



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

APR 25 1989

OFFICE OF
WATER

Honorable Robert Page
Assistant Secretary of the Army
(Civil Works)
Department of the Army
Washington, D.C. 20310-0103

Dear Mr. Page:

In accordance with the provisions of the Memorandum of Agreement (MOA) between the Environmental Protection Agency (EPA) and the Department of the Army regarding Section 404(q) of the Clean Water Act, I am formally requesting your review of the decision of the District Engineer, New York District, to issue a Section 404 permit. By letter to Mr. William J. Muszynski, Acting Regional Administrator, EPA Region II dated March 28, 1989, the New York District Engineer provided notice that he intends to issue a Section 404 permit to Hartz Mountain Development Corporation authorizing the placement of fill material into 97.41 acres of federally regulated wetlands at a site known as Mill Creek in Secaucus, Hudson County, New Jersey. The purpose of the fill is to create uplands to facilitate the construction of a high-density residential housing development.

Subsequent to comprehensive review of available information regarding the subject proposal, we have determined that this case warrants elevation in accordance with Paragraphs 5.b.1 and 5.b.3 of the MOA. I am requesting this elevation based on our finding that there has been a failure to resolve stated EPA concerns regarding compliance with the Section 404(b)(1) Guidelines (40 CFR 230). Specifically, EPA believes that there are less environmentally damaging practicable alternatives to the project [230.10(a)], that the project as proposed will cause or contribute to significant degradation of waters of the U.S. by directly impacting 97.41 acres of wetlands and their associated wildlife values [230.10(c)], and that the proposed mitigation plan will not offset project related impacts [230.10(d)]. Indeed, the mitigation plan is of a promissory nature since a definite plan has not been submitted and since EPA and the Corps have not agreed upon the baseline values of either the wetlands on the project site or those wetlands of the proposed mitigation sites.

We also believe that this referral meets the criteria in Section 5.b.3 because the Corps utilized a definition of project purpose throughout the review of this project that is too specific to the applicant's proposal, appears to favor selection of the proposed project site as the only practicable alternative, and excludes other sites from the analysis that may indeed serve the basic or general project purpose. We believe that if the Corps method of defining project purpose in this case is applied locally or nationwide to all permits, it will result in the unnecessary and inappropriate restriction of the alternatives analysis and lead to erroneous final permit decisions as it did in this instance. Therefore, we believe that this aspect of the Corps regulatory process and permit decision constitutes an environmental issue of national importance requiring policy level review.

In the following sections, we outline each of these points in more detail.

Section 5.b.1. Criteria

A. Practicable Alternatives

Section 230.10(a) of the Section 404(b)(1) Guidelines requires that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. We believe that the Corps' analysis of alternatives was unnecessarily constrained by several factors which served to narrow the scope of the review. Overall, the analysis was biased towards the applicant's purpose of constructing a profitable development, in this case, a high-density residential project on a site it already owns. EPA, on the other hand, believes that the analysis should have been based simply on the purpose of providing residential housing. Therefore, we continue to believe that the applicant has not rebutted the presumption that practicable, less environmentally damaging alternatives are available to the proposed project.

First, EPA believes that the geographic area of alternatives consideration was insufficient. The area in which the applicant sought alternative sites was based on a region defined by the New Jersey Council on Affordable Housing (COAH) which EPA considers overly restrictive. While the boundaries defined by COAH may be reasonable for the assessment of alternative locations and/or need for low and moderate income housing, they are not accurate in this case because the majority of the project proposed by Hartz Mountain is not comprised of low-moderate income housing. We believe that a reasonable search for alternative locations for a project of the magnitude and type proposed by Hartz Mountain requires a broader geographical area of review. In addition, the majority of the COAH region within which the alternatives analysis was conducted has been designated no-growth or low-growth areas. Most of the vacant

parcels within the COAH defined region that were identified by the applicant were dismissed because zoning requirements precluded the development of high-density residential units. Since these areas had been designated no-growth or low-growth, it is not reasonable to consider them as potential alternatives if the objective is to construct high-density housing. On the other hand, if the project purpose were to construct residential housing (which EPA considers to be the general and more appropriate project purpose in this case), then alternatives should be assessed based on the housing that could reasonably be constructed. Indeed, under these circumstances, analysis of the involved COAH region may have produced alternative sites.

