

ADMINISTRATIVE APPEAL DECISION

TALBOT'S, INC.; FILE NO. POA-2006-688-M

US ARMY CORPS OF ENGINEERS, ALASKA DISTRICT

JULY 18, 2008

Review Officer: James E. Gilmore, U.S. Army Corps of Engineers, Southwestern Division

Appellant and Representatives: Ms Nancy McNulty, Talbot's, Inc., Pete McNulty, Talbot's Inc., Paul Arley Harrel, Attorney

Division/District Representatives: Terri Stinnett-Herczeg, POA, Nicole Hayes, POA, Richard Carlile, POD, Thom Lichte, POD

Appeal Conference/Site Visit: 13 May 2008

Authority: Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C § 403)

Executive Summary: Talbot's is a building supply business in Ketchikan, Alaska, that is accessible by land or water (boats and seaplanes). Talbot's previously enjoyed wide-open waterside access which provided easy ingress/egress to Talbot's dock and broad potential for future dock expansion to accommodate additional and larger air and watercraft.

Access to Talbot's property was significantly impaired by the issuance, over Talbot's objection, of a COE permit allowing Talbot's neighbor to construct "berth IV" which extends directly in front of Talbot's waterside property and is used to dock extremely large cruise ships. Berth IV itself, and particularly the cruise ship docking operations at berth IV, have created several navigational restrictions and concerns that limit the number and type of water and aircraft that can access Talbot's business and may, in fact, interfere with the public's right to free navigation on all navigable waters of the U.S. Specifically, the District's berth IV finding that "[b]ased upon the USCG findings, the Corps does not believe the proposed project [berth IV] would have undue interference on navigation" appears open to significant dispute, especially in light of the District's recognition that "[t]he right of access for adjacent riparian property owners is discussed in 33 CFR 320.4(g)(3), which states, 'In the case of proposals which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied.'"

Having essentially created these navigational hazards by issuing the permit for berth IV, the District nevertheless denied Talbot's permit application to construct additional docking facilities, citing the very same navigational hazards.

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Talbot's appeal was not clearly or concisely worded and the bases for appeal (discussed in detail below) had to be gleaned from repetitive and overlapping arguments. The gist of Talbot's complaints, however, is that the COE's permit decisions are incorrect and have violated Talbot's property rights.

Although the precise basis for denial of Talbot's permit is not irrational – the navigational hazards do in fact exist – the hazards were undeniably created by berth IV. The equities of the situation, and the risk of adverse publicity and litigation, suggest that the District should revisit both Talbot's permit application and the berth IV permit to ensure that Talbot's legally protected rights have not been impermissibly impaired by the COE and that COE's permit decisions, for Talbots and berth IV, will withstand legal challenge.

Background Information: On 27 March 2006, the US Army Corps of Engineers' Alaska District (the District) issued a Department of the Army permit, POA-1922-22-Y,¹ to the City of Ketchikan to expand the city's existing cruise ship berthing facilities. The work included the construction of two new cruise ship berths – Berths III and IV. The City of Ketchikan owns and/or operates six harbor facilities and the Port of Ketchikan. The fender line/mooring dolphins for Berth IV was constructed in a parallel line from east to west in front of Talbot's existing ±360-linear foot dock. According to plans contained in the administrative record for POA-1922-22-Y, the fender line/mooring dolphins are separated from the existing Talbot's Pierhead Line² or property line by ± 120 feet at the most westerly point and ± 70 feet at the most easterly point. However in the District's Department of the Army Permit Evaluation and Decision Document approved on 27 November 2007 ("decision document"), it is states: "[A] part of the berthing structure (Berth 4) authorized under POA-2006-1418-1, Survey Point Holds Inc. (SPH) authorized on March 22, 2007, and currently under construction), will be 28 feet from Talbot's Inc.'s pierhead/property line on the east side of the property. This is the closest the berthing structure will be to Talbot's Inc. property."

During the Public Interest Review process for permit application POA-1922-22-Y, the District evaluated several factors, including Traffic/Transportation Patterns, Navigation, Consideration of Private Property and Economics. The decision document states:

1 Traffic/transportation patterns: Regarding vessel access to businesses behind the proposed Berth IV location, the U.S. Coast Guard has determined that access would be adequately maintained for current users (up to 120-foot barges or fish tenders). Vessels 300-foot plus in length would be able to access these businesses only with tugs and favorable tides.

