

**ADMINISTRATIVE APPEAL DECISION  
SEARCY COUNTY REGIONAL WATER DISTRICT  
FILE NO. 13861  
LITTLE ROCK DISTRICT**

**9 November 2000**

**Review Officer:** James E. Gilmore, U.S. Army Corps of Engineers (USACE), Southwestern Division, Dallas, Texas

**Appellant Representative:** Mr. Michael Barker, President Searcy County Regional Water District (SCRWD), Jeff Mays, Joe Willis, Members SCRWD, Darryl Laws, James Rice, Jason Temple, NRS Consulting Engineers, and Sid Lowrance, NRCS

**Receipt of Request For Appeal (RFA):** 7 July 2000

**Appeal Conference Date:** 24 August 2000      **Site Visit Date:** N/A

**Background Information:** In July 1997, SCRWD submitted a permit application to the Little Rock (SWL) District Engineer for the construction of a dam and water supply reservoir located on an intermittent portion of Bear Creek. The purpose of the proposed project was to create an estimated 92-acre regional water supply reservoir. The planned water yield, 3.7 million gallons per day (mgd) would have met the regions water needs until 2050.

SWL issued a public notice on 13 August 1997. In response to comments received during the public comment period, SWL requested the applicant to provide additional information regarding the proposed project. Major concerns included the potential adverse impacts to the Buffalo National River, endangered species, fish and wildlife and cultural resources. In addition, several comments were received requesting SWL to evaluate less environmentally damaging alternatives to the proposed project. SWL's evaluation concentrated on the above issues. After evaluating several alternatives, SWL determined that the applicant's proposal and the Clinton-Marshall pipeline alternative were the only alternatives that met the applicant's needs. These 2 alternatives were evaluated in detail by SWL. After evaluating the environmental impacts of both projects, SWL determined that the applicant's proposed project had greater environmental impacts than the Clinton-Marshall pipeline

alternative. SWL determined that the proposed Bear Creek Reservoir would cause permanent impacts to approximately 2 miles of Bear Creek.

**Summary of Decision:** I find the appeal has merit for the reasons discussed below.

a. The SWL District Engineer should re-evaluate the decision. This may include supplementing the existing administrative record. After conducting this re-evaluation, if he again determines the permit should be denied, he should address any significant environmental differences between the Bear Creek Reservoir and the Clinton-Marshall pipeline. To the extent such differences relate to water quality issues, he also should identify the significant national issues of overriding importance which led him to draw a different conclusion than the Arkansas Department of Environmental Quality (ADEQ).

b. If he determines the permit should be denied, the SWL District Engineer also should explain how he determined that the cost to construct the selected alternative was not prohibitive to the appellant.

This matter is remanded to the SWL District Engineer for reconsideration of the permit decision consistent with the instructions in this administrative appeal decision.

**Appeal Evaluation, Findings and Instructions to the SWL District Engineer (DE):**

Reasons for the appeal are as presented by the appellant. The reasons for appeal are found in the appellant's transmittal letter. The items listed as reasons 1 - 4 are clarifying information.

**Reason 1:** The DISTRICT's appeal is based on the COE's, Little Rock district, inappropriately applying the Section 404 (b) (1) guidelines, and using inappropriate and speculative information to compare a non-available, a non-feasible, and therefore a non-practicable Clinton-Marshall Pipeline Alternative to the DISTRICT's proposed Bear Creek Reservoir.

**FINDING:** The reason for appeal has merit.

**ACTION:** The permit decision is remanded to the SWL District Engineer. The District Engineer should supplement the administrative record to the extent he feels it appropriate,

then fully review the record to determine if there are "significant overriding issues of national concern" necessary to override the ADEQ decision to issue a water quality certification for the Bear Creek Reservoir. The SWL District Engineer should also review the record to determine if there is an identifiable or discernible difference in adverse impacts on the aquatic environment between the appellant's proposed alternative and the pipeline.

**DISCUSSION:** 33 CFR 320.4(j)(2) and (4) and 325.2(a)(6) states that if the District Engineer's decision on a permit application is contrary to the State (ADEQ), the decision document will show the "significant overriding national concern" and explain how these issues are of overriding importance. SWL's Combined Decision Document (CDD) and §404(b)(1) Guidelines Analysis concluded that construction of the Bear Creek Reservoir would result in only minor impacts to the aquatic environment. SWL went to great lengths to show that the Bear Creek Reservoir would not impact the Buffalo National River, endangered or threaten species, fish and wildlife or cultural resources. The CDD did not conclude that the appellant's proposed project would reach the level a of significant national issues. In fact, it apparently concluded impacts are minimal.

