

ADMINISTRATIVE APPEAL DECISION

Mr. and Mrs. Larry Gauer
File No. 441180-1
Rock Island District
March 4, 2004

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

Appellant/Applicant: Mr. and Mrs. Larry Gauer, Dubuque, Iowa

Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): November 10, 2003

Appeal Conference and Site Visit Date: December 15, 2003

Background Information: Mr. and Mrs. Larry Gauer (the Gauers) are appealing Rock Island's jurisdictional determination (JD) for a borrow pit/pond located on the Gauer property in Dubuque County, Iowa.¹ Located along Iowa Highway 52 (Highway 52) and in a designated floodway, portions of the property are utilized in the Gauer's recreational vehicle sales and service business. In the middle 1970's, material was excavated from the site for road construction. Previous landowners acquired the property in 1976 and placed fill material into excavated borrow areas. The Gauers bought the property in 1978 and continued to fill portions of the property.

On July 30, 2002, in response to a complaint from an adjacent property owner, the Corps of Engineers, Rock Island District (MVR), inspected a portion of the Gauer property located along Highway 52. Based on its investigation, the MVR determined recent new fill material had been placed in approximately 0.37 acres of wetlands that were subject to the Corps of Engineers jurisdiction. In an August 5, 2002, letter, MVR informed the Gauers the filling was in violation of Section 404 of the Clean Water Act (CWA). The Gauers were provided the opportunity to resolve the violation by removing the fill material from the wetland or applying for an after-the-fact permit.

In an August 14, 2002, letter on behalf of the Gauers, Mr. Morris Preston of Preston Engineering stated the Gauers believed it was permissible to fill areas previously excavated for borrow material. Preston Engineering referenced historical photographs to support its contention no fill material had been placed in the pond. They noted evidence of wetland vegetation along the pond perimeter and stated the Gauer's intention to fill only a previously excavated area near some buildings. The Gauer's did not want to file an after-the-fact permit application, but rather wanted to grade and revegetate the side slope of the pond to control erosion.

¹ The property is located in Sections 2 and 3, Township 89 North and Range 2 East, Dubuque County, Iowa.

In a letter dated August 21, 2002, the MVR provided an aerial photo with notations that described the location and acreage estimates of recent deposition of fill material. These areas were described as Area "A", approximately 0.33 acre, and Area "B", 0.04 acre. The MVR stated it will typically not pursue enforcement action on projects over five years old. The MVR concurred the Gauer property had been excavated more than five years but asserted jurisdiction since the area had been abandoned for five years, developed wetland characteristics and functions, and was connected by a surface drainage that eventually flows into navigable waters of the United States.

Based on a September 12, 2002, site investigation, the MVR determined the northern portion of Area "A" contained broken concrete rubble below the ground surface, evidence of previous fill activities.² In the appeal conference the MVR personnel stated they relied on Regulatory Guidance Letter No. 88-4, when it determined the five-year statute of limitations for pursuing enforcement action for historic fills had ended, and the MVR would not consider the filling of the northern portion of Area "A" to be a violation.

The September 12, 2002, investigation report determined Area "B" was isolated and not subject to the Corps of Engineers jurisdiction because it did not have a surface water connection to a stream with a defined bed and bank that eventually flows into a navigable water of the United States. Based on this finding, the deposition of fill material into Area "B" was not a violation of the CWA.

The September 12, 2002, investigation report determined the southern portion of Area "A" did not contain evidence of previous fill activity, and seven out of eight data sheets documented the presence of wetlands (enclosure).³ Based on these findings, the report stated deposition of fill in the southern portion of Area "A", containing 0.18 acre of wetlands, is considered a violation of the CWA. The report notes the Gauers maintained their belief the southern portion of Area "A" contained historic fill material, similar to the northern portion of Area "A".

