



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108



REPLY TO
ATTENTION OF

0 8 FEB 1996

Honorable George T. Frampton, Jr.
Assistant Secretary for Fish
and Wildlife and Parks
Department of the Interior
Washington, D. C. 20240

Dear Mr. Frampton:

Thank you for your letter of January 11, 1996, in which you requested our review of issues related to a Department of the Army permit being considered by the Army Corps of Engineers Galveston District. The permit would allow the city of Lake Jackson to fill a total of two acres of scattered wetland depressions to facilitate the construction of an 18-hole public golf course in 115 acres of hardwood forest.

Your request for elevation was made pursuant to Part IV of the 1992 Section 404(q) Memorandum of Agreement (MOA) between the Department of the Interior (DOI) and the Department of the Army. The DOI's primary concerns relate to the accuracy of the Corps wetland delineation and the loss of 115 acres of mature hardwood forest through clearing. Other concerns raised include: the direct loss of two acres of wetlands; the degradation of wildlife habitat in an adjacent 1600-acre contiguous hardwood forest through habitat fragmentation and induced development; the degradation of the adjacent forest ecosystem through siltation and contamination caused by runoff of disturbed soils, building materials, and associated pollutants during and following construction of the golf course; and the degradation of the adjacent forest ecosystem by interruption and diversion of sheetflow that maintains the present hydrologic regime. In addition, DOI believes that the impacts to the aquatic ecosystem and wetland wildlife resources of national significance have not been fully considered by the District Engineer; that there appear to be less damaging practicable alternatives to the proposed work; and that even if the impacts were unavoidable, they would not be substantially compensated for by the compensatory mitigation proposed. Regardless of the final decision on the instant case, DOI has requested that the Corps utilize the experts at the Waterways Experiment Station, in cooperation with the U.S. Fish and Wildlife Service (FWS) and other agency personnel, to evaluate the wetland characteristics of bottomland hardwood forests in this region, in order to provide valuable information on these wetlands to future permit applicants and the public.

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 must involve an aquatic resource of national importance (ARNI); and 2) the project must result in substantial and unacceptable impacts to an ARNI.

We have carefully considered the concerns raised in your letter, the District's decision documents and draft permit, and information collected from a January 23, 1996, tour of the proposed project site, and from independent interviews with the Galveston District staff, consultants to and representatives of the city of Lake Jackson, and the staff of the Clear Lake Field Office of the FWS. Based on the results of this review, we have determined that the first test of Part IV of the MOA has not been met. The affected aggregate total of two acres of isolated depressional wet areas does not constitute an ARNI, either alone or in association with the surrounding upland forest. The overwhelming majority of the directly affected 115-acre construction area is a floodplain forest which is not subject to regulatory jurisdiction under Section 404 of the Clean Water Act (CWA). The 1600-acre hardwood forest is, perhaps, a resource of national importance, but we do not agree that the entire 1600-acre tract can reasonably be considered to be an aquatic resource. In addition, we agree that the contiguous wetlands on the project site would qualify as ARNIs. However, these have been avoided by the golf course.

While the first part of the ARNI test was not met and further analysis is not required, we do not believe that the proposed project would result in an unacceptable adverse impact to the wetland resources. In this case, these scattered and limited wetlands are not integral to the functions and values of the hardwood forest. For example, we believe that the elimination of these two acres of wetlands would not alter the overall character of the forest system.

Although the disagreement over the scope of the directly affected jurisdictional wetlands (two acres) on the project site is not an issue which qualifies for consideration under the terms of the MOA, it appears to be DOI's primary concern. For this reason, despite the disqualification of this issue from consideration under the MOA, we reviewed the District's delineation protocol and their findings in light of the USFWS information and opinion. Representatives of the Clear Lake Office of the FWS concede that the District's delineation protocol was adequate and appropriate. However, based on observations

of topography and hydrology during March 6 to April 10, 1995, the FWS believes that the wetland delineation should be far more inclusive than is reflected in the Corps delineation. The District did consider the FWS data on hydrology, but they determined that the flooded conditions found at that time were an unusual situation, and not corroborated as a long-term condition by any corresponding and requisite soil indicators in these areas. In light of this, the District concluded that these areas do not qualify as jurisdictional wetlands under the 1987 Federal Manual for Delineating Jurisdictional Wetlands. As a final consideration of the Corps position on the wetland delineation, the District asked the U.S. Environmental Protection Agency (EPA) to review their delineation. The EPA completed this review and concurred that the Corps delineation is correct. We consider this concurrence to be dispositive since EPA has the ultimate responsibility to determine CWA jurisdiction.

