Bruce

UNITED STATES DEPARTMENT OF COMMERCE
OFFICE OF ADMINISTRATIVE LAW JUDGE
Suite 6716
WASHINGTON, D.C. 20230

RECOMMENDED DECISION

In the Matter of:	
Peter E. Hess	Docket No. 251-008
Applicant	

Appearance for Applicant: Jay C. Beasley, Esq.
Miller, Oliver, Beachley & Stone
28 West Washington Street
Hagerstown, MD 21741-1269

Appearance for Agency: Ole Varmer, Esq.
U.S. Department of Commerce
NOAA, Office of General Counsel
Universal South Building
1825 Connecticut Ave., N.W.
Suite 603
Washington, D.C. 20235

PRELIMINARY STATEMENT

This expedited proceeding has been initiated under the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. § 1431-1445, and the implementing regulations promulgated thereunder in 15 C.F.R. Part 924.

BACKGROUND

To have an understanding of the importance of this sanctuary, it is appropriate to examine the historical events and reasons that make this site significant.

In the early days of the Civil War Congress, at the request of Gideon Welles, the Union Secretary of the Navy, authorized a special board to select and oversee the construction of an iron-clad warship. Welles recommended and the board selected the design of the brilliant Swedish Naval Architect John Ericsson. The keel

of the ship was laid October 25, 1861 and completed on February 15, 1862. MONITOR, as she was named, was built in the impressive time of eighty two days. Meanwhile the Confederate Secretary of the Navy, Stephen R. Mallory, determined that the Confederates too must have ironclad vessels in order to compete with the more powerful Union Navy. Mallory believed that with such a vessel he could break the Union blockade and successfully battle the Federal gun boats. In order to quickly satisfy this dictate the Confederates raised the sunken Union frigate MERRIMACK and constructed on her hull an iron superstructure. She carried ten large guns and in the water resembled a floating roof. In the early afternoon of March 8, 1862, MERRIMACK[1] headed for Newport News and engaged and sunk two Union vessels blockading the James River. A third vessel, the U.S.S. MINNESOTA, coming to their aid was nearly destroyed and ran aground. As darkness covered the Hampton Roads area, MERRIMACK, fearing she too might become grounded, withdrew to nearby Sewell's Point, intending to finish the destruction of MINNESOTA the next day. While the battle was going on MONITOR was proceeding to the Hampton Roads area from New York, arriving about 9:00 p.m. the same day. During the night hours she lay at anchor guarding the damaged MINNESOTA. Early the next morning MERRIMACK lifted anchor and headed toward MINNESOTA intending to finish the fight she had started the previous day. MONITOR intervened, and the two ships engaged in a fierce gun battle at close range. After an arduous exhausting fight lasting nearly four hours, the two vessels broke off the engagement. MERRIMACK returned to Sewell's point, and MONITOR again positioned herself by MINNESOTA. Although both sides claimed victory, it was clear the battle had been a standoff. Following the confrontation neither ship attempted to again engage the other in battle. Although the combatants survived the battle they both failed to survive the year. On May 10, 1862, fearing capture by Union forces, MERRIMACK's crew scuttled and burned her. On December 31, 1862, MONITOR, while being towed south was lost at sea in a storm off the coast of North Carolina. The magnitude of the event which took place in Hampton Roads 130 years ago is significant, for it marks a major turning point in the history of naval conflict. The age of the wooden ship was over. The dawn of the iron ship had begun, and naval operations would never again be the same.

