

ADMINISTRATIVE APPEAL DECISION

WILSON PROPERTY; FILE NO. 2007-1563-16

DETROIT DISTRICT

December 18, 2009

Review Officer: Pauline Thorndike, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division (LRD)

Appellant: Ms. D'Anne Wilson

Permit Authority: Rivers and Harbors Act, Section 10 (33 U.S.C. 403) and the Clean Water Act, Section 404 (33 U.S.C. 1344)

Receipt of Request for Appeal: January 26, 2009

Appeal Conference and Site Visit Date: April 30, 2009

Summary of Decision: The administrative record of the District's proffered permit decision shows that the District considered the issues that the Appellant identified in her administrative appeal but reached different conclusions on those issues than the Appellant. The District's conclusions were reasonable and do not conflict with the laws, regulations, or policy requirements of the Corps regulatory program. The Appellant's appeal does not have merit.

Background Information:

In December 2007, the appellant submitted an application to the Detroit District (District) for mechanical bottom grooming activities along the shoreline of Wildfowl Bay (within Saginaw Bay, Lake Huron) in Pigeon (Sand Point), Huron County, Michigan. The application was submitted by D'Anne Wilson (appellant) and requested authorization to perform bottom grooming along several properties, including the following properties on Point Charity Drive: 8915, 8867, 8879, 8883, 8895, 8899, 8901, 8911, 8919, 8921, 8923, 8925, 8929, and 8937. Ms. Wilson is representing all of the property owners at the above properties. Mechanical bottom grooming is a term also known as exposed lakebed grooming, lake bottom grooming (bottom grooming), and shoreline grooming.

The administrative record describes grooming as a federally regulated activity resulting in movement, redistribution and discharge of sand and sediments below the Ordinary High Water Mark (OHWM) of Lake Huron, which removes small lakebed contours. Conversely, mowing is described as a non-regulated activity that removes the above ground portion of plants.

Lake Huron water levels are cyclical, both in the short term and the long term, and Wildfowl Bay is under the direct influence of Lake Huron. Since 1999, the monthly mean level has been below

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the long term annual average. This has resulted in exposed lakebed between the OHWM and the current water's edge, and vegetation has grown in these lakebed areas. Grooming would remove the vegetation (and roots) and redistribute sand and sediments.

On January 11, 2008, the District published its Public Notice describing the appellant's request to mechanically groom all of the coastal wetland lake bed sediments and sand from the OHWM located at the existing steel bulkhead to the water's edge along 1,050 linear feet of shoreline for a variable distance that may exceed 1,000 feet lakeward from the bulkhead.

The State of Michigan Department of Environmental Quality (MDEQ) authorized a General Permit on January 14, 2008, for grooming the exposed lakebed to a depth not to exceed 4 inches, in a 50–100 foot by 400 foot area at each of the properties. To clarify, this General Permit is not to be confused with 401 Water Quality Certification (WQC). MDEQ did not issue or deny 401 WQC; The District presumed the 401 WQC to be waived.

In a letter received by the Detroit District Regulatory office on March 11, 2008, the appellant modified their proposal to groom only 400 feet of lake bottom instead of 1000 feet. In a letter dated April 21, 2008, the District determined that the project as proposed would be contrary to the overall public interest and failed to comply with the 404(b)(1) Guidelines of the Clean Water Act, the District denied the appellant's request for 400 linear feet of grooming and instead provided them with an initial proffered permit for 50 linear feet of grooming. In a letter dated June 11, 2008, the appellant disagreed with the District's determination and objected to the terms and conditions of the initial proffered permit. The District considered the appellant's objections and new request, and issued a proffered permit on October 10, 2008. The appellant disagreed with the District's determination and appealed its decision in a submittal received by LRD on December 8, 2008. This December 8, 2008 submission was determined by LRD to be incomplete. The appellant submitted a second request for appeal dated January 26, 2009, received by LRD on the same date. This January 26, 2009 submission was determined to be complete. The submission included some of the same information as Mr. Gordon Colorito's request for appeal.

