# U.S. ARMY CORPS OF ENGINEERS
# NORTH ATLANTIC DIVISION
Date: 2 May 2008

ADMINSTRATIVE APPEAL DECISION

THOMAS BYRD, JR.

PHILADELPHIA DISTRICT FILE CENAP-OP-R-199802562-46

**Review Officer:** James W. Haggerty, U.S. Army Corps of Engineers, North Atlantic Division

**Appellant:** Thomas Byrd, Jr.

**Appellant's agent:** Lucy Byrd

**Date of Receipt of Request for Appeal:** 13 August 2007

**Date of Acceptance of Request for Appeal:** 16 November 2007

**Appeal Conference/Site Visit Date:** 11 December 2007

## NAD-ACCEPTED REASONS FOR APPEAL:

NAD accepted the following reasons for appeal as enumerated by the agent in the attachment to the Request for Appeal dated 8 August 2007 and in a separate submittal dated 12 October 2007:

1. The Philadelphia District should not have denied the permit application because the roadway referenced in the district's decision was pre-existing, constructed over 60 years ago, and never widened;
2. Maintenance of the road did not result in fill material being placed in wetlands, and maintenance activities did not require a Department of the Army permit in accordance with Title 33 of the Code of Federal Regulations (33 CFR) Part 323.4 (a)(2);
3. The district erred by requiring removal of a pre-existing dock that should have been allowed to remain in the waterway in accordance with Title 16, U.S. Code Part 1281;
4. The pond on the site is not a jurisdictional water of the United States under the Rapanos Supreme Court decision;
5. The pond was excavated from uplands and material was sidecast in uplands whereas the district maintains these activities occurred in a wetland area; and
6. The district's decision is not in accordance with 33 CFR Part 320.4 (g) in that it does not allow for reasonable use of this private property.

## BACKGROUND INFORMATION:

On 13 June 2007, the Philadelphia District ("the district") denied an application for a Department of the Army ("DA") permit submitted by Mr. Byrd requesting authorization for the following activities:

a) the prior discharge of fill material into 0.4 acres of tidal emergent wetlands for construction of a road to the Great Egg Harbor River;
b) the prior discharge of fill material into 0.2 acres of emergent wetlands for construction of a beach adjacent to the river;
c) the prior discharge of dredged material into 0.5 acres of forested wetlands to create a 0.75-acre pond, including discharges associated with mechanized landclearing, grading and berm construction; and
d) an existing 4 foot by 8 foot timber dock and a proposed 8-foot by 109-foot fixed main dock along with one 8-foot by 50-foot fixed and two 4-foot by 50-foot fixed finger docks to create three boat slips. Mechanical boat lifts were proposed in each slip, along with two separate boat lift piles and an ice breaker piling.

It should be noted that the 4 foot by 8 foot dock was no longer in the river during the 11 December 2007 site inspection, despite the fact that the district indicated in a 24 May 2006 letter to the appellant's attorney that the structure was authorized by the "grandfathering" provision found at 33 CFR 330.3 (b).

The 50-acre property is identified as Lot 1, Block 8301 and is located at 1329 Somers Point-Mays Landing Road, Egg Harbor Township, Atlantic County, New Jersey.

In conjunction with this decision, the district directed Mr. Byrd to restore 1.1 acres of waters of the United States by 26 October 2007 to pre-construction topographic and vegetative conditions in accordance with a specific set of guidelines. However, since Mr. Byrd elected to appeal the district's decision, he has been relieved of the requirement to complete the restoration work by that date.

The district's decision represented the culmination of a process that began with a 21 October 1998 letter from the National Park Service ("NPS") to the district pursuant to a report to NPS from a recreational boater in the Great Egg Harbor River that a roadway and beach area were being constructed in wetlands. The district conducted its initial site investigation on 4 February 2000 and performed several follow-up inspections during the ensuing weeks. On 9 November 2000, the district accepted an application for a DA permit seeking authorization for the work described above. The district issued a public notice describing the work on 21 March 2003 for a 30-day comment period. Two years passed before the district received a completed response from the applicant's attorney to letters of objection from the U.S. Environmental Protection Agency, National Marine Fisheries Service, U.S. Fish & Wildlife Service, and NPS.

