

ADMINISTRATIVE APPEAL DECISION

LEVENSON DEVELOPMENT, File No. SPK-2002-00338

SACRAMENTO DISTRICT

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division, acting by designation on behalf of the South Pacific Division (SPD)

Appellant: Donald Levenson – Levenson Development

Date of Receipt of Initial Request for Appeal: 9 October 2009

Date of Receipt of Revised Request for Appeal: 2 April 2010

Date of Acceptance by Division of Request for Appeal: 7 May 2010

Appeal Conference Date: 9 November 2010

SPD - ACCEPTED REASONS FOR APPEAL:

SPD accepted the following reasons for appeal as detailed in the revised Request for Appeal dated 2 April 2010:

- 1) The District was incorrect in its application of law, regulation or officially promulgated policy;
- 2) The District was arbitrary and capricious in its interpretation of the project specifications and its requirement for the purchase of mitigation bank credits.

SUMMARY OF DECISION:

The appellant's request for appeal has merit, in part. The administrative record does not support the Sacramento District's determination since the administrative record does not contain substantial evidence to support Special Condition's 3 and 13 as part of the issued proffered permit. All other aspects of this appeal do not have merit.

BACKGROUND INFORMATION:

Following a permit process beginning in 2002, an initial proffered permit was issued by the District on 30 April 2009. On 15 June 2009 the Appellant wrote a letter to the District objecting to several special conditions in the initial proffered permit and asked the District to reconsider them. On 10 August 2009 the District issued a proffered permit which changed one of the conditions and stated its rationale for not changing any of the other conditions. The proffered permit was issued to the Oasis Development Center for the construction of a commercial development in the City of Redding, Shasta County, California. The permit allows for the filling of waters of the United States subject to jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) in accordance with several special conditions.

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On 8 October 2009 the Appellant submitted an initial Request for Appeal to the South Pacific Division (SPD). Due to a conflict of interest because the current SPD Regulatory Appeals Review Officer had worked on this file in his prior position, the responsibilities for reviewing the appeal were delegated to Mike Vissichelli, Review Officer (RO) for the North Atlantic Division (NAD). On 19 November 2009, Mr. Vissichelli sent a letter to the Appellant stating that additional information was necessary to evaluate if the initial Request for Appeal could be accepted. By telephone on 1 December 2009 the Appellant requested more time to submit the additional information to support their initial Request for Appeal because they wanted to first review the District's administrative record. The RO honored their request. The administrative record was provided to the Appellant in February 2010. The Appellant submitted a revised Request for Appeal (RFA) dated 2 April 2010 which was accepted by the RO on 7 May 2010. An appeal conference followed by a site walk was held on 9 November 2010.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION:

- 1) The District provided a copy of the administrative record, which was reviewed and considered in the evaluation of this RFA.
- 2) With submission of the RFA, the Appellant provided documents containing its comments and analysis of the District's proffered permit. The submittals were accepted as clarifying information in accordance with 33 C.F.R. 331.7(f).
- 3) At the appeal meeting the Appellant provided a tabbed binder containing numerous documents. Several documents in the binder were not part of the administrative record and were not considered in the review of the RFA.

EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:

The Appellant is appealing several special conditions issued as part of a proffered permit which has been declined by the Appellant. The special conditions and the reasons for their appeal are addressed below.

Appeal Reason 1: The District was incorrect in its application of law, regulation or officially promulgated policy;

Appeal Reason 1(a): The Appellant raised specific concerns regarding the requirements for specific dates that construction of mitigation must be started and completed by as detailed in Special Condition 1(b) below. The appellant contends that Regulatory Guidance Letter 02-2 (RGL 02-2) encourages mitigation to commence concurrently or in advance of project construction but does not require the Corps to specify a specific date for the initiation or final construction of mitigation.

Special Condition 1: To mitigate for the loss of 0.563 acres of waters of the United States you shall construct or enhance a minimum of 0.704 acres of intermittent stream habitat within the on-site preserve as proposed in the document incorporated below. Following the completion of the monitoring period a minimum of 80% of the constructed or enhanced mitigation shall be deemed successful based on the approved success criteria.

