

## **CHAPTER 7**

### **COMPLIANCE, CONSULTATION, AND COORDINATION WITH OTHERS**

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#### **7.1 COMPLIANCE WITH APPLICABLE FEDERAL LAWS, REGULATIONS, EXECUTIVE ORDERS, AND OTHER GUIDANCE**

In undertaking the Otay River Estuary Restoration Project (ORERP or proposed action), the U.S. Fish and Wildlife Service (Service) must comply with all applicable Federal laws, regulations, executive orders, and other guidance. As stated below, compliance has been or will be accomplished in association with implementation of the proposed action.

##### **Agency Coordination**

###### *Executive Order 12372, Intergovernmental Review of Federal Programs*

Federal agencies are required to provide opportunities for consultation to all State and local governments that would be directly affected by a Federal action.

Coordination and consultation regarding the proposed restoration is ongoing with State agencies, tribes, other Federal agencies, and local governments that have jurisdiction over one or more aspects of the proposed action, have an interest in the proposed action, or may be affected by activities associated with the proposed action. These entities will be provided with copies of the Environmental Impact Statement (EIS) for review and comment.

##### **Human Rights Regulations**

###### *Executive Order 12898, Environmental Justice*

Federal agencies are mandated to achieve environmental justice by identifying and addressing disproportionately high and significant human health or environmental impacts of its programs, policies, and activities on minority and low-income populations.

Environmental justice impacts associated with the proposed action are addressed in Section 4.5.7, Environmental Justice, of this EIS, which states that the various restoration alternatives analyzed for the Otay River Floodplain Site and Pond 15 Site would not cause disproportionately high or significant human health impacts in any population. None of the alternatives would create a greater burden on low-income households.

##### **Cultural Resources Regulations**

Compliance with the following Federal laws and executive orders related to cultural resources is outlined in Section 4.4, Cultural Resources, of this EIS.

***Executive Order 13007, Indian Sacred Sites***

This executive order provides for access to and ceremonial use of Native American sacred sites on Federal land used by Native American or religious practitioners, and directs Federal land managers to avoid significantly affecting the physical integrity of such sacred sites.

***Executive Order 13175, Consultation and Coordination with Indian Tribal Governments***

This executive order requires Federal agencies to implement an accountable process to ensure meaningful and timely input by tribal officials as policies are developed that have tribal implications. Federally recognized tribes and other tribal organizations were contacted to solicit comments and initiate consultation with respect to development of this EIS and the alternatives evaluated within this document.

***American Indian Religious Freedom Act 1978 (PL 95-341; 92 Stat. 469; 42 U.S.C. 1996)***

This act protects and preserves the right of Native Americans to believe, express, and exercise their traditional religions, including access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites.

***Executive Order 11593, Protection and Enhancement of the Cultural Environment***

This executive order requires that if the Service proposes any activities that may affect archaeological or historical sites, the Service will consult with Federal and State Historic Preservation Officers to comply with Section 106 of the National Historic Preservation Act of 1966, as amended.

***Antiquities Act of 1906***

This act authorizes the scientific investigation of antiquities on Federal land, prohibits and provides penalties for unauthorized search for or collection of artifacts or other objects of scientific interest, and authorizes the president to establish national monuments and cultural areas on Federal lands.

***National Historic Preservation Act of 1966, as amended (PL 89-665; 50 Stat. 915; 16 U.S.C. 470 et seq.; 36 CFR 800)***

Federal agencies are directed to take into account the impacts of their actions on items or sites listed or eligible for listing in the National Register of Historic Places (Section 106). Section 110(a) sets inventory, nomination, protection, and preservation responsibilities for Federally owned cultural properties.

***Archaeological Resources Protection Act of 1979, as amended (PL 96-95; 93 Stat. 722; 16 U.S.C. 470a(a)–47m(m))***

This act protects archaeological resources on public lands.

