ADMINISTRATIVE APPEAL DECISION

DEAN THOMPSON

FILE NUMBER 200105877 (LP-VA)

JACKSONVILLE DISTRICT

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

Appellant Representative: Sandra Walters, Sandra Walters Consultants, Inc., Key West, Florida.

Receipt of Request For Appeal (RFA): January 24, 2002.

Appeal Conference Date: March 11, 2003. **Site Visit Date:** March 11, 2003.

Summary of Decision: I find that the appeal does not have merit. I find that the District evaluated and documented their proffered permit dated October 28, 2002 according to applicable laws, regulations and policy guidance. The special conditions placed on the permit, including the revised plans/drawings, are reasonable given the specific circumstances of the permit request.

Background Information: In a joint environmental resource permit application, dated October 9, 2000, Mr. Dean Thompson requested authorization to install an approximately 62.5 linear foot seawall and place backfill in an area approximately 813 square feet between the proposed seawall and the top of slope of the bank of a man-made canal off Bougainvillea Avenue, on Raccoon Key, in Monroe County, Florida.

The applicant authorized Mr. Glen Boe (Engineer / Glen Boe & Associates) "to act on [his] behalf...as the agent in the processing of this application for the permit...and to furnish, on request, supplemental information in support of the application. In addition...to bind me...to perform any requirements which may be necessary to procure the permit or authorization..." Emphasis added.

The application included the following general description of the proposed project. "The applicant owns a canal front lot in Key Haven [subdivision]. The applicant wishes to construct a dock with davits along the shoreline. The purpose of this project is to provide boating access to the shoreline and to provide shoreline stabilization. Construction of the dock will proceed by installing augercast piles as required. The remainder of the concrete work will consist of building forms, setting steel and pouring concrete...all work will be conducted from the land. Prior to any construction activity, turbidity curtains will be deployed to isolate the construction

site from ambient waters. These will remain in place until all construction-induced turbidity has subsided."

The application indicated that vegetation coverage of the shoreline consisted of between 34% and 65% and consists of buttonwood, sea oxeye daisy and that less than 50% of the vegetation consists of the exotic Brazilian Pepper. The application also indicated that the impact to over story and herbaceous species involves an area approximately 15 feet wide by 45 feet long. The application indicated that coverage of the littoral shelf along the shoreline, involving two or less species of macro algae, was between 34% and 65%. It indicated the absence of seagrass. The length of the shoreline fronting the canal is 62.5 feet. The application indicated that a single family residence was proposed for the site.

By letter of January 29, 2002, the District circulated a coordination letter with local, state and Federal agencies and with some members of the public. The letter stated that the proposed "work may affect, but is not likely to adversely affect the endangered West Indian manatee" and that it was USACE responsibility to coordinate its determination with the US Fish and Wildlife Service (FWS). The letter also stated, "[t]his...initiates the Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act" with the National Marine Fisheries Service (NMFS). The letter also stated, "**Mitigation will be required for any impacts to resources**." Emphasis was in the letter.

By letter of October 25, 2000, the FWS responded, "The Service concurs with the Federal Agency determination (no affect or may affect, not likely to adversely affect) pursuant to the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*)."

On October 28, 2002, the District authorized the applicant "to install an 8-foot wide pier deck, bulkhead and two davits with backfill, along 41.5 feet of shoreline resulting in 415 square feet of aquatic impacts."

By letter of November 25, 2002, the appellant submitted a Request For Appeal to the District, along with revised plans for a marginal dock 8 feet wide by 41.5 feet long, backfill, an inclined elevator boat lift to be located on the west south west corner of the property and rip rap to be placed along the remainder of the shoreline. The appellant stated, "With the addition of the rip rap I am willing to pay added mitigation and replant any of the vegetation that would be impacted in the building of the seawall. The majority of the existing vegetation is above the mean high water with no vegetation on the waters edge. I would also be willing to hear any other suggestions that could make this proposal a success for the Corps and myself [sic]."

