ADMINISTRATIVE APPEAL DECISION

JAVIER PEREZ

FILE NUMBER 200101589 (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): August 23, 2002.

Appeal Conference Date: March 12, 2003. **Site Visit Date:** March 12, 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 June 24, 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 February 28, 2001, Mr. Javier Perez requested authorization to install an on-grade 8-foot wide pier deck with davits, 60 feet along a shoreline. The proposed pier deck will be constructed on top of slope of the bank of a man-made canal shoreline to provide boating access to the shoreline at Lot 2, Block 1, Summerland Key Cove, Monroe County, Florida. After eventual removal of unauthorized shoreline fill, a coordination letter was circulated to the agencies.

By letter of February 11, 2002, the District circulated a coordination letter with an adjacent property owner, local, state and Federal agencies and with some members of the public. The letter stated that the applicant proposed to install his project "along a wetland shoreline, formerly supporting up to 20 foot buttonwood mangroves and seaoxeye, saltwort, seashore dropseed, sea purslane, saltweed and hurricane grass. The project is located within navigable waters of the United States, a canal to Long Key Bight and adjacent shoreline wetlands...The pier installation would impact approximately 240 square feet of mangrove / saltmarsh wetlands..." Emphasis added. The letter also stated "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 FWS. The letter also stated that "the applicant will be required to adhere **to Special Manatee Conditions. Mitigation will be required for any impacts to resources."** Emphasis was in the letter. 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).

By letter of March 20, 2002, 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.*)."

By letter of March 5, 2002, the NMFS stated that the project site contains and supports habitats identified as Essential Fish Habitat (EFH). To ensure conservation of EFH and fishery resources, the NMFS recommended that the Department of the Army (DOA) authorization not be granted unless the action is modified and the mangrove wetland fringe be restored to a pre-work condition by removing all unauthorized fill and re-plant the wetlands along the shoreline.

On June 24, 2002, the District authorized the applicant "to install an 8-foot wide ongrade pier deck and two davits, along 40 linear feet of wetland shoreline resulting in 120 square feet of aquatic impacts". Mitigation for this unavoidable wetland impact will be accomplished through the submittal of $1,137.49 In-Lieu-Fee to the Florida Keys Environmental Restoration Trust Fund, and the restoration/preservation of the remaining shoreline wetlands.

By letter of August 23, 2002, the appellant submitted a Request For Appeal of the proffered permit for a marginal dock 8 feet wide by 40 feet long including restoration and preservation of the remainder of the shoreline wetlands.

The applicant authorized Ms. Sandra Walters, (Sandra Walters Consultants, Inc) to act on his behalf as the agent in the processing of this appeal.

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

Reason 1: "Omission of material fact" - (a) the Florida Department of Environmental Protection (DEP) issued a determination that the project was exempt; (b) the property does not contain wetlands vegetation; (c) the property is not essentially different from the neighbors to the west or other properties close to this property on the same canal system who were recently issued permits for the full 60-feet seawalls; (d) other properties near his, on the same canal system were issued permits for full, 60-foot seawalls; (e) another property on the same canal was issued a permit; (f)FWS issued a memorandum that the proposed project was not likely to adversely affect endangered species; (g) the entire Summerland Key Cove subdivision was constructed I the 1960s by dredging and filling the adjacent wetlands; (h) a buttonwood tree (*Conocarpus erectus*, a common native landscape tree which grows in upland as well as wetland soils) was the only native tree on the property and was left in place when the lot was cleared of exotic vegetation under Monroe County permit number 97-1-1365; (i) Monroe County biologists did not report any wetland vegetation on the property; (j) when NMFS visited the site, none of the issues noted by the District were evident to them.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The appellant stated that the DEP issued a determination that the entire 60 feet seawall dock was exempt from the need for an Environmental Resource Permit. In the Environmental Assessment and Statement of Findings (EA & SOF), (page 2), the District stated that DEP issued water quality certification exemption for the project on March 6, 2001. This certification exempts the appellant from the state DEP's regulations only. It does not exempt the appellant from other state and Federal regulations.

