



LAND USE AND NATURAL RESOURCES

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ENHANCING CERTAINTY OF PERMITS UNDER THE 404 PROGRAM

Business Nexus

The Sacramento region is one of the fastest growing areas in the United States, with a high quality of life and housing cost options that are more reasonable than coastal alternatives. Construction of infrastructure, critical flood protection facilities, housing of all types and retail centers and business parks are affected by the Army Corps of Engineers' wetland permit processes.

In recent years, two large landscape-level Habitat Conservation Plans (HCPs) have been approved with aquatic mitigation features: the South Sacramento HCP and the Placer County Conservation Plan. Despite the success of these programs, the region would benefit from greater certainty in project planning, staffing levels and policy in the 404-permitting program under the Clean Water Act.

Requested Action

Revise the 2008 Mitigation Rule to be more outcome and performance based such that landowner applicants can more easily offer multiple pathways to compliance with wetlands mitigation rules.

Brief Background

The Corps' 2008 Mitigation Rule (33 CFR 332.3) requires approval of compensatory mitigation prior to making a permit decision, and the regulations require evidence that the applicant has either purchased their mitigation credits prior to the start of work or completed permittee responsible mitigation in advance of, or concurrent with, impacts to waters. The current regulation in 33 CFR 332.3 (k)(2) requires individual permits to identify the responsible party providing the mitigation, a final mitigation plan approved by Corps staff, the performance standards and monitoring and financial assurances.

In the Sacramento region, there is a shortage of wetland mitigation bank credits that are often identified and required in the Corps permits. During the permit approval process, the applicant must provide

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information to the Corps verifying the availability of credits in the Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS). Credit availability during the permit approval process does not guarantee credit availability at groundbreaking, because builders in California must acquire a wide array of permits that can take many years, which encourages applicants to rush to purchase bank credits years in advance. This approach is costly or even unfeasible without a project ready to fund the mitigation. When mitigation credits are no longer available, applicants and the local Corps staff must embark on a lengthy and costly permit modification process.

Current regulations allow applicants to submit multiple mitigation plan options to hedge against credit availability, but the scale of detailed work required makes this approach prohibitively expensive in both cost and time. Even if multiple plans are submitted, there are no guarantees that the bank credits will be available when needed.

Mitigation plans can include a combination of purchasing mitigation bank credits, utilizing in lieu fee programs, or developing permittee responsible mitigation, but must specify a single mitigation strategy including one or more of these options (i.e., a credit purchase *and* on-site wetland creation). Other, more affordable and/or appropriate mitigation may become available between the time the permit is issued and project implementation (i.e., permittee responsible wetland creation at a 3:1 ratio *or* a credit purchase at a 1:1 ratio if in-watershed credits become available prior to construction). A plan may include bank credits *and* permittee responsible mitigation but may not include both bank credits *or* permittee responsible mitigation.

The current regulations already call for the new wetland restoration projects to be “based on what is practicable and capable of compensating (emphasis added) for the aquatic resource functions that will be lost as a result of the permitted activity.” 33 CFR § 332.3(a)

The guidance for general permits (subsection 330.3 k (3)) offers a more flexible approach whereby the mitigation proposal must simply be “described” (in concept or detail) and allows work if the Corps either approves the final mitigation plan or determines that it’s not necessary.

Requested Actions

- Amend the 2008 Mitigation Rule to:
 - Allow the Army Corps to review and approve a menu of mitigation options with less specificity if the landowner is required to secure final Corps approval prior to groundbreaking. Use 33 CFR 332.3 k (3) as the basis to allow flexibility for individual permits to meet the standard.
 - Allow applicants to obtain Corps approvals when wetlands credits have been purchased in approved (but unbuilt) banks where there are unreleased credits.

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- Allow mitigation to be finalized concurrent with construction in exchange for greater assurances if needed. Other state and federal agencies allow this more flexible approach to wetlands compliance.
- Facilitate Creation of New Wetland Mitigation Banks
 - Allow newly approved wetland banks to release/sell up to 25% of their credits (instead of the current 15%) prior to site work being completed, with requisite assurances if the bank is not completed.
 - Mitigation Bank Secondary Phases. Expedite production of mitigation banks by making approval of subsequent phases of bank construction much easier/quicker.
 - Adjust Corps staffing and salary levels in the Sacramento District to review 404 permit applications. Add additional Army Corps staff at the Sacramento office to process 404 permits and work to retain that staff by adjusting salaries levels to compensate for the increasing cost of living in the Sacramento region.

COVID-19 Impact

The Sacramento region is one of the fastest growing areas of the United States. Throughout the COVID-19 lockdowns, the Sacramento area continued to add housing units while many other areas of California saw significant slowdowns. Over the last ten years, the region has regained its footing from the Great Recession of 2008 and seen ever increasing numbers of housing units, reaching approximately 7,000 units in 2020. However, the historical average for the region is approximately 11,000 units per year, strongly indicating that demand for Army Corps wetland permitting staff will only continue to grow as more housing units are demanded and local General Plans are built out. Due to the topography, and the prevalence of wetlands, there is strong demand for additional Army Corps staff that can work to evaluate 404 permit applications. COVID-19 has also made the Sacramento area a more desirable place to live for those leaving coastal markets, which has increased the cost of living in the Sacramento region.