



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

SUBJECT: Clean Water Act Section 404(q) Elevation March 10, 2003
FROM: Donald S. Welsh *Donald S. Welsh*
Regional Administrator
TO: G. Tracy Mehan, III
Assistant Administrator for Water

This memorandum refers to a decision by the Norfolk District of the U.S. Army Corps of Engineers to issue a permit authorizing the Virginia Seafood Council's proposal to introduce up to a million non-native, triploid Suminoe oysters (*C. ariakensis*) into the waters of the Chesapeake Bay and Atlantic Ocean.

Region III believes that this project would have substantial and unacceptable impacts on Aquatic Resources of National Importance. Furthermore, the proposed permit issuance appears to be inconsistent with the 1993 policy on the introduction of non-native species to the Chesapeake Bay. This is particularly a concern when a National Academy of Sciences study, which is expected to address many of the key issues, is well underway and should be completed in August 2003. We have attempted to resolve these issues with the Norfolk District from early on in the public interest review process, but have had limited success.

Attached is a copy of my March 7 letter to Colonel Hansen, District Engineer, Norfolk District, in which I specify two conditions suggested by the Chesapeake Bay Ad Hoc Panel and indicate that, if the Corps were to include them in the permit, I would be willing to withdraw my request for permit elevation. Absent Corps agreement to incorporate those conditions, I believe it is important for EPA to seek elevation of this case to the Department of the Army to protect the ecological integrity of the Chesapeake Bay.

Please call me if you have any questions concerning this case. Staff contacts are Bill Hoffman, Chief of the Office of Environmental Programs in the Environmental Services Division (215/814-2995), and Mike Fritz, Chesapeake Bay Program Office (410/267-5721).

Attachment





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MAR 07 2003

Colonel David L. Hansen
District Engineer, Norfolk District
U.S. Army Corps of Engineers
Fort Norfolk, 803 Front Street
Norfolk, Virginia 23510-1096

Dear Colonel Hansen:

This letter refers to a proposal by the Virginia Seafood Council (VSC) for the introduction of non-native oysters into waters of the Chesapeake Bay and the Atlantic Ocean using a variety of aquaculture grow-out methods. We appreciate that you have addressed some of Environmental Protection Agency (EPA) Region III's concerns as evidenced in a February 14, 2003, letter from the Norfolk District of the U.S. Army Corps of Engineers (Corps). However, after consideration of issues raised by the Chesapeake Bay Ad Hoc Panel, EPA continues to believe that the project as currently proposed will result in substantial and unacceptable adverse impacts to the Chesapeake Bay, an Aquatic Resource of National Importance. The Corps' proposed permit issuance appears inconsistent with the 1993 Chesapeake Bay Program policy on the introduction of non-native species to the Chesapeake Bay and the Memorandum of Agreement between our agencies regarding Clean Water Act Section 404(q). This is particularly a concern when a National Academy of Sciences (NAS) study, which is expected to address many of the key issues, is well underway with an expected completion date of August 2003.

The February 14 letter indicates that the Corps intends to issue the permit over EPA's previous objections. Therefore, pursuant to the 1992 Clean Water Act Section 404(q) Memorandum of Agreement between the Department of the Army and EPA, this letter serves as notification that the proposal as currently described will have substantial and unacceptable impacts on an Aquatic Resource of National Importance. We have forwarded this issue to the Assistant Administrator for the Office of Water and are recommending that, by March 27, 2003, he request review of the permit decision by the Assistant Secretary of the Army for Civil Works.

However, upon written notification from the Corps that two key Ad Hoc Panel recommended conditions have been incorporated in the permit, we are willing to withdraw this request for permit review elevation. Those key recommendations were included in a letter dated February 21, 2003, from the Chesapeake Bay Program Ad Hoc Panel and are as follows: (1) impose a reopener clause in any permit that would enable the implementation of findings and



recommendations that come from the NAS study on this issue; and (2) to end all field trials by June 1, 2004 (study period of 9-12 months), so as to minimize the risk that a reproducing population of non-native oysters is introduced into the Chesapeake Bay. We also recommend that serious consideration be given to adopting the other recommendations contained in that letter.

As previously stated in our letter of June 11, 2002, we emphasize that the establishment of *Crassostrea ariakensis* in the Chesapeake Bay and Atlantic Coast poses significant and adverse ecological risks. Irreversible ecological consequences could include disease transmission, disruptive competition with native organisms, and competitive exclusion of native species (including the native oyster, *C. virginica*). As also stated in that letter, the VSC proposal appears to be based on the premise that there are no practicable alternatives to restore an oyster industry in the Bay. Alternative approaches to revitalizing the Chesapeake Bay's oyster industry, using the native oyster, *C. virginica*, are under development as described below, and there indeed may be other practicable alternatives that could be developed. Examples of successful native oyster aquaculture include: the Chesapeake Bay Foundation's Virginia Oyster Aquaculture Program, where the Foundation is producing approximately one million disease resistant oysters per year for use in oyster reef restoration; the York River Yacht Haven Association, which just received a Virginia Marine Resources Commission permit to expand its native oyster aquaculture operations to produce 20-30 million oysters in the York River; and the Circle C oyster ranch in Maryland, which has been practicing selective native oyster breeding for maximum growth and disease resistance for several years, for sale to the half-shell market.

You should be aware that if a future Section 404 permit application is filed for a project involving full scale commercial introduction of non-native oysters, we believe that preparation of an Environmental Impact Statement with a full and thorough analysis of alternatives to the establishment of non-native oysters in the Bay is necessary. Such analysis would need to include full consideration of the National Academy of Sciences study results and thorough documentation of compliance with the Clean Water Act (CWA) Section 404(b)(1) Guidelines. Unless this is done, such a project could be a candidate for invoking our authorities under CWA Section 404(c). In order to avoid any unnecessary delays, we would be pleased to cooperate with you and other interested Federal and State agencies to begin work on the technical studies and alternatives analysis that will ultimately be needed to support preparation of the EIS.

Thank you for the opportunity to provide these comments. I look forward to continuing our partnership to restore the Chesapeake Bay.

Sincerely,



Donald S. Welsh
Regional Administrator