

Colonel Allan B. Carroll  
U.S. Army Corps of Engineers  
Norfolk District  
803 Front Street  
Norfolk, Virginia 23510-1096

Attn: Robert Berg  
Regulatory Branch

Re: Biological Opinion for Gentry's Used  
Auto Parts, Permit Application No. 98-  
5350-29, Suffolk, Virginia

Dear Colonel Carroll:

The U.S. Fish and Wildlife Service has reviewed the Department of the Army permit application, 98-5350-29, submitted by Gentry's Used Auto Parts, requesting an after-the-fact permit for the unauthorized filling of 4.85 acres of wetlands and additionally, to fill 3.87 acres of wetlands in Suffolk, Virginia. Your August 7, 1998 request for formal consultation was received on August 13, 1998. 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. This letter also provides the separate comments of the Service and the Department of the Interior pursuant to the Fish and Wildlife Coordination Act (48 Stat. 401, as amended; 16 U.S.C. 661 et seq.), which are included following the biological opinion.

### I. CONSULTATION HISTORY

- 07-31-98 The Service participated in a site visit with the U.S. Army Corps of Engineers.
- 08-13-98 The Service received the Corps' request to initiate formal consultation
- 10-13-98 The Service received additional information from Davis Environmental Consultants, Inc.

### II. BIOLOGICAL OPINION

#### DESCRIPTION OF PROPOSED ACTION

The applicant intends to fill pockets of palustrine scrub/shrub wetlands (3.87 acres) that are surrounded by junked cars and fill material at this used auto parts business located on a 56-acre parcel south of Route 58/460 in Suffolk, Virginia. The applicant would also like to resolve a violation of Section 404 of the Clean Water Act for filling 4.58 acres of palustrine forested wetlands at this site (Figures 1-3).

This 4.58-acre area consisted of logged forested wetlands which were contiguous to the Dismal Swamp and which have 3 to 4 feet of fill placed atop the wetland substrate. Cars are currently being stored atop the fill material. In addition, the ditch located at the southern end of the violation will be blocked. This ditch is not connected to other ditches.

### RANGEWIDE STATUS OF THE SPECIES

This information on the Dismal Swamp southeastern shrew was provided to the U.S. Army Corps of Engineers in the biological opinion dated August 13, 1997 for permit application 97-5420-18, and is still applicable.

### 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 56-acre parcel owned by the applicant.

Description of the Action Area - The property contains palustrine forested wetland areas dominated by loblolly pine, clear-cut areas, and palustrine scrub/shrub and emergent wetland areas. All soils mapped on this site are hydric: Rains, Tomotley, and Torhunta. The proposed fill area consists of pockets of palustrine scrub/shrub and emergent wetlands surrounded by junk automobiles and fill material. The violation area was a logged forested wetland that currently has 3 to 4 feet of fill over the wetland substrate.

Status of the Species in the Action Area - The action area contains appropriate habitat for the Dismal Swamp southeastern shrew and this species has been documented approximately one mile from this property. The applicant did not conduct a shrew survey and has chosen to assume that the shrew is present within the action area.

### EFFECTS OF THE ACTION

Direct Effects - 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, grading, and filling at the site. The shrew will also be directly affected by the permanent loss of 8.45 acres of habitat, of which 4.85 acres have already been filled. This project will likely result in the loss of individual shrews. However, this loss should not affect the genetic viability or range of the species and no habitat

fragmentation is expected.

Indirect Effects - Indirect effects are defined as those that are caused by the proposed action and are later in time, but still are reasonably certain to occur (50 CFR § 402.02). No indirect effects are anticipated.

Interrelated and Interdependent Actions - As defined in 50 CFR § 402.02, interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration. The Service is not aware of any interrelated or interdependent actions.

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 filling, and the cumulative effects, it is the Service's biological opinion that this project, 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

Previous studies have indicated that “mature forests with closed canopies . . . have densities of only 1-4 [shrews] per hectare” and “densities of southeastern shrews in early successional stages (which usually represent prime habitat) probably are in the range of 10-30 per hectare.” (Rose 1995). The area where the unauthorized activities occurred was in an early successional stage before filling and the area proposed to be filled has been maintained in an early successional stage. Therefore, at the median number of 20 shrews per hectare, the Service estimates that 36 Dismal Swamp southeastern shrews were taken during the unauthorized filling activity and 31 shrews will be taken during the proposed grading and filling. 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.

- C Vegetation clearing should be minimized to reduce soil and leaf litter disturbance.
- C Impacts to wetlands should be minimized.
- C 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 proposed grading and filling limits.

- b. No ground disturbance or vegetation clearing will occur in wetlands outside of the proposed grading and filling limits.
  - c. No use of broad scale or aerial herbicide or pesticide applications.
2. 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.
3. 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

#### 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.

#### FISH AND WILDLIFE COORDINATION ACT COMMENTS

The following comments constitute the report of the Service and the Department of the Interior on this project and are submitted under provisions of the FWCA:

- C As stated during the site visit with the Corps on July 31, 1998, concerning the violation, the Service recommended restoration of the wetlands. If the applicant is not required to restore, compensation for any impacts to wetlands on the site should be provided at a 2:1 ratio within the range of the shrew in Virginia, and all remaining wetlands on this site should be preserved in perpetuity.

The Service appreciates this opportunity to work with the Corps in fulfilling our mutual responsibilities under the ESA. Please contact Kim Marbain of this office at (804) 693-6694, extension 126, if you require additional information.

Sincerely,

Karen L. Mayne  
Supervisor  
Virginia Field Office

Enclosures

## 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.

(KMarbain:10/2/98)

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bcc: GARD-South, Region 5  
ARD-ES, Region 5  
Endangered Species Coordinator, Region 5  
Law Enforcement, Yorktown  
(Attn: Dan Hurt)  
Law Enforcement, Richmond  
(Attn: Senior Resident Agent)  
CBFO Reading File  
VDGIF, Richmond  
(Attn: Environmental Services)  
VDGIF, Williamsburg  
(Attn: Don Schwab)  
DNH, Richmond  
(Attn: Tom Smith)  
USFWS, Raleigh