



State of Louisiana
DEPARTMENT OF NATURAL RESOURCES
OFFICE OF COASTAL MANAGEMENT

November 23, 2009

Mr. Edward Creef
Chief, Environmental Function
U. S. Army Corps of Engineers, New Orleans District
P. O. Box 60267
New Orleans, Louisiana 70160-0267

RE: **C20090500**, Coastal Zone Consistency
U. S. Army Corps of Engineers, New Orleans District
FY 2010 Maintenance Dredging of the Mississippi River's Southwest Pass from Mile 6.5
AHP to Mile 22.0 BHP, **Plaquemines Parish, Louisiana**

Dear Mr. Creef:

This office received the above referenced determination on September 11, 2009, for consistency review with the approved Louisiana Coastal Resources Program (LCRP) in accordance with Section 307(c) of the Federal Coastal Zone Management Act of 1972, as amended. After careful review, we have determined that proposed activity is inconsistent with the LCRP, and hereby object to your consistency determination pursuant to National Oceanic and Atmospheric Administration (NOAA) Regulations on Federal Consistency at 15 CFR 930 Subpart C, for the reasons described below.

The Louisiana Department of Natural Resources (LDNR) is fully aware of the economic and strategic value, to the State and the nation, of safe and unencumbered navigation of the Mississippi River. We recognize that dredging Southwest Pass to maintain such a dynamic channel is a complex and challenging task. As the discussion below should make clear, the intent of the State is for the Corps to continue to maintain the full authorized channel dimensions so navigation and maritime commerce on the river are not compromised and that beneficial use becomes an integral part of the management of the lower river. Our objection lies solely with the unsound dredged material disposal practices proposed for this valuable resource.

As you are aware, Louisiana is suffering the loss of coastal wetlands at a staggering rate. This loss is due in part to the maintenance of the Mississippi River for navigation and flood control, preventing the periodic flooding and nourishment of adjacent wetlands. Millions of cubic yards of sediment are removed from the Mississippi River system each year by the Corps, in order to maintain the federally-authorized navigation channel. This dredged material could, with proper handling, restore a significant amount of the coastal land lost from this area each year. The LCRP has, for the past 39 years, included the federally-approved legal requirement to use dredged material beneficially. Unfortunately, the New Orleans District has continued to dispose of much of this valuable resource in deep water disposal sites where it is completely lost to the coastal system.

Secondly, as you are also aware, dredged material disposal at the heads of Pass a Loutre and South Pass is environmentally unsound, in that it contributes significantly to the shoaling-in of those channels, interfering with the natural water and sediment distribution processes and leading to sediment starvation and loss of wetlands in the eastern portion of the distributary delta and the State and Federal wildlife refuges located there. In addition, the passage of hurricanes in recent years has caused extensive losses of wetlands which can only recover if proper flows of water and sediment are reestablished in the eastern portion of the delta. Further, public access and use of the deltaic ecosystem is adversely impacted not only by the wetland losses sustained, but by the blockage of channels to boat traffic from spoil-related shoaling.

The Louisiana Department of Wildlife and Fisheries (LDWF) has collected information at the Pass a Loutre Wildlife Management Area (WMA) which demonstrates trends of increasing shoaling in the two passes, increasing salinities on the WMA, and decreasing flow rates, all of which correlate to the increasing disposal of dredged material by hopper dredges working in Southwest Pass. The U.S. Fish and Wildlife Service (USFWS) has submitted similar comments to your agency multiple times in the past years, most recently in their October 12, 2007, letter to Colonel Alvin Lee, as well as in their comment letter to LDNR on December 11, 2008.

For the above-stated reasons, the subject consistency determination is not fully consistent with the Louisiana Coastal Resources Program in that it fails to meet the following enforceable policies of the Louisiana Administrative Code, Title 43 Part I:

§701 G It is the policy of the coastal resources program to avoid the following adverse impacts. To this end, all uses and activities shall be planned, sited, designed, constructed, operated and maintained to avoid to the maximum extent practicable significant:

- 1) reductions in the natural supply of sediment and nutrients to the coastal system by alterations of freshwater flow.