Appeal Evaluation and Findings:

Appeal Reason 1a. Use of incorrect information and failure to consider the impact of the proffered permit on private recreational uses. The appellant originally requested to groom 400 feet to the waters edge. However, the appellant was only permitted to groom 50 feet. The appellant feels 50 feet limits their ability to use the area for their children and grandchildren to participate in various sport activities.

The appellant further alleges that the District used incorrect information when publishing the public notice by stating that the appellant originally requested 1000 feet along 1050 linear feet of frontage when she only requested 400 feet along 1050 feet of frontage.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion:

This reason for appeal implicates several issues, thus the discussion below is organized by subject matter.

PUBLIC NOTICE

The appellant asserts that if their 400 feet grooming proposal was published in the public notice, instead of 1000 feet, comments from U.S. Fish and Wildlife Service (USFWS) would have been more favorable to their project. The public notice was accurate based on the information the District had at the time. Also, the District decision would not have changed even if more favorable comments from USFWS were received, as the District's evaluation was based on 400 feet instead of 1000 feet, and their Environmental Assessment (EA) indicates bases for the decision other than the USFWS comments.

The Corps regulations at 33 CFR 325.2(a)(2) state:

The district engineer will issue a supplemental, revised, or corrected public notice if in his view there is a change in the application data that would affect the public's review of the proposal.

The District has the discretion to decide whether a change in the application data would affect the public's review of the proposal, and thus whether a supplemental, revised, or corrected public notice should be published. There is no requirement that the Administrative Record provide a statement as to why a supplemental, revised, or corrected public notice was not published.

PROPOSED GROOMING LIMIT

The appellant feels that the District evaluated the wrong proposal. However, the Administrative Record establishes that the District evaluated the correct proposal (400' proposal) and did not make its permit decision based on a proposal for 1000 feet of bottom grooming.

The apparent confusion relating to the amount of grooming requested may have had its origin in the permit application. The application is unclear on the grooming limit (length/width) proposed by the applicant. The District sought clarification from the appellant in a letter dated December 20, 2007. The District followed up with a telephone conversation on January 3, 2008, in which the appellant stated a desire to groom to the water's edge. The public notice was issued shortly thereafter on January 11, 2008, and it indicated that the applicant wished to groom for a variable distance that may exceed 1,000 feet lakeward from the bulkhead.

The District provided the appellant an opportunity to modify their proposal in a letter dated February 5, 2008, by stating: "Although your application described your proposed work footprint as 400 to 460 feet lakeward of the existing bulkhead, this distance may be considerably larger. The distance from the bulkhead to the water's edge was approximately 1,100 feet when we inspected this reach of shoreline on October 23, 2007. When we evaluate this proposal, we will need to do so using this observed distance, unless you propose to limit your requested grooming to a lesser distance, or otherwise modify your proposal. If so, please submit new drawings and specifications so that we can complete our permit review." In a letter received by the District on

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March 11, 2008, the appellant stated that they did not need to groom all 1000 feet, but instead requested grooming of not more than 400 feet from the existing bulkhead to the water's edge. New drawings and specifications were not provided with the letter.

The District issued an initial proffered permit on April 21, 2008, based on the appellant's 400 foot proposal. In response, in a letter received by the District office on June 19, 2008, the appellant asked the District to reconsider its decision. The District issued a proffered permit on October 10, 2008, based on the appellant's 400 foot proposal. The District determined that no more than 50 feet of bottom grooming could be authorized.

Thus, the Administrative Record is clear that the District evaluated the correct grooming proposal.

