

ADMINISTRATIVE APPEAL DECISION

MADE IN DETROIT, INC., FILE NO. 88-007-079-4

DETROIT DISTRICT

MARCH 28, 2000

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

Applicant Representative: Saulius K. Mikalonis, Butzel Long, Detroit, Michigan.

Receipt of Request For Appeal (RFA): October 29, 1999

Basis for Appeal as Presented by Appellant:

Count A: Army Corps of Engineers (ACE) (hereinafter USACE) exceeded their statutory authority by regulating upland areas well away from the proposed fill and dredge activities.

Count B: USACE acted arbitrarily, capriciously and inconsistently with its own regulations when it ruled against state and local authorities who supported the planned development.

Count C: USACE did not make available for review its takings analysis.

Count D: USACE failed to support its conclusion that its decision was not based on an impermissible, discriminatory basis.

Count E: USACE's decision was not based on objective and valid scientific conclusions.

Count F: A compilation of subordinate issues characterized as miscellaneous by the appellant. They include: 1) Contrary to permit application review procedures at 33 CFR 325.2(a)(3), USACE did not provide and allow Made in Detroit (MID) to comment on the Waterways Experiment Station (WES) document, regarding the requirement for a buffer zone, prior to making the permit decision. 2) USACE indicates that the project will result in loss of recreational hunting opportunities. However, hunting is illegal in Gibraltar and Trenton. Therefore, there will be no loss of recreational hunting opportunities. 3) USACE indicates that there is some question as to the economic impacts of the project and that MID's decision to place the development in the Downriver area arbitrarily restricts the alternatives analysis. USACE's questioning of the economic benefits is contrary to regulations at 33 CFR 320.4(q).

NOTE: I determined that Count C was inadmissible in correspondence dated December 2, 1999 (enclosed).

Appeal Conference Date: January 28, 2000

Information Received and its Disposition During the Appeal Review:

1) A November 24, 1999, letter from Mr. Bruce Jones and an attached letter, dated November 18, 1999, from the Grosse Ile Nature & Land Conservancy (GINLC) to the Chief of Engineers, LTG Joe N. Ballard. The GINLC letter is in response to an August 17, 1999, letter from MID to General Ballard (Encl. C of RFA). **Disposition: Considered irrelevant.**

2) A June 16, 1999, letter from MID to President Clinton and the July 29, 1999, U.S. Army Corps of Engineers (Corps) response to MID. These documents were referenced in the August 17, 1999, MID letter. The documents were requested by the Review Officer from the headquarters office of the Corps. **Disposition: Considered to be clarifying information.**

3) A January 12, 2000, circuit court ruling in the case of *Michigan Department of Environmental Quality (MDEQ) v. Made in Detroit, Inc.* **Disposition: Considered irrelevant based on judge's rescission of order (March 9, 2000, Corps meeting record).**

4) A February 3, 2000, letter and package of information from Mr. Bruce Jones. The information package contained the following items: a) Lake Erie Metropark map showing the location of a trail/boardwalk constructed under a Corps permit to the Huron-Clinton Metropolitan Authority (Corps processing no. 87-007-093-8). b) A July 8, 1999, newspaper article in the Heritage Sunday paper regarding the Lake Erie Metropark trail/boardwalk. c) Color aerial photograph of the Hennepin Marsh area showing the location of the North End dredge project site (Corps permit no. 98-007-003-0). d) An October 12, 1998, letter from Mr. Bret DesErmia of the North End Dredge Committee to the Detroit District Regulatory Chief. e) A September 20, 1995 letter from the law firm of Look, Kalmbach and Look to the Grosse Ile Township Board members regarding a legal opinion of hunting in Grosse Ile township. f) A July 18, 1999, letter from Mr. Bruce Jones to Mr. David Gesl (Corps project manager for MID application review) regarding his assessment of projected tax revenues and property values for the MID project. g) A December 2, 1999, letter from Mr. Bruce Jones to the editor of The Detroit News. h) A September 14, 1998, letter from Mr. Steven Gronda. **Disposition: Considered irrelevant.**