In early 2006, the district presented the appellant's attorney with the option of potentially authorizing the road under the Nationwide General Permit program and the proposed dock under an existing state programmatic general permit, while also allowing the applicant to maintain a 0.25-acre portion of the pond provided the appellant restored and/or created 0.5 acres of wetlands from originally disturbed wetlands and/or uplands. By letter dated 7 July 2006, the attorney rejected the district's offer and requested that the district proceed to a decision on the permit application in its existing state. By letter dated 31 January 2007, the

applicant's father offered to deed a five-acre property to the district as compensation for wetland infringements; the district decided not to accept this offer and proceeded to deny the permit application.

**INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:**

a) The district provided a copy of the administrative record, which was reviewed and considered in the appeal

b) The appellant's agent, Lucy Byrd, submitted information by letter dated 12 January 2008. The information includes her comments and analysis of information already contained in the administrative record. This submittal was accepted as clarifying information in accordance with 33 CFR Part 331.7 (e).

**DECISION:**

The appellant's request for appeal does not have merit. The administrative record and current Corps policies support the district staff's conclusions regarding the scope of jurisdictional activities on the site and the district's decision in this matter.

**EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:**

**First Accepted Reason for Appeal:** The Philadelphia District should not have denied the permit application because the roadway referenced in the district's decision was pre-existing, constructed over 60 years ago, and never widened.

**Determination—this reason for appeal does not have merit.**

The district extensively investigated NPS's 1998 allegation that a roadway had recently been constructed through emergent wetlands on the applicant's property to the vicinity of the river's edge. As indicated in the district's decision document, its investigation revealed the historic presence of a roadway on aerial photographs dating back to 1940. However, the district indicates that much of the road in question was barely discernible in a 1983 aerial photograph, and that aerial photographs from 1991 and 1995 indicated that wetlands existed in the path of much of the previously existing road. Based upon this information, and the initial information that NPS provided, the district concluded in 28 November 2004 Memorandum for the Record that unauthorized fill material had been placed in wetlands to construct the existing road and widen the pre-existing road sometime between 14 March 1995 and 21 October 1998. The district's analysis satisfactorily supports its conclusion set forth in said memorandum. Regarding the decision to deny the permit application, the district determined that discharges of fill material into waters of the United States associated with road construction did not comply with the Section 404 (b)(1) of the Clean Water Act Guidelines. In accordance with 33 CFR Part 323.6 (a), a permit must be denied automatically if a discharge of dredged or fill material

is found to be in non-compliance with the Guidelines. Therefore, the decision is fully supported by applicable regulations.

**Second Accepted Reason for Appeal:** Maintenance of the road did not result in fill material being placed in wetlands, and maintenance activities did not require a Department of the Army permit in accordance with 33 CFR Part 323.4 (a)(2).

**Determination—this reason for appeal does not have merit.**

The district contends that the appellant constructed a road and widened a portion of an existing road between 14 March 1995 and 21 October 1998 while the agent contends that only maintenance work was performed on the road without widening it in 1996-1997.

Section 404 (f)(1)(B) of the Clean Water Act and 33 CFR Part 323.4 (a)(2) exempt from Clean Water Act jurisdiction discharges of dredged or fill material into waters of the United States for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures. Contrary to the assertions of the appellant and his agent, the private roadway on the appellant's property is not a causeway, nor is it a transportation structure. Therefore, any maintenance activities on this privately owned road that involved discharges of dredged or fill material into waters of the United States required authorization pursuant to Section 404 of the Clean Water Act. As stated in the preceding section of this decision document, the administrative record supports the district's conclusion that the appellant discharged fill material into wetlands to construct a roadway and widen a pre-existing road.

**Third Accepted Reason for Appeal:** The district erred by requiring removal of a dock that was pre-existing and should have been allowed to remain in the waterway in accordance with Title 16, U.S. Code Part 1281.

**Determination—this reason for appeal does not have merit.**

Title 16, U.S. Code Part 1281 (a) states as follows:

> "Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features. Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area."

The Great Egg Harbor River, which is adjacent to the project site, is a designated National Wild & Scenic River. The agent contends that under this law, the district should have allowed the appellant to retain what she describes as a previously existing dock in the river. The appellant's attorney stated in an 8 December 2003 letter that this dock was 38 feet long and that a district representative verbally ordered its removal in 2000. In its 28 November 2004 Memorandum for the Record, the district indicates this dock was not present in the waterway during its initial inspection on 4 February 2000, and no one from the district ordered its removal. Therefore, this point is rendered moot. Nevertheless, the above cited law does not authorize construction of docks in navigable waterways; such authorization is necessary under Section 10 of the Rivers and Harbors Act of 1899.

