

SUBJECT: United States Environmental Protection Agency Section 404(q) Elevation of a Section 404 Permit Decision, Sacramento District Permit 199875119

1. This is in response to your memorandum of 24 January 2001, concerning the Environmental Protection Agency (EPA) request for elevation of the U.S. Army Corps of Engineers Sacramento District proposal to issue the subject permit to Vail Associates. The permit would authorize permanent impacts to 0.70-acre of aquatic resources and temporary impacts to 0.21-acre of aquatic resources located within the Cucumber Creek and Cucumber Gulch Watersheds, near Breckenridge, Summit County, Colorado. The EPA request contends that issuance of the proposed permit will cause substantial and unacceptable adverse impacts to an Aquatic Resource of National Importance (ARNI). EPA also requests that you require the District Commander to hold the permit in abeyance until their concerns regarding the following issues are resolved: (1) the significance of risk to a critical wetland resources in the Cucumber Gulch Watershed, (2) the lack of appropriate modeling data which is necessary for the Section 404(b)(1) Guidelines' compliance determination, and (3) the failure to public notice the latest development plans identified in the draft permit. EPA commits to accept the results of such a scientifically valid water flow study and mitigation plan, provided that an appropriate model is used with valid assumptions. EPA also states that if "resolution of our concerns can be satisfactorily achieved with the applicant, and any resulting agreed upon conditions incorporated into the permit by the District, EPA would withdraw its request for your review."

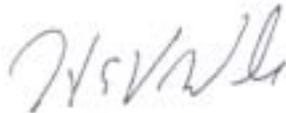
2. We have thoroughly reviewed the Environmental Protection Agency's request. While we agree that the aquatic resources located within the Cucumber Gulch Watershed qualify as ARNI, we do not agree that the proposed permit will result in substantial and unacceptable adverse impacts to those resources. We believe that the District has completed an adequate alternatives analysis and we support their determination that the applicant's project was the least damaging practicable alternative. We also believe that the District has adequately looked at all the known impacts, including the direct, indirect, secondary and cumulative impacts of the project and required mitigation, as necessary, to address those impacts. In regard to any unknown impacts, we concur with the District's decision to issue a conditioned permit that clearly states that, prior to construction of the buildings on private lands, a plan must be submitted to our Northwestern

District Commander and his staff will coordinate that information with the EPA prior to issuance of the DA Permit. It is also important to note that, in order to ensure independent review by qualified experts, Vail Associates has agreed to fund the review of this plan by an independent consultant selected by the District staff. The results of that review will also be shared with the EPA. In regard to the direct impacts of the proposed project, the District is presently working with a conceptual mitigation plan that will be finalized later this summer. The DA Permit will also be conditioned in such a manner that the planned mitigation efforts will adequately remediate and/or mitigate the direct impacts of the proposed project.

3. I recommend that this case not be elevated and that the District Commander proceed with the permit decision.

4. Enclosed is a copy of the CECW-OR, "HQUSACE Analysis and Options Paper" prepared for this elevation case and pertinent information collected and reviewed during that analysis. As requested, we are also enclosing a draft reply to the requesting official from the Environmental Protection Agency. If you have any additional questions or disagree with my recommendation, please call me or contact Mr. Mike Smith, Project Manager, Regulatory Branch at (202) 761-4598.

FOR THE COMMANDER:



HANS A. VAN WINKLE
Major General, USA
Director of Civil Works

2 Encls

1. PURPOSE: This paper provides the Headquarters, U.S. Army Corps of Engineers analysis of the request for elevation from the EPA of a proposed decision by the Corps Sacramento District to issue a Section 404 permit to Vail Associates.

2. BACKGROUND: The Corps proposes to issue Vail Associates a Department of the Army permit to fill 0.91 acre of wetlands located in the upper reaches of the Cucumber Creek and Cucumber Gulch Watersheds near Breckenridge, Summit County, Colorado. Of the 0.91-acre fill area, temporary impacts would effect 0.21-acre, leaving 0.70-acre of permanent impacts. The proposed permit is for the development of new ski mountain terrain and lifts and base village facilities at Peak No. 7 of the Breckenridge Ski Area and for the development of base village facilities at Peak No. 8. This permit addresses construction of two buildings, ski lift construction grading, and the reconstruction of water quality ponds at Peak No. 8. Additionally, the permit would address the construction of an access road necessary to construct the top terminal of a new ski lift and a restaurant at Peak No. 7. The temporary impacts are associated with the installation of utility lines, including sewer, water, and snow making lines. A conditioned Department of the Army permit would be issued to Vail Associates with a requirement that, prior to construction of the two buildings on private land, a completed plan must be submitted to the District Commander which would document that neither of the proposed buildings nor their associated infrastructure would effect the hydrology of the down-gradient wetlands located in either watershed, or if a potential adverse effect were determined to be present, the plan must specify, in detail, how such effect would be remediated and/or mitigated. The District Commander will subsequently provide the plan to EPA for their review and comment. Construction at the base of Peak No. 7 and Peak No. 8 cannot commence until the District, after opportunity to receive comments from the EPA, either concurs with the "no effect" finding or approves the mitigation plan.

