

**ADMINISTRATIVE APPEAL DECISION**

**Commonwealth of Pennsylvania Department of Transportation  
File No. CENAP-OP-R-19980018-11  
Proffered Permit Appeal  
Philadelphia District  
October 4, 2004**

Review Officer (RO): Ms. Martha Chieply, U.S. Army Corps of Engineers (Corps), Mississippi Valley Division<sup>1</sup>

Appellant/Applicant: Mr. Amar C. Bhajandas, Commonwealth of Pennsylvania Department of Transportation (PennDOT), Allentown, Pennsylvania

Authority: Section 404 of the Clean Water Act

Receipt of Request for Appeal (RFA): May 13 2004

Appeal Conference and Site Visit Dates: July 13, 2004

SUMMARY OF APPEAL DECISION: In its RFA, PennDOT stated two reasons for appeal. First, PennDOT asserts that the Initial Proffered Permit should not include conditions pertaining to mitigation for upland terrestrial impacts caused by the project. PennDOT stated that the conditions were excessive, beyond the Corps of Engineers regulatory jurisdiction and in conflict with relevant guidance and standard operating procedures. Upon remand, the Philadelphia District shall provide clarification about the acres of upland property needed to address stream and wetland mitigation and protection of wetland areas. The Philadelphia District needs to provide additional documentation to support its inclusion of permit special conditions requiring preservation/enhancement of upland sites as compensatory mitigation for upland/terrestrial impacts as advocated in its Statement of Findings/Record of Decision/404 (b)(1) Analysis (SOF). Alternatively, the Philadelphia District may elect to revise and adjust the applicable special conditions, which

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<sup>1</sup> In a Memorandum dated May 24, 2004, General Merdith W.B. Temple, North Atlantic Division Commander (NAD) appointed Ms. Martha S. Chieply to serve as the RO to assist in reaching and documenting the NAD Division Engineer's decision on the merits of the appeal.

relate to the compensatory mitigation required for upland/terrestrial impacts.

In its second reason for appeal, PennDOT asserted that monitoring and reporting requirements of restored temporarily impacted Waters of the United States are not reasonably related to the impact. I have determined that the Philadelphia District was not arbitrary and capricious when incorporating Special Condition 22 (requiring annual inspections for three years of restored Waters of the United States temporarily impacted) in its Initial Proffered Permit. The Philadelphia District appropriately determined the need to minimize temporary impacts to waters of the United States and include Special Condition 21 in its Proffered Permit. The administrative record contains sufficient documentation that the temporary impacts to waters of the United States were of sufficient magnitude to warrant the inclusion of monitoring requirements that ensure the restoration of functions and values. Consequently, the Philadelphia District chose a reasonable level of monitoring for temporarily impacted wetlands.

BACKGROUND INFORMATION: This administrative appeal decision is in response to the objection from the Appellant, PennDOT, to the March 30, 2004 proffered permit by the Philadelphia District of an application for an individual Department of the Army (DA) permit.<sup>2</sup> The permit authorized the discharge fill material into federally regulated waters of the United States in order to construct the single and complete Marshalls Creek Traffic Relief Project (Alternative 3D1 MOD-3), Phases One, Two and Three, Middle Smithfield and Smith Townships, including the Village of Marshalls Creek, Monroe County Pennsylvania. The project's purpose is to relieve congestion along US Highway 209, Business 209, SR 402, and Marshalls Creek Road in the vicinity of the Village of Marshalls Creek and eliminate backups onto Interstate Highway 80 from US Highway 209.<sup>3</sup>

Timeline of permit evaluation:

In 1991, PennDOT initiated a feasibility study to determine the magnitude of the transportation problem and to establish a detailed scope of work for subsequent preliminary engineering

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<sup>2</sup> Tab 1 of the administrative record

<sup>3</sup> Philadelphia District Statement of Findings (SOF), Volume 1, Summary, Section VII. PROJECT PURPOSE, page 3 (Tab 13 of administrative record)

and environmental studies.<sup>4</sup> Following completion of that study in 1992, funding was programmed for more detailed preliminary engineering and environmental studies that were initiated in 1993. The proposed project was the subject of three public notices issued jointly by the Philadelphia District and FHWA (Federal Highway Administration)/PennDOT.<sup>5</sup>

PennDOT developed the project in accordance with the Interagency Consensus on Integrating National Environmental Policy Act (NEPA)/Section 404 of the Clean Water Act reviews for Transportation Projects dated July 23, 1992.<sup>6</sup> Significant environmental impacts were anticipated as a result of the construction of the Marshalls Creek Traffic Relief Project and, consequently, the FHWA made the determination to prepare an Environmental Impact Statement (EIS) for the project and serve as the lead Federal agency for the project/document. The Corps, the U.S. Environmental Protection Agency (EPA) and the Pennsylvania Department of Environmental Protection (PADEP) were cooperating agencies in the preparation of the EIS.

