

## ADMINISTRATIVE APPEAL DECISION

CHAD J. ALLEN, FILE NUMBER 99-016-320-0

### DETROIT DISTRICT

JUNE 29, 2001

**Review Officer (RO):** Roberto Barbosa, U.S. Army Corps of Engineers, North Atlantic Division, Brooklyn, New York.

**Receipt of Request for Appeal (RFA):** 13 December 2000

**Appeal Conference Date:** 1 March 2001    **Site Visit:** Not Applicable

**Background:** On 17 October 1999, the Appellant submitted a permit application pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344, to discharge approximately 200 cubic yards of fill material into approximately 0.06 acres of Federally regulated wetlands to construct a single-family residence. The appellant's proposal would have taken place in Federally regulated wetlands adjacent to Lake Huron, in Presque Isle, Michigan.

The U.S. Army Corps of Engineers, Detroit District (District) initially reviewed the appellant's application to determine whether Nationwide General Permit (NWP) Number 29 was appropriate to the proposed project. The District issued a pre-construction notification on 25 January 2000. In a letter dated 11 February 2000, the U.S. Fish and Wildlife Service (USFWS) stated that the dwarf lake iris (*Iris lacustris*) and Houghton's goldenrod (*Solidago houghtonii*), two plant species listed as threatened pursuant to the Endangered Species Act (ESA, 16 U.S.C. §1531 *et seq*), were present at the site. As part of a previous permit application at the appellant's project site, the District and Michigan Department of Natural Resources (MDNR), had confirmed the presence of these species. The USFWS objected to the appellant's proposal because it foresaw adverse impacts to these species and because a previous NWP permit issued to Mr. and Ms. Jon Mettert for the same site authorized a less environmentally damaging alternative than the appellant's proposal. On 14 February 2000, the District determined that the proposal would result in more than minimal adverse effects on the environment and required an individual permit.

On 24 February 2000, the District issued a Public Notice for a 20-day comment period. Following the public comment period, the District requested that the appellant provide additional information to demonstrate compliance with the U.S. Environmental Protection Agency's (USEPA) "Guidelines for Specification of Disposal sites for Dredged or Fill Material"(Guidelines), 40 C.F.R. § 230. Mr. Allen was asked to rebut the presumptions that 1) a non-wetlands alternative was available and 2) that an upland alternative is less environmentally damaging than his proposal. Specifically, the District identified a December 1998 Department of the Army (DA) verification of NWP no. 18 to

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Mr. and Ms. Jon Mettert, for the same parcel, as a less environmentally damaging alternative (District's File Number 98-016-064-0). The Mettert permit authorized the discharge of fill material to construct a boardwalk, from a residence constructed entirely on uplands, through two wetland areas, to Lake Huron. The permit also required the permittees to execute a restrictive declaration to preserve the undeveloped portion of the parcel.

In a 2 May 2000 letter, Mr. Allen responded that the Mettert alternative was impracticable because 1) the project design and permit conditions prevented him from achieving his project objective, and 2) a residence built solely on the uplands would be aesthetically unpleasing because the building would be unreasonably close to Grand Lake Road. The appellant also stated that relocating the residence to the upland area as the District suggested would be impracticable because it would place the garage over the septic tank and the basement approximately ten feet from the septic field. With regard to Federally threatened species, the appellant stated that his proposal would not affect these species. Mr. Allen also stated that the District was acting unfairly by requiring him to avoid wetlands completely while it allowed his adjacent property owner, Mr. James Cameron, to fill wetlands to construct his residence. The administrative record shows that on 10 July 1997, the District issued an individual DA permit to Mr. James Cameron to discharge fill material into approximately 0.01 acre of wetlands to facilitate the construction of a single family residence.