5) MID provided a written Supplemental Submission in Support of the RFA on January 28, 2000, at the start of the appeal conference. The District also received a copy at that time. MID considered the document to be additional support and elucidation of Counts A and C of the initial RFA. The document contains ten pages of text (Count A addressed on pages 3-8) and, in support of Count C, two formal ethics complaints by MID against a state and a federal employee. Also included are five exhibits referenced in the ethics complaint against the state employee. The complaints were filed on December 3, 1999, (federal) and January 5, 2000, (state), after the August 31, 1999, date of the District's permit decision. **Disposition: Considered as clarifying information.**

6) Report entitled "Potential Impacts Related to a Hypothetical Bridge and Housing Development", dated September 9, 1999, by Wade-Trim. **Disposition: Considered to be clarifying information.**

Of the supplemental information received, items 1, 4 and 6 are being provided to the appellant (enclosed); Items 1, 2 and 4 are being provided to the District (enclosed) for its disposition.

Appeal Decision and Instructions to Detroit District Commander (DE):

Count A: Army Corps of Engineers (USACE) exceeded their statutory authority by regulating upland areas well away from the proposed fill and dredge activities.

FINDING: Appeal does not have Merit.

ACTION: No action required.

DISCUSSION: The District was within its authority to consider the secondary (indirect) impacts from the proposed access to Humbug Island. The Corps' authority is derived from the NEPA (National Environmental Policy Act) implementation procedures for the Regulatory Program at 33 CFR 325, Appendix B. Part 7(b) of these regulations provides a discussion on determining the scope of analysis under NEPA. Part 7(b)(2) states "A district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action." Under NEPA, the DE's review can be extended to the entire project, including portions outside of waters of the U.S., if sufficient Federal control and responsibility over the entire project exists. Once the DE has established the scope of analysis, the project analysis must include the direct, indirect and cumulative impacts on all Federal interests within the purview of NEPA.

In this project, the proposed bridge requires a Department of the Army (DA) permit pursuant to both Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. A proposed 600-foot bridge causeway approach, impacting 1.0 acre of river bottom and wetland, will involve the discharge of fill material (Section 404) below the Ordinary High Water (OHW) elevation of the Detroit River, a Federal navigable waterway (Section 10). Development of the island cannot occur absent the construction of the bridge.

According to the RFA (page 1), the 409-acre project parcel consists of 231 acres of upland and 178 acres of open water of which approximately 54 acres is wetland. Based on these figures, approximately 57% of the parcel is subject to regulatory jurisdiction under either or both of the aforementioned laws. The onsite Section 10 wetland is a rare and valuable coastal, riverine, emergent and submergent wetland complex. With the exception of a small wetland at Elizabeth Park, this wetland complex is the last wetland on the mainland U.S. side of the Detroit River, an international waterway. The wetland provides valuable habitat for a variety of fish and avian species.

Humbog Island protects the wetland complex from waves and is a key component of this valuable aquatic resource.

Also, while the Corps does not have the authority to directly regulate upland, it can require vegetated buffer zones around wetlands and other waters of the U.S. (Final Notice of Issuance and Modification of Nationwide Permits, Federal Register/Vol. 65, No. 47/Thursday, March 9, 2000/Pg. 12818; and Army Corps of Engineers Standard Operating Procedures for the Regulatory Program). Vegetated buffers next to waterways and wetlands help maintain the chemical, physical and biological integrity of these aquatic resources. This is the goal of the Clean Water Act, as stated in Section 101, and is applicable to all sections of the act including Section 404. The vegetated buffer requirement is not an attempt to regulate uplands or to mitigate for upland impacts. It is, however, a method to protect and minimize impacts to aquatic habitats and water quality.

Count B: USACE acted arbitrarily, capriciously and inconsistently with its own regulations when it ruled against state and local authorities who supported the planned development.

FINDING: Appeal has Merit.

ACTION: As detailed in the discussion, the permit decision is remanded to the DE to adequately define the "significant overriding issues of national concern" necessary to override the state MDEQ permit issuance decision. Also, the District should delete all references to the May 19, 1999, MDNR documents and cite other enclosures that provide essentially the same information.

