

ADMINISTRATIVE APPEAL DECISION

BOROUGH OF CARTERET - FILE NO. NAN-2012-01198

NEW YORK DISTRICT

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division

Appellant: Borough of Carteret

Date of Receipt of Request for Appeal (RFA): 3 May 2013

Appeal Meeting Date: 21 June 2013

ACCEPTED REASON FOR APPEAL:

The North Atlantic Division office accepted the following reasons for appeal as detailed in the RFA by the Borough of Carteret dated 3 May 2013:

1. The district's decision was not supported by substantial evidence in the administrative record, omitted material facts and relies upon inaccurate data.
2. The district's decision was based on an incorrect application of policy, guidance, law or regulations.
3. The district's determination was arbitrary and capricious

SUMMARY OF DECISION:

The appellant's request for appeal has merit. The administrative record (AR) does not contain substantial evidence to support the district's decision to deny the permit. With regard to the aspects of the appeal on which merit has been found, I am remanding the decision back to the district to provide additional analysis and documentation and reconsider its decision.

BACKGROUND INFORMATION:

The appellant requested a permit to construct a 220 boat slip marina with associated dredging and placement of clean fill materials to remediate contaminated sediments in the area of the proposed marina. The work is proposed in the Arthur Kill located in the Borough of Carteret, Middlesex County, New Jersey. The New York District denied the permit request based on concerns regarding the impact to safety and navigation. The work proposed by the appellant is subject to jurisdiction under Section 10 of the Rivers and Harbors Act of 1899¹ and Section 404 of the Clean Water Act².

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION:

- 1) The district provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.
- 2) With the request for appeal, the appellant provided documents containing its comments and analysis of the district's jurisdictional determination. At the appeal meeting, the appellant provided e-mail correspondence not included in the AR between the district and their agent

¹ 33 U.S.C. 403

² 33 U.S.C. 1344

requesting the decision document. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7 (f).

EVALUATION OF THE REASONS FOR APPEAL:

Appeal Reason 1: The district's decision was not supported by substantial evidence in the administrative record, omitted material facts and relied upon inaccurate data.

Finding: These reasons for appeal have merit.

Action: The district shall reconsider its determination to include a detailed analysis of its findings to support the rationale of its final decision based on facts and science. Specific issues that require further evaluation include: 1) the district's finding that the Stevens Report³ is biased and flawed; 2) why the recommendations of the Stevens Report are not acceptable to mitigate for impacts from the proposed marina; 3) what basis the district used to support its findings that surge related impacts will occur and why the Stevens Report recommendations do not mitigate for the surge related impacts; and, 4) the district's analysis of the information contained in the report prepared by Marine Safety Consultants, Inc⁴.

Discussion: The appellant disagrees with the district's determination to deny the permit. The appellant states that the district did not give appropriate consideration to the information provided as part of the permit application and the decision was not supported with documentation in the AR to substantiate the district's findings.

In addition to their own findings, the district relied heavily upon letters provided by the United New York and New Jersey Sandy Hook Pilots' Benevolent Associations, (the Pilots), the United States Coast Guard (USCG) and the Harbor Safety Operations and Navigation Committee of the Port of New York and New Jersey (Harbor Ops Committee) to support its denial. The appellant agrees that the waterway is a challenging area; however, they believe the challenges can be mitigated. The appellant states it was not given a chance to provide a rebuttal to the comments received and they do not believe the information they provided to support permit issuance was given appropriate consideration.

The Harbor Ops Committee and the Pilots⁵ state: "the Stevens Report is biased, flawed and of little value." The district's determination appears to rely heavily upon the comments received from these groups however little detail is provided to support why they believe the report is biased, flawed and of little value. No discussion is provided in the AR to dispute the recommendations in the Stevens Report to mitigate for impacts at the marina.

The district states that "the Borough's permit application and supporting documentation does not provide justification or details that counter, at all, the position of the USCG, the Harbor Ops Committee and the concerns of the commercial mariners over the past decade. It is clear that as currently planned, this proposal would substantially interfere with navigation and safety on the Arthur Kill."⁶

³ Water Level Oscillations in Response to Vessel Passage through Fresh Kills Reach, Carteret, New Jersey, Center for Maritime Systems Stevens Institute of Technology, 30 April 2009. 45 Pages.

