ADMINISTRATIVE APPEAL DECISION

Mr. Marty Bennett
File No. MVM-2005-543
Memphis District
January 11, 2006

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

Appellant/Applicant: Mr. Marty Bennett, Aubrey, Arkansas

Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): October 18, 2005.

Appeal Meeting and Site Visit Dates: December 12, 2005.

Summary of Appeal Decision: Mr. Bennett asserts that a portion of his property, specifically Tract 2, does not require a section 404 permit. He maintains Tract 2 is similar to another tract which Memphis District determined was not subject to the Corps of Engineers' (Corps) jurisdiction. There is substantial documentation in the administrative record that Tract 2 of the property contains wetlands and is subject to the Corps' jurisdiction. The Appellant's reason for appeal does not have merit.

Background Information: This administrative appeal decision is in response to the objection by the Appellant to the August 10, 2005, Approved Jurisdictional Determination (JD) by the Memphis District (MVM).[1] The MVM JD determined that a portion of the Appellant's 20-acre property referred to as Site 2, contains wetlands which are jurisdictional waters of the United States.[2] Additionally the MVM JD determined that Sites 1, 3, 4, and 5 did not contain waters of the United States. The Appellant's property is located four miles southwest of Aubrey in Lee County, Arkansas.

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1 Page 3 of the administrative record

2 The Appellant's RFA referred to the portions of the site as Tracts 1 and 2. The MVM administrative record refers to the same areas as Sites 1 and 2. The unnamed tributary is referred to in other documents in the administrative record as Lateral Ditch Number 1. Hereafter, the appeal decision will refer to Tracts 1 and 2 as Sites 1 and 2 and the unnamed tributary will be referred to as Lateral Ditch Number 1.

In a letter dated July 7, 2005, Ms. Angela R. Gibson, District Conservationist for the Natural Resources Conservation Service, Marianna Field Service Center, requested a Certified Wetland Determination/Delineation for Mr. Bennett's property.[3] The administrative record contained a NRCS form signed by Mr. Bennett which requested a certified wetland determination/delineation. The form identified his property as Farm No. 3526, Tract No. 10811. It stated that Mr. Bennett intended to clear the woods for agricultural production.[4] The wooded areas of Tract 10811 consisted of five sites. Sites 1, 3, 4, and 5 are located along Lee Roads 173 and 142.[5] Site 2 is located primarily along Lateral Ditch Number 1.

By letter dated August 10, 2005, the MVM provided Mr. Bennett an Approved JD determining that there were no waters of the United States located at Sites 1, 3, 4, and 5, and that he might proceed with plans to clear those wooded sites without the need of a permit from the Department of the Army. The MVM JD determined that Site 2 contains jurisdictional waters of the United States and that clearing or deposition of fill material in the wetlands adjacent to an unnamed tributary to Crooked Creek would require a Department of the Army Individual Permit. The JD included two copies of a Department of the Army application form with instructions, a list of consultants, an internet link to an electronic copy of the JD, an example of a compensatory mitigation plan, and a Notification of Administrative Appeal Options and Process for Appeal (NAP) form.

Mr. Bennett filed an RFA with MVM which was forwarded to the Review Officer (RO) on October 18, 2004.[6] The Corps, Mississippi Valley Division (MVD) accepted the appeal by letter dated November 22, 2005. The site inspection and appeal meeting were conducted on December 12, 2005.

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

3 Page 28 of the Administrative Record

4 Page 29 of the Administrative Record

5 Page 26 of the Administrative Record

6 The RFA was dated October 5, 2005, and received by MVM on October 13, 2005

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 August 6, 2005.[7] 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. MVM provided a copy of the administrative record. The administrative record was considered in reaching this decision.

2. During the appeals meeting, the RO provided an Administrative Appeal Process Flowchart for Approved JDs. The flowchart is Exhibit 1 in the Appeal Meeting Memorandum for the Record (MFR).

3. By letter, fax and email dated December 1, 2005, the RO transmitted questions to MVM for discussion at the appeals meeting. No questions were posed to the Appellant. 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 RO considered MVM's response to be clarifying information and considered it in making the appeal decision recommendation.

