ADMINISTRATIVE APPEAL DECISION

CABALLERO PROFFERED PERMIT DENIAL APPEAL
FILE NO. MVN-2002-1156-CT
NEW ORLEANS DISTRICT
October 25, 2004

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

Appellant/Applicant: Mr. Phillip J. Caballero, White Castle, Louisiana

Authority: Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899

Receipt of Request for Appeal (RFA): July 26, 2004

Appeal Conference and Site Visit Dates: September 9, 2004

BACKGROUND INFORMATION: This administrative appeal decision is in response to the objection from the Appellant, Mr. Phillip J. Caballero, to the June 24, 2004, Proffered Permit by the New Orleans District (MVN). The Proffered Permit authorized the installation and maintenance of a bulkhead and filling to reclaim land for a camp, and installation and maintenance of a walkway for access. The property is located in the Lake Verret Recreation Community adjacent to Lake Verret near Pierre Part, Assumption Parish, Louisiana. MVN determined that the proposed work would impact wetlands and Section 10 waters of the United States.[1]

Mr. Caballero submitted an application for a Department of the Army permit on January 14, 2002.[2] The application requested authorization to: "facilitate building of home/camp." The February 22, 2002, Public Notice described the proposed development as the clearing, grading and filling in wetlands associated with road construction and/or the installation and maintenance of a walkway and camp for residential use. The proposed roadway or walkway would be located through a cypress swamp and provide access to a camp in Lake Verret.

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[1] Tab 8 of the administrative record
[2] Tab 15 of the administrative record

In June 25, 2002, MVN concluded its evaluation and provided an Initial Proffered Permit for the camp and an elevated walkway. Mr. Caballero objected to the special conditions detailed in MVN's Initial Proffered Permit, ultimately submitting a RFA dated September 9, 2002, appealing MVN's Proffered Permit. The MVD accepted the appeal on October 3, 2002, and held a site visit and appeal conference on October 28, 2002. At the appeals conference Mr. Caballero introduced information regarding construction of camps over state-owned water-bottoms and land reclamation via the Louisiana Office of State Lands permit process. Based on this information, the RO determined that the September 9, 2002, RFA contained new information which could not be considered in the administrative appeal. Mr. Caballero was given the choice to either withdraw the RFA and submit any new information for review and decision by the MVN Engineer, or elect to receive a decision on the RFA excluding the new information.[3] Mr. Caballero requested that the RFA be withdrawn. In a letter dated December 11, 2002, MVD withdrew the RFA and provided Mr. Caballero and MVN clarifying information developed by the RO in the course of the appeal.

In his letter dated April 9, 2003, Mr. Caballero provided drawings for proposed construction of a bulkhead and backfilling associated with the reclamation of land he stated had been lost through erosion.[4] The letter also provided cross sections and sketches for the proposed construction of a roadway through the cypress swamp to the reclamation area. In its letter dated May 9, 2003, MVN notified Mr. Caballero that he must apply to the Louisiana State Land Office for reclamation of lands lost through erosion and provide a certified map or plat of survey defining the boundary between lands belonging to the state and riparian owners and showing the exact extent of land claimed to be lost through erosion.[5] The modified project was re-advertised by public notice on April 25, 2003.[6] Comments were received from National Marine Fisheries Service, Louisiana Department of Wildlife and Fisheries, and U.S. Fish and Wildlife Service.[7] The Louisiana Department of Natural Resources, Coastal Management

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[3] By letter dated November 15, 2002
[4] Tab 12 of the administrative record
[5] Tab 10 of the administrative record
[6] Tab 11 of the administrative record
[7] Tab 10 of the administrative record

Division, determined the proposed activity did not require a Coastal Use Permit and the Louisiana Department of Environmental Quality had no objection to the project revision.[8]

In a letter dated November 10, 2003, Mr. Caballero provided a copy of the Louisiana State Land Office permit which authorized the reclamation of approximately 4,709 square feet of state owned water bottoms in Lake Verret, in front of Section 31, Township 13 South, Range 13 East, Assumption Parish, Louisiana.[9] MVN determined, from its review of the survey attached to the reclamation permit from the Louisiana State Lands Division, that the applicant had moved the project to the south and lengthened the proposed road.[10]

