ADMINISTRATIVE APPEAL DECISION

CHARLESTON COUNTY PARK AND RECREATION COMMISSION
FILE NO. 99-1E-301

CHARLESTON DISTRICT

DATE: February 6, 2001

Review Officer: Arthur L. Middleton, U.S. Army Corps of Engineers (USACE), South Atlantic Division, Atlanta, Georgia.

Appellant Representative: Mr. Ellison D. Smith (attorney), Charleston, South Carolina, Charleston County Park and Recreation Commission, Charleston, South Carolina.

Receipt of Request For Appeal (RFA): November 15, 2000.

Appeal Conference Date: January 10, 2001. **Site Visit Date:** January 10, 2001.

Background Information: The Charleston County Park and Recreation Commission (PRC), by application received on August 15, 1999, requested a permit for the placement of structures and fill material in waters of the United States pursuant to Section 10 of the Rivers and Harbors Act of 1899, and Section 404 of the Clean Water Act (33 U.S.C. 1344). The proposed project consists of constructing a bulkhead, boat ramps, and a courtesy dock in Shipyard Creek at the end of Juneau Avenue on the former Charleston Naval Base Complex, North Charleston, South Carolina. The originally proposed project consisted of constructing approximately 420 linear feet of bulkhead; four (4) 2-lane 28' x 100' concrete boat ramps; five (5) 10' x 100' floating "ground out" docks; one (1) 10' x 300' courtesy dock with fuel dispensers accessed by two (2) gangways and two (2) 8' wide, varying lengths, fixed walkways. During the permit evaluation, the applicant revised the proposal such that it consists of constructing 215 linear feet of bulkhead; four (4) 2-lane 28' x 110' concrete boat ramps; four (4) 10' x 90' floating "ground out" docks; one (1) 10' x 200' courtesy dock accessed by one (1) 6' x 70' gangway and one (1) 8' x 48' fixed walkway with a 16' 24' fixed platform at the end. The proposal for the fuel system was removed from the courtesy dock and proposed to be located upland. (**Note:** The applicant refers to the project location as Shipyard Creek; however, the approved Federal navigation project is known as Shipyard River. For purposes of this decision document, Shipyard Creek and Shipyard River are interchangeable). On September 15, 2000, the Charleston District Engineer denied the request for authorization. He concluded that the proposal "is contrary to the public interest and trust since the proposed work will cause unacceptable impacts to commercial navigation in Shipyard Creek; would increase congestion in this heavily used portion of Shipyard Creek; create hazardous navigational conditions; interfere with the construction of the authorized Federal navigation project (1000' turning basin); and, place the recreational boating public in harm's way." The denial is being appealed.

ENCL 1

Summary of Decision: I find the appeal does not have merit. I find that the Charleston District's decision to deny PRC's permit application was not arbitrary and capricious. The decision was neither contrary to public interest nor contrary to the previous application and interpretation of the various regulations and policies of the USACE applied to similar permits. The decision of the Charleston District is sustained.

Appeal Evaluation, Findings, and Instructions to the Charleston District Engineer (DE):

Reasons for the appeal as presented by the appellant: "The decision of the District Engineer...in denying Charleston County Park and Recreation Commission's permit application...is arbitrary and capricious and contrary to public interest and is contrary to the previous application and interpretation of the various regulations and policies of the United States Army Corps of Engineers governing the issuance of similar permits on the following grounds, to-wit:"

Reason 1: "The proposed project is designed to meet a substantial and overwhelming public need in Charleston for residents of the county as well as residents of the State of South Carolina for recreational boat access to Charleston Harbor and this is particularly true for citizens and residents of the Charleston peninsula and North Charleston. The City of North Charleston and its Mayor Keith Summey are wholeheartedly in support of this project.

FINDING: Reason 1 for the appeal has no merit.

ACTION: No action required.

