

# ADMINISTRATIVE APPEAL DECISION

JOHN CARLSON

FILE NO. SAJ-1999-688

JACKSONVILLE DISTRICT

23 September 2013

**Review Officer (RO):** Jason Steele, U.S. Army Corps of Engineers, South Atlantic Division (SAD)

**Appellant:** John Carlson

**Date of Receipt of Request for Appeal:** 8 July 2013

**Acceptance of Request for Appeal:** 8 August 2013

**Appeal Conference:** 21 August 2013

**Authority:** Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403)

## **BACKGROUND**

By letter dated 28 June 2013, Mr. John Carlson (Appellant) submitted a request for appeal (RFA) of the Jacksonville District's (District) 10 May 2013 proffered permit<sup>1</sup>. The proffered permit (letter of permission) authorizes the construction of a dock extension, installation of a boatlift, and dredging adjacent to the dock; also, it requires the removal of two pilings set at 30.38 and 31.85 feet from the near edge of the channel, which Appellant placed within the setback area without authorization. The project is located in the Intracoastal Waterway (IWW), adjacent to the residential property located at 975 Hillsboro Mile (SR A1A), in the Town of Hillsboro Beach, in Broward County, Florida.

On 22 February 2013, the District issued a proffered permit for the above described work. On 7 March 2013, the applicant declined<sup>2</sup> to accept the proffered

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<sup>1</sup> "Proffered permit means a permit that is sent to an applicant that is in the proper format for the applicant to sign (for a standard permit) or accept (for a letter of permission). The term 'initial proffered permit' as used in [33 C.F.R. Part 331] refers to the first time a permit is sent to the applicant. The initial proffered permit is not an appealable action. However, the applicant may object to the terms or conditions of the initial proffered permit and, if so, a second reconsidered permit will be sent to the applicant. The term 'proffered permit' as used in [33 C.F.R. Part 331] refers to the second permit that is sent to the applicant. Such proffered permit is an appealable action." 33 C.F.R. § 331.2.

<sup>2</sup> "Declined permit means a proffered individual permit, including a letter of permission, that an applicant has refused to accept, because he has objections to the terms and special conditions therein.... Where an applicant declines a permit (either initial or modified), the applicant does not have a valid permit to conduct

permit and submitted a RFA to the South Atlantic Division (SAD). On 21 March 2013, SAD advised the District that they needed to send the Appellant an initial proffered permit before they proffered the permit. SAD also contacted the Appellant and advised him that his current RFA could not be accepted at this time and that the District would be sending him an initial proffered permit. SAD advised the Appellant of the appeal process for proffered permits, including the first step of objecting to an initial proffered permit at the district level and the opportunity to appeal a district decision to SAD only after a district proffers a permit that responds to any objections raised by a potential appellant.

On 5 April 2013, the District provided to Appellant an initial proffered permit, which allowed Appellant the opportunity to object to any of the District's special conditions placed on the permit. By letter dated 10 April 2013, Appellant objected to numerous special conditions (by referring to the objections in his 7 March 2013 letter). By letter dated 10 May 2013, the District issued a proffered permit, along with an explanation to each of Appellant's objections and rationale for not changing any of the special conditions.

By letter dated 28 June 2013, Appellant submitted to SAD a RFA of the District's proffered permit. In accordance with 33 C.F.R. § 331.3(b)(2), the RO conducted an independent review of the administrative record to address the appeal reasons and verify that the record provides an adequate and reasonable basis supporting the district engineer's decision, that facts or analysis essential to the district engineer's decision have not been omitted from the administrative record, and that all relevant requirements of law, regulations, and officially promulgated Corps policy have been satisfied.

### **INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION**

1. The District provided a copy of the administrative record, which was reviewed and considered in the evaluation of this RFA.
2. The Appellant supplied supporting documentation at the time of submittal of the RFA.

### **APPELLANT'S STATED REASONS FOR APPEAL**

**Appeal Reason:** Appellant appeals Special Condition #3, the 40-foot setback,<sup>3</sup> alleging that "near bottom edge" is ambiguous and, therefore, must be resolved against USACE as the drafter; a reasonable person might understand the centerline of the IWW but only certain engineers understand the unique USACE phrase; permittees must rely on an

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regulated activities in waters of the United States, and must not begin construction of the work requiring a Corps permit unless and until the applicant receives and accepts a valid Corps permit." 33 C.F.R. § 331.2.

<sup>3</sup> Special Condition #3, "Federal Channel Setback" states, "Under no circumstances shall any structures be allowed closer than 40 linear feet from the near bottom edge of the federal channel."

inaccessible computer program to determine the horizontal distance from the X & Y State Plane Coordinates to the edge of the Federal Channel; the “alleged” channel direction is different than the actual waterway use; and water depth at a certain buoy has been inadequate, raising the issue of dredging which is the reason for Federal Channel setbacks.

### **SUMMARY OF DECISION**

Appellant’s RFA does not have merit. The Administrative Record supports that the District reasonably applied the 23 November 1998 Setback Criterion (hereinafter the “Setback Criterion”) in designating the 40-foot setback criteria in the permit. Furthermore, the setback criteria is consistent with Appellant’s application because Appellant submitted drawings for a dock extension and boat lift that are, at a minimum, 40 feet from the edge of the IWW.

