

**ADMINISTRATIVE APPEAL DECISION**

**FILE NUMBER 200207202 (LP-CR)**

**JACKSONVILLE DISTRICT**

**DATE: January 21, 2006**

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

**Appellant Representative:** Wayne R. Miller

**Receipt of Request for Appeal (RFA):** September 30, 2003

**Appeal Conference Date:** February 5, 2004

**Site Visit Date:** February 5, 2004

**Background Information:** Mr. Wayne R. Miller requested a permit to perform work in navigable waters of the United States. On July 31, 2003, the Jacksonville District sent a Department of the Army Letter of Permission (LOP) to Mr. Miller. The LOP authorization is for the construction of a 5' x 40' (200 square feet) marginal wooden boat dock within Garrison Bight. According to Mr. Miller (Appellant), and the Statement of Findings, the original request, was approved by the Florida Department of Environmental Protection, for a 300 square foot dock within Garrison Bight and a 360 square foot extension to an existing dock into Florida Bay. The dock extension into Florida Bay would be over a thick bed of *Thalassia testudinum* (turtle grass). A concrete bulkhead characterizes the southern shoreline (Garrison Bight) and the proposed 5'x40' marginal moorage platform would cover sparse areas of turtle grass and microalgae. The Appellant and the Corps worked together to minimize the project impacts to 200 square feet in Garrison Bight and to eliminate the dock extension into Florida Bay. Special conditions to the LOP require the appellant to pay \$1974.90 for in-lieu fee mitigation to compensate for project impacts and to place 28,100 square feet of submerged land under deed restrictions.

**Summary of Decision:** I find that the appeal has merit. I find that the mitigation imposed by Jacksonville District (District) in the proffered permit does not comply with applicable Corps' regulations and policy.

**APPEAL EVALUATION, FINDINGS, and INSTRUCTIONS to the Jacksonville District Engineer (DE):**

**Reasons for Appeal as Presented by the Appellant:**

**Appeal reason:** According to the appellant, the Corps did not mention the deed restrictions during the permit evaluation process. The appellant states: "The proposed deed restrictions

make no sense to me. First, they substantially reduce the value of my property since they place an encumbrance on my title. Second, the size of the deed restriction, 28,100 square feet, is significantly larger than the size of the project, 200 square feet. Third, the majority of the property covered by the deed restriction is on the north side of my property where the requested dock extension was deleted from the project.”

**FINDING: This reason for appeal has merit.**

**ACTION:** That the Jacksonville District revisit the mitigation conditions of the permit to remove the deed restriction requirements, unless it can establish that they are necessary to ensure that the activity is not contrary to the public interest, and document the basis for any remaining on-site mitigation in the administrative record, including the consistency with applicable regulations, policy, and mitigation ratios.

**Discussion:** A Department of the Army LOP was proffered for this project. Permit conditions are being appealed which require the protection, in perpetuity, of on-site submerged bay bottom to **minimize** the impacts of the proposed action, and to ensure that cumulative impacts are minimal. Jacksonville District Regulatory personnel must evaluate every project in the context of the physical characteristics of the site including direct, indirect, and cumulative impacts.

It is a standard procedure to require mitigation for aquatic resource impacts from permit issuance. The implementing regulations for the US Army Corps of Engineers Regulatory Program (33 CFR 320-330) state at 320.4(r)(1),

Mitigation is an important aspect of the review and balancing process on many Department of the Army permit applications. Consideration of mitigation will occur throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses.

Additional mitigation measures may be required as a result of the public interest review process, but “[o]nly those measures required to ensure that the project is not contrary to the public interest may be required under this subparagraph [(320.4(r)(1)(iii)]. Further, the Corps of Engineers can require mitigation to compensate for the specifically-identifiable, probable impacts of the proposal. The implementing regulations for the US Army Corps of Engineers Regulatory Program (33 CFR 320-330) state at 320.4(a) *Public Interest Review* (1),

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... All factors which may be relevant to the proposal must be considered including the cumulative effects thereof...

Again at 320.4(r), *Mitigation* (2),

All compensatory mitigation will be for significant resource losses which are **specifically identifiable, reasonably likely to occur**, and of importance to the human or aquatic environment. Also, **all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts**, and reasonably enforceable. District engineers will require all forms of mitigation, including

compensatory mitigation, only as provided in paragraphs (r)(1) (i) through (iii) of this section. Additional mitigation may be added at the applicants' request [320.4(r)(2), emphasis added].

The Corps' Regulatory Guidance Letter No. 02-2, Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, dated December 24, 2002, states,

Under existing law, the Corps requires compensatory mitigation to replace aquatic resource functions unavoidably lost or adversely affected by authorized activities... Permittees must provide appropriate and practicable mitigation for authorized impacts to aquatic resources in accordance with the laws and regulations [¶ 1.a]...

Districts will determine what level of mitigation is "appropriate" based upon the functions lost or adversely affected as a result of impacts to aquatic resources. [¶ 2.c]...

