

**ADMINISTRATIVE APPEAL DECISION
INDIVIDUAL PROFFERED PERMIT CONDITIONS
KND INVESTMENTS, LTD., PROPERTY
ANCHORAGE, ALASKA
ARMY CORPS OF ENGINEERS ALASKA DISTRICT
PROJECT FILE NUMBER POA-2003-800**

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California, on behalf of the Pacific Ocean Division, Fort Shafter, Hawaii.

Appellant: KND Investments, Ltd., Anchorage, Alaska

Permit Authority: Section 404 of the Clean Water Act (33 U.S.C. 1344)

Receipt of Request for Appeal: June 21, 2005

Appeal Conference and Site Visit: September 22, 2005

Summary of Decision: The District's administrative record sufficiently supported its conclusion that the area the Appellant proposed to fill met the definition of a Relative Ecological Value (REV) 2 area in accordance with the "The Anchorage Debit/Credit Method." The District's administrative record also sufficiently supported the District's calculation that 0.54 REV 2 debits was the appropriate in lieu fee mitigation credit requirement for this proposed fill activity. The District did not sufficiently document that a six-foot permanent fence was a necessary mitigation requirement, as opposed to the Appellant's proposal to use a temporary four-foot fence. The District must reconsider and modify and/or further document its conclusion that a four-foot temporary fence is insufficient and that a six-foot permanent fence is required, and document the results of that reevaluation in a revised Statement of Findings, and provide the results of that reconsideration to the Appellant.

Background Information: This administrative appeal evaluates whether the special conditions of an Army Corps of Engineers, Alaska District (District) proffered permit provided to KND Investments, Ltd. (Appellant) were reasonable, consistent with the Clean Water Act, and in accordance with Army Corps of Engineers regulations and policies. The Appellant's specific proposal is to fill a 100 foot x 200 foot building site including approximately 0.46 acres of wetlands on a portion of the Appellant's property at Lot 3, Block 3, "C" Street Industrial Subdivision, located on the west side of "B" Street near its intersection with Dowling Road in Anchorage, Alaska. Although some of the correspondence in the Request for Appeal from the Appellant was received on KND Engineering, Inc. letterhead, the listed applicant is KND Investments, Ltd., and the proffered permit was issued to KND Investments, Ltd. While this difference is noted, the permit issuance and related matters involve dealings between the District and the named

applicant, KND Investments, Ltd. For the purposes of this decision document, KND Investments, Ltd. is assumed to be the Appellant.

The Appellant received an initial proffered permit (incorrectly identified in District correspondence as a proffered permit) from the District on May 3, 2004. In a May 17, 2004 letter, the Appellant objected to two conditions of the initial proffered permit including the requirement for an in lieu fee payment of 0.54 REV 2 debits as determined by the "The Anchorage Debit/Credit Method" and the requirement that a permanent six-foot fence be constructed around the filled area. On January 4, 2005, the District provided the Appellant a further statement regarding the Clean Water Act jurisdictional status of the property, but did not address the Appellant's objections to the District's May 3, 2004, initial proffered permit.

On February 17, 2005, the Appellant appealed the District's January 4, 2005 Clean Water Act approval jurisdictional determination, citing the same reasons the Appellant had submitted on May 17, 2004 to object to the District's initial proffered permit. The Pacific Ocean Division (Division) reviewed the Appellant's February 17, 2005, request for appeal, and concluded the District had not yet responded to the Appellant's objections to the District's May 3, 2004, initial proffered permit. The Division directed the District to consider the Appellant's objections to the initial proffered permit as required by the Corps regulations at 33 CFR 331.6, and determine whether the District considered it appropriate to modify some, all, or none of the provisions of the initial proffered permit to resolve the Appellant's objections. The Division held the Appellant's February 17, 2005, request for appeal in abeyance until that process was complete. The District concluded its evaluation process on April 21, 2005, and retained all the special conditions contained in the District's May 3, 2004, initial proffered permit. On June 21, 2005, the Division received the Appellant's request for appeal citing the same objections initially raised in the Appellant's May 17, 2004, letter. The standard of evaluation for Army Corps of Engineers administrative appeals of special conditions of individual permits is whether the District's proposed special conditions were 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.

Appellant Reason for Appeal 1: Appellant objects to the Corps of Engineers' classification of a portion of the affected area as Relative Ecological Value (REV) 2, and requiring mitigation for this classification level.

Finding: This reason for appeal did not have merit.