3. PROJECT SETTING: Peak No. 7 and Peak No. 8 are located in the Breckenridge Ski Resort Area which is situated both on private land and on public lands managed by the White River National Forest, Dillon Ranger District, in Summit County, Colorado. The Cucumber Creek and Cucumber Gulch Watersheds are tributaries of the Blue River, east of the Town of Breckenridge (southwest of Denver) in the Southern Rocky Mountains. Jurisdictional wetlands located within the watershed complex amount to approximately 77 acres.

elevations (11,000 feet) on USFS lands, the wetlands are a combination of willow and sedge wetlands associated with minor drainages and kettle ponds. At the lower elevations on USFS lands, the wetlands are predominately forested slope wetlands comprised of spruce and aspen with a willow, alder and sedge understory. Kettle ponds are also present on the lower elevations of the USFS property. On the private lands, the wetlands are a mixture of forested and shrub slope wetlands. Fens are present as well as deep springs. The forested wetlands are dominated by Englemann spruce and subalpine fir with dense stands of alder and willow. Beaver ponds are present on the steep gradient wetland that connects down to the Cucumber Gulch drainage. The wetland along Cucumber Gulch is a combination of willow, bog birch, and sedge on an organic soil and a prevalence of beaver ponds. Small stands of spruce are present throughout the wetland. The private land below the realigned county road is a mosaic of wetlands and uplands that provides excellent wildlife habitat and helps to maintain water quality and channel stability in Cucumber Gulch.

The ski trails on USFS lands will impact (non-jurisdictional impacts) wetlands through the cutting of vegetation. However, the District and the USFS has worked with the applicant to minimize those impacts. The trails cross over 5.1 acres of wetlands where no vegetation will be cut (the wetlands will be skied over). The applicants believes that snow depths on Peak No. 7 will "lay down" the willows to allow skiing without any trimming. The District expects some damage to the tops of taller shrubs during some years. In 1.27 acres of forested wetlands on the mid-slopes, overstory will be cut in order to create trails but the shrubs will not be cut. They will require leaving the felled timber wherever possible to create coarse woody debris (CWD) in the forest. This impact will maintain the wetlands but most likely change the plant community allowing more light tolerant species, and the wetlands will be wetter due to less evapo-transpiration.

The wetlands that will be impacted by road construction will be lost from the system. The impacts on USFS lands are primarily to high alpine meadow wetlands comprised of sedges and tufted hairgrass located on steep slopes. These systems are seasonally wet early in the summer, drying up later in the growing season. They are primarily supported by both surface and subsurface hydrology from local snowmelt. The wetlands to be impacted on private land are both forested wetlands and a shrub wetland as well several man-made wetlands at the base of Peak No. 8. The wetlands at the base of Peak No. 8 are low quality systems created by drainage from developed features and groundwater. The wetlands impacted at Area 5 are a quality scrub/shrub wetland dominated by willows (*Salix monticola*) with a few trees present. These wetlands will now only be temporarily impacted during construction of the sewer and water lines and will require tight construction control procedures to eliminate

elevation of specific individual permit cases will be limited to those cases that involve an ARNI. The 77-acre wetland complex located within the Cucumber Gulch Watershed is an acknowledged ARNI by the Corps and by the EPA.

b. Substantial and unacceptable impacts. According to the MOA, cases elevated under this MOA will cause resource damages similar in magnitude to cases evaluated under Section 404 (c) of the Clean Water Act (CWA). Section 404 (c) relates to, among others, the unacceptable adverse effect resulting from the discharge of fill material on shellfish beds and fishery areas. EPA maintains that the direct and indirect impacts associated with this proposed discharge of fill material will result in substantial and unacceptable impacts to this ARNI. Their concern is based upon the potential loss of the water that sustains the wetland complex. They believe that the construction of substantial below-grade building foundations and the installation of accompanying drains are likely to intercept the water flow supporting the rare slope/fen wetlands in Cucumber Gulch, which lie immediately down-slope of the project. EPA indicates that their primary concerns with the draft permit include: 1) the significance of risk to critical wetland resources in the Cucumber Gulch Watershed, 2) the lack of appropriate modeling data which is necessary for the Section 404(b)(1) Guidelines' compliance determination, and 3) the failure to Public Notice the latest development plans identified in the draft permit.