***Native American Graves Protection and Repatriation Act of 1990 (PL 101–601; 25 U.S.C. 3001 et seq.)***

Federal agencies are required to provide information about Native American cultural items (e.g., human remains, funerary objects, sacred objects, and objects of cultural patrimony) to parties with standing, such as lineal descendants or culturally affiliated Native American tribes or Native Hawaiian organizations, and, upon presentation of a valid request, dispose of or repatriate these objects to them.

***Curation of Federally Owned and Administered Archaeological Collections (36 CFR 79)***

Federal agencies are responsible for ensuring proper care of Federally owned and administered archaeological collections, including ensuring that significant prehistoric and historic artifacts and associated records are deposited in an institution with adequate long-term curatorial capabilities. Repositories, whether Federal, State, local, or tribal, must be able to provide professional, systematic, and accountable curatorial services on a long-term basis.

**Biological Resources Regulations**

***National Wildlife Refuge System Improvement Act of 1997***

This act, which amends the National Wildlife Refuge System Administration Act of 1966, addresses the administration, management, and planning for National Wildlife Refuges. It ensures that the National Wildlife Refuge System is managed as a national system of related lands, waters, and interests for the protection and conservation of wildlife resources in the United States. The main components of this act are requirements to maintain the biological integrity, diversity, and environmental health of the National Wildlife Refuge System, recognizing that wildlife-dependent recreational uses involving hunting, fishing, wildlife observation and photography, and environmental education and interpretation, when determined to be compatible, are legitimate and appropriate public uses of the National Wildlife Refuge System.

Implementation of the proposed action would include objectives presented in the San Diego Bay National Wildlife Refuge (NWR) Comprehensive Conservation Plan (CCP), which was prepared in compliance with this act.

***Magnuson-Stevens Fishery Conservation and Management Act***

This act is intended to provide conservation and management of fisheries and associated resources. This includes promoting domestic commercial and recreational fishing under sound principles, and promoting the protection of Essential Fish Habitat in the review of projects conducted under Federal permits, licenses, or other authorities that have the potential to affect such habitat. Prior to the approval of any permits for the proposed action from the U.S. Army Corps of Engineers, San Diego Regional Water Quality Control Board, or California Coastal Commission, consultation regarding potential impacts to Essential Fish Habitat would be conducted with the National Oceanic and Atmospheric Association (NOAA) National Marine Fisheries Service (Fisheries).

***Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.)***

This act provides for the conservation of ecosystems on which threatened and endangered species of fish, wildlife, and plants depend, both through Federal action and by encouraging the establishment of State programs. Section 7 of the Endangered Species Act requires Federal agencies to ensure that any action authorized, funded, or carried out by them is not likely to jeopardize the continued existence of listed species or modify their critical habitat. Section 7 compliance would occur prior project implementation.

***Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds***

This order instructs Federal agencies to conserve migratory birds by several means, including the incorporation of strategies and recommendations found in Partners in Flight Bird Conservation Plans, the North American Waterfowl Plan, the North American Waterbird Conservation Plan, and the United States Shorebird Conservation Plan, into agency management plans and guidance documents.

Limitations on when the proposed construction can occur within the San Diego Bay NWR have been imposed in accordance with this executive order, and the proposed restoration is consistent with the goals and objectives of the San Diego Bay NWR CCP, which incorporates the strategies and recommendation of the applicable bird conservation plans.

***Executive Order 13113, Invasive Species***

Federal agencies whose actions may affect the status of invasive species are required to use relevant programs and authorities to prevent, control, monitor, and research such species, and coordinate complementary, cost-efficient, and effective activities concerning invasive species by relying on existing organizations that address invasive species issues.

The control of invasive exotic weeds would be a required component of the proposed action's habitat maintenance plan.

***Migratory Bird Treaty Act of 1918, as amended***

This act provides protection for birds that migrate across State and international boundaries.

The Service's Division of Migratory Birds and Habitats Program was consulted during preparation of restoration alternatives, and the actions described in the alternatives proposed for each site were reviewed for consistency with the requirements of the Migratory Bird Treaty Act.

