

ADMINISTRATIVE APPEAL DECISION

JACKSON COUNTY WATER ASSOCIATION; FILE NO. 200400646

LOUISVILLE DISTRICT

DECEMBER 4, 2007

Review Officer: Mike Montone, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division

Appellant: Mr. Howard Williams, President of the Jackson County Water Association;

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

Receipt of Request for Appeal: April 6, 2006

Background Information: In May 2004, the appellant, the Jackson County Water Association (JCWA) submitted an application to the Louisville District (District) requesting authorization under Section 404 of the Clean Water Act (CWA) to discharge fill materials in waters of the U.S. in order to construct a dam and reservoir on War Fork and Steer Fork in the Daniel Boone National Forest in Jackson County, Kentucky.

The appellant refers to this proposed project as "The Jackson County Lake Project." According to documents submitted by the appellant, the proposed project is part of a strategic plan developed by the JCWA, the Jackson County Fiscal Court, and the Jackson County Empowerment Zone Community (JCEZ) and is an approved initiative of the Jackson County Strategic Plan under the Kentucky Highlands Empowerment Zone (EZ) Program.

The EZ program is a federally sponsored program facilitated by the U.S. Department of Agriculture (USDA) Rural Development. According to the USDA EZ website, the EZ program was designed to empower local communities with high rates of poverty through initiatives such as: addressing a comprehensive range of community problems and issues; establishing long-term partnerships between the federal government and rural communities; use of comprehensive strategic plan to identify and prioritize principal issues; utilizing broad-based citizen participation; providing for local self-determination; encouraging regional approaches to local problem-solving; and establishing performance benchmarks.

Local communities were encouraged to compete for grants by submitting applications that consisted of comprehensive strategic plans developed with the active participation of low-income community residents. The Kentucky Highlands EZ was one of three communities initially selected into the EZ program in 1994.

The proposed reservoir would have a capacity to supply 3.5 million gallons of water per day (mgd). According to the appellant the reservoir would meet the Kentucky Highlands EZ

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goals of improving the water supply and increasing recreational opportunities for the County and surrounding region.

Under the EZ program, the USDA Rural Development Rural Utilities Service (RUS) was selected as the lead agency for implementing the Jackson County Lake Project. RUS was responsible for leading the efforts to produce and publish the Final Environmental Impact Statement (FEIS) in May 2001 and issued the Record of Decision (ROD) recommending the 3.5 mgd reservoir in September 2001. According to RUS, the primary scope of the Environmental Impact Statement (EIS) was to evaluate the environmental impacts of, and alternatives to, the JCWA request for RUS to co-fund a proposed reservoir with the dual purpose of water supply and recreation.

On February 8, 2006, the District denied the JCWA request for authorization for the proposed dam and reservoir project. In their denial letter the District stated "... there are practicable alternatives which accomplish the project purpose with less impacts to waters of the U.S. Consequently, the project was deemed to be contrary to the overall public interest and the requested permit was denied." In a letter dated April 5, 2006, the JCWA appealed the District's decision.

Information Received and its Disposition During the Appeal Review: The Division evaluated this appeal based on the appellants' reasons for appeal, the District's administrative record, clarifications to the administrative record at the appeal conference including the Division's appeal conference summary and any addendum to the appeal conference summary submitted by the appellant and/or District at the request of the Division.

Summary of Decision: The District's administrative record supports its decision. The six reasons presented in this Request for Appeal do not have merit.

Appeal Evaluation and Findings:

The following are the appeal Reasons 1 and 2 as stated by the appellant:

Reason 1. The Corps has redefined the project's purpose.

Reason 2. The Corps has inappropriately directed a change in the project's goals. The Corps has attempted to reduce the importance of the recreational aspect of the project.

Due to the interrelated nature of these reasons for appeal, the discussion of merit has been combined.

Finding: These reasons for appeal do not have merit.

Action: No action required.

Discussion: The appellant asserts that the Corps has improperly redefined the project's purpose and inappropriately directed a change in the project's goals to reduce the importance of the recreational aspect of the project. In support of this position, the appellant states that the draft

environmental impact statement (DEIS), FEIS, RUS's record of decision (ROD), and its Corps 404 CWA permit application all clearly identify the project's purpose as two-fold: to increase the available municipal water supply capacity and to provide a *lake-based* [emphasis added] recreational facility.

