ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
MOBLEY CONSTRUCTION - FILE NO. 990461110
MEMPHIS DISTRICT

ADMINISTRATIVE APPEAL DECISION

Mobley Construction Company
File No. 990461110
Memphis District (MVM)
August 27, 2003

Review Officer (RO): Martha S. Chieply and Philip Hollis, U.S. Army Corps of Engineers (USACE), Mississippi Valley Division

Appellant/Applicant: Mr. Bryce Mobley, Mobley Construction Company, Morrilton, Arkansas

Appellant's Representative: Ms. Anna Schoonover, Solutions, Incorporated, Vicksburg, Mississippi

Authority: Section 10 of the Rivers and Harbors Act of 1899

Receipt of Request For Appeal (RFA): January 21, 2003

Appeal Conference and Site Visit Dates: March 20, 2003

Information Received and Its Disposition: See Attachment hereto.

I. Reason for Appeal as Presented by Appellant

As stated by the Appellant in the RFA, the Appellant's reason for appeal centers on Special Condition (SC) 2.[1] In its Attachment to Request For Appeal, Mobley clarified its reason for appeal and asserted that:

1. SC 2 should be deleted from the Permit;
2. There is no substantial evidence in the record to support the "imposition" of SC 2, and the District Engineer's decision to include the SC is arbitrary, capricious, and an abuse of discretion;
3. There is substantial evidence in the record to show that the paddlefish and five fish species populations in the White River are being maintained, and are not adversely impacted by current mining activities;
4. The District Engineer's review of Appellant's economic information and the District Engineer's determination that the information was inadequate and did not show significant financial hardship is not supported by substantial evidence, and is an arbitrary determination; and,
5. SC 2 conflicts with the stated purpose and project description of the Permit.[2]

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[1] SC 2 states, "No dredging will be allowed from March 1 until May 31 of each year between River Miles 120-125 and 259-274 due to fish spawning."

[2] Each of these reasons is discussed in detail in Mobley's Attachment to Request For Appeal.

II. Summary of Appeal Decision

The appeal has no merit. The decision of the MVM District Engineer was not arbitrary, capricious, or an abuse of discretion. The District Engineer's decision was supported by substantial evidence in the administrative record. It was not plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance. The administrative record provides substantial evidence for the inclusion of the permit SCs including SC 2. The District Engineer based his decision on public comments, the Appellant's responses to the comments, and independent research. The District Engineer, using his best judgment, considered and evaluated the issues using reasonable means, and balanced the economic impact to Mobley against the public interest factors. The District Engineer engaged in the required public interest review, and properly determined that the public interest required the permit to be conditioned.

FINDING: The appeal does not have merit.

ACTION: No action is required.

III. Background Information

On November 15, 1995, the Memphis District Engineer issued Permit Number White River - 368 to Mobley Construction Co., Inc. (Mobley). This permit was issued under the authority of Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403). The Permit allowed Mobley, to dredge sand and gravel from the White River for commercial resale. This Permit contained several SCs, and was scheduled to expire on December 28, 1999.[3]

In a letter dated December 7, 1998, Mobley requested a meeting to discuss its anticipated request to extend Permit No. White River - 368.[4] The purpose of the meeting would be to review the permit conditions dealing with mussel bed exclusion distances, and dredging exclusion dates for two river reaches, which Mobley had found to be extremely restrictive.[5] This pre-application meeting was held on February 24, 1999. Attendees were Mobley, Welch/Harris Incorporated, MVM, Arkansas Game and Fish Commission, and U.S. Fish and Wildlife.[6] After this meeting, Mobley requested that MVM consider altering the dredging exclusion zone contained in SC 2 of the permit.[7]

On May 26, 1999, Mobley requested a five-year extension of Permit No. White River - 368. Mobley also requested modifications to SC 2, 4, and 5 of the current permit. These SCs

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[3] Administrative Record (AR) 1628 – 1631. References to the AR are by page numbers.
[4] AR 1621.
[5] Mobley was concerned with the SCs that did not allow dredging within ¼ mile from each end of identified mussel beds, and SC 2, which stated, "No dredging will be allowed from March 1 until May 31 of each year between Miles 120-125 and 259-274 due to fish spawning."
[6] AR 1622.
[7] AR 1620.

dealt with the mussel bed exclusion distances and the exclusion dates for the two river reaches.[8]

On November 1, 1999, MVM issued Public Notice No. White River 99-111 [jod] for Mobley's Permit application.[9] Public comments were received in response to the Public Notice.[10] Three commenters objected to the permit and wanted the dredging halted.[11] Two commenters warned of existing gas pipeline crossings that needed to be avoided.[12] Four commenters objected to the changes as proposed.[13] One commenter requested information about mussel bed locations and questioned whether increased turbidity in the water would adversely impact mussel beds. On December 27, 1999, the District Engineer granted Mobley a temporary extension of Permit No. White River - 368. It was extended from December 28, 1999 until June 28, 2000, and all terms and conditions remained in effect. [14]

By letter dated December 28, 1999, MVM provided the public comments it had received to Mobley.[15] Mobley was requested to provide relevant comments, and to provide information on three alternatives. The three alternatives were 1) no action, 2) other project designs, and 3) other sites available.[16] Mobley responded to the comments on January 4, 2000. Mobley reiterated that it had been dredging in this area for approximately 65 years, and that there was no proof that its dredging activity had been a detriment. Mobley reemphasized that the permit conditions were very restrictive and caused Mobley economic problems. Regarding the three alternatives, Mobley said 1) if the permit were denied (no action), after exhausting administrative remedies and legal processes, then Mobley would probably be forced to close; 2) other project designs were not an alternative because of the location of the material in the river and the market location; and, 3) other sites were not available because Mobley's permit area was defined by its state lease and the desired materials were within that lease.[17]

In January 2000, MVM prepared a Department of the Army Permit Evaluation and Decision Document.[18] The Decision Document contained an environmental assessment and statement of findings for the proposed work.[19] The Decision Document detailed the

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[8] AR 1616.

