



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

May 6, 1993

Honorable G. Edward Dickey
Acting Assistant Secretary (Civil Works)
Department of the Army
Washington, D.C. 20310

Dear Dr. Dickey:

In accordance with provisions of the December 21, 1992, Clean Water Act Section 404(q) Memorandum of Agreement (MOA) between our agencies, I am requesting your review of the Norfolk District (District) Engineer's decision to issue a Section 404 permit for the project described in Public Notice CENAO-CO-R 92-0200-08. The permit would authorize the applicant, Greensprings Plantation, Inc., to place fill material in wetlands to develop a residential and commercial complex with two golf courses on a 1402-acre tract in James City County, Virginia. The District has determined that the proposed project will directly affect 5.9 acres of primarily forested wetlands. However, the proposed project will also affect, at a minimum, an additional 7.7 acres of wetlands through use of these wetlands as stormwater detention basins. After review of the District's March 30, 1993, notification to the U.S. Fish and Wildlife Service (Service) and an analysis of project site values and impacts (enclosed), I have determined that this case warrants elevation in accordance with criteria found in Part IV of the revised MOA (Elevation of Individual Permit Decisions).

Issuance of a Department of the Army permit for the Greensprings project will have substantial and unacceptable adverse effects on aquatic resources of national importance, primarily forested wetlands and associated species populations. Construction of project facilities will lead to substantial and unacceptable adverse impacts to wetlands, and proposed compensation will not reduce the net effects of the project to an insignificant level. The Department of the Interior, acting through the Service, is vested with the authority and obligation to protect, conserve, and enhance the Nation's fish and wildlife resources. These matters fall within our jurisdiction under the Fish and Wildlife Coordination Act (FWCA), Section 404(m) of the Clean Water Act, the Fish and Wildlife Act of 1956, the Emergency Wetlands Resources Act of 1986, the Endangered Species Act of 1973, as amended, and the Migratory Bird Treaty Act, as amended.

The Greensprings Plantation property contains tributaries of and directly abuts Powhatan and Shellbank Creeks. Powhatan Creek and its associated wetlands have been recognized through the Emergency Wetlands Resources Act (EWRA) as nationally significant and warranting priority attention for protection. Powhatan and Shellbank Creeks are tributaries of the James River, which has been designated as one of eleven focus areas in Virginia under the North American Waterfowl Management Plan due to its importance for migratory waterfowl. The Department of Defense has entered into a MOA with the

Department of the Interior regarding implementation of the goals of the North American Waterfowl Management Plan, which call for the conservation and restoration of wetlands within Joint Venture Areas such as the Chesapeake Bay.

Temporarily and seasonally flooded palustrine forested wetlands in Virginia and the Chesapeake Bay region provide an array of ecological and societal values, and they are declining at an alarming rate. From the mid-1950s to the mid-1970s, Virginia experienced a loss of 57,000 acres of palustrine vegetated wetlands, with forested wetlands making up the majority of this loss (Tiner and Finn 1986). More recent information indicates that Virginia's wetlands continue to decline at a significant rate (Frayer 1991). This decline, and the significance of remaining Chesapeake Bay wetlands, has been underscored by the "Chesapeake Bay Wetlands Policy" (Chesapeake Executive Council 1988), which calls for a goal of no net loss of wetlands, with a long-term goal of a net resource gain. Restoration of wetlands has also been identified as an essential component in non-point source improvement strategies for the Chesapeake Bay.

