



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
123 ARMY PENTAGON
WASHINGTON DC 20315-9100



REPLY TO
ATTENTION OF

15 JUN 1994

Honorable George T. Frampton
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 May 16, 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 Baltimore District. The permit would allow Riddle Farm Associates, L. P., to excavate a boat basin, construct marina facilities within the basin and dredge material from within Herring Creek to provide for navigation channels and basin flushing in West Ocean City, Maryland. The project would result in the excavation of 0.62 acre of tidal wetlands and dredging of 6.3 acres within Herring Creek. The project is a component of the 995-acre Riddle Farm residential development project.

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 Interior (DOI). The DOI's concerns focused on the potential availability of alternatives to the Herring Creek boat basin, the accuracy of the wetland delineation, the Corps consideration of secondary impacts to forested areas, and the potential availability of alternatives to avoid forested wetland impacts. 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 Baltimore District's decision documents and draft permit, numerous comments from concerned citizens and groups, and information from Riddle Farms. Our review included an on-site inspection and meetings with Fish and Wildlife Service (FWS) representatives, Riddle Farms, the Corps North Atlantic Division and Baltimore District, and representatives from a

concerned citizens group. Based on our evaluation, we agree with DOI that the tidal wetlands within the site qualify as ARNI's. We also agree that some forested wetlands, such as some of those found on the Riddle Farm site, qualify as ARNI's.

While we agree that the proposed project site contains ARNI's, we do not agree that the proposed project will result in substantial and unacceptable adverse impacts to these resources. The boat basin excavation will involve impacts to 0.62 acre of tidal wetlands. To compensate for these impacts, the Corps will require the creation of 3.44 acres of saltmarsh cordgrass and the enhancement of 2.4 of reedgrass by planting saltmarsh cordgrass. The creation of tidal wetlands has been proven over the years to be successful and we concur with the Corps' determination that the impacts to the ARNI's have been adequately compensated.

The position taken by the DOI that other alternatives were less environmentally damaging and practicable was discussed during our on-site meeting. Specifically, the FWS has suggested that the boat basin should be located within the former racetrack site on Turville Creek. The DOI, including the FWS representatives that met on-site, did not have the benefit of the most recent information regarding the availability of the Turville Creek site for the placement of a boat basin. As explained to your staff, the State Water Quality Certification requires the use of the former racetrack area as a reserve area for the spray irrigation treatment of wastewater from the on-site wastewater treatment facility. As noted in the enclosed letter from the Maryland Department of the Environment (MDE), Riddle Farms must use the racetrack site for wastewater treatment. We also considered the availability of vacant boat slips or use of dry storage and boat ramps as identified as potential alternatives by the DOI. While these alternatives may be practicable, we could not conclude that any were less damaging to the environment, a requirement pursuant to 40 CFR 230.10 (a). The fact that under the current proposal Riddle Farms will prohibit docks, piers, boat slips and access channels along 3.2 miles of shoreline substantially reduces potential impacts from the project. Without the boat basin, such protective measures will not occur.

The proposed dredging of Herring Creek to accommodate the boat basin was also identified by the DOI as a concern. This concern was based on the belief that Turville Creek would require dredging in the future due to an existing public boat ramp located upstream of Riddle Farm. Our investigation revealed that similar numbers of waterfront property owners have boats on both creeks, and due to similar water depths within both creeks, we believe that dredging will likely be necessary on both Turville and Herring Creeks. While we recognize that this should not be used as the sole rationale for allowing dredging within Herring Creek, we also believe that dredging to -4 feet mean low water will not have an adverse effect on the creek. In fact, Herring Creek has been subjected to recent accumulation of sediments that has reduced what was historically deeper water. The dredged area as proposed is at a depth that is still within the parameters for qualification as shallow water habitat as identified by the FWS (<6.6 feet in depth). Available research also indicates that the benthic community will rapidly recolonize the area after completion of the dredging.

The FWS also provided supplemental information to the DOI elevation request regarding water quality concerns within the proposed 14-acre Herring Creek boat basin. These concerns were associated with the sediment oxygen demand (SOD) as it relates to the model used by the MDE to calculate tidal flushing within the boat basin. On June 14, 1994, the MDE provided a clarification and explained that the SOD measurements are not used in the Flushing Model recommended by the Environmental Protection Agency (EPA) in their Coastal Marina Assessment Handbook. Therefore, the SOD conditions do not affect the flushing rates within the boat basin. Flushing will occur within approximately four days which is consistent with the recommendations in the EPA handbook.