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- a. You shall construct the compensatory mitigation prescribed by this plan concurrently with, or in advance of the start of construction of the authorized/permitted activity.
- b. In no case shall initiation of the construction of compensatory mitigation be delayed beyond August 1, 2010. Construction of compensatory mitigation shall be completed no later than November 1, 2010.
- c. To insure that mitigation is completed as required, you shall notify the District Engineer of the start date and the completion date of the mitigation construction, in writing and no later than ten (10) calendar days after each date.
- d. To provide a permanent record of the completed mitigation work, you shall provide two complete sets of as builts of the completed work within the on-site and off-site mitigation, preservation, and avoidance areas to the Corps of Engineers. The as builts shall indicate changes made from the original plans in indelible red ink. These as-builts shall be provided to this office no later than 60 days after the completion of construction of the mitigation area wetlands.

Discussion: In accordance with RGL 02-2 regarding “Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act” dated 24 December 2002:

m. Timing of Mitigation Construction: Construction should be concurrent with authorized impacts to the extent practicable. Advance or concurrent mitigation can reduce temporal losses of aquatic functions and facilitate compliance. In some circumstances it may be acceptable to allow impacts to aquatic resources to occur before accomplishing compensatory mitigation, for example, in cases where construction of the authorized activity would disturb or harm on site compensatory mitigation work or where a simple restoration project is required. Some Federal-aid highway projects have legal and contractual requirements regarding the timing of mitigation that conflict with the policy to accomplish advance or concurrent mitigation. For compensatory mitigation involving in-lieu-fee arrangements or mitigation banks, the guidance applicable to those forms of mitigation should be followed with respect to timing of mitigation site development. After-the-fact mitigation may also be required for permits issued in emergencies or from an enforcement action.

RGL 02-2 states that mitigation construction should be concurrent with authorized impacts to the extent practicable; RGL 02-2 also permits and contemplates advance mitigation. RGL 02-2 provides the District discretion on how to determine the timing of mitigation construction.

At the appeal conference the District clarified its rationale behind requiring mitigation completion within certain timeframes. The District stated that the requirement for mitigation construction prior to the beginning of authorized work was to ensure that the mitigation gets completed prior to impacting

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protected resources. The District did act within the discretion allowed by RGL 02-2 in establishing the permit conditions related to mitigation construction.

Finding: This reason for appeal does not have merit as it is at the District's discretion, in accordance with existing laws, regulations and policies, to require mitigation be constructed and completed within certain reasonable time frames to reduce temporal losses and ensure success of the proposed mitigation.

Action: The dates provided in the proffered permit have since elapsed and should be revised accordingly in coordination with the Appellant per 33 C.F.R. 320.4 (r). Although the reason for appeal does not have merit, in the course of revising the dates, the District should provide additional documentation in the administrative record to support their rationale for requiring specific dates for the initiation and completion of construction of mitigation. The District should work with the Appellant to provide reasonable timelines to ensure that the special conditions are reasonable and enforceable in accordance with 33 C.F.R. 325.4.

Appeal Reason 1(b): Special conditions 2(a) and 7 of the Department of the Army permit require that the Applicant submit a final mitigation and monitoring plan and preserve management plan for Corps review and approval prior to commencing any work authorized by the Department of the Army permit. The Appellant is concerned that delays in review of the final mitigation and monitoring plan and preserve management plan will delay the start of construction. The Appellant has asked that the Corps commit to a short duration time frame in the permit and for the Corps to review these documents within 30 days of their receipt so as not to hold up progress of the project.

Special Condition 2(a): You shall develop a final comprehensive mitigation and monitoring plan, which must be approved by the Army Corps of Engineers prior to initiation of construction activities. The plan shall be based on the above referenced document. The plan must include mitigation location and design drawings, vegetation plans, including target species to be planted and final success criteria presented in the format of the Sacramento District's Habitat Mitigation and Monitoring Proposal Guidelines, dated December 30, 2004. The purpose of this requirement is to insure replacement of functions and values of the intermittent stream that would be lost through project implementation.

Special Condition 7: To insure that the preserve is properly managed, you shall develop a specific and detailed preserve management plan for the on-site mitigation, preservation, and avoidance areas. This plan shall be submitted to and specifically approved, in writing, by the Corps of Engineers prior to engaging in any work authorized by this permit. This plan shall describe in detail any activities that are proposed within the preserve area(s) and the long term funding and maintenance of each of the preserve areas.

Discussion: The District's 28 June 2009 response to the Appellant's objection to the initial proffered permit states that although the District does not condition its permits to place restrictions or obligations upon itself, that the District would make every effort to review any documents and provide comments and/or approval in a timely manner.

