

ADMINISTRATIVE APPEAL DECISION

FILE NO. 199905014 (IP-VA)

JACKSONVILLE DISTRICT

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

Appellant Representative: M.K. Stevenson represented by Hershoff, Lupino & Mulick, LLP.

Receipt of Request for Appeal (RFA): August 24, 2002

Appeal Conference Date: March 11, 2003

Site Visit Date: March 13, 2003

Background Information: On September 10, 1999, Mr. M.K. Stevenson submitted an application for a Department of the Army Permit. The request was for construction of a seawall and to backfill landward from the seawall. The initial project totaled 7,660 square feet of fill. Pursuant to a pre-application consultation with agency personnel, a revised drawing was submitted for this project. The drawing submitted on January 19, 2000, indicated that the area proposed to be filled totaled 8,627 square feet. On March 3, 2000, another revised drawing was provided for this project. This new drawing showed a drainage swale at the toe of the landward side of the seawall and a total area of fill to be 6,398 square feet. The Public Notice (PN) for this project was issued on August 2, 2000. The PN states that: "fill will be placed within approximately 3,447 square feet of wetlands and 2,000 square feet of submerged aquatic resources." That implies a total filled area of 5,447 square feet. Several of the comments received as a result of the PN suggested that no fill be allowed below the Mean High Water Line (MHWL). Ultimately, the permit evaluation was completed and a draft permit was provided to Mr. Stevenson on June 26, 2002. The permit authorizes the discharge of fill over 6,837 square feet of wetlands. The drawing attached to the draft permit indicated no fill will be discharged below the MHWL. This drawing is remarkably different in indicated fill area than the PN's drawing. The difference is that the permit drawing indicates less fill than the PN drawing. But the PN proposes 5,447 square feet of fill and the permit authorizes 6,837 square feet of fill.

Summary of Decision: I find that the appeal does have merit. I find that the District evaluated and documented their approved Department of the Army permit according to applicable laws, regulations and policy guidance. But there appears to be discrepancy in the actual amount of fill that will be discharged. Since this fill area is the basis for calculating compensatory mitigation, an accurate measurement and assessment of aquatic resource conditions is necessary.

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

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

Reason 1: “The proffered permit, which confines rip-rap and fill to the upland portion of the property, deprives the property owner of his right to use and protect his property. Pursuant to the applicable regulations, the rights of the property owner must be balanced against the potential harm to the public interest. Allowing the property owner to res[t]ore his original shoreline will have no negative impact on the public interest. The area sought to be restored has little or no functional wetland value. Contrary to the position asserted by the Department, the altered shoreline where the rip-rap and fill are to be placed does not contain turtle grass or other benthic flora. As can be seen on the enclosed photographs, the area is primarily marl and other rock debris.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: 40 CFR Part 230 Section 230.41 states: “Possible loss of values: The discharge of dredged or fill material in wetlands is likely to damage or destroy habitat and adversely affect the biological productivity of wetlands ecosystems by smothering, by dewatering, by permanently flooding, or by altering substrate elevation or periodicity of water movement. The addition of dredged or fill material may destroy wetland vegetation or result in advancement of succession to dry land species. It may reduce or eliminate nutrient exchange by a reduction of the system's productivity, or by altering current patterns and velocities. Disruption or elimination of the wetland system can degrade water quality by obstructing circulation patterns that flush large expanses of wetland systems, by interfering with the filtration function of wetlands, or by changing the aquifer recharge capability of a wetland. Discharges can also change the wetland habitat value for fish and wildlife. When disruptions in flow and circulation patterns occur, apparently minor loss of wetland acreage may result in major losses through secondary impacts. Discharging fill material in wetlands as part of municipal, industrial or recreational development may modify the capacity of wetlands to retain and store floodwaters and to serve as a buffer zone shielding upland areas from wave actions, storm damage and erosion.”

The 404(b)(1) Guidelines, 40 CFR 230.10(a) state: “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have a less adverse impact on the aquatic ecosystem, so long as the alternative does not have other adverse environmental consequences.... Where the activity associated with a discharge which is proposed for a special aquatic site...does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e. is not “water dependent”), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise.”

The purpose of the proposed discharge of fill material, as defined in the August 2, 2000, public notice is “to fill within the platted residential lots for the purpose of constructing a

single family residence". Housing does not require access or proximity to or siting within a special aquatic site, wetlands, to fulfill its basic purpose and is therefore not water dependent. Regulatory Guidance Letter (RGL) No. 84-9 states "Both the Corps' regulations and the 404(b)(1) guidelines contain a water dependency "test." Corps regulations limit the application of this test to work which would alter wetlands, while the guidelines set up a rebuttable presumption against discharges in all aquatic sites. In both situations, however, the water dependency test, standing alone, is not intended to be determinative of whether a permit is issued. Activities which are not water dependent may still receive permits, provided the overall public interest balancing process so warrants, and also provided the guidelines' presumption against such discharges is successfully rebutted and the other criteria of the guidelines are met."

