

ADMINISTRATIVE APPEAL DECISION

**Mr. Eldridge Daniel
File No. 20-010-0562
New Orleans District
June 20, 2001**

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

Appellant/Applicant: Mr. Eldridge Daniel

Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): March 22, 2001

Appeal Conference Date: May 15, 2001

Site Visit Date: May 14, 2001

Background Information: On November 17, 2000, Ms. Van C. Seneca requested a Department of the Army Jurisdiction Determination (JD) on behalf of Mr. Daniel.

Mr. Daniel owns a 12.5-acre project site located within the New Orleans District (MVN), Calcasieu Parish, Louisiana. The project site is bounded by the Goldsmith Canal on the southwestern edge and forested on the other two sides. It is part of an undeveloped portion of the Magnolia Forest Subdivision. The Goldsmith Canal drains into Burnett Bay/Calcasieu River, a navigable water of the United States.

Mr. Daniel purchased the site in August 1990, and subsequently cleared small trees and brush from his property using a bulldozer. In a site visit conducted on August 23, 1994, the MVN determined that the work did impact wetlands. Mr. Daniel was allowed to submit an after-the-fact permit application for work.

In October 31, 1995, Mr. Daniel submitted an after-the-fact permit application. In a letter dated June 8, 1995, the MVN offered a draft permit authorizing the construction of a personal residence, driveway, and out-building. Mr. Daniel refused to sign the draft permit because he did not believe the site to be a jurisdictional wetland. On June 3, 1997, Mr. Daniel filed a complaint against the MVN in the United States Court of Claims asserting the 1994 MVN JD was erroneous and resulted in a "taking" of his property. Judge Baskir's opinion filed May 10, 1999, granted the defendant's (MVN's) motion to be dismissed stating that the Court did not have jurisdiction over his claim.

In a letter, dated January 19, 2001 (MVN JD letter), the MVN determined that Mr. Daniel's property contained wetlands subject to the Corps of Engineers' jurisdiction. The MVN also determined that the Goldsmith Canal was a water of the United States. The MVN JD letter included a map depicting the wetlands and "Other Waters" of the United States, a Basis for Jurisdictional Determination form, and the Combined Notification of

Appeal Process (NAP)/ Request For Appeal (RFA) form.

Mr. Daniel submitted a completed RFA on March 22, 2001. The RFA was received within the requisite 60-day time period.

Information Received and its Disposition during the Appeal Review:

1. The MVN provided a copy of the administrative record. The appeal of an approved JD is limited to the information contained in the administrative record by the date of the Notice Of Appeal Process (NAP) for the approved JD. The NAP for Mr. Daniel was dated January 22, 2001. Three documents were considered new information because they were dated after the date of the NAP form:

- a. A letter from Ms. Van C. Seneca dated February 8, 2001, requesting the Corps of Engineers' position regarding jurisdiction over Mr. Daniel's property in light of the Supreme Court case, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (January 9, 2001) (SWANCC).
- b. An MVN memo dated February 12, 2001.
- c. An MVN letter dated February 22, 2001, responding to Ms. Seneca's letter.

These documents were not given any weight or consideration by the RO. No other new information is contained in the administrative record or was considered by the MVN.

2. The RO provided a list of questions to the MVN and the Appellant asked in the appeals conference. The list of questions is referred to as Exhibit 1 in the appeals conference.

3. The MVN provided a written response to the questions asked in the appeals conference, which was considered to be clarifying information. In addition, Mr. Daniel verbally responded to questions in the appeals conference. All responses are found in the verbatim record of the administrative appeal conference, dated 15 May 2001. The written response provided by the MVN was considered clarifying information and is referred to as Exhibit 2 in the appeals conference.

4. The MVN provided a color infra-red photograph, labeled Exhibit 3-LC7-D 1983. The photograph was considered clarifying information and referred to as Exhibit 3 in the appeals conference.

5. The Appellant provided an undated computer printout of plant species titled Regional Lists file Structure/Description referenced in the appeals conference as Exhibits 4 and 5. The Appellant could not provide documentation to verify where the information had been obtained or if the information contained an entire listing of all plant species for all regions. The MVN reviewed the document and could not attest that the MVN had reviewed the document in the JD. The information was considered new

information and not given any weight or consideration by the RO.

6. The MVN provided a color infra-red photograph entitled MOSSBLUFFNE and dated January 16, 1998. The photograph was considered clarifying information and is referred to as Exhibit 6 in the appeals conference.

7. The MVN provided an undated and untitled color infra-red photograph. In the appeals conference the MVN stated that the photograph was an enlargement of a section of the 1995 aerial photograph. The photograph was considered clarifying information and is referred to as Exhibit 7 in the appeals conference.

8. The MVN provided a color infrared photograph labeled as 4866-1449 and dated 1995. This photograph was considered clarifying information and is referred to as Exhibit 8 in the appeals conference.