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Mandated time frames as suggested by the Appellant are not mentioned in the regulations. Certain parts of the regulations speak to timing guidelines for permit decisions (e.g. 33 C.F.R. 325.2), but the regulations are silent as to the Corps following certain timeframes in reviewing additional documentation submitted as a result of permit conditions. As the purpose of the permit is to authorize certain activities of an applicant, placement of specific deadlines on the District in the permit as a condition would not be appropriate.

Though it is not placed in the permit as a permit condition, the District has committed to working towards reviewing and/or approving the documents without undue delay. The District has indicated, both in its 28 June 2009 letter and at the appeal conference, its intent to review the additional documentation as quickly as possible and in a timely fashion.

Finding: This reason for appeal does not have merit as there is no specific regulation, policy or guidance that requires the District to have time frames placed upon them for expeditious review of additional documentation required as a result of special conditions.

Action: As indicated in its 28 June 2009 correspondence with the Appellant and at the appeal conference, the District shall make every effort to review any subsequent documents provided by the Appellant in response to requirements of special conditions and provide comments and/or approval in a timely manner.

Appeal Reason 1(c):

The Appellant alleges that the District incorrectly applied EPA's Final Rule on compensatory mitigation with regard to the special conditions requiring a fully funded endowment to provide for maintenance and monitoring of the preserve and that a conservation-oriented third party hold the required easement over the Salt Creek preserve and act as preserve manager. See Special Conditions 5(a) and 5(b) below.

Special Condition 5: Prior to initiating any activity authorized by this permit, you shall, to insure long term viability of mitigation, preservation, and avoidance areas:

- a. Establish a fully funded endowment to provide for maintenance and monitoring of on-site and off-site mitigation, preservation, and avoidance areas.
- b. Designate an appropriate conservation-oriented third part[y] entity to function as preserve manager and to hold the required conservation easements.
- c. Record permanent conservation easements maintaining all mitigation, preservation and avoidance areas as wetland preserve and wildlife habitat in perpetuity. Copies of the proposed conservation easement language shall be provided to the Corps of Engineers for approval prior to recordation.
- d. Provide copies of the recorded documents to the Corps of Engineers no later than 30 days prior to the start of construction of any of the activities authorized by this permit.

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Discussion: In accordance with RGL 02-2 regarding “Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act” dated 24 December 2010:

j. Financial Assurances: Compensatory mitigation plans will identify the party responsible for providing and managing any financial assurances and contingency funds set aside for remedial measures to ensure mitigation success. This includes identifying the party that will provide for long-term management and protection of the mitigation project. Financial assurances should be commensurate with the level of impact and the level of compensatory mitigation required. Permit conditions for minimal and low impact projects are generally sufficient for enforcing performance standards and requiring compliance, without the requirement of additional financial assurances. Financial assurances should be sufficient to cover contingency actions such as a default by the responsible party, or a failure to meet performance standards. District Engineers will generally emphasize financial assurances when the authorized impacts occur prior to successful completion of the mitigation, to include the monitoring period. Financial assurances may be in the form of performance bonds, irrevocable trusts, escrow accounts, casualty insurance, letters of credit, legislatively enacted dedicated funds for government operated banks or other approved instruments. Such assurances may be phased-out or reduced, once the project has been demonstrated functionally mature and self-sustaining in accordance with performance standards.

Financial assurances for third party mitigation should be consistent with existing guidance (e.g., Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, and the Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act). The District will determine project success, and the need to use financial assurances to carry out remedial measures, in accordance with the project performance standards.

RGL 02-02 details specific actions that the District should take to ensure success of the mitigation proposal. By including conditions 5(a) and 5(b) the District did not place any undue burden on the Appellant and acted in accordance with existing laws, regulations and officially promulgated policies.

The Appellant stated in the RFA their concern with the special condition requiring a fully funded endowment be established to provide for maintenance and monitoring of on-site and off-site mitigation, preservation, and avoidance areas. The District has authority through existing law, regulations and policy to determine what is necessary to ensure the success of the proposed mitigation. The Appellant can propose alternative funding mechanisms, but the burden is on the Appellant to demonstrate to the District that the alternative funding mechanism will be sufficient.

