CHAPTER 9
REGULATORY REQUIREMENTS AND MITIGATION

Construction and operation of the Salton Sea Restoration Project would be subject to a variety of regulatory standards that are in place to safeguard the human environment. Many of these regulatory standards would require the lead agencies to obtain applicable permits. In addition, a mitigation monitoring and reporting program would be implemented to ensure that the permit requirements are satisfied, that restoration actions are performing as expected, and that mitigation measures are applied appropriately. The following sections describe the regulatory requirements, the permits required, and the mitigation monitoring and reporting program.

9.1 REGULATORY FRAMEWORK

The Salton Sea Restoration Project will operate within the framework of a number of regulations designed to protect the environment. The most important of those regulatory requirements are summarized below.

9.1.1 Water Quality Standards

Several federal and state laws, regulations, and policies are applicable to this project. The Clean Water Act, the California Water Code, the California Code of Regulations, the U.S. Code of Federal Regulations (specifically, 40 CFR Subchapter D); State Water Resources Control Board (SWRCB) Policies, and the Water Quality Control Plan for the Colorado River Basin Region are applicable federal and state laws, regulations and policies associated with water quality. These laws and regulations apply in their entirety. The following selected rules and regulations generally relate to discharges to receiving waters. They are designed to protect environmental, agricultural, municipal, industrial, and recreation uses of water. The major federal and state regulations and sections specifically associated with this project and water quality are discussed below.

Clean Water Act—Section 303(d). Section 303(d) of the Clean Water Act (CWA) requires that each state develop a list, known as a 303(d) list, of waterbodies whose water quality is impaired. The 303(d) list for each state identifies impaired waterbodies and sources of impairment, such as mine drainage, agricultural drainage, urban and

industrial runoff, and municipal and industrial wastewater discharges. In 1996, the state of California identified approximately 90 impaired waterbodies in its 303(d) list. The Salton Sea and its tributaries, the New and Alamo rivers, are included on the 303(d) list. The 303(d) compliance process involves establishing TMDLs for listed water quality parameters. A work group has been established, separate from the Salton Sea Restoration Project, to develop and implement strategies for TMDL compliance at the Sea and its tributaries.

Federal Guidance on Water Quality Criteria for Toxic Pollutants. The USEPA has developed National Guidance on Water Quality Criteria (CWA Section 304[a]) for pollutants to protect human health and aquatic life. Relevant pollutants are identified under Section 307 of the CWA. The states used these criteria to develop the now defunct 1991 Inland Surface Water Rule. An update to the National Guidance document, the National Toxics Rule, was promulgated in 1992. California was included in the rule for parameters that were not addressed in the Inland Surface Water Rule. Currently, the USEPA is developing a California Toxics Rule to address parameters not covered for California in the original National Toxics Rule. The California Toxics Rule will be an update of the national rule, based on best currently available scientific data. Decisions regarding site-specific conditions will be deferred to the state RWQCBs.

Porter-Cologne Act. In 1967, the Porter-Cologne Act established the State Water Resources Control Board (SWRCB) and nine regional boards as the state agencies with primary authority over the regulation of water quality and allocation of appropriative surface water rights in California. The Porter-Cologne Act is the primary state water quality legislation administered by SWRCB and requires regional boards to formulate and adopt water quality control plans (basin plans) that are reviewed and revised periodically. The nine regional water quality control boards (RWQCBs) implement Porter-Cologne, the CWA, SWRCB policies, and their Basin Plans in their respective Regions. Basin plans designate beneficial uses for specific surface water and ground water resources and establish water quality objectives to protect those uses. To ensure that water quality objectives are met, SWRCB issues water right permits, and RWQCBs issue waste discharge requirements for the major point-source waste dischargers, such as municipal wastewater treatment plants and industrial facilities.

The SWRCB enacted the Enclosed Bays and Estuary Plan (EBEP) and the Inland Surface Waters Plan (ISWP), which set numeric and narrative criteria for toxic metals and organic compounds. Litigation brought against the plans in 1994 resulted in their revocation, and they are currently under review for readoption. Since that time, California has not been in compliance with Section 303(c)(2)(B) of the Clean Water Act (CWA). This section, which was amended to the CWA in 1987, required the states to adopt water quality criteria for all CWA Section 307(a) priority toxic pollutants (priority pollutants) that could interfere with the designated uses of the State's waters and for which the USEPA has published criteria guidance under CWA Section 304. The rescinded ISWP and EBEP included water quality objectives (which are equivalent to federal water quality criteria) for the majority of the priority pollutants.

