ADMINISTRATIVE APPEAL DECISION
JUPITER WRECK, INC.
DECLINED PROFFERED PERMIT
JACKSONVILLE DISTRICT
SAJ-1990-30285

Division Engineer: *BRIGADIER GENERAL DANIEL HIBNER, SOUTH ATLANTIC DIVISION*[1]

Review Officer: *ANDREW DANGLER, NORTH ATLANTIC DIVISION*

Appellant/Applicant: *SCOTT THOMSON, JUPITER WRECK, INC.*

Regulatory Authority: *Section 10 of the Rivers and Harbors Act of 1889 (33 USC 403) & Section 404 of the Clean Water Act (33 USC § 1344)*

Date Acceptable Request for Appeal Received: *28 February 2024*

Date of Appeal Conference: 23 July 2024 (Virtual via WebEx)

Summary of Appeal Decision: Mr. Scott Thomson (Appellant) is challenging a proffered permit issued by the Jacksonville District (District), for a project located within the Atlantic Ocean, offshore of the Jupiter Inlet in Palm Beach County, Florida (Corps file number SAJ-1990-03285).[2] The Appellant has submitted four (4) reasons for appeal, asserting that the Corps incorrectly applied law, regulation, and policy during the permit review process. For the reasons detailed in this document, the Appellant's Reasons for Appeal 1-3 are found to not have merit and Reason for Appeal 4 was found to not be an acceptable reason for appeal. I find that the District evaluated and documented their 13 February 2024, proffered permit accordance with applicable laws, regulations, and policy guidance.

Background Information: The Appellant submitted a permit application to the District via email dated 20 December 2022.[3] The 320-acre project area is located within the Atlantic Ocean, between Florida Department of Environmental Protection Monument Markers R-11 and R-19 and extends varying distances up to 0.60 miles offshore, in Palm Beach County, Florida. By letter dated 8 January 2024, the District sent an initial

[1] Pursuant to 33 CFR § 331.3(a)(1), the Division Engineer has the authority and responsibility for administering the administrative appeal process. The Division Engineer may delegate the authority and responsibility of the administrative appeal process for approved jurisdictional determinations, including the final appeal decision. The South Atlantic Division Engineer is the decision authority regarding the merits of this appeal; however, the administrative review of this specific appeal was delegated to the North Atlantic Division review officer. Regardless of this delegation, the South Atlantic Division Engineer retains overall responsibility for the administrative appeal process. The District Engineer retains the final Corps decision-making authority for the permit decision.
[2] Administrative Record (AR) Corps_0000002-00081
[3] AR Corps_000130-000132

proffered permit to the Appellant.[4] The Appellant responded via email correspondences dated 10 and 13 January 2024, with a series of objections to the terms and conditions of the initial proffered permit.[5] As documented in the memorandum dated 26 January 2024, the District considered the Appellant's objections and subsequently revised portions of the initial proffered permit.[6] By letter dated 6 February 2024, the District sent a proffered permit to the Appellant for reconsideration.[7] By letter dated 13 February 2024, the District informed the Appellant that it had inadvertently identified the proffered permit as an "Initial Proffered Permit" rather than a "Proffered Permit" on the Notification of Administrative Appeal Options and Process and Request for Appeal (NAO/NAP) form (NAO/NAP) form provided.[8] To correct this error, the District provided the Appellant with a copy of the proffered permit, an updated NAO/NAP form dated 13 February 2024, a copy of the decision document for the initial proffered permit, and the 26 January 2024, supplemental memorandum explaining their response to the Appellant's objections to the initial proffered permit.[9]

The Appellant appealed the proffered permit by submitting a complete Request for Appeal (RFA), which was received by the South Atlantic Division (SAD) on 28 February 2024. By letter dated 21 March 2024, the Appellant was informed by the SAD Review Officer (RO) that the RFA was accepted. On 9 MAY 2024, SAD requested assistance from the North Atlantic Division (NAD) with the review of the subject appeal. On 13 May 2024, NAD accepted the request for assistance.

