

ADMINISTRATIVE APPEAL DECISION

MR. JOHN GABRIES

FILE NUMBER 200206032

JACKSONVILLE DISTRICT

DATE: MAY 14, 2005

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

Appellant Representative: Glen Boe & Associates, Inc., Marathon, Florida

Receipt of Request For Appeal (RFA): December 23, 2003

Appeal Conference Date: March 15, 2005

Site Visit Date: March 7, 2005

Background Information:

Mr. John Gabries submitted a Department of the Army (DA) permit application to construct a 570 square foot concrete marginal pile supported dock with davits, and a 100 square foot seawall on June 24, 2002. His property is located at Lot 213, Port Antigua Plat 5-6, at Ponce De Leon Boulevard, in Section 21, Township 64 South, in Islamorada, Monroe County, Florida. Mr. Gabries plans were included in a public notice issued on September 26, 2002. The basic project purpose is to provide boating access. The public notice stated that this project could impact approximately 670 square feet of submerged aquatic vegetation (SAV) and would adversely impact areas identified as Essential Fish Habitat (EFH) by the South Atlantic Fishery Management Council. Additionally, the public notice stated, "the proposed...work may affect the West Indian manatee in accordance with the revised Manatee Key dated January 2, 2001. Therefore, the Corps intends to request formal consultation with the US Fish and Wildlife Service pursuant to Section 7 of the Endangered Species Act of 1973, as amended, and the Marine Mammal Protection Act."

By letter dated October 17, 2002, the National Marine Fisheries Service (NMFS) responded to the public notice, stating the project site contains and supports habitats identified as EFH. To ensure conservation of EFH and fishery resources, the NMFS recommended that DA authorization not be granted unless the proposed action is modified to come into compliance with

*the Dock Construction Guidelines in Florida for Docks or Other Minor Structures Constructed In or Over Submerged Aquatic Vegetation, Marsh, or Mangrove Habitat.*¹

By letter dated October 9, 2002, the US Fish and Wildlife Service responded to the Section 7 request with a Biological Opinion stating that the project is not likely to jeopardize the continued existence of the manatee and is not likely to adversely modify its critical habitat.

According to the administrative record, the Corps of Engineers (Corps) project manager, reviewed the file, consulted with interested resource agencies, determined compliance with laws and regulations, and decided the proposed project can meet the project purpose and be designed to reduce impacts on this high quality aquatic environment. The Corps Project Manager (PM), the applicant, and the applicant's agent engaged in numerous telephonic and electronic correspondences in efforts to avoid and minimize impacts. By proffered permit dated October 27, 2003, the Corps informed the applicant that the least environmentally damaging practicable alternative (LEDPA) would be a 505 square foot concrete pile supported dock with davits and a 78 linear foot retaining wall. The retaining wall will be landward of the Mean High Water Line (MHWL) and compensatory mitigation will offset impacts to aquatic resources.

By letter dated October 8, 2003, the NMFS responded to the project design changes by acknowledging the applicant incorporated many of the NMFS recommendations mentioned in the above paragraph. The NMFS stated that if the applicant mitigates for project impacts he would meet the intent and procedural requirements of the Magnuson-Stevens Fishery Conservation and Management Act.

Mr. Gabries appealed the proffered permit on December 23, 2003. In the fall of 2004 and winter of 2005, the South Atlantic Division Administrative Appeals Review Officer (RO) attempted to coordinate an on-site visit and appeals conference with the appellant. During this period, the appellant was not available. The RO conducted an appeals conference between the Corps project managers and the appellant on March 15, 2005. A copy of the report of the meeting is attached (enclosure 1).

Summary of Decision: I find that the appeal does not have merit. I find that the District evaluated and documented their proffered permit dated October 27, 2003, 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(s) For Appeal as Presented by the Appellant:

¹ U.S. Army Corps of Engineers/National Marine Fisheries Service, Dock Construction Guidelines in Florida for Docks or Other Minor Structures Constructed in or over Submerged Aquatic Vegetation (SAV), Marsh or Mangrove Habitat, August 2001.

