

ADMINISTRATIVE APPEAL DECISION

ALAN VAN HORN

FILE NUMBER SAJ-2003-7096

JACKSONVILLE DISTRICT

January 21, 2006

Review Officer: Michael F. Bell (RO), US Army Corps of Engineers (Corps), South Atlantic Division, Atlanta, Georgia.

Appellant: Mr. Alan Van Horn.

Appellant Representative: Mr. Bradon Percy, Environmental Services, Incorporated

Receipt of Request for Appeal (RFA): July 11, 2005.

Site Visit Date: October 20, 2005.

Summary of Appeal Decision: The Appellant asserts that his proposed site plan complies with the Section 404(b)(1) Guidelines of the Clean Water Act and constitutes the least environmentally damaging practicable alternative (LEDPA). Substantial documentation exists in the administrative record to support Jacksonville District's decision that the Appellant has not fully complied with the 404(b)(1) Guidelines. The Corps is within its authority to propose a practicable, less damaging alternative and provided sufficient documentation to support the decision to deny the permit. The Appellant's RFA does not have merit.

Background Information: Mr. Alan Van Horn is appealing the Jacksonville District's decision to deny the permit for the deposition of fill material into 0.2 acres of adjacent regulated wetlands. The proposed project purpose is for the construction of a single-family home on property located along South Tropical Trail, east of Island Grove Drive and adjacent to the Banana River, in Brevard County, Florida.

Environmental Services, Inc., on behalf of the appellant, submitted a permit application for the proposed work on June 19, 2003. The Appellant's 5.2-acre property lies next to Indian River Lagoon (IRL) and is bordered by South Tropical Trail to the west, the Banana River to the east, an existing single-family home to the south, and an undeveloped mosquito impoundment to the north. This portion of the Banana River is considered a Class III water system, Outstanding Florida Waters and is designated as a critical resource water.

With the exception of the .29-acre upland mosquito berm, which bisects the property in an east/west direction, the entire site consists of wetlands. The wetlands on the site include impounded and unimpounded estuarine wetlands. Impounded wetlands range from hardwoods (Brazilian pepper, cabbage palm, wax myrtle, saltbush, elderberry and ferns) in the northwestern boundary, mangrove and leather fern in the center, and open water with a minor component of cattail which dominates the eastern third of the impoundment. The Appellant's proposed development is located outside the impoundment, south of the mosquito berm, and along the Banana River. This section consists of a sparse understory of wax myrtle and Brazilian pepper. To the west of the Appellant's proposed development in the southwest corner of the property, the wetlands are disturbed hardwoods, consisting of Brazilian pepper, wax myrtle, and grape vine. A free flowing creek adjacent to the impoundment berm flows from the road to the Banana River.

On September 19, 2003, The Jacksonville District issued a public notice to place fill material in wetlands to widen the upland berm, which would facilitate access to the proposed residence along the Banana River. Additional fill in wetlands was proposed for the construction of the single family residence. To compensate for wetland impacts the Appellant proposed on-site wetland and upland enhancement and preservation. Enhancement activities consisted of the placement of equalizer pipes in the western half of the site which would reconnect the closed impoundment to the IRL, and the eradication of Brazilian pepper.

The Environmental Protection Agency (EPA) responded by two letters, one requesting an extension of the comment period to 30 days and another stating that the proposed project would cause direct, secondary, and cumulative impacts. EPA suggested the proposed house pad be located close to South Tropical Trail and the Appellant provide in-kind, on-site mitigation by removing the existing road/berm. If the project and mitigation package were not modified, EPA was "of the opinion that the proposal does not comply with the 404(b)(1) Guidelines" and should be denied.

By letter dated October 17, 2003, the National Marine Fisheries Service (NMFS) informed the Appellant that based on an on-site investigation and review, the proposed filling of wetlands and surface waters would permanently eliminate the water quality maintenance, trophic, and fishery habitat functions provided by the wetlands and would adversely affect an important area of Essential Fish Habitat (EFH) and affiliated Federally managed species. NMFS retained serious reservations concerning the appropriateness of the proposed action with regard to the purposes of the Clean Water Act and recommended that Department of the Army authorization not be granted.