DISCUSSION: The Charleston District was well aware of public sentiment regarding the need of public boat launching facility in Charleston County that would provide access to Charleston Harbor. This sentiment is well documented in the administrative record. The decision document (page 6) states, "[a]pproximately 255 postcards and three (3) letters were received supporting the proposed docking facility." The administrative record documents that many of the individuals, businesses, organizations, and agencies opposed to this specific proposal, acknowledged the need for a public boat launching facility in this general area of Charleston County. The decision document (page 11) states, "[a]lthough the general public has favorably embraced this project, the fact that this project is located in a historically commercial channel cannot be ignored." It further states, "[b]y regulation, 33 CFR 320.4(o)(3), District Engineers are required to insure the protection of navigation in all navigable waters of the United States." In addition, it states, "[t]he comments received in response to the public notice from the commercial interests, who navigate this area daily, and from the U.S. Coast Guard, indicate that navigational impacts of this project far outweigh any benefits the public may gain from launching a boat at this location." Emphasis added.

At the appeal conference on January 10, 2001, Mr. Smith referred to a permit issued a number of years ago, by the Charleston District, to the United States Navy (USN), for a marina which included a boat ramp at the site of the proposed public boat launching facility. In this context and as a reason for appeal, Mr. Smith alleges that the issuance of that permit demonstrates that the Charleston District's decision was "contrary to the previous application and interpretation of

the various regulations and policies of the United States Army Corps of Engineers governing the issuance of similar permits." At the site visit on January 10, 2001, prior to the appeal conference, Mr. Jeff Schryver, PRC, said that the proposed launching ramps are located at the site of the USN authorized boat ramp. The review officer noted that the authorized boat ramp was not constructed. Mr. Bobby Riggs, USACE, Charleston District, pointed out, however, that the proposed launching ramps are waterward of the USN authorized boat ramp because the USN authorization was conditioned such that the ramp was to be located outside of the footprint of the authorized turning basin.

In a letter to the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM), dated December 2, 1999, (page 4) the applicant's agent stated, "[t]he original permit for the Naval Base marina (PN 91-3T-101, now the Cooper River Marina) also contained a boat ramp located on the edge of the proposed enlarged turning basin. The permit was issued with no objections concerning the boat ramp." The boat ramp was outside the footprint of the authorized turning basin, was small compared to the proposed "events-related" public boating facility, and was not intended to be used by the general public.

I find that the Charleston District did appropriately regard the public's support of this proposed project, along with other public interest factors found at 33 CFR 320.4, in reaching its decision.

Reason 2: "To the extent that denial of the permit application was based upon the contention that the project would interfere with the construction of a federally-authorized 1000-foot turning basin in Shipyard Creek, it should be noted that while the turning basin has received Congressional authorization it has not received funding and, in fact, the local sponsor, the South Carolina State Ports Authority, has publicly stated that they do not intend to provide funds for this project and it is speculative at best as to whether or not the 1000-foot turning basin in the lower reaches of Shipyard Creek will ever be constructed. As important is the fact that in order to construct the 1000-foot turning basin in the lower reaches of Shipyard Creek it will be necessary to acquire high ground property owned by the National Park Service and leased to Charleston PRC. Such an acquisition would implicate the provisions of Section 6(F)(3) of the Land and Water Conservation Act and 36 C.F.R. Part 59 which was not addressed by the United States Army Corps of Engineers, Charleston District, in making its decision".

FINDING: Reason 2 for the appeal has no merit.

ACTION: No Action required.

DISCUSSION: The decision document (page 2, paragraph 3.a.) presents an exhaustive review of the history of the Federally authorized Shipyard River Navigation Project going back to 1912. It states, "[t]he 1986 Water Resources Development Act (WRDA 86) authorized deepening to 38' as part of the Charleston Harbor, SC, improvement, as well as authorizing two (2) 1000-foot turning basins and widening about 2000' of the upper Shipyard River Channel to 250'. This basin was not constructed since the local sponsor, the South Carolina State Ports Authority, did not have facilities in Shipyard River. However, by a letter dated November 2, 1999, Kinder-Morgan, in partnership with Blue Circle Cement, notified this office [Charleston District] that

they recently broke ground for the 2nd largest import cement storage facility in the United States, and requested that the Corps proceed with the expansion of the lower reach turning basin. Currently, the South Carolina State Ports Authority, the state sponsor, has not provided their portion of funds for the widening project: however, with the growth of commercial traffic in Shipyard River as a result of the Kinder-Moran expansion, the decision to fund the widening of the basin could occur in the future. In addition, the WRDA 96 authorized the deepening of the Shipyard River Channel to 45'. This deepening is expected to occur in FY 2002." Emphasis added.