To bring California into compliance with Section 303(c)(2)(B), the USEPA is proposing to promulgate the California Toxics Rule (CTR). The CTR will establish water quality criteria for priority pollutants that were not previously promulgated for California in U.S. EPA's National Toxics Rule, promulgated on December 22, 1992 (57 Federal Register 60848-60923) and amended on May 4, 1995 (60 FR 22228-22237). The SWRCB and the RWQCBs also implement sections of the federal CWA, administered by the USEPA through the SWRCB and RWQCBs, including the National Pollutant Discharge Elimination System (NPDES) permitting process for all point sources and for certain nonpoint source waste discharges. The RWQCBs can adopt and enforce requirements on any proposed or existing waste discharge, including discharges from point and nonpoint sources.

Concurrently, the SWRCB is coordinating its activities with the CTR by developing the ISWP and EBEP in two phases. Phase 1 entails the development and adoption of the proposed Policy. Phase 2 will involve incorporating the policy provisions, together with State-adopted water quality objectives, into a new ISWP and EBEP.

Both numerical and narrative water quality objectives are established to protect beneficial uses. Water quality objectives are established to protect beneficial uses, including human health and aquatic life. Once approved by the USEPA, the objectives become enforceable under both the CWA and Porter-Cologne.

Water Quality Control Plan for the Colorado River Basin Region. The Water Quality Control Plan for the Colorado River Basin Region and applicable statewide plans serve as California's Water Quality Management Plan governing waterbodies in the Colorado River Basin Region. The Plan contains the designated beneficial uses and water quality objectives that apply to the waters of the Region.

9.1.2 Water Rights

Two basic types of water rights characterize water use in California: riparian water rights and appropriative water rights. Riparian water rights are based on ownership of land adjacent to a waterbody, while appropriative water rights are based on the principle of "first in line, first in right."

Riparian water rights are not lost if unused and are not quantified. Landowners with these rights can divert portions of a waterbody's natural waterflow for reasonable and beneficial use on their land, provided the land is within the same watershed as the waterbody. During times of water shortage, all riparian water rights holders must share the available supply according to each landowner's reasonable requirements and uses (California State Water Resources Control Board 1989). Appropriative water rights account for the vast majority of water rights in California. These rights are based on the concept that the first to claim and beneficially use a specific amount of water has a superior claim to later appropriators.

Appropriative rights are quantified and may be lost if unused. Appropriative water rights issued after 1914 are under the jurisdiction of the SWRCB. All water users

existing in 1914 were assigned the same seniority. The SWRCB issues appropriative rights with conditions to protect other water rights holders, including delta and upstream riparian water users, and to protect the public interest, including fish and wildlife resources. The quantity and quality of water used by existing riparian and senior appropriative users must not be impaired by subsequent appropriative water rights.

9.1.3 Biological Resources Protection

Biological resources within California are protected by both the federal Endangered Species Act (ESA) and the California Endangered Species Act (CESA), which are described below.

Federal Endangered Species Act. Section 7 of the ESA of 1973, as amended, requires federal agencies, in consultation with the USFWS, to ensure that their actions do not jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of the critical habitat of these species. Salton Sea Restoration Project Phase 1 actions will require consultation under Section 7 of the ESA. In general, this consultation will include specification of incidental "take" limits for any special category species that may be adversely affected by the project. "Take," as defined in the ESA, includes harassment of and harm to a species, directly and indirectly caused mortality, and actions that adversely modify habitat. Reclamation is preparing a biological assessment (BA) to address potential species of concern affected by Phase 1 Alternatives. This BA will be submitted to the USFWS for review and concurrence; a BA for Phase 2 alternatives will be prepared at a later date. Following acceptance of the BA, the USFWS and the National Marine Fisheries Service (NMFS) will prepare separate biological opinions.

The Phase 2 alternatives will be subjected to more programmatic environmental review than Phase 1 actions, reconnaissance-level analysis, and feasibility-level planning. The broad analysis of Phase 2 alternatives will be followed by project-specific analyses in supplemental documents. This approach also will ensure ESA compliance for Phase 2 actions that affect listed species.

California Endangered Species Act. CESA requires an agency, when acting as a lead agency for purposes of complying with CEQA, to consult with the CDFG. This consultation will ensure that its action does not jeopardize the continued existence of a species listed as endangered or threatened under CESA. The CDFG uses information in draft environmental documents, such as an EIR, to issue a biological opinion on whether the action would jeopardize the continued existence of any state-listed species affected by the proposed alternatives. CESA requires that when an action affects a species listed under both CESA and ESA and the project is subject to state lead agency and federal agency action, the CDFG must request and participate in the federal consultation to the greatest extent practicable. CDFG, as a participant in the consultation process for the Salton Sea Restoration Project, may adopt the federal biological opinion as written findings of its biological opinion for the EIS/EIR.

