

California Native Plant Society

North Coast Chapter
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SUBMITTED BY EMAIL AND U.S. MAIL

Mr. David Ammerman
Eureka Field Office
U.S. Army Corps of Engineers
P.O. Box 4863
Eureka, CA 95502

Subject: Public Notice 256720N, Proposed Eco-Nutrients Compost Operation and Wetland Mitigation, Hambro Forest Products, Elk Valley Road, Del Norte County, CA

Dear Mr. Ammerman,

The following comments are submitted on behalf of the California Native Plant Society and the Center for Biological Diversity.

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 represents 300 members in Humboldt, Del Norte, and Trinity Counties. Our chapter has worked for many years to protect and restore the habitat of the federally endangered western lily, *Lilium occidentale*, at sites near Crescent City and Table Bluff (adjacent to Humboldt Bay).

We are concerned that the proposed Compost Operation and Wetland Mitigation described in Public Notice 256720N ("Public Notice") will have significant negative impacts to the endangered western lily and the Crescent City Marsh. The Crescent City Marsh is an environmentally sensitive habitat area within the Coastal Zone, and is home to the only recovery-level population of the federally endangered western lily, *Lilium occidentale* (Bencie and Imper 2003). The Marsh

is also home to many other species of sensitive plants, and is the only known California occurrence for several species. The Crescent City Marsh Wildlife Area was purchased by the California Department of Fish & Game to protect this unique and sensitive area.

Preferred Project is not the Least Environmentally-Damaging Alternative

The Public Notice does not include an analysis of reasonable alternatives, but simply states that the project applicant has selected the Preferred Project Alternative as the Least Environmentally-Damaging Project Alternative in accordance with EPA guidelines. However, the Off-site Alternative (Alternative 3) should be analyzed in more detail since relocating the project away from environmentally-sensitive habitat areas would most likely be the Least Environmentally-Damaging Project Alternative. According to the U.S. EPA's 404 (b)(1) Guidelines:

Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative. The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a) requires that no discharge shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact to the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment. Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).¹

Locating the project to a more appropriate site should be thoroughly considered. The proposed location within the watershed of the only recovery-level western lily population is inappropriate, especially since the western lily was documented at the south property line in 1992 (Public Notice, page 4).

Both federal and state laws and policies require an adequate analysis of a reasonable range of alternatives to the project. As required under CEQ regulations 40 CFR 1502.2(d), NEPA documents must include a section stating how each alternative analyzed in detail would or would not achieve the requirements of sections 101 and 102(1) of NEPA and other environmental laws and policies. NEPA Sec. 101 [42 USC § 4332] states that:

[A]ll agencies of the Federal Government shall -- (E) study, develop, and describe appropriate alternatives to recommended courses of action in any

¹ U.S. EPA Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR 230, posted at <<http://www.epa.gov/owow/wetlands/regs/mitigate.html>>

proposal which involves unresolved conflicts concerning alternative uses of available resources.

Proposed Project is not a Coastal-Dependent Use

The Purpose and Need for the proposed project does not describe a coastal-dependent use. According to the Public Notice, "the project is considered by the Army Corps to be not water-dependent because the project does not require being located next to waters of the U.S." (page 5).

The Coastal Act defines "environmentally sensitive area" (ESHA) as an area in which plant or animal life or their habitats are either rare or especially valuable because of their nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." Cal. Pub. Res. Code § 30107.5. Under the Coastal Act, ESHAs "shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas." Cal. Pub. Res. Code § 30240(a).

Section 30233(a) of the Coastal Act provides:

- (a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following [, including]: ...
 - (1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.
 - (2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.
 - (3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. The size of the wetland area used for boating facilities, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, shall not exceed 25 percent of the degraded wetland.
 - (4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.
 - (5) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.
 - (6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.
 - (7) Restoration purposes.
 - (8) Nature study, aquaculture, or similar resource dependent activities.

