ADMINISTRATIVE APPEAL DECISION

Guste Jurisdictional Determination Appeal
File No. 20-020-3668
New Orleans District
August 27, 2003

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

Appellant/Applicant: Messrs. William and Roy Guste, St. Tammany Parish, LA

Authority: Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899

Receipt of Request For Appeal (RFA): January 30, 2003

Appeal Conference and Site Visit Dates: March 26, 2003

Background Information: This administrative appeal decision is in response to objections from the Appellants, Messrs. William and Roy Guste, to a jurisdictional determination (JD) presented to them by the U.S. Army Corps of Engineers, New Orleans District (MVN) in a letter of December 13, 2002. In 1959, the Appellants purchased a 3,000-acre tract located near Madisonville, LA, adjacent to Lake Pontchartrain. They acquired additional acreage there in 1962 and 1963. The Appellants used the property for livestock grazing. A levee and canal system with an operating pump and siphon protected the property from flooding. The Appellants also constructed approximately 15 miles of vehicular levees, roads, canals, and smaller drainages that encompass 2,800 acres. The Appellants supplemented the gravity drainage system by installing four pumping stations to remove surface water. Once the drainage system was completed, a considerable amount of the property was converted for agricultural use.

The jurisdictional history of the tract began in 1975. At that time, the MVN granted Section 10 permits for work on the property located within the ordinary high water of Lake Pontchartrain.

The next regulatory action took place in 1981 when the MVN made a second JD. The 1981 JD concluded that areas inside the levees that had been planted to wheat, rye, and rye grass as winter forage for cattle were not subject to Corps jurisdiction.

Further, the MVN concluded that areas outside the levees were wetlands and subject to Corps jurisdiction.

In 1982, the MVN responded to the Appellant's request for a third JD by concluding that the entire property was a non-wetland.

The Appellants requested a fourth JD in 1986. The MVN forwarded the 1986 JD to the Appellants by letter of June 24, 1986. The fourth MVN JD concluded that because levees and pumping systems maintained the property as a "dry semi-developed pasture for nine months" that the property would no longer be subject to Corps jurisdiction as long as the levees and pumps were actively maintained. The 1986 JD did not have an expiration date and in compliance with Regulatory Guidance Letter 90-06 (RGL 90-06), expired two years after the RGL 90-06 was issued.

On August 14, 1990, the U.S. Army Corps of Engineers issued RGL 90-06. RGL 90-06 provided Corps-wide guidance regarding the expiration of wetland JDs. In 1992, the Appellants requested the MVN to reaffirm the 1982 JD (the third JD). In compliance with RGL 90-06, and based upon Appellants' substantial commitment of resources on their land, the MVN established August 14, 1997, as the expiration date for the 1982 JD. The August 14, 1997 expiration date was the greatest length of time, 5 years, permissible under
RGL 90-06.

On March 26, 1998, in response to a request from the Appellants, the MVN informed the Appellants that the MVN did not have the authority to extend the validity of the 1982 JD beyond August 14, 1997. The MVN then reviewed maps, aerial photographs, and soils data, and issued a 1998 JD that determined there were wetlands on the property.

The Appellants made a sixth JD request by letter of May 23, 2002. MVN Regulatory staff made a visit to the tract on September 11, 2002, for a field jurisdictional determination. The MVN also reviewed recent maps, aerial photography, soils data, information supplied with the Appellants' request, and information gathered during the site visit. As a result, in a letter of December 13, 2002, the MVN informed the Appellants of jurisdictional areas on the tract. The letter enclosed a map that described the jurisdictional areas as follows:

1. Areas shown in green were not subject to Corps jurisdiction.

Further, the MVN concluded that areas outside the levees were wetlands and subject to Corps jurisdiction.

In 1982, the MVN responded to the Appellant's request for a third JD by concluding that the entire property was a non-wetland.

The Appellants requested a fourth JD in 1986. The MVN forwarded the 1986 JD to the Appellants by letter of June 24, 1986. The fourth MVN JD concluded that because levees and pumping systems maintained the property as a "dry semi-developed pasture for nine months" that the property would no longer be subject to Corps jurisdiction as long as the levees and pumps were actively maintained. The 1986 JD did not have an expiration date and in compliance with Regulatory Guidance Letter 90-06 (RGL 90-06), expired two years after the RGL 90-06 was issued.

On August 14, 1990, the U.S. Army Corps of Engineers issued RGL 90-06. RGL 90-06 provided Corps-wide guidance regarding the expiration of wetland JDs. In 1992, the Appellants requested the MVN to reaffirm the 1982 JD (the third JD). In compliance with RGL 90-06, and based upon Appellants' substantial commitment of resources on their land, the MVM established August 14, 1997, as the expiration date for the 1982 JD. The August 14, 1997 expiration date was the greatest length of time, 5 years, permissible under
RGL 90-06.

