

Colonel Robert H. Reardon, Jr.
U.S. Army Corps of Engineers
Norfolk District
803 Front Street
Norfolk, Virginia 23510-1096

Attn: Steve Martin
Regulatory Branch

Re: Biological Opinion for Baymark
Construction/Castleton Subdivision,
Permit Application No. 96-5766-18,
Virginia Beach, Virginia

Dear Colonel Reardon:

The U.S. Fish and Wildlife Service has reviewed the Department of the Army permit application, 96-5766-18, submitted by Baymark Construction Corporation, to construct a road and fill lots associated with the development of the proposed Castleton subdivision in Virginia Beach, Virginia. Your April 24, 1997 request for formal consultation was received on April 30, 1997. This document represents the Service's biological opinion on the effects of that action on the Dismal Swamp southeastern shrew (*Sorex longirostris fisheri*), federally listed threatened, in accordance with Section 7 of the Endangered Species Act of 1973, as amended, (16 U.S.C. 1531 et seq.). A complete administrative record of this consultation is on file in this office.

I. CONSULTATION HISTORY

Provided in Appendix A.

II. BIOLOGICAL OPINION

DESCRIPTION OF PROPOSED ACTION

The applicant intends to develop a residential subdivision on a 199-acre forested parcel located south of London Bridge Road in Virginia Beach, Virginia (Figure 1). The subdivision will include as many as 408 single-family homes and 167 condominium units. The proposed development will entail fill of 0.44 acres of headwater and isolated wetlands for lot development and portions of three roadways. The fill of 0.31 acres of wetlands associated with development of 7 lots and portions of 2 roadways may be authorized under Nationwide Permit 26. The fill of 0.13 acres of wetlands for a road crossing may be authorized under Nationwide Permit 14. The proposed road crossings and lot fills will take 24 months to complete.

The applicant is proposing to compensate for unavoidable wetland impacts associated with this project through preservation of wetlands and uplands on-site. The proposed compensation consists of preservation of 26.87 acres of uplands and wetlands. This includes 17.17 acres of forested wetlands and 9.7 acres of forested uplands. Most of this area is located along a tributary to West Neck Creek.

RANGEWIDE STATUS OF THE SPECIES

This information on the Dismal Swamp southeastern shrew was recently provided to the U.S. Army Corps of Engineers in a biological opinion dated May 30, 1997.

ENVIRONMENTAL BASELINE

As defined in 50 CFR 402.02 "action" means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies in the United States or upon the high seas. The "action area" is defined as all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action. The direct and indirect effects of the actions and activities resulting from the federal action must be considered in conjunction with the effects of other past and present federal, state, or private activities, as well as the cumulative effects of reasonably certain future state or private activities within the action area. The action area for this biological opinion has been determined by the Service to be the entire Castleton subdivision.

Status of the Species - In 1995, Rose (1995) conducted a Dismal Swamp southeastern shrew survey at the proposed development site. He collected two individual *S. l. fisheri*. Rose estimated that the density of *S. l. fisheri* was 1 to 4 individuals per hectare.

Effects of the Action - Direct impacts to the shrew associated with this project include the potential to crush shrews with vehicles and heavy equipment, resulting in death or injury, while clearing vegetation for the lots and roads, constructing the roads, and preparing the lots for construction. The shrew will also be directly affected by the permanent loss of 0.44 acres of habitat. While there is likely to be a loss of individual shrews, because there will only be a minor amount of permanent habitat loss and no habitat fragmentation is expected, this loss should not affect the genetic viability or range of the species.

Cumulative Effects - Cumulative effects include the effects of future State, local, or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to Section 7 of the ESA. We are not aware of any future State, local, or private actions planned for this site.

CONCLUSION

After reviewing the current status of the Dismal Swamp southeastern shrew throughout its range and in the action area, the environmental baseline for the action area, the effects of the proposed clearing and construction, and the cumulative effects, it is the Service's biological opinion that the construction of the subdivision, as proposed, is not likely to jeopardize the continued existence of the Dismal Swamp southeastern shrew. No critical habitat has been designated for this species, therefore, none will be affected.

III. INCIDENTAL TAKE STATEMENT

Sections 4(d) and 9 of the ESA, as amended, prohibit taking (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct) of listed species of fish or wildlife without a special exemption. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns such as breeding, feeding, or sheltering. Harass is defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns, which include, but are not limited to, breeding, feeding, or sheltering. Incidental take is any take of listed animal species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by the federal agency or applicant. Under the terms of Section 7(b)(4) and Section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered a prohibited taking provided that such taking is in compliance with the terms and conditions of this incidental take statement.

AMOUNT OR EXTENT OF TAKE

As discussed, this site contains 1 to 4 shrews per hectare. Therefore, the Service anticipates that no more than one Dismal Swamp southeastern shrew will be taken during vegetation clearing for and construction of the proposed project. The incidental take is expected to be in the form of direct killing, harassment, or harm.

