ADMINISTRATIVE APPEAL DECISION

Mr. John Naylon
File No. EKK-20-030-3672
New Orleans District
April 15, 2005

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

Appellant/Applicant: Mr. John Naylon, Metairie, 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): January 5, 2005

Appeal Conference and Site Visit Dates: February 18, 2000

Summary of Appeal Decision: Mr. Naylon asserts that other persons in the vicinity were granted permits for similar projects and New Orleans District's (NOD's) proposed alternative is impracticable due to security and safety issues. While other persons with similar projects received Programmatic General Permit (PGP) authorizations, NOD provided substantial reasons in the administrative record for treating Mr. Naylon and other applicants in the vicinity differently. NOD's decision to evaluate proposed developments in the U.S. Highway 90/Fort Pike area more rigorously was documented in the administrative record. NOD was within its authority to propose a practicable, less damaging alternative. There was insufficient documentation of safety and security issues forwarded by Mr. Naylon to rebut the presumption that the proposed alternative is less damaging or contrary to the public interest. Mr. Naylon's RFA does not have merit.

Background Information: Mr. John Naylon is appealing the New Orleans District Engineer's decision to deny the permit application for the deposit of fill for the construction of a 420-foot driveway, parking area, campsite, walkway, wharf, and two boat sheds on property located along the left descending bank of Fort Pike Canal and U.S. Highway 90 (Highway 90) in Orleans Parish, Louisiana.

Mr. Naylon submitted a permit application for the proposed work on August 7, 2001, receiving an authorization under the NOD PGP[1], Category II on October 31, 2001. NOD PGP Category II procedures authorize up to one half acre of fill in wetlands for residential use and are typically not reviewed by National Marine Fisheries Service (NMFS). The PGP authorization stated that if work was not initiated within 2 years of permit issuance, the authorization would be null and void and was invalid until Mr. Naylon obtained a Coastal Use Permit.

In letters dated February 12, 2002, and September 12, 2001, 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.[2] NMFS recommended that NOD utilize individual public notice procedures rather than abbreviated PGP processes to provide notice of individual residential and recreational home site developments in this area. In its letter dated April 9, 2003, NOD notified Mr. Naylon of NMFS concerns, withdrew the previously issued PGP determination/authorization, and required the permit application be evaluated as an Individual Permit. Mr. Naylon submitted a permit application on July 18, 2003.

On September 3, 2003, NOD issued a Joint Public Notice for Mr. Naylon's project. Project implementation would permanently impact 0.15 acres of saline brackish marsh, also determined to be Essential Fish Habitat. 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 letter dated September 21, 2001, NMFS stated work would adversely impact habitat supportive of marine fishery resources and did not comply with 404(b)(1) guidelines. The

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[1] Section 404(e) of the Clean Water Act (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 PGP is a type of general permit that authorizes certain activities that also are regulated by another level of government. NOD issued the Programmatic General Permit NOD-PGP on May 1, 1998.

[2] The NMFS letter is mentioned in the April 9, 2003 NOD letter.

NMFS believed the activity is not water dependent and therefore did not have to be sited in wetlands to fulfill the basic purpose. In an email dated October 8, 2003, the NMFS recommended that the camp site be constructed on pilings and moved such that it does not exceed the first one third of the property adjacent to Highway 90. Additionally, the NMFS recommended that access to the boat launch and dock could be provided by an elevated walkway over the marsh wetlands and the applicant provide compensatory mitigation.

The Louisiana Department of Environmental Quality issued a Water Quality Certification on October 8, 2003. The certification stated that the placement of fill material would not violate the water quality standards of Louisiana.

In a letter dated January 8, 2004, Ms. Heather Szapary, City of New Orleans, Office of Environmental Affairs (City), provided comments regarding the issuance of Coastal Use Permit P20031083. The City determined it was possible to minimize the wetland impacts and recommended Mr. Naylon reduce impacts by moving the driveway westward to higher ground. In an email to NOD dated January 13, 2004, the City stated the Coastal Use Permit would be on hold until Mr. Naylon decides whether or not revise his project. A November 2, 2004, City letter informed Mr. Naylon that his Coastal Use Permit would be withdrawn within 30 days unless he made changes to his application or responded to the City.

