

***The Life of a Dredge and Fill Permit***  
**Case Study of a Proposed Development on Long Island, Texas**

Permit application #15760 was first submitted to the Army Corps of Engineers Galveston District office (hereafter referred to as "the Corps") in August 1981. In August 2000, the permit is still pending. While it is often true that adequate review and the legally-required paperwork can delay the time it takes to process and issue a permit, this case demonstrates the Corps apparent reluctance to "just say no" to some permits, even those that are clearly not in the best interests of the community and may in fact be harmful to wetlands.

The intent behind this case study is to point out that the Corps can and should exercise its responsibility to protect wetlands, and to protect the public interest more vigorously by denying permits when necessary. Wetlands serve society in many ways, and as a public agency the Corps is mandated to regulate development in and around wetlands in such a way that they will not be adversely impacted. Regulation includes the power to deny a permit, but the Corps seems unwilling to do so if in denying a permit it will deny a landowner the right to develop his or her property. As this case shows, however, Corps attempts to be sensitive to private property rights can result in unreasonable expenditure of time and taxpayer dollars, thus allowing an individual developer to take precedence over serving the public interest in a timely fashion.

***Brief Case History***

Long Island is located in the Laguna Madre of Cameron County, Texas – the southeastern-most county in the state. The small island of approximately 700 acres is directly south of the coastal town of Port Isabel. The Gulf Intracoastal Waterway enters at the northern tip of the island where it becomes the Port Isabel ship channel, then wraps around the west side of the island before joining the Brownsville ship channel to the south. About 2,000 seasonal residents live on Long Island in the cottage community of Outdoor Resorts or in a small condo development adjacent to Outdoor Resorts. These two developments are located on the northern third of the island; the remainder is a mix of tidally influenced sand flat, mudflat, mangrove and upland. There is an elevated berm that was intended originally to be a road (though inoperable) for access to the interior of the island running along the eastern edge of the island. Immediately adjacent to the "road" is a line of mangroves, and on either side of the road and south of the developed community is an area of tidally influenced sand flat, with some wetland vegetation present such as salicornia. Snowy plovers frequently nest in small crevices along the berm, and a variety of shorebirds forage and rest in the sand flats when submerged (please see attached map for more detail).

Permit application #15760, to construct a marina and boat basins on these undeveloped parts of Long Island, first came before the Corps in August 1981. The developer proposed to dredge over a million cubic yards of mud and sand to construct the canals and marina and to use the dredged material as fill for another housing development. The

project fell under Corps jurisdiction; Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act.

The National Marine Fisheries Service (NMFS), the EPA, and the US Fish & Wildlife Service (FWS) replied to the Public Notice with several concerns: the proposed depth of the channels, the placement of fill material up to and including the line of mangroves, and placement of fill material into what might be considered wetlands. In March 1982 the agencies and the applicant met to work out these concerns, and by June the applicant had submitted another proposal. This proposal incorporated some, but not all, of the concerns previously raised, and FWS and NMFS responded again that the applicant had not addressed concerns about the mangroves and the placement of fill into wetlands. The applicant finally agreed to revise his plans, and the statement of findings (SOF) issued in February 1983 indicated a permit would be issued since all objections had been resolved.

The Brownsville Navigation District (BND) belatedly realized that the developer actually included land leased from the port in his original plans. Language was added to the permit that directed the applicant to submit a request in writing to BND before any work would be done on the leased property, and the permit was issued in April 1983, with a deadline for completion of the project in December 1986. The applicant had not completed any work on the project by that date. In February 1986 he applied for and received a permit extension to December 1989, with no objections raised by the other agencies. In July 1989, still no work had begun and the applicant again applied for an extension, which was again granted for an additional three years, to December 1992. In August 1992 the applicant again requested an extension. By this time, changes in regulations and other factors caused agency personnel to take a closer look at the site. The island's ecology had altered somewhat from previous surveys due to natural events, and all the agencies raised objections and questions about the permit.

Specifically, NMFS and others were concerned that what the project proposed to fill were not actually "uplands" as the original permit stated, but were wetlands, based on site visits by NMFS. The Corps then asked the applicant to perform a wetland delineation – a process whereby certified professionals would draw up the boundaries of the wetland in question. In addition, some of the area looked like it might support the endangered piping plover, a small migratory shorebird that winters in the area and forages on mud and algal flats of the Laguna Madre. The Corps requested the applicant undertake a piping plover survey to ensure that none of the project area could be considered critical habitat. By August 1993 none of the requested work had been completed, and the Corps sent the applicant a "Warning of Withdrawal" within 30 days.

The applicant had a wetland delineation performed by an environmental consulting firm, but fired the firm after deciding he did not agree with their findings. Apparently, disagreement arose over what areas of the land were considered wetland and which should be considered mudflat. The applicant then asked that the Corps perform the wetland delineation. The Corps agreed to do the delineation but warned the applicant that their decision would be considered final, and again requested that the applicant contract a

piping plover survey. In the meantime, the Corps withdrew the permit application from being considered for a time extension until the wetland delineation could be completed.

