

OTHER FEDERAL LAWS AND REGULATIONS

SECTION 404 OF THE CLEAN WATER ACT/SECTION 10 OF THE RIVERS AND HARBORS ACT

OVERVIEW

Section 404 of the Clean Water Act (CWA) requires that a permit be obtained from the U.S. Army Corps of Engineers (USACE) for the discharge of dredged or fill material into “waters of the United States, including wetlands”. Section 10 of the Rivers and Harbors Act of 1899 prohibits the unauthorized obstruction or alteration of any navigable waters of the United States without a permit from USACE. If Section 404 jurisdiction encompasses areas regulated by Section 10, USACE typically combines the permit requirements of Section 10 and Section 404 into one permitting process.

USACE issues two types of permits under Section 404 and Section 10, general permits (either nationwide or regional) and standard permits (either letters of permission or individual permits). General permits—nationwide permits and regional general permits—are issued by USACE to streamline the Section 404 process for nationwide, statewide, or regional activities that have minimal environmental impacts. Standard permits—letters of permission and individual permits—are issued for activities that do not qualify for a general permit, i.e., that may have more than a minimal adverse environmental impact.

Waters of the United States is a term used to describe areas that fall under federal jurisdiction under the Clean Water Act. Waters of the United States include, but are not limited to:

- navigable waters;
- tributaries of navigable waters;
- waters that are, were, or may be used in interstate or foreign commerce;
- interstate waters;
- intrastate lakes, rivers, streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds used by interstate travelers for recreation and other purposes, the use, degradation or destruction of which could affect interstate or foreign commerce. This includes waters that:
 - are used by interstate or foreign travelers for recreation
 - are the source of fish or shellfish sold in interstate or foreign commerce, or
 - are used for industrial purposes by industries engaged in interstate commerce.

Figure 6 illustrates the Section 404 and Section 10 permit process.

WHO NEEDS TO COMPLY?

Section 404 and Section 10 requirements apply to any person or entity proposing to work in, over, or under navigable waters of the United States (Section 10), or proposing to dump or place dredged or fill material in waters of the United States (Section 404). Actions typically subject to Section 404 requirements are those that would take place in wetlands or stream channels that convey natural runoff, including intermittent streams, even if they have been realigned. Artificial channels that convey only irrigation water usually are not included, unless they connect directly to jurisdictional waters of the United States. Within stream channels, a permit under Section 404 would be needed for any discharge activity below the ordinary high-water mark, which is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, or the presence of litter or debris.

The following types of activities involving navigable waters of the United States typically require permits from USACE under either Section 404 or Section 10, or both:

- construction or modification of levees, dams, and dikes;
- other structures or work, including excavation, dredging, and/or disposal activities within, under, or over the navigable waters;
- activities that alter or modify the course, condition, location, or physical capacity of these waters; and
- discharges of dredged or fill material.

WHO IS EXEMPT?

Certain activities are exempt from Section 404 permit requirements:

- normal ongoing (as of 1985) farming, ranching, and forestry activities, such as plowing, minor draining of upland areas to waters of the United States, and harvesting;
- constructing and maintaining stock ponds or irrigation ditches, or maintaining drainage ditches;
- constructing or maintaining farm, forest, or mining roads in accordance with best management practices (BMPs);
- maintaining or, in emergency situations, reconstructing structures that are currently serviceable;
- any work in uplands (including sedimentation basins); and

- activities regulated by an approved program of BMPs authorized by Section 208(b)(4) of the CWA; and
- construction of USACE civil works projects specifically authorized by Congress.

There are no exemptions from Section 10 permit requirements.

HOW LONG DOES THE APPROVAL PROCESS TAKE?

The length of the approval process varies with the permit requested. See “What Does the Application and Evaluation Process Entail?” below for more information on these permits.

NATIONWIDE PERMITS. For nationwide permits (NWP) where a preconstruction notification (PCN) is required (see below for details), USACE has 30 days to determine whether a PCN package has been submitted with all required information. Once the package has been determined to be complete, USACE has 45 days (from application submittal) to either verify that the work can be authorized under the applicable NWP, or require that the project proceed under an individual permitting process.

REGIONAL GENERAL PERMITS. To be eligible for a regional general permit (RGP), the applicant must meet conditions similar to those of the NWP program, including prior notification. USACE’s typical review time for RGPs is 30 days.