AUTHORIZED GROOMING LIMIT

The administrative record supports and provides a rational basis for the District's proffered permit decision to authorize grooming for a distance of 50 feet instead of 400 feet. The District's EA identifies adverse impacts to the lakebed and wetlands as a result of bottom grooming and establishes that the effects of grooming extend well beyond the actual groomed area, in the EA under the section titled III.A.I "Effects on Water Quality". The District considers this information when determining the secondary impacts to the lakebed and wetlands. The District also provided a fact specific analysis in their EA regarding their cumulative impact analysis.

The District concludes that no more than 50 feet of grooming should be authorized in order to minimize cumulative impacts and meet Clean Water Act 404(b)(1) guidelines. The District identified the cumulative impact area as a 2.7 mile distance along the shoreline, evaluated data for that area, and drew a conclusion based on their analysis.

Since a revised public notice is not necessary, the Administrative Record evaluates the correct proposal, and the authorized grooming limit of 50 feet is justified, I find that this reason for appeal has no merit.

Recreational interests are discussed below in Appeal Reason 2.

Reason 1b. Water Level. The appellant alleges that when site visits were conducted in June 2008 the lake level was higher than normal due to a seiche, so the district never was able to see the property during normal conditions. The District measured to the water's edge during this high water period.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The administrative record took into account that the water's edge fluctuates over time and that during June 2008 the lake level was high due to a seiche. Several photographs contained in the administrative record taken in previous years show the water's edge much

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further from the bulkhead than observed in June 2008, and these photographs were considered in the District's decision. The District adequately documented the cyclical water levels.

Further, the location of the water's edge is not relevant to the location at which Sections 10 and 404 jurisdiction commences, which is the OHWM located along the bulkhead. The District's policy for determining OHWM is to use both the standard elevation for Lake Huron and visual observations. The standard OHW elevation for Lake Huron is 581.5 feet International Great Lakes Datum (IGLD), 1985. Visual observations indicate an OHWM at a steel bulkhead along one of the properties.

The administrative record described two different site visits and states:

Even with the current low water levels, storms and winds can create seiches that can return the water's edge to the bulkhead or very close to it. Such conditions existed on June 17, 2008, with the water only 20 to 25 feet from the bulkhead . . .

We revisited the south shore of Sand Point again on July 2, 2008 (Encl. 36). While there were onshore winds, the water surface was relatively calm. The water's edge was approximately 20 feet from the bulkhead in some locations, with saturation to within 10 feet of the bulkhead. On these two dates, the water elevations were not atypical. Lake Huron's water elevation during the month of June, 2008, varied approximately 0.77 feet, from a low of 577.54' to a high of 578.31', with a rising trend, and on June 17 it was at 578.19'. Thus, during our inspection, the water level was at approximately 85 percent of the overall rise for the month; it was not at an unusual or abnormally high elevation on that date, and the photographs clearly show that waves were not driving the water to an unusual degree. Yet the water still reached to within 25 feet of the bulkhead. Lake Huron's water elevation during the month of July, 2008, varied approximately 0.35 feet, from a low of 578.07' to a high of 578.42', with a rising trend, and on July 2 it was at 578.14'. During our inspection on July 2, the water level was at only 20 percent of the overall rise for the month, not at an unusual or abnormally high elevation, yet the water's edge still reached to within 20 feet of the bulkhead. Photography on July 2, 2008 shows that waves were not driving the water to an unusual degree on that date.

Lake Huron water levels are cyclical, both in the short term and the long term. The long term annual average water level for Lake Huron is approximately 579 feet (IGLD-1985) (see:

<http://www.lre.usace.army.mil/greatlakes/hh/datalinks/PrinterFriendly/quickGraph.pdf>, Encl. 20). Although the monthly mean level has been below the long term annual average since the start of 1999, a period of eight years, this length of time in the cycle is not unprecedented. Water levels have been above the long term annual average from 1969 to the end of 1999, thirty years, except for small dips below this level in 1977, 1978, 1982 and 1996, and a period from 1988 through 1992 when the level fluctuated back and forth. We expect that this time period encompasses much if not most of the undefined historical memory referenced by the proponents of grooming during which they stated that they enjoyed sandy areas with no vegetation, with the exception of 1968. From 1956 to 1968, water levels were below the annual average

water level except for a peak in 1960, essentially a twelve year period. Again, from 1930 to 1942, water levels were below the annual average water level, another twelve year period. In 2003, the water levels reached as low as 576.54 feet, but in 1964 and 1965, Corps records show that low water levels on Lake Huron exceeded this mark when they reached as low as 576.05 feet, lower than the lowest level experienced since 1999 (see: <http://www.lre.usace.army.mil/greatlakes/hh/greatlakeswaterlevels/historicdata/greatlakeshydrographs/>).

The wind and wave energy along this sandy, shallow-sloped coastline contributes to a considerable variability in the location of the water's edge. The 2008 site visits verified what the above observations implied, that this area is under the direct influence of Lake Huron, despite being in the low water level portion of the long term cycle.

Thus, the District considered the cyclical nature of the water's edge, various photographs from different years, and water elevation data for over fifty years. Furthermore, the District's jurisdictional limit commences at the OHWM (absent adjacent wetlands not present at this location), not the water's edge. The District made a factual determination as to where the jurisdictional limit is located (along the bulkhead). Since the district's decision is supported by the record, I find that this reason for appeal has no merit.

Reason 1c. Water Quality. MDEQ's issuance of a permit was an indication/evidence that water quality was not an issue.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: MDEQ issued a General Permit for bottom grooming General permit on January 14, 2008, not a Section 401 Water Quality Certification (WQC). Since WQC was not issued, the District presumed it to be waived. The District considered water quality issues in its permit decision. The District listed several water quality issues in the EA under the section titled "Effects on Water Quality", and determined that the proposed 400 foot impact would not meet the Clean Water Act 404(b)(1) Guidelines. Several other public interest factors were considered in the District's decision to proffer a permit for a reduced project scope.

The District partially based their proffered permit decision on water quality concerns, as the 400-foot project proposal would not meet the Clean Water Act 404(b)(1) Guidelines. Therefore, I find that this reason for appeal has no merit.

Appeal Reason 2. Failure to consider the impact of the proffered permit on private recreational uses and to properly weigh property ownership. Property values are decreasing.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: This reason for appeal implicates several issues, thus the discussion below is organized by subject matter.

The appellant feels 50 feet of bottom grooming limits her ability to use the area for her children and grandchildren to participate in various private recreational sport activities. The District addressed the appellant's private recreation concerns in the EA, and also took the appellant's private recreational wishes into consideration when they defined the project purpose.

PROJECT PURPOSE

The permit application form submitted by the appellant does not specify the project purpose. In a telephone conversation between the district and the appellant on January 3, 2008, the appellant clarified that the project purposes for the proposed work are clean up debris and weeds, and to maintain the shore as they have had it in the past.

The District determined that the project purpose was to transform the appearance of the lakebed from mowed vegetation to bare sand, improve the visual aesthetics of the lake and for recreation, achieve an unimpeded view of the lake's waters when the water is at a distance from the bulkhead, and control Phragmites.

33 CFR 325.9(b)(4) states "...the Corps will in all cases exercise independence judgment in defining the purpose and need for the project from both the applicant's and the public's perspective."

The District properly included the applicant's perspective in the project purpose.

PUBLIC INTEREST FACTOR REVIEW

The District is responsible for evaluating approximately twenty factors in their public interest review (e.g. aesthetics, safety, water quality, etc.). The public interest review is a balancing test by the Corps of the foreseeable benefits and detriments of proposed projects on an individual and cumulative basis. The following general criteria of the public interest review must be considered in the evaluation of every permit application (33 CFR 320.4(a)(2)):

- i. The relative extent of the public and private need for the proposed structure or work.
- ii. Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work.
- iii. The extent and permanence of the beneficial and/or detrimental effect(s) that the proposed structure or work is likely to have on the public and private uses to which the area is suited.

