ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
ROGERS AND BEACH - FILE NO. EG-19-990-3786
NEW ORLEANS DISTRICT

ADMINISTRATIVE APPEAL DECISION

Mr. Fennon Rogers and Mr. John Beach
File No. EG-19-990-3786
New Orleans District
12 August 2002

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

Appellants/Applicants: Mr. Fennon Rogers and Mr. John Beach, Covington, Louisiana

Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): 31 July 2001

Appeal Conference and Site Visit Date: 26 September 2001

Background Information: On 22 October 1999, Messrs. John Beach and Fennon Rogers applied for a Department of the Army Permit. The Appellants proposed to clear, grade, excavate and fill for the development of a residential subdivision on approximately 20.7 acres of land in St. Tammany Parish, Louisiana.

The project site is located within the New Orleans District (MVN). The proposed subdivision development was advertised in a public notice on 27 December 1999. The wetlands acreage to be impacted was 20.7 acres. The Appellants propose to develop 14 home sites to meet the local demands for housing opportunities in the $90,000 to $130,000 range.

Based on a preliminary evaluation of the revised proposal and agency comments, the MVN's letter and Decision Document (MVN DD), dated 8 June 2001, determined that the proposed project was contrary to the overall public interest and denied the permit. The denial decision was based on MVN’s findings that the proposed project would adversely impact moderate to high quality wetlands that support fish and wildlife resources, maintain local water quality, and provide storm water storage capabilities. The MVN advised Messrs. Rogers and Beach of the USACE Administrative Appeal Process.

Messrs. Beach and Rogers submitted a completed RFA on 31 July 2001. The RFA was received within the requisite 60-day time period.

Information Received and Its Disposition During the Appeal Review:

1. Prior to the appeal conference, the MVN provided a copy of the administrative record. The appeal of a denied permit is limited to the information contained in the administrative record by the date of the Notice Of Appeal Process (NAP) for the denied permit. The NAP for Appellants was dated 8 June 2001.

2. Prior to the appeal conference, the RO provided a list of questions to the MVN and the Appellants to be asked in the appeal conference.

3. At the appeal conference, the MVN provided a written response to the questions asked in the appeal conference, which was considered to be clarifying information.

4. At the appeal conference, the Appellants provided a written response to the questions asked in the appeal conference; this was considered to be clarifying information.

5. At the appeal conference, the Appellants provided selected pages from Appendix B, Chapter 40 of the subdivision ordinance for St. Tammany Parish. This information was considered to be clarifying information.

6. At the appeal conference, the Appellants provided an undated topographic map depicting the Appellants' property to other referenced permit decisions and subdivisions. The portion of the map depicting the Appellants' property, Tammany Hills subdivision and Hallmark Homes, is already contained in the administrative record. The map references two permit decisions (Reiche and E2-200-4118). These references are new information and were not considered. The topographic map appeared to be similar to the Covington, Louisiana topographic map dated 1955 and later photo-revised in 1968 and 1994. Other than the references to the two permit decisions, the undated map would be considered clarifying information.

7. During the appeal conference, the Appellants provided selected pages from the United States Department of Agriculture, Soil Conservation Service Soil Survey Of St. Tammany Parish, Louisiana. This information was considered to be clarifying information. One soils map references two permit decisions (Reiche and E2-200-4118). These references are new information and were not considered.

8. At the appeal conference, the MVN provided a copy of the Statement of Findings for Hallmark Homes and the Department of the Army Permit Evaluation and Decision Document for B.I.L., L.L.C, Corps of Engineers file number EB-19-980-2596. This information was considered to be clarifying information.

9. After the appeal conference, the MVN provided a Covington, Louisiana topographic map dated 1955 and later photo-revised in 1968 and 1994. The topographic map was considered clarifying information (enclosure 1).

Copies of all clarifying information received from the Appellants and the MVN will be provided to both parties.

Summary of Appeal Decision:

Appellants' Reason 1: No merit - The MVN administrative record showed that the subject wetlands were moderate to high quality pond cypress/pine savannah complex wetlands.

Appellants' Reason 2: Merit - The MVN did not provide substantial information to show the need to require the Appellants to provide a detailed market analysis regarding the availability of homes and need for the proposed subdivision.

Appellants' Reason 3: Merit - There was insufficient information in the administrative record to substantiate whether or not on-site or alternative sites are available to the Appellants.

Appellants' Reason 4: No Merit - The MVN's assessment of the impacts to soils was appropriate.

Appellants' Reason 5: Merit - The MVN should develop additional information to determine the impacts of this project on the issues of concern.