Based on information from a September 12, 2002 meeting and site visit, review of Food Security Act aerial photographs, historic photographs, and Preston Engineering's September 13, 2002, letter, the MVR determined the area, depicted by an enclosed drawing referred to as Exhibit B, is a wetland and subject to the Corps of Engineers jurisdiction. MVR determined the wetland had been filled without a Department of the Army authorization within the last five years and remains a violation of the CWA. The Gauers were provided three options to resolve the violation: 1) sign a Tolling Agreement and apply for an after-the-fact permit; 2) remove fill material from the wetlands to an upland, non-wetland location; or 3) provide evidence the area either was previously filled or all or portions of the site are not subject to the Corps of Engineers jurisdiction. The Gauers were required to respond within 20 days of the date of this letter with a

² An aerial photograph of the site was provided by the Gauers during the appeal conference. The RO noted locations of Areas A and B on the map. The aerial photograph is Exhibit 4 of the Memorandum for Record of the Appeal Conference and is provided here as a reference.

³ 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.

plan or action to resolve the matter. The Gauers were notified the activity may require Iowa Department of Natural Resources floodplain authorization because it is located within Zone A7 floodway.

In a letter dated October 4, 2002, Mr. Gauer requested a meeting with MVR. As documented in a Memo to File dated February 12, 2003, and a February 13, 2003, Nationwide Permit No. 39 authorization letter, MVR personnel met with the Gauers and Ms. Alicia Law of Preston Engineering. MVR determined the Gauers' project would result in the placement of 0.10 acre of fill material in wetlands subject to the Corps of Engineers jurisdiction. In the appeal conference MVR clarified the previously reported 0.18 acreage estimate was reduced to 0.10 acre. This acreage figure includes the reduction of the violation acreage from 0.18 acre to 0.09 acre and the proposed additional fill in wetlands of 0.01 acre. The Gauers would fill over an existing field tile and exposed concrete with soil. The 0.09 acre violation and 0.01 proposed fill would be authorized under Item 39 of the Nationwide Permits. The Gauers agreed to mark the boundary of the authorized fill, and the MVR would revisit the site during the 2003 growing season to delineate wetlands prior to additional proposed deposition of fill material. The Nationwide Permit 39 authorization letter determined the violation resolved.

In a facsimile cover sheet dated August 18, 2003, Mr. Gauer requested MVR conduct a jurisdiction determination for an area in front of the pond and along Highway 52. In a letter dated September 4, 2003, the MVR provided a jurisdiction determination (JD) concluding an area highlighted in green on an enclosed copy of an aerial photograph of the property does not contain wetlands and does not require a Department of the Army Section 404 authorization. An area highlighted in pink containing the northern portion of the pond and the mowed path along the pond is considered jurisdictional waters of the United States. The placement of fill material into the pink area would require a Department of the Army Section 404 authorization. The Gauers could fill up to the northern edge of the existing path without acquiring authorization. Authorization would be required for any proposed deposition of fill material in the northern portion of the pond or any other portion of the pond. Compensatory mitigation will be required for areas to be filled plus the 0.10 acre of previously authorized fill. The September 4, 2003, JD letter included a map depicting wetlands and waters of the United States; the February 13, 2003, Nationwide Permit verification letter; and a Combined Notification of Appeal Process (NAP)/RFA form.

The MVR revised its September 4, 2003, JD when Mr. Gauer notified the MVR the path area along the north end of the pond is located within an area (the northern portion of Area "A") MVR previously determined not be subject to the Corps of Engineers jurisdiction. In its September 10, 2003, JD, the MVR determined the placement of fill in the area north of, but not into, the pond does not require a Corps of Engineers authorization. The MVR determined the pond is a water of the United States and the placement of fill material into the pond will require a Corps of Engineers authorization. The revised JD reiterated only the existing pond is considered jurisdictional waters of the United States. At the appeal conference, the MVR provided a written response that no enclosures were provided with the September 10, 2003, JD.

The Gauers submitted a completed RFA to MVN on November 10, 2003. I accepted the RFA on November 24, 2003. The site visit and appeal conference were held by my RO on December 15, 2003.

