

ADMINISTRATIVE APPEAL DECISION

BARRETT BOAT WORKS; FILE NO. LRE-1983-570234

DETROIT DISTRICT

FEBRUARY 12, 2014

Review Officer: Elliott N. Carman, U.S. Army Corps of Engineers (USACE), Southwestern Division

Appellant: Barrett Boat Works

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

Receipt of Request for Appeal: April 3, 2013

Appeal Conference and Site Visit: August 29, 2013

Summary of Appeal Decision: Barrett Boat Works (appellant) is appealing a USACE Detroit District (District) proffered permit for their property in Spring Lake, Ottawa County, Michigan. The appellant submitted three reasons for appeal in which they contend that the District was arbitrary and capricious, omitted material facts, and committed a procedural error. For reasons detailed in this document, the first reason for appeal discussed below does not have merit, reasons for appeal 2 and 3.b. discussed below have merit, and reason for appeal 3.a. is outside the scope of the appeal program. The proffered permit is remanded to the District for reconsideration.

Background Information: The appellant's property is located at 821 West Savidge Street, Spring Lake, Ottawa County, Michigan. The appellant was initially denied a state permit for the proposed project¹ which they contested. The appellant later received their state permit from the Michigan Department of Environmental Quality (MDEQ)² upon order by State Administrative Law Judge Richard Lacasse after the conclusion of the state contested case hearing (CCH).³ The District denied the applicant's original application without prejudice by letter dated February 4, 2005, in response to the initial MDEQ denial.⁴ Upon conclusion of the CCH, the applicant reapplied to the District on October 13, 2010,⁵ which the District later withdrew via letter dated May 3, 2011, due to, "...lack of response to issues raised after publication of our Public Notice..."⁶ The appellant submitted the requested information via letter dated November 4, 2011,⁷ which the District considered, then sent an initial proffered permit to the appellant via

¹ Administrative Record (AR) page 89.

² AR page 91.

³ *Id* at 431.

⁴ *Id* at 1245.

⁵ *Id* at 1381.

⁶ *Id* at 1478.

⁷ *Id* at 423.

letter dated June 1, 2012.⁸ The appellant responded via letter dated July 25, 2012, with objections to the initial proffered permit.⁹ The District considered the objections and sent a proffered permit to the applicant for reconsideration via letter dated February 6, 2013.¹⁰

The appellant appealed the proffered permit by submitting a Request for Appeal (RFA) to the Great Lakes and Ohio River Division (Division) via letter dated April 2, 2013. The RFA was received by the Division on April 3, 2013. The appellant was informed, by letter dated April 19, 2013, that their RFA was accepted.

Information Received and its Disposition During the Appeal

33 Code of Federal Regulations (CFR) § 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this proffered permit. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding permits, as that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his Review Officer (RO) conducts an independent review of the District's administrative record (AR) to address the reasons for appeal cited by the appellant. The District's AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. Neither the appellant nor the District may present new information to the Division. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the District's AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the permit. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the District's AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal process and its disposition is as follows:

1. The District provided a copy of their AR to the RO and the appellant. The AR is limited to information contained in the record by the date of February 6, 2013.
2. An appeal conference was held on August 29, 2013, at the Loutit District Library in Grand Haven, Michigan. The conference followed the agenda provided to the District and the appellant by the RO via e-mail on August 23, 2013. During the appeal conference, the appellant and the District provided several documents to the RO and the conference participants. These documents are as follows:
 - a. The District provided a document to both the RO and the appellant that listed the locations of the attachments to the email found on AR page 272. This document and the attachments identified were not considered new information as the attachments

⁸ *Id* at 1569.

⁹ *Id* at 1215.

¹⁰ *Id* at 4.

