



DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
ARMY CORPS OF ENGINEERS CENTRE
190 FIFTH STREET EAST
ST. PAUL MN 55101-1638

REPLY TO
ATTENTION

December 13, 2006

Operations
Regulatory (2005-5527-WAB)

Mr. Robert Evans
Excelsior Energy, Inc.
11100 Wayzata Blvd.
Suite 305
Minnetonka, MN 55305

Dear Mr. Evans:

In October 2004, the U.S. Department of Energy (DOE) selected four projects under Round 2 of the Clean Coal Power Initiative (CCPI). One of those projects is the Mesaba Energy Project, a coal-feedstock power plant using Integrated Gasification Combined Cycle (IGCC) technology, proposed to be located in northern Minnesota. The power plant would be constructed in two phases, with each phase capable of producing 606 megawatts (MW) of base load power.

On August 9, 2005, the DOE National Energy Technology Laboratory notified the U.S. Army Corps of Engineers St. Paul District (Corps), of its intent to prepare an Environmental Impact Statement (EIS) for the Mesaba Project. The letter states, "Because the siting of the Project may affect jurisdictional wetlands in northern Minnesota, this letter is intended to initiate consultation with your office regarding compliance with Section 404 of the Clean Water Act and to ascertain whether the U.S. Army Corps of Engineers wishes to participate in the EIS as a cooperating agency under NEPA." In a letter dated September 16, 2005, the St. Paul District agreed to serve as a cooperating agency in that effort.

Throughout 2005 and 2006, regulatory staff from the St. Paul District and Bemidji Field Offices have attended public scoping meetings on the proposed project and met with, in person and through phone conference, staff from DOE, Excelsior Energy, and Short Elliott Hendrickson (SEH) to discuss the following Clean Water Act (CWA) 404 permitting requirements.

CWA Section 404 Permit Process

The Corps' evaluation of a Section 404 permit application involves multiple analyses, including (1) evaluating the proposal's impacts in accordance with the National Environmental Policy Act (NEPA) (33 CFR part 325), (2) determining whether the proposal is contrary to the public interest (33 CFR § 320.4) and (3), in the case of a Section 404 permit, determining whether the proposal complies with the Section 404(b)(1) Guidelines (Guidelines) (40 CFR part 230).

Compliance with NEPA: NEPA is a procedural vehicle. Both NEPA and the 404(b)(1) regulations require a review of alternatives to identify environmental impacts. Under NEPA, as with the 404(b)(1) Guidelines, the project purpose dictates the ranges of alternatives. As described in the NEPA implementation procedures for the Corps Regulatory Program (33 CFR Part 325) and policy guidance under CEQ Regulations 40 CFR 1500-1508, the goal of the St. Paul District is that the DOE's resulting EIS can be adopted by the Corps for purposes of exercising its regulatory authority. The Corps has discussed with and recommended to the DOE to merge the NEPA and CWA 404 reviews together in the EIS to ensure that the project review satisfies the environmental documentation and procedural requirements for both federal laws. If the resulting EIS does not satisfy the CWA review requirements, the Corps will be required to do a separate NEPA analysis.

Compliance with the Section 404(b)(1) Guidelines: The 404(b)(1) Guidelines specifically require that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences" (40 CFR § 230.10(a)). In addition, no discharge can be permitted under the Guidelines if it would, individually or cumulatively, cause or contribute to significant degradation of waters of the United States or violate other applicable laws, such as State water quality standards, toxic effluent standards, or the Endangered Species Act. The 404(b)(1) Guidelines also state that no discharge in wetlands shall be permitted unless appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem. Under the Guidelines, when a proposal is not "water dependent," meaning that it does not need to be located in or near special aquatic sites such as wetlands, to serve its basic purpose, it is presumed that alternative upland sites are available and that the use of an upland site would be less environmentally damaging. Time and money spent on a proposal prior to applying for a Section 404 permit cannot be factored into the Corps' decision as to the existence of a less damaging practicable alternative to the proposal.

Public Interest Review: Projects must be in compliance with the 404(b)(1) guidelines and in the public interest. The decision whether to issue a permit is also based on an evaluation of the probable impacts, including cumulative impacts of the proposed activity and its intended use, on the public interest. Evaluation of the probable impact that the proposed activity may have on the public interest requires a careful weighing of all those factors that become relevant in each particular case. The benefits that reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal and if so, the conditions under which it will be allowed to occur are, therefore, determined by the outcome of this general balancing process.

The public interest factors include such considerations as conservation, economics, aesthetics, navigation, fish and wildlife values, water supply, water quality, energy needs, and flood damage prevention. The Corps also considers all comments received in the permit process, whether in response to a public notice or a public hearing. The Corps must determine that a proposal is not contrary to the public interest to issue a permit.