In addition, EPA is concerned that the Corps relied too heavily upon the COAH position, stated in the September 27, 1988 letter, as a demonstration of need for housing in the region and, therefore, a definition of the public interest to be served by issuance of the permit. The "compelling need" discussed in COAH's September 27, 1988 letter to the applicant and referenced in the New York District Engineer's decision, addressed a need for low and moderate income housing and expressly states that the predicated need referred to is solely the low and moderate income housing number and does not address the number of market units that may be built. We believe that statements made in the letter have been taken out of context and utilized beyond their relevance. As previously noted, COAH is concerned with the development of low and moderate income housing. Moreover, the COAH letter explains that their projection of a need for 213,000 housing units in the region is an extrapolation based on the assumption that a developer must provide at least four units of market value housing in order to offset the costs of constructing one of the required low-moderate income units. Therefore, this much expanded "need" is based on developer profit necessary to reach COAH anticipated figures and does not reflect the need for housing in the area of consideration in general or Hartz's proposed development in particular.

Second, although the Corps deemed the selected criteria for reviewing sites for practicability to be appropriate, the criteria were established based on the applicant's goal for a profitable development and were "developed against the fact that the applicant already owns and pays taxes on the 131.26 acre IR-2 parcel, the established zoning and the need for housing in the general area." Therefore, this clearly indicates an attempt to narrow the availability of practicable alternatives to suit the applicant's project as proposed. In addition, EPA believes that the method of evaluating the practicability of potential alternative sites, as applied (by assigning numerical values to eight criteria for each site with a minimum of 16 points defining the "lower limit of practicability"), served to set too high a standard of practicability that eliminated other sites from consideration that may have served the general project purpose and been otherwise "practicable," but were perhaps not as desirable to the applicant. For example, within the site size criteria, a rating of 3 (or excellent) was assigned to sites over 150 acres which is larger than the developable portion of the Hartz site currently at issue in the permit application. It would seem that a site need only be as large as

the proposed project site to earn the highest rating. In this instance, does this mean that the proposed project site received a value of only one point (the value assigned to sites between 50 and 100 acres) within the analysis in this case?

In particular, we believe that revitalization of existing urban areas should have received more consideration during the review of this project. The Corps requested that Hartz consider these types of areas within its alternatives analysis earlier in the permit review process; however, this was not adequately addressed. The reconstruction or rehabilitation of disused developed areas could avoid impacts to undeveloped wetlands entirely. Hartz Mountain investigated municipalities adjacent to the Hackensack Meadowlands, but found no privately owned vacant lands available. However, reconstruction or rehabilitation of existing or abandoned structures was not addressed. Since the availability of infrastructure such as roadways and sewers was among the criteria used to assess alternatives, it would appear that rehabilitation in already developed areas could be feasible. In fact, several municipalities in close proximity to the Meadowlands such as Newark, Jersey City and Hoboken, are currently undergoing major revitalization. Urbanized areas in various states of disuse are projected to be upgraded. A large-scale project such as that proposed by Hartz Mountain could serve to provide a substantial boost to the revitalization efforts of these municipalities.

B. Significant Degradation

Section 230.10(c)(3) of the Guidelines requires that no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of waters of the U.S. Effects on fish and wildlife diversity, productivity, stability, habitat, and life stages can constitute significant degradation. For reasons discussed below, we believe that this proposal is likely to result in significant degradation and therefore violates the Guidelines.

The project as proposed would cause the direct loss of 97.41 acres of wetlands and associated wildlife values. Resources indirectly impacted would include adjacent wetlands and a mitigation site required by a previous permit issued to Hartz Mountain which is currently being constructed on 63 acres of the project site. Cumulative impacts within the Mill Creek basin in particular and in the Meadowlands in general are of major concern.

The resource value of both the project site and the proposed mitigation areas in their existing condition has been a matter of contention throughout the review process. We have repeatedly expressed our concern that, contrary to the preliminary results of investigations conducted in conjunction with the ongoing Advanced Identification (AVID) effort as well as comments and recommendations provided by the federal

resource agencies, the New York District perceives the existing Mill Creek site and proposed mitigation sites as "degraded" and therefore of low value.

Due to the recognized importance of the wetlands in the Meadowlands District, an AVID study has been underway for several years. The Mill Creek site, as well as the proposed mitigation sites, were investigated during the wetland functional assessment conducted as part of the AVID process. The wetland functional assessment was conducted by an interagency team, which included representatives of the New York District. The methodology utilized during the wetland assessment analyzes existing site characteristics to assess the likelihood that a particular wetland performs a variety of functions. An excerpt from the output for the Mill Creek site and the two proposed mitigation sites indicating the predominance of high and moderate values attributed to the sites is attached. This analysis, in addition to the comments provided by the resource agencies, indicates that the wetlands affected by the project as proposed already provide significant wetland values.