There is no dispute between the applicant and the District that step one of the sequence to avoid, minimize, and compensate has been met and that there are no other practicable alternative locations available to the applicant for the project. This reason for appeal is based solely on the fact that the project, as it was originally proposed, has been modified to accommodate avoidance and minimization of impacts to the aquatic environment.

The Army Corps of Engineers Standard Operating Procedures for the Regulatory Program, April 8, 1999, states "The Corps determines the project purpose, the extent of the alternatives analysis, determination of which alternatives are practicable, which are less environmentally damaging, the amount and type of mitigation and all other aspects of the decisionmaking process (RGL 92-1)." It further states "It always makes sense to examine first whether potential alternatives would result in no identifiable difference in impact on the aquatic ecosystem. Those alternatives that do not, may be eliminated from the analysis since Section 230.10(a) of the Guidelines only prohibits discharges when a practicable alternative exists which would have less adverse impact on the environment." Emphasis added.

By letter dated September 21, 2000, the District requested that the applicant provide information addressing the comments received from US Fish and Wildlife Service, National Marine Fisheries Service, and South Florida Regional Planning Council. Specifically, the necessity of the current project configuration and what was the public and private need for the project and the benefits to be derived.

The District is correct in its position that the applicant did not provide documentation to substantiate his claim that the rip-rap revetment should be placed within the shallows at the margins of these lots. The rebuttable presumption at 40 CFR 230.10(a)(3) is intended to increase the burden on an applicant for a non-water dependent activity to clearly demonstrate that no less environmentally damaging practicable alternative is available. Since the applicant did not so demonstrate, the decision to confine the riprap and fill to the upland portion was consistent with applicable law and regulations.

Reason 2: "The amount determined by the Department for mitigation of the impact from this project (\$54,235.41) far exceeds the reasonable value of the area impacted. This sum borders on being punitive as it fails to recognize the fact that the property owner has already paid for the land he is now being assessed a significant sum to utilize."

FINDING: This reason for appeal does have merit in part.

ACTION: The decision is remanded to the DE to accurately define the area of waters of the US to be filled and to access their functional condition as it relates to the debit units (DU) per square foot. Once this is accomplished, the corrected/verified values can be used to calculate the compensatory mitigation required for this project, as it was permitted.

DISCUSSION: The Army Corps of Engineers Standard Operating Procedures for the Regulatory Program, April 8, 1999, states “The Corps determines the project purpose, the extent of the alternatives analysis, determination of which alternatives are practicable, which are less environmentally damaging, the amount and type of mitigation and all other aspects of the decisionmaking process (RGL 92-1).”

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 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.”

The fact is that a Department of the Army Standard Permit was proffered for this project. The District acknowledged in its’ Memorandum For Record, Subject: Department of the Army Environmental Assessment and Statement of Finding that “[t]he lots are zoned improved subdivision, and the proposal as authorized is consistent with this designation. However, there are recognized impacts to the aquatic environment for which there must be compensation.

The evaluation of adverse effects should be 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. USACE 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 has been done in this case. This District used the Keys Mitigation Functional Assessment (KEYMIG) worksheet to provide the functional assessment of the project site. The outcome is derived by inserting information into equations printed on the worksheet. The outcome is not intended to be punitive but rather provide a consistent way to determine environmental debits and credits. However, in this case, there are some unexplained discrepancies in the exact number of square feet of wetland

and submerged habitat that will be filled which could have an impact on the outcome of the assessment. Additionally, there is a dispute about the functional value of the aquatic resources that would be impacted. Since this fill area is the basis for calculating compensatory mitigation, an accurate measurement and assessment of aquatic resource conditions is necessary.

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.

Conclusion: After reviewing and evaluating the administrative record provided by the Jacksonville District, I conclude that there is sufficient information in the administrative record to support the District's decision to issue a permit for fill up to the MHWL and to request compensatory mitigation for unavoidable impacts to the aquatic environment and that these actions were not arbitrary, capricious, or contrary to law. However, the area of waters of the US to be filled and to their functional condition as it relates to the debit units (DU) per square foot needs to be checked to ensure that the compensatory mitigation required for this project, as it was permitted is accurately calculated. This concludes the Administrative Appeal Process.

11 March 2005

(Date)

Benjamin S. Butler *cc*
for Michael J. Walsh
Brigadier General, US Army
Commanding