

5.0 CONSULTATION AND COORDINATION

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5.0 CONSULTATION AND COORDINATION

5.1 Compliance with Laws, Regulations, and Executive Orders

Coordination and evaluation of required compliance with specific federal acts, executive orders, and other policies for the various alternatives is achieved, in part, through the coordination of this document with appropriate agencies and the public. Appendix S documents compliance with all applicable federal statutes, executive orders, and policies, unless otherwise noted in Table 5.1-1. Table 5.1-1 summarizes the means of compliance with those statutes, orders, and policies.

Law, Regulation, or Policy	Status	Comments
Oil Pollution Act of 1990	pending	The LA TIG is evaluating CPRA's request to implement the Project with DWH natural resource damages funds pursuant to OPA. The LA TIG intends to use this EIS to satisfy its obligations for NEPA review of its proposed action.
Clean Air Act of 1970 (CAA)	complies	The Project area is within parishes that are currently in attainment of NAAQS. A general conformity determination is not required.
Clean Water Act of 1972	pending	Section 401 correspondence and compliance will be provided in Appendix S of the FEIS. CEMVN will complete the 404(b)(1) evaluation prior to its decision.
Fish and Wildlife Coordination Act of 1958 (FWCA)	pending	The Draft Fish and Wildlife Coordination Act Report (FWCAR) dated January 20, 2021 includes the USFWS positions and recommendations (Appendix T). USFWS recommendations and Applicant responses are provided in Section 5.3.
Endangered Species Act of 1973	pending	A BA will be formally submitted to NOAA and USFWS for ESA consultation concurrent with the issuance on the DEIS for public review. NOAA and USFWS will respond with a Biological Opinion (BO) prior to issuance of the FEIS. The BA is in Appendix O. The BO will be provided in Appendix O to the FEIS.
Magnuson-Stevens Fishery Conservation and Management Act of 1976	pending	An EFH assessment will be formally submitted to NOAA concurrent with the issuance of the DEIS for public review. NOAA will respond with EFH conservation recommendations prior to issuance of the FEIS. The EFH assessment is provided in Appendix N of this DEIS, and NOAA's response will be provided in Appendix N of the FEIS.
Coastal Zone Management Act of 1972	pending	LDNR's decision whether to issue CUP #P20131098 will be provided in Appendix S to the FEIS.
Coastal Barrier Resources Act and Coastal Barrier Improvement Act	N/A	Although System Units and Otherwise Protected Areas fall within the Project area, no actions are being taken which impact these resources.
Marine Mammal Protection Act (MMPA)	Complies	As directed by Congress under the Bipartisan Budget Act of 2018, NMFS issued a waiver of the MMPA moratorium and prohibitions for the proposed Project on March 15, 2018. The waiver is provided in Appendix S.