The decision document (page 2, paragraph 3.b.) documented that those individuals/organizations within the Charleston District, responsible for matters related to Federal Navigation Projects, "initially informed the Regulatory Branch that the proposed project may encroach upon the Federally authorized channel...[and] the project manager for O&M [Operations and Maintenance] Projects, notified...that the installation of the pipeline necessary for the annual dredging of Shipyard River would "present interference to recreational boaters during the installation thereof. There is potential that boaters could run into the pipeline causing property damage and the possibility of causing injury to boaters and/or workers on the dredging contract"...further stated that the decision to fund the...1000-foot turning basin could occur in the future and that the "increase in commercial traffic would pose a potential safety hazard to recreational boaters."

Regulatory Guidance Letter (RGL) No. 84-17 states, "[p]roposed activities which may result in modifications of, or encroachment on, constructed Congressionally authorized Federal projects require careful and thorough review at all stages of the permitting process. Applications should be reviewed for the potential impact on the authorized purpose(s) for which the Federal project was constructed. This review will include reference to the authorizing legislation, the Chief of Engineers' report to Congress, and any other historical documentation necessary to define fully the project's purpose..." Further, "[w]hen the district engineer determines that the proposed activity...would conflict with the project's Congressionally authorized purposes, established limitations or restrictions, or that it would limit an agency's ability to provide the necessary operation and maintenance functions, he will so notify the applicant and all interested parties of his determination."

In addition, regulations at 33 CFR 325 Appendix A-Permit Form and Special Conditions-Further Information: 2.d. states, "[t]his permit does not authorize interference with any existing or proposed Federal project." Emphasis added. This provision limits any authorized activity from interfering with a Federal project, if not otherwise conditioned.

In Views of the District Engineer, the decision document (page 10) states, "this project will encroach into a Federally authorized channel. Even if the structures themselves do not encroach in the channel, the launching of boats at the edge of the channel presents an unacceptable problem of encroachment. At present, there is an annual dredging requirement to dredge this area. The structure, as proposed, would interfere with the pipeline installation and routing when dredging is in progress. Although the enlargement of the turning basin approved by WRDA 86 has not yet been constructed, this office is currently reviewing the economics of the project. Authorizing a permanent encroachment into an authorized Federal navigation channel conflicts

with Congressional intent and authority and potentially threatens any future plans to proceed with construction of the approved turning basin...If the proposed project were allowed to proceed, at some point in the future, this office would be faced with the prospect of protracted contract actions and litigation to effectuate removal of the structures." To accent this concern of potential protracted contract actions and litigation, a recent court case (i.e., U.S. v. Alameda Gateway, LTD, 213 F.3d 1161 (9th Circuit, 2000)) was cited and a copy attached to the decision document.

In a letter to the OCRM, dated December 2, 1999, (page 4) the applicant addressed the concern that the proposed project is in conflict with a Federally authorized project by stating, "it is our understanding that the State Ports Authority has no intentions of funding the improvements since the private sector was previously unwilling to share cost on the project." In this regard, at the appeal conference conducted on January 10, 2001, the appeal review officer noted that the administrative record contains no documentation from the SCSPA by which they state they do not intend to fund nor sponsor the authorized Federal project.

The appellant's statement above, "that in order to construct the 1000-foot turning basin in the lower reaches of Shipyard Creek it will be necessary to acquire high ground property owned by the National Park Service and leased to Charleston PRC...would implicate the provisions of Section 6(F)(3)..." is an issue that should not have been addressed in this present permit decision. The regulations at 36 CFR 59.3(a) state, "Section 6(f)(3) of the L&WCF [Land and Water Conservation Fund] Act is the cornerstone of Federal compliance efforts to ensure that the Federal investments L&WCF assistance are being maintained in public outdoor recreation use. This section of the Act assures that once an area has been funded with L&WCF assistance, it is continually maintained in public recreation use unless NPS [National Park Service] approves substitution property of reasonably equivalent usefulness and location and of at least equal fair market value." Emphasis added. No matter what entity owns the property needed to construct the Federally authorized improvements in Shipyard Creek, the details of land acquisition would be considered under the National Environmental Policy Act (NEPA) requirements by those individuals and organizations within the Charleston District, responsible for matters related to Federal Navigation Projects.

