

ADMINISTRATIVE APPEAL DECISION

FILE NO. 98-00289

KANSAS CITY DISTRICT

DATE _____

Review Officer: Mores V. Bergman, U.S. Army Corps of Engineers (USACE), Northwestern Division

Appellant: Ambrose Scheckel, 2211 Allen Terrace, Richmond, Kansas 66080

Receipt of Request For Appeal (RFA): August 17, 2000

Appeal Conference Date: October 3, 2000 **Site Visit Date:** October 3, 2000

Background Information: On August 19, 1997, the Kansas City District (KCD) was informed by the Natural Resource Conservation Service (NRCS), Topeka, Kansas office, of a possible violation of Section 404 of the Clean Water Act that had occurred in Section 12 & 13, T19S, R18E in Franklin County, Kansas. The alleged violation was located on property owned by Mr. Ambrose Scheckel and consisted of the relocation and filling portions of Sac Creek and its adjacent wetlands. On Nov 24, 1997, the KCD Pomona Regulatory office confirmed that this activity was, in fact, performed without the required Section 404 permit. On Oct 8, 1998, KCD informed Mr. Scheckel of the alleged violation. On Dec 3, 1998, KCD provided Mr. Scheckel with the option of restoring the site or applying for an after-the-fact Section 404 permit. A permit application was received from Mr. Scheckel on Feb 16, 1999. The NRCS had determined that Mr. Scheckel's activity was also a violation of the Food Security Act, because it converted existing wetlands to cropland. In an effort to mitigate the impacts of the project, and to obtain a permit from the Corps and to receive NRCS Department of Agriculture payments, Mr. Scheckel worked with the NRCS and the KCD to develop a mitigation plan. On September 17, 1999 Mr. Scheckel signed an agreement with NRCS, which stated that he would implement the mitigation plan that had been developed. On February 2, 2000, the KCD proffered a Section 404 permit to Mr. Scheckel, which contained the requirement to implement this same mitigation plan as a condition of the permit. On March 3, 2000, Mr. Lindsay Wood, Attorney for Ambrose Scheckel, sent a letter to the KCD stating that Mr. Scheckel would not sign the proffered permit because he objected to several provisions of the mitigation plan requirements. This letter was submitted in accordance with regulation 33CFR 331.6, regarding objections to an initial proffered permit. After obtaining additional information from the applicant and performing further evaluation, the KCD decided to revise the initial proffered permit to incorporate changes to the mitigation condition, as requested by Mr. Scheckel. On June 26, 2000, the KCD sent a revised proffered permit to Mr. Scheckel. On July 14, 2000, Mr. Wood sent another letter to the KCD stating that Mr. Scheckel had further objections to the mitigation conditions. On July 27, 2000, the KCD informed Mr. Wood that any further objections to the proffered permit should be submitted as an appeal to the Division Engineer in accordance with the Appeals Regulation (33CFR 331).

On August 15, 2000, Mr. Wood submitted an appeal to the Division Engineer on behalf of Mr. Ambrose Scheckel. A signed Tolling Agreement was submitted with the appeal request. An appeal conference and a site visit were held on October 3, 2000.

Reasons For Appeal: The following stated Appeal Reasons are paraphrased, for brevity, from the text of the letter of appeal dated August 15, 2000 (enclosure 1).

Reason 1: The appellant contends the permit condition requiring 9.0 acres of wetland mitigation is excessive because the actual wetlands eliminated by Mr. Scheckel's project were overestimated. The appellant proposes that either the 9.0 acre wetland requirement be modified to say 9 acres, more or less, or that the Corps (of Engineers) survey the area to precisely determine the size of the wetlands that have been constructed.

Reason 2: Appellant contends that the permit conditions requiring 30 foot wide buffers along the sides of channels and requiring native grass planting in buffer areas are an abuse of discretion and/or an arbitrary and capricious requirement by the Kansas City District, not supported by Corps policy or guidance. The appellant proposes an alternate buffer width of 20 feet and an alternate grass planting of "fescue grass", instead of "native grass".

Reason 3: Appellant contends that the permit condition requiring tree plantings along the south side of the creek in Section 1, T19S, R18E, is not necessary, and that such a requirement is an abuse of discretion and/or arbitrary and capricious agency action.

