ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
KITTERLIN CREEK, LLC - FILE NO. 200310580
VICKSBURG DISTRICT

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Kitterlin Creek, L.L.C.
File No. 200310580
Vicksburg District
August 21, 2004

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

Appellant/Applicant: Mr. Wayne Hagan, Kitterlin Creek, L.L.C., Clinton, Louisiana

Appellant Representative: Mr. M. Dwayne Johnson, Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, L.L.P., Baton Rouge, Louisiana

Authority: Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act

Receipt of Request for Appeal (RFA): May 14, 2004

Appeal Conference and Site Visit Date: June 29, 2004

Background Information: Kitterlin Creek L.L.C. (Kitterlin Creek) is appealing Vicksburg District's February 11, 2004, jurisdiction determination (MVK JD) on property located in La Salle Parish, Louisiana.

The Vicksburg District (MVK) received complaints from individuals asserting that Kitterlin Creek had not acquired the proper environmental permits for work associated with developing a hunting club within the Kitterlin Creek Bay area in LaSalle Parish, Louisiana. Based on an October 29, 2003, field investigation, the MVK determined Kitterlin Creek was responsible for unpermitted land clearing and filling activities in wetlands associated with ditching and clearing along an existing woods road and the shoreline area. In addition, Kitterlin Creek removed an existing water control structure at Kitterlin Creek Bay for the purpose of repairing the structure and also constructed a drainage ditch to lower water levels of the lake to enhance waterfowl habitat. Kitterlin Creek asserted the clearing associated with the road was to repair ruts with the intention of raising the roadbed to facilitate all-weather access for hunting/fishing clients to Fools River Lake. The clearing of bald cypress was intended to allow clients the opportunity to observe the lake from a proposed hunting lodge.

In its response to the onsite meeting, Kitterlin Creek voluntarily decided to restore the wetlands adjacent to the woods road and the area along the shoreline and to restore the constructed ditch to pre-project elevations.

By letter dated February 11, 2004, MVK issued a Cease and Desist Order and approved JD advising Kitterlin Creek that the discharge of dredged material into wetlands associated with land clearing, ditching, and removal of a water control structure were subject to Department of the Army regulatory requirements. MVK accepted Kitterlin Creek's permit application for a water control structure pending verification of the restoration effort. MVK also provided a copy of the Basis of jurisdiction determination (Basis of JD) and Combined Notification of Appeal Process (NAP)/RFA forms. By letter dated April 7, 2004, MVK acknowledged the Combined NAP/RFA and Basis for JD forms provided in its February 11, 2004, letter had not been properly dated, and MVK reissued dated NAP/RFA and Basis of JD forms.

In his letter dated April 7, 2004, and on behalf of Kitterlin Creek, Mr. M. Dwayne Johnson (of Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, L.L.P.) provided an RFA and a document entitled "Attachment A." The RO received the RFA and other submitted materials by facsimile on April 7, 2004, and by Federal Express on April 8, 2004.

The RO reviewed the information provided and learned that the approved JD was associated with an unauthorized activity and that Kitterlin Creek had not provided MVK a signed tolling agreement. MVK notified the RO that a permit application had been submitted; however, because the application did not include the after-the-fact ditch excavation or clearing for the access road and shoreline, it was not accepted. In addition, Kitterlin Creek had not verified its completion of initial corrective measures. In a letter dated April 22, 2004, the RO informed Kitterlin Creek the RFA was not complete based on the absence of the signed tolling agreement, the incomplete permit application, and the lack of verification that initial corrective measures had been completed. Kitterlin Creek was given the opportunity to correct the identified deficiencies and submit a revised RFA.

In a letter dated May 14, 2004, Kitterlin Creek provided a revised RFA. The RO received the revised RFA by facsimile on May 14, 2004, and by mail on May 17, 2004. The revised RFA included a May 14, 2004, cover letter to the RO; a document entitled "Attachment A"; an April 30, 2004, letter to the

Vicksburg District; a signed tolling agreement; a May 14, 2004, letter to the Vicksburg District; and a copy of the Kitterlin Creek Voluntary Restoration Plan. The MVK confirmed its receipt of the tolling agreement and verified that the permit application was complete and that initial corrective measures had been completed. General Don T. Riley accepted the RFA on June 8, 2004. The site visit and appeal conference were held by the RO on June 29, 2004.[1]

Summary of Appeal Decision: The MVK JD is a complete approved JD. MVK appropriately determined that the Kitterlin Creek property contains wetlands subject to the Corps' jurisdiction under Section 404 of the Clean Water Act. There is insufficient documentation in the administrative record to support the determination that the Kitterlin Creek property contains waters of the United States subject to Section 10 of the Rivers and Harbors Act of 1899 (Section 10). Additional documentation regarding the geographic limit of Section 10 waters is needed.

