ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
TALBOT AND HOOD - FILE NO. WN-20-000-0997
NEW ORLEANS DISTRICT

ADMINISTRATIVE APPEAL DECISION

Mr. Keith Talbot and Ms. Jane Hood
File No. WN-20-000-0997
New Orleans District
July 19, 2002

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

Appellants/Applicants: Mr. Keith Talbot and Ms. Jane Hood, Pierre Part, Louisiana

Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): June 27, 2001

Appeal Conference Date: August 22, 2001

Site Visit Date: August 22, 2001

Background Information: On December 29, 1999, the Appellants requested a Department of the Army Permit to clear, grade and fill an area to construct additional parking and storage/ recreational areas and to provide road stabilization and prevent soil erosion near Pierre Part, Louisiana. The site is located within the New Orleans District (MVN).

The Appellants own two lots in the Bayou Tranquille Subdivision located along Bayou Tranquille Road and a cypress swamp that is contiguous to Lake Verret, part of the backwater area of the Atchafalaya River Basin. The fill site consists of a permanently flooded cypress swamp located on the side of the road opposite the Appellants' residence.

In a letter dated May 1, 2001 (MVN denial letter), the MVN determined that, from a public interest perspective, the benefits to be accrued from the project would not balance the direct and secondary adverse impacts to the project area's forested wetlands ecosystem. The MVN determined that an option existed that would reduce the project size to that of previously issued permits and--coupled with adequate compensatory mitigation to offset detrimental impacts--that would not be contrary to the public interest. The MVN denial letter included the combined Notification of Appeal Process (NAP)/Request For Appeal (RFA) forms.

The Appellants submitted a completed RFA on June 27, 2001. The RFA was received within the requisite 60-day time period.

In their RFA and appeal conference, the Appellants provided numerous examples of permit decisions in the vicinity of the their property to support their reasons for appeal that the MVN denial decision was arbitrary and capricious. According to 33 C.F.R. Section 331.7(f), an appeal of a permit denial is "limited to the information contained in the administrative record by the date of the Notice of Appeal Process (NAP) for the application."

Upon review of the administrative record, the RO found that the following six permit decisions mentioned either in the RFA or in the administrative appeal conference were not referenced in the administrative record and are new information:

(1) Wilson St. Germain, WS-20-000-2501-1

(2) Sidney Simoneaux, WN-19-970-3757[1]

(3) Jessie Pondville, WN-19-970-3303-1

(4) Harold Aucoin, WN-19-970-3320-1

(5) Scott Setoon, WN-990-4163

(6) Orlene Franks, no number provided

The RO's finding that these permit decisions constitute new information is based on the fact that the permits are not contained in the administrative record.

Pursuant to 33 C.F.R. Section 331.7(e)(6), new information is to be treated as a new permit application and may not be considered in an administrative appeal. In a letter dated November 5, 2001, the RO informed the Appellants of the option to withdraw the subject appeal and submit the new information for review to the New Orleans District Engineer in a new application. Alternatively, the Appellants could elect to withdraw those reasons for appeal, due to the fact that they contain new information, and proceed with this appeal.

---

[1] There are references in the administrative record to a Sidney Dimoneaux and a Wayne Simoneaux, neither of whom corresponds to the permit decision of Sidney Simoneaux referenced in the RFA.

In a letter dated November 30, 2001, the Appellants elected to withdraw those reasons for appeal, insofar as they contain new information.

Accordingly, the review of appeal reasons 1, 3, 4, 7, 11, 12, 14, and 21 may not be completed, insofar as they contain references to new information. My decision does analyze those portions of the above listed reasons contained in the administrative record.

Information Received and its Disposition during the Appeal Review:

1. The MVN provided a copy of the administrative record. The appeal of permit denial is limited to the information contained in the administrative record by the date of the NAP for the permit denial. The NAP for the Appellants was dated May 17, 2001.

2. The RO provided the MVN and the Appellants with a list of questions to be asked in the appeal conference (enclosure 1).

3. The Appellants provided a written response to the questions asked in the appeal conference. The MVN verbally responded to the questions in the appeal conference. The written response from the Appellants was considered clarifying information.

