



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240
October 6, 1994

SA4101204

Dr. John H. Zirschky
Acting Assistant Secretary (Civil Works)
Department of the Army
Washington, D.C. 20310

Dear Dr. Zirschky:

In accordance with the provisions of the December 21, 1992, Clean Water Act Section 404(q) Memorandum of Agreement (MOA) between the Department of the Interior and the Department of the Army (Army), I am requesting your review of the U.S. Army Corps of Engineers, New York District (District) Engineer's decision to issue a Section 404 permit for the project described in Public Notice No. 93-09170-RS.

This decision would modify Army Permit 16093, issued on May 16, 1991, and would authorize the applicant, Hartz Mountain Development Corporation, to discharge fill in wetlands for the purpose of constructing a 2,000-unit housing development in the Hackensack Meadowlands, Town of Secaucus, Hudson County, New Jersey. The proposed project, known as the Villages at Mill Creek, would result in the direct loss of 68 acres of estuarine emergent wetlands. Compensatory mitigation for the proposed project would involve enhancement of 124 acres of existing wetlands through re-grading and planting, enhancement of tidal flushing of 47.7 acres of wetlands, and preservation of 72.2 acres of existing wetlands.

On September 1, 1994, the Fish and Wildlife Service (Service) received the District Engineer's notice of intent to proceed with issuance of the modified permit. After a thorough review of background information on the project, I have determined that this case warrants elevation in accordance with the criteria found in Part IV of the 1992 MOA (Elevation of Individual Permit Decisions). Specifically, I have concluded that the proposed project will have substantial and unacceptable adverse effects on aquatic resources of national importance.

The District Engineer's proposed permit decision will allow filling of wetlands within the Hackensack Meadowlands that would lead to substantial direct and cumulative adverse impacts on nationally significant waterfowl, wading bird, and shorebird populations. 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 (48 Stat. 401; 16 U.S.C. 661 et seq.), Section 404(m) of the Clean Water Act, the Fish and Wildlife Act of 1956 (70 Stat. 1119; 16 U.S.C. 742), and the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-712) as amended, to implement international treaties regarding the conservation of migratory bird populations.

Significant among these international agreements is the North American Waterfowl Management Plan, a joint agreement between the United States and Canada to protect and enhance waterfowl habitat. The North American Waterfowl Management Plan of 1986 identifies the Hackensack Meadowlands as "priority habitat" for North American waterfowl and places the Hackensack Meadowlands within a "key priority habitat range"

along the Atlantic coast. The North American Waterfowl Management Plan was established to reverse the decline of waterfowl by establishing goals for conserving wetland habitat for waterfowl and other wetland-dependent wildlife. The loss and degradation of waterfowl habitat has been identified as the major waterfowl management problem in North America.

The Hackensack Meadowlands currently function as an important corridor for migratory birds. In general, New Jersey is widely recognized as an important migratory bird concentration area. Geologic features such as the Delaware and Hudson rivers, Atlantic Coast, and Kittatinny Ridge provide natural navigational corridors for migratory birds. Additionally, the diversity of physiographic regions and vegetative cover types in New Jersey provides essential habitat for a wide variety of migratory and resident bird species. The State's coastal and freshwater wetlands are particularly important to migratory shorebirds, waterfowl, and wading birds. While the southern portion of New Jersey supports extensive areas of estuarine wetlands, the Hackensack Meadowlands are the only significant area of remaining estuarine emergent wetlands in New Jersey north of the Raritan Bay, representing over ninety percent of the remaining estuarine emergent wetlands in northern New Jersey. The survival of migrating birds depends on the availability of suitable habitat throughout the Atlantic flyway. The Hackensack Meadowlands have already lost over 12,000 of wetlands due to human encroachment (over 60 percent of the historic wetland resources of the area). Therefore, the role of the remaining wetland resources of the Hackensack Meadowlands in providing suitable habitat for wetland dependent migratory birds in northern New Jersey is all the more important.