MVN completed its review of the permit application and in its letter dated April 20, 2004, forwarded an Initial Proffered Permit to Mr. Caballero.[11] The Initial Proffered Permit authorized the installation and maintenance of a bulkhead and fill to reclaim land for a camp and the installation and maintenance of a walkway, rather than a roadway, for access. In a letter dated May 17, 2004, from Mr. Caballero to MVN, Mr. Caballero objected to the Initial Proffered Permit.[12] In its letter dated June 24, 2004, the MVN District Engineer stated, "After a review of your appeal comments and an examination of the decision documents, the Executive Office has found there is no reason to reverse the initial evaluation of your project."[13] The letter enclosed the same permit previously proffered, the Notification of Administrative Appeal Options and Process (NAP) and RFA forms, and copies of the April 20, 2004, MVN Decision Document (Decision Document) and the June 24, 2004, Addendum to the Decision Document (Addendum).[14] Mr. Caballero provided MVD

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[8] Tab 10 of the administrative record

[9] Tab 7 of the administrative record. Mr. Caballero obtained the Class A Reclamation Permit on behalf of Risley C. Triche et al. Notes on the September 16, 2003 survey indicate that Parcels "A" and "B" are to be acquired by Mr. Caballero. Portions of the proposed roadway/elevated walkway are part of 14-foot servitude to access Parcel "B."

[10] April 20, 2004 MVN Department of the Army Permit Evaluation and Decision Document, I Proposed Project, page 1, Tab 3 of the administrative record

[11] Tab 5 of the administrative record

[12] Tab 4 of the administrative record

[13] Tab 2 of the administrative record

[14] Tabs 2 and 3 of the administrative record

an RFA on July 20, 2004. In a letter dated July 26, 2004, the RO notified Mr. Caballero and MVN that the RFA was unacceptable based on the absence of specific reasons for appeal and gave Mr. Caballero 30 days to revise the RFA to correct the deficiency.

In a facsimile dated and received on July 26, 2004, Mr. Caballero provided a revised RFA. MVD accepted the appeal on August 21, 2004. The site inspection and appeals conference were conducted on September 9, 2004.

SUMMARY OF APPEAL DECISION: The RFA asserts that MVN did not properly document the environmental impacts associated with the construction and maintenance of the elevated walkway. MVN's documentation of the impacts associated with the elevated walkway was reasonable within the context of the existing conditions and general site utilization in cypress swamps and lakes in south Louisiana. The RFA asserts MVN did not adequately complete its 404(b)(1) Guidelines compliance review regarding the practicability of alternatives available to Mr. Caballero. MVN's determination of practicable alternatives available to Mr. Caballero was reasonable and supported in the administrative record. The RFA asserts that MVN treated Mr. Caballero differently than other similarly situated permit applicants. There was substantial information in the record that the projects forwarded by the RFA were different than Mr. Caballero's.

INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL:

Pursuant to 33 C.F.R. Section 331.2, *Request for appeal (RFA)*, no new information may be submitted on appeal. As indicated in 33 C.F.R. 331.3(a)(2), the Division Engineer does not have authority under the appeal process to make a final decision to issue or deny a permit. The authority to issue or deny permits remains with the District Engineer. The Division Engineer, or his RO, conducts an independent review of the administrative record to address the reasons for appeal cited by the appellant. The administrative record is limited to information contained in the record by the date of the NAP form. Neither Mr. Caballero nor MVN may present new information.

To assist the Division Engineer in making his decision on the appeal, the RO may allow the parties to interpret, clarify,

or explain issues and information already contained in the administrative record. Such interpretation, clarification, or explanation does not become part of the administrative record, because the District Engineer did not consider it in making a decision on the permit. However, in accordance with 33 C.F.R. 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

1. MVN provided a copy of the administrative record. The administrative record is limited to information contained in the record by the date of the NAP form. The date of Mr. Caballero's NAP form is June 24, 2004. The administrative record was considered in reaching this appeal decision.

2. In a facsimile to Mr. Caballero and MVN on September 2, 2004, the RO provided a set of tentative questions to MVN and Mr. Caballero for discussion at the appeal conference. These questions are contained in the September 10, 2004 Memorandum for the Record (MFR) documenting the appeal conference and site visit. These questions and the answers were clarifying information and were considered in reaching this appeal decision.

3. During the appeal conference, the RO provided two Administrative Appeal Process Flowcharts. The flowcharts are Exhibit 2 in the Appeal Conference MFR.

4. MVN provided a survey showing the proposed reclamation area and parcels to be acquired by Phillip J. and Karen D. Caballero. The survey was already part of the administrative record and is Exhibit 3 in the Appeal Conference MFR.

