ADMINISTRATIVE APPEAL DECISION

TAWAS BEACH CLUB 98-016-160-4

DETROIT DISTRICT

July 29, 2008

Review Officer: Mike Montone, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division

Appellant: Mr. Guy Moulthrop

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

Receipt of Request for Appeal: January 12, 2007

Appeal Conference and Site Visit Date: September 26, 2007

Summary of Decision: The appellant's request for appeal has merit and the permit denial is remanded to the District to include sufficient documentation to support its decision and to reconsider its decision as appropriate.

Background Information:

In October, 2005, the appellant submitted an application to the Detroit District (District) for mechanical grooming activities along the shoreline of Tawas Bay (Lake Huron) in East Tawas, Iosco County, Michigan. The application was submitted by Tawas Beach Club (appellant) and requested authorization to groom the soil in specified areas consistent with authorization granted by the State of Michigan Department of Environmental Quality (MDEQ) on April 12, 2005, and modified on June 21, and 28, 2005. Attached to the appellant's application were three diagrams associated with each authorization or modification issued by the state.

In December, 2005, the District published its Public Notice describing the appellant's request and estimating approximately 4.3 acres of impacts to waters of the U.S. including coastal marsh habitat. The public notice described impacts at five distinct locations spanning approximately 2,270 linear feet of shoreline at varying depths of 20 to 100 feet.

In November, 2006, after determining that the project as proposed would be contrary to the overall public interest and failed to comply with the 404(b)(1) Guidelines of the Clean Water Act of 1977, the District denied the appellant's request for a permit. The appellant disagreed with the District's determination and appealed its decision in January, 2007.

Appeal Evaluation and Findings:

Appeal Reason 1. The District improperly assumes the applicant's entire site is wetland.

Finding: This reason for appeal has merit.

Action: The District shall further consider and fully documents its determination of the absence or presence of wetlands on site.

Discussion: The appellant presented five reasons arguing that the District erred in determining that the project site is wetlands and therefore improperly assumed that portions of the property provide wetland functions. The appellant alleges that the District reached this error by following improper procedures and relying on incorrect or speculative data.

Central to the appellant's argument, is the assertion that the District neglected to identify or document hydric soils to substantiate its determination. Instead, the appellant states that the District documented the following:

> ...an absence of native roots and rhizomes; that the soils were not mucky; that the soil was 'a light colored sandy profile,' or 'clean, bright recreation sands'; that there was no 'muck or detritus surface layer or a grey color'; and that the sandy soil found was inconsistent with the USDA Soil Survey listing dark and/or mucky soil.

Corps policy requires the District to use the 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual) to identify and delineate wetlands that may be regulated under Section 404 of the Clean Water Act. Accordingly, under normal circumstances[1] and site conditions, the District will document the presence of wetland hydrology, hydrophytic vegetation, and hydric soils in order to substantiate that an area is wetlands. This is commonly referred to as a "routine determination" or the "three parameter test". Depending on resources available and specific site conditions, an on-site inspection may or may not be necessary for completing a routine determination.

There is no information within the administrative record to suggest that circumstances and site conditions were not normal (i.e. a wetland criteria was *absent* due to human alteration or natural event) *and* the District documented their on their site inspection. Therefore, the process for making a routine inspection with an on-site inspection will be reviewed to address how the District documented the presence of wetlands on site.

The appellant does not contest the presence of hydrophytic vegetation and wetland hydrology. A review of the administrative record shows that these parameters were adequately documented in the administrative record (see "Permit Evaluation Inspection Field Notes and Report" dated August 16, 2006).

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[1] The 1987 Manual notes "normal circumstances" to address situations where an area may fail to meet the diagnostic criteria for wetlands due to human alterations (e.g. vegetation removal, draining, deposition of fill, impoundments, etc.) or natural events (e.g. change in river course, beaver dams, fires, mudslides, etc.) that result in one or more parameters being *absent.*

The appellant's primary argument against the presence of wetlands is its assertion that the District did not adequately document the presence of wetland (hydric) soils. During the appeals conference, the District was asked to clarify how it concluded the presence of hydric soils. In response, the District acknowledged that while the District described the soils on site, it did not classify the soils as any particular type. The District also stated that sandy soils, such as those present on site, are problematic. The District also pointed out that it documented that the sandy soils exhibit colors consistent with hydric soils and that the site exhibited both hydrophytic vegetation and wetland hydrology. The District then draws on the following quote from the 1987 Manual to explain that since the sandy soils in the area satisfy the conditions of supporting hydrophytic vegetation and displaying indicators of wetland hydrology they should be considered hydric soils.

