

1.1 Overview

The East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan (ECCC HCP/NCCP) is intended to provide an effective framework to protect natural resources in eastern Contra Costa County, while improving and streamlining the environmental permitting process for impacts on endangered species. The HCP/NCCP (or Plan) will allow Contra Costa County (County) and the Cities of Brentwood, Clayton, Oakley, and Pittsburg to better control local land use decisions in the region while providing comprehensive species, wetlands, and ecosystem conservation and contributing to the recovery of endangered species in northern California. This Plan will help to avoid project-by-project permitting that is generally costly and time consuming for applicants and often results in uncoordinated and biologically ineffective mitigation.

1.1.1 Mission Statement

The ECCC Habitat Conservation Plan Association (HCPA), which has led the development of this Plan, developed the following Mission Statement to define the Plan's guiding principles:

The East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan will provide comprehensive species, wetlands, and ecosystem conservation and contribute to recovery of endangered species within East Contra Costa County while:

- Balancing open space, habitat, agriculture, and urban development;
- Reducing the cost and increasing the clarity and consistency of federal and state permitting;
- Consolidating and streamlining these processes into one, locally controlled plan;
- Encouraging, where appropriate, the multiple use of protected areas, including recreation and agriculture;

- Sharing the costs and benefits of the habitat conservation plan as widely and equitably as possible; and
- Protecting the rights of private-property owners.

1.1.2 Purpose

The purpose of this Plan is to protect and enhance ecological diversity and function within the rapidly urbanizing region of eastern Contra Costa County. To that end, the Plan describes how to avoid, minimize, and mitigate, to the maximum extent practicable, impacts on covered species and their habitats and wetlands while allowing for the growth of selected regions of the county and the cities of Pittsburg, Clayton, Oakley, and Brentwood. The Plan also addresses the need for expansion of urban infrastructure in the eastern portion of the county. The Plan therefore encompasses many of the on-going operations and maintenance activities of the Contra Costa County Flood Control and Water Conservation District (County Flood Control District). As an NCCP, this Plan will contribute to the recovery of listed species and help preclude the need to list additional covered species in the future.

The HCPA and the County Flood Control District are asking the U.S. Fish and Wildlife Service (USFWS) to issue permits that authorize incidental take on listed species. The HCPA and the County Flood Control District are also asking the California Department of Fish and Game (CDFG) to issue permits that authorize take of all covered species. The Plan includes a conservation strategy to compensate for impacts to covered species. The conservation strategy provides for the conservation and management of covered species and their habitats. It is anticipated that USFWS and CDFG will issue take permits to the local jurisdictions under the federal Endangered Species Act (ESA) and the Natural Community Conservation Planning Act (NCCPA). The local jurisdictions will then be able to use those permits to authorize development and other activities within areas designated in the Plan. USFWS and CDFG will also provide assurances to local jurisdictions and Plan participants that no further commitments of funds, land, or water will be required to address impacts on covered species beyond that described in the Plan (see Chapter 9, *Funding*).

The Plan is also intended to serve as the basis for subsequent applications for regional wetlands permits. The HCPA and the County Flood Control District intend to cooperate with the U.S. Army Corps of Engineers (USACE), the San Francisco Bay Regional Water Quality Control Board and Central Valley Regional Water Quality Control Board (RWQCBs), and CDFG to develop and operate simplified regional permit programs for aquatic resources under Sections 404 and 401 of the Clean Water Act (CWA) and under Section 1602 of the California Fish and Game Code relating to Streambed Alteration Agreements.

1.1.3 Background

In 1997, representatives of USFWS and CDFG began meeting with representatives from the County, the Cities of Antioch, Brentwood, Clayton, and Pittsburg and the Contra Costa Water District (CCWD) to discuss the possibility of a regional HCP/NCCP in response to growing concern over the rapid pace of urban development, recent species listings including the California red-legged frog and Alameda whipsnake, and the cumulative loss of habitat for a variety of native species. USFWS and CDFG encouraged the local jurisdictions to pursue a regional plan to protect the County's biological resources and provide a coordinated and streamlined permitting process for the rapidly expanding cities within eastern Contra Costa County. By 1999, the four cities, the County, CCWD, and the East Bay Regional Park District (EBRPD) began working together towards forming the HCPA.

On January 25, 2000, the County Board of Supervisors declared its intent to work with other agencies to prepare an HCP for ECCC. The Board also directed County staff to work with the cities and other local agencies, as well as various stakeholder groups, to determine their willingness to participate. An estimate of future growth in the area was commissioned to determine the need for permits under the HCP. Stakeholder groups drafted a series of principles that they recommended public agencies adopt before initiating the conservation planning effort. The land use planning agencies adopted these principles as the Principles of Participation in their decision to form the HCPA. A March 28, 2000, interagency staff report cited many benefits of pursuing an HCP, including

- fostering regional cooperation and consistency among local jurisdictions;
- purchasing and permanently protecting biologically-rich habitat;
- accelerating the permitting process, improving regulatory certainty, and reducing applicants' permitting costs; and
- redirecting money away from the process of permitting and towards the protection of resources.

In April 2000, CCWD committed to work with land use agencies in eastern Contra Costa County to develop, and agreed to provide funding for, a regional HCP as a condition of future water deliveries to the agency. This commitment was made during a U.S. Bureau of Reclamation consultation with USFWS regarding CCWD's construction of a multipurpose pipeline and future water supply implementation program. USFWS issued a biological opinion (BO) that addressed the construction, maintenance, and operation of the pipeline as well as the secondary effects of urban growth and development resulting from increased water availability. USFWS, Reclamation, and CCWD agreed that a regional HCP would offset the adverse growth-inducing effects of future water deliveries within CCWD's service area. According to the terms of the BO, CCWD cannot deliver more than 148,000 acre-feet of water per year until an HCP is completed and an ESA Section 10 permit is issued.