Elements of the Corps Review Process

The Corps' CWA Section 404 regulatory review is generally considered to have four critical stages or concurrence points: Purpose and Need, Range of Alternatives and the Alternatives Carried Forward, the Selected Alternative, and Design Phase Impact Minimization.

The goal of the concurrence points process is to review, provide feedback and/or request additional information that is sufficient to satisfy CWA 404 requirements at each of the four stages. It is beneficial for the applicant to obtain Corps concurrence at each of these steps because assumptions made in early steps influence subsequent steps. For example, a flawed project purpose could easily result in a flawed alternatives analysis. Concurrence does not in any way preclude the Corps from exercising any provision of its authorities and policies applicable to permit review.

We have completed a preliminary review of the draft EIS "Purpose and Need" section, last revised and forwarded to the Corps of Engineers on October 17, 2006. We have also completed a preliminary review of Section 1.13, "Siting Process and Description of Sites," pages I-377 through I-384 in the Mesaba Energy Project Environmental Supplement: Section One, prepared by Excelsior Energy and forwarded to the Corps on October 30, 2006.

Project Purpose and Need

Defining the project purpose is critical to the evaluation of any project for compliance with the Section 404(b)(1) Guidelines. The overall project purpose is used for determining practicable alternatives under the 404(b)(1) Guidelines. The project purpose should be specific enough to define the proposer's needs, but not so restrictive that it precludes all discussion of alternatives. Corps of Engineers concurrence will indicate that the information sufficiently satisfies CWA Section 404 requirements and can be used with confidence in the next stage. Defining the project purpose is the responsibility of the Corps; however, applicant input is considered in making this determination.

The purpose and need statement should define why the proposal must be implemented and be quantified by some means. In this case, the "**basic project purpose**" is to provide additional base load power generation in Minnesota. We believe the "**overall project purpose**" of the Excelsior Proposed Action is to be a commercially-viable power generation operation that satisfies the projected power needs of Minnesota through the use of IGCC technologies. The Corps will use the project purpose and need to determine the adequacy of the alternatives analysis.

The proposed "**need statement**" indicates a projected need for 3,000 to 6,000 MW of new base load power generation in Minnesota over the next 15 years. Secondary aspects of the "need statement" indicate that the project is required to satisfy Minnesota Statutes that provide incentives to develop electric power generating projects within the Taconite Tax Relief Area (TTRA) of northeastern Minnesota and that the project will bring renewed economic vitality to northeastern Minnesota by creating new jobs on the Iron Range and making it a regional production center for state-of-the-art, clean, affordable, energy. While we do not consider the economic and logistic incentives provided to be an element of the project purpose or need they may have a bearing on the practicability of site locations. While the public benefits would likewise not be considered part of the project purpose or need, they would be important factors in our public interest review. It should be noted that **the Corps believes additional information is necessary to complete a reasonable review of the project need according to requirements under the public interest review (33 CFR 320.4)**. Please provide information that demonstrates that Minnesota will need 3,000 to 6,000 additional MW of power over the next 15 years. In addition, please provide a justification for why it is not practicable to seek sites for the power generating project outside the TTRA.

Range of Alternatives

As previously discussed, the basic project purpose is used to determine whether a project is “water dependent,” and the overall project purpose dictates the development and review of practicable project alternatives under the 404(b)(1) Guidelines. The Corps must evaluate all practicable alternatives that meet the project purpose. A practicable alternative is defined as one that would fulfill the proposal’s overall purpose after considering cost, existing technology, and logistics. According to nationwide policy guidance, time and money spent on a specific alternative prior to applying for a Section 404 permit cannot be factored into the Corps’ decision as to the existence of a less damaging practicable alternative to the proposed project.

The construction of a new power plant using innovative technology does not require siting in or near special aquatic sites; therefore, it is not a water dependent activity. In this particular case, a project has been proposed for a region of the United States that is known to contain a significant proportion of aquatic resources. In fact, it is proposed within a specific area of Minnesota particularly rich with aquatic resources. Under the CWA, the applicant must overcome the presumption that an alternative upland site or sites are available and that the use of an upland site would be less environmentally damaging. In those cases where no entirely upland sites are available, it must be demonstrated that the least damaging practicable site has been selected.

