ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
CITY OF RICHFIELD - FILE NO. 99-04552-JJY
ST. PAUL DISTRICT

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August 29, 2000

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

Appellant/Applicant: City of Richfield

Applicant's/Appellant's Representative: Mr. Peter Willenbring, WSB & Associates, and Incorporated

Receipt of Request For Appeal (RFA): June 5, 2000

Appeal Conference Date: July 31, 2000

Site Visit Date: July 31, 2000

Background Information: The City of Richfield (City) submitted a Department of the Army Permit Application on March 18, 1999. The project site is located within the St. Paul District (MVP) in the City of Richfield. The original project described in the Public Notice(PN), dated June 30, 1999, proposed to create a storm water treatment system around the perimeter of Richfield Lake and dredge three areas within Richfield Lake to remove built up storm sewer sediment deltas. A small berm would be created near the northwest corner of the wetland to separate the treatment pond from the main part of the wetland and relocate an existing trail. The net affected wetland acreage to be impacted was 8.25 acres. In a letter, dated September 1, 1999, the City revised the permit application, reducing impacts to 4.88 acres. The revised project was described in the PN, dated October 22, 1999. The revised project represents a reduction in wetland impacts, which avoided impact to existing islands and stands of river bulrush and cattail located in the main part of the lake.

Based on a preliminary evaluation of the revised proposal and agency comments, the MVP's Decision Document (MVP DD), dated January 3, 2000, determined that the proposed project would not be contrary to the public interest. In their letter, dated January 3, 2000, the MVP provided a provisional permit describing the work that would be authorized, detailing the

General and Special Conditions that would be placed on the final Department of the Army permit, if the Section 401 water quality certification requirements were satisfied. The provisional permit contained special conditions that required compensatory mitigation. In a letter, dated February 16, 2000, the City declined the draft permit. In the MVP's letter, dated April 7, 2000, the MVP stated there was no reason to reverse the Corps' initial evaluation of the City's project, and advised the City of Richfield of the Corps of Engineers Administrative Appeal Process.

An affecting party appealing an approved jurisdictional determination, permit denial or declined permit must submit an RFA that is received by the Division Engineer within 60 days of the date of the Combined Notification of Appeal Process (NAP) and RFA form. The RFA was received on June 5, 2000, which was within the requisite 60-day time period. In a letter, dated June 12, 2000, the Mississippi Valley Division acknowledged receipt of the properly submitted RFA. Mr. Peter Willenbring is the City of Richfield's representative for this Administrative Appeal. Throughout this document the City of Richfield is referred to as the Appellant, and Mr. Willenbring is the Appellant's Representative.

Review of the administrative file identified a lack of documentation regarding the MVP's jurisdiction under Section 404 of the Clean Water Act (CWA) for the proposed excavation in 1.4 acres of wetlands located in the middle of the wetland/lake.

The administrative file did not adequately document how the proposed in-lake excavation in the 1.4 acres of wetlands would result in a greater than a de minimis discharge of dredged material, thereby triggering regulation by the Corps of Engineers. The National Environmental Policy Act (NEPA) does require agencies to consider the impacts from all aspects of a project but the excavation guidance limits jurisdiction to activities that require more than incidental fallback or a de minimis deposit of dredged material. Without this documentation, there is no basis to assert jurisdiction for the 1.4 acres of in-lake dredging.

The lack of documentation regarding the MVP's jurisdiction for the 1.4 acre of in-lake dredging is a procedural deficiency requiring correction. I have determined that in addition to the recommended actions discussed in this decision document, the MVP must review and document the administrative record regarding the jurisdiction of the 1.4 acres of in-lake dredging.

Basis for Appeal as Presented by Appellant (Quoted from the Appellant's RFA and presented in bolded lettering):

Appellant's Reason 1: The Richfield Lake environment has been created, enhanced, and manipulated over the years by dredging, storm water inputs, and trail construction. This manipulation has created islands and other habitat. The Department of Natural Resources has indicated that these islands provide habitat for a variety of native bird species. Additional manipulation of the lake is not anticipated to negatively impact the values of this already manipulated and artificially enhanced environment.

FINDING: This reason for appeal does have merit.

