

**ADMINISTRATIVE APPEAL DECISION
ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT
PROFFERED PERMIT DECISION
PERRY CITY, UTAH
WASTEWATER TREATMENT FACILITY EXPANSION PROJECT
ARMY CORPS OF ENGINEERS SACRAMENTO DISTRICT FILE #200250435**

December 22, 2004

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

Technical Advisor to Review Officer: Antal Szijj, Regulatory Project Manager, Los Angeles District, Ventura, California

District Representative: Jim Thomas, Regulatory Project Manager, Sacramento District, Intermountain Region Regulatory Office, Bountiful, Utah.

Appellant Representative: Edward Skrobiszewski, Mayor, Perry City, Utah

Authority: Clean Water Act (CWA), Section 404 (33 U.S.C. 1344)

Receipt of Request For Appeal (RFA): September 15, 2004

Appeal Conference Date: October 12, 2004 **Site Visit Date:** October 12, 2004

Background Information: The Appellant, Perry City, Utah, proposed to fill 1.8 acres of wetland and inundate 9.0 acres of wetlands within Clean Water Act (CWA) jurisdiction to form 1.8 acres of berms and a 9.0 acre wastewater treatment pond. The project is located at Perry City's existing wastewater treatment complex in Box Elder County, Utah, approximately 2 miles northeast of the Great Salt Lake. The Appellant and the District agreed that the proposed project is the least damaging practicable alternative but disagreed whether compensatory mitigation was necessary to comply with the Clean Water Act. The District believed compensatory mitigation was necessary. The Appellant asserted the project was self-mitigating. During the permit evaluation process, Perry City proposed compensatory mitigation measures, but later rescinded its proposal. The District provided Perry City a proffered permit with special conditions requiring compensatory mitigation. Perry City appealed, stating that it should receive a permit decision based on its proposed project with no mitigation, as it requested when it withdrew its compensatory mitigation proposal.

Summary of Decision: The appeal had merit. The District did not provide a permit decision based on Perry City's proposed project after Perry City rescinded its proposal for compensatory mitigation. The District must reconsider its prior permit decision and make a decision to issue or deny this permit application based on an evaluation of Perry City's currently proposed project in accordance with the Clean Water Act, Section 404, and Corps regulatory program regulations and requirements, including, but not limited to, those specifically identified in this appeal decision.

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

Reason 1: The District did not provide a decision on the project proposed by the Appellant.

FINDING: The appeal had merit.

ACTION: The District must reconsider its prior permit decision. Specifically, the District must reach permit decision whether to: (1) issue Perry City a permit for its project as described in Perry City's original application which included no compensatory mitigation, or (2) deny the permit because the Appellant's proposed project does not meet the CWA Section 404 and/or Corps regulatory program regulations or requirements to issue a permit. The District Engineer must sign this permit decision. The specific reconsiderations that the District must undertake in reaching one of the conclusions described above are described in more detail in the discussion below. In addition, the District must review its delegation of signature authority for the Regulatory Program to insure it is consistent with the requirements of the Corps Administrative Appeal Process at 33 Code Federal Regulations (CFR) 331.

DISCUSSION: On July 23, 2003 the Sacramento District, Army Corps of Engineers (District) received a permit application on behalf of Perry City, Utah (Appellant), requesting a CWA permit authorization to fill 1.8 acres of wet meadow and mudflat/saltflat wetland area within CWA jurisdiction in a currently undeveloped wetland area using approximately 17,550 cubic yards of earth and relocated riprap. The proposed activity would remove 10.8 acres of wetland from CWA jurisdiction and replace it with approximately 1.8 acres of upland berms and 9.0 acres of wastewater treatment ponds outside of CWA jurisdiction, adjacent to Perry City's existing wastewater treatment facility.

