ADMINISTRATIVE APPEAL DECISION

TODD PROPERTY; FILE NO. 2004-470040

DETROIT DISTRICT

FEBRUARY 25, 2011

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

Appellant: Mr. and Mrs. Ivan and Clara Todd

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: March 12, 2010

Appeal Conference and Site Visit Date: July 13, 2010

Summary of Decision: The administrative record (AR) of the District's proffered permit 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. The Appellant's appeal does not have merit.

Background Information:

On October 19, 2004, the Detroit District (District) received a Michigan Department of Environmental Quality (MDEQ) permit authorization for construction of a bulkhead and backfill at the Todd property bordering Pentwater Lake, at 5814 and 5820 Long Bridge Road, in Pentwater, Oceana County, Michigan. The transmittal included a permit application dated July 27, 2000, submitted to MDEQ by Mr. and Mrs. Ivan and Clara Todd.

On June 30, 2005, the District performed a site visit to verify the on-site wetland boundaries and determine whether bulkhead construction had occurred. No construction of the bulkhead or any discharge of fill material had commenced at the time of the site visit. The District verified that the project location contains wetlands below the ordinary high water mark (OHWM) of Pentwater Lake.

On August 2, 2005, the District performed another site visit and determined that the bulkhead had been constructed between 25 and 47 feet waterward of the existing bulkhead, resulting in 263 cubic yards (2350 square feet) of backfill waterward of the OHWM, including 1150 square feet of fill discharged in wetlands. The OHWM and existing bulkhead are the same location. A portion of the work along the shoreline (13 linear feet of the total 80 linear feet) occurred on the neighboring property at 5820 Long Bridge Road, owned by Mr. Brian Shea.

Mr. and Mrs. Todd are acting on behalf of Mr. Shea for the portion of work that extends onto his property. The District notified Mr. Shea and Mr. and Mrs. Todd of the violation in letters dated August 10, 2005, and provided each party with the option to restore the site, or apply for and receive an after-the-fact (ATF) permit for the unauthorized activity. In a telephone conversation on August 15, 2005, Mrs. Todd informed the District that she wanted to pursue an ATF permit. Their original application dated July 27, 2000, was evaluated as an ATF application. A tolling agreement dated August 2005 was signed by Mr. and Mrs. Todd. In a letter dated September 8, 2005, Mr. Shea requested that the proposal be treated as one project, and also submitted an ATF permit application for the completed work. A tolling agreement was signed by Mr. Shea and the District. In a letter dated October 19, 2005, the District notified Cluchey Lakefront Construction (the agent performing the work) that unauthorized activities occurred on site.

On October 6, 2005, the District published its Public Notice describing the Appellant's request to receive ATF authorization for the construction of an 80-foot wooden bulkhead and the discharge of approximately 318 cubic yards of backfill in a 2,350 square foot area behind the bulkhead. Sixty-seven feet of the wall is located on the Todd property, and thirteen feet is located on the Shea property. The bulkhead and all of the backfill was placed below the OHWM of Pentwater Lake, and the filled area included approximately 1,150 square feet of wetlands (approximately 0.026 acre). The purpose of the work was to protect the Todd property from erosion. Later, in a conversation on October 25, 2005, the project purpose was modified by the Appellant. The new project purpose was to keep sand from covering up the weeds in the water and depleting the fish population in the area, and was again modified on November 28, 2005, to also provide handicap access to the water.

In a letter dated November 22, 2005, the District asked the Appellant to consider ways to avoid or minimize the discharges into wetlands, and stated that the Appellant's application would be withdrawn if a response was not received within 30 days. The Appellant responded in a letter dated November 28, 2005, but did not provide any feasible less environmentally damaging alternatives.

In a letter dated October 2, 2006, the District determined that the project as proposed could be authorized under a modified permit. According to the District's decision document, the project as proposed would fail to comply with the 404(b)(1) Guidelines of the Clean Water Act. The District denied the Appellant's request for 2350 square feet of backfill (including 1150 square feet of wetland fill) and instead provided them with an initial proffered permit of 1200 square feet of backfill (including 50 square feet of wetland fill). In a submittal dated November 20, 2006, the Appellant disagreed with the District's determination and objected to the initial proffered permit. The District considered the Appellant's objections and issued a proffered permit on January 21, 2010, with no changes to the permit authorization. The Appellant disagreed with the District's determination and appealed its decision in a submittal received by LRD on March 12, 2010.

