U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION
Date: 23 July 2008

ADMINISTRATIVE APPEAL DECISION

TOWN OF WARRENTON
NORFOLK DISTRICT FILE NAO-06-V0553

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

Appellant: Town of Warrenton

Appellant's agent: John K. Byrum, Jr., Esq., Troutman Sanders LLP Attorneys at Law

Date of Receipt of Request for Appeal: 15 February 2008

Date of Acceptance of Request for Appeal: 22 February 2008

Appeal Conference/Site Visit Date: 26 March 2008

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 15 February 2008:

1. The Norfolk District's decision erroneously overestimates the environmental impact of the proposed pond;
2. The Norfolk District's decision underestimates the need for the proposed pond;
3. The Norfolk District's decision erroneously applies the 404 (b)(1) Guidelines to find that the Town of Warrenton failed to demonstrate sufficient avoidance and minimization of impacts; and
4. The Norfolk District's decision misapplies Corps regulations, guidance and policy.

SUMMARY OF DECISION:

As discussed below, this request for appeal does not have merit. The administrative record supports the conclusion of the Norfolk District ('the district") that the appellant's proposal does not comply with the Section 404 (b)(1) Guidelines ("the Guidelines") because the appellant did not rebut the presumption at 40 CFR Part 230.10 (a) that practicable alternatives are presumed to exist for proposals involving such discharges into special aquatic sites for non-water dependent activities. Also, the administrative record supports the district's Statement of Findings and Environmental Assessment ("SOF/EA"), that the project would result in changes to the flow regime of the stream, increased sedimentation, and degradation of habitat and water quality both at the project site and downstream.

BACKGROUND INFORMATION:

On 18 December 2007, the district denied an application for a Department of the Army ("DA") permit submitted by the Town of Warrenton ("the town") requesting authorization for the discharge of fill material into approximately 607 linear feet of Great Run Tributary, a perennial stream channel in conjunction with the construction of Warrenton Park. The Development Plan for the 65-acre site called for construction of an indoor natatorium and fitness facility, sports fields, a skate park, an outdoor in-line skating rink, a recreational and education pond, bike trails, an amphitheatre and associated parking, access road and facilities. The town constructed the first phase of the project, including the athletic fields, skate park and skating rink in late 2004/early 2005 and constructed the second phase, namely the indoor natatorium and exercise facility, in 2006. None of these project elements were sited in waters of the United States, and therefore a DA permit was not required for the construction of these features.

A pre-application meeting was held on 23 May 2005 among the appellant, its environmental consultant, the district and the Virginia Department of Environmental Quality ("DEQ"). The appellant submitted a joint permit application to the district, DEQ, and the Virginia Marine Resources Commission on 8 March 2006. The appellant responded to initial comments from the district and DEQ in a 9 June 2006 letter. In an 8 August 2006 letter, the district stated it believed that the project would have more than minimal adverse environmental impacts and that the pond could be eliminated from the project entirely or relocated into upland portions of the park site. The district issued a public notice for the proposal on 25 September 2006 for a 30-day comment period that was subsequently extended by an additional 15 days. The public notice described the original proposal to discharge fill material in approximately 657 linear feet of existing stream channel to create a recreational pond and sediment forebay, along with compensation to include off-site stream restoration, stream buffer restoration along 1,020 linear feet of perennial stream channel and 230 linear feet of intermittent stream channel.

In an 18 December 2006 letter, the district advised the appellant that its preliminary recommendation was to deny the permit application for several reasons, including lack of demonstration that the proposal is the least environmentally damaging practicable alternative. The district reiterated its belief that the pond could be constructed off-line from the stream in an upland portion of the site.

During the ensuing months, the appellant attempted to address the district's concerns and eliminated the proposed sediment forebay from the pond to reduce stream impacts to 607 linear feet. In a 23 March 2007 letter, DEQ stated its recommendation that the Virginia Water Protection ("VWP") permit be denied for a variety of environmental reasons. Several meetings were held among the district, the appellant and its environmental consultant, culminating in a 14 December 2007 meeting attended by the Norfolk District Commander in an effort to broker a mutually agreeable solution. Ultimately, the appellant believed that none of the alternatives offered by the district were acceptable, and on 18 December 2007 the district issued its decision. Subsequently, on 21 December 2007, DEQ issued a draft VWP permit.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

The district provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.

EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:

First Accepted Reason for Appeal: The Norfolk District's decision erroneously overestimates the environmental impact of the proposed pond.

