ADMINISTRATIVE APPEAL DECISION

MR. LUTHER BARKLEY, File No. 13595

TULSA DISTRICT

October 14, 2004

Review Officer: John Davidson, US Army Corps of Engineers, Galveston District, Galveston, Texas

Appellant Representative: Luther Barkley; Appellant

Tulsa District Representatives: Dale Davidson, Project Manager; Shane Charlson, Team Leader

Permit Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): 2 April 2004

Appeal Conference/Site Visit Date: 8 July 2004

Background Information: The Corps of Engineers, Tulsa District (District) issued an approved jurisdictional determination, 13595, regarding a wetland delineation on property located in the Northwest ¼ of Section 12, Township 7 North, Range 9 West, Caddo County, Oklahoma on 5 March 2004, a determination that forms the subject of this appeal.

The District found that the 24-acre area that Mr. Barkley planned to clear for crops was a wetland adjacent to the Washita River. The District issued its approved jurisdictional determination (13595) on 5 March 2004, it stated:

> "We have examined the property and concluded that the referenced property contains wetlands within the boundary as depicted on the enclosed map. Placement of fill material or heavy mechanized landclearing within the wetland boundary will require prior authorization from the U.S. Army Corps of Engineers (Corps) pursuant to Section 404 CWA.
>
> The basis for this determination is that the area depicted on the map is an adjacent wetland of the Washita River, a tributary to navigable water of the United States as defined by the Verden, Oklahoma, National Wetland Inventory map. The NRCS wetland map shows there to be approximately 14 acres of open water wetland and approximately 9 acres of forested wetland."

The appellant submitted a Request for Appeal on 2 April 2004.

Appeal Decision and Instructions to the Tulsa District Engineer:

Mr. Barkley listed 11 reasons for appeal or objections. For simplicity, we have combined all similar appeal reasons into two categories.

Appeal Reason 1: The first category of reasons for appeal relates to the Corps' designation of the subject area as a wetland. The appellant listed seven reasons for an appeal of that designation. These reasons relate to vegetation, hydrology, and Mr. Barkley's belief that the subject area is not a swamp, marsh, or bog.

FINDING: This appeal reason has merit.

ACTION: The Tulsa District is directed to reassess its decision, applying the guidance, policies and regulations pertaining to identifying wetlands as defined under §328.3(a) and the three criteria required by the 1987 Corps of Engineers Wetland Delineation Manual (Technical Report Y-87-1) for an area to be classified as wetland for the purposes of Section 404 of the Clean Water Act. The three criteria for reconsideration regard the dominance of hydrophytic vegetation, positive wetland hydrology, and hydric soil indicators. The District shall include sufficient documentation to support its reassessed determination.

DISCUSSION: The District's administrative record contains the following documents: a Site Visit Report, dated 24 February 2004; the Corps' Jurisdictional Determination Decision Document, dated 25 February 2004; the District's 5 March 2004 approved JD letter; a 15 March 2004 letter defining what a wetland is and how the Corps determines if a site meets the criteria to be identified as a wetland; a national wetland inventory map; a Digital Ortho Quarter Quad aerial photograph; a flood insurance rate map, NRCS wetland maps; three color photographs of the site, and a conversation record. As explained below, discrepancies in the information contained in these documents bring into question the accuracy of the District's JD.

When assessing §404 jurisdiction, the Corps is required to use the procedures in its 1987 Corps of Engineers Wetland Delineation Manual (Technical Report Y-87-1) to complete wetland determinations. The Manual describes in detail both the on-site and off-site processes for identify and delineate wetlands for the purposes of Section 404 of the Clean Water Act. The primary on-site actions are to identify the dominant vegetation at the sample point to *Genus species* and correlate their respective wetland indicator symbol to determine if there is a dominance of hydrophytic vegetation. The next step is to look for positive wetland hydrology indicators such as, but not limited to, inundation, soil saturation within the upper 12 inches, or water marks. The final step is to dig a soil pit to characterize the soil to determine if the soil has hydric indicators such as, but not limited to, gleyed or low-chroma color, sulfidic material, or concretions. The information gathered from the sample point is recorded on a routine wetland determination data form. The manual requires that all three wetland indicators to be positive for an area to be determined a wetland.

The District conducted a site visit to the project area on 11 February 2004; however, no sample point data was collected as required by the Manual. In the "Record of Field Investigation" the

Project Manager stated that the soil series for the site was not listed as a hydric soil. While in its 15 March 2004 letter to the appellant, the District stated that the Manual requires that three criteria have to be met before a site is identified as a wetland, it also stated that "[n]o soil pits were dug to confirm whether the soil contained hydric inclusions." The Project Manager also stated in the "Record of Field Investigation" that the Natural Resource Conservation Service (NRCS) was contacted to determine if the NRCS had identified the area as a wetland[1]. The NRCS indicated that the site was a wetland and provided the District with a wetland map. There is no documentation in the administrative record to indicate whether the NRCS followed the procedures in the Corps Manual to complete its determination or if they followed the procedures described in the National Food Security Act Manual for identifying wetlands on agricultural lands. The National Food Security Act Manual outlines the procedures for wetland delineations on agricultural lands while the Corps Manual outlines the procedures for wetland delineations on non-agricultural lands. Mr. Barkley provided a copy of a revised wetland determination completed by the NRCS on 30 April 2004, which was after the District issued the approved JD. The NRCS originally determined that the subject area is a wetland. In the revision, the NRCS stated they used the procedures of the current National Food Security Act Manual and the Corps of Engineers Wetlands Delineation Manual and determined that the site was not a wetland. This information is considered new and therefore, cannot be used during the administrative appeal process. If Mr. Barkley wants the District to consider the new NRCS report (30 April 2004) in their decision, he should submit the new NRCS report to the District and request a new jurisdictional determination for the subject tract.

Appeal Reason 2: The second category of reasons for appeal relates to Mr. Barkley requesting help from the NRCS to determine if the project site is suitable for growing desirable crops or trees. The appellant listed four reasons for appeal related to the type of crops or trees he would like to plant and the NRCS sending the Corps a copy of their new report when completed.

FINDING: This appeal reason does not have merit.

ACTION: No action required.

DISCUSSION: Review of this type of activity is not appealable action under the Corps Administrative Review Process.

CONCLUSION: After reviewing and evaluating the administrative record, I conclude that there is insufficient information in the administrative record to support the District's determination that the area in question is a wetland as defined by the 1987 Corps of Engineers Wetlands Delineation Manual (Technical Report Y-87-1) for the purposes of Section 404 of the Clean Water Act. Specifically, the District must document that they correctly followed the 1987

[1] In 1994 the Corps and Department of Agriculture signed a MOA, which allowed the NRCS to make wetland determination/delineation on agricultural lands owned by Agricultural Program Participants. For §404 purposes the NRCS is required to use the Corps Manual for wetland determinations/delineations.

Corps of Engineers Wetland Delineation Manual to complete their approved jurisdictional determination. Accordingly, I conclude that this Request For Appeal has merit, and remand this action to the District for further action consistent with the instruction contained in this decision document.

14 Oct 2004
(Date)

for Jeffrey J. Dorko COL, EN
Commander,
Southwest Division