ADMINISTRATIVE APPEAL DECISION

ALBERT HANIMOV

FILE NUMBER 200205348

JACKSONVILLE DISTRICT

DATE: AUGUST 24, 2005

Review Officer: Michael F. Bell, US Army Corps of Engineers (USACE), South Atlantic Division (SAD), Atlanta, Georgia

Appellant Representative: Mr. Glen Larson, Dock and Marine Construction, Miami, Florida

Receipt of Request For Appeal (RFA): July 23, 2004

Appeal Conference Date: June 22, 2005

Site Visit Date: June 22, 2005

BACKGROUND INFORMATION:

On July 1, 2002, the Corps of Engineers (Corps) Jacksonville District received a permit application from Mr. Glen Hanimov (applicant) for a 400 square foot dock/observation platform and a 100 square foot jet ski lift structure in Monroe County, Florida. The applicant submitted a modification/revision to the application on November 26, 2002, for a marginal observation platform/dock adding an additional 1,200 square feet (90 linear feet) to the 500 square foot structure. On May 14, 2003, the Corps Project Manager (PM) inspected the site and discovered the originally proposed 500 square foot dock and jet ski lift structure constructed without Department of the Army (DA) authorization. The Corps issued a cease and desist order to the owners and contractor of the project. On June 30, 2003, the PM received a request by the violator to process the original and modified permit applications as one After-The-Fact (ATF) permit application. The PM complied with the applicant's request. The applicant received a proffered permit for the existing 500 square foot facility on April 26, 2004. The proffered permit did not include approval to extend the marginal moorage facility an additional 90 linear feet. Mr. Hanimov appealed the proffered permit on June 23, 2004, requesting the entire 1,700 square foot project as advertised in the ATF public notice. By letter dated July 1, 2004, the SAD Administrative Appeals Review Officer (RO) requested the appellant supply specific reasons for the appeal. The appellant sent the specified reasons on July 23, 2004. The RO accepted the appeal by letter dated September 27, 2004.

On June 22, 2005, the RO (Michael Bell) conducted an on-site investigation and appeal conference with Corps representatives and the appellant's agent.

Summary of Decision: I find that the appeal does not have merit. I find that the District evaluated and documented their proffered permit dated April 26, 2004, according to applicable laws, regulations, and policy guidance. The special conditions placed on the permit are reasonable given the specific circumstances of the permit request.

APPEAL EVALUATION, FINDINGS and INSTRUCTIONS to the Jacksonville District Engineer (DE):

Reasons For Appeal:

Appeal Reason 1: "Permit request was for a 90 foot dock extension not the after the fact authorization for an existing structure."

Finding: This reason for appeal does not have merit.

Action: No action required by the District relative to this appeal reason.

Discussion: In the ATF permit issued to the appellant, the District modified the site plan to include only the existing moorage structures. The District decided that by not approving the addition of the proposed 90 linear feet of fishing and observation platform, west of the existing structure, and requiring that portion of the property to be preserved from future development by placing it under a deed restriction, the appellant will meet his purpose and need without unnecessarily impacting aquatic resources. The appellant desired a marginal shoreline moorage/observation facility located along most of his property line. While the planned additions in the permit application would allow the applicant a long marginal dock structure for moorage and a fishing and observation deck, the District decided to avoid the additional aquatic habitat loss.

Three citations in the Corps regulations require the Corps to issue permits that are in the public interest and comply with federal laws and regulations. It is clear a permit can be proffered which includes conditions and/or restrictions that could limit the scope of the project.

Regulations at 33 CFR 325.4(a) state, "District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable." [Emphasis added.]

Regulations at 33 CFR 325.8(b) states, "District engineers are authorized to issue, or deny permits in accordance with these regulations pursuant to sections 9 and 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act... District engineers are also authorized to add, modify, or delete special conditions in permits in accordance with § 325.4 of this Part."

The regulations at 33 CFR 320.4(g)(2) states, "Because a landowner has the general right to protect property from erosion, applications to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of others, adversely affect public health and safety, adversely impact floodplain or wetland values, or otherwise appears contrary to the public interest, the District engineer will so advise the applicant and inform him of possible alternative methods of protecting his property."

An exiting retaining wall and riprap armored shoreline was present before the appellant applied for the existing and proposed work. The additional work would not add additional protection to the shoreline.

At the appeal conference, the Corps and the appellants agents agreed with the purpose and need for this project. The purpose and need is clearly stated in the Statement of Findings (SOF). The basic purpose is to provide a dock, over water observation platform, boatlift, and jet ski lift at the appellant's property. The point of contention is the amount of shoreline needed for these activities.

The public interest review in the SOF listed several important factors the Corps must consider before deciding to issue the permit. The discussions centered on the loss of aquatic habitat and the appellants purpose and need. The public interest review concluded that minimizing the moorage facility and observation platform, the project would meet the purpose and need while reducing the loss of riparian habitat. In Addition, the US Fish and Wildlife Service requested formal consultation and the consultation was resolved by the Corps committing to require manatee protection conditions. The National Marine Fisheries determined that the project would not significantly affect Essential Fish Habitat if the work is minimized and a deed restriction is used to encumber 1,980 square feet of shoreline.

During the appeals conference, the Corps further stated that overtime, the State of Florida has lost over 50 percent of its mangrove and near shore habitat. Losses have resulted from both large-scale developments as well as the cumulative losses over time resulting from individual property owners who wish to live by the water. It is this cumulative loss, in combination with the high quality aquatic habitat, which makes it incumbent upon the Corps to evaluate each dock application carefully.

