ADMINISTRATIVE APPEAL DECISION

Mr. John L. Conner
File No. 200200758
Memphis District
June 8, 2004

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

Appellant/Applicant: Mr. John L. Conner, Holden-Conner Realty, Incorporated, Newport, Arkansas

Appellant Representatives: Ms. Lucie Brackin and Mr. Shelley Evins, Holden-Conner Realty, Incorporated, Newport, Arkansas

Authority: Section 404 of the Clean Water Act

Receipt of Request for Appeal (RFA): October 10, 2003

Appeal Conference and Site Visit Date: December 2, 2003

Background Information: Mr. John L. Conner is appealing Memphis District's jurisdiction determination (MVM JD) on two forested tracts referred to as UN-3A/Tract713 (UN-3A) and UN-2/Tract 2001 (UN-2).[1] Both tracts are located in Woodruff County, west and northwest of Tupelo, Arkansas.[2]

On September 10, 2002, the Memphis District (MVM) and National Resources Conservation Service (NRCS) personnel conducted a field examination on both tracts. In the Memo to File dated September 10, 2002, MVM documented that NRCS determined both tracts contained wetlands.[3] The MVM memo affirmed the NRCS's determination, noting the presence of "rack lines", "silt on leaves", and hydrophytic vegetation.[4] By letter dated October 30, 2002,

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[1] MVM Joint Public Notice dated December 23, 2002 refers to Tract UN-2 as Site #1. UN-2 consists of 7.6 acres and is located at approximate latitude 35-23-6.0001 and longitude 91-16-1.2001, Section 26, Township 9 North and Range 3 West. Tract UN-3A is referred to as Site #2 and consists of 2.2 acres and is located in approximate latitude 35-25-47.9999 and longitude 91-16-22.8000, Section 2,
Township 9 North and Range 3 West.

[2] The tracts were initially reported to be located in Jackson County, Arkansas. Upon receipt of the MVM administrative record it was determined that the tracts are located in Woodruff County, Arkansas.

[3] The NRCS determines the presence or absence of wetlands for purposes of the National Food Security Act. MVM determines the presence or absence of wetlands for purposes of the Clean Water Act.

[4] MVM clarified at the appeal conference that "rack lines" refers to drift lines and "silt on leaves" refers to sediment deposits. Drift lines and sediment deposits are primary indicators of wetland hydrology. The 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual) requires positive evidence of hydrophytic vegetation, hydric soils, and wetland hydrology for a determination that an area is a wetland.

Mr. Conner's designated agent, Mr. Shelley Evins, submitted a completed Department of the Army Permit Application, a topographic map, a document entitled "Wetland Mitigation Plan" and three maps. Mr. Conner proposed to mechanically clear, precision-grade, and fill 9.7 acres of wetlands to provide "irrigation to adjacent cropland". By letter dated November 19, 2002, MVM requested additional information. Mr. Evins provided a vicinity map showing the location of the proposed mitigation site and a list of adjacent landowners' names and mailing addresses on November 27, 2002. By facsimile on December 18, 2002, the NRCS provided MVM a Routine Wetland Determination Data Form dated November 5, 1996.

MVM and the State of Arkansas issued Public Notice No. AR-2002-758 (JB) for Mr. Conner's permit application dated December 23, 2002. Public comments were received in response to the public notice. By letter dated April 17, 2003, MVM forwarded the comments to Mr. Evins; requested additional information on alternative sites and/or project design; and noted that the Arkansas Department of Pollution Control and Ecology issued a water quality certification for the proposed work. In a letter dated April 24, 2003, Mr. Evins responded to MVM's letter stating Holden-Conner had no alternative plan or way to complete the farm improvements by making the project smaller or different than proposed. In its letter to Ms. Brackin dated July 23, 2003, MVM referenced a meeting on June 26, 2003, and determined the three agricultural fields Holden-Conner Realty proposed as compensatory mitigation for wetland impacts were unsuitable. MVM stated the permit application would be held in abeyance until an alternate mitigation plan was submitted, and after 45 days the permit application would be considered withdrawn.