LETTERS OF PERMISSION. Letters of permission are typically processed within 45 days.

INDIVIDUAL PERMITS. Typical processing time for individual permits is 90–180 days unless a public hearing is required or an EIS must be prepared.

Please note: USACE cannot issue an individual permit or verify the use of a general permit until the requirements of the federal Endangered Species Act (FESA), the Coastal Zone Management Act (CZMA), and the National Historic Preservation Act (NHPA) have been met. In addition, USACE cannot issue or verify any permit until a CWA Section 401 water quality certification has been issued. These processes can take longer than the typical USACE permit processing time and may delay receipt or verification of a permit.

WHAT INFORMATION DOES THE APPLICANT NEED TO PROVIDE?

The application for a standard permit (ENG Form 4345, Application for a Department of the Army Permit) requests the following information:

- a detailed description of the proposed activity, including the purpose, use, type of structures, composition and quantity of dredged or fill material, and location of the disposal site;

- names and addresses of adjoining property owners, others on the opposite side of streams or lakes, or those whose property fronts on a cove and who may have a direct interest because they could be affected by the project;
- enough detail about the location—street number, tax assessor’s description, political jurisdiction, and name of waterway—to allow the site to be easily located during a field visit;
- a list of the status of all approvals and certifications required by federal, state, and local governmental agencies;
- an explanation of any approvals or certifications denied by other governmental agencies; and
- names and addresses of the applicant and the authorized agent (if any), and dates when the project will begin and end.

The applicant must also submit one set of 8-1/2-inch by 11-inch original drawings or good copies that show the location and character of the proposed activity. In addition, three types of additional drawings are required: a vicinity map, plan view, and elevation and/or cross section view. Information regarding the presence of species that are federally listed as threatened or endangered and cultural resources at or near the project site should accompany the permit application.

For nationwide and general permit PCNs (described below), the following information is required:

- the name, address, and telephone numbers of the prospective permittee;
- the location of the proposed project;
- a brief description of the proposed project, the project’s purpose, and direct and indirect adverse environmental effects the project would cause; and
- any other NWP, RGP, or individual permits used or intended to be used to authorize any part of the proposed project or any related activity.

Specific NWPs have additional requirements, such as a wetland delineation or restoration plan for temporary wetland impacts. ENG Form 4345, which must be signed by the applicant, may be used for an NWP PCN. However, the application must clearly state that it is a PCN and must include all information required under the NWP general condition.

WHAT IS THE FEE?

There is a fee only for an individual permit. A fee of \$10 is charged for a permit for a noncommercial activity; \$100 is charged for a permit for a commercial or industrial activity.

The district engineer will make the final decision as to the amount of the fee. No fees are required for letters of permission, any activities authorized by a general permit, or permits for government agencies.

WHAT DOES THE APPLICATION AND EVALUATION PROCESS ENTAIL?

GENERAL PERMITS

NATIONWIDE PERMITS. USACE has developed and adopted a set of 44 NWPs in cooperation with concerned agencies. These permits, which authorize certain activities that comply with both general and specific conditions, apply throughout the country.

No permits are actually issued to the project proponent; once the conditions specified in the NWP are met, the project can move forward. However, certain NWPs require prior notification to and an authorization letter from USACE. This process, called a PCN, is required in all cases for some NWPs, and for other NWPs only when certain impact thresholds are exceeded. The USACE district may exercise discretionary authority to override the NWP and require an individual application and review.

The entire set of NWPs is reauthorized every 5 years. The majority of the current set of NWPs was renewed February 11, 1997, and will require reauthorization by February 11, 2002. On June 7, 2000, USACE added five new NWPs and modified six existing NWPs. These permits are scheduled for reauthorization by June 7, 2005, but will be reauthorized by February 11, 2002, so that all the NWPs will be on the same 5-year review cycle.

The NWPs that may be the most relevant to specific CALFED actions are listed below. Sometimes, projects that appear to qualify for specific NWPs may not meet all the conditions applicable to a particular permit. Therefore, USACE should always be consulted to confirm the applicability of projects to NWPs.

