ADMINISTRATIVE APPEAL DECISION

OSLO BOAT RAMP

FILE NO. SAJ-2008-223 (SP-TSD)

JACKSONVILLE DISTRICT

4 JUNE 2012

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

Appellant: Indian River County

Date of Receipt of Request for Appeal: 25 October 2011

Acceptance of Request for Appeal: 31 October 2011

Appeal Conference: 11 January 2012

Authority: Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403) and Section 404 of the Clean Water Act (33 U.S.C. §1344)

BACKGROUND

By e-mail dated 25 October 2011, Indian River County submitted a request for appeal (RFA) of the U.S. Army Corps of Engineers, Jacksonville District's (District) decision to deny their permit application. Indian River County (Appellant) requested authorization to fill approximately 1.61 acres of mangrove wetlands and open water (canal and ditch) to widen Oslo Road and construct 22 parking spaces (expand existing parking area). In addition, the Appellant requested authorization to dredge 300 cubic yards of material from the Indian River for navigable access at the existing boat ramp. Also, the Appellant requested to lengthen the existing dock by 35 feet and install 6 new channel markers. The project is located on Oslo Road (aka 9th Street), east of US 1, Latitude: 27.586° North, Longitude: 80.367° West, Vero Beach, Indian River County, Florida.

On 26 August 2011, the District denied the permit. The denial was based on two grounds: There being less environmentally damaging practicable alternatives to the applicant's overall project purpose, and the project being contrary to the public interest.

The Appellant offered three reasons for appeal: Firstly, the proposed project cannot be further minimized. Specifically, the proposed road width cannot be minimized because of State construction requirements (Green Book) and safety concerns, and the parking cannot be minimized any further than proposed because of safety concerns. Secondly, the District incorrectly denied the project based on the conclusion that the proposed project would result in

the incidental take of manatees. And lastly, the District denied the permit in an unprofessional manner. Specifically, at the end of a teleconference, that was scheduled prior to the denial and set up to work through outstanding issues, the District told the appellant that they had already denied the permit.

SUMMARY OF DECISION

Appellant's request for appeal (RFA) has merit. The administrative record does not contain sufficient evidence to support the District's decision to deny the permit based on there being less environmentally damaging practicable alternatives, and the proposed project being contrary to the public interest.

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 request for appeal.

2. The Appellant supplied supporting documentation at the time of submittal of the RFA, which was reviewed and considered in the evaluation of this request for appeal.

3. The District and Appellant supplied information, at the appeal conference, which was reviewed and considered in the evaluation of this request for appeal.

APPELLANT'S REASONS FOR APPEAL

Appeal Reason 1: The proposed project cannot be further minimized.

Appeal Reason 2: The District incorrectly denied the project based on the conclusion that the proposed project would result in the incidental take of manatees.

Appeal Reason 3: The District denied the permit in an unprofessional manner.

EVALUATION OF THE REASONS FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE JACKSONVILLE DISTRICT COMMANDER

Appeal Reason 1: The proposed project cannot be further minimized.

Finding: This reason for appeal has merit.

Discussion: The Appellant states, pages 1-2 of the RFA, "The County has amended its proposed plans to minimize impacts to the wetlands. For example, the stormwater treatment pond has been removed from the previously altered wetland area of the project. In addition, the wetlands that the Corps seeks to protect are previously disturbed wetlands, and have served as a mosquito impoundment for the past 50 or so years. The parking configuration encroaches into a 65-feet

wide man-made ditch that has been determined by the Corps to be of 'national importance.' The parking must encroach partially into the ditch in order to meet the necessary geometry for the parking. The parking configuration cannot be reduced any more than what has already been done or it will be unsafe for public use."

The District defined, (page 1, of the Department of the Army Environmental Assessment and Statement of Findings (EA/SOF)), the overall project purpose as, "To improve navigable access and to provide a parking area for the Oslo boat ramp in Indian River County, Florida."

However, the Appellant stated and District affirmed (11 January 2011 letter from District to Appellant), that the widening of Oslo Road was also a clear intent of the project. This should have been included in the overall project purpose and evaluated accordingly.