5. MVN provided copies of the issued Department of the Army permits and Statement of Finding/Decision Documents for permit numbers 20-020-2477, 20-000-4203, and Mr. Jimmy Ramagost, SW(L.T.M.A) 1301. MVN provided portions of two topographic maps (Napoleonville LA 1:62,500) that depicted the locations of the three projects in relation to Mr. Caballero's property. MVN also provided three infrared photographs depicting locations of permit numbers 20-020-2477, 20-000-4203, and Mr. Caballero's project.

These documents are clarifying information and Exhibit 4 in the Appeal Conference MFR.

6. During the site visit, the RO took nine digital photographs of the site. The photos are clarifying information and exhibit 5 in the Appeal Conference MFR.

Basis for Appeal as Presented by Appellant:

Appellant's Verbatim Reasons for Appeal:

The New Orleans District's position regarding matters of human health and safety is distorted, misleading, unsound, and careless.

The New Orleans District's position regarding the negative environmental impact caused by a wooden pathway is arbitrary, capricious, shallow and short sighted.

FINDING: These reasons for appeal do not have merit.

ACTION: No action is required.

DISCUSSION: The MVN Department of the Army Permit Evaluation and Decision Document provided an assessment and evaluation of the probable impacts that the proposed activity may have on the public interest. General policies for evaluating permit applications call for "a careful weighing of all those factors which become relevant in each particular case."[15] The RFA asserts that MVN's evaluation of probable impacts to human health and safety associated with the construction of the elevated walkway were not properly considered. Specifically the RFA references the safety issues related to exposure to "toxic biota," construction/maintenance of an elevated walkway, and

[15] 33 C.F.R. 320.4(a)(1). Public interest factors are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

emergency access limitations. The RFA asserts that MVN did not properly document the environmental impacts associated with the construction and maintenance of the elevated walkway.

I find that MVN consideration of impacts to human health and safety was reasonable and relevant to general citizens utilizing camps in south Louisiana. In the Addendum, MVN documented that persons accessing the camp would be exposed to toxic plants and venomous insects already present in native swamp ecosystems.[16] The RFA asserts that a greater risk of exposure to "toxic biota" exists for those utilizing the walkway rather than the roadway, noting wasps' nests will be hidden from view on the underside of the walkway. MVN recognized that the advent of the West Nile virus is a serious public health threat, particularly in areas where mosquitoes are present to facilitate transmission. MVN noted that such risks are inherent in use of a natural setting and determined that the incremental increase in risk attendant to the walkway was minor relative to that associated with general utilization of the site. I find this is a reasonable assessment.

The RFA disagrees with MVN's determination that routine maintenance required by the Department of the Army general permit condition would minimize hazards. The MVN Decision Document and Addendum discuss the safety concerns associated with a roadway and elevated walkway, and how general maintenance of the elevated walkway would minimize hazards. MVN recognized that users of the camp would access the camp by walking along an elevated walkway that may have a "possibly hazardous surface." The Addendum stated that inclusion of General Condition 2 of the Department of the Army permit, which required proper maintenance of the walkway, would minimize the risks associated with rotten wood and uneven or loose boards. The Decision Document discussed alternative construction materials that would have a longer life and commercially available biocides that can help prevent mold/mildew.[17] The Addendum discussed other maintenance actions (the use of special marine paint materials) that would minimize algae accumulation, alleviate slick conditions, and

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[16] Addendum to Decision Document for Permit Applicant by Phillip J. Caballero 20-020-1156-2, dated June 24, 2004 and Tab 3 of the administrative record, paragraph 1, page 1.

[17] Decision Document, II.B.(2) Other project designs, page 2

promote structural durability.[18] I find this to be a reasonable assessment.

The RFA disagrees with MVN's assessment of impacts to safety associated with the inability of emergency vehicles to access the camp. MVN recognized the potential existed for an incident that required emergency medical attention and noted that most citizens who utilize camps as part of their outdoor recreational activities would reasonably anticipate those hazards, develop contingency plans, and implement necessary precautions to ensure safety.[19] I find this to be a reasonable assessment.