c. Agency Recommendations: Based on their concerns, the Environmental Protection Agency urges the Assistant Secretary of the Army (Civil Works) to reconsider the proposed permit decision. In particular, they believe that there should be a scientifically valid water flow study and mitigation plan completed prior to permit review. They commit to accept the results of such an evaluation and the predicted effects of the proposed project, provided that an appropriate model is used with valid assumptions. Once sufficient information is obtained, they request that a new Public Notice be issued providing them and the public with an opportunity to comment on the study results and any resulting implications on less damaging practicable alternatives that meet the basic project purpose and avoid impacts to wetlands down-gradient of the project.

In light of the fact that the water flow study will not be completed prior to the issuance of the DA Permit, EPA requests that the proposed Special Condition #2 of the permit be modified to afford them the opportunity to review and concur (in writing) whether the groundwater documentation presently being developed by the applicant's consultant (Seacor), actually results in a no effect finding. They also request that the groundwater study must be developed specifying, in detail, how any adverse effect would be avoided. If the study does indicate that

does, in fact, constitute an ARNI.

b. Substantial and unacceptable impacts. We reviewed the District's record relating to the proposed filling of the 0.70-acre of wetlands at the project. We do not agree that these actions will have substantial and unacceptable impacts on an Aquatic Resource of National Importance. As presented, activities associated with the project will affect a total of 0.91-acre of jurisdictional wetlands. Impact Area No. 1 (building at Peak No. 8) will permanently impact 0.19-acre of wetlands, Impact Area No. 2 (ski lift) will permanently impact 0.17-acre, Impact Area No. 3 (recontouring existing water quality ponds) will permanently impact 0.15 Acre, Impact Area No. 4 (second building at Peak No. 8) will permanently impact 0.12-acre, and the access road will permanently impact 0.07-acre. The total permanent impacts to jurisdictional wetlands will be 0.70-acre. The installation of the utility lines will temporarily impact 0.21-acre of jurisdictional wetlands.

We believe that the Special Conditions contained in the DA Permit adequately protect the aquatic resource. Those Special Conditions require that the permittee submit adequate documentation that neither of the two buildings or their associated infrastructure will effect the wetland complex or, if a potential of an effect is discovered, a mitigation plan must be submitted that would specify in detail how such effect would be remediated and/or mitigated, prior to construction of the buildings. The applicant continues to attempt to submit the appropriate information. In this regard, the District will ensure that the model being utilized by the applicant's consultant (Secor) is properly calibrated, accurate, and state of the practice. The applicant has also agreed that, in order to ensure independent review by a qualified expert, they will fund the review of the plan by such an independent expert selected by the Corps. Finally, it is important to note that the applicant has taken several positive steps to substantially reduce the impacts to the wetland complex by moving the residential units to a high ground location above our regulatory jurisdiction.

The District and the USFS has also worked with the applicant in an effort to develop a mitigation plan that will offset the direct impacts of this proposal. The applicant has agreed to remove the road grade of the existing Summit County Road #3 when they construct the new alignment. The District has identified an area of jurisdictional wetlands that was separated when the original roadbed was created. The removal effort will reestablish the connection between the two-separated wetland areas. The District is working with a conceptual plan at the present time and the applicant will develop the final plan later this summer. The USFS also required the applicant to mitigate for the wetlands adversely affected on their property. In this regard, the

the ground water recharge to the wetlands. Once the water is reintroduced into the ground, Seacor believes that it will flow at approximately the same rate that it did prior to construction. This effort is planned to prevent interruption of the ground water recharge to the down-gradient wetlands. The success of this plan is dependent upon the success of the model that Seacor is now re-running. If the District determines that the proposed mitigation will not succeed and that the proposed construction may have an unacceptable impact on the wetland area, the applicant will not be allowed to pursue their plans for underground parking.

