

(OW-2-FRL-3239-8)

Proposed Determination To Prohibit or Restrict the Specification of an Area for Use as a Disposal Site**AGENCY:** Environmental Protection Agency.**ACTION:** Notice.

SUMMARY: Section 404(c) of the Clean Water Act authorizes the Environmental Protection Agency (EPA) to prohibit or restrict the discharge of dredged or fill material at defined sites in waters of the United States (including wetlands) if EPA determines, after notice and opportunity for hearing, that use of the site for discharge of dredged or fill material would have an unacceptable adverse effect on various resources, including wildlife. EPA's Regional Administrator, Region II, has reason to believe that the unauthorized discharge of fill and the proposed discharge of fill into wetlands by the Russo Development Corporation—71 Hudson Street, Hackensack, New Jersey—within the Hackensack Meadowlands in Carlstadt, New Jersey for the purpose of building warehouses may have unacceptable adverse effects on wildlife. Accordingly, this notice announces the Regional Administrator's proposed determination to prohibit or restrict the discharge of dredged or fill material at the site and seeks public comment on his proposal.

Public Hearing

EPA will schedule a public hearing if there is a significant degree of public interest, or if Russo Development Corp., as landowner and permit applicant, requests one. If a public hearing is scheduled, public notice of a hearing will be issued and will contain: (1) Reference to this public notice of the proposed determination, (2) the date, time, and place of the hearing and, (3) a brief description of the nature and purpose of the hearing including the rules and procedures.

The public hearing would be scheduled no earlier than 21 days from the date of this notice of proposed determination. Requests for a public hearing should be submitted within 15 days of the date of this notice.

DATES: All comments on this proposed determination to prohibit or restrict the use of the Russo site for the discharge of dredged or fill material should be submitted to the person listed under **ADDRESSES** within 60 days of the date of this notice.

ADDRESSES: Comments should be sent to Mr. Mario Del Vicario, Chief, Marine and Wetlands Protection Branch, U.S.

Environmental Protection Agency
Region II, 26 Federal Plaza, New York,
NY 10278.

FOR FURTHER INFORMATION CONTACT:
Mr. Mario Del Vicario, Chief, Marine
and Wetlands Protection Branch, U.S.
EPA Region II, 26 Federal Plaza, New
York, NY 10278, (212) 264-5170.

SUPPLEMENTARY INFORMATION:**I. Description of the Section 404(c) Process**

The Clean Water Act, 33 U.S.C. 1251 *et seq.*, prohibits the discharge of pollutants, including dredged and fill material, into the waters of the United States (including wetlands) except in compliance with, among other things, section 404, 33 U.S.C. 1344. Section 404 authorizes the Secretary of Army, acting through the Chief of Engineers, to authorize the discharge of dredged or fill material at specified sites through the application of environmental guidelines developed by EPA in conjunction with the Secretary or where warranted by the economics of anchorage and navigation, except as provided in section 404(c). Section 404(c) authorizes the Administrator of EPA, after notice and opportunity for hearing, to prohibit or restrict the use of a defined site for disposal of dredged or fill material where he determines that such use would have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas.

Regulations published in 40 CFR Part 231 establish the procedures to be followed by EPA in exercising its section 404(c) authority. Whenever the Regional Administrator has reason to believe that use of a site may have an unacceptable adverse effect on the pertinent resources, he may begin the process by notifying the Corps of Engineers and the applicant that he intends to issue a proposed determination under section 404(c). Unless the applicant or the Corps persuades the Regional Administrator that there will not be unacceptable adverse impacts or identifies corrective measures satisfactory to the Regional Administrator within 15 days, the Regional Administrator publishes a notice in the *Federal Register* of his proposed determination, soliciting public comment and offering an opportunity for a public hearing. Today's notice represents this step in the process.