Summary of Appeal Decision: The administrative record contains insufficient evidence the pond is a water of the United States.

Information Received and Its Disposition During the Appeal Review: See Attachment hereto.

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 pond is not subject to the Corps of Engineers jurisdiction because it does not flow into navigable waters.

FINDING: This reason for appeal has partial merit.

ACTION: The MVR shall provide sufficient documentation to support its finding that the pond and connecting ditch are waters of the United States.

DISCUSSION: There is sufficient documentation in the administrative record of a surface water connection from the pond to navigable, interstate waters of the United States. There is insufficient evidence in the administrative record of the existence of an ordinary high water mark along the pond and connecting ditch. Evidence of an ordinary high water mark is required to determine if the landward extent of waters of the United States encompasses the Gauer pond.

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 landward limits of jurisdiction of those waters. In the absence of adjacent wetlands, 33 C.F.R. 328.4(c)(1) states the jurisdiction extends to the ordinary high water mark..

As indicated on the MVR Basis for Jurisdictional Determination form dated September 4, 2003, "Property referenced in the attached correspondence contains waters of the United States based on: "The presence of one or more tributaries (stream channels, man-made conveyances, lakes, ponds, rivers, etc.) that eventually drain or flow into navigable or interstate waters. Includes property below the ordinary high water mark of the tributary."

The administrative record and clarifying comments in the appeals conference document a surface water connection from the pond to a navigable, interstate water of the United States. The August 21, 2003, MVR letter states the site contains "a surface drainage that eventually flows into navigable waters of the United States. . . . and it is connected by a surface drain at the southeast end. The surface drain then flows north into the little Maquoketa River, which eventually flows into the Mississippi River." The July 30, 2002, Investigation Report states, "Water from the site drains through a culvert of the south end and runs northward in a well-

defined stream channel towards the Little Maquoketa River.” The August 28, 2003, report stated, “The pond is connected to a tributary that eventually flows into navigable waters of the United States, and is therefore, regulated.” In the appeal conference the MVR provided clarification. MVR personnel referenced topographic maps and aerial photographs which depicted the tributary connection as beginning from the pond to a connecting ditch at the south end of the pond; through a culvert under an access road; through a culvert under Highway 52 north to an unnamed tributary; to the Little Maquoketa River; and ultimately into the Mississippi River, a Section 10 navigable and interstate water.”

However, the administrative record does not document the presence of an ordinary high water mark along the pond or connecting ditch. 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.

Photographs taken from an October 29, 2002, site investigation show distinct ordinary high water marks at two photo points. These photo points appear to depict drainage into the culvert under an access road and the drainage ditch along Highway 52. Photo points of the connecting ditch and the pond do not appear to depict an ordinary high water mark. In the appeal conference MVR personnel stated an ordinary high water mark was not identified because of recent excavation of the connection ditch.

Additional documentation is needed to determine if the connecting ditch and pond are waters of the United States. This can be accomplished by identifying the presence or absence of an ordinary high water mark and documenting a tributary connection to a navigable or interstate water. This reason for appeal has partial merit.

Appellant’s Reason 2 for Appeal: Our property has not been abandoned for five years or more and has not developed wetland characteristics or wetland functions.

FINDING: This reason for appeal does not have merit.


ACTION: No action

DISCUSSION: The revised September 10, 2003, JD did not determine the presence of wetlands; it attempted to determine the presence of non-wetland waters of the United States. The September 10, 2003, JD specifically stated the path area along the north end of the pond lies within an area (the north portion of Area “A”) that the September 30, 2002, MVR letter described as **not** a jurisdictional wetland. Considering the two MVR JD letters (September 4 and 10, 2003), MVR conceded that only the pond constitutes a water of the United States.

In the appeal conference the Gauers clarified in the RFA that they were referring to the whole property, not the pond, and they wanted to appeal the September 10, 2003, JD. The abandonment of use in an area in some cases may lead to the establishment of wetland characteristics (wetlands vegetation or hydrology). However, the criteria for establishing non-wetland waters of the United States is the presence of an ordinary high water mark and a tributary connection to a navigable or interstate water, not wetland characteristics. Reason 2 for Appeal has no merit.