ACTION: The MVP shall further document and/or revise conclusions, and undertake a new 404 review based on the revised documentation and/or conclusions concerning the habitat values and functions.

DISCUSSION: The Appellant's Reason 1 contains several statements regarding the environmental conditions at Richfield Lake, and the anticipated impacts associated with the proposed work.

The first three statements are undisputed: Richfield Lake has been manipulated by past activities; past activities have created islands and habitat; and the islands contain habitat values and functions.

Information obtained through the review of the administrative record, site visit, and discussions at the appeals conference corroborate the undisputed statements. The PN described the lake as an altered natural wetland that is used for storm water management. In the appeals conference both the MVP project manager and the Appellant attested that Richfield Lake environment has been created, enhanced, and manipulated over time. The manipulations have resulted in the creation of islands and other habitats. The islands and other habitats described in the PN contain values and functions. The revised MVP PN notes that only .25-acre of islands would be affected from the proposed work.

The last statement, "*Additional manipulation of the lake is not anticipated to negatively impact the values of this already manipulated and artificially enhanced environment.*" is the disputed statement. At the appeals conference, the Appellant clarified what they meant by this statement. The Appellant

disagreed with MVP DD's findings concerning the impacts to wetland habitat functions and values associated with the proposed project.

Before assessing impacts, applicants must demonstrate there are no practicable alternatives. The MVP DD adequately documented that off-site alternatives were not practicable. The MVP adequately documented that practicable on-site alternatives existed. The MVP appropriately directed the Appellant to modify the project to avoid impacting the bulrush beds located in the main lake and to limit excavation to only the open-water and cattail areas.

After analysis of avoidance and minimization of adverse impacts, the MVP DD addressed the adverse and beneficial impacts on a limited basis associated with the proposed project. The MVP DD documents adverse impacts in noise levels, aesthetic values, habitat diversity and interspersion, terrestrial habitat, and wetlands. However, review of the administrative record found that MVP provided insufficient documentation as to the adverse and beneficial environmental impacts of the project. Examples are the MVP's evaluation of post-project habitat utilization, aesthetics, compensatory mitigation, and water quality, and secondary and cumulative effects.

The MVP did not fully comply with the RGL 84-09. The DD and the administrative record did not contain sufficient evidence identifying the functional importance of the wooded area/wetlands. Regulatory Guidance Letter, RGL 84-09, provides guidance for the required documentation for public interest review and states:

> *"When alteration of wetlands considered to have important functions is proposed by the applicant, especially on important cases, the environmental documentation should be as specific as possible about how the functional importance (or lack of functional importance) of the wetland was determined. . .The documentation should clearly show the weighing process used to balance project benefits against detriments."*

Specifically, the MVP administrative record did not fully document the change in wildlife utilization; and the impacts to aesthetic values; functions and values associated with the 1.1 acres of created wetlands.

The MVP DD and supplementing information provided in MVP's letter, dated April 7, 2000, adequately documented the pre-project ecological characteristics of the wetlands to be excavated for the perimeter ponds.

The MVP DD, Wetlands section did not discuss how the post project habitat values associated narrow fringe of emergent vegetation would be less than the pre- project site's wooded and emergent wetland vegetation. The MVP DD states that animals (frogs, toads, birds,) presently utilize the project but does not assess the change in utilization when converted to a narrow fringe of emergent vegetation.

The MVP DD's Aesthetic values section states: *"Loss of trees and extensive wetland disturbance would be an adverse impact, although the project area would be landscaped afterwards to blend into surrounding park and private property*." The MVP DD does not state if or how the landscaping would mitigate the adverse aesthetic affects associated with the project.

The MVP DD, Compensation section stated that the project would expand the existing wetland by 1.1 acres within the perimeter storm water pond. These wetlands "... *may be of limited value as mitigation."* The MVP did not adequately document what functional values would be limited. MVP project manager stated in the appeals conference that the created wetland fringe along the edge of the perimeter ponds would experience a "bounce" or frequent water level fluctuations that would affect wetland vegetation and habitat values. MVP did not address if the construction of the perimeter ponds would reduce "bounce" in the main part of the lake/wetland.

The Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Mitigation MOA), dated February 6, 1990, states:

> *"Functional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field and/or the best professional judgment of federal and state agency representatives, provided such, assessments fully consider ecological functions included in the Guidelines."*

The Mitigation MOA provides guidance for the assignment of appropriate compensatory mitigation. The Mitigation MOA states:

> *"The determination of what level of mitigation constitutes "appropriate" mitigation is based solely on the values and functions of the aquatic resource that will be impacted."*

Additional clarification in the MVP DD, Wetlands, Aesthetic values, and Compensation would document the MVP's decision regarding the wetland habitat functions and values impacted from the proposed work and assignment of appropriate compensatory mitigation.

Appellant's Reason 2: Richfield Lake and its existing perimeter currently act as a Stormwater storage and treatment facility.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The MVP made a reasonable assumption. The MVP PN states that Richfield Lake is an altered wetland used for storm water management. At the appeals conference, MVP project manger and Appellant discussed how the Richfield Lake and the existing perimeters currently act as a storm water storage and treatment facility. The MVP project manager stated that the wetlands located in Richfield Lake provide other benefits such as wildlife habitat and recreation opportunities. The Appellant's agreed to this characterization.

Appellant's Reason 3: Richfield Lake has been providing a stormwater storage and treatment function since the 1960's when the I-35W was constructed, and therefore the functions and values will not be negatively impacted.

FINDING: This reason for appeal does have merit.

ACTION: The MVP shall further document and/or revise conclusions, and undertake a new 404 review based on the revised documentation and/or conclusions regarding storm water storage and water treatment values and functions.

DISCUSSION: The Appellant's Reason 3 is a two-part statement. Based on review of the administrative record and the appeals conference, the first statement, "Richfield Lake provides storm water storage and treatment function" is undisputed. The lake does provide storm water storage. The MVP and Appellant noted

that while the storm water is not treated after entering the lake, pollutants and contaminants are allowed to settle out before the runoff is discharged into the main part of the lake and downstream.

The second statement: *"the functions and values will not be negatively impacted"* is disputed. At the appeals conference, the Appellant clarified what they meant by this statement. The Appellant disagreed with the MVP DD assessment regarding the projects storm water storage and treatment functions and values. The CWA requires districts to balance the adverse and beneficial impacts from a proposed action in their determination of the net loss of wetland functions and values. There was a lack of evidence supporting MVP's decision to require compensatory mitigation. The MVP did not adequately document how the beneficial/adverse impacts associated with storm water storage, water treatment, habitat values and functions would result in a net loss of aquatic resource functions and values. There were some inconsistencies contained in the MVP DD.

In the MVP DD Public Health section MVP states:

> *"Cleaner water in the lake and down stream in the Minnesota/Mississippi River system would have some public health benefits. Downstream benefits would be minimal considering this project alone; however, the City of Richfield and other entities are constructing many similar projects that may have a substantial cumulative benefit."*

This statement is inconsistent with comments in the other sections of the MVP DD. In the MVP DD General Evaluation, Relative extent of public and private need for the proposed work, MVP states that the proposed measure would improve water quality in Minnesota and Mississippi Rivers and may become more important in this area if reconstruction of Interstate 35 and Trunk Highway 62 channel more storm water into Richfield Lake. In a telephone conversation between MVD and MVP project manager, on August 9, 2000, the project manager stated that MVP did consider the probable impacts associated with the interstate reconstruction. However, there was some uncertainty about the amount of storm water that would be diverted into Richfield Lake; some storm water could be diverted into other water bodies. Additional documentation of the known and probable impacts associated with reconstruction of Interstate 35/Trunk Highway 62 would clarify MVP's decision.

The MVP DD Project Purpose, Flooding, Existing/potential land use, Public facilities and services, Aquatic habitat, Water Quality, and Secondary and cumulative effects sections all attribute beneficial impacts with the proposed work but do not document why these benefits do not offset the wetland habitat functions and values impacted.

Appellant's Reason 4: Eleven storm sewer pipes discharge stormwater into the Richfield Lake complex. This storm water does not received pretreatment prior to discharge. By excavating areas within the lake to allow the lake to more efficiently treat stormwater, no functions and values will be lost since the entire basin is currently acting to treat stormwater.

FINDING: This reason for appeal does have merit.

ACTION: The MVP shall further document and/or revise conclusions, and undertake a new 404 review based on the revised documentation and/or conclusions regarding storm water storage and water treatment values and functions.