DISCUSSION: While zoning permits and state and local approvals do not and should not guarantee issuance of a Corps permit, the decision documentation must clearly indicate the important factors that the District considered to override a favorable State permit decision. Reference 33 CFR 320.4(j)(2) and (4) and 325.2(a)(6). In the statement of findings (SOF), the DE stated:

The significant issues that are of overriding national importance include the waterway's status as an international boundary, the habitat values of the project area, and the scope of impact analysis required under Federal regulations. The Detroit River forms the boundary between the United States and Canada. Numerous laws, initiatives, and treaties in both Canada and the United States are designed to protect and restore the quality of the Great Lakes ecosystem. Many of the actions and agreements list fish and wildlife habitat loss and degradation as a significant issue requiring that I be circumspect and overriding in this instance. The 404(b)(1) Guidelines as well as the National Environmental Protection Act require that I evaluate secondary impacts of regulated activities. The Michigan Department of Environmental Quality does not have this responsibility.

Outside of the SOF, a general reference is also found on page 61 of the environmental assessment (EA).

Regarding this statement, the Detroit River is, undeniably, an international boundary water. The District's decision document thoroughly discusses the wetland habitat functions and values and was correct in its scope of analysis (refer to the discussion under Count A above). The state regulation cited on page 21 of the RFA, to refute the DE's statement, does not list secondary or indirect effects as a criteria that the state will consider.

However, as the appellant asserted, the SOF statement does include the mention of unspecified laws, initiatives and treaties. The District described the potential adverse impacts to the aquatic habitat but the record does not indicate, with specificity, how the impacts to the onsite special aquatic sites have significant interstate, national or international importance.

Designations that may be relevant to demonstrating the area's significance include the identification of Humbug Marsh as critical waterfowl habitat in the North American Waterfowl Management Plan (EA, page 39), the designation of the Detroit River as an American Heritage River, and designation of Humbug Marsh as a key habitat and restoration site within the 1996 Detroit River Remedial Action Plan (EA, page 56). These items were provided in comments received from the public and there may be others. One such possibility is the Great Lakes Water Quality Agreement of 1978. This international agreement allows for the designation of Areas of Concern (AOC) by the International Joint Commission. On page 20 of the EA, the District noted that the Detroit River is identified as an AOC. The District did not provide any further comments or discussion on the importance that these designations may have. In conclusion, the decision document should, where possible, cite specific laws, regulations and/or file enclosures that support the District's decision and statements.

In a related matter, the appellant claims that the Corps did not rely on the MDEQ's position because MDNR (Michigan Department of Natural Resources) memos dated May 19, 1999, were referenced on page 24 of the EA and included as enclosure 40 to the District's EA (RFA footnote, page 17). I find that the District's citation of these memos generated by the MDNR Fisheries and Wildlife Management units is confusing. These memoranda were attached to a May 19, 1999, letter signed by the MDNR Resource Management Deputy. A May 26, 1999, letter, without enclosures, from the Director of MDNR superceded the earlier correspondence in its entirety and is clearly indicated to be the official MDNR response.

However, I view the impact of this error to be harmless. Although the Governor may have designated the MDEQ, not MDNR, as the responsible coordinating agency for the State of Michigan, that does not preclude the MDNR from providing resource comments for the Corps' consideration. The documents are primarily a reiteration of information contained elsewhere in the administrative record and do not contain substantial new or unique information. Nevertheless, the District should delete the reference to the May 19, 1999, documents and cite other enclosures that provide essentially the same information.

Count C: USACE did not make available for review its takings analysis.

FINDING: Inadmissible.

ACTION: Transmittal letter dated December 2, 1999 (enclosed).

Count D: USACE failed to support its conclusion that its decision was not based on an impermissible, discriminatory basis.

FINDING: Appeal does not have Merit.

ACTION: No action required.

DISCUSSION: The appellant presented several claims in support of this count. They are: 1) differing buffer requirements between MID and Marina Ventures International (MVI), a previous applicant on the subject property; 2) MID had to do two archaeological studies; and 3) the Corps submitted written affidavits to the state in support of a MDEQ v MID lawsuit. The RFA states that the record should include what actions, if any, the Corps conducted to discount the possibility that race factored into the decision. At the appeal conference, the appellant clarified that they had done a regression analysis that compared their proposal against fifteen projects authorized by the Corps within the last five to six years. He stated their analysis showed that the only factor that varied was race. The RFA states that the District's only reference to the issue of race was a conclusory statement that is not supported by the record (RFA, page 27).