- **NWP 4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.** This permit applies to harvesting devices and activities (such as pound nets and duck blinds) and to fish attraction devices (such as open-water fish concentrators). This permit may also cover installation of fish screens under a certain size. A PCN is not required.
- **NWP 6. Survey Activities.** This permit applies to survey activities including core sampling, soil survey and sampling, surveys of historic resources, seismic exploratory operations, and plugging of exploratory-type bore holes. (Discharges and structures associated with recovery of historic resources are not authorized.) A PCN is not required.
- **NWP 13. Bank Stabilization.** This permit applies to bank stabilization activities necessary to prevent erosion. Materials used for bank stabilization cannot be placed in special aquatic sites, including wetlands, and the activity cannot impair the flow of surface water into or out of any wetland area. A PCN is required for bank

stabilization activities that are more than 500 feet long, or where the volume of stabilization materials placed along the bank below the ordinary high-water mark or the high-tide line exceeds an average of 1 cubic yard per running foot.

- **NWP 14. Linear Transportation Crossings.** This permit applies to fill activities associated with linear transportation facility crossings of waters of the United States, including roadways, railways and trails. For public linear transportation projects, the fill area is limited to one-third of 1 acre and a length of 200 linear feet in tidal waters or nontidal wetlands adjacent to tidal waters, and is limited to one-half of 1 acre in nontidal waters. A PCN is required if the discharge will cause the loss of greater than one-tenth of 1 acre of waters of the United States, or if the discharge is in a special aquatic site.
- **NWP 18. Minor Discharges.** This permit applies to minor activities involving fill material in which the quantity of discharged material and the volume of excavated area does not exceed 25 cubic yards below the ordinary high-water mark or high tide line. The activity must not cause the loss of more than one-tenth of 1 acre of a special aquatic site, including wetlands. A PCN is required for activities that exceed 10 cubic yards below the plane of the ordinary high-water mark or high-tide line, or in special aquatic sites (including wetlands). This NWP cannot be used to authorize the placement of fill material for the purpose of stream diversion.
- **NWP 19. Minor Dredging:** This permit applies to activities involving dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., Section 10 waters) as part of a single and complete project. This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist, but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States.
- **NWP 27. Stream and Wetland Restoration Activities.** This permit allows discharge activities associated with the restoration of former waters, the enhancement of degraded tidal and nontidal wetlands and riparian areas, the creation of tidal and nontidal wetlands and riparian areas, and the restoration and enhancement of nontidal streams and nontidal open-water areas. Activities qualifying for this NWP are those conducted on:
 - nonfederal public and private lands, in accordance with a binding agreement for wetland enhancement, restoration, or creation between the landowner and the U.S. Fish and Wildlife Service (USFWS) or the Natural Resources Conservation Service (NRCS), or voluntary actions for wetlands restoration, enhancement, and creation documented by NRCS pursuant to NRCS regulations;
 - any federal land;

- reclaimed lands previously surface mined for coal, in accordance with a Surface Mining Control and Reclamation Act permit; or
- any private or public lands, provided that a PCN is submitted to USACE.

Example activities covered under the provisions of NWP 27 are the removal of accumulated sediment, the removal of undesirable vegetation, and the restoration or creation of riffle and pool stream structures. This NWP is expected to provide Section 404 authorization for a large percentage of CALFED ecosystem restoration actions.

- **NWP 33. Temporary Construction, Access, and Dewatering.** This permit authorizes temporary structures (including cofferdams), work, and discharges necessary for construction activities, access fills, or dewatering of construction sites. The primary activity must be authorized by USACE or the U.S. Coast Guard, or must not be subject to USACE or Coast Guard regulations. Temporary fills must be removed in their entirety when the construction activity is completed, and affected areas must be restored to pre-project conditions. A PCN is required; it must include a restoration plan containing reasonable measures to avoid and minimize impacts on aquatic resources.

In addition to the specific conditions associated with each particular NWP, all activities authorized under NWPs must comply with a set of 26 general conditions, BMPs, and construction practices to minimize adverse environmental impacts. Four of the general conditions require special attention in relation to CALFED actions:

- **Condition 4: Aquatic Life Movements.** Unless the activity's primary purpose is to impound water, no activity authorized under a NWP may substantially disrupt the movement of aquatic life species indigenous to the water body, including species that normally migrate through the area.
- **Condition 9: Water Quality Certification.** Section 401 of the CWA prohibits federally authorized activities (including those authorized under Section 404 and Section 10) from violating state water quality standards. Therefore, for permit compliance, project proponents must obtain a water quality certification from the State Water Resources Control Board (SWRCB) through the regional water quality control boards (RWQCBs) (see "Section 401 of the Clean Water Act" later in this chapter).
- **Condition 11: Endangered Species.** An activity under a NWP must not jeopardize the continued existence of a species listed as threatened or endangered under FESA. In addition, it must not destroy or adversely modify areas designated as critical habitat. If the activity may affect a listed species or its habitat, USACE must complete the consultation process required by Section 7 of FESA. Once USACE has successfully completed the consultation, the activity can proceed under a NWP. (See

“Federal Endangered Species Act, California Endangered Species Act, and Natural Community Conservation Planning Act”, earlier in this chapter.)

- **Condition 12: Historic Properties.** The permit applicant must notify USACE if the proposed activity may adversely affect historic properties (e.g., archaeological sites, historic sites, historic structures) that are included on or are eligible for listing on the National Register of Historic Places (NRHP), as required by Section 106 of the NHPA. USACE must provide the California State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP) with an opportunity to comment on the proposed activity and must consider any recommendations made by the SHPO or ACHP. Significant unavoidable impacts on important cultural resources would preclude issuance of a permit. (See “National Historic Preservation Act” later in this chapter.)

REGIONAL GENERAL PERMITS. A USACE division or district engineer may issue an RGP for a type of activity whose impacts are individually and cumulatively minimal and that does not require further authorization by an individual permit. As with NWP, the USACE district will determine and add appropriate conditions to the RGP to protect the public interest. The district may override the RGP and require an individual permit application and review if it determines that concerns about the aquatic environment dictate such actions. The USACE district may revoke an RGP if it determines the permit to be contrary to the public interest. RGPs are issued for a period of no more than 5 years.

The following RGPs issued by USACE’s Sacramento District may be the most relevant to specific CALFED actions during Stage 1.

- **RGP 08, Fill for Spawning Areas.** Issued September 21, 1998; expires September 21, 2003. This RGP authorizes the California Department of Fish and Game (DFG) or its authorized representative to place fill material below the ordinary high-water elevation (in tidal waters, below the mean high elevation) for rehabilitation of salmon spawning areas in the Sacramento-San Joaquin River system.
- **RGP 14, Sacramento-San Joaquin River Delta Dredging for Levee Maintenance.** Issued January 1, 1996; expires January 1, 2001. (This RGP is currently under revision.) This RGP authorizes entities eligible under the Delta Flood Protection Act of 1988 (Senate Bill 34), as well as other public agencies or littoral land owners doing similar work, to dredge below the mean high-water line to obtain material for maintenance and repair of existing serviceable levees in navigable waters of the Sacramento-San Joaquin River Delta. This general permit is intended to be used in tandem with NWP 03, Maintenance, which would authorize the actual placement of the fill for the levee repair.

STANDARD PERMITS

LETTERS OF PERMISSION. USACE’s Sacramento District may issue letters of permission to authorize certain fill activities or work within district boundaries having a minimal

impact on the aquatic ecosystem. A letter of permission is a type of standard permit for an individual action, designed to expedite the permitting process for noncontroversial projects whose applicants perform effective preapplication coordination, formulate projects that comply with the Section 404(b)(1) Guidelines and other program objectives, and propose effective mitigation for unavoidable impacts.

Letters of permission are subject to the same compliance requirements as an individual permit (see below). They may be issued through an abbreviated processing procedure that includes preapplication coordination with federal and state fish and wildlife agencies and an evaluation of the public interest.

INDIVIDUAL PERMITS. Projects that involve discharge activities in waters of the United States but that are not eligible for exemptions, a NWP, RGP, or letter of permission must obtain an individual permit. Individual permits are issued to a single entity (e.g., an agency, joint-power agency, individual, or company) to authorize specific activities.

The steps for obtaining an individual permit are as follows:

1. The project proponent must submit a completed application (ENG Form 4345, Application for a Department of the Army Permit). In addition to the application, the permit applicant must provide an alternatives analysis as required by the U.S. Environmental Protection Agency's (EPA's) Section 404(b)(1) Guidelines along with information about federally listed species and cultural resources that may be present in or near the project area.
2. Once a complete application is received, USACE issues a public notice for a comment period, usually 30 days. Copies of the public notice are distributed via U.S. Mail or email to local, State, and federal agencies, adjacent landowners, and other interested parties who have notified USACE that they wish to receive public notices. The public notice is also posted on USACE's web site.

