# ADMINISTRATIVE APPEAL DECISION
# CLEAN WATER ACT
# BAILEY - FILE NO. MVN-2005-2099-WW
# NEW ORLEANS DISTRICT

**ADMINISTRATIVE APPEAL DECISION**
**BAILEY PROFFERED PERMIT**
**NEW ORLEANS DISTRICT**
**CORPS FILE NUMBER MVN-2005-2099-WW**
**NOVEMBER 16, 2008**

**Review Officer:** James B. Wiseman, Jr., U.S. Army Corps of Engineers, Mississippi Valley Division (MVD)

**Appellant:** Mr. Roland Bailey, Moss Bluff, Louisiana

**Authority:** Section 404 of the Clean Water Act

**Approved Jurisdictional Determination Conference:** 13 March 2008

**Summary of Appeal Decision:** The appeal has partial merit. The administrative record does not adequately address the question of need for the project. There are also several discrepancies in the administrative record regarding the ecological characterization of the jurisdictional areas on the appellant's property.

**Background Information:** Mr. Roland Bailey owns property on the left descending bank of the West Fork of the Calcasieu River, approximately 0.7 mile downstream of the Highway 378 bridge, in Section 12, Township 9 South, Range 9 West, Moss Bluff, Calcasieu Parish, Louisiana. On 27 September 2004, based on a report from a member of the public and a field investigation, MVN issued a cease and desist order to Mr. Bailey for "mechanized land clearing, filling and grading in a tidal wetland" and for "construction of a boat house and wharf in a navigable water of the United States." In order to resolve the violation, MVN allowed Mr. Bailey to submit an after-the-fact (ATF) permit application for the unauthorized work. By regulation, in order to accept an ATF permit application, a District office must also receive a signed tolling agreement[1]. MVN received an initial ATF permit application on 20 January 2005, a signed tolling agreement on 16 May 2005, and a complete permit application on 20 May 2005.

MVN and the Louisiana Department of Environmental Quality (LDEQ) issued a joint public notice advertising the ATF permit application on 3 June 2005, which contained the following description of the character of work:

[1] Such agreement will state that, in exchange for the Corps acceptance of any after-the-fact permit application and/or any administrative appeal associated with the unauthorized activity, the responsible party agrees that the statute of limitations will be suspended (*i.e.*, tolled) until one year after the final Corps decision on the after-the-fact permit application or, if there is an administrative appeal, one year after the final Corps decision as defined at 33 CFR 331.10, whichever date is later.

> Clear, dredge, grade, and place approximately 3,130 cubic yards of hauled in earthen fill material and concrete rubble, and dredge approximately 209 cubic yards of native material all to construct a boat slip, pier, boathouse, and a 66 foot wide by 470 foot long private road. Project implementation would directly impact 0.5 acres of tidal marsh wetlands.

The map[2] included with the public notice includes an area of "unauthorized fill in wetlands" and an area of "unauthorized rip rap", neither of which is mentioned in the public notice or in the cease and desist order.

On 27 July 2005, LDEQ issued state water quality certification for the project as described in the public notice. By letter dated 17 October 2005 to Mr. Regan Brown of Arabie Environmental Solutions, Inc. (agent for Mr. Bailey), MVN stated that "[W]e have determined that there is no demonstrated need or is it in the public interest to fill 0.24 acres of cypress swamp for a new access road [or] . . . the unauthorized filling of 0.23 acres of cypress swamp along the western portion of his property." This 0.23 acre of unauthorized fill appears to correspond to the area identified on the map but not mentioned in the text of the public notice. The 17 October 2005 letter also includes a request to "remove the new access road from the project drawings and provide this office with a plan for the removal of the 0.23 acres of unauthorized fill and the restoration of the cypress swamp." MVN further stated that "[o]nce we receive the required information, the evaluation and processing of Mr. Bailey's permit will proceed." According to MVN records, neither Mr. Bailey nor Mr. Brown responded, and by letter dated 1 May 2006, MVN gave a 20-day notice to Mr. Bailey to respond or the matter would be referred for enforcement action. By letters dated 22 May 2006 from Mr. Bailey and 6 July 2006 from Mr. Bailey's agent, MVN was requested to reconsider the decision regarding the proposed road and the unauthorized fill on the western property line. Reasons cited for keeping the proposed new road include access problems from the main road to the existing access road, the narrowness of the existing access road, and problems with maintenance of the existing road since it is not a county road.

By electronic mail on 1 November 2006, MVN notified the appellant's agent that:

[2] Exhibit 1

> [W]e must decide whether to proffer a permit to Mr. Bailey, or deny his permit application. This district is prepared to issue a permit that would authorize your client's boat-slip, dock and rip-rap. Such a permit would include a restoration plan for the area of unauthorized fill in wetlands . . . . The proffered permit would also omit Mr. Bailey's proposed access road.