Information Received and its Disposition During the Appeal Review: The administrative record (AR) is limited to information contained in the record as of the date of the NAO/NAP form. No new information may be submitted to support an RFA and, therefore, neither the Appellant nor the District may present new information to the RO.[10] To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the AR, because the District Engineer did not consider it in making the decision on the AJD. However, the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision.[11]

The information received during this appeal review and its disposition is as follows:

1. On 21 February 2024, the South Atlantic Division received the Appellant's RFA. In the RFA, the Appellant identified the four (4) reasons for appeal listed below.

[4] AR Corps_003221-003225 and Corps_003226-003308
[5] AR Corps_003355-003357
[6] AR Corps_000123-000129
[7] AR Corps_003640-003645
[8] AR Corps_003732-003735
[9] AR Corps_003736-003737, Corps_000082-Corps 000122 and Corps_000123-000129
[10] *See* 33 CFR 331.2
[11] *See* 33 CFR 331.7(f)

2. On 13 March 2024, the District provided a complete copy of the proffered permit, transmittal letter and associated NAO/NAP form by email to the RO. The District also confirmed that the proffered permit is not associated with an enforcement action. In addition, the District indicated that it had reviewed the RFA and had identified the following as new information that was not considered by the date of the proffered permit: 1) Code of Conduct for RPA members, RFA Appendix B; 2) "Motion to Allow Salvage to Proceed", dated May 18, 1987, RFA Appendix D; 3) Current State Permits to Research and Recover Shipwreck, dated February 5, 2024, RFA Appendix F; 4) Florida Department of Environmental Protection Permit Time Extension to February 2029, RFA Appendix F; and, 5) Recommend Sample "Letter of Permission", RFA Appendix I. By email correspondence dated 19 March 2024, the District clarified that none of the information identified as new information would have affected its final permit decision.

3. On 21 March 2024, the RO informed the Appellant by letter that the appeal had been accepted.

4. On 8 April 2024, the District provided a copy of the AR by email to the RO and the Appellant. The AR is limited to information contained within the record prior to the date of the proffered permit and NAO/NAP form. In this case, that date is 13 February 2024.

5. On 23 July 2024, a virtual appeal conference was held. The conference followed the agenda provided to the District and the Appellant by the RO via email dated 16 July 2024. The goal of the conference was to summarize and clarify the Appellant's and the District's positions as they relate to the appeal. Topics discussed at the appeal meeting are summarized in the document entitled "Memorandum for Record of 23 July 2024, Appeal Conference for Jupiter Wreck, Inc.'s Appeal of Declined Proffered Permit CESAJ-1990-30285". A draft of this document was circulated to the appeal meeting attendees for review on 26 July 2024, and was finalized by the RO on 6 August 2024.

Evaluation of the Appellant's Reasons for Appeal:
The reasons for appeal described below are based on the Appellant's RFA but have been rephrased to clearly describe the findings that must be made regarding this appeal. The review is limited to whether the District examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the decision made.

First Reason for Appeal: The Appellant asserts that the District incorrectly applied federal law when it conducted a review of its proposal pursuant to Section 106 of the National Historic Preservation Act of 1966 (NHPA). Specifically, the Appellant asserts that in this case the Abandoned Shipwreck Act of 1987 (ASA) grants the authority to conduct archaeological reviews to the state of Florida and exempts the Corps from conducting a review pursuant to Section 106 of the NHPA.

Finding: This reason for appeal does not have merit.

Action: No action is required.

Discussion: The ASA[12] and the NHPA [13] both address the protection of historic properties; however, these laws have different focuses and scopes. The ASA focuses on abandoned shipwrecks in the nation's rivers and lakes, and in the ocean to a distance of three miles from shore. The ASA generally gives states the title to these shipwrecks and establishes a framework for their management and protection. The "Abandoned Shipwreck Act Guidelines" provide advice to the States and Federal agencies on how to effectively manage shipwrecks in waters under their ownership or control. Specifically, the ASA Guidelines at "Part II. Guidelines B. Establishing Federal Shipwreck Management Programs, Guideline 4: Consider the effects of proposed undertakings on historic shipwrecks", state that**:**

> [i]n accordance with section 106 of the National Historic Preservation Act (16 USC 470f), Federal agencies must take into account the effect of any proposed Federal, federally assisted, or federally licensed undertaking on any shipwreck that is included in or eligible for inclusion in the National Register of Historic Places. In addition, agencies must afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the proposed undertaking. Agencies must take these actions prior to approving the expenditure of any Federal funds or prior to issuing any license, as the case may be. The Advisory Council on Historic Preservation's regulations (36 CFR Part 800) set forth procedures for Federal agencies to fulfill their section 106 responsibilities.[14]

