ADMINISTRATIVE APPEAL DECISION

ANDREW CONLYN, FILE NO. 200001477 (IP-TWM)

JACKSONVILLE DISTRICT

DATE: September 13, 2005

Review Officer: Mores Bergman, US Army Corps of Engineers

Appellant: Andrew Conlyn

Appellant's Representative: Douglas Rillstone, Attorney, Broad and Cassel

Receipt of Request for Appeal: April 2, 2004

Action Appealed: Denied Permit

Authority: Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act

Date of Appeal Conference and Site Visit: July 20, 2004

Background Information:

On April 18, 2000, the Corps of Engineers (Corps) Jacksonville District (District) received a permit application from Mr. Andrew Conlyn for the construction of a single-family home and associated amenities on a 23.4-acre waterfront site located on Pine Island in Lee County, Florida. The application was not considered complete until January 15, 2002. The entire site consists of wetlands, including 22.9 acres of mangroves wetlands (red, white, and black mangroves) and 0.5 acres of shoreline tidal wetlands. The original proposal required filling 0.59 acres of mangrove wetlands to construct the home, driveway, and other features. During the review process, the applicant agreed to reduce project impacts by decreasing the total size of the fill to 0.36 acres. In order to mitigate for the impacts of the project, the applicant also agreed to donate 17.11 acres of land to the University of Florida Foundation for preservation, to purchase 0.66 acres of saltwater wetland credits from the Little Pine Island Mitigation Bank, and to give a conservation easement on 5.57 acres of wetlands to the Florida Department of Environmental Protection (FDEP). On February 9, 2004, the Jacksonville District Engineer provided the applicant with a decision that the permit be denied. The District's reasons for denying the permit are that the proposed project does not comply with the Section 404(b)(1) Guidelines or the Corps Wetland Policy, and would be contrary to the public interest because the discharge would result in significant adverse impacts to the mangrove wetlands on the site, and there are less environmentally damaging practicable alternatives available to the applicant.

On April 2, 2004, Mr. Douglas Rillstone sent a Request for Appeal (RFA) of the denied permit, on behalf of Mr. Conlyn, to the Corps South Atlantic Division in accordance with the Corps Administrative Appeal Regulation 33 CFR 331. The appellant objects to the permit denial because he contends that the District failed to consider Mr. Conlyn's needs regarding his existing physical challenges, in establishing the overall project purpose, in concluding that a practicable alternative site existed, and in determining that issuing a permit was contrary to the public interest. The Review Officer conducted an appeal conference and site visit on July 20, 2004.

Reasons for Appeal Submitted by Appellant:

Reason 1: The Corps failed to accept basic project principles from Mr. Conlyn in establishing the overall project purpose.
Reason 2: The Corps failed to recognize that the Corps proposed on-site alternative is not practical.
Reason 3: The Corps required a level of analysis contrary to its existing policy and concluded that if its proposed on-site alternative, if practicable, would have less adverse environmental impact than the proposed project in the absence of any site-specific information and contrary to the FDEP findings.
Reason 4: The Corps has not complied with the requirements of 33 CFR 325.2(a)(6).
Reason 5: The Corps made an incorrect application of the Section 404(b)(1) Guidelines.
Reason 6: The Corps did not document evidence upon which the reasonable foreseeable future cumulative environmental impacts analysis was based.
Reason 7: The Corps incorrectly applied Law, Regulation, and Officially Promulgated Policy in denying this permit by relying upon unwritten policy to prohibit "Single Family Residential Fill in Mangrove Forest."
Reason 8: The Corps has failed to rebut the presumption the project's proposed discharge was acceptable and not contrary to the public interest.

Information Received During the Appeal Review and Its Disposition:

The District provided the Review Officer and the appellant with a copy of the administrative record for the permit decision. This information was considered in the appeal review. Information obtained during the appeal conference and site visit conducted on July 20, 2004, was also considered in the appeal review, to the extent that it provided clarification or explanation of the administrative record.