A Draft Environmental Statement (DEIS) was circulated in October 1995, and a public hearing was held on November 30, 1995.<sup>7</sup> On April 17, 1996, the DA permit application was withdrawn without prejudice after PennDOT informed the Philadelphia District that the project had not received new funding and had been put on hold.<sup>8</sup>

In November 1997, two rare species of fish, *Notropis bifrenatus* (bridle shiner) and *Notropis chalybaeus* (ironcolor shiner), one of which was listed as extirpated in Pennsylvania, were discovered in Marshalls Creek.<sup>9</sup> Both species were officially listed as State Endangered in July 1999. A January 1998 Supplemental DEIS (SDEIS) was prepared to evaluate the environmental consequences of two new alternatives since the DEIS had been published. The March 20, 1998 public notice advertised the availability of the SDEIS for review and comment, the receipt by the Philadelphia District of a DA permit application, and a request to received public comments on the

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<sup>4</sup> Final Environmental Impact Statement (FEIS), C. Project History, page S-3

<sup>5</sup> SOF, Section X: Date of Public Notice, Public Hearing and Summary of Public Involvement, page 6, Tab 13 of the administrative record.

<sup>6</sup> SOF, V. PROCESSING OF THE DA PERMIT APPLICATON, page 1.

<sup>7</sup> FEIS, C. Project History, page S-3

<sup>8</sup> Tab 123 of the administrative record

<sup>9</sup> FEIS, C. Project History, page S-3

permit application.<sup>10</sup> The cooperating federal agencies determined that all alternatives presented in the DEIS and SDEIS would result in adverse impacts to the habitat of these fish. Alternative 3D1 MOD-3 was developed to minimize impacts upon the fish habitat and presented in a FEIS developed in November 1999. The FEIS presented an evaluation of seven relocation alternatives plus the No-Build Alternative.

As part of the Section 404 review, the Philadelphia District evaluated the FEIS in conjunction with the supplemental and supporting documents provided by PennDOT as part of their permit application package.<sup>11</sup> Although impacts to most natural resources within the project area increased during the on-going project final design process, the Philadelphia District determined that there was no substantial difference in the information in the FEIS and the information known at the time regarding the Marshalls Creek Traffic Relief Project, Alternative 3D1 MOD-3.

In its February 3, 2004 SOF, the Philadelphia District concluded that supplemental NEPA documentation for the project is not required.<sup>12</sup> The Philadelphia District adopted, and incorporated by reference, the project's EIS with all supplemental documents contained in the administrative record. The Final EIS included all comments received on the DEIS and SDEIS, as well FHWA and PennDOT's responses to those comments.<sup>13</sup> The Philadelphia District included all comments received on the FEIS and the responses to those comments into a document entitled "FEIS Comment and Response Document" dated June 2000. The FHWA Record of Decision (ROD) dated August 24, 2000 provides a comprehensive overview of the Marshalls Creek Traffic Relief Project development process and serves as the FHWA decision document identifying Alternative 3D1 MOD-3 as the Selected Alternative for the project.<sup>14</sup> Because of the time lapse between the issuance of their ROD and project construction, FHWA re-evaluated the FEIS and on September 9, 2003 determined that a Supplemental FEIS was not warranted.<sup>15</sup> By letter dated May 23, 2003 (CENAP-OP-R-200300621-11) the Philadelphia District identified the extent of Corps of Engineers jurisdiction within

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<sup>10</sup> Tab 110 of the administrative record

<sup>11</sup> SOF Section V. PROCESSING OF THE DA PERMIT APPLICATION, PAGES 1-2

<sup>12</sup> SOF Section V. PROCESSING OF THE DA PERMIT APPLICATION, PAGES 1-2

<sup>13</sup> SOF, Chronology of events including administrative history, page 4

<sup>14</sup> Tab 27a of the administrative record

<sup>15</sup> Tab 27a of the administrative record

the geographic boundaries of the project.<sup>16</sup> In its SOF dated February 3, 2004, Philadelphia District determined that the construction of the project was not contrary to the general public interest.

In a letter dated February 3, 2004, the Philadelphia District provided a Provisional Initial Draft Permit to PennDOT.<sup>17</sup> The Initial Proffered Permit contained 38 special conditions (enclosure 1). PennDOT's RFA referred to special conditions 22, 23, 26, 27, 28, 30, 32, and 35 which addressed the minimization and mitigation for the unavoidable impacts which would occur as a result of the project construction.

