

ADMINISTRATIVE APPEAL DECISION

SAND SUPPLY INC., File No. D-13792

GALVESTON DISTRICT

February 12, 2003

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

Appellant Representative: James Machin; R.J. Brandes Company, Kevin May; Sand Supply, Inc.

Galveston District Representatives: Andy Williams; Project Manager, John Daivdson, South Unit Leader

Permit Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): 28 October 2002

Appeal Conference/Site Visit Date: 14 January 2003

Background Information: The Corps of Engineers, Galveston District (District) issued an approved jurisdictional determination, D13792, regarding the portion of Middle Bayou that crosses the property leased by the appellant on 30 September 2002. This determination forms the subject of this appeal. Previous permitted actions completed by the District regarding Middle Bayou are related to this appealed jurisdictional determination. Two Department of the Army (DOA) permits were issued by the District for work on sections of Middle Bayou, the first issued in 1987 and the second in 1999. Both of these permits authorized work on sections of Middle Bayou located upstream of the appellant's project site. The project site is located on a parcel of land that the appellant has leased from the property owner, Mr. Danny Booth, a section that will hereafter be referred to as the "lower" portion of Middle Bayou.

The first permit referenced above, DOA Permit 17751, authorized the permittee to channelize and re-route a portion of Middle Bayou and to construct a flood control levee. Pursuant to that permit, Middle Bayou was diverted into a 200-foot wide drainage channel that flowed into the Brazos River through a newly constructed outfall structure. The levee was constructed across a portion of Middle Bayou cutting off flow downstream of the levee. On 30 January 1998, the District finalized a jurisdictional determination on the portion of Middle Bayou located downstream of the flood protection levee authorized by DOA Permit 17751, finding that this downstream portion of Middle Bayou still met the criteria to be identified as a water of the United States. Subsequent to that determination, the District issued the second DOA permit, Permit 21380, on 5 August 1999. This permit authorized the work to channelize, re-route and construct a flood control levee on another portion of Middle Bayou, the section that had been

immediately downstream from where the work had been authorized under Permit 17751. Permit 21380 authorized work to again cut off the flow of Middle Bayou downstream of the levee, in a manner similar to the work under Permit 17751 in 1987.

At some time after the issuance of Permit 21380 in 1999, the appellant excavated a channel and settling pond at the project site. The District found that the excavation of neither the channel nor the settling pond resulted in a discharge into a water of the United States. However, an unauthorized discharge of fill material was found to have been placed into the lower portion of the Middle Bayou immediately downstream from the channel excavated by the appellant. This fill serves to block any flow of water from the upstream portion of the bayou into the Brazos River and to divert the flow of all water in the affected section of the bayou into the settling pond. The District first became aware of the excavation and the lower Middle Bayou diversion from site visits it conducted pursuant to an unauthorized activity report it received on 30 May 2001. This report resulted in Enforcement Case I-4413, a case not directly related to this appeal. There has apparently also been an unauthorized discharge of fill into that section of the lower Middle Bayou located immediately upstream of that section of the channel in use by the appellant for its sand and gravel operation.¹ It is not presently clear who may be responsible for either of these unauthorized discharges. While the District found that the settling pond and channel excavated by the appellant did not involve discharges into waters of the United States, the District determined that the settling pond and channel were themselves waters of the United States by virtue of the fact that they were located below the ordinary high water mark of Middle Bayou.

District Memorandum for the File dated 20 September 2002, indicates that the appellant informed the District's project manager that a section of Middle Bayou located on the property leased to the appellant had been filled by the property owner and Westbrook - Greatwood, L.P. (Greatwood).² The memorandum goes on to state that "[t]he Army Corps of Engineers is taking discretionary authority in this specific case and will not pursue enforcement action involving the fill of this U.S. Waters." Thus, no enforcement action has been initiated in that regard. Nevertheless, it is not clear whether the reference in the memorandum to "fill of this U.S. Waters" was a reference to the fill placed in that portion of the lower Middle Bayou that lies upstream or downstream of the diversion channel and sand classification plant, or both. Whatever the case may be, the District declined to exercise discretionary authority to pursue an enforcement action. The District issued its approved jurisdictional determination (D-13792) on 30 September 2002. It stated:

"Based on our desk review and site inspections, we have determined a portion of Middle Bayou located on the property which has been diverted and directed into a detention pond is a water of the United States. Additionally, the ordinary high water mark of the channel and the detention pond are waters of the United States, subject to Section 404 of the Clean Water Act."

¹ The bayou channel has been filled to the top of the stream banks so as to make the surface of the bayou bed level with the adjacent field through which the bayou runs.

