ADMINISTRATIVE APPEAL DECISION

RUDOLPH AND ROSEANN KRAUSE

FILE NUMBER 2002 8023 (LP-CR)

JACKSONVILLE DISTRICT

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

Receipt of Request For Appeal (RFA): September 30, 2003.

Appeal Conference Date: February 3, 2004. **Site Visit Date:** February 3, 2004.

Summary of Decision: I find the appeal does not have merit. I find that the District evaluated and documented their proffered permit dated August 28, 2003 according to applicable laws, regulations and policy guidance. The special conditions placed on the permit are reasonable given the specific circumstances of the permit request.

Background Information: In a joint environmental resource permit application (U.S. Army Corps of Engineers and the Florida Department of Environmental Protection Division), dated September 9, 2002, Rudolph and Roseann Krause requested authorization to construct a 12' X 24' wood boat dock on a residential canal off Breezeswept Beach Estates, Ramrod Key, Monroe County, Florida.

The application included the following general description of the proposed project. "The site of this proposed work is a canal front residence in Ramrod Key. The owner wishes to build a marginal wood dock to provide boating access to the property. Construction of the dock will proceed by installing all of the necessary piles. Bents will be bolted to the dock support pile pairs. Stringers and docking will be added to complete the project." In a Memorandum for Record dated August 26, 2003, Subject: "Department of the Army Environmental Assessment and Statement of Finding for [200208023]", page 1, the existing site conditions are further described:

> The project site is located on a residential canal tributary to the Atlantic Ocean. There is an algal community, consisting of more than two species of algae, extending 2' waterward of the existing rip rap. Waterward of this is a bed of seagrass with approximately 80% coverage of *Syringodium filiforme*, *Thalassia testudinum*, and macroalgae. Most of the shoreline in the community is developed with single-family home sites.

At the site visit on February 3, 2004, the Review Officer observed that the canal is approximately 50 feet wide, relatively shallow, and the bottom is vegetated almost in its entirety. Beginning at

the bank, which is rip rapped, there is a shallow shelf that gradually slopes toward the center of the canal.

By letter of January 22, 2003, the District circulated a coordination letter with local, state and Federal agencies and with some members of the public. The letter described "a 12'X 24' marginal wood dock on a residential canal." A copy of the letter was furnished to Glen Boe & Associates, the applicant's agent. The letter stated that the proposed "work may affect the West Indian manatee and result in adverse modification of their critical habitat. Therefore, the Corps is requesting formal consultation with the U.S. Fish and Wildlife Service (FWS) pursuant to Section 7 of the Endangered Species Act of 197, as amended, and the Marine Mammal Protection Act." 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 2003, FWS provided the biological opinion for 14 single-family dock projects in Monroe County, including Mr. Krauses' project. FWS stated that "...the actions, as proposed, are not likely to jeopardize the continued existence of the manatee and is not likely to adversely modify critical habitat." Emphasis added.

By letter of June 24, 2003, the District requested that Mr. Rudolph Krause provide the Corps with a written agreement to render the compensatory mitigation of $1,941.34 before final action is taken on the application. By letter of June 27, 2003, Mr. Rudolph Krause agreed with the mitigation fee.

On August 28, 2003, the District authorized the applicant to "install a 12'x 24' marginal wood pile-supported dock." The plans included in the permit indicated that the dock would be constructed over existing boulders, i.e. rip rap.

By letter of September 15, 2003, the appellants submitted a Request For Appeal to the District, stating, "[w]e applied for a wood dock permit to build on to an existing permitted 60' boulder rip-rap seawall, located on a deep water canal on the ocean side.....Our original intention was to build the dock on the full 60' seawall in order to accommodate a larger boat. The letter of permission authorizes a 24'wood dock overlapping the boulder rip-rap seawall." The appellants objected to special conditions # 4-11 of the issued permit. Special conditions # 4 and 5 require the preservation of the remaining shoreline and provide conditions for maintenance of mangrove resources along the shoreline. Special conditions # 6 through #11 outline the requirements for a deed restriction to establish preservation areas along the shoreline. In additionto these objections, the appellants raised two questions which are addressed as follows:

Question #1: "Condition #2 - Under what law, rule or regulation is the calculation of the monetary fee for mitigation applied?"

The Section 404(b)(1) Guidelines require the applicant to avoid, minimize and mitigate for the unavoidable impacts. By letter of September 29, 2003, to Mr. Krause, the District responded that " ... mitigation for impacts associated with this project was calculated using the Keys'

Mitigation Index Guidelines, which is part of our permit review for evaluating projects that propose impacts to the aquatic environment in the Florida Keys."

Question #2: "Condition #3 – … What are the Manatee construction guidelines?"

Mr. Krause was not familiar with guidelines for the construction of structures in waters known to be used by manatees. In the Request For Appeal, Mr. Krause asked the question, "What are the Manatee construction guidelines?" By letter of September 29, 2003, the District forwarded a copy of the Manatee Construction Guidelines to Mr. Krause.

