ADMINISTRATIVE APPEAL DECISION

BARBARA MOORE

FILE NUMBER 200004449 (LP-VA)

JACKSONVILLE DISTRICT

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

Appellant Representative: John J. Wolfe, P.A., Marathon, Florida.

Receipt of Request For Appeal (RFA): August 9, 2002.

Appeal Conference Date: March 13, 2003. **Site Visit Date:** March 13, 2003.

Background Information: In a joint environmental resource permit application, dated October 9, 2000, Ms Barbara Moore requested authorization to install an approximately 110 linear foot seawall and place backfill in an area approximately 770 square feet between the proposed seawall and the existing bank of a man-made canal off Sombrero Beach Road in Marathon, Monroe County, Florida.

The application included the following general description of the proposed project. "The applicant owns a canal front lot in Marathon. She wishes to install a concrete pile-slab soil retention wall. The purpose of this project is to stabilize the shoreline and to prevent any future erosion. An existing seawall fell into the canal during a storm in 1996. Since the wall was destroyed there has been considerable erosion along the shoreline. The top of the bank has eroded 5.5' to 11.5' since removal of the seawall. There is existing vegetation along the shoreline. It is clear...that the vegetation is not preventing erosion. The previously existing seawall was on line with the adjacent property's seawall. There was no seagrass located within the proposed limits of construction."

The applicant authorized Mr. Glen Boe (Engineer / Glen Boe & Associates) "to act on [her] behalf...as the agent in the processing of this application for the permit...and to furnish, on request, supplemental information in support of the application. In addition...to bind me...to perform any requirements which may be necessary to procure the permit or authorization..." Emphasis added.

By letter of November 6, 2000, the District circulated a coordination letter with local, state and Federal agencies and with some members of the public. By letter of March 9, 2001, the District informed the applicant that the proposed project may affect the endangered West Indian manatee and that it was USACE responsibility to coordinate its determination with the US Fish and Wildlife Service (FWS). The letter also informed the applicant that the National Marine

Fisheries Service (NMFS) had responded (November 21, 2000) and recommended that authorization not be issued for the project as currently proposed. They further recommended "placing all soil retention structures [seawall] to areas above mean high water and for any eroding areas below mean high water, hand-placed riprap should be used in order to minimize impacts to wetland vegetation."

By letter of October 25, 2000, the FWS responded, "c/o Glen Boe & Associates, Inc.", to the applicant's request for technical assistance coordination with the [FWS] for the proposed construction of a dock.

By letter of June 18, 2001, the applicant's agent informed the District of the applicant's desire to participate in the manatee guidance program via a cash contribution to National Fish and Wildlife Foundation's Manatee Conservation Fund. This was done to resolve the issue of potential impacts to the West Indian manatee. By letter of July 2, 2001, the FWS informed the District that the applicant had provided proof of contribution to the National Fish and Wildlife Foundation's Manatee Conservation Fund.

By letter of March 23, 2001, the applicant's agent provided revised drawings to the District for the proposed project. The letter stated, "Enclosed please find the revise drawings for the referenced project [Barbara Moore 200004449 (LP-VA)]. The drawings have been revised to relocate the proposed seawall." The revised drawings depicted the proposed bulkhead location to be, on average, at or landward of the mean low water line.

On May 6, 2002, the District authorized the applicant "to bulkhead and backfill a wetland shoreline using approximately 20 cubic yards of material and resulting in approximately 300 square feet of successional black and white mangrove/saltmarsh impacts in navigable waters of the United States and adjacent wetlands in a residential canal...in accordance with the enclosed drawings and conditions that are incorporated in, and made part of, the permit." The drawings in the permit are the revised drawings, noted above, submitted by the applicant's agent.

In a note signed June 21, 2002, the applicant stated, "I hereby designate and authorize John J. Wolfe as my agent to act on my behalf, or on behalf of my corporation, as the agent in the processing the appeal of Permit No. 200004449 (LP-VA); and to furnish, on request supplemental information in support of the appeal. In addition, I authorize the above-listed agent to bind me, or my corporation to perform the requirements which may be necessary to procure a permit or authorization indicated in the appeal."

Summary of Decision: I find that the appeal does not have merit. I find that the District evaluated and documented their proffered permit dated May 6, 2002 according to applicable laws, regulations and policy guidance. The special conditions placed on the permit, including the revised plans/drawings, are reasonable given the specific circumstances of the permit request.

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

Reason: "I am objecting to Permit No. 200004449 (LP-VA), and request that the permit be modified to grant a permit in accordance with the application as submitted in October 2000. As submitted, the application requested a permit for construction of a seawall at the same location prior to being damaged beyond repair during a storm event in 1996. The seawall had been in that location since originally permitted and constructed in 1973...The permit as issued does not authorize replacement in its original position, but specifies placement of the seawall farther landward of its original location."