² The District is not known to have verified the correctness of this assertion.

The appellant submitted a Request for Appeal on 28 October 2002.

Appeal Decision and Instructions to the Galveston District Engineer:

Appeal Reason: “Sand Supply disagrees with the approved Jurisdictional Determination (JD). The remnant piece of Middle Bayou on the Sand Supply property is an isolated water not subject to USACE jurisdiction. This isolated water has no connection to the Brazos River or any other waters of the U.S. Furthermore, the detention pond into which the remnant now flows is a temporary sedimentation basin for a mining activity and is not subject to regulation under Section 404 per 33 CFR 323.4a4.”

FINDING: This appeal has merit.

ACTION: Since the District’s administrative record does not adequately address the effect the unauthorized placement of fill material in the lower section of Middle Bayou may have had on the issue of Corps jurisdiction over the project site, the District shall reconsider its approved jurisdictional determination accordingly and include sufficient documentation to support its decision.

DISCUSSION: The first question is whether the portion of the lower Middle Bayou that crosses the property leased to the appellant still meets the definition to be identified as a water of the United States. There is nothing in the record to indicate that upon completion of the work authorized under DOA Permit 21380, that any section of the lower portion of Middle Bayou ceased to be a water of the United States as a tributary to the Brazos River, which is a navigable water. The record shows that the District’s project manager was informed that the lower section of Middle Bayou, that portion located on the property leased to the appellant, had been filled without Corps authorization. In its jurisdictional determination of 30 January 1998, the District identified this section of Middle Bayou as a tributary to a navigable water of the United States. However, more than one section of the lower Middle Bayou was improperly filled. This unauthorized fill activity apparently occurred either after, or pursuant to, the completion of work authorized under DOA Permit 21380. The District has the authority to initiate an enforcement action against whomever it may find responsible for these unauthorized discharges of fill material. It is for the District to exercise its discretion in determining whether to pursue an enforcement action for any unauthorized placement of fill material into these waters of the United States. If the District decides to pursue an enforcement action, it may require either corrective action(s) or the submission of an after-the-fact permit for the placement of that fill, or both. The District may decide not to take an enforcement action in some cases. The District apparently decided not to take enforcement action in this case. Section 328.5 addresses changes in the limits of waters of the United States. 33 CFR Section 328.5 states:

“For example, changing sea levels or subsidence of land may cause some areas to become waters of the United States while siltation or a change in drainage may remove an area from waters of the United States. Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer.”

The administrative record does not adequately address the affect that the unauthorized filling of the lower portion of Middle Bayou may have had on the District's jurisdiction over that water body. The District should first reconsider whether an enforcement action should be initiated regarding the unauthorized discharges of fill material into the affected lower portion of Middle Bayou. If it again decides not to initiate any enforcement action it should document why the unauthorized discharge of fill material into this section of Middle Bayou is not substantial enough to warrant opening an unauthorized activity investigation. It is clear that if the unauthorized fill is not to be removed from the bayou just below the diversion channel, the entire section of lower Middle Bayou upstream of that point will have ceased to be a tributary to a navigable water of the United States, rendering the diversion channel and settling pond little more than an isolated water body. Thus, the District must then re-evaluate its jurisdictional determination in that regard.

The second part of this appeal is the appellant's belief that the District did not interpret the regulation correctly when it determined that the settling pond and diversion channel were waters of the United States. The appellant cited 33 CFR 323.4(a)(4) as a reason why the Corps did not have jurisdiction to regulate the settling basin and diversion channel under Section 404 of the Clean Water Act. Section 323.4 addresses discharge activities that do not require permits. Section 323.4(a) states:

“Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:”

Section 323.4(a)(4) addresses the construction of temporary sedimentation basins. Specifically, Section 323.4(a)(4) states:

“Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S. The term “construction site” refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.”

Section 323.4(c) addresses activities that are not exempt from permitting requirements. This section specifically states:

“Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1)-(6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it

was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.”

The proper application of these sections cannot be determined until the District has first decided whether or not to bring an enforcement action regarding the unauthorized discharges addressed above. Depending on the jurisdictional status of the project site following that decision, the District will need to inform the appellant whether it may need a permit pursuant to 33 CFR 323.4(c), or whether 33 CFR 323.4(a)(4) may apply.

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 portion of Middle Bayou located on the appellant’s property, specifically the settling pond and diversion channel, are jurisdictional waters of the United States subject to the authority of the Clean Water Act. 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.

3 March 03

(Date)



Robert Crear
Brigadier General, US Army
Commanding General