ADMINISTRATIVE APPEAL DECISION

COLORITO PROPERTY; FILE NO. 2007-1512-16

DETROIT DISTRICT

November 13, 2009

Review Officer: Pauline Thorndike, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division (LRD)

Appellant: Mr. Gordon Colorito

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: November 3, 2008

Appeal Conference and Site Visit Date: April 30, 2009

Summary of Decision: The administrative record of the District's proffered permit decision shows that the District considered the issues that the Appellant identified in his administrative appeal but reached different conclusions on those issues than the Appellant. The District's conclusions were reasonable and do not conflict with the laws, regulations, or policy requirements of the Corps regulatory program. The Appellant's appeal does not have merit.

Background Information:

In November 2007, the appellant submitted an application to the Detroit District (District) for mechanical bottom grooming activities along the shoreline of Wildfowl Bay (within Saginaw Bay, in Lake Huron) in Pigeon (Sand Point), Huron County, Michigan. The application was submitted by Gordon Colorito (appellant) and requested authorization to perform bottom grooming along several properties, including the following properties on Point Charity Drive: 9157, 9167, 9161, 9151, 9147, 9145, 9137, 9129, 9127, 9123, 9121, and 9117, in addition to the Betty Street and Ann Street Easements. Mr. Colorito is representing all of the property owners at the above properties. Mechanical bottom grooming is a term also known as exposed lakebed grooming, lake bottom grooming (bottom grooming), and shoreline grooming.

The administrative record describes grooming as a federally regulated activity resulting in movement, redistribution and discharge of sand and sediments below the Ordinary High Water Mark (OHWM) of Lake Huron, which removes small lakebed contours. Conversely, mowing is described as a non-regulated activity that removes the above ground portion of plants.

Lake Huron water levels are cyclical, both in the short term and the long term, and Wildfowl Bay is under the direct influence of Lake Huron. Since 1999, the monthly mean level has been

below the long term annual average. This has resulted in exposed lakebed between the OHWM and the current water's edge, and vegetation has grown in these lakebed areas. Grooming would remove the vegetation (and roots) and redistribute sand and sediments.

On December 19, 2007, the District published its Public Notice describing the appellant's request to mechanically groom all of the coastal wetland lake bed sediments and sand from the OHWM located on the existing steel bulkhead to the water's edge along 750 linear feet of shoreline for a variable distance that may exceed 1,000 feet lakeward from the bulkhead.

The State of Michigan Department of Environmental Quality (MDEQ) authorized a General Permit on January 14, 2008, for grooming the exposed lakebed to a depth not to exceed 4 inches, and a 50 foot by 600 foot area at each of the properties, with the exception of 9145 Point Charity Drive which was authorized a 100 foot by 600 foot area. To clarify, this General Permit is not to be confused with 401 Water Quality Certification (WQC). MDEQ did not issue or deny 401 WQC; The District presumed the 401 WQC to be waived.

In a letter dated February 25, 2008, the appellant modified his proposal to groom only 400 feet of lake bottom instead of 600 feet. In April 2008, 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 400 linear feet of grooming and instead provided them with an initial proffered permit for 50 linear feet of grooming. The appellant disagreed with the District's determination, objected to the terms and conditions of the initial proffered permit, and requested a permit to groom only 200 feet from the bulkhead and place a six foot path to the water's edge, in a letter dated June 11, 2008. The District considered the appellant's objections and new request, and issued a proffered permit on October 10, 2008. The appellant disagreed with the District's determination and appealed its decision in a letter dated October 31, 2008, received by LRD on November 3, 2008.

During the appeal conference the appellant brought up several alleged misstatements of fact which are described in the appeal conference minutes. Several of the alleged misstatements of fact were unrelated to the reasons for appeal and would have had no substantive impact on the District's decision. The alleged misstatements of fact that have been considered in this appeal decision have been combined into Appeal Reason 1 (Use of incorrect information).

Appeal Evaluation and Findings:

Appeal Reason 1. Use of incorrect information.

