



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

APR -2 1998 SA8040709

Dr. John H. Zirschky, Ph.D.
Acting Assistant Secretary
of the Army
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, I am requesting your review of a decision by the Norfolk District, U.S. Corps of Engineers (Corps) to authorize the project advertised by Public Notice 93-0688-14, dated June 6, 1996. The City of Virginia Beach proposes to dredge 5.2 miles of main channel within the Western Branch of the Lynnhaven River and a segment of Old Donation Creek to improve recreational navigation. Staff of the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) have been on site numerous times during the permit review process. We have repeatedly recommended denial of the application as proposed, due to the project's substantial and unacceptable impacts on aquatic resources of national importance. We request that you deny this permit unless it is revised and conditioned to reduce adverse effects on aquatic resources. The enclosed information paper details the reasons NOAA recommends these changes.

The permit would authorize dredging of the majority of the proposed channel to a depth of -5' mean low water (mlw) (which includes 1' of "advance maintenance"), plus 1' of an allowable variance, for a total allowable dredge depth of -6' mlw. For parts of the channel in Old Donation Creek and Thurston Creek, the dredge depth is reduced to -4 mlw plus 1' allowable variance. The applicant also anticipates that future authorizations will be required for dredging of an extensive network of private ancillary channels, to depths between 3' and 5' mlw.

The main channel dredging would adversely impact approximately 21 acres of shallow water habitat, including 15 oyster leases. The ancillary channel dredging would directly impact an additional 18.0 acres of shallow water habitat with existing depths of 0.0 to -2' mlw and could cause significant adverse impacts to approximately 220 acres of shallow water habitat with depths of -2' mlw or less.

THE DEPUTY ADMINISTRATOR



NOAA has determined that the West Branch of the Lynnhaven River is an aquatic resource of national importance due to its important function as a nursery habitat for numerous species of fish and shellfish. The commercial and recreational fisheries for lower Chesapeake Bay are based on estuarine and marine species that are dependent on the wetlands and shallow waters of the Lynnhaven River system as primary nursery areas and adult life stage habitat. Several of those species are under management pursuant to the recently amended Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Mid-Atlantic Fishery Management Council (MAFMC) has indicated that nursery habitat in the Western Branch of the Lynnhaven River will likely be identified as essential fish habitat for summer flounder under the Magnuson-Stevens Act.

The proposed dredging will destroy shallow water nursery habitat, converting it to deeper water habitat that does not provide equivalent functions. NOAA and MAFMC are particularly concerned that the loss of significant nursery habitat for summer flounder will compound the difficulty of rebuilding the currently depleted stock of this important commercial species.

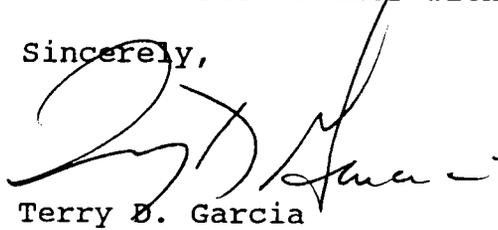
Pursuant to Section 7 of the Endangered Species Act, NMFS has reviewed this project for potential impacts to sea turtles, including the endangered Kemp's ridley (*Lepidochelys kempii*) and threatened loggerhead (*Caretta caretta*). Potential impacts to sea turtles include direct impacts during the dredging and disposal operations, reduction in the value of the habitat as a foraging area for sea turtles, and collisions with the vessels that will utilize the newly dredged channels. At this time, the Corps has met only one condition we specified during consultation, therefore consultation is not yet complete.

In summary, it is NOAA's determination that Federal authorization of the proposed dredging will result in unacceptable adverse impacts on "aquatic resources of national importance." NOAA recommends that dredging of the Western Branch of the Lynnhaven River be authorized only after the following modifications and conditions are incorporated into the permit: (1) prohibit dredging in any area with existing depths of -2' mlw or less, (2) reduce the proposed dredge depths to a maximum of -4' mlw (plus 1' overdredging allowance), (3) prohibit dredging in areas with existing depths of -4' mlw or greater, (4) formulate a plan to minimize the amount of ancillary channel dredging, and (5) formulate a plan to reduce the risk to sea turtles from vessel

collisions. NOAA is willing to work with the applicant and Corps toward an alternative that does not result in substantial and unacceptable impacts on aquatic resources of national importance.

I would be pleased to discuss our concerns further with you.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry D. Garcia", written over the typed name below.

Terry D. Garcia

Enclosure



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

04 MAY 1998

REPLY TO
ATTENTION OF

Honorable Terry D. Garcia
The Assistant Secretary for
Oceans and Atmosphere
United States Department of Commerce
Washington, D. C. 20230

Dear Mr. Garcia:

This is in response to your letter of April 2, 1998, in which you requested our review of issues related to a Department of the Army permit being considered by the Army Corps of Engineers Norfolk District. The permit would allow the city of Virginia Beach to dredge portions of the West Branch of the Lynnhaven River. The purpose of the project is to restore navigable capacity to the river.

