

ADMINISTRATIVE APPEAL DECISION

CAM MINING, LLC; FILE NO. LRL-2007-69

LOUISVILLE DISTRICT

AUGUST 4, 2014

Review Officer (RO): Ms. Mary J. Hoffman, U.S. Army Corps of Engineers, Northwestern Division

Appellant: CAM Mining, LLC

Permit Authority: Section 404 of the Clean Water Act (33 USC 1344 et seq.)

Receipt of Request for Appeal: June 7, 2013

Appeal Conference and Site Visit: December 3, 2013

Summary: Each of the Appellant's seven reasons for appeal were evaluated in this appeal decision, and for reasons detailed in this document, none of the reasons for appeal have merit. The conclusion that the permit should be proffered with special conditions is supported by substantial evidence in the administrative record. The proffered permit is in accordance with applicable laws, regulations and policy guidance. The District's decision is not arbitrary, capricious or an abuse of discretion and is not plainly contrary to applicable law or policy.

Background Information: The Louisville District received a complete application from the Appellant on December 14, 2006. The application requested authorization under Section 404 of the Clean Water Act (CWA) to discharge fill material into "waters of the United States" for the purpose of constructing two hollow fills¹ and one instream sediment pond in an unnamed tributary of Cane Branch and the main stem of Cane Branch of Elkhorn Creek a tributary of the Russell Fork. Russell Fork is a tributary of the Levisa Fork, a tributary of the Big Sandy River. The proposed discharges into waters of the United States are necessitated by the Appellant's ongoing surface mining operation that is located along Anderson Branch, Big Branch and Panther Branch of Elkhorn Creek. The activities proposed under this application are located approximately 16 miles southwest of Elkhorn City in Pike County, Kentucky.

On June 11, 2009, a Memorandum of Understanding (MOU) was signed by the U.S. Environmental Protection Agency (EPA), the U.S. Department of Interior and the Department of the Army (DA) announcing the implementation of an Interagency Action Plan (IAP) regarding Appalachian surface coal mining activities. The purpose of the IAP was to significantly reduce the harmful environmental consequences of surface coal mining activities in Appalachia. One of

¹ The application was later modified in order to minimize adverse impacts to aquatic resources. The modified application deleted one of the proposed hollow fills.

the elements of the IAP was an Enhanced Coordination Process (ECP) for DA pending Appalachian coal mining-related permit applications that were received and on which a public notice had been issued prior to March 31, 2009. The Appellant's proposed project was on the ECP list, and therefore was subject to additional reviews outlined in the MOU. The District participated in periodic interagency meetings, through the ECP, with the Office of Surface Mining (OSM), the U.S. Fish and Wildlife Service (USFWS), the EPA, the Kentucky Department of Natural Resources (KDNR), and the Appellant throughout 2010 and 2011. However, on October 6, 2011, the U.S. District Court for the District of Columbia, in *National Mining Assoc. v. Jackson*, 880 F. Supp.2d 119 (D. D.C. 2012), ordered the ECP vacated.² No additional coordination under the ECP occurred after this date.

The District initially proffered a Standard Individual Department of the Army Permit to the Appellant on August 10, 2012. The Appellant notified the District on October 3, 2012, that they objected to certain terms and conditions, and requested that the proffered permit be modified. The District evaluated the Appellant's concerns and objections, along with additional information submitted by the Appellant. On April 10, 2013, the District proffered a modified permit to the Appellant.

On June 12, 2013, the Great Lakes and Ohio River Division received this Request for Appeal (RFA) from the Appellant, which cites seven reasons for the appeal.

Information Received and its Disposition During the Appeal Review: The administrative record (AR) is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. 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 AR. Such interpretation, clarification, or explanation does not become part of the AR, because the District Engineer did not consider it in making the permit decision. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision.

The RO conducted an appeal conference and site visit on December 3, 2013. The appeal meeting notes were not considered as part of the AR (which formed the basis of the District's permit decision), but were used by the RO to help interpret and clarify the Appellant's RFA and review the District's AR during this appeal evaluation and decision.

