

ADMINISTRATIVE APPEAL DECISION

OHIO DEPARTMENT OF NATURAL RESOURCES

FILE NUMBER 1996-4790013(11)

BUFFALO DISTRICT

JANUARY 11, 2010

Review Officer: Michael Montone, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division

Appellant: Ohio Department of Natural Resources

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

Receipt of Request for Appeal: June 5, 2007

Appeal Meeting and Site Visit Date: February 20, 2008

Background Information: The Ohio Department of Natural Resources (the “appellant”) applied for authorization to hydraulically dredge approximately 225,000 cubic yards of primarily silt materials from channels within East Harbor to provide navigational access to several existing marinas. The appellant proposed that the dredged materials be discharged into a new clay containment dike in Middle Harbor (adjacent to East Harbor) to evaluate the reuse of dredged material to improve and restore wetland habitat as a component of an environmental enhancement project. According to the District, the appellant’s proposed project would be carried out over a minimum six year period and the footprint of the project would cover approximately forty acres of Middle Harbor, including approximately 0.1 acre of wetlands. The proposed project would also restore approximately ten acres of wetlands and eight acres of vegetative shallows in Middle Harbor. The proposed project is located in East and Middle Harbors in Danbury Township, Erie County, Ohio.

The District denied the appellant’s request for authorization stating that the proposed project will result in substantial individual and cumulative impacts to Middle Harbor and does not represent the least environmentally damaging practicable alternative (LEDPA). For the navigation aspect of the proposed project, the District stated that disposal of the dredged material into an established open-lake disposal site and/or an upland area would represent the LEDPA. For the evaluation of the beneficial re-use of dredged material aspect of the proposed project, the District stated that the construction of a smaller (five-acre) pilot project would provide an adequate demonstration to evaluate the beneficial re-use of dredged materials from both the engineering and biological perspectives.

According to the District, the demonstration project would have allowed the applicant to further address the District's concerns about the viability of the larger project.

The appellant disagrees with the District's determination and appealed their decision. The appellant's request for appeal centers on the argument that their project as proposed does represent the LEDPA and that the District's proposed alternatives are not practicable.

Summary of Decision: The appellant submitted multiple reasons for appeal based on legal and factual arguments challenging the District's determination that the appellant's preferred alternative is not the least environmentally damaging practicable alternative (LEDPA). To facilitate this appeal review, the appellant's reasons for appeal were divided and discussed below in Reasons 1 through 6. Also, during the review of the administrative record, the Review Officer (RO) discovered an inconsistency in the District's documentation that was not specifically raised by the appellant. For purposes of this appeal review, this inconsistency is discussed under Reason 1. Accordingly, this permit decision is remanded and the District must resolve the inconsistencies within its decision document and reconsider its final decision.

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

Reason 1: Legal Basis for Appeal: The District's permit denial with prejudice was based on an incorrect application of existing law and Corps regulations and policies.

Finding: This reason for appeal does not have merit. However, an inconsistency in the District's documentation, not specifically raised by the appellant, was discovered by the RO.

Action: The District must resolve the inconsistencies within its decision document and reconsider its final decision.

Discussion: Central to the appellant's argument is their position that the open lake disposal of dredge materials should be avoided. The appellant restated this position multiple times in its request for appeal (RFA) and during the appeal conference.

The appellant argues that the District failed to properly execute its responsibilities as directed by Corps regulations at 40 CFR 230.1(c), 40 CFR 230.5(c), and 40 CFR 230.75(d). Regulations at 40 CFR 230 constitute the Clean Water Act Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Materials (the "Guidelines"). The Guidelines presuppose that a LEDPA exists to the alternative of discharging dredge or fill materials into the aquatic ecosystem unless demonstrated otherwise (40 CFR 230.1(c)). In doing so, the Guidelines direct permitting authorities to consider alternatives that do not discharge materials into waters of the U.S. or discharge into alternative aquatic sites with less damaging consequences (40 CFR 230.5(c)). Lastly, the specific regulations in the Guidelines cited by the appellant state that a permitting authority shall not allow a discharge of dredged or fill materials into waters of

the U.S. unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. The Guidelines propose possible methods to minimize adverse impacts including the construction or restoration of aquatic habitats (40 CFR 230.75(d)).

