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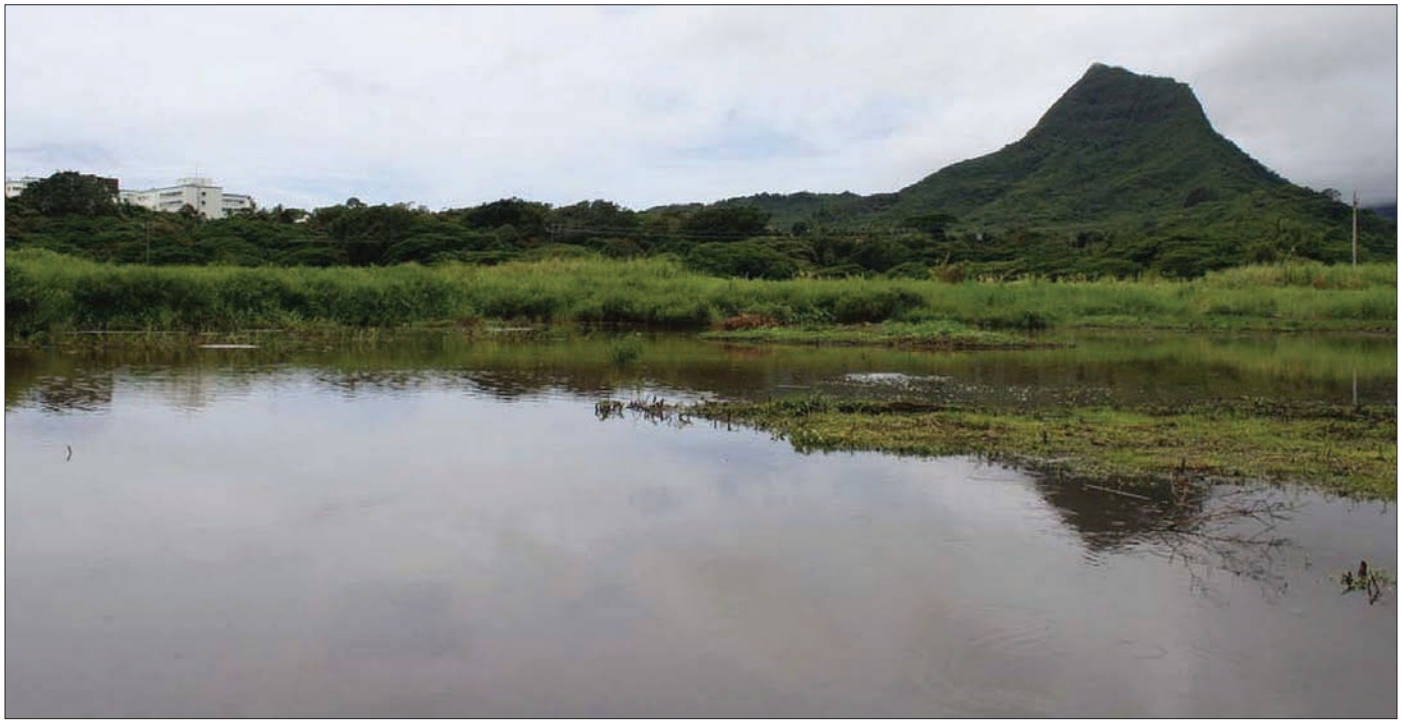
The Military Engineer

The Water Issue

Preview of the 2016 JETC in Phoenix, May 24-26 • SAME National Board of Direction Candidates

The Water Issue

The world's most abundant resource is also its most precious. The articles featured in this issue of The Military Engineer offer a multi-faceted look at how government and industry are working to solve the water challenges of the 21st century.



Work on the Kawainui Marsh Environmental Restoration Project in Kailua, O'ahu, overseen by the Hawaii Department of Land and Natural Resources and USACE Honolulu District, began in June 2012. The project was designed to increase populations of endangered waterfowl, create scenic open space, reduce upland runoff to coastal reefs, and remove invasive weeds from the marsh. The Sources Sought Notice was issued in June 2011. The Section 7 approval of the *Endangered Species Act* permit was received in December 2009. USACE HONOLULU DISTRICT PHOTO BY JOSEPH BONFIGLIO

Permitting and Endangered Species

Obtaining an *Endangered Species Act* certification is a crucial but sometimes overlooked part of *Clean Water Act* permitting, as all construction projects with a federal nexus must comply with the act's Section 7 consultation process.

By William Hartwig and Jonathan Deason, Ph.D.

The northern long-eared bat is a tiny creature, measuring less than 4-in and weighing only a few ounces. But last May, it became powerful enough to interfere with logging and pipeline construction throughout the Midwest and Northeast, including in Pennsylvania's Marcellus Shale region.

The U.S. Fish and Wildlife Service (FWS) listed the bat as "threatened" under the *Endangered Species Act of 1973*. The designation of "threatened" was less serious than "endangered." But it was still sufficient to trigger months of delays—or "protective measures" in federal parlance—for construction operations in affected states.

A year earlier, a major pipeline construction company had seen the possibility of FWS action and wisely conducted field surveys and analysis of its operations' impact on the bat. The goal was to head off delays in the Formal Consultation process as provided by Section 7 of the *Endangered Species Act*. This legislation requires a Formal Consultation if FWS determines a project will adversely affect a listed species. That determination is concluded by a Biological Opinion, in which FWS offers its opinion on whether the project is likely to jeopardize a listed species or destroy or adversely modify a listed species' critical habitat.