Table 5.1-1 Compliance with Environmental Laws, Regulations, and Executive Orders		
Law, Regulation, or Policy	Status	Comments
Bipartisan Budget Act of 2018, Section 20201	pending	The State of Louisiana shall, in consultation with the Secretary of Commerce: (1) to the extent practicable and consistent with the purposes of the Project, minimize impacts on marine mammal species and population stocks, and (2) monitor and evaluate the impacts of the Project on such species and population stocks. This EIS evaluates the potential impacts of the MBSD Project on marine mammals. CPRA's Monitoring and Adaptive Management (MAM) Plan includes monitoring of marine mammal populations.
Marine Protection, Research and Sanctuaries Act	N/A	No ocean dumping is proposed as part of this Project.
Estuary Protection Act of 1968	N/A	The Barataria Basin is not a designated estuary under this Act.
Anadromous Fish Conservation Act	N/A	The Project would not be funded under this Act.
Migratory Bird Treaty Act (MBTA), Migratory Bird Conservation Act, and Bald and Golden Eagle Protection Act	complies	The BMPs listed in Chapter 4, Section 4.27, and USFWS recommendations would be followed to avoid impacts on any protected birds.
Wild and Scenic River of 1968	N/A	No federally designated rivers are within the Project area.
Submerged Lands Act of 1953	N/A	This Project would not modify the coastline or base line from which the territorial sea is measured for purposes of the Submerged Lands Act.
Rivers and Harbors Act of 1899, Sections 10 and 14	pending	Decision whether to issue a Section 10 authorization and Section 408 permission will be made by USACE after the FEIS is issued.
National Historic Preservation Act of 1966	pending	Section 106 consultation was initiated with the SHPO and Tribal Nations on October 14, 2016. USACE has determined that the effects on historic properties cannot be fully determined before plan approval, and in accordance with ER 1105-2-100, paragraph C-4(d)(5)(d)(2), USACE has elected to fulfill its obligations under Section 106 of the NHPA, as amended, through the execution and implementation of a PA. A copy of the draft PA for consultation, identification of historic properties, assessment, and resolution of adverse effects is included in Appendix K.
Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation, and Liability Act, Toxic Substances Control Act of 1976	complies	An ASTM Standard E1527-13 Phase I Environmental Site Assessment of the construction footprint and immediate outfall area was completed on January 31, 2020 and is included in Appendix J. An ASTM Standard E1527-13 Phase I Environmental Site Assessment would again be conducted within 6 months of the start of construction to identify any potential Recognized Environmental Conditions (RECs) or Historical Recognized Environmental Conditions (HRECs) that could be encountered during construction and operation of the Project.
Farmland Protection Policy Act of 1981	complies	NRCS determined that the Project would impact lands classified as prime farmland and that the Project will not impact NRCS work in the vicinity. USACE coordination letters and responses from NRCS are found in Appendix S.

Law, Regulation, or Policy	Status	Comments
E.O. 11988 Floodplain Management	pending	Upon issuance of the ROD, USACE will determine whether construction of the Project in the floodplain is or is not in the public interest, and that whether the impacts of potential flooding on human health, safety, and welfare, and risks of flood losses, would or would not be minimized by mitigation measures described in Chapter 4, Section 4.27.
E.O. 11990 Protection of Wetlands	complies	Chapter 4, Section 4.27 describes the Applicant's proposed mitigation for wetland impacts. Unavoidable Project-induced impacts would be mitigated by the Project's creation of marsh, and hence, the plan complies with the EO 11990.
E.O. 12898 Environmental Justice	pending	Upon issuance of the ROD, the USACE will determine whether implementation of the Project would or would not have a disproportionately high and adverse impact to minority and/or low-income residents.
E.O. 13112 Invasive Species	complies	USACE has determined that the benefits of the Project outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm would be taken in conjunction with the Project.

5.2 Cooperating Agency Review Process (General)

Concurrent with CEMVN's review of CPRA's Clean Water Act and Rivers and Harbors Act permit and permission requests, the LA TIG is evaluating CPRA's proposal to implement the MBSD Project pursuant to OPA through the Restoration Plan. The LA TIG intends to use this EIS to satisfy its obligations for NEPA review of its proposed action in the Restoration Plan, and consequently the LA TIG has coordinated with CEMVN throughout the development of this EIS to ensure it is adequate to support the LA TIG's proposed action as well as CEMVN's decision process.

In November 2016, pursuant to NEPA, CEMVN formally requested federal, state, and tribal agencies to be cooperating or commenting agencies for this EIS and the MBSD permitting process based on jurisdiction by law and/or special expertise. In February 2017, after the MBSD Project was placed on the FAST-41 Permitting Dashboard, CEMVN, pursuant to FAST-41, formally requested appropriate federal, state, local, and tribal agencies to cooperate or participate in developing the FAST-41 CPP. In March 2017, as both the NEPA and FAST-41 lead federal agency, CEMVN finalized the CPP, which listed the roles and responsibilities for all entities with NEPA or federal authorization responsibilities for the MBSD Project. In September 2017, CEMVN, USEPA, NOAA, USDOJ, USFWS, and USDA entered into a "Cooperating Agency Memorandum of Understanding for the Proposed 'Mid-Barataria Sediment Diversion' Environmental Impact Statement," which outlined the roles and responsibilities of the lead and cooperating agencies for preparing the DEIS and FEIS for the MBSD Project.