MDEQ initially denied the Appellant's request to construct a bulkhead. The state's decision was appealed, and on January 12, 2004, an administrative law judge issued a decision, which the MDEQ responded to by re-evaluating the permit application. This state-issued appeal decision has no relevance to the Corps' appeal evaluation. On October 4, 2004, MDEQ authorized work

to construct a wooden seawall with 110 cubic yards of clean backfill. Although the Appellant performed work beyond the limits of the MDEQ permit, the MDEQ determined that the discrepancy was not large enough to warrant an enforcement action against the Appellant.

The District's jurisdictional limit commences at the OHWM (absent adjacent wetlands not present at this location), not the water's edge. The OHWM is the location of the old bulkhead/stone wall, which happens to coincide with the location of the lot line. Pentwater Lake is influenced by Lake Michigan and both water levels are cyclical. The District considered the cyclical nature of the water's edge, various photographs from different years, and water elevation data for over 70 years when determining the OHWM.

Appeal Evaluation and Findings:

Reason 1: The permit provided to the Appellant authorized work other than requested. The Appellant originally requested to install a bulkhead that included 2,350 square feet of backfill (including 1,150 square feet of fill in wetlands subject to federal jurisdiction under the Clean Water Act). However, the Appellant was only permitted to install a bulkhead that included 1,200 square feet of backfill (including 50 square feet of fill within wetlands). The Appellant feels that the modified permit will damage the ecosystem that has formed lakeward of the existing bulkhead.

Further, the District's decision document states that "an ATF permit could be issued, allowing the completed bulkhead to remain, with a special condition added to require the placement of a stone toe in front of the wall." The District did not authorize this alternative even though the Appellant prefers it over the permitted alternative.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The District's evaluation details the impacts to the aquatic ecosystem as a result of the project. The pre-construction aquatic ecosystem functions and values are detailed in the sections titled "Biological Characteristics" and "Effects on Wildlife", while the impacts are detailed in the section titled "Post-construction and Use Impacts", "Effects on Wildlife" and "Identified Biotic Impacts". The District's evaluation stated that it is very common for fish species to spend a majority of their lives in open water and use vegetated shallow water habitats for spawning and as protective nursery areas for larvae and juvenile fish. The evaluation further stated that vegetation at the site provided shelter for the eggs and juveniles, in addition to providing habitat for the various invertebrate species upon which the young fish feed. The District disagrees with the Appellant's assertion that erosion from their shoreline is harming the lake, and explains how the changing lake elevations have a large influence on the shoreline.

The 404(b)(1) Guidelines provide for special consideration of "special aquatic sites" including wetlands that the Guidelines recognize as providing important aquatic resource functions. In a letter dated November 22, 2005, the District provided the Appellant an opportunity to present a modified proposal that would result in fewer impacts. In that letter the District informed the

Appellant that the 404(b)(1) guidelines require that the District presume that the overall project purpose can be accomplished in a way that does not involve wetlands, and that any design that does not involve wetlands will have less adverse impact on the aquatic ecosystem. The Appellant responded to the District's letter in a timely manner but did not provide a modified proposal, and therefore the District made a decision based on the Appellant's original proposal of 2,350 square feet of backfill.

Also, the US Environmental Protection Agency and Corps Memorandum to the Field dated August 23, 1993, and entitled: "Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements" states "The amount of information needed to make such a determination and the level of scrutiny required by the Guidelines is commensurate with the severity of the environmental impact (as determined by the functions of the aquatic resource and the nature of the proposed activity) and the scope/cost of the project." It is therefore appropriate, given the nature and scope of the project, that the District's 404(b)(1) guideline analysis was not as detailed as the Applicant might have liked, but provided adequate analysis to arrive at a conclusion regarding the least environmentally damaging practicable alternative.

