



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY


WASHINGTON, D.C. 20460

JUN 14 2005

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Region 6 Request for Review of Proposed Section 404 Permit
Levee Improvement District 15, Fort Bend County, Texas

FROM: Benjamin H. Grumbles 
Assistant Administrator for Water

TO: Richard E. Greene
Regional Administrator (6RA)

DATE: June 13, 2005

On May 10, 2005, you requested that I refer the subject permit to the Assistant Secretary of the Army (Civil Works) for review, pursuant to the 1992 *Clean Water Act Section 404(q) Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army*. Since that time, my staff, in coordination with Region VI, have been working with the Department of the Army (Army) and the Corps of Engineers (Corps) in an effort to resolve EPA concerns with the issuance of the proposed permit for this project. As a result of those discussions, the Corps provided EPA with a revised draft permit and decision document. After consulting with Region VI and in recognition of the improvements to the mitigation plan and modifications to the permit and decision document made by the Corps, I have determined it is no longer necessary to seek review of the project by the Assistant Secretary of the Army (Civil Works).

Of primary concern with the proposed permit was the District's interpretation that the construction of a levee adjacent to the Brazos River would remove waters of the United States behind the levee from Clean Water Act jurisdiction. As a consequence, the development of a proposed Master-Planned Community (MPC) behind the levee could discharge dredged or fill material into those waters without the benefit of Clean Water Act review. While the applicant (the Levee Improvement District) had agreed to mitigate for impacts associated with the MPC, EPA was concerned that the District's interpretation is inconsistent with the agencies' regulations. The Corps and EPA have consistently interpreted our regulations to preserve jurisdiction over waters inside a levee because such waters remain "adjacent." The Corps has removed this language from the revised permit and decision document, and now all proposed discharges to waters associated with construction of the levee and MPC are appropriately authorized in the permit.

Another key concern with the proposed permit focused on the adequacy of the compensatory mitigation plan to effectively offset all anticipated adverse environmental impacts to waters of the United States associated with permitted discharges. The applicant has now agreed to double the duration, from five to ten years, of the long-term management plan for Chinese Tallow eradication on the off-site preservation area (the Sweeney Tract). The applicant will provide Region VI with annual monitoring results on the Sweeney Tract and consult with the Region on the effectiveness of efforts to regenerate hardwoods on the portion of the site impacted by the Tallow. The applicant's mitigation plan is being modified to reflect the commitment to increase the duration of long-term monitoring on the Sweeney Tract.

While we appreciate the Corps' willingness to respond to several of the Agency's concerns, we believe that issues remain regarding the District's interpretation and application of CWA section 404(b)(1) Guidelines. This concern focuses on the characterization of an appropriate project purpose and the evaluation of project impacts, including consideration of all indirect, secondary, and cumulative adverse effects to waters of the United States. I am particularly concerned because the characterization of project purpose is critical to an effective analysis of potential off-site alternatives and to the consideration of opportunities to minimize on-site impacts. At your request, Headquarters' staff are available to work with Region 6 and the Corps District to promote the appropriate, effective, and consistent application of the Guidelines in the review of future applications for section 404 permits. Please let us know if we can support your discussions with the District.

I would like to thank you and your staff for the time and effort expended in working with my staff to negotiate a resolution that enables this project to move forward while conserving important aquatic resources.

cc: Lawrence Starfield
Deputy Regional Administrator