ADMINISTRATIVE APPEAL DECISION

ROSS J. NOVELLI, SR.

Permit Denial, FILE 21071(02)

GALVESTON DISTRICT

23 March 2004

Review Officer: James E. Gilmore, US Army Corps of Engineers, Southwestern Division, Dallas, Texas

Appellant Representative: Ross J. Novelli, Sr.

Galveston District Representatives: Don Nanninga and Janet Thomas-Botello

Permit Authority: Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): 6 November 2003

Appeal Conference/Site Visit Date: 24 February 2004

Background Information: Mr. Novelli proposed to construct a 350-foot long by 18-foot wide T-head groin/pier. The project site was located in Offatts Bayou at 8415-17 Teichman Road, Galveston, Galveston County, Texas. The project as proposed consisted of the placement of approximately 1,335 cubic yards of broken concrete riprap in Offatts Bayou for the construction of the groin/pier. A six-foot wide walkway would have been constructed on top of the groin.

The Galveston District (District) denied the permit because the project as proposed was not the least damaging practicable alternative. The District concluded that a less damaging practicable alternative was available and that the appellant had not avoided and/or minimized on-site impacts to waters of the United States to the maximum extent practicable. The appellant asserted that construction of a "conventional" pier was impracticable because it would be destroyed during a tropical storm or hurricane.

Summary of Decision: The District reasonably denied the permit because of the substantive requirements of Section 404 of the Clean Water Act and the 404(b)(1) Guidelines (40 CFR Part 230). The appeal does not have merit.

Appeal Reason 1: The District did not correctly determine practicable alternatives for this project in accordance with the Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or fill Material (Guidelines).

FINDING: The appeal does not have merit.

ACTION: None required

DISCUSSION: The appellant proposed to fill 0.15 acres of Offatts Bayou, a water of the US, for the construction of a groin/pier. The appellant's stated purpose for the project was for personal recreation and shoreline protection. The appellant asserted that no practicable alternative for his proposed project existed. A key provision of the 404(b)(1) Guidelines is the "practicable alternative test" which requires that "no discharge of fill material shall be permitted if there is a practicable alternative to the proposed fill which would have a less adverse impact on the aquatic ecosystem." For an alternative to be considered practicable it has to be "available and capable of being done after taking into consideration cost, existing technology, and logistic, in light of overall project purpose." The District and appellant disagree that a practicable alternative for the project existed.

The District determined that a practicable alternative existed that would meet part of the appellant stated project purpose. The District found that a pile-supported pier would be a less environmentally damaging alternative that still met the appellant's objective of providing recreational access to Offatts Bayou, although a pile-supported pier would not meet the appellant's stated project purpose of providing shoreline erosion protection. Based on a review of aerial photographs and an on-site meeting, the District determined that the appellant shoreline was already protected by riprap. Review of the photographs also indicated that the appellant's property was not eroding but has been accreting.

The appellant disagrees with the District's determination that a pile-supported pier is a practicable alternative. Mr. Novelli stated that in the "short term" a pile-supported pier appears to be the best practicable alternative. However, the appellant feels that the cost to keep replacing a pile-supported pier every time it is destroyed in a storm makes it impracticable. In a letter dated 21 October 2002, Mr. Novelli stated that he or his family has had to replace four different pile supported piers since 1935, a period of 69 years. Mr. Novelli did not submit any documentation on the cost of replacing the four piers nor did he submit any cost estimates for construction of the groin/pier. Without this information it is impossible to determine if Mr. Novelli's contention is correct.

Mr. Novelli also stated that he had spoken with Dr. Sammy M. Ray, Ph.D., Professor Emeritus, Marine Biology Department, Texas A&M University at Galveston. Dr. Ray provided a written statement to Mr. Novelli that stated: "The concrete rip of the pier-groin covering this amount of the bottom will remove habitat for the benthic (bottom) organisms. However, in my opinion, the amount of substrate added will provide sufficient biological productivity through the introduced sessile (attached) organisms (oysters, mussels, barnacles) to compensate for the loss of benthic productivity. Crevices in broken concrete do provide food and shelter for small fish and crustaceans." In addition, the appellant stated that he had a discussion with National Marine Fisheries Service (NMFS) personnel regarding his project in which NMFS personnel stated the project was minor. Mr. Novelli held these discussions after his permit application was denied. Mr. Novelli informed the District of his discussions with Dr. Ray and NMFS in a letter to the District dated 19 September 2003. In that letter, Mr. Novelli included a copy of the statement he

received from Dr. Ray. (The District did not receive any documentation from NMFS personnel regarding their conversation with Mr. Novelli.) Based on the information he received, Mr. Novelli requested that the District reconsider its decision regarding his application.
NMFS submitted comments to the District in a letter dated 5 February 2003. NMFS stated that the Gulf of Mexico Fishery Management Council had designated the proposed project site as Essential Fish Habitat (EFH). NMFS also stated "The Environmental Protection Agency's 404(b)(1) Guidelines require that no discharge of dredged or fill material be permitted if there is a practicable alternative to the proposed fill site which would have less adverse impact on the aquatic ecosystem." NMFS continued by stating "If the applicant requires recreational access to deeper water, then an elevated walkway and terminal structure can be constructed as an alternative to the proposed groin." NMFS recommended that the District not issue a permit for the project as currently proposed.

The District reviewed the information provided by the appellant and agreed that a rock groin would allow sessile organisms to attach and provide food and shelter for small fish and crustaceans. However, based on the comments made by NMFS and the requirements of the Guidelines, the District determined that these benefits did not offset the permanent impacts to the marine environment caused by the fill. The District ultimately concluded that the appellant had not provided sufficient information to clearly demonstrate that no less damaging practicable on-site alternative was available. The District denied the appellant's permit request as required by the Guidelines.

CONCLUSION: After reviewing and evaluating the administrative record, I conclude that the District's decision was appropriate. Therefore, I find that the appellant's appeal does not have merit.

26 March 04
(Date)

Robert Crear
Brigadier General, US Army
Commanding General