

**ADMINISTRATIVE APPEAL DECISION
RIVERS AND HARBORS ACT - PERMIT DENIAL
ANDERSON PROPERTY
HIDDEN BEACHES VILLAGE
CITY OF BLYTHE
RIVERSIDE COUNTY, CALIFORNIA
LOS ANGELES DISTRICT
FILE NUMBER 206-01891-MB**

February 14, 2007

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

Appellant: Virginia Anderson, property owner

District Representative: Marjorie Blaine, Corps, Los Angeles District (District)

Authority: Rivers and Harbors Act, Section 10 (33 USC 403)

Receipt of Request For Appeal: November 29, 2006

Appeal Conference Date: January 22, 2007. No site visit was required.

Summary of Decision: The District's evaluation and permit decision were reasonably supported by the administrative record, within the District's zone of discretion, and there was no basis under 33 CFR 331.9 to find that the Appellant's appeal had merit.

Background Information: The Appellant owns a property parcel with a single-family residential structure within the Hidden Beaches Village subdivision north of Hidden Beaches Drive, in the City of Blythe, Riverside County, California. The Appellant's property has approximately 55 feet of frontage on the Colorado River, at approximately River Mile 127. The Appellant requested a Corps permit to place two permanent pilings, an approximately 10 foot x 19 foot floating dock, and an approximately 3 foot x 20 foot gangway within the Colorado River channel. The Appellant and the District agree that the proposed structure would require a Corps permit in order to comply with Section 10 of the Rivers and Harbors Act. The District reviewed the Appellant's permit request, and ultimately denied the permit request as contrary to the public interest because of adverse impacts, including cumulative impacts, of individual docks to navigation, public recreation, and public safety on this reach of the Colorado River. The Appellant then appealed the permit denial decision.

Appeal Evaluation, Findings and Instructions to the Los Angeles District Engineer (DE):

Reason 1: The Appellant claims that the facts regarding the Anderson property do not support a permit denial decision.

FINDING: This reason for appeal did not have merit.

ACTION: None required.

DISCUSSION: The Corps regulations at 33 Code of Federal Regulations (CFR) 320 - 331 describe requirements and procedures the Corps uses when processing applications for Corps permits. As stated at 33 CFR 320.1:

“the program has evolved to one involving the consideration of the full public interest by balancing the favorable impacts against the detrimental impacts. This is known as the “public interest review.” The program is one, which reflects the national concerns for both the protection and utilization of important resources. “

The Corps regulations at 33 CFR 320.4 (a) describe the public interest review process in more detail:

“Public Interest Review. (1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (see Secs. 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.”

The Corps regulations at 33 CFR 322.5 (d) (1) specifically discusses Rivers and Harbors Act, Section 10, evaluations of boat dock permits, stating that:

“(1) In the absence of overriding public interest, favorable consideration will generally be given to applications from riparian owners for permits for piers, boat docks, moorings, platforms and similar structures for small boats. Particular attention will be given to the location and general design of such structures to prevent possible obstructions to navigation with respect to both the public's use of the waterway and the neighboring proprietors' access to the waterway. Obstructions can result from both the existence of the structure, particularly in conjunction with other similar facilities in the immediate vicinity, and from its inability to withstand wave action or other forces which can be expected. District engineers will inform applicants of the hazards involved and encourage safety in location, design, and operation. District engineers will encourage cooperative or group use facilities in lieu of individual proprietary use facilities.”

The District also uses its *Colorado River Guidelines* to inform the public of the types of projects the District will typically authorize in the channel of the Colorado River. However, these guidelines are not federal regulations, and the District did not use them as federal regulations, or as the basis of its permit denial. In the introduction to the *Colorado River Guidelines* the District describes the use of the guidelines as follows:

“Increased development along the Colorado River has resulted in increased impacts to the aquatic ecosystem. Therefore, in an effort to minimize the cumulative effects of shoreline development, the Corps, in coordination with other Federal and State resource agencies, has developed the following general guidelines for your use in planning your shoreline project(s).”

The District’s administrative record established that the District considered the public and private benefits of issuing a permit authorization for a private, individual boat dock in the public waters of the Colorado River channel adjacent to the Appellant’s property. In this instance the District concluded that authorizing that particular private boat dock would be contrary to the public interest because of its adverse impacts, including its contribution to cumulative impacts, on navigation, public recreation, and safety. In the Appellant’s request for appeal, she presented several reasons why she concluded the District’s decision was not based on facts and was incorrect.

