

ATTACHMENT 4A – ENVIRONMENTAL CROSS-CUTTERS

Environmental Authorities	Procedure	Responsible Agency
ARCHEOLOGICAL AND HISTORIC PRESERVATION ACT OF 1974, 16 U.S.C. 16 U.S.C. § 469a-1	Obtain review for all projects.	State Historic Preservation Office Native Hawaiian Organizations, and U.S. Environmental Protection Agency in certain cases
Bald and Golden Eagle Protection Act, 16 U.S.C. §§668-668c	Permit required for taking eagles.	U.S. Department of the Interior
CLEAN AIR ACT, 42 U.S.C. 7506(c)	Coordinate to assure project conforms with State Implementation Plan (SIP).	State Department of Health, Clean Air Branch
COASTAL BARRIER RESOURCES ACT, 16 U.S.C. §§3501-3510	Obtain review if project is located on a coastal barrier island.	State Coastal Zone Management Agency
COASTAL ZONE MANAGEMENT ACT OF 1972, 16 U.S.C. §§ 1451-1464	Obtain review if project is located in coastal zone.	State Coastal Zone Management Agency
ENDANGERED SPECIES ACT 16 U.S.C. §§ 1531-1543	Obtain review by U.S. Fish and Wildlife Service and/or National Marine Fisheries Service for all projects.	U.S. Fish and Wildlife Service and/or National Marine Fisheries Service, and U.S. Environmental Protection Agency in certain cases
ENVIRONMENTAL JUSTICE, EXECUTIVE ORDER 12898	Identify and address the disproportionately high and adverse human health or environmental effects of project on minority or low-income populations.	U.S. Environmental Protection Agency
FARMLAND PROTECTION POLICY ACT, 7 U.S.C. §§ 4201-4209	Obtain review if project area contains prime farmland.	U.S. Department of Agriculture
FISH AND WILDLIFE COORDINATION ACT, 16 U.S.C. §§ 661-664	Obtain review for all projects.	U.S. Fish and Wildlife Service
FLOODPLAIN MANAGEMENT, EXECUTIVE ORDER 11988 as amended by EXECUTIVE ORDERS 12148 and 13690	Obtain review if project is located in or affects 100-year flood plain.	Federal Emergency Management Agency
MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT, 16 U.S.C. §§ 1801 <i>et seq.</i>	Obtain review if project is located in area with Wild and Scenic Rivers.	National Marine Fisheries Service and U.S. Environmental Protection Agency in certain cases
Marine Mammal Protection Act, 16 U.S.C. §§1361 <i>et seq.</i>	Permit required for taking of marine mammals.	U.S. Fish and Wildlife Service and National Marine Fisheries Service
MIGRATORY BIRD TREATY ACT, 16 U.S.C. §§703 <i>et seq.</i>	Obtain review if project impacts breeding bird species.	U.S. Fish and Wildlife Service
NATIONAL HISTORIC PRESERVATION ACT OF 1966, 54 U.S.C. §§300101 <i>et seq.</i>	Obtain review for all projects.	State Historic Preservation Office Native Hawaiian Organizations
PROTECTION OF WETLANDS, EXECUTIVE ORDER 11990, as amended by EXECUTIVE ORDER 12608	Obtain review if project area contains wetlands.	U.S. Army Corps of Engineers
RIVERS AND HARBORS ACT, 33 U.S.C. § 403	Obtain review if project requires construction of any structure in or over a navigable water of the U.S. or if structure or work will affect the course, location, or condition of a water body.	U.S. Army Corps of Engineers
SAFE DRINKING WATER ACT, 42 U.S.C. §§ 300f-300j-9	Obtain review if project could affect sole source aquifer.	State Department of Health, Safe Drinking Water Branch, U.S. Environmental Protection Agency
WILD AND SCENIC RIVERS ACT, 16 U.S.C. §§ 1271 <i>et seq.</i>	Obtain review if project is located in area with Wild and Scenic Rivers.	National Park Service, U.S. Forest Service, Bureau of Land Management

ENVIRONMENTAL CROSS-CUTTERS – ATTACHMENT 4B

Federal Cross-Cutting Authorities Environmental Review¹

Numerous federal environmental laws and Executive Orders may apply to projects funded under the CWSRF and DWSRF which are referred to as the Federal Cross-Cutting authorities.

- **Archaeological and Historic Preservation Act**

The Archaeological and Historic Preservation Act (AHPA) provides for the preservation of significant scientific, prehistoric, historic and archaeological materials and data that might be lost or destroyed as a result of flooding, the construction of access roads, relocation of railroads and highways, or any other federally funded activity that is associated with the construction of a dam or reservoir (54 U.S.C. §§312501-312508). Under this law, historical and archaeological resources do not have to be eligible, or considered eligible, in the National Register of Historic Properties for an impact to occur. If a project will have an adverse effect on historical or archaeological resources or data, the USEPA will notify the Secretary of the Interior in writing. The Secretary then has 60 days after the notification to initiate a survey or recovery effort. The Secretary will notify the USEPA of the progress of any surveys or data recovery being conducted for the project. The USEPA will transmit this information to the State.