As part of the District's permit evaluation, in accordance with the Environmental Protection Agency, CWA Section 404 (b) (1) Guidelines (CWA 404 (b) (1) Guidelines) *Guidelines for Specification of Disposal Sites for Dredged or Fill Material* 40 CFR 230 (which although identified as "guidelines" are actually substantive requirements (See Federal Register Vol 45, page 85336, Dec 24, 1980)), the District reviewed whether the proposed project was the least damaging practicable alternative before compensatory mitigation measures were considered. After several submittals from the Appellant, the District and the Appellant ultimately agreed that the project as proposed was the least damaging practicable alternative. However, the District believed that compensatory mitigation was necessary to mitigate for the loss of 10.8 acres of wetlands and Perry City disagreed. Perry City claimed that the project was self-mitigating and that the 9.0 acres of open water wastewater treatment pond provided superior aquatic resource functions compared to the 10.8 acres of wet meadow and mudflat/saltflat wetlands they replaced. The District issued a public notice for this action and several agencies and individuals sent comments agreeing with the District's position that compensatory mitigation for the loss of 10.8 acres of wetlands was necessary and should be required as part of the permit authorization. The District and the Appellant attempted to resolve their disagreement over mitigation by discussing possible compensatory mitigation measures.

The Corps regulations at 33 CFR 331.6 require that the Corps provide a proffered permit to permit applicants for activities the Corps intends to permit using a standard permit or letter of

permission. Applicants can either accept or object to any special terms and/or conditions of the permit. The Corps regulations at 33 CFR 331.2 define the Corps first offering of the permit with special conditions as the “initial proffered permit.” If the applicant objects to the special conditions in an initial proffered permit, the District Engineer reviews those conditions and determines whether it is appropriate to modify some, all, or none of the permit special conditions. The District Engineer then offers the permit to the applicant a second time. The Corps Regulations at 33 CFR 331.2 define the second offering of the permit as the “proffered permit.” The applicant can appeal a proffered permit to the appropriate Division Engineer if he still objects to the permit’s special conditions, as was the case in this appeal.

The District’s March 11, 2004 initial proffered permit included proposed special conditions regarding compensatory mitigation that the District considered necessary to compensate for unavoidable losses of aquatic resources. By letter of March 23, 2004, Perry City submitted its objections to some of the special conditions relating to compensatory mitigation in the initial proffered permit. Perry City informed local residents of its position and encouraged them to object to the special conditions as well. On April 16, 2004, the District issued a second “initial proffered permit” letter signed by the District’s Chief of Construction – Operations. The second “initial proffered permit” letter modified some, but not all, of the compensatory mitigation special conditions that Perry City objected to in the District’s first initial proffered permit letter.

There were two procedural errors associated with the District’s April 16, 2004 second “initial proffered permit.” First, in accordance with 33 CFR 331.2, the District’s April 16, 2004 second “initial proffered permit” should actually have been identified as a “proffered permit.” If correctly identified as a proffered permit, Perry City could have appealed the District decision to the Division Engineer as of Perry City’s receipt of the District’s April 16, 2004 permit. Second, in accordance with 33 CFR 331.6 (d), the District Engineer is required to sign proffered permits returned to applicants with unresolved objections and cannot delegate signature authority for that action. But the second “initial proffered permit” was signed at a lower level. However, information in the administrative record suggested that the District was following an existing delegation of signature authority protocol that had not been updated to reflect implementation of the Corps administrative appeal process.

The administrative record identifies that the Sacramento District Engineer met with the Mayor of Perry City on May 10, 2004. As a result of that meeting the District Engineer ordered a peer review of the District’s proposed permit decision by a Corps of Engineers regulator outside of Sacramento District and the South Pacific Division, and chose a regulator from the Kansas City District in the Northwestern Division to undertake the review. The peer review report identified minor procedural problems in the District’s procedures, including the two items identified in the preceding paragraph, but generally supported the District’s approach set forth in the District’s April 16, 2004 second “initial proffered permit” regarding necessary compensatory mitigation measures and proposed special conditions.

After the final peer review report was submitted to the District, the District received the Appellant’s June 15, 2004 letter formally objecting to conditions in the District’s April 16, 2004 second “initial proffered permit.” The Appellant’s June 15, 2004 letter stated that:

“(a) We shall accept the draft permit, including the terms and special conditions, provided you or Col. Conrad would simply modify Special Condition 1 as per our recollection of the agreement reached at the January 8, 2004, meeting in Perry. As we’ve expressed (pleaded) in the past, your request for the development and submission of a mitigation plan consistent with RGL 02-2 and the District’s HMMPG [Habitat Mitigation and Monitoring Proposal Guidelines] is simply cost prohibitive, and clearly unnecessary in view of the mitigation proposal and special conditions already submitted on our behalf by Lone Goose Environmental, L.L.C.”

and that:

“If you determine that our compromise offer (above) is unacceptable, then we have no other reasonable nor practicable alternative than to request that the District Engineer make a permit decision on our original application. That is, either issue or deny the permit application as described in the Public Notice.
...Please understand that we do not wish to appeal any of the terms or conditions of this second draft permit pursuant to the formal “Notification of Administrative Appeal Options and Process and Request for Appeal.”

