

## **ADMINISTRATIVE APPEAL DECISION**

John A. Neal, File No. MVN 2004-3497 CZ  
US Army Engineer District, New Orleans  
July 19, 2006

**Review Officer:** James E. Gilmore, U.S. Army Engineer Division,  
Southwestern

**Appellant:** Mr. John A. Neal

**Authority:** Section 404 of the Clean Water Act (33 U.S.C. § 1344)

**Background Information:** On 12 July 2004, Mr. Neal, of Livnjoy Ascension, LLC, submitted a permit application to the U.S. Army Corps of Engineers New Orleans District (the District). The application was received by the District on 14 July 2004. The Appellant proposed to construct a residential/commercial development on 130 acres adjacent to Henderson Bayou near the intersection of Highways 44 and 933, in the Prairieville area, Ascension Parish, Louisiana (the site). Mr. Neal's consultant determined that the 130-acre site contained approximately 35+ acres of jurisdictional wetlands, which are proposed to be filled. Submitted with the permit application were letters from Mr. Reid J. Cancienne of Smithport Planting and Wetland Services, LLC (Smithport), dated 24 May 2004, and 2 June 2004, respectively, stating that Smithport had 35 acres of bottomland hardwood (BLH) lands available for Mr. Neal's use as mitigation for the impacts of his development.

By letter dated 23 July 2004, the District informed the Livnjoy Ascension, LLC, that its permit application was not complete and that additional information would need to be submitted before the application would be considered complete. Livnjoy Ascension, LLC, was also informed that use of the Smithport facility was not acceptable for mitigation of the proposed project.

As previously stated, the District received the Appellant's permit application on 14 July 2004, and considered it complete on 9 August 2004. A Public Notice was sent to all interested parties including appropriate Federal and State agencies on 13 August 2004. Extended communication with Appellant ensued concerning mitigation requirements. An Initial Proffered Permit was issued to the Appellant on 5 June 2006. The Appellant declined to accept the Initial Proffered Permit and submitted a letter to the District outlining his objections to the Initial Proffered Permit on 19 June 2006. By letter dated 26 June 2006, the District Engineer responded to the Appellant's objections. The District Engineer stated that he found no reason to reverse the mitigation requirements contained in the initial proffered permit. The District again proffered the permit to Mr. Neal. Mr. Neal again declined acceptance of the Proffered Permit and submitted a Request for Appeal (RFA) to the Mississippi Valley

Division Commander. The RFA was received on 27 June 2006. Mr. Neal was contacted by the Review Officer (RO) on 27 June 2006, to discuss his RFA and Corps' Administrative Appeal procedures. At that time Mr. Neal was informed that the Corps regulation under Section 331.7(e) states that an appeal conference will be held for all declined proffered permits, unless the appellant and RO agree that a conference is not needed. Mr. Neal informed the RO that he did not believe that a conference would be necessary and declined his right to hold a conference. The RO concurred with Mr. Neal's decision to decline the conference.

**Summary of Decision:** The District's administrative record supports its decision, and the appeal does not have merit for the reasons discussed below.

**Appeal Decision Evaluation, Findings, and Instructions to the New Orleans District Engineer (DE):**

**Reason 1:** The reason I am appealing the proffered permit (MVN 2004-3497 CZ) is that the mitigation is not practicable. As shown in the administrative record I have already purchased 35.1 acres of bottomland hardwood in the Smithport Mitigation Area. This is closer to the area to be impacted than the Mitigation Area that the New Orleans District is requiring me to use. In addition, I have offered and am willing to purchase another 7.1 acres in the Silo Mitigation Area. The cost of buying bottomland hardwood acreage in the Smithport Mitigation Area verses in the Silo Mitigation Area is \$3,500/acre verses \$20,000/acre. The required acreage in the proffered permit is unreasonable - 70.3 acres.

