ADMINISTRATIVE APPEAL DECISION
STEPHENS JURISDICTIONAL DETERMINATION APPEAL
FILE NO. MVM 2005-406, MEMPHIS DISTRICT
October 27, 2005

Acting Review Officer: Dr. James B. Wiseman, Jr., U.S. Army Corps of Engineers, Mississippi Valley Division (MVD)

Appellant/Applicant: Mr. John Stephens II, Des Arc, Arkansas

Authority: Section 404 of the Clean Water Act

Receipt of Request for Appeal: July 11, 2005

Approved JD Appeal Meeting and Site Visit: September 27, 2005

Background Information: This administrative appeal decision is in response to the objection from Mr. John Stephens II to a June 6, 2005, jurisdictional determination (JD) by the Memphis District (MVM) (see Tab 1) The MVM JD determined that portions of Mr. Stephens's property located in White County, Arkansas, contain wetlands subject to the U.S. Army Corps of Engineers (Corps) jurisdiction.

During a field trip on May 18, 2005, MVM staff members Messrs. Joseph Brougher and Randy Clark met with Mr. Doug McClellan, District Conservationist (DC) in the White County office of the Natural Resources Conservation Service (NRCS), and visited Mr. Stephens's property for purposes of making a JD and to discuss his plans to construct an irrigation reservoir. Subsequently, by letter dated May 19, 2005, the DC informed Mr. Stephens that the Corps had visited the site and had determined the area in question to be a jurisdictional wetland, and that a permit would be required "if the area is manipulated or destroyed." By letter dated June 6, 2005, MVM provided Mr. Stephens with an approved JD. The JD concluded that parts of Mr. Stephens' property were wetlands subject to the Corps' jurisdiction. The JD correspondence also included a vicinity map, an aerial photograph showing the approximate wetland boundary, a Notification of Administrative Appeal Options and Process and Request for Appeal (NAP/RFA) form, and a copy of the Jurisdictional Determination form (JD form) provided though personal communication from Mr. Joseph Brougher.

Mr. Stephens submitted a completed RFA form dated July 7, 2005, to the Division Engineer, Mississippi Valley Division (MVD), which was received on July 11, 2005. The RFA was forwarded to the Acting Review Officer (RO) on July 27, 2005. MVD accepted the appeal by letter dated August 10, 2005. According to guidelines established in the regulations governing the administrative appeals process (33 C.F.R. 331 et seq), the RO should normally conduct a site investigation within 60 days of receipt of an acceptable RFA. However, the RO may extend that time period under extenuating circumstances. Due to events and circumstances surrounding Hurricane Katrina, it was necessary to make such a time extension in this case. Mr. Stephens and MVM were notified by telephone on September 12, 2005, and by letter dated September 19, 2005, that the approved JD meeting and site visit would be conducted on September 27, 2005.

SUMMARY OF APPEAL DECISION: It is Mr. Stephens's position that MVM incorrectly asserted jurisdiction over his property, stating that the area in question is upland and an "isolated intrastate wet area." The administrative record for the Mr. Stephens JD contains substantial evidence that the area in question is a wetland and has hydrologic connections which ultimately flow to the White River, a navigable water of the United States. MVM correctly asserted jurisdiction based on procedures found in the 1987 Corps of Engineers Wetland Delineation Manual (1987 Manual) and on definitions found in regulations at 33 C.F.R. 328.3(a)(5) and (7).

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. MVM provided a copy of the administrative record to the RO, and the RO provided a copy to Mr. Stephens (as an attachment to the letter dated September 19, 2005). The administrative record is limited to information contained in the record by the date of receipt of an acceptable RFA form, in this case, July 11, 2005. Only the administrative record and any clarifying information were considered in reaching this appeal decision.

2. In a letter sent to Mr. Stephens and MVM on September 19, 2005, the RO provided a set of possible questions for discussion at the approved JD meeting. These questions are shown in Exhibit 1 in the October 14, 2005, Memorandum for the Record (MFR) documenting the approved JD meeting and site visit. These questions and their answers are deemed clarifying information and were considered in reaching the appeal decision.

