

ADMINISTRATIVE APPEAL DECISION

PROFFERED PERMIT

ED LEWIS LLC.

FILE NUMBER 2007-4571

JACKSONVILLE DISTRICT

MARCH 11, 2009

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

Appellant: Salvador Gutierrez Jr., President, Ed Lewis LLC.

Receipt of Request for Appeal (RFA): January 2, 2009

Appeal Accepted: January 23, 2009

Appeal Conference/Site Visit: February 20, 2009

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

Background Information: The Jacksonville District received a permit application from the Appellant on November 18, 2008, to place approximately 244 cubic yards of fill material over 3,875 square feet of wetlands on their residential lot. The Appellant proposes to construct a single-family residence and appurtenances and surround it with a stormwater retaining wall while preserving 9,302 square feet of wetlands adjacent to navigable waters of the US. The proposed work includes constructing a 780 square foot T-dock with a 4-foot by 160-foot elevated access terminal platform also over navigable waters of the US. The project site is located adjacent to Sacarma Bay, on Rogers Lane, legally described as Lot 14 and adjacent parcel, Block 13 of the Cutthroat Harbor Estate First Addition Subdivision, in Section 33, Township 66 South, Range 28 East, Cudjoe Key, Monroe County, Florida.

According to the District's Statement of Findings (SOF), the property is undeveloped and contains wetlands. The 1987 manual criteria and associated Data form were used to establish the basis for the Corps JD. The wetland on the property is a tidally-influenced saltwater system, subject to the ebb and flow of tidal waters. The lot consists of a black mangrove scrub marsh with periphyton covering un-vegetated areas. The

herbaceous layer contains two species of glassworts (OBL) (*Salicornia bigelovii* and *Sarcocornia perennis*), saltwort (OBL) (*Batis maritime*), sea shore dropseed (FACW+) (*Sporobolus virginicus*), and Silver head (FACW+) (*Blutaparon vermiculare*). The tree and shrub layers contain black mangrove (OBL) (*Avicennia germinans*), green buttonwood (FACW+) (*Conocarpus erectus*) white mangrove (FACW+) (*Languncularia racemosa*). The shoreline consists of a mature mangrove fringe. Approximately 25-feet of the shoreline is disturbed and vegetation has been cut. This area supports submerged aquatic resources, including *Thalassia testudinum* located on a shallow submerged shelf. Adjacent to this area is a dense fringe of red mangroves.

Herbaceous ground cover and mangrove pneumatophores are presumed to have been present in the cleared area based on their prevalence on the entire lot. A few pieces of asphalt and a small mound of woodchips were deposited on the site.

A healthy and abundant mat of periphyton is present in areas void of herbaceous groundcover. During a previous site visit, over 2 inches of standing water was present in the areas void of vegetation. Rack lines with flotsam debris were present throughout the entire lot.

The District proffered a Department of Army (DA) permit to the Appellants on December 19, 2008. To mitigate for project impacts the Appellant was asked to make a monetary contribution of \$34,849.36 to the Keys Environmental Restoration Fund (KERF). The Appellant disagreed with the cost to mitigate for the project impacts and appealed the decision to the South Atlantic Division Commander on January 2, 2009. The South Atlantic Division Appeal Officer accepted the appeal on January 23, 2009.

Site Visit: Michael Bell, the Appellant, and Appellant Representative Ron Ballentine, met District Project Manager (PM) Susan Blass, Project Manager Rosa Rodriguez and District Team Leader Paul Kruger (TL) on-site. The purpose of the site visit was to review the area and allow the participants to freely discuss all relevant issues and material facts associated with the appeal. The RO reviewed the project history then led the District representatives on the project site. The Appellant declined to walk the property with the RO and the District representatives.

The existing condition of the Appellant's lot was adequately reflected the description of the site in the EA/SOF and in the Background Information above. The lot was dry during the site visit; however, hydrologic indicators on the site demonstrated extended periods of inundation.

After returning to the vehicles the RO noticed that the Appellant had a photographer and a hand held voice recorder. The RO told the Appellant that he was not allowed to make a verbatim recording of the meeting (see 33 CFR 331.7(e)(7)). The Appellant offered the RO an opportunity to view a PowerPoint presentation which demonstrated his reasons for appeal. The presentation contained several lots with high quality wetlands where the District issued permits with lower in-lieu fee mitigation requirements. The District asked the Appellant for the acreages of the environmental impacts on each lot in

the presentation so a better comparison could be made. The Appellant had no impact information.