[This reason for appeal was subdivided into multiple reasons (labeled 1a-1e) for evaluation purposes)

Reason 1a) Grooming Limit. The appellant asserts that his original request was to be permitted to groom 600 feet from the OHWM toward the water, which was later modified to 400 feet and again to 200 feet. The District permitted grooming for 50 feet. The appellant feels 50 feet limits his ability to use the area for his children and grandchildren to participate in various recreational activities.

The appellant further alleges that the District used incorrect information when publishing the public notice by stating that the appellant originally requested 1000 feet along 1800 feet of frontage when he only requested 600 feet along 750 feet of frontage. Therefore, the appellant asserts that the District exaggerated his proposal, and the proposal of neighboring property owners who sought the same amount of groomed area, by almost 70%.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion:
This reason for appeal implicates several issues, thus the discussion below is organized by subject matter.

PUBLIC NOTICE
The appellant asserts that if its 600 feet grooming proposal was published in the public notice, instead of 1000 feet, comments from U.S. Fish and Wildlife Service (USFWS) would have been more favorable to his project. The public notice was accurate based on the information the District had at the time. Also, the District decision would not have changed even if more favorable comments from USFWS were received, as the District's evaluation was based on 200 feet instead of 1000, 600, or 400 feet and their Environmental Assessment (EA) indicates bases for the decision other than the USFWS comments.

The Corps regulations at 33 CFR 325.2(a)(2) state:

> The district engineer will issue a supplemental, revised, or corrected public notice if in his view there is a change in the application data that would affect the public's review of the proposal.

The District has the discretion to decide whether a change in the application data would affect the public's review of the proposal, and thus whether a supplemental, revised, or corrected public notice should be published. There is no requirement that the Administrative Record provide a statement as to why a supplemental, revised, or corrected public notice was not published.

PROPOSED GROOMING LIMIT
The appellant feels that the District evaluated the wrong proposal. However, the Administrative Record establishes that the District evaluated the correct proposal (200' proposal) and did not make its permit decision based on a proposal for 1000 feet of bottom grooming.

The apparent confusion relating to the amount of grooming requested may have had its origin in the permit application. The application is unclear on the grooming limit (length/width) proposed by the applicant. The District sought clarification from the appellant in a letter dated December 6, 2007. The District followed up with a telephone conversation on December 10, 2007, in

which the appellant stated a desire to groom to the water's edge. The water's edge fluctuates, and in some circumstances may exceed 1,000 feet lakeward from the bulkhead, and in other circumstances may be within several feet of the bulkhead. The public notice was issued shortly thereafter on December 19, 2007, and it indicated that the applicant wished to groom for a variable distance that may exceed 1,000 feet lakeward from the bulkhead.

The District provided the appellant an opportunity to modify his proposal in a letter dated February 5, 2008, by stating: "[a]s we described in a telephone conversation with you on December 10, 2007, the distance from the bulkhead to the water's edge was approximately 1,100 feet when we inspected this reach of shoreline on October 23, 2007. You agreed that the water's edge is highly variable. When we evaluate this proposal, we will need to do so using this observed distance, unless you propose to limit your requested grooming to a lesser distance, or otherwise modify your proposal. If so, please submit new drawings and specifications so that we can complete our permit review." In a letter dated February 25, 2008, the appellant stated that they did not need to groom all 1000 feet, but instead requested grooming of not more than 400 feet from the existing bulkhead to the water's edge. New drawings and specifications were not provided with the letter.

The District issued an initial proffered permit on April 21, 2008, based on the appellant's 400 foot proposal. In response, in a letter dated June 11, 2008, the appellant asked the District to reconsider its decision and requested "a permit to groom 200 feet from our bulkhead and place a six foot path to the water's edge." The District issued a proffered permit on October 10, 2008, based on the appellant's 200 foot proposal. The District determined that no more than 50 feet of bottom grooming could be authorized.

Thus, the Administrative Record is clear that the District evaluated the correct grooming proposal.

