

**ADMINISTRATIVE APPEAL DECISION
RIVERS AND HARBORS ACT - PERMIT DENIAL
HOLZMANN DOCK
EMERALD SPRINGS SUBDIVISION
CITY OF EHRENBERG
LA PAZ COUNTY, ARIZONA
LOS ANGELES DISTRICT
FILE NUMBER SPL-2008-00654-MB**

DATE: May 19, 2008

Review Officer: Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

Appellant: Andrew Holzmann, 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: January 3, 2008

Appeal Conference and Site Visit: February 14, 2008.

Summary of Decision: The District's evaluation and permit decision were generally well supported by the administrative record and within the District's zone of discretion. However, portions of the Appellant's appeal had merit and must be reconsidered by the District. The District must further consider and address the implications of sandbars at the Appellant's property on navigation and the applicability of and weight given to the Colorado River Guidelines in denying the requested permit.

Background Information: The Appellant owns a property parcel with a single-family residential structure at 48974 Riviera Place, Lot 24, within the Emerald Springs subdivision in the City of Ehrenberg, La Paz County, Arizona. The Appellant's property has approximately 50 feet of frontage on the Colorado River, at approximately River Mile 121. The Colorado River is approximately 500 feet wide at that location. Rock has been placed along the shoreline of the Colorado River along the length of the subdivision. As a result of the rock slope protection, little or no vegetation remains along the Colorado River at that location. Sandbars have formed from the center of the channel to the Arizona side of the Colorado River, which is where the Appellant's property is located. The deepest portion of the Colorado River is along the California side of the river. The Appellant requested a Corps permit to place 2 permanent pilings, an approximately 8 foot

x 20 foot floating dock, and an approximately 3.5 foot x 15 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 Corp's interpretation of 33 CFR 320.1, would not allow anything to be built along the Colorado River as any addition would have a "cumulative impact" on the river. The Corp has misused the term "encourage" to mean force. Encourage is defined as "to help, to give support to, to be favorable to, to foster". The existing facilities are inadequate for the number of users. The additional phases which are addressed will likely not occur as the property is currently under going a bank foreclosure. If this occurs, it would be the third developer to fail in their attempts to develop this portion of the Colorado River.

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 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.

The District determined that 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 potentially 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 27 other individual parcels within the current phase of Emerald Springs subdivision with frontage on the Colorado River. There are extensive sand bars in the center of the Colorado River in this area.

The District’s October 4, 2007, Memorandum For Record (MFR) discusses the cumulative effects of issuing a permit to the Appellant stating that:

“If the Corps were to authorize Mr. Holzmann’s dock, there would be tremendous pressure to authorize 27 other docks at the current phase of Emerald Springs as well as docks for all individuals in the subsequent phase of this subdivision (which will encompass over 5000 linear feet of shoreline) and other subdivisions with shoreline property in the Lower Colorado River.”

The District states in the October 4, 2007, MFR that the District would be under tremendous pressure to authorize boat dock permits for all other parcels in the subdivision if the Appellant’s boat dock permit were authorized. 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 of 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.

REASON 2: The first paragraph on the second page is contradictory and incorrect. It states that “....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.” It goes on to state “However, the shoreline in front of your property has an existing sandbar which already impedes navigation at certain times of the year. There would be times of the year when a dock would be unusable at this location and would provide a further navigation hazard.” This insane logic demonstrates The Corps predisposition to deny an application for a dock. The Corp has the data generated by the Arizona Game and Fish Dept which clearly demonstrate that there is no channel in front of my home and that all navigation occurs along the California shoreline. It is comical to suggest that a dock sitting on the dry river bottom would create a hazard to navigation.

FINDING: Portions of this reason for appeal had merit.

ACTION: Prior to making its final decision, the District must further consider and address whether, given that the Appellant’s property is located on the depositional side of the channel and sand bar formation occurs from the center of the river channel to the Appellant’s property, its conclusion that there would be a hazard to navigation from a

dock that would be in water so shallow that the only likely navigation in during times of low water would be jet skies.

