



June 8, 2010

Water Quality Division
District Department of the Environment
1200 First Street NE 6th Floor
Washington DC 20002

District Engineer
US Army Corps of Engineers
Baltimore District
PO Box 1715
Baltimore, MD 21203-1715

Re: Combined Comments to the District of Columbia and U.S. Corps of Engineers, Baltimore District, Regarding Proposed 404 Permit for “The Shops at Dakota Crossing”

Introduction

The following comments are offered to the U.S. Army Corps of Engineers, Baltimore Division (“Corps”), and the District of Columbia Department of the Environment, Water Quality Div. (“DDOE”) in response to a proposed application from Fort Lincoln Retail, LLC, for a permit under Clean Water Act (“CWA”) § 404 to discharge dredged and fill material into waters of the United States in the Anacostia River watershed to construct “The Shops at Dakota Crossing.” That proposed project is expected to result in permanent impacts to approximately 33,503 square feet (0.77 acre) of non-tidal emergent/scrub-shrub/forested wetlands and approximately 12,680 square feet (0.28 acres) along 1,160 linear feet of waters of the United States.” Public Notice at 1, CENAB-OP-RMS (THE SHOPS AT DAKOTA CROSSING) 06-01308-M07.

Because the proposed project will cause significant adverse direct and indirect effects on water quality in the Anacostia River, the District cannot certify that the proposed discharge will comply with the requirements of federal and District law adopted under the CWA, as required by CWA § 401, 33 U.S.C. § 1341.

In addition, because the proposed permit is a major federal action significantly affecting the quality of the human environment, the Corps must conduct an environmental impact statement pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332, before it can make a determination whether to issue the proposed permit. Because the Public Notice indicates that the proposed project will cause significant degradation to the aquatic environment in the Anacostia River watershed, the permit should not be granted as proposed.

A. The District Cannot Issue a 401 Certification for the Permit as it is Currently Proposed.

Section 401 of the CWA is designed to give states and the District the opportunity to take an active role in the permitting decisions by the Corps of Engineers that will affect wetlands and waterways in their jurisdictions. *See* 33 U.S.C. § 1341, which requires project applicant to provide a certification from the state (in this case the District) “that any such discharge [into navigable waters of the United States] will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317” of the CWA). In determining whether to grant certification under CWA § 401, the District must consider whether the project will ensure compliance with the District’s water quality standards and wasteload allocations in available TMDLs for pollutants.

For the following reasons, the proposed permit and project are likely to cause or contribute to worsening water quality conditions that already violate water quality standards enacted under District law pursuant to CWA § 303. Based on the information provided in the Public Notice, the proposed permit is inconsistent with available wasteload allocations in TMDLs adopted pursuant to CWA § 303(d), 33 U.S.C. § 1313(d), for a number of pollutants including, but not limited to, sediment/total suspended solids, oil and grease, and organics and metals.

- In the District of Columbia, not a single segment in the Anacostia watershed currently attains conditions that would qualify for designation as “Category 1- All designated uses are attained and no use is threatened,” or “Category 2- Some, but not all, of the designated uses are attained and no use is threatened.”¹
- Almost no information is provided about the current conditions of the site (including what species currently use the site as habitat), or the expected effect the proposed project would have on the chemical, physical and biological integrity” of the Anacostia River watershed. *See* 33 U.S.C. § 1251(a) setting forth the objectives of the CWA. Comprehensive information must be provided in order for members of the public to determine whether the project is consistent with CWA requirements.
- Satellite images available from Google Maps indicate that the proposed site is currently forested. Therefore the permit will involve permanent destruction of as much as 42 acres of

¹ DDOE, Draft Methodology for the Development of the 2010 Section 303(d) List and the 2010 Section 303(d) List of Impaired District of Columbia Waters at unnumbered p. 8 (March 31, 2010).

forested land cover – a significant percentage of the remaining forested land in the District. Based on the description of the project, it appears that the lost forest cover will be replaced with mostly impervious pavement and buildings. Given that water quality degradation in the District’s portion of the Anacostia River watershed is attributable primarily to the wide-scale replacement of forested land and wetlands by impervious surfaces, the destruction of another 42 acres of forest will unavoidably cause or contribute to further water quality standards violations in the watershed. In particular, the project is likely to generate increased sediment/total suspended solids, oil and grease, and other pollutants associated with large low-profile buildings, parking lots, and vehicular traffic.