² On July 11, 2014, the United States Court of Appeals for the District of Columbia reversed and remanded the *Jackson* decision. See *National Mining Assoc. v. McCarthy*, Nos. 12-5310, 12-5311, 2014 WL 3377245 (C.A. D.C. July 11, 2014).

Appeal Evaluation, Findings, and Instructions to the Louisville District Engineer: The appellant's reasons for appeal, listed in order from their RFA, were as follows:

1. The Appellant asserts that Special Condition 'd' imposes a standard or benchmark for conductivity in the effluent of Pond SS-1 that is not supported by relevant site-specific data or sufficient peer reviewed scientific analysis. Further, that the benchmark was determined to be an illegally imposed water quality standard by the U.S. District Court for the District of Columbia. Finally, CAM asserts that it has mitigated for any increase in conductivity by the fees associated with their proposed in-lieu-fee mitigation payment.
2. Special Condition 'e' requires annual benthic macro invertebrate surveys at three defined stations. The Appellant asserts that annual surveys are unnecessary as the current macro invertebrate community is degraded, and the in-lieu fees to be paid by CAM would compensate for any adverse impact to the aquatic biological community. In addition, the Appellant asserts that the Section 401 Water Quality Certification and limits imposed in the Section 402 permit issued by the Commonwealth of Kentucky should be relied upon by the Corps in review of water quality issues.
3. The Appellant asserts that Special Condition 'f', which requires conductivity monitoring at two benthic sampling sites in Elkhorn Creek, should not be necessary due to in-lieu fees to be paid by CAM that will compensate for any increase in conductivity, and the Section 401 Water Quality Certification and Section 402 permit issued by the Commonwealth of Kentucky.
4. The Appellant asserts that Special Condition 'g', which requires establishment of a control sampling station in an adjacent watershed to monitor changes to the aquatic biological community that may not be related to the authorized activity, is unnecessary. With elimination of Special Conditions 'd' and 'e', this Special Condition is not necessary.
5. The Appellant asserts that the District's requirement, per Special Condition 'h', to submit documentation regarding best management practices (BMPs) implemented during construction is unnecessary.
6. The Appellant asserts that the proffered permit clearly includes, without documenting such in writing, permit conditions based on EPA's involvement in the Enhanced Coordination Process, the April 1, 2010, memorandum and two study reports issued on the same day, and the July 21, 2011, guidance recently determined to have been issued illegally.
7. The Appellant asserts that the Corps issuance of the proffered permit was arbitrary, capricious, an abuse of discretion, and not supported by substantial evidence in the administrative record.

Appellant's First Reason for Appeal: The Appellant asserts that Special Condition 'd' imposes a standard or benchmark for conductivity in the effluent of Pond SS-1 that is not supported by relevant site-specific data or sufficient peer reviewed scientific analysis. Further, that the benchmark was determined to be an illegally imposed water quality standard by the U.S. District Court for the District of Columbia. Finally, CAM asserts that it has mitigated for any increase in conductivity with the required in-lieu-fee mitigation payment.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion:

Special Condition 'd' requires that the permittee submit monthly specific conductivity (SC) measurements to the Corps, EPA Region 4, and the Kentucky Department for Natural Resources. The conductivity is to be measured no less frequently than two times per month for the effluent of Pond SS-1 following the commencement of discharges of material into "waters of the United States," and extending until final Surface Control and Reclamation Act (SMCRA) bond release.

If, after monitoring the effluent of Pond SS-1 for six months, the rolling average exceeds 500 microSeimens per centimeter ($\mu\text{S}/\text{cm}$), then the permittee must conduct an analysis of the sources of effluent SC and develop an Adaptive Management Plan (AMP) to reduce effluent SC and total dissolved solids (TDS). The AMP implementation would continue until the six-month rolling average declines below 500 $\mu\text{S}/\text{cm}$. If the average remains greater than 500 $\mu\text{S}/\text{cm}$, then additional measures are outlined in the permit special condition.

First, the Appellant's assertion that the water quality standard imposed by the District is "illegal" does not have merit because the case upon which the Appellant cites to support its argument here has been reversed by *McCarthy*, 2014 WL 3377245 at *8.

