ADMINISTRATIVE APPEAL DECISION

ANTHONY AND DARLENE D'ASCANIO

FILE NUMBER 200207662

JACKSONVILLE DISTRICT

DATE: March 19, 2006

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

Appellant Representative: Paul Lin & Associates, Miami, Florida

Date of Receipt of Request for Appeal (RFA): March 21, 2005

Date of Appeal Conference / Site Visit: September 8, 2005

Background Information: The US Army Corps of Engineers' Jacksonville District (District) originally received a Department of the Army (DA) permit application from Mr. Anthony D'Ascanio to construct a 516 square foot dock over navigable waters of the United States on July 19, 2002. The plans showed an L-shaped wooden dock with 40-foot legs and a boatlift. His property is located at Lots 20 and 21 on Ibis Isle, at the terminus of Ibis Lane, in Section 15, Township 66 south, Range 32 east in Marathon, Monroe County, Florida. On August 12, 2002, the Corps received an exemption letter for the dock from the Florida Department of Environmental Protection.

Mr. D'Ascanio's plans were transmitted to the U.S. Fish and Wildlife Service and to other state and Federal resources agencies on November 14, 2002, to determine any potential effect on threatened or endangered species or their critical habitat, and to initiate Essential Fish Habitat Consultation. The letter stated, "the proposed...work may affect the West Indian manatee in accordance with the revised Manatee Key dated January 2, 2001. Therefore, the Corps intends to request formal consultation with the US Fish and Wildlife Service pursuant to Section 7 of the Endangered Species Act of 1973, as amended, and the Marine Mammal Protection Act."

By letter dated December 9, 2002, the National Marine Fisheries Service (NMFS) stated that impacts to Essential Fish Habitat (EFH) were probable and the proposed structure does not adhere to the *Dock Construction Guidelines in Florida for Docks or Other Minor Structures Constructed In or Over Submerged Aquatic Vegetation, Marsh, or Mangrove Habitat.*[1]

[1] U.S. Army Corps of Engineers/National Marine Fisheries Service, Dock Construction Guidelines in Florida for Docks or Other Minor Structures Constructed in or over Submerged Aquatic Vegetation (SAV), Marsh or Mangrove Habitat, August 2001.

By letter dated December 9, 2002, the US Fish and Wildlife Service responded to the Section 7 request, stating that the project may affect, but is not likely to adversely affect the manatee and its critical habitat.

The Florida Department of State, Division of Historical Resources also responded by letter dated December 19, 2002. The letter stated that the there are no significant archeological or historical resources within the project area, and because of the location and/or nature of the project it is unlikely that any such sites will be affected.

According to the administrative record, the Corps Project Manager (PM) performed a site inspection on March 13, 2003, at which point it is discovered that fill material had already been placed into wetlands on the site. The Corps requested information regarding the fill by email dated May 6, 2003. By letter dated December 15, 2003, Mr. Paul Lin with Paul Lin & Associates (Agents) provided information including photos of the site showing pre-construction conditions. The letter stated that 18 inches of fill was placed in the backyard of the property to raise the elevation, but that no fill was placed below the mean high water line. In response to this letter, the Corps emailed the Agent on January 26, 2004, stating that the photos and survey showed where wetlands were mowed, but that this did not establish the edge of jurisdiction, which commonly occurs above the mean high water line. The email also requested a proposal for remedying the violation. The appellant's agent responded by letter dated January 30, 2004, indicating that no jurisdictional boundary had been established. He then indicated by email on February 27, 2004, that the owner had agreed to correct the violation by scraping back 2 feet of fill from around the shoreline, and installing a fence at the edge of the fill.

On March 11, 2004, the Corps sent a letter to the Agent stating the dock should be redesigned to comply with the dock construction guidelines in order to achieve acceptable minimization. The administrative record next indicates that the Agent provided a fax to the Corps on March 24, 2004, stating that they were moving forward with removal of the fill and construction of a fence. The fax also requested a larger dock than originally proposed in the permit application because they owned two lots. On May 20, 2004, the Agent provided photos of the fence and removed fill and again requested a larger dock.

The Corps conducted a second site visit on June 9, 2004, and concluded that fill had not been removed from the wetland. Photos were taken of the site during this visit that show the remaining fence and fill along the mangrove fringe on the property. On August 17, 2004, a cease and desist order was sent to Anthony and Darlene D'Ascanio informing them that unauthorized fill had been placed into 2,500 square feet of coastal wetland on their property. The U.S. Environmental Protection Agency was notified of the violation by letter dated September 29, 2004.