In letters dated October 15, 2003; November 24, 2003; and January 20, 2004, NOD notified Mr. Naylon that there was a less damaging alternative. This alternative consisted of minimizing fill by decreasing the length of the driveway from 420-feet to 100-feet in length and shifting the parking pad and home site approximately 320-feet northwesterly, closer to Highway 90. This alternative project design would impact 0.03 acres of wetlands from fill activities and 0.12 acres as a result of shading effects. NOD recommended Mr. Naylon revise the project or provide supporting documentation that the alternative was not practicable. NOD's alternative would avoid impacting high quality wetlands and allow Mr. Naylon to achieve his overall project purpose. In his letters dated October 17, 2003; December 9, 2003; and February 6, 2004, Mr. Naylon responded that NOD's proposed alternative would be impracticable and that positioning his camp close to the canal was no more damaging than other camps. Another letter by Mr. Naylon's attorney,

Mr. Eric Oliver Person, dated October 1, 2004, stated that while Mr. Naylon wanted to cooperate, Mr. Naylon had been singled out and did not want to have the only lot with the home pad fronting the highway. Ultimately, in an email dated October 29, 2004, Mr. Naylon stated that he would prefer to go forward with "permit denial and appeals process."

On December 5, 2004, NOD prepared a Decision Document. The NOD Decision Document contained an Environmental Assessment and Statement of Findings for the proposed work. NOD determined that Mr. Naylon'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. NOD decided that the proposed discharge did not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem. NOD 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 December 5, 2004, Colonel Peter Rowan, NOD District Engineer, denied the permit, stating that the benefits to be accrued from the proposed residential development would not balance direct and secondary adverse impacts to the proposed area's wetland ecosystem, the project did not comply with the 404(b)(1) Guidelines, and was contrary to the public interest. The letter enclosed a Combined Notification of Administrative Appeal Options and Process and Request for Appeal (RFA) Form.

Mr. Naylon appealed the permit denial on January 5, 2005. I accepted the RFA on January 20, 2005, because it was received in my office within the requisite 60-day time period and met the criteria for appeal. The site visit and appeal conference were held by my RO on February 18, 2005.[3]

Information Received and Its Disposition During the Appeal Review:

[3] The administrative appeal site visit and appeal conference were initially scheduled on February 11, 2005. The site visit and appeal conference were rescheduled and conducted on February 18, 2005, within the 60-day timeframe.

Regulation 33 C.F.R. 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this permit denial. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding permit denials, as that authority remains with the District Engineer. Upon appeal from the District Engineer's decision, 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 Notification of Appeal Process (NAP) form. The NAP for the Naylon permit denial is dated December 5, 2004. Pursuant to 33 C.F.R. Section 331.2, RFA, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information to MVD.

To assist the Division Engineer in making a 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 the decision on the permit denial. 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. NOD provided a copy of the administrative record. The administrative record was considered in reaching this decision.

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

3. On February 11, 2005, the RO transmitted by e-mail tentative questions to NOD and Mr. Naylon for discussion at the appeals conference. Exhibit 2 in the Appeal Conference Memorandum for Record (MFR) contains the questions.

4. During the appeal conference, NOD provided a written response to the RO's questions. The NOD written response is Exhibit 3 in the Appeal Conference MFR. The RO considered NOD's

response to be clarifying information and considered it in making the appeal decision recommendation.

5. NOD provided copies of pages 167 through 170 of the administrative record (Attachment 1 of Exhibit 3). The pages originally provided were unreadable.

6. NOD provided a copy of an April 9 2003, NOD letter to Mr. Naylon (Attachment 2 of Exhibit 3). The NOD letter is clarifying information and considered in making the appeal decision.

7. NOD provided a copy of a certified mail receipt addressed to Mr. Naylon and dated September 27, 2001. The receipt, Exhibit 4 in the Appeal Conference MFR, is clarifying information and considered in making the appeal decision.

8. NOD provided a copy of a February 12, 2002, NFMS letter to Mr. Ron Ventola, NOD Regulatory Branch Chief. The letter, Exhibit 5 in the Appeal Conference MFR (referenced in the April 9, 2003, NOD letter) is considered clarifying information and used in making the appeal decision.

9. During the site visit, the RO took 7 digital photographs of the site. The photos are Exhibit 6 in the Appeal Conference MFR, considered clarifying information, and considered in making the appeal decision.

The RO will provide copies of all information received during the appeals process to both NOD and Mr. Naylon.

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

Appellant's Reason 1 for Appeal: Mr. Naylon alleges he is being discriminated against because other residences on adjacent properties are currently completing construction or are still under construction in the vicinity for similar locations and configurations as his.

Finding: This reason for appeal does not have merit.

Action: No action is required.

Discussion: Mr. Naylon's RFA did not specify other residences that he asserts are similarly situated or that they had received permit authorizations. Review of the administrative record shows that NOD provided substantial reasons for evaluating Mr. Naylon's permit application and another similarly situated applicant under individual permit procedures.[4] There is substantial documentation in the record to support NOD's decision that a less damaging practicable alternative existed.