In referring to 40 CFR 230.1(c), the appellant argues that the District must consider that a LEDPA exist to the District's recommended alternative of open-lake disposal. The appellant stated its official agency position that the disposal of silt/clay materials in an open lake environment is unacceptable in shallow, sensitive, environment such as the established open lake disposal site the District proposed be used as a LEDPA. The appellant also argues its commitment to upland disposal as their agency's number one preference assuming it is feasible, is consistent with the Guidelines. In this case, the appellant states it is not feasible (cost prohibitive), so it considered the Guidelines at 40 CFR 230.75 and its secondary preferred alternative of a habitat restoration unit (HRU). Lastly, the appellant argues that consistent with the Guidelines at 40 CFR 230.5(c), it exhausted every alternative known before choosing the HRU which is located within an aquatic site. The appellant further asserts that the District had an obligation to consider this regulation because it is bound by the Guidelines and the application submitted requested an HRU. The appellant argues that this regulation could have weighed more heavily in the District's permit evaluation and that the District should have given greater deference to an alternative that utilizes habitat development/restoration techniques versus open-lake disposal.

During the appeal conference, experts representing both the appellant and the District elaborated on their agency principles regarding the use of established open-lake disposal sites. In this particular case, the District recommended an open-lake disposal site established through its Civil Works Program in coordination with state agencies including the appellant's agency (ODNR) and the Ohio Environmental Protection Agency (OEPA). In fact, the very site the District recommends be used for open-lake disposal for this proposed project was recommended to the District to consider as an open-lake disposal site by the OEPA. However, despite the state's approval of the use of this open-lake disposal site for other navigation projects, it maintains that it does not represent the LEDPA in this particular case, pointing out that the State considers silt and clay sediment to be an unacceptable contaminant, whereas the District considers contaminants to be of a chemical composition in nature.

The District maintains that in this particular case, it considered the Guidelines and arrived at the conclusion that the open lake disposal of dredged materials represents the LEDPA. The District discussed its lengthy and thorough process to establish an open-lake disposal site in order to comply with the Clean Water Act. Its process also included coordination and joint review by federal and state agencies as required by NEPA. At the conclusion of this process, the District relied on its expert opinion and coordination with other resource agencies and the public to determine that the site was acceptable as an open-lake disposal area.

In this case, the appellant acknowledged that its goals were influenced by the availability of fenced funds to accomplish the dredging if used in conjunction with an HRU versus open-lake or upland disposal. However, the District is not obligated to consider funding source when it evaluates a project proposal. The District is obligated to consider the appellant's proposed disposal site which occupies a mudflat/emergent wetland/open water habitat. Per the Guidelines, some subcategories of waters of the U.S. such as mudflats and wetlands are considered special aquatic sites and are afforded additional protection. Regulations at 40 CFR 230.1(d) state:

From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.

I find that the District reasonably considered and substantially addressed the Guidelines. The District sufficiently documented its rationale for determining that open lake disposal was the LEDPA, both from the environmental impact perspective and documenting that such methods were reasonable from the dredge industry perspective.

Throughout its decision document, the District also demonstrated its substantial effort evaluating the engineering aspect of the appellant's proposed HRU by Corps experts and its due diligence in communicating issues and questions to the appellant. As of the District's decision, the appellant still had not shown evidence of satisfying the District's serious concerns with the engineering design and the potential for the appellant's plan to fail, resulting in the release of the dredged materials into the surrounding aquatic environment. The District was seeking proactive assurances that the appellant's design would not fail, whereas the appellant continued to represent their reactive position that they would address failures as they arose. Lastly, the District offered a single demonstration cell (5-acre site) for purposes of evaluating the engineering aspect and biological benefits of using dredged materials in the construction of an HRU. This demonstrates a reasonable approach to constructing a habitat restoration project given the District's well documented concerns regarding the engineering aspects of the appellant's project. Therefore, I find that this reason for appeal has no merit.

