



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, NORTHWESTERN DIVISION
PO BOX 2870
PORTLAND OR 97208-2870

REPLY TO
ATTENTION OF

Program Support Division

Ms. Edith Savage
Savage and Savage Inc.
4610 Haystack Drive
Windsor, CO 80550-2597

Dear Ms. Savage:

I have completed my review of the Request for Appeal, submitted on behalf of Northern Colorado Constructors (NCC), regarding the approved jurisdictional determination (JD) made by the Omaha District for the NCC site located in the NE ¼ of Section 24, Township 2 North, Range 67 West, Weld County, Colorado, File Number 200080040.

After evaluating the information provided in the Request for Appeal, the District's administrative record, and the information obtained during the appeal meeting and site visit, I have determined that your appeal has merit. Enclosed is a copy of the Administrative Appeal Decision document, which provides the details of my findings for the appeal.

I am remanding the JD decision to the Omaha District with instructions to re-evaluate their determination. The District will contact you to provide their final decision on jurisdiction, when they complete their re-evaluation. If you have any questions about that process, you may contact Timothy Carey of the Omaha District 303-979-4120.

If you have any questions about the appeal decision, you may contact the Appeal Review Officer, Mr. Mores Bergman, at 402-697-2533.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter C. Gibson".

Peter C. Gibson
Chief, Program Support Division

Enclosure

ADMINISTRATIVE APPEAL DECISION

NORTHERN COLORADO CONSTRUCTORS, FILE NO. 200080040

OMAHA DISTRICT

DATE: April 8, 2005

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

Appellant: Northern Colorado Constructors, Inc.

Appellant's Representatives: Edith Savage

Receipt of Request For Appeal: July 15, 2004

Appeal Conference and Site Visit Date: September 22, 2004

Background Information: On February 24, 2004, the Corps Omaha District Denver Regulatory Office (District) received a request for a Section 404 jurisdictional determination, from a Mr. Ken Rollins, representing Northern Colorado Constructors (NCC), for a seventy-acre parcel of land located in the NE ¼ of Section 24, Township 2 North, Range 67 West, Weld County, Colorado. The parcel is known as NCC Pit #1 Extension site. NCC has an existing gravel mining operation site immediately to the south of the subject parcel, and it is their intention to also mine the site in question. The District informed Mr. Rollins on February 26, 2004 that it appeared there may be jurisdictional waters on the site and requested that NCC submit a wetland delineation for the site.

On May 10, 2004 Ms. Edith Savage of Savage and Savage Inc. submitted a wetlands and waters of the United States delineation report for the site to the District. In the report Ms. Savage had determined that one segment of stream and eight separate wetlands existed on the site. She identified the wetlands as features "A", "B", "C", "E", "F", "G", "H", and "I" and the stream segment as feature "D". She concluded in her report that wetlands A, B, C, E, and F are isolated, and as such are not waters of the United States. Ms. Savage further determined that wetlands G, H, and I, and stream segment D are waters of the United States. After reviewing the report, the District prepared an Approved Jurisdictional Determination (JD) for the NCC property, and provided it to Ms. Savage by letter dated May 24, 2004. In the approved JD, the District identified stream segment D as being a water of the United States because it is part of Little Dry Creek, which flows to the South Platte River, an interstate water. The District also determined in the approved JD that wetlands A, B, C, and F are waters of the United States because they are adjacent to Little Dry Creek, and that wetland G is jurisdictional because it is surface connected to Little Dry Creek. The District further determined that wetlands E, H, and I are isolated wetlands and therefore are not jurisdictional. In a letter dated June 11, 2004,

Ms. Savage asked the District for a detailed explanation of how the District determined that wetlands A, B, C, and F are jurisdictional based on adjacency. The District responded by letter dated June 16, 2004, providing their reasons for determining that the wetlands are jurisdictional.

On July 13, 2004, Ms. Savage submitted a Request for Appeal (RFA) of the approved JD to the Corps Northwestern Division, on behalf of NCC, in accordance with the Corps Administrative Appeal Regulation 33CFR 331. The appellant contends that the wetlands identified as F, C, B and A are isolated wetlands and therefore are not waters of the United States. The appellant's reasons for appeal are shown below. The Review Officer conducted an appeal meeting and site visit on September 22, 2004. Attached is a copy of the appeal meeting and site visit report.

Reasons for Appeal Submitted by Appellant:

The wetland depression features F, C, B, and A do not fulfill the defined criteria for adjacency, are not surface connected to a tributary system, and are therefore non-jurisdictional under the SWANNC ruling¹.