**Land and Water Use Regulations**

***Executive Order 11988, Floodplain Management***

In accordance with Executive Order 11988, Floodplain Management, Federal agencies are prohibited from contributing to the "significant impacts associated with the occupancy and modification of floodplains" and the "direct or indirect support of floodplain development." In addition, before proposing, conducting, supporting, or allowing an action in a floodplain, each agency is to determine whether planned activities will affect the floodplain and evaluate the potential impacts of the intended actions on floodplain functions.

The potential impacts of restoring wetlands within the Otay River Floodplain Site on properties located upstream and downstream of the project site are evaluated in Sections 4.2.1, Topography/Visual Quality, 4.2.2, Geology and Soils and 4.2.5, Hydrology and Water Quality, of this EIS, and measures have been incorporated into the scope of the proposed action to ensure that no significant impacts associated with implementation of the action alternatives would occur.

***Executive Order 11990, Protection of Wetlands***

This executive order states that each agency must provide leadership and take action to minimize the destruction, loss, or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands when conducting Federal activities and programs affecting land use, including water and related land resources planning, regulating, and licensing activities.

Each of the action alternatives described in this EIS includes proposals to improve and/or restore current wetland habitat on the project site while avoiding negative impacts to the current wetland areas within the South San Diego Bay Unit of the San Diego Bay NWR.

***Coastal Zone Management Act of 1972 (16 U.S.C. 1451–1646)***

This act requires that all Federal actions proposed in the coastal zone be conducted in a manner consistent with the approved coastal zone management plan. A CDP from the California Coastal Commission (Commission) must be issued for the portion of the proposed action to occur on the San Diego Bay NWR before construction can begin, and a CDP from the Port of San Diego must be issued for excavation within the Port’s jurisdiction that will occur in association with breaching Pond 15.

***Federal Water Pollution Control Act of 1948, as amended (33 U.S.C. 1251–1376; Chapter 758; PL 845; 62 Stat. 1155) (Clean Water Act)***

This act establishes the basic structure for regulating discharges of pollutants into waters of the United States. Section 402 of the act established the National Pollutant Discharge Elimination System program to authorize the U.S. Environmental Protection Agency’s issuance of discharge permits (33 U.S.C. 1342), and Section 404 authorized the U.S. Army Corps of Engineers (Corps) to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites (33 U.S.C. 1344).

Prior to implementation of the proposed wetland restoration, the appropriate permits related to the Clean Water Act would be obtained. Best management practices (BMPs) would be implemented during restoration to avoid or minimize the potential for significant impacts to water quality to the San Diego Bay and adjacent wetlands.

## **7.2 REQUIRED PERMITS OR APPROVALS**

### **Biological Resources**

Compliance with Section 7 of the Endangered Species Act will occur prior to implementation of any proposed action. The Service will consult with NOAA Fisheries due to the presence of the threatened East Pacific green sea turtle (*Chelonia mydas*) in the vicinity of the project site. In addition, the Service will conduct an Intra-Service consultation to consider potential effects of the Service’s actions on the listed species addressed in Section 3.3.3 of this EIS.

### **Water Resources and Water Quality**

In accordance with the Clean Water Act, prior to project implementation, a Section 401 Certification will be obtained from the San Diego Regional Water Quality Control Board demonstrating that any discharges into waters of the United States will comply with all applicable water quality standards, limitations, and restrictions. Once this certification has been granted, a Clean Water Act Section 404 Permit and a Rivers and Harbors Act Section 10 Permit

will be obtained from the U.S. Army Corps of Engineers to permit the proposed activities to occur within jurisdictional waters of the United States.

### **Coastal Resources**

Because the proposed action is occurring in part as mitigation for the Carlsbad Desalination Plant and a portion of the proposed action is located in an area covered by the Local Coastal Program for the Port of San Diego, the project must be implemented in conformance with California Coastal Act. In addition, the majority of the project will occur on federal land; therefore, the project must also be found consistent with the Coastal Zone Management Act.

