ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
DIKMEN/MALONIS - FILE NOS. 2006-4013-DJP AND 2006-4018-DJP
ST. PAUL DISTRICT

ADMINISTRATIVE APPEAL DECISION
DIKMEN/MALONIS JURISDICTIONAL DETERMINATIONS
ST. PAUL DISTRICT
CORPS FILE NUMBERS 2006-4013-DJP AND 2006-4018-DJP
AUGUST 9, 2008

Review Officer: James B. Wiseman, Jr., U.S. Army Corps of Engineers, Mississippi Valley Division (MVD)

Appellants: Dr. Ned Dikmen, Chicago, Illinois
Ms. Karen Malonis, Chicago, Illinois

Authority: Section 404 of the Clean Water Act

Approved Jurisdictional Determination Conference: 14 January 2008

Summary of Appeal Decision: The appeals do not have merit. The administrative record contains substantial evidence that the jurisdictional determinations (JDs) made by St. Paul District (MVP) are consistent with U.S. Army Corps of Engineers (Corps) regulations, guidance and policy.

Background Information:

Dr. Ned Dikmen and Ms. Karen Malonis are appealing approved jurisdictional determinations made by MVP for their properties in the Village of Pleasant Prairie, Kenosha County, Wisconsin. Dr. Ned Dikmen's lot (0.25 acre) is identified as Lot 7, Block 34, Carol Beach Estates Subdivision, Unit 4, located in section 20, T1N-R23E. Ms. Malonis owns two lots totaling 0.54 acre and identified as Lots 19 and 20, Block 15, Carol Beach Estates Subdivision, Unit 2, located in section 29, T1N-R23E. Ms. Malonis' lots are adjoining. Dr. Dikmen's lot is located approximately 1.2 miles north of the two Malonis lots. All three lots are located in a dune/swale complex adjacent[1] to Lake Michigan.

In October 1994, the Southeastern Wisconsin Regional Planning Commission (SEWRPC) conducted a jurisdictional determination (JD) of Dr. Dikmen's lot and delineated 0.06 acre of wetlands in two swales. Subsequently, Dr. Dikmen applied for a Department of the Army (DA) standard individual permit to fill the wetlands for construction of a single-family residence. MVP used the wetland boundaries established by SEWRPC for their permit

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[1] The term "adjacent" means bordering, contiguous, or neighboring. 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." (33 C.F.R. 328.3).

evaluation. Prior to a decision by MVP on the permit application, the Wisconsin Department of Natural Resources (WDNR) denied Dr. Dikmen's application for state water quality certification (Section 401 of the Clean Water Act). On 8 August 1995, MVP denied the DA permit without prejudice[2]. In 1998, Dr. Dikmen requested that MVP conduct a JD on his lot. On 18 May 1998, MVP conducted a JD and found the same two wetland swales delineated by SEWRPC but determined that the extent of wetlands in the larger swale was less than determined by SEWRPC. SEWRPC and WDNR did not concur with the MVP determination. Consequently, an interagency team revisited the site on 19 October 1998, but a consensus was not reached. It was determined that the MVP delineation met Federal wetland criteria[3], and that the SEWRPC delineation met state wetland criteria. The MVP and SEWRPC wetland delineation boundaries were surveyed and plotted on plats of the lots.

SEWRPC conducted a wetland delineation on Ms. Malonis' lots in May 2001 and supplied a copy to MVP by copy of their letter dated 6 July 2001.

In July 2006, Ms. Malonis and Dr. Dikmen requested that SEWRPC update the jurisdictional determinations for their lots. On 10 November 2007, SEWRPC and WDNR conducted a field inspection, located the surveyed markers from the 1998 delineation, determined that nothing had changed, and concluded that the existing survey accurately represented the wetland boundary. On 15 November 2006 and 1 January 2007, Dr. Dikmen contacted MVP to express his concerns about the SEWRPC delineations and requested an independent delineation. MVP conducted a field investigation of Dr. Dikmen's and Ms. Malonis' lots on 19 June 2007. MVP determined that MVP's 1998 wetland boundary map for Dr. Dikmen's lot was in error, and that the boundary identified by SEWRPC in 1994 and 1998 accurately represented the wetlands on the lot. By letter dated 25 July 2007, MVP issued an approved JD to Dr. Dikmen and enclosed the wetland boundary map from the SEWRPC 19 October 1998 delineation. By letter dated 26 July 2007, MVP issued an approved JD to Ms. Malonis and confirmed the SEWRPC wetland boundary determined in 2001.

