

ADMINISTRATIVE APPEAL DECISION

MR. GUY PITTMAN; FILE NO. 01-016-303-2

DETROIT DISTRICT

AUGUST 20, 2004

REVIEW OFFICER: Mike Montone, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division

APPELLANT: Mr. Guy Pittman

PERMIT AUTHORITY: Section 404 of the Clean Water Act (33 U.S.C. 1344) and Section 10 of Rivers and Harbors Act (33 U.S.C 403)

RECEIPT OF REQUEST FOR APPEAL: July 28, 2003

APPEAL CONFERENCE AND SITE VISIT DATE: April 27, 2004

BACKGROUND INFORMATION:

Mr. Pittman's proposed project is located along the shoreline of Saginaw Bay (Lake Huron) at his primary residence of 7530 Port Austin Road, Caseville Township, Huron County, Michigan. In a submittal dated October 28, 2002, Mr. Pittman requested Department of the Army authorization to discharge fill materials in waters of the U.S. Mr. Pittman's application specifically requested to discharge approximately 40 cubic yards of clean sand across his shoreline in an area approximately 0.04 acres (1620 square feet) in size. The proposed fill area is approximately 27 feet in width, 60 feet in length, and 8 inches in depth. Mr. Pittman's stated purpose for discharging fill materials was to "eliminate a health hazard." His concerns focus on removing and preventing the pooling of stagnant water that collects in a small depression during low water periods to reduce the risk of contracting the West Nile virus (WNV).

The District determined that the project as proposed is contrary to the overall public interest and denied Mr. Pittman's request for a permit on June 30, 2003. Mr. Pittman disagreed with this determination and on July 28, 2003 he submitted his request for appeal (RFA) of the District's permit denial. On February 4, 2004, Mr. Pittman's RFA was accepted and on April 27, 2004 an appeals conference was held on site with Mr. Pittman and Mr. Bob Deroche of the Detroit District.

The District's administrative record contained:

- Permit Denial letter to Mr. and Mrs. Pittman dated June 30, 2003
- Statement of Findings Memorandum for permit application 01-016-303-2
- Environmental Assessment for permit application 01-016-303-2
- Applicant response letter to District dated March 16, 2003
- Applicant response letter to USFWS dated March 12, 2003
- MDEQ e-mail dated March 10, 2003
- District conversation record dated March 10, 2003
- District letter to applicant dated March 5, 2003
- MDEQ letter to applicant dated January 13, 2003
- Saginaw Chippewa Indian Tribe letter to District dated January 8, 2003
- Applicant letter to District dated January 6, 2003
- District Permit Evaluation Inspection Field Notes and Report dated January 2, 2003
- MDNR letter to District dated December 16, 2002
- USFWS letter to District dated December 10, 2002
- Mr. and Mrs. Klingler e-mail response to District Public Notice dated December 2, 2002
- Mr. and Mrs. George e-mail response to District Public Notice dated December 2, 2002
- District's Joint Public Notice dated November 26, 2002
- District conversation record dated November 18, 2002
- Application dated October 28, 2002
- District Site Inspection Report dated August 7, 2001
- Aerial photograph dated June 25, 1999

Additional information considered during the appeal review:

- Division Appeal Conference Record dated April 27, 2004
- District e-mail response to Appeal Conference Record dated June 25, 2004
- Division Memorandum revoking NWP 39 in the state of Michigan
- Corps Regulatory Guidance Letter (RGL) 84-09

Information received after the date of the District's permit denial and not considered during the review of the appeal:

- District Site Inspection Report (with pictures) dated July 29, 2003
- Conversation Record dated July 29, 2003

SUMMARY OF DECISION: The Appellant's reason for appeal has merit and the permit denial is remanded back to the Detroit District to include sufficient documentation in the administrative record and to reconsider its permit decision as appropriate.