The USEPA retains the responsibility for compliance with the AHPA requirements. The State will coordinate with USEPA to complete the consultation with the National Park Service where appropriate.

- **Bald and Golden Eagle Protection Act**

The Bald and Golden Eagle Protection Act (16 U.S.C. §§668-668c), prohibits anyone, without a permit issued by the Secretary of the Interior, from "taking" bald eagles, including their parts, nests, or eggs. The Act provides criminal penalties for persons who "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or any manner, any bald eagle ... [or any golden eagle], alive or dead, or any part, nest, or egg thereof." The Act defines "take" as "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." "Disturb" means: "to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior."

In addition to immediate impacts, this definition also covers impacts that result from human-induced alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagle's return, such alterations agitate or bother an eagle to a degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, and causes injury, death, or next abandonment.

¹ This SERP only addresses the Environmental cross-cutting authorities. It does not include the Social Policy and Economic federal cross-cutting authorities. For more information on the Social Policy and Economic cross-cutting authorities see: <https://www.USEPA.gov/sites/production/files/2015-08/documents/crosscutterhandbook.pdf>

- **Clean Air Act**

The Clean Air Act (CAA) directs the USEPA to set ambient air quality standards, which are airborne pollutant levels that are sufficient to protect public health and welfare. Each state develops its own State Implementation Plan (SIP) describing how it will maintain, enforce, and attain the National Ambient Air Quality Standards (NAAQS). Section 176(c) of the Clean Air Act (42 U.S.C. §7506(c)) requires that federal projects conform to the purpose of the SIP, meaning that federal activities will not cause new violations of NAAQS, increase the frequency or severity of NAAQS violations, or delay timely attainment of the NAAQS or any interim milestone. Section 176(c) therefore prohibits federal assistance for an activity within a nonattainment or maintenance area that fails to conform to an applicable SIP.

The USEPA's regulations at 40 C.F.R. § 93.158 *et seq.* - *Determining Conformity of General Federal Actions to State or Federal Implementation Plans* govern its implementation of Section 176(c) of the Clean Air Act. A general conformity analysis applies to projects in a nonattainment area or an attainment area subject to a maintenance plan ("maintenance area") and is required for each federal criteria pollutant for which an area has been designated nonattainment or maintenance.

If the project consists of an activity listed as exempt, no general conformity analysis is needed because the project is presumed to conform to the Clean Air Act requirements (40 C.F.R. § 93.153 [c][2]). Generally, the types of projects that receive CWSRF financing do not appear on the rule's exempt activity list. The applicant must explain how the exemption applies to the project if one is claimed. Rehabilitation projects are not considered routine maintenance and rUSEPAir projects are not exempt from a general conformity determination.

If the project is not exempt from a general conformity determination, the applicant shall follow the steps below:

- i. The applicant must determine if the project is in a nonattainment or maintenance area for federal criteria pollutants. Information on where nonattainment and maintenance areas are located can be found on the USEPA's Green Book website (<http://www3.USEPA.gov/airquality/greenbook>). If the project is located in an air basin that is in an attainment area not under a maintenance plan, or in an unclassified area, for all federal criteria pollutants, then the project is not subject to a general conformity determination and no further analysis is necessary.
- ii. If the project is in a nonattainment or maintenance area, the applicant must calculate the direct and indirect project construction and operational emissions, in tons per year, for each federal criteria pollutant that is in nonattainment or maintenance. The USEPA has established NAAQS for six criteria pollutants including ground-level ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, particulate matter and lead. Note that for ozone, the applicant will need to calculate the precursors to ozone.
- iii. If a project's total estimated emissions (construction and operation) for each nonattainment or maintenance criteria pollutant are below the federal *de minimis* thresholds ("nonattainment rates") as set forth in the applicable regulation (40 C.F.R. § 93.153), then no general conformity determination is necessary, and the State can conclude that the project conforms to the SIP. *De minimis* levels for each criteria pollutant

are defined by their designations (i.e. serious, severe or extreme). Further information on *de minimis* levels can be found at:

<https://www.USEPA.gov/general-conformity/de-minimis-emission-levels>.

