

California Native Plant Society

North Coast Chapter
P.O. Box 1067
Arcata, CA 95518
July 16, 2004

David Ammerman, Permit Manager
Army Corps of Engineers
333 Market Street
San Francisco, CA 94105-2197

Re: Public Notice Number 28433N
Martin Ranch, Del Norte County, CA
Project Applicant: Elk Valley Rancheria

Dear Mr. Ammerman,

The California Native Plant Society (CNPS) is a nonprofit organization of nearly 10,000 amateurs and professionals dedicated to the preservation of California's diverse native flora. CNPS conducts a variety of conservation efforts focused on long-term protection and preservation of native flora in its natural habitat. The Society has been assessing the status of rare plant species for over 30 years, and is the foremost non-governmental organization working to protect rare, threatened, and endangered plants in California. The North Coast Chapter is one of 32 chapters and represents 300 members in Humboldt, Del Norte and Trinity Counties.

We are writing this letter on behalf of CNPS and the Environmental Protection Information Center (EPIC) of Garberville, California to urge you to deny the Section 404 permit to fill 9.46 acres on this site. The proposed project does not adequately address direct, indirect and cumulative impacts, nor does it propose acceptable mitigation for wetlands slated for destruction. In addition to biological issues, various procedural issues are not adequately addressed by the Public Notice currently under review. The Army Corps of Engineers (ACOE) should postpone consideration of this permit until a federal consistency determination is made by the California Coastal Commission, and until an Environmental Impact Statement is released for public review and comment. At this point in time, the project applicant has not met the requirements of applicable federal law, nor does the public have all the information necessary to review and comment on the proposal.



Dedicated to the preservation of California native Flora

I. Failure to Comply with NEPA

We believe that the National Environmental Policy Act (NEPA) requires that Army Corps circulate an Environmental Impact Statement (EIS) for public review and comment prior to authorizing this project. The requirements of NEPA are not satisfied by limiting public review to the Public Notice (PN), especially given the inadequate and vague information it contains.

Despite the fact that the proposed project would have significant environmental effects that are of great public concern, the Army Corps is attempting to bypass its obligation to include the public in its decisions affecting the environment. In addition to the deficient information discussed herein, the PN does not contain an alternatives analysis or an analysis of the Least Environmentally Damaging Practicable Alternative (LEDPA). If the Army Corps limits public review and comment to the PN, the public will be denied any opportunity to review these analyses if and when the Corps conducts them, and therefore, the important role of the public in the NEPA process will be improperly constrained and left unfulfilled.

"Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 CFR § 1501.2.

Cooperating agencies are permitted to adopt an EIS signed by the lead agency, provided they undertake "an independent review of the statement" and determine that their "comments and suggestions have been satisfied." 40 C.F.R. § 1506.3(c).

The Corps may only issue a permit for a project found to be the Least Environmentally Damaging Practicable Alternative (LEDPA). This can only be done if the decision is informed by public process that includes an EIS. Since the Bureau of Indian Affairs has not even completed the Draft EIS at this time, it is premature for the Corps to issue a permit or undertake public review of the permit application at this time.

"NEPA does not work by mandating that agencies achieve particular substantive environmental results," but it does "work" by requiring that the environmental consequences of an action be studied before the proposed action is taken. *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 371 , 109 S.Ct. at 1858.

The Corps must have before it a full picture of the environmental consequences of its actions and take a "hard look" of these consequences prior to issuing a permit. An agency has met its "hard look" requirement if it has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs.*, 463 U.S. at 43, 103 S.Ct. at 2866. The court will overturn an agency's decision as arbitrary and capricious under "hard look" review if it suffers from one of the following: (1) the decision does not rely on the factors that Congress intended the agency to consider; (2) the agency failed entirely to consider an important aspect of the problem; (3) the agency offers an

explanation which runs counter to the evidence; or (4) the decision is so implausible that it cannot be the result of differing viewpoints or the result of agency expertise. *Id.*, 103 S.Ct. at 2867.

II. Lack of Federal Consistency Determination

The Public Notice for a Section 404 permit prior to federal consistency determination and certification is premature and should be postponed due to lack of information.

Under Section 307 (c) (3)(A) of the Coastal Zone Management Act (CZMA), 16 USC Section 1456 (c) (3)(A), federally permitted activities that effect any land or water use or natural resource of the coastal zone are required to be consistent with the affected state's coastal management program. Coastal Consistency Certification must be in compliance with Section 930.50 *et seq.* of the National Oceanic and Atmospheric Administration Federal Consistency Regulations (Title 15 Code of Federal Regulations Part 930).

The proposed project must comply with the enforceable policies of California's approved management program and will be conducted in a manner consistent with such program (15 CFR § 930.57(b)). At this time, there is no basis for a finding of federal consistency with applicable laws and regulations, since the draft environmental impact statement is pending.

