

**ADMINISTRATIVE APPEAL DECISION**  
**CITY OF EVANSVILLE, FILE NO. 199901250-LAD**

**LOUISVILLE DISTRICT**

**AUGUST 29, 2001**

**Review Officer:** Suzanne L. Chubb, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

**Appellant Representative:** Mr. G. Michael Schopmeyer, Kahn, Dees, Donovan & Kahn, LLP, Evansville, Indiana.

**Permit Authority:** Section 10 of Rivers and Harbors Act (33 U.S.C. 403).

**Receipt of Request For Appeal (RFA):** May 8, 2001

**Appeal Conference/Site Visit:** July 24, 2001

**Background Information:** The appellant, the City of Evansville, submitted an application request dated September 16, 1999, to the Louisville District (District) to reconstruct and renovate the existing "Dress Plaza" built in 1937. The project site is located on the right descending bank of the Ohio River at Mile 792.2 in the State of Indiana. The project entailed demolishing existing concrete below the Ordinary High Water (OHW) elevation of 357.5 feet Ohio River Datum (ORD) and installing a steel sheet pile retaining wall capped with concrete, riprap and a concrete boat ramp. Dredging upstream of the boat ramp was also proposed. Additional project features requiring concrete below OHW were amphitheater seating, upper and lower stadium seating, a retaining wall for the upper stadium seating, a service drive and staging area. The District issued a 30-day public notice on October 15, 1999. The appellant requested to remove the small watercraft mooring cleats and amphitheater aspects of their proposal in letters dated March 6, 2000, and June 14, 2000, respectively. On July 28, 2000, the District issued an individual permit for the plaza restoration work with a special condition "that no large passenger vessels moor in the plaza area." The District continued to evaluate the City's request to moor large commercial passenger vessels at the plaza. On March 31, 2001, the District notified the City of its decision to deny the mooring of large commercial passenger vessels. The appellant has appealed this decision to the Division office.

**Summary of Appeal Decision:** The appeal is found to have no merit. The District Engineer (DE) correctly asserted regulatory jurisdiction over the mooring of commercial passenger vessels and adequately supported his decision to deny the mooring of these vessels.

**Appeal Decision and Instructions to the Louisville District Engineer (DE):**

**Reason 1:** The Louisville DE incorrectly applied Section 10 of the Rivers and Harbors Act.

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

**Action:** None required.

**Discussion:** In the RFA, the appellant incorrectly interpreted the regulatory jurisdiction of the Army Corps of Engineers under Section 10 of the Rivers and Harbors Appropriation Act of 1899 (33 U.S.C. Section 403). The appellant contends that regulatory jurisdiction under Section 10 only applies to new construction in waters of the United States and not to the renovation of existing structures. Section 10 prohibits the unauthorized obstruction or alteration of any navigable water of the United States, including any work affecting the course, location, condition or capacity of a navigable water [33 CFR 320.2(b)]. The proposed work can include dredging and filling activities as well as the construction of structures in, over or under the waterway. The Section 10 limit of jurisdiction in navigable waters is the lateral extent of the Ordinary High Water (OHW) elevation of the water body (33 CFR 329.11), currently 357.5 feet ORD. The original plaza construction may or may not have needed a DA permit, depending on the OHW elevation in use at that time. However, under the latest proposal, a large portion of Dress Plaza is below the OHW elevation of the river and any work requires DA review and approval.

**Reason 2:** The current need for Army Corps of Engineers (Corps) authorization to moor commercial passenger vessels is contradictory to past events.

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

**Action:** None required relative to the appeal. However, the District's addendum contains a statement that misrepresents past site conditions and should be corrected.

**Discussion:** There have been past occurrences of the Delta Queen Steamship Company vessels docking at the Evansville landing. An internet search of the Evansville Courier & Press archives resulted in past newspaper articles reporting (one of) these vessels moored on May 20, 1992 (for a 5-hour period including one hour for boats tours), August 14, 1995 (for possibly a 7-hour period), October 7, 1995, November 4, 1996, and in late September 1998. An April 26, 1992 article reported that, in the past, the Delta Queen and Mississippi Queen usually stopped in Evansville four or five times a summer.

During the appeal conference, the appellant stated there was an error in the District's Addendum to the Decision Document, page 2, where the District stated

“At times in the past, commercial passenger vessels have stopped in the Evansville Bend. However, there were no actual mooring devices on the bank used to secure these vessels. Furthermore, these visits were infrequent and of

short duration. Hence, no authorization was needed from the Corps to moor these vessels in the bend. . . . Nevertheless, the proposal which I am reviewing now is for commercial passenger vessels to be secured to a permanent structure, cleats, on the bank. Therefore, an authorization in accordance with Section 10 of the Rivers and Harbors Act is clearly needed because the vessels would be secured to a structure on a navigable water.”

The appellant stated that there were past mooring rings set in concrete along the plaza.