4. Verbal responses from all parties present at the appeal conference were taken, recorded in a Memorandum For the Record (MFR), and submitted to the parties for review. Some challenges to the MFR from the Appellant and MVN were rejected as new information. The Appeal Conference MFR was considered to be clarifying information (enclosure 2).

5. The MVN provided a copy of its letter dated June 26, 1997 (enclosure 3), subject: Department of the Army Regulatory Activities for Residents of the Bayou Tranquille Subdivision. The letter was considered to be clarifying information.

6. At the RO's request, the MVN provided the following:

a. Copies of the decision documents/permit authorizations for the five after-the-fact permit applications and seven individual permits referenced in the MVN Decision Document (MVN DD)(enclosure 4). The decision documents/permit authorizations were considered clarifying information.

b. A copy of a map originally provided by the Appellants that depicted the lots located along Bayou Tranquille Road and Clyde Tucker Drive. The copy of the map was mailed to the RO after the appeal conference, and was considered clarifying information (enclosure 5).

c. File numbers and issue dates for six permit applications: Wilson St. Germain, Sidney J. Simoneaux, Harold Aucoin, Jesse Pondville, Scott Settoon and Orlene Franks. The information was provided in an email dated October 26, 2001 and considered clarifying information (enclosure 6).

Copies of the Appellants' written response to the questions asked in the appeal conference were provided to the MVN at the appeal conference.

Summary of Appeal Decision:

Appellants' Reasons 1, 2, 3, 4, 5, 7, 11, 12, 14, and 21: No Merit - The Appellants did not provide substantial evidence to support their reason for appeal, which was that the MVN denial decision was arbitrary and capricious.

Appellants' Reason 6: Merit - The MVN does not address the safety issues associated with construction of a permanent outbuilding/storage building or discuss how the Bayou Tranquille Road designation would affect the MVN evaluation.

Appellants' Reasons 8, 9, 10, 15, and 18: No merit - The Appellants did not provide substantial evidence to rebut the MVN's finding that the minimized development would be a less environmentally damaging, practicable alternative.

Appellants' Reasons 13, 16 and 17: Merit - The MVN did not provide substantial evidence regarding the significance of the potential cumulative impacts within the identified geographic area.

Appellants' Reasons 19 and 20: No merit - The Louisiana Department of Environmental Quality (LADEQ) determinations regarding the water quality certification and the number of objections received do not dictate the results of the USACE regulatory findings under Section 404 of the Clean Water Act (CWA) for the proposed development.

Basis for Appeal as Presented by Appellants (paraphrased from the Appellants' RFA and presented in bold lettering):

Appellants' Reasons 1, 2, 3, 5, 11, 12, and 14: The Appellants allege that the MVN treated them differently than other people who live along Bayou Tranquille Road who applied for/or received permits from the MVN (disparate treatment).

FINDING: These reasons for appeal do not have merit.

ACTION: No action is required.

DISCUSSION: The administrative record does not contain substantial evidence to show that the MVN denial decision was arbitrary and capricious.

The Appellants' reasons for appeal 1, 3, 11, 12, and 14 did not cite specific permit applications as evidence that the permits were similarly situated. The Appellants bear the burden to show by substantial evidence that other persons/permits/ projects/applications were similarly situated and--in those cases--resulted in different decisions from the MVN. Merely stating that other similarly situated permit decisions have been issued does not support a finding that the denial here was arbitrary and capricious.

The Appellants did not provide substantial evidence in reasons for appeal 2 and 5 to support their allegation that three of the four cited permits were similarly situated. Reason for appeal 2 cited three issued permits on Bayou Tranquille:

(1) Mr. Donald White, SW (Assumption Parish Wetlands) 161

(2) Bayou Tranquille Landowners Association, WB-19-990-2480

(3) Bayou Tranquille Landowners Association, SW (Assumption Parish Wetlands) 146

The reason for appeal 5 cited a permit issued to Mr. Lawrence Lemoine, WM-20-000-1592.

