



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

NOV 25 1998

The Honorable Joseph W. Westphal
Assistant Secretary of the Army
(Civil Works)
Department of the Army
The Pentagon
Washington, D.C. 20310

Dear Dr. Westphal:

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 (ND), U.S. Army Corps of Engineers (Corps) to authorize the project advertised by Public Notice 97-2035-30, dated February 19, 1998. The property owner, William F. Nickel III, et al., proposes to construct four waterfowl impoundments for the use of a hunting club in Accomack County, Virginia. Three freshwater impoundments in palustrine wetlands would total 117 acres. The fourth proposed impoundment would be constructed in approximately 50 acres of estuarine wetlands. The proposed permit would adversely impact a total of 167 acres. Staff of the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) inspected the site twice during the permit review process. Since 1993, when the applicant originally requested authorization to impound estuarine wetlands, 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 filling approximately 5 acres and impounding approximately 117 acres of palustrine forested wetlands. The permit would also authorize filling approximately 2 acres, excavating approximately 10 acres, and impounding an additional 40 acres of estuarine emergent wetlands. Previously authorized and existing impoundments on this site total 110 acres; therefore the onsite cumulative impacts of this permit are approximately 280 acres of impoundments and fill.

NMFS is particularly concerned about the proposed construction of the 50-acre brackish impoundment, which will fill and impound not only estuarine wetlands but also two tidal guts. Fish and shellfish are totally dependent on the ecological and trophic elements associated



THE DEPUTY ADMINISTRATOR

with sensitive estuarine nutrient cycles and circulation regimes, which would be interrupted by impoundment of this estuarine wetland. The benefits of the proposed impoundment to waterfowl would not outweigh the costs to other aquatic resources. The Corps recognized this in 1993 when the applicant was informed that a permit request for the estuarine impoundment would not be granted (the applicant subsequently modified that request to exclude the estuarine impoundment).

Two tidal creeks, Deep Creek and Doe Creek, are adjacent to the project site and feed into Pocomoke Sound. Trawl sampling conducted in Pocomoke Sound by the Virginia Institute of Marine Science in July 1998 revealed the presence of 38 different species of fish, including species of "national economic importance" such as alewife, summer flounder, bluefish, blueback herring, American shad, and weakfish, as well as other important commercial and recreational fish species such as Atlantic croaker, scup, silver perch, spot, smallmouth flounder, and black seabass. It is expected that these species will be present in Deep Creek and Doe Creek, as well as in the tidal guts. Tidal guts and marshes provide excellent foraging areas for finfish and shellfish. The estuarine habitat of the Chesapeake Bay has been proposed by the Mid-Atlantic Fishery Management Council as essential fish habitat for summer flounder. The proposed 50-acre brackish impoundment will isolate and fragment estuarine marsh and two tidal guts that are important components of the Chesapeake Bay ecosystem.

The Corps' documentation supporting the proposed permit asserts that the proposed brackish impoundment might increase fish density. The referenced study (Clark, undated), an internal Delaware Fish and Game study, did find an increased number of fish in impoundment ditch systems in Delaware. However, the majority of the fish captured (94.44 percent) were species such as mummichog and sheepshead minnow which have a tendency to congregate in ditches and depressions because they are well-adapted to the degraded water quality in impoundments. Other species common in the Pocomoke Sound area, such as striped bass and summer flounder, are more susceptible to poor water quality conditions and therefore will not thrive in the impoundment area. Fish productivity cannot be based on standing crop numbers alone, but must consider diversity and the cycling of organisms in the estuary.

An alternative to impounding the estuarine marsh would be excavating interconnected ponds in the upper part of the marsh. This practice, known as open marsh water management, provides open water to attract waterfowl (as well as fish) with much less damage to the ecosystem than impoundments. NOAA has suggested this option to the ND Corps and the applicant as a reasonable alternative to the proposed brackish impoundment.

