ADMINISTRATIVE APPEAL DECISION

Mr. Ricky Bourg
File Nos. EL-19-990-3578 and ES-19-970-5668
New Orleans District
4 October 2002

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

Appellant/Applicant: Mr. Ricky Bourg, Harvey, Louisiana

Appellant Representative: Mr. Chris M. Trepagnier, Trepagnier Law Firm, Destrehan, Mississippi

Authority: Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act

Receipt of Request For Appeal (RFA): 3 April 2002

Appeal Conference Date: 26 July 2001

Site Visit Date: 27 July 2001

Background Information: On 11 August 1997, Mr. Rickey Bourg submitted an application for a Department of the Army permit to install and maintain a bulkhead and fill at Grand Isle, Jefferson Parish, Louisiana. The first public notice was issued on 23 September 1997. The New Orleans District (MVN) requested additional information to continue permit evaluation. Mr. Bourg did not supply the requested information. In a letter dated 27 January 1998, the MVN returned the application stating that Mr. Bourg had not responded to its request for additional information on needs and alternative sites. Mr. Bourg proceeded to construct the bulkhead portion of the project without Federal or State authorizations. The MVN issued a Cease and Desist Order on 7 September 1999. While the legal issues surrounding the unauthorized work were being reviewed, Mr. Bourg placed fill behind the unauthorized bulkhead. An after-the-fact permit application was received on 5 May 2000. A joint public notice for the proposed project was issued on 23 May 2000. In a letter dated 4 April 2001, the MVN determined that issuance of a permit for the proposed action would be contrary to the public interest and therefore, denied the permit request.

Mr. Chris Trepagnier of the Trepagnier Law Firm, on behalf of Mr. Bourg, submitted a completed RFA on 30 May 2001. The RFA was received within the requisite 60-day time period. By letter

dated 18 June 2002, the MVD accepted the appeal. A site visit and appeal conference followed on 26 and 27 July 2001, respectively. During the course of the appeal process, the Appellant stated that the MVN had granted permits in the vicinity of the Appellant's project; they referenced permit decisions to support Appeal Reason 4 that the MVN denial decision was arbitrary and capricious. Using the discussions at the appeal conference, the MVN determined that the Appellant was referring to:

(a) Programmatic General permit issued to Cigar's Marina on 24 April 2000

(b) Individual permit issued to Grand Isle Port Commission issued on 20 June 2001

(c) An individual permit issued to Mr. Joseph Burregi on 29 November 1990

According to 33 C.F.R. Section 331.7(f), an appeal of a permit denial is "limited to the information contained in the administrative record by the date of the Notice of Appeal Process (NAP) for the application." The date of the Appellant's first NAP was 4 April 2001. The permit decision of 20 June 2001, for Grand Isle Port Commission was made after the Appellant's NAP and could not be considered. Additionally, upon review of the administrative record, the RO found that the other two permit decisions (Cigar's Marina and Mr. Joseph Burregi) were not referenced in the administrative record and were therefore considered "new information." The RO's finding that these permit decisions constituted new information was based on the fact that the permits were not contained in the administrative record.

In a letter dated 1 October 2001, the MVD notified the Appellant of its determination that the review of Appeal Reason 4 could not be completed. That letter also provided the Appellant the option of withdrawing the subject appeal and submitting new information to the MVN in the context of a new permit application. Alternatively, the Appellant could elect to withdraw Appeal Reason 4 and proceed with the appeal.

The Appellant elected to withdraw the pending appeal so that the MVN could consider the new information. By a letter of 23 October 2001, the MVD withdrew the appeal and forwarded the MVN clarifying information developed by the RO. The Appellant provided new information to the MVN. In its letter dated

4 February 2002, the MVN informed the Appellant that the information submitted did not substantiate Mr. Bourg's claim that the denial of his permit was arbitrary and capricious.

In a faxed letter dated 3 March 2002 and received on 3 April 2002, Mr. Chris Trepagnier of the Trepagnier Law Firm, on behalf of Mr. Bourg, requested the opportunity to appeal MVN's 4 February 2002 decision to deny Mr. Bourg's permit. The Appellant reiterated his original reasons for appeal with additional clarification of Appeal Reason 4. The MVD accepted the appeal request and determined that a second site visit and appeal conference were not warranted. Appeal regulations found in 33 C.F.R. 331.7(c) Site investigations allow the RO discretion to determine if a site visit is necessary. An Appellant's request for a site visit will be granted if:

> [T]he RO has determined that such an investigation would be of benefit in interpreting the administrative record.

