Northern California Wetlands and Endangered Species Permits Working Group

U.S. Army Corps of Engineers
South Pacific Division
San Francisco District
Sacramento District

U.S. Environmental Protection Agency
Region IX

U.S. Fish and Wildlife Service
Sacramento Field Office

California Department of Fish and Game
Habitat Conservation Planning Branch

Northern California Regional Conservation Planning Partners (Participating Partners Only)
East Contra Costa County HCP/NCCP
Solano HCP/NCCP
South Sacramento HCP
Placer County Conservation Plan

Institute for Ecological Health

Opportunities for Coordinating Permitting Under Section 404 of the Clean Water Act with Regional Habitat Conservation Planning

I. OVERVIEW

The Northern California Wetlands and Endangered Species Permits Working Group (Working Group) was formed when staff from regional conservation planning efforts in the counties of Contra Costa, Placer, Sacramento and Solano approached management of the U.S. Army Corps of Engineers (Corps) South Pacific Division and the U.S. Fish and Wildlife Service (USFWS) California/Nevada Operations Office on April 19, 2003 to request consultation on permit coordination. Conservation planning efforts in these four counties have been in progress for several years. Past work has focused on habitat for endangered species, including streams, vernal pools, and other permanent and seasonal wetlands. The four conservation planning efforts sought consultation on permit coordination to advance the common goal of writing a conservation plan that could address both endangered species and wetlands needs.

The Corps and USFWS accepted the request and the Working Group was formed. It included representatives of the four Northern California conservation planning efforts, representatives from the Corps' South Pacific Division and Sacramento and San Francisco Districts, and representatives from the Sacramento Field Office of USFWS. Staff from the U.S. Environmental Protection Agency (USEPA), Region IX and the California Department of Fish and Game (CDFG) Headquarters Office were invited and did join the Working Group because of the integral role these agencies also play in wetlands and endangered species regulations.[1] The Working Group met four times between August 2003 and January 2004. Its specific tasks were:

- To explore opportunities for complying with the Clean Water Act (CWA) and receiving Regional General Permits (RGPs), Programmatic General Permits (PGPs) and/or permit assurances for impacts to wetlands and waters of the U.S.[2];
- To consider how to coordinate regional wetlands permitting through conservation planning processes also designed to comply with and provide regional permits under the Federal Endangered Species Act (FESA), the California Endangered Species Act (CESA) the California Natural Community Conservation Planning Act (NCCPA).

[1] Staff from the State Water Resources Control Board were contacted and provided an opportunity to participate but were unable to attend the meetings.
[2] To improve readability of this document, the term "wetlands regulations" is frequently used in lieu of "regulations for wetlands and other waters of the U.S." However, the broader connotation is intended in every case.

The outcome of these meetings is a general understanding among those involved of the opportunities and constraints for synthesizing regional permitting for endangered species with regional permitting for wetlands and other waters of the U.S. While the Working Group does not recommend pursuing a completely integrated approach to regulatory compliance—that is, it does not recommend attempting to comply with both types of regulations through one unified permit application, implementing agreement and environmental document—it does believe that it is possible to achieve the goal of establishing complementary regional permit programs for wetlands and endangered species through a parallel approach to complying with these regulations.

The Working Group has identified a range of alternative mechanisms for receiving wetlands permits or permit assurances on a regional basis and has identified the contrasting features that should be considered when selecting the mechanism that best fits a given area and set of circumstances. The Working Group also reviewed the staffing and funding challenges faced by wetlands regulatory agencies and agreed that it will be important to attempt to augment the resources available to support this innovative work.

II. PURPOSE OF THIS DOCUMENT

The Working Group prepared this document for the following reasons:

- To serve as a record of the Working Group process;
- To document the progress the Working Group has made in developing a common understanding on viable approaches to the challenge of incorporating regulations on endangered species and regulations on wetlands and other waters of the United States in regional conservation planning efforts;
- To serve as a road map for future work by individual planning efforts;
- To memorialize the status of the Working Group's discussion and communicate recommendations to local policy makers and to decision makers at state and federal agencies;
- To communicate to others the challenge of addressing multiple regulations and to explain the Working Group recommendations on opportunities for doing so.