- were present in the District's AR prior to the date of their decision. Therefore, the document was considered as part of the evaluation of this RFA.
- b. The appellant provided a handout to both the RO and the District that contained the appellant's written responses to the points for clarification found in the appeal conference agenda. This document was not considered new information as it was merely a written form of the verbal clarification provided during the appeal conference and documented in the final appeal conference memorandum for record (MFR). Therefore, the handout was considered as part of the evaluation of this RFA.
 - c. The District provided both the RO and the appellant a map that illustrated the locations of the "similar projects and permit decisions" included in the table found on AR pages 40-41. This map was included as Appendix C to the final appeal conference MFR. This map was not considered new information as it was merely a visual representation of the location of projects identified on a table in the District's decision document that was present in the District's AR prior to the date of their decision. Therefore, the map was considered as part of the evaluation of this RFA.
 - d. The District provided a map that illustrated the locations of four additional residential pier applications they had received since they proffered the Barrett Boat Works permit. This map was included as Appendix D to the final appeal conference MFR. The map is considered new information as it illustrates the location of projects not discussed in the District's AR prior to the date of their decision. Therefore, the map was not considered as part of the evaluation of this RFA.
3. On September 18, 2013, the District provided via email to the appellant and the RO a document that contained the District's written responses to appeal conference agenda questions III.b.i.1, IV.b.i., and IV.b.iv. This document was not considered as new information as it was merely a written form of the verbal clarification provided during the appeal conference and documented in the final appeal conference MFR. Therefore, this document was considered as part of the evaluation of this RFA.
 4. On September 23, 2013, the appellant provided via email a copy of the same handout provided to both the RO and the District during the appeal conference (and referenced in section 2.b. above) that contained the appellant's written responses to the points for clarification found in the appeal conference agenda. Additionally, the email contained a reply to the District's written responses outlined in item 3 above. As previously stated, the appellant's handout that contained their written responses to the points for clarification found in the appeal conference agenda was not considered new information and was considered as part of the evaluation of this RFA. The appellant's reply to the District's written response to appeal conference agenda questions was considered new information as it was provided in response to District comments and not as clarifying information related to their RFA. Therefore, this written response was not considered as part of this RFA.
 5. On September 23, 2013, the RO forwarded via e-mail a draft MFR summarizing the appeal conference topics to the appellant and the District with a request that they review and provide comments by September 30, 2013. In an email dated 26 September 2013, the District provided comments regarding sections 1, 4.a., 5.d., 5.g., 5.m., 5.r., 5.s., 6.a., and 6.b. of the

draft MFR. In an email dated September 30, 2013, the appellant provided comments regarding sections 3, 4.b.(1), 5.k. and 5.r of the draft MFR.

6. The RO supplied the final MFR to the appellant and the District via e-mail on October 4, 2013. The District and appellant's comments were included in section 8 of the final MFR.

Appeal Evaluation, Findings and Instructions to the Detroit District Engineer:

The appellant's reasons for appeal, listed in order from their RFA, were as follows:

1. The District was arbitrary and capricious when it used inconsistent policies to evaluate the applicant's marina expansion relative to that of another marina in the same review area, as well as when it limited the proposed expansion to 176 feet waterward of the existing shoreline.
2. The District omitted material fact when it failed to consider, "...factual information and expert testimony on key issues."
3. The District committed a procedural error by not alerting the applicant to either a "...fact or circumstance which would negatively impact navigation or safety" or possible project modifications that could minimize adverse project impacts prior to permit issuance.

These reasons are not discussed in this order, but rearranged in the discussion below in order to make this decision document easier to understand.

Reason for Appeal 1: The District omitted material fact when it failed to consider, "...factual information and expert testimony on key issues."

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: In the RFA, the appellant stated that, "The Corp failed to consider important factual information and expert testimony on key issues." The appellant then followed the statement with a discussion that elaborated on what factual information and testimony they believed was not considered.

First, the appellant indicated that the District did not consider the fact that the proposed project lies entirely within a "slow no wake zone," which they defined as an area where watercraft are, "...legally required to operate at a slow speed so that a wake is not created."

The District's decision document, which documents the information considered as part of the District's decision, as well as the rationale for their decision, provided discussion regarding the slow, no wake zone in several areas. The District provided a definition, based on the CCH testimony, of a slow, no wake zone, then documented the presence of, and limits associated with

the slow, no wake zone within the project area.¹¹ The District also discussed the speed of various boat sizes within the slow, no wake zone,¹² and the difficulty of enforcing slow, no wake zone rules,¹³ and that evidence showed that some vessels traveled at speeds that created a wake through the slow, no wake zone.¹⁴ Furthermore, the District discussed the impact the proposed project would have on traffic density within the slow, no wake zone.¹⁵ By inclusion in the District's decision document, these references, and several others not mentioned here, demonstrate that the District did indeed consider that the proposed project lies entirely within a slow, no wake zone.

