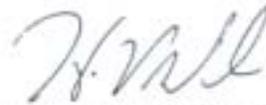


SUBJECT: United States Environmental Protection Agency Section 404(q) Elevation of Section 404 Permit Decision, Sacramento District Permit 199200769 to Diablo Grande Limited Partnership

1. On 4 January 2001, the Assistant Secretary of the Army (Civil Works) (ASA (CW)) sent a letter to the Environmental Protection Agency indicating the U.S. Army Corps of Engineers Sacramento District Commander would be allowed to issue the subject permit. Enclosed is a copy of the letter signed by ASA (CW).
2. In accordance with Part IV (g)(1) of the Memoranda of Agreement with the Environmental Protection Agency, the District may proceed with the final decision. The review of this case indicated the District's decision was made in accordance with all applicable policies and regulations.
3. The Corps and ASA(CW) thank the District for the quality of the documentation they provided and their coordination during our consideration of this case. The District is to be commended for its many years of effort directed at improving protection of the aquatic resources, while providing quality service to the regulated public.
4. Should you have any questions or comments concerning our decision, please do not hesitate to contact me or have your staff contact Mr. Mike Smith, Program Manager, Regulatory Branch, at (202) 761-4598.

FOR THE COMMANDER:

1 Encl



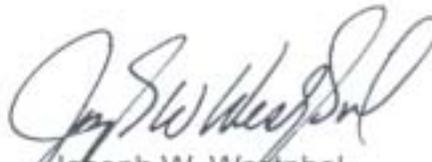
HANS A. VAN WINKLE
Major General, USA
Director of Civil Works

SUBJECT: United States Environmental Protection Agency Section 404(q) Elevation of a Section 404 Permit Decision, Sacramento District Permit 199200769

Enclosed is a copy of my reply to the Honorable J. Charles Fox, the Assistant Administrator of the Environmental Protection Agency, concerning his request that I review the issues related to the permit being considered by the Army Corps of Engineers Sacramento District Permit 199200769 to the Diablo Grande Limited Partnership.

I have completed my review of those issues and I concur with your recommendation that this case not be elevated. Please notify the District Commander that he may proceed with his final action on the permit decision, based on my denial of this request.

Please convey my thanks to all the Corps staff, for the quality of the documentation they provided and their extensive coordination during our consideration of this case.



Joseph W. Westphal
Assistant Secretary of the Army
(Civil Works)

Dear Mr. Fox:

This is in reply to your letter of December 4, 2000, requesting that I review the proposed decision on the Army Corps of Engineers Sacramento District Department of the Army permit to Diablo Grande Limited Partnership. Because your request was made pursuant to our Section 404(q) Memorandum of Agreement, my staff carefully reviewed the concerns raised in your letter, the District's decision documents and draft permit, and information provided by the applicant. The review also included an on-site inspection and meeting with those parties concerned in the issues being raised.

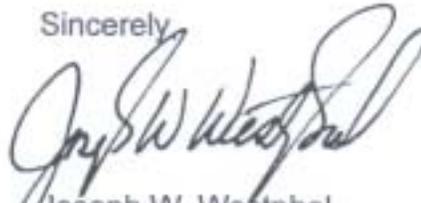
The permit is for the construction of the Oak Flat Village residential area and a three mile connector road (cut-across road) in southwestern Stanislaus County, California. The proposed fill, which consists of 5.44 acres, would be deposited into several ephemeral and intermittent streams (including several previously constructed field ditches) and into a wetland area associated with an alkali seep.