On 8 September 2000, the District sent an initial proffered permit to the appellant. The initial proffered permit modified the appellant's proposal by relocating all requested structures outside waters of the United States and authorized the appellant to discharge fill material to construct a boardwalk from the residence, through two wetland areas, to Lake Huron. One of the proposed permit special conditions required the appellant to execute and register a restrictive declaration preserving in perpetuity, and in its natural undisturbed state, the undeveloped portion of the parcel.

The appellant objected to the initial proffered permit and conditions on 2 October 2000. Mr. Allen objected to declaring the undeveloped portion a "preserved area" and considered the distance between the drain field and residential basement inadequate. The appellant also stated that he would agree to preserve a portion of the wetland areas and would discharge the minimum amount of fill needed to construct the residence, which would still be less than what the District allowed Mr. Cameron.

By letter dated 13 October 2000, the District issued a second, unmodified proffered permit to the appellant.

**Administrative Appeal Process:** On 13 December 2000, the appellant filed a RFA with the Great Lakes and Ohio River Division (LRD). By memorandum dated 8 January 2001, LRD requested that Mr. Roberto Barbosa, Regulatory Appeals Review Officer for the North Atlantic Division, be assigned as RO for this appeal review. By letter dated 12 January 2001, LRD informed Mr. Allen that his RFA had been accepted, identified the

reasons for appeal, and assigned Mr. Barbosa as RO. An appeal teleconference was held on 1 March 2001.

**Appeal Evaluation, Findings and Instructions to the Detroit District Engineer (DE):**

**First Reason for Appeal:** The depiction of the extent of wetlands in the proffered permit's drawing is not accurate.

**Second Reason for Appeal:** An accurate drawing of the existing wetlands at the site renders the District's alternative included in the proffered permit impracticable.

**Finding:** These two reasons for appeal are rejected as a procedural matter thereby rendering a determination on their merits unnecessary.

**Action:** No action required.

**Discussion:** The revised drawings submitted with the RFA and supporting these reasons for appeal were prepared after the 13 October 2000 permit decision by the District. Mr. Allen admitted during the appeal teleconference that these drawings were prepared after the date of the Notification of Appeal Process (NAP) and the District confirmed it had not seen these revised drawings until it received a copy of the RFA.

The administrative appeal process regulations state that, "Issues not identified in the administrative record by the date of the NAP for the application may not be raised or discussed, because substantive new information or project modifications would be treated as a new permit application." 33 C.F.R. § 331.7(e)(6). The appellant's allegation that the depiction of the wetland boundary in the proffered permit's drawing was inaccurate and the revised drawings purporting to support this allegation were made after the date of the NAP. For this reason, I do not make a decision on whether these reasons for appeal have merit.

Further, with regard to the appellant's belief that the District's alternative is impracticable, the appellant did not provide sufficient information to support his assertion that a distance of ten feet between the septic drain field and the residential basement would be inadequate. The appellant asserts that constructing a basement ten feet from a septic drain field could result in gray water infiltrating the basement. The appellant did not provide design or construction manuals supporting his allegation. In addition, the appellant stated at the appeal conference that he did not know the local construction code or zoning law requirements on this matter. For these reasons, the appellant failed to support his assertion that constructing the septic drain field ten feet from the basement renders the alternative in the proffered permit impracticable.

**Third Reason for Appeal:** The District Engineer did not consider an additional alternative that would allegedly result in no impact to Federally regulated wetlands and would accomplish the stated project purpose.

**Finding: This reason for appeal does not have merit.**

**Action:** No action required.

**Discussion:** The appellant's submittal of a fourth, potentially non-regulated alternative with the RFA, is based upon the new, revised drawings. The District has not reviewed this alternative to determine whether impacts to Federally regulated wetlands would result from the proposal. If, as the appellant alleges, the alternative would not require a DA permit, the probable impacts from this alternative would be identical to the impacts resulting from the "no action" alternative. Corps' regulations describe the "no action" alternative as "one which results in no construction requiring a Corps permit." 33 C.F.R. § 325 Appendix B, (9)(b)(5)(b). Therefore, the "no action" alternative encompasses both a denial of the applicant's proposal and the probable impacts that would occur if an appellant modifies his proposal to avoid the need for a DA permit. The District considered the "no action" alternative in their alternatives analysis and permit decision.

