ADMINISTRATIVE APPEAL DECISION

HOLDEN CONNER REALTY PERMIT DENIAL APPEAL
FILE NO. 200300385
MEMPHIS DISTRICT
September 1, 2004

Review Officer (RO): Mr. James W. Haggerty, U.S. Army Corps of Engineers, North Atlantic Division (NAD)[1]

Appellant/Applicant: Mr. John Conner, Holden Conner Realty, Newport, AR

Appellant/Applicant Representative: Mr. Shelley Evins, Newport, AR

Authority: Section 404 of the Clean Water Act

Receipt of Request for Appeal (RFA): March 3, 2004

Appeal Conference and Site Visit Dates: April 13, 2004

BACKGROUND INFORMATION: This administrative appeal decision is in response to the objection from the Appellant, Mr. John Conner of Holden Conner Realty, to the February 17, 2004, denial by the Memphis District (MVM) of an application for an individual Department of the Army permit to discharge fill material into approximately two acres of wetlands to facilitate construction of a farm road and to convert the wetland area to row crops.

Mr. Conner submitted an application for a Department of the Army permit on June 11, 2003. The application requested authorization for: "[c]onstruction of berms/farm roads along east and north side of the 2 acres; for dimensions of road, see cross-sectional map; 3 sixteen-inch pipes would be placed under road to facilitate drainage; berm/road would be built and UN1 filled from removing soil from adjacent 'PC' tract which will minimize impact on hydrology; conversion of UN1 to agricultural use; UN1 has a previous delineation of 'CC'; conversion of the 2 acres and building farm road would complete initial farm plan for this tract; there are definite plans to work on this tract

[1] In a Memorandum dated March 22, 2004, General Don T. Riley, MVD Commander appointed Mr. James Haggerty to serve as the RO to assist in reaching and documenting the MVD Division Engineer's decision on the merits of the appeal.

upon completion of this project; there would be no discharge of dredged or fill material placed [sic] into Overcup Ditch." The application also indicated that a prior application for a Department of the Army permit for this proposal was denied by the MVM on September 13, 2002.

The property is located approximately one-half mile from the Town of Shoffner, Jackson County, Arkansas and field observations along with information in the Administrative Record indicates that the two-acre wetland area is adjacent to Overcup Ditch. This wetland is part of an overall 149.6-acre tract of land.

Upon receipt of the application on June 16, 2003, the MVM issued a Basis for Jurisdictional Determination stating that the site contains waters of the United States based on 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 may include man-made conveyances such as ditches or channelized streams. Specifically, the two-acre wetland is adjacent to Overcup Ditch, which flows into the Cache River and, eventually, the Mississippi River.

The MVM issued Public Notice No. AR-2003-385 (JOD) on July 11, 2003, for a 30-day comment period. In response to the public notice, the U.S. Environmental Protection Agency, the U.S. Fish & Wildlife Service, Arkansas Parks and Tourism, Arkansas Soil and Water Conservation Commission, and the Arkansas Game & Fish Commission all recommended Mr. Conner provide suitable compensatory mitigation for the loss of two acres of wetlands. Additionally, the Arkansas Heritage Commission recommended avoidance of impacts and mitigation of unavoidable impacts, suggesting appropriate mitigation could consist of restoration of degraded wetlands along Overcup Ditch. A member of the general public recommended denial of the permit application due to the lack of planned mitigation, and two other members of the general public expressed their support of this proposal. In its letter dated July 16, 2003, the Arkansas Department of Environmental Quality issued water quality certification for the project.

By letter dated August 29, 2003, the MVM provided

Mr. Conner with copies of comments received in response to the public notice and the opportunity to furnish the MVM with a voluntary rebuttal or resolution to the objections. The letter also requested Mr. Conner provide additional information relative to project alternatives, avoidance and minimization of wetland impacts, plus submission of a compensatory mitigation plan to replace wetland functions and values that would be lost from the proposed project.