We disagree with your conclusion that the aquatic resources located within the boundary of Phase 1 (primarily the Salado Creek Watershed) of the Diablo Grande Development qualifies as an aquatic resource of national importance and we do not agree that substantial and unacceptable adverse impacts will result from the District's proposed permit. Therefore, we do not believe that your request meets the criteria for elevation under the Section 404(q) Memorandum of Agreement. Our review has affirmed the District's determination that the project constitutes a single and complete project with independent utility. Based upon that affirmation, we do not agree that an Environmental Impact Statement should be prepared for the entire 29,500-acre development (which may or may not be developed). We have also affirmed the District's determination that the project represents the least environmentally damaging, practicable alternative and that they have adequately looked at the direct impacts of the Phase 1 project. Further, we believe that the District has required the mitigation necessary to address those direct impacts. We also have concluded that the District's determination that all required mitigation should be limited to Phase 1 of the project, including that mitigation required for the previously approved golf courses, is

based upon that review, they will evaluate the need for additional mitigation to offset those impacts. Additionally, the District will be encouraged to explore various mitigation options, such as the use of wider vegetative buffers along the watercourses, to offset any direct impacts, if it is determined that additional mitigation may be necessary. They will also recommend that the District eliminate inconsistencies contained in their decision document regarding effects on historic properties and that they ensure that all of the requirements of the National Historic Preservation Act have been satisfied, prior to the issuance of this permit. Finally, the District will be encouraged to consider the applicant's record of compliance with the terms and conditions of previous permits issued to them, and address any shortcomings. It may be appropriate to require the applicant to post a financial performance bond to ensure compliance with all of the terms and conditions of this permit

Although we have not agreed to elevate this proposed permit for further Corps review, we believe there has been value added to the process through your raising this case to our attention. The on-site meeting resulted in a better understanding at the Headquarters and field level about sources of disagreement in the Diablo Mountain Range and associated watersheds and how those may be resolved. This is especially important should the permittee decide to move forward with the remaining phases of this development in the future. Should you have any questions or comments concerning our decision in this case, please contact me or Mr. Chip Smith, my Assistant for Environmental, Tribal and Regulatory Affairs at (703) 693-3655.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph W. Westphal". The signature is fluid and cursive, with a large initial "J" and "W".

Joseph W. Westphal
Assistant Secretary of the Army
(Civil Works)

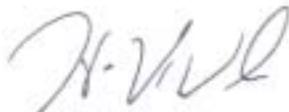
1. This is in response to a memorandum from Mr. Michael L. Davis, former Deputy Assistant Secretary (Policy and Legislation), dated 7 December 2000, concerning the Environmental Protection Agency (EPA) request for elevation of the U.S. Army Corps of Engineers Sacramento District proposal to issue the subject permit to the Diablo Grande Limited Partnership. The permit would authorize the filling of 5.44 acres of aquatic resources located primarily in the Salado Creek Watershed of Stanislaus County, California. The EPA request contends that issuance of the proposed permit will cause substantial and unacceptable adverse impacts to an aquatic resource of national importance. EPA also requested that you require the District Commander to: (1) conduct a full and adequate study of the direct, indirect, secondary and cumulative impacts of the project, (2) complete a thorough alternatives analysis, (3) independently scrutinize the applicant's proposed alternatives, and (4) require a complete mitigation package for all impacts, and (5) that these objectives should be completed in the context of an Environmental Impact Statement.

2. We have thoroughly reviewed the Environmental Protection Agency's request. We do not agree that the aquatic resources located within Phase 1 of the Diablo Grande Resort Development qualifies as an aquatic resource of national importance. Additionally, we do not agree that the proposed permit will result in substantial and unacceptable adverse impacts to the aquatic environment. Therefore we do not believe that their request meets the criteria for elevation under the Section 404(q) Memorandum of Agreement. We do believe that the District has completed an adequate alternatives analysis and we support their determination that the applicant's project was the least damaging practicable alternative. We also believe that they have adequately looked at all the impacts, including the direct, indirect, secondary and cumulative impacts of the Phase 1 project and required mitigation, as necessary, to address those impacts. We agree with the District that all required mitigation should be limited to Phase 1 of this project, including that mitigation required for the previously approved golf courses. We concur with the District's decision not to require an Environmental Impact Statement for this project, as Phase 1 is a stand-alone project with independent utility. Finally, we also concur with the District's approach to issuing the permit based upon a conceptual mitigation plan and requiring a final mitigation plan, including the preserve management plan, for their review, in coordination with the Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the California Department of Fish and Game, prior to initiation of construction activities.

for the losses that would occur as a result of permitting this proposal.

