

ADMINISTRATIVE APPEAL DECISION

THE SAND POINT TOY BOX; FILE NO. 02-016-069-0

DETROIT DISTRICT

AUGUST 10, 2005

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

Appellant: Mr. David Clabuesch

Permit Authority: Section 404 of the Clean Water Act (33 U.S.C. 1344)

Receipt of Request for Appeal: January 13, 2004

Appeal Conference and Site Visit Date: May 5, 2004

Background Information: Mr. Clabuesch's project is located on a five acre lot he owns adjacent to Lake Huron. His property front is on the east side of Port Austin Road, just south of Crescent Beach Road, in the Town of Caseville, Huron County, Michigan. Mr. Clabuesch began construction of storage buildings in June 2000 and expanded this project in the summer of 2001. On April 17, 2002, the Michigan Department of Environmental Quality (MDEQ) informed the District that unauthorized fill activities had occurred on site. The District performed an initial site inspection on May 23, 2002 and confirmed that construction activities were performed in waters of the U.S. without proper Department of the Army authorization. On July 2, 2002, the appellant submitted an after-the-fact (ATF) permit application and signed tolling agreement. The ATF permit application was accepted and the tolling agreement was countersigned by the District on August 12, 2002. On October 4, 2002, the District published a Public Notice detailing Mr. Clabuesch's request for ATF authorization to discharge fill materials into approximately 1.6 acres of federally jurisdictional wetlands and a proposal to impact an additional 0.8 acres of wetlands. The District stated that the purpose of his work was a commercial storage venture. Mr. Clabuesch's original ATF permit application was later modified on June 29, 2003 to a request for approximately 1.72 acres of existing impacts and no additional proposed impacts. Mr. Clabuesch also proposed to restore approximately 4.14 acres of farmed wetlands approximately ten miles from the project site, near Bayport, Michigan as compensatory mitigation for the existing impacts.

The District determined that the project as proposed is contrary to the overall public interest and denied Mr. Clabuesch's request for a permit on November 14, 2003. Mr. Clabuesch disagreed with this determination and on January 13, 2004 he submitted his Request for Appeal (RFA) of the District's permit denial. On February 20, 2004, Mr. Clabuesch's RFA was accepted and on May 5, 2004 an appeal conference was held on/near the project site with Mr. Clabuesch, his

Programs Support Division
Subject: The Sand Point Toy Box Appeal Decision

attorney Mr. Charles Dunn, his environmental consultant Mr. Brooks Williamson, and Mr. Bob Deroche and Mr. Bill Leiteritz of the Detroit District.

The Division evaluated this appeal based on the appellant's reason for appeal, the District's administrative record, clarifications conveyed by both parties at the appeal conference, and the following information:

- Corps Regulatory Guidance Letter (RGL) 84-09
- RGL 95-01
- "Two Years of Progress, Meeting Our Commitment For Wetlands Reform, Protecting America's Wetlands: A Fair and Flexible Approach, August 1993-August 1995."

Summary of Decision: The appellant's request for appeal has merit and the permit denial is remanded back to the District to include sufficient documentation to support its decision and to reconsider its decision as appropriate.

Appeal Evaluation, Findings and Instructions to the Detroit District Engineer:

Reason 1: The Corps exceeded its statutory authority by regulating upland areas that are neither themselves navigable nor adjacent to navigable waters as that term has been interpreted by the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, (SWANCC), 531 U.S. 159, 172-74, 121 S. Ct. 675, 682-84 (2001).

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The *SWANCC* decision is not applicable to this situation. The Supreme Court in *SWANCC* narrowly confined its ruling to invalidating that portion of the Corps' regulations pertaining to an assertion of CWA jurisdiction based on the so called "Migratory Bird Rule." In its opinion, the Court specifically declined to interfere with the holding in *United States v. Riverside-Bayview Homes, Inc.*, 474 U.S. 121 (1985). Thus, *Riverside-Bayview* continues to support the Corps' assertion of CWA jurisdiction over, *inter alia*, all of the traditional navigable waters, upstream to the highest reaches of the tributary systems, and over all wetlands adjacent to any and all of those waters.

The District performed three site inspections on May 23, 2002, August 28, 2002, and September 15, 2003. Site notes contained within the District's administrative record document each inspection. The District documented that the storage buildings and associated fill impacted wetland areas by establishing that the project area was bordered by jurisdictional wetlands to the north, east and west. The District substantiated their basis for jurisdiction by documenting a surface water connection (unnamed drain) between the wetlands and Lake Huron. The process used by the District to determine jurisdiction is consistent with the methods outlined in the 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual) for atypical situations. The

Programs Support Division
Subject: The Sand Point Toy Box Appeal Decision

District adequately supported its determination of jurisdiction. Therefore, this reason for appeal does not have merit.

Reason 2: The District made erroneous conclusions and errors in its public interest evaluation and incorrectly applied the EPA Guidelines for the Specification of Disposal Sites for Dredged or Fill Material when it determined that the project was contrary to the overall public interest.

[RO Note: This reason for appeal was subdivided into multiple reasons (labeled 2a – 2l) for evaluation purposes.]

Reason 2a. The District inappropriately characterized the appellant's stated purpose for work as "commercial." The purpose for work should have been characterized as "owner-occupied structures consistent with local zoning for agricultural properties."

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: During the appeal conference, the appellant elaborated that the effect of this mischaracterization is an intentional bolstering of alleged cumulative impacts resulting from the construction of commercial operations which can not be properly attributed to this project. Therefore, the appellant believes that all references to alleged cumulative effects are unsupported, speculative and contrary to a common sense, case-by-case review of the project as required by regulations. The appellant then provided examples of areas where the District reached various unsupported conclusions, citing sections III.A.1.a. (Construction Impacts), III.A.1.b. (Post-Construction and Use Impacts), and III.C.4. (Land Use Patterns) of the District's Environmental Assessment (EA). This discussion will focus on the District's use of the term "commercial." A broader discussion on the District's entire cumulative impact assessment is located in the discussion for Reason 2e.

The appellant clarified in the appeal conference that local land use should be deferred to, and mimic the Caseville Township Planning Commission approval of the appellant's building permit which characterized his construction activities as "owner-occupied structures consistent with local zoning for agricultural properties." The appellant also stated that the District did not define the terms "commercial" or "profit" and did not consider the by-laws for the Toy Box.

During the appeal conference the District responded that the permit evaluation focused on impacts to the aquatic resource rather than one word such as "cooperative" or "business." Therefore, the characterization of commercial versus owner-occupied is harmless with regard to the permit evaluation performed by the District. The District clarified that they considered that this project was commercial in the sense that it was clustered storage units on one parcel rather than scattered storage units on multiple parcels. The appellant explained the title of the storage company, clarifying during the appeals conference that the title "Toy Box" was a reference to the "toys" that the stereotypical adult male accumulates over time, such as watercrafts, all terrain/recreation vehicles, lawn and landscape equipment, and farm equipment.

In section III.A.1.a., the District documented how they considered the nature of the fill that resulted from the appellant's construction activities. The characterization of the appellant's construction activities as "commercial" was not referenced. Instead, the District described the status of the areas disturbed by filling activities as "re-vegetated, has an asphalt drive, or has storage buildings constructed on top of it." Furthermore, when the District discussed cumulative impacts of this project it specifically considered "the construction of many such projects in these wetlands" and did not use the commercial characterization.

In section III.A.1.b., the District also documented how they considered the nature of the fill that resulted from the appellant's construction activities. Once again, the District characterization of the appellant's construction activities as "commercial" was not referenced. Instead, the District considered the case specific fill, the use of the project specific structures, and the past and proposed placement of drainage tiles. The District stated that the use of the existing and proposed structures would be a new source of runoff pollutants, citing potential pollutants such as lawn fertilizers, herbicides, pesticides, road salt, oil, and grease. This is a reasonable conclusion based on the equipment expected to be stored on site.

The District also clarified that the by-laws were not voluntarily submitted by the appellant or requested by the District. There is no regulatory requirement that the District review the by-laws of an organization before characterizing the project as "commercial."

The administrative record contains substantial evidence that Mr. David Clabuesch purchased the property and was responsible for the construction of the pole barns in order to provide storage for himself (as a resident of Pointe West) and ultimately other residents through a cooperative agreement. The District reasonably concluded that such a business venture is "commercial" regardless of local zoning practices because this storage for "toys" is not consistent with traditional agricultural practices or residential construction. Furthermore, as evidenced by the above discussion, the District focused its permit evaluation on the impacts of the specific project rather than on a broad array of impacts that the appellant asserts is assumed when the District characterized the project as commercial. Therefore, this reason for appeal does not have merit.

Reason 2b. The District failed to support its conclusions regarding Construction Impacts (Section III.A.1.a.) and Post-Construction and Use Impacts (Section III.A.1.b.) that construction or use of the project would result in increased turbidity into Saginaw Bay. Further, the District provided no supporting documentation or evidence as to new sources of pollutants or the magnitude of such negative impacts considering the project is a "owner-occupied" facility, rather than a commercial facility.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The appellant disagreed that the administrative record supported this determination and stated that more information is needed to substantiate new sources of turbidity or the possibility that other pollutants will enter a waterway as a result of this project. The appellant

also stated that the District did not provide supporting documentation to substantiate the magnitude of these predicted effects considering the project is “owner occupied” rather than a “commercial facility.”

As previously stated in the discussion for Reason 2a, the characterization of commercial versus owner-occupied structure is harmless with regard to the permit evaluation performed by the District. In evaluating turbidity, the District contrasted the primary and secondary activities that it reasonably expected would occur from this project with the known function of wetlands to decrease turbidity and slow surface water runoff. The District then evaluated the potential impacts of restoring the area (permit denial) and the impacts of the completed work on the area (permit authorization) considering the presence or absence of wetland functions on site. In addition, three aerial photographs (dated June 25, 1999; April 10, 1987; and April 17, 1980) contained within the administrative file document a sedimentation plume originating from the tributary that receives water from the drain leading from the project site. This is further evidence that the District’s conclusion that increased turbidity at the project site would impact the water quality of Lake Huron is reasonable.

The administrative record at the above referenced points is adequately documented and supported. This reason for appeal does not have merit.

Reason 2c. The District did not support its determination at section III.B.1. (Effects on Aquatic Organisms) or section III.B.2. (Effects on Wildlife) of its EA.

Finding: This reason for appeal has merit.

Action: The District shall prepare and include in the administrative record a decision document that includes sufficient documentation to support its decision and to reconsider its decision as appropriate. The District shall complete these tasks within 45 days from the date of this decision, and upon completion, provide the Division office and appellant with a copy of its decision document and final decision.

Discussion: Pursuant to state regulations, the MDEQ issued a Public Notice (PN) on July 11, 2003, describing the appellant’s project as constructed and the appellant’s proposed modifications. The MDEQ PN characterized the appellant’s project differently than the District’s PN published earlier on October 4, 2002. During the appeal conference, the appellant stated that its project was “downsized” by the MDEQ PN. In fact, both PNs refer to the approximate 1.7 acres of wetlands that had been impacted by the appellant’s construction activities. However, at the time that the District published their PN the appellant was proposing to impact an additional 0.8 acres of wetland for additional storage buildings. The appellant later modified his project to remove the additional proposed impacts when he submitted an application to the MDEQ. As a result, the state PN is limited to current impacts and does not address the additional impacts as initially proposed by the District’s PN. The District referenced MDEQ’s PN to describe the appellant’s latest project description which it considered in its EA.

The appellant focused on the state PN to illustrate its point that the District’s conclusions were missing facts to support them. The appellant first stated that the Michigan Department of

Programs Support Division
Subject: The Sand Point Toy Box Appeal Decision

Natural Resources (MDNR) responded to the state PN with no objections to the proposed project. The appellant then stated that the District generally accepted the changes in the project description shown in MDEQ's PN, as represented by the District using the state's project description in its EA. The appellant then stated that the District did not further investigate the outcome of MDEQ's PN or did not rely on local experts to provide support for its evaluation of biotic impacts. The appellant asserted that if the District had done this, it would not have denied the permit which was the direct opposite conclusion that the MDNR reached when it responded to the state PN with no objections. Therefore, the District lacked the facts on which to base its conclusion regarding biotic impacts.

According to the District's administrative record, its PN was distributed to MDNR but no response was received. During the appeal conference, the District clarified that neither the appellant nor MDNR submitted a copy of an MDNR's response to the state PN. Therefore, this information was not considered by the District during their permit evaluation.

In making its conclusion in Section III.B.1. the District stated:

In summary, the project will have major short and long-term negative impacts on the aquatic biota. The cumulative impacts of numerous such projects, with secondary effects of development, would be major and negative. The negative impacts would be reduced greatly if the permit were denied and restoration required.

To support its statement that the project will have major short and long-term negative impacts on the aquatic biota, the District made the following statements regarding the direct impacts of the project:

The completed placement of fill has eliminated beds of hydrophytic vegetation and associated invertebrates. No recolonization by these plants and organisms is expected because the physical conditions are dissimilar to what existed prior to the placement of fill in terms of substrate type and particle size, temperatures and hydroperiod, so the original benthos community will not return.

Some benthic communities, sedentary life stages, and eggs have been directly buried by the completed placement of fill material.

Statements that a project will have a major long term negative impact to the aquatic biota due to the loss of the benthos community must be supported with specific information in the administrative record such as: a record of what species exist/existed in the project area or similar areas adjacent to the impacted areas; the relevance of the benthos community to the aquatic biota; the relationship between the impacted benthos community and the aquatic biota. Without this documentation, statements such as those made by the District in section III.B.1. are unsupported.

In making its conclusion in Section III.B.2. the District stated:

In summary, the project will have major short and minor long-term negative impacts on the terrestrial biota. The cumulative impacts of numerous such projects would be major and negative. The negative impacts would be reduced greatly if the permit were denied and restoration required.

To support its statement that the project will have major short and minor long-term negative impacts on the terrestrial biota, the District made the following statements regarding the direct impacts of the project:

The completed work has eliminated reproductive, foraging, resting habitat, and interrupt a travel corridor for game birds, waterfowl, songbirds, small and large mammals, reptiles, amphibians, and invertebrates which are associated with the aquatic ecosystem and the aquatic food chain.

A variety of organisms have been displaced from their habitat by impacts of the construction and resulting use. Those displaced organisms will not cause degradation of habitat values for those areas to which they have been driven. Recolonization of the project area would not be expected to occur as the project has resulted in the filling of the habitat and construction of structures on the fill. The net exchange of habitats will be an overall decrease in the wildlife diversity and productivity.

Statements that a project will have major short and minor long-term negative impacts to the terrestrial biota due to the loss of habitat, interruption of a travel corridor, and displaced organisms must be supported with specific information in the administrative record such as: a record of what species exist/existed in the project area or similar areas adjacent to the impacted areas; evidence that organisms used the identified habitat and travel corridors; the relevance of the identified habitats and corridors to the terrestrial biota; the relationship between the impacted organisms and the terrestrial biota. Without this documentation, statements such as those made by the District in section III.B.2. are unsupported.

Reason 2d. The District did not support its determination that wetlands exist in the project area or the magnitude (geographic extent) of the alleged wetlands at section III.B.3. (Effects on Wetlands) of its EA.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The appellant submitted a written response to the District dated December 20, 2002, in which the appellant stated the location and extent of wetlands that may have been impacted by his project was not known due to land clearing activities before he purchased the property. The appellant also stated in this letter that he was willing (for settlement purposes) to agree that his project impacted 0.5 to 1.0 acres of wetlands, and recommended mitigation by purchasing and preserving land with existing wetlands. The appellant also referred to a U.S. Fish and Wildlife Service (USFWS) letter dated October 31, 2002 as support for his claims that

wetland areas on site were marginal and why he thought he was using fringe habitat and not wetland habitat in which to construct his buildings.

The District clarified in the appeal conference that it submitted a diagram depicting wetland impacts to the appellant as an attachment to a tolling agreement which was counter-signed and returned to the appellant on August 27, 2002.

The District also performed three site inspections on May 23, 2002, August 28, 2002, and September 15, 2003. Site notes contained within the District's administrative record document each inspection and substantiate the presence of wetland adjacent to the appellant's site consistent with the methods outlined in the 1987 Manual. During the appeal conference, the District clarified that in order to calculate impacts to wetlands it determined that the entire footprint of the project was in wetland and used the dimensions of the footprint to calculate the area of impacts to wetland. The District stated that the adjoining wetland area was jurisdictional and substantiated their basis for jurisdiction by documenting a surface water connection (unnamed drain) between the wetlands and Lake Huron.

Therefore, this reason for appeal does not have merit.

Reason 2e. The District conclusion at section III.B.4. (Effect on Conservation and Overall Ecology) that minor long term impacts on conservation and overall ecology will eventually result in major impacts is contradictory.

Finding: This reason for appeal has merit.

Action: The District shall reconsider the issues associated with its entire cumulative impact assessment and include adequate documentation to support its final permit decision. The District shall complete these tasks within 45 days from the date of this decision, and upon completion, provide the Division office and appellant with a copy of its decision document and final decision.

Discussion: In making its conclusion at Section III.B.4. the District stated:

In summary the project will have major short and minor long-term negative impacts on the conservation and overall ecology. The cumulative impacts of numerous such projects would be major and negative. The negative impacts would be reduced greatly if the permit were denied with restoration required.

The District made the identical conclusion for impacts to terrestrial biota at Section III.B.2. (see discussion at Reason 2c).

The District's conclusion at Section III.B.1. was different only in that it determined that the project will have major short and *major* long-term negative impacts on the aquatic biota. The District's conclusion regarding cumulative impacts at III.B.1. was identical to the conclusion in III.B.4. and III.B.1. (see discussion at Reason 2c).

In case specific conditions, project specific aquatic impacts can be both major in the short term and minor in the long term. Likewise, project specific aquatic impacts can be major in both the short and long term. Also, project specific aquatic impacts may be minor, but when considered in addition to the existing and imminent aquatic impacts within a defined cumulative impact area (CIA), the cumulative impacts could be major. However, the CIA must be properly defined and the conclusions regarding cumulative impacts must be adequately documented and supported.

RGL 84-09 states that “[t]he geographic size of the area (e.g., watershed or other readily identifiable geographic area) in which cumulative impacts are to be considered should be established.” In its decision document (p. 8), the District set the geographic limits of the CIA as the undeveloped wetlands adjacent to tributary creeks in Caseville Township. Based on RGL 84-09, the District’s designation is reasonable. However, the District’s administrative record lacks the rationale for this specific CIA designation, versus another political boundary such as a village or county. The District shall include a rationale for its CIA designation in the administrative record.

Furthermore, RGL 84-09 states that “[w]ithin this selected area, a description of historical permitting activity should be developed, along with anticipated future activities in the area. This will provide the decision maker some sense of the rate of development in the area.” In its EA (pg 8), the District stated that “[t]he type of project epitomized by this application is the discharge of fill material in wetlands landward of the OHWM for the purposes of commercial development.” The District also stated that similar projects and permit decisions within the CIA have included several applications that were denied without prejudice. Notations within the administrative record indicate that the permitting history was limited to five years and a radius of five miles from downtown Caseville. The District adequately documented the permit history (past impacts) but did not adequately document anticipated future activities. The District shall include adequate documentation to quantify both existing and future impacts in its cumulative impact assessment.

Reason 2f. The District’s conclusion at section III.C.4. (Land Use Patterns) of its EA that this project may encourage a trend in the conversion of wetland areas to upland commercial development is contrary to the comments submitted by the Huron County Economic Development Corporation (HCEDC). Furthermore, the District’s conclusion at section III.F.1. (The relative extent of the public and private need for the existing and proposed structures or work) of its EA that there is no demonstrated need for public storage is also contrary to comments submitted by the HCEDC.

Finding: This reason for appeal has merit.

Action: The District shall reconsider the issues associated with its determination that the project may encourage a trend of conversion of wetland areas to upland commercial development and include adequate documentation to supports its final permit decision. The District shall complete these tasks within 45 days from the date of this decision, and upon completion, provide the Division office and appellant with a copy of its decision document and final decision.

Discussion: This reason for appeal is focused on the District reaching a different conclusion than the public notice comments of the HCEDC. The appellant also clarified that as discussed above, the District made inappropriate and unsubstantiated conclusions.

While the District is not required to accept the conclusions provided in response to its public notice, it is required to consider and address relevant comments. The administrative record adequately documents that the comments from the HCEDC were considered and addressed. However, the District's statement that "[f]rom a national perspective, the work may encourage a trend of conversion of wetland areas to upland commercial development" is unsupported and appears to assign precedential value to this project.

Permit applications must be evaluated on a case by case basis and by careful examination of the individual merits and detriments of each project. Therefore, speculation by the District that an individual permit decision may trigger a development trend 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. Furthermore, issuance or denial of a permit should not be perceived as encouraging or discouraging landowners with similar property to develop their land. The District did not provide a rationale for how it determined that this project may set a development precedent when each applicant's proposal is to be evaluated on its own merits. Therefore, the determination that this project may trigger a development trend is unsubstantiated.

The district shall reconsider this statement and provide adequate documentation to support its final permit decision.

Reason 2g. The District's conclusions at section III.C.6. (Effects on Recreation) of its EA are erroneous and contradictory to previous conclusions made by the District at section III.C.3. (Designated Historic, Cultural, Scenic, and Recreational Values) of its EA.

Finding: This reason for appeal has merit.

Action: The District shall prepare and include in the administrative record a decision document that includes sufficient documentation to support its decision and to reconsider its decision as appropriate. The District shall complete these tasks within 45 days from the date of this decision, and upon completion, provide the Division office and appellant with a copy of its decision document and final decision.

Discussion: The appellant strongly disagrees with the District's conclusion that the project's impact to wildlife is major and negative. During the appeal meeting, the appellant stated that there was no wildlife cited in the MDNR comment letter to the state PN and pointed out that a deed restriction prohibits hunting within the project area.

During the appeal conference, the District clarified that its conclusions in section III.C.3. were limited to assessing the impact that the project had on areas with special designations. Since the project is not located within lands that possess this special designation, the District determined that the project will have no effect on these areas. The District documented this in section III.C.

Programs Support Division

Subject: The Sand Point Toy Box Appeal Decision

3. when it stated that the project has not affected: Registered Historical sites; Federal Wild and Scenic Rivers; Natural Landmarks, National Rivers; National Lakeshores; National Parks; National Monuments; and archeological resources. The District also clarified that its conclusions in section III.C.6. were specific to publicly designated areas, or areas that do not have the special designations as reviewed in section III.C.3.

The District is not obligated to seek, obtain, consider, and address comments submitted in response to another agency's PN. Nor is it reasonable to conclude that impacts to wetlands will have no effect on recreation simply because that site has a deed restriction prohibiting hunting. There is no evidence that the District's conclusions in III.C.3. and III.C.6. are contradictory, as the District demonstrated that separate issues were being evaluated.

In making its conclusion in III.C.6. the District stated:

In summary, the project's effect on recreation would be major, short and long term, and negative. The cumulative impacts would be major and negative. Denial of the permit would avoid these negative impacts.

To support its statement that the project will have major, short and long term, negative impacts on recreation, the District made the following statements regarding the direct impacts of the project:

The completed work has destroyed an area that was important to maintenance of populations of wildlife, although it is not in itself open to public use for hunting and or other passive recreation.

Together, these statements appear to assign an extreme value to the habitat that was destroyed by the project as being critical to the overall success of recreation in this area. Developed lands that prohibit hunting can, in some circumstances, function as a wildlife sanctuary and produce or maintain game species that are hunted, or non-game species that are viewed, on adjacent lands. In this instance, the project impacted less than two acres of land and there is no supporting documentation within the EA that the project area contained habitat critical to supporting area wildlife populations.

Statements that a project will have a major effect on recreation due to the loss of wildlife habitat must be supported with site specific information in the administrative record such as: a record of what species exist/existed in the project area; the relevance of the habitat/area to impacted wildlife populations; the relationship between the impacted species and the recreational value that is documented to occur in this area. Without this documentation, statements such as those made by the District in section III.C.6. are unsupported.

Reason 2h. The District's conclusion at sections III.F.2. (Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the object of the existing and proposed structures or work) and V [404(b)(1) Guidelines Compliance Evaluation] that the appellant did not meet the

alternative analysis requirements is erroneous and contrary to previous statements made by the District.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: In his RFA, the appellant stated:

Applicant clearly identified the need to site the project in the vicinity of the anticipated multiple-owner use area. In addition, the USACE's own statements regarding the existence of "significant" wetland resources in Huron Township clearly suggests that only limited alternatives may be available rebutting the presumption that a less damaging practical alternative exist. Even the USACE's suggestion of alternative sites implies that the existence of wetlands (as "inclusion") would be problematic to development. This suggests that the current site may in fact be equal or be more desirable a location than an alternate site which also requires filling.

During the appeal conference, the District clarified that the appellant did not address whether alternative sites were considered. The District followed its practice of requesting alternatives information from standard permit applicants. The District then referenced its letter to the appellant dated December 2, 2002 in which it informed the appellant that, in the absence of other information, it would presume that alternatives exist which do not include impacting wetlands. In other words, the District would assume that upland sites exist until the appellant demonstrated otherwise. This is consistent with the U.S. Environmental Protection Agency's Guidelines for Specification of Disposal Sites for Dredged or Fill Material [404(b)(1) Guidelines], 40 CFR Part 230. The District also clarified that it accepts and evaluates an applicant's response to its request for information on alternatives at face value and will not typically seek further responses. In its decision document, the District also documented that prior to its decision, it had directed the appellant to address the alternative of available uplands. The appellant responded in writing by stating that all land in Huron County is coastal wetland or contains wetland inclusions that would likely be regulated. The appellant did not submit clear evidence that there were no available upland parcels within Caseville Township. Accordingly, the District correctly presumed in sections III.F.2. and V. that upland parcels were available and that a less damaging practicable alternative existed.

The District further clarified that they performed a real estate property search for a five mile radius and looked for residential and agricultural land. The appellant responded that the District's administrative record did not contain evidence supporting this search. The District and the RO then determined that the administrative record was incomplete, and the District committed to forwarding the results of this search to the RO and the appellant. The District clarified that it performed the real estate property search during the time they were evaluating the appellant's ATF permit application. Accordingly, both the appellant and District agreed that the results of that search are not representative of the available land in 1999 when the project was initiated. The appellant argued that no process exists for providing an alternative analysis within the confines of the ATF permit review. The District responded by clarifying that the alternative

analysis used by the District was based on the options that were available when the work was performed in 1999. The use of current real estate listings when reviewing an ATF permit application is a reasonable gauge to determine lands currently available. This reason for appeal does not have merit.

Reason 2i. The District was arbitrary in its conclusions regarding Economic Effects (Section III.C.5.) and Consideration of Property Ownership (Section III.C.11.).

Finding: This reason for appeal has merit.

Action: The District shall reconsider the issues associated with its entire cumulative impact assessment and include adequate documentation to support its final permit decision. The District will also document and consider the impacts of denying the permit application during its evaluation of Economic Effects and Consideration of Property Ownership. The District shall complete these tasks within 45 days from the date of this decision, and upon completion, provide the Division office and appellant with a copy of its decision document and final decision.

Discussion: The appellant stated that the District gave no due consideration for economic effects and private property ownership in its review. Specifically, the appellant pointed out that project specific environmental impacts were considered to be minor and negative and cumulative environmental impacts were considered to be major and negative. However, when the District considered project specific economic impacts to be minor and positive, it also considered cumulative economic impacts to be minor and positive as well. The appellant stated that this was arbitrary and exemplified the District's presupposition in this case to deny the permit application. The appellant also clarified that the demolition of buildings (only option if permit application is denied and restoration is required) is detrimental to him and an economic loss to the seventeen owners and should have been considered in economic and private ownership impacts. The appellant also asserted that while the District recognized major, long term positive impacts for the appellant in its consideration of private ownership, it did not extend these same benefits in a cumulative manner to the future owners or participants in this storage co-op.

Throughout the EA, the District showed a pattern that when project specific impacts (either short or long term) were determined to be minor and negative, the cumulative impacts were extrapolated into major and negative cumulative impacts [see Construction Impacts (pg 9), Effects on Wildlife (pg 12), Effects on Wetlands (pg 13), Effects on Conservation and Overall Ecology (pg 13)]. The District then states in Cumulative Effects (pg 16) that "...the proposed permit activity would have major impacts as described in the sections above." The effect of this characterization by the District is elevating negative impacts of the project to major when considered in a cumulative manner. The District clarified during the appeal conference that it compared census data to the seventy units proposed by the appellant and concluded the project did not represent a major positive impact. This conclusion is not explained or supported in the record.