- iv. If a project's total estimated emissions (construction and operation) for a nonattainment or maintenance criteria pollutant are above the applicable *de minimis* threshold and the project is not otherwise exempt from a conformity determination, then a general conformity determination **is** required.
- The applicant shall provide to the USEPA the information set forth in 40 C.F.R. § 93.158 requirements for making a general conformity determination.
 - If estimated emissions are above the federal *de minimis* threshold ("nonattainment rates") or are greater than ten percent (10%) of the air basin's emissions inventory, but the project is sized to meet only the needs of current population projections that are used in the approved SIP, then the applicant must quantitatively indicate how the proposed capacity increase was calculated using population projections. With this information, the USEPA will be able to make a positive general conformity determination for project emissions for these criteria pollutants under this specific criterion provided in the rule (See 40 C.F.R. § 93.1544). The project must be found to conform to the approved SIP to receive CWSRF or DWSRF funding approval.

The USEPA maintains a General Conformity website at: <https://www.USEPA.gov/general-conformity>, and <https://www.USEPA.gov/general-conformity/what-general-conformity>.

- **Coastal Barriers Resources Act**

The Coastal Barriers Resources Act is intended to discourage development in the Coastal Barrier Resources System and adjacent wetlands, marshes, estuaries, inlets, and near-shore waters. Should the applicant believe there may be impacts to the Coastal Barrier Resources System due to special circumstances, they should use the following information as a guide:

During the planning process, the applicant should consult with the appropriate Coastal Zone management agency (e.g., City or County with an approved Local Coastal Program) to determine if the project will have an effect on the Coastal Barrier Resources System. If the project will have an effect on the Coastal Barrier Resources System, the State must consult with the appropriate Coastal Zone management agency and the USFWS. Any recommendations from the Coastal Zone management agency and the USFWS will be incorporated into the project design prior to funding approval.

To help ensure that the applicant complies with the Coastal Barriers Resource Act, it should visit <http://www.fws.gov/CBRA/> for more information on the legal requirements and to confirm that no modifications to Coastal Barrier Resources System units have occurred.

- **Coastal Zone Management Act**

The Coastal Zone Management Act requires all federal agencies to ensure that activities in coastal areas are consistent with approved state Coastal Zone management plans. Before any federally supported project is implemented in a Coastal Zone, a determination that the project is consistent with the Coastal Zone management plan must be made. The applicant should consult directly with the state Coastal Zone management agency (City or County with an approved Local Coastal Program) to determine if the project is consistent with the Coastal Zone

management plan. Consistency may be achieved by appropriate siting of the project and any components, or by incorporating mitigation measures from the state Coastal Zone management agency into the project design. The applicant must provide documentation to the State that the project is not in a Coastal Zone or is consistent with the state Coastal Zone management plan.

To help ensure that the applicant complies with the Coastal Zone Management Act, it should visit the following website to obtain more detailed information regarding legal requirements: <https://coast.noaa.gov/czm/media/StateCZBoundaries.pdf> for affected areas.

- **Endangered Species Act (ESA), Section 7**

The State must ensure that CWSRF and DWSRF projects are not likely to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify their critical habitat. The USEPA has designated the State (DOH) as its non-federal representative for conducting informal consultations with the USFWS and the NMFS (see Attachments 5A and 5B, respectively). The State will coordinate with the USEPA to conduct informal and formal consultation with the USFWS and the NMFS if necessary. Any issues raised by those agencies must be resolved prior to funding approval by the State.

The applicant must obtain, in written form, current species lists from the USFWS and the NMFS, of any listed or proposed species and any designated or proposed critical habitat that may be present in the project action area. If any listed or proposed species or designated or proposed critical habitat may be present in the project area, the applicant should contact the appropriate USFWS and/or NMFS regional office to help determine whether the project may affect any of the species or habitat. The applicant will identify to the State any listed or proposed species and describe the potential effects of the project on such species.

A “may affect” finding is the appropriate conclusion when a proposed action may result in any effects on listed species or designated critical habitat. “Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.” See 50 C.F.R. § 402.02. “May affect” is a relatively low threshold that includes any possible effect, whether beneficial, benign, adverse, or of an undetermined character.

The following is a non-exhaustive list of factors to consider when analyzing potential direct and indirect effects of the proposed action:

- a. Exposure
 - Proximity of the project action to the listed species
 - Distribution of species and habitat use
 - Timing, duration, magnitude, and nature of effects
- b. Biology
 - Breeding, feeding, and sheltering
 - Sensitivity and resilience to change
 - Recovery rate

The concept of “take” is also important in an ESA consultation. “Take” is defined by the ESA to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” (16 U.S.C. § 1532(19).)

The terms “harass” and “harm” are further defined as follows:

- “Harass” means an “intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering.” (50 C.F.R. § 17.3.)
- “Harm” means “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering.” (50 C.F.R. § 17.3.)

Identifying habitat modifications that harm individuals of a species involves understanding a species’ life history.