The Corps is responsible for conducting Section 106 of the NHPA reviews in accordance with its governing regulations (i.e., 36 CFR 800.1 et seq. and 33 CFR 325: Appendix C et seq.).[15] In this case, the federal undertaking involves the District issuing a DA permit for the work associated with the proposed salvage activities. During the application review process, the Appellant repeatedly argued that a Section 106 NHPA review was not required. However, in a letter dated 22 September 2024, the District informed the Appellant that the admiralty claim does not supersede the Corps' obligation to ensure compliance with the NHPA for activities authorized by a DA permit. Accordingly, as detailed in Section 2 and Section 10 of the 8 January 2024, Environmental Assessment/Statement of Findings (EA/SOF), the District conducted the necessary Section 106 NHPA review of the proposed undertaking pursuant to 36 CFR

[12] *See* 43 USC 2101-2106)
[13] *See* (54 USC 306101 et seq)
[14] *See* Final Guidelines for the Abandoned Shipwreck Act issued by the Department of the Interior, December 4,1990, in the Federal Register, Vol. 55, No. 233, pp. 50116-50145.
[15] 54 USC 306108

800.1 and 33 CFR 325: Appendix C.[16]. The AR clearly demonstrates that the District properly fulfilled the requirements of the NHPA and its implementing regulations by completing a Section 106 review for the proposed undertaking. There is no evidence to suggest, nor any reason to believe, that the District misapplied its Section 106 analysis during its review of this action. Therefore, this reason for appeal does not have merit.

Second Reason for Appeal: Within this reason for appeal, the Appellant asserts the following two points:

Point A: The Appellant asserts that the proposed work is not subject to Section 10 of the RHA because it is not located in a navigable channel. Based on this claim, the Appellant contends that the District lacked the authority to impose the special conditions.

Point B: The Appellant argues that the District applied an incorrect definition of "fill" and altered the project description without obtaining the Appellant's approval. Specifically, the Appellant claims that the District should have used the February 2001 definition of "incidental fallback." Furthermore, the Appellant asserts the project does not require a Section 404 permit under the CWA.

Finding: As described below, Points A and B of this reason for appeal do not have merit.

Action: No action is required.

Discussion: The AR provides the following permit history for the project: "A Department of the Army (DA) permit was issued on 3 August 1990, and after subsequent modifications, expired on 19 June 2003. A DA permit was issued on 26 May 2005 and expired on 31 August 2010. The Corps Enforcement issued a cease-and desist notice on 6 September 2011 for ongoing salvage operations without a valid DA permit authorization. The Corps rescinded the cease-and-desist notice and issued a DA permit on 10 October 2013. That DA permit expired on 31 August 2015. On 18 July 2018, the Corps again issued a DA permit for the authorized work and that permit expired on 18 July 2023".[17] As further detailed on Page 8, Table 1, of the Appeal Conference Memorandum for Record (MFR), dated 6 August 2024, (Appendix A of this decision document), the past permits included in the AR were issued pursuant to varying authorities (Section 10 of the RHA only, and both Section 10 of the RHA and Section 404 of the CWA), and utilizing various permit types, including standard individual permits and letters of permission.[18]

[16] AR Corps_003312-Corps_003313 and Corps_003335-Corps_003340
[17] AR Corps_000083
[18] An LOP is a type of individual permit issued in accordance with abbreviated procedures which include and a public interest evaluation, but without the publishing of an individual public notice. Letters of permission may be used in those cases subject to Sec 10 when, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition. Activities requiring authorization under Sec 404 generally are not authorized by LOP.

