



## United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

November 22, 1994

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 (Department) and the Department of the Army (Army), I am requesting your review of the Huntington District (District) Engineer's decision to issue a Section 404 permit for the project described in Public Notice No. 94-27, Application Number North Fork Hughes River-Fill-057463 (1145b).

This permit would authorize the applicant, Little Kanawha Soil Conservation District, to place 13,000 cubic yards of fill material below the ordinary high water elevation of the North Fork Hughes River near Harrisville, West Virginia, to build a dam for the purposes of providing regional recreation, water supply, and flood control. The proposed dam will impound 305 acres of water at normal pool and result in the direct loss of 8.1 miles of high quality stream habitat (including 6.6 acres of wetlands, other special aquatic sites, and an unquantified amount of riffle/pool complexes), 61 acres of bottomland hardwoods, and 43 acres of upland hardwoods.

Mitigation for the proposed project includes enhancement of fisheries habitat in the resulting reservoir, wetland creation, planting of bottomland hardwoods, stabilizing and revegetating eroding streambanks located downstream of the dam site, monitoring of relocated mussel populations, monitoring of a downstream population of the snuffbox mussel (*Epioblasma triquetra*, a candidate for Federal listing as threatened or endangered), monitoring of water quality, and construction of recreation facilities.

On October 13, 1994, the District Engineer notified the Fish and Wildlife Service (Service) of his intent to proceed with permit issuance. After a thorough review of background information on the project, I have determined that this case warrants your attention in accordance with the criteria found in Part IV of the MOA (Elevation of Individual Permit Decisions). The Department, 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

Dr. John H. Zirschky

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Act of 1956 (70 Stat. 1119; 16 U.S.C. 742), the Migratory Bird Treaty Act (40 Stat. 755, as amended; 16 U.S.C. 703-712), and the Endangered Species Act (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*).

Specifically, I have concluded that the project, as currently proposed, would have substantial and unacceptable adverse effects on aquatic resources of national importance. These resources include the 8.1 miles of high quality stream and riparian habitats, and the fish and wildlife that occur within these habitats. The Hughes River, including the North Fork, is one of only three rivers of its size still free flowing in West Virginia. The river supports at least 22 species of freshwater mussels within the reach that would be directly affected by the proposed project, and the snuffbox mussel, a candidate for listing, is found downstream of the proposed dam site. Freshwater mussels are the most highly jeopardized taxa in North America, in large part due to projects such as that proposed. In addition, over 80 species of migratory birds breed in the project area, while over 110 species use the area during migration.

The cumulative effects of impoundment, channelization, and acid mine drainage in West Virginia alone have resulted in the loss of thousands of miles of riverine habitat and associated palustrine wetlands, with corresponding declines in the fish and wildlife populations supported by these habitats. Construction of the proposed dam would result in elimination of an additional 8.1 miles of high quality stream and riparian habitats, including a significant net loss of productive mussel habitat, and regionally scarce mature bottomland hardwood habitat used extensively by neotropical migrant birds during breeding and migration. Project-induced habitat losses and the resulting impacts to fish and wildlife would be substantial and unacceptable when considered in the context of cumulative losses which have occurred in West Virginia, the Ohio River watershed, and nationally, and that are likely to occur from foreseeable future development.

While a mitigation plan has been prepared, it would not fully offset anticipated environmental impacts. This high quality riverine and riparian system, and the diversity of plant and animal species supported by the system, would be difficult, if not impossible, to replace. Thus, the proposed project, including mitigation, would result in a significant net loss of riverine habitat to the detriment of species already in decline. Moreover, this project would probably result in the introduction of the exotic zebra mussel into the reservoir, and ultimately the Hughes River drainage. The impacts of this introduction on native mussel populations downstream of the dam also could not be mitigated.