[9] AR 1593. This Public Notice detailed Mobley's requested changes to SCs 2, 4, and 5 of Permit No. White River - 368.

[10] AR 1573 – 1591.

[11] These commenters were a private citizen (AR 1590); American Agricultural Service (AR 1584); and, Johnson Decorating (AR 1579).

[12] These two commenters were Reliant Energy (AR 1589 and AR 1586), and Texas Eastern Transmission (AR 1588).

[13] These four commenters were U.S. Fish and Wildlife (AR 1581); Arkansas Natural Heritage Commission (AR 1580); U.S. EPA (AR 1577); and, Arkansas Game & Fish Commission (AR 1573).

[14] AR 1568.

[15] After this letter, some late comments were received from the Arkansas Historic Preservation Program and the State of Arkansas Clearinghouse (AR 1550 – 1563; note that 1562 is a redundant copy of the ADEQ water quality certificate found at AR 1592.)

[16] AR 1567.

[17] AR 1564.

[18] AR 1263-1320. (The regulatory team members signed the Decision Document on January 5-6, and the District Engineer signed it on January 14, 2000.)

[19] The environmental assessment and statement of findings are required under 33 C.F.R. 325.2(a)(4) and 33 C.F.R. (a)(6).

environmental and public interest factors considered. The Decision Document found that the substrate would be disturbed as a result of dredging and it could directly destroy spawning habitat for fish and other aquatic organisms. It was found that SC 2 would prevent total destruction of habitat in the upper reaches, and that SC 5 would provide river bottom contours and reflect any signs of headcutting in the river bottom due to the mining activity.[20] MVM found that turbidity of the White River waters would be increased during dredging and washing operations, but that conditions would return to normal when such operations ceased.[21] MVM found that, while the fish themselves could avoid the dredge, the proposed activity would adversely impact habitat for fish and other aquatic organisms. MVM decided that SCs 1, 2, 3, 4, and 6, as shown on the attachment to the Decision Document, would lessen the impacts to fish and other aquatic organisms by restricting dredging operations to limited areas or to certain time frames.[22] The Decision Document stated that two endangered species of fresh water mussels exist in the White River, Arkansas.[23] To protect these species, it was found that dredging should be restricted near identified mussel beds. MVM also found that SC 2 would provide benefits to these species.[24] A summary of the public comments on the permit application was included and discussed in the Decision Document.[25] MVM found that the SCs were necessary to lessen adverse impacts from the proposed activity.[26] MVM also found that there were no available, practicable alternatives having less adverse impact.[27] MVM found that the proposed activity would benefit Mobley by providing sand and gravel for its business, and that the proposed activity would result in a beneficial gain to the public by providing sand and gravel at reasonable prices.[28] The Decision Document determined that, with the inclusion of the special conditions, there would be no significant impact on the environment, and, that issuance of a permit would not be contrary to the public interest.[29]

On January 7, 2000, an initial proffered permit was sent to Mobley.[30] By letter dated February 28, 2000, Mobley declined the initial proffered permit, and explained its objections to the permit.[31] A meeting was held by MVM, on March 28, 2000, to discuss Mobley's objections.[32] On April 6, 2000, a second Public Notice was issued regarding Mobley's permit application.[33] This Public Notice contained proposed changes to the SCs.[34]

Public comments were received from state resource agencies, Texas Eastern

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[20] AR 1518.
[21] AR 1518.
[22] AR 1518.
[23] The two species are the pink mucket and the scaleshell mussels.
[24] AR 1519.
[25] AR 1520-1521.
[26] AR 1269.
[27] AR 1270.
[28] AR 1270-1271.
[29] AR 1271.
[30] AR 1510.
[31] AR 1493.
[32] AR 1482.
[33] AR 1462.
[34] These proposed changes were suggested in order to address Mobley's objections to the initially proffered permit.

Transmission Co., and federal resource agencies.[35] On June 16, 2000, MVM prepared Addendum I to the January 2000 Decision Document.[36] Addendum I discussed the public comments received in response to the second Public Notice, and MVM's position on the comments.

Mobley requested and was granted a second extension of Permit No. White River – 368, until December 28, 2000.[37] Mobley wanted the extension in order to hire a consultant (GBMc) to research and review data on paddlefish, and objectively evaluate the state and federal resource agencies' comments to the Public Notices.[38] On August 14, 2000, Mobley provided its consultant's report to MVM.[39] In its letter, Mobley stated that, except for SC 2, MVM had satisfactorily resolved Mobley's concerns regarding the permit, and requested a meeting to resolve this final issue.

MVM sent GBMc's report to the concerned state and federal resource agencies, and set the meeting for September 19, 2000.[40] Before the meeting, the Arkansas Game and Fish Commission, U.S. Fish and Wildlife Service, and U.S. EPA indicated that they disagreed with the conclusions drawn in the GBMc report.[41] Resolution was not reached at the meeting, and the parties continued the dialogue over SC 2.[42]

Under the Wetlands Regulatory Assistance Program (WRAP), MVM requested technical assistance from the U.S. Army Engineer Research and Development Center (ERDC) in reviewing the conclusions of the GBMc report.[43] ERDC initially prepared two WRAP responses: WRAP Response #01-02 and WRAP Response #01-03.