The appellant further asserts in its reasons for appeal:

The Corps contends that the 404 permit application "narrowly" defines the recreational aspect of the project as lake-based recreation and that the application "elevates the role of the proposed recreational uses, to allow them to serve as causal agents of elimination". The applicant reiterates that the project is titled the "Jackson County LAKE Project" and has always had the goal of providing lake-based recreation.

Lastly, the appellant stated in this reason for appeal:

In the case of *citizens of Burlington, Inc V. James B. Busey IV, Administrator, FAA, 938 F.2.D at 195 (D.C. Cir., Feb 9, '91)* the court stated "An agency cannot redefine the goals of the proposal that arouses the call for action: it must evaluate alternative ways of achieving its goals shaped by the application at issue and by the function that the agency plays in the decisional process. Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be."

As explained further below, the District properly followed applicable regulations and guidance in assessing the purpose of the proposed project and determining that purpose to be municipal water supply with an incidental benefit of recreation. The District acted according to Corps regulations in establishing the project purpose for purposes of its CWA 404 application evaluation.

REGULATORY BACKGROUND

Regulations and Corps policy guide the District's evaluation of project purpose, which then guides the evaluation of alternatives to the proposal. Federal regulations at 40 CFR 230 implement Section 404(b)(1) of the CWA and govern the process of evaluating alternatives. These regulations are commonly referred to as the 404(b)(1) Guidelines or "Guidelines." The Guidelines generally prohibit the permitting of projects where there "is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences" (40 CFR 230.10(a)). To be "practicable," an alternative must be "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of *overall project purposes*" (40 CFR 230.10(a)(2), emphasis added). For projects that are not water-dependent, the Guidelines establish a presumption that there are practicable alternatives unless clearly demonstrated otherwise (40 CFR 230.10(a)(3)). A water dependent project "requires access or proximity to or citing within the special aquatic site in question to fulfill its *basic purpose*" (40 CFR 230.10(a)(3), emphasis added).

The 1999 Army Corps of Engineers Standard Operating Procedures for the Regulatory Program (1999 SOP) clarifies that under the CWA the District must define both a basic and overall project purpose. The basic project purpose is used to determine if the proposed activity is water dependent and the overall project purpose is used to evaluate the least environmentally damaging practicable alternatives (LEDPA). The overall project purpose must be specific enough to define the applicant's needs, but not so restrictive as to preclude all discussions of alternatives.

The 1999 SOP also states that defining the overall project purpose is the District's responsibility. However, the applicant's needs must be considered in the context of the desired geographic area of the development and the type of project being proposed. The Corps has to differentiate between components that are integral to the project's purpose and those that are merely incidental to the applicant's basic purpose. However, in all cases, the District will exercise independent judgment and define the purpose and need for the project from both the applicant's and the public's perspective.

In addition, under the National Environmental Policy Act (NEPA), project purpose and need must reflect the "underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action" (40 CFR 1502.13). The project purpose and need is used to determine reasonable alternatives.

What the District Considered in Determining Project Purpose

The language in the DEIS, FEIS, ROD and 404 CWA permit application is fairly consistent and summarized below. With the exception of the purpose statement submitted by the appellant in its 404 CWA application, the term used to describe the recreation element is *recreation* as opposed to *lake-based* recreation.

DEIS: The purpose is to provide (adequate and long term) water supplies for Jackson County and neighboring counties **and** to provide recreational opportunities to meet the present and future needs of Jackson County and the surrounding region.

FEIS: The **dual** purpose is to provide (adequate and long term) water supplies for Jackson County and neighboring counties **and** to provide recreational opportunities to meet the present and future needs of Jackson County and the surrounding region. [RUS acknowledged that the primary purpose of the proposed reservoir is water supply and any recreation that may occur at the reservoir would be an incidental benefit as the lake is not necessary to provide swimming facilities, or recreational activities such as hiking, camping and picnicking.¹]

¹ This acknowledgment is found in the FEIS in an official response from RUS to comments it received from the U.S. Environmental Protection Agency (USEPA) regarding RUS's DEIS. In its July 2000 letter to RUS commenting on the DEIS, the USEPA stated multiple times its concerns with the development of recreation as a project purpose and questioned how "recreation can become a bonafide project purpose capable of serving as a casual agent for elimination of other non-reservoir alternatives." In response, RUS acknowledged in the FEIS that: the primary purpose of the proposed reservoir is water supply; any recreation that may occur at the reservoir would be an

ROD: The stated purpose and need for the proposal was two-fold – water supply and recreation.