First, the Appellant stated that if the Appellant’s boat dock were authorized it would still be possible for boats to navigate in the Colorado River channel between the Appellant’s boat dock and the sandbars in the center of the Colorado River channel in this area. The District did not dispute that conclusion. However, that determination does not negate the District’s basis for its permit denial. The District’s determination was the adverse effects of approving this boat dock for an individual private owner, when combined with the reasonably foreseeable cumulative effects of additional individual private owners requesting and receiving authorizations for boat docks, would result in individual and

cumulative adverse impacts to navigation, public recreation, and public safety that were contrary to the public interest.

The Council on Environmental Quality's National Environmental Policy Act (NEPA) implementing regulations 40 CFR 1508.9 define a cumulative impact as:

“ “Cumulative impact” is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”

The District's evaluation of the cumulative impacts of issuing this permit is consistent with established definition of cumulative impacts. There are 28 individual property parcels in the Hidden Beaches Village subdivision north of Hidden Beaches Drive, each with approximately 55 feet of frontage on the Colorado River. These parcels are located immediately upriver of a 180 degree hairpin turn in the Colorado River. There are extensive sand bars in the center of the Colorado River in this area.

The District's October 19, 2006 Memorandum For Record (MFR) discusses the cumulative effects of issuing a permit to the Appellant stating that:

“If the Corps were to authorize Ms. Anderson's dock, it would also be required to authorize 27 other docks at Hidden Village Beaches as well as docks for all individuals residing in subdivisions with shoreline property in the Lower Colorado River.”

The District's statement in the October 19, 2006 MFR that the District would be *required* to authorize boat dock permits for all other parcels in the subdivision if the Appellant's boat dock permit were authorized is inaccurate. Each Corps permit application is reviewed on its own merits, and issuing a permit to the Appellant would not require the District to issue permits to future applicants in the same area. However, the District's conclusion that many additional individual property owners would likely apply for individual boat dock permits if this permit is issued is reasonably foreseeable. If approved, these additional boat docks would reduce the size of the navigable channel between the docks and the sandbars in the center of the Colorado River channel in this area. As stated in the administrative record, since this is a sediment gaining area, the new boat docks could increase sedimentation and the size of sandbars in the area. A concentration of individual boat docks along the shoreline would also force boats away from the shoreline in this area, reducing recreational access for fishing and other near shore activities. The District also concluded this increase in obstructions would result in an increased potential for boating accidents. The District concludes that when taken together, these adverse effects are sufficient to make the issuing this permit contrary to the public interest. The Appellant disagrees with the District's conclusion, but the fact

that boats could still navigate through this area with more obstructions in place does not make the District's decision unreasonable.

The Appellant's other reasons for asserting that the District's permit decision was flawed included that (1) that the Nelson property, 1.4 miles upriver of the Appellant's property, had received a boat dock permit, (2) that other reaches of the Colorado River were "sediment gathering", and (3) that a past Corps permit decision authorizing a permit for a community dock for the Appellant's subdivision was part of the basis for denial of the Appellant's permit request.

The District did discuss the differences between the Appellant's property and the Nelson property in its October 19, 2006 MFR. The District stated that the Nelson property was one of four large parcels along a specific area of the river, and had concluded that there was sufficient distance between these large parcels so that the reasonably foreseeable cumulative impacts of issuing the Nelson boat dock permit were less than for the Anderson permit request, even though the Colorado River channel is narrower at the Nelson property than at the Appellant's property. The Appellant stated that the Nelson property had actually been subdivided into 9 parcels, and so the area of the Nelson property could experience a higher level of cumulative impacts than the District had previously anticipated. The information that the Nelson property had been subdivided was new information that the District did not have available to it at the time the Nelson permit was issued and was not included in the District's administrative record of the Appellant's permit denial. In accordance with 33 CFR 331.7 (e) (6) new information cannot be considered during an administrative appeal. Also new information regarding the Nelson property is not relevant to this administrative appeal, but rather might be relevant to an evaluation of the District's decisionmaking process for the Nelson permit, an action outside the scope of this appeal.

In regard to sedimentation, the District did not dispute that other reaches of the Colorado River are sediment gaining areas. Instead, the District's administrative record stated that the Palo Verde Diversion or reach of the Colorado River between Horace Miller Park at River Mile 106 and the Palo Verde Diversion Dam at River Mile 133, is a particularly prolific sediment gaining area, and that sand bars in the center of the river are common there. The Appellant did not provide evidence to refute that determination.

The District's administrative record does not support the conclusion that the District considered the prior issuance of a community boat dock permit for the Hidden Beaches Village subdivision as part of its basis for this permit denial. The District clarified at the appeal conference that the discussion of that prior permitting action in the permit denial letter and the administrative record were provided for information. The Hidden Beaches Village community boat dock was not constructed. Instead, the property owner elected to sell all the property parcels within the subdivision to individual owners and not retain a parcel to build a community boat dock, or establish any common property for such purpose in Hidden Beaches Village subdivision. The administrative record shows this permit denial decision did not assume that a community boat dock was still a viable

alternative. The permit denial decision stated that such a facility had been approved in the past, but that the former property owner had chosen not to build it.