5. Enclosed is a copy of the CECW-OR, "HQUSACE Analysis and Options Paper" prepared for this elevation case and a book of information collected and reviewed during that analysis. As requested, we are also enclosing a draft reply to the requesting official from the Environmental Protection Agency. If you have any additional questions or disagree with my recommendation, please call me or contact Mr. Mike Smith, Project Manager, Regulatory Branch at (202) 761-4598.

FOR THE COMMANDER:



HANS A. VAN WINKLE
Major General, USA
Director of Civil Works

4 Encls

2. **BACKGROUND:** The Corps proposes to issue the Diablo Grande Limited Partnership a Department of the Army permit to fill 5.44 acres of wetlands located primarily in the Salado Creek Watershed of southwestern Stanislaus County, California, for the construction of Phase 1 of the Diablo Grande Resort Development. This permit addresses construction of the Oak Flat Village residential area and a three-mile connector road (cut across road) from Del Puerto Canyon Road to Oak Flat Road. The total acreage of waters subject to the Corps regulatory jurisdiction is 17.3 acres within the Oak Flat Village residential area and 23.46 acres within the cut-across road corridor. A conditioned permit would be issued with a conceptual mitigation plan, providing the applicant with the assurances necessary to begin financing the final mitigation plan. The completed plan would be reviewed and approved by the District Commander, in coordination with the Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the California Department of Fish and Game prior to initiation of construction activities. Additionally, a preserve management plan for the on-site and off-site mitigation, preservation and avoidance areas would be submitted and approved by the District Commander, in coordination with those entities previously mentioned, prior to the implementation of any of the activities authorized by the permit. Additionally, no activity authorized by the permit would be undertaken until the requirements of the National Historic Preservation Act have been satisfied.

3. **PROJECT SETTING:** The Diablo Grande Limited Partnership presently owns approximately 29,500 acres of land located in Stanislaus County, California. The project site (Phase 1) encompasses approximately 2,330 acres. This parcel is located primarily in the Salado Creek Watershed, which is a tributary of the San Joaquin River, which drains into the San Francisco Bay Delta and subsequently empties into the Pacific Ocean. There are several additional streams and associated wetlands that are located within the overall 29,500-acre tract and together they make up the Del Puerto Creek, Crow Creek, and Orestimba Creek Watersheds. The original development was envisioned to be a planned destination resort and residential community. At the present time, the project proponent is proposing to construct Phase 1. Plans for the additional four phases are presently unknown, with potential build-out occurring over the next 25-30 years, if at all.

The project site is located west of the City of Patterson between Interstate Highway 5 and California Highway 99. A total of 84.8 acres of the site are wetlands. Within the Phase 1 area, the Salado Creek channel occurs near the eastern boundary. The Diablo Grande

in the upper reaches of the channels and in the smaller streambeds. All flows within the streambeds are generated by storm runoff.

Phase 1 is projected to include 2,038 residential units constructed on 817 acres, a town center, a shopping center, public services, a resort complex constructed on 65 acres, and an open space area preserved and established on 763.33 acres. Existing golf courses, parks, and vineyards will cover 367.61 acres. Road systems will encompass approximately 187 acres.

Components within Phase 1 that have been constructed to date include two golf courses, the realignment of approximately five miles of Oak Flat Road (Diablo Grande Parkway), and the installation of a water pipeline in the Diablo Grande Parkway. The existing work was previously approved by several Nationwide Permits

4. AGENCY POSITION: The Environmental Protection Agency's request for elevation cites the criteria of Part IV of the Section 404 (q) Memoranda of Agreement (MOA). The primary issues raised, and on which this analysis focuses, are summarized as follows:

a. Aquatic Resources of National Importance (ARNI). According to the MOA, the elevation of specific individual permit cases will be limited to those cases that involve an ARNI. The 29,500-acre tract held by the Diablo Grande Limited Partnership contains several streams and associated watersheds that EPA has determined to constitute an ARNI. They base their determination on the fact that these combined watersheds serve as refugia for regionally declining assemblages of native fishes, reptiles, and amphibians endemic to California. They state the areas to be impacted by the proposed project possess ecological characteristics of high food-web productivity, physical habitat for fish and wildlife, and water quality functions, among other important and easily disrupted ecological functions.