The District states (pages 14-15, EA/SOF),

> In regards to the portion of the overall project purpose that is not water dependent (parking area), the Corps has determined that the applicant's proposal is not the least damaging practicable alternative because the applicant did not clearly demonstrate that there are no practicable alternatives that involve no discharges into a special aquatic site. In addition, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem. Moreover, the Corps identified possible minimization that could be incorporated for this project that demonstrates that there are practicable alternatives to the proposed discharge which would have less adverse impact on the aquatic ecosystem. The proposed alternative would cause or contribute to significant degradation because these wetlands are considered special aquatic sites and the loss of these wetlands may cause irreversible loss of valuable aquatic resources. The proposed project will impact mangrove areas that serve as a nursery, forage and refuge habitat for commercially and recreationally important fish and shellfish species… **Therefore, the least damaging practicable alternative is the no action alternative** (emphasis added). In the existing condition, the Oslo Boat Ramp project site consists of a maintained marl road leading to a cul-de-sac that provides sufficient parking for vehicles (including trucks with trailers). In addition, the existing boat ramp provides motorized vessel access to the Indian River following the PVC poles and the existing channel markers. Use of the existing boat ramp is already limited to mean high water times since the surrounding area is so shallow. The existing site is more commonly used by wade fisherman who park at the site and wade into the Indian River. In addition, the existing site is more commonly used by people with canoes/kayaks. **Therefore, the overall project purpose can be met with the No Action alternative.**" (emphasis added).

In response to the question, "Based on the 'overall project purpose"', could the appellant accomplish the project without a Corps permit?", which was asked as part of questions presented at the 11 January 2012 appeal conference, the District provided the following:

> The Applicant has indicated, "There is currently ample room to parallel park 40 or more trucks / trailers onsite along Oslo Road." (see, AR00342). The Applicant's current proposal only allows for 12 trailer parking spots. (see, AR00972). The Applicant has also acknowledged, "Pervious parking could be considered." (see, AR00639). Thus, the Applicant has not clearly demonstrated why **"[s]afer controlled parking"** (see, AR00910) cannot be provided without discharge of fill into a special aquatic site, nor taken all appropriate and practicable steps to minimize potential adverse impacts of a discharge on the aquatic ecosystem. (see, AR00983).

The AR lacks evidence documenting that the District asked the appellant to clearly demonstrate why "safer controlled parking" cannot be provided without discharge of fill into wetlands (No action alternative). Also, the AR is silent as to whether 12 trailer parking spots is unnecessary because there is room for 40 parking spots along the road or whether the proposed parking would not eliminate road parking, a safety issue.

In response to the question, "Based on the 'overall project purpose', could the appellant accomplish the project without a Corps permit?", the District provided the following:

> The Applicant has stated,
>
> > The paving of Oslo Road will provide a smooth surface for the motorist, **eliminate grading and maintenance for the County, and will eliminate harmful sediments and excessive turbidity from being carried off the unpaved marl road surface that goes directly into the Indian River Lagoon with every rain event**. (see, AR00911). (emphasis added).
>
> However, neither paving Oslo Road, providing a smooth surface, eliminating grading and maintenance, nor reducing runoff are a part of the Applicant's overall project purpose. It is not clear why paving Oslo Road is required to meet the overall project purpose unless it is the Applicant's position that a paved road is required to provide "improved navigable access." (see, AR00982). ("The overall project purpose, to provide navigable access and parking area, does not require roadway widening.") The Applicant's original position was basically that it might as well pave the road since a storm water management system is required by the State anyway due to proposed impacts to wetlands. (see, AR00227). (Stating that the Applicant considered a semi-pervious surface as a minimization option but rejected it because "a stormwater management facility will still be required even with a semi pervious surface due to the fact that the project will have impacts to wetlands."). In February 2011, the Applicant asserted that a paved county road was required to comply with the Florida Department of Transportation Green Book. (see, AR00655). On March 3, 2011, SAJ informed the Applicant:
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> > During the meeting [on February 25, 2011], you stated that the widening of Oslo road was a Florida Department of Transportation (FDOT) requirement. The Corps has reviewed the FDOT roadway green book and

> discussed the project with FDOT. Since Oslo Road is a county road, maintenance and improvements to the roadway is a county responsibility, not the State's. County roads do not have to adhere to the design specifications of state roads. In light of this, it appears that the proposed work and wetland/surface water impacts associated with widening Oslo Road **can be avoided using alternative surfaces and/or maintaining the existing width of the roadway**. (see, AR00655). (emphasis added).