Recreation Factor

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The appellant feels that 50 feet of bottom grooming limits her ability to use the area for her children and grandchildren to participate in various private recreational sport activities. The appellant objected to the initial proffered permit because she and the other property owners that she represents require 400 feet to enjoy the beach, and state that grooming is required “to make reasonable use of [their] property” including “recreational activities (volleyball, horse shoes, family and friends picnicking, sunbathing, softball, campfires etc.)”

In response to the appellant’s objection, the District describes their view of the recreation public interest factor, from a public viewpoint, as follows:

We view the public interest factor of recreation as truly a public resource, from the perspective of accessibility available to the public and to neighbors along the alignment of their respective riparian interest areas (see Encl. 31). As we understand it, in Michigan, the most recent court results are that the public trust assures the public the right to walk along the shoreline (Glass v. Goeckel). We further understand that walking and viewing is the extent of the recreation that the court assured. Hence, public recreation is limited to viewing the vegetation and wildlife that would be associated with a mowed coastal marsh, and possibly viewing the private backyards of landowners when the water’s edge is close enough. At the great variability of the water level along this shallow slope, the water’s edge may be 1,000+ feet from the bulkhead, or nearly at the bulkhead, or anywhere in between. The applicants’ revised proposal to groom 200 feet (Mr. Colorito) or remain with an unrevised 400 feet (Ms. Wilson) as measured from the bulkhead waterward may have negative impacts on the public’s recreation when the water level is near the bulkhead and the portion of the shoreline that is available to the public for recreation approaches or coincides with the revised proposed work area.

The District further evaluated public recreation in their EA under the section “Recreation”. The District’s viewpoint of the public interest factors is consistent with the Corps regulations. The District evaluated personal recreation in their EA under the section “Effect on Conservation and Overall Ecology”. The appellant’s perspective was considered as follows:

...grooming beginning at the steel bulkhead and extending waterward from it for a distance of 50 feet (which is equal to the width of most properties), as in the initial proffered permit, would provide an area on which the landowners could pursue recreational activities, as well as a visual and accessible sandy area.

According to the District, personal recreation was also discussed under the “Consideration of Property Ownership” public interest factor. However, upon reviewing this factor, personal recreation concerns brought by the appellant are not directly addressed.

Consideration of Property Ownership Factor

The District evaluated the Consideration of Property Ownership public interest factor in their EA under the section “Consideration of Property Ownership.” The appellant’s perspective on property ownership was considered and addressed in the EA under the subsection “Applicant’s Response/Rebuttal”. Specifically, the EA indicates that the appellant feels it is within her rights

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to alter and maintain the lakebed to achieve a property condition that is agreeable to them. The appellants have provided specific and general reasons for conducting the mechanized grooming, including the elimination of Phragmites and to make reasonable use of their property, which they define to include all activities and objectives including access to the water, recreational activities and health and safety. The District responded to these comments in their evaluation of this public interest factor.

The appellant clarified during the appeal conference that no one is buying homes in the area due to the current condition of the beach and the constraints that arise as a condition of beach grooming permits. The District evaluated economic concerns under the public interest factor "Economic Effects". The District also acknowledged property value concerns under the public interest factor "Consideration of Property Ownership", and stated that property value concerns are beyond the evaluation requirements of the Corps Regulatory program. The District's EA inappropriately cited a previous appeal decision when evaluating the beneficial or detrimental impacts on property values for Mrs. Wilson's project.

Corps regulations at 33 CFR 331 state:

...an appeal decision of the division engineer is applicable only to the instant appeal, and has no other precedential effect. Such a decision may not be cited in any other administrative appeal, and may not be used as precedent for the evaluation of any other jurisdictional determination or permit application.

Although the District erred when they cited the previous appeal decision in their evaluation of "Consideration of Property Ownership", this is a harmless error that would not have changed or affected the District's proffered permit decision.