⁴ Borough of Carteret Proposed Marina Navigation Risk Assessment. Marine Safety Consultants, Inc. Received by the district on 27 July 2012. 26 pages (incomplete in AR).

⁵ AR 174 & 198

⁶ AR 25

The appellant provided the district with scientific data (i.e., the Stevens Report) that it believes negates the challenges identified by the various groups with regard to wakes and surge. Specifically, the appellant provided a partial document⁷ and the Stevens Report, which, both provide information that contradicts the district's findings. The district did not provide detailed information in the AR to support a denial that refutes the scientific information provided by the appellant on water level oscillations in response to vessel passages in the area of the proposed project.

The issue of impacts from water displacement caused by surge from large commercial vessels was brought up in several places in the AR and was specifically raised as a concern of the Harbor Ops Committee and the Pilots. It was apparent from discussions at the appeals conference that some of the district's concerns were about the impacts of vessel created surge on operational recreation vessels, not just how they are moored. Although used as a reason to support denial, no scientific or factual data is provided in the AR that demonstrates that vessel surge would have a significant impact on navigation. The Stevens Report, however, takes surge into consideration in its recommendations on design of the marina and the mooring of vessels that will use the marina. The issue of surge impacts on operational vessels is not clearly discussed in the Stevens report. The Harbor Ops Committee and the Pilots letters request that the district require the completion of an in-depth study of surge impacts. There is no evidence in the AR that an in-depth study of surge impacts was completed by the district. It also is not clear in the AR why the Stevens report provided by the appellant does not address the districts concerns about surge.

The district's decision refers to several places in the regulations to support the permit denial. 33 CFR 320.4(g)(3) states:

"A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface. In the case of proposals which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied."

The district states that it denied the appellants proposal based on 33 CFR 320.4(g)(3) because the proposal will create undue interference with access to, or use of, navigable waters⁸. Further, the district states that Carteret has water access through an existing public boat launch, thus, permit denial is not denying them access to the water⁹.

33 CFR 320.4(o)(3) states: "Protection of navigation in all navigable waters of the United States continues to be a primary concern of the federal government."

The district states that it also denied the appellants proposal based on this regulation and also based on input from the USCG, the Harbor Operations Committee, the Pilots and its own opinions. They state the primary reasons supporting the denial is the potential introduction of a large number of recreational vessels into a narrow, busy, waterway used primarily for deep draft commercial navigation. The district raises concerns regarding the difficulty that the large ocean going vessels have with visibility over the bow, their ability to see small vessels, the risk for

⁷ Borough of Carteret Proposed Marina Navigation Risk Assessment, Prepared by Marine Safety Consultants, Inc received by the district on 27 July 2012. Only the first 15 pages of this 26 page document are included in the AR -- the district stated they never received the remainder of the document.

⁸ AR 8

⁹ AR 24

collision, injury or potential loss of life and potential environmental and economic impacts that could result from a collision. Additionally, the district raises concerns over increased incursions by recreational vessels into the USCG one hundred yard safety and security zone¹⁰ for commercial vessels carrying petroleum⁷. The district says permanent effects on navigation, safety, port security and the general environment of the Arthur Kill would occur if the marina is permitted⁸. The area of the proposed marina is one of the few places in the Arthur Kill where vessels are allowed to meet or overtake one another per the USCG Vessel Traffic Service¹¹. The district states that the introduction of small vessels in this unique zone, where large commercial vessels are authorized to overtake one another and have limited visibility over the bow, is likely to result in an unacceptable risk of collision. It believes that it could lead to injury or potential loss of life, adverse environmental impacts, and/or economic impacts should the channel have to be closed and possible risk to national security due to the nature of the commercial cargo.¹²

The regulations state that "...even if official certification and/or authorization is not required by state or federal law, but a state, regional, or local agency having jurisdiction or interest over the particular activity comments on the application, due consideration shall be given to those official views as a reflection of local factors of the public interest."¹³ The district states that the USCG letter emphasized an unacceptable level of risk to safety, security and the environment in the Arthur Kill if the proposed structure is authorized. The district's allegations of potential impacts from the proposal on navigation are supported by other federal agencies and industry.

