

**ADMINISTRATIVE APPEAL DECISION**

**WW RANCH, FILE NO. 199661212**

**OMAHA DISTRICT**

**DATE: OCTOBER 9, 2001**

**Review Officer:** Mores V. Bergman, U.S. Army Corps of Engineers (USACE),  
Northwestern Division

**Appellant:** WW Ranch, Owners: Michael Wachter and Patrick Wachter

**Appellant's Representative:** Randall J. Bakke, Smith-Bakke-Hovland-Oppegard,  
Attorneys at Law

**Receipt of Acceptable Request For Appeal (RFA):** July 10, 2001

**Appeal Conference Date:** July 18, 2001      **Site Visit Date:** July 18, 2001

**BACKGROUND INFORMATION:**

In 1993 WW Ranch Partnership received Department of the Army (DA) authorization from the Omaha District's North Dakota Regulatory Office (NDRO) to place 600 feet of rock bank stabilization along the Missouri River in Morton County, North Dakota to protect a small six lot riverfront development project know as "River Place". In 1996, WW Ranch decided to expand the River Place development project to sixty-two lots. On June 14, 1996, WW Ranch requested a permit from the NDRO to place approximately 4700 feet of additional rock to protect the riverbank along the expanded development property.

The River Place development is located in Section 16, Township 140 North, Range 81 West, in Morton County, North Dakota. The proposed bank protection project is located between river miles 1324.9 and 1325.8 of the right bank of the Missouri River Garrison Reach (MRGR). The June 14, 1996 application contained two parts. One was a request for an emergency permit to protect approximately 500 feet of bankline in the area of an irrigation water intake. The other part of the request was for bank protection along the remaining 4100 feet on bankline. The NDRO considered the application incomplete at that time and requested additional information from the applicant, particularly on the emergency work.

On July 29, 1996, NDRO observed alleged unauthorized work being performed at the project site and began an investigation. Upon completion of their review, NDRO decided to allow WW Ranch to submit an "after-the-fact" permit application for the work. WW Ranch submitted a new application for the River Place development bank protection project on December 10, 1996, and submitted a separate application for the irrigation

intake site emergency work on January 16, 1997. The NDRO authorized the irrigation intake protection project on January 21, 1997 in accordance with existing Nationwide General Permits.

After much review and discussion, and in an effort to reduce environmental impacts of the proposed project, WW Ranch amended their permit application on September 14, 1999 by reducing the length of their proposed bank protection from 4100 feet to 2789 feet.

On May 19, 2000, WW Ranch filed a lawsuit in Federal Court requesting that the Court mandate the Omaha District (District) to provide a decision on the permit application. Although on March 22, 2001, the District Engineer proffered a permit to WW Ranch, the lawsuit is still pending.

On April 11, 2001, WW Ranch sent a letter to the District Engineer objecting to the mitigation conditions contained in the permit. On May 16, 2001, the District Engineer sent a letter to WW Ranch addressing their objections and providing them with a revised proffered permit. The District also provided WW Ranch with a Notification of Appeal Options (NAP), a Request for Appeal (RFA) form, and a Tolling Agreement form to sign, in case they wanted to appeal the decision. A tolling agreement is required to extend the statute of limitations to preserve the Corps right to pursue possible enforcement action in cases where after-the-fact permit applications and possible appeals are involved.

On June 11, 2001, WW Ranch sent an appeal request to the Division Engineer, Northwestern Division (NWD). The RFA from WW Ranch did not include a signed tolling agreement, as required by the Corps Appeals Regulation found at 33 CFR Part 331. Part 331.11 of the regulation provides that no administrative appeal associated with an after-the-fact permit application will be accepted until a signed tolling agreement is furnished. The appellant's representative, Mr. Randall Bakke provided a signed tolling agreement to NWD on July 10, 2001.

**REASONS FOR APPEAL AS SUBMITTED BY THE APPELLANT:**

WW Ranch objects to one provision of the permit, condition A-9, which requires the implementation of a "S.A.N.D.B.A.R." Management Plan (SMP), for the following reasons: (Appellant's reasons for appeal are condensed here for brevity. See RFA (enclosure 1) for complete text.)

**Reason 1:** WW Ranch objects to being required to implement an SMP when other private landowners have not been required to do so.

**Reason 2:** The Corps has not provided justification for the requirement of condition 9 to create and maintain a 10-acre SMP project.

**Reason 3:** WW Ranch objects to being required to correct problems or conditions that WW Ranch had no role in creating.