WRAP Response #01-02 was entitled Dredging Permit for Mobley Construction Company In the White River, Arkansas: Paddlefish Spawning Habitat in the Exclusion Zone.[44] WRAP #01-02 concluded that the exclusion zone addressed by SC 2 was suitable for spawning and rearing of paddlefish. It also concluded that the scope and methodology of analysis in the GBMc report were flawed. According to WRAP #01-02, the GBMc report did not address certain issues relevant to fish reproduction in the exclusion zone. WRAP #01-02 stated that it was conservative to assume a wide calendar season for paddlefish reproduction and prudent to maintain a wide window (i.e. Mar-May) of prohibited dredging in the exclusion zone.[45]

WRAP Response #01-03 was entitled Dredging Permit for Mobley Construction

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[35] AR 309-323.
[36] AR 301.
[37] AR 1446; AR 1428.
[38] AR 1447; AR1446; and, AR 1413.
[39] AR 1391. (Although Mobley's letter indicates the GBMc report is dated July 28, 2000, the report itself carries a date of August 9, 2000.)
[40] AR 1389.
[41] AR 1383-1388; AR 1378..
[42] AR 1367; AR 1365; AR 1364; AR 1361; AR 1359.
[43] The WRAP Program is a technology transfer activity that provides direct scientific and technical assistance in support of the Corps Regulatory program for site and/or problem-specific issues.
[44] AR 1328-1336.
[45] AR 1334.

Company In the White River, Arkansas: Sensitive Fish Species in the Exclusion Zone.[46] WRAP #01-03 concluded that four benthic species of fish, listed as inventory elements by the State, occur in the exclusion zone addressed by SC 2, and are dependent on the gravel and sand substrate. According to WRAP #01-03, this dependence on the substrate makes these fish directly vulnerable to dredging operations.[47]

These two WRAP responses were received by MVM on December 21, 2000.[48] On December 22, 2000, MVM extended Mobley's permit, until February 5, 2001, in order to complete its review of the WRAP responses.[49]

On January 19, 2001, MVM prepared Addendum II to its January 2000 Decision Document.[50] Addendum II corrected errors in the original Decision Document; added additional analysis; discussed Mobley's objections to the initially proffered permit; discussed state and federal resource agencies' comments on Mobley's proposed changes; discussed the GBMc report and the WRAP responses; and stated MVM's position on each SC to be included in the new permit.[51]

On January 23, 2001, MVM proffered a second, reconsidered, permit to Mobley (Permit No. White River 99-111 [jod]).[52] This proffered permit included Addendum II and the two WRAP responses. Mobley was granted a third extension of Permit No. White River – 368 in order to continue work while he reviewed the proffered permit.[53] Mobley appealed the second permit by letter dated March 22, 2001. The MVD Division Engineer received this first RFA on March 23, 2001.[54] The RFA contained an attachment, in two parts, entitled GBMc Comments on WRAP Response #01-02 and GBMc Comments on WRAP Response #01-03. This GBMc attachment, dated March 20, 2001, was not part of the AR, and had not been considered by the District prior to its proffer of the second permit.

On April 11, 2001, Mobley withdrew the RFA.[55] Mobley withdrew the RFA for two reasons: 1) In order for the District Engineer to review the new information contained in the RFA, including the GBMc comments, and 2) In order for Mobley to submit additional economic information to the District Engineer. Mobley submitted the additional economic information on May 8, 2001.[56] On January 9, 2002, Mobley offered a compromise on the SCs contained in the

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[46] AR 1337-1344.
[47] AR 1343.
[48] AR 1327.
[49] AR 1326.
[50] AR 1241. The MVM District Engineer signed Addendum II on January 23, 2001.
[51] Addendum II states that a second modified permit was assembled by MVM in June 2000; however this second permit was not mailed to Mobley at Mobley's request (AR 1244). With Mobley's agreement, two new SCs had been added to the pending permit (AR 1322; AR 1321). Addendum II discusses the differences between the declined January 2000 initial proffered permit, and the second modified permit which was not mailed in June 2000.
[52] AR 1231.
[53] AR 1229.
[54] AR 1148.
[55] AR 1142.
[56] AR 970.

second proffered permit.[57]

MVM analyzed the additional information[58]; discussed Mobley's suggested compromise with federal and state resource agencies[59], held a meeting with the resource agencies on February 7, 2002 to discuss Mobley's suggested compromise[60]; evaluated the economic information provided by Mobley[61]; and, requested additional WRAP assistance from ERDC.[62] On May 7, 2002, after conducting these activities, the District Engineer advised Mobley that Mobley's request to modify SCs 1 and 9 was agreed, that SC 2 would remain unchanged, and that another SC would be added to the pending permit.[63] The District Engineer asked Mobley to provide comments to the proposed permit conditions.

On September 13, 2002, the District Engineer signed Addendum III to the January 2000 Decision Document.[64] Addendum III discussed the additional information considered by MVM including GBMc Comments on WRAP Response #01-02, GBMc Comments on WRAP Response #01-03, WRAP Response #02-08; Mobley's submitted economic information; river stages and dredging opportunities; and, state and federal resource agencies' comments. Addendum III also discussed the changes Mobley proposed to the second proffered permit. It concluded that there would not be a hazard to navigation, or a detrimental impact to natural resources, including aquatic life, if specified SCs were included in the pending permit. The Little Rock District Engineer also reviewed Addendum III, and signed it on October 24, 2002.[65]

In its letter dated November 12, 2002, MVM proffered to Mobley a Section 10 permit involving commercial dredging of sand and gravel from the White River in Arkansas.[66] The proffered permit contained revisions made at Mobley's request, and as requested by the U.S. Fish and Wildlife Service. Along with numerous other enclosures, the letter enclosed a combined Notice of Appeal Process (NAP) and RFA form that was dated November 14, 2002.[67] Because Addendum III was inadvertently omitted from this letter, it was separately mailed to Mobley by letter dated November 22, 2002.[68] Mobley received Addendum III on November 26, 2002.[69] Because of the delay in receipt, on November 27, 2002, MVM provided Mobley with a

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[57] AR 959.
[58] AR 1143-1147; AR 1141; AR 1140; AR 968; AR 967; AR 511-513; and AR 371-510.
[59] AR 944-958; AR 871.
[60] AR 907-943
[61] AR 898; AR 515; AR 897; and AR 894.
[62] AR 872. This WRAP response, #02-08, reviewed and commented on the GBMc report attached as new information to the withdrawn RFA. (Attachment, dated March 20, 2001, entitled GBMc Comments on WRAP Response #01-02 and GBMc Comments on WRAP Response #01-03.)
[63] AR 859. The letter enclosed comments received on Mobley's compromise from the federal and state resource agencies.
[64] AR 17. Addendum III was dated September 12, 2002.
[65] AR 41.
[66] AR 13.
[67] AR 15.
[68] AR 12.
[69] AR 11.

new NAP dated November 22, 2002.[70] This NAP allowed a 60-day time frame for an appeal request to begin from November 22, 2002.