III. BACKGROUND

A Variety of State and Federal Agencies Administer Natural Resource Regulations: Responsibility for administering and enforcing a variety of state and federal laws designed to protect natural resources falls to several agencies. Below is a brief summary of the key regulatory responsibilities of these state and federal agencies, as these responsibilities relate to the types of impacts addressed by regional conservation plans.

> U.S. Army Corps of Engineers (Corps): Approves delineations of wetlands and other waters of the U.S. and regulates the fill of such areas under Section 404 of the CWA. Permits for very minor impacts may be issued under the Nationwide Permit (NWP) Program. Larger impacts require an Individual Permit. Similar types of minor impacts

across a region may be covered under a Regional General Permit (RGP). A Biological Opinion from USFWS or National Marine Fisheries Service (NOAA Fisheries) (for species that spend all or a part of their lifecycle in the ocean) issued under Section 7 of FESA (see below) is required before a CWA permit may be issued for projects that could affect threatened or endangered species.

State Water Resources Control Board (SWRCB): Under Section 401 of the CWA, the federal government delegates to certain states the responsibility for certifying that discharges to wetlands and other waters of the U.S. meet water quality standards. In California, the SWRCB and its Regional Boards oversee Section 401 of the CWA and issue water quality certifications for activities that require a Corps permit under Section 404. The SWRCB and Regional Boards also implement the Porter-Cologne Water Quality Control Act, which provides separate, but partially overlapping, state authority to protect wetlands.

U.S. Environmental Protection Agency (USEPA): Pursuant to USEPA's 404(b)(1) Guidelines (Guidelines), USEPA oversees the administration of the Corps' Section 404 Clean Water Act permit program. USEPA reviews activities requiring a 404 permit to discharge dredged or fill material into waters of the United States to ensure only the least environmentally damaging practicable alternative is authorized as required under the Guidelines. In addition, the 1992 Memorandum of Agreement Between the Environmental Protection Agency and the Corps under section 404(q) of the Clean Water Act establishes a procedure for higher level of review of permit decisions by the Corps when EPA believes the proposed project would result in substantial and unacceptable impacts to aquatic resources of national importance. Lastly, under 40 CFR Part 231 Section 404(c) Clean Water Act procedures, USEPA may prohibit or withdraw the specification of a defined area as a disposal site, or to deny, restrict or withdraw the use of any defined areas for the discharge of any particular dredged or fill material should an activity result in an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.

U.S. Fish and Wildlife Service (USFWS)[3]: Enforces the FESA[4]. Non-federal projects apply to the USFWS for an endangered species permit (an incidental take permit) under Section 10 of FESA. Federal projects, including private projects that receive federal funds or federal permits (including Section 404 permits), are regulated under Section 7 of FESA. . Permits issued under Section 10 of FESA require preparation of a Habitat Conservation Plan (HCP). Local planning agencies may prepare an HCP that covers multiple project sites across a region and receive a permit that can be extended to private developers pursuing activities covered by the plan. Such Regional HCPs often contain assurances that activities covered under Section 7 of FESA will be regulated in a manner consistent with the HCP.

[3] Final comments from USFWS on this document are pending.
[4] A separate agency, NOAA Fisheries, enforces FESA for species that spend at least a part of their life cycle in the ocean.

California Department of Fish and Game (CDFG): Enforces the CESA. CDFG may issue endangered species permits under Section 2081 of the California Fish and Game Code. Alternatively, an applicant may prepare a Natural Community Conservation Plan (NCCP) and receive a permit under Section 2835. The requirements for preparing an NCCP were changed by the adoption of a new Natural Communities Conservation Planning Act by the State in 2002. The new Act requires that NCCPs address not only the covered species, but also conservation of general biological diversity, ecosystem functions, environmental gradients, etc. CDFG also regulates impacts to lakes or streambeds under Section 1600 of the Fish and Game Code through the approval of lake or streambed alteration agreements. It is possible and encouraged to concurrently plan for and receive a "programmatic" lake or streambed alteration agreement that is consistent with a regional HCP or NCCP.

