



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

April 19, 1993

Honorable G. Edward Dickey
Acting Assistant Secretary (Civil Works)
Department of the Army
Washington, D.C. 20310

Dear Dr. Dickey:

In accordance with provisions of the December 21, 1992, Section 404(q) Memorandum of Agreement (MOA) between our agencies, I am requesting your review of the Vicksburg District (District) Engineer's decision to reissue General Permit 19(GP-19). GP-19 would authorize hydrocarbon exploration and production activities within the noncoastal portion of the District. I have determined that this case warrants elevation in accordance with criteria found in Part IV of the revised MOA (Elevation of Individual Permit Decisions). Reissuance of GP-19 will have substantial and unacceptable adverse effects on aquatic resources of national importance, largely because the District has failed to include adequate compensatory mitigation to offset project impacts.

While I do not object to a General Permit for hydrocarbon development activities, I am concerned that the District Engineer's decision to reissue GP-19, as proposed, is inconsistent with the purpose and intent of General Permit activities, as defined by Section 404(e)(1) of the Clean Water Act. It is my opinion that, despite the District's proposed compensatory mitigation, the proposed activity will result in more than minimal cumulative environmental impact to Federal trust fish and wildlife resources. The Department of the Interior (Department), acting through the Fish and Wildlife Service (Service), is vested with the authority to protect, conserve, restore, and enhance the Nation's fish and wildlife resources. These matters fall within our jurisdiction under the Fish and Wildlife Coordination Act, the Fish and Wildlife Act of 1956, the Endangered Species Act of 1973, as amended, the Migratory Bird Treaty Act, and Section 404(m) of the Clean Water Act.

Re-issuance of GP-19 will result in the loss of increasingly scarce forested wetlands within the Mississippi River Alluvial Valley (MRAV), which I have determined to constitute aquatic resources of national importance. Those forested wetlands are among the most productive habitat types in the United States; they support a vast array of fish and wildlife, including: resident and migratory waterfowl; other migratory birds, including neotropical migrants; game mammals; furbearers; amphibians and reptiles; and numerous freshwater fishes. The Louisiana black bear, a federally listed threatened species, inhabits forested wetlands in the permit area. Declining species abundance and diversity, exacerbated by habitat fragmentation and loss of dispersal corridors, have accompanied the loss of over 80 percent of the forested wetlands in the MRAV.

The activities regulated under GP-19 would not have substantial adverse impacts to aquatic resources of national importance if compensatory mitigation to fully offset those impacts was required. However, the District's compensation options are seriously deficient; consequently, adverse impacts will not be fully compensated. This unmitigated net loss of forested wetland habitat values represents a substantial and unacceptable adverse impact on a wetland type which has already experienced extensive losses. Accordingly, I have identified two primary areas of disagreement between the Department and the District for your consideration: 1) compensatory mitigation based on 1:1 replacement of the affected acreage, rather than full replacement of habitat values lost; and 2) a compensatory mitigation option based on payment of \$300 per affected acre to an approved conservation entity.

Regarding the first issue, the Service provided the District with an assessment methodology, adapted from the Habitat Evaluation Procedures (HEP), to measure the quality of forested wetland sites and quantify compensation needs. That assessment procedure was developed cooperatively with regulatory staff from the New Orleans District over the past 2 years, and has been successfully used to quantify the impacts and compensation needs of regulated activities in that Corps District. However, in spite of its current use by another Corps District, and without a biologically sound rationale, the District rejected the Service's assessment methodology, stating only "[w]e believe that, in most cases, 1 acre of restoration/ reforestation for 1 acre of wetland functions and value impacted, in addition to site restoration, is adequate compensation." In contrast, the Service's HEP-based methodology indicates that the District's acre-for-acre approach will result in compensatory mitigation shortfalls of up to 65 percent when high value wetlands are affected and compensation would occur on public wildlife refuges. Moreover, Part III(B) of the 1990 MOA on mitigation between the Department of the Army and the Environmental Protection Agency specifies 1 to 1 functional replacement such that there be *no net loss of values*. The MOA only allows for 1 to 1 acreage replacement as a surrogate for no net loss of functions and values when more definitive information is lacking.

