



## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

## REGION IV

345 COURTLAND STREET, N.E.  
ATLANTA, GEORGIA 30365

DEC 22 1993

REF: WMD/WOWB/MF

Colonel Stanley Phernambucq  
District Engineer  
U.S. Army Corps of Engineers  
Vicksburg District  
P.O. Box 60  
Vicksburg, MS 39180-5191

OPTIONAL FORM 99 (7-90)

## FAX TRANSMITTAL

# of pages ▶ 12

To <i>Cliff Radar</i>	From <i>Mike Wylie</i>
Dept./Agency	Property <i>404 347 4015</i>
Fax# <i>202 860 7546</i>	Fax# <i>404 347 3269</i>
NSN 7540-01-317-7300	5009 101 GENERAL SERVICES ADMINISTRATION

Attention: Mr. Philip B. Hollis

Subject: Application No.: CELMK-OD-FE 14-9(DELTA)-1

Dear Colonel Phernambucq:

This letter and the initiation of the following procedures are in response to your correspondence received on December 13, 1993 regarding the above referenced project. Although your letter refers to enclosures, none have been received to date. The following comments are based on the November 18, 1993 Draft General Permit for the above project received by the Environmental Protection Agency (EPA), Region IV.

Your letter states that pursuant to Part IV.3.(c)(3) of the 1992 Section 404(q) Memorandum of Agreement between the Department of Army and EPA (MOA), you have concluded that EPA concerns have been addressed. The letter serves as a notice of intent to issue the above permit. The procedural implications of this interpretation of the MOA are of great concern to EPA. Despite numerous conversations with the project manager, and other conversations with the Acting Chief of Permitting and the Regulatory Branch Chief in which EPA clearly indicated significant outstanding objections, your letter states that no EPA objections remain. EPA attempts to resolve outstanding issues since the interagency meeting of November 2, 1993 have been unsuccessful. Our outstanding objections are discussed in Attachment A with suggestions for their resolution.

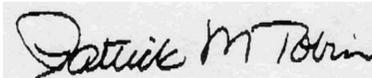
Although coordination procedures with the U.S. Fish and Wildlife Service are continuing and the permit has been modified to address some of their concerns, further revisions of the permit or a decision document were not forwarded to EPA. Since EPA does not have the opportunity to review these latter documents, pursuant to Part IV.3.(d)(2) of the MOA, EPA, Region IV has decided to forward this issue to EPA Headquarters Assistant

Administrator for Water with a recommendation to request review by the Assistant Secretary of the Army for Civil Works.

Additionally, our concerns over the nationwide procedural and policy implications of your interpretation of the MOA have led EPA to believe that it may be appropriate for clarification to be provided at the national level. Therefore, pursuant to Part III of the MOA we are also considering elevation of these policy issues as outlined in Attachment B.

If you have any questions feel free to contact me or Mr. Tom Welborn, Chief of the Wetlands Regulatory Section at 404/347-3871.

Sincerely yours,



Patrick M. Tobin,  
Acting Regional Administrator

Enclosures

cc: EPA-HQ-Washington, D.C.  
EPA, Region VI-Dallas, TX  
U.S. Fish & Wildlife Service-Lafayette, LA  
U.S. Fish & Wildlife Service-Daphne, AL  
U.S. Fish & Wildlife Service-Vicksburg, MS  
Department of Environmental Quality-Jackson, MS  
DELTA-Jackson, MS

ATTACHMENT A

Project Description:

The Delta Environmental Land Trust Association (DELTA) has applied for a general permit to the Vicksburg District of the U.S. Army Corps of Engineers (Corps) to establish a commercial wetlands mitigation bank in Mississippi, Louisiana and Arkansas, excluding the coastal zones of Mississippi and Louisiana. The tracts to be admitted to the bank will include prior converted or farmed wetlands which are to be restored to bottomland hardwoods through hydrologic manipulation and planting of appropriate species. The minimum parcel size is 100 acres. Mitigation credits for each bank are only applicable within the State in which the bank is located. Restoration plans for each parcel will be coordinated with appropriate state and federal agencies through a ten day review process or longer if circumstances warrant. Ownership of each parcel is to be maintained by the current owner. Activities will be carried out through authorization granted by a recorded conservation easement.