Appellants' Reason 6: Improper appeal ground - The Appellant's claim that this permit denial constitutes a taking is outside the purview of the regulatory appellate process and will not be considered by the Review Officer.

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

Appellants' Reason 1: The MVN's opinion that the project's 20 acres consist of high quality, forested wetlands is not born out by physical inspection.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The administrative record contains sufficient information to show that the subject wetlands are moderate to high quality pond cypress/pine savannah complex wetlands. The MVN determination of quality varied. There was sufficient information to support a finding of moderate quality wetland as to habitat function and value. The administrative record also showed that the site wetlands are high quality because of the property's water quality and flood control functions and values.

The comments provided by the resource agencies and the site visit support the MVN determination that the site contained moderate wetlands habitat functions and values. The subject site is part of a contiguous wetland, relatively unfragmented. Comments by the Environmental Protection Agency state that the project area provides moderate valuable habitat for indigenous and migratory avian species. The U.S. Fish and Wildlife Service (FWS) attested to the degree of plant species richness. The MVN credibly determined that the property's pine savannahs are extremely important since most of these native plants cannot exist in other wetland types and many are rare throughout the state due to the limited natural range and potential habitat loss. Though the FWS

acknowledged that the project area was exhibiting shrub and over-story encroachment, it deemed this condition was caused by a lack of frequent burning. The administrative record documented that the quality of the wetlands habitat for many terrestrial species at the project site had been reduced somewhat due to historic logging activities at the site.

In addition, the administrative record showed that the MVN properly considered proximity of other developments and determined that the project pine savannah wetlands are high quality due to their functional ability to hold storm and floodwater and reduce the flow of non-point source pollution into nearby watercourses. The administrative record includes comments that were received from private individuals who reside in neighboring residential developments. These comments communicated concerns that the development would increase flooding in the vicinity. The FWS determined that the pine savannah wetlands in the project are aquatic resources of national importance which provide floodwater storage and perform water quality maintenance functions by reducing excessive dissolved nutrient levels and filtering pollutants. The Environmental Protection Agency stated that minor contributors of nonpoint source pollutants taken cumulatively with other development occurring in and out of wetlands in St. Tammany Parish could be significant.

The administrative record contained Appellants' information, which noted flood zone designations and proximity to other developments/utilities to support their reason for appeal that the project wetlands are not high quality. The Federal Emergency Management Agency's floodplain designation is a factor, but does not singularly determine the quality of wetlands under Section 404 of the Clean Water Act. Considering all of the information in the administrative record, the substantial weight of the information shows that the project wetlands are high quality due to their functional ability to hold storm and floodwater and reduce the flow of non-point source pollution into nearby watercourses.

Appellants' Reason 2: The MVN's assessment that there are sufficient lots available to meet housing demand is not supported by the substantial weight of evidence in the administrative record.

FINDING: This reason for appeal has merit.

ACTION: The MVN shall provide substantial information to support its reason for requiring the Appellant to provide a detailed market analysis to support the need for the project. If the MVN determines that an independent review of project need is warranted, then the scope of the MVN's evaluation should be proportionate to the significance of the impacts associated with the proposed development. Upon conclusion of the independent review, the MVN shall undertake a new 404 review based on the additional information and/or revised analysis.

DISCUSSION: The Corps of Engineers regulations require the MVN to evaluate project need as part of the public interest review. The MVN did not provide substantial information to show the need to require the

Appellants to provide a detailed market analysis regarding the availability of homes and need for the proposed subdivision. The scope of the analysis is to be proportionate to the significance of the impacts.

The Corps of Engineers' public interest review should balance the economic need for a project along with other factors of the public interest. Pursuant to the regulations at 33 CFR, Section 320.4(a)(1), "the decision of whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." An evaluation of project need is consistent with the regulatory obligations concerning the public interest review.

The MVN did not provide sufficient reasons for requiring the Appellants to provide a detailed analysis that assessed the need for the project. Corps of Engineers regulations at 33 CFR Section 320.4(q) specifically grant deference to the applicant on project need:

> *When private enterprise makes application for a permit, it is generally assumed that appropriate economic evaluations have been completed, the proposal is economically viable and is needed in the market place. However, the district engineer in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest.*

The fact that a project is located in or near wetlands, alone, is insufficient to require more than cursory evaluation of the need for the project. Other than stating that moderate to high quality wetlands may be impacted; the administrative record lacks sufficient information for requiring a more detailed assessment of project need. The preamble to the Federal Register, page 41208, Volume 51, Number 219, 13 November 1986 provides a discussion of public comments and final changes to specific sections of the regulation and references the depth of the evaluation:

> *The district engineer may determine that the impacts of a proposed project on the public interest may require more than a cursory evaluation of the need for the project. The depth of the evaluation would depend on the significance of the impacts and in* ***unusual*** *circumstances could include an independent economic analysis (emphasis added).*

On remand the MVN should provide necessary information to support requiring additional analysis from the Appellants regarding the need for project.

