ADMINISTRATIVE APPEAL DECISION

Mrs. Lisa Thiel
File No. EZ-20-020-1355
New Orleans District
June 18, 2004

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

Appellant/Applicant: Mrs. Lisa Thiel, Chalmette, Louisiana

Appellant's representative: Mr. Henry Maitre, Jr., Chalmette, 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 7, 2003

Appeal Conference and Site Visit Dates: October 1, 2003

Background Information: Mrs. Lisa Thiel is appealing the New Orleans District Engineer's decision to deny her permit application to clear, grade, dredge, and place fill material for construction of a single family residence, driveway, parking area, boat launch, and wharf on property located along the left descending bank of Fort Pike Canal and U.S. Highway 90 (Highway 90) in Orleans Parish, Louisiana.[1] Mrs. Thiel submitted a permit application dated January 28, 2002. The proposed work would impact 0.37 acre of wetlands.

The New Orleans District (MVN) evaluated Mrs. Thiel's permit application under individual permit procedures based on recommendations by the National Marine Fisheries Service (NMFS). Prior to Mrs. Thiel's permit application, numerous permit applications to construct residential and recreational homesites adjacent to the Highway 90/Fort Pike area were authorized under the New Orleans District (MVN) Programmatic General Permit (PGP)[2], Category I. MVN PGP Category I procedures authorize up

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[1] The Thiel property is located in Section 30, Township 10 South, Range 15 East, Orleans Parish, Louisiana.

[2] 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

to one half acre of fill in wetlands for residential use and are not reviewed by NMFS. Additionally, PGPs are invalid until an applicant obtains a Coastal Use Permit. In a letter dated February 12, 2002, the NMFS determined that previous PGP authorizations in the Highway 90 Orleans Parish (Highway 90/Fort Pike Area) area created significant developmental pressure and risk of cumulative loss of large acreage of wetlands.[3] NMFS recommended that the MVN utilize individual public notice procedures rather than abbreviated PGP processes to provide notice of individual residential and recreational home site developments in this area. Based on the NMFS request, the MVN withdrew some previously issued PGP authorizations in the vicinity of Mrs. Thiel, stating that continued permit evaluation would be by the individual permit process. After this decision by MVN, Mrs. Thiel's permit application was the first request in the Highway 90, Fort Pike area to be received and evaluated using the individual permit process.

On April 30, 2002, the MVN issued Public Notice No. EZ-20-020-1355 for Mrs. Thiel's permit application. Comments expressing no position or no objection were received from the U.S. Fish and Wildlife Service and the Louisiana Department of Wildlife and Fisheries. In the NMFS comment letter, dated May 13, 2002, NMFS expressed its concern that the project would adversely impact Essential Fish Habitat, would not comply with 404(b)(1) Guidelines, and would add to the cumulatively significant loss of wetlands along Highway 90. NMFS believed that continued piecemeal development of wetlands could result in the future destruction of up to 300 acres of the area's brackish marsh. Based on these concerns, NMFS recommended that the permit for the project, as proposed in the public notice, not be issued. If the permit was issued, NMFS recommended that the project be revised by moving the location of the residence closer to Highway 90, limiting fill to that necessary for a residence and parking area, and deleting all fill associated

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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.

[3] The NMFS letter was inadvertently left out of the administrative record. The NMFS letter is mentioned in the administrative record on page 18 of the MVN Decision Document and is properly part of the administrative record.

with access to the boat launch. Access to the boat launch and dock could be provided by an elevated walkway over the marsh wetlands, and the applicant could provide compensatory mitigation.

The May 23, 2003, U.S. Environmental Protection Agency (EPA) comment letter noted the potential for significant cumulative decline of wetlands in the Orleans Parish area. EPA recommended that the permit as proposed not be issued unless the applicant limit fill activities, reduce flow of nonpoint source pollution, install culverts through the access roadway, and provide compensatory mitigation.

The Louisiana Department of Environmental Quality issued a Water Quality Certification on June 25, 2002. The certification stated that the placement of fill material would not violate the water quality standards of Louisiana.

In an e-mail dated May 30, 2003, Mr. Garrick Rose, City of New Orleans (City), Office of Environmental Affairs, provided comments regarding the issuance of Coastal Use Permit P020129. The e-mail stated that the City would require special conditions that would limit fill to that needed for the access road and parking area. Mrs. Thiel would be required to design and construct a culverted access road that would serve two lots, connect the residence to the Lake Catherine Sewer District, and provide compensatory mitigation.