Following the public hearing and the close of the comment period, the Regional Administrator decides whether to withdraw his proposed determination

or prepare a recommended determination. If he prepares a recommended determination, he then forwards it and the complete administrative record compiled in the Region to the Assistant Administrator for Water at EPA's headquarters for a final decision affirming, modifying, or rescinding the recommended determination. The Corps of Engineers and the applicant are provided with another opportunity for consultation before this final decision is made. It is important to note that this section 404(c) action is being initiated in response to an after-the-fact permit action by the Corps pursuant to 33 CFR 326.3(e) and, therefore, primarily involves existing unauthorized fill. EPA may follow up this section 404(c) action with an enforcement action with respect to the unauthorized fill.

II. Description of the Site**A. Russo Site**

Prior to filling in 1981, the Russo site was characterized by 57.5 acres of palustrine emergent marsh, dominated by common reed (*Phragmites australis*) and blue joint grass (*Calamagrostis canadensis*). Groupings of aspen (*Populus tremuloides*) and ephemeral ponds were interspersed within the tract. The site is situated within a larger palustrine emergent marsh along the Hackensack River commonly referred to as the Empire tract of the Hackensack Meadowlands. This tract was cut off from tidal river flow by dikes placed in the 1920's. The Russo site receives upland drainage and storm water runoff from adjacent areas and transfers this drainage via ditches dredged on site in the 1920's to Moonachie Creek which drains to the Hackensack River. Moonachie Creek has had a tide gate at its confluence with the Hackensack River since the 1920's.

Historically the site has impounded large areas of water. For example, during construction of the western spur of the New Jersey Turnpike from 1969 to 1971 ditches within the Empire Tract were filled with fill material and drainage was blocked. The Empire tract including the Russo site became an impoundment area with standing water. When turnpike construction was finished in 1971 the drainage ditches were re-dredged. No further maintenance of these ditches or those on the Russo site has occurred since then. In addition, severe storm events in conjunction with the inadequate drainage provided by unmaintained ditches on the Russo site have resulted in storm water retention and

impoundment related to storm water back-up upstream of the Moonachie Creek tide gate.

Between 1981 and 1985 the Russo Development Corporation discharged 52.5 acres of fill material, shot rock (a fill mixture of clean dirt and rock) from excavation sites in New York, on the site without Department of the Army authorization. Six warehouses were constructed on 44 of the 52.5 acres of fill and are currently tenanted; 8.5 acres of fill remain undeveloped. The remaining five acres of wetland on site which did not receive fill have developed into a freshwater pond edged by cattail (*Typha* sp.) and common reed. The Russo Development Corporation has sought after-the-fact Department of the Army authorization to maintain the 52.5 acres of fill and authorization to discharge fill material into the remaining 5 wetland acres for the purpose of constructing more warehouses. The Russo site was/ and remains wetlands and waters of the United States pursuant to 33 CFR 328.3 and 40 CFR 230.3. The site therefore is subject to regulations under section 404 of the Clean Water Act and a Department of the Army 404 permit is required to discharge fill onto the site. This permit issuance must be in compliance with the section 404(b)(1) Guidelines.

Currently, muskrat, waterfowl and a variety of rodents have been observed on the remaining five wetland acres on site. Historical accounts of wildlife use, prior to or at the time of discharge of 52.5 acres of fill, list grey fox (occasional), rabbit, pheasant, waterfowl, woodcock, killdeer and, marsh-associated songbirds. In addition, waterfowl utilization was high when the Russo site impounded large areas of water. Prior to discharge of fill the site functioned in sediment and toxicant retention, contributing to water purification. After discharge of fill, 52.5 acres of the site was transformed from a reed, blue-joint grass and interspersed emergent vegetative community into an upland industrial building complex. The discharge of fill resulted in a higher site elevation, a complete change in substrate and hydrology with the consequent loss of occasional open water impoundment, the loss of ephemeral ponds, the loss of wetland vegetation and animal communities associated with wetland habitat, and the loss of sediment and toxicant retention capacities.