Later that year, six entities formed the HCPA, a Joint Powers Authority consisting of the Cities of Brentwood, Clayton, and Pittsburg, CCWD, EBRPD, and the newly incorporated City of Oakley. The County initially declined to participate, but in 2001 the County joined the HCPA. The City of Antioch also declined to participate at the time the HCPA was formed. The HCPA subsequently encouraged the city of Antioch to join the HCPA but the City did not change its position and did not to participate in developing this Plan. The County Flood Control and Water Conservation District (Flood Control District) joined the planning effort in early 2004.

The role of the HCPA is to manage and fund development of the Plan for submission to USFWS and CDFG. Pursuant to Section 10(a)(1)(B) of the ESA, the approved Plan and associated permit will authorize incidental take of federally listed species within the permit area. The approved Plan will also serve as an NCCP and allow CDFG to authorize take of covered species under Section 2835 of the NCCPA. The local agencies applying for ESA and NCCPA permits (the Permittees) are:

- Contra Costa County
- Contra Costa County Flood Control and Water Conservation District
- City of Brentwood
- City of Clayton
- City of Oakley
- City of Pittsburg

1.2 Scope of the HCP/NCCP

1.2.1 Permit Duration

The HCPA and the Flood Control District are seeking permits from USFWS and CDFG with terms of 30 years. Accordingly, all assessments in the Plan are based on a 30-year time period. Prior to permit expiration, the HCPA and Flood Control District may apply to renew or amend the Plan and its associated permits and authorizations to extend their terms. Thirty years was chosen as the permit duration because it is a reasonable timeframe in which to forecast local growth (Association of Bay Area Governments 2002). Even though the current General Plans of all local jurisdictions have a lifetime of 15 years or less, it may take considerably longer to realize the growth within these plans. For example, the Cities of Pittsburg and Brentwood have planned growth beyond their current jurisdiction (City of Brentwood 1993; City of Pittsburg 2001), which may not be realized during their current General Plans. This 30-year timeframe is also expected to be necessary to assemble the Preserve System called for in this Plan.

1.2.2 Geographic Scope

The ECCC HCPA began the planning process by defining a broad area, called the inventory area, in which all planning would occur for the HCP/NCCP.

Inventory Area

The HCP/NCCP inventory area is located in the eastern portion of Contra Costa County, California. Contra Costa County has a land area of more than 435,000 acres; the inventory area covers approximately one-third of the County, or 175,435 acres, the entirety of which is in East Contra Costa County (Figure 1-1). The inventory area was defined as the area in which impacts would be evaluated and conservation would occur. Inventory-area boundaries were based on a combination of political, ecological, and hydrologic factors. Watershed boundaries were used to define the inventory area wherever possible.

The southern boundary of the inventory area is generally defined by the Alameda–Contra Costa County line. The southwestern portion of the boundary follows the western edges of the watersheds of Kellogg and Marsh creeks. From the peak of Mount Diablo to the north, the western boundary follows the Mount Diablo Meridian and the Clayton sphere of influence. The northwestern boundary generally follows the watershed line in the hills between Pittsburg and Concord but excludes the city of Concord and the Concord Naval Weapons Station.

The northern boundary of the inventory area is defined by the San Joaquin River shoreline. Current and historic tidal areas (as determined by Soil Conservation Service soil surveys [1977]) are excluded to avoid duplicating other conservation efforts focused on species and natural communities restricted to the Sacramento–San Joaquin Delta. This excludes the northern edges of Bay Point, Pittsburg, and Oakley. The eastern boundary of the inventory area was defined by the course of the westernmost Delta sloughs between Oakley and the Alameda–Contra Costa County line near Clifton Court Forebay. Former tidal areas were excluded from the eastern boundary of the inventory area. The community of Discovery Bay was also excluded because it is already developed and will not require additional coverage under ESA or the California Endangered Species Act (CESA).

Permit Area

The permit area is the area in which the HCPA is requesting authorization from USFWS and CDFG only for activities and projects that may result in take of species covered by this Plan (i.e., covered activities). The permit area is land within the inventory area defined by the following parameters.

- The Urban Limit Line (ULL) of Contra Costa County or the city limits of the participating Cities of Pittsburg, Clayton, Oakley, and Brentwood, whichever is largest.
- The footprint of specific rural infrastructure projects or activities outside the ULL described in this Plan (see Chapter 2).
- The boundary of any land acquired in fee title or conservation easement and managed under this Plan (i.e., the HCP/NCCP Preserve System [Preserve System]).

The city of Antioch is not participating in the HCP/NCCP and so is excluded from the permit area. A limited number of rural infrastructure projects outside the ULL will be included in the permit area, as will management and restoration activities in the Preserve System.

The HCP/NCCP has been designed to accommodate reasonable and expected growth of the participating jurisdictions based on current General Plans (City of Clayton 2000; City of Brentwood 1993; Contra Costa County 2005; City of Pittsburg 2001; City of Oakley 2002). However, participating jurisdictions have differing positions on where and how much future growth will occur. These differences may lead to changes in land use policies as the location of growth boundaries are discussed, as annexations transfer land use authority from one jurisdiction to another, and as General Plans are updated or amended. To respond to potential changes in land use policy among the participating jurisdictions, the HCP/NCCP permit area could expand or contract as a result of local land use decisions made independently of the HCP/NCCP (e.g., change in the ULL, annexation), provided that the revised permit area boundary is consistent with successful implementation of the HCP/NCCP conservation strategy. For more discussion of how the permit area could change in response to local land use decisions, see Chapter 2.

1.2.3 Covered Species

Species proposed for coverage are those for which the plan provides for their conservation and management, and for which take authorization may be required during the term of the HCP/NCCP. These *covered species* are fully addressed in this Plan and are expected to be included in the ESA and NCCPA take permits.

This Plan addresses 28 listed and non-listed species (see Table 3-9 and Chapter 3, *Physical and Biological Resources*). These species were identified on the basis of an initial assessment of the effect of proposed activities and conservation measures on listed species or species that could become listed during the term of the HCP/NCCP. One hundred fifty-four special-status species with the potential to occur in the inventory area were evaluated for coverage in this Plan and screened according to specific criteria. From this list, 28 species were selected for coverage. For a detailed description of the species, selection criteria, and evaluation results, see Chapter 3.