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[2] Denial without prejudice means that there is no prejudice to the right of the applicant to reinstate processing of the Army permit application if subsequent approval is received from the appropriate Federal, state and/or local agency on a previously denied authorization and/or certification (33 C.F.R. 320.4(j)).

[3] Explicit in the definition [of wetlands] is the consideration of three environmental parameters: vegetation, hydrology, and soils. Positive wetland indicators of all three parameters are normally present in wetlands. (Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Technical Report Y-87-1. U.S. Army Waterways Experiment Station. Vicksburg, MS. Online version, p. 6)

Via facsimile on 20 August 2007, Dr. Dikmen and Ms. Malonis (Appellants) submitted separate Request for Appeal (RFA) forms for jurisdictional determinations made by MVP on their lots in Carol Beach Estates. The two requests were not accepted for appeal, since no specific reasons for appeal were given. By letter dated 21 September 2007, and according to appeal regulations at 33 C.F.R. 331 et seq, the Appellants were given until 20 October 2007 to revise and resubmit their requests. Via facsimile on 18 October 2007 and by letters received 19 October 2007, the Appellants submitted revised RFA forms, citing six reasons for appeal[4]. Upon review, as explained in letters from the RO to the Appellants dated 19 November 2007[5], two reasons for appeal were determined to be valid, and the appeals were accepted.

Information Received and Its Disposal During the Appeal:

33 C.F.R. 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this JD. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding JDs, as that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his RO conducts an independent review of the administrative record to address the reasons for appeal cited by the Appellant. The administrative record is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAP) form. Pursuant to 33 C.F.R. Section 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information to MVD. 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 administrative record. Such interpretation, clarification, or explanation does not become part of the administrative record, because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

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[4] (1) the JD did not include supplemental information; (2) MVP relied on a previous JD by a state agency; (3) the administrative record may demonstrate a possible disparity in the location of the wetland/non-wetland line; (4) the term "normal circumstance" is not defined; (5) the JD is not based on current data; (6) there is a discrepancy between the Federal and state definition of wetlands.

[5] Exhibits 1 and 2.

1. With cover letter dated 17 August 2007, MVP provided a copy of the administrative record to the RO and to the Appellants. The administrative record is limited to information contained in the record by the date of the NAP form/JD letter, in this case, 25 July 2007 for Dr. Dikmen and 26 July 2007 for Ms. Malonis.

2. On 14 January 2008, the RO conducted an appeal meeting by teleconference. The RO prepared a Memorandum for Record dated 19 February 2008 summarizing the meeting[6]. The MFR is considered clarifying information.

3. Via electronic mail and fax on 15 January 2008, the Appellants expressed their concern over the fact that Mr. Steve Eggers of MVP and Dr. Donald Reed of SEWRPC had co-authored a book[7]. They also expressed concern about mistakes made during the Corps 1998 field investigation, and they requested that a group of Corps experts from another part of the country redo the wetland delineation on their property.

There is nothing in the administrative record to indicate that Mr. Eggers acted with any bias towards the Appellants, and the Appellants have not presented any evidence of collusion between Dr. Reed and Mr. Eggers or any reason why SEWRPC or MVP would treat the Appellants any differently than any other landowners in the Carol Beach area.

It is not the role of the Division Engineer to substitute his judgment for that of the District Engineer, and there is nothing in the appeal regulations which would require a group of experts from another part of the country to perform a jurisdictional determination as requested by the Appellants.

4. In response to the draft MFR summarizing the appeal conference sent by the RO on 12 February 2008, the Appellants responded via electronic mail on 19 February 2008. A copy of this email is attached as Exhibit 2 in the final MFR. The Appellants expressed their concern about the sample point locations, particularly sample point 3 on Dr. Dikmen's lot[8]. See below for a discussion and analysis of this sample point.

