

ADMINISTRATIVE APPEAL DECISION

ROBERT COOK, FILE NO. 200200165 (LP-KBH)

JACKSONVILLE DISTRICT

DATE: April 18, 2005

Review Officer: Mores Bergman, U.S. Army Corps of Engineers

Appellant: Robert Cook, Islamorada, Florida

Appellant's Representative: Kenneth J. Plante, Attorney

Receipt of Request For Appeal: February 18, 2004

Action Appealed: Proffered Permit

Date of Appeal Conference and Site Visit: June 18, 2004

Background Information:

On December 22, 2003, the Corps of Engineers Jacksonville District (District) provided a proffered permit to Mr. and Mrs. Robert Cook for the construction of a concrete dock with davits in a tributary canal that is located along the Cook property at Lot 4 of the Port Antigua subdivision in Islamorada, Monroe County, Florida. The permit was issued under the authority of Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. The District's proffered permit authorized construction of the project subject to permit conditions that are included to protect water quality and to mitigate for loss of mangrove wetlands and other aquatic resources that would be affected by the construction of the dock. Conditions include requirements for installing turbidity screens during construction, mangrove trimming restrictions, protection of endangered species, payment of a mitigation fee to be used to by the Florida Keys Restoration fund to replace aquatic resources affected by the project, and the requirement to preserve in perpetuity 255 square feet of mangrove shoreline through a deed restriction.

On February 16, 2004, Mr. Kenneth Plante sent a request for appeal (RFA) of the proffered permit, on behalf of Robert Cook, to the Corps of Engineers (Corps) South Atlantic Division in accordance with the Corps Administrative Appeal Regulation 33CFR 331. The appellant objects to permit conditions 5 through 11, which pertain to the preservation in perpetuity, by means of a deed restriction, of 255 square feet of mangrove wetland, which is located on the Cook property. The appellant's reasons for appeal are listed below. The Review Officer conducted an appeal conference and site visit on June 18, 2004. A copy of the report of the meeting is attached (enclosure 1).

Reasons For Appeal Submitted by Appellant:

The appellant objects to Permit Conditions 5 through 11 for the following stated reasons:

Reason 1: The Corps did not discuss the inclusion of such permit conditions with Mr. Cook.

Reason 2: This property is not ideal for fisheries or other aquatic species to thrive, as all homes have bulkheads.

Reason 3: It is possible that through an act of nature or the act of others, the mangroves could be adversely affected or destroyed. The permit language does not recognize such instances may occur at no fault of Mr. Cook and not hold him liable.

Reason 4: The permit requires deed restrictions to preserve the mangrove shoreline. There appears to be no legal basis for this requirement. The permit provides for payment of mitigation fees stating that the "Total Mitigation Fee" is \$4,176.58. The \$4,176.58 is the mitigation required to offset the impacts of this project. The deed restrictions are, arguably, beyond the authority of the Corps. See 33 CFR 325.4 & 33 CFR 320.4.

Reason 5: Assuming permit conditions number 5 through 11 serve as mitigation, the District Engineer is authorized to consider current government controls that may achieve the objective of the desired condition. See 33 CFR 325.4a2. Florida regulates mangroves pursuant to Sections 403.9321 through 403.9334, Fla. Statute, which should be taken into consideration.

Reason 6: The requirement for deed restrictions unduly restricts the use of the property for eternity and will likely diminish the value of the property.

Reason 7: Deed restrictions imply liability to Mr. Cook if the mangroves are harmed. This places Mr. Cook in the untenable position of being liable for any adverse affect the mangroves suffer which may be due to no fault of his own.

Reason 8: Permit condition 11 places unreasonable restraints on the alienation of the Cook property.

Reason 9: Pursuant to [Corps of Engineers] Regulatory Guidance Letter Number 02-2, dated Dec 24, 2002, "Preservation does not result in a gain of wetlands and will be used only in exceptional circumstances." The instant Permit does not create an exceptional circumstance, which requires perpetual preservation of the mangrove shoreline.

Information Received During the Appeal Review and Its Disposition:

The District provided the Review Officer and the appellant with a copy of the administrative record for the permit decision. This information was considered in the appeal review. Information obtained during the appeal conference and site visit conducted on June 18, 2004 was also considered in the appeal review, to the extent that it provided clarification of the administrative record. The District also provided the RO with a copy of the State of Florida's Law "1996 Mangrove Trimming and Preservation Act" On June 28, 2004, the District provided the Review Officer with a copy of the District's January 24, 1997 policy entitled: "Preservation of Lands via Conservation Easements and Deed Restrictions," which was mentioned during the appeal conference. This information was considered to the extent that it helped explain the District's reasons

for requiring deed restrictions for permit conditions. In addition, on July 1, 2004, Mr. Plante provided the Review Officer with a copy of a compilation of court cases which he called: "Florida case law relating to the rule against perpetuity and unreasonable restraints on the alienation of property." This information was not considered in the review of the appeal since was not a part of the District's administrative record and was not addressed in the request for appeal.