On page 1 of the District's SOF, the DE addressed this issue with the following statement: "We have not subjected the project to any extraordinary burden or excessive processing time. Final determination required careful evaluation of complex issues raised over highly sensitive and valuable public interest factors. The issue of race is not a listed public interest review factor and played no role, positive or negative, in our review or conduct."

There is no evidence in the administrative record to indicate the Detroit District's permit denial decision was racially motivated. The District's review was consistent with a large-scale controversial proposal on an environmentally-sensitive and, preliminarily, archaeologically-sensitive site. The buffer widths mentioned in 1990 Corps correspondence to MVI were preliminary and were not part of any final Corps permit decision. The written affidavits provided by Corps employees to the State of Michigan were made at the request of the state Attorney General.

MID's regression analysis was not provided to me so I am unable to respond in any detail to that document. However, MID made comparative statements about projects in their RFA and I am able to respond to those. The Corps evaluates each permit application based upon its own individual circumstances - the type and extent of aquatic resource impacts, the functions and values of the onsite aquatic resources and the proposed project features. A comparison of similar project types on differing sites, and the converse of comparing similar sites with differing projects, would not yield clear and valid results.

Dredging or excavation has different environmental impacts than the discharge of dredged or fill material. Dredging may change a wetland to an open water feature but the resulting resource is still a regulated water of the U.S. When a wetland or waterway is

placement of houses, concrete, pavement etc. on the fill greatly reduces the possibility that the area will ever be restored to an aquatic habitat. Furthermore, while a subdivision, golf course and shopping plaza may all require the discharge of fill material, different indirect impacts would be expected from each project type.

In 1990, MVI also received a Corps permit denial on a proposal involving the subject property. In a January 29, 1999, Corps letter to the appellant (EA, encl. 14a), the DE indicated that the MID project and the MVI proposal shared some common adverse environmental impacts. The proposed development of Humbug Island and along the mainland shoreline is expected to cause significant secondary aquatic impacts. In the RFA, the appellant compares these proposals relative to their project features and magnitude of area impacts. The Corps' evaluation is based upon common adverse aquatic impacts. The projects were treated similarly and consistently when the District denied activities that cause substantial adverse aquatic impacts.

The District's decision document provides a detailed discussion of the high quality wetland characteristics within the project area and the important functions it serves for fish and wildlife habitat, water filtration and purification, sediment trapping, erosion protection, food chain production, active and passive recreation and aesthetics. Documentation of diverse fish and avian populations is provided. For these reasons and because of the local and regional rarity of this aquatic resource, the District determined the onsite wetland value to be high (EA, pages 19-26 and 46-49).

As indicated in Count A, the District's scope of impact analysis correctly included the consideration of potential indirect (secondary) and cumulative impacts of the project as required by the Corps regulations for implementing NEPA (33 CFR 325 Appendix B). Also discussed in Count A was the Corps' ability to require vegetated buffer zones around wetlands and other waters of the U.S. (Final Notice of Issuance and Modification of Nationwide Permits, Federal Register/Vol. 65, No. 47/Thursday, March 9, 2000/Pg. 12818; and Army Corps of Engineers Standard Operating Procedures for the Regulatory Program).

The District exhibited a fair and flexible balancing of protection of the aquatic environment and the needs of the applicant when it found that an authorized project is possible on this parcel. Any authorized project would require the establishment of a permanent conservation easement around Humbug Marsh, Monguagon Marsh and Humbug Island and a buffer 150 feet in width along the mainland shoreline and a portion of Handler Drain. The District reduced the buffer width by half from that recommended in the WES document. Furthermore, the District indicated a willingness to allow greater impacts to the mainland wetland pockets, due to their lower value relative to Humbug Marsh, in order to protect the remaining high value wetlands on the parcel (EA, page 45).

Count E: USACE's decision was not based on objective and valid scientific conclusions.

FINDING: Appeal does not have Merit.

ACTION: No action required.

