



west virginia department of environmental protection

Division of Water and Waste Management
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Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
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April 7, 2016

Mr. Scott Hans
Chief, Regulatory Branch
United States Army Corps of Engineers
Pittsburgh District
1000 Liberty Avenue
Pittsburgh, PA 15222

Re: State 401 Water Quality Certification
(WQC) Denial, Public Notice No. 15-16,
High Tech Corridor Development, White
Oaks Phase II, unnamed tributaries of
Thomas Fork, Bridgeport, Harrison County,
West Virginia; WQC 150003

Dear Mr. Hans,

The West Virginia Department of Environmental Protection-Division of Water and Waste Management (WVDEP-DWWM), in conjunction with the West Virginia Division of Natural Resources - Wildlife Resources Section (WVDNR-WRS), has completed review of the above-referenced project.

The applicant submitted an application for Individual 401 Water Quality Certification on April 10, 2015, proposing to construct the White Oaks Phase II Business Park. The stated purpose of the project was to provide lots that accommodate businesses that require larger pad sizes (3+ acres) and/or interstate frontage. The site would consist of five non-contiguous pads, totaling 30.2 acres, which could be further subdivided based on market demand, and include the connection of White Oaks Business Park and State Route 131 near Bridgeport in Harrison County. Coordinates of the proposed project are 39° 20' 22.26"N, -80° 13' 44.19"W.

The project would permanently impact four unnamed tributaries of Thomas Fork totaling 2,595 linear feet (lf) of stream (1,115 lf intermittent and 1,480 lf ephemeral) and 0.189 acre of wetlands (0.106-acre open water wetland and 0.083-acre emergent wetlands). Impacts to streams and wetlands were evaluated utilizing the West Virginia Stream and Wetland Valuation Metric (SWVM) and resulted in 1,232 stream debits and 0.378 wetland debits.

Promoting a healthy environment.

A conceptual permittee responsible mitigation (PRM) was submitted with the 401 WQC application, along with two subsequent revisions, dated June 30, 2015 and July 22, 2015. To compensate for impacts associated with this project, the applicant proposed bank stabilization in areas where the banks portray characteristics of instability, re-establishment of riparian buffer, installation of in-stream habitat improvement structures, and wetland restoration/enhancement at two off-site locations, Morgan Sites 1 and 2. The original submission and 1st plan revision claimed mitigation credit for using the watershed approach and Level III Restoration at both sites. The latest version, dated July 22, 2015, claimed incorporation of the watershed approach, incentive Level II at Morgan Site 1 and incentive Level III at Morgan Site 2. The applicant predicted the proposed mitigation activities at Morgan Site 1 would generate 601 stream credits and 2.0 wetland credits and Morgan Site 2 would generate 656 stream credits and 0.18 wetland credits.

The following information was taken from Public Notice LRH-2011-WV SWVM v 2.0 issued by the Huntington District United States Army Corps of Engineers (USACE) dated February 1, 2011 to provide factors used in evaluating the proposed PRM for this project.

Level II restoration includes "Significant floodplain re-establishment, habitat improvement, and bank stability...and correlates with the Priority 2 extent of work." The Public Notice defines Priority 2 Restoration as "Stream channel restoration that involves re-establishment of a new floodplain at the existing level or higher but not at the original level...based upon NSD [natural stream design] methodologies."

Level III restoration includes "Intensive channel restoration, habitat restoration, and bank stability" and defines Level III restoration as "Stream channel restoration to a channel without an active floodplain but with a flood prone area" and "must involve full extent channel restoration including the establishment of the proper channel morphology (in accordance with NSD principles) to remain stable."

Enhancement activities may include "In-stream and/or streambank activities, but in total fall short of restoring one or more of the geomorphic variables: dimension, pattern, and profile" and provides six examples of enhancement activities (instream structures, habitat structures, bankfull bench creation, laying back banks, bioremediation techniques, and streambank planting).

