

ADMINISTRATIVE APPEAL DECISION

FILE NUMBER AL98-00542-L

MOBILE DISTRICT

May 17, 2002

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

Appellant Representative: Mr. Frank Hughes, Orange Beach, Alabama.

Receipt of Request For Appeal (RFA): September 28, 2001.

Appeal Conference Date: December 11, 2001. **Site Visit Date:** December 11, 2001.

Proposed Project: The project is a proposed 34 home residential subdivision located on Robinson Island, an approximate 14 acre private island owned by Mr. Frank A. Hughes. The project involves the dredging of 2,190 cubic yards of sand from an area approximately 130 feet by 130 feet on the northeast end of the island; to a depth of 3.5 feet below mean low water. A community pier with 19 boat slips is proposed at the proposed dredge site. A 24-foot by 30-foot boat slip would also be built adjacent to the pier to accommodate supply boats. Twenty-nine 30-foot by 12-foot-long piers would be constructed; one at each of 29 proposed residential lots along the shoreline of Robinson Island. Pile-supported, 5-foot-wide wooden walkways, where needed, without placement of fill, would be built over wetlands to access the piers from the proposed homes. Riprap is proposed, as needed, below the mean low tide line to control erosion. No riprap materials are proposed in fringe marsh areas. A hard-surfaced, 14-foot-wide road is proposed from the northeast to the southwest ends of the island with no associated wetland fill (approximately 200 feet of marsh in the central interior of the island would be bridged). All wetlands within the center of Robinson Island are to be preserved in perpetuity by deed restriction. All upland areas located in the center portion of the island, between Lots 8, 9, 22, and 23, excluding the road, would be set aside for a period of six years, at which time they could be used for development. This proposed project is considered to be interdependent with the application for Baldwin County Electric Membership Corporation (EMC) (AL98-0541-L) (See below).

Background Information: An application from Mr. Frank A. Hughes (AL98-0542-L) was received February 18, 1998 and considered complete for evaluation on March 21, 1998. A public notice was published jointly with the Alabama Department of Environmental Management on March 27, 1998 for Mr. Frank A. Hughes (AL98-00542-L). The public notice stated that the applicant proposed to develop Robinson Island into a private residential island. Thirty-eight waterfront lots, a community pier, swimming pool, and tennis courts were proposed. Property owners would access the island via their private boats. The notice stated that Department of the Army (DOA) authorization was sought to construct a common pier that would

be available to homeowners to moor their boats. A hard surface road was proposed to serve the residents of the island and the mode of transportation on the island would be restricted to golf carts, bicycles, or walking. Automobiles would not be allowed as a means of transportation on the island. Approximately 200 linear feet of the road was proposed to bridge jurisdictional wetlands. The notice stated that DOA authorization was sought for thirty-eight 30- by 12-foot-long boat docks, one for each lot. To prevent future beach erosion, DOA authorization was sought for installation of riprap around the north and the south ends of the island, as well as, intermittent spot placement on the east and west sides of the island. No bulkheads were proposed for this development. DOA authorization was sought for dredging a 25- by 30-foot boat slip on the north end of the island to moor the supply boat to be used to furnish the island with supplies, building materials, and equipment. The mainland loading site for the supply boat would be Griffith's Marina located on Terry Cove. Also, dredging was proposed to a depth of -3 feet, mean low tide to remove sandbars adjacent to the island in areas near the proposed individual piers and community pier. The applicant stated that the sandbars were navigational hazards and the dredging would allow for proper boat mooring and safer boat operation. The proposed dredging would result in the removal of approximately 7,500 cubic yards of sand that would be deposited on the uplands located on the island. A submerged vegetation survey was submitted with the application that showed that no aquatic vegetation exists within the pier area nor in the areas proposed to be dredged. In response to State and Federal agency comments objecting to the proposed work, the applicant made six formal proposed modifications to the project in attempts to reduce environmental impacts. The modifications in general, resulted in reducing the number of lots, preserving areas with wetlands, reducing and eliminating some proposed areas to be dredged, and reducing the area of proposed riprap. In the final modification dated May 5, 1999 the applicant's proposal was as described above (Proposed Project).

An application for Baldwin County EMC (AL98-0541-L) was received February 17, 1998 and considered complete for evaluation on February 27, 1998. A public notice was published jointly with the Alabama Department of Environmental Management on March 28, 1998 for Baldwin County, EMC (AL98-00541-L). The applicant proposed to install four 5-inch-diameter PVC conduits, between the mainland and Robinson Island, 4 to 6 feet below the water bottom, using a water jet and/or jet plow. Two 15 kV power cables would be installed in one of the conduits. Spare conduits may be leased/sold to other utilities (phone, water, etc.). The conduits would be placed in a corridor leased from the State of Alabama.