Next, the District used the Appellant's cumulative impact assessment of the Upper Levisa 8-digit HUC watershed, which is a watershed-specific water quality and biological assessment, to consider cumulative and secondary impacts.³ Under this assessment, selected watersheds were chosen to give a representative cross-section of existing impacts within the Upper Levisa watershed. The assessment included 28 representative subwatersheds, and 40 monitoring stations on the main stems of 10 streams within the Upper Levisa watershed. In addition, the District considered findings of a report submitted August 5, 2011, by EPA entitled, *CAM Mining Elkhorn Creek Water Quality Study Final Report, Pike County, KY, January 2011*, with appendices.⁴ The EPA study is specific to the waters proposed for impact under this permit action. It was designed to evaluate the water quality of the headwater streams of the Cane Branch watershed, as well as the upstream and downstream receiving waters of Elkhorn Creek. The sample stations were chosen to profile water and habitat quality through the collection of chemical, biological, and physical data. An assessment and relative comparison of specific

³ AR at 102, 110-111

⁴ *Id* at 769-879

conductance measurements were included in the EPA report, which noted that as in-stream specific conductance values increased, macroinvertebrate populations became impaired.

Further, the District states in the AR that a Federal and state interagency team developed the Eastern Kentucky Stream Assessment Protocol⁵ (EKSAP) for the purpose of assessing the relative quality of a particular headwater stream ecosystem based on visual estimates of regional indicator data concerning its physical, chemical, and biological characteristics and provides an estimate of the integrity of the ecosystem as a whole.⁶ Under the EKSAP, specific conductance (SC), or conductivity of the stream is a measurement used to assess chemical characteristics.⁷ The record states that the District has recognized for several years that a correlation exists between SC and biotic health of headwater streams in the Eastern Kentucky mountains, summarizing that, “In general, headwater streams with conductivities exceeding 500 $\mu\text{S}/\text{cm}$ tend to have more pollution tolerant macroinvertebrate and lack or have reduced populations of more sensitive species such as Ephemeroptera (mayfly) species. This loss of sensitive species is viewed as evidence that the stream segment has degraded over time from least disturbed or reference conditions.”⁸

The District provided rationale throughout the AR⁹ for inclusion of Special Condition “d”. The District’s rationale is based on its assessment of SC values observed in the Cane Branch watershed, including sufficient rationale for using the SC measurement and requiring continued monitoring through this Special Condition.

Finally, the Appellant asserts that in-lieu fees to be paid by CAM compensate for any adverse impacts to conductivity, the aquatic biological community, as well as rendering water quality monitoring unnecessary. The District’s AR states clearly, in numerous places,¹⁰ that “**all on-site direct stream impacts**” [emphasis added] are proposed to be offset through the payment of an in-lieu fee to the Kentucky Department of Fish and Wildlife Resources (KDFWR) Stream and Wetland Mitigation Trust Fund. The direct impacts to waters of the US which result from the

⁵ The EKSAP was developed in 2001-02 by an interagency team including members from the U.S. Army Corps of Engineers (COE), the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (USFWS), the Kentucky Division of Water (KDOW), and the Kentucky Department of Fish and Wildlife Resources (KDFWR) to address a need to assess headwater streams in the eastern Kentucky Coalfield Region to accommodate the 404 programmatic requirements. The EKSAP was based on the EPA’s *Rapid Bioassessment Protocols for Use in Streams and Rivers (RBP)*, which has undergone extensive scientific peer reviews since the 1980’s. (EPA 841-B-99-002)

⁶ AR at 81

⁷ Conductivity is a measurement of dissolved solids in solution and the metric that provides greatest statistical discrimination among a suite of chemical variables studied in the dataset; *Id* at 81

⁸ *Id* at 118; also, RO readily found public documents supporting this statement at <http://www.lrl.usace.army.mil/Missions/Regulatory/Mitigation/EasternKentucky.aspx>

⁹ *Id* at 78-128 and 305-350

¹⁰ *Id* at 80, 81, 92, 95, 96, 98 and 123

proposed discharge of fill material into the stream would be offset by payment of an in-lieu fee which will be used to restore streams and riparian habitat in the Upper Levisa Watershed.