Summary of Decision:

This appeal does not have merit. It is found that the District did comply with applicable laws, regulations, and policies in reaching their permit denial decision and did provide adequate documentation to support the determination. The specifics of the findings are provided below.

Appeal Decision Findings and Instructions for District Action:

Reason 1: The Corps failed to accept basic project principles from Mr. Conlyn in establishing the overall project purpose.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action is required by the District regarding this appeal reason.

Discussion: In the appeal submittal letter dated April 2, 2004, Mr. Rillstone stated that according to 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), the Corps will determine the overall project purpose considering the applicant's needs in the context of the desired geographic area and the type of project being proposed. Mr. Rillstone also referenced a January 19, 2001, letter by Assistant Secretary of the Army Joseph Westphal to US Fish and Wildlife Service, in which Mr. Westphal said that the Corps must accept basic project principles from the applicant in establishing the project purpose. Based on these documents, Mr. Rillstone concluded that the Corps should have considered Mr. Conlyn's physical challenges in determining the overall project purpose. The SOP states:

> "The overall project purpose must be specific enough to define the applicant's needs, but not so restrictive as to preclude all discussion of alternatives. Defining the overall project purpose is the responsibility of the Corps, however, the applicant's needs must be considered in the content of the desired geographic area of the development, and the type of project being proposed."

The overall project purpose identified by the District for the Conlyn project is, "Construct a single-family house with a waterfront access in Lee County, Florida." Mr. Rillstone stated the overall project purpose should have been: "Construct a single-family house in Lee County, Florida, with waterfront access for a physically challenged individual." Mr. Rillstone further contends that by omitting material facts of Mr. Conlyn's physical challenges in the project purpose statement, the entire Section 404(b)(1) Guidelines analysis was tainted because the Corps included alternatives in their review that could not meet Mr. Conlyn's needs. Mr. Rillstone also states in his April 2, 2004, letter that Mr. Conlyn had sold his prior house because it had a 700-foot boardwalk, which was too long for him to walk safely because of his physical condition. Mr. Rillstone also pointed out in his appeal submittal letter that Mr. Conlyn had advised the Corps that several of the six on-site alternatives under review would not provide Mr. Conlyn with safe and reasonable access to the waterfront. An example that Mr. Rillstone presented as being unacceptable to Mr. Conlyn was the alternative that included a 419-foot long boardwalk.

In reviewing the administrative record for the permit application, it is found that Mr. Conlyn's original application for permit, which was received by the District in April 2000, contained a site plan that showed a proposed home-site with a 442-foot long

boardwalk for access to the waterfront. The site-plan was later revised (in July 2000), which included a boardwalk of 419-feet in length. The District published the public notice for the project January 24, 2002, and contained a second revised plan to address concerns of the State that showed a 267-foot long boardwalk. At the appeal conference, the District stated that they had determined the overall project purpose based on the information submitted with the permit application. The District's record shows that there was no mention that the original applied for project or the revised project plans would not meet the applicant's needs until Mr. Conlyn informed the District by letter on June 3, 2002, that he had concerns regarding accessibility due to his physical impairment. In that letter Mr. Conlyn discussed the six on-site alternatives that he had submitted to the Florida Department of Environmental Protection (DEP) and the Jacksonville District, and pointed out that three of the alternatives, including the original applied for plan and one other alternative identified by the District, were not acceptable to him because of the length of the boardwalks required to reach the waterfront. The appellant's proposed redefinition of the overall project purpose would be so restrictive as to preclude consideration of even his original site plan and his first revised site plan.

