

**ADMINISTRATIVE APPEAL DECISION
ABRAHAM PERMIT DENIAL
ST. PAUL DISTRICT
CORPS FILE NUMBER 2004-04040-EMN
MAY 8, 2009**

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

Appellant: Mr. David Abraham, Traverse County, Minnesota

Authority: Section 404 of the Clean Water Act

Approved Jurisdictional Determination Conference: 28 October 2008

Summary of Appeal Decision: Mr. David Abraham is appealing a denial by St. Paul District (MVP) of his permit application to discharge fill material into a wetland adjacent to Lake Traverse, an interstate water of the United States. Mr. John Kolb, acting as agent/attorney for Mr. Abraham, suggested three primary reasons for the appeal. One of the reasons for appeal was found to have merit. The permit decision is remanded to MVP for reconsideration and reevaluation based on the findings in this document.

Background Information: On 29 May 2007, the Regulatory Branch of the U.S. Army Corps of Engineers St. Paul District (MVP) received a wetland report and permit application package from Svoboda Ecological Resources on behalf of Mr. David Abraham. The report and application package concerned property owned by Mr. Abraham in Traverse County, Minnesota.¹ The application was also submitted to various state and local agencies as part of an established joint application process in Minnesota. According to the drawings supplied with the application, Mr. Abraham originally proposed to discharge fill material into 0.46 acre of wetlands on his property for residential construction.

In response to the concerns of state and local agencies, the permit application was revised and the amount of proposed fill reduced to 0.16 acre.² On 21 August 2007, Mr. Abraham received approval for his project from the Traverse County Soil and Water Conservation District which implements the provisions of the Minnesota Wetland Conservation Act. In September 2007, Mr.

¹ Location: SE ¼ of Section 1, Township 126 North, Range 48 West, and Government lot 2.

² Sequencing Discussion and Wetland Replacement Plan Application prepared by Svoboda Ecological Resources, June 2007.

Mr. Abraham also received a special use permit from Traverse County under the county's shoreline management ordinance and approval from the Bois de Sioux Watershed District for floodplain impacts.

The revised permit application was submitted to MVP on or about 25 June 2007. By letter dated 1 August 2007, MVP requested additional information in order to determine whether the project needed to be located in or near wetlands to serve its basic purpose (water dependency³) and whether alternative sites were available. After review, MVP informed Mr. Abraham, by letter dated 12 October 2007,⁴ that his application for a Department of the Army permit did not meet the requirements for review under regional general permit RGP-3-MN.⁵ This general permit allows, among other things, up to 0.5 acre of fill for residential development provided certain general and special conditions are met. MVP cited the project's lack of water dependency and the availability of alternative sites as reasons for requiring an individual permit instead of an authorization under the general permit. MVP issued a public notice for the proposed project on 8 November 2007⁶ as part of the individual permit evaluation process.

By letter dated 7 February 2008, MVP informed Mr. Abraham that his permit had been denied. MVP also enclosed a copy of the decision document, which had been signed by the district engineer on 31 January 2008,⁷ and a Notification of Administrative Appeal Options and Process and Request for Appeal form dated 7 February 2008.⁸

Mr. John Kolb⁹ submitted a completed Request for Appeal (RFA) on behalf of Mr. Abraham to Mississippi Valley Division (MVD) which was received 7 April 2008.¹⁰ MVD accepted the appeal by letter dated 6 May 2008.

³ See Environmental Protection Agency regulations at 40 C.F.R. § 230.10(a)(3).

⁴ Administrative record (AR), p. 24.

⁵ This regional general permit number may be found in three different forms: RGP-3-MN, RGP-03-MN, and RGP-003-MN.

⁶ AR, p. 26-31.

⁷ AR, p. 15-21.

⁸ AR, p. 2-3.

⁹ Rinke-Noonan Attorneys at Law, St. Cloud, Minnesota.

¹⁰ Cover letter, RFA and attachments submitted by Ms. Julie L. Fincher, paralegal, on behalf of Mr. Kolb.

Information Received and Its Disposal During the Appeal:

33 C.F.R. § 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this permit denial. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding a denied permit, as that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his review officer (RO) conducts an independent review of the administrative record to address the reasons for appeal cited by the Appellant. The administrative record is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAP) form. Pursuant to 33 C.F.R. § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information to MVD. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the administrative record. Such interpretation, clarification, or explanation does not become part of the administrative record, because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

1. MVP provided a copy of the administrative record (AR) to the RO and the Appellant. The RO received the AR on 9 June 2008. The administrative record is limited to information contained in the record by the date of the NAO/RFA form, which in this case was 7 February 2008.