B. The Hackensack Meadowlands District

The Russo site is part of the Hackensack Meadowlands ecosystem. The 7,000-8,000 acres of wetlands

contained therein provide habitat for many species of waterfowl, wading birds, shorebirds, passerines, raptors, and various mammals, reptiles and amphibians:

While the Meadowlands perform critical environmental functions, they are under intense development pressure. In fact, the Hackensack Meadowlands Development Commission (HMDC) reports that the wetlands acreage in the Meadowlands District decreased from 10,521 to 7,800 acres between 1972 and 1984. The HMDC Master Zoning Plan provides for development of approximately an additional 2,200 acres of wetlands.

Because of the concern that development in the wetlands and flood-plain areas of the Meadowlands would conflict with section 404 of the Clean Water Act, the Fish and Wildlife Coordination Act of 1958, and other federal policies, EPA and the U.S. Fish and Wildlife Service (FWS) presented recommendations to the Corps of Engineers in 1981 concerning potential permit reviews. In particular, EPA and FWS divided the Meadowlands into marginal and critical wetlands categories. The Agencies anticipated that permits could be granted for "marginal wetlands", provided adequate compensation and other appropriate permit conditions were imposed. The Russo site was designated in this category. For "critical, high quality, and extremely productive wetlands," EPA and FWS indicated that they would be likely to recommend permit denial. If a permit were issued, compensation of at least two wetland acres for every acre lost would be necessary.

While the 1981 policy reflected an initial effort to distinguish among wetlands, it was based on a preliminary and limited data base. Consequently, EPA in late 1985 initiated an Advanced Identification study within the Hackensack Meadowlands with the support of other federal and state agencies. The study is evaluating wetland values, as well as impacts of the intense development pressures to these wetlands, in much greater detail. It is EPA's expectation that the results of the study will serve as a template for future section 404 permit decisions in the Meadowlands. During this time frame, HMDC will also be revising its Master Plan for a number of reasons, including the fact that the Master Plan has not been subject to review for consistency with the National Environmental Policy Act and section 404 of the Clean Water Act.

III. Proceedings to Date

For the reasons stated earlier, a Department of the Army permit is required to discharge fill onto the Russo site. The Russo Development Corporation has sought an after-the-fact Department of the Army permit for the existing and proposed work previously described.

The Corps of Engineers issued Public Notice 12360-85690-J1 for this application on August 28, 1985 proposing to maintain the 52.5 acres of unauthorized fill, to authorize 5 further acres of fill for the purpose of constructing warehouses and to require mitigation for the entire 57.5 acres. The Corps has approved Russo Development Corp.'s mitigation proposal which includes enhancement of existing wetlands within the Hackensack Meadowlands to provide a 0.5:1 (enhance:lost) value-for-value compensation for the wetlands lost and a deed restriction securing permanent preservation of 23 wetland acres owned by the applicant in Troy Meadows of the Passaic River basin (i.e., outside of the Hackensack River basin).

The Corps advised EPA of its intention to issue the permit as requested by the Russo Development Corporation with the mitigation discussed above. EPA Region II reiterated previously expressed objections to the project and requested 2:1 complete and appropriate mitigation to replace the functions and values provided by all 57.5 acres. EPA did not seek removal of the warehouses on the 44 acres that had been illegally filled, since restoration was unlikely to return the site to its previous wetland state.

EPA sought to resolve its concerns through procedures established by the federal agencies under section 404(q) of the Act (see the 404(q) Memorandum of Agreement, November 1985). Section 404(q) directs the Corps and EPA to enter into an agreement to coordinate and expedite permit decision making. In October 1986 correspondence, the Regional Administrator requested notification of the Corps of Engineers permit decision on the Russo application in accordance with these procedures. Accordingly, on December 22, 1986 the Corps submitted a preliminary Notice of Intent to Issue (NII) a permit to EPA and other federal agencies. In response (December 24, 1986), the Regional Administrator requested a meeting with the Division Engineer and suspension of further actions on the permit application. Following their January, 1987 meeting, the New York District Corps reexamined the preliminary NII

and submitted a final NII maintaining the Corps decision to issue a permit without the mitigation EPA considered necessary. In April 20, 1987 correspondence the Assistant Administrator for Water, requested that the Assistant Secretary of the Army (Civil Works) refer the New York District Corps decision to a higher level for re-evaluation. The Assistant Secretary denied EPA's request.