I find that the degree of consideration given by the Charleston District to the potential impacts to the existing and authorized Federal Navigation project improvements were appropriate.

Reason 3: "To the extent that the permit denial was based upon the assertion that the proposed boat ramps, bulkhead and courtesy dock in Shipyard Creek would have unacceptable impacts on commercial navigation in Shipyard Creek or increase congestion creating hazardous navigational concern, it is important to note that the only entities which objected to the creation of a public boat ramp in Shipyard Creek are allied with commercial navigation interests in the Charleston Harbor and none represent the needs, concerns or desires of recreational boaters in the State of South Carolina or Charleston County. Specifically, comments of the United States Coast Guard via the Captain of the Port merely echoed the concerns of the commercial shipping interest and industrial users of commercial shipping. None of the other federal regulatory agencies had any objection to the project. More specifically the entity which is in charge of recreational boating in the Charleston Harbor, the South Carolina Department of Natural Resources, had absolutely no

objection to the project and, in fact, supported it. Moreover the administrative record developed is well documented with the fact that the usage of Shipyard Creek by commercial shipping interests is exceptionally light when compared with the uses in other parts of Charleston Harbor by commercial shipping and commercial navigational interests. The United States Army Corps of Engineers, Charleston District, had in its possession a report by the Charleston Harbor Pilots Association which documents this fact".

FINDING: Reason 3 for the appeal has no merit.

ACTION: No action required.

DISCUSSION: The decision document (pages 3-5) deals extensively with the issue of navigation safety, regarding both commercial navigation or recreational boating. Commercial shipping interests were very much opposed to the proposed boat ramp.

The decision document (page 11) states, "[t]he safety of the general public, commercial users of the harbor, and commercial operators is of paramount concern to this office. The protection of safe navigation has been and continues to be of primary concern to the Corps of Engineers." It cited regulations at 33 CFR 320.4(o)(3) which state, "[p]rotection of navigation in all navigable waters of the United States continues to be a primary concern of the federal government." In this instance, the primary Federal agencies with this responsibility are the USACE, Charleston District, and the Commander, U.S. Coast Guard, Captain of the Port, Charleston, South Carolina (Commander).

By letter dated September 28, 1999, the Commander stated, "[t]he large commercial vessels which move in and out of Shipyard Creek are very restricted in their ability to maneuver and usually require tug assistance. Meeting situations between these types of ships and small boats in confined waterways can be hazardous. These deep draft vessels and towing vessels can create turbulence and wakes that could be extremely dangerous to small boat operators trying to launch boats on the ramp, recover their boats, or moor them alongside the proposed fuel dock; the finger piers for the proposed boat ramp would also be susceptible to wake damage. Navigation in this area at night or in restricted visibility is already difficult and would be made even more so by the added congestion from users of a boat ramp and docks."

After the original proposal was revised, the Commander, in a letter dated December 28, 1999, to the OCRM stated, "[o]n October 25, 1999, I sent a letter...addressing the significant public safety concerns I had for this project, as originally proposed. In reviewing the proposed modifications, I do not feel any of those concerns have been adequately mitigated." See additional comments in Reason 4, below.

The PRC was aware of possible problems associated with locating public launching facilities in Shipyard Creek as early as 1996. By letter dated November 13, 1996, to Mr. Eubanks of PRC, the Charleston Naval Complex Redevelopment Authority commented, "regarding the proposed public boat landing, the Authority was not opposed to the concept but questioned the feasibility of the location and the extent of your research into the proposed site. Shipyard Creek has a heavy commercial traffic of seagoing tankers and deep draft dry bulk carriers. This heavy

commercial use could result in a dangerous mix of small recreational craft with very large deep draft vessels." In a memorandum dated November 18, 1996, Mr. Eubanks forwarded this letter to the PRC Commissioners with the comment, "[a]ttached is correspondence...which does not bode well for what we have proposed."

