ADMINISTRATIVE APPEAL DECISION

Herman Wayne Sharp/The Sharp Land Company
New Orleans District File No. EB-19-970-1093
July 26, 2000

Review Officer: James E. Gilmore (Acting for the Mississippi Valley Division), U.S. Army Corps of Engineers (USACE), Southwestern Division, Dallas, TX

Appellant/Applicant Representatives: Mr. H. Wayne Sharp and Ms. Claire P. Sharp, Shreveport, LA

Receipt of Request for Appeal (RFA): June 10, 1999

Site Visit Date: April 25, 2000

Appeal Conference Date: April 26, 2000

Background Information: The Corps of Engineers, New Orleans District (MVN) involvement with this action started in December 1993 due to unauthorized activity by the appellant. On February 17, 1994, MVN referred the case to the Environmental Protection Agency (EPA) for further enforcement action. The EPA issued Mr. Sharp and the Sharp Land Company three Administrative Orders (AOs) dated October 4, 1994, January 27, 1995, and June 20, 1995, respectively. Each AO required that Mr. Sharp and The Sharp Land Company perform initial corrective measures and either completely restore the site or--within 30 days of receiving the AO--apply for an after-the-fact permit from the Corps. The Corps received a complete after-the-fact permit application from Herman Wayne Sharp and The Sharp Land Company in October 1996. A Public Notice was issued on December 4, 1996 for the following work (as stated in the public notice): "to dredge and maintain four ponds and a drainage channel and clear, grade and deposit fill for a roadway, homesite, garden and disposal area. The proposed project would remove about 17,500 cubic yards of material from the pond areas and drainage ditch. About 100 cubic yards of limestone would be hauled in and used in roadway construction. Some of the dredged material would be used as fill for the roadway and homesite, and the remainder of the material would be stockpiled on site. As currently proposed, the project would adversely impact about 4.0 acres of wetlands previously cleared by logging activities." A draft permit was offered to the Sharps in July 1998. The Sharps declined the draft permit. MVN denied the permit April 12, 1999. The denial is being appealed.

The AOs issued by EPA required the appellant to perform initial corrective measures. In particular, the appellant was required to "plug" portions of the drainage ditches located adjacent to the road constructed on the property. The EPA determined that the primary function of the ditches was to drain the wetlands located on the site. Completion of the "initial corrective measures" was a condition of the AOs that had to be completed before an after-the-fact (ATF) permit could be submitted to and accepted by the MVN. No documentation verifying the completion of the required corrective measures by the EPA or the MVN was found in the administrative file. Additionally, there was no record indicating the EPA had contacted the MVN notifying them of the completion of the required corrective measures which would allow the MVN to accept an after-the-fact permit application. During the April 26, 2000 appeal conference, the appellant stated that he had not "plugged" the drainage ditches as required by the AOs.

In spite of the lack of clarity in the record as to whether the appellant completed required corrective measures, the administrative file does document the MVN's acceptance of the application and the requirement of a Tolling Agreement. The MVN's acceptance of the application and the requirement of a Tolling Agreement implied that initial corrective measures had been completed to the satisfaction of the District Engineer. In accordance with 33 CFR 326.3(e)(1) "The District Engineer will accept such a permit (ATF) after the completion of any required initial corrective action."

The lack of clarity in the record as to whether appellant has implemented corrective measures is a procedural deficiency requiring correction. Pursuant to 33 C.F.R. Section 326.3(e)(1), a District Engineer may only accept an after-the-fact (ATF) permit upon completion of the initial corrective measures. Similarly, pursuant to 33 C.F.R. Section 331.11 an RFA will not be accepted until the initial corrective measures have been completed to the satisfaction of the District Engineer. As the administrative record did not contain information that appellant had not completed the initial corrective measures, MVD did not have sufficient information to not accept the RFA. Based, on the information obtained during the appeals conference to the effect that appellant had not completed the initial corrective measures, the question arises as to whether the District Engineer properly accepted the ATF permit and whether MVD properly accepted the RFA.

Since MVN accepted the appellant's ATF permit application and completed its evaluation of the project, and since the final agency action is not complete until the appeal process is complete, I have determined that the appropriate action is to render a decision regarding the RFA and further to require that the administrative record clarify initial corrective actions. Specifically the MVN must:

1. Coordinate and document that EPA has verified the completion of the corrective actions as dictated in the EPA's AO dated June 20, 1995 or alternatively procure in writing that EPA has withdrawn the AO requirements.

2. Upon completion of these items, reevaluate the acceptance of the ATF permit.

Summary of Decision: I find the appeal has merit for the reasons given below. I find that:

a. The District Engineer (DE) did not adequately determine the limits of jurisdiction for the project site by having a wetlands delineation completed;

b. The DE should clarify the administrative record regarding the silviculture exemption;

c. The DE should re-evaluate the project as two single and complete projects;

d. The DE should document the impacts on water quality; and

e. The DE should clarify the summary of comments received.