The Plan includes conservation measures to protect all 28 covered species, whether or not they are currently listed. Accordingly, any non-listed species addressed by the Plan's conservation strategy will not require additional conservation measures within the inventory area should that species be listed in the future (Chapter 9).

1.2.4 Covered Activities

The primary goal of this Plan is to obtain authorization for take of covered species under ESA and NCCPA for the reasonable expansion of urban development in the cities of Clayton, Pittsburg, Brentwood, and Oakley and specific areas of Contra Costa County in accordance with approved land use plans. Covered activities within these approved urban boundaries are broadly defined to include all ground-disturbing activities controlled by permit holders via their land use planning process. Covered activities will also include specific rural infrastructure projects outside these urban boundaries that will support urban growth (e.g., road and flood control projects and maintenance). A small amount of take of covered species is expected to occur within the preserves as a result of ongoing management, restoration, and monitoring activities by preserve managers and from limited public access. These routine activities will also be covered by the Plan. For details on the covered activities, see Chapter 2.

1.3 Regulatory Setting

The Plan is designed primarily to comply with the ESA and NCCPA. The Plan is also consistent with other federal and state wildlife and related laws and regulations, each of which is described in greater detail below:

- Migratory Bird Treaty Act (MBTA);
- Bald Eagle and Golden Eagle Protection Act;
- California Fish and Game Code Sections 3511, 4700, 5050, 5515 (Fully Protected Species);
- California Fish and Game Code Section 3503 (Bird Nests);
- California Fish and Game Code Section 3503.5 (Birds of Prey);
- National Environmental Policy Act of 1969 (NEPA);
- California Environmental Quality Act of 1970 (CEQA);
- CWA Sections 401 and 404;
- Fish and Game Code Sections 1601–1607 (Lake or Streambed Alteration Agreement); and
- California's Delta Protection Act.

1.3.1 Federal and State Endangered Species Laws

Federal Endangered Species Act

USFWS and the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NOAA Fisheries) administer the ESA. The ESA requires USFWS and NOAA Fisheries to maintain lists of threatened and endangered species and affords substantial protection to listed species. NOAA Fisheries’ jurisdiction under the ESA is limited to the protection of marine mammals, marine fishes, and anadromous fishes; all other species are subject to USFWS jurisdiction.

USFWS and NOAA Fisheries can list species as either *endangered* or *threatened*. An *endangered* species is at risk of extinction throughout all or a significant portion of its range (ESA Section 3[6]). A *threatened* species is likely to become endangered within the foreseeable future (ESA Section 3[19]). Section 9 of the ESA prohibits the *take* of any fish or wildlife species listed under the ESA as endangered and most species listed as threatened. *Take*, as defined by the 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.” Section 9 prohibits the “removal or reduction to possession” of any listed plant species “under federal jurisdiction” (i.e., on federal land, where federal funding is provided, or where federal authorization is required).

The ESA includes mechanisms that provide exceptions to the Section 9 take prohibitions. These are addressed in Section 7 for federal actions and Section 10 for nonfederal actions.

Section 7

Section 7 of the ESA requires all federal agencies to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat critical to such species’ survival. To ensure that its actions do not result in jeopardy to listed species or in the adverse modification of critical habitat¹, each federal agency must consult with USFWS or NOAA Fisheries—or both—regarding federal agency actions that have the potential to harm listed species. Consultation begins when the federal agency submits a written request for initiation to USFWS or NOAA Fisheries, along with the agency’s biological assessment (BA) of its proposed action, and USFWS or NOAA Fisheries accepts that BA as complete. If USFWS or NOAA Fisheries concludes that the action is

¹ Critical Habitat is defined as specific geographic areas, whether occupied by listed species or not, that are determined to be essential for the conservation and management of listed species, and that have been formally described in the Federal Register.

not likely to adversely affect a listed species, the action may be conducted without further review under ESA. Otherwise, USFWS or NOAA Fisheries must prepare a written BO describing how the agency's action will affect the listed species and its critical habitat. The issuance of a permit for this Plan is a federal action that triggers a section-7 consultation. The USFWS will consult internally (with themselves) to address this requirement.

If the BO concludes that the proposed action would jeopardize the continued existence of a listed species or adversely modify its critical habitat, the opinion must suggest "reasonable and prudent alternatives" that would avoid that result. If the BO concludes that the project as proposed would involve the take of a listed species, but not to an extent that would jeopardize the species' continued existence, the BO must include an *incidental take statement*. The incidental take statement specifies an amount of take that may occur as a result of the action and may suggest reasonable and prudent measures to minimize the impact of the take. If the action complies with the BO and incidental take statement, it may be implemented without violation of the ESA, even if incidental take occurs.

Future projects with a federal nexus can benefit from the HCP/NCCP by using the conservation measures described in this Plan as a guide to mitigation under the Section 7 consultation process. It is expected that future Section 7 consultations in the inventory area will complement the conservation strategy in this Plan.

Most projects in the inventory with a federal nexus will require a permit under Section 404 of the CWA. Many of these projects may be eligible to use the Regional General Permit Program that is being developed in parallel with this HCP/NCCP, if it is approved. USACE, as the permitting agency under CWA, must consult with USFWS or NOAA Fisheries on the effects of their action on federally-listed species. If the applicant complies with the conservation measures in this HCP/NCCP and the requirements of the Regional General Permit Program, the Section 7 consultation process is expected to be greatly streamlined. USFWS has the ability to require additional conservation measures under the Section 7 consultation process, but if applicants are in compliance with the HCP/NCCP and the Regional General Permit Program, USFWS is not likely to require additional measures beyond those already required in the HCP/NCCP.

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 NOAA Fisheries 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.”