REASONABLE AND PRUDENT MEASURES

The measures described below are nondiscretionary, and must be implemented by the Corps so that

they become binding conditions of any permit issued to the applicant in order for the exemption in Section 7(o)(2) to apply. The Corps has a continuing duty to regulate the activity covered by this incidental take statement. If the Corps (1) fails to require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit, and/or (2) fails to retain oversight to ensure compliance with these terms and conditions, the protective coverage of Section 7(o)(2) may lapse. The Service considers the following reasonable and prudent measures to be necessary and appropriate to minimize take of the Dismal Swamp southeastern shrew.

- o Vegetation clearing should be minimized to reduce soil and leaf litter disturbance.
- o Impacts to wetlands should be minimized.
- o The use of pesticides and herbicides should be avoided.

TERMS AND CONDITIONS

In order to be exempt from the prohibitions of Section 9 of the ESA, the Corps must comply with the following terms and conditions, which implement the reasonable and prudent measures described above. Monitoring is not required for this project because only a small number of Dismal Swamp southeastern shrews are likely to be affected by the proposed project and the anticipated take is minimal. These terms and conditions are nondiscretionary.

1. The following measures will be taken during clearing and construction activities associated with the project:
 - a. No vehicle or equipment use or placement or stockpiling of materials will occur in wetlands outside of the construction path.
 - b. No ground disturbance or vegetation clearing will occur in wetlands outside of the construction path.
 - c. No use of broad scale or aerial herbicide or pesticide applications.
 - d. All work in wetlands will be done on mats where practicable, preferably during the driest period of the year (May-October).
2. The applicant is required to notify the Service before initiation of construction and upon completion of the project at the address given below. All additional information to be sent to the Service should be sent to the following address:

Virginia Field Office

U.S. Fish and Wildlife Service
P.O. Box 99
6669 Short Lane
Gloucester, VA 23061
Phone (804) 693-6694
Fax (804) 693-9032

3. Care must be taken in handling any dead specimens of proposed or listed species that are found in the project area to preserve biological material in the best possible state. In conjunction with the preservation of any dead specimens, the finder has the responsibility to ensure that evidence intrinsic to determining the cause of death of the specimen is not unnecessarily disturbed. The finding of dead specimens does not imply enforcement proceedings pursuant to the ESA. The reporting of dead specimens is required to enable the Service to determine if take is reached or exceeded and to ensure that the terms and conditions are appropriate and effective. Upon locating a dead specimen, notify the Service at the address provided.

V. REINITIATION - CLOSING STATEMENT

This concludes formal consultation on the action outlined in the Corps' request. As provided in 50 CFR 402.16, reinitiation of formal consultation is required where discretionary federal agency involvement or control over the action has been retained and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

If this opinion does not contain national security or confidential business information, the Service will provide copies to the appropriate state natural resource agencies ten business days after the date of this opinion.

The Service appreciates this opportunity to work with the Corps in fulfilling our mutual responsibilities under the ESA. Please contact Cindy Schulz of this office at (804) 693-6694, extension 127, if you require additional information.

Sincerely,

Colonel Robert H. Reardon, Jr.

6

Karen L. Mayne
Supervisor
Virginia Field Office

Enclosure

LITERATURE CITED

Rose, R.K. 1995. Final report of the field study to determine the presence of the federally threatened Dismal Swamp southeastern shrew (*Sorex longirostris fisheri*) on the property of Southeastern Virginia et al. and the property known as Fountaingate, located near London Bridge Road between Lake Placid Estates and the Piney Ridge subdivision in Virginia Beach, Virginia. Submitted to Thomas A. Stierhoff, Stokes Environmental Associates, Ltd., Norfolk, VA.

Appendix A

CONSULTATION HISTORY

- 01-12-95 The Service received a request from the Corps regarding information on federally listed species and critical habitat within the project area.
- 01-20-95 The Service recommended to the Corps that a survey be conducted for the Dismal Swamp southeastern shrew and the Virginia least trillium (*Trillium pusillum* var. *virginianum*) at the project site.
- 07-03-95 The Service received a copy of the Dismal Swamp southeastern shrew survey results.
- 09-27-95 The Service participated in a site visit with the Corps and the project consultant.
- 12-01-95 The Service indicated to the Corps via telephone that any work in wetlands where the shrew had been documented would require formal consultation.
- 03-21-97 The Service received a Pre-Construction Notification from the Corps for this project.
- 04-11-97 The Service provided the Corps with concurrence on the need for formal consultation via facsimile.
- 04-30-97 The Service received the Corps' request to initiate formal consultation.
- 05-29-97 The Service received the Corps' request to receive a draft of the biological opinion.
- 06-17-97 The Service provided the Corps' with a draft of the biological opinion.
- 06-19-97 The Corps indicated to the Service via telephone that they did not have any comments on the draft biological opinion.