CONCLUSION: For the reasons stated above, I conclude the Gauers' Appeal has partial merit. The final Corps appeal decision will be the MVR District Engineer's decision made pursuant to my remand.

Enclosure



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

Attachment to Appeal Decision: Information Received and Its Disposition

1. The MVR provided a copy of the administrative record. 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 basis of the appeal decision regarding the September 10, 2003, JD is limited to the information in the NAP dated September 11, 2003. Neither the Gauers nor the MVR 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. Unless stated, the exhibits or attachments are considered clarifying information.

2. Appeal Conference Memorandum for the Record which included:

a. **Exhibit 1** consists of two Administrative Appeal Process Flowcharts, which were provided by the RO to the MVR and the Appellant during the appeal conference.

b. **Exhibit 2** is a list of questions to be discussed in the RFA appeal conference that the RO provided to the Gauers and the MVR.

c. **Exhibit 3** is a written response and attachments provided to the RO in the appeal conference.

Attachment A (to Exhibit 3) is a partial copy of Dubuque North, Iowa-WIS.-ILL 1972 photo revised topographic map.

Attachment B (to Exhibit 3) is three topographic maps depicting the Gauer property.

Attachment C (to Exhibit 3) is an aerial photo with notations.

Attachment D (to Exhibit 3) is an aerial photo noting photo points.

Attachment E (to Exhibit 3) is a telephone conversation record dated December 9, 2003, signed by MVR project manager to Ms. Anna O'Shea.

Attachment F (to Exhibit 3) is a copy of the Corps of Engineers Regulatory Guidance Letter No. 88-4, dated April 7, 1988.

Attachment G (to Exhibit 3) is a document entitled "Completed Work Certification" issued February 13, 2003.

Attachment H (to Exhibit 3) is Rock Island District Fact Sheet No. 5(IA).

d. **Exhibit 4** to the appeal conference record. During the appeal conference, the Appellant provided an aerial photo of the site. During the appeal conference the RO noted the photo points where digital photographs (also part of Exhibit 4) were taken by the RO during the site visit. The aerial photograph noted Area "A", Area "B", and a drainline.

e. **Exhibit 5** is a series of documents that the Gauer provided at the appeal conference. Exhibit 5 consists of documents labeled A through LL. The contents of Exhibit 5 are identified as follows:

Exhibit A (to Exhibit 5) is page one of the August 5, 2003, MVR letter to Mr. Gauer with handwritten notes on the bottom of the page. Exhibit A is found on pages 14 and 15 of the administrative record.

Exhibit B (to Exhibit 5) is an August 8, 2002, Preston Engineering, Incorporated letter to Larry and Karen Gauer. The MVR personnel stated in the appeal conference they had not received or considered this letter in the JD. Exhibit B is new information and was not considered in the appeal decision.

Exhibit C (to Exhibit 5) contains the December 20, 2002, MVR letter to Ms. O'Shea, Zoning Administrator, Dubuque County Zoning. Exhibit C is found on pages 14 and 15 of the administrative record.

Exhibit D (to Exhibit 5) is a September 13, 2002, Preston Engineering letter to Ms. Donna Jones. Exhibit D is found on pages 24 and 25 of the administrative record.

Exhibit E (to Exhibit 5) is an August 21, 2002, MVR letter to Mr. Morris Preston, Preston Engineering. Exhibit E is found on pages 19 and 20 of the administrative record.

Exhibit F (to Exhibit 5) contains a handwritten document entitled "History of Couler Valley RV" signed by Mrs. Gauer. In the appeal conference the MVR personnel stated they had not received or considered this letter in the JD. Exhibit F is new information and was not considered in the appeal decision.

Exhibit G (to Exhibit 5) is a historic photograph of the Gauer property. In the appeal conference the MVR personnel stated they had not received or considered the photograph in the JD. Exhibit G is new information and was not considered in the appeal decision.