The District correctly concluded that the appellant failed to comply with the 404(b)(1) Guidelines. The appellant failed to rebut the presumptions in the Guidelines that a non-wetland alternative to his original proposal is available and would have less adverse impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a)(3)

Lastly, I have determined that the District's decision on Mr. Cameron's application does not support the appellant's assertion that the District is treating him differently. The Corps' public interest review evaluation policy requires Districts to perform an individual determination on each permit application based on the information relevant to each proposal. 33 C.F.R. § 320.4(a)(3). The regulations do not preclude Districts from reaching different conclusions regarding the impacts of similar proposals in the same general area.

**Fourth Reason for Appeal:** The District's decision document contains inaccurate statements regarding the source of fill material and the effects of the proposed work on Federally threatened species present at the site.

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

**Action:** The District must reevaluate its decision and discuss whether any probable impact would occur at the borrow site that would not occur but for the appellant's proposal. Furthermore, the District must reevaluate its National Environmental Policy Act (NEPA) and public interest review evaluation to ensure consistency with Corps regulations, guidance and policy. Beyond the re-evaluation of this particular project, the District should also review the standard "boiler-plate" language in their environmental assessment template document and remove any language which contributes to broad, unsubstantiated statements of secondary and cumulative project impacts.

**Discussion:** The District's administrative record does not support its decision regarding the anticipated impacts at the borrow site. In addition, the District analysis of the

appellant's proposal is not consistent with Corps regulations as set forth in 33 C.F.R. Part 320 *et seq.* and USEPA's Section 404(b)(1) Guidelines. Specifically, the District denied the appellant's proposal because it was not the least damaging alternative to the environment. Instead, the District determined that a project design featuring the applicant's proposal on the uplands (no DA permit required) and including an unrequested, regulated boardwalk through the wetlands, was the least environmentally damaging alternative. The regulated boardwalk provided "the vehicle" for the District to require a Declaration of Restriction on Land Use over the remaining undisturbed portions of the parcel, including uplands (Environmental Assessment, EA pages 6, 8, 10, 11, 12 and 16).

The District did not apply the proper standard of review in considering the impacts that would result from the appellant's proposal at the borrow site. The District stated in the decision document and in the appeal conference that it considered direct, indirect, secondary, and cumulative impacts in making its decision. The District, however, was not free to consider any and every impact resulting from the Appellant's proposal. The pertinent regulation states:

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. Evaluation of the probable impacts which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. 33 C.F.R. Part 320.4(a)(1)

The District incorrectly concluded that the appellant's proposal would adversely impact terrestrial biota at the fill borrow site (EA page 9). The appellant stated that the borrow site is an operating quarry and there would be no on-site borrow area. The District conceded that it had not visited the borrow site and had no information of the conditions at the borrow site. The District assumed that any terrestrial vegetation that could be present at the quarry would be adversely affected. The administrative record lacks site-specific information to support this conclusion.

With regard to Federally threatened species, the District included a permit special condition requiring the appellant to prepare and execute a restrictive declaration on the undeveloped portion of the parcel to minimize secondary impacts to wetlands and threatened plant species and to fulfill its Section 7 obligations. The restrictive declaration was a result of a Section 7 consultation process with the USFWS during the review of the Mettert application. The administrative record contains an inadequate justification for the condition. It is unclear whether the USFWS required the restrictive declaration to fulfill legal requirements under Section 7 of the ESA. Since the appellant's proffered permit is nearly identical to the Mettert permit, an adequate discussion may be contained in the Mettert administrative record. If so, it should be appropriately referenced or otherwise incorporated into the Allen administrative record.