**Fourth Accepted Reason for Appeal:** The pond on the site is not a jurisdictional water of the United States under the Rapanos Supreme Court decision.

**Determination—this reason for appeal does not have merit.**

The Rapanos Supreme Court decision does not apply to this permit action because the applicant has not requested a new Approved Jurisdictional Determination for the pond in the aftermath of the 5 June 2007 issuance of joint guidance by the Corps and USEPA. The district's analysis and administrative record sufficiently documents that activities associated with the pond construction were jurisdictional under the Clean Water Act. The district issued an Approved Jurisdictional Determination to the appellant on 12 August 2003, which the appellant did not appeal and which remains valid until 12 August 2008 in accordance with applicable Regulatory guidance. This action occurred before the U.S. Supreme Court issued its decision in the Rapanos and Carabell cases.

**Fifth Accepted Reason for Appeal:** The pond was excavated from uplands and material was sidecast in uplands whereas the district maintains these activities occurred in a wetland area.

**Determination—this reason for appeal does not have merit.**

The appellant's agent references an 8 June 1995 Letter of Interpretation ("LOI") from the New Jersey Department of Environmental Protection ("NJDEP") that states "freshwater wetlands, waters and transition areas are not present within the proposed area of disturbance" of a survey plan for the upland residence on the site. This LOI, however, did not apply to the area where the pond was constructed. In fact, the survey plan in question as approved by NJDEP shows wetlands of an unspecified extent in the location where the pond was subsequently constructed, and marsh land along the route of the roadway leading to the river's edge. The district examined historic aerial photography of the property and collected soil and vegetation information during a 23 February 2000 site inspection. On the basis of that information, it determined that construction of the pond partially occurred within a formerly existing freshwater wetland, and excavated material was sidecast into wetlands. The district's findings in this regard are supported by the administrative record.

**Sixth Accepted Reason for Appeal:** The district's decision is not in accordance with 33 CFR Part 320.4 (g) in that it does not allow for reasonable use of this private property.

**Determination—this reason for appeal does not have merit.**

As part of its final decision, the district determined that discharges of fill material into waters of the United States associated with pond and beach creation and road construction did not comply with the Section 404 (b)(1) of the Clean Water Act Guidelines. In accordance with 33 CFR Part 323.6 (a), a permit must be denied automatically if a discharge of dredged or fill material is found to be in non-compliance with the Guidelines. The provisions of 33 CFR Part 320.4 (g) do not apply to those aspects of this permit action since the decision to deny authorization is prescribed by regulation. Regarding the proposed dock construction, NPS indicated they believe it would have an adverse effect on the resources of the Great Egg Harbor River, and that the project site is in a section of the river that is designated as "scenic". They object to permit issuance based upon potential adverse impacts to the scenic viewshed and to the coastal ecosystem. Also, the New Jersey Department of Environmental Protection has not authorized the dock and has not made the required determination that this dock construction is consistent with the federally-approved Coastal Zone Management Program ("the CZMP"). There is no evidence in the administrative record that the appellant has submitted the required certification of compliance with the CZMP to the State of New Jersey. The provisions of 33 CFR 325.2 (b)(2)(ii), preclude issuance of a DA permit for dock construction at this time.

Consideration of reasonable use of private property is one of several policies and regulations governing the review of DA permit applications. The overarching framework governing review of DA permit applications is the public interest review process found at 33 CFR 320.4 (a)(1). The public interest review process requires an evaluation of the probable impacts, including the cumulative impacts, of a given project upon the public interest. For each permit decision, the reasonably foreseeable benefits must be evaluated and balanced against potential detriments. In the present case, NPS strongly objected to issuance of a DA permit, citing the anticipated adverse impacts of the dock and its usage upon this scenic portion of the Great Egg Harbor River, which was declared a National Wild & Scenic River by Congress on 1992. Utilizing NPS's input, the district analyzed the potential detriments to the resource versus the potential benefits of the dock and the appellant's right to reasonable private use of his property. The district properly followed all relevant regulations and procedures, and the decision document contains the required analysis supporting the finding that issuance of a permit for the proposed dock would be contrary to the public interest.

**OVERALL CONCLUSION:**

I find that this request for appeal does not have merit, and I hereby uphold the district's decision in this matter. Accordingly the administrative appeals process for this permit action is hereby concluded.

TODD T. SEMONITE
Brigadier General, USA
Commanding