Following issuance of the cease and desist order, a jurisdictional determination was made on October 18, 2004, which indicated that wetlands existed on the property approximately 15 feet landward from the mean high water limit and that 0.057 acres (2,500 square feet) of wetlands were filled. On October 18, 2004, the Corps sent a letter to the appellant, which transmitted a tolling agreement and the options for resolving the violation on the site. On November 22, 2004,

the appellant signed the tolling agreement and indicated that he wished to pursue after-the-fact (ATF) permit authorization for the unauthorized fill.

On January 19, 2005, the appellants received a letter of permission (LOP) permit for a L-shaped dock with a 4' by 40' head and a 4' by 40' walkway and boatlift over navigable waters. The permit included conditions requiring mitigation to offset impacts associated with the fill placed in wetlands. Utilizing the mitigation index guidelines established for the Florida Keys (Key Mig), the initial mitigation fee was determined to be $17, 916.81 for the wetlands and $392.22 for the shoreline fringe and submerged aquatic resources affected by the dock. The permit condition also states, "to compensate for resources and temporal losses associated with work performed without federal authorization the permittee will make an additional contribution of $17,916.81 to fund the restoration of 2,375 square feet of unauthorized work elsewhere in the Florida Keys. This portion of the contribution should be used solely for the restoration of unauthorized fill in the Florida Keys." The Appellants were required to remove all fill beyond the retaining wall or 12 inches beyond the fence and restore this section as a condition of the permit. The proffered permit was appealed by letter of March 16, 2005.

On September 8, 2005, the South Atlantic Division Administrative Review Officer (RO) conducted an on-site visit and appeal conference with Corps representatives and the appellant.

Summary of Decision: I find the appeal has merit. I find that the District did not follow prescribed procedures for determining the amount of mitigation necessary to fully offset the functional loss of wetlands associated with after-the-fact authorization of unauthorized work.

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

Reasons for Appeal as Presented by the Appellant:

Appeal Reason 1: "The applicant does not agree with the impacted area assessed by the U.S. Army Corps of Engineers (USCOE)."

FINDINGS: This reason for appeal has no merit.

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

Discussion: The appellant stated that in the permit the Corps identified an impact area of 2,375 square feet of coastal herbaceous marsh and mangrove along the property shoreline. The applicant also agreed that when placing fill on the upland area, some of the fill spilled over the edge of the existing riprap along a portion of the shoreline. According to the appellant, the impacted area is no more than 100 feet long by 5 feet wide.

At the time that the Jurisdictional Determination was issued to the property owner the action was treated as an enforcement case, and therefore the delineation of the wetlands on the site was not appealable pursuant to 33 CFR 331.5(b)(10). However, once the Corps accepted an after-the-fact permit application for the unauthorized fill, the delineation became appealable. At this

point, it would have been appropriate for the applicant to be provided a Request for Appeal (RFA) form to explain his rights to appeal the jurisdictional determination. In this case, however, the request for appeal did not raise the question of whether or not the particular area was a wetland. At issue in this reason for appeal is the extent of fill placed into wetlands. The appellant has argued that the amount of fill placed within the wetland is smaller than stated by the Corps, and actually measures only 5 feet by 100 feet.

The fact that the fill was conducted without authorization and prior to any site visit by a Corps representative must be considered. In these situations, the Corps is forced to rely on the best available information to determine both the extent of wetland and the extent of fill. Information used to determine the amount of fill in this case included photos provided by the Appellant showing the conditions of the site before any fill was placed, a survey of the site that included elevation points, and observations and photo documentation of the site after the fill was placed.

The initial investigation of the site was conducted on March 13, 2003, during which it was discovered that fill had been placed on the site. Specific notes detailing the site visit are not included in the administrative record, however photographs of the fill taken during the site visit are included in the file. The photographs clearly show fill material placed up to the edge of the mangrove fringe at the back of the property. In the letter of December 15, 2003, the appellant's agent confirmed that 18 inches of fill had indeed been placed in the backyard of the property to raise the elevation of the site. On February 27, 2004, the appellant's agent also stated that the fill would be removed by "scraping back 2 feet of fill around the shoreline". During the second visit to the site, conducted on June 9, 2004, the Corps representative concluded that the fill material had not been removed from the wetlands. Regardless of whether the fill had been removed as proposed, this action would not have been sufficient to remove all of the material from the wetlands. Additional photos that document the conditions during the visit are also included in the administrative record.

During the appeals conference, the Appellant's agent agreed that fill material was still present along the waterfront in the backyard, but stated that he believes the fill is limited to a 100 foot stretch of the waterfront. He argued that no fill material had been placed along the waterfront in the side yards. All of the meeting attendees walked along the entire waterfront of the property. Currently, a fence runs immediately landward of the mangrove fringe on the property. The yard is landscaped with grass, plantings, and walking surfaces to the fence in all areas. There is also clear evidence of fill material beyond the fence in several areas. The documentation included in the administrative record contains a jurisdictional determination dated October 18, 2004, that documents the appellant filled 0.057 acres of jurisdictional wetlands. Observations made during the site visit confirmed the determination.