The Appellant previously raised this issue with the District under the initially proffered permit, stating that the Appellant believed collecting, monitoring, and reporting conductivity data should not be required because 1) in-lieu fee mitigation is a permit requirement, and 2) it is not an important factor in the health of the aquatic community at this site because the current stream condition is rated as poor. During District meetings with the Appellant, it was communicated that the in-lieu fee mitigation is calculated for the on-site direct impacts of the project and **not any downstream indirect impacts** [emphasis added] that may result in degradation to waters of the U.S.¹¹ It is clear that payments to KDFWR's trust fund are not intended to address possible indirect adverse project impacts to the integrity of the nation's waters. The District disclosed the limitations and applicability of the in-lieu fee option as it would pertain to the Appellant's project proposal.

The District's explanation for its decision to include the Special Condition "d" is supported by the AR following current regulations and agency guidance, and makes a rational connection between the facts and the choice made. This reason for appeal does not have merit.

Appellant's Second Reason for Appeal: Special Condition 'e' requires annual benthic macro invertebrate surveys at three defined stations. The Appellant asserts that annual surveys are unnecessary as the current macro invertebrate community is degraded, and the in-lieu fees to be paid by CAM would compensate for any adverse impact to the aquatic biological community. In addition, the Appellant asserts that the Section 401 Water Quality Certification and limits imposed in the Section 402 permit issued by the Commonwealth of Kentucky should be relied upon by the Corps in review of water quality issues.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The Appellant asserts that annual surveys for benthic macro invertebrates, as required under Special Condition 'e', are unnecessary because the current macro invertebrate community is degraded, and that the in-lieu fees to be paid by CAM would compensate for any adverse impact to the aquatic biological community.

Special Condition 'e' states:

The permittee must conduct new baseline benthic macroinvertebrate surveys if stream impacts to "waters of the United States" have not occurred by March 2015. These surveys must include Rapid Bioassessment Protocol (RBP) scores and be in accordance with Methods for Conducting Resource Extraction Individual Permit Intensive Surveys in non-OSRW Streams of the Eastern Kentucky Coalfields (KDOW Document DOWSOP03018) or the appropriate KDOW method in effect at the time of the survey.

¹¹ *Id* at 119

The results of the new baseline surveys must be submitted to and approved by the Corps prior to the start of site disturbance.

The location of the baseline sampling sites shall be in Cane Branch between the toe of the proposed pond and the confluence with Elkhorn Creek and in Elkhorn Creek, approximately 300 feet upstream and downstream of the confluence of Cane Branch and Elkhorn Creek.

In addition, sampling shall occur annually at these baseline locations through final SMCRA bond release. All results must be reported to the Corps and USEPA R4 within 60 days following the date of the survey or a waiver must be requested by the permittee and approved by the Corps. The waiver request must specifically explain why the results are not available and a timeline for submittal.

The purpose of the required in-lieu fees and conductivity monitoring is addressed above under the First Reason for Appeal. Further, the District provides substantial rationale for requiring periodic macroinvertebrate surveys with recognition of current degraded conditions in Cane Branch. The District states that “the purpose of the special condition is to ensure the [Appellant’s] project does not contribute to further degradation of Cane Branch.”¹² The required sampling will provide a comparison to monitor adverse effects of the proposed discharge on indigenous aquatic communities.

Next, the Appellant asserts that the Corps should rely upon the section 401 and 402 certification and permit, respectively, in its review of water quality issues. Surface mining operations are typically required to obtain Clean Water Act permits under Sections 401, 402, and 404.

CWA Section 401 requires certification from the Commonwealth of Kentucky that any discharge into waters of the U.S. complies with the state’s water quality standards. The Commonwealth of Kentucky provided a conditioned water quality certification, under Section 401 of the CWA, on August 31, 2012.¹³ The certification acknowledged that the Corps “may require additional mitigation measures,” and that the Corps “requirements must be satisfied for this Water Quality Certification to be valid.”

