



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, PORTLAND DISTRICT
PO BOX 2946
PORTLAND OR 97208-2946

MAR 02 2006

Program Support Division

Mr. Robert Welter
4610 Grand Canyon
Greeley, Colorado 80634

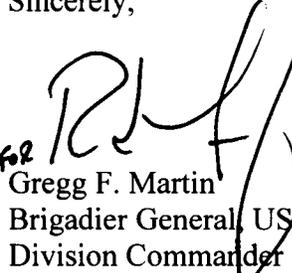
Dear Mr. Welter:

I have completed my review of your appeal request, dated October 25, 2005, regarding the proffered permit sent to you by the Omaha District for your project located in Weld County, Colorado (Application number 200380549).

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

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

Sincerely,


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

Enclosure

ADMINISTRATIVE APPEAL DECISION

ROBERT WELTER, FILE NO. 200380549

OMAHA DISTRICT

DATE: MAR 02 2006

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

Appellants: Robert Welter

Receipt of Request for Appeal: November 4, 2005

Appeal Meeting and Site Visit Date: January 12, 2006

Background Information:

On October 30, 2003, the Omaha District Denver Regulatory Office (District) investigated an alleged unauthorized Section 404 (Clean Water Act) channel relocation activity that had occurred in Section 26, Township 5 North, Section 66 West, in Weld County, Colorado. The alleged violator was Mr. Robert Welter. As a result of the investigation, the District issued Mr. Welter a cease and desist order on October 31, 2003. After consulting with the Environmental Protection Agency (EPA) regarding the violation, the District decided to accept an after-the-fact permit application for the project. A public notice for the permit application was published on December 8, 2003. After reviewing comments received on the proposed project from state and federal agencies and the public, and discussing the comments and possible alternatives with the applicant and his consultant, the District received a revised project proposal from the applicant's consultant, Mr. Wayne Erickson, by letter dated July 12, 2004. The proposal included restoring approximately 600 foot of channel to an alignment similar to the original alignment except for that portion of the channel where erosion had previously threatened existing homes. On December 15, 2004, Mr. Erickson submitted additional minor revisions to the proposed project to address environmental concerns identified by the District. After reviewing the revised proposal, the District prepared a Statement of Findings, and issued an initial proffered permit to the applicant on May, 19, 2005.

On July 13, 2005, Mr. Erickson submitted an appeal of the initial proffered permit to the Denver Regulatory Office, on behalf of Mr. Welter, in accordance with the provisions of the Corps Appeal Program Regulation 33 C.F.R. Part 331. The appellant's objections to the initial proffered permit included that Mr. Welter had not had sufficient input into the re-vegetation plan and mitigation requirements, and that he felt the existing channel was currently stable and performing satisfactory, except for a 145 foot portion which he was willing to stabilize. After reviewing the appeal, the District determined that the re-vegetation plan should be modified to reduce the total number of new planting from 125 to 25 feet, but that all other conditions of the permit should remain the same.

The District Engineer, Colonel Jeffrey Bedey, sent a final proffered permit to Mr. Welter on September 22, 2005. On October 25, 2005, Mr. Welter submitted an appeal of the permit decision to the Northwestern Division. The appeal was received on November 4, 2005 and was processed in accordance with the Administrative Appeal Regulation 33 C.F.R. Part 331. A summary of the appellant's reasons for appeal are listed below.

Summary of Reasons for Appeal Submitted by Appellant:

Reason 1: The appellant contends that the Denver Regulatory Office did not address the appellant's July 13, 2005 alternative proposal and reasons for change, in any return correspondence that he received from their office.

Reason 2: The appellant contends that the "system" was used unfairly in making a decision on his project. Examples provided by the appellant include: that the Omaha District representatives refused to listen to his or his consultant's comments or proposals provided during meetings at the project site, that Mr. Welter was not informed of a public hearing that was held for his project and that he was told by the District that he wouldn't be allowed to protest or respond to comments from the public hearing.

Reason 3: The appellant contends it would be counter productive to destroy the current established channel and relocate it farther away from the adjacent irrigated field, thus permitting more acreage erosion to occur.

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 appeal case. This information was considered in the appeal review. Information obtained during the appeal conference and site visit conducted on January 12, 2006 was also considered in the appeal review to the extent that it provided clarification or explanation of the appeal request and the administrative record.

Summary of Decision: The appeal does not have merit. I find that the District did consider the appellant's alternative proposal and other input in conducting its review, correctly applied applicable laws and regulations in reaching a decision, and has provided sufficient evidence in the administrative record to support the permit decision.

Appeal Decision Findings and Instructions for District Action:

Reason 1: The appellant contends that the Denver Regulatory Office did not address the appellant's July 13, 2005 alternative proposal and reasons for change, in any return correspondence that he received from their office.

Finding: This reason for appeal 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 District's administrative record for the permit action, documents are found that show the District did respond to the July 13, 2005 alternative proposal that was contained in the appeal of the initial proffered permit. One document is a letter from Mr. Timothy Carey, of the Denver Regulatory Office, to Mr. Welter dated August 1, 2005. In reviewing Mr. Carey's letter of August 1, 2005, it is found that he stated that he had reviewed the appellant's appeal, and had provided a response to Mr. Welter in which he summarized the District's understanding of the reasons for appeal, and asked that Mr. Welter confirm that the District had correctly understood his position on the issues of the appeal. Mr. Welter responded to Mr. Carey by letter of August 22, 2005, informing Mr. Carey that in his appeal he was requesting that the District allow the unauthorized work be left in place and allow him to stabilize any unstable areas. In the letter, Mr. Welter also requested that the requirement for planting 125 woody plants be reduced to a reasonable number since he believed that only a few willows had been disturbed by the unauthorized work. Mr. Welter also stated in his August 22, 2005 letter that agricultural irrigation water runoff from an adjacent land was causing the erosion problem along the channel and that he felt that he would not be able to complete the requirements of a permit until this drainage problem was solved.

