

ADMINISTRATIVE APPEAL DECISION

ECHUBBY LAKE HUNTING CLUB; FILE NO. 17530

LITTLE ROCK DISTRICT

Review Officer: James E. Gilmore, U.S. Army Corps of Engineers, Southwestern Division, Dallas, Texas

Appellant Representative: Mr. Joseph A. Strode; Bridges, Young, Matthews, & Drake

Little Rock District Representatives: Bradley Myers; Project Manager

Permit Authority: Section 10 of the Rivers and Harbors Act & Section 404 of the Clean Water Act.

Receipt of Request For Appeal (RFA): 24 October 2002

Appeal Conference/Site Visit Date: 30 October 2002

Background Information: The Corps of Engineers, Little Rock District's (district) involvement with this action started in March 2001 as a reported unauthorized activity. By letter dated 4 October 2001, the Echubby Lake Hunting Club (Club) submitted a permit application to the district for nationwide permit authorization to construct a road crossing across Echubby Lake. The district Regulatory staff conducted a site inspection on 1 November 2001. During the site inspection, district personnel noted that the Club had completed additional work not included in its permit application. The district determined that the work completed by the Club was in violation of Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. A Cease and Desist letter was issued to the Club on 9 January 2002. In the letter, the district stated that the appellant existing work did not comply with the Nationwide Permit General Conditions and in particular General Condition 1. General Condition 1 addresses adverse effects on navigation. The Club was also informed that it either had to remove the unauthorized fill and restore the impacted areas or revise its permit application to include all proposed work. In its 1 February 2002 response letter to the district, the Club again stated that the areas in question are not navigable waters and, therefore, are not subject to the Corps jurisdiction under Section 10 of the Rivers and Harbors Act. In the same letter, however, the Club did acknowledge that the project areas are subject to the Corps jurisdiction under Section 404 of the Clean Water Act. On 21 February 2002, members of the Club and their legal counsel met with the district staff to discuss the district's position that Echubby Chute and Echubby Lake were subject to the Corps jurisdiction under Section 10 of the Rivers and Harbor Act. During the meeting, the district stated that its position is that Echubby Chute, Echubby Lake and the connecting ditch are subject to the Corps jurisdiction under Sections 329.4 and 329.11. In a letter dated 7 March 2002, the

Club stated its position regarding Echubby Lake, Echubby Chute and the connecting ditch. It is the Club's position that:

“Echubby Lake Chute, Echubby Lake, and the connecting ditch are all privately owned property on which the property owner has the right to control access, and to control all hunting and fishing activities. We do not believe that these areas are navigable even in their current state, because there is no commercial utility, there is no exit point, the surrounding lands are all owned by Echubby Lake Hunting Club, and the area does not meet the historical test of navigability. Furthermore, as it affects property rights, the determination of navigability must be made with reference to the Arkansas River in its natural state, prior to the navigation project, rather than in its current state. All of the areas in question were clearly private property before the Arkansas River navigation project, and since that time the valuable property rights of hunting and fishing have neither been taken nor granted away.”

By letter dated 25 June 2002, the district again informed the Club that it had the option to remove the unauthorized structures/fill or apply for a permit to retain the structures/fill. The Club was also told that once a completed permit application had been received, they would have 60 days to appeal the district's approved jurisdictional determination. On 24 July 2002, the Club requested and received an additional 30 days to submit its Section 404 permit application. The Club submitted a revised permit application on 21 August 2002. The district requested additional drawings on 3 September 2002. The Club submitted the requested drawings on 18 September 2002. The Club requested authorization to discharge dredged and fill material into waters of the United States associated with the construction of two, 60-foot long by 12-foot wide road crossings adjacent to the Arkansas River. In addition, the Club requested authorization for an existing 40-foot long by 8-foot wide railroad car crossing on the channel connecting Echubby Chute to Echubby Lake. A Public Notice regarding the Club's application was issued by the district on 7 October 2002.

Appeal Decision and Instructions to the Little Rock District Engineer:

Appeal Reason 1: “The Corps has no jurisdiction under Section 10 of the Rivers and Harbor Act because the water areas of the application (Echubby Chute, Echubby Lake and the connecting ditch) are not navigable in fact and are not subject to a navigational servitude of the U.S., and the Corps regulations are excessively broad.

