

## ADMINISTRATIVE APPEAL DECISION

Tri-City Properties, LLC; FILE NO. CENAO-2006-5097

### NORFOLK DISTRICT

3 October 2008

**Review Officer:** Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division

**Appellant:** Tri-City Properties, LLC

**Appellant's agents:** Joe Corrigan and Jerry Stouck, Greenberg Traurig, LLP, Attorneys at Law

**Date of Receipt of Request for Appeal:** 1 May 2008

**Date of Acceptance of Request for Appeal:** 29 May 2008

**Appeal Conference/Site Visit Date:** 19 June 2008

#### **NAD-ACCEPTED REASONS FOR APPEAL:**

NAD accepted the following reasons for appeal as detailed by the agent in the attachment to the Request for Appeal dated 1 May 2008:

1. The decision is contrary to the factual record;
2. The decision was arbitrary and capricious;
3. The decision was not in accordance with the law due to omissions of material fact; and
4. The District incorrectly applied the 404(b)(1) guidelines.

#### **SUMMARY OF DECISION:**

The appellant's request for appeal does not have merit. The administrative record and current Corps regulations and policies support the district's conclusions regarding its decision on this matter.

#### **BACKGROUND INFORMATION:**

Tri-City Properties, LLC is appealing the Norfolk District's decision to deny its permit request for placement of fill material into approximately 181.3 acres of federally regulated wetlands for the proposed Centerville Property Development on a 428 acre parcel located in the Greenbrier region of the City of Chesapeake, Virginia. The proposed project purpose is to develop a mixed use community to support the expanding commerce and employment center around the I-64 interchange.

The original wetland delineation at the site was conducted in 1994 by Law Environmental and Engineering Services. In 1998, the Norfolk District (NAO) disagreed with the delineation, which resulted in an additional 40 acres of wetlands being identified by NAO as jurisdictional. In the late 1990's, EPA investigated an alleged violation of Section 404 of the Clean Water Act (CWA) at this site. The allegations related to illegal ditching, but were never resolved. On 14 September 2000, a joint permit application was submitted to NAO and the Virginia Department of Environmental Quality (DEQ)

proposing to ditch and/or fill approximately 144.6 acres of wetlands. NAO determined the application was incomplete and requested additional information. The applicant never provided the information and, consequently, NAO withdrew the permit application from further processing. The DEQ issued a permit for this request on 21 November 2003 authorizing impacts to approximately 144.6 acres of forested wetlands under the States regulatory program. NAO received a new permit application on 21 January 2005 for the same work authorized by DEQ. NAO coordinated with EPA regarding their pending investigation into the alleged violations and EPA did not object to NAO's processing of the application. NAO determined the application to be complete and subsequently issued a public notice on 1 February 2005. NAO received several letters of objection from individuals, organizations and resource agencies. EPA recommended denial of the permit and initiated its elevation procedures under Section 404(q). Between March 2005 and June 2006, NAO held numerous site visits to review an area determined by DEQ to be uplands. NAO, however, ultimately issued a JD for the site which contained an additional 36.7 acres of wetlands from what was originally identified, increasing the proposed impacts under federal jurisdiction from 144.6 acres to 181.3 acres. As a result, NAO issued a revised PN on 20 January 2007 to reflect the increase in proposed wetland impacts. The administrative record shows considerable correspondence and meetings between NAO and the applicant in the period of time leading up to the 3 March 2008 permit denial related to onsite and offsite alternatives, onsite avoidance and minimization, proposed mitigation, and cost analyses. The appellant submitted its request for appeal on 1 May 2008.

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

- 1) The district provided a copy of the administrative record, which we reviewed and considered in the evaluation of this request for appeal.
- 2) With the request for appeal, the appellant provided documents containing its comments and analysis of the district's decision to deny the permit. We did accept some submittals as clarifying information in accordance with 33 CFR 331.7 (e); however, we did not accept other submittals since they contained information that was not in the administrative record or were prepared after NAO's decision to deny the permit.

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

**Appeal Reason 1:** The decision is contrary to the factual record;

**Finding:** This reason for appeal does not have merit.

**Action:** No action required.

**Rationale:** The administrative record shows that NAO's decision is not contrary to the factual record. The decision to deny the permit was based upon the appellant's proposal not meeting the 404(b)(1) guidelines and because it is contrary to the public interest. The administrative record's Statement of Findings and Environmental Assessment details the District's rationale for their decision. See discussion below.