At the appeal conference on July 20, 2004, the District stated that they did consider the information provided in Mr. Conlyn's June 3, 2002 letter, and decided that their original "overall project purpose" was still appropriate, since the waterfront was accessible by all identified alternatives, even though a wheelchair or motorized vehicle may be necessary for access by a physically impaired person for some of the alternatives. Mr. Rillstone also states in his April 2, 2004 appeal letter that the on-site alternative identified by the Corps, which involved locating the house in the northeast corner of the site and requiring a boardwalk over 1,000 feet long, is not a practicable alternative because it would not provide Mr. Conlyn with a reasonable and safe access to the waterfront. Mr. Rillstone further states that Mr. Conlyn was not informed of this alternative before he received the District's denial letter. The District stated at the appeal conference that they believed this alternative is a practicable alternative for consideration, even for Mr. Conlyn, since a wheelchair or motorized vehicle could be used for access, if needed. The record further shows that Mr. Conlyn discusses the alternative of locating a house in the northeast corner of the site on page 6 of his June 3, 2002, letter to the District. In that document, he objects to this alternative because of its long travel distance from the shoreline. The District discussed with the applicant at a meeting on February 11, 2003, as mentioned on page 9 of the Districts Statement of Findings.

In reviewing the 404(b)(1) Guidelines at 40 CFR Part 230.10(a)(2), it is found that an alternative is practicable if it is capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose. Further, in the SOP (referenced above), it states that the overall project purpose must be specific enough to define the applicant's needs, but not so restrictive as to preclude all discussion of alternatives. It is determined that the District did follow the requirements contained regulation 40 CFR part 230 and the policy guidance provided in the Corps SOP and by the Secretary of the Army in determining the overall project purpose and in identifying practicable alternatives for the Conlyn permit application. It is therefore determined that this reason for appeal does not have merit.

Reason 2: The Corps failed to recognize that the Corps proposed on-site alternative is not practical.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

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

Discussion: As discussed under Reason 1 above, the on-site alternative identified by the District in the northeast corner of the project site does meet the definition of a practicable alternative, as contained in 40 CFR Part 230.10. This alternative was identified in the District's Statement of Findings as the least environmentally damaging practicable alternative available to the applicant. It is determined that the District did comply with the applicable regulations and policies in making their determination.

It is therefore determined that this reason for appeal does not have merit.

Reason 3: The Corps required a level of analysis contrary to its existing policy and concluded that its proposed on-site alternative, if practicable, would have less adverse environmental impact than the proposed project in the absence of any site-specific information and contrary to the Florida Department of Environmental Protection (FDEP) findings.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action is required by the District regarding this appeal reason.

Discussion: In the appeal request letter of April 2, 2004 (starting on page 12), Mr. Rillstone states that he believes that the District ignored the appropriate level of analysis as governed by the Corps SOP and Regulatory Guidance Letter 93-02. Mr. Rillstone points out the applicant was required to analyze 4 external (offsite) alternatives and 7 internal (onsite) alternatives and he contends that this the level of analysis is beyond that required under Corps policy, considering the relative size of project and its impacts. Mr. Rillstone points out that the size difference among alternatives range from 1 percent of the total property site acreage, to 3 percent of the total site.

In reviewing the SOP, at Part 12 and Regulatory Guidance Letter 93-02, it is found that the level of alternative analysis should be commensurate with the seriousness of the potential adverse impacts to the aquatic environment. In the case of this project site, the record shows that the District has determined that the mangrove wetlands on the subject site are high value wetlands that support a variety of aquatic life and ecological functions and that the potential for significant adverse impacts of the proposed project exist. The District also determined that because of the value of the wetlands and the requirement of

the 404(b)(1) Guidelines to select an alternative with the least adverse impacts, it is not unreasonable to review the range of alternatives that were considered. The District did conclude that there was enough difference in adverse impacts of the different alternatives to justify the analysis. The record also shows that the State DEP also required the applicant to consider many of the same alternatives that the Corps reviewed. Therefore, the number of alternatives that were reviewed was not unreasonable. In the case of the offsite alternatives, it was required under the 404(b)(1) Guidelines to consider alternatives that are not in a special aquatic site, because it is presumed that such sites are available for non-water dependent activities, unless it clearly demonstrated that such alternatives are not practicable.