9. The MVN provided a Moss Creek topographic map dated 1955 and later photo revised in 1967 and 1975. The topographic map was considered clarifying information and is referred to as Exhibit 9 in the appeals conference.

10. The Appellant provided pages from the publication entitled Louisiana Department of Environmental Quality Regulations. The MVN reviewed the publication and could not attest that the MVN had reviewed the document in their jurisdiction determination. The information was referred to as Exhibit 10 in the appeals conference, considered new information, and not given any weight or consideration by the RO.

11. The MVN Data form dated January 2001 was referenced during the appeals conference and an extra copy provided to the RO to aid in discussion during the appeals conference. This information was in the administrative file and referred to in the appeals conference as Exhibit 11.

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

Summary of Appeal Decision:

Appellant's Reason 1: No merit- The Federal Emergency Management Agency (FEMA) floodplain designations do not necessarily coincide with (nor dictate) the limits of the Army Corps of Engineers regulatory jurisdiction.

Appellant's Reason 2: Merit- The administrative record does not support the MVN JD decision.

Appellant's Reason 3: No Merit- The Appellant's claim that the subject wetlands had become derelict was not substantiated.

Basis for Appeal as Presented by Appellant (quoted from the Appellant's RFA and presented in bold lettering):

Appellant's Reason 1: The property is classified in a "C" Flood. A "C" Flood Zone is defined as out of the 100 year floodplain. This Land cannot be frequently flooded by waters of the united States, which is required to be a wetland, that the Corps would have Jurisdiction.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The Federal Emergency Management Agency (FEMA) floodplain designations do not necessarily coincide (nor dictate) with the limits of the Army Corps of Engineers regulatory jurisdiction under Section 404 of the Clean Water Act (CWA). Wetlands are identified using criteria/indicators of criteria as set forth in the 1987 Wetlands Research Program Technical Report Y-87-1 Corps of Engineers Wetlands Delineation Manual (1987 Manual) and subsequent guidance irrespective of FEMA floodplain designation.

The MVN JD for the project site wetlands was based on the presence of hydrophytic vegetation, hydric soils, and hydrology, as required by the 1987 Manual. The MVN stated that FEMA floodplain designations are indicative of areas that have a contiguous connection, through over-bank flooding with the referenced river and/or stream. The floodplain designations do not depict the ultimate limits of adjacent wetlands.

The MVN data sheet for Mr. Daniel's properly documents that wetland hydrology was present. The data sheet stated that the MVN reviewed recorded data, which consisted of aerial photographs. Field observations documented no surface water and 4.0 inch depth to saturated soil. One primary wetland hydrology indicator (saturated in upper 12.0 inches) and four secondary indicators (oxidized root channels in upper 12.0 inches, water-stained leaves, local soil survey data, and Facultative-Neutral (FAC- Neutral) Test) were documented. At the site visit the RO corroborated similar findings.

Appellant's Reason 2: The Property Are not adjacent to any waters Of the United States. Navigable or otherwise, there has been no waters of the United States named in this Jurisdictional Determination. THE Goldsmith Canal is not a natural tributary, it is a man made irregation ditch for rice farming and according to 33USC 1344 (c) it is not a water of the united states, and cannot be considered In Making a determination to a wetland status.

FINDING: This reason for appeal has merit.

ACTION: As detailed in the discussion, the jurisdictional determination decision is remanded for reconsideration and, as appropriate, to provide additional documentation in the MVN administrative record to support the decision.

DISCUSSION: The administrative record does not support the MVN JD decision. The administrative record did not clearly document how the Goldsmith Canal, a man-made ditch, was a tributary to the Calcasieu River. The MVN's position that the subject wetlands are adjacent to Goldsmith Canal is not substantiated in the administrative record. The administrative record lacked specificity of how the wetlands located in on the Appellant's property were adjacent to Calcasieu River.

There is insufficient evidence in the administrative record to document that Goldsmith Canal is a tributary to the Calcasieu River and thereby a water of the United States. The MVN JD stated that the Goldsmith Canal was a water of the United States because it was a tributary that eventually drains or flows into a navigable or interstate water (Calcasieu River). In the appeals conference, the MVN described the hydrologic connection as a surface water connection from Goldsmith Canal via Texaco Canal, to an unnamed natural drain (tributary) and ultimately into the Calcasieu River.

The Corps of Engineers' regulations at 33 CFR 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 CFR 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 jurisdiction extends to the Ordinary High Water Mark (OHWM) of the unnamed natural drain (tributary). In documenting the tributary connection the MVN did not clearly establish that the point of connection from the unnamed natural drain to the Calcasieu River was below the plain of the Calcasieu River OHWM.

The administrative record and clarifying information did not support the MVN's determination that the site's wetlands were adjacent to Goldsmith Canal. In the appeal conference, the MVN stated that the site's wetlands were adjacent to Goldsmith Canal and to the Calcasieu River. The MVN appropriately determined that portions of Mr. Daniel's property were wetlands and documented the presence of hydrophytic vegetation, hydric soils, and hydrology, as required by the 1987 Manual.