Four Regional Conservation Planning Efforts Seek to Incorporate Wetlands Regulations: Initiated in southern California in the early 1990s, conservation planning on the countywide or partial-countywide scale is becoming a more common ambition in Northern California where two plans have been completed and several others are underway. Of these, the following four efforts have participated in the Working Group process because they wish to address wetlands regulations as well as endangered species regulations:

- South Sacramento HCP
- Solano HCP/NCCP
- Placer County Conservation Plan, Phase I
- East Contra Costa County HCP/NCCP

Though each planning effort has distinctive features, they share the following broad policy goals:

- Improve conservation of natural resources by addressing conservation needs at a regional scale more suitable for planning conservation actions. By purchasing and permanently protecting larger, connected blocks of biologically-rich habitat, and by coordinating monitoring and adaptive management activities on a regional basis, regional conservation planning provides the tools necessary for long-term conservation;
- Provide a more coordinated alternative to the project-by-project process for issuing/obtaining natural resource permits;
- Accelerate and integrate the permitting process, improve regulatory certainty, reduce applicants' permitting costs, and facilitate needed public infrastructure projects;
- Provide economic incentives to willing private landowners to conserve and steward valuable natural resources;
- Make better use of our limited time and money by investing less in the process of permitting and more in the protection of resources;
- Enable local governments to play a leadership role in natural resource conservation and permitting, within a framework established in partnership with regulatory agencies; and

- Improve the baseline scientific information on natural resources, enabling better decisions on permitting, on conservation, and on minimizing impacts of new development.

Challenges Associated With Integrating Wetlands and Endangered Species Compliance: Integrating compliance with these two suites of regulations is not straightforward. The first regional conservation planning efforts in southern California recognized the difficulty of integration and chose to focus first on species permitting. By the late 1990s, many of these same regions began developing Special Area Management Plans (SAMPs) to receive wetlands permits (in addition to the endangered species permits already secured through the prior HCPs / NCCPs). Integration is difficult because:

- While often complementary, wetlands and species laws and regulations have distinct purposes, procedures and priorities;
- Lead agencies on wetlands issues often are not the lead agencies on endangered species issues;
- Some wetland regulatory agencies are not ordinarily staffed or funded to assist with regional planning efforts;
- Species permitting on the landscape level is typically less dependent on detailed, site-specific information than is wetlands permitting;
- Through HCPs, the USFWS issues permits to non-federal projects under Section 10 of the FESA; projects requiring wetlands permits are federal projects, which cannot be completely covered by the Section 10 permit issued through an HCP.

Why Is It Desirable to Incorporate Both Wetlands and Endangered Species Regulations in Conservation Planning Efforts? Stakeholders and local governments in the four involved counties seek more certainty and efficiency in the permitting process. Separate compliance with just one set of regulations would have some benefits and could even facilitate compliance with the regulations not covered. For example, if only an HCP were prepared, wetland permitting would nonetheless improve because the HCP would supply baseline scientific information and a set of regional conservation objectives that would simplify and accelerate USFWS issuance of Biological Opinions on wetlands permits, a sometimes time-consuming and uncertain step in the wetlands permit process.

The planning efforts underway in the four Northern California counties would like to go one step further. Each would like to develop a plan with conservation measures that satisfy both sets of regulations. Development of a more comprehensive conservation plan holds a number of benefits:

- Addressing both wetlands and endangered species regulations in one concurrent and coordinated planning process helps assure that these mandates are implemented in a compatible and complementary fashion and that any potential conflicts are avoided, minimized, and otherwise resolved as early and effectively as possible.