Mr. Rillstone also pointed out in his appeal request letter that the District's findings were contrary to the State DEP findings for the project, and that the State had provided several conditions in the permit that would mitigate for any adverse impacts that may occur. It is noted that the State is not subject to the 404(b)(1) Guidelines that the Corps must follow. Under the Guidelines the Corps cannot issue a permit for a project if there is a practicable alternative available that has less adverse impacts to the ecosystem. The Corps must also require avoidance and minimization of adverse impacts, before allowing an applicant to provide compensatory mitigation to offset impacts.

The District's record shows that the Corps asked the applicant to review upland sites, and the applicant identified and analyzed various off property sites and determined that these sites were not practicable. The District concurred in that determination, as is stated in paragraph 8(a) of their Statement of Findings.

It is determined that the District did follow applicable regulations and policies in doing their alternatives analysis and provided adequate justification for the level of analysis.

I therefore find that this reason for appeal does not have merit.

Reason 4: The Corps has not complied with the requirements of 33 CFR 325.2(a)(6).

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action is required by the District regarding this appeal reason.

Discussion: The Corps of Engineers Regulatory Regulation 33 CFR Part 325.2 (a)(6) addresses the decision making process for permit applications. In his appeal letter of April 2, 2004 (page 17), Mr. Rillstone points out that Part 320.4(j)(2) of the regulation requires that if a permit decision is contrary to state or local decisions regarding zoning and land use matters that the district will include in the decision document the significant national issues and explain how they are overriding in importance. Mr. Rillstone also makes reference to Regulation 33 CFR 320.4(j)(2), which describes significant issues of national importance to "include but not necessarily limited to national security, navigation, national economic development, water quality, preservation of special aquatic

areas, including wetlands, with significant interstate importance, and national energy needs." Mr. Rillstone also provides his opinion in the appeal letter that there is an absence of significant issues of overriding national importance contained in the administrative record, and that the proposed project would cause only a de minimums level of unavoidable impact on the wetlands. Mr. Rillstone further states that he believes the impacts from the project do not raise to the level of "significant" as discussed in the Corps regulatory guidance letter RGL 87-02.

In support of his statements, Mr. Rillstone points out that the State DEP has determined that Mr. Conlyn's proposed project will not violate state water quality standards, and further that he could not find anything in the District's administrative record to support the District's determination regarding this issue, other than a brief statement in the memorandum for record to the effect that "as proposed, the project would cause or contribute to significant degradation of Aquatic Resources of National Importance." Mr. Rillstone also referenced the Corps RGL 82-08 and regulation 33 CFR Part 320.4(j)(4), which further discuss the Corps' policy regarding state and local decisions. He points out that these references also conclude that in the absence of overriding national factors, a Corps would issue a corps permit if a project has received State approval.

It is correct that regulation 33 CFR Part 320.4 states that Districts will grant a permit unless there is overriding national factors of the public interest. However, Part 320.4 also states:

> "(4) In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR parts 320-324, and the applicable statutes have been considered and followed: e.g., the National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archeological Preservation Act; the National Historic Preservation Act; the Endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the Clean Water Act, the Archeological Resources Act, and the American Indian Religious Freedom Act. Similarly, a permit will generally be issued for Federal and Federally-authorized activities; another federal agency's determination to proceed is entitled to substantial consideration in the Corps' public interest review." (Emphasis Added).

As mentioned in previous parts of this document, Regulation 33 CFR Part 323.6 (a) requires that a permit will be denied under Section 404 of the Clean Water Act if the discharge does not comply with the Section 404(b)(1) Guidelines. Since the District has determined that the proposed project does not comply with the Guidelines, they have denied the permit. Compliance with the 404 (b)(1) Guidelines must be met along with issues concerning overriding national factors.