On November 15, 2007, the Commission approved a CDP (No. E-06-013) for Poseidon to construct and operate a desalination facility in Carlsbad, California. As a part of Special Condition 8 of this approval, the Commission required Poseidon to prepare and submit a Marine Life Mitigation Plan (MLMP) to address the potential impacts caused by the Carlsbad Desalination Plant's use of estuarine water and its entrainment of marine organisms. This MLMP was finalized on November 21, 2008, with incorporations and revisions from the Commission (Poseidon 2008).

The MLMP required Poseidon to submit a proposed mitigation site and restoration plan, which led to development of the proposed action. A determination from the Commission that the proposed action is consistent with the requirements, objectives, and restrictions of the MLMP is required.

The Commission required an application for a CDP be submitted for the proposed action in May 2014. A staff report and findings related to the CDP application for the proposed action will serve as the CEQA-equivalent environmental analysis document prepared under the Commission's certified regulatory program.

The restoration of Pond 15 requires dredging of a 0.79-acre portion of Port land located immediately to the north of the Pond 15 levee. The need to remove approximately 4,300 cubic yards of material within the Port's jurisdiction to facilitate tidal exchange within the pond requires the approval of a CDP from the Port for that specific action.

### **Air Quality**

In accordance with Rule 1501 (Conformity of General Federal Actions), a conformity determination that the proposed action conforms to the California State Implementation Plan is required for each pollutant where the total direct and indirect emissions in a nonattainment or maintenance areas caused by a Federal action would equal or exceed any of the rates presented in the Rule. However, the requirement for a conformity determination does not apply to actions where the total direct and indirect emissions are below the emissions levels in paragraph (b) of

the Rule. Based on the analysis presented in Section 4.2.6.1 of this EIS, project implementation would not result in emissions equal to or in excess of the rates presented in Rule 1501, therefore, no conformity determination is required.

### **Other Permits or Approvals**

If aspects of the proposed action are altered, such as staging, stockpiling, or haul trips, and as a result, impacts occur within the City of San Diego's permitting jurisdiction, additional permits or approvals may be required.

## **7.3 CONSULTATION AND COORDINATION WITH OTHERS**

### **7.3.1 Public Outreach**

The following summarizes the public outreach that occurred for this EIS, including the initial scoping meetings, interagency meetings, restoration update mailings, Federal Register notices, and an overview of the topics discussed or comments received. For the 2011 Scoping Meetings, the EIS distribution list and a summary of the public comments provided during initial scoping are provided in Appendix A. For the 2013 Scoping Meeting, the EIS distribution list and summary of comments provided are in Appendix B.

#### **7.3.1.1 Initial Scoping Meetings**

##### **2011 Scoping Meetings**

**Date and Location of the Meetings:** December 6, 2011, at the Swiss Park & Club, 2001 Main Street, Chula Vista, California 91911 (two separate meetings, at 1 p.m. and 6 p.m.).

**Notification Process:** Project packets distributed, including a project description, notice of scoping meetings, proposed action schedule, and comment information.

**Purpose:** To inform the public/receive public comments.

**Format:** A presentation describing the proposed action, purpose and need, and objectives and a tour of the project site.

**Number of Participants:** A total of 22 people between the two meetings.

##### **2013 Scoping Meeting**

**Date and Location of the Meeting:** January 23, 2013, at the Swiss Park & Club, 2001 Main Street, Chula Vista, California 91911.

**Notification Process:** Restoration plan update distributed, including a project description, notice of scoping meetings, proposed action schedule, and comment information.

**Purpose:** To inform the public and receive public comments.

**Format:** A presentation describing updates to the proposed action, purpose and need, and objectives.

**Number of Participants:** Fourteen people.

### **7.3.1.2 Proposed Action Updates**

**Date:** November 2011.

**Purpose:** To inform the public of the proposed action's details, provide notice of additional scoping meeting, update EIS schedule, request public comments, and provide contact information.

**Date:** January 2013.

**Purpose:** To inform the public of updates on the proposed action's details, provide notice of additional scoping meeting, update EIS schedule, request public comments, and provide contact information.

