ADMINISTRATIVE APPEAL DECISION

HAVENER JURISDICTIONAL DETERMINATION APPEAL
FILE NO. 2004-00420
ST. LOUIS DISTRICT
December 6, 2004

Review Officer: Ms. Martha S. Chieply, U.S. Army Corps of Engineers, Mississippi Valley Division

Appellant/Applicant: Mr. Marvin Havener, Winkle Farms L.P., Mexico, Missouri

Authority: Section 404 of the Clean Water Act

Receipt of Request for Appeal: September 30, 2004

Conference Call: November 12, 2004

Background Information: This administrative appeal decision is in response to the objection by Mr. Marvin Havener to the August 31, 2004, Jurisdictional Determination (JD) by the St. Louis District (MVS).[1] The MVS JD determined that the unnamed tributary on the Winkle Farm, farm number 1051, located in Monroe County, Missouri, contains waters of the United States subject to Corps of Engineers' (Corps) jurisdiction.

Mr. Havener submitted a Department of the Army permit application to MVS on January 30, 2004, proposing to clear timber from an area to construct a grass waterway.[2] By letter dated February 11, 2004, the Natural Resources Conservation Service (NRCS) documented its findings from a field investigation.[3] NRCS determined that building a grass waterway in the draw (tributary) and removing the old pond would not be a violation of the Farm Bill. NRCS informed Mr. Havener that a Section 404 permit from the Corps might be required to build the grass waterway. NCRS provided MVS information gathered in its investigation, requested that MVS concur with its findings, and asked MVS to determine the geographic extent of the Corps' jurisdiction.

MVS conducted a site investigation on March 24, 2004.

---

[1] Tab 3 of the administrative record
[2] Tab 8 of the administrative record
[3] Tab 7 of the administrative record

Mr. Havener submitted a second permit application on August 9, 2004.[4] The proposed work consisted of constructing a grassed waterway approximately 1,900 feet long and widening the existing channel.

MVS provided Mr. Havener an approved JD dated August 31, 2004.[5] MVS determined that the unnamed tributary possesses an ordinary high water mark (OHWM) and is a jurisdictional water of the United States. MVS did not concur with the delineation report prepared by NRCS, stating that the geographic extent of waters of the United States extended to a gravel road and may extend beyond the road.[6] The JD included two topographic maps; a Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA) form; and a Jurisdictional Determination form (JD basis form).[7] The letter notified Mr. Havener that the excavation or placement of any dredged or fill material in waters of the United States below the ordinary high water elevation or in wetlands, must be authorized by a Corps Section 404 permit and outlined additional information and steps necessary to complete the permit process.[8]

In a letter MVS received on September 24, 2004, Mr. Havener provided an RFA which was forwarded to the Review Officer (RO) on September 30, 2004.[9] Mr. Havener asserted that the channel is not a water of the United States because it does not have a continuous flow of water in the channel. In a letter dated October 26, 2004, Mississippi Valley Division (MVD) accepted the appeal. A teleconference call was conducted on November 12, 2004.

Summary of the Appeal Decision: The administrative record contains substantial documentation that Mr. Havener's property contains waters of the United States. MVS correctly asserted jurisdiction based on 33 C.F.R. 328.3(a)(5).

---

[4] Tab 5 of the administrative record

[5] Tab 3 of the administrative record

[6] MVS JD basis form

[7] In the appeal teleconference MVS clarified that the gravel road was Monroe County Road number 743.

[8] The MVS JD did not determine that the property contained wetlands subject to Corps' jurisdiction.

[9] The RFA was dated September 23, 2004 and received by MVS on September 24, 2004.

Information Received and Its Disposition During the Appeal:

33 C.F.R. 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this JD. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding JDs, as that authority remains with the District Engineer. Upon appeal from the District Engineer's decision, the Division Engineer or his RO conducts an independent review of the administrative record to address the reasons for appeal cited by the Appellant. The administrative record is limited to information contained in the record by the date of the NAP form. Pursuant to 33 C.F.R. Section 331.2, *Request for appeal (RFA)*, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information to MVD.

