ADMINISTRATIVE APPEAL DECISION

West Calcasieu Port, Harbor, and Terminal District
File No. WG-19-980-2004
New Orleans District
May 16, 2003

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

Appellant/Applicant: Mr. G. L. Todd, West Calcasieu Port, Harbor and Terminal District, Sulphur, LA

Appellant's Representative: Mr. Glen James, Sulphur, LA

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): October 13, 2002

Appeal Conference and Site Visit Dates: January 22, 2003

Background Information: In 1971, the New Orleans District (MVN) issued to the West Calcasieu Port Harbor and Terminal District (Port) a Department of the Army Section 10 permit for the dredging and maintenance of a barge slip and deposition of dredged spoil material into a disposal area. The Port's barge slip and disposal area/containment basin are located approximately 12 miles south of Sulphur, LA along the northern shore of the Intracoastal Waterway in Calcasieu Parish. In 1985, the Port applied for authorization to perform maintenance dredging for the existing slips, and for installation and maintenance of fill. In 1986, MVN authorized this work under a permit, which expired in 1988. The 1986 permit required the Port to obtain either a real estate instrument, or a waiver of such, from the MVN Real Estate Division prior to beginning the work.

In 1995, August through November, the Port performed additional maintenance dredging to return the basin to a usable condition. The Port pumped the dredged material into the area used in 1971 when the barge basin was originally built. Although the Port applied to the MVN Real Estate Division for extensions of the original real estate instrument, the Port did not apply for an extension of the 1986 Section 10 permit, which had expired in 1988. There is disagreement between the Port and MVN on whether, in 1994, MVN personnel informally told the Port that the 1971 permit would cover the work performed in 1995.

According to the Port, based upon their belief that the 1995 work was covered under the original permit, coupled with the on-going extensions of their real estate instrument, the Port did not believe they needed to apply for a separate Section 10 permit. It is not disputed that the MVN was unaware of the work when it was performed in 1995.

On March 16, 1998, the Port submitted a permit application for the proposed dredging project on the existing Basin. This permit application consolidated the proposed 1998 work with the completed 1995 work. The purpose of the consolidation was to resolve the existing violation.

However, in a January 13, 1999 meeting between the MVN and the Port, it was decided that the most effective way to handle the proposed barge basin extension, the cleanout of two existing slips, and the 1995 violation was to separate the permit requests. It was agreed that the Port would first request authorization for the cleanout of the two existing slips, and then submit a permit application for the Basin extension and to resolve the 1995 violation.

During a March 22, 1999, telephone call, the MVN informed the Port that even if the Port wanted to delay action on the Basin extension, it was necessary to resolve the 1995 violation. On April 19, 1999, the MVN sent a letter notifying the Port that it had 10 days from the date of the letter to furnish the after-the-fact permit application for the violation, or the file would be forwarded for enforcement action. On June 1, 1999, the Port submitted a permit application for the after-the-fact activities.

On January 8, 2000, the MVN contacted the Port regarding Corps mitigation requirements, and to discuss possible options. The Port did not submit a mitigation plan. Because of this, and because there were no available mitigation banks for brackish marsh habitat in which the Port could participate, the MVN recommended the Port make a donation to the Louisiana Coastal Restoration Fund. The donation would be based on the number of acres to be mitigated, type of habitat, and the affected hydrologic basin. Based on these factors, the amount of the donation would be $42,000.

On February 6, 2001, a meeting was held between the Port and MVN to discuss compensatory mitigation. The Port disagreed with the number of impacted acres but offered no commitment to comply with the compensatory mitigation requirement.

On October 23, 2001, the Port's attorney, Mr. Glen James, asserted that the five year statute of limitations contained in 28 U.S.C. 2462[1] applied to their violation. The Port's position was that since 5 years had elapsed form the date the violation occurred, the Corps could not proceed with any enforcement action regarding the 1995 violation.

By letters dated November 14, 2001 and January 28, 2002, the MVN Office of Counsel, responded to this Port letter and a subsequent Port letter[2], by discussing the distinction between enforcement actions, to which the statute might apply, and compensatory mitigation and other equitable actions, to which the statute does not apply.

On February 25, 2002, the MVN, Chief, Regulatory Branch, forwarded a draft permit to the Port for consideration. This draft permit would have authorized after-the-fact, the unauthorized 1995 work. As compensation for unavoidable project related impacts, Special Condition 16 of the proffered permit required the Port to donate $42,000 to the Louisiana Coastal Restoration Fund for the restoration of 17 acres of brackish marsh habitat. In a letter dated April 22, 2002, to the MVD Review Officer, Mr. James, on behalf of the Port, declined the draft permit and requested an appeal based on the Port's objection to Special Condition 16 of the proffered permit.

The MVN District Engineer responded on June 25, 2002, formally proffering the permit with Special Condition 16 to the Port, and formally advising the Port of the Corps of Engineers Administrative Appeal Process. In this letter, the District Engineer enclosed the Notification of Appeal Process (NAP) form, and the Request For Appeal (RFA) form.