### **EVALUATION OF THE REASONS FOR APPEAL - FINDING, DISCUSSION, AND ANY ACTION FOR THE JACKSONVILLE DISTRICT COMMANDER**

#### **Discussion:**

The Setback Criterion, which was issued via Public Notice on 1 December 1998,<sup>4</sup> establishes Corps policy and guidance regarding setback criterion for structures along the Atlantic Intracoastal Waterway, IWW on the east coast of Florida, IWW on the west coast of Florida, and Okeechobee Waterway (paragraph 3). The standard setback criterion for all structures proposed in the Federal channels is 100 feet from the near bottom edge of the channel (paragraph 4).

Variances to this optimum setback of 100 feet are allowed, however, to include a policy of generally approving a marginal dock extending 5 feet into the waterway and of a reasonable length along the waterway so long as the structures are not closer to the channel than the top edge of the side slope of the channel (paragraphs 4.c. and 4.d.). Furthermore, variances closer than 62.5 feet are not allowed for structures that will not be utilized to dock a vessel or for docking structures that do not have adequate mooring depth (paragraph 4.e.).

The Setback Criterion requires applicants to provide X & Y State Plane Coordination Points (hereinafter “X & Y coordinates”) for the most waterward points of the proposed structure, as determined utilizing the 1927 Datum. The District enters these coordinate points into a specialized computer program to determine the horizontal distance from those points to the edge of the Federal channel (paragraph 2.(i)).

During the 21 August 2013 appeal teleconference, the Appellant clarified that, early in the permit application review process, the District project manager asked for X

<sup>4</sup> The Setback Criterion is available at [http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/other\\_permitting\\_factors/IWW%20Criterion%20pn12011998.pdf](http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/other_permitting_factors/IWW%20Criterion%20pn12011998.pdf).

& Y coordinates. The Appellant confirmed that he supplied the X & Y coordinates, along with drawings of the proposed project, which were accepted and issued as part of the proffered permit.

In issuing the proffered permit that incorporates the Appellant's drawings, the District authorized the construction of the dock extension and boat lift in accordance with the measurements that are depicted on the drawings. Authorization of the structure is not the same as acceptance of the Appellant's determination of the distance to the edge of the Federal Channel because – as stated in the Setback Criterion - the District, not the applicant, determines the horizontal distance from the structure to the edge of the Federal Channel using the X&Y coordinates that are entered into the applicable computer program. There is, however, only a small difference between the District's determination and the Appellant's determination, and a setback of 40 feet is consistent with authorization of the structure to be constructed in accordance with the drawing.

In its 22 February 2013 Memorandum for Record, the District stated that the outermost extension of the existing dock is approximately 55 feet from the near design edge of the Federal Channel. Appellant's drawing specifies the distance from the IWW to the edge of the existing dock to be 57.17 feet. The dock extension will be northward and, therefore, construction of the extension will not cause the dock to be closer to the IWW than it is currently. However, the boat lift will be westward, toward the IWW, with a total width of 14 feet. This will put the new structure a distance of approximately 41 feet from the IWW based on the District's calculations (or 43.17 feet from the IWW based on Appellant's drawing, i.e., 57.17 feet – 14 feet).

The 40-foot setback was a special condition in the 5 April 2013 initial proffered permit, and the Appellant objected to its inclusion. In response to this objection, the District provided the following explanation for retaining the special condition in the 10 May 2013 proffered permit:

Page 1, paragraph 1, #2 provides the written project description of which activities you requested to perform. You proposed, as stated in part in the project description, to 'Install a 16,000 pound boat lift onto the waterward [side] of the dock face. The most waterward piling of the lift will be placed no closer than 40-feet from the near bottom edge of the Federal Channel.' This page is describing that the Corps has authorized you to install a boat lift provided the lift is located at that distance from the channel. As this is simply a description of the project that you have requested, no change will be made to the proffered [sic] permit.

In applying the Setback Criterion and setting the 40-foot setback, the District considered effects on navigation. In its 22 February 2013 Memorandum for Record, the District noted the series of reviews by the Navigation Branch, with the Navigation Branch ultimately concluding that navigational concerns were

addressed so long as all structures are 40 feet from the near edge of the channel, with mitigation being the removal of the unauthorized structures. The location of these unauthorized structures (at 30.38 and 31.85 feet from the near edge of the channel) and the configuration of the sailboat that was docked perpendicular to the channel and moored to the unauthorized pilings were concluded to be potential hazards to safe navigation within the Federal Channel.

The District reiterated the need for a 40-foot setback in its 10 May 2013 letter by stating on page 1, "The criterion is necessary to minimize potential hazards to navigation and impediments to maintenance dredging created by fixed structures or moored vessels along the edge of the navigational channel."

The RO finds that the administrative record supports the District's application of the Setback Criterion in determining the need for a 40-foot setback from Appellant's structure to the near edge of the Federal Channel. Furthermore, the 40-foot setback is consistent with the incorporation of the drawings into the proffered permit and authorization to construct the structure as set forth in the drawings.

**Action:** None required.

### **CONCLUSION**

For the reason stated above, I find that the appeal does not have merit. The District's administrative record contains adequate documentation to support the special condition in its proffered permit that requires a 40-foot setback. The administrative appeals process for this action is hereby concluded.



Donald E. Jackson, Jr.  
Brigadier General, U.S. Army  
Commanding