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

Appeal Evaluation, Findings, and Instructions to the MVN District Engineer

Reasons for the appeal are as presented by the appellant and are shown in **bold** type.

Reason 1, Jurisdiction and Delineation: The applicants have claimed that the Corps does not have jurisdiction and that the delineation of wetlands is inaccurate. The applicants understand from reading the proposed regulation that they are not allowed to appeal the matters herein, but retain all their rights to bring other legal actions related thereto.

Finding: This reason for appeal has merit. The reason has merit because MVN did not complete a jurisdictional wetlands delineation. As discussed below, MVN properly determined that the site contained waters of the United States (US) but did not determine the precise limits of waters of the US involved. MVN needs to determine the limits of waters of the US involved so that the limits of jurisdiction, the amount of adverse impacts, and the appropriate amount of mitigation required to compensate for unavoidable adverse impacts may be determined.

Action: The DE should determine the limits of waters of the US on the project site so that he is able to accurately determine the limits of Corps jurisdiction under Section 404 of the Clean Water Act (CWA). In addition, he will be better able to determine the amount of mitigation required to compensate for all unavoidable adverse impacts.

Discussion**:** When making its initial assessment of the property, MVN used a combination of onsite/off-site methodology to make its jurisdictional determination. This determination was a preliminary determination to determine if waters of the US existed on the property. It was not precise enough nor was it meant to determine the exact limits of waters of the US. The method MVN used to determine if waters of the US existed on the site involved using aerial photography of the site and conducting a preliminary jurisdictional determination using the *1987 Wetlands Research Program Technical Report Y-87-1 Corps of Engineers Wetlands Delineation Manual*. Due to limited resources, this is an acceptable method of determining jurisdiction.

The appellant's position, as stated in the RFA, is that the Corps does not have jurisdiction and that the delineation of wetlands is inaccurate. (Neither the Corps nor the EPA made a delineation of the property.) The appellants are basing their belief that the Corps or EPA does not have jurisdiction because they assert that all the work performed on site was exempt due to the fact that it was part of an ongoing silviculture activity. The record indicates that MVN determined that the work performed was not part of an ongoing silvicultural operation. MVN also contends that even if the appellant's work was part of an established silvicultural operation, it still failed to meet the exemption, because the site had been converted to a different use--in this case a subdivision (323.4(a)(1)(ii)). (The issue of whether or not any or all of the work performed on the site was exempt under 404(f)(1)(A) is further discussed under Reason 2.)

On several occasions, the applicant requested, in writing, that the Corps and/or EPA perform a wetland (boundary) delineation identifying the limits of waters of the United States on the 160-acre tract. However, for reasons not clearly documented in the administrative record, a delineation of the tract was never performed. The importance of having the project site delineated was emphasized in a MVN letter to the Sharps dated March 12, 1997. MVN letter

stated that mitigation was required, but because a delineation had not yet been performed, the amount of mitigation required could not be determined. The EPA's June 20, 1995 AO stated:

> You are still required to either fully restore all impacted areas or implement interim protection measures and apply for an after-the-fact permit from the Corps of Engineers (COE). This must be accomplished within thirty (30) days of receipt of both this Order and the site wetland delineation currently being prepared by the COE. This 30 day time requirement does not start until both documents have been received. Further indication for the need of a delineation is also found in a letter from the EPA to the applicants stating:
>
> . . . the wetland hydrology indicators that are used for determining whether or not the hydrology criteria are met, although met; they are weak at best.

In this same AO, the EPA indicated that the applicant felt that only 30% of the property is jurisdictional, but--in the spirit of compromise—they were willing to accept that 50% of the property is subject to Federal regulation under the CWA. MVN feels that 95% of the property is jurisdictional. It is obvious that there is a discrepancy in the amount of area that is considered jurisdictional on this particular site. Even if MVN, EPA, and the appellant agree that 50% of the property is jurisdictional, a delineation is still required to determine the amount of impacts and the amount of compensatory mitigation required for all unavoidable impacts.

The administrative record also contains a letter from appellant's attorney stating that the Corps agreed to perform a wetland delineation on the property. There is no evidence in the administrative record that a wetland delineation was performed on the property by either the Corps or the EPA. The administrative record does not give a clear, definitive answer to the question regarding how much of the project site is subject to Federal regulation.

The record lacks a wetland delineation. The record further lacks adequate justification of why there is no wetland delineation. Accordingly, preparation of a wetland delineation is required so that the District Engineer can determine the limits of jurisdiction and what portions of the project requires a Corps permit.