The terrestrial, stream and wetlands mitigation focuses on the acquisition of 122 acres of property for preservation, enhancement and restoration; the creation of 1.09 acres of riparian buffer; and the creation of 3.19 acres of wetlands habitat. PDEP issued a Water Quality Certification on December 3, 2003.<sup>18</sup>

Aquatic resources impacted:

The project area contains many examples of the diverse natural resources for which the Pocono region is known. Large blocks of upland forest, wetlands, and high quality streams are all found in the project area.<sup>19</sup>

Marshalls Creek, and its tributary Pond Creek, are the major streams in the area. Marshalls Creek is a cold water stream, joining Brodhead Creek and ultimately the Delaware River. Marshalls Creek supports a population of wild, reproducing trout as well as the fore-mentioned bridge and ironcolor shiner fish species. Pond Creek is a slow moving stream which flows east to west joining Marshalls Creek. Pond Creek flows through a series of bogs and other wetlands and supports a warm water fish community.<sup>20</sup>

Construction activities associated with the Marshalls Creek Traffic Relief Project, Alternative 3D1 MOD-3 will result in the permanent, regulated discharge of approximately 498,285 cubic

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<sup>16</sup> Tab 43 of the administrative record

<sup>17</sup> Tab 12 of the administrative record

<sup>18</sup> Tab 6c of the administrative record

<sup>19</sup> FEIS page S-4

<sup>20</sup> FEIS page II-2

feet of material into 2.83 acres of federally regulated wetlands and open water habitat and 1773 linear feet (0.88 acres) of perennial and intermittent streams.<sup>21</sup> Aquatic resource impacts are primarily associated with Marshalls Creek, Pond Creek and a number of unnamed tributaries to each of those waterways.

Construction activities associated with the Marshalls Creek Traffic Relief Project, Alternative 3D1 MOD-3 will result in the temporary, regulated discharge of material into 0.79 acres of federally regulated wetlands and open water habitat and 1785 linear feet (0.94 acres) of perennial and intermittent streams.<sup>22</sup>

Temporary and Permanent Acreage Impacts by Type:

	Wetlands	Open Water Habitat	Perennial and Intermittent streams
Temporary	0.766	0.021	0.94
Permanent	2.517	0.308	0.88
Total	3.283	0.329	1.82

Time line of appeal process

PennDOT provided comments and revised information regarding the Provisional Initial Draft permit.<sup>23</sup> PennDOT withdrew the written requests detailed in a previous letter.<sup>24</sup> PennDOT appealed the Initial Proffered Permit, objecting to special conditions number 22 and 27.<sup>25</sup> The Philadelphia District concluded that Special Conditions 22 and 27 as contained in the Initial Proffered Permit are both appropriate to the scope and degree of the anticipated project impact and necessary to insure the project will not be contrary to the public interest.<sup>26</sup> The Philadelphia District provided a copy of the SOF and the

<sup>21</sup> SOF VI. PROJECT LOCATION AND DESCRIPTION, page 3

<sup>22</sup> SOF VI. PROJECT LOCATION AND DESCRIPTION, page 3

<sup>23</sup> The January 16, 2004 and March 5, 2004 letters are found in Tabs 9 and 11 of the administrative record

<sup>24</sup> During a March 25, 2002 telephone conversation with the Philadelphia District Regulatory Branch Chief PennDOT requested the withdrawal of a pervious submitted request. The telephone conversation was documented in a March 26, 2004 email found in Tab 7 of the administrative record.

<sup>25</sup> The February 26, 2004 PennDOT letter is found in Tab 5 of the administrative record

<sup>26</sup> The March 30, 2004 Philadelphia District letter is found in Tab 1 of the administrative record

Memorandum for the Record: Evaluation of PennDOT Objections to Initial Proffered Permit. PennDOT filed a Request for Appeal which was received in the North Atlantic Division on May 13, 2004.<sup>27</sup> The appeal was accepted and the site inspection and appeals conference were conducted on July 13, 2004.<sup>28</sup>

INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL:

Pursuant to 33 C.F.R. Section 331.2, *Request for Appeal (RFA)*, no new information may be submitted on appeal. As indicated in 33 C.F.R. 331.3(a)(2), the Division Engineer does not have authority under the appeal process to make a final decision to issue or deny a permit. The authority to issue or deny permits remains with the District Engineer. The Division Engineer, or his RO, conducts an independent review of the administrative record to address the reasons for appeal cited by the appellant. The administrative record is limited to information contained in the record by the date of the Notice of the Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA) form. Neither PennDOT nor the Philadelphia District may present new information.

To assist the Division Engineer in making his decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the administrative record. Such interpretation, clarification, or explanation does not become part of the administrative record because the District Engineer did not consider it in making a decision on the permit. However, in accordance with 33 C.F.R. 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

1. The Philadelphia District provided a copy of the administrative record. It is limited to information contained in the record by the date of the NAP. The date of the PennDOT NAP is March 30, 2004. The administrative record was considered in reaching this appeal decision.

2. In an electronic mail communication to PennDOT and Philadelphia District on July 9, 2004, the RO provided a set of

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<sup>27</sup> The PennDOT letter was dated May 11, 2004

<sup>28</sup> The acceptance letter was dated June 8, 2004

questions for discussion at the appeal conference. The July 14, 2004 Memorandum for the Record (MFR) documenting the appeal conference and site visit contains these questions and the answers the parties provided. The RO and I consider these questions and the answers to be clarifying information and were considered in reaching this appeal decision.