The Corps has reviewed Section 1.13, “Siting Process and Description of Sites,” Pages I-377 through I-384 in the Mesaba Energy Project Environmental Supplement: Section One, prepared by Excelsior Energy, date June 16, 2006. On August 17, 2006, St. Paul District regulatory staff met with Excelsior Energy and discussed the CWA 404 requirements regarding alternatives. At that meeting, it was explained that, in the alternatives analysis, it is critical that clear consideration be given to avoidance and minimization of adverse aquatic resource impacts. Also the alternatives analysis needs to explicitly evaluate, in comparative format where possible, all the environmental factors for each alternative considered. Another essential element of the alternatives analysis is the documentation of those alternatives considered and eliminated. This documentation would provide a clear history of alternatives development that can be included in the Corps administrative record for a permit evaluation.

A review of alternatives requires the establishment of site selection criteria and the application of those criteria to each site. Examples of site selection criteria might include proximity of a rail line to provide coal, presence of a cooling water source, proximity to electrical power lines, etc. Once acceptable site selection criteria are established, they are applied to each potential site. Sites with the necessary amenities are then analyzed and compared to identify the least damaging alternative.

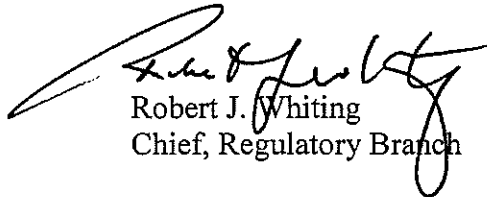
The information provided in Section 1.13 of the above referenced document is not sufficient to satisfy CWA 404 requirements for the alternatives analysis. **Additional information is needed regarding the evaluation and dismissal of alternatives as either not practicable or more environmentally damaging than the alternatives that have been retained for further evaluation.** It is not clear how the “site selection criteria” were applied to the candidate sites (11) or the second tier of 6 sites. Your document states that, “following the detailed evaluation of environmental, engineering and other factors, the initial list of eleven sites was narrowed to six sites.” Please provide this information in a comparative matrix format that documents the evaluation of the alternative sites, including the upland alternative and why alternatives were dismissed either as not practicable or more environmentally damaging.

When the Corps became involved in this project, the alternatives to be carried forward had already been selected even though we had not been provided an opportunity to review, comment, and concur on the development of a project purpose and need statement, the establishment of a reasonable site search area, the identification of potential project sites, the establishment of site selection criteria, or the application of site selection criteria to each site.

At this time it has not been clearly demonstrated to us that the range of alternatives considered should be limited to the TTRA. Furthermore, even if you can support limiting the search area to the TTRA, we have some doubts as to whether either of the alternatives being carried forward for evaluation in the draft EIS are in fact the least damaging practicable alternative. If a practicable alternative is available that is less damaging than either of your preferred alternatives, we would be required under the 404(b)(1) guidelines to deny your permit application. A denial would result in a substantial delay in your project, including preparing either a new EIS or a supplement to the one underway. Accordingly, we believe it would be prudent to resolve these issues before going forward with publication of the draft EIS.

While these comments are provided in response to a preliminary review of the Purpose and Need section of the draft EIS and Section One of the "Mesaba Energy Project Environmental Supplement," they should also be considered as generic comments on the EIS process that must be performed if we are to adopt the EIS to satisfy our NEPA requirements and determine whether the preferred alternative is the least damaging practicable alternative as required by the 404(b)(1) guidelines. We are reviewing the advance copy of the draft EIS and will provide you a copy of those comments. If you have any questions, please contact Kelly Urbanek or Bill Baer at 218-444-6381.

Sincerely,



Robert J. Whiting
Chief, Regulatory Branch

Copy furnished:
Richard Hargis, DOE NEPA Document Manager
Minnesota Department of Commerce
Minnesota Public Utilities Commission

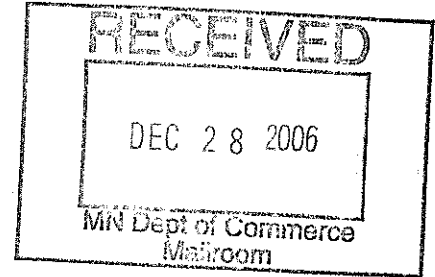


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December 27, 2006

Operations
Regulatory (2005-5527-WAB)



Mr. Richard Hargis
NEPA Document Manager
U.S. Department of Energy
National Energy Technical Laboratory
PO Box 10940
Pittsburgh, PA 15236

Dear Mr. Hargis:

In October 2004, four projects were selected by the U.S. Department of Energy (DOE) under Round 2 of the Clean Coal Power Initiative (CCPI). One of those selected projects is the Mesaba Energy Project, a proposed coal-feedstock power plant utilizing Integrated Gasification Combined Cycle (IGCC) technology, to be located in northern Minnesota. The power plant would be constructed in two phases, with each phase capable of producing 606 MW of baseload power.