We also obtained site-specific information regarding the Ocean Pines marina. The FWS used the water quality conditions within the Ocean Pines marina to compare with the proposed Herring Creek boat basin. We concur with the MDE determination that the SOD values taken for the Ocean Pines marina are not relevant to characterize the SOD values expected in the Herring Creek boat basin. The Ocean Pines marina is deeper and only has one inlet, which has silt deposition restricting tidal flushing. At Riddle Farms, the applicant has proposed to maintain a depth of -4 feet mean low water to provide for tidal flushing in accordance with

the EPA handbook, will monitor water quality within the boat basin, and in the event of degrading water quality, will use mechanical aeration to increase oxygen levels. Further measures to protect water quality within the boat basin include a restriction on the number of boats that can occupy the docks (95 boats) within the boat basin and restrictions on the use of the boat ramp and dry storage (150 boats). Riddle Farm property owners that do not secure one of the available spaces within the boat basin or dry storage will be required to seek boating facilities elsewhere. Overall, we believe that the consolidation of the boating facilities, boat usage limits, pumpout facilities, speed limits within the boat basin and Herring Creek, and preservation of the 3.2 miles of shoreline along the Riddle Farm development is the most environmentally desirable approach from a water quality standpoint for the specific type of development proposed.

A major issue of concern to the DOI relating to this project is the September 1988 wetland delineation relied upon by the district in their evaluation of the project. We have thoroughly reviewed this matter and have found that the district has fully complied with current guidance regarding this issue. The district has proceeded appropriately and should not modify the wetland delineation until the current determination has expired. The principal guidance used by the district is the provision in Regulatory Guidance Letter 90-6 that a wetland delineation that accompanied a permit application submitted and completed prior to 1990 will represent the Federal Government's position for the purposes of the Clean Water Act (CWA). While we disagree with your recommendation to revoke the valid wetlands determination, we do not disagree that additional forested wetlands satisfying the technical criteria of the Corps' 1987 Wetland Manual exist within the site. Delineations performed by the district since August 1991 have identified similar forested areas as wetlands subject to CWA jurisdiction. We do not, however, agree that it would be equitable to revise our position in the Riddle Farm permit at this time. Landowners and permit applicants must have some level of confidence that they can rely upon written wetland jurisdiction determinations from the Government. In this case, we have notified Riddle Farms on three occasions of the extent of wetlands on the property.

Notwithstanding our position on the validity of the wetlands jurisdiction determination, we share your concerns over the potential impacts to forested wetlands. In this regard, we believe that the suggestion by EPA that the applicant request authorization under the State Non-tidal Wetlands Program is appropriate and affords the FWS an opportunity to provide its views regarding impacts to the forested areas not considered jurisdictional by the Corps in 1988. The Baltimore District will also participate in efforts to identify the resource impacts associated with the project during the State's evaluation. We understand that the applicant has proposed to reduce the development of forested wetland areas. Based on this revision, wetlands impacts have been reduced to approximately 12 acres. In addition, mitigation will be required to compensate for loss of the 12 acres. We suggest FWS's participation in the State's efforts to evaluate and address the impacts of this portion of the project.

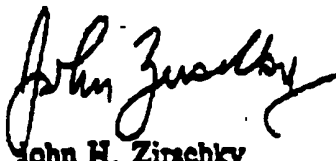
The last issue identified in your request for elevation concerned the secondary impacts of the housing and golf course development which are associated with the regulated part of the project (e.g., boat basin). Your request indicated that the Corps, notwithstanding its non-jurisdiction determination for the forested wetland areas, should consider the impacts of the remaining part of the development. Based on discussions with the applicant and the review of other information, we agree with the district that the development can "stand alone" without the boat basin (the portion of the project requiring an Army permit). That is, the housing and golf course portions of the development could and would very likely be completed without the need for an Army permit. However, as noted above, individual lot owners would pursue development of boating facilities similar to those found in the Ocean Pines development where boat slips have been developed on most individual waterfront lots -- a situation resulting in greater environmental impacts.

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. The district will continue their review associated with the State's evaluation and we advise them to encourage FWS's participation in this analysis.

Based on our involvement in this permit case, it appears that FWS field staff did not participate fully in the evaluation process until the Corps was close to a permit decision. The Baltimore District advises us that FWS did not participate in any of the three project-specific meetings. We have directed all Corps districts to consider fully resource agency comments in making permit decisions. In return, we expect the resource agencies to be knowledgeable of the project, provide site-specific information, and participate to the maximum possible extent in interagency discussions on the permit.

Although in this particular case we disagree on the specific issues raised, we share fully 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. Michael L. Davis, Assistant for Regulatory Affairs, at telephone (703) 695-1376.

Sincerely,



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

Enclosure