

**U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION**

Date: 7 March 2006

ADMINISTRATIVE APPEAL DECISION

JOHN GRIER CONSTRUCTION COMPANY
NORFOLK DISTRICT FILE NO. 02-V1749

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

Appellant: John Grier Construction Company

Appellant's Agent: Marina Liacouras Phillips, Esq.

Date of Receipt of Request for Appeal: 2 September 2005

Date of Acceptance of Request for Appeal: 17 November 2005

Appeal Conference/Site Visit Date: 1 December 2005

NAD-ACCEPTED REASONS FOR APPEAL:

NAD accepted the following reasons for appeal for consideration, as enumerated in the agent's 7 October 2005 letter clarifying the appellant's original request for appeal:

- 1) The denial of the permit application was an incorrect application of law, regulation or officially promulgated policy.
- 2) The denial of the permit application is the result of an omission of material facts and is not supported by the record.

BACKGROUND INFORMATION:

On 3 September 2002, the Norfolk District received an application for an after-the-fact Department of the Army ("DA") permit for construction of a gravel path through non-tidal forested wetlands adjacent to the Chickahominy River in James City County, Virginia. The constructed path impacted approximately 11,892 square feet (0.27 acres) of wetlands. The project purpose is to provide pedestrian access to the river from the upland portion of a 17.85-acre residential lot, known as Barrett's Ferry Lot #1, which is one of eight subdivided residential lots on the overall site within the appellant's ownership at the time of the application.

The district issued a public notice for this project on 18 October 2002 for a 30-day comment period. In their response to the public notice, the U.S. Fish & Wildlife Service ("The Service") Virginia Field Office recommended that the appellant restore the wetlands to their pre-existing condition by removing the gravel path. The Service pointed out that if the appellant had applied for a permit prior to constructing the path, they would have recommended that a boardwalk be constructed in lieu of the gravel path, thus avoiding impacts to wetlands. If the district authorized the permit, the Service recommended the appellant provide compensation at a 3:1 ratio for the 0.27 acres of impacted wetlands. The U.S. Environmental Protection Agency ("USEPA), Region III elected not to provide comments.

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On 4 February 2003, the Norfolk District received a submittal from the appellant, which included aerial photographs from 1976 and 1990. The appellant provided the aerial photographs to support their contention that the gravel was placed atop a pre-existing logging road; however, the Norfolk District subsequently determined that the photographs did not conclusively confirm the previous existence of the logging road. The submittal also included a Preliminary Opinions of Value from a local real estate appraiser and an avoidance, minimization and alternatives analysis. The Norfolk District requested the analysis to assist in their review of the permit application and to utilize the information contained therein in their determination of compliance with the Section 404 (b)(1) of the Clean Water Act Guidelines ("Section 404 (b)(1) Guidelines") as part of the final decision on the permit application.

During the ensuing several months, the Norfolk District reviewed the submitted information and awaited the Commonwealth of Virginia's decision on the appellant's application for a water protection permit. On 30 October 2003, the State Water Control Board provided the appellant with an executed copy of a consent order wherein the appellant agreed to pay a civil charge of \$10,000 to settle a notice of violation issued on 1 October 2002.

On 18 March 2004, the Commonwealth of Virginia Department of Environmental Quality ("VADEQ") notified the appellant of their preliminary decision to tentatively deny the application for the Water Protection Permit. On 23 April 2004, the Norfolk District informed the applicant that it was unlikely that the project could be permitted since the proposal is not the least environmentally damaging practicable alternative under the Section 404 (b)(1) Guidelines. Specifically, the applicant had not provided the Norfolk District with information demonstrating that construction of a pile-supported timber boardwalk through the non-tidal wetlands is *not* a practicable alternative to the existing fill path.

On 1 July 2004, a meeting was held involving the Norfolk District, the appellant, VADEQ and the agent during which a path forward toward resolution of outstanding issues was discussed. During the meeting, the appellant restated his position that he improved an existing pathway that was historically present on the property by placing gravel on top of it. Subsequent to the meeting, the agent provided the Norfolk District with aerial photographs of the project vicinity between 1953 and 1990, and stated her position that the pathway was evident on the aerial photographs. A USEPA Region III representative reviewed the aerial photographs and was unable to identify the existence of the path in question. The Norfolk District so informed the agent on 18 October 2004.

The Norfolk District and two VADEQ representatives conducted a site inspection on 2 December 2004. The purpose of the site visit was to dig through the recently placed gravel fill in an effort to determine whether a filled path had previously existed, as indicated by the appellant. However, the Norfolk District and VADEQ were unable to find evidence of a previously existing path, since the profile of the soil underlying the path was the same as the profile of the soil in the adjacent wetland area.

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On 6 May 2005, the Norfolk District Engineer denied the appellant's permit application because the placement of fill did not comply with the Section 404 (b)(1) Guidelines, and directed the appellant to remove all unauthorized fill material from the wetlands and restore the natural contour of the land prior to 19 August 2005. The appellant responded in a 31 May 2005, questioning aspects of the District Engineer's decision and indicating that he had sold the property in question. The District Engineer responded in a 7 July 2005 letter, restating the basis for her decision and providing the appellant with the opportunity to appeal the decision.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

The Norfolk District provided a copy of the administrative record, which was reviewed and considered in the appeal review process along with the results of the 1 December 2005 site inspection and appeal conference.

SUMMARY OF DECISION:

The appellant's request for appeal does not have merit because the Norfolk District Engineer's decision to deny the permit application was a correct application of the laws and regulations governing the Corps of Engineers Regulatory Program. The administrative record supports the District Engineer's decision.