There are many indicators of high biological resource values within and adjacent to the Greensprings Plantation site. Powhatan Creek and its wetlands support spawning anadromous fish (river herring), and several populations of Virginia least trillium (Trillium pusillum var virginianum), a candidate for Federal listing. Other populations of rare plant species and State listed endangered amphibian species may also be present. An active nest of the federally listed bald eagle (Haliaeetus leucocephalus) is located directly adjacent to the Greensprings Plantation property within Powhatan Creek wetlands. In addition, forested uplands and wetlands within the project site provide habitat for migratory birds during migration, winter, and breeding seasons. Of particular importance is the use of this area by neotropical migrant bird species. Over 75 percent of the forest-dwelling birds breeding in Virginia are neotropical migrants, such as woodland warblers, vireos, and flycatchers (Bradshaw 1992). Information from Service Breeding Bird Surveys indicates that over two thirds of these birds have shown steady population declines since 1980. Many of these birds require large, undisturbed, mature forested areas, such as that provided at the Greensprings site, to reproduce and sustain viable populations.

I am concerned that the District's proposed permit decision will allow for significant, uncompensated loss and degradation of forested wetlands, impacts to nesting bald eagles, and losses of forested upland habitat. I am also concerned that the District has not considered the full impacts of this project, as well as the cumulative impacts of this and the many similar projects constructed, and proposed for construction, in the Chesapeake Bay region. The project will destroy six acres of wetlands for stormwater management, irrigation, and golf course creation, all of which are non-water dependent activities. The District failed to consider the impacts to a minimum of 8 additional acres of wetlands that will be frequently inundated by stormwater. Overall, the effects of permit issuance would include the loss and modification of 14 acres of habitat for wetland dependent species, and changes in wetland hydrology, water quality, ecosystem functions, and community structure. The Department is opposed to utilization of free-flowing streams and natural wetlands for instream treatment of stormwater. As such,

it constitutes conversion of these waters, with all their important ecological attributes, into a waste treatment system.

The District failed to fully evaluate the range of potentially practicable alternatives that would minimize or avoid impacts to aquatic resources. The District did not require the applicant to provide a thorough, cost-benefit analysis of upland alternatives, such as alternative project configurations, alternative irrigation water storage facilities, or upland treatment of stormwater. The alternatives analysis that was provided by the applicant only attested that other alternatives were not considered economically feasible; the applicant did not show that upland alternatives would not have provided a profitable project. Based upon project design, it appears to the Department that the Corps is allowing the applicant to place the greatest emphasis on maximizing profits rather than minimizing project impacts. Furthermore, the District failed to explore whether variances in local stormwater management regulations could be implemented to avoid the loss of wetlands, as recommended by the Service.

The proposed compensatory mitigation does not fully offset project impacts, and a substantial net loss of aquatic resources will occur. By incorporating the State's compensation requirements into its proposed permit, the District has in effect accepted a wetland compensatory mitigation ratio of just over one to one, which would not fully replace the functions and values of the forested wetlands that will be affected. Moreover, the compensation areas will be located within proposed stormwater detention basins, and thus will be subject to adverse impacts associated with increased flooding and increased inputs of sediments and site contaminants. We question whether wetland creation within the stormwater detention basins will even be successful. The compensatory mitigation will also result in the destruction of 19 acres of forested uplands that currently provide habitat for migratory birds and other wildlife species. It is our position that it is inappropriate to destroy high value upland habitat to compensate for wetland losses.

Finally, although not an issue to be addressed through permit elevation, I note that the District has not fulfilled its mandatory obligations under Section 7(a) of the Endangered Species Act to determine the effects of the permit decision on the federally listed bald eagle. Accordingly, I have asked the Service's Director to proceed with discussions with the Division Engineer, and, if necessary, the Chief of Engineers, regarding Section 7 compliance.

In conclusion, I recommend that the District deny authorization of wetland fills associated with stormwater treatment, irrigation storage, and golf course construction unless the following concerns identified by the Department are resolved:

1. Consideration of upland alternatives such as alternate project configurations that maximize open space and utilize upland areas for stormwater detention facilities, and upland storage facilities for irrigation water.

