



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
1455 MARKET STREET, 16TH FLOOR
SAN FRANCISCO, CALIFORNIA 94103-1398

June 20, 2014

Executive Office

SUBJECT: NOTICE OF PERMIT SUSPENSION
FILE NO. 1991-194740N

Mr. Charlie Fielder
District 1 Director
California Department of Transportation
P.O. Box 3700
Eureka, California 95502

Dear Mr. Fielder:

This letter is written in reference to Department of the Army Permit 1991-194740N, which authorized you to construct a new segment of U.S. Highway 101 (U.S. 101) that will bypass the City of Willits in Mendocino County California (Willits Bypass Project), beginning at Post Mile 43.1 and terminating at Post Mile 45.6, City of Willits, Mendocino County, California. Based on an onsite mitigation compliance inspection on June 17, 2014, January 14, 2014, and June 25, 2013, letters dated June 20, 2013, and August 16, 2013, and numerous phone and email communications between Corps staff and Caltrans staff, the Corps has determined Caltrans is not in compliance with Corps Permit 1991-194740N, dated February 16, 2012. Caltrans has failed to complete mitigation site preparation actions in a timely manner as required in the Mitigation and Monitoring Plan (MMP), dated January 2012. Additionally, Corps staff is concerned that future required mitigation actions detailed in the MMP will ~~be~~ continue to be behind schedule as a result of the contracting situation for the mitigation construction. Due to the ongoing and serious nature of this non-compliance, Corps Permit 1991-194740N is conditionally suspended. No additional permitted work within waters of the U.S., including wetlands, may occur on the bypass construction until Caltrans complies with the permit conditions. Construction may continue on the compensatory mitigation project as long as it is itemized and approved by the Corps in writing as described in this letter.

In accordance with our regulations at 33 C.F.R. § 325.7 modification, suspension, or revocation of permits, the district engineer may reevaluate the circumstances and conditions of any permit and initiate any action to modify, suspend or revoke a permit as may be made necessary by considerations of the public interest. Within ten (10) days of the receipt of this notice you may request a meeting with me and/or a public hearing to present information in this matter. Please be advised, my last day in command is June 27, 2014. I am tentatively available to meet on June 24 between 0830 and 0930 hours and 1500 and 1600 hours. After the completion of the meeting or hearing, I will take action to reinstate, modify, or revoke the permit.

The Corps considers non-compliance a serious breach of permit conditions. Over the past two years, Corps staff has repeatedly met and worked with Caltrans staff to bring the permit into compliance. These efforts have largely been unsuccessful in ensuring that Caltrans provides the compensatory mitigation required concurrent with wetland fill and impacts. Currently, Caltrans has failed to fulfill and/or adequately respond to a list of permit conditions, corrective measures, and other major concerns.

Caltrans is currently out of compliance with the following conditions of Corps Permit 1991-194740N:

Special Condition 1: The Permittee shall mitigate for permanent impacts to 42.76 acres and temporary impacts to 22.91 acres of waters of the U. S. associated with Phase I of the Project, through restoration (rehabilitation) of 344.63 acres and establishment of 49.58 acres of wetlands and the rehabilitation of 19.03 acres of other waters of the U.S. as described in the final mitigation plan: “Willits Bypass Project Mitigation and Monitoring Proposal”.

Special Condition 3: A performance bond or other Corps-approved financial assurance mechanism, or alternate mechanism, such as a formal and documented commitment from Caltrans or a public authority, must be in place within ninety (90) days following permit issuance or prior to commencing the permit activity, whichever is sooner. It must ensure a high level of confidence that the compensatory mitigation will be performed and maintained, in accordance with 33 C.F.R. § 332.3(n) and the Institute for Water Resources White Paper, *Implementing Financial Assurance for Mitigation Project Success*, June 2011.

Special Condition 5: The Permittee shall record a Conservation Easement (CE) in a form approved by the Corps, which shall run with each off-site mitigation parcel, obligating the Permittee, its successors and assigns to protect and maintain the mitigation areas (parcels identified in Tables 6-2, 6-4, and 6-5 of the MMP, and as shown in Figures L-1 through L-34 of Appendix E (“Design plans for Offsite Mitigation”) dated February 1, 2012) as natural, unmanaged, wetland and other waters in perpetuity. Each CE will identify that the mitigation parcels shall not have any agricultural or management activities that may reduce or diminish successional vegetation development, without prior approval from USACE. Each CE must include a 3rd party easement holder qualified to hold easements pursuant to California Civil Code § 815.3 and California Government Code § 65965. Each CE must also identify the Corps as a 3rd party beneficiary. The Permittee must provide monies in the form of an endowment (as specified in Chapter 13 of the final mitigation plan) for the purposes of fulfilling the 3rd party easement holder’s responsibilities under the CE. Each CE shall abide by and fulfill all requirements of the “Willits Bypass Project Mitigation and Monitoring Proposal,” dated January 2012, and prepared by Caltrans (Willits Bypass Project MMP). Review of CE will include review of title reports all off-site mitigation parcels with maps depicting any recorded easements. CEs shall have as an exhibit the Willits Bypass Project MMP, and

reference this document's adaptive management plan and long-term management plan. Each CE shall preclude establishment of fuel modification zones, paved public trails, drainage facilities, walls, maintenance access roads and/or future easements, except as provided in the Project Description (described in this permit). Further, to the extent practicable, any such facilities outside the CE shall be sited to minimize indirect impacts on the avoided, created, restored and enhanced wetland and non-wetland waters of the U.S. Prior to its execution and within six months of issuance of this permit, the Permittee shall submit drafts of each CE to the Corps for review. The Permittee shall not execute or record any CE until it has received written approval from the Corps. No later than 30 calendar days after receiving Corps approval of the final draft CEs, the CEs shall be executed and recorded and a recorded copy furnished to the Corps.

