

ADMINISTRATIVE APPEAL DECISION

S. E. Yandle and Industrial Pump Sales, Incorporated
File No. EI-19-980-0243
New Orleans District
November 1, 2000

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

Appellant/Applicant: Mr. S. E. Yandle

Applicant's/Appellant's Representative: Mr. Robert B. Evans,
Reed, Burgos, Venezia & Evans, L.L.C.

Authority: Section 10 of the Rivers and Harbors Act of 1899.

Receipt of Request For Appeal (RFA): July 26, 2000

Appeal Conference Date: September 20, 2000

Site Visit Date: September 20, 2000

Background Information: Mr. S. E. Yandle of Industrial Pump Sales, Inc., submitted a Department of the Army Permit Application on October 1, 1997. The Appellant proposed to expand an existing barge mooring facility in the Mississippi River, right descending bank, at a point about 100.8 miles above the Head of Passes, at Marrero, in Jefferson Parish, Louisiana. The project site is located within the New Orleans District (MVN). The proposed expansion was advertised by a public notice on February 10, 1998. Objections were received from the United States Coast Guard (USCG) and pilot organizations. Their main concern was that the expansion of the existing facility would pose an unacceptable threat to navigation on the Mississippi River. It was later learned from the applicant that he was also proposing to install a chemical barge channelward along side the proposed ship. Although not required by Corps policy, the MVN informed the applicant that, upon receipt of the revised drawings, a letter of no objection must be submitted to the MVN office by each of the objectors, should their objections be resolved or withdrawn. One Federal pilot association did not withdraw its objections. In a memo dated September 27, 1999, the USCG renewed its objections stating that the approval of the permit would create an unacceptable hazard to navigation and strongly recommended that the permit application--as it currently exists--not be approved. In the MVN's statement of

findings and its letter dated May 31, 2000, the permit application was denied. The MVN found that permit issuance would be contrary to the overall public interest in that it would create an unacceptable hazard to general navigation and pose a serious safety hazard. The MVN advised Mr. Yandle of the USACE Administrative Appeal Process.

An affected party appealing an approved jurisdictional determination, permit denial, or declined permit must submit an RFA that is received by the Division Engineer within 60 days of the date of the Combined Notification of Appeal Process (NAP) and RFA form. The RFA was received within the requisite 60-day time period. Mr. Robert Evans is Mr. Yandle's representative for this Administrative Appeal. Throughout this document Mr. Yandle of Industrial Pump Sales, Inc. is referred to as the Appellant, and Mr. Evans is referred to as the Appellant's Representative.

Information Received and its Disposition during the Appeal Review:

1. LT. Kevin Lynn, USCG, provided a written response to questions asked in the appeals conference. This response was considered to be clarifying information.

2. Ms. Olivia Nelson, project manager for MVN, provided a written response to the questions asked in the appeals conference. This response was also considered to be clarifying information.

All supplemental clarifying information received was provided to the Appellant, the USCG, and the MVN at the appeals conference.

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

Appellant's Reason 1: The Amended Permit would keep activities within two hundred twenty nine (229') feet of the already permitted three hundred (300') feet Channelward limit in which the Corps and Coast Guard have permitted the Facility to operate with six barges, consequently creating a wider Channel.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: Relying on U.S. Coast Guard determinations that the

permit would create an unacceptable hazard to navigation, the MVN properly determined that the permit would create an unacceptable navigation and safety hazard.

As noted by the Appellant, the original permit did authorize activities to an area 300 feet into the channel while the proposed permit would limit activities to 229 feet, consequently creating a wider buffer for river traffic by 71 feet. However, the change in width alone was insufficient to overcome the USCG's objection to the proposed permit. Their concerns were based on both the hazardous nature of the proposed activity and the planned ship/lightering vessel configuration.

The MVN's determination that the permit would create an unacceptable hazard to navigation and safety hazard was based on the proposed transfer (lightering) of a highly flammable and toxic liquid and the proposed vessel/barge configuration as well as increased river transportation.

The MVN determined that the proposed facility would place moored vessels in close proximity to the main channel and could further impede mariners, particularly down river traffic as they navigate around the lower end of a sharp bend situated just above the proposed facility. The type of vessels proposed to be moored at the project site differs from what was described in the original permit. The Appellant's revised plans (dated October 16, 1998) included a tank barge moored alongside the outboard side of the ship for the purpose of chemical cargo transfer (lightering) of acrylonitrile, a highly flammable and toxic liquid.

The MVN's evaluation properly considered comments received from the USCG and Federal Pilots Associations. These comments stated that the expansion would restrict the channel and create an unacceptable hazard to navigation. In a letter dated September 27, 1999, the USCG determined that the permit would "create an unacceptable hazard to navigation." The USCG had reviewed supplemental information provided by the appellant and strongly recommended the permit not be approved as it currently exists. The USCG letter of September 27, 1999 further stated that there would be a strong potential for a barge moored outboard of a ship at the facility to experience a suction effect away from the ship when large vessels and tows transit close to the facility when exiting the upstream bend. At the appeals conference, the MVN stated that river conditions and traffic had increased since the original permit.

Under the provisions of the Ports and Waterway Safety Act of 1972 at 33 U.S.C. Sections 1221 through 1236, the USCG is recognized as the Federal authority on matters relating to navigational safety. At the appeals conference, the USCG stated that its decision regarding the navigational safety was based on all information available and comments received from the Federal pilots. The USCG agreed with the comments of the Associated Federal Pilots and Docking Masters of Louisiana's (Associated Federal Pilots), stating the proposed mooring alongside of the ship for the purpose of transferring the dangerous liquid chemical cargo caused tremendous concern. In its letter of October 19, 1998, the Associated Federal Pilots stated:

"I am comfortable with the mooring of the ship and feel that we could live with it in harmony. However, the chemical barge alongside causes me tremendous concern, primarily with the close proximity to the sailing line of southbound traffic, in addition to the manner in which it would be moored to the ship."