3. MVM and Mr. Stephens provided written responses to the questions. The written responses are deemed clarifying information and are contained in Exhibits 2 and 3 (at Tabs 2 and 3, respectively) of the approved JD Meeting MFR.

4. During the site visit, twenty digital photographs of the site were taken. The digital pictures are deemed clarifying information and are contained in Exhibit 4 of the approved JD meeting MFR.

Basis for Appeal as Presented by Appellant:

Appellant's First Verbatim Reason for Appeal:
The site was created on an upland area by excavation and/or diking land to collect and retain water and which is used exclusively as a settling basin.

FINDING: These reasons for appeal do not have merit.

ACTION: No action is required.

DISCUSSION: As required by the 1987 Corps of Engineers Wetland Delineation Manual (1987 Manual), in order to establish the presence of a wetland, hydrophytic vegetation, hydric soils, and wetland hydrology must be identified. During their field trip on May 18, 2005, MVM found all three parameters and documented these findings on the data sheet found in the administrative record. According to regulations found at 33 C.F.R. 328.3(c):

> The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

The administrative record includes substantial evidence that portions of Mr. Stephens property contain wetlands.

Appellant's Second Verbatim Reason for Appeal:

The site is an isolated intrastate wet area with no nexus to interstate commerce. The site is not currently being used, has never been used, and is not susceptible to use in interstate of foreign commerce. The site is located at 200 feet elevation and is well above ordinary or mean high water marks. The site is 2000 feet from the nearest water of any type and never floods from any creek, stream, tributary or river.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the approved JD letter dated June 6, 2005, MVM states that a "hydrologic connection exists between the wetlands and an unnamed tributary to Boat Gunwale Slash." (See Appellant's Fifth Verbatim Reason for Appeal below for a discussion of contradictory statements in the approved JD letter versus the JD Form concerning Boat Gunwale Slash and the White Oak Creek/Bayou Des Arc/White River.) In the administrative record, there is a black and white aerial photograph which identifies a "surface water connection from the wetland to White Oak Creek that appears to replace a natural swale." During the approved JD meeting, the RO asked MVM if it was District policy to take jurisdiction over all man-made ditches where the ditch replaces a natural swale or drainage, and they responded in the affirmative.

The administrative record also includes copies of other aerial photographs and topographic maps which contain sufficient evidence to establish adjacency and/or a continuous hydrological connection from the wetland identified on Mr. Stephens property through unnamed tributaries to White Oak Creek and ultimately into the White River, a navigable water of the United States.

Appellant's Third Verbatim Reason for Appeal:

Under Basis for Jurisdictional Determination, B-5, "The presence of a tributary to a water identified in (1)-(4) above", was checked. However, nothing was identified in (1)-(4) above. The rational for the basis of the JD referred to the "wetlands" and "unnamed tributary" flowing into White Oak Creek. The form fails to make any connection between the "wetland" and "unnamed tributary". Nothing furnished connects my site with any unnamed tributary. I maintain that my site has no connection with any tributary.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: Standard procedure for filling out a JD Form requires that the Corps check any and all appropriate boxes for those categories of waters identified on the site. By checking box B-5, MVM is recognizing jurisdiction based on the presence of a tributary on the site. (See pictures 11 and 12 in

Appendix 4 (Tab 4) of the approved JD meeting MFR.) Since none of the other categories of waters listed in boxes B-1 through B-4 occur on the site, those boxes were not checked.

Under Rationale for the Basis of Jurisdictional Determination on the JD form included in the administrative record, MVM states: "The wetland and unnamed tributary flow into White Oak Creek, which flows into Bayou Des Arc, which flows in to the White River, which is navigable."

Appellant's Fourth Verbatim Reason for Appeal:

Under Basis for Jurisdictional Determination, B-7, "The presence of wetlands adjacent to other waters of the U.S., except those wetlands adjacent to other wetlands" was also checked. The rationale for this basis was not documented. My site, that you have determined to be wetlands, is not adjacent to any waters of the U.S. or adjacent to any other wetlands.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: By checking box B-7 on the JD form, MVM is indicating that wetlands are present on the site, and the occurrence of wetlands is well documented in the administrative record.

