**FRIENDS OF WHITEHAVEN**
**SUPPLEMENTARY SUBMISSION**
**TO THE BOARD OF ZONING ADJUSTMENT (BZA)**

**REGARDING SPECIAL EXCEPTION APPLICATION #17276**
**2101 FOXHALL ROAD, NW (SQUARE 1346, LOT 822),**
**OTHERWISE KNOWN AS THE "PHILLIPS PROPERTY"**

**MARCH 28, 2005**

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D.C. ZONING COMMISSION

Introduction

Pursuant to Title 11, Section 3121, the Friends of Whitehaven ("Friends") hereby submits these supplementary proposed findings of fact and conclusions of law as authorized and requested by the BZA on March 8, 2005. The Friends also incorporate by reference all earlier submissions, testimony, cross-examination, and the like by William Snape, III, Kent Slowinski, Julie Moore and others.[1] Today's submission is focused solely and wholly on ***the issue of wetlands identification and protection on and adjacent to the Phillips property*** at 2101 Foxhall Road, a significant issue left quite unresolved by the testimony of all parties when the three day hearing ended on March 8.

Findings of Fact

1. The only scientific expert testimony in the record at present regarding wetlands located roughly in the center of the Phillips property (alternatively called the "western wetlands" or "wetlands north of the already identified "southern" wetlands) is that offered by Julie Moore on March 8 and codified by her declaration dated March 28, 2005 at ¶¶ 3, 4, and 8. See also Testimony of Kent Slowinski, Friends of Whitehaven, March 8, 2005 (map at Attachment B, identified as "western wetland").
2. The Army Corps of Engineers did not testify at the BZA hearing regarding this application. Nothing in the record indicates that this federal agency disagrees with the findings of Ms. Moore and Mr. Slowinski with regard to any issue regarding wetlands protection and this proposed development, and specifically with regard to the identification of wetlands in the center portion of Phillips property.
3. Upon information and belief, the D.C. Department of Health, including but not limited to the Watershed Protection Division, also believes that this "western" wetland – north and geographically distinct from the Army Corps' delineated wetlands – is a wetland worthy of protection under both federal and D.C. law. The D.C. Department of Health is the agency responsible for

[1] The one significant exception is the assertion made by Friends on page 3 of William Snape's March 8 testimony, which reads: "Perhaps the most serious problem caused by this development proposal, an issue *inter alia* which impacts both tree and wildlife conservation is the high probability (if not certainty) that the federally identified wetlands on Park Service land and the Phillips property will be irreversibly damaged or destroyed." Today's submission will clarify this statement with greater specificity. See Conclusion, *infra*.

BZA
Case No. 17276
Exhibit No. 59



Board of Zoning Adjustment
District of Columbia
CASE NO. 17276
EXHIBIT NO. 59

protecting and overseeing wetlands in the District of Columbia. As of this date, the D.C. Department of Health, and specifically the Watershed Protection Division, has not submitted anything in writing regarding either the identification of this second wetlands complex, nor submitted anything in writing on the impact of this proposed development by the applicant on either of the two major wetlands complexes (and associated streams) identified by Ms. Moore and others.

4. Ms. Moore's expert testimony also presents strong evidence that the proposed development will negatively impact both major wetlands complexes, and associated streams. See Moore Declaration at ¶¶ 5, 7, 9.
5. Neither the Army Corps of Engineers nor the National Park Service[2] have completed an environmental assessment (EA) pursuant to the federal National Environmental Policy Act (NEPA) on how their actions and/or inactions will impact either of the two wetlands complexes, and associated streams, as a result of proposed development on the Phillips property and neighboring property.
6. The wetlands and streams on the Phillips property are hydrologically connected to each other and to the wetlands on Park Service land. Moore Declaration at ¶ 3; Slowinski Testimony from March 8, 2005.
7. No D.C. agency, including the D.C. Department of Health, has yet completed any environmental (and related) reviews under applicable D.C. law.

