ADMINISTRATIVE APPEAL DECISION
Mr. Billy Reeves
File No. WX-20-020-2078-0
New Orleans District
December 10, 2003

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

Appellant/Applicant: Mr. Billy Reeves, St. Amant, 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): May 5, 2003

Appeal Conference and Site Visit Date: June 25, 2003

Background Information: On April 29, 2002, Mr. Reeves applied to the State of Louisiana, Department of Natural Resources, Coastal Management Division (referred to as CMD) for a coastal use permit for property improvements on his lot located along Bayou Petit Caillou in Section 65, Township 20 South, Range 18 East, Terrebonne Parish, Louisiana. The proposed work also would require Section 10 and Section 404 permits. CMD has a joint permit processing procedure with the New Orleans District (MVN), Corps of Engineers, for Section 10 and 404 permits, and the Louisiana Department of Environmental Quality (LDEQ) for water quality certification. A public notice for the proposed work was issued on May 21, 2002. This public notice listed only 0.04 acre of water bottoms and 0.18 acre impact of developed uplands as the impacted areas. Mr. Reeves later requested that his application be amended to include dredging material from a 50-foot by 40-foot area from within the bayou channel to fill the lot in addition to hauling in borrow material. This change prompted a second joint public notice dated July 2, 2002, to include the project revision. The revised public notice listed only 0.05 acre of water bottoms and 0.18 acre impact of developed uplands as the impacted areas.

On June 18, 2002, the MVN sent Mr. Reeves an approved jurisdictional determination based on a field investigation indicating that Mr. Reeves' entire lot is a jurisdictional wetland that is tidal. The MVN letter informed him that the entire lot is subject to jurisdiction under Section 10 of the Rivers and Harbors permit because the property is tidally influenced. Therefore, in addition to a Section 404 permit a

Department of the Army Section 10 permit would be required for any work in the waterway or the tidal wetland. The Corps jurisdictional determination meant that approximately 0.33 acre of wetlands would be impacted as a result of completion of the proposed project. However, neither the MVN nor CMD issued a new public notice to reflect the change in project impacts.

On August 20, 2002, the CMD issued a coastal use permit with conditions but with no requirement for compensatory mitigation. The LDEQ issued a water quality certification without special conditions for the project on June 28, 2002. Other resource agencies had no comments except for the National Marine Fisheries Service (NMFS).

In its letter dated June 6, 2002, NMFS did not object to the issuance of a permit for the project. NMFS subsequently retracted that letter and submitted comments by a letter dated July 18, 2002. NMFS referenced the MVN wetland determination that the project site consisted of tidally influenced brackish marsh wetlands. In its second letter, NMFS cited its concern over numerous camps authorized through Joint Public Notices and Programmatic General Permits[1](PGP) and the lack of sufficient monetary mitigation contributions to ensure full compensation for wetland impacts. NMFS stated that it would not object to payment to the Louisiana Wetlands Conservation and Restoration Fund (Wetlands Conservation and Restoration Fund) at the rate of $1,800 per 0.1 acre of impact to brackish marsh wetlands.

By letter faxed on December 11, 2002, Mr. Reeves proposed using the Castex La Terre Mitigation Bank for a cost of $3,000 instead of the Wetlands Conservation and Restoration Fund ($6,000) recommended by NMFS. The Castex La Terre Mitigation Bank Mitigation Bank has changed its name to the Apache La Terre Mitigation Bank (ALTMB). At the appeals conference, the MVN project manager stated that during the evaluation process he had suggested to Mr. Reeves the use of the ALTMB as a possible source for compensatory mitigation. However, after making the suggestion he found out that the ALTMB was under reevaluation by

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[1] Section 404(e) of the Clean Water Act (CWA) (33 U.S.C. §1344) allows for the issuance of general permits on a statewide basis, which operate in conjunction with a State regulatory program that protects the aquatic environment in a manner equivalent to the Department of the Army regulatory program, provided that the activities permitted under each category of such general permits are similar in nature and result in no more than minimal individual or cumulative adverse effects on the aquatic environment. A Programmatic General Permit is a type of general permit that authorizes certain activities that also are regulated by another level of government. The MVN issued the Programmatic General Permit NOD-PGP on May 1, 1998.

the MVN Mitigation Bank Review Team (MBRT) and was therefore not available for compensatory mitigation of wetlands impacts.

