

ADMINISTRATIVE APPEAL DECISION

ROBERTO TOMBO

FILE NUMBER 200307995

JACKSONVILLE DISTRICT

DATE: March 7, 2006

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

Appellant Representatives: Marlene Leon-Rubido, Attorney for Appellant
Kathy Rogers, President of Port Antigua Homeowners Association
Don Achenberg, Vice President of Port Antigua Homeowners Association
Humberto Codispoti, member of Architectural Review Committee for Port Antigua Homeowners Association

Receipt of Request for Appeal (RFA): May 16, 2005

Appeal Conference Date: January 18, 2006

Site Visit Date: January 18, 2006

Background Information:

The subject property is located at Lot 215, Ponce de Leon Boulevard, Port Antigua Subdivision in Section 21, Township 64 South, Range 36 East, in Islamorada, Monroe County, Florida. The lot is adjacent to a residential canal tributary to Florida Bay. The navigable width of the adjacent canal is 60 feet. The 75 foot wide lot will eventually contain a single-family residence and is upland in its entirety. The shoreline fringe is composed of 70% shrub and 30% herbaceous vegetation. Buttonwoods (*Conocarpus erectus*) and Red Mangrove (*Rhizophora mangle*) are predominant along the shoreline. Also sea grape (*Coccoloba uvifera*), black mangrove (*Avicennia germinans*), poisonwood (*Metopium toxiferum*), and sea ox-eye (*Borrchia spp.*) are found. Lush submerged aquatic vegetation is located on a defined shelf and consists of coverage of greater than 66% coverage of *Syringodium filiforme* (manatee grass) and greater than three species of macroalgae and oysters.

On January 21, 2004, the Corps issued a Public Notice for the proposed project. The project is to construct a 50-foot concrete pile-supported dock, a 25-foot precast retaining seawall, and install a 14,000 lb. inclined elevator boatlift, two boat davits and two mooring piles over 575 +/- square-feet of navigable waters. The purpose of the project is to "provide boating access and

shoreline stabilization to this waterfront property on which a single-family residence is proposed.”

By letter dated February 10, 2004, the National Marine Fisheries Service (NMFS) responded to the Public Notice and stated that the project site contained and supported habitats identified as Essential Fish Habitat (EFH) by the Gulf of Mexico Fishery Management Council. Florida Bay has also been identified by the South Atlantic Fishery Management Council as a geographically defined Habitat Area of Particular Concern (HAPC). HAPC's are subsets of EFH that are rare, particularly susceptible to human-induced degradation, especially ecologically important, or located in an environmentally stressed area. The NMFS recommended:

1. The dock and access walkway shall fully adhere to the specifications in the *Dock Construction Guidelines in Florida for Docks or Other Minor Structures Constructed In or Over Submerged Aquatic Vegetation, Marsh, or Mangrove Habitat* [*“Dock Construction Guidelines”*].¹ Specifically, the height of the dock and access walkway shall not be less than 5 feet above the Mean High Water, and spacing between deck boards shall be limited to no less than ½-inch;
2. The seawall shall be constructed landward of wetlands;
3. The remaining wetlands on the property shall be preserved via deed restriction; and
4. All unavoidable impacts shall be compensated through the use of the Key's Mitigation Index Guidelines (KeyMIG).

On April 26, 2004, the Corps advised the applicant and agent of the responses to the January 21, 2004, Public Notice (i.e., NMFS) and provided the Corps' concerns/recommendations. The Corps advised that if the applicant reduced the length of the dock to 40-feet and moved the retaining wall 10-feet landward of the Mean High Water Line (MHWL), the project would qualify for authorization under General Permit 82 thus reducing mitigation fees, accelerating issuance of a permit, and reducing damage to EFH and Submerged Aquatic Resources (SAR). If the applicant chose not to follow recommendations, the Corps asked for explanations for the necessity for a 50-foot vs. 40-foot dock, the necessity for both davits and a boat elevator, the feasibility of NMFS recommendations (i.e. Dock Construction Guidelines), and the feasibility of moving the seawall to the west of the dock at least 10-feet upland of the MHWL. The Corps requested a response within 30 days of the letter.

The agent responded to the Corps' letter of May 25, 2004, stating that: a) the submitted dock length (50-feet) is what was necessary to meet the applicant's needs, b) the installation of the davits and boat lift would allow the applicant's boats to be removed from the water when not in use and were a critical aspect of the project due to the applicant's need for easy access to boat for maintenance, daily storage, and storm tie down (therefore, adhering to the Dock Construction

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.

Guidelines was not feasible to the applicant), and c) the seawall was relocated as per the Corps recommendation.