Mr. Conner responded that there were no alternatives available that would fulfill the project purpose, which was to use the entire tract to its maximum agricultural potential. Mr. Conner declined to submit a compensatory mitigation plan because the site in question had received a "commenced determination" from the U.S. Department of Agriculture. In addition, Mr. Conner indicated that the construction of the berms/farm roads constituted a normal farming activity that is exempt from Clean Water Act (CWA) jurisdiction.

MVM completed its review of the permit application and denied the application on February 17, 2004, due to Mr. Conner's refusal to minimize impacts to wetlands and to provide compensatory mitigation. Mr. Conner filed a Request for Appeal on March 3, 2004, which was accepted by letter dated March 22, 2004. The site inspection and appeals conference were conducted on April 13, 2004.

SUMMARY OF APPEAL DECISION:

Mr. Conner cited the provisions of Regulatory Guidance Letter (RGL) 90-5 as the basis for his appeal. Mr. Conner believes that the MVM failed to correctly interpret and apply RGL 90-5. RGL 90-5 was rescinded, effective September 24, 1993, when RGL 93-03 was issued. Mr. Conner applied for his permit after RGL 90-5 was rescinded. The District Engineer correctly relied upon and interpreted pertinent regulations and policy in his decision to deny Mr. Conner's permit application. The District Engineer denied Mr. Conner's permit because Mr. Conner refused to minimize impacts to wetlands and to provide compensatory mitigation.

INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL:

Pursuant to 33 C.F.R. Section 331.2, *Request for appeal (RFA)*, no new information may be submitted on appeal. As indicated in 33 C.F.R. 331.3(a)(2), the Division Engineer does not have authority under the appeal process to make a final decision to issue or deny a permit. The authority to issue or deny permits remains with the District Engineer. The Division Engineer, or his Review Officer, 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 Notification of Appeal Process (NAP) form. Neither Mr. Conner nor the MVM may present new information.

To assist the Division Engineer in making his decision on the appeal, the Review Officer 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 a decision on the permit. 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. The MVM provided a copy of the Administrative Record. The Administrative Record is limited to information contained in the record by the date of the NAP. The date of the Holden Conner Realty NAP is February 17, 2004. The Administrative Record was considered in reaching this appeal decision.

2. In a facsimile to Mr. Conner on April 9, 2004, and an electronic mail communication to the MVM on the same date, the RO provided a set of questions to the MVM and Mr. Conner for discussion at the appeal conference. These questions are contained in the April 30, 2004 Memorandum for the Record documenting the appeal conference and site visit. These questions and the answers were clarifying information and were considered in reaching this appeal decision.

Basis for Appeal as Presented by Appellant:

Appellant's Verbatim Reason for Appeal:

1. The Regulatory Guidance Letter dated July 18, 1990, states if the owner of the property demonstrates that he or she has committed substantial resources toward the clearing in reliance on earlier guidance.

2. The approved commenced determination granted by ASCS in 1988 proves that substantial resources have been committed to this project.

3. Due to COR misinterpretation of regulations we have been unable to complete planned work on this farm.

Summarized: Appellant's reason for appeal is that, as shown by a 1988 ASCS commenced determination[2], he has committed substantial resources to clearing and therefore, under RGL 90-5, Landclearing Activities Subject to Section 404 Jurisdiction, because he has committed substantial resources toward clearing, the Corps should not assert jurisdiction over his landclearing activities.

FINDING: The reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION:

Mr. Conner asserts that in denying his permit application, the MVM misinterpreted the RGL dated July 18, 1990 [RGL 90-5]. Issued on July 18, 1990, RGL 90-5 clarified that mechanized landclearing activities are subject to Corps jurisdiction pursuant to Section 404 of the Clean Water Act if such activities occur in wetlands that are waters of the United States.[3] RGL 90-5 did not alter the exemptions for normal

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[2] While the RFA speaks to a 1988 approved commenced determination, the Administrative Record does not contain an approved commenced determination; it contains Mr. Conner's 1988 application for such a determination. (Administrative Record, page 177) However, the record does indicate that the commenced determination cited by Mr. Conner in his RFA was revoked in 1996. (Administrative Record, page 108) Therefore, this decision will refer to Mr. Conner's 1988 application for a commenced determination.