Having exhausted these procedures for resolution of EPA's concerns, the Regional Administrator initiated section 404(c) procedures through which the EPA Administrator may exercise a veto over the specification by the Corps of Engineers of a site for the discharge of dredged or fill material. The Regional Administrator notified the District Engineer and the Russo Development Corp. (May 26, 1987) of his intent to issue a Public Notice on his proposed section 404(c) determination and notified each that there would be a 15 day consultation period to resolve his concern regarding the significant adverse effects. The Corps and the Russo Development Corp. responded (May 27, 1987 and June 10, 1987 respectively) concluding that the project did not pose any unacceptable adverse effects. The consultation period closed on June 11, 1987. Following a review of responses received from the Corps and the applicant, the Regional Administrator concluded that no new information had been provided and, therefore, he was not persuaded that there would be no unacceptable adverse effects from the existing and proposed fill.

IV. Basis for Proposed Determination

A. Section 404(c) Criteria

The Clean Water Act requires that exercise of the final section 404(c) authority be based on a determination of "unacceptable adverse effect" on municipal water supplies, shellfish beds, fisheries, wildlife or recreational areas. The regulations define unacceptable adverse effect:

Impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas. In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the section 404(b)(1) Guidelines (40 CFR Part 230). (40 CFR 231.2 (e))

The preamble to the 404(c) regulations explains that one of the basic functions of section 404(c) is to police the application of the section 404(b)(1) Guidelines.

Those portions of the guidelines relating to significant degradation of waters of the U.S. (40 CFR 230.10(c)), to minimizing adverse impacts to aquatic resources (40 CFR 230.10(d)) and to the determination of cumulative effects on the aquatic ecosystem (40 CFR 230.11(g)) are of particular importance to evaluating the unacceptability of environmental impacts in this case. Compliance with the Guidelines requires that no discharge of dredged or fill material shall be permitted if it causes or contributes to significant degradation of waters of the U.S. Effects contributing to significant degradation include but are not limited to the loss of wildlife habitat or the loss of a wetland's capacity to assimilate nutrients. Compliance with the guidelines requires that no discharge be permitted unless appropriate and practicable steps have been taken to minimize adverse impacts of the discharge on the aquatic ecosystem. In addition, the guidelines state that the permitting authority should collect and solicit information concerning cumulative impacts and document and consider this information during the decision-making process. Thus, it is appropriate under section 404(c) to take into account whether the project has or will result in significant degradation to aquatic resources, particularly wildlife habitat, or whether the proposed mitigation is adequate to offset the impacts of the Russo project.

B. Impacts to Filling the Russo Site

As discussed previously, the existing and proposed fill has/will replace the wetland soils, vegetation and hydrology with impervious surface resulting in a loss of the site's sediment and toxicant retention capabilities. In addition, the existing and proposed fill is and will be a source of pollutants to adjacent aquatic areas during rainfall events.

Beyond these general but very significant environmental impacts, EPA believes wildlife has and will be significantly affected by the fill at the Russo site. Historical accounts of wildlife use prior to or at the time discharge of the fill list wetland-associated songbirds and waterfowl, woodcock, killdeer, pheasant, rabbit and, occasional grey fox. Loss of 52.5 acres of habitat is likely to have disturbed at least the marsh-related species, particularly in view of development north and west of the project site also encroaching on wildlife habitat. FWS and the Corps have characterized the 52.5 acres of the Russo site as low to moderate habitat prior to its being filled. FWS has explained that this rating is based upon the lack of diversity of wildlife habitat because of

the monotypic vegetative cover. In addition, FWS noted, and EPA agrees, that the site provided the wildlife habitat functions of a Meadowlands wetland and supported wetland-associated wildlife even though the habitat was monotypic. Moreover, FWS considers the five acres Russo seeks to fill to be a good quality wetland.