The Mill Creek site is comprised of predominantly estuarine emergent, intertidal and open water wetlands. By letter to the District Engineer dated July 13, 1987, the U.S. Fish and Wildlife Service (FWS) determined that "the site specific characteristics, such as the interspersed of estuarine habitat types, make the Mill Creek basin a valuable fish and wildlife habitat in its existing state." The FWS described the site as providing habitat for clapper and sora rails, long-billed marsh wrens, swamp and song sparrows, common gallinules, migratory shorebirds, green-backed herons, common and cattle egrets, black-crowned night herons, snowy egrets, American and least bitterns, great blue herons and a variety of waterfowl. By letter to the District Engineer dated July 10, 1987, the National Marine Fisheries Service (NMFS) characterized the Hackensack River as a productive waterway which provides habitat for Atlantic tomcod, silver hake, spot, and such forage species as mummichog and Atlantic silversides. The river also provides spawning habitat for anadromous clupeids such as the blueback herring and alewife. NMFS stated that "the wetlands adjacent to the river provide nutrients to the food web and adsorption capacity for upland-generated and water-borne pollutants." NMFS further predicted that with the current trend for improved water quality, biological diversity will improve with species that are currently found infrequently, such as blue crab, striped bass and American shad, becoming more common.

We realize that a Habitat Evaluation Procedure (HEP) conducted on behalf of Hartz Mountain indicates that both the proposed project site and the proposed mitigation sites have relatively low existing fish, wildlife and ecological value. EPA has stated in the past that it does not believe that the subject HEP analysis was properly conducted nor agree with the conclusions. Also, we are concerned because the HEP results are contrary to those arrived at through the implementation of the Wetland Evaluation Technique (WET) by the aforementioned interagency team. EPA's specific

concerns are addressed in detail in the record. We believe that the results of the HEP analysis are not sufficient to either support the Corps' conclusions regarding existing resource values or justify sacrificing those values for the potential environmental returns currently associated with the proposed mitigation plan.

From a cumulative impact perspective, the Hackensack Meadowlands represent the last remaining expanse of wetlands in this portion of New Jersey. Formerly encompassing around 18,000 acres, the wetlands of the Meadowlands District have been significantly reduced by commercial and industrial development and use as sites for landfills. Almost all of the useable upland has been developed. Approximately 7,800 acres of wetlands remain. Many of these wetlands have been adversely impacted by landfill and development activities. Nevertheless, the Meadowlands continue to function as important habitat for waterfowl, wading birds, shorebirds, raptors, passerines, mammals and invertebrates. EPA-supported water quality improvement programs such as sewage treatment upgrading and non-point source pollution control activities are contributing to maintenance and improvement of water quality and ecological values in the Meadowlands.

On a smaller scale, EPA is also concerned about the cumulative adverse impact on the Mill Creek basin. In 1977, the Mill Creek parcel owned by Hartz Mountain consisted of 406 acres of predominantly estuarine emergent wetlands. In 1983, Hartz Mountain obtained a permit to fill 127 acres of wetlands in the Mill Creek parcel to construct a commercial and industrial development. The original application associated with the project, however, also included plans for a residential component, which was subsequently deleted by Hartz Mountain from the permit application. Hartz Mountain now proposes to construct the previously deleted residential component on an additional 97 acres of wetlands. Hence, EPA feels that Hartz Mountain has returned to its original plans thus requiring environmental review of its development in a piecemeal manner. When viewed cumulatively, EPA feels that this permit application and the previous 1983 permit would adversely impact the Mill Creek basin. In addition, as part of the 1983 permit, Hartz Mountain was required to provide compensation for wetlands losses. The northern portion of the Mill Creek site, immediately adjacent to the area now proposed for development, was identified as one mitigation area. An assessment of the value expected to be derived from Hartz Mountain's enhancement activities included consideration of the fact that the mitigation area was surrounded by wetlands, not developed areas. Thus, the construction of this project as proposed will also undermine the effectiveness of mitigation required for Hartz Mountain's previous permit.

We believe that to approve the permit as proposed, in light of the cumulative impacts and continued threat to the remaining wetland resources of the Meadowlands, is inconsistent with the Guidelines requirement to not permit fill activities which cause or contribute to significant degradation of waters of the United States.

C. Mitigation

As previously stated we are concerned that the resource value of both the project site and the proposed mitigation areas in their existing condition has been a matter of contention throughout the review process. We do not believe that the results of the aforementioned HEP analysis support either the Corps' conclusions regarding the values associated with these sites or the decision that enhancement (and preservation) of the proposed mitigation areas is appropriate.