The Appellant's application described the proposed activity as follows "the applicant proposes to move sand on the seabed by use of small dredges, propeller deflectors, blowers, and air lifts in order to retrieve artifacts for a salvage recovery project and then allowing the sand to return to the site." The application also references the same project drawings that were used to support prior permit actions.[19]

The District published a public noticed on 5 April 2023, announcing that it had received an application for a DA permit pursuant to Section 10 of the RHA.[20] The public notice included two maps depicting the project location and two drawings detailing the activities associated with the proposed project.[21]

An Approved Jurisdictional Determination (AJD) was previously issued for the project site on 4 June 2010, and expired on 4 June 2015.[22] The AR indicates that the District did not issue an AJD for the current action.[23] Regulatory Guidance Letter (RGL) 16-01 states that "the Corps regulations implementing the CWA and RHA leave the decision of whether to issue a JD to the discretion of the District Engineer."[24] The District determined that the proposed activities for the current action fall under the jurisdiction of both Section 404 of the CWA and Section 10 of the RHA.[25]

As discussed below in the Third Reason for Appeal, the Appellant first raised concerns regarding the District's assertion of Section 404 of the CWA and Section 10 of the RHA jurisdiction in their objections to the initial proffered permit issued by the District.[26] In response to these objections, the District prepared a memorandum dated 26 January 2024,[27] to supplement the findings of its 8 January 2024, EA/SOF.

In the supplemental memorandum the District stated that:

> [t]he applicant's salvage methodologies proposed and evaluated during the permit review process include the use of both powerful propwash deflectors capable of dispersing sands to depths of 20 feet, suction hand-dredges no greater than 6-inches in diameter, blowers, and air lifts. The propwash deflectors, blowers and hand-dredges will be used to move sand from the sea floor to other areas, which will create a pit (dredge hole) in the sand. These pits can be up to 15 to 20 feet in depth and 20-30 feet in width. The sand that is moved out of the pits will be discharged nearby but to different areas on the ocean floor, creating a large buildup of sand outside the pits where exploration and, potentially, recovery

[19] AR Corps_00131
[20] AR Corps_001654-001658
[21] AR Corps_001659-001662
[22] AR Corps_000756-000763
[23] AR Corps_000084
[24] *See* RGL-16-01
[25] AR Corps_000084
[26] AR Corps_003355-003357 and Corps_003363-003367
[27] AR Corps_ 000123-000129

activities may occur. These dredge holes are expected to fill in through natural processes over time, although the sand that fills in these dredge holes will, for the most part, not be the same sand that was initially removed from them.

Specific to Section 10 jurisdiction under the RHA, the District explained in the supplemental memorandum that "the Atlantic Ocean is a navigable water of the United States pursuant to 33 CFR 329.4, as it is subject to the ebb and flow of the tide and/or is presently used, or has been used in the past, or may be susceptible for use to transport interstate or foreign commerce". Based on the project location provided in the application submitted by the Appellant, the District confirmed that the project site is located within the Atlantic Ocean, no more than 0.60 miles offshore of the Florida coast near Jupiter inlet.[28] The supplemental memorandum further states:

- The project location is within three nautical miles seaward from the baseline (The Territorial Seas)[29], which pursuant to 33 CFR 329.12(a), is the extent of Corps jurisdiction in all ocean and coastal waters.
- Sediment movement will be conducted using powerful propwash deflectors capable of dispersing sands to depths of 20 feet, and suction hand-dredges with a diameter of no more than six inches. Depending on the methods used, size of temporary deposition areas will vary based on the amount of sediment displaced. The blown sand creates dredge holes in the seabed that can reach depths of 15 to 20 feet and widths 20 to 30 feet.
- Pursuant to 33 CFR 322.2(c) the term "work" includes activities such as dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States. Furthermore, pursuant to 33 CFR 322.3(a), DA permits are required for structures and/or work in or affecting navigable waters of the United States unless exempt by 33 CFR 322.4.[30]

Based on this information, the District concluded: "[T]he work to be performed constitutes dredging, excavation, filling and/or another modification that alters or modifies the course, location, condition, or capacity of the navigable waters in which the project will be located by, inter alia, temporarily changing the bottom elevation of those waters by up to approximately 20 feet and changing the water's condition via temporary

[28] AR Corps_000082
[29] 33 CFR 329(a)(1) states that "generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured."
[30] Pursuant to 33 CFR 322.4(a) Activities that were commenced or completed shoreward of established Federal harbor lines before May 27, 1970 (see 33 CFR 320.4(o)) do not require section 10 permits; however, if those activities involve the discharge of dredged or fill material into waters of the United States after October 18, 1972, a section 404 permit is required. (See 33 CFR part 323.) and (b) Pursuant to section 154 of the Water Resource Development Act of 1976 (Pub. L. 94-587), Department of the Army permits are not required under section 10 to construct wharves and piers in any waterbody, located entirely within one state, that is a navigable water of the United States solely on the basis of its historical use to transport interstate commerce.

increase in turbidity".[31] The AR demonstrates that the District correctly applied Corps regulations to determine the project's location is within a navigable water of the United States and provides sufficient rationale which supports its determination that the proposed project would involve work within a navigable water of the United States. The Appellant's claim that that the proposed project is not subject to Section 10 jurisdiction because it is not located within a navigable channel is not supported by Corps regulations.