CWA Section 402 established the National Pollutant Discharge Elimination System (NPDES) permit program to regulate point source discharges of pollutants into waters of the United States.¹⁴ An NPDES permit sets specific discharge limits for point sources discharging pollutants into waters of the United States and establishes monitoring and reporting requirements as well as special conditions. The administration of the NPDES permit program can be, and in most cases such as here in Kentucky, has been delegated by EPA to individual states. The Commonwealth of Kentucky issued a Section 402 General Permit for this project on January 22, 2008.

¹² *Id* at 120-122

¹³ Section 401 certification was initially granted on March 26, 2011 and reissued on August 31, 2012

¹⁴ Point sources are discrete conveyances such as pipes or man-made ditches.

Most relevant to the present administrative appeal, a mine operator must obtain a Section 404 permit for the discharge of dredged or fill material into waters of the U.S. at specified disposal sites. Under the 404 permit review, the Corps is required to comply with guidelines promulgated by the EPA in conjunction with the Corps, also referred to as the § 404(b)(1) Guidelines.¹⁵ In accordance with the 404(b)(1) Guidelines, the Corps must not issue a permit if the discharge of dredged or fill material would, “cause or contribute to significant degradation of the waters of the United States,” which may include significantly adverse effects of the discharge of pollutants on human health or welfare, life stages of aquatic life and aquatic ecosystem diversity, and recreational, aesthetic, and economic values.¹⁶

In addition to the 404(b)(1) Guidelines, the Corps imposes general policies that are to be considered in the evaluation of all permit applications. Under these policies, a decision must include an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest, and reflect the national concern for both protection and utilization of important resources (generally called the “public interest review”).¹⁷

It is the Corps policy that:

Certification of compliance with applicable effluent limitations and water quality standards required under provisions of section 401 of the Clean Water Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration.¹⁸

As the Appellant has noted, the Regional Administrator (RA) did not raise concerns about water quality considerations during the comment period. Based on the lack of concern expressed by the RA, the Appellant asserts that the Corps should have relied on the Commonwealth’s approvals and that the Corps does not have the discretion to include water quality-based special conditions in the proffered permit.

Even so, in exceptional cases a District Engineer can determine that overriding factors of the public interest justify denial or conditioning of a Department of the Army Permit to address water quality concerns even where the state, or Commonwealth, has issued a Section 401 water quality certification and where the RA of the EPA has not asserted other water quality aspects. Such an exceptional case might exist where the District Engineer determines that the concerns, policies, goals, and requirements as expressed in 33 CFR Parts 320-324, and the applicable statutes, would justify permit denial or conditioning based on the Corps’ documented water quality concerns notwithstanding a favorable state, or Commonwealth, determination expressed in an issued state Section 401 water quality certification.

In this case, the District Engineer exercised his discretion to make an exception to that general rule. In its 404 permit evaluation, the District considered public notice comments received from

¹⁵ 33 U.S.C. § 1344(b)(1); see also 33 C.F.R. § 320.2(f) and 40 C.F.R. pt. 230

¹⁶ 40 C.F.R. § 230.10(c)(1)-(4)

¹⁷ 33 C.F.R. § 320.4(a)

¹⁸ 33 C.F.R. § 320.4(d)

Commonwealth and Federal agencies, the Appellant's response to comments, and site inspections of the project area. The District also considered Commonwealth authorizations and certifications (including SMCRA Title V, and CWA Sections 401 and 402), the Cumulative Impact Assessment for the Upper Levisa Watershed, the Appellant's proposed Best Management Practices for construction activities, the Appellant's proposed monitoring plan, and the proposed payment of in-lieu fees for on-site impacts. Based on these analyses and considerations, the District determined that the proposed mining activities would potentially result in additional adverse impacts to water quality downstream of the mining operation.¹⁹ The decision to include permit special conditions to mitigate potential adverse affects to water quality is within the District Engineer's discretion.

While Corps regulations recognize that the state's water quality certification will normally be considered conclusive, a District Engineer may determine that exceptions to that general rule exist. In this case, the AR has noted such an exception and makes a rational connection between the facts found and the choice made. The District did not violate current federal laws, regulations, or policy guidance in reaching its decision to include Special Conditions related to water quality. As a result, I have determined that this reason for appeal does not have merit.