AUTHORIZED GROOMING LIMIT

The administrative record supports and provides a rational basis for the District's proffered permit decision to authorize grooming for a distance of 50 feet instead of 200 feet. The District's EA identifies adverse impacts to the lakebed and wetlands as a result of bottom grooming and establishes that the effects of grooming extend well beyond the actual groomed area, in the EA under the section titled III.A.I "Effects on Water Quality". The District considers this information when determining the secondary impacts to the lakebed and wetlands. The District also provided a fact specific analysis in their EA regarding their cumulative impact analysis.

The District concludes that no more than 50 feet of grooming should be authorized in order to minimize cumulative impacts and meet Clean Water Act 404(b)(1) guidelines. The District identified the cumulative impact area as a 2.7 mile distance along the shoreline, evaluated data for that area, and drew a conclusion based on their analysis.

Since a revised public notice is not necessary, the Administrative Record evaluates the correct project proposal, and the authorized grooming limit of 50 feet is justified, I find that this reason for appeal has no merit.

Recreational interests are discussed below in Appeal Reason 2.

Reason 1b) Water Level. The appellant alleges that when site visits were conducted in June 2008 the lake level was higher than normal due to a seiche, so the district never was able to see the property during normal conditions. The District measured to the water's edge during this high water period.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The administrative record took into account that the water's edge fluctuates over time and that during June 2008 the lake level was high due to a seiche. Several photographs contained in the administrative record taken in previous years show the water's edge much further from the bulkhead than observed in June 2008, and these photographs were considered in the District's decision. The District adequately documented the cyclical water levels.

Further, the location of the water's edge is not relevant to the location at which Sections 10 and 404 jurisdiction commences, which is the OHWM located along the bulkhead. The District's policy for determining OHWM is to use both the standard elevation for Lake Huron and visual observations. The standard OHW elevation for Lake Huron is 581.5 feet International Great Lakes Datum (IGLD), 1985. Visual observations indicate an OHWM at a steel bulkhead along one of the properties.

The administrative record described two different site visits and states:

> Even with the current low water levels, storms and winds can create seiches that can return the water's edge to the bulkhead or very close to it. Such conditions existed on June 17, 2008, with the water only 20 to 25 feet from the bulkhead . . .
> We revisited the south shore of Sand Point again on July 2, 2008 (Encl. 36). While there were onshore winds, the water surface was relatively calm. The water's edge was approximately 20 feet from the bulkhead in some locations, with saturation to within 10 feet of the bulkhead. On these two dates, the water elevations were not atypical. Lake Huron's water elevation during the month of June, 2008, varied approximately 0.77 feet, from a low of 577.54' to a high of 578.31', with a rising trend, and on June 17 it was at 578.19'. Thus, during our inspection, the water level was at approximately 85 percent of the overall rise for the month; it was not at an unusual or abnormally high elevation on that date, and the photographs clearly show that waves were not driving the water to an unusual degree. Yet the water still reached to within 25 feet of the bulkhead. Lake Huron's water elevation during the month of July, 2008, varied approximately 0.35 feet, from a low of 578.07' to a high of 578.42', with a rising trend, and on July 2 it was at 578.14'. During our inspection on July 2, the water level was at only 20 percent of the overall rise for the month, not at an unusual or abnormally high elevation, yet the water's edge still reached to within 20 feet of the bulkhead. Photography on July 2, 2008 shows that waves were not driving the water to an unusual degree on that date.