MONITOR remained on the sea bottom, her exact position unknown, until 1973 when, as a result of an extensive effort, her location was discovered. On January 30, 1975, 113 years after it's launching, MONITOR and the site where she lay were designated the first Marine Sanctuary, under the Marine Protection Research and Sanctuaries Act of 1972.(16 U.S.C. §§ 1431 et seq.) The purpose of the designation was, to ensure that the MONITOR be preserved for systematic scientific investigation and development, and as a

---

[1] The Confederates renamed the ship VIRGINIA, however the use of this name has ceased to be commonly employed.

resource of national significance. As was stated at the time of dedication, "The MONITOR occupies a place in history never to be accorded another American Ship".[2]

FACTS

This case involves an appeal from a denial of an application by the Applicant, Peter Hess, to the National Oceanic and Atmospheric Administration (Agency) for a permit to dive and conduct research in the MONITOR National Marine Sanctuary. The application was in response to Federal Register Notice dated February 20, 1991. The Notice requested research proposals for studies in the Sanctuary. The notice further stated that guidelines for research topics could be found in the MONITOR Sanctuary Management Plan.[3] The Applicants application was filed and accepted by the Agency on April 4, 1991 (AR B-1).[4] On July 22, 1991, the Applicant requested a response to his previously filed application. By letter dated July 23, 1991, the Agency advised the Applicant, that the application was not acceptable as presented and suggested it would accept modifications (AR D-2).[5] In the letter the Agency offered technical assistance to the Applicant for making these modifications (Tr. 229-231). The Applicant chose to consider the Agency's letter a denial of the application by letters dated August 21, 1991,(AR F-1) and September 30, 1991,(AR D-5) and requested an administrative hearing pursuant to 15 C.F.R. § 924.8(c). On November 22, 1991, the Applicant's permit application was denied by the Agency (AR C-1). The letter further stated that the Agency treated the Applicants previous requests for a hearing as timely filed. On January 9, 1992, the Office of Administrative Law Judge received a request from the Agency to hold an informal hearing pursuant to 15 C.F.R. § 924.8. By agreement of the Parties the informal hearing was scheduled for February 13, 1992, and was held on that date. Notice of this hearing date was published in the Federal Register January 28,

---

[2] Secretary of Commerce, Frederick B. Dent, 1975.

[3] The Management Plan is set forth in the Administrative Record (AR A-6). The reference is to the Administrative Record which is made a part of the record in this matter. The designation is therefore AR, and the letter and number referenced is to that specified in the Administrative Record index.

[4] The Applicant filed an addendum to the application on April 5, 1991, which the Agency accepted and considered as part of the application process (AR B-2).

[5] The letter was signed by Susan Durden, Chief, Atlantic and Great Lakes Branch of N.O.A.A.'s National Ocean Service. Although the letter was dated July 23, it was not sent until July 26 (AR D-4).

1992. (57 Fed. Reg. 3163)

DISCUSSION

I

Criteria for Evaluation of the Application

The issue to be decided is whether the application of the Applicant, Peter Hess, to conduct research in the MONITOR Sanctuary was properly considered and evaluated by the Agency according to the criteria and factors set forth in 15 C.F.R. 924.6(b).

The Regulations provide that the Secretary in making the determination whether to grant a permit for the purpose of conducting research related to the MONITOR, shall consider the following matters:

(1) the general professional and financial responsibility of the applicant;
(2) the appropriateness of the research method(s) envisioned to the purpose(s) of the research;
(3) the extent to which the conduct of any permitted activity may diminish the value of the MONITOR as a source of historic, cultural, aesthetic and/or maritime information;
(4) the end value of the research envisioned; and
(5) such other matters as the Administrator deems appropriate.

It is my determination that the Administrator did, using the criteria set forth in the Regulations, properly consider, evaluate, and deny the Hess application. This determination is based on the considerations set forth above and in the Regulations as well as the record made at the hearing.

II

The Hess Application

The Hess application contains a proposal to conduct research in three areas, i.e.: archaeological studies; corrosion studies; and the effects of Hurricane Lilly on the site. An analysis is made of each part as presented, and the sufficiency of the proposal.

1. Archaeological Studies. The application states that it "proposes to undertake a series of archaeological inquires of the wreck site in order to answer questions critical to a fuller understanding of the long range management options open to NOAA". The Agency in an attempt to understand what was intended asked for clarification of this proposal in its July 23 letter. At the hearing the Applicant's expert witness, Daniel Koski-Karell, testified that the application did not contain a scientific plan

of research which specified the objectives of the research and employed a methodology consistent with the objective of the project. The witness stated that this plan would come later after the permit was approved (Tr. 176).