Appellant's Third Reason for Appeal: The Appellant asserts that Special Condition 'f', which requires conductivity monitoring at two benthic sampling sites in Elkhorn Creek, should not be necessary due to in-lieu fees to be paid by CAM that will compensate for any increase in conductivity, and the Section 401 Water Quality Certification and Section 402 permit issued by the Commonwealth of Kentucky.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The assertions are addressed above in the first and second reasons for appeal and found to not have merit.

Appellant's Fourth Reason for Appeal: The Appellant asserts that Special Condition 'g', which requires establishment of a control sampling station in an adjacent watershed to monitor changes to the aquatic biological community that may not be related to the authorized activity, is unnecessary. With elimination of Special Conditions 'd' and 'e', this Special Condition is not necessary.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The Appellant objects to Special Condition 'g', which requires establishment of a sampling station in an adjacent watershed of similar size without active mining or land disturbances, to monitor changes which may or may not be related to the proposed mining

¹⁹ AR at 93-95, 101-124

activities. The Appellant's concerns associated with Special Conditions 'd' and 'e' are discussed above in the first and second reasons for appeal and were determined to not have merit.

The AR discusses the rationale for establishing a control in an adjacent watershed devoid of mining activities, stating that it will help inform whether the Department of the Army authorized impacts occurring in the Cane Branch watershed, are the result of mining activities or other factors. The use of controls is a standard scientific method which establishes a reference point of observation designed to minimize the effects of variables. This practice increases the reliability of the results, often through a comparison between measurements taken at the control site versus treated or modified site(s).

The AR documents the District's determination that each of the Special Conditions is needed to address concerns regarding potential adverse impacts on water quality associated with the hollow fill construction, and a determination that ongoing monitoring of conditions within the watershed are warranted. The District determined that the project would not contribute to significant degradation of the waters of the United States, contingent upon stipulated factors.²⁰

The District's explanation for its decision to include Special Condition 'g' is supported by the AR, following current regulations and agency guidance. The District makes a rational connection between the facts and the choice made and is within the District Engineer's discretion. This reason for appeal does not have merit.

Appellant's Fifth Reason for Appeal: The Appellant asserts that the District's requirement, per Special Condition 'h', to submit documentation regarding best management practices (BMPs) implemented during construction is unnecessary.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: As part of their request for a Department of the Army permit, the Appellant proposed implementation of a BMP plan to minimize overall stream loss and stream degradation. The Appellant believes that providing written documentation of their compliance with the proposed BMP plan is unnecessary.

The District based its permit decision on an evaluation of the probable impacts which included consideration of the proposed construction BMP plan, among other factors. The AR noted that some of the proposed BMPs are experimental in nature, and that the proposed BMPs (according to the Appellant's submitted plan) would be implemented as practicable and as field conditions allow.²¹ The AR also noted that during construction new BMPs may be developed (through technical or scientific advances in the mining industry) which were not available at the time of permit issuance. Under this Special Condition, the Appellant will be required to report the use of

²⁰ *Id* at 116-124

²¹ *Id* at 117-118

any new or experimental BMPs and confirm which of the Appellant's originally proposed BMPs were implemented.

The District Engineer is required to maintain an effective permit compliance program. In accordance with regulations, District Engineers have a discretionary duty to take reasonable measures to inspect permitted activities as necessary, or require permittee reporting through permit conditions, to ensure that these activities comply with the specified terms and conditions of the permit.²² The District Engineer may add conditions on a case-by-case basis to clarify compliance with the permit terms and conditions, to satisfy compliance with the 404(b)(1) Guidelines, and to ensure the proposal would not be contrary to the public interest. Implementation of the BMP plan became a condition of the DA permit, and the District provided sufficient rationale for requiring post-construction reporting of the BMPs implemented by the Appellant during project construction.

The District's explanation for including this Special Condition is supported by the AR, follows current regulations and agency guidance, and is within the District Engineer's discretion. This reason for appeal does not have merit.