The Appellant's representative did not request a site visit. Appeal regulations at 33 C.F.R. 331.7(e) allow the RO to forego an appeal conference if:

> [T]he RO and the appellant mutually agree to forego a conference.

The Appellant's Representative agreed to forego conducting a second appeal conference.

Information Received and Disposition During the Appeal Review:

1. The MVN provided:

(a) A copy of the administrative record. Pursuant to 33 C.F.R. Section 331.7(f), the basis of a decision regarding a permit denial is limited to the information contained in the administrative record by the date of the Notice of Appeal Process (NAP).

(b) Five documents pertaining to its permit authorization for the Grand Isle Port Commission (permit number EM-19-970-1836-1)(enclosure 1):

(1) Department of the Army Permit Evaluation and Decision Document dated 9 December 1999

(2) Revised Statement of Findings dated 20 June 2001

(3) Department of the Army permit authorization letter and permit dated 20 June 2001

(4) Public Notice dated 27 March 2001

(5) Approved Jurisdiction Determination

The Appellant did not provide the Grand Isle Port Commission permit decision in the second RFA to support his claim that the MVN was arbitrary and capricious. These documents were not considered by the RO.

(c) Department of the Army permit authorization letter dated 24 April 2000 to Cigar's Marina (permit number EL-20-000-2148) and additional permit drawings (enclosure 2). This document was provided to the RO prior to the Appellants' decision to withdraw the pending appeal. These documents were considered to be clarifying information.

(d) The MVN provided four documents pertaining to the MVN permit authorization for Mr. Joseph Burregi (permit number SE Caminada Bay 63)(enclosure 3):

(1) Statement of Findings dated 29 November 1990

(2) MVN Public Notice dated 28 August 1989

(3) MVN letter dated 10 January 1990

(4) Department of the Army Permit dated 29 November 1990

This document was provided to the RO prior to the Appellant's decision to withdraw the pending appeal. These documents were considered to be clarifying information.

2. The Appellant's Representative provided:

(a) A written response to the questions to be answered during the appeals conference. The written response provided by the Appellant was considered clarifying information and is referred to as Exhibit 3 in the verbatim record of the appeal conference.

(b) Verbatim record of the administrative appeal conference dated 27 July 2001.

3. The RO provided:

(a) The Appeal Conference Memorandum For the Record (MFR); considered to be clarifying information (enclosure 4).

(b) A list of questions to be answered in the appeals conference. The list of questions is referred to as Exhibit 1 in the verbatim record of the appeal conference.

4. The National Marine Fisheries Service (NMFS) representative provided an undated color infrared photograph of the project area prior to the bulkhead construction and filling. The photograph was considered clarifying information and was referred to as Exhibit 2 in the verbatim record of the appeal conference.

Summary of Appeal Decision:

Appellant's Reason 1: No Merit - The MVN followed Corps of Engineers regulations when: 1) they advised the Appellant that the proposed bulkhead and associated fill activities could adversely impact wetland values and 2) informed him of possible alternative methods of protecting his property.

Appellant's Reason 2: Merit - The Appellant has not clearly defined his project purpose, and the MVN has not clearly characterized the site. The MVN should reconsider the after-the-fact permit application in light of the redefined project purpose, applying, as appropriate, the presumption of practicable alternatives.

Appellant's Reason 3: No Merit - The MVN's characterization of the project wetlands as high quality is reasonable and documented in the administrative record.

Appellant's Reason 4: No Merit - The Appellant did not provide substantial information to support his reason for appeal that the MVN denial decision was arbitrary and capricious.

Appellant's Reason 5: No Merit - The Appellant's claim that the MVN failed to conduct a proper public interest review was unsubstantiated.

Bases for Appeal as Presented by the Appellant (quoted from the Appellant's RFA and presented in bold lettering):

Appellant's Reason 1: Mr. Bourg is simply trying to do what the state and other agencies have attempted to do—protect his property and maintain his livelihood. In doing so he relies on 33 CFR 320.4(b)(5)(g)(2). 33 CFR 320.4(b)(5)(g)(2) states, "Because a landowner has the general right to protect property from erosion, applications to erect protective structures will usually receive favorable consideration." The NOD has chosen to ignore its own regulations which govern this type of activity. Additionally, while not dispositive of this issue, the State of Louisiana recognizes the right of a private property owner to reclaim his lands that have been lost to erosion.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The MVN followed Corps of Engineers regulations when advising the Appellant that the proposed bulkhead and associated filling could cause damage to other properties and adversely impact wetland values. The MVN appropriately informed the Appellant of possible alternative methods of protecting his property.

