ADMINISTRATIVE APPEAL DECISION
FASHION PLANTATION ESTATES, LLC.
PERMIT DENIAL
FILE NO. MVN-2004-3150-EGG
NEW ORLEANS DISTRICT
JULY 15, 2009

Review Officer: James B. Wiseman, Jr., U.S. Army Corps of Engineers, Mississippi Valley Division (MVD)

Appellant/Applicant: Fashion Plantation Estates, LLC.

Points of Contact: Mr. Paul Hogan (Agent) and Mr. Chris Trepagnier (Agent/Attorney)

Authority: Section 404 of the Clean Water Act

Receipt of Request for Appeal: 23 June 2008

Approved JD Appeal Meeting and Site Visit: 10 December 2008

Summary of Appeal Decision: Fashion Plantation Estates, LLC. is appealing their permit denial by New Orleans District (MVN) for the construction of a church complex in wetlands in St. Charles Parish, Louisiana. The Request for Appeal (RFA) challenges the purpose and need statement and the alternative sites analysis made by MVN in their decision document. The appeal is found to have merit.

Background Information: On 20 August 2004, Fashion Plantation Estates, LLC. (FP) submitted a Department of the Army Section 404 permit application to MVN on behalf of Lakeside Apostolic Church (Lakeside) for the deposition of fill into wetlands for the construction of a church building, day care center, gym, paved parking area, and sports field on a site near Hahnville, St. Charles Parish, Louisiana. MVN issued a public notice for the proposed project on 28 September 2004. After evaluation, MVN determined that issuance of a permit was contrary to the public interest and denied the application. MVN informed FP of the permit denial by letter dated 18 July 2006. On 25 August 2006, Mississippi Valley Division (MVD) received a RFA from Mr. Paul Hogan on behalf of FP. By letter dated 13 September 2006, MVD informed Mr. Hogan that the appeal was not acceptable.[1] However, in the RFA, FP stated that Lakeside was willing to "try

[1] The RFA did not contain valid reasons for appeal per 33 C.F.R. § 331.5(b).

to modify their plan to accommodate the useable area that can be permitted by the Corps."

On 30 November 2006, FP submitted a modified application which excluded the sports field, reducing the area to be impacted from 5.28 acres to 2.74 acres. A public notice was issued on 12 January 2007. After review and consideration of comments, the permit application was denied. The District Engineer signed the completed decision document on 3 April 2008, and a copy of the document was sent to the applicant with cover letter dated 4 April 2008. Apparently, a Notification of Administrative Appeal Options (NAO) form was not included in the original mailing. By letter dated 24 April 2008, MVN sent a NAO form to the applicant. Mr. Chris Tregagnier, agent/attorney for FP, submitted a Request for Appeal (RFA) form to MVD on 23 June 2008. By letter dated 21 July 2008, the MVD Review Officer (RO) informed Mr. Trepagnier that the RFA met the criteria for an acceptable appeal.

Information Received and Its Disposal During the Appeal:

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 decisions, as that authority remains with the District Engineer. Upon appeal of 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 Administrative Appeal Options and Process (NAP) form. Pursuant to 33 C.F.R. Section 331.2, 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 JD. 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 to the RO and to Mr. Trepagnier. The administrative record is limited to information contained in the record by the date of the NAO form, in this case, 24 April 2008.

2. A site visit/appeal meeting was held on 10 December 2008. The RO prepared a draft Memorandum for Record (MFR) summarizing the meeting and site visit and supplied a copy to Mr. Trepagnier and MVN on 6 March 2009 for comment. Based on comments received, a final MFR was prepared on 20 March 2009.

Basis for Appeal as Presented by Appellant:

Appellant's Reasons for Appeal:

1. MVN misstated the need for the project such that the resultant public interest review is improper.

FINDING: This reason for appeal has merit.

DISCUSSION: The National Environmental Policy Act (NEPA) requires federal agencies to address environmental impacts of federal actions.[2] If the action is not categorically excluded, an environmental impact statement (EIS) or an environmental assessment (EA) must be prepared. The decision documents for these analyses are a Record of Decision (ROD) or a Finding of No Significant Impact (FONSI), respectively. According to NEPA regulations, the EIS or EA shall include a purpose and need statement to "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."[3] Each federal agency has its own guidance on NEPA documentation.[4]

In this case, the applicant's need for the project, as stated on the permit application, is "[t]o meet the needs of the growing community of Hahnville." However, according to the MVN decision document, "the applicant needs the proposed project to realize economic gain through the sale of the proposed site to Lakeside Apostolic Church." The statement of need should be framed in such a way as to reflect the need for the project or activity that will result in the placement of fill material. The fact that the applicant is the seller and not the ultimate buyer/user