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[6] The RO prepared a draft memorandum on 12 February 2008 and supplied copies to MVP and the Appellants for comment. MVP did not respond. Via electronic mail on 19 February 2008, the Appellants provided comments which were incorporated into the final memorandum.

[7] Eggers, Steve D. and Donald M. Reed. 1997. Wetland Plants and Plant Communities of Minnesota and Wisconsin. U.S. Army Corps of Engineers, St. Paul District. 263 p.

[8] Identified later in this document as Plot ID 3.

The Appellants also expressed concern about the fact that MVP agreed with the wetland line establish by SEWRPC using only four data points and stated that "the Corps acted hastily and in a sloppy way and jumped to judgment with SEWRPC."

As discussed below, MVP performed the JDs on the Appellants' lots according to regulation, guidance (including procedures established in the 1987 Manual) and policy.

Basis for Appeal as Presented by Appellants

Appellants' Accepted Reasons for Appeal

1. The administrative record may demonstrate a possible disparity in the location of the wetland/non-wetland line.

FINDING: This reason for appeal does not have merit.

DISCUSSION: The initial delineation, as related to this appeal, of the wetland/non-wetland boundary on Dr. Dikmen's lot (Exhibit 3) was based on a site visit conducted by SEWRPC in October 1994. At Dr. Dikmen's request in 1998, MVP conducted an independent assessment of the wetlands on his lot and issued a letter and wetland delineation map (Exhibit 4) on 22 June 1998. MVP determined that the jurisdictional area was smaller than what was identified by SEWRPC in 1994, particularly in the easternmost swale. SEWRPC and WDNR did not concur with that delineation[9]. After an interagency meeting on 19 October 1998, it was determined that the MVP delineation met Federal wetland criteria, and that the SEWRPC delineation met state wetland criteria. The MVP and SEWRPC wetland delineation boundaries were surveyed and plotted on a plat of the lot (Exhibit 5).

A delineation of the wetland/non-wetland boundary on Ms. Malonis' two adjoining lots was made by SEWRPC in May 2001. A copy of that delineation was forwarded to MVP.

In July 2006, the Appellants requested that SEWRPC update its delineations. Prior to the site visit, the Appellants had the previous wetland/non-wetland boundaries surveyed and flagged on all three lots. On 10 November 2006, representatives from SEWRPC and WDNR visited the property and determined that the previously delineated boundaries had not changed since 1998 for

[9] MVP Memorandum by Dale J. Pfeiffle dated 1 February 2007.

the Dikmen lot and 2001 for the Malonis lots[10]. By electronic mail on 15 November 2006, Dr. Dikmen provided MVP with his assessment of the results of the 10 November 2006 field trip and expressed his dissatisfaction with the SEWRPC/WDNR determination that "nothing has changed."

MVP did not participate in the 10 November 2006 field investigation. Therefore, as of that date, MVP had not made an approved JD for Ms. Malonis' lots[11], and the JD for Dr. Dikmen's lot had expired[12].

By letter dated 1 January 2007, the Appellants requested that MVP conduct an independent wetland delineation on their three lots. By letter dated 21 February 2007, MVP advised the Appellants to hire a private consultant to gather field data and submit a report. Subsequently, MVP agreed to use Corps personnel to conduct a field investigation, and on 19 June 2007, MVP regulatory staff members visited all three lots.

Dikmen Lot: By letter dated 25 July 2007, MVP issued an approved JD, including a wetland delineation map (Exhibit 6), to Dr. Dikmen which determined that the wetland boundary identified on his lot by SEWRPC in 1998 and confirmed in 2006 was valid. By agreeing with the wetland boundary established by SEWRPC on Dr. Dikmen's lot, MVP disavowed the boundary shown on the MVP map in the JD dated 22 June 1998 (Exhibit 4), which had expired in 2003. The area at issue is the easternmost swale on Dr. Dikmen's lot, particularly the southwestern part of the swale, and this is an area of concern to Dr. Dikmen[13].

During the 19 June 2007 site visit, MVP recorded data from this part of the swale on a data form identified as Plot ID 3. As shown on the form, MVP determined that "normal circumstances" did not exist, that the site was a "problem area," and that the area was not significantly disturbed at the time of the site visit. MVP determined that the site was a "problem area" due

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[10] Letters dated 18 December 2006 and 21 December 2006 from SEWRPC (Philip C. Evenson) to Village of Pleasant Prairie (Thomas Shircel).

