

ADMINISTRATIVE APPEAL DECISION

ALEXANDER ET. AL., FILE NO. 98-016-159-0

DETROIT DISTRICT

APRIL 13, 2000

Review Officer: Suzanne Chubb, U.S. Army Corps of Engineers, Great Lakes & Ohio River Division, Cincinnati, Ohio.

Applicants: Kerry and Marleen Alexander, Norman and Margie Degenhardt, Edward and Almira Hershops, and Mr. Paul Byington.

Applicant Representative: Mr. David Haywood and Mr. Christian Mullett, D. Haywood & Associates, P.C., Lansing, Michigan

Receipt of Request For Appeal (RFA): October 15, 1999 (lacked signed tolling agreements)

Appeal Complete and Accepted: December 20, 1999

Basis for Appeal as Presented by Appellant:

Count A: "The Army Corps of Engineers incorrectly applied the guidelines of Section 404(b)(1) when it determined that the project was contrary to the overall public interest."

Count B: Other Issues Raised in RFA (two have been paraphrased by RO):

The project area is an artificial swale and not a regulated water of the U.S. (RFA, pg. 2).

The project area does not contain suitable nesting habitat for piping plovers, an avian species listed as endangered under the Endangered Species Act (RFA, pg. 3).

"The Corps erred in its determination that the project negatively impacted social factors." (RFA, pg. 3)

"The Corps' findings regarding Appellant's application are not supported by the facts." (RFA, pg. 5)

Appeal Conference Date: February 10, 2000

Appeal Decision and Instructions to Detroit District Engineer (DE):

Count A: “The Army Corps of Engineers incorrectly applied the guidelines of Section 404(b)(1) when it determined that the project was contrary to the overall public interest.”

FINDING: Appeal does not have merit.

ACTION: No action required.

DISCUSSION: The RFA states that the Corps did not take into account the appellant’s project purpose when it applied the U.S. Environmental Protection Agency’s 404(b)(1) Guidelines (hereafter referred to as Guidelines). The project purpose, as defined by the appellants, is to maintain a flat beach and improve the appearance of the beach.

In applying the Guidelines, the Corps must define the applicant’s basic and overall project purposes. In doing so, the Corps considers the applicant’s stated purpose but does not allow it undue deference. The District determined that the basic project purpose was lawn activities (Environmental Assessment (EA), page 16) and the overall project purpose was aesthetic alteration (EA, page 1). Although “aesthetic alteration” is rather broad and is not descriptive of the project, a redefined overall project purpose would not alter the outcome of the alternatives analysis performed by the District.

The District correctly determined from the basic project purpose that the project is a non-water dependent activity and offered practicable and reasonable alternatives to the project. The District considered the following alternatives: permit denial and site restoration (considered the no action alternative as required by the National Environmental Policy Act) and permit issuance for the completed project. The RFA states that grading in upland dune areas, landward of the Ordinary High Water (OHW) mark, was also suggested by the District.

The overall District analysis is consistent with the presumption in the 404(b)(1) Guidelines that, for non-water dependent activities, less damaging alternatives exist.

Count B: Other Issues Raised in RFA (two have been paraphrased by RO):

The project area is an artificial swale and not a regulated water of the U.S. (RFA, pg. 2).

The project area does not contain suitable nesting habitat for piping plovers, an avian species listed as endangered under the Endangered Species Act (RFA, pg. 3).

“The Corps erred in its determination that the project negatively impacted social factors.” (RFA, pg. 3)

“The Corps’ findings regarding Appellant’s application are not supported by the facts.” (RFA, pg. 5)

FINDING: Appeal does not have merit.

ACTION: No action required.

DISCUSSION: The administrative record supports the District's determination that the project area was a wetland. The soil sampling performed by the appellants, outlined in a letter dated June 3, 1999, (EA, encl. 5a), does not change this decision. District personnel performed three site visits, on August 5, 1998, May 14, 1999, and May 26, 1999 (EA, encl. 8b, 8a and 7 respectively). The completed delineation data forms clearly indicate that wetland vegetation and hydrology were present on the project site. The determination of hydric sandy soils can be problematic, especially when they are periodically disturbed as in this situation.

