ADMINISTRATIVE APPEAL DECISION

VERLIN MARSEE; FILE NO. 2009-00045-7

DETROIT DISTRICT

NOVEMBER 16, 2011

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

Appellant: Mr. Verlin Marsee, represented by Mr. Robert Kaufman

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: August 23, 2011

Appeal Conference and Site Visit Date: October 20, 2011

Summary of Decision: The administrative record of the District's permit denial and JD decision show that 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 January 2009, the Detroit District (District) visited the site in response to notice of an alleged unauthorized activity related to the installation of a covered boat hoist at 14687 Klenk Street, in Detroit, Michigan. The site is along a canal known as the Klenk Canal, which flows to and is contiguous with the Detroit River, a traditional navigable water (TNW). During the site visit, the District observed that four foundation posts had been installed in a concrete footing landward of a bulkhead, and that no work had taken place waterward of the bulkhead. The District then notified the Appellant in a letter dated January 29, 2009, that under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act, a Department of the Army permit from the Corps of Engineers is required for any construction or other work in waters of the U.S. such as the installation of a covered boat hoist or boathouse.

In March 2009, the Appellant submitted an application to the District for the installation of a 25 foot long by 12 foot wide roof to cover a boat. The District requested additional information in a letter dated April 29, 2009. During the appeal conference, the Review Officer asked the District if the requested information was received because it was unclear in the administrative record. The District clarified that they received this additional information. On May 25, 2009, the District published its Public Notice describing the Appellant's request to construct a 25 foot long by 12 foot wide by 10 foot high boat shelter with a cantilevered roof. The notice stated that the sloped steel roof would be anchored on shore by four steel posts and

would extend eleven feet beyond the bulkheaded shoreline. Several public comments were received requesting denial of the permit request due to navigation concerns. On May 4, 2009, the District conducted a site inspection of the property and documented the existing conditions including the presence of existing canopies and moored boats.

In the 2000s, the neighboring property owner was authorized to construct a boat canopy that extended approximately ten-twelve feet over the canal. The boat canopy was constructed and is approximately 21 feet high. Mr. Marsee's proposed boat canopy is shorter in height and designed to be ten feet high.

On June 29, 2009, the State of Michigan Department of Environmental Quality (MDEQ) denied the Appellant a state permit under Part 301, Inland Lakes and Streams of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended. The state denied the permit because it would interfere with the rights of navigation, violate a deed restriction, and because proper public notice was not given to all impacted property owners. The District then denied the permit without prejudice in a letter dated July 7, 2009. According to notes provided in the index for the administrative record, the Appellant appealed the State's denial. According to a drawing date stamped April 27, 2010, the Appellant modified the proposed width of the canopy over the canal to ten feet instead of eleven feet based on an April 10, 2010, on-site meeting with the Michigan Department of Natural Resources and Environment (MDNRE). MDNRE visited the site again on July 6, 2010, and found that the canal is 42 feet wide. They also found that the boat that Mr. Marsee currently moors along his seawall is ten feet wide, the same width of the proposed canopy, so the MDNRE concluded that the canopy would not create any additional encroachment into the canal affecting navigation. On July 15, 2010, the MDNRE issued a permit for a 25 foot long by 10 foot wide cantilevered roof over the canal. A MDNRE memo dated July 15, 2010, provides a rationale for the state's permit issuance. According to MDNRE, adverse impact to the public trust is minimal. Their memo states that the canal is 42 feet wide in front of Mr. Marsee's property, based on measurements obtained on July 6, 2010. According to the memo, during the site visit MDNRE interviewed one boat owner who apparently has the largest boat in the canal system. The boat owner reported that he navigates down the middle of the canal system, and does not utilize the area that Mr. Marsee's boat is moored, even when Mr. Marsee's boat is absent. MDNRE's memo states that it is not reasonable to expect Mr. Marsee to construct a 21 foot high canopy [the same height as the neighboring property owner's canopy] for larger boat passage when Mr. Marsee's boat is not moored under the canopy nor is it reasonable to excavate his land to move the proposed roof further inland [to entirely avoid impacts to navigation].

In a letter dated August 24, 2010, the District re-opened the file, and requested additional information from the Appellant on dimensions of the project site, and requested a response to the letters received from the public notice comments. It is unclear from the administrative record whether a response was received regarding the August 24, 2010, letter, although an undated phone conversation between the District and MDNRE is documented in the record describing the project dimensions. The District visited the site again in May 2011 to measure the width of the canal. The District's measurements of the canal width are smaller than the measurements provided in MDNRE's July 15, 2010, memo. The District documented two measurements; one at 39.6 feet from a roof edge on the opposite side of the canal to the edge of Marsee's mooring

pilings. The other measurement was only 34.3 feet, from the sheet steel wall immediately downstream of the corner boat house on the opposite side of the canal to an existing gray-door boat house. Photographs in the administrative record clearly show these locations. The 1907 survey of the Lighthouse Subdivision (the name of the neighborhood that the project is located in) depicts the Klenk canal as 40 feet wide.

