

ADMINISTRATIVE APPEAL DECISION

DOUGLAS STAMM, FILE NO. NE 05-10133

OMAHA DISTRICT

DATE: 20 December 2005

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

Appellants: Douglas Stamm and Vikki Stamm, Co-owners

Receipt of Request for Appeal: September 19, 2005

Appeal Meeting and Site Visit Date: November 15, 2005

Background Information:

On February 8, 2005, Mr. Douglas Stamm sent a letter to the Omaha District's Nebraska Regulatory Office (