Exhibit H (to Exhibit 5) is a historic photo of the Gauer property. The MVR personnel stated the photo was shown to them during a February 2003 meeting.

Exhibit I (to Exhibit 5) is an October 3, 2003, Preston Engineering, Incorporated, letter to Mr. Michael Chyi, Water Resources Section. The MVR stated in the appeal conference they had not received or considered this letter in the JD. The letter is dated after the date of the NAP. Exhibit I is new information and was not considered in the appeal decision.

Exhibit J (to Exhibit 5) is a November 19, 2003, Preston Engineering, Incorporated, letter to Ms. Martha Chieply, RO. Ms. Chieply stated in the appeal conference she had no record of receiving the letter. The letter is dated after the date of the NAP. Exhibit J is new information and was not considered in the appeal decision.

Exhibit K (to Exhibit 5) is a copy of the September 4, 2003, MVR JD cover letter. Exhibit A is found on page 53 of the administrative record.

Exhibit L (to Exhibit 5) is a copy of the September 10, 2003, MVR JD cover letter. Exhibit L is found on page 55 of the administrative record.

Exhibit M (to Exhibit 5) is a copy of the August 26, 2003, Iowa Department of Transportation letter to Mr. Jim Waller, Dubuque County Board of Supervisors. The MVR personnel stated in the appeal conference they had not received or considered the letter in the JD. Exhibit M is new information and was not considered in the appeal decision.

Exhibit N (to Exhibit 5) is a February 13, 2002, MVR letter to Mr. Gauer. Exhibit N is found on pages 44 and 45 of the administrative record.

Exhibit O (to Exhibit 5) is an aerial photo of the Gauer property with notations. Exhibit O is found on pages 18 and 26 of the administrative record.

Exhibit P (to Exhibit 5) is a copy of the October 7, 2003, State of Iowa, Department of Natural Resources, letter to Ms. Law. In the appeal conference MVR personnel stated they did not consider this letter in the JD. The letter is dated after the date of the NAP. Exhibit P is new information and was not considered in the appeal decision.

Exhibit Q (to Exhibit 5) is a facsimile cover sheet dated October 10, 2003, from Preston Engineering, Incorporated. In the appeal conference MVR personnel stated they did not consider this cover sheet in the JD. The coversheet is dated after the date of the NAP. Exhibit Q is new information and was not considered in the appeal decision.

Exhibit R (to Exhibit 5) is a copy of a historic photograph taken in 1989 and included in the Gauer's RFA. In the appeal conference MVR personnel stated they did consider the photograph in the JD.

Exhibit S (to Exhibit 5) is a copy of three photographs with notations. Mr. Gauer stated in the appeal conference the photographs depicted how flooding occurred on the property. In the appeal conference MVR personnel stated they had not received or considered these photographs in the JD. Exhibit S is new information and was not considered in the appeal decision.

Exhibit T (to Exhibit 5) is a copy of four photographs depicting the Gauer property with notations. MVR personnel stated they had not seen these photographs, but depicted similar

conditions observed in earlier site investigations. Exhibit T is new information and was not considered in the appeal decision.

Exhibit U (to Exhibit 5) is a copy of three photographs depicting the Gauer property with notations. Mr. Gauer stated in the appeal conference these photographs had been sent to the Sageview Drainage District. Exhibit U is new information and was not considered in the appeal decision.

Exhibit V (to Exhibit 5) is a copy of a historic photograph shown to MVR personnel during the February 2003 site investigation.

Exhibit W (to Exhibit 5) is a copy of a historic photograph of the Gauer property. MVR personnel stated in the appeal conference they had not received or considered the photograph in the JD. Exhibit W is new information and was not considered in the appeal decision.

Exhibit X (to Exhibit 5) is a copy of a photograph taken of the Gauer property and included in the Gauer's RFA. In the appeal conference MVR personnel stated they did consider the photograph in the JD.