However, it is my determination that it is not possible for the Agency to issue a permit without having such a plan before it for review. Without the plan the Agency could not make that determination with which it is charged in the Regulations and under the Act. The argument, that the detail necessary for the Agency to make its determination is not required until the permit is issued, is without merit. The Agency must be able review the scientific plan of the research, the objectives of the research and the methodology. The Agency offered the Applicant an opportunity to amend the proposal so that it could be better understood. The Applicant chose to ignore this offer of assistance.

2. Corrosion Studies. The application relating to these studies also does not include that information necessary for the Agency to make an informed decision regarding this research. At the hearing the Applicant's expert witness, David L. Johnson, testified to the galvanic and sonar methods of testing for corrosion of metals. He explained the methodology of corrosion testing. It is possible that these studies, had they been put forth in the application, might have constituted research for which the Agency had an interest and need. However the Agency did not have the benefit of Mr. Johnson, or his explanation of the methodology of this type of research, at the time of its review of the Hess application for none of that information was contained therein. Because of the sparse data contained in the proposal it appears that the Agency did not have a complete presentation, or explanation as it pertained to corrosion studies.[6] It appears Therefore, the decision to deny the permit regarding this research was properly made.

3. The Effects of Hurricane Lilly to the Site. This part of the proposal also did not set forth the type of research to be performed. In addition the Applicant does not indicate or show the expertise which would be necessary to conduct any such research.

III

The Applicant's Argument

The Applicant sets forth his argument, that the Agency improperly and incorrectly denied him a permit, in three parts. Each part of the argument is discussed below.

---

[6] Compare the testimony of the witness (Tr. 162-164) with the Agency letter of denial (AR C-1).

1. The Agency continues to Possess "Unalterably Closed Minds". In arguing this issue, the Applicant quotes a recent decision by this Tribunal, In the Matter of Gary Gentile, No. 951-193, November 20, 1989.[7] In that case this Tribunal, in referring to the Agency's action in regard to the handling of an application for a permit, stated,

> "The failure to act or issue an opinion on applicant's requests by the diving office of NOAA for over a year when there was '..not a hell of a lot of thinking' involved in reaching the adverse determination, demonstrates a very unfortunate attitude and mind set on the part of the NOAA officials."

The Applicant contends that the Agency's behavior in that case is the same as it is here. However, the issue decided in the first Gentile case was different than the one in this case. In the first Gentile case the Agency denied a permit to dive on the MONITOR because the Applicants safety standards were not the same as those proscribed by it. In making the determination in the first Gentile case the Agency did not consider the criteria set out in the Regulations and therefore denied the permit for the wrong reasons. The Hess argument that the Agency continues to possess "an unalterably closed mind" in the matter of his application is not persuasive. The issues in the two cases are not the same.

The Applicant also argues that because of the many battles he has waged over the years in an attempt to obtain permits to dive in the MONITOR Marine Sanctuary the Agency has developed an animosity and prejudice toward him. He alleges that his application was denied because of his prior legal representation of Gary Gentile, a previous applicant who was granted a permit to dive on the MONITOR only after a hearing before this Tribunal. The Applicant believes that the adverse relationship which resulted from those hearings caused the hostility between the Agency and himself and which led to the denial of the current application. As I stated at the hearing, the focus of this matter is on this application. The purported hostility that may have been present at prior hearings, or because the Applicant here was counsel for a previous applicant, is not pertinent unless it can be shown to evidence a predisposition toward the present applicant. No evidence of such has been shown.