404 CWA application: The purpose is to provide (adequate and long term) water supplies for Jackson County and neighboring counties. *Additionally*, the lake will provide recreational opportunities to meet the present and future needs of Jackson County and the surrounding region.

The District also documented their consideration of a strategic plan developed by the JCEZ in association with the Kentucky Highlands EZ titled “What We Envision: A Strategic Plan for Future Development, Jackson County.” The District documented how this plan identified providing a safe and adequate drinking supply for Jackson County as a goal and separately identified recreational needs as objectives to be met under another goal of increasing tourism.

The District also documented that RUS is committed to fund any other reasonable and feasible alternative identified in the EIS and that the non-reservoir alternative of drawing water from the Kentucky River appears reasonable and feasible based on the FEIS.

Analysis of the District’s Actions Establishing Project Purpose

Project Components:

The District first evaluated the project’s components. Accordingly, the District reasonable concluded that the proposed project consists of two basic components (water supply and recreation) with independent utility. The District documented that the independent utility of the recreational activities are substantiated numerous times within the FEIS.

Basic Project Purpose:

Based on the regulations and policy discussed above, the District then evaluated the basic project purpose and found it to be non-water dependant, triggering the assumption that practicable alternatives exist. The District documented that based on the materials it reviewed, the stated recreational needs of hiking, picnicking, camping and swimming are not lake dependent. Similarly, the District documented that the basic purpose of water supply was not dependent upon a reservoir. The District documented how they considered and addressed non-reservoir alternatives for supplying water. It is reasonable to conclude from this that neither reservoir or non-reservoir project aimed at recreation or water supply must be located within a special aquatic site such as a wetland, mudflat, or within a riffle pool complex

incidental benefit; the lake is not necessary to provide swimming facilities, or recreational activities such as hiking, camping and picnicking.

Overall Project Purpose:

With respect to overall project purpose, the District found that the primary overall purpose was water supply and the secondary overall purpose was recreation. The District further documented their position that a non-reservoir alternative could provide a safe and reliable supply of drinking water and that recreational needs could be met independent of the water supply project. These determinations are reasonable and within the discretion afforded to the District by Corps regulations and policy.

Additional Actions Taken by the District

The District also made the appellant aware of its concerns regarding the treatment of the recreation element of project purpose. This is documented in the administrative record. The appellant submitted notes from a July 8, 2002 teleconference that demonstrate the District raised multiple concerns including those associated with the treatment of recreation and stated the potential to deny the permit if the concerns were not adequately addressed.

The District also sent the appellant a letter on September 24, 2004, informing the appellant of substantive objections and concerns that were raised in response to the District's public notice. Included in these concerns were those raised by the USEPA which specifically addressed recreation and project purpose by making the following statements:

[T]he appellant apparently diverged from the project purpose statements in the DEIS and FEIS... the appellant has become more focused than RUS by insisting the purpose is to construct and maintain a water supply and recreational reservoir... the appellant's recreational need analysis was not adequately documented and the conclusion was flawed.

The District informed the appellant that these comments will weigh heavily in their permit evaluation, and offered the opportunity to resolve or rebut all concerns. The appellant submitted a written response to the objections and concerns forwarded by the District. The appellant indicated they had carefully reviewed all comments and ultimately referred to the objections and concerns as "...more detailed, protracted, legalistic, and convoluted rehash" of comments previously issued during the development of the EIS. The appellant stated their belief that they had satisfied all requirements of the regulations for issuance of a permit and any remaining issues concerning impacts and mitigation would be addressed in the final design stages. Therefore, the appellant stated there was no reason to continue "...to belabor minor details further delaying the project, and adding even more expense" and requested the decision on their permit application be based on the thousands of pages of information contained within the permit application and supporting documents.

As clarified by the District in the appeals conference, the process of notifying and requesting feedback to substantial concerns and objections is the appellant's opportunity to rebut or resolve the objections and concerns. Typically, this process results in additional coordination and dialogue between an applicant and the District prior to the District finalizing their decision. However, according to the District, the appellant bypassed this step and went straight to asking

for a decision. Normally the District would re-direct the applicant to address critical concerns. However, in this case the District did not due to the strongly worded response letter from the appellant. Accordingly, the District did not make any further requests for additional information to address the identified concerns critical to issuance of a permit, including project purpose.