The regulation cited by the Appellant, 33 C.F.R. 320.4(b)(5)(g)(2) goes on to state:

> However, if the protection structure may **cause damage to the property of others**, affect public health and safety, **adversely impact floodplain or wetland values**, or otherwise appears contrary to the public interest, the district engineer will so advise the applicant and **inform him of possible alternative methods of protecting his property** (emphasis added).

There is information in the administrative record to show that the project may cause damage to other properties. On page 8 of the MVN's Decision Document (DD), Erosion and accretion patterns section, the MVN states that the construction of the project could increase erosion to neighboring properties through changes in local circulation patterns. There was testimony at the appeals conference that the bulkhead would cause erosion of adjacent property and would adversely impact floodplain and wetland values.

There is information in the administrative record to show that the proposed bulkhead construction and fill activities would impact jurisdictional wetland values. On page 8 of the MVN's DD, Flood control functions section, the MVN stated that the project would cumulatively contribute to a reduction in the local storm water storage capacity provided by local wetlands.

The MVN informed the Appellants of possible alternative methods of protecting his property. The MVD letter dated 1 December 1997 recommended that the Appellant reduce environmental impacts by using non-wetland property for the proposed parking area and utilize z-walls, gabions or riprap breakwaters to control erosion on the subject property. The MVN forwarded the NMFS letter dated 22 October 1997, which recommended the project site be redesigned to restore intertidal elevations. The NMFS recommended shoreline protection measures which would protect against further shoreline erosion and allow marine fishery access to the marsh edge. On page 5 of the MVN DD, Other project designs (smaller, larger, different etc.) section, stated that it would have no objection to considering a permit to erect protective structures at the shoreline to protect the Appellant's property from erosion. The MVN recommended similar shoreline protection measures for the Burregi permit located adjacent to the Appellant's. See the discussion of the Burregi permit at Appeal Reason 4, below.

Appellant's Reason 2: In various documents the site has been referred to as water bottoms and shallow water estuarine habitat. The site is merely an unvegetated shallow water area or water bottom and as such is not subject to the presumptions [of 40 C.F.R] 230.10(a)(3). Therefore, practicable alternatives are not presumed to be available and any practicable alternatives are not presumed to have less adverse impact on the aquatic ecosystem, at least for a portion of the project site.

FINDING: This reason for appeal has merit.

ACTION: The MVN shall require the Appellant to clearly define his project and its purpose(s). The MVN will characterize the site and consider the after-the-fact permit application in light of the project purpose, applying, as appropriate, the presumption of practicable alternatives.

DISCUSSION: The administrative record reflects two problems that combined to create the need for a remand with instructions to the MVN. The Appellant has not clearly defined his project purpose, and the MVN has not clearly characterized the site.

The MVN should consider the after-the-fact permit application in light of the redefined project purpose, applying as appropriate, the presumption of practicable alternatives.

The MVN stated three specific considerations which led to its decision to deny the Appellant's permit application: the proposed work would destroy highly productive shallow water estuarine habitat and saline marsh wetlands; the detrimental impacts outweigh the public benefits; and the Appellant failed to address project alternatives that would reduce adverse impacts.

The Corps of Engineer's 404(b)(1) guidelines found at 40 C.F.R.230.10(a) state that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact to the aquatic ecosystem. When a project is proposed in a "special aquatic site" (SAS) and is a non-water dependant activity, practicable alternatives are presumed to be available (40 C.F.R. 230.10(a)(3)). In the present appeal, the administrative record is unclear on two points: 1) whether the activity is water-dependent, and 2) if portions of the Appellant's property constitute a SAS.

The administrative record did not clearly define the project purpose. Without a clear definition, it is uncertain if the project is a water dependent activity subject to the presumption of practicable alternatives. The administrative record contains varying statements by the Appellant describing the proposed project and purpose. The original application by the Appellant (received on 11 August 1997) stated that he wanted to reclaim his land and prevent erosion. In conversations with the NMFS personnel and in a letter dated 28 November 1997, the Appellant acknowledged the fill area would be used for parking boats and trailers. The second permit application (dated 27 December 1999) stated that the project purpose was reclaiming land, preventing erosion, and adding to the motel. A third permit application (dated 20 February 2000) stated that the purpose was to reclaim land and provide a recreational area for hotel visitors. The administrative record did not state whether the second application was returned to the Appellant or revised by the Appellant. Some of these activities may be water dependant while others are not. The MVD should require the Appellant to clearly define his project and its purpose(s) and make appropriate determination regarding water-dependency.