b. Substantial and unacceptable impacts. According to the MOA, cases elevated under this MOA will cause resource damages similar in magnitude to cases evaluated under Section 404 (c) of the Clean Water Act (CWA). Section 404 (c) relates to, among others, the unacceptable adverse effect resulting from the discharge of fill material on shellfish beds and fishery areas. EPA maintains that this proposed project's impact to the Diablo Mountain Range represent a substantial and unacceptable impact (loss). As presented, activities associated with the development of the Phase 1 area and access road will affect a total of approximately 9.08 acres of jurisdictional intermittent and ephemeral streams, seasonal wetlands, stock ponds, and an alkali seep. The existing components of the project (Diablo Grande Parkway, the two golf

In the case of this proposed project, the purpose of the proposed fill is for the construction of the Phase 1 residential areas and a three-mile connector road. The project would meet the need for housing and access to the proposed development. Alternatives reviewed included the following:

1. No action. No permit would be issued. No additional fill would be placed in waters. The previously constructed golf courses would continue to operate. Additional development of the site would be possible in uplands with occasional bridge and utility line crossings.

2. Other project designs (smaller, larger, different, etc.). The proposed project design is the smallest possible to effect the needed work. During the permit review process, the permittee responded to requests to consider additional avoidance with small incremental reductions in fill and minor project realignments that increased avoidance to the point where the project could be considered permissible.

3. Other sites available to the applicant. The applicant considered four ranches within the defined market area, which were potentially able to meet the permittee's goals. Each of these sites was dismissed based upon factors such as being located in multiple jurisdictions (counties), topography, elevation, and proximity to transportation corridors. The permittee concluded that the selection of one alternative, the Simon-Newman Ranch, could result in effects to more significant biotic resources. Additionally, three alternative alignments were considered to the permitted cut-across road. Each of these was dismissed based upon a failure to meet county safety standards, increased costs, and conflicts with existing facilities.

EPA believes that the discharge of fill materials into 5.44 acres of jurisdictional waters of the United States, in addition to the 3.64 acres of fill material previously authorized by Nationwide Permits, would cause additional indirect impacts extending beyond the footprint of the fill area. They estimate that an additional 41 acres of wetlands/waters will be indirectly impacted by the proposed project and that those indirect impacts would result in direct or indirect impacts to 100% of the wetlands/waters located within the boundaries of Phase 1. They state that the indirect impacts will include: (1) reduction in water quality in downstream reaches of Salado Creek due to erosion-related sedimentation, flow impediments, and urban pollutant runoff from filled areas; (2) vegetative changes and disturbance to previously undisturbed wetland habitats, resulting in a reduction in the functional capacity of adjacent wetlands, (3) the introduction of exotic and noxious pests and weeds, and (4) fragmentation of large undeveloped,

impacts of the project.

- b. Require a thorough alternatives analysis.
- c. Independently scrutinize the applicant's proposed alternatives.
- d. Require a proposal for a complete mitigation package for all impacts.
- e. Require that Objectives (a) through (d) be conducted in the context of an Environmental Impact Statement.

5. HQSACE ANALYSIS:

a. Aquatic Resource of National Importance (ARNI). After reviewing the information relating to the EPA's ARNI determination and information concerning the status of the aquatic resources, we do not agree that the aquatic resources located within the boundary of Phase 1 of the proposed development constitute an ARNI and we do not agree that substantial and unacceptable adverse impacts will result from the District's proposed permit. Subsequently, we do not believe that EPA's request meets the criteria for elevation pursuant to the Section 404(q) Memorandum of Agreement.