- Concurrent, coordinated compliance provides local agencies and other permittees with greater certainty of what will be required to receive a permit. It also provides regulatory agencies with a more efficient and effective means for fulfilling their mandates.
- Incorporating wetlands regulations and agencies in the conservation planning process while it is still going on helps to assure that these regulations and agencies play a role in shaping the form and substance of future conservation in these areas, and ultimately makes the land use review process easier.
- Coordinated implementation of these regulations would improve conservation of natural resources. Such a strategy leads to planning processes that optimize attainment of a broad array of conservation objectives rather than planning processes that focus more narrowly on a single set of objectives. It is far more effective and efficient to coordinate multiple regulatory objectives up-front than it is to augment or "patch-up" mitigation requirements on a project-by-project basis to account for objectives not addressed by a more narrowly focused plan.
- It is not expected that regional conservation plans that seek to address these regulations in a concurrent, coordinated manner would require significantly more work from the local planning efforts. The resulting regional plans will make processing of applications much easier for the involved regulatory agencies.

IV. PARALLEL COMPLIANCE

A primary recommendation of the Working Group is that coordination of endangered species and wetlands regulations is best pursued through parallel processes. For the reasons outlined above, the two regulatory mandates should be addressed concurrently and in a coordinated way. However, complete integration is not recommended. Complying with both sets of regulations through one unified document or documents—one implementing agreement, one environmental document, etc.—has outward appeal, but the Working Group was concerned that the mature planning process in the four counties would slow or stall if they attempted to craft all documents to serve all parties. Rather, the Working group envisioned parallel but separate processes focused on the two distinct regulatory mandates but unified by a common core of conservation measures.

The Working Group offers the following opinions on implementing parallel compliance:

- Developing a programmatic approach to wetlands permitting through work products and a schedule that parallels development of a programmatic approach to endangered species permitting may be more achievable and efficient than complete integration of the regulatory processes.
- Key components of the habitat conservation plan (HCP/NCCP) can be excerpted or referenced to serve as the basis for a regional wetlands compliance process. For instance, the wetlands compliance document can reference conservation measures in the HCP/NCCP, including avoidance and minimization measures and measures to conserve resources offsite to mitigate for unavoidable impacts.

V. WETLANDS PERMIT ALTERNATIVES

Below please find an overview of some alternative means for pursuing regional compliance with wetlands regulations.

Special Area Management Plans (SAMPs)[5]:

- Of all the alternatives, SAMPs are the closest equivalent of an HCP/NCCP and can provide the greatest permit assurances. A SAMP is a plan document; based upon the SAMP, the Corps can authorize one or more types of permits, including a Programmatic General Permit (PGP), letter of permission, or other approach. To provide this level of assurance, SAMPs require detailed hydrologic information and analysis, including advanced delineation of wetlands to be impacted. In the earliest efforts, the Corps took the lead in preparing the SAMP and performed data collection and analysis itself. For at least one more recent SAMP process, the Corps and the local agency are exploring assigning the local agency and its consultants more of a lead role, similar to the way regional HCPs/NCCPs are typically developed.
- Some of the HCP/NCCP efforts in Southern California that bypassed regional wetlands compliance originally are now trying to upgrade their planning efforts to include wetlands. There, SAMPs have been selected as the preferred approach.
- Generally, the Corps prefers the SAMP approach if the regional conservation planning effort is just getting underway and there is time, funding, and the practical ability to prepare a SAMP without holding up other aspects of the planning process.
- The Corps can work with a permit applicant in defining a SAMP that meets local needs. The Working Group discussions indicated that SAMPs are an evolving tool.

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[5] Originally conceived under the 1980 Amendments to the Coastal Zone Management Act (CZMA) as a tool for use within the coastal zone, a SAMP is defined within the CZMA as "a comprehensive plan providing for natural resource protection and reasonable coastal-dependent economic growth containing a detailed and comprehensive statement of policies, standards and criteria to guide public and private uses of lands and waters; and mechanisms for timely implementation in specific geographic areas within the coastal zone."

