



# CWA 404 Permit Strategy Aligned with the Placer County Conservation Program

U.S. ARMY CORPS OF ENGINEERS

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## Background

The Placer County Conservation Program (PCCP) applies to western Placer County and specific conservation activity areas in neighboring Sutter County. The PCCP includes both a proposed Habitat Conservation Plan (HCP) and Natural Community Conservation Plan (NCCP), the proposed Western Placer County Aquatic Resources Program (CARP), and the proposed Placer County In-Lieu Fee (ILF) Program. The HCP/NCCP proposes to cover fourteen species of wildlife, including nine state and/or federally-listed as threatened or endangered. The CARP is proposed by the County to provide a structure for protecting aquatic resources in western Placer County while streamlining the environmental permitting process for impacts to aquatic resources. The HCP/NCCP uses a regional approach to address issues related to planned development and species habitat conservation and restoration. The proposed boundaries of the PCCP are generally Nevada and Yuba Counties on the north, the City of Auburn and California State Highway 49 on the east, Sacramento County on the South, and Sutter County on the west. The PCCP Plan Area also includes specific areas in western Placer County and a small area in adjacent Sutter County where specific covered activities may be conducted by the Plan Participants. The Plan Area excludes the Cities of Auburn, Roseville and Rocklin and the Town of Loomis, with the exception of specific activities within these cities that would be conducted by the Plan Participants. The four PCCP Plan Participants are the County of Placer, City of Lincoln, South Placer Regional Transportation Authority (SPRTA), and Placer County Water Agency (PCWA). The Plan Participants are forming the Placer Conservation Authority (PCA), a joint exercise of powers agency, to implement the HCP/NCCP and the CARP commitments and requirements. Based on the HCP/NCCP, the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) will issue species incidental take permits to the Plan Participants and the PCA under Section 10 of the Endangered Species Act (ESA 10). Before they can issue incidental take permits, the USFWS and NMFS must internally consult under Section 7 of the ESA (ESA 7) and are 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 and other special aquatic sites, 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. A determination of the least environmentally damaging practicable alternative (LEDPA) under the 404(b)(1) Guidelines involves evaluating avoidance, minimization and compensation for proposed 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 established on a regional, nationwide, or programmatic basis for activities with minimal impacts on the aquatic environment, individually and cumulatively, and individual permits (standard permits and letters of permission) for those activities which do not fall under a general permit and/or have greater than minimal impacts. The Corps' Sacramento District (Sacramento District) administers the Regulatory Program in the Central Valley and Sierra Nevada of California, the States of Nevada and Utah, and the Western Slope of Colorado.

In 2004, recognizing that many of the listed species to be covered by the HCP/NCCP spend some or all of their lifecycles in aquatic environments regulated under the Corps' Regulatory Program, the Sacramento District was invited to work with the Plan Participants and agencies. In 2006, the USEPA, Sacramento District and other agencies advanced a proposed approach to complying with the 404(b)(1) Guidelines at a regional level.<sup>i</sup> In addition, in 2012 and 2014, the Sacramento District identified principle needs for establishing a CWA 404 permitting strategy that could align with and

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complement the HCP/NCCP. A CWA permitting strategy would provide for better assurances and quicker CWA 404 permit decisions for the regulated public, while protecting aquatic resources to an equal or greater level than existing regulations, policies and processes. This expectation continues to be based on a number of tenets upon which the HCP/NCCP is founded including, but not limited to:

- protection of a broad range of species and habitats,
- low impact development strategies (LIDS),
- consistency with general plans,
- avoidance of high quality vernal pool landscapes,
- preservation of watershed functions and stream corridors, and
- development of large, contiguous preserves, with particular focus on the Reserve Acquisition Area.

Presently, the Corps reviews permit applications on an individual basis, making it challenging to evaluate avoidance, minimization and compensation of impacts to aquatic resources on a broad scale. As a result, the Corps' review is generally focused 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

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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, in some areas, permits issued by the Corps have led to a patchwork of wetland mitigation sites, which may have disjointed or inconsistent preserve boundaries and be functionally compromised by abutting development, causing edge effects, and other adverse impacts. Furthermore, the distance between the permitted impact location and

its mitigation site may be considerable 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 HCP/NCCP 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, NMFS and Plan Participants to develop and implement a "streamlined" approach to permitting under CWA 404 that encompasses a number of different permit types and processes.