DISCUSSION: The RFA states that "MID introduced several items to USACE identifying the lack of objectivity among the individuals who were providing supposedly

scientific information . . . Yet, USACE accepted the scientific statements at face value without ever considering the source of those statements." Since submittal of the RFA, MID has filed formal ethics complaints against an MDNR employee and an employee of the U.S. Geological Survey (USGS). The RFA also claims that the Corps denial is based on speculative concerns submitted by the U.S. Fish and Wildlife Service (USFWS) and U.S. Environmental Protection Agency (USEPA) (page 30).

The Corps used independent judgement when it evaluated the comments received from agencies as well as the public. The District did not simply accept all statements as fact or as having merit. The District staff independently verified and evaluated salient facts and opinions expressed during their review consistent with 33 CFR 325.

As an example, the District discounted the following comments by the USFWS: "Housing and street lights will result in a negative phototactic response by light sensitive species, such as walleye, causing them to avoid important shallow water habitats." "Construction of the bridge would also interfere with waterfowl flight between Chrysler Bay, the Trenton Channel and the northern end of the marshes on the project site." "In addition, there is some preliminary evidence that aquatic habitats near the mouth of the Monguagon Creek Drain may provide a refugia for native unionid mussel species from zebra mussels."

In addressing these statements, the District stated:

Lighting from proposed homes, roads and automobile use would not disrupt feeding patterns by fish or other aquatic species. We are not aware of any scientific information to support this concern and our personal experiences have been that such lighting, in fact, attracts insects and other components of the food chain and also predators such as walleye. Although the proposed work may provide zebra mussel attachment sites, we do not expect that this addition will adversely impact other mussel species. It is unlikely that native mussels which could be out-competed by zebra mussels are found in this vicinity. They are likely to have been extirpated." (EA, pages 34-35). "Waterfowl would easily move under, over, or around the bridge, therefore, flight patterns would not be significantly affected." (EA, page 40).

The appellant also asserts that the Corps and other Federal agencies engaged in the retrospective collection of data to support preconceived notions (RFA, page 32). I find that without baseline environmental data, the Corps cannot make a determination of the value of aquatic resources that would be impacted or the appropriate level of mitigation required to comply with USEPA's 404(b)(1) Guidelines. These determinations are crucial to the Corps' decision-making process and they should not be made prior to obtaining the necessary and appropriate information on the value of the aquatic resources within the project area.

Count F (1): Contrary to permit application review procedures at 33 CFR 325.2(a)(3), USACE did not provide and allow Made in Detroit (MID) to comment on the Waterways Experiment Station (WES) document, regarding the requirement for a buffer zone, prior to making the permit decision.

FINDING: Appeal has Merit.

ACTION: The permit decision is remanded to the DE to allow the appellant to submit comments regarding the WES report to the District for consideration.

DISCUSSION: The District did not coordinate an August 1999 WES report entitled "Technical Support for Evaluation of Buffer Strips on the Made in Detroit Development Project" with the appellant prior to making its permit decision. The RFA cites regulations at 33 CFR 325.2(a)(3) as requiring coordination of substantive comments, such as the WES document, with the appellant. This regulation refers to comments received in response to a public notice but also states "At the earliest practicable time other substantive comments will be furnished to the applicant for his information and any views he may wish to offer." The District considered the WES report to be an internal technical document and therefore did not feel the need to provide it to the applicant for comment.

The objectives of the report, as stated by WES at the beginning of the document, was "... assessing the effectiveness of existing buffer strips to provide wildlife habitat and protect water quality ...". The document was cited as enclosure 35 of the EA and considered by the District in its determination of effects on water quality, terrestrial biota, wetlands, conservation and overall ecology, and economics and in its 404(b)(1) Guidelines compliance evaluation. As the document carried some weight in the District's decision, its information should have been provided to the appellant for review and comment prior to the permit decision. The document was received on August 20, 1999, via email. The District was committed to providing a timely permit decision by August 31, 1999, and this deadline was a factor in the decision to not coordinate the WES report with the appellant. The appellant received the information at the time of the denial, along with the District's decision document and referenced enclosures.

The permit decision is remanded to the DE to allow the appellant to submit comments regarding the WES report to the District for consideration.