APPEAL EVALUATION, FINDINGS AND INSTRUCTIONS TO THE DETROIT DISTRICT ENGINEER:

REASON 1: Appellant disagreed with the District's evaluation of several public interest review factors, asserting that the District did not process the permit request in accordance with Corps regulations at 33 CFR Part 320.4 (Public Interest Review). The appellant stated that the District inappropriately considered the following factors: economics, land use, recreation, safety, considerations of property ownership, and in general, the needs and welfare of the people. Subsequently, during the appeal conference, the appellant clarified that his concerns were based on his determination that his project lacked precedent and the District's cumulative impact assessment was flawed, arbitrary, and unfairly biased towards the environment.

FINDING: This reason for appeal has merit.

ACTION: The District's evaluation of cumulative impacts and compliance with the 404(b)(1) guidelines was incorrect. The District shall prepare and include in the administrative record a decision document that correctly considers these issues and supports its final permit decision. The District shall complete these tasks within 60 days from the date of this decision, and upon completion, provide the Division office and appellant with its decision.

DISCUSSION:

PUBLIC INTEREST REVIEW

The District summarized its Public Interest Review on pages 14-17 of the Environmental Assessment (EA). The District's conclusions reflected a pattern of minor detrimental environmental impacts associated with the specific project and major detrimental environmental impacts associated with the cumulative effect of subsequent similar projects. All factors of the Public Interest Review should be considered in both favorable and unfavorable lights (RGL 84-09). The District's Public Interest Review fails to fairly evaluate both adverse and beneficial impacts of the proposed project. Without documentation of this analysis, the evaluation and balancing of this particular public interest factor appears arbitrary and result-driven. For example, when minor impacts specific to the project were determined to be beneficial the District failed to consider the cumulative effect of any possible beneficial impacts. The District also failed to consider reasonable detrimental impacts specific to the appellant if the permit was denied. Likewise, these detrimental impacts were also not considered cumulatively.

Considerations of property ownership: The District determined in its EA (p. 17) that the applicant would derive benefits from completing the project as proposed. The appellant agrees and believes that the District should have considered this a major, beneficial impact as it applied to the cumulative impact area. It is reasonable to expect the District to consider the cumulative benefits of these activities in its Public Interest Review. However, there is no evidence that the District considered the cumulative impacts to property ownership and its review of this public interest factor appears arbitrary.

The appellant stated that property values will depreciate across the community if the land is not able to be filled. He further stated that the District did not consider the negative impact of

denying him the opportunity to improve his property or the cumulative negative impacts if the community was not allowed to improve its property by similar fill activities. The appellant's expectation to improve the value of his property is reasonable. Therefore, it is also reasonable to expect the District to consider these activities its Public Interest Review. However, there is no evidence that the District considered the specific and cumulative negative economics impacts associated with a permit denial and its review of this public interest factor appears arbitrary.

Land use: The appellant stated that land-use patterns change due to usability. According to the appellant, since he is not allowed to fill in the low spots, he will not be able to use a portion of his shoreline. He clarified that this represents a change from previous years when he was able to use this land because it did not harbor the stagnant water. The District determined in its EA (p. 15) that land use patterns would not change due to the proposed work and that the appellant will use the shoreline for recreational purposes regardless of whether or not the permit is issued. The appellant further stated that these effects were not considered cumulatively. There is no evidence in the administrative record that the District considered the cumulative impacts of land use patterns. However this consideration is not necessary based on the District's initial conclusion that a final permit decision would have no impact on land use patterns.

Economics: The appellant stated that his project does not contain habitat that is critical to the economy. According to the appellant, water levels have never approached the height necessary to turn his project area into fish, fur-bearer, or duck habitat. The District determined in its EA (p. 15) that the removal of vegetation will result in higher erosion rates and a decrease in wildlife habitat. The District then determined that cumulatively, these effects would in-turn have a major negative impact on the economy. In addition, the District estimated the economic value of Michigan's coastal wetlands to sport fishing, hunting, fish and waterfowl habitat, non-consumption recreation, trapping, and commercial fishing in 1980 to be \$1,368/year (Supplemental Decision Document for the Revocation of NWP 39 in the State of Michigan, May 2002). The District's EA adequately documents that this area is important to wildlife habitat.

