



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, NORTHWESTERN DIVISION
PO BOX 2870
PORTLAND OR 97208-2870

18 AUG 2006

Program Support Division

Mr. Ira S. Feitelson
Attorney At Law
1467 13th Street SE
P.O. Box 805
Salem, OR 97308-0805

Dear Mr. Feitelson:

I have completed my review of the Request for Appeal by K-D Sand and Gravel, regarding the permit denial made by the Portland District for application file number 19930576.

After evaluating the information provided in your Request for Appeal, the District's administrative record, and the information obtained during the appeal meeting and site visit, I have determined that your appeal does not have merit. Enclosed is a copy of the Administrative Appeal Decision document, which provides the details of my findings for the appeal.

The District Engineer's decision to deny your permit application is upheld. You are welcome to submit a revised permit application and work with the district to develop a project that can be permitted and meet your needs.

If you have any questions about the appeal decision, you may contact my Regulatory Program Manager, Ms. Karen Kochenbach, at 503-808-3888.

Sincerely,

GR
Gregg F. Martin
Brigadier General, US Army
Division Engineer

Enclosure

ADMINISTRATIVE APPEAL DECISION

K-D SAND AND GRAVEL, FILE NO. 199300576

PORTLAND DISTRICT

DATE: 17 August 2006

Review Officer: Mores Bergman, U.S. Army Corps of Engineers, Northwestern Division.

Appellant: K-D Sand and Gravel

Appellants' Representative: Ira Feitelson, Attorney

Receipt of Request For Appeal: December 23, 2005

Appeal Conference and Site Visit Date: May 18, 2006

Background Information: On May 8, 2003, the Corps of Engineers (Corps) Portland District (District) received a permit application from K-D Sand and Gravel for the excavation of gravel from the Willamette River in Polk County, Oregon. The Portland District determined that the proposed project is regulated under Section 10 of the Rivers and Harbor Act of 1899 and Section 404 of the Clean Water Act. The District processed the permit application in accordance with 33 C.F.R. §§ 320-330. On November 30, 2005, the District Engineer, Portland District, denied the permit application because he determined that the proposed project is likely to jeopardize the continued existence of ESA listed species, would be contrary to the public interest, and does not comply with the Environmental Protection Agency's Section 404(b)(1) Guidelines. By letter of December 22, 2005, the appellant's representative, Mr. Ira Feitelson, sent a request for appeal to the Portland District. The appeal was forwarded to the Corps' Northwestern Division on December 23, 2005. The appellants' reasons for appeal are listed below. This appeal was processed in accordance with the Corps of Engineers Administrative Appeal Regulation, 33 C.F.R. Part 331, dated March 28, 2000. Due to seasonal high water conditions at the site, the appellant requested a delay in the site inspection and appeal conference until May 2006. On May 18, 2006, the Review Officer conducted the site visit and appeal conference.

Reasons for Appeal Submitted by Appellant:

Reason 1: Appellant contends the permit denial is based upon inaccurate or incorrect information supplied by the U.S. Department of Interior and National Marine Fisheries Service. The appellant considers the information inadequate and incorrect because it doesn't deal with exactly what the applicant is proposing to do.

Reason 2: The appellant states that he is willing to fully comply with conservation measures as set forth under terms and conditions, however the terms and conditions suggest there is in-water work which is not the case.

Reason 3: The State of Oregon, Department of State Lands, issued a gravel removal permit to K-D Sand and Gravel involving the same piece of property, and based on the same information as the Corps used in making their decision to deny a permit.

Information Received during the Appeal Review and Its Disposition:

The District provided the Review Officer and the appellant with a copy of the administrative record for subject permit denial. This information was considered in the appeal review. Information obtained during the appeal conference and site visit conducted on May 18, 2006 was also considered in the appeal review to the extent that it provided clarification or explanation of the administrative record.