Second, the appellant indicated that the District was not able to consider important factual information when they scheduled their site visit during the off season and did not observe the project area from the water during the site visit. By conducting the site visit during the time when few boats were present, the appellant believed the District was not able to gain any insight on either navigation patterns or the amount of available navigation space within the project area. Additionally, the appellant noted that the District's observations were made from Ferrysburg Park (the park located near the M104 bridge) which Judge Lacasse had said via comments made during the CCH regarding photos taken from the same location,¹⁶ offered an obscured view of the project area. The appellant also indicated that by not observing the project area from the water, the District was not able to clearly understand either navigation patterns or the amount of available navigation space within the project area as the perception of the area differs from the water than from the shore.

During the appeal conference, the District discussed the processing history of the file (see Background Section above) and summarized that they did not visit the site during the peak recreation season, because the review period did not coincide with the season due to the timing of receipt of the application and supplemental information. Nevertheless, the District indicated during the appeal conference that while their site visit was conducted during the off-season, it did assist them in understanding the layout of the existing structures (including the M104 bridge) within the project area. And while the appellant believed the District's vantage point from Ferrysburg Park was obstructed, the District indicated in their decision document that many of the Vanderpuy photographs, which were taken at the same location, showed, "...the waterward portion of the proposed project area, by lining up the approximate locations from which photos were taken...with the residences visible on the opposite shoreline..."¹⁷ The District clarified during the appeal conference that by using this technique, they were able to determine that all but three of the photographs showed the project area which demonstrated that the vantage point was not obscured. Finally, while District personnel did not physically view the area from the water, the District's decision document showed that they did consider information from individuals that had. Therefore, the District did consider the information the appellant asserted they were not able to consider.

¹¹ *Id* at 31.

¹² *Id* at 32.

¹³ *Id* at 33.

¹⁴ *Id* at 38 and 43.

¹⁵ *Id* at 49.

¹⁶ *Id* at 440.

¹⁷ *Id* at 38.

Third, the appellant stated that the District relied primarily on the CCH testimony and did not consider Judge Lacasse's opinion in which he determined that boats travel north/northeast along the center of the Spring Lake towards the slow, no wake buoys, that any activity in the area was associated with the appellant's marina, that the proposed project would still leave a 400 foot fairway between it and the marina on the opposing shore, and that the proposed project would not compromise navigation or safety. The appellant also stated in their RFA that the District considered testimony of certain individuals, while giving little, if any, credibility or weight to others such as Mr. Eric Olsen, or as clarified during the appeal conference, Messer's Chris Lisowicz, Timothy Bureau, or Randall Styburski.

The District included multiple references and discussions in their decision document pertaining to the CCH testimony, the same information upon which Judge Lacasse's opinion is based, including the individuals mentioned above. Among the several references to Mr. Olsen's testimony, the District noted Mr. Olsen testified that boats enter the slow, no wake zone from all directions.¹⁸ The District also noted the number of boats Mr. Olsen observed during his observation of the area,¹⁹ that he believed the proposed expansion area was used exclusively by Barrett Boat Works customers,²⁰ and that "fairway" size did not have to be as wide in slow, no wake zones.²¹ Mr. Bureau's testimony was referenced in multiple locations in the District's decision document including comments that boaters moved uplake towards the no wake buoys which he believed marked the navigation way²² as well as the his comment regarding the density of boaters during the Independence Day fireworks display.²³ Some of the multiple references to Mr. Lisowicz included his testimony that the Vanderpuy photographs did not show the proposed expansion area,²⁴ that traffic moved freely through the project area without piling up,²⁵ and that the proposed expansion would help enforce the slow, no wake zone.²⁶ And finally, Mr. Styburski's testimony is referenced in several locations including his comments regarding boater perception while moving through the project area, that the travel lane is not depth dependant, and that boats travel towards the two buoys at the beginning of the slow, no wake zone.²⁷ The District also included a discussion regarding the 23-minute video taken by Mr. Styburski as well as comments on his associated testimony.²⁸

As previously noted, the inclusion of these references and discussion in the District's decision document demonstrated that the District did indeed consider the CCH and associated testimony of the individuals referenced in this reason for appeal. However, the appellant's concern seems primarily based on the credibility or weight given to some testimony relative to that of other testimony. The District addressed this in their decision document when they stated that they are responsible for evaluating a proposal and reaching a permit decision under Section 10 of the

¹⁸ *Id* at 32.

¹⁹ *Id* at 32.

²⁰ *Id* at 34.

²¹ *Id* at 59.

