ADMINISTRATIVE APPEAL DECISION

LCNI JURISDICTIONAL DETERMINATION APPEAL
FILE NO. MVN-2004-3349-SC
NEW ORLEANS DISTRICT
November 29, 2004

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

Appellant/Applicant: Mr. Bob Austin, LCNI, L.L.C., Lafayette, Louisiana

Appellant/Applicant Representative: Mr. Robert Brenham, Lafayette, Louisiana

Authority: Section 404 of the Clean Water Act

Receipt of Request for Appeal: September 8, 2004

Appeal Conference and Site Visit Dates: October 13, 2004

Background Information: This administrative appeal decision is in response to the objection from the Appellant's Representative, Mr. Robert Brenham, on behalf of LCNI, L.L.C. (LCNI) to the July 23 2004, Jurisdictional Determination (JD) by the New Orleans District (MVN).[1] The MVN JD determined that portions of the LCNI property located in Lafayette Parish, Louisiana contain wetlands and other waters of the United States subject to the Corps of Engineers' (Corps) jurisdiction.

In a letter dated May 13, 2004, Mr. Brenham notified MVN that LCNI intended to develop the LCNI property for residential use.[2] The 73.4-acre LCNI property is partially bordered by Isaac Verot Coulee Lateral 2-A and contains various drainage ditches that flow into Isaac Verot Coulee Lateral 2-A.[3] LCNI asserted that the Isaac Verot Coulee Lateral 2-A was not subject to the Corps' jurisdiction under the Oil Pollution Act of 1990 or the Clean Water Act (CWA), because it does not directly discharge into the Vermilion River and neither the LCNI property or the Isaac Verot Coulee Lateral 2-A is adjacent to a navigable body of water. The letter requested MVN's concurrence in this

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[1] Tab 2 of the administrative record
[2] Tab 1 of the administrative record
[3] Also referred to as Isaac Verot Coulee

opinion. In another letter dated June 14, 2004, Mr. Brenham stated that Mr. Gary Couret of the MVN Lafayette Office had requested LCNI submit a "Request for a Wetland Determination" form.[4] Mr. Brenham asserted that the completion of the form required his client to recognize that the Corps has jurisdiction under Section 404(a) of the CWA, a conclusion with which LCNI disagrees. Notwithstanding this disagreement, the letter enclosed a series of documents regarding the LCNI property and granted MVN authority to access the property.[5]

The MVN provided Mr. Brenham an approved JD dated July 23, 2004. The JD concluded that parts of the LCNI property were wetlands or other waters of the United States subject to the Corps' jurisdiction. The JD included two color infrared maps depicting non-wetlands, Section 404 Mixed Wetlands, and Section 404 Other Waters, a Notification of Administrative Appeal Options and Process (NAP), a Request for Appeal (RFA) form, and a Basis for JD form dated July 1, 2004.

On behalf of LCNI, Mr. Brenham filed an RFA with MVN which was forwarded to the Review Officer (RO) on September 8, 2004.[6] The Corps of Engineers, Mississippi Valley Division (MVD) accepted the appeal by letter dated September 22, 2004. The site inspection and appeal conference were conducted on October 13, 2004.

SUMMARY OF APPEAL DECISION: LCNI asserts that MVN exceeded its authority when determining that portions of the LCNI property are subject to the Corps' jurisdiction. The administrative record for the LCNI JD is supported by substantial evidence that the LCNI property contains wetlands and waters of the United States. MVN correctly asserted jurisdiction based on regulations at 33 C.F.R. 328.3(a)(5) and (7). LCNI also asserts that LCNI was treated differently than the applicant in another MVN JD. MVN's finding that the evidence in another JD is dissimilar to the evidence for this property is supported by substantial evidence in the administrative record. Finally, LCNI asserts that the LCNI property is not subject to Corps jurisdiction, because the landowner is not proposing to place any dredge or fill material within the confines of Isaac Verot

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[4] The LMN Form 1263(a) and instructions are located on www.mvn.usace.army.mil/ops/regulatory/wetlandDeter.asp.

[5] Tab 2 of the administrative record

[6] The RFA was dated September 1, 2004, and received by MVN on September 7, 2004.