> Additionally, the Applicant has tried to rationalize its proposal to pave Oslo Road by stating that paving the road will "eliminate the large quantity of sediment from storm water runoff into the Indian River Lagoon" and therefore, "greatly benefit the seagrasses in the area by provided better water clarity with significantly reduced sedimentation into the lagoon." (see, AR00635 and AR00638). ("The County still **desires** to pave Oslo Road in order to reduce sediment runoff into the Indian River Lagoon.") (emphasis added). Yet, the 404(b)(1) Guidelines require SAJ to presume that practicable alternatives that do not involve a discharge into a special aquatic site to have less adverse impact on the aquatic ecosystem unless clearly demonstrated otherwise. 40 CFR 230.10(a)(3).

It appears the appellant provided a justification as to why they needed to widen Oslo Road (eliminate grading and maintenance for the County, eliminate harmful sediments and excessive turbidity from being carried off the unpaved marl road surface that goes directly into the Indian River Lagoon with every rain event, a paved county road was required to comply with the Florida Department of Transportation Green Book, and safety). However, the AR lacks evidence documenting that the District evaluated the appellant's justification for widening Oslo Road.

No permit may be issued under Section 404 of the Clean Water Act unless it is in compliance with guidelines developed by the Administrator of EPA in conjunction with the Secretary of the Army pursuant to Section 404(b)(1) of the Clean Water Act, with a potential exception only for situations where navigation and anchorage may be affected. 33 U.S.C. § 1344; 33 C.F.R. § 320.2(f); 40 C.F.R. §§ 230.2 and 230.12. The focus of these "404(b)(1) Guidelines" is on the protection of the aquatic ecosystem. 40 C.F.R. §§ 230.1 and 230.10.

The primary restrictions on discharges of dredged and fill material in the 404(b)(1) Guidelines are set forth in 40 C.F.R. § 230.10(a) through (d). See 40 C.F.R. § 230.5(a). These restrictions are: no discharge where there is a practicable alternative with less adverse impact on the aquatic ecosystem and no other significant adverse environmental consequences (230.10(a)); no discharge where it would result in a violation of State water quality standards, toxic effluent standards, or compromise the protection of endangered or threatened species or marine sanctuaries (230.10(b)); no discharge where it will cause or contribute to significant degradation of waters of the United States (230.10(c)); and, no discharge unless appropriate and practicable steps have been taken to minimize potential adverse impacts on the aquatic ecosystem (230.10(d)). In determining whether any one of these restrictions would preclude the issuance

of a permit, the Corps of Engineers may rely in part on information provided by the permit applicant and other government agencies, but in all cases must independently evaluate and verify information in the record without undue deference to other entities to reach its determination.

The practicable alternatives analysis of 40 C.F.R. § 230.10(a) requires the Corps to determine whether "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." Practicable alternatives include those "which do not involve a discharge ... into waters of the United States," as well as "[d]ischarges ... at other locations in waters of the United States." 40 C.F.R. § 230.10(a)(1). A "practicable" alternative is one that "is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2). An otherwise practicable alternative is "available" even if it is "an area not presently owned by the applicant, [if it] could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity." 40 C.F.R. § 230.10(a)(2). If an alternative is unreasonably expensive to an applicant, 45 Fed. Reg. 85343 (Dec. 24, 1980), or does not "provide similar logistical opportunities," Old Cutler Bay Permit 404(q) Elevation (13 Sept. 1990), it is not a practicable alternative. There is a presumption that practicable alternatives exist if a proposed project is not water-dependent. 40 C.F.R. § 230.10(a)(3).