The MVN stated at the appeals conference that NMFS had requested the reevaluation of the mitigation bank because of its concern that the ALTMB had not produced any credit and might have caused adverse impacts to the marsh that the bank was intended to enhance. Projects covered under a PGP administered by the Louisiana Department of Natural Resources (LDNR) can use the ALTMB. However, the MVN made a verbal commitment to NMFS that the MVN would not allow mitigation bank use on projects where the NMFS provided substantive comments. In accordance with this commitment, because NMFS provided substantive comments on the Reeves permit application, the MVN did not permit use of the ALTMB for compensatory mitigation.

In its Statement of Findings[2], Final Environmental Review, dated December 2, 2002, the MVN determined that with the inclusion of a special condition requiring the Appellant to donate $6,000 to the Wetlands Conservation and Restoration Fund, the proposed disposal site for discharge of dredged or fill material complied with Section 404(b)(1) guidelines. In arriving at this amount, the MVN used a rate recommended by NMFS instead of a rate calculated in accordance with the State's method. In administering its Coastal Use Permit Program, CMD uses a formula prescribed in its statutorily authorized regulations to calculate required mitigation using a donation to the Wetlands Conservation and Restoration Fund (LAC 43:1:724).

In a letter dated December 20, 2002, the MVN forwarded Mr. Reeves a draft copy of a permit containing a special condition to donate $6,000 to the Wetlands Conservation and Restoration Fund. Mr. Reeves attempted to appeal the draft permit, objecting to the amount of the required compensatory mitigation. The MVN letter sending the draft permit to Mr. Reeves had not been signed by the District Engineer. For this reason, on March 19, 2003, Colonel Peter Rowan, the MVN District Engineer, sent a letter to Mr. Reeves. In this letter, the District Engineer concluded that there was no reason to change the MVN's initial permit decision. The letter enclosed a proffered permit and a Combined Notification of Administrative Appeal Options and Process and Request for Appeal.

Mr. Reeves submitted an RFA to MVD that was received on

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[2] The Statement of Findings, Final Environmental Review, is MVN's decision document documenting its compliance with applicable environmental laws and regulations.

May 5, 2003. The RFA asserted that the compensatory mitigation requirement was a penalty, and that the cost of the mitigation was unreasonable and unfair.

Summary of Appeal Decision: The appeal has partial merit. The MVN decision to require compensatory mitigation was not a penalty; however, there is insufficient documentation in the administrative record to support the MVN decision to use a rate recommended by NMFS instead of the rate prescribed in CMD regulations.

The administrative record lacks documentation as to when the MVN uses the State method and when, and under what authority, the MVN deviates from the State method of calculating mitigation when allowing mitigation using the Wetlands Conservation and Restoration Fund.

Accordingly, the proffered permit is remanded to the MVN to provide documentation to support its decision to deviate from the State method of calculating mitigation using the Wetlands Conservation and Restoration Fund. Alternatively, the MVN may elect to calculate the mitigation requirement commensurate with the CMD regulations governing the Wetlands Conservation and Restoration Fund, or other practicable alternate compensatory mitigation.

In addition, the proffered permit is remanded to the MVN to 1) supplement the administrative record by describing MVN's concerns over cumulative impacts in the project area that required an individual permit review instead of the PGP; 2) correct the Statement of Findings statement that Mr. Reeves agreed to the compensatory mitigation condition because he had not so agreed; and, 3) to document MVN's consideration of and reason for rejection of the ALTMB compensatory mitigation alternative presented by Mr. Reeves.

Information Received and Its Disposition During the Appeal Review:

1. The MVN provided:

a. A copy of the administrative record. Pursuant to 33 C.F.R. Section 331.7(f), an 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 Notice of Appeal Process (NAP) for the application."

b. Written response to discussion questions at the Appeals Conference (enclosure 1). The response was considered clarifying information.

c. E-mail, August 6, 2003, to MVD forwarding permits issued since January 2002, using the Wetlands Conservation and Restoration Fund. The e-mail contained new information and was not considered in this appeal decision.

2. NMFS provided a table titled "Marsh Creation Projects Funded and Constructed under CWPPRA (Coastal Wetlands Planning, Protection and Restoration Act) OR LDNR (Louisiana Department of Natural Resources) small dredge program (enclosure 2)." The table is considered clarifying information.

