ADMINISTRATIVE APPEAL DECISION

PAUL AND AGNES RISHELL

FILE NUMBER 200304838

JACKSONVILLE DISTRICT

DATE: MAY 7, 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): October 5, 2004

Appeal Conference Date: March 8, 2005

Site Visit Date: March 8, 2005

Background Information:

Mr. Tom Donovan originally submitted a Department of the Army (DA) permit application to construct a 528 square foot marginal concrete pile supported dock (66 linear feet), davits, and retaining wall landward of the shoreline on April 24, 2003. His property is located at Lot 13, Block 32, Venetian Shores Subdivision in Section 14, Township 63 South, Range 37 East, in Islamorada, Monroe County, Florida. Mr. Donovan's plans were included in a public notice issued on December 15, 2003. The public notice stated that "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 January 16, 2004, the National Marine Fisheries Service (NMFS) stated the project site contains and supports habitats identified as Essential Fish Habitat (EFH). To ensure conservation of EFH and fishery resources, the NMFS recommended that DA authorization not be granted unless the 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]

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[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.

By letter dated February 12, 2004, 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 project Manager (PM), reviewed the file, consulted with interested resource agencies, and determined the proposed project can meet the project purpose and be designed to reduce impacts on the aquatic environment. By letter dated February 6, 2004, the Corps informed the applicant that the least environmentally damaging practicable alternative would be a "T" or "L" shaped docking facility with compensatory mitigation to offset impacts to aquatic resources.

Ms. Agnes Rishell, an interested local realtor, contacted the Corps several times regarding the status of Mr. Donovan's permit application because of her interest in purchasing the property. The PM met with Ms. Rishell in the Miami Regulatory Office on December 9, 2003, and informed her of the ability of a "T"-shaped moorage facility to perform the same functions as a concrete shoreline moorage facility while minimizing impacts to the aquatic environment. The Corps inspected the property on January 6, 2004, and documented the site conditions. The site supports red mangroves and a submerged shelf, vegetated with turtle grass and several species of green and brown macroalgea communities. On January 9, 2004, the PM e-mailed Ms. Rishell and informed her that a "T"-shaped moorage facility would still appear to be the least environmentally damaging practicable alternative (LEDPA).

On March 31, 2004, Glen Boe and Associates informed the Corps that the Rishells purchased the property and sought to construct a marginal dock on the site. By e-mail dated April 1, 2004, the Corps informed the applicant's agent that a marginal concrete moorage facility was evaluated and the Corps, with support from the National Marine Fisheries Service, determined that a "T" or "L"-shaped dock would be the LEDPA. By letter dated June 20, 2004, the appellant's agent provided a letter stating the water was too deep for a structure located away from the shoreline. The applicants received a permit for a "T"-shaped facility with mitigation requirements to offset impacts on September 10, 2004. The proffered permit was appealed the proffered permit by letter dated October 7, 2004.

On March 8, 2005, the South Atlantic Division Administrative Review Officer (RO) conducted an on-site visit and appeal conference with Corps representatives and the appellants (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 September 10, 2004, 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 For Appeal: "The application for permit was not considered in a fair and unbiased manner as all previous applications by others for similar shoreline docks have been approved".

Finding: This reason for appeal does not have merit.

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

Discussion: The appellants stated that their property is not essentially different from the neighbor's property or other properties in close proximity. They are all on the same canal system where others lately received issued permits for concrete shoreline marginal moorage facilities. They further stated that they would minimize the proposed concrete dock to protect some of the shoreline. The appellants provided documentation of marginal shoreline moorage facilities permitted in 2002. During the appeals conference, the RO asked the Corps representatives if other permittees in the Florida Keys are treated the same as the Appellants. For the record, the Corps 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 stated the Corps recognizes the exceptional natural environment present in the Florida Keys, and takes great care 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 mangrove shorelines in the Florida Keys provide a number of valuable functions as part of this critical ecosystem. Mangroves provide valuable nursery, foraging, and refuge habitat for commercial and recreational species of fish and shellfish such as blue crab, snook, striped mullet, and tarpon. Mangroves also provide nesting, foraging, and roosting habitat for several species of reptiles, amphibians, and mammals. Mangroves provide important water quality functions such as pollution uptake from bio-assimilation and assimilation of nutrients in runoff from uplands. They also stabilize shorelines, attenuate wave action, produce, and export detritus that is an important component of marine and estuarine food chains. Due to their location along the shoreline, mangrove systems provide a critical buffer between upland development and submerged aquatic resources including both seagrass beds and coral communities.

The Corps further stated that overtime, 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 Corps to evaluate each dock application carefully.

Corps regulations recognize the importance of cumulative impact losses. 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, "<u>The specific weight of each factor is determined by</u>

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.

Some portions of the canals in Venetian Shores have mangroves; however, there are concrete marginal moorage facilities a long most of the canals. These remaining mangroves still provide the functions listed above for mangrove communities.

The Corps representatives stated during the appeals conference that one of the requirements of the Corps permitting program, as required under the Clean Water Act, is to reach a final project that represents the least environmentally damaging, practicable alternative. The PM worked with the first applicant, then the appellant in an effort to reach an acceptable alternative. Discussions with the applicants included items related to potential dock design changes as well as permitting requirements typically associated with permits issued in the Florida Keys. While it is true that there are concrete marginal moorage facilities in other portions of the canal systems in Venetian Shores, the Corps no longer considers concrete shoreline moorage facilities when canals are wide enough to support a dock at the end of a walkway. Corps General Permit SAJ-82, dated February 7, 2003, states the standard, "A "T" dock may not be practicable when encroachment into the navigable waterway exceeds 25 percent." The Corps referenced, in the e-mail communication with the appellant, that they are seeking consistency for all moorage projects in South Florida. The appellant referenced marginal concrete moorage facilities that were recently permitted. According to the administrative record, the other moorage facilities were permitted approximately two years earlier with each having a different navigation problem. The Corps has worked with other landowners in the Keys either to construct a "T-shaped dock" or to minimize the length of a marginal dock where canals are too narrow to support a dock at the end of an access walkway. These alternatives provide a docking facility, while still minimizing impacts to the mangrove habitat that the Corps considers essential for the Florida Keys ecosystem.

In the Statement of Findings (page 2), the District stated, "The overall project purpose is to provide boating access and waterfront amenities to a single-family home on a canal front lot in Islamorada, Monroe County, Florida." The document further states that (page 5), "The project, as modified presents the least environmentally damaging, practicable alternative because it is feasible, provides boating access and minimizes impacts to the submerged aquatic vegetation".

The Section 404(b)(1) Guidelines of the Clean Water Act, 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...all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumes to have less adverse impacts on the aquatic ecosystem, unless clearly demonstrated otherwise." The District stated in the EA & SOF (page 2) that "Full consideration was given to all comments received in response to the public notice...**The applicant been required to minimize the shoreline work to only allow access to a "T"-shaped moorage facility.**

The appellants stated in the administrative record and at the site visit that the proffered permit is not practicable due to cost, logistics, and zoning. US Environmental Protection Agency regulations 40 CFR Part 230.10(a)(2) defines an alternative as being practicable "if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall purposes." Contractors have the technology to construct the moorage facility offered in the proffered permit. The appellants stated the "T"-shaped facility would cost $10,000 more to build than the marginal dock. This is not documented; however, with the lot valued at $750,000 dollars, spending S10, 000 more to protect resources appears reasonable.

The appellants also discussed safety and land use. Although not officially listed as a reason for appeal, the Rishells stated that the "T"-shaped moorage structure would intrude further into the channel than surrounding moorage facilities. The Rishells stated that this would constitute a hazard to navigation. In the Statement of Findings (page 9), the District stated, "The applicant expressed concern regarding the impacts of a "T" dock on navigation in the adjacent channel. The Corps determined that the channel width of 105 feet provides ample navigation clearance. In addition, the appellants told the RO during the March 8, 2005, site visit that canal areas in Monroe County, Florida, would now be idle speed areas, reducing the probably for accidents.

The appellants also stated that the proffered permit would not comply with the 1957 subdivision covenants for Venetian Shores. By letter dated June 20, 2004, appellants representative informed the Corps that, "Due to the 1957 deed restriction, the Corps' issuance of a T-dock may not allow the Rishells to construct a dock on their property." No deed restriction is in the administrative record. The Corps informed the appellants that subdivision zoning did not supersede Federal Law in an E-mail string in the administrative record. In addition, Regulations at 33 CFR 320.4 (j)(2) provides as follows:

> The primary responsibility for determining zoning and land use matters rests with state, local, tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues include...water quality, preservation of special aquatic areas, including wetlands...

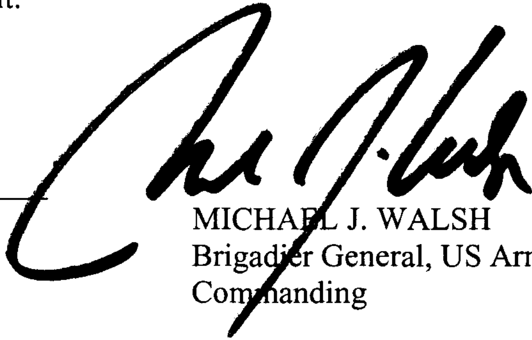
For the reasons listed above, it is determined that the District's decision is in accordance with the Section 404(b)(1) Guidelines of the Clean Water Act. Therefore, this reason for appeal has no merit.

In the permit issued to the appellant, the District modified the site plan by not approving 62 linear feet of concrete shoreline dock, allowing a "T"-shaped moorage facility at the end of the walkway, and keeping the retaining wall at the upland location. The original permit application proposed the construction of a 66 linear foot concrete dock, davits and retaining wall landward of the shoreline.

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 <u>to otherwise satisfy the public interest requirement</u>. 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. This action is not contrary to the public interest according to Corps regulations and policies.

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