ADMINISTRATIVE APPEAL DECISION

Mr. James Gilmore
File No. 20-030-3769
New Orleans District
February 10, 2004

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

Appellant/Applicant: Mr. James A. Gilmore, Hammond, Louisiana

Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): September 15, 2003

Appeal Conference and Site Visit Date: November 4, 2003

Background Information: Mr. James Gilmore is appealing New Orleans District's jurisdictional determination (JD) on a 93.53-acre tract. The tract is located along the Interstate 12 Service Road at Jane Drive, east of Louisiana State Highway 441, Livingston Parish, Louisiana.[1]

On September 2, 2002, by letter, Mr. Todd Ryan, Hydrologic Surveys L.L.C., requested a verification of the wetland delineation opinion issued by Hydrologic Surveys, L.L.C. for Mr. Gilmore's property. The Hydrologic Surveys L.L.C. wetland delineation included a written report, a wetland delineation map, a vicinity map, a USGS Frost Quadrangle map, sheet 17 of a soil survey of Livingston Parish, data sheets, and site photographs. The delineation map depicted 15.78 acres of forested wetlands and two natural drains. In another letter dated November 4, 2002, Mr. Ryan provided New Orleans District (MVN) a revised wetland delineation map depicting 16.92 acres of wetlands and two natural drains.

Based on a review of recent maps, aerial photography, soils data, information submitted, and a site visit on October 15, 2002, MVN by letter to Mr. Ryan dated November 20, 2002, determined that Mr. Gilmore's property contained wetlands

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1 The tract is located in Section 5, Township 7, South, Range 6 East, Livingston Parish, Louisiana.

subject to Corps of Engineers jurisdiction. The November 20, 2002 MVN JD letter included a map depicting wetlands and waters of the United States, a Basis for Jurisdictional Determination form, and a Combined Notification of Appeal Process (NAP)/RFA form.[2]

Mr. Gilmore submitted a completed RFA to MVN on January 9, 2003. The RFA was forwarded by MVN to the MVD RO by facsimile on January 15, 2003, and by mail on January 23, 2003. MVN subsequently reviewed the RFA and informed the RO by telephone that the RFA contained new information. Appeal regulations found at 33 C.F.R. 331.6(c) allow an RFA that contains new information to be returned to the District Engineer for reconsideration. In a telephone conversation on January 30, 2003, the RO informed Mr. Gilmore that the RFA contained new information and would be returned to MVN for reconsideration.

Pursuant to Mr. Gilmore's request, MVN conducted an additional field investigation on July 24, 2003. Based on the results of the field investigation and a review of the previous data, MVN provided Mr. Gilmore a revised JD dated August 14, 2003. The revised MVN JD rescinded MVN's previous JD, determined that a larger portion of the property contained wetlands, and notified Mr. Gilmore that a Department of the Army permit would be required prior to the deposition of dredged or fill material into the wetlands or channels on the property. The revised MVN JD included a map depicting the wetlands and "404" waters of the United States[3], a Basis for Jurisdictional Determination form, and a NAP/RFA form.

Mr. Gilmore submitted a completed RFA on September 15, 2003. I accepted the RFA on September 29, 2003. The site visit and appeal conference were held by my RO on November 4, 2003.

Summary of Appeal Decision: The administrative record contains sufficient evidence that Mr. Gilmore's property contains wetlands and waters of the United States. MVN correctly asserted jurisdiction based on regulations found in 33 C.F.R. 328.3(a)(1) and (7).

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[2] The RFA was dated November 21, 2002; the Basis for Jurisdictional Determination was dated November 15, 2002.

[3] Wetlands include "waters of the United States" as defined in 33 C.F.R. 328.3(a).

Information Received and Its Disposition During the Appeal Review: Pursuant to 33 C.F.R. 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 August 14, 2003 MVN JD is dated August 21, 2003. Neither Mr. Gilmore nor the MVN 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. The MVN provided a copy of the administrative record. The administrative record was considered in reaching this decision.