The second issue involves donating \$300 per affected acre to an approved conservation entity for the purchase, restoration, or enhancement of wetlands. We recognize that this mitigation option represented an important first step in achieving compensation for habitat losses when the original General Permit was developed. However, this option has three major shortcomings. First, the amount donated is based on the acreage affected, not on the acreage actually needed to achieve full, in-kind mitigation (which should be determined by a habitat-based assessment of the impact and compensation areas over time). Second, the amount to be donated accounts for neither lost habitat value, nor the costs associated with acquiring, reforesting, and managing the compensation area. Those costs would likely exceed \$750 per acre, based on existing costs for acquiring and reforesting suitable compensation lands. Third, Service discussions with Ducks Unlimited and the Tensas Conservancy Coalition revealed that GP-19 donations have not been used to purchase threatened forested wetlands, or to restore forested wetlands on cleared areas. I am particularly concerned that the District has failed to develop formal agreements with conservation entities to ensure that the forested

wetland values lost will be replaced in-kind, and that significant uncompensated losses of forested wetland habitat values will continue.

Finally, I also have concerns regarding the District's requirement that, for "...work on State or Federal Wildlife management areas, the applicant must obtain a certification from the managing agency....[f]ailure by the managing agency to respond or to request an extension for responding within 15 days shall constitute such certification." The Service cannot waive the statutory requirement for obtaining special-use authorizations for work on National Wildlife Refuges, except in those cases where judicial intervention has occurred. Accordingly, the Corps cannot dictate a 15-day concurrence deadline where Special-Use Permit authority exists.

In conclusion, I would not object to the reissuance of GP-19, provided that the District be required to include the following special conditions:

1. A habitat-based methodology, developed in consultation with the Service, shall be used to assess project-related impacts and determine the amount of compensatory mitigation needed for each authorized activity.
2. Contributions to conservation organizations, as well as any other forms of proposed compensation, will be limited to projects or funds dedicated to compensating for forested wetland habitat losses on private lands. Compensatory mitigation shall be approved in consultation with the Service prior to contribution. Contribution amounts must reflect the actual costs of accomplishing the necessary compensation work.
3. For regulated activities on State wildlife management areas or National Wildlife Refuges, managers of those lands shall be consulted by the applicant prior to permit application. The applicant shall provide documentation with the permit application demonstrating that the appropriate management agency's concerns (e.g., special-use authorizations, access routes, onsite restoration measures, and compensatory mitigation) have been satisfied.

Enclosures 1 and 2 provide additional information to substantiate the above concerns and recommendations as they relate to the proposed reissuance of GP-19. I request your review of the District Engineer's decision to reissue GP-19, based on the information used, and procedures followed, in reaching that decision.

Sincerely,



Acting Assistant Secretary for Fish
and Wildlife and Parks

Enclosures



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0108



REPLY TO
ATTENTION OF

20 MAY 1993

Mr. Thomas B. Williams
Acting Assistant Secretary for
Fish and Wildlife and Parks
Department of the Interior
Washington, D. C. 20240

Dear Mr. Williams:

Thank you for your letter of April 19, 1993, in which you requested higher level review of issues related to a regional general permit being considered by the Army Corps of Engineers Vicksburg District. The regional permit (GP-19) would authorize the discharge of dredged or fill material associated with certain hydrocarbon exploration and production activities. Your request was made pursuant to Part IV of the 1992 Section 404(c) Memorandum of Agreement (MOA) between the Department of the Army and the Department of the Interior (DOI).

Part IV of the MOA establishes procedures for elevation of specific permit cases. To satisfy the explicit requirements for elevation, the permit case must pass two tests: 1) the proposed project would occur in aquatic resources of national importance (ARNIs), and 2) the project would result in unacceptable impacts to ARNIs.