On June 27, 2011, the District denied the permit request because the project would have major detriments to navigation, safety, and recreation. The District determined that use of the proposed project would interfere with and impact navigation by exposing boaters to an obstruction to navigation that does not presently exist. The District determined that the benefits of the project as proposed do not outweigh its detriments to the overall public interest. In the same letter, the District provided an approved jurisdictional determination (JD) documenting that there are navigable waters of the U.S. present on the property subject to jurisdiction under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act.

The Appellant disagreed with the District's determination and appealed its permit denial and approved jurisdictional determination in a letter dated August 23, 2011, received by LRD on the same date. According to the Appellant, the District's decision has no basis in fact, is not supported by substantial evidence, and is not plausible. Further, the Appellant disagreed that the canal is subject to the navigational servitude of the U.S. or federal jurisdiction under the Rivers and Harbors Act.

The Appellant provided two major reasons for appeal that have been re-worded for clarity of discussion.

The original reasons for appeal are as follows:

1. We have previously pointed out to Mr. O'Connor in the District Engineer's Office that the proposed project abuts Klenk Street Canal, an artificially-constructed canal in The Lighthouse, a platted subdivision recorded in 1907. Although that canal connects to the Detroit River, such doesn't suffice to subject that canal to the navigational servitude of the United States or the Rivers and Harbors Act, 33 USC s 401, et seq. at s 404. Vaughn v Vermilon Corp., 356 So 2d 551 (La App 1978), cert den. 357 So 2d 558 (La 1978), *aff'd in pertinent part*, 444 US 206 (1979), and,

2. The District Engineer's finding that the proposed project, an elevated canopy to shelter the applicant's fishing boat, 'would have major detriments to navigation, safety, and recreation,' has no basis in fact, isn't supported by substantial evidence, and isn't plausible. There is a permanent canopy of the same elevation as that which the applicant proposes to install overhanging the canal from supports on the applicant's next door neighbor's property. We do not understand how putting another such canopy right next to this neighboring canopy could portend any additional hazard to the masts of other boats traversing the canal. The canopy's overhang extends no further than the width of the hull of applicant's boat which the canopy is intended to shelter.

Appeal Evaluation and Findings:

Reason 1: The canal is not a waterway subject to Corps jurisdiction under Section 10 of the Rivers and Harbors Act of 1899, and the canal is not subject to the navigational servitude of the U.S.

Finding: This reason for appeal has no merit.

Action: No action required.

Discussion:

In their request for appeal, the Appellant states that although the canal connects to the Detroit River, it is not subject to the navigational servitude of the U.S. or the Rivers and Harbors Act. The Appellant provided information available in the District's administrative record showing that the canal in question was artificially constructed for a subdivision in 1907.

Corps regulations at Title 33 of the Code of Federal Regulations Part 329.4 (33 CFR 329.4) define "navigable waters of the U.S." as:

> . . . those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

These waters are referred to as Section 10 of the Rivers and Harbors Act (Section 10) navigable waters. According to regulations at 33 CFR 329.11, the Section 10 limit of jurisdiction in navigable waters is the lateral extent of the water surface, which includes all the land and waters below the ordinary high water mark (OHWM).

The District documents their JD in a form dated May 26, 2011. The JD form states that Section 10 navigable waters are present on the site that have been presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. However, the District did not provide a rationale for their determination in the "explain" section provided within the form nor did they clarify whether this determination was in reference to the Detroit River, the Klenk Canal, or both. This oversight has no affect on the District's JD decision because a publicly available Michigan state government website contains a document, updated 7 January 2010, that lists the Detroit River as a Section 10 navigable water within the regulatory jurisdiction of the U.S. Army Corps of Engineers for which a navigability determination has been made.[1] The document also lists the Fox Creek Canal System as below the OHWM of the Detroit River. The document specifies that the Fox Creek Canal System

[1] http://www.michigan.gov/documents/deq/lwm-jpatm-appx-i_213469_7.pdf. The District website is under construction but would also have a current list of navigable waters.

includes the entire canal system south of Scripps Avenue, which includes the project area where the Klenk Canal is located.

The District's JD form states that the elevation of the established ordinary high water mark is 576.1 feet International Great Lakes Datum (IGLD), 1985, interpolated from the documented ordinary high water marks at Belle Isle upriver and Grosse Pointe downriver. However, the District does not specify in the JD form whether the ordinary high water mark is specific to the Detroit River, Klenk Canal, or both. This oversight is resolved in the previous paragraph because the Klenk Canal is located below the OHWM of the Detroit River, a navigable water of the U.S. and therefore the Klenk Canal is itself a navigable water of the U.S. and no further delineation of an ordinary high water mark is required to establish Section 10 jurisdiction. Furthermore, page 12 of the District's Environmental Assessment provides more information and states that the waters of both the Detroit River and Klenk canal are contiguous. Since the Klenk canal is located below the OHWM of the Detroit River, it is considered part of the Detroit River Section 10 navigable water designation. Therefore, the Klenk Canal is a federally regulated water of the U.S. and this reason for appeal has no merit.

It is worthwhile noting that the District addresses some of the Appellant's concerns regarding jurisdiction on page 12 of their Environmental Assessment, as the Appellant had previously expressed their concerns regarding jurisdiction during the permit evaluation.