3. The RO provided:

a. The Appeal Conference Memorandum for the Record (MFR). The MFR is considered to be clarifying information (enclosure 3).

b. A list of questions to be answered by the parties in the appeals conference (enclosure 4).

Copies of all information considered in making this decision, were provided to the MVN and the Appellant.

Basis for Appeal as Presented by Appellant (condensed and paraphrased by the RO and presented in bold lettering):

Appellant's Reason for Appeal: Mr. Reeves believes that the compensatory mitigation requirement of $6000.00 was a penalty, not reasonable, and unfair.

FINDING: This reason for appeal has partial merit.

ACTION: As described below, because there is insufficient documentation to support its decision to deviate from CMD mitigation regulations, the MVN proffered permit is remanded for the MVN provide documentation to support its decision to deviate from the State method of calculating mitigation using the Wetlands Conservation and Restoration Fund. Alternatively, the MVN may elect to calculate the mitigation requirement commensurate with the CMD regulations governing the Wetlands Conservation and Restoration Fund, or other practicable alternate compensatory mitigation.

In addition, the proffered permit is remanded to the MVN

to 1) supplement the administrative record by describing, in the Statement of Findings, MVN's concerns over cumulative impacts in the project area that required an individual permit review instead of the PGP; 2) correct the Statement of Findings statement that Mr. Reeves agreed to the compensatory mitigation condition because he had not so agreed; and, 3) document MVN's consideration of and reason for rejection of the ALTMB compensatory mitigation alternative presented by Mr. Reeves.

DISCUSSION: The MVN's mitigation requirement compensates for unavoidable project related wetland impacts. In accordance with 33 C.F.R. Section 320.4, the decision whether to issue a permit is based on an evaluation of the impacts of the proposed activity on the public interest. The benefits that are expected to accrue from the proposal must be balanced against the reasonably foreseeable detriments. This public interest balancing process whether to authorize a proposed activity, and the conditions under which it will be authorized, determines the decision.

Under 33 C.F.R. Section 320.4(r), mitigation is an important aspect of the review and balancing process for permit applications. Consideration of mitigation occurs throughout the permit process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses. In accordance with 33 C.F.R. Section 325.4, District Engineers are to add such conditions as are necessary to satisfy the public interest requirement. The December 24, 2002, Corps of Engineers' Regulatory Guidance Letter No. 02-2 (Part 3.J. Financial Assurances) addresses financial assurances for mitigation and specifically describes as acceptable a legislatively enacted dedicated fund. "Financial assurances may be in the form of performance bonds, irrevocable trusts, escrow accounts, casualty insurance, letters of credit, ***legislatively enacted dedicated funds for government operated banks*** or other approved instruments" (Emphasis added).

The proffered permit contained a condition that Mr. Reeves contribute $6,000 as compensatory mitigation to the Wetlands Conservation and Restoration Fund. During the appeals conference, the MVN indicated that calculations made by NMFS were the basis for the $6,000 rate in the special condition. NMFS presented a table at the conference showing costs from past marsh restoration projects and explained its rationale in arriving at an average figure for the restoration of an acre of marsh. The MVN used that NMFS average figure to calculate the required cost of a donation by Appellant to the Wetlands Conservation and Restoration Fund for compensatory mitigation.

CMD collects and maintains accounting for all donations to the Wetlands Conservation and Restoration Fund. For coastal use permit applicants, CMD follows its statutorily authorized regulations to determine the cost of a donation required for compensatory mitigation to offset unavoidable wetland losses including marsh. CMD applies the following regulatory formula to determine monetary contributions to the Wetlands Conservation and Restoration Fund: anticipated unavoidable net loss of ecological value, measured in Average Annual Habitat Units (AAHU) H (annual base mitigation cost) H (project years) = compensatory mitigation cost. The two public notices did not describe any wetland impacts; therefore, CMD did not require compensatory mitigation for issuance of a coastal use permit for the project. But, MVN did require compensatory mitigation because its public interest review determined that the project would result in unavoidable project related wetland impacts.

The administrative record lacks documentation as to when the MVN uses the State method and when, and under what authority, the MVN deviates from the State method of calculating mitigation when permitting mitigation using the Wetlands Conservation and Restoration Fund. The MVN did not provide substantial evidence in the administrative record to support its conclusion that additional monetary contributions, over that required by CMD regulations, are needed. There is no documentation of why MVN chose not to use the Wetlands Valuation Assessment as set out in CMD regulations for use of the Wetlands Conservation and Restoration Fund for compensatory mitigation.