- There is no information in the Public Notice that would support a finding that the proposed mitigation activities will offset the direct and indirect impacts of the proposed permit. The Public Notice asserts that the “applicant proposes to mitigate for wetland impacts by creating approximately 67,006 square feet (1.54 acres) forested wetlands and 12,680 square feet (0.28 acre) of emergent wetland/open water at a site located on the north side of Commodore Joshua Barney Drive, in northeast Washington, D.C.” However, the proposed mitigation site appears to be currently forested, meaning that the proposed mitigation action will likely **cause**, rather than alleviate, adverse water quality impacts. Unless a detailed mitigation plan is provided for public scrutiny and comment, the District cannot conclude that the proposed mitigation supports a CWA § 401 certification of compliance with applicable water quality requirements.

B. The Corps Cannot Issue a 404 Permit for the Project as it is Currently Proposed Without First Conducting an Environmental Impact Statement to Assess the Impacts of the Proposed Permit and Proposed Mitigation Plan in Light of the 404(b)(1) Guidelines.

The National Environmental Policy Act (“NEPA”) requires that the Corps conduct an environmental impact statement (“EIS”) for any “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). In deciding whether to prepare an EIS, the Corps must consider a broad range of effects including not only the direct effects of the permitted discharge into waters of the United States, but also the foreseeable indirect effects including but not limited to “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” 40 C.F.R. § 1508.8. The Corps must consider not only the direct effect of discharges to waters of the United States, but also the effect that the entire project will have on the human environment.

Effects that the Corps must consider include “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.” *Id.* Cumulative impact that the Corps must consider includes “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.* § 1508.7. “Affecting” means “will or may have an effect.” *Id.* § 1508.3. Whether a project “significantly” affects the

quality of the human environment must be determined in “several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality,” after consideration of numerous factors set forth in 40 C.F.R. § 1508.27.

In addition to the requirements for environmental assessment under NEPA, the Corps is prohibited from issuing a § 404 permit unless it finds that the permit complies with the applicable “404(b)(1) Guidelines,” set forth at 40 C.F.R. Part 230. Among other things, the Guidelines provide that “no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States.” 40 C.F.R. § 230.10(c). Effects that the Corps must consider include “adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water.” For the same reasons as discussed above and for the following additional reasons, the very limited information provided in the Public Notice indicates that the proposed project will have significant direct, indirect, and cumulative impacts on the human environment.

- The Corps has not presented information that could support a determination either that the proposal can proceed without an environmental impact statement, or that the proposal meets the 404(b)(1) Guidelines. At a minimum, the Corps must prepare an “environmental assessment” (“EA”) in order to determine whether to conduct a more in-depth EIS. If the Corps adopts this approach we hereby request that the Corps make the draft EA available to the public for review and comment before making a final determination whether to issue the permit, pursuant to 40 C.F.R. § 1501.4(e)(2). The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement. *Id.*
- As stated above, there is no information in the Public Notice to support a finding that the proposed mitigation activities will offset the direct and indirect impacts of the proposed permit. For this reason alone, the Corps must provide make the detailed proposed mitigation plan available to the public before conducting a public hearing on whether to grant the proposed § 404 permit.
- In considering the cumulative effects of this proposed project in combination with others, the Corps must consider the other tree canopy losses in the District. Such losses have been all too frequent in the District. For example, a report by American Forests documented a devastating loss of forest cover over a 24-year period between 1973 and 1997—including a 64% drop in heavy tree canopy. See http://www.americanforests.org/downloads/rea/AF_WashingtonDC.pdf, at p.2. Such losses have continued, both in the Anacostia basin and elsewhere in the District (note that all areas of the District eventually drain into, and thus impact, the Potomac River and Chesapeake Bay). Examples include highway projects joining South Dakota Avenue to New York Avenue and reconstructing the 11th Street Bridge, a residential development project adjoining Glover Archibald Park at Foxhall Road and W St. in Northwest D.C., and many others. The cumulative effects of this deforestation warrant completion of an EIS, and likely will ultimately warrant denial of the proposed permit due to unavoidable significant degradation of the affected waters, in violation of the 404(b)(1) Guidelines.