The Corps has two major concerns, which were detailed in our non-compliance letter dated June 20, 2013. The outstanding concerns are as follows:

1. Financial assurances, specifically allocation of a long-term endowment for transfer to a non-profit conservation investment organization and full funding of all tasks, such as inspectors, related to mitigation compliance. How does Caltrans intend to complete the MMP with less funds than anticipated? Provide cost breakdown of how Caltrans will successfully complete the MMP in a timely fashion.
2. Updated mitigation implementation schedule. As stated in the Corps' letter, dated January 25, 2013, we expect to be kept up-to-date on mitigation activities. Figure 7-1 of the MMP, dated January 2012, is a Mitigation Implementation Schedule that indicates that site preparation should commence June 1, 2013, for eight of the off-site mitigation parcels. Since the Baseline data study required by Special Condition 10 has not been concluded and the resulting report approved by the Corps, this schedule may need revision. Caltrans is also advised that delays in the mitigation implementation schedule may result in the requirement of additional mitigation to compensate for the temporal loss. Provide an updated Figure 7-1 that reflects the current anticipated schedule.

The Corps required five corrective measures in our non-compliance letter, dated August 16, 2013. Caltrans is out of compliance with the following Corrective Measures:

Corrective Measure 2: Complete site preparation requirements (including cattle removal, fencing, and other requirements from Chapter 7 of the MMP) by October 1, 2013.

Corrective Measure 3: Complete revisions of all MMP chapters that have not met, or are likely to not meet, time deadlines in the January 2012 MMP.

In addition to immediate compliance with the permit conditions and initial corrective measures, the Corps requires additional corrective measures to ensure appropriate mitigation and financial assurances. These measures are consistent with the information stated in previous non-compliance letters, "Failure to successfully accomplish goals, or provide acceptable reports within timelines established by the corrective measures, may result in additional mitigation requirements, administrative fines, or permit suspension. The Corps will utilize the SPD Mitigation Ratio Checklist to assess additional mitigation for failing to comply with the MMP timelines." The additional corrective measures are as follows:

1. Revised implementation schedule, as identified in the January 2012 MMP, with current and realistic deadlines for contracting, site preparation activities, propagule collection and mitigation site construction. This revised implementation schedule should be easily comparable to Figure 7-1 so the Corps may accurately determine the temporal loss in the compensatory mitigation. This revised implementation schedule is due by July 15, 2014.
2. Completed and signed native seed collection and propagule collection contract for the mitigation project by July 15, 2014.
3. Itemized list of all mitigation project ground disturbing and fill activities for the remainder of 2014, due by July 15, 2014.
4. Caltrans staff has been excellent partners in the revisions of MMP Chapter 9. At this time there are numerous other chapters of the MMP that require revisions due to contracting and construction delays. Corps staff will arrange a meeting with Caltrans staff by July 15, 2014 to revise and update the MMP.
5. As a result of the failure to implement the mitigation plan concurrently with impacts to waters of the U.S. (Special Condition 1), Caltrans is required to provide an additional 5.727 acres of wetland establishment, and an additional 9.015 credits of wetland rehabilitation. This is required to compensate for the 6 months of additional temporal loss as of June 2014. You must provide a proposal for the additional compensatory mitigation or a proposal for a reduction in fill in waters of the U.S., including wetlands, by July 15, 2014.


Failure to remain in compliance with the permit, including all Special Conditions, may result in permit revocation or modification and administrative penalties. Pursuant to section 309(g) of the Clean Water Act, the Corps is able to levy Class I Administrative Penalties of up to \$11,000 per violation of a Special Condition of a permit, to a maximum of \$27,500. Among the other enforcement options available are actions in Federal District Court for fines and injunctions requiring work cessation and/or restoration. The court may also require that the restoration be performed by a third party and be funded through a money judgment against the permittee.

This Corps permit is conditionally suspended. No additional permitted work on the bypass construction project may occur until Caltrans complies with corrective measures 1 through 5 above. In addition, further delays in mitigation project construction could result in the assessment of additional wetland mitigation to compensate for every month of additional temporal loss of wetlands since July 2013.

Within 10 days of the receipt of this letter, please provide a response indicating that you have reviewed the information outlined above, and any relevant information you have relating to these non-compliance issues. You must also submit your request for a meeting with me and/or a public hearing within 10 days of the receipt of this notice. Submit this information to the Chief, Regulatory Division, Attn: Sahrye Cohen, 1455 Market Street, San Francisco, California 94103.

If you have any questions regarding this matter, please contact Sahrye Cohen in our Regulatory Division at 415-503-6779 or via e-mail at Sahrye.E.Cohen@usace.army.mil.

Sincerely,


John K. Baker, P.E.
Lieutenant Colonel, US Army
District Engineer

Copies furnished:

Congressman Jared Huffman, California District 1
U.S. Attorney, San Francisco, CA
U.S. EPA, San Francisco, CA
California Department of Fish and Wildlife, Eureka, CA
North Coast Regional Water Quality Control Board, Santa Rosa, CA
National Marine Fisheries Service, Santa Rosa, CA
Malcolm Dougherty, Caltrans Director, Sacramento, CA