¹ Permit POA-1922-22-Y was amended on 22 March 07. The amendment was issued to transfer the City of Ketchikan's permit interest to Survey Point Holdings and given permit number POA-2006-1418-2.

²The line in navigable waters beyond which construction is prohibited; open-pier construction may extend outward from the bulkhead line to the pierhead line.

2. Navigation: Summarizing comments from the Marine Safety Office, with specific regard to the northernmost shoreward access behind Berth IV, the USCG stated that there would be minimal effects on navigation for vessels less than 80-feet in length – which comprise the great majority of vessel traffic in Southeast Alaska. Navigation by vessels larger than 80-feet would be more substantially impacted, but not so much that access would be eliminated by vessels that currently use the existing docks. The USCG recommends installation of a fendering system that would afford barges or larger vessels attempting to maneuver behind the cruise ship pier a point to pivot against if needed to better align the approach, and would also protect the cruise ship pier itself. Vessels 300 plus feet in length would still be able to access this area, but would require aid from tugs and perhaps awaiting adequate tides. Although vessels of this size have accessed the Talbot dock in the past, these occurrences are very infrequent.

The decision document imposes the following special condition:

Your use of the permitted activity must not interfere with the public's right to free navigation on all navigable waters of the U.S.

3. Consideration of private property: There is an issue of secondary “navigation” impacts to adjacent property owners. The concern is that the proposed project may interfere with existing and/or speculative navigational uses of the shoreline areas behind proposed Berth IV. Based upon the USCG findings, the Corps does not believe the proposed project would have undue interference on navigation. Further discussion on this issue relative to the public interest review is found below in items III, B, 1&2.

4. Economics: The owner of Talbot Building Supply, a business located shoreward of the proposed Berth IV site, indicates the project would negatively impact their existing business as well as future business opportunities by limiting the type of vessels that could access their dock. However, the USCG analysis indicates that vessels that Talbot's indicates currently uses their dock would still have safe and adequate access to their dock. Additionally, the USCG indicates that 300-foot long vessels would still be able to access Talbot's dock, but would have to do so using tugs and favorable tide conditions. This may mean that potential dock users would have to find other more convenient areas to moor their vessels.

Under the Summary of secondary and cumulative effects section of the decision document the District states the following:

“There is an issue of secondary “navigational” impacts to a few adjacent property owners. The adjacent owners’ concerns are that the proposed project may interfere with their navigational access to their businesses adjacent to the proposed Berth IV.

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The issue of property ownership, and rights of property owners is not an issue the DA becomes involved in per guidance in; 33 CFR 320.4(g)(6)³ of the Regulatory Programs of the Corps of Engineers [Federal Register dated November 13, 1986]. This issue is being addressed as a result of possible impacts to the right of access to navigable waters by an adjacent property owner. The right of access for adjacent riparian property owners is discussed in 33 CFR 320.4(g)(3), which states, "In the case of proposals which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied."

The Appellant submitted comments to the District opposing issuance of the Berth IV permit. The District summarized the Appellant's comments to the Berth IV proposal as follows:

"Ms Nancy McNulty of Talbot's Building Supply submitted comment letters on November 17, 2005, January 19, 2006, and a fax on February 7, 2006. In summary, Talbot's Building Supply has been operated at its current location for more than 80 years, and owns at its current location for more than 80 years, and owns the tideland directly in front of the property (363 linear feet of shoreline). Ms McNulty believes Berth IV, as currently proposed, would restrict boat access to her business and would degrade her property. She states that the City of Ketchikan (City) should purchase all the adjacent waterfront property and develop it as desired by the cruise ship industry. If not purchased by the City, she asks that the permit be denied. Additionally, she provided diagrams of an alternative configuration for the proposed berth expansions."

The District's response to above comments were the same as its comments under the Economics section of its Decision Document. The four factors listed above, as well as the excerpts from the cumulative impact section and comment section of the POA-1922-22-Y decision document indicates that the Appellant had issues with the issuance of the Berth IV permit. The issues focus on what the Appellant considers to be adverse impacts to Talbot's ability to have unencumbered access to its docking facilities.

³ 320.4(g)(6) states the following: "A DA permit does not convey any property rights, either in real estate or material, or any exclusive privileges. Furthermore, a DA permit does not authorize any injury to property or invasion of rights or any infringement of Federal, state or local laws or regulations. The applicant's signature on an application is an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application. The district engineer will not enter into disputes but will remind the applicant of the above. The dispute over property ownership will not be a factor in the Corps public interest decision."