On August 22, 2002, via facsimile, Mr. James submitted a RFA dated August 20, 2002 to MVD. A hard copy of this RFA was received at MVD on August 26, 2002. By letter dated September

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[1] 28 U.S.C. 2462
Time for commencing proceedings Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

[2] This letter, dated January 2, 2002, was not in the administrative record and, therefore, was not considered in reaching this Decision. However, the January 2, 2002 letter included the same Summary Memorandum that was included with the Port's RFA. This Summary Memorandum was considered in reaching this Decision.

19, 2002, the MVD Division Engineer notified Mr. James that the RFA was not acceptable, because the permit application was associated with an unauthorized activity and was not accompanied by the required tolling agreement. He afforded the Port the opportunity to revise the RFA by providing a copy of a signed tolling agreement.

On October 13, 2002, the Port's revised RFA enclosing a signed tolling agreement was received at MVD. The RO determined that the revised RFA met the criteria for an acceptable appeal. The MVD Acting Division Engineer so advised the Port by letter dated November 6, 2002. The Review Officer conducted an Administrative Appeals Conference on January 22, 2002.

Summary of Appeal Decision: Special Condition 16 of the MVN proffered permit is compensatory mitigation, and not a penalty. Therefore, the Port's argument that 28 U.S.C. 2462 acts to prevent this permit condition is without merit.

Information Received and Its Disposition During the Appeal Review:

1. The MVN provided a copy of the administrative record. Pursuant to 33 C.F.R. Section 331.7(f), the basis of a decision regarding the jurisdiction determination is limited to the information contained in the administrative record by the date of the Notice of Appeal Process (NAP). The NAP for the Port is June 25, 2002. The administrative record was considered in reaching this decision.

2. During the appeal conference, the RO provided two flowcharts describing the administrative appeal process. The flowcharts are Exhibit 1 in the record of the appeal conference, dated January 22, 2003 (enclosure 1). The administrative appeal process was followed in reaching this decision.

3. During the appeal conference, the MVN provided a written response to the questions provided by the RO. The written response provided by the MVN was considered clarifying information, and was considered in reaching this decision. It is Exhibit 2 in the record of the appeal conference.

4. The MVN provided a copy of a November 1997 color infra-red photograph. The photograph was considered clarifying information and was considered in reaching this decision. It is Exhibit 3 in the record of the appeal conference.

5. During the appeal conference, the MVN provided a series of documents:

a. A list of permit actions associated with the Port and a written comment by Mr. Ronnie Duke

b. Department of the Army permit with attachments, file number LMNOD-SP (L.T.C.S.)16, to the Port dated July 30, 1971

c. A letter with attachments from the MVN, October 16, 1974, (file number LMNOD-SP(L.T.C.S.)16)

d. A letter from the MVN, May 17, 1978, (file number LMNOD-SP(L.T.C.S.)16)

e. A letter with attachments from the MVN, July 12, 1978, (file number LMNOD-SP(L.T.C.S.)16)

f. A letter with attachments from the MVN, June 4, 1979, (file number LMNOD-SP(L.T.C.S.)16)

g. A letter with attachments from the MVN, November 9, 1979, (file number LMNOD-SP(L.T.C.S.)16)

h. A letter from the MVN, January 13, 1982, (file number LMNOD-SP(L.T.C.S.)16)

i. A letter with attachments from the MVN, July 2, 1986, (file number LMNOD-SP(L.T.C.S.)16)

The listed materials are Exhibit 4 in the record of the appeal conference. They were considered clarifying information, and they were considered in reaching this decision.

6. The RO provided the MVN and the Appellant a list of questions to be answered at the appeal conference. These questions are Exhibit 5 in the record of the appeal conference, and were considered in reaching this decision.

7. During the appeal conference, the Appellant provided a series of documents:

a. A letter from Mr. Glen James, December 30, 2002. The letter provided written responses to the Review Officer's written questions.

b. A cross-section drawing titled "Existing Typical Cross-Section."

c. A set of construction drawings titled "West Calcasieu Harbor and Terminal District Plans of Proposed Port Improvement State Project No. 578-10-006."

The items listed in paragraph 7 are Exhibit 6 in the record of the appeal conference. They were considered clarifying information, and were considered in reaching this decision.

8. The Appellant provided a Port letter to the MVN, February 6, 1998. The letter is Exhibit 7 in the record of the appeal conference. It was considered clarifying information, and was considered in reaching this decision.

9. The Appellant provided a document with acreage calculations. The document is Exhibit 8 in the record of the appeal conference. It was considered clarifying information, and was considered in reaching this decision.

10. During the appeal conference, each participant noted his/her name, organization, and phone and fax numbers on a sign-in sheet. The sign-in sheet is referred to as Exhibit 9.

