



REPLY TO
ATTENTION OF:

District Commander
POA-2006-688-M

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, ALASKA
P.O. BOX 6898
ELMENDORF AFB, ALASKA 99506-0898

MAR 30 2009

Ms. Nancy McNulty
Talbot's Inc.
1101 Tongass Avenue
Ketchikan, Alaska 99901

Dear Ms. McNulty:

This letter is in regards to the denial of your request to modify Department of the Army Permit POA-2006-688-1, Tongass Narrows, to construct a 45-foot by 100-foot dock, provide additional staging and storage areas, relocate an existing hoist to load boats and barges, and replace areas now designed for fuel storage, freight staging, passenger loading, and parking. The proposed project is located within Section 25, T. 75 S., R. 90 E., Copper River Meridian; USGS Quad Map Ketchikan B-5; Latitude -55.3450° N., Longitude 131.6578° W.; 1101 Tongass Avenue, in Ketchikan, Alaska.

You submitted a request for appeal (RFA) on January 22, 2008, and provided subsequent information for the RFA on April 3, 2008. An appeal conference and site visit was held on May 13, 2008. On July 29, 2008, the Commander and Division Engineer for Pacific Ocean Division determined the RFA had merit and instructed that the administrative record be reviewed and re-evaluated. The Alaska District has completed the re-evaluation as directed, and the conclusions are described in the enclosed document. Pursuant to 33 Code of Federal Regulations 331.10(b), this is the Alaska District's final decision.

You may contact us by mail at the address above, or by calling Ms. Nicole Hayes of my staff at (907) 753-2792, toll free from within Alaska at (800) 478-2712, or via email at nicole.m.hayes@usace.army.mil if you have questions.

Sincerely,

A handwritten signature in black ink, appearing to read "James R. Stone".

James R. Stone
Lieutenant Colonel, Corps of Engineers
Acting District Commander

Enclosures



**U.S. Army Corps
of Engineers
Alaska District**

Department of the Army

Re-Evaluation

APPELLANT AND APPLICANT: Talbot's, Inc.

APPLICATION NO.: POA-2006-688-M

WATERWAY: Tongass Narrows

AND

APPLICANT: Survey Point Holdings, Inc.

APPLICATION NO.: POA-2006-1418-2

WATERWAY: Tongass Narrows

Background:

The following is a timeline of the history of the permit actions and appeal:

- 09/28/06: Issued permit to Talbot's, Inc., for floatplane dock for applicant (POA-2006-688-1)
- 03/22/07: Issued permit for Berth IV to Survey Point Holdings, Inc. (SPH) (POA-2006-1418-2) which is 28-feet seaward of Talbot's Inc.'s pierhead line on the east corner of her property with a special condition based on USCG risk assessment stating that vessels larger than 58-feet should not maneuver shoreward of Berth IV
- 07/10/07: Received complete application for dock extension (POA-2006-688-M).
- 08/09/07: Corps receives risk assessment from the USCG recommending denial of POA-2006-688-M
- 08/27/07: Applicant responds requesting re-evaluation of POA-2006-1418-2 based on the fact that 120-foot barges need to have access to their docks, as they have been stated all along
- 08/29/07: Corps asks USCG to complete risk assessment for POA-2006-1418-2, without consideration of POA-2006-688-1, as the presence of the floatplane dock limits vessels that access Talbot's Inc. to 58-feet in length
- 10/05/07: Met with the USCG to discuss and clarify past three risk assessments and to provide any remaining information necessary to complete the assessment for POA-2006-688-M

- 10/23/07: Received final risk assessment from USCG stating the only way for vessels 120' in length to access Talbot's dock would be if POA-2006-688-1 were not constructed and POA-2006-688-M was denied
- 11/27/07: Denial letter and decision document for POA-2006-688-M signed by Colonel Wilson and mailed to applicant
- 01/22/08: Request for Appeal (RFA) for the denial of POA-2006-688-M was sent to Pacific Ocean Division (POD)
- 03/07/08: POD determined that the RFA was incomplete and did not meet the criteria to be accepted under the Alaska District' Administrative Appeal Process
- 05/13/08: Conducted a site visit and attended an appeals conference for POA-2006-688-M, with POD Review Officer, POD Counsel, POD Regulatory Program Manager, POA Deputy Chief, POA Project Manager, Appellant (Talbot's), and Talbot's attorney

