

## **ADMINISTRATIVE APPEAL DECISION**

**MR. NOEL DAVIS, JR; FILE NO. 19504**

### **LITTLE ROCK DISTRICT**

**December 15, 2004**

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

**Appellant Representative:** Mr. Noel Davis, Jr.

**Little Rock District Representatives:** Joel Ward, Project Manager

**Permit Authority:** Section 404 of the Clean Water Act.

**Receipt of Request For Appeal (RFA):** 29 October 2004

**Appeal Conference/Site Visit Date:** N/A

**Background Information:** The Corps of Engineers, Little Rock District's (District) involvement with this action started on 5 August 2004 as an unauthorized activity. The appellant was observed utilizing a bulldozer to "spread" fill material into a wetland area. District personnel completed an initial site inspection on 5 August 2004 and determined that Mr. Davis had completed work in violation of Section 404 of the Clean Water Act (CWA). The appellant discharged approximately 650 cubic yards of fill material into jurisdictional wetlands. The purpose of the work was to create an upland area for commercial development. The project site is located in the SW ¼ of section 25, T.9S., R 27 W., near Nashville, Howard County, Arkansas. A Cease and Desist letter was issued to Mr. Davis on 24 August 2004. Mr. Davis was allowed to apply for an after-the-fact (ATF) permit to retain the existing fill and for any other work he proposed to complete on the site. Mr. Davis submitted an ATF permit application and tolling agreement to the District on 31 August 2004 and 3 September 2004, respectively.

The District completed a second jurisdictional determination on 14 September 2004. The District determined that the 8-acre project site contained approximately 3.3 acres of adjacent wetlands, which are subject to the Corps jurisdiction under § 404 of the CWA. Mr. Davis was issued an approved jurisdictional determination (JD) on 21 October 2004. Mr. Davis is appealing the District's approved JD.

#### **Appeal Decision and Instructions to the Little Rock District Engineer:**

**Appeal Reason 1:** "I object to your findings because a "wet-land" can be both man-made as well as by nature. Before the east Nashville by-pass was built, there was a drainage ditch in this area, which handled all the excess rainwater. After the by-pass was built, there was no ditch and

no place for the water to go except on this land. Consequently, this area is artificially wet. This area, if properly drained would in no way be considered a "wet land".

**FINDING:** This appeal reason does not have merit.

**ACTION:** No action required.

**DISCUSSION:** In his RFA, Mr. Davis contends that prior to the construction of the Highway 278 Nashville by-pass, his property was well drained because an existing drainage ditch drained all excess water from his property. In addition, Mr. Davis stated that after the highway project was completed, the drainage ditch was removed, which allowed the excess water to accumulate on his property.

The District's position is that the wetlands located on the Davis property are adjacent to an ephemeral stream that is a tributary to Mine Creek. Regulations at 33 CFR 328.3(a)(7)(c) state, "the term adjacent means bordering, contiguous or neighboring. Wetlands separated from other waters of the United States by man-made ditches or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'."

The District initially determined that the wetlands located on the Appellant's property are adjacent to an ephemeral stream that is part of the tributary system of the Saline River. The District found that water flowed from the appellant's property through a culvert under Highway 278 into Mine Creek. The administrative record includes copies of a county soil survey map, Quad maps and aerial photographs of the area. These maps and photographs indicate that a natural drainage way flowed through the appellant's property into Mine Creek. As stated by the appellant, highway construction in the area has caused substantial changes to the drainage patterns in the area. Section 328.5 of the Corps regulations addresses changes in the limits of waters of the United States. Under §328.5 it states that man-made changes may affect the limits of waters of the United States. In this case, the construction of the Highway 278 by-pass changed the landscape south and west of the appellant's property by eliminating an existing drainage ditch. However, the District was able to document the flow from the unnamed ephemeral stream through Mr. Davis' property into a culvert under the by-pass to Mine Creek.


The District completed two site investigations for this action and documented its findings on two separate Basis of Jurisdictional Determination forms and Memorandums for File. The District described the types of waters located on the appellant's property and the hydrological connection between the Davis wetlands and Mine Creek. The District determined that the site contains tributary waters of the United States, which are themselves classified as waters of the United States in accordance with Title 33 of the Code of Federal Regulations, Part 328.3 (a)(5) and that the site contains wetlands according to the criteria established in the 1987 "Corps of Engineers Wetland Delineation Manual" which are adjacent to waters of the United States (Part 328.3(a)(7)).

The District provided sufficient documentation that the wetlands are not isolated. At 33 CFR 330.2 the Corps regulations define the term "isolated waters" as non-tidal waters of the United States that are: 1) not part of a surface tributary system to interstate or navigable waters of the

United States; and 2) not adjacent to such tributary water bodies. The District's basis for jurisdiction is that the wetland is adjacent because it is contiguous to a tributary system that eventually drains or flows into a navigable water. The unnamed tributary constitutes a tributary connection to Mine Creek. Mine Creek is a tributary of the Saline River, which flows into Millwood Lake and the Little River. The Little River, below Millwood Dam is a navigable water of the United States. The Little River is a tributary of the Red River, which is also a navigable water of the United States. Therefore, the wetlands located on the Appellant's property are adjacent to a tributary to navigable waters and are not isolated. Because the instant wetlands meet the definition of waters of the United States under § 328.3 (a)(7) the nexus to navigable waters has been met.

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

10 January 2015  
(Date)

  
\_\_\_\_\_  
Jeffrey J. Dorko  
Colonel, US Army  
Commanding