

**U.S. ARMY CORPS OF ENGINEERS  
SOUTH PACIFIC DIVISION**

Sept 8, 2004  
ADMINISTRATIVE APPEAL DECISION

DELTA BREEZE VINEYARDS, LLC  
SACRAMENTO DISTRICT FILE NO. 200000204

**Review Officer:** James W. Haggerty, U.S. Army Corps of Engineers, North Atlantic Div.

**Appellant:** Jake Stephens, III, Delta Breeze Vineyards LLC

**Date of Receipt of Request for Appeal:** 26 January 2004

**Date of Acceptance of Request for Appeal:** 12 April 2004

**Appeal Conference/Site Visit Date:** 15 June 2004

**APPELLANT'S STATED REASONS FOR APPEAL:**

- 1) There is no nexus between the impacts of the proposed fill activities and Special Conditions 3, 5, 6, 7, and 8 of the proffered permit.
- 2) Alternatively, to the extent that the district considered impacts of the vineyard operation in imposing Special Conditions 3, 5, 6, 7, and 8, it failed to comply with Corps regulations on the scope of environmental review.
- 3) Even if Special Conditions 3, 5, 6, 7, and 8 were otherwise proper, those conditions are disproportionate to the impacts identified by the district.
- 4) Special Condition 4 appropriately calls for creation of wetlands to mitigate impacts of the proposed fill, but inappropriately prescribes an unsuitable location for such wetlands.

**BACKGROUND INFORMATION:**

On 17 April 2000, the Sacramento District of the U.S. Army Corps of Engineers ("the district") responded to a 20 March 2000 request for comments from the Lake County Community Development Department regarding the Delta Breeze Vineyards project. The district provided a preliminary jurisdictional determination that waters of the United States appear to be present on the site and these waters may be impacted by fill activities. A site visit between the district and an environmental consultant retained by the appellant was conducted for 25 May 2000. A subsequent interagency pre-application meeting was held on 6 July 2000 at the district office. A wetland delineation report was submitted to the district by the consultant on 22 July 2000, and the district issued an approved jurisdictional determination on 26 July 2000.

On 24 August 2000, the appellant's project engineer submitted an application for an individual Department of the Army ("DA") permit to the district. The Project Description indicated that the nature of the regulated activity was a proposal to develop a 350-acre

CESPD-RP-C

SUBJECT: Decision Document for Administrative Appeal of Proffered Permit for Sacramento District Application No. 200000204

vineyard on a 780-acre parcel of woodland, chaparral and former grazing land. The site itself is located on a portion of Sections 2, 3, 10 & 11, Township 13 North, Range 7 West, MMDB&M, Lake County Assessor Parcel Numbers 10-003-52, 56 & 59, Clearlake, Lake County, California. The application further stated that the reasons for the discharge were to construct dam embankments to impound and store water as well as to protect the discharge of spillways from erosion and to construct embankments across watercourses for siltation basins. The applicant indicated that the project purpose was to construct and operate a vineyard, with the purpose of the dams to collect and store surface water to supplement well water for use in frost protection and irrigation for the vineyard. The purpose of the siltation basins was to trap silt and prevent it from entering Clear Lake as part of an erosion control plan that had been approved by Lake County. The application also indicated that tilling of land for the vineyard had begun and the dormant grape vines were to have been planted during the fall of 2000, and that the siltation basins needed to be constructed prior to 1 November 2000.

According to information provided by the appellant, the construction of dams would have resulted in the filling of 0.076 acres of wetlands and 0.159 acres of other jurisdictional waters of the United States (mostly ephemeral streams) along with inundation of 0.99 acres of wetlands and 0.213 acres of other jurisdictional waters. The appellant proposed to create 0.476 acres of seasonal wetlands as compensatory mitigation.