Based on the appellant's response, the District acted in a reasonable manner by basing their determination of project purpose on the information within the administrative record. The District also adequately documented their efforts to seek input from the appellant before making this determination.

The District appropriately defined project purpose and adequately documented its consideration of the appellant's needs and its efforts to resolve issues identified as critical to its permit evaluation. Therefore, for the reasons discussed above, I find no evidence that the District inappropriately changed the project goals or attempted to under emphasize the importance of the recreation element of the proposed project and these reasons for appeal do not have merit.

Reason 3. The Corps has inappropriately manipulated the wording of particular phrases contained in the DEIS and FEIS to direct the selection of a non-reservoir alternative as the LEDPA.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The appellant's arguments focus on the alleged differences between the manner in which RUS and the District treated the recreation element of the project purpose in their respective NEPA and CWA alternative analyses by stating that:

The non-reservoir alternatives were included in the documents similar to the "no-action" alternative required by NEPA. It was clearly understood by RUS that the project was two-fold and RUS repeatedly stated in ROD that "non-reservoir alternatives would not meet the overall stated purpose and need of the applicant's proposed action." The Council on Environmental Quality (CEQ) concluded in 1983 that there is "...no need to disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives."

As explained above, the first stage in evaluating a proper range of alternatives is the definition of project purpose. The District appropriately defined both the basic and overall project purposes based on the information in the record. For the Corps, the range of alternatives to be evaluated is then informed by the requirements of *both* NEPA and the CWA. While NEPA and the CWA both direct an analysis of reasonable alternatives, only the CWA requires that the action taken by the federal agency represent the LEDPA. In contrast, NEPA requirements are focused toward ensuring an objective, informed, and transparent decision making process and do not carry the same rigorous tests as presented by the Guidelines nor require the selection of the LEDPA. RUS demonstrates this in their ROD by stating that their responsibility under NEPA is

to “objectively evaluate the potential environmental effects of the proposed action and through an informed decision-making process decide whether or not to fund the proposal.”

While RUS clearly is not operating under the same set of rigorous tests as presented by the CWA requirements discussed above, they make findings about the actual effects of various alternatives that are similar to the District’s analysis. However, they arrive at different conclusions with regards to RUS selecting a preferred alternative that the District ultimately denied. As discussed below, RUS documents their selection of the appellant’s preferred alternative throughout the developmental stages of the EIS and consistently steers towards the reservoir alternative. The District consistently responds to RUS during these stages that its documentation fails to meet the standards of the CWA. However, RUS ultimately concludes that its choice of the reservoir project is acceptable and the District continues by advising the appellant that this selection will not meet the stricter requirements of the their CWA review (which demands selection of the LEDPA) and recommends the appellant provide additional and substantial documentation to supplement the EIS in order for their proposed project to address the LEDPA.

In their FEIS, RUS concludes that the preferred (reservoir) alternative would result in “moderately significant, short- and long-term harm to aquatic biota and riparian vegetation” and “moderately significant, adverse impact” on fauna. In contrast, RUS concludes in their FEIS that the Lock 14 pipeline alternative would result in a “short term, moderately significant degradation of water quality”. RUS also acknowledges in its ROD that the pipeline to the Kentucky River could reasonably meet the water need as supported by their consultation with the Kentucky River Authority. These conclusions evidence that RUS is not restricted to CWA requirements by their documentation of the existence of a LEDPA that was not selected as their preferred alternative.

RUS supports their decision to select an alternative other than the LEDPA by stating that their decision “weighs heavy in supporting the intent and goals of the Empowerment Zone initiative by showing deference to the local citizens long stated desire ... for a reservoir to provide a long-term sustainable water supply and for developing recreational opportunities to further the [region’s] economic development goals.” Thus, RUS’s selection of a preferred alternative appears driven by their analysis of the ability of the alternative to meet the appellant’s stated recreational needs. Indeed, this is captured when RUS concludes in their ROD that selecting a pipeline alternative fails to provide recreational opportunities and would result in “a moderately significant potential to disrupt social relations within the County, and/or impede other development goals of the EZ and the selection of the proposed reservoir would provide a significant increase in recreational opportunities for the region. These supporting arguments appear to contradict the statement made by RUS and documented in the FEIS that lake-based recreation is an incidental benefit (see footnote 1 above).