Coulee Lateral 2-A. A determination whether a particular activity, like placing fill, would require a Department of the Army permit, is a separate application and is not part of a JD.

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. MVN provided a copy of the administrative record to the RO and LCNI. The administrative record is limited to information contained in the record by the date of the LCNI NAP form, in this case, July 27, 2004. Only the administrative record and any clarifying information were considered in reaching this appeal decision.

2. In a facsimile sent to LCNI and MVN on October 6, 2004, the RO provided a set of possible questions for discussion at the appeal conference. These questions are shown in Exhibit 1 in the October 14, 2004, Memorandum for the Record (MFR) documenting the appeal conference and site visit. These

questions and the answers are deemed clarifying information and were considered in reaching the appeal decision.

3. During the appeal conference, the RO provided two Administrative Appeal Process Flowcharts. These charts explain the administrative process for this JD. The flowcharts are Exhibit 2 in the Appeal Conference MFR.

4. MVN provided a written response to the questions. The written responses are deemed clarifying information and are contained in Exhibit 3 in the Appeal Conference MFR.

5. MVN provided a partial copy of the Lafayette, LA topographic map, noting the locations of the Sands and LCNI properties. The topographic map is deemed clarifying information and is Exhibit 4 in the Appeal Conference MFR.

6. LCNI provided a partial copy of a topographic map depicting the drainage from LCNI to the Vermilion River. The topographic map is deemed clarifying information and is Exhibit 5 in the Appeal Conference MFR.

7. LCNI provided written responses to the questions. LCNI's written responses are deemed clarifying information and are contained in Exhibit 6 in the Appeal Conference MFR.

8. During the site visit, the RO took five digital photographs of the site. The digital pictures are deemed clarifying information and are contained in Exhibit 7 of Appeal Conference MFR.

9. By letter dated October 27, 2004, Mr. Brenham provided three compact disks which contained 23 digital photographs of the site, maps depicting the proposed lots, photo points and elevations, three aerial photographs, three coordinate files and a topographic map depicting the drainage. The topographic map is the same map as Exhibit 5 in the Appeal Conference MFR. The other photographs and maps are already part of the administrative record.

Basis for Appeal as Presented by Appellant:

Appellant's First Verbatim Reason for Appeal:

Isaac Verot Coulee Lateral 2-A, located approximately 4.2 linear miles from the nearest navigable body of water in Sections 25 & 26, T-10-S, R-2-E, Lafayette Parish, Louisiana is not subject to jurisdiction under 404(a) of the Clean Water Act.

33CFR(a)(1) and (a)(7) is (sic) an administrative declaration without the original scope of the jurisdictional grant afforded by Congress, an interpretation of which against the landowner aversely affects commerce and the broad reading, granting jurisdiction to the Corps, calls into question significant constitutional and federalism questions. Such a reading of 33CFR328.3 is over broad and beyond the congressional grant of authority under Section 404(a) of The Clean Water Act.

***Solid Waste Agency of Norther (sic) Cook County v. United States Army Corps of Engineers, et al.*, 531 U.S.159(2000) prohibits such an extension of the jurisdictional grant under Section 404 of The Clean Water Act.**

FINDING: These reasons for appeal do 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. Section 404 permit authorities were delegated by the Secretary of the Army to the Chief of Engineers and his authorized representatives on March 12, 1973. The Corps implements this statute through regulations found at 33 C.F.R. 320, 323, 325, and 328. 33 C.F.R. 325.9 states 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." 33 C.F.R. 328.3(a)(1) through (a)(7) define the term "waters of the United States."

Those portions of the Isaac Verot Coulee Lateral 2-A and the unnamed tributary located within the LCNI property and determined by MVN to be "Sec.404 Other Waters" satisfy the regulatory definitions of waters of the United States at 33 C.F.R. 328.3(a)(5) entitled "Tributaries of waters identified in

paragraphs (a)(1) through (4) of this section."[7] MVN properly cited the below reason for asserting jurisdiction:

> The presence of one or more tributaries (stream channels, man-made conveyances, lakes, ponds, rivers, etc.) that eventually drain or flow into navigable or interstate waters. Includes property below the ordinary high water mark of the tributary. [33CFR328.3(a)(5)](Footnote 4 - The lateral limits of waters of the U.S. are/or have been determined by the high tide line, ordinary high water mark, and/or by the limit of adjacent wetlands.)