Reason 4: The appellant contends that the permit condition drawing labeled NW1/4, SE1/4, Section 35, T18S, R19E, which shows the locations of berms and diversion terraces and native grass buffers, is not correct. The appellant contends that the Corps representative, Lonnie Miller, had agreed to a different construction and buffer-planting plan than is shown in the drawing.

Summary of Decision:

- a.) Appeal Reason 1 does not have merit. The KCD administrative record contains the analysis for 9.0 acres of wetlands at the site in question, as part of the overall mitigation plan for the project. The proffered permit for this project contains a standard permit condition, which requires the permittee to certify that the permit conditions have been met. Thus, any surveys deemed necessary for certification would be the responsibility of the permittee.
- b.) Appeal Reason 2 does not have merit. The KCD administrative record provides adequate justification for requiring the mitigation buffer widths and vegetation plantings contained in the permit conditions. Further, Mr. Scheckel had signed a mitigation agreement on September 17, 1999, agreeing to construct a 30-foot wide, native grass buffer along the sides of the new channel.
- c.) Appeal Reason 3 does not have merit. The KCD administrative record supports the determination that the tree plantings in Section 1, T19S, R18E, are required for mitigation for habitat that was destroyed as part of the applicant's channel relocation project. In addition, the tree-planting requirement at this site is contained in the September 17, 1999 mitigation agreement, which was signed by Mr. Scheckel.

d.) Appeal Reason 4 has partial merit. It is agreed that the mitigation condition drawing (NW1/4, SE1/4, Section 35, T18S, R19E) does not show adequate detail as to the intended locations or dimensions of terraces, berms, buffer areas, and other features. Although the drawing was prepared by the NRCS and approved by Mr. Scheckel, it lacks adequate detail for construction purposes. Also the KCD did not take into account modifications, that had previously been done by Mr. Scheckel at the site, when they prepared their final proffered permit conditions. The KCD will be requested to re-evaluate and clarify the mitigation requirements for the area in question.

Appeal Evaluation, Findings and Directions for District Action:

Reason 1: The appellant contends the permit condition requiring 9.0 acres of wetland mitigation is excessive because the actual wetlands eliminated by Mr. Scheckel's project were overestimated. The appellant proposes that either the 9 acre wetland requirement be modified to say "9 acres, more or less", or that the Corps survey the area to precisely determine the size of the wetlands that have been constructed.

FINDING: Appeal Reason 1 does not have merit.

ACTION: No action required by the District.

DISCUSSION: In Mr. Lindsay Wood's letter of August 15, 2000 (enclosure 1), it is stated that it is Mr. Scheckel's belief that the wetlands that he has already constructed are at least 9.0 acres in size. Mr. Wood's letter also states that since wetlands that were eliminated by Mr. Scheckel's project were overestimated, he believes that the mitigation wetlands he constructed would provide mitigation in excess of that required when applying the 1.25 to 1 mitigation ratio. The KCD Findings of Fact dated June 26, 2000 indicates that the 1.25 to 1 mitigation ratio is reasonable in this case. The Corps normally requires a mitigation ratio greater than 1 to 1 to makeup for the temporary lose of habitat while the new mitigation wetland is being developed and because wetland creation is seldom 100 percent successful. Upon reviewing the administrative record, it is found that the amount of wetlands eliminated by Mr. Scheckel's project was determined to be 8.7 acres. By applying the 1.25 to 1 mitigation ratio to the 8.7 acres, the KCD determined that the total wetland mitigation acreage required is 10.87 acres. The mitigation condition of the proffered permit, indicates that the applicant is being given credit for wetland mitigation in the amount of 1.82 acres, at other locations in the project area. Subtracting the 1.82 acres from the total of 10.87 acres, leaves 9.05 acres remaining to be mitigated. KCD rounded-off this amount to 9.0 acres, which they specified in the permit condition as wetland mitigation for the site in question. This determination seems reasonable. Regarding the appellant's proposal for the Corps to survey the mitigation area for accuracy, it is noted that the proffered permit for this project contains a condition, which is standard in all Corps permits, that requires the permittee to certify that all permit conditions have been met. Thus, any surveys that may be necessary for this certification, would be the responsibility of the permittee. For the reasons stated above, I have determined that Appeal Reason 1 does not have merit.