In a Decision Document dated July 18, 2008, regarding the Applicant's RFA, the Commander and Division Engineer for POD concluded the following in the evaluation of the Request for Appeals:

"I find that the District properly determined that authorizing the Appellant to construct the pier extension would create an unacceptable navigation and safety hazard. Although I have determine that denying permit application POA-2006-688-M for navigational and safety reasons is a supportable decision, I find that this decision could be based on flawed information. I find that there is enough information to document that there were no navigational and/or safety issues at the Talbot site prior to the issuance of the Berth IV permits. (The District confirmed that there were no navigation or safety issues at the Talbot site prior to issuing the Berth IV permits.) Therefore, the District Engineer should re-evaluate the Berth IV project to determine if its issuance is in compliance with 33 CFR 320.4(g)(3). In addition, the District should re-evaluate the impacts to navigation and safety to the Appellant without the construction of the float plane float and dock extension but with vessels being docked at the Berth IV float located on the shoreward side of the Berth IV fender line (opposite the hoist located at the Talbot's dock). The District should also re-evaluate the Berth IV permits to determine if the issuance of the permit(s) amounted to a "takings" due to the impacts on the Appellant's property."

Findings of the re-evaluation based on the above directive:

1. The District should re-evaluate the Berth IV project to determine if its issuance is in compliance with 33 CFR 320.4(g)(3).

33 CFR 320.4(g)(3) states, "A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's

right of navigation on the water surface. In the case of proposals which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied.”

The Alaska District coordinated with the U.S. Coast Guard (USCG) during the initial review of Berth IV as well as the subsequent review. The USCG is recognized as the Federal authority on matters relating to navigational safety in marine waters.

In response to the initial review of Berth IV (POA-1922-22-Y), the USCG provided comments on February 13, 2006. In summary, their conclusion was they recommended approval of the permit based on the fact that an approved structure would not inhibit typical vessel traffic (less than 80 feet in length) from maneuvering on the inside of Berth IV. They stated that while vessels larger than 80 feet will be substantially impacted, they would not be so severe as to hamper access by vessels that currently use existing docks. Measures such as assist tugs may be employed in instances where barges or larger vessels intend to moor at existing docks. Additionally, they recommended installation of a fendering system on the northernmost section of Berth IV to mitigate risk and facilitate navigation. The Alaska District concurred with the USCG findings and stated in the March 6, 2006, Department of the Army (DA) permit evaluation and decision document, “...the Alaska District does not believe the proposed project would have undue interference on navigation.”

In response to the review of the Berth IV modification (POA-2006-1418-2), which occurred after the float plane dock at the Appellant’s property was permitted (POA-2006-688-1), the USCG provided comments on September 28, 2006. In summary, their conclusion was: 1) the proposal would have a minor impact on navigation, provided that the left hand side float of Berth IV is not used for cruise ship tenders, while the Appellant operates the float plane dock; 2) the same float can be used by vessels 58-feet in length or less and do not subject the area to frequent interactions with float planes using the dock at the Appellant’s property; and 3) the limit of the proposed batter piles on the left hand side of Berth IV do not encroach any closer than the original plan. The Alaska District concurred with the USCG risk assessment and stated in the March 16, 2007, DA permit evaluation and decision document, “The proposed work would not affect any existing or future property rights of private landowners in the area.”

The Alaska District still believes that the Appellant’s general right of access to navigable waters of the United States has been upheld and that Berth IV as well as the Appellant’s proposals and property have been subject to the same standards and rights of access afforded to all riparian landowners. The Alaska District’ maintains the position

that Berth IV does not create *undue interference* with access to, or use of Tongass Narrows.

