

TITLE: Modification of the March 21, 1988, Russo Development Corporation Section 404(c) Final Determination

AGENCY: U.S. Environmental Protection Agency

ACTION: Notice of Modification of Clean Water Act (CWA) Section 404(c) Final Determination for Russo Development Corporation.

SUMMARY: Notice is hereby given that the U.S. Environmental Protection Agency (EPA) has modified the March 21, 1988, CWA Section 404(c) Final Determination concerning the Russo Development Corporation (Russo) site located in the Hackensack Meadowlands (Meadowlands), Bergen County, New Jersey. This modification allows Russo to seek authorization for the discharge of dredged or fill material into a 13.5-acre tract containing wetlands, provided Russo deeds over for preservation and enhancement a 16.3 acre property located in Ridgefield, New Jersey, and provides \$700,000 for wetland enhancement activities at sites in the Meadowlands. Any discharges of dredged or fill material to wetlands on the Russo site must be authorized by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act.

EFFECTIVE DATE: The amendment was effective on [insert date of signature of this document by EPA's Assistant Administrator for Water.]

FOR FURTHER INFORMATION CONTACT: John Ettinger (EPA) at (202) 260-1190.

SUPPLEMENTARY INFORMATION: CWA Section 404(c) authorizes EPA to prohibit, deny, restrict, or withdraw the specification of a site for the disposal of dredged or fill material. On March 21, 1988, EPA's Assistant Administrator (AA) for Water rendered a final determination which prohibited the designation of 57.5 acres of wetlands as a disposal site for fill material. These wetlands were and are currently owned by the Russo Development Corporation (Russo), and are located in the Hackensack Meadowlands in Carlstadt, Bergen County, New Jersey. The Final Determination pertained to a proposal by Russo to maintain 52.5 acres of unauthorized fill (of which 44 acres have been built upon) and to fill a remaining five acres of wetlands of a 13.5-acre tract to complete a warehouse complex. The reason cited by the AA for Water for the 1988 404(c) determination was that the discharge of fill would have unacceptable adverse effects, both individually and cumulatively, on wildlife in the Meadowlands. The 1988 Final Determination stated that the Russo site was/is very valuable to wildlife from a site specific and cumulative standpoint and, that the compensatory mitigation proposed by Russo at that time would not adequately replace those wildlife values that had been and were anticipated to be lost. In the Final Determination, however, EPA indicated that its Section 404(c) prohibition could be reconsidered upon demonstration that

the adverse effects to wildlife have been satisfactorily addressed.

Litigation was undertaken by Russo with regard to EPA's and the Army Corps of Engineers' (Corps) actions regarding the site. The litigation history is summarized in the notice of proposed amendment of the 404(c) determination (See 60 Federal Register 15913).

The Corps, EPA, and Russo have engaged in discussions to resolve issues arising under Section 404 with regard to the Russo site. As a result of these discussions, Russo agreed to provide additional mitigation. Based on this additional mitigation, EPA proposed to amend the 404(c) final determination on March 28, 1995. In particular, Russo has agreed to deed over, for preservation and enhancement, an approximately 16-acre parcel of wetlands in Ridgefield, NJ, located approximately 1.5 miles from the subject Russo sites. Russo also agreed to provide \$700,000 for the purpose of enhancing wetlands both at this site and at sites contained in a Hackensack Meadowlands Development Commission (HMDC) mitigation bank, as appropriate. This mitigation proposal is designed to compensate for wetlands functions lost as a result of the past and future fill activities on both Russo sites. Based on the increased mitigation, EPA proposed to amend the prohibition of the discharge of fill material on the 13.5-acre Russo site to allow for designation of

the subject property as a disposal site, provided the compensatory mitigation conditions are met. After final amendment of the Final Determination, Russo would seek an after-the-fact authorization from the Corps for the past discharge of fill material into the subject wetlands for the purpose of constructing a warehouse complex, as well as authorization for the future discharge of fill material into remaining wetlands for additional development activities.