Corps regulations recognize the importance of cumulative impact losses. Regulations at 33 CFR 320.4(a)(1) states, "The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impacts which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case...All factors which may be relevant to the proposal must be considered including the cumulative impacts thereof: among those are... general environmental concerns, wetlands...fish and wildlife values...land use, navigation, shore erosion and accretion...water quality...safety...considerations of property ownership, and in general the needs and welfare of the people." 33 CFR 320.4(a)(3) continues, "The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be

given great weight on one proposal, while it may not be present or as important on another." [Emphasis added.]

The "Corps of Engineers Standard Operation procedures for the regulatory Program (SOP)" issued April 8, 1998 (Note: the final document is dated October 15, 1999), states the Corps will determine the overall project purpose considering the applicant's needs in context of the desired geographic area and the type of area and project. After viewing the project site, and reading the administrative record, it is determined that the District did follow the requirements in the regulations. The appellant still met his purpose and need with a reduced scope of work and conditions to minimize impacts. It is therefore determined that this reason for appeal does not have merit.

Appeal Reason 2: "We would like a permit for the dock extension that was applied for."

Finding: This reason for appeal does not have merit.

Action: No action required by the District relative to this appeal reason.

Discussion: See the discussion under Reason 1.

Appeal Reason 3: "There are no resources at the site nor do the conditions warrant for the growth of resources."

Finding: This reason for appeal does not have merit.

Action: No action required by the District relative to this appeal reason.

Discussion: The appellant's specific concerns that the Corps was arbitrary when dealing with describing resources at the site are because submerged aquatic vegetation does not exist on the site and that macroalgae will survive under the proposed dock extension. The Corps stated during the appeals conference that the shading from the 90-foot platform extension would impact shoreline habitat, including macroalgea. As pointed out in the National Marine Fisheries Services' (NMFS) 21 July 2003, letter, the additional work, as proposed, would exacerbate the loss of functionally important fishery resources that has occurred in connection with other construction in this area. The proposed and existing work will shade SAV in the form of macroalgea. This habitat provides nursery, foraging and refuge sites for commercially and recreationally important fish and shellfish. Pink shrimp, spiny lobster, and various species of estuarine dependent and near shore snapper and grouper are among the many species that utilize this habitat. NMFS summarized their comments by recommending a DA permit not be issued for the 90-foot addition, since the existing moorage facility provides reasonable access to the water.

Additionally, due to the resources at the site and the surrounding area, the Corps initiated formal consultation under section 7 of the Endangered Species Act due to the elevated risk to the endangered Manatee at the proposed project area.

Appeal Reason 4: "The owner has offered to add rip rap mitigation to the shoreline and even construct a mangrove planter which was never considered by the ACOE."

Finding: This reason for appeal does not have merit.

Action: No action required by the District relative to this appeal reason.

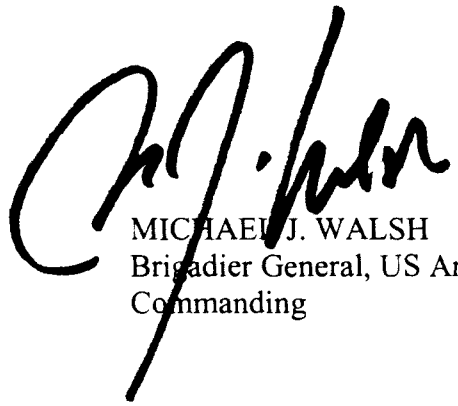
Discussion: Mangroves transplanted by inexperienced property owners could die and be subject to the secondary and cumulative impacts of home and yard improvement. The February 6, 1990, Memorandum of Agreement (MOA) between the EPA and the DA concerning mitigation, states, "Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required. Compensatory actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site (onsite compensatory mitigation). In the appellant's case, on-site/in-kind mitigation is available in the form of deed restrictions on the remaining near shoreline habitat.

The MOA further states, "In determining compensatory mitigation, the functional values lost by the resource to be impacted must be considered. Generally, in-kind compensatory mitigation is preferable to out-of-kind. There is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success."

Regulatory Guidance Letter (RGL) 02-2 reiterates the importance of this practice. The RGL at section 2.1. states, "Districts will include in individual permits, and general permit verifications that contain a wetland compensatory mitigation requirement, special conditions that: 1) identify the party(s) responsible for meeting any or all components of compensatory mitigation requirements; 2) performance standards for determining compliance; and, 3) other requirements such as financial assurances, real estate assurances, monitoring programs, and the provisions for short and long-term maintenance of the mitigation site." Section 3.g. states, "Compensatory mitigation plans should include a written description of the legal means for protection of mitigation area(s), and permits will be conditioned accordingly. The wetlands, uplands, riparian areas, or other aquatic resources in the mitigation project should be permanently protected, in most cases, with appropriate real estate instruments, e.g., conservation easements, deed restrictions, transfer of title to Federal or state resource agencies or non-profit conservation organizations." These mitigation requirements are not usually practicable for small landowners in South Florida; therefore, preserving the appellant's remaining riparian habitat appears practicable.

CONCLUSION: After reviewing the information contained in the Jacksonville District's administrative record, information presented by the appellant, and information obtained at the appeal conference and site visit, I conclude there is substantial evidence in the administrative record to support the District's decision to issue a conditioned Department of the Army Permit, pursuant to Section 10 of the Rivers and Harbors Act of 1899, for the construction of a moorage facility in the waters of the United States. I also conclude this decision was not arbitrary,

capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.



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(Date)

MICHAEL J. WALSH
Brigadier General, US Army
Commanding