# ADMINISTRATIVE APPEAL DECISION
# CLEAN WATER ACT
# RICHARD KESLER - FILE NO. 200104152
# ST. PAUL DISTRICT

**ADMINISTRATIVE APPEAL DECISION**
**Mr. Richard Kesler**
**File No. 200104152**
**St. Paul District**
**16 July 2002**

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

Appellant/Applicant: Mr. Richard Kesler, Appleton, WI

Authority: Section 404 of the Clean Water Act (CWA)

Receipt of Request For Appeal (RFA): 10 October 2001

Appeal Conference Date: 20 November 2001

Site Visit Date: 20 November 2001

Background Information: Mr. Kesler (Appellant) requested a jurisdiction determination (JD) for property located near White Lake in Shawano County, WI. The site is located within the USACE St. Paul District (MVP) boundary and consists of two lots purchased by Appellant and his wife. The property is bounded between the shoreline of White Lake and a paved roadway named Lakeshore Drive. Lakeshore Drive intercepts surface water runoff moving down a slope from adjacent agricultural fields toward White Lake. A culvert under Lakeshore Drive enters the Kesler property from the east and conveys runoff from the upland fields through a shallow swale, through the Kesler property, and finally to forested wetlands adjacent to White Lake.

The MVP conducted a field investigation on 10 May 2001, and demarcated the wetlands. In a letter dated 18 June 2001, the MVP determined that Appellant’s property contained wetlands subject to USACE jurisdiction.

The MVP authorized the relocation of drainage on the subject property by a Department of the Army General Permit (GP/LOP-98-WI) on 21 June 2001. The authorization was contingent on the confirmation of a Wisconsin Department of Natural Resources (WDNR) water quality certification and on-site creation of wetlands.

The MVP received the Appellant's RFA on 15 August 2001 (within the 60-day time period). The MVP forwarded the RFA to MVD on 23 August 2001. Although the MVD did not receive the RFA within 60 days of the date of the Notice of Appeal Process (NAP), the RFA was reviewed for completeness. Upon review, the RFA was determined to be unacceptable because it did not contain the reason(s) for requesting an appeal of the approved jurisdictional determination (JD).

By letter of 12 September 2001, the MVD notified the Appellant that his RFA was unacceptable and gave him the opportunity to submit a revised RFA. The Appellant submitted the revised RFA on 10 October 2001.

On 9 November 2001, prior to the appeal conference, the MVP reported to the RO that the Appellant had plowed the site. In a 14 November 2001 E-mail, the MVP informed the RO that it would not pursue the plowing of the site as a violation. Since the MVP determined not to pursue the action as a violation, the administrative appeal continued.

Information Received and Disposition During the Appeal Review:

1. The RO provided the MVP and the Appellant with a list of questions to be asked in the appeal conference (enclosure 1).

2. The MVP 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 NAP for the approved JD. The NAP for Appellant was dated 21 June 2001.

3. At the appeal conference, the following was provided:

a. MVP provided a written response to the questions asked in the appeal conference. The Appellant and his wife verbally responded to the questions in the appeal conference. Notes of these responses were taken, recorded in a Memorandum For the Record (MFR), and submitted to the parties for review. No challenges were made to the MFR from the Appellant or his wife. This was considered to be clarifying information (enclosure 2).

b. MVP provided a U.S. Geological Survey Aerial Photograph entitled "39 km NW of Green Bay, WI, United Stated 23 Apr 1998," and labeled "01-04152-GRK Ric Kesler" (enclosure 3). This was considered clarifying information.

c. MVP provided an untitled topographic map depicting the Appellant’s site and the drainage outlet from White Lake (enclosure 4). This was considered clarifying information.

d. MVP provided a copy of the Public Notice for the GP/LOP-98-WI-MMW issued 6 April 2000 and the description of the GP/LOP-98-WI-MMW authorization procedures (enclosure 5). This was considered clarifying information.

e. The Appellant provided photos that were not available to MVP during permit evaluation. The photos were rejected as new information.

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

Summary of Appeal Decision:

Appellant's Reason 1: Merit - The administrative record does not contain substantial evidence to support the MVP JD decision.

Appellant's Reasons 2 and 3: No Merit - Findings by the WDNR are not determinative of USACE regulatory jurisdiction under Section 404 of the CWA.

Appellant's Reason 4: No Merit - The Appellant did not provide substantial evidence to support his allegation that the property's prior agricultural use constituted an exemption from permitting requirements under Section 404 of the CWA.

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

**Appellant's Reason 1: The original wetlands identification and delineation is to [sic] vast and I would like it reviewed.**

FINDING: This reason for appeal has merit.

ACTION: The JD decision is remanded for reconsideration by the MVP and for it to provide substantial evidence in the administrative record, for its determination, as required by the 1987 Manual[1].

[1] 1987 Wetlands Research Program Technical Report Y-87-1, Corps of Engineers Wetlands Delineation Manual

DISCUSSION: The MVP did not support its decision that portions of the Appellant's property contain wetlands, as required by the 1987 Manual.

