

ADMINISTRATIVE APPEAL DECISION

FILE NO. 200100096 (LP-TKA)

JACKSONVILLE DISTRICT

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

Appellant Representative: Alex Cardenas represented by Bruce Jerner, of Jerner & Associates,
Inc.

Receipt of Request for Appeal (RFA): October 10, 2002

Appeal Conference Date: February 25, 2003

Site Visit Date: February 25, 2003

Background Information: Mr. Alex Cardenas requested a permit to perform work in navigable waters of the United States. On September 25, 2002, the Jacksonville District sent a Department of the Army Standard Permit to Mr. Cardenas. The permitted work is for the construction of boat docks in a canal located along lots M, N, P, and L-7 of the Queens Cove subdivision, in St. Lucie County, Florida. All of the lots front on a canal system off of the Indian River. The shoreline of lots M, N, and P are dominated by red mangroves. There is a narrow strip of upland, just in from the MHWL, then more mangroves. Lot L-7 is much the same - its habitat is composed of red mangrove, white mangrove, and black mangrove wetlands. All 4 lots are platted as single-family residential lots, though because of the presence of mangrove swamp on the lots, none is deemed by the Corps to have sufficient upland area to construct residential homes. The Standard Permit contains a Special Condition (Special Condition #4 a through e) that requires the permittee to place a deed restriction on the subject lots to ensure that the wetlands on these sites are preserved in perpetuity.

Summary of Decision: I find that the appeal does have merit. I find that the mitigation imposed by the District in the proffered permit was not in compliance with applicable regulations and policy.

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

Reason(s) for the appeal as presented by the appellant:

Reason 1: The appellant states:

The permittee appeals the Special Conditions #4 (a – e) of the proffered permit.... These conditions require deed restrictions be placed on each lot to prohibit future development. To my knowledge, these deed restrictions have not been required for any similar residential dock structures in the Queens Cove subdivision or the entire Stuart Regulatory

area. Project impacts are minimal.... No mitigation should be required to offset the de minimus impacts of these projects [sic].

It is my opinion that the deed restriction is a pre-emptive attempt to prohibit future development of the remaining portions of the properties which are predominantly wetlands. I understand the Corps concern over future development of these wetlands, however, I question a Corps policy that singles out and inequitably burdens a property owner simply because they have wetlands occurring on their property. The deed restriction process requires the permittee to procure boundary surveys; prepare legal language, obtain title insurance and record public notices. The cost of this is easily \$1000 per parcel. The lengthy and relatively costly two year processing timeframe to obtain Corps permits *and* this added administrative burden create undue financial hardship on the permittee. The permittee simply requests equitable Corps review and issuance conditions [sic] similar to all docking structures in the Stuart Regulatory area.

In summary, the permittee believes he received disparate treatment in the mitigation conditions that were included in his permit, and that they are an inappropriate attempt to preempt future development, and he requests the removal of Special Condition #4 (a through e).

FINDING: This reason for appeal does have merit.

ACTION: That the Jacksonville District revisit the mitigation conditions of the permit to remove all deed restriction requirements that are not based on either compensatory mitigation or requirements necessary to ensure that the activity is not contrary to the public interest, and that the basis for any remaining on-site mitigation be documented in the administrative record.

DISCUSSION: A Department of the Army Standard Permit was proffered for this project. What is being appealed is a permit condition requiring the protection, in perpetuity, of on-site wetlands as mitigation areas. Jacksonville District Regulatory personnel must evaluate every project in the context of the physical characteristics of the site including direct, indirect, and cumulative impacts. It is a standard procedure to require mitigation for resources that will be negatively impacted by permit issuance.

Mitigation is an important aspect of the review and balancing process on many Department of the Army permit applications. Consideration of mitigation will occur throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses.

30 C.F.R. § 320.4(r)(1). Additional mitigation measures may be required as a result of the public interest review process, but “[o]nly those measures required to ensure that the project is not contrary to the public interest may be required under this subparagraph.” 30 C.F.R. § 320.4(r)(1)(iii). Further,

All compensatory mitigation will be for significant resource losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment. Also, all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable. District

engineers will require all forms of mitigation, including compensatory mitigation, only as provided in paragraphs (r)(1) (i) through (iii) of this section. Additional mitigation may be added at the applicants' request.

30 C.F.R. § 320.4(r)(2).

The MEMORANDUM OF AGREEMENT BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF THE ARMY CONCERNING THE DETERMINATION OF MITIGATION UNDER THE CLEAN WATER ACT SECTION 404(b)(1) GUIDELINES February 6, 1990 also addresses compensatory mitigation:

“Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required.”

The Corps' REGULATORY GUIDANCE LETTER No. 02-2, Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, Dated: 24 December 2002 , states that

Under existing law the Corps requires compensatory mitigation to replace aquatic resource functions unavoidably lost or adversely affected by authorized activities... Permittees must provide appropriate and practicable mitigation for authorized impacts to aquatic resources in accordance with the laws and regulations [¶ 1.a]...

