

**U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION
DATE: 31 July 2002**

ADMINISTRATIVE APPEAL DECISION

HENRY G. ZAPRUDER, BALTIMORE DISTRICT FILE NO. 00-66704-1

Review Officer: James W. Haggerty, U.S. Army Corps of Engineers (“Corps”), North Atlantic Division

Appellant: Henry G. Zapruder

Appellant’s Agent: Jeffrey J. Utermohle, Law Offices of Peter Angelos, 100 North Charles Street, 20th Floor, Baltimore, MD 21201-3812

Date of Receipt of Request for Appeal (“RFA”): 15 February 2002

Date of Acceptance of RFA: 19 April 2002

Appeal Conference/Site Visit Date: 29 May 2002

HQNAD-ACCEPTED REASONS FOR APPEAL:

HQNAD reviewed the agent’s RFA dated 14 February 2002 and determined it was incomplete. By letter dated 20 February 2002, additional information was requested by this office in order to deem the RFA complete. This information was provided by the agent by letter dated 21 February 2002. By letter dated 28 February 2002, this office indicated acceptance of the following three reasons for appeal:

- 1) Baltimore District allegedly failed to properly assess cumulative impacts in determining that the dredging proposal is contrary to the public interest;
- 2) Baltimore District allegedly failed to give due consideration to reasonable alternatives as required by 33 CFR 320.4 (a)(2)(ii);
- 3) Baltimore District’s denial of the permit application is not supported by relevant scientific evidence.

By letter dated 1 March 2002, the agent requested that this office reconsider its rejection of three additional reasons for appeal contained within the RFA, plus an allegation of a property taking under the Fifth Amendment to the Constitution of the United States. In accordance with guidance provided by Headquarters, U.S. Army Corps of Engineers, the allegation of a property taking is not an appealable action under this process. By letter dated 29 April 2002, this office stated it had reconsidered its rejection of the three additional reasons for appeal and determined that one was valid, as follows:

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- 4) Baltimore District's reliance upon Mr. Zapruder's January 13, 1993 letter as justification in denying the 2000 permit application was arbitrary, capricious, unfair and contrary to the doctrine of equitable estoppel.

By letter dated 3 May 2002, the agent agreed to proceed with scheduling of the appeal conference with the four above listed reasons for appeal as agenda topics. The appeal conference was scheduled on 13 May 2002 and occurred on 29 May 2002. Subsequent to the appeal conference, the Review Officer, the appellant's environmental consultants and three Baltimore District representatives, performed a site inspection and also transited the proposed channel and downstream area in the West River via a Baltimore District vessel.

BACKGROUND INFORMATION:

On 31 January 1992, the appellant applied for a permit to construct an 8 foot by 100 foot pier with a 20 foot by 20 foot "L"-head, and dredge material from a 630 foot by 15 foot spur channel with a 2,320 square foot mooring/turning basin to a depth of 3.5 feet below mean low water in John's Creek, off Chesapeake Bay near Shadyside, Anne Arundel County, Maryland. He subsequently submitted a separate application on 30 July 1992 to construct a six-foot wide pier with an overall length of 135 feet, including a 10 foot by 20 foot "L"-head, plus a boat lift and two mooring piles. By letter dated 30 December 1992, the district advised the appellant they were withdrawing the second application, which sought approval for construction of the 135-foot pier under a regional general permit, and that they were reviewing this pier construction proposal along with the proposed dredging as a single and complete project, in accordance with 33 CFR 325.1 (d)(2).

Subsequent to this letter, the district advised the appellant that they had concerns regarding potential adverse environmental impacts associated with his shallow water dredging proposal, and that a permit would not likely be authorized. By letter dated 13 January 1993, the appellant withdrew the dredging portion of his application, and sought approval to construct the 135-foot pier, boat lift, and mooring piles. The letter contained two written statements: first, that if he acquired a deeper-draft vessel in the future, he would house it at a local marina; second, that he had no intention of refiling an application for a dredging permit in the future. The district then authorized his pier, boat lift and pilings on 10 February 1993 under the regional general permit.