Summary of Decision: I find that the appeal does not have merit. I find that the District evaluated and documented their proffered permit dated December 22, 2003, according to applicable laws, regulations and policy guidance. The special conditions placed on the permit, including revised plans/drawings and mitigation, are reasonable given the specific circumstances of the permit request.

Appeal Decision Findings and Instructions for District Action (if required):

Reason 1: The Corps did not discuss the inclusion of such permit conditions with Mr. Cook.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District relative to this appeal reason.

Discussion: In the February 16, 2004 appeal transmittal letter, Mr. Kenneth Plante states that prior to the receipt of the permit, there were no discussions between Mr. Cook and the Corps regarding the permit conditions. In the District's administrative record is found a drawing submitted by the project consultant Laura Pellow of Blue Water Engineering and Design (BWE&D), dated Oct 24, 2002, which showed a revised dock length of 54.5 feet. This change was a result of discussions between the Corps and Ms. Pellow regarding the need to avoid impacts to the mangrove wetlands along the canal. The District's record also contains a copy of a letter dated June 10, 2002 to the District from Mr. Cook, in which he agreed to pay a compensatory mitigation fee for environmental impacts from his proposed project. Also in the administrative record is found a letter dated April 25, 2003 from the District to BWE&D, with copy furnished to Robert Cook, in which the District discussed the possibility of further reduction in the length of the proposed dock and the need to provide protection of existing mangrove wetlands to minimize project impacts so as to end up with a project that is the least environmentally damaging practicable alternative. These documents show that the applicant and/or his representative had been made aware of those provisions of the permit that require avoidance, minimization, and protection of the mangrove wetlands and the condition requiring a compensatory fee for any wetlands that would be destroyed, before the final decision was made by the District. At the appeal conference, Ken Huntington, the District's project manager for the permit action, stated he believed he had discussed all proposed permit conditions with Ms. Pellow of BWE&D, before finalizing the permit documents. Mr. Cook stated at the appeal conference that he had not been informed of

the deed restriction conditions beforehand, and that he would liked to have had the opportunity to have discussed other alternatives for satisfying the preservation of wetlands requirement before receiving the final permit.

In reviewing the District's administrative record, no evidence is found that indicates that the District had specifically provided Mr. Cook with a copy of the deed restriction conditions (conditions 6 thru 11) before the proffered permit was sent to him on December 22, 2003. Although it is unfortunate that Mr. Cook did not become aware of the deed restriction conditions prior to finalization of the permit decision, it is found that the District did not violate any laws, regulations, or policies by not coordinating the final conditions with Mr. Cook before sending him the proffered permit. The Corps' Permit Program Regulations (33CFR Parts 320 through 330) do not require pre-coordinating permit conditions with an applicant before issuing a permit. It is therefore determined that this reason for appeal does not have merit.

Reason 2: This property is not ideal for fisheries or other aquatic species to thrive, as all homes have bulkheads.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District relative to this appeal reason.

Discussion: In reviewing the District's Environmental Assessment and Statement of Findings dated November 15, 2003 and its supporting documents, it is found that the District has identified that significant amounts of fish and other aquatic life do live in and use the canal adjacent to the Cook property as well as the other canals within the entire Port Antigua development, in which the Cook property is located. The District has also pointed out, in their findings, that the mangrove vegetation provides important habitat for the aquatic life found in the canals. The District's administrative record also contains a letter, dated February 20, 2002, from the U.S. National Marine Fisheries Service which identifies the proposed project area as being in an area designated as Essential Fish Habitat. In addition, the U.S. Fish and Wildlife Service, by letter dated May 13, 2002, indicated that the canals in the area of the proposed project are habitat for the endangered species West Indian Manatee. During the site visit on June 18, 2004, the Review Officer observed that fish and other aquatic life are present in the canal adjacent to the Cook property, and also observed the habitat functions that the mangroves provide to aquatic life in the canals. The Review Officer also noted during the site visit that although many properties in the housing development do have bulkheads along the canal, some do not. The Review Officer also observed that some of the other properties in the development also have mangrove trees growing adjacent to the canals, similar to the Cook property. Upon considering the information contained in the administrative record and observations made at the project site, it is determined that this reason for appeal does not have merit.

Reason 3: It is possible that through an act of nature or the act of others, the mangroves could be adversely affected or destroyed. The permit language does not recognize such instances may occur at no fault of Mr. Cook and not hold him liable.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District relative to this appeal reason.