On March 26, 1998, in response to a request from the Appellants, the MVN informed the Appellants that the MVN did not have the authority to extend the validity of the 1982 JD beyond August 14, 1997. The MVN then reviewed maps, aerial photographs, and soils data, and issued a 1998 JD that determined there were wetlands on the property.

The Appellants made a sixth JD request by letter of May 23, 2002. MVN Regulatory staff made a visit to the tract on September 11, 2002, for a field jurisdictional determination. The MVN also reviewed recent maps, aerial photography, soils data, information supplied with the Appellants' request, and information gathered during the site visit. As a result, in a letter of December 13, 2002, the MVN informed the Appellants of jurisdictional areas on the tract. The letter enclosed a map that described the jurisdictional areas as follows:

1. Areas shown in green were not subject to Corps jurisdiction.

2. Areas shown in red contained a substantial, but yet undetermined, amount of acreage not subject to Corps jurisdiction.

3. Areas shown in brown contained a substantial, but yet undetermined, percentage of wetland areas subject to Corps jurisdiction.

4. Lake Pontchartrain and waters marked in blue were navigable waterways subject to Corps jurisdiction under Section 10 of the Rivers and Harbors Act.

In this 2002 JD, the MVN stated that a detailed field investigation would be needed to accurately delineate wetlands/non-wetlands for areas described in paragraphs 2 and 3. The MVN letter enclosed a map broadly depicting the wetlands and non-wetlands, a Basis for Jurisdictional Determination form, and the Combined Notification of Appeal Process (NAP)/Request For Appeal (RFA) form.

The Appellants submitted a completed RFA to the MVD Division Engineer on January 30, 2003, via facsimile, and hard copies of the enclosures and exhibits via parcel post on January 31, 2003, and February 3, 2003. The MVD RO received the RFA within the requisite 60-day time period from the date of the NAP. The RO determined that the RFA fit the criteria for an appeal. I accepted the RFA on February 27, 2003. The site visit and appeal conference were held by my RO on March 26, 2003.

Summary of Appeal Decision: There are navigable waterways on Appellants' property over which the Corps has the authority to exert jurisdiction. Portions of the Appellants' property contain wetlands that are subject to Section 404 of the Clean Water Act. Past MVN JDs, including the 1982 and 1986 JDs, have expired and are no longer valid. The MVN correctly relied upon and interpreted pertinent regulations and policy in preparing the December 13, 2002 JD.

Information Received and Its Disposition During the Appeal Review: Neither the appellant nor the Corps may present new information not already contained in the administrative record, but both parties may interpret, clarify, or explain issues and information contained in the record.

1. The MVN provided a copy of the administrative record. Pursuant to 33 C.F.R. Section 331.7(f), the basis of a decision regarding the JD is limited to information contained in the

administrative record by the date of the NAP form. The NAP for the Guste property is dated December 13, 2002. The administrative record was considered in reaching this decision.

2. Prior to the appeal conference, the MVN provided three maps depicting the location of the Appellants' property. The RO considered the maps clarifying information and considered them in reaching this decision.

3. In his letter dated March 11, 2003, Mr. Roy Guste requested a copy of RGL 90-06. The RO faxed a copy of the RGL 90-06 to him on March 18, 2003.

4. By facsimile dated March 19, 2003, the RO provided a set of questions to the MVN and the Appellants for discussion at the appeals conference. Exhibit 3 in the Appeal Conference Memorandum For Record (MFR) contains the sets of questions.

5. In a facsimile dated March 19, 2003, Mr. Roy Guste provided a written response to the RO's questions. Mr. Guste's written response to the questions is Exhibit 1 in the Appeal Conference MFR. The RO determined Mr. Guste's written response to be clarifying information, and considered it in reaching this decision.

6. By letter dated March 18, 2003, and facsimile dated March 24, 2003, Mr. Roy Guste provided a list of persons who would participate in the appeal conference.

7. During the appeal conference, the MVN provided a written response to the RO's questions. The MVN written response is Exhibit 2 in the Appeal Conference MFR. The RO considered MVN's response to be clarifying information, and considered it in reaching this decision.

The RO provided copies of all information received during the appeals process to both the MVN and the Appellant.

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

Appellants' Reason for Appeal 1: The Appellants deny that any of the waters marked in blue on the 2002 MVN JD map, other than Lake Pontchartrain, are navigable waterways and subject to Corps jurisdiction. The Appellants allege that these waters and waterways are privately constructed lakes, ponds, canals, or drains, built and owned by the owners of the property and are

therefore not subject to the Corps jurisdiction under Section 10 or Section 404 of the Clean Water Act.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The administrative record contains substantial documentation that the waters shown in blue in the 2002 MVN JD, and depicted as a "Waters of the United States," are navigable waters of the United States and subject to regulation by the Corps under Section 10 of the Rivers and Harbor Act. Canals or other artificial water bodies that are subject to ebb and flow of the tide are navigable waters of the United States even though they have been privately developed and maintained, or pass through private property.

