ADMINISTRATIVE APPEAL DECISION

Mr. Mike Skelton
File No. MVM-2004-290
Memphis District
February 23, 2006

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

Appellant/Applicant: Mr. Mike Skelton, Kennett, Missouri

Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): November 25, 2005.

Appeal Meeting and Site Visit Dates: January 9, 2005.

Summary of Appeal Decision: Mr. Skelton asserts that because the ditches and ponds on his property were man-made and existed before implementation of the Clean Water Act they should not be subject to the Corps of Engineers' (Corps') jurisdiction. While the specific reasons for appeal forwarded by the Appellant do not have merit, my review finds that there was insufficient documentation in the record to support the finding that the ponds and the unnamed ditch are waters of the United States. Additional documentation is needed to document whether the unnamed ditch located to the west of the ponds is a water of the United States, whether the ponds consist entirely of wetlands, and whether the ponds are adjacent to the unnamed tributary.

Background Information: This administrative appeal decision is in response to the objection by the Appellant to the September 27, 2005, Approved Jurisdictional Determination (JD) by the Memphis District (MVM).[1] The MVM JD determined that the ditch flowing north from the northwest corner of the westernmost pond exhibits an ordinary high water mark and is an unnamed tributary of the St. Francis River, a navigable water of the United States and that the project area is a wetland or other waters of the United States.

In a letter dated April 26, 2004, Mr. Donnie Holbrook, Wetland Team Soil Scientist for the Natural Resources Conservation Service, requested the MVM review a wetland

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delineation for Mr. Skelton's property.[2] The administrative record contained a NRCS form signed by Mr. Skelton requesting a certified wetland determination/delineation. The form identified his property as Farm No. 1209, Tract No. 910. It stated that Mr. Skelton intended to drain and fill the ponds to allow crop production.[3]

By letter dated September 27, 2005, the MVM provided Mr. Skelton an Approved JD determining that the project area is a wetland or other waters of the United States and that a Department of the Army permit would be needed to fill the ponds and covert them to agriculture use. The JD included an internet link to an electronic copy of the JD and a Notification of Administrative Appeal Options and Process for Appeal (NAP) form.

Mr. Skelton filed an RFA to the Corps, Mississippi Valley Division (MVD) Review Officer (RO) on November 25, 2005. The MVD accepted the appeal by letter dated December 19, 2005. The site inspection and appeal meeting were conducted on January 9, 2006.

Information Received and Its Disposition During the Appeal Review:

33 C.F.R. 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this Approved 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 the 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. The NAP for the Appellant's JD is dated September 27, 2005. 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

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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. MVM provided a copy of the administrative record. The administrative record was considered in reaching this decision.[4]

2. During the appeal meeting, the RO provided two Administrative Appeal Process Flowcharts. The flowcharts are Exhibit 1 in the Appeal Meeting Memorandum for the Record (MFR).

3. By letter, fax and email dated January 6, 2006, the RO transmitted questions to MVM and the Appellant for discussion at the appeals meeting. Exhibit 2 in the Appeal Meeting MFR contains the questions.

4. During the appeal meeting, MVM provided a written response to the RO's questions. The MVM written response is Exhibit 3 in the Appeal Meeting MFR. The Appellant did not provide a written response. The RO considered MVM's response to be clarifying information and considered it in making the appeal decision recommendation.

5. During the appeal meeting, MVM provided a two page fax from the Natural Resources Conservation Service (NRCS) Area Office. The fax included a drawing of the pond with dots denoting the location of plot points 1, 1b, 1c, 1e, and 2, and a photo denoting the ponds and plot points. NRCS' fax is Exhibit 4 of the Appeal Meeting MFR. The RO considered the fax clarifying information and considered it in making the appeal decision recommendation.