[2] Issuance of a Department of the Army permit is a federal action subject to NEPA regulations.
[3] 40 CFR § 1502.13
[4] NEPA guidance for Department of the Army permits may be found in regulations at 33 CFR § 325 (Appendix B).

of the property should not alter that analysis. In and of itself, the realization of economic gain through sale of the property does not necessarily involve an activity regulated by the Corps of Engineers. A permit is not needed to sell the property, but one is required to build the church complex. Even though the permit application shows Fashion Plantation Estates, LLC. and not Lakeside Apostolic Church (Lakeside) as the applicant, FP is essentially acting as agent for Lakeside, since the purpose of the project is to construct a church complex. The evaluation in the decision document should have been based on the purpose of and the need for the church complex.

ACTION: MVN should reevaluate the permit application based on the applicant's stated purpose (to build a church) and on the applicant's stated underlying need (to serve the Hahnville community).

2. MVN incorrectly used a four-parish area as the area for consideration in the alternatives sites analysis when, in actuality, in their 14 April 2005 letter MVN requested a more localized area bounded by River Road, I-310, Highway 3127 and Home Place Road.

FINDING: This reason for appeal has merit.

DISCUSSION: The Section 404(b)(1) guidelines[5] establish, among other things, a framework for the assessment of the basic and overall project purpose and for determination of the least environmentally damaging practicable alternative which meets the applicant's overall project purpose. The guidelines state that no discharge of dredged or fill material "will be permitted if there is a practicable alternative to the discharge which would have less adverse impact on the aquatic ecosystem provided the alternative does not have other significant adverse environmental consequences."[6] To be practicable, an alternative must be generally available; achieve the project purpose; and be feasible in terms of cost, technology, and logistics. In addition, NEPA requires that environmental analysis documentation include a purpose and need statement and the assessment of reasonable alternatives. Alternatives that meet both the underlying purpose and the need for the project are considered the most reasonable and should receive the most detailed analysis.

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[5] 40 CFR § 230 *et seq*
[6] 40 CFR § 230.10(a)

The applicant owns the proposed project site. In consideration of this fact, Mr. Trepagnier stated in the RFA that "the purchase of another site or complete avoidance of the site is not a practicable alternative." While Corps policy (RGL 95-01[7]) allows for flexibility in the application of the Section 404(b)(1) guidelines for residential construction by small landowners involving impacts of two acres or less, the case under appeal is for 2.74 acres of impacts and does not involve residential development, so RGL 95-01 does not apply, and other sites not owned by the applicant may be considered.

As noted above, the applicant's stated need was to serve the Hahnville community by constructing a church complex. In the discussion of alternative sites in the decision document[8], MVN refers to the previous decision document, approved on 18 July 2006, which was prepared for the original permit application. It states: "As part of the evaluation in considering alternatives, which may avoid or minimize a project['s] impact on wetlands, a request was presented to the applicant by letter dated April 14, 2005, requesting the applicant review alternatives within a given area shown on a map."[9] The map[10] shows a highlighted region in the Hahnville area, not the four-parish area referred to in the 3 April 2008 decision document. In the 3 April 2008 decision document, MVN states that, "[T]he applicant's potential probable client is attempting to serve members from approximately four parishes; however, alternatives from all four parishes were not presented by the applicant."[11] MVN concluded that the applicant "did not provide clear and convincing evidence to rebut the less damaging alternative presumption." The only other reference in the record to a larger four-parish area is the Lakeside Apostolic Church letter dated 3 December 2004[12] which states that the church has members residing in several surrounding parishes. There is nothing in the administrative record to show that MVN requested the applicant to consider the larger area in their alternatives analysis.

When questioned about the alternatives analysis during the appeal meeting, MVN stated that the burden of proof lies with the applicant. The administrative record includes documentation demonstrating that the applicant addressed the availability of

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[7] Regulatory Guidance Letter 95-01: Guidance on Individual Permit Flexibility for Small Landowner; issued 31 March 1995.
[8] Administrative Record (AR), p. 7
[9] AR, p. 138
[10] AR, p. 262
[11] AR, p. 9
[12] AR, p. 268

alternative sites in the target area specified by MVN in their 14 April 2005 letter. This documentation includes a letter dated 15 June 2007[13] which addresses the lack of availability of non-wetland alternative sites and a map of the Hahnville area with notations about the availability of specific sites.[14]

ACTION: The permit decision is being remanded for a reevaluation and reconsideration of the alternative sites analysis.