The five remaining acres which have not yet been filled consist of a 3 acre pond and 2 acres of palustrine emergent marsh with phragmites, cattail, dwarf spikerush, and juncus spp. This freshwater pond with associated emergent vegetation contributes to the diversity of wetlands within the Meadowlands District and provides quality habitat of food and cover to wetland-associated wildlife, especially waterfowl, wading birds, and muskrat. Loss of the additional five acres can therefore be expected to adversely affect wetland associated wildlife.

In addition to the direct loss of the Russo site, there is reason to conclude that there may be more far-reaching repercussions on wildlife values. Because of the extensive past losses of wetlands in the Meadowlands, EPA believes there is cause to conclude that the past and future fill of the Russo site is likely to contribute to cumulative adverse impacts on wildlife. As mentioned above, gradual and continual wetland development has diminished the Meadowlands District's wetlands by 2,721 acres (10,521 to 7,800) and, the Hackensack Meadowlands Development Commission's Master Plan provides for the development of an approximate additional 2,200 acres. The U.S. Fish and Wildlife Service has designated wetland areas within the eastern flyway, a category into which the Hackensack Meadowlands falls, as priority areas in their Waterfowl Management Plan (May 1986). The Service reports that the degradation of migration and wintering habitat have contributed to long-term downward trends in some duck populations. In those periods when the Russo site impounded large areas of water, waterfowl were numerous on the site. In addition, population declines would be expected for those less mobile wetland-associated species such as muskrat and other rodents, reptiles and amphibians. Ecological theory suggests that disturbed animal populations do not necessarily simply shift into remaining habitat. Depending on the habitat's carrying capacity disturbed populations may perish or displace other organisms which may perish.

There is not a great deal of existing information in the record identifying the

specific values and functions provided by the formerly existing wetlands. For that reason EPA strongly encourages the public to submit any relevant information. EPA believes, though, that the Meadowlands environment cannot tolerate the loss of the Russo site unless the ecological values the site served/ serves are compensated for.

In order for filling of the site to be consistent with the section 404(b)(1) Guidelines, EPA believes adequate mitigation must be provided to assure replacement of the wildlife values and functions, thereby stemming the net loss of wildlife habitat in the Meadowlands.¹ Wetland enhancement and creation to provide complete compensation for wetland values lost would constitute appropriate mitigation in this case.

It appears, however, that adequate mitigation will not be provided. Russo has offered only to compensate on a 0.5:1 value-for-value basis by enhancing existing wetlands within the Meadowlands District and to place a deed restriction on 23 acres of wetlands it owns outside the District.

The information provided to date on the proposed mitigation does not identify a particular site and is too limited to evaluate the anticipated ecological gains and the probability of success. Thus, contrary to EPA's and FWS's consistent comments that 1:1 to 2:1 value-for-value compensation is necessary to prevent net loss of wetland values and functions, the proposed mitigation is unlikely to accomplish that goal. Moreover, the deed restriction affords only questionable environmental benefit since the wetland site would already be protected from significant degradation under section 404 in the event that the discharge of fill were proposed.

