CALFED ECOSYSTEM RESTORATION:

ENVIRONMENTAL PERMIT COORDINATION PROCESS

Introduction

It is important to start now on the restoration of fish, wildlife, and plant communities and ecological processes and functions in the Estuary and its watershed to begin restoring its ecological health. The environmental process for ecosystem restoration projects, however, could be time consuming, delaying implementation of these projects for several years. Delays pose an obstacle to implementing restoration projects for which funding is available now through sources such as Category III and Proposition 204. The process of completing environmental documentation and acquiring permits can preclude funding otherwise worthy projects. The purpose of this report is to provide a strategy available for both CALFED agency projects and projects sponsored by other entities which are compatible with the goals and objectives of ecosystem restoration.

State and Federal agency staff, CALFED staff, and other interested parties met to discuss streamlining the environmental process. They recommended several approaches to streamlining at various steps of the environmental documentation process. They identified steps to address potential delays and proposed potential remedies. The group's recommendations have been incorporated into a systematic approach to the preparation of environmental documentation and acquisition of permits. That approach is summarized in this report.

CALFED regulatory agencies have limited resources to commit to a permit coordination process. Therefore, the success of the proposed approach would depend upon the availability of external resources to support staff working on expedited environmental review and permitting. CALFED would need to consider funding mechanisms to ensure sufficient, ongoing resources, and a system for allocating the resources to the appropriate entities. For this streamlined environmental process to be effective CALFED will then need to provide the foundation for and a long term commitment to the process.

This report provides a definition of what is, and what is not, an effective environmental permit coordination process. It describes a conceptual approach to the process including how State and Federal permits that can be expedited. An example is used to demonstrate the

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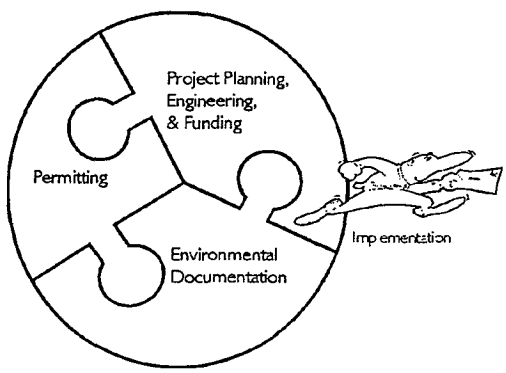
proposed approach. For this process to be successful a regulatory steering review team composed of agency staff and stakeholders should be formed. In addition, an environmental processing team or "Permit Central" should be formed to assist the Lead Agency in compiling and coordinating the necessary environmental documentation leading to acquiring permits. A "Permit Central" would ensure the project's environmental documentation is ready when the project is ready to be implemented. The strategy and techniques described here should help in processing the necessary environmental documentation and permits for projects whether they are submitted before or after CALFED's programmatic EIR/EIS is completed.

Streamlined Environmental Process: Definition

A streamlined environmental process is defined as:

State and Federal environmental compliance and associated environmental permitting which is completed in a concurrent, efficient, and timely manner so as to not cause unnecessary delays or preclude scheduled project implementation.



What Streamlining Is Not

A streamlined environmental process does not circumvent any required environmental permitting process and ensures compliance with both the California Environmental Quality Act (CEQA), California Endangered Species Act (CESA), National Environmental Policy Act (NEPA), Federal Endangered Species Act (ESA), Clean Water Act and Porter-Cologne Act, as well as all other regulatory requirements. The streamlined environmental process does not substitute for the Water Rights permitting process of the State Water Resources Control Board. The process does not give preferential treatment to agency projects but ensures fairness to both CALFED agency projects and projects sponsored by other entities.

Long Term Commitment

A streamlined environmental process can only be accomplished through a long term commitment to provide the staff and funding needed to coordinate and provide guidance during the environmental process. Staffing and funding for preparing environmental documentation,

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completing permit applications, tracking permits, permit term compliance, and project monitoring is often overlooked. Instead, they should be in place prior to the onset of a project.

Permitting and reviewing resource agencies must also be staffed adequately to provide timely review of environmental documentation, consultation pursuant to both CESA and ESA, and permit processing.

