

5 August 2005

Marvin E. Moriarty, Regional Director
U.S. Fish and Wildlife Service
300 Westgate Center Drive
Hadley, MA 01035-9589

Re: Draft §404 permit for proposed King William Reservoir

Dear Mr. Moriarty

The undersigned environmental organizations urge you to seek elevation of the 29 July 2005 decision of the North Atlantic Division (NAD) of the Corps to issue a permit to construct the proposed King William reservoir. As you know, the project would result in the largest authorized wetland loss in Virginia, and in the mid-Atlantic region, in the history of the Clean Water Act section 404 program. The project will result in substantial and unacceptable impacts to an aquatic resource of national importance (“ARNI”), as the Service has found throughout the review process. As you are aware, the 1992 Memorandum of Understanding between the Department of Interior and the Department of the Army (“1992 MOU”) allows elevation of specific individual permit cases involving aquatic resources of national importance. 1992 MOU, Part IV, ¶ 1. Because the King William reservoir permit is just such a case, we request that you initiate the elevation process within the requisite 15-day period in accordance with the 1992 MOU and section 404(q) of the Clean Water Act.

At each phase of the review process, the Service has expressed its opposition to the project. In commenting on the 1997 Final Environmental Impact Statement (“EIS”), the Service recommended that the Corps deny the § 404 permit application, stating that the project’s impacts “are extremely detrimental to the fish and wildlife resources of Southeast Virginia.” Letter from John Wolflin, Supervisor, Chesapeake Bay Field Office, to Col. Reardon, Norfolk District Engineer, at 6 (25 July 1997). The Service specifically found that the project “will result in substantial and unacceptable impacts to aquatic resources of national importance.” *Id.* The U.S. Environmental Protection Agency (“EPA”) has likewise found that the wetlands complex constitutes an ARNI. *See, e.g.*, Letter from Stanley Laskowski, EPA Region III, to Col. Carroll, Norfolk District, at 5 (1 May 2001); Memorandum from Regina Poeske, EPA Region III, to Carol Coch, James Haggerty, NAD, at 1 (22 July 2003).

Subsequently, in commenting on the Recommended Record of Decision (“ROD”) of the Norfolk District, the Service stated that it “strongly supports [the] recommended decision to deny the permit application.” Letter from Acting Regional Director, Mamie A. Parker, to Col. Carroll, Norfolk District Engineer, at 2 (1 May 2001). The Service agreed with the

Recommended ROD that “the proposed project would cause or contribute to significant degradation of waters of the United States, including wetlands.” Id.

The Service has maintained this position since the NAD’s reversal of the Norfolk District’s Recommended ROD in September 2002. For example, in commenting on the June 2004 Wetlands Mitigation Plan, the “Service reiterate[d] our strong opposition to permit issuance for the proposed King William Reservoir IV,” as well as its position that the wetlands complex qualifies as an ARNI. Letter from John Wolflin, FWS Chesapeake Bay Field Office, to Brigadier General Temple, NAD, at 1 (1 Feb. 2005). See also Letter from Marvin Moriarty, FWS Regional Director, to Brigadier General Temple, NAD, at 1 (23 June 2005)(resource is ARNI).

The Service has also repeatedly determined that the proposed compensatory mitigation will not offset the substantial and unprecedented impacts of the King William Reservoir, including the loss of wetlands and stream habitats. In the comment letter on the June 2004 Wetlands Mitigation Plan, the Service found that “this project constitutes a net loss of wetlands and aquatic habitats, and will result in significant degradation of the aquatic ecosystem.” Letter from John Wolflin, FWS Chesapeake Bay Field Office, to Brigadier General Temple, NAD, at 1 (1 Feb. 2005). In addition, the Service expressed the belief that the proposed project “is not in compliance with the Clean Water Act’s 404(b)(1) Guidelines.” Id.

Likewise, the Service notified Newport News that the Service “has reached the conclusion, after extensive involvement in this project, that the proposed permit would constitute a net loss of wetlands and aquatic habitats. The Cohoke Creek stream valley wetland complex is a diverse and productive ecosystem which cannot be recreated through mitigation.” Letter from Marvin E. Moriarty, FWS Regional Director, to Randy Hildebrandt, Assistant City Manager, Newport News, at 4 (23 March 2005).