As shown above, Perry City’s June 15, 2004 letter requested that the District either issue a permit that only included the proposed compensatory mitigation special conditions that Perry City found acceptable, or consider the City’s compensatory mitigation proposal withdrawn. Perry City also requested that if its proposed compensatory mitigation measures were rejected, that the District provide a permit decision on Perry City’s proposed project as originally submitted, which included no compensatory mitigation.

However, instead of taking either of those courses of action, the District took a different action. The District’s July 15, 2004 letter provided a proffered permit to Perry City that included the same special conditions as the District’s April 16, 2004 letter, except that the District identified that a conservation easement could be used in place of deed restrictions on State of Utah lands where the proposed compensatory mitigation measures were to occur.

The District erred by not considering Perry City’s June 15, 2004 letter as an either/or final proposal from Perry City regarding the proposed project. In Perry City’s June 15, 2004 letter it specifically rejected any proposed compensatory mitigation measures other than the City’s specific proposal. When the District determined it would not accept Perry City’s proposed compensatory mitigation, it should have heeded Perry City’s request and either: (1) issued a permit with no compensatory mitigation as Perry City requested; or (2) denied the permit and identified an appropriate reason for doing so in accordance with the CWA Section 404 and Corps regulatory program regulations and requirements. The appeal has merit.

The District must reconsider, evaluate, and issue a permit decision on Perry City’s proposed activity as described in the City’s original permit application and the District’s public notice, and requested in the City’s June 15, 2004 letter. That project proposes the placement of approximately 17,550 cubic yards of fill on 1.8 acres of wetlands, which will result in the inundation of an additional approximately 9.0 acres of wetlands. The Appellant’s proposed

project would create approximately 1.8 acres of berms, and approximately 9.0 acres of new wastewater treatment ponds that will be outside of CWA jurisdiction. No compensatory mitigation is proposed as part of the Appellant's project. The Appellant asserts that the project is self-mitigating and no compensatory mitigation is necessary.

The District's reconsideration must include, but is not limited to, the following CWA Section 404 and Corps regulatory program regulations, requirements, and guidance regarding compensatory mitigation and other factors relevant to reaching a permit decision.

The Corps regulations at 33 CFR 320.4 (r) *Mitigation* includes a general description of the District Engineer's authority to require mitigation including that the District Engineer may:

“require minor project modifications” (33 CFR 320.4 (r)(i))

and that:

“For Section 404 applications, mitigation shall be required to ensure that the project complies with the 404 (b) (1) Guidelines.” (33 CFR 320.4 (r) (ii))

and that:

“Mitigation measures in addition to those under paragraphs (r)(i) and (ii) of this section may be required as a result of the public interest review process.” (33 CFR 320.4 (r) (iii)).

However, although the District Engineer has the ability to make minor modifications to an applicant's proposed project, and District Engineer should also consider the guidance in the Preamble to the Corps *Regulatory Programs of the Corps of Engineers; Final Rule* (Fed Reg V. 51, page 41208 November 13, 1986) that states:

“If an applicant refuses to provide compensatory mitigation which the district engineer determines is necessary to ensure that the proposed activity is not contrary to the public interest, the permit must be denied.”

Also, the Corps regulations at 33 CFR 325.4 (c) state that:

“If the district engineer determines that special conditions are necessary to insure the proposal will not be contrary to the public interest, but those conditions would not be reasonably implementable or enforceable, he will deny the permit.”

The CWA 404 (b) (1) Guidelines at 40 CFR 230.12 (a) (3) i - iv identify conditions that do not comply with the Guidelines. Based on my review of this action, I determined the District had reasonably concluded, and the Appellant has agreed, that Perry City's proposed project is the least damaging practicable alternative and does not have other significant adverse environmental consequences. Therefore, the District need not reconsider its conclusion regarding alternatives under 40 CFR 230.12 (a) (3) i.

