



DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

572 OCT 1991

REPLY TO
ATTENTION OF:

CECW-OR

MEMORANDUM THRU COMMANDER, OHIO RIVER DIVISION

FOR COMMANDER, LOUISVILLE DISTRICT

SUBJECT: Permit Elevation Analysis Results, Andalex Resources, Inc.

1. Pursuant to their respective Section 404(q) Memoranda of Agreement (MOA), the Department of the Interior (DOI), and the Environmental Protection Agency (EPA), in letters dated 3 July 1991 and 15 August 1991, respectively, requested that the Assistant Secretary of the Army (Civil Works) [ASA(CW)], Nancy P. Dorn, review the decision of the Corps of Engineers Louisville District to issue a permit to Andalex Resources, Inc. The DOI and EPA had requested national policy level review of the District's definition of project purpose for the Andalex application. EPA also requested review of the distinction between "basic" and "overall" project purpose. EPA requested review of new information resulting from the Western Kentucky Advanced Identification (WKADID) effort and expressed concerns with regard to environmental impacts, the adequacy of the proposed mitigation, and in view of these concerns, the precedent-setting nature of the District's decision to issue the permit. The DOI opined that the 7 February 1990 Army/EPA MOA on Mitigation applies to the Andalex permit application, expressed concerns with regard to environmental impact and mitigation issues and, in view of these concerns, the precedent-setting nature of the District's decision to issue the permit.

2. By letters dated 6 September 1991, the ASA(CW) advised DOI and EPA that further Headquarters review of the Andalex permit decision pursuant to the Section 404(q) MOA is unnecessary. In support of this decision, the ASA(CW) advised that, in addition to pursuing discussions with EPA at the Headquarters level with regard to definition of project purpose and the distinction between "basic" and "overall" project purpose, the District could effectively address the remaining issues identified in the DOI and EPA referral request letters.

3. We have reviewed the administrative record, conducted an on-site meeting with representatives of the office of the ASA(CW), the District, EPA, DOI, Fish and Wildlife Service (FWS), and the applicant on 7 August 1991 and coordinated with personnel on your

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staff. Based on our review, we believe that two of the District's three stated "project purposes" contain, or may contain, elements overly specific to the applicant's project purpose statements, and that insufficient information has been provided to justify selection of 10 miles from the Andalex coal processing facility as a limit for searching for alternative mining sites. We have concluded that, viewed from the perspective of today, when we apply the Army/EPA MOA on Mitigation, reasonable questions might be raised regarding the District's conclusion that there are no practicable less environmentally damaging alternative mining sites. However, the District did not act inappropriately in accepting mitigation due to the fact that the permit application preceded the Army/EPA MOA on Mitigation.

4. The proposed mitigation package for the Andalex case is based on a significant amount of site-specific information generated by Andalex, and has been formulated with the involvement of the Corps Waterways Experiment Station (WES), the District, FWS, EPA, and the involved State agencies. We are providing additional guidance in an effort to better ensure that the mitigation plan will succeed should the District ultimately decide to issue the permit. We believe that, considering the expertise and resources that have been, and will continue to be applied to the mitigation plan, this is an opportunity to reasonably judge whether application of current technology to restoring bottomland hardwood wetlands on mined spoils as well as prior converted croplands can be expected to produce tangible environmental benefits. Further, we believe that the likelihood of success of mitigation in replicating significant wetlands functions is an important consideration in rendering permit decisions of this nature.

5. This case underscores the need to address surface mining in a broader context. The District is encouraged to increase its efforts, in conjunction with EPA, in pursuit of the WKADID effort currently underway. In addition, to address the temporal impacts inherent in replacement of forested wetland systems, a forum should be provided to discuss the concept of mitigation banking, especially with the mining industry.

6. In future 404(g) MOA situations, the District should notify all involved Federal resource agencies of its intent to issue a permit at the same time. To the extent there is overlap between the Federal resource agencies' positions, discussions with any

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one agency have the potential to resolve the concerns of other agencies, and possibly, those agencies' intentions with respect to elevation of the District's proposed permit decision.