By letter dated August 12, 2003, Ms. Brackin enclosed copies of the NRCS-CPA-026E forms, and requested a jurisdiction determination for UN-3A and UN-2. Ms. Brackin questioned if UN-3A and UN-2 were isolated wetlands and not subject to the Corps jurisdiction based on the United States Supreme Court ruling in the Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (January 9, 2001) ("SWANCC case"). MVM conducted a field examination on August 19, 2003. In a letter dated August 26, 2003, Ms. Taub provided a map of UN-3A which highlighted the location of a road and levee.

MVM provided an approved jurisdiction determination to Ms. Brackin dated September 25, 2003 (MVM JD). The MVM JD determined that wetlands located on UN-2 and UN-3A are not isolated. Ms. Brackin was provided the opportunity to appeal the MVM JD by completing a district form entitled "Jurisdictional Appeal".

Mr. Conner submitted two copies of the completed district appeal form to this office on October 2, 2003. By facsimile on October 3, 2003, Mr. Conner designated Ms. Taub as his agent and point of contact.

The RO reviewed the information provided and learned MVM inadvertently failed to send the Combined Notification of Appeal Process (NAP)/Request for Appeal (RFA) form, and the Memphis District Regulatory Branch Basis For Jurisdictional Determination form (Basis form). In accordance with 33 C.F.R. Section 331.4, affected parties notified of a Corps approved JD should receive these two forms. By facsimile dated October 3, 2003, MVM provided

Ms. Brackin and the RO the Basis form dated August 19, 2003, and a Combined NAP/RFA form dated October 3, 2003.

In a letter dated October 8, 2003, and received on October 10, 2003, Ms. Taub provided the completed RFA form. I accepted the RFA on October 28, 2003. The site visit and appeal conference were held by the RO on December 2, 2003.

Summary of Appeal Decision: The administrative record contains sufficient evidence of a tributary connection from both sites to navigable, interstate waters of the United States. MVM did not support its decision that UN-3A and UN-2 contain wetlands, as required by the 1987 Manual. On remand, MVM should provide documentation (data sheets and/or other documentation) to show that the relevant portions of UN-2 and UN-3A exhibit indicators of all three mandatory parameters for wetlands as required by the 1987 Manual, i.e. a predominance of hydrophytic vegetation, hydric soils, and the hydrologic indicators.

Information Received and Its Disposition During the Appeal Review: Pursuant to 33 C.F.R. Section 331.7(f), the basis of a decision regarding a jurisdictional determination is limited to information contained in the administrative record by the date of the NAP form. The NAP for the MVM JD is dated October 3, 2003. Neither Mr. Conner nor MVM may present new information not already contained in the administrative record. However, both parties may interpret, clarify, or explain issues and information contained in the record.

1. MVM provided a copy of the administrative record which was considered in reaching this decision.

2. In a letter dated October 31, 2003, Ms. Brackin provided a list of attendees for the site visit and appeal conference.

3. By facsimile dated November 25, 2003, the RO provided questions to Mr. Conner and MVM for discussion at the appeals conference. The questions are Exhibit 2 in the Appeal Conference Memorandum for Record (MFR).

4. During the appeals conference, the RO provided two Administrative Appeal Process Flowcharts. The flowcharts are Exhibit 1 in the Appeal Conference MFR.

5. During the appeal conference, MVM provided a written response to the RO's questions. The written responses are Exhibit 3 in the Appeal Conference MFR and considered clarified information.

6. During the appeal conference, MVM provided a blank copy of the Routine Wetland Determination Data Form. The form is Exhibit 4 in the Appeal Conference MFR and considered clarified information.

7. During the appeal conference, MVM provided documents relating to an application by Mr. John Conner to enlarge an existing road for farm equipment. These documents consisted of a MVM letter dated June 29, 1998; a topographic map; a permit application from Mr. Conner dated April 24, 1998; and a Natural Resources Conservation Service map. This permit application and subsequent authorization were referenced in MVM memorandum dated August 19, 2003. These documents are Exhibit 5 in the Appeal Conference MFR and considered clarifying information.