DISCUSSION: The District’s administrative record stated that the 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 District described the basis for its permit denial decision in its permit denial letter 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, safety, 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. However, the shoreline in front of your property has an existing sandbar which already impedes navigation at certain times of the year. There would be times of the year when a dock would be unusable at this location and would provide a further navigation hazard. 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, issuance of Department of the Army authorization would be contrary to the public interest.”

Sandbars in that reach of the Colorado River form from the center of the channel to the Appellant’s property on the Arizona side of the river. The deepest portion of the river is along the California side and the majority of navigation occurs in that deeper portion when water levels are low. The District has concluded that when water levels are low enough that boats would not be able to navigate along the Arizona side of the river that the a potential dock would create a hazard to navigation due to potential jet ski use in the low water. The Appellant has questioned this conclusion and the District’s administrative record does not sufficiently support the basis of this conclusion.

REASON 3: The Colorado River Guidelines do not prohibit docks in areas with non-native shorelines and in fact they were written to standardize them. I agree with Colonel Magness that we should adhere to those guidelines as he suggests in paragraph 2 on the second page of his response. My application meets all of the criteria that is enumerated

in the Colorado River Guidelines. Unfortunately, I have attempted to work with The Corp (sic) for almost 3 years on an alternative and they have been intransigent.

FINDING: Portions of this reason for appeal had merit.

ACTION: Prior to making its final decision, the District must further consider and address the applicability of the Colorado River Guidelines to the shoreline along the Appellant's property and how those guidelines were used to support the decision to deny the Appellant's request for a permit.

DISCUSSION: The District 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. However, the District's reference to the Colorado River Guidelines and the indications that other agencies requested that they be adhered to suggests that the District believed them to be applicable to the Appellant's property and that they carry some weight in decision making. 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 Colorado River Guidelines refer to “native shorelines currently undeveloped or minimally developed”. The shoreline along the Appellant's property and along the shoreline of the remainder of the existing homes in the subdivision is lined with rock and largely devoid of vegetation. The District's administrative record does not sufficiently address the applicability of the Colorado River Guidelines to the Appellant's property and what weight they were given in the decision to deny the Appellant's request for a permit.

REASON 4: This paragraph [33 CFR 322.5(d) (1)] is being ignored by The Corp (sic). My home is located in an area with a non-native shoreline, and has a continual sand bar in front of it which prevents most recreation and navigation. If there is a location along the river where the addition of a small dock would have a minimal impact, this is it. Upon approval, I will work with The Corp (sic) to minimize the impact that the dock will have on neighboring properties as well as the river overall.

FINDING: This reason for appeal did not have merit.

ACTION: None required.

DISCUSSION: 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 permit denial letter and the administrative record also document that the Appellant had alternatives to a permanently placed boat dock to moor boats at the property. The permit denial letter identifies that there is a community boat launching ramp upriver of the property. The permit denial letter indicates that the District would look more favorably on a request to expand the existing facility and that the current developer is planning additional community ramps/docks to serve a subsequent phase of Emerald Springs and those facilities would be available to residents in the Appellant's phase. While the Appellant provided potential new information indicating that the current developer is facing bankruptcy, that information was apparently not available to the District nor was it part of the administrative record. The implications of a developer bankruptcy, as new information, were not considered in the review of the appeal. 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 Corp's regulations at 33 CFR 331.9 (b) establishes 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 are, for the most part, clearly identified in the administrative record, meet the requirements 33 CFR 331.9 (b) above, and are within the zone of discretion delegated to District Engineers by the Corp's regulations. However, the District must further consider and address the implications of sandbars at the Appellant's property on navigation and the applicability of and weight given to the Colorado River Guidelines in denying the requested permit as described above.

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 District's written response to questions asked at the appeal conference.
3. The Appellant's written response to questions asked at the appeal conference.

This information was used to clarify the existing administrative record. The only notable exception to this was information provided by the appellant indicating that the current developer of the Emerald Springs subdivision was potentially in bankruptcy. This was new formation which was not available or considered in the administrative record. It was, therefore, not considered.

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 generally well supported by the administrative record and within the District's zone of discretion. However, prior to making its final decision, the District must further consider and address the issues described above

Original Signed

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

