



CWA 404 Permit Strategy Aligned with the South Sacramento Habitat Conservation Plan

U.S. ARMY CORPS OF ENGINEERS

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Background

The South Sacramento Habitat Conservation Plan (SSHCP) proposes to cover twenty-eight species of plants and wildlife, including ten that are state and/or federally-listed as threatened or endangered. The SSHCP is a regional approach to address issues related to planned development and species habitat conservation. The proposed boundaries of the SSHCP are generally U.S. Highway 50 to the north, the Sacramento River levee and County Road J11 to the west, the county line with El Dorado and Amador Counties to the east, and the county line with San Joaquin County to the south. The Plan Area excludes the Cities of Sacramento, Elk Grove and Folsom, the Sacramento-San Joaquin Delta, and the Community of Rancho Murieta, as well as the sovereign lands of the Miwok Tribe. The six SSHCP Plan Partners are the County of Sacramento, City of Galt, City of Rancho Cordova, Sacramento County Water Agency, Sacramento Regional County Sanitation District, and the Southeast Connector Joint Powers Authority. The Plan Partners are forming a SSHCP Implementing Entity to implement the HCP's commitments and requirements. The U.S. Fish and Wildlife Service's Sacramento Field Office (USFWS) will approve the SSHCP through a species incidental take permit issued to five of the Plan Partners and the SSHCP Implementing Entity under Section 10 of the Endangered Species Act (ESA 10). Before it can issue its incidental take permit, the USFWS must internally consult under Section 7 of the ESA (ESA 7) and is required to comply with the National Environmental Policy Act (NEPA) and other related laws.

The U.S. Army Corps of Engineers (Corps) regulates discharges of dredged or fill material into waters of the United States, including wetlands, under Section 404 of the Clean Water Act (CWA 404) through its Regulatory Program. Permits are issued to applicants only after a determination has been made that the proposed activity is the least environmentally damaging practicable alternative under the U.S. Environmental Protection Agency's (USEPA) 404(b)(1) Guidelines, which involves evaluating avoidance, minimization and compensation for impacts to waters of the U.S. Further, the Corps must comply with ESA 7, NEPA, Section 401 of the Clean Water Act (CWA 401), and Section 106 of the National Historic Preservation Act (NHPA 106) before authorizing an activity under CWA 404. Types of permits the Corps issues include general permits issued on a regional, nationwide, or programmatic basis for activities with minimal impacts on the aquatic environment, individually and cumulatively, and individual permits (standard and letters of permission) for those activities which do not fall under a general permit or have greater than minimal impacts. The Corps' Sacramento District (Sacramento District) administers the Regulatory Program in the Central Valley and Sierra Nevada California, the States of Nevada and Utah, and the Western Slope of Colorado.

Currently, the Corps reviews permit applications on an individual basis, making it challenging to evaluate avoiding, minimizing and compensating impacts to aquatic resources on a broader scale. As a result, the Corps' review is generally on the merits of the individual activity and the characteristics of the proposed project site, with limited ability to comprehensively evaluate where the risks, trade-offs and interactions among several projects and aquatic resources can be considered. Over time, environmental issues and development demands, especially in urbanizing areas, have resulted in adverse effects to the aquatic ecosystem that are not necessarily surprising, but fall short of more ecologically meaningful and

sustainable outcomes that a landscape-scale permitting solution may afford. For instance, permits issued by the Corps have led to a patchwork of wetland mitigation sites in certain areas, which may have disjointed or inconsistent preserve boundaries and be functionally compromised by abutting development, causing edge effects. Furthermore, the distance between the permitted impact location and its mitigation site may be great or located in another watershed, especially in cases where the compensatory mitigation was accomplished through the purchase of credits at a mitigation bank or through an in-lieu fee program.