7. In light of the above, the following guidance shall be incorporated into your analysis and documentation of the permit decision on the Andalex project. After incorporation of such guidance, you should proceed with a decision on the permit application.

a. The permit evaluation must be made based on a single, concise statement of project purpose determined by the Corps to be appropriate. Specifically naming the Newcoal site in the project purpose statement is too specific to Andalex's proposal. Furthermore, referencing a 10 mile distance from Andalex's coal processing facility as a practicable limit for searching for alternative mining sites may also be too specific. We believe the information in the record regarding whether the 10 mile distance is too specific is inconclusive. Therefore, in the absence of additional justification we believe the statement "to develop a coal reserve so that Andalex can fulfill its obligations under existing coal supply agreements and maintain the future economic viability of the Cimarron Division" to be the most appropriate and reasonable statement of project purpose.

b. The District should either provide additional justification as to why 10 miles is the appropriate distance within which to search for practicable, less environmentally damaging alternative mining sites or reconsider its conclusion that it is the appropriate distance, and thus that there are no practicable alternatives.

c. The District should itemize relevant terms and conditions from the May 1990 Mitigation Plan which will apply to the proposed mitigation effort as special conditions in the permit, in addition to referencing the entire document as a Special Condition. The District should specifically establish: (1) the environmental goals of the mitigation project (e.g. reestablish the density and species mix of forested wetland vegetation on the Newcoal site both on the Newcoal and the off-site mitigation areas); (2) schedules of specific on-site and off-site mitigation construction events; (3) criteria for this project with which the Corps will gauge the success of the mitigation effort; (4) a schedule of evaluations by the Corps and

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the applicant using these criteria; and (5) a contingency plan incorporating potential courses of action or corrective measures should the aforementioned criteria not be met. This contingency plan should also list corrective measures to address the potential for subsurface mining activities and the discovery of National Register eligible sites that could otherwise reduce the quality or quantity of mitigation. Andalex should be required to submit scheduled progress reports in accordance with c.(4) and to follow subsequent Corps recommendations regarding corrective measures. The District should consider utilizing the expertise of WES in this effort, especially with regard to item c.(3).

d. Special condition 5 should be revised as follows: "That no additional tree clearing other than that required for levee construction may occur until at least 25% of the off-site mitigation area is under contract for restoration. All restoration activities on this 25% of the off-site mitigation area must be completed within 12 months of permit issuance. This required restoration would include all hydrological modifications and tree planting as required in the mitigation plan. All initial vegetation planting and hydrological modification must be completed at a rate of 25% of the off-site mitigation area per year and the entire 746 acre off-site mitigation area shall be completed no later than 4 years from the restart of mining operations."

e. The District should review and incorporate the new information resulting from the WKADID into its permit decision and documentation. The new information addresses the wildlife habitat and water quality maintenance values of the Newcoal site within a site-specific and watershed context. EPA will forward a copy of this information to the District.

f. In order to address the uncertainty with regard to the post-mining hydrology on the Newcoal site, potential methods should be explored for reestablishing a more representative range of pre-project wetland surface elevations on-site as opposed to grading to a uniform elevation. If the District determines that removal of the additional overburden to an off-site location would be impracticable, consider increasing the size of the overburden piles to be left on the site. All pre-project site elevations should be represented after reclamation; however, the relative acreages are left to the District's discretion.

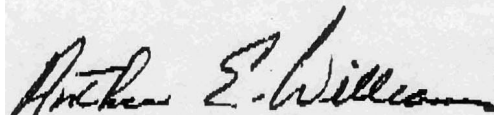
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g. The District should revise and/or provide additional discussion in its permit decision document in conjunction with items 7.(a) - 7.(f) as appropriate.

8. Please notify CECW-OR as soon as you reach your permit decision and complete your documentation. Questions or comments may be directed to Mr. Kirk Stark at (202) 272-1786.

FOR THE COMMANDER:



ARTHUR E. WILLIAMS
Major General, USA
Director of Civil Works