ADMINISTRATIVE APPEAL DECISION

MR. NOEL DAVIS, JR; FILE NO. 19504

LITTLE ROCK DISTRICT

February 6, 2006

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

Appellant Representative: Mr. Noel Davis, Jr.

Little Rock District Representatives: Joel Ward, Project Manager

Permit Authority: Section 404 of the Clean Water Act.

Receipt of Request For Appeal (RFA): 22 December 2005

Background Information: The Corps of Engineers, Little Rock District's (District) involvement with this action started on 5 August 2004 as an unauthorized activity. The appellant was observed utilizing a bulldozer to "spread" fill material into a wetland area. District personnel completed an initial site inspection on 5 August 2004 and determined that Mr. Davis had completed work in violation of Section 404 of the Clean Water Act (CWA). The appellant discharged approximately 650 cubic yards of fill material into jurisdictional wetlands. The purpose of the work was to create an upland area for commercial development. The project site is located in the SW ¼ of section 25, T.9S., R 27 W., near Nashville, Howard County, Arkansas. A Cease and Desist letter was issued to Mr. Davis on 24 August 2004. Mr. Davis was allowed to apply for an after-the-fact (ATF) permit to retain the existing fill and for any other work he proposed to complete on the site. Mr. Davis submitted an ATF permit application and tolling agreement to the District on 31 August 2004 and 3 September 2004, respectively.

The District completed a second jurisdictional determination on 14 September 2004. The District determined that the 8-acre project site contained approximately 3.3 acres of adjacent wetlands, which are subject to the Corps jurisdiction under § 404 of the CWA. Mr. Davis was issued an approved jurisdictional determination (JD) on 21 October 2004. Mr. Davis appealed his approved JD on 29 October 2004. Mr. Davis' appeal was determined to be without merit.

The District placed the evaluation of the Mr. Davis' ATF permit in abeyance until a final decision was made regarding his appeal of the District's approved JD. On 2 February 2005, the District issued a public notice detailing Mr. Davis' project. Mr. Davis proposed to retain the 650 cubic yards of fill already discharged into jurisdictional waters in addition to placing approximately 38,000 cubic yards of additional fill into 3.3 acres of wetlands and 720 linear feet of an ephemeral stream. After completing his evaluation of the proposed project, the Little Rock District Engineer (DE) determined that Mr. Davis' project did not adhere to the EPA's

§404(b)(1) Guidelines (Guidelines). In addition, the DE stated that the project could adversely impact an archeological site located in the project area.

By letter dated 27 October 2005, Mr. Davis was informed that his permit application had been denied and that he had 60 days to submit a RFA. Mr. Davis submitted his RFA within the required 60 days period. During a 30 January 2006 telephone conference, Mr. Davis stated that he did not feel that an appeal's conference was needed. His appeal is based on his belief that his project does comply with the §404(b)(1) Guidelines and that his project will not adversely impact any archeological site(s).

Appeal Decision and Instructions to the Little Rock District Engineer:

Appeal Reason 1: The denial was based on the project not complying with EPA's Section 404(b)(1). The appellant position is that the District did not follow applicable guidance regarding the flexibility of the Section 404(b)(1) Guidelines.

FINDING: This appeal reason does not have merit.

ACTION: No action required.

DISCUSSION: The DE decision to deny the appellant's permit application was based on his evaluation that found the appellant's proposed project did not comply with the Section 404(b)(1) Guidelines. Specifically, the DE found that there were less environmentally damaging practicable alternatives available to the appellant. As previously stated, the appellant does not agree with the District's decision. Mr. Davis feels that the DE did not follow Corps and EPA guidance regarding the flexibility of the Guidelines when evaluating small projects. To support his position, Mr. Davis provided a copy of the Corps and EPA's August 1993 Memorandum to the Field "Appropriate Level of Analysis Required For Evaluating Compliance with the Section 404(b)(1) Guidelines Alternative Requirements."[1] The stated purpose of this guidance was to clarify the appropriate level of analysis that is required to determine compliance with the Guidelines' requirements for consideration of alternatives. Even though the Memorandum emphasizes the flexibility built into the Guidelines it still reiterates the fact that the Guidelines specifically require that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." It is incumbent upon the applicant to provide supporting documentation to the DE that there are no practicable alternatives available for the proposed project. In this case the appellant failed to provide any information to support his claim that there are no less environmentally damaging alternatives available to him. The memorandum