From 1994 up to the present time, the following occurred: the Corps completed a wetland delineation, the applicant contracted an additional wetland delineation (apparently wanting to "prove" that the Corps had jurisdiction over the areas it claimed jurisdiction over) and completed a variety of studies - some which had nothing to do with what the Corps requested in the way of studies. The final delineation found 90 acres of the area to be filled were considered wetlands. Finally, the applicant re-submitted the project, for the fifth time. The resource agency personnel involved in reviewing the permit noted that the impacts would require that the applicant provide mitigation for the lost wetlands at a 3:1 ratio (one acre of mitigated habitat for every three destroyed by the fill). However, the applicant claimed that he only had to provide mitigation at an 8:1 ratio based on a past permit the Corps had authorized. The last available documented correspondence (June 8<sup>th</sup> 2000) on this case shows that the Corps is still waiting for the applicant to submit a revised application form, updated mitigation plans, a plan view and an elevation view. This correspondence again advises the applicant his permit may be withdrawn.

During the 19-year life of this permit, a great deal of agency review and correspondence has been expended on this project - both within the Corps and among agencies reviewing the permit, and with the applicant and various contracted firms. Excluding the Corps, five different resource-management and regulatory agencies reviewed and responded to the project application formally during this time. Numerous informal exchanges (e-mail, memos to the file, and telephone conversations) also took place.

In the past year, the community of Outdoor Resorts has roused in opposition to the permit as well. Concerned about loss of visual scenery and impacts to their neighboring wildlife areas, the largely retirement-age population is keeping a close watch on the permitting process. The community appointed an Environmental Committee, which is gathering information and communicating their concerns to the Corps on a regular basis. Their ultimate goal is to bar development in the undeveloped sand and mudflats that are periodically inundated. Currently, residents enjoy an unobstructed view of the Laguna Madre and its resident avian species such as plovers, spoonbills and herons, and are quite committed to preserving the scenic value of the site. This scenic and wildlife habitat value are now more important to these residents than any nuisances development might help to alleviate, such as windblown dust from the uplands (which were previously dredge disposal sites).

### ***Discussion***

This case raises several important issues. First, one wonders how many permit extensions may be granted before a project is considered obsolete and the permit withdrawn. Second, it appears that the Corps is reluctant to enforce its decision-making authority and simply turn down a permit. Third, a significant amount of several government agencies' personnel time and resources are being spent on this permitting process, seemingly at the whim of a single developer. Included in the mission statement of the Galveston District's

Corps office is the phrase "administer laws for the protection and preservation of navigable waters and wetlands." While it does appear that the Corps is attempting to provide an adequate review of the project, at least in this particular case, it is also clearly within their purview to deny any development from proceeding in the island's wetland areas.

Wetlands in the Laguna Madre region support a variety of commercially important species such as redfish, sea trout, and shrimp. The algal mats, vegetated flats and sand flats, considered by some to be unproductive areas, are actually quite productive in terms of their ecosystem values. Algal mats harbor a variety of invertebrate food sources for foraging shorebirds, periodically inundated areas transport nutrients from upland areas to the marine ecosystem, and mangroves are complex vegetative systems highly valued for stabilizing shorelines, filtering contaminants and converting nutrients.

It seemed apparent through this review that the applicant has no clear idea why there may be natural resource impacts inherent in his project, nor does he exhibit any real commitment to protecting them, based on his repeated attempts to find "new" wetland delineations, and to provide as little mitigation for the lost wetlands as possible.

The Corps has considered the concerns of Outdoor Resorts in this process, and appears to be fully weighing all of the agency and community concerns. However, the question remains - after 19 years, why not deny the permit as the project is proposed, and require the developer to shift all future development to areas not considered wetlands, especially since the applicant cannot seem to come up with adequate mitigation plans? Future property values and owners will only benefit from the continued enjoyment of these areas, and will likely pay a higher price to do so.

While this is not an exhaustive review and only examines one case, there are many others in the Galveston District that share similarities, and TCPS has documented these in a previous publication (see *A New Interpretation of No Net Loss...* January 1999, TCPS). This previous report shows that the Corps has made a consistent practice of issuing permits for projects that impact wetlands in this region. In fact, the report examined 25 Section 10 and Section 404 permit applications and found that only one had been denied a permit - to construct a helicopter-landing pad in the Laguna Madre. By repeatedly refusing to deny permits, even to those applicants known to have violated permits or who have acted as an advisor in cases where permits were violated, the Corps may inadvertently be sending a message to developers. Unfortunately, this message seems to have taught the development community that wetland regulations are there to "get around", rather than adhere to in a strict fashion. Until the Corps can take a strong and decisive stand to deny permits for projects that impact wetlands, the incidences of such 19-year permits may continue.

To be sure, the Corps seems to be increasingly improving its coordination with resource agencies such as FWS and NMFS. That said, there are still a variety of ways the agency can better serve the public interest in protecting valuable wetlands.

The Corps could better protect wetlands through its permitting and review process if the agency undertook to:

- Place limits on the number of times a permitted application can be extended
- Follow the advice of resource agencies and deny permits for construction in areas classified as wetlands, especially if the area has defined ecosystem values for aquatic and terrestrial wildlife
- Require that mitigation (even if mitigation is proposed, it is often unmonitored and/or unsuccessful) be feasible and if possible completed at a ratio equal to that of the lost wetland/s
- Conduct periodic progress checks and reviews of long-standing permits where no action has been taken to determine if the project still has merit or should be withdrawn and resubmitted