ADMINISTRATIVE APPEAL DECISION

David Woolverton

Permit Denial, FILE 22457

GALVESTON DISTRICT

1 September 2004

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

Appellant Representative: David Woolverton and Jason Simms

Galveston District Representatives: Terri Stinnett

Permit Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): 1 December 2004

Appeal Conference/Site Visit Date: 7 July 2004

Background Information: The Galveston District's (District) initial involvement with this action began in September 1999 when District staff investigated an alleged unauthorized activity on Mr. Woolverton's property. The alleged unauthorized activity involved the discharge of fill material into saltwater coastal flat wetland located adjacent to the Laguna Madre. The project site is located at 714 Michigan Street, Laguna Heights, Cameron County, Texas. On 27 September 1999, the District issued a warning letter to Mr. Woolverton requesting that he provide information regarding his project. Mr. Woolverton replied to the District in a letter dated 20 October 1999. Mr. Woolverton stated that he placed the material to repair erosion damage to his property and was not aware that he needed a permit from the Corps to do the work. Based on information obtain during a 15 September 1999 site visit and from Mr. Woolverton's 20 October 1999 response letter, the District determined the appropriate resolution of the unauthorized activity was to allow Mr. Woolverton to apply for an after-the-fact (ATF) permit. The appellant signed a tolling agreement on 16 May 2001 and the action was transferred to the Evaluation Section. Mr. Woolverton applied for an ATF permit to retain the fill.

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.

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: After attending your public hearing and reviewing the documents provided, it confirmed my position that I should be able to protect my residence as I am presently, from 5 years ago. None of any of the protection system I've placed on my property has ever been in tidal waters. It is all well behind the average normal highest annual fall tide line. I have also purchased a topographic survey that shows the location of my protection system to be at well over 2.54 feet above sea level. I have attached a copy of my survey of my survey and 4 photographs and a copy of your related issues and definitions document.

FINDING: The appeal does not have merit.

ACTION: None required

DISCUSSION: The appellant contends that he did not discharge any fill material into tidal waters of the United States and that all fill material was placed above the +2.54 foot contour. The District agrees that Mr. Woolverton did not place any fill into "tidal waters". The term "tidal waters" is defined under Section 328.3(f) as "those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Section 329 defines navigable waters of the United States. Section 329.12 states that the shoreward limits of "jurisdiction in coastal areas extends to the line on the shore reached by the plane of the "mean high water"(MHW). Section 329.13 states that "wetlands and similar areas are "navigable in law," if they are subject to inundation by the MHW". Navigable waters of the United States are subject to the Corps jurisdiction under Section 10 of the Rivers and Harbors Act of 1899 as well as under Section 404 of the Clean Water Act. Section 10 of the Rivers and Harbors Act regulates activities in or affecting navigable waters of the United States. Mr. Woolverton's activity was subject to the Corps authority under Section 404 of the Clean Water Act. Under Section 404 of the Clean Water Act, the Corps regulates the discharge of dredged or fill material into waters of the United States. The term "waters of the United States" is defined under Section 328.3.

Mr. Woolverton also contends that he did not place any fill material below the "average normal highest annual fall tide line", which he stated is located at or above the +2.54 foot contour. He stated that the +2.54 foot contour is based on information he received during a public hearing held in the South Padre Island area. Mr. Woolverton did not provide any additional information regarding the purpose of the public hearing. Mr. Woolverton use of the term "average normal highest annual fall tide line" is an apparent reference to the Corps terminology for this type of tide under Section 328.3(d); however, the measure is different than the standard found in the regulation. Section 328.3(d) defines the term "high tide line"(HTL). The HTL is defined as "the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm."

The District does not have an establish elevation for the limits of the "high tide line". However, a pilot study was conducted along the southeastern end of the Laguna Madre shore of the Town of South Padre Island, Texas to determine if regulatory personnel can reliably identify the extent of MHW and the HTL. The study concluded that regulatory personnel can accurately determine the extent of MHW and HTL using visual observation techniques. The pilot study also concluded that "...the demonstrated consistency of the measurements in an area which experiences substantial changes in water level through seasonal variations, strong predominant wind and frequent weather fronts, the Section-404 procedure is likely to have comparable reliability at other tidal wetlands". District regulatory staff, using visual observation techniques, determined that Mr. Woolverton had placed fill material below the HTL without proper authorization.

The appellant requested ATF Section 404 authorization to retain the fill that he placed on his property for erosion control. The fill material was placed in saltwater coastal flat wetlands. The saltwater coastal flat wetland was comprised of black mangrove (Avicennia germinans), saltwort (Batis maritime), sea ox-eye daisy (borrichia frutescens) and seashore paspalum (Paspalum vaginatum). Saltwater coastal flats are largely nonvegetated or with only sparse vegetation cover, but the invertebrates that live in these flats and feed on organic materials are extremely important in the diets of some fish and birds. 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 logistics in light of overall project purpose." The District requested that the appellant provide information regarding alternatives to his project. The appellant did not submit an alternative to his project. However, the District did review and evaluate four alternatives to determine if a practicable alternative for the project existed. The following alternatives were reviewed.

1. No Action Alternative. This alternative would result in the district denying the permit. Under this scenario, the applicant would be required to remove all of the unauthorized fill and to restore the site to pre-fill contours.
2. Offsite Alternatives. No offsite alternatives were considered due to the fact that the fill is site specific.[1]
3. Onsite Alternative 1. This alternative would allow the applicant to keep all fill placed above the high tide line which would place the fill outside of the Corps jurisdiction. The remainder of the fill would be removed and the area restored to its original pre-fill contours.
4. Onsite Alternative 2 (Applicant' Preferred Alternative). This alternative would allow the applicant to keep the unauthorized fill.

[1] Regulatory Guidance Letter 95-1, Guidance on Individual Permit Flexibility for Small Landowners states 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 § 404(b)(1) Guidelines.

The District determined that Onsite Alternative 1 was the least damaging practicable alternative and that this alternative would meet the appellant stated project purpose of providing erosion protection while eliminating impacts to aquatic resources. This alternative would allow the appellant to keep all fill placed above the high tide line. The remainder of the fill would be removed and the area restored to its original pre-fill contours. After reviewing aerial photographs and information obtained during on-site meeting, the District found that the appellant shoreline was not eroding but has actually been accreting. This is not unusual since research shows that a black mangrove marsh helps to establish and maintain shorelines by trapping sediments.

Historically, the District has worked with permit applicants to modify their permit applications to avoid or minimize impacts to black mangrove areas. Due to increasing concern for this type of habitat, the District has a regional condition prohibiting the use of nationwide permits to authorize the placement of fill into mangrove marshes. All applications for discharges into mangrove marshes are reviewed under the individual permit evaluation process. In addition to the District's condition, the Texas Commission on Environmental Quality (TCEQ) has mandated that this type of permit application be reviewed as Tier II actions for water quality purposes. Tier II are projects that impact more the 3 acres of state waters, including wetlands or projects that impact rare or ecologically significant wetlands. The TECQ considers mangrove marshes as rare or ecologically significant wetlands.

The District reviewed the information provided by the appellant; however, based on the comments made by the Federal and State resource agencies and the requirements of the Guidelines, the District determined that a 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.

7 Sept 2007
(Date)

Jeffrey J. Dorko
Colonel, US Army
Commanding