²² *Id* at 32.

²³ *Id* at 32.

²⁴ *Id* at 35.

²⁵ *Id* at 35.

²⁶ *Id* at 43.

²⁷ *Id* at 35.

²⁸ *Id* at 35.

Rivers and Harbors Act, that they do not presume to qualify expert witnesses, and that they evaluated the merits of the input of each witnesses' testimony.²⁹ Furthermore, the District stated that they gave, "...substantial weight to comments from state and local law enforcement officers who routinely patrol Spring Lake,"³⁰ and that, "Because of their particular agency interest in navigation and boating safety in Spring Lake, we view [state and local law enforcement] comments as important input from sources which have direct and extensive experience in these issues."³¹ And finally, the District stated that they considered, "...the opinions and information provided by these two individuals [hired by the applicant to provide their professional opinions in the state administrative hearing] in our analysis, but we find that the weight of the evidence and testimony of law enforcement officials is more compelling."³²

Therefore, while the District reached a contrary conclusion than the appellant pertaining to this issue, the District's AR clearly showed that they did consider the CCH testimony (the information upon which Judge Lacasse's opinion was based) which included the testimony of Messer's Olsen, Lisowicz, Bureau, and Styburski and provided a rationale as to why the District placed more weight on certain information and testimony than others.

Finally, the appellant noted that the District did not consider Judge Lacasse's comment that few, if any, of the photographs taken by Deputy Emily Vanderpuy showed the proposed project area as the Judge believed her vantage point at the park beneath the M104 bridge was obscured. These appellant also stated that the District used the photos to make assumptions regarding the movement of boats within the project area and that these assumptions were without any information to corroborate or substantiate them.

As previously stated, the District indicated in their decision document and clarified during the appeal conference that only three of the Vanderpuy photographs were obstructed as the District determined that the photographs showed, "...the waterward portion of the proposed project area, by lining up the approximate locations from which photos were taken...with the residences visible on the opposite shoreline..."³³ The appellant asserted that District conclusions drawn from these photographs were without information to corroborate or substantiate them. However, the District provided the rationale supporting their conclusions when they described the movements of individual boats as seen in the series of photographs.³⁴ Therefore, the District provided a rationale for not only why they used the Vanderpuy photographs, but also how they substantiated the information obtained from them.

Based on the contents of the District's AR, the District demonstrated that they did consider the factual information and expert testimony associated with this reason for appeal in the appellant's RFA. Therefore, this reason for appeal does not have merit. The degree to which the District properly considered the factual information and expert testimony referenced in the appellant's RFA will be evident in the discussion pertaining to the other two reasons for appeal.

²⁹ *Id* at 51.

³⁰ *Id* at 51.

³¹ *Id* at 51.

³² AR pages 51-52.

³³ AR page 38.

³⁴ *Id* at 38.

Reason for Appeal 2: The District committed a procedural error by not alerting the applicant to either a, “...fact or circumstance which would negatively impact navigation or safety” or possible project modifications that could minimize adverse project impacts prior to permit issuance.

Finding: This reason for appeal has merit.

Action: The District shall convey the alternative included in the proffered permit to the applicant for response. Upon receipt of the applicant’s response, the District shall re-evaluate their permit decision consistent with applicable regulation and policy. The District shall revise the AR accordingly to document and reflect the information considered in this re-evaluation.

Discussion: In their RFA, the appellant stated that, “The Army Corp did not properly carry out its own evaluation procedures as the applicant was not made aware of any fact or circumstance which would negatively impact navigation or safety.” The appellant further stated that the District did not follow the procedure as described in 33 CFR § 320.4(r)(1)(i)³⁵ as they believed the District did not inform them, “...of any adverse project impacts at any point in time until denial of the permit it requested,” and that, “The Corp discussed no potential adverse impacts, nor potential to minimize such impact at any time with Applicant Barrett Boat Works.”

Regulations at 33 CFR § 320.4(r)(1) state that, “Consideration of mitigation will occur throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses.” The timing for discussing mitigation can be found at 33 CFR § 320.4(r)(1)(i), which states, “Project modifications to minimize adverse project impacts should be discussed with the applicant at pre-application meetings and during application processing.” This section further states that, “As a result of these discussions and as the district engineer’s evaluation proceeds, the district engineer may require minor project modifications...that if adopted, will result in a project that generally meets the applicant’s purpose and need.” While not regulation, the preamble to regulations at 33 CFR § 320.4(r) clarifies that project modifications should be in the form of special conditions when it stated that, “As a result of these discussions, district engineers may condition permits to require minor project modifications...”