Finally, the Appellant states that the canal is not subject to the navigational servitude of the U.S. However, federal regulatory jurisdiction extends "laterally to the entire water surface and bed of the navigable water body, which includes all the land and waters below the ordinary high water mark." [33 CFR 329.11(a)]. Therefore, this reason for appeal has no merit.

Reason 2: The District Engineer's finding that the proposed project, an elevated canopy to shelter the applicant's fishing boat, "would have major detriments to navigation, safety, and recreation," has no basis in fact, isn't supported by substantial evidence, and isn't plausible.

Finding: This reason for appeal has no merit.

Action: No action required.

Discussion:

In their request for appeal, the Appellant explains that the next door neighbor's canopy extends to the same height as the Appellant proposes, and therefore their project is not an impediment to navigation. Furthermore, the Appellant explains that their canopy will overhang the canal no further than the width of the hull of the Appellant's boat which is already moored in the project location. The Appellant does not understand how the canopy would be an additional hazard to the masts of other boats traversing the canal.

Section 10 of the Rivers and Harbors Act prohibits the unauthorized obstruction or alteration of any navigable water of the U.S., including any work affecting the course, location,

condition or capacity of a navigable water [33 CFR 320.2(b)]. The proposed work can include dredging and filling activities as well as the construction of structures in, over or under the navigable water. The decision whether to issue a permit is based on an evaluation of the probable impacts of the proposed activity and its intended use on the public interest, including the public interest factors of safety and navigation [33 CFR 320.4(a)(1)]. District engineers are authorized to deny permits where he/she determines that the activity will clearly interfere with navigation [33 CFR 325.8(b)].

The District denied the permit because they determined that the structure would cause undue interference to safe passage of boats from moorage spaces in the canal to the Detroit River and an increased exposure of people to a hazard to navigation. The District documents the hazards to navigation on pages 4-7 and 12-15 of their Environmental Assessment, safety on page 19, and recreation on page 18. Specifically, the District documents that the amount of veering and maneuvering required around Marsee's proposed canopy would exceed that of the neighboring property's canopy due to the presence of a blind corner in the immediate area. The District documents that the canal is already narrow and difficult to pass through with the blind corner and an additional structure is likely to exacerbate this problem. The District takes into account wind, oncoming boat traffic and congestion, inclement weather, and necessary veering/maneuvering in current conditions when reaching their decision.

In their Environmental Assessment, the District describes how boats do not typically turn at a 90 degree angle, and instead turn at a diagonal angle such that the width of the boat while turning is larger than the width of the boat steering right. Further, the District states that a metal structure with a solid corner that overhangs ten feet into a waterway does not have the same effect on navigation as a floating boat of similar size or smaller. The District clarifies that they do not regulate boats themselves or the size of the boats but do regulate structures in and over the water associated with boat moorage. The District identifies a reasonable and practicable alternative that accomplishes the Appellant's objectives and has been completed by several other property owners along the canal. Other property owners have already excavated a boat well into their properties, eliminating the potential negative impact on navigation and safety because it avoids constricting the navigable width of the canal. The District's administrative record supports that this is a reasonable and practicable alternative that will minimize negative effects on navigation while still fulfilling the project purpose of installing a boat shelter.

The District took into consideration many comments received in response to the public notice that expressed concern about the navigation and safety hazard of the structure. The District recognizes that riparian owners have a general right of access to navigable waters of the U.S. from their property, and that issuance of a permit for a riparian owner should not create a situation that would impair access for a similarly situated riparian owner. The District documented that the project would prevent or make difficult other riparian owners' ability to access the Detroit River.

The District also documented the differences between the neighboring property (Barrett) where a canopy already exists and the Marsee property. According to the District's Environmental Assessment, although the properties are adjacent, boats seldom need to turn in front of the Barrett property because it would place them in a direction away from the Detroit

River. The District also documented that if a boat were passing the Barrett property, toward the river, east to west, it would have sufficient room to swerve right, into the north-south canal, then swerve back left to continue west to the river. Boats passing or turning in front of Marsee's property have no such room to swerve to avoid a collision because to their south there is a bulkhead, Barrett's canopy, sometimes Marsee's boat, and to their north there is a boathouse, and if the proposed canopy were there the existing passage would be even more restricted.

The administrative record indicates that the MDNRE based their permit issuance on different measurements of the canal width than that of the District. These different measurements caused the District's analysis to differ from that of the State. While the District takes into account a favorable State decision, the District is obligated to pursue its own independent review in order to protect the policies, goals, and requirements of the applicable authorities [33 CFR 320.4(j)].

The District properly evaluated the permit application and provided adequate documentation for denying the permit due to the proposed project's probable major, long term, negative impact on navigation, safety, and recreation.

Conclusion:

I find that the District's administrative record supports its decision. The administrative record of the District's permit denial and JD decision shows that the District's conclusions were reasonable and do not conflict with the laws, regulations, or policy requirements of the Corps regulatory program. Therefore, for the reasons stated above, the appeal does not have merit.

Margaret W. Burcham
Margaret W. Burcham
Colonel, U.S. Army
Division Engineer