Due to a lack of funds to construct the Berth IV project, the City of Ketchikan signed a Memorandum of Agreement with Survey Point Holdings, Inc. (SPH) for SPH to complete the development of the Berth IV project. Under the MOA, SPH would design, develop, construct and manage Berth IV. The City signed a 30 year lease agreement with SPH. On 19 January 2007, the elements of DA permit POA-1922-22-Y specific to Berth IV were transferred to SPH. A new permit number was assigned to the Berth IV project – POA-2006-1418-2. SPH applied for and received a modification to the original Berth IV proposal. According to the District's Department of the Army Permit Evaluation and Decision Document for POA-2006-1418-2, the permit modification deviated from the original authorization in three respects:

1. The proposed project included fill into greater than 2 acres below high tide line (HTL). The original permit was only for structures in navigable waters for Berth III and Berth IV, the reconfiguring of Casey Moran Harbor, and a waterfront promenade. While the original authorization included 5,377 cy of fill below HTL, the fill was associated with the drilling necessary for pile installation.
2. The project purpose has been expanded. Along with the cruise ship berthing structure in the original permit, the proposed project now included fill for parking and a commercial retail and residential development.
3. The proposed project included the demolition of one, and the relocation of a second property identified as eligible for the National Register of Historic Places. The original permitted project was determined through coordination with the Alaska State Historic Preservation Officer (ASHPO) to have no effect to any historic properties.

“Following the public notice comment period, the applicant modified the proposal to construct 701 feet of open cell sheet pile bulkhead with ten 36-inch fender piles, and 151 feet of concrete retaining wall. The applicant increased the discharge and area of fill from 77,000 to 89,000 cy of shotrock, sand, and gravel behind the bulkhead into 2.12 acres of intertidal and subtidal open water habitat below HTL (approximately 67,000 cy of fill was proposed to be placed into 1.81 acres below MHW to create a 360-foot long by 330-foot wide filled dock). In addition, a 220 –foot long, 48-inch diameter culvert was proposed to be constructed, extending through the fill from beneath Tongass Avenue, extending 198 feet beyond the HTL. The secondary use of the proposed fill dock for cargo and heavy crane use was subsequently withdrawn.”

In response to the public notice, the USCG reviewed the proposal and conducted a risk assessment. The USCG stated that it “believe the proposal will have only minor impacts to navigation,” but this was contingent on the following measures.

1. The float on the left-hand side of Berth 4 should not be used for cruise ship tenders conducting passenger lightering operations while Talbot's Inc. operates a float plane dock.

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2. The float on the left-hand side of Berth 4 can be used by vessels 58 feet or less whose traffic patterns do not subject the area to frequent interactions with float planes using the dock at Talbot's (i.e., transient moorage).
3. The limit of the proposed batter piles on the left-hand side of Berth 4 should not encroach any closer to shore than the original plan. This is so as not to impede the safe navigation of seaplanes using the dock permitted for Talbot's or other vessels using the float mentioned above.

The USCG further stated "Normal practice in construction of harbor facilities allows maneuvering areas that are approximately 1.2 to 1.5 times the length of the vessels that use the facility. The float on the right-hand side of Berth 4 is approximately 83 feet from a moored cruise ship. This is sufficient clearance for use by cruise ship tenders or other vessels 64 feet in length or less." The USCG also reiterated its comment in response to the original Berth IV proposal POA-1922-Y, concerning signs warning boaters about prop wash in the vicinity of cruise ships.

The Appellant submitted similar comments regarding DA permit application POA-2006-1418-2 to the District. The Appellant maintained that the proposed project would have adverse impacts upon navigational rights as a riparian land owner.

Prior to submitting its permit application POA-2006-688-M, the Appellant applied for and received Department of the Army permit POA-2006-688-1 to "[I]ninstall a 7,250 square foot floating wooden dock supported by nine steel piles, a 10-foot by 10-foot platform supported by two steel piles and extending from an existing pile-supported dock, and a 5-foot wide by 80-foot long steel ramp between the platform and dock. The dock would be 230 feet long by 30 feet wide with a 35-foot by 10-foot landing at the base of the ramp. The total area of structures in navigable waters would be 7,750 square feet."

In its 21 September 2006 transmittal letter to the Appellant, the District provided two copies of proffered permit POA-2006-688-1 for the Appellant's signature. Included in the letter were six advisories from the US Coast Guard (USCG). The advisories were not included as conditions on the proffered permit. Advisory 2 is important to this appeal action. (Only advisory 2 will be listed below.) The following is how the advisories were included in the District's transmittal letter.

