



LAND USE AND NATURAL RESOURCES

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ENHANCING CERTAINTY OF PERMITS UNDER THE CLEAN WATER ACT 404

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, retail centers, and business parks are affected by the Corps of Engineers wetland permitting 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.

Brief Background

Wetlands provide important environmental benefits to water quality and wildlife. The federal Clean Water Act requires that if wetlands are affected by economic activities (new infrastructure or housing, for example) that restoration actions happen to ensure there is no net loss of wetlands. Since the Sacramento region sits at the confluence of two major rivers, most major land-use decisions, and investments trigger consideration of impacts to wetlands. When wetlands are impacted by new projects, the law requires an offset (“mitigation”).

Requested Action #1

- Ensure Newly Developing EPA Regulations on Waters of the US (WOTUS) have exemptions recognized by prior administrations.
- There is very little clarity over what qualifies as “wetlands” under the Clean Water Act or the various rules and court decisions that have been handed down over the last 20 years.

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The U.S. Supreme Court has on three occasions considered the extent to which non-navigable waters or wetlands are subject to the Act but has been unable to develop a clear framework. The last two administrations have promulgated new wetlands regulations and federal courts have invalidated each. The U.S. Supreme Court has recently accepted a new case (Sackett) and the Biden Administration, through EPA, is currently developing new regulations governing what is covered as a “water of the U.S.” (wetland) requiring mitigation.

It is essential that some critical exemptions that have been recognized by both Democratic and Republican Administrations continue to be recognized in any new regulation from EPA governing Waters of the US. There should be clear exemptions for ditches, prior converted cropland, artificially irrigated areas that would revert to upland if the irrigation ceased, stormwater basins, and other artificial features described in the preamble to the 1986 regulations.

Requested Action #2

- Direct available IIJA funding intended for additional staffing immediately to the district level to ensure that additional hiring can commence to keep up with federal infrastructure investment and economic and housing growth in the region.

Having been recently identified as one of the fastest growing areas of the United States, there is a looming challenge to keep and retain adequate Corps staffing to handle the growing workload of issuing wetland permits under the Clean Water Act.

The approval of the Infrastructure Investment and Jobs Act (IIJA) will only place additional workforce burdens on the local Corps staff as major infrastructure enhancements are vigorously implemented. The IIJA authorized \$160 million in funding for additional Army Corps staffing over five years. The IIJA is already beginning to place strains on staffing at the local level. This issue is even more important given the supply chain backlogs that the nation is facing. It is therefore critical that approved funding be directed to the local offices immediately so that hiring can commence.

Requested Action #3

- Insert Language in the 2022 Water Resources Development Act (Sec 214) to allow the private sector to fund environmental analysis by the Army Corps staff as is currently allowed for public sector agencies.
- Determine if Corps Guidance may allow a governmental entity such as a Habitat Conservation Plan to issue funding for expedited review as a non-federal public entity.

Federal law now allows public agencies (Caltrans, for example) to pay for expedited permitting and staffing from the Army Corps to issue their Clean Water Act 404 permits. There are several Habitat

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Conservation Plans in the Sacramento region run by different consortiums of local governments (South Sacramento HCP, Placer, and Natomas). Given the strong demand for staffing and issuance of Clean Water Act 404 permits, it would be extremely helpful for the private sector to be allowed to help fund analysis and work by the Army Corps utilizing the local Habitat Conservation Plans as a mechanism for compliance.

Relevant Law

WRDA Section (a)(2) PERMIT PROCESSING. – The Secretary, after public notice, may accept and expend funds contributed by a non-Federal public entity or a public-utility company, natural gas company, or railroad carrier to expedite the evaluation of a permit of that entity, company, or carrier related to a project or activity for a public purpose under the jurisdiction of the Department of the Army.

Requested Action #4

- Seek adjustment to Army Corps regional policy (as well as Fish and Wildlife Service, National Marine Fisheries Service, EPA) to increase the amount of initial mitigation bank credits from 15% to 20% that may be sold and recognized by the Corps as adequate mitigation.

When wetlands are impacted/affected by projects, those impacts must be neutralized/mitigated so there is no environmental loss. When the impact to a wetland area is unavoidable, the project will many times pay private parties who create new wetland mitigation banks which are often in short supply compared to demand. Banks are allowed to sell credits at different intervals and one way to help make wetland banking and projects more viable is to allow the initial phase of wetland bank credits to be expanded under the amount now allowed by federal Army Corps guidance.

Army Corps Headquarters Guidance Letter 19-01 allows the Corps to accept/recognize up to 25% of credits from newly approved wetland banks, yet current informal policy in California is to only allow the first phase of banks to sell only 15% of credits before site work being completed. A new policy at the regional level in line with Corps HQ Policy (19-01) would facilitate the creation of new wetland mitigation banks and thus spur economic growth and investment certainty in environmental and business outcomes.