Mobley appealed the final permit on January 21, 2003. I accepted the RFA on February 11, 2003 because it was received in my office within the requisite 60-day time period. The site visit and appeal conference were held by my RO on March 20, 2003.

IV. Discussion

A District Engineer's decision whether to issue a permit is based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impacts, which the proposed activity may have on the public interest, requires careful weighing of all factors that become relevant in each case. The benefits that may reasonably be expected to result from the proposed activity must be balanced against the reasonable foreseeable detriments. The decision whether to authorize an activity and, if so, the conditions under which it will be allowed, is determined by the outcome of this balancing process.[71]

A District Engineer's decision will be disapproved by a Division Engineer only if the Division Engineer determines that the District Engineer's decision on some relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance.[72]

In its RFA, Mobley objects to the inclusion of SC 2 in the declined permit. SC 2 states, "No dredging will be allowed from March 1 until May 31 of each year between River Miles 120-125 and 259-274 due to fish spawning." Mobley thinks SC 2 should be deleted from the Permit because there is no substantial evidence in the record to support the inclusion of SC 2. Mobley asserts that the District Engineer's decision to include the SC is arbitrary, capricious, and an abuse of discretion. Mobley believes there is substantial evidence in the record to show that the paddlefish and five fish species populations in the White River are being maintained, and are not adversely impacted by Mobley's mining activities. Mobley asserts that the District Engineer was arbitrary in finding that SC 2 did not cause significant financial hardship to Mobley. Additionally, Mobley states that SC 2 conflicts with the stated purpose and project description of the Permit itself.[73] Each of these assertions is discussed below.

Mobley asserts that SC 2 should be deleted from the Permit because there is no substantial evidence in the record to support the inclusion of SC 2. Corps regulations require District Engineers to add special conditions to permits when such conditions are "necessary to

[70] AR 7. The NAP date was revised from November 14 to November 22 because November 22 was the date that Addendum III was actually mailed to Mobley.
[71] 33 C.F.R. 320.4(a).
[72] 33 C.F.R. 331.9(b)
[73] Each of these reasons is discussed in detail in the Attachment to Mobley's RFA.

satisfy legal requirements or to otherwise satisfy the public interest requirement."[74] In accordance with this requirement, the District Engineer decided that Mobley's permit should contain certain SCs, including SC 2. The District Engineer issued two Public Notices regarding Mobley's permit. The first Public Notice was issued November 1, 1999, and the second Public Notice was issued April 6, 2000.[75] The District Engineer considered the public comments received in response to the public notices.[76] The District Engineer also considered Mobley's rebuttal to the public comments.[77] Meetings were held with Mobley to discuss the permit conditions.[78] Under the provisions of the WRAP program, MVM requested technical assistance regarding the issues, and received and considered three WRAP responses from Dr. Jan Hoover, a fish biologist.[79] The District Engineer issued a Decision Document and three Addenda that considered and discussed the potential impacts of the permit activity to the environment.[80] The considered factors included: 1) the physical/chemical characteristics and anticipated changes to the substrate and suspended particulate turbidity[81], and 2) the biological characteristics and anticipated changes to habitat for fish and other aquatic organisms and endangered or threatened species.[82] Contrary to Mobley's assertion, the AR contains substantial evidence to support the District Engineer's decision to include SC 2 in the permit.

Mobley asserts that the District Engineer's decision to include SC 2 is arbitrary, capricious, and an abuse of discretion. According to Mobley, the District Engineer's evaluation of fish species and the probable impacts of the dredging operation on the fish population was improper and not based on a proper review of scientific evidence. Mobley asserts that there are no studies in the AR to show that paddlefish and five identified fish species are declining in numbers and/or geographic range in the White River. In the AR, WRAP Response # 02-08 and WRAP Response #01-03 discuss the reasons for concern for paddlefish and other noted fish species. According to these WRAP responses, the best available information indicates that five species are imperiled at a regional or national level and warrant some level of protection.[83] Some of these species are listed as "inventory elements" and "vulnerable".[84] Relying on a technical report, MVM believes that "The crystal darter continues to lose ground in the battle for survival partly due to dredging operations and losses of extensive areas of clean sand."[85] MVM

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[74] 33 C.F.R. 325.4, Conditioning of permits, at 325.4(a).
[75] AR 1593; AR 1462.
[76] AR 1573-1591; AR 1448-1461.
[77] AR 1391; AR 1564.
[78] AR 1365; AR 1622.
[79] AR 1327; AR 100. Dr. Hoover attended meetings with the parties, reviewed their concerns and positions, reviewed primary scientific literature on paddlefish biology, and formally evaluated Mobley's position on the likelihood of impacts to paddlefish. Dr. Hoover, along with other scientists, conducted field surveys of fishes and physical habitat in the exclusion zone. He also reviewed literature and wrote a formal evaluation of possible impacts on fishes other than paddlefish.
[80] AR 1263 (Decision Document); AR 301 (Addendum I); AR 1241 (Addendum II); AR 17 (Addendum III).
[81] AR 269. (The District Engineer decided that SC 2 would prevent the total destruction of spawning habitat for fish and other aquatic organisms in the upper reaches of the White River.)
[82] AR 269-270. (The District Engineer decided that SC 2 would restrict dredging operations to limited areas and certain time frames thereby lessening impacts to fish and other aquatic organisms.)
[83] AR 107.
[84] AR 1337.
[85] AR 1340.

also relied on WRAP Response #01-03, which notes that the stargazing darter has been extirpated such that its range lies mostly within the state of Arkansas.[86] Tables 1 and 2 of the WRAP Response #02-08 also noted slow growth and low condition of paddlefish.[87] Addendum III, acknowledges that state listing does not convey regulatory protection under Federal Endangered Species Act; but notes that there is adequate documentation of potential adverse impacts to the aquatic environment (paddlefish and other species) to warrant some level of protection.[88]

Mobley says that no studies in the AR show that fish species have spawned in the exclusion zone covered by SC 2. MVM says that Mobley's conclusion that regulated water flows from the dams upstream of the exclusion zone render it less suitable for spawning than downstream reaches of the White and Black River are not supported by Batesville hydrographic data or by the scientific literature.[89] WRAP Response #02-08 acknowledges that no field studies have been conducted of paddlefish reproduction within the exclusion zone.[90] WRAP Response #02-08, WRAP Response #01-02, and WRAP Response #01-03 provide substantial discussion regarding the suitability of the exclusion zone for spawning. WRAP Response #02-08 states, "Paddlefish spawning in the White River has not been directly observed, but an estimate of the onset the season can be obtained objectively by looking at the latitudinal variation in paddlefish spawning seasons."[91] A field study was conducted to characterize the physical habitats in the exclusion zone. [92] WRAP Response #01-02 stated, "Paddlefish spawning in areas are rarely delineated (Wallus, 1986), but environmental requirements for successful spawning are well-established (Crance, 1987)."[93] WRAP Response #01-02 provided a thorough discussion of the GBMc Report, which considered several requirements associated with successful reproduction of paddlefish. [94] WRAP Response #01-02 also addressed the Appellant's claims that regulated water flows from dams upstream render the exclusion zone less suitable for spawning.[95] WRAP Response #01-02 concluded that based on the criteria established in the GBMc report, the exclusion zone provides suitable spawning habitat.[96] Mobley acknowledges that the spawning season of the western sand darter is presumed to be in June (it may be earlier as well) and that the spawning season of the stargazing darter is unknown.[97] WRAP Response #02-08 and WRAP Response #01-03 state that three species (Sabine shiner, Pealip Shorthead redhorse, and the Crystal darter) spawn in the spring.[98] It was reasonable for the District Engineer to rely on the technical information presented, as shown in the AR, and his decision to include SC 2 was not

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[86] AR 1340.
[87] AR 115 to 117.
[88] AR 21; AR 23.
[89] AR 19.
[90] AR 104
[91] AR 105
[92] AR 1338
[93] AR 1328.
[94] AR 1329.
[95] AR 1333.
[96] AR 1333.
[97] AR 1340.
[98] AR 1340; AR 109

arbitrary, capricious, or an abuse of discretion. There is substantial evidence in the AR to support the District Engineer's position.[99]

Mobley believes there is substantial evidence in the record to show that the paddlefish and five fish species populations in the White River are being maintained, and are not adversely impacted by Mobley's mining activities. Mobley asserts that no studies in the AR show that Mobley's activities ever have, or ever will have, any substantial adverse effect on paddlefish or the fish species populations or on their spawning. The AR discusses the impact to early life stages of fish species from dredging operations. WRAP Response #01-03 concluded that four benthic species of fish, occurring in the White River exclusion zone, are dependent on gravel and sand substrates, making them directly vulnerable to dredging operations. Mining gravel-sand substrates from the river bottom would entrain these species. Net loss of sand from that reach would constitute habitat losses for all species, but particularly for sand darters and crystal darters.[100] WRAP Response #01-02 states that dredging activities could make paddlefish larvae susceptible to non-lethal entrainment (and loss). Larvae might also be impacted by turbulence generated by some forms of dredge disposal.[101] Addendum III discusses the direct effects to include entrainment of adult and larval fish from boat motors, suffocation and obliteration of eggs from being buried by redeposited refuse substrates, obliteration of eggs and fish by being sucked up in the dredge.[102] This evidence supports the District Engineer's determination that dredging may adversely affect both the spawning and early life stages.

WRAP Response #02-08 noted that mining of stream substrates can degrade aquatic environments and impact communities several kilometers downstream of dredging sites.[103] MVM utilized information from studies in other stream systems in accessing the effect of sand and gravel mining in streams.[104] Addendum III noted instances where mounds of gravel were left mid-channel that indicate the disposal material was not put back into the location it was taken from after it was processed. Other mounds were documented as a hazard to navigation. This information supports the District Engineer's conclusion that dredging can degrade aquatic environments.

According to WRAP Response #02-08, there are no data indicating that Mobley's dredging has not impacted paddlefish populations in the White River.[105] The WRAP Response states that demographic data collected prior to 1934 (when Mobley dredging operations began) was not presented. Conclusions in WRAP Response #02-08 recommended a further study of the dredging–related impacts to paddlefish and other fish species. The AR reflects paddlefish population maintenance through harvest and sand and gravel dredging restrictions in place on sections of the White River prior to Mobley's request for change. Addendum II notes that the White River contains the most stable population of paddlefish within the states associated with

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[99] AR 516-853 contains 15 technical reports considered by MVM in the evaluation of these issues.
[100] AR 1343.
[101] AR 1331.
[102] AR 22.
[103] AR 103.
[104] AR 517-531.
[105] AR 103.

the Mississippi Interstate Cooperative Resource Agreement (MICRA).[106] Addendum III acknowledges that the White River has a relatively stable population of paddlefish."[107] WRAP Response 02-08 stated, "Permit restrictions imposed on Mobley Construction via special conditions imposed by CEMVM are environmentally conservative and reasonable based on 'best available information."