A Department of the Army (DOA) permit was issued to Mr. Hughes on September 23, 1999. Prior to issuance, the US Fish and Wildlife Service (FWS) Field Office requested that the US Army Corps of Engineers' tentative permit decision be elevated to the Assistant Secretary of the Army (Civil Works) (ASA(CW)) in accordance with the 1992 Memorandum of Agreement (MOA) between the DOA and the Department of the Interior (DOI), pursuant to Section 404(q) of the Clean Water Act. Failure of the FWS Regional Office to meet time deadlines set by the MOA resulted in the elevation request not being forwarded to the DOI Headquarters. A Notice of Intent to issue a DOA permit to Baldwin County EMC was sent to the Regional Director of FWS on November 4, 1999. On December 8, 1999 the DOI requested that the ASA/CW elevate for his review the District's tentative permit decision for the Baldwin EMC permit and that the DOA permit issued to Mr. Hughes also be reviewed due to the interdependency of the two projects. The ASA/CW concurred with the DOI elevation request. On January 7, 2000 the

Headquarters US Army Corps of Engineers (HQUSACE), as requested by ASA(CW) verbally directed the District to suspend the Hughes permit pending a policy review. Mr. Hughes' permit was suspended on January 18, 2000. On October 20, 2000 the HQUSACE provided its review findings and provided the following guidance under which the District would reevaluate its permit decision: (1) give full consideration to FWS recommendations concerning the bird rookery on Robinson Island, and recommendations to minimize impacts; (2) perform a new 404(b)(1) Guidelines analysis and public interest review based on an expanded scope of analysis, including indirect effects of the entire upland development; (3) develop a new project purpose statement; (4) revise and revisit the documentation for Mr. Hughes' suspended permit and Baldwin County EMC pending permit, providing additional documentation of the District evaluation; and (5) make a final decision regarding both permits concurrently. After additional evaluation of the proposed project under an expanded scope of analysis, to include the bird rookery and other aquatic resources, in accordance with the above guidance, the Environmental Assessment and Section 404(b)(1) Guidelines evaluation were revised and combined for the two permit requests.

On August 1, 2001 the District issued the permit to Baldwin County EMC (AL98-0541-L) and reinstated the permit to Frank A. Hughes (AL98-00542-L), with modified Special Conditions as follows:

- a. Special Condition "b": Except for the permitted 14-foot-wide hard-surfaced road, construction on all upland areas between Lots 8, 9, 22, and 23, as shown on Figure 2 of the DOA permit, will be prohibited. This condition may be reviewed after no less than six years for possible modification or retraction, if requested by the permittee.
- b. Outdoor construction on lots 9 thru 22 is permitted to occur only during the period of 15 July thru 15 February each year. There is no restriction on indoor construction.
- c. No construction will occur within 130 feet of any active heron nest, defined by having nesting herons, heron eggs or chicks.
- d. Trees with heron nests will not be removed if such trees have had heron activity during the previous one-year period, nor will the nests in such trees be disturbed in any way.
- e. The island's road layout will be modified to comply with the above conditions, as well as to avoid heron nesting trees and wetlands to the maximum extent possible.
- f. All lots will maintain a 20-foot-wide vegetated buffer between landscaped areas and wetlands and waterfront areas. The vegetated buffer shall consist of native vegetation.

Summary of Decision: I find that the appeal does not have merit. I find that the District in its re-evaluation, under an expanded scope of analysis, did appropriately condition the permit to minimize the unavoidable impacts of the proposed activity.

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

Reasons for the appeal as presented by the appellant: In his Request for Appeal, dated September 19, 2001 Mr. Hughes initially identified three reasons for the appeal. One of these actually consisted of three reasons, each of which will be addressed as a reason for appeal. Subsequently, Mr. Hughes identified six additional reasons. These 11 reasons are listed and addressed in the order they are listed in the Request for Appeal.

Reason 1: “Condition (E) The island road layout will be modified to avoid Blue Heron nesting trees and wetlands.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: Condition “e” of Modification Number 2 to DOA Permit Number AL98-00542-L, Frank A. Hughes, states, “The island’s road will be modified to comply with the above conditions, as well as to avoid heron nesting trees and wetlands to the maximum extent possible.”

Mr. Hughes further explains this reason, “Permit...A[L]98-00542-L...was approved and issued on September 23, 1998...At that time, Blue Herons were roosting in live pine trees located in the one and one-half acre interior...wetlands in the center of the island. Since the permit issue date...the wetlands were inundated with salt water from Hurricane Georges, which killed all of the wetland’s trees. The trees have died and the Blue Herons have abandoned this area, therefore, there is no reason to add conditions (E) and (F) as modifications to the ...reinstated...permit.” He continued, “Since Blue Herons are no longer in the wetlands and [the] applicant is authorized to cross wetlands by Nationwide Permit, as well as being approved on this reinstated permit, this condition should be eliminated.”