Appellants' Reason 3: The Appellants disagree with the MVN's finding that development of smaller lots was a practicable alternative.

FINDING: This reason for appeal has merit.

ACTION: The MVN shall provide additional information to substantiate its finding that practicable alternative sites are available to the Appellants. The information needs to directly correlate to the Appellants' primary purpose and should consider alternatives both in terms of the Appellants' wishes and capabilities and in terms of the need for, or the purpose to be served by the proposed activity.

DISCUSSION: While the MVN stated that on-site minimization alternatives exist, there is insufficient information in the administrative record to substantiate whether or not on-site or alternative sites are available to the Appellants.

The CWA Section 404(b)(1) Guidelines allow the MVN to assume that non-wetland alternative sites for non-water dependent activities are available to the Appellants. The administrative record contains information from the Appellants that refutes this assumption. The Appellants provided examples of alternative sites and discussed reasons why they were impracticable (letters dated 7 August 2000, 13 February 2000, and 28 April 2000). The MVN acknowledged receipt of the information but discounted it as "minimal" (MVN Decision Document, General Evaluation). There is insufficient information in the administrative record to support MVN's conclusion that this information is inadequate.

The MVN concluded that the proposed development (filling) does not include all appropriate and practicable on-site measures to minimize potential harm to the aquatic ecosystem. The administrative record shows that some minimization alternatives may not be available to the Appellants. In the appeal conference, the MVN stated that during the permit evaluation the MVN and Appellants discussed preserving portions of the site. The administrative record contains information from FWS which recommends that impacts to project wetlands be minimized by reducing the size of each lot to a half-acre or less and placing a conservation easement on the avoided area (14 January 2000 FWS letter). However, the Appellants responded by showing that lot reduction would be impracticable due to St. Tammany Police Jury's water/sewer systems requirements for subdivisions with greater than 14 homes. The MVN had determined that a conservation servitude by a third party on half of the property was not possible because of size. The administrative record is silent on whether any other wetland minimization options are available and practicable.

On remand, the MVN should provide sufficient information to substantiate its finding that a practicable alternative is available and capable of being utilized after taking into consideration cost, existing technology, and logistics in light of overall project purpose (40 CFR 230.3(q)). Regulatory Guidance Letter (RGL) 84-09, 3. c. Practicable Alternatives provides that:

> The discussion of practicable alternatives for any or all of the above requirements should be guided by the rule of reason, and should consider alternatives both in terms of the applicant's wishes and capabilities and in terms of the need for or purpose to be served by the proposed activity.

Regulations found in 33 CFR 320.4(r)(i) encourage districts to discuss with the applicant project modification to minimize adverse project impacts:

> As a result of these discussions and as the district engineer's evaluation proceeds, the district engineer may require minor project modification. Minor project modifications are those that are considered feasible (cost, constructability, etc.) to the applicant and that, if adopted, will result in a project that generally meets the applicant's purpose and need.

The Appellants allege that reducing lots sizes would require installation of a central sewage system that they cannot afford. In the absence of cost information by the Appellants, the MVN may elect to request that Corps' economists provide relevant cost information. RGL 93-02, Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking, 3. <u>b. Relationship between the Scope of Analysis and the Scope/Cost of the Proposed Project,</u> states that the level of analysis required for determining which alternatives are practicable will vary depending on the type of project proposed:

> The determination of what constitutes an unreasonable expense should generally consider whether the project cost is substantially greater that the cost normally associated with the particular type of project.

Additionally, the RGL 93-02 refers to the relevant consideration for individual homeowners and small businesses in determining what constitutes a practicable alternative:

> It is important to emphasize, however, that it is not a particular applicant's financial standing that is the primary consideration for determining practicability, but rather characteristics of the project and what constitutes a reasonable expense for these projects that are most relevant to practicality determinations.

In evaluating off-site alternative subdivision sites for development the MVN should consider guidance found in RGL 88-13:

> When considering what weight the impacts of a project, requiring a permit will be given in NEPA decisions, district engineers should consider whether another project, not requiring a permit, could likely occur at

the site or in the vicinity, and whether its impacts would be similar to impacts of the project requiring a permit.

Appellants' Reason 4: The MVN's statement that the site's soils are unsuitable for residential uses is unsubstantiated. The soil type has no bearing on the project.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The MVN's assessment in the administrative record of the impacts to soils found in the substrate was supported by substantial information. The MVN's finding was appropriately based on recognized information sources.