Streamlining Components

The following describes the teams and regulatory involvement needed to establish the foundation for a successful streamlining process:

- Regulatory Steering Review Team

  Policy/oversight: A Regulatory Steering Review Team should be formed to oversee the streamlined environmental process. The team should be composed of a designated group of agency staff and stakeholders. The team's purpose is to ensure compliance with CEQA/NEPA, CESA, ESA, and other State and Federal laws, executive orders, and their agencies' administrative policies. The team would also help identify potential concerns and recommend modifications to improve the process. The team could be led by CALFED's Environmental Coordinator.

- Environmental Team ("Permit Central")

  Project-specific streamlining: An environmental processing team, "Permit Central", should be formed with oversight from the Regulatory Steering Review Team. Permit Central would be a technical team funded by CALFED, working under the direction of the Ecosystem Restoration Coordinator to assist and guide lead agencies or project proponents in preparation of environmental documentation. Permit Central would assist in several ways such as preparing environmental documentation and obtaining permits, or acting as an information and processing clearinghouse. A subteam of Permit Central would facilitate permitting and environmental reviews for specific projects. Another subteam would coordinate and consolidate certain activities and information needs for the program as a whole. (i.e., across projects). Examples include developing mitigation strategies and/or mitigation banks, uniform and coordinated monitoring, and GIS to support environmental documentation and permitting.

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This environmental team would assist a Lead Agency or project proponent by ensuring that the environmental documentation and permitting is ready when the project is, and that new information is continually assimilated to improve the process and encourage adaptive management.

- Regulatory Team

The Regulatory Team is made up of a regulatory staff dedicated to work on CALFED restoration projects. The regulatory staff should be knowledgable of the environmental processes and permitting. The team's responsibilty is to provide timely review of environmental documentation, close interagency coordination, permitting, development of mitigation measures and monitoring requirements, and completion of biological opinions. The Regulatory Team would receive prepared documentation and permit applications from Permit Central and provide third party review in support of the Federal and State decision making process. To ensure engagement of the required regulatory staff, a funding mechanism should be established independent of the lead agency seeking regulatory approval. The Regulatory Team would receive its direction from the regulatory agencies. An example of this is in the Department of Fish and Game (DFG) where a special water project planning unit provides departmental environmental review, response, and permitting for Department of Water Resources' projects.

Streamlined Environmental Process

The actions required for NEPA/CEQA and ESA/CESA are intertwined and both must be complied with fully. Neither has "priority" in the strict sense of the word. The following describes each of the recommended streamlined environmental process steps. These steps include the importance of defining a particular project such as refining the project purpose, conducting a 404(b)(1) alternatives analysis, identifying the lead agency(ies) and cooperating partners, and conducting early consultation. It is assumed that these steps apply to those projects which have been judged eligible for expedited review/process. Language is included under the project proposals section to identify potential projects which may be successfully streamlined. Figure 1 is a flow chart further illustrating these steps.

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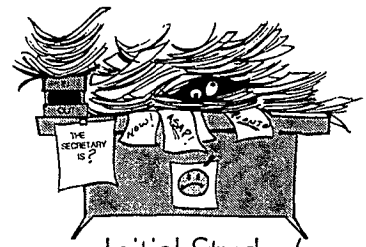
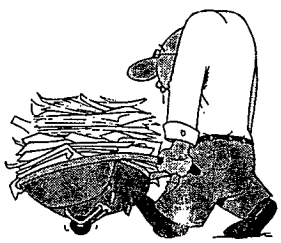
Streamlined Environmental Process

Preliminary Project Planning / Early Agency Consultation



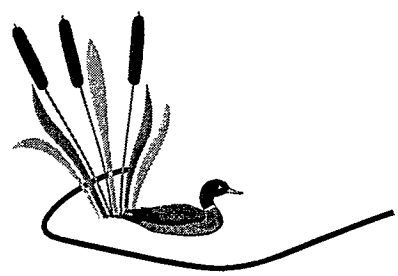
Initial Study / Environmental Assessment / CESA/ESA / Biological Assessment/ Wetlands Delineation



Decision Documentation Preparation

Agency and Public Review and Response

Completion of CEQA/NEPA and Environmental Permitting Compliance



Project Implementation

Figure 1

Step 1: Preliminary Project Planning/Early Agency Consultation

- Project Proposals

The design and purpose of the project is important in achieving a streamlined process. For streamlining purposes, simpler/smaller projects are generally easier to move through the process. Similar projects can be grouped and moved through the regulatory process concurrently.