The Associated Federal Pilots remained opposed to the location of the tank barge and urged the Appellant to investigate relocating the barge to the shore side of the ship. The USCG memo to the MVN (dated September 27, 1999) noted these concerns in its determination of navigational safety stating:

"This permit proposal is also intended to allow for ship to barge lightering of acrylonitrile, a highly flammable and toxic liquid. I attempt to evaluate all transfers of hazardous materials for appropriateness, and the potential health and environmental threats posed by acrylonitrile are such that I would not allow a ship to barge transfer at this site."

As such, there was substantial evidence in the record to the effect that granting the permit would create an unacceptable hazard to navigation. Accordingly, the record supports MVN's determination that permit authorization would create an unacceptable safety hazard, compromising the safety of vessel traffic in this area.

Appellant's Reason 2: The location of the facility is Mississippi River Mile Point 100.8, not 101.5 as the stated by the Associated Federal Pilots in its most recent objection.

FINDING: This reason for appeal does not have merit.

ACTION: No action

DISCUSSION: The Appellant contends that the Associated Federal Pilots relied on incorrect river mile location in providing its comments. The USCG was aware of the river mile misquote. There is sufficient evidence in the record to show that the persons who provided comments knew the correct location of the project site. The river mile misquote was discussed in meetings with the Associated Federal Pilots and did not influence the USCG's determination of navigational safety.

The Appellant references a letter dated February 2, 1999, from the Associated Federal Pilots to Mr. Ronald Besson of the Jefferson Parish Council, which cites an incorrect river mile location of the Appellant's facility. In this letter the Association of Federal Pilots states that a meeting was held on January 25, 1999. The Corps was not present at the meeting. The letter refers to a discussion of the berthing of a ship by the Appellant on the right descending bank of the Mississippi River in the vicinity of River Mile 101.5 LMR just below the five mile point and recommended that the appellant move its berthing plans at least 1,000 feet down river and conduct intended cargo transfers from the barges on the inside (land side) to a vessel on the outside (channel side) of the berth. Other letters from the Associated Federal Pilots (October 19, 1998, and February 18, 1998) reference the correct river mile location.

In the appeals conference, the MVN stated that it was not aware of the Associated Federal Pilot's misquote of the river mile, as noted in the letter of February 2, 1999. The MVN stated that the incorrect river mile would not have affected MVN's permit application denial because all commenting parties present at the meetings were supplied with a set of drawings which included a vicinity map indicating the exact location of the proposed work.

The Appellant discussed the river mile misquote in a letter dated March 17, 1999, that was addressed to the previous MVN project manager Mr. John Reddoch, who has passed away. The letter referred to the Associated Federal Pilot's recommendation that the facilities be moved 1,000 feet down river. The Appellant stated that he had discussed the Associated Federal Pilot's recommendation with Mr. Reddoch. The MVN stated that it had no record of any meetings between Messrs. Yandle and Reddoch. The MVN project managers do not recall Mr. Reddoch referring to any such meeting or any misquote of the river mile

by the Associated Federal Pilots.

In the appeals conference the USCG stated it was aware of the river mile misquote. The river mile misquote by the Associated Federal Pilots was discussed in a meeting with State Senator Hollis where the USCG, and the Associated Federal Pilots were present. Accordingly, the misquote is irrelevant, since the USCG stated it did consider the correct river mile location in its determination of navigational safety.

Appellant's Reason 3: The Facility has been operated by the owners since 1981 without a single accident, so there is no history of accidents at this location.

FINDING: This reason for appeal does not have merit.

ACTION: No action.

DISCUSSION: The Appellant's RFA states that the Associated Federal Pilots raised the issue that there is a history of accidents at the project site. The Appellant contends that comments regarding a history of accidents are unsubstantiated and lack merit. The Appellant's RFA states: " *From October 28, 1981 through September 23, 1997 [date when permit was requested], Yandle operated his Facility within the boundaries of his permit without one single accident, collision, allision, or the like.*" They assert that the facility has been operated without a marine casualty and provided evidence that it is located in a safe area.

The USCG stated that it had reviewed casualty data for the last three years finding no other marine casualties at the site. During the site visit and appeals conference, the USCG stated that Mr. Yandle had reported a marine casualty at the site on July 13, 1999. A barge hit the Appellant's dock. The Appellant stated that the reason for that marine casualty was due to poor piloting, not the site's location. Another reported marine casualty occurred when a vessel lost power and struck a service dock facility located at Mississippi River Mile 101.4. These two marine casualties support comments that there is a history of accidents in the vicinity.

The Associated Federal Pilots provided two comment letters to the MVN (dated October 19, 1998 and February 18, 1998) and one comment letter to Mr. Ronald Besson (dated February 2, 1999). These letters do not identify or refer to a history of accidents. However, the Maritime Navigation Safety

Association's letter of March 12, 1998, and the Steamship Association of Louisiana's letter of February 23, 1998, state that the project area had a history of accidents.

Although there were no reported marine casualties from October 28, 1981 through September 23, 1997 [date when permit was requested], there is a history of two reported marine casualties at the site and the vicinity. Thus, appellant's assertion that there have been no accidents, collisions, allisions, or the like is not substantiated.

CONCLUSION: For the reasons stated above, I conclude that the Appellant's Reasons 1, 2, and 3 for this administrative appeal do not have merit.

Encl

EDWIN J. ARNOLD, JR.
Brigadier General, USA
Commanding