Findings of Law

1. Pursuant to the federal Clean Water Act, 33 U.S.C. § 1344, and associated regulations, it is unequivocally unlawful to grade or fill waters of the United States, including federally identified wetlands, without authorization from the Army Corps.
2. Pursuant to Chapter 8, Section 103.06 of the D.C. Code, the Mayor is restrained from allowing "dredge and fill activities or construction activities in wetland and on underwater lands" unless he complies with certain conditions.
3. Pursuant to Title 21, Section 1103.2 of the D.C. Municipal Regulations, "wetlands with rooted vascular aquatic vegetation ... ***shall be protected*** from significant adverse hydrologic modifications, excessive sedimentation, deposition of toxic substances in toxic amounts, nutrient imbalances, and other adverse anthropogenic impacts." (emphasis added).
4. Nothing in the federal Clean Water Act or any other federal law allows the District of Columbia to set up a wetlands protection regime weaker than federal law. See, e.g., 33 U.S.C. § 1344(i). However, the District is permitted

[2] The applicant's attorney has told the Park Service that "the District of Columbia Court of Appeals has said that the District of Columbia's Board of Zoning Adjustment cannot even take into account compliance with the District's own environmental law and regulations when it considers an application before it." Letter from Richard Nettler to Mr. Joe Lawler and Ms. Adrienne Coleman, 9 February 2005. While the applicant has not yet repeated such a legal argument before this body, undersigned counsel strenuously disputes this legal conclusion and applicant's attorney can point to no statutory, regulatory or case law that supports his position with the facts before us, particularly as they relate to wetlands and water protection.

under federal law to possess a wetlands protection program stronger than federal law. 33 U.S.C. § 1344(t).

5. Under the federal Administrative Procedure Act (APA), failure to act is defined as a form of action subject to judicial review in federal court.

Proposed Condition on Wetlands Protection

Building off ANC 3D's requested conditions dated March 3, 2005, as well as Friends' Condition #3 in William Snape's March 8 testimony, Friends suggests the following reasonable condition to protect wetlands on the Phillips property and adjacent to the Phillips property:

1. In conjunction with the Friends and all other interested members of the public, the applicant must secure the written testimony and opinion from the U.S. Army Corps of Engineers and all relevant offices of the D.C. Department of Health regarding:
   a. Identification or non-identification of all jurisdictional wetlands on the Phillips property;
   b. The impact of the proposed development on all D.C. and federal jurisdictional wetlands, and the necessity of permits or authorization to harm such wetlands; and
   c. A comprehensive analysis of the hydrology (including site analysis, aerial photographs and geological historic maps) of the Phillips property, the adjoining Park Service land, and all other relevant land in the area.

Conclusion

Based on all available evidence now before the BZA, Friends strongly believes that there exist unidentified jurisdictional wetlands on the Phillips property and that the proposed development will negatively impact several wetlands complexes, and associated streams, including those identified already as waters of the United States. These negative impacts include complete obliteration of the northern/western wetland on the Phillips property, highly probable damage to the federally identified jurisdictional wetlands in the southern portion of the Phillips property, and potential damage to the wetlands on Park Service land. ***The BZA must solicit the testimony from all relevant agencies on these important water-related issues before it renders its final decision.*** Potentially significant legal violations hang in the balance.

Thank you for your time and attention to this matter. All parties have been served with a copy of this submission as required by D.C. law.

Respectfully,

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Declaration of Julie H. Moore

I, Julie H. Moore, declare and state as follows:

1. I am a citizen of the state of Virginia; I am a conservation biologist by profession who has worked in the southeastern Unites States for 34 years. I hold a M. S. degree in Botany from the University of North Carolina. I have additional training and two years experience in identification and mapping of wetlands by the standards prescribed by the US Fish and Wildlife Service. I completed the National Wetlands Inventory Classification and Inventory Training Program, October 1983.