As previously stated, the District is bound by CWA regulations to define the project purpose independently of the appellant or the public interests. Therefore, the District must evaluate all practicable alternatives with equal weight when determining if a LEDPA exists. In preparing the ROD, RUS once again demonstrates that they are not bound by the same standard and states within their ROD that “[t]hese non-reservoir alternatives ultimately did not meet the

proposal's two-fold purpose and need, but were analyzed in the event the reservoir alternative would prove unfeasible for economic or environmental reasons."

Unlike the District, RUS demonstrated that the appellant's preferred alternative is feasible by asserting that the significant biological effects to the aquatic environment are acceptable considering the Guidelines based on their determination that water quality will benefit from a vast majority of the preferred alternative being located within a National Forest. In reaching this conclusion, RUS also acknowledged in their ROD that "[m]any comments were received regarding the proposal's consistency with the Clean Water Act, Section 404(b)(1) Guidelines." RUS then places the burden of meeting these guidelines on the appellant by stating in their ROD that "determination of whether the intent of these guidelines have been met are a determination that USACE will make when acting on the [appellant's] Section 404 permit application." This is consistent with the statements made by RUS in the FEIS under "Issues to Be Resolved." In this section, RUS acknowledges that additional information is necessary to satisfy the District's evaluation of the Guidelines during the permit evaluation process. This is also consistent with statements made by RUS via email to the District (November 3, 2000) in which RUS states "...RUS's role in the 404 permit will be limited in that it will be the responsibility of the project proponents [appellant] to coordinate and obtain all the proper permits prior to construction of whatever alternative is selected."

Of course RUS has no authority or expertise with respect to the Guidelines. Therefore, any substantive statements made by RUS regarding the compliance of the project with the Guidelines are unsupported. The District recognized this and attempted to address this in their coordination with RUS between the DEIS and FEIS stages.

In a July 10, 2000 letter to RUS commenting on the DEIS, the District: informed RUS of the District's regulatory responsibilities under Section 404 of the CWA including evaluating compliance with the Guidelines; suggested the most efficient way for the federal government to address this project proposal would be to address as many section 404 concerns within the EIS as possible; and stated that the non-reservoir alternatives needed more documentation before they are excluded from consideration as the LEDPA.

In a March 21, 2001 letter to RUS commenting on the preliminary FEIS (PFEIS), the District: informed RUS that the NEPA documentation prepared for the PFEIS was not sufficient for the District's Guidelines analysis; stated the need to further document the potential adverse impacts of the appellant's proposed project and the means to mitigate any unavoidable impacts in order to comply with the Guidelines; informed RUS on the specific requirements of the Guidelines to select the LEDPA, the sequential decision making that begins with avoidance, and the fact that the PFEIS appears to document Lock 14 as the LEDPA; and reiterated concerns with how recreation was being evaluated as a project purpose dependent upon a reservoir.

After RUS issued their ROD in 2001, but before the appellant submitted their CWA 404 permit application, the District participated on a teleconference call organized by the appellant on July 8, 2002. According to notes submitted by the appellant documenting this teleconference, the District raised concerns regarding: the Guidelines; the LEDPA being the pipeline vs. the

reservoir; and the potential to deny the reservoir alternative in light of these concerns not being adequately addressed.

And ultimately, as previously discussed above (see discussion for Appeal Reasons 1 and 2), the District submitted a September 24, 2004 letter to the appellant informing the appellant of substantive objections and concerns that were raised in response to the District's public notice. Among those comments submitted to the appellant are the following that are specific to the alternative analysis required by the Guidelines and the selection of the LEDPA:

The U.S. Fish and Wildlife Service (USFWS) stated that the applicant has clearly not complied with the Guidelines due to: high quality of the aquatic and karst ecosystems proposed to be impacted; the existence of a LEDPA (pipeline); the potential destruction of high quality habitat for federally listed bat species; and extensive information that identifies the intended project purpose and need of the project as water supply.

The USEPA stated their concern with the appellant's apparent divergence from the project purpose statements in the DEIS and FEIS and asserts that the appellant has become more focused than RUS by insisting the purpose is to construct and maintain a water supply and recreational reservoir. The USEPA also commented that the recreational need analysis was not adequately documented and the conclusion was flawed. The USEPA asserts that Lock 14 pipeline alternative is the LEDPA and unlike NEPA, the LEDPA must be selected under the Guidelines.

As previously discussed above (in Appeal Reasons 1 and 2), the appellant requested the decision on their permit application be based on the information contained within the permit application and supporting documents. Thus, the serious concerns forwarded by the District were not addressed by the appellant and the District appropriately evaluated the appellant's permit application based on the information in the file.