In a letter dated June 24, 2002, Mrs. Thiel responded to the agencies' comments. She was willing to incorporate measures in project plans to reduce nonpoint source pollution, install culverts along the access road, and provide compensatory mitigation. She stated her desire to locate the residence and parking area near the water rather than Highway 90. She was opposed to constructing an elevated walkway and dock in lieu of a boat launch.

In a letter dated August 21, 2002, the MVN advised Mrs. Thiel that her project was non-water dependent and did not have to be sited in wetlands to achieve its overall basic project purpose. The MVN encouraged her to revise her project using a less damaging alternative. The MVN advocated that Mrs. Thiel locate the home site adjacent to Highway 90, construct an elevated walkway and dock to access Fort Pike Canal, and remove all fill associated with the boat launch and

access road. By letter dated August 28, 2002, Mrs. Thiel stated that the MVN's proposed less damaging alternative would not satisfy her project needs and would render her property worthless. She stated that her proposed work was similar to that constructed on other properties in the vicinity. She alleged that the property was one of twenty-three that has not received a permit.

In April 16, 2003, the MVN prepared a Decision Document (MVN DD). The MVN DD contained an Environmental Assessment and Statement of Findings for the proposed work. The MVN determined that the piecemeal development of more than 20 lots would have a cumulative impact to an already severely impacted local aquatic environment.[4]

The MVN determined that Mrs. Thiel's proposed project did not comply with the 404(b)(1) Guidelines, because a practicable alternative existed that had less adverse impact on the aquatic ecosystem and was without other significant adverse environmental consequences. The MVN decided that the proposed discharge did not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem. The MVN determined that the project- derived benefits did not outweigh the detriments resulting from the destruction of high quality intertidal emergent wetlands and that authorization of such an action would be contrary to the overall public interest.

In a letter dated May 21, 2003, Colonel Peter Rowan, the MVN District Engineer, denied the permit, stating that the benefits to be accrued from the proposed residential development: 1) would not balance direct and secondary adverse impacts to the proposed area's wetland ecosystem, 2) did not comply with the 404(b)(1) Guidelines, and 3) were contrary to the public interest. The letter enclosed a Combined Notification of Administrative Appeal Options and Process and Request For Appeal Form.

Mr. Maitre, Mrs. Thiel's representative, appealed the permit denial on July 7, 2003. I accepted the RFA on August 11, 2003, because it was received in my office within the requisite 60-day time period and met the criteria for appeal.

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[4] It was not clear from the administrative record if this number included the Thiel property.

The site visit and appeal conference were held by my RO on October 1, 2003.[5]

Summary of Appeal Decision: While some developments forwarded by Mrs. Thiel were similar and received permits under a Programmatic General Permit, the MVN explained why Mrs. Thiel's permit application was processed as an individual permit. However, additional documentation is needed to support the MVN findings that the proposed alternative would have less adverse impacts and how this alternative will meet the applicant's basic project purpose.[6]

Information Received and Its Disposition During the Appeal Review: Pursuant to 33 C.F.R. 331.7(f), the basis of a decision regarding a jurisdictional determination is limited to information contained in the administrative record by the date of the NAP form. The NAP for the Thiel permit denial is dated May 21, 2003. Neither Mrs. Thiel nor the MVN may present new information not already contained in the administrative record. However, both parties may interpret, clarify, or explain issues and information contained in the record.

1. The MVN provided a copy of the administrative record. The administrative record was considered in reaching this decision.

2. On August 21, 2003, the RO transmitted by facsimile questions to the MVN and Mrs. Thiel's representative for discussion at the appeals conference. Exhibit 1 in the Appeal Conference Memorandum for Record (MFR) contains the questions (enclosure 1).[7]

3. During the appeal conference, the MVN provided a written response to the RO's questions. The MVN written response is Exhibit 3 in the Appeal Conference MFR. The RO considered the MVN's response to be clarifying information and considered in the making the appeal decision.

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[5] At Mrs. Thiel's request, the administrative appeal site visit and appeal conference were conducted past the 60-day timeframe.

[6] The basic project purpose is the fundamental, essential, or irreducible purpose of the proposed project. The overall project purpose is determined by the Corps of Engineers from the applicant's perspective and is narrowly defined for the purpose of rebutting the presumption that practicable alternatives are available.

[7] The questions previously posed to Mrs. Thiel weren't specifically asked or answered at the conference; however pertinent information was covered.

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

5. During the appeals conference, the MVN provided a copy of its letter, dated April 9, 2003, to Mr. John Paul Naylon. Mr. Naylon's permit application was referenced in the administrative record. The letter is Exhibit 4 in the Appeal Conference MFR. It was considered clarifying information and was considered in reaching the appeal decision.