Information Received during the Appeal Review and Its Disposition:

The District provided the Review Officer and the appellant with a copy of the administrative record for the JD decision. This information was considered in the appeal review. Information obtained during the appeal meeting and site visit conducted on September 22, 2004 was also considered in the appeal review, to the extent that it provided clarification of site conditions and other information contained in the administrative record.

Summary of Decision: The appeal is found to have merit. The District's basis for determining that wetlands F, C, B, and A are adjacent wetlands and therefore jurisdictional is not supported by adequate evidence in the District's administrative record. The jurisdictional determination is therefore remanded to the District to reevaluate their determination for the wetlands on the NCC Pit #1 Extension site.

Appeal Decision Findings and Instructions for District Action:

Reasons: The wetland depression features F, C, B, and A do not fulfill the defined criteria for adjacency, are not surface connected to a tributary system, and are therefore non-jurisdictional under the SWANNC ruling.

Findings: The appeal has merit, for the reasons contained in the Discussion section below.

¹"SWANCC" is acronym for the United States Supreme Court decision Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Engineers, No. 99-1178 (January 9, 2001)

Action: The Approved Jurisdictional Determination is remanded to the District to reevaluate their determination of jurisdiction for the wetlands in question.

Discussion: The appellant's representative, Ms. Edith Savage, presented the reasons for appeal in the appeal submittal document dated July 2004. Ms. Savage stated on page 1 of the appeal document: "As the wetlands features F, C, B, and A are not bordering, contiguous, or neighboring, and are not separated from waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, or other like features, the only conclusion based on the statute and regulations is that these features are non-jurisdictional." On page 3 of the document, Ms. Savage further states: "the sole determinant that the District employed to conclude that wetland features F, C, B, and A are jurisdictional was that they are separated from Little Dry Creek by a man-made dike." It is believed that Ms. Savage made this statement based on the explanation that was provided to her by the District in their June 16, 2004 letter.

In the June 16, 2004 letter, the District stated their reasons for determining that the subject wetlands are adjacent as follows:

" These wetlands are considered adjacent to a tributary locally known as Little Dry Creek, which is tributary to the South Platte River, which is an interstate water. Wetlands that are adjacent to a water of the U.S., which Little Dry Creek is, are jurisdictional pursuant to Section 404 of the Clean Water Act.

As identified in the Federal Register dated November 13, 1996, 33 CFR Parts 320 through 330, Part 328.3(c), the term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

Wetlands F, C, B, and A were created during an activity to remove sand and gravel from the land. The removal of this sand and gravel resulted in a reach of land (man-made dike) between the edge of these wetlands and Little Dry Creek.

For purposes of the above definition of a man-made dike, our office has determined that a dike may be developed by the placement of dirt or other man-made materials in order to form a linear raised reach of topography such as a "levee." Our office has determined that the remaining area of land between an excavation site and a stream also results in a man-made dike. Our office has no guidance as to what width the man-made dike should be to determine adjacency."

At the appeal review meeting and site visit, which took place on September 22, 2004, the District provided this same explanation (as above) as their reason for determining that the wetlands in question are adjacent to Little Dry Creek and therefore are waters of the United States. During the site visit on September 22, 2004, the Review Officer (RO) observed that a segment of natural land did exist between wetland F and Little Dry Creek that separates the wetland from the creek. The segment of land separating wetland F from the creek ranges in width from approximately 50 to 100 feet, and is at a higher elevation than both wetland F and the creek channel. (See enclosed appeal meeting and site visit report dated September 30, 2004.)

In reviewing the District's approved JD letter dated May 24, 2004 and the accompanying Jurisdictional Determination document dated May 21, 2004, it is found that the District did not provide any specific explanation or evidence in these documents to support their conclusion regarding jurisdiction based on adjacency. The May 24, 2004 document simply states: "adjacent wetlands F, C, B, and A are waters of the United States." The May 21, 2004 document states: "Rationale for Basis: The jurisdictional areas are either adjacent to or surfaced connected to Little Dry Creek that flows into the South Platte River, which is an interstate water." It is therefore assumed that the reasons presented in the District's June 16, 2004 letter is the District's only justification for determining these wetlands are "adjacent wetlands."

On page 4 of the appeal submittal document, Ms. Savage makes reference to a definition of "dike or dam" that is provided in Regulation 33 CFR Part 321, which states: "a dam or dike is any impoundment structure that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce." Based on this definition, Ms. Savage contends that the District's determination of jurisdiction is erroneous because there is no impoundment structure spanning a water of the United States on the site. In reviewing the regulation at Part 321.2, it is found that this definition only applies to section 9 of the River and Harbor Act. The definition does not apply to all waters defined under Part 328. There is no definition of "dike" found in Part 328.