[11] MVP had received a copy of the SEWRPC 2001 JD but had not issued a Corps approved JD letter.

[12] Regulatory Guidance Letter (RGL) 05-02 issued 14 June 2005, which replaced RGL 94-01 with similar wording, states that "…all approved geographic jurisdictional determinations completed and/or verified by the Corps must be in writing and will remain valid for a period of five years …".

[13] Dr. Ned Dikmen, personal communication.

to the presence of sandy soils and to the occurrence of seasonal wetlands in the Chiwaukee Prairie/Carol Beach area[14]. The investigation determined that two of the three Federal wetland criteria (hydrophytic vegetation, hydric soils) referred to above at footnote 3 were present.

For Plot ID 3, MVP found that hydrophytic vegetation[15] was present based on methodology found in *Corps of Engineers Wetland Delineation Manual*[16] (1987 Manual). The soils were sampled and analyzed using standard procedures found in the 1987 Manual and related guidance. In the soil section of the data form for Plot ID 3, MVP noted the presence of two hydric soil indicators: "gleyed or low-chroma colors" and "organic streaking in sandy soils" thus confirming the presence of hydric soils.

A positive determination of wetland hydrology, under normal environmental conditions, requires the presence of one primary or two secondary field indicators[17]. On the data form for Plot ID 3, MVP did not identify a primary or secondary hydrology indicator. In the remarks area of the hydrology section of the form for this plot, MVP stated:

> Topographic low spot: interdunal swale with hydrology influenced by lake levels. Lake Michigan water levels have been below average for 8 consecutive years. Drier conditions over that time frame have resulted in observations of FACU species invading interdunal swales that were dominated by hydrophytes and delineated as wetlands prior to the protracted low lake levels. These conditions are not "normal circumstances" with regard to hydrology.

In the Remarks section of the Wetland Determination section of the data form for Plot ID 3, MVP stated:

> Seasonal wetland problem area. Additionally, lack of hydrology indicators must be put in context of protracted low lake levels and drier conditions, which are not considered "normal circumstances."

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[14] See Remarks section of data forms from 19 June 2007 field investigation.

[15] In order to have hydrophytic vegetation, more than 50% of the dominant plant species must be classified as obligate (OBL), facultative wetland (FACW), or facultative (FAC) (excluding FAC-) in the National List of Species That Occur in Wetlands. Environmental Laboratory, page 17.

[16] Environmental Laboratory.

[17] Environmental Laboratory, User Note, page 34.

> Hydric soils and dominance by hydrophytes do not typically develop in uplands; rather, they are valid indicators of the long-term wetland conditions at this sample point. A return to average or above average lake levels would be expected to reverse the drying trend and reestablish normal hydrology in the interdunal swales. Over a period of years, it is expected that hydrophytic species would predominantly replace the FACU species that have established during the protracted low lake levels.

MVP summarized its analysis of problem area wetlands in the Chiwaukee Prairie/Carol Beach dune/swale complex in memoranda dated 3 November 2006 and 13 April 2007, which are part of the administrative record. While the memoranda were prepared to specifically address wetland swales on a lot approximately 500 feet south of Dr. Dikmen's lot, the analysis found in the memoranda is germane to this appeal, since the lots are in close proximity, have a similar topographic setting in relation to Lake Michigan, and have similar soils and vegetation.

Based on positive indicators of hydrophytic vegetation and hydric soils found during their field investigation and their analysis of historical hydrology data, MVP concluded that their 1998 map had been in error since it did not take fluctuating lake levels into consideration.

Malonis Lots: Ms. Malonis' two lots are located approximately 1.2 miles south of Dr. Dikmen's lot and are also in the Chiwaukee Prairie dune/swale complex. At the request of the Appellants, MVP conducted a field investigation of these two lots on 19 June 2007. Subsequently, by letter dated 26 July 2007, MVP issued an approved JD and included a wetland delineation map (Exhibit 7). The letter stated that MVP had determined that the wetland boundary identified by SEWRPC on Ms. Malonis' lots in 2001 was valid.