The proposed project does not comply with state and federal law at this time, and therefore it is unlikely that federal consistency will be met by this project as submitted. There is not sufficient information for either the public or trustee agencies to adequately review this project at this time. It would be irresponsible and premature for the ACOE to issue a Section 404 permit without further information. A new Public Notice should be issued after the consistency determination is made, and when sufficient information is submitted to evaluate the effects of this project.

III. Impacts to Botanical Resources

Direct, indirect, and cumulative impacts to rare, threatened and endangered plant species are not adequately addressed by the project proposal.

Direct impacts to botanical resources cannot be evaluated at this time due to lack of substantial information. Botanical surveys conducted according to state and federal standards (CDFG 2000; U.S. FWS 1996) must be conducted and the results submitted for review before impacts to sensitive species can be evaluated. A determination on significant impacts of the project in the absence of this information would be inappropriate and illegal, and does not conform with the California Coastal Commission's general procedures for evaluating the performance of wetland mitigation projects as described in Hymanson and Kingma–Rymek (1995).

The proposed project site is adjacent to the Crescent City Marsh Wildlife Area (CCMWA), which is owned and managed by the California Department of Fish and Game (CDFG). The property was acquired in 1979 for protection of coastal freshwater wetlands. In 1991, the largest known population of the State and federally listed endangered western lily (*Lilium occidentale*) was discovered at the CCMWA. The Department of Fish and Game's primary management goals for this property include maintenance and enhancement of existing western lily populations, early successional fen habitats, and coastal prairie vegetation.

The Crescent City Marsh and environs are home to more than 230 plant species, at least a dozen of which are considered rare, threatened, or endangered by state and federal laws (CNPS 2001; CDFG 2002). Rare, threatened, or endangered plants of the wetland (fen) habitats include:

- Western lily (*Lilium occidentale*)
- Arctic starflower (*Trientalis arctica*)
- Great burnet (*Sanguisorba officinalis*)
- Green sedge (*Carex viridula* var. *viridula*)
- Lyngbye's sedge (*Carex lyngbyei*)
- Marsh pea (*Lathyrus palustris*)
- Marsh violet (*Viola palustris*)
- Vanilla grass (*Hierochloa odorata*)

Several rare plant communities occur in the Marsh, at least one of which is found nowhere else in California. Known as buckbean marsh, this plant community is dominated by the buckbean (*Menyanthes trifoliata*), more common in the Sierra Nevada and Cascade Mountains of Oregon.

Significant changes in recharge and storage through subsurface connections between wetlands of the Crescent City Marsh Wildlife Area and those of the Martin's Ranch which are proposed for development would likely have significant negative impacts on the adjacent wetlands and the sensitive species which occupy these habitats. Additional impacts related to the proposed project include runoff from proposed roads, pesticide-related impacts from the proposed golf course, and impacts from invasive non-natives that may be used in landscaping around the development. The proposal does not include enough information to address these concerns, and the permit should not be issued until more information and appropriate alternatives are submitted.

IV. Impacts to Listed Species

Direct, indirect, and cumulative impacts to listed species are not adequately addressed by the project proposal, and cannot be evaluated at this time due to lack of substantial information.

The Western Lily

The western lily (*Lilium occidentale*) is a federally listed endangered species known from early successional fens and coastal scrub from northwestern California to central Oregon. It was listed as endangered without critical habitat in 1994. More than half of all known flowering plants occur at the Crescent City Marsh Wildlife Area. The population is currently estimated at 2,000 plants and represents the only recovery-level population as defined by the federal recovery plan for the species (Bencie and Imper 2003; U.S. Fish and Wildlife Service 1998). The population at the Crescent City Marsh Wildlife Area has been in decline for the past five years, and this decline may be associated with impacts to water levels of past development within the watershed. Since the proposed project seeks to develop a substantial portion of the remaining wetlands upslope from the lily population, it is likely that such development would have significant direct, indirect, and cumulative negative impacts to the western lily population. Such impacts may in fact jeopardize the recovery of the species, since this population is the only viable population of the species.

The project as submitted proposes to discharge 60,000 cubic yards of fill into 9.46 acres of wetlands that qualify as waters of the United States. Such discharge is not consistent with federal regulations, which state that:

The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species (33 CFR § 323.4 (a)(6)(ix)).

The Public Notice states that the Bureau of Indian Affairs (BIA), as the Lead Agency, intends to initiate a Section 7 informal consultation with the U.S. Fish & Wildlife Service. According to the Endangered Species Act of 1973, Section 7(a)(2):

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available (16 U.S.C. § 1536 (a)(2)).

