

4.3 PERMITTING

4.3.A Relationship Between EIR/LRDP and CWA/ESA Permitting

This response addresses comments O2-1, O14-2, O14-3, O21-1, O21-18, O25-3, O26-30, O28-42, O31-13, O31-15, O32-5, SA10-2, SA10-3, SA10-4, SA10-5, SA10-6, SA10-13, and SA10-15. Several commenters provide comments that augment the content of the Draft EIR and elucidate agency needs for consultation and permitting under the ESA, the Fish and Wildlife Coordination Act, the CWA, and the California Endangered Species Act (CESA). A variety of other comments take issue with the fact that the University and the County are planning to adopt EIRs for the Campus and University Community prior to obtaining permits or authorization under the CWA, ESA, and CESA. One commenter indicates that implementation of the LRDP and UCP will require agency action that triggers ESA. One commenter also asserts that construction of Phase 1 on the golf course site before preparing a Section 404(b)(1) alternatives analysis is improper. Other comments question the relationship between the LRDP and/or the UCP to the development of an HCP/NCCP for Eastern Merced County.

4.3.A.1 *Timing of EIR/LRDP in Relation to Clean Water Act and ESA Approvals*

A question has been raised about whether, under the provisions of CEQA or the CEQA Guidelines, certification of the EIR for the UC Merced Campus, and adoption of the findings mandated by Public Resources Code 21081 and CEQA Guidelines 15190–93, must be deferred pending issuance of state or federal agency permits and other approvals that may be necessary to implement various phases of development under the proposed UC Merced LRDP.

The commenters are correct in noting that portions of the Campus, as proposed for development under the LRDP, will require a Section 404 permit and ESA and CESA approvals for activities outside of the Phase 1 boundaries. The University intends to apply for a Section 404 permit for authorization to fill wetlands in those areas. Due to the potential for effects to listed species as a result of activities under the Section 404 permit, the University anticipates that the USACE will initiate Section 7 consultation with the U.S. Fish and Wildlife Service (USFWS). Additionally, the potential for take of state-listed species due to development outside the Phase 1 boundaries also would require incidental take authorization pursuant to CESA.

With respect to authorizations that may be required from other state agencies, CEQA requires that the EIR be certified and the findings required under Public Resources Code 21081 and CEQA Guidelines 15190–93 be made before permits or other approvals may be issued by such other state agencies for the project. This requirement follows from the requirement that such other state agencies, which are responsible agencies, take their permitting or other approval actions based upon the certified EIR for the project after the lead agency has taken its action on the project.

The CEQA Guidelines do not contain any parallel provisions with respect to authorizations issued by federal agencies. While the Guidelines encourage cooperation between federal and state agencies with respect to preparation of environmental documents as discussed in greater detail above in Section 4.1, the Guidelines recognize that in many cases the process under CEQA will not run concurrently with the environmental review and permitting process under federal law (see Guidelines

15220–28). Accordingly, under CEQA and the CEQA Guidelines, a state agency has discretion to proceed with and complete the CEQA process in advance of any applicable federal permitting process.

4.3.A.2 *Timing of State and Federal Approvals in Relation to NCCP/HCP*

Commenters recommend that mitigation proposed in the Draft EIR should be used to guide the NCCP/HCP underway for eastern Merced County and that the NCCP/HCP would be an appropriate means to implement project-specific mitigation. Several commenters also suggest that the eastern Merced County NCCP/HCP is a suitable vehicle for coordinating all of the environmental permits related to the impacts on native plants and animals and their habitat needs, and that the development of the Campus has been placed ahead of conservation. Another commenter suggests that by proceeding with the Draft EIR, including the Phase 1 campus, before receiving a Section 10(a)(1)(B) permit, the University and the County are violating NEPA and ESA.

Incidental Take Authorization Under the Federal ESA

The Draft LRDP EIR indicates that development of the Main Campus would result in effects to federally-listed species. Mitigation measures have been identified in Section 4.4 to mitigate for the project’s significant environmental impacts to biological resources and to reduce the significant impacts to a less-than-significant level under CEQA. See Section 4.8.D for a discussion of the mitigation program.

The project requires a Section 404 permit for fill activities within USACE jurisdictional areas. Because activities under the Section 404 permit may affect federally-listed species, the USACE (the federal action agency) will consult with the USFWS under Section 7 regarding those effects. Draft LRDP EIR, p. 4.4-16. The University anticipates that the Resource Mitigation Program (RMP), as it may be more fully developed through the Section 7 process, will address those effects and be incorporated into the permitting requirements for the Campus.

USFWS has indicated that it may conclude the Section 7 process and issue its biological opinion (and associated incidental take authorization) prior to completion of the NCCP/HCP process (See LRDP EIR Comment Letter SA10). Thus, incidental take authorization will be obtained under Section 7 of ESA. Construction of the Main Campus would not depend upon adoption of the NCCP/HCP nor would it require that a Section 10(a)(1) permit be issued based upon an HCP. Ultimately, however and as more fully described below, the conservation measures included in the RMP and required as permit conditions of the University’s incidental take authorization may be incorporated into the eastern Merced County NCCP/HCP, should it be adopted in the future.

