ADMINISTRATIVE APPEAL DECISION
JAMES BRATTON
APPROVED JURISDICTIONAL DETERMINATION
FILE # D-10705/(02)
GALVESTON DISTRICT
23 March 2004

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

Appellant Representative: Richard D. Jones

Galveston District Representatives: Andrew Williams

Permit Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): 22 January 2004

Appeal Conference/Site Visit Date: 25 February 2004

Background Information: The Galveston District's (District) initial involvement with this action was on 12 August 1999, when it received a request from Mr. Gary Greene of Gary Greene Realtors to conduct a jurisdictional determination on a 4.6-acre tract, which was subdivided into two separate lots. The project site was located approximately 0.1 mile west of Jamaica Beach on FM 3005, Galveston County, Texas. The District advised Mr. Greene, by letter dated 16 September 1999, that it would not be able to respond to his request in a timely manner and recommended that he hire an environmental consultant to perform the jurisdictional determination. Mr. Greene hired Mr. Richard D. Jones of Jones/Smith Environmental Services, Inc., to perform a wetland delineation/jurisdictional determination on the tract. By letter dated 31 May 2000, Mr. Jones submitted his findings, which included a surveyed drawing depicting the location and size of waters of the United States located on the two lots. On 5 July 2000, Mr. Jones met with District personnel regarding the jurisdictional determination. Mr. Jones was requested to identify the "spring high tide" line on the survey he provided to the District. Mr. Jones made the requested changes and submitted a new survey to the District on 18 July 2000. The District issued a preliminary jurisdictional determination[1] on 18 August 2000, which stated that three areas, totaling 0.16 acres, exist within the site. The District identified these areas as waters of the United States subject to the Corps jurisdiction under Section (§) 404 of the Clean Water Act (CWA).

On 3 September 2003, the District received a report that an alleged violation of §404 of the CWA had occurred on lot two. The District conducted a preliminary site investigation on 9 and 11 September 2003. The District concluded that no violation of §404 of the CWA had occurred. During its initial investigation, the District determined that the previous jurisdictional determination, issued in August 2000, appeared to be in error. Mr. Bratton was informed of the

[1] §331.2 states that Preliminary JDs are advisory in nature.

District's initial findings in a letter dated 16 September 2003. The District conducted a final site investigation on Mr. Bratton property on 23 October 2003.

Based on information obtain during the 23 October 2003 site visit and desk review of other information including aerial photographs, the District determined that two of the wetlands areas identified as Wetland Areas A and B were actually one contiguous wetland and not two separate wetlands as initially identified in the 14 August 2000 delineation and verification. The District issued a new jurisdictional determination to Mr. Bratton on 5 December 2003. This determination was an approved jurisdictional determination, which is an appealable action.

Summary of Decision: The appellant's request for appeal does not have merit, because current Regulatory regulations and guidance support the District's decision to issue a new approved jurisdictional wetland determination.

Appeal Decision and Instructions to the Galveston District Engineer: The reason for appeal described below is based on the appellant's Request for Appeal but has been rephrased to clearly describe the findings that must be made regarding this appeal.

Appeal Reason 1: The appellant feels that the District did not follow applicable Corps guidance, policy or regulations when the District changed its original jurisdictional determination.[2]

FINDING: This appeal does not have merit

ACTION: None required

DISCUSSION: During the 25 February2004 site meeting, Mr. Bratton's consultant, Mr. Richard Jones, stated that he did not think it was fair for the Corps to issue a jurisdictional determination that was subject to being changed by the Corps at a later date. Mr. Jones was referring to the following statement contained in the District's 14 August 2000 preliminary determination letter "This jurisdictional determination is valid for a period of 5 years from the date of this letter unless new information warrants a revision prior to the expiration date."

By Regulatory Guidance Letter (RGL) dated 14 August 1990, the Corps issued guidance pertaining to expiration dates of wetland jurisdictional determinations. RGL 90-6, Expiration Dates for Wetlands Jurisdictional Determinations states: "Since wetlands are affected over time by both natural and man-made activities, we can expect local changes in wetland boundaries. As such, wetlands jurisdictional delineations will not remain valid for an indefinite period of time." RGL 90-6 required all Corps district to include a statement in all jurisdictional determination letters stating that the jurisdictional delineation/determination is "valid for a period of three years from the date of the letter unless new information warrants revision of the delineation before the expiration date." Each Corps district was required to issue a public notice on this guidance. The full text of the RGL was included in the public notice.

[2] Reasons for appeal, as discussed in the Corps regulation under §331.5(2) include incorrect application of regulation or officially promulgated policy.

In 1994 the Corps issued RGL 94-1[3]. This RGL revised RGL 90-6. RGL 94-1 extended the expiration date of RGL 90-6 as well as extended the time period a determination was valid. Corps jurisdictional determinations were now valid for five years unless new information warranted revision before the expiration date.

In addition to the above referenced RGLs, the Corps issued its final rule establishing an administrative appeal process. Under Section 331.2 of that rule the Corps defines the term jurisdictional determination. The definition states, in part, that the term jurisdictional determination "...includes a written reverification of JDs where new information has become available that may affect the previously written determination."

CONCLUSION: After reviewing and evaluating the applicable Corps regulations and guidance, I conclude that the District's decision was appropriate. Therefore, I find that the appellant's appeal does not have merit.

20 March 04
(Date)

Robert Crear
Robert Crear
Brigadier General, US Army
Commanding General

[3] Unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs remains valid after the expiration date.