Inconsistency Identified by the RO During the Appeal Review

Corps regulations at 33 CFR 325.2.(a)(6) state that when a District makes a permit decision contrary to state or local determinations (33 CFR 320.4(j)(2), (j)(4)), the District's decision document will include discussion of overriding national factors of the public interest that support a contrary decision or will explain why those state or local determinations do not serve the goals and requirements of various federal statutes (33 CFR 320.4(j)(4)). I find that in this particular case, the District arrived at a decision that was contrary to the state's determinations (the appellant and the OEPA both represent the state and approved the appellant's proposed project). During the appeal conference, the District acknowledged that it did not consider these regulations in its decision.

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Therefore, the District's decision is remanded for further consideration and additional documentation to address these regulations in its final decision.

Reason 2: Factual Basis for Appeal: The Appellant's proposal represents the LEDPA.

Finding: This reason for appeal does not have merit.

Action: No action necessary.

Discussion: The appellant argues that the open-lake disposal of dredged materials as identified by the Corps as one of two alternatives (the other being upland disposal) that satisfy the LEDPA will actually result in unacceptable adverse impact on Lake Erie. The appellant further asserts that in this particular case, open-lake disposal is more environmentally damaging than the appellant's identified LEDPA of constructing an HRU within Middle Harbor. The appellant then articulates various environmental risks associated with the practice of open-lake disposal including: smothering small fish and eggs, water treatment problems, and algal blooms. The appellant suggests that even if the appellant's alternative represents the same risks, it has the advantage of environmental benefits associated with the HRU that open-lake disposal does not. Therefore, according to the appellant, it must be considered the LEDPA.

As previously discussed in appeal reason 1, the appellant and the District arrived at different conclusions regarding the use of open-lake disposal practices. In this case, the appellant has a vested interest in using the HRU methods as opposed to the open-lake disposal methods (fenced funding source associated with the HRU). Accordingly and as previously discussed above, the District's determination that open-lake disposal represents the LEDPA is reasonable and substantially documented. Therefore, this reason for appeal has no merit.

Reason 3: Factual Basis for Appeal: Taken as a whole, the ODNR proposal will minimize unacceptable adverse impacts on the ecosystem.

Finding: This reason for appeal does not have merit.

Action: No action necessary.

Discussion: During the appeal conference, the appellant summarized this reason for appeal by reiterating that its proposal is the LEDPA and adding that cost must be weighed in "close calls" or instances where competing alternatives have similar detriments/benefits. In this case, the appellant argues that if the negatives of the disposal proposals within Middle Harbor (HRU) and Lake Erie (open-lake) are weighed in a similar fashion, then logically it follows that the Middle Harbor proposal must be the LEDPA because it also contains benefits (HRU) which the Lake Erie (open-lake) proposal does not. Further more, the appellant argues that by denying the Middle Harbor HRU alternative, the Corps is prohibiting the culvert aspect of the proposed project which

will restore water circulation between East and Middle Harbors. The appellant argues that the culvert aspect of the project is inseparably bound with the HRU aspect of the project due to funding streams within ODNR. During the appeal conference the appellant also clarified that the culvert aspect of the project is tied to the HRU for ecological purposes as well. According to the appellant, the District did not weigh the detrimental impact of preventing culvert installation in its evaluation and determination that the appellant's proposal was not the LEDPA.

As previously discussed, the appellant and the District have arrived at different conclusions regarding the appropriate/acceptable use of open-lake disposal methods and the District adequately documented their rationale for why open-lake disposal was the LEDPA. Also, during the appeal conference, both the appellant and the District acknowledge that increased circulation between harbors may have beneficial results for the aquatic environment and the District clarified that the culvert portion of the proposed project was technically feasible and could be authorized in a separate permit action. Corps regulations do not bind the District to consider funding sources/constraints internal to the appellant when it determines which parts of a project are "inseparably bound." Therefore, this reason for appeal does not have merit.

Reason 4: Factual Basis for Appeal: The District's recommended "pilot study" is not a practicable alternative.

Finding: This reason for appeal does not have merit.

Action: No action necessary.

Discussion: The appellant argues that the reduction of the proposed project from 39 acres down to a 5-acre "pilot study" project is unwarranted and impracticable. The appellant asserts that the potential for the HRU design to fail after construction and release dredged materials into the surrounding aquatic environment is not as likely as the District suggests and elaborates on measures it will take to ensure success. The appellant also argues that the "downsizing" and "compartmentalizing" of the proposed project eliminates the economy of time and scale resulting in substantially higher costs and a drawn out schedule to completion.