Once the applicant has provided the relevant information to the State, the State, USEPA and USFWS and/or NMFS, in their respective roles, must make one of the following ESA determinations described below for each federally listed or proposed species or designated or proposed critical habitat:

- i. **No Effect** determination occurs when there are no direct or indirect effects on any listed species or its designated critical habitat (not even a beneficial effect), pursuant to the standard set forth in 50 C.F.R. § 402.02. Examples of “no effect” determinations include when there is no overlap between the range of the listed and proposed species and the project area, the species’ habitat does not occur in or adjacent to the project area, designated critical habitat does not occur in the project vicinity, or there is no chance the project will have an effect on the listed species or designated critical habitat.

The State makes “no effect” determinations based upon the information submitted by the applicant and informal discussions with the USFWS and/or NMFS, and must provide written notification and a brief statement of the basis of “no effect” determinations to USEPA.

- ii. **May Affect, Not Likely to Adversely Affect (NLAA)** determination occurs when impacts to a listed species or its designated critical habitat due to project actions are likely to be discountable, wholly beneficial, or insignificant, and never rise to the level of “take” (see definition above). Beneficial effects are contemporaneous positive effects without any adverse effects to the species or habitat. Insignificant effects relate to the size of the impact and should never reach the scale where take occurs. Discountable effects are those extremely unlikely to occur.

The State will communicate with the USFWS and/or NMFS to ensure all biological documents to be used for informal consultation are complete and justify the recommended determination. A biological assessment is typically required for major construction activities. See 50 C.F.R. § 402.12(f). The applicant is encouraged to contact the State to discuss questions and to request an example biological assessment template.

Based upon its review of the biological documentation and upon its own decision regarding the appropriateness of an NLAA determination, the State will summarize the biological documentation in a written NLAA recommendation submitted to USEPA.

The USEPA makes all official NLAA determinations. To the extent that USEPA agrees with the State's NLAA recommendation, the USEPA will send a letter to the USFWS and/or NMFS making an official NLAA determination and seeking concurrence from the USFWS and/or NMFS on the NLAA determination.

Concurrence from USFWS and/or NMFS must be in writing. USFWS and/or NMFS may require project modifications and/or conservation measures to avoid adverse impacts. Any project modifications and/or conservation measures should typically be incorporated into and made enforceable in any approval of CWSRF or DWSRF financing.

- iii. ***May Affect, Likely to Adversely Affect*** determination occurs when a listed species or its designated critical habitat may be adversely affected as a result of the proposed action or its interrelated or interdependent actions, and the effect is not discountable or insignificant. In the event the overall effect on the proposed action is beneficial to the listed species, but also is likely to cause some adverse effects, then the proposed action "is likely to adversely affect" the listed species. **Formal consultation with the USFWS and/or NMFS is required for all "may affect, likely to adversely affect" determinations.**

In preparation for formal consultations, the State will request the applicant prepare a biological assessment. The State will communicate with the USFWS and/or NMFS to ensure the biological assessment is complete and justifies the proposed determination. A biological assessment may include the following elements:

- The results of an on-site inspection and focused protocol surveys of the project area to determine if species are present or occur seasonally.
- The views of recognized experts on the species at issue.
- A review of the literature and other information.
- An analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies.
- An analysis of alternate actions considered.

Based upon its review of the biological documentation and upon its own decision regarding the appropriateness of a "may affect, likely to adversely affect" determination, the State will summarize the biological documentation in a written "may affect, likely to adversely affect" recommendation submitted to USEPA.

The USEPA makes all "may affect, likely to adversely affect" determinations. Upon making such a determination, the USEPA will send a letter to the USFWS and/or NMFS initiating formal consultation.

Formal consultation is concluded when the USFWS and/or NMFS issues a Biological Opinion. Formal consultation relies on more detailed descriptions, relevant studies, surveys, biological assessments, as set forth at 50 C.F.R. § 402.14(c), and involves up to 90 days of consultation, followed by 45 days for the USFWS and/or NMFS to produce the Biological Opinion. In the Biological Opinion, USFWS and/or NMFS often recommend

project modifications and/or reasonable and prudent conservation measures to avoid jeopardy. Any project modifications and/or conservation measures should typically be incorporated into and made enforceable in any approval of CWSRF or DWSRF financing.

- iv. **May Affect, Likely to Adversely Affect** determination on species proposed for listing or on habitat proposed as critical habitat requires a conference with the USFWS and/or NMFS. Upon a determination by ESPA that a proposed project may have an adverse effect on species proposed for listing or on habitat proposed as critical habitat, USEPA will initiate a conference with the USFWS and/or NMFS pursuant to Section 7(a)(4) of the ESA to determine the appropriate course of action.

If the project involves resources that are protected by a Habitat Conservation Plan (HCP), the applicant must provide the State with supporting evidence regarding whether the proposed project impacts will be consistent with the HCP requirements (16 U.S.C. § 1539(a)(2)(A)).

