ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
GEORGE MAYNARD - FILE NO. 20-000-3496
NEW ORLEANS DISTRICT

ADMINISTRATIVE APPEAL DECISION

Mr. George Maynard
File No. 20-000-3496
New Orleans District
December 20, 2000

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

Appellant/Applicant: Mr. George Maynard

Appellant Representative: Kathy Wiltenmuth, Riparian, Incorporated

Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): September 14, 2000

Appeal Conference Date: October 19, 2000

Site Visit Date: October 19, 2000

Background Information: On July 20, 2000 Ms. Kathy Wiltenmuth of Riparian, Incorporated, requested a Department of the Army Jurisdiction Determination (JD) on behalf of Mr. Maynard.

Mr. Maynard owns the 102-acre project site located within the New Orleans District (MVN) on the northwest corner of Old Gentilly Road and Almonaster Boulevard, Orleans Parish, Louisiana. Mr. Maynard’s property is located within the Almonaster-Michoud Industrial Development (AMID), now referred to as the New Orleans Business and Industrial District (NOBID) property, established in the late 1970’s by the City of New Orleans (City). The NOBID property contained approximately 7,000 acres and has been within a protected levee and pumped for 65 years. The City of New Orleans' plan for the property was basic infrastructure development. On May 20, 1981, The Department of Commerce, Economic Development Administration dedicated funds for the preparation of an Environmental Impact Statement (NOBID EIS) to address the significant adverse and beneficial impacts of the future infrastructure development.

An October 15, 1980 Corps jurisdiction determination/wetland delineation (1980 MVN JD) on the NOBID property was incorporated into the NOBID EIS. The 1980 MVN JD identified approximately 70 acres of wetlands within the NOBID tract. As a result of the NOBID EIS, the City and the Nature Conservancy entered into an agreement for providing compensation for impacts to

approximately 70 acres of wetlands within the NOBID corridor. However, The 1980 MVN JD did not identify jurisdictional wetlands on Mr. Maynard's property.

Mr. Maynard purchased the 102-acre site in 1971. The property is bounded by the Old Gentilly Road to the south, the Charbonnet Canal and Chef Menteur Highway Service Road to the east and the CSX/L & Railroad Rights-Of-Way to the north. The railroad rights-of-way was established in the 1880's. The Charbonnet Canal was originally located in its present location. A small section of the canal (50-100 feet) was realigned under the railroad trestle. The Interstate 510 (I-510) interchange was constructed in the 1980's. The Charbonnet Canal was cleaned out and widened as part of the I-510 improvements. Mr. Maynard allowed vegetation and spoil material from the interchange construction and canal widening to be placed on his property. Mr. Maynard mechanically cleared and windrowed his property in 1988.

In support of the JD request, Ms. Wiltenmuth provided a wetland delineation report, dated July 20, 2000 (Appellant's JD report), entitled "Wetland Delineation NOBID Site-102 Acres Almonaster and Gentilly New Orleans, Louisiana." In a letter, dated August 23, 2000 (2000 MVN JD letter), the MVN determined that Mr. Maynard's property contained wetlands subject to the Corps' jurisdiction. The MVN also determined that the Charbonnet Canal was "Other Waters" of the United States. The 2000 MVN JD letter included a map depicting the wetlands and "Other Waters" of the United States, a Basis for Jurisdictional Determination form, and the Combined Notification of Appeal Process (NAP)/ Request For Appeal (RFA) form.

Ms. Wiltenmuth submitted a completed RFA dated September 14, 2000. The RFA was received within the requisite 60-day time period. Ms. Wiltenmuth of Riparian Incorporated is the representative for Mr. Maynard for this Administrative Appeal.

<u>Information Received and its Disposition during the Appeal Review</u>:

1. An aerial photo, dated September 28, 1993, four undated aerial color photographs, a plat denoting Mr. Maynard's property, a drawing titled "Figure 4-30. Floodplain and Wetlands (after Federal Insurance Administration 1978; USCE 1980b)", a map titled "Existing Drainage Patterns," an undated survey map, and an undated color photo noting the Chef Mentor Highway and retention pond were submitted at the appeals conference by the Appellant. These items were considered to be clarifying information.

2. The Appellant submitted at the appeals conference a letter dated October 19, 2000, from the Louisiana Department of Transportation and Development (LADOT). The LADOT notified Mr. Maynard that LADOT would be clearing the 120-foot Charbonnet Canal drainage servitude. This item was determined to be new information, but was not considered by the RO in her evaluation.