As for the Appellant's concern that the District did not authorize the stone toe alternative, the statement on page 16 of the decision document is confusing: "An ATF permit could be issued, allowing the completed bulkhead to remain, with a special condition added to require the placement of toe stone in front of the wall." However, it is clear later in the decision document that the District did not authorize the alternative of an ATF permit allowing the completed bulkhead to remain with stone toe in front of the wall because, according to their Section 404(b)(1) compliance summary matrix on page 25-26 of the decision document, that alternative (depicted as A2 on the matrix) would not meet the Section 404(b)(1) criteria. Specifically, the District documented that the proposed discharge fails to comply with the 404(b)(1) Guidelines because there is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, and the alternative does not have other significant adverse environmental consequences. The District issued a permit for 1,200 square feet of backfill, including 50 square feet of fill within wetlands, because it was a practicable alternative with less adverse effect on the aquatic ecosystem.

The District provided adequate documentation in their analysis that no more than 1,200 square feet of backfill (including 50 square feet of fill within wetlands) could be authorized. Therefore, this reason for appeal has no merit.

Reason 2: The District did not adequately evaluate historic adjacent fills when determining the amount of fill to permit for the Todd project.

Finding: This reason for appeal has no merit.

Action: No action required.

Discussion: In their request for appeal the Appellant states that although the District's evaluation briefly mentioned the adjacent bulkheads that were constructed over 20 years ago, these adjacent fills were not considered in determining an acceptable amount of fill for the Todd's project. The Appellant states that the District did not provide a rationale for choosing to evaluate fills for only the last 20 years and not a longer time period. The Appellant believes that allowing the adjacent property owner to fill in 1450 square feet of wetlands with a riprap bulkhead sets precedent for similar actions, thus, denying the Todd project as proposed is prejudicial. The Appellant further clarified in an e-mail dated July 14, 2010, that they believe it was unfair to combine the impacts of the Shea property with the impacts of the Todd property when comparing the project to single projects along the shoreline. In addition, the Appellant stated that the amount of fill authorized for the Todd project is less than that authorized for the nearby Hitchcock project referenced in the environmental assessment. Further, the Appellant believes that using a half mile sample for lake impacts is inaccurate because it does not take into account the amount of lake frontage already impacted versus possible future impacts, and does not account for the areas of the lake that are more susceptible to erosion due to wind and current exposure. The Appellant believes that there are several other bulkheads existing on the lake that have not been considered in the District's decision. Also, the Appellant believes that the amount of fill material in their proposed project is so minimal that the impacts to the total lake are insubstantial, and that removing a portion of the bulkhead will not have a measurable benefit to the lake. Finally, the Appellant disagrees with the District's evaluation in that it did not include rip rap fill material.

Permit applications must be evaluated on a case by case basis and by careful examination of the individual benefits and detriments of each project and a site-specific review of the facts. The issuance of an individual permit does not set precedent for a similar permit to be issued. Further, issuance or denial of a permit should not be perceived as a guarantee that people who own similar property will alter their interests accordingly by applying for, or neglecting to apply for, authorization to perform similar projects.

Requirements for performing a cumulative impact analysis are provided in several Corps regulations and guidance. The Corps' National Environmental Policy Act (NEPA) implementing regulations for the Regulatory Program (Title 33 Code of Federal Regulations Part 325 Appendix B) require that the Corps evaluate the cumulative environmental impacts of providing a permit authorization to an applicant. The Corps regulations at 33 CFR 320.4(a) regarding its public interest review process require that the Corps consider cumulative impacts regarding public interest review factors. Furthermore, Corps regulations at 33 CFR 325.3(c) state: "The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity on the public interest." Also, Corps policy in Regulatory Guidance Letter (RGL) 84-09 offers guidance for establishing a cumulative impact area (CIA) and assessing cumulative impacts. Although this RGL expired on December 31, 1986, it is still generally applicable to the Corps regulatory program as outlined in RGL 05-06 dated December 7, 2005. RGL 84-09 directs the District to establish a CIA and develop a sense of the rate of development by providing a description of the historical permitting activity and the anticipated future activities within the CIA.