By letter dated October 11, 1999, the South Carolina Department of Natural Resources stated, "[w]e offer no objections to the proposed work, provided the issued permit is conditioned...[t]he proposed docking facility is constructed and operated in accordance with the current OCRM regulation." This condition requires the construction and operation to conform to OCRM regulations. It does not address safety issues related to commercial navigation or recreational boaters distant from the docking facility. In addition, their letter of no objection predated the OCRM Critical Area Permit/Water Quality Certification, issued on March 15, 2000, by five months. Two (2) other dealt with wetlands issues.

The report, referred to above, by the "Charleston Harbor Pilots Association" (Charleston Branch Pilot's Association) is a letter dated 3 Jan 00, to the Charleston District – Subject: DEIS Comments: P/N # 99-1T-345-P-C-W. This document was not a part of the administrative record at the date of the Notification of Appeal Process and therefore, is not considered. At the appeal conference on January 10, 2001, Mr. Ellison D. Smith (attorney) stated that he acquired the document from the Charleston District.

Although there are conflicting points of view on interpretation of the information and data furnished by interested parties, I find that Charleston District appropriately considered all of the information contained in the administrative record regarding potential impacts to commercial navigation.

Reason 4: "To the extent the permit denial was based upon the notion that "the proposed project would place a recreational boating public in harms way," the decision was erroneous since statistics clearly demonstrate that there have been few, if any, accidents within Charleston Harbor or for that matter the Intracoastal Waterway in close proximity to the Charleston Harbor which involved commercial shipping or navigational interests and recreational boaters. There is ample space within Shipyard Creek to accommodate public recreational boating access and commercial shipping interest and Charleston County Park and Recreation Commission made it clear at its various meetings with the staff persons employed by the United States Army Corps of Engineers, Charleston District, that it was committed to operate its public boat ramp so as to avoid any conflict between recreational boaters and commercial traffic which might transverse Shipyard Creek,"

FINDING: Reason 4 for the appeal has no merit.

ACTION: No action required.

DISCUSSION: The Charleston Districts' decision was made in light of the fact that statistics indicate that there have been few accidents in Charleston Harbor between commercial vessels and recreational boaters. In a letter dated October 25, 1999, the Commander responded to a request by OCRM for information on past collisions. He stated, "I appreciate the opportunity to

provide the information requested. However, I caution that looking at statistics regarding the single parameter of past collisions does not reflect my numerous concerns about this proposal. Nowhere else in the Port of Charleston would there be such a mixed use of the waterway in such a congested area. The shore [-] to [-] shore distance across Shipyard River is no more than 200 yards...You point out that there are other areas in the port, where recreational facilities are in close proximity to commercial shipping ventures. What is not stated is that each of these areas are located on wide areas of a river and none pose the same congestion problems as this proposal." He continued, "Patriots Point Marina is farther from the heavily used commercial channel than the proposed Shipyard River boat ramp would be, yet has demonstrated all of the problems that were pointed out to its developers during its permit process as far back as 1986: congestion, wake damage, near collisions, impeding vessel traffic and chronic complaints from recreational boat owners. In short, approving a launch facility in the Shipyard River area would pose unacceptable hazards to an unsuspecting public that expects regulators at all levels to work in their best interest."

By letter dated April 20, 2000, Mr. John Shaffer, Jon Guerry Taylor, P.E., Inc. (Consultant), provided a report to Charleston District, comparing statistics of various public boat launching facilities located on the Atlantic Intracoastal Waterway (AIWW), including the distance from the ramps to the channel compared to that of the proposed Shipyard Creek facility. The distance from the ramp of the proposed facility was shown to be 125'. The other ramps were shown to be 105', 145', 125'(appx), and 95' (appx) respectively.

A Charleston District Memorandum For The Record documented that on June 2, 2000, the District Engineer, Charleston District, conducted a field inspection of several boat ramps in the Charleston County area, including three (3) of those identified in the letter from Mr. Shaffer.