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

**Action:** No further action required.

**Discussion:** The District must follow the Clean Water 404(b)(1) Guidelines and the guidance in the 6 February 1990 Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (EPA/Army Mitigation MOA), that require the appropriate level of compensatory mitigation be based on the functions and values of the aquatic resources to be lost and practicability of replacing those resources. The term "practicable" is defined under Part 230.3(q) - Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material (Guidelines). In accordance with the Guidelines, "practicable" means "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." It is further stated in the EPA/Army Mitigation MOA "[T]hat the determination of what level of mitigation constitutes "appropriate" mitigation is based on functions of the aquatic resources that will be impacted." It is also stated in the

MOA that use of a mitigation bank is acceptable where the bank to be used has been approved by the EPA and Corps "for the purposes of providing compensatory mitigation for [a] specific identified project."

In accordance with 33 CFR Section 320.4, the decision whether to issue a permit is based on an evaluation of the impacts of the proposed activity on the public interest. The benefits that are expected to accrue from the proposal must be balanced against the reasonably foreseeable detriments. This public interest balancing process whether to authorize a proposed activity and the conditions under which it will be authorized, determines the decision. Under 33 CFR Section 320.4(r), mitigation is an important aspect of the review and balancing process for permit applications. Consideration of mitigation occurs throughout the permit evaluation process and includes avoidance, minimization and compensation for unavoidable impacts. In accordance with 33 CFR Section 325.4, District Engineers are to add such conditions as are necessary to satisfy the public interest requirement. The permit conditions added "will be directly related to the impacts" of the proposed project and will be "appropriate to the scope and degree of those impacts." In addition, 33 CFR Section 325.4(c) states that if the District Engineer determines that a special condition(s) is needed to insure that the proposed project is not contrary to the public interest, but the special condition(s) is not implementable the permit will be denied. The goal of compensatory mitigation is to offset any unavoidable impacts to aquatic resources. "Additionally for wetlands, such mitigation will provide at a minimum, one for one functional replacement (i.e., no net loss of values), with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan." The Corps has emphasized the need for functional replacement for wetland loss as elaborated in the National Action Plan toward developing Hydrogeomorphic Approach for Assessing Wetland functions published in the *Federal Register* on 16 August 1996 (note Regulatory Guidance Letter (RGL) 02-2(e) and (i)).

Prior to reaching a permit decision, the District must complete an analysis to determine whether the wetland functions to be lost as a result of the Appellant's proposed project require compensatory mitigation in order to comply with the Clean Water Act 404(b)(1) Guidelines and the Corps Regulatory program regulations and requirements. As described in RGL 02-2, it is the District's responsibility to reach a conclusion regarding what, if any, replacement of wetland functions by compensatory mitigation is necessary. If the District concludes compensatory mitigation is necessary, it is the District's responsibility to identify the specific amounts and types of compensatory mitigation that are appropriate. Part 2 of the RGL states:

"Districts will use watershed and ecosystem approaches when determining compensatory mitigation requirements, consider the resource needs of the watersheds where impacts will occur, and also consider the resource needs of neighboring watersheds. When evaluating compensatory mitigation plans, Districts should consider the operational guidelines developed by the National Research Council (2001) for creating or restoring ecologically self-sustaining wetlands. These operational guidelines, which are in Appendix B, will be provided to applicants who must implement compensatory mitigation projects."

Based on guidelines contained in the District's Compensatory Mitigation Standard Operating Procedures (SOP), the District advises applicants that compensatory mitigation may be required to offset unavoidable impacts. However, applicants are encouraged to not submit a formal compensatory mitigation plan until the District has determined if the project will meet the overall public interest and that all impacts to aquatic resources have been avoided and/or minimized to the fullest extent possible. As stated in the background section of this document, the applicant submitted letters from Smithport with his permit application, which stated the bank could accommodate Mr. Neal's request to purchase 35 acres of BLH mitigation. The 2 June 2004 letter from Smithport stated that "Smithport Planting & Wetland, LLC has agreed to allocate upon **"Corps of Engineers approval"** (emphasis added) 35 (thirty-five) acres of BLH mitigation for said project at \$3,500 per acre." In response to Mr. Neal's permit application, in particular his proposal to use the Smithport Mitigation Bank, the District stated in a letter dated 23 July 2004, the following:

You have supplied documentation from Smithport Planting & Wetland Services, LLC, referencing the availability of compensatory mitigation for your proposed project. We are at the earliest of stages with our review of your proposed project. We will further discuss compensatory mitigation with you if a Department of the Army permit can be issued for your proposed project or a modified version thereof. Until that time, we would like to make sure you are aware that Smithport Planting & Wetland Services, LLC, is not an acceptable compensatory mitigation banking option for the watershed your proposal is located in.