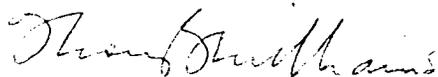
Honorable G. Edward Dickey

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2. Initiation of discussions with the local government, James City County, to determine whether the project can meet local ordinances without the destruction of wetlands for stormwater management.
3. Compensation for remaining unavoidable impacts through the use of habitat of low ecological value, not forested uplands, and location of compensation wetlands outside of stormwater management facilities.
4. Development of a detailed compensation plan based on (3) above prior to permit issuance, with an opportunity for Service review and comment.

Enclosed is additional information to support Department of the Interior concerns and recommendations relating to the proposed permit decision. I request your review of the decision by the District to proceed with permit issuance for the Greensprings Plantation project.

Sincerely,

A handwritten signature in cursive script, appearing to read "Thomas Smith".

Acting Assistant Secretary for Fish
and Wildlife and Parks

Enclosure



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0108



REPLY TO
ATTENTION OF

07 JUN 1993

Mr. Donald J. Barry
Acting Assistant Secretary for
Fish and Wildlife and Parks
Department of the Interior
Washington, D. C. 20240

Dear Mr. Barry:

This is in response to Mr. Thomas Williams' letter of May 6, 1993, in which he requested higher level review of issues related to a Department of the Army permit being considered by the Army Corps of Engineers Norfolk District. The permit would authorize the discharge of dredged or fill material into 5.9 acres of waters of the United States, including forested wetlands. The permit is associated with the Greensprings Plantation development which consists of two golf courses and a residential subdivision within a 1,402-acre tract in James City County, Virginia. Mr. Williams' request was made pursuant to Part IV of the 1992 Section 404(q) Memorandum of Agreement (MOA) between the Department of the Army and the Department of the Interior (DOI).

Part IV of the MOA establishes procedures for elevation of specific permit cases. To satisfy the explicit requirements for elevation, the permit case must pass two tests: 1) the proposed project would occur in aquatic resources of national importance (ARNIs); and 2) the project would result in substantial and unacceptable impacts to ARNIs.

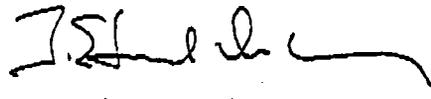
We have carefully reviewed the concerns raised in the May 6 letter and the Norfolk District's decision documents and draft permit for this case. Our review included a joint on-site meeting with Fish and Wildlife Service (FWS) staff, the applicant, and the district. Based on our evaluation, we have concluded that many of the forested wetlands adjacent to Powhatan Creek within the 1,402-acre tract would qualify as ARNIs. We could not, however, conclude that the specific forested wetland areas to be affected by the filling of 5.9 acres constitute ARNIs. These areas have been substantially degraded from relatively intense logging that occurred from 1979 to 1985. In light of this information, the first part of the elevation test has not been met.

While additional review pursuant to the MOA is not required, I will note that in this case we share concerns over the use of upland forest for wetlands creation. We believe that all appropriate and practicable compensatory mitigation options should be considered fully, including off-site restoration options. The fundamental objective must be to obtain the most environmentally beneficial compensatory mitigation plan that is practicable. Specifically, in the Greensprings Plantation case we were concerned that careful attention had not been given to potential off-site restoration alternatives. As a result of this concern, the district has initiated discussions with the applicant, the FWS, and the State of Virginia Water Quality Control Board to revise the mitigation plan. I understand that an off-site tract of prior converted cropland that may be suitable for restoration has been located. This approach would preserve an additional 16.6 acres of uplands on-site as requested in the May 6 letter. The district will continue to work with the FWS as the final mitigation plan is completed.