9.1.4 Air Quality Standards

The purpose of the Clean Air Act (CAA) is to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population. The CAA requires that any federal action be evaluated to determine its potential impact on the quality of the air in the project region. Specifically, the federal agency must make a conformity determination. California has a corresponding law that must be considered during the EIR process.

Pursuant to the requirements of Section 176 of the CAA (42 USC Section 7506[c]), federal agencies are prohibited from engaging in or supporting in any way an action or activity that does not conform to an applicable state implementation plan. Conforming to an implementation plan means conforming to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and expeditiously attaining such standards. USEPA has promulgated conformity regulations (codified in 40 CFR Section 93.150 et seq.) This EIS/EIR includes a conformity analysis of the Salton Sea Restoration Project Phase 1 alternatives. A more general discussion is provided for air quality issues associated with Phase 2 actions, with more specifics to be provided in subsequent supplemental documents.

9.1.5 Cultural Resource Protection

Cultural resources are defined broadly as archaeological and architectural resources, Native American resources, and paleontological resources. Archaeological, architectural, and Native American resources are protected through federal and state laws; paleontological resources are protected indirectly through various laws.

Archaeological and Architectural Resources. Cultural resources are protected primarily through the National Historic Preservation Act (NHPA) of 1966 and its implementing regulation, Protection of Historic Properties (36 CFR § 800), the Archaeological and Historic Preservation Act of 1974, the Archaeological Resources Protection Act of 1979, and CEQA. Section 106 of the NHPA (16 USC 470-470w6), as amended (PL 89-515), requires federal agencies to consider the effects of their actions on properties that are listed in or eligible for listing in the National Register of Historic Places (NRHP).

The implementing regulations of the NHPA require federal agencies to provide the State Historic Preservation Officer (SHPO) with an opportunity to comment on any actions that may affect a historic property and to provide the Advisory Council on Historic Preservation (ACHP) with an opportunity to comment on any action that will adversely affect a historic property.

CEQA requires state agencies to consider the effects of their actions on historically significant resources, which are those that meet the criteria for listing in the California Register of Historical Resources (CRHR) or a local register of historical resources. Criteria for inclusion in the CRHR are provided in Section 15064.5 of CEQA and are similar to the criteria for inclusion in the NRHP, described above.

Native American Resources. Section 101(d)(6)(A) of the NHPA allows properties of traditional religious and cultural importance to a tribe to be determined eligible for inclusion in the NRHP. The American Indian Religious Freedom Act of 1978 also allows for access to sites of religious importance to Native Americans. The Native American Graves Protection and Repatriation Act of 1990 provides for the repatriation of human remains and funerary items to identified Native American descendants. Appendix K of CEQA also contains provisions for the discovery of human remains that are of Native American origin.

Paleontological Resources. While there are no federal or state laws directly pertaining to paleontological resources, several laws include such resources within their scope. Federal agencies are required under NEPA to protect all historical, cultural, and natural aspects of the environment. The Federal Land Policy Management Act of 1976 (FLPMA) specifies that public lands should be managed in a manner that protects the quality of scientific resources. Also, CEQA requires state agencies to consider the effects of their projects on all aspects of the physical conditions that exist within the area affected by the proposed project, including paleontological resources. Appendix G of CEQA states that a project may be deemed to have a significant effect on the environment if it will disrupt or adversely affect a paleontological site, except as part of a scientific study.

The BLM considers all vertebrate and some scientifically important invertebrate species to be significant nonrenewable resources (Cunkelman 1999). Fossil resources on BLM land are regulated by three statutes (FLPMA, Federal Caves Resources Protection Act of 1988, and Crimes and Criminal Procedures 18 USC 641) and ten regulations. Permits are required for collecting or disturbing vertebrate fossils on BLM land.

Reclamation must adhere to statutes (18 USC 641, PL 100-691) that prohibit collecting fossils or destroying cave resources. Secretarial Order 3104 grants Reclamation the authority to issue paleontological resource use permits for lands under its jurisdiction.

