

ADMINISTRATIVE APPEAL DECISION

JERRY SUEDKAMP; FILE NO. 97-016-525-1

DETROIT DISTRICT

NOVEMBER 15, 2002

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California.

Appellant Representative: Gerald Suedkamp, Oscoda, Michigan.

Detroit District Representative: Robert Deroche, Regulatory Project Manager

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

Receipt of Request For Appeal (RFA):

Original: Submitted May 21, 2002; rejected for insufficient grounds, July 18, 2002.

Revised: Submitted August 1, 2002 and accepted for consideration Sept 27, 2002

Appeal Conference/Site Visit Date: October 16, 2002

Background Information: The Appellant's property, a residential lot with a house and lawns, is located in Oscoda, Michigan. U.S. Highway 23 is west of the parcel and Lake Huron is east of the parcel. Other houses on residential parcels are located north and south of the property. Lake Huron water levels fluctuate periodically. In the last "high water" period, in 1996 and 1997, the Appellant constructed an authorized sea-wall to protect his house and parcel from high water and erosion. The Lake Huron water level has substantially declined since that time. The Appellant's sea-wall is currently approximately 200 feet from the water's edge.

A portion of this area contains a vegetated swale the District has determined to be wetlands within Clean Water Act (CWA) jurisdiction. The Appellant proposes to fill the vegetated swale with beach sand immediately adjacent to the swale. The District has concluded that the Appellant's project does not comply with the EPA Section 404 (b) (1) *Guidelines for the Specification of Disposal Sites for Dredged or Fill Material*, (CWA 404 (b) (1) guidelines) (40 CFR Part 230), has significant cumulative impacts to wetlands, and is contrary to the public interest.

Information received from the Appellant during the Appeal Review and its Disposition: The Appellant submitted a large packet of materials at the appeal conference. These materials are listed below, as well as how they were considered during the administrative appeal. Corps regulations prohibit new information from being considered as part of an administrative appeal. Items dated after the District's permit denial letter of April 23, 2002 were new information unless otherwise noted.

- The Appellant included a brief letter stating his reasons for appeal in his request for appeal. This was considered during the appeal.
- Copy of undated article in The Bay City Times discussing Corps permit issued to Bay City State Recreation Area for beach grooming. This item appears to have been dated after the date of the permit denial decision on April 23, 2002. It was therefore considered new information and not addressed in the appeal decision.
- Copy of front page of Detroit Free Press dated April 29, 2000 with article regarding water levels in the Great Lakes. This was considered clarifying information.
- Copy of August 2001 issue of The Flush, Northeast Michigan's Funniest Paper. This item was unrelated to the issue under administrative appeal and was not germane to the administrative appeal.
- Copy of April 23, 2002 letter from Detroit District Corps of Engineers to Congressman James Barcia regarding Corps jurisdiction on Lake Huron and discussing some activities requiring a Corps permit. Considered clarifying information.
- Copy of undated article from The Bay City Times regarding the Save Our Shorelines organization. Item not germane to the administrative appeal and not considered.
- Copy of the "Save our Shoreline" organization letter to members dated April 25, 2002. New information dated after April 23, 2002 and could not be considered. Item not germane to the administrative appeal and not considered.
- Copy of the "Save our Shoreline" organization press release dated May 10, 2002. New information not germane to the administrative appeal and not considered.
- Copy of Iosco County News and Oscoda Press dated May 29, 2002 including article regarding Mr. Suedkamp's disagreement with the Corps of Engineers and Michigan Department of Environmental Quality. New information dated after April 23, 2002 and could not be considered.
- Copy of June 5, 2002 letter from Detroit District Corps of Engineers District Engineer to Honorable Joe Knollenberg, House of Representatives regarding Corps jurisdiction over certain activities in the exposed bottomlands in the Saginaw Bay region. New information dated after April 23, 2002 and could not be considered.
- Copy of June 30, 2002 article regarding beach grooming on page 11A in the June 30, 2002 The Bay City Times. New information dated after April 23, 2002 and could not be considered.
- Copy of June 27, 2002 article on beach grooming from The Detroit News. New information dated after April 23, 2002 and could not be considered.
- Copy of July 3, 2002 article on Save our Shoreline organization from the Oscoda Press. New information dated after April 23, 2002 and could not be considered.
- Copy of Page 42 of August/September issue of National Wildlife discussing the South Florida Estuary and the National Wildlife Federation's goals regarding their

efforts to redirect the projects of the Corps of Engineers to be more consistent with the goals of the National Wildlife Federation. This information was dated after April 23, 2002 and not germane to items being considered.

- Copy of the “Save our Shoreline” organization newsletter dated September 1, 2002. This was new information dated after April 23, 2002 and could not be considered. Not germane to items being considered.
- Copy of e-mail dated August 8, 2002 regarding at Scripps Institute statement about CFCs. This was new information dated after April 23, 2002 and could not be considered. Not germane to items being considered.
- Copy of October 2, 2002 issue of the Iosco County News Herald and Oscoda Press including article regarding upcoming meeting of the Save our Shoreline organization. This was new information dated after April 23, 2002 and could not be considered. Not germane to items being considered.
- Copy of October 9, 2002 issue of Oscoda Press including article regarding recent meeting of the Save our Shoreline organization. This was new information dated after April 23, 2002 and could not be considered. Not germane to items being considered.
- Copy of Detroit District Regulatory Home Page with printing date of October 8, 2002, with indication that Corps ordinary high water mark (OHWM) on Lake Huron is elevation 580.5 feet. This was considered clarifying information. (The District representative identified the web page as being in error, and subsequent followup information identified that the District had established the OHWM on Lake Huron as 581.5 feet, International Great Lakes Datum).
- Copy of web pages from the Virginia Shore and Beach Preservation Association with printout date of October 12, 2002, which consist of a document identified as “The Economic Value of Beaches – 2002 Update” by James R. Houston, U.S. Army Engineer Research and Development Center. This was considered new information as it was not submitted to the District during the permit evaluation process.
- Copy of FAX between private individuals dated October 14, 2002 containing copy of 42 U.S. Code Section 4332, with accompanying cover letter with comments. This information was not germane to the action being considered.
- Copy of e-mail between private individuals dated October 15, 2002 providing discussion of the number of miles of Lake Huron shoreline and wetlands in Michigan. This was considered clarifying information, and was considered during the administrative appeal.
- Copy of page identified as being from December 2002 of “Fly Fisherman” discussing EPA finding in the Potomac River regarding fish and toxic sludge associated with a Corps of Engineers discharge. This information was not germane to the action being considered.

Information received from the District during the Appeal Review and its

Disposition: In addition to the administrative record, the District provided:

- Brief e-mails clarifying that the District had identified its basic project purpose for this action as recreation, and its overall project purpose to be aesthetic improvement.

This was considered clarifying information, and was considered during the administrative appeal.

Reasons for Appeal (condensed and paraphrased by the RO):

Appeal Reason 1: The District concluded that filling the wetland swale area on the Appellant's property would adversely affect the wetland and other natural resources. The Appellant asserts that there were no wetland areas between his house and the water's edge (of Lake Huron), until after the 1996-97 high water, and that he should be able to fill this area as he has requested. The Appellant states that past fill activities on his and other properties has never had an adverse environmental effect on the aquatic ecosystem.

Appeal Reason 2: The District's analysis concluded that the project as proposed would not meet the EPA Section 404 (b) (1) *Guidelines for the Specification of Disposal Sites for Dredged or Fill Material*, (404 (b) (1) guidelines) 40 CFR Part 230 as the least damaging practicable alternative and that the No Action alternative would be a less damaging practicable alternative. The Appellant asserts that his project as proposed fulfills his project purpose and complies with the 404 (b) (1) guidelines.

Appeal Reason 3: Appellant asserts that the District's conclusions of its public interest evaluation is incorrect and that the District did not properly weigh and compare the cumulative environmental and economic impacts of having extensive areas of shorelines remain vegetated instead of having those areas maintained as beaches.

Summary of Decision: Appeal reasons 1, 2, and 3 were found to have no merit. The District's decision of April 23, 2002 is found to be reasonable.

Appeal Decision and Instructions to the Detroit District Commander (DE):

Appeal Reason 1: The Appellant asserts that there were no wetland areas between his house and the water's edge (of Lake Huron), until after the 1996-97 high water, and that he should be able to fill this area as he has requested. The Appellant states that past fill activities on his and other properties have never had an adverse environmental effect on the aquatic ecosystem and that none would occur now.

Finding: This appeal reason does not have merit.

Action: None required.

Discussion: The Appellant stated that prior to the high water in Lake Huron of 1996-97, no vegetation other than his lawn existed between his house and the edge of the water, and the sand area between his lawn and the water did not have a low area or swale. Since the high water of 1996-97, the Appellant has installed a sea wall. There is a low swale area depression between the Appellant's lawn and the remaining sand beach area leading to the water's edge. This swale is now vegetated. The District documented that this area

met the definition of a wetland under the Corps 1987 Wetland Delineation Manual (1987 Wetland Manual). The Appellant did not dispute the District's wetland determination.

The administrative record shows that Lake Huron is regulated under both the CWA and Section 10 of the Rivers and Harbors Act based on its status as an interstate water that is used for interstate and foreign commerce. The Corps regulations at 33 CFR Part 328 and 33 CFR Part 329 define the extent of the Corps jurisdiction under the CWA and RHA respectively. For Lake Huron, the landward boundary of CWA jurisdiction in non-tidal areas is the Ordinary High Water Mark (OHWM), as defined in the Corps regulations at 33 CFR Part 328.4. As portions of Lake Huron have wetland areas adjacent to the landward side of the OHWM, the limit of CWA jurisdiction further extends to the limit of such adjacent wetlands as provided for in the Corps regulations at 33 CFR Part 328.4 (c) (2). The landward extent of the RHA jurisdiction also extends to the OHWM as defined in the Corps regulations at 33 CFR 329.11.

The District's administrative record and clarifying information at the appeal conference identified that the Ordinary High Water Mark (OHWM) of Lake Huron is a fixed elevation contour of 581.5 feet, International Great Lakes Datum. While the waters edge of Lake Huron may rise and fall over time, the OHWM of Lake Huron is defined as a specific, fixed elevation. However, the location of the 581.5 foot OHWM contour on Lake Huron will move laterally over time as wind and wave action modify the shoreline elevations by the movement, accretion or erosion of sediments.

The Corps regulations at 33 CFR 328.3 (b) and the 1987 Wetland Manual define a wetland as:

“... those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”

The Corps has addressed the appropriate interpretation of the term “normal circumstances” as related to the presence of wetlands in Regulatory Guidance Letter (RGL) 86-9, *Clarification of "Normal Circumstances" in the Wetland Definition (33 CFR 323.2 (c) and RGL 90 – 7 Clarification of the Phrase "Normal Circumstances" as it Pertains to Cropped Wetlands*. (Note: Although these RGLs have expired, RGLs are considered appropriate guidance after expiration unless specifically rescinded.) The Corps stated in RGL 86 – 9 that:

““Normal circumstances” are determined on the basis of an area's characteristics and use, at present and in the recent past.”

From the administrative record it is clear the Appellant considers normal circumstances to be those of higher water on Lake Huron prior to the 1996 – 97 extreme high water,

while the District considers normal circumstances to be the present conditions of lower water on Lake Huron.

RGL 86 –9 also states:

“...it is our (*the Corps*) intent under Section 404 to regulate discharges of dredged or fill material into the aquatic system as it exists and not as it may have existed over a record period of time. (Note: words in italics added for clarity)

In addition RGL 90 – 7 states that:

“The primary consideration in determining whether a disturbed area qualifies as a section 404 wetland under "normal circumstances" involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydrophytic vegetation.”

The Appellant’s permit request indicates that he would periodically fill the existing wetland swale area to maintain it as a sandy beach area without vegetation. I find the administrative record supports the District’s conclusion that a detailed analysis of the loss of this wetland was required. The presence of a wetland swale between the Appellant’s lawn and the water line now represents normal circumstances as that term is used in the Corps definition of a wetland area in 33 CFR 328.3 (b). Past local practices of shoreline grooming and grading, and the past circumstances of higher water levels, do not relieve the District of the responsibility for completing an environmental analysis of the effects of the Appellant’s proposal on the wetland swale, and considering the results of that analysis as part of the District’s deliberations on whether to issue or deny a permit.

The District’s permit evaluation document identified several adverse environmental impacts that would result from the loss of the wetland swale area if the project were implemented. These include changes in oxygen levels in the water, higher turbidity, increased erosion, loss of invertebrate habitat, loss of water bird habitat, reptile, amphibian, and mammal habitat. The Appellant asserts that these environmental effects are insignificant (except for erosion addressed separately below) because few wetlands were present along the Lake Huron shoreline until after 1997 due to higher water and the regular occurrence of shoreline grooming and grading. The District’s position is reasonable. The Appellant’s position ignores that the functions and values provided by the wetlands currently present will be lost if they are removed, regardless of whether such wetlands were routinely removed in the past.

Appeal Reason 2: The Appellant asserts that his project as proposed fulfills his project purpose, complies with the EPA Section 404 (b) (1) *Guidelines for the Specification of Disposal Sites for Dredged or Fill Material*, (404 (b) (1) guidelines) 40 CFR Part 230, and is the least damaging practicable alternative. The District’s analysis concluded that the project as proposed by the Appellant would not meet the project purposes and is not the least damaging practicable alternative.

Finding: This appeal reason does not have merit.

Action: None required.

Discussion: The District stated in its November 29, 2001, letter to the Appellant that they were having difficulty identifying his project purpose. The Appellant specifically identified three project purposes in his September 10, 2001 permit application, and January 7, 2002 letter. These were erosion control, elimination of a biting insect problem, and elimination of a human health hazard.

During the evaluation of this permit application, the District sought clarification of the project purpose from the Appellant. The Appellant reiterated that the three project purposes described above were his purposes for conducting this action. However, other documents in the administrative record and the discussion with the Appellant at the appeal conference suggest that the Appellant had additional purposes for the proposed fill activities. These include creating a pedestrian access route to the beach that did not involve crossing wetlands or standing water, replacing wetlands with sand beach as the Appellant considered this a more desirable aesthetic feature, and providing more beach area between the Appellant's house and the water for recreational use.

As part of this administrative appeal, the review officer obtained clarification from the District regarding its definitions of the basic project purpose and overall project purpose for this action. The District identified the project purpose for this action as "recreation" in the record of the Dec 17, 2001 telephone call between the District project manager and the Appellant. The District clarified for the review officer that they considered the basic project purpose of the Appellant's proposal to be "recreation." The District identified "aesthetic improvement" as its project purpose in its April 23, 2002 permit evaluation of this action. The District clarified for the review officer that it considered aesthetic improvement to be the overall project purpose for this action. The District evaluated the Appellant's project purposes as well as those identified by the District.

The Appellant stated that he believes the project would provide for erosion control when higher water levels return. The Appellant proposes to reduce the potential damage from erosion by increasing the volume of sand between his sea-wall and the water line of Lake Huron. The District concluded that the Appellant's proposed project would be less effective at controlling erosion than the No Action alternative. The District reached this conclusion because they believe that rooted wetland vegetation would be more effective at reducing wave action than an area of additional sand with no rooted vegetation.

The District's position was based on their professional judgment, and the Appellant stated his position was based on his local experience in the area. No detailed studies, reports, or similar evaluations supporting either conclusion were provided in the administrative record. The District's conclusion that the wetland vegetation and roots were more likely to bind the substrate and resist erosion, as compared to an area of unvegetated sand, was a reasonable conclusion based on the information available and the District's experience in this area. The Appellant provided no information that he had professional expertise in this area, and provided no information beyond his personal

opinion that the District's conclusion was incorrect. The District reasonably concluded that the Appellant's proposed project was not the least damaging practicable alternative for erosion control.

The Appellant stated that an additional project purpose was to reduce a biting insect problem – particularly from mosquitoes. The Appellant stated he experienced an increase in the number of biting mosquitoes when there was standing water in the wetland swale on his site. The District stated that mosquitoes could still travel to his property from nearby areas, even if the wetland swale on the Appellant's property was filled in. The District also identified that “no-see-ums” (biting midge flies) would be more likely to inhabit the sand that the Appellant proposes to use to fill the wetland area and so a biting insect problem would remain. The Appellant stated that it was his personal experience that the biting insect problem would disappear if he could fill in the wetland swale area. The Appellant did not explain why mosquitoes from nearby areas would not continue to be a problem if the wetland swale was fill other than to indicate this had not been his experience in the past. The District reasonably concluded that the Appellant did not demonstrate that filling in the wetland swale was the least damaging practicable alternative to resolve the biting insect problem, as the problem would likely remain even if the wetland was filled in.