DISCUSSION: The Appellant's Reason 4 contains statements regarding the environmental conditions at Richfield Lake, and the anticipated lack of impacts associated with the proposed work.

Neither the Appellant nor the MVP disputes the first two statements: eleven storm sewer pipes discharge storm water into the Richfield Lake complex and the storm water does not receive pretreatment prior to discharge.

The last statement: "*no functions and values will be lost since the entire basin is currently acting to treat stormwater*" is disputed. At the appeals conference, the Appellant clarified what they meant by this statement. The Appellant disagreed with the MVP DD assessment regarding the projects storm water storage and treatment functions and values. This reason for appeal is the same as Appellant's Reason 3.

As stated in Appellant's Reason 3, there was a lack of evidence supporting MVP's decision to require compensatory mitigation. MVP did not adequately document how the beneficial/adverse impacts associated with storm water storage, water treatment, habitat values and functions would result in a net loss of aquatic resource functions and values. Even considering MPCA's water quality certification and comments, the administrative

record does not demonstrate an independent analysis of required compensatory mitigation by the MVP.

Since this reason for appeal is the same as the Appellant's Reason 3, the recommended actions are the same.

Appellant's Reason 5: Since the center portion of the basin will not be providing primary treatment after construction as it currently does, it is anticipated that the value of the entire center portion will be enhanced.

FINDING: This reason for appeal does have merit.

ACTION: The MVP shall further document and/or revise conclusions, and undertake a new 404 review based on the revised documentation and/or conclusions regarding storm water storage and water treatment values and functions.

DISCUSSION: The MVP adequately documented the functional impacts associated with the in-lake excavation. However, as discussed in this Appeal Decision Analyses as to Appellant's Reasons 1 and 3, there was a lack of evidence supporting MVP's decision to require compensatory mitigation. MVP did not adequately document how the beneficial/adverse impacts associated with storm water storage, water treatment, habitat values and functions would result in a net loss of aquatic resource functions and values.

The MVP DD addressed the impacts associated with the in-lake excavation in the Aquatic habitat, and Wetlands sections. The MVP letter, dated April 7, 2000, documented the functional change associated with the 1.4 acres of in-lake excavation and the MVP's rationale for not requiring mitigation for that portion of the project.

Additional clarification to the administrative record is necessary to document the MVP's decision regarding the wetland functions and values impacted from the proposed construction of the perimeter ponds, and allow for appropriate assignment of compensatory mitigation.

Appellant's Reason 6: If the city does not undertake the project, there will be negative impact on the functions and values of the wetland since it will continue to fill in.

FINDING: This reason for appeal does have merit.

ACTION: MVP should document the file, evaluating a no-action alternative.

DISCUSSION: The MVP DD Avoidance section states, "*Apart from the dredging, this work is not a water–dependent activity because storm water ponds and trails do not need to be in wetlands or other special aquatic sites to accomplish their intended purpose."* The perimeter ponds excavation and trail/berm construction are not water dependent. The MVP DD must include a discussion of the reasonable alternatives.

The 33 CFR Part 325(B)(7) provides guidance regarding the consideration of alternatives, including a no-action alternative. No discussion of alternatives is required if three conditions are met: 1) the applicant's proposal is not significant; 2) no unresolved conflicts concerning alternative uses of available resources, and 3) the proposed activity is water dependent. The applicant's proposal is not significant and there are no unresolved conflicts concerning alternative uses of available resources. However, the proposed permit activities are not water dependent. Because one of the listed above criteria is not met, there must be a discussion of the alternatives, including a no-action alternative. The district must discuss reasonable alternatives, including a no-action alternative.

The MVP did discuss some alternatives. The MVP DD, Alternatives Not Evaluated section states: *"Other alternatives with less wetland impacts were not considered feasible because these would reduce the water quality benefits of the proposed project."* The MVP DD did not specifically discuss a no-action alternative or state why a no-action alternative was not reasonable.

CONCLUSION: For the reasons stated above, I conclude that the Appellant's Reasons 1, 3, 4, 5, and 6 for this administrative appeal do have merit.

Encl

PHILLIP R. ANDERSON
Major General, USA
Commanding