Reason 2: Appellant contends that the permit conditions requiring 30 foot wide buffers along the sides of channels and requiring native grass planting in buffer areas are an abuse of discretion

and/or an arbitrary and capricious requirement by the Kansas City District, not supported by Corps policy or guidance. The appellant proposes an alternate buffer width of 20 feet and an alternate grass planting of fescue, instead of native grass.

FINDING: Appeal Reason 2 does not have merit.

ACTION: No action required by District.

DISCUSSION: In Mr. Wood's August 15, 2000 appeal letter, he states that fescue grass should be allowed instead of native grass for the buffers along the channel because they can be established more quickly than the native grass and would require no fertilization. The letter also states that the appellant believes a 20-foot wide buffer would adequately protect the channel from agricultural runoff. Mr. Wood further states in the letter that Mr. Lonnie Miller (KCD project manager for the permit application) had previously agreed to using fescue in place of native grass. At the appeals conference on October 3, Mr. Wood referred to an article prepared by the Environmental Protection Agency (EPA) which stated that fescue grass is an effective buffer planting for controlling run-off sedimentation. (The Memorandum for Record of the Appeal Conference is provided as enclosure 2). Also at the appeals conference, Mr. Hibbs (of KCD) stated that the purpose of requiring the taller native grass buffer was to replace environmental functions of the vegetation that had been removed as part of Mr. Scheckel's project, in addition to providing sediment control. It is noted that the mitigation plan agreement, that was signed by Mr. Scheckel on September 17, 1999, provided for a 30 foot wide buffer of native grass on either side of the channel, which is located in Section 12, T19s, R18E. The standard riparian buffer plan that is required at other locations on this project is a 50-foot wide buffer, which includes tree and shrub plantings in addition to native grass. The KCD and the NRCS allowed a lesser width (30 ft) buffer and native grass at this site, to accommodate the desires of the applicant, who indicated he plans to install a pivot irrigation system adjacent to this site. The NRCS used the US Department of Agriculture Technical Guide KS-249, Section IV, dated July 1999 in determining the buffer requirements for this project. The KCD concurred with the NRCS in accepting the mitigation plan for the project. At the appeals conference, Mr. Hibbs also stated that the KCD relied upon the expertise of NRCS and on past Corps experience and practice in determining acceptable buffer widths and plantings for the mitigation for this project. In a written statement provided by Mr. Lonnie Miller on October 17, 2000 (enclosure 3), Mr. Miller states that he had never agreed to allow a 20-foot wide buffer or to allow planting of fescue grass as mitigation on this project. Also, in the KCD administrative record for this case, is found a facsimile message, dated February 8, 2000, from Mr. Miller to Mr. Scheckel, which clearly states the requirement for a 30 ft wide buffer of native grass along the channel in question. Upon considering information contained in the administrative record for this case, information provided at the appeal conference, and the statements contained in Mr. Miller's letter of October 17, 2000, as discussed above, I conclude that Appeal Reason 2 does not have merit.

Reason 3: Appellant contends that the permit condition requiring tree plantings along the south side of the creek in Section 1, T19S, R18E, is not necessary, and that such a requirement is an abuse of discretion and/or arbitrary and capricious agency action.

FINDING: Appeal Reason 3 does not have merit.

ACTION: No action required by District.