The District should correct this statement in its documentation. Although the administrative record contains an error, it does not change the Corps’ jurisdiction or influence the District’s ultimate decision. Section 10 prohibits the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any water of the United States. The District could not locate a permit for the original plaza construction and to the best of their knowledge the structure was “grandfathered” pursuant to 33 CFR 330.3(b). The regulation states that structures or work completed before December 18, 1968, are permitted by Nationwide permits issued on July 19, 1977, provided there is no interference with navigation. Unless modified, the activities (or structures) do not require further permitting. It is unlikely that the plaza activities in the late 1930’s caused interference to navigation. Barge size and traffic volumes were less than they are today. The District had no reason to review the grandfathered structure until the City submitted a request to renovate the plaza.

In the current proposal, the proposed moorings would be below the OHW elevation of the river and are subject to regulation. River traffic has changed since the 1930’s and the District correctly considered current river conditions when evaluating the navigation and public safety factors of the public interest review.

**Reason 3:** The DE did not consider the frequency and duration of commercial passenger vessel stops at Dress Plaza in reaching his permit decision. Thus, the DE erroneously calculated (overstated) the level of risk (to navigation and public safety).

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

**Action:** None required.

**Discussion:** The Corps and United States Coast Guard (USCG) share the evaluation of navigation and public safety factors on Section 10 proposals. The Corps’ Section 10 responsibilities are the protection of navigation and the prevention of obstructions to navigation through its review and authorization of proposed work in navigable waters. The Ports and Waterways Safety Act (33 USC §§1221 *et seq.*) is the statutory basis for the USCG’s management of risk on navigable waterways. The USCG is responsible for conducting risk analyses and providing a risk assessment to the Corps. A Corps/USCG Memorandum of Agreement, dated June 2, 2000, references these assessments. USCG policy guidance for implementing the MOA and a risk model were provided to Captains of the Port and others in August 2000. These documents became available after the District’s public notice for this project (October 15 to November 15, 1999) and, therefore,

the USCG did not perform a risk assessment on this project, in accordance with the newest policy guidance.

The USCG and District considered the comments of the barge and commercial passenger industry and used their best professional judgement in evaluating these factors. The DE fully considered the USCG's assessment of navigational risk in his finding that the mooring of commercial passenger vessels is an unacceptable hazard to navigation and public safety. The frequency and duration of the moorings are valid aspects in the consideration of the scope and degree of risk involved. However, they are not the only consideration and can be outweighed by other relevant factors. In this case, the configuration of the river, water levels and current conditions, barge size, cargo, traffic volume, and the potential harm to public safety and the environment were considered. The administrative record indicates the District was aware that the past moorings were infrequent and of "short" duration (undefined). Although the administrative record does not specifically discuss the frequency and duration of the proposed moorings, I find that the District's decision documents adequately explain the primary factors the DE considered relevant in his decision. The administrative record supports the DE's decision.

During the appeal conference, the appellant stated they believed the decision was biased toward the barge industry and that the industry operates without constraints on the Ohio River. Legal and regulatory requirements indicate otherwise. By law, the Corps maintains navigation for all waterway users, both commercial and private. The limited maneuverability of barges, the volume of barge traffic, and the river configuration at Evansville required the District to carefully weigh the impact of commercial passenger moorings on the barge industry. While the towing industry is self-regulating and the USCG does not restrict tow size, the Corps limits the size of tows at our locks to a configuration that can be processed with one lockage through a 1200 foot by 110 foot lock chamber. The USCG regulates cargo handling and storage procedures, vessel operation and minimum safety equipment standards. Also, USCG-licensed pilots must operate their vessels in accordance with the USCG navigation regulations.

**Reason 4:** The absolute ban on commercial passenger moorings does not comply with Corps policy at 33 CFR 320.4(r).

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

**Action:** None required.

**Discussion:** The above citation, 33 CFR 320.4(r), refers to the general policy on mitigation that is applicable to the review of all applications for DA permits. The District's addendum to the decision document and the summary memorandum regarding USCG and industry contacts, dated July 30, 2001, indicate that the District did consider possible alternatives concerning when commercial passenger moorings may be acceptable. The District considered river elevations, at and above 351.0 feet ORD, but these elevations were found to occur in the December through April timeframe, outside of the traditional boating season. The District also noted that during the higher river

levels barge maneuverability decreases and the risk of barge breakaways increases due to the higher current velocities.

The District also considered an excavated inland mooring slip similar to the adjacent Casino Aztar gambling boat. However, the District considered this alternative to be impracticable to the appellant and noted that any upstream bumper cells placed to protect a commercial passenger vessel would also pose a hazard to navigation. Therefore, this option was also discarded.

I find that the District did adequately consider other possible alternatives that would allow the mooring of commercial passenger vessels. The District's review of alternatives does not need to be an exhaustive one. If the appellant believes other possible alternatives exist that the District did not consider, the appellant is free to present these possibilities to the District and USCG for their review and consideration.

**Conclusion:** For the reasons stated above, I conclude that this Request For Appeal does not have merit.

A handwritten signature in black ink, appearing to read 'Steven R. Hawkins', with a long horizontal stroke extending to the right.

STEVEN R. HAWKINS  
Brigadier General, U.S. Army  
Commanding