The proposed project would result in a net loss of estuarine wetland acreage that currently provides high quality migratory bird habitat, and would contribute to the continuing loss of wetland area and value in the Hackensack Meadowlands. This loss of wetland acreage and value is unacceptable in light of the cumulative loss of wetlands that has already occurred and that may occur from other reasonably foreseeable future development proposals in the Hackensack Meadowlands. Moreover, the decision documents do not adequately evaluate these cumulative impacts or even provide any documentation of their scope. Additionally, the type of compensatory mitigation proposed by the applicant (wetland enhancement) would merely convert one type of high quality habitat to another, and would not result in the substantial increase in overall habitat value necessary to offset the adverse impacts of the proposed project. Therefore, the many species that are already fully utilizing the existing wetlands on the project site would not benefit. Further, the proposed project would result in a net loss of wetland acreage, to the detriment of species that require large contiguous blocks of wetland habitat to satisfy their life requisites.

The adverse impacts to aquatic resource of national importance and nationally significant fish and wildlife resources that would result from this proposed project are also unacceptable in light of the applicant's failure to demonstrate that less environmentally damaging practicable alternatives are not available for this non-water dependent project. Specifically, the applicant has not presented adequate documentation to support the position that the minimum viable size for a housing project that would meet the basic project purpose is 2,000 units. Additionally, the applicant's alternatives analysis only considered sites consisting of large contiguous blocks of vacant land, and did not consider sites with redevelopment potential or the possibility of constructing the proposed project

on a number of smaller parcels. Further, the criteria used by the applicant to evaluate alternative sites were biased to favor the applicant's preferred site.

As you know, the Department of the Interior previously requested higher level review of this proposed project in April 1989, and the Headquarters of the Army Corps of Engineers (HQUSACE) issued findings regarding this case on July 25, 1989. As noted in the August 17, 1989, memorandum from the Assistant Secretary of the Army (Civil Works) to the Director of Civil Works, the guidance and information contained in the HQUSACE findings regarding the alternatives analysis and mitigation provisions of the Section 404(b)(1) Guidelines is applicable to all Section 404 permit applications. In fact, the HQUSACE findings in the original Hartz Mountain Section 404(q) elevation have helped shape national policy on issues concerning the practicable alternatives and mitigation provisions of the Section 404(b)(1) Guidelines for over five years. Therefore, I am concerned that the District Engineer appears to have reached a permit decision contrary to the HQUSACE guidance.

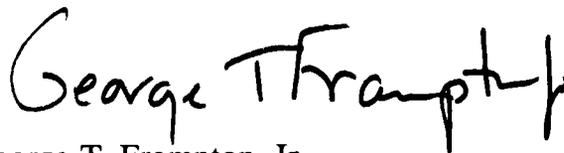
Based on the high values of the project site wetlands, the extensive cumulative loss of wetlands in the Meadowlands, and the documented availability of alternative project sites, I request that the District be directed to deny issuance of the permit modification for the Villages at Mill Creek project, and not grant any extension to the May 1991 permit issued to the applicant.

If a permit is ultimately issued for this project, the District should require the applicant to develop a revised plan that provides compensatory mitigation for all adverse impacts associated with the proposed project, including replacement of those wetland functions associated with the loss of wetland area.

The Service remains available to assist the District in conducting any additional studies that may be necessary to accurately quantify the impacts of the proposed project and to determine appropriate mitigative measures.

Enclosed is additional information addressing these and other issues relating to the proposed permit decision. Please do not hesitate to contact me if you have any questions.