We have carefully reviewed the concerns raised in your letter and the Vicksburg District's decision documents and draft permit for this case. Our review included a joint meeting with Fish and Wildlife Service (FWS) staff and the district. Based on our evaluation, we have concluded that at least some of the forested wetlands within the area covered by GP-19 would qualify as ARNIs. Therefore, the first part of the ARNI test has been met.

The second test involves whether substantial unacceptable adverse impacts would occur to ARNI's after considering mitigation. We have determined that with the clarifications regarding the district's decision identified in this letter, issuing the general permit would not result in substantial unacceptable adverse impacts to ARNI's.

The fundamental question is the suitability of the compensatory mitigation requirements in GP-19. This is consistent with the two primary concerns raised in your elevation request: compensatory mitigation ratios for public versus private lands; and the compensatory mitigation option based on the payment of a \$300 contribution per acre of impacted wetlands.

Enclosure

First, I would like to acknowledge the validity of your approach to considering "with project" and "without project" scenarios in determining compensatory mitigation requirements for public versus private lands. This important planning principle has been followed by the Corps for many years. While often particularly difficult to apply in the context of the regulatory program, we believe that it is important to consider how an area might change from an environmental standpoint over time with and without a permitted activity. Nevertheless, we also believe that additional factors must be considered when determining the most desirable location for compensatory mitigation. Specifically, your analysis does not consider input of time preference in establishing the value of present versus future restoration activities. While the appropriate discount rate to be applied to these decisions may be debatable, the fact remains that any positive rate reduces the value of actions in the future relative to the present. Moreover, we are concerned that higher compensation ratios for public lands will have unintended adverse environmental consequences by encouraging oil and gas companies to perform mitigation on private lands. In our view, this is often a much less desirable alternative than having the mitigation performed on public lands such as a wildlife refuge. Aggregating small compensation projects on public lands with existing management capabilities will generally be better for the environment than having many small projects dispersed throughout the region on lands that are more difficult to monitor and manage. Accordingly, we do not believe that we have a definitive basis on which to establish different compensation ratios for mitigation on public and private lands.

While we believe that compensatory mitigation ratios should not generally vary based on land ownership alone, we agree that compensation must be related to the value of the resource to be impacted. The district relied upon Habitat Evaluation Procedures (HEP) which were conducted for several Corps Civil Works projects within the district. The acre-for-acre "average" for compensatory mitigation was based upon this analysis. The district determined that a one-to-one replacement ratio would provide for environmental benefits, through time, based on the district's knowledge that many projects would involve moderate or low value wetlands. Furthermore, since only 15 percent of all well sites are producers and all wetland areas impacted will not include high-value areas, the district's one acre "average" will provide for compensatory mitigation which will, meet or in most cases exceed compensatory mitigation requirements. If we adopted your modified HEP analysis for producer wells within high-value wetlands, the compensatory mitigation requirements would only require 1.1 acre compensation. Utilizing your modified HEP for all other scenarios would result in compensatory mitigation of less than one acre. We do recognize that some areas on public lands may be in some stage of reforestation. We have requested that the district clarify the

final permit so that compensatory mitigation will be conducted only on lands which are currently being maintained in a cleared condition (e.g., for crop production).

Regarding your concerns about the \$300 contribution to a conservation organization for wetlands restoration as a mitigation alternative, we believe that this concept, like mitigation banking, can provide an environmentally attractive option for wetlands mitigation, if carefully managed. We do share your concern that in some cases the \$300 contribution will not be commensurate with the impacts on wetlands. The Corps advises that the intent of the \$300 contribution was primarily for the planting of existing cleared wetland areas. Therefore, we have requested that the district clarify this issue to explain that the funds can only be used for planting cleared wetland areas.