Reason 2, Silviculture Exemption: The Corps has maintained that the cutting of trees on the tract in question does not fall within the silviculture exemption. There is no substantial evidence in the administrative record to support this allegation. The tract historically was used for silviculture as clearly admitted in the Corps' evaluation and Decision Document. The applicants were and are practicing silviculture on their property. This is evidenced by receipts for purchases of seedlings, the planting of seedlings, the timber cruise on adjacent property, the purchase contract on adjacent property, and the fact that the property is not being used for any other purpose. *There can be no change in use until there is a new use*. To hold otherwise is plainly contrary to law.

Finding: This reason for appeal has merit. The decision document does not contain sufficient information or analysis to support MVN's determination of inapplicability of the silvicultural exemption. Determining if all or part of the work performed or to be performed meets the criteria to be exempt under Section 404(f)(1)(A) has a direct bearing on whether a permit is required for all or part of the work performed by the appellant. Further clarification is needed.

Action: The DE needs to clarify the administrative record and Environmental Assessment/ Statement of Findings (Decision Document) regarding the applicability of thesilviculture exemption. The DE needs to make a final government determination, with the concurrence of the EPA, if all or any part of the work done on the project site meets the Section 404 (f)(1)(A) silviculture exemption.

Discussion: The silviculture exemption issue is one of the appellant's primary points of contention with the Corps and the EPA. The record is unclear and conflicting as to the rationale of the inapplicability of the silvicultural exemption. The MVN position is that none of the work is exempt under 404(f)(1)(A) and the EPA's position is that some of the work meets the criteria to be exempt under 404(f)(1)(A). The Corps' initial involvement with this action started with the appellant removing trees from the site and constructing an improved road. Throughout the enforcement and permit evaluation processes, the appellant has maintained that the work performed was exempt under Section 404 (f)(1)(A) and therefore did not require a permit. MVN's position has been and remains to be that the work performed does not meet the criteria to be exempt under Section 404 (f)(1)(A). MVN determined that the work performed was not part of an ongoing silvicultural operation. MVN also contends that even if the appellant's work was part of an established silvicultural operation, it still failed to meet the exemption, because the site had been converted to a different use--in this case a subdivision (323.4(a)(1)(ii)).

In a December 22, 1994 letter to the appellant, the EPA explained why the applicants' activities failed to meet the silvicultural exemption. However, in the EPA's June 20, 1995 AO, it appears that the EPA agrees that work performed on a portion of the 160-acre tract does meet the silviculture exemption. The EPA required the appellant to submit documentation that supported their claim that the work performed was part of an ongoing silviculture operation. According to the appellant, the required documentation was submitted to the EPA. The EPA representative at the appeal conference stated that he did not review the documents but assumed that the documentation was adequate and that the EPA accepted the fact that part of the work performed did meet the criteria to be exempt under the silviculture exemption. During the appeal conference, the appellant again emphasized that the work performed on the site met the silviculture exemption and referred to the EPA's June 20, 1995 AO as proof.

MVN reiterated its position that the work performed did not meet the criteria to be exempt under Section 404 (f)(1)(A). The Decision Document does not discuss the silviculture exemption in any detail and does not provide for a reconciliation of the different positions of MVN and EPA.

Neither the administrative record nor the Decision Document give a clear, definitive answer to the question regarding how much of the work performed by the applicant is subject to the Section 404(f) exemption. The Decision Document should be revised to provide clear documentation and analysis regarding the applicability of the silviculture exemption.

Reason 3, Joint Application: The Corps forced the applicants to submit a joint application which is the source of confusion that is apparent on the face of the poorly written and poorly reasoned Evaluation and Decision Document. The very first item addressed in the Decision Document states that Mr. Sharp does not need the roadway. That is true - The Sharp Land Company needs the roadway to access the remainder of its property and to continue its silviculture operations. There are two entirely different projects jumbled

together in the Decision Document. Mr. Sharp is applying for a permit for a homesite, and the Sharp Land Company is applying for a permit to legitimize a roadway with shallow roadside ditches to enable it to continue its operations. These two different requests and their concomitant interests and needs cannot not adequately, fairly or clearly be addressed in one permit application. Forcing the applicants to file a joint application is arbitrary, capricious and abuse of discretion.

Finding: This reason for appeal has merit. It is appropriate for MVN to consider two permit applications rather than a combined permit application.

Action: The DE should reevaluate the project as two separate and complete permit actions.

Discussion: A March 25, 1995 letter from MVN to the appellant's attorney stated:

> . . . it is our opinion that Mr. Sharp should apply for the work on his lot, both unauthorized and proposed. Furthermore, The Sharp Land Company is responsible, and should apply for the entire unauthorized roadway, ditches and all other unauthorized work not legitimized by another party, such as the property's purchaser.

This letter supports the appellant's position that each action should have been evaluated as a single and complete action. During the Appeal Conference, the project manager stated that because the activity was a violation, he wanted to make sure all unauthorized activities were covered under the permit. The administrative record does not support the MVN conclusion that both the work done by Mr. Sharp on his personal property and the work done by The Sharp Land Company should have been evaluated as one project.