Recreation: The appellant stated that birds and fur-bearers do not use his property and water levels will not support fish. According to the appellant, the recreational uses of his property are limited to traditional beach activities like sun-bathing and swimming, and his proposed project will have no effect on fish and game populations. The administrative record contains multiple records of the appellant's statements that his project is necessary to reduce the risk of contracting the WNV so that he might enjoy outdoor recreation. The District stated in its EA (pp. 15-16) the importance of Saginaw Bay as a recognized migratory waterfowl flyway and determined that the destruction and fragmentation of vegetated areas along the shoreline of Saginaw Bay could significantly impact the number of waterfowl available for public use (hunting and observing). The District further determined that cumulatively, the impacts on wildlife would be major and negative. The appellant's expectation to use his property for traditional beach activities is reasonable and it is also reasonable to expect the District to consider these activities its Public Interest Review. However, there is no evidence that the District considered the project specific and cumulative negative impacts on the appellant's recreation associated with a permit denial and its review of this public interest factor appears arbitrary.

Safety: The appellant stated that if nothing is done to clean up this area of his beach there will be another health hazard from the “beach trash” that accumulates in this low spot. Specifically, the appellant stated that people could cut their feet from walking on nails, glass, fish bones, hooks, and zebra mussels. Cleaning up beach trash by hand or using small tools such as a lawn rake are unregulated activities by the Corps and do not require authorization by the District. Furthermore, this reason for discharging fill materials was not presented to the District prior to its final permit decision and therefore was not addressed in the District’s decision document or considered during the appeal review.

CUMULATIVE IMPACT REVIEW

The geographic size of the Cumulative Impact Area (CIA) should be established as a watershed or other readily identifiable geographic area (RGL 84-09). In its decision document (p. 8), the District set the geographic limits of the CIA along the northern shoreline of Saginaw Bay from Caseville to Point Au Gres (approximately 90 miles) and stated that the “activities epitomized by this application are the discharges of sand within wetlands between the OHWM and the sand berm that forms in the summer.” During the appeal conference, the District stated that the cumulative impact area was similar shoreline habitat, possessed by private property owners. However, the District did not provide the significance of this segment of shoreline as compared to the entire shoreline of Saginaw Bay or Lake Huron. Therefore, the District failed to adequately document how it established the CIA. Without this rationale, the process for establishing a CIA appears arbitrary.

At a minimum, the administrative record should provide a description of historical permitting activity and anticipated future activities to provide a sense of the rate of development in the CIA (RGL 84-09). In its Statement of Findings Memorandum (p. 1), the District cited that approximately 200 Cease and Desist (C&D) letters were sent to riparian property owners who performed the exact same action as the applicant without a permit in 2001. In its EA (p. 9), the District’s stated that “[a]side from initial incidents of unauthorized work, there have been very minimal prior impacts to this cumulative impact area.” However, the District did not state how many of the C&D letters were issued to property owners within the CIA, did not quantify the unauthorized work, and did not document how it determined prior impacts were very minimal compared to the proposed impacts (0.04 acres) of the appellant’s project.

Cumulative impacts should be evaluated by assessing the effect that the proposed project will have on a CIA in addition to the *current* impacts of past projects, or *imminent* impacts that can reasonably be expected to occur (e.g. permit requests recently issued or currently under review and likely to be authorized). The size, location, function, and value of the existing aquatic resources must be estimated in the CIA. These estimates must then be compared with the proposed impact of a specific project in addition to the current or imminent impacts of past permitted projects. In this case, the District predicted the *potential* impact of future permit applications, that may or may not be filed with the District, and considered these impacts imminent. The administrative record lacks evidence that these potential and future impacts have been, or will soon be, requested. The EA also fails to explain why, if requested, additional permits must be issued. Without clear evidence, predicted impacts are not ripe for consideration

and should not be given the same weight as current or imminent impacts when assessing cumulative impacts.