Addendum II discusses this point, and the stability issue is discussed in reference to the Mississippi Interstate Cooperative Resource Agreement. The AR documents that the exclusion zone reach of the White River does contain areas suitable for spawning habitat. Commercial fishing for paddlefish in the White River is permitted and regulated by the Arkansas Game and Fish Commission (AGFC). However, the AGFC recommended the retention of SC 2 as a safeguard to the continued health of the paddlefish population and availability of aquatic habitat for other sensitive aquatic species. MVM considered previously documented and recognized adverse impacts to fish spawning habitat in other similar areas that are associated with dredging activities because of the detrimental effects of siltation. WRAP Response 02-08 discusses the degradation of aquatic environments associated with dredging operations.[108] The District Engineer's conclusion was that dredging within the exclusion zone would have the same type detrimental effect on spawning and aquatic habitat. The District Engineer did not conclude that the presence of other suitable spawning areas elsewhere on the White River would override the concern expressed by the state and federal resource agencies. The District Engineer agreed with the conclusion in WRAP Response 02-08 that dredging would threaten the White River population of paddlefish, not the species.

WRAP 01-03 stated that the western sand darter inhabits sandy substrates, in which it buries itself. Sand darter spawning season is not documented, but it is presumed to take place in June. This means that it may also spawn earlier (e.g., May). WRAP Response #01-03, states, "Five benthic species of fish, occurring in the White River exclusion zone and listed as inventory elements by the Arkansas Natural Heritage Commission (ANHC), are dependent on gravel and sand substrates, making them directly vulnerable to dredging operations." Mobley asserts that paddlefish are not listed as an Inventory Element in Independence County. Arkansas Natural Heritage Commission clarified that paddlefish are state listed as an Inventory Element. The absence of a species from the county list indicates that no record exists in the agency's database not that it does not occur in that county.[109] Spawning habitat is not the sole reason for the District Engineer's inclusion of SC 2. The adverse impacts of the dredging operation on aquatic habitat for sensitive aquatic species were also of concern. This is reflected in Addendum III. Therefore, despite Mobley's assertion, the District Engineer concluded that the present condition of stability did not warrant a change from the status quo in favor of potentially damaging actions by Mobley. This decision by the District Engineer is supported by substantial evidence in the AR.

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[106] AR 327.
[107] AR 21.
[108] AR 103.
[109] AR 1140.

Mobley asserts that the District Engineer was arbitrary in finding that SC 2 did not cause significant financial hardship to Mobley. Under SC 2, for 3 months of the year, Mobley is prohibited from commercially dredging sand and gravel from one 5-mile reach and one 15-mile reach of the river. The other 9 months of the year Mobley can dredge in these reaches. Outside of these two reaches, Mobley can dredge year round. Addendum III sums up the District Engineer's consideration of economic impact associated with the imposition of SC 2.[110] Mobley submitted economic information, via an affidavit, and an MVM economist reviewed it. The economist's conclusion was that Mobley's information indicated an added cost of doing business, and some indication of loss; however, Mobley provided insufficient data to determine whether these additional expenditures were incurred as a result of SC 2.[111] The economist stated that the additional expenditures could have been the result of the hydrological conditions (generally drought conditions) that prevailed during the 1995-2000. Without benchmarks, such as expenditure data for the years prior to 1994 or financial statements for the 1990 decade, the economist could not determine the reason for the additional expenditures. The economist attempted to locate proprietary data (balance sheets, income statements, cash flow statements, etc.) from readily accessible public sources but could not find additional information to corroborate Mobley's claims. From dredging information provided, the economist determined that Mobley did have dredging opportunities between 1995 and 1999. Using a bivariate regression analysis, the economist could not find a statistically significant relationship between the additional expenses shown by Mobley and the number of dredging opportunities. A statistical analysis was done to determine if the mean of the total unrestricted) dredging opportunities was significantly different from the mean of the remaining (restricted) dredging opportunities. The findings indicated no significant difference, which did not lend support to the claim of added financial hardship. The economist concluded that there was no proof that the dredging restrictions between March and May were alone responsible for the losses claimed by Mobley.[112] The District Engineer considered the MVM economist's conclusions, dredging information provided by Mobley, and dredging opportunities afforded to Mobley under a permit containing SC 2. The District Engineer concluded that any hardship to Mobley caused by SC 2 was outweighed by the potential adverse impacts to the aquatic environment.[113] The District Engineer considered and evaluated the issue using reasonable means and weighed the economic impact to Mobley Construction against the public interest factors using best professional judgment. The District Engineer's evaluation and determination regarding the economic impact of SC 2 on Mobley was not arbitrary.

Mobley asserts that SC 2 conflicts with the stated purpose and project description of the Permit itself. The stated project purpose was to dredge sand and gravel from the White River for commercial resale.[114] This project purpose was considered by MVM, and it was recognized in the January 2000 Decision Document that the "no action" alternative (permit denial) would completely prevent Mobley from dredging sand and gravel from the river.[115] MVM also

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[110] AR 24-34.
[111] AR 894; AR 24.
[112] AR 894-895.
[113] AR 24.
[114] AR 268.
[115] AR 268.

recognized that other project designs would not work for Mobley because Mobley believed this project was the best for his business.[116] MVM also considered that other project sites were not available because Mobley's commercial business is located on the White River.[117] If the District Engineer had determined that special conditions were necessary to insure the proposal would not be contrary to the public interest, but that those conditions would not be reasonably implementable or enforceable, the District Engineer would have been required to deny the permit.[118] After considering the project purpose and description, the District Engineer proffered a conditioned permit to Mobley.

The District Engineer's decision on Mobley's permit was not arbitrary, capricious, or an abuse of discretion. The District Engineer's decision is supported by substantial evidence in the administrative record. The District Engineer's decision is not plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance. The permit decision was based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. The permit evaluation reflects a careful weighing and balancing of al pertinent factors. The District Engineer determined that the incorporation of SC 2 was necessary to avoid and/or minimize anticipated environmental harm, and still afford dredging opportunities to Mobley.

V. Conclusion

For the reasons stated above, I conclude that Mobley's Appeal does not have merit. The final Corps decision will be the MVM District Engineer's letter advising the Appellant of this decision, confirming his initial decision, and sending the final proffered permit for signature to the Appellant.