The appellant stated that the property does not contain wetland vegetation. The District stated in a memorandum for the record (Functional Assessment – KEYMIG Worksheet) dated June 4, 2002, (page 3) ", up to 20' buttonwood mangroves occupied 100% of the 3-foot wide wetlands at or above MHW, with understory seaoxeye daisy groundcover." The memo continued (item 3, Submerged Aquatic Resources) "100% coverage of 3-foot wide shelf by Acetabularia and Halimeda spp., as well as filamentous green and brown algae." As noted above, the February 11, 2002 letter stated, "along a wetland shoreline, formerly supporting up to 20 foot buttonwood mangroves and seaoxeye, saltwort, seashore dropseed, sea purslane, saltweed and hurricane grass. The project is located within navigable waters of the United States, a canal to Long Key Bight and adjacent shoreline wetlands...The pier installation would impact approximately 240 square feet of mangrove / saltmarsh wetlands". The District indicated that this area had wetland vegetation prior to its removal by the appellant. In addition, the appellant conducted unauthorized fill activity in this wetland prior to obtaining a Deportment of the Army permit and was required to remove the fill. In the EA & SOF (page 1), the District stated, "A coordination letter was circulated on 11 February 2002, after eventual removal of unauthorized shoreline fill." The District considers this wetland tidally influenced. Condition 4 (a) of the permit states, "The deed restriction will encompass approximately .003 acres of wetlands. This area is shown on the revised site plan as "preserve". This "preserve" area is approximately 3 feet wide by 20 feet long.

The administrative record contains an e-mail string regarding this file that includes an e-mail message dated June 3, 2002, which included the statement "aerial photos show mature fringe", and asked "what is the date of the photos?" Emphasis added. A response on that same date indicated that the photo was taken in January, 1999. The photo in question was not identified in the administrative record. While the aerial photo in question indicated a vegetation fringe, the discussion did not indicate whether the vegetation was wetland vegetation.

Included in the RFA, was a copy of a January 28, 2002 letter coordinating with property owners, local, state and Federal agencies a project proposed by the appellant's adjacent property owner (Greg C. and B.J. Witt, File Number 200102566 (LP-NF)) to install a 60 foot by 8 foot concrete dock. The letter stated that the project site is located in a designated critical habitat for the West Indian Manatee and that the Corps of Engineers has made a determination that the proposed work may affect the West Indian Manatee in accordance with the revised Manatee Key dated January 2, 2001 and would request formal consultation with the U.S. Fish and Wildlife Service (FWS). There was no mention in the letter of any wetland fringe along the canal.

The appellant stated that the property is not essentially different from the neighbor's property to the west or other properties close to this property on the same canal system that were recently

issued permits for the full 60-feet seawalls. The District indicated that in 2002, they were in the process of implementing additional guidance regarding avoidance and minimization throughout the Florida Keys. Prior to and even during this implementation, some permits were issued for the full 60-feet seawall decks. In the EA & SOF (page 1), the District stated, "Consistent with contemporary projects throughout the Florida Keys, the project required minimization, compensatory mitigation and remaining wetland preservation for final authorization." The District did see a need to minimize impact and determine that there is a practicable alternative in light of overall project purpose. The NMFS in a letter dated March 5, 2002, stated that the project site contains and support habitats identified as EFH. The District stated in a letter dated June 7, 2002, to NMFS, that "Recent comparable contemporary Corps permits in the Florida Keys, considered acceptable by NMFS, have authorized replacement of up to 2/3 of a canal lot's wetland shoreline by marginal pier configuration, with full mitigation."

In the Environmental Assessment and Statement of Findings (page 2), 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 would outweigh 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 avoidance, minimization and compensatory mitigation. The applicant has therefore been required to minimize the pier [dock] to 40.0 feet in length (120 square feet), to provide full monetary compensatory mitigation for associated impacts and to restore and preserve the remaining 20 foot long, by planting the wetland shoreline and preserve it via deed restriction. The monetary compensation for the loss of 120 feet of mangrove/saltmarsh wetlands and vegetated shallows, determined to be $1137.49 based on the MIG, is to be paid to the Florida Keys Environmental Restoration Trust Fund.

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."