The administrative record did not sufficiently determine if the proposed project contains a special aquatic site. Special aquatic sites are identified as sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs and riffle and pool complexes (40 C.F.R. Subpart E). The information in the administrative record indicates that the site is part wetlands and part unvegetated shallows. However, there are other characterizations as well. The site is referred to as: 1) saline marsh and shallow water habitat; 2) saline marsh and vegetated shallow water bottoms; and 3) saline marsh and shallow open water bottoms. In the appeals conference, the MVN stated that the site consisted of saline marsh and unvegetated shallow open water bottoms. The RO corroborated that the site consisted of saline marsh and shallow unvegetated open water bottoms. It is therefore, possible that part of the site is a Special Aquatic Site (SAS) and is subject to the presumption of practicable alternatives, and part is open water and is therefore not subject to the presumption.

The MVN should characterize the site and consider the after-the-fact permit application in light of the redefined basic and overall project purposes, applying the presumption of practicable alternatives where appropriate. In the event the presumption does not apply, regulations allow the MVN to show that there are practicable alternatives that will accomplish the project purpose with less damage to the environment (40 C.F.R. 230.10(a)). If the MVN makes such a showing, the burden will be on the applicant to show that the MVN's alternatives are not practicable. After the receipt of all information and any rebuttal, the MVN should make a decision to grant or deny the requested after-the-fact permit.

Appellant's Reason 3: The NOD has wrongly characterized the area as "high quality." … The site is not contiguous to any large expanses of saline marsh and the area has been previously impacted by similar projects.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The MVN's characterization of the site's wetlands, the majority of which consisted of high quality saline marsh vegetated primarily by smooth cordgrass, is reasonable, and is documented in the administrative record.

Based on the 404(b)(1) guidelines, the MVN's DD, and the field review, the MVN's determination of the nature of the site's wetlands was appropriate. The MVN's DD reports that coordination with Federal and State organizations occurred. The MVN DD referenced the NMFS description of the site's wetlands, reinforcing the MVN's position that the saline wetlands are high quality. On page 9 of the MVN's DD, in the Biological characteristics and anticipated changes section, the MVN describes the functions and values associated with tidal saline marsh and shallow open waters found in barrier islands. On page 7 of the MVN's DD, Water quality (temperature, salinity patterns, and other parameters) section, the MVN documents the water quality functions associated with the wetlands.

The MVN acknowledges the site's wetland acreage was not contiguous to large expanses of wetlands, but it countered that the scarcity of wetlands and narrowness of the barrier island at that location contributed to the importance of the wetlands.

Appellant's Revised Reason 4: The NOD has issued permits in the past for similar projects. Specifically the Corps has issued permits to Cigar's Marina, Mr. Joseph Burregi, Mr. Joseph T. Arnona, Mr. Bobbie Collins, Mr. Webb Cheramie, Jr., Ms. Dana Cheramie, and Mr, (sic) Harry J,(sic) Cheramie which are similar in purpose and scope to Mr. Bourg's application. The issuance of the aforementioned permits indicates the arbitrary and capricious nature of the Corps' decision to deny Mr. Bourg's permit application and is nothing more than an attempt to punish Mr. Bourg for proceeding under a good faith presumption that he had a valid permit.

FINDING: This reason for appeal has no merit.

ACTION: No action is required.

DISCUSSION: The administrative record does not contain substantial information to show that the MVN denial decision was arbitrary and capricious. The Appellant alleges that seven similarly situated projects have received permits while his permit was denied. The Appellant alleges that these permits are located in the general vicinity of the Appellant's property and authorized similar work. The Appellants bear the burden of showing, by substantial information that other persons/permits/projects/applications were similarly situated and, in those cases, the MVN made different decisions. The information must show that the similar permits were located

within the vicinity of the contested permit, authorize similar work, and had similar project purposes and impacts.