Copies of all information received 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: The Port objects to the proffered Permit, particularly item 16 of the Special Conditions. The Port sees Special Condition 16 as a penalty which penalty is barred by 28 U.S.C 2462 because five years have passed since the violation. The Port's position is that the 1995 violation is clearly wholly past and does not involve any kind of latent injury so there is no basis for tolling the limitations period. The five-year limitations period should bar any current action against the Port.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The Port appeals Special Condition 16 of the after-the-fact permit proffered to it by the New Orleans District Engineer for a violation which occurred in 1995. Special Condition 16 states:

> As compensation for unavoidable project related impacts, the permittee shall donate $42,000/00 to the Louisiana Coastal Restoration Fund for the restoration of 17 acres of brackish marsh habitat. The check shall be written to the Louisiana Wetlands Conservation and Restoration Fund, and mailed to coastal (sic) Restoration Fund, Attn: Jim Holcombe, Post Office Box 44487, Baton Rouge, Louisiana 70804, prior to commencement of work. Also, please mail a copy of the check to: U.S. Army Corps of Engineers, New Orleans District, CEMVN-OD-SW, Attn: John M. Herman, Post Office Box 60267, New Orleans, Louisiana 70160-0267.

General Regulatory Policies of the Corps of Engineers are found in 33 C.F.R. Part 320. The mitigation policy is contained in 33 C.F.R. 320.4(r) and it applies to the after-the-fact proffered permit at issue in this case. In accordance with 33 C.F.R. 320.4, the decision whether to issue a permit, including an after-the-fact 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. The decision whether to authorize a proposed activity, and the conditions under which it will be authorized, are determined by this balancing process. Under 33 C.F.R. 320.4(r), mitigation is an important aspect of the review and balancing process for permit applications. Consideration of mitigation is to occur throughout the permit process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses. In accordance with 33 C.F.R. 325.4, District Engineers are to add such conditions as are necessary to satisfy the public interest requirement.

On February 5, 1998, during the course of a field inspection to do a preliminary wetland determination for an unrelated proposed dredging project at the Basin, the MVN determined that unauthorized dredged and fill activities had occurred on the site. The unauthorized activities consisted of the placement of dredged material in the containment area, and the construction of a water control structure and drainage swale. That same day, February 5, 1998, the MVN issued a Cease and Desist Order to the Port.

As a follow-up to the Cease and Desist Order, in a letter dated October 14, 1998, the MVN reminded the Port not to perform or allow any further unauthorized work. Additionally, the MVN

advised the Port that the unauthorized work could have subjected the Port to judicial proceedings for violation of Section 10 of the Rivers and Harbors Act, and Section 301 of the Clean Water Act. The MVN letter informed the Port that these proceedings could have resulted in statutory penalty, restoration, or other appropriate relief. The MVN also stated that after reviewing the investigative findings, and considering the Port's willingness to cooperate, such judicial proceedings were not warranted. The MVN informed the Port that acceptance of an after-the-fact permit application would cause no additional adverse impact and would be accepted. The letter was signed by the MVN Chief of the Operations Division for the MVN District Engineer.

The State of Louisiana initially assessed an administrative penalty against the Port for violating the Louisiana Coastal Resources Program; however, this administrative penalty was dropped and on November 13, 2000, the State issued an after-the-fact Coastal Use Permit.

In response to the Public Notice issued for the after-the-fact permit application, the U.S. Department of the Interior stated no objection if compensatory mitigation was required as a permit condition.

On March 20, 2001, MVN formally notified the Port that compensatory mitigation would be required for the loss of wetland functions and values at the project site. The Port was informed that there was no available mitigation bank for the restoration of the 17 acres of brackish marsh habitat. Therefore, a donation of $42,000, based on the formula used by the Coastal Management Division of the State, would be required.

On April 19, 2001, MVN responded to an inquiry regarding compensatory mitigation from State Senator Willie Mount. This letter discussed the distinction between a penalty and a mitigation requirement, and explained in detail the reason for requiring the $42,000 donation for compensatory mitigation as a condition for issuance of an after-the-fact permit to the Port.

This distinction was again made in letters, dated November 14, 2001 and January 28, 2002, sent by the MVN Office of Counsel to the Port. These letters also discussed the distinction between enforcement actions, compensatory mitigation and other equitable actions.

In its RFA, the Port asserts that the MVN District Engineer could not add compensatory mitigation as a special condition of

the Port's after-the-fact permit because 28 U.S.C. 2462 contains a five year statute of limitation. Therefore, according to the Port, since the violation occurred in 1995, the statute bars the ability of the District Engineer to condition the after-the-fact permit on compensatory mitigation. However, the Port's RFA contained a Summary Memorandum of law regarding 28 U.S.C. 2462. In this Memorandum, the Port's representative conceded that 28 U.S.C. 2462 applies only to civil fines, penalties, or forfeitures, and not to equitable relief.

The administrative record is clear that Special Condition 16 is not a fine or penalty. Therefore 28 U.S.C. 2462 does not apply to Special Condition 16, and it does not bar the District Engineer from conditioning the after-the-fact permit on compensatory mitigation.

CONCLUSION: For the reasons stated above, I conclude that the Port's Appeal does not have merit. The Final Corps decision will be the District Engineer's letter advising the Appellant of this decision, confirming his initial decision, and sending the proffered permit to the Appellant for signature.

Encl

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