through Section 7 consultation with NMFS and USFWS, the project received two (2) Biological Opinions (BO) with incidental take statements including reasonable and prudent measures (RPMs) and terms and conditions required to implement the RPMs. The NMFS BO, Number: WCR-2018-10630, dated February 21, 2019, includes minimization and avoidance measures to reduce impacts to the federally listed threatened Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*) Evolutionarily Significant Unit, the threatened California Central Valley (CCV) steelhead (*O. mykiss*) Distinct Population Segment (DPS), and the threatened Southern DPS (sDPS) of the North American green sturgeon (*Acipenser medirostris*). NMFS has also concluded that the Project is not likely to destroy or adversely modify the designated critical habitats for CCV steelhead, and sDPS green sturgeon that occur within the action area. The USFWS BO, Number: 08FTBDT00-2015-F-0303, dated April 16, 2019, contains mandatory terms and condition for impacts. The USFWS BO covers impacts to the federally listed valley elderberry longhorn beetle (*Desmocerus californicus dimorphus*) and riparian brush rabbit (*Sylvilagus bachmani riparius*). All terms and conditions, conservation measures, and reasonable and prudent measures resulting from these consultations will be implemented in order to minimize take of endangered species and avoid jeopardizing the species.

Consultation with the SHPO in accordance with Section 106 of the NHPA has led to the determination that there are three (3) historic properties within the area of potential effects (APE). The SHPO concurred (COE110404A) with USACE's finding that the LSAP, as described, will have No Adverse Effect in accordance with 36 CFR Part 800.5(b). USACE may have additional future responsibilities for this undertaking under certain circumstances such as unanticipated discovery or a change in project description.

I. Findings

Based on my review of the 33 U.S.C. 408 recommendation package, the FEIS, the views of other Federal, state, regional, and local agencies, and input from the public, I find the recommended LSAP Project to be technically adequate and not an impairment to the usefulness of the existing Federal project; to be in accordance with environmental statutes; to be without significant adverse hydraulic impacts; and to not be injurious to the public interest. The Requester's Preferred Alternative is the environmentally preferable alternative following consideration of the seven distinct environmental effects. Therefore, pursuant to my delegated authority under 33 U.S.C. Section 408 and subject to the above mitigation measures the request for alteration of the Lower San Joaquin River and Tributaries Project, the LSAP Project is approved. I hereby grant permission to the CVFPB to allow RD 17 to construct the LSAP Project and to alter the Federal project.

Date

Antoinette Gant
Colonel, U.S. Army
Commanding