It is clear that the Appellant was informed by Smithport that he should have approval from the Corps before purchasing any credits from its mitigation bank. It is also evident that the District informed the Appellant (within 2 weeks of receipt of his application) that the use of the Smithport Mitigation Bank was not appropriate for this proposal because it was not located within the impacted watershed. For this reason, Mr. Neal cannot rely upon his subsequent purchase of

credits at the Smithport site as a basis for challenging the practicability of the proposed mitigation.

After completing its evaluation of the Appellant's permit application, the District determined that the Appellant's proposed project would adversely impact 35.2 acres of BLH wetlands. To quantify the adverse impacts to the functions and values of the BLH wetlands located on the project site, the District used the Habitat Assessment model for BLHs for the Louisiana Coastal Zone (WVA<sup>1</sup>) dated 10 January 1994. This model calculates the changes in functional quality, expressed as average annual habitat units by evaluating the project site habitat value with and without the proposed project. Using these values, the District determined that the appropriate compensatory mitigation would be the enhancement/preservation/ restoration of 42.2 acres (a 1.2:1 mitigation ratio) of BLH wetlands within the same watershed<sup>2</sup> as the proposed project. On 7 December 2005, the Appellant was informed of the mitigation requirements and that two options were available to him to complete the required compensatory mitigation. The Appellant was informed that he could either submit his own mitigation plan, which had to be located within the appropriate watershed or he could purchase 42.2 credits (acres) from the Tunica Swamp/Silos Mitigation Bank, which is the only approved mitigation bank located in the same watershed as the Appellant's proposed project.

The Appellant informed the District that he had purchased 35.1 mitigation credits from the Smithport facility on 30 September 2005. The purchase was made before the District completed its evaluation of the proposed project and after Mr. Neal was informed by the District on 23 July 2004, that the Smithport facility was not an acceptable mitigation bank to use for the proposed project because it was not located in the same watershed as the Appellant's proposed project.

Mr. Neal believes he should be able to use the Smithport facility, because it is located closer to his project site than the Silos facility. Using techniques described in its SOP regarding mitigation, the District determined that the mitigation bank proposed for use by the Appellant is located in a different watershed located on the west side of the Mississippi River, while the proposed project site is located on the east side of the Mississippi River. The District found that this "represents a separation of relative wetland functions by a major riverine system that has levees along its course to control

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<sup>1</sup> The Wetland Value Assessment Methodology is an assessment that is a modification of the Habitat Evaluation Procedure (HEP). This model is used to evaluate impacts on fish and wildlife resources more on a community basis and not on individual species as the HEP model does. The Corps mission is to protect and/or maintain the chemical, physical, and biological integrity of the Nations' waters under Section 404 of the Clean Water Act. The District utilized a biological functional assessment model to attempt to capture the impacts to the biota by the proposed project.

<sup>2</sup> To determine which watershed the proposed project is located in, the District utilized the USGS Hydrologic Unit Map - 1974 for the State of Louisiana. Identifying watersheds using this methodology is contained in the District's Mitigation SOP.

flooding of areas adjacent to the river." Although the Smithport facility would provide "in-kind" BLH wetland habitat, it would not replace the function and values of the wetlands within the impacted watershed.