On 29 August 2000, the district received the current application for dredging of approximately 1,435 cubic yards of material from a 787-foot long channel, generally 20 feet wide, inclusive of mooring and turning basins, to a depth of four feet below mean low water and issued a public notice describing the proposal on 15 September 2000. In a 23 October 2000 letter responding to this notice, the U.S. Fish & Wildlife Service ("USFWS") recommended denial of a DA permit for the proposal because the dredging is proposed in shallow water habitat that they believe historically supported submerged aquatic vegetation ("SAV") growth. Specifically, they alleged that SAV was present at

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the project site in 1995, according to the 1995 Distribution of Submerged Aquatic Vegetation in the Chesapeake Bay, a report issued by the Virginia Institute of Marine Science (VIMS). Accordingly, the site is considered a Tier I area as per the Chesapeake Bay Program's Guidance for Protecting Submerged Aquatic Vegetation in Chesapeake Bay from Physical Disruption. Such areas have a goal or target of restoration or establishment of SAV in areas of "historic distribution", defined as between 1971 and the present. They stated the appellant should moor any deeper draft vessel he may acquire at an existing local marina, or he should extend his existing pier to reach deeper water. Additionally, the Maryland Department of Natural Resources ("MDNR") recommended a seasonal dredging restriction to protect anadromous fish spawning and nursery activities, as well as late summer growth of any SAV that may be present. They also recommended that the appellant extend his pier, refrain from dredging areas with existing depths of less than one foot at mean low water, limit dredging to three feet below mean low water in areas containing one to three feet of water at mean low water, and that no dredging occur waterward of the three feet below mean low water contour unless historic boat usage in John's Creek can be documented.

The appellant's environmental consultant responded to the concerns of these agencies in a letter dated 14 March 2001. The appellant retained Dr. J. Court Stevenson, an estuarine ecologist at the University of Maryland, to perform detailed SAV surveys in the immediate project area and surrounding cove during June, 1992 and the summer of 2000. No SAV was found in the immediate vicinity of the channel or the cove during either of these surveys. The consultant also stated that Dr. Stevenson and Dr. Robert Orth of VIMS questioned a finding of the presence of a widgeon grass bed in or near the proposed channel in a 1995 VIMS survey, because it was based upon input from unidentifiable data collection efforts or groups that are not verifiable, according to VIMS. Additionally, Dr. Stevenson believes that the water quality and bottom sediments in the area to be dredged are not productive SAV habitat; the sediments are highly organic and easily resuspended. Further analysis revealed that the SAV finding was on a site approximately one-half kilometer south of the project site. Thus, on the basis of this information, the appellant contends his project will not disrupt SAV beds. The district clarified during the Appeal Conference that it was their position that the site did not contain SAV.

The district coordinated the consultant's reply to USFWS on 27 March 2001. By letter dated 1 May 2001, USFWS restated their previous recommendation to the appellant to either extend his pier or moor any deeper-draft vessel at a local marina. It also questioned the information provided by Dr. Stevenson, but conceded that it did not have a more specific location for the widgeon grass SAV report other than John's Creek. It also, without rationale, modified its position to state the project site is a Tier II area, in contrast to its earlier comments. Tier II areas have a goal or target of restoration or establishment of SAV to a depth of one meter in *potential habitat*, i.e. where there has been no documentation of the presence of SAV since 1971.