FINDING: This appeal reason does not have merit.

ACTION: No action required.

DISCUSSION: The administrative record supports the district's conclusion that Echubby Chute and Echubby Lake are navigable waters of the United States and, therefore, subject to the Corps jurisdiction under Section 10 of the Rivers and Harbors Act of 1899. The district's jurisdictional

determination was based on Section 329.4 and 329.11 of the Corps Regulations. Section 329.4 addresses the general definition of navigable waters of the United States. Section 329.4 states:

“A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.”

- Section 329.11 of the Corps Regulations discusses the Corps geographic and jurisdictional limits of navigation in rivers and lakes. Section 329.11(a) states:

“Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.”

The Corps authority to exert jurisdiction over the “connecting ditch” is discussed under Sections 322.5(g), 329.6(a) and 329.8. Sections 322.5(g) and 329.8 discuss the Corps authority to regulate “artificial channels”. Section 329.6 discusses what is commerce. Section 322.5(g) states:

“A canal or similar artificial waterway is subject to the regulatory authorities discussed in 322.3, of this Part, if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States in a manner which affects their course, location, condition, or capacity, or if at some point in its construction or operation it results in an effect on the course, location, condition, or capacity of navigable waters of the United States. In all cases the connection to navigable waters of the United States requires a permit.”

Section 329.8(a) states:

“An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property.”

Section 329.8(a)(3) states:

“Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the

public; it is then not considered to be a navigable water of the United States.”

Echubby Lake is connected to Echubby Chute by an improved channel (ditch), which extends the lateral reach the ordinary high water of the Arkansas River to Echubby Lake. A review of aerial photographs from the 1950s indicates that the ditch existed during that time frame and that it was connected to Echubby Chute. Echubby Chute is a natural water feature that is connected to the Arkansas River. The Arkansas River is part of the McClellan-Kerr Arkansas River Navigation System.

Appeal Reason 2: “The Corps has no jurisdiction under §404 of the Clean Water Act because the road crossings which the applicant desires to construct are specifically excluded from your jurisdiction pursuant to 33 C.F.R. 323.4.”

Finding: This appeal reason does not have merit.

Action: No action required.

Discussion: The appellant cited 33 CFR 323.4 as a reason why the Corps did not have jurisdiction to regulate the proposed road crossings under Section 404 of the Clean Water Act. Section 323.4 addresses activities that involve established and on-going farming, silviculture, or ranching operations. Specifically, Section 323.4 addresses the permitting requirements related to the exemptions for such activities as laid out in Section 404(f)(1) of the Clean Water Act. As 33 CFR 323.4 may relate to the appellant in this case, it is clear that the provision contained in this part of the regulation involves issues relating to permit requirements for this type of activity, not whether the Corps has jurisdiction. It otherwise appears the appellant has already acknowledged the Corps’ jurisdiction under Section 404 of the Clean Water Act and contests only the manner of permitting that may be required. Consequently, it cannot be found that the appellant has identified a jurisdictional issue under 33 CFR 323.4 that needs to be addressed. Once the Little Rock District Engineer makes a final decision regarding the appellant’s permit application, the appellant can submit a request for appeal to the Division Engineer regarding the proffered or denied permit.

Appeal Reason 3: “The Corps has no jurisdiction to condition the grant of a permit upon a requirement that a private landowners grant public access to his private property, or otherwise to adjudicate property rights issues between landowners and the public.”

Finding: This reason for appeal is premature and based upon conjecture regarding action that may or may not be taken in response to the appellant’s permit application.

Action: No action required.

Discussion: A Department of the Army Permit has not been issued to the appellant for this action. Therefore, the appellant can only appeal the district approved Jurisdictional Determination. Once the Little Rock District Engineer makes a final decision regarding the

appellant's permit application, the appellant can submit a request for appeal to the Division Engineer regarding the proffered or denied permit.

CONCLUSION: For the reasons stated above, I find that the appellant's reasons for appeal do not have merit.

15 Jan 03
(Date)



Robert Crear
Brigadier General, US Army
Commanding