> Only when a hydric soil supports hydrophytic vegetation and the area has indicators of wetland hydrology may the soil be referred to as a "wetland" soil.

According to the 1987 Manual, under normal circumstances the presence of hydric soils can only be concluded based on the presence of any one of a number of soil indicators listed in the 1987 Manual. There is no method to assume or conclude hydric soils based on positive indicators of hydrophytic vegetation or wetland hydrology. The District's reliance on the above quote appears to be taken out of context. The complete text is as follows:

> A hydric soil may be either drained or undrained, and a drained hydric soil may not continue to support hydrophytic vegetation. Therefore, not all areas having hydric soils will qualify as wetlands. *Only when a hydric soil supports hydrophytic vegetation and the area has indicators of wetland hydrology may the soil be referred to as a "wetland" soil* [emphasis added].

This paragraph reflects that, in normal conditions, hydric soils alone may not be an accurate indicator of wetlands.

Lastly, not all indicators listed in the manual can be applied to sandy soils. The 1987 Manual specifically cautions that soil color should not be used as an indicator in most sandy soils. The District's administrative record lacks the documentation describing why the use of color is appropriate in this case. Even if the use of soil color to classify the sandy soils as hydric is appropriate in this case, the District administrative record lacks sufficient details (e.g. documenting color observations were made at the proper depth and distinguishing the presence of a matrix chroma of 1 or less in unmottled soils or 2 or less in mottled soils) to justify the presence of hydric soils.

Therefore, without further explanation, the District's rationale that hydric soils are present based on the color of the sandy soils and/or the presence of hydrophytic vegetation and indicators of wetland hydrology appears unsubstantiated and this reason for appeal has merit. Upon remand, the District shall further consider and fully documents its determination as to whether or not wetlands exist within the project area.

Appeal Reason 2. The evaluator improperly evaluated the effects of Phragmites.

Finding: This reason for appeal has no merit.

Action: None required.

Discussion: The appellant presented over 12 arguments disputing the manner in which the District considered impacts associated with grooming in an area where Phragmites is generally present. The appellant's arguments addressed a range of issues questioning the District's evaluation of the biological and physical effects of the presence of and removal of Phragmites.

The appellant questioned the District's analysis and understanding of the ecology of the Great Lakes shoreline by arguing the following points: Phragmites is not normal for this area, the various effects Phragmites may have on the natural flora and fauna in the area, and the potential effect of removing shoreline vegetation.

The appellant questioned the District's analysis and understanding of management techniques such as mowing and removing Phragmites by arguing the following points: existing, continuing, and additional future Phragmites control offer benefits not considered by the District; the possibility of removing Phragmites from the area by grooming should have been considered as mitigation by the District; the District improperly considered that mowing activities exacerbate the Phragmites problems; the District improperly considered that grooming activities contribute to the proliferation of Phragmites.

The District discusses the ecology and management of Phragmites throughout its decision document. The appellant specifically raised issue with the District's treatment of Phragmites on pages 12-14, 18, 29 and 38 of its decision document. The following passage on page 29 may best summarize how the District considered and addressed the effects of Phragmites:

> Our review of pertinent materials and assorted sources ... indicates that disking and raking of natural marsh vegetation would likely only enhance the spread of phragmites, except perhaps under the most precisely timed, regimented and persistent methodology of attack. Our belief is further supported by direct observation of groomed parcels along the [cumulative impact area] upon which only phragmites was recovering... The expected result from implementation of the applicant's proposed activities would be impacts upon the ecological balance and integrity of a valuable resource... The proposed project will ensure the change from a habitat that continues to support a variety of species in the understory of native wetland vegetation, despite the invasion of phragmites, into a habitat that is somewhat sterile and nearly devoid of vegetation except for resurgent phragmites.

The District's conclusions regarding Phragmites are reasonable, within its discretion, and appear justified by substantial documentation of best professional opinion throughout its decision document and specifically the conclusions and statements made on pages 12, 13, 14, 18, 29, and 38. Therefore, this reason for appeal has no merit.

The appellant also argued that the District improperly failed to consider the negative visual aesthetics of Phragmites in its public interest review. This reason for appeal is considered and addressed in Appeal Reason 4.

Appeal Reason 3. The District improperly evaluated Impacts and Cumulative Impacts of the proposed project.

Finding: This reason for appeal has merit.

Action: District shall reconsider and provide adequate documentation to support its overall evaluation and conclusion regarding cumulative effects. The District shall clarify the location and extent of past, present (proposed) and reasonably foreseeable future impacts in its cumulative impact assessment. The District shall then reconsider and provide adequate documentation to support its evaluation and conclusion regarding the cumulative effects of relevant decision factors (i.e. its public interest review factors).

Discussion: The appellant provided 13 arguments disputing the manner in which the District considered cumulative impacts associated with the proposed project. The appellant asserts that the District improperly determined the cumulative impact area and improperly evaluated past, current, and future impacts.

CUMULATIVE IMPACT REVIEW

Cumulative impact is defined in the Council on Environmental Quality's (CEQ) NEPA regulations at 40 CFR 1508.7 as the "impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions ..." Corps regulations direct the District to assess cumulative impacts (33 CFR 320.4(a)(1)) in its evaluation of permit applications. Corps policy articulated in Regulatory Guidance Letter (RGL) 84-09 offers guidance for establishing a cumulative impact area (CIA) and assessing cumulative impacts. It directs the District to establish a CIA (based on watershed or other readily identifiable geographic area) and develop a sense of the rate of development by providing a description of the historical permitting activity and the anticipated future activities within the CIA.

Cumulative impacts should then be evaluated by assessing the effect that the proposed project will have on a CIA in combination with the estimated impacts of past projects and future impacts or projects that can reasonably be expected to occur (e.g. secondary impacts associated with the proposed action, impacts associated with authorized projects not yet completed, impacts associated with projects currently under Corps review and reasonably foreseeable but not speculative future actions). The size, location, function, and value of the existing (or remaining) aquatic resources must be estimated in the CIA. These estimates must then be compared with the proposed impact of the project being reviewed in addition to the current impacts of past permitted projects or imminent impacts of projects currently under review and likely to authorized or those authorized projects where impacts have not yet occurred. A CEQ guidance memo to federal agencies dated June 24, 2005 directs the evaluation of cumulative impacts be

focused on the aggregate effects of past, present and reasonably foreseeable future actions that are truly meaningful.

CUMULATIVE IMPACT AREA

The appellant argues that the District's cumulative impact assessment was based on an inaccurate project scope. The appellant asserts that the District improperly limited the CIA by excluding additional property owned by the appellant.

The District adequately documented the CIA by establishing the geographic area as the shoreline of Tawas Bay from the eastern side of the City of East Tawas (which is situated to the west of the appellant's property) to the eastern end of the appellant's property on the bay side of the Tawas Peninsula. The District explained that beyond the CIA limits the shoreline has been armored, encroached by development, and/or exposed to higher wave energy (such as areas not under the same protection as provided by the north eastern portion of Tawas Bay). Therefore, I find that the District properly considered and established the CIA.

PAST ACTIONS

The appellant asserts that the District improperly considered past impacts such as the normality of site conditions and past grooming practices. The appellant argues that the District failed to consider the contribution of pollution, zebra mussels, and manipulation of water levels on the condition of the appellant's property.

Although the extent and influence of the environmental factors identified by the appellant may be disputed, it is reasonable to conclude that they all represent relatively permanent changes to the watershed. Therefore, these factors can reasonably be considered part of the normal circumstances for the project and CIA and special consideration of these factors by the District is unwarranted.

The Appellant claims the District's statements regarding past grooming practices are "...inaccurate, speculative, illogical and contrary to the record". In making its argument, the appellant cites the following statements made by the District on page five of its decision document:

> Many if not most of the locations fronting the residential establishments has likely been historically groomed *or otherwise cleaned* [emphasis added] and maintained in the very sandy areas between members' lawns and the OHWM, rather than the [currently] exposed lakebed areas between the OHWM and the low current lake level waterline that represents a different footprint that was submerged during higher lake levels.

In submitting its application, the appellant stated that it would "like to groom a portion of its beach to return the groomed portions to the condition that it typically enjoyed in previous years." The District made further statements on page seven of their decision document which also helps to clarify the context of its statements made on page five of its decision document.

> The discrepancy resulting from the agent's claim that the applicant seeks to restore a previous condition of non-vegetated shoreline actually arises from the fact that the waterline no longer reaches the previously sandy portion of the shore located landward of the OHWM. The lake bottom that is vegetated and the subject of desired grooming was waterward of the OHWM and was submerged during high water periods.

The above statements made by the District clarify the context of the currently proposed footprint to be groomed with respect to the constant benchmark of OHWM and do not detract from the District's evaluation of past impacts. The District properly considered historic lake levels (which were documented to be higher in the past than recent years and covered areas now exposed and vegetated) and statements made by the appellant that it desires to enjoy sandy beaches as it did in the past to conclude that the appellant likely groomed or otherwise cleaned the sandy areas that historically existed. Therefore, I find that the District adequately considered and documented past practices and impacts.

CURRENT IMPACTS

The appellant argues that the District improperly considered current impacts when it failed to acknowledge that a portion of the proposed impacts (footpaths) are already authorized by general permit

Corps regulations at 33 CFR parts 325.2(e)(2) and 330.1(d) give discretionary authority to the District to require an individual permit review in cases where proposed activities are otherwise authorized by nationwide or regional permit and the District has concerns for the aquatic environment (e.g. proposed project would have more than minimal individual or cumulative negative impacts or otherwise contrary to the public interest). Accordingly, I find no merit in the appellant's assertion that the District failed to account for the pieces of the proposal that fit within the limits of an established general permit (footpaths) as those features appear bound up in the appellant's permit application which the District raised numerous concerns for the environment.

The appellant also argues that the District improperly considered current impacts when it assumed grooming will take place at an average depth of 100'. The appellant does not dispute the District's estimated number of linear feet of shoreline to be groomed. Rather, the appellant contests how the District estimated the width of the proposed impacts and thus the proposed area of impacts.

In the appellant's official application to the District, it requested authorization to groom the soil in specified areas consistent with authorization granted by the state (MDEQ) on April 12, 2005, and modified on June 21 and 28, 2005. Attached to the appellant's application were three diagrams associated with each authorization or modification issued by the state.

Diagrams provided by the state (MDEQ) and attached to their April 2005 authorization represent grooming in the same five areas as ultimately determined by the District. The diagram attached to the authorization is a vicinity map of Tawas Bay and simply indicates the general project area. The drawing does not specify depth of grooming for any of the five areas proposed to be

groomed. However, the language within the permit authorizes that grooming may occur up to depth of 100 feet.

The diagram attached to the June 21, 2005, modification also shows the same five areas to be groomed. The diagram is marked as "variable not to scale" and the depth of the major portion (1760 linear feet) of grooming is drawn to indicate grooming between the shoreline and the OHWM. For the smaller four portions of proposed grooming, the state drawings indicate exact areas of grooming will be at depths between 20 to 40 feet. The remaining distance from the limits of the proposed areas to be groomed (in the four smaller areas) to the individual cottages was adjusted to reflect vegetation cutting at a minimum height or 12 inches. Finally, in the diagrams attached to the June 28, 2005, modification, the state authorizes the installment of eight, 12 foot wide paths as depicted in a diagram.

According to diagrams attached to the District's Public Notice dated December 9, 2005 and attached to the District's decision document, the appellant's proposed project consists of five areas to be groomed. The major portion of the proposal is a continuous section of approximately 1,760 linear feet of shoreline. The other four sections are discontinuous and add up to approximately 507 linear feet of shoreline.

The District described the major portion of the appellant's proposal in its December 2005, Public Notice in the following manner, "...1,760 linear feet of frontage varying from 48 to 100 feet in depth (approx 132,000 sq.ft. = 3.03 acres)...". The District also specifically described the width of grooming for the other four sites to be between 20 and 40 feet for a total area of approximately 0.3 acres. The total of the proposed impacts estimated within the District's Public notice appear to be no greater than 3.35 acres.

On the first page of the District's decision document, the District described the proposed impacts in its decision document in the following manner "...1,760 linear feet of frontage varying from 48 to 100 feet in depth (maximum of 176,000 sq.ft. = 4.04 acres) ...". The District's description of the four other areas to be groomed was consistent with its Public Notice. Thus, the total acres of proposed (or current) impacts evaluated changed from 3.35 acres in the public notice to 4.35 acres in the decision document. A close examination of the District's cumulative impact assessment on page 15 illustrates that the District further evaluated the appellant's request and determined "secondary lateral impacts" to an additional 1,050 linear feet at varying depths for an added acre of impacts.

Regarding the District's determination of secondary lateral impacts, the appellant argues that the District erred by relying on the March 2006, MDEQ report titled "Report on the Impacts of Beach Maintenance and Removal of Vegetation under Act 14 of 2003". The MDEQ report was based on a joint scientific study and concluded that secondary lateral impacts can be expected up to 50 meters in areas where shoreline vegetation is removed. The appellant asserts that the conclusions were incorrect, based on sites that are dissimilar to the appellant's site, and received criticism under peer review.

The MDEQ report documented the secondary lateral impacts of shoreline grooming and provided scientific evidence that negative "impacts to fish and invertebrate habitat can extend

more than 150 feet on either side of a cleared area...". Accordingly, the District evaluated secondary lateral impacts associated with each of the sites to be groomed. In this case, I find that the District's conclusions regarding the MDEQ report were reasonably considered, within its discretion, and appear justified by substantial documentation of best professional opinion throughout its decision document and specifically the conclusions and statements made on pages 15, 18 and 19 with regards to assessing the secondary impacts of the proposed project.

The appellant also states that the District erred by mischaracterizing the habitat type, function, and value to be impacted by the proposed project. The appellant argues that the District incorrectly considered that wetlands exist within the entire area proposed to be groomed.

As previously discussed in appeal reason 1, the District's administrative record lacks adequate documentation that the entire area proposed to be groomed contains wetlands. Therefore, this reason for appeal has merit. Upon remand, the District shall further consider and fully documents its determination as to whether or not wetlands exist within the project area, specifically the areas proposed to be groomed and evaluate the potential impacts to wetland functions.

REASONABLY FORESEEABLE FUTURE ACTIONS

Lastly, the appellant claims the District improperly considered future impacts by relying on the principle of an individual permit setting a precedent within the cumulative impact area.

On page 16 of the District's decision document, the District provides their rationale for why authorizing the appellant's request will ultimately lead to future impacts. The District states that the observation by neighboring property owners (neighbors) of the appellant's authorized grooming will lead to their expectation for the same authorization and the District therefore would expect submittals of applications for equivalent permits. The District then states:

> Since we strive for fair and consistent permit decisions, it would be contrary to policy and arbitrary to foresee a different permit decision for these lots. The CIA would thus be subject to these anticipated impacts.

It appears from the above statements that the District believes its policy of fair and consistent permit decisions would drive the permit evaluation process for like projects requested by neighbors and reasonably lead to the same permit decision (issuance). The District then attempts to quantify these impacts in the following manner:

> If only half of [the neighbors] actually requested similar authorization, the secondary lateral impacts from clearing the vegetation from the bottomlands along their frontages would be sufficient to result in cumulative impacts to the whole 0.45 mile reach.

Accordingly, the District estimated that if half of the neighbors requested similar permits, the result would be the District ultimately authorizing impacts for an additional 2,376 linear feet at an average depth of 100' for an additional 5.45 acres of impact within the CIA. The additional

5.45 acres of impact evaluated by the District in its decision are attributed to impacts the District assumes will be applied for by, and granted to, the appellant's neighbors.

