



REPLY TO
ATTENTION OF

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

29 JUL 2005

Program Support Division

Rob Drake
Mayor, City of Beaverton
4755 S.W. Griffith Drive
Box 4755
Beaverton, OR 97076

Dear Mayor Drake:

I have completed my review of the Request for Appeal, regarding the permit denial made by the Portland District for application file number 200300312.

After evaluating the information provided in the 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.

I have also informed the District Engineer, Portland District of this decision. The District Engineer will therefore be sending you the final permit denial decision. I encourage you to continue to work with the District to develop a project that can be permitted and will meet your transportation system needs.

If you have any questions about the appeal decision, you may contact my Appeal Review Officer, Mr. Mores Bergman, at 402-697-2533.

I have also provided a copy of this appeal decision to Mr. Fred Gast of Polygon Northwest.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregg F. Martin".

Gregg F. Martin
Colonel, US Army
Division Engineer

Enclosure

ADMINISTRATIVE APPEAL DECISION

CITY OF BEAVERTON/ POLYGON NORTHWEST, FILE NO. 200300312

PORTLAND DISTRICT

DATE:

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

Appellants: City of Beaverton/ Polygon Northwest

Appellants' Representatives: Rob Drake, Mayor of Beaverton
Fred Gast, Polygon Northwest

Receipt of Request for Appeal: February 28, 2005

Appeal Conference and Site Visit Date: May 18, 2005

Background Information: On May 8, 2003, the Corps of Engineers Portland District (District) received a Section 404 permit application from Polygon Northwest and the City of Beaverton for the placement of fill in Summer Creek and its adjacent wetlands in connection with the proposed extension of SW Murray Boulevard in Beaverton, Oregon. The project is a joint endeavor by the City of Beaverton and a local developer, Polygon Northwest. The Portland District processed the permit application in accordance with Regulation 33 C.F.R. §§ 320-330. On January 6, 2005, the District Engineer denied the permit application because he determined the proposed project did not comply with the Section 404(b) (1) Guidelines, and as such the issuance of the permit would be contrary to the public interest. By letter of February 24, 2005, the appellants appealed the District's decision to the Corps' Northwestern Division. The appellants' reasons for appeal are listed below. On May 18, 2005, the Review Officer held an appeal meeting and site visit for the project. This appeal was processed in accordance with Corps of Engineers Administrative Appeal Regulation 33 C.F.R. § 331, dated March 28, 2000. The regulation at 33 C.F.R. § 331.9 (b) provides the basic standard that the Division Engineer will use in reaching a decision on an appeal. The regulation states in part "The Division Engineer will disapprove a District Engineer's decision only if he determines that the decision on some relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance. The Division Engineer will not attempt to substitute his judgment for that of the District Engineer regarding a matter of fact, so long as the District Engineer's determination was supported by substantial evidence in the administrative record, or regarding any other matter if the District Engineer's determination was reasonable and within the zone of discretion delegated to the District Engineer by Corps regulations."

Reasons for Appeal Submitted by Appellant:

Reason 1: An “Unreasonable Expensive Alternative” is “Not a Practicable Alternative.” The permit denial should be overturned as a violation of Corps of Engineers Regulatory Guidance Letter 93-02 (RGL-2), dated August 23, 1993.

Reason 2: The Asserted “Practicable Alternative” was withdrawn by the applicants.

Reason 3: Challenge the 404(b)(1) Guidance. Appellants believe the Section 404(b)(1) Guidelines of the Clean Water Act cited as a point of non-compliance for the project is in error.

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 the permit decision. This information was considered in the appeal review. Information obtained during the appeal conference and site visit conducted on May 18, 2005 was also considered in the appeal review, to the extent that it provided clarification or explanation of the administrative record. The Portland District also provided a memorandum, dated May 16, 2005, to the Review Officer providing the District’s comments on the appellant’s reasons for appeal contained in the appeal request dated February 24, 2005. On May 20, 2005, Mayor Rob Drake provided a letter dated May 20, 2005 to the Review Officer addressing comments contained in the District’s May 16, 2005 memorandum, and summarizing the City of Beaverton’s position that had been presented at the appeal conference on May 18, 2005. Both of these documents were considered to the extent that they clarified or explained the reasons for appeal and other information contained in the administrative record.

Summary of Decision: The appeal does not have merit. It is found that the District complied with the Section 404 (b) (1) Guidelines and Regulatory Guidance Letter 93-02, in performing their alternatives analysis, and that the District did provide sufficient evidence in the administrative record to support the denial decision.

Appeal Decision Findings and Instructions for District Action:

Reason 1: An “Unreasonable Expensive Alternative” is “Not a Practicable Alternative.” The permit denial should be overturned as a violation of Corps of Engineers Regulatory Guidance Letter 93-02 (RGL-02), dated August 23, 1993.

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

Action: No action required by District.

Discussion: In the Request for Appeal (RFA) dated February 24, 2005, the appellants contend that the practical alternative identified by the District is not a “practicable” alternative as defined in the 404(b) (1) Guidelines (40 C.F.R. 230). The appellants state that the applicant’s proposed stream-crossing project is estimated to cost \$4 million and that the District’s identified

practicable alternative is estimated to cost an additional \$1.5 million. The appellants point out that the Corps' RGL 93-02, (at subparagraph 3.b) states that the preamble of the Guidelines state: "if an alleged alternative is unreasonably expensive to the applicant, the alternative is not 'practicable.'" The appellants further state in their RFA that they consider the incremental cost differential of \$1.5 million on a \$4 million project to be unreasonable and therefore it is not a practicable alternative.

In reviewing RGL 93-02, it is found that in the same subparagraph (3.b) it also states: "It is important to emphasize, however, that it is not a particular applicant's financial standing that is primary consideration for determining practicability, but rather characteristics of the project and what constitutes a reasonable expense for the projects that are most relevant to practicability determinations." RGL 93-02 also states at subsection 3.b: "The determination of what constitutes an unreasonable expense should generally consider whether the projected cost is substantially greater than the costs normally associated with the particular type of project."

The District's Environmental Assessment and Statement of Findings (EASF), dated January 6, 2005, contain the District's alternatives analysis (on page 14, paragraph 5.). In reviewing the District's alternatives analysis, it is found that the District considered several alternatives including no action, smaller project designs, larger project designs, and different project designs. The District determined that the no-action alternative did not meet the project purpose and that larger projects were not considered to be the least environmentally damaging practicable alternatives. The District determined that the applicant's proposed crossing location was the most appropriate considering logistics, but that the applicants proposed project, even after a reduction in size, was not the least environmentally damaging practicable alternative. The District also considered two other alternative project designs in their analysis, one a 140-foot clear span bridge costing \$11 million, and the other a two-span bridge with an estimated total project cost of \$5,443,000. The District determined the 140-foot clear span bridge not be practicable based on excessive cost. However, the District determined that the two-span bridge would have less adverse impact on the aquatic ecosystem than the applicant's proposed alternative, and was practicable even though it was \$1.5 million more expensive than the proposed alternative. The District provided evidence in their EASF that the two-span bridge alternative was similar in design and cost as other bridges that either have been constructed or are authorized for construction in the same general area as the proposed project (Washington County, Oregon). The District also concluded that the difference in cost between the applicant's proposed project, which is \$3,959,000, and the cost of the two-span bridge, costing \$5,443,000, is not unreasonable and should not be beyond the applicant's means.

At the appeal conference Mayor Drake and his staff explained that although the City and Polygon had concurred that the cost estimates as stated above were reasonable estimates at the time the estimates were prepared, they commented that the estimate for the alternative that the District has identified as being the least environmentally damaging practicable alternative does not include costs of the additional public review process that would now be necessary if this alternative were to be adopted. Mayor Drake explained that the City had performed the required state and local public interest review and decision process for the applicant's preferred project before they had any indication that the District might deny the permit based on another higher cost alternative being selected by the District. He stated that the cost of going through the public

review and approval process for a new project, plus the associated escalation in construction costs that would occur because of time delays due to the additional design and the review process, are not included in the cost estimate for the District's identified alternative. Mayor Drake indicated those items could add several hundred thousand dollars or more to the cost of that alternative. Major Drake also stated at the appeal conference that money was very limited for the project, and that any increase in cost above the current estimate of \$3,959,000 could prevent the project from being built. The appellants also stated in their appeal request letter that they could not understand the judgment that would lead to such an additional expenditure of funds for the small decrease in affected wetland impact of 0.08 acres.