I conclude that the District Engineer did support his wetland and fill determination with sufficient evidence. It is therefore determined that this reason for appeal does not have merit.

Appeal Reason 2: "The mitigation attributed to the after the 'After-the-Fact' permit should not be added to the required mitigation because the applicant has taken immediate actions to correct the problems as soon as we were informed by the USCOE."

FINDING: This reason for appeal has merit. Compensatory mitigation must be demonstrated as necessary to offset the functional losses for the fill placed in wetlands. Information contained in the administrative record, as supplemented by the appeals conference, shows that the primary reason for doubling the required mitigation for impacts to wetlands is because they were filled without a permit, and it is expensive to mitigate for ATF permits. The District used established procedures, including a functional assessment, to determine the required mitigation fee, but the fee was then doubled and required as a condition of the permit. Corps policy and regulations clearly limit mitigation requirements to only those needed to offset the functional loss of wetlands associated with a project. However, the regulations go on to say that ATF permit conditions may include special conditions related to the after-the-fact character of the permit. Therefore, if supported by evidence in the administrative record that additional fees are necessary to properly mitigate for the project impacts, the increased fees may be justified. The administrative record does not appear to make a clear case for the increased mitigation fees.

ACTION: The decision is remanded to the DE to review the procedures used to determine the amount of mitigation necessary to compensate for the functional loss of wetlands impacted by the unauthorized fill.

Discussion: The reason given for the appeal was that the fines were unduly doubled, and that the additional mitigation should not be required because the applicant took immediate actions to correct the problems including removal of the spilled fill within 5 feet of the shoreline. In their letter of May 20, 2005, the appellant specifically objected to the doubling of the mitigation fee and requests "that the required mitigation is reduced to the amount that reflects the actual impact that has occurred as a result of the accidental spill of the fill". In this case, the appellant's argument that removal of excess fill should eliminate the requirement for additional mitigation is not at issue. Based on information included in the administrative record and discussions held during the appeals conference, there is sufficient evidence to show that most of the fill material in question was removed, but not in a timely manner (18 months). Nevertheless, the appellant does raise a legitimate concern by questioning whether the required mitigation is commensurate with the impacts, and it is this question that becomes the central issue in determining if the appeal has merit.

In numerous locations, Corps regulations and guidance letters state that the overall goal of mitigation is to achieve "no net loss" of functions for wetland impacts. As stated in the Corps Standard Operating Procedures, part 18, which deals with compensatory mitigation,

> the amount of mitigation required should be commensurate with the anticipated impacts of the project. The goal of mitigation is to replace aquatic resource functions and other impacts.

This concept is restated in Corps Regulatory Guidance Letter (RGL) 02-2, which states,

> for wetlands, the objective is to provide, at a minimum, one-to-one functional replacement, i.e., no net loss of functions, with an adequate margin of safety to reflect anticipated success.

Of course, there are numerous considerations in determining the extent of mitigation necessary to compensate for wetland losses. The regulations identify several factors, including what type of mitigation will be performed (i.e., preservation, enhancement, restoration, or creation), whether mitigation will be on-site or off-site, if it will be in kind, the likelihood of success, the type of functions lost, etc. When possible, it is preferable to try to reach some measure of function, and ensure that adequate mitigation is provided to offset the lost function. The regulations at 33 CFR 326.6 impose some limits on the nature and scope of mitigation. However, there is also room for requiring mitigation in after-the–fact situations to compensate for temporal losses.

In some cases, it is appropriate to use an acreage surrogate rather than a functional measurement. As discussed in RGL 02-2,

> In the absence of more definitive information on the functions of a specific wetland site, a minimum one-to-one acreage replacement may be used as a reasonable surrogate for no net loss of functions. For example, information on functions might be lacking for enforcement actions that generate after-the-fact permits or when there is no appropriate method to evaluate functions. When Districts require one-to-one acreage replacement, they will inform applicants of specific amounts and types of required mitigation. Districts will provide rationales for acreage replacement and identify the factors considered when the required mitigation differs from the one-to-one acreage surrogate.

In this case, the administrative record did not provide specific information regarding the level of function lost by the fill placed in the wetlands. Nevertheless, because the size and type of wetland was known, the Corps was able to employ an assessment tool (Key Mig) to determine the approximate functional loss. In the EA, the Corps utilized Key Mig, which considers a number of factors in determining the replacement value of wetlands, including wetland type, quality, temporal loss, and risk. According to the Corps representatives present at the appeals conference, Key Mig has been used extensively by the District to calculate wetland functional values for impacts in the Florida Keys associated with numerous permit actions. By using this methodology, the Corps concluded that a fee of $17,916.81 would be sufficient to compensate for the impact associated with the fill placed in wetlands on the property. This assessment assumes that the wetland to be restored will be the same type as the impacted wetland (i.e., in-kind replacement). It is important to note that in this case the wetland was assigned a functional value of 1.0, which is the highest rating possible. In the appeals conference, the Corps representative explained that this was done because the impacts had already occurred making it impossible to perform a functional assessment to evaluate the quality of the lost wetland.