3. The Appellant provided a written response to the questions asked in the appeals conference, which was considered to be clarifying information. In addition, MVN verbally responded to questions in the appeals conference. All responses are found in the Memorandum For The Record for the Administrative Appeal Conference, Mr. George Maynard, Department of the Army, New Orleans District Permit Application No. 20-000-3496, dated November 27, 2000.

4. An email from Mr. Kelly Haggar, Riparian Incorporated, dated December 8, 2000, containing suggested edits and clarification of the Appellant's RFA was submitted. This information was considered to be clarifying information.

5. A fax dated December 7, 2000, from the Appellant, which provided some hand drawings depicting the Charbonnet Cannel realignment, was submitted. These drawings were considered to be clarifying information.

6. A fax dated October 23, 2000, from the Appellant, transmitting Global Positioning System slides depicting locations of data points visited during the October 19, 2000 site visit was received. These slides were considered to be clarifying information.

Copies of all clarifying information received from the Appellant and the MVN were provided to both parties.

Summary of Appeal Decision:

The MVN appropriately applied current regulatory criteria and associated guidance for identifying and delineating wetlands. The RO's review of the administrative record and clarifying information obtained from the appeals conference documents the MVN's decision-making process, the basis for the decision and the final decision. The existence of the NOBID EIS does not substitute for a JD nor conclude the Appellant's responsibility to comply with Section 404 of the Clean Water Act by complying with

the permitting process. No permit application was submitted to the MVN nor had the MVN accepted or required a mitigation plan; therefore the existence of the NOBID EIS does not satisfy the permit process.

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

Appellant's Reason 1: Several procedural errors occurred when Corps review personnel failed to either fully consider the complete delineation report or else incorporated their documentation into the Corps' determination letter. (Further discussed in the RFA, Section A. Procedural errors)

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The MVN's actions as described in the Appellant's RFA #1, Section A, are not procedural errors. There is no requirement that the MVN decision letter must address each piece of information that was utilized during its JD evaluation. Information contained in the administrative file documents the MVN's decision-making process, the basis for the decision, and the final decision. The Appellant was provided a copy of the administrative record.

The Appellant claims that there was no indication in any record provided to the Appellant during the determination process what factors were considered by MVN. The 2000 MVN JD letter contains the requisite information. An approved jurisdiction determination is a Corps' document which indicates the presence or absence of waters of the United States on a parcel, or which provides a written statement of jurisdiction with a map identifying the limits of water of the United States on a parcel, and a basis of JD form.

The 2000 MVN JD letter did not have to refer to all the information MVN considered. The 2000 MVN JD letter stated that the Appellant's JD report had been reviewed. The MVN personnel attested in the appeals conference that the MVN personnel had utilized the Appellant's JD report as well as other information. In addition, other information was obtained from review of infrared photographs, soils maps, historical information of the NOBID Corridor, and other JDs in the area. The MVN attended meetings with NOBID and Mr. Maynard and performed two site visits. This information was sufficient to render a JD.

The Appellant also claims that the 2000 MVN JD letter should have refuted only the facts, logic, and law cited in the Appellant's JD report and that the MVN's utilization of any other information constituted new information. The 2000 MVN JD letter was the notification to the Appellant of the MVN's decision regarding jurisdiction. It is the administrative record and not the decision letter, which documents the MVN's decision-making process, the basis for the decision, and the final decision. The MVN is not bound to consider only what information is provided by the Appellant, but is also charged with making an appropriate jurisdictional determination based on the pertinent information.

The RO reviewed the administrative record, and found only one item that constituted "new information" as defined by regulation:

> *The appeal of an approved JD, a permit denial, or a declined permit is limited to the information contained in the administrative record by the date of the NAP for the application or approved JD, NAP for the application or approved JD, the proceedings of the appeal conference and any relevant information gathered by the RO as described in section 331.5.*
>
> *33 CFR. 331.7(f).*

According to this regulation, issues not identified in the administrative record by the date of the Notification of Appeal Process (NAP) form (August 23, 2000) for the application may not be raised or discussed. Only a letter, dated October 19, 2000, from the Louisiana Department of Transportation and Development and received at the appeals conference, was considered new information because it was dated after the date for the NAP form. However, it was not given any weight or consideration by the RO. No other new information is contained in the administrative record or was considered by the MVN.