The concept of coordinating particular issues associated with a proposed project, including mitigation, so the District may complete their public interest determination can also be found at 33 CFR § 325.2(a)(3) which states, “If the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his views on such issue to the district engineer. At the earliest practicable time other substantive comments will be furnished to the applicant for his information and any views he may wish to offer.”

³⁵ It should be noted that the appellant’s RFA incorrectly referred to this section as 33 CFR § 320.4(r)(i) instead of 320.4(r)(1)(i). The correct citation is used within the body of this decision document.

The *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program* (SOP)³⁶ recommends that districts convey comments raised in response to the public notice via a letter to the applicant. The SOP further recommends that districts also utilize this letter to, "...clearly identify any additional information the district needs to make a decision on the permit application." Finally, the SOP indicates that if a district receives an inadequate response from the applicant, the district should follow up via telephone calls or letters as appropriate to obtain the information needed to make a decision on the permit application.

Based on the above regulation and guidance, a district should discuss particular issues with applicants at pre-applications meetings and/or during application processing. The timing of the coordination is before a District makes their decision and is often included as part of District correspondence that transmits comments received in response to the public notice to the applicant. Finally, a District can utilize conditions to require minor project modifications.

During the evaluation process, the District conveyed potential alternatives, public notice comments, and specific issues related to navigation and safety to the applicant via letters dated February 2, 2011,³⁷ and January 24, 2012,³⁸ to which the appellant responded via letters dated November 4, 2011,³⁹ and February 24, 2012,⁴⁰ respectively. After considering the applicant's information and upon conclusion of the evaluation process, the District determined that the proposed project, "...would have more than minimal adverse impacts to navigation and public safety, and would be contrary to the public interest."⁴¹ However, rather than denying the permit as required by the regulations⁴² and consistent with the SOP,⁴³ the District proffered a permit in which they modified the actual project description with a "less damaging alternative"⁴⁴ and stated that their, "...decision to proffer a modified permit rather than deny the permit is based on our determination that practicable alternatives are available that would minimize impacts."⁴⁵

Therefore, the District was consistent with the regulation and policy when they twice conveyed concerns to the appellant after the close of the public notice period; however, the District did not correctly follow the process as defined in the regulations when they modified the actual project description which they included in the proffered permit instead of simply conveying this alternative to the applicant to consider during the evaluation process.

³⁶ July 1, 2009. *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program: Section 14: Permit Application Evaluation*. The *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program* is a headquarters document that provides a summary of current policies and procedures and should be used as day-to-day informal guidance by regulatory project managers as they implement the program.

³⁷ AR page 323.

³⁸ *Id* at 851.

³⁹ *Id* at 423.

⁴⁰ *Id* at 875.

⁴¹ *Id* at 4.

⁴² Regulations at 33 CFR § 320.4(a)(1) states that, "...a permit will be granted unless the district engineer determines that it would be contrary to the public interest."

⁴³ The SOP states that, "The Corps will deny with prejudice the permit for a project that is contrary to the public interest..."

⁴⁴ AR page 51.

⁴⁵ *Id* at 4.

Reason for Appeal 3: The District was arbitrary and capricious when it used inconsistent policies to evaluate the applicant's marina expansion relative to that of another marina in the same review area, as well as when it limited the proposed expansion to 176 feet waterward of the existing shoreline.

For clarity, this reason for appeal is separated in the discussion below into two parts. The first part, which deals with the consistency of the District's application of policy between the different marinas, is referred to as Reason 3.a. below. The second part, which deals with the District limiting the proposed expansion, is referred to as Reason 3.b. below.

Reason 3.a.: The District was arbitrary and capricious when it used inconsistent policies to evaluate the applicant's marina expansion relative to that of another marina in the same review area.

Finding: This reason for appeal is outside the scope of the appeal process.

Action: No action required.

Discussion: In the RFA, the appellant stated that, "The Army Corp created [cumulative impact area] precedent when it permitted the 1996 expansion of Keenan Marina." The appellant further stated that, "The Corp has not applied consistent policies to [Keenan and Barrett Boat Works] marinas and its determination to deny Barrett's proposed permit is arbitrary and capricious."