- The Corps must also consider the effect of the proposed forest loss in light of the District's 2005 report on greenhouse gases. That report stated that "[m]ore than 15 percent of the District includes trees and urban forestry. Managed appropriately, trees can store or 'sequester' carbon, providing a way to reduce the concentration of carbon in the atmosphere while emission reduction strategies take hold." The report recommended the "key action" to "[p]rotect and enhance the GHG reduction potential of District's urban forests and other working landscapes. Specific actions include urban forest and tree cover conservation; and providing incentives to property owners to maintain and plant trees." D.C. Greenhouse Gas Emissions Inventories and Preliminary Projections at 14 (Oct. 2005), available at http://ddoe.dc.gov/ddoe/lib/ddoe/DC_GreenHouseGas_Inventory.pdf.
- The Public Notice asserts without support that "steps were taken to ensure avoidance and minimization of impacts to wetland and stream resources to the maximum extent practicable." Before the Corps makes a final determination on this score, the Corps must provide detailed information on alternatives that were considered and a rationale for why those alternatives were rejected.
- Founded in 1996, the DC Environmental Network has a long history of involvement in water-quality related activities on both the national and local levels, and is actively engaged in efforts to protect and enhance water quality in the District of Columbia. Volunteer members of the Surfrider Foundation's DC Chapter have worked since 1993 to clean up and protect the waters of the greater Washington metro area. Members of the DC Environmental Network and the Surfrider Foundation use and enjoy waters including the Anacostia River, Sligo Creek, Paint Branch, and other tributaries of the Anacostia River in Maryland and the District of Columbia, as well as the Potomac River, Rock Creek, Cabin John Creek, and other tributaries of the Potomac River in Maryland and the District of Columbia. As this proposed project will cause significant adverse direct and indirect effects on water quality in the Anacostia River we request a public hearing so that we will have additional opportunities to expand on our concerns.

Conclusion

The proposed project reflects a lack of vision for a sustainable environment that is suitable for the District of Columbia's goals of attaining fishable, swimmable water quality, and its goal to protect forested areas for their carbon-trapping benefits. The design of the project is likely to generate significant additional heavy vehicle traffic, given that it is far from any Metro location and difficult to access by foot. There is no information to support a finding that the project is consistent with District water quality standards or allocations in TMDLs. In short, this is not the type of project that D.C. should consider placing at one of the most important gateways to the city.

Respectfully submitted on June 8, 2010.

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DC ENVIRONMENTAL NETWORK is dedicated to the protection and enhancement of the natural resources of this country, including air, water, and land with an emphasis on the Metro Washington region. Founded in 1996, the DC Environmental Network has a long history of involvement in water-quality related activities on both the national and local levels, and is actively engaged in efforts to protect and enhance water quality in the District of Columbia. Members of the DC Environmental Network use and enjoy waters that could be adversely affected by this project, including the Anacostia River, Sligo Creek, Paint Branch, and other tributaries of the Anacostia River in Maryland and the District of Columbia, as well as the Potomac River, Rock Creek, Cabin John Creek, and other tributaries of the Potomac River in Maryland and the District of Columbia.

THE SURFRIDER FOUNDATION is a global grassroots nonprofit organization dedicated to the protection and enjoyment of the world's oceans, waves, and beaches. In 1984, a handful of members of the surfing community concerned with the condition of beaches and water quality came together to form the Surfrider Foundation. Today, the Foundation is represented by over 50,000 members and 70 chapters in the U.S., Australia, Japan, Europe, and Brazil. The Washington, DC Chapter, founded in 1993, represents 800 residents from the greater Washington, DC, area, including western Maryland and Virginia. The DC Chapter strives to affect coastal water quality through upstream improvements, achieved through hands-on projects, education programs, and advocacy campaigns. Our long-term guiding goal is to see the Potomac and Anacostia Rivers swimmable.