



South Carolina Environmental Law Project

Lawyers for the Wild Side of South Carolina

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a 501c3

non-profit organization

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Re: P/N #SAC-2009-01012; Berkeley/Charleston Tradeport

Dear Corps and DHEC Staff:

On behalf of the South Carolina Coastal Conservation League, please accept these comments concerning the above-referenced application of Stratford Land for a permit to fill 12.72 acres of freshwater wetlands and a perennial tributary (Miller Dam Branch) of the Cypress Swamp. This is delineated as 29,040 cubic yards of fill into 4 acres of wetlands and the Miller Dam Branch for road crossings and 61,654 cubic yards of fill into 8.72 acres of wetlands for “grading activity for land development.”

This is a substantial project with several large buildings envisioned in the plans--approximately 4.9 million square feet not including parking and roadway paving--and an extensive area will be paved or otherwise made impervious such

that stormwater, and concomitant pollutants and sediments, may flow and accumulate in nearby wetlands that are not filled. Thus, there is a great likelihood that this project will affect not only the wetlands that the applicant proposes to fill, but also those in the project's vicinity.

Those wetlands in this project's vicinity are not exclusively isolated, rather they are part of Cypress Swamp from which the headwaters of the Ashley River flow. Cypress Swamp's watershed occupies 139,162 acres of the Lower Coastal Plain of South Carolina. The Ashley River contains twenty-six (26) separate sites listed in the National Register of Historic Places with twenty-two (22) miles designated as a State Scenic River. The importance of Cypress Swamp and the Ashley River to the Greater Charleston area and this State is beyond question. Therefore, these resources must be safeguarded from any interruption or pollution as a result of the applicant's proposal.

We will address the proposed project in two parts. The first section addresses the direct wetlands impacts, filling 12.72 acres to facilitate the commercial development and construction of roadways that would occur if the project is approved in its current iteration. The second section addresses effects to the wetlands and the surrounding areas that will result due to the project's situation in the vicinity of a vast wetlands network, the size of the project and the amount of fill and grading.

I. The Proposed Project's Direct Wetlands Effects are Substantial, Problematic and Contrary to State and Federal law.

At the outset, we request that the Corps and DHEC explore all alternatives to filling wetlands to facilitate the construction of portions of the road and several buildings. The standard for approving the filling of wetlands is that there is no feasible alternative that would accomplish the project purpose. According to the Corps' 404(b)(1) guidelines, "the degradation or destruction

of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts" and "fill materials should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities[.]" 40 C.F.R. § 230.1(c)-(d).

The 404(b)(1) guidelines require that "no discharge or dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem," including "[a]ctivities which do not involve a discharge of dredged or fill material into the waters of the United States[.]" 40 C.F.R. 230.10(a).

The following passage is also applicable to this project:

[w]here the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), **practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise.** In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

40 C.F.R. § 230.10 (a)(3) (emphasis added). Wetlands are a special aquatic site under subpart E.

40 C.F.R. § 230.41. The aforementioned sections require the applicant to prove the impracticability of the alternatives that have no or fewer impacts to the wetlands proposed to be filled.

The applicant cannot clearly demonstrate the absence of other alternatives because there are several that involve no or fewer wetlands' impacts. For example, if building 5 is broken into two smaller units, wetland fill for the center portion of that building could be avoided. Similarly,

building 9 could be altered and broken into two units to avoid wetlands fill. If Building 7 is eliminated or reduced in size, a large amount of wetland fill will be avoided. Building 6 could be reduced slightly and that wetland impact would be avoided. The roadway and parking between buildings 8 and 9 could be re-designed to avoid wetland fill. Doubtless there are myriad other alternatives to the current project design that would lessen wetlands impacts. All of these options must be addressed by the applicant both because this project is not “water dependent” as that term is defined and particularly because there is a danger of extensive pollution throughout the broader aquatic system due to the size of Cypress Swamp’s watershed and the fact that those waters feed into the Ashley River.