**Appeal Reason 2:** The decision was arbitrary and capricious.

**Finding:** This reason for appeal does not have merit.

**Action:** No action required.

**Rationale:** The administrative record shows that NAO's decision was not arbitrary and capricious since it was based on sound logic, analysis, and factual information. The appellant failed to rebut the presumption that a less environmentally damaging practicable alternative exists and that the project as proposed was contrary to the public interest due to environmental impacts. This failure is set forth in the administrative record. Therefore, NAO's decision was neither arbitrary nor capricious. See discussion below.

**Appeal Reason 3:** The decision was not in accordance with the law due to omissions of material fact.

**Finding:** This reason for appeal does not have merit.

**Action:** No action required.

**Rationale:** The administrative record shows that NAO's decision was in accordance with the law since it did not omit material facts.. The appellant failed to clearly rebut the presumption that a less environmentally damaging practicable alternative exists and the project as proposed was contrary to the public interest due to environmental impacts. This failure is supported in the administrative record by the appellant's failure to respond to letters from the District requesting less environmentally damaging alternatives. The decision that the issuance of a permit for this proposed work would be contrary to the public interest is supported in the Environmental Assessment which details impacts the proposed construction would have to conservation, water quality, wetlands, fish and wildlife. Therefore, the District's decision was in accordance with the law and the administrative record contains the material facts to support their decision. See discussion below.

**Appeal Reason 4:** The District incorrectly applied the 404(b)(1) guidelines.

**Finding:** This reason for appeal does not have merit.

**Action:** No action required.

**Rationale:** Based on the administrative record, the appellant failed to clearly rebut the presumption that an alternative with less adverse impact on the aquatic ecosystem exists for this non-water dependent activity. Therefore, the district correctly denied the permit based on the 404(b)(1) guidelines. See discussion below.

**Discussion:**

Public Interest:

The administrative record provides detailed documentation supporting that the impacts from the proposed project would be contrary to the public interest. In accordance with 33 CFR 320.4(a)(1):

The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof...

A detailed discussion in the Statement of Findings and Environmental Assessment provides numerous reasons why the project is not in the public interest. The overall reasons relate to the adverse impacts that would occur on conservation, wetlands, general environmental concerns, flood hazards, water quality, and fish and wildlife values. The administrative record reflects that the benefit of the applicant's project purpose on the local and regional economy, by developing a mixed use community to support the expanding commerce around the I-64 interchange, does not outweigh its detriments on conservation, wetlands, general environmental concerns, flood hazards, water quality, and fish and wildlife values. The administrative record contains numerous comments from concerned citizens, environmental groups and federal resource agencies supporting denial of this permit because of the adverse environmental impacts that would result from issuance of a permit for the appellant's proposal. The wetlands on the site are part of a larger system which has been identified by the state and EPA as locally significant due to the increased development in the area. The sites wetlands ecosystem provides numerous environmental functions to the region such as habitat, flood storage, water quality and nutrient retention. These benefits are vital to the surrounding ecosystems associated with the Gum Swamp/North Landing River watershed and would be impacted if a permit were issued for the proposed development. As stated in 33 CFR 320.4(b)(2) the following wetlands perform functions that are important to the public interest:

- (i) Wetlands which serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species;
- (iii) Wetlands the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;
- (v) Wetlands which serve as valuable storage areas for storm and flood waters;
- (vi) Wetlands which are ground water discharge areas that maintain minimum baseflows important to aquatic resources and those which are prime natural recharge areas;

- (vii) Wetlands which serve significant water purification functions; and
- (viii) Wetlands which are unique in nature or scarce in quantity to the region or local area.

In accordance with 33 CFR 320.4(b)(4):

no permit will be granted which involves the alteration of wetlands identified as important by 33 CFR 320.4(b)(2)...unless the district engineer concludes, on the basis of the analysis required in paragraph (a) of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource. In evaluating whether a particular discharge activity should be permitted, the district engineer shall apply the section 404(b)(1) guidelines (40 CFR Part 230. 10(a) (1), (2), (3)).