On July 17, 1998, the MVN offered a draft permit to the appellant. The MVN modified the appellant's original proposal to avoid and minimize adverse impacts to wetland functions and values. The permit would have authorized the appellant to dredge and maintain a pond and a drainage way and to clear, grade, and deposit fill material for an access roadway, homesite, and garden. Although the public notice states 4 acres will be impacted, a total of 5.5 acres of wetlands would have been adversely impacted by the authorized work. The appellant declined the offered permit, because it did not allow them to keep the entire road. According to the appellant, The Sharp Land Company needed the road so that the company could continue silviculture activities on its own property. Issuing the draft permit for the homesite and not for the road gives the appearance that--without fully evaluating the Sharps' need for the project--MVN inappropriately made a decision that the work requested by The Sharp Land Company was contrary to the public interest.

Reason 4, Ownership of Property: The Corps, in denying the permit, has ordered the restoration/replanting of approximately 70 acres that at one time was owned by The Sharp Land Company. Over half this property is no longer owned by the Company, and was not even owned by either Mr. Sharp or The Sharp Land Company when the original cease and desist order was issued. The other owners will not agree to having the road destroyed or having their property replanted. The Decision Document does not address this problem.

Finding: This reason for appeal does have merit. The administrative record lacks pertinent ownership information.

Action: Address ownership of property in the Decision Document.

Discussion: MVN needs to determine who the property owner(s) were at the time the work was performed and who was responsible for causing the discharge of fill material into waters of the US. In addition, MVN needs to determine if The Sharp Land Company sold any portion of the property after receiving the Corps cease and desist order from MVN's district commander.

Mr. Sharp and/or The Sharp Land Company were initially identified as the responsible party that caused the unauthorized discharge of fill material into waters of the United States. In a letter dated December 22, 1994, to Ms. Sharp and The Sharp Land Company, the EPA addressed the issue of land ownership, however MVN did not. The EPA stated that the present owners of the property would be allowed to apply for an after-the-fact permit to retain the unauthorized work and for any proposed work. If, after the receipt of the Corps cease and desist order, Mr. Sharp and/or The Sharp Land Company sold the property, Mr. Sharp and/or The Sharp Land Company are still accountable for the violation.

MVN needs to obtain documentation that verifies property ownership. It is imperative that the Corps and EPA be consistent in their handling of the ownership issue. MVN should not hold Mr. Sharp or The Sharp Land Company responsible if the EPA is telling them that they are not responsible for land they no longer own.

An important part of this issue relates to the appellant's reasons 1 and 2. First, a determination of the limits of waters of the US is needed to determine the amount of impacts and the amount of compensatory mitigation or restoration required. Secondly, it is important to determine if any or all of the work performed met the criteria to be exempt under Section 404(f)(1)(A). If the work is exempt then a permit is not required; therefore no mitigation/restoration is required.

Reason 5, A Compilation of Subordinate Issues Addressing the Guidelines under Section 404(b)(1). There is no substantial evidence in the administrative record to support the following allegations:

The appellant has broken down Reason 5 into 15 subsections. Reason 5 deals with MVN's review of the project's impact under the Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material. The Guidelines are the substantive criteria used in evaluating discharges of dredged or fill material under section 404 of the Clean Water Act. The guidelines apply to all Section 404 permit decisions.

For activities involving the discharge of dredged or fill material subject to the CWA Section 404, the Corps regulations (33 CFR 320.4 (a)(1)) require that a permit will be denied if the discharge that would be authorized by such permit would not comply with the CWA Section 404 (b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria, including water quality certification and/or coastal zone consistency, a permit will be granted unless the DE determines it would be contrary to the public interest. (See 33 CFR 320.2 and 320.3.)

Several of the issues raised by the appellant under Reason 5 have been, to some extent, addressed under Reasons 1 through 4 of this document. Reasons 5 (a), (g), (j), and (m) deal with the amount of direct and indirect adverse impacts the project has or will cause. Under Reason 1 of this document, the need to determine the limits of jurisdiction was discussed. It is obvious that there is a discrepancy in the amount of area that is considered jurisdictional on this particular site.

Reasons 5 (g) and (j) as well as Reason 5 (i) deal with water quality issues. MVN is justified in addressing water quality concerns even though the State has issued a water quality certification for the project. MVN is obligated to consider water quality impacts to wetland values and functions.

Reason 5(a): Section IIA states:

Issuance of a permit for all the requested work would have adversely impacted approximately 70 acres of forested wetlands as a result of draining and filling. The work requested by Mr. Sharp affects less than 1 acre of a 10-acre tract. The roadway affects only about 1 acre of the larger 70-acre tract. The EPA stated that the work done the applicant's….

Finding: This reason for appeal does have merit based on the fact that the direct and indirect impacts are not thoroughly addressed in the Decision Document.