During the appeal conference, the District indicated that they used the same evaluation factors, including the same public interest review factors, for both the Keenan Marina and Barrett Boat Works actions. Furthermore, the District stated that the environmental assessments prepared for both actions had the same evaluation factors; however, the District did note that the regulatory program documentation standards had changed since they completed the evaluation for the Keenan Marina. As a result, documentation associated with the Keenan Marina was not as detailed as that which the District prepared for the Barrett Boat Works action. An appeal is associated with a specific Corps action and reasons for appeal are limited to, for example, a district's application of regulation, guidance, or policy to that specific action. Therefore, the consistency of a District's application of policy between different actions is beyond the scope of the appeal process and cannot be addressed further within this decision document.

Reason for Appeal 3.b: The District was arbitrary and capricious when it limited the proposed expansion to 176 feet waterward of the existing shoreline.

Finding: This reason for appeal has merit.

Action: As part of the District's response to the instructions associated with reason for appeal two, the District must also address the basis of using the gas dock as a significant visual cue within this portion of the lake and then re-evaluate their permit decision consistent with applicable regulation and policy. The District shall revise the AR accordingly to document and reflect the information considered in this re-evaluation.

Discussion: In the RFA, the appellant stated that, "...the Corp arbitrarily chose a previously installed dock structure as the limitation of Barrett's expansion," and that, "There is nothing in the record which supports 176 f[ee]t as the maximum expansion which can be safely allowed."

As previously stated and based on regulation and guidance, a district should discuss particular issues with applicants at pre-application meetings and/or during application processing. This timing of the coordination is before a District makes their decision and is often included as part of District correspondence used to convey comments received in response to the public notice to the applicant. Upon completion of the evaluation process, a District can add special conditions to Department of the Army permits to require minor project modifications and also, consistent with 33 CFR § 325.4(a), "...when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement." 33 CFR § 320.4(a)(1) states that, "...a permit will be granted unless the district engineer determines that it would be contrary to the public interest." And finally, the SOP states that, "The Corps will deny with prejudice the permit for a project that is contrary to the public interest..."

The appellant's project as proposed was documented as installing 93 new slips on three head docks and one service dock on Spring Lake. The three head docks are referred to as docks A, B, and C, while the service dock is referred to as Dock S.

- Dock A would measure 291.25 feet long by 8 feet wide with fifteen finger docks measuring 40.25 feet long by 4 feet wide, and one finger dock measuring 50.25 feet long by 4 feet wide. Dock A would provide a total of 33 slips.
- Dock B would measure 267 feet long by 8 feet wide, with fourteen finger docks measuring 40.25 feet long by 4 feet wide. Dock B would provide a total of 30 slips.
- Dock C would measure 245 feet long by 8 feet wide, with an "L-shaped" waterward end piece measuring 152.8 feet long by 8 feet wide. Seven 40 feet long by 4 feet wide finger piers would be constructed on each section of Dock C, providing 30 slips.
- Dock S would measure a total of 342 feet long by 10 feet wide from the bulkhead and would extend an existing head pier 123 feet long by 10 feet wide at the same location.⁴⁶

Upon completion of their evaluation of the proposed project, the District stated that, "...the proposed marina expansion would cause a constriction of an area heavily used for recreational navigation," as well as, "...contribute additional boat congestion to an already congested area by increasing the number of boats in the area and confining the existing traffic into a smaller space."⁴⁷ Additionally, the District stated that the, "...proposed structures would alter existing traffic patterns, causing shifts in existing traffic lanes and contributing additional cross traffic over a longer expanse of the fairway."⁴⁸ Therefore, the District concluded that, "The project would have major, long term detriments to navigation and safety,"⁴⁹ that, "...the proposal is contrary to the public interest, and ...cannot be authorized as proposed," and that, "Less

⁴⁶ *Id* at 24.

⁴⁷ *Id* at 52.

⁴⁸ *Id* at 60.