Integral to project selection is the concept of mitigation sequencing; i.e. avoidance, minimization, and compensation, so that impacts are not merely being shifted from one resource to another. A carefully drafted project purpose is needed to demonstrate that habitat tradeoffs are minimized or that the overall values are greater in absolute terms relative to other alternatives. That project purpose will be used to complete the Sec.404 (b) (1) alternatives analysis.

Ideally, there should be early screening for those projects requiring a Section 404 or Section 10 permit, the permitting process for these projects should then proceed on a separate, but concurrent, track with the NEPA/CEQA process. In addition, it is desirable that the 404 (b)(1) alternatives analysis be completed as early in the process as possible (either during step 1 or step 2).

- Project Selection

The streamlined process could be generally available to a full range of projects. The projects may be judged worthy based on how well they accomplish CALFED's ecosystem restoration objectives and how effectively they avoid any significant adverse effect on the environment. The project design and selection process should be worked out in close coordination with the Ecosystem Roundtable process. Streamlining criteria which identify proposals that are readily implementable should be in the Roundtable's project reviews. This could lead to early agency consultation during project selection which will improve the efficiency of this step.

Preliminary planning should include an in-house identification of issues, authorities, and agencies. Appropriate research, including a literature search and review of previous environmental documents for similar projects, should be completed as part of the preliminary planning process. There should be broad consensus that the project will contribute to the goal of restoring the estuary. Implementing the restoration project should, therefore, demonstrate a clear benefit.

Projects which are most likely to receive a streamlined environmental review and regulatory process possess the following attributes:

Acceptability

Projects acceptable to all regulatory agencies which adequately satisfy the requirements for permit issuance. If there is consensus, the need for a lengthy, formal endangered species consultation may be eliminated. The Regulatory Steering Review Team, in consultation with the Ecosystem Roundtable, would help develop a list of projects for which there is consensus on their value.

Similar Actions

Projects which involve similar activities in a tightly defined regional area could be permitted under a broad permit, such as a U.S. Army Corps of Engineers (USACE) General Permit. Previous environmental documentation can be used for previous projects consisting of similar actions.

Quick Success

Successful completion of the regulatory process for simple, less complex projects and implementation of those projects can facilitate cooperation and coordination for projects with greater complexity.

- Identification of Partners

Sharing responsibilities and tasks with others can provide momentum and project support. Allow cooperators to carry their share, and resist the temptation to take on more than you can handle. Cooperative projects

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may take longer to accomplish than anticipated, so realistic time frames should be set.

- Lead Agency Determination

  A Lead Agency is the agency that has the principal responsibility for carrying out or approving a project and preparing CEQA/NEPA documents. When a project is subject to both CEQA and NEPA, State and local agencies are encouraged to cooperate with Federal agencies, through joint planning, research, hearings, and preparation of environmental documents. This will eliminate duplication with Federal, State, and local procedures. By providing for joint preparation and ensuring compliance with other agency procedures an agency may adopt appropriate environmental documentation prepared by another agency. A written memorandum of understanding between the two Lead Agencies should spell out the roles and responsibilities of each. Since NEPA and CEQA are somewhat different with regard to procedural and content requirements, the agencies should apply whichever requirements are more stringent. The scope and content of the environmental documentation and the respective responsibilities for reviewing interim drafts should be clearly spelled out.

- Agency Consultation

  To encourage resolution of potential conflict as early as possible, Federal and State lead agencies should consult informally with the DFG, U.S. Fish and Wildlife Service (USFWS), and National Marine Fisheries Service (NMFS). Before initiating consultation, the agency should evaluate the adequacy of the project data and its effects on any threatened or endangered species. It is the responsibility of the lead agency to provide the fish and wildlife agencies with the information necessary to evaluate whether the proposed project will jeopardize any state or federally listed species.

After the project proposals are screened and selected the Environmental Coordinator submits the proposals to the Regulatory Steering Review Team for their information and to Permit Central to start the work. After this step all of the team functions are involved.

