ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
PORT OF WEST ST. MARY - FILE NO. 20-000-028689
NEW ORLEANS DISTRICT

ADMINISTRATIVE APPEAL DECISION

Port of West St. Mary
File No. 20-000-2689
New Orleans District
November 20, 2000

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

Appellant/Applicant: Mr. A. Phillip Prejean, Executive Director, Port of West St. Mary

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

Receipt of Request For Appeal (RFA): August 24, 2000

Appeal Conference Date: October 20, 2000

Site Visit Date: October 20, 2000

Background Information: Mr. A. Philip Prejean, Port of West St. Mary (the Port), requested a Department of the Army Jurisdiction Determination (JD) on May 17, 2000 (Exhibit I). The 150-acre project site is located within the New Orleans District (MVN), south of Highway 83 and north of the Gulf Intracoastal Waterway, St. Mary Parish, Louisiana. In a letter dated June 28, 2000, the MVN determined that wetland areas subject to the Corps' jurisdiction do occur on the property (Exhibit A). The project site wetlands could not be accurately delineated without a field investigation. The MVN requested field data concerning vegetation, soils, and hydrology. The MVN also determined that the Ivanhoe Canal is a navigable waterway and subject to Corps jurisdiction under Section 10 of the Rivers and Harbors Act. The MVN's JD 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) and RFA form. The MVN advised the Port of the Corps of Engineers Administrative Appeal Process.

The Port provided a completed RFA dated July 18, 2000, and attached additional Natural Resource Conservation Service (NRCS) information (Exhibit L). The Port contended that the property is a prior-converted wetland and can be returned to agricultural production without a Department of the Army (DA) permit.

Administrative Appeal Regulations, Section 331.6(c) state:

> *An approved JD will be reconsidered by the District Engineer if the affected party submits new information or data to the District Engineer within 60 days of the date of the NAP.*

33 C.F.R. 331.6(c).

The MVN reviewed the new information and reissued the approved JD. In a letter dated August 9, 2000, the MVN responded to the Port's RFA. The MVN stated:

> *Although the property was historically planted in an agricultural commodity crop, it is now considered abandoned and subject to CWA [Clean Water Act] permitting requirements.*

Exhibit G.

The MVN stated that its position remains that:

> *1) parts of the property are in wetlands subject to Corps jurisdiction under the CWA; 2) A DA permit under section 404 of the Clean Water Act will be required prior to depositing or redistributing fill material into these wetlands; and 3) our jurisdiction determination dated June 28, 2000, remains valid.*

Exhibit G.

The Administrative Appeal Regulations state that the affected party may appeal the District Engineer's reissued or new approved JD. The MVN advised the Port of the Corps of Engineers Administrative Appeal Process, and enclosed a RFA form.

The Port supplied another RFA dated August 21, 2000 (Exhibit B). The RFA was received within the requisite 60-day time period. Mr. A. Philip Prejean is the Port's representative for this Administrative Appeal.

Information Received and its Disposition during the Appeal Review:

1. An infrared photograph dated January 1998(Exhibit K). This was considered to be clarifying information.

2. A MVD Data Sheet, dated June 29, 1999 that compared policies regarding the completion of in-house determinations, acreage limits for requesting data, and completion of preliminary/approved determinations (Exhibit F). This was considered to be clarifying information.

3. The MVN completed a request for JD form on May 15, 2000 (Exhibit J). One page was inadvertently omitted from the administrative record and was provided at the Appeals Conference. This was considered to be clarifying information.

4. A three-part document titled, "Army Corps of Engineers Standard Operating Procedures For the Regulatory Program," dated April 8, 1999, hereinafter referred to as the SOP (Exhibit E). This was considered to be clarifying information.

All supplemental clarifying information received was provided to the Appellant and the MVN at the Appeals Conference.

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

Appellant's Reason: We feel that the J.D. unfairly burdens the Port of West St. Mary by forcing the Port to assume what we consider exorbitant cost to attempt to identify suspected wetlands, with no guarantee that wetlands identified or not identified would be accepted by the Corps of Engineers. If the Corps' had made a specific determination on what part of the acreage in question are wetlands, the Port of West St. Mary would not find this appeal necessary. We feel that a J.D. based on the supposition of wetlands is not fair nor is it professionally acceptable and legally questionable.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The MVN's approved JD, dated June 28, 2000, meets the requisite criteria as an approved JD (Exhibit A). The administrative record provides an adequate and reasonable basis supporting the Districts Engineer's decision.