Additionally, in reviewing the District's decision document and administrative record, it is found that the District did identify issues of national importance as part of their review

of the application. In Section 8.d (page 15) of the Statement of Finding (SOF) the District states that the mangrove wetlands on the project site are adjacent to Pine Island Sound, which is a part of a National Estuarine Preserve, and within the EPA Gulf of Mexico Ecological Management site. The wetlands on the Conlyn property have been determined to be Essential Fish Habitat (EFH) by the National Marine Fisheries Service (NMFS). Also on pages 18 and 19 of the SOF, at paragraph 9.a.(5), is described the important functional values that this EFH provides in support of the commercial and sport fisheries, birds and a variety of invertebrates, crustaceans, amphibians, and other animals the use the Sound and Gulf area. On page 27, in paragraph 10.h, 11, 12, and 13, the District states that the NMFS determined that the project would substantially and unacceptably impact the mangrove wetlands on the site, which are nationally important aquatic resources. Letters from the US Fish and Wildlife Service (FWS) and NMFS objecting to the project, as discussed on pages 4, 7, and 8 of the SOF, are found in the administrative record. Upon considering these agencies comments and performing their own review, the District Engineer concluded that the project would cause or contribute to significant degradation of Aquatic Resources of National Importance. This determination is a judgment call that is made by the District Engineer based on his review of the information available to him. It is concluded that the District Engineer did support his determination with sufficient evidence. It is therefore determined that this reason for appeal does not have merit.

Reason 5: The Corps made an incorrect application of the Section 404(b)(1) Guidelines.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

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

Discussion: Mr. Rillstone states on page 19 of his appeal submittal letter that according to the Corps RGL 93-02, a reasonable common sense approach should be used when conducting the Section 404(b)(1) Guidelines alternative analysis. Mr. Rillstone also references the preamble to the Guidelines Regulation 33 CFR 230, which states that a certain amount of flexibility is intended in the regulation. The preamble further states: "while the ultimate conditions of compliance are "regulatory", the guidelines allow some room for judgment in determining what must be done to arrive at a conclusion that those conditions have or have not been met." Mr. Rillstone further makes reference to guidance in the Corps SOP, and RGL 93-02 which states: "In cases of negligible or trivial impacts (e.g., small discharges to construct individual driveways), it may be possible to conclude that no alternative location could result in less adverse impact within the meaning of the Guidelines. In such cases, it may not be necessary to conduct an offsite alternatives analysis but instead require only any practicable onsite minimization." Mr. Rillstone contends that the present case fits this situation in that the difference in acreage impact (or footprint), between Mr. Conlyn's final revised project and the alternative that the District identified as being the least damaging practicable alternative, is only 0.04 acres.

Upon reviewing the decision document, including the 404(b)(1) analysis done by the District, it is found that the District did perform their 404(b)(1) review in accordance with the procedures provided in the Guidelines and in accordance with other applicable regulations and Corps RGLs. The record shows that the District did more than just look at acreage difference in determining the least damaging practicable alternative, but also considered the impacts of project location within the site for the different alternatives, to determine the overall impact of each alternative. In the SOF, in paragraphs 8b and 8c (pages 14 and 15), the District did an analysis that compared alternatives to determine which alternative best minimized adverse impacts to the mangrove wetlands in regard to both the direct impacts from the size and location of the fill itself, and also provided the least impact by locating those project features that would provide the most disturbance (such as driveway and living quarters), away from the majority of the mangrove wetlands, while still allowing access to the waterfront. In this case, the District did show that there was more than minimal difference between the impacts of the applicants proposed alternative and the alternative that the District identified as being practicable and having less overall adverse impacts. The District also provided a summary of this analysis in their letter to Mr. Conlyn, dated February 9, 2004. It is determined that the District did exercise reasonable flexibility and judgment in conducting their alternatives analysis and did correctly apply the 404(b)(1) Guidelines.
It is therefore determined that this reason for appeal does not have merit.

Reason 6: The Corps did not document evidence upon which the reasonable foreseeable future cumulative environmental impacts analysis was based.

Findings: This appeal reason does not have merit for the reasons contained in the Discussion section below.

Action: No action is required by the District regarding this appeal reason.