The wetlands, uplands, riparian areas, or other aquatic resources in a mitigation project should be permanently protected, in most cases, with appropriate real estate instruments, e.g., conservation easements, deed restrictions.... [¶ 3.g]

In its July 21, 2003, Statement of Findings (SOF), the District discusses appropriate mitigation and states:

"The permittee agrees to compensate for 200 square feet of submerged aquatic resource impacts by sponsoring mitigation in the amount of \$1,974.90 to the Florida Keys Environmental Restoration Trust Fund for the acquisition, enhancement, preservation, and management of wetland resources within Monroe County."

Corps 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. In this case, the District used the Keys Mitigation Functional Assessment (KEYMIG) worksheet to provide the functional assessment of impacts to aquatic resources at 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.

The project manager completed the Functional Assessment KEYMIG Worksheet on February 7, 2003. The assessment concluded, "A total of \$1,974.90 will be required as in-lieu payment to the Florida Keys Environmental Restoration Trust Fund for compensation for unavoidable wetland impacts." The SOF did not discuss how the preservation of submerged bay bottom would compensate for unavoidable impacts to aquatic resources.

By letter dated July 11, 2003, the Corps informed the appellant that his proposed work would require an in-lieu fee of \$1,974.90 to mitigate for project impacts. The appellant was directed to

provide written intention of continuing with the permit process. The Corps letter did not discuss the requirement for conservation restrictions.

However, the SOF did discuss conservation restrictions in the minimization discussion on page 4:

“The applicant has minimized the proposal to the fullest extent possible by reducing the length of the original wood dock by 35’, by eliminating the extension to the wood pier, and by preserving the remaining privately-owned submerged bay bottom by deed restriction.”

At the appeal conference, the Jacksonville District conceded the appellant’s point that the 28,100 square foot deed restriction was not imposed as compensatory mitigation after avoidance and minimization. Further, the SOF acknowledged that the aquatic impacts are insignificant. The Jacksonville District explained that deed restrictions have been required when there are concerns about cumulative impacts. The appellant responded that KEYMIG calculations were used to determine mitigation requirements and that preservation of his submerged lands surrounding the permit area, and on the opposite side of his lot where no work is permitted, is punitive.

While the District can require mitigation for specifically-identifiable impacts, including a proposal’s contribution to cumulative impacts, the administrative record and discussion at the appeal conference did not support the position that the appealed project would produce indirect impacts or a contribution to cumulative impacts to the aquatic environment that were unacceptable. Therefore, the administrative record or findings from the appeal conference did not support the imposition of the permit condition requiring deed restrictions on appellant’s submerged property.

The site plan attached to the proffered permit (LOP) indicates that the areas required to be placed under deed restriction are located on both the north end (area A=26,250 square feet) and the south end (area B=1,850 square feet) of the applicant’s property. The authorized work for this particular project is confined to area B. For a 200 square foot impact, 1,850 square feet of preservation (area B) is at a ratio of 9.25 to 1. By adding an additional 26, 250 square feet of sea bed (area A), the preservation ratio goes to 140.5 to 1. Historically, the Corps uses a 10 to 1 mitigation ratio for preservation mitigation when other options are exhausted.

In this case, the Corps applied other compensatory mitigation measures by using an in-lieu fee for mitigation. As discussed earlier, the District’s functional assessment concluded, “A total of \$1,974.90 will be required as in-lieu payment to the Florida Keys Environmental Restoration Trust Fund for compensation for unavoidable wetland impacts.” The in-lieu fee satisfied the compensatory mitigation requirements in and of itself. Additionally, it appears that the in-lieu fee mitigation alone is “appropriate” compensation if the applicant did not have control of the 28,100 square feet of submerged real estate that lies in areas A and B. [emphasis added].

In this circumstance, the required compensatory mitigation is not “appropriate” for the direct, indirect, and contribution to cumulative impacts associated with this activity. The administrative

record does not support the Corps position that an unacceptable level of indirect and cumulative impact contribution could result from the proposed work if the subject deed restrictions are not in place. Based on the administrative record on appeal, the mitigation represented by the deed restriction appears excessive.

**Information Received and its Disposition during the Appeal Review:**

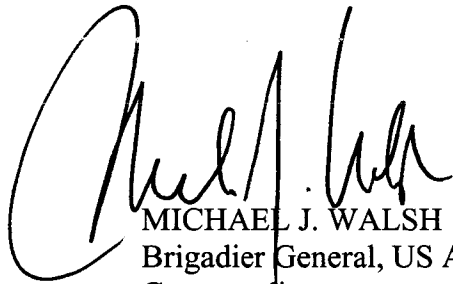
1) The Jacksonville District furnished a copy of the Administrative Record for the subject application.

2) The appellant furnished a copy of the proffered permit with his Request for Appeal.

**CONCLUSION:** After reviewing and evaluating the administrative record provided by the Jacksonville District, I conclude that the District's decision to impose permit conditions requiring deed restrictions on all of the submerged properties owned by the appellant for non-compensatory purposes is contrary to applicable law as expressed in Corps regulations and policy. Accordingly, I conclude this Request for Appeal has merit.

26 JAN 2008

(Date)



MICHAEL J. WALSH  
Brigadier General, US Army  
Commanding