6. By e-mail dated October 6, 2003, the MVN provided color copies of infra-red photographs entitled "RIGOLETSSW EZ-20-020-1355" and "RIGOLETSSW." Black and white copies of these documents are found on pages 30 and 31 of the administrative record.

7. On October 10, 2003, the MVN provided by facsimile NMFS letter dated February 12, 2003. While referenced in the MVN DD, the letter had inadvertently been left out of the administrative record (enclosure 2).

8. An MFR dated October 10, 2003 was prepared which documented a telephone conversation between the RO and Mrs. Thiel's representative. The memo is considered clarifying information and was considered in reaching the appeal decision.

9. An MFR dated February 12, 2004 was prepared which documented a telephone conversation between the RO and Mrs. Thiel's representative. It was considered clarifying information and was considered in reaching the appeal decision.

The RO will provide copies of all information received during the appeals process to both the MVN and Mrs. Thiel.

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

Appellant's Reason 1 for Appeal: Mrs. Thiel alleges that the MVN issued permits to other people who live in the vicinity.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: Review of the administrative record shows that MVN provided substantial reasons for evaluating the permit application by an individual permit process.

Mrs. Thiel's RFA referred to ten properties/developments, citing that they were similar to hers. Of these ten properties, the RFA referred to two developments that were located on either side of her property. Mrs. Thiel's representative clarified in the appeals conference that those properties belonged to Mr. John Higgins and Mr. Bertucci. The RFA included photographs and depicted developments near the canal with access roads and, in one location, having a boat launch similar to that proposed by Mrs. Thiel.

Based upon an October 10, 2003 telephone conversation with the Appellant's representative, the RO determined that remaining eight developments referenced in the RFA belong to Messers Robertson, Willis, Tony Cinquemano, Numa Jones, and David Frady.[8] These developments were described as being constructed near the canal with access roads and boat launches.

Upon review of the administrative record, the RO determined that six developments owned by Messers Robertson, Bertucci and Higgins and generally mentioned in the RFA were not referenced in the administrative record and are considered new information. Pursuant to 33 C.F.R. 331.7(e)(6), new information is to be treated as a new permit application and may not be considered in an administrative appeal.

The remaining four developments (Willis, Cinquemano, Jones and Frady), were referenced in the administrative record and were considered in this decison. An MVN table entitled "Fort Pike Subdivision - Along the Fort Pike Canal near Rigolets, LA - Orleans Parish" lists twelve applicants, the permit type and status of the Corps and Local Coastal Use permit evaluations. The table includes these four developments. The four developments appear to be similar to Mrs. Thiel's stated project purpose and need: they proposed to fill wetlands for development of a residence with an access road, parking and boat launch.

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[8] Four developments belong to Mr. Robinson, and four other developments individually belonging to Messrs. Willis, Cinquemano, Jones, and Frady.

Two applicants, Mr. Frady and Mr. Cinquemano were issued PGP authorizations prior to the MVN's determination that further development would have a cumulative impact and require evaluation using the individual permit process. The MVN DD, II. F. Summary of secondary and cumulative effects and III.B.(2)(a.) Consideration of comments, adequately addresses the potential cumulative impacts as a result of permit issuance. Comment letters from NMFS and EPA support the MVN decision to utilize individual permit procedures. The MVN asserts the project involves a high value aquatic resource in an area that has been subject to substantial prior development. The MVN projected additional substantial development. The MVN evaluation of alternatives for Mrs. Thiel, including on-site avoidance, was appropriate.

There is sufficient information in the administrative record to show that Messrs. Willis and Jones and other persons within the vicinity with similar developments had their permits evaluated in the same manner. In the appeals conference, the MVN clarified that the PGP authorizations for Mr. Willis and Mr. Jones were withdrawn by MVN and would be evaluated as individual permits. The MVN table stated that Mr. Ronald Morris' permit application was evaluated using the individual permit process and was denied. The MVN table indicated that the informal decision to deny Mr. Morris' permit was made before Mrs. Thiel's permit was denied.[9] In the appeals conference, the MVN clarified that Mr. Morris' permit application was denied for the same reason as Mrs. Thiel's, i.e., because a less damaging practicable alternative existed.

In summary, while other persons with similar projects received PGP authorizations, the MVN provided substantial reasons in the administrative record for treating Mrs. Thiel and other applicants in the vicinity differently. The MVN's decision to evaluate proposed developments in the Highway 90/Fort Pike area more rigorously was documented in the administrative record. The MVN coordinated with state and Federal agencies, factored information on cumulative effects into its evaluation, and adjusted its decision appropriately. This reason for appeal has no merit.

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[9] The MVN clarified in the appeals conference that the MVN table, Column "COE Date" referred to the date the MVN project manager met with supervisors and made an informal permit decision.