3. At the appeal conference, the RO provided to PennDOT and the Philadelphia District two Administrative Appeal Process Flowcharts. The Flowcharts are Exhibit 1 of the appeal conference MFR and considered clarifying information.

4. During the appeal conference, the Philadelphia District provided the RO and the Appellant a written response to questions asked in the appeal conference. The written response is Exhibit 3 of the appeal conference MFR and considered clarifying information.

5. During the appeal conference, the Appellant provided the RO and Philadelphia District with a written response to the questions asked in the appeal conference. The written response is Exhibit 4 of the appeal conference MFR and is considered clarifying information.

6. During the appeal conference, the Appellant provided the RO and Philadelphia District with selected parts of the Marshalls Creek Traffic Relief Study, Final Environmental Impact Statement. The Philadelphia District stated that the pages were copies from documents found in the administrative record. These pages are Exhibit 5 of the appeal conference MFR.

7. During the appeal conference, the Appellant provided the RO and Philadelphia District with five maps: 1) Wetlands with 7 Alternative Alignments; 2) Plate M, Alternative 3D1RB; 3) Plate U, Alternative 3D1RB Modified; 4) Plate Y, Alternative #3D1MOD-3; and 5) Marshalls Creek ByPass. The Philadelphia District stated that the maps were copies of maps found in the administrative record. The maps are Exhibit 6 of the appeal conference MFR.

Basis for Appeal as Presented by Appellant:

**Appellant's Reason for Appeal:** The proffered permit should not include conditions pertaining to mitigation for upland terrestrial impacts cause by the project. The proffered permit



conditions are excessive, beyond the Corps' regulatory jurisdiction and conflict with the Corps' relevant guidance and standard operating procedures.

FINDING: This reason for appeal does have merit.

ACTION: Upon remand, the Philadelphia District shall clarify the acreage of upland property needed to augment stream and wetland mitigation and protection of wetland areas. The Philadelphia District shall establish how the upland restoration and/or preservation advocated in its SOF augment the functions of wetlands or other aquatic resources. The Philadelphia District must also clarify the need and authority of the Philadelphia District to include in its DA permit special conditions requiring preservation/enhancement of upland sites as compensatory mitigation for upland/terrestrial impacts.

Consequently the Philadelphia District should revise Special Conditions 23 to specify only those actions needed to compensate for the unavoidable loss of Waters of the United States as a result of construction of the Marshalls Creek Traffic Relief Project. The Philadelphia District should also revise Special Conditions 26, 27, 28, 30, 32 and 35 to adequately reflect the appropriate plantings (Special Condition 26), inspections (Special Condition 27), remedial actions (Special Condition 28), restrictive covenants (Special Conditions 30 and 32), and upland restoration from temporary impacts (Special Condition 35).

DISCUSSION: The Philadelphia District was within its authority to review the entire project and require a compensatory mitigation for the unavoidable loss of Waters of the United States. Corps of Engineers regulations found in 33 C.F.R. 320.4(r)(2) state: "All compensatory mitigation will be for significant resource losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment." The Philadelphia District has the discretion to consider all environmental impacts in determining compensatory mitigation requirements. Regulatory Guidance Letter (RGL) 02-2 directs districts to ". . . use watershed and ecosystem approaches when determining compensatory mitigation requirements, consider the resource needs of the watershed where impacts will occur, and also consider the resource needs of

neighboring watersheds."<sup>29</sup> The administrative record contains substantial documentation relative to the anticipated impacts to waters of the United States, terrestrial resources, and other important public interest factors (i.e., conservation, economy, aesthetics, cultural resources, fish and wildlife values, flood hazards, floodplain values, land use, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, air quality and the welfare of people).<sup>30</sup>

Based on Corps guidance and its public interest review, the Philadelphia District was within its authority to use a watershed-based approach to aquatic resource protection, which may include a mix of habitats including adjacent uplands. The Appellant's RFA asserts that the Philadelphia District failed to make any findings in its SOF that upland terrestrial impacts were such that mitigation was required based on public interest. The SOF, XII. VIEW OF THE DISTRICT ENGINEER CONCERNING PROBABLE EFFECTS OF THE PROPOSED WORK, references documents in the administrative record and discusses the strategy for the development of the comprehensive compensatory mitigation package.<sup>31</sup> The SOF states that the mitigation package is a response to the concerns of federal and state regulatory and resource agencies regarding the loss and fragmentation of a variety of habitats within the project area and PennDOT's commitment. The RO's review of agencies comments does document a concern for areas cleared, fragmented and cutoff by the four-lane highway.<sup>32</sup>