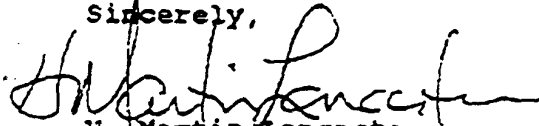
DOI's concern about the direct loss through clearing of 115 acres of the mature forest is a reasonable and valid concern. Despite this loss of a significant area of a dwindling but non-jurisdictional resource, we find that the limited and isolated nature of the interspersed small pockets of wetlands on the project site, and the extremely limited adverse direct effects resulting from their loss, are insufficient to justify the consideration of the impacts to the non-jurisdictional upland forest as a compelling factor in the permit decision. We share your concerns about the fragmentation effects from prospective development that may be induced by the golf course. However, we believe that this issue must be addressed on a case-specific basis, consistent with the scope of the Corps jurisdiction over the individual properties involved, and in keeping with established policy on cumulative impacts. We believe that the concerns about degradation of the remaining habitat from siltation and runoff from the golf course, and from the interruption and diversion of sheetflow, have been adequately addressed by the standard erosion controls and water management facilities that have been incorporated in the project design. These controls should sufficiently minimize any adverse effects in these regards.

The positions taken by DOI that there appear to be less damaging practicable alternatives, and that the project impacts are under-compensated by the proposed mitigation, also have been considered in our review. Although seven alternative sites for the golf course were considered in addition to the proposed project site, none of the seven sites were found to be practicable for

various combinations of reasons including the unavailability of the candidate site, insufficient size, other environmental concerns, and cost. Sites outside the city of Lake Jackson's Extra-Territorial Jurisdiction were not found to be feasible for the city since such alternatives would have involved legal and political considerations related to the expenditure of city funds for the construction of the golf course in another corporate jurisdiction. As mitigation for the unavoidable impacts to the affected aquatic resources on the project site, the city is proposing to perform remedial work on 2000 linear feet of actively eroding streambank and bottom, and four lateral gullies. This work will prevent further habitat loss and degradation by controlling erosion and protecting the hydrology of the adjoining bottomland wetlands. We believe this constitutes adequate mitigation for the loss of the aggregate total of the two acres of isolated depressional wetlands on the project site. However, in recognition of the concerns about the habitat value of the larger tract of hardwood forest, we will ask the Galveston District to continue discussions with the city of Lake Jackson regarding their willingness to consider annexing an approximate 200-acre parcel of land that adjoins the southern boundary of the project site, to the city's 480-acre Wilderness Park which borders the golf course site on the north and east.

In light of the findings summarized above, additional review pursuant to the MOA is not required. I will advise the Corps to proceed with the final permit decision in accordance with the MOA. Although in this particular case we disagree on the specific issues raised, we share fully your desire to protect the Nation's aquatic resources and the public interest. Toward these ends, we concur with your recommendation that the Corps and the FWS evaluate the wetland characteristics of bottomland hardwood forests in this region. We agree that such a cooperative venture, as a cost-shared effort, will provide valuable information on these forests, which will contribute to more efficient issue resolutions in the future. The efforts of you and your staff in raising both the case-specific and the generic issues to our attention are appreciated. If you have any questions concerning our decision in this case, contact me or Mr. Michael L. Davis, Chief, Corps Regulatory Program at (202) 761-0199.

Sincerely,



H. Martin Lancaster
Assistant Secretary of the Army
(Civil Works)