2. The Agency's Prejudice Against the Applicant is Demonstrated by its Inordinate Delay in Informing Him of the Application's Denial. The Applicant argues that the same bureaucratic foot-dragging attendant to the Gentile applications was present in his

---

[7] Hereafter referred to as the first Gentile case. There was also a second Gentile appeal, In the Matter of Gary Gentile, No. 051-389, November 30, 1990.

application and demonstrates the Agency's prejudice toward him. He asserts that the delay of notifying him of the Agency decision, which had been made in early June, precluded him from acting on an appeal, and conceivably diving during that summer season. The Applicant also argues that the Agency's July 23 letter (AR D-2) was in fact a denial of his application, and as such should have afforded him a hearing within 30 days.[8] An examination of the Agency's action, from the date it received the application until it issued the letter of July 23, does not indicate foot-dragging. As set forth in the Administrative Record, the actions of the six people who reviewed the application as well as the Agency chief who signed that letter indicates progressive action on the Agency's part (AR D-1, D-8, D-9, D-7, D-2).[9] An examination of the letter shows that the Agency made suggestions for modification of the application and an offer to accept such revisions. The Agency letter of July 23, can only be construed as an offer of technical assistance, it was not a denial. The Agency did not issue a denial of the application until after it became apparent that the Applicant was not going to modify his proposal.

3. <u>The Application Satisfies the Regulatory Criteria found in 15 C.F.R. 924.6 for Issuing a Permit for Conducting Research Related to the MONITOR</u>. In making it's determination whether to grant a research permit the Agency must consider the five factors for evaluation set out in Section 924.6 of the Regulations; Permit Procedures and Criteria. The Agency letter of November 22, 1991, discusses each of the five factors and explains the reason for reaching it's decision to reject the application for a permit. The Applicant argues that his application, as presented, was complete and proposed significant scientific research as required to be set forth by the Agency in their notice. A review of the application indicates it is not sufficient. in its July 23 letter the Agency indicated the areas in which the proposal was deficient, and explained the areas in which it requested more information or modification. The Agency informed the Applicant that the proposal did not contain the research design and methodology necessary for it to make a determination to grant the permit. Not only was the application deficient in specifying a detailed design, scope of work and methodology, but it was put together in a manner difficult to consider. There was a lack of detail and organization of the proposal, which had it been present, would have made for a more timely response.

---

[8] The letter is dated July 23, but was not sent to Hess until July 26. The reason for this delay was not explained. However this delay is neither considered prejudicial to the Applicant nor does it show an unfavorable predisposition to his application.

[9] The Exhibits from the Administrative Record are set out in the chronological order in which the activity took place.

IV

Other Issues

1. Review of the Application. Using the criteria set out in the Regulations the Agency properly reviewed the application put before it. It was not incumbent on the Agency to speculate on the design and methodology of the Applicant's research. The Agency offered the Applicant an opportunity to clarify and revise his proposal. He chose to ignore this suggestion. It was necessary for the Applicant to present an application in a complete and finished form for consideration. In its review of the action taken by the Agency this Tribunal is limited as part of its consideration, to the application and that material which is contained therein. An Applicant may not put together an incomplete Application and when the Agency denies the permit, request a hearing in order to perfect his Application. The Application will stand or fall on that which is presented to the Agency for review. The function of the appeal process is to determine whether the proposal submitted to the Agency satisfies the criteria set forth in the Regulations and whether the Agency in its review and determination properly considered this criteria.

2. The Right of Public Access to the Sanctuary. As this Tribunal has stated previously, there is no entitlement to access to the MONITOR under the statute or regulations. "It is not an open public facility." "The sanctuary designation preserves it from human interference." In the Matter of Gary Gentile, Docket No. 051-389, (Nov. 30, 1990).

3. Agency's Management Philosophy Regarding the MONITOR. The Applicant has stated that the Agency's management philosophy does not reflect the reality of the present condition of the MONITOR. The question whether the MONITOR is in a precarious condition is not at issue before this Tribunal. The Agency has been charged with the management and care of this very important site. The responsibility for it's action are great. Every American citizen is concerned that this remnant from the Civil War receive proper care and supervision. Although there may be those who feel the Agency is not exercising its duty as the custodian of this significant relic, it is not for this Tribunal to make that determination. Those issues are not properly here for resolution, and they will not be considered or discussed.