On July 1, 2004, the Corps advised the agent to remove from the drawings the mooring pilings to be located in the mitigation area to be preserved. The agent responded on July 5, 2004, with revised drawings and removed the pilings from the preservation area. In addition, the agent stated that the Homeowner's Association claimed ownership of the canal bottom; therefore, the applicant could not put a deed restriction on the area. On July 8, 2004, the Corps advised the agent all encumbrances on the property would be required.

On August 3, 2004, the Corps advised the agent of the need to adhere to the Dock Construction Guidelines and that the preservation area should be free of any impacts. On September 8, 2004, the Corps again advised the agent of the need to minimize impacts to seagrass and macroalgae on the submerged shelf and suggested a T-shaped dock, grating, elevation, decreasing overall size, etc.

On February 9, 2005, the President of the Port Antigua Property Owners Association (PAPOA) faxed the Corps a Good Faith Agreement between Mr. Tombo and the PAPOA regarding the construction of the seawall, including portions of the PAPOA's restrictive covenants pertaining to the seawall and dock construction. Regarding bulkheads, the PAPOA documents state that the PAPOA "will approve other compatible designs, however, to obtain approval of other designs it will be necessary to ... [h]ave plans and specifications approved by Army Corps of Engineers." Regarding docks (but under Section 6, Bulkheading), the PAPOA documents provide that "[w]ith respect to all lots in the subdivision, no dock shall extend more than 5 feet from any bulkhead into any canal." The PAPOA documents further provide that "deviation [is allowed] from the covenants on a case-by-case basis ... if the property owner is unable to secure permits for bulkheading from the appropriate permitting authorities ... including an effort to exhaust any and all administrative remedies and appeals"

The Corps met with the applicant on February 9, 2005, and explained that a T-dock represented the least damaging practicable alternative providing boating access on the property. The Corps stated that the T-dock would extend 7 feet waterward of the MHWL. The applicant explained that the PAPOA would not accept this proposal. The Corps recommended that the applicant pursue a variance from the PAPOA.

On February 16, 2005, the Project Manager (PM) met with the applicant and explained that the Corps would not approve a marginal dock on the property because of impacts to mangrove and seagrass (EFH).

On February 17, 2005, the PM faxed to the applicant the T-dock design for review.

On March 25, 2005, the Corps proffered a letter of permission (LOP) for the proposed project. The permit was for a T-dock with inner face placed 2-feet waterward of the MHWL with a 5-foot by 75-foot T-head. The decking was to be made of 43% light permeable grating and placed 5-feet above MHWL. The structure would have a 14,000 lb. inclined elevator boatlift and two mooring piles. A stormwater retaining wall would be constructed landward of any mangrove wetlands. All unavoidable impacts caused by shading and the access walkway were to be

mitigated for by the permittee's monetary contribution (\$1,933.98) to the Keys Environmental Restoration Fund (KERF) based upon use of the Keys' KeyMIG, and by preserving the remaining 71 linear-foot shoreline on which is located a 2-foot wide mangrove fringe. The proffered permit was appealed by letter dated May 16, 2005.

The Corps and appellant representatives conduct a site visit and appeal conference on January 18, 2006 (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 March 25, 2005, 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 as Presented by the Appellant: "The Port Antigua Property Owners Association has reviewed the proposed T-dock plan and has denied the plan. The Association has however, approved the construction of a 40-foot dock, provided the bulkhead lines up with the canal right of way. * * * The owners request that the US Army Corps of Engineers reconsider its request for a T-dock and instead consider the 40 foot dock plan * * * To only permit the construction of a T-dock would essentially be a denial of any dock construction, as the T-dock is clearly not permitted by the Association."

FINDING: This reason for appeal does not have merit.

ACTION: No action required by the District.

Discussion: At the appeal conference, Mr. Tombo's attorney explained that the [proffered] permit cannot be accomplished due to the [Port Antigua Property Owners Association (PAPOA)'s] requirements and subsequent rejection of the proposal. The PAPOA's reasons for denying the T-dock were that they owned the bottom of the canal and it would be trespassing by Mr. Tombo if the T-dock were to be built, and that the PAPOA had to be consistent in its treatment of all docks (no T-docks have been authorized).

Regardless of whether the PAPOA owns the bottom of the canal, the Corps has authority to regulate structures in navigable waters and/or waters of the United States. While **regulations at 33 CFR 320.4 (j)(2) provide** that "the primary responsibility for determining zoning and land use matters rests with state, local, tribal governments," and that "the district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance," a decision by a homeowners' association is not equivalent to zoning or land use decisions of state, local, or tribal governments. Accordingly, the District was not obliged to either accept the decision of the PAPOA or demonstrate that there were significant issues of overriding national importance. It is also worth noting that the

PAPOA document expressly provides for authorizing deviations on a case-by-case basis where a property owner has been denied a permit and has exhausted his administrative remedies.

A permit must be denied under Section 404 of the Clean Water Act if the discharge does not comply with the Section 404(b)(1) Guidelines, or if it is contrary to the public interest. 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 presumed to have less adverse impacts on the aquatic ecosystem, unless clearly demonstrated otherwise.