For reasons which will be discussed in this attachment, EPA, Region IV believes that although mechanisms for resolving outstanding issues exist, permitting of this project as proposed would lead to significant individual and cumulative adverse impacts to aquatic resources of national importance. All comments are based on the November 18, 1993 draft general permit.

Aquatic Resources of National Importance:

EPA, Region IV has determined that forested wetlands, especially within the geographic boundaries of the Vicksburg District of the U.S. Army Corps of Engineers, are aquatic resources of national importance. This is specifically due to the vast historical losses and increasing developmental pressures. Forested wetlands provide many important functions and values that are critical to ecosystem fitness, water quality maintenance and the survival of endangered and threatened species. Important functions of forested wetlands drive community dynamics, physio-chemical processes, surface water and ground water storage. These functions provide values that are not only desirable but critical to society. Values are manifested in biomass production, food chain support, recreational uses, erosion control, water quality maintenance, flood storage and control, low flow augmentation and aquifer recharge.

Forested wetlands in the lower Mississippi Valley had declined by approximately 80% by the mid 1980's. The overwhelming majority of these losses can be attributed to agricultural conversion. Between 1975 and 1985, the State of Louisiana lost approximately 523,000 acres of forested wetlands in the Valley. In the same period, Mississippi lost 204,000 acres of forested wetlands due to agricultural conversion in the lower Mississippi Valley. Arkansas' corresponding loss is 210,000 acres. This area corresponds to the boundaries of the Vicksburg District.

While the rate of forested wetlands losses in the lower Mississippi Valley have decelerated as of the latter part of the 1980's, developmental pressure remains strong. EPA believes that the remaining forested wetlands within the boundaries of the Vicksburg District are of critical importance due to their increasing scarcity. At various times of the year, forested wetlands in the lower Mississippi Valley provide wintering, nesting and foraging habitat for waterfowl, neo-tropical migratory songbirds, wading birds and the threatened bald eagle. Seasonally inundated forested wetlands provide spawning and nursery areas for many freshwater fish. Many species of mammals, both recreationally and commercially important, depend on forested wetlands for food and habitat. Among these is the federally listed Louisiana black bear. Due to the massive agricultural conversion of historical forested wetlands in the Vicksburg District, the remaining tracts are critical in providing water quality benefits, flood suppression and erosion control.

EPA, Region IV believes that the permit, as proposed, will not adequately replace the lost functions and values of the remaining forested wetlands tracts. Region IV believes the remaining tracts of forested wetlands in the Vicksburg District are too important to the health of the present ecosystem to jeopardize additional losses without adequate functional replacement. For these reasons, Region IV believes that the remaining forested wetlands in the lower Mississippi Valley are aquatic resources of national importance. Since resource restrictions at the Region and at EPA Headquarters cannot accommodate the elevation and resolution of the numerous permits which will undoubtedly use the available banks, inadequate compensation for these impacts will individually and cumulatively constitute significant adverse impacts to aquatic resources of national importance.

Individual objections and options for resolution are discussed below.

Objection:

Up to 50% of the restored forested areas, can be clearcut in 12-15 years, with the balance being eligible for cutting in another 12-15 years. Hardwood trees of such age composition are gaining value in the pulp and paper industry. However, in most targeted species, adequate mast production which is a primary asset to wildlife, has not yet begun. The permit states, "The species and age composition of the residual stand must be similar to that of the preharvest stand." Unless 12-15 year old trees are replanted, such a requirement cannot be met. The permit also states, "Compensatory mitigation credit shall apply only to in-kind habitat losses when high quality habitats are impacted." Clearly, high quality habitat will not be what these losses are compensated with.