The Appellants allege that circumstances of four permits are similar to their permit application, because there was a request for authorization for impacts 50 lateral feet from Bayou Tranquille Road. The MVN administrative record shows that the

two permits issued to the Bayou Tranquille Landowners Association were for a community dumpster and a bus turnaround. The Appellants did not provide substantial evidence to support how the potential consequences for environmental effects, social well-being, and the public interest of the proposed construction of a community dumpster and a bus turnaround were similar to the Appellants' proposed storage/recreational development. Additionally, there is substantial evidence in the administrative record that the MVN individual permit issued to Mr. Lemoine did not contain similar circumstances to their permit application. Mr. Lemoine's initial application was similarly situated, but the project was modified as suggested by MVN (limit of 25-foot lateral fill from Bayou Tranquille Road) in a way similar to what the MVN suggested to the Appellants.

One referenced permit decision for appeal reason 2 (Mr. Donald White) appears to be similar to the Appellant's stated project purpose and need; both proposed to fill wetlands for storage and parking. The MVN provided sufficient reasons for different treatment. The MVN DD, F. Summary of secondary and cumulative effects, adequately addresses the potential cumulative impacts as a result of permit issuance. The MVN shows that five after-the-fact permits were issued for work already performed and seven individual permits were issued for parking along Bayou Tranquille Road. Mr. White's permit was one of the seven issued individual permits. The MVN DD stated:

> At the time those permits were issued, our office was not aware of the delicate nature of the impacted areas along Bayou Tranquille Road and Clyde Tucker Drive, nor did we realize the potential cumulative impacts as a result of permit issuance.

The MVN factored information on cumulative effects into its evaluation and adjusted its decision appropriately. The project involves a high value aquatic resource in a watershed that has been subject to substantial prior development. The MVN projected additional substantial development. The MVN evaluation of alternatives, including on-site avoidance, was appropriately more rigorous.

Appellants' Reasons 4, 7, and 21: The Appellants allege the MVN treated them differently than those who reside in other areas of Assumption Parish or nationwide than those who applied for/or received permits (disparate treatment).

FINDING: These reasons for appeal do not have merit.

ACTION: No action is required.

DISCUSSION: The Appellants did not provide substantial evidence to support an arbitrary and capricious reason for appeal.

The Appellants' reason for appeal 4 alleges the MVN treated Bayou Tranquille landowners differently than other Assumption Parish applicants. The Appellants failed to cite specific issued permits/applications as evidence that the permits were similarly situated.

In reason for appeal 7, the Appellants allege that if the impacts associated with potential remaining impacts along Bayou Tranquille were permitted, those impacts would be less than five acres, and similar to permitted areas located in the Pierre Part area. To support these reasons for appeal, the Appellants provided a list of issued permits in the surrounding Pierre Part area:

(1) Wilson St. Germain, 04/28/00, WS-20-000-2501-1, 104 feet x 150 feet

(2) Sidney Simoneaux, 10/13/99, WN-19-970-3757, 89 feet x 150 feet

(3) Jessie Pondville, 01/28/99, WN-19-970-3303-1, 100 feet x 125 feet, 100 feet x 150 feet

(4) Harold Aucoin, 03/21/00, WN-19-970-3320-1, 100 feet x 125 feet

(5) Brady, Paul Sanchez, 10/13/97, WD-19-970-3575, 170 feet x 125 feet

Four permits (Wilson St. Germain, Sidney Simoneaux, Jessie Pondville, and Harold Aucoin) are not referenced in the administrative record. They constitute new information and cannot be considered in an administrative appeal.

The Appellants did not provide substantial evidence to show that the Sanchez permit was similarly situated to the Appellants. The administrative record is silent as to what type of development was issued in the Sanchez permit. The only reference to a Paul or Brandy Sanchez in the administrative record is in a May 9, 2000 letter from the Appellants to the MVN project manager. The letter enclosed a list of persons and lot

numbers for Clyde Tucker Drive and Bayou Tranquille Court. The Appellants bear the burden to show by substantial evidence that other persons/permits/projects/applications were similarly situated and that, in those cases, different decisions resulted.