2. I have visited the Phillips property twice, the first time at the invitation of Ann Haas, Harry Gates, and Ted Visnic, builder, in December 2004, and again in February 2005, with Ann Haas, Harry and Alma Gates and Kent Slowinski. On both occasions I walked the property from the northern boundary along the eastern boundary to the southern boundary and traversed the central part of the property. I made observations on tree species, distribution and condition, wetland vegetation, hydric features, topographic features of the site and proximity of the site to public lands to the east and south.

3. With regard to wetland features on the property, I observed that there are two major areas with wetland features. These distinctively different areas will be described separately although they are connected hydrologically.

4. The northernmost wetland is situated slightly south of the approximate center of the property. I could locate no US Army Corps of Engineers' flagging tape (pink with black strips) delineating this area as a wetland. Today this area supports an extensive zone of cattails (*Typha* sp.) with a few other wetland species such as willow (*Salix* sp.) with abundant growth of the sprawling vine tear thumb *(Polygonum sagittifolium)*. I observed that the surface of the soil was wet and the soil saturated in this area which resembles a fresh water marsh. The fact that this area supports few trees indicates to me that is has been disturbed in some way in the past. Woody vegetation was removed and, due to the amount of water moving through the soil and across the surface, an extensive area of hydric vegetation now dominates the site. On the west side of this wetland, water was observed flowing from two locations that appear to be springs. Water from this open wetland flows southward into the southern wooded wetland through a wash out in a berm of fill that was placed across the site for an east-west running road (known as the Driggs road) that was never completed and partially blocked the natural surface flow southward. The flow has been of sufficient volume to wash out a segment of the 6 to 10 foot existing berm.

5. The southern wetland is distinctly different having a wooded over story above a clearly defined stream bed. The distinctive Corps of Engineers wetland delineation flagging tape was clearly evident. This wetland is spring fed and several old cisterns still remain in the creek attesting to possible use as a water source. Water also seeps from the northern wetland into this creek. One of the steepest slopes on the property is located at the southwest end of this perennial drainage. Mature hardwoods grow on this slope above the springs. The fill road constructed but never completed, to the north of this delineated

wetland has had an impact on this wetland; however it still retains wetland vegetation and there has been a flow of water on both of my visits.

6. Corps of Engineers wetland delineation tape (pink with black strips) was observed on the Phillips property around the wooded wetland extending northward along the western drain head from one of the two springs observed. No delineation tape was located around the open cattail wetland.

7. I made observations regarding potential topographic alterations by comparing the topographic map of the site as it exists today with the most current development plan. To allow for building site and street construction, the current development plan indicates that the northern open cattail marsh area will be covered by fill dirt as will the two springs observed. On the north side of the east-west running wooded wetland a berm will be constructed approximately on the existing fill road. The precise height of that slope is difficult to interpret from the current site plans, but it appears to be at least twenty feet higher than the current fill road and will be at a steep enough slope to potentially cause erosion along the entire length of the berm (400 feet) into the wooded wetland.

8. From my two site visits, I can conclude that there are more wetlands on the property than have been delineated to date by the Corps of Engineers. The wetlands that have not yet been delineated, according to the current plan, will be filled for construction sites and/or roads. These wetlands will be destroyed by grading (cutting and filling) activities to prepare the site for construction, and their wetland values terminated. I can determine no design effort from the current plans to remove the hydric features that have created this wetland from the site.

9. I believe that the wooded wetlands that have been delineated by the Corps will be impacted by the new berm to be located immediately to the north both during its construction, by erosion before it is vegetated, and also from alteration of the hydrologic pattern that feeds water into the wetland. The bridge planned on the steep slope at the western end of the drainage has the potential to impact the springs and alter their flow that feeds into the creek as well as causing erosion into the wetlands during construction.

Pursuant to 28 U.S.C. Section 1748, I declare under penalty that the foregoing is the true and correct, and that this Declaration was entered into in Arlington, Virginia, March 28, 2005.

Julie H. Moore