I find that the District properly evaluated the "recreation" and "consideration of property ownership" public interest factors. The District addressed the appellant's private recreation concerns in the EA, and also took the appellant's private recreational wishes into consideration when they defined the project purpose. Therefore, this reason for appeal has no merit.

Appeal Reason 3: The appellant alleged that the District did not follow a fair, equitable, and impartial process. The District disregarded the appellant's concerns (non-responsive to concerns.) The appellant feels they were treated unfairly compared to residents at the tip of Sand Point.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion:

The appellant feels that the District biased the public review, including the USFWS review, by stating that grooming was proposed for up to 1000 feet or more waterward measured from the existing bulkhead, rather than the 400 feet the appellant believed was a more accurate representation of her request. The appellant stated she believed that USFWS would not have

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objected had it considered the lesser (400-foot) impact area. As previously stated, the District's public notice was accurate based on the information available to them at the time of its publication.

The District provided a copy of the USFWS comments to the appellant, in part to allow an opportunity for the appellant to resolve and or to address the USFWS comments. The District's letter dated February 5, 2008, stated "We are enclosing a copy of a letter from the U.S. Fish and Wildlife Service (FWS) regarding your proposed work. We feel that the FWS letter raises a substantial concern that will weigh heavily in our decision on your application. You may contact the FWS in an attempt to resolve their objection, or you may provide a rebuttal to their position."

The District's EA fully considered all of the relevant factors listed in the applicable regulation, 33 CFR 320.4(a), and does not indicate that the USFWS comments were the sole basis for their decision. Even so, the District could have reasonably determined that the public interest review factors (issues) raised in the USFWS letter would weigh heavily in their decision, as the regulations 33 CFR 320.4(a) further state:

(3) The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another. However, full consideration and appropriate weight will be given to all comments, including those of federal, state, and local agencies, and other experts on matters within their expertise.

Regardless, the district's decision is supported by the record.

The appellant expressed concern that they were being treated unfairly compared to residents at the tip of Sand Point. Permit applications must be evaluated on a case by case basis and by careful examination of the individual merits and detriments of each project. Thus, individual permit decisions do not have precedence

Since the District's decision is supported by the record and the permit was properly evaluated, I find that this reason for appeal has no merit.

Reason 4: Public health and safety concerns. Weeds, debris, and mosquitoes are public health and safety concerns, in addition to stagnant water affecting wildlife.

Finding: This reason for appeal does not have merit.

Action: No action required.

The appellant clarified during the appeal conference that white suds wash ashore, and weeds catch the debris and allow the debris to pile up. The vegetation grows tall and catches incoming muck and vegetation, and invasive plant species are growing in the water. Mosquitoes are breeding in the small depressions. They further indicated that run-off from farms is causing

water quality problems. In the past, a dog was sick after drinking the water. In the 1980s the appellant could see fish spawning in the water, but in recent years the appellant no longer sees fish spawning.

The District's EA addressed the appellant's safety and health concerns under the section "Effects on Safety." The appellant's perspective was considered as follows: x

Debris:

The existence of a natural non-vegetated foreshore berm can lessen the work effort required to clean the debris. The removal of vegetation and the leveling of the shoreline would remove any such natural barriers to the spread of washed up debris, thus enlarging the footprint that debris wash-up can reach, thereby increasing the safety concerns for the public by making it more difficult to avoid debris. If each applicant were allowed to clear and level a large expanse of lakebed, the debris problem would be more extensive than if natural vegetation limited its movement. Indeed, extensive mowing and unauthorized grooming has already allowed widespread distribution of washed-up debris. This does present a safety issue for the public user when the water level recedes and the public may legally access the lakebed. However, the condition associated with denial of the project would appear to be beneficial to the public safety in that it would preserve the natural limiting effect of any foreshore berm on the location of the distribution of debris wash up, barring mowing which is now subject to DA regulation.