In Regulatory Guidance Letter 86-10 (http://www.sac.usace.army.mil/permits/86-10.html), the Corps brought the SAMP concept to bear on non-coastal wetland resources, stating that "[t]his process of collaborative interagency planning within a geographic area of special sensitivity is just as applicable in non-coastal areas." Since Coastal Zone Management Programs do not apply in non-coastal areas, there is no single manner in which a non-CZMA SAMP must be carried out, and RGL86-10 states instead that the parties to a SAMP should identify an implementation mechanism in the form of a definitive regulatory product. More specifically, RGL 86-10 states that, "Because SAMPs are very labor intensive, the following ingredients should usually exist before a district engineer becomes involved in a SAMP:

a. The area should be environmentally sensitive and under strong developmental pressure.
b. There should be a sponsoring local agency to ensure that the plan fully reflects local needs and interests.
c. Ideally there should be full public involvement in the planning and development process.
d. All parties must express a willingness at the outset to conclude the SAMP process with a definitive regulatory product..."

- The Working Group agreed that SAMPs were not the best approach for conservation planning efforts that are farther along, such as the efforts underway in Placer, South Sacramento, Solano, and East Contra Costa Counties.
- Complete upfront delineation of wetlands to be impacted, a requirement of SAMPs, is not an option for these planning efforts because so much of the resources in the planning areas are entirely contained within privately owned lands that securing permission to survey would constitute an insurmountable barrier.

Programmatic General Permit (PGP): If local agencies do not wish to prepare a SAMP but still do wish to assume full local control of wetlands permitting, the PGP is an option. Under a PGP, the local agency submits a program to the Corps for local regulation of wetlands impacts that is as strong or stronger than existing Corps regulations[6]. If the program is approved by the Corps, the local agency adopts an ordinance and detailed procedures to implement the plan, putting in place an integrated locally-led regulatory process that allows federal Corps regulation, focused on a single subject matter, to step back to a role of ensuring that the local agency has done the work required under its approved program. Like a SAMP, local agencies receive significant assurances. Unlike a SAMP, private project proponents typically delineate wetlands and apply for permits project-by-project. Likewise, precise permit conditions, such as exact avoidance locations, are not determined upfront as would occur in a SAMP.

Four key elements of the PGP application to the Corps are:

1. Complete landscape level delineation of wetlands[7];
2. Complete landscape level functional assessment of aquatic resources
3. Determine general location and extent of impacts to be covered in general permit(s) to local agency;
4. Determine which Nationwide Permits will be replaced and develop separate general permit(s) for the activity(ies) to be covered.

Landscape level information on wetlands is suitable if:

- Site-specific delineations still performed project-by-project
- Wetlands classification system conforms to Corps standards

Other key observations:

- Impacts to be covered by general permits must be “minimal”.
- Adopting the ordinance and providing adequate staffing could be a major challenge for the local agency.

[6] There are five requirements for issuance of a general permit involving discharges of dredged or fill material, including a programmatic general permit. Corps must determine that the activities in such category [1] are similar in nature, [2] will cause only minimal adverse environmental effects when performed separately, and [3] will have only minimal cumulative adverse effect on the environment. In addition, any such general permit must [4] be based on the Section 404(b)(1) guidelines, and [5] set forth the requirements and standards which shall apply to any activity authorized by the general permit. (33 U.S.C. § 1344(e)(1).)

[7] Typically created through interpretation of aerial photos, not protocol-level field surveys of the entire area.

Simplified Permitting Program (SPP): The label "Simplified Permitting Program" was conceived by the Working Group to describe a general approach to regional wetlands compliance that relies on a variety of wetlands permitting instruments (Regional General Permits and/or Letters of Permission, for example), one for each type of activity covered. These components would be packaged under the umbrella of a regional permit program description and linked heavily to the conservation measures in an HCP and/or NCCP.

Under an SPP, the Corps would suspend duplicative aspects of the Nationwide wetlands permit program for the covered area and adopt the SPP provisions in their stead. Local agencies could draft the SPP as a proposal to the Corps, but would not be an applicant as is the case for the PGP. Under the SPP, project proponents would still need to individually apply for wetlands permits from the Corps, but the hope is the permit conditions and mitigation requirements would exactly match those under the HCP/NCCP (in fact, it might be possible to develop a Corps permit application form for the SPP that was identical to the application form collected by local agencies to issue permits under the HCP/NCCP). To approve an SPP, the Corps would need a landscape level delineation, functional analysis and other components required for a PGP above.