4. Whether the Agency's Unreasonably and Capriciously Delayed Issuance of the Permit Denial. The Applicant presented no evidence to show capricious or unreasonable action by the Agency. This issue was raised by the Applicant in his original brief, however he failed to present further argument to substantiate the claim. It will therefore be disregarded.

LAW AND REGULATIONS

16 U.S.C. 1431. Findings, purposes and policies

(b) Purposes and policies. The purposes and policies of this title are--

(1) to identify areas of the Marine environment of special national significance due to their resource or human-use values;

(2) to provide authority for comprehensive and coordinated conservation and management of these marine areas that will compliment existing regulatory authorities;

(3) to support, promote, and coordinate scientific research on, and monitoring of, the resources of these areas;

(4) to enhance public awareness, understanding, appreciation, wise use of the marine environment; and

(5) to facilitate, to the extent compatible with the primary objectives of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities.

15 C.F.R. § 924.6 Permit procedures and criteria.

(b) In determining whether to grant a permit for the conduct of a permitted activity for the purpose of research related to the MONITOR, the Secretary shall evaluate such matters as:

(1) the general professional and financial responsibility of the applicant;

(2) the appropriateness of the research method(s) envisioned to the purpose(s) of the research;

(3) the extent to which the conduct of any permitted activity may diminish the value of the MONITOR as a source of historic, cultural, aesthetic and/or maritime information;

(4) the end value of the research envisioned; and

(5) such other matters as the Administrator deems appropriate.

FINDINGS

1. The determination by the Agency to deny the application of the Applicant Peter Hess for a permit to dive and conduct research in the MONITOR Marine Sanctuary was properly made after considering the factors and criteria set forth in 15 C.F.R. § 924.6(b).

2. In order for the Agency to properly assess an application to conduct research in the sanctuary the proposal must contain a systematic scientific plan of research which specifies the objectives of the research, and which employs a suitable methodology consistent with the objectives of the project.

3. The application submitted by the Applicant on April 4 and 5, 1991, was incomplete in that it did not contain a systematic scientific plan of research which specified the objectives of the

research, and which employed a suitable methodology consistent with the objectives of the project.

4. There was no evidence presented to show that the Agency developed a hostility, animosity or prejudice toward the Applicant as a result of his prior representation as counsel for a previous Applicant.

5. The Agency's action in processing the application was preformed in a reasonable manner, and within a reasonable time.

6. The appeal process under § 924.8 of the Regulations may not be used to supplement, modify, amend, or perfect an application to conduct research in the sanctuary.

7. The Agency's delay in issuance of the permit denial was neither unreasonable, nor capricious.

CONCLUSION

The decision by the Agency to deny the permit was properly considered using the criteria set forth in the regulations, and was rendered within a reasonable time

RECOMMENDATION

That the action denying the issuance of the permit be sustained and the Appeal be denied.

William A. Ogden
Administrative Judge

March 11, 1992
Date

CERTIFICATE OF MAILING

I certify that I have sent the attached document by Certified Mail, postage prepaid, and also hand delivered to the following persons:

Jay C. Beasley, Esq.
Miller, Oliver, Beachley & Stone
28 West Washington Street
Hagerstown, MD 21741-1269
(CERTIFIED NO. P 656 308 982)

Ole Varmer, Esq.
U.S. Department of Commerce
NOAA, Office of General Counsel
Universal South Building
1825 Connecticut Ave., N.W.
Suite 603
Washington, D.C. 20235
(CERTIFIED NO. P 656 308 984)

John J. Carey
Deputy Assistant Administrator
National Ocean Service, NOAA
Universal South Building
1825 Connecticut Ave., N.W.
Room 611
Washington, D.C. 20235
(Complete Certified Record Hand Delivered)

March 11, 1992
Date

Williemae Smith
Williemae Smith
Support Services Assistant