The Appellant discusses in their RFA that they do not agree with the District’s requirements that the manager of the preserve area being proposed as mitigation and owner of the easement has to be a “conservation-oriented third party” typically consisting of non-profit conservation organizations. At the appeal conference the District said that it would be open to discussions with the Appellant on who could serve as the third party preserve manager to hold the conservation easements.

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Finding: This reason for appeal does not have merit as the District's requirement to include Special Conditions 5(a) and 5(b) is in accordance with existing laws, regulations and policies.

Action: During the appeal conference the District stated they may be amenable to other alternatives for conservation oriented third parties other than non-profit organizations to manage the preserve and hold the easements. Although the District acted accordingly and this reason for appeal has no merit, the District and the Appellant should work together to identify other potential funding mechanisms to fund maintenance and monitoring of mitigation areas and to identify potential third parties to function as preserve manager and to hold the required conservation easements.

Appeal Reason 1(d):

The Appellant alleges that Special Condition 15 requiring that Covenants, Conditions & Restrictions (CC&R's) be recorded with the Registrar of Deeds prior to any work in waters of the United States on the project site is redundant with Special Condition 5(c) requiring the recordation of a conservation easement.

Special Condition 15: To validate this authorization, you must take the actions required to record the enclosed CC&R's with the Registrar of Deeds or other appropriate official charged with the responsibility for maintaining records of title to or interest in real property. You must provide evidence that these CC&R's have been recorded against the deed for this property to this office prior to any work in waters of the United States otherwise authorized by this permit.

In accordance with RGL 02-2 regarding "Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act" dated 24 December 2002:

g. Site Protection: Compensatory mitigation plans should include a written description of the legal means for protecting mitigation area(s), and permits will be conditioned accordingly. The wetlands, uplands, riparian areas, or other aquatic resources in a mitigation project should be permanently protected, in most cases, with appropriate real estate instruments, e.g., conservation easements, deed restrictions, transfer of title to Federal or state resource agencies or non-profit conservation organizations. Generally, conservation easements held by tribal, state or local governments, other Federal agencies, or non-governmental groups, such as land trusts, are preferable to deed restrictions. Homeowners' associations should be used for these purposes only in exceptional circumstances, such as when the association is responsible for community open spaces with restrictive covenants. Districts may require third party monitoring if necessary to ensure permanent protection. In no case will the real estate instrument require a Corps official's signature. Also, Districts will not approve a requirement that results in the Federal government holding deed restrictions on properties, or that contains real estate provisions committing Corps Districts to any interest in the property in question, unless proper statutory authority is identified that authorizes such an arrangement.

Special Condition 5(c) is for the recordation of permanent conservation easements maintaining all mitigation, preservation and avoidance areas as wetland preserve and wildlife habitat in perpetuity.

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Special Condition 15 refers to recording the CC&R's enclosed in the final permit; those CC&R's include the requirements to record easements and deed restrictions as referenced in Special Condition 5(c) and all other conditions in the proffered permit. Special Condition 15 further states that the permit is not valid unless those CC&R's are recorded and evidence of their recordation is provided to the District prior to any work in waters of the United States. Although they are redundant, these conditions are in accordance with existing laws, regulations and policies.

Finding: This reason for appeal does not have merit as the District's requirement to include Special Conditions 5 and 15 is in accordance with existing laws, regulations and policies.

Action: No further action required.

Appeal Reason 2: The District was arbitrary and capricious in its interpretation of the project specifications and its requirement for the purchase of mitigation bank credits.

Appeal Reason 2(a): The appellant alleges that Special Condition 3 requiring purchase of credits at a wetland mitigation bank contradicts previous guidance and commitments made by the Corps and that the requirement to purchase credits from a bank is not justified in the Corps decision document.

Special Condition 3: To mitigate for the loss of 1.4344 acres of waters of the United States and indirect effects to 0.823 acres of waters of the United States, you shall purchase 2.2574 credits consisting of 0.2906 vernal pool, 1.1688 seasonal wetlands and 0.829 intermittent stream habitat at a Corps approved wetland mitigation bank. The selected mitigation bank shall include the area of the permitted project within its service area. Evidence of this purchase shall be provided to this office prior to proceeding with any activity otherwise authorized by this permit.