The appellant provides info in the AR on vessel usage in the Arthur Kill.¹⁴ It is the appellant's contention that denial of its permit is not warranted as the large ocean going vessel traffic in the Arthur Kill is limited. It indicates that marinas have been authorized and currently operate elsewhere in the Arthur Kill with no identified safety issues^{15, 16} and the appellant states that the impacts of increased vessel traffic associated with the marina, were it permitted, would only be seasonal.

The district provides numerous reasons related to potential safety hazards and potential impacts to the environment and commerce in support of its decision to deny the proposed permit application. The district identifies support of the commercial navigation community for denial in accordance with the concerns for safety as part of the public interest review. But it fails to clearly support its decision in the AR with substantial evidence that refutes information provided by the appellant that potential impacts can be mitigated.^{3, 4}

The appellant raised several other points about the public interest review that it believed the district disregarded, including the need for open space, site remediation need and costs, access to the water, and relocation of the NJ state police boats.

The district's decision to deny the permit was based on probable and cumulative impacts of the proposed marina and its intended use. It considered all public interest factors in accordance with 33 CFR 320.4(a)(1). Although the decision document lacks detail to support the denial, the above factors (open space, remediation, access, police boats) were appropriately considered in

¹⁰ 33 CFR 165.169(a)(15)

¹¹ AR 154

¹² AR 25

¹³ 33 CFR 320.4(1)(J)

¹⁴ AR 84 - 89

¹⁵ Appellant's Request for Appeal dated 2 May 2013

¹⁶ AR 54, 58-61,

the AR, but were not determining factors in the decision to issue or deny the permit with regard to the public interest¹⁷.

Appeal Reason 2: The district's decision was based on an incorrect application of policy, guidance, law or regulations.

Finding: This reason for appeal has merit.

Action: The district shall provide the public notice comments to the appellant and allow them to respond to the substantive comments received and the ability to reach out to the objectors to work with them to try and resolve the issues of concern. After coordinating with the appellant in accordance with 33 CFR 325.2(a)(3), the district shall reconsider its determination to include a more detailed analysis of its findings.

Discussion:

The appellant states that the district did not provide the appellant with notification of the issues raised by objectors that were relied upon to deny the permit application. In addition to not providing the comments, the appellant states that the district did not provide it a chance to respond to the comments made in opposition to the proposal prior to the district denying the permit request. The appellant states that by not receiving the comments it was not provided a chance to meet with objectors and address their concerns or propose modifications to address the objections. The appellant states that by not having the ability to respond to comments and meet with objectors, the district made a determination on an incomplete administrative record.

33 CFR 325.2(a)(3) states:

The district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application. Receipt of the comments will be acknowledged, if appropriate, and they will be made a part of the administrative record of the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another federal agency, the district engineer may seek the advice of that agency. If the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his views on such issue to the district engineer (see §325.2(d)(5)). 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. A summary of the comments, the actual letters or portions thereof, or representative comment letters may be furnished to the applicant. The applicant may voluntarily elect to contact objectors in an attempt to resolve objections but will not be required to do so. District engineers will ensure that all parties are informed that the Corps alone is responsible for reaching a decision on the merits of any application. The district engineer may also offer Corps regulatory staff to be present at meetings between applicants and objectors, where appropriate, to provide information on the process, to mediate differences, or to gather information to aid in the decision process. The district engineer should not delay processing of the application unless the applicant requests a reasonable delay, normally not to exceed 30 days, to provide additional information or comments.

¹⁷ AR 23-26

Per the regulations, the district is not required to seek the input of the appellant unless the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination. The regulations leave the discretion with the district on the need for input from the appellant.

