

**U.S. ARMY CORPS OF ENGINEERS  
SOUTH ATLANTIC DIVISION**

**ADMINISTRATIVE APPEAL DECISION**

**NEILL GRADING & CONSTRUCTION COMPANY, INC.  
WILMINGTON DISTRICT FILE NO. 200101147**

**Review Officer:** James W. Haggerty, US Army Corps of Engineers, North Atlantic Division

**Appellant:** J. Clayton Neill, P.E., Neill Grading & Construction Company, Inc.

**Date of Receipt of Request for Appeal:** 21 January 2004

**Date of Acceptance of Request for Appeal:** 4 February 2004

**Appeal Conference/Site Visit Date:** 18 March 2004

**APPELLANT'S STATED REASONS FOR APPEAL:**

1) Discretionary authority was inappropriately used in requiring an individual permit for this project.

2) The US Army Corps of Engineers (i.e. Wilmington District) exceeded their time limit in processing the application and therefore the permit should be waived.

3) Army Corps' (i.e. Wilmington District) personnel sought to maximize mitigation for the project through dubious means, instead of balancing the impacts against the benefits. As a result, the mitigation is excessive in relation to the impacts.

4) The Riparian Buffer should be removed from the mitigation requirement because it is not under a threat of loss or substantial degradation.

5) If a Riparian Buffer is determined necessary, the appellant believes that mowing of the buffer (to a height of no less than six inches) would not affect its utilization.

6) Special conditions are excessive and unjustified.

7) The Corps (i.e. Wilmington District) inappropriately attempted to require additional studies for the federally endangered dwarf-flowered heartleaf (*Hexastylis naniflora*), instead of following the appropriate procedures.

## **BACKGROUND INFORMATION:**

On 4 December 2002, Wetlands and Natural Resource Consultants, Inc. submitted a Pre-Construction Notification to the Wilmington District's Asheville Regional Field Office and the North Carolina Division of Water Quality (NCDWQ) on behalf of the appellant. The submittal requested project authorization under Department of the Army (DA) Nationwide Permit No. 39 (NP 39) and North Carolina Division of Water Quality (NCDWQ) Water Quality Certification 3362, which is the blanket certification issued by the state of North Carolina authorizing discharges of dredged or fill material into waters of the United States under NP 39. The appellant, Neill Grading & Construction Company, Inc. of Hickory, North Carolina, proposed to fill a jurisdictional streambed for construction of an impoundment structure and outlet on an approximate 118-acre property drained by an unnamed tributary of the South Fork of the Catawba River in Hickory, Catawba County, North Carolina. Also proposed were construction of an approximate 1.8-acre forebay/stormwater protection area, a minimum of 0.55 acres of littoral shelves, and approximately two acres of buffers surrounding the lake, which would serve as an approximate 18-acre championship water-ski slalom course. The project is known as the Rocky Ford West Lake project. The consultant characterized impacts to waters of the United States as minimal due to the degraded/low quality state of the existing channels to be flooded or filled, which they state are a continued source of sediment loading to downstream waters.

After receipt of the notification on 10 December 2003, the Wilmington District, the consultant, and the appellant participated in a 7 January 2003 site inspection, during which the district indicated that additional information was needed in order to enable them to evaluate the project. Additionally, the district indicated a preliminary intent to require an individual permit for the proposal, under the discretionary authority procedures at 33 CFR 330.8 (c). After receipt and review of additional information from the consultant on 21 January 2003, the district notified the appellant in a 29 January 2003 letter that they were exercising discretionary authority and requiring an individual permit. The district determined that it was likely that establishment of the water-ski facility proposed by the appellant will involve substantial impacts to streams in the project area. In a letter dated 27 February 2003, the appellant confirmed their intention to submit an application for an individual DA permit.

The district received the application package on 3 March 2003 and scheduled an interagency coordination meeting site inspection that occurred on 14 March 2003. During this meeting, the U.S. Environmental Protection Agency (USEPA) and the U.S. Fish & Wildlife Service (USFWS) both expressed concern regarding the loss of perennial stream channel that would result from the project. The USEPA requested adequate mitigation for stream impacts and removal of the forebays from the plan. The USFWS also stated a survey would be required to determine whether dwarf-flowered heartleaf was present at the site.

Subsequent to the inspection and receipt of preliminary agency comments, the appellant submitted a revised proposal to the district and NCDWQ by letter dated 7 April 2003. The proposed direct and indirect impacts were reduced and mitigation was offered, consisting of: 1.3 acres of wetland creation; a 3-5 acre littoral shelf (later reduced to 1.5 acres); a 20-foot wide buffer along 922 linear feet of remaining perennial stream and 163 linear feet of remaining intermittent streams which would not be flooded; 27.5 acres of land placed under a preservation/conservation easement; and a cool water release for the principal spillway. The appellant also committed to maintaining a minimum release downstream during the initial flooding of the lake and in drought events.