Sincerely,



George T. Frampton, Jr.
Assistant Secretary for Fish
and Wildlife and Parks

Enclosure



UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for
Oceans and Atmosphere
Washington, D.C. 20230

SA4101205

OCT 6 1994

The Honorable John H. Zirschky
Acting Assistant Secretary of the Army
(Civil Works)
Department of the Army
The Pentagon
Washington, D.C. 20310

Dear Dr. Zirschky:

Pursuant to Part IV(f)(2) of our Memorandum of Agreement under Section 404(q) of the Clean Water Act (CWA), I request your review of a decision by the New York District (NYD), U.S. Army Corps of Engineers to authorize the project advertised by Public Notice 93-09170-RS dated October 29, 1993. The applicant, Hartz Mountain Development Corporation (Hartz), proposes to fill 68 acres of estuarine wetlands for the construction of a residential housing development. The current permit action requests modification of an earlier permit that would have resulted in the filling of 76 acres of wetlands for the same project, and that was originally part of a development project that will have a combined impact of 195 acres of wetland fill. The National Oceanic and Atmospheric Administration (NOAA) objects to the issuance of a permit for this project due to substantial and unacceptable impacts on aquatic resources of national importance that will be caused by the wetland fill at this site, and due to the lack of an adequate analysis of cumulative impacts associated with this and other development in the Meadowlands. NOAA requests that (1) this permit modification not be issued, and (2) the existing permit, which has expired, not be extended. The enclosed documents detail the reasons for this request.

The permit would authorize Hartz to fill 68 acres of partially inundated tidal estuarine wetlands in the Hackensack Meadowlands of New Jersey. The Meadowlands, located in the intensely urbanized New York - New Jersey area, is an estuarine resource of great importance to migrating and resident fish, waterfowl, and other wildlife. Consisting of 32 square miles in the floodplain of the Hackensack River, these wetlands comprise the largest remaining brackish marsh in northern New Jersey. In recognition of the importance of the Meadowlands, it has been designated by Environmental Protection Agency as a National Priority Wetland Site. National Priority Wetland Sites are those wetlands that are the most important and vulnerable wetlands in the Nation. The purpose of the listing is to focus attention on critical wetlands that require protection.

THE DEPUTY ADMINISTRATOR



The proposed project site borders Mill Creek, a tributary of the Hackensack River, and consists of an emergent wetland dominated by common reed (*Phragmites australis*). The Hackensack River and Mill Creek support a variety of fish and invertebrates including striped bass, blueback herring, American shad, white perch, and blue crab. The dominant fish species in the wetlands of the site and the creek adjacent to the site are mummichogs and killifish, which are important prey items for a variety of avian and fish species.

Although the wetlands in the proposed project area are not pristine, they are part of a larger wetland system which is of great importance regionally and nationally. The cumulative effects of development in this area have already resulted in the loss of over 10,000 acres, more than half of the wetlands in the Meadowlands. It has also resulted in the degradation of the remaining wetlands, and impairment of the Meadowland's ability to support fishery and other resources. Approving this permit application will permanently remove another 68 acres of wetlands from the Meadowlands. This loss would degrade the wetland system as a whole by putting additional strain on an ecosystem which is already under stress. Additionally, wetlands such as those at the project site have great value for fulfilling the Administration's stated long-term goal of increasing wetland resources through wetlands enhancement and restoration work. If these wetlands are filled, the public will suffer a loss of potential future wetland functions as well as the existing functions performed by the proposed project site. A thorough review of the cumulative impacts of development pursuant to the National Environmental Policy Act is needed. Such a review is currently being developed as part of the Special Area Management Plan (SAMP) for the Hackensack Meadowlands, scheduled for release in November or December of 1994.

The proposed project has been the subject of previous permit applications, an elevation by EPA and Department of the Interior (DOI), a discontinued CWA 404(c) action by EPA, and numerous reports submitted by the applicant and the Federal agencies involved in the review of this project. In comment letters submitted by the National Marine Fisheries Service (NMFS) throughout the permit review process (which began in 1987), NOAA has raised concerns about the lack of consideration of less environmentally damaging alternatives such as the use of multiple sites or redevelopment sites for this proposed project.