9.1.6 Indian Trust Assets

The Department of the Interior Order No. 3175 requires all its bureaus and offices to explicitly address anticipated effects on Indian Trust Assets in planning, decision, and operation documents. On July 2, 1993, Reclamation adopted the Indian Trust Asset Policy, which states that Reclamation would seek to protect or avoid adverse impacts to Indian Trust Assets. When adverse impacts cannot be avoided, Reclamation will provide for an appropriate mitigation or compensation. This policy also states that Reclamation will not engage in a taking of Indian Trust Assets without statutory authority and adequate compensation.

Reclamation policy (BOR 1994) advises that a NEPA document must state clearly the United States' position when a resource in question is not considered an Indian Trust Asset. If disputed by an Indian group, the group's position also must be clearly outlined.

9.1.7 Public Trust Doctrine

California has an affirmative duty to take the public trust into account in planning and allocating water resources and to preserve, so far as is consistent with the public interest, the uses protected by the trust. In common law, the public trust doctrine protected navigation, commerce, and fishery uses in navigable waterways. However, the courts have expanded the application of the doctrine to apply to protection of tidelands, wildlife, recreation, and other public trust resources in their natural state for recreational, ecological, and habitat purposes as they affect birds and marine life in navigable waters. In the National Audubon Society v. Superior Court case (1983), the California Supreme Court ruled that in administering water rights laws and approving water diversions, the state also has a duty to continuously supervise the taking and use of appropriated water to protect these public trust uses.

9.2 PROJECT APPROVAL REQUIREMENTS

A number of laws and regulations apply to the project that would require permit preparation, review and approval actions. Table 9-1 provides a summary of potential permit and approval requirements from applicable federal, state, and local agencies. Table 9-2 indicates which specific permits and what approval may be required for each project feature.

9.3 MITIGATION MONITORING AND REPORTING PLAN

The mitigation monitoring and reporting plan would be part of the overall long-term science and management plans for the Sea. The long-term science plan would include conceptual modeling, long-term monitoring, quantitative modeling, focused investigations, technical assistance, and data management. The conceptual modeling would guide both long-term monitoring and focused studies toward

Table 9-1
Salton Sea Restoration Project Approval Requirements

Agency	Permit/Approval	Authority
US Army Corps of Engineers	River and Harbors Appropriation Act, sections 9 and 10, permit for construction in navigable waters	33 USC §§ 401, 403; 33 CFR Parts 320, 322, and 325
US Army Corps of Engineers	Section 404 of the Clean Water Act permit	33 USC § 1344
US Environmental Protection Agency	Project review	
US Fish and Wildlife Service	Interagency consultation pursuant to § 7 of the Endangered Species Act	Endangered Species Act, 16 USC §§ 1531 et seq.; 50 CFR Part 402
US National Marine Fisheries Service	Interagency consultation pursuant to § 7 of the Endangered Species Act	Endangered Species Act, 16 USC §§ 1531 et seq.; 50 CFR Part 402
US National Oceanic and Atmospheric Administration (Monterey Bay National Marine Sanctuary)	Endangered Species Act and National Marine Sanctuaries Act consultation	Endangered Species Act, 16 USC §§ 1531 et seq.; 50 CFR Part 402
Advisory Council on Historic Preservation	Interagency consultation pursuant to Section 106 of the National Historic	NHPA; 36 CFR § 800

Agency	Permit/Approval	Authority
	Preservation Act (NHPA)	
Bureau of Land Management	Section 106 consultation and concurrence (for projects on BLM land).	NHPA; 36 CFR § 800
California Coastal Commission	Coastal zone development permit and federal coastal consistency determination	California Coastal Act of 1976, Cal. Pub. Res. Code §§ 30000 et seq.; Federal Coastal Zone Management Act, 16 USC §§ 1451-1465
California State Historic Preservation Officer	Interagency consultation pursuant to Section 106 of NHPA	NHPA; 36 CFR § 800; CEQA
Colorado River Basin Regional Water Quality Control Board	Point source NPDES permit	State Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13370-13389, Federal Clean Water Act, 42 USC §§ 1251-1389
Colorado Region Regional Water Quality Control Board	Clean Water Act Section 401 compliance (water quality certification); Waste Discharge Requirements	State Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000-14958, Federal Clean Water Act, 33 USC §§ 1251-1387; Title 27, Cal Code of Regulations and 40 CFR 258.1
California State Water Resources Control Board	Appropriated water permits	
Imperial County Air Pollution Control District and South Coast Air Quality Management District	Air pollution control permit	Cal. Health & Safety Code §§ 40918-40926; Federal Clean Air Act 42 USC §§ 7401-7642
Imperial County Air Pollution Control District and South Coast Air Quality Management District	Permit to construct	Cal. Health & Safety Code §§ 40501.2-40719; Federal Clean Air Act 42 USC §§ 7401-7642