"The following advisories are included, as a reflection of comments submitted by the U.S. Coast Guard in response to the Public Notice for your project:

2. You are advised that sufficient room must exist for the largest float planes to safely maneuver between a moored float plane and the pilings of Berth 4. If vessels will use the dock, their length should not exceed the wingspan of the largest float planes using the dock."

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The Appellant has consistently stated that she was not informed that signing the proffer permit meant that Talbot's was now restricted to docking only 58-foot long vessels at its dock when she had always stated her desire to dock 120+ foot vessels at her dock.

Prior to sending out its 21 September 2006 transmittal letter, the District sent a letter dated 6 September 2006 to the Appellant. This letter regarded comments that the District had received concerning the Appellant's permit application POA-2006-688-1. The purpose of the letter was to allow the Appellant an opportunity to provide a rebuttal to comments received during the public interest review period. The letter stated in part the following:

"The USCG concluded that "this project should not significantly impact safe navigation," but advised that the current design would only be safe for DHC-2, or smaller, float planes and similarly sized vessels; the design would not allow for safe operations for the DeHavilland Otter (DHC-3), or larger, float planes or vessels. The USCG proposed the following contingencies to ensure no more than a minimal impact to navigation.

- a. All measurements, particularly the distances each float plane would extend into the waterway (while moored) need to be verified by Talbot's.
- b. Sufficient room must exist for the largest float planes to safely maneuver between a moored float plane and the pilings of Berth 4. If vessels will use the dock, their length should not exceed the wingspan of the largest float planes using the dock.
- c. The construction must meet marine engineering standards for the expected stresses."

Based on the above comments, the Appellant revised her original plans to accommodate DHC-3 float planes.

Again it is important to note that in its letters to the Appellant regarding her permit application/proffered permit, the District only stated that the USCG comments were advisories and did not included the advisories as conditions/requirements on the permit. However, as a condition to the SPH permit and on sheet 4 of 13 of the permit plans the following note is included.

"Vessels longer than 58 feet are restricted from using the north tender float. Passenger lightering operations are restricted on the north tender float when there is an active float plane operation at the adjoining property (POA-2006-688-1). Vessels

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longer than 63 feet are restricted from using the south tender float.”
(Emphasis added)

On 3 June 2007, Ms Nancy McNulty, Talbot's Inc. (Appellant), submitted a permit application (POA-2006-688-M) to the District to “construct a 45-foot by 100-foot dock, to provide additional staging and storage areas, including a hoist to load boats and barges, and to replace areas now designed for fuel storage, freight staging, passenger loading, and parking, authorized by permit POA-2006-688-1.” The project site is located at southeast corner of the existing Talbot's docking facility 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, Ketchikan, Alaska (the site).

The District denied the Appellant's permit application on 28 November 2007 stating that issuance of the permit would not be in the public's interest. The Appellant states that the Berth IV project has significantly impacted Talbot's ability to have unobstructed and safe access to its waterfront property. The Appellant also feels that construction of the Berth IV project is the main reason that its permit application POA-2006-688-M was denied. The Appellant disagreed with the District's decision to deny her permit application and submitted an acceptable Request for Appeal (RFA) dated 3 April 2008.

Decision: The District's administrative record

Appeal Decision Evaluation, Findings and Instructions to the Alaska District Engineer (DE):

Reason 1: The Corps and the Coast Guard did not apply their regulations fairly or objectively, and acted in an arbitrary and capricious manner when reviewing and denying permit POA 2006-688-M.

Finding: This reason for appeal does have merit.

Action: The District needs to re-examine the Appellant's permit, as well as the Berth IV permits, to determine if the permit decisions impaired the Appellant's rights and/or can withstand legal challenge.

Discussion: In her RFA, the Appellant states:

“The Corps of Engineers in Anchorage has acted in an arbitrary and capricious manner when denying POA-2006-688-M by blatantly ignoring and overlooking Talbot's federally required right of access by violating the rights of a riparian landowner adjacent to Tongass Narrows. Talbot's has a right to unobstructed access to its property and without undue interference to navigation. This is true as Talbot's dock exists today or if Talbot's makes

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further infrastructure improvements within the established pierhead line. The Corps of Engineers in Anchorage has prejudiced Talbot's, a riparian landowner for over 2 years by ignoring laws of the Federal Government that prevent construction seaward of the pierhead line, requesting information of Talbot's that is irrelevant to permit application POA-1922-22-Y and POA-2006-1418-2, because they both violate Talbot's federal access rights, and have reduced Talbot's access to it property to vessels 58' or less for their entire 363' long deepwater dock and property. 33 CFR 320.4(g)(3) requires the Corps of Engineers to provide for similar access of adjacent property owners (all nearby riparian property owners have unobstructed access to and from Tongass Narrows) and does not allow the Corps to create undue interference to navigation when permitting projects."