The District evaluated their cumulative impact analysis under the section of their decision document titled "Cumulative Impact Area". Page 8 of the decision document states that "the geographic area for which we are reviewing cumulative effects [is] the shoreline of Pentwater Lake". The District's table on page 8 assesses similar projects, constructed within the last 20 years, located with a ¼ mile radius of the project area (¼ mile in either direction for a total of ½ mile). Instead of evaluating all bulkheads along the entire shoreline, they examined impacts associated with projects located in the ½ mile segment and projected past and future impacts (20 years past and 20 years future) for the entire lake using that ½ mile impact rate. The decision document only addressed cumulative detrimental impacts to the aquatic resources and does not address whether there may be any cumulative beneficial impacts.

Not all bulkheads along the shoreline were considered in the cumulative impact analysis. The Council on Environmental Quality (CEQ) regulations at 40 CFR 230 do not require agencies to catalogue or exhaustively list and analyze all individual past actions in a cumulative impact analysis. In addition, the CEQ guidance memo to federal agencies dated June 24, 2005, advises that the extent and form of the information needed to analyze appropriately the cumulative effects of a proposed action and alternatives under NEPA varies widely and must be determined by the federal agency proposing the action on a case-by-case basis. The District clarified at the appeal conference that they only evaluated vertical bulkheads in the CIA, and excluded rip rap bulkheads because rip rap bulkheads tend to be wider and have different impacts. The District's decision document shows that they evaluated past and future impacts using an impact rate given the limited project scope and impact. The ½ mile impact rate is described in the previous paragraph. By using an impact rate it would not have mattered that the Todd and Shea properties were combined in the cumulative impact analysis because it is based on impact per geographic area, not impact per property. Finally, the AR supports that the ½ mile area is representative of the entire shoreline. Although there is a large, undeveloped wetland complex at the east end of the lake, where the Pentwater River enters the lake (this area is part of the Pentwater River State Game Area), most of the shoreline is developed with residential properties, associated shore protection structures, piers, boat lifts, and other recreational structures.

The Appellant believes that several other bulkheads constructed along Pentwater Lake were larger than theirs and should have been included in the District's evaluation. The Appellant believes that the ½ mile rate does not allow one to accurately project impacts. The District's decision document notes that the size of the fill area for the Todd/Shea project is larger than all other projects in the vicinity [½ mile] and includes wetland fill. Their decision document recognizes that neighboring bulkheads have been in place for several decades and that some of them may not have included wetland fills. The District's analysis is appropriate given the limited project scope and impact.

In an e-mail dated August 5, 2010, the District clarified that typically they do not require compensatory mitigation for bulkhead projects, and that it was not required for any of the projects authorized within the CIA. The District further clarified, however, that they frequently require mitigation in the form of avoidance and minimization of aquatic impacts, including the use of silt fences and turbidity curtains. In addition, during the appeal conference, the District clarified that they did not examine projects older than 20 years because regulation/policy has changed since then and examining a period greater than 20 years is a long time. In addition, one

can surmise that impact information greater than 20 years ago would be more difficult to find. However, the above information was conveyed at the appeal conference and is not found in the District's AR.

Unauthorized impacts are not included in the District's cumulative impact analysis. The District clarified in their August 5, 2010, e-mail that this is because those impacts are later counted when an ATF permit is authorized. In addition, the District clarified that pending ATF reviews would have been included in the future/reasonably foreseeable portion of the cumulative impact analysis. However, the cumulative impact analysis guidance indicates that *all* past actions within the selected timeframe should be analyzed, which likely includes any unauthorized impacts not later authorized with an ATF permit.