Don T. Riley
Brigadier General, U.S. Army
Division Engineer

Encls
(Conference Transcript and Supplement to Administrative Record)

[116] AR 268; AR 275.
[117] AR 268; AR 275.
[118] 33 C.F.R. 325.4(c).

Mobley Construction Company
Request For Appeal (RFA)
File No. 990461110
Memphis District
August 2003

Attachment to RFA Decision: Information Received and Its Disposition

The MVM provided a copy of the administrative record. Pursuant to 33 C.F.R. Section 331.7(f), the basis of a decision regarding the proffered permit is limited to information contained in the administrative record by the date of the NAP form. The NAP for Mobley Construction Company is dated November 22, 2002. Unless otherwise indicated, the documents listed below were part of the administrative record and/or clarifying information received from MVM and Mobley.

1. **Letter,** January 28, 2003, received by the RO via facsimile on January 28, 2003, and by parcel post on January 31, 2003, in which Mr. Mobley designated Ms. Anna Schoonover, Solutions Incorporated, as his point of contact for the RFA.

2. **Email**, received by the RO on January 30, 2003, in which Ms. Ann Faitz stated that the law firm of Chisenhall, Nestrud & Julian would represent the Mobley Construction Company in the appeal and requested a copy of the administrative record. (The RO held a teleconference call with Mr. Mobley, Ms. Schoonover, Ms. Faitz, and Ms. Judy Deloach (MVM project manager) on January 31, 2003. Mr. Mobley stated in that conversation that Ms. Schoonover would be his point of contact in the appeal.)

3. **Letter,** February 13, 2003, in which the Appellant provided the RO with a copy of the January 21, 2003 facsimile of the RFA and cover letter. This letter also included a document entitled "Attachment To Request For Appeal." The RO received these documents on February 14, 2003.

4. Verbatim Record of the Appeals Conference, dated March 20, 2003, which included:

a. **Exhibit 1** to the verbatim record of the administrative appeal conference held on March 20, 2003. Exhibit 1 consists of two Administrative Appeal Process Flowcharts, which were provided by the RO to the MVM and the Appellant during the appeal conference.

b. **Exhibit 2** to the appeal conference record. During the appeal conference, the Appellant provided a topographic map that depicted points where digital photographs (also part of Exhibit 2) were taken by the RO during the site visit.

c. **Exhibit 3** to the appeal conference record. The RO provided the MVM and the Appellant with a list of questions to be discussed in the RFA appeal conference.

d. **Exhibit 4** to the appeal conference record. During the appeal conference, the MVM provided a written response to the RO's questions.

e. **Exhibit 5** to the appeal conference record. During the appeal conference, the Appellant distributed a series of documents that became Exhibit 5. This Exhibit 5 consists of Mobley's response to the RO's questions and 9 documents which Appellant labeled Exhibit A,

Exhibit B, Exhibit C, Exhibit D, Exhibit E, Exhibit F, Exhibit G, Exhibit H, and Exhibit I. The contents of Exhibit 5 are identified as follows:

Appellant's written response to the RO's questions.

Exhibit A (to Exhibit 5) is an unsigned narrative prepared by GBMc & Associates. It is dated September 12, 2002, and entitled "Applicant's Response to Addendum III." Exhibit A is new information, and was not considered in the Decision.

Exhibit B (to Exhibit 5) is an unsigned narrative prepared by GBMc & Associates. It is dated April 10, 2002, and entitled "Comments to WRAP Response." Exhibit B also includes two U.S. Army Waterways Experiment Station Environmental Lab Technical Notes. One is entitled "Guide To Selecting A Dredge For Minimizing Resuspension of Sediment" (EEDP-09-1, December 1986). The other is entitled "Sediment Resuspension By Selected Dredges (EEDP-09-2, March 1988). Exhibit B is new information, and was not considered in the Decision.

Exhibit C (to Exhibit 5) contains 24 documents that were cited or relied upon by GBMc in its August 9, 2000 report and comments to Corps WRAPs and Addendums. These documents are identified as:

(1) Warren, M.L., Jr., B.M. Burr, S.J. Walsh, and twelve co-authors, 2000. Diversity, Distribution, and Conservation Status of the Native Freshwater Fishes of the Southern United States. Fisheries 25: 7-29.

(2) George, S.G., W.T. Slack, and N.H. Douglas, 1996. Demography, Habitat Reproduction, and Sexual Dimorphism of the Crystal Darter, *Crystallaria asprella* (Jordan), from South-Central Arkansas. Copeia 1996:68-77.

(3) Purkett, C.A., Jr. 1961. Reproduction and Early Development of the paddlefish. Trans. Am. Fish. Soc. 90: 125-129.

(4) Epifanio, J.M., J.B. Koppelman, M.A. Nedbal, D.P. Phillipp. 1996. Geographic Variation of Paddlefish Allozymes and Mitochondrial DNA. Trans. Am. Fish. Soc. 125: 546-561.

(5) Paukert, C.P. and W.L. Fisher. 2000. Abiotic Factors Affecting Summer Distribution and Movement of Male Paddlefish, *Polyodon spathula*, in a Prairie Reservoir. Southwestern Nat. 45: 133-140.

(6) Adams, S.R., T.M. Keevin, K.J. Killgore, and J.J. Hoover. 1999. Stranding Potential of Young Fishes Subjected to Simulated Vessel-Induced Drawdown. Trans. Am. Fish. Soc. 128: 1230-1234.

(7) Killgore, K.J., A.C. Miller, and K.C. Conley. 1987. Effects of Turbulence on Yolk-Sac Larvae of Paddlefish. Trans. Am. Fish. Soc. 116: 670-673.

(8) Reed, B.C., W.E. Kelso, and D.A. Rutherford. 1992. Growth, Fecundity, and Mortality of Paddlefish in Louisiana. Trans. Am. Fish. Soc. 121: 378-384.