These concerns were also expressed by Headquarters U.S. Army Corps of Engineers (HQUSACE) during the previous elevation proceedings, and by EPA during the 404(c) proceedings. However, contrary to guidance from HQUSACE to the District, issues regarding the use of multiple sites or redevelopment sites have not been adequately addressed by the applicant or by NYD. Thus, the applicant has not rebutted the CWA 404(b)(1) Guidelines'

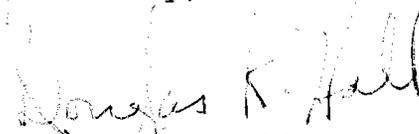
presumption that practicable alternatives exist that would have a less damaging effect on the environment. NOAA believes that practicable alternatives are available that would result in little or no resource loss. Thus, the issue of alternatives is inextricably linked to living marine resource protection.

NOAA is also concerned that even if there were no practicable alternatives, the mitigation proposed for the project is not appropriate. Thirty percent of the proposed mitigation is preservation of existing wetlands - a mitigation method that in no way compensates for the permanent loss of existing wetlands. The remainder of the proposed mitigation is wetland enhancement. As discussed in NMFS comment letters, calculations of the amount of enhancement needed to offset impacts associated with the proposed project do not accurately reflect the existing habitat value of the proposed project site or mitigation sites, nor do they accurately reflect the likely continuation of the improvement of habitat values that is occurring throughout the Meadowlands.

In summary, NOAA has determined that the proposed project will cause substantial and unacceptable adverse impacts to aquatic resources of national importance. NOAA believes that practicable alternatives exist that would substantially reduce the impact of this proposed project on aquatic resources of national importance. Therefore, NOAA recommends that HQUSACE review the revised alternatives analysis, including a determination of whether it complies with direction provided in the 1989 Findings prepared subsequent to the DOI/EPA elevation of the original permit for this project. Of primary importance is an investigation of the potential for siting a housing development on smaller multiple sites rather than on one large site, and an investigation of the possibility of using redevelopment sites in areas such as Newark and Jersey City rather than filling valuable wetlands in the Meadowlands. We request that the proposed permit modification and any extension of the original permit be held in abeyance pending this analysis.

I appreciate your consideration of our concerns and would be pleased to discuss this further with you. If your staff would like more information, they may contact Thomas E. Bigford, Acting Director, Office of Habitat Protection, NMFS at 301/713-2325.

Sincerely,



Douglas K. Hall

Enclosure



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108



REPLY TO
ATTENTION OF

07 NOV 1994

Honorable Douglas K. Hall
The Assistant Secretary for
Oceans and Atmosphere
United States Department of Commerce
Washington, D. C. 20230

Dear Mr. Hall:

This is in response to your letter of October 6, 1994, in which you requested our review of issues related to a Department of the Army permit being considered by the Army Corps of Engineers New York District. The permit would allow the Hartz Mountain Development Corporation to fill 68 acres of estuarine wetlands and shallow water habitat in the Hackensack Meadowlands, Secaucus, New Jersey. The purpose of the project is to construct a high density residential development. In light of the findings summarized below, I have decided that additional review pursuant to the 1992 Section 404(q) Memorandum of Agreement (MOA) is not required. Accordingly, I have advised the New York District to proceed with the final permit decision.

Your request for review was made pursuant to Part IV of the MOA between the Army and the Department of Commerce (DOC). The DOC's concerns focused on the potential availability of less environmentally damaging practicable alternatives, the compliance with previous guidance from our office and Corps headquarters regarding the previous Section 404(q) elevation by the Department of the Interior and the Environmental Protection Agency (EPA), and that the mitigation plan is inadequate. 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 must involve an aquatic resource of national importance (ARNI); and 2) the project must result in substantial and unacceptable impacts to an ARNI.