However, for the Corps of Engineers to maintain jurisdiction, the wetlands must be adjacent to waters of the United States. The Corps of Engineers' regulations that define waters of the United States [CFR 328.3(a)] include:

Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

The MVN Basis of Jurisdiction Determination form (MVN JD Basis form) dated January 16, 2001, stated that the property 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.

As discussed earlier, the MVN did not provide substantive documentation that Goldsmith Canal is a water of the United States. The MVN's position that the subject wetlands are adjacent to a water of the United States (Goldsmith Canal) is unsubstantiated.

The MVN administrative record lacks specific documentation that the subject wetlands are adjacent to the Calcasieu River, a water of the United States. There is an undated memo by an MVN project manager describing the wetlands, and the previously mentioned MVN JD Basis form, in the administrative record, which stated that the wetlands were adjacent to a navigable or interstate water. Only in the clarifying information provided during the appeals conference did the MVN provide some documentation showing how the wetlands are adjacent to the Calcasieu River. In the appeals conference the MVN stated that the subject wetlands are part of a larger, broader wetland system with a hydric component that forms a net or lace like pattern connecting through and draining to the Calcasieu River, a navigable water of the United States. The MVN provided infra-red color photography to document the hydric connection. Further documentation in the administrative record is needed to confirm the direct hydric connection.

Appellant's Reason 3: The permit Profefered indicated that the study of this property was in accordanec with the 1987 manuel. If that was the method then this property should have been classified as a nonwetland. The property is 23 feet above the mean low tide, and no water has been on this property in the ten years we have own it. If hypothetically, this property was ever a wetland, it has become derilect, and no longer would it be under the Corps Jurisdiction.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The MVN based the wetland jurisdiction determination on the presence of hydrophytic vegetation, hydric soils, and hydrology, as required by the 1987 Manual. The Appellant's claim that the subject wetlands had become derelict was not substantiated. Claims detailed in the Appellant's cover letter regarding the validity of the MVN JD and the MVN's consideration of mesophytes was not substantiated.

Wetlands, as defined by the 1987 Manual are present on the site. The project area contains depressional areas that exhibit all three mandatory criteria as required by the 1987 Manual (a predominance of hydrophytic vegetation, hydric soils, and the hydrologic indicators to support the previously mentioned indicators). The discussion section for the Appellant's Reason 1 discusses how the MVN documented the sites' hydrology. The MVN appropriately determined whether or not hydric soils were present using hydric soil indicators such as gleyed or low-chroma colors, with soft masses, accumulations, and/or depletions. The MVN appropriately documented that hydrophytic plant communities were encountered on the site. The dominant species in the tree, shrub/sapling, herbaceous, and/or woody vine layer were determined. Referenced sample points containing those dominants were documented in an undated memo to the file prepared by an MVN project manager and in a Corps of Engineers' Data form attached to the MVN JD. In accordance with the 1987 Manual, vegetative communities having greater than 50% of the dominants that are FAC or wetter are considered hydrophytic.

In the appeals conference the RO requested that the Appellant clarify what he had meant in the RFA about the property's wetlands becoming derelict. Mr. Daniel referred to the Corps of Engineers' regulations found at 33 CFR 328.5 and stated that because there is no water on the site the property had become derelict. Section 328.5 refers to the Corps of Engineers' jurisdiction in situations where there are permanent or gradual changes of shoreline configuration that result in similar alterations of the boundaries of waters of the United States. There is no evidence in the administrative record that such permanent or gradual shoreline configuration has affected the wetlands located on the Appellant's property. The MVN did state that the area surrounding the Appellant's property likely contained more wetlands than are present today. The MVN acknowledged that construction and improvement of drainage canals and ditches, and stream channelization has contributed to a reduction in wetland acreage in the area. These hydrologic impacts have not been sufficient to create non-wetlands throughout the entire project site.

In the Appellant's cover letter dated March 10, 2001 (cover letter), Mr. Daniel claimed that the vegetation found on his property is mesophytes and adapted to environments that are neither extremely wet nor extremely dry. The 1987 Manual defines mesophytes but does not make use of this designation in its methodology for identifying wetlands. The 1987 Manual references hydrophytes and utilizes the hydrophytic vegetation parameter that must be met for an area to be considered a wetland.

In the Appellant's cover letter, Mr. Daniel claimed the MVN JD was invalid because it was performed using offsite methodology with no field investigation. This claim is unsubstantiated. The 1987 Manual allows districts to perform jurisdictional determinations using on-site and/or off-site methods. The administrative record provides documentation that the MVN conducted several field investigations.

CONCLUSION: For the reasons stated above, I conclude that the Appellant's Reason 2 does have merit, and the Appellant's Reasons 1 and 3 do not have merit. The case has been remanded to the MVN for resolution.

Encl

EDWIN J. ARNOLD, JR.
Brigadier General, USA
Commanding