



## Memorandum

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Date: January 23, 2003

To: East Contra Costa County HCPA c/o John Kopchik

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From: David Zippin and Paul Cylinder, Jones & Stokes

Subject: **Approach to Section 404 and Section 1601 Compliance and Current Status of This Effort**

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Jones & Stokes recommends that the East Contra Costa County Habitat Conservation Planning Association (HCPA) include regional compliance with Section 404 of the Clean Water Act and Section 1601 of the California Fish and Game Code as components of the East County planning process and that conservation measures for resources regulated under Section 404 and Section 1601 be included in the Habitat Conservation Plan/Natural Community Conservation Plan (HCP/NCCP). This memorandum summarizes Jones & Stokes' recommended approach to compliance with Section 404 and Section 1601, optional approaches to this issue, and the status of discussions with agencies. This memo also serves as the final Phase 1 deliverable for Tasks 9 and 10. A key to the acronyms used in this memo are presented at the end.

### **Section 404 Compliance**

Two main approaches are available to integrating Section 404 compliance with the HCP/NCCP: Regional General Permit (RGP) and Programmatic General Permit (PGP).

**Regional General Permit.** A RGP is issued by the U.S. Army Corps of Engineers (USACE) district or division and authorizes a class of activities within a geographic region that are similar in nature and have minimal individual or cumulative environmental effects. The RGP serves to streamline the permitting process within the boundaries designated for its use, avoiding the more complex and extended process of issuing individual permits on a project-by-project basis. A RGP is usually more locally effective than and supplements the Nationwide Permit (NWP) process. Project proponents must meet special and general conditions included in the RGP in order for a project to qualify for authorization under the RGP. The HCPA can work in partnership with USACE to develop appropriate RGP conditions within all or a portion of the HCP/NCCP inventory area. For regional planning purposes, conditions in the RGP can be developed to coincide with the goals and requirements of the HCP/NCCP. Once issued by USACE, the RGP is a standing permit that all individuals can use if all stated conditions are met. In contrast with a PGP (described below), permitting control under an RGP is not delegated to a local entity but remains the responsibility of USACE. As with all general permits, the RGP is

issued for a five-year period, subject to expiration, modification, or renewal by USACE.

**Programmatic General Permit.** A PGP is issued by the USACE district or division where a local, state, or other federal program provides protections for wetlands and other waters that achieve (or exceed) the objectives of the Section 404 permit program. The future HCP/NCCP implementing entity or each participating city and the County would assume portions of USACE responsibility, as defined in the PGP, within its jurisdiction. The PGP offers a streamlined regulatory procedure under Section 404, because the local agency holding the permit becomes the permitting authority and USACE is no longer involved in approval of each use of the permit. As with all general permits, a PGP is reviewed by USACE every five years; at that point it may lapse or be reauthorized with or without modification. The County and each city would need to develop ordinances that regulate wetlands and other waters at least as stringently as Section 404 requirements and apply to USACE for a PGP based on these ordinances. Section 404 permitting could then be conducted by the County and the cities in conjunction with the standard development approval processes. The wetland ordinance(s) would be developed from measures in the HCP/NCCP for conservation of wetlands, streams, and ponds.

**RGP versus PGP: Pros and Cons.** The following are the benefits of a RGP over a PGP:

- A RGP is more easily developed than a PGP. Because it does not require writing and approval of local ordinances, a RGP can be developed, reviewed, and authorized more quickly than a PGP. The PGP would be more time consuming to develop and approve (needing both Board/Council and USACE approval).
- USACE Sacramento and San Francisco Districts are more experienced with RGP issuance than with PGP issuance. They would likely be able to consider and issue an RGP more expeditiously.