In this case, the District adequately documented the importance of the aquatic resources along the shoreline of Tawas Bay and specifically within the CIA. The District also documented their consideration and conclusion that it was unable to identify or devise any potential compensatory mitigation measures for the negative impacts to water quality that would result from impacting these resources. The District then cited the presence of an unauthorized (grooming) activity directly adjacent to the appellant's property as an example of the desire for neighbors to complete similar projects within the CIA. Therefore, it is reasonable to assume and consider that if the appellant is authorized to complete this project, the observation of such work may motivate *some* neighbors to apply for similar authorization or undertake a similar activity without a permit. It is also reasonable to assume that if similar projects *were* authorized, the impacts of those projects would be similar and have a cumulative impact within the CIA. However, the District's assertions that *50%* of the neighbors will submit equivalent applications and that the District *will* grant authorization for an additional 5.45 acres of impacts based on their policy of fair and consistent permit decision appear unsupported and pre-decisional in nature without further documentation.

The District's consideration, while unsubstantiated, is not misplaced. The District is obligated to consider reasonably foreseeable future actions that are triggered by the proposed action under review in its cumulative impact assessment. Examples of such future actions in this case may include but are not limited to future permit applications, unauthorized activities, or other development the District may be aware of. However, the manner in which the District estimates and weighs the potential impacts of such actions must be carefully documented. For example, in this case, the District should consider that while some permit applications may be received or violations discovered, the final permit decision will be based on an independent review and avoidance, minimization, and mitigation sequencing as directed by the 404(b)(1) Guidelines of the Clean Water Act.

In general, examples of impacts that can reasonably be expected to occur in the future and can reasonably be evaluated as impacts to the CIA will usually be associated with secondary impacts of the proposed project, impacts associated with actions the agency is aware of (e.g. other development plans within the CIA, authorized impacts within the CIA that have not been completed, or impacts within the CIA pending Corps review), and potential unauthorized impacts where the District has shown a pattern of past violations. Specifically, in this case, I find that the District reasonably concluded and adequately documented such reasonably foreseeable future actions discussed above as "secondary lateral impacts." The single documented case of an unauthorized activity within the CIA demonstrates a desire for like activities and in conjunction with other violations may provide reasonable estimates for the percentage of the CIA the District can expect to be impacts. **However, the issuance of an individual permit does not, by itself, provide credible evidence that "x" percentage of additional permits will be requested within a CIA nor does it provide substantial merit for similar permits to be issued within a CIA if requested.** Likewise, a permit denial does not, in itself, provide credible evidence that additional permits will not be requested or substantial merit for denying similar requests if received.

The reality of the situation may be that the appellant's neighbors will inevitably desire to mimic any behavior they observe and deem beneficial. In turn, this may place a burden on the District to document and explain their individual permit decisions as they issue them. However, regardless of the public perception of the ability to secure a permit based on the issuance of one permit, the District has a responsibility to objectively evaluate each application it receives. In its January 1997 report titled "Considering Cumulative Effects Under the National Environmental Policy Act", the CEQ stated that the consideration of cumulative impact are often problematic and offered guidance regarding this challenge. In its report, CEQ suggests that a review of potential impacts (e.g. those impacts associated with the future possibility of receiving permit applications and/or discovering unauthorized activities) acknowledge and describe the assumptions inherent to such considerations. For example, the District should consider whether the cause and effect relationship between the cumulative impacts and a particular resource within a CIA will be simple (e.g. the cumulative effect is additive) or complex (e.g. the cumulative effect may be greater or less than the sum of the impacts). Therefore, since estimates of the incremental effect of future impacts are speculative, the review of such effects shall normally be considered an important discussion that informs the District in its decision versus an absolute analysis that results in definitive impacts being quantified for purposes of the District's cumulative impact assessment.

Therefore, I find that the District improperly assumed and considered the potential impacts of equivalent projects as cumulative impacts of the appellant's project without adequate documentation. Upon remand, the District shall reconsider and provide adequate documentation to support its overall evaluation and conclusion regarding cumulative effects. The District shall include adequate documentation to quantify to the extent practicable, both existing and reasonably foreseeable future meaningful impacts in its cumulative impact assessment. The District shall then reconsider and provide adequate documentation to support its evaluation and conclusion regarding the cumulative effects of relevant decision factors (i.e. its public interest review factors).

Appeal Reason 4. The District's public interest review and analysis is flawed.

