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Legal Update: Army Corps of Engineers Issues New Endangered Species Act Section 7 Guidance

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On June 11, 2013, the Army Corps of Engineers ("Corps") issued a new Endangered Species Guidance Document ("Guidance") on the Section 7 consultation requirement for federal discretionary actions. While focused primarily on the Corps' public works projects, the Guidance also sets forth the Corps' position on issues that may be relevant to private California real estate development projects requiring Clean Water Act ("CWA") Section 404 fill permits that trigger consultation under the Endangered Species Act ("ESA").

Consultation Requirement

As background, Section 7 of the ESA requires that Federal agencies, such as the Corps, consult with the resource agencies -- the U.S. Fish and Wildlife Services ("FWS") or the National Marine and Fisheries Service ("NMFS") -- to ensure their discretionary actions do not jeopardize listed species or adversely impact designated critical habitats. (16 U.S.C. § 1536(a)-(d).) The Guidance points out that the results of consultation often seem at odds with the purpose of Corps projects as authorized by Congress, especially projects relating to the maintenance of existing structures, such as dams and levees. The Guidance therefore attempts to clarify the Corps' responsibilities under the ESA in several areas.

Carefully Defining Discretionary Action and Environmental Baseline

The Guidance emphasizes the importance of carefully *defining* the Corps' "action" as the initial step undertaken by the Corps pursuant to Section 7 of the ESA. The regulations define "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part by the Federal agencies in the United States or upon the high seas," and further provide that actions include, but are not limited to, those that "directly or indirectly caus[e] modifications to the land, water, or air." (50 CFR § 402.02.)

The Guidance clarifies that the "mere continued existence" of a Corps structure, such as a dam, cannot be considered to be a "modification" under the regulations. In other words, the mere maintenance of the structure, to maintain the operation of the project, does not in itself modify the existing environment, and the Corps is not required to mitigate the pre-existing impacts of the entire project.

Further, the Guidance clarifies that the maintenance of existing structures is not discretionary. Essentially, the responsibility of maintaining a structure, to serve its intended Congressionally-authorized purpose, is inherent in the initial grant of authority by Congress to undertake construction. However, the Guidance acknowledges that the "how and when" of the maintenance process may still be subject to the Section 7 consultation requirement if it in itself could impact a listed species or designated critical habitat.

The Guidance indicates that careful definition of the action to be undertaken necessarily entails definition of the environmental baseline against which the action's effect will be measured. Upon carefully defining the action, the Corps must prepare a biological assessment ("BA") to be reviewed by the resource agency. The BA's careful drafting can prove decisive in the resource agency's analysis and subsequent determination. In reviewing the BA, the resource agency analyzes "the direct and indirect effects of an action on the species or critical habitat, together with the effect of other activities that are interrelated or interdependent with that action." (40 CFR § 402.02.) The Guidance emphasizes that the ESA only mandates the consideration of effects that are "reasonably certain to occur," a less stringent requirement than National Environmental Protection Act's ("NEPA") requirement to consider "reasonably foreseeable" effects. It further clarifies that, with respect to the action/baseline issue, secondary activities with independent utility that are related to the Corps' primary action should not be included in the analysis if the secondary activity is "reasonably certain" to occur absent the primary action.

Reasonable and Prudent Alternatives

Under the ESA, upon concluding that a discretionary action may adversely impact a listed species or habitat, the resource agency prepares a "biological opinion" ("BO"). A determination of jeopardy or adverse modification requires that the resource agency set forth in the BO reasonable and prudent alternatives ("RPAs") to be considered to avoid the impacts. Importantly, the Guidance clarifies the Corps' position that the RPAs drafted by the resources agency are not legally binding on it, and that it retains discretion to choose various alternative means to ensure ESA compliance, with the caveat that it must be careful as its decision in this regard will necessarily involve legal risks. The Corps' alternatives to incorporating the resource agency's RPAs as written include: canceling the project; disagreeing with the resource agency's assessment and proceeding with the action (while ensuring that no jeopardy or modification takes place); re-initiating the consultation in an effort to receive a more favorable determination; or seeking an exemption.

In addition, the Guidance seeks to facilitate interagency communication and recognition of the deference owed to the Corps' expertise through encouraging the Corps' requests for draft BOs to allow the opportunity for the Corps' review and comment. Such interagency cooperation will help to reconcile the agencies' inherent biases stemming from their divergent Congressionally-mandated missions and obligations.

Conclusion and Implications

While the legal standards governing the delineation of wetlands and other navigable waters as jurisdictional "waters of the United States" under the CWA remain controversial and unclear, the recent Guidance offers some hope to the regulated community in other related areas. Significantly, it reflects (1) a sharpened Corps focus on its lack of discretion to require mitigations with regard to existing projects that are part of the environmental baseline, and (2) added emphasis on the Corps' autonomy – under appropriate circumstances – to reject conditions of project approval and the seemingly compulsory RPAs drafted by the resource agencies. While these may be small steps, if they signal the Corps' willingness to consider deviating from RPAs that require excessive and unreasonable mitigation, they are welcome news to the regulated community.

Questions

If you would like assistance in incorporating the Corps' new principles into your permitting requests or projects, please contact:

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