

ADMINISTRATIVE APPEAL DECISION

LAWRENCE KAINÉ, FILE NO. 97-034-007

DETROIT DISTRICT

DECEMBER 20, 1999

Review Officer: Rodney L. Woods, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

Applicant Representative: John A. Leithauser, Land Use Solutions, Levering, MI 49755.

Date of Appeal: August 17, 1999.

Basis for Appeal as Presented by Applicant:

Count I: The Chief of the Regulatory Branch of the Construction-Operations Division is not authorized to make factual determinations material to the issuance or denial of a permit.

Count II: The COE erroneously concluded that the involved proposal is not water dependent.

Count III: The COE Denial Determination failed to identify the "significant national issues... and explain their overriding importance" required when COE decision is contrary to the decision of the MDEQ.

Count IV: Failure to give due regard to applicant's mitigation efforts.

Appeal Conference Date: September 30, 1999.

Date of Final Written Arguments from Appellant: October 21, 1999.

Review Officer Decision and Recommended Instructions to Detroit District Commander:

Count I: Appeal Has Merit: The permit decision is remanded to the District Engineer (DE) to clearly document that he has fully reasoned through the case and that he takes ownership of the Environmental Assessment and Decision Documents per **Corps of Engineers Regulations, 33 CFR 325.8(b)**. The DE is not required to draft the documents but must follow the reasoning, make the critical decision breakpoints in the

reasoning process and sign the documents making a DE's decision. Permit decisions are major Federal actions and a denial means an end point in a final government decision affecting use of private properties. The regulations elevate such an action to the DE to signify its weight, finality and importance.

Count II: Appeal has Merit: The permit decision is remanded to the DE to fully review the evaluation of practicable alternatives. The DE should review the logic and reasoning in the light that the applicant deserves consideration in overcoming the presumption that there are alternatives to building in wetlands by considering his overall purpose to be housing with lakeside property. The district must decide the region of evaluation, as in the Old Cutler Bay case southern Dade County was used, **Reference Old Cutler Bay Guidance, 9 Oct 1990**. There are a number of points of confusion here, some caused by misapplication of Corps rules and some by lack of substantial arguments and by the applicant. The district reasons correctly that housing is not water dependent and follows the **Required Presumption** that there are available alternatives. The appellant points out that the Corps EA discusses that there is great pressure on the remaining possible building sights around Crooked Lake and that the applicant has limited alternatives from which to choose. In effect, the appellant claims the Corps is proving his case for him that no other practicable alternatives exist. The record provides no strong alternatives analysis from the applicant proving his case. The appellant claims that his desire for lakeside housing actually passes the water dependency test. There is strong precedent that housing is **not** water dependent in such cases but as in the Twisted Oaks Joint Venture case the applicant makes a valid case for his desire for lakeside or water amenity property in his Overall Purpose. The appellant claims the district has shown that practicable alternatives are extremely limited and that his burden is made easier to show that no reasonable or practicable alternatives exist. The District should have granted that overall purpose could include the lakeside view water amenity. However, the District is correct that the basic purpose, housing is not water dependent. **Reference Twisted Oaks Joint Venture Guidance dated 9 November 1991**.

BASIC PURPOSE is broadly defined to raise the presumption against non-water dependent activities. OVERALL PURPOSE is narrowly defined for the purpose of rebutting the presumption. If a project is non-water dependent, then the lack of practicable alternatives must be demonstrated. EPA Guidelines, 40 CFR 230.10(a)(2) "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of OVERALL PROJECT PURPOSE.

The District did not state the overall project purpose properly and the applicant did not rebut it properly. To expand from Old Cutler Bay and Twisted Oaks Joint Venture, the burden of demonstrating that no practicable alternative exists is the sole responsibility of the applicant, not the Corps district or the Federal resource agencies.

The District also incorrectly applied the 404(b)(1) Guidelines when it is reasoned that because the applicant was aware of the wetlands before purchasing the property that he cannot meet the avoidance test. The applicant had a "wetland delineation" and knew

there was a sizable upland parcel on the property and could reasonably assume that he may use that upland for construction. The District applies the next step correctly based upon their previous step that, under the 404(b)(1) Guidelines for minimization, the applicant has theoretically unlimited choices of upland property to purchase. However, the avoidance test must include an applicant's reasonable expectation to use his property unencumbered by what the Corps thinks about his decision to purchase his property. When an applicant applies for a Corps of Engineers Permit, neither law nor regulations apply penalties or negative connotations for an applicant's decision to possess private property whether or not he knows work may require such a permit.

Count III: Appeal has Merit: The permit decision is remanded to the DE to fully review and determine if the documentation is in the record to show the "significant overriding issues of national concern" necessary to override the state MDEQ decision to issue the permit. The DE should also review the documentation that declares that impacts are minimal and makes the leap to impacts serious enough to Crooked Lake to override the State decision. The documentation does not present evidence or logic to substantiate such an increase in impact to the aquatic environment.

When the DE makes a decision on a permit application which is contrary to the State decision he must describe in the decision document the overriding national concerns for his actions. **Reference 33 CFR 325.2 (a)(6) and 33 CFR 320.4(j) (2) & (4).** The environmental assessment (EA) and decision document describes the lack of impact of the project and does not discuss any direct impacts that are strong negative impacts to the aquatic environment, **Reference EA, nearly every summary paragraph.**

As the appellant claims, the connection of the impact in the wetland to Crooked Lake is not substantiated. The appellant also argues that he proposes no activity on shore and that the conservation easement condition (see discussion in Count IV), including the 60 feet setback from shoreline required by the County, will limit any activity on the shoreline. No arguments are made in the decision document that reach the level of significant national issues but in fact the EA says that impact is minimal. For a variety of reasons the District does exercise some wide discretion in making decisions overriding State decisions and such decisions may be made for substantial impacts on the aquatic environment, especially where important resources exist. However the EA repeatedly evaluates factors showing no major impact and evidence of only minor adverse impact.

Count IV: Appeal does not have Merit: The appellant did not develop an argument that showed a Corps failure to give due regard to the applicant's mitigation. The Corps may not have explored the applicant's conservation easement in depth but more than likely because the case did not develop toward a resolution. The applicant bears the burden for fully rebutting the alternative presumption, reference Count II. If during the remanded evaluation process, the DE reviews the procedures and documentation and finds that he should review the mitigation, he should evaluate the specifics of the conservation easement to determine its enforceability and its relationship to impacts on the edge of Crooked Lake.



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