The decision document (page 11) states, "[t]he safety of the general public, commercial users of the harbor, and commercial operators is of paramount concern to this office. The protection of safe navigation has been and continues to be of primary concern to the Corps of Engineers." It cited regulations at 33 CFR 320.4(o)(3) which state, "[p]rotection of navigation in all navigable waters of the United States continues to be a primary concern of the federal government." In this instance, the primary Federal agencies with this responsibility are the U.S. Army Corps of Engineers, Charleston District, and the U.S. Coast Guard, Captain of the Port, Charleston, South Carolina.

Although there are conflicting points of view on interpretation of the information and data furnished by interested parties, I find that Charleston District appropriately considered all of the information contained in the administrative record regarding this issue.

Reason 5: "The decision of the United States Army Corps of Engineers, Charleston District, denying the proposed project and its reliance on information provided by the commercial shipping interest, the United States Coast Guard and the Charleston Harbor Pilots Association is inconsistent, at best, with its review of the proposed expansion of the State Ports Authority's terminal presently proposed for Daniel Island."

FINDING: Reason 5 for the appeal has no merit.

ACTION: No action required.

DISCUSSION: Information regarding the proposed expansion of the South Carolina State Ports Authority in not a part of the administrative record for the instant appeal. That proposal is a pending application for Department of the Army authorization. No decision has been reached, therefore, no conclusions have been reached about specific issues.

Reason 6: "The decision of the Charleston District to deny the permit while an appeal of the state permit issued by the OCRM Division of the South Carolina Department of Health and Environmental Control was pending is contrary to and in conflict with prior practices of the Charleston District in similar matters."

FINDING: Reason 6 for the appeal has no merit.

ACTION: No action required.

DISCUSSUON: At the appeal conference on January 10,2001, Mr. Smith stated "it has been the practice of the Charleston District, in similar situations, to wait until appeal of the state permit is resolved before Charleston District would make its decision." Mr. Riggs answered, "Mr. Smith is right in that when Charleston District was satisfied with a project, but the state had denied its permit/Coastal Zone Management certification, Charleston District would wait for an appeal of the state's decision to be resolved before they would make their decision. However, each permit is evaluated on a case-by-case basis.

As stated at 33 CFR 320.4(j), "where the required Federal, state and/or local authorization and/or certification has been denied for activities which also require a Department of the Army permit before final action has been taken on the Army permit application, the district engineer will, after considering the likelihood of subsequent approval of the other authorization and/or certification and the time and effort remaining to complete processing the Army permit application, either immediately deny the Army permit without prejudice or continue processing the application to a conclusion. If the district engineer continues processing the application, he will conclude by either denying the permit as contrary to the public interest, or denying it without prejudice indicating that except for the other Federal, state or local denial the Army permit could, under appropriate conditions, be issued."

In this case the Charleston District determined that the proposed project was contrary to the public interest for the reasons they identified in their decision document and therefore, did not wait for the appeal to be resolved before making their decision.

Information Received and its Disposition During the Appeal Review:

1. At the appeal conference on January 10, 2001, Mr. Smith submitted a copy of PHASE 1 CHARLESTON HARBOR SOUTH CAROLINA DEEPENING AND EXTENDING CHANNELS FOR NAVIGATION, dated April 1980. See comment below.

2. At the appeal conference on January 10, 2001, Mr. Smith submitted a copy of a letter from the Charleston Branch Pilots' Association, dated January 3, 2000, to the Charleston District – Subject: DEIS Comments: P/N # 99-1T-345-P-C-W. See comment below.

The documents, identified above as not being a part of the administrative record, were discussed with Mr. Stephen Lingenfelter, SAD Division Counsel. He advised that since they were not part of the original record, under our appeal regulations at 33 CFR 331.7(f) which states "The appeal...is limited to the information contained in the administrative record by the date of the [Notification of Appeal Process] NAP...Neither the appellant nor the Corps may present new information not already contained in administrative record, but both parties may interpret, clarify or explain issues and information contained in the record." Therefore, the documents cannot be considered.

Phillip R. Anderson
Major General, U.S. Army
Division Engineer