DISCUSSION: In Mr. Wood's letter of August 15, 2000 (enclosure 1), the reason given for objecting to the condition requiring trees at the referenced site is that the appellant believes that the trees will serve no useful purpose. The letter also alleges that in February 2000, Mr. Lonnie Miller verbally agreed with Mr. Scheckel on this point. At the appeal conference and site visit on October 3, 2000, Gerald Scheckel again stated that he saw no purpose for the trees to be planted at the site and that he believed that Mr. Miller had agreed with him that the trees were not needed. Also, at the appeal conference, Mr. Hibbs (of KCD) stated that the reason for requiring the planting of trees at the site is to partially mitigate for the environmental values of habitat that was removed during Mr. Scheckel's channel relocation project. Further, it is found that the requirement for planting the trees at the site is contained in the mitigation plan that Mr. Scheckel agreed to, and signed, on September 17, 1999. Also contained in the KCD's administrative record for the project are comment letters from the US Fish and Wildlife Service (dated July 29, 1999) and the Kansas Department of Fish and Game (dated August 3, 1999), which point out the need to mitigate for riparian habitat (trees and shrubs) that was removed as part of Mr. Scheckel's project. Mr. Miller was not able to attend the appeal conference, but did provide a letter to Mr. Bergman dated October 17, 2000 (enclosure 3) addressing the allegations contained in Mr. Wood's August 15, 2000 letter. In his letter, Mr. Miller states that the conversation with the Scheckels was not about whether the trees at this location were needed or not, but rather about possible flood damage that could occur to the trees if planted there. Mr. Miller's October 17, 2000 letter further states that the trees were required at this location for protective cover for the area and to off-set the area in Section 12 where trees and shrubs were left out (not required to be planted). Since the KCD reasonably determined as set forth in the administrative record that planting of the trees in question at this location for protective cover was necessary, and since Mr. Scheckel's allegations concerning Mr. Miller's representation have been challenged, I conclude that Appeal Reason 3 does not have merit.

Reason 4: The appellant contends that the permit condition drawing labeled NW1/4, SE1/4, Section 35, T18S, R19E, which shows the locations of berms and diversion terraces and native grass buffers, is not correct. The appellant contends that the Corps representative, Lonnie Miller, had agreed to a different construction and buffer planting plan than is shown in the drawing.

FINDING: Appeal Reason 4 has partial merit.

ACTION: The proffered permit is being remanded to the District for re-evaluation and clarification of the proposed permit conditions that apply to mitigation requirements in the NW1/4, SE1/4, Section 35, T18S, R19S, Franklin County, Kansas.

DISCUSSION: In Mr. Wood's letter of August 15, 2000, he states that the drawing referenced above is not correct as to the boundaries of cropland and buffer areas, and regarding buffer plantings required. He states that Mr. Lonnie Miller had agreed to a plan different than what is shown on the mitigation condition drawing. At the appeal conference, Mr. Wood provided a

copy of a sketch (attachment to enclosure 2), which he said shows what was agreed to by Mr. Miller. In Mr. Miller's letter of October 17, 2000 (enclosure 3), Mr. Miller states that he did not agree to allow planting of fescue grass in the subject area. He also states that Ambrose Scheckel had cleared two native areas that were not supposed to be destroyed. Also in the KCD administrative file is found a memo by Mr. Miller (enclosure 4), which discusses a meeting he had with Gerald Scheckel on February 9, 2000 at the mitigation site in question. In the memo, Mr. Miller states that the vegetated area, that was intended to form a buffer to the wetlands, has now been destroyed and the area has been tilled. Mr. Miller further indicated in the memo that there would need to be an addition to the mitigation plan since the original plan was not to disturb this area. In reviewing the KCD's currently proposed mitigation condition for this area, it is noted that the condition's current wording and drawing lack specificity regarding locations of project features and do not take into account the site changes that have occurred since the original mitigation plan was accepted. Because clearing of the native wooded areas has occurred, it is believed that the conditions, as written, in the KCD's current proposed permit may no longer be attainable. It is further determined that the drawing that was provided by Mr. Wood does not reflect the mitigation requirements that are contained in the KCD permit conditions. The drawing also lacks necessary construction details and shows some features, such as native areas that no longer exist. For the reasons discussed above, I find that Appeal Reason 4 has partial merit. I am therefore remanding the proffered permit to the Kansas City District to re-evaluate and to clarify the mitigation requirements that apply to the area in question.

The comments presented in Mr. Wood's August 15, 2000 letter about Mr. Scheckel's financial concerns and health situation were not factors in the initial permit decision or in this appeal, I conclude that these issues do not affect my decision on the merits of this appeal.

Conclusion: For the reasons stated above, I find that Appeal Reasons 1, 2, and 3 do not have merit and that Appeal Reason 4 has partial merit. The proffered permit will be remanded to the Kansas City District for re-evaluation and clarification of the issues identified above regarding Appeal Reason 4.

CARL A. STROCK
Brigadier General, U. S. Army
Division Engineer

Enclosures