¹ Since EPA's first response to the Corp's Public Notice of Russo's application for a permit in September, 1985, EPA has consistently stated that mitigation to replace wetland functions and values is required. However, in the fall of 1986, EPA questioned not only the adequacy of Russo's mitigation proposal but also whether there were not, in fact, practicable alternatives to using the Russo site for constructing warehouses. EPA has taken the position that mitigation cannot be used to compensate for avoidable losses; i.e., where there are practicable alternatives to filling a wetland site. Consequently, EPA suggested that (1) mitigation providing value-for-value replacement be required for the 44 acres that have been filled and contain warehouses, (2) restoration be required for the 8.5 acres that have been filled but contain no warehouses and, (3) that a permit be denied to fill the remaining 5 wetland acres. However, assessing the existence of practicable alternatives in the context of an after-the-fact permit raises particularly difficult analytical issues that go far beyond those raised in this particular permit application. Consequently, I have decided not to pursue the practicable alternatives issues in this section 404(c) action.

EPA consequently has concluded that the loss of 57.5 acres of wetlands, taken in the context of the cumulative loss of wetland acreage occurring in the Hackensack Meadowlands, could result in significant loss and damage to wildlife habitat areas. Unless and until the Russo Corporation agrees to provide adequate mitigation as described above, it is EPA's view that an after-the-fact permit for 52.5 acres and a pre-discharge permit for five acres could result in unacceptable adverse impacts to wildlife within the meaning of section 404(c) and 40 CFR 231.2(e). Accordingly, EPA proposes to prohibit the use of the Russo site for discharge of fill material under the conditions reflected in the permit the Corps proposes to issue. Thus, the fill of the five remaining acres of wetlands would be prohibited. In addition, EPA may initiate enforcement action with respect to the unauthorized fill of the 52.5 acres in order to achieve appropriate restoration of or mitigation for the filled area.

V. Solicitation of Comments

EPA would like to obtain comments on: (1) Whether or not the impacts of such discharge would represent an unacceptable adverse effect as described in section 404(c) of the Clean Water Act; (2) the vegetative and hydrologic characteristics of the subject site and observations of or information concerning wildlife on the site prior to and after the placement of fill material; (3) observations of or information concerning wildlife in wetlands similar to the subject site and in the Hackensack Meadowlands in general; (4) what corrective action, if any, could be taken to reduce the adverse impacts of the discharge; (5) the need for a public hearing and; (6) whether the Regional Administrator should recommend to the Assistant Administrator for Water the determination to prohibit or restrict the discharge of dredged or fill material on the site. Comments should be submitted within 60 days of the date of publication of this Federal Register notice to the person listed above under ADDRESSES. All comments received will be fully considered by the Regional Administrator in making his decision to prepare a recommended determination to prohibit or restrict filling of the Russo site or to withdraw this proposed determination.

Christopher J. Daggett,
Regional Administrator.
[FR Doc. 87-17187 Filed 8-6-87; 8:45 am]
BILLING CODE 6560-50-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

Agency Information Collection Submitted to the Office of Management and Budget for Clearance

The Federal Emergency Management Agency (FEMA) has submitted to the Office of Management and Budget the following information collection package for clearance in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Type: Extension of 3067-0142
Title: Hazard Identification, Capability Assessment, and Multi-Year Development Plan (HICA/MYDP) for Local Governments

Abstract: FEMA requires consistent information on the status of State and local emergency management and the impact of FEMA funds on improving capability. HICA/MYDP data has established a nationwide baseline on State and local hazards, current capability, and resource requirements. Data is being used to set program priorities, prepare the FEMA budget, allocate funds, and provide reports to Congress.

Type of Respondents: State or local governments
Number of Respondents: 3,410
Burden Hours: 55,910
Frequency of Recordkeeping or Reporting: Annually

Copies of the above information collection request and supporting documentation can be obtained by calling or writing the FEMA Clearance Officer, Linda Shiley, (202) 646-2624, 500 C Street, SW., Washington, DC 20472.

Comments should be directed to Francine Picoult, (202) 395-7231, Office of Management and Budget, 3235 NEOB, Washington, DC 20503 within two weeks of this notice.

Wesley C. Moore,
Director, Office of Administrative Support.
[FR Doc. 87-17953 Filed 8-6-87; 8:45 am]
BILLING CODE 6718-01-M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties