ADMINISTRATIVE APPEAL DECISION

JAMES JOHNSON, PERMIT NUMBER 199601445(IP-MN)

JACKSONVILLE DISTRICT

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

Appellant Representative: Mr. Frank E. Matthews (attorney).

Receipt of Request For Appeal (RFA): July 31, 2002.

Appeal Conference/Site Visit Date: March 14, 2003.

Background Information: Mr. Johnson (appellant) applied for a permit to fill 1.4 acres of tidally-influenced red, black and white mangroves on a 2.49 acre tract containing 0.15 acres of upland. The fill was for the construction of a 72-unit hotel with docking facilities for guests. The application also included the construction of a 700 linear foot retaining wall, the rebuilding of a 220-foot long boardwalk, and the construction of a 352-foot dock with 12 parallel slips. Mitigation in the initial application consisted of preservation of 0.84 acres of on-site wetlands, and enhancement/preservation of 9.31 acres of off-site wetlands. Over the course of the application process, the applicant made a series of revisions to the initial application. These revisions resulting in a proposed fill of 0.98 acres, a 140 linear foot retaining wall, an eight slip "T"-shaped docking facility, and off-site mitigation of 60 acres. The property is located on the east side of State Road 29 (Copeland Blvd) and west of an unnamed, manmade dead end canal in Collier County, Florida.

The U.S. Army Corps of Engineers' Jacksonville Districts (District) originally received the application for a Department of Army permit on 15 March 1996. A request for additional information (RAI) was sent to the applicant 15 March 1996. The Corps then sent a letter on 28 January 1997 due to lack of response to the RAI. The application was resubmitted on 25 February 1997 by the applicant's consultant, and was followed by another RAI to the applicant. The application was considered complete by the Corps on 31 March 1997.

The Corps issued a public notice for the project on 2 April 1997. Comments were received in response to the public notice, including those of EPA and the National Marine Fisheries Service, both of which recommended denial. The applicant's consultant requested that the Corps consider the application withdrawn, which it did on 3 July 1997. The Corps reactivated the application on 10 September 2001 when the applicant submitted sufficient information to address the 1997 public notice comments by the federal commenting agencies. The South Florida Water Management District (SFWMD) issued an Environmental Resource Permit, No. 11-01819-P, on 11 May 2000. Issuance of the SFWMD permit constituted certification of compliance with state water quality standards pursuant to Florida statute. On 3 June 2002, the Jacksonville District Engineer (DE) denied the request for authorization. He determined both that the proposed fill discharge would not comply with the Section 404(b)(1) Guidelines because less environmentally

damaging alternatives were available to the applicant, and that the project was contrary to the overall general public interest. The permit denial is being appealed.

Summary of Decision: I find the appeal has merit as follows: I find that the District did not identify significant national issues and how they are overriding in importance in light of SFWMD's decision to issue state water quality certification and their environmental resource permit.

Appeal Evaluation, Findings, and Instructions to the Jacksonville District Engineer (DE): Reasons for the appeal are as presented by the appellant:

Reason 1: "The Corps arbitrarily and capriciously applied the Section 404(b)(1) guidelines during review of this permit by using incorrect, incomplete and speculative information in its analysis."

Finding: The reason does not have merit.

Action: None required.

Discussion: The appellant listed 5 basic concerns regarding the alleged arbitrary application of the 404(b)(1) guidelines. These included: 1) salinity - the Corps' statement that the project will "negatively affect salinity" was not substantiated in the record, and should have yielded to the SFWMD's water quality certification; 2) suspended particulate/turbidity - the Corps' finding that there was a "'probability' that suspended particulate matter would leach into the remaining tidal areas from the hotel" was not supported by any evidence, and the Corps should have deferred to the water quality certification; 3) contaminant availability - there was no evidence to support the DE's finding that "the use of fertilizers in the grassed and planted areas would tend to leach into the tidal receiving waters" ; 4) cumulative impacts - that because the proposed project was unique and had minimal impacts, the potential for setting a precedent for cumulative impacts was remote and speculative; and, 5) recreation – there was no evidence for the DE to conclude that recreational activities such as sport and commercial fishing and shell fishing could be adversely affected, and he failed to consider the positive recreational and environmental benefits of the project.

These 5 issues are all part of the analysis that is done pursuant to the 404(b)(1) Guidelines. However, a more central issue is the determination of water dependency. As stated in 40 CFR 230.10(a):

> Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant 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 sitting 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 purpose of the proposed discharge of fill material, as defined in the 2 April 1997 public notice, is for the commercial development of a hotel with a swimming pool and boat docks. The Statement of Findings identified the project's basic purpose as being to construct a motel facility. The applicant desires that the motel be situated on the proposed waterfront location because of its proximity to Everglades National Park and Big Cypress National Preserve, for access by boat, and to enhance the facility's ecotourism theme. These factors do not change the fact that the motel does not require access or proximity to or sitting within a special aquatic site, wetlands, to fulfill its basic purpose and is, therefore, not water dependent.

Regarding water dependency, Regulatory Guidance Letter (RGL) No. 84-9 states "Both the Corps regulations and the 404(b)(1) guidelines contain a water dependency "test." Corps regulations limit the application of this test to work which would alter wetlands, while the guidelines set up a rebuttable presumption against discharges in all aquatic sites. In both situations, however, the water dependency test, standing alone, is not intended to be determinative of whether a permit is issued. Activities which are not water dependent may still receive permits, provided the overall public interest balancing process so warrants, and also provided the guidelines' presumption against such discharges is successfully rebutted and the other criteria of the guidelines are met." In addition to the water dependency test, the 404(b)(1) guidelines require that an applicant first avoid, then minimize impacts, before offering compensatory mitigation for impacts.

The applicant did not demonstrate that the avoidance requirements had been met, or that there were no other practicable alternative locations available to the applicant for the project. The Corps' 30 May 1997 letter outlined the requirements of an alternatives analysis, beginning with the rebuttable presumption in the Guidelines and proceeding through restrictions on discharges. The letter included a discussion of significant degradation, and advised the applicant that mitigation could only be considered after the avoidance and minimization component of the Guidelines had been satisfied. The letter included some of the ways the project could be modified to address the minimization component of the Guidelines.

On 3 July 1997, the applicant's consultant responded to the Corps' 30 May 1997 letter with a request to put the application "on hold" (i.e., withdrew the application) while the applicant evaluated off-site mitigation areas; this communication did not mention anything concerning compliance with avoidance or minimization. The applicant's consultant provided a revised application for a Department of Army permit by letter dated 18 June 1999. The submission indicated a reduction in wetland fill from 1.4 acres to 1.28; a description of the site vegetation as dominated by red and black mangroves; project plans and sketches; secondary/cumulative impacts and public interest study; and a mitigation site map, sketch and legal description. The Corp's response, dated 15 July 1999, restated the rebuttable presumption of the Guidelines , and sent a copy of the earlier correspondence. In addition, this response stated that the minor reduction did not constitute a significant change, and that there were inconsistencies between the two permit applications.

The applicant's attorney replied on 30 May 2000, advising the Corps of the project's name change from Holiday Inn Express to the Everglades Ecotour Lodge, and providing a practicable alternatives analysis, a manatee impacts section and a section on wetland impacts and mitigation.

The reply did not propose a reduction in the 1.28 acres of impact as was proposed in the 18 June 1999 correspondence. The alternatives analysis defined the project as a lodge "designed to cater to individuals seeking to combine environmental education with travel....A key component to the marketing of the Everglades Ecotour Lodge is that it is located across from the entrance to the Everglades National Park Gulf Coast Ranger Station. The property has city water and sewer lines available, and the city has provided a fire hydrant at the site. The property is within walking distance of the local airport. It is the only property available that is zoned properly for a hotel and is the only suitable property in Everglades City for this project. It is not a practicable alternative to locate the project in another area owned or not owned by the applicant because such areas do not exist or are economically unviable."

The Corps sent a 26 June 2000 email response to the applicant's 30 May 2000 letter. In this email the Corps outlined six specific problem areas, including: the need for the applicant to review the Corps 15 July 1999 letter; that this might not be an appropriate site for the proposed development since the site only had 0.14 acres on non-jurisdictional uplands ("disturbed lands that were previously filled along State Road 29"); that the alternatives analysis had serious shortcomings, and did not justify the proposed location (suggestions were made for fewer rooms and/or to move the parking lot to an off-site location, justification was sought for the pool location, and questions were noted regarding development costs); the need for the applicant to respond to the FWS information request concerning the Florida manatee; the need to address the significant degradation section of the Guidelines, and the fact that more preservation would not appropriately compensate for the proposed impacts; and finally, the attorney was asked to respond to the Environmental Protection Agency (EPA) and NMFS letters.

The applicant's attorney responded to EPA's and NMFS's letters by letter dated 1 November 2000. The EPA had reflected the Corp's concern that the applicant had not followed the 404(b)(1) Guidelines by avoiding, minimizing and compensating for unavoidable impacts. The applicant's response stated:

> "The joint EPA-Corps memorandum to the field dated August 23, 1993, regarding the alternative analysis recognizes that an alternative is not practicable if it will result in an unreasonable expense. In determining what constitutes an unreasonable expense, the memorandum mandates consideration of whether a project cost is substantially greater than costs normally associated with a particular type of project. Additionally, the memorandum points out that to the extent that small businesses may typically be associated with small projects with minor impacts, the nature of the applicant may also be a relevant consideration in determining what constitutes a practical alternative.
> In this case, we submit that the applicant has undertaken all "practicable" alternatives to reduce and minimize the wetland impacts. To avoid and minimize wetland impacts, we have designed a technologically advanced, complex hotel design and construction in other similar communities. Any further avoidance and minimization efforts are either technically impracticable or would result in unreasonable expenses...."

The Corps followed-up with an email on 1 December 2000 noting that there had been no change to the project as promised, and as previously pointed-out in the Corps' letter of 15 July 1999. The applicant submitted a project revision to the Corps by letter dated 7 June 2001. The revision proposed reduced wetland impacts to 0.98 acres and included a wetland functional analysis using

the Wetland Rapid Assessment Procedure (WRAP) showing a deficit after mitigation of 0.78 functional units. Several emails were sent by the Corps (13 June 2001, 20 June 2001, 16 July 2001, and 23 July 2001) requesting the applicant provide revised drawings, a further explanation of the WRAP analysis, better information on the off-site mitigation areas, possible mitigation measures on the site other than preservation, and a better location map of the off-site mitigation for analysis purposes. The attorney provided the information requested by email in a letter dated 8 August 2001.

In the 7 June 2001 letter, the applicant concluded that "[I]t is our firm belief that this revised submittal fully addresses the comments received from the commenting agencies directed to the Corps regarding the applicable criteria and standards, including the Section 404(b) guidelines." Although the applicant proposed mitigation for unavoidable impacts, he did not further address the matter of alternatives to the proposed location. The Statement of Finding states,

> "The applicant did not provide any documentation that any other location was considered for the project that would have fewer wetland impacts than the current proposed project. The applicant indicated that this was the only property available that was zoned for a hotel and it was the only suitable property in Everglades City because of the property's location next to the national park. The applicant asserted that it is not a practicable alternative to locate the project in another area owned or not owned by the applicant because such areas either did not exist or were not economically viable. The applicant's attorney asserted that such economic considerations made other alternatives impracticable as defined by Corps regulations. The applicant's attorney did not provide any documentation to show that other sites existed, where these sites were located, and why these sites were not practicable alternatives."