The Corps and EPA strongly support the "watershed based" compensatory mitigation approach as evidenced by RGL 02-2, the National Mitigation Action Plan and the agencies' proposed rule regarding mitigation. In addition, the National Research Council's 2001 report regarding assessment of wetland replacement practices stated that the Corps should adopt a watershed-based approach to compensatory mitigation. In fact, **Department of Defense; Department of the Army, Corps of Engineers; 33 CFR 325 & 332; Compensatory Mitigation for Losses of Aquatic Resources; Proposed Rule** states that

"The watershed approach in the proposed rule will be implemented by district engineers with available information to determine the types and locations of compensatory mitigation activities that would best serve the watershed."

It is further stated in the proposed rule that

"The watershed approach in the proposed rule will help support the objective of the Clean Water Act, and is intended to result in more effective replacement of aquatic resource functions impacted by activities authorized by DA permits. The level of detail used in the watershed approach for a specific activity is dependent on the availability of information and on the scope and scale of the activity."

Under Section 332.3(c)(1) of the proposed rule it states

"The district engineer must use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practicable."

Although the above cites are taken from the Corps' proposed rule regarding compensatory mitigation they show the Corps' determination to move to a watershed approach for compensatory mitigation. For these reasons, the district's decision to require that compensatory mitigation be located within the impacted river basin is supported by the record. For the same reasons, Mr. Neal's offer to purchase additional credits at Smithport will not address the underlying reason for the district's decision not to accept the Smithport site as compensatory mitigation.

For several months the District and the Appellant discussed compensatory mitigation options available to the Appellant. To end the stalemate, the District Engineer conditioned the permit to require 35.2 acres of BLH mitigation credits to be purchased from the

Tunica/Silos mitigation bank and allow the Appellant to use the 35.1 credits he purchased from Smithport. (It should be noted that the EPA, US Fish and Wildlife Service, and State of Louisiana Wildlife Department opposed this plan because it utilized out of watershed mitigation.) The District Engineer understands that, while his decision does not provide all of the appropriate wetland functional replacement within the Amite River watershed, it does replace a majority of the lost functions while providing additional wetland functions to an adjacent watershed. The permit was proffered to the Appellant. As shown by the record, the amount of mitigation required replaces the functions and values lost due to the impacts of Mr. Neal's proposed project and is not unreasonable.

After receiving the initial proffered permit, the Appellant submitted his objections to the New Orleans District Engineer for re-evaluation of the permit's special conditions that specify the compensatory mitigation requirements. The Appellant believes that the compensatory mitigation requirements are not "practicable," too costly, and unreasonable. Based on the above discussion, I find that the compensatory mitigation plan contained in the proffered permit is "practicable."

The Appellant's proposed project is a commercial development. Cost of mitigation is a part of the cost of completing the proposed project. As stated above, cost is not the deciding factor in determining appropriate and required mitigation. It is one of several factors used to determine "practicability." The Appellant did not provide sufficient supporting documentation to support his claim that the mitigation requirements are too costly. The Appellant stated that the price of a credit in the Silos bank has doubled since Hurricane Katrina made landfall in the New Orleans area. Through discussion with the operators of the Silos bank, the District determined that the price of a credit at the Silos bank increased from \$8,200 to \$17,500 prior to Hurricane Katrina and the price of a credit increased an additional \$2,500 to \$20,000 per credit after Katrina.

The District also provided supporting documentation that use of the Silos site for mitigation is "practicable" and reasonable by providing information that 31 permits impacting BLH wetlands have been issued since 1 October 2005. These projects impacted approximately 114.7 acres of BLHs. All impacts were mitigated using the Silos mitigation bank. Mr. Neal was also offered the opportunity to plan his own mitigation and purchase appropriate lands therefor. The record supports the District Engineer's decision, and the appellant has not shown that the proposed mitigation is impracticable.

**Conclusion: I find that the Appellant's reason for appeal does not have merit for the reasons discussed above. The District's administrative record contains sufficient documentation that the mitigation proposed in the proffered permit will compensate for the wetland functions and values lost, will avoid a net loss of wetlands in the Amite River Basin, and that there are practicable means of**

either providing the required compensation or of reducing the project's impacts. I also find that the District followed all of the appropriate regulations, policies, and guidance regarding compensatory mitigation.

ROBERT CREAR  
Brigadier General, USA  
Division Engineer