

APPENDIX A

ENVIRONMENTAL REGULATIONS AND PERMIT REQUIREMENTS

Many biological resources in California are protected by Federal and State laws and regulations. During the project planning and pre-implementation process, surveys and other assessments may be needed to determine site sensitivities and compliance measures to minimize environmental impacts or effects on protected resources. Key environmental regulatory requirements and permits applicable to implementation of the General Plan 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) have authority over projects that may result in take of a 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 that it would 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).

The recreation facilities improvements and recreation activities discussed in this report have the potential to affect federally listed threatened or endangered, and candidate or proposed species.

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 nongame 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 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 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 U.S. Army Corps of Engineers (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 ½ 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 of an individual permit.

STATE

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 California Department of Fish and Game (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.

Section 401 of the Clean Water Act (CWA)

Section 401(a)(1) of the Clean Water Act (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.

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 1600 of the California Fish and Game Code - Streambed Alteration Agreement

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 and/or riparian vegetation are subject to regulation by CDFG, pursuant to §1600 through §1603 of the California Fish and Game Code. Under §1601 for public projects and §1603 for projects proposed by nonpublic entities, 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. Authorization from CDFG would be in the form of a Streambed Alteration Agreement.