The MVP Basis of JD form, dated 21 June 2001, states:

> Property referenced in the attached correspondence contains an area of water/wetland areas considered to be a water of the United States because the area:
>
> …
>
> 5. is connected to or adjacent to a tributary of any waters/areas identified under paragraphs (1) through (4) of 33 CFR 328.3(a). [328.3(a)(5)]
>
> 6. contains wetlands or water adjacent to waters/areas defined as waters of the U.S. in paragraphs (1) through (5) in 33 CFR328.3 (a). [328.3(a)(7)].

In the finding at paragraph 5 above, the record contains substantial evidence that the subject property is connected or adjacent to a tributary that eventually drains or flows into a navigable water (Wolf River). Evidence in the administrative record (a topographic map and aerial photograph) shows the tributary connection. Lakeshore Drive intercepts surface water runoff moving down slope from adjacent crop fields toward White Lake. A culvert under Lakeshore Drives enters the Appellant's property from the east, and delivers runoff water from the upland fields through a shallow swale. Water flows from the shallow swale into the forested fringe wetlands along White Lake, into White Lake, through a northwest outlet to the West Branch of the Shico River, and ultimately to the Wolf River.

However, there was insufficient evidence in the administrative record to support the MVP's decision that the subject property contains wetlands at that point of tributary connection. The record contains no data sheets establishing the presence of hydrophytic vegetation, hydric soils, and hydrology, the three parameters required by the 1987 Manual and subsequent guidance to indicate the presence of wetlands.

The MVP conducted an onsite inspection and flagged the wetland/upland boundary. The administrative record also referred to a primary indicator for the hydrology parameter; the alleged wetland area had saturated soils within 6 inches of

the surface. Only one primary hydrology indicator is required to meet the hydrology parameter. The administrative record does not contain substantial evidence to support MVP's finding that the hydrophytic soil and vegetation parameters are present. The administrative record contains only conclusory statements, which generally depict the site's vegetation and soils. The vegetation was described as a scrub/shrub wetland consisting of willow and dogwood and surrounded by a fringe of reed canary grass. The MVP stated that soil pits were excavated and examined to reveal the presence of dark chroma soils that extended beyond the alleged wetland boundary. These statements notwithstanding, the soils and vegetation evidence did not sufficiently determine that the hydrophytic vegetation and hydric soil parameters for the presence of wetlands were met, as mandated by the 1987 Manual.

On remand, the MVP should provide substantial evidence (data sheets and/or other documentation, as required) to show that the relevant portion of the Appellant's property exhibits indicators of all three mandatory parameters for wetlands as required by the 1987 Manual, i.e. a predominance of hydrophytic vegetation, hydric soils, and the hydrologic indicators. Additionally, the MVP should provide substantial evidence that those portions of the Appellant's property that are determined to be wetlands, if any, are adjacent to or contiguous to the forested fringe wetlands along White Lake.

**Appellant's Reason 2: The J.D. as described will not be acceptable to the Wisconsin Dept. of Natural Resources.**

**And**

**Appellant's Reason 3: The area that the Army Corps identified as wetlands is a manmade ditch that comes from a culvert installed under a town road. This ditch is not navigable as determined by the Wisconsin Dept of Natural Resources.**

FINDING: These reasons for appeal do not have merit.

ACTION: No action is required.

DISCUSSION: The response to these Reasons for Appeal 2 and 3 are similar and are combined for convenience. The WDNR determinations regarding the existence of wetlands or the navigational component of an area are not determinative of USACE

regulatory jurisdiction under Section 404 of the CWA. USACE determines wetlands using criteria and/or indicators of criteria as set forth in the 1987 Manual and subsequent guidance.

**Appellant's Reason 4: The property was a cut hay field when I bought it in 1996. No wetlands existed.**

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The Appellant did not provide substantial evidence to support his allegation that the property's prior agricultural use constituted an exemption from permitting requirements under Section 404 of the CWA. There is no evidence in the administrative record of on-going farming operations or of a Natural Resource Conservation Service (NRCS) farm designation for the subject property.

The administrative record shows that the Appellant's property is not part of an established, on-going farming operation. The CWA exempts from the Section 404 program requirements those discharges associated with normal farming, ranching, and forestry activities such as plowing, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices (33 CFR 323.4 (a)(1)(ii)). Prior converted designated farmland is excluded from the definition of waters of the United States for the purposes of the CWA (33 CFR Part 328). Other farm designations such as farmed wetland pasture or hayland (FWP) or farmed wetlands (FW) are considered wetlands (Section 514, NRCS Food Security Manual, Third Edition, March 1994).

The MVP's investigation found no NRCS farm designation for the subject property. The Appellant did not provide the MVP with information to show that the site was a hayfield. The MVP's review of the NRCS historical slides indicated that the area had been a hayfield, but that it had not been cultivated since 1995. Even if the subject property had a prior converted farm designation, the site's designation would have changed because more than five years have elapsed since cultivation. Under Regulatory Guidance Letter 90-07, if prior converted cropland is abandoned and wetland conditions return, the area will be subject to regulation under section 404 of the CWA.

CONCLUSION: For the reasons stated above, I conclude that the Appellant's Reason 1 has merit, but that Appellant's Reasons 2, 3, and 4 do not have merit. The case has been remanded to the MVP for resolution.

/signed/

5 Encls

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