c. Alternatives to the proposed project. The alternatives analysis is part of the CWA's Section 404(b)(1) Guidelines. Part of this analysis is the rebuttable presumption that, for non-water dependent projects, there are practicable alternatives that are less damaging to the environment. In the case of this proposed project, the purpose of the proposed fill is to meet the needs of skiing at the Breckenridge Ski Resort (BSR) and to develop their private land at the Base of Peak No. 7 and Peak No. 8 to create a new base area. The purpose of the ski area improvements is to increase and enhance the recreation opportunities at the ski area by increasing the amount of terrain and lift service which will better distribute skiers more evenly across the area by drawing skiers away from congested areas and improving the connection

possible. The application included an alternative trail alignment that would not construct the lower portions of trails 3, 4, 5, and 6 where the majority of the cutting of forested wetlands is proposed. This alternative would terminate those trails on the lower mountain access road where skiers would traverse over to either trails 1 and 2 or the existing Claimjumper trail. This would increase the number of skiers on these trails requiring widening of the trails as well as the access road. This widening would require wetland impacts that have been avoided. This alternative creates adverse skier densities on the limited trails, which would decrease the popularity of the Peak No. 7 pod. Skiers would likely continue to use other portions of the resort thus defeating the purpose of the Peak No. 7 expansion.

The private lands development alternative is the least damaging alternative which still allows development. The public notice included VRD's original plan for this property. That proposal includes single family residential lots in the lower portions of the property with road access crossing wetlands. The current proposal removes these single family lots entirely while still developing the upper portions (uplands) of the property with multi-family lots and lodges. The wetland impacts are from the realignment of County Road 3. Currently the road is too steep and makes too many tight curves to handle the traffic generated by a large-scale development. In addition, the property slopes down gradient from the existing alignment, which would make development difficult. The presence of a county road between the ski area and the proposed village at the base of Peak No. 7 would not be conducive to the operation of the ski resort.

There is not any other realignment that would reduce wetland impacts. The wetlands located above the proposed alignment are of higher quality than the wetlands to be impacted at Location 5. An alignment lower on the slope would greatly increase the wetland impacts and would not work well for the development. The chosen gondola alignment does cross portions of the high quality forested wetland on the private land. Due to existing development within the Town of Breckenridge, there are not any other alignments for the gondola. Tower locations are outside of the boundaries of wetlands. To avoid a tower location in the Cucumber Gulch wetland complex, the design spans the Gulch with 2 eighty five-foot towers.

f. Other sites available to the applicant: There are not any other sites available for the applicant for the ski area expansion. Peak 6 is the next peak over but it would not make sense to develop a separate pod of skiing completely separated from the existing ski area, and this is not yet in their U.S. Forest Service (USFS) Special Permit boundary. The development of private land as a base is dictated by the location of the ski terrain. VRD owns other parcels within Breckenridge in town which will be developed; however, the project purpose is to

1. inform the District Engineer to proceed with final action on the permit decision;
2. inform the District Engineer to proceed with final action in accordance with case specific policy guidance; or
3. make the final permit decision in accordance with 33 CFR 325.8.

Based on this analysis the case specific options are as follows:

a. Proceed with Final Action. Selection of this option is contingent on a determination that there are not substantial unacceptable impacts to aquatic resources of national importance, as a result of the District's proposed permit decision. Our analysis clearly supports selection of this option. Therefore, we recommend that the District Commander proceed with the permit decision, issuing the conditioned permit as his staff has crafted it. This is the option we recommend the Assistant Secretary of the Army (Civil Works) adopt.

b. Proceed Based on Case Specific Policy Guidance. Selection of this option also requires a determination that there are not substantial unacceptable impacts to aquatic resources of national importance, as a result of the District's proposed permit decision, but further recognizes that policy guidance may be necessary to ensure that the decision is appropriate. We do not believe that policy guidance is required in this case and therefore we do not recommend this option.

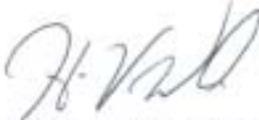
c. Elevate the Decision. This option requires a determination that there would be substantial unacceptable impacts to aquatic resources of national importance as a result of the proposed permit or that the permit review/decision should be made at a higher level in the organization. We do not believe this to be the situation, and therefore do not consider this a viable option.

CONCLUSION AND RECOMMENDATION: We do not believe that the proposed project to be permitted would cause substantial and unacceptable adverse impacts to the aquatic environment. Therefore we recommend that the District Commander proceed with the permit decision, issuing a conditioned permit as discussed herein.