EVALUATION OF THE REASONS FOR APPEAL/APPEAL DECISION FINDINGS:

First Accepted Reason for Appeal—The denial of the permit application was an incorrect application of law, regulation or officially promulgated policy.

Second Accepted Reason for Appeal—The denial of the permit application is the result of an omission of material facts and is not supported by the record.

Determination on the Merits of These Reasons for Appeal—*these reasons for appeal do not have merit:* The appellant and his agent presented four arguments in support of the first accepted reason for appeal, as follows:

- The appellant voluntarily disclosed construction of the gravel path to the Norfolk District after being told that a DA permit was required. They were previously unaware of the requirement for a DA permit. The appellant consulted with James City County, and believed that all necessary permits had been obtained.
- The appellant paid a civil charge of \$10,000 to the Virginia State Treasury and offered to mitigate impacts to wetlands by purchasing 0.54 acres of existing wetlands from the James River Wetland Mitigation Bank at a cost of \$29,700.
- The Norfolk District's Statement of Findings and Environmental Assessment states that the path has no impact on fish, fish habitat, wildlife, endangered birds or animals, historical sites, navigation, shore erosion, water supply or conservation, floodplain values, energy needs, safety, food and fiber production, mineral needs or clean air.

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- Claims of loss of filtration would be valid if the path were constructed of non-water permeable material such as asphalt. However, this path is constructed of loose gravel, which not only permits water filtration, but also is required on all new construction sites in order to allow water drainage and filtration.

The agent believes that the Norfolk District should have resolved this matter by authorizing the completed work under Department of the Army Nationwide Permit No. 32 (NWP #32), since the appellant voluntarily disclosed the violation and offered to provide environmental benefits via the land purchase from the mitigation bank. NWP #32 authorizes any structure, work or discharge of dredged or fill material, remaining in place, or undertaken for mitigation, restoration, or environmental benefit in compliance with the terms of either: (i) a final written Corps non-judicial settlement agreement; (ii) a USEPA order on consent; or (iii) a final federal court decision, consent decree or settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources. In this case, Parts (ii) and (iii) of NWP #32 are not applicable here because we are not dealing with either a final decision, settlement in a USEPA order on consent or a final federal court decision, consent decree or settlement agreement, or non-judicial settlement agreement from a natural resource damages claim. With regard to Part (i), the Norfolk District elected to process the after-the-fact permit application as the appropriate means to resolve this case instead of pursuing a settlement agreement with the appellant. The decision to do so was not unreasonable, was within the zone of discretion delegated to the Norfolk District Engineer by Corps regulations, and was not arbitrary or capricious.

The appellant is correct in his analysis of the conclusions from the Norfolk District's Statement of Findings and Environmental Assessment that the completed work had no appreciable effects upon several environmental and public interest factors. The Norfolk District Engineer, however, denied the permit application because the appellant did not rebut Title 40, CFR Part 230.10 (a)(3)), which states that all practicable alternatives to the proposal which do not involve a discharge of fill material into waters of the United States are presumed to be available, unless clearly demonstrated otherwise by the appellant. Because the permit was denied based upon non-compliance with the Section 404 (b)(1) Guidelines, environmental impacts were a secondary factor in the decision.

The appellant and the agent submitted information at the appeal conference suggesting that the construction of a timber walkway in lieu of the path should not be considered a practicable alternative in light of the value of the property. Title 40, CFR Part 230.10 (a)(2) states that an alternative is practicable if it is capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes. However, the Norfolk District Engineer stated in the Statement of Findings and Environmental Assessment that the appellant had not adequately rebutted the presumption that practicable alternatives were not available. Therefore, the Norfolk District Engineer's decision to deny the permit based upon lack of compliance with the 404 (b)(1) Guidelines was appropriate. Because the decision to deny the permit application was based in part upon lack of compliance with the 404 (b)(1) Guidelines, the filtration issue raised by the appellant is rendered moot.

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The appellant and his agent presented two arguments in support of the second accepted reason for appeal, as follows:

- Removal of the gravel path will require heavy machinery, both to dig out the loose gravel and haul it away from the site. This machinery, by both its size and the space necessary to operate it, will unavoidably damage trees and vegetation along the path. Also, loose and non-compacted soil would then be able to wash off into the Chickahominy River during even moderate rainstorms.
- An elevated boardwalk is not necessary to gain access to the river. The path was never intended as a road. It is not a boat ramp, nor does it lead to docking facilities on the Chickahominy River. Its sole intent was to make viewing of the property more easily accessible while the property was listed for sale.

The agent argued that the Norfolk District Engineer incorrectly applied the Section 404 (b)(1) Guidelines in evaluating construction of a boardwalk as an alternative to the path. As stated previously in this document, the appellant did not sufficiently rebut the presumption that practicable alternatives (including boardwalk construction) existed to the discharge of fill material into a special aquatic site; as such, the Norfolk District Engineer correctly determined that the discharge did not comply with the Section 404 (b)(1) Guidelines. In accordance with Title 33, CFR 320.4 (a), a DA permit will be denied for discharges that do not comply with the Section 404 (b)(1) Guidelines.

Although the appellant argued that construction of a boardwalk is not necessary to gain access to the river, it was correctly judged by the Norfolk District Engineer to be a practicable alternative that could have served the same purpose as the fill path

OVERALL CONCLUSION:

After reviewing and evaluating the entirety of the administrative record provided by the Norfolk District, NAD concludes that the Norfolk District Engineer's denial of the permit application was a correct application of the laws and regulations governing the Corps of Engineers Regulatory Program, and the decision is appropriately supported by the administrative record. NAD hereby finds that the appellant's request for appeal does not have merit.

SIGNED

WILLIAM T. GRISOLI
Brigadier General, USA
Commanding