This submittal completed the permit application and enabled the district to proceed with a public notice, issued on 29 April 2003 for a standard 30-day comment period. In a letter dated 7 May 2003, the district requested additional information from the appellant to ensure that the proposal meets with the 6 February 1990 Memorandum of Agreement between DA and the USEPA specifying mitigation requirements under the Section 404 (b)(1) of the Clean Water Act Guidelines. The appellant responded in a 15 May 2003 letter with the following justification for the proposed mitigation:

- 1) The project would replace an aquatic feature that is abundant in the area (17 million linear feet of streams in Catawba County) with an out-of-kind feature (1.3 acres of wetlands) that is lacking and which would promote habitat diversity in the area.
- 2) The project would impact 0.35 acres of perennial stream channels, but the proposed wetland creation and littoral shelf would result in the creation of 2.8 acres of wetlands (the littoral shelf plus the wetland creation area) in an area where no wetlands currently exist.
- 3) The appellant's proposal is environmentally preferable to the "no action" alternative, which would involve the unavoidable, bufferless harvest of 118 acres of mature forest in order for the property to remain under the forestry/agricultural value assessment for present use property tax valuation.

The project received Water Quality Certification No. 3421 from NCDWQ on 18 May 2003.

On 17 June 2003, the district transmitted to the appellant copies of three comment letters received in response to the public notice. The North Carolina Wildlife Resources Commission (NCWRC) recommended that preservation/conservation easements be permanent, and that the appellant provide 50-foot wide buffers on each side of the intermittent stream discharging into the proposed lake, and 100-foot wide buffers on each side of the perennial stream discharging into the proposed lake. The USFWS stated the survey results provided by the appellant were unacceptable to them and that further coordination with the district was required to determine whether initiation of formal consultation pursuant to Section 7 of the Endangered Species Act was necessary. They also recommended elimination of the wetland creation area (categorizing this feature as a forebay sediment basin), the same buffers as recommended by NCWRC, and additional compensation such as restoring, enhancing, or otherwise stabilizing the perennial stream below the proposed impoundment site. USEPA recommended relocation of a sediment trap/removal area to an open water area of the proposed lake in an effort to reduce stream impacts, along with some sort of in-kind compensation for remaining stream impacts. The district also requested additional information pertaining to project need and the possibility of further reducing filling and flooding impacts to the intermittent and perennial streams. The district stated concern that the proposal would not adequately offset impacts to the stream habitat to be impacted, and that the appellant aggressively pursue a legal mechanism for protection of the proposed mitigation/ preservation areas.

The appellant responded in a 20 June 2003 letter, stating the proposed forebay would be eliminated from the project plans and that the recommended stream buffers would be implemented. Also, although state guidelines do not require stream mitigation in this case, they propose to mitigate less than 150 linear feet of hard perennial stream impacts by preserving 922 linear feet of perennial stream below the dam, up to a culvert at US Route 321. Additionally, the appellant and the district discussed the application in detail during a telephone conference on the same date. The appellant expressed concern regarding the implementation of a buffer around the entire lake plus the potential reduction in the future value of the

property by placement of an easement. The district stated their position that some level of permanent protection around the perimeter of the lake, including the littoral shelf, was necessary (approximately 6,000 linear feet). The appellant requested some flexibility to allow boat ramps, piers and the like to encroach upon 10% or less of the area.

The appellant advanced another revised mitigation proposal in a 27 June 2003 letter. Highlights of the modified proposal include the placement of nesting islands in the mitigation area; creation of 3,260 linear feet of 20-foot wide littoral shelf at a 10:1 slope, to include an allowance of up to 20% to be covered by boat ramps, piers, etc.; and a 6,700 linear foot buffer around the lake and wetland. The buffer would be 60 feet wide and include a 10-foot wide impervious walking path and allow for minor maintenance activities and view corridors therein with associated thinning of underbrush, shrubs and low-hanging limbs.

On 9 July 2003, the district conducted a survey of the proposed lake site for the presence of *Hexastylis naniflora*, and concluded that the proposal will have no effect thereupon. This determination enabled the district to conclude required consultation pursuant to Section 7 of the Endangered Species Act with USFWS.