**Reason 4:** The permit condition includes insufficient details and specifics to allow WW Ranch to determine precisely what the Corps wants WW Ranch to include under its SMP.

**Reason 5:** The SMP requirement is completely open-ended as far as costs are concerned and is an onerous burden for WW Ranch. WW Ranch objects to the cost of creating and maintaining the SMP project and believes there should be a maximum dollar limit included in the condition.

**Reason 6:** WW Ranch considers the SMP condition unacceptable to them, unless the Corps includes a “hold harmless” clause in the permit condition, because WW Ranch is concerned that implementing the condition may expose WW Ranch to liability or possible violation under State and Federal laws, or may expose them to civil liability.

#### **INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:**

1. The Omaha District provided a copy of the Decision Document dated March 21, 2001 and a copy of their administrative record for the WW Ranch case. This information was considered in the appeal review.
2. There was a verbatim record made of the July 18, 2001 appeal conference, which was provided to the NWD by the appellant on August 9, 2001. Information in this document received consideration during the appeal review.
3. At the appeal conference on July 18, 2001, Mr. Bakke submitted two documents for possible consideration. One was a copy of a decision document for the Dakota Dunes permit (Case No. SD2SBOTX313470). This case was referenced in the WW Ranch RFA. It was a case that also involved a permit condition requiring the construction of endangered species habitat in the Missouri River, as mitigation, similar to the requirement in the WW Ranch case. This document did receive consideration in the appeal review. The second document was an affidavit by a Mr. Merle Brink dated May 8, 2001. Mr. Brink owns property in the River Place (WW Ranch) development. In accordance with the Appeals regulations and at the discretion of the NWD Review Officer, this document did not receive consideration in the appeal since it was submitted after the date of the RFA and Mr. Brink’s concerns were not relevant to the Reasons for Appeal submitted by the appellant.

#### **SUMMARY OF DECISION:**

**Appellant’s Reason 1 does not have merit.** Although the District has not previously required a SMP condition in connection with other bank stabilization project permits in the MRGR, they have required similar mitigation for a project located on the Missouri River in South Dakota. Also, the District’s Decision Document does provide information sufficient to show mitigation is required for the WW Ranch project based on expected direct, indirect, and cumulative impacts to endangered species.

**Appellant's Reason 2 has merit.** The District has not provided adequate support, evaluation or analysis for the 10-acre SMP condition in the administrative record.

**Appellant's Reason 3 does not have merit.** The District's Decision Document clearly shows that WW Ranch's proposed project will directly, indirectly, and cumulatively impact endangered species and other fish and wildlife habitat in the MRGR area.

**Appellant's Reason 4 has merit.** Although the District's permit document, Special Condition A9, provides specific details for the construction of the SMP, it does not adequately define maintenance. Further, as stated for appeal reason 2 above, the District has not provided adequate support, evaluation, or analysis for the 10-acre SMP or its maintenance requirement.

**Appellant's Reason 5 has merit.** Because of the uncertainty of the maintenance requirement that is contained in permit condition A9, it is agreed that this condition requires further refinement. However, it is also determined that the District has shown in their Decision Document that mitigation is required to offset the impacts to aquatic resources and to avoid adverse effects to listed species under the Endangered Species Act. Providing a better definition of the requirements of this permit condition should assist WW Ranch in estimating their total project costs and determining whether the overall project with mitigation conditions is feasible.

**Appellant's Reason 6 does not have merit.** . The allegations provided by WW Ranch are broad, vague and speculative and are not supported by any specific evidence to show the extent to which construction of the SMP would subject them to unreasonable state and federal regulation or liability. In addition, it is noted that the Corps Administrative Appeal Regulations provide that in cases where the controlling factors of permit provisions cannot be changed by the Corps decision maker, such as requirements of binding laws or regulations, these provisions are not appealable (see 33 CFR § 331.5(b)).

## **APPEAL DECISION FINDINGS AND INSTRUCTIONS FOR DISTRICT ACTION:**

**Reason 1: WW Ranch objects to being required to implement an SMP when other private landowners have not been required to do so.**

**Finding:** This appeal reason does not have merit.

**Action:** No action required by District.

**Discussion:** Although it is correct that this type of mitigation plan has not been required before by the NDRO for impacts to the endangered Least Tern and the threatened Piping Plover, the District has required similar mitigation for a project in South Dakota. The District provided Mr. Lang (per his request) with a copy of the decision document for that project (Dakota Dunes project). This project was also discussed at the appeals

conference on July 18, 2001. It was explained at the conference that there are differences in the two projects, in that, the impacts to the Terns and Plovers at the Dakota Dunes project were direct impacts due to the destruction of islands containing the birds' habitat. In the case of the proposed WW Ranch project, the impacts to the listed species are from indirect and cumulative impacts that bank protection has on habitat due to the prevention of bank erosion, which reduces the amount material available for forming natural sandbar islands. The similarity between the two cases is that both require the permittee to create Tern and Plover habitat. The Dakota Dunes permit required 7.5 acres to be created. The WW Ranch permit condition requires 10 acres of habitat.