2. By facsimile dated September 27, 2003, the RO provided questions to Mr. Gilmore and the MVN for discussion at the appeal conference. Exhibit 2 in the Appeal Conference Memorandum for Record (MFR) contains the questions.

3. During the appeal conference, MVN provided a written response to the RO's questions and two maps of the project site. MVN's written response and maps are Exhibit 4 in the Appeal Conference MFR. MVN's response and maps were clarifying information and were considered in this decision.

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

5. During the appeal conference, Mr. Gilmore provided an undated letter and two vicinity maps. The letter and maps are Exhibit 3 in the Appeal Conference MFR. Mr. Gilmore's letter and maps are clarifying information and were considered in this decision.

6. By facsimile dated November 24, 2003, MVN provided another copy of the November 21, 2002 Combined NAP/RFA form. (The MVN had inadvertently left out the RFA form out of the administrative record.)

The RO provided copies of all information received during the appeal process to both Mr. Gilmore and MVN.

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

Appellant's Reason 1 for Appeal: The areas shown as wetlands in the MVN JD are not subject to the Corps of Engineers jurisdiction because they are not adjacent to a navigable stream and not subject to flooding by a navigable stream.

FINDING: This reason for appeal does not have merit.

ACTION: No action

DISCUSSION: Wetlands exist on the property. The basis for determining the landward limit of the Corps of Engineers jurisdiction is the existence of adjacent non-tidal wetlands, not the reach of flood waters. As documented in the MVN administrative record, the wetlands are adjacent either to an unnamed tributary or man-made conveyance that flows into navigable and interstate waters of the United States.

There is sufficient documentation in the administrative record that Mr. Gilmore's property contains wetlands. The MVN JD contains a map that depicts four wetland areas: a large wetland located in the north central portion of the property, a small wetland located along the northwest boundary, and two wetlands bordering a man-made conveyance in the southern portion of the property.

For the north central portion of the property, the administrative record contains data sheets documenting the presence of the three wetland parameters required by the 1987 Wetlands Delineation Manual and subsequent Corps of Engineers guidance.[4] MVN referred to infrared photographs in the administrative record to show that the wetlands in the north central portion of the site are contiguous to the unnamed tributary. In the appeal conference, MVN stated that surface water connections from the wetlands to the unnamed tributary were observed during site investigations.

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[4] 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.

MVN's JD map depicts a small wetland located along the northwest boundary. In the appeal conference, MVN clarified that the small wetland was sampled for the three wetland parameters, but a data sheet was not completed. MVN stated that the wetland vegetation, hydrology, and soils were similar to that documented in an MVN data point located in the north central wetland. The small wetland appeared to be isolated on the MVN JD map (having no tributary connection). At the appeal conference, MVN referred to infrared photographs, which are in the administrative record, to show that the small wetland is part of the large north central wetland that is adjacent to the unnamed tributary. The north central wetland extends through wetlands on adjacent private property located to the west. The wetlands in the private property encompass the small wetland. At the appeal conference, MVN clarified that it verified that the adjacent property contained wetlands that are connected to the north central wetland on Mr. Gilmore's property through wetland signatures on the 1985 infrared photograph, visual observation of the wetland plant community, and soils information.

The administrative record contained a data sheet documenting the presence of three wetland parameters for the two wetlands in the southern portion of the property. MVN's written response in the appeal conference stated that the southern wetlands border a man-made conveyance, separated by a spoil bank. This man-made conveyance drains into the same unnamed tributary to which the north central wetland is adjacent.

Corps of Engineers regulations at 33 C.F.R. 328.3(a) define which waters are "waters of the United States." Once a water is determined to be a "water of the United States," regulations at 33 C.F.R. 328.4 define the limits of those waters. The landward limit of non-tidal waters extends to the limit of the adjacent wetlands as identified in paragraph (c) (2) of 33 C.F.R. 328.4.

All of the wetlands located on Mr. Gilmore's property are adjacent to either the unnamed tributary or the man-made conveyance. The MVN administrative record and clarifying discussions in the appeal conference document the fact that the unnamed tributary flows south-southeast to Hickory Branch, then to Blood River, and ultimately into the Tickfaw River. Blood River is considered a navigable water at a point four miles above its confluence with the Tickfaw River. It is a matter of public knowledge that the Tickfaw River is a navigable and interstate water.

