

February 6, 2007

Department of the Army
Jacksonville District Corps of Engineers
Attn. Regulatory Division North Permits Branch,
Mr. Edward Sarfort
Pensacola Regulatory Office
41 North Jefferson Street, Suite 111
Pensacola, FL 32502-5669

Re: Permit Application Number SAJ-2006-0062-IP-EPS –Magnolia Bay Marina and Resort

Dear Mr. Sarfort:

These comments on the Clean Water Act permit application for the Magnolia Bay Marina and Resort are submitted on behalf of the Clean Water Network of Florida, Inc. (CWNofFL). CWNofFL is a statewide environmental organization with 155 member groups and 5,000 individual members. CWNof FL is dedicated to the strongest possible implementation and enforcement of the Clean Water Act and we actively advocate for these protections of our waters on behalf of our members.

The permit as currently proposed would authorize the destruction of more than 105 acres coastal wetlands and nearly 36 acres of mature sea grass community. The secondary and long-term impacts to these wetlands and grassbeds would be much more extensive due to several factors, including but not limited to:

- Additional nutrient loading
- Additional boat traffic
- On-going dredging of the boat channel which would be required

The proposed site includes high-quality wetlands and submerged seagrasses. The tremendous biodiversity of the area is evident by the resident by animals and plants on both the state and federal threatened and endangered species lists, such as shortnose sturgeon, Green, Leatherback and Kemp's ridley turtles, the Peregrine falcon, the woodstork and the Florida manatee. Allowing the contemplated destruction of wetlands and seagrass beds will have a substantial and irreversible adverse impact on the ecosystems, habitat and wildlife of the Big Bend Aquatic Seagrass Preserve and other waters in the watershed.

The Corps should deny the application to dredge and fill waters at the proposed site because the project would have irreversible adverse impacts on the environment and wildlife that are impermissible under federal law. As a result, a decision by the Corps to grant this permit would be arbitrary, capricious and not in accordance with law.

The applicant has failed to provide adequate descriptions of the wetlands and other waters that will be destroyed and the adverse environmental impacts to water quality, wildlife, and other

resources that will result from the proposed dredging and filling of wetlands, streams and seagrass beds. Furthermore, because the proposed impacts of this project are so destructive to an extremely valuable public resource, a full Environmental Impact Statement should be required of the applicant before any further consideration to this application is given. Notwithstanding the lack of an EIS at this point, it is evident from the scant information available that the proposed permit is unlawful and should be denied by the Corps.

ALTERNATIVES

The Corps is required to describe and analyze any practicable alternatives to the proposed project. The applicant apparently owns several thousand acres of land, presumably some of which is uplands or could be traded for uplands that would allow for a residential and commercial development that would have significantly less adverse impacts. As currently proposed the project violates Section 404(b)(1) of the Clean Water Act and its implementing regulations. Under 40 C.F.R. Section 230.10(a) the Corps shall not permit filling wetlands “if there is a practicable alternative to the proposed discharge that would have a less adverse impact on the aquatic ecosystem.”

MINIMIZE ADVERSE AFFECTS

Pursuant to the Section 401(b)(1) guidelines, no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. 40 C.F.R. §230.10(d). Here the proposed permit would destroy more than 105 acres coastal wetlands and nearly 36 acres of mature sea grass community. The applicant must avoid and minimize impacts to wetlands and seagrass beds by choosing a more appropriate site for his development as required by law.

WATER QUALITY

Before issuing a §404 permit the Corps must receive state certification under § 401 of the CWA that the permit will not cause a violation of state water quality standards. 33 U.S.C. § 1341(a); 33 C.F.R. § 325.2(b)(ii). Florida has not provided a § 401 water quality certification for this project and cannot do so without violating several Florida statutes and implementing regulations. The Corps must deny this permit because to do so would cause or contribute to violations of Florida’s water quality standards. See 40 C.F.R. § 230.10(b)(1). The proposed development site is located just south of the mouth of the Fenholloway River. Not only are there on-going exceedances of dissolved oxygen, coliform, nutrients, BOD, unionized ammonia and dioxin in the near-shore waters of the Fenholloway, but these waters are listed on EPA’s 303(d) list for Florida waters and TMDLs for pollutants were required to be developed by EPA by no later than 2002, which has long passed. Federal regulations do not allow a new source to cause or contribute to the impairment of Section 303(d) waters. Until these TMDLs are developed, there can be no further permitting of new pollution sources and to do so would be in violation of [40 C.F.R. § 122.4\(i\)](#).¹ If the proposed development is constructed, the consequent increase in

¹ [Section 122.4\(i\)](#) provides in relevant part:

stormwater runoff and other sources of pollution will exacerbate the impaired condition of these waters and lead to continuing exceedances of Florida's water quality standards. Because the activities described in this application for a permit would cause or contribute to violations of Florida's water quality standards, the Corps should deny the § 404 permit application.

Outside of these highly polluted waters, exist some of the most pristine wetlands and productive nursery areas in the eastern Gulf of Mexico. The state has designated the area as the Big Bend Seagrasses Aquatic Preserve and the waters are designated as Outstanding Florida Waters under the State's anti-degradation Federal CWA requirements. These coastal wetlands are extremely effective at filtering nutrients and other pollutant loads from run-off before it reaches the Gulf.