Information Received and Its Disposition During the Appeal Review: Pursuant to 33 C.F.R. Section 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 NAP for the MVK JD is dated April 7, 2004. Neither Kitterlin Creek nor MVK 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.

a. MVK provided a copy of the administrative record that was considered in reaching this decision.

b. In its letter dated April 30, 2004, Kitterlin Creek provided a copy of an executed Tolling Agreement.

c. In a letter dated June 17, 2004, Mr. Dwayne Johnson provided a list of attendees for the site visit and appeal conference.

d. By facsimile dated June 18, 2004, the RO provided questions to Kitterlin Creek and MVK for discussion at the appeals conference. The questions are Exhibit 1 in the Appeal Conference Memorandum for Record (MFR).

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[1] The appeal meeting was held at a different location than originally proposed at the Appellant's request.

e. In letters dated June 23 and 25, 2004, Mr. Will Coenen notified the RO of other persons attending the site visit and appeal conference.

f. During the appeals conference, the RO provided two Administrative Appeal Process Flowcharts. The flowcharts are Exhibit 2 in the Appeal Conference MFR.

g. During the appeals conference, MVK provided a written response to the RO's questions. The written responses are Exhibit 3 in the Appeal Conference MFR and are considered clarifying information.

h. During the site visit the RO took seven digital pictures of the site. The photo points are noted on a topographic map of the site. The photos and map comprised Exhibit 4 in the Appeal Conference MFR and are considered clarified information.

The RO provided copies of all information received during the appeals process to both Kitterlin Creek and MVK.

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

Appellant's Reason 1 for Appeal: Procedural deficiencies. The approved JD is incomplete. The Corps has not specifically delineated the area subject to jurisdiction under Section 10 of the Rivers and Harbors Act and/or under Section 404 of the Clean Water Act. The Vicksburg District incorrectly cited its basis for jurisdiction.

FINDING: This reason for appeal has no merit.

ACTION: No action.

DISCUSSION: The MVK JD is a complete approved JD. Appeal regulations found at 33 C.F.R. 331.2 define a JD as a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act or a written determination that a waterbody is subject to regulatory jurisdiction under Section 10. Such geographic JDs may include but are not limited to a determination of the presence of wetlands, the ordinary high water mark, and interstate commerce nexus for isolated waters. An approved JD

is defined as a Corps document stating the presence or absence of waters of the United States on a parcel **or** a written statement and map identifying the limits of waters of the United States on a parcel and will include a basis of JD.[2] While the MVK did not provide a delineation of waters of the United States in its JD, it determined the presence of waters of the United States and provided a basis of JD. These actions constitute a complete approved JD.

The incorrect citation on the Basis of JD form is a harmless procedural error. In its April 7, 2004, letter MVK corrected its error by reissuing a corrected Basis of JD form.

Appellant's Reason 2 for Appeal: The Vicksburg District lacks jurisdictional authority over Kitterlin Creek Bay under Section 10 of the Rivers and Harbors Act of 1899.

FINDING: This reason for appeal has merit.

ACTION: The MVK should document how gauge data for 25% duration correlates to physical fact Ordinary High Water Mark (OHWM) determinations and how it constitutes an appropriate means to determine the lateral geographic limit of the Corps jurisdiction under Section 10. Alternatively, MVK may elect to determine the OHWM for Kitterlin Creek property by physical site inspection.

DISCUSSION: There is insufficient documentation in the administrative record to support the MVK JD that the Kitterlin Creek property contains waters of the United States subject to Section 10. Additional documentation regarding the geographic limit of Section 10 waters is needed.

MVK's February 11, 2004, Cease and Desist (C&D) Order and approved JD stated the work was in violation of Section 10.[3] The MVK Basis of JD form, dated April 7, 2004, identified three categories of waters of the United States as defined in the Corps regulations at 33 C.F.R. 328.3(a). Category 1 waters were described as "Waters, which are, were, or could be susceptible

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[2] Appeal regulations define a basis of JD as a summary of the indicators that support the Corps approved JD. MVK completed a Basis for JD form that documented those indicators. 33 C.F.R. § 331.2.

[3] The construction of any structure in or over any navigable water of the United States, the excavating from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. 33 U.S.C. § 403 and 33 C.F.R. §§ 322.1 *et seq.*

to use in interstate or foreign commerce (including all waters subject to the ebb and flow of the tide)." This definition also corresponds to the definition of Navigable waters of the United States as defined in 33 C.F.R. 329.4. Navigable waters of the United States are regulated under both the Clean Water Act and the Section 10.

Corps regulations found at 33 C.F.R. 329.5 *et seq.* provide the factors that must be examined when making a determination whether a waterbody is a navigable water of the United States. Three conditions must be satisfied: (a) Past, present, or potential presence of interstate or foreign commerce; (b) Physical capabilities for use by commerce; and (c) Defined geographic limits of the waterbody. In support of factors (a) and (b), topographic maps and the MFR, Summary Report of Unauthorized Activity (C&D memo) document Little River as a navigable-in-law water of the United States and Kitterlin Bay as navigable-in-fact due to the existence of boat ramps used for recreational activities. In the appeals conference the MVK clarified that persons charged the public to use boat ramps on the Kitterlin Creek property. Mr. Hagan stated he was aware of a ramp accessing Kitterlin Creek Bay on International Paper property. The Quad map for Fishville, Louisiana shows the possible presence of at least three boat ramps on Kitterlin Bay and Alligator Brake.