MVN's assessment of impacts to the environment associated with maintenance of the elevated walkway was reasonable. The RFA asserts that chemical use of Clorox and "continued replacement of entire sections of the walkway" will be harmful to the environment. The Addendum documents that the proper use of chemical cleansers in accordance with applicable state and federal restrictions was not expected to result in measurable harm to the environment. The Decision Document provided evidence that elevated walkways were less susceptible to mold/algae growth than walkways constructed on the ground.[20] The Decision Document and Addendum provided substantial documentation showing how the construction of the pilings for the walkway would have minimal impact on the substrate, currents, circulation and drainage patterns, water quality, flood control, storm wave and erosion buffers, and fish habitats. The anticipated impacts were contrasted with the impacts associated with construction and maintenance of a roadway which included conversion of wetland to upland, impeded water flows, increased duration and elevation of water levels, stress to plant communities, and deterioration of ecological health. MVN recognized the secondary and cumulative effects from the proposed roadway to the camp: "Development of wetlands for residential and recreational use has contributed to wetland loss in Louisiana, both directly and indirectly. Direct effects

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[18] Addendum, paragraph 1, page 1
[19] Addendum, paragraph 1, page 2
[20] MVN DD, II.B.(2) Other project designs, page 2

are conversion of wetlands to uplands resulting in loss of wetland functions and values such as habitat, water quality, water storage and storm buffering. Indirect effects include deterioration from erosion, subsidence, and reduced animal population due to habitat loss."[21]

In summary, MVN's documentation of the impacts associated with the elevated walkway was reasonable within the context of existing conditions and general site utilization in cypress swamps/lakes in south Louisiana. A reasonable assessment of anticipated impacts and benefits associated with proposed activities is important when determining whether the proposed activity is the least damaging practicable alternative. Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proper structure or work is one of the general criteria considered by districts in every permit application. The following sections will discuss the adequacy of MVN's evaluation of the proposed project's compliance with the 404(b)(1) Guidelines, especially with regard to the practicability of an elevated walkway in lieu of a roadway.

Appellant's Verbatim Reasons for Appeal:

The New Orleans District's position regarding the economical practicality of a wooden pathway is vague, ambiguous, and unreliable.

The New Orleans District's position regarding the need for a road to facilitate equipment access to the project site is defective and meaningless.

FINDING: These reasons for appeal do not have merit.

ACTION: No action is required.

[21] MVN Decision Document, II.F.Summary of secondary and cumulative effects, page 10.

DISCUSSION: Section 404 of the Clean Water Act, 33 U.S.C. § 1344, authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into waters of the United States. The Corps of Engineers implemented this statute through regulations found at 33 C.F.R. Parts 320, 323, 325, and 328. For activities involving Section 404 discharges, a permit will be denied if the discharge that would be authorized by the permit would not comply with the 404(b)(1) Guidelines.[22] Mr. Caballero's proposed construction of a roadway and reclamation of property involves the deposition of dredged or fill material into waters of the United States and is subject to the permit requirements and the 404(b)(1) Guidelines.

The 404 (b)(1) Guidelines specifically require that: "[N]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."[23] In evaluating compliance with the 404 (b)(1) Guidelines, practicable alternatives are those alternatives that are available and capable of being utilized after taking into consideration cost, existing technology, and logistics in light of overall project purpose.[24] 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.

Based on Mr. Caballero's permit application, MVN determined that his overall project purpose was the construction of a home/camp for recreational use on private property on Lake Verret. The need for the project was solely for a recreational

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[22] 40 C.F.R. Part 230.10
[23] 40 CFR 230.10(a)
[24] 40 CFR 230.10(a)(2)

camp for Mr. Caballero and his family; the project would not fulfill any public need.[25] In the appeal conference MVN stated that MVN considered recreational camps to be water dependent. Typically, camps are utilized for outdoor recreation (fishing and boating), and as such, the location of the camp is linked to the aquatic environment (water dependent). It is within this context that MVN completed its compliance evaluation.

The determination that the recreational camp was linked to the aquatic environment is important, because the establishment of a primary residence is generally not considered to be a water-dependent activity and therefore does not have to be located in a special aquatic site (such as a wetland) to fulfill its basic purpose. The preamble to the 404 (b)(1) Guidelines indicates that it is the applicant's responsibility to rebut the presumption that here is a less damaging non-wetland alternative. If Mr. Caballero had expressly stated the project need was for a permanent residence, the 404 (b)(1) Guidelines would have required him to rebut the presumption that other upland properties were unavailable and or impracticable.

While it is consistent with compliance evaluation procedures to consider the need for the recreational camp to be cited near the aquatic environment and allow Mr. Caballero access to the waterway, Corps regulations found in 33 CFR 320.4(r)(i) encourage districts to discuss with the applicant project modification to minimize adverse project impacts. The district engineer may require minor project modifications. 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. MVN appropriately determined that instead of clearing the swamp (wetlands) and depositing fill material to construct a roadway, an elevated walkway could be constructed for access to the lake and the camp could be constructed on pilings in the swamp west of Lake Verret's current shoreline.[26] The Decision Document determined that an elevated walkway would have minor, short-term impacts on the

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[25] MVN Decision Document II. A. Purposes and needs, Tab 3 of the administrative record

[26] MVN Decision Document II. B.(2) Other project designs, page 2

swamp during construction, requiring removal of a minimum number of trees and no fill. The land reclamation portion of the project would still eliminate shallow water habitat in Lake Verret.[27] This determination is reasonable and represents a practicable alternative.