## **Benefits of CWA 404 Alignment**

In addition to providing a regional platform to inform better and faster CWA 404 permit decisions, a USFWS- and NMFS-approved HCP/NCCP provides several other benefits to the Sacramento District and its customers. As an action significantly affecting the quality of the human environment, the HCP/NCCP requires the USFWS, as the lead Federal agency, to prepare an Environmental Impact Statement (EIS) under NEPA that will include impact analyses over a 50-year period of all HCP/NCCP 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 is expected to examine a range of reasonable 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 would 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. Any necessary subsequent NEPA documentation prepared by the Sacramento District would tier from the HCP/NCCP EIS.

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The Sacramento District would seek to further streamline the CWA 404 regulatory review process by requesting the USFWS and NMFS to consult once programmatically for all HCP/NCCP covered activities that require a CWA

404 permit, eliminating the need for individual project-by-project ESA 7 consultations. Furthermore, the Sacramento District would 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 would eliminate the need for permit applicants to apply individually for CWA 401 certification. Finally, to comply with NHPA 106, the Sacramento District would seek to develop a programmatic agreement with the State Historic Preservation Officer, following coordination with tribes and others, for the CWA 404 permit strategy. The Sacramento District would work with USFWS to avoid any potential duplication or conflicts in complying with NHPA 106 and Appendix C of the Corps' regulations at 33 CFR Part 325.

The Sacramento District recognizes the CWA 404 permit strategy is a critical element for streamlining regulatory approvals, while achieving greater protection of the highest quality aquatic resources than the existing project-by-project review process. For several years, the Sacramento District has worked closely with the USFWS, NMFS, USEPA, California Department of Fish and Wildlife, and the State and Regional Water Quality Control Boards to ensure processes and policies related to aquatic resource protection are understood and aligned. In June 2010, the agencies completed a permit process relationships mapping exercise which included aligning schedules, and provided

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the output to the Plan Participants and other interested parties. These agencies continue to meet and resolve differences among their authorities and policies in the interest of a successful PCCP. The Sacramento District is committed to having its CWA 404 permit strategy in place, including programmatic compliance with ESA 7, CWA 401 and NHPA 106, when USFWS and NMFS issue permits based on the HCP/NCCP.

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## **CWA 404 Permitting Strategy**

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

- A programmatic general permit (PGP) founded on a local aquatic resources protection program and implemented by local ordinances, and designed to reduce duplication with that program, for activities with minimal individual and cumulative effects on the aquatic environment;
- A regional general permit (RGP), if needed, for activities with minimal individual and cumulative effects on the aquatic environment that do not fall under the PGP and for certain activities conducted by PCWA, and activities to implement the HCP/NCCP conservation strategy under the ILF program;
- 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 PCCP that may have a significant impact on the human environment, and require the preparation of an EIS.

### PGP

Based on the PCCP and local aquatic resource ordinances (Placer County and City of Lincoln) that implement the CARP, the Sacramento District intends to establish a PGP for covered activities that would have minimal impacts on the aquatic environment, individually and cumulatively. 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 process for the Corps to establish a PGP follows the standard permit process, which requires a public notice. The PGP will be addressed in the Sacramento District's ROD prepared for the PCCP EIS. The PGP, which will likely include limits and thresholds that exceed those found in the Nationwide Permits, would be effective once the local aquatic

resources ordinances are approved. An activity determined to be compliant with the HCP/NCCP and ordinances, and the CARP would be authorized under the PGP, assuming all terms and conditions of the PGP are met. The PGP would not impose additional requirements or conditions on individual activities for avoiding, minimizing or compensating for the loss of aquatic resources beyond those required under the HCP/NCCP, CARP, and ordinances. A simple notification to the Sacramento District for individual activities may be necessary; however, the Corps would generally rely on the entities responsible for administering the CARP/ordinances to regularly report to the Sacramento District on use of the ordinances and coverage under the PGP. The ultimate goal of the PGP is to rely heavily on the HCP/NCCP, HCP/NCCP EIS, USFWS's and NMFS's programmatic biological opinions, CARP and the local aquatic resources ordinances, thus eliminating to the maximum extent possible the Sacramento District's review of activities with minimal impacts on waters of the U.S. The PGP would result in CWA 404 authorization in under 30 days.

***The PGP would not impose additional requirements or special conditions for avoiding, minimizing or compensating for the loss of aquatic resources.***

### RGP

For PCCP-covered activities that would have minimal impacts to aquatic resources conducted by PCWA and other activities associated with implementation of the HCP/NCCP conservation strategy under the ILF program, the Sacramento District would establish an RGP. Like the PGP, the method for establishing an RGP follows the standard permit process and would be documented in the Sacramento District's ROD. The RGP would have limits and thresholds greater than those found in the Nationwide Permit Program. The RGP would rely on the HCP/NCCP to reduce the Sacramento District's review of activities with minimal impacts on waters of the U.S., and would be designed to not impose additional requirements or special conditions for avoiding, minimizing or compensating for the loss of aquatic resources for individual activities. An activity determined to be compliant with all HCP/NCCP requirements would be authorized under the RGP after the applicant has notified the Sacramento District and the District has verified the activity meets all terms and conditions of the RGP. The RGP is expected to result in CWA 404 authorization in about 30 days.

