



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

MAY 10 2005

MEMORANDUM

SUBJECT: Request for Review of Galveston District Permit #22516, Fort Bend County Levee Improvement District 15

FROM: Richard E. Greene *R. Greene*
Regional Administrator (6RA)

TO: Benjamin Grumbles
Assistant Administrator
Office of Water (4101M)

In accordance with the Memorandum of Agreement (MOA) between the U.S. Environmental Protection Agency and the Department of Army, under Section 404(q) of the Clean Water Act, I am requesting that you seek a review by the Assistant Secretary of the Army for Civil Works of the proposed Section 404 permit by the Fort Bend County Levee Improvement District 15, Fort Bend County, Texas. Colonel Steven P. Haustein, District Engineer for the Galveston District, issued a Notice of Intent to issue a permit on April 21, 2005. The proposed project involves a 5.7-mile long earthen levee and associated development, with impacts to 106 wetlands acres, primarily bottomland hardwood floodplain forests known locally as the Columbia Bottomlands.

My staff has consistently expressed the Region's concerns to the Galveston District since the scoping process for this proposed project. We have also attempted to work with the Corps, through the 404 process, to address our concerns about the project. Our primary concerns are the availability of less damaging alternatives (as stated by the developer), the significant and avoidable impacts of the project, and inadequate compensatory mitigation. We have had numerous phone conversations with Galveston District Regulatory Branch management, as well as Colonel Haustein. The goal of these negotiations has been to develop a revised project proposal that will be acceptable under the section 404(b)(1) guidelines.

We have been working closely with your staff on this issue and will continue to do so as we proceed to the next stage of the MOA process. Attached for your review is our May 9, 2005, letter to Colonel Haustein and the supporting information. In addition, we have already forwarded background material to your staff and will continue to prepare and forward important information in this matter.

Attachments



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Colonel Steven P. Haustein
Galveston District
U.S. Army Corps of Engineers
P.O. Box 1229
Galveston, TX 77553

Re: Recommendation to Request a Higher Level Review for Department of the Army Permit #22516, Fort Bend County Levee Improvement District 15.

Dear Colonel Haustein:

This letter is to inform you of my decision to recommend that the Assistant Administrator, Office of Water (AAOW), U.S. Environmental Protection Agency (EPA), request review by the Assistant Secretary of the Army (Civil Works) of the proposed Department of the Army Permit #22516. This request for higher review is in response to the Corps of Engineers' notice of intent to issue a permit, dated April 21, 2005, for a proposed 5.7-mile long earthen levee and associated development, by the Fort Bend County Levee Improvement District 15 in Ft. Bend County, Texas, and pursuant to the *Clean Water Act Section 404(q) Memorandum of Agreement (MOA) Between the Environmental Protection Agency and the Department of the Army*, Part IV, paragraph 3(d)(2). As described in the MOA, Part IV, paragraph 3(e), the proposed permit should be held in abeyance pending completion of the review process.

EPA remains concerned that the proposed project will result in unacceptable adverse impacts to aquatic resources of national importance. I have enclosed a fact sheet with supplemental information addressing specific issues. We believe that due to an inadequate alternatives analysis with flawed assumptions and because impacts to wetlands have not been avoided and minimized to the maximum extent practicable, the proposed project is not the least environmentally-damaging practicable alternative, and a permit cannot be issued. Having been unable to resolve these issues at the Regional level, we feel it is necessary to seek Headquarters review of this case.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Richard E. Greene".

Richard E. Greene
Regional Administrator

Enclosure

cc: Ren Lohofener, U.S. Fish and Wildlife Service, Austin, TX
Carlos Mendoza, U.S. Fish and Wildlife Service, Houston, TX
Rollin MacRae, Texas Parks and Wildlife Department, Austin, TX
Woody Woodrow, Texas Parks and Wildlife Department, Dickinson, TX
Mark Fisher, Texas Commission on Environmental Quality, Austin, TX

Supplemental information – specific issues

The project will result in direct and indirect impacts to 106.43 acres of jurisdictional wetlands and other waters of the United States. Of these 106 acres, 1.29 acres are located within the footprint of the levee. The remaining 105.14 acres will be indirectly impacted by the levee and subsequent development of a Master Planned Community inside the levee. Many of the wetlands and other waters are within a 785-acre floodplain forest. The area is part of the Columbia Bottomlands ecosystem and supports hundreds of species of resident and migratory wildlife. Historically this floodplain forest covered over 1,000 square miles, but now only about one-quarter remains.

We continue to have concerns that the project as proposed would substantially and unacceptably impact aquatic resources of national importance. We believe the Clean Water Act Section 404(b)(1) Guidelines have not been satisfied and that this project is not the least environmentally-damaging practicable alternative.

As we have stated in letters of October 8, and November 1, 2002, and June 26, 2003, we believe there are alternatives that would involve greatly reduced impacts to waters of the U.S. We maintain that the project, the levee and associated development, is not water dependent.

The Environmental Assessment and Statement of Findings (EA/SOF) states that the project site consists of 2,773 acres which will be removed from the floodplain of the Brazos River by the proposed levee. Many of the wetlands and other waters are found within a 785-acre forested area, which is located in a contiguous block on one side of the project site. Thus there are nearly 2,000 acres on which a development could occur without significant impacts to aquatic resources. Further, the applicant has clearly stated (page 4-5 of the Alternative Analysis dated November 6, 2002), that development could occur on-site without a permit by raising non-wetland areas.

Additionally, the issue of adjacency remains to be addressed. We believe that these wetlands are connected to the Brazos River by the tributary system. Runoff from the wetlands drains into tributaries such as Alcorn Bayou and then into the Brazos. The EA/SOF states that the wetlands and waters remaining within the levee "...could become isolated, thereby removing them from...jurisdiction." We believe this is inconsistent with the definition of "adjacent" (33CFR Part 328.3(c)) which states in part, "Wetlands separated from other waters of the U.S. by man-made dikes or barriers...are 'adjacent wetlands.'" The levee will not cause the interior wetlands to become "isolated," and they will not be removed from Clean Water Act jurisdiction.

As we have stated in letters of June 26, 2003, and January 27, 2005, we believe that the compensatory mitigation proposal is inadequate to compensate for the impacts. Specifically, the two compensatory mitigation tracts being considered by the Corps will not adequately offset wetland functions and values lost as a result of the proposed project. In an effort to help resolve our concerns with the proposed project, we have identified another mitigation option. Under this option, the applicant would contribute funds to purchase land containing at least 742 acres of Columbia Bottomlands with wetlands and other waters which are comparable in both quality and type to those on the project site. We have been and continue to remain available to help identify and develop an acceptable mitigation option for this case.