It is important to point out that even if the 5.9 acres to be affected constituted ARNIs, we could not have concluded that the permitted activity would have resulted in substantial and unacceptable impacts to ARNIs. We believe that the current mitigation proposal will compensate for the wetland losses associated with the permitted part of the project. As noted above, the district is working to improve the environmental benefits of the plan by pursuing off-site restoration in lieu of on-site creation. Further, we do not agree that, in this case, the dry impoundments will substantially impact the 7.7 acres of beaver dam wetlands. Corps wetlands experts have indicated that the duration and frequency of runoff into the impoundments will not adversely impact the existing wetlands. In addition, the on-site preservation of approximately 300 acres of forested wetlands and 250 acres of uplands in a conservation easement will provide for substantial protection of the wetland resources in the Powhatan Creek watershed, including ARNI wetlands. This approach appears to be consistent with the objectives of both the Emergency Wetlands Resources Act and the North American Waterfowl Management Plan and our desire to take a more holistic approach to wetlands protection.

The DOI's interest and efforts in raising this case to our attention are appreciated. In my opinion, our discussions were constructive and professional and improved the environmental benefits of the mitigation plan. Should you have any questions or comments concerning this elevation, or the program in general, do not hesitate to contact me, or Mr. Michael Davis, Assistant for Regulatory Affairs, at telephone (703) 695-1376.

Sincerely,



G. Edward Dickey
Acting Assistant Secretary of the Army
(Civil Works)



DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

28 JUN 1993

REPLY TO
ATTENTION OF:

CECW-OR

MEMORANDUM THRU COMMANDER, NORTH ATLANTIC DIVISION

FOR COMMANDER, NORFOLK DISTRICT

SUBJECT: Request for Permit Elevation, Greensprings Plantation

1. On 7 June 1993 the Acting Assistant Secretary of the Army (Civil Works) (AASA(CW)) responded (encl) to the request by the Department of the Interior (DOI) for elevation of the U.S. Army Corps of Engineers Norfolk District's proposed decision to issue a permit for the Greensprings Plantation development project. The project involves the development of a residential subdivision with two associated golf courses within a 1,402 acre tract in the southwestern section of James City County, Virginia. The permit is pursuant to Section 404 of the Clean Water Act for the filling of 5.9 acres within waters of the United States, including wetlands.

2. The DOI's request was made pursuant to Part IV of the Section 404(q) Memorandum of Agreement (MOA) between the Department of the Army and Department of the Interior regarding review of an individual permit case. The DOI believed that Aquatic Resources of National Importance (ARNI's) would be impacted and substantial unacceptable adverse impacts to such resources would occur. The issues presented by the DOI for our consideration pertained to impacts to ARNI's, because the compensatory mitigation was inadequate, the on-site alternative analysis is inadequate, the placement of irrigation/stormwater management impoundments within wetlands is unacceptable, the compensatory mitigation should be conducted in areas of low ecological value and not within high-value forested uplands.

3. The AASA(CW) letter advised the DOI that the request for elevation under Part IV did not meet the test established in the MOA. The AASA(CW) did agree with the DOI that a portion of the forested wetlands associated with Powhatan Creek were ARNI's. However, the AASA(CW) did not conclude that the forested wetland areas to be affected by the filling of the 5.9 acres constitute ARNI's. The AASA(CW) also advised the DOI that the 7.7 acres within the dry impoundment areas will not be substantially impacted. However, the AASA(CW) advised the DOI that they shared their concerns regarding the use of upland forest for wetlands creation. We understand the District has initiated discussions with the applicant, Fish and Wildlife Service (FWS), and the State of Virginia Water Quality Control Board to revise the mitigation plan. We are encouraged by the District's efforts and

CFCW-OR

SUBJECT: Request for Permit Elevation, Greensprings Plantation

they should continue to work with the applicant, FWS, and State as the final mitigation plan is completed.

4. The District's proposed decision has adequately addressed all issues regarding wetland impacts. We are advising the District to proceed to a final permit decision for the Greensprings Plantation project upon completion of their review of the compensatory mitigation plan.

5. If you have any comments or questions, please contact Mr. Victor Cole at (202) 272-0201.

Encl



STANLEY G. GENEGA
Brigadier General (P), USA
Director of Civil Works