Another document that is found in the administrative record is the District's supplemental environmental assessment and statement of findings for the permit case. This document was attached to and made a part of the final proffered permit package that was sent to Mr. Welter on September 22, 2005. The supplement findings document specifically addresses Mr. Welter's request to leave the channel in its present location, and the channel stabilization, reduction of woody vegetation, and the drainage and erosion issues that were contained in the appeal request to the District dated July 13, 2005 and in Mr. Welter's letter of August 22, 2005. It is noted that the District's final proffered permit, that was issued September 22, 2005, did reduce the woody vegetation requirement from 125 plants to 25 plants, but did not authorize any other changes to the permit, for reasons explained in the decision document. Since the administrative record shows that the District did address and provide a response to the appellant's July 13, 2005 proposed changes, it is determined that this reason for appeal does not have merit.

Reason 2: The appellant contends that the "system" was used unfairly in making a decision on his project. Examples provided by the appellant include: that the Omaha District representatives refused to listen to his or his consultant's comments or proposals provided during meetings at the project site, that Mr. Welter was not informed of a public hearing that was held for his project, and that he was told by the District that he wouldn't be allowed to protest or respond to comments from the public hearing.

Finding: This reason for appeal 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 Mr. Welter's appeal request of October 25, 2005 he included several examples of why he felt he had been unfairly treated by the Denver Regulatory staff and the permit process system in the review of his permit application. He stated that during site meetings, the Corps Denver office representatives would not listen to his comments or suggestions. He also stated

that he was excluded from discussions between the Corps and other agencies that occurred onsite. He further stated that he was not informed of the public hearing for the application and was informed by the Corps that he would not be allowed to protest or respond to comments from the hearing. He further stated that he did not receive notice of the final onsite meeting held on September 17, 2005 until the day of a meeting, and was then unable to attend. He stated that his consultant, Mr. Erickson, attended the meeting, but since Mr. Welter wasn't able to attend, he felt he did not have adequate input into the discussions of the final project proposal.

In reviewing the District's record, there was no evidence found that would support the allegations as submitted by Mr. Welter in his appeal. The allegations contained in the appeal letter were discussed at the appeal meeting on November 4, 2005. What was revealed during the discussions is that either miscommunication or differences of opinion, or both, occurred between the Regulatory Project Manager and Mr. Welter during the permit process. It is believed that this is likely what led to the comments presented by Mr. Welter in his appeal letter. The District's administrative record further indicates that no public hearing was held for the permit application, but a public notice was issued on December 8, 2003 which solicited comments on the proposed project. The administrative record also contains a copy of a letter dated to February 26, 2004, which was sent to Mr. Welter providing him with copies of the comments received as a result of the public notice, and requesting Mr. Welter's comments on same. Also found in the record is an e-mail message dated May 7, 2004 informing the District that Mr. Erickson had been hired by Mr. Welter to represent him regarding this permit action. The appeal document submitted by Mr. Erickson dated July 25, 2005, on behalf of Mr. Welter, demonstrates this fact. The record further shows that after Mr. Erickson was hired, the District coordinated primarily with him regarding environmental and technical issues about the project. It seems reasonable to assume that Mr. Erickson kept Mr. Welter informed throughout the permit process regarding his dealings with the District. Based on these findings, it is determined that this reason for appeal does not have merit.

Reason 3: The appellant contends it would be counter productive to destroy the current established channel and relocate it farther away from the adjacent irrigated field, thus permitting more acreage erosion to occur.

Finding: This reason for appeal 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: The impacts and effects of the channel to remain in its current location and condition is addressed in the District's supplemental environmental assessment and statement of findings that was provided to Mr. Welter as an attachment to the District's final proffered permit letter dated September 22, 2005. In that document, the District identified adverse consequences of the straightened stream to include increased velocities resulting in increased erosion and bank instability, decrease in groundwater recharge, and elimination of natural biological communities. The District also stated in the supplemental findings document that allowing the unauthorized work to remain would violate the Clean Water Act Section 404(b)(1) Guidelines since this project would not represent the least environmentally damaging practical alternative available to

meet the project purpose and need. The District's administrative record also contains a letter dated January 6, 2004 from the City of Evans, Colorado, which contained attached photos that show the channel and bank-line conditions shortly after the unauthorized channel was constructed. The date on the photos is August 6, 2003. The construction was reported to have been done about August 2nd or 3rd in 2003. The photos show that substantial erosion had occurred along the newly constructed bank-line and that the erosion extending into the farm field immediately adjacent to the new channel. In the letter, the City Director of Public Works, Mr. Earl Smith, states that this erosion occurred during and immediately after the channel was dug in that location. Evidence of erosion along this same bank-line was also observed during the site visit conducted on November 4, 2004 by the Review Officer, the appellant, and District staff. Based on the information contained in the administrative record and observations made on site, it does not seem reasonable to conclude that moving the channel farther away from the irrigated farm field will cause more erosion to occur than the current situation. Further, since the District provided sufficient documentation in their decision document to support their determination that the unauthorized channel could not be permitted, it is determined that this reason for appeal does not have merit.

Overall Conclusion:

After reviewing and evaluating information provided by the appellant, information contained in the District's administrative record, and information obtained during the appeal meeting and site visit, I conclude that this appeal does not have merit for the reasons stated above.



Gregg F. Martin
Brigadier General, US Army
Division Commander