There is an additional presumption that "all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site ... have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3). "Special aquatic sites" include wetlands. 40 C.F.R. § 230.41 (subpart E).

The basic principle of the practicable alternatives analysis is one of avoidance: "if destruction of an area of waters of the United States may reasonably be avoided, it should be avoided." 45 Fed. Reg. 85340 (Dec. 24, 1980). The project purpose and practicable alternatives should be viewed from the perspective of a person or entity in the applicant's position. The practicable alternatives analysis is not susceptible to numerical precision, but requires a balancing of the applicant's needs with environmental concerns.

The burden to clearly demonstrate a lack of practicable alternatives and rebut the 404(b)(1) presumptions lies with the permit applicant. With guidance from the Corps, the applicant must conduct an assessment of practicable alternatives. The practicable alternatives analysis must be supported by appropriate documentation. See 40 C.F.R. § 230.6(b). The ultimate determination of whether the presumption(s) of the 404(b)(1) Guidelines has/have been rebutted is the sole responsibility of the Corps.

Where the 404(b)(1) Guidelines' practicability analysis presumption(s) is/are rebutted, an applicant must still demonstrate that "appropriate and practicable steps have been taken to minimize potential adverse impacts on the aquatic ecosystem" in accord with 40 C.F.R. § 230.10(d). This means that once the least damaging practicable alternative has been identified, steps must be proposed or agreed-to by the applicant to minimize project impacts through project

modifications and permit conditions. Corps/EPA Mitigation MOA (1990).

While the District ultimately determined that the overall project purpose could be accomplished without impacting wetlands (No Action Alternative), it did not take into account the appellant's complete project purpose that included the widening of Oslo Road. In addition, the District inadequately evaluated the appellant's justification as to their practicable alternatives analysis. And finally, the District did not provide a rationale for determining the alternatives (A1-A3, p. 12-14, EA/SOF) are available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose.

Action: 1) The District must adequately document how the appellant's request to widen Oslo Road was considered in defining the overall project purpose. In addition, the District must adequately document how it considered and addressed the appellant's justification for widening Oslo Road (eliminate grading and maintenance for the County, eliminate harmful sediments and excessive turbidity from being carried off the unpaved marl road surface that goes directly into the Indian River Lagoon with every rain event, a paved county road was required to comply with the Florida Department of Transportation Green Book, and safety) and adequately document the determination as to whether or not Oslo Road needs to be widened.

2) In light of the overall project purpose, as documented per action 1, the District must re-evaluate the alternatives (A1-A3, p. 12-14, EA/SOF) and provide a rationale as to if the District believes that each alternative is available and capable of being done after taking into consideration cost, existing technology, and logistics. The District must also document how they considered and addressed the appellant's analysis for A1-A3 in the District's conclusion.

Appeal Reason 2: The District incorrectly denied the project based on the conclusion that the proposed project would result in the incidental take of manatees.

Finding: This reason for appeal does not have merit.

Discussion: During the 11 January 2012 appeal conference, the District was asked to clarify their conclusion, located at 7(b)(4) of the EA/SOF, that the project is not likely to jeopardize the continued existence of the West Indian manatee. In response, the District provided the following:

> On September 14, 2010, SAJ requested formal consultation with the U.S. Fish and Wildlife Service (FWS) pursuant to the Section 7 of the Endangered Species Act (ESA) based on the Corps' effects determination that the proposed project "may affect" the manatee. (see, AR00553-55). This letter explains SAJ's effects determination using the October 2008 State of Florida Effect Determination Key for the Manatee in Florida. This letter also provides an analysis of the proposed project and impacts. On January 18, 2011, FWS determined that the proposed project is inconsistent with the Manatee Protection Plan (MPP) and, therefore, the proposed project is "**reasonably certain to result in the take of manatees in the form of additional deaths and injuries**."

(emphasis added). (see, AR00622). FWS also noted that incidental take of manatees has not be authorized by the Marine Mammal Protection Act (MMPA); thus, FWS is unable to issue incidental take authorization for manatees for the proposed project. On June 29, 2011, FWS found that the revised project is inconsistent with the MPP and determined that the revised project may exceed the capacity of the manatee protective measures afforded in the MPP. (see, AR01005). Thus, FWS concluded that the revised project is reasonably certain to result in the take of manatees and that it was not authorized to issue incidental take for manatees pursuant to the MMPA. SAJ indicated in its EASOF that the proposed project is not likely to jeopardize the continued existence of the manatee. (see, AR00994).