The Appellant provided seven MVN permit decisions to support his claim that the MVN was arbitrary and capricious:

a. Mr. Joseph Burregi, SE(Caminada Bay)63, issued 29 November 1990

b. Cigar's Marina, EL-20-000-2148, issued 24 April 2000

c. Mr. Joseph T. Arnona, SE(Caminada Bay)52, issued 8 April 1994

d. Mr. Bobbie Collins, SE(Caminada Bay)50, issued 18 November 1987

e. Mr. Webb Cheramie, Jr. SE(Caminada Pass)1, issued 15 August 1994

f. Ms. Dana Cheramie, SE(Caminada Pass)12 , issued 2 September 1994

g. Mr. Harry J. Cheramie, Sr., SE(Caminada Bay)72, issued 14 June 1996

The alleged similarly situated permits involve the installation of bulkheads, riprap, and fill material in an effort to reclaim land lost due to erosion and the installation of piers for recreational or commercial use. A discussion of each alleged similar permit decision follows.

Mr. Joseph Burregi:

The Appellant failed to show that the permit decision for his application was different than Mr. Burregi's. The MVN provided sufficient information to show that while Mr. Burregi's initial application was similar, the project was modified as suggested by MVN in a way similar to that suggested for the Appellant's. Mr. Burregi's project is located on the same barrier island, adjacent to the Appellant's property. Mr. Burregi originally proposed constructing a bulkhead using sand filled longard tubes, dredging in an area to reclaim eroded shoreline; installing a wharf dock and boat sheds; filling for marsh creation; reclaiming land lost due to erosion; and installing a bulkhead. The MVN stated that the project would impact saline marsh and shallow unvegetated open water bottoms as the

Appellant's did. In a letter dated 10 January 1990, the MVN stated that the proposed project did not comply with the 404(b)(1) guidelines since a viable alternative existed. The MVN suggested an alternative that would meet the guidelines. Mr. Burregi revised the project to eliminate fill in the bay and limit fill placement to the existing ground. Therefore, the Appellant has not been treated differently than Mr. Burregi.

Cigar's Marina:

The Appellant failed to show that the permit issued to Cigar Marina was similarly situated. On 24 April 2000, the MVN issued a Programmatic General Permit (MVN PGP) to Cigar's Marina for the maintenance dredging of existing slips, maintenance and repair to piers, riprap and shore protection and fill area with culvert. Cigar's Marina was not located on a barrier island. The Cigar's Marina permit information provides limited information about the proposed work and associated impacts. Cross section drawings (Sheet 2 of 4 and Sheet 3 of 4) depict maintenance dredging and road widening. Dredged material would be deposited alongside a boat slip impacting approximately 0.25 acres. The drawings identified the placement of fill material associated with the road widening, but did not identify acreage impacts. Otherwise there is no information describing the type or extent of aquatic impacts. The information submitted by the Appellant does not detail the extent of wetlands impacted or attest to its similarity to wetland impacts found on the Appellant's property.

Mr. Joseph T. Arnona:

The Appellant failed to show that the permit issued to Mr. Arnona was similarly situated. Mr. Arnona's permit was originally authorized in 7 May 1984, extended in 8 May 1987, amended in 26 October 1990, and extended in 8 April 1994. Mr. Arnona's property is located on the same barrier island, near the Appellant's property. The permit authorized the reclamation of 1.02 acres, dredging and maintenance of an area and the installation and maintenance of a breakwater, six culverts, pilings, walkways, fill, bulkhead, longard tube, wharf, and buildings for a commercial marina. The only reference to wetlands is a statement on plan drawings referred to as "Sheet 1," which was provided with the permit application, which states, "Wetlands reserved 0.8 acres." The MVN Permit Evaluation and DD dated 8 April 1994, contain no descriptions of wetlands on the Arnona property or assessment of wetland impacts. The information submitted by the Appellant does not

detail the extent of wetlands impacted or attest to its similarity to wetland impacts found on the Appellant's property.

Mr. Bobbie Collins:

The Appellant failed to show that the permit issued to Mr. Collins was similarly situated. Mr. Collins' permit authorized the deposition of dredged material associated with the installation and maintenance of a bulkhead and the deposition fill material for erosion control. The Collins property was not located on a barrier island. The information submitted by the Appellant contains no description of wetlands on the Collins property, no assessment of wetland impacts, and does not attest to its similarity to those wetland impacts found on the Appellant's property.

Mr. Webb Cheramie, Jr. and Ms. Dana M. Cheramie:

The Appellant failed to show that the permits issued to Mr. and Ms. Cheramie were similarly situated. The permits issued to Mr. and Ms. Cheramie authorized the installation and maintenance of piers and fill for private recreational use and the reclaiming of land lost to erosion. Neither property is located on a barrier island. The drawings for both permits depicted some filling, but did not disclose if wetlands were present and/or impacted. Other than stating that both permits authorized similar work, the information submitted by the Appellant did not attest to the similarity of wetlands impacts to those on the Appellant's property. Additionally, the permits had different project purposes than the Appellant's. The permits issued to Mr. and Ms. Cheramie were for recreational use. The Appellant's permit was for commercial development.