The appellant also clarified during the appeals conference its opinion that the Lock 14 alternative is not reasonable because the river is not a reliable source of water. The appellant stated that according to news media there is a frequent water crisis along the Kentucky River and drought restrictions are in place most years by communities that rely on Kentucky River as a water source. Documentation in FEIS by RUS indicates that the Lock 14 alternative will provide an adequate source of water to meet the water supply needs of the appellant and there is no clear evidence in the record to support the appellant's assertions that the Lock 14 alternative is unreasonable.

Therefore, for the reasons discussed above, I find the District's rationale is reasonable, consistent with Corps regulations and adequately documented in the District's decision document. Furthermore, I find no evidence that the District manipulated the wording of particular phrases contained in the DEIS and FEIS to direct the selection of a non-reservoir alternative as the LEDPA. Therefore, this reason for appeal does not have merit.

Reason 4. The Corps has concluded that the permit application must be denied because it “causes or contributes to violations of any applicable State water quality standards.” Our meeting with the Kentucky Division of Water have indicated that the long-term releases from the proposed reservoir will comply with the water quality standards provided the outlet works is properly designed and flow regime adequately scheduled.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: In a letter to the appellant dated November 8, 2004, the Kentucky Department of Environmental Protection (KDEP) stated that the required water quality certification (WQC) could not be issued by the Kentucky Division of Water (KDOW) at the time and recommended the appellant pursue plans to draw water from the Kentucky River. KDEP based their conclusions on the fact that the proposal will impact Steer Fork, which is considered to be the stream of highest quality within the state, and the appellant did not provide adequate information to document that the stream’s important functions would not be degraded or assurances that the state’s water quality standards would not be violated.

On page 101 of the District’s decision document, the District makes the following statement:

Under 40 CFR 230.10(b), a permit must be denied if it causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standards. I note that KDOW has stated that based on available information it cannot be assured that the water quality standards of Kentucky will not be violated by the proposed project and that it cannot issue the required WQC. A WQC is required prior to issuance of a Section 404 CWA permit.

The District’s statement present federal regulations and provide relevant information regarding the controlling state agency and the status of WQC. The District does not make a conclusion regarding permit denial relative to state WQC. The District’s statement of findings is presented on page 102 of their decision document. In this summary, the District clearly bases their decision to deny the requested permit on the following:

...there are practicable alternatives, which can accomplish the project purpose with less impact to aquatic resources and that the subject property would result in significant degradation of “waters of the United States”.

There is no apparent evidence in the District’s decision document to suggest that the District based their denial on the disposition of the appellant receiving water quality certification from KDOW. Therefore, this reason for appeal does not have merit.

Reason 5. The applicant disagrees with the conclusion that the project “will cause or contribute to *significant* degradation of the waters of the United States.”

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The decision to issue a permit is based on an evaluation of the probable impacts, including cumulative impacts of the proposed project, and its intended use on the public interest (33 CFR 320.4). Accordingly, the District evaluated 37 environmental considerations within its decision document (see pp 60-98). These included: 15 physical/chemical/biological characteristics and anticipated changes; 19 human use characteristics and impacts; and three public interest consideration.

Within the Environmental Consideration section, the District clearly identified and substantially documented adverse impacts and potential adverse impacts of the proposed project. Specific adverse impacts were identified in the District’s decision document during their evaluation of the following environmental factors: erosion and sedimentation (pg 65); habitat for fish and other aquatic organisms (pg 69); and wildlife habitat (pg 71). Likewise, specific potential adverse impacts were identified in the District evaluation of the following factors: recreation (pg 77); aesthetics (pg 79); wild and scenic rivers (pg 80); general water quality (pp 87-89); cumulative and secondary impacts (pp 90-97). In addition, the District stated that the project as proposed may also result in adverse affects to federally threatened and endangered species unless more data is presented and reviewed (pg 76).

When the environmental section is taken as a whole, the overall conclusion at the end of the decision document is clear that the proposed project does not comply with federal regulations and would contribute to the significant degradation of waters of the U.S. in both an individual and cumulative nature (see Determinations and Conclusion, pp 98-102).