The take prohibition for listed plants is more limited than for listed fish and wildlife. Under section 9(a)(2)(B) of the ESA, endangered plants are protected from removal, reduction to possession, and malicious damage or destruction in areas that are under Federal jurisdiction. Section 9(a)(2)(B) of the ESA also provides protection to plants from removal, cutting, digging up, damage, or destruction where the action takes place in violation of any state law or regulation or in violation of a state criminal trespass law. Thus, 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 the 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.

To receive an incidental take permit, the permit applicant is required to provide:

- a complete description of the activity sought to be authorized;
- the common and scientific names of the species sought to be covered by the permit, as well as the number, age, and sex of such species, if known; and
- an HCP.

The HCP must specify:

- the impact that will likely result from such taking;
- what steps the applicant will take to monitor, minimize, and mitigate such impacts; the funding that will be available to implement such steps; and the procedures to be used to deal with unforeseen circumstances;
- what alternative actions to such taking the applicant considered and the reasons why such alternatives are not proposed to be utilized; and
- such other measures that the Director [of the Department of Interior or Commerce] may require as being necessary or appropriate for purposes of the plan (50 Code of Federal Regulations [CFR] 17.22(b)).

The ECCC HCP/NCCP is intended to satisfy these requirements.

Prior to the approval of an HCP, USFWS and/or NOAA Fisheries 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 included in this Plan to meet the requirements of Section 7.

California Endangered Species Act

CESA prohibits take of wildlife and plants listed as threatened or endangered by the California Fish and Game Commission. *Take* is defined under the California Fish and Game Code as any action or attempt to “hunt, pursue, catch, capture, or kill.” Like the ESA, CESA allows exceptions to the take prohibition for take that occurs during otherwise lawful activities. The requirements of an application for incidental take under CESA are described in Section 2081 of the California Fish and Game Code. Incidental take of state-listed species may be authorized if an applicant submits an approved plan that minimizes and “fully mitigates” the impacts of this take.

Natural Community Conservation Planning Act

In 1991, California’s NCCPA (California Fish and Game Code, Section 2800 *et seq.*) was enacted to implement broad-based planning that balances appropriate development and growth with conservation of wildlife and habitat. Pursuant to the NCCPA, local, state, and federal agencies are encouraged to prepare NCCPs to provide comprehensive management and conservation of multiple species and their habitats under a single plan, rather than through preparation of numerous individual plans on a project-by-project basis. The NCCPA is broader in its orientation and objectives than are ESA and CESA. The primary objective of the NCCP program is to conserve natural communities at the ecosystem scale while accommodating compatible land use. To be approved by CDFG, an NCCP must provide for the conservation of species and protect natural communities within the inventory area in perpetuity.

An approved NCCP provides for take of species whose conservation and management are provided for in the Plan (California Fish and Game Code Section 2835). The 1991 NCCPA was repealed and replaced with a substantially revised and expanded NCCPA in 2002. The revised NCCPA established new standards and guidance on many facets of the program, including scientific information, public participation, biological goals, interim project review, and approval criteria. The new NCCPA took effect on January 1, 2003=.

This Plan complies with the NCCPA to conserve the ecosystems of eastern Contra Costa County and to provide authorization to take covered species in accordance with Section 2835 of the California Fish and Game Code.

1.3.2 Other Federal and State Wildlife Laws and Regulations

Migratory Bird Treaty Act

The MBTA implements various treaties and conventions between the U.S. and Canada, Japan, Mexico, and the former Soviet Union for the protection of migratory birds. Under the MBTA, taking, killing, or possessing migratory birds is unlawful as is taking of any parts, nests, or eggs of such birds (16 USC 703). Taking is defined more narrowly under MBTA than under the ESA and includes only the death or injury of individuals of a migratory bird species or their eggs. Take under the MBTA does not include the concepts of harm and harassment as defined by the ESA. The MBTA defines migratory birds broadly; all covered birds in this HCP/NCCP are considered migratory birds under the MBTA.

The USFWS provides guidance regarding the incidental take of ESA-listed migratory birds (Appendix 5 in the HCP Handbook). According to these guidelines, the an incidental-take permit can function as a Special Purpose Permit under the Migratory Bird Treaty Act (50 C.F.R. 21.27) for the take of all ESA-listed covered species in the amount and/or number and subject to the terms and conditions specified in an HCP. Any such take will not be in violation of the Migratory Bird Treaty Act of 1918, as amended (16 USC 703-12). None of the covered birds are currently listed under ESA, so no MBTA coverage can be provided at this time through the HCP. Should any of the covered birds become listed under the ESA during the permit term, the ESA permit would also constitute an MBTA Special Purpose Permit for that species for a 3-year term as specified under 50 CFR Sec. 21.27 subject to renewal by the Permittees.

Non-listed covered species as well as other migratory birds not covered by the permit will benefit from seasonal restrictions on construction and other conservation measures described in this Plan. The acquisition of the Preserve System and subsequent restoration and management will also be a significant “benefit to the migratory bird resource” as required by the Special Purpose Permit. However, until a covered bird is listed under ESA, it will be the responsibility of individual project applicants to fully comply with the MBTA.

Bald Eagle and Golden Eagle Protection Act

The Bald Eagle and Golden Eagle Protection Act prohibits the taking or possession of and commerce in bald and golden eagles, with limited exceptions. Under the Act, it is a violation to “...take, possess, sell, purchase, barter, offer to sell, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or golden eagle, alive or dead, or any part, nest, or egg, thereof...” *Take* is defined to include pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest, and disturb. Bald Eagle is not a covered species in this HCP/NCCP, but Golden Eagle is. The Plan complies

with provisions of the Bald Eagle and Golden Eagle Protection Act for Golden Eagles.

California Fully Protected Species

In the 1960s, before CESA was enacted, the California Legislature identified species for specific protection under the California Fish and Game Code. These *fully protected* species may not be taken or possessed at any time, and no licenses or permits may be issued for their take except for collecting these species for necessary scientific research and relocation of the bird species for the protection of livestock. Fully protected species are described in Sections 3511 (birds), 4700 (mammals), 5050 (reptiles and amphibians), and 5515 (fish) of the California Fish and Game Code. These protections state that "...no provision of this code or any other law shall be construed to authorize the issuance of permits or licenses to take any fully protected [bird], [mammal], [reptile or amphibian], [fish]." This Plan includes conservation measures to avoid taking Fully Protected species.