Finally, I note that the applicant, the Natural Resources Conservation Service (NRCS, formerly the Soil Conservation Service), and the Corps of Engineers (Corps) have not conducted the thorough analysis of alternatives required by the National Environmental Policy Act. By accepting the analysis prepared by the NRCS, and not requiring the applicant to demonstrate that less environmentally damaging practicable alternatives are unavailable, the Corps has also failed to assure compliance with the Section 404(b)(1) Guidelines. The Service and the Department have previously identified concerns regarding alternatives to the

Dr. John H. Zirschky

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proposed project in comments on the applicant's environmental documents, as well as during the Corps' review of the permit application, and the records of decision indicate that neither the applicant nor the Corps have fully considered these concerns.

Based on the high values of the affected habitats, cumulative losses of riverine habitat in the region, the failure of proposed mitigation to provide for in-kind replacement of these habitats, and the likely existence of less environmentally damaging practicable alternatives, I request that the District be directed to require that NRCS and local project sponsors fully evaluate alternatives for each of the project purposes (i.e., flood control, water supply, and recreation), instead of only considering one multi-purpose project. If a less environmentally damaging alternative is selected, the District should require the applicant to develop, in consultation with the Service, a mitigation plan that compensates for all unavoidable adverse impacts associated with the selected alternative.

Enclosed is additional information addressing these and other issues relating to the proposed permit decision. To avoid unnecessary delay, I request that you complete your review by December 16, 1994. Please do not hesitate to contact me if you have any questions.

Sincerely,



Robert P. Davison  
Acting Assistant Secretary for  
Fish and Wildlife and Parks

Enclosure



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

NOV 22 1994

OFFICE OF  
WATER

Honorable John H. Zirschky  
Acting Assistant Secretary (Civil Works)  
Department of the Army  
Washington, DC 20310-0130

Dear Dr. Zirschky:

In accordance with the provisions of the 1992 Memorandum of Agreement (MOA) between the U.S. Environmental Protection Agency (EPA) and the Department of the Army under Section 404(q) of the Clean Water Act (CWA), I am requesting your review of a decision by Colonel Richard W. Jemiola, U.S. Army Corps of Engineers (Corps), Huntington District, to issue a Section 404 permit to the Little Kanawha Soil Conservation District for the North Fork of the Hughes River Dam and Reservoir Project in Ritchie and Doddridge Counties, West Virginia. The proposed permit would authorize the construction of an 86 foot high and 505 foot long roller compacted concrete dam, water treatment plant and transmission system, and recreational facilities. The dam would create a 305 acre permanent pool, permanently inundating 8.1 miles of the North Fork of the Hughes River. After a thorough review of the available information, EPA has determined that this case warrants elevation in accordance with the criteria under Part IV of the MOA, Elevation of Individual Permit Decisions.

The primary purposes of the dam and impoundment are to provide improved flood control for the town of Cairo and North Bend State Park; to supply water to Harrisville, Cairo, Ellenboro, Pennsboro, and North Bend State Park; and to enhance recreational opportunities in the region. We also recognize the critical economic development objectives associated with the project. I would emphasize from the outset EPA's support for realizing these project objectives, most importantly, the goal of improving flood protection for the citizens of Cairo. It is our serious concern, however, that practicable alternatives are available that would satisfy these important project objectives while significantly reducing adverse effects to the area's valuable aquatic resources. In such circumstances, the Section 404(b)(1) Guidelines contemplate selection of the least damaging practicable alternative in order to minimize environmental impacts.

The proposed project would convert high quality riverine aquatic habitat to a lacustrine system. The North Fork of the Hughes River, which is listed on the National Rivers Inventory recognizing nationally or regionally significant resources, is relatively undisturbed and provides extensive and virtually irreplaceable aquatic and riparian habitat. While the river supports a warmwater fishery, species typical of cooler aquatic environments such as smallmouth bass can

OPTIONAL FORM 99 (7-90)

<b>FAX TRANSMITTAL</b>		# of pages ▶ 34
To JOHN ZIRSCHKY	From BOB PERCIASEPE	
Department JOHN STUT	Phone # 202/260-5700	
Fax #	Fax #	