As previously discussed above (see discussion for Appeal Reasons 1 and 2 and 3), the District submitted a September 24, 2004 letter to the appellant informing the appellant of substantive objections and concerns that were raised in response to the District’s public notice. Among those comments submitted to the appellant are the following that are specific to the discussion of significant, adverse impacts:

The KDEP stated their objection to damming the rivers due to detrimental impacts to the aquatic resource and their concern that wetlands within the surrounding area were not adequately delineated. The response from the State also indicated a separate project review letter would be forthcoming from the WQC Section. Accordingly, the KDEP, submitted a letter to the appellant dated November 8, 2004, and stated that the required WQC could not be issued at the time and recommended the appellant pursue plans to draw water from the Kentucky River. KDOW based their conclusions on the fact that the proposal impacts Steer Fork, which is considered to be the stream of highest quality within the state, and the appellant did not provide adequate information to document that streams important functions would not be degraded or assurances that the state’s water quality standards would not be violated.

The USFWS stated their concern that the proposal will have substantial and unacceptable impacts to aquatic resources of national importance (ARNI) and recommended denial of the project.

The USEPA concludes that the project as proposed will impact waters considered to be ARNI and can not be authorized.

As previously discussed above (see Appeal Reasons 1 and 2 and 3), the serious concerns forwarded by the District were not addressed by the appellant and the District appropriately evaluated the appellant's permit application based on the information in the file. Therefore, this reason for appeal does not have merit.

Reason 6. The applicant disagrees with the conclusion that “all *appropriate and practicable* measures to minimize potential harm and avoid significant degradation” will not be accomplished by the project.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: During the appeals conference, the appellant clarified that the mitigation and dam release plans were not fully addressed during the permit application process. They stated that during discussions with the District, “appropriate” mitigation was neither quantified nor qualified and mitigation proposals were not verified nor confirmed by District. The appellant asserts that these discussions led them to believe that mitigation could be part of the design phase, which would commence after a permit is issued. The appellant further asserted that since several issues regarding conceptual mitigation were discussed during the permit application phase, it was a forgone conclusion that they would comply with any final conditions that the District placed on the permit to address mitigation.

The appellant's assertions are not supported by the District's actions or evidence in the administrative record. To the contrary, the District requested additional information regarding mitigation. As previously discussed above (see Appeal Reasons 1 and 2, 3, and 5), the District submitted a September 24, 2004 letter to the appellant informing the appellant of substantive objections and concerns that were raised in response to the District's public notice. The District informed the appellant these comments will weigh heavily in their permit evaluation and offered the opportunity to resolve or rebut all concerns. Among those comments submitted to the appellant is the following comment specific to the discussion of avoiding, minimizing, and mitigating adverse impacts:

The USEPA states that the appellant has failed to provide an exhaustive analysis of the measures that could be taken to avoid aquatic impacts and then analyze the potential measures to minimize impacts. The USEPA states that such analysis is required before appropriate and practicable mitigation is considered.

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Indeed, regulations at 40 CFR 230.10(d) state that "...no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." However, as previously discussed above (see Appeal Reasons 1 and 2, and 3), the appellant responded to the District's request for additional information by requesting a permit decision be based on the information previously submitted. On page 96 of its decision document, the District stated:

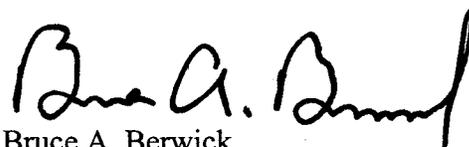
...[the appellant] provided no substantive response to the comments received from the state and federal agencies relevant to this issue generated by the public notice of their CWA Section 404 permit application.

Corps Regulatory Guidance Letter (RGL) 02-2 addresses the process to be used by District's to evaluate and determine appropriate compensatory mitigation. The RGL 02-2 states:

Districts will advise applicants of the mitigation sequencing requirements of the Section 404(b)(1) Guidelines, or what is required for general permits. Compensation is the *last* [emphasis added] step in the sequencing requirements of the Section 404(b)(1) Guidelines. Thus, for standard permit applications, Districts should not require detailed compensatory mitigation plans until they have established the unavoidable impact.

Thus, the serious concerns forwarded by the District were not addressed by the appellant and the District appropriately evaluated the appellant's permit application based on the information in the file. Accordingly, the District's rationale is reasonable, consistent with Corps regulations and adequately documented in the District's decision document and this reason for appeal does not have merit.

Overall Conclusion: I find that the District's administrative record supports its decision. Therefore, for the reasons stated above, I conclude that the six reasons presented in this Request for Appeal do not have merit.



Bruce A. Berwick
Brigadier General, U.S. Army
Division Engineer