In his September 19, 2001 letter (page 5) Mr. Hughes explained that a July 16, 2001 meeting was held at the Mobile District Regulatory Office “to discuss and possibly come to an agreement on the Modification recommendations for the suspended...permit.” He stated, “The applicant left the meeting accepting the outlined recommendations...with the following changes...” (Page 6) “Road layout will avoid Blue Heron nesting trees and wetlands to the maximum.”

In the proceedings of the Appeal Conference, ADMINISTRATIVE APPEAL MR. FRANK ALLEN HUGHES DECEMBER 11, 2001 (page 23) Mr. Hughes stated, “ On condition E, per se, I don’t have any problem with that. That’s to my betterment anyway, and I plan to avoid wetlands to the maximum. If I avoid them, I don’t have to cross them. And if I cross them, I’ve got to bridge over them. So, expense wise, if nothing else, I will delete to the maximum I can from crossing wetlands.”

Reason 2: “Condition (F)...All lots will maintain a 20[-] foot [-] wide vegetative buffer from wetlands.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: Condition “f” of Modification Number 2 to DOA Permit Number AL98-00542-L, Frank A. Hughes, states, “All lots will maintain a 20-foot-wide vegetated buffer between landscaped areas and wetlands and waterfront areas. The vegetated buffer shall consist of native vegetation.

In his September 19, 2001 letter (page 1) Mr. Hughes stated, “since trees are no longer in wetlands and therefore herons are not in the wetland trees, I see no reason for a 20 foot setback from wetlands.” He added, “At the request of ...[the] Corps and [Alabama Department of Environmental Management] ADEM, [the] permittee had previously altered the permit application to establish a 5 foot setback from wetlands and permit was issued based on this alteration...The Blue Heron are the reason for initiation Modification 2 to the permit, and it is obvious that the 20 ft setback from wetlands has been established by the Corps of Engineers in consideration of the Blue Herons, and now that they are no longer using the wetlands, there should be no valid reason for this extended setback.” Mr. Hughes continued, “other permits in the area are approved with a 0 or 5 foot setback...a 20 foot setback would be prejudiced against this project...applicant believes that the developable lot reduction is the true intent of [FWS] and the Corps...and is the real reason for establishing a 20 ft ...setback.”

In his letter Mr. Hughes discussed how he had made concessions to his proposal by reducing the development from 38 lots to 29 lots and offering to delay construction on 5 upland lots for six years. He stated, “A 20 ft wide setback rather than the permitted 5 foot setback would certainly create a hardship on the developer and this condition is an unreasonable, unfair [,] and unwarranted condition in the modification of this permit.”

The statement, “permitted 5 foot setback” identified above derives for a September 28, 1999 letter from the Alabama Department of Environmental Management (ADEM) regarding the State’s decision pertaining to Clean Water Act, Section 401, water quality certification and Coastal Zone Management Act, coastal consistency determination for the subject project. In their letter, ADEM describes the proposed project and states, “Developable lots containing delineated wetland areas will maintain building setbacks a minimum of 5 feet outside the wetlands...” Emphasis added.

In their September 28, 1999 letter ADEM concurred with the applicant’s coastal consistency certification, with conditions, but waived water quality certification.

In the combined Environmental Assessment for both Baldwin County EMC (AL98-0541-L) and Mr. Frank A. Hughes (AL98-0542-L) the District addressed the issue of water quality by stating, “development of the island with the construction of houses and amenities could have a negative impact on the water quality surrounding the island and on the island wetlands. This could result from runoff of contaminants from the developed area. Because no decision on impacts to water quality was issued by ADEM, a special condition should be placed on the permit to insure water quality is not degraded. A twenty-foot buffer around all tidal, wetland and waterfront areas, limited to natural vegetation only, is expected to maintain water quality.”

The District was required to, “perform a new 404(b)(1) Guidelines analysis and public interest review based on an expanded scope of analysis, including indirect effects of the entire upland development...”

Regulations at 33 CFR 320.4(a)(1) state, “The decision 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...All factors which may be relevant to the proposal must be considered including the cumulative impacts thereof: among those are...water quality.”

Reason 3: “Condition (B) No outdoor construction will be allowed on lots 9 through 22 (14 of the 29 permitted lots) from February 15 through July 15 (5 months each year).”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: Condition “b” of Modification Number 2 to DOA Permit Number AL98-00542-L, Frank A. Hughes, states, “Outdoor construction on lots 9 thru 22 is permitted to occur only during the period of 15 July thru 15 February each year. There is no restriction on indoor construction.”

In his September 19, 2001 letter (page 3) Mr. Hughes stated, “The Corps of Engineers has allowed only seven months in which to clear and prepare the home[.]site, construct a quality home complete with landscaping and complete the outdoor construction work required...In the Orange Beach area, it takes eight to ten months to complete the quality of house envisioned for this island, and being an island necessitates additional construction time.” Mr. Hughes continued, “I challenge the Corps of Engineers to explain to...me the authority which gives them the right to restrict the owners use of upland property for the consideration of the Blue Heron.”