The RFA disagrees with MVN's determination regarding the practicability of an elevated walkway, citing the costs associated with constructing an elevated pathway having sufficient structural capacity to support transportation by light-weight multi-passenger vehicle and ability for access by emergency vehicles. The RFA also cites the costs associated with constructing the camp using a barge. The Addendum provides a thorough discussion of the practicability of the walkway and use of floated construction equipment and addresses the liability/maintenance costs.[28] Additionally, the Addendum acknowledged the practicability of constructing the residential portion of the camp on the non-wet portion of Mr. Caballero's property adjacent to Lake Verret Court. This alternative addresses Mr. Caballero's issues regarding access for emergency vehicles and the liability/maintenance/construction costs.

Appellant's Verbatim Reasons for Appeal:

The New Orleans District's position and statements involving the Ramagost permit are biased and incomplete.

The New Orleans District's position and statements regarding the Bayou Tranquille permits are deceptive, prejudiced, and discriminatory.

FINDING: These reasons for appeal do not have merit.

ACTION: No action is required.

DISCUSSION: While some developments forwarded by Mr. Caballero appear at first glance to be similar, MVN provided documentation showing that the environmental circumstances were different.

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[27] MVD Decision Document II.D. Special aquatic sites, page 6
[28] Addendum paragraph 3, page 4

The RFA asserts MVN issued a permit to Mr. Ramagost for a project similar to Mr. Caballero's proposed roadway and camp. The Addendum discusses MVN's evaluation of Mr. Ramagost's permit application noting the environmental circumstances are not comparable.[29] I concur with MVN's findings. Review of the Ramagost Decision Documents finds some subtle differences between the Ramagost permit and Mr. Caballero's.

The Ramagost Decision Document states that numerous similar projects exist in the vicinity. These projects were described as residential, commercial, and industrial. The types of developments in the vicinity of Mr. Caballero's were residential and recreational camps. Resource agency comments varied between the two projects. EPA's comments in the Ramagost public interest review advocated that fill be limited to the amount needed for access to the site. National Marine Fisheries Service and Louisiana Department of Wildlife and Fisheries advised that any adverse or significant effects that might occur would be minimal. In response to Mr. Caballero's project, EPA recommended denial, and U.S. Fish and Wildlife recommended that no fill be placed in wetlands or open water, and that only the camp and elevated walkway be authorized. National Marine Fisheries Service and Louisiana Department of Wildlife and Fisheries had no objections. The Addendum stated Mr. Ramagost's project site was in a subdivision with residential and commercial activities and was largely developed. Based on the extent of development, MVN determined the value of the wetland area was low.[30] The Ramagost Decision documents infer that wetland values were already affected by the existing developments. The Caballero administrative record documented high quality wetland and open water values that could be degraded by the cumulative impacts associated with permit authorizations for projects similar to Mr. Caballero's.

The RFA asserts that MVN treated Mr. Caballero differently than landowners in the Bayou Tranquille area. The Addendum notes that Mr. Caballero's proposal and referenced activities along Bayou Tranquille are similar insofar as incurring impacts to high quality swamp habitat and facilitating recreational use. However, the Bayou Tranquille activities and Mr. Caballero's

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[29] Addendum, Paragraph 5, page 5
[30] Addendum, Paragraph 5, page 5

proposed work do not have comparable levels of secondary impacts, potential direct impacts/benefits, and availability of less damaging alternatives.[1] MVN findings are reasonable. There is sufficient documentation in the record to support MVN's finding that Mr. Caballero's proposal is not similar to Bayou Tranquille landowners who received permits.

CONCLUSION: For the reasons stated above, I conclude that Mr. Caballero's RFA does not have merit. The outcome of MVN's evaluation balances Mr. Caballero's private need for recreational housing with other relevant public interest factors such as the protection of wetlands and fisheries and wildlife habitats. The final Corps decision will be the MVN District Engineer's letter advising Mr. Caballero of this decision, confirming his initial decision, and sending the final proffered permit for signature to Mr. Caballero.

Richard B. Jenkins
Colonel, Corps of Engineers
Acting Division Engineer

[1] Addendum, Paragraph 6, page 6