Finding: This reason for appeal has merit.

Action: The District's review of public interest factors was closely associated and/or based upon its cumulative impact assessment, which I have found to be insufficient. Thus, upon remand, the District will reconsider its review of public interest factors in light of its reconsideration of cumulative impacts.

Discussion: The appellant presented six reasons arguing that the District's public interest review and analysis is flawed. The appellant argued that the District erred when it failed to acknowledge or consider: that objections to the project were not raised by members of the public during the public notice period; that the appellant is the largest payer of real estate taxes in Iosco County; the benefits and detriments to the appellant and those similarly situated in the cumulative impact area; the negative visual aesthetics of Phragmites; and the needs and welfare

of the people as expressed by Michigan's unanimous legislature. The appellant also asserts that the District's public interest review and analysis is biased, arbitrary, and result driven.

Corps regulations at 33 CFR 325.3(d)(3) state:

> It is presumed that all interested parties and agencies will wish to respond to public notices; therefore, a lack of response will be interpreted as meaning that there is no objection to the proposed project.

The District stated on page three of its decision document that the public did not respond to the public notice. Regulations clearly direct that a lack of response from the public shall be considered as no objection to the project. However, regulations do not imply that a lack of objection must reflect positively on the project. Similarly, objections raised by the public do not necessarily reflect negatively on the project. Instead, in making its permit decision Corps regulations at 33 CFR 325.2(a)(3) direct that the District consider all comments received in response to the public notice and that the District alone is responsible for reaching a decision on the merits of any application. Therefore, the appellant's assertion that a lack of objections from the public must reflect positively on its permit application is incorrect and this reason for appeal has no merit.

The appellant also argues that its property taxes will decrease as the property value declines to reflect the lesser value of a vegetated versus sandy beach. This apparent tax break for the appellant will then result in a negative drop in revenue for Iosco County. During the appeals conference, the appellant acknowledges that no information was submitted to the District to support its claims. The appellant also stated that it owns approximately five percent of the Iosco County shoreline but that it was not clear what percentage of Iosco County shoreline property owners share the same situation of declining property values. The appellant did not raise this issue with the District prior to its decision and there is no evidence in the record to suggest that its assertions are more than speculative. Therefore, this reason for appeal has no merit.

The appellant also argued that in general, its interests and those of similarly situated property owners weren't considered in the District's review of public interest factor. The appellant argues that the District improperly excluded it from consideration as "public" in the public interest review factors.

The District is responsible for evaluating the public interest in their public interest review, a review of approximately 20 factors (e.g. aesthetics, safety, energy conservation and development, etc). The permit applicant's interests are not necessarily bound up within each of the public interest review factors such as aesthetics. Instead, the District is responsible for considering the permit applicant's perspective in the review factor that addresses consideration of property ownership. The District's administrative record adequately documents their evaluation and consideration of the appellant's interest with regard to its review of public interest factors. The District appropriately evaluated the appellant's interests in the following factors: land use patters (page 31 of the District's decision document) and consideration of property ownership (page 37 of the District's decision document). Furthermore, the appellant's perspective was considered and addressed throughout the decision document under multiple

subheadings titled "Applicant Comments". Therefore, I find that this reason for appeal has no merit.

The appellant asserts that the District failed to consider the negative visual aesthetics of Phragmites and erred in its evaluation of the aesthetics public interest factor.

The District considered and addressed the public interest factor of aesthetics on pages 30 and 31 of its decision document. The District appropriately discussed this factor from the perspective and vantage points of the public and neighbors. Accordingly, the District concluded a net neutral impact, citing both positive and negative impacts depending on personal preference. I find the District's conclusion reasonable and adequately documented. Therefore, this reason for appeal has no merit.

The appellant also asserts that the Districts public interest review and analysis is generally biased, arbitrary, and result driven. The appellant specifically argued that the District's failure to consider the needs and welfare of the people as expressed by Michigan's unanimous legislature was evidence of this bias.

As discussed in the following reason for appeal (see discussion for "Appeal Reason 5"), I find no evidence of the District's decision being biased. However, as discussed above in appeal reason three, the District improperly considered cumulative impact. The District's review of public interest factors was closely associated and/or based upon its cumulative impact assessment. Therefore, the District will also reconsider its review of public interest in light of its reconsideration of cumulative impacts.