The MVN Basis of JD form dated December 9, 2002, stated:

> A. Property referenced in the attached correspondence contains waters of the United States based on:
>
> . . .
>
> The presence of waters which are subject to the ebb and flow of the tide, including tidal wetlands, i.e., navigable waters of the United States (in part). (Footnote 2- Wetlands are identified and delineated using the methods and criteria established in the Corps of Engineers Wetlands Delineation Manual (87 Manual). 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 shows that the waters depicted in blue on the MVN JD map are navigable waters of the United States as defined in 33 C.F.R. 329.4:

> . . . those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.

The administrative record shows that the waters under question are tributaries to navigable waters of the United States and are tidally influenced. In the appeal conference, the MVN referred to 33 C.F.R. 329.4 and stated that the subject waters on the Guste property are tidal. Aerial photographs and a topographic map show the tributary connection of the canals to Tchefuncta River and Lake Pontchartrain. It is a matter of public knowledge that Tchefuncta River and Lake Pontchartrain are navigable waters of the United States.

The administrative record contains references to present public use of the entrance channel, and past logging commerce on the canals. One instance found in the administrative record demonstrating public use involves the MVN issuance of a Department of the Army Permit to Grilmar Limited Liability Company for work for the Madisonville on the Lake Subdivision. The permitted work facilitated public use of the entrance channel, lake system, interconnecting canals, and docks. The Appellant also provided evidence of public use. In their March 11, 1998, letter, the Appellants noted past interstate commerce use of the canals for logging.

The Appellants' contention that the waters under question were privately constructed and should not be considered navigable waters is unsubstantiated. The Corps' authority to exert jurisdiction over "artificial channels" is found in 33 C.F.R. 322.5(g) which states:

> A canal or similar artificial waterway is subject to the regulatory authorities discussed in 322.3, of this Part, if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States in a manner which affects their course, location, condition, or capacity, or if at some point in its construction or operation it results in an effect on the course, location, condition, or capacity of navigable waters of the United States. In all cases the connection to navigable waters of the United States requires a permit.

In addition, 33 C.F.R. 329.8(a)(1) states:

> An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property.

In 33 C.F.R. 329.8(a)(3), the regulations states:

> Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States.

The subject waters are connected to navigable waters of the United States, are subject to tidal influence, have been used for interstate commerce, and are presently used by the public. This reason for appeal does not have merit.

Appellants' Reason for Appeal 2: Those areas located within the levee and drainage system and shown with red and brown lines on the 2002 MVN JD map are not subject to the Corps jurisdiction because previous MVN JDs have determined that they were not subject to Corps jurisdiction. The May 13, 1982, JD determined the Appellants' property to be non-wetlands. The June 24, 1986, JD found that the leveed area was not subject to the Corps jurisdiction as long as it was maintained for agricultural use (dry semi-developed pasture).

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The administrative record documents that the MVN correctly relied upon and interpreted pertinent regulations and policy in preparing the December 13, 2002 JD. The Appellants assert that the properties, noted in the December 13, 2002, JD as wetlands, are not subject to the Corps jurisdiction because two prior JDs stated otherwise. On August 14, 1990, the Corps recognized the need for national consistency regarding the time limits for valid JDs. To address this need, The Corps issued Regulatory Guidance Letter 90-06 (RGL 90-06)[1], which provided

---

[1] During the appeal conference, the Appellants provided a written response that stated that RGL 90-06 has expired and is no long applicable. RGL 90-06 is listed as a current and valid guidance document in Volume 60; Number 49 of the Federal Register dated March 14, 1995 and on the Corps of Engineers website www.usace.army.mil/inet/functions/cw/cecwo/reg/rglsindx.htm. As stated on the Corps of Engineers Regulatory website, the RGLs are sequentially numbered and expire on a specified date. However, unless superseded by specific provisions of subsequently issued regulations or RGLs,

guidance regarding the expiration of existing wetland JDs. In accordance with RGL 90-06, in 1992, the MVN established August 14, 1997, as the expiration date for the 1982 JD based upon Appellants' substantial commitment of resources on their land. This date represents the longest time allowable under the RGL 90-06. Additionally, the enactment of the 1987 Corps of Engineers wetland delineation manual affected the 2002 MVN jurisdictional determination. Thus, the prior MVN JDs expired and are no longer valid.

