APPENDIX D – FEDERAL REGULATORY ENVIRONMENT FOR BIOLOGICAL RESOURCES

Federal Regulatory Environment for Biological Resources

Federal Endangered Species Act (ESA)

The ESA protects fish and wildlife species and their habitats that have been identified by the U.S. Fish and Wildlife Service (USFWS) or the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) as threatened or endangered. *Endangered* refers to species, subspecies, or distinct population segments that are in danger of extinction through all or a significant portion of their range. *Threatened* refers to species, subspecies, or distinct population segments that are likely to become endangered in the near future.

The ESA is administered by USFWS and the NMFS. In general, NMFS is responsible for protection of ESA-listed marine species and anadromous fish, whereas other listed species are under USFWS jurisdiction. Provisions of ESA Sections 3, 7, 9, and 10 may be relevant to the MTP 2035 and are summarized below.

Critical Habitat (Sections 3 and 4)

Critical habitat is defined in Section 3 of the ESA as the specific area within the geographic range occupied by the species at the time it is listed. In accordance with the ESA, critical habitat includes those biological features essential to the conservation of the species and that may require special management considerations or protection. Specific areas outside the geographical area occupied by a species at the time it is listed may also be included. Such areas are included when it is determined that they are essential for the conservation of the species. Provisions for designating critical habitat are included in Section 4 of the ESA.

Endangered Species Act Authorization Process for Federal Actions (Section 7)

Section 7 of the ESA provides a means for authorizing *take* of threatened and endangered species by federal agencies. *Take*, as defined by ESA, means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Harm* is defined as "any act that kills or injures the species, including significant habitat modification." Under Section 7, the federal agency conducting, funding, or permitting an action (the lead federal agency, such as the Corps) must consult with USFWS or NMFS, as appropriate, to ensure that the proposed action will not jeopardize endangered or threatened species or destroy or adversely modify designated critical habitat. If a proposed project "may affect" a listed species or designated critical habitat, the lead agency is required to prepare a biological assessment evaluating the

nature and severity of the expected effect. In response, USFWS or NMFS issues a biological opinion, with a determination that the proposed action either:

- may jeopardize the continued existence of one or more listed species (*jeopardy finding*) or result in the destruction or adverse modification of critical habitat (*adverse modification finding*), or
- will not jeopardize the continued existence of any listed species (*no jeopardy finding*) or result in adverse modification of critical habitat (*no adverse modification finding*).

The biological opinion issued by USFWS or NMFS may stipulate discretionary "reasonable and prudent" conservation measures. If a project would not jeopardize a listed species, USFWS or NMFS issues an incidental take statement to authorize the proposed activity.

Endangered Species Act Prohibitions (Section 9)

Section 9 of the ESA prohibits the take of any fish or wildlife species listed under the ESA as endangered. Take of threatened species is also prohibited under Section 9, unless otherwise authorized by federal regulations. In some cases, exceptions may be made for threatened species under ESA Section 4[d]; in such cases, the USFWS or NMFS issues a "4[d] rule" describing protections for the threatened species and specifying the circumstances under which take is allowed. In addition, Section 9 prohibits removing, digging up, cutting, and maliciously damaging or destroying federally listed plants on sites under federal jurisdiction.

Endangered Species Act Authorization Process for Non-Federal Actions (Section 10)

Until 1982, state, local, and private entities had no means to acquire incidental take authorization as could federal agencies under Section 7. Private landowners and local and state agencies risked being in direct violation of the ESA no matter how carefully their projects were implemented. This statutory dilemma led Congress to amend Section 10 of the ESA in 1982 to authorize the issuance of an incidental take permit to nonfederal project proponents upon completion of an approved conservation plan. The term *conservation plan* has evolved into *habitat conservation plan (HCP).*

In cases where federal land, funding, or authorization is not required for an action by a nonfederal entity, the take of listed species must be permitted by USFWS and/or NMFS through the Section 10 process. Private landowners, corporations, state agencies, local agencies, and other nonfederal entities must obtain a Section 10(a)(1)(B) incidental take permit for take of federally listed fish and wildlife species "that is incidental to, but not the purpose of, otherwise lawful activities."