The district issued a public notice on 10 October 2000 for a 30-day comment period. Comments were submitted by the U.S. Environmental Protection Agency, U.S. Fish & Wildlife Service (USFWS), California Department of Transportation (CalTrans), California Historical Resources Information System, and Lake County. The major concerns in correspondence from these agencies included potential impacts to historic resources and hydraulic impacts to CalTrans facilities. At a later stage in the process, the district initiated formal consultation with USFWS because of the potential that the project may adversely impact several Federally endangered or threatened animal and plant species.

Many months passed before the applicant was able to address these concerns to the satisfaction of the aforementioned agencies. Additionally, during a period of several months in early 2001, an investigation was conducted to ascertain whether the appellant had discharged fill material into waters of the United States without the requisite DA approval. Once the investigation was completed, processing of the application resumed.

The district issued an initial proffered permit on 21 July 2003. The appellant appealed the initial proffered permit to the district on 15 October 2003 after the district extended the 60-day timeframe for submission of a request for appeal. The district issued a proffered permit on 25 November 2003 after deciding the permit should be issued as previously written.

CESPD-RP-C

SUBJECT: Decision Document for Administrative Appeal of Proffered Permit for Sacramento District Application No. 200000204

The appellant then again attempted to resolve differences informally with the district but submitted a formal request for appeal on 26 January 2004. The appellant and district met on 30 March 2004 in an unsuccessful last-ditch effort to resolve differences.

**INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:**

- a) The Sacramento District provided a copy of their administrative record, which was reviewed and considered in the appeal review process along with the results of the 15 June 2004 site inspection and appeal conference.
- b) During the conference, the appellant provided visual aids, including aerial photographs and topographic surveys of the project site and nearby properties. These materials were used to help clarify the remainder of the administrative record.

**SUMMARY OF DECISION:**

The appellant's Request for Appeal has merit, because the Sacramento District's administrative record does not sufficiently support the total scope of the mitigation requirements in their proffered permit. The level of mitigation required by the district is excessive compared to the level mandated by applicable Corps' regulations and policies. Additionally, the administrative record is lacking in justification for imposition of the requirements for a fenced, protected buffer along both sides of intermittent stream corridors on the site, as well as those for an endowment for maintenance of areas to be placed under a conservation easement.

**INSTRUCTIONS FOR SUBSEQUENT DISTRICT ACTION/  
APPEAL DECISION FINDINGS:**

*Action:* The Sacramento District is to reassess the special conditions of their proffered permit, especially the requirements for a fenced stream buffer area, in-perpetuity maintenance, and an endowment to fund such maintenance. The district must confirm that these measures to mitigate adverse impacts from the vineyard project fall within the overarching framework specified in 33 CFR 320.4 (r)(2) and 33 CFR 325.4 (a), as well as other documents, including but not limited to: Regulatory Guidance Letter (RGL) 02-2; the Standard Operating Procedures of the Regulatory Program; and the 1990 MOA between DA and USEPA regarding mitigation.

*Appeal Decision Findings:*

**Reason #2:** Alternatively, to the extent that the district considered impacts of the vineyard operation in imposing Special Conditions 3, 5, 6, 7, and 8, it failed to comply with Corps regulations on the scope of environmental review.

CESPD-RP-C

SUBJECT: Decision Document for Administrative Appeal of Proffered Permit for Sacramento District Application No. 200000204

**Finding:** This reason for appeal does not have merit. The district appropriately included the vineyard operation within its scope of analysis pursuant to the National Environmental Policy Act (NEPA), along with the direct, indirect and secondary impacts anticipated to result from the regulated discharge of fill material into waters of the United States.

**Discussion:** The appellant's team asserts that impacts from operation of the vineyard should not be considered within the NEPA scope of analysis for this project. The vineyard was placed entirely in upland areas outside DA jurisdiction, and operation of the vineyard commenced in late 2000. The district believes otherwise.