Appellant's Sixth Reason for Appeal: The Appellant asserts that the proffered permit clearly includes, without documenting such in writing, permit conditions based on EPA's involvement in the Enhanced Coordination Process, the April 1, 2010, memorandum and two study reports issued on the same day, and the July 21, 2011, guidance recently determined to have been issued illegally.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: Under Section 404 of the Clean Water Act (CWA), EPA and the Army Corps of Engineers share responsibility for regulating discharges of dredged or fill material into waters of the United States. EPA develops and interprets CWA policy, guidance and criteria for evaluating permit proposals. EPA also reviews and comments on individual permit applications and has the authority to elevate the review of permit proposals under Section 404(q).

The Corps is the decision-maker and project manager for the Department of Army's Regulatory Program, which includes the day-to-day administration of the 404 permit program. The Corps considers, to the maximum extent possible, all timely, project-related comments from other Federal agencies, including the EPA, when making regulatory decisions. It is recognized that the Federal resource agencies have an important role in the Department of the Army Regulatory Program under the CWA, National Environmental Policy Act, Endangered Species Act, and other relevant statutes. When providing comments, Federal resource agencies submit substantive comments within their respective areas of expertise and authority regarding project-related information on the impacts of activities being evaluated by the Corps and may recommend appropriate and practicable measures to mitigate adverse impacts. While the Corps will fully

²² 33 CFR 326.4 and 33 CFR 325.4

consider agency comments, the final decision regarding the permit application, including a determination of compliance with the 404(b)(1) Guidelines and need for special conditions, rests solely with the Corps.

As discussed above under the first and second reasons for appeal, the District conducts an objective, good-faith evaluation of water quality issues as part of its 404 permit evaluation. The District concluded that, in accordance with agency regulations and guidance,²³ permit conditions were warranted to satisfy compliance with the 404(b)(1) Guidelines and to ensure the proposal would not be contrary to the public interest.

In the AR the Corps has shown a valid concern about adverse impacts to water quality, including the potential of increasing conductivity resulting from the hollow fill activities that extend beyond the initial discharge of material into the stream. In the exercise of its congressionally mandated mission to protect the integrity of the nation's waters the District took into consideration the relevant factors of this permit evaluation. The District followed current promulgated guidance and applied Federal standards regarding the permit evaluation. The District's AR sufficiently documents its consideration of relevant factors, on-site analyses, and need for additional assessments and monitoring during construction. As a result, this reason for appeal is without merit.

Appellant's Seventh Reason for Appeal: The Appellant asserts that the Corps issuance of the proffered permit was arbitrary, capricious, an abuse of discretion, and not supported by substantial evidence in the administrative record.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The Appellant raised questions in the Request For Appeal relating to whether the District based its decision on a consideration of the relevant factors and whether there has been a clear error of judgment.

To be "arbitrary and capricious" there would be an absence of a rational connection between the facts found and the choice made. There would be a clear error of judgment; an action not based upon consideration of relevant factors, an abuse of discretion, failure to be in accordance with law, or failure to observe a procedure required by law.²⁴

The District Engineer based his permit decision on a determination that inclusion of Special Conditions were necessary to reach a determination that issuance of the permit would not be


²³ 33 CFR 325.4

²⁴ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983); see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971).

contrary to the public interest. The AR supports the District's reasoning and decision making process and draws a rational connection between the facts found and the conclusion reached.

There was no clear error of judgment identified during this administrative review of the District's AR; the District's action was based on a consideration of relevant factors and it was within the District Engineer's discretion to determine that the Special Conditions included in the proffered permit were warranted. The District did not fail to act in accordance with pertinent laws, nor did it fail to observe a procedure required by law. As a result, I find this reason for appeal does not have merit.

Conclusion: I find that the District's administrative record supports its permit decision. The District's conclusions regarding the seven reasons for appeal were reasonable and do not conflict with laws, regulations, executive orders, or officially promulgated policies of the Corps Regulatory Program. Therefore, for the reasons stated above, the appeal does not have merit.


Steven J. Roemhildt, P.E.
Colonel, U.S. Army
Division Engineer