Philadelphia District maintains that PennDOT agreed to the extent and amount of upland restoration/preservation. While PennDOT communicated that it would mitigate for terrestrial and wildlife to ensure biodiversity is created or enhanced, its commitment does not appear to be voluntary.<sup>33</sup> By a December 22, 1995 to FWMA, the Philadelphia District stated: ". . . the implementation of any of the project alternatives will result in the loss of significant acreages of upland habitat and their associated wildlife values. Therefore, the FEIS should address mitigation for those losses not only in terms of proposed habitat enhancement measures, but also in terms of avoidance and

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<sup>29</sup> RGL 02-2, 2. General Considerations

<sup>30</sup> SOF, pages 7-10, Tab 13 of the administrative record

<sup>31</sup> SOF, page 7, Tab 13 of the administrative record

<sup>32</sup> March 16, 2000 EPA comment letter, tab 73 of the administrative record

<sup>33</sup> FEIS, Page IV-43

minimization measures that will be investigated during final design to reduce project impacts to the maximum extent possible."<sup>34</sup> Additionally, PennDOT's January 16, 2004 letter to Lieutenant Colonel Chapman expresses its opinion that that the Philadelphia District request for monitoring and reporting on uplands site is unreasonable and unjustified.<sup>35</sup> Written comments received during the appeals conference stated that PennDOT negotiated terrestrial mitigation in order to keep the project moving forward. Notwithstanding this, there was sufficient information in the record which supports the inclusion of some terrestrial habitats in the compensatory mitigation proposal. But what is not clear is the Philadelphia District's rationale for the extent of upland restoration/preservation advocated in its SOF.

The decision regarding the amount of terrestrial habitats included in mitigation compensation plans should be based on Corps guidance which instructs districts to craft mitigation requirements that are substantially related to the impacts of the proposal and replace aquatic resource functions unavoidably lost or adversely affected by authorized activities.<sup>36</sup> Army Corps of Engineers Standard Operating Procedures for the Regulatory Program (SOP) dated April 8, 1999, states that special justification should be referenced when upland buffers are incorporated into the decision. RGL-02-2 allows, under limited circumstances, for inclusion of upland areas within a compensatory mitigation project to the degree that the protection and management of such areas is an enhancement of aquatic functions and increases the overall ecological functioning of the mitigation site, or of other aquatic resources.<sup>37</sup> Districts may require the establishment and maintenance of buffers to ensure that the overall mitigation for the project performs as expected. Buffers are upland or riparian areas that separate wetlands or other aquatic resources from developed areas and agricultural lands.

The administrative record does provide sufficient documentation for the establishment of buffers along streams and wetlands. The August 2002 Terrestrial/Stream and Wetlands

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<sup>34</sup> December 22, 1995 Philadelphia District letter, Paragraph 11, Tab 134 of the administrative record

<sup>35</sup> Tab 11 of administrative record

<sup>36</sup> Army Corps of Engineers Standard Operating Procedures for the Regulatory Program (SOP) dated April 8, 1999, paragraph 17

<sup>37</sup> RGL-02-2, page 5, 1. Upland Areas

Mitigation Report (Mitigation Report) documents the link of terrestrial mitigation to aquatic resources protections protecting *Notropis* (shiner) habitat within Marshalls Creek and protecting the wetland replacement site.<sup>38</sup> The November 1998 PennDOT report recommends maintaining natural buffer zones and limiting plant removal.<sup>39</sup> The November 1998 report did not advocate preservation of large terrestrial parcels discussed in the Mitigation Report, 1. Vegetation and Wildlife. The Philadelphia District needs to provide further clarification to support the conclusion that without preservation of a large parcel, where terrestrial mitigation areas TP1-A and TP1-B are located, development on this parcel could have serious adverse impacts on the habitat of the two *Notropis* species. The FEIS, Chapter VIII, section states that Preferred Alternative leaves no access to the site for future development.<sup>40</sup> If there is no access to the site for development, why does the Philadelphia District determine that the placement of a conservation easement is necessary?

Additionally, there is insufficient documentation in the administrative record to support the amount of preservation, enhancement of and/or creation of new wildlife habitat described in the Mitigation Plan, particularly the 122.85 acres described in the Mitigation Report.<sup>41</sup> The record contains insufficient documentation to support requiring general terrestrial enhancement methods such as removal of exotic, non-native species, retention of den trees/dead snags, placement of brush piles, rock piles, nesting boxes, bat boxes and/or planting of warm season grasses. The Mitigation Report clearly described the benefit of these upland enhancements but did not establish how those developments or the preservation augment the functions of wetlands or other aquatic resources.<sup>42</sup>

Upon remand, the Philadelphia District shall provide clarification about the acres of upland property needed to address stream and wetland mitigation and protection of wetland areas. It must also provide additional clarification to

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<sup>38</sup> Tab 27b of the administrative record, page 4

<sup>39</sup> 1998 *Marshalls Creek Traffic Relief Study, Detailed Effects Assessment of Proposed Draft Environmental Impact Statement and Supplemental Draft Environmental Impact Statement Relocation Alternative Modifications Developed to Minimize Effects on N. bifrenatus and N. chalybaeus*, Tab 97 of the administrative record.

