



REPLY TO
ATTENTION OF

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

Program Support Division

Mr. Doug Rosenberg, President
Tillamook Bay Habitat Improvement
and Estuary Improvement District
2 North Main Avenue
P.O. Box 700
Tillamook, Oregon 97141

Dear Mr. Rosenberg:

I have completed my review of the Request for Appeal by Clarence Greenwood of Black Heterline LLP regarding the permit denial made by the Portland District for application file number 200000689.

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,

for

Gregg F. Martin
Brigadier General, US Army
Division Engineer

Enclosure

Copies Furnished:

Tillamook Bay Habitat & Estuary
Improvement District
Attorney
P.O. Box 700
Tillamook, Oregon 97141

ADMINISTRATIVE APPEAL DECISION

TILLAMOOK BAY HABITAT & ESTUARY IMPROVEMENT DISTRICT

FILE NO. 200000689

PORTLAND DISTRICT

DATE: 13 September 2006

Review Officers: Mores Bergman and John Moeschel, U.S. Army Corps of Engineers, Northwestern Division.

Appellant: Tillamook Bay Habitat & Estuary Improvement District

Appellants' Representative: Clarence Greenwood, Attorney, Black Heterline, LLP

Receipt of Request for Appeal: March 20, 2006

Appeal Conference and Site Visit Date: May 31, 2006

Background Information: On March 21, 2005, the U.S. Army Corps of Engineers (Corps), Portland District (District) received a permit application from the Tillamook Bay Habitat & Estuary Improvement District (TBHEID) for the excavation of 60,000 cubic yards of gravel, sand and silt from 3700 linear-feet of the Kilchis River in Tillamook County, Oregon. Upon receipt of complete information, a public notice for the project was issued August 22, 2005. The Portland District determined that the proposed project is regulated under Section 404 of the Clean Water Act and Section 10 of the River and Harbors Act. The District processed the permit application in accordance with 33 C.F.R. §§ 320-330. On January 20, 2006, the District Engineer, Portland District, denied the permit application.

Reasons for Appeal Submitted by Appellant:

Reason 1: Appellant contends the Corps does not have Section 404 jurisdiction over the activity since Section 404 jurisdiction is over fills, not removals, and the TBHEID project involves removals, not fills.

Reason 2: Appellant contends that Section 10 jurisdiction is limited to navigational rights and is not intended generally to protect fish, shellfish, or aquatic ecosystems. To the extent the Corps based its denial of the permit on Section 10 of the Rivers and Harbors Act, such denial is, therefore, contrary to law.

Reason 3: Appellant contends that it was error for the Corps to base its decision on the proposed listing of the Coho Salmon.

Reason 4: Appellant contends that the Corps' decision on alternatives fails to apply the proper legal standards and lacks substantial evidence on the record.

Reason 5: Appellant contends that the Corps omitted consideration of the key data reflected in the Mike 11 modeling.

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 31, 2006 was also considered in the appeal review as well as subsequently received clarifying information to the extent that it provided clarification or explanation of the administrative record.

Summary of Decision: The appeal does not have merit. The District provided sufficient evidence in the administrative record to support the denial decision. See 33 C.F.R. § 331.9(b).

Appeal Decision Findings and Instructions for District Action:

Reason 1: Appellant contends the Corps does not have Section 404 jurisdiction over the activity since Section 404 jurisdiction is over fills, not removals, and the TBHEID project involves removals, not fills.

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: There is substantial documentation contained in the administrative record that the Kilchis River is a water of the United States and the proposed project is subject to Corps' jurisdiction pursuant to both Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. The Jurisdictional Determination form (desktop determination July 18, 2005, site visits April 15, 2004 and June 23, 2005) states that the proposed project is located in a stretch of the Kilchis River that is a water of the U.S. because it is currently used, or was used in the past, or may be susceptible to use in interstate or foreign commerce and also because it is a navigable water and subject to the ebb and flow of the tide. 33 C.F.R. § 328.3(a)(1); 33 C.F.R. § 329.4. The administrative record contains numerous references to the fact that this stretch of the Kilchis River is subject to the ebb and flow of the tide. There is evidence in the administrative record including the appellant's application itself, which proposed as part of the project the construction of three push-up dams in the Kilchis River. The proposed push-up dams, which will be constructed by the placement of excavated Kilchis River bed material, meet the definition of "fill" found at 33 C.F.R. § 323.2(e)-(f). Consequently, despite the fact the appellant states that some material from the project would be placed on upland farm property, not in wetlands, the projects still involves a discharge of fill material into a water of the United States. Furthermore, the administrative record contains evidence that the "upland farm" disposal areas are indeed wetlands. On page one (1) of the appellant's permit application form, the appellant stated that the

disposal area was a wetland/waterway and not upland. The administrative record also contains a Natural Resource Conservation Service (NRCS) wetland determination which indicates that a disposal site and haul road construction are proposed in a field determined to be a farmed wetland pasture (July 8, 2005, NRCS letter from Kristine Homma to Mitch Cummings confirms that a disposal area is proposed in a farmed wetland pasture based on July 19, 2004 wetland determination). Therefore, this reason for the appeal has no merit.