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Although the threatened plant species are also protected under state law, I note that the state permit did not include the special conditions noted in a 24 June 1998 letter from the MDNR to this parcel's previous applicants, the Metters. The state permit merely contains a cautionary note that the dwarf lake iris is known to occur on or near the site and if the project impacts these threatened plants, a permit may be required under state law. Since the plants are not present in the areas Mr. Allen proposed to fill, he disputes the District's conclusions regarding impacts to these species. I have determined that the District did not demonstrate that the impacts it identified were probable as opposed to possible impacts or that the impacts affect either species.

It is also possible there are other, less restrictive ways to address Section 7 concerns. An analysis of the appellant's proposal consistent with Corps' regulations and policy could have resulted in a different permit decision. For these and additional reasons outlined below, and in accordance with 33 C.F.R. § 331.9(b), I am remanding this matter to the District for reevaluation.

In its decision document, the District analyzed three alternatives which included the appellant's proposal and the "no action" alternative (e.g., denial of the permit application). In addition, the District considered an alternative involving construction of the residence entirely on uplands, a discharge of approximately ten cubic yards of fill material to construct a boardwalk over wetlands, and a restrictive declaration preserving virtually the remainder of the undeveloped parcel (proffered alternative). I have determined that the District did not sufficiently support its conclusion that some impacts it identified are probable or reasonably foreseeable. Also, the District's conclusion with regard to the impacts resulting from the appellant's proposal lacks full consideration of other Federal, state, or local control or a discussion identifying the District's reasons for not relying on them. In addition, the special condition requiring the restrictive declaration is inconsistent with the requirements set forth in 33 C.F.R. § 325.4(a). For these reasons, I am remanding this decision to the District for reevaluation.

The District relies substantially on its evaluation of impacts for the appellant's proposal when it discusses the impacts of the proffered alternative. For this reason, I am identifying and discussing those factors in the evaluation of the appellant's proposal where the District misapplied Corps regulation, guidance, or policy, or where the administrative record does not support the District's conclusion.

- A. The District did not provide sufficient support for its decision concerning the anticipated impacts of the appellant's proposal.

The administrative record does not support the District's conclusion regarding certain impacts the District anticipated would result from the appellant's proposal. In many instances, the District failed to support its conclusion that the impacts it identified were probable in accordance with 33 CFR Part 325.4(a).

For example, the administrative record does not support the District's conclusion regarding long-term impacts to water quality and aquatic and terrestrial biota. Although the District reasoned that the appellant's proposal would destroy or adversely impact wetland areas that filter runoff, the District also concluded that runoff would carry pollutants used at the site, unfiltered, into Lake Huron. In contrast, the drawings in the administrative record show that the appellant's proposal would fill an area of Federally regulated wetlands measuring approximately 30 feet by 90 feet. The drawings also show an area of Federally regulated wetlands measuring approximately 75 feet by 145 feet immediately adjacent to Lake Huron. The District did not identify or discuss its reasons to conclude that this wetland area would not filter runoff or would be ineffective at it.

In addition, the District did not consider whether state or local controls would address impacts associated with erosion. On 19 January 2000 the appellant received a permit from the Michigan Department of Environmental Quality (MDEQ). The MDEQ permit included three "special instructions and specifications" addressing erosion control. The District, however, neither discusses whether these conditions in the MDEQ permit would address the District's water quality concerns with regard to erosion and sedimentation nor states the reasons for not relying on the MDEQ permit's condition on these matters.

Further, the District did not support its conclusion that the appellant's proposal would result in an overall decrease in aquatic biota diversity and productivity, and major long-term negative impacts to terrestrial biota. The District did not support its conclusion that the appellant would utilize lawn fertilizer, herbicides, pesticides, road salt, oil or grease at the site or that the appellant would apply these compounds in a manner that would adversely affect water quality. Similarly, the District asserted that the proposed septic system would fail but did not support this conclusion. The conclusions presented in the District's decision document are problematic in that many of the conclusions regarding impacts resulting from the proposal are speculative at best, are not supported by the record, are inconsistent with the regulations, and lack a discussion of why the District reached that decision. The District should relate the nature of the impacts (e.g., the loss of wetland functions and adverse impacts to natural resources) to the scale of the appellant's proposal (e.g., the proposed discharge of fill material into 0.06 acres of Federally regulated wetlands).

The District also identified adverse impacts to water quality, biota and wetlands due to further development activities by the appellant. When considering impacts to terrestrial biota, the District noted it is likely that recreation, gardening, landscaping, cutting, mowing and other activities will occur. "This secondary impact will have a major adverse cumulative impact by establishing the precedent and expectation for these activities on adjoining lots, as well as other vacant lots around the Harbor." (EA page 9) I submit that these activities already are, and should be, expectations of residential property owners. Permit issuance will not establish these activities.

The administrative record does not mention a single instance where the appellant or any other party considered or proposed additional construction at the site. Thus, the District's conclusion is tantamount to stating that additional work at the site is inevitable and that any subsequent work that could possibly occur at the site, whether on Federally regulated wetlands or on uplands, regardless of the scope and extent of the activity, will inevitably result in impacts to waters of the United States. This is not a probable impact within the scope of 33 CFR Part 320.4(a)(1).

With regard to cumulative impacts resulting from the appellant's proposal, the District reached conclusions that are not consistent with Corps regulations. In its analysis, the District stated that issuing a permit for the appellant's proposal would set a precedent and the District would receive similar requests to fill more Federally regulated wetlands than necessary to accomplish the basic project purpose. The District's concern with setting a precedent is contrary to 33 C.F.R. § 320.4(a)(3), which states that the specific weight of each factor is determined by its importance and relevance to the particular proposal. The District must make individualized determinations on each permit application based on the information relevant to each proposal. To the extent that the District's conclusion implies that issuing a permit to the appellant in this case would inevitably lead to the issuance of other permits in the same general area, the District's conclusion is not consistent with the discretion accorded to the DE in the Corps regulations.

For the aforementioned reasons, I am remanding this matter to the District to ascertain and discuss, in light of 33 C.F.R. § 320.4(a), what impacts resulting from the appellant's proposal are probable and, in light of 33 C.F.R. § 325.2(a)(2), to consider whether state or local controls would address some or all of the concerns the District identified.

B. The District failed to apply Corps regulations when it developed and issued the proffered permit with special conditions.

The District erred in selecting the proffered alternative because it includes a special condition that does not satisfy the requirements of 33 C.F.R. § 325.4 ("Conditioning of permits"). In addition, the proffered alternative fails to consider the benefits and detriments of other alternatives to the boardwalk. Furthermore, the proffered alternative is not consistent with Corps regulations and policy. For these reasons, I am remanding these matters to the District for reevaluation.

In the proffered permit, the District included a special condition that required the property owner to preserve an area of the property such that it will remain in its natural undisturbed condition in perpetuity. This special condition is not directly related to the impacts of the proffered alternative, is not appropriate to the scope and extent of those impacts, and therefore is not consistent with Corps regulations and guidance. Established permit conditioning policy requires permit conditions to "be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable." 33 C.F.R. § 325.4(a).

The restrictive declaration does not relate directly to the probable impacts of the proffered alternative. The District's discussions of the impacts resulting from the proffered alternative with respect to the various public interest review factors outlined in 33 C.F.R. § 320.4(a) generally refer to the same impacts outlined in the District's analysis of the appellant's proposal. The District notes, however, that these impacts would be attenuated because the proposed residence and ancillary features would be constructed outside wetlands and because the restrictive declaration would prevent any subsequent impact by preserving the remainder of the appellant's parcel. As discussed in item A of this "Discussion" section, above, the administrative record does not support the District's conclusion that many of the impacts it stated would result from the appellant's proposal are probable as opposed to merely possible impacts. In this case, the District relies on its analysis of the appellant's proposal to establish the scope and extent of impacts of the proffered alternative. For this reason, and the reasons outlined above, I have determined that, with respect to the proposed residence, the District failed to show that the restrictive declaration directly relates to the probable impacts that would result from the proffered alternative.