⁴⁹ *Id* at 21.

damaging alternatives are available that do not extend as far into the waterway and would reduce the impacts on these factors.”⁵⁰

The District then proffered a permit to the appellant with this less damaging alternative included as a new, project description which stated:

Install three new floating head docks and one service dock on Spring Lake. The three head docks are referred to as docks A, B, and C, while the service dock is referred to as Dock S. Docks A and B would measure up to 176 feet long and 8 feet wide, with finger docks up to 50.25 feet long extending northeast and southwest of the head docks. Dock C would measure up to 176 feet long and 8 feet wide, with finger docks extending northeastward. Dock C may include an L-shaped segment at the westward end, extending approximately 80 feet westward, with finger docks extending southeastward of it. Replace the existing 118-foot service dock with a 176-foot by 10-foot floating service dock (Dock S). Remove 12 existing fixed docks as needed to install the new floating docks.⁵¹

and included four special conditions, two of which were consistent with the District’s modified project description. These two conditions were as follows:

1. The permittee must provide detailed plans meeting the authorized project description above, or another configuration extending no more than 176 feet waterward of the shoreline, to this office prior to final issuance of this permit.
2. No boat slips may open to the northwest at the waterward ends of the new head docks, with the exception of jet ski ramps.

The District’s alternative is consistent with their belief that, “A marina development plan that maintained existing navigation patterns and traffic flow would be likely to have minimal impacts to navigation.”⁵² This alternative was also based on two factors: 1) that current navigation patterns could be preserved if development was limited to the area within existing site lines (or visual cues), and 2) that limiting development to within a line parallel to the shoreline from an established sight line would preserve the “gradual funnel shape of this part of Lower Spring Lake” and the associated navigation patterns.⁵³

In their decision document, the District stated that, “...the visual cues used by boaters navigating Lower Spring Lake include the Slow, No Wake Zone buoys, land points that protrude into the lake, and existing docks,”⁵⁴ then further clarified that the Barrett Boat Works gas dock was one of the significant visual cues within this portion of the lake. The District measured this gas dock at 176 feet waterward of the shoreline.⁵⁵ Thus, the District’s rationale for limiting the proposed

⁵⁰ *Id* at 22.

⁵¹ *Id* at 9.

⁵² *Id* at 53.

⁵³ *Id* at 53.

⁵⁴ *Id* at 50.

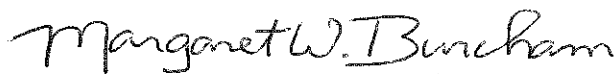
⁵⁵ *Id* at 53.

expansion to 176 feet waterward of the existing shoreline is based on the District's belief that the gas dock was a significant visual cue, and that limiting expansion to a line parallel to the shore from this point would preserve the navigation patterns within this portion of the lake.

Initially, the District alluded to the fact that they could not authorize the proposed project because it was contrary to the public interest. On the surface, this was consistent with regulation and policy, however, as previously stated, rather than denying the permit as required by regulation and consistent with policy, the District stated that, "The permit was not denied; rather a modified permit was proffered."⁵⁶ The District proffered a permit in which they modified the actual project description with a "less damaging alternative"⁵⁷ and stated that their, "...decision to proffer a modified permit rather than deny the permit is based on our determination that practicable alternatives are available that would minimize impacts."⁵⁸ While the regulations provide a mechanism for a district to modify a project with the addition of special conditions, they do not provide a mechanism for a district to modify the actual project description. Therefore, the District incorrectly applied regulation and policy when it proffered a permit after having determined that the project as proposed was contrary to the public interest instead of simply conveying this alternative to the applicant to consider during the evaluation process.

As previously stated, the District stated that, "...the visual cues used by boaters navigating Lower Spring Lake include the Slow, No Wake Zone buoys, land points that protrude into the lake, and existing docks,"⁵⁹ then further clarified that the Barrett Boat Works gas dock was one of the significant visual cues within this portion of the lake.⁶⁰ The District cited CCH testimony in numerous locations in their decision document that supported their assertion that the buoys served as visual cue to boaters,⁶¹ however, the District's AR lacks any such support that established the gas dock, the basis of the 176 foot limitation, as a primary visual cue in Lower Spring Lake. Therefore, this reason for appeal has merit.

Conclusion: For the reasons stated above, I have determined the first reason for appeal discussed above does not have merit, reasons for appeal 2 and 3.b. discussed above have merit, and reason for appeal 3.a. is outside the scope of the appeal program. The proffered permit is remanded to the Detroit District for reconsideration consistent with comments detailed above. The final USACE decision in this case will be the Detroit District Engineer's decision made pursuant to my remand.



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⁵⁶ *Id* at 21.

⁵⁷ *Id* at 51.

⁵⁸ *Id* at 4.

⁵⁹ *Id* at 50.

⁶⁰ *Id* at 53.

⁶¹ AR pages 32, 35, and 37.