In a submittal dated 10 July 2003, the appellant provided conceptual typical sectional views of the littoral shelf on the eastern and the western side of the proposed lake. The buffer on the eastern side of the lake would be wooded, while the appellant desires the buffer on the western side of the lake to be perennial ground cover for aesthetic reasons. The appellant indicated a 6-8 foot wide portion of the outside of the proposed littoral shelf would have to be regularly mowed in order to adequately maintain its primary function of attenuating wake impacts without resulting in erosion of the inner portion of the shelf itself.

On 22 July 2003, the district issued an initial proffered permit, with special conditions, to the appellant. The permit included special conditions as discussed in preceding paragraphs of this document, one of which required a 50-foot wide buffer around the entirety of the littoral shelf. The appellant appealed the issuance of the initial proffered permit to the Wilmington District Engineer on 18 September 2003, citing reasons similar to Reason Nos. 1, 2, 3 & 6 of this request for appeal. The District Engineer responded in a 14 October 2003 letter. After another exchange of correspondence, the district issued a proffered permit on 25 November 2003.

#### **INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:**

a) The Wilmington District provided a copy of their administrative record, which was reviewed and considered in the appeal review process along with the results of the 18 March 2004 site inspection and appeal conference.

b) During the conference, the appellant provided visual aids, including aerial photographs and topographic surveys of the project site and nearby properties. These materials were used to help clarify the remainder of the administrative record.

c) Subsequent to the appeal conference, Wilmington District provided a copy of the proffered DA permit that was not originally included in the administrative record.

## **SUMMARY OF DECISION:**

The appellant's Request for Appeal has merit, because the Wilmington District's administrative record does not sufficiently support the total scope of the mitigation requirements in their proffered permit. The administrative record indicates that the predominant impacts of the project to intermittent and perennial streams would be secondary in nature, and the overall quality of these streams is not exceptional. The administrative record lacks a functional assessment that would afford a comparative analysis of the proposed impacts and the required mitigation. Additionally, the administrative record is lacking in justification for the requirement for a forested buffer around the entirety of the lake, as well as the requirements that would restrict usage of the buffer area.

## **INSTRUCTIONS FOR SUBSEQUENT DISTRICT ACTION/APPEAL DECISION FINDINGS:**

*Action:* The Wilmington District is to reassess the mitigation requirements in their proffered permit, to confirm that the requirements fall within the overarching framework specified in 33 CFR 320.4 (r)(2) and 33 CFR 325.4 (a), as well as other documents, including but not limited to: Regulatory Guidance Letter (RGL) 02-2; the Standard Operating Procedures of the Regulatory Program; and the 1990 MOA between DA and USEPA regarding mitigation. Additionally, the district is to reassess the requirement for in-perpetuity maintenance as well as the requirement for the forested buffer surrounding the entire littoral shelf.

### ***Appeal Decision Findings:***

**Reason #1:** Discretionary authority was inappropriately used in requiring an individual permit for this project. (See Finding below).

**Reason #2:** The Army Corps (i.e. Wilmington District) exceeded their time limit in processing the application and therefore the permit should be waived. (See Finding below).

**Reason #7:** The Army Corps (i.e. Wilmington District) inappropriately attempted to require additional studies for dwarf-flowered heartleaf, instead of following the appropriate procedures. (See Finding below).

**Finding:** These reasons for appeal do not have merit, since these decisions/actions are not appealable under the Corps of Engineers' Administrative Appeal Process.

**Reason #3:** Army Corps' (i.e. Wilmington District) personnel sought to maximize mitigation for the project through dubious means, instead of balancing the impacts against the benefits. As a result, the mitigation is excessive in relation to the impacts. (See Finding below).

**Reason #6:** Special Conditions are excessive and unjustified. (See Finding below).

**Finding:** These two reasons for appeal have merit. These reasons for appeal are basically the same and will be analyzed together below in this decision memorandum.

It is important to note that although the project would involve construction of a small lake to serve as a private water-ski slalom course, the actual jurisdictional activity proposed in waters of the United States

would consist of the discharge of fill material to facilitate construction of two earthen impoundment structures. The construction of one of the impoundment structures would involve the filling of approximately 150 linear feet of perennial streambed channel, and the second would involve the filling of approximately 150 linear feet of intermittent streambed channel. Approximately 3,500 linear feet of jurisdictional stream channel would be flooded; however, the flooding is a secondary impact and would not result in a direct, "hard" impact to streambed channels. The project would impact one type of special aquatic site (as defined in 40 CFR 230.3 (q-1), namely riffle and pool complexes, the extent of which are not described in the administrative record. Since the predominant impacts to aquatic resources would be secondary in nature, and no wetlands would be impacted, the "no net loss" goal pertaining to wetlands does not apply in this case. Any required mitigation measures should be commensurate with the degree of project impacts.