Reason 2: Appellant contends that Section 10 jurisdiction is limited to navigational rights and is not intended generally to protect fish, shellfish, or aquatic ecosystems. To the extent the Corps based its denial of the permit on Section 10 of the Rivers and Harbors Act, such denial is contrary to law.

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 General Regulatory Policies of the Corps, set out at 33 C.F.R. § 320.4, apply to review of all applications for Department of the Army permits, including permits under the Rivers and Harbors Act. The “public interest review” applied in evaluation Rivers and Harbors Act permit applications explicitly includes “environmental concerns” and “fish and wildlife,” 33 C.F.R. § 320.1(a)(1) and (c). This policy has been upheld in numerous federal court cases. Since the Kilchis River is a water of the U.S., the project is subject to review under the Section 404(b)(1) Guidelines. This reason for appeal has no merit.

Reason 3: Appellant contends that it was an error for the Corps to base its decision on the proposed listing of the Coho Salmon.

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: Though the proposed Coho listing issue was considered in the Corps’ review and decision process, the administrative record contains evidence that the permit denial was based on issues other than the Endangered Species Act (ESA). Section 4.3 of the Corps Decision addressed Endangered Species Act concerns. The Corps consulted with the National Marine Fisheries Service (NMFS) pursuant to the Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation (MSA). On August 23, 2005, the Corps’ Regulatory Branch requested that the Hydrologic, Coastal and River Engineering Section (EC-HY) assess what effect the project would have on flooding. The Mike 11 model, which was developed by the EC-HY for the Tillamook Bay Feasibility Study, was chosen. The Kilchis River was one of the rivers within the Tillamook Bay watershed included in the original modeling efforts. The Corps evaluated the comments received from the NMFS during the MSA consultation, the comments received during the public notice comment period, and the Mike 11 modeling results. Because there were no listed specie or proposed listings for this specie in this

waterbody there was no requirement for consultation under the Endangered Species Act, and the project was denied based on matters other than ESA issues. This reason for appeal has no merit.

Reason 4: Appellant contends that the Corps' decision on alternatives fails to apply the proper legal standards and lacks substantial evidence on the record.

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 District's decision to deny the permit application was based primarily on non-compliance with the Section 404(b)(1) Guidelines (Guidelines), specifically that the proposed discharge will result in significant degradation of the aquatic ecosystem under 40 C.F.R. § 230.10(b) or (c) and the discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem. There is substantial evidence in the administrative record that the appellant's proposed alternative will result in significant degradation of the aquatic ecosystem. For example, the EPA, in a letter dated September 21, 2005, recommended that the Corps deny the proposed project and identified the resources proposed for impact as an Aquatic Resource of National Importance (ARNI). In a letter dated October 14, 2005, the EPA notified the Corps that the proposed project will have substantial and unacceptable impacts to an ARNI. The United States Fish and Wildlife Service (USFWS), in a letter dated September 21, 2005, recommended the Corps deny the permit and identified the resources proposed for impact as an Aquatic Resource of National Importance. In a subsequent letter dated October 14, 2005, the USFWS notified the District that the proposed project will have substantial and unacceptable impacts to an ARNI. The Corps received comments from NMFS on September 26, 2005, that the proposed project would not achieve the intended purpose and would result in adverse impacts to the aquatic environment. Section 5 of the District's decision document discusses the Corps' consideration of alternatives. The administrative record contains evidence that the District concurred with these agency findings, including the finding that the project will have unacceptable impacts to the aquatic environment. The Tillamook Bay and Estuary and General Investigative Feasibility Report of 2005, which is contained in the administrative record, identified several alternatives which may have accomplished the project purpose while minimizing the impacts to the aquatic environment. The appellant did not provide supporting documentation that demonstrated that other project design alternatives are not practicable, which is needed to refute the presumption under the Guidelines that less environmentally practicable alternatives exist. There is evidence in the record, including the District's Mike 11 analysis and the EC-HY review dated July 11, 2006, that the appellant's preferred alternative would not accomplish the project purpose and would result in unacceptable adverse impacts to the aquatic environment. Therefore this reason for appeal has no merit.

Reason 5: Appellant contends that the Corps omitted consideration of the key data reflected in the Mike 11 modeling.

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

Discussion: The District's decision was based on the determination that the proposed discharge will result in significant degradation of the aquatic ecosystem pursuant to 40 CFR 230.10(b) or (c) and the discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem. There is evidence in the Administrative Record to support this decision. The Corps' Hydrologic, Coastal, and River Engineering Section (EC-HY) performed a Mike 11 hydraulic analysis for the proposed project area and submitted clarifying information dated July 11, 2006 in response to the appellant's Request for Appeal. There is substantial information on the record that the findings provided in that analysis and the subsequent clarifying information was not the basis for the Corps' decision. The Corps' decision was based on the determination that the proposed discharge will result in significant degradation of the aquatic ecosystem under 40 C.F.R. § 230.10(b) or (c) and the discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem. As discussed in Reason for Appeal 4, there is substantial evidence in the administrative record that the appellant's proposed alternative will result in significant degradation of the aquatic ecosystem and the discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem. The reason for appeal has no 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.

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