[3] There is substantial documentation in the Administrative Record, pages 79-92 (records from the Natural Resources Conservation Service, U.S. Department

farming or silviculture activities under section 404(f). RGL 90-5 stated that except to the extent it would be inequitable, the RGL should apply to property that had not been cleared, unless the owner can demonstrate, in reliance on earlier Corps of Engineers guidance, he has committed substantial resources towards the clearing.

Mr. Conner's position is that, as shown by his 1988 ASCS application for a commenced determination, he committed substantial resources to his project and therefore, under RGL 90-5, Landclearing Activities Subject to Section 404 Jurisdiction, because he has committed substantial resources toward the clearing, the Corps should not assert jurisdiction over his activities. Mr. Conner refers to his 1988 ASCS application for "Swampbuster Commenced And Third-Party Determinations" to support his assertion that he had already committed substantial resources toward clearing the subject wetlands before filing his permit application.[4]

This position fails for several reasons: 1) the Administrative Record does not show that Mr. Conner committed substantial resources to landclearing before July 18, 1990 (the effective date of RGL 90-5); 2) the record does not show that Mr. Conner committed substantial resources to landclearing on the subject two-acre wetlands in reliance on earlier Corps guidance; 3) RGL 90-5 was rescinded, effective September 24, 1993, and was not applicable guidance when Mr. Conner filed his 2003 permit application; and, 4) there is substantial evidence in the record supporting the District Engineer's decision to deny the permit for failure to mitigate.

Mr. Conner's 1988 ASCS application states that he committed $140,126.30 for work on Farm Number 1746 and that, between 1972 and 1985, he moved dirt, cleared trees, performed drainage work, and spent "several thousands dollars" on pipe and bridge

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of Agriculture), 165 (Corps Jurisdictional Determination), and 173-176 (permit application) that the subject property, UN-1, contains wetlands. A June 3, 2003 MVM trip report documented that letters were sent to Mr. Conner in 1999, instructing him to retain a cut in berm to allow for natural flooding and dewatering of the wetland site. (Administrative Record, pages 149-152) The trip report noted that the clearing of wetlands by chainsaw did not constitution a violation of the Clean Water Act.

[4] A Commenced determination is an ASCS document that confirms that a landowner has commenced a project to convert wetlands into farmland, thereby exempting the parcel in question from the "Swampbuster" provision of the 1985 Food Security Act.

materials. While this work occurred before July 18, 1990, it is not clear from the application that a substantial amount of these resources were in fact committed to mechanized landclearing activities.

Even if it is assumed that a substantial amount of Mr. Conner's 1972-1985 resources were dedicated to mechanized landclearing activities, there is no indication in the record that landclearing was performed on the subject two-acre wetlands. Based on the proposed work described in Mr. Conner's 2003 permit application, it is reasonable to believe that little of this 1972-1985 work occurred on the subject two acres. In a July 9, 2003 email to MVM, Mr. Conner's agent specifically stated that no mechanical clearing of tree stumps would be conducted. Landleveling activities would consist of the placement of fill material over the stumps. The proposed placement of fill material and redeposit of soil during landleveling activities constitutes a point source discharge subject to Section 404 of the CWA. Except for the chain sawing of some trees in 1999, there is no indication in the record that any work occurred on the subject two acres between 1985-2003.

RGL 90-5 stated that it would apply to property that had not been cleared unless an owner could demonstrate that he, in reliance on earlier Corps guidance, had committed substantial resources toward clearing that property. And even then, the exception would apply only to the extent it would be inequitable to apply RGL 90-5.

In this case, even if it is assumed that Mr. Conner dedicated a substantial amount of resources to landclearing activities, and it is assumed that such landclearing occurred on the subject two acres, there is no indication that Mr. Conner relied upon earlier Corps of Engineers guidance in performing any such work. Neither the RFA nor the Administrative Record provides documentation of earlier Corps of Engineers guidance inducing Mr. Conner to perform work. The commenced determination application cited by Mr. Conner specifically states that the granting of a commencement request does not remove other legal requirements that may be required under State or Federal water laws. Additionally, a NRCS wetland determination dated January 4, 2000, included as part of his permit application, advised Mr. Conner to contact the Corps of Engineers if he planned to clear, drain, fill, level or

manipulate the areas designated as wetland areas.[5] Field UN1 is designated as wetlands on this NRCS conservation determination. For these reasons, if RGL 90-5 had been in effect at the time of Mr. Conner's permit application then the exception it contained would not have been applicable to Mr. Conner's proposed activities.