Requested Action #5

- Seek clarification on the 2008 Mitigation Rule regarding flexibility options on implementation.

The Corps' 2008 Mitigation Rule (33 CFR 332.3) requires approval of compensatory mitigation before making a permit decision, and the regulations require evidence that the applicant has either purchased

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their mitigation credits before 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 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 infeasible 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 before 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.

Recommendations

- Seek Clarification on Flexibility the Army Corps can Exert Under the 2008 Mitigation Rule

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- Obtain information from the Army Corps on the level of detail needed when presenting multiple mitigation options for review by a local field office.
- Ascertain what additional assurances would be necessary for the Corps to allow landowners to propose a menu of mitigation options with less specificity.
- Obtain feedback from Corps staff on how 33 CFR 332.3 k (3) could be used as the basis to allow flexibility for individual permits to meet the standard.
- 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.

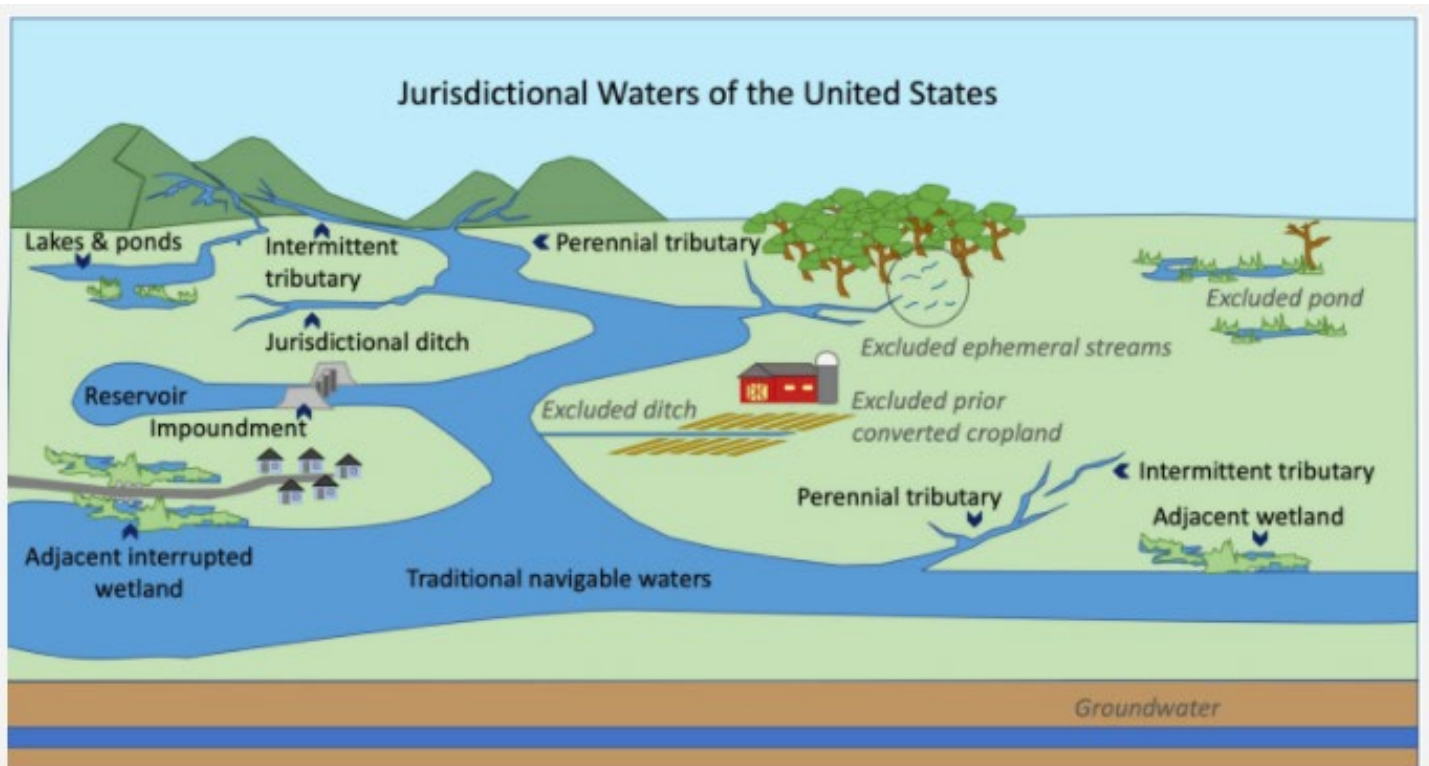


Figure 1. Jurisdictional Waters of the U.S. regulated under the 2020 Navigable Waters Protection Rule are listed in the black text. Waters excluded from regulatory control are listed in gray italicized text. Image credit: Sarah A. White, Clemson University. (Adapted from USEPA.)