Regarding the Appellant's claim that the Corps lacked authority to impose special conditions in the proffered permit, 33 CFR 325.4 outlines the circumstances under which special conditions may be included in DA permits. Specifically, 33 CFR 325.4(a) states "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." Additionally, 33 CFR 325.4(a)(1) notes that "[l]egal requirements which may be satisfied by means of Corps permit conditions include compliance with the 404(b)(1) guidelines, the Environmental Protection Agency's (EPA) ocean dumping criteria, the Endangered Species Act, and requirements imposed by conditions on state section 401 water quality certifications."

The District documented its rationale for including each of the 13 special conditions in the initial proffered permit.[32] As previously mentioned – and further discussed in the Third Reason for Appeal - the District prepared a supplemental memorandum on 26 January 2024, to address the Appellant's objections to the initial proffered permit. This supplemental memorandum also explains the District's rationale for modifying, in part, the special conditions included in the proffered standard individual permit (proffered permit).[33] The AR shows that the District followed Corps regulations and provides a reasonable basis for its decision to included special conditions in the proffered permit for the project. The Appellant's claim that that the Corps lacked authority to impose special conditions on the proposed project is not supported by Corps regulation. For these reasons, Point A of this reason for appeal does not have merit.

In Point B of this reason for appeal, the Appellant claims that the District should have followed the January 17, 2001, Final Rule[34] which defined "incidental fallback" as "the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed".

[31] AR Corps_000127
[32] AR Corps_000116-000120
[33] AR Corps_000003-000081
[34] *See* 66 FR 4549, January 17, 2001, and 66 FR 10367, February 15, 2001

On 30 December 2008, the USACE and the EPA published a final rule which amended a CWA section 404 regulation that defines the term “discharge of dredged material. The December 2008 Rule was issued to conform the USACE's and EPA's regulations to a court order which invalidated the 17 January 2001, amendments to the regulatory definition of discharges of dredged material.[35] The December 2008 rule returns the definition of “discharge of dredged material” to that which was promulgated in the 10 May 1999, Final Rule, which includes several examples where a discharge results in a regulable redeposit, but specifically excludes incidental fallback without defining that term. The 2008 rule states that “as with the 1999 rule,[36] deciding when a particular redeposit of dredged material is subject to Clean Water Act jurisdiction will entail a case-by-case evaluation, consistent with our Clean Water Act authorities and governing case law.”

33 CFR 323.2(d)(1) defines the “discharge of dredged material” as any addition of dredged material into, including the redeposit of dredged material (other than incidental fallback) within, the waters of the United States, except as provided in paragraph (d)(3). Pursuant to 33 CFR 323.2(d)(1)(iii), a discharge of dredged material includes the addition of material into waters of the United States which is incidental to any activity, including mechanized land-clearing, ditching, channelization, or other excavation.

Specific to Section 404 CWA jurisdiction, the District stated in the supplemental memorandum that “as noted above, the amount of sand being discharged by propwashing, blowers, suction hand-dredges and ancillary equipment is relatively substantial and is not de minimis.[37] The sand excavated and/or removed by the applicant will not be redeposited in the exact same location. Instead, it will be intentionally discharged outside the dredge holes in other nearby locations to allow for other exploration and recovery activities.” The supplemental further states:

- The methods employed by the applicant to explore and recover materials from the shipwreck site will result in the discharge of dredge and/or fill material (sand), which are pollutants,[38] from a point source (propwash deflectors, suction hand-dredges and ancillary equipment).”[39]
- The sand discharged by propwashing, blowers, suction hand-dredges and ancillary equipment meets the definitions of both dredged material and fill pursuant to 33 CFR 323.2(c) and (d)(1) and (2), (e)(1) and (2) and (f).
- Some small amount of sand will undoubtedly be spilled or disturbed and redeposited the same location as the dredge holes. For the purposes of this permitting decision, the Corps does not take a position on whether that small fraction of spilled or disturbed sand might qualify as incidental fallback or