However, the regulations are not discretionary and the district must provide substantive comments to the appellant allowing them the opportunity to provide any views it wishes to offer and the opportunity to reach out to objectors to resolve their objections. There is no evidence in the AR that the district provided the public notice comments to the appellant and allowed them the opportunity provided in the regulations to respond to the substantive comments received or the ability to reach out to the objectors to work with them on resolving the issues of concern.

The district's decision document states that the proposed work is contrary to the public interest because of probable unacceptable impacts to navigation within the Arthur Kill waterway. In accordance with 33 CFR 325.8(b):

...In cases where permits are denied for reasons other than navigation or failure to obtain required local, state, or other federal approvals or certifications, the Statement of Findings must conclusively justify a denial decision. District engineers are authorized to deny permits without issuing a public notice or taking other procedural steps where required local, state, or other federal permits for the proposed activity have been denied or where he determines that the activity will clearly interfere with navigation except in all cases required to be referred to higher authority...

Although the district did not deny the permit request based on this part of the regulations¹⁸, the decision appears to have taken part of this into consideration by not following the procedures as prescribed in 33 CFR 325.2(a)(3) for the public notice process. The district engineer clearly has the authority to deny permits without issuing a public notice where they determine the activity will "clearly interfere with navigation". For the district to deny based on 33 CFR 325.8(b), the AR needs to clearly support how the proposal will "clearly" (emphasis added) impact navigation. The language used throughout the AR, when discussing impacts to navigation, is mostly speculative. The AR is not clear as to why the district issued a public notice, but did not provide the appellant the public notice comments or a chance to rebut them prior to issuing a final decision.

The appellant stated that the district never provided them with the complete administrative record to support the permit denial and that they never received the Environmental Assessment or the 404(b)(1) analysis to support the district's decision.

Based on the AR, it does not appear that the district provided the decision document to the appellant with the denial determination as they should have in accordance with 33 CFR 331.2.¹⁹ The denial letter references enclosures, but it is not specific to what the enclosures consist of and if they were actually provided to the appellant. At the appeal conference, the appellant provided e-mail correspondence from the district that is not in the AR that says the Statement of

¹⁸ 33 CFR 325.8(b)

¹⁹ *Denial determination* means a letter from the district engineer detailing the reasons a permit was denied with prejudice. The decision document for the project will be attached to the denial determination in all cases.

Findings was not provided with the permit decision.²⁰ In accordance with the regulations, the district was in error in not providing the decision document with the denial letter. The appellant was ultimately furnished a copy of the decision document upon request and, therefore, this is considered to be a harmless procedural error.

Appeal Reason 3: The district's determination was arbitrary and capricious

Finding: This reason for appeal has merit.

Action: The district shall reconsider its decision in light of Appeal Reasons 1 and 2 above.

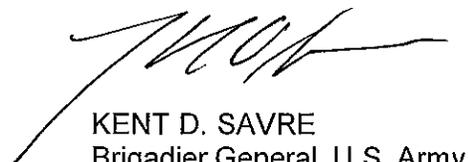
Discussion:

The administrative record shows that the district's decision was arbitrary and capricious since it was not supported by analysis and supporting factual information. The appellant provided factual information in the AR, which is not considered in the district's determination to deny the permit. The district's decision is based upon allegations of anticipated impacts, but is not supported by any scientific or factual basis.

OVERALL CONCLUSION:

For the reasons stated above, I find that the appeal has merit since the AR does not contain substantial evidence to support the district's decision to deny the permit. With regard to the aspects of the appeal on which merit has been found, I am remanding the denied permit back to the district to reconsider its decision. The district must provide additional analysis and documentation to support its findings in the administrative record.

This concludes the administrative appeal process. The district shall complete these tasks within 60 days from the date of this decision and upon completion, provide this office and the appellant with its final decision document.



KENT D. SAVRE
Brigadier General, U.S. Army
Commanding

²⁰ E-mail dated 11 April 2013 from Leslie Early-Bowles, USACE to Joe Giddings, CME Associates. In the e-mail Ms. Early Bowles states that the district does not typically send out the Statement of Findings with permit decisions unless specifically requested. A previous e-mail from earlier that day provided Mr. Giddings with the decision document which he requested in an e-mail dated 10 April 2013.