

**ENVIRONMENTAL PROTECTION
AGENCY**

[Notice No. IV-404002-BJE; A-4-FRL 2466-8]

Proposed Determination To Prohibit, Deny, or Restrict the Specification, or the Use for Specification, of an Area as a Disposal Site; Public Hearing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Determination and Notice of Public Hearing.

SUMMARY: Section 404(c) of the Clean Water Act (33 U.S.C. 1251 *et seq.*) provides that, the Administrator of the U.S. EPA is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearing, that the discharge of dredged or fill materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreation areas. The procedures for implementations of 404(c) are set forth in 40 CFR Part 231. This notice of the proposed determination and public hearing is being published in accordance with 40 CFR 231.3 by the Regional Administrator of the EPA's Region IV

In 1980, the Corps of Engineers advertised a permit application No. AL-80-00327-C for the deposition of fill material in approximately 55 acres of wetlands (waters of the United States) adjacent to Three Mile Creek. The proposed disposal area was subsequently reduced to 25 acres of wetlands per the applicant's request. The applicant is Mr. M. A. Norden, P.O. Box 2245, Mobile, Alabama 36601, who proposes to construct an office, warehouse and a storage yard on the filled wetlands. The proposed site borders Three Mile Creek and One Mile Creek and is bound on the east by Conception Street within the city limits of Mobile, Alabama.

EPA proposes to prohibit the specification of the wetland area described herein as a disposal site for dredged or fill materials under the provisions set forth in 40 CFR Part 231 based on the anticipated unacceptable adverse effects on shellfish beds and fishery areas (including spawning and breeding areas), and wildlife areas

In accordance with 40 CFR 231.4, I find that it would be in the public interest to hold a hearing on the proposed determination.

Purpose of Public Notice

This notice serves as a notice of proposed determination and public hearing on permit application No. AL80-00327-C. Region IV would like to obtain comments on EPA's proposal to prohibit disposal on the wetlands in question and whether or not the impacts of destroying 25 acres of tidally influenced wetlands in the Three Mile Creek floodplain area represent an unacceptable adverse effect as described in Section 404(c) of the Clean Water Act.

Hearing Date

December 15, 1983, beginning at 7 p.m.

Hearing Address

Airport Ramada Inn, 600 Beltline Highway So., Mobile, Alabama.

Comments may be submitted prior to the hearing or presented at the hearing. The hearing record will remain open after the hearing until close of business, December 30, 1983, for the submittal of written comments. Comments submitted prior to or after the hearing or requests for copies of the proposed determination should be submitted to EPA's designated Record Clerk, Ms. Earline Hanson, Office of Policy and Management, Environmental Protection Agency, 345 Courtland Street, Atlanta, Georgia 30365. Oral and written comments should directly address whether the proposed determination should become the final determination or whether corrective action could be taken to reduce the adverse impact of the discharge. All such comments will be considered in reaching my decision to either withdraw the proposed determination or prepare a recommended determination to prohibit or deny the specification or the use for specification of the area as a disposal site. If a recommended determination is made, it and the administrative record will be forwarded to the Administrator of EPA for review and the making of the final determination. The procedures to be used by the Administrator in making the final determination are specified at 40 CFR 231.6

Copies of all comments submitted in response to this notice will be available for public inspection during normal working hours (8 a.m. to 4:30 p.m.) at the U.S. EPA at the address above

Hearing Procedures

a. The Regional Administrator of EPA's Region IV, or his designee, will be the Presiding Officer at the hearing.

b. Any person may appear at the hearing and submit oral or written statements and data and may be represented by counsel or other authorized representative. Any person may present written statements for the hearing file prior to the time the hearing file is closed to public submissions, and may present proposed findings and recommendations. The Presiding Officer shall afford the participants an opportunity for rebuttal.

c. The Presiding Officer will establish reasonable limits on the nature, amount or form of presentation of documentary material and oral presentations. No cross examination of any hearing participant shall be permitted, although the Presiding Officer may make appropriate inquiries of any such participant.

d. The hearing file will be open for submission of written comments until close of business, December 30, 1983.

Background

Under Section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*), any person who wishes to discharge dredged or fill material into the waters, including wetlands, of the United States must first obtain a dredge or fill permit from the Secretary of the Army, acting through the Chief of Engineers. Mr. M. A. Norden purchased the wetland in question in August of 1980 and applied to the Mobile District Corps of Engineers for a Section 404 permit to fill 65 acres (55 acres of which were determined to be wetlands).

Controversy regarding placement of fill in Three Mile Creek swampland was well documented prior to Mr. Norden's purchase of the property. As early as 1974 the Corps of Engineers attempted to use the area for disposal of dredged materials but were unsuccessful because of the unstable wetland substrate. Other studies conducted by the Corps addressed the frequent and severe flooding problems in the Three Mile Creek area.