Summary of Decision: The appeal does not have merit. It is found that the Portland District complied with applicable laws and regulations in making their decision and supported their decision to deny the permit with sufficient documentation.

Appeal Decision Findings and Instructions for District Action:

Reason 1: Appellant contends the permit denial is based upon inaccurate or incorrect information supplied by the U.S. Department of Interior and National Marine Fisheries Service. The appellant considers the information inadequate and incorrect because it doesn't deal with exactly what the applicant is proposing to do.

Findings: This appeal reason does not have merit for the reasons contained in the Discussion section below.

Action: No action required by the District regarding this reason for appeal.

Discussion: In the request for appeal dated December 22, 2005, the appellant makes reference to two documents. One is the U.S. Fish and Wildlife Service's (USFWS) comment letter dated February 11, 2004, regarding the applicant's proposed project. The other is the U.S. National Marine Fisheries Service's (NMFS) August 23, 2005 letter providing the Endangered Species Act (ESA) Biological Opinion for the proposed project. In the request for appeal, the appellant points out that these documents discuss such things as the value of shallow waters, that gravel mining causes instability and undercutting of channel banks, impacts of removal of the fish spawning sized material, possible downstream erosion and increased sediments and turbidity caused by gravel mining, and other possible upstream affects from gravel mining. The appellant states that since the proposed gravel mining would only take place on the gravel bar in the dry, and away from the flowing water channel, he does not believe that the impacts listed by the agencies in their documents would occur as a result of his proposed mining operation. The appellant further states that the majority of the August 23, 2005 document talks about possibilities and probabilities and deals with other than the specific site of his project. He further contends that the statements made in the August 23, 2005 report are not backed by scientific data or evidence.

In reviewing the two documents, it is found in the USFWS document of December 22, 2005 does discuss the specific project site, but primarily evaluated impacts to fish and wildlife resources based on past studies that had been performed on gravel mining operations, including sandbar mining, in streams in Washington and Oregon. Several references to sources of information were included in the December 22, 2005 document. As a result of their review, the USFWS recommended that the permit be denied because of expected negative physical and biological impacts due to sediment removal. Although the proposed project will occur in the dry, USFWS determined impacts to listed species are likely to occur during subsequent high flow periods after the mining itself is completed.

In reviewing the NMFS Biological Opinion dated August 23, 2005, it is found that the NMFS determined, in accordance with the ESA, that the proposed project would likely jeopardize the continued existence of the Upper Willamette River (UWR) spring-run Chinook salmon and the UWR Steelhead and result in the adverse modification of critical habitat. The NMFS Biological Opinion also included reasonable and prudent alternatives (RPA), prepared in accordance with the ESA, which they believe, if followed, would avoid jeopardy to the endangered species and their critical habitat. The incidental take statement for the RPA described reasonable and prudent measures necessary as appropriate to minimize incidental take associated with the RPA. These measures include a limited annual volume of mined material, post-mining profile, specific work window, in addition to recommended conservation measures. The NMFS document further concluded that the proposed action would likely affect essential fish habit pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA), and thus provided conservation recommendations to avoid, minimize, and offset adverse impacts to EFH.

The District's Environmental Assessment and Statement of Findings (EA&SF) for the proposed project, dated November 30, 2005, (on page 5) identified expected adverse impacts from gravel mining the sandbar at the project site to include: habitat reduction, destabilization of the channel bed due to do removal of form resistance, removal of spawning size gravel material, downstream erosion due to decreased sediment supply, increased water turbidity due to inundation of excavated mined areas, and alteration of aquatic community composition leading to adverse effects on the food chain.

