



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



REPLY TO  
ATTENTION OF

07 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.

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 Fish and Wildlife Service (FWS) representatives, National Marine Fisheries 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

the DOI 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 of 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 acreages 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)

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- Morgan Rees  
Deputy Assistant Secretary  
(Planning Policy and Legislation)