Although Lake County issued separate approvals for the vineyard and dam/reservoir components, the district's decision to include the vineyard in its scope of analysis comports with the regulations for implementing NEPA in the Corps Regulatory Program, found at Title 33 of the Code of Federal Regulations, Part 325, Appendix B. The permit application submitted by the appellant indicated that the project purpose was to construct and operate a vineyard, and that the proposed dams and reservoirs would collect and store surface waters during winter months for frost protection and irrigation. It is reasonable to infer from the content of the permit application that the vineyard and dams/reservoirs are related components of the overall stated project purpose of constructing and operating a vineyard.

The appellant's team provided further justification for their position by arguing that the vineyard has been operational for nearly four years, and has relied upon well water for irrigation. However, the appellant indicates he would have to drill deeper wells and pump the water to the surface in order to ensure he has sufficient water to protect against frost damage. He has indicated this is not a practicable alternative. The appellant has also indicated he may not be able to secure additional project financing unless he constructs the dams/reservoirs to protect against frost damage.

Since the overall weight of information in the administrative record supports a contention that the functionality of the vineyard operation is dependent upon construction of the dams/reservoirs, the district was correct by considering impacts from the upland vineyard in its NEPA scope of analysis. Additionally, the dams/reservoirs would serve no discernible purpose in the absence of a vineyard at this location.

**Reason #1:** There is no nexus between the impacts of the proposed fill activities and Special Conditions 3, 5, 6, 7, and 8 of the proffered permit.

**Reason #3:** Even if Special Conditions 3, 5, 6, 7, and 8 were otherwise proper, those conditions are disproportionate to the impacts identified by the district.

CESPD-RP-C

SUBJECT: Decision Document for Administrative Appeal of Proffered Permit for Sacramento District Application No. 200000204

**Reason #4:** Special Condition 4 appropriately calls for creation of wetlands to mitigate impacts of the proposed fill, but inappropriately prescribes an unsuitable location for such wetlands.

**Finding:** These three reasons for appeal have merit. The district's administrative record does not adequately support their rationale for inclusion of the aforementioned Special Conditions of the proffered permit. The record also does not sufficiently support the district's selection of the mitigation site, in light of concerns expressed by the appellant in the Request for Appeal and at a 30 March 2004 meeting that wetland creation efforts may ultimately fail due to existing soil conditions.

The issue of vegetative buffers is discussed in RGL 02-2, Special Condition No. 19 of the nationwide permits, and in the preamble to the 15 January 2002 Federal Register notice of the issuance of nationwide permits. The Corps' Regulatory Program recognizes that vegetated buffers are a critical element of the aquatic ecosystem in virtually all watersheds. Buffers provide water quality benefits to open water areas via reduction in pollutant and sediment loading. Corps districts are required to consider inclusion of vegetated buffers as part of an overall watershed approach to determining appropriate mitigation for impacts to the aquatic environment.

Generally, the regulations advocate inclusion of protected, vegetated upland/riparian buffers if doing so is beneficial on a watershed basis. However, any mitigation requirements must comply with the overarching framework specified in 33 CFR 320.4 (r)(2) and 33 CFR 325.4 (a). That is, the district must determine that the compensatory mitigation be directly related to the impacts of the proposal, and appropriate to the scope and degree of impacts. In the present case, the total acreage of waters of the United States that would be impacted is 0.372 acres, of which 0.159 acres would directly lost to filling activities. It is noted that Nationwide Permit Nos. 39 & 42 allow impacts to 0.33 acres of waters of the United States. Thus, the impacts associated with this project are only slightly above a level that has been determined to result in minimal individual and cumulative adverse impacts to waters of the United States, and this must be taken into consideration in determining mitigation requirements or other special permit conditions.

The district's administrative record does not sufficiently demonstrate that the special conditions requiring protected upland buffers along unaffected portions of the site including approximately six miles of ephemeral streams, plus fencing and a fully-funded endowment, are reasonable and appropriate to the relatively small scope of this proposal. The district indicates in their 25 November 2003 letter to the appellant that these conditions are standard for this type of project; while it is laudable from a programmatic consistency standpoint that the district has standard conditions for this type of project, the necessity for

CESPD-RP-C

SUBJECT: Decision Document for Administrative Appeal of Proffered Permit for Sacramento District Application No. 200000204

these conditions, individually and as a group, must be justified on a project-specific basis. The district's administrative record does not contain a sufficient justification in this regard.