<sup>40</sup> FEIS, Volume 2, Chapter VIII, 1. Vegetation and Wildlife, page VIII-5

<sup>41</sup> Mitigation Report, Section II. TERRESTRIAL MITIGATION, page 2

<sup>42</sup> RGL02-2, 1. Upland Areas, page 6

document the need and its authority for including special conditions requiring preservation/enhancement of upland sites as compensatory mitigation for upland/terrestrial impacts. Alternatively, the Philadelphia District may elect to revise applicable special conditions, which relate to the compensatory mitigation required for upland/terrestrial impacts.

**Appellant's Reason for Appeal:** The monitoring and reporting requirement contain in Special Condition 22 are not reasonably related to the impact.

**FINDING:** The reason for appeal does not have merit.

**ACTION:** No action is required.

**DISCUSSION:** The Philadelphia District was not arbitrary and capricious when incorporating Special Condition 22 (requiring annual inspections for three years of restored Waters of the United States temporarily impacted) in its proffered permit.

The Philadelphia District appropriately included special conditions in its Proffered Permit deemed necessary to minimize temporary impacts to Waters of the United States. Its authority is based on the Clean Water Act (CWA) Section 404(b)(1) Guidelines ("Guidelines") that set forth a goal of restoring and maintaining existing aquatic resources.<sup>43</sup> The Guidelines instruct the Corps of Engineers to make a determination that potential impacts have been avoided and minimized, and finally, require compensation for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required.<sup>44</sup> Corps of Engineers regulations found at 33 C.F.R. 325.4 state District Engineers will add special conditions to DA permits when such conditions are necessary to comply with legal requirements, i.e. the Guidelines.

Accordingly, the Philadelphia District included Special Condition 21 requiring all Waters of the United States disturbed as a result of authorized temporary construction activities be returned to their predisturbance conditions within 60 days after the construction activities on those sites are completed. The *Impacts Narrative, Marshalls Creek Traffic Relief Study, US 209, Monroe County, Pennsylvania, Revised November 2003* (Narrative) described the temporary and permanent impacts to Waters of the

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<sup>43</sup> Mitigation MOA, Section II.B.

<sup>44</sup> Mitigation MOA, Section II.C.

United States associated with the project, and outlined the minimization efforts conducted to reduce the temporary impacts to the extent practicable.<sup>45</sup> In PennDOT's plan, temporary impacts were generally limited to approximately 2 meters (6.6 feet) around proposed structures and were estimated to consist of 0.76 acre of wetlands and open water habitat and 0.94 acre of perennial and intermittent streams.

The Philadelphia District's inclusion of monitoring requirements outlined in Special Condition 22 is in accordance with Corps regulations. Regulatory Guidance Letter 02-2 instructs Districts to include special conditions that identify performance standards for determining compliance with the Guidelines.<sup>46</sup> Special Condition 21 stated that the restored temporary impact sites would be replanted/seeded in accordance with specifications outlined in an attached document entitled "Restoration of Temporarily Disturbed Wetlands (Attachment 1)." Special Condition 22 directed PennDOT to conduct annual inspections of the restored impacted Waters of the United States as referenced in Special Condition 21 and outlined performance standards.

The administrative record contains sufficient documentation to indicate that the temporary impacts are of sufficient magnitude to warrant the inclusion of monitoring requirements that ensure the restoration of functions and values. RGL 93-02 provides districts the flexibility to adjust its level of analysis, based on the relative severity of the environmental impact of proposed discharges of dredged or fill material into Waters of the United States. The RFA stated the temporary impacts are not considered permanent, or of the same magnitude as impacts requiring compensatory mitigation. The administrative record clearly differentiates between the temporary and permanent impacts. The administrative record also contains sufficient documentation of similar values and magnitude of the temporary impacted wetlands to permanently impacted wetlands. The Philadelphia District attested to the value of the temporary wetlands. The Memo referenced findings that ". . . the wetlands within the project are providing a

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<sup>45</sup> Narrative, page 7 of 31 (Tab 27 of the administrative record)

<sup>46</sup> RGL 02-2, Section I. Permit Special Conditions, also instructed Districts to identify the responsible parties for meeting any or all components of compensatory and other requirements such as financial assurances, real estate assurances, monitoring programs, and the provisions for short and long-term maintenance of the mitigation site.

variety of functions and values." and "The Pennsylvania Modified Habitat Evaluation procedure (PAMHEP) . . . concluded that wetlands in the project area provide high quality habitat for evaluation species".<sup>47</sup>