Earlier statements of the Service also reflect the Service’s position that the wetland and habitat impacts cannot be mitigated. In a letter dated 23 August 1996, the Supervisor of the FWS Chesapeake Bay Field Office stated: “The Service does not believe it is practical or possible to mitigate for the loss of an entire watershed.” Letter from John P. Wolflin, Supervisor Chesapeake Bay Field Office, to Col. Reardon, Norfolk District Engineer, at 2 (23 Aug. 1996). Again, in its comments on the 1997 EIS, the Service stated that “we do not see the possibility that the applicant can adequately replace the wetland functions, contiguous habitat, and wetland types that the project proposes to impact.” Letter from John Wolflin, Supervisor, Chesapeake Bay Field Office, to Col. Reardon, Norfolk District Engineer, at 2 (25 July 1997). Likewise, the Service has stated that the wetland systems “are not a readily replaceable, mitigatable resource” and that the “considerable effort” of the applicant to find mitigation sites “does not overcome the final fact that the mitigation proposed is significantly out-of-kind, and does not compensate for the loss of the Cohoke Mill Creek stream valley wetland complex.” Letter from John P. Wolflin, Supervisor, FWS Chesapeake Bay Field Office, to Col. Carroll, Norfolk District Engineer, at 2 (22 July 1999).

The Service has also made clear that its participation in the mitigation development process “should not be construed as support for the project proposal.” Letter from John P. Wolflin,

Supervisor, FWS Chesapeake Bay Field Office, to Brigadier General Merdith Temple, NAD, at 1 (1 Feb. 2005). Because the project poses substantial and unacceptable impacts on aquatic resources of national importance, as the Service has repeatedly stated, we urge the Service to forward the matter to the Assistant Secretary of Fish and Wildlife and Parks and request that the NAD's decision be elevated to the Assistant Secretary of the Army.

In addition, the NAD decision fails sufficiently to address a number of important concerns raised by the Service regarding wetlands mitigation and other issues, providing further justification for requesting elevation of the decision. For example, in response to the Service's concerns that the wetlands mitigation plan will not replicate the wetland functions and values that would be lost, the decision merely indicates that the plan need not "fully replicate all impacted wetlands functions." Decision at 28. Likewise, regarding the Service's concern about the use of out-of-basin mitigation sites, the decision indicates that mitigation is not required "to be completely in-kind" and that the applicant is still required to create or restore 806 acres of wetlands regardless whether particular mitigation sites are available to the applicant. Decision at 28, 32. Such conclusory statements miss the point of the Service's concerns.

Similarly, the decision fails to resolve the Service's concern that compensatory mitigation ratios for stream impacts outlined in the Mitigation Plan "are far too low, especially for enhancement and preservation activities." Letter from John P. Wolflin, Supervisor, FWS Chesapeake Bay Field Office, to Brigadier General Merdith Temple, NAD, at 3 (1 Feb. 2005)(emphasis in original). The Service pointed out that the ratios provided by the applicant were the lowest from the range of mitigation ratios set forth in the Wilmington Stream Guidelines, id., and were considerably lower than the stream mitigation guidance currently under consideration in discussions led by the Virginia Department of Environmental Quality, see Letter from Marvin E. Moriarty, FWS Regional Director, to Brigadier General Merdith Temple, NAD, at 2 (23 June 05). The NAD decision does not reflect sufficient consideration of these issues, but instead simply concludes that the plan achieves the no overall net loss requirement. Decision at 32.

Other issues that the Service has raised remain unaddressed. For example, the Service stated its concern that the applicant has not provided sufficient analysis of how the Mattaponi pumping hiatus would affect the withdrawal patterns during the drier summer period or how the hiatus would affect the applicant's safe yield of water. Letter from Marvin E. Moriarty, FWS Regional Director, to Brigadier General Merdith Temple, NAD, at 1-2 (23 June 05). As the Service's letter indicates, the potential environmental impacts and safe yield were not considered during the VMRC permit evaluation. Rather than address these issues, however, the decision instead indicates that the changes are not significant. Decision at 34.

The proposed King William reservoir is also contrary to the commitments made in the Chesapeake 2000 Agreement. As you are aware, the Commonwealth of Virginia and the United States agreed that they would:

"Achieve a no-net loss of existing wetlands acreage and function in the signatories' regulatory programs."

“By 2010, achieve a net resource gain by restoring 25,000 acres of tidal and non-tidal wetlands.” “To do this, we commit to achieve and maintain an average restoration rate of 2,500 acres per year basin wide by 2005 and beyond.”

These commitments further emphasize the importance of seeking elevation in this case.

The Service has sought elevation of several other permitting decisions in the last 12 years pursuant to the 1992 MOU. Many of these elevation requests were for sites where far fewer acres of wetlands would have been destroyed than is the case with the proposed King William reservoir project. See, e.g., Proposed highway project, Pennsylvania Dept. of Trans. U.S. 220/I-99. Hence, we believe that elevation of this matter - the largest authorized wetland destruction in the Mid-Atlantic region - is clearly warranted.

In conclusion, the project will have substantial and unacceptable impacts on an aquatic resource of national importance, and the unprecedented loss of wetlands and aquatic habitat cannot be mitigated. To protect this resource, it is essential that the Service seek elevation of the NAD’s decision. See 1992 MOU, Part IV, ¶ 3.

Thank you for your consideration.

Sincerely yours,

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cc: John Wolflin
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