Discussion: In the appeal transmittal letter, dated February 16, 2004, Mr. Plante states: “placing deed restrictions regarding the preservation of the area carries with it the implication of liability to Mr. Cook if the mangroves are harmed in anyway other than that specifically authorized by this permit. Such requirement is patently unfair since Mr. Cook has no control over natural occurrences, the actions of the neighbors and others, or actions of those utilizing and maintaining the canals that could affect the health of the mangroves.” Mr. Plante’s letter further states: “to hold Mr. Cook responsible for the preservation of the 25.5 feet of mangrove shoreline in perpetuity places Mr. Cook in the untenable position of being liable for any adverse affect the mangroves suffer which may be through no fault of his own.” At the appeal conference on June 18, 2004, Mr. Cook further expressed his concern regarding the liability implications of the conditions, by stating that he felt it was unfair to hold him responsible for damages, that could occur to the mangroves on his property, that were not his fault. At the appeal conference, Mr. John Studt of the Jacksonville District stated that the District would be fair and reasonable in enforcing the permit conditions, and would consider whether or not any damage that may occur to the mangroves was caused by or within the control of the permittee, in determining if any enforcement action would be taken.

In fact, the Declaration of Deed Restriction states such a limitation in that it “may be enforced by the Corps, or its successor agencies, in an action at law [or] equity against any person(s) or other entity/entities violating or attempting to violate this covenant.” In other words, an enforcement action would not be undertaken against a person who is not violating or attempting to violate the covenant. For example, in addition to the Declarant, all those authorized to act or use the property by him would be among those who may subject the Declarant to liability under the Declaration. However, in the example of criminal acts or trespasses by third parties that violate the covenant, the Declarant would not be deemed to violate the covenant, since the criminal actor or trespasser would be the violator. Similarly, the Declarant would not be liable for “acts of God” such as hurricane damage to the resource, since these would not involve a “person ... attempting to violate” the covenant. The Declaration is made by the Declarant as the “fee simple owner” of the property; accordingly, it is expected that the Declarant will protect the resource placed under restriction within the limits of his dominion and control over the property.

Reason 4: The permit requires deed restrictions to preserve the mangrove shoreline. There appears to be no legal basis for this requirement. The permit provides for payment of mitigation fees stating that the “Total Mitigation fee” is \$4,176.58. The \$4,176.58 is

the mitigation required to offset the impacts of this project. The deed restrictions are, arguably, beyond the authority of the Corps. See 33 CFR 325.4 & 33 CFR 320.4.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District relative to this reason for appeal.

Discussion: In Mr. Plante's letter of February 16, 2004 (pages 2 & 3), he states that he cannot locate any legal authority or bases, which provides for the Corps to require 25.5 feet of mangrove shoreline to be preserved into perpetuity. Mr. Plante further points out, in his letter, that the Corps permit regulation, at 33 CFR Part 325.4, states that: "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." The regulation further states: "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 regulation, at Part 325.4 also states: "Legal requirements may be satisfied by means of Corps permit conditions include compliance with the Section 404(b)(1) Guidelines, the EPA ocean dumping criteria, the Endangered Species Act, and requirements imposed by conditions on state Section 401 water quality certifications." The legal basis for the required conditions is the Section 404(b)(1) Guidelines (40CFR Part 230). Deed restrictions are a common method used by the Corps to assure long-term compliance with permit conditions (See the "Discussion" section of Reasons 5 and 6, below, for further information regarding the use of deed restrictions by the Jacksonville District). The Guidelines must be complied with in order for a permit to be issued under Section 404 of the Clean Water Act. On February 6, 1990, the Environmental Protection Agency (EPA) and the Department of the Army (DA) published a memorandum of agreement which provides the agencies' policy and procedures for implementing the Section 404b (1) Guidelines concerning mitigation. The memorandum explains that to satisfy the Guidelines, a project must avoid and minimize adverse impact to the maximum extent practicable, and that compensatory mitigation can be used to offset any remaining adverse impacts that can't be avoided or minimized. The Districts permit decision Statement of Findings (SOF) dated Nov 15, 2003 (page 7, paragraph 9) discusses the District's determination of compliance with the Guidelines for the proposed project. The SOF (page 7) indicates that avoidance and minimization was obtained by reducing the dock length to 54.5 feet and by preserving the mangroves on the remainder of the property. The District determined that this would result in the least environmentally damaging practical alternative. The SOF also shows that the District required, by condition 2, that payment be made in the amount of \$4,176.58 to the Florida Keys Environmental Restoration Trust Fund to mitigate, or compensate, for that area of mangrove shoreline and submerged aquatic resources that would be destroyed by the proposed project. This action is found to be in accordance with the Section 404b (1) Guidelines and Corps regulations and policies. It is therefore determined that this reason for appeal does not have merit.