- 2) adverse economic impacts on the locality of the use and affected governmental bodies.
- 5) destruction or adverse alterations of streams, wetland, tidal passes, inshore waters and waterbottoms, beaches, dunes, barrier islands, and other natural biologically valuable areas or protective coastal features.
- 8) detrimental changes in existing salinity regimes.
- 9) detrimental changes in littoral and sediment transport processes.
- 10) adverse effects of cumulative impacts.
- 12) reductions or blockage of water flow or natural circulation patterns within or into an estuarine system or a wetland forest.
- 15) fostering of detrimental secondary impacts in undisturbed or biologically highly productive wetland areas.
- 16) adverse alteration or destruction of unique or valuable habitats, critical habitat for endangered species, important wildlife or fishery breeding or nursery areas, designated wildlife management or sanctuary areas, or forestlands.
- 17) adverse alteration or destruction of public parks, shoreline access points, public works, designated recreation areas, scenic rivers, or other areas of public use and concern.
- 18) adverse disruptions of coastal wildlife and fishery migratory patterns.
- 19) land loss, erosion and subsidence.
- 21) reductions in the long term biological productivity of the coastal ecosystem.

§701 I Uses shall to the maximum extent practicable be designed and carried out to permit multiple concurrent uses which are appropriate for the location and to avoid unnecessary conflicts with other uses of the vicinity.

§707 A Spoil shall be deposited utilizing the best practical techniques to avoid disruption of water movement, flow, circulation and quality.

§707 B Spoil shall be used beneficially to the maximum extent practicable to improve productivity or create new habitat, reduce or compensate for environmental damage done by dredging activities, or prevent environmental damage. Otherwise, existing spoil disposal areas or upland disposal shall be utilized to the maximum extent practicable rather than creating new disposal areas.

§707 C Spoil shall not be disposed of in a manner which could result in the impounding or draining of wetlands or the creation of development sites unless the spoil deposition is part of an approved levee or land surface alteration project.

§707 E Spoil shall not be disposed of in such a manner as to create a hindrance to navigation or fishing, or hinder timber growth.

§711 H Surface alterations shall, to the maximum extent practicable, be located away from critical wildlife areas and vegetation areas. Alterations in wildlife preserves and management areas shall be conducted in strict accord with the requirements of the wildlife management body.

§713 C Undesirable deposition of sediments in sensitive habitat or navigation areas shall be avoided through the use of the best preventive techniques.

Finally, Louisiana further disagrees with your agency's finding that the proposed activity is consistent to the Maximum Extent Practicable with the LCRP because full consistency is prohibited by the Federal Standard. NOAA regulations at 15 CFR 930.32(a)(2) require the Federal agency to "...clearly describe, in writing, to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to be fully consistent with the enforceable policies of the management program."

The New Orleans District has not provided citation of any such legal provision which either mandates the establishment of a Federal Standard or otherwise limits its discretion to be fully consistent with the LCRP. The legislation cited as prohibiting full consistency contains no such prohibition. The Water Resources Development Act of 2007, P.L. 101-114, 121 Stat. 1041 (WRDA 2007, Section 2037(c)(A)) offers guidance as to how the Corps may perform beneficial use of dredged material as part of a regional sediment plan. There is nothing in that legislation, however, that prohibits beneficial use; the statute merely provides for a method to accomplish that goal in circumstances where the Corps' is not otherwise compelled to comply with beneficial use requirements. In other words, WRDA 2007 provides for a beneficial use method for situations which are not covered by obligations such as the Louisiana Coastal Resources Program, but it establishes no impediment to the use of other appropriations to comply with the Coastal Zone Management Act.

