



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(q) 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.

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)