The three soil test pits performed by the appellants on October 29, 1998, were primarily to look for organic streaking. However, in a letter dated June 3, 1999 (EA, encl. 5a), the appellants state that a spodic horizon or an organic "A" horizon were also not seen in the soil test pits. These characteristics are listed in the 1987 Corps of Engineers Wetlands Delineation Manual as hydric soil indicators for sandy soils.

During the August 1998 District site visit, a sample data point located in an undisturbed location on the Degenhardt property exhibited hydric soil conditions. Sample data points located in the project area did not exhibit hydric soil characteristics. However, the District concluded that hydric soils could be inferred from the adjacent undisturbed swale wetland (EA, page 9).

At the project site, the sand is constantly being shifted by wind and wave energy to form ridge and swale complexes. In addition to the natural movement of the sand, the appellants have graded the area on a somewhat regular basis throughout the 1990's and this disturbance would prevent the appearance of hydric soil indicators. In this scenario, it is quite likely that you would not find the standard hydric sandy soil indicators (page 34 of delineation manual). Under these circumstances, the District can infer hydric soils from an undisturbed area immediately adjacent to the project site that occurs in the same topographic position.

The District also accurately determined that the wetland was "adjacent" to Lake Huron as that term is defined at 33 CFR 328.3(c). An adjacent wetland can be regulated under Section 10 of the Rivers and Harbors Act of 1899 and/or under Section 404 of the Clean Water Act depending on whether the elevation of the wetland is above or below the OHW elevation of the neighboring water body. For navigable waters, Federal regulatory jurisdiction extends laterally and includes all lands below the OHW mark [33 CFR 329.11(a)]. Although the initial Corps determination of adjacency (EA, encl 8b) indicates that the wetland is one foot above the OHW elevation of Lake Huron, the project drawings indicate that the wetland elevation closely approximates the OHW elevation (581.5 feet International Great Lakes Datum, 1985). The District determined that the wetland was subject to regulation under both Section 10 and Section 404. Although the water elevation of the lake may be low during times of temporary drought, this does not immediately remove an adjacent wetland from Corps jurisdiction. Water exchange through the sand is still likely from wind-generated wave action.

Concerning the project's effect on piping plover habitat, the U.S. Fish and Wildlife Service comment letter (EA, encl. 3) and the District's EA (page 10) clearly indicate that the concern is that the project site contained potential foraging habitat, not nesting habitat. The District did not pursue Section 7 coordination under the Endangered Species Act, resulting in additional time and expense to the appellants, because the

District determined that the project did not comply with the 404(b)(1) Guidelines and resulted in adverse impacts to the aquatic environment. The issue of piping plover habitat was not a factor in the District's permit denial.

Under Part C of the EA (pages 11-14), the District evaluated the following social factors: visual aesthetics, noise, designated historic, cultural, scenic and recreational values, land use patterns, economic effects, recreation, safety, food and fiber production, mineral needs, energy conservation and development, and consideration of property ownership. Of these public interest factors, the appellants disagree with the District's assessment of minor, adverse impacts on visual aesthetics, noise, land use and recreation and assert that the determinations are arbitrary.

The evaluation of these factors can be subjective but, where possible, the EA discusses the benefits and detriments from both the applicant and public interest perspectives. The District used personal experience and best professional judgement when analyzing the project impacts on these factors. The specific weight of each factor is determined by its importance and relevance to the particular proposal [33 CFR 320.4(a)(3)]. These factors were considered but were not key components in the District's permit denial decision. The denial was primarily based on non-compliance with the Guidelines and adverse impacts to the aquatic environment (rare, interdunal wetlands and the vertebrate and invertebrate biota that it supports).

Summary of Findings:

Count A: Appeal does not have merit.

Count B: Appeal does not have merit.

Encl



ROBERT H. GRIFFIN
Brigadier General, U.S. Army
Commanding