The District Engineer's decision asserts that the mitigation as proposed will provide full compensation thereby assuring no net loss of wetland values and precluding adverse impacts to public resources. However, as some of the proposed permit Special Conditions indicate, the current level of information concerning the wetland sites at issue is not sufficient to assure that this will occur. For example, the fact that the proposed permit requires the applicant to provide, within one year of the date of issuance of the permit, documentation "evaluating all wetlands acreage which would be directly impacted by the proposed development and mitigation activities" indicates that such information is currently insufficient.

Special Condition A directs that an assessment of the wetlands should be compiled utilizing the aforementioned WET technique developed by the Waterways Experiment Station of the Corps of Engineers. Special Condition A further stipulates that the outcome of the WET be utilized to "confirm that the proposed wetland mitigation values compensate for the aggregate value of the wetland functions lost to the filling activities authorized by this permit on a minimum ratio of 1.2:1.0." EPA has two concerns with this condition. First, the permit documentation indicates that the Corps based its conclusions with respect to the fish and wildlife habitat values of the site on the applicant's HEP results which contradict those of the WET analysis. However, in conjunction with an interagency team of federal and state agencies, the Corps was involved in the AVID study which applied a WET analysis to the proposed project site and mitigation sites. EPA feels that the Corps should have based its decision on the AVID results which they participated in obtaining, instead of on the applicant's results. In addition, we contend that in order to accurately predict the anticipated post-project values as a result of mitigation, the issue of the baseline (or pre-project) values of the existing wetlands must be resolved first. We would submit that this has not yet occurred; certainly not to EPA's satisfaction. Indeed, this condition leads one to question the Corps' basis for assuming that the wetlands are "degraded." Second, this condition would be difficult to enforce since the WET methodology is not designed for such use. The output obtained from application of the WET methodology is not quantifiable, and so could not demonstrate a ratio of return.

Special Condition B of the proposed permit requires that Hartz provide the New

York District with a "comprehensive wetlands mitigation program for the project consisting of a grading and planting/seeding plan." Since the District does not currently possess a sound mitigation plan, the assumption that full compensation will be provided appears at best, optimistic, and at worst, unfounded. The decision document refers to the aforementioned mitigation program undertaken by Hartz in association with a separate permit (issued in 1983) and indicates that work is "successful." However, it should be noted that the referenced mitigation work has been substantially modified from the original proposal and is still in the process of being completed, six years after the permit was issued, and therefore, cannot be regarded as "successful." In addition, regardless of the degree of "success" achieved by the mitigation, substantial losses of wetland values have accrued in the time frame between wetland destruction and functional replacement.

Special Condition D requires additional information detailing environmental conditions at the proposed mitigation sites in their existing condition, further illuminating the District's lack of data to support conclusions regarding both the existing value of the sites and the comparative value of any proposed mitigation.

Special Condition E is purportedly designed to assure timely compensation for lost wetland values. However, the time frames specified require only the completion of grading activities prior to the destruction of existing wetlands. Completion of grading requirements does not constitute assurance of wetland value replacement.

Section 5.b.3. Criteria

The definition of project purpose has been inconsistently presented throughout the review process. Without a clear definition of project purpose, we question the adequacy of the alternatives analysis. As a general rule, EPA interprets the basic purpose as the generic function of a proposed activity, in this case, the construction of residential housing. The New York District, however, alternately describes the project purpose as "construction of a 3,301 unit residential housing development (Villages at Mill Creek) adjacent to Cromakill and Mill Creeks within the Hackensack River Basin in the Town of Secaucus, Hudson County, New Jersey," and "to construct residential housing to help satisfy a regional and Hackensack Meadowlands District need," and "construction of a large-scale residential development." We believe that a determination of project purpose based on the applicant's desire to construct a specific number of units at a pre-determined location is overly restrictive and not in accordance with the intent of the Guidelines. Such a narrow definition precludes an adequate assessment of alternatives. The District Engineer acknowledges that the project purpose as defined by the applicant has been selectively based on existing property ownership and HMDC-mandated zoning, as well as the applicant's goals for profit. The alternatives analysis conducted by the applicant is based on their goal of developing 3,301 units on a specific site it already owns and therefore restricted by zoning and other logistical constraints.

If the basic project purpose is to provide residential housing, then the number of units becomes a matter of logistics for the applicant. The basic project purpose is the development of residential housing, not specifically 3,301 units of residential housing.