An element of the proffered alternative not requested by the appellant is a boardwalk from the rear of the residence, through two wetland areas, to Lake Huron. This boardwalk is the only project feature in the proffered alternative that requires a permit. The District stated that this boardwalk, in conjunction with the restrictive declaration, would provide controlled access to the shoreline and would protect wetlands because it would prevent trampling of wetland vegetation to access the waterway. Although the presence of a boardwalk may encourage its use to access the shoreline, it does not prevent persons from walking through wetlands to reach the shoreline. In addition, the District notes that there is an existing corridor approximately 50 feet wide that was cleared of vegetation and traverses the property from Grand Lake Road to Lake Huron. The District did not consider the benefits and detriments of allowing the Appellant to maintain a reduced portion of the cleared area as access to the waterfront as opposed to discharging fill material in Federally regulated wetlands to facilitate the construction of a boardwalk.

The restrictive declaration is not appropriate to the scope and degree of the probable impacts of the proffered alternative. The District did not discuss whether alternatives to a restrictive declaration or a more limited restrictive declaration would have adequately addressed the impacts it identified. I note that the NWP affirmed for the Mettert proposal limited the required restrictive declaration to the remaining undisturbed wetland and did not restrict the remaining upland. Also, the sole regulated activity in the proffered alternative is the discharge of fill material into wetlands to facilitate the construction of the boardwalk.

The boardwalk could be a condition of a DA permit if it related to other project impacts requiring authorization. That is not the case here. Regulatory Guidance Letter 84-09 states that "the discussion of practicable alternatives for [the Guidelines, NEPA, and the Corps' public interest review factors] should be guided by the rule of reason, and should consider alternatives both in terms of the applicant's wishes and capabilities, and in terms of the need for or purpose to be served by the proposed activity." Paragraph 3(c), 26 July

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1984. In this case, the appellant did not request or desire to construct a boardwalk to access the waterfront. The District failed to identify the probable impacts of the boardwalk and to consider the reasonably foreseeable benefits and detriments of the boardwalk relative to allowing the appellant to maintain a portion of an already cleared wetland area for access to Lake Huron. Therefore, the District's decision to authorize the discharge of fill material to construct a boardwalk as shown in the proffered alternative is not consistent with Corps' regulatory guidance.

Statements made at the appeal conference reinforce the following facts as reflected in the administrative record: (1) that the Appellant applied for a project that requested to construct a private residence at the site, (2) that the Appellant did not ask for a walkway at any time during the permit evaluation process, (3) that the walkway does not further the Appellant's basic project purpose, and (4) that the discharge of fill material associated with the construction of the walkway is the sole basis of jurisdiction in the proffered permit. The District issued a permit that does not address the Appellant's basic project purpose in a manner different than the "no action" alternative. The whole concept of an alternative analysis is to provide options on how the applicant can fulfill the project purpose.

For these reasons, and because the Corps decision in the manner by which it would fulfill its Section 7 responsibilities is directly related to the issues raised regarding the restrictive declaration, I have determined that this reason for appeal has merit. Consistent with 33 C.F.R. § 331.9(b), I am remanding this matter to the District for further analysis and discussion.

**Conclusion:** For the reasons discussed above, I have determined that the first, second and third Reasons for Appeal **do not have merit**. I have also determined that the fourth Reason for Appeal **has merit**. The District will reevaluate its decision to ensure that the final Corps action is consistent with Corps regulations, the implementing NEPA regulations, the Guidelines, and this decision.



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Commanding