2. A site visit and appeal meeting were held on 28 October 2008. A memorandum summarizing the visit and meeting is attached as Exhibit 1.

3. During the appeal meeting, the Mr. Kolb, Attorney for Mr. Abraham, stated that he would supply the "impaired waters list" for the state of Minnesota. The list furnished by Mr. Kolb was received by the RO on 10 November 2008. Mr. Kolb also supplied copies to the appellant and to MVP.

4. During the appeal meeting, the RO requested that MVP supply any copies of electronic mail (e-mail) that were not included

with the AR. On 26 November 2008, MVP supplied six pages of e-mail to the RO and to Mr. Kolb.

5. On 24 November 2008, the RO forwarded a draft Memorandum for Record (MFR) detailing the site visit and appeal meeting to MVP and Mr. Kolb. MVP responded that the draft MFR contained some minor typographic errors, but that content was accurate. Mr. Kolb responded that he considered the draft MFR to be accurate. A final MFR was prepared on 12 December 2008 (Exhibit 1).

Appellant's Reasons for Appeal

1. St. Paul District applied an improper standard to activities proposed by Mr. Abraham which fall within the scope of a regional general permit (RGP-003-MN).

2. St. Paul District incorrectly applied the law, current regulation and officially promulgated policy by failing to either revoke the regional general permit or identify reasons that the proposed activities are a departure from those authorized by the RGP.

FINDING: These reasons for appeal do not have merit.

DISCUSSION: These two reasons for appeal are considered together. In the RFA, Mr. Kolb states that "the activities proposed fall clearly within the Regional General Permit". RGP-3-MN does allow for up to 0.5 acre of impacts to wetlands for residential development, and Mr. Abraham applied for authorization to discharge fill material into 0.16 acres of wetlands on his property for a building site. While there are a number of activities specifically excluded from the regional general permit (RGP), none appear to apply to Mr. Abraham's project.

However, by letter dated 1 August 2007, MVP requested additional information in order to determine whether the project needed to be located in or near wetlands to serve its basic purpose (water dependency¹¹) and whether alternative sites were available. After subsequent review, MVP informed Mr. Abraham, by letter dated 12 October 2007,¹² that his application for a Department of the Army permit did not meet the requirements for review under the RGP. MVP cited the project's lack of water dependency and

¹¹ 40 C.F.R. § 230.10(a)(3)

¹² AR, page 24.

the availability of alternative sites as reasons for asserting discretionary authority and requiring an individual permit.

Discretionary authority is addressed in regulations governing the permit process at 33 C.F.R. § 325.2(e)(2):

When the issuing authority determines on a case-by-case basis that the concerns for the aquatic environment so indicate, [the district engineer] may exercise discretionary authority to override the regional permit and require an individual application and review.

The permit decision document for RGP-3-MN, which was attached to the public notice announcing the extension of the RGP on 1 August 2006, refers specifically to discretionary authority:

As allowed under 33 CFR 325.2(e)(2), the Corps retains discretionary authority to require an individual permit review of any activity eligible for authorization under RGP-03-MN based on concern for the aquatic environment or for any other factor of the public interest.

Based on the above discussion, MVP has discretionary authority to determine if a particular project qualifies for authorization under a regional general permit or if it requires an individual permit. However, that discretion must be properly exercised.¹³

In their letter dated 12 October 2007, MVP cited lack of water dependency as one of the reasons to assert discretionary authority. However, since most residential developments do not need to be located in or near waters of the United States in order to fulfill their basic purpose, residential development is normally not water dependent. If water dependency is the deciding factor in asserting discretionary authority in this case, then residential development should have been excluded from activities potentially authorized under RGP-3-MN. Lack of water dependency alone is not a valid reason for asserting discretionary authority.

MVP also determined that less environmentally damaging alternative sites were available. In order to be considered

¹³ "The division engineer will disapprove . . . the district engineer's decision only if he determines that the decision on some relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance." 33 C.F.R. § 331.9.

practicable, however, alternatives must exist on property already owned by Mr. Abraham,¹⁴ contrary to the statement made by MVP in their 12 October 2007 letter. MVP cited alternatives identified by the local Technical Evaluation Panel (TEP).¹⁵ These alternatives involve modification and/or reconfiguration of the project within the boundaries of Mr. Abraham's property to minimize impacts.