"The difference between projects defined as Restoration versus Enhancement depends on whether or not changes are necessary to address the current channel's dimension, pattern, and profile. A proposal is categorized as enhancement typically when only two or less geomorphic variables are addressed to produce a stable channel or improve aquatic habitat. Enhancement projects typically focus on habitat improvement and isolated stability issues."

The WVDEP-DWWM and WVDNR-WRS completed a site visit on July 8, 2015 to evaluate the impact/mitigation sites and verify SWVM data submitted. Two enhancement measures (laying back banks to reduce bank erosion and streambank planting) were proposed at

both sites. These measures address dimension, not Natural Stream Design (NSD) methodology to address the three stream geomorphic variables of pattern, profile, and dimension. According to the WV SWVM v 2.0 Public Notice, the proposed activities would qualify as enhancement, not restoration. Therefore, claiming restoration incentives Levels II and III were not appropriate. In addition, watershed approach was indicated on the SWVM forms, however, a watershed approach was not incorporated into the mitigation project, and claiming the incentive was not appropriate. For these reasons, on July 8th, 2015 the agencies did not agree with the net mitigative lift predicted by the mitigation plan and advised the agent of this disagreement. Revised SWVM calculations for the proposed mitigation sites were requested and to-date, the requested information has not been received by the WVDEP-DWWM.

Due to the error in level of restoration used in the SWVM, lack of watershed approach, and lack of NSD, the WVDEP-DWWM believes that only approximately 50 percent of credits predicted by the mitigation plan may be produced by the end of the monitoring period. After a site visit, conference calls, and emails, the PRM plan was never revised to be acceptable. The monitoring plan was also unacceptable. Therefore, WVDEP-DWWM cannot approve the PRM plan.

The Pittsburgh District USACE issued a Section 404 permit for the project on February 24, 2016 and a letter of noncompliance on March 25, 2016. The letter of noncompliance was in response to the determination that the project was completed prior to issuance of the Section 404 permit and WV 401 WQC.

401 WQC-14-0012 was issued for an adjacent White Oaks project on March 31, 2014. The PRM included restoring 1090 lf of stream with a 150 lf riparian buffer. WVDEP and WVDNR visited the site July 8, 2015 and determined the restoration project is not performing as projected. The agent was informed that the site was not performing adequately, had been adversely effected by surface runoff, the structures had been inappropriately installed and was directed to reevaluate the site and recommend a corrective action plan as part of their monitoring report that was due by December 31, 2015. To date, this has not been submitted.


After consideration of the, to-date, unsuccessful mitigation for impacts in 2014 and the agencies resources expended on the current PRM, we believe it is unlikely the applicant will propose an acceptable PRM plan. Therefore, in the event, that the applicant applies for an after-the-fact 401 WQC for this unauthorized fill, we recommend the applicant purchase credits from a Corps approved mitigation bank or WVDEP In-Lieu Fee Program to mitigate for impacts. In addition, per 47CSR5A, Section 8.2, WVDEP will require 125% of the original calculated mitigation.

State 401 Certification, as required by the Clean Water Act, for Department of Army Permit #2007-231 is hereby denied without prejudice. Certification denial shall be effective fifteen (15) days after receipt unless appealed under Title 47, Series 5A, Section 7 of the Code of State Regulations, State Certification of Activities Requiring a Federal Permit. The appeal must

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be in writing and set forth the action complained of and the grounds upon which the appeal is based. It should be directed to: Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection, 601 57th Street SE, Charleston, West Virginia 25304: ATTENTION: 401 Certification Program.

Sincerely,

pvc 
Scott G. Mandirola
Director

SGM/njd

cc: Mr. Jack Keeley
High Tech Corridor Development
600 White Oaks Boulevard
Bridgeport, WV 26330
U.S. Environmental Protection Agency - Jessica Martinsen
U.S. Fish and Wildlife Service – John Schmidt
WVDNR-Wildlife Resources Section, Elkins – Danny Bennett