In reaching his decision, the SWL District Engineer referred to §404(b)(1) Part 230.10(a). Part 230.10(a) states that "no discharge 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." However, the SWL District Engineer failed to recognize that the preamble to the Guidelines notes that where there are not significant or easily identifiable differences in impact, the alternative need not be considered to have less impact. In addition, the Guidelines prohibit the discharge of dredged or fill material if it would "cause or contribute to significant degradation of the waters of the United States" [40 CFR 230.10(c)]. Significant degradation includes significant adverse effects on aquatic ecosystem diversity, productivity and stability, and these adverse effects include effects on municipal water supplies as well as loss of fish and wildlife habitat. As previously stated, the CDD and §404(b)(1) Guidelines Analysis failed to identify any significant impact that would be caused by the appellant's proposed project. Where there is little or no environmental impact difference among the alternatives, the SWL District Engineer should have focused on the aquatic environment, not just the technical alternative

analysis. (Reference Regulatory Guidance Letter 93-2; Guidance on Flexibility of the §404(b)(1) Guidelines and Mitigation Banking which had as an enclosure the 23 August 1993 MEMORANDUM TO THE FIELD; SUBJECT: Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements. This supports the above statement regarding focusing on impacts to the aquatic environment and not just the technical alternative analysis and Part 230.10(b) - (d).)

The second part of this reason for appeal deals with the appellant's belief that the SWL District Engineer used "inappropriate and speculative information to compare a non-available, a non-feasible, and therefore a non-practicable Clinton-Marshall Pipeline Alternative to the DISTRICT's proposed Bear Creek Reservoir." The focal point of this issue was how did the SWL District Engineer determine that the added cost to construct the Clinton-Marshall alternative was not an unreasonable expense to the applicant. SWL was not able to provide a clear answer to this question. During the appeal conference, the appellant stated that Searcy County was the second poorest county in Arkansas with a per capita annual income of \$8,800. Based on this fact, the appellant stated any increase in cost would be prohibitive and make the project impracticable. This is one of the factors which should be considered in determining if the pipeline alternative is practicable.

The permit decision is remanded to the SWL District Engineer for additional review of this issue if he again determines the permit should be denied. The SWL District Engineer should provide the rationale behind his decision that the pipeline alternative is not cost prohibitive to the appellant.

**Reason 2:** The Clinton-Marshall pipeline alternative could also indirectly be more damaging to the aquatic ecosystems of the Buffalo National River than the Bear Creek reservoir if it is recognized as a less damaging practicable alternative and the permit is denied. As an expedient means to meet their water demands, Searcy County would most likely exploit and capture all of the 1.6 MGD available flow from their current water supply, Hughes Spring, which is a very close tributary to the Buffalo National River. This would have direct and measurable impact on the BNR and associated aquatic ecosystems.

**FINDING:** This reason for appeal does not have merit.

**ACTION:** No action is required.

**DISCUSSION:** The appellant's assumption that the Clinton-Marshall Pipeline alternative could indirectly be more damaging to the aquatic ecosystems of the Buffalo National River was not supported by any documentation or other evidence. The water source for the Clinton-Marshall Pipeline is Greers Ferry Reservoir. Greers Ferry Reservoir is not part of the Buffalo National River watershed. There was no showing of a significant need for more water from Hughes Spring during the time that would be needed to construct the pipeline.

It appears that the appellant brought this issue up because it does not consider the Clinton-Marshall Pipeline alternative as a viable option. Denial of the permit application to construct the Bear Creek Reservoir left the appellant, in its opinion, with only one viable option. That option is to utilize all available water from their existing water supply source, which is Hughes Spring. It should be noted that the appellant had the authority to capture and use all of the available water from Hughes Spring prior to applying for a Corps' permit to construct Bear Creek Reservoir. However, utilization of all available water from Hughes Spring will not meet the County's long-term water supply needs.

**Information Received and Its Disposition During the Appeal Review:**

- 1) 1 June 2000 letter from National Park Service (NPS) requesting that the NPS be allowed to attend the appeal conference. The NPS was not allowed to participate in conference. The RFA did not involve any comments from the Service and the Service's involvement was not needed to clarify the administrative record. However, if the District Engineer re-opens the administrative record to consider additional information on remand, the NPS should be allowed an opportunity to provide additional information concerning the environmental impacts of the proposed reservoir on the BNR
- 2) 20 July 2000 letter from Arkansas State Representative, Mike Hathorn requesting that the SWL District Engineer's decision be reversed. Information contained in the letter was basically the same as contained in the

appellant's RFA. Letter was kept in file but not used to make appeal decision.

- 3) 10 August 2000 letter from Mr. Joe M. Blair supporting the appellant's appeal. Letter kept in file but not used to make appeal decision.
- 4) Received requested clarifying information from the appellant's consultant and from SWL staff at the administrative appeal conference.

**OTHER:** The Governor of Arkansas has provided a written objection to denial of the permit. Therefore, if the District on remand determines again that the permit should be denied, a recommended decision will be sent to the Division, which will evaluate the record and make the final decision on the permit.

**CONCLUSION:** For the reasons stated above, I conclude this administrative appeal has merit and remand it to the Little Rock District Engineer to reevaluate the subject permit in light of the guidance provided in my findings and take action accordingly.

DAVID F. MELCHER  
Brigadier General, USA  
Commanding