The District's EASF shows that the applicant's proposed project would directly and permanently impact 0.28 acres of wetlands on site, plus would impact an addition 0.09 acres of wetlands temporarily during construction. The EASF also documents that the two-span bridge alternative identified by the District would impact 0.20 acres of wetlands permanently. However, the EASF also indicates that the two-span bridge alternative would have less direct, secondary and cumulative adverse environmental impacts than would the applicant's proposed project. In Part 6 of the EASF (pages 17 through 23), the District presents an environmental analysis of the applicant's proposed alternative. The District determined that the proposed project would adversely affect the flow and circulation of the creek resulting in increased erosion, and adversely impact fish and wildlife using the area, primarily because the culverts would adversely affect species movements along the stream corridor. The record also contains letters from U.S. Fish and Wildlife Service and the Oregon Department of Fish and Wildlife in which they also expressed concern regarding many of the same impacts that the District identified would occur as a result of the applicant's proposed project. The District determined that since the 140-foot two-span bridge alternative would only have a single 4-foot diameter pier located in the middle of the creek, it would have minimal adverse impacts on the stream and wetlands, and have less impact than would the applicant's proposed project. It is concluded that the District has provided substantial evidence to support their determination that the two-span alternative is the least damaging practicable alternative.

Upon reviewing the District's alternatives analysis in the EASF and administrative record and considering the applicant's comments contained in the RFA and presented at the appeal conference, it is determined that the District's decision is in accordance with applicable laws, regulations and policies, including the 404(b)(1) Guidelines. It is therefore determined that this reason for appeal does not have merit.

Reason 2: The Asserted "Practicable Alternative" was withdrawn by the applicants.

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 appellants states in the RFA that although they had presented the 140-foot two-span bridge alternative to the District in April 2004 as a possible alternative from an engineering standpoint, the alternative was formally withdrawn on June 14, 2004 because the

applicants had determined that the alternative was financially not viable. The appellants also pointed out in the RFA that they had determined that the \$1.5 million cost differential, between the proposed project and the two-span bridge alternative, was not available from private, City or regional transportation funds. The appellants further stated in the RFA that they believed that the two-span bridge alternative would drive the construction costs well beyond any rational level, without any consequent environmental or wildlife benefits.

The District's administrative record shows that the District, in a letter dated August 19, 2003, requested that the applicant provide information on possible alternatives to the applicants proposed project, so the District could conduct an alternatives analysis to comply with the Section 404(b)(1) Guidelines. The applicant's consultant MGH Associates provided information on alternatives to the District for review by letters of October 16, 2003, and April 4, 2004, which included the two-span bridge alternative. As stated above, on June 14, 2004 the City of Beaverton and Polygon Northwest informed the District that they considered the two-span bridge alternative not to be a viable project because of cost. However, as discussed in the "Discussion" section under Reason 1 above, the District determined that the two-span bridge alternative is the least environmentally damaging practicable alternative in this case, and as a result, the District determined that the applicants proposed project does not comply with the 404(b) (1) Guidelines. The final determination of whether or not an alternative is the least environmentally damaging practicable alternative rests with the Corps of Engineers, not with the applicant. The fact that the applicant believes that the alternative identified by the Corps as being the least environmentally damaging practicable alternative is not financially viable, does not exclude it from consideration under the 404 (b) (1) Guidelines. The District has shown that they considered cost as well as environmental impacts and other public interest factors in reaching their decision. It is therefore determined that this reason for appeal does not have merit.

Reason 3: Challenge to 404 (b) (1) Guidance. Applicants believe the Section 404 (b) (1) Guidelines of the Clean Water Act cited as a point of non-compliance for the project is in error.

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: The appellants state in the RFA, dated February 24, 2005, that they cannot understand how the environment of Summer Creek relates to the criteria referenced in Section 404 (b) (1) Guidelines of the Clean Water Act.

In Regulation 40 CFR Part 230.2(a) of the Guidelines, it states: "the Guidelines are applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States." The Guidelines also state at Part 230.2 (a) (1) that the Guidelines apply to the Army Corps of Engineers regulatory program under sections 404 (a) and (e) and references Corps of Engineers Regulation 33 CFR Parts 320, 323, and 325. Evidence is found in the District's administrative record that the District had determined that Summer Creek and its adjacent wetlands are waters of the United States. The appellant did not challenge the jurisdictional determination. Since Summer Creek and its adjacent wetlands are waters of the United States, it is clear that the project site is subject to review under the specifications of the

Section 404 (b) (1) Guidelines. Therefore, it is 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 and information obtained during the appeal conference, I conclude that this Request for Appeal does not have merit for the reasons provided in the discussion above.



Gregg F. Martin
Colonel, US Army
Division Engineer

29 JUL 2005