The administrative record contains substantial evidence supporting this finding. MVN conducted field investigations and utilized drainage maps, infrared photographs, and topographic maps. The photographs and topographic/drainage maps depict a tributary system that eventually drains or flows into a navigable water. The administrative record (intake sheet) shows that the unnamed tributary on the LCNI property flows into the Isaac Verot Coulee Lateral 2-A, to Anslem Coulee, and ultimately west to the Vermilion River.[8] The Vermilion River is a navigable water under the regulatory definition. Data sheets and digital photographs of sample sites in the administrative record evidence the existence of an ordinary high water mark along the unnamed tributary and Isaac Verot Coulee Lateral 2-A.[9]

The administrative record contains substantial evidence that portions of the LCNI property are "Section 404 Mixed Wetlands Area Not Delineated" in that they contain wetlands and meet applicable regulatory definitions at Section 33 C.F.R. 328.3(a)(7).

The MVN JD form states the following reason for asserting jurisdiction:

> The presence of wetlands determined by the occurrence of hydrophytic vegetation, hydric soils and wetland hydrology. The wetlands are adjacent to navigable or interstate waters, or eventually drain or flow into navigable or interstate waters through a tributary system that

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[7] The unnamed tributary is also referred to as L-9

[8] Anslem Coulee is also referred to as W-6. Tab 3.a.

[9] Data Sheets for Sample Sites 1 and 7. Tab 3.b.

> may include man-made conveyances such as ditches or channelized streams. [33CFR328.3(a)(7)] (Footnote 2 - Wetlands are identified and delineated using the methods and criteria established in the Corps Wetland Delineation Manual (87 Manual). Footnote 3 - Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, etc. are "adjacent wetlands").[10]

This finding is supported by substantial evidence in the administrative record. The administrative record shows that wetlands located on LCNI property are adjacent to either the unnamed tributary or Isaac Verot Coulee Lateral 2-A. The administrative record also contains data sheets documenting the presence of the three wetland parameters required by the 1987 Wetlands Delineation Manual and subsequent Corps guidance.[11] The administrative record contains a data sheet which shows that wetlands are present along the Isaac Verot Coulee Lateral 2-A, a Section 404 water of the United States, and are located below the ordinary high water mark.[12] At the appeal conference, MVN's written response to an RO question, shows that surface water connections from wetlands to the unnamed tributary and Isaac Verot Coulee Lateral 2-A were observed during site investigations.[13]

I find that MVN's JD is supported by substantial evidence in the administrative record. While the wetlands are not specifically delineated in this JD, wetlands and other waters of the United States exist on the LCNI property. The wetlands either contain a surface water connection or are adjacent to the unnamed tributary or Isaac Verot Coulee Lateral 2-A, which ultimately flows into navigable water (the Vermilion River).

LCNI asserts that its property is not subject to the Corps' jurisdiction due to the holding in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)(SWANCC). LCNI's written comments claim "indicators", (1) Navigability in fact; (2) adjacency; (3) ordinary high water

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[10] Tab 2 of the administrative record

[11] The 1987 Corps of Engineers Wetlands Delineation Manual (87 Manual) requires positive evidence of hydrophytic vegetation, hydric soils, and wetland hydrology for a determination that an area is a wetland.

[12] Data Sheet for Sample Site 7, Tab 3.b

[13] Appeal Conference MFR, Exhibit 3, paragraph 5

mark; or (4) potential for pollution, are required to be present under the SWANCC ruling but are not present on the LCNI property.[14] LCNI is incorrect. In SWANCC, the Supreme Court held that the Corps had exceeded its authority in asserting CWA jurisdiction pursuant to section 404(a) over isolated, intrastate, non-navigable waters under 33 C.F.R. 328.3(a)(3), based on use as habitat for migratory bird pursuant to preamble language commonly referred to as the Migratory Bird Rule" found at 51 FR 41217 (1986).[15] The administrative record conclusively shows that the basis for asserting Corps jurisdiction in this case was based on 33 C.F.R. 328.3(a)5 and (a)7, and not on the use of the property as habitat for migratory birds. The administrative record includes substantial evidence that portions of the LCNI property contain waters of the United States, including wetlands. These reasons for appeal have no merit.