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Step 2: Initial Study/Environmental Assessment, CESA/ESA Biological Assessment Preparation, and Wetlands Delineation

The second step involves complying with NEPA, CEQA, and other regulatory requirements. Success in streamlining this step is if the environmental considerations were part of the project definition and early consultation was successful. It includes the development of an Initial Study (IS) and Environmental Assessment (EA). This step can be completed in a manner that reduces the risk of a project being challenged by communicating with experienced regulatory agency personnel; inviting outside interests; bringing together land owners; providing full and fair disclosure; embracing not just enforcement of the State and Federal endangered species acts, but commitment to the policy language in those acts affirming it is the duty of government agencies to enhance conditions for threatened and endangered species to assist in their eventual recovery; agreeing up front to take care of concerns; including a wetlands delineation; supporting findings of no significant impact with analytical data; and providing complete biological information.

In a streamlined process, the focus should be on the project's IS and EA. They present the reasons why an action, not otherwise excluded, will not have a significant effect on the environment and why a Negative Declaration/FONSI or Mitigated Negative Declaration/Mitigated FONSI will be prepared. It may then be unnecessary to pursue a rigorous examination of various alternative courses of actions when the analysis of a preferred course of action reveals that there is no significant impact on the environment or that the action is not controversial.

For CESA and ESA compliance, the absence of listed species must be verified according to DFG, NMFS, and USFWS protocols or, if present, the possible effects of the implementation of the action on the species or its habitat must be documented and measures to avoid or minimize are assured. If a listed species will not be affected, or will, in the opinion of the DFG, NMFS, and USFWS likely benefit from the project, a letter of concurrence may be issued by the Federal and State agencies which indicates that unless new information reveals adverse effects of the action that may affect listed species in a manner or to an extent not considered, or a new species or critical habitat is designated that may be affected by the proposed action, no further action pursuant to the ESA or CESA is necessary.

If a listed species may be affected by the project, under ESA, a document called a Biological Assessment (BA) is needed for a major project. This assessment evaluates the likelihood that the proposed action may adversely affect the listed

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species. The proposing agency may conduct its own studies, and present them for evaluation. This could be done to assist in speeding the evaluation process. The BA also is used to determine whether formal consultation or conferencing is required. Prior to filing for a Federal permit, the permit applicant and Federal agency may initiate early consultation with USFWS and NMFS. Smaller projects generally do not require a separate BA.

Although CESA does not formally call for a BA, DFG can use the BA prepared for an ESA consultation. The equivalent of a BA can be the CEQA documentation if it provides sufficient information for DFG to prepare a finding. The consultation requirements of the CESA parallel and incorporate the consultation requirements of CEQA. If it is determined that jeopardy would not result, a Mitigated Negative Declaration may be sufficient for CEQA compliance.

During this step, in coordination with State Historic Preservation Officer (SHPO) and/or Advisory Council on Historic Preservation (ACHP) if necessary, Section 106 of the National Historic Preservation Act would be addressed.

The process of identifying the Federal and State permits necessary should begin. However, Federal and State permitting agencies typically require environmental documentation to be completed prior to issuing permits. Following step 5 of this report is a section of several Federal and State permits which have an abbreviated permit process.

Step 3: Decision Document Preparation

This step involves the preparation of a Negative Declaration/ FONSI, Mitigated Negative Declaration/ Mitigated FONSI. Any needed or proposed mitigation measures must be incorporated and the project revised accordingly before the environmental document is released for public review.

Step 4: Agency and Public Review and Response

The lead agency preparing the environmental documentation circulates the Draft Negative Declaration/FONSI or Mitigated Negative Declaration/Mitigated FONSI and provides public notice of that fact within a reasonable period of time prior to adoption. The environmental documentation should set forth the reasons for the determinations. After public and agency review all comments received should be addressed. This approach fulfills the public participation

policies in CEQA/NEPA by requiring the lead agency to consider the public comments on a proposed Negative Declaration/FONSI or Mitigated Negative Declaration/Mitigated FONSI.

Step 5: Completion of CEQA/NEPA Documentation/Environmental Permitting Compliance

As a result of the public review process, including administrative decisions and public hearings, the lead agency may conclude that certain mitigation measures may be deleted and substituted for other mitigation measures identified which are equivalent or more effective in reducing significant effects on the environment to a less-than- significant level and that do not cause any potentially significant adverse effect on the environment.