The following are the benefits of a PGP over a RGP:

- A PGP may address a wider range of covered activities than a RGP. Because the RGP must be written for a specific class of covered activities that are similar in nature and have minimum impacts, its use may be more limited than a PGP. (However, should USACE require a narrowly defined use for the RGP, the HCPA could propose the development of several RGPs to cover a broader range of activities.)
- A PGP provides more local control than a RGP. The PGP authorizes a program run by the County and cities; and USACE involvement in each future project is limited. With a PGP, development interests get a true “one-stop-shop” with the County and cities empowered to provide development approval, Section 404 approval, and federal/California Endangered Species Acts approval.

**Section 401 CWA Compliance under the Section 404 Process.** Issuance of either a RGP or PGP requires certification of compliance with State water quality standards by the Regional Water Quality Control Board (RWQCB) or State Water Resources Control Board (SWRCB). Section 401 certification of the RGP would provide another level of permit streamlining to the

HCPA. If the RGP or PGP is not certified under Section 401, then each future permit user needing to conduct fill activities would be required to obtain separate Section 401 certification before the RGP or PGP could be used.

### **Section 1601 Compliance**

California Department of Fish and Game (DFG) may develop a Master Streambed Alteration Agreement (MSAA) with the HCPA (or with the County and each city) under Section 1601 of the California Fish and Game Code. DFG has indicated their desire to work with the HCPA to develop a MSAA for the East County. Conservation measures for streams and riparian habitat developed in the HCP/NCCP would be used as the basis for the MSAA. DFG is currently developing several MSAs in Southern California. The MSAA would allow the County and cities to provide Section 1601 compliance in the conjunction with the development approval process.

### **Parallel Section 404 and ESA Compliance Processes**

U.S. Fish and Wildlife Service (USFWS) and USACE administer separate regulatory programs under Sections 7/10 of the Endangered Species Act (ESA) and Section 404 of the CWA, respectively, that follow different permitting processes. Figure 1 shows how the ESA and Section 404 processes can be accomplished in parallel. Note that the term “parallel compliance” is used and not “combined compliance”. USFWS and USACE have made clear that they cannot combine their separate permit processing procedures. However, the separation of permit processing by these agencies does not mean that the HCPA must prepare separate conservation plans for endangered species and USACE jurisdictional waters. Because many of the covered species in the HCP/NCCP use wetlands, ponds, and streams as habitat (e.g., California red-legged frog, California tiger salamander, vernal pool fairy shrimp), preparing a single conservation plan that addresses both species and jurisdictional waters is more efficient and effective than separate planning efforts.

The Section 10 compliance process (Figure 1) requires preparation of the following major components:

- HCP (in our case a joint HCP/NCCP)
- Section 10 permit application
- Environmental Impact Statement (EIS) on the Section 10 permit issuance with USFWS as lead agency (in our case we are doing a joint EIS/EIR)
- Internal USFWS Section 7 consultation and Biological Opinion (BO) on the issuance of the Section 10 permit

The Section 404 compliance process (Figure 1) requires preparation of the following major

components:

- Section 404 permit application (in our case a proposed RGP or PGP)
- Environmental Assessment (EA) or EIS on the Section 404 permit issuance with USACE as lead agency
- Section 7 consultation between USACE and USFWS on the issuance of the Section 404 permit (RGP or PGP)
- Section 401 certification of RGP or PGP by RWQCB or SWRCB

Note that the process depicted in Figure 1 initiates with a joint HCP/NCCP that contains all of the conservation measures necessary for covered species and for wetlands, ponds, and streams. Wetlands, ponds, and streams are addressed as covered natural communities under the Natural Community Conservation Planning Act (NCCPA) and as jurisdictional waters of the US (note that not all wetlands and other waters will be USACE jurisdictional under Section 404). Once there is agreement from USFWS and USACE on the overall approach to resource conservation in the HCP/NCCP, then conservation measures for wetlands, streams, and other waters can be extracted from the HCP/NCCP to develop the RGP or PGP.