By letter of December 19, 2002, the appellant submitted another, slightly revised, Request For Appeal to the District.

By routing and transmittal slip, dated February 13, 2003, the District forwarded the Request For Appeal to SAD indicating that the District completed their reconsideration on February 5, 2003. The District did not issue a revised permit.

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

Reason 1: "I am writing in reference to permit number 200105877 (LP-VA) that was issued on October 28, 2002. The permit that was issued has some changes from the original application. I originally applied for a 62.5 ft seawall, which was decreased to 41.5 ft. leaving 21 ft. of the property unprotected.

FINDING: The reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the Request for Appeal, the appellant added, regarding the relocation of the issued permit, "I am requesting a reevaluation of the project due to some large concerns I have as the homeowner. I live on a canal that is 99% developed with all homes having 100% development of the waters edge. I live at the beginning of the canal and carry the greatest amount of exposure to wave action and boat traffic, which increases the amount of erosion on my property." The appellant's property is near the beginning of the canal. At the appeal conference, the appellant pointed out that there are two lots between his lot and a large undeveloped, unplatted area to the north. According to the appellant, this large undeveloped area "will not be developed...according to the county. They are not legally platted." The vicinity map included in the application submitted by the appellant's agent depicts the appellant's lot as lot 14. The next two lots north are numbered 15 and 16. The map also depicts lots numbered 17 thru 24 to the north. In the Environmental Assessment and Statement of Findings (EA) (page 2), October 28, 2002, the District stated, "The proposed wetland alteration is necessary to realize the project purpose and should result in minimal adverse environmental impacts, with mitigation. The benefits of the project ...out[weigh] the minimal detrimental impacts. Therefore the project is in accordance with the Corps wetland policy with the attached special conditions, including the Mitigation Index Guideline's (MIG) compensatory contribution for aquatic resource impacts... Consistent with contemporary projects throughout the Florida Keys ...the project required minimization, compensatory mitigation and remaining wetland preservation for final authorization. The applicant has therefore been required instead to minimize the pier [dock] to 41.5 feet in length (415 square feet), to provide full monetary compensatory mitigation for associated impacts and to preserve the remaining 21 foot long, climax mangrove wetland shoreline at the west end via deed restriction." The monetary compensation for the loss of 415 feet of mangrove/saltmarsh wetlands and vegetated shallows, determined to be $3469.83 based on the MIG, is to be paid to the Florida Keys Environmental Restoration Trust Fund. The appellant has not disputed the required monetary compensation.

Regulations at 33 CFR 320.4(a)(1) state "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 impact 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.

During the appeal conference the appellant indicated that he thought the county was responsible for issuing retaining wall permits. At one point he stated, "I was under the impression that the county was issuing these permits allowing you to build the retaining wall; just the retaining wall with no actual dock on top; no...davits or anything in place; just to reclaim, is the impression I was under."

In the Request For Appeal the appellant continued, "The enclosed proposal shows a 41.5ft. sea wall with 21 ft. [of] rip rap. The rip rap that was added [in the appellants revised proposal] to the approved permit would stabilize the shoreline and would eliminate the continuing erosion and the possibilities of a debris trap. A debris trap would collect trash and seaweed that would be offensive to my neighbors and myself [sic]. Without stabilizing the shoreline my property will continue to erode, therefore increasing the size of the debris trap and decreasing the size of my property. The vegetation on the property consists of a few green buttonwoods that will eventually be undermined by erosion and do nothing to protect my property or the environment."

Based on the Administrative record, the issue regarding the location of the proposed dock preservation area is the relative value of the aquatic resource along the existing shoreline, including the designated preservation area.