In order to meet the requirements of the ESA described above, as well as the requirements of the Magnuson-Stevens Fishery Conservation and Management Act, DOH will comply with the following procedures:

- i. **No Effect** (DOH makes determination):
 - a. DOH will
 - i. Collect and review appropriate information, make determination, and document the determination.
 - ii. Provide documentation of the No Effect determination in an email to the USEPA project officer.
 - b. The USEPA will maintain a copy of the No Effect determination documentation.
- ii. **May Affect, Not Likely to Adversely Affect (NLAA)** listed species or its designated critical habitat (USEPA makes determination after DOH conducts informal consultation with the Service(s)):
 - a. DOH will
 - i. Collect and review appropriate information, engage Service(s) in an early consultation, and document the consultation effort with the Service(s).
 - ii. Coordinate with the applicant and the Service(s) and resolve any issues.
 - iii. Conduct informal discussions with the Service(s).
 - iv. Request assistance from USEPA in resolving any issues raised by the Service(s).
 - v. Send USEPA a NLAA recommendation, along with copy of all relevant informal consultation documents (e.g. biological assessment/report evaluation, species list, mitigation/conservation measures, records of communications, etc.).
 - b. The USEPA will
 - i. Assist DOH as needed.
 - ii. To the extent USEPA agrees with the DOH's NLAA recommendation, send a NLAA determination letter to the Service(s) (copy DOH) seeking concurrence.

DOH will not execute a financing agreement for a CWSRF or DWSRF project until it has received concurrence on a NLAA determination from the Service(s).

- iii. **Formal Consultation** where the proposed project is likely to adversely affect species or critical habitat, USEPA will initiate formal consultation under Section 7 (USEPA makes determination):
 - a. DOH will
 - i. Collect and review appropriate information and engage Service(s) prior to the initiation of formal consultation.
 - ii. Request assistance from USEPA, as needed.
 - iii. Send USEPA a letter requesting initiation of formal consultation, providing all relevant information and documents necessary for the consultation, including the Biological Assessment or Biological Evaluation.
 - iv. Assist USEPA in resolving any issues raised by the Service(s) regarding the formal consultation.
 - b. The USEPA will
 - i. Communicate with, and facilitate communication among, DOH and the Service(s), as needed.
 - ii. Send a letter to the Service(s) (copy DOH) requesting formal consultation, enclosing the letter and other relevant information and documents from DOH.
 - iii. Provide any draft Biological Opinions received from the Service(s) to the DOH and consider any comments from DOH.
 - iv. Work with the Service(s) and the DOH until any issues are resolved and formal consultation is completed.

DOH will not execute a financing agreement for a CWSRF or DWSRF project until formal consultation is complete. Formal consultation usually is completed with the issuance of a final Biological Opinion from the Service(s).

- iv. **Likely to Jeopardize Proposed Species/Adversely Modify Proposed Critical Habitat** (USEPA makes determination):
 - a. DOH will provide assistance to USEPA as requested.
 - b. The USEPA will request a conference with the proposing Service(s).

The applicant is encouraged to visit <http://www.fws.gov/endangered/laws-policies/index.html> and <http://www.nmfs.noaa.gov/pr/laws/esa> for further information on the federal ESA.

- **Environmental Justice – Executive Order No. 12898**

The applicant must identify and address any disproportionately high and adverse human health or environmental effects of the project activities on minority, low-income, indigenous populations, or tribes. The USEPA has defined environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” The applicant is encouraged to review the USEPA’s *Final Guidance for Incorporating Environmental Justice Concerns in USEPA’s NUSEPA Compliance Analyses* (<https://www.USEPA.gov/sites/production/files/2015-04/documents/ej-guidance-nUSEPA-compliance-analyses.pdf>) as an aid in meeting the objectives of the Executive Order.

Fair Treatment means that no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative consequences of industrial, governmental, and commercial operations or programs and policies.

Meaningful Involvement means that: 1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; 2) the public's contribution can influence the agency's decision; 3) the concerns of all participants involved will be considered in the decision-making process; and 4) the decision-makers seek out and facilitate the involvement of those potentially affected.

The term "environmental justice concern" is used to indicate the actual or potential lack of fair treatment or meaningful involvement of minority, low-income, or indigenous populations, or tribes in the development, implementation, and enforcement of environmental laws, regulations, and policies.

A project may involve an "environmental justice concern" if the project could:

- a) Create new disproportionate impacts on minority, low-income, or indigenous populations;
- b) Exacerbate existing disproportionate impacts on minority, low-income, or indigenous populations; or
- c) Present opportunities to address existing disproportionate impacts on minority, low-income, or indigenous populations that are addressable through the project.

- **Farmland Protection Policy Act**

The Farmland Protection Policy Act requires identification of potential adverse effects on farmland and its conversion to nonagricultural uses, mitigation of these effects, and assurance that projects are carried out in a manner compatible with the farmland preservation policies of state and local governments and of private organizations.