The level of monitoring for temporary impacted wetlands prescribed by the Philadelphia District is reasonable. The PennDOT's RFA asserts that the replanting of temporarily impacted wetlands should not require the same level of monitoring and reporting as is required when creating wetland replacement sites. PennDOT states that the scientific uncertainty associated with the creation of wetland compensatory mitigation site is not present; the proper substrate is present, seed sources are on site and nearby, and the appropriate hydrological conditions exist. Based on the Narrative's description of the type of impacts, i.e. placement of rock for a rip-rap aprons and cut and fill activities associated with roadways, structures and pipes, Philadelphia District reasonably concluded that the impacts may be sufficient to impact the sites' hydrologic regimes, substrate and seedbed. Even in the event the temporary impacted sites' hydrologic regimes, substrate and seedbed were not significantly altered by the construction activities, other agents exist which could affect the success of restoration efforts. Examples are herbivore depredation of wetlands plants, insect infestations, and/or invasion of undesirable wetland species (e.g. *Phragmites* and purple loosestrife). The level of monitoring suggested by PennDOT (a joint field review after one growing season) does not provide the opportunity for remedial action and is below the time recommended by RGL-02-2 (5 to 10 years).<sup>48</sup>

CONCLUSION: For the reasons stated above, I conclude that PennDOT's request for appeal does have merit. The final Corps of Engineers decision will be the District Engineer's decision made pursuant to my remand.

/s/  
Merdith W.B. Temple  
Brigadier General, U.S. Army  
Division Engineer

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<sup>47</sup> Paragraph b of the Memorandum for the Record, Record of PennDOT Objections To: Initial Proffered Permit CENAP-OP-R-199800918-11, Tab 2 of the administrative record.

<sup>48</sup> RGL 02-2, paragraph i, page 11

Enclosure 1: Special Conditions addressed in the RFA

21. All Waters of the United States disturbed as a result of authorized temporary construction activities shall be returned to their predisturbance conditions within 60 days after the construction activities on those sites are completed. This work includes restoration of stream bank elevations and stream channel and wetland surface contours. The restored temporary impact sites shall be replanted/seeded in accordance with the attached "Restoration of Temporarily Disturbed Wetlands" specification prepared by the permittee (Attachment 1).

22. The permittee shall conduct annual inspections of the restored temporarily impacted Waters of the United States, referenced in Special Condition 21 above. For sites owned by the permittee, annual site inspections shall be conducted for three years starting with the first full growing season following completion of planting activities. A monitoring report documenting the restoration of the temporary impact sites shall be submitted to the Corps of Engineers District Engineer by December 31 of each monitoring year. The monitoring report shall provide quantitative and qualitative documentation, including photographs, that permanent wetland hydrologic regimes have been restored and that the planted sites have achieved a permanent vegetative stand comprised of planted species or appropriate volunteer species over 85% of the surface area after the second complete growing season. Failure to achieve this survival rate by the end of the second growing season will require the replacement of all planted dead plants with new stock. If, after completion of the monitoring period (three years), 85% coverage is not achieved, the permittee shall evaluate the site conditions to determine if wetland functions have been restored and shall submit their report to the Corps of Engineers District Engineer for review and approval. If wetland functions have been restored, no further action shall be required. If the wetland functions have not been restored, the permittee shall propose remedial action for approval by the Corps of Engineers District Engineer. Such remedial action may include additional vegetative plantings and/or mitigation work.

For sites which the permittee does not own and has secured a temporary easement prior to the date of this permit, if 85% cover of appropriate species is not achieved by the end of the temporary easement period, the permittee shall evaluate the site conditions to determine if wetland functions have been restored for review and approval by the Corps of Engineers District Engineer. If they



have, then no further action shall be required. If wetland functions have not been restored, the permittee shall propose remedial action for approval by the Corps of Engineers District Engineer. Such remedial action may include additional planting and/or mitigation work.

23. The permittee shall compensate for the unavoidable loss of Waters of the United States and terrestrial habitats as a result of construction of the Marshalls Creek Traffic Relief Project by implementing a compensatory mitigation program in accordance with project plans and commitments identified as/in:

(a) Plans prepared by Rettew Associates, Inc., and Larson Design Group, Inc., undated, entitled: Wetland Mitigation Plan, Sheets 1 through 21 of 21. (Note: This site is referred to as the Leaps Bog wetland mitigation site)

AND

(b) Plans prepared by Rettew Associates, undated, entitled: Quantities and Details, Stream/Terrestrial Mitigation Plan, Sheets 1 through 7 of 7.

AND

(c) A document prepared by Rettew Associates, dated August 2002, last revised November 2003, entitled: Terrestrial/Stream/and Wetlands Mitigation Report.

Implementation of (a), (b) and (c) above provides for the creation of approximately 3.19 acres of wetlands and the enhancement/preservation of approximately 122 acres of contiguous upland and aquatic habitats including the enhancement/preservation of approximately 6448 linear feet of riparian corridors associated with Marshalls Creek, Pond Creek and the unnamed tributary from Leaps Bog to Marshalls Creek at 8 locations.