> Lake Huron water levels are cyclical, both in the short term and the long term. The long term annual average water level for Lake Huron is approximately 579 feet (IGLD-1985) (see: http://www.lre.usace.army.mil/greatlakes/hh/datalinks/PrinterFriendly/quickGraph.pdf, Encl. 20). Although the monthly mean level has been below the long term annual average since the start of 1999, a period of eight years, this length of time in the cycle is not unprecedented. Water levels have been above the long term annual average from 1969 to the end of 1999, thirty years, except for small dips below this level in 1977, 1978, 1982 and 1996, and a period from 1988 through 1992 when the level fluctuated back and forth. We expect that this time period encompasses much if not most of the undefined historical memory referenced by the proponents of grooming during which they stated that they enjoyed sandy areas with no vegetation, with the exception of 1968. From 1956 to 1968, water levels were below the annual average water level except for a peak in 1960, essentially a twelve year period. Again, from 1930 to 1942, water levels were below the annual average water level, another twelve year period. In 2003, the water levels reached as low as 576.54 feet, but in 1964 and 1965, Corps records show that low water levels on Lake Huron exceeded this mark when they reached as low as 576.05 feet, lower than the lowest level experienced since 1999 (see: http://www.lre.usace.army.mil/greatlakes/hh/greatlakeswaterlevels/historicdata/greatlakeshydrographs/).
>
> The wind and wave energy along this sandy, shallow-sloped coastline contributes to a considerable variability in the location of the water's edge. The 2008 site visits verified what the above observations implied, that this area is under the direct influence of Lake Huron, despite being in the low water level portion of the long term cycle.

Thus, the District considered the cyclical nature of the water's edge, various photographs from different years, and water elevation data for over fifty years. Furthermore, the District's jurisdictional limit commences at the OHWM (absent adjacent wetlands not present at this location), not the water's edge. The District made a factual determination as to where the jurisdictional limit is located (along the bulkhead). Since the district's decision is supported by the record, I find that this reason for appeal has no merit.

Reason 1c) Cumulative Impact Analysis. The District's cumulative impact analysis was incorrect. Several areas of existing wetlands located along the bay will never be groomed because they are preserved. Therefore, the District's calculations regarding the total amount of potential grooming is flawed, since at least one mile of the bay will never be groomed. (The District did not consider that there are large areas of wetland currently under protection nearby, and the loss of wetlands offshore his property was small in comparison.)

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: I find that the District's cumulative impact analysis is not flawed. The District evaluates their cumulative impact analysis under the section titled "Cumulative Impact Area (CIA)". The EA states that "the geographic area for which we are reviewing cumulative effects is the southern side of Sand Point on Wildfowl Bay extending from almost the western tip of Sand Point to a point where the residential development pressure lessens and the shoreline becomes highly organic, a shoreline distance of about 2.7 miles (Encl. 26)."

An examination of Enclosure 26 shows that the shoreline area contains residences along the entire stretch. There is no evidence in the record indicating a preservation area located within the cumulative impact area. Further, the appellant clarified in a telephone conversation that the preservation area is located outside of the cumulative impact area shown on Enclosure 26. I find that the District's cumulative impact area designation was reasonable and consistent with regulations and guidance, therefore, I find that this reason for appeal has no merit.

Reason 1d) Water Quality. MDEQ's issuance of a permit was an indication/evidence that water quality was not an issue.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: MDEQ issued a General Permit for bottom grooming on August 1, 2007, not a Section 401 Water Quality Certification (WQC). Since WQC was not issued, the District presumed it to be waived. The District considered water quality issues in its permit decision. The District listed several water quality issues in the EA under the section titled "Effects on Water Quality", and determined that the proposed 200 feet impact would not meet the Clean Water Act 404(b)(1) Guidelines. Several other public interest factors were considered in the District's decision to proffer a permit for a reduced project scope.

The District partially based their proffered permit decision on water quality concerns, as the 200-foot project proposal would not meet the Clean Water Act 404(b)(1) Guidelines. Therefore, I find that this reason for appeal has no merit.

Reason 1e) Sand/Soils. The District inconsistently indicates whether there is fine sand in the area. The appellant believes that if there is no fine sand, then the area isn't necessarily a beach (the appellant would not expect to find fine sand in a wetland).

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The District properly evaluated soils. The District states in their EA that the material to be discharged in this project consists of fine sands. The EA does not provide conflicting information that the sands are coarse grained or other than fine grained sands.

Further, the District evaluated that the area was a wetland under the 1987 Corps of Engineers Wetland Delineation Manual and documented their findings using routine wetland delineation data forms. The data forms indicate that sand is present at the site, and also indicate that the area is a problem area, significantly disturbed, and that normal circumstances are not present. I did not find inconsistent information in the administrative record with regard to discussion of soils, and therefore I find that this reason for appeal has no merit.