Section 307 (c)(1)(A) of the Coastal Zone Management Act (CZMA) states that:

Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.

Impacts to Wetlands

The Public Notice fails to address wetlands that meet the single criterion definition (hydrology, hydric soils, or hydrophytic vegetation) of wetlands as defined by the U.S. Fish & Wildlife Service, the California Coastal Commission, and the California Department of Fish & Game. The environmental consequences of each alternative should be revised to assess impacts to all wetlands, rather than limiting the discussion to wetlands as defined by the U.S. Army Corps of Engineers. The California Coastal Commission is the primary agency responsible for implementing and enforcing the federal Coastal Zone Management Act, and as such will have authority over federal consistency determination.

Changes in the quantity and seasonality of runoff could severely impact the western lily and other rare plants and plant communities of the Crescent City Marsh. Therefore, a hydrological analysis should be conducted to assess the project's potential impacts on the water table in the Crescent City Marsh throughout the seasons. Information on existing water table levels, seasonal changes in water table levels, site specific information on soils and geology that affect subsurface and surface water interconnectivity, and known life history traits of the western lily should be included. Without this information, the analysis cannot ensure that direct, indirect, and cumulative impacts do not significantly negatively impact the western lily, its habitat, non-listed sensitive species, and the Crescent City Marsh.

According to the Draft Management Plan for the Crescent City Marsh Wildlife Area (CCMWA),

The CCMWA lies within a relatively small watershed of approximately 2,000 acres. Most of the watershed has a low gradient with slow moving water... Because many of the rare plants, including the western lily, occupy only a very narrow elevation band within the marsh, even small changes in water levels caused by increased runoff or sedimentation from land use upstream could impact these species (Wear 2005).

Section 30231 of the Coastal Act states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where

feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Inadequate Mitigation Measures

Removal of unauthorized fill should not be considered as mitigation for the proposed project, especially since the project proponent's unauthorized temporary stockpiling of fill materials damaged the wetlands in the project area.

According to the Public Notice, direct wetland impacts would be mitigated at a one-to-one replacement ratio (page 3). This is the minimum ratio allowed for mitigating impacts to wetlands, and is inappropriately low for environmentally sensitive habitats and suitable habitat for endangered species.

According to III (B) of the U.S. EPA's 404 (b)(1) Guidelines,

Additionally for wetlands, such mitigation should provide, at a minimum, one for one functional replacement (i.e., no net loss of values), with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan, recognizing that this minimum requirement may not be appropriate and practicable and thus may not be relevant in all cases... However, this ratio may be greater where the functional values of the area being impacted are demonstrably high and the replacement wetlands are of lower functional value or the likelihood of success of the mitigation project is low.²

The wetlands of the Crescent City Marsh watershed are unique, sensitive habitats that should be considered to have demonstrably high functional values. According to the Coastal Zone Management Act Title 16 USC § 1453, Sec. 304 (2), the term "coastal resource of national significance" means any **coastal wetland**, beach, dune, barrier island, reef, estuary, or fish and wildlife habitat, if any such area is determined by a coastal state to be of substantial biological or natural storm protective value [emphasis added].

Del Norte Local Coastal Program Concerns

According to the Public Notice, the project site is not in the permitting jurisdiction of the California Coastal Commission, but may be subject to local authority under a Local Coastal Plan appeal-able to the Coastal Commission. The Del Norte County Local Coastal Program was certified by the Coastal Commission and the

² U.S. EPA Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR 230, posted at <<http://www.epa.gov/owow/wetlands/regs/mitigate.html>>

County assumed permit-issuing authority in 1984.³ The County must comply with state and federal Coastal Zone laws and regulations in order to retain permit issuance authority.