The permit denial letter and the administrative record also document that the Appellant had an alternative to a permanently placed boat dock to moor boats at the property. The permit denial letter identifies that there is a public boat launching ramp approximately one mile upriver of the property by road and by River Mile, and a boat launching facility and marina approximately 10 miles downriver. The permit denial letter also stated that no Corps permit was required for the Appellant to use mooring devices and mooring balloons to moor a boat on a temporary basis in the Colorado River channel immediately adjacent to the Appellant's property. The Appellant did not dispute that this alternative is available.

The District described the basis for its permit denial decision in its November 14, 2006 permit denial letter (administrative record pages 43 – 44) stating that:

“After a detailed review, I have concluded I must deny your permit request due to the impacts including cumulative impacts, of individual docks to navigation and public recreation on this reach of the Colorado River.”

and that:

“This reach is a “sediment gaining” portion of the river. Sediment moves from upstream reaches and tends to remain in this reach instead of moving to the lower reaches, causing the formation of sandbars, typically in the center of the channel. Frequently during the year, boaters must navigate the channel along the shorelines, as the centerline is too hazardous. If the shoreline is congested with docks at individual lots, there is no room for safe navigation. In addition, a proliferation of individual docks along the shorelines preempts recreational use of shoreline areas by the general public and has, in the past, caused accidents and associated mortalities. Because of potential safety and navigation hazards resulting from the sediment-gaining condition of this reach of the river and the cumulative impacts to public recreation of individual dock permits, the permit cannot be granted.”

The Corp's regulations at 33 CFR 331.9 (b) establish the threshold for determining whether an administrative appeal has merit as follows:

“The division engineer will disapprove the entirety of or any part of the district engineer's decision only if he determines that the decision on some relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance. The division engineer will not attempt to substitute his judgment for that of the district engineer regarding a matter of fact, so long as the district engineer's determination was supported by substantial evidence in the

administrative record, or regarding any other matter if the district engineer's determination was reasonable and within the zone of discretion delegated to the district engineer by Corps regulations.”

The reasons supporting the District Engineer’s decision to deny this permit can be clearly identified from the administrative record, meet all the requirements 33 CFR 331.9 (b) above, and are within the zone of discretion delegated to District Engineers by the Corp’s regulations.

During review of this administrative appeal, the review officer discovered that the permit denial letter had been signed by the Los Angeles District Regulatory Branch Chief, rather than by the Los Angeles District Engineer, as required by USACE regulations at 33 CFR 331.5 (d). The review officer therefore sought clarification of the extent of communication between the Regulatory Branch Chief and the District Engineer prior to the permit decision. The Regulatory Branch Chief clarified the coordination between himself and the District Engineer for the review officer in a February 2, 2007 e-mail stating that (1) the District Engineer was traveling at the time the permit denial decision was ready for final approval, (2) the Regulatory Branch Chief verbally explained the basis of the proposed permit denial decision to the District Engineer, (3) the District Engineer verbally approved of the Regulatory Branch Chief signing out the permit denial letter prior to the District Engineer’s return. Since the District Engineer was advised of, verbally approved of, and directed the Regulatory Branch Chief to issue the permit denial decision, the Regulatory Branch Chief’s decision to sign the permit denial in place of an officially designated acting District Engineer was a harmless procedural error that did not affect the basis or validity of the District’s permit denial decision.

Information Received and its Disposition During the Appeal Review: In addition to the District’s administrative record for this action the following materials were also evaluated:

1. General aerial photographs of the project vicinity.
2. The Appellant stated at the appeal conference that the Nelson property, which had received a Corps permit for a boat dock, was actually a subdivision. This represented new information that was not in the administrative record and therefore could not be considered as part of this administrative appeal. However, the permit decision for the Nelson property was not directly relevant to the basis of permit decision for the Anderson property evaluated in this administrative appeal.
3. The District Regulatory Branch Chief’s February 2, 2007 e-mail to the SPD review officer clarifying the coordination between the branch chief and the Los Angeles District Engineer.

Conclusion: The Appellant's Request For Appeal makes a general assertion of error by the District in issuing its permit denial. However, after a detailed review, evaluation, and report from my staff, I conclude that the Appellant is requesting a revision of the District's public interest review in the Appellant's favor so as to allow a permit to be issued. As described in this appeal decision, the District's existing evaluation and permit decision are reasonably supported by the administrative record, within the District's zone of discretion, and there is no basis under 33 CFR 331.9 to find that this appeal has merit.

original signed by

John R. McMahon
Brigadier General, U. S Army
Commanding