The RO also asked the District to review the calculations concerning of how the in-lieu-mitigation fee was established (KEYMIG). During this review it became apparent that the District had not provided the KEYMIG calculations to the Appellant. The RO asked the District to send the KEYMIG calculations to the Appellant and told the Appellant he had two weeks to review this information and respond in writing to the RO if he wanted to further dispute any of the findings.

APPEAL EVALUATION, FINDINGS and INSTRUCTIONS to the Jacksonville District Engineer (DE):

Reason for Appeal Transferred Verbatim from the RFA: I have prepared a power point presentation depicting the inconsistency of your process for determining mitigation fees. I am working with Senator Nelson's office and will be carbon copying this letter to their office. I have received through a FOIA (freedom of information act) a list of mitigation fees compiled from 1997 to present date. Many of these fees are completely inconsistent with the fee charged in my project and I wish to review all methods of fee determination used in compiling the amounts determined for payment. I will prove that all fees [sic] totals were arrived at through a totally arbitrary and capricious method.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: No dispute exists between the Appellants and the District that steps one and two of the required sequencing to avoid and minimize wetland impacts have been met and that there are no other practicable alternative locations for the Appellant's proposals. The foremost reason for appeal is compensatory mitigation. Specifically, the Appellant believes other permitted wetland lots in the Florida Keys contain similar types of wetland values but each lot he has researched was subsequently required to make a smaller monetary contribution to the KERF for wetland mitigation. According to the Special Conditions of the proffered permit, the Appellants were offered the opportunity to mitigate for the project impacts by paying \$34,849.36 to the KERF, while the owners of other lots were required to pay lower amounts for compensatory mitigation for filling similar types of wetlands. The Appellant did not provide the impacts from the selected lots.

The RO acknowledged during the site meeting that the Corps of Engineers evaluates each permit on its own merits. However, if this permit decision is not supported by facts in the administrative record or appears to be inconsistent with District decisions in similar situations, then the appeal may have merit. The RO reviewed the Appellant's PowerPoint point presentation and asked the District about the mitigation fees paid by the other lot owners. The District then asked the Appellant if he knew the amount of

impacts to regulated wetlands and waters from the lots in his he PowerPoint presentation so a comparison could be made. The Appellant did not know the impacts to regulated resources which would require mitigation. The District stated that they could not compare the mitigation fees without knowing the regulated impacts and individual circumstances.

The District's *Functional Assessment KEYMIG Worksheet* (Worksheet) identifies how the adverse impacts for the Appellant's proposed project were calculated. The impact evaluations were undertaken with a view toward being able to assign an identified debit to be offset by a credit. The method for assessing debits should be comparable to the method used for assigning credits. Corps regulatory program project managers are responsible for using consistent, district-approved methods for assessing and assigning credits or debits in terms of amount, type, and location. That is what happened in this case. The District used the Worksheet in the administrative record to provide the functional assessment of the site. The outcome is derived by inserting information into equations on the worksheet.

During the appeal conference, the TL and PM explained the impact assessment by leading the group through the Worksheets contained in the administrative records. The District stated that the figures were accurate and the assessment was consistent with other functional assessments conducted in the past. It was noted that another recent appeal with similar impacts and wetlands in Cudjoe Key (Richardson) had similar mitigation in-lieu fee amounts.

In conclusion, the compensatory mitigation fees the Appellant would pay are fair and supported in the Administrative Record. This appeal does not have merit.

The District provided the Appellant with the opportunity to provide mitigation without using the KERF. The Appellant discussed other mitigation options but decided to appeal the in-lieu-fee amount without offering an alternate mitigation site and plan with corresponding mitigation reporting requirements.

For the record, the District representatives explained the importance of the Florida Keys ecosystem, the history of moorage facilities in the area and the current review process for moorage facilities. They recognized the exceptional natural environment present in the Florida Keys, and that great care is required in the evaluation of permits to preserve and protect this valuable but fragile ecosystem. The waters surrounding the Florida Keys are designated as a National Marine Sanctuary and Aquatic Preserve.

The TL further stated that over time, the State of Florida, including the Florida Keys, has lost over 50 percent of its mangrove habitat. Losses have resulted from both large-scale developments as well as the cumulative losses over time resulting from individual property owners who wish to live by the water. In the Florida Keys, it is this cumulative loss, in combination with the high quality aquatic habitat that makes it incumbent upon the District to evaluate each dock application carefully and assign appropriate compensatory mitigation.

CONCLUSION: As my final decision on the merits of the appeal, I conclude substantial evidence exists in the administrative record to support the proffered permit conditions and conclusions, which are in accordance with applicable laws, regulations and policy guidance. The District's determination was not arbitrary, capricious or an abuse of discretion and 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.



Joseph Schroedel
Brigadier General, US Army
Commanding