<u>Appellant's Reason 2</u>: Corps' review personnel made several incorrect applications of regulations, laws and officially promulgated policies when they maintained that a simple Regulatory Guidance Letter (RGL) took precedence over a Final Environmental Impact Statement (EIS). (Further discussed in the RFA, Section B)

<u>FINDING</u>: This reason for appeal does not have merit.

<u>ACTION</u>: No action is required.

<u>DISCUSSION</u>: The Appellant's claims in Reason #2 will be considered in two subparts: 1) The RGL's have expired and are not

binding on another agency; and 2) the MVN should not assert jurisdiction because the NOBID EIS authorized the work in wetlands and the MVN accepted compensatory mitigation.

Subpart 1. The MVN's use of RGL's is appropriate.

The RGL's are used not only to interpret or clarify existing regulatory program policy, but also to provide mandatory guidance to the Corps' District offices. The Corps of Engineers is the permitting agency regarding compliance with Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act of 1899, and Section 103 of the Marine Protection Research and Sanctuaries Act of 1972. The MVN properly applied the pertinent RGL's appropriate here to the circumstances under consideration.

The RGL's were developed by the Corps of Engineers as a system to organize and track written guidance that is issued to its field agencies. The RGL's are normally issued as a result of evolving policy, judicial decisions and changes to the Corps' regulation or another agency's regulations, which affect the permit program. The *Federal Register* provides current Regulatory Guidance Letters to the public and states:

> *However, unless superseded by specific provisions of subsequently issued regulations or RGL's, the guidance provided in RGL's generally remains valid after the expiration date.*
>
> *Federal Register, Volume 60, Number 49, dated March 14, 1995.*

Therefore, the RGL's (94-01, 81-02 and 86-09) have not expired. The MVN's utilization of RGL 90-6 (later modified and extended by RGL 94-01) was appropriate.

The MVN's letter, dated April 11, 1991, determined that the wetland determination performed in October 15, 1980 was valid until August 14, 1997. In a letter, dated July 15, 1997, the Department of the Army, Directorate of Civil Works, Washington D.C. (Corps Headquarters), affirmed MVN's decision relative to the 1980 MVN expiration date. Only a valid permit or substantial expenditure of funds would serve to extend the prior JD. No permit was requested or work begun. Since neither a permit was requested nor was work begun, the 1980 MVN JD expired. Only the 2000 MVN JD, dated August 23, 2000, constitutes the current jurisdiction determination.

Subpart 2. The NOBID EIS and Mitigation Agreement does not negate the Appellant's responsibility to comply with Section 404 of the Clean Water Act.

The Appellant's RFA #2, Section (B)(5), states:

> *"The Corps has previously concurred that all wetlands have already been fully permitted and mitigated within NOBID."*
>
> *Appellant's RFA dated September 14, 2000.*

The Appellant contends the MVN should not assert jurisdiction because the NOBID EIS authorized the work in wetlands and the MVN accepted compensatory mitigation. The RO has reviewed the administrative record and found no evidence that a permit application was submitted for work in the NOBID property. The requirement for a permit was communicated in a letter (December 18, 1998) and in a meeting with NOBID (August 15, 2000). The Appellant was told in the appeals conference that there has not been an MVN evaluation relative to compliance with Section 404 of the Clean Water Act and/or public interest review for work on property belonging to the Appellant or NOBID. Without such a review, the Appellant has not complied with Section 404.

The administrative record confirms MVN's statement in the appeals conference that no permit application had been received. The NOBID EIS indicated that a permit would be required for work on the NOBID property. The MVN's Memorandum for Record, dated August 15, 2000, documented a meeting with NOBID and the City of New Orleans. In the memorandum, The Corps stated that no permits had been issued to NOBID, nor had it agreed to any mitigation for proposed wetland impacts. In that memorandum, the MVN also noted in the appeals conference that the mitigation was imposed by the City of New Orleans to comply with a Community Development Block Grant, not the result of any permitting requirements from the Corps of Engineers. Additionally, the MVN's letter, dated December 18, 1998, notified NOBID that a permit would be required to fill and develop the wetland areas on the site.