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7 MVM personnel stated that the NAP form was inadvertently dated with an earlier and different date than the JD cover letter dated August 10, 2005. In the interest of fairness, I consider the August 10, 2005 letter part of the administrative record for the purpose of establishing the date of the NAP.

5. During the appeal meeting, MVM provided a copy of a Helena 1:250,000 topographic map. The topographic map highlighted the tributary connection from Site 2 to the White River and is Exhibit 4 in the Appeal Meeting MFR. The RO considered the topographic map to be clarifying information and considered it in making the appeal decision recommendation.

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

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

Appellant's Reason for Appeal: Mr. Bennett disagrees with the findings for Tract 2 (Site 2). Because Tract 1 and Tract 2 are similar in elevation and vegetation, Tract 2 should not be subject to the Corps jurisdiction.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The RFA asserts that Site 2 is similar in elevation and vegetation to Site 1 which MVM determined to consist entirely of uplands. While the elevation and vegetation may appear to be similar for both sites, there is substantial documentation in the administrative record that environmental circumstances are different and that Tract 2 contains wetlands.

The administrative record specifically discussed how Sites 1 and 2 were different.[8] MVM conducted a field investigation of Tract 10811's wooded areas and completed a data sheet for Site 2.[9] The data sheet documented the presence of the three wetland parameters required by the 1987 Wetlands Delineation Manual and subsequent Corps guidance. Hydrophytic vegetation was dominant, four primary and three secondary hydrology indicators were present, and soil features associated with hydric soils were evident. In addition to the information documented in the data sheet, the MVM JD Basis form documented data reviewed and utilized by MVM.[10] USDA Natural Resources Conservation Service Soil Survey for Lee County Arkansas indicated that Site 2

8 Administrative Record page 5

9 Administrative Record pages 5-10, 15 and 16

10 Administrative Record pages 8 and 9

contained Zachary frequently flooded and Calloway silt loam soils.[11] MVM clarified in the appeal meeting that both soils are listed on the hydric soil list for Lee County. Pictures taken during the site visit document wetland hydrology indicators: water marks, water stained leaves, and redoximorphic features.[12] I find that there is substantial information in the administrative record to support the MVM JD that portions of Site 2 contain wetlands.

The MVM Basis for Jurisdiction form for Site 2 documented the tributary connection from Site 2 wetlands to a navigable water of the United States. Site 2 borders Lateral Ditch Number 1 which flows to Main Ditch, Crooked Creek, Big Creek, and ultimately to the White River which is a navigable water of the United States. The administrative record contains maps which show that Site 2 was located adjacent to Lateral Ditch Number 1.[13] At the appeals conference MVM provided a copy of a Helena 1:250,000 topographic map that clarified the tributary connection of Site 2 to the White River.

The MVM Basis for Jurisdiction form for Site 1 summarized the data utilized by MVM and stated the area consisted entirely of uplands.[14] MVM's August 6, 2005, Memorandum for the File, documented that Site 1 contained soils that were borderline hydric. The MVM clarified in the appeal meeting that soil at Site 1 had a matrix chroma of 3 with mottles.[15] To be considered as hydric, a soil with mottles would need to have a matrix chroma of 2 or less. Additionally, the Memorandum for the File documented no evidence of hydrology at Site 1.

In conclusion I find that this is an accurate JD supported by the administrative record. Wetlands exist on Mr. Bennett's property. These wetlands border Lateral Ditch Number 1 that ultimately flows into navigable, interstate waters. MVM correctly asserted jurisdiction based on regulations found in 33 C.F.R. 328.3(a)(7). This reason for appeal has no merit.

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11 Administrative Record page 18

12 Administrative Record pages 13 and 14

13 Administrative Record pages 10, 17, 19, 20, 21, 22, 23, 25, 26, 27, 31, 32

14 Administrative Record pages 6 and 7

15 Mottles are also referred to as redoximorphic features.

Conclusion: For the reasons stated above, I conclude that Mr. Bennett's RFA does not have merit. The final Corps decision will be contained in the MVM District Engineer's letter advising Mr. Bennett of this decision and confirming the August 10, 2005, JD.

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