Action: The DE should review and revise the permit evaluation and Decision Document to add clarifying documentation concerning the amount of direct and indirect adverse impacts.

Discussion: The appellant does not believe that MVN was within its authority to consider the secondary indirect impacts from the proposed work and the work already completed. The Corps authority is derived from the National Environmental Policy Act (NEPA) implementation procedures for the Regulatory Program at 33 CFR 325, Appendix B. Part 7(b) of these regulations provides a discussion on determining the scope of analysis under the NEPA. Part 7(b)(2) states:

> A district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.

Under the NEPA, the DE's review can be extended to the entire project, including portions outside waters of the United States, if sufficient Federal control and responsibility over the entire project exists. Once the DE has established the scope of analysis, the project analysis must include the direct, indirect, and cumulative impacts on all Federal interests within the purview of the NEPA. The MVN was within its authority to consider the secondary indirect impact from the proposed work and the work already completed.

However, MVN did not provide supporting documentation regarding the amount of direct and indirect impacts that the proposed and completed work did or would cause. In fact, there are

differences between the amount of impacts that the project will cause or has caused as described in the public notice, the offered permit, and the denied permit. The Public Notice states that the project will adversely impact 4 acres previously cleared by logging activities. The draft permit, which was modified by MVN, stated an adverse impact of 5.5 acres of wetlands. This is an increase of 1.5 acres of direct impacts over what was described in the Public Notice. The Decision Document for the denied permit states that there will be a "direct destruction of 8.3 acres of wetlands." This was an increase of approximately 3 acres of direct impacts from what was described in the draft permit. The Decision Document does not provide the analysis for these increases. In the Public Notice MVN does not mention the possibility of 70 acres of indirect impacts if the work is authorized; it is only mentioned in the Decision Document. There is no analysis of this discrepancy. Review of the comment letters received by the Federal and state resource agencies do not support the MVN determination of 70 acres of indirect impacts. The MVN did not provide sufficient documentation to support portions of its environmental impact analysis in the Decision Document.

Reason 5(b): Section IIB states, "These project components were not needed to meet the applicants' purposes to reforest the site and provide for a home site." The Document offers no substantial evidence to back up this statement.

Finding: This reason for appeal does not have merit. The appellant has not provided supportive documentation.

Action: No action is required.

Discussion: The appellant stated that without the improved roadway he will not be able to continue his silvicultural activities. Not having an improved, all-weather road will not preclude Mr. Sharp or The Sharp Land Company from continuing silvicultural activities on the property they own, nor will it prevent Mr. Sharp from accessing his homesite. Mr. Sharp was offered a draft permit that would have allowed him ingress and egress to his homesite. In addition, the appellant stated in his RFA that the other property owners would not agree to the road being removed. This gives the appearances that the road's primary function is for access to homesites and not for forestry activities. The appellant has not provided any supportive documentation that without the road he would neither be able to access his homesite nor continue forestry activities.

Reason 5(c): Section IIB states, "The logging road and drainage improvements are not required to manage the site for bottomland hardwood silviculture." Normal practices usually employ skidders to remove felled trees to a central point from which the logs are loaded onto trucks. The site is not so large that the site cannot be managed without improved roadways to reach remote sites. However, the applicants insisted that an improved roadway was needed to continue long-term forestry practices. Best Management Practices (BMPs) which are recommended by the Corps and the EPA do not substantiate these statements.

Finding: This reason for appeal does not have merit. The appellant did not provide supportive documentation.

Action: No action is required.

Discussion: As stated in the discussion under Reason 5(b), the appellant did not provide supportive documentation that an improved road was required to continue silvicultural activities. As previously stated in the appellant's RFA, adjacent property owners would not agree to having the road removed. This comment substantiates the Corps and the EPA position that the road's primary purpose is not for silvicultural activities, but for ingress and egress to the appellant's property.

With regard to the BMPs, the Corps and the EPA stated that the BMPs listed in the 1986 regulations are the BMPs that should be used when designing a project.

Reason 5(d): Section IIC states that the water table is within a depth of 10 inches during the wet periods. This only addresses the low areas and does not address the high areas referred to in the paragraph. Additionally, evidence of the existence of high elevations was provided to the Corps.

Finding: This reason for appeal does not have merit. The information was obtained from the U.S. Department of Agriculture.

Action: No action is required.

Discussion: This information was obtained from the U.S. Department of Agriculture's Soil Survey for West Baton Rouge Parish. This data is verified for each soil series found in a county or parish nationwide.

Reason 5(e): Section IIC states that the natural contours and elevations would be altered by excavation and deposition of fill materials. It is important to note that there are few natural contours left on this tract. At one time a large portion of the tract was farmed. Many of the drainage ditches on the property were manmade. Additionally, repeated timber cutting has acted to destroy or degrade various drainage areas.

Finding: This reason for appeal does not have merit. MVN was reasonable in its evaluation.