(9) Hoxmeier, R.J.H. and D.R. DeVries. 1997. Habitat Use, Diet, and Population Structure of Adult and Juvenile Paddlefish in the Lower Alabama River. Trans. Am. Fish. Soc. 126: 288-301.

(10) Crance, J.H. 1987. Habitat Suitability Index Curves for Paddlefish, Developed By Delphi technique. N. Am. J. Fish. Management 7: 123-130.

(11) Southall, P.D. and W.A. Hubert. 1984. Habitat Use By Adult Paddlefish in the Upper Mississippi River. Trans. Am. Fish. Sock. 113: 125-131.

(12) Pasch, R.W., P.A. Hackney, and J.A. Holbrook, II. 1980. Ecology of Paddlefish in Old Hickory Reservoir, Tennessee, With Emphasis On First Year Life History. Trans. Am. Fish. Soc. 109: 157-167.

(13) Wallus, R. 1986. Paddlefish Reproduction In the Cumberland and Tennessee River Systems. Trans. Am. Fish. Soc. 115: 424-428.

(14) Russell, T.R. 1986. Biology and Life History of the Paddlefish-A Review. Pp. 2-20, In the Paddlefish: Status, Management, and Propagation, edited by J.G. Dillard, L.K. Graham, and T.R. Russell, American Fisheries Society Special Publication Number 7.

(15) Sparrowe, Rollin; Threats to Paddlefish habitat. U.S. FWS. 36-45.

(16) Unkenholz, D.G. Effects of Dams and Other Habitat Alterations on Paddlefish Sport Fisheries South Dakota Department of Game, Fish and Parks. 54-61.

(17) U.S. Fish & Wildlife Service. July/August 2000 Issue, *Fish and Wildlife News*. This document is new information, and was not considered in the Decision.

(18) Page of an undated document titled "Clearwater Dam Pertinent Data." This document is new information, and was not considered in the Decision.

(19) Rehwinkel, B.J. 1978. The Fishery For Paddlefish at Intake, Montana During 1973 and 1974. Trans. Am. Fish. Soc. 107: 263-268.

(20) U.S.G.S. Water Resources Investigations Report 92-4044. Trends In Stream Water-Quality Data in Arkansas During Several Time Periods Between 1975 and 1989. This document is new information, and was not considered in the Decision.

(21) U.S.G.S. Water-Resources Investigations Report 92-4026. Flow Duration and Low-Flow Characteristics of Selected Arkansas Streams. This document is new information, and was not considered in the Decision.

(22) Hubert, W.A., Anderson, S.H., Southall, P.D.; and Crance, J.H. 1984. Habitat Suitability Index Models and Instream Flow Suitability Curves: Paddlefish. FWS/OBS-82/10.80.

(23) Arkansas Soil & Water Conservation Commission. 2000. White River Allocation: Bull Shoals Dam to the Mississippi River-Technical Analysis. 109pp. Only the data

from a draft of this report is part of the administrative record. All other information in the final report is new information and was not considered in the Decision.

(24) Eight copies of News Release by AGFC.

Exhibit D (to Exhibit 5) is an email, November 1, 2000, from GBMc (Mr. Roland McDaniel) to Ms. Deloach (MVM).

Exhibit E (to Exhibit 5) is a Memorandum for the Record, November 9, 2000, that documents a conversation between Mr. Mobley and Ms. Deloach. This document is new information, and was not considered in this Decision.

Exhibit F (to Exhibit 5) consists of three documents:

(1) A cover sheet titled "Attachment Graph of Paddlefish #41.480 tracking data."

(2) A graph titled "#41.480"

(3) A document titled "Attachment Arkansas Natural Heritage Commission Inventory." Pages 3-1, 3-4, 3-5, 3-6, 3-33, 3-49, 3-51, 3-70, 3-80, 3-89, 3-109, and 3-110 were enclosed.

Exhibit G (to Exhibit 5) is a series of USGS Flow Graphs.

Exhibit H (to Exhibit 5) is an Arkansas Game and Fish Commission report prepared by Mr. Steve Filipek and referred to as Project Number F-42, Arkansas Paddlefish Investigations.

Exhibit I (to Exhibit 5) is a duplicate of the Attachment To Request For Appeal as described in paragraph Number 3 above.

5. **Email**, March 25, 2003, from Judy Deloach, MVM, responding as requested to questions raised at the appeal conference.

6. **Letter**, March 27, 2003, from Ms. Ann Faitz of Chisenhall, Nestrud & Julian, to the Court Reporter, Mr. Bob Kieninger that enclosed copies of Exhibit 5 to the administrative appeal record.

7. **Memorandum**, April 8, 2003, from MVM stating which portions of Exhibit 5 were in the administrative record before the date of the NAP.

8. **Facsimile**, August 7, 2003, from MVM. This facsimile forwarded a copy of the second proffered permit, and an email message thread (from Ecological Resources Management) referenced in the January 2000 Department of the Army Permit Evaluation and Decision Document. These documents had been inadvertently omitted from the copies of the AR.

9. **Administrative Record Supplement,** on August 21, 2003, the MVM confirmed that the following documents had been inadvertently omitted from the copies of the AR.

a. **Letter**, June 20, 2000, from Bryce Mobley to the MVM requesting a six-month extension of the existing permit for the period June 29, 2000 through December 28, 2000.

b. **Letter**, June 23, 2000, MVM proffered a permit to Mobley (Permit No. White River 99-111 [jod]).

c. **Email,** October 18, 2000, from Cindy Osborne, Arkansas Natural Heritage commission, providing information to Judy Deloach about White River sensitive species.

d. **Email,** October 7, 2002, from Larry Watson forwarding a revised Addendum to Jerry Harris of Corps of Engineers Little Rock District for review.

e. **Email,** October 2, 2002, from Jerry Harris forwarding comments regarding the Mobley permit documentation to Judy Deloach.

f. Comments, on Mobley's Permit, March 1999, from Jack Kilgore of the Waterways Experiment Station

Copies of all information received during the appeal conference were provided to the Appellant and the MVN.