Notwithstanding the foregoing discussion, Mr. Conner's reason for appeal does not have merit because RGL 90-5 was rescinded, effective September 24, 1993. RGL 93-03, issued on September 13, 1993, rescinded RGL 90-5 stating "as of 24 September 1993 [RGL 90-5] will no longer be used for guidance since the guidance contained in those RGLs has been superseded by the regulation [Excavation Rule]".[6] Mr. Conner's permit application was dated June 11, 2003, almost ten years after RGL 90-5 was rescinded.

The District Engineer correctly applied current guidance in making his decision on Mr. Conner's permit application. Tract 1746 is described as containing two fields. Field 1 is classified as prior converted cropland and Field UN-1 is classified as wetlands to include wetlands farmed under natural conditions. On Page 8 of its Environmental Assessment/Statement of Findings/404 (b)(1) Compliance Determination, the MVM correctly states that Commenced determinations "…have no significance or weight under the CWA and do not provide automatic clearances or authorizations to fill wetlands and/or other Waters of the United States." As indicated in the permit application contained in the Administrative Record, the filling of the two acres of wetlands is intended to construct berms/farm roads and convert a wetland area to agricultural usage. Thus, the activity is not part of an ongoing farming operation, and is not exempt from CWA regulation in accordance with 33 C.F.R. 323.4 (a)(1)(ii), which states that "[a]ctivities which bring an area into farming, silviculture or ranching use are not part of an established operation."

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[5] Administrative Record, page 174.

[6] The "Excavation Rule" was published in the Federal Register (58 FR 45008) and modifies the definition of "Discharge of Dredged Material" to address landclearing activities; modifies the definitions of "Fill Material" and "Discharge of Fill Material" to address the placement of pilings; and modifies the definition of "waters of the United States" to address prior converted cropland.

Finally, Mr. Conner's permit was not denied because he proposed to undertake landclearing activities; his permit was denied because he declined to minimize impacts to wetlands and to provide compensatory mitigation. There is substantial evidence in the Administrative Record to support the District Engineer's decision to deny Mr. Conner's permit application because of his refusal to avoid or minimize adverse impacts to wetlands and provide compensatory mitigation. The District Engineer's Environmental Assessment/Statement of Findings/404 (b)(1) Compliance Determination adequately supports his decision to deny the permit application on the basis of lack of compliance with the 404 (b)(1) Guidelines (Guidelines).

The Administrative Record notes that Mr. Conner's proposal does not meet the avoidance, minimization, and compensatory mitigation requirements of the February 6, 1990, Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the CWA Section 404 (b)(1) Guidelines, nor does it meet the Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps of Engineers Regulatory Program Pursuant to Section 404 of the CWA and Section 10 of the Rivers & Harbors Act of 1899 (RGL 02-2). Numerous resource agencies recommended Mr. Conner comply with the Guidelines by avoiding and/or minimizing wetland impacts and providing compensatory mitigation. The MVM provided Mr. Conner, both in writing and electronic mail communications, with reasonable opportunity to modify his proposal to bring it into compliance with the Guidelines. Mr. Conner declined and did not rebut the presumption set forth in the Guidelines at 40 C.F.R. 230.10 (a)(3) that less environmentally damaging practicable alternatives exist to his non-water dependent proposal.

CONCLUSION: For the reasons stated above, I conclude that Mr. Conner's request for appeal does not have merit. The final Corps of Engineers decision will be the MVM District Engineer's letter advising Mr. Conner of this decision and confirming the denial of his permit application.[7]

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

[7] Brigadier General Crear assumed Command of the Mississippi Valley Division on June 23, 2004.