California Fish and Game Code 3503 (Bird Nests)

Section 3503 of the Fish and Game Code makes it unlawful to take, possess or needlessly destroy the nests or eggs of any bird. CDFG may issue permits authorizing take. The Plan contains conservation measures to avoid such take in order to comply with Section 3503.

California Fish and Game Code 3503.5 (Birds of Prey)

Section 3503.5 of the Fish and Game Code prohibits the take, possession or destruction of any birds of prey or their nests or eggs. CDFG may issue permits authorizing take pursuant to CESA or NCCPA. The Plan contains conservation measures to avoid such take in order to comply with Section 3503.5.

1.3.3 National Environmental Policy Act

NEPA requires federal agencies to include in their decision-making process appropriate and careful consideration of all environmental effects of a proposed action and of possible alternatives. Documentation of the environmental impact analysis and efforts to avoid or minimize the adverse effects of proposed actions must be made available for public notice and review. This analysis is documented in either an environmental assessment (EA) or an environmental impact statement (EIS). Project proponents must disclose in these documents whether their proposed action will adversely affect the human or natural

environment. NEPA's requirements are more procedural than substantive in that NEPA requires disclosure of environmental effects and mitigation possibilities but includes no mandate to actually require the imposition of mitigation.

Because the issuance by USFWS of an incidental take permit under Section 10 of the ESA constitutes a federal action, USFWS must comply with NEPA. To satisfy NEPA requirements, USFWS has prepared a draft EIS that accompanies this draft HCP.

1.3.4 California Environmental Quality Act

CEQA is similar to but more extensive than NEPA in that it requires that significant environmental impacts of proposed projects be reduced to a less-than-significant level through adoption of feasible avoidance, minimization, or mitigation measures unless overriding considerations are identified and documented. CEQA applies to all California projects, and NCCPs are required to comply with CEQA. The HCPA is serving as the lead agency under CEQA. To comply with CEQA, the HCPA has prepared a draft joint environmental impact report/environmental impact statement (EIR/EIS).

The EIR/EIS prepared for this HCP/NCCP is intended to provide programmatic compliance for CEQA for all activities covered by this Plan regarding impacts to covered species. Future projects that receive take coverage under the HCP/NCCP must also comply with CEQA through their local jurisdiction. It is expected that the conservation provided in this Plan will be sufficient to meet all CEQA mitigation standards for impacts to the special-status species that are covered by this Plan. Although CEQA does not have a provision like No Surprises in ESA (so future CEQA compliance cannot be guaranteed), it is expected that future CEQA documents for applicants that receive take coverage under this Plan will incorporate the conservation measures in this Plan by reference to comply with CEQA for those species. Although not evaluated in the HCP/NCCP or the EIR/EIS, many of the conservation measures in the Plan will also benefit other special-status species (i.e., species not covered by the Plan) and these measures may be sufficient to meet CEQA standards for these other species as well.

1.3.5 Federal and State Wetland Laws and Regulations

Clean Water Act Section 404

The CWA is the primary federal law that protects the physical, chemical, and biological integrity of the nation's waters, including lakes, rivers, wetlands, and coastal waters. Programs conducted under the CWA are directed at both point-source pollution (waste discharged from outfalls and filling of waters) and

nonpoint source pollution (runoff from agricultural fields). Under the CWA, the U.S. Environmental Protection Agency (EPA) and states set effluent limitations and issue permits under Section 402 of the CWA governing point source discharges of wastes to waters. The USACE, applying its regulations and guidelines issued by EPA, issues permits under Section 404 of the CWA governing under what circumstances dredged or fill material may be discharged to waters. These 402 and 404 permits are the primary regulatory tools of the CWA.

USACE issues two types of permits under Section 404: general permits (either nationwide permits [NWP] or regional permits) and standard permits (either letters of permission or individual permits). General permits are issued by USACE to streamline the Section 404 process for nationwide, statewide, or regional activities that have minimal direct or cumulative environmental impacts on the aquatic environment. Standard permits are issued for activities that do not qualify for a general permit (i.e., that may have more than a minimal adverse environmental impact). The Sacramento and San Francisco Districts of the USACE will review and consider issuing permits for projects within the HCP/NCCP inventory area that propose to fill waters of the United States.

The Sacramento and San Francisco Districts of the USACE are considering developing a regional general Section 404 permit program for certain activities covered under the Plan. This regional general permit program may replace the nationwide permit program for activities in east Contra Costa County that are covered by the Plan. The Plan provides specific conservation measures for waters of the United States, including wetlands. It is anticipated that the regional general permit program would incorporate or reference these conservation measures and be directly linked to the payment of fees and performance of mitigation under the Plan, so that compliance with Section 404 would be consistent with what is required under the Plan. Discussions with USACE and EPA are on-going and it is not yet known whether the conservation measures included in this Plan for waters of the United States will be an adequate basis for the regional Section 404 regional permit program.

Clean Water Act Section 401 and the Porter-Cologne Water Quality Act

Under CWA Section 401, states have the authority to certify federal permits for discharges to waters under state jurisdiction. States may review proposed Federal permits (e.g., CWA Section 404 permits) for compliance with state water quality standards. The permit cannot be issued if the state denies certification. In California, the State Water Resources Control Board (SWRCB) and the RWQCBs are responsible for the issuance of CWA Section 401 certifications. The San Francisco Bay and the Central Valley RWQCBs or the SWRCB will review any CWA Section 404 permit applications for projects within the HCP/NCCP inventory area.