As discussed above, the take prohibition for listed plants is more limited than for listed fish and wildlife; the ESA does not prohibit the incidental take of federally listed plants on private or other non-federal lands unless the take or action resulting in take requires federal authorization or is in violation of state law. Thus, Section 10 incidental take permits are only necessary for take of wildlife and fish species. The Section 7(a)(2) prohibition against jeopardy, however, applies to plants, and USFWS may not issue a Section 10(a)(1)(B) incidental take permit if the issuance of that permit would result in jeopardy to a listed plant species.

Prior to the approval of an HCP, USFWS and/or NMFS are required to undertake an *internal* Section 7 consultation because issuance of an incidental take permit is a federal action. (See the discussion of ESA Section 7, above.) Elements specific to the Section 7 process that are not required under the Section 10 process (e.g., analysis of impacts on designated critical habitat, analysis of impacts on listed plant species, and analysis of indirect and cumulative impacts on listed species) are required to meet the requirements of Section 7.

Clean Water Act (CWA)

The CWA was enacted as an amendment to the federal Water Pollution Control Act of 1972, which outlined the basic structure for regulating discharges of pollutants to waters of the United States. The CWA serves as the primary federal law protecting the quality of the nation's surface waters, including lakes, rivers, and coastal wetlands.

The CWA empowers U.S. Environmental Protection Agency (EPA) to set national water quality standards and effluent limitations and includes programs addressing both point source and nonpoint-source pollution. Point-source pollution is pollution that originates or enters surface waters at a single, discrete location, such as an outfall structure or an excavation or construction site. Nonpoint-source pollution originates over a broader area and includes urban contaminants in stormwater runoff and sediment loading from upstream areas. The CWA operates on the principle that all discharges into the nation's waters are unlawful unless specifically authorized by a permit; permit review is the CWA's primary regulatory tool. The following discussion provides additional details on specific sections of the CWA.

Permits for Fill Placement in Waters and Wetlands (Section 404)

CWA Section 404 regulates the discharge of dredged and fill materials into waters of the United States. Waters of the United States refers to oceans, bays, rivers, streams, lakes, ponds, and wetlands, including:

- areas within the ordinary high water mark (OHWM) of a stream, including nonperennial streams with a defined bed and bank and any stream channel that conveys natural runoff, even if it has been realigned; and
- seasonal and perennial wetlands, including coastal wetlands.

As discussed above, the SWANCC ruling removed Corps jurisdiction over isolated wetlands (i.e., wetlands that have no hydrologic connection with a water of the United States).

A June 19, 2006 federal ruling on two consolidated cases (Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers), often referred to as the Rapanos decision, may affect whether adjacent waters or wetlands are considered jurisdictional under the CWA. The directive of the court likely will follow the opinion by Justice Anthony Kennedy, which states that the test for waters of the United States should be determined on a case-by-case basis by Corps on the basis of whether a particular water body has "significant nexus" to navigable waters.

As of the preparation of this report, no guidance from the EPA or Corps has been issued on the Rapanos decision. The Corps and EPA may strive to meet the intent of the Kennedy opinion by requiring Corps districts to evaluate on a case-by-case basis whether a water body possesses a "significant nexus" to waters that are or were navigable. The significant nexus likely will need to be linked to the purpose of the CWA ("restore and maintain the chemical, physical, and biological integrity of the Nation's waters").