In the Federal Register notice proposing to amend the 404(c) prohibition, EPA requested comments on allowing for restricted use of the Russo site based on the compensatory mitigation proposal discussed above. (A more complete background on this case, as well as a detailed description of a possible compensation scenario that could be implemented under the proposed amendment can be found in the March 28, 1995, notice.) In particular, EPA was interested in comments relating to the proposed compensatory mitigation and its ability to replace the wildlife values lost as a result of past fill activities, as well as anticipated losses due to proposed discharges in the subject wetlands. EPA also mailed copies of the Federal Register notice to parties listed on the U.S. Army Corps of Engineers mailing list for the Hackensack Meadowlands District and to recipients of an October 14, 1987, public notice scheduling a public hearing for the Russo Section 404(c) action.

EPA received three written comments in response to the March 28, 1995, Federal Register notice. These comments are summarized below, along with EPA's responses to these comments.

The Pleasantville Field Office of the U.S. Fish and Wildlife Service (Service) opposed the proposed action on several grounds. The Service contended that it would adversely affect fish and wildlife resources by contributing to the continuing loss of regionally significant habitat, and would be contrary to the objective of maintaining and restoring regional biodiversity. The Service emphasized that the Meadowlands is a corridor for migratory birds, as well as a large island of habitat in an intensely urbanized area that plays a critical role in maintaining the region's biodiversity.

The Service also commented that the draft Environmental Impact Statement (DEIS) on the proposed Special Area Management Plan (SAMP) for the Hackensack Meadowlands fails to articulate specific fish and wildlife management objectives for target species or species groups. This lack of clearly articulated management objectives, according to the Service, makes it impossible to evaluate the success of individual wetland enhancement projects or the cumulative effects of all such projects on the Hackensack Meadowlands ecosystem.

The Service also contended that the proposed compensatory

mitigation is not likely to replace the wetland functions and values lost as a result of Russo's fill activity because the wetlands filled by Russo provided high value fish and wildlife habitat, while the wetlands to be enhanced are already of moderate to high value for fish and wildlife. The Service recommended that the original prohibition under Section 404(c) on the 13.5 acre parcel should remain intact.

Response: EPA agrees that the Meadowlands is a significant habitat for fish and wildlife. The desire to protect the remaining wetlands in the Meadowlands motivated EPA, the Corps, the Hackensack Meadowlands Development Commission (HMDC), the New Jersey Department of Environmental Protection (NJDEP) and the National Oceanic and Atmospheric Administration (NOAA) to join as partners to develop the SAMP, which is a 20-year plan that provides for natural resource protection, and reasonable economic growth within the Meadowlands. The proposed SAMP includes measures for the permanent protection and enhancement of about 90% of the remaining wetland acreage in the Meadowlands, along with the measures proposed for upland and wetland habitat improvement.

The DEIS is intended to be programmatic in nature, and the mitigation plan and strategies contained therein are designed to meet the program goal agreed to by the partner agencies, i.e., no net loss of wetland functions within the Meadowlands District.

The targeting of a wetlands mitigation effort toward habitat enhancement for particular species or species groups is more appropriately performed at the site-specific level, on a case-by-case basis, as mitigation sites are developed and not as part of the DEIS. When a specific site is chosen to implement mitigation consistent with the proposed action, specific species or species groups could be targeted as part of the mitigation strategy. EPA will consider all comments regarding the SAMP and DEIS, including those submitted by the Service.

EPA believes, however, that the compensatory mitigation plan proposed by Russo will replace the fish and wildlife values lost as a result of the past and future fill activities. The Advanced Identification of the Hackensack Meadowlands, in which the Service was a participant, as well as additional, detailed studies performed in conjunction with the SAMP, clearly indicate that not all habitat in the Meadowlands is of moderate to high value for wildlife. If a mitigation bank site is established on a site with low habitat value, appropriate enhancement of the site would provide the requisite increase in fish and wildlife value needed to offset the loss in value due to Russo's activity. Appropriate targeting of mitigation bank sites by HMDC, in coordination with EPA, will help to ensure that this goal is achieved. Moreover, the example provided in the March 28, 1995 notice is a mitigation strategy that could offset the loss of wildlife value from Russo's activity.