The Porter-Cologne Water Quality Act is the primary state law concerning water quality. It authorizes the SWRCB and RWQCBs to prepare management plans such as Regional Water Quality Plans to address the quality of ground water and surface water. The Porter-Cologne Water Quality Act also authorizes the RWQCBs to issue Waste Discharge Requirements (WDRs) defining limitations on allowable discharge to waters of the state. In addition to issuing CWA Section 401 certifications on CWA Section 404 applications to fill waters, the RWQCBs may also issue WDRs for such activities. Because the authority for WDRs is derived from the Porter-Cologne Water Quality Act and not the CWA, WDRs may apply to somewhat different range of aquatic resources than do CWA Section 404 permits and CWA 401 Water Quality Certifications.

The San Francisco Bay and Central Valley RWQCBs are considering developing a regional Section 401/WDR permit program for certain activities covered under the Plan. This simplified permit program would be similar to what is being considered by USACE and EPA for Section 404 permits. Discussions with the RWQCBs are on-going and it is not yet known whether the conservation measures included in this Plan for waters of the state will be an adequate basis for the regional Section 401/WDR permit program.

Lake or Streambed Alteration Agreement

CDFG has jurisdictional authority over streams and lakes and wetland resources associated with these aquatic systems under California Fish and Game Code Sections 1600 et seq. California Fish and Game Code Section 1600 et seq. was repealed and replaced in October of 2003 with the new Section 1600–1616 that took effect on January 1, 2004 (Senate Bill No. 418 Sher). CDFG has the authority to regulate work that will “substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake.” Activities of any person, state or local governmental agency, or public utility are regulated by CDFG under Section 1602 of the Code. CDFG enters into a streambed or lakebed alteration agreement with the project proponent and can impose conditions on the agreement to ensure no net loss of values or acreage of the stream, lake, associated wetlands, and associated riparian habitat.

The lake or streambed alteration agreement is not a permit, but rather a mutual agreement between CDFG and the project proponent. Because CDFG includes under its jurisdiction streamside habitats that may not qualify as wetlands under the federal CWA definition, CDFG jurisdiction may be broader than USACE jurisdiction.

A project proponent must submit a notification of streambed alteration to CDFG before construction. The notification requires an application fee for streambed alteration agreements, with a specific fee schedule to be determined by CDFG. CDFG can enter into streambed alteration agreements (SAAs) that cover

recurring operation and maintenance activities and can also enter into long term agreements to cover development and other activities described in regional plans.

CDFG is considering developing a SAA permit program for certain activities covered under the Plan similar to what is being considered by USACE, EPA, and the RWQCBs. The Plan provides specific conservation measures for streams and lakes. It is anticipated that the simplified permit program would incorporate or reference these conservation measures and be directly linked to the payment of fees and performance of mitigation under the Plan, so that compliance with Section 1602 of the California Fish and Game Code would be consistent with the Plan. Discussions with CDFG are on-going and it is not yet known whether the conservation measures included in this Plan for state jurisdictional streams and lakes will be an adequate basis for the SAA permit program.

Wetland Regulations and HCP/NCCP Compliance

During development of the HCP/NCCP, the HCPA expressed their interest to USACE, EPA, the RWQCBs, and CDFG to broaden the scope of the Plan beyond endangered species to include regional permitting under state and federal laws for impacts on wetlands. In fact, one of the Principles of Participation² of the HCPA states:

The [HCP/NCCP] should provide for the issuance of a programmatic 404 permit and identify any required wetlands mitigation. Alternatively, the HCP must be accepted as tacit approval by USFWS of any 404 permit application to the U.S. Army Corps of Engineers within the affected area and consistent with the HCP.

The HCPA's interest in integrating federal and state wetland permitting into the HCP/NCCP process is the same as the articulated purpose of the Plan—to benefit stream and wetland resources by conserving these resources in a more coordinated and comprehensive fashion on a regional scale. As it relates to endangered species compliance, the HCPA's opinion is that integrated permitting would provide an alternative to the often inefficient and costly project-by-project approach. However, there is no protocol for integrating aquatic resources permitting and ESA permitting to coordinate protection and regulation of impacts to wetlands and wetland species. Therefore, an independent yet parallel track for the two permitting processes is being pursued.

The concepts for wetlands permitting programs related to this Plan are discussed above within the descriptions of CWA Section 404, CWA Section 401 and the Porter-Cologne Water Quality Act, and Lake or Streamed Alteration Agreements. The HCPA will seek agreements with the applicable state and federal wetlands regulatory agencies to cooperate in the implementation of these regional permit programs. The HCPA proposes cooperative implementation of these permit programs to include the following key provisions:

² The Principles of Participation are broad statements of the goals of the HCP/NCCP planning effort adopted by the members of the HCPA in June 2000. The Principles of Participation were developed before the Mission Statement.

- Project proponents conduct site-by-site delineation of wetlands and other waters consistent with the current regulatory process.
- Project proponents submit permit application materials directly to each applicable wetlands regulatory agency. The HCPA proposes that the content and format of required application materials be coordinated as much as possible with the content and format of the application materials required for ESA/CESA coverage under this Plan.
- Wetlands regulatory agencies review the applications for consistency with their regional permit programs and consider issuing permits. The HCPA proposes that the avoidance, minimization and mitigation provisions of the regional wetlands permit program be consistent with relevant provisions of this Plan.
- Project proponents pay applicable HCP/NCCP fees to their local land use planning agency and/or contribute land as required by this Plan.
- Local agencies use fee revenues and contributed land to acquire, restore and manage habitat, including wetlands and other waters. Local agencies ensure that all conservation measures required by this Plan and the regional wetlands permit programs are implemented, including compliance with mitigation ratios for wetlands and other waters. The local agencies will also ensure mitigation measures stay ahead of impacts to aquatic resources. (See Chapter 5 for more information on conservation measures for aquatic resources.)

Discussion with USACE, EPA, the RWQCBs, and CDFG is ongoing regarding this parallel approach to compliance with wetlands regulations and the adequacy of the avoidance, minimization, and mitigation measures in this Plan for regional wetlands permitting programs.