During this time, USACE will also initiate formal endangered species consultation with USFWS or the National Marine Fisheries Service (NMFS) and, as needed, will conduct the necessary review and coordination regarding any cultural resources that are in the permit area. The applicant should have applied to the RWQCB to obtain water quality certification, and to the San Francisco Bay Conservation and Development Commission (BCDC) for a consistency determination if the proposed project is within the BCDC's jurisdiction.

USACE may require the permit applicant to provide supporting documentation along with the basic application to assist in the decision-making process.

3. Once comments are received, the applicant is notified of any objections to the project or outstanding issues, and is given an opportunity to respond.

4. The culmination of the Section 404 approval process is the preparation of a NEPA document, usually an environmental assessment, and a final decision on the permit application. When it issues an individual permit for the discharge of dredged or fill material, USACE must document that the project complies with the Section 404(b)(1) Guidelines, which state that there must be no practicable alternatives to the proposed discharge that would have fewer adverse impacts on the aquatic ecosystem. According to the guidelines, when the discharge site is a special aquatic site (e.g., a wetland) and the proposed activity is not water-dependent, a less damaging alternative that does not affect a special aquatic site is presumed to exist. The feasibility of an alternative is determined, in light of overall project purposes, as a function of cost, technical, and logistical factors, including the availability of the alternative to the project proponent at the time of market entry. The applicant bears the burden of demonstrating that no practicable alternatives exist that will meet the project purpose and result in less damage to the environment.

The decision by USACE to issue an individual permit for a project is based on an evaluation of the probable impacts of the proposed activity, analyzed according to the Section 404(b)(1) Guidelines, and the effects of the proposed activity on the public interest.

USACE may add special conditions to the permit to ensure the protection of sensitive biological or cultural resources, to require habitat mitigation and monitoring, or to ensure that the project is in the public interest.

DOES THIS PROCESS TRIGGER THE NEED FOR COMPLIANCE WITH OTHER REGULATIONS?

A Department of the Army permit often requires compliance with several other regulations.

- **NEPA.** Compliance with NEPA is required for all permits issued by USACE. If no other federal lead agency is identified for a project, USACE assumes lead agency status for the preparation of a NEPA environmental document (see “National Environmental Policy Act” earlier in this chapter). However, NEPA compliance for general permits is performed at the time the permit is issued and no separate NEPA compliance is necessary for each separate action authorized under the general permit.
- **Section 401 of the CWA.** To issue a permit under Section 404, USACE must ensure that the discharge will not violate state water quality standards. Therefore, in California, project proponents must obtain a water quality certification from RWQCBs in accordance with Section 401 of the CWA (see “Section 401 of the Clean Water Act” later in this chapter).
- **FESA.** If the proposed project may affect a species listed under the FESA, USACE must complete the consultation process required by Section 7 of FESA (see “Federal Endangered Species Act, California Endangered Species Act, and Natural

Community Conservation Planning Act” earlier in this chapter). If another federal lead agency has been identified, that agency may conduct the primary consultation.

- **Section 106 of the NHPA.** If the proposed project may adversely affect historic properties that are included or eligible for listing on the NRHP, USACE must provide the SHPO and ACHP with an opportunity to comment on the proposed activity and must consider any recommendations made by the SHPO or ACHP (see “National Historic Preservation Act” later in this chapter). If another federal lead agency has been identified, that agency would conduct the consultation.
- **CZMA.** For projects within the coastal zone, compliance with Section 404 requires compliance with the CZMA (see “Coastal Zone Management Act” later in this chapter).

WHAT ARE THE OPPORTUNITIES FOR FACILITATING COMPLIANCE WITH THIS PROCESS?

The following are recommended steps to simplify and streamline the Section 404 process for CALFED actions.

- **Avoid impacts through early consultation.** Starting the Section 404 process early in the project planning process addresses two different needs. First, Section 404 and the Section 404(b)(1) Guidelines state that avoidance must be the first approach in addressing potential impacts on waters of the United States. If wetlands on the project site are identified early enough in the project design stage, some or all wetland impacts may be avoided through project redesign. USACE will require documentation of avoidance of wetlands during the Section 404 letter of permission and individual permitting process (although this is also a requirement for general permits, there is less of a need to proactively demonstrate avoidance). In addition, starting the Section 404 process early enables the applicant to include measures in the project description designed to avoid wetland impacts.