Discussion: On page 22 of the appeal submittal letter, Mr. Rillstone states that the Corps has failed to evidence or delineate how any of the statements in their cumulative effects analysis, if true, would add to the future cumulative environmental impacts around the project site and the particular aquatic ecosystem.

Although the District did not provide detailed references or attach specific documents to support the analysis, they provided detailed cumulative effects in their SOF (on page 20). The appellant failed to provide any evidence demonstrating that the analysis is incorrect. It is reasonable to conclude that there will continue to be increasing pressure for development of the coastal areas of South Florida, based on what has historically occurred in Florida. It is also reasonable to assume that if overall project purpose may be defined in the restrictive manner urged by the appellant, a precedent will indeed be set for future permit actions resulting in greater cumulative impacts. Indeed, the proven historical impacts, the high concentration of remaining mangrove wetlands in Lee County, the continuing growth rate and development pressures provide the content for concluding that small projects in this area add up to significant impacts on mangrove wetlands. As for the expected impacts of the proposed development, the District has

provided documentation of these impacts in their SOF and supporting administrative record. Therefore, it is determined that this reason for appeal does not have merit.

Reason 7: The Corps incorrectly applied Law, Regulation, and Officially Promulgated Policy in denying this permit by relying upon unwritten policy to prohibit "Single Family Residential Fill in Mangrove Forest."

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action is required by the District regarding this appeal reason.

Discussion: There was no evidence found in the administrative record or submitted by the appellant to support this claim. At the appeal conference, Mr. Studt of the District's Palm Beach Garden Regulatory Office, stated that his office had no such policy. He said his office considers each permit application individually on its own merit.

It is therefore determined that this reason for appeal does not have merit.

Reason 8: The Corps has failed to rebut the presumption the project's proposed discharge was acceptable and not contrary to the public interest.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action is required by the District regarding this appeal reason.

Discussion: In his appeal request letter, Mr. Rillstone states that according to 33 CFR 320.4(a)(1), the District will grant a permit unless the District determines the proposed discharge would be contrary to the public interest. Mr. Rillstone further states that the District failed to analyze and consider the public interest review submitted by Mr. Conlyn in 2002 and provided no definitive findings directly related to Mr. Conlyn's project in their public interest review write-up regarding 20 public interest review factor. The agent believes the Districts public interest review statements are contrary to the State DEP findings.

It is correct that regulation 33 CFR Part 320.4 states that Districts will grant a permit unless the proposed project is found to be contrary to the public interest. However, Part 320.4 also that states (at the beginning of the section), "Additional policies specifically applicable to certain types of activities are identified in 33 CFR Parts 321-324." As mentioned in previous parts of this document, Regulation 33 CFR Part 323.5 (a) requires that a permit will be denied under Section 404 of the Clean Water Act if the discharge does not comply with the section 404(b)(1) Guidelines. Since the District has determined that the proposed project does not comply with the Guidelines, they have denied the permit.

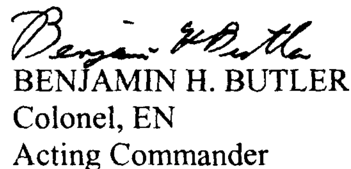
In reviewing the public interest review section of the District's SOF, I found in section 10(a), that the District has adequate responses regarding the 20 items that Mr. Rillstone had mentioned. In addition to the 20 items, that the District also addressed other public interest factors in sections 10(b)–(h) (starting on page 25 of the SOF). The District determined that several of these additional factors were not in the public interest and as a result, the District determined that issuance of a permit would be contrary to the public interest.

It is determined that the appellant's arguments regarding this reason for appeal are unfounded; therefore, this reason for appeal does not have merit.

Overall 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 made, I conclude there is sufficient information in the administrative record to support the District's decision to deny a Department of the Army Permit pursuant Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act, for the placement of fill material for the construction of a residence and walkway in the waters of the United States, including wetlands. Accordingly, I conclude that this Request For Appeal does not have merit.

26 Sep 2005
(Date)



BENJAMIN H. BUTLER
Colonel, EN
Acting Commander