Table 9-1
Salton Sea Restoration Project Approval Requirements *(continued)*

Agency	Permit/Approval	Authority
California State Lands Commission	Sate Lands Commission dredging permit	Cal. Pub. Res. Code §§ 6000 et seq.; Title 14, Cal. Regs. §§ 1900 et seq.
California State Lands Commission	Land use lease	Cal. Pub. Res. Code §§ 6000 et seq.; Title 14, Cal. Regs. §§ 1900 et seq.
California Department of Fish and Game	Interagency consultation	California Endangered Species Act, Cal. Fish & Game Code §§ 2090 et seq.; Cal. Fish & Game Code § 1603
California Department of Fish and Game	Lake and streambed alteration permit	Title 14, Cal. Regs. §§ 1600-1607
California Department of Fish and Game	Department of Fish and Game dredging permit	Cal. Regs. §§ 228
Department of Parks and Recreation	Encroachment permit	Cal. Pub. Res. Code §§ 5012
California Department of Transportation	Encroachment permit for use of state rights-of-way	California Streets and Highways Code § 1460
County of San Diego	Coastal development permit Consistency with San Diego County's local coastal program Grading permit Encroachment permit for use of county rights-of-way	California Coastal Act of 1976, Cal. Pub. Res. Code §§ 30000 et seq.
Counties of Imperial and Riverside	EIR certification	CEQA, Cal. Pub. Res. Code §§ 21000-21178.1
Native American tribal groups	Consultation for projects on tribal land	NHPA; 36 CFR § 800; native American Graves Protection and Repatriation Act; American Indian Religious Freedom Act; Department of Interior Order No. 3175

goals and objectives identified for the project. Monitoring would be implemented to evaluate the success of restoration actions and to collect long-term data from which quantitative models can be validated. Quantitative modeling would be used to generate hypotheses about these processes and ecosystem functions that focused investigations then would explore. Focused investigations would fill in key information gaps, would support monitoring by identifying important measures that were not initially recognized, and also would help in validating quantitative models. Technical assistance would involve time-responsive short-term needs, such as consultations, data synthesis and evaluation, and other scientific evaluations to guide management response and actions. The data management program that would facilitate integration of data among monitoring, focused investigations, modeling, and management is also an essential component of the science effort. This program is expected to be environmentally beneficial in that it would allow managers to adapt restoration actions to future ecological needs. The long-term science program, including the monitoring components, is discussed in more detail in Section 2.6.8 of Chapter 2 of the EIS/EIR.

Table 9-2
Potential Permitting Requirements

Permits		404 Permit	Endangered Species Act	Habitat Conservation Plan	Point Source NPDES Permit	401 Certification	Appropriated Water Permit	Air Pollution Control Permit	State Lands Encroachment Permit	State Lands Dredging Permit	Streambed Alteration Permit	DFG Dredging Permit	Department Of Parks Encroachment	CalTrans Encroachment	County Permits
Phase One - Alternatives	Concentration ponds SW Shore	X	X	X	X	X	X	X	X	X					
	EES former Salton Sea Test Base		X	X				X			X			X	
	EES - Bombay Beach		X	X				X			X			X	
	Concentration ponds and EES	X	X	X	X	X	X	X	X	X	X			X	
Phase One - Common Actions	Fish harvesting		X	X											
	Improved recreational facilities	X	X	X		X			X	X					X
	Floods flows via existing or new facilities	X	X	X	X	X	X		X		X				
	Shoreline cleanup		X	X									X		X
	Integrated wildlife disease control and long-term management programs														
Phase One - Conditional Actions	Perimeter pupfish channel	X				X			X	X					
	Nesting/roosting structures														
	Sustain fishery (dike system/fishing programs)	X			X	X			X	X	X				
Phase Two - Alternatives	Export to expanded EES		X	X							X				
	Export to the Gulf of California	X	X	X	X	X	X		X	X	X			X	X
	Export to the Pacific	X	X	X	X	X	X		X	X	X		X	X	X
	Export to Danby	X	X	X	X	X	X		X	X	X			X	X
	Import through Yuma, AZ	X	X	X	X	X	X		X	X	X			X	X
	Import from San Diego Water Treatment Plant	X	X	X	X	X	X		X	X	X		X	X	X
Phase Two - Conditional Actions	Wetlands and/or sediment traps	X	X	X	X	X	X		X						
	Soil stabilization measures		X	X	X	X	X		X						