Discussion: The Appellant made reference in their RFA as well as in the appeal meeting to alleged guidance they received from the District regarding the necessity of purchasing credits from a mitigation bank. The Appellant believed they were told that the mitigation they proposed for enhancements to Salt Creek would also serve as mitigation for impacts to waters of the United States. In the Appellant's RFA they reference conversations with the former District Section Chief, Kevin Roukey and an e-mail dated 14 January 2009 from Mr. Roukey to Ginger Fodge (Appellant's consultant). Mr. Roukey's e-mail is clear that there is a possibility that enhancements to Salt Creek may be able to serve as mitigation for all impacts on the site, however he states that "in essence [it] is correct that until we [the Corps] obtain the necessary information to determine if the proposed mitigation, including adequate buffers, will offset both the direct and indirect impacts, we [the Corps] cannot determine if all the necessary mitigation can be accomplished in Salt Creek." The e-mail details specific information which the District requested from the Appellant to fully assess if the enhancements to Salt Creek would satisfy the mitigation requirements for all on-site impacts.

In accordance with RGL 02-2 regarding "Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act" dated 24 December 2002:

2d. Measuring Impacts and Compensatory Mitigation. The Corps has traditionally used acres as the standard measure for determining impacts and required mitigation for wetlands and other aquatic resources, primarily because useful functional assessment methods were not available. However, Districts are encouraged to increase their reliance on functional assessment methods. Districts will determine, on a case-by-case basis, whether to use a functional assessment or acreage surrogates for determining mitigation and for describing authorized impacts. Districts will use the same approach to determine losses (debits) and gains (credits) in terms of amounts, types, and location(s) for describing both impacts and compensatory mitigation.

RGL 02-2 further states:

3. Compensatory Mitigation Plans: Districts will strive to discuss compensatory mitigation proposals with applicants during pre-application consultation. If this does not occur, the scope and specificity of proposed compensatory mitigation plans merely represent the applicant's view of what is necessary, a view that may not be acceptable to the Corps or other governmental authorities. At the earliest opportunity, Districts will advise applicants of the mitigation sequencing requirements of the Section 404(b)(1) Guidelines, or what is required for general permits. Compensation is the last step in the sequencing requirements of the Section 404 (b)(1) Guidelines. Thus, for standard permit applications, Districts should not require detailed compensatory mitigation plans until they have established the unavoidable impact. In all circumstances, the level of information provided regarding mitigation should be commensurate with the potential impact to aquatic resources, consistent with the guidance from Regulatory Guidance Letter 93-2 on the appropriate level of analysis for compliance with the Section 404 (b)(1) Guidelines. Districts will identify for applicants the pertinent factors for this determination (e.g., watershed considerations, local or state requirements, uncertainty, out-of-kind compensation, protection and maintenance requirements, etc.). Districts also will identify for applicants the rationale to be used (e.g., best professional judgment, Hydrogeomorphic Assessment Method, Wetland Rapid Assessment Procedure, etc.) for determining allowable impact and required compensatory mitigation. Applicants will be encouraged to submit appropriate compensatory mitigation proposals with individual permit applications or general permit pre-construction notices. The components listed below form the basis for development of compensatory mitigation plans.

In reviewing the administrative record the District requested the Appellant to support their proposal to provide mitigation through functional lift with enhancements to Salt Creek in a revised mitigation proposal that demonstrates complete off-set of project related impacts to waters. This was requested in e-mails dated 14 January 2009 from Mr. Kevin Roukey to Ms. Ginger Fodge and 12 January 2009 from Mr. Matt Kelley to Ms. Ginger Fodge. There is no evidence in the record identifying the District rationale to be used for determining allowable impacts and required compensatory mitigation per RGL 02-2 Section 3. There is no evidence in the administrative record showing that the Appellant provided information to support their proposal that enhancement of Salt Creek would offset all impacts associated with the proposed

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project. This was further verified by Ms. Fodge at the appeal conference when she stated that the Appellant never provided a functional assessment to the District to support their proposal.

The Appellant alleges that a briefing package provided in July 2008 entitled "Briefing Package Characterizing the Potential Effects of Levenson Development's Redding Oasis Project on Anadromous Salmonids and Proposed Mitigation Measures" outlines proposed mitigation to offset impacts for the entire site. The plan does not address the impacts to wetlands and is focused primarily on stream impacts associated with the proposed project.