[35] See 73 FR 79641, December 30, 2008
[36] See 64 FR 25120, May 10, 1999
[37] 33 CFR 323.2 (d)(5)
[38] *See* 33 U.S.C. § 1362(6)
[39] *See* 33 U.S.C. § 1362(12)

incidental deposition of dredged or fill material. The Corps' determination is based on lion's share of sand which will be removed from the sea floor and discharged in substantial quantities in other locations.

- The intent of the applicant's dredging and excavation of sand from dredge holes is to move that sand to another location. Such discharges of sand do not qualify as "incidental fallback," an "incidental addition" of dredged or fill material, or the "[i]incidental movement of dredged material occurring during normal dredging operations." In this instance, the discharge of this sand in another location is not "incidental" to dredging, excavation or other in-water work and is not "fallback." Rather, the movement of this sand from one place to another, to allow the applicant to access the remains of the Jupiter Wreck, is the primary purpose and objective of the in-water dredging and excavation work. This sand is not spilling out of a clam shell, bucket or dredge incidentally and being redeposited back in the exact place it was removed from. Rather, the purpose of the dredging or excavation work to be performed is to move this sand off the sea floor and pile it up in another location.
- Moreover, the discharge of this sand is anticipated to temporarily raise the bottom elevation of the sea floor. These activities designed to move sand from one location to another are the functional underwater equivalent to the sidecasting dredged or fill material.

Based on this information, the District concluded: "For these reasons and others, the project, as proposed and as permitted, falls within the jurisdiction of the CWA and is required to obtain a Section 404 CWA permit. The AR demonstrates that the District correctly applied Corps regulations and provides a sufficient rationale which supports its determination that the proposed project would result in the discharge of dredged or fill material into waters of the United States and is therefore subject to Section 404 CWA jurisdiction. The Appellant's claim that that the proposed project is not subject to Section 404 jurisdiction based on the 2001 Final Rule definition of incidental fallback is not supported by Corps regulations.

As discussed in detail below in the Third Reason for Appeal, the District provided the Appellant with an initial proffered permit on 8 January 2024, in accordance with 33 CFR 331.2. The initial proffered permit notified the Appellant of the District's intent to issue a standard permit for the prosed project pursuant to Section 10 of the RHA and Section 404 of the CWA and provided the Appellant with an opportunity to object to the terms and conditions of the permit. By emails dated 10 and 13 January 2024, the Appellant objected to certain conditions included in the initial proffered permit.[40] As detailed in the supplemental memorandum, the District considered the Appellants objections and made certain modifications to the permit prior to issuing the proffered permit to the Appellant. In addition to the proffered permit, the District provided the Appellant with a copy of the

[40] AR Corps_003355-003357 and Corps_003363-003367

8 January 2024, EA/SOF and supplemental memorandum which support the District's permit decision. The AR contains substantial evidence to support the proffered permit conditions and the District's conclusions regarding the applicability of Section 404 of the CWA to the Appellant's activities were made in accordance with applicable laws, regulations, and policy guidance

For these reasons, Point B of this reason for appeal does not have merit.

Third Reason for Appeal: The Appellant asserts that the District incorrectly applied law, regulation, and officially promulgated policy when it did not provide the Appellant with an opportunity to appeal the initial proffered permit before receiving the proffered permit.

Finding: This reason for appeal does not have merit.

Action: No action is required.

Discussion: The administrative appeal regulations at 33 CFR 331.2 require the Corps to provide a proffered permit to applicants for activities it intends to permit using a standard permit or letter of permission. According to 33 CFR 331.2, the Corps' first offering of the permit with special conditions is referred to as the "initial proffered permit". Applicants may either accept or object to any special terms and special conditions of the permit. If the applicant objects to the terms or conditions of the permit, they must submit a letter to the District Engineer explaining their objections. The District Engineer, after evaluating the objections, may: (1) modify the permit to address all of the Applicant's objections, (2) modify the permit to address some, but not all, of the applicant's objections, or (3) decide not to modify the permit and issue as originally written. The District Engineer will then offer the permit to the applicant a second time. 33 CFR 331.2 defines the second offering as the "proffered permit". If the applicant still objects to the terms and conditions, they may decline the proffered permit and submit a RFA to the appropriate Division Engineer in accordance with 33 CFR 331.6(b).