There is little doubt of the environmental importance of the approximate 7 million acres of unfragmented land that makes up the Diablo Mountain Range, however, after conducting an onsite inspection of the area, it is clearly our opinion that the 17.3 acres of jurisdictional area located within Phase 1 do not represent an ARNI. However, we are aware that the Federal government and the Nature Conservancy have committed considerable resources in the recent past to obtain lands in and around the Henry Coe State Park, including the Simon-Newman Ranch and the Romero Ranch, both of which are either immediately adjacent to or in close proximity of the Diablo Grande holdings. We are also aware that the U.S. Fish and Wildlife Service (Service) is in the process of acquiring existing conservation easements owned by the Nature Conservancy and the two ranches which total approximately 61,000 acres in the Diablo Range. The projected result of their efforts would be the establishment of the Diablo Range National Wildlife Refuge in Merced, Santa Clara, and Stanislaus Counties. In this regard, EPA has been negotiating and continues to negotiate with the Diablo Grande Limited Partnership in

the proposed mitigation of the 5.44 acres of wetlands at the project site and proposed mitigation. The applicant's mitigation plan includes: (1) the creation of 15.21 acres of waters of the U.S. to mitigate for the loss of 9.08 acres of waters of the U.S. within the Phase 1 area, (2) 295 acres of on-site preserves, containing 27.6 acres of created, avoided, and preserved waters of the United States, (3) the establishment of a vegetated upland buffer for all created, preserved, and avoided waters of the United States, including wetlands within the proposed on-site preserves, (4) the restoration of 2.15-acre within East Salado Creek and the establishment of an 8-acre seep preserve, located near the terminus of the permitted cut-across road, at its intersection with Del Puerto Canyon Road, which will contain 6.3 acres of created, avoided, and preserved waters of the United States to be established and maintained in perpetuity, and (5) the monitoring of compensatory mitigation, avoidance, and preservation areas for five years or until the success criteria described in the approved mitigation plan are met, whichever is greater. The monitoring period will commence upon completion of the construction of the mitigation wetlands and continued success of the mitigation wetlands, without human intervention, must be demonstrated for three consecutive years, once the success criteria have been met. The District has determined that the mitigation plan will not be deemed successful until this criterion has been met.

Although a previous mitigation plan was approved for this project, it was subsequently replaced by the current plan. However, some portions of that original plan were completed. To date, a 1.71-acre freshwater marsh and an associated pond have been constructed according to the specifications described in the original wetland mitigation plan. Additionally, the 2.15-acre Salado Creek realignment/restoration project has been implemented.

We do not agree that these actions will have substantial and unacceptable impacts on an aquatic resource of national importance. The waters and wetlands located within the boundary of Phase 1 that are subject to our regulatory jurisdiction, pursuant to Section 404 of the Clean Water Act, include a total of 46 intermittent and ephemeral streams, seasonal wetlands, man-made ditches and wetlands associated with an alkali seep. There are also 30 channels of various sized located along the access roads. These aquatic resources are primarily located along Salado Creek and Lotta Creek, with all of the drainage being within the Salado Creek watershed. Many of the stream beds have been degraded by past livestock grazing practices, which have triggered undercutting of banks and formation of erosion gullies. In addition, the ephemeral streambeds carry water only during and after major storm events. One alkali seep is present, located along the cut-across road. This seep, which drains an unnamed channel, encompasses approximately 18.88 acres subject to our jurisdiction. Vegetation adjacent to the channel consists of salt grass

The revised total fill area for the total Phase 1 project now equals 9.08 acres. In response to comments, the applicant has reduced fill for Phase 1 residential development from a total of 4.42 acres to 1.85 acres. The reduction in the residential fill requirement is due to recent project redesign aimed at reducing fill (*i.e.*, adjusting lot lines, using bridges as opposed to culverts, etc.). However, due to roadway alignment modifications mandated by the County, the cut-across road was re-configured, resulting in an increase in fill. As a result, the revised total reflects both a decrease in the fill required for the golf course/residential development areas, and an increase in fill required for the cut-across road. The permittee's revised wetland mitigation plan includes the creation/restoration of a total of 15.21 acres. The revised plan incorporates some of the mitigation areas proposed in the original mitigation plan, as well as several additional mitigation sites.