The reason that the District is requiring the SMP mitigation condition for this project is that they now have data that shows that the cumulative impacts of bank stabilization projects on Terns and Plover habitat in the MRGR have reached a level that mitigation of the impacts is now necessary to avoid adversely affecting these endangered and threatened species. This information was not available in the past. The Decision Document's Environmental Findings (pages 47-54) and Appendices B, and E support the District's conclusion. In the future the District intends to require mitigation for all bank stabilization projects in the MRGR due to cumulative impact effects on Terns and Plovers.

**Reason 2: The Corps has not provided justification for the requirement of condition 9 to create and maintain a 10-acre SMP project.**

**Finding:** This appeal reason has merit.

**Action:** The permit case is being remanded to the District for them to provide sufficient analysis, evaluation or supporting information for the 10-acre habitat creation and the maintenance requirement of the SMP, as contained in proposed permit condition A9, or to take other appropriate action in the remand of this case.

**Discussion:**

33 CFR § 325.4 (a) states, District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirements. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable." In reviewing the District's Decision Document, substantial evidence is found that the proposed WW Ranch project is likely to adversely affect the Least Tern and Piping Plover. (See discussion for reason 1 above.) However, the document does not contain any evidence to support the District's determination that 10 acres" is the appropriate amount of habitat or that the maintenance provision is needed to offset the impacts of the project. Although the District Engineer did address this subject in a letter dated July 18, 2001 to Mr. Randall Bakke, that letter does not provide adequate information for the size requirement. The letter concluded: "Therefore, to offset the permanent impacts with temporary mitigation, the Corps utilized best professional judgment as the basis for the requisite 10-acre mitigation site requirement and applied the best science available (see biological assessment pages 23 through 26)." Pages 23

through 26 of the biological assessment contain a list of reference cites, but no further analysis. It is therefore determined that justification for the 10-acre SMP condition is inadequate.

**Reason 3: WW Ranch objects to being required to correct problems or conditions that WW Ranch had no role in creating.**

**Findings:** This appeal reason does not have merit.

**Action:** No action required by District.

**Discussion:** Corps regulations state that legal requirements which may be satisfied by means of Corps permit conditions include compliance with the Endangered Species Act, 33 CFR § 325.4 (a) (1). Thus, the fact that WW Ranch may have not been a contributing cause of the factors leading to the listing of the threatened and endangered species, is not relevant in determining mitigation that is required as a result of the project.

In the RFA, the appellant states that: “WW Ranch is not aware of any studies that show connection to the bank stabilization and the erosion of sandbars and/or the loss of wildlife habitat.” In reviewing the District’s Decision Document, particularly in the Environmental Findings section (pages 21-60), and in Appendix B (Cumulative Impacts), and in Appendix E (ESA Biological Assessment), there is found detailed information on the impacts of the WW Ranch project. The Decision Document also contains references, at Appendix F, that list other documents and studies that the District used in their evaluation in reaching their decision. WW Ranch was provided a copy of the Decision Document. An explanation of the cause-and-effect relationship between the proposed bank stabilization project, by WW Ranch, and the impacts to listed species, is contained in the District’s May 18, 2001 letter to Mr. Randall Bakke in response to his questions about the permit decision. Corps regulations further provide that permit conditions may be accomplished on-site, or may be accomplished off-site for mitigation of significant losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment, see 33 CFR § 325.4 (a) (3).

**Reason 4: The permit condition includes insufficient details and specifics to allow WW Ranch to determine precisely what the Corps wants WW Ranch to include under its SMP.**

**Findings:** This appeal reason has merit.

**Action:** As indicated above in the findings for Reason 2, the permit case is being remanded to the District to provide adequate information underlying the mitigation conditions which include the SMP and the maintenance condition of the SMP, A9.

**Discussion:** Upon reviewing the District's proffered permit document, Special Conditions section, I find that condition A9 does provide detailed specific requirements for the construction of the SMP. However, the condition does not define or specify what is required as far as the "maintenance" provision of this condition. The condition states: "The period of maintenance under A9 shall be a minimum of three years. Completion of such activities shall occur prior to June of each year." I concur that further definition is needed regarding the maintenance provision. In addition, as discussed in Reason 2 above, the Decision Document lacks adequate documentation to support the 10-acre SMP or maintenance requirement of condition A9.