The District reasonably weighed the impacts of denying the permit request and requiring restoration during its consideration of most of the public interest review factors. In fact, the

District does comment on this potential outcome in virtually every factor that it determined this project would affect [see Construction Impacts (pg 9); Post-Construction and Use Impacts (pg 10); Effect on Aquatic Organisms (pg 11); Effects on Wildlife (pg 12); Effects on Wetlands (pg 13); Effects on Conservation and Overall Ecology (pg 13); Noise (pg 14); Effects on Recreation (pg 15). However, the District failed to consider these effects in the analysis of Economic Impacts or Consideration of Property Ownership, specifically the reasonable impact of the demolition of existing buildings.

Reason 2j. The District did not give due consideration to the appellant's willingness to achieve a mutually acceptable mitigation solution.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The appellant asserts that the District did not give due consideration to the mitigation proposed in the appellant's December 20, 2002 letter to the District.

The District acknowledged the appellant's mitigation plan to restore 4.14 acres of farmed wetlands approximately ten miles away from the project site in the introduction section of the EA (pg 1). The District then considered and addressed the impacts of successfully completing the proposed mitigation plan in Effects on Wildlife (pg 13). Lastly, the District determined during its 404(b)(1) Guidelines Compliance Evaluation (pg 19) that compensation (mitigation aimed at replacing the functions and values of impacted waters of the U.S.) was not appropriate because the appellant had not met the avoidance and minimization criteria.

The administrative record adequately documents the District's consideration of the appellant's proposed mitigation plan. Therefore, this reason for appeal does not have merit.

Reason 2k. The District did not give due consideration to the USFWS letter dated October 31, 2002 regarding recommended mitigation ratios and on-site versus off-site mitigation alternatives.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The District acknowledged the USFWS comments on the proposed mitigation plan in the introduction section (pg 2) of their EA. Furthermore, as discussed in Reason 2j, the administrative record adequately documents the District's consideration of the appellant's proposed mitigation plan. Therefore, this reason for appeal does not have merit.

Reason 2l. The District did not give due consideration to the MDEQ letters dated February 13 and August 28, 2003 regarding their suggestion that mitigation be considered appropriate to resolve the alleged violation.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The MDEQ letter dated February 13, 2003 was included in the District's administrative record. The MDEQ submitted the letter to the District as an attachment to the appellant's state permit application. This letter was not specifically addressed by the District in its EA. However, this letter is a response letter from MDEQ to the appellant addressing his concerns with MDEQ's permitting/compliance process and was not an official response from the state to the District's public comment period or agency coordination process. Furthermore, this letter does not refer to mitigation issues. Therefore, the District's lack of consideration for this letter in its evaluation was appropriate.

The letter from MDEQ dated August 28, 2003 was referenced by the District in its EA during its review of state certifications (pg 2-3). The District cited this letter as documentation that neither the Section 401 Water Quality Certification nor the Coastal Zone Consistency Certification were issued, denied or waived. MDEQ's letter informs the appellant that the state will take no further action on his application until an acceptable mitigation plan is submitted. While this does not appear to be an endorsement of the appellant's mitigation proposal, the letter does later comment that the site location appears to satisfy state requirements.

The District is not bound to accept the statements or recommendations made by state regulatory agencies during the comment period or inter-agency coordination. However, the District must consider and address substantial comments relative to the District's permit application evaluation. In this instance, neither letter from the MDEQ provided substantial comments to the District regarding the District's evaluation of the appellant's federal permit application. Furthermore, as discussed above in 2j, the administrative record adequately documents the District's consideration of the appellant's proposed mitigation plan. Therefore, this reason for appeal does not have merit.

Reason 3: The District's decision was discriminatory and biased because it was based in part, on prior violations committed by the appellant. The appellant disputes a prior history with the District.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The appellant pointed out the following paragraph in the denial letter from the District to the appellant:

Regardless of whether you elect to comply with the restoration order or appeal the denied After-The-Fact permit application, I will be asking my District Counsel to review your compliance history with the Corps Regulatory program as to whether the initiation of legal action against you may be appropriate for what I have determined, in reviewing your case history, to be the fifth apparent violation since 1995.

The appellant clarified that this topic should never have been brought up in the denial letter as it is such a strict line in favor of the District and offered no substantial evidence to support the statements.

The District clarified that enforcement matters are separate from permit application processing. The District stated it does not discriminate against permit applicants based on past violation history. The District also stated that the project manager prepared the recommended denial decision, which was then reviewed by the Regulatory Enforcement Chief, who then added the above paragraph into the letter. The denial decision was not made official until the District Engineer signed the denial letter.

The administrative record contains substantial evidence that Mr. David Clabuesch purchased the property and was responsible for the construction of the pole barns. The record does not contain evidence of a history of violations by the appellant. Therefore, the reason for appeal does not have merit.

