



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 19 2001

OFFICE OF
WATER

Honorable Joseph W. Westphal
Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Pentagon
Washington, DC 20310-0130

Dear Dr. Westphal:

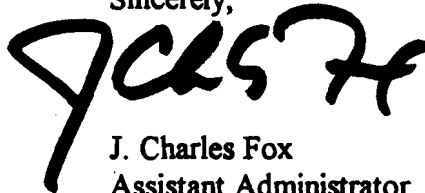
I am writing to follow up on your January 4, 2001, response to the U.S. Environmental Protection Agency's (EPA) request that you review a Clean Water Act (CWA) Section 404 decision by Colonel Michael J. Walsh, U.S. Army Corps of Engineers, Sacramento District, to issue a permit to Diablo Grande Limited Partnership for the Diablo Grande Resort Development, Phase 1 in Stanislaus County, California. Army reviewed this permit decision pursuant to the provisions of the 1992 Memorandum of Agreement (MOA) between our two agencies under Section 404(q) of the CWA. Although I am quite disappointed in the general outcome of your review, I appreciate Army's recognition of the proposed mitigation shortfalls and the direction to the District to address those concerns. EPA's continued discussions with the applicant have identified an effective resolution of our mitigation concerns.

I am also obligated to point out that your January 4, 2001, response appears to misinterpret the agencies agreement under Section 404(q). Specifically, the letter seems to indicate that Army can reject a determination by EPA of what constitutes an aquatic resource of national importance (ARNI). This indication may not have been Army's intent, as the letter continues on to provide Army's evaluation of the specific Section 404(b)(1) Guidelines issues we raised. However, it is important to clarify that the MOA is structured such that EPA determines what is an ARNI and thereby, determines what resources merit a higher level review by the Army. This fact is born out in the language of the MOA itself (e.g., Part IV), as well as in the official set of questions and answers that accompanied it (e.g., number 15).

Given that our agencies have used the MOA for almost ten years now, it would be of value for EPA and Army to convene discussions about provisions in the MOA and its success in achieving the objectives of Section 404(q). Differing approaches to interpreting the Section 404(b)(1) Guidelines are highlighted during the Section 404(q) process and are evident in Army's response to this most recent action. For example, approaching the alternative analysis and

impacts analysis in a way that does not make use of the same information regarding the scope of the proposed project will defeat the objectives of the Guidelines. Clarifying the appropriate approach is important to prevent misapplication in future permit actions. I look forward to our agencies continued work together.

Sincerely,

A handwritten signature in black ink, appearing to read "J Charles Fox". The signature is stylized and cursive, with the first letter of each name being large and prominent.

J. Charles Fox
Assistant Administrator
Office of Water