1.3.6 California's Delta Protection Act

The Johnston-Baker-Andal-Boatwright Delta Protection Act of 1992 (Delta Protection Act) identified the Sacramento–San Joaquin Delta as a natural resource of statewide, national, and international significance and formalized the state's commitment to preserve and protect its diverse values. The purpose of the Act is to ensure protection, maintenance, and enhancement of the Delta environment; assure orderly and balanced use of delta land resources; and improve flood protection to increase public health and safety. Key provisions of the Act specifically:

- recognize the Delta's agricultural value and the corollary importance of Delta agricultural lands as habitat for waterfowl using the Pacific Flyway, and stress the need to keep these lands in agricultural use;
- identify the importance of habitat values offered by the Delta's nonagricultural lands, including its waterways, unveeved channel islands, wetlands, and riparian forests;

- recognize the Delta’s leveed islands and tracts as floodprone areas of critical statewide significance because of the cost and difficulty of responding to flood emergencies in these areas, and acknowledge that even with continued maintenance, the levee system cannot be expected to address all flood risks successfully, such that the most appropriate land uses in much of the Delta are agriculture, wildlife habitat, and recreational activities; and
- recognize the historical and cultural importance of Delta communities, and the need to protect them as an aspect of the region’s economic and cultural vitality.

The Delta Protection Act mandated a state-level planning effort to address these needs and established the Delta Protection Commission to oversee the effort. Originally intended to have a 4-year lifespan, the Delta Protection Commission was made a permanent state agency in 2000 as a need for continued planning and management was identified. It has planning jurisdiction over portions of five counties—Solano, Yolo, Sacramento, San Joaquin, and Contra Costa—comprising the “heart” of the Delta or *Primary Delta Zone*. As stipulated in the Act, members of the Commission include the directors of the State Department of Parks and Recreation, Lands Commission, Department of Water Resources, Department of Boating and Waterways, Department of Fish and Game, and Department of Food and Agriculture, or their designees; one supervisor from each of the five counties in the Delta region; three Delta city representatives; and representatives of the five Delta reclamation districts.

The Delta Protection Commission was charged with developing a comprehensive regional plan to guide land use and resource management in the heart of the Delta. The resulting *Land Use and Resource Management Plan for the Primary Zone of the Delta* was adopted by the Commission on February 23, 1995. Its policies became part of the California Code of Regulations in 2000, and it has undergone one round of subsequent revision (May 2002). The policies of the Plan have been forwarded to the five Counties under the Commission’s jurisdiction for incorporation into their general plans and zoning codes, enabling implementation of the Plan at the County level, through the existing local government framework. The Delta Protection Commission does not have land use authority but it can suspend local projects under an appeal process while the Commission reviews them for consistency with the Act and the Plan.

The HCP/NCCP inventory area includes two small areas considered Primary Delta Zones by the Commission. The first is the land between the Clifton Court Forebay and the Contra Costa County line to the south. The second and larger area roughly corresponds to the agricultural zone northeast of the Brentwood city limit and south of the Oakley city limits. The inventory area includes extensive areas of the Secondary Delta Zone in the cities of Pittsburg, Antioch, Oakley, Brentwood, and Contra Costa County in low-elevation agricultural areas of the eastern County where land uses are monitored but not regulated by the Commission.

Commission regulations (Title 14, CCR, Chapter 3, Sect. 20030) state that “Lands managed primarily for wildlife habitat shall be managed to provide

several inter-related habitats. Delta-wide habitat needs should be addressed in development of any wildlife habitat plan. Appropriate programs, such as “Coordinated Resource Management and Planning” (Public Resources Code Section 9408(c)) and “Natural Community Conservation Planning” (Fish and Game Code Section 2800 et seq.) should ensure full participation by local government and property owner representatives.” The HCP/NCCP has been developed to be consistent with this and other relevant regulations of the Delta Protection Commission and with the land use policies in the *Land Use and Resource Management Plan for the Primary Zone of the Delta*.

1.4 Overview of HCP/NCCP Process

1.4.1 Organization of the Process

The HCP/NCCP has involved and will continue to involve many agencies and organizations in its preparation and implementation. Development of the Plan has been led by the HCPA, represented by an *Executive Governing Committee*. The Executive Governing Committee is advised by the *Staff Committee*, the *HCPA Coordination Group*, the *Consultant Team*, and the *Science Advisors*. Each organization is described below.

1.4.2 Executive Governing Committee

The HCPA is led by the Executive Governing Committee (EGC), which is composed of elected officials from each member agency. All EGC members except EBRPD vote on key policy and budget decisions of the HCPA, although the CCWD representative cannot vote on land use decisions. EBRPD is a non-voting member of the committee. The EGC meets quarterly and is advised by senior staff at each member agency, the HCPA Coordination Group, the Consulting Team, and the Science Advisors.

1.4.3 Coordination Group

In April 2002, the ECCC HCPA formed a working committee of about 20 representatives from a variety of interest groups and public agencies, including conservation organizations, business and development interests, landowner representatives, local resource-management agencies, state and federal regulatory agencies and HCPA Member Agencies. The committee met monthly to discuss key issues and review preliminary drafts of key elements of the plan, facilitated by HCPA staff. Subcommittees of the Coordination Group were formed as needed to address specific technical issues, including an Agricultural subcommittee and a Finance subcommittee. The group strove to achieve consensus on all issues; however, when consensus was not possible, all views

were referred to the EGC for their consideration. All meetings were publicly noticed and open for public attendance and comment.

1.4.4 Science Advisors

Under its Five-Point Policy, USFWS “encourage[s] the use of scientific advisory committees during development and implementation of an HCP” (65 FR 106 35256, June 1, 2000). Independent scientific input is required by the NCCPA [Section 2810(b)(5)]. The HCPA felt strongly that independent scientific input early in the planning process was critical to the success of the Plan. In early 2002, the Science Advisors were invited to provide independent scientific input for development of the HCP/NCCP. HCPA staff and representatives from USFWS and CDFG suggested potential advisors with the assistance of a facilitator. Criteria for panel selection included:

- expertise in the ecology or population biology of one or more key covered species in the plan;
- expertise in conservation biology and its application to preserve design; and
- no affiliation with the HCPA, the HCP/NCCP consultant, USFWS or CDFG.