Section 8, subpart C of the EA, states, "The wetland resources on the lot affected by the fill are valued by the Key Mig at $17,916.81. The shoreline fringe and submerged aquatic resources affected by the dock are valued at $392.22. A contribution of $18,309.04 will therefore be required to be made to the Keys Environmental Restoration Fund to compensate for those impacts. The fill on this site was emplaced without a federal permit. To compensate for the resource and temporal losses associated with work performed without federal authorization, the permittee will make an additional contribution of $17,916.81 to fund the restoration of 2,375 square feet of unauthorized work elsewhere in the Florida Keys." This statement does two things. First, it establishes that the replacement value determined to be commensurate with the

filled wetlands is $17,916.81. Second, it requires the payment for the wetland fill be doubled because the work was performed without a permit. In doing so, no justification is provided for the additional fee, other than to state it is for resource and temporal losses. Even this reasoning seems to be problematic, however, as the documentation provided for the Key Mig calculation already incorporates resource and temporal losses. Nowhere else in the administrative record is there a discussion regarding the doubling of the mitigation fee.

When this concern was discussed during the appeals conference, the PM stated that the payment would go to the Florida Keys Environmental Trust Fund who would use the money for the restoration of a particular site. He explained that costs of restoring the selected mitigation site is actually greater than the fee calculated by Key Mig, which is one reason why the additional fee was required. This justification is not supported by the wording of the findings however, that suggest the mitigation fee was not doubled to compensate for the functional loss on-site, but rather to fund the restoration of other unauthorized impacts elsewhere in the Florida Keys. Restoring filled wetlands is a typical mitigation method for standard as well as ATF permits.

The Corps Representative was asked if the compensatory mitigation requirement would be doubled for a project with similar impacts where the proper authorization had been obtained prior to placing the fill. The PM responded that the mitigation requirement would not be doubled. He went on to explain that it is District policy to double the mitigation requirement in cases where the fill had occurred as an unauthorized activity, stating that 33 CFR 326.2 encourages the Corps to take steps to discourage unauthorized fill. As stated by 33 CFR 326.2:

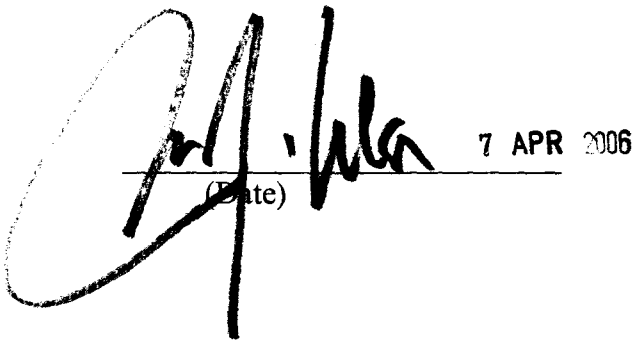
> Enforcement, as part of the overall regulatory program of the Corps, is based on a policy of regulating the waters of the United States by discouraging activities that have not been properly authorized and by requiring corrective measures, where appropriate, to ensure those waters are not misused and to maintain the integrity of the program. There are several methods discussed in the remainder of this part, which can be used either singly, or in combination to implement this policy, while making the most effective use of the enforcement resources available.

The regulation goes on to say that the ATF permit conditions may include special conditions related to the after-the-fact character of the permit. Therefore, if supported by evidence in the administrative record that additional fees are necessary to properly mitigate for the project impacts, the increased fees may be justified. The administrative record does not appear to make a clear case for the increased mitigation fees.

In summary, the administrative record does not provide adequate justification for the doubling of the mitigation fee. Further, the assertion that the fee was doubled because of the cost of establishing the mitigation site is belied by the fact that only mitigation fees for after-the-fact permits are doubled. The Key Mig calculations determine monetary losses from resource and temporal impacts. If the actual cost of replacing wetland functions is underestimated by Key Mig, the procedures for calculating in-lieu fees should be corrected for all permit actions.

CONCLUSION: After reviewing and evaluating the entirety of the administrative record provided by the Jacksonville District, I conclude that information contained therein does not

support the scope of the mitigation requirements contained in their proffered permit authorizing the appellant's proposal. Accordingly, I conclude that this Request for Appeal has merit. I hereby return this matter to the Jacksonville District for additional analysis as prescribed within this decision memorandum.



7 APR 2006

(Date)

Michael J. Walsh
Brigadier General, US Army
Commanding