The district accepted the appellant's offer to preserve 922 linear feet of perennial stream channel downstream of the impoundment structure along with a 100-foot buffer on both sides of the stream, for the 150 linear feet of "hard" impacts on the perennial stream, and required such preservation in the proffered permit. Remaining aspects of the project requiring mitigation are therefore approximately 150 linear feet of "hard" intermittent stream channel impacts and 3,500 linear feet of indirect perennial and intermittent stream impacts.

The issue of stream mitigation is discussed in RGL 02-2, Section 2. Districts may use an acreage surrogate or a functional assessment, on a case-by-case basis, for determining mitigation and describing impacts. Districts will use the same approach in determining losses and gains in terms of amounts, types and locations, for describing both impacts and compensatory mitigation. Where functional assessment is not practical, mitigation projects for streams "...should generally replace linear feet of stream on a one-to-one basis." (Section 2.d.5 of RGL 02-2)

The RGL goes on to state that the concepts of establishment (creation), restoration (re-establishment or rehabilitation), enhancement, or protection/maintenance (preservation) can be used for decisions on other types of aquatic resource mitigation projects beyond wetlands, although a mitigation plan consisting of solely preservation can only be used in exceptional cases. However, credit for preservation can be given if aquatic resources are preserved in conjunction with establishment, restoration and enhancement activities, only if the preserved resources will augment newly established, restored or enhanced aquatic resources. In this matter of this project, some credit can be afforded to its preservation aspects since these would augment the wetland and open water establishment activities being undertaken by the appellant.

Overall, the administrative record does not provide adequate support for the overall scope of the mitigation requirements in the proffered permit. In their Request for Appeal, the appellant indicates that flooding would impact approximately one-third of one acre of streambed channel. According to the appellant the littoral shelf creation would occupy approximately 1.5 acres, the lake approximately 17 acres, and the created wetland approximately 1.3 acres. Not included in these figures are the stream preservation and buffer area requirements in the proffered permit; as indicated in a preceding paragraph in this document, the district has already agreed that the preservation of 922 linear feet of downstream channel and an adjacent buffer is sufficient mitigation for the project's hard impacts to 150 linear feet of perennial stream. Although the littoral shelf, open water lake and created wetlands constitute out-of-kind compensation, each may be considered on their own independent merit as potential mitigation measures for 3,500 linear feet of stream flooding and hard impacts to 150 linear feet of intermittent stream, since one-to-one replacement of these

features is not practicable for the appellant in this project. The scope of required mitigation should be limited to the minimum necessary to ensure the discharge of fill material complies with the Section 404 (b)(1) of the Clean Water Act Guidelines, and/or enables the district to determine that the project just passes into the realm of being in the public interest. The district determines that the proposed mitigation in its entirety is acceptable, but does not sufficiently address or refute the appellant's contention that the mitigation measures are excessive compared to the scope and degree of impacts that would result from this project.

The administrative record contains two Stream Quality Assessment Worksheets prepared by the district. One evaluates a 2,500 linear foot reach south of an existing power line right-of-way, while the other evaluates a 500 linear foot reach above (i.e. upstream of) the right-of-way. The worksheet assesses physical characteristics of streams, along with stream biology, stability and habitat on a quantitative basis. The first worksheet assesses the overall stream quality at 56.5 points, and the second at 68 points, both out of a possible 100 points, which would represent the highest quality stream. The form does not prescribe specific degrees of quality to a given point score range, however the weighted average of the stream quality is 58.4 points.

It is reasonable to infer from this information that the perennial stream does not perform a large number of substantial physical, chemical or biological functions of overriding importance to the public interest. The district confirms this in portions of their decision document. In view of this, the mitigation requirements in the proffered permit are excessively onerous since the overarching regulations mandate that compensatory mitigation proposals be directly related to the impacts of the proposal, and appropriate to the scope and degree of impacts.

A final factor to consider is that the State of North Carolina did not require any compensatory mitigation in any form for this project. The appellant ascribes this to the project replacing one type of aquatic habitat with another, larger area aquatic habitat.

**Reason #4:** The Riparian Buffer should be removed from the mitigation requirement because it is not under a threat of loss or substantial degradation. (See Finding below).

**Reason #5:** If a Riparian Buffer is determined necessary, the appellant believes that mowing of the buffer (to a height of no less than six inches) would not affect the buffer's use as a vegetative buffer. (See Finding below).

**Finding:** These reasons for appeal have merit. It is noted that these reasons for appeal both pertain to the establishment and maintenance of riparian buffers for this project, and these will be analyzed together below in this decision memorandum.