Mr. Harry J. Cheramie, Sr.:

The Appellant failed to show that the permit issued to Mr. Cheramie was similarly situated. Mr. Cheramie was issued a permit to construct and maintain a wharf and bulkhead; fill for private recreational use; and reclaim land loss due to erosion. Mr. Cheramie's property was not located on a barrier island. While the MVN Statement of Findings dated 14 June 1996 stated that wetlands were considered and found not to be significant, there is no other characterization of wetlands found on the Cheramie property or description of wetland impacts. Other than stating that both permits authorized similar work, the information submitted by the Appellant does not attest to the similarity of wetlands impacts to those on the Appellant's property.

Additionally, the permits had different project purposes than the Appellant's. The permit issued to Mr. Cheramie was for recreational use; the Appellant's permit was for commercial development.

While the Appellant provided information that six permits within the general vicinity were issued for similar work, there was insufficient information that these permits had similar project purposes and wetland impacts. In the seventh permit, the decision by MVN was similar to that offered to the Appellant. The weight of the information did not provide substantial information to support the Appellant's reason for appeal that the MVN denial decision was arbitrary and capricious.

Appellant's Reason 5: The NOD failed to conduct a proper public interest review. … When applying the general evaluation criteria contained in 33 CFR 320.4(A)(2), it is difficult to understand how the NOD reached its determination that the proposed action would be contrary to the public interest with such an abbreviated public interest review.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The Appellant's claim that the MVN failed to conduct a proper public interest review was unsubstantiated. The Appellant was provided information regarding the Corps' permit criteria and had the opportunity to furnish arguments or additional rebuttal information to the District Engineer.

At the appeals conference, the Appellant's representative attempted to show how the MVN failed to conduct a proper public interest review. The Appellant acknowledged that information regarding public interest factors (project related impacts, alternatives, and public and private interests involved) was requested by MVN when he first applied for a permit, and that he did not provide a response. The Appellant's representative stated that during the permit evaluation for the after-the-fact permit application, the MVN failed to request this information again. The Appellant questioned how the MVN could have evaluated the public and private interest factors without Mr. Bourg's input.

Regulations found in 33 C.F.R. 325.2(a) detail standard procedures for processing of applications. After completing

these actions, the District Engineer will determine--in accordance with the record and applicable regulations--whether or not the permit should be issued and will prepare a statement of findings or a record of decision. If the final decision is to deny the permit, the applicant will be advised in writing of the reason(s) for denial. If the final decision is to issue the permit, the issuing official will forward the permit to the applicant for signature.

On numerous occasions the MVN provided the Appellant information regarding the public interest factors. The Appellant was provided a copy of the second public notice dated 23 May 2000. This disclosed the Corps of Engineers Federal Permit Criteria. In the MVN letter dated 10 July 2000, comments from the NMFS, the Chitimacha Tribe of Louisiana, and the Louisiana Department of Natural Resources were forwarded to the Appellant. The MVN suggested that the Appellant furnish written arguments or additional information to refute these objections/comments. The NMFS letter referenced earlier comment letters, discussed project impacts, and non-compliance with the 404(b)(1) guidelines. Telephone conversation records document that the MVN project manager discussed the permit status with the Appellant's agent, Mr. Del Caldwell, on 2, 22, and 23 August 2000; and with the Appellant's representative, Mr. Chris Trepagnier on 25 August 2000 and on 19 October 2000. The MVN consulted with the Appellant, interested parties and tribes. A public notice was issued. Comments were received and the Appellant was given the opportunity to respond. Regulations found in 33 C.F.R. 325.2(d)(5) allow the District Engineer to proceed with a final decision regarding permit issuance if the applicant does not respond with the requested information. The MVN decision to proceed with a decision without the Appellant's response to the received comments fully complies with the public interest review requirements of the Corps of Engineers regulations.

CONCLUSION: For the reasons stated above, I conclude that the Appellant's Reason 2 has merit, and the Appellant's Reasons 1, 3, 4, and 5 do not have merit. The case has been remanded to the MVN for reconsideration.

/signed/
RICHARD B. JENKINS
Colonel, Corps of Engineers
Acting Division Engineer

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