Early in the project planning process, the applicant should seek assistance from the state conservationist or local representative regarding the alternative project locations. The state conservationist can provide advice on: (a) what further actions must be taken by the applicant to further evaluate important farmlands, (b) the significance of all identified important farmlands, (c) the sizing of the project as it relates to secondary growth, (d) the continued viability of farming and farm support services in the project area, and (e) alternatives or mitigation measures for reducing potential adverse effects on important farmlands.

The Natural Resources Conservation Service provides information on the Farmland Protection Policy Act at: <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/landuse/fppa/>.

- **Fish and Wildlife Coordination Act**

Pursuant to 16 U.S.C. §662(a) of the FWCA, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any dUSEPartment or agency of the United States, or by any public or private agency under Federal permit or license, such dUSEPartment or agency first shall consult with the USFWS, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.

The provisions of Section 662(a) do not apply to those projects for the impoundment of water where the maximum surface area of such impoundments is less than ten acres, nor to activities for or in connection with programs primarily for land management and use carried out by Federal agencies with respect to Federal lands under their jurisdiction.

As this law was established before the ESA and the Clean Water Act, the affected water bodies do not have to be a "Water of the U.S." or considered critical habitat for a federally listed species to trigger actions required under the FWCA. Reports and recommendations from the wildlife and/or fisheries agencies can be submitted to the action agency. Reports and recommendations received must accompany project reports for authorization or approval and are not legally binding but should be strongly considered.

Should consultation under the FWCA be required, the State will provide information about the project to the USEPA and will work with the USEPA to initiate the consultation process.

- **Floodplain Management – Executive Order No. 11988, as amended by Executive Order No. 12148, and Executive Order No. 13690**

The applicant must take action to reduce the risk of flood loss, to minimize the impact of floods on human safety, and to restore and preserve the natural and beneficial values served by floodplains. The applicants must determine if the project will occur in or affect a floodplain. Floodplain locations can be determined by examining maps available from the United States DUSEPartment of Housing and Urban Development, the United States DUSEPartment of Homeland Security, Federal Emergency Management Agency (FEMA), and the United States DUSEPartment of Agriculture. The applicant must select, if feasible, viable project alternative locations that will not adversely affect floodplains.

To determine if a project is located in a floodplain, the applicant should use the best-available information and the FEMA's effective Flood Insurance Rate Map. If the project will occur in a floodplain because no practicable alternative location is available, then measures must be taken to minimize the risk of flood damage to or within the floodplain, such as flood proofing the facility to be constructed, elevating structures above base flood levels, or providing compensatory flood storage. A public review is required for each plan or proposal for an action taking place in a floodplain.

If the project will be located in or will affect a floodplain, the applicant must prepare a floodplain/wetlands assessment. If there are no practicable alternatives to the proposed location, the applicant must document the mitigation measures or design modifications that will be incorporated into the project to reduce any flooding threats. The applicant must inform the community located in the project area why the project is to be located in a floodplain.

All documentation describing mitigation and design measures must be submitted to the State. If the applicant has not consulted with the local flood protection agency and/or FEMA, the State will notify FEMA to seek comments. FEMA may have additional measures to enhance flood protection.

For further information, the applicant is encouraged to go to: <https://www.fema.gov/floodplain-management>

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

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) is designed to enable the management and conservation of national fishery resources. Essential Fish Habitat (EFH) consultations under the Magnuson-Stevens Act are required only for actions that may adversely affect an EFH. With assistance from the State, the applicant must ascertain whether the proposed project may adversely affect an EFH. The National Marine Fisheries Service maintains maps and/or other information on the locations of EFH, and provides information on ways to promote conservation of the EFH to facilitate this assessment. The applicant must complete an EFH assessment if the project may adversely affect EFH.

50 CFR §600.920(c) provides that a federal agency can designate a non-federal representative to conduct consultations on EFH required under the Magnuson-Stevens Act. The USEPA designated the State as its non-federal representative for purposes of EHF consultations with NMFS (Attachment 5B) if a project may adversely affect EFH.

Depending upon the circumstances, the State initiate consultations with the NMFS on EFH as part of an ESA consultation on the project. Alternatively, after discussions with NMFS and USEPA, and with USEPA's agreement, the State may utilize one of the other consultation approaches outlined in 50 CFR §600.920.

USEPA ultimately remains responsible for compliance with the Magnuson-Stevens Act. Any project modifications and/or conservation measures identified by NMFS should typically be incorporated into and made enforceable in any approval of CWSRF or DWSRF financing. For information regarding procedures that DOH will follow to comply with the Magnuson-Stevens Act, please refer to the ESA procedures in the ESA section above.