According to the Public Notice, the agent for the applicant states that a local special use permit was obtained to temporarily stockpile unclassified soil material excavated from a CalTrans road improvement project on parcel #117-020-14 (page 1). The unauthorized fill was placed on 2.56 acres of wetlands regulate by the Army Corps of Engineers pursuant to Section 404 of the Clean Water Act. If such permit was issued by a local agency without review by the Army Corps and/or the California Coastal Commission, the Del Norte County Local Coastal Program (LCP) should be reevaluated for compliance with laws and regulations governing permit authority.

Under the Coastal Act, the Commission is statutorily required to periodically review LCPs and is authorized to initiate an LCP amendment. Specifically, the Coastal Act requires the Commission to review every certified LCP from "time to time, but at least once every five years." Cal. Pub. Res. Code § 30519.5. The purpose of the Commission's review is to determine whether the LCP is being implemented in a way that is consistent with the purpose of the Coastal Act. Case law reiterates that this periodic review is mandatory. *Citizens of Goleta Valley v. Board of Supervisors*, (1990) 52 Cal. 3d 553, 574.

Impacts to Threatened and Endangered Species

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.

The project has the potential to cause erosion, sedimentation, pollutant loading, and alteration of the hydrological regime of the Crescent City Marsh. Direct, indirect, and cumulative impacts to the western lily and other public trust resources are not adequately addressed in the Public Notice and cannot be evaluated at this time due to lack of substantial information. According to NEPA, "[a]ll agencies of the Federal Government shall— [i]nitiate and utilize **ecological information** in the planning and development of resource-oriented projects."

³ Local Coastal Planning Program Annual Report, June 30, 2004. California Coastal Commission, < <http://www.coastal.ca.gov/la/lcpstatus.html> >

(emphasis added). Sec. 102, (H) [42 U.S.C. § 4332]. Such ecological information should be included if there is to be a meaningful assessment of impacts of the project.

The Public Notice states that the Corps will consult with the U.S. Fish & Wildlife Service pursuant to Section 7 of the Endangered Species Act of 1973, as amended, regarding impacts to the western lily (page 4). Public review and comment is premature since a formal consultation has yet to be completed. The public should be given the opportunity to review the Biological Opinion issued as a result of the formal consultation. The Corps should extend the public comment period until the Biological Opinion is complete and available to the public for review.

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 could be jeopardized. 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)).

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].

Direct impacts to botanical resources cannot be evaluated at this time due to lack of substantial information. The Public Notice states that most of the property appeared suitable for western lily habitat prior to the stockpiling of unauthorized fill, and that surveys had not been done at the seasonally-appropriate time of year to detect the western lily (page 4). Botanical surveys must be conducted according to state and federal standards (CDFG 2000; U.S. FWS 1996) and the results submitted for review before impacts to sensitive species can be evaluated.

Other federally-listed species that could potentially be impacted by the project include the marbled murrelet and the tidewater goby. Impacts to these species are not addressed in the Public Notice, and should be considered by the Section 404 permitting process.

Impacts to Non-Listed Species and Sensitive Plant Communities

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

Direct impacts to botanical resources cannot be evaluated at this time due to lack of substantial information. Botanical surveys must be conducted according to state and federal standards (CDFG 2000; U.S. FWS 1996) and the results submitted for review before impacts to sensitive species can be evaluated. The DEIS fails to include basic requirements of appropriate botanical surveys, including a scoping list of sensitive plants known to occur in the vicinity, complete list of species present, qualifications of surveyors, survey routes, and number of field-person hours. Without such information, CNPS cannot assess whether botanical surveys were conducted in accordance with standards set forth by the Department of Fish & Game (CDFG 2000) and the U.S. Fish & Wildlife Service (U.S. FWS 1996).

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 the following species, all of which qualify for consideration under 14 Cal. Code Reg. § 15380:

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 (*Hierochloe 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.

Conclusion

We appreciate the opportunity for input on this process, and hope that our comments and botanical expertise will help preserve and protect these ecologically spectacular resources for future generations.

Sincerely,



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References:

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