Similarly, the South Carolina Coastal Zone Management Plan’s (“CMP”) policies reflect the national interest in wetlands and strongly encourage protection against unwarranted filling of freshwater wetlands. CMP III-7. The CMP provides that projects that propose to fill freshwater wetlands “will not be approved unless no feasible alternative exists or an overriding public interest can be demonstrated, and any substantial environmental impact can be minimized.” CMP III.C.3.XII.E. (1). The regulations echo this stance: “Certification will be denied if...there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses.” S.C. Code Ann. Regs. 61-101(F)(5). Proposed commercial development that proposes to fill wetlands must clear an additional hurdle because certification “**will be denied unless no feasible alternatives exist and the facility is water-dependent.**” CMP Policy III.C.3.IV.(1)(b)(emphasis added).

“Water-Dependent” is defined by the CMP as “a facility which can demonstrate that dependence on, use of, or access to, coastal waters is vital to the functioning of its primary activity.” CMP Glossary vi. 15. There is nothing in the proposed commercial design that could

lead one to conclude that any of the proposed development depends on the use of or access to coastal waters whatsoever--much less that the use of or access to coastal waters is "vital" to its functioning or has anything to do with its "primary" activities. This conclusion, alone, is sufficient to deny a consistency certification. There is also no question that other feasible alternatives exist that would minimize, if not eliminate, wetland impacts.

The CMP defines "feasible" or "feasibility" as including consideration of "environmental, economic, social, legal and technological suitability of the proposed activity and its alternatives." CMP Glossary v. 8. Moreover, "feasible alternatives" applies not only to "locations or sites" but also includes "methods of design or construction, and includes the no action alternative." *Id.* The alternatives listed above are feasible in that they involve different designs but still yield the overall same result, even if some square footage is slightly diminished. The overall design calls for approximately 4,900,000 square feet in area. There is little doubt that this design could be altered to allow for some sacrifice of square footage while meeting the project's overall purpose.

Additionally, the idea that the wetlands should be filled in order to facilitate the construction associated with the roadway should be re-evaluated. The CMP states that "[r]oad and highway routes shall be aligned to avoid salt, brackish and freshwater wetlands wherever feasible. Where they cannot be avoided, **bridging of these wetlands ... rather than filling to create roadbeds**, will be required wherever feasible." CMP III, II, II, B. 1), a), p. III-22 (emphasis added). Here, the roadway could be altered to avoid the wetlands impacts. Even if some small portion could not, bridging should be explored because it would result in fewer detrimental impacts than the filling of over 4 acres of wetlands. There is not an extensive area of roadway that would necessitate bridging so it would be feasible.

The proposed project is not water dependent. Therefore, filling wetlands to facilitate the project is forbidden by the CMP. Also, practicable alternatives are presumed to exist that do not involve filling wetlands. The applicant has not and cannot clearly demonstrate that there aren't practicable alternatives as we have listed several ways the design could be changed to avoid or minimize wetland fill. Finally, the roadway should be designed to avoid wetlands fill or, if this is impossible, bridging should be required.

II. The Proposed Project Endangers Wetlands in Close Proximity to the Project.

South Carolina has long recognized that wetlands “are valuable habitat for wildlife and plant species and serve as hydrologic buffers, providing for absorption of storm water runoff and aquifer recharge, [therefore] commercial development is discouraged in these areas.” *Id.* at III-40. The Clean Water Act contains similar language. 40 C.F.R. 230.41(b) (wetland fill may reduce “the system’s productivity” and “can degrade water quality by obstructing circulation patterns that flush large expanses of wetland systems” and may “change the wetland habitat for fish and wildlife”)

Regulation 61-101 states that Section 401 water quality certification “will be denied if (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired [.]” S.C. Code Ann. Regs. § 61-101 F. 5. (a).