The MVN administrative record provided evidence of how other areas in the Pierre Part were not similarly situated to the Appellants. In an October 20, 2000 letter to Congressman Billy Tauzin the MVN stated:

> The Corps of Engineers has issued permits for single-family residences along Louisiana Highway 70, near Pierre part, Louisiana; however, it is not in the same cypress swamp referred to by the applicants. Those areas are located approximately 10 miles northerly from Bayou Tranquille and sited within areas that have been previously impacted. The DOA permits authorized clearing and deposition of fill material in areas, not to exceed one-third of an acre in size, for home sites along Louisiana Highway 70. The issues raised by the applicants regarding the home sites along Louisiana Highway 70, and regarding the fill for parking and storage along Bayou Tranquille, are mutually exclusive. The need to site single family residences in lower quality wetlands in Assumption Parish can more easily be justified than impacting high quality cypress swamp primarily to park recreational and commercial vessels, and vehicles for residents whom currently have sufficient space for parking and storage.

In reason for appeal 21, the Appellants question why their permit request was denied when the Corps of Engineers web site states that only 3% of permit applications nationwide are denied. The statistical information cited in the web site is provided for information purposes only and does not constitute substantial evidence to show that Appellants' permit may not be denied.

Appellants' Reason 6: The Appellants have submitted a reasonable permit request based on safety issues.

FINDING: This reason for appeal has merit.

ACTION: The MVN shall revise conclusions and undertake a new 404 review based on the revised documentation and/or analyses regarding safety issues.

DISCUSSION: At the appeal conference the Appellants clarified how the MVN failed to consider safety issues on three grounds:

(1) Proximity of the shop/outbuilding to Bayou Tranquille Road,

(2) The opportunity to safely store their belongings, and

(3) The MVN's characterization of traffic conditions and road designation of Bayou Tranquille Road.

The administrative record is silent as to the safety issues associated with construction of an outbuilding/shop. It is unclear how the MVN evaluated the change in designation of Bayou Tranquille Road from a private road to parish road.

The Appellants allege that restricting the extent of lateral fill from Bayou Tranquille Road into the wetland would force them to construct a smaller shop/outbuilding in close proximity to Bayou Tranquille Road, thereby creating a safety hazard when entering/exiting the shop/outbuilding. The Appellants allege that a larger permanent storage building is required to safely store and protect their belongings. The MVN does not address the safety issues associated with construction of a permanent outbuilding/storage building. In the MVN DD, Safety, the MVN states that the reduction of on-street parking would reduce the likelihood of incidents involving automobiles in the immediate vicinity of the project site.

The Appellants disagree with the MVN DD finding that Bayou Tranquille Road is a low traffic road. The Appellants compare traffic levels at Bayou Tranquille Road to those along Louisiana State Highway 70 (Highway 70) near Pierre Part, Louisiana. To support this allegation, the Appellants stated that Bayou Tranquille Road contains a bus stop and provides mail delivery. The MVN did not quantify the traffic flow for Bayou Tranquille Road but compared it to other areas. There is no evidence in the administrative record that the MVN contacted local or parish authorities to determine the road designation or traffic level information. Through the site visit, the RO corroborated that Bayou Tranquille Road was a narrow, one-lane, dead-end road having no through traffic. The presence of a bus stop and availability of mail delivery does not constitute substantial evidence to support the Appellants' allegation that the two roads have similar traffic levels.

The MVN did not discuss how the Bayou Tranquille Road designation would affect the MVN evaluation. The MVN DD, (x) Traffic/transportation patterns, states that Bayou Tranquille Road is a one-lane road. In a letter dated September 29, 2000, the Appellants notified the MVN that Bayou Tranquille Road had been designated as a parish road. The MVN stated that it had no knowledge of the change in designation.

On remand the MVN should provide additional evidence regarding the safety issues associated with construction of an outbuilding/shop. The MVN should confirm the change in road designation of Bayou Tranquille from the appropriate police jury. If appropriate, the MVN's evaluation should reflect the change in road designation.

Appellants' Reasons 8, 9, 10, 15, and 18: The proposed property improvements are part of the original home design and site selection criteria. Alternative locations or configurations/ minimizations are not practicable.

FINDING: These reasons for appeal do not have merit.

ACTION: No action is required.

