



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
190 FIFTH STREET EAST
ST. PAUL, MN 55101-1638

May 26, 2006

Operations
Regulatory (2005-5527-WAB)

Mr. Richard Hargis, Jr.
U.S. Department of Energy
PO Box 10940
Pittsburgh, Pennsylvania 15236

Dear Mr. Hargis:

This is in response to your letter dated April 28, 2006, requesting Corps review of the wetland delineations completed by Short Elliott Hendrickson, Inc. The wetland delineations were conducted on the East Range and the West Range Sites being considered by Excelsior Energy for the construction of the Mesaba Energy Project. Per your request, the Corps of Engineers will consider the forwarded information to be "draft documents."

We have reviewed the draft wetland delineation reports and concur that the wetland boundaries on the property appear to have been established in accordance with the *Corps of Engineers Wetland Delineation Manual* (1987 Manual). Numerous wetland basins were described as "isolated", which suggests the identified basins are outside the Corps' Clean Water Act jurisdiction. The Corps of Engineers would like to field verify whether the various basins are isolated according to Corps guidance before commenting on this matter. When the Corps of Engineers receives a final delineation report and provides concurrence with the report, the wetland delineation shall remain valid for a period of five years from the date of the concurrence letter, unless new information warrants revision of the delineation before the expiration date.

It is apparent that many of the wetlands at the West Site are adjacent to the Prairie River and the Swan River and wetlands at the East Site are adjacent to tributaries of Colby Lake, Whitewater Lake, and the St. Louis River. Pursuant to Section 404 of the Clean Water Act, the Corps of Engineers has regulatory jurisdiction over the discharge of dredged and fill materials, including discharges associated with mechanical land clearing, in all waters of the United States, which includes most of the wetlands identified at these sites.

Department of the Army Permit – General Information

Waters of the United States include navigable waters, their tributaries, and adjacent wetlands (33 CFR § 328.3). CWA Section 301(a) prohibits discharges of dredged or fill material into waters of the United States, unless the work has been authorized by a Department of the Army permit under Section 404.

The Corps' evaluation of a Section 404 permit application involves multiple analyses, including (1) evaluating the proposal's impacts in accordance with the National Environmental Policy Act (NEPA) (33 CFR part 325), (2) determining whether the proposal is contrary to the public interest (33 CFR § 320.4), and (3) in the case of a Section 404 permit, determining whether the proposal complies with the Section 404(b)(1) Guidelines (Guidelines) (40 CFR part 230).

Compliance with the Section 404(b)(1) Guidelines

The 404(b)(1) Guidelines specifically require 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” (40 CFR § 230.10(a)). In addition, no discharge can be permitted under the Guidelines if it would, individually or cumulatively, cause or contribute to significant degradation of waters of the United States, or violate other applicable laws, such as State water quality standards, toxic effluent standards, or the Endangered Species Act. The 404(b)(1) Guidelines also state that no discharge in wetlands shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.

Analysis of Alternatives

Under the 404(b)(1) Guidelines, when a proposal is not “water dependent,” meaning that it does not need to be located in or near special aquatic sites, such as wetlands, to serve its basic purpose, it is presumed that there are alternative upland sites available and that the use of an upland site would be less environmentally damaging.

The overall project purpose is used for determining practicable alternatives under the 404(b)(1) Guidelines. The overall project purpose must be specific enough to define a permit applicant's needs, but not so restrictive as to preclude all discussions of alternatives. The Corps must evaluate practicable alternatives that meet the overall project purpose. A practicable alternative is defined as one that would fulfill the proposal's overall purpose after considering cost, existing technology, and logistics. Defining the project purpose is the responsibility of the Corps; however, applicant input is considered in making this determination.

Public Interest Review

The decision whether to issue a Department of the Army permit will be based on an evaluation of the probable impacts, including cumulative, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact that the proposed activity may have on the public interest requires a careful weighing of all those factors that become relevant in each particular case. The benefits that reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process.

The public interest factors include such considerations as conservation, economics, aesthetics, navigation, fish and wildlife values, water supply, water quality, energy needs, and flood damage prevention. The Corps also considers all comments received in the permit process, whether in response to a public notice or a public hearing. The Corps must determine that a proposal is not

contrary to the public interest in order to issue a permit. Any investment made for the proposal outside of the Section 404 process cannot be factored into our alternatives analysis under the 404(b)(1) guidelines.

If you have any questions, contact Bill Baer in our Brainerd Regulatory field office at (218) 829-2711. In any correspondence or inquiries, please refer to the Regulatory number shown above.

Sincerely,

William Baer
for
Robert J. Whiting
Chief, Regulatory Branch