FINDING: The reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the Request for Appeal, the appellant added, regarding the relocation of the proposed bulkhead, "Apparently, this placement attempted to respond to a recommendation of the NMFS that the proposed bulkhead be moved landward of the mean high water line. After receipt of the Corps March 9, 2001 letter stating this position, [a representative] of Glen Boe & Associates, my agent in submitting the Application, revised his drawing to illustrate the effect of the requested change. He was instructed by [agent] and myself that this was not acceptable. Apparently, he had inadvertently faxed a copy to the [District], and it was considered to be part of the Application. While faxing the revised drawing may have created some confusion, the letters from my attorney on July 24, 2001 and April 11, 2002...made it clear that I was not willing to make the requested change and asked for permit issuance as originally requested."

The appellant continued, "It was consistently stated during the application process that all I am requesting is replacement of the seawall in its location prior to the storm. Due to the fact that erosion occurred since the storm, I have consistently stated that I am willing to make a mitigation payment as appropriate. This seems particularly appropriate in this situation, because as has been pointed out during the application process, experience has shown that vegetation along this canal when it returns has not been sustainable."

In the July 24, 2001 letter, noted above, the appellant's attorney stated, "The only remaining issue of substance appears to be the [District's] concurrence with the response to the [NMFS] recommending that the proposed bulkhead be moved landward of the mean high water line. The [District] in your March 9, 2001 letter requested revised plans for the Permit Application. Moving the bulkhead in this far would not accomplish my client's objective in applying for the permit and seems to an unwarranted request. This application is for the replacement of a previously existing seawall which was destroyed by a storm...We fail to see the basis for a valid objection to its reconstruction. We hereby request that you continue to process the application as submitted...and either approve or deny the application. If there are some additional measures other than relocating the seawall which you think can be taken to lead to issuance of the permit, we are open to hearing them."

Based on the Administrative record, the issue regarding the alignment of the proposed bulkhead is the relative value of the aquatic resource of the area between the original bulkhead alignment and the recently established mean high water line.

The EA, Public interest review, states, "There is a very high degree of water shallowness in the reach [due to erosion of the bank since bulkhead failure in 1996]. Seagrass between the shoreline and open area/channel is present. Dock density is very high."

As noted above, by letter of March 23, 2001, the applicant's agent provided revised drawings to the District for the proposed project.

By letter of April 11, 2002, the applicant's attorney referenced various efforts, through conversations and correspondence among representatives for the applicant and representatives of the District, to resolve the outstanding issues. He reiterated, "The Application merely requests to replace a seawall in an artificial canal which existed on the lot since 1973, when it was originally permitted, until 1996 when it was destroyed by a storm...[applicant] was not able to immediately attend to this following the storm, particularly because she had to spend a considerable amount of money promptly removing the fallen seawall form the canal...She was not aware that delaying reconstruction could result in the inability to restore the seawall to its original position. She also did not anticipate the amount of erosion that would occur in such a short period of time...As pointed out in the Application, it is clear that the existing vegetation is not preventing erosion."

At the appeal conference, March 13, 2003, the applicant's brother pointed out that during the time following the failure of the bulkhead the applicant's "husband passed away, the estate had to be settled, that took several years to do...she had no idea or inkling that she was losing her window of opportunity to replace this wall in its original location and configuration."

At the appeal conference the District's Project Manager spoke to the issue of the "time frames of when the nationwide permit repair and rehabilitation permits were in effect. In a sense, [they are] in effect all of the time...If there are sufficient storm-generated events, such as a hurricane, emergency authorizations of the same type of nationwide permit [are authorized] for specified periods of time. The longest period of time we've had in recent history here has been subsequent to Hurricane Georges, where it was authorized for a year period...through September of [19]99. That one was applicable for that storm event. It was...extended another three months. There was no specific nationwide authorization for the storm event...in [19]96, that's been...referred to. And in that case the nationwide permit was applicable and the timeframe gave a nominal two-year period. And those nationwide permits expire on a regular two-year basis...any kind of nationwide authorization for repair and rehabilitation had been exceeded by the time the application was submitted on this permit."

The **Federal Register** / Vol. 56, No. 226 / Friday, November 22, 1991 / Rules and Regulations publish the nationwide permit that was in effect at the time of the 1996 storm that destroyed the applicant's bulkhead. 33 CFR 330 Appendix A, Nationwide Permits, 3. Maintenance, states, "The repair and rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill...Minor deviations in the structure's configuration...are permitted provided the environmental impacts resulting from the repair, rehabilitation, or replacement are minimal...Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction...authorizes the repair, rehabilitation, or replacement of those structures destroyed by storms, floods, fire, or other discrete events, provided the repair...is commenced or under contract to commence within two years of the date

of their destruction or damage In cases of catastrophic events, such as hurricanes or tornadoes this two-year limit may be waved by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays."

At the appeal conference, March 13, 2003, the applicant's attorney pointed out that one of the problems with relocating the bulkhead landward is "setbacks...we have setbacks from...the property line, that being mean high water, and so by losing the extra six or seven feet...it pushes whatever structure is later built farther out onto the property, which in this case it's on a fairly heavily-traveled road right across from the high school...it obviously diminishes the value of the land...[l]and is...very scarce down here, very expensive. And cutting anything off...ends up in an economic diminution of the property."