Reason 4: The District acted arbitrarily, capriciously and inconsistently with the intent of its own regulations when it ruled opposite to the state and local authorities who clearly supported issuance of an after-the-fact permit.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The District's EA at Sections I.F.2.a and I.F.2.b documents that the state neither issued, denied, or waived Section 401 Water Quality Certification or the Coastal Zone Consistency Certification before the District reached its conclusion. Without a final permit decision by the state, the appellant's speculations that the state clearly supported an after-the-fact permit are unsubstantiated. The District determined it had sufficient information to proceed with its own, independent permit decision. There is nothing unusual or inappropriate with this practice. Therefore, this reason for appeal does not have merit.

Reason 5: The District acted arbitrarily and capriciously when it required the appellant to consider alternative locations to avoid wetland impacts on-site in applying for its permit. The appellant cited a document found on the Corps' National website entitled "Two Years of Progress, Meeting Our Commitment For Wetlands Reform, Protecting America's Wetlands: A Fair and Flexible Approach, August 1993-August 1995."

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The appellant referred to the following statement from the document cited in this reason for appeal:

Landowners who wish to expand or construct homes, build farm structures, or expand small businesses when those activities will affect less than two acres of wetlands, will no longer have to consider alternative locations to avoid wetland impacts on-site.

The document that contains this quote is a report on the actions taken by the Clinton Administration between August 1993 and August 1995. This report was a basis for a National Regulatory Guidance Letter (RGL 95-01) in 1995. The District clarified that it considered the guidance established by RGL 95-01.

RGL 95-01 provided guidance for flexibility when processing standard permits. The RGL states:

In order to clearly affirm the flexibility afforded to small landowners under Section 404 of the Clean Water Act, this policy clarifies that for discharges of dredged or fill material affecting up to two acres of non-tidal wetlands for the construction or expansion of a home or farm building, or expansion of a small business, it is presumed that alternatives located on property not currently owned by the applicant are not practicable under the Section 404(b)(1) Guidelines.

Specifically, for those activities involving discharges of dredged or fill material affecting up to two acres into jurisdictional wetlands for:

1. the construction or expansion of a single family home and attendant features, such as a driveway, garage, storage shed, or septic field;
2. the construction or expansion of a barn or other farm building; or
3. the expansion of a small business facility;

which are not otherwise covered by a general permit, it is presumed that alternatives located on property not currently owned by the applicant are not practicable under the Section 404(b)(1) Guidelines. The Guidelines' requirements to appropriately and practicably minimize and compensate for any adverse environmental impacts of such activities remain.

The appellant argues that his new construction of storage buildings is covered by this RGL because he is characterizing his storage buildings as "owner-occupied structures consistent with local zoning located on agricultural property."

RGL 95-01 further states that:

This policy statement clarifies that, for the purposes of the alternative analysis, it is presumed that practicable alternatives are limited to property owned by the permit applicant in circumstances involving certain small projects affecting less than two acres of non-tidal wetlands. This presumption is consistent with the practicability considerations required under the Guidelines and reflects the nature of the projects to which the presumptions applies -- specifically, the construction or expansion of a single family home and attendant features, the construction or expansion of a barn or other farm building, or the expansion of a business. For such small projects that would solely expand an existing structure, the basic project purpose is so tied to the existing structures owned by the applicant, that it would be highly unusual that the project could be

practicably located on other sites not owned by the applicant. In these cases, such as construction of driveways, garages, or storage sheds, or with home and barn additions, proximity to the existing structure is typically a fundamental aspect of the project purpose.

The District reasonably concluded that the appellant's project can be characterized as new construction of a commercial storage business and; therefore, the appellant's project type does not meet the specific criteria covered by this RGL. Specifically, the appellant's project is not an expansion of a single family home, a small business, or barn or other farm building and it is not the new construction of a barn or other farm building associated with an existing structure. Therefore, the District considered and correctly applied the guidance of RGL 95-01 and this reason for appeal does not have merit.

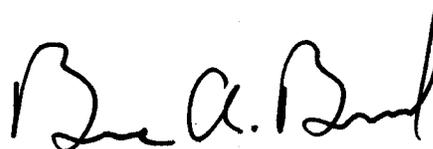
Reason 6: The District should not have considered the comments of the USFWS dated October 31, 2002 because they were received after the public comment period expired on October 24, 2002.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The USFWS requested an additional thirty days to respond to the District's PN. The request for additional time was submitted to the District on October 22, 2002. The purpose for requesting the time extension was to allow USFWS staff to conduct a site visit. On October 25, 2002, the District responded to the USFWS by granting their request. The comments from the USFWS were then received on October 31, 2002. On December 2, 2002 the District forwarded a copy of these comments to the appellant and afforded the appellant an opportunity to respond. There is nothing unusual or inappropriate with the District's decision to grant a time extension and consider the comments from the USFWS. Therefore, this reason for appeal does not have merit.

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.



Bruce A. Berwick
Brigadier General, U.S. Army
Division Engineer