Key aspects of parallel permit processing are that USFWS and USACE communicate on the contents of their separate NEPA documents and that USFWS is consistent in its two Section 7 consultations. Although USFWS and USACE will prepare separate NEPA documents for their separate permits, these documents will address the same proposed third party project (i.e., implementation of covered activities and conservation measures identified in the HCP/NCCP). Hence, the NEPA conclusions reached by USFWS and USACE regarding effects on the human environment should be essentially the same. For the same reason, the conclusions in the two BOs prepared by USFWS should be essentially the same. The BO on the Section 404 permit may include only those species that use waters of the US, but the analysis of effects of implementing the HCP/NCCP is the same as for the BO on the Section 10 permit.

Note that compliance with NCCPA and Section 1601 are also conducted in parallel with the ESA and Section 404 compliance.

**Programmatic Section 7 ESA Biological Opinion for Section 404 Permits.** In preliminary conversations, USACE has suggested that the HCPA also consider the option of completing the HCP/NCCP and obtaining an ESA Section 10 permit before addressing Section 404 compliance. Following Section 10 permit issuance, the USFWS and USACE would consult under Section 7 of the ESA and USFWS would issue a programmatic Section 7 BO that would provide the basis for future Section 7 consultations for Section 404 permits in the East County. This approach has several serious drawbacks:

- It requires much more time to wait for a final HCP/NCCP and Section 10 permit prior to initiating the Section 7 consultation process that eventually results in the programmatic BO.
- While providing a streamlined process for ESA compliance for Section 404 permitting, it

does not provide any streamlining of the Section 404 permit itself for placement of dredge and fill into waters of the US (regardless of whether ESA listed species are present).

### **Recommended Approach to Section 404 and Section 1601 Compliance**

We recommend the RGP for compliance with Section 404 and preparation of a MSAA for Section 1601 compliance. Jones & Stokes recommends the following approach (in roughly chronological order) to regional Section 404 and Section 1601 compliance in the East County:

- Include wetlands, ponds, and streams in the landscape-level conservation measures in the HCP/NCCP; and prepare specific conservation measures for wetlands, ponds, and streams in the HCP/NCCP that will meet or exceed Section 404 and Section 1601 mitigation requirements.
- Provide an administrative draft of the HCP/NCCP to USACE and DFG for review and comment prior to preparing drafts of the RGP and MSAA.
- Develop a proposed RGP (or several RGPs) based on covered activities and conservation measures for wetlands, ponds, and streams in the HCP/NCCP. Ensure that the RGP (or RGPs) covers a wide range of activities; that the thresholds for impacts are more favorable than under NWPs; and that the process for mitigation of impacts is clear and efficient and conducted through the HCP/NCCP implementation process.
- Develop a proposed MSAA based on covered activities and conservation measures for wetlands, ponds, and streams in the HCP/NCCP. Ensure that the MSAA covers a wide range of activities; and that the process for mitigation of impacts is clear and efficient and conducted through the HCP/NCCP implementation process.
- Provide proposed RGP and MSAA to USACE and DFG for review and comment
- Work with USFWS and USACE to ensure that their project descriptions are consistent and that respective NEPA documents are as consistent as possible in their conclusions. Jones & Stokes is preparing the EIS/EIR for USFWS and HCPA. We need to ensure that there is coordination with USACE in the development of the EIR/EIS and that USACE uses the EIR/EIS to develop their NEPA document (EA or EIS) on the RGP.
- Work with USFWS to ensure that the Section 10 and Section 404 (RGP) actions are as consistent as possible and that the USFWS' BOs on these actions are as consistent as possible in their conclusions; that the BO on the RGP will provide streamlined ESA compliance for use of the RGP; and that the BO on the Section 10 permit will provide streamlined ESA compliance for all federal actions (actions by USACE and other federal agencies, such as FHWA) requiring future Section 7 review in the East County.
- Work with SWRCB to ensure that the HCP/NCCP, and hence the RGP, provide sufficient measures addressing water quality such that SWRCB can issue Section 401 certification of the RGP.