The administrative record documents that the MVN fully considered the Appellants circumstances when implementing time limits for the JDs for the Appellants' property. The 1982 and 1986 JDs were prepared before the effective date of RGL 90-06 and did not contain an expiration date. As such, the RGL 90-06 guidance, paragraph 4(a) imposed a time limit of two years from the effective date of the RGL (August 14, 1990). However RGL 90-06, paragraph 5, provided instances where a District Engineer could extend an otherwise expired JD for five years:

> . . . where the applicant can fully demonstrate that substantial resources have been expended or committed based on a previous Corps jurisdiction delineation. . .

In letters dated June 23 and July 9, 1992, the Appellants requested that the MVN consider documentation of expenditures and extend the 1982 JD. In its letter dated July 20, 1992, the MVN concluded: "as significant funds have been expended and committed on the basis of the 1982 determination that determination will remain in effect through August 14, 1997."

In its letter dated March 26, 1998, the MVN reiterated that it did not have the authority to extend the expiration date. The 1982 and 1986 MVN JDs have expired and are no longer valid.

In addition to RGL 90-06, there were other changes in the regulatory program, in particular, how wetlands are delineated, which affected the 2002 MVN jurisdictional determination. The 1982 and 1986 JDs reflected regulatory guidance at a time when agricultural lands, including pastureland, were not regulated. Prior to the enactment of the 1987 Corps of Engineer Wetlands Delineation Manual (1987 Manual) and the 1989 Corps of Engineer Wetlands Delineation Manual (1989 Manual) the MVN did not

---

the guidance provided in RGLs generally remains valid after the expiration date.

regulate agricultural land.[2] Under these manuals, which are the current policy, the fact that land is in agricultural use does not in itself exempt such land from Corps jurisdiction. The MVN appropriately followed the 1987 Manual in its 2002 MVN JD. In light of current regulations and policy, the 2002 MVN JD was proper. This reason for appeal does not have merit.

Appellants' Reason for Appeal 3: The MVN incorrectly relied upon and interpreted RGL 90-06 in its December 13, 2002 JD. The conversion of the wetlands on the Appellants' property was completed prior to the effective date of the RGL 90-06. The Appellants' adherence to a cautionary statement in a prior JD clearly establishes that all of the properties within the levee system are non-wetlands and not subject to the Corps jurisdiction.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The "cautionary statement" to which Appellants refer is a statement in the 1986 JD that documents that the pumping systems maintained portions of the Appellants' property as a "dry semi-developed pasture." The Appellants provided information to show that construction of a drainage system had been completed prior to the effective date of RGL 90-06. This completed drainage system of roads, levees and pumps enabled the Appellants to convert portions of their property to agricultural use.

The Appellants claim that their property is exempt from guidance found in RGL 90-06, because the construction of the drainage system and conversion of property to agricultural use were completed prior to the effective date of the RGL 90-06. To support their request for appeal, the Appellants referred to paragraph 5 of the RGL 90-06, which states:

> The guidance in paragraph 4(a)-(b) above does not apply to completed permit applications [33 CFR 325.1(d)(9)] received before the effective date of this RGL.

In the appeal conference, the Appellants provided a written description of the completed work, which consisted of the

---

[2] The 1989 Manual was enacted on March 20, 1989. In an August 23, 1991, memo entitled Implementation of the 1987 Corps Wetland Delineation Manual; District Engineers were directed to use the 1987 Manual in all initial delineations after August 17, 1991.

construction of a drainage system to include roads, levees, and pumps. Completion of the drainage system in 1968 allowed the Appellants to convert "a considerable amount" of property into agricultural land. This information was provided to refute the MVN position that the property had been converted to non-wetlands and no longer subject to the Corps jurisdiction. The Appellants state in the RFA:

> There is not the slightest doubt that this project, the conversion of poorly drained land into drained, non-wetland, was completed long before the effective date of the RGL.

RGL 90-06 did not change Corps regulatory jurisdiction; it imposed expiration dates on existing JDs. Portions of the Appellants' property contain currently regulated wetlands and are subject to Section 404 of the Clean Water Act. As discussed above, at the time of the 1986 JD, such pastureland was not regulated. The Appellants' cannot rely on a caveat in the expired 1986 MVN JD to defeat current Corps jurisdiction. The 1987 Manual requires the Corps to regulate wetlands found on agricultural and non-agricultural property.

While the property has been subject to extensive hydrologic alteration, the administrative record contains substantial documentation that the areas within the leveed perimeter contain wetlands based on the occurrence of hydrophytic vegetation, hydric soils, and wetlands hydrology. This reason for appeal does not have merit.

CONCLUSION: For the reasons stated above, I conclude that the Appellants' Appeal does not have merit. The final Corps decision will be the MVN District Engineer's letter advising the Appellants of this decision and confirming the initial approved jurisdiction decision.

Encl

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