In the permit issued to the appellant, the District modified the site plan by removing 21 feet of the dock along the west southwest shoreline and requiring that portion of the property to be preserved from future development by placing it under a deed restriction. When the appellant appealed to the District regarding the permit, he submitted revised plans depicting a 41.5 foot long dock located along the west southwest shoreline and rip rap along the remaining north northeast shoreline. As noted above, he proposed this plan to eliminate an anticipated debris trap and to protect the shoreline. While this plan did result in some minimization, rip rap verses the hard surface of the previously proposed dock, it continued to propose the elimination of the area the District determined should be avoided.

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."

As noted above, the appellant states, "I live at the beginning of the canal and carry the greatest amount of exposure to wave action and boat traffic, which increases the amount of erosion on my property." The Districts permit allows for the bulkhead and dock to be constructed on the property nearest to the entrance to the canal. In the EA (page 1) the District states, "[t]he proposed work, as revised, will not adversely affect the water quality, recreation..., navigation, esthetics, shore erosion, flood protection, conservation of natural resources, fish and wildlife resources..., or land use of the area. The original proposal would have replaced recovering cut buttonwood mangrove/saltmarsh and algal vegetated shallows aquatic resources approximately 11 feet wide along the entire shoreline, to the detriment of their wildlife habitat and productivity, water quality maintenance and flood damage attenuation functions, identified as individually and cumulatively important by Department of the Army permit regulations." Emphasis added. As noted above, the appellant states, "[t]he vegetation on the property consists of a few green buttonwoods that will eventually be undermined by erosion and do nothing to protect my property or the environment." Should this situation develop the permittee may propose corrective measures to the District.

Reason 2: "The approved permit is also asking me to surrender 210 sq. ft. of my property by way of a deed restriction, which would eliminate some of my property rights. I am planning to build a swimming pool on the left rear portion of my property. This surrender of property usage would eliminate that option and decrease the function of my property."

FINDING: The reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: Included in the original application was a site plan that depicted the applicant's lot (14) proposed dock, davits and backfill. The plan also depicted the location of a proposed single family residence and indicated what appears to be setbacks from the street (east side) and the left (south side) property line. There is no indication on the plan of a proposed swimming pool.

In the November 25, 2002, Request For Appeal to the District, the appellant submitted revised plans for the District to consider. In addition to a copy of the original site plan depicting the proposed residence, this submittal included another site plan depicting a one story concrete block structure on concrete columns. Neither the letter nor the plans indicated a proposed swimming pool.

In the December 18, 2002, Request For Appeal, the appellant included a discussion of a future swimming pool in the letter, but the proposed pool was not depicted on the plans attached. At

the appeal site visit and conference the Review Officer observed that the one story concrete block structure on concrete columns is in place. The design and orientation of the residence on the lot has limited any future placement of a swimming pool.

The 404(b)(1) Guidelines, 40 CFR 230.10(a) state "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have a less adverse impact on the aquatic ecosystem, so long as the alternative does not have other adverse environmental consequences.... Where the activity associated with a discharge which is proposed for a special aquatic site...does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e. is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise."

The deed restriction would preclude certain activities in the preservation area. However, it is not that dissimilar to the limitations imposed on property by city, county, and state requirements for setbacks, easements, etc.

The placement of deed restrictions is a common practice and is used throughout the USACE Regulatory Program to facilitate sufficient mitigation to offset impacts to waters of the United States including wetlands. 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 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."(Note: Unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs generally remains valid after the expiration date as discussed in the Federal Register notice on RGLs of March 22, 1999, FR Vol. 64, No. 54, Page 13783.)

Information Received and its Disposition During the Appeal Review:

1) The Jacksonville District furnished a copy of the Administrative Record for the subject application.

2) The appellant furnished a certified copy of the transcript of the appeal conference held on March 11, 2003.

Conclusion: After reviewing and evaluating the administrative record provided by the Jacksonville District, I conclude that there is sufficient information 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 and Section 404 of the Clean Water Act, for the placement of fill material and construction of a bulkhead and dock in waters of the United States, including wetlands. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

mFeb 04
(Date)

Randal R. Castro
Brigadier General, US Army
Commanding