The District must reconsider its conclusions regarding conditions covered by 40 CFR 230.12 (a) (3) ii, iii, and iv in light of Perry City's decision that it would not provide any compensatory mitigation. In particular, the District should reconsider whether or not Perry City's proposed new wastewater treatment pond provides sufficient aquatic functions to be "self-mitigating" as the Appellant has claimed, and does not require any compensatory mitigation to comply with CWA Section 404 and Corps Regulatory program regulations and requirements. The District must also consider whether all appropriate and practicable measures to minimize potential adverse impacts or harm to the aquatic ecosystem in accordance with 40 CFR 230.10 (d) and 40 CFR 230.12 (a) (3) iii have been included in Perry City's proposed project.

In the administrative record and at the appeal conference regarding this action, Perry City and the District have stated that the limited financial resources of the Perry City should be considered in reaching a permit decision including determining the practicality of compensatory mitigation measures. That approach is incorrect. The District must follow the CWA 404 (b) (1) Guidelines and the guidance in the February 6, 1990 *Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404 (b) (1) Guidelines* (EPA/Army Mitigation MOA), which require that the appropriate level of compensatory mitigation be based on the functions and values of the aquatic resources to be lost, and practicability of replacing those resources. The CWA 404 (b) (1) Guidelines define "practicable" as:

"The term "practicable" means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose."

The District must also consider other guidance in the EPA/Army Mitigation MOA that states that:

"The determination of what level of mitigation constitutes "appropriate" mitigation is based solely on the values and functions of the aquatic resources that will be impacted."

and that

"The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands will strive to achieve a goal of no overall net loss of values and functions."

and that

"However, the level of mitigation determined to be appropriate and practicable under Section 230.10 (d) may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, or would accomplish only inconsequential reductions in impacts. Consequently, it is recognized that no net loss of wetlands functions and values may not be achieved in each and every permit action."

and that

“In determining “appropriate and practicable” measures to offset unavoidable impacts, such measures should be appropriate to the scope and degree of those impacts and practicable in terms of cost, existing technology, and logistics in light of overall project purposes. The Corps will give full consideration to the views of the resource agencies when making this determination.”

and that

“Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required.”

and that

“In the absence of more definitive information on the functions and values of specific wetlands sites, a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values. Conversely, the ratio may be less than 1 to 1 for areas where the functional values associated with the area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.”

and that

“Monitoring is an important aspect of mitigation, especially in areas of scientific uncertainty. Monitoring should be directed toward determining whether permit conditions are complied with and whether the purpose intended to be served by the condition is actually achieved.”

and that

“If the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.”

In undertaking this analysis, the District Engineer must consider the guidance in *Regulatory Guidance Letter 02-2, Guidance on Compensatory Mitigation Projects for Aquatic Resources Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899* (RGL 02-2) dated December 24, 2002, in particular that:

“In all circumstances, the level of information provided regarding mitigation should be commensurate with the potential impact to aquatic resources, consistent with the guidance from Regulatory Guidance Letter 93-2 on the appropriate level of analysis for compliance with the Section 404 (b) (1) Guidelines.”

and that:

“For wetlands, the objective is to provide, at a minimum, one-to-one functional replacement, i.e., no net loss of functions, with an adequate margin of safety to reflect anticipated success. Focusing on the replacement of the functions provided by a wetland, rather than only calculation of acreage impacted or restored, will in most cases provide a more accurate and effective way to achieve the environmental performance objectives of the no net loss policy.”

and that:

“...on an acreage basis, the ratio should be greater than one-to-one where the impacted functions are demonstrably high and the replacement wetlands are of lower function. Conversely, the ratio may be less than one-to-one where the functions associated with the area being impacted are demonstrably low and the replacement wetlands are of higher function.”

and that:

“In the absence of more definitive information on functions of a specific wetland site, a minimum one-to-one acreage replacement may be used as a reasonable surrogate for no net loss of functions.”

and that:

“When Districts require one-to-one acreage replacement, they will inform applicants of specific amounts and types of required mitigation. Districts will provide rationales for acreage replacement and identify the factors considered when the required mitigation differs from the one-to-one acreage surrogate.”

Prior to reaching a permit decision, the District must complete an analysis to determine whether the wetland functions to be lost as a result of the Appellant’s proposed project require compensatory mitigation in order to comply with the CWA 404 (b) (1) Guidelines and the Corps Regulatory program regulations and requirements. The District’s July 15, 2004 proffered permit special condition 1 incorrectly placed this burden on the Perry City stating that:

“The mitigation plan must clearly identify how the proposed restoration of 4.65 acres will compensate for the anticipated loss of the functions and values of 10.8 acres of wet meadow and mudflat/saltflat.”

