

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
AVERY - FILE NO. MVM-2013-00283
MEMPHIS DISTRICT**

2 MAR 2015

Review Officer (RO): Mr. Thomas A. McCabe, U.S. Army Corps of Engineers, Mississippi Valley Division, Vicksburg, Mississippi

Appellant: Mr. Ed Avery

Permit Authority: Section 404 of the Clean Water Act (33 USC 1344 et seq.)

Receipt of Request for Appeal: September 16, 2014

Site Visit/Appeal Meeting: October 27, 2014

Summary: The Appellant is appealing an approved jurisdictional determination (AJD) completed by the Memphis District (District) which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over a 5.33-acre wetland (Site 1) located in Section 5, T7N-R6E, Crittenden County, Arkansas. The Appellant asserts the District incorrectly determined that Site 1 is a wetland and is connected to waters of the United States.

For reasons detailed in this document, it is found that the District's administrative record (AR) adequately supports its determination that Site 1 is a wetland and is connected to waters of the United States. Therefore, the appellant's reasons for appeal do not have merit. As a result, the District's AJD dated 11 July 2014 stands.

Background Information: The appellant's property is a 160-acre tract located in Section 5, T7N-R6E, Crittenden County, Arkansas. The property contains two potential wetlands, a 5.33-acre wetland (Site 1) and a 1.70-acre wetland (Site 2).

On June 26, 2013 the USDA-Natural Resources Conservation Service (USDA-NRCS) provided the District with a determination that Sites 1 and 2 were both wetland. The NRCS requested the District review the provided delineation and make its own determination regarding jurisdiction under the CWA.

The District conducted site visits on July 8 and 17, 2013 and provided a Preliminary Jurisdictional Determination (PJD)

asserting jurisdiction for Sites 1 and 2 on July 23, 2013. Upon receipt of the PJD, the appellant then requested an AJD for both sites. In response, the District made further site visits on August 8, 2013, September 25, 2013, and June 12, 2014, and provided an AJD dated July 11, 2014, that stated Site 1 was a wetland subject to jurisdiction under Section 404 of the CWA. A separate AJD, also dated July 11, 2014, was provided to the appellant that concluded Site 2¹ was an isolated wetland and therefore not a water of the U.S.

The Appellant submitted a complete Request for Appeal (RFA) to the District office on September 16, 2014, which was forwarded to the Mississippi Valley Division office on September 18, 2014. In a September 24, 2014 telephone conversation, the RO explained the Corps Appeals Program and the Appellant clarified his "reasons for appeal or objections" he had listed on the RFA. The Appellant was informed by letter dated October 7, 2014, that the RFA was acceptable as it met the criteria for appeal found in 33 CFR Part 331.5. The Appellant's objections stated on the RFA are listed below, along with a statement as to how each objection was treated by the RO:

1. "Site 1 does not meet required measures for a wetland and exhibits no special qualities compared to surrounding farm land." - This objection was deemed acceptable and is the basis for Appeal Reason 1 (listed in the following section of this document).
2. "Drainage ditches on West and East side of site 1 are a man made road ditch and a field water furrow. These are routine practices of road construction and farming." - This objection was deemed acceptable and is the basis for Appeal Reason 2 (listed in the following section of this document).
3. "Site has been in cultivation and other agricultural practices". - This objection was not deemed acceptable by itself but was used along with objection 1 to summarize Appeal Reason 1.
4. "Site map MVM-2013-283 is incorrect and does not show correct water drainage/ditches." - This objection was not deemed acceptable by itself, but was used along with objection 2 to summarize Appeal Reason 2.

¹ AR, pages 179-186.

5. "If site 1 is determined to be a wetland; we cannot implement soil erosion and water management practices to prevent environmental damages. The Corp of Engineer's policy conflicts with USDA-NRCS EQIP Program. Thus the Corps of Engineers would be intentionally damaging the environment." - This objection was not deemed acceptable, although the different roles between government agencies were acknowledged and briefly discussed.

6. "I request a face to face meeting to discuss issues." This objection was addressed in a face to face meeting among the Appellant, the District, and the RO in an appeals conference.