**Reason 5: The SMP requirement is completely open-ended as far as costs are concerned and is an onerous burden for WW Ranch. WW Ranch objects to the cost of creating and maintaining the SMP project and believes there should be a maximum dollar limit included in the condition.**

**Findings:** This appeal reason has merit.

**Action:** The permit case is being remanded to the District to provide an analysis, evaluation or support for the requirements of the SMP condition, particularly the 10-acre size requirement and the maintenance requirement.

**Discussion:** In the RFA, the appellants indicate that they had been told by the NDRO that the cost of the mitigation would be in the range of \$10,000 to \$25,000. They also indicated later in the RFA that Mr. Cruse, the District's "sandbar expert," estimated that the cost of the SMP condition at \$50,000 to \$100,000. At the appeals review conference on July 18, 2001, the issue of the cost of the mitigation was again raised. At the conference it could not be substantiated that the NDRO had told the appellants that they would not be required to spend more than \$25,000 on the mitigation, as is alleged in the RFA document. When asked if he had promised WW Ranch that the cost of the mitigation would not exceed 10 to 25 thousand dollars, Mr. Winters, the Corps' Regulatory Program Manager for the North Dakota Regulatory Office, responded "No." It was agreed at the appeals conference that the Review Officer would rely on information contained in the administrative record regarding this issue since there remains a difference of opinion on what may have been said at meetings or during telephone conversations between the NDRO and the applicant. In reviewing the administrative record, there was nothing found to support the contention that the NDRO had agreed to put a maximum dollar limit on the costs of mitigation.

When evaluating permit applications, the Corps is required to perform an alternatives analysis in accordance with regulations 33 CFR Part 230. One of the factors that are considered in determining the practicability of alternatives is cost. The District determined in their Decision Document (pages 83 and 86) that the modified WW Ranch project was the least environmentally damaging practicable alternative, with the inclusion of the condition requiring the SMP mitigation. The District also determined that mitigation for impacts to Terns and Plovers habitat is required for permit issuance in this

case, in order to meet the requirements of the Endangered Species Act. Although cost was a consideration in comparing alternatives, it is not a factor in determining what mitigation is necessary to allow the issuance of a permit.

It is agreed that the maintenance requirement contained in permit condition A9 is not clearly defined as currently written, and as a result could be considered “open-ended”. Providing a better definition of the requirements of this permit condition should assist WW Ranch in determining the project costs. The economic decision as to whether or not an owner can afford to build a project, is something the owner must decide after considering all benefits and costs of the project, including the costs of complying with environmental and other laws. Corps regulations provide that if special conditions are necessary to ensure the proposal will not be contrary to the public interest (in this case protection of threatened and endangered species and their critical habitat) but are not capable of implementation, the permit will be denied, see 33 CFR § 325.4 (c).

**Reason 6: WW Ranch considers the SMP condition unacceptable to them, unless the Corps includes a “hold harmless” clause in the permit condition, because WW Ranch is concerned that implementing the condition may expose WW Ranch to liability or possible violation under State and Federal laws, or may expose them to civil liability.**

**Findings:** This Appeal Reason does not have merit.

**Action:** No action required by District.

**Discussion:** WW Ranch alleges that the SMP condition will expose them to unknown liability and/or possible violation of state or federal laws. However, beyond these general allegations WW Ranch has not provided any substantiating evidence that it would be subject to this type of liability. Generally, in implementing off-site mitigation applicants are expected to comply with local, state and federal requirements. The costs of these mitigation requirements must be considered by the applicant in deciding to go forward with the proposed project. It is also noted that Corps Regulation 33 CFR § 331.5(b), provides that in cases where the controlling factors of permit provisions cannot be changed by the Corps decision maker, such as requirements of binding laws or regulations, these provisions are not appealable. Based upon these factors it is my determination that this appeal reason does not have merit.

**CONCLUSION:**

**For the reasons stated in the discussions above, I find that appeal Reasons 1, 3, and 6 do not have merit. Reasons 2, 4, and 5 do have merit. Based on these findings the permit is being remanded to the District with instructions for them to provide an analysis, evaluation or support in the administrative record for the SMP acreage for Terns and Plover habitat creation and maintenance requirements or to take other appropriate action in the remand of this case.**

( Signed )

David A. Fastabend  
Colonel, U.S. Army  
Division Engineer