Options:

As consistent with the August 23, 1993 Memorandum to the Field on mitigation banking, allowed silvicultural activities can be restricted to selective timber harvest where the majority of the trees in stands are allowed to reach full functional maturity, approximately 60 years for hard mast trees. Alternatively, mitigation credits may only apply to offsetting adverse impacts to young bottomland hardwood sites or sites of lower functional quality.

Objection:

No restoration efforts are proposed prior to sale of credits. The permit states, "The D.E.L.T.A. shall initiate restoration work during the planting season following collection of funds and shall complete the work on the whole account/tract within 5 years." It is uncertain how many credits need to be sold before DELTA initiates restoration work. Other than the signing of the conservation easement by the landowner, no aspect of this proposed bank is up front. The applicant has five years to complete plantings, which is a longer delay than that encountered in most individual permit mitigation projects. Functions lost at the time of impacts may not be replaced for several years.

If not reflected in appropriate ratios for purchase of credits, this fact alone could result in a further net loss of functions. This time period also poses chronological discrepancies within DELTA's proposed monitoring scheme and contingency measures which are discussed below.

#### Options:

memo # 3

A limited percentage of available credits may be sold prior to the initiation of restoration efforts. A lower and upper limit of credit sales needs to be established to allow DELTA adequate funds to start and complete work on a given tract. The time allowed for completion of restoration on a given tract should be shortened to a maximum of two years, unless the lower limit of necessary credits have not been sold. Discrete relationships between sale of credits and acreage on which restoration is completed need to be established. These relationships can serve all tracts admitted to the bank.

#### Objection:

The proposed planning, monitoring practices and contingency measures are not suitable throughout the proposed geographic range of the permit. Some examples are discussed.

Planning of hydrologic restoration is assigned to DELTA or a registered forester. Although most registered foresters have adequate knowledge of hydrologic manipulation techniques to allow for tree regeneration, the goals of wetland restoration and silviculture may at times differ. In the Mississippi Delta both goals can be met through the proposal. However, the permit also applies to more gradient-limited areas in Arkansas and Louisiana which do not benefit from the consistent annual flooding of the flat Mississippi River floodplain. EPA, Region IV has extensive experience with the challenges of restoring bottomland hardwoods in the Piedmont region of Georgia. Even after careful surveys and engineering of the hydrologic restoration requirements, many sites do not successfully display wetland characteristics.

Options:

Plans for the restoration of hydrology at such sites should be delegated to an accredited wetland hydrologist or to a multidisciplinary team of wetlands experts. The review period for restoration plans at such sites should reflect the required duration of the necessary planning and review.

Objection:

Monitoring for success of mitigation applies a one parameter approach. Survival of 75% of the planted trees (120 per acre) is the only parameter of monitoring proposed. Each site is to be visited by DELTA once annually for five years. A videotaped report is to be submitted to the Corps and placed in the tract file. No coordination for review of success is proposed. As mentioned earlier, where a flat landscape is not available, strict hydrologic monitoring is necessary to ensure that the sites meet the hydrologic criteria for wetlands. In certain instances, planting of tree species will need to occur prior to the restoration of the hydrology to allow the saplings to become established and tolerant of saturated soils or inundation. Similarly, in certain landscapes natural recruitment may not be adequate to supplement the 120 tree/acre proposed for planting. This number may be adequate for the Mississippi Delta, but may need to be augmented in other settings.

memo #5

Options:

Minimum monitoring criteria should be included in the permit with reference to additional potential site specific requirements. The necessity for such requirements should be coordinated with appropriate state and federal agencies as part of the review of each proposed restoration plan for a given tract. Similarly, the success of restoration at each site should be revisited by an interagency review group at least annually.

Objection:

The permit states, "The restoration plan will specify tree replanting (if necessary) after the year three and the year five visit." As proposed, restoration on a given tract

memo # 5  
 may not be finished in year three or five. Since there is no concrete schedule of restoration within the five year time frame allotted for each tract, devising a monitoring schedule is also difficult. Functional loss would result should tree survival fall below success levels since no contingency measures for replanting exist after the fifth year.