The argument that beneficial use is not possible because funding is insufficient, is not viable. The federal regulations implementing the Coastal Zone Management Act (CZMA) of 1972, at 15 CFR § 930.32, as confirmed by the Secretary of Commerce in past disputes, provide that insufficient funding is no justification for failure to achieve full consistency. The required action when funding is insufficient is for the federal agency to seek adequate funding from Congress for the activity.

The present consistency determination provides no documentation to demonstrate that the NOD sought, in its FY 2010 budget and planning process, sufficient funds to be fully consistent with the LCRP, nor has it sought additional funds for this purpose when those appropriations were not made by Congress. Our request for information on the FY 2010 funding requests submitted by the NOD for Southwest Pass maintenance were summarily denied; our second request via the mechanism of the Freedom of Information Act remains unfilled. In the absence of this information, we can only conclude that no such efforts were undertaken by the NOD, despite the requirements under federal law to do so.

Because of the foregoing, this office disagrees with your conclusion that the proposed activity is consistent to the Maximum Extent Practicable with the LCRP.

OCM has attempted, at every opportunity, to have meaningful negotiations and consultations with your agency over the management of the Mississippi River. That we have been unable to resolve the impasse is due entirely to the New Orleans District's refusal to take meaningful steps to meet the requirements of the LCRP. Most recently, we were asked to provide the NOD with suggestions as to how your office might achieve the goals of beneficial use and the avoidance of adverse impacts. We forwarded comments in October of this year outlining options for enhancing flow in Pass a Loutre, and recommending that your FY 2010 consistency determination be withdrawn and its disposal plans revised. It is apparent that your office has elected to reject this advice. Earlier this year, OCM convened a working group of River users and stakeholders, and produced and presented to the Corps a White Paper which included examples of steps the Corps might take to achieve consistency. In the five months since, no effort has been made by your agency to implement any of those suggestions. Our January 29, 2009, conditional consistency for your FY 2009 Southwest Pass maintenance dredging proposal required the NOD to commit to the preparation of a dredged material plan that would be consistent with the State's approved coastal resources program by providing for beneficial use of the dredged material and requesting funding to accomplish the same. The NOD ignored this requirement in the FY 2010 consistency determination and has failed to take any action consistent with this condition. The State has provided funding for two studies of alternative dredging and disposal operations for Southwest Pass, in 2002 and 2007. Both produced positive results but neither has been pursued by the Corps. We have had numerous meetings, telephone conversations, and exchanges of written communications, yet your office has failed throughout to express any interest in compliance with the law.

We reiterate that the State of Louisiana has no wish for navigation of the River to be impeded, and we strongly urge the New Orleans District to forego deferring the maintenance dredging of the Mississippi River as a course of action. However, the present Corps practices for the

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disposal of material removed from the Mississippi River are simply unacceptable. Once the NOD accepts that it can be done, there are no obstacles that can prevent it from making a meaningful increase in beneficial use of this valuable resource as part of an integrated plan to manage the lower Mississippi River.

By copy of this letter, we are notifying the Director of the Office of Ocean and Coastal Resource Management (OCRM), National Oceanic and Atmospheric Administration, that the project, as proposed, is not consistent with the LCRP. Pursuant to 15 CFR 930 Subpart G, the Corps of Engineers, New Orleans District may request mediation by OCRM or the Secretary of the Department of Commerce.

We will be happy to work with your staff in implementing appropriate alternatives to the proposed dredging project that will bring the activity into full consistency with the LCRP. If you have any questions concerning this determination, please contact Mr. Gregory J. DuCote of the Interagency Affairs/Field Services Division at (225) 342-5052 to discuss the necessary revisions to your proposed activity to bring it into compliance with the Louisiana Coastal Resources Program.

Sincerely,



Louis E. Buatt
Assistant Secretary

LEB:GJD:pso

cc: Director, OCRM/NOAA
Richard Hartman, NMFS
Angela Trahan, USFWS
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