The State of New Jersey Department of Environmental Protection provided comments on the proposal in the form of two letters. The first letter dated April 21, 1995, objected to the modification. However, a second letter dated June 15, 1995, expressly superseded the Department's earlier letter. In this letter, the State indicated that the proposed settlement and modification of the 404(c) prohibition would serve to satisfy all State regulatory concerns for both the Carlstadt site and the Ridgefield site, and expressed their full support for both actions.

Mr. Henry Gluckstern, a private citizen, wrote in objection to the proposed modification of the 404(c) prohibition, contending that the alternative remedial approaches outlined in the March 28 notice should be rejected as entirely inadequate and that "nothing in the data supplied in the notice supports an actual impossibility of restoring the land to its original wetland values." Mr. Gluckstern opined that the proposed compensatory mitigation will not achieve true biological equivalency, and that as such, it should be rejected.

Response: The information contained in the March 28, 1995, public notice on the proposed amendment provided a detailed chronology of the history of activity on the 13.5 acre tract. For the reason explained below, EPA believes that restoration of the Russo site to its original condition with attendant wildlife

values is not likely to be possible. Most of the tract was excavated, with several feet of the original organic soil and "meadow mat" being removed. Subsequently, approximately 8.5 acres of the tract were filled with shot rock varying in size from cobbles to boulders. Two to three acres of the remaining five acres of wetlands on this site subsequently ponded.

The loss of the original substrate, along with its seed bank, would result in a complete change in any plant community that could establish and be naturally sustained if the fill were removed. The establishment of a pond on the excavated portion of the five acre site, which was not present in the original wetlands complex, is direct evidence it would be unlikely that the original wetlands conditions could be established there naturally. In addition, the placement of several feet of rock on 8.5 acres of the site has resulted in compaction of the remnants of the original soil on that site. Evidence of this, based on excavation of the fill performed in 1990, are part of the records of this case.

Moreover, fill removal would permanently change the drainage characteristics of the soil. In addition, the elevation of the remnant original soil would be lower than its original level as a result of the compaction of the fill. As a result of these changes, along with the loss of the organic surface substrate, the conditions at the site would be very different from those

that originally existed and supported the historic complex of wetland types on the site. In particular, the wet-meadow complex which existed on site is typically a ground-water fed system, and therefore very dependent on both the drainage characteristics of the substrate and the elevation of the wetland. Even if appropriate seeding/planting could take place, and organic substrate could be added to raise the elevation of the site to its original conditions, the change in the lower soils would still be likely to influence site hydrology, on which such a wetland system is dependent. Consequently, EPA has determined that the data do not support a likelihood of restoring the site to its original wetlands values.

The contention that no true biological equivalence for the wildlife values lost from the site can be established is difficult to address, because the commenter does not define how he is applying the term equivalence. Actual habitat can never be exactly replicated from one site to another, because natural sites rarely have identical (although they frequently have similar) physical, geological, and biological conditions. Likewise, the determinants of community structure are the products of a complex interaction of both existing ecological conditions and stochastic events, and thus will vary from one site to another. However, appropriate conditions to support given wildlife species or groups can be established, particularly if the habitat requirements of the desired species or communities

are broad. The term equivalence, when applied to individual species, generally refers to two different species which perform the same general ecological role in two different geographic areas. Ecologically equivalent communities, likewise, may have different species; those species, however, would be performing similar roles and the communities would have the same general community structure and dynamics, although those communities would be in two different locations. Given these assumptions, a community which is ecologically equivalent to the Russo site would be considered to be successfully established if it contains similar features and supports a similar number of species which perform the same general roles as those species which were likely to have been present on the site.

The March 28, 1995 notice described a possible combination of mitigation strategies which, if implemented, would support similar wildlife species to those which used the Russo tracts prior to Russo's activities. For example, the excavation of ponds and/or channels would provide open water habitat adjacent to a natural windbreak (i.e., Phragmites). This activity would provide resting and feeding habitat for waterfowl and wading birds, especially overwintering black duck, Anas rubripes, (a U.S. Fish & Wildlife Service species of special concern) and a species of concern in the final determination of the AA for Water. The resulting habitat would therefore be similar habitat, and would provide support for the same species that may have used

the Russo tracts. Likewise, the establishment of either a wet meadow or a high salt marsh would provide hunting habitat for northern harrier, Circus cyaneus, and other raptors, as well as game birds such as woodcock and pheasant. Thus, these activities could establish equivalent wildlife values to those lost from the Russo tracts. Those losses have been sustained for nearly ten years, and we believe that implementation of an appropriate mitigation strategy could only benefit the Meadowlands. We therefore continue to believe that the proposal could provide good compensation for wildlife values which were lost from the Russo tracts.