Discussion: In the request for appeal, the appellant's agent discusses several portions of the district's SOF/EA and suggests that some of the conclusions are unsupported by evidence. The agent asserts that the town adopted measures to avoid and minimize adverse impacts to the stream, and that the project would in many respects improve the stream channel.

Second Accepted Reason for Appeal: The Norfolk District's decision underestimates the need for the proposed pond.

Discussion: The agent states his belief that the district did not adequately consider the desire of the town to increase recreational opportunities for town residents within its corporate boundaries through construction of the proposed pond. The SOF/EA notes that there are ponds and lakes currently being utilized elsewhere in Faquier County for public fishing and/or boating. The agent purports that the SOF/EA discounts the need for the proposed pond to irrigate adjacent athletic fields; however the document concludes that the applicant did not adequately demonstrate the need for irrigation of the athletic fields when irrigation is not required for other fields in the county.

Third Accepted Reason for Appeal: The Norfolk District's decision erroneously applies the 404 (b)(1) Guidelines to find that the Town of Warrenton failed to demonstrate sufficient avoidance and minimization of impacts.

Discussion: The agent states the district misapplied the Guidelines, specifically in that the town failed to adequately demonstrate avoidance and minimization of potential impacts from pond construction. The agent elaborates on the consideration of alternative sites for the park, stating that some alternative sites were rejected because they could not accommodate the features of the Development Plan, and others were rejected because construction of the park would have resulted in greater adverse impacts to jurisdictional waters of the United States. With regard to on-site alternatives, the agent questions the district's findings that an off-line pond would satisfy the project purpose. The district's decision document includes an extensive discussion of on-site alternatives, and concludes that the appellant did not reexamine the layout of facilities in upland portions of the park with an eye toward avoiding and minimizing impacts to the stream channel.

Fourth Accepted Reason for Appeal: The Norfolk District's decision misapplies Corps regulations, guidance and policy.

Discussion: The agent believes the provisions of 33 CFR 320.4 (j)(1) favor permit issuance and alleges that the district contravened the provisions of 33 CFR 320.4 (j)(2) by questioning the need for the project where the town has made a local land use decision. It should be noted that the district is not denying use of the land; it is requiring a sequential process of avoiding, minimizing, and then finally compensating impacts to the stream only if such impacts are unavoidable. The agent also states that the district "ignores" the issuance of the VWP permit and water quality certification pursuant to Section 401 of the Clean Water Act; however, the record shows the district denied the permit application on 18 December 2007 whereas the VWP permit was not issued until 21 December 2007. As stated previously and analyzed below, the district correctly determined that the project does not comply with the Guidelines. Also, the district was not required to await issuance of the water quality certification before making its decision to deny this permit application.

DETERMINATION AND OVERALL CONCLUSION:

The overarching controlling factor in the district's decision to deny the permit application is the lack of compliance with the Guidelines. Specifically, the district determined that the applicant did not rebut the presumption at 40 CFR Part 230.10 (a) that practicable alternatives exist to proposed discharges of dredged or fill material into special aquatic sites for non-water dependent activities. The district's decision document states that the appellant's stated project purpose is to provide irrigation for adjacent soccer fields, stormwater management, and to provide recreation and education for local residents. Although the project purpose involves the usage and management of water, these aspects of the project are considered to be non-water dependent activities in that they do not require proximity to, or siting within, a special aquatic site to fulfill the basic purpose of the project. In this case, discharges of fill material were proposed into a riffle and pool complex at the pond location, the existence of which is referred to in Part D of the district's SOF/EA. Riffle and pool complexes are considered to be special aquatic sites in accordance with 40 CFR Part 230.45; consequently, the requirements of the Guidelines are more stringent as compared to projects that are not in special aquatic sites.

The district's SOF/EA also demonstrates that the proposal is expected to result in adverse environmental impacts to the perennial stream which is proposed to be altered under this proposal. The district correctly factored these impacts into its determination that the project does not comply with the Guidelines.

The administrative record and the SOF/EA adequately support the district's finding that the presumption was not rebutted by the applicant. As stated at 40 CFR Part 230.10 (a), 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. Since the appellant has not rebutted the presumption that practicable alternatives exist for its proposal, the district was required by regulation to deny the permit application exclusive of other parameters such as private and public need for the project, its anticipated environmental

impacts, and evaluation of public interest factors. The district's administrative record supports the findings set forth in its SOF/EA.

I hereby uphold the district's decision in this matter, and accordingly the administrative appeals process for this permit action is hereby concluded.

TODD T. SEMONITE
Brigadier General, USA
Commanding