Count F (2): USACE indicates that the project will result in loss of recreational hunting opportunities. However, hunting is illegal in Gibraltar and Trenton. Therefore, there will be no loss of recreational hunting opportunities.

FINDING: Appeal does not have Merit.

ACTION: No action required.

DISCUSSION: The EA states that "recreational hunting opportunities would be eliminated by the proposed development" (page 66). The RFA states that all hunting is illegal in Gibraltar and Trenton and therefore, there will be no loss of recreational hunting opportunities.

Since the appeal conference, the District has provided the following clarifying information. The project embayment is located within the City of Gibraltar which has a no hunting ordinance. Also, the underwater lands of the embayment are owned by MID.

An employee of the MDNR told Mr. David Gesl, the Corps project manager, that state law requires that hunters be greater than 450 feet from an occupied structure. Regardless, the District did not consider this issue to be a major factor in the evaluation of the MID application.

Based upon this information, hunting could currently occur on the east side of Humbug Island below the OHW elevation. Once the mainland and/or island contain occupied structures, this hunting opportunity would be lost. Therefore, the District's statement was correct.

COUNT F (3): USACE indicates that there is some question as to the economic impacts of the project and that MID's decision to place the development in the Downriver area arbitrarily restricts the alternatives analysis. USACE's questioning of the economic benefits is contrary to regulations at 33 CFR 320.4(q).

FINDING: Appeal does not have Merit.

ACTION: No action required.

DISCUSSION: The RFA states that the Corps' EA (page 63) indicates there is some question as to the economic impacts of the project. Further, the RFA states the Corps' questioning of the project's economic benefits is contrary to regulations at 33 CFR 320.4(q) since the Corps did not provide independent economic data.

The aforementioned regulation states "When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place. However, the district engineer in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest." The depth of evaluation performed by the District is dependent on the significance of the project's impact on the public interest. The review can range from a cursory evaluation of the applicant's economic evaluation to, in unusual circumstances, the District performing an independent economic analysis. In the Corps' final analysis, the District balances the economic need for a project evenly with the other public interest review factors listed at 33 CFR 320.4(a).

Based upon my review of the decision document, I do not agree with the appellant. The District found that, "The proposed site development would provide economic development to the area", and "... positive economic impacts are expected as a result of issuing the proposed permit." The District's discussion addresses both the public benefits expected to accrue from the project as well as the potential private benefits and detriments to MID. The EA details the project's many benefits to the public interest such as providing an increased tax base, increased property values, short term benefits to the local construction trades, and long term benefits to area businesses. The District also discusses the potential private benefits and detriments to the developer dependent upon the project's success or failure. In regards to MID's economic evaluations, the District states "Although a development of this nature and magnitude would likely contribute to the economy, if successful, we cannot verify the employment

and economic claims made by Made in Detroit." The District conducted a fair and balanced review of the economic need for the project in its public interest review.

In regards to the alternatives analysis, the Corps found that the appellant's offsite search criteria was arbitrarily limited to the Downriver area, specifically Wayne County. When asked for clarification, the District stated that the analysis should have included the entire Detroit metropolitan area encompassing Wayne, Macomb, Monroe and St. Clair Counties.

Lastly, the RFA also questions the Corps' statement that the issuance of a permit to develop Humbug Island has the potential for major long-term adverse cumulative impacts from the development of other uninhabited islands. Although the appellant calls the statement "conjecture", in a previous sentence the appellant agrees that island development has occurred and will likely occur in the future (RFA, page 35).

Summary of Findings:

Count A: Does not have merit.

Count B: As detailed in the discussion, the permit decision is remanded to the DE to adequately define the "significant overriding issues of national concern" necessary to override the state MDEQ permit issuance decision. Also, the District should delete all references to the May 19, 1999, MDNR documents and cite other enclosures that provide essentially the same information.

Count C: Inadmissible.

Count D: Does not have merit.

Count E: Does not have merit.

Count F(1): The permit decision is remanded to the DE to allow the appellant to submit comments regarding the WES report to the District for consideration.

Count F(2): Does not have merit.

Count F(3): Does not have merit.

Encl



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Commanding