The preparer of the document will need to make a finding or written statement that explains how each significant impact and alternative in the documentation is dealt with and whether each impact has been mitigated. CEQA requires that the decision maker balance the benefits of a proposed project against unavoidable environmental risks in determining whether to approve the project. If there is approval of a project with unavoidable significant environmental effects, the agency must prepare a written Statement of Overriding Considerations explaining why it is willing to accept those impacts. The Lead Agency should then file a Notice of Determination following the approval for which an EIR was considered and include a mention of the Statement of Overriding Considerations. Similarly, for NEPA a Record of Decision is prepared which includes a statement of what the decision was, identifies all alternatives considered in making the decision, and a statement of means to mitigate environmental damage.

The environmental documentation should also include a program of monitoring or reporting to ensure that the provisions or revisions are complied with during implementation of the project.

If the project meets the applicable requirements the following permits can provide opportunities to streamline the permit process:

Federal Permits

ESA Section 7

To satisfy Section 7 an Implementation Agreement is an approach which allows the project proponent, Federal action agency, and the Federal fish and wildlife agencies to enter into a three way agreement. This agreement sets forth the obligations of each party to conserve species and avoid or minimize take. These agreements have been incorporated into the permit issued by the authorizing agency to put the third party directly "on the hook" for compliance. On occasion they are treated as free standing agreements.

USACE Section 404 and Section 10

Nationwide or General Permits may be issued on a state, regional, or nationwide basis. Nationwide or General permits are designed to expedite the permitting process as long as authorized activities do not result in more than minimal environmental harm either individually or cumulatively. A Regional General Permit would be the best mechanism to expedite the environmental process for a similar class of activities.

State Permits

State Lands Commission (SLC) Leases

The SLC may lease or otherwise regulate the use of tidelands and submerged lands under its jurisdiction. Tidelands and submerged lands may not be sold. Projects proposing to use state-owned lands for purposes other than dredging, mining, or oil, gas, or geothermal exploration must obtain a land use lease from the SLC. If a project will affect several areas of tidelands and submerged lands within a geographical region of the project the SLC could issue a "Master Land Use Lease".

California Regional Water Quality Control Board (RWQCB) Waste Discharge Permit and 401 Certification

The RWQCB is able to make an expeditious review and approval of dredging and sediment placement projects with the use of a General

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Order Waste Discharge Requirement or a waiver of waste discharge requirements. The goal of the General Order Waste Discharge Requirement is to provide a set of pre-project testing and monitoring requirements that a project proponent can perform and submit to the RWQCB. They demonstrate that their project's dredging and sediment placement activities will not create potential water quality impacts. Projects that meet the applicability requirements of the General Order will receive a Notice of Applicability which is a functional equivalent to receiving a Clean Water Act Section 401 Water Quality Certification.

DFG Code Section 1600; Streambed Alteration Agreement (SAA)

The SAA is a legally binding agreement between a project proponent and the DFG which contains the measures the project proponent must implement to avoid or mitigate any adverse impacts to fish and wildlife. To expedite the process the USACE permit should be obtained prior to requesting a 1600 permit. This could eliminate any DFG concerns and the SAA can be issued incorporating the mitigation measures required in the USACE permit. The DFG can enter into a Memorandum of Understanding or General Maintenance Agreement to address a program of similar restoration activities to eliminate the need for a project by project SAA.

CESA

If an action has the potential to adversely impact a State listed endangered or threatened species a 2081 Memorandum of Understanding (MOU) or a Section 2090 CESA Biological Opinion may be issued for broad programs instead of specific project by project consultations. The DFG may adopt a Federal Section 7 Biological Opinion to meet the requirements of CESA.

Environmental Permit Coordination: An Example
San Joaquin River Diversion Screening Program

Step 1: Preliminary Project Planning/Early Agency Consultation

Project Selection

In the Bay-Delta system there are many factors or stressors that reduce ecological functions or cause mortality of species at different stages in their life cycle.

The project approved for funding from Category III funds consists of the construction of fish screens on all diversions greater than 100 cfs on the lower San Joaquin River from Vernalis to Pittsburgh to provide protection for migrating salmon smolts and other resident fish species.