Action: None required.

Discussion: The District determined the in-lieu mitigation debit amount for the Appellant's proposed project using *The Anchorage Debit/Credit Method, A Method for Determining Debits and Compensatory Mitigation Credits for Aquatic Areas in Anchorage, Alaska* finalized 12/12/2000, which was developed by representatives of the

U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, and Municipality of Anchorage. The Anchorage Debit/Credit Method page 4 defines patterned ground (bogs) and other ponded wetlands that are seasonally ponded as REV 2 areas. The District identified a seasonally ponded, patterned ground wetland bog with low ridges (strangmores) and shallow depressions (flarks) on the May 18, 1997 aerial photograph of the property, on other on-site photographs, and on visits to the property.

The District and the Appellant agreed that the Anchorage Debit/Credit Method does not provide a quantitative definition of the extent of ponding required in order for an area to be considered seasonally ponded. However, the District's administrative record includes photographs and site investigations that reasonably support the District's conclusion that portions of the property are seasonally ponded. The administrative record also includes the Environmental Protection Agency's November 28, 2003, letter concurring with the District's determination. The area including this property was also identified as a seasonally ponded area in the description of area 38C in the 1995 *Anchorage Wetlands Management Plan*. The District's March 17, 2000, Public Notice regarding general permits and Anchorage Wetlands Management Plan Revision (page 22) identified the area including the property as a seasonally flooded, patterned bog, and excluded it from coverage under the District's general permits for the Anchorage area.

The Appellant asserted that the hydrology of the area had changed in recent years due to the widening of "C" Street on the western edge of the area, that the property was becoming drier as a result, and that the property should no longer be considered seasonally ponded. The Appellant also asserted that the area to be filled was of lower ecological value because of isolation by other developments, installation of utilities, and unauthorized debris and trash dumping in the past.

In the absence of a quantitative definition of seasonal ponding the District's use of a combination of evidence including aerial photographs, site visits, site photographs, and prior determinations of seasonal ponding of the property represented a reasonable approach to establish that the property was a seasonally ponded, patterned ground, wetland bog. Such areas are defined by the Anchorage Debit/Credit Method as REV 2 areas. The District provided sufficient evidence in the administrative record that portions of the property are still functioning as a pattern ground wetland bog, even if the area receives less water than in the past due to the widening of "C" Street or other factors.

The District followed the procedures in the Anchorage Debit/Credit Method to determine that 0.54 REV debits were the appropriate in-lieu of compensatory mitigation fee amount that the Appellant must provide in order to compensate for the loss of aquatic functions on this project site. The Appellant did not challenge the Anchorage Debit/Credit Method calculation procedures the District followed in reaching its determination that 0.54 REV debits were the appropriate in-lieu of compensatory mitigation fee amount. The District stated in its April 21, 2005 letter that the Appellant could propose other compensatory mitigation projects instead of the in-lieu of compensatory mitigation fee payment, but the Appellant did not elect to pursue other compensatory mitigation projects.

The District followed the procedures in the Anchorage Debit/Credit Method to determine that the wetlands on the property were REV 2 areas and to calculate that 0.54 in-lieu fee debits were an appropriate in-lieu fee debit amount for the Appellant's proposed project to fill some of those wetlands. This reason for appeal did not have merit.

Appellant's Reason for Appeal 2. The permanent six-foot tall fence is unnecessary given the fact that future development is likely to occur on the property.

Finding: This reason for appeal has merit.

Action: The District must reconsider and further document or modify its conclusion that a permanent six-foot fence is an appropriate and necessary mitigation measure to prevent unauthorized activities on the project site, and is necessary to reduce adverse effects to snowshoe hares, moose, and migratory birds which would otherwise occur if only a four-foot plastic fence were present.

Discussion: The District's Permit Evaluation and Decision Document Addendum identified as a permit special condition 7 that:

"Prior to use of the developed fill area, the permittee shall construct a permanent six-foot tall fence on all fill boundaries with remaining adjacent wetlands. The purpose of the permanent fence is to provide a physical barrier to wetland encroachment and a visual barrier to wildlife. The fence must be constructed of either:

- a. cedar or pressure treated lumber with boards installed close enough to create a visual barrier;
- b. typical chain link with the visual plastic slats installed in the chain link;
- c. a similar structure designed to accomplish the same permanent physical and visual barrier."

and the District's April 21, 2005, letter to the Appellant explains the requirement for the six-foot permanent fence, stating that:

"We do not agree that a temporary plastic (orange barrier) fence will serve the purpose of permanent protection for the adjacent wetlands from future encroachment by heavy equipment, general storage and debris, and it would allow visual disturbance to nesting birds or other wildlife. Years of experience with industrial and residential wetland development sites in Anchorage have clearly demonstrated the secondary and cumulative impacts caused to wetlands by such encroachment."