Mosquitoes and flies:

The water that pools along the shoreline of Lake Huron is exposed to wind and wave action, two things that discourage mosquitoes from breeding in this type of habitat. Elimination of vegetated swales during the grooming process would destroy mosquito habitat, but it would also destroy the habitat of those macro-invertebrates and other organisms that prey upon mosquitoes. Mosquitoes can breed in very small amounts of stagnant water such as are commonly found close to residences (e.g., clogged gutters, clogged plant pots, birdbaths, irrigation and road-side ditches, boat covers, French drains, rain barrels, etc.). The difference between these mosquito sources close to residences and the coastal marshes is the lack of mosquito-eating predators in the former. Although the mosquito habitat may be eliminated on the coastal marshes, many species of mosquitoes are known to fly extensively from their birth site. Even the weaker flying species are known to travel up to one-quarter mile for a blood meal. Eliminating the marsh will do little to eliminate a perceived insect problem, and may exacerbate mosquito population growth if exposed ponded areas are not regraded within two to three weeks of forming. This is because the many predators of mosquito larva are also removed by grooming and sand leveling, and the marsh normally supports a balanced ecosystem in which mosquitoes are prey. Destruction of the coastal wetlands destroy balanced ecosystems and create expanded habitat for those mosquitoes that depend on a lack of predators and disturbed conditions. Predators usually take longer to reestablish themselves than do mosquitoes. Hence, the proposed work will result in the cumulative impact of

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creating expanses of open sand in which ephemeral swales would form, dependent on grooming frequency.

The District also addresses invasive species in their EA under the section “Effect on Conservation and Overall Ecology”:

Our review of assorted sources (Dodici, et.el. 2004; Tu, ed., undated) indicates that disking and raking of natural marsh vegetation would likely only enhance the spread of phragmites, except perhaps under the most precisely timed, regimented and persistent methodology of attack. We are not convinced that the coastal wetland, prior to the complete mowing that had taken place prior to our site visit, consisted solely, or even mostly, of phragmites, and a lack of any native wetland vegetation. The vegetative regrowth observed on site refutes the applicants’ position that the wetland was all phragmites. The position that the previous grooming is the reason that we did not find phragmites is in conflict with known characteristics of the invasive species, its reproductive abilities, and its opportunistic strengths. We acknowledge that the applicants’ proposed grooming methodology may be an effective means to remove the phragmites in the short term, but we recognize far more native resources in the coastal wetlands than the applicant apparently does. Further, we must consider the long term damage of such activities to conservation and overall ecology, and the cumulative impacts as well.

The District addressed water quality in several sections of the EA. However, water quality concerns originating from farms outside of the project area are not addressed in the EA because an evaluation of these upland farm areas are beyond the evaluation requirements of the Corps Regulatory program.

I find that the District properly evaluated public health and safety concerns in the EA, and adequately addressed the appellant’s concerns. Therefore, this reason for appeal has no merit.

The following item was considered clarifying information and considered during this administrative appeal:

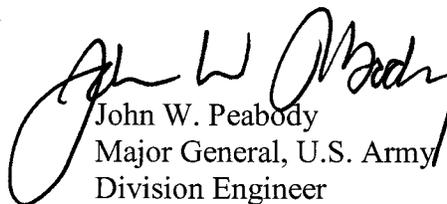
Various photographs of the shoreline taken over the past 50 years, that were presented at the appeal conference.

The following item was determined to be new information and was not considered in this administrative appeal in accordance with 33 CFR 331.7 (e) (6):

The sentence “...it is requested that we be issued a permit to groom 150 feet from our bulkhead and place a foot path to the waters edge” located in Mr. Colorito’s 31 October 2008 RFA and attached to Mrs. Wilson’s RFA, as this is a new grooming limit proposal not identified in any previous documentation.

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Conclusion: I find that the District's administrative record supports its decision. Therefore, for the reasons stated above, the appeal does not have merit.



John W. Peabody
Major General, U.S. Army
Division Engineer