The Corps of Engineers regulations in 40 C.F.R Section 230.11 require factual determinations of the potential short-term or long-term effects on the aquatic environment. The nature and degree of effect to the physical substrate is one of the factual determinations used in making a finding of compliance or non-compliance with the 404(b)(1) guidelines.

MVN DD entitled Substrate, characterized the primary soil type as Guyton silt loam, and analyzed the anticipated changes to this soil type from the proposed development. The administrative record contains sufficient information that Guyton silt loams and Myatt fine sandy loams are situated in regions that serve as floodwater storage areas and ground water recharge sites. Fill activities associated with the residential development would compact the substrate, decrease surface porosity, and increase slopes. The direct impact to the area soils would reduce the wetland's ability to function as a flood retention area. The administrative record shows that the MVN appropriately relied on soils information obtained from the *United States Department of Agriculture, Soil Conservation Service Soil Survey Of St. Tammany Parish, Louisiana*. The soil survey sufficiently supports the MVN's finding that the soils are poorly suited to urban uses because of flooding, slow permeability, and low strength for roads. The poor suitability of the site’s soils for housing development does not in itself preclude development, but was a contributing factor in the MVN review.

Appellants' Reason 5: The development will have no effect on flow patterns due to the light impact of low density of development. The development is 800 feet from the Bayou. There is ample storage capacity in roadside drainage ditches.

FINDING: This reason for appeal has merit.

ACTION: The MVN should develop additional information to determine the impacts of this project on the issues of concern.

DISCUSSION: The MVN raised a legitimate concern regarding the anticipated increase in storm water and the capacity of the roadside ditches to hold the increased storm water. The MVN appropriately required information from the Appellants to address the anticipated impacts. The Appellants provided only an opinion and speculation to support their position that the increased storm water will have no adverse impact. The MVN subsequently denied the permit citing as one reason, the loss of storm water storage capabilities. There is insufficient information about this project's impact on anticipated increase in storm water and the capacity of the roadside ditches to support MVN's decision to deny the permit.

The administrative record documents concerns that the proposed street and house pad construction would modify natural contours, alter the hydrology, and decrease retention time of water on the property. The MVN determined that, if the development occurred, then adjacent wetlands and waterways would have to store the additional water that was no longer stored at the current project site.

By letters dated, 10 July 2000, 2 February 2000, and 14 April 2000, the MVN requested drainage/hydrologic information for the proposed project. This information would "… insure your project will not have adverse impacts to local hydrology and that no on-site measures will be required to offset hydrologic impacts (MVD letter dated 10 July 2000)." The Appellants provided statements by their engineering consultants that St. Tammany Parish would not require on-site detention and that storm water run-off could be re-routed and detained within roadside drainage ditches. The Appellants supplied no other information to support their claims of no impact.

The MVN DD cited the loss of wetland storm water storage capabilities as a reason for denying the permit. Although this is a legitimate concern, without project-specific information or data to define the impacts of this proposed activity, denial is premature. Additional hydrologic information regarding increased storm water levels and sediment loads into roadside drainage ditches is needed. The Appellants may be required to furnish the required data. If there is insufficient information upon which the District Engineer reasonably may base his decision, the permit should be withdrawn.

Appellants' Reason 6: Appellants disagree with the MVN's statement that the Appellants would suffer a short-term financial loss if the permit were denied. The Appellants allege that the permit denial would result in a total economical loss by affecting the economic value of the property by removing it from commerce. The Appellants allege that the MVN's statement was an attempt to avoid its obligation under the 5th Amendment of the U.S. Constitution to negate the Appellants' financial loss.

FINDING: This reason for appeal is outside the purview of the regulatory appeal process and will not be addressed by the review officer.

ACTION: No action is required.

DISCUSSION: The MVN is assigned the responsibility to decide whether to condition or grant a permit in accordance with the laws, regulations, and policy. Neither the MVN, in deciding to condition or grant a permit, nor the Division Commander in reviewing an appeal, may consider whether or not such action constitutes a taking under the 5th Amendment of the Constitution. Therefore, Appellants' claim that this permit denial is a taking under the 5th Amendment of the US Constitution is improper under the regulatory appellate process and will not be considered by the Review Officer.

CONCLUSION: For the reasons stated above, I conclude that the Appellants' Reasons 2, 3, and 5 have merit, and the Appellants' Reasons 1 and 4 do not have merit. Appellants' Reason 6 was found to be outside the purview of the regulatory appellate process and will not be considered. The case has been remanded to the MVN for reevaluation.

Encl

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