Options:

When a time frame for the sale of credits and restoration of a given tract is established, proper timing for various aspects of monitoring can be determined. Under circumstances where plantings are necessary prior to hydrologic restoration of the site, a case specific schedule for monitoring of the vegetation should be devised.

Objection:

memo # 4  
 There is no direct enforcement link between the Corps and the landowner. Enforcement of all on-site activities is delegated to DELTA. Should a violation of the terms of the easement be detected by DELTA, the sale of credits from that parcel will be suspended by the Corps until remedial action has been completed. However, in order to enforce remedial actions, DELTA will decide at its discretion if resources allow a court action at that time. EPA, Region IV is concerned that should all credits from a parcel be sold, little financial motivation will remain for the applicant to allocate resources to obtaining court relief. Other enforcement measures through the Internal Revenue Service and local tax authorities also exist. However, when permits have been issued with compensatory mitigation provided through the use of a particular bank site, should the mitigation site not provide adequate mitigation, a net loss of resources has occurred.

Options:

DELTA can be required to assign credits from another appropriate tract to offset the impacts of the unsuccessful mitigation. Should a court case or other action lead to satisfactory restoration, those credits may then be resold.

**Objection:**

Within each state, all tracts have a statewide area of applicability. No differentiation in withdrawal ratios is proposed for increasing distances from the impact site. Some geographic features within each state make state wide applicability of bank parcels inappropriate.

**Options:**

EPA, Region IV recommends that each state be subdivided into ecologically sensible segments within which no differentiation in ratios is necessary. Alternately, the same boundaries could serve as the basis for discrete withdrawal ratio increases as conditions of the permit.

**Objection:**

ERROR!

With respect to the calculation of available credits, the draft general permit proposes to use Habitat Evaluation Procedures (HEP) Habitat Units (HU's). The District assumes that all restored wetlands as a result of the DELTA bank have an HU value of 0.8. A rating of 0.8 HU's represents a highly functional wetland. As discussed earlier, EPA, Region IV believes that as proposed the restored tracts may never attain a 0.8 HU rating.

**Options:**

When each tract is reviewed to determine the appropriate restoration needs, future HU's (credits) can be calculated based on an abbreviated HEP. Alternately, should our timber harvesting concerns be addressed by the permit, a table of acre to HU ratios can be devised for different stages of the mitigation project. As restoration proceeds and success criteria are met, the acreage to HU ratio would approach 1:1.

ATTACHMENT BIssue:

On December 13, 1993, the Vicksburg District Corps of Engineers issued a notice of intent (NOI) to authorize the proposed DELTA permit (pending water quality certification conditions) in accordance with the field level procedures outlined in the August 1992 Memorandum of Agreement (MOA) between the EPA and COE, Part IV.3.(c)(3) regarding Section 404(q) of the Clean Water Act, 33 U.S.C. §1344(q). Region IV had 15 days from the receipt of the NOI to continue the elevation procedures by notifying the District Engineer that Region IV was forwarding the issue to the AAOV to request a review by the ASA(CW). EPA Regions IV and VI have outstanding objections to the proposed permit conditions as does the U.S. Fish and Wildlife Service. The State of Mississippi is withholding 401 certification until the end of January.

Region IV is also considering notifying the AAOV pursuant to Part III.4. of the MOA that we feel Part IV.3.(c)(3) of said MOA has limited Region IV's ability to resolve individual permit concerns at the Corps of Engineers District level. *How?*

Background:

Sometime in early summer, Region IV was alerted to the fact that the Vicksburg District was working on a mitigation bank. The bank would serve the three states in the Vicksburg District. When Region IV staff inquired about further information, EPA was informed that more information about the bank would be supplied later. The Vicksburg District initially published the proposed DELTA public notice on August 27, 1993, with a 30-day comment period. Region IV, per a telephone conversation with the Vicksburg District on September 21, 1993, was informed of a 14-day extension to the DELTA permit comment period. Region IV sent comments to the District on October 8, 1993, in accordance with Part IV.3.(a) of the 404(q) MOA. *3a* Region IV discussed our project related concerns with the Vicksburg District and resource agencies in attendance in a conference call on October 12, 1993. EPA Region IV followed the 3.(a) letter with a 3.(b) letter on November 2, 1993, to ensure EPA comments would have full consideration under the 404(q) MOA procedure. EPA Region VI also sent 3.(a) and 3.(b) objecting to the project as well. The 3.(b) letter was not provided with the time frame specified by the MOA and thus the Vicksburg District decided the Region VI has forfeited its right to an individual project elevation. Region IV will participate in any policy elevation related to the DELTA permit.

36

On November 2, 1993, Region IV staff attended a meeting in Vicksburg, Mississippi, with the District and attending resource agencies to further discuss EPA comments. EPA's representative was informed at the meeting by the assistant Chief of Operations that the District appreciated the agencies' comments and the permit would be issued forthwith. EPA's representative was handed a second draft of the proposed permit at the meeting. He then spent most of the day reviewing the draft and providing comments to the applicant and the District.

In response to agency comments on the proposed permit, the District issued the third draft permit which EPA received on November 18, 1993. This is the last complete draft EPA has received and is the basis of all comments on the individual permit elevation.

On December 13, 1993, Region IV received correspondence from the District stating the District had satisfied EPA's project related concerns in the November 18th draft permit and, following the procedures outlined in Part IV.3.(c)(3) of the 404(q) MOA, were issuing an NOI to authorize the proposed permit pending state water quality certification. Additionally, pursuant to Part IV.3.(d) of the 404(q) MOA, the District requested Region IV notify their office within 15 calendar days of the receipt of the NOI letter of EPA actions.

*Corps must send modif. for conditions which they believe satisfied EPA's concerns. Did they?*

On December 20, 1993, in an effort to resolve the remaining EPA concerns with the DELTA project, Region IV conducted a conference call with the Vicksburg District and the applicant. The Region telefaxed a list of remaining concerns to the District with the actions necessary to resolve the project related objections. Representatives of the Vicksburg later called to indicate that they would not make some the recommended changes to the permit.

#### Policy Discussion:

While Region IV was unable to reconcile differences with the Vicksburg District over the proposed DELTA permit, EPA feels that the Agency's options were severely curtailed due to the Vicksburg District's use of Part III.3.(c)(3) of the MOA.

The Vicksburg District made a unilateral decision that Region IV's concerns were adequately addressed by the November 18th draft DELTA permit revisions pursuant to Part III.3.(c)(3) of the MOA. In fact Region IV's concerns were not addressed. EPA's inquires to District staff after receipt of the NOI were not fruitful in resolving EPA's remaining concerns. Region IV was informed by the District that neither a decision document nor a final permit was available to accompany the December 13th NOI.

3

The Region was encouraged to submit comments for District review but the final permit conditions were not complete. In fact, the proposed permit conditions of the November 18th draft were changing after discussions between the applicant and the U.S. Fish and Wildlife Service. Region IV was left with few options. The NOI had to be addressed, but the Region only had the November 18th letter from the District and no final draft permit or decision document to address the District's resolution of the Region's concerns. The proposed permit conditions were being changed even after the Region's receipt of the NOI. Until the Region could ascertain the District's final permit position, EPA was compelled to maintain the outstanding objections, especially given the 15-day elevation decision period.

In conclusion, the Region feels that Part III.3.(c)(3), as interpreted and used by the Vicksburg District, did not allow for effective dispute resolution at the local level. This provision of the MOA allows a District the option to make a unilateral decision on agency comments with no supporting documentation. Thus, if a commenting agency does not feel its project specific concerns were addressed, the agency's only recourse is permit elevation, even for a matter as simple as reviewing the District's rationale for addressing agency concerns.

*NO, it does not*

For these reasons, the Region believes that Part III.3.(c)(3) of the MOA should be addressed at the national level for interpretive guidance to the field.