The Corps' considers fish and wildlife values as part of the overall public interest review, 33 CFR 320.4(a), as well as a stand-alone factor, 33 CFR 320.4(c). The Corps is required to give "full consideration" to the views of NMFS. As evidenced by its April 26, 2004 letter, the District had concerns that the project as proposed did not properly avoid and minimize impacts consistent with the 404(b)(1) Guidelines, and was contrary to the public interest. Since the District determined that the proposed project would not comply with the Guidelines and would be contrary to the public interest, they proffered a permit that would comply with the Guidelines and be consistent with the public interest.

The Corps' reason for proffering a permit for the T-dock was that it was the least environmentally-damaging practicable alternative that would meet the overall project purpose, and that the permitted T-dock would adhere to the "Dock Construction Guidelines in Florida," where the original marginal dock did not. The term **practicable** means available and capable of being done after taking into consideration cost (the T-dock should be less expensive than the concrete marginal dock), existing technology (T-docks present no appreciable technological challenges), and logistics in light of overall project purpose. The T-dock would satisfy the overall project purpose of providing boating access to a single-family home in Islamorada, Monroe County, Florida.

In addition, during the on-site investigation it became apparent that the appellant could drive the mooring pilings into his submerged property and not trespass on the PAHOA property. This is because the Homeowners Association property line is 10 feet waterward of the MHWL. Therefore, the T-dock would not trespass on the submerged PAPOA property.

The District stated in the EA/SOF (page 4):

The original proposal was to construct a 575 square foot 50' long concrete pile-supported marginal dock with davits. This marginal structure would destroy the shoreline that possesses a fringe of *Rhizophora mangle* (red mangrove) Black mangrove (*Avicennia germinans*) and buttonwood (*Conocarpus erectus*) that is approximately two feet wide. A submerged shelf exists and is vegetated with a lush meadow of *Syringodium filiforme*

(manatee grass). A marginal dock would destroy this vegetated shelf by shading and by propeller dredging. The dock therefore was redesigned as a T dock to avoid impacts to shoreline and aquatic resources mentioned above by moving waterward two feet. The original proposal did not have a retaining wall. A retaining wall was added to stop non-point pollution from entering the adjacent waters. As amended, the project minimizes impacts to the greatest extent practicable.

The importance of the mangrove shorelines in the Florida Keys is that they 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, which 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.

Over time, 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. The NMFS' letter of February 10, 2004, states that the Dock Construction Guidelines were developed in part to address the problem of cumulative impacts to this high quality aquatic habitat in the Florida Keys.

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

The PM worked with the applicant's agent in an effort to reach an acceptable alternative. Discussions with the applicant 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 Port Antigua, the Corps no longer considers concrete shoreline moorage facilities when canals are wide enough to support a dock at the end of an access walkway. 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.

The appellant also discussed navigational safety. Although not officially listed as a reason for appeal, the appellant stated that the T-shaped moorage structure would intrude further into the channel than surrounding moorage facilities. The appellant further stated that this would constitute a hazard to navigation.

Corps General Permit SAJ-82, February 7, 2003, states, “A “T” dock may not be practicable when encroachment into the navigable waterway exceeds 25 percent.” As stated above, the proposed LOP would use less than 25% of the navigable waterway. In the EA/SOF (page 2), the District stated, “The overall project purpose is to provide boating access to a single-family home in Islamorada, Monroe County, Florida.” The document further states (page 10):

The use of a T dock is practicable at this project site. The technology exists to accomplish the construction requirements. The canal bottom is less than 20 feet deep allowing driving of required piles. The canal width is 60 feet. The construction of a T dock 2 feet waterward will allow sufficient space for navigation on the canal. Employing a T dock commencing 2 feet waterward of the mean high water line has minimized the detrimental affects on the abundant natural resources at the site.

For the reasons listed above, it is determined that the District’s decision that without further modification, the proposed project would violate the 404(b)(1) Guidelines and be contrary to the public interest is supported by the administrative record. Therefore, this reason for appeal has no merit.

In the permit proffered to the appellant, the District modified the site plan, allowing a T-shaped moorage facility at the end of a 2-foot walkway, and kept the retaining wall at the upland location. The original and modified applications proposed the construction of a concrete marginal dock.

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].

The District Engineer’s action in proffering a permit for a modified project with reduced impacts that would not be contrary to the public interest, that would comply with the Section 404(b)(1) Guidelines, and that would still meet the overall project purpose, was within his discretion consistent with 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 substantial evidence 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, for the construction of a moorage facility in the waters of the United States. Accordingly, I conclude that this Request for Appeal does not have merit.

24 March 2006

(Date)

Benjamin G. Walsh, COL
Michael J. Walsh
Brigadier General, US Army
Commanding