In reviewing the wetlands and waters of the United States delineation report submitted by Ms. Savage on May 10, 2005, it is found that the report concludes (on page 5) that wetland depressions A, B, C, E, and F are all isolated depressions that are not adjacent to or connected to any tributary system. The only information found in the report to support these conclusions is an aerial photo of the site, which has the wetlands drawn on it, and which appears to show that the wetlands were not connected to the creek. The delineation report contained no compelling evidence that would support the conclusion that the wetlands are not "adjacent wetlands." The delineation report contains wetland delineation data sheets for wetlands A, F, G, and for stream segment D, however, the data sheets do not address adjacency. Also, no data sheets were included in the report for wetlands B, C, E, H, and I. The RO inspected wetlands A, B, C, E, and F during the site visit, and found that wetlands A, B, and C are located much closer to Little Dry Creek than is wetland E or F. The RO also found that the elevation of the ground surface separating wetlands A, B, and C from Little Dry Creek appeared to be only slightly higher than the wetlands and the creek bank at that location.

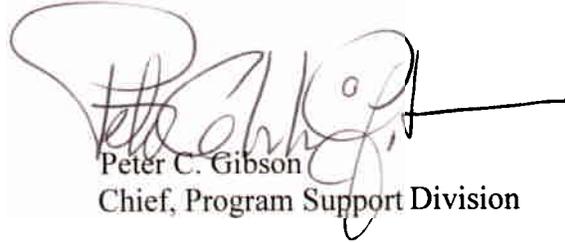
Although it is found that the delineation report provided by Savage and Savage Inc. does not provide adequate information to support their conclusion that the wetlands in question are not adjacent to Little Dry Creek, it should be kept in mind that the determination of whether or not the wetlands and other waters on the site are jurisdictional is the responsibility of the Corps of Engineers. What is found is that the District has not provided sufficient evidence to support their determination. The District based their determination of adjacency on an interpretation of what constitutes a man-made dike that is not in agreement with the normally accepted dictionary definition or common understanding of what constitutes a man-made dike. The District also did not provide

any other evidence to would support a jurisdictional determination for the wetlands on any basis other than adjacency due to the man-made dike. The approved JD is therefore remanded to the District for reevaluation.

Overall Conclusion:

After reviewing and evaluating information provided by the appellant, the District's administrative record, and information obtained during the appeal conference, I conclude that this Request For Appeal has merit for the reasons provided in the discussion above. The Approved JD is remanded to the District for reevaluation.

FOR THE DIVISION ENGINEER



Peter C. Gibson
Chief, Program Support Division

MEMORANDUM TO FILE

SUBJECT: Summary of the Appeal Meeting and Site Visit for the Northern Colorado Constructors Appeal Case, File No. 20000040

1. Date of Appeal Meeting and Site Visit: September 22, 2004

2. Purpose: The purpose of the appeal meeting and site visit was to review and clarify information presented in the appellant's Request For Appeal and information contained in the District's administrative record, regarding the approved jurisdictional determination (JD) made by the Corps of Engineers Omaha District. The appeal meeting and site visit was held in accordance with Corps of Engineers Administrative Appeal Regulation 33 CFR Part 331.

3. Attendees:

Edith Savage, Savage and Savage Inc, Environmental Consultant representing Northern Colorado Constructors

John W. Zadel, representing Northern Colorado Constructors

Chris Zadel, representing Northern Colorado Constructors

Terry McKee, Omaha District Denver Regulatory Office

Scott Franklin, Omaha District, Denver Regulatory Office

Mores Bergman, Appeal Review Officer (RO), Corps of Engineers Northwestern Division (NWD)

4. Background: On February 24, 2004, the Corps Omaha District Denver Regulatory Office (District) received a request for a Section 404 jurisdictional determination, from Northern Colorado Constructors (NCC), for a seventy-acre parcel of land located in the NE ¼ of Section 24, Township 2 North, Range 67 West, Weld County, Colorado. The parcel is known as NCC Pit #1 Extension. On February 27, 2004, the District informed NCC that they would need to prepare a wetlands and waters delineation for the site. On May 10, 2004 Ms. Edith Savage submitted a delineation report for the site to the District, on behalf of NCC. The report identified the wetlands as features A, B, C, E, F, G, H, and I and the stream segment as feature D, and included a site map showing the location of each feature. Ms. Savage concluded in her report that wetlands A, B, C, E, and F are isolated, and as such are not waters of the United States. Ms. Savage further determined that wetlands G, H, and I, and stream segment D are waters of the United States (U.S.). After reviewing the report, the District prepared an Approved Jurisdictional Determination (JD) for the NCC property, and provided it to Ms. Savage by letter dated May 24, 2004. In the approved JD, the District determined that they concurred with Ms. Savage's delineation, except for wetlands A, B, C, and F, which the District determined to be jurisdictional because they are adjacent to a tributary of a water of the U.S. On July 13, 2004, Edith Savage submitted a Request for Appeal (RFA) of the approved JD to the Corps Northwestern Division, on behalf of NCC. The appellant contends that the wetlands identified as wetlands A, B, C and F are isolated and therefore are not waters of

the U. S. The Appeal is being processed in accordance with the Corps Administrative Appeal Regulation 33CFR 331.