Prior to the MBSD Project being placed on the FAST-41 Permitting Dashboard, CEMVN began coordination with agencies that potentially had jurisdiction by law and/or special expertise relevant to the MBSD Project, including members of the LA TIG. CEMVN determined a need to convene the federal cooperating agencies to maximize efficiencies among federal partners and coordinate timelines for MBSD permit review. In December 2016, a meeting was held with these agencies to begin the coordination process for the EIS and to begin development of a process by which the MBSD EIS would include information necessary for decision making by all cooperating agencies. CEMVN refers to the group of federal cooperating agencies for the MBSD Project as the “Federal Coordination Team” (FCT). The primary objectives of the FCT were to:

- establish effective and efficient working relationships among the federal entities; and to
- allow for efficient coordination amongst and between those federal agencies in order to reduce duplication of effort and identify, address, and align information needs and schedules.

Throughout the NEPA process each federal agency retains and exercises its independent evaluation and decision making authority. Participating members of the FCT included representatives from:

- USACE
- NOAA/NMFS
- USDOJ/USFWS
- USEPA
- USDA/NRCS

Representatives from the Federal Permitting Improvement Steering Council (FPISC), CEQ, and USGS also attended meetings on an as-needed basis. Following FCT meetings, CEMVN coordinated with the LA TIG and CPRA (the Applicant) to exchange information and provide updates on the status of their efforts and development of the MBSD EIS.

In January 2018, members of the FCT and FPISC entered into a MOU with the State of Louisiana, “Framework for Establishing Discipline and Accountability in the Environmental Review and Authorization Process of the Mid-Barataria Sediment Diversion Project.” Consistent with the January 2018 MOU, CEMVN expanded the FCT to include the LA TIG, thereby including the Applicant (CPRA), since CPRA, in its role as Louisiana’s lead natural resource trustee, is a member of the LA TIG. This group, the USACE/FCT/TIG group became known as the UFT and met regularly through development of the MBSD EIS. Led by CEMVN, the UFT included members from:

- USACE
- NOAA/NMFS
- USDOI/USFWS
- USEPA
- USDA-NRCS
- CPRA

Additional participants included representatives from FPISC, CEQ, USGS, LDEQ, LDNR, LDWF, and LOSCO, as well as the third-party contractor and consultants to the LA TIG and the CPRA for discussion of technical information, as needed. The intent of the UFT was to allow for:

- efficient coordination amongst and between federal agencies that are cooperating, participating, or commenting on the EIS for the proposed MBSD Project;
- a means of communication and coordination with cooperating agencies regarding NEPA compliance needs;
- an organized approach to coordinate efforts for development of one EIS;
- a venue for organized conflict resolution;
- a means to facilitate clear and transparent information sharing and communication to include the Applicant; and
- coordination amongst all relevant parties to reduce duplication of effort and identify, address, and align information needs and schedules.

The UFT met on a monthly or otherwise as-needed basis throughout development of the MBSD EIS and formed ad hoc subject-specific working groups to address technical or significant issues as they arose. These working groups covered a range of topics including: (1) the identification and selection of a reasonable range of alternatives for review in this EIS; (2) technical evaluation of the inputs, parameters and outputs of the various technical models (for example, Delft3D Basinwide Model, ADCIRC, HSLs, navigation) used to evaluate the impacts of the alternatives considered in the EIS; and (3) review and discussion of the impact analyses included in the EIS.

Concurrent with these efforts by the UFT, members of the LA TIG met weekly throughout the EIS development process to coordinate regarding the preparation of the Restoration Plan evaluating the MSBD Project and to provide input to CEMVN regarding the analysis contained in the EIS. In addition, federal trustee agencies that are members of the LA TIG, in their capacities as subject matter experts and agencies

with legal/regulatory authority over the MBSD Project, engaged in depth with CEMVN with regard to particular areas of the environment. For example, NOAA/NMFS, in their regulatory capacity under the EFH provisions of the MSFCMA, engaged throughout the EIS development process with both CEMVN and the other LA TIG members regarding the potential effects of the proposed action on habitat for aquatic species. Similarly, USDO/USFWS, in their regulatory capacity under the ESA, engaged directly with CEMVN and the other LA TIG members regarding the potential effects of the proposed Project on threatened and endangered species under their jurisdiction. There are multiple other examples of similar engagement.