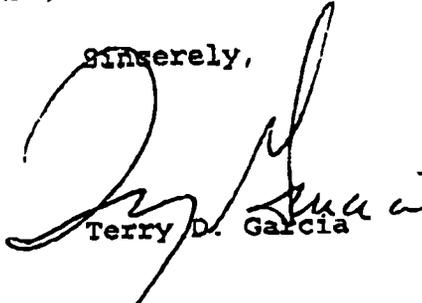
NOAA believes that the proposed mitigation plan needs verification and modification to ensure compensation for the project's adverse impacts. Approximately 15 acres of mitigation is to be provided by the seasonal flooding of scattered areas of non-hydric soils within a proposed freshwater impoundment. However, these non-hydric soil inclusions have not been verified by a Professional Soil Scientist nor located by survey to determine their actual limits or locations. The remainder of the proposed mitigation is preservation of 213 acres of undisturbed estuarine wetlands and limited preservation (after an initial thinning) of 648 acres of pine plantation forest. However, the Corps' permit would allow for tree removal for shed(s), a club house, and road construction within the preservation area. Preservation of the forested areas would be through restrictive covenants/deed restrictions. However, the applicant has declined to have the covenants or restrictions held by a third party, because he has stated that he wants to be able to remove the water control structures and reestablish timber harvest on the site if he cannot, at a later date, sell the property to a conservation group or natural resource agency.

In summary, it is NOAA's determination that Federal authorization of the proposed impoundment construction will result in unacceptable adverse impacts to aquatic resources of national importance. NOAA recommends that the project as proposed be denied. Should a permit be issued, the following conditions should be met:

- (a) The brackish impoundment should be deleted from the proposal.
- (b) Any non-hydric soil inclusions proposed as mitigation sites should be field verified by a qualified Professional Soil Scientist and located by survey to determine their actual extent.
- (c) The conservation easement covering any area proposed as mitigation should prohibit any disturbance of the area.
- (d) The conservation easement for any mitigation area should be held in perpetuity by a third party, such as The Nature Conservancy.

I appreciate your consideration of our concerns and would be pleased to discuss this further with you. If you or your staff would like more information, please contact Joseph R. Blum, Acting Director, Office of Habitat Conservation, NMFS, at (301) 713-2325.

Sincerely,


Terry D. Garcia

Enclosure



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

Thank you for your letter of November 25, 1998, requesting that I review the proposed decision on the Army Corps of Engineers Norfolk District Department of the Army permit to Mr. William F. Nickel, III. Because your request was made pursuant to our Section 404(q) Memorandum of Agreement, my staff carefully reviewed the concerns raised in your letter, the District's decision documents and draft permit, and information from the applicant. The review also included an on-site inspection and meeting with those parties concerned in the issues being raised.

We do not agree that the resources on this site are Aquatic Resources of National Importance. The site, while appearing to be a natural area, is one where timber harvesting activities have and continue to have adverse impacts to the ecosystem. The project site has the only freshwater impoundments permitted or proposed on the Chesapeake Bay side of the Virginia portion of the DELMARVA peninsula. The 20 acre estuarine (storm and spring tide *Juncus* saltmarsh) that will be managed as a brackish fish marsh is nearly surrounded by upland hummocks, roads, and remnant berms. There are also no other brackish ponds that have been permitted in this area. If the permit is not issued the site will continue to be subject to timber production, as well as development pressures.

The project site is for the most part managed for timber production, with periodic harvesting operations, which are exempt, when they occur in waters of the United States, including wetlands. The permit would allow a change in the area use from timber production to a wildlife management area. We believe this is an acceptable if not positive change, and the impacts associated with the projects to support that change are also acceptable. NOAA's objections focused on the creation of the brackish marsh to be managed as a seasonal waterfowl refuge. We do not agree with the NOAA contention that management of the site for waterfowl will render the area unsuitable and/or inaccessible to numerous critical marsh-dependent fauna during critical periods of the year. Rather than being subject to storm and spring high tides, the tidal influence will be managed for enhanced productivity.