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On 18 September 2001, the consultant met at the project site with USFWS representatives and a former United States Congressional representative. During this event, the consultant restated the appellant's offer originally made during a 25 April 2001 interagency joint evaluation meeting that he would be willing to finance a \$10,000 study of the potential effects of his dredging upon water quality, benthic organisms, and sediments in John's Creek. By letter dated 29 November 2001, the district stated they had considered the comments of USFWS and MDNR and the additional information provided on the appellant's behalf, and outlined three potentially reasonable alternatives to avoid and minimize the impacts of the proposal. These included: 1) use of a local marina for mooring of a deeper draft vessel; 2) extension of the pier so that it is closer to the existing contour of four feet below mean low water; and 3) reducing the depth of the proposed dredged channel. The district did not address the appellant's offer to finance a study. The attorney responded in a 17 December 2001 letter, stating the appellant's willingness to expend an additional \$10,000 to extend the fixed pier by 50 feet. The district verbally informed the attorney in an 18 December 2001 telephone conversation that they did not find this to be a significant revision to the original plan. The district project manager stated in a memorandum for the record memorializing the conversation that "...the only alternative was for the appellant to moor any deeper draft vessels at one of the many nearby marinas". The district then denied the permit application on 20 December 2001.

EVALUATION OF THE REASONS FOR APPEAL, HQNAD FINDINGS AND INSTRUCTION FOR SUBSEQUENT DISTRICT ACTION:

First Accepted Reason for Appeal: Baltimore District allegedly failed to properly assess cumulative impacts in determining that the dredging proposal is contrary to the public interest.

Determination on the Merits of This Reason for Appeal--This Reason for Appeal Has Merit: The appellant's attorney believes that the district utilized an overly expansive region, specifically the entire Chesapeake Bay, in its consideration of the scope of cumulative and secondary impacts for this project. As a result, the attorney believes the district is evaluating the impacts of this project cumulatively with hundreds, or even thousands, of similar potential spur channel dredging projects that it believes could be proposed if a permit is issued for this proposal. The attorney believes the district is mistaken in categorizing these hundreds or thousands of projects as being similar and indistinguishable from the appellant's proposal. Instead, he advances the argument that site-specific conditions and studies would readily distinguish this project from other spur channel dredging applications elsewhere in Chesapeake Bay. For this reason, and the fact that each project receives an individualized permit decision based upon a particularized evaluation of the probable impacts and its intended use upon the public interest, the attorney believes the district should not fear that it is "setting a precedent" which would influence its consideration of other similar dredging projects.

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The attorney alleges that the cumulative impact analysis did not meet the standards set forth in Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985). The decision in this case stated that “A meaningful cumulative-effects study must identify: (1) the area in which effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions – past, proposed, and reasonably foreseeable – that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.” He believes that limiting the scope of the cumulative impacts analysis to John’s Creek itself is appropriate given the scale of this project.

The attorney concludes by pointing out that the Statement of Findings (“SOF”) supporting the district’s decision states that the project individually would not have substantial adverse impacts; that no wetlands or Essential Fish Habitat would be adversely affected; and that the National Marine Fisheries Service and the U.S. Environmental Protection Agency did not object to the proposal. He believes the district’s policy of actively discouraging spur channel applications constitutes an impermissible, *a priori* decision to deny such applications.

HQNAD concurs with the attorney in that the entire Chesapeake Bay is too broad an area for consideration of the cumulative and secondary impacts of this project, which would involve disturbance of less than 0.4 acre of existing substrate, and therefore finds merit with this reason for appeal. During the past several years, the perspective of the Regulatory Program has evolved into a watershed approach for reviewing permit applications and evaluating environmental restoration and mitigation activities. The project site in this instance is located within the Severn watershed, US Geological Survey Cataloging Unit No. 02060004. This watershed includes the Severn River and other sub-watersheds and small shallow-water embayments extending southward along the western shore of Chesapeake Bay to the Maryland-Virginia state boundary, including the West River sub-watershed in which the project site is located. Use of the Severn watershed as the area in which to assess cumulative and secondary impacts instead of the entire Chesapeake Bay would be consistent with the watershed approach currently in use in the Regulatory Program.