5. Summary of Appeal Meeting: The appeal meeting was held at the NCC field office near the NCC Pit #1 Extension site. The Review Officer (RO) opened the meeting by explaining the appeal review process. The RO told the attendees that the purpose of the meeting was to give the appellant (or his representatives) the opportunity to explain the reasons for appeal, to allow the District to explain how they made their jurisdictional determination, and to allow for informal discussion of the issues relative to the case. The site visit is for the RO to see the site conditions, and to allow both the District and the appellant to point out and explain site features relative to the case.

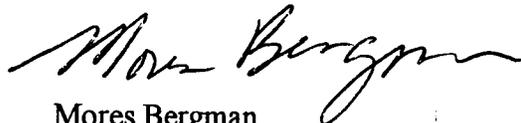
At that time, the RO asked the appellant's representatives if they would like to explain the reasons for appeal. Ms. Savage began by pointing out that according to the Corps regulation (33 CFR 328.3(c)), wetlands that are separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands, and are considered waters of the United States. She said that the District had determined that the wetlands A, B, C, and F, were jurisdictional because they said they were separated from Little Dry Creek by a man-made dike. She further said that when she asked the Colorado Regulatory office for an explanation, they told her (in a letter dated June 16, 2004) that they considered the piece of land that remained between the wetlands and the creek to be man-made dikes. She said that since those areas were not man-made, they did not meet the definition, and should be considered isolated.

The RO then asked the District if they would explain their reasons for determining that the wetlands in question were adjacent wetlands and therefore jurisdictional. Terry McKee drew a sketch showing a cross-section of land, with an excavated pit on one side and a stream on the other, separated by an elevated section of land located in between. He said he considered the section of land remaining between the excavated pit (which is now the wetland) and the stream, to be a man-made dike because man had disturbed the area. Mr. McKee further said that although wetland E was also in the same area as wetlands A, B, and C, he did not consider E to be jurisdictional because he said he determined it to be adjacent to wetland C, not adjacent to the stream. He said that according to the definitions in the Corps regulations (at 33CFR 328.3(a)(7)), wetlands that are adjacent to other wetlands are not jurisdictional.

John Zadel then asked what happens if it is decided as a result of the appeal that the District's determination was correct and the wetlands are jurisdictional? Scott Franklin explained that if the District's determination is upheld, a permit review process would be required for their project if it involved any fill being placed in jurisdictional wetlands or other waters on the property.

The RO asked if there was any questions or any more information or that anyone wanted to present. There being no more comments at that time, the group agreed to proceed to the property in question for the site visit.

6. Summary of Site Visit: The group started the inspection at the site by wetland F. Some water and wetland vegetation were observed in wetland F. Wetland F is located about 100 feet from Little Dry Creek in the northern portion of the property. The section of land existing between wetland F and the creek was higher in elevation than the wetland perimeter and the creek bank. It appeared that this section of land had not been disturbed by man and did not appear to be a natural river berm. Mr. McKee pointed out that wetland F had been created by excavation of a gravel pit many years ago. He said he considers the piece of land that now exists between the wetland and the creek to be the same as a man-made dike for the purpose of determining adjacency. The group then walked northeast along Little Dry Creek to the northern edge of subject property. This portion of the creek is the waterbody designated as feature D in the wetland and waters of the U.S. delineation report prepared by Ms. Savage. It was noticed that there was some fill that had been placed, sometime in the past, on the bank of the creek in spots along that portion of the creek near the northern property line. It appears that this fill may have come from cleaning out of the creek. The creek continues onto the neighboring property to the north, which contained much wetland area including some open water as well as some small braided channels that connect with the main channel of Little Dry Creek. The group stopped and looked at wetlands C, B, and A. These three wetlands were at a lower elevation than the land to the south and appeared to be about the same elevation as Little Dry Creek in that area. Each of these wetlands was located close to the braided tributaries that connect with Little Dry Creek. Wetland E was separated from the other wetlands and lays approximately 100 to 150 feet from Little Dry Creek. It appeared to be at a slightly higher elevation than wetlands A, B, and C. The group did not inspect the wetlands identified as G, H, I, since there was no disagreement about the jurisdictional status of these waters. The site visit ended at this location. I thanked the participants for their assistance and we left the site.



Mores Bergman
Appeal Review Officer