Districts will determine what level of mitigation is “appropriate” based upon the functions lost or adversely affected as a result of impacts to aquatic resources. [¶ 2.c]...

The wetlands, uplands, riparian areas, or other aquatic resources in a mitigation project should be permanently protected, in most cases, with appropriate real estate instruments, e.g., conservation easements, deed restrictions [¶ 3.g]

In this case, the EPA initially recommended permit denial unless the appellant placed conservation restrictions over the wetlands portion of the properties in question. The EPA later changed its position, stating that it would not object provided the permit was conditioned on the permittee's obligation to include in any deed transferring the lots a notice that the lots included wetlands covered by Clean Water Act permitting requirements, and that the lots may not be suitable for residential development.

In its 25 September 2002 Statement of Findings (SOF), the Corps determined that the “[w]etland impacts associated with the project are insignificant and include minor trimming of mangroves,” and that “there should be no adverse cumulative or secondary impacts as a result of the project.” The appellant was required to place deed restrictions on approximately 0.7 acres of mangrove wetlands on the 4 lots to ensure that they would remain in their natural state in perpetuity with their only use being as a natural area. The determination of the amount of mitigation required for the permitted activity was reportedly made using the Estuarine Wetlands Rapid Assessment Program (WRAP), though there is no calculation or basis set forth in the record on appeal for the 0.7 acre figure.

At the appeal conference, the Jacksonville District explained that it did not require deed restrictions on other lots in the Queens Cove subdivision because those were upland lots. They have, however, required deed restrictions in the Stuart area where they are concerned about cumulative impacts. The appellant responded that his point was that this type of mitigation had not been required for dock structures (it is not clear whether the District has required this type of mitigation in the Stuart area for dock structures). The Jacksonville District further explained that the deed restriction was not compensatory mitigation, but protection from cumulative impacts. It agreed at the conference with the appellant's characterization of the deed restriction as a preemptive attempt to prohibit future development of the remaining wetland portions of the properties.

The record and testimony at the appeal conference do not support the imposition of the permit condition requiring deed restrictions on appellant's lots. At the hearing, the Jacksonville District conceded the appellant's point that the 0.7 acre deed restriction was not imposed as compensatory mitigation after avoidance and minimization. The SOF acknowledged that the wetland impacts were insignificant. Because the 0.7 acre deed restriction is not compensatory mitigation, it is unclear how the WRAP was the basis for the mitigation imposed in the proffered permit. This is not a situation where the threat of development was taken into account in determining whether preservation is an appropriate compensatory mitigation approach, but one where the District instead imposed the mitigation to preempt possible cumulative impacts from future development.

The District's position at the hearing as to the need for protection from cumulative effects was contradicted by the SOF. The SOF states that "there should be no adverse cumulative or secondary impacts as a result of the project." Corps' regulations provide that if additional mitigation is imposed pursuant to the public interest review, it must be limited to that necessary to ensure that the project is not contrary to the public interest. There is no documentation in the record that the mitigation was necessitated by the public interest in this case, or regarding the amount of mitigation that might be required on this basis. It is noted that the EPA withdrew its demand for conservation restrictions.

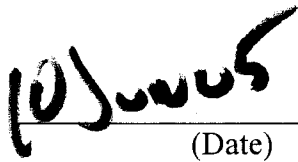
As for the costs associated with providing mitigation, where appropriate, it is inescapable that there will be some expense related to providing appropriate real estate instruments such as deed restrictions. Aside from the issue of the propriety of the underlying mitigation, itself, the expense involved here does not appear to be arbitrary or capricious.

Information Received and it's Disposition during the Appeal Review:

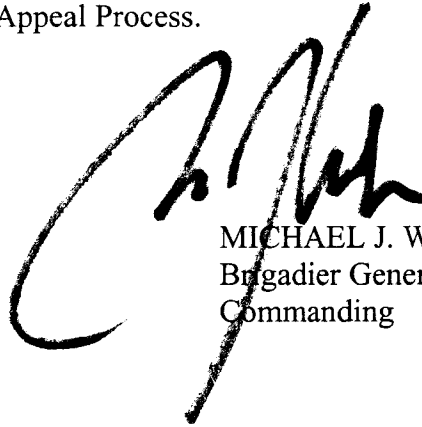
- 1) The Jacksonville District furnished a copy of the Administrative Record for the subject application.
- 2) The appellant furnished a copy of the proffered permit with his Request for Appeal.

Conclusion: After reviewing and evaluating the administrative record provided by the Jacksonville District, I conclude that the District's decision to impose a permit condition requiring deed restrictions on all of the wetland acreage of appellant's lots for non-compensatory purposes was contrary to applicable law as expressed in Corps regulations and policy. Accordingly, I conclude that this Request for Appeal does have merit.

This concludes the Administrative Appeal Process.



(Date)



MICHAEL J. WALSH
Brigadier General, US Army
Commanding