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Encl. 1

Although we recommend that the District proceed with its proposed decision, our detailed review has identified several specific elements of the District's decision, which could have been more clearly stated in the permit conditions. We will have the District clarify and strengthen the permit conditions as follows:

- The design for construction of the levees and water control structures are somewhat general. Since these are critical to success in developing enhanced aquatic functions and values, the design plan needs to be reviewed by a hydraulic engineer.
- The District needs to verify that there are approximately 15 acres of uplands within pond 2, which will become wetlands.
- Permit conditions need to clearly reflect that the District will approve the applicant's water management plan for the ponds.
- The permit condition on project performance needs to be clear regarding assessment, by the applicant, of establishment of expected vegetative characteristics of the ponds (e.g., that Ruppia becomes established in the shallow excavations within pond 4).
- A permit condition should be added, which clearly states that the Corps will assess, in coordination with National Marine Fisheries Service and Fish and Wildlife Service, the success of the project in establishing expected aquatic habitat types. Furthermore, the condition will state that should the Corps determine that aquatic ecosystems developed are not providing the ecological benefits expected, remediation actions will be required. Remediation could involve reestablishing uncontrolled tidal exchange by breaching the constructed dikes at the two existing tidal guts. Such remediation would be simple, since the area to be established as pond 4 is currently largely surrounded by uplands and existing roads/berms, with tidal exchange only at storm and spring high tides through the two tidal guts.

In light of these findings, additional review pursuant to the Memorandum of Agreement is not warranted and the District will be allowed to proceed with issuance of the permit.

Thank you for your interest in this matter. Although we have not agreed to subject this proposed permit to further Corps review, should you have any questions or comments concerning our decision in this case, please contact me or Mr. Chip Smith, Assistant for Environment and Regulatory Affairs, at (703) 693-3655.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph W. Westphal". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph W. Westphal
Assistant Secretary of the Army
(Civil Works)



DEPARTMENT OF THE ARMY

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

REPLY TO
ATTENTION OF:

07 FEB 1999

CECW-OR

MEMORANDUM THRU COMMANDER, NORTH ATLANTIC DIVISION

FOR COMMANDER, NORFOLK DISTRICT

SUBJECT: National Oceanic and Atmospheric Administration Section 404 (q) Elevation of Permit Decision, Norfolk District Permit 97-2035-30

1. On 23 December 1998, the Assistant Secretary of the Army (Civil Works) (ASA(CW)) replied to National Oceanic and Atmospheric Administration indicating the U.S. Army Corps of Engineers Norfolk District Engineer would be allowed to issue the subject permit. Enclosed is a copy of the ASA(CW) letter.
2. This will confirm that in accordance with Part IV (g)(1) of the Memorandum of Agreement with Department of Commerce, the District was allowed to proceed with the final decision, subject to clarifying and strengthening the permit conditions as follows:
 - a. The design for construction of the levees and water control structures are somewhat general. Since these are critical to success in developing enhanced aquatic functions and values, the design plan needs to be reviewed by a hydraulic engineer.
 - b. The District needs to verify that there are approximately 15 acres of uplands within pond 2, which will become wetlands.
 - c. Permit conditions need to clearly reflect that the District will approve the applicant's water management plan for the ponds.
 - d. The permit condition on project performance needs to be clear regarding assessment, by the applicant, of establishment of expected vegetative characteristics of the ponds (e.g., that Ruppia becomes established in the shallow excavations within pond 4).
 - e. A permit condition should be added, which clearly states that the Corps will assess, in coordination with National Marine Fisheries Service and Fish and Wildlife Service, the success of the project in establishing expected aquatic habitat types. Furthermore, the condition will state that should the Corps determine that aquatic ecosystems developed are not providing the

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SUBJECT: National Oceanic and Atmospheric Administration Section 404 (q) Elevation of Permit Decision, Norfolk District Permit 97-2035-30

ecological benefits expected, remediation actions will be required. Remediation could involve reestablishing uncontrolled tidal exchange by breaching the constructed dikes at the two existing tidal guts. Such remediation would be simple, since the area to be established as pond 4 is currently largely surrounded by uplands and existing roads/berms, with tidal exchange only at storm and spring high tides through the two tidal guts.

4. We and ASA(CW) thank the District for the quality of the documentation they provided and their extensive coordination during our consideration of this case. Should you have any questions or comments concerning our decision, please contact Mr. John Studt, Chief, Regulatory Branch, at (202) 761-0199.

FOR THE COMMANDER:



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

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