Where a § 404 permit application seeks approval to fill wetlands in such a way that it will cause "significant degradation of waters of the United States," the Corps should deny the application. 40 C.F.R. §230.10(c). We have precisely that situation here. The Corps regulations outline certain factors that are to be considered in determining whether there will be "significant degradation." Included in these factors are significant adverse affects "on aquatic ecosystem diversity, productivity and stability. Such affects include but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water or reduce wave action. 40 C.F.R. § 230.10(c)(3). If this permit is not denied, then more than 105 acres coastal wetlands and nearly 36 acres of mature sea grass community will be permanently lost and unable to assimilate nutrients, purify water and provide habitat for fish and wildlife.

Furthermore the application fails to adequately consider the impacts of increased impervious surfaces and resulting stormwater runoff on water quality.

NPDES PERMITS

No permit may be issued: . . . to a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by [Section 301(b)] of [the] CWA,[n2] and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:

- (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
- (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

40 C.F.R. §122.4(i). Two basic propositions may be derived from the regulation. One is that a new source cannot discharge if it will contribute to the violation of water-quality standards. The other is that, when a new discharge is proposed and a TMDL has been established, the proponent must demonstrate that the discharge complies with the TMDL.

The availability of NPDES permits for stormwater and sewage should also be taken into consideration with this project. A development of this size will require a major sewage treatment facility to be built. The closest existing sewage treatment facility was funded by federal grants which preclude the facility being used for new growth or to encourage new growth and development. Unless the relevant federal regulations are violated, a new sewage treatment facility will be required and a discharge outfall could be presumed. No NPDES permits for a discharge in this area should be allowed since the discharge from a wastewater treatment plant would increase the amount of nutrients, total suspended solids, BOD, or coliforms to the Big Bend area. The ability to obtain a permit for a wastewater treatment plant or stormwater runoff should preclude the Corps from granting a permit for the proposed project.

FACTUAL DETERMINATIONS

The Corps' regulations require assessment of a number of factors prior to approval of any permit that allows for filling of wetlands. The impact of fill of wetlands and streams as proposed on the substrate at the disposal site, water circulation, turbidity, contaminants, aquatic ecosystems, organisms, cumulative effects on the aquatic ecosystem further demonstrate that the permit should be denied. The cumulative effect of this permit, if granted, would be to open the floodgates to further permit applications in the surrounding wetlands and through the grassbeds. Setting a precedent that would allow further destruction of this ecologically important area in Florida would be unconscionable.

THREATENED AND ENDANGERED SPECIES

Under Section 7 of the Endangered Species Act (ESA), all federal agencies must consult with the FWS or NMFS to ensure that no action authorized by that agency will jeopardize the continued existence of a listed species or destroy or adversely modify a listed species' habitat. The proposed project will have a significant impact on threatened and endangered species.

The Big Bend Seagrasses Aquatic Preserve provides a habitat for many endangered and threatened species including the shortnose sturgeon, Green, Leatherback and Kemp's ridley turtles, the Peregrine falcon, the woodstork and the Florida manatee.

This project represents a major change with resultant cumulative impacts to essential fish habitats of the Big Bend Seagrasses Aquatic Preserve and Outstanding Florida Waters (OFW) beyond the specific and substantial individual impacts of the proposed channel dredging, seawall, bulkhead, riprap placement and wetland filling.

ESSENTIAL FISH HABITAT

The proposed project will adversely affect fishing and marine productivity. The open marine waters, marsh habitat, and grassbeds are identified as essential fish habitat (EFH) for a multitude of economically important commercial fish species, including but not limited to: postlarval and

juvenile shrimp, mullet, sea trout, redfish, and gag grouper in accordance with the provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).” Furthermore, the Big Bend Aquatic Seagrass Preserve is an economically important fishery resource. In particular, Gag Grouper use these sea grass beds as a nursery during part of their life cycle.

Tidal wetlands provide nursery, feeding, and refuge habitat for these species at various periods within their life cycle. These wetlands produce and export detritus (decaying organic material) which is an important element of the marine and estuarine food chains. The marsh helps maintain water quality by removing various pollutants from the water column and serves to stabilize the intertidal sediments. Cumulatively, adverse impacts to tidal wetland habitats will result in a reduction of overall fisheries productivity in the Big Bend. This project portends a cumulative impact to adversely impact these habitats reducing the vitality of the local and regional commercial fisheries that are already working toward better management actions.

In light of all these considerations, the Clean Water Network of Florida, Inc. urges the Corps to protect these high quality wetlands, marshes and grassbeds from unnecessary development. A permit denial would send a strong message to other developers who might want to also destroy nearby, similar unique and valuable natural resources. Requirement of the Clean Water Act leave no option but for the Corps to deny this permit.

Sincerely,

Linda L. Young
Director

Cc:

Rhonda Evans, USEPA, Region 4
Gregg Waugh, South Atlantic Fisheries Management Council
Mr. Mark Thompson, NMFS, Panama City
Ms. Gail Carmody, U.S. Fish and Wildlife Service, Panama City
Mary Anne Poole, FFWCC
Secretary Thomas Pelham, Florida Department of Community Affairs
Secretary Mike Sole, Florida Department of Environmental Protection
Congresswoman Kathy Castor
Mr. Seth Blicht, Manager of the Apalachicola National Estuarine Research Reserve
Ms. Melissa Charbonneau, Acting Manager, Big Bend Seagrasses Aquatic Preserve
Ms. Anastasia Richmond, Florida Department of Community Affairs
Steve Wolf, CAMA, FDEP

Mr. Wayne D. Humphries, Taylor County Manager
Mr. Charles Justice, Executive Director, NCFRPC