The MVN JD constitutes an approved JD. The MVN affirmed that waters of the United States were present and notified the applicant of its determination in its "Basis of Jurisdiction Determination" dated May 23, 2000. The fact that a wetland delineation was not included in the MVN's JD does not disqualify the MVN JD as an approved JD.

The Corps of Engineers Administrative Appeal regulations (33 CFR Sections 320-331) established policies and procedures to be used for the administrative appeal of approved JDs, permit applications denied with prejudice, and declined permits. An approved Jurisdictional Determination 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. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.*

33 C.F.R. 33.2 (emphasis added).

The MVN policy regarding handling of JD requests was consistent with officially promulgated Corps implementation guidance.

MVN detailed its policy regarding handling of JD requests in its Memorandum For the Record dated July 25, 2000 (Exhibit G). In the Appeals Conference, the MVN stated that it conducts in-house reviews on any property, regardless of size or intended use (Exhibit D). The MVN gathers the field data required for wetland delineations on non-commercial properties smaller than five acres. The MVN will provide an in-house, approved delineation when the clear signature indicated on an aerial photograph is supported by soils data and the MVN's familiarity with the area.

The MVN based its policy on the SOP that states:

> *Field wetland delineations are essential to timely and accurate process and evaluation of permit in these areas. However, delineations are time and resource intensive and, in some districts, require an inordinate amount of time that the district would be devoting to other aspects of the process.*

Exhibit E.

The priority for accomplishing JD/delineations is: 1) verification of applicant prepared delineations; 2) field wetland delineations of “mom and pop” requests in conjunction with a permit application; 3) other JD/delineations, not associated with a permit application. The JD/delineations not associated with a permit application should be conducted as resources and time allow. The Port’s JD request did not include a permit application (Exhibit J). Accordingly, the Port’s delineation request held a low priority.

The MVN’s policy regarding field delineations is consistent with other MVD districts. At the Appeals Conference the MVN provided an MVD Data Sheet, which detailed each MVD district’s policy and procedures concerning JDs (Exhibit F).

Prior to the SOP, the Department of the Army, Directorate of Civil Works, Washington D.C. (Corps Headquarters) provided policy guidance for a similar case. In a letter dated April 4, 1995, Corps Headquarters stated:

> *Due to the limited staff and resources, the District has determined that it can no longer conduct site investigations on properties exceeding 50 acres in size. On large tracts, the District reviews available data, such as maps, aerial photographs, soils data, and anything the District can use to advise the applicant of the presence or absence of wetlands. Based on this preliminary study the District can then notify the applicant of its findings and request the specific data that is*

> *required to make a jurisdictional determination. In this manner, the District can respond to most jurisdictional inquiries in a reasonable amount of time.*

(Exhibit H).

The MVN administrative record provides an adequate and reasonable basis supporting the MVN decision. The MVN correctly identified the presence of wetlands on the property. The MVN conducted a site investigation, determining the presence of wetlands; the complexity of the wetland/upland system; and the condition of the site such that a DA permit would be required for the proposed activity should jurisdictional wetlands be present. The MVN MFR dated June 14, 2000, documented the findings from the site investigation (Exhibit G).

The administrative record provided justification for requesting additional surveys. The subject property encompassed 150 acres; the wetland hydrology on the property is questionable in certain areas; the applicant was a commercial entity; and the jurisdictional determination request did not contain a permit application.

The MVN stated in the Appeals Conference that the MVN was not able to accommodate the Appellant’s request for a delineation, because detailed site verification was required (Exhibit D). Site verification may not be required in instances where soils data confirms a clear wetland signature as shown on an infrared photo. Even though the wetland signature shown on the infrared map was relatively constant on the subject property, the MVN determined that detailed site verification was required because of the site’s soils and history of leveeing and pumping practices (Exhibit D).

At the site visit, the RO investigated two areas previously visited by the MVN during a preliminary survey (Exhibit D). The RO assessed vegetation, soils, and hydrology at each site to determine if wetland characteristics were present and to validate the previous findings of the District. There were wetlands present on the site and two distinct hydric soil types on the property: Baldwin, and Alligator soils. The Baldwin soils typically occupy a slightly higher topographic landscape position. There was a definable vegetative break indicating a change in hydrological conditions at the higher elevations and evidence of historical leveeing and pumping practices in the area.

Finally, the Appellant's RFA stated that the exercising of jurisdictional control over this property by the Corps of Engineers results in a taking of these properties. The assertion of jurisdiction alone is not a taking.

CONCLUSION: For the reasons stated above, I conclude that the Appellant's Reason for this administrative appeal does not have merit.

Encl

FREDERICK L. CLAPP, JR.
Colonel, EN
Acting Commander