Appeal Reason 2. Failure to consider the impact of the proffered permit on private recreational uses and to properly weigh property ownership.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: This reason for appeal implicates several issues, thus the discussion below is organized by subject matter.

The appellant feels 50 feet of bottom grooming limits his ability to use the area for his children and grandchildren to participate in various private recreational sport activities. The District addressed the appellant's private recreation concerns in the EA, and also took the appellant's private recreational wishes into consideration when they defined the project purpose.

PROJECT PURPOSE
The permit application form submitted by the appellant does not specify the project purpose. In a telephone conversation between the district and the appellant on December 10, 2007 the appellant clarified that the project purposes for the proposed work are to maintain a historic beach, for recreational activities, to remove invasive species (Phragmites), and to maintain a view of the water.

The District determined that the project purpose was to transform the appearance of the lakebed from mowed vegetation to bare sand, improve the visual aesthetics of the lake and for recreation, achieve an unimpeded view of the lake's waters when the water is at a distance from the bulkhead, and control Phragmites.

33 CFR 325.9(b)(4) states "...the Corps will in all cases exercise independence judgment in defining the purpose and need for the project from both the applicant's and the public's perspective."

The District properly included the applicant's perspective in the project purpose.

PUBLIC INTEREST FACTOR REVIEW
The District is responsible for evaluating approximately twenty factors in their public interest review (e.g. aesthetics, safety, water quality, etc.). The public interest review is a balancing test by the Corps of the foreseeable benefits and detriments of proposed projects on an individual and cumulative basis. The following general criteria of the public interest review must be considered in the evaluation of every permit application (33 CFR 320.4(a)(2)):

> i. The relative extent of the public and private need for the proposed structure or work.
> ii. Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work.
> iii. The extent and permanence of the beneficial and/or detrimental effect(s) that the proposed structure or work is likely to have on the public and private uses to which the area is suited.

Recreation Factor

The appellant feels that 50 feet of bottom grooming limits his ability to use the area for his children and grandchildren to participate in various private recreational sport activities. The appellant objected to the initial proffered permit because he and the other property owners that he represents require 200 feet to enjoy the beach, and state that grooming is required "to make reasonable use of [their] property" including "recreational activities (volleyball, horse shoes, family and friends picnicking, sunbathing, softball, campfires etc.)"

In response to the appellant's objection, the District describes their view of the recreation public interest factor, from a public viewpoint, as follows:

> We view the public interest factor of recreation as truly a public resource, from the perspective of accessibility available to the public and to neighbors along the alignment of their respective riparian interest areas (see Encl. 31). As we understand it, in Michigan, the most recent court results are that the public trust assures the public the right to walk along the shoreline (Glass v. Goeckel). We further understand that walking and viewing is the extent of the recreation that the court assured. Hence, public recreation is limited to viewing the vegetation and wildlife that would be associated with a mowed coastal marsh, and possibly viewing the private backyards of landowners when the water's edge is close enough. At the great variability of the water level along this shallow slope, the water's edge may be 1,000+ feet from the bulkhead, or nearly at the bulkhead, or anywhere in between. The applicants' revised proposal to groom 200 feet (Mr. Colorito) [...] as measured from the bulkhead waterward may have negative impacts on the public's recreation when the water level is near the bulkhead and the portion of the shoreline that is available to the public for recreation approaches or coincides with the revised proposed work area.

The District further evaluated public recreation in their EA under the section "Recreation". The District's viewpoint of the public interest factors is consistent with the Corps regulations. The District evaluated personal recreation in their EA under the section "Effect on Conservation and Overall Ecology". The appellant's perspective was considered as follows:

> ...grooming beginning at the steel bulkhead and extending waterward from it for a distance of 50 feet (which is equal to the width of most properties), as in the initial

> proffered permit, would provide an area on which the landowners could pursue recreational activities, as well as a visual and accessible sandy area.