It should be clarified that, under the terms of this 404(c) restriction, \$700,000 would be provided by Russo to fund any appropriate mitigation at the Ridgefield parcel and any other locations selected out of the mitigation bank to be operated by HMDC. As discussed by EPA in the notice of the proposed 404(c) determination, effective mitigation could include enhancement activities at the Ridgefield site as well as other appropriate locations. The terms of the 404(c) restriction do not, however, specifically mandate how the money is to be allocated. If a mitigation plan is submitted demonstrating that greater environmental benefit would be obtained from enhancing sites other than the Ridgefield parcel, such a mitigation plan would be consistent with the 404(c) restriction. EPA will be involved in reviewing such a mitigation plan to ensure that it is appropriate

taking into account the functions and values needed to compensate for the losses at the 13.5 and 44 acre sites. In addition, it is EPA's intent that, aside from incidental expenses associated with the development of an appropriate mitigation plan, the money provided by Russo to HMDC will be used for actual enhancement activities. Allocation of a portion of the funds for land acquisition, for example, would not be appropriate because it would make it difficult to achieve the degree of mitigation necessary to compensate for losses incurred at the Russo site.

FINDINGS AND CONCLUSIONS: EPA has carefully reviewed Russo's proposed compensatory mitigation offer and the comments submitted in response to the proposed amendment of the 1988 Final Determination for the CWA Section 404(c) action. Based on this review, EPA concludes that the proposed compensatory mitigation adequately addresses the adverse effects to wildlife described in the Final Determination.

As discussed above, given the extent and impact of Russo's activities on the 13.5-acre site, it is highly unlikely that suitable wetland conditions could be established on-site. Consequently, offsite mitigation is needed to compensate for the adverse effects to wildlife identified in the Final Determination.

The providing of funds to HMDC's proposed mitigation bank

for enhancement activities in the Meadowlands will ensure that such mitigation is provided. As a result, a prohibition on the placement of fill material is no longer necessary to prevent unacceptable adverse effects to wildlife. EPA is instead issuing a restriction under Section 404(c) that allows specification of the Russo site as a disposal site for fill material conditional on performance of the mitigation steps specified in the modification below. EPA stated in the Federal Register notice proposing this amendment to its 404(c) action that this amendment be conditional on a binding agreement by Russo to perform the specified mitigation. This condition would be met through the imposition of binding conditions in a permit issued under Section 404 by the Corps specifying that Russo must perform this specified mitigation in order for discharges of fill on this site to be authorized under Section 404.

For these reasons, EPA concludes that it is appropriate to modify the original March 21, 1988, Final Determination to allow Russo to seek authorization to discharge dredged or fill material into the 13.5-acre site, provided that Russo implements the mitigation specified below (such mitigation could include the steps outlined in the proposed 404(c) amendment or an equivalent mitigation plan). Any discharge activities to waters of the U.S. must be authorized pursuant to applicable permits issued by the Corps under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act.

MODIFICATION: The March 21, 1988, Clean Water Act Section 404(c) Final Determination for the Russo Development Corporation Site is hereby modified as follows:

The prohibition imposed in the March 21, 1988, Final Determination is removed and a restriction is imposed upon specification of the site for the disposal of dredged or fill material. Under this restriction, the Russo Development Corporation may seek authorization from the U.S. Army Corps of Engineers for discharges of dredged or fill material into waters of the United States within the area previously prohibited by EPA, provided the terms of the authorization require Russo to (1) deed over for preservation and any appropriate enhancements, an approximately 16.3 acre parcel of wetlands located in Ridgefield, New Jersey; and, (2) provide funding in the amount of \$700,000 for the purpose of enhancing wetlands in the Hackensack Meadowlands.

Robert Perciasepe

Robert Perciasepe
Assistant Administrator for Water

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Date

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FAX TRANSMITTAL

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