It is important to note that the purpose of an effects determination is for the action agency to determine whether or not to request formal consultation. 50 CFR 402.14(a). "May effect" does not mean the same thing as "jeopardize the continued existence of." See 50 CFR 402.02. Similarly, "not likely to adversely affect" does not mean the same thing as "not likely to jeopardize the continued existence of." Thus, when the Corps determined that the proposed project "may affect" the manatee, the requirement to formally consult with FWS was triggered. However, the formal consultation process did not conclude a biological opinion from FWS on whether the proposed project was likely to jeopardize the manatee. Instead, FWS recommended denial of the application based on reasonably certain take that could not be authorized pursuant to the MMPA, amongst other reasons. Incidental take does not necessarily mean jeopardy for a species. It is SAJ's opinion that although the impacts of the proposed project may include incidental take of manatee, they do not necessarily rise to the level of jeopardy. Jeopardy determinations are quite rare and may happen, for instance, if a project was located at a power plant that has a warm water discharge and is considered a warm water aggregation area (WWAA). However, in regards to the proposed project, it appears that due to the shallow water depths, abundance of submerged aquatic vegetation, manatee numbers that utilize the area, the inconsistencies with the Indian River County Manatee Protection Plan (IRC MPP), and that the subject area is not slow speed year round, that the project will lead to a take in the manatee. The 404(b)(1) Guidelines requires denial of a permit application for discharge of dredged or fill material into waters of the United States that jeopardizes the continued existence of a listed species. 40 CFR 230.10(b)(3). If the proposed project caused jeopardy to the manatee, SAJ's permit review would end there because in no case will the Corps issue a permit contrary to the ESA and 404(b)(1) Guidelines.

The District's rationale for denying the permit (Public Interest Determination and NOT 404(b)(1) Guidelines), based on their independent effects determination along with the USFWS determination, is sufficient justification to deny the permit based on the conclusion that the proposed project would result in the incidental take of manatees. It should be noted that the Public Interest denial is not challenged (except to the extent that "Fish & Wildlife Values" was a part of that review).

Action: None required.

Appeal Reason 3: The District denied the permit in an unprofessional manner.

Finding: This reason for appeal does not have merit.

Discussion: This particular reason for appeal involves a 29 August 2011 teleconference between the County, USFWS, and the District. The teleconference was requested by the appellant for the purpose of discussing permitting concerns raised by the USFWS. At the end of this teleconference the District informed the appellant that the permit had been denied, as of 26 August 2011. The appellant felt this was unprofessional.

As per 33 CFR, Part 331.7 e. 6. & 8., "Issues not identified in the administrative record by the date of the NAP for the application may not be raised or discussed, because substantive new information or project modifications would be treated as a new permit application."

In addition, 33 CFR, Part 331.5 a. 2. states, "The reason(s) for requesting an appeal of an approved JD, a permit denial, or a declined permit must be specifically stated in the RFA and must be more than a simple request for appeal because the affected party did not like the approved JD, permit decision, or the permit conditions. Examples of reasons for appeals include, but are not limited to, the following: A procedural error; an incorrect application of law, regulation or officially promulgated policy; omission of material fact; incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands; incorrect application of the Section 404(b)(1) Guidelines (See, 40 CFR Part 230); or use of incorrect data."

Since the District denied the permit on 26 August 2011 and the reason for appeal involves an issue that took place after the decision (29 August 2011), this reason for appeal may not be raised since it is considered new information.

Action: None required.

CONCLUSION

For the reasons stated above, I find that the appeal has merit. The District's administrative record does not contain adequate evidence to support its permit denial as outlined above. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law, regulation, Executive Order, or policy. The administrative appeals process for this action is hereby concluded.

ERIC R. CONRAD
Colonel, USA
Commanding