The issue of vegetative buffers is discussed in RGL 02-2, Special Condition No. 19 of the nationwide permits, and in the preamble to the 15 January 2002 Federal Register notice of the issuance of nationwide permits. The Corps' Regulatory Program recognizes that vegetated buffers are a critical element of the aquatic ecosystem in virtually all watersheds. Buffers provide water quality benefits to open water areas via reduction in pollutant and sediment loading, and often function to provide shading to maintain cool water streams used by a variety of fish species. Corps districts are required to consider inclusion of vegetated

buffers as part of an overall watershed approach to determining appropriate mitigation for impacts to the aquatic environment.

Generally, the regulations advocate inclusion of protected, vegetated upland/riparian buffers if doing so is beneficial on a watershed basis. However, any mitigation requirements must comply with the overarching framework specified in 33 CFR 320.4 (r)(2) and 33 CFR 325.4 (a). That is, the district must determine that the compensatory mitigation be directly related to the impacts of the proposal, and appropriate to the scope and degree of impacts.

The appellant proposes to maintain a grassed buffer instead of a forested or grassed/ forested buffer on the west side of the lake in order to maximize the duration of sunlight reaching the lake on a daily basis. This in turn would maximize available opportunities for water-skiing activities. The district believes that utilization of a grassed buffer would "...significantly compromise the benefits that the buffer was originally intended to provide and would be inconsistent with agency recommendations and expectations..." (14 October 2003 letter from Col. Charles R. Alexander, Jr.). However, the appellant provides information that indicates that maintained, grassed buffers are effective in helping to control sedimentation from entering receiving waters.

The 14 October 2003 letter also states that the district has a "...concern with the *potential* for nutrients, primarily nitrogen and phosphorous as well as other contaminants including pesticides and herbicides, to enter the lake and remaining streams that *may*, over the long term, result in the degradation of surface water quality." (emphasis added) The Regulatory Program mandates consideration of project impacts that are reasonably foreseeable, not conjectural. In this case, the appellant indicates there is no demonstrable potential threat of these types of pollutants resulting from activities on their property. The appellant does not propose to develop or farm upland portions of the project site. If such activities were to occur on adjacent upslope properties, there is already sufficient undisturbed land that would serve as a natural buffer to trap most pollutants. The inclusion of buffers around the lake, whether grassed or forested, would serve to reduce sedimentation from entering receiving waters, and the wetland area would help trap pollutants from upstream sources.

There is a possibility that the appellant and/or a succeeding landowner may, in the future, utilize upland portions of the site for developmental purposes. The highly sloping nature of the site does not lend itself readily for utilization for farming activities. However, the mere possibility that sedimentation and other pollutants may enter receiving waters as a result of potential future non-jurisdictional activities should not form the predominant basis for a requirement for the appellant to enter into a protective mechanism that would restrict usage of portions of the property in perpetuity.

It should be noted that the administrative record indicates the appellant has agreed to increase the buffer width from 60 feet to 70 feet, with a future provision for a 10-foot wide impervious walking path at or near the landward edge of the buffer. The source of remaining disagreement between the district and appellant is the district's requirement for a protected, forested buffer around the periphery of the 20-foot wide littoral area bordering the proposed lake. Instead, the appellant wishes to maintain a buffer on the west side of the lake that would contain grass of a minimum height of six inches. Overall, the district's administrative record does not sufficiently justify the need for a protected, forested buffer when considered against the particular circumstances surrounding this project.

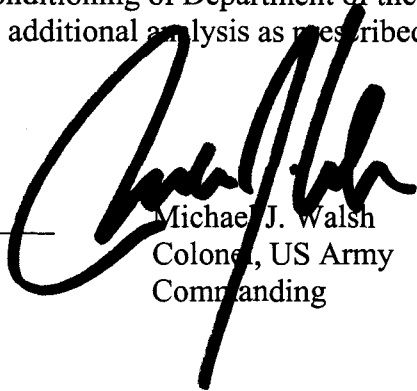
#### **OVERALL CONCLUSION:**



After reviewing and evaluating the entirety of the administrative record provided by the Wilmington District, I conclude there is insufficient information therein to support the scope of the mitigation requirements contained in their proffered permit authorizing the appellant's proposal. I also conclude that the requirement for a protected, forested buffer around the entire lake must be further justified in order to meet current regulations regarding conditioning of Department of the Army permits. I hereby return this matter to the Wilmington District for additional analysis as prescribed within this decision memorandum.

**15 SEP 2004**

(Date)



Michael J. Walsh  
Colonel, US Army  
Commanding