To integrate input from the LA TIG, and federal LA TIG agencies in their regulatory and subject matter expertise capacities, preparation of the EIS included collaborative writing in which UFT members provide comments on submitted drafts.

5.3 Fish and Wildlife Coordination Act Report Recommendations

The Fish and Wildlife Coordination Act (FWCA) requires federal agencies that construct, license, or permit water resource development projects to first consult with the USFWS, NMFS, and state resource agencies regarding the impacts on fish and wildlife resources and measures to mitigate these impacts. Section 2(b) requires the USFWS to produce a Fish and Wildlife Coordination Act Report (FWCAR) that details existing fish and wildlife resources in a project area, potential impacts due to a proposed project, and recommendations for a project. The Draft FWCAR dated January 20, 2021 includes the USFWS positions and recommendations (see Appendix T for complete FWCAR). These recommendations, and the Applicant's response to these recommendations, are provided below.

USFWS Recommendation 1:

The Service recommends the construction of new, additional, crevasse projects that may include terracing to offset the indirect loss of 926 acres on the Delta NWR and 37 acres on the Pass A Loutre WMA. Funding for these crevasse projects is currently available from a variety of sources, including the Coastal Wetland Planning, Protection and Restoration Act (CWPPRA), but should funding not be available through those sources to implement the crevasse projects, funding should be secured through Operations and Maintenance costs associated with the project or set aside in the Monitoring and Adaptive Management (MAM) Plan to ensure wetlands losses in the Delta NWR and Pass A Loutre WMA will be addressed. Any CWPPRA funding for these crevasse projects should be in addition to, and should not displace, CWPPRA funding that would otherwise be used to implement crevasse projects in Delta NWR and Pass A Loutre WMA. The Service recognizes that the Birdfoot Delta Hydrologic Restoration Project, the engineering and design of which were funded pursuant to Deepwater Horizon Oil Spill, Louisiana Trustee Implementation Group Final Restoration Plan and Environmental Assessment #7: Wetlands, Coastal and Nearshore Habitats and Birds (November 2020), will, if funded for implementation, provide further benefits to the Delta NWR and Pass A Loutre WMA and offset the indirect losses on those resources from the MBSD. For additional information on possible projects/plans,

associated permits, and for all activities occurring on the Delta NWR, please coordinate with this office and the Southeast Louisiana Refuges by contacting Barret Fortier (985.882.2011, barret_fortier@fws.gov), and the LDWF by contacting Mr. Vaughan McDonald (225-765-2708, atvmcdonald@wlf.la.gov).

Applicant Response 1: CPRA agrees to Conservation Recommendation 1.

USFWS Recommendation 2:

The impacts to Essential Fish Habitat should be discussed with the NMFS to determine if the project complies with the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), Magnuson-Stevens Act; P.L. 104-297, as amended and its implementing regulations.

Applicant Response 2: CPRA agrees to Conservation Recommendation 2 and is actively coordinating with NMFS regarding potential impacts to Essential Fish Habitat.

USFWS Recommendation 3:

In order to better coordinate and consider the overall health of the Barataria Basin, the Service recommends that a basin-wide operations and basin monitoring data repository be developed. The data and conclusions should be readily available to help in the general coordination among diversion operators, within their authorizations, and to understand both adverse and beneficial impacts to the overall basin. The Service and other natural resource agencies should be involved in reviewing, and commenting on this data repository.

Applicant Response 3: CPRA agrees to Conservation Recommendation 3 and has developed a data repository consistent with this Recommendation. CPRA looks forward to discussing that repository with the Service and other natural resource agencies.