Incidental Take Authorization Under CESA

The University will be required to secure authorizations from CDFG prior to conducting activities outside of the Phase 1 boundaries that would take species protected under CESA. CDFG has indicated that, as a responsible agency, it will rely on the LRDP EIR and related findings prepared for the LRDP to determine conditions necessary to include in any authorization required for the Campus project. Thus, CDFG could issue incidental take authorizations under Section 2080.1 or 2081 of the Fish and Game Code and Streambed Alteration Agreements prior to adoption of the NCCP/HCP. Although the University anticipates securing these approvals prior to completion of the NCCP/HCP, if this were not the case then

CDFG could base its permit decisions, in part, on the NCCP described below (See LRDP EIR Comment Letter SA10).

NCCP/HCP

Under the Natural Community Conservation Planning Act, an NCCP is prepared to provide for the regional or areawide protection and perpetuation of natural wildlife diversity while allowing “compatible and appropriate development and growth” (Fish and Game Code Section 2805). In some instances, an NCCP/HCP is prepared as a combined program to provide for the conservation of species and authorize incidental take under both CESA and FESA. In accordance with Section 10 of the ESA and the Natural Community Conservation Planning Act, Merced County is undertaking preparation of an NCCP/HCP for eastern Merced County. This combined NCCP/HCP is being designed to comprehensively promote the long-term survival of eastern Merced County ecosystems and habitats and those species that are dependent upon those ecosystems and habitats. The NCCP/HCP process is in its early stages. Recently, the County initiated the request for proposals process for the eastern Merced County NCCP/HCP. The NCCP/HCP process is intended to be a multiyear planning process that will not be completed until sometime after anticipated commencement of construction of Phase 1 of the Campus. If delays occur in the preparation and approval of the NCCP/HCP, it also is possible that construction of the next phase of Campus development could occur prior to adoption of the NCCP/HCP. As described above, the University expects to seek incidental take authorizations under CESA and FESA prior to completion of the NCCP/HCP. Due to the conservation measures to be included in the RMP and incorporated into the University's permit requirements, the University's participation in the NCCP/HCP will not be required to mitigate the biological resource impacts of the Campus under ESA or CESA. Nonetheless, consistent with the state's Policy on Conservation (Fish and Game Code Section 2055), the University has committed to work with the County, the USFWS, and CDFG as part of the Campus planning and environmental permitting process, to undertake a collaborative, systematic approach to conservation strategies for lands under the University's control.

Because the NCCP/HCP is a separate planning process in its early planning phases, the University cannot predict at this time the conservation strategies that will be reflected in the NCCP/HCP. Nonetheless, as stated on page 4.4-18 of the Draft LRDP EIR, the University will work with the County, CDFG, and USFWS to assure that the mitigation strategies set forth in Section 4.4 of the LRDP EIR, including the conservation measures reflected in the RMP, ultimately can coordinated with and possibly reflected in the NCCP/HCP. Given the amount of land that will be preserved through the \$30 million appropriation made by the Legislature and reflected in the RMP, and the importance of those lands to regional conservation and recovery efforts, the NCCP/HCP likely will reflect the University's RMP as a part of its conservation strategy. (see Section 4.8.D).

As explained in Section 4.1, above, the University is statutorily required to prepare a LRDP and an EIR that addresses the physical development and a land use plan to meet academic and institutional objectives for UC Merced. Public Resources Code 21080.09. Consistent with its statutory obligations, the University prepared the LRDP and LRDP EIR to address UC Merced Campus planning needs, before it proceeds with further specific campus-related development activities. By preparing the LRDP and the LRDP EIR, the University has not prioritized development over conservation, or limited the scope of its environmental review; it has taken steps to comply with state law.

4.3.A.3 *Commitment of Resources under ESA*

Several commenters state that by proceeding with the Draft EIR and approval of Phase 1 of the Campus before the entire project is evaluated, both the University and the County are committing resources improperly before review under the ESA has been completed.

The University's preparation of a Draft EIR and consideration of the LRDP does not constitute an irreversible and irretrievable commitment of resources under ESA. ESA does not require that the federal action agency complete Section 7 consultation prior to a state agency's preparation of a Draft EIR or certification of a final EIR under CEQA.

With respect to Phase 1, as stated above in Section 4.1.C.1, although federal approvals related to subsequent phases of Campus development would trigger Section 7 consultation, approval and construction of Phase 1 would not require any federal approvals. Construction of the Phase 1 Campus would not affect federally listed threatened or endangered species or their habitats because these species and their habitats are not present within the Phase 1 boundaries, and measures have been incorporated into the Phase 1 project to assure that Phase 1 grading, development, and operational activities would not result in indirect effects to federally listed species or their habitats located outside the Phase 1 boundaries.

