



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103



REPLY TO
ATTENTION OF

6 SEP 1991

Honorable LaJuana S. Wilcher
Assistant Administrator for Water
Environmental Protection Agency
Washington, D. C. 20460

Dear Ms. Wilcher:

Thank you for your letter of August 15, 1991, in which you requested higher level review of issues related to a permit application being considered by the Louisville District of the Army Corps of Engineers (District) for a project proposed by Andalex Resources, Incorporated. Your request was made pursuant to the 404(q) Memorandum of Agreement (MOA) between the Department of the Army and the Environmental Protection Agency (EPA).

Our review of the issues raised in your 404(q) referral request and the administrative record identified concerns that the District must address prior to rendering a final permit decision on the Andalex application. These concerns, which are outlined below, will be conveyed to the District by memorandum in the next two weeks. Because the District can effectively address the issues raised during our evaluation, we do not believe further headquarters level review of the Andalex permit decision pursuant to the 404(q) MOA is necessary. We will provide you a copy of our memorandum to the District when it is completed.

Our review of the Andalex application indicated the need for further discussions between our respective agencies regarding the definition of project purpose and whether there is a distinction between "basic" and "overall" project purpose. We do not believe, however, that these issues should be addressed within the context of reviewing the Andalex permit application. Moreover, resolution of these issues need not precede final Corps action with respect to the Andalex permit. We believe there is a need for our agencies to attempt to resolve these issues from a Headquarters perspective and to provide joint agency guidance. To that end, we hope to provide draft guidance on the definition of project purpose for your consideration by October 15, 1991.

In regard to the Andalex application, we agree that certain statements of project purpose in the District's decision documents contain elements too specific to the

applicant's preferred project (i.e., specifically naming the Newcoal site in the project purpose). In addition, we believe that additional justification is needed for selecting the 10 mile radius from Andalex's existing coal processing facility as a limit of practicable alternative investigations. We will direct the District to address these issues and revise the decision documents accordingly.

The District's consideration of compensatory mitigation in the alternatives evaluation represents one approach utilized by some Corps districts to effect a determination of compliance with the 404(b)(1) Guidelines. This approach was considered appropriate, in certain circumstances, prior to the Army-EPA MOA on Mitigation. As you are aware, the Andalex permit application was received prior to the effective date of the Army-EPA Mitigation MOA and is not subject to it. Therefore, any possible additional guidance and/or clarification concerning the definition of project purpose would not be expected to alter the District's decision of the Andalex permit.

In regard to information on the relative value of the wetland resources at the project site, we will direct the District to incorporate new information recently generated in conjunction with the Western Kentucky Advanced Identification effort into its permit decision. The District will also be directed to document its conclusions with regard to unresolved EPA issues raised, as well as any other issues identified during our evaluation concerning environmental impacts and mitigation. We believe this case underscores the need to address surface mining in a broader context, and we will encourage the District's continued efforts with regard to the ongoing advanced identification. Further, we believe that the concept of mitigation banking should be discussed in conjunction with this effort to address temporal adverse environmental impacts inherent in the replacement of forested wetland ecosystems.

If the District ultimately decides to issue the permit, we believe that this mitigation project provides a good opportunity to reasonably judge whether the application of current technology to restoring bottomland hardwood (BLH) wetlands on mined spoils, as well as prior converted wetlands, produces tangible environmental results. In order to better ensure that the Andalex BLH mitigation will be successful, we will direct the District to more clearly tie specific components of the

mitigation plan to the special conditions of the permit. We believe that this will ensure the enforceability of the conditions and emphasize our commitment to full compliance in the Andalex project. Further, we are discussing with the District the need to accomplish a significant percentage of the off-site wetlands restoration project prior to the commencement of mining activities.

Your interest and efforts in raising the issues associated with this case to our attention are appreciated. I look forward to working with you in the future to improve the efficiency of the regulatory process and where necessary increase the level of protection afforded to our Nation's valuable aquatic resources.

Sincerely,

A handwritten signature in black ink, appearing to read "Nancy P. Dorn", written in a cursive style.

Nancy P. Dorn
Assistant Secretary of the Army
(Civil Works)