The administrative record also lacks documentation to support the MVN decision to evaluate the Appellant's permit application using the individual permit process instead of the PGP. During the appeals conference, the MVN clarified its concern over cumulative impacts resulting from the PGP issuance and its perception of minimal oversight of the program by the State of Louisiana. At the conference, the MVN gave these reasons for requiring an individual permit review instead of using the PGP (Appeals Conference MFR paragraph 4.1).

The administrative record contains two references regarding cumulative impacts: a comment letter from NMFS and a statement in the MVN Statement of Findings. The NMFS July 18, 2003 comment letter expressed NMFS' concern over the increased development of remaining wetlands along Louisiana Highway 56, south of Chauvine. The MVN Statement of Findings stated that MVN had considered cumulative effects, noting a negligible adverse cumulative impact in its checklist titled Preliminary

Analysis of Socioeconomic and Environmental Factors, Section 404(b)(1) Evaluation. Other than these references, the administrative record does not provide documentation that continued PGP authorizations would have an adverse cumulative effect on natural resources.

The administrative record contains one reference regarding the concern over the issue of minimal oversight by the State of the Wetlands Conservation and Restoration Fund. The reference is a sentence in the July 18, 2003 NMFS comment letter: "Permit authorization has been problematic because of the piecemeal development and inadequacy, to date, of sufficient monetary contributions to ensure wetlands impacts can be fully compensated." Other than the NMFS comment, the administrative record does not discuss inadequacy or "minimal oversight" of the Wetlands Conservation and Restoration Fund.

Additional documentation is needed in the administrative record to document how minimal oversight by the State of the Wetlands Conservation and Restoration Fund and/or adverse cumulative impacts necessitate the need for MVN to evaluate the permit application using the individual permit process instead of the PGP.

The administrative record contained a statement in the Statement of Findings that Mr. Reeves agreed to the MVN compensatory mitigation condition. During the appeals conference, the MVN clarified its intended meaning of that statement. The MVN intended to address acceptance of the proffered permit had Mr. Reeves agreed to the conditions. Upon remand, the MVN should correct the Statement of Findings statement to read that Mr. Reeves did not agree to the MVN compensatory mitigation condition.

The administrative record did not document the MVN's consideration of and reason for rejection of the compensatory mitigation alternative Mr. Reeves presented. In response to the RO's appeals conference question on this issue, the MVN elaborated that the ALTMB might have been acceptable mitigation had NMFS not provided substantive comments on the appellant's application. The ALTMB is currently under reevaluation by the MVN Mitigation Bank Review Team (MBRT), and the MVN made a verbal commitment to NMFS that the MVN would not allow mitigation bank use on projects where the NMFS provided substantive comments. In accordance with this commitment, because NMFS provided substantive comments on the Reeves permit application, the MVN did not permit use of the ALTMB for compensatory mitigation. (Appeals Conference Discussion question

1, MVN written response). Upon remand, the MVN should document MVN's consideration of and reason for rejection of the ALTMB compensatory mitigation alternative presented by Mr. Reeves

CONCLUSION: The appeal reason that the mitigation requirement was a penalty does not have merit. However, because there is insufficient documentation to support the MVN decision to deviate from CMD mitigation regulations, the MVN proffered permit is remanded to the District Engineer to provide documentation to support its decision to deviate from the State method of calculating mitigation using the Wetlands Conservation and Restoration Fund. Alternatively, the MVN may elect to calculate the mitigation requirement commensurate with the CMD regulations governing the Wetlands Conservation and Restoration Fund, or other practicable alternate compensatory mitigation.

In addition, the proffered permit is remanded to the MVN to 1) supplement the administrative record by describing in the Statement of Findings, MVN's concerns over cumulative impacts in the project area that required an individual permit review instead of the PGP; 2) to correct the misstatement in the Statement of Findings that Mr. Reeves agreed to the MVN compensatory mitigation condition; and, 3) to document MVN's consideration of and reason for rejection of the ALTMB compensatory mitigation alternative presented by Mr. Reeves. The final Corps decision will be the District Engineer's decision made pursuant to my remand.

DON T. RILEY
Brigadier General, U.S. Army
Division Engineer

Enclosures