Applicants must obtain a permit from the Corps for all discharges of dredged or fill material into waters of the United States, including adjacent wetlands, before proceeding with a proposed activity. The Corps may issue either an individual permit evaluated on a case-by-case basis or a general permit evaluated at a program level for a series of related activities. General permits are preauthorized and are issued to cover multiple instances of similar activities expected to cause only minimal adverse environmental effects. Nationwide permits (NWPs) are a type of general permit issued to cover particular fill activities. Each NWP specifies particular conditions that must be met for the NWP to apply to a particular project. Potential waters of the United States in the project area would be under the jurisdiction of the Sacramento District of the Corps.

Compliance with CWA 404 requires compliance with several other environmental laws and regulations. The Corps cannot issue an individual permit or verify the use of a general permit until the requirements of NEPA, ESA, and National Historic Preservation Act (NHPA) have been met. In addition, the Corps cannot issue or verify any permit until water quality certification has been issued pursuant to CWA 401.

Water Quality Certification (Section 401)

Under CWA 401, applicants for a federal license or permit to conduct activities that may result in the discharge of a pollutant into waters of the United States must obtain certification from the state in which the discharge would originate or, if appropriate, from the interstate water pollution control agency with jurisdiction over affected waters at the

point where the discharge would originate. Therefore, all projects that have a federal component and may affect state water quality (including projects that require federal agency approval, such as issuance of a CWA 404 permit) also must comply with CWA Section 401.

Permits for Stormwater Discharge (Section 402)

CWA Section 402 regulates construction-related stormwater discharges to surface waters through the National Pollutant Discharge Elimination System (NPDES) program, administered by EPA. In California, the State Water Resources Control Board is authorized by EPA to oversee the NPDES program through the Regional Water Quality Control Boards (RWQCBs) (see the related discussion under "Porter-Cologne Water Quality Control Act" below).

NPDES permits are required for projects that disturb more than 1 acre of land. The NPDES permitting process requires the applicant to file a public notice of intent (NOI) to discharge stormwater and prepare and implement a stormwater pollution prevention plan (SWPPP). The SWPPP includes a site map and a description of proposed construction activities. In addition, it describes the best management practices (BMPs) that will be implemented to prevent soil erosion and discharge of other construction-related pollutants (e.g., petroleum products, solvents, paints, and cement) that could contaminate nearby water resources. Permittees are required to conduct annual monitoring and reporting to ensure that BMPs are correctly implemented and effective in controlling the discharge of stormwater-related pollutants.

Wetlands Stewardship

Many programs and policies have been adopted by federal, state, and regional agencies and private entities to protect and restore wetlands in California. In 1993, a California Wetlands Conservation Policy was established. The goals of the policy were to establish a framework and a strategy that would:

- ensure no overall net loss and achieve a long-term net gain in the quantity, quality, and permanence of wetlands acreage and values in California in a manner that fosters creativity, stewardship, and respect for private property;
- reduce procedural complexity in the administration of state and federal wetlands conservation programs; and
- encourage partnerships to make landowner incentive programs and cooperative planning efforts the primary focus of wetlands conservation and restoration.

Executive Order 13186 (Federal Migratory Bird Treaty Act)

The Migratory Bird Treaty Act (MBTA) (16 U.S. Government Code 703–711) prohibits the take of any migratory bird or any part, nest, or eggs of any such bird. Under the act, *take* is defined as the action of or

attempt to “pursue, hunt, shoot, capture, collect, or kill.” This act applies to all persons and agencies in the United States, including federal agencies.

Executive Order 13186 for conservation of migratory birds (January 11, 2001) requires any project with federal involvement to address the impacts of federal actions on migratory birds. The order is designed to assist federal agencies in their efforts to comply with the MBTA and does not constitute any legal authorization to take migratory birds. The order also requires federal agencies to work with USFWS to develop a memorandum of understanding (MOU). Protocols developed under the MOU must promote the conservation of migratory bird populations through:

- avoiding and minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions;
- restoring and enhancing the habitat of migratory birds, as practicable; and
- preventing or abating the pollution or detrimental alteration of the environment for the benefit of migratory birds, as practicable.