6. MVM provided a copy of a Senath 1:24,000 topographic map. The topographic map highlighted the tributary connection from the Appellant's Ponds to the St. Francis River and the location of plot points 1, 1b, 1c, 1e, and 2. A partial copy of the

[4] MVM provided a copy of the administrative record to the RO. Documents were arranged in chronological order with the pages unnumbered. The RO numbered the administrative record; page one beginning with the September 27, 2005 MVM Letter to Mr. Mike Skelton. A numbered copy of the administrative record was provided to the Appellant.

topographic map was in the administrative record. The topographic map with the notations is Exhibit 5, was considered clarifying information and considered in the appeal decision.

The RO will provide copies of all information received during the appeals process to both MVM and Mr. Skelton.

Basis for Appeal as Presented by Appellant (condensed and paraphrased by the RO and presented in bold lettering):

Appellant's Reason for Appeal: Mr. Skelton asserts that because the ditches and ponds on his property were man-made and existed before implementation of the Clean Water Act they should not be subject to the Corps of Engineers' jurisdiction.

FINDING: While I find that the specific reason for appeal forwarded by the Appellant is without merit, I am remanding the JD to the MVM for further documentation because the administrative record for the approved JD does not provide an adequate and reasonable basis for supporting the District Engineer's decision.[5] There is insufficient documentation in the administrative record that the unnamed ditch located to the west of the ponds is a water of the United States with a hydrologic connection to a navigable water of the United States. Additionally, there is insufficient documentation regarding the extent of wetlands and how they are adjacent to waters of the United States.

ACTION: The MVM shall develop additional documentation showing whether the ponds consist entirely of wetlands. The district should also document in the record whether the wetlands are adjacent to waters of the United States and whether the unnamed ditch located to the west of the ponds is a water of the United States.

DISCUSSION: District Engineers when making decisions regarding the Corps' jurisdiction reserve the right on a case-by-case basis to determine that a particular water body is a water of the United States and utilize definitions found in 33 C.F.R.

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[5] Appeal regulations at 33 C.F.R. 331.3(b)(2) allow the RO to conduct an independent review of the administrative record to verify that the record provides an adequate and reasonable basis supporting the District Engineer's decision, that factors for analysis essential to the District Engineer's decision have not been omitted from the administrative record, and that all relevant requirements of the law, regulations, and officially promulgated Corps policy guidance have been satisfied.

328.3 to determine if waters of the United States are found on a property. For purposes of the Clean Water Act, the fact that the ponds and ditches were man-made is not conclusive to a determination of the Corps' jurisdiction. If wetlands exist on the property and those wetlands are adjacent to a tributary to a navigable water of the United States then the Corps may have regulatory jurisdiction. *Leslie Salt, Co. v. U.S.* 896 F.2d 354 (9th Cir. 1990) *cert. den.* 498 U.S. 1126.

Not all man-made aquatic resources are subject to the Corps' jurisdiction. Preamble language to 33 C.F.R. 328.3 Definition states "for clarification it should be noted that we generally do not consider the following waters to be "waters of the United States". . . (d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons". While the Appellant clarified that the ponds were constructed for recreational swimming and fishing, the total size of the ponds (2.4 acres) is larger than most generally recognized pools or small ornamental bodies of water. Because of the size of the ponds and lack of documentation that the ponds were created for primarily aesthetic reasons, categorizing the Appellant's pond as a non-water of the United States under this preamble clarification does not apply in this case.

The Appellant alleges that the ponds and ditches were constructed prior to the implementation of the Clean Water Act. Corps regulations in 1975 which implemented the Clean Water Act detailed a phased schedule for requiring permits for the discharge of dredged material or of fill material into navigable waters, not for asserting jurisdiction[6]. The date a wetland was created is immaterial for determining jurisdiction. Rather, a man-made structure that pre-dates the Clean Water Act is considered to have a permit. It is not considered exempt from Clean Water Act jurisdiction. So, it is irrelevant whether the ponds are man-made and it is also irrelevant when they were made. What matters is whether their characteristics make them subject to Corps jurisdiction. Data sheets in the administrative record document evidence of all three wetland parameters required by the 1987 Manual and subsequent Corps guidance.

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[6] 40 Fed.Reg., 31,325-6 (1975).