In letters dated July 16, 2003, and December 5, 2003, and March 1, 2004, the District requested additional information regarding avoiding and minimizing impacts and provided comments received in response to the public notice. The Corps asserted that positioning the private residence and accoutrements close to the South Tropical Trail would locate the new facilities in a previously disturbed corridor and establish the maximum width of continuous wetland buffer between new construction and the Banana River. In letters dated September 2, 2003, and

January 6, 2004, the Appellant maintained that his proposed project constituted the least damaging practicable alternative, rather than developing adjacent to South Tropical Trail.

By letter dated March 1, 2004, the Corps notified the Appellant that it believed that the least environmentally damaging practicable alternative was to restrict development to the southwestern corner of the site. The Appellant was given the opportunity to modify the application or rebut this proposal.

By letter dated August 19, 2004, the Corps notified the Appellant of its intention to recommend that the permit be denied, though it again offered the opportunity to revise project plans to reflect the alternatives presented in the March 1, 2004, letter. In its letter dated September 28, 2004, Environmental Services requested written approval or denial of the proposed permit application, disagreeing with the District's determination that a less damaging practicable alternative exists.

The Corps Project Manager (PM) prepared an Environmental Assessment and Statement of Findings (EA/SOF) for the proposed work, dated May 5, 2005. The EA/SOF noted that the portion of the Banana River in question is considered a Class III water system, Outstanding Florida Water, and is designated "an estuary of national significance" and included in the National Estuary Program by EPA. The Corps determined that the proposed discharge did not comply with the 404(b)(1) Guidelines due to the availability of a less damaging practicable alternative of relocating the house pad to the southwestern corner of the site and the presumption that additional off-site alternatives exist. The District stated that since housing is a non-water dependent use it is presumed that there are alternative project sites available with less environmental impacts. The District also determined that as proposed, the project would cause or contribute to significant degradation of Aquatic Resources of National Importance and is contrary to the public interest.

In a letter dated May 5, 2004, the Jacksonville District Engineer denied the permit, stating that less environmentally damaging alternatives are available. The proposed project would, therefore, not be in compliance with the Section 404(b)(1) Guidelines. The proposed project did not comply with the Corps wetland policy, and was contrary to the overall general public interest.

By letter dated July 1, 2005, and on behalf of Mr. Van Horn, Environmental Services, appealed the permit denial. The site visit and appeal conference were held by my RO on October 20, 2005.

APPEAL EVALUATION, FINDINGS, and INSTRUCTIONS to the JACKSONVILLE DISTRICT ENGINEER (DE):

Reasons for the appeal are as presented by the appellant:

Reason 1: Contrary to the Jacksonville District's determination, the proposed project complies with 404(b)(1) Guidelines.

FINDING: This reason for appeal does not have merit.

ACTION: No further action is required.

DISCUSSION: As detailed below, the PM documented factual determinations which support the determination that the proposed discharges in wetlands associated with the construction of a private residence did not comply with the 404(b)(1) Guidelines.

In 1972, amendments to the Federal Water Pollution Control Act (later referred to as the Clean Water Act) added what is commonly called Section 404 authority (33 U.S.C. 1344) to the regulatory program. The Secretary of the Army, acting through the Chief of Engineers, is authorized to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into waters of the United States at specified disposal sites. Selection of such sites must comply with guidelines developed by the EPA in conjunction with the Secretary of the Army; these guidelines are known as the 404(b)(1) Guidelines. Compliance requirements state that no discharge of dredged or fill material in waters of the United States shall be permitted if there is a practicable alternative, if it violates other program requirements, if it causes or contributes to significant degradation of waters of the United States, or if appropriate and practicable steps have not been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.

The Appellant states that the proposed development complies with the 404(b)(1) Guidelines by utilizing the upland portions of the property for use as an access, locating the private residence in an area having disturbed wetland functions and values, and compensating for the unavoidable impacts. While the administrative record documents that the proposed project avoids impacting wetlands and does not violate other program requirements, there is substantial documentation in the record that the proposed activity would contribute to significant degradation of waters of the United States, and that a practicable alternative is available which would minimize the potential adverse impacts.

Clarifying information from the appeal conference and site investigation documented that both the Appellant's proposed project and the alternative advocated by the Corps would impact similar aquatic resources. The administrative record provided substantial documentation that even though the two sites are similar in their vegetation composition, the impacts associated with the discharge of dredged or fill material in the proposed site along the Banana River are different and constitute a significant degradation of waters of the United States due to lack of riparian buffer. The EA/SOF Evaluation of 404(b)(1) Guidelines and Public Interest Review, documented the District's factual determinations regarding the ecological importance of the IRL system and the direct/cumulative impacts to water quality, flood protection, Essential Fish Habitat (EFH) and other fish and wildlife values.