Among the factors DHEC must both consider and address in reaching a determination about water quality impacts of this project are “(a) whether the activity is water dependent and the intended purpose of the activity; (b) whether there are feasible alternatives to the activity; (c) all potential water quality impacts of the project, **both direct and indirect, over the life of the project** including: (1) **impact on existing and classified water uses;** (2) **physical, chemical,**

and biological impacts, including cumulative impacts; (3) the effect on circulation patterns and water movement; (4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.” S.C. Code Ann. Regs. § 61-101 F. 3. (a)-(c). DHEC “shall condition the certification upon compliance with all measures necessary to minimize adverse effects, including stormwater management.” S.C. Code Ann. Regs. § 61-101 F. 4.

“Drainage plans and construction measures for commercial development should be designed to lessen or eliminate erosion, water quality degradation and other negative impacts on adjacent waters and wetlands—for example, through buffering and filtering runoff water, use of naturally vegetated and permeable surfaces rather than paving, and grass-ditching and surface drainage rather than direct storm water discharges.” *Id.* at p. III-40.

Moreover, “[c]are should be taken in the design of roads to **minimize direct drainage of roadway runoff into adjacent water bodies.** Inclusion of techniques for filtering runoff water, such as grass ditching or vegetative buffers must be considered.” CMP III, II.B.1), d), p. III-22 (emphasis added). The authors of the CMP recognize that “[c]hanges in the natural drainage pattern may increase flooding hazards, and storm water runoff may become a problem. Water quality may also be affected due to heavy loads of toxic pollutants and nutrients from the road surface and adjacent embankments if care is not taken in design of roadways to handle storm water runoff.” *Id.* at p. III-21.

Even if this project is altered to address the wetland fill, there remains a great likelihood that “indirect” impacts to the wetlands in the vicinity will continue throughout the “life of the project” which, commenter presumes, spans many decades, at the very least. With close to five million square feet of space being covered and, with the extreme grading to elevate these buildings

and roadway, there is no question that there will be excessive stormwater, sediment and pollutant runoff. The cumulative effect of this runoff jeopardizes Cypress Swamp and the Ashley River.

The Applicant is aware of this likelihood or otherwise it would not have included so many retention ponds stationed around the edges of the project. This reflects knowledge of the danger, but these designs do not alleviate it. Retention ponds have limits, of course, and it is understood that they are not wholly effective in preventing stormwater and sediment runoff--especially considering the grade of the area. Furthermore, there are several areas, such as the north portion of building 7, the western part of building 5, and the northern areas of buildings 4 and 11, where runoff would not flow into the waiting but inadequate retention ponds. Instead, the stormwater would flow down into the nearby wetlands.

One must then consider the proposed buffers along the edges of the project. The proposed buffers are insufficient to preclude extensive erosion, water quality degradation and safeguard Cypress Swamp and the Ashley River from sediment and pollutants in stormwater runoff given the height from which the water will flow and the extensive impermeable surfaces from which it will collect and run. This element of the design should be re-evaluated and the applicant must demonstrate that the surrounding wetlands are not placed at risk from the cumulative, indirect runoff both immediately and over the life of the project.

For the reasons set forth above, we recommend that this project be modified to minimize the impacts not only to the wetlands that are proposed to be filled but also, and more importantly, to ensure that the larger wetland system that the commercial development is situated so closely to be protected from pollutants attendant to its construction including the use of the roadways as required by federal and state law and policies. This project encroaches on the border of Cypress Swamp. Cypress Swamp constitutes an extensive watershed and if also births the Ashley River.

Perils abound when proposing to build in an area directly connected to valuable resources. This connection warrants the application of additional scrutiny to this project.

Thank you for your attention to and consideration of these issues and we request notification of any action or decision reached by your respective organizations that is related to this project. Notification to the undersigned, on behalf of CCL, via email at ben@scelp.org is preferred. Otherwise, please notify the undersigned, on behalf of CCL, via regular mail at the address provided on the first page of this letter.

Cordially,

A handwritten signature in blue ink, appearing to read "Benjamin D. Cunningham", with a long horizontal flourish extending to the right.

Benjamin D. Cunningham

cc: Charles Hightower, SCDHEC-BOW