The Phase 1 area of the Diablo Grande project site consists of approximately 7.1 acres of riparian habitat. Riparian woodland is comprised of valley oak (*Quercus lobata*), buckeye (*Aesculus californica*), cottonwood (*Populus fremontii*), and willow (*Salix sp.*). Potential impacts to riparian habitat were identified in the *Draft and Final Environmental Impact Report for the Diablo Grande Specific Plan*. The *Riparian Habitat Management Plan* details the mitigation measures that will be implemented to compensate for any loss in riparian habitat as a result of project development. In summary, disturbance will be kept to a minimum and planting trees along an approximately six-acre stretch of the Salado Creek will enhance existing riparian woodland. Trees will be planted at a density of 10 to 15 trees per acre and will include the following species: valley oak, western sycamore (*Plantanus racemosa*), willow, cottonwood, and interior live oak (*Quercus wislizenii*).

Mitigation measures to compensate for loss of oak woodland are identified in the *Oak Habitat Management Plan*. The plan includes provisions aimed at protecting and enhancing existing oak woodland habitat, as well as replacing lost or damaged oak trees. Temporary fencing to be erected by the construction crew will protect oaks that are in close proximity to construction areas. Oaks lost or damaged during construction will be replaced at a 5:1 ratio.

c. Alternatives to the proposed project. The project purpose is for the construction of the Phase 1 residential areas and a three-mile connector road. The project would meet the need for housing and access to the proposed development. The permittee has also indicated that, in their opinion, this project must be developed within Stanislaus County, as the Stanislaus County

As part of its review, District also considered the permittee's claim that it was necessary to have relatively clean access to I-5 in close proximity to a large urban area where access to retail and commercial services and existing schools could be obtained. The permittee considered four ranches within the defined market area, which were potentially able to meet their goals. Each of these sites was dismissed based upon factors such as being located in multiple jurisdictions (counties), topography, elevation, and proximity to transportation corridors. Additionally, three alternative alignments were considered for the cut-across road. Each of these was dismissed based upon failing to meet county safety standards, increased costs, and conflicts with existing facilities.

The District considered the "No Action Alternative" which would mean that no permit would be issued, no additional fill would be deposited into waters of the U.S. and the previously constructed golf courses would continue to operate as stand-alone projects. Other project designs (smaller, larger, different, etc.) were also considered. The proposed project design is the smallest design possible to effect the needed work. During the permit review process, the permittee voluntarily responded to requests from the District to consider additional avoidance with small incremental reductions in fill and minor project realignments that increased avoidance to the point where the project could be considered permissible.

d. Options: The MOA with EPA provides three basic options:

1. inform the District Engineer to proceed with final action on the permit decision;
2. inform the District Engineer to proceed with final action in accordance with case specific policy guidance; or
3. make the final permit decision in accordance with 33 CFR 325.8.

Based on this analysis the case specific options are as follows:

a. Proceed with Final Action. Selection of this option is contingent on a determination that there are not substantial unacceptable impacts to aquatic resources of national importance, as a result of the District's proposed permit decision. Our analysis clearly supports selection of this option. Therefore, we recommend that the District Commander proceed with the permit decision, issuing a conditioned permit with a conceptual mitigation plan, providing the applicant with the assurances necessary to begin financing the final mitigation plan. This is the option we recommend the Assistant Secretary of the Army (Civil Works) adopt.

proposed permit or that the permit review/decision should be made at a higher level in the organization. We do not believe this to be the situation, and therefore do not consider this a viable option.

6. CONCLUSION AND RECOMMENDATION: We do not believe that the aquatic resources located within the boundaries of Phase 1 of the Diablo Grande project site qualify as an aquatic resource of national importance and we do not believe that the proposed project to be permitted would cause substantial and unacceptable adverse impacts to the aquatic environment. Therefore we recommend that the District Commander proceed with the permit decision, issuing a conditioned permit with a conceptual mitigation plan.