The District acted in accordance with 33 C.F.R. 320.4(r) and RGL 02-2 in requiring acreage replacement as proposed in the original permit application through the purchase of mitigation bank credits. The Appellant even proposed purchase of credits from a mitigation bank to offset proposed impacts at the site in their original application submittal dated 6 December 2002. In a memo dated 27 April 2009 from Mr. Levenson's consultant to the California Department of Fish and Game the availability of credits at the Stillwater Plains Mitigation Bank is referenced. In this memo the Appellant states that credits are available at the mitigation bank and that they do not know how much, if any, additional mitigation the Corps will require beyond the proposed Salt Creek enhancements. Although it was determined that mitigation was required and purchase of credits was proposed and anticipated by the Appellant, the District was not clear in identifying the requirements for consideration in the Appellant's mitigation plan proposal to determine how many credits would be required. The Appellant did not provide further information to demonstrate that functional lift from the proposed Salt Creek enhancement plan would mitigate for all impacts associated with the project. Although the District's requirement to purchase credits at a mitigation bank is valid, how they determined the amount of allowable impact and required compensatory mitigation is not clear in the administrative record. The Appellant further raised concerns on how the District arrived at the amount of mitigation required for indirect impacts to offsite wetlands. The administrative record does not provide any supporting information to support the District's determination to require mitigation for indirect offsite impacts.

Finding: This reason for appeal has merit.

The District was not provided sufficient information from the Appellant to support their proposal that providing mitigation onsite through enhancements to Salt Creek would offset all proposed impacts. The District's determination to require the Appellant to purchase credits at a mitigation bank was not arbitrary and capricious and is in accordance with existing laws, regulations, and policy. However, the administrative record does not support that the District was clear in identifying pertinent factors for determining potential impacts to aquatic resources and rationale to be used for determining allowable impacts and required compensatory mitigation.

In addition, the District did not provide clear rationale for requiring mitigation for indirect impacts to offsite wetlands. This reason for appeal has merit as the administrative record does not support the District's determination.

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Action: The District shall work with the Appellant to identify the information necessary in a final mitigation plan to provide the required compensatory mitigation. The administrative record shall identify how the mitigation will offset the proposed impacts. The administrative record shall clearly identify any requirement for mitigation of indirect impacts to offsite wetlands.

Appeal Reason 2(b): The Appellant alleges that based on the requirements of Special Condition 13, the District has changed the project description without the consent of the Appellant and without justification of regulations. The Appellant details in their RFA that the condition requiring construction of an open channel poses many issues including site grading, need to construct bridges and costs. They also state that the stream would need 9 foot high retaining walls on either side due to the amount of grading on the site. Furthermore, they explain that construction of an open channel was never an alternative that was proposed or discussed with the District at any point in the process.

Special Condition 13: As required in the National Marine Fisheries Service letter of concurrence and in the California Department of Fish and Game application, the diversion of the intermittent stream along the northern project boundary shall be constructed in an open channel. The channel shall be earthen bottom and banks and where sufficient soil occurs over the bedrock, riparian vegetation shall be planted along the banks. A detailed riparian planting plan with specific success criteria for this channel shall be provided to this office for approval, prior to any construction activities otherwise authorized by this permit.

Discussion: Due to a lack of clear plans detailing the specific construction proposal for realignment of the intermittent stream, there are several interpretations of what was actually being proposed to be constructed. The District based its Special Condition upon what was approved in the National Marine Fisheries Service (NMFS) 9 October 2008 letter that determines that the project is not likely to adversely affect federally listed anadromous fish species or their designated critical habitat and the California Department of Fish and Game Application.

The 19 December 2008 NMFS letter states that per the project description provided to them by the Appellant on 9 October 2008 “flows from the intermittent creek would be diverted via a channel along the northern project boundary to Salt Creek and construction of this channel may require blasting.”

An unsigned document prepared on 28 April 2009 that appears to be a draft of the California Department of Fish and Game (CDFG) “Agreement Regarding Proposed Lake or Streambed Alteration” is located at pages 1077 through 1085 of the administrative record. The information contained in the project description of this document does not clearly describe the project; rather, it states that a complete diversion of an unnamed channel will occur along the northern project boundary and that the diversion will be constructed in an artificial channel between the northern project boundary and Salt Creek to the east to re-route flows around the project site. In a 27 April 2009 memo from the Appellant to the CDFG clarification was provided on the final design for the diversion ditch. The Appellant stated that they were awaiting final design of the ditch and that it could be piped as described in the application to the Corps but it appeared based on other

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references in the memo that it may be proposed as an open channel; the specifics are not clearly defined.