SUBJECT: United States Environmental Protection Agency Section 404(q) Elevation of Section 404 Permit Decision, Sacramento District Permit 199875119 to Vail Associates

1. On 5 February 2001, the Deputy Assistant Secretary of the Army (Management and Budget) (DASA (CW)) sent a letter to the Environmental Protection Agency indicating the U. S. Army Corps of Engineers Sacramento District Commander would be allowed to issue the subject permit. Enclosed is a copy of the letter signed by DASA(CW).
2. In accordance with Part IV (g)(1) of the Memoranda of Agreement with the Environmental Protection Agency, the District may proceed with the final decision. The review of this case indicated the District's decision was made in accordance with all applicable policies and regulations.
3. The Corps and DASA(CW) once again thank the District for the quality of the documentation they provided and their coordination during our consideration of this case. The District is to be commended for its many years of effort directed at improving protection of the aquatic resources, while providing quality service to the regulated public.
4. Should you have any questions or comments concerning our decision, please do not hesitate to contact me or have your staff contact Mr. Mike Smith, Program Manager, Regulatory Branch, at (202) 761-4598.

FOR THE COMMANDER:


HANS A. VAN WINKLE
Major General, USA
Director of Civil Works

1 Encl

Dear Ms. Regas:

This is in reply to a letter we received from Mr. J. Charles Fox, former Administrator for Water, on January 19, 2001, requesting that we review the proposed decision on the Army Corps of Engineers Sacramento District Department of the Army (DA) permit to Vail Associates. Because this request was made pursuant to our Section 404(q) Memorandum of Agreement, my staff carefully reviewed the concerns raised in the District's decision documents and draft permit, and information provided by the applicant. The review also included a lengthy teleconference with those parties concerned in the issues being raised.

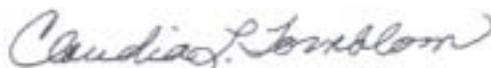
The permit is for the deposition of fill materials that will result in permanent impacts to 0.70-acre of wetlands subject to our regulatory authority for the development of new ski terrain and ski lifts on Peak No. 7 and for the development and redevelopment of the base village facilities at both Peak 7 and Peak 8, located in the Cucumber Gulch Watershed, located in Summit County, Colorado. The project also includes temporary impacts to 0.21-acre of jurisdictional wetlands brought about by the installation of sewer and water lines as well as lines for snowmaking equipment.

While we agree with your conclusion that the aquatic resources located within the Cucumber Gulch Watershed do, in fact, qualify as an Aquatic Resource of National Importance, we do not agree that substantial and unacceptable adverse impacts to those aquatic resources will result from the District's proposed permit. We believe that the Special Conditions that the District has placed within the proposed DA permit adequately protect the aquatic resource. Those Special Conditions require that the permittee submit adequate documentation that neither of the two proposed buildings or their associated infrastructure will effect the wetland complex located down-gradient or, if a potential of an effect is discovered, a mitigation plan must be submitted that would specify, in detail, how such effect would be remediated and/or mitigated, prior to construction of the buildings. In this regard, the applicant has agreed that, in order to ensure independent analysis of their documentation by a qualified expert, they will fund

Although we have not agreed to elevate this proposed permit for further Corps review, we believe there has been value added to the process through your raising this case to our attention. The recent conference call participated in by your Headquarters staff as well as the Regional staff, by my staff and Corps Headquarters staff, by the attorneys for Vail Associates, and by the Corps Sacramento District staff resulted in a better understanding of the issues.

Should you have any questions or comments concerning our decision in this case, please contact Mr. Chip Smith, my Assistant for Environmental, Tribal and Regulatory Affairs at (703) 693-3655.

Sincerely,



Claudia L. Tomblom
Deputy Assistant Secretary of the Army
(Management and Budget)

SUBJECT: United States Environmental Protection Agency Section 404(q) Elevation of a Section 404 Permit Decision, Sacramento District Permit 199875119

Enclosed is a copy of my reply to Ms. Diane Regas, Acting Assistant Administrator for Water, Environmental Protection Agency, concerning a request that we received from Mr. J. Charles Fox, the former Assistant Administrator for Water, regarding his request that we review the issues related to a proposed Department of the Army Permit (199875119), presently being considered by the Army Corps of Engineers Sacramento District for Vail Associates.

I have completed my review of those issues and I concur with your recommendation that this case not be elevated. Please notify the District Commander that he may proceed with his final action on the permit decision, based on my denial of this request.

Please convey my thanks to all the Corps staff, for the quality of the documentation they provided and their extensive coordination during our consideration of this case.



Claudia L. Tornblom
Deputy Assistant Secretary of the Army
(Management and Budget)

Enclosure