The Appellant asserted that stained sand and standing water in the wetland swale between his lawn and the water's edge represented a human health hazard because it was caused by contaminated groundwater from residential sewage leach fields bringing human sewage waste to the surface. The Appellant considered stained sand as evidence that this was occurring. The District's April 23, 2002 permit evaluation documented two likely explanations for this staining. It is likely that the staining is either due to naturally occurring high iron levels in the water and/or the presence of tannins – naturally occurring chemicals in forested areas. Sand staining along the Lake Huron shoreline is widespread. The permit evaluation also documented that the local health department authorities had tested runoff from nearby developments, and concluded that no such human health hazard was present. The Appellant presented no other information documenting his claim that there was a human health hazard. The District reasonably concluded that no human disease hazard associated with contaminated groundwater was present. Therefore, the No Action alternative was the least damaging practicable alternative. No wetland fill is justified at this time to resolve a problem that the local health department has concluded does not exist.

The Appellant also stated at the appeal conference that he wanted to reduce the human health hazard from West Nile Virus, a human disease spread by mosquitoes. Based on a review of the administrative record for this action I conclude the concern regarding the spread of West Nile Virus is new information as it was not considered an issue at the time the District reached its decision on this action on April 23, 2002. Therefore, a lack of a discussion of that issue in the District's April 23, 2002 permit evaluation document was not a flaw in the District's documentation for this action. However, the District's permit evaluation did discuss the potential effect of the proposed project to reduce the mosquito population in the vicinity of the Appellant's property. The District concluded there

would be no significant change regarding the presence of mosquitoes in the area as possible future disease vectors. Under existing procedures, future District permit decisions will continue to identify and consider all relevant environmental issues, including when appropriate the possible effect of future regulatory decisions on the spread of West Nile Virus.

The District's 404 (b) (1) guidelines analysis in the permit evaluation document primarily considers whether there are practicable alternatives to the specific project purposes identified by the Appellant. The District also addressed the broader project purpose it had identified as aesthetic improvement. The District reasonably concluded based on the information in the administrative record that there were less damaging practicable alternatives to control erosion and protect humans from biting insects. The District reasonably concluded that no human health hazard from sewage-contaminated groundwater existed.

Other portions of the administrative record, and discussions at the administrative appeal conference, suggest that other project purposes, such as the provision of a sand beach for recreational access from the Appellant's home to Lake Huron, Appellant's visual enjoyment of Lake Huron from his maintained lawn, and enhancement of property value, may have been additional project purposes of interest to the Appellant. In its analysis, the District reasonably emphasized the project purposes that were clearly identified in writing by the Appellant.

Appeal Reason 3: Appellant asserts that the District's public interest review evaluation is incorrect and that the District did not properly weigh and compare the cumulative environmental and economic impacts of having extensive areas of shoreline remain vegetated instead of having those areas maintained as beaches to promote tourism.

Finding: This appeal reason did not have merit.

Action: None required.

Discussion: The District's statement of findings concluded that the project as proposed would have minor, long-term benefits to visual aesthetics and major, long-term benefits to the rights of property ownership. The District also concluded that the project as proposed would have minor, long-term detriments to water quality, aquatic organisms, wildlife, visual aesthetics, economics and recreation, and major long-term detriments to shoreline erosion, wetlands, and conservation and overall ecology. The District believes the project's detriments outweigh its benefits. The Appellant disagrees.

The District's analysis identified that this project will have adverse effects on public resources. As the District concluded that the Appellant's project as proposed would not even meet the Appellant's own stated purposes for the project, the District reasonably concluded that granting the permit would be contrary to the public interest. The District's conclusion that this project would contribute to adverse cumulative impacts associated with unauthorized shoreline grading is another factor supporting the District's

conclusion. While the Appellant asserts that his project will support public access to the shoreline, it occurs on an area the Appellant considers private property, and the public has other points of access.

The Appellant asserts that if the shore areas such as his are not maintained as beaches, that there will be regional adverse economic impacts including reduction in tourism and reduction in property values and associated tax revenue available for public services. However, the Appellant did not identify such access as a reason for his project and his project would not affect regional access to the shoreline. While the District determined that it must deny the Appellant's permit request, the District is required to weigh each request for shoreline grooming and/or grading on its own merits. The District's denial of this permit does not obligate the District to deny all future permit requests for shoreline grooming and grading if they are not contrary to the public interest.

Conclusion: For the reasons stated above, I conclude that the three reasons presented in this Request for Appeal do not have merit.



STEVEN R. HAWKINS
Brigadier General, U.S. Army
Commanding