Your request for elevation was made pursuant to Part IV of the 1992 Section 404(q) Memorandum of Agreement (MOA) between the Army and the Department of Commerce (DOC). The DOC's concerns focused on the potential for impacts to habitat for fisheries species of national economic importance, and to sea turtles that are protected under the Endangered Species Act. 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's); and 2) the project must result in substantial and unacceptable impacts to ARNI's.

We have carefully reviewed the concerns raised in your letter, the Norfolk District's decision documents and draft permit, and information from the applicant. Our review included an on-site inspection and meeting with National Marine Fisheries Service representatives, the Corps Norfolk District, and City of Virginia Beach representatives. Based upon our evaluation, we agree with the DOC that, portions or all of the West Branch of the Lynnhaven River might qualify as ARNI's. However, we disagree that substantial and unacceptable adverse impacts will result from dredging proposed to be approved by the Norfolk District's proposed permit to the City of Virginia Beach.

Our determination is based upon the small percentage of shallow waters and intertidal mud flat habitat that would be

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affected by dredging the main channel to restore navigation and potentially by dredging within the ancillary channels to improve navigation. The District's decision to include the cumulative impacts in ancillary channels depended on a relative certainty that this dredging will, indeed, be proposed by private applicants. The public interest review, NEPA documentation and any Section 404(b)(1) evaluation stemming from each ancillary channel application will be made separate from the city of Virginia Beach permitting action. During the cumulative impact assessment, the district has properly identified a protocol for information that ancillary channel applicant's will be required to provide, and established a preference for avoiding, minimizing or mitigating mud flats, where practicable. We believe this will allow the district to take an objective posture concerning future applications in these important areas and to perhaps further minimize or mitigate impacts.

In addition to the relatively small percentage of area being impacted, the district's decision involved substantial requirements modifying the project from what was originally requested. These modifications were to protect the resources you expressed concern about. The district has required a reduction in the depths to be dredged from a requested 8 ft. to 5 ft. plus an average of 0.5 ft. of over dredging; modified the channel location in one section to take advantage of existing depths of 5 ft.; required moving shellfish beds; required avoidance of sponge and shellfish habitat; and strengthened time of year restrictions to avoid dredging during periods of greater finfish presence. Moreover, only 2000 ft. of the 5.2 mile channel involves dredging in summer flounder habitat.

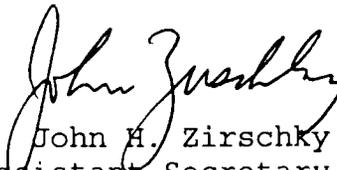
With respect to the potential for impacts to sea turtles that are protected under the Endangered Species Act, the actions taken to require "No Wake Zones" in all but two short stretches of the channel minimizes the possibility of a boat striking any sea turtles that might enter the system.

In light of the findings summarized above, additional review pursuant to the MOA is not required. I will advise the Corps to proceed with the final permit decision in accordance with the MOA.

Although in this particular case we disagree on the specific issues raised, we share your desire to protect the Nation's aquatic resources and the public interest. 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. Chip Smith, Assistant for Environment and Regulatory Affairs, at telephone (703) 693-3655.

Sincerely,

A handwritten signature in black ink, appearing to read "John Zirschky". The signature is written in a cursive style with a large initial "J".

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



DEPARTMENT OF THE ARMY

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

08 JUN 1998

REPLY TO
ATTENTION OF:

CECW-OR

MEMORANDUM THRU COMMANDER, NORTH ATLANTIC DIVISION

FOR COMMANDER, NORFOLK DISTRICT

SUBJECT: Request for Section 404(q) Elevation, Restoration of Navigation to the West Branch of the Lynnhaven River

1. On 4 May 1998, the Acting Assistant Secretary of the Army (Civil Works) (AASA(CW)) denied the Department of Commerce (DOC) request for higher level review of the Norfolk District's proposed permit to the city of Virginia Beach for dredging portions of the West Branch of the Lynnhaven River. Enclosed is a copy of the AASA(CW) letter to DOC.

2. In accordance with Part IV (g)(1) of the Memorandum of Agreement with DOC, the District may proceed with the final decision. Although the review of this case indicated the District's decision on this case was made in accordance with all applicable policies and regulations, the AASA(CW) has also requested that the District take the following steps prior to final action on the permit:

a. require the applicant to provide more accurate calculations for the area extent of the dredging impacts being evaluated, and check the calculations when received, and

b. reconcile language in the decision documents that might lead to a conclusion that applications for the size and scope of ancillary channels that were evaluated as a part of the cumulative assessment, would receive favorable consideration by the U.S. Army Corps of Engineers. We recognize that the District's intentions were always to take an objective posture concerning future applications in these important areas, and to perhaps further minimize or mitigate impacts.

3. Should you have any questions or comments concerning the decision, please contact Mr. Jack Chowning, Regulatory Branch, at (202) 761-1781.

FOR THE COMMANDER:

Encl


RUSSELL L. FUHRMAN
Major General, USA
Director of Civil Works