3. The permit application, as revised, is the least damaging practicable alternative.

FINDING: This reason for appeal cannot be addressed.

DISCUSSION: Since the second reason for appeal was found to have merit, the permit decision is being remanded for a reevaluation and reconsideration of the alternative sites analysis. As a result, a determination of the least damaging practicable alternative cannot be made until the alternative sites analysis is revisited.

ACTION: This issue must be revisited by MVN as part of their reconsideration and reevaluation pursuant to the remand.

4. The applicant has followed the proper sequencing process and has avoided and minimized impacts.

FINDING: This reason for appeal cannot be addressed.

DISCUSSION: The following discussion is provided for guidance to both the District and the appellant in the further proceedings. "Sequencing" is the term used to describe the mitigation process and has its roots in NEPA regulations[15] which define mitigation to include: (a) avoiding the impact altogether by not taking a certain action or parts of an action; (b) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and (e) compensating for the impact by replacing or providing substitute resources or environments.

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[13] AR, p. 230-231.
[14] AR, p. 251
[15] 40 C.F.R. § 1508.20

The sequencing process for Department of the Army permit applications is defined in Section 404(b)(1) of the Clean Water Act, which requires EPA, in conjunction with the Corps, to develop criteria which the Corps uses in its permit decisions. These criteria, known as the 404(b)(1) guidelines (Guidelines), require consideration of alternative disposal sites[16] and minimization of adverse environmental impacts. Subpart H[17] of the Guidelines describes a number of actions that the Corps should consider as permit conditions to minimize adverse effects (for example, actions concerning the location of discharge, composition of discharge material, control of material after discharge, method of dispersal, and use of appropriate equipment and technology). The Guidelines require that a permitted activity not cause or contribute to significant degradation of the waters of the United States, either individually or cumulatively. When determining whether a proposed activity will result in significant degradation, the Corps will consider to what extent compensatory mitigation will offset the activity's adverse effects.

The Guidelines were developed in accordance with the Administrative Procedure Act's[18] public notice and comment procedures and are binding regulations.[19] Frequently however, EPA and the Corps use less formal Memorandums of Agreement (MOAs) or Regulatory Guidance Letters to interpret the requirements of the Clean Water Act and the Guidelines.[20] These documents provide guidance to agency personnel and the public to explain how the agencies intend to apply the statute and regulations in the field. Prior to the development of the "mitigation rule" regulation,[21] much of the mitigation policy for the Section 404 program could be found in these less formal guidance documents. A 1990 MOA between EPA and the Department of the Army explains how mitigation determinations should be made.[22] The MOA notes that the mitigation requirements of NEPA and the Guidelines are compatible and, as a practical matter, may be condensed to three general types of mitigation: avoidance, minimization, and compensatory mitigation. The MOA emphasizes that this mitigation must be applied in a sequential fashion: an applicant must first avoid wetlands to the extent practicable; then minimize unavoidable impacts; and, finally,

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[16] The deposition of dredged or fill material into a disposal site which includes waters of the United States requires a Department of the Army Section 404 permit.
[17] 40 C.F.R. § 230.70-77
[18] 60 Stat. 238
[19] 5 U.S.C. § 1001-1011
[20] These documents are usually interagency policy agreements or statements and do not involve a public notice and comment period.
[21] 33 C.F.R. § 332 *et seq*
[22] Federal Register 55(1990):9210

compensate for any remaining impacts through restoration, enhancement, creation, or in exceptional cases, preservation.[23]

There is evidence in the administrative record that the FP permit application addressed avoidance and minimization of impacts to wetlands. Based on their alternative sites analysis, FP concluded that non-wetland alternative sites did not exist and thus impacts to wetlands could not be avoided in the target Hahnville area. With respect to minimization, after the original permit application was denied by MVN, FP submitted a revised application which reduced wetland impacts by 2.54 acres by eliminating the sports field.

ACTION: Whether the appellant has appropriately avoided, minimized, and offered compensation for the impacts of the project must be resolved between the District and the appellant upon remand, and the Administrative Record shall be supplemented to document this resolution.

CONCLUSION:

I find that the appeal has merit. The permit decision is remanded to New Orleans District for reconsideration and reevaluation based on comments detailed above. The final Corps decision will be the MVN District Engineer's permit decision made pursuant to my remand.

Michael J. Walsh
Brigadier General, U.S. Army
Division Engineer

[23] National Research Council. 2001. *Compensating for Wetland Losses Under the Clean Water Act*. National Academies Press. p. 65-67.