The second meritorious factor for this reason for appeal is that the district did not apply the proper decision-making standard in much of its analysis in its decision document. The district largely uses speculative language in its analysis of potential impacts and does not present a sufficiently compelling argument to support its finding that issuance of a permit would be contrary to the public interest. As stated at 33 CFR 320.4 (a)(1), the decision-making standard is an evaluation of the *probable* impacts of the proposed activity and its intended use upon the public interest. Benefits of the project which are *reasonably foreseeable* must be balanced against its reasonably foreseeable detriments in order to arrive at the proper public interest decision. In its SOF, the district is imprecise with regard to the type of fish species that inhabit the project area, whether the project

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would result in long-term adverse impacts for the benthic community, the functions of the shallow water habitat at the site, and the expected impacts of the project upon many of the public interest review factors. Overall, the SOF does not conclusively justify the denial decision. As stated at 33 CFR 325.8 (b), this is required where a permit is denied for reasons other than navigation or failure to obtain required local, state, or other Federal approvals or certifications.

Second Accepted Reason for Appeal: Baltimore District allegedly failed to give due consideration to reasonable alternatives as required by 33 CFR 320.4 (a)(2)(ii).

Determination on the Merits of This Reason for Appeal--This Reason for Appeal Does Not Have Merit: The appellant's attorney focuses upon events which transpired at the final stage of the district's review of the permit application. In a letter dated 29 November 2001, the district indicated they believed there were reasonable alternative locations and methods available to accomplish the objective of the appellant's proposal. These included, but were not limited to, three specific less environmentally damaging potential alternatives: mooring of a deeper-draft vessel at a local marina; a pier extension; and dredging to a shallower depth than four feet below mean low water. In a letter dated 17 December 2001, the attorney indicated the appellant was willing to expend an additional \$10,000 to extend his existing pier by 50 linear feet. The administrative record contains a memorandum documenting that district project manager verbally informed the attorney on 18 December 2001 that it did not find the 50-foot extension to be a significant revision to the plans, and that mooring at one of the nearby marinas is the only alternative. Further, the appellant had previously acknowledged this alternative to the district in his 13 January 1993 letter. The attorney points out that the SOF supporting the permit denial decision incorrectly indicated that the appellant rejected the opportunity to minimize impacts by extending his existing pier. In light of this, and what the attorney describes as the project manager's repudiation of the pier extension alternative as a means to minimize impacts, the attorney believes the district did not meaningfully consider the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed dredging.

As per 33 CFR 320.4 (a)(2)(ii), the district was required to consider the practicability of the use of alternative locations and methods to fulfill the project purpose, since in this case there were unresolved conflicts as to resource use. Notwithstanding the fact that the project manager deviated from the district's written position in verbally stating that the only alternative available to the appellant was to moor his deeper draft vessel at a nearby marina, the district arrived at the correct conclusion in its SOF that the least environmentally damaging alternative to this proposal is the "no action" alternative. The district also correctly indicated that the option of mooring at a local marina is a reasonably available alternative location and method to allow the appellant to safely utilize a deeper draft vessel. It is not necessary for the district to identify and evaluate *all* alternatives, or all *reasonable* alternatives, as part of its permit decision. The fact that the project manager indicated that mooring at a marina was the only alternative does not

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mean that the district failed to consider other alternatives. The district's determination of the least environmentally damaging alternative, and identification of a reasonable alternative method and location to meet the appellant's need was sufficient to fulfill the requirements of 33 CFR 320.4 (a)(2)(ii).

The district's indication in the SOF that the appellant rejected the alternative to extend the pier is inaccurate. However, HQNAD concurs with the district that the appellant's offer to extend his existing pier by 50 feet did not constitute a significant change to the project. The amount of dredging would not have appreciably been reduced since the extension would have gained only 0.1 foot of additional existing water depth. It is reasonable to conclude the district would most likely have arrived at the same decision even if it were based on an alternative project involving a 50-foot pier extension.

Although the administrative record does not indicate that either the appellant or the district considered an additional pier extension beyond 50 feet, the soundings provided by the appellant indicate the pier would have to be extended by 400 feet or more to reach two feet of water at mean low water. An extension of such length might not be practicable because the resulting structure may create undue interference with navigation in John's Creek, and therefore might not be permitted.

