

**United States Department of the Interior
U.S. Fish and Wildlife Service
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AESO/FA

February 4, 2004

Aaron O. Allen, Ph.D.
Acting Chief , Regulatory Branch
U.S. Army Corps of Engineers, Los Angeles District
ATTN: CESPL-CO-RN-970031200-RRS
915 Wilshire Boulevard
Los Angeles, California 90017-3401

Dear Dr. Allen,

The U.S. Fish and Wildlife Service has received Special Public Notice (SPN) 970031200-RRS, issued December 23, 2003, soliciting comments on the proposed Mitigation Guidelines And Monitoring Requirements (Guidelines) for the Los Angeles District of the U.S. Army Corps of Engineers (Corps). Unfortunately we did not become aware of the availability of the SPN until January 12, 2004. We have discussed this matter with Mr. Robert R. Smith of your staff and agreed to submit comments on the SPN by February 5, 2004.

GENERAL COMMENTS

Our primary concern is not with the process of developing mitigation plans themselves, but with the environmental impact analysis upon which mitigation is based. It has been our experience that the Corps generally does not evaluate the influence of uplands and project amenities occurring above the ordinary high water mark. It is our view that an adequate discussion of mitigation must consider the impacts to uplands as well as jurisdictional waters.

We have raised this concern in our reviews of Public Notices for individual permits in Arizona and in our recent review of the National Wetland Mitigation Action Plan Draft Documents. The SPN does not address this issue in great detail and we believe it warrants more attention for the Guidelines to effectively conserve and protect the biological, chemical, and physical integrity of waters of the United States and associated wetlands. We recommend that the Cops provide specific guidance that requires assessment of the totality of project-related impacts including secondary, indirect, and cumulative effects, including those occurring in upland areas above the ordinary high water mark

SPECIFIC COMMENTS

I. INTRODUCTION

B. MITIGATION POLICY

This section states on page 3: “The Section 404(b)(1) Guidelines limit the issuance of a permit to the activity or project design representing the least environmentally damaging practicable alternative (LEDPA) that is not contrary to the public interest. More specifically, the Section 404(b)(1) Guidelines state that no discharge of dredged or fill material shall be permitted if there is a practicable alternative available to the proposed discharge that would have less adverse impact on the aquatic ecosystem, if the alternative does not have other significant adverse environmental consequences. Practicability is defined in terms of cost, logistics, and existing technology in light of the overall project purpose. The burden to demonstrate compliance with the Section 404(b)(1) Guidelines rests with the permit applicant.”

Corps regulations (CFR 33, Appendix B to Part 325) state: “The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.” Accordingly, if we assume that projects to be permitted by the Corps are in compliance with Section 404(b)(1), then we assume the Corps and applicant have analyzed alternatives that would result in no discharge of dredged or fill material for the purpose of constructing the overall project and have mutually determined that those alternatives are not economically, technically, or logistically feasible. Also, pursuant to Corps regulations, project activities occurring above the ordinary high water mark are essentially products of the Corps permit action because they cannot be constructed but for the issuance of a section 404 permit authorizing the proposed discharge. This reasonable interpretation directs the Corps to extend the scope of impact analysis to address the totality of project-related impacts, including those portions of the permitted activity occurring in upland areas beyond the delineated jurisdictional boundary.

C. CORPS POLICY

This section states on page 4: “The Corps strives to avoid or minimize adverse impacts to waters of the U.S., and to achieve a goal of no net loss of wetland functions and values. To achieve these goals, compensatory mitigation is generally required at a minimum 1:1 replacement ratio. In the past, the Corps has accepted acreage as a surrogate for functions and values because the former parameter is easier to measure.” It is our experience in Arizona that the Corps focuses on vegetative structure and land acreage when developing compensatory mitigation. We believe this approach assumes that biological function is adequately addressed through replacement of structure. This may not be the case when evaluated in a landscape context. For example an acre of habitat within an urban landscape cannot be assumed to function the same as an acre of habitat within a natural setting simply because vegetative structure within those acres is similar.

The loss of upland biotic communities associated with Section 404-permitted activities can have negative impacts on wildlife populations within and adjacent to jurisdictional waters. These areas likely provide movement corridors, nesting sites, and foraging areas for numerous wildlife

species. Upland modifications adversely affect population dynamics through habitat loss or fragmentation and disrupt intra- and interspecific wildlife interactions, resulting in population and community shifts. Utilizing acreage as a surrogate for functions does not capture the influence of the loss of adjacent uplands on jurisdictional waters.