If this was unacceptable to Mr. Bailey, MVN stated that they would proceed with permit denial and further enforcement action to resolve the unauthorized work. Reasons cited in Mr. Bailey's and his agent's previous requests to reconsider the decision were not addressed. In response, by letter dated 1 December 2006, Mr. R. Regan Brown, agent for applicant, informed MVN that Mr. Bailey had decided not to pursue a permit for the proposed road or for the fill material placed along the western boundary of the property. Based on that letter, MVN completed its permit evaluation and drafted an initial proffered permit (IPP). The IPP was forwarded to Mr. Bailey with cover letter dated 16 January 2007 and also included a combined Notification of Administrative Appeal Options and Process and Request for Appeal form (NAO/RFA). Mr. Bailey objected to the terms and conditions of the IPP, completed the RFA form expressing his objections, and returned it to MVN on 1 March 2007[3]. Mr. Bailey's reasons for appeal were (paraphrasing):

> (1) Most of the fill on the lot predated the Clean Water Act and was done by previous owners. He only "top-dressed" the area of identified by MVN as unauthorized fill.
>
> (2) The proposed road crosses open water, not wetlands.
>
> (3) The Corps has a double standard. The appellant has a demonstrated need for the new road "equally valid" to that of an adjacent landowner who had previously been issued a similar permit.

According to appeal regulations at 33 C.F.R. 331.6, when an applicant objects to an IPP for an individual permit, the District Engineer must evaluate the objection(s) and may modify the permit to address all of the applicant's objections; modify the permit to address some, but not all, of the applicant's

[3] MVN received the RFA on 5 March 2007. Since Mr. Bailey returned the completed RFA within the 60-day timeframe required by the appeal regulations, MVN accepted the appeal.

objections; or not modify the permit, having determined that the permit should be issued as previously written. According to a timeline included in the administrative record (AR), MVN prepared a response to the request for appeal on 29 March 2007, but it was not sent to Mr. Bailey until October 2007.

The AR contains an "Addendum to Decision Document" (addendum) signed by the project manager on 27 August 2007 and by the District Commander on 24 October 2007. In the addendum, MVN addressed the appellant's reasons (1) and (2) by stating that the permit application signed by Mr. Bailey included language affirming the existence of unauthorized fill along the western property boundary and affirming that the proposed road crossed wetlands. The District did not address whether or not the fill predated the Clean Water Act or the proposed road would only impact open water. In response to the appellant's claim that the adjacent landowner received preferential treatment, MVN stated that the permit at issue was granted in 1987 and that "knowledge gained over the years as to the importance of wetland functions and values to both human and fish and wildlife communities has resulted in a more comprehensive evaluation of the need to destroy wetland resources for residential, commercial, or industrial developments."

In a letter dated 24 October 2007 from the District Commander to Mr. Bailey, MVN stated that "[a]fter reconsideration of your comments, and a second review of your proposed action, we concluded that there in no reason to change our initial permit decision." A new NAO/RFA form, also dated 24 October 2007, was enclosed with the letter.

Mr. Bailey maintained his objections to the conditions and restrictions of the permit and submitted a second RFA form to appeal the proffered permit. The RFA was received at the Mississippi Valley Division office on 15 December 2007. By letter dated 11 January 2008, the RFA was determined to be complete and acceptable.

**Information Received and Its Disposal During the Appeal:**

33 C.F.R. 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this JD. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding a denied permit, declined permit, or jurisdictional determination, as that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his Review Officer (RO) conducts an independent review of the administrative record

to address the reasons for appeal cited by the Appellant. The administrative record is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAP) form. Pursuant to 33 C.F.R. Section 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information to MVD. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the administrative record. Such interpretation, clarification, or explanation does not become part of the administrative record, because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

1. MVN provided a copy of the administrative record to the RO and the Appellant, which was received by the RO on 22 January 2008. The administrative record is limited to information contained in the record by the date of the NAP form, which in this case was 24 October 2007.

2. A site visit and appeal meeting was held on 13 March 2008. During the site visit, the RO took three digital photographs that were included as Exhibit 1 in the Memorandum for Record[4] prepared by the RO summarizing the site visit and appeal meeting. The memorandum and photographs are deemed clarifying information.