The strategy of this Screening Program is to help reverse the decline in ecosystem health by reducing or eliminating factors which may reduce the population size or health of a species. One of these factors includes direct and indirect mortality caused by water diversions from the system through unscreened diversions.

There is broad consensus from fishery agencies that screening of water diversions may reduce the direct and indirect mortality of fish species. Mitigation requirements in other programs have included screening as a criteria e.g. Suisun Marsh Screening Program.

Lead Agency

The DFG as lead agency will be responsible for preparing or taking primary responsibility for preparing the environmental documentation for NEPA/CEQA compliance. By providing joint preparation and ensuring compliance with other agency procedures these other agencies will be able to adopt the appropriate environmental documentation prepared by the DFG. To comply with ESA/CESA, the DFG will consult internally and will informally consult with the USFWS and NMFS.

DFG will consult with the owners of the lands where the diversions occur and include them in the project planning and early consultation. In addition, if the water diverter is a public agency there may be questions as to which agency is the appropriate Lead Agency. However, for this particular example DFG was delegated lead.

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Regulatory Steering Review Team

The Regulatory Steering Review Team is contacted to evaluate the process. The team will ensure that CEQA/NEPA, CESA, ESA, and all other State and Federal laws, executive orders, and administrative policies are being fulfilled. The team's overview at each of the steps will identify potential concerns and monitor how these concerns are addressed.

Permit Central and Regulatory Involvement

Permit Central is contacted to coordinate the environmental processes. Permit Central assists the DFG by coordinating the gathering of permits and completing other environmental tasks. The team receives oversight from the Regulatory Steering Review Team.

To ensure full engagement of the required regulatory staff CALFED will provide funding and designate regulatory staff to work on this project.

Step 2: Initial Study/Environmental Assessment, CESA/ESA Biological Assessment Preparation, and Wetland Delineation

The DFG's environmental processing team prepares the EA and IS to satisfy NEPA/CEQA and communicates with experienced regulatory agency personnel, invites outside interests, and coordinates with affected land owners.

For CESA and ESA compliance, the absence of listed species must be verified according to DFG, NMFS, and USFWS protocols or, if present, the possible effects of the implementation of the action on the species or its habitat must be documented and measures to avoid or minimize are assured. The USFWS and NMFS provide a letter which indicates that, unless new information reveals adverse effects of the action that may affect listed species in a manner or to an extent not considered or a new species or critical habitat is designated that may be affected by the proposed action, no further action pursuant to the ESA is necessary. There is no need for consultation of any sort under Section 7(a)(2) if a federal agency makes a determination of "no effect". A wetlands delineation is completed and accepted by the USACE.

Step 3: Decision Document Preparation

A FONSI and Negative Declaration is prepared for regulatory and public review by the environmental processing team, setting forth the decision of no significant impact to the

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environment and the reasons for the determination. Any needed or proposed mitigation measures are incorporated and the project is revised accordingly.

Step 4: Agency and Public Review and Response

The DFG submits the FONSI/Negative Declaration to the USFWS and NMFS. The previous concerns expressed by the public were adequately dealt with during the IS and EA process no other concerns arise, go to construction. There is no need to prepare further environmental documentation, although a program of monitoring and reporting would be appropriate. If other concerns arise, go to Step 5 to add mitigation, or reduce remaining effects to levels of insignificance and receive a no jeopardy opinion.

Step 5: Completion of CEQA/NEPA Documentation/Environmental Permitting Compliance

As a result of the public review process a determination is made to use a mitigated Negative Declaration/FONSI with additional mitigation measures that reduce the remaining effects to a less-than-significant level. The environmental documentation also includes a program of monitoring and reporting to ensure that the provisions or revisions are complied with during implementation of the project. The Negative Declaration/FONSI also includes a completed internal DFG CESA consultation.

Designated regulatory staff acquire the following permits and letters of concurrence:

- General or Individual Permit for 404 and Section 10 from the USACE
- Notice of Applicability for 401 Water Quality Certification from the RWQCB
- Fish and Game Code 1600 Streambed Alteration Agreement
- Letter under ESA from the Federal fish and wildlife agencies indicating no further action pursuant to the ESA or CESA is necessary.

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