Therefore, the District failed to adequately demonstrate the imminent threat of potential projects, thus, it improperly considered the potential impact of all future applications as the cumulative impact of the appellant's project.

In order to consider cumulative impacts the District predicted that similar permit requests would be authorized and result in multiple and similar impacts. The District stated in its EA (p. 9) that "[T]his project sets a precedent because permits for filling in wetlands waterward of the OHWM have not been issued and issuance of such a permit will open the gates for requests for potentially much larger areas of wetlands as the sand berm migrates further waterward." The District also stated that "[C]onceivably, if every property owner within the cumulative effect area that has 50' of frontage applied for the same type of work as Mr. Pittman, approximately 500 acres of wetlands could be affected. We will consider the cumulative impact of continuing this development." The District did not provide a rationale for this statement. In reality, it would take 12,500 projects equal to the impacts of the appellant's project (0.04 acres of wetland) to impact 500 acres of wetland. Assuming a minimum shoreline of 50 feet for each project site, 12,500 projects would span approximately 625,000 feet, or 118 miles, of shoreline. The District estimated the distance between Caseville and Point Au Gres to be 90 miles. Assuming an irregular shoreline, it is conceivable that the required number of property owners exists within the CIA, but without proper documentation it is difficult to assume that each property is limited in size by the 50 foot minimum, that each property contains wetlands, and that each property owner desires to discharge fill materials into wetlands on their property.

PERMIT PRECEDENT

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, the concept that individual permit decisions have precedent is inherently flawed. The issuance of an individual permit does not, in itself, provide substantial merit for a similar permit to be issued. Likewise, a permit denial does not, in itself, provide substantial reason for denying similar permit applications. 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. The District did not provide a rationale for how it determined that this permit decision has precedence when each applicant's proposal is to be evaluated on its own merits. Therefore, the determination that this permit decision has precedent is unsubstantiated and the cumulative impact assessment based on this determination appears arbitrary.

The appellant challenged the District's statement that prior fills within the CIA were minimal and referred to the prior issuance of permits to discharge fill materials into Saginaw Bay at locations near Caseville. The appellant stated that the District should have considered the Point West subdivision located on Sand Point because they were allowed to discharge sand into Saginaw Bay. According to the appellant, since Point West was granted a permit, a precedent for issuing permits has already been set for this area. The District clarified that Sand Point is approximately 8 miles east of Caseville and falls within the limits of the CIA. However, the

District did not consider the permit history of Point West subdivision. A check of District records indicates that multiple permits were issued from 1997 to the present for the discharge of sand materials below the OHWM for the purpose of beach nourishment. It is not known if coastal wetlands were impacted. While issuance of a permit for the Point West subdivision does not set a precedent, the fact that the District included it within the CIA for the purposes of analysis, yet did not include it in the actual analysis, is on its face an arbitrary action without a reasonable basis.

COMPLIANCE WITH 404 (b)(1) GUIDELINES

A project is in compliance with the 404(b)(1) guidelines when it offers the least environmentally damaging practicable alternative (LEDPA) that still serves to fulfill the applicant's basic project purpose. When assessing the availability of a LEDPA, all impacts should be compared either cumulatively *or* individually. Therefore, in its EA (p. 19) the District improperly compared the cumulative impacts of the applicant's preferred alternative with the individual impacts of its chosen LEDPA.

OVERALL CONCLUSION: For the reasons stated above, I conclude that this request for appeal has merit. The permit denial is remanded back to the Detroit District to include sufficient documentation in the administrative record consistent with this decision and to reconsider its permit decision as appropriate.



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