Consequently, I find that the administrative record supports the NAO's determination that this proposal is not in the public interest since the benefits of the proposed alteration of these wetlands and their functions do not outweigh the damage that would occur to the wetlands resource if a permit was issued for the appellant's proposal.

404(b)(1) Guidelines:

The administrative record provides detailed documentation supporting NAO's conclusion that the appellant's proposal does not meet the 40 CFR Part 230 Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material ("the guidelines"). Part 230.10(a) clearly states that "except as provided under section 404(b)(2), 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."

Part 230.10(a)(3) states:

Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or sighting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge, which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

As the proposed work is not water dependent, the burden is on the appellant to rebut the presumption that other alternatives with no impacts or impacts less than those proposed exist. Documentation in the administrative record provided by the appellant fails to clearly provide justification and support that an alternative with less impact on the environment that would meet its project purpose, as well as being practicable and profitable, does not exist.

The record clearly shows that the District requested that the appellant look at alternatives to develop a 90 acre upland portion of the property. By a 5 September 2007 letter, the District stated that "An alternative with no wetland impact was not included (in the appellant's alternatives analysis). We [NAO] previously asked for an evaluation of development causing no wetland impacts (i.e., an alternative evaluating the best use of the 90 acres of upland)." In closing, the letter states that as discussed in a meeting on 20 August, 2007 with the District Commander, "an alternative that 1) eliminates Plantation Woods Parkway from Centerville Turnpike through the central portion of the site to Elbow Road and the utilities in the same corridor; and 2) utilizes the 90 acres of uplands that are predominantly agricultural fields and the upland pockets in the north along with some wetland impacts to make the pockets useable, may be permissible." Neither the administrative record nor any clarifying information provided by the appellant show that it provided an analysis of this alternative. The appellant only provided information on various alternatives which would have similar impacts to wetlands and none of those alternatives looked at exclusively building out the 90 acre upland portion of the site. Alternatives including selling the 90 acres, using it for development in conjunction with the rest of the site or using the 90 acres as a mitigation area were discussed. No documentation to support the determination that the 90 acres was or was not a practicable alternative exists in the administrative record because it appears that none was provided to NAO.

The focus of discussions on alternatives by the appellant at the appeals conference and in the administrative record refer to potential zoning issues prohibiting the use of an alternative for development of only the 90 acre upland portion of the site or other alternatives that may have less adverse impact on the aquatic ecosystem. Discussions between the District and the appellant were based upon the potential or lack of potential for the appellant to get the required zoning for specific alternatives with less impact to wetlands. The burden of demonstrating that these were not practicable alternatives is on the appellant. Documentation provided by the appellant regarding zoning restrictions was based on speculation and alleged conversations. Its correspondence was not supported by written documentation clearly demonstrating that specific alternatives were not feasible or that specific conditions would be required from the City.

The appellant provided cost analyses based upon alternatives it chose. It based its costs on proffers and requirements of zoning approvals based on its preferred alternative. The appellant exchanged several versions with the District, but it is not clear that the information in the cost analyses is accurate. Regardless, it still appears that less damaging alternatives are available which were not included in the submitted cost analyses. In accordance with 40 CFR 230.10(a)(2) "an alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant, which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered." The administrative record clearly shows that the appellant failed to provide adequate support that other alternatives are not practicable.

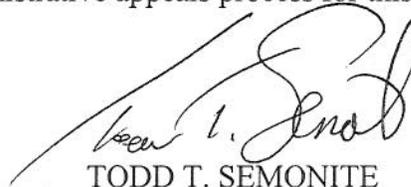
After a review of the administrative record, I find that it supports the District's decision to deny the permit based upon the fact that the appellant failed to adequately rebut the presumption that practicable alternatives which would have less adverse impact on the aquatic ecosystem than the proposed discharge are available.

CENAD-PD-PSD-O

SUBJECT: Tri-City Properties, LLC Appeal Decision, Norfolk District File No. CENAN-2006-5097

**OVERALL CONCLUSION:**

For the reasons stated above, the appeal does not have merit. I hereby uphold the district's decision in this matter, and accordingly the administrative appeals process for this permit action is hereby concluded.

A handwritten signature in black ink, appearing to read "Todd T. Semonite", written in a cursive style.

TODD T. SEMONITE  
Brigadier General, USA  
Commanding