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GENERAL SERVICES ADMINISTRATION

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also be found. The North Fork has a highly diverse mussel population, providing habitat for at least 22 species of freshwater mussels. Freshwater mussels as a group are one of the most endangered fauna in the world. More than half of all freshwater mollusk species occur in the rivers and streams of eastern North America. Further, this type of riverine ecosystem with its diverse mussel population is becoming scarce in its ecoregion. The impoundment of this aquatic ecosystem, which would permanently inundate 8.1 miles of stream and periodically inundate an additional 5.1 miles of stream, including as much as 8.8 acres of wetlands, vegetated shallows, and submerged aquatic vegetation, would result in significant direct and secondary adverse impacts to this valuable aquatic resource.

Concerns regarding the nature of project impacts are heightened by information indicating that the most significant direct and secondary effects are avoidable. The Huntington District appears to have made its permit decision in this case without considering the availability of less damaging practicable alternatives. Information in the Corps record for this project documents the incorrect assertion made by the National Resources Conservation Service-West Virginia, that the scope of alternatives considered under the National Environmental Policy Act (NEPA) and subsequently the Section 404(b)(1) Guidelines, may be constrained by limits imposed by Congressional appropriation. As a result, only the applicant's preferred alternative and the "no build" alternative were substantively evaluated. Neither the analyses required under the Clean Water Act Section 404(b)(1) Guidelines nor NEPA may be appropriately constrained in this way (see 46 Federal Register 18026). Had the scope of evaluation been expanded to consider the full extent of practicable alternatives, we are confident that a less environmentally damaging alternative would have been identified to meet the project's important objectives. A detailed discussion of these issues is enclosed.

Because of the existing inadequacies of the record in examining a more complete range of potential alternatives, we can not reach the ultimate conclusion required by the Guidelines regarding selection of the least damaging practicable alternative, and subsequently, therefore, regarding the permitability of this project. However, it is for this very reason we are concerned that the Huntington District was able to rely on an inadequate record to establish the basis for its decision to issue a permit in this case. It is our strong recommendation that the Corps convene a group which includes EPA, U.S. Fish and Wildlife Service, Natural Resources Conservation Service, and State representatives to supplement the record focusing on consideration of potential practicable alternatives that would provide the basis for a more informed permit decision. We agree that a reasonable schedule should be established to complete the record so that a timely permit decision could be made.

I hope that you will carefully review the record associated with this proposed permit decision, and look forward to your response. If my staff can provide any assistance during your evaluation of this request, please direct questions to Mr. Gregory E. Peck, of the Wetlands Division, at (202) 260-8794.

Sincerely,



Robert Perciasepe  
Assistant Administrator

Enclosure



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



REPLY TO  
ATTENTION OF

22 DEC 1994

JC  
8A 4/12504

Honorable Robert Perciasepe  
Assistant Administrator for Water  
U. S. Environmental Protection Agency  
Washington, D. C. 20460

Dear Mr. Perciasepe:

This is in response to your letter of November 22, 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 Huntington District. The permit would allow the Little Kanawha Soil Conservation District to construct a dam on the North Fork of the Hughes River near Harrisville, West Virginia. I have decided there is a need for additional review of alternatives to the proposed action, as required by the Section 404 (b)(1) Guidelines.

Your request for review was made pursuant to Part IV of the MOA between the Army and the Interior (DOI), and focused on the potential availability of less environmentally damaging practicable alternatives. We have carefully reviewed the concerns raised in your letter and the Huntington District's decision documents, and additional information from NRCS and the applicant. Our review included an on-site inspection and discussions with Environmental Protection Agency (EPA) representatives, Fish and Wildlife Service (FWS) representatives, the Corps Headquarters and Huntington District, State agency representatives, and representatives of the applicant.

We agree that the North Fork of the Hughes River qualifies as aquatic resources of national importance. However, we were unable to determine whether the proposed project would result in substantial and unacceptable adverse impacts to these resources or if the net loss to the resources, after considering any mitigation, would be unacceptable.