33 CFR 320.4(g)(3) refers to riparian landowner's rights and states the following:

"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."

Prior to the construction of the Berth IV project (POA-1922-22-Y/POA-1418-2), the District acknowledged that there were no navigational and/or safety hazards at the Talbot's site. This was verified during the appeal conference when the Appellant showed a video of her dock prior to the construction of Berth IV. The video showed that vessels had unobstructed access to the Talbot's dock from three sides. The administrative record also contains two photographs of the Talbot's site, looking to the east and west, which shows no obstructions in front of the Talbot's dock. The photos were taken on 25 July 2007 by the District's Project Manager for this action.

I find that the District needs to re-examine the Appellant's permit, as well as the Berth IV permits, to determine if the permit decisions impaired the Appellant's rights and/or can withstand legal challenge.

Reason 2: The Corps and the Coast Guard have recommended denial and denied Talbot's its permit, POA-2006-688-M, to construct on its private property citing navigation and safety issues.

Findings: This reason for appeal has merit.

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Action: The District Engineer will re-evaluate the Berth IV permits (POA-1922-22-Y/POA-2006-1418-2) to determine if the permits comply with 33 CFR 320.4(g)(3).

Discussion: The District denied the permit because the project, as proposed, would be contrary to the overall public interest in that it would create an unacceptable hazard to general navigation and pose unnecessary public safety concerns. 33 CFR Part 325.8(b) which discusses the District Engineer's authority, states that "District Engineers are authorized to deny permits without issuing a public notice or taking other procedural steps where required local, state, or other federal permits for the proposed activity have been denied or **where he determines that the activity will clearly interfere with navigation.**" (Emphasis added). Based on this regulation, the District determined that a permit should be denied since a federal easement would not be issued, and the entities primarily responsible for navigation interests objected.

Under the provisions of the Ports and Waterway Safety Act of 1972 at 33 U.S.C. Sections 1221 through 1236, the USCG is recognized as the Federal authority on matters relating to navigational safety. Relying on the USCG determination that the proposed pier would create an unacceptable hazard to navigation, the District properly determined that issuing the permit to construct the pier would create an unacceptable navigation and safety hazard.

However, the appellant contends that "[T]he navigation and safety concerns of the Corps and the U.S. Coast Guard and the denial of the permit are solely related to the construction of Berth 4, POA-2006-1418-2, that the Corps and the U.S. Coast Guard authorized and permitted in violation of law." (The law the Appellant is referring to is 33 CFR 320.4(g)(3)).

As previously stated, prior to the construction of the Berth IV project, the District acknowledged that there were no navigational and/ safety hazard at the Appellant's site. This was verified during the appeal conference when the Appellant showed a video of her docking facility prior to the construction of Berth IV. The video showed that vessels had unobstructed access to the Talbot's dock from three sides. The administrative record also contains two photographs of the Talbot's site, looking to the east and west, which shows no obstructions in front of the Talbot's dock. The photos were taken on 25 July 2007 by the District's Project Manager for this action.

After construction of the Berth IV fender line/mooring dolphins/batter pile (fender line) vessels can only access the Talbot's dock from the west. Vessels trying to dock at Talbot's must now negotiate between the fender line and an existing float plane float. (This float plane float is located on the adjacent property and is not part of Talbot's.)

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Although I have determined 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. 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).

Reason 3: The Alaska Department of Natural Resources Office of Project Management and Permitting found Talbot's project, POA-2006-688-M, is consistent with the Alaska Coastal Management Plan – 33 CFR 320.4(j)(4).

Findings: This reason for appeal has merit.

Action: The overriding national factors of the public interest which were revealed during the permit evaluation process are valid reasons to override the state's findings that the Appellant's project is consistent with the Alaska Coastal Management Plan. As I stated in Reason 2 above and in the discussion below, I find that the District properly determined that issuing the permit to construct the pier would create an unacceptable navigation and safety hazard. However, more importantly, I find that this decision could be based on flawed information. The District Engineer will re-evaluate the Berth IV permits (POA-1922-22-Y/POA-2006-1418-2) to determine if the permits comply with 33 CFR 320.4(g)(3) when considering 33 CFR 320.4(j)(4).