Action: No action is required.

Discussion: MVN did not make an unreasonable assumption in stating that the natural contours and elevations on the site would be impacted by the project. It is reasonable to assume that excavation and deposition of fill material would change existing contours and elevations on the project.

Reason 5(f): Section IIC also states that the roadside ditches facilitated movement of some surface water and that, prior to these alterations, water tended to pond on the surface. Actually the drainage patterns were degraded due to repeated logging, and the prior completed work only acted to restore the drainage. Additionally, the shallow drainage ditches along the roadway do not act to provide any substantial drainage to the tract. This is verified by an engineer's report in the record. There is no substantial evidence that these ditches cause any substantial drainage whatsoever; they only act to drain the roadway itself. Additionally Brusly, the head of Enforcement stated on site that the ditches did not drain the property. This is consistent with wetland reference material stating that a few

ditches cannot drain a tract of land and only impact adjacent property. (Also see the attached EPA letter.)

Finding: This reason for appeal has merit. MVN's conclusion is confusing and is not supported by the record. The record does not contain information as to whether MVN considered the information contained in a hydrologic study provided by the appellant.

Action: The DE should either provide further documentation and analysis to substantiate the conclusion or modify the conclusion. The DE should also address the finding in the appellant's hydrologic study.

Discussion: On page 4 of the Decision Document, MVN states:

> Existing drainage patterns have been affected by work performed prior to obtaining a permit. Although one natural drainage way has been restored, another still functions to drain storm water runoff from the site. The roadside ditches also facilitate movement of some surface water. Prior to these alterations, water tended to pond on the surface away from the drainage way as the project had very little slope. Water remained trapped in the wetlands and either slowly percolated into the ground or was lost due to evapotranspiration.

Resolution of the enforcement action associated with this project required the appellant to "plug" portions of the roadside ditches to prevent draining the site. However, it appears from the statement that restoration of the natural drainage ways causes storm water to drain off the project site, not just the roadside ditches and that the roadside ditches only play a minor role in draining the project site. This portion of the decision document does not support the conclusion that the roadside ditches are the primary cause of draining the site.

Reason 5 (g): Section IIC on page 5 of the MVN Decision Document states that the "project" would seriously reduce the ability of the project site wetlands to perform functions contributing to maintaining water quality by the direct destruction of 8.3 acres of wetlands. First of all, the requested projects do not destroy 8.3 acres of wetlands. Secondly, the functions contributing to water quality such as preventing contaminants from other tracts from moving into deep water are not applicable to this tract. No water flows on this tract from other property. Directly to the north of the property lies a major excavation preventing any water from the natural direction of water flow. Water originates on the project site only.

Finding: This reason for appeal has merit. MVN's conclusions are not supported by the record. Additional analysis and documentation are needed with regard to the requirements of Section 401 of the Clean Water Act.

Action: The DE should either provide further documentation and analysis to substantiate the conclusion or modify the conclusion.

Discussion: The public notice states:

> [t]he project would adversely impact about 4 acres of wetlands previously cleared by logging activities.

The administrative record contains no supporting documentation regarding direct impacts to 8.3 acres. The 8.3 acres are mentioned only in the Decision Document. In addition, Regulatory Guidance Letters 86-6 and 90-4 state:

> The DE can usually presume that a state's water quality certification satisfies the requirement of Section 401 of the Clean Water Act (CWA), 40 CFR 230.10(b)(1), and 33 CFR 320.4(d).

The guidance also states:

> Section 320.4(d) provides that a state's certification of compliance with applicable effluent limitations and water quality standards will be conclusive with respect to water quality considerations, unless the EPA advises the District Engineer of "other water quality aspects" that he should examine.

The EPA did not comment on the project. The Louisiana Department of Environmental Quality (DEQ) issued a 401 Water Quality Certification on December 30, 1996. The certification stated that it was the DEQ's opinion that the proposed project would not violate water quality standards of the State of Louisiana. This opinion is based on the Corps public notice. If the information contained in the public notice is not correct, the DE should request a new water quality certification based on the new information.

Reason 5(h): Section IIC on page 6 of the MVN Decision Document states:

> **It is anticipated that the hauled in fill material would be clean sand or clay material obtained off site. There is no evidence in the record that the Applicants intend to haul any material from off site. Any fill material would be taken from the existing site.**

Finding: This reason for appeal does not have merit. MVN's statement is accurate.

Action: No action is required.

Discussion: MVN is basically stating that any fill material that might have to be obtained off site, including the limestone, would be free of contaminants and would not cause a water quality problem.

Reason 5(i): Section IIC on page 6 of the MVN Decision Document states:

> **(t)he proposed project would result in serious, localized and long-term direct and secondary adverse impact to the water quality functions currently performed by the project site wetlands.**

The preceding paragraph stated that "the secondary adverse impacts to water quality should be minor, short term and localized." This is clearly contradictory.