The appellant stated that FWS "issued a FAX memorandum ...which concluded that the dock as proposed in the application ... was not likely to adversely affect endangered species..." FWS memorandum states that the proposed action is not expected to significantly impact fish and wildlife resources. In the EA & SOF (page 1), the District stated, "The proposed work as revised, will not adversely affect the water quality, recreation, archeology, navigation, esthetics, shore erosion, flood protection, conservation and natural resources, fish and wildlife resources, economics, or land use of the area." Emphasis added.

The appellant stated that he was told by a NMFS biologist who visited the site "...that when he visited the subject property... none of the issues were evident ..." However, in a letter dated March 5, 2002, the NMFS stated that "The coordination letter for this project states that the shoreline formally supported mature buttonwood mangroves and saltmarsh wetland vegetation. When unaltered, these wetlands provide shelter and other habitat functions for marine fish and

invertebrates...A (NMFS) biologist inspected the site and found evidence of recent removal of wetland vegetation and of fill placement in fringing wetlands on the property. The project site contains and supports habitats identified as Essential Fish Habitat (EFH)". Emphasis added. NMFS continues, "Our site inspection indicated that the dock structures have been removed; however, removal of mangrove wetlands and placement of fill along the entire shoreline has adversely affected the function and habitat value of the wetlands and associated ecosystem."

Reason 2: "Incorrect application of law, regulation or officially promulgated policy" - (a) The appellant installed auger holes in "non-jurisdictional upland adjacent to the canal (survey shows 3.3foot elevation) in anticipation of receipt of the dock permit..."; (b) It is stepping beyond jurisdictional authority for agency personnel to assert that someone has filled wetlands and violated the law and provided no evidence to that effect, particularly when permits are issued for the same kind of facility on adjacent and surrounding properties; (c) No environmental benefit arises from preventing the construction of the proposed project. Permit condition that require planting of mangroves are mitigation for impacts not proven.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The appellant stated that the District "... took exception to installation of the holes because they would ultimately serve as a component of the dock, for which the permit had not yet been issued, and ... required the holes be filled." In the EA & SOF (page 1), the District stated "A coordination letter was circulated on 11 February 2002, after eventual removal of unauthorized shoreline fill." Emphasis added. The appellant was in violation of section 404 of the Clean Water Act that prohibits the discharge of dredged or fill material into all "waters of the United States" without obtaining a permit from the Corps of Engineers. The appellant removed the unauthorized fill and the District was able to proceed with the permit process. The administrative record does not address the extent of the fill. The appellant indicated that the auger holes were located on "upland adjacent to the canal" at a 3.3 foot elevation. There exists a slope (natural angle of repose) between the top of the bank and the tidally fluctuating surface of the water in the canal. At least some portion of this area would be considered waters of the United States. If the auger hole was "adjacent to the canal" and the typical result of an auger depositing waste material 360 degrees around the hole would be expected, then material would have been deposited between the auger hole and the canal.

The appellant stated that "It is stepping beyond jurisdictional authority for agency personnel to assert that someone has filled wetlands and violated the law and provided no evidence to that effect, particularly when permits are issued for the same kind of facility on adjacent and surrounding properties," The District indicated that only a narrow strip of the shoreline is considered wetlands, and therefore, within its jurisdictional authority when it declared the applicant's filling activity was in violation of section 404 of the Clean Water Act. In addition, the appellant recognized the need for a permit by stating "... permits are issued for the same kind of facility on adjacent and surrounding properties." As noted above in Reason 1, the administrative record only implies that a wetland vegetation fringe existed along the shoreline before it was removed.

The appellant stated that "No environmental benefit arises from preventing the Perez's from constructing a dock facility identical to that at both his adjacent neighbors and to lots all along the canal. The permit conditions that require planting of mangroves along a portion of the canal frontage are exacting mitigation for impacts not proven," NMFS indicated that the project site contains and supports habitats identified as EFH. Therefore, any avoidance and minimization of impact will assist in maintaining this area as an EFH. Planting the mangroves is part of the restoration of the shoreline. The NMFS stated in the letter dated March 5, 2002, (page2) "to ensure conservation of EFH and fishery resources, the NMFS recommends that Department of the Army authorization not be granted in this case unless the action is modified". The letter contained four recommendations. The second recommendation states "The mangrove wetland fringe shall be restored to a pre-work condition by removing all fill and by planting buttonwood mangroves and saltmarsh vegetation along the shoreline."