Discussion: 33 CFR 320.4(j)(4) states the following:

“In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR Parts 320-324, and the applicable statutes have been considered and followed: e.g., the National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archeological Preservation Act; the National Historic Preservation Act; The endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research and sanctuaries Act of 1972, as amended; the Clean Water Act, the Archeological Resources Act, and the American Indian Religious Freedom Act. Similarly, a permit will generally be issued for Federal and Federally-authorized activities; another federal agency's determination to proceed is entitled to substantial consideration in the Corps' public interest review.”

Under section 5.1.2.2, the District states that the Alaska Department of Natural Resources Office of Project Management and Permitting (ANDR) issued a consistency determination on 4 September 2007. The ANDR determined that the Appellant's project was consistent with the Alaska Coastal Management Program.

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As noted under 320.4(j)(4) "a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR Parts 320-324, and the applicable statutes have been considered and followed." In this case, the District determined that "overriding national factors of the public interest" exist at the project site. These factors were determined to be navigational and safety issues.

The District, under section 8.1.1 Determination for project being contrary to the public interest of its decision document found that the Appellant's project "is contrary to the public interest." The District determined "[T]he impacts to navigation and safety that would occur as a result of this project are contrary to the public interest. The dock extension would minimize the area a vessel can safely transit in the southwest portion of the project site, and would create a hazard to navigation if vessels were to moor at, or attempt to moor at the dock extension. With or without the construction of the floatplane dock, vessels over 50 feet in attempting to access the proposed dock would create a safety risk to any vessels in the area and their occupants. There is not enough room for vessels to transit between the proposed dock and the permitted Berth IV structure."

As stated in Reason 2 above, the Appellant reiterated her position that the navigational and safety issues found to be "overriding national factors of the public interest" by the Corps were not present at the Talbot's dock until the District authorized the construction of the Berth IV project.

As I stated in Reason 2 above, I find that the District properly determined that issuing the permit to construct the pier would create an unacceptable navigation and safety hazard. Although I have determined 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. 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).

Reason 4: Cumulative Impacts (effects on navigation) cited by the Corps of Engineers in denying POA-2006-688-M "cumulative impacts would include decreasing the navigational room for vessels seaward of the proposed structure. The project would result in direct impacts to navigation..."

Finding: This reason has merit.

Action: See required action for reason 2 and 3.

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Discussion: The Appellant's supporting documentation for this reason for appeal is basically the same as those contained in Reasons 2 and 3. As a result of this, my findings for this reason for appeal are the same as those for reasons 2 and 3.

Reason 5: The fifth reason for this RFA is that the denial of Talbot's permit POA-2006-688-M is clearly a takings of Talbot's 363' waterfront property.

Finding: This reason for appeal does not have merit

Action: No action required.

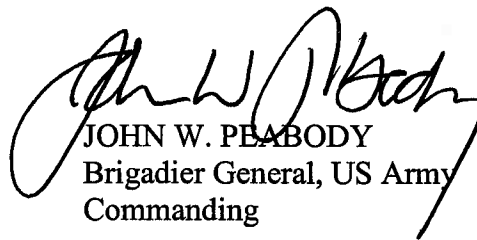
Discussion: The appellant gave the following explanation why she feels the denial of her permit application amounts to a takings by the District.

"Talbot's entire 363' waterfront property has been obstructed by Berth 4, permitted by the Corps of Engineers in violation of Federal law 33 CFR 320.4(g)(3). The Corps of Engineers and the U.S. Coast Guard have blatantly overlooked and ignored Talbot's federal access rights and by their actions in permitting POA-1922-22-Y and POA-2006-1418-2 have taken Talbot's right to construct on its private property, which is evidenced by the arbitrary and capricious denial of POA-2006-688-M."

The rationale that the Appellant uses to support her claim that the denial of her permit application amounted to a "takings" is based solely on the issuance of the Berth IV permits. It does not give any supporting documentation that the District, in its evaluation of her permit application, did not follow the applicable regulations, guidance or policies regarding takings. After reviewing the administrative record for POA-2006-688-M, I find that the District followed the required procedures for determining if a takings would occur if the permit was denied. Therefore, I find that this reason for appeal does not have merit when considered solely on the basis of the District's factual determination. However, a re-evaluation of this issue is recommended in the event further information is considered.

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Conclusion: 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 determined 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.



JOHN W. PEABODY
Brigadier General, US Army
Commanding