Finding: This reason for appeal does have merit. The evidence in the record does not support MVN's determination

Action: The DE should either provide further documentation and analysis to substantiate the conclusion, or modify the conclusion consistent with available information.

Discussion: Under Reason 5(g) above, MVN is directed to review its documentation regarding compliance of the project with state water quality standards.

Reason 5(j): Section IIC on page 6 of the MVN Decision Document also states:

> **The proposed project would fill and/or adversely affect through direct and secondary impacts approximately 70 acres of bottom land hardwoods. The wetlands on the project site function to store storm-water runoff following rainfall events.**

First of all, the issue of the amount of acres affected was addressed above, and there is no storm water runoff because of the excavated tract to the north.

Finding: This reason for appeal does have merit. The evidence in the record does not support MVN's determination.

Action: The DE should either provide further documentation and analysis to substantiate the conclusion or modify the conclusion.

Discussion: Consistent with the discussion in Reasons 5(a) and 5(g) above, MVN is to review its documentation regarding compliance of the project with state water quality standards.

Reason 5(k): Section IID regarding biological characteristics and expected changes on page 8 [of the MVN Decision Document] states:

> **That it is anticipated that the habitat value would eventually be quite high.… The proposed project would eliminate the habitat value and other functions performed by the wetlands.**

The work done by the Applicants has actually improved the habitat value. In fact the same trees noted on adjacent tracts are growing on the project site, including elderberry and blackberry. Also note that the EPA was satisfied with the natural reforestation on the tract. This section additionally states that the Louisiana Black Bear also occurs within the forested wetlands near the proposed site. On page 10, this is refuted by the statement that discussion with local residents have not seen any bears in the project vicinity and that discussion with representatives of FWS indicate that the proposed project would not likely affect the species or habitat critical to the survival of the species. This is because human occupation in adjacent areas would have already affected the occurrence of the species in the area once the actual effected acres were determined.

Finding: This reason for appeal does not have merit. The appellant misquoted the document.

Action: No action is required.

Discussion: Review of the Decision Document indicates that the appellant misquoted the document. (The MVN stated that "it is anticipated that the habitat value would eventually be quite high.") The actual statement by MVN was:

> It is anticipated that without the proposed project, the habitat value and other wetland functions would eventually be quite high improving with the growth of a forest ecosystem.

What the MVN is saying is that once the site revegetates, habitat values will increase. The FWS supported the MVN opinion of the potential adverse impacts to the wildlife habitat that the proposed project could cause to the area.

With regard to impacts to the Louisiana Black Bear, MVN simply stated that the bear occurs in forested areas near the project. MVN did not state that the project would adversely impact the bear or its habitat.

Reason 5(l): Section IIE, in addressing aesthetics of the aquatic ecosystem states that the

> **"site alteration resulting from project construction and facility installation would cause serious visual impacts on the forested view provided by the property from the surrounding development."**

Applicants take exception to the allegation that there are "serious visual impacts on the forested view." This suggests that the forest is being eliminated which is totally untrue. This type exaggeration is typical of the Document and should throw suspicion as to the Document overall accuracy. The Applicants do agree that the visual impacts would have minimal effects on the human environment.

Finding: This reason for appeal does not have merit. MVN's findings were reasonable and supported by substantial evidence in the record.

Action: No action is required.

Discussion: Section 230.53, Aesthetics, states that:

> Aesthetics associated with the aquatic ecosystem consist of the perception of beauty by one or a combination of the senses of sight, hearing, touch, and smell. Aesthetics of aquatic ecosystems apply to the quality of life enjoyed by the general public and property owners.

MVN did state that the project would cause serious visual impacts on the forested view without providing supporting documentation. However, the final sentence of this discussion states, "It is anticipated that visual impacts would have minimal effects on the human environment."

Based on the fact that no adjacent property owner commented on the project supports MVN finding that the project will have minimal impacts on the human environment.

Reason 5(m): Section IIE, page 12 [of the MVN Decision Document] states that the project would result in the change of forestry type on the 8.3 acres of the project (the amount of which is contested) and of the remaining 61.7 acres because of the drainage of the site and the replanting of less wet-tolerant species. This statement is not based on the facts. More than half of the 71-acre tract is owned by other parties, and no work has been done on these tracts other than a narrow, crude logging road with shallow ditches that drain the road. Additionally, the planting of trees on Tract L amounts to a very small area and the trees are all hardwood species which would not change the site to an upland area. Additionally, the Decision Document conclusion on this matter is not consistent with the law on change of use.

Finding: This reason for appeal does have merit. The record does not support MVN's conclusion.

Action: The DE should review and revise the permit evaluation and Decision Document to add clarifying documentation concerning the amount of direct and indirect adverse impacts.

Discussion: The issue of how much area would be impacted by the project has been discussed previously in this document. The DE has been instructed to perform a wetland delineation to determine the limits of jurisdiction on the tract and to re-evaluate the projects as separate and complete actions.