In his October 20, 2000 Memorandum for the Commander, Mobile District, the Deputy Commander for Civil Works, Headquarters USACE, concluded, “we agree with the FWS that the District should expand its NEPA scope of analysis and evaluate the secondary and cumulative impacts of the entire island development to the bird rookery in the center of the island and the adjoining marine waters. We believe that these impacts, resulting from the construction of the residential subdivision, would not occur but for the installation of utilities and dredging and docking facilities which induce home construction.” Emphasis added.

In addition, the Deputy Commander for Civil Works, Headquarters USACE, found and directed that, “The District should give full consideration to the information provided by FWS regarding the bird rookery. This review should include the FWS information on the regional importance of the rookery as well as the recommendations to minimize impacts of the proposed residential subdivision on the rookery...The District should perform a new 404(b)(1) Guidelines analysis and public interest review based on the expanded scope of analysis, which includes consideration of the indirect effects of the entire upland development which is expected to be caused by the permitted activities. This reevaluation should consider any practicable reductions and/or

revisions to the proposed residential subdivision, which would minimize the potential loss of the bird rookery and effects on adjoining marine waters.” Emphasis added.

The District requested that Mr. Hughes provide an expert evaluation, by a qualified ornithologist, of the current status of the rookery, including an estimate of the number and species of birds, and the number of nests on the island. It was also requested that the professional opinion include ways to reduce environmental impacts to the rookery.

By letter dated November 12, 2000 Dr. Allen Tubbs, Assistant Professor of Biology at the University of South Alabama, provided the requested evaluation on behalf of Mr. Hughes. He recommended that major construction should be avoided during the mid-March through mid-June period and that all trees with substantial nests should be retained. Dr. Tubbs provided a letter with supplemental information dated January 25, 2001. In that letter he stated that he had no recommendation on the numbers of lots or homes that should be permitted on the island. He stated that decision is up to the developer and permitting agencies. He reiterated his previous statement that all trees with substantial nests should be retained. He stated that the proximity of the lots or homes to heron nests is difficult to ascertain.

By letter dated January 29, 2001 the FWS disagreed that avoiding construction on the northeast two-thirds of the island would mitigate concerns about impacts to the rookery.

Dr. Tubbs offered a rebuttal of the FWS comments in a letter dated April 17, 2001. In that letter he pointed out that his previous letter of January 25, 2001 was an amendment to the letter of November 12, 2000. The amendment was, among other things, a clarification regarding that portion of the island that should be avoided during critical nesting times. He stated that his amended recommendation was intended to mitigate the subjective distance buffer based on cited literature that would prohibit construction during the GBH nesting period. Dr. Tubbs stated that the FWS recommendation to avoid construction activities during the nesting season, February 15 through September 30, would not be supported by any prominent authority or birder. He stated that all current citations on the courtship and nesting behavior pointed to, at most a five-month period starting in late February.

Considering the above, the District expanded its NEPA scope of analysis to include “the secondary and cumulative impacts of the entire island development to the bird rookery in the center of the island and the adjoining marine waters.” As noted in the discussion of reason 2 above, Regulations at 33 CFR 320.4(a)(1) state, “The decision 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...All factors which may be relevant to the proposal must be considered including the cumulative impacts thereof: among those are...fish and wildlife values.” 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. As noted above, in his October 20,

2000 Memorandum for the Commander, Mobile District, the Deputy Commander for Civil Works, Headquarters USACE, stated, “We believe that these impacts, resulting from the construction of the residential subdivision, would not occur but for the installation of utilities and dredging and docking facilities which induce home construction.” Emphasis added.

Regulations at 33 CFR 325.4(a) goes on to state at (1), “Where appropriate, the district engineer may take into account the existence of controls imposed under other federal, state, or local programs which would achieve the desired condition...” In this regard, the Migratory Bird Treaty Act (MBTA), enforced by the FWS, provides protection to the Great Blue Heron, its nest with eggs and chicks. The District reiterated the permittee’s responsibility to comply with the MBTA as a condition of the permit. However, the MBTA does not protect the rookery.

The District considered the comments and recommendations of the FWS regarding the Great Blue Heron rookery; however, the District gave greater value to the comments and recommendations made by Dr. Tubbs. The instant condition is based on the comments and recommendation by Dr. Tubbs. Considering the “but for” scenario noted above, the condition is included to protect the Great Blue Heron rookery. If the birds abandon the rookery, the permittee could request negotiation of this condition.

Reason 4: “Condition (C) No construction will occur within 130 feet of any active Blue Heron nest, defined as having nesting herons, heron eggs, or chicks.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: Condition “c” of Modification Number 2 to DOA Permit Number AL98-00542-L, Frank A. Hughes, states, “No construction will occur within 130 feet of any active heron nest, defined by having nesting herons, heron eggs or chicks.”

In his September 19, 2001 letter (page 3) Mr. Hughes stated, “Condition C even creates a far more significant impact on this development. It restricts any construction 130 feet from a Blue Heron’s nesting tree for five months out of the year. This equates to a restriction of 260 feet, north to south, 260 feet east to west, from the tree, “no construction will be permitted.” The north end of the island is less than 260 wide and approximately 500 feet long. If only two trees, 260 feet apart were located on the north end of the island, and they had Blue Heron activity presently...would prohibit the developer from performing any construction in this area for five months of the year.”

As noted above in the discussion of Reason 3, In his October 20, 2000 Memorandum for the Commander, Mobile District, the Deputy Commander for Civil Works, Headquarters USACE, concluded, “we agree with the FWS that the District should expand its NEPA scope of analysis and evaluate the secondary and cumulative impacts of the entire island development to the bird rookery in the center of the island and the adjoining marine waters. We believe that these impacts, resulting from the construction of the residential subdivision, would not occur but for

the installation of utilities and dredging and docking facilities which induce home construction.”
Emphasis added.

In addition, the Deputy Commander for Civil Works, Headquarters USACE, found and directed that, “The District should give full consideration to the information provided by FWS regarding the bird rookery. This review should include the FWS information on the regional importance of the rookery as well as the recommendations to minimize impacts of the proposed residential subdivision on the rookery...The District should perform a new 404(b)(1) Guidelines analysis and public interest review based on the expanded scope of analysis, which includes consideration of the indirect effects of the entire upland development which is expected to be caused by the permitted activities. This reevaluation should consider any practicable reductions and/or revisions to the proposed residential subdivision, which would minimize the potential loss of the bird rookery and effects on adjoining marine waters.” Emphasis added.

As noted above, by letters of November 12, 2000 and January 25, 2001, Dr. Allen Tubbs, Assistant Professor of Biology at the University of South Alabama, stated and reiterated his recommendation that all trees with substantial nests should be retained.

As noted above, the District considered the comments and recommendations of the FWS regarding the Great Blue Heron rookery; however, the District gave greater value to the comments and recommendations made by Dr. Tubbs. The instant condition is based on the comments and recommendation by Dr. Tubbs. Considering the “but for” scenario noted above, the condition is included to protect the Great Blue Heron rookery.

Reason 5: “Condition (D) Trees with Blue Heron nests will not be removed if such trees have Blue Heron activity during the previous one year period, nor will the nests in such trees be disturbed in anyway.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: Condition “d” of Modification Number 2 to DOA Permit Number AL98-00542-L, Frank A. Hughes, states, “Trees with heron nests will not be removed if such trees have had heron activity during the previous one year period, nor will the nests in such trees be disturbed in any way.”

In his September 19, 2001 letter (page 3) Mr. Hughes stated, “According to condition D the builder would possibly be prohibited from cutting or clearing a tree. If the tree was located within the footprint of the house, it would eliminate the possibility to build on that lot.”

As noted above, the District was directed to expand the scope of analysis to include potential impacts to the Great Blue Heron rookery. The District documented in the Environmental Assessment that nothing could assure a long-term viability since even the Service agrees that Great Blue Heron nesting trees can be removed outside the breeding season. A FWS letter of February 8, 2000 to a consultant for Honda, regarding an unrelated Honda automobile

manufacturing plant proposal, near Talladega, Alabama, stated, "For your information, the MBTA...does not prohibit the removal of unoccupied nesting trees associated with a rookery. The removal of the trees must be accomplished prior to the birds arriving for their breeding season. If the great blue heron arrives on site prior to the tree removal, the bird and nest are protected and in no way should be harmed. To avoid conflicts with the MBTA, work in the rookery site could only take place after the birds vacate the rookery later in the year." When the requirements of the MBTA do not apply, all the trees on the island can be removed unless some other provision is put in place. The District's condition allows a Great Blue Heron to return to the same nesting tree at least in at least one successive nesting season by ensuring that the tree will be there. If the tree is not used in the second nesting season, then the condition does not apply and the tree may be removed. As long as the tree is used year after year the tree remains available to the rookery.

The District's authority to add this condition is discussed in Reason 3 above.

Reason 6: Mr. Hughes states, "By law, the U.S. Fish and Wildlife Service[] states that as long as migratory birds have vacated their nest and the nest no longer has chicks in it, the land owner is within his or her right to cut down the tree housing the old nest and destroy the vacated inactive nest...Condition D prohibits the cutting down of a tree with an inactive nest or destroying a vacated nest. Since the law allows this action, the COE has no right to deny this right to a property owner. This is a form of "taking" of private property and this condition should be considered a violation of the law an stricken from...the permit."

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The "law" Mr. Hughes is referring to is the MBTA. Mr. Hughes is responsible for compliance with the MBTA. Mr. Hughes would normally be able to remove trees in accordance with the MBTA and guidance from the FWS as provided in the February 8, 2000 noted above. However, Mr. Hughes is seeking a DOA permit, a Federal permit, that caused the District to consider others laws; specifically, the National Environmental Policy Act (NEPA). As noted above, the HQUSACE required the District to reevaluate Mr. Hughes' request under an expanded NEPA scope of analysis, to include potential impacts to the Great Blue Heron rookery. As a result of their reevaluation, taking into account recommendations from the FWS and Dr. Tubbs, the District developed conditions to provide a level of protection to the rookery and allow Mr. Hughes to use his property.

Reason 7: "These conditions were placed on [the] permit...by the COE as a result of appeasing the U.S. Fish and Wildlife Service, who has used the Migratory Bird Treaty Act "MBTA" as it's authority. The MBTA is for the enforcement of the law prohibiting the killing, hunting, taking, etc., of migratory birds and the conditions outlined in Modification 2 have nothing to do with the killing or unlawful taking of migratory birds. If the MBTA is not being violated, then the Corps of Engineers have no legal justification for introducing these conditions...No construction within 130 feet of a Blue Heron's active nest during five (5) months of the year is unreasonable and it caters to the Fish and Wildlife MBTA, which, according to attachment #3 the Corps of

Engineers decision is not to be subjected to or should not be influenced by the MBTA in the permitting process...In view of this regulation, these conditions should be stricken from the permit.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: Same as above. Mr. Hughes reference to “**attachment #3**” is in regard to his Request for Appeal, which had several attachments. This specific attachment included an excerpt of the MBTA and a copy of a letter of August 14, 2001 addressed to Frank Hughes, from Carmen P. Simonton, For Assistant Regional Director, Migratory Birds and State Programs, FWS. The letter, in response to a conversation between Frank Hughes and Carmen Simonton, regarding a great blue heron rookery, stated, “The [MBTA] prohibits the take of migratory birds, parts, eggs or nests. The [FWS] by policy will not require a permit to take inactive nests. Inactive nest is defined as a nest that does not contain eggs or young. However, permits are necessary for the take of endangered or threatened species.”

Reason 8: “It is my understanding that a Blue Heron rookery existed at the construction site of the Honda Plant in Lincoln, Alabama. Although the Blue Heron issue was considered in the permitting process, it evidently was not a vital issue or a concern. The Honda Project was issued a Permit by the Corps of Engineers, which allowed the cutting down of trees with Blue Heron nests, even in the wetlands, with no restrictions...The applicant considers this a “double standard” on the part of the Corps of Engineers.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

~~**DISCUSSION:** The District was not required to expand the NEPA scope of analysis in the “Honda Project” because the potential impacts were not due to a “but for” situation as in the Robinson Island permit.~~

Reason 9: “According to the U.S. Fish and Wildlife Service, there are only two Blue Heron rookeries located in coastal Alabama, one being, Robinson Island. I discovered two additional rookeries within a mile of Robinson Island, which the Fish and Wildlife [Service] are not aware of...In addition, I have enclosed photo’s of over 100 miles of pine tree[] lined uninhabitable Alabama coastline, that is available to the Blue Herons for nesting...This information was submitted to the District Engineer...but evidently, it was not used in their evaluation. Both of these rookeries, along with the entire uninhabitable coastline mentioned above, are available to the Blue Heron. With all of this available roosting sites, there is no justification that these restrictions be placed on Robinson Island.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: Same as above. The District did consider both the FWS information and Mr. Hughes' information in their evaluation.

Reason 10: "On July 16, 2001 a meeting was held by the Corps of Engineers Mobile Office Regulatory Chief and the applicants, Frank and Catherine Hughes. The purpose of this meeting was to discuss and possibly come to an agreement on the Modification recommendations for the suspended A[L]98-00542-L Frank A. Hughes Permit. The...Recommendation Profile was presented as being the District Engineer['s] proposed recommendations, which would allow [the] suspended permit...to be reinstated and to allow permit A[L]98-[00]541[-]L Baldwin EMC to be issued. The applicant left the meeting accepting the outlined recommendations with...changes..."

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: In his September 19, 2001 letter (page 6) Mr. Hughes pointed out that at the July 16, 2001 he did not agree to several proposed recommendations. He said that he did not agree with the statement, "If active during the year, no Blue Heron nesting tree will be removed or nest disturbed." He indicated that he and the District "were in agreement that active was defined as a nest with eggs or chicks in it." Regarding "No construction will occur within 130 feet of the nearest Blue Heron nesting tree, and outdoor construction on lots 7 through 14 will occur only during the period of July 15th through Feb[ruary] 15th", Mr. Hughes stated " "Within 130 feet of nearest Blue Heron nesting tree"...was not agreed upon by the applicant." He stated, " "Outdoor construction on lots 7 through 14" was changed to 9 through 14 (6 lots)...was agreed upon..." He indicated that the District was to determine the definition of "nesting tree". With regard to the recommendation "Lots shall maintain 20 foot wide vegetative buffer zone between landscaped areas and wetlands/tidal areas", Mr. Hughes stated, "This was not agreed upon..." Mr. Hughes pointed out that there are differences between the recommendations agreed to at the meeting and some of the conditions of the modified permit. He note that the District condition reads "Outdoor construction on lots 9 through 22 (14 lots not 6 as agreed upon) is permitted to occur only during the period of July 15 through Feb[ruary] 15." Mr. Hughes also noted that "during the previous one year period" had been added to "If active during the previous year, no Blue Heron nesting tree will be removed..." therefore, "making it more restrictive."

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...and to modify, suspend and revoke permits according to the procedures of § 325.7 of this Part."

Reason 11: "It is my belief that the MOA [Memorandum of Agreement between the Department of the Interior and the Department of the Army] was violated in the Permit Evaluation Process and these violations consisted of...[a]ccepting comments and 3 B elevation

request beyond the time frames allowed by the MOA...[u]nauthorized signature on 3 B elevation documents...[u]nauthorized extended response times allowed in violation of MOA during comment period, 3 B request period, and elevation determination and elevation period. (over 3 ½ years)...[t]he Blue Heron, by definition not an “Aquatic Resource of National Importance-ARNI” did not qualify the permit for elevation...The Blue Heron is not an...ARNI which is required to elevate a permit application per the MOA. The Fish and Wildlife Service tried to use seagrass, water quality [,] and wetlands, all of which are ARNI’[s] to substantiate elevation of A[L]98-0054[1-L] Baldwin County EMC and to have A[L]98-00542[-]L suspended. All of these authentic ARNI’[s] were evaluated and passed muster by the Mobile District in their evaluation report, therefore, neither permit application qualified for elevation status.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: Permit application AL98-00542-L, Frank A. Hughes, was not elevated for review under the MOA. The FWS attempted to elevate the permit for review but failed to meet the required time frame established by the MOA. However, AL98-00541-L, Baldwin County EMC, was elevated for review and allowed the ASA(CW) to conclude, “we have decided to elevate the administrative records for additional review. I have also requested that Corps Headquarters advise the Mobile District to suspend the permit issued to Mr. Frank Hughes on September 14, 1999 for residential development on Robinson Island, pending outcome of the Corps Headquarters review of the policy and environmental impact implications for the entire project, including the work authorized in the Hughes permit.”

In his September 19, 2001 letter (attachment 6), in reference to a September 9, 1999 email to the chief of Regulatory Branch, HQUSACE, Mr. Hughes pointed out that the Notice of Intent to Issue (NOII) permit AL98-00542-L, Frank A. Hughes, was signed on August 16, 1999 and that the NOII permit AL98-00541-L, Baldwin County EMC was not signed until two months later and therefore, breached an agreement that the two permits would be evaluated together. Mr. Hughes indicated that the explanation he got from the District about why the two permits were not evaluated concurrently was that they “forgot”. Mr. Hughes stated, “[t]his oversight enabled EMC to be elevated.” While there may have been intent on the part of the District to evaluate the permits concurrently, project specific issues, manpower, and time constraints, can get the individual projects out of sync. In fact, in an email of September 10, 1999 the Regulatory Branch Chief informed the DE that, “the developer is aware of the lateness of FWS’s response, and is pushing for a quick decision.” Emphasis added. The District subsequently issued permit AL98-00542, Frank A. Hughes, on September 14, 1999.

The appellant contends that unauthorized extended response times were allowed during the comment period in violation of MOA. The MOA specifically states, “[a]n extension of time beyond 30 calendar days from the date of the public notice, must be requested in writing by the **FWS Regional Director, Deputy Director, or Assistant Regional Director/Enhancement**. The written request must be received three calendar days prior to the end of the basic comment period and must demonstrate the reason for the extension.” The public notice for AL98-00541-L required comments to be submitted prior to April 28, 1998. FWS requested an extension by

letter dated April 28, 1998. The letter in the administrative record has a date stamp of April 29, 1998 typical of those placed on incoming mail in District Regulatory Branch. The administrative record does not indicate that the District received a faxed copy of the letter nor a telephone record indicating that the letter had been signed by FWS and was in the mail. In 1998, April 23 was on a Thursday and April 27 was on a Monday. There is no indication of when the letter arrived in the District. The District accepted the request for extension under these circumstances and by letter of April 30, 1998 extended the comment period to May 29, 1998.

The appellant pointed out that the appropriate FWS representative as outlined in the MOA did not sign the letter requesting the extension of time. In this case, Pardue signed for Kelsey, Assistant Regional Director. In addressing this issue, the District provided a copy of a Memorandum for Record, October 5, 1995 signed by the Regulatory Program Manager, SAD, documenting a telephone conversation with the Chief, Regulatory Branch, HQUSACE, that states, "EPA HQ raised an issue...regarding a district's refusal to accept a "3 (b) letter with the EPA Regional Administrator's block but with the signature of someone other than the Regional Administrator over the signature block...[Chief] advised that we should assume that these individuals are acting for the Regional Administrator and accept such letters (usually the person signs his/her name and writes "for" as being in compliance with the MOA unless we have clear evidence that it is being abused." The District applies this guidance with regard to all MOA agency letters.

By letter of May 26, 1998 the FWS submitted their comments in accordance with Part IV, 3(a) of the MOA, indicating that the proposed project may result in substantial and unacceptable impacts to aquatic resources of national importance. Then, by letter of June 15, 1998, submitted their comments within 25 calendar days in accordance with Part IV, 3(b) of the MOA, stating that the proposal will have a substantial and unacceptable impact on aquatic resources of national importance. By meeting these time frames, the FWS maintained their option to elevate a decision by the District to issue the permit over FWS objection.

The appellant is also concerned that the ASA(CW) decision to elevate was not accordance with the MOA. The MOA at Part IV, 3(g) states, "Within 30 calendar days from the A/S-FWP's [Assistant Secretary for Fish and Wildlife and Parks] request for review, the ASA(CW), through the Director of Civil Works, will review the permit decision document and either: (1) inform the District Engineer to proceed with final action on the permit decision; or (2) inform the District Engineer to proceed with final action in accordance with case specific policy guidance; or (3) make the final permit decision in accordance with 33 CFR 325.8." At Part IV, 1 the MOA further states, "The final decision on the need to elevate a specific individual permit case and any subsequent case specific policy guidance rest solely with the ASA(CW)." Emphasis added. The appellant is concerned that the "case specific policy guidance" was not completed within the 30 days provided in the MOA for the ASA(CW) to reach his decision regarding A/S-FWP's request for review. The ASA(CW), after HQUSACE review of the permit decision document, made the decision to elevate the review on day 30. He specifically requested HQUSACE to advise the District to suspend the permit issued to the appellant, pending the outcome of HQUSACE review of policy and environmental impact implications. A Memorandum For Commander, Mobile District, of October 20, 2000 completed the subsequent review with specific guidance to the District.

The appellant contends that the Great Blue Heron is not an aquatic resource of national importance, a requirement to elevate a permit decision under the MOA. As noted above, Part IV, 1 the of the MOA states, "The final decision on the need to elevate a specific individual permit case and any subsequent case specific policy guidance rest solely with the ASA(CW)." Emphasis added. In other words, only the ASA(CW) can agree on what constitutes an aquatic resource of national importance. In his January 7, 2000 letter to the A/S-FWP, the ASA(CW) stated, "the aquatic resources within and surrounding Robinson Island are aquatic resources of national importance." In his letter he did indicate that the A/S-FWP request raised important national issues regarding the scope of analysis used by the District. The HQUSACE guidance required the District to expand the scope of analysis to include the upland portions of Robinson Island where the Great Blue Heron Rookery is mostly located.

Information Received and its Disposition During the Appeal Review:

1). Mobile District furnished a copy of the administrative record. This information was considered.

2). Mr. Hughes furnished a certified original transcript of the appeal conference held on December 11, 2001. This information was considered.

3). Copy of plat of Robinson Island, furnished by Mr. Hughes at the December 11, 2001 conference, depicting possible impacts to his proposed development due to setback conditions. This information was considered.

4). Undated "REBUTTAL" furnished by Mr. Hughes at the December 11, 2001 conference. This information was considered.

5). Copy of an email message on December 10, 2001 from Rick Corbett to Mr. Hughes (kakyfran@gulftel.com); Subject: Blue Herons. This was furnished at the December 11, 2001 conference. This information was considered.

6). Facsimile transmission of December 17, 2001 from Mr. Hughes to the Appeal Review Officer, that included a December 17, 2001 cover letter, a November 21, 1998 letter from Mr. Hughes to Ms. Barbara Allen (Mobile District), a September 28, 1999 letter from the Alabama Department of Environmental Management regarding coastal consistency certification, and a February 18, 1999 letter from Mr. Hughes to Mr. Ronald Krizman (Mobile District). This information was considered.

7). Facsimile transmission of February 21 2002 from Mr Hughes to the Appeal Review Officer that included a August 14, 2001 letter from Carmen P. Simonton (FWS) to Mr. Hughes, copy of an email message of May 7, 2001 from Mr. Lewis C. Sumner (Mobile District) to Mr. Ronald A. Krizman (Mobile District), and partial pages 1 and 2 of a letter, undated, to Mr. Krizman. This information was considered.

8). Facsimile transmission of February 26, 2002 of a copy of a Memorandum for Record of October 5, 1995, Subject: Section 404(q) MOA – Part IV, Paragraph 3(b) Letters, sent from Lewis C. (Chuck) Sumner (Mobile District) to the Appeal Review Officer. This information was considered.

A handwritten signature in black ink, appearing to read "Peter T. Madsen". The signature is fluid and cursive, with a large initial "P" and a long horizontal stroke extending to the right.

Peter T. Madsen
Brigadier General, US Army
Division Engineer