An informal consultation with the U.S. Fish & Wildlife Service is inadequate for this project. A formal consultation must be initiated to ensure that the western lily is protected in a manner that will ensure the species' recovery and survival, and in a manner that is consistent with federal laws and regulations. According to the Endangered Species Act,

All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act (16 U.S.C. § 1536 (a)(1)).

According to 16 U.S.C. § 1532 (3),

The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, **law enforcement**, habitat acquisition and maintenance, propagation, live trapping, and transplantation [emphasis added].

The recovery of the western lily depends on the conservation and protection of the Crescent City Marsh Wildlife Area. If the western lily population in this location is not protected from impacts that result in a decline of the population, the recovery goal of downlisting to threatened will certainly not be met, and the species as a whole is likely to be jeopardized.

The Marbled Murrelet and the Northern Spotted Owl

The proposed action has the potential to modify northern spotted owl habitat and disturb marbled murrelets and northern spotted owls in Jedediah Smith State Park. Construction activities and long-term ongoing disturbance related to the proposed project during these species' breeding seasons could result in direct, indirect, and cumulative significant negative impacts to these species, both of which are federally listed. According to a recent scientific report, the marbled murrelet faces a 100% probability of extinction in California, Oregon, and Washington within the next forty years (Portland Oregonian, May 5, 2004).

The lack of information on the presence, abundance, and reproductive status of these species within the project area should be disclosed prior to the public review period. Impacts to critical habitat should be analyzed in conjunction with this permit application, and this information is also absent from the proposal as submitted.

V. Impacts to Wetlands

Direct, indirect, and cumulative impacts to onsite and adjacent wetlands are not adequately addressed by the project proposal.

Direct impacts to wetlands cannot be evaluated at this time due to lack of substantial information. Surveys should be conducted to determine the presence, quality, and abundance of wetland habitats in the area proposed for development. Standard wetland

surveys and delineation should be conducted (Cowardin et al. 1979; Environmental Laboratory 1987) and the results submitted for review before impacts to wetland habitat can be evaluated. A determination on significant impacts of the project in the absence of this information would be inappropriate and illegal.

A detailed hydrologic study should be conducted using the best available scientific information to determine the relationship between wetlands of the Crescent City Marsh Wildlife Area and those of the Martin's Ranch which are proposed for development. The best scientific information should be used to determine the existing subsurface connections and relationships between the various wetlands in the watershed, and how changes would potentially affect water levels at the Crescent City Marsh. Information on how the Martin's Ranch wetlands are currently contributing to the recharge and/or storage of subsurface water flowing to the Crescent City Marsh is crucial information necessary to evaluate potential direct and cumulative impacts to the western lily and other sensitive species and habitats. The ACOE should request this information and appropriate hydrologic studies be conducted prior to evaluating this proposal.

VI. Inadequate Mitigation

The proposed project states that 9.46 acres of wetland will be filled, and that these impacts will be mitigated by creation of replacement wetlands, 3 acres of which are onsite, 4 acres of which are offsite, and protection of 17 acres of wetlands offsite. These proposed mitigations are inadequate for several reasons:

Creating replacement wetlands is inappropriate since artificial wetlands cannot replace the biologically unique ecosystem that is lost when intact wetlands are destroyed.

Creating onsite replacement wetlands will not necessarily mitigate significant negative impacts to the western lily and other rare, threatened, and endangered plant species in the Crescent City Marsh Wildlife Area. A detailed hydrologic study should be conducted using the best available scientific information to determine impacts related to wetland fill, summer irrigation and pesticide use associated with the proposed golf course, increased runoff associated with the proposed roads, and changes in water table levels and underground input associated with the proposed replacement wetland.

Creating offsite replacement wetlands will not mitigate impacts to the biological resources within the watershed, including the adjacent Crescent City Marsh Wildlife Area. Offsite mitigation is entirely inappropriate as mitigation to such a unique site and should not be considered to mitigate the impacts of the proposed project in any way.

The 17-acre offsite wetland proposed for protection as mitigation is already protected under federal and state law, and no significant conservation benefit would result from claiming that protection as mitigation for the proposed fill.

VII. Conclusion

The Army Corps must consider all direct, indirect, and cumulative impacts that could result from the proposed project, including growth-inducing impacts that such development could generate in the future.

We urge you to deny the Section 404 permit as proposed in this Public Notice. The proposed project does not adequately address direct, indirect and cumulative impacts, nor does it propose acceptable mitigation for wetlands slated for destruction. The Army Corps of Engineers (ACOE) should postpone consideration of this permit until adequate information is submitted for public review and comment. At this point in time, the project applicant has not met the requirements of applicable federal law, nor does the public have all the information necessary to review and comment on the proposal.

Sincerely,



Jennifer Kalt, Conservation Chair
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and

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Cc:

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Michael Long, U.S. Fish and Wildlife Service, Field Supervisor, Arcata Office
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Karen Kovacs, California Department of Fish and Game

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