CAPITOL-TO-CAPITOL

SACRAMENTO, CA WASHINGTON, D.C.

LAND USE AND NATURAL RESOURCES (LUNR)

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REGIONAL GUIDANCE REQUESTED FOR SECTION 404 PROGRAM

Requested Action:

Clarity around Waters of the United States

- Direct the U.S. Army Corps of Engineers (USACE) and the U.S. Environmental Protection Agency (USEPA) to issue practical guidance to assist project applicants in determining which waters and wetlands qualify as "waters of the United States" (WOTUS) after *Sackett* and provide opportunities for the regulated community to provide input as this guidance is developed.
- Direct the USACE to continue honoring jurisdictional determinations issued by USACE before *Sackett*.

Establish Regional Guidance on Section 404 Program

- Direct the USACE to prepare a Regional Guidance Letter (RGL) addressing the level of detail required in a mitigation plan prepared as part of a CWA Section 404 permit applications. This RGL would allow USACE to review and approve a mitigation proposal which provides a "menu" of mitigation options prior to permit issuance, with a requirement that the final mitigation proposal be approved by the USACE prior to groundbreaking.

Business Nexus

California's Capital Region is one of the fastest-growing areas in the United States. The timely construction of housing, retail and commercial services, infrastructure, and critical flood protection facilities, among other land uses, can be thwarted by delays in the Clean Water Act (CWA) Section 404 permitting program which regulates discharges into "waters of the United States" (WOTUS).

Recent changes to the definition of WOTUS due to the Supreme Court's decision in *Sackett v. EPA*, 143 S. Ct. 1322 (2023) (*Sackett*) have created additional confusion about the scope and extent of waters and wetlands regulated pursuant to Section 404, which makes it very difficult to determine the most appropriate and expeditious path of regulatory compliance. Further guidance from the U.S. Army Corps of Engineers (USACE) and the U.S. Environmental Protection Agency (USEPA) is needed to clarify which waters qualify as WOTUS. Applicants for Section 404 permits also experience difficulty identifying feasible mitigation for impacts to WOTUS, and the existing regulatory requirements for identifying mitigation are inflexible, arduous, and cost-prohibitive. Guidance infusing additional flexibility into this process is needed.

Background

Clarity around Waters of the United States

The regulated community has experienced vastly different approaches to regulating WOTUS under the previous two administrations. Most recently, the Supreme Court's decision in *Sackett* and subsequent regulatory revisions by the USACE and the USEPA made even more sweeping changes to the definition of WOTUS. While *Sackett* answered some questions about the scope of the CWA, the decision and subsequent regulations have also created significant uncertainty for the regulated community about which waters and wetlands are considered WOTUS and thus subject to regulation under the CWA.

To be more specific: although some waters very obviously meet the definition of a WOTUS under *Sackett* (such as oceans, rivers, and lakes), the proper categorization of other waters, such as wetlands, is less clear. For example, under *Sackett* and USACE's/USEPA's subsequently amended regulations, a wetland is only considered a WOTUS when it has a "continuous surface connection" to bodies of water that are "WOTUS in their own right, so that there is no clear demarcation between 'waters' and 'wetlands.'" No guidance is provided as to what this "continuous surface connection" entails. Indeed, LUNR committee members and their consultants have experienced situations where a "continuous surface connection" was found to exist where runoff from a wetland was discharged, via a pipe, to another WOTUS. Other project proponents have experienced the opposite result: no jurisdiction was found where the wetland and WOTUS were connected via some human-made means. The USACE has indicated that it makes these determinations on a "case-by-case" basis, and that a determination of jurisdiction in one case is not considered "precedent" such that another wetland – even a similarly-situated feature - would also be subject to the CWA.

This lack of clarity has significant consequences for development projects. A project's regulatory permitting requirements depend upon the jurisdictional nature of the aquatic features on the project site. In the current, post-*Sackett* world in California, a project which impacts wetlands or other waters will need a permit from either the USACE, the California State Water Resources Control Board, or both.

Without any additional guidance on the front end of the permitting process as to which waters are considered WOTUS, and thus subject to Section 404, applicants must wait for the USACE and USEPA to make their determination(s) as to the extent of jurisdiction, a process which often takes well over six months. Only then will a project proponent know which type of application it needs to prepare, and to which agency that application must be directed. The retraction of federal jurisdiction over waters and wetlands has also created ambiguity about the geographic limit of federal responsibility for compliance with other regulatory programs including the Endangered Species Act, Section 106 of the NHPA and NEPA. Where a project (or a portion of a project) lacks a "federal handle" (i.e., a 404 permit), a project proponent is left without a streamlined, effective means to address these important Federal environmental laws, and other approaches must be undertaken.

Practical, uniform guidance for assessing the jurisdiction of waters and wetlands will provide the regulated community with more certainty in planning much-needed housing, infrastructure, and other development projects. It will provide project proponents with a measure of confidence that they are obtaining the appropriate regulatory entitlements and allow them to reasonably project the time and expense of obtaining these authorizations. Importantly, additional clarity as to the scope of WOTUS will benefit the USACE as well, alleviating the need to conduct an exhaustive, time-consuming analysis of jurisdiction for each individual aquatic feature.

In this same vein and request for certainty, we also request that USACE be directed to continue honoring (and not to reconsider) jurisdictional determinations that were approved or issued by the USACE prior to the *Sackett* decision.

Establish Regional Guidance on the Section 404 Program

The USACE 2008 Mitigation Rule (33 CFR 332.3) requires the USACE to approve an applicant's compensatory mitigation prior to making a permit decision. Regulations also 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 WOTUS. These compensatory mitigation requirements then become conditions of the applicant's 404 individual permit.

In the Capital Region, there is a serious shortage of wetland mitigation bank credits. If an applicant wants to purchase bank credits as mitigation, it must – as part of the 404 permitting process - provide information to the Corps verifying the availability of credits.

However, credit availability during the permit approval process does not guarantee credit availability at the time of project groundbreaking, since builders in California must acquire a wide array of permits that can take many years to obtain. The consequence of this situation is that applicants often rush to purchase their mitigation bank credits years in advance. This approach is risky, costly, and infeasible if the applicant does not have a shovel-ready project able to fund the mitigation. When mitigation credits are no longer available, applicants and the local Corps staff must embark on a lengthy and costly process to modify their permits to revise their original mitigation proposal.

Current regulations allow permit applicants to submit multiple mitigation plans identifying different mitigation options (e.g., a plan to purchase credits alongside another plan to create or restore wetlands) to hedge against credit availability, but the scale of detailed work required makes this approach prohibitively expensive in both cost and time. Mitigation plans can include a combination of purchasing mitigation bank credits, using 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 but not a credit purchase *or* in-lieu fee payment). Additionally, more affordable, 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).

The regulated community – and the projects they seek to build – would benefit from the ability to propose a suite of mitigation options during the 404 permitting process, with a requirement that the applicant's final mitigation proposal be approved by USACE before groundbreaking. A measure of flexibility is already inherent in the existing regulations, which state that new wetland restoration projects 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). In addition, guidance for general permits (subsection 330.3 k (3)) already offers a more flexible approach whereby the mitigation proposal must simply be "described" (in concept or detail) in the permit application. This allows work if the Corps either approves the final mitigation plan or determines that it is not necessary.