In the documents furnished to us, there is a lack of substantive information regarding environmental impacts in the district's 404(b)(1) Guidelines evaluation alternative analysis. The analysis did not indicate that all special aquatic sites had been considered.

Accordingly, I have asked Corps Headquarters to advise the Huntington District that prior to proceeding with the final permit decision, the district must undertake a reevaluation of the

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alternatives as required by the section 404 (b)(1) Guidelines. This reevaluation must take into consideration the value and impacts to special aquatic sites.

The District's evaluation will include an opportunity for involvement and comment by the local FWS and EPA representatives, as well as coordination with the local NRCS. The reevaluation will occur in two steps. The first step will be to review existing file information we understand to be available from the NRSC and report back to Corps headquarters as to the sufficiency of that information for the 404 (b)(1) analysis. At that time, Corps headquarters will, in coordination with your office, provide additional guidance to the District Engineer, if required, to complete the 404 (b)(1) analysis, and proceed to a decision on the merits.

As always, 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)



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



REPLY TO  
ATTENTION OF

22 DEC 1994

JA 4120104

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 November 22, 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 Huntington District. The permit would allow the Little Kanawha Soil Conservation District to construct a dam on the North Fork of the Hughes River near Harrisville, West Virginia. I have decided there is a need for additional review of alternatives to the proposed action, as required by the Section 404.(b)(1) Guidelines.

Your request for review was made pursuant to Part IV of the MOA between the Army and the Interior (DOI), and focused on the potential availability of less environmentally damaging practicable alternatives. We have carefully reviewed the concerns raised in your letter and the Huntington District's decision documents, and additional information from NRCS and the applicant. Our review included an on-site inspection and discussions with Environmental Protection Agency (EPA) representatives, Fish and Wildlife Service (FWS) representatives, the Corps Headquarters and Huntington District, State agency representatives, and representatives of the applicant.

We agree that the North Fork of the Hughes River qualifies as aquatic resources of national importance. However, we were unable to determine whether the proposed project would result in substantial and unacceptable adverse impacts to these resources or if the net loss to the resources, after considering any mitigation, would be unacceptable.

In the documents furnished to us, there is a lack of substantive information regarding environmental impacts in the district's 404(b)(1) Guidelines evaluation alternative analysis. The analysis did not indicate that all special aquatic sites had been considered.

Accordingly, I have asked Corps Headquarters to advise the Huntington District that prior to proceeding with the final permit decision, the district must undertake a reevaluation of the

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alternatives as required by the section 404 (b)(1) Guidelines. This reevaluation must take into consideration the value and impacts to special aquatic sites.

The District's evaluation will include an opportunity for involvement and comment by the local FWS and EPA representatives, as well as coordination with the local NRCS. The reevaluation will occur in two steps. The first step will be to review existing file information we understand to be available from the NRSC and report back to Corps headquarters as to the sufficiency of that information for the 404 (b)(1) analysis. At that time, Corps headquarters will, in coordination with your office, provide additional guidance to the District Engineer, if required, to complete the 404 (b)(1) analysis, and proceed to a decision on the merits.

As always, 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)



DEPARTMENT OF THE ARMY

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

REPLY TO  
ATTENTION OF:

CECW-OR

26 JAN 1995

MEMORANDUM THRU COMMANDER, OHIO RIVER DIVISION

FOR COMMANDER, HUNTINGTON DISTRICT

SUBJECT: Request for Section 404(q) Elevation, North Fork Hughes River

1. On 22 December 1994, the Acting Assistant Secretary of the Army (Civil Works) (AASA(CW)) responded to requests by the Environmental Protection Agency (EPA) and the Department of the Interior (DOI) for higher level review of a permit proposed by the U.S. Army Corps of Engineers Huntington District. The project proposed by the Little Kanawha Soil Conservation District involves the construction of a dam on the North Fork Hughes River near Harrisville, West Virginia.
2. The requests from EPA and DOI were made pursuant to Part IV of the 1992 Section 404(q) Memoranda of Agreement between the Department of the Army and EPA and the Department of the Army and DOI. The main issues EPA and DOI presented for consideration were based on their conclusion that substantial and unacceptable adverse impacts to an aquatic resource of national importance would occur. In addition, both EPA and DOI believe that it has not been clearly demonstrated that the proposed project is the least environmentally damaging practicable alternative which meets the project purpose.
3. The enclosed AASA(CW) letters concur with the EPA and DOI position that the North Fork Hughes River, which will be directly impacted, is an aquatic resource of national importance. However, the AASA(CW) was unable to determine whether the proposed project would result in substantial and unacceptable adverse impacts to this resource or if the net loss to the resource, after considering mitigation, would be unacceptable. In addition, the AASA(CW) notes that there is a lack of substantive information regarding environmental impacts in Huntington District's Section 404(b)(1) Guidelines evaluation alternatives analysis and that the analysis did not indicate that all special aquatic sites (i.e., riffle and pool complexes) had been considered.

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SUBJECT: Requests for Section 404(q) Elevation, North Fork Hughes River

4. By enclosed memorandum, dated 22 December 1994, the AASA(CW) indicates that a re-evaluation of the alternatives analysis as required by the Section 404(b)(1) Guidelines must be accomplished. Prior to reaching a final decision, Huntington District must:

a. Review all existing information to identify the full range of alternatives which have been considered, or raised for consideration, and re-evaluate those alternatives. The Huntington District should determine the characteristics of a viable project and the criteria to be used to identify practicable alternatives. Detailed practicability analyses should only be conducted for alternatives which would have less impact on the environment than the proposed project. The re-evaluation of alternatives must address the extent to which all criteria, including consideration of the environmental impacts, have been applied to the full array of practicable alternatives, including the applicant's preferred alternative. The Huntington District must ensure that the re-evaluation of alternatives takes into consideration the value of and impacts to all special aquatic sites. This re-evaluation is to be conducted in coordination with the Natural Resources Conservation Service, EPA, and the U.S. Fish and Wildlife Service.

b. Prepare a comprehensive alternatives analysis document which summarizes the re-evaluation of alternatives described above. This document is to include a description of the criteria used in identifying potential alternatives, the process or methodology used to screen alternatives, and the re-evaluation of alternatives. If deemed appropriate, the Huntington District may require that the applicant, or their agent, compile the documentation. However, the Huntington District is expected to be familiar with the project's existing supporting documentation for purposes of providing specific instructions concerning the preparation of the summary document and in order to validate the information presented. The summary document is to be incorporated into the project file and is not expected to be submitted to higher headquarters for review and approval.

c. Within 60 days of the date of this memorandum, brief Washington level officials concerning the results of the review of existing information. This briefing will include representatives from the Assistant Secretary of the Army (Civil Works) and this office, as well as Washington level representatives from EPA, DOI, and the Natural Resources

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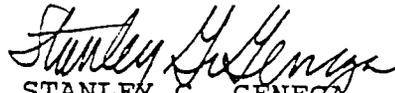
SUBJECT: Requests for Section 404(q) Elevation, North Fork  
Hughes River

Conservation Service. The content of the briefing is to include a summary of the criteria and methodology used to identify and evaluate viable alternatives. The briefing should also include recommendations concerning the need to conduct any additional analysis as may be required to complete a sufficient Section 404(b)(1) Guidelines analysis.

d. Proceed to a final decision based on additional case specific guidance from this office. This guidance can be expected to contain feedback from the briefing described above. The Huntington District should also expect that future guidance will most likely indicate that the "short form procedure" used by the Huntington District for evaluation under the Section 404(b)(1) Guidelines is not appropriate in this case.

5. If you have any questions or comments, please call Ms. Cheryl Smith at (202) 272-1780. Ms. Smith will also assist you in scheduling the Washington level briefing.

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