For more information on EFH, see:

http://www.nmfs.noaa.gov/sfa/reg_svcs/Council%20stuff/council%20orientation/2007/2007TrainingCD/TabT-EFH/EFH_CH_Handout_Final_3107.pdf

- **Marine Mammal Protection Act**

The Marine Mammal Protection Act (MMPA), 16 U.S.C. §§1361 *et seq.*, protects all marine mammals. It was the first legislation to mandate an ecosystem-based approach to marine resource management. The ecosystem approach has been incorporated in other U.S. statutes including the Magnuson–Stevens Fishery Conservation and Management Act, and in international agreements such as the Convention for the Conservation of Antarctic Marine Living Resources. The MMPA includes a general moratorium on the taking and importing of marine mammals. The MMPA prohibits, with certain exceptions, the "take" of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the U.S. Jurisdiction for MMPA is shared by U.S. Fish and Wildlife Service and the National Marine Fisheries Service. The U.S. Fish and Wildlife Service's Branch of Permits is responsible for issuing take permits when exceptions are made to MMPA.

Under the exception for incidental taking, the Fish and Wildlife Service or the National Marine Fisheries Service must find that the total taking over the five-year period will have a "negligible impact" and will not adversely affect the availability of the marine mammal species or stock for subsistence use by Alaskan natives.

- **Migratory Bird Treaty Act of 1918**

The Migratory Bird Treaty Act (MBTA) provides legal protection for almost all breeding bird species occurring in the United States. The MBTA restricts the killing, taking, collecting, selling, or purchasing of native bird species or their parts, nests, or eggs. The treaty allows hunting of certain game bird species, for specific periods, as determined by federal and state governments. The MBTA must be addressed in the environmental document.

If the environmental document includes mitigation measure(s), the State will coordinate with USEPA, and will notify the USFW, MBTA Office to seek comments.

For further information, the applicant is encouraged to go to: <https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php>.

- **National Historic Preservation Act (NHPA), Section 106**

Section 106 of the NHPA (Section 106) requires an analysis of the effects of proposed projects on “historic properties.” The Section 106 process seeks to accommodate historic preservation concerns with the needs of federal undertakings through consultation among the agency official or officials and other parties with an interest in the effects of the undertaking on “historic properties.” Consultation should commence during the early stages of project planning. “Historic properties” are properties that are included in or eligible for listing in the National Register of Historic Places. “Historic properties” include buildings, structures, objects, and archaeological sites 50 years or older.

On October 19, 2015, the USEPA notified the Hawaii State Historic Preservation Office (SHPO) and numerous Native Hawaiian Organization that it was designating DOH to act on USEPA’s behalf when initiating the NHPA consultation process in connection with projects funded under the DWSRF. (Attachment 6A). However, USEPA will remain responsible for participating in the consultation process when: 1) DOH determines that the “Criteria of Adverse Effect” under 36 CFR §800.5 applies to an undertaking; 2) there is a disagreement between DOH and the SHPO or Native Hawaiian Organizations regarding the scope of the area of potential effects, identification of historic properties, or evaluation of effects; 3) there is an objection from consulting parties or the public regarding findings or determinations or the implementation of agreed provisions; or 4) there is potential for a foreclosure situation or intentional adverse effects as described under 36 CFR §800.9 (b) and (c).

In addition, pursuant to the terms of the 1990 Programmatic Agreement on Historic Preservation for the CWSRF (Attachment 6B), the State shall carry out the requirements of federal regulation 36 CFR §§800.4 through 800.6, and other applicable sections of 36 CFR Part 800. The State shall seek concurrence for compliance with Section 106 of the NHPA and for cultural resources protected under the NHPA as applicable. USEPA will participate in the Section 106 process under the NHPA to the extent mutually agreed upon by the USEPA and the State, but at a minimum the USEPA must be notified by the State if, after routine consultation or coordination with the SHPO and NHOs, disputes remain.

The applicant is required to retain a consultant that meets the Secretary of the Interior’s Professional Qualifications Standards to prepare a cultural resources report. The records search should be current. The applicant must identify the Area of Potential Effects (APE) to identify historic properties that may exist for the proposed project, including construction and

staging areas, and the length, width, and depth of any excavation on a map and in the text of the cultural resources report. The APE is three-dimensional and includes all areas that may be affected by the Project. The APE includes the entire surface area of the project and extends below ground to the total depth of any project excavations.

The State reviews Section 106 cultural resources reports/documents submitted by the applicant for adequacy and compliance with Section 106. Projects that the State determines to have “No historic properties affected”/ “No effect to historic properties”/ “No adverse effect to historic properties”/ “Adverse effect to historic properties” are submitted to SHPO from DOH for concurrence. Consultation with the SHPO by DOH will be used to develop and evaluate alternatives or modifications to the proposed project that could avoid, minimize or mitigate adverse effects on “historic properties.” Any project modifications and/or mitigation measures identified by the applicant, State, SHPO and/or Native Hawaiian Organizations should typically be incorporated into and made enforceable in any approval of CWSRF or DWSRF financing.

The USEPA remains legally responsible for all determinations under the NHPA.