Adjacency is documented on the JD form included with the administrative record. On that form, MVM establishes adjacency from the wetland via an unnamed tributary, White Oak Creek, and Bayou Des Arc to the White River, which is navigable. The administrative record includes topographic maps and aerial photographs which support this conclusion.

Appellant's Fifth Verbatim Reason for Appeal:

Mr. Timothy Davis's letter of June 6, 2005, states "that a hydrologic connection exist between the wetlands and an unnamed tributary to Boat Gunwale Slash." Boat Gunwale Slash is more than 45 miles from my site. It is in Monroe County, Arkansas and northeast of Holly Grove, Arkansas. It is totally

unreasonable to tie any soil hydrology connection between my site and that of Boat Gunwale Slash. I contend that you have not established a valid soil hydrology for my site and in the absence of a valid wetland hydrology identification, my site should not be considered wetlands and jurisdictional waters of the U.S.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: One of the tentative questions provided to MVM prior to the approved JD meeting (see Exhibit 1 found at Tab 1 of the approved JD meeting MFR) concerned the difference between the hydrological connections cited in the approved JD letter and those indicated in the associated JD Form:

> In your approved JD letter dated June 6, 2005, you note a hydrologic connection between jurisdictional wetlands and "an unnamed tributary of Boat Gunwale Slash." In the associated JD Form, the hydrologic connection is described as "The wetlands and unnamed tributary flow into White Oak Creek, which flows into Bayou Des Arc, which flows in to the White River, which is navigable." Please clarify these seemingly contradictory statements.

MVM responded (see Exhibit 2 found at Tab 2 of the approved JD meeting MFR):

> The contradiction noted above was an unintentional error. The June 6, 2005, letter to Mr. Stephens was drafted using a letter from a different Memphis District action that was very similar in nature, with the majority of the wording being the same in both letters. In an attempt to provide a hasty answer for Mr. Stephens, the project manager (Mr. Joe Brougher) overlooked the need to edit the phrase "… hydrologic connection between jurisdictional wetlands and White Oak Creek." This unintended oversight was explained to Mr. Stephens shortly after he received our June 6, 2005, letter and he seemed to understand our explanation of this discrepancy.

During the approved JD meeting, the RO asked Mr. Stephens if he remembered receiving an explanation from MVM. Mr. Stephens stated that he did not remember such a conversation. Mr. Stephens also stated that recognizing this error should be considered new information and should not be included in the appeal process. However, since the both the JD letter and the JD form are part of the administrative record, information contained in either document is not new information.

The administrative record shows that there is a hydrologic connection from wetlands on Mr. Stephens property through named and unnamed tributaries to the White River. Clarifying information gathered during the appeals process explains the difference in the named waterways found in the JD letter and the JD form.

Appellant's Sixth Verbatim Reason for Appeal:

All of my site and all adjoining or adjacent land to my site is classified by USDA-NRCS as either Gore Silt Loam 0-3 percent slope or Calloway Silt Loam 0-1 percent slopes. Except for misc wet areas, none of these soils are hydric soils. Since there are no misc wet areas adjoining or adjacent to my site, there is no hydric soil and consequently no wetlands or waters of the U.S. Also, the soil hydrology of any unnamed (and unidentified) tributary that might adjoin my site would also be erroneous for the reason sited in the above paragraph.

FINDING: These reasons for appeal do not have merit.

ACTION: No action is required.

DISCUSSION: In the Manual, under Part IV (Methods), when all the dominant plants species in a plant community have an indicator status of OBL (obligate wetland plants with a probability of occurrence in wetlands greater than 99 percent), hydric soils can be assumed. All of the plants listed on the MVM data form, which is part of the administrative record, are classified as OBL.

CONCLUSION: For the reasons stated above, I conclude that Mr. Stephens' request for appeal does not have merit. The final Corps decision will be the MVM's jurisdictional determination letter dated June 6, 2005.

COLONEL
DEPUTY CDR

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