The National Environmental Policy Act (NEPA) regulations found in 40 CFR Part 1501.2(d)(2) requires Federal agencies to consult early with appropriate state and local agencies, Indian tribes, and with interested private persons and organizations when its own involvement is reasonably foreseeable. Accordingly, prior to 1980, the Department of Commerce Economic Development Administration appropriately contacted the MVN. The MVN provided

a JD and notified the city that a permit would be required for working the wetlands. The NOBID EIS's Record for Decision (ROD), dated September 16, 1982, references the MVN's permit request:

> *In order to assure that the implementation of a drainage system does not cause avoidable adverse impact, the City will further investigate the areas with unusual levels of heavy metals or toxic chemicals. This investigation will be coordinated with the Permit Section of the U.S. Army Corps of Engineers (USCE) and EPA and the results will be submitted with the required permit request.*
>
> *ROD, dated September 16, 1982, Page 5.*

The Appellant's claim that the Corps required a mitigation plan from the City of New Orleans and accepted a mitigation project is unsubstantiated in the administrative record. The NOBID EIS and ROD document that there was coordination with the MVN and the Environmental Protection Agency regarding the MVN's jurisdiction. However, there is no specific reference that the MVN required mitigation or that the MVN accepted the referenced mitigation plan. The ROD states:

> *The potential mitigation measures include, but are not limited to, isolation of the channel from adjacent marshes using rip-rap or appropriate structures, use of maintenance dredged material for marsh restoration, low sill structures in major cross-navigation channels, and installation of engineering structures to reduce the impact of ship wakes on the shorelines.*
>
> *ROD, dated September 16, 1982, Page 8.*

Moreover, a document titled "Agreement for Professional Services Between the City of New Orleans and the Nature Conservancy" (Mitigation Agreement) stated that approximately 40 acres of the wetlands would provide adequate mitigation for wetlands impacted in the AMID and satisfy the AMID mitigation requirement. There was no mention in the NOBID EIS/ROD or the Mitigation Agreement that the site was compensatory mitigation for proposed wetland impacts associated with a Corps permit. The Appellant's written response provided at the appeals conference stated that they did not have a record from the Corps directing the City to pay money to the Nature Conservancy. The Appellant did not provide sufficient evidence to support his claim that the Corps required the Mitigation Agreement in compliance with Section 404 of the Clean Water Act.

Appellant's Reason 3: Corps review personnel incorrectly applied the current regulatory criteria and associated guidance for identifying and delineating wetlands when they failed to: (a) follow the guidance in the 1987 Delineation Manual concerning classification of lands being artificially affected by man-made activities, and (b) properly apply the definition of a wetland. (Further discussed in the RFA, Section C. Incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands)

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The MVN appropriately applied current regulatory criteria and associated guidance for identifying wetlands. The MVN appropriately determined that the wetlands found on Appellant's property did not meet the criteria as a man-induced wetland. The "normal" hydrological condition inside a levee is not necessarily a drought as the Appellant claimed. In its 2000 MVN JD, the MVN was not required to find or discuss errors in the NOBID EIS or the expired 1980 MVN JD.

The *1987 Wetlands Research Program Technical Report Y-87-1 Corps of Engineers Wetlands Delineation Manual (1987 Manual)* define wetlands as follows:

> *Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.*
>
> *1987 Manual, Part II. Technical Guidelines, Wetlands.*

The 2000 MVN JD determination is based on the conclusion that the present site condition represents a new "normal" circumstance. A normal circumstance is determined on the basis of an area's characteristics and use, at present and in the recent past. The MVN stated that the historical normal circumstance of the entire NOBID property was a swamp supported by a surface water system. The new "normal" circumstance is a site supported by a ground water system that contains hydric soils, and a predominance of hydrophytic vegetation. The levee and pump systems altered the wetland characteristics from a surface water system to a ground water system that is levied and pumped. The effects of the railroad ditch, landclearing and canal widening have resulted in

some portions of the site becoming non-wetlands. However, the MVN determined that wetland indicators of all three parameters (i.e. vegetation, soils, and hydrology) were present on 24 acres of the site.

The Appellant's RFA #3, Section (C)(5) states that the "normal" hydrological condition inside a levee is a "drought". In the appeals conference the MVN addressed the site conditions typically found within levied and pumped areas and the effects to wetlands. The purpose of the levees and pumping stations is to control surface water, not ground water. MVN referenced other jurisdiction determinations and permit decisions where wetland signatures were present in areas that were levied and pumped. Ground water systems are influenced by the site's soils. Over time, as pumping continues, the physical characteristics of the soils change. The semi-fluid mineral mucky soils consolidate and compress to form a tight mineral clay. At that time, a "new normal circumstance" occurs.