In summary, the applicant's representatives made unsubstantiated statements that the applicant had done an alternatives analysis and that it was unreasonable to look at any other property than that owned by the applicant. This was clearly shown throughout the administrative record of this permit application. The applicant had not rebutted the presumption that other land with less wetlands or poorer quality wetlands was available for this construction of a hotel.

The appellant's specific concerns that the SOF was arbitrary when dealing with salinity, suspended particulates/turbidity, contaminant availability, cumulative impacts, and recreation are secondary issues where the water dependency presumption has not been rebutted. However, it is worth noting that the Corps' findings on these secondary issues are consistent with the probable adverse results if the proposed activity is located in the special aquatic area. As pointed out in the NMFS' 19 September 2001, 23 May 1997, and 29 April 1997 letters, and EPA's 23 May 1997 letter, the mangrove habitat proposed to be filled was Essential Fish Habitat for postlarval, juvenile, and adult penaeid shrimp and red drum, juvenile and adult gray snapper, and juvenile yellowtail snapper and Spanish mackerel. This habitat supports several species of fish and shellfish identified as being of "national economic importance" in Section 906(e)(1) of the Water Resources Development Act of 1986(PL99-602), is an aquatic resource of national importance (ARNI), stabilizes shorelines, and provides important water quality functions such as pollutant and sediment removal. It is likely that the loss of shallow water, intertidal mangroves will eliminate water circulation through the filled areas, will eliminate the shallow intertidal fluctuations in those areas filled, will leach particulate matter and fertilizers into the remaining

mangrove habitat, and will place additional burdens on the remaining mangrove habitat that would not be present but for the project development. The Corps' analysis and supporting Federal agency letters support the SOF. More detailed analysis regarding these general accepted cause and effects would not be warranted unless the basic presumption that there are not other upland areas available was rebutted.

Reason 2: "The Corps failed to consider relevant information when considering the applicant's efforts to avoid and minimize adverse impacts associated with the project."

FINDING: The reason does not have merit.

ACTION: No action required.

DISCUSSION: The Corps reasonably considered the information provided by the applicant. The problem is that the applicant did not provide an adequate avoidance analysis; therefore, the minimization and compensation of the project's impacts were not adequately addressed. Please refer to the discussion under Reason 1, above.

In the RFA, the appellant supported its position on this issue by pointing-out the support for the project by the Mayor and Everglades Area Chamber of Commerce and in various newspaper articles, and a concern that by not accepting this support as a strong public need, the Corps would have failed in its analysis as required by 33 CFR 320.4 (see discussion under Reason 4, below).

In the RFA, the appellant argued that this property is the only one with access that "conveniently provides both automobile and boat access." The review of the correspondence shows that the revised dock configuration and manatee concessions were a non-issue regarding the permit approval. At issue was the automobile parking lot being located in a special aquatic site, and the fact that this 'use' was not being water dependent. The SOF and administrative record was very clear regarding this.

Finally, the appellant stated that the project size had been minimized from 2.24 acres to 0.98 acres, and that the Corps failed to adequately consider these considerable alterations to minimize the adverse impacts to wetlands. However, the minimization analysis only comes into play after compliance with the avoidance analysis (as discussed under Reason 1, above). Because the applicant's avoidance analysis was inadequate, even if there were problems with the minimization analysis, the applicant would not be entitled to relief. Please see discussion under Reason 1, above.

Reason 3: "The Corps misapplied and failed to consider relevant information in its review of the public interest factors."

FINDING: The reason does not have merit.

ACTION: No action required.

DISCUSSION: The relevant information was considered. Please refer to the discussion in Reason 1.