Third Accepted Reason for Appeal: Baltimore District's denial of the permit application is not supported by relevant scientific evidence.

Determination on the Merits of This Reason for Appeal--This Reason for Appeal Has Partial Merit: The appellant's attorney states that USFWS confirmed that no detailed scientific studies of the effects of spur channel dredging in Chesapeake Bay have ever been completed. For that reason, the appellant offered to fund up to a \$10,000 study to provide pre- and post-project data to provide concrete scientific evidence, and enhance the ability of Federal and state agencies and the Corps to review similar permit applications. The attorney cites a 19 January 2001 letter from the former Assistant Secretary of the Army for Civil Works, Joseph W. Westphal, to the U.S. Environmental Protection Agency's former Assistant Administrator for Water, J. Charles Fox, in the matter of a permit elevation case involving channel dredging by Baltimore and Anne Arundel Counties. This letter cites dredging as likely having an overall positive influence upon SAV growth in the channels associated with those permit applications.

The appellant has retained consultants who have provided site-specific information to the district regarding the sediment characteristics, lack of SAV at the project site, and potential beneficial impacts of the proposed dredging. This information was discussed at the appeal conference held on 29 May 2002. The district included this information within a section of the SOF relating to a summary of public notice comments and informational replies submitted on the appellant's behalf, plus the responses from USFWS to that information as embodied in a 1 May 2001 letter. The district is required to give great weight to the views of USFWS with regard to potential impacts of this

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project upon fish and wildlife resources, but is also required to fully consider the differing findings of the appellant's consultants in its decision-making. The district includes the consultants' information in their SOF, but does not clearly justify the lack of historical boating access at the four foot below mean low water depth as their first rationale for denying this permit application. It is incumbent upon the district to conclusively justify denial of this and any other permit application based upon an analysis of the reasonably foreseeable impacts from this project, in addition to secondary and cumulative impacts. As noted previously in this memorandum, such standard is not achieved in the SOF for this permit application. The third stated reason for denial, i.e. that dredging in such areas as the applicant proposes could have substantial cumulative adverse environmental impacts in the Chesapeake Bay region, is deficient for reasons discussed previously in this document.

Fourth Accepted Reason for Appeal: Baltimore District's reliance upon Mr. Zapruder's 13 January 1993 letter as justification in denying the 2000 permit application was arbitrary, capricious, unfair, and contrary to the doctrine of equitable estoppel.

Determination on the Merits of This Reason for Appeal--This Reason for Appeal Does Not Have Merit: The appellant's attorney alleges that the district failed to observe its policies and the regulations, and in so doing purportedly misled the appellant to forego his legal rights as a riparian property owner. The major point of contention is a 13 January 1993 letter from the appellant to the district in which he formally modified his proposal. As part of his revised proposal he withdrew his request for a dredging permit, acknowledging the district's concerns with the potential environmental impacts associated therewith. He also stated, "Should I acquire a deeper draft boat in the future, I will house it at a local marina" and "I have no intention of refiling this [dredging] application in the future...". The district then issued a permit to construct a pier, boat lift and mooring piles on 10 February 1993.

The attorney mistakenly cites the provisions of 33 CFR 322.5 (d)(1) as providing a *presumption* of favorable consideration for pier permit applications, and alleges that the district misled the appellant by indicating they would grant the pier permit "only if" he withdrew the dredging application. This section of the regulations does not establish a presumption of favorable consideration for applications for pier permits; it states, "In the absence of overriding public interest, favorable consideration will generally be given to applications from riparian owners for permits for piers, boat docks, moorings, platforms and similar structures for small boats."