- **Protection of Wetlands – Executive Order No. 11990, as amended by Executive Order No. 12608**

Projects, regardless of funding, must receive approval for any temporary or permanent disturbance to federal and state waters, wetlands, and vernal pools. The CWA Section 404 permitting process is administered by the United States Army Corps of Engineers (USACE). This process can be lengthy and may ultimately require project alterations to avoid wetlands, vernal pools, and waters of the United States. The applicant must consult with the USACE early in the planning process if the project site contains wetlands, and other federal waters. The USACE Wetland Delineation Manual is available at: <http://www.cpe.rutgers.edu/Wetlands/1987-Army-Corps-Wetlands-Delineation-Manual.pdf>.

If the evaluation determines that there are no practicable alternatives that would avoid impacts to wetlands and waters of the United States, then the applicant shall design or modify the project to minimize adverse impacts to those resources and provide an opportunity for public review and comment on the project. Under the USACE “no net loss” policy, where natural wetlands will be destroyed by project construction, the applicant must devise plans to construct substitute or mitigation wetlands. Further, the applicant should seek assistance from the USFWS when developing measures to mitigate adverse impacts on wetlands to ensure that these measures adequately protect the diversity and habitat of species living in the affected wetland.

The applicant must obtain the CWA Section 404 permit from the USACE and the CWA Section 401 Water Quality Certification from DOH Clean Water Branch.

- **Rivers and Harbors Act, Section 10**

If a project requires the construction of any structure in or over a navigable water of the United States, action under Section 10 of the Rivers and Harbors Act, 33 U.S.C. §403, is triggered, regardless of whether the applicant is pursuing federal funding or not. Additionally, structures or work outside the defined area for a navigable water of the United States could also trigger the need for a Section 10 permit if the structure or work will affect the course, location, or condition of the water body. A Section 10 permit is issued by the Secretary of the Army through the

USACE. The applicant will initiate the process of obtaining a Section 10 permit itself and will supply a copy to the State. This process is similar to obtaining a CWA Section 404 permit discussed above.

- **Safe Drinking Water Act, 42 U.S.C. 300f et seq.**

Under this Act, Congress emphasized preventing contamination of aquifers that are the sole source of drinking water for a community under the Safe Drinking Water Act (SDWA). Section 1424 of the SDWA, 42 U.S.C. §300h-3, directs the USEPA, upon determining that a sole source aquifer may be at risk of contamination, to publish notice of that determination in the Federal Register. In accordance with Section 1424(e) of the SDWA, 42 U.S.C. §300h-3(e), after the notice is published:

... no commitment for Federal financial assistance (through a grant, contract, loan guarantee, or otherwise) may be entered into for any project which the Administrator [of the USEPA] determines may contaminate such aquifer through a recharge zone so as to create a significant hazard to public health, but a commitment for Federal financial assistance may, if authorized under another provision of law, be entered into to plan or design the project to assure that it will not so contaminate the aquifer.

Before the State can approve SRF financing for a project, the applicant must contact state officials to determine whether a sole source aquifer is in the vicinity of the proposed project. If a sole source aquifer is in the project planning area, then the applicant, in consultation with state ground water officials, must conduct investigations to determine if the aquifer could be contaminated by the project.

If the project could potentially affect ground water supplies, the applicant, in consultation with ground water officials, must elect an alternative site or devise adequate mitigating measures. In the latter case, the State will coordinate with the USEPA of the applicant's plans. If the USEPA requires additional mitigation measures, the State, with the assistance of the USEPA, will work with the applicant to integrate those measures into the project's design.

For the USEPA and state contacts, please go to:

<https://www3.USEPA.gov/region9/water/groundwater/contacts.html>.

For sole source aquifer locations, go to:

<http://USEPA.gov/region09/water/groundwater/ssa.html>.

- **Wild and Scenic Rivers Act**

Congress passed the Wild and Scenic Rivers Act to preserve the special scenic, cultural, historic, recreational, geologic, and fish and wildlife values of the nation's free flowing rivers and related adjacent land. The Wild and Scenic Rivers Act establishes requirements for projects that may affect a wild and scenic river, river segments, or the adjacent land.

During project planning, the applicant should consult with the appropriate federal agencies and the State to determine whether the project may affect a designated river. The appropriate agency to consult with is the one with jurisdiction over the rivers in the project area and includes the National Park Service, United States Forest Service, or Bureau of Land Management.

The federal cross-cutter requirements of the Wild and Scenic Rivers Act are satisfied if there are no designated rivers in the project area, or if the project will not have a direct and adverse effect on a designated river.

With help from the appropriate agencies and the State, the applicant must evaluate any alternatives under consideration that may affect a wild and scenic river. If those evaluations demonstrate that an alternative will have an adverse effect on a wild and scenic river, then that alternative must be eliminated from consideration and other alternatives or planning adjustments must be pursued.