**Basis for Appeal as Presented by Appellant**

**Appellant's Verbatim Reasons for Appeal**

**1. The omission of the proposed road from the permit. As explained to the Corps on May 22, 2007[5], the proposed road is not wide enough to serve our needs. There are no existing landowner objections to our proposed road. A similar permit was granted to an adjacent Catholic retreat. Only 160 feet by 66 feet of wetlands is needed to build a private road.**

[4] A draft dated 31 March 2008 was sent to MVN and to the Appellant. No comments were received, and the Review Officer issued the final memo on 23 April 2008.

[5] The administrative record does not contain a letter from Mr. Bailey dated 22 May 2007. However, there is a letter dated 22 May 2006 (with a date stamp of 24 May 2006) in the AR, in which the Appellant addresses these same issues, and it is assumed that the Appellant simply made a mistake or that the 2007 date was a typographical error.

FINDING: This reason for appeal does not have merit.

DISCUSSION: The difference in the MVN's evaluation of the Diocese permit application and of the Appellant's application was adequately addressed in the addendum to the decision document. The Diocese permit was issued approximately 18 years before Mr. Bailey applied for his permit in 2005. It is reasonable that permit evaluation practices have changed over that span of time, and that potential adverse impacts to waters of the United States are better understood than in the past.

The need for the project is addressed below.

ACTION: No action is required.

**2. The approximate 0.25 acres of fill on the west part of the property of Lot 16 should be granted. Our family is large, and our house is very near a marsh area. The additional fill gives us a little more distance and safety for our family, including our children.**

**3. Under NEPA and Corps regulations at 33 C.F.R. 320, the Corps is supposed to consider the applicant's purpose and need in evaluating permits. Our purpose and need as stated is to enhance the access road and to provide a margin of safety for my family at my site. The Corps is arbitrary and capricious in rejecting these valid needs in the permit process**

FINDING: These reasons for appeal have merit.

These two reasons for appeal are considered together. Discussion of practicable alternatives should consider the alternatives both in terms of the applicant's wishes and capabilities and in terms of the need for or the purpose to be served by the proposed activity[6]. The evaluation of every permit application must include an analysis of the relative extent of the public and private need for the proposed structure or work. Where there are unresolved conflicts as to resource use, the district must consider the practicability of using reasonable alternative locations and methods to accomplish the applicant's objective. The district must also consider the extent and permanence of the beneficial and/or detrimental effects which a structure or work is likely to have on the public and private uses to which the area is suited[7]. These issues are usually addressed in the Findings section of the combined

[6] From Regulatory Guidance Letter 84-08 (Permit Decision Documentation) issued 26 July 1984.

[7] 33 C.F.R. 320.4(a)(2)

decision document. Neither the original decision document approved on 16 January 2007 nor in the addendum to the decision document approved on 24 October 2007 addressed the issue of public versus private need for this project. The decision document contains a statement that MVN determined that "the detriments to natural resource functions and values outweighed the potential benefits" and that the existing road and existing filled upland areas are "sufficient to meet the applicant's stated overall objective"[8], but these statements are not supported by discussion or analysis in the original decision document or in the addendum. In a letter to Mr. Bailey's agent dated 17 October 2005, MVN stated that after review of the permit application, "we have determined that there is no demonstrated need or is it in the public interest to fill 0.24 acres of cypress swamp for a new access road" and "there is no demonstrated need for the unauthorized filling 0.23 acres of cypress swamp" in reference to the fill on the western property line. MVN requested that Mr. Bailey remove these two items from his permit application and submit revised drawings and a restoration plan for the unauthorized fill. MVN's rationale in reaching these conclusions is not provided in the decision document, the addendum to the decision document, or elsewhere in the administrative record.

One of the reasons cited in Mr. Bailey's request for appeal filed in response to the District's initial proffered permit (IPP) is that the proposed road would only impact open water, not wetlands. The addendum to the decision document, which was prepared in response to the appeal of the IPP, does not address whether or not this area is open water or wetlands. In fact, there is considerable discrepancy in how MVN characterizes the area impacted by the unauthorized fill or the area to be impacted by the proposed road. In the public notice, these areas are described as "tidal marsh wetlands". In the decision document[9], MVN refers to "local emergent and/or forested wetlands." In the letter responding to Mr. Bailey's request for appeal of the IPP, MVN stated that "[t]he benefits to be derived from the additional proposed work do not appear to justify the destruction of 0.5 acres of high quality river floodplain forested wetlands." Anecdotally, during the site visit, the RO took a photograph of the route of the proposed road[10]. The photograph shows that this area is not forested.

---

[8] Department of the Army Permit Evaluation and Decision Document, page 1.

[9] Discussion of special aquatic sites, page 6.

[10] Memorandum for Record, 7 April 2008, Exhibit 3.