The district acted properly in advising the appellant up front of the inherent difficulty in obtaining a dredging permit. By recommending deletion of the dredging aspect of the proposal, the district issued the pier permit expeditiously under a regional general permit, thereby allowing him to exercise his riparian rights. Had the appellant not deleted the proposed dredging, an individual Department of the Army permit would have been necessary; if the application had ultimately been denied, the appellant would not have

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been able to construct his pier since the denial would have applied to both the pier and dredging aspects of the single and complete project. Additionally, the district was proper in requiring the appellant to state in writing he had no intentions of refiling a dredging application in the future, in order to comply with the requirements of 33 CFR 325.1 (d)(2) prohibiting segmentation.

The attorney also alleged the district violated its own policy regarding applicants being allowed to redesign projects for which permit applications have been denied. Instead of allowing the appellant to redesign his project in 1993, the district indicated the pier permit could be granted only if the dredging were deleted and the appellant committed to not re-file a dredging application in the future. HQNAD notes that this policy of the district applies to permit denials; the deletion of the dredging from the original proposal did not constitute a permit denial. Also, as discussed in the preceding paragraph, it was necessary for the appellant to state he would not re-file the application in the future in order to ensure the provisions of 33 CFR 325.1 (d)(2) were complied with.

The appellant also states his belief that the district's reliance on the 13 January 1993 letter as justification for this permit denial is arbitrary, capricious, unfair, and contrary to the doctrine of equitable estoppel. This is because the district assured the appellant that, notwithstanding his 1993 letter, his application submitted in 2000 would receive a fair, unbiased, and de novo consideration.

HQNAD has reviewed the administrative record in this matter and finds no merit with this reason for appeal. The district acted appropriately in its inclusion of the appellant's commitment in its decision to deny the permit application. Although the attorney suggests the appellant was, in essence, forced by the district to modify his original proposal, such action was proper and paved the way for the appellant to expeditiously receive a permit to construct his pier. The district would have been remiss in not providing such advice to the appellant. The appellant could have elected to proceed at his own risk with processing of the entire permit application, with the knowledge there was no guarantee the application would ultimately be authorized. The record indicates the appellant was advised clearly by the district, and the district appropriately utilized his written commitment in review of this application. It should be noted that none of the appellant's written statements were cited by the district as any of the three specific reasons for their finding that permit issuance was contrary to the public interest. With regard to the issue of fair, unbiased and de novo consideration of this application, there is nothing in the administrative record that suggests the district did not treat this application accordingly, despite the fact it was denied.

Another issue raised by the attorney is the allegation that the district's discouragement of spur channel dredging applications constitutes improper *a priori* permit denial decisions. As stated previously, the discouragement of these type projects by the district is based upon their past experience in reviewing such applications and is intended to provide sound advice to applicants either before submitting applications or early in the permit

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process. It would be unfair to applicants for the district to refrain from imparting such knowledge. A major criticism of the Regulatory Program is its lack of predictability, thus it behooves the Baltimore District, and all Corps districts, to advise applicants of potential obstacles in gaining approval for their projects.

OVERALL CONCLUSION/REQUIRED ACTION: HQNAD finds merit with two of the four reasons for appeal as submitted by the appellant's attorney. In accordance with 33 CFR 331.9 (a), this matter is hereby being remanded to the Baltimore District Commander for the following actions:

- 1) To refocus his analysis of cumulative and secondary impacts, required by 33 CFR 320.4 (a)(1), from the entire Chesapeake Bay to the Severn watershed, in accordance with the discussion on Page 5 of this document;
- 2) To re-evaluate his decision through application of the proper decision-making standard specified at 33 CFR 320.4 (a)(1), including consideration of probable impacts of the proposal and balancing of its reasonably foreseeable benefits and detriments, and to meet the requirement at 33 CFR 325.8 (b) that the SOF must conclusively justify his decision to deny the permit application.

RECOMMENDED: _____ /s/
JAMES W. HAGGERTY
NAD Regulatory Appeals Review Officer

CONCUR: _____ /s/
THOMAS M. CREAMER
Chief of Operations – HQNAD

APPROVED: _____ /s/
M. STEPHEN RHOADES
Brigadier General, USA
Commanding