There is insufficient documentation to support the MVK JD relative to factor (c), the extent of defined geographic limits of the navigable waters of Little River. Corps regulations found at 33 C.F.R. 329.11 (a) state Federal geographic and jurisdictional limits extend laterally to the entire water surface and bed of a navigable water to include all the land and waters below the OHWM. Corps regulations at 33 C.F.R. 329.11(a)(1) state the OHWM on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a 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. The first five indicators are referred to as a physical fact OHWM determination.

The MVK asserts that gauge data for 25% duration historically correlates to a physical fact OHWM determination.[4] MVK stated in the appeals conference that in lieu of an onsite physical fact OHWM determination, the lateral extent of Section 10 jurisdiction was determined as the ordinary high water elevation of Little River at the site. The C&D memo stated MVK utilized gauge data for a 25% duration to determine the ordinary high water elevation for two locations along the Little River (Catahoula Lake and Highway 8 near Trout Creek). These elevations were extrapolated to determine the ordinary high water elevation of Little River at the site. MVK stated in the appeals conference that this determination was supported by the information found on topographic maps and onsite evidence of dominant obligate plant species.

There is no evidence in the administrative record to scientifically support this method of determining the OHWM. Upon remand the MVK should document how gauge data for 25% duration correlates to physical fact OHWM determinations and constitutes an "appropriate means" of determining the lateral geographic limit of the Corps' jurisdiction. Alternatively, the MVK may elect to determine the OHWM for Kitterlin Creek property by physical site inspection.

Appellant's Reason 3 for Appeal: The Vicksburg District has no jurisdictional authority over Kitterlin Creek Bay under Section 404 of the Clean Water Act. The wetlands in Kitterlin Creek Bay are not adjacent to the Little River.

FINDING: This reason for appeal has no merit.

ACTION: No action.

DISCUSSION: There is substantial documentation in the administrative record that the Kitterlin Creek property contains wetlands subject to the Corps' jurisdiction under Section 404 of the Clean Water Act.

The MVK Basis of JD form, dated April 7, 2004, identified three categories of waters of the United States as defined in the Corps regulations at 33 C.F.R. 328.3(a). Category 1 waters were described as "Waters, which are, were, or could be susceptible to use in interstate or foreign commerce (including

[4] The 25% duration is a particular water elevation that is equaled or exceeded 25 % of the time. Gauge data is routinely collected at a point on a waterway. Gauge data is collected by MVK's Hydraulic Branch.

all waters subject to the ebb and flow of the tide)." Category 4 waters were described as "Impoundments of other categories of waters." Category 7 waters were described as wetlands that were determined by the occurrence of hydrophytic vegetation, hydric soils and wetlands hydrology adjacent to Category 1 and 4 waters.

The administrative record contains substantial documentation that wetlands occur on the Kitterlin Creek property and are connected or adjacent to a tributary that eventually drains or flows into a navigable and interstate waters. The C&D memo, aerial photographs, data sheets, soil maps, and National Wetlands Inventory Map (NWI map) document the presence or absence of existing wetland parameters.[5] The MVK stated in the appeal conference that the wetlands found on the Kitterlin Creek property are contiguous to Little River. Kitterlin Creek Bay and the Little River compose an extensive riverine/wetland complex as illustrated by the National Wetland Inventory mapping. Aerial photographs depict wetland signatures from Kitterlin Creek Bay to Little River. There is a surface water connection between the Little River and Kitterlin Creek Bay shown by U.S.G.S. topographic mapping, aerial photography, and site visit photographs. The administrative record documents surface water flows from wetlands in Kitterlin Creek Bay, to Kitterlin Creek, through a closure dam to Little River, into the Ouachita River, into the Black River, into the Red River and ultimately into the Mississippi River. All of these rivers are Section 10 navigable waters of the United States.

The RFA asserts Kitterlin Creek Bay is separated from Little River by approximately a quarter mile of ridge line and is not adjacent to the Little River. 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.'" The ridge line is a natural river berm. During the appeals conference, the MVK stated that portions of the ridge line contain wetlands. This is supported by the NWI map. The existence of the river berm does not remove the wetlands on the Kitterlin Creek property from the Corps' jurisdiction. The RO confirmed the conclusions of MVK as to

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[5] The 1987 Corps of Engineers Wetlands Delineation Manual requires positive evidence of hydrophytic vegetation, hydric soils, and wetland hydrology for a determination that an area is a wetland.

adjacency of the tracts at issue to waters of the United States based on the June 29, 2004, site visit.

CONCLUSION: For the reasons stated above, the MVK JD is remanded to the District Engineer for additional documentation to support its finding that Kitterlin Creek Bay is subject to the Corps' jurisdiction under Section 10. MVK appropriately determined that the Kitterlin Creek property contains wetlands that are subject to the Corps' jurisdiction under Section 404 of the Clean Water Act. The final Corps decision will be the District Engineer's decision made pursuant to my remand.

Robert Crear

Enclosure

Robert Crear
Brigadier General, U.S. Army
Division Engineer