Regarding the evaluation of future foreseeable impacts, the District provided their rationale for why authorizing the Appellant's request could ultimately lead to future impacts. The District stated that "the shoreline to the west of the site and shoreline directly across the lake to the north have similar, irregular alignments, with small pockets and projections." The evaluation later stated that "...the anticipated future activities within the CIA include continued bulkhead and backfill projects for the purpose of shore protection." The District also states that since they strive "for fair and consistent permit decisions, it would be contrary to policy and arbitrary to foresee a different permit decision for any similar projects within the CIA". According to the above statements the District believes its policy of fair and consistent permit decisions would drive the permit evaluation process for similar projects requested by other shoreline property owners and reasonably lead to the same permit decision. The District also attempts to quantify these impacts by stating that "Based upon the impact rate of 1,505 square feet of impact per ½ mile of shoreline, we estimate that approximately 0.55 acres of bulkhead/backfill impacts have been authorized on Pentwater Lake within the past 20 years...If permits for bulkhead construction are issued at the same rate over the next 20 years, with the addition of two projects similar to the Todd/Shea project, impacts would increase to 0.66 acre, or about 20% over the base estimate. If one Todd/Shea sized project is authorized per ½ mile, the authorized impacts to Pentwater Lake would increase to approximately 1.52 acres, 2.5 times greater than the 20-year impacts from average sized projects."

Although the District's decision document includes several minor deficiencies in their cumulative impacts analysis (it did not indicate whether mitigation for historic impacts was considered, did not document why a 20 year time period was chosen, did not include unauthorized impacts, and did not include a statement regarding cumulative effects of possible beneficial impacts), these minor errors would not have affected the District's decision to proffer a permit for the least environmentally damaging practicable alternative.

The District completed an adequate cumulative impact analysis given the size and scope of the project. Further, the District adequately documented the importance of the aquatic resources and the shoreline of Pentwater Lake and specifically within the CIA. The AR supports the District's conclusion that additional bulkhead projects would result in more severe adverse cumulative effects on aquatic organisms and wetlands, and that cumulative effects would increase if the District issued permits for projects similar to the Appellant's proposal. Therefore, this reason for appeal has no merit.

Reason 3: The District's evaluation included misleading statements. The District's decision document provided a misleading statement as follows: "other authorized bulkheads have not included backfill in wetland areas". In addition, the Appellant believes that removal of the bulkhead will not result in wetland restoration, and will instead damage the ecosystem that has formed lakeward of the existing bulkhead, contrary to the conclusions stated in the District's permit evaluation.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The District's statement that other authorized bulkheads have not included backfill in wetland areas is misleading because it is contrary to a statement made earlier in the District's decision document under their cumulative impact analysis. The earlier statement acknowledges that previous impacts have involved wetland impacts, specifically an ATF request by James Stearns. However, this error would not have altered the District's proffered permit decision.

During the appeal conference, the District commented that the original wetland seed bank still exists beneath the bulkhead. They stated that if a portion of the bulkhead were removed, the wetland vegetation would grow from the seed bank, and the wetland area would become restored.

The AR supports the conclusion that removal of the bulkhead would result in wetland restoration. Prior to the installation of the bulkhead, in June 2005, the District documented the presence of wetlands using routine wetland determination data forms and jurisdictional determination forms that are located in the AR. The decision document states in several locations "...relocation of the wall to the wetland boundary would allow for the restoration of the wetland area that was destroyed by the unauthorized work. The above modifications and restoration would reduce impacts to aquatic organisms by avoiding and minimizing the loss of shoreline wetlands and vegetation, and the valuable habitat they provide." The decision document indicates the same for terrestrial organisms, and states that relocating the wall would reduce impacts to conservation and overall ecology. The decision document also states that the relocation of the wall would "reduce impacts to water quality by avoiding and minimizing the loss of shoreline wetlands and the filtering and sediment stabilization they provide."

There is no evidence in the AR that bulkhead removal would permanently destroy the ecosystem. And as previously discussed, correcting the District's misstatement regarding wetland impact areas would have not affected their proffered permit decision. Therefore, this reason for appeal has no merit.

Other Information Considered:
In an email dated July 14, 2010, the Appellant identified several additional concerns regarding the District's decision document. All items were considered during this administrative appeal. It was determined that they would not have impacted the District's decision to proffer a permit for

the least environmentally damaging practicable alternative. Therefore, the additional concerns were not examined in detail.

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
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Division Engineer