The University's CEQA review for the Phase 1 project and its decision to proceed with Phase 1 construction would neither restrict nor limit the USACE's choice of reasonable alternatives for the Campus project, nor would it preclude the formulation of a reasonable and prudent alternative under the ESA. The University has evaluated fully the significant environmental effects of the Phase 1 project and the LRDP, and has considered more than 20 alternative configurations and locations for the entire Campus in Chapter 5 of the Draft LRDP EIR. Refer to Section 4.21 of this Final EIR for a discussion of responses to comments regarding the alternatives analysis.

Through the Section 404(b)(1) analysis and NEPA, the USACE also may consider the alternatives such as those evaluated in the EIR as well as additional alternatives identified through the Section 404 and NEPA processes. Under Section 404, the USACE could select an alternative location or alternative configuration for the Campus that is different from the proposed project if it finds such an alternative is the least environmentally damaging practicable alternative (LEDPA) from a CWA perspective. Similarly, the USFWS could identify a reasonable and prudent alternative to the proposed Campus project that would avoid jeopardy to federally listed species, if the USFWS determined through the Section 7 process that the proposed Campus project would result in jeopardy.

4.3.B **Section 404 LEDPA Analysis and Evidence Needed for LEDPA Analysis**

This response addresses comments FA1-7, FA1-9, O24-19, O26-30, O28-7, and O28-76. Commenters state that a proper assessment of the LRDP and UCP should incorporate the LEDPA required under the CWA, the U.S. Environmental Protection Agency's (USEPA's) regulations under Section 404, and applicable provisions of the Porter Cologne Act.

Commenters assert that the EIR's analysis is unable to satisfy the alternatives requirements for issuance of a Section 404 permit and that the EIR should provide a federal Section 404 alternative analysis. Other commenters note that the wetlands present within the Campus in the foothills are aquatic sites within the meaning of Section 404 and contain vernal pools supporting

endangered fairy shrimp. In that regard, a commenter suggests that the EIR must assess whether the project will violate USEPA regulations contained in 40 CFR 230.10, which prohibits significant degradation of wetlands.

4.3.B.1 *Requirements for the Treatment of Alternatives Under CEQA and the Section 404 Guidelines*

CEQA and the Section 404 process contain different requirements pertaining to the treatment of alternatives. CEQA requires that an EIR describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, (14 CCR 15126.6). Consistent with CEQA requirements, the University evaluated over 20 alternative locations and configurations that were designed to address impacts to wetlands as well as other environmental considerations resulting from the proposed project. See Section 4.2.1 below for a discussion of alternatives.

By contrast, the USEPA Section 404(b)(1) regulations prohibit the discharge of dredged or fill material if a practicable alternative to the proposed discharge exists that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences, (40 CFR 230.10(a)). Practicable alternatives are presumed to exist for nonwater dependent projects, and alternatives requiring less fill are presumed to be less damaging, “unless clearly demonstrated otherwise” (40 CFR 230.10(a)(3)).

The USEPA Section 404(b)(1) regulations are focused on impacts to wetlands and apply to the USACE’s issuance of a Section 404 permit. As a preliminary step in identifying alternatives that ultimately may be considered in the Section 404 process, the University and Community prepared a CAA in March 2001. These alternatives were also included in the evaluation of the 20 alternatives contained in the LRDP EIR. Although not required by the Section 404 process or CEQA, the University and County prepared the CAA to identify alternatives that could be considered both in the CEQA process and the Section 404(b)(1) analysis.

In meeting CEQA’s requirements, the University has not marginalized nor circumvented the requirements of the Section 404 process. When the University commences the Section 404 permit application process and preparation of the Section 404(b)(1) analysis, the University and the USACE will fully evaluate alternatives in the manner provided by Section 404 and the applicable federal regulations. Through the Section 404 process, the University will also address useful comments on the CAA provided by the USACE, USEPA, and members of the public. Specifically, through the Section 404(b)(1) analysis, the University acknowledges that it will be required to justify the need for campus programs, size, and activities and demonstrate the practicability of Campus land use requirements as part of the USACE’s process.

4.3.B.2 *Miscellaneous Comments Regarding 404(b)(1) Analysis*

Commenters suggest that in considering project alternatives, the University should keep in mind that under Section 404(b)(1) an alternative does not have to accommodate components of a project that are merely incidental to the Section 404 applicant’s basic purpose and that actions or inactions by the applicant do not foreclose otherwise practicable alternatives under Section 404.

The limitations that apply under Section 404 do not necessarily apply, however, to CEQA's requirements for the treatment of alternatives as set forth in Section 15126.6. As discussed in further detail in Section 4.21 of this Final EIR, under CEQA, the selection of alternatives is guided, in part, by the ability of the alternatives to feasibly attain most of the basic objectives of the project.

One commenter requests that the University define how it is that the Parkway, Campus, and Community are water dependent. A determination of whether or not the project is "water dependent" within the meaning of Section 404 is not a CEQA requirement. The University has not defined the Campus, Community, or Campus Parkway projects at this as "water dependent" or "nonwater dependent." Those determinations will be made in consultation with the USACE and USEPA through the Section 404 process.