Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=2b0ba761-6979-45e9-a083-8e260efe5701

MORRISON | FOERSTER

Legal Updates & News

Legal Updates

New Proposed Rule Expands Use of Conservation Easements to Protect Mitigation Areas under Clean Water Act

March 2007
by Marc T. Campopiano

Related Practices:

- Environmental Law
- Land Use & Natural Resource Law

The Army Corps of Engineers (Army Corps) and Environmental Protection Agency (EPA) recently proposed a new joint rule under the Clean Water Act (CWA) that clarifies and expands requirements associated with compensatory mitigation for losses to aquatic resources allowed by Army Corps permits.

The CWA requires that a proposed discharge of dredged or fill material into a wetland or waterbody take all appropriate and practicable steps to avoid and minimize impacts to aquatic resources. However, in some situation, certain impacts may be unavoidable. In such circumstances, the proposed discharger is required to replace the loss of wetland, stream, or other aquatic resource; this is known as compensatory mitigation. The proposed rule would require that land set aside for such compensatory mitigation be subject to long-term protection through an "appropriate real estate instrument," such as a conservation easement. The real estate instrument must restrict or prohibit incompatible uses that would jeopardize the mitigation project while allowing for the long-term management of the site.

Background: Conservation Easements

Generally speaking, a conservation easement is an interest in real property that a property owner donates or sells to a third party who then has a right to restrict certain types of development (as defined in the easement agreement) on the subject property. Except in limited circumstances, the long-term validity of "negative" restrictions on land is held in question because traditional common law rules disfavor such restrictions, which bar the free use of property long after the original parties to the agreement cease having control of the property. However, many states, including California, have enacted laws that now allow certain negative restrictions on land such as conservation easements for the purposes of conservation and preservation of natural, agricultural, historic, or scenic resources.

In 1979, the California legislature passed the Conservation Easements Act (the Act), which created a broad definition of conservation easements that eliminated common law requirements that traditional easements must satisfy in order to be enforceable. The Act also effectively removed the technical distinctions between easements, deed restrictions, covenants and conditions, thus giving a landowner seeking to voluntarily place legally binding, permanent restrictions on his land the flexibility to use a variety of instruments to carry out this purpose.

To ensure that conservation easements are used to meet the Act's central objective of land conservation, the Act identifies and restricts the types of entities that may acquire and hold conservation easements to:

- Most state or local governmental entities;
- Most nonprofit organizations that have a primary purpose of protecting or preserving natural, scenic, historical, agricultural, forest, or open-space resources; and
- Most California Native American tribes.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=2b0ba761-6979-45e9-a083-8e260efe5701

Pursuant to the Act, conservation easements establish a legal agreement between a landowner (grantor) and a qualified entity (grantee). Typically, while the subject property remains in private ownership, the grantee governmental agency, tribe or non-profit group provides monitoring, maintenance and enforcement of the applicable restrictions. A conservation easement may take several forms, the most common of which include:

- *Negative Restrictive Conservation Easement Deed*. This type of easement is the standard form for conservation easements. It generally lists a series of prohibited activities, such as development, agricultural, and industrial operations, for the property subject to the easement. This type of deed can be challenging in that it is difficult to anticipate, and therefore enumerate, future uses that should be prohibited.
- *Result-Oriented Conservation Easement Deed*. This variation on the negative restrictive deed uses language generally outlining the easement's conservation objectives, which avoids the problem of identifying and specifically listing prohibited uses or activities. The deed then gives the easement holder authority to allow those activities which are consistent with the goals and to prohibit those determined inconsistent. However, this approach may increase the risk of a dispute between the landowner and easement holder over what uses are "consistent." In general, the likelihood of disputes tends to rise if the subject property comes under new ownership because the new owners may not have the same interpretation of the conservation easement or the same motivation to preserve the resources as the original owner.
- *Reserved Interest Deed.* With a reserved interest deed the easement holder acquires all rights, title and interests in a property except those rights specifically reserved by the landowner. In contrast to the above two types of easement deeds, any rights not expressly reserved by the landowner under this form is considered transferred to the easement holder.

Proposed Rule

Under the proposed new joint rule, the Army Corps and EPA require assurances that compensatory mitigation lands will be protected and preserved in perpetuity. As a practical matter, this requires a permit applicant to demonstrate that: (1) mitigation areas will not be used or developed in a manner inconsistent with the mitigation purposes; and (2) proper long-term management and oversight will be provided.

A conservation easement with a government entity, tribe, or an established non-profit group such as a local land trust satisfies both these prongs if the agreement is properly written to restrict inconsistent uses of the land and if an adequate funding mechanism is established to ensure proper long-term management. The appropriate form the easement agreement should take will depend on a case-by-case review of the parties involved and the resources requiring protection.

A conservation easement does not satisfy the requirements of the new rule if no qualified entity—government, tribe, or non-profit—is willing or able to take on the easement and the concomitant long-term maintenance and enforcement obligations. This is most likely to occur in cases where the mitigation area is geographically isolated or very small in size, or when the grantor is unwilling or unable to provide a long-term funding mechanism.

The new rule provides some much-needed guidance on the type of protections required for compensatory mitigation. However, although the purpose of the compensatory mitigation is to strike a balance between economic development and wetlands protection, some question whether the rule may go too far and eliminate some of the flexibility available to landowners under the current program. Of particular concern are the proposed rule's preference for on-site mitigation alternatives and the phase-out of the in-lieu fee program. By making the requirements more rigid, the proposed rule runs the risk of discouraging participation in compensatory mitigation, devaluing the program. How and if these concerns are played out will be a key issue when the proposed rule becomes final in the upcoming months.

Citations

Compensatory Mitigation for Losses
of Aquatic Resources, 71 Fed. Reg. 15520 (March 28, 2006) (to be codified at 40 C.F.R. pt. 230 and 33 C.F.R. pts. 325 and 332)

Cal. Civ. Code § 815.1

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=2b0ba761-6979-45e9-a083-8e260efe5701

Cal. Civ. Code § 815.3

© 1996-2007 Morrison & Foerster LLP. All rights reserved.