ACTION: The JD is remanded to the District for reevaluation, reconsideration and additional documentation. The District must provide documentation addressing the relative extent of the public and private need for the proposed new road and for the unauthorized fill on the western property line.

The District should also reconsider and reevaluate the route of the proposed new road and address whether or not the route crosses open water. If the route is determined to be a wetland, the District should clarify the record to accurately reflect the actual wetland type. The District should also clarify the wetland type of the area along the western property boundary and determine whether or not any of this area had been previously filled.

CONCLUSION: Mr. Bailey's reasons for appeal have partial merit. The proffered permit is remanded to the New Orleans District with the instructions stated above. The final decision will be the District Engineer's decision made pursuant to my remand.

Michael J. Walsh
Brigadier General, U.S. Army
Division Engineer
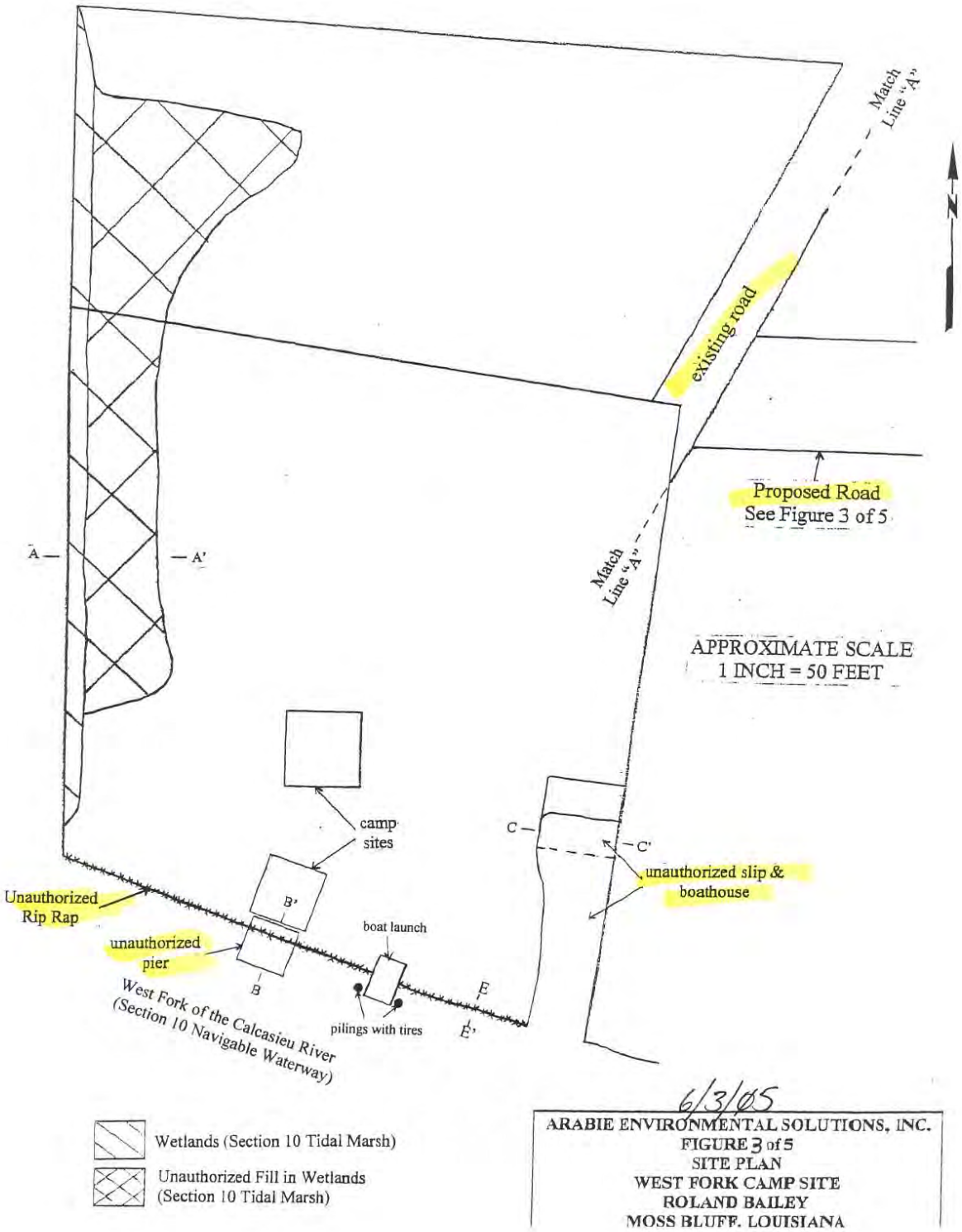
**Exhibit 1 – Map from Public Notice**