Appellant's Reason 2 for Appeal: As stated in the RFA and clarified in the appeal conference, Mrs. Thiel disagreed with the MVN finding that the property should be developed adjacent to the US Highway 90 rather than at the edge of the canal.

FINDING: This reason for appeal has partial merit.

ACTION: Upon remand the MVN should revise its description of the type and quality of project site wetlands. The MVN should document the potential impacts from surrounding unculverted access roads, how its recommended alternative will meet the applicant's project needs, and, if necessary, revise its determination of a less damaging practicable alternative.

DISCUSSION: The MVN correctly followed the 404(b)(1) Guidelines in determining that Mrs. Thiel's project (construction of a residence, access road and parking) was not water dependent. While the MVN is authorized to suggest less damaging alternatives, there was insufficient documentation in the administrative record that the project would impact high quality wetlands, and that the MVN recommended alternative would have less adverse impacts on lower quality wetlands. Additional documentation is needed to document the impact from adjacent developments and how the demonstrated alternative (positioning the house closer to US Highway 90) would have less adverse impacts.

MVN's Determination of Water Dependency

The MVN's DD stated that Mrs. Thiel's proposed construction of a residence, driveway, and parking area, would impact 0.37 acre of wetlands and is not a water dependent activity. The 404(b)(1) Guidelines found in 40 C.F.R. 230.10(a)(3) support the MVN:

> Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in Subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special

> aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

MVN's determination, that the construction of a residence, access road and parking is not water dependent, is reasonable. The MVN's recommended alternative provided for the construction of an elevated walkway and dock to access Fort Pike Canal. The construction of a boat launch would necessitate a longer access road to the boat launch and impact wetlands. The elevated walkway and dock would provide access and not require an access road. The MVN noted that a public boat launch facility was located within the vicinity of Mrs. Thiel's property. The distance traveling along Highway 90 from the public boat launch facility to the Thiel property is two to three miles. The MVN proposed elevated walkway and dock would provide access to navigable waters.

MVN's Finding of a Less Damaging Practicable Alternative

The 404(b)(1) Guidelines allow the District Engineer to require minor project modifications. General Policies For Evaluating Permit Applications, 33 C.F.R 320.4(r)(i) states:

> Project modifications . . . As a result of these discussions . . . 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. Such modifications can include reductions in scope and size; . . .

The MVN DD concluded that a minor project modification would consist of locating the home site adjacent to Highway 90. The MVN stated that this modification would avoid impacting the high quality intertidal brackish marsh and still allow Mrs. Thiel to achieve her basic project purpose (a private residence

with access to the canal). In the appeals conference the MVN's written response stated:

> As proposed, the project would be located entirely within EFH [Essential Fish Habitat] tidal marsh. By locating the development adjacent to U.S. Highway 90 where wetlands have previously experienced impacts resulting from highway construction and the wetlands are significantly low in quality, tidal exchange would continue along Ft. Pike Canal and high quality EFH wetland would remain intact thus providing invaluable functions supportive to aquatic resources.

Review of the administrative record revealed no documentation of the existence of lower quality wetlands adjacent to Highway 90. Additional information regarding the type and quality of wetlands is needed to support MVN's findings that a practicable alternative that impacts lower quality wetlands exists.

In the appeals conference, Mrs. Thiel's representative questioned the quality of the project wetlands, noting that wetlands located in the property were already affected by the construction of unculverted access roads on adjacent properties. Mr. Maitre maintained that the unculverted access roads already limited tidal exchange throughout the property and that the proposed access road would not have an adverse impact.

The MVN DD notes that surrounding properties have been developed, but it does not document how development on adjacent properties have or have not impacted the quality of the wetlands or affected tidal exchange on Mrs. Thiel's property. Upon remand the MVN should document the potential impact from surrounding unculverted access roads and, if necessary, revise its determination of a less damaging practicable alternative.

The administrative record provided substantial documentation that portions of the proposed project are not water dependent, however, while the MVN was within its authority to propose a practicable, less damaging alterative, the administrative record did not adequately document the quality of the wetlands and the impact from adjacent developments to support MVN's claim that the alternative would have less impact. This reason for appeal has partial merit.

During MVN's reconsideration of Reason for Appeal 2, Ms. Thiel may submit new information to the MVN about other developments she believes to be similarly situated.

Conclusion: For the reasons stated above, I conclude that Appellant's Reason 2 has partial merit. The appeal is remanded on that reason alone. The final Corps decision will be the District Engineer's decision made pursuant to my remand of Reason 2 of the appeal action.

Don T. Riley
Brigadier General, U.S. Army
Division Engineer

Enclosure