Appellant's Second Verbatim Reason for Appeal:

On June 4, 1996 the U.S. Army Corps of Engineers made a jurisdictional finding that property located in Sections 25 & 26, T-10-S, R-4-E, Lafayette Parish, Louisiana was not subject to jurisdiction under Section 404 of The Clean Water Act on property approximately 800 feet from the property made the subject of this appeal.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: LCNI asserts that it was treated differently than another property owner under similar circumstances, citing a JD issued to Mr. Sands on June 4, 1996 (file number 13574).[16] In the appeal conference, LCNI referred to the infra-red photography of the Sands and LCNI JDs, asserting that there was not a "big" difference in coloration between the two sites. While the Sands' property is located near the LCNI property and both properties abut Isaac Verot Coulee Lateral A-2, the administrative record contains substantial evidence that environmental factors on the two properties are different.

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[14] Appeal Conference MFR, Exhibit 6, page 2

[15] Background section of Appendix A, January 15, 2003, Corps of Engineers and the EPA Joint Memorandum, Advance Notice of Proposed Rulemaking on the CWA Regulatory Definition of "Waters of the United States."

[16] Tab 4 of the administrative record

The Sands' administrative record contains substantial evidence that there are no wetlands on the Sands' property. For the Sands JD, MVN conducted a field investigation of the Sands' property and completed two data sheets. In summary, neither data sheet contains positive evidence of all three wetland parameters. The data sheets contain evidence of hydrophytic vegetation for both sample points and one sample point contains evidence of hydric soils. Evidence of wetland hydrology was not contained in either sample points. Based on the failure to find evidence of all three wetland determinants as required, MVN properly determined that the Sands' property does not contain wetlands.

Although the Sands JD did not contain wetlands, the MVN determined in both the Sands and LCNI JDs that Isaac Verot Coulee Lateral 2-A is a water of the United States and subject to the Corps jurisdiction. A map accompanying the Sands JD and the MVN intake sheet stated that the Isaac Verot Coulee Lateral 2-A was an "other water-Section 404" or "Section 404 water." Both JDs contained statements that the deposition of dredged or fill material into the Isaac Verot Coulee Lateral 2-A would require a Department of the Army permit.

There is substantial evidence in the administrative record to support the finding that the Sands JD with regard to the wetlands determination is not similar to the LCNI JD wetlands determination.

Appellant's Third Verbatim Reason for Appeal:

The landowner in this matter is not proposing to place any dredge or fill material within the confines of Isaac Verot Coulee Lateral 2-A.

FINDING: This is not an acceptable basis for appeal.

ACTION: No action is required.

DISCUSSION: LCNI asserts that the property is not subject to the Corps' jurisdiction, because it is not proposing to place any dredge or fill material within the confines of Isaac Verot Coulee Lateral 2-A. This fact, even if true, is irrelevant to the JD because a JD does not determine that a particular activity requires a Department of the Army permit.

Corps regulations at 33 CFR 331.2 define "jurisdictional determination" as:

> [A] written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) . . . .
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> . . .
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> [S]uch geographic JDs may include, but are not limited to, one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other waters of the United States.
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> . . .
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> JDs do not include determinations that a particular activity requires a DA [Department of the Army] permit.

As demonstrated by the regulations, a JD is a determination that a site is subject to Corps regulatory authority under the CWA or Section 10 of the Rivers and Harbors Act. Whether or not LCNI is authorized to conduct a particular activity affecting waters of the United States is not part of the LCNI JD.

CONCLUSION: For the reasons stated above, I conclude that LCNI's RFA does not have merit. The final Corps decision will be contained in the MVN District Engineer's letter advising LCNI of this decision and confirming the July 23, 2004, jurisdictional determination.

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