As described in RGL 02-2 above, it was the District’s responsibility, not Perry City’s, to reach a conclusion regarding what, if any, replacement of wetland functions by compensatory mitigation was necessary to comply with CWA Section 404 and Corps regulatory program regulations and requirements. If the District had concluded compensatory mitigation was necessary, it was also the District’s responsibility to identify whether the specific amounts and types of compensatory mitigation proposed by Perry City were sufficient. At that point the District could have

determined whether concise special permit conditions would have been sufficient to implement and enforce any necessary compensatory mitigation, or whether a more complex compensatory mitigation plan prepared by Perry City was required. That approach is consistent with RGL 02-2 that states that:

“Districts should not require detailed compensatory mitigation plans until they have established the unavoidable impact. In all circumstances, the level of information provided regarding mitigation should be commensurate with the potential impact to aquatic resources, consistent with the guidance from Regulatory Guidance Letter 93-2 on the appropriate level of analysis for compliance with the Section 404 (b) (1) Guidelines.”

As Perry City has specifically rescinded its compensatory mitigation proposal, the District must now reconsider Perry City’s assertion that the project is self-mitigating, and that the project requires no mitigation because the aquatic functions of a 9.0 acre open water wastewater treatment pond are sufficient to replace the aquatic functions of 10.8 acres of wet meadow and mudflat/saltflat wetlands. The District must now reach a decision to issue a permit or a permit denial on Perry City’s current proposed project, including, but not limited to, consideration of the CWA Section 404 and Corps regulatory program regulations and requirements, and provide a permit decision to Perry City.

Information Received and its Disposition During the Appeal Review: The Division evaluated this appeal based on the Appellant’s request for appeal, the District’s administrative record, clarification of the administrative record at the appeal conference, Appellant comments regarding the project in Lone Goose Environmental’s October 27, 2004 e-mail, and the Appellant’s appeal conference summary addendum submittal.

Portions of the Appellant’s appeal conference summary addendum submittal included new information regarding permit exemptions, CWA jurisdictional issues, and a new analysis regarding the relative importance of the wetlands to be lost in relation to the remaining wetland habitat in the Great Salt Lake region. The Appellant’s appeal conference summary addendum included references to the Appellant’s compensatory mitigation proposal that Perry City specifically rescinded in its June 15, 2004 letter and Perry City’s September 14, 2004 request for appeal. The appeal conference summary addendum submittal also referenced information from the Corps Regulatory Guidance Letter 01-01, which was superceded by the Corps Regulatory Guidance Letter 02-02 on December 24, 2002. Lone Goose Environmental’s October 27, 2004 e-mail also discussed new information regarding CWA jurisdictional issues that were not discussed in administrative record or the request for appeal. I could not consider any new information that was provided after the District’s July 15, 2004 issuance of its proffered permit as that would be contrary to the Corps Regulatory program regulations at 33 CFR 331.7 (e) (6) that state that:

“Issues not identified in the administrative record by the date of the NAP [Notice of Appeal Process] for the application may not be raised or discussed, because substantive new information or project modifications would be treated as a new permit application (see Sec. 331.5(b)(5)).”

The District must consider the Appellant's appeal conference summary addendum and October 27, 2004 e-mail as part of its reconsideration of this action. Such consideration does not establish a new appeal right for the Appellant.

Conclusion: The Appellant's reason for appeal had merit. The District did not provide a permit decision to Perry City based on Perry City's proposed project and did not take in to account Perry City's specific statement that if the City's specific compensatory mitigation proposal was not accepted, that it would be rescinded. The District must reconsider its prior permit decision regarding the Appellant's permit application. Specifically, the District must decide whether to: (1) permit the Appellant's project with no compensatory mitigation, or (2) deny the permit because the Appellant's proposed project does not meet the CWA Section 404 and/or Corps regulatory program regulations and requirements to issue a permit. The District must reevaluate its permit decision in accordance with the specific instructions identified in this administrative appeal decision. The District Engineer must sign the District's permit decision. In addition, the District must review its delegation of signature authority for the Regulatory Program to insure it is consistent with the requirements of the Corps Administrative Appeal Process at 33 CFR 331.

original signed by

Joseph Schroedel
Brigadier General, U. S. Army
Commanding