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.

Reason 3: "Undue hardship" – (a) "Since vertical seawalls exist to the edge of the property on both sides, and along the entire length..., the only feasible way to prevent the...property from eroding is to connect the revetment along this lot with that on the adjacent properties. Any other than the proposed structure will be less secure and more subject to erosion from wave action"; (b) The appellant appeared to have been singled out for inappropriate and excessive regulatory restrictions; (c) It took almost 1-1/2 years to issue the permit, while neighbors who applied more recently, received permits more quickly, (d) The mitigation fee was imposed for removal of wetland vegetation that was never present, and should be adjusted to be directly comparable to that of the neighbors, $482.40.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION:
The appellant states, " Since vertical seawalls exist to the edge of the property on both sides, and along the entire length of the rest of the canal, the only feasible way to prevent the subject property from eroding is to connect the revetment along this lot with that on the adjacent

properties. Any other structure will be less secure and more subject to erosion from wave action of all other seawalls in the area." 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." The District's permit allows for the bulkhead and dock to be constructed on the property. In the EA & SOF (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" Emphasis added. The original proposal would have eliminated the shoreline habitat identified as individually and cumulatively important by Department of the Army permit regulations and NMFS.

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 District stated in the EA & SOF (page 2) that "Full consideration was given to all comments received in response to the public notice...**The applicant has been therefore required to minimize the pier to 40 feet in length**..." Emphasis was in the letter. Concerning the appellant's statement that "[t]he only feasible way to prevent the subject property from eroding is to connect the revetment along this lot with that on the adjacent properties." Should this situation develop, the permittee may propose corrective measures to the District.

The appellant stated that they "...appear to be singled out for inappropriate and excessive regulatory restrictions, in comparison with immediate and close neighbors that have received permits for structures identical to that requested here." In the EA & SOF (page 1), the District stated "Consistent with contemporary projects throughout the Florida Keys, the project required minimization, compensatory mitigation and remaining wetland preservation for final authorization." The District indicated that the appellant has not been singled out, in-fact; a number of permits were issued in the same general area for reduced structures.

The appellant stated that they "...applied for their permit in February 1999, and the objectionable permit was not issued until June 24, 2002, almost 1-1/2 years later, while their neighbors, who applied more recently, received permits more quickly." The District indicated that applicant was in violation of section 404 of the Clean Water Act. This violation had to be resolved prior to the District circulating a coordination letter. The District stated in the EA & SOF (page 1) "the application was received on 16 May 2001. A coordination letter was circulated on 11 February 2002, after eventual removal of unauthorized shoreline fill." Emphasis added. This permit was issued in less than 5 months from the time of coordination letter was circulated.

The appellant stated that"...mitigation fee is being calculated to address removal of wetland vegetation that was never present, and should be adjusted to be directly comparable to that of the neighbors. The permit for the subject property specifies $1137.49, and the neighbors permit specifies $482.40." The District stated that "Old fees were lower at a rate of $1.34 per square foot; new fees are higher at a rate if $3.90 per square foot." The new rate is approximately three times the old rate.

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 administrative record documents that some wetland vegetation, including buttonwood mangrove, was known to be present along the shoreline. As noted in Reason 1, the District stated in a memorandum for the record (Functional Assessment – KEYMIG Worksheet) dated June 4, 2002, (page 3) ", up to 20' buttonwood mangroves occupied 100% of the 3-foot wide wetlands at or above MHW, with understory seaoxeye daisy groundcover." Also noted in Reason 1, former shoreline vegetation also included, "saltwort, seashore dropseed, sea purslane, saltweed and hurricane grass..."

Conclusion: After reviewing and evaluating the administrative record provided by the Jacksonville District, I conclude that the District's determination to exercise jurisdiction under 33 CFR 328.3(a)(7) was not arbitrary or capricious, and was not contrary to applicable law, regulations, and guidance, and 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 an 8-foot wide on grade pier deck and two davits along 40 linear feet in waters of the United States, including wetlands. Accordingly, I conclude that this Request for Appeal does not have merit.

OCT 18 2004

(Date)

MICHAEL J. WALSH
Colonel, EN
Commanding