The appellant clarified this concern with two specific issues. The District Engineer stated that the project would be contrary to the public interest with regard to conservation (Statement of Findings, 10.A.(1)). However, the appellant stated that the District Engineer failed to consider the extensive WRAP analysis performed which demonstrated that the preservation of 60 acres of offsite mangrove wetlands would adequately offset the impacts. Again, the Corps is not obligated to review compensatory mitigation until after avoidance and minimization have been successfully accomplished. The applicant failed to provide an adequate avoidance analysis, so no further analysis is warranted, and no relief can be granted on the basis of failure to adequately consider compensatory mitigation.

The District Engineer also stated that the "private need for this project is to develop that property to maximize the applicant's financial return on his investment." The appellant strongly disagreed with this characterization, and noted that it had revised its original project plan in ways that reduced potential return on the investment. Nevertheless, without more, there is no basis for a determination that this finding was arbitrary, capricious, or an abuse of discretion.

Reason 4: "The Corps acted arbitrarily, capriciously and inconsistently with its own regulations when it failed to identify the "significant national issues" and explain their "overriding importance" after it ruled against state and local authorities who supported the planned development.

FINDING: The reason has merit to the extent that there is not substantial evidence in the administrative record documenting and explaining the overriding national issues.

ACTION: The decision is remanded to the DE to document by substantial evidence the significant national issue(s) and explain their overriding importance over the SFWMD's issuance of state water quality certification and their environmental resource permit.

DISCUSSION: The appellant correctly identified the procedural requirement that requires the DE to identify significant national issues and explain how they are overriding in importance when the decision of the Corps is contrary to state and local decisions (33 CFR 320.4(j)(2) and (4), 325.2(a)(6).

33 CFR 320.4 General policies for evaluating permit applications states,

> "(j) Other Federal, state, or local requirements.
> (2) The primary responsibility for determining zoning and land use matters rests with state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include but are 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. Whether a factor has overriding importance will depend on the degree of impact in an individual case. . . .

(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."

Additionally, 33 CFR 325.2 Processing of Permits, states,

"(6) After all above actions have been completed, the district engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. He shall prepare a statement of findings (SOF) or, where an EIS has been prepared, a record of decision (ROD), on all permit decisions. The SOF or ROD shall include the district engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material into waters of the United States (40 CFR part 230) or with the criteria for dumping of dredged material in ocean waters (40 CFR parts 220 to 229), if applicable, and the conclusions of the district engineer. The SOF or ROD shall be dated, signed, and included in the record prior to final action on the application. Where the district engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the SOF or ROD. If a district engineer makes a decision on a permit application which is contrary to state or local decisions (33 CFR 320.4(j) (2) & (4)), the district engineer will include in the decision document the significant national issues and explain how they are overriding in importance. . ." (Emphasis Added).

There is inadequate evidence in the DE's Statement of Findings to identify the significant national issues and explain how these national issues would override the SFWMD's issuance of state water quality certification and issuance of their environmental resource permit. Within the SOF and the administrative record there were references to the "national economic importance" of the fish and shellfish found in mangrove habitat as referenced in section 906(e)(1) of the Water Resources Development Act of 1986(PL99-602) and the "nationally important aquatic resources" listed as Essential Fish Habitat provided by the Magnuson-Stevens Fishery Conservation and Management Act 1988. However, the DE did not identify these as the national issues of significance that would override the SFWMD's actions. The SOF and the administrative record referenced pollutants (suspended solids and fertilizers), loss of shallow, intertidal mangrove habitat, and net loss of function which would still be present with the project's construction even with the special conditions found in the SFWMD's environmental resource permit. The DE did not specifically identify these to be significant national issues or

provide sufficient explanation why the significant nation issues would override the local decisions.

CONCLUSION: After reviewing and evaluating the administrative record provided by the Jacksonville District, I conclude that there is insufficient information in the administrative record that identifies significant national issues and explains how the national issues would override the SFWMD's issuance of state water quality certification and issuance of their environmental resource permit. 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.

11 March 2005
(Date)

Benjamin G Bulla, COL
RA
Michael J. Walsh
Brigadier General, US Army
Commanding