USFWS Recommendation 4:

Monitoring of the Davis Pond and Caernarvon Diversions indicated that some contaminants were being introduced into the receiving areas from the Mississippi River. To address potential impacts of future contaminants on fish and wildlife resources, the Service recommends that pre and post sampling of fish and shellfish, from the outfall area and the Mississippi River be undertaken. The Service recommends that CPRA, in coordination with the Service, develop a list of contaminants to be analyzed. The list of contaminants to be analyzed would be taken from the most recent EPA Priority Pollutants and Contaminants of Concern (COC) list. Periodic post-operational sampling should start after sufficient time for potential contaminants to accumulate (i.e., 3 to 5 years) and the frequency of subsequent periodic sampling (e.g., 3 to 5 years) would be

predicated upon levels of contaminants detected. Expansion of sampling to local nesting bald eagles, (e.g. fecal and blood samples analyzed for the same contaminants) would also be predicated upon the type and level of contaminants detected. If high levels of contaminants are found, the Service and other resource agencies should be consulted. This adaptive sampling plan should be developed in cooperation with the Service and other natural resource agencies and implemented prior to operation.

Applicant Response 4: CPRA agrees to Conservation Recommendation 4.

USFWS Recommendation 5:

The Service recommends that consideration be given to operating the diversion in a manner that would prevent or minimize adverse impacts to wetlands due to prolonged inundation and focus on the overall enhancement of the entire project area to the greatest extent possible.

Applicant Response 5: CPRA agrees to Conservation Recommendation 5.

USFWS Recommendation 6:

The Service recommends development of a detailed Monitoring and Adaptive Management (MAM) Plan to inform operational decisions in order to minimize adverse impacts where possible. The MAM Plan should be developed through coordination with the Service, NMFS, and other resource agencies. At a minimum, the MAM Plan should address the following issues:

- a. Receiving area water levels should be monitored to minimize any potential adverse impacts such as inundation impacts (refer to Service's Recommendation 5, which should be included as part of the MAM plan).
- b. The operational plan should include provisions for water level triggers to mitigate effects from coastal flood advisories during operation.
- c. Implementation of water quality sampling for concentrations of nutrients and dissolved oxygen prior to and during operation to help determine impacts from diverted water on nutrient concentrations and resulting water quality effects .
- d. Concentration of EPA Priority Pollutants and Contaminants of Concern (COC) should be sampled in fish and shellfish from the outfall area and Mississippi River prior to and following operation to determine potential adverse effects to fish and wildlife. The frequency, intensity, and potential expansion of the sampling should be predicated upon contaminant levels detected (refer to the Services' Recommendation 4 which should be included in the MAM plan).
- e. There should be monitoring of below- and above- ground biomass to understand inundation and salinity effects on wetland health.

- f. Measurement of sediment accretion (water bottom and on the marsh surface) and bulk density should be conducted throughout the receiving area to provide the data needed to optimize sediment delivery and distribution to receiving area wetlands.
- g. MAM plan results (i.e., sedimentation, fishery, water quality monitoring, etc.) should be used to refine and improve future operations (refer to the Services' Recommendation 3).

Applicant Response 6: CPRA agrees to Conservation Recommendation 6 and has worked closely with the Service, NMFS, and other resource agencies to develop a MAM Plan that satisfies the components of this Recommendation.

USFWS Recommendation 7:

The Service recommends adaptively managing the diversion outfall area to minimize stage increases and to maximize distribution and capture of suspended sediments within the immediate outfall area. This is needed to prevent the loss of diversion efficiency should diverted water attempt to circumvent the wetlands and flow directly into Wilkinson Canal or the Barataria Bay Waterway rather than flow over marsh where it will do the most good and ensure achieving project goals. Dredged material associated with achieving this recommendation should be beneficially used to create, restore, or enhance marsh within the basin or surrounding areas.

Applicant Response 7: CPRA agrees to Conservation Recommendation 7.

USFWS Recommendation 8:

A report documenting the status of implementation, operation, maintenance, and adaptive management measures should be prepared every three years by the managing agency and provided to the USACE, the Service, National Marine Fisheries Service, U.S. Environmental Protection Agency, Louisiana Department of Natural Resources, Louisiana Coastal Protection and Restoration Authority, and the Louisiana Department of Wildlife and Fisheries. That report should also describe future management activities, and identify any proposed changes to the existing management plan.