### LOP Procedure

For covered activities found to be consistent with the PCCP 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 would institute an abbreviated procedure for issuing LOPs under CWA 404. The process for establishing the LOP procedure requires the development of a list of categories or activities proposed for authorization through coordination with Federal, state and local agencies, a public notice, and a 401 WQC issued or waived on a general or individual basis. The decision to implement the LOP procedures will be addressed in the Sacramento District's ROD. The LOP procedure would 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 PCCP EIS. Further, the LOP procedure would rely on the HCP/NCCP to address avoidance, minimization and requirements for compensatory mitigation for impacts to aquatic resources. For instance, compensatory mitigation requirements should be the same as those in the HCP/NCCP. The goal is to issue LOPs in 60 days or less, assuming programmatic compliance with other laws is in place.

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### SP Abbreviated Process

A small number of PCCP covered activities requiring CWA 404 will not fall under the PGP, RGP, or LOP procedure and will require a SP. In many cases, these activities are those that may potentially 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 avoidance, minimization and compensation and other measures required under the HCP/NCCP. For instance, the degree of analysis in the project EIS would be lessened by tiering from the PCCP EIS, and off-site alternatives analyses under Section 404(b)(1)

***Off-site alternatives analyses under the Section 404(b)(1) Guidelines would not be required because avoidance has already been addressed at the regional level and compensatory mitigation requirements would align with those of***



Guidelines would not be required because avoidance has already been addressed at the regional level and compensatory mitigation requirements would align with those of the HCP/NCCP. In addition, the on-site alternatives analysis under Section 404(b)(1) would focus on evaluating alternative means of applying on-site avoidance and minimization measures required under the HCP/NCCP. Time may further be shortened through the preparation of joint EIS/EIRs for projects. In addition, the Corps would pursue programmatic compliance with ESA, NHPA 106 and CWA 401 to provide for greater assurances and further streamline the process. With reliance on the PCCP EIS and programmatic compliance with related laws, the Corps expects to complete SP decisions for activities under the PCCP within six months.

To complete its CWA 404 Permit Strategy aligned with the HCP/NCCP, the Sacramento District must rely on several sources of information, including a baseline estimate of the location and amount of waters of the U.S. in the PCCP Plan area, the functional or conditional quality of those resources, use of a watershed approach to assess the existing and proposed future condition of the major watersheds within the PCCP Plan Area, a CWA 404 cumulative impact assessment, draft ordinances describing local aquatic resource protection plans, ESA recovery plans for aquatic species, and analysis in the PCCP EIS. For the permit types described above, the Sacramento District would need to complete a CWA 404 jurisdictional determination (JD) for most proposed activity sites, based on an aquatic resources delineation provided by the project proponent, before the applicant submits an application for a CWA 404 permit.

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

## The Way Forward

As an EIS cooperating agency with significant interest in the success of the PCCP, the Sacramento District will continue to work with the USFWS and NMFS to ensure the PCCP Draft EIS addresses and incorporates the proposed CWA 404 Permit Strategy, including the terms, conditions, limits/thresholds and processes for each permit type described above. Following public input on the Draft EIS, coordination with the Plan Participants, resource agencies and others, and the review of any new information that becomes available, the Sacramento District's approach to streamlined CWA 404 permitting will be updated and included in the Final EIS for the PCCP. With adoption of the EIS, the Sacramento District would then complete a ROD and implement its CWA 404 Permit Strategy. At the implementation phase, the Sacramento District plans to execute an MOU with Placer County and the City of Lincoln to address coordination and permit timelines.

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<sup>i</sup> See *A Proposed Methodology for a "Regional LEDPA" Determination: Permitting under CWA Section 404 in Western Placer County* (6 April 2006) Tim Vendlinski – USEPA Wetland Regulatory Office. This proposed methodology was premised on and incorporated other references including a description of EPA's Federal Guidelines (40 CFR 230), and the Corps' implementing regulations (33 CFR 323) released by Sylvia Quast at Resources Law Group entitled: *Clean Water Act Section 404 Permit Process For Projects in Western Placer County That Cannot Be Authorized Under The County's Aquatic Resource Plan*; plus the classic treatment of "impact avoidance" published in the journal *Wetlands: Wetlands Protection Through Impact Avoidance: A Discussion of the 404(b)(1) Alternatives Analysis* (Yocom, Leidy, and Morris, 1989).