DISCUSSION: The Appellants' need to store property items, vehicles, and boats was weighed against the public benefits associated with wetlands. In reasons for appeal 8 and 15, the Appellants stated that the proposed improvements are part of their original home design and that they have already fully utilized other portions of their property. The Appellants allege in reason for appeal 10 that they have sufficiently minimized impacts by proposing to impact a smaller amount of wetlands. To support their allegations, the Appellants list property items (boats, cars, woodworking equipment) they wish to store at their residence. They state that they have fully utilized non-wetland portions of their property. The RO corroborated that Appellants have constructed a large patio, several outbuildings, and covered storage/parking pads on the non-wetland portion of their property.

The Appellants did not provide substantial evidence to rebut the MVN's finding that the minimized development would be a less environmentally damaging, practicable alterative. The MVN DD, B.3, Other sites available to the applicant (40 CFR 230.10), states that the deposition of fill material into wetlands for the purpose of recreational and commercial development is considered a non-water dependant activity. In accordance with

the 404(b)(1) Guidelines, there is a regulatory presumption that a less environmentally damaging, practicable alternative site or project designs exists, unless the Appellants can clearly demonstrate otherwise. The minimized alternative advocated by the MVN would provide storage of property items and parking. The MVN determined that the additional storage/parking, in excess of the minimized alternative, would result in unacceptable cumulative impacts.

The Appellants state in reasons for appeal 9 and 18 that off-site alternatives are not practicable. The MVN concurs with the Appellants. The MVN DD, (3) Other sites available to the applicant (40 CFR 230.10) and (4) Other sites not available to the applicant, state:

> other available sites would not satisfy the applicant's desire to expand their existing property for recreational and commercial use

and

> Other less damaging sites in the area that could accommodate the proposed action but are not available to the applicant would not be considered practicable alternatives as defined under the 404(b)(1) Guidelines, Part 230.10 (a)(2).

Appellants' Reasons 13, 16, and 17: The expected benefits associated with the development outweigh any reasonable foreseeable detriments.

FINDING: These reasons for appeal have merit.

ACTION: The MVN shall provide additional evidence to the administrative record to support its evaluation of environmental consequences of potential cumulative effects.

DISCUSSION: The MVN appropriately considered cumulative effects in assessing the expected adverse impact associated with the proposed development. Additional evidence regarding the significance of the potential cumulative impacts within the identified geographic area is recommended.

The MVN determined that the discharge of fill material associated with the proposed development failed to comply with the requirements of the 404(b)(1) guidelines, because it does not include all appropriate and practicable measures to minimize

potential harm to the aquatic ecosystem. In assessing the expected adverse impacts, the MVN stated that the wetland impact was not significant in size, but determined that any loss of high quality wetlands with disregard for the 404(b)(1) guidelines would be a critical loss to the aquatic environment.

The MVN supported its finding that the proposed development would constitute a critical loss by identifying the secondary and cumulative effects. In MVN DD F., Summary of secondary and cumulative effects, the MVN states:

> After a re-evaluation of all existing, proposed and possible future projects, it was determined that fill activities for additional parking and storage area have more than minimal cumulative effect on the adjacent high quality cypress swamp.

The review of the adequacy of MVN's assessment of cumulative impacts utilized results of research and consultations found in the Council on Environmental Quality's (CEQ) handbook titled, Considering Cumulative Effects[2] (CEQ Handbook). The CEQ Handbook introduces the complex issues of cumulative effects, outlines general principles, presents useful steps, and provides information on methods of cumulative effects analysis.

The CEQ Handbook approached the process of analyzing cumulative effects to that of enhanced traditional components of an environmental impact assessment: 1) scoping, 2) describing the affected environment, and 3) determining the environmental consequences.[3] The CEQ Handbook recognized the need to incorporate a cumulative effect analysis into the development of alternatives for an environmental assessment. The CEQ Handbook acknowledged the complexity of analyzing cumulative impacts and suggested a focus on important cumulative issues.