As previously discussed in appeal reason 1, the District adequately documented its thorough efforts evaluating the engineering aspect of the appellant's proposed HRU, proactively identifying risks of failure, and communicating these issues to the appellant. Three of these issues were 1) water quality concerns associated with containment of sediment suspended during the discharge of pumped dredge material, 2) control of invasive plant species such as Phragmites and purple loosestrife, and 3) lack of written, defined adaptive management and contingency plans for issues that may arise during construction. As of the District's decision, the appellant still had not shown evidence of satisfying the District's concerns. Also, as discussed above, the District's determination that a single demonstration cell (5-acre site) could be authorized to evaluate the engineering aspect of the HRU demonstrated a reasonable approach given the District's

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well documented concerns regarding the engineering aspects of the appellant's project. Therefore, I find that this reason for appeal has no merit.

Reason 5: Factual Basis for Appeal: The appellant's preferred alternative minimizes potential impact to vegetation, fish, birds and water quality.

Finding: This reason for appeal does not have merit.

Action: No action necessary.

Discussion: The appellant argues that its proposed project addresses the District's concerns regarding negative impacts to vegetation, fish, birds and water quality. The appellant then elaborates on its plans to manage water quality and potential problems associated with invasive species such as Phragmites and carp and native species such as American lotus and migratory birds. These arguments attempt to refute statements made by the District during its review of public interest factors.

In its decision document the District states that the appellant's project will result in permanent, minor detrimental impacts to water quality and permanent, substantial detrimental impacts to fish, wildlife and wetland (vegetation) values within Middle Harbor. The District cites the presence of the aggressive and invasive Eurasian milfoil in East Harbor and the potential for this species to invade Middle Harbor via the discharge/transfer of plant material from East to Middle Harbor via the dredged material. The District also sites the loss of native plant communities such as lotus beds due to an increase of turbidity from initial dredge/discharge activities and the potential failure of the HRU. According to the District, the loss of native plant communities will in turn negatively impact fish and wildlife species that depend upon these native plants. For similar reasons, the District also states that the increased turbidity will negatively impact water quality both short and long term. Lastly, the District sites the appellant's proposed timeframe for construction as disruptive to migratory bird behavior.

I find that the District substantially documented its concerns regarding the likelihood of the proposed project negatively impacting the Middle Harbor and arrived at reasonable conclusions based on best professional judgment. Therefore, this reason for appeal has no merit.

Reason 6: Factual Basis for Appeal: The appellant's preferred alternative supports sound public policy.

Finding: This reason for appeal does not meet the criteria for an acceptable reason for appeal.

Action: No action is required.

Discussion: The appellant states that various governmental agencies have recently adopted strong policies in support of, or identified beneficial results of utilizing dredged

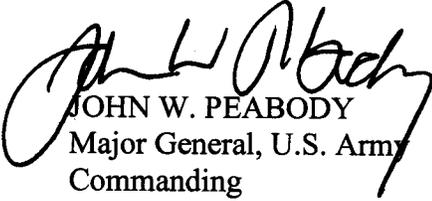
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materials for habitat restoration including the OEPA, the Great Lakes Commission and the Corp's Baltimore District. During the appeal conference, the appellant reiterated that OEPA is very supportive of using dredged material to construct an HRU and adamantly opposed to open lake disposal in these circumstances.

This reason for appeal does not meet the criteria for appeal set forth by Corps regulations at 33 CFR 331.5(a)(2). Valid reasons for appeal include procedural errors, an incorrect application of law, regulation or official policy, an omission of material fact or use of incorrect data. While the District is bound to consider, address and follow official Corps policy, it is not bound to interpret the individual principals enumerated by, or actions taken by, various governmental agencies as "strong public policy" and react accordingly in arriving at permit decisions. Therefore, this reason for appeal was not evaluated for merit.

Information Received and its Disposition During the Appeal Review: The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal and clarifying information received during the appeal conference and through follow-up correspondence.

Conclusion: I remand this permit denial to the Buffalo District for reconsideration of the items I have specifically identified and described in detail in this administrative appeal decision.


JOHN W. PEABODY
Major General, U.S. Army
Commanding