

ADMINISTRATIVE APPEAL DECISION

**Mr. Joffrey Easley
File No. 20-020-3030
New Orleans District
February 11, 2003**

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

Appellant/Applicant: Mr. Joffrey Easley, Baton Rouge, Louisiana

Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): October 2, 2002

Appeal Conference and Site Visit Dates: December 2, 2002

Background Information: On July 26, 2002, Mr. Barry McCoy, Gulf Engineers & Consultants, Incorporated (GEC), requested a verification of the routine wetland delineation conducted by GEC for Mr. Joffrey Easley. Mr. Joffrey Easley owns a 4.0-acre site located within the New Orleans District (MVN), Livingston Parish, near Walker, Louisiana. The project site is located along the west side of Louisiana Highway 1023 (LA Hwy 1023). The GEC wetland delineation concluded that a portion of the property contained wetlands encompassing approximately 0.23 acre. The GEC wetland delineation stated: "There are no streams connected to this wetland. The hydrology to the wetland appears to be supplied through surface water, which becomes perched at this site due to insufficient drainage caused by the highway base."

The MVN jurisdiction determination (JD) letter dated August 8, 2002 determined that Mr. Easley's property contained wetlands subject to the Corps of Engineers' jurisdiction. The MVN JD letter included a map depicting the wetlands, a Basis for Jurisdictional Determination form, and the Combined Notification of Appeal Process (NAP)/Request For Appeal (RFA) form.

Mr. Easley submitted a completed RFA on October 2, 2002. The RFA was received within the requisite 60-day time period.

Summary of Appeal Decision: The MVN administrative record shows that the wetlands on the Appellant's property are adjacent to navigable waters of the United States and subject to the Corps of Engineers jurisdiction. The Appellant's reasons for appeal, which allege that the wetlands are isolated, are unsubstantiated. The Appellant asserted that a previous MVN JD determination for the same property did not contain wetlands. Upon review, it was determined that the previous JD request had incorrectly identified the location of the property. That JD has expired and is no longer valid.

Information Received and Its Disposition During the Appeal Review:

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 jurisdiction determination is limited to the information contained in the administrative record by the date of the Notice of Appeal Process (NAP). The NAP for Mr. Easley is August 9, 2002.
2. The RO provided a list of questions to the MVN and the Appellant to be answered in the appeal conference. The list of questions is referred to as Exhibit 1 in the appeal conference Memorandum For Record (Appeal Conference MFR), dated December 2, 2002 (enclosure 1).
3. During the appeal conference, the MVN provided a written response to the questions. The Appellant verbally responded to the RO's questions. All verbal responses are found in the Appeal Conference MFR. The written response provided by the MVN is considered clarifying information and is referred to as Exhibit 2 in the Appeal Conference MFR.
4. The MVN provided a copy of the coversheet and page 41251 of the Federal Register publication titled Part II, Department of Defense, Corps of Engineers, Department of the Army, 33 CFR Parts 320 through 330, Regulatory Programs of the Corps of Engineers; Final Rule, dated November 13, 1986. The coversheet and page 41251 are considered clarifying information and are referred to as Exhibit 3 in the Appeal Conference MFR.
5. The MVN provided a copy of the cover sheet and pages 12823 and 12824 of the Federal Register publication titled Part III, Department of the Army, Corps of Engineers, Final Notice of Issuance and Modification of Nationwide Permits; Notice, dated March 9, 2000. The coversheet and pages are considered clarifying information and are referred to as Exhibit 4 in the Appeal Conference MFR.
6. The MVN provided a copy of a document titled Memorandum For Division and District Counsel, dated March 15, 2002. The memorandum is considered clarifying information and is referred to as Exhibit 5 in the appeal conference MFR.

Copies of all clarifying information received from the MVN were provided to the Appellant.

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

Appellant's Reason 1: The Appellant disagrees with the fact that the MVN can take jurisdiction of the property. An investigation of the latest Quadrangle maps of the region will reveal that the portion of the property that exhibits the characteristics of a wetland does not drain into any navigable or interstate water. The topography of the area does not allow for the portion of the property that was deemed to be a wetland to flow to West Colyell Creek or any other body of water.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: During the appeal conference, the Appellant clarified his reason for appeal. He disagrees with the MVN's determination that the wetlands on his property are connected to the wetlands across from LA Hwy 1023. He alleges that the wetlands on his property are isolated because of the LA Hwy 1023. There is sufficient documentation in the MVN administrative record to show that the wetlands are adjacent to navigable waters of the United States and subject to the Corps of Engineers jurisdiction.