### **7.3.1.3 Federal Register Notices**

#### **2011 Federal Register, 76 FR 70480**

**Date of Notice:** November 14, 2011.

**Purpose:** Notice of Intent to prepare an EIS and request public comment.

**Contents of the Notice:** The notice includes a project summary, background on the proposed action, project description, request for public comment, and contact information.

#### **2013 Federal Register, 78 FR 1246**

**Date of Notice:** January 8, 2013.

**Purpose:** Notice of Intent to prepare an EIS and request public comment.

**Contents of the Notice:** The notice includes a project summary, background on the proposed action, project description, request for public comment, and contact information.

### **7.3.2 Agency Coordination**

The Corps is participating in the review, analysis, and preparation of this EIS as a cooperating agency. Coordination and consultation is ongoing with other Federal and State agencies, tribes, and the local governments that surround the San Diego Bay NWR. These entities were also provided with copies of the Draft EIS for review and comment.

Consultation with NOAA Fisheries is required by the Federal Endangered Species Act and Magnuson-Stevens Fishery Conservation and Management Act. Coordination with NOAA Fisheries about the potential action alternatives' impacts on Essential Fish Habitat and the East Pacific green sea turtle will also occur prior to project initiation.

#### **Scientific Advisory Panel**

The Scientific Advisory Panel (SAP) is a combination of Federal, regional, and local agencies formed to provide a technical perspective on location, design, and implementation of the proposed action. The SAP is a collaboration of representatives from the Regional Board, California Department of Fish and Wildlife, Commission, Corps, and Carlsbad Fish and Wildlife Office. Depending on the stage of the process, the SAP has held either weekly or monthly meetings to ensure early collaboration between these agencies.

The SAP was formed to provide scientific expertise to the MLMP workgroup, which includes a collaboration of the Commission and representatives from several other State and Federal agencies. The MLMP workgroup, a separate entity from the SAP, was tasked to develop restoration alternatives to comply with the MLMP required by Special Condition 8 of the permit allowing Poseidon to construct and operate a desalination facility in Carlsbad, California.

### **7.4 TRIBAL CONSULTATION/COORDINATION**

Title 36 of the Code of Federal Regulations, Part 800, implements Section 106 of the National Historic Preservation Act. This defines the necessary consultation with Federally recognized Native American tribes to identify resources with important cultural values; to determine whether or not they may be significantly affected by a proposed undertaking; and to outline the process for eliminating, reducing, or mitigating significant impacts. In accordance with the National Environment Policy Act, National Historic Preservation Act, and Native American Graves Protection and Repatriation Act, the Service conducted consultations with several tribes, as outlined in Table 7-1. Tribal consultation will be ongoing throughout the proposed action timeline, and responses received to date included a request that a qualified tribal member monitor the archaeological survey and testing activities. In addition, a request was made that archaeologists and cultural monitors be on site to monitor construction activities. Cultural monitors have specialized knowledge of cultural practices and physical objects particular to the project site.

**Table 7-1**  
**NRHP Eligibility Status for Cultural Resources within the Project Area**

Date	Policy	Purpose
—	NEPA	Notice of Intent
July 11, 2012	NHPA	Undertaking and Area of Potential Impacts
April 3, 2013	NAGPRA	Inadvertent Discovery
June 5, 2013	NAGPRA	Notice of Intended Disposition
—	NEPA and NHPA	Pre-Project Consultation

NRHP = National Register of Historic Places; NEPA = National Environment Policy Act; NHPA = National Historic Preservation Act; NAGPRA = Native American Graves Protection and Repatriation Act.

Positively identified human remains were located during subsurface testing on site. The Service initiated Native American consultation efforts to determine further actions. On July 24, 2013, all human remains were repatriated to the Most Likely Descendant on the Kumeyaay Cultural Repatriation Committee. Details of this process are included in the Otay River Estuary Restoration Project Cultural Resources Evaluation prepared by Dudek in 2014, included as Appendix K of this EIS.

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