VI. ISSUES AND CHALLENGES

The Working Group identified the following key issues and challenges that would need to be addressed by each planning effort.

A) USEPA involvement: It is important to engage USEPA wetlands staff not just in the Working Group but also with each individual conservation planning effort.

B) CWA Section 401 (water quality certification by the State):
   1) The Corps will seek water quality certification on any regional wetlands permitting program, but may only receive programmatic coverage and Section 401 compliance may need to be partially re-visited later on a project-by-project basis.
   2) The Regional Boards are the appropriate level within the State organization to approach again with this concept. The Working Group felt renewed outreach would be appropriate by individual planning efforts and by the Working Group as a whole once the plans had a specific wetlands compliance proposal to discuss. Initial consultations conducted by one of the conservation planning efforts show support for the concept.

C) Fish and Game Code 1600: The Working Group spent very little time discussing Master Lake or Streambed Alteration Agreements. Individual planning efforts must explore the requirements of this aspect of state regulations in much more detail.

D) Translating the SPP and RGP concepts into successful approaches for Northern California planning efforts: What still needs to be clarified and what hurdles remain?
   1) What is "minimal"? In other words, what types of impacts can be covered individually and cumulatively under an SPP or PGP?

2) What level of information and analysis will be required in the landscape-level functional assessment?
3) What level of minimization and avoidance is appropriate for plans that address functions and values at a regional scale, particularly given the need to consider wetlands in a broader ecological context beyond what is required by the CWA alone?
4) How and when to mitigate? How much consistency can there be between CWA and ESA mitigation measures?

E) National Historic Preservation Act, Section 106: How do we integrate the requirements of this regulation into the regional conservation planning process?

F) FESA, Section 7: The USFWS would need to issue a Biological Opinion on the proposed adoption of any regional wetlands compliance program entitling issuance of a programmatic permit. Since the regional wetlands compliance program would share common elements with the HCP/NCCP, could such a Programmatic Biological Opinion provide assurances that the conservation actions required for non-federal projects covered under the HCP will also apply to projects whose only federal nexus is a wetlands permit? Could the internal Biological Opinion the USFWS will need to issue when approving the HCP mesh easily with the Biological Opinion that will be needed for the regional wetlands compliance program?

G) What to do when planning areas span parts of multiple watersheds? The general consensus of the Working Group was that it was unrealistic to expect planning areas to always follow hydrologic boundaries. The Corps and USEPA expressed willingness to participate in planning efforts that included only portions of affected watersheds.

H) The role of agency's scientific laboratories, such as the Corps' lab in Vicksburg, needs to be better defined for the various permit alternatives. The potential for Corps experts to participate in a peer review capacity could be explored.

I) These plans must also undergo an environmental review based on the National Environmental Policy Act (NEPA) and the California Environmenatl Quality Act (CEQA).

VII. CONCLUSION AND NEXT STEPS

In conclusion, the Working Group offers the following observations and recommended next steps:

- Corps participation in regional conservation planning efforts requires additional staff time and resources. The Corps will make an effort to assist within existing budget constraints, but local agencies recognize that a lack of dedicated staff for regional planning may slow the adoption of regional wetlands compliance programs.
- The four participating Northern California conservation planning efforts are committed to helping the Corps attain needed funding. These local agencies

requested an appropriation from Congress for FY 2005 and, if this is not successful, will pursue such funding again for FY2006.

- Individual planning efforts will continue to meet individually with the Corps and USEPA and with USFWS and CDFG as their conservation plans develop to craft wetland- and endangered species-specific elements of the plans and to ensure that core elements of the conservation strategy address the requirements of both wetland and endangered species regulations.
- The Working Group will reconvene approximately annually to share lessons learned from the individual planning efforts and to perform joint outreach to other interested bodies, such as the SWRCB and the Regional Boards.

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