The District's EA&SF also contains an alternatives analysis (starting on page 10). Section 404 (b)(1) of the Clean Water Act prohibits the discharge of dredge or fill material into waters of the United States unless the proposed project is the least environmentally damaging practical alternative. 40 C.F.R. § 230.10 provides criteria for evaluating alternatives. 40 C.F.R. § 230.10(a) states "Except as provided under 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." Alternatives identified by the District included the "no action" alternative and "other project design" alternatives. The District determined that the applicant did not provide sufficient information to rebut the presumption that less environmentally damaging and more practicable alternatives are not available to meet their project purpose and need. The smaller project design alternative identified in the NMFS Biological Opinion as a RPA was considered by the District, but it also was determined to have more adverse impacts than the no action alternative. The record shows that the District (by letter

of March 2, 2004) did request the applicant to provide an alternatives analysis; however, the District stated that none was provided. The District also evaluated the permit application in accordance with the public interest criteria contained in regulation 33 C.F.R. § 320.4. That section requires, among other things, that alternative locations and methods be considered when there are unresolved conflicts as to resource use. Section 6 of the EA&SF (beginning on page 13) addresses the public interest factors. The District concluded in the EA&SF (page 23) that issuance of the permit is contrary to the public interest, based on their public interest review.

It is determined after review of the documents discussed above that this reason for appeal does not have merit.

Reason 2: The appellant states that they are willing to fully comply with conservation measures as set forth under terms and conditions, however the terms and conditions suggest there is in-water work which is not the case.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District.

Discussion: The conservation measures and terms and conditions that the appellant references are those listed in the Biological Opinion prepared by the NMFS, which is discussed under Reason 1 above. In reviewing the District's administrative record including the EA&SF and letters provided by applicant, it is believed that the District and the commenting agencies fully understand that it is the applicant's intent to perform the proposed gravel mining operation on the sandbar site during that part of the year when the water in the river is low and than sandbar is dry. The administrative record shows that the water level of the Willamette River in the winter and early spring at the proposed project site is normally several feet higher than the sandbar in question and that flooding of the mining site will occur during that period. The project site is located below the ordinary high water mark (OHWM) of the river at that location. The OHWM is the Corps' line of jurisdiction. What is also evident from the administrative record is that the Corps and the resource agencies, including the EA&SF and USFWS, are concerned about the effects that the mining operation, particularly the removal of sand and gravel, will have on the river and the fish and wildlife that use the river after the mining operation is completed. These concerns are discussed under reason 1 above and are addressed in detail in the documents included in the administrative record. Regardless of whether the applicant is willing to comply with the conservation measures identified in the RPA, the District determined that project is still not the least damaging practicable alternative and is not in the public interest.

It is therefore determined that this reason for appeal does not have merit.

Reason 3: The State of Oregon, Department of State Lands, issued a gravel removal permit to K-D Sand and Gravel involving the same piece of property, and based on the same information as the Corps used in making their decision to deny a permit.

Findings: This reason for appeal does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District.

Discussion: A copy of the Oregon, Department of State Lands (DSL) permit dated December 12, 2005 was provided to the Corps' Northwestern Division with the request for appeal. The administrative record shows that the DSL did likely get all the same information to review as did the Corps' Portland District. However, the Corps and the DSL do not have the same set of laws and regulations governing the permit review and decision process. Two requirements in particular that are contained in 33 C.F.R. §§ 320-330, which are not in Oregon State requirements, and which were important in the District's review of the K-D Sand and Gravel permit application, are compliance with the Section 404(b)(1) Guidelines and the consultation requirements with NMFS and/ or USFWS under Section 7 of the Endangered Species Act and the Fish and Wildlife Coordination Act. As discussed under Reason 1 above, the results of the review process that the District was required to follow in meeting these federal program requirements lead to the District's decision to deny the permit. Since the State's laws and regulations governing the activity are different than the federal requirements, it is not unusual that the DSL reached a different decision.

It is therefore determined that this reason for appeal does not have merit.

Overall Conclusion:

After reviewing information provided by the appellant and the District, including the District's administrative record, I conclude that this appeal does not have merit for the reasons provided in the discussion above. The District's decision to deny the permit application is upheld.


for Gregg F. Martin
Brigadier General, US Army
Division Engineer