

# **Appendix C**

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## Applicable Regulations for Biological Resources



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### Federal

**Federal Endangered Species Act.** Provisions of the federal Endangered Species Act (federal ESA) protect federally listed threatened and endangered species and their habitats from unlawful take and ensure that federal actions do not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Under the federal ESA, “take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any of the specifically enumerated conduct.” The United States Fish and Wildlife Service’s (USFWS) regulations define harm to mean “an act which actually kills or injures wild-life.” Such an act “may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering” (50 Code of Federal Regulations Section 17.3).

Critical habitat is defined in Section 3(5)(A) of the federal ESA as “(i) the specific areas within the geographical area occupied by the species on which are found those physical or biological features (I) essential to the conservation of the species, and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species upon a determination by the Secretary of Commerce or the Secretary of the Interior (Secretary) that such areas are essential for the conservation of the species.” The effects analyses for designated critical habitat must consider the role of the critical habitat in both the continued survival and the eventual recovery (i.e., the conservation) of the species in question, consistent with the recent Ninth Circuit judicial opinion, *Gifford Pinchot Task Force v. United States Fish and Wildlife Service*. Activities that may result in “take” of individuals are regulated by the USFWS. Candidate species are not afforded any legal protection under the federal ESA; however, candidate species typically receive special attention from federal and State agencies during the environmental review process.

**Migratory Bird Treaty Act.** Raptors (e.g., eagles, hawks, and owls), other native birds, and their nests are protected under both federal and State regulations. The federal Migratory Bird Treaty Act (MBTA) prohibits killing, possessing, or trading in migratory birds except in accordance with regulations prescribed by the Secretary. This act encompasses whole birds, parts of birds, and bird nests and eggs.

**Bald and Golden Eagle Protection Act.** The Bald and Golden Eagle Protection Act of 1940 (16 United States Code Section 668, as amended) protects bald and golden eagles by prohibiting the taking, possession, and commerce of such birds and establishes civil penalties for violation of this Act. Take of bald and golden eagles is defined as follows: “disturb means 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 an 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” (72 Federal Register 31132; 50 Code of Federal Regulations Section 22.3).

The USFWS is the primary federal authority charged with the management of golden eagles in the United States. On November 10, 2009 the USFWS implemented new rules (74 Federal Register 46835) governing the “take” of golden and bald eagles. The new rules were released under the existing Bald and Golden Eagle Protection Act which has been the primary regulation protection unlisted eagle populations since 1940. All activities that may disturb or incidentally take an eagle or its nest as a result of an otherwise legal activity must be permitted by the USFWS under this act. The definition of disturb (72 Federal Reg-

ister 31132) includes interfering with normal breeding, feeding, or sheltering behavior to the degree that it causes or is likely to cause decreased productivity or nest abandonment.

**Regulated Habitats.** Areas meeting the regulatory definition of “Waters of the U.S.” (e.g., “Jurisdictional Waters”) are subject to the jurisdiction of the U.S. Army Corps of Engineers (USACE) under provisions of Section 404 of the Clean Water Act (1972) and Section 10 of the Rivers and Harbors Act (1899). These waters may include all waters used, or potentially used, for interstate commerce, including all waters subject to the ebb and flow of the tide, all interstate waters, all other waters (intrastate lakes, rivers, streams, mudflats, sandflats, playa lakes, natural ponds, etc.), all impoundments of waters otherwise defined as “Waters of the U.S.,” tributaries of waters otherwise defined as “Waters of the U.S.,” the territorial seas, and wetlands (termed “Special Aquatic Sites”) adjacent to “Waters of the U.S.” (33 Code of Federal Regulations, Part 328, Section 328.3). Wetlands on non-agricultural lands are identified using the USACE Wetlands Delineation Manual. Construction activities within jurisdictional waters are regulated by the USACE. The placement of fill into such waters must comply with permit requirements of the USACE. No USACE permit would be effective in the absence of State water quality certification pursuant to Section 401 of the Clean Water Act. As a part of the permit process the USACE works directly with the USFWS to assess potential project impacts on biological resources.

## State

**California Endangered Species Act and Regulations Protecting other Special-Status Species.** Provisions of California Endangered Species Act (State ESA) protect State-listed Threatened and Endangered species. The California Department of Fish and Wildlife (CDFW) regulates activities that may result in “take” of individuals (“take” means “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill”). Habitat degradation or modification is not expressly included in the definition of “take” under the California Fish and Game Code. Additionally, the California Fish and Game Code contains lists of vertebrate species designated as “fully protected” (California Fish & Game Code Sections 3511 [birds], 4700 [mammals], 5050 [reptiles and amphibians], 5515 [fish]). Such species may not be taken or possessed.