The Sacramento District views the SSHCP as a chance to improve both species and aquatic resource protection in a coordinated way on a regional scale, taking into account planned development and providing greater certainty for the regulated public. With this in mind, the Sacramento District has been coordinating with the USFWS and Plan Partners, and others, since 2004 to develop and implement a “streamlined” approach to permitting under CWA 404 that encompasses a number of different permit types and processes. The Corps’ “CWA 404 permit strategy” is intended to provide for better assurances and quicker permit decisions for the regulated public, while protecting aquatic resources to an equal or greater level consistent with existing regulations, policies and processes.

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The expectation of putting in place an effective and efficient CWA 404 permit strategy is based on a number of tenets upon which the SSHCP is founded including, but not limited to:

- Protection of a broad range of species and habitats,
- Implementation of Low impact development strategies (LIDS),
- Consistency with general plans,
- Avoidance of high quality vernal pool landscapes; and
- Preservation of watershed functions and stream corridors, and development of large, contiguous preserves, with particular focus on the Mather Core Recovery Area.

The CWA 404 permit strategy is now drafted and ready for public review and comment.

Benefits of CWA 404 Alignment

In addition to providing a regional platform to inform better and faster CWA 404 permit decisions, a USFWS-approved SSHCP provides several other benefits to the Sacramento District and its customers. As an action significantly affecting the quality of the human environment, the SSHCP requires the USFWS prepare an Environmental Impact Statement (EIS) under NEPA that will include impact analyses over a 50 year period of all SSHCP covered activities within the Plan Area. As a cooperating agency, the Sacramento District intends to use the EIS in a programmatic manner to underpin its CWA 404 permit strategy. Because the EIS will examine a range of reasonable HCP alternatives affecting waters of the U.S., it can serve as a basis for the Sacramento District’s evaluation of less damaging alternatives and mitigation under USEPA’s 404(b)(1) Guidelines. The Sacramento District will adopt the EIS and make its own Record of Decision regarding the CWA 404 permit strategy’s compliance with the 404(b)(1) Guidelines at the regional scale.

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Any necessary subsequent NEPA documentation prepared by the Sacramento District will tier from the EIS.

The Sacramento District will further streamline the CWA 404 regulatory review process by requesting the USFWS to consult once programmatically for all SSHCP covered activities that require a CWA 404 permit, eliminating the need for individual project-by-project ESA 7 consultations. Furthermore, the Sacramento District will request programmatic water quality certification under CWA 401 from the Central Valley Regional Water Quality Control Board for all activities under the CWA 404 permit strategy. This will eliminate the need for permit applicants to apply individually for CWA 401 certification. Finally, to comply with NHPA 106, the Sacramento District will seek to develop a programmatic agreement with the State Historic Preservation Officer, following coordination with tribes and others, for the CWA 404 permit strategy.

CWA 404 Permitting Strategy

The Sacramento District has developed a multi-tiered approach to CWA 404 permitting that will address activities which involve discharges of dredged or fill material into waters of the U.S. covered by the USFWS-approved SSHCP. This strategy consists of the use of:

- A programmatic general permit (PGP) founded on a local aquatic resources protection program to be implemented via local ordinance, and designed to reduce duplication with that program, for activities with minimal individual and cumulative effects on the aquatic environment;
- A procedure for issuing Letters of Permission (LOPs) for activities with more than minimal but less than significant effects on the human environment, including aquatic resources; and
- An abbreviated process for issuing standard permits (SPs) for other activities consistent with the SSHCP that may have a significant impact on the human environment, and require the preparation of an EIS under NEPA.

