

## LAND USE AND NATURAL RESOURCES 2023

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## REGIONAL GUIDANCE REQUESTED FOR 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 Corps of Engineers' wetland permit processes.

Two areas of uncertainty currently exist in the Sacramento Region for administering the 404 Program: Waters of the U.S. jurisdiction and timing of mitigation implementation.

The release of the *Sackett* Supreme Court case ruling is eminent and could be available by the time of our meetings in D.C. The final ruling could have sweeping changes to the Corps' jurisdiction with the potential to greatly impact the regulated community. The regulated community has already experienced vastly different approaches to wetland regulations under the last two administrations. The Biden administration finalized its own regulations last year, which will influence the outcome in *Sackett*, but it is presently unclear how those regulations will look and the extent to which they may affect the Supreme Court's deliberations.

### Requested Action

We request guidance on the process that will follow the *Sackett* ruling. We urge the Corps to provide clear guidance to District staff on the impact (if any) on the jurisdiction of wetlands and Waters of the United States. Since the ruling may require another update to the definitions of Waters of the United States, we request clarification on how the Corps will handle existing permits and the preferred Corps headquarters process and expectations going forward so we may act in concert with Corps field staff.

## 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 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 (for example, 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 (for example, 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 Action**

1. Prepare Regional Guidance Letter on Permit Applications and the Declaration of Mitigation
  - a. 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.
  - b. Allow applicants to obtain Corps approvals when wetlands credits have been purchased in approved (but unbuilt) banks where there are unreleased credits.
  - c. 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.

### **Requested Action**

Direct available infrastructure bill funding for additional staffing to the district level so that additional hiring can commence to keep up with federal infrastructure investment and economic and growth in the region.

### **Brief Background**

The Sacramento region is one of the fastest-growing areas in the United States, and that trend has only grown in recent years. It has been challenging 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 Bipartisan Infrastructure Bill will only place additional workforce burdens on the local Corps staff as major infrastructure enhancements are vigorously implemented. Currently, approximately 30% of the work performed by the local Corps staff is related to this Congressionally directed infrastructure work. The bill authorized \$160 million in national funding for additional Army Corps staffing over five years, with \$5 million allocated to the Sacramento-area Corps. Currently, \$800,000 has been allocated to the local offices for hiring (16%). We therefore respectfully urge the Corps to direct all available funding to the local offices as soon as possible so that hiring can commence with greater certainty.