The 27 January 2009 Water Quality Certification (WQC) issued by the California Regional Water Quality Control Board Central Valley Region states that the "Construction of Phase 1 will involve capturing and re-routing the intermittent stream along the north property boundary of the site, in a concrete box culvert, to Salt Creek."

The original proposal to the Corps and that which was put out on public notice shows an area identified as a "diversion culvert" on figure 3 of the plans, but no clear details are provided.

It is not clear in the administrative record what is proposed by the applicant or whether an open or closed channel would have either positive or negative impacts on the environment. In addition, the District has attachments to its decision to the initial proffered and proffered permits that reference the NMFS 19 December 2008 letter, the 27 January 2009 WQC and the July 2008 briefing package; these references all lack consistent and clear project descriptions. Based on the lack of clarity and supporting information in the administrative record to demonstrate that one construction method is preferred or proposed, this issue should be further discussed and clarified among the District and the Appellant.

In accordance with 33 C.F.R. 320.4

(r) *Mitigation* (1) Mitigation is an important aspect of the review and balancing process on many Department of the Army permit applications. Consideration of mitigation will occur throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses. Losses will be avoided to the extent practicable. Compensation may occur on-site or at an off-site location. Mitigation requirements generally fall into three categories.

(i) Project modifications to minimize adverse project impacts should be discussed with the applicant at pre-application meetings and during application processing. As a result of these discussions and as the district engineer's evaluation proceeds, the district engineer may require minor project modifications. Minor project modifications are those that are considered feasible (cost, constructability, etc.) to the applicant and that, if adopted, will result in a project that generally meets the applicant's purpose and need. Such modifications can include reductions in scope and size; changes in construction methods, materials or timing; and operation and maintenance practices or other similar modifications that reflect a sensitivity to environmental quality within the context of the work proposed. For example, erosion control features could be required on a fill project to reduce sedimentation impacts or a pier could be reoriented to minimize navigational problems even though those projects may satisfy all legal requirements (paragraph (r)(1)(ii) of this section) and the public interest review test (paragraph (r)(1)(iii) of this section) without such modifications.

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Further, 33 C.F.R. 325.4 says:

If the district engineer determines that special conditions are necessary to insure the proposal will not be contrary to the public interest, but those conditions would not be reasonably implementable or enforceable, he will deny the permit.

It is not supported in the administrative record that the changes to the project description to require construction of an open channel were discussed with the Appellant during the application process. It also is not clear in the administrative record if project modifications to require an open channel as conditioned in the proffered permit constitute minor project modifications that are considered feasible or reasonably implementable.

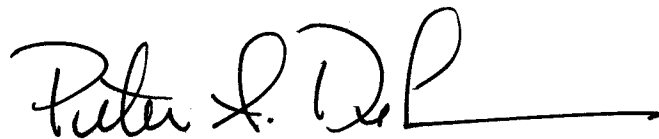
Finding: This reason for appeal has merit as the administrative record does not support the District's determination to require construction of an open channel.

Action: The District shall work with the Appellant to clarify the project proposal and will evaluate and issue its permit decision upon that proposal. Requirements for mitigative measures to reduce impacts should be discussed with the Appellant. Prior to making a final decision on any modified proposal, the District shall re-coordinate any issues such as Endangered Species or Essential Fish Habitat as necessary with the relevant Federal agencies. The administrative record should be supplemented to include an analysis of any requirements to modify the Appellant's proposed construction methodology as well as additional agency coordination and its results. A final permit decision shall be made in light of any revised project description and agency coordination and any final permit decision shall reference the specific detailed design drawings upon which the determination was based.

OVERALL CONCLUSION:

For the reasons stated above, I find that the appeal has merit in part since the District's administrative record does not contain substantial evidence to support Special Condition's 3 and 13. All other aspects of the appeal do not have merit. With regard to the aspects of the appeal on which merit has been found, I am remanding the proffered permit back to the District to reconsider their decision and provide additional analysis and documentation to support their findings in the administrative record. Other issues that did not have merit under this appeal review but where the District stated willingness to work with the Appellant to clarify certain issues, have been identified for further action.

This concludes the Administrative Appeal Process. The District shall complete these tasks within 45 days from the date of this decision and upon completion, provide the SPD office and appellant with its final decision document.



PETER A. DELUCA
Brigadier General, Corps of Engineers
Division Engineer