26. All activities specified in Special Conditions 23(b) and 23(c) above other than terrestrial planting activities at the Leaps Bog wetland mitigation site shall be completed in accordance with a schedule identified as: Schedule prepared by Dewberry, dated December 3, 2003, entitled "Marshalls Creek Traffic Relief Project, Anticipated 404 Permit Submission Schedule and Mitigation Construction".

27. The permittee shall conduct annual inspections of the compensatory mitigation sites (wetland creation, upland enhancement and stream restoration/enhancement sites) and restored temporarily impacted upland sites within the boundaries of the compensatory mitigation sites (as specified in Special Condition 35 below) for a minimum of five (5) years starting with the first full growing season following completion of the planting activities at each of the sites. A yearly compensatory mitigation monitoring report documenting the findings of the monitoring program shall be submitted to the Corps of Engineers District Engineer by December 31 of each monitoring year. The compensatory mitigation monitoring report shall provide quantitative and qualitative documentation, including photographs, that a permanent wetland hydrologic regime has been established at the wetland creation site and that the wetland creation, upland restoration/enhancement and stream restoration/enhancement sites support a permanent vegetative stand comprised of planted species or appropriate volunteer species over 85% of the surface area after the second complete growing season. Failure to achieve this survival rate by the end of the second growing season will require the replacement of all planted dead plants with new stock until a permanent and appropriate vegetative stand over 85% of the created/restored/enhanced areas is achieved.

28. If the post-planting monitoring program success criteria described in Special Conditions 22 and 27 above are not achieved, the permittee shall evaluate the site conditions and associated monitoring documentation and propose remedial action as necessary for review and approval by the Corps of Engineers District Engineer as part of the yearly monitoring reports.

30. The permittee shall place restrictive covenants in the deed instrument or instruments covering the entire compensatory mitigation site(s) properly identified in a project plan prepared by Dewberry-Goodkind, Inc., dated December 3, 2003, entitled "Marshalls Creek Traffic Relief Project Mitigation Area Marker Locations", contingent upon Corps of Engineers authorization of the proposed relocated alignment of the Columbia Gas Easement, and shall record the deed instrument or instruments with the appropriate county office responsible for maintaining land records.

In the event that the Corps of Engineers does not authorize the proposed relocated alignment of the Columbia Gas Easement as depicted on the referenced plan, then the permittee shall seek a

permit modification. The purpose of the restrictive covenants is to protect the environmental values of the compensatory mitigation site(s) in perpetuity. The restrictive covenants shall prohibit the following activities:

(a) The removal, excavation, mining, drilling or dredging of soil, sand, gravel or other material of any kind, nor any change in the topography of the land;

(b) The drainage or disturbance of the water level or the water table;

(c) The dumping, depositing, abandoning, discharging or releasing of any gaseous, liquid, solid or hazardous waste substance, materials or debris of whatever nature on, in, over or under the ground or into surface or ground water, except for stormwater discharges from the Marshalls Creek Traffic Relief Project and any maintenance work associated with the stormwater discharges;

(d) The driving of piles;

(e) The placement of water obstructions or encroachments;

(f) The spraying of insecticides, pesticides or herbicides or other chemicals, except as may be necessary to control invasive species that threaten the natural character of the Mitigation Area;

(g) The removal, disturbance or destruction of any trees, shrubs or other vegetation or animal species except for safety purposes. Vegetation within the mitigation area shall be allowed to grow and regrow to maturity and to remain in such state in perpetuity;

(h) The construction, placement, preservation, maintenance, alteration, decoration or removal of any buildings, roads, signs, billboards or other advertising, utility lines or structures on, in over or above ground, except for a reasonable number of signs for resource protection, safety, boundary identification, management, and identification of the owner;

(i) Any other acts, uses or discharges which adversely affect fish or wildlife habitat or the preservation of land or water areas on the Mitigation Area;

(j) Any other use of or activity in the Mitigation Area which would materially impair the fields, forest land, wetlands and waterways found therein.

32. The permittee shall record the restrictive covenants on the appropriate Mitigation Area deed instrument(s) in accordance with the following schedule and shall provide copies of all recorded deed instruments to the Corps of Engineers District Engineer:

Parcels 24 and 39:	Prior to construction of authorized work in Waters of the United States.
Parcels 25, 26 and 47:	By December 31, 2004.
Parcel 33:	By December 31, 2004 or 120 days following a permit decision by the Corps of Engineers on an anticipated application by Columbia Gas Company to relocate its transmission line and associated easement, which ever comes last.

35. All upland areas within the boundaries of those lands covered by the restrictive covenants referenced in Special Condition 30 above and disturbed as a result of authorized temporary construction activities as depicted in plans identified in Special Condition 34 above shall be returned to their predisturbance conditions within 60 days after the construction activities on those sites are completed. The restored temporary impact sites shall be replanted utilizing the terrestrial planting specifications identified in Special Condition 23(b) above.