The administrative record states that nine camps were authorized from 1999 to 2001 under the PGP due to the minimal impact of each camp. The nine developments appear to be similar to Mr. Naylon's stated project purpose and need: they proposed to fill wetlands for development of a camp with an access road, parking, and boat launch.

As a result of the PGP evaluations and input from NMFS, the administrative record documents that NOD became concerned by piecemeal permitting practices and cumulative impacts on brackish marsh and Essential Fish Habitat. There is substantial documentation in the record that further camp development will have cumulative impacts that require evaluation using the individual permit procedures.

The basis for utilizing the individual permit procedures was thoroughly discussed in the administrative record. The NOD Decision Document at Section II, F. "Summary of secondary and cumulative effects"; D. "Biological characteristics and anticipated changes", and Section III, B.(2)(a.) "Consideration of comments", adequately addresses the potential cumulative impacts as a result of permit issuance of the proposed development. Comment letters from NMFS support the NOD decision to utilize individual permit procedures and document the potential for adverse cumulative effects from continued authorizations under the PGP. NOD documented that the project site contains a high value aquatic resource in an area that has been subject to substantial prior development. NOD projected additional development.

There is substantial information in the administrative record to show that NOD evaluated and denied another similarly situated permit application in the same manner as Mr. Naylon's. The NOD Decision Document at Section II, F. "Summary of

[4] Ms. Thiel, permit number EZ 20-020-1355

secondary and cumulative effects" stated two applications, including Mr. Naylon's, were processed similarly. NOD clarified in the appeals conference that the other applicant was Ms. Thiel, permit number EZ 20-020-1355. Both applicants were requested to consider a less damaging alternative and when they did not accept the less damaging alternative, NOD denied both permit applications.

NOD's evaluation of alternatives and recommendation of on-site avoidance were appropriate. NOD correctly followed the 404(b)(1) Guidelines when determining that Mr. Naylon's project (construction of a camp, access road, and parking) was not water dependent and suggesting less damaging alternatives.[5] There is substantial documentation in the administrative record that the project would impact high quality wetlands and that the NOD recommended alternative would have fewer adverse impacts on lower quality wetlands.

In summary, while other persons with similar projects that predate Mr. Naylon's application received PGP authorizations, NOD provided substantial reasons in the administrative record for requiring Mr. Naylon and another applicant in the vicinity to apply for individual permits. NOD's decision to evaluate proposed developments in the Highway 90/Fort Pike area more rigorously was documented in the administrative record. NOD was within its authority to propose a practicable, less damaging alterative. NOD 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.

Appellant's Reason 2 for Appeal: Mr. Naylon disagrees with NOD's determination that situating the camp closer to Highway 90 is practicable. Moving the development closer to Highway 90 raises safety and security issues.

Finding: This reason for appeal does not have merit.

Action: No Action.

Discussion: Mr. Naylon did not provide sufficient documentation of safety and security issues to rebut the presumption that the

[5] 40 C.F.R. 230.10(a)

proposed alternative is less damaging and contrary to the public interest.

The preamble to the 404(b)(1) Guidelines [40 C.F.R. 230.10(a)(3)] indicates that it is the applicant's responsibility to rebut the presumption that here is a less damaging non-wetland alternative. NOD advocated shifting the parking pad and campsite closer to Highway 90. This alternative would avoid impacting high quality wetlands and allow Mr. Naylon to achieve his overall project purpose. In letters dated October 15, 2003; November 24, 2003; and January 20, 2004, NOD notified Mr. Naylon that there were less damaging alternatives and recommended Mr. Naylon revise the project or provide supporting documentation that NOD's proposed alternative was not practicable. In his letters dated October 17, 2003; December 9, 2003; and February 6, 2004, Mr. Naylon responded that NOD's proposed alternative would be impracticable and that positioning his camp close to the canal was no more damaging than other developments. NOD determined that Mr. Naylon had not sufficiently addressed why the alternative was not practicable. There is insufficient documentation of safety or security issues forwarded by Mr. Naylon which outweigh the public interest in avoiding and minimizing impacts to high quality wetlands.

Conclusion: For the reasons stated above, I conclude that Mr. Naylon's RFA does not have merit. The final Corps of Engineers decision will be contained in the NOD District Engineer's letter advising Mr. Naylon of this decision and confirming the December 5, 2005, permit denial decision.

Robert Crear
Brigadier General, U.S. Army
Division Engineer

Enclosures