Additionally, the record does not fully justify the need for buffers along all ephemeral streams. The district indicates the fenced preserve is necessary to [e]nsure that the remaining functions and values of the aquatic environment are protected. The decision document indicates that the district anticipates long-term impacts to jurisdictional waters from *potential* pesticide and fertilizer use [emphasis added], and that the buffer requirements in Special Condition No. 3 are aimed at protecting these streams. The district does not establish with any degree of certainty that fertilizers and pesticides would be used in the vineyard; even so, the vineyard occupies less than one-half of the project site, leaving unaddressed the justification for fenced buffers along ephemeral streams over the remainder of the site. Other reasons for fencing of the buffer are to prevent unauthorized discharges into waters of the United States, dumping, and vehicular intrusion. There is no evidence presented in the administrative record to suggest that stream corridors would be routinely intruded upon by vehicles; the 15 June 2004 site inspection revealed many of the stream corridors are bounded by relatively steeply sloping areas which are unsafe to cross in vehicles. Filling and dumping activities into waters of the United States are already regulated under the Clean Water Act; thus it is unnecessarily duplicative to mandate special measures such as installation of 12 miles of fencing at large cost to the appellant (approximately several hundred thousand dollars) to discourage such discharges from occurring in or near ephemeral streams.

It should be noted that the vineyard employs drip irrigation practices whereby water, nutrients and pesticides are fed via tubing directly to the plants. This negates the need to apply fertilizers and pesticides to the soil, and as such there is no direct runoff of these into receiving streams. The only appreciable runoff is from natural precipitation.

The potential installation of approximately 12 miles of fencing on the site in and of itself is a substantial component of the project whose impacts should have been evaluated as part of the district's public interest review. Installation of such length of fencing is likely to have an adverse impact upon the ability wildlife to traverse the site. It should be noted that the appellant has installed fencing around the periphery of the vineyard areas, with provision for a wildlife corridor leading to a passageway under California Route 53.

The district's decision document does not present a sufficiently compelling case for the special permit conditions requiring recordation of a permanent conservation easement maintaining all preservation and avoidance areas as wetland preserve and wildlife habitat. As indicated in the preceding paragraph, the functionality of wildlife habitat at the site would be compromised by the requirement to install 12 miles of fencing along ephemeral stream corridors. No rationale is presented by the district to support their requirement for placement of a conservation easement on the remaining 420 acres of the site, which almost entirely consists of uplands. The appellant proposes to leave the 420 acres in its

CESPD-RP-C

SUBJECT: Decision Document for Administrative Appeal of Proffered Permit for  
Sacramento District Application No. 200000204

natural state for the 25-to-30 year life of the vineyard operation. There is also no evidence that the district considered the proposed reservoirs themselves in their determination of the mitigation requirements. The creation of year-round open water areas would likely result in a positive impact by providing sources of drinking water for wildlife resources on a site that is arid much of the time.

**OVERALL CONCLUSION:**

After reviewing and evaluating the entirety of the administrative record provided by the Sacramento District, I conclude there is insufficient information therein to support the scope of the mitigation requirements contained in their proffered permit authorizing the appellant's proposal. I also conclude that the requirements pertaining to establishment, maintenance and land use restrictions along remaining unimpacted stream corridors and the remaining undisturbed portions of the site must be further justified in order to meet current regulations regarding conditioning of Department of the Army permits. I hereby return this matter to the Sacramento District for additional analysis as prescribed within this decision memorandum.

original signed by

Leonardo V. Flor, COL, EN

for

JOSEPH SCHROEDEL  
BG, USA  
Commanding