We have carefully reviewed the concerns raised in your letter, the New York District's decision documents and draft permit, EPA's analysis of the project and information from the applicant. Our review included an on-site inspection and meeting with National Marine Fisheries Service representatives, Fish and Wildlife Service representatives, the Corps North Atlantic Division and New York District, Hackensack Meadowlands Development Commission representatives, and Hartz representatives. Based upon our evaluation, we agree with

Enclosure

the DOC that the Hackensack Meadowlands wetland complex qualifies as an ARNI. However, due to the degraded nature of some of the wetland areas, we disagree that all the wetland areas within the complex warrant this designation. This determination is supported by EPA's position regarding the importance of the resource in its evaluation for a potential veto of the Corps permit under Section 404(c) of the Clean Water Act.

While we agree that the proposed site is an ARNI, we do not agree that the proposed project will result in substantial and unacceptable adverse impacts to these resources. Our determination is based upon two elements of the MOU. First, the provisions of Part IV, Paragraph 1 of the MOU provide for consideration of mitigation in determining any net losses of ARNI's. The mitigation proposal offsets the unavoidable impacts associated with the 68 acres of fill. The wetlands mitigation proposal developed between the applicant and the EPA provides for a total of 244 acres and includes 124 acres of wetlands enhancement, the increase of tidal inundation within 47.7 acres of wetlands, and preservation of 72.2 acres of wetlands. The enhancement of wetlands in this area by removal of common reedgrass is a proven method for wetland enhancement. In fact, the Corps' review, as well as the EPA review revealed that this enhancement method has proven effective. The Army Corps of Engineers Waterways Experiment Station originally reviewed the district's 1991 decision and provided technical advice which resulted in similar types and acreage of mitigation necessary to offset unavoidable impacts at that time. The EPA mitigation proposal which is now a part of the current Corps decision increases the total acreage of the wetland enhancement and preservation which will more than adequately provide mitigation for project impacts.

Second, we have thoroughly reviewed the information regarding the alternatives analysis as it relates to the guidance provided to the district as a result of the previous Section 404(q) elevation in 1989. This analysis concluded that the district has fully complied with the guidance regarding the determination of the least environmentally damaging practicable alternative. The district conducted a thorough alternatives analysis which considered 63 sites. We concur with the district's determination that the applicant's site represents the least environmentally damaging practicable alternative. EPA, as a part of its 404 (c) action, also investigated the availability of practicable alternatives. EPA identified two sites with less environmental impact but noted they may not be practicable

due to local land use constraints. The Corps found that those alternatives were not practicable because of land use constraints. As a result, the applicant's proposal, as modified during 404(c) process, is the least damaging practicable alternative.

The efforts of you and your staff in raising this case to our attention are appreciated. Should you have any questions or comments concerning our decision in this case, do not hesitate to contact me or Mr. Jack Chowning, Acting Assistant for Regulatory Affairs, at (202) 272-1725.

Sincerely,



John H. Zirschky
Acting Assistant Secretary of the Army
(Civil Works)

Morgan Rees
Deputy Assistant Secretary
(Planning Policy and Legislation)



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108



REPLY TO
ATTENTION OF

17 NOV 1994

Honorable George T. Frampton, Jr.
Assistant Secretary for Fish
and Wildlife and Parks
Department of the Interior
Washington, D. C. 20240

Dear Mr. Frampton:

This is in response to your letter of October 6, 1994, in which you requested our review of issues related to a Department of the Army permit being considered by the Army Corps of Engineers New York District. The permit would allow the Hartz Mountain Development Corporation to fill 68 acres of estuarine wetlands and shallow water habitat in the Hackensack Meadowlands, Secaucus, New Jersey. The purpose of the project is to construct a high density residential development. In light of the findings summarized below, I have decided additional review pursuant to the 1992 Section 404(q) Memorandum of Agreement (MOA) is not required. Accordingly, I have advised the New York District to proceed with the final permit decision.

Your request for review was made pursuant to Part IV of the MOA between the Army and the Interior (DOI). The DOI's concerns focused on the potential availability of less environmentally damaging practicable alternatives, the compliance with previous guidance from our office and Corps headquarters regarding the previous Section 404(q) elevation by the DOI and the Environmental Protection Agency (EPA), and that the mitigation plan is inadequate. 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 must involve an aquatic resource of national importance (ARNI); and 2) the project must result in substantial and unacceptable impacts to an ARNI.