By letter of April 12, 2002, the District informed the applicant (c/o Glen Boe & Associates, Inc.) that a functional assessment evaluation utilizing the Florida Keys Mitigation Index Guidelines (KEYMIG) had been conducted for the proposed project. The functional assessment concluded that $1,899.28 would be required as in-lieu payment to the Florida Keys Environmental Restoration Trust Fund for unavoidable impacts to 300 square feet (area of white mangroves 3 feet wide by 100 feet long) of shoreline fringe wetland.

By facsimile dated April 16, 2002, the applicant's agent (Glen Boe & Associates, Inc.) provided a letter dated April 16, 2002, signed by the applicant stating, "I agree to donate $1,899.28 as mitigation for the environmental impacts for the proposed project."

By letter of April 17, 2002, the District informed the NMFS that the District was prepared to take final action on this application and that Essential Fish Habitat (EFH) recommendations will not be fully implemented. The District stated these reasons; "The applicant has agreed to relocate the bulkhead landward of mean high water on the southern 40 feet of shoreline, but to bisect the line on the northern 60 feet...Full mitigative monetary contribution for 300 square feet of successional mangrove fill in the amount of $1899.28 will be required...The collapse of a previous vertical bulkhead waterward of the proposed location indicates the shoreline substrate is insufficient to provide for the efficacy of hand[]placed riprap below mean high water, as recommended." The District took the position that not all the area between the original bulkhead alignment and the recently established mean high water line is an important aquatic resource, including EFH, but agreed that some of it is.

Regulations at 33 CFR 320.4(a)(1) state " The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case...All factors which may be relevant to the proposal must be considered including the cumulative impacts thereof: among those are... general environmental concerns, wetlands...fish and wildlife values...land use, navigation, shore erosion and accretion...water quality...safety...considerations of property ownership, and in general the needs and welfare of the people." 33 CFR 320.4(a)(3) continues, "The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with

each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another." Emphasis added.

Regulations at 33 CFR 325.4(a) state, "District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable." Emphasis added.

Regulations at 33 CFR 325.8(b) states, "District engineers are authorized to issue or deny permits in accordance with these regulations pursuant to sections 9 and 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act...District engineers are also authorized to add, modify, or delete special conditions in permits in accordance with § 325.4 of this Part."

The 404(b)(1) Guidelines, 40 CFR 230.10(a) state "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have a less adverse impact on the aquatic ecosystem, so long as the alternative does not have other adverse environmental consequences.... Where the activity associated with a discharge which is proposed for a special aquatic site...does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e. is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise."

The "Environmental Assessment and Statement of Finding" (EA), dated May 6, 2002, prepared by the District stated, "The applicant voluntarily proposed avoidance and minimized configuration landward to the approximate mean high water line (MHWL) on March 23, 2001. A NMFS EFH letter of November 21, 2000, recommending location of the bulkhead landward of the MHWL was not considered appropriate because the applicant's home and the proposed structure are at the end of the canal and exposed to the effects of open water storm surge. Shoreline armoring and fill to support the docking structure are needed to secure the property from storm events."

The regulations at 33 CFR 320.4(g)(2) states, "Because a landowner has the general right to protect property from erosion, applications to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of other, adversely affect public health and safety, adversely impact floodplain or wetland values, or otherwise appears contrary to the public interest, the district engineer will so advise the applicant and inform him of possible alternative methods of protecting his property."

The EA, Scope of Analysis, stated, "The proposed project is comparable to other projects nearby and throughout the upper Florida Keys. Avoidance and minimization measures were considered for the project. A review of the project with other recently permitted activities found it to be consistent with comparable projects throughout Monroe County."

The EA, Alternatives, stated, "The projects purpose is water dependent and avoidance of impact, under any circumstances, is not feasible...[t]he project was not fully minimized because this

would have exposed the applicant's property to storm events without sufficient shoreline armoring to prevent damage as the result of shoreline discontinuity...[a]s initially proposed, the project presented impact to aquatic resources which are commonly associated with marginal [along the margin of the shoreline] docks in this area...[t]he project, as currently proposed [revised plan] by the applicant presents a form which...may be viewed as a least environmentally damaging, practicable alternative, and approved elsewhere within the area."

The EA, Public interest review, stated, "The applicant reduced to approximately 50% of the alternative considered practicable for the entirety of wetland impacts as imparted to NMFS [by the District] in the April 17, 2002 EEH letter. The applicant's mitigation was proffered by letter of April 12, 2002 and accepted by agreement letter of April 16, 2002. No response was received from NMFS by the 10-day April 17, 2002 reply deadline."

Information Received and its Disposition During the Appeal Review:

1) The Jacksonville District furnished a copy of the Administrative Record for the subject application.

2) The appellant furnished a certified copy of the transcript of the appeal conference held on March 13, 2003.

Conclusion: After reviewing and evaluating the administrative record provided by the Jacksonville District, I conclude that there is sufficient information in the administrative record to support the District's decision to issue a conditioned Department of the Army permit, pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act, for the placement of fill material for the construction of a bulkhead in waters of the United States, including wetlands. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

13 June 03
(Date)

Peter T. Madsen
Brigadier General, US Army
Commanding