We recommend that your Guidelines provide detailed guidance on project impact assessment and mitigation development. For compensatory mitigation, measures should not only address structural vegetative parameters such as canopy cover, biomass, and total volume, but also changes or loss of wildlife diversity, abundance, density, richness, and evenness. Compensatory mitigation based solely on replacing vegetative structure and land acreage will risk the impairment and loss of the biological function of jurisdictional waters.

This section further states, pages 4-5: “A recent study of Orange County compensatory mitigation sites by Sudol (1996) suggested that many past mitigation sites have not been successful, when measured by permit compliance or by estimating the capacity of the riverine habitat at these sites to perform functions compared to relatively undisturbed riverine habitat in the region. This study determined that many compensatory mitigation sites lack natural hydrology, which reduces their capacity to perform a range of functions expected for the type of habitat being mitigated.” We have not had the opportunity to review this report, and we request that a copy of Sudol (1996) be provided to our office.

This section also states on pages 5-6: “For Standard Permit applications, the applicant should submit a conceptual mitigation plan along with the formal application materials... At this juncture, the Corps will typically discuss with one or more of the resource agencies the likely efficacy of the proposed compensatory mitigation.” We request that your Guidelines require your field offices to provide resource agencies the opportunity to review and comment upon draft mitigation plans for standard permit applications. It would also be helpful to review draft environmental assessments, since impact analyses drive mitigation development.

II. MITIGATION GUIDELINES

A. Project Site Impact Assessment

This section states on page 8: “An adequate assessment of the current functions and values before construction of the project is important for determining the relative importance of the aquatic resources to the site and the region or watershed.” As previously indicated, we agree with this statement. However, we suggest the Guidelines be modified to include clear and concise guidance regarding appropriate methods to quantify functions for the purpose of mitigation. Although index-based methods such as the Hydrogeomorphic Approach can be useful, they must be structured in a manner that properly captures the influence of adjacent landscapes on the ecological functioning of jurisdictional waters. Often, index-based methods are vulnerable to subjective interpretation and do not adequately capture this influence. We suggest the application of well-established empirical methods of conservation biology such as measures of vegetative canopy cover, biomass, and total volume, and wildlife diversity, abundance, density, richness, and evenness.

C. Compensatory Mitigation Site Design

This section states on page 14: “The factors used in the preliminary design of the compensatory mitigation site should have a functional assessment basis.” We agree and recommend the Guidelines be modified to provide clear and concise guidance regarding functional assessment consistent with our comments above. This section further states on page 14: “The purpose of the compensatory mitigation project must be clearly identified and include specific statements about the type(s) of habitat (and associated functions and values) to be impacted by the construction project, the functions and values that would be replaced at the proposed compensatory mitigation site, and any other functions and/or values that are desired (e.g., habitat for federally listed threatened or endangered species). Clearly written purpose statements will provide important information for the development of useful performance standards and success criteria and the approval of the compensatory mitigation and monitoring plan.” Again, we agree and recommend the Guidelines be modified to provide clear guidance on developing performance standards that include specific empirical criteria and monitoring provisions to evaluate the success of mitigation for ecological functions in terms of both wildlife populations and vegetation communities.

This section also states on page 17: “Development of appropriate success criteria is the single most important element in the development of a successful compensatory mitigation and monitoring program.” We appreciate this statement and agree that development of success criteria is the most important element after proper quantification of project impacts.

CLOSING COMMENTS

In closing, we reiterate our suggestions that the Guidelines be modified to provide clear and concise guidance on project impact assessment, quantification of ecological function, empirical success criteria, and monitoring provisions. We are willing to provide technical assistance to your staff in this endeavor. Should you require further assistance or if you have any questions, please contact Mike Martinez or Don Metz at (602) 242-0210.

Sincerely,

/s/ Steven L. Spangle
Field Supervisor

cc: Regional Director, Fish and Wildlife Service, Albuquerque, NM (Attn: Dean Watkins)
Supervisor, Project Evaluation Program, Arizona Game and Fish Department, Phoenix, AZ
Regional Administrator, Environmental Protection Agency, San Francisco, CA