Reason 1: “I believe the mitigation fees are excessive for the size of the dock and the location of the seawall. Dock is only 505 square feet. I am being assessed for 921 square feet of habitat destruction.”

Finding: This reason for appeal does not have merit.

Action: No action required by the District relative to this appeal reason.

Discussion: There is no dispute between the applicant and the District that steps one and two of the required sequencing to avoid, minimize, and compensate has been met and that there are no other practicable alternative locations available to the applicant. This foremost reason for appeal is compensatory mitigation.

The District’s Statement of Findings (SOF) dated October 27, 2003; (page 6, paragraph c.) discusses how the adverse impacts for the proposed project are calculated. The effects evaluations are 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. This happened in this case. The Jacksonville District used the Keys Mitigation Functional Assessment (KEYMIG) Worksheet in the administrative record to provide the functional assessment of the project site. The outcome is derived by inserting information into equations on the worksheet.

The PM used KEYMIG to determine “a contribution of \$6,778.65 to the Florida Keys Environmental Restoration Trust Fund will be required to offset impacts to 309 square feet of mangrove fringe, 234 square feet of salt marsh vegetation and 378 square feet of submerged aquatic grasses and macroalgae.” While it is true the appellant’s dock is only 505 square feet, the total aquatic impact of the proposal is 921 square feet. The 921 square foot total is from direct, indirect, and cumulative habitat destruction from the proposed project. Shading, construction, and land use practices contribute to the to the indirect and cumulative habitat losses.

The direct placement and disruption of fill will result in losses of 309 square feet of mangrove fringe and 234 square feet of salt marsh vegetation. 378 square feet of macroalgae will die due to shade effects. The Environmental Protection Agency (EPA) Guidelines for Specification of Disposal Sites for Dredged or Fill Material at 40 CFR 230.11 (h) 1. Determination of secondary effects on the aquatic ecosystem. states, “Secondary effects are effects on the aquatic ecosystem that are associated with a discharge of dredged or fill material, but do not result from the actual placement of the material. Information about secondary effects on the aquatic ecosystem shall be considered” . Therefore, it is lawful and reasonable to include shading impacts.

Corps regulations also recognize the importance of cumulative impact losses. After the residence is constructed, the lot will lose some of its unique aquatic characteristics. Regulations at 33 CFR 320.4(a) (1) states, “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 impacts 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.

Reason 2: “I offered to remove plants in question and transplant to a barren area so they would live and not be killed, and was told this was not an option. If the intent of the Corp(s) is to keep valuable wetland plants alive then why is this option not considered?”

Finding: This reason for appeal does not have merit.

Action: No action required by the District relative to this appeal reason.

Discussion: Mangroves transplanted by inexperienced property owners could die and be subject to the secondary and cumulative impacts discussed under reason 1, above. The February 6, 1990, Memorandum of Agreement between the EPA and the DA concerning mitigation, states, “Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required. Compensatory actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site (onsite compensatory mitigation). If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area if practicable (i.e., in close physical proximity and, to the extent possible, the same watershed). In determining compensatory mitigation, the functional values lost by the resource to be impacted must be considered. Generally, in-kind compensatory mitigation is preferable to out-of-kind. There is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success.” Emphasis added.

Resource agencies established The Florida Keys Environmental Restoration Trust Fund to provide riparian residences an opportunity to enjoy shoreline use while providing successful mitigation. Regulatory Guidance Letter (RGL) 02-2 reiterates the importance of this practice. The RGL at section 2.1. states, “Districts will include in individual permits, and general permit verifications that contain a wetland compensatory mitigation requirement, special conditions that: 1) identify the party(s) responsible for meeting any or all components of compensatory mitigation requirements; 2) performance standards for determining compliance; and, 3) other requirements such as financial assurances, real estate assurances, monitoring programs, and the provisions for short and long-term maintenance of the mitigation site.” Section 3.g. states, “Compensatory mitigation plans should include a written description of the legal means for

protection of mitigation area(s), and permits will be conditioned accordingly. The wetlands, uplands, riparian areas, or other aquatic resources in the mitigation project should be permanently protected, in most cases, with appropriate real estate instruments, e.g., conservation easements, deed restrictions, transfer of title to Federal or state resource agencies or non-profit conservation organizations.” These mitigation requirements are not usually practicable for small landowners in the Florida Keys.

In addition, during the appeals conference, the Corps PM offered to possibly accept the appellants offer to transplant the mangrove, but in order to receive mitigation credit, the appellant must submit a mitigation plan with monitoring and success criteria requirements. The reason has no merit since the appellant declined to submit to the mitigation requirements.

Reason 3: “Submerged grasses and microalgae will not be killed by (the) dock. Sunlight can still reach under the dock. Plus the addition of pilings creates more habitats for microalgae to thrive on.”

Finding: This reason for appeal does not have merit.

Action: No action required by the District relative to this appeal reason.

Discussion: During the March 7, 2005, site visit, the RO inspected several docks of various heights and found that moorage facilities less than five feet high produce enough shade to kill Submerged Aquatic Vegetation (SAV), under the dock. The five foot height standard appears to be an accurate height for determining SAV loss. Therefore, Reason 3 does not have merit.

Reason 4: “Mr. Kirby told me I was being assessed for a marine Daisy Plant that (is) growing in the center of my lot ...”

Finding: This reason for appeal does not have merit.

Action: No action required by the District relative to this appeal reason.

Discussion: The appellant stated during the appeals conference that the mitigation assessment included impacts to a marine plant located on upland soils in the center of his property. Mr. Kirby responded that the marine plant was located on the fringe around the shoreline classified as jurisdictional wetlands; therefore, this reason has no merit.

Reason 5: “...Although the Corp(s) approved this plan October 2, (20)03, I did not receive notice until November which does not leave me enough time to complete paperwork.”

Finding: This reason for appeal does not have merit.

Action: No action required by the District relative to this appeal reason.

Discussion: The appellant completed the paperwork and the appeal was accepted.

Reason 6: The appellant wanted assurances that he could trim the mangroves along the shoreline.

Finding: This reason for appeal does not have merit.

Action: No action required by the District relative to this appeal reason.

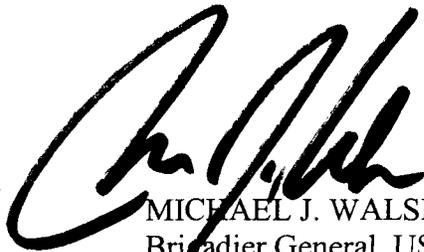
Discussion: Mr. Kruger explained the restrictions on trimming mangroves to Mr. Gabries during the appeals conference (See Special Condition 6 in the October 27, 2003, proffered permit.)

Instructions to the Jacksonville District Engineer (DE): Although I found that the appeal had no merit, I believe it would be good customer service to provide Florida Keys riparian permit applicants a short explanation of the KEYMIG functional assessment and an equally short comment about the Florida Keys Environmental Trust Fund. This explanation could be attached to or incorporated into the *Dock Construction Guidelines in Florida for Docks or Other Minor Structures Constructed In or Over Submerged Aquatic Vegetation, Marsh, or Mangrove Habitat*. Permittees may appeal less frequently if they understood the process for accessing mitigation fees and what the mitigation fees support.

Conclusion: After reviewing the information contained in the Jacksonville District's administrative record, information presented by the appellant, and information obtained at the appeal conference and site visit made, I conclude 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 moorage facility in the waters of the United States, including wetlands. Accordingly, I conclude that this Request for Appeal does not have merit.

20 May 05

(Date)



MICHAEL J. WALSH
Brigadier General, US Army
Commanding