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Second, we have thoroughly reviewed the information regarding the alternatives analysis as it relates to the guidance provided to the district as a result of the previous Section 404(q) elevation in 1989. This analysis concluded that the district has fully complied with the guidance regarding the determination of the least environmentally damaging practicable alternative. The district conducted a thorough alternatives analysis which considered 63 sites. We concur with the district's determination that the applicant's site represents the least environmentally damaging practicable alternative. EPA, as a part of its 404 (c) action, also investigated the availability of practicable alternatives. EPA identified two sites with less environmental impact but noted they may not be practicable

due to local land use constraints. The Corps found that those alternatives were not practicable because of land use constraints. As a result, the applicant's proposal, as modified during 404 (c) process, is the least damaging practicable alternative.

The efforts of you and your staff in raising this case to our attention are appreciated. Should you have any questions or comments concerning our decision in this case, do not hesitate to contact me or Mr. Jack Chowning, Acting Assistant for Regulatory Affairs, at (202) 272-1725.

Sincerely,



 John H. Zirschky
Acting Assistant Secretary of the Army
(Civil Works)

Morgan Rees
Deputy Assistant Secretary
(Planning Policy and Legislation)



DEPARTMENT OF THE ARMY

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

REPLY TO
ATTENTION OF:

CECW-OR

14 NOV 1994

MEMORANDUM THRU COMMANDER, NORTH ATLANTIC DIVISION

FOR COMMANDER, NEW YORK DISTRICT

SUBJECT: Hartz Mountain Development Corporation 404(q) Elevation Requests from the Department of the Interior and the Department of Commerce

1. On 7 November 1994, the Acting Assistant Secretary of the Army (Civil Works) (AASA(CW)) responded (encls) to the requests by the Department of the Interior (DOI) and the Department of Commerce (DOC) for elevation of the U.S. Army Corps of Engineers New York District's proposed decision to issue a permit to the Hartz Mountain Development Corporation pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The proposal involves the filling of 68 acres of estuarine wetlands and shallow water habitat in the Hackensack Meadowlands, located in Secaucus, New Jersey. The purpose of the project is to construct a high density residential development. Mitigation for project impacts involves the enhancement of 124 acres of existing wetlands, reestablishment of tidal flushing within 47.7 acres of wetlands, and preservation of 72.2 acres of wetlands.

2. The DOI and the DOC requests were made pursuant to Part IV of the Section 404(q) Memoranda of Agreement between the Department of the Army and the DOI and the DOC regarding review of an individual permit case. The DOI and the DOC 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 and the DOC for our consideration pertained to impacts to ARNI's, that practicable less environmentally damaging alternatives may exist for the high density residential development, that the project did not comply with previous Office of the Assistant Secretary of the Army (Civil Works) and Corps Headquarters guidance regarding the alternatives analysis, and that the proposed mitigation was inadequate.

3. The AASA(CW) letter advised the DOI and the DOC that the requests for elevation under Part IV did not meet the test established in the Memoranda of Agreement. The AASA(CW) did agree with the DOI and the DOC that the project site contains

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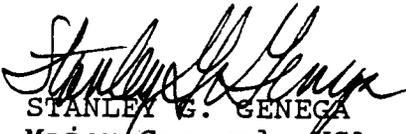
SUBJECT: Hartz Mountain Development Corporation 404(q) Elevation Requests from the Department of the Interior and the Department of Commerce

ARNI's. However, the AASA(CW) determined that no substantial unacceptable adverse impacts to ARNI's would occur as a result of the District's issuance of the permit when considering the proposed mitigation.

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 Hartz Mountain Development Corporation.

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

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STANLEY G. GENECA
Major General, USA
Director of Civil Works