[1] This guidance memorandum was issued to Corps Regulatory Offices as an enclosure to Regulatory Guidance Letter (RGL) 93-2 on 23 August 1993. Regulatory Guidance Letters were developed by the US Army Corps of Engineers Headquarters as a way to organize and track written guidance to the District Regulatory Offices. On 7 December 2005, RGL 05-06 was issued to provide guidance regarding the status and use of previously issued RGLs. Attached to this RGL was a list of valid RGLs. Those RGLs not included on the list are considered to "no longer be valid and are not to be utilized by Corps field offices as guidance." Regulatory Guidance Letter 93-2 and its enclosures was not listed and therefore no longer considered valid guidance.

cited by Mr. Davis as well as the Guideline state that a permit cannot be issued when a less environmentally damaging practicable alternative for the proposed discharge exists.

Based on my review of the District's administrative record for this action, I have determined that the DE used the appropriated level of analysis to evaluate the appellant's proposed project. In evaluating available alternative sites, the DE focused mainly on property already owned by Mr. Davis. Specifically, three upland areas were identified that are currently owned by Mr. Davis. These sites, which included the 5.5 acres of uplands located on the proposed project site, are located within or near the proposed project site. The Guidelines require the Corps to complete an alternative analysis. It is assumed that other practicable, less damaging alternatives to the proposed project exist unless demonstrated otherwise. By letter dated 22 March 2005, Mr. Davis was asked to provide information, to the District, why the properties identified by the District could not be developed in lieu of the proposed project site. The appellant did not response to the District's request. Therefore, the DE concluded that less damaging environmental practical alternatives to the proposed project existed and that the appellant's project did not comply with the Guidelines.

Appeal Reason 2: The DE based part of his denial decision on erroneous information regarding the existence of a known archeological site being located on the appellant's property.

FINDING: This appeal reason does not have merit.

ACTION: No action required.

DISCUSSION: The second part of the Mr. Davis' appeal concerns the DE's second reason for denying the appellant permit application. The DE based this part of his decision to deny the permit application on information received from the Deputy Arkansas State Historic Preservation Officer (ASHPO). In his comment letter, the ASHPO stated that his records showed that a known archeological site is located within the project area and that it could be affected by the proposed project. The ASHPO also stated that the project site exhibited "a high probability for the occurrence of other unrecorded sites." The ASHPO recommended that a cultural resources survey of the site be conducted and that Mr. Davis submit a report in accordance with the standards contained in the "State Plan for the Conservation of Archeological Resources in Arkansas" to the ASHPO for review.

In his RFA, Mr. Davis provided a copy of a "conversation record" between the Project Manager and himself regarding the denial of his permit application based on the presence of a known archeological site being located on the appellant's property. The "conversion record" was dated 21 November 2005. In the "conversation record" the Project Manager stated that he had again contacted the District's staff archeologist to request that the information concerning the known archeological site be re-examine to determine if it was, in fact, located on the appellant's property. The Corps archeologist reported that the site referenced in the ASHPO comment letter was not located on the appellant's project site and would not be impacted by the proposed project.

The new information regarding the location of the known archeological site was not available to the DE at the time he made his final decision concerning the appellant's permit application. The DE is required to make a timely decision based on the information available at the time, which he did. The appellant was given ample opportunity to rebut the comments received during the public interest review period and to provide additional information to help the DE make his final decision on the permit application but Mr. Davis failed to provide any new information.

This reason for appeal may have had merit had it been raised during the public interest review/decision making period. However, this appeal considers only that information that was before the DE when he made his decision. Although this new information regarding the absence of an archeological site on the property would be grounds for a new permit application, such action would be moot in view of my decision on Appeal Reason 1, above. The fact remains that the appellant's project did not adhere to the Guidelines' requirement that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."

CONCLUSION: A review of the District's administrative record for this actions shows that the District adhered to the appropriate regulations, guidance and policy in making its final decision regarding the appellants permit application. For the reasons stated above, I find that the appellant's reasons for appeal do not have merit.

8 Feb 06
(Date)

Jeffrey J. Dorko
Brigadier General, US Army
Commanding