A Public Notice describing Mr. Norden's plans for filling wetlands within the Three Mile Creek flood plain was distributed by the Corps on October 7, 1980. Review agencies, including EPA, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) objected to permit issuance on the basis of the project's non-water dependency. Applicant's failure to adequately consider less

damaging alternatives, and the potential for loss of functioning wetlands, adverse environmental effects anticipated to fish and wildlife, loss of water filtration benefits and loss of stormwater storage capacity.

On April 21, 1982, Mr. Norden modified his application by reducing the proposed fill area to 25 acres of wetlands. Mr. Norden indicated he had considered upland alternatives, but determined those alternatives to be too costly.

On June 3, 1982, EPA responded to the Corps indicating that the revised proposal did not comply with the Section 404(b)(1) Guidelines and that no ecological justification was found to alter the previously stated EPA denial position. On August 3, 1983, Colonel James B. Hall, Acting Division Engineer of the Corps of Engineers' South Atlantic Division, wrote to EPA indicating the Division's decision to direct the Mobile District Engineer to issue the permit.

In accordance with the existing Section 404(q) Memorandum of Agreement between EPA and the Department of the Army, EPA wrote to Mr. William R. Gianelli, Assistant Secretary of the Army (Civil Works) on August 30, 1983, requesting a review of the Division's decision by a higher authority in the Department of the Army. In his September 22, 1983, response, Mr. Gianelli declined referral of the application to a higher authority level, having determined that EPA's objections constituted a technical disagreement between Division and EPA, not an issue of national importance. He suggested that provisions contained in Section 404(c) of the Clean Water Act would more appropriately address the technical disagreements between EPA and the Division Engineer. On September 30, 1983, EPA initiate procedures to prohibit the specification of the site in question as a disposal site as provided in 40 CFR 231.3(a)(2).

Potential Adverse Impacts of Permit Issuance

Mr. Norden's proposed Permit No. AL80-00327-C, if granted, would allow deposition of an undisclosed volume of demolition material and sand into and onto approximately 25 acres of highly productive, tidally influenced wetlands.

EPA staff inspected the originally proposed project site twice in 1980. From these inspections, EPA concluded that the tract, composed of diverse deep marsh habitat with a scattered canopy of wetland tree species, appeared to perform many beneficial functions including providing fish and wildlife habitat, hydrological buffering, water purification, pollution and erosion traps, and food chain production. In a letter to the Corps dated January 22, 1981, EPA recommended denial of permit application No. AL80-00327-C based on noncompliance with the 404(b)(1) Guidelines as follows: (1) There had been no demonstration that other practicable, less environmentally damaging alternatives were unavailable; (2) the proposed activity was not water dependent; (3) adverse ecological impacts, both individual and cumulative in nature, would result from filling the wetland; and (4) existing flooding problems in the lower Three Mile Creek watershed would be further exacerbated by the placement of fill in the floodplain.

On June 3, 1982, EPA again objected to issuance of the proposed permit as revised and indicated that there was no ecological basis for changing the Agency's position.

Ecological surveys conducted by EPA technical staff in October, 1983, confirmed the importance of the subject wetlands to the commercially valuable downstream fisheries resources of Mobile Bay. The wetlands export detrital materials which serve as a base for the estuarine and marine food web. These wetlands are important wildlife habitat, a fact confirmed by the abundance of migratory and resident waterfowl, wading birds, song birds and

raptor species. American alligators were observed on the property bordering and in Three Mile Creek. Numerous other reptile species were noted as was evidence of small mammal use of the habitat.

Observations by EPA indicated that the 25-acre marshy substrate supports a lush and diverse herbaceous community typically adapted for life and reproduction in saturated and unconsolidated soil conditions and that the community functions as an effective filter, assimilating and removing pollutants from tidal waters and stormwaters, thereby helping to purify these waters and lessening the downstream pollutant discharge to important fisheries.

Therefore, based on a thorough site re-evaluation and review of all available information, the Regional Administrator of EPA Region IV is of the opinion that the unnecessary destruction of the 25 acres of wetlands in question could result in an unacceptable adverse effect on shellfish beds and fishery areas (including spawning and breeding areas) and wildlife areas. EPA proposes to prohibit the specification of this wetland site for disposal of dredged or fill materials because such disposal could result in the direct loss of fish and wildlife habitat, loss of detrital materials which are exported to downstream fisheries by tidal exchange and upland runoff and, the loss of the assimilative capacity (which aids in purification of waters by removing nutrients and pollutants).

FOR FURTHER INFORMATION CONTACT:
E. T. Heinen, Chief, Environmental Assessment Branch, Office of Policy and Management, Environmental Protection Agency, 345 Courtland Street, Atlanta, Georgia 30365, (404) 881-7901.

Dated: November 1, 1983.

Charles R. Jeter,
Regional Administrator, Region IV.

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