In your letter, you also recommended a special permit condition that would require individuals using GP-19 for activities on Federal and State wildlife refuges to consult with the refuge manager prior to submitting an application to the Corps. More specifically, you expressed concern over the district's proposal to dictate a 15-day refuge manager concurrence deadline where Special-Use Permit authority exists. We agree that in this case such a time limit is inappropriate. While it was not clearly raised prior to your elevation request, we understand that the district has agreed to clarify the permit on this issue.

Specific details concerning our determinations in this case will be articulated to the district. Your interest and efforts in raising this case to our attention are appreciated. Should you have any questions or comments concerning the GP-19 elevation, or the program in general, do not hesitate to contact me, or Mr. Michael Davis, Assistant for Regulatory Affairs, at telephone (703) 695-1376.

Sincerely,



G. Edward Dickey
Acting Assistant Secretary of the Army
(Civil Works)



DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

28 MAY 1993

CECW-OR

MEMORANDUM THRU COMMANDER, LOWER MISSISSIPPI VALLEY DIVISION

FOR COMMANDER, VICKSBURG DISTRICT

SUBJECT: Request for Permit Elevation, Hydrocarbon Exploration
and Production General Permit

1. On 20 May 1993 the Acting Assistant Secretary of the Army (Civil Works) (AASA(CW)) responded (encl) to the request by the Department of the Interior (DOI) for elevation of the U.S. Army Corps of Engineers Vicksburg District's proposed decision to issue a general permit. The permit is pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 for hydrocarbon exploration and production (GP-19).
2. The DOI's request was made pursuant to Part IV of the Section 404(q) Memorandum of Agreement (MOA) between the Department of the Army and Department of the Interior regarding review of an individual permit case. The DOI believed that Aquatic Resources of National Importance (ARNI's) would be impacted and substantial unacceptable adverse impacts to such resources would occur. The issues presented by the DOI for our consideration pertained to impacts to ARNI's, adequacy of the compensatory mitigation, the \$300 option for a monetary contribution as an alternative to compensatory mitigation and a special permit condition regarding coordination with Federal and State resource managers.
3. The AASA(CW) letter advised the DOI that the request for elevation under Part IV did not meet the test established in the MOA. The AASA(CW) did agree with the DOI that a portion of the projects authorized by GP-19 would occur within ARNI's. However, the AASA(CW) determined that no substantial unacceptable adverse impacts to ARNI's would occur as a result of the District's issuance of GP-19. The remaining issues raised by the DOI were addressed during the District's permit evaluation. The AASA(CW) advised the DOI that the District will clarify that cleared lands will be used for compensatory mitigation and the limitations involved when an applicant chooses the \$300 contribution option to provide for mitigation. In addition, the District agreed to clarify the special permit condition regarding notification to Federal and State resource managers.
4. The District should identify in the final permit decision that only lands currently cleared, and which are in a nonforested condition (e. g., crop production, pasture, etc.), including fallow lands that are a part of an agricultural rotation cycle,

Background

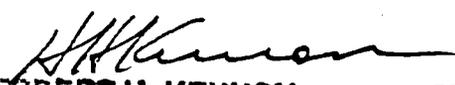
SUBJECT: Request for Permit Elevation, Hydrocarbon Exploration
and Production General Permit

can be utilized for compensatory mitigation. The District should also clarify that the \$300 monetary contribution option to provide for mitigation is limited to wetland vegetation planting projects, and normally not for acquisition. This is the basis under which \$300 will provide for a 1:1 wetlands acreage replacement. The District may consider approval of specific cases where an organization is capable of utilizing the \$300 to purchase wetlands or purchase land and plant wetland species on an acre-for-acre basis.

5. The District's proposed decision has adequately addressed all issues regarding wetland impacts. We are advising the District to proceed to a final permit decision for GP-19 after providing for the clarifications stated in paragraph 4.

5. If you have any comments or questions, please contact Mr. Victor Cole at (202) 272-0201.

Encl


HERBERT H. KENNON
Acting Director of Civil Works

STANLEY G. GENEGA
Brigadier General (P), USA
Director of Civil Works