Appeal Reason 5. The evaluator's report is biased contrary to 33 CFR 320.1(a)(4).

Finding: This reason for appeal has no merit.

Action: None required.

Discussion: The appellant provided over 12 arguments to assert that the District's decision was biased. The appellant raises a number of issues ranging from specific examples of inconsistencies and bias within its decision document to general claim of bias against the management of the District's Regulatory Branch and leadership of the District itself.

The appellant also raised the concern that the District's Regulatory Branch demonstrates an inherent bias by staffing biologists and other wetland professionals to evaluate permit requests, instead of those trained in other public interest factor areas (e.g. economics, recreation, and safety). The authority to execute the Regulatory Program at the local level has been delegated to the District Engineer. The decisions to hire and train a professional Regulatory Branch staff is clearly within the discretion and responsibility of the District Engineer and is not a valid reason for appeal.

The appellant also raised concerns that efforts by a past District Engineer have left a lasting impression on the District and aided its bias. The appellant cited actions taken by past District

Engineer, LTC. Magness, including a link to a letter to the editor that was present on the District's Website at the time of the District's decision. While the letter to the editor was present on the District's Website, I find no evidence that it was part of the District's decision making process for this decision. Furthermore, the District's decision was signed by the current District Engineer, LTC. Leady.

I have also reviewed the appellant's specific concerns and found no examples of documented bias within the District's administrative record or decision document. Therefore, this reason for appeal does not have merit.

Appeal Reason 6. The District's decision results in disparate treatment to the appellant.

Finding: This reason for appeal has no merit.

Action: None required.

Discussion: The appellant argues the District should authorize this permit request based on previous actions of nearby property owners (permitted and unauthorized impacts to similar aquatic resources) and the availability of general permits that authorize removal of vegetation for commercial properties.

As previously discussed in appeal reason three, permit actions do not set precedent, are based on a site-specific review of the facts, and the District maintains its discretionary authority regarding the manner (i.e. general versus individual permit) it chooses to review permit applications. Therefore, this reason for appeal has no merit.

Appeal Reason 7. The decision is inconsistent with the State decision (MDEQ permit) and the District fails to properly identify overriding national issues and to properly explain why they are overriding in importance.

Finding: This reason for appeal has no merit.

Action: Upon remand, if the District's final decision is contrary to the State, it will document the significant national issues and explain how they are overriding in importance according to Corps regulations at 325.2(a)(6).

Discussion: The appellant asserts that the District did not comply with Corps regulations at 33 CFR 325.2(a)(6) which state:

> If a [District] makes a decision on a permit application which is contrary to state or local decisions... the [District] will include in the decision document the significant national issues and explain how they are overriding in importance.

I find that the District's Statement of Findings (see page two) documented that their decision was contrary to the state decision and identified the issues that are overriding in national importance.

The District provided its rationale for its decision by referencing its memo dated March 3, 2005 and titled "Issues of overriding national importance vis a vis state or local authorizations."

As indicated above, the District's decision has been remanded for further consideration. If upon remand, the District's final decision is contrary to the State, it will document the significant national issues and explain how they are overriding in importance per Corps regulations at 33 CFR 325.2(a)(6).

Appeal Reason 8: The District failed to consider the appellant's proposal to eliminate Phragmites from the entire site as mitigation.

Finding: This reason for appeal has no merit.

Action: None required.

Discussion: According to documents submitted by the appellant, the Appellant proposed removing all vegetation from specific areas of the project sire and not just Phragmites. There is no evidence in the record to suggest that the appellant proposed to remove only Phragmites as a strategy to compensate for the impacts. Furthermore, the District documented throughout its decision document that they considered but were unable to identify or devise any potential mitigation measures. Therefore, this reason for appeal does not have merit.

Overall Conclusion: For the reasons stated above, I conclude that this request for appeal has merit. The permit denial is remanded back to the Detroit District to include sufficient documentation in the administrative record consistent with this decision and to reconsider its permit decision as appropriate.

Jeffrey C. Smith
Colonel, Corps of Engineers
Division Engineer