The MVN Basis for Jurisdictional Determination form dated August 12, 2003, includes two reasons for asserting jurisdiction, the first of which states:

> A. Property referenced in the attached correspondence contains waters of the United States based on:
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> 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. [33CFR328.3(a)(7)] (Footnote 2 - Wetlands are identified and delineated using the methods and criteria established in the Corps of Engineers Wetlands 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").

I find that this is an accurate determination supported by the administrative record. Wetlands exist on Mr. Gilmore's property. These wetlands either contain a surface water connection or are adjacent to an unnamed tributary or man-made conveyance that ultimately flows into navigable, interstate waters. This reason for appeal has no merit.

Appellant's Reason 2 for Appeal: Those areas designated as waters of the United States are not subject to Corps of Engineers jurisdiction because they do not contain water.

FINDING: This reason for appeal does not have merit.

ACTION: No action

DISCUSSION: The administrative record contains sufficient evidence that the property contains waters of the United States. Those waters depicted by MVN as "404" waters of the United States meet the applicable definitions, and there is sufficient documentation to support this determination by MVN.

Corps of Engineers regulations found in 33 C.F.R. 328.3(a) define "waters of the United States." The applicable section for this case is 33 C.F.R. 328.3(a)(1):

> All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

As indicated on the MVN Basis for Jurisdictional Determination form dated August 12, 2003, the property contains: "The presence of waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, i.e., navigable waters of the United States (in part). [33CFR328.3(a)(1)]"

In support of this finding, MVN conducted field investigations and utilized infrared photographs and topographic maps. The photographs and topographic maps depict a tributary system that eventually drains or flows into navigable, interstate water. MVN's administrative record (intake sheet) and clarifying discussions in the appeal conference sufficiently document the fact that the unnamed tributary flows south-southeast to Hickory Branch, then to Blood River, and ultimately into the Tickfaw River. Blood River is considered a navigable water at a point four miles above its confluence with the Tickfaw River. It is a matter of public knowledge that the Tickfaw River is a navigable and interstate water.

Mr. Gilmore's RFA asserts that the area shown in the MVN JD as "(404) waters of the United States" has no water. In the appeal conference he clarified that those areas designated as "(404) waters of the United States" are not subject to the Corps of Engineers jurisdiction because they do not contain water. The hydrologic characteristics of the property, evidence of the presence of water that has an over-riding influence, is shown on Mr. Gilmore's property by ordinary high water marks. The term "ordinary high water mark" is defined in 33 C.F.R. 328.3(e) as:

> . . . that line on the shore established by the **fluctuations of water** and indicated by physical characteristics such as clear natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate

means that consider the characteristics of the surrounding areas. (emphasis added)

During the appeal conference, the MVN representative clarified that ordinary high water marks were noted during field investigations as shown by the data sheets in the administrative record. During the appeal site visit the RO observed ordinary high water marks along the unnamed tributary and the man-made conveyance.

There is sufficient evidence in the administrative record to determine presence and extent of "404" waters of the United States. The administrative record also documents characteristics of wetland hydrology on the property. Primary wetland hydrology indicators consisted of saturation in upper the upper 12 inches of the soil profile, water marks, drift lines, sediment deposits and drainage patterns.[5] As discussed in Reason 1, there was sufficient evidence in the administrative record of the three wetland parameters (including wetland hydrology) needed to determine the presence of wetlands. Reason 2 for Appeal has no merit.

CONCLUSION: For the reasons stated above, I conclude that Mr. Gilmore's Appeal does not have merit. The final Corps of Engineers decision will be the District Engineer's letter advising Mr. Gilmore of this decision and confirming the August 14, 2003 MVN JD.

Enclosure

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

[5] MVN data sheet dated July 24, 2003 & Hydrologic Surveys L.L.C. data sheet dated August 24, 2002 (wetland delineation report).