In this case, by letter dated 8 January 2024, the District sent an initial proffered permit and the associated NAO/NAP form to the Appellant for review.[41] By emails dated 10 and 13 January 2024, the Appellant objected to certain conditions included in the initial proffered permit.[42] Specifically, the Appellant requested modifications or deletions to General Condition 3, which pertains to the handling of previously unknown historic or archeological remains discovered during the permitted activity and Special Condition 6, which includes measures aimed at protecting he the federally-listed West Indian manatee. Additionally, the Appellant requested that the District modify Special Condition 12, which identified the area in which any salvage operations were authorized.

[41] AR Corps_003221-003225 and Corps_003226-003308
[42] AR Corps_003355-003357 and Corps_003363-003367

The Appellant also stated that they did not intend to waive any of rights granted to them under their admiralty claim and/or by the State of Florida. Additionally, the Appellant requested that the District include language in the permit ensuring that any termination by the Corps would only occur after notification and an opportunity to resolve any noncompliance issues, and that the Appellant would be afforded due process in accordance with the U.S. Constitution. Further, as discussed above in the Second Reason for Appeal, the Appellant stated that Section 10 of the RHA and Section 404 of the CWA jurisdiction do not apply to the proposed work associated with the project.

As detailed in the supplemental memorandum, the District considered the Appellant's objections and subsequently revised General Condition 3 and deleted Special Conditions 6 and 7 from the initial proffered permit.[43] The District also agreed to inform the Appellant that the issuance or acceptance of a DA permit would not waive or recognize any of their admiralty rights or claims. However, the District did not agree to revise Special Condition 12 of the initial proffered permit, nor did it agree to add requirements limiting or altering the Corps' ability to modify, suspend, or revoke the DA permit in accordance with 33 CFR 325.7(a) - (e). Furthermore, the District disagreed with the Appellant's assertion that Section 404 CWA and Section 10 RHA do not apply to the proposed project. By letter dated 6 February 2024, the District sent a proffered permit and NAO/NAP form to the Appellant.[44] In an email on the same date, the District informed the Appellant of a clerical error on the NAO/NAP form, which incorrectly labeled it as the "Initial Proffered Permit" rather than the "Proffered Permit."[45] To correct the error, the District re-sent the proffered permit with a corrected NAO/NAP form, both dated 13 February 2024, along with a copy of the 8 January 2024, EA/SOF and the 26 January 2024, supplemental memorandum detailing its response to the Appellant's objections.[46] By providing the corrected NAO/NAP form, the District ensured that the Appellant had the full 60-day period to appeal the permit decision in accordance with 33 CFR 331.6. The AR documents that the District correctly followed the appeal process procedures outlined in Corps regulation 33 CRF 331. Therefore, this reason for appeal does not have merit.

Fourth Reason for Appeal: The Appellant asserts that the District Archaeologist's sworn duty to adhere to the Registered Archeologists' Code of Conduct resulted in a conflict of interest during the permit application review process.

Finding: This is not an acceptable reason for appeal.

Action: No action is required.

[43] AR Corps_000123-000129
[44] AR Corps_003640-003645
[45] AR Corps_003489
[46] AR Corps_003736-003737, Corps_000082-Corps 000122, and Corps_000123-000129

Discussion: Acceptable reasons for appeal include, but are not limited to, procedural errors, incorrect application of law or regulation, omission of material fact, incorrect application of regulatory criteria or guidelines, or use of incorrect data. The Appellant's perceived conflict of interest does not fall within these acceptable grounds for appeal, as outlined by 33 CFR 331.9(b), and is therefore not considered a valid reason for appeal.

Conclusion: As my final decision on the merits of the appeal, I conclude substantial evidence exists in the AR to support the that the District's conclusions and clearly demonstrates that the conditions included within the proffered permit were made in accordance with applicable laws, regulations, and policy guidance. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

25 MAR 2025
DATE

Andrew Dangler
FOR DANIEL H. HIBNER, PMP
Brigadier General, USA
Commanding