The Appellant agrees that that some scattered man-made impounded areas meet the criteria as wetlands. However, the Appellant contends that the wetlands located on the site are man-induced wetlands by virtue of the windrows/berms and spoil banks along the Canal and should be exempt under Corps of Engineers regulations or policy. The MVN stated in the appeals conference that if a wetland site contains hydric soils, and some man-made activity increased the hydrology, then that site would not be considered a man-induced wetland. The MVN stated that under most conditions a man-induced wetland does not have hydric soils.

Man-induced wetlands are those areas that have been purposely or incidentally created by human activities. The 1987 Manual states:

> *Although wetland indicators of all three parameters (i.e. vegetation, soils, and hydrology) may be found in some man-induced wetlands, indicators of hydric soils are usually absent. Hydric soils require long periods (hundreds of years) for development of wetness characteristics, and most man-induced wetlands have not been in existence for a sufficient period to allow development of hydric soil characteristics.*
>
> *1987 Manual, Section F, Subsection 4, Man-Induced Wetlands.*

Review of the administrative file indicated that the entire site contained hydric soils. The MVN detailed the change in soil characteristics from the original “normal” condition to the “new normal” condition. The site’s soils changed from a semi-fluid mineral muck (a Barbary muck), a hydric soil, to consolidate and compress to form a tight mineral clay (Harahan clay), also a hydric soil.

The 1987 Manual, Section F, subsection 4 employs steps (a-d) to determine whether an area represents a potential man-induced wetland. None of the conditions detailed in steps (a) through (d) applied:

(a) There has not been a recent man-induced change in hydrology that caused the area to become significantly wetter. The construction of the Charbonnet Canal and the Railroad ditch and pump systems removed water from the site, resulting in areas that are non-wetlands.

(b) The original wetland consisted of a swamp, not a deepwater aquatic habitat.

(c) There was not a man-induced stream channel realignment that significantly altered the area’s hydrology.

(d) The area has not been subject to long-term irrigation practices.

The subject site does not represent a man-induced wetland.

The Appellant also references a caution in the 1987 Manual, Section F, Subsection 4, and Step 4:

> *If hydrophytic vegetation is being maintained **only** because of man-induced wetland hydrology that would no longer exist if the activity (e.g. irrigation) were to be terminated, the area should not be considered a wetland.*
>
> *1987 Manual, Section F, Subsection 4 (Emphasis added).*

Appellant claims that only the man-made ridges are maintaining the wetlands on the site. The MVN stated that the wetlands on this property are located in depressions. During the site visit, the

areas delineated as wetlands appeared to exist at slightly lower elevations than nearby berms. These berms were either naturally formed and/or created by past landclearing activities. Though some berms appear to be continuous, the majority of the berms have eroded and/or were burned, creating frequent breaks in drainage.

The MVN stated that sufficient time, (10 years) has passed since the canal was widened and the site cleared. The MVN stated that entire site, including the non-wetlands, contains hydrophytic vegetation maintained by a groundwater system. Hydrophytic vegetation was noted in the non-wetland areas during the appeals site visit. The predominance of hydrophytic vegetation over the entire site, and berm erosion support MVN's statement that the site conditions have reached an equilibrium. The eroded berms are not the only reason why the hydrophytic vegetation is maintained in the site's wetlands.

Finally, the Appellant's RFA #3, Section (C)(5) states that the Corps failed to assert in its 2000 MVN JD that new information might warrant revising any earlier JD. The MVN notified the Appellant that new information might warrant a revision in the Corps jurisdiction determination. The 2000 MVN JD stated:

> *You are advised that this approved jurisdiction determination is valid for a period of 5 years from the date of this letter unless new information warrants revision prior to the expiration date.*
>
> *2000 MVN JD, dated August 23, 2000.*

The RO contacted the Appellant to clarify that comment. In a telephone conversation on December 8, 2000, the Appellant objected to the Corps' right to revisit the JD and/or permit decision, once compensatory mitigation has been paid. This issue was discussed in RFA #2 above. As discussed in the Appellant's RFA #2, no permit application was submitted to the MVN and the MVN has not required or accepted a mitigation plan. As such, there has not been an MVN evaluation relative to compliance with Section 404 of the Clean Water Act and/or public interest review for work on property belonging to the Appellant or NOBID.

CONCLUSION: For the reasons stated above, I conclude that the Appellant's Reasons 1 – 3 for this administrative appeal do not have merit.

Encl

EDWIN J. ARNOLD, JR.
Brigadier General, USA
Commanding