By collecting field data in anticipation of FWS' decision, the company avoided at least six months of construction delays stemming from the "threatened" listing.

ENSURING COMPLIANCE

An *Endangered Species Act* certification is a crucial but sometimes overlooked part of *Clean Water Act* permitting. All construction projects with a federal nexus (need for permit, license, loan guarantee or other approval or guarantee) must comply with the *Endangered Species Act* Section 7 process. Essentially, all water-related projects have a federal nexus and even completely private projects with no federal connection must comply with the act's Section 10 regulations on habitat conservation planning if they are to avoid prosecution for harming or harassing an endangered or threatened species.

Before the U.S. Army Corps of Engineers (USACE) issues a Section 404 permit, which concerns the discharge of dredged and fill material into waters of the United States (rivers, lakes, streams and most wetlands), the agency is required to obtain an endangered species sign-off from FWS. Other approvals, such as archeological and

ESA: IT AIN'T OVER TILL IT'S OVER

It is not difficult to find recent examples of delayed construction projects due to a confluence of water and ESA regulations. Last July, for example, reports emerged that the tiny Hine's emerald dragonfly had blocked efforts of officials in Lockport, Ill., to expand the public water supply. In August, concern about the endangered snuffbox mussel forced Lake County, Ohio, to stop work on a $27 million bridge over the Grand River.

Snuffbox mussels collected from West Virginia. FWS PHOTO

And in an especially instructive example, this past November, it was revealed how an unsigned July 2015 letter from FWS' Phoenix office to USACE was causing major problems for a planned development near Tucson, Ariz. Back in 2006, USACE had issued a *Clean Water Act* permit to the developer but construction never began due to the housing crisis. A new company subsequently took over the project. Then last year, about nine years after the 2006 permit approval, FWS took another look at the project's impact on imperiled species along the neighboring San Pedro River. Its letter last year suggested a reasonable chance that two endangered species (a cuckoo and garter snake) exist on the proposed site. FWS also raised new concerns about impact to the endangered jaguar.

USACE's 2006 report had concluded that impact to the jaguar was unlikely, but subsequently, the federal government designated land in and adjacent to the site as critical jaguar habitat. Finally, FWS' 2015 letter raised concerns about the development's potential indirect impacts on the species from groundwater pumping. These include degraded water quality, erosion, habitat destruction, flooding and alteration of stream channels.

Any company seeking USACE approval would be wise to focus on *Endangered Species Act* compliance early. Although it is statutorily mandated for the Consultation Process to be completed within 135 days, it often takes longer and, in some cases, much longer.

state water clearances, are usually not overly complicated or time-consuming.

But the *Endangered Species Act* is different. It is powerful legislation and has significant potential to cause regulatory problems and legal headaches. Any company seeking USACE approval would be wise to focus on *Endangered Species Act* compliance early. Although it is statutorily mandated for the Consultation Process to be completed within 135 days, it often takes longer and, in some cases, much longer. It should be noted that USACE does not set the policy; its responsibility is implementation.

From a legal standpoint, the *Endangered Species Act* is a very good litigation hook for anyone opposing a particular project. That is because there is little leeway in its provisions. Even if an endangered species is not proven to be present in an area—but reasonably suspected—an analysis is necessary. Moreover, a proper Endangered Species Compliance Study is almost always time-consuming, particularly in wetland areas as they often provide important habitat for multiple species including many listed as endangered or threatened. Compliance must include every endangered or threatened species and normally should include those species being studied for possible listing, as well as any designated critical habitat for those species. The study must cover each species' distinctive life pattern in which they grow, mate, migrate and hibernate.

ADDITIONAL CONSIDERATIONS

Another important consideration is that *Endangered Species Act*-related issues can limit a company's ability to conduct certain activities during the year. For example, turtle nesting seasons may conflict with preferred times for construction activities in lacustrine wetlands. These constraints should be accounted for early in the process.

Finally, even beyond "threatened" and "endangered" species, it often is advisable for an entity requesting a Section 404 permit to include declining species. Such a study, conducted early, can help the entity get out front of FWS designations that take place prior to the project's conclusion.

It must be emphasized that FWS reserves the right to update its *Endangered Species Act* review at any time prior to approval of a 404 permit. If new listings are completed or a new sighting of an existing listed species occurs prior to permit approval (or where the permit had expired), FWS will review the impact of the yet-to-be-approved project on each threatened or endangered species.

PLAN EARLY AND ACCORDINGLY

Enacted during the Nixon Administration, the *Endangered Species Act* is more than 40 years old. For decades, there have been efforts to weaken it; each time the result was the same: failure. The legislation is not going anywhere. Companies over the years have attempted many creative ways to get around the act's regulations. Those have invariably failed—usually at a cost to the companies of significant legal fees, fines, regulatory delays and cost overruns.

Our recommendation is to conduct field surveys and review scientific literature as soon as your project is contemplated. Record every decision made to avoid or minimize impacts on listed and currently studied endangered or threatened species. And plan a robust effort to compensate for those impacts that cannot be avoided. Expect the Section 7 process to take upwards of six months and plan accordingly.

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