To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the administrative record. Such interpretation, clarification, or explanation does not become part of the administrative record because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

1. MVS provided a copy of its administrative record to Mr. Havener and the RO. MVS's administrative record is limited to information contained in the record by the date of the Havener NAP form, in this case, August 31, 2004. Only the administrative record and any clarifying information were considered in reaching this appeal decision.

2. In a letter sent to Mr. Havener and MVS on October 29, 2004, the RO provided a set of possible questions for discussion at the appeal teleconference. These questions are shown in Exhibit 1 in the November 12, 2004, Memorandum for the Record (MFR), which documents the teleconference. These questions and the answers are deemed clarifying information and were considered in reaching this appeal decision.

Basis for Appeal as Presented by Appellant:

Appellant's Verbatim Reason for Appeal: I [Mr. Havener] don't believe the channel is [an] other water of the United States, because it doesn't have a continuous flow of water in the channel.

Finding: This reason for appeal does not have merit.

Action: No action is required.

Discussion: Section 404(a) of the Clean Water Act, 33 U.S.C. 1344, delegates authority to the Secretary of the Army to issue permits for the discharge of dredged or fill material into waters of the United States. The Corps implements this statute through regulations found at 33 C.F.R. 320, 323, 325, and 328. Corps regulations found at 33 C.F.R. 325.9 state that District Engineers are authorized to determine the area defined by the terms "navigable waters of the United States" and "waters of the United States." Corps regulations found at 33 C.F.R. 328.3(a)(1) through (a)(7) define the term "waters of the United States."

The administrative record contains substantial evidence that the property contains waters of the United States and meets the applicable definition. Corps' regulations found in 33 C.F.R. 328.3(a) define "waters of the United States." The applicable section for this case is 33 C.F.R. 328.3(a)(5) "Tributaries of waters identified in paragraphs (a)(1) through (4) of this section."

MVS conducted a field investigation and utilized infrared photographs and topographic maps and information provided by NRCS. The photographs and topographic maps depict a tributary system that eventually drains or flows into a navigable water. Regulatory Analysis Management System (RAMS) data in the administrative record documents the fact that the unnamed tributary flows to Brush Creek to the South Fork Salt River to the Salt River.[10] Salt River is considered a water of the United States as defined in 33 C.F.R. 328.3(a)(1).

[10] Tab 1 of the administrative record

There is substantial documentation in the administrative record to support the MVS JD. The MVS JD basis form stated the property contains "waters of the "United States" (as defined by 33 CFR part 328 and associated guidance) within the reviewed area. Approximate size of jurisdictional area: 3000 linear feet x 8-12 foot wide channel." The basis of jurisdiction was the presence of a tributary to another water of the United States, 33 C.F.R. 328.3(a)(5). The extent of jurisdiction was based on evidence of an OHWM and Mean High Water Mark. The OHWM was indicated by 1) clear, natural line impressed on the bank, 2)the presence of litter and debris, 3)changes in the character of soil, 4)destruction of terrestrial vegetation, and 5) shelving. The Mean High Water Mark was indicated by physical markings and vegetation lines/changes in vegetation types. The MVS JD basis form detailed the data reviewed for the MVS JD.

Mr. Havener's RFA asserts that the channel is not a water of the United States because it does not have a continuous flow of water in the channel. Evidence of a continuous flow of water is not a sole determinant for identifying the presence of waters of the United States. An OHWM in the unnamed tributary is evidence that water flows in the unnamed tributary. The Corps utilizes an OHWM in determining the limits of waters of the United States. The term "ordinary high water mark" is defined in 33 C.F.R. 328.3(e) as:

> . . . that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

There is substantial information in the administrative record of the hydrologic characteristics of the property, including evidence of an OHWM along portions of the unnamed tributary on the Havener property. In addition to the JD basis form, the MVS Stream Description Information form documented the type of flow, channel size, and evidence of an OHWM of the unnamed tributary.[11] Field notes documented flowing water. This reason for appeal has no merit.

---

[11] Tab 6 of the administrative record

Conclusion: For the reasons stated above, I conclude that Mr. Havener's RFA does not have merit. The final Corps decision will be the MVS District Engineer's letter advising Mr. Havener of this decision and confirming the August 31, 2004, jurisdiction determination.

ROBERT CREAR
Brigadier General, U.S. Army
Division Engineer