Additional documentation is needed to show whether the unnamed tributary located to the west of the ponds is a water of the United States as defined in 33 C.F.R. 328.3(a)(5) and if the pond wetlands are adjacent to the unnamed tributary. The MVM JD form states that a continuous wetland is adjacent to an unnamed tributary of an unnamed tributary of Varney River Ditch, a tributary of the St. Francis River, a navigable water of the United States.[7] The MVM provided a topographic map which illustrated a hydrologic (blue line) tributary connection to a navigable water of the United States.[8] Other than stating in the MVM September 22, 2005 Field Trip Report that the unnamed ditch located west of the ponds contained an Ordinary High Water Mark (OHWM), there is no documentation of the characteristics of an OHWM along the unnamed tributary.[9] Additionally, a map in the administrative record shows a road crossing which may sever the hydrologic connection.[10] Additional documentation regarding the OHWM characteristics observed along the man-made unnamed tributary located west of the ponds and verification of a continuous hydrologic connection along the tributary is needed for MVM to determine that the unnamed tributary is a water of the United States as defined in 33 C.F.R. 328.3(a)(5).

Documentation should verify whether or not the man-made hydrologic connections provide a current connection between waters of the United States. Factors to consider in addressing this issue are: 1) whether the ponds are located higher in the landscape than the waters of the United States; 2) does the connection replace, relocate and/or connect to waters of the United States; and 3) is the flow discrete and confined or recurrent.

Additional documentation is needed for MVM to determine that the pond's wetlands are a water of the United States because they are adjacent to waters of the United States as defined in 33 C.F.R. 328.3(a)(7). The September 22, 2005 Field Trip Report documents that water overtops the pond's berm into a

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[8] The Senath 1:24,000 topographic map is Exhibit 5 of the appeal meeting MFR. Portions of the topographic map were included in the administrative record on page 11. The topographic map depicts a hydrologic connection (blue line) from a seepage ditch located alongside a levee, to another unnamed tributary, to the Varney River Ditch which is a tributary of the St. Francis River.

[9] Characteristics of an OHWM are clear, natural line impressed on the bank, the presence of litter and debris, changes in the character of soil, destruction of terrestrial vegetation, and/or shelving.

[10] Page 14 of the administrative record

v-ditch and that there is evidence of wetland herbaceous plants in the unnamed tributary located west of the ponds. The administrative record does not indicate where the surface water overtops the pond's berms or if the v-ditch has a surface water connection to the unnamed tributary located west of the ponds. It is unclear whether the MVM asserts the pond's wetlands are adjacent to the unnamed tributary at the northwest corner of the ponds or that wetlands located in the unnamed tributary are continuous to the wetlands identified within the interior perimeter of the pond.

Additionally, MVM's assertion that the subject ponds consist entirely of wetlands is not fully supported in the administrative record. It is not clear how MVM considered changes in depth of surface water and the extent of wetland vegetation. At the appeal meeting the Appellant clarified he abandoned the ponds by not pumping water into the ponds after 1989. NRCS data sheets and field Wetland Delineation Worksheet confirm this by documenting that depth of surface water was +/- 6 inches with wetland vegetation growing within and around the edges of the pond. However, the Appellant stated that after the NRCS site investigation and prior to MVM's site visit, the pond's berms were refurbished and water was again pumped into the ponds. MVM documented in its 2005 field investigation that wetland vegetation was found only along the pond fringe but did not verify surface water depths.[11] Additional documentation is needed to verify the surface water depths' effect on the extent of wetlands in the ponds.

CONCLUSION: I find that while the reason for appeal forwarded by the Appellant has no merit, additional documentation is needed to ensure the administrative record provides a reasonable basis for asserting jurisdiction. I am remanding the JD for additional documentation and findings as detailed above. The final Corps JD decision will be the MVM District Engineer's decision made pursuant to my remand.

Robert Crear
Brigadier General, U.S. Army
Division Engineer

[11] The September 22, 2005 MVM Field Trip report, page 7 of the administrative record and Exhibit of the Appeal Meeting MFR.