In his memorandum included with the RFA, Mr. Kolb stated that "the District Engineer in this case has failed to articulate what specific environmental concerns would indicate the requirement for individual permit review" and "proceeded as if the General Permit did not exist." However, MVP did articulate a reason for individual permit review by noting the existence of less damaging alternatives than those proposed by the applicant. Mr. Kolb also stated that the proposed work was covered by the general permit and the "application for the Department of the Army Permit did not need to be made." However, Section O of RGP-3-MN specifically states that applicant must notify MVP prior to construction. This notice allows the district to make a determination whether the proposed project is appropriately handled under the GP or if an individual permit should be required.

As discussed above, the district engineer may, on a case-by-case basis, assert discretionary authority to override a RGP and require an individual permit application and review. For Mr. Abraham's proposed project, MVP determined that the proposed project did not qualify for authorization under RGP-003-MN. Since MVP identified less damaging alternatives, this determination was not arbitrary, capricious or an abuse of discretion.

ACTION: No action is required.

¹⁴ National regulatory policy (Regulatory Guidance Letter 95-1) allows flexibility to small landowners for discharges of dredged or fill material affecting up to two acres of non-tidal wetlands for the construction or expansion of a home or farm building. Under this policy, it is presumed that alternatives located on property not currently owned by the applicant are not practicable under the Section 404(b)(1) Guidelines.

¹⁵ The Minnesota Wetland Conversation Act is implemented by a local governing unit (LGU), which in this case is Traverse County Soil and Water Conservation District. Permit recommendations are provided to the LGU by the TEP. On 10 August 2007, the TEP determined, as shown in their "Sequencing Findings of Fact" (AR, p. 36), that sequencing was not adequately addressed and that "alternatives were suggested and considered but not accepted by the applicant." However, the final decision on the permit is made by the LGU. On 22 August 2007, the Board of Commissioners for the LGU approved Mr. Abraham's application.

3. St. Paul District failed to identify a prevailing national interest in making a decision contrary to state and local decisions as required in Part (a)(6) of the procedures in Section 325.2 of Title 33 of the Code of Federal Regulations.

FINDING: This reason for appeal has merit.

DISCUSSION: The district commander is responsible for determining when a public interest factor is of national significance and when it becomes an overriding factor in the public interest balancing process. If a decision contrary to state or local decisions is made, the district commander must clearly document the significant national issues and explain how they are overriding in importance.¹⁶

Regulations at 33 C.F.R. § 320.4(j)(2) state:

The primary responsibility for determining zoning and land use matters rests with the state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include but are not necessarily limited to national security, navigation, national economic development, water quality, preservation of special aquatic areas, including wetlands, with significant interstate importance, and national energy needs. Whether a factor has overriding importance will depend on the degree of impact in an individual case.

It is further stated at 33 C.F.R. 320.4(j)(4) that:

In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR Parts 320-324 and the applicable statutes have been considered and followed: e.g., the National Environmental Policy Act, . . . the Endangered Species Act, . . . the Clean Water Act

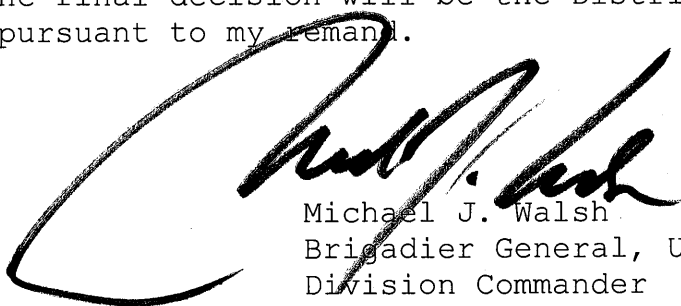
¹⁶ Regulatory Guidance Letter 82-08 dated 18 June 1982.

Mr. Abraham applied to the Minnesota Pollution Control Agency for state water quality certification, but a decision to issue or deny certification was not made prior to the final federal permit decision by MVP. Mr. Abraham also applied to the Traverse County Soil and Water Conservation District for a permit pursuant to the Minnesota Wetland Conservation Act. His "replacement plan" was approved on 21 August 2007.¹⁷ Also in August 2007, the appellant received a special use permit from Traverse County (shoreline management ordinance) and received authorization from Bois de Sioux Watershed District for his "flood mitigation" plan.¹⁸

Since local and state authorizations were issued, but the federal permit was denied, significant national issues of overriding importance should have been documented by MVP. The permit decision document, dated 31 January 2008, does not address overriding national factors of the public interest.

ACTION: The permit decision is remanded to the district for reevaluation. MVP should address whether there are overriding national issues pursuant to regulations at 33 C.F.R. § 320.4(j).

CONCLUSION: The final decision will be the District Engineer's decision made pursuant to my remand.



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

¹⁷ AR, p. 42.

¹⁸ Copies provided by Mr. Kolb as enclosure with RFA.