Reason 5(n): Section IIE on page 12 [of the MVN Decision Document] also addresses economics and states that since the applicant has sold most of the area surrounding the project site:

> **the roadway would enhance the marketability of the remainder of the property more than provide an economical method of managing the site.**

There is no substantial evidence that the roadway would enhance the marketability of the remainder of the property more than provide an economical method of managing the site. If this were true, timber companies would never bother to building permanent logging roads.

Finding: This reason for appeal does not have merit. MVN made a reasonable conclusion.

Action: No action is required.

Discussion: Section 320.4(q) states:

> When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place.

Since the appellant has sold portions of the property, it is a reasonable to conclude that having an all-weather road to access the property makes it more marketable to potential buyers.

Reason 5(o): Section IIE, page 13 [of the MVN Decision Document] lists the criteria of "consideration of private property" and refers to the discussion in Alternative and Economics. This is clearly an inadequate consideration of property. The sections referred to do not give this proper attention nor do they address the fact that property required to be replanted belongs to other people, that the requirements that the roadway be destroyed and replanted will deprive them of reasonable access to their property, to mention only a few property concerns that should be addressed. Failure to address this concerned violated guidelines promulgated by the Corps itself.

Finding: This reason for appeal under the Alternative and Economics section does not have merit. The MVN analysis was adequate for the project. However, we found merit in the Property Ownership section in Reason 4 above.

Action: No other action is required.

Discussion: Section 320.4(g)(1) of the CWA states:

> An inherent aspect of property ownership is a right to reasonable private use. However, this right is subject to the rights and interests of the public in the navigable and other waters of the United States, including the federal navigation servitude and federal regulation for environmental protection.

A review of the Alternatives and Economics section of the Decision Document indicates that MVN analysis was adequate for the project. MVN determined that authorizing the discharge for a home site was not contrary to the public interest. MVN found that an all-weather road was not needed to manage the remainder of the site for silvicultural activities. However, the appellant states that MVN did not give proper consideration to the other property owners' needs for the road. Appellant's own statements support MVN's finding that the road primarily serves as an access road for the property owners and not as a forest road.

Reason 6, Comments Received: The Decision Document failed to give proper weight to the fact that there were no adverse comments, and no one objected granting the permit. Even the EPA did not comment. Additionally, this section of the Decision Document suggests that there were multiple comments indicating that:

> **permit issuance would not be contrary to the overall public interest if *the project were modified to minimize impacts to only those areas necessary to implement the homesteading of Tract L*. [emphasis added]**

We have read no comments that so state. The only comment requesting mitigation or minimization was by FWS [U.S. Fish and Wildlife Service]. If there were other comments requesting that the project be "modified to minimize impacts to only those areas necessary to implement the homesteading of Tract L," we have not seen them.

Findings: This reason for appeal has merit; the evidence in the record does not support MVN's conclusion.

Action: The DE should either provide further documentation and analysis to substantiate the conclusion or modify the conclusion.

Discussion: Review of the comments received and the Summary of Comments Received Section of the Decision Document revealed that there is some discrepancy in what the comment letters stated and what was written in the Decision Document. The FWS letter dated December 31, 1996 stated:

> While the Service does not object to the proposed project features (i.e., pond construction, homestead development, and minor dredging to restore the integrity of an existing slough), we recommend that the issued permit require compensatory mitigation sufficient to fully offset adverse impacts to the affected wetlands. If it is determined that the recent clearing does constitute an activity regulated under Section 404 of the Clean Water Act, we recommend that compensation be required for those cleared areas which are essential to the applicant's objective of homestead development, and that restoration be required for those cleared areas which are not essential to that objective.

The MVN should have paraphrased the FWS letter to indicate that the FWS does not object to the project if compensatory mitigation is sufficient to offset adverse impacts.

The MVN stated that based on an internal review of the project plans by its Real Estate Division, it was determined that a real estate instrument from the Corps would be required. This statement is incorrect; the memo from the Real Estate Division stated that a real estate instrument is not required for the project.

Under the State and Local Agencies section of the Summary of Comments Received, MVN mistakenly omitted comments received from the State of Louisiana, Department of Health and Hospitals. Their comment letter stated that the project would not violate applicable provisions of the State Sanitary code. MVN needs to correct the decision document to accurately reflect from whom comments were received.

In reviewing the comments received for this project during the public interest review period, I found nothing that indicated that the project was contrary to the public interest.

Information Received and Its Disposition During the Appeal Review: No additional information was received during the Appeal Review.

Conclusion: For the reasons stated above, I conclude this administrative appeal has merit and remand it to the New Orleans District Engineer to reconsider the permit denial decision for the appellant's project based on instructions in this Appeal Decision Document.

PHILLIP R. ANDERSON
Major General, USA
Commanding