Compliance requirements also state that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less

adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. The EA's Evaluation of 404(b)(1) Guidelines, documented that the proposed discharges in wetlands associated with the construction of a private residence along the Banana River does not require access, or proximity to, or sitting within the special aquatic site in question to fulfill its basic purpose (i.e., is not water dependent).

The Appellant attempted to rebut this presumption by stating the proposed project impacts have been minimized and have fewer impacts than if the development were to occur adjacent to South Tropical Trail. While the Corps acknowledged that the relocation of the house pad westward and adjacent to South Tropical Trail might increase the acreage of impacts to wetlands, it provided sufficient documentation regarding the cumulative and secondary impacts of developing estuarine wetlands without riparian buffers, which would cause or contribute to greater significant degradation to Aquatic Resources of National Importance. Additionally, the EA documented the ecological importance of the wetlands as a buffer between development and the IRL. The District's preferred alternative would retain a buffer between the development and the IRL and stem future development in wetland areas abutting the IRL. The Appellant was given the opportunity, but declined, to revise the original proposal.

In conclusion, the Jacksonville District correctly followed the 404(b)(1) Guidelines when determining that the project (construction of a private residence and access road) would cause or contribute to significant degradation to waters of the United States and suggesting a less environmentally damaging alternative. The PM coordinated with State and Federal agencies, factored information on cumulative effects into its evaluation, and adjusted its decision appropriately. This reason for appeal has no merit.

Reason 2: Contrary to the Jacksonville District's determination, the proposed site plan constitutes the least damaging practicable alternative.

FINDING: This reason for appeal does not have merit.

ACTION: No further action required.

DISCUSSION: The Appellant did not provide sufficient data or documentation to establish that its proposed alternative is a less environmentally damaging practicable alternative. Instead, there is substantial documentation in the administrative record to support the District's determination that a less environmentally damaging practicable alternative is available, on site.

In letters dated December 5, 2003, March 1, 2004, and August 19, 2004, the PM notified the Appellant that there appears to be less damaging alternatives and recommended the project be revised. The Appellant responded that the alternate alternative road would be impracticable and that positioning his residence close to the South Tropical Trail was more damaging because of potential impacts to mangrove-dominated swamp and would require more fill than his proposed development. Clarifying information obtained in the appeal site investigation and conference established that the District's suggested alternative would not damage mangroves. As discussed

discussed in the previous reason for appeal, the EA/SOF Evaluation of 404(b)(1) Guidelines and Public Interest Review, documented the ecological importance of the IRL system as an estuary of national significance, and the direct/cumulative impacts to water quality, flood protection, EFH, and fish and wildlife values.

The Corps properly utilized the allowed flexibility in the application of the 404(b)(1) Guidelines. The 404(b)(1) Guidelines, General Policies for Evaluating Permit Applications [33 CFR 320.4(r)(1)(i)] state:

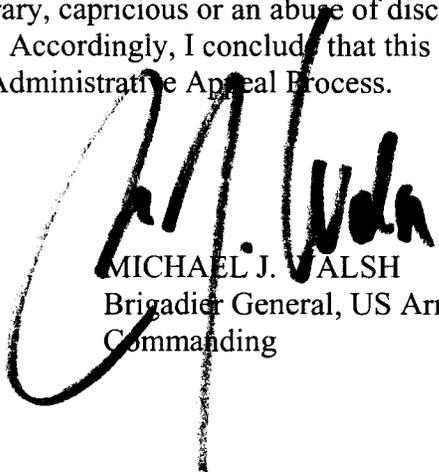
" ...the District Engineer may require minor project modifications. Minor project modifications are those that are considered feasible...will result in a project that generally meets the applicant's purpose and need. Such modifications can include reduction in scope and size..."

The modified, relocated project would have provided for the applicant's basic and overall project purposes. This reason for appeal has no merit.

CONCLUSION: After reviewing the information contained in the administrative record, and information obtained at the site visit and appeals conference, I conclude there is substantial evidence in the administrative record to support the District's decision to deny the permit, and that this determination was not arbitrary, capricious or an abuse of discretion, was not plainly contrary to applicable law or policy. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

FEB 15 2008

(Date)



MICHAEL J. WALSH
Brigadier General, US Army
Commanding