2. The District should re-evaluate the impacts to navigation and safety to the Appellant without the construction of the float plane float and dock extension but with vessels being docked at the Berth IV float located on the shoreward side of the Berth IV fender line (opposite the hoist located at the Talbot's dock).

In response to a request by the Alaska District, the USCG provided a navigation risk assessment on October 15, 2007, that evaluated the ability of vessels to safely navigate shoreward of the dock without the Appellant's float plane dock in place (POA-2006-688-1) and without the dock extension (POA-2006-688-M). The USCG made the following conclusions: 1) the largest vessel that could safely navigate the entire length of the Appellant's dock during any period is 55-feet, using standard maneuvering clearances. The small number is due to the comparatively restricted area at the southern end of the dock near the existing hoist and the assumption that tender traffic is occurring at the North Float of Berth IV; 2) without tenders mooring at the North Float, the longest vessel that can maneuver shoreward of Berth IV in the vicinity of the hoist at the Appellant's dock is 68-feet; and 3) vessels up to 120-feet could still safely maneuver to moor on the northernmost half of the Appellant's dock regardless of how the North Float of Berth IV is used.

The Alaska District still concurs with the USCG assessment and believes that the construction of Berth IV does not create a substantial impact to navigation and/or safety in the vicinity of the Appellant's dock. Further evidence that there does not appear to be a substantial navigation or safety hazard is the ability to moor vessels at both docks concurrently, as shown in the attached photos (undated, but post-construction of Berth IV). The photos depict a 73-foot vessel moored at Talbot's dock concurrent with a small motorized vessel being moored on the shoreward side of Berth IV.

3. The District should also re-evaluate the Berth IV permits to determine if the issuance of the permit(s) amounted to a "takings" due to the impacts on the Appellant's property.

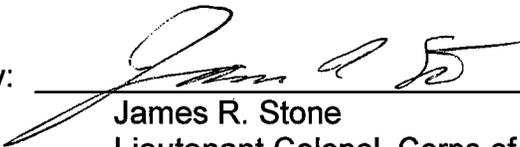
We reviewed the Berth IV permits and the record supporting the permits, in addition to reviewing relevant information from our files related to the Applicant's application and permits. The District concludes that issuance of the Berth IV permits did not amount to a taking due to impacts on the Applicant's property, nor is there any takings implication as a result of the Berth IV permit decisions.

The applicant is able to use its property in essentially the same manner as the available evidence shows it has used the property for many years. The Berth IV permits did not adversely affect that use. The applicant asserts, without support, that the Berth IV permits prevented it from docking vessels larger than 120 feet long. There is no evidence that the applicant docked vessels of that length. The applicant may safely dock vessels up to 55 feet in length if the applicant's permitted floatplane facility is built and up to 120 feet if that facility is not built. It is the applicant's choice as to which use it prefers. There is no absolute right to reserve navigable waters for a speculative future use.

Conclusion:

POD concurred that the Alaska District properly determined that authorizing the Appellant to construct the pier extension would create an unacceptable navigation and safety hazard. The Alaska District re-evaluated the Berth IV project to determine if its issuance is in compliance with 33 CFR 320.4(g)(3); re-evaluated the impacts to navigation and safety to the Appellant without the construction of the float plane float and dock extension but with vessels being docked at the Berth IV float located on the shoreward side of the Berth IV fender line (opposite the hoist located at the Talbot's dock); and re-evaluated the Berth IV permits to determine if the issuance of the permit(s) amounted to a "takings" due to the impacts on the Appellant's property. The Alaska District concludes that the issuance of DA permit POA-2006-1418-2, as prescribed by regulations published in 33 CFR 320 to 330, was not contrary to the public interest.

As a result of the above conclusions, the Alaska District reaffirms the decision to deny the application for DA permit POA-2006-688-M was not based on flawed information and that construction of this project would create an unacceptable navigation and safety hazard.

Approved by:  _____ 
James R. Stone
Lieutenant Colonel, Corps of Engineers
District Commander
Date