8. During the appeal conference, MVM provided copies of 33 C.F.R. Part 323, Permits for Discharges of Dredged or Fill Material Into Waters of the United States, and 33 C.F.R. Part 328, Definition of Waters of the United States. These Corps regulations are Exhibit 6 of the Appeal Conference MFR and considered clarifying information.

9. On December 3, 2003, Ms. Brackin sent an email to the RO indicating she would no longer serve as Mr. Conner's representative. The email requested future correspondence be directed to Mr. Shelley Evins.

10. Upon the request of the RO, the MVM faxed a document which listed the navigable waters of the United States within MVM.

The RO provided copies of all information received during the appeals process to both Mr. Evins and MVM.

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

Appellant's Reason for Appeal: Based on the United States Supreme Court ruling in the Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (January 9, 2001) (SWANCC), UN-3A and UN-2 are isolated from jurisdictional 'waters of the United States.' Neither of these fields drains into 'waters of the United States' as stated in the MVM Basis for Jurisdictional Form.

FINDING: This reason for appeal has partial merit.

ACTION: The MVM JD decision is remanded to MVM to provide additional documentation to the administrative record, as required by the 1987 Manual, to support a finding that both tracts contain wetlands.

DISCUSSION: The administrative record contains sufficient evidence of a tributary connection from both sites to navigable, interstate waters of the United States. The MVM did not support its decision that UN-3A and UN-2 are wetlands, as required by the 1987 Manual.

Because the SWANCC case limited use of 33 C.F.R. Section 328.3(a)(3) as a basis of jurisdiction over certain isolated waters, it has focused greater attention on Clean Water Act (CWA) jurisdiction generally, and specifically over wetlands that are "adjacent wetlands " for

CWA purposes.[5] On January 15, 2003, the Corps of Engineers and the EPA issued a Joint Memorandum, Appendix A of the Advance Notice of Proposed Rulemaking on the CWA Regulatory Definition of "Waters of the United States" (ANPRM). Published in the Federal Register on January 15, 2003 (68 FR 1991-1998), the ANPRM provided clarifying guidance regarding the U.S. Supreme Court's decision in the SWANCC case.

The ANPRM guidance is relevant to this matter since the RFA contends that, pursuant to the SWANCC case, UN-2 and UN-3A are isolated and should not be regulated under the CWA. In the SWANCC case, the Supreme Court confined its ruling to invalidating that portion of the Corps of Engineers regulations pertaining to an assertion of CWA jurisdiction in isolated waters based upon the "Migratory Bird Rule" at 51 FR 41217 (1986).[6] In its opinion the Supreme Court specifically declined to interfere with the holding in the United States v. Riverside-Bayview Homes, Inc., 474 U.S. 121 (1985) (Riverside). The Court in Riverside found that "Congress' concern for the protection of water quality and aquatic ecosystems indicted its intent to regulate wetlands 'inseparably bound up with' " jurisdictional waters (474 U.S. at 134).[7] The ANPRM guidance instructed field staff to continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and generally speaking, their tributary systems (and adjacent wetlands.) As identified in paragraph (c) of 33 C.F.R. Section 328.4, the landward limit of the Corps jurisdiction for the two sites extends beyond the ordinary high water mark of the tributaries to the limit of adjacent wetlands.