According to the District's EA, personal recreation was also discussed under the "Consideration of Property Ownership" public interest factor. However, upon reviewing this factor, personal recreation concerns brought by the appellant are not directly addressed.

Consideration of Property Ownership Factor

The District evaluated the Consideration of Property Ownership public interest factor in their EA under the section "Consideration of Property Ownership." The appellant's perspective on property ownership was considered and addressed in the EA under the subsection "Applicant's Response/Rebuttal". Specifically, the EA indicates that the appellant feels it is within his rights to alter and maintain the lakebed to achieve a property condition that is agreeable to them. The appellants have provided specific and general reasons for conducting the mechanized grooming, including the elimination of Phragmites and to make reasonable use of his property, which they define to include all activities and objectives including access to the water, recreational activities and health and safety. The District responded to these comments in their evaluation of this public interest factor.

The District's EA inappropriately cited a previous appeal decision when evaluating the beneficial or detrimental impacts on property values for Mr. Colorito's project.

Corps regulations at 33 CFR 331 state:

> ...an appeal decision of the division engineer is applicable only to the instant appeal, and has no other precedential effect. Such a decision may not be cited in any other administrative appeal, and may not be used as precedent for the evaluation of any other jurisdictional determination or permit application.

Therefore, the District erred when they cited the previous appeal decision in their evaluation of "Consideration of Property Ownership". However, this is a harmless error that would not have changed or affected the District's proffered permit decision.

I find that the District properly evaluated the recreation public interest factor. The District addressed the appellant's private recreation concerns in the EA, and also took the appellant's private recreational wishes into consideration when they defined the project purpose. Therefore, this reason for appeal has no merit.

Appeal Reason 3: The appellant alleged that the District did not follow a fair, equitable, and impartial process. The District disregarded the appellant's concerns (non-responsive to concerns.)

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion:
The appellant feels that the District biased the public review, including the USFWS review, by stating that grooming was proposed for up to 1000 feet or more waterward measured from the existing bulkhead, rather than the 600 feet the appellant believed was a more accurate representation of his request. The appellant stated he believed that USFWS would not have objected had it considered the lesser (600-foot) impact area. As previously stated, the District's public notice was accurate based on the information available to them at the time of its publication.

The District provided a copy of the USFWS comments to the appellant, in part to allow an opportunity for the appellant to resolve and or to address the USFWS comments. The District's letter dated February 5, 2008, stated "We are enclosing a copy of a letter from the U.S. Fish and Wildlife Service (FWS) regarding your proposed work. We feel that the FWS letter raises a substantial concern that will weigh heavily in our decision on your application. You may contact the FWS in an attempt to resolve their objection, or you may provide a rebuttal to their position."

The District's EA fully considered all of the relevant factors listed in the applicable regulation, 33 CFR 320.4(a), and does not indicate that the USFWS comments were the sole basis for their decision. Even so, the District could have reasonably determined that the public interest review factors (issues) raised in the USFWS letter would weigh heavily in their decision, as the regulations 33 CFR 320.4(a) further state:

> (3) 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. However, full consideration and appropriate weight will be given to all comments, including those of federal, state, and local agencies, and other experts on matters within their expertise.

Regardless, since the district's decision is supported by the record, I find that this reason for appeal has no merit.

The following items were considered clarifying information and considered during this administrative appeal:

Photographs of the shoreline at 9157, 8921, and 8895 Point Charity Drive, taken May 22, 2009.

Photograph of the shoreline at 9157 Point Charity Drive, taken October 18, 2008.

The following item was determined to be new information and was not considered in this administrative appeal in accordance with 33 CFR 331.7 (e) (6):

The sentence "...it is requested that we be issued a permit to groom 150 feet from our bulkhead and place a foot path to the waters edge" located in Mr. Colorito's 31 October 2008 RFA, as this is a new grooming limit proposal not identified in any previous documentation.

Conclusion: I find that the District's administrative record supports its decision. Therefore, for the reasons stated above, the appeal does not have merit.

John W. Peabody
Major General, U.S. Army
Division Engineer