Information Received and its Disposition During the Appeal Review:

The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. 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 AR. Such interpretation, clarification, or explanation does not become part of the AR, because the District Engineer did not consider it in making the decision on the AJD. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal review and its disposition is as follows:

1. The District provided a copy of the AR by mail to the RO and the Appellant on October 10, 2014. The AR is limited to information contained in the record on or before July 16, 2014, which is the date the District's AJD was provided.

2. As provided for in the Corps' Appeal Program regulations², the RO held a site visit and informal appeal meeting on October 27, 2014. A summary of the appeal meeting topics were

² 33 CFR 331.7(c).

documented by the RO in a memorandum for record (MFR) that was provided to the Appellant and the District on December 5, 2014. Comments to the MFR were received from the Appellant on December 10, 2014 and were used to update the final MFR. Using the Appellant's RFA and the clarifying discussions at the appeal meeting, the Appellant's reasons for appeal are summarized as follows:

Appeal Reason 1: The District incorrectly determined that Site 1 is a wetland.

Appeal Reason 2: The District incorrectly determined that Site 1 is connected to waters of the United States.

**APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE
MEMPHIS DISTRICT ENGINEER**

Appeal Reason 1: The District incorrectly determined Site 1 is a wetland.

Finding: This reason for appeal does not have merit. It is found that the District adequately documented that Site 1 is a wetland.

Action: No further action.

Discussion: In the RFA, the Appellant's objection #1 stated that Site 1 does not meet required measures for a wetland and exhibits no special qualities compared to surrounding farmland. During the appeals meeting, the Appellant clarified his statement that Site 1 was not a wetland is based on his experience of farming the adjacent ground. The Appellant stated that the soils are not porous because of a hard clay pan, which prevents the water from reaching the aquifer. The Appellant stated that it simply does not rain that much in the vicinity of Site 1, and therefore there is not enough water for the site to be a wetland. The Appellant acknowledged that even though Site 1 was wooded as compared to the surrounding farmland, that it did not exhibit the necessary characteristics of a wetland. In the RFA, the Appellant's objection #3 stated that the site has been in cultivation and other agricultural practices. The Appellant clarified this objection to refer to the majority of the property other than Site 1. In summary, the Appellant feels

that Site 1 was incorrectly determined to be a wetland due to the lack of adequate hydrology, soils and vegetation. The Corps and the USEPA³ jointly define wetlands as:

Those areas that are inundated or saturated by Surface or ground water at a frequency and duration Sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

According to the Corps' JD Guidebook⁴ (Guidebook), documentation is required to support a wetland determination. Wetlands will meet all three parameters of hydrology, hydrophytic vegetation, and hydric soils, as required by the agency regulations, and described in the Corps of Engineers Wetlands Delineation Manual⁵ (Manual) and/or appropriate Regional Supplement.

According to the AR, the District evaluated the subject property using U.S. Geologic Survey map, aerial photography, the USDA-NRCS soil survey for Crittenden County, FEMA/FIRM maps and the USDA-NRCS provided Data forms. The District documented on-site evaluations in 2013 on July 8 and 17, August 8, and September 25, and on June 12, 2014, with photographs. The District found that climatic and hydrologic conditions on the site were typical for this time of year and that normal circumstances were present. The District concurred with the Data Forms⁶ provided by USDA-NRCS, which indicated that all three wetland parameters (vegetation, soils, and hydrology) were met for Site 1.

During the Appeals meeting, the District clarified the process used to evaluate and reach the determination for wetlands found on the subject site. The District used criteria stipulated in the Atlantic and Gulf Coastal Plain Regional Supplement and 1987

³ Federal Register 1980 and 1982.

⁴ Jurisdictional Determination Form Instructional Guidebook. U.S. Army Corps of Engineers and Environmental Protection Agency, May 30, 2007.

⁵ Corps of Engineers Wetlands Delineation Manual, Wetlands Research Program Technical Report Y-87-1(1987 Manual).

⁶ AR, pages 45-50.