The possibility that the property owner or an unauthorized third party might encroach on the unfilled wetland area of the property is also present under existing conditions. The Appellant proposed to address this possibility by fencing the perimeter of the filled area with four-foot high plastic fencing. The District objected to the Appellant's proposed fencing material because it would not serve as permanent protection from encroachment.

At the appeal conference the Appellant and the District both confirmed the Appellant has not agreed to permanently protect the remainder of the project site from future development or fill. The Appellant and the District also agreed the Appellant is able to avoid placing fill on the remainder of the project site at this time. The Appellant's proposed plastic fence would provide more protection from unauthorized fill of wetlands on the project site than exists under current conditions, and more protection than exists on adjoining developed and undeveloped properties north and south of the property.

The District did not sufficiently document why a permanent wood or metal fence was necessary to provide permanent protection for the undeveloped portion of the property, when the District and the Appellant both acknowledge that this property is in an industrial subdivision and may be subject to additional proposals for fill activities and development in the future. The District did not provide a sufficient basis to reject the Appellant's alternative of maintaining a four-foot plastic fence around the fill area for the indefinite future as a method to prevent encroachment onto the undeveloped portion of the property.

The District also stated a six-foot permanent fence was needed to screen the filled area from the remainder of the property. The District stated that this would provide a visual screening to minimize disturbance to nesting migratory birds, as well as snowshoe hares, moose, and other wildlife that might use the area. This property is located in a developing industrial area.

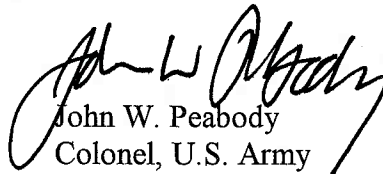
A six-lane major north/south city street, "C" Street, is located to the west of the property, although that street is partially screened from the site by trees. Another industrial development is located south of the property, and an undeveloped area is located north of the property. No fencing is currently located on the property. Beyond the property boundary to the west an approximately four-foot high open wire fence separates the property from "C" Street.

Other than birds and other flying animals, any animal that enters and exits this property would need to either cross "C" Street, or pass through part of the "C" Street industrial subdivision, being exposed to various kinds of human activities in the process. The District did not explain why such non-flying animals would be expected to be sufficiently tolerant of such human disturbances and activity to cross an industrial subdivision or a six-lane street to reach this property, but then be disturbed by similar activities on the filled portion of the property itself to such an extent that it would preclude their use of the undeveloped portion of the property.

With regard to migratory bird use, the District did not sufficiently explain why the Appellant's proposed four-foot fence would not provide a sufficient visual screen between the activities occurring on the filled area and the low branches and undeveloped ground of the remainder of the property. The District also did not sufficiently explain why a visual barrier between the Appellant's proposed new activities and the remainder of the property would be necessary and effective to maintain migratory bird use while the north, west, and south sides of the undeveloped portion of the Appellant's property would remain unfenced.

The District must reconsider its conclusion that a permanent six-foot fence is an appropriate and necessary mitigation measure to prevent unauthorized activities on the project site and is necessary to reduce adverse effects to snowshoe hares, moose, and migratory birds which would otherwise occur if only a four-foot plastic fence were present. The District must also reconsider the extent to which these environmental effects would be mitigated as part of the requirement that the Appellant pay an in lieu fee amount of 0.54 REV 2 debits, which includes a portion of that debit amount for "Disturbance Shadow Size" of an area outside of the area to be filled.

Conclusion: The District has sufficiently supported its conclusion that the area to be filled is a REV 2 area, as defined by the Anchorage Debit/Credit Method, and that an in lieu mitigation fee of 0.54 REV 2 debits is an appropriate in lieu fee mitigation debit requirement. The District has not sufficiently documented that a six-foot permanent fence is a necessary mitigation requirement, as opposed to the Appellant's proposal to use a temporary four-foot fence. The District must reconsider and modify and/or further document its conclusion that a four-foot temporary fence is insufficient and that a six-foot permanent fence is required.


John W. Peabody
Colonel, U.S. Army
Division Engineer