In addition to federal and State-listed species, the CDFW also has produced a list of Species of Special Concern to serve as a “watch list.” Species on this list are of limited distribution or the extent of their habitats has been reduced substantially, such that threat to their populations may be imminent. Species of Special Concern may receive special attention during environmental review, but they do not have statutory protection.

Birds of prey are protected in California under the State Fish and Game Code. Section 3503.5 states it is “unlawful to take, possess, or destroy any birds of prey (in the order *Falconiformes* or *Strigiformes*) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by this Code or any regulation adopted pursuant thereto.” Construction disturbance during the breeding season could result in the incidental loss of fertile eggs or nestlings or otherwise lead to nest abandonment. Disturbance that causes nest abandonment and/or loss of reproductive effort is considered “take” by the CDFG. Under Sections 3503 and 3503.5 of the State Fish and Game Code, activities that would result in the taking, possessing, or destroying of any birds-of-prey, taking or possessing of any migratory nongame bird as designated in the Migratory Bird Treaty Act, or the taking, possessing, or needlessly destroying of the nest or eggs of any raptors or non-game birds protected by the Migratory Bird Treaty Act, or the taking of any non-game bird pursuant to Fish and Game Code Section 3800 are prohibited.

**Regulated Habitats.** Areas meeting the State’s definition of “Jurisdictional Waters” are regulated by the State Water Resources Control Board together with the Regional Water Quality Control Boards [RWQCB]),

and are charged with the protection of water resources pursuant to the Porter-Cologne Act and California Code of Regulations Titles 23 (Waters) and 27 (Environmental Protection). The Proposed Project falls under the jurisdiction of the Central Coast (Region 3) RWQCB.

Activities that result in either the (1) diversion or obstruction of the natural flow of a stream, (2) substantially change the bed, channel, or bank of a stream, or (3) utilize any materials (including vegetation) from a streambed, may also require that a project applicant enter into a Streambed Alteration Agreement with the CDFW. The CDFW can potentially extend the definition of stream to include “intermittent and ephemeral streams, rivers, creeks, dry washes, sloughs, United States Geological Survey (USGS) blue-line streams, and watercourses with subsurface flows. Canals, aqueducts, irrigation ditches, and other means of water conveyance can also be considered streams if they support aquatic life, riparian vegetation, or stream-dependent terrestrial wildlife.”

**Oak Woodlands Conservation.** California Public Resources Code Section 21083.4 requires each county in California to implement an oak woodland protection policy to mitigate for the loss of oak woodlands resultant from approved quarry extensions within their jurisdiction. In this policy, oak trees are defined as all native species of oaks larger than five inches diameter measured at breast height (DBH), or four and one-half feet above grade. At least one of four mitigation alternatives for significant conversions of oak woodlands are required in this regulation: 1) conserve oak woodlands through the use of a conservation easement; 2) plant an appropriate number of trees, including maintaining plantings and replacing dead or diseased trees (additionally, tree maintenance must last for seven years and mitigation plantings shall not fulfill more than one-half the mitigation requirement for the quarry extension); 3) contribute funds to the Oak Woodlands Conservation Fund, as established under Section 1363 (a) of the Fish and Game Code; or 4) other mitigation measures developed by a county. The second alternative may also be used to restore former oak woodlands.

### **Other Applicable Regulations, Plans, and Standards**

**California Native Plant Society (CNPS) Rare Plant Program.** The mission of the CNPS Rare Plant Program is to develop current, accurate information on the distribution, ecology, and conservation status of California's rare and endangered plants, and to use this information to promote science-based plant conservation in California. The Program currently recognizes more than 1600 plant taxa (species, subspecies and varieties) as rare or endangered in California (California Rare Plant Rank [CRPR] 1B and 2). This constitutes approximately 20 percent of California's native flora. More than 500 additional species are on the CNPS' list of plants of limited distribution (CRPR 4, a “watch” list) and approximately 55 additional species are on the CNPS' list of taxa about which we need more information (CRPR 3). The *Inventory* also contains information on approximately 25 native plants that are presumed to have gone extinct in California in the last 100 years (primarily because of land conversion to agriculture and urban development). The Program operates under a Memorandum of Understanding (MOU) with CDFW. The MOU outlines broad cooperation in rare plant assessment and protection, and formalizes cooperative ventures such as data sharing and production of complementary information sources for rare plants. Plants ranked as CRPR 1b and 2 are special-status species that require consideration during the CEQA process.

**Voluntary Oak Woodlands Management Plan for San Luis Obispo County.** This Plan describes voluntary conservation and mitigation strategies for oak trees and oak woodlands in the County.