Although the need for residential housing in northeast New Jersey has been the subject of investigation, several inconsistencies appear in the determination. First, as previously stated, the District Engineer's decision relies heavily on a statement made by COAH, which, in actuality, only reflects the need for low and moderate income housing. The District Engineer acknowledges that the specific number of low and moderate income housing units that will be generated by this project is unspecified. Second, although the "compelling need" for housing is used to justify the public interest, limitations are placed on the type and amount of housing to be constructed. For example, the District Engineer acknowledges that the area required for the construction of the same number of units in high-rise residential buildings would be half of that required for the construction of the proposed mid-rise residential buildings. However, the applicant has indicated that high-rise units would not be marketable. If the need for housing was as critical as presented, presumably any units constructed would be marketable.


The alternatives analysis conducted by Hartz evaluated alternative actions based on the preconceived plan to construct 3,301 units of housing. Hartz contends that the number of units was determined by density restrictions and zoning requirements stipulated by the HMDC, the State agency mandated with management of the Meadowlands District. It should be noted that there are few, if any, other areas in northeast New Jersey which would permit such high density development. As previously discussed, the majority of alternate sites identified by Hartz were situated in areas where zoning requires significantly less density. Since this project relies on zoning restrictions within the Meadowlands, the project is therefore dependent on the HMDC Master Plan. The HMDC Master Plan, however, was completed prior to implementation of the 404(b)(1) Guidelines and is currently undergoing revision specifically to address compliance with the Guidelines to the maximum extent practicable. In addition, the State of New Jersey has delegated its Coastal Zone Management (CZM) Program to the HMDC for those projects within the boundaries of the Meadowlands District. The CZM plan, based on the HMDC Master Plan, did not evaluate alternatives with the same project-specific consideration of impacts required by the Guidelines. While we acknowledge that it may be appropriate to consider local zoning and/or approved CZM plans that have identified practicable alternatives, it is not dispositive in this case.

I realize that we have covered a number of issues in this correspondence and, in closing, I wish to summarize EPA's major concerns regarding the proposed Villages at Mill Creek. First and foremost, EPA believes that the Corps' conclusions with respect to the values of the wetlands at issue are not supported by the current information and that the loss of this area would result in significant degradation of the aquatic

ecosystem and would be in violation of Section 230.10(c) of the Guidelines. Second, we believe that the alternatives analysis involved too small a geographic area, was unnecessarily biased toward factors associated with the applicant's project such as high density and served to select optimal sites instead of otherwise practicable sites, and, therefore, did not conclusively demonstrate that there are no practicable, less environmentally damaging alternatives as required by Section 230.10(a) of the Guidelines. Third, we question whether the proposed mitigation will yield the purported environmental returns [Section 230.10(d) of the Guidelines] because the baseline wetland values have not been resolved and the method proposed for quantifying the mitigation returns does not lend itself to this application, and there is no mitigation plan at this time. In addition, because we do not believe that the presumption of available alternatives has been adequately rebutted we do not consider mitigation to be appropriate. EPA is concerned that the definition of project purpose has not been consistently applied and that this has unnecessarily restricted the Corps' analysis of alternatives. We also believe that the Corps relied too heavily upon the COAH position as demonstration of the need for housing in the region and, therefore, as a definition of the public interest to be served by permit issuance. EPA believes that the goal of the Clean Water Act to restore and maintain the chemical, physical, and biological integrity of the nation's waters is best served in this case by the Corps' denial of the proposed Section 404 permit for the Villages at Mill Creek.

We are concerned by matters of interpretation of the Guidelines as applied by the New York District and the potential for site specific and cumulative environmental impacts as well as impacts on the integrity of the Section 404 program. Therefore, I believe that the decision to issue the permit warrants additional review. I look forward to your response to our concerns and analyses as provided for in our MOA. If my staff can be of further assistance during your evaluation, please have your staff direct their questions to Kirk Stark in the Office of Wetlands Protection at 475-8796. You should also, of course, feel free to contact me, or David G. Davis, Director of the Office of Wetlands Protection, at 475-7791.

Sincerely,



Rebecca W. Hanmer
Acting Assistant Administrator
for Water

cc: Mr. William J. Muszynski
Acting Regional Administrator

Attachment

Excerpted from:
**Wetland Functional Assessment in New Jersey's
 Hackensack Meadowlands**

FUNCTION	PROJECT SITE	MITIGATION SITES	
	Mill Creek	Anderson Marsh	So. Secaucus
Wildlife	moderate	moderate	high
Waterfowl	high	high	high
Fisheries	moderate	high	high
Aquatic			
Diversity	moderate	high	moderate
Sediment/Tox			
Retention	high	high	low
Sediment			
Stabilization	high	high	high