## **USACE and RWQCB Jurisdiction**

A small but important issue remains of which district of USACE and region of RWQCB will represent their agency in discussions and negotiations with the HCPA. The USACE San Francisco District and Sacramento District both have jurisdiction within the inventory area. Similarly, the San Francisco Bay Region and the Central Valley Region of the RWQCB both have jurisdiction in the inventory area. The USACE has indicated that the Sacramento District would likely take the lead in this process because more of their region falls in the inventory area. The RWQCB has indicated that the SWRCB in Sacramento, the body that oversees all RWQCB Regions, will likely represent their agency to the HCPA. Jones & Stokes provided information to the RWQCB staff for a staff report to the SWRCB proposing that the SWRCB lead discussions with the HCPA but this issue remains unresolved.

There is no similar issue with DFG. The same staff representing DFG on California Endangered Species Act (CESA) issues represents DFG on 1601 issues.

## **Current Status of Wetlands Permitting for HCP/NCCP**

Jones & Stokes and HCPA staff have attended one meeting with staff from USACE and RWQCB regarding regional approaches to compliance with Sections 401 and 404 (March 14, 2002) and one meeting with EPA staff regarding these issues (June 28, 2002). At these meetings, we presented our proposed approach outlined above. The USACE and RWQCB were somewhat skeptical about the approach, but offered constructive advice and expressed willingness to explore the issue further. The EPA appears more immediately inclined to support the approach. Having provided funding to the HCPA (\$75,000), EPA has an expectation that wetlands and other waters will be addressed in the HCP/NCCP. We understand that other HCP efforts in the State have had subsequent discussions with USACE on similar issues and that the USACE may be more receptive to integrating wetlands permitting with HCPs than in our initial discussions.

The next steps in developing a successful approach to integrating wetlands permitting into the HCP/NCCP are:

- Work with USACE and RWQCB (or SWRCB) staff on our proposed approach to integrating wetlands permitting into the HCP/NCCP and seek a mutual understanding on how this approach can be implemented.
- Identify the individuals at each agency who will represent them at relevant HCPA meetings, and seek their consistent attendance at these meetings.

The following specific actions require attention in the short term:

- Need to make clear who the lead offices will be on the Section 404 and Section 401 compliance. At this time, it appears that Sacramento District of USACE will be the Section 404 lead and the SWRCB (rather than one of the RWQCBs) will be the Section 401 lead.

- EPA Counsel has indicated that the RGP application would not need to include an alternatives analysis to comply with Section 404(b)(1) Guidelines. USACE typically prepares alternatives analyses prior to issuing NWPs. We need a determination from USACE and EPA whether the Section 404 alternatives analysis will be required. If required, this alternatives analysis can be incorporated in the EIS/EIR analysis of alternatives, however certain Section 404-specific requirements must be met.
- The mapped information on jurisdictional waters for the inventory area is of relatively low resolution. A better inventory of potentially jurisdictional (USACE and DFG) waters (and possibly a functional assessment of those waters) may be necessary to develop the RGP. A discussion with USACE and EPA is necessary to determine the level of information sufficient for developing the RGP.

Jones & Stokes will assist the HCPA during Phase 2 in carrying out these action items and developing a successful program integrating wetlands compliance with the HCP/NCCP.

#### **Acronym Key**

BO	Biological Opinion
CESA	California Endangered Species Act
CWA	Clean Water Act
DFG	California Department of Fish and Game
EA	Environmental Assessment
EIR	Environmental Impact Report
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act
HCP	Habitat Conservation Plan
HCPA	Habitat Conservation Plan Association
MSAA	Master Streambed Alteration Agreement
NCCP	National Community Conservation Plan
NCCPA	National Community Conservation Planning Act
NEPA	National Environmental Policy Act
NWP	Nationwide Permit
PGP	Programmatic General Permit
RGP	Regional General Permit
RWQCB	Regional Water Quality Control Board
SWRCB	State Water Resources Control Board
USACE	U.S. Army Corps of Engineers
USFWS	U.S. Fish and Wildlife Service

**Figure 1. Parallel Section 10 ESA and Section 404 CWA Compliance for the East Contra Costa HCP/NCCP**