Applicant Response 8: CPRA agrees to Conservation Recommendation 8.

USFWS Recommendation 9:

Further detailed planning of project features and any adaptive management and monitoring plans should be developed in coordination with the Service and other State and Federal natural resource agencies so that those agencies have an opportunity to review and submit recommendations on the work addressed in those reports and plans.

Applicant Response 9: CPRA agrees to Conservation Recommendation 9 and the MAM Plan referenced in Conservation Recommendation 6 includes provisions on governance that establish the suggested inter-agency coordination.

USFWS Recommendation 10:

The pallid sturgeon is found in the Mississippi River and is adapted to large, free-flowing, turbid rivers with a diverse assemblage of physical characteristics that are in a constant state of change. Entrainment associated with the diversion of river water to coastal estuaries is a potential effect that should be addressed in coordination with the Service. The Service recommends consultation under the Endangered Species Act (ESA) with this office for pallid sturgeon.

Applicant Response 10: CPRA agrees to Conservation Recommendation 10 and is actively coordinating with the Service regarding potential impacts to pallid sturgeon.

USFWS Recommendation 11:

West Indian manatees occasionally enter Louisiana coastal waters and streams during the warmer months (i.e., June through September). During in-water work in areas that potentially support manatees all personnel associated with the project should be instructed about the potential presence of manatees, manatee speed zones, and the need to avoid collisions with and injury to manatees. All personnel should be advised that there are civil and criminal penalties for harming, harassing, or killing manatees which are protected under the Marine Mammal Protection Act of 1972, the Endangered Species Act of 1973, and state law. Additionally, personnel should be instructed not to attempt to feed or otherwise interact with manatees, although passively taking pictures or video would be acceptable. For more detail on avoiding contact with manatees, refer to the Endangered and Threatened Species section of this document and contact this office. Should a proposed action directly or indirectly affect the West Indian manatee, further consultation with this office will be necessary.

Applicant Response 11: CPRA agrees to Conservation Recommendation 11.

USFWS Recommendation 12:

If implementation of the proposed action has the potential to directly or indirectly affect the red knot, piping plover, and eastern black rail or their habitat, further consultation with this office will be necessary.

Applicant Response 12: CPRA agrees to Conservation Recommendation 12 and is considering the species listed therein as part of the ongoing Endangered Species Act consultation with the Service.

USFWS Recommendation 13:

Avoid adverse impacts to bald eagle nesting locations and wading bird colonies through careful design of project features and timing of construction. During project construction, a qualified biologist should inspect the proposed construction site for the presence of documented and undocumented wading bird nesting colonies and bald eagles.

- a. All construction activity during the wading bird nesting season (February through October 31 for wading bird nesting colonies, exact dates may vary) should be restricted within 1,000 feet of a wading bird colony. If restricting construction activity within 1,000 feet of a wading bird colony is not feasible, CPRA should coordinate with FWS to identify and implement alternative best management practices to protect wading bird nesting colonies.
- b. During construction activities, if a bald eagle nest is within or adjacent to the proposed project area, then an evaluation must be performed to determine whether the project is likely to disturb nesting bald eagles. That evaluation may be conducted online at: <http://www.fws.gov/southeast/es/baldeagle>. Following completion of the evaluation, that website will provide a determination of whether additional consultation is necessary and those results should be forwarded to this office.

Applicant Response 13: CPRA agrees to Conservation Recommendation 13.

USFWS Recommendation 14:

The Service recommends that CPRA and the USACE contact the Service and LDWF for additional consultation if: 1) the scope or location of the proposed project is changed significantly, 2) new information reveals that the action may affect listed species or designated critical habitat, 3) the action is modified in a manner that causes effects to listed species or designated critical habitat, or 4) a new species is listed or critical habitat designated. Additional consultation as a result of any of the above conditions or for changes not covered in this consultation should occur before changes are made or finalized.

14. *Applicant Response 14: CPRA agrees to Conservation Recommendation*