The Science Advisors met four times to discuss key scientific issues and address questions posed by the HCPA, regulatory agencies, and the consultant. All meetings of the group were open to the public, and public comments were solicited and received at each meeting. Topics considered by the advisors have included:

- evaluation of data adequacy for inclusion in the HCP/NCCP,
- identification of data gaps and sources of uncertainty,
- formulation of biological goals and objectives to conserve covered species and natural communities,
- identification of preserve-design principles and scientifically sound conservation measures for the local area, and
- development of monitoring and adaptive management guidelines for covered species and habitats.

After each meeting, the panel produced a meeting report documenting its findings; each report was made available to the public. Representatives of the HCPA and the consultant team were present at each meeting of the Science Advisors to explain all relevant components of the Plan, receive their comments, and request clarification. The HCPA considered all comments from the Science Advisors provided during their meeting and through their meeting reports when developing the Plan. A final summary report of the major findings of the panel was produced at the end of the process. All reports of the Science Advisors are available on the project web site: www.cocohcp.org.

1.4.5 HCPA Member Agency Staff

Planning directors and/or senior staff from the HCPA member agencies met approximately once a month to provide guidance to the Consultant Team and to help develop details of the Plan. Staff provided administrative support for all EGC and Coordination Group meetings. Contra Costa County is designated as the Coordinating Agency in the HCPA Agreement, and County planners were the primary staff support to the planning effort.

1.4.6 Consultant Team

This Plan was prepared by a Consultant Team under the guidance and direction of the HCPA Member Agency Staff and the Executive Governing Committee. The Consulting Team consisted of scientific, planning, legal and other technical staff from Jones & Stokes in San Jose, Oakland, and Sacramento, Economic & Planning Systems in Berkeley, and Resources Law Group in Sacramento.

1.4.7 Public Outreach and Involvement

Public involvement has been an integral part of the process of developing this HCP/NCCP. Stakeholders and the public have had the following opportunities to provide their input and influence the development of the plan:

- quarterly public meetings of the ECCC HCPA EGC,
- monthly public meetings of the HCPA Coordination Group,
- periodic public meetings of the HCP/NCCP Science Advisors,
- public scoping and public involvement associated with the CEQA/NEPA process,
- periodic presentations to official governing bodies of participating agencies (e.g., planning commissions, boards),
- many presentations to interested organizations upon request, and
- website announcing all public meetings and posting all public documents (www.cocohcp.org).

The ECCC HCPA has developed this plan in compliance with USFWS's public involvement guidelines (U.S. Fish and Wildlife Service and National Marine Fisheries Service 1996) and the requirements of the NCCPA.

1.5 Document Organization

This Plan and supporting information are presented in the chapters and appendices listed below. Volume 1 includes the draft HCP/NCCP, and Volume 2 includes all appendices.

Chapter 1, *Introduction*, discusses the background, purpose, and objectives of the Plan; reviews the regulatory setting; and summarizes the HCP process.

Chapter 2, *Land Use and Covered Activities*, describes the land uses of the inventory area and the activities covered under the Plan and the associated Section 10(a)(1)(B) incidental take permit.

Chapter 3, *Physical and Biological Resources*, describes the existing conditions of the inventory area.

Chapter 4, *Effects on Ecosystems, Communities, and Species*, presents the impact analyses of the Plan and covered activities.

Chapter 5, *Conservation Strategy*, summarizes the approach to the Conservation Strategy and describes the specific conservation measures to be implemented in the execution of the Plan.

Chapter 6, *Conditions on Covered Activities*, describes the specific surveys, avoidance and minimization mitigation measures required of all covered activities.

Chapter 7, *Monitoring and Adaptive Management Program*, discusses the monitoring requirements and adaptive management procedures associated with implementation of mitigation and preserve management.

Chapter 8, *Plan Implementation*, details the legal and administrative requirements associated with Plan implementation.

Chapter 9, *Funding*, reviews the costs associated with Plan implementation and the various funding sources that may be developed to support those costs.

Chapter 10, *Assurances*, describes the protections for Permittees and neighboring landowners in the event of changed circumstances, unforeseen circumstances, or the necessity of modifying or amending the Plan.

Chapter 11, *Alternatives to Take*, presents the required analysis of alternatives to take of covered species.

Chapter 12, *Literature Cited*, is a comprehensive bibliography of references cited in the text.

Chapter 13, *List of Preparers*, identifies the individuals involved in the preparation of this document.

Appendix A, *Glossary*, is a list of terms and their definitions used in this document. (Also see the Implementing Agreement in Appendix B for additional definitions.)

Appendix B, *Draft Implementing Agreement*, is a copy of the draft Implementing Agreement that will be entered into by the Permittees and the regulatory agencies.

Appendix C, *Preliminary Analysis of Potential Impacts on Fish in Marsh Creek*, is a memorandum submitted to NOAA Fisheries summarizing the preliminary impact analysis for fish species in the ECCC HCP/NCCP.

Appendix D, *Species Profiles*, presents detailed accounts of all covered species, including the habitat models that were developed for selected species.

Appendix E, *Urban-Wildland Interface Design Guidelines*, provides discussion and guidelines to assist the Implementing Entity and project proponents in designing projects proposed for the urban-wildland interface.

Appendix F, *Draft Template of Implementing Ordinance*, is a draft template of the local ordinances that participating local jurisdictions are expected to adopt to implement the HCP/NCCP.

Appendix G, *HCP/NCCP Cost Data*, is a detailed accounting of estimated costs necessary for Plan implementation.

Appendix H, *HCP/NCCP Funding Analysis*, is a detailed breakdown of potential funding sources and mechanisms.

Appendix I, *List of Acronyms*, is a list of the acronyms used in this document. It can be folded out for convenient reference.

Appendix J, *Draft Aquatic Resources Inventory, Classification, and Function for East Contra Costa County HCP/NCCP Inventory Area*, provides a detailed assessment of the potentially jurisdictional wetlands in the inventory area to support the Regional Permit Program.