Reason 5: Assuming permit conditions number 5 through 11 serve as mitigation, the District Engineer is authorized to consider current government controls that may achieve the objective of the desired condition. See 33 CFR 325.4a2. Florida regulates mangroves pursuant to Sections 403.9321 through 403.9334, Fla. Stat., which should be taken into consideration.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District relative to this reason for appeal.

Discussion: At the appeal conference, Mr. John Studt, supervisor of the Corps Palm Beach Gardens Regulatory Office, explained that the District has routinely used deed restrictions to insure compliance with conditions for those projects such as the Cook's project, where the conditions provide for long-term protection of resources. He also indicated that he was aware of the State laws concerning mangrove protection, but that it has been the District's experience, that the State does not always have the resources to enforce their regulations and also, in some cases, projects are exempt from State regulation. Therefore, the District has required the deed restriction conditions. Mr. Studt further stated that the Jacksonville District has a written policy regarding the use of deed restrictions, which has been in effect for several years. A copy of the District's deed restriction conditioning policy, dated January 24, 1997, was provided to the Review Officer for review. The deed restriction conditions contained in the Cook permit document are found to be in accordance with the District's policy. The District policy regarding deed restrictions is also found to be in compliance with the Corps' Regulatory Guidance Letter (RGL) 02-2, dated 24 December 2002, which provides guidance for the establishment and maintenance of compensatory mitigation projects. It is determined that the District's decision to use the deed restriction conditions is reasonable and in accordance with applicable laws, regulations, and guidance. This reason for appeal is, therefore, found to have no merit.

Reason 6: The requirement for deed restrictions unduly restrict the use of the property for eternity and will likely diminish the value of the property.

Findings: This appeal reason does not have merit for the reasons contained in the Discussion section below.

Action: No action required by the District relative to this reason for appeal.

Discussion: The appellant has not presented evidence to support the claim that the deed restriction will unduly restrict the use or diminish the value of the Cook property. The use of deed restrictions is common practice, not only in the Jacksonville District, but also throughout the Corps of Engineers Regulatory Program, to insure compliance with long-term mitigation conditions such as those required in this case. Corps RGL 02-2 discusses the importance of this practice. The RGL, at section 3.g. states, "The wetlands, uplands, riparian areas, or other resources in a mitigation project should be permanently protected,

in most cases, with appropriate real estate instruments, e.g., conservation easements, deed restrictions, transfer on title to Federal or state resource agencies or non-profit conservation organizations.”

Reason 7: Deed restrictions imply liability to Mr. Cook if the mangroves are harmed. This places Mr. Cook in the untenable position of being liable for any adverse affect the mangroves suffer which may be due to no fault of his own.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District relative to this appeal reason.

Discussion: See discussion under Reason 3 above. This appeal reason addresses essentially the same issue as that contained in Reason 3. Reason 7 is therefore also found not to have merit.

Reason 8: Permit condition 11 places unreasonable restraints on the alienation of the Cook property.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District relative to this reason for appeal.

Discussion: See discussion under Reason 6 above. This appeal reason addresses essentially the same issue as that contained in Reason 6. The appellant has not provided evidence with his Request for Appeal to support the assertion made that condition 11 places unreasonable restraints on the alienation of the Cook property. Reason 8 is therefore found to not have merit.

Reason 9: Pursuant to Regulatory Guidance Letter Number 02-2, dated Dec 24, 2002, “[p] reservation does not result in a gain of wetlands and will be used only in exceptional circumstances.” The instant Permit does not create an exceptional circumstance which requires perpetual preservation of the mangrove shoreline.

Findings: This appeal reason does not have merit for the reasons contained in the Discussion section below.

Action: No action required by the District relative to this reason for appeal.

Discussion: RGL 02-2 provides as follows:


If preservation alone is proposed as mitigation, Districts will consider whether the wetlands or other aquatic resources: 1) perform important physical, chemical, or biological functions, the protection or maintenance of which is important to the

region where those aquatic resources are located; and 2) are under demonstrable threat of loss or substantial degradation from human activities that might not otherwise be avoided.

The mangrove area in question would appear to meet both of these criteria, based on the administrative record. The area does perform important biological functions. As noted under Reason 2, above, the U.S. National Marine Fisheries Service has identified the proposed project area as being in an area designated as Essential Fish Habitat, and the U.S. Fish and Wildlife Service, has indicated that the canals in the area of the proposed project are habitat for the endangered species, West Indian Manatee. And, as noted under Reason 5, above, despite the fact that state law provides some protection, due to lack of enforcement resources and/or exemption under state law, these resources are under some threat of loss.

Overall Conclusion:

After reviewing the information contained in the Jacksonville District's administrative record, information presented by the appellant, and information obtained at the appeal conference and site visit made, I conclude 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 for the construction of a moorage facility in the waters of the United States, including wetlands. Accordingly, I conclude that this Request for Appeal does not have merit.


Michael J. Walsh
Brigadier General, US Army
Commanding