In accordance with the National Environmental Policy Act (NEPA), NEPA implementation procedures for the Corps Regulatory Program (33 CFR Part 325) and policy guidance under CEQ Regulations 40 CFR 1500-1508, the St. Paul District, Corps of Engineers (Corps) has reviewed the advanced copy of the Draft Environmental Impact Statement (DEIS), for the above referenced project, dated November 2006. This letter is in response to the advanced copy of the DEIS. Information contained in this letter outlines our concerns regarding Sections 1 and 2 of the DEIS and **our position that the DEIS does not adequately document a consideration of a range of alternatives under both NEPA and the Section 404(b)(1) Guidelines** (Guidelines). We have deferred our comments on other aspects or sections of the DEIS, as we feel it is critical to resolve these issues.

On December 13, 2006, the Corps sent a letter to Excelsior Energy, the project proponent, regarding our preliminary review of Section 1 of the DEIS (Purpose and Need) and Section 1.13, "Siting Process and Description of Sites" Pages I-377 through I-384 in the Mesaba Energy Project Environmental Supplement: Section One. Information contained in that letter, specifically our discussion of the project purpose and need and range of alternatives, is also pertinent here, therefore, we have attached a copy for your reference.

As a participating agency in the preparation of the Mesaba Energy Project EIS, it is our expectation that this process will result in a final product that identifies and analyzes a range of project alternatives in sufficient detail to satisfy all of the participating agency's regulatory requirements. The Corps' evaluation involves multiple analyses, including (1) evaluating the proposal's impacts in accordance with NEPA (33 CFR part 325), (2) determining whether the proposal is contrary to the public interest (33 CFR § 320.4), and (3) in the case of a Section 404 permit, determining whether the proposal complies with the Section 404(b)(1) Guidelines (Guidelines) (40 CFR part 230).

The 404(b)(1) Guidelines specifically require that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences" (40 CFR § 230.10(a)). Under the 404(b)(1) guidelines, an applicant must overcome the presumption that a practicable, less environmentally damaging alternative site outside wetlands exists. In those cases where no practicable upland sites are available, the site with the least adverse impact to wetlands would be considered the least damaging practicable alternative.

Based on discussions with the Department of Energy (DOE) and our understanding of the Minnesota Public Utility Commission (PUC) process, it is our understanding that those agencies believe the alternatives and analyses contained in the draft EIS meets their needs. **However, since we are unable to determine what process or criteria were used to select the alternatives carried forward for further study, the DEIS does not satisfy our requirements under the Clean Water Act 404(b)(1) guidelines.**

When the Corps became involved in this project, the alternatives to be carried forward had already been selected even though we had not been provided an opportunity to review, comment, and concur on the development of a project purpose and need statement; the establishment of a reasonable site search area; the identification of potential project sites; the establishment of site selection criteria; or the application of site selection criteria to each site.

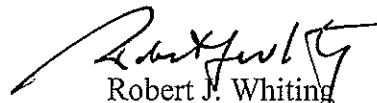
At this time, it has not been clearly demonstrated to us that the range of alternatives considered should be limited to the Taconite Tax Relief Area (TTRA). Furthermore, if information can be shown that supports limiting the search area to the TTRA, we have some doubts as to whether either of the alternatives being carried forward for evaluation in the draft EIS are in fact the least damaging practicable alternative.

Although, the project proponent has provided the Corps with supplemental information regarding a site selection process and Section 2.1.2.2 of the DEIS briefly describes a three-tiered siting process, **this information is not sufficient to document the evaluation of alternative sites.** There is no documentation of the site selection criteria and it is not clear how the "site selection criteria" were applied to the candidate sites (11) or the second tier of 6 sites. At an August 2006 meeting, the project proponent discussed project siting and the evaluation of alternative sites. From what was discussed, it appears that several of the sites eliminated earlier in the process may have been located on brown field sites or were sites that may result in less wetland impacts. These sites must be documented to our satisfaction as being "not practicable" before we can eliminate them from consideration, alternatively they should be carried forward in the DEIS for further analysis. The term practicable means available and capable of being done

after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

If a practicable alternative is available that is less damaging than either of the preferred alternatives, we would be required under the 404(b)(1) guidelines to deny the permit application. A denial would result in a substantial delay in the project, including preparing either a new EIS or a supplement to the one underway. **Accordingly, we believe it would be prudent to resolve these issues before going forward with publication of the draft EIS.** If you have any questions, please contact Kelly Urbanek or Bill Baer at 218-444-6381.

Sincerely,



Robert J. Whiting
Chief, Regulatory Branch

Copy furnished:

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