PGP

Based on the SSHCP and local aquatic resource ordinances (Sacramento County, City of Galt and City of Rancho Cordova) that implement the County's Aquatic Resources Program (ARP), the Sacramento District will establish a PGP for covered activities that have minimal impacts on the aquatic environment. The PGP is premised on the ordinances resulting in the same or better level of protection to waters of the U.S. as currently in place under CWA 404. The PGP includes limits and thresholds that exceed those found in the Nationwide Permits, such as an upper threshold for most projects of 2 acres instead of 0.5 acre. The PGP will be effective once the local aquatic resources ordinances are approved. The PGP will not impose additional requirements or conditions on individual activities for avoiding, minimizing or compensating for the loss of aquatic resources beyond those in the SSHCP, ARP and ordinances. The Corps will rely on the agency(ies) responsible for administering the ARP/ordinances to regularly report to the Sacramento District on use of the ordinances and coverage under the PGP, not requiring a project-by-project notification or review process, thus eliminating to the maximum extent possible the

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Sacramento District's review of activities with minimal impacts on waters of the U.S. The PGP will result in CWA 404 authorization in under 30 days.

LOP Procedure

For covered activities found to be consistent with the SSHCP requirements which would have more than minimal impacts to aquatic resources but less than significant impacts on the human environment under NEPA, the Sacramento District will institute an abbreviated procedure for issuing LOPs under CWA 404. For purposes of the permit strategy, activities that are determined to not require an EIS will be eligible for

The LOP procedure will rely on the SSHCP to address avoidance, minimization, and compensatory mitigation for impacts to aquatic resources.

authorization under the LOP procedure; thus, the procedure will not have a specified maximum acreage threshold. The process for establishing the LOP procedure requires the development of a list of categories or activities proposed for authorization (which consists of the SSHCP covered activity categories) through coordination with Federal, state and local agencies, a public notice, and a 401 WQC issued or waived on a generic or individual basis. The decision to implement the LOP procedures will be addressed in the Sacramento

District's ROD. The LOP procedure will streamline the standard permit process by eliminating the need for a public notice and only require the preparation of a simplified decision document that tiers from the SSHCP EIS. Further, the LOP procedure will rely on the SSHCP to address avoidance, minimization and requirements for compensatory mitigation for impacts to aquatic resources. Like the other types of CWA 404 permits in the Sacramento District's permit strategy, compensatory mitigation requirements will be the same as those in the SSHCP. The goal is to issue LOPs in 60 days or less, assuming programmatic compliance with other laws is in place.

SP Abbreviated Process

A small number of SSHCP covered activities requiring CWA 404 will not fall under the PGP, RGP, or LOP procedure and will require a SP. These activities are those that may have a significant impact on the human environment, and require the preparation of an EIS under NEPA. Even for activities that require a SP, the process and amount of time it takes to reach a permit decision can be compressed significantly by relying on the SSHCP. For instance, the extent of analysis in the project EIS will be lessened by tiering from the SSHCP EIS, alternatives will be limited to the project site because avoidance has already been addressed at the regional level, and compensatory mitigation requirements will align with those of the SSHCP. Time may further be foreshortened through the preparation of a joint EIS/EIRs for projects (the Corps' preference). In addition, the Corps will pursue programmatic compliance with ESA, NHPA 106 and CWA 401 to provide for greater assurances and further streamline the process. With reliance on the SSHCP EIS and programmatic compliance with related laws, the Corps expects to complete SP decisions for activities under the SSHCP within six months.

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Activities not Covered by the SSHCP

Activities involving a discharge of fill material into waters of the U.S. that are not covered under the SSHCP would be subject to the normal Corps' regulatory permit processes.

Next Steps

The Sacramento District's CWA 404 permit strategy is provided in draft form (PGP and LOP Procedure) in the SSHCP Draft EIS, including the terms, conditions, limits/thresholds and processes for each permit type. Following public input on the Draft EIS, coordination with the Plan Partners, resource agencies and others, and review of any new information that becomes available, the Sacramento District's CWA 404 permit strategy and final draft permit instruments (e.g., PGP) will be updated and included in the Final EIS for the SSHCP. The Final EIS will also include more details on process and timelines for the SP abbreviated process. With adoption of the EIS, the Sacramento District will complete its ROD and implement the CWA 404 permit strategy.