During the 2007 field investigation requested by appellants, MVP identified two wetland areas on the two lots, a larger area occupying most of lot number 20 and part of lot number 19 and a smaller area in the back corner of lot number 19 (see Exhibit 7). On the data form for sample sites in both of these wetland areas, MVP confirmed the presence of hydrophytic vegetation and found two indicators of hydric soils according to standard methodology in the 1987 Manual. However, no primary and only one secondary indictor of wetland hydrology was found

(FAC-neutral test[18]). MVP noted the existence of saturated soil at a depth of 13 inches in the larger wetland area and at a depth of 20 inches in the smaller area, but neither of these observations meets the field indictor criteria for a primary indicator of wetland hydrology.

In the remarks section of the data forms for the sample sites in the two wetland areas, MVP used the same explanation presented in the data form for the wetland swales on Dr. Dikmen's lot indicating that this was a seasonal wetland problem area and that the lack of hydrology indictors was related to protracted low levels of Lake Michigan. MVP concluded that wetland hydrology would reestablish when the lake returned to average levels, thus under normal circumstances, the swales were wetlands.

The administrative record supports the conclusion by MVP that the swales on the Appellant's lots are wetlands and that the wetland boundaries delineated on maps included with approved jurisdictional determinations dated 25 July 2007 (Dikmen) and 26 July 2007 (Malonis) accurately define the areas subject to Corps of Engineers jurisdiction pursuant to Section 404 of the Clean Water Act.

ACTION: No action is required.

2. The JD is not based on current data.

FINDING: This reason for appeal does not have merit.

DISCUSSION: Vegetation and soils information used for the MVP jurisdictional determinations for the Appellants' lots were collected during a 19 June 2007 field investigation. On the 19 June 2007 data forms, MVP did not identify a primary or secondary hydrology indicator on Dr. Dikmen's lot and only found one secondary indictor of hydrology on Ms. Malonis' lots.

However, data forms for all three lots show that MVP determined that "normal circumstances" do not exist, and that this dune/swale complex is a "problem area" due to the presence of

[18] The FAC-neutral test is performed by compiling a list of dominant plant species across all strata in the community, and dropping from the list any species with a facultative indicator status (i.e., FAC, FAC–, and FAC+). The FAC-neutral test is met if >50 percent of the remaining dominant species are rated FACW and/or OBL. This indicator may be used in communities that contain no FAC dominants. If there are an equal number of dominants that are OBL and FACW versus FACU and UPL, non-dominant species should be considered.

sandy soils and to the occurrence of seasonal wetlands in the Chiwaukee Prairie/Carol Beach area.

The 1987 Manual recognizes that wetland determinations on some sites may be difficult when wetland indicators may be present only at certain times of the year or during certain years in a multi-year cycle. Positive indicators of hydrophytic vegetation, hydric soils, and/or wetland hydrology cannot always be found due to effects of recent human activities or natural events.[19]

In addition, the 1987 Manual should be implemented with flexibility. Use of the manual is not meant to substitute for an investigator's experience and good judgment. Year-round experience with wetlands in local areas is important for accurate results, and use of the manual as a cookbook can produce erroneous results, particularly in problem areas[20].

ACTION: No action is required.

CONCLUSION:

Using the best available data and approved methods from the 1987 Manual tempered by experience and professional judgment, MVP concluded that the swales on Dr. Dikmen's and Ms. Malonis' lots are wetlands. Their conclusion is based on the presence of hydric soils, the presence of hydrophytic vegetation, a concave landscape position and analysis of historical hydrology data and is supported by substantial evidence in the administrative record.

For the reasons stated above, I conclude that Dr. Dikmen's and Ms. Malonis' requests for appeal do not have merit. The final Corps decision will be the MVP jurisdictional determination letter dated 25 July 2007 for Dr. Dikmen and MVP jurisdictional determination letter dated 26 July 2007 for Ms. Malonis.

Date: 9 Aug 2008

MICHAEL J. WALSH
Brigadier General, U.S. Army
Division Engineer

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[19] Environmental Laboratory, p. 73

[20] Regulatory IV, Wetland Delineation. Lecture notes. 1987 Corps of Engineers Wetland Delineation Manual training course administered by Environmental Research and Development Center (ERDC), Vicksburg, MS.