UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

January 9, 2004

Colonel Timothy J. Gallagher
District Engineer
U.S. Army Corps of Engineers
Alaska District
P.O. Box 898
Anchorage, Alaska 99506-0898

Re: SPN 03-07

Dear Colonel Gallagher:

The National Marine Fisheries Service (NMFS) has reviewed the above referenced Special Public Notice (SPN)2003-07. The SPN is part of the Corps of Engineers' (Corps) national efforts per the national Mitigation Action Plan to respond to recommendations received from the National Academy of Science, National Research Council in its findings after review of the Corps Regulatory Program procedures and requirements for compensatory mitigation.

Background

Pursuant to 33 Code of Federal Regulations (CFR) Parts 320 to 330, permit applications for the discharge of dredged or fill material into waters of the United States (U.S.), including wetlands must be evaluated in accordance with the Environmental Protection Agency's (EPA) Section 404(b)(1) Guidelines (40 CFR Part 230). The Guidelines are the substantive criteria used in evaluating proposed discharges of dredged or fill material to the aquatic environment to ensure environmental impacts are acceptable, and that all practicable measures have been taken to reduce these impacts.

These regulatory requirements have been interpreted in several policy memoranda over the years. The May 13, 1994, memorandum noted that avoidance of impacts to wetlands and compensatory mitigation may not be practicable in areas where a high proportion of available land is wetlands. Further, minimization of project impacts through reduction of project footprint, co-location of facilities where possible, and seeking to locate the project in lower value wetlands are emphasized over avoidance or compensatory mitigation. Compensatory mitigation is frequently not practicable where wetlands are the overwhelming majority of land cover type, are lacking suitable sites for creation, enhancement or restoration. In addition, restoring or creating wetlands presents unique technical challenges due to the short growing seasons and shallow growing layer in wetlands dominated by permafrost. For these reasons, in Alaska, minimization (and avoidance) has frequently been the primary means of achieving compliance with the Guidelines. However, this does not preclude the Alaska District from requiring compensatory mitigation on a case-by-case basis where appropriate and practicable.

Comments

Compensatory mitigation is the restoration, enhancement or preservation of aquatic resources in order to compensate for losses of functions and values of those resources, such as contaminant filtration, fish and wildlife habitat, and flood water retention. The Corps' Alaska District makes the determination whether compensatory mitigation will be required or not for 404 permit authorization on a case by case basis.

The Compensatory Mitigation Plan Checklist is structured so that it easily addresses mitigation for wetlands, however as currently structured it may not be useful for other waters of the United States such as nearshore marine areas. We understand that the checklist is meant as a technical guide and note that the Guidelines also pertain to restoration of other aquatic resources. NMFS would be happy to work with the Corps' Alaska District to adapt the checklist to account for nearshore marine waters and other associated resources.

In addition, mitigation banks and in-lieu-fee mitigation are examples of compensatory mitigation used by the Corps' Alaska District. NMFS suggests that the Alaska District Mitigation Guidlines should should reference the existing guidance for these, as both mitigation banking and in-lieu fee-mitigation can serve as effective and useful approaches to satisfy compensatory mitigation requirements. Likewise, the Alaska District Mitigation Guidelines should address research and education as other approaches to complement compensatory mitigation. The Corps has required educational efforts on a number of projects in Alaska. Research may also be beneficial in certain circumstances because so little is known about so many resources.

Jeanne Hanson is NMFS point of contact on this subject, and can be reached at 271-3029.

Sincerely,

For James W. Balsiger
Administrator, Alaska Region

cc: USFWS, EPA, OPMP, OHMP, ADEC - Anchorage