The MVM Basis of JD form, dated August 19, 2003, includes two reasons for asserting jurisdiction and states:

> **DETERMINATION**: Site#1 (also referred to as UN-2) and Site #2 (also referred to as UN-3A)
>
> 1. _X_ This site has been determined to contain jurisdictional waters of the United States based on:
>
> ___a. Its location on a waterway not used, used in the past or susceptible for use in interstate commerce (Section 10 waterway).
>
> ___b. Its location on an interstate waterbody.
>
> ___c. Its location on isolated waters of the United States containing a linkage to interstate or foreign commerce through the presence of:
>
> ___Commercial timber and/or other merchantable forest products
> ___Oil, gas, sand, gravel or other minerals of commerce
> ___Other:_____

[5] ARPRM guidance The Scope of CWA Jurisdiction After SWANNC.
[6] ARPRM guidance Background.
[7] ARPRM guidance C. (1) Wetlands Adjacent to Traditional Navigable Waters.

d. Its location on an impoundment of a water otherwise defined as a water of the United States.

. . .

__X__ e. Its location on a tributary of any of the waters described in items a., b., c., and d. above.

. . .

__X__ g. Its location on wetlands located adjacent to waters described in items a., b., c., d., and e. above.

. . .

In the finding at paragraph e above, the administrative record contains sufficient documentation that UN-2 and UN-3A are connected or adjacent to a tributary that eventually drains or flows into a navigable and interstate waters (White and Cache Rivers). Information in the administrative record (the August 19, 2003 MVM memo, topographic maps, photographs, and aerial photographs) shows the tributary connection. Surface water flows from UN-2 through a culvert directly into a road side ditch, into Main Overcup Ditch, into the Cache River and ultimately into the White River. Surface water flows from UN-3A to a roadside ditch, into Hog Pen Slough, to unnamed sloughs and drains (White Lake), into Taylor Bay and ultimately into the White River. MVM stated in the appeal conference all tributaries cited as surface water connections exhibit physical characteristics, ordinary high water marks, which are indicative of jurisdictional waters of the United States. Additionally, MVM stated the White and Cache Rivers are interstate waterways, and the White River is a navigable waterway utilized for commercial navigation in support of interstate commerce. The RO confirmed the conclusions of MVM as to adjacency of tracts to waters of the United States based on the December 2, 2003 site visit and reference to the Memphis District's list of navigable waters.

In the finding at paragraph g above there was insufficient documentation in the administrative record to support MVM's decision that UN-2 and UN-3A contain wetlands. The record contains no data sheets for UN-2 establishing the presence of hydrophytic vegetation, hydric soils, and hydrology, the three parameters required by the 1987 Manual, and subsequent guidance to indicate the presence of wetlands. The data sheet for UN-3A was prepared seven years ago and may not accurately reflect the presence or absence of existing wetland parameters.

The administrative record does not contain substantial evidence to support MVM's finding that the hydrophytic soil and vegetation parameters are present. The administrative record contains only conclusory statements which generally depict the site's vegetation and soils. The Memo to the File dated September 10, 2002, noted evidence of two primary indicators of wetland hydrology for both tracts (rack lines and silt on leaves). Only one primary hydrology indicator is required to meet the hydrology parameter. While a topographic map in the administrative record listed plant species found on the tracts, it did not sufficiently document the percentage of dominate obligate, facultative or facultative-wetland species.[8] There was insufficient information to support a finding that both tracts contained hydric soils. The only mention of hydric soils was the NRCS-CPA-026E form which stated hydric soils were found on

[8] To meet the hydrophytic vegetation parameter, more than 50 percent of the dominant species must be obligate, facultative-wetland, or facultative on lists of plant species that occur in wetlands.

the farm and the July 23, 2003 MVM letter which notified Ms. Brackin that the proposed mitigation areas were primarily mapped as non-hydric soil types.

On remand, MVM should provide documentation (data sheets and/or other documentation) to show that the relevant portions of UN-2 and UN-3A exhibit indicators of all three mandatory parameters for wetlands, as required by the 1987 Manual, i.e. a predominance of hydrophytic vegetation, hydric soils, and the hydrologic indicators.

CONCLUSION: For the reasons stated above, the MVM proffered permit is remanded to the District Engineer for additional documentation to support its finding that UN-2 and UN-3A contain wetlands. The final Corps decision will be the District Engineer's decision made pursuant to my remand.

Enclosure

DON T. RILEY
Brigadier General, U.S. Army
Division Engineer