By letter of March 25, 2004, the appellants requested the appeal be held in abeyance.

By letter of May 18, 2004, the appellants requested that SAD proceed with the appeal decision.

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

Reason: The appellants objected to some of the special conditions of the issued permit, specifically, the appellant stated concerning Condition # 4 "We cannot accept or agree to preserve in perpetuity the remaining 60% of shoreline on both sides of the authorized dock as shown on the attached plan view drawing and be restricted to only be able to use 40% of the seawall located on the deep water near to the ocean. It makes it difficult to own a boat of one's choice, difficult to repair along the existing boulder riprap seawall when necessary and difficult to sell." The appellants stated concerning sections (a) and (b) of the above condition that "There are no mangroves in the area." In addition, with regard to conditions 5 through 11, the appellant states "We cannot accept the prohibitive conditions with recording a deed restriction of perpetuity…"

FINDING: The reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: 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."

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." Emphasis added.

In the Request For Appeal the appellants stated, "[w]e applied for a wood dock permit to build on to an existing permitted 60' boulder rip-rap seawall, located on a deep water canal on the ocean side….Our original intention was to build the dock on the full 60' seawall in order to

accommodate a larger boat. The letter of permission authorizes a 24'wood dock overlapping the boulder rip-rap seawall." Plan drawings dated August 28, 2002, prepared by Glen Boe and Associates, Inc., applicant's agent, received by the Florida Department of Environmental Protection (DEP), and provided to the District, clearly indicated a 12'X 24' wood dock. The plan view depicted the dock as being situated along the central portion of the shoreline with 18.0' of open shoreline between it and the property line on either side.

In the Request For Appeal the appellants stated that they cannot accept or agree to preserve in perpetuity the remaining 60% of the shoreline. It is standard procedure for the District to require the preservation of the remaining shoreline identified as mitigation. The placement of deed restrictions is a common practice and is used throughout the USACE Regulatory Program to facilitate sufficient mitigation to offset impacts to waters of the United States including wetlands. Regulatory Guidance Letter (RGL) 02-2[1] reiterates the importance of this practice. The RGL at section 2.l. states, "Districts will include in individual permits, and general permit verifications that contain a wetland compensatory mitigation requirement, special conditions that: 1) identify the party(s) responsible for meeting any or all components of compensatory mitigation requirements; 2) performance standards for determining compliance; and, 3) other requirements such as financial assurances, real estate assurances, monitoring programs, and the provisions for short and long-term maintenance of the mitigation site." Section 3.g. states, "Compensatory mitigation plans should include a written description of the legal means for protection mitigation area(s), and permits will be conditioned accordingly. The wetlands, uplands, riparian areas, or other aquatic resources in the mitigation project should be permanently protected, in most cases, with appropriate real estate instruments, e.g., conservation easements, deed restrictions, transfer of title to Federal or state resource agencies or non-profit conservation organizations." Emphasis added.

The appellants stated, "It makes it difficult to own a boat of one's choice, difficult to repair along the existing boulder riprap seawall when necessary and difficult to sell." In the Environmental Assessment (EA) dated August 26, 2003, the District stated "The project as proposed has not been changed." The District authorized the structure as requested by the appellants without modification. The difficulty noted by the appellants concerning owning "a boat of one's choice" will not be controlled by the size or location of the preservation area; rather, it will be controlled essentially by the appellant's lot size (60 feet wide) and by the size of the canal. These two features are likely to be the limiting factors in determining the size of the boat. The issued permit does not authorize the appellant to impact adjacent property. 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

[1] Unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs generally remains valid after the expiration date as discussed in the Federal Register notice on RGLs of March 22, 1999, FR Vol. 64, No. 54, Page 13783.

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.

As noted above, the applicant stated, concerning sections (a) and (b) of condition #4, "There are no mangroves in the area". The Project Manager in a Memorandum for the Record, dated February 7, 2003, subject: Functional Assessment KEYMIG Worksheet, under item 2, Shoreline Fringe, indicated that there was no vegetative cover. Sections (a) and (b) of condition #4 would only apply if mangroves were present at the site.

A monetary compensation for the unavoidable loss to waters of the U.S., for the proposed dock construction, was determined to be $1,942.34 based on the KEYMIG, is to be paid to the Florida Keys Environmental Restoration Trust Fund. The appellants have not disputed the required monetary compensation, and by letter of June 27, 2003, the appellants agreed with the mitigation fee.

Conclusion: After reviewing and evaluating the administrative record provided by the Jacksonville District, I conclude that there is substantial evidence 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 construction of a wooden pile-supported dock in waters of the United States. I also conclude that this decision was not arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

21 Sun 06
(Date)

Michael J. Walsh
Brigadier General, US Army
Commanding