Wetland Delineation Manual to evaluate wetland hydrology, hydrophytic vegetation, and hydric soils. The District determined that Site 1 was a wetland.

Based on the information within the AR and the clarifying information from the appeals meeting, the District correctly followed regulatory criteria and associated guidance for identifying and delineating wetlands when it determined that Site 1 was a wetland. As a result, this reason for appeal does not have merit.

Appeal Reason 2: The District incorrectly determined that Site 1 is connected to waters of the United States.

Finding: This reason for appeal does not have merit. It is found that the District adequately documented that Site 1 is connected to waters of the United States.

Action: No further action.

Discussion: In the RFA, the Appellant's objection #2 stated that the drainage ditches on the West and East sides of Site 1 are a man made road ditch and a field water furrow, and that they are routine practices of road construction and farming. The Appellant's objection #4 stated that the District's site map "is incorrect and does not show correct water drainage/ditches." During the appeals meeting, the Appellant clarified his belief that the District's drainage map was inaccurate because the map shows the drainage from the northwest would flow uphill over a ridge at one point. The Appellant stated that he thought that Site 1 was not connected to the adjacent drainage ditches because of the disconnect by the road and furrow construction. The Appellant stated that because he thought there were no connections to waters of the U.S. that Site 1 should be considered "isolated."

The term "adjacent" is defined at 33 C.F.R. 328.3(c) to mean "bordering, contiguous, or neighboring." These section further states, "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 regulatory definition of adjacency is further clarified in the guidance that the Corps and EPA jointly issued in response to the

U.S. Supreme Court consolidated cases of *Rapanos v. United States* and *Carabell v. United States* (*Rapanos Guidance*).⁷ This guidance document explains that wetlands are adjacent if one of the following three criteria is satisfied: (1) there is an unbroken surface or shallow subsurface connection to jurisdictional waters; (2) they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.

The District determined in the AJD that Site 1 is a wetland that is adjacent to and directly abutting Relatively Permanent Waters (RPW) that flow directly or indirectly into a TNW. The District determined that the unnamed tributary that runs along the west and south sides of Site 1 is a Relatively Permanent Water (RPW) that has continuous flow "seasonally" to a downstream TNW. The District determined there to be a "discrete wetland hydrologic connection" between Site 1 (wetlands) and the unnamed tributary (RPW). The District defines the flow route to the TNW as: Wetlands direct surface connect to an Unnamed Tributary, to a Unnamed Tributary, to Ditch 13, to Blackfish Ditch, to Little Blackfish Bayou, to Ditch 16, to Blackfish Bayou, to Blackfish Lake, to Blackfish Bayou (TNW).⁸ On June 12, 2014, the District documented by observation and photographs: (1) that connection does exist between Site 1 and the drainage ditches; (2) that the connection was not severed due to any farming or road construction practices; and (3) that the water drainage/ditches shown on the site map were correct.⁹

The District stated during the Appeals meeting that the following three hydrologic connections exist from Site 1 to waters of the U.S. that eventually connect downstream to a Traditional Navigable Water (TNW): (1) an abutting surface water connection from the SW corner of Site 1 to the unnamed tributary running along the southern boundary; (2) the adjacent unnamed tributary that drains the rice field east along the farm

⁷ Guidance Memorandum. "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*." Original guidance released 5 June 2007; revised guidance released 2 December 2008.

⁸ AR, pages 168-178.

⁹ AR, pages 145-158.

road, under the road and then along the southern boundary;
(3) overland sheet flow from the SE corner of Site 1 across the
agriculture field to the ditch flowing north to south.

The AR supports the District Commander's determination,
following current regulations and guidance that Site 1 is
subject to jurisdiction under Section 404 of the CWA. As a
result, this reason for appeal does not have merit.

Conclusion: After reviewing and evaluating the RFA, the
District's AR, and recommendation of the RO, I have determined
that the District Commander's decision regarding the wetland
determination was reasonable, supported by the AR, and does not
conflict with laws, regulations, executive orders, or officially
promulgated policies of the Corps Regulatory Program. The
appeal has no merit.



Michael C. Wehr
Major General, U.S. Army
Division Commander