Exhibit Y (to Exhibit 5) is a photograph depicting high water levels during the summer on the Gauer property. MVR personnel stated they had not seen the photograph. The photograph depicted similar conditions observed in earlier site investigations. Exhibit Y is new information and was not considered in the appeal decision.

Exhibit Z (to Exhibit 5) is eleven photographs depicting high water levels on the Gauer property. The MVR personnel stated in the appeals conference they had not seen the photographs but were aware the area was located in a floodway. Exhibit Z is new information and was not considered in the appeal decision.

Exhibit AA (to Exhibit 5) is a copy of MVR field notes and a MVR Project Manager's business card.

Exhibit BB (to Exhibit 5) is notes by the Gauer from a July 2002 MVR field investigation. The MVR stated in the appeal conference the notes were not provided to MVR. Exhibit BB is new information and was not considered in the appeal decision.

Exhibit CC (to Exhibit 5) is a December 7, 2002, document signed by Ms. Mary L. Schulte, a former landowner. The Gauer showed the documents to MVR during a February 2003 meeting. A copy was not provided to MVR.

Exhibit DD (to Exhibit 5) is a list of Engineering/Environmental Consulting firms provided to the Gauer from MVR. The Gauer stated in the appeal conference they had highlighted Preston Engineering.

Exhibit EE (to Exhibit 5) is the first page of a Tolling Agreement prepared by MVR sent to the Gauers but not executed.

Exhibit FF (to Exhibit 5) is Dubuque Telegraph Herald newspaper article about flooding in Couler Valley. The MVR stated in the appeal conference the Gauers had not provided a copy to MVR. Exhibit FF is new information and was not considered in the appeal decision.

Exhibit GG (to Exhibit 5) is a document by Preston Engineering detailing the Gauer sales history from January 1, 2000 to January 31, 2004. In the appeal conference MVR personnel stated the document was not provided to MVR. Exhibit GG is new information and was not considered in the appeal decision.

Exhibit HH (to Exhibit 5) is thirteen photographs of the Gauer and surrounding properties. MVR personnel stated in the appeal conference the Gauers may have shown the photographs to them during a February 2003 meeting. Copies of the photographs were not provided to MVR.

Exhibit II (to Exhibit 5) is a facsimile coversheet from Preston Engineering dated September 17, 2003. MVR personnel stated in the appeal conference they had not seen this coversheet prior to completing the JD decision. Exhibit II is new information and was not considered in the appeal decision.

Exhibit JJ (to Exhibit 5) is a drawing used by the Gauers to estimate the size of the pond on the Gauer property. Exhibit JJ is new information and was not considered in the appeal decision.

Exhibit KK (to Exhibit 5) is a December 8, 2003, letter by the Dubuque County Zoning to the Gauers. The letter is dated after the date of the NAP. Exhibit KK is new information and was not considered in the appeal decision.

Exhibit LL (to Exhibit 5) is a photograph taken November 2, 1998. The Gauers stated in the appeal conference the photo was taken prior to excavation of the drainage ditch. They were unsure if the area depicted in the photograph was part of the Gauer property. The MVR personnel stated in the appeal conference MVR had visited the site prior to the ditch excavation but were unsure if they had seen the area depicted in the photograph. Exhibit LL is new information and was not considered in the appeal decision.

Exhibit MM (to Exhibit 5) is three photographs of flooding on the Gauer property. The photographs were not shown to MVR during site investigations or meetings. The MVR stated in the appeal conference they had not seen the photographs but were aware the area flooded. Exhibit MM is new information and was not considered in the appeal decision.

Exhibit NN (to Exhibit 5) is four photographs of flooding on the Gauer property. The MVR stated in the appeal conference they had not seen the photographs but were aware the area flooded. Exhibit NN is new information and was not considered in the appeal decision.

Exhibit OO (to Exhibit 5) is a copy of a historic photograph of the Gauer property, included in the Gauer's RFA.

f. **Exhibit 6** is a written response prepared by the Gauer's and provided to the RO during the appeal conference.