The wetlands located on the Appellant's property are part of a tributary system adjacent to the Amite River, an interstate, navigable water of the United States. The Corps of Engineers' regulations at 33 C.F.R. 328.3(a) define what waters are "waters of the United States." Once a water is determined to be a "water of the United States," then regulations at 33 C.F.R. 328.4 define the limits of those waters. The landward limit would extend to the high tide line or to the limits of adjacent non-tidal waters of the United States as identified in paragraph (c), of section 328.4.

The MVN Basis of JD form dated August 7, 2002, states:

A. Property referenced in the attached correspondence 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. (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").

As to the finding above, the administrative record contains sufficient evidence that the property is part of a larger wetland complex adjacent to an unnamed tributary, which flows into West Colyell Creek and eventually drains or flows into the Amite River, a navigable and interstate water of the United States. The MVN intake sheet and discussions held at the appeals conference document its review of infrared photographs that indicated the wetland is part of a large system located to the east of LA HWY 1023 and contiguous with West Colyell Creek, a tributary to the Amite River.

Two factors are considered when determining adjacency, actual proximity of the wetlands to the waterway and hydrologic connections between the wetland and waterway. Regulations at 33 C.F.R. 328.3(a)(7)(c) state, "the term adjacent means bordering, contiguous or neighboring. Wetlands separated from other waters of the United States by man-made ditches or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'." Although 'road' is not explicitly mentioned in the definition, it is a man-made barrier or obstruction separating portions of a once intact wetland adjacent to West Colyell Creek. The road does not negate a finding of adjacency.

The presence or absence of a culvert does not change the MVN's determination that the wetland is adjacent. The appellant asserted in the appeal conference that the two culverts that convey flow from the wetland under the LA Hwy 1023 constitute a poor connection to the larger wetland complex across the LA Hwy 1023. The RO corroborated the MVN findings that the wetlands are hydrologically connected via several culverts which direct flow from the wetland along drainage ditches under the LA Hwy 1023 to the larger wetland complex. The hydrological connection is only one consideration of "adjacency." Proximity is also a highly relevant factor. The wetlands on the Appellant's property were one wetland complex prior to installation of the LA Hwy 1023. Soil maps show a continuum of hydric Gilbert soils extending from the Appellant's wetlands to the larger wetland complex across the LA Hwy 1023.

The MVN provided sufficient documentation that the wetlands are not isolated. At 33 C.F.R. 330.2 the Corps regulations define the term "isolated waters" as non-tidal waters of the United States that are: 1) not part of a surface tributary system to interstate or navigable waters of the United States; and 2) not adjacent to such tributary waterbodies. The MVN's basis for jurisdiction was that the wetland was adjacent to a tributary system that eventually drains or flows into a navigable or interstate water. I find that this is an accurate determination and supported by the administrative record. The unnamed tributary and West Colyell Creek constitute a tributary connection to the Amite River, a navigable, interstate water. Therefore, the wetlands located on the Appellant's property are adjacent to a tributary and are not isolated.

Appellant's Reason 2: A previous "In House" jurisdiction determination found that the property was not a wetland.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The Appellant alleges that the current MVN JD for the property is inconsistent with a previous JD for the same property issued to Mr. David Stilley (Corps number 3748). The administrative record shows that Mr. Stilley's JD request had incorrectly identified the location of the property. This incorrect identification resulted

in a determination that the property was not a wetland. The MVN JD provided to Mr. Easley is the current JD for the property. In addition, the MVN JD letter to Mr. Stilley was valid for three years and expired in 1996.

A map attached to the Stilley JD request incorrectly depicted its location. In a JD request dated August 13, 1993, Mr. David Stilley requested a wetland determination for a property identified as Lot #4 and located in Section 22, Township 5 South, Range 3 East, near Watson Louisiana. The request stated that the property contained non-hydric Satsuma soils and attached a section of a topographic map, a drawing depicting lots and a soils map. In its JD letter dated September 1, 1993, the MVN stated:

Based on the information you supplied, a review of aerial photography, study of soils information, and our knowledge of the area, we have determined this property is not wetland subject to the Corps' jurisdiction under Section 404 of the Clean Water Act.

The MVN stated in the appeal conference that it did not realize that Mr. Stilley had misrepresented the location of the property until Mr. Easley's JD request referenced a previous JD. The MVN identified the previous JD as Mr. Stilley's. As shown in the administrative record, using the soils map and infrared photographs, the MVN confirmed that the Stilley JD request had misrepresented the location of the property. The MVN noted that the GEC wetland delineation had correctly noted the property's location and the presence of Gilbert-Brimstone and Satsuma soils.

As discussed in Appeal Reason 1, the administrative record supports the MVN JD.

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

Encl

/S/ signed
Don T. Riley
Brigadier General, U.S. Army
Division Engineer