Second, by contacting USACE early in the project design process, the project applicant may be able to identify ways to modify the project to avoid the need for a Section 404 permit or to make the project eligible for an expedited Section 404 permitting process. Although not required for most types of permits, a preapplication meeting with USACE, EPA, and USFWS (and, as appropriate, NMFS, DFG, other relevant State resource agencies, and local and regional agencies with authority over land use at the project location) is encouraged; such a meeting allows the attending resource agencies to contribute information that may expedite the permitting process. At this meeting, the resource agencies may suggest that the project proponent modify the project or incorporate mitigation features that will likely be required as part of the formal permitting process. By incorporating these features into the project early in the process, delays caused by the need for redesign of the project late in the process can be avoided.

- **Minimize impacts.** The Section 404(b)(1) Guidelines and the USACE and EPA memorandum of agreement (MOA) regarding habitat mitigation and monitoring, dated November 15, 1989, on wetlands mitigation require that projects minimize negative effects on wetlands for those that cannot first be avoided. According to the MOA, the proper priority sequence in project design is:

1. Avoid adverse effects on wetlands.
2. If avoiding adverse effects is not practicable, minimize effects on wetlands to the extent practicable.
3. If avoiding and minimizing effects is not practicable, compensate for effects on wetlands to replace the function and value of the wetlands.

The Section 404(b)(1) Guidelines and the MOA state that if the project purpose cannot be achieved without affecting jurisdictional areas, the project proponent should strive to minimize disturbance to special aquatic sites and the acreage affected within the jurisdictional boundaries.

When projects can be designed to avoid impacts on wetlands, the need for a Section 404 permit can be eliminated or the use of NWPs can sometimes be possible. When the project description can be designed to include compensatory mitigation for impacts on wetlands, processing of individual permits can be smoother if the applicant has demonstrated that avoidance and minimizing impacts have been considered before mitigation was evaluated.

- **Comply with USACE conditions.** Compliance with Section 404 requires compliance with several other environmental laws and regulations (as described above). When the project proponent works with the pertinent resource agencies early in the process and complies with these other laws and regulations before submitting an application to USACE, the Section 404 permitting process can be expedited. Special attention should be paid to the following:
 - consultation requirements in Section 7 of FESA, for effects on threatened and endangered species;
 - coordination requirements in Section 106 of the NHPA, for effects on cultural resources; and
 - certification requirements in Section 401 of the CWA, for water quality effects.
- **Use specialized CALFED processes.** If the CALFED agencies working with USACE develop a specialized letter of permission process or special RGPs, use of these processes can result in much faster processing times for permits.

- **Tier from the programmatic memorandum of understanding (MOU).** The Programmatic Record of Decision (ROD) for the CALFED Bay-Delta Program Final Programmatic Environmental Impact Statement/Environmental Impact Report (PEIS/EIR) includes a [CWA Section 404 MOU](#) signed by the U.S. Bureau of Reclamation, EPA, USACE, and California Department of Water Resources (DWR). Under the terms of the MOU, when a project proponent applies for a Section 404 individual permit for CALFED projects, the proponent is not required to re-examine program alternatives already analyzed in the PEIS/EIR. USACE and EPA will focus on project-level alternatives that are consistent with the PEIS/EIR when they select the least environmentally damaging practicable alternative at the time of a Section 404 permit decision, unless new information is submitted that indicates that the programmatic-level information is incorrect or incomplete. USACE must consult with the relevant agencies and interested stakeholders and assess whether new information or circumstances warrant additional review of programmatic alternatives and program commitments.

As an example, consider a CALFED project to construct and operate a new surface water reservoir. In preparing the Section 404(b)(1) alternatives analysis, the project proponent would not be required to consider increases in water use efficiency as an alternative to surface water storage, as long as the water use efficiency commitments included in the ROD were met. The project proponent would be required to analyze only site-specific alternatives that met the site-specific purpose and need statement. These could include alternative reservoir locations or sizes. However, any beneficiaries of water supplies from the project would need to demonstrate compliance with the applicable urban or agricultural council agreements and applicable state laws relative to water use efficiency.

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