The MVN administrative record provided a reasonable analysis regarding scoping principles, as recommended by the CEQ Handbook.[4] The MVN identified that the proposed impacts to the high quality cypress swamp constituted a significant cumulative effect issue. The MVN identified the geographic scope, which is the cypress swamp within the vicinity of Bayou Tranquille Road

---

[2] Considering Cumulative Effects Under the National Environmental Policy Act, Council on Environmental Quality, January 1997.
[3] CEQ Handbook, page vii.
[4] CEQ Handbook, page 11.

and Clyde Tucker Drive that is contiguous to Lake Verret. The MVN identified a timeframe for the analysis: beginning with the original authorization of the Bayou Tranquille Subdivision to Sunshine Properties in 1986 to the date of Appellants' permit application. The MVN referred to other actions affecting the resources of concern: the original authorization of the Bayou Tranquille Subdivision, the five after-the-fact permits and seven individual permits previously issued, and numerous other permits issued for bulkheads, piers, wharves and other filling located on the pre-existing canal bank.

As recommended in the CEQ Handbook, the MVN administrative record provided a reasonable characterization of the affected environment.[5] The MVN identified resources that could be potentially affected when considering cumulative effects and their response to change. Specifically, the MVN DD F., Summary of secondary and cumulative effects, focused on important cumulative impacts to the high quality cypress swamp:

> ... in light of various public interest factors and regulatory requirements, it was generally very difficult to support the issuance of permits for the destruction of high quality cypress swamp for non-water dependent facilities such as parking, workshops, storage or recreation. Permanently flooded cypress swamp is extremely difficult to replace and expensive to mitigate for losses of wetland functions.

The MVN characterized the stresses affecting these resources, ecosystems, and human communities and their relation to regulatory thresholds. In MVN DD D., Biological characteristics and anticipated changes, wildlife habitat, the MVN addressed the stresses in relation to wildlife habitat impacts in forested wetlands:

> Impacts to forested wetlands can have far-reaching and environmental impacts, especially in lieu of their rapid and continued decline. Forested wetlands provided a variety of niches… which have exhibited substantial declines in the last 30 years.

[5] CEQ Handbook, page 23.

The administrative record referred to the 404(b)(1) guidelines and the national and state mandate of achieving "no net loss of wetlands."[6]

Additional evidence in the administrative record is needed to support the MVN's determination of environmental consequences of cumulative effects. As recommended in the CEQ Handbook, the MVN identified important cause-and-effect relationships between human activities and resources (the developmental pressure along Bayou Tranquille Road and Clyde Tucker Road).[7] In a memorandum dated April 6, 2000, the MVN quantified the potential cumulative impacts associated with the developmental pressure. However, additional evidence is needed to support MVN's determination that the 10.9-acre cumulative impact from allowing 50 feet of lateral fill into the wetland would cause significant degradation within the identified geographic area (the cypress swamp within the vicinity of Bayou Tranquille Road and Clyde Tucker Drive that is contiguous to Lake Verret). The MVN administrative record was unclear in explaining the basis for determining that the 10.9-acre cumulative impact would result in significant degradation as compared to those associated with 25 feet of lateral fill. On remand, the MVN needs to provide evidence to address how the 10.9-acre cumulative impact would constitute a significant degradation within the identified geographic area.

On remand, the MVN's determination regarding the significance of cumulative effects should support the decision to limit the size of fill areas and should include a more rigorous evaluation of alternatives.

Appellants' Reasons 19 and 20: The proposed development was reasonable since the LADEQ issue of a water quality certification and no objections were received.

FINDING: These reasons for appeal do not have merit.

ACTION: No action is required.

DISCUSSION: The Corps of Engineers relies on State Water Quality agencies to provide comments relative to state water quality standards and issues. The LADEQ determination regarding the water quality certification and the number of objections

[6] Environmental Protection Agency letter, March 8, 2000
[7] CEQ Handbook, page 37

received are not determinative of the USACE regulatory findings under Section 404 of the CWA for the proposed development.

CONCLUSION: For the reasons stated above, I conclude that the Appellants' Reasons 6, 13, 16, and 17 have merit, and that the Appellants' Reasons 1-5 and 7-12, 14-15, and 18-21 do not have merit. The case is hereby remanded to the MVN for reevaluation.

/signed/
RICHARD B. JENKINS
Colonel, Corps of Engineers
Acting Division Engineer

5 Encls