

**ADMINISTRATIVE APPEAL DECISION
WALTER FONDREN IV
PROFFERED PERMIT
GALVESTON DISTRICT
FILE NO. SWG-2012-00951**

Review Officer: Elliott N. Carman, U.S. Army Corps of Engineers (USACE), Southwestern Division

Appellant/Applicant: Mr. Walter Fondren IV

Regulatory Authority: Section 10 of the Rivers and Harbors Act of 1899

Date Request for Appeal Received: 13 August 2013

Proffered Permit Appeal Conference: 5 November 2013

Summary of Appeal Decision: Mr. Walter Fondren IV (appellant) is appealing a USACE Galveston District (District) proffered permit (Letter of Permission – LOP) associated with property in Port O'Connor, Calhoun County, Texas. The appellant submitted one reason for appeal in which he contended that the District incorrectly applied law, regulation or officially promulgated policy when it included Special Condition No. 4 in the LOP, which the appellant considered to be inapplicable to the circumstances encompassed by the LOP. For reasons detailed in this document, this reason for appeal has merit. The proffered permit is remanded to the District for reconsideration.

Background Information: The appellant's property is located at the end of Caracol Drive in Port O'Connor, Calhoun County, Texas. The appellant submitted a permit application to the District via letter dated 12 November 2012.¹ The District sent an initial proffered permit to the appellant via letter dated 6 May 2013.² The appellant responded via letter dated 9 July 2013, with objections to the initial proffered permit.³ The District considered the objections and sent a proffered permit to the appellant for reconsideration via letter dated 2 August 2013.⁴

The appellant appealed the proffered permit by submitting a Request for Appeal (RFA) to the Southwestern Division (Division) via letter dated 12 August 2013. The RFA was received by the Division on 13 August 2013. The appellant was informed, by letter dated 23 August 2013, that his RFA was accepted.

¹ AR page 79.

² AR page 201.

³ AR page 214.

⁴ AR page 2.

Information Received and its Disposition During the Appeal

33 Code of Federal Regulations (CFR) § 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this proffered permit. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding permits, as that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his Review Officer (RO) conducts an independent review of the District's administrative record (AR) to address the reasons for appeal cited by the appellant. The District's AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. Neither the appellant nor the District may present new information to the Division. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the District's AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the permit. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the District's AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal process and its disposition is as follows:

1. The District provided a copy of their AR to the RO and the appellant. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is 2 August 2013.
2. An appeal conference was held via teleconference on 5 November 2013. The conference followed the agenda provided to the District and the appellant by the RO via e-mail on 30 October 2013. During the appeal conference, the RO requested that the District and the appellant provide copies of certain information or documents referenced during the discussion. This information and its disposition is described below. Additionally, the appellant provided five additional reasons for appeal. These reasons are listed and their disposition discussed in the discussion section associated with the appellant's reason for appeal below.
3. On 5 November 2013, the District provided via email to the appellant and the RO a copy of Corps of Engineers Permit 22348 as well as the associated modification, permit 22348(01), which was referenced in the appellant's RFA. These copies were provided in response to a request by the RO during the appeal conference. These permits were not considered as new information as they were both issued by the District prior to 2 August 2013, and therefore could have been considered as part of the District's decision. Consequently, these documents were considered as part of the evaluation of this RFA.
4. On 6 November 2013, the appellant provided via email to the District and the RO a copy of the statement read by the appellant during the appeal conference.⁵ This statement, which was provided in response to a request by the RO during the appeal conference, contained

⁵ This statement was included as Appendix B to the appeal conference MFR.

extensive discussion concerning the real estate easement to which the contested special condition on the regulatory permit applies as well as discussion that the District inconsistently applied the special condition pertaining to the real estate requirement to its regulatory permits. The requirements associated with the Corps real estate easement, as well as the consistency of a District's application of policy between different actions, is beyond the scope of the appeal process as an appeal is associated with a specific Corps regulatory action and reasons for appeal are limited to, for example, a district's application of regulation, guidance, or policy to that specific action. Therefore, this statement was not considered as part of this RFA.

5. On 6 November 2013, the appellant provided, via email to the District and the RO, eight emails which the appellant asserted during the appeal conference were missing from the District's AR. These emails, which were provided in response to a request by the RO during the appeal conference, occurred prior to the District's regulatory decision and were between the appellant and the District Engineer. District regulatory personnel other than the regulatory project manager assigned to the action were copied on some of the emails, District real estate personnel on others, and some were solely between the appellant and the District Engineer. While these emails were not considered by the regulatory project manager assigned to the action, these emails are not considered new information as they were provided to the District Engineer, the decision maker for both the real estate and regulatory actions, prior to the District's regulatory decision. Therefore, these emails were considered as part of the evaluation of this RFA.
6. On 8 November 2013, the RO forwarded, via e-mail, a draft MFR summarizing the appeal conference topics to the appellant and the District with a request that they review and provide comments by 15 November 2013. In an email dated 15 November 2013, the District responded that they, "...have reviewed the draft appeal conference MFR and we have no questions or comments." In an email dated 15 November 2013, the appellant provided comments regarding sections 1, 2.b., 3.d., and 5.d. of the draft MFR.
7. The RO supplied the final MFR to the appellant and the District via e-mail on 19 November 2013. The District and appellant's comments were included in section 7 of the final MFR.

Appellant's Reason for Appeal

REASON 1: The District incorrectly applied law, regulation or officially promulgated policy when it included Special Condition No. 4 in the LOP, which the appellant considered to be inapplicable to the circumstances encompassed by the LOP.

FINDING: This reason for appeal has merit.

DISCUSSION: In the RFA, the appellant stated that the proposed project was geographically located totally within a subdivision previously authorized by District regulatory permit number 22348(01). The appellant further indicated that this permit, 22348(01), made, "...no reference to

the need for seeking accesses, authorizations, or rights-of-way from the Corps Real Estate Division.” The appellant asserted that the proposed project was completely within this previously authorized area and would not affect “USACE operations.” In addition, the appellant stated that further permission for work within this area was not necessary as the previous permit granted, “... permission to access and make improvements to the site.” The appellant stated that the District real estate requirements would presumably apply with or without a permit for the proposed project and that, “Inclusion of this USACE Real Estate requirement is neither critical nor applicable to the Section 10/404 permit.” Finally, based on the above, the Appellant requested that the District remove special condition 4 from the regulatory permit.

During the appeal conference, the appellant indicated they wished to include five additional reasons for appeal. These five reasons were summarized as:

1. The appellant believed that special condition 1 protected the Corps’ real estate interests and therefore accomplished the purpose of special condition 4 of their permit found on administrative record (AR) page 3. As a result, the appellant believed that special condition 4 was unnecessary.
2. The appellant believed the District regulatory branch incorrectly accepted the real estate branch recommendation to add a special condition to the permit as the regulatory branch received the recommendation three weeks after the conclusion of the internal District coordination process.
3. The appellant believed that neither special condition 4, nor the real estate requirement, should be required for the permit as they believe that neither was included as part of a previous permit, 22348(01); and the geographic area associated with the appealed proffered permit (SWG-2012-00951) was entirely within the geographic area associated with that permit.
4. The appellant believed that special condition 4 was unnecessary as the District’s outgrant policy was specific to fee owned property only and not easements, such as that associated with the appellant’s property.
5. The appellant believed that special condition 4 was unnecessary as the language of the real estate easement in question was specific to the GIWW, and the appellant’s property lies on an inlet and outside the GIWW boundaries.

The appeal regulations state that an appellant’s RFA, which includes the appellant’s reasons for appeal, must be received by the Division within 60 days of the date of the appeal form.⁶ The regulations further state that RFA’s received after 60 days of the date of the appeal form that contain new reasons for appeal cannot be accepted.⁷ Additional reasons 1, 2, 4, and 5 above are not directly related to, nor do they clarify the appellant’s reason for appeal included in their RFA dated 12 August 2013 and were received after 60 days of the date of the appeal form associated with this action. Therefore, these four additional reasons for appeal cannot be accepted, and consequently will not be discussed as part of this RFA. Additional reason for appeal 3, above, however, does directly relate to the reason included in the appellant’s RFA dated 12 August 2013. Therefore, it will be discussed as part of this RFA below.

⁶ 33 CFR § 331.2, 331.5(a)(1), 331.6(a), and 331.6(b).

⁷ 33 CFR § 331.5(b)(6).

The need for a real estate requirement for the property associated with regulatory permit 22348(01) or the proposed project is beyond the scope of the appeal process because the controlling factor in that case, the need for a real estate requirement, cannot be changed by the Corps regulatory decision maker.⁸ However, the inclusion of a special condition on the regulatory permit that points to this real estate need does fall within the scope of the appeal process as the regulatory decision maker does have a controlling factor in that case. Therefore, this discussion will focus on the appellant's statement in their RFA that, "Inclusion of this USACE Real Estate requirement is neither critical nor applicable to the Section 10/404 regulatory permit," and that special condition 4 should be removed.

Special condition 4, the contested condition, states:

"The project is located within a Corps easement. Prior to the start of construction, you must obtain written approval from the SWG Real Estate Division. The SWG Regulatory Branch's approval of this permit DOES NOT commit the SWG Real Estate Division in any manner. The SWG Real Estate Division may approve the application, reject it, require changes and/or additional real estate actions including, but not limited to, the issuance of one or more real estate outgrants. Modifications in project design that alter impacts to waters of the United States may need further review by the Regulatory Branch."⁹

Regulations at 33 CFR § 325.4(a) state that, "District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable." Legal requirements include, "...compliance with the 404(b)(1) guidelines, the EPA ocean dumping criteria, the Endangered Species Act, and requirements imposed by conditions on state section 401 water quality certifications,"¹⁰ while factors associated with the public interest requirement include, "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people."¹¹

In the AR, the District stated that they included special condition 4 in their permit as a courtesy and to, "assure that the applicant has the requisite property interest to undertake the authorized activity on lands under the control of the Corps, as described in 33 CFR § 325.1(d)(7)."¹² The District further stated that this condition served as the mechanism that, "...ensures that the permittee possesses the requisite property interest to undertake the activity, and provides assurance that property under control of the Corps, through a real estate easement, is not

⁸ 33 CFR § 331.5(b)(4).

⁹ AR page 3.

¹⁰ 33 CFR § 325.4(a)(1).

¹¹ 33 CFR § 320.4(a)(1).

¹² AR page 7. It should be noted that the District incorrectly referred this section as 33 CFR § 325.1(d)(8) in their AR instead of 33 CFR § 325.1(d)(7). The correct citation was used within the body of this decision document.

infringed upon without proper documentation and RE approval;" that removal of special condition 4 would not preclude the appellant from the need to obtain District real estate approval;¹³ and that the special condition was necessary in order to coordinate the Real Estate and Regulatory aspects of this action.¹⁴

33 CFR § 325.1(d)(7) states that, "...the signature of the applicant or agent will be an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application, except where the lands are under the control of the Corps of Engineers, in which cases the district engineer will coordinate the transfer of the real estate and the permit action." The District's reference of this regulation supports the establishment or presence of their internal review process in which they coordinate proposed projects with other district components such as real estate¹⁵ that may impact lands that are under Corps control. However, the District did not clearly indicate in their AR how special condition 4 satisfied the legal requirements or the public interest requirement factors stated in 33 CFR § 325.4(a) and 325.4(a)(1). Therefore, this reason for appeal has merit.

ACTION: The District shall re-evaluate their permit decision consistent with applicable regulation and policy. As part of this re-evaluation, the District shall consider the information contained within the eight emails the appellant asserted were missing from the District's AR. Additionally, the District must address whether special condition 4 is necessary to satisfy legal requirements or the public interest requirement. The information considered in this re-evaluation must be clearly identified in the AR.

Conclusion: For the reasons stated above, I have determined the reason for appeal has merit. The proffered permit is remanded to the Galveston District for reconsideration consistent with the discussion detailed above. The final USACE decision in this case will be the Galveston District Engineer's decision made pursuant to my remand.

13 Dec 2013

Date



Thomas W. Kula
Brigadier General, US Army
Commanding

¹³ AR page 7.

¹⁴ AR page 8.

¹⁵ AR page 96.