

ADMINISTRATIVE APPEAL DECISION

PRIME DEVELOPERS, S.E.

FILE NO. SAJ-1996-04379

JACKSONVILLE DISTRICT

9 March 2015

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division

Receipt of Request for Appeal: 14 March 2014

Acceptance of Request for Appeal: 24 March 2014

Appeal Meeting: 29 July 2014

Authority: Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) and Section 404 of the Clean Water Act (CWA) (33 U.S.C. § 1344)

SUMMARY OF DECISION

Prime Developers, S.E. (Appellant) appealed a 14 January 2014 U.S. Army Corps of Engineers (Corps), Jacksonville District (District) proffered permit, specifically challenging Special Condition 20 which requires the Appellant to execute a performance bond and restore the site to pre-2000 conditions if the project does not alleviate erosion or mitigation fails. The project is located near the Embassy Suites Hotel, Dorado del Mar, Municipality of Dorado, Puerto Rico.

For reasons detailed in this document, it is found that the District's administrative record (AR) does not sufficiently support the inclusion of Special Condition 20 in the proffered permit. Therefore, the Appellant's request for appeal (RFA) has merit and is remanded to the District for reconsideration.

BACKGROUND

The Appellant received a permit on 8 May 2000 to extend existing breakwaters to create a sandy beach area for recreational use.¹ Following permit issuance, the Appellant violated the permit, to include not following permit conditions and constructing the project beyond the scope of the authorized footprint. Following project construction, numerous complaints from neighboring property owners raised concern regarding

¹ AR 1244-1260.

shoreline erosion caused by the project and anticipated impacts from the proposed corrective actions. The District worked with the Appellant in an attempt to resolve the permit violations through corrective actions and administrative penalties.² After years of coordination and the Appellant's unsuccessful attempts to correct the shoreline erosion caused by its project, the District suspended the permit.³

The District coordinated with the Appellant, adjacent property owners, local and federal resource agencies, and the Corps' regulatory and coastal engineering experts to develop the currently proposed corrective measures. The current proposal is for the discharge of fill to construct two submerged breakwaters, two revetments, and beach nourishment to alleviate the ongoing shoreline erosion and to provide a sandy beach area, as intended in the original permit.⁴

In response to the Appellant's proposal, the District issued an initial proffered permit with special conditions.⁵ The Appellant requested changes to several of the special conditions in the initial proffered permit, including Special Condition 20.⁶ The District made some changes but did not agree to change Special Condition 20 and issued a proffered permit on 14 January 2014.

The Appellant's RFA objects to requirements in Special Condition 20 of the 14 January 2014 proffered permit. On 24 March 2014, the South Atlantic Division office accepted Appellant's appeal.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

The District provided a copy of the AR, which was reviewed and considered in the evaluation of this RFA. With the RFA, the Appellant provided documents containing its comments and analysis of the District's jurisdictional determination. The submittals were accepted as clarifying information in accordance with 33 C.F.R. § 331.7(f).

EVALUATION OF THE REASON FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE JACKSONVILLE DISTRICT COMMANDER

Appeal Reason: The Appellant alleges that the proposed project does not necessitate the use of a performance bond; the criteria used by the District does not follow Corps

² AR 1152-1153, 1214-1215, 1220-1222, 1873-1879, and 3512-3513.

³ AR 2649-2674. It appears the District did not follow the suspension procedures to closure. The regulations at 33 C.F.R. § 325.7 provide the rules for modification, suspension, or revocation of permits. Section 325.7(c) allows the district engineer to suspend a permit and, after certain procedures have been followed, states that "the district engineer will take action to reinstate, modify, or revoke the permit." The AR only documents that the District required the permittee/Appellant to submit a new permit application (that is, a Joint Permit Application).

⁴ AR 3969.

⁵ AR 4135-4165.

⁶ AR 4098-4103.

Regulatory Guidance Letter (RGL) No. 05-1;⁷ and the requirement to remove all structures to conditions prior to 8 May 2000 may cause serious environmental damage and impose liability on other property owners due to increased erosion.

Appellant also asserts that the District should allow the following:

(1) corrective action as an alternative to full removal and restoration to original conditions; (2) an exemption to the requirement for corrective action when unsuccessful construction is due to extraordinary meteorological events; and (3) a letter of credit as an alternative to a performance bond.⁸

Finding: This reason for appeal has merit. The AR does not adequately document the basis for the District's requirement of Special Condition 20 in the 14 January 2014 proffered permit.

Discussion: The RFA objects to requirements in Special Condition 20 of the proffered permit that the District provided to the Appellant on 14 January 2014.

Special Condition 20 states the following:

The permittee shall execute a performance bond for the amount equal to the cost associated for the removal of the existing structures authorized on permit issued May 8, 2000 and this permit to provide financial assurance for the performance of all the obligations, covenants, terms, conditions and agreements required of the permittee. This Bond shall remain in place until the monitoring and mitigation reports reveal success of the authorized work and mitigation, and written verification has been provided by the Corps and shall be evaluated at least once a year. Should the proposed construction prove unsuccessful in alleviating shoreline erosion or should erosion continue to increase or mitigation fails, the Bond should be executed and the permittee be required to restore the site to pre-2000 conditions. The permittee will submit to the Corps a draft of the performance bond instrument for review and approval within 30 days from the issuance of the permit.

This condition addresses two issues. One issue is to ensure the success of the proposed project to minimize shoreline erosion that occurred as a result of the initial

⁷ Regulatory Guidance Letter No. 05-1. February 14, 2005. Guidance on the Use of Financial Assurances, and Suggested Language for Special Conditions for Department of the Army Permits Requiring Performance Bonds.

⁸ This decision document focuses on the Appellant's appeal of the requirement for a performance bond and requirements for the site to be restored to pre-2000 conditions if erosion continues or mitigation fails. The Appellant's counterproposal regarding alternatives that the District should allow would be considerations for the District to evaluate and determine whether or not to incorporate in a special condition but are not appropriate for evaluation on appeal.

construction that was authorized on 8 May 2000. The other issue is the assurance that the proposed compensatory mitigation for environmental impacts resulting from this construction will be successfully completed.

The Special Condition states that, if construction is unsuccessful in alleviating erosion or mitigation fails, the performance bond should be executed. The Special Condition requires the site to be restored to pre-2000 conditions if either occurs. That is, if the project is successful in minimizing erosion but the mitigation fails, the Special Condition is worded to require the structures to be removed and the site restored. The AR does not document the rationale for requiring the removal of structures that are serving their intended purpose instead of requiring the permittee to take steps to achieve the necessary mitigation.

Both 33 C.F.R. Part 332 and RGL 05-1 provide guidance on use of financial assurances. For an individual Department of the Army permit that requires permittee-responsible mitigation, the Corps regulations at 33 C.F.R. § 332.3(k)(2)(iv) require the special conditions to describe any required financial assurances or long-term management provisions for the compensatory mitigation project, unless they are specified in the approved final mitigation plan. Also, 33 C.F.R. § 332.7(d) addresses the long-term management of the compensatory mitigation project, and subsection (d)(3) allows the district engineer to require provisions to address contingencies, as appropriate, to include appropriate long-term financing mechanisms.

In addition to its guidance concerning financial assurances, RGL 05-1 provides more specific guidance concerning the use of performance bonds, with district engineers having the discretion to condition the approval of a permit to require the posting and execution of a performance bond by the permittee. This RGL highlights that the decision to require financial assurances should be made on a permit-by-permit basis, and the RGL lists factors that should be taken into account when deciding whether or not to require additional financial assurances.⁹ Furthermore, the RGL states the following:

The analysis used to determine that an additional financial assurance is required for a particular permit must be documented on a case-specific basis and included as part of the administrative record for that permit.¹⁰

As explained above, the Corps requires, in RGL 05-01, that Districts document their analysis that supports the determination to require a financial assurance (e.g., the need, type and amount of financial assurance required for a particular permit). The specific mitigation requirements developed for this permit action are identified in the proffered permit¹¹ for impacts that will occur to sensitive sea grass and coral habitats. However, the AR does not sufficiently document the District's analysis to support the inclusion of a

⁹ RGL No. 05-1, at para. 2.b.

¹⁰ RGL No. 05-1, at para. 2.b.

¹¹ AR 3970 to 3979.

requirement of a performance bond for the amount equal to the cost to remove all structures and return the site to pre-2000 conditions.¹²

The AR also lacks sufficient documentation to support the requirement that the Appellant remove all structures and return the site to pre-2000 conditions, if coral and seagrass mitigation fail, even if the project is alleviating erosion.¹³ If the project is achieving its intended purpose and only the mitigation effort needs to be revised and has not ultimately failed, the District does not document that removal of the structures would not cause more adverse environmental impacts and be a reasonable alternative. To the contrary, the District listed removal of the detached breakwater and removal of both existing structures as alternatives that are not practicable or reasonable.¹⁴

Action: The District shall reconsider its decision to require financial assurances and, if financial assurances are determined to be required, the District shall adequately document its analysis in the AR, and the analysis should apply the considerations and guidance in RGL No. 05-1. The AR should also address the thresholds that will trigger the requirement to execute the bond (i.e., the circumstances that constitute mitigation failure and/or failure to alleviate erosion). Also, the AR should sufficiently document the District's support for its requirement to restore the site to pre-2000 conditions.

CONCLUSION

For the reasons stated above, I have determined the appeal has merit. The AR does not adequately support the District's analysis to support the requirement for financial assurances and the requirement to remove all structures and restore the site to pre-2000 conditions - even when the structures are alleviating erosion but mitigation fails, as specified in Special Condition 20 of the 14 January 2014 proffered permit. The administrative appeals process for this action is hereby concluded.



C. David Turner
Brigadier General, U.S. Army
Commanding

¹² The AR documents the U.S. Fish and Wildlife Service's (USFWS) recommendation that a performance bond equal to the amount for removal of the entire structure for a minimum of five years be required. See AR 3567 (Environmental Assessment and Statement of Finding (EA/SOF), p. 6); AR 3742 (District Report Status, which documents USFWS's recommendation for a performance bond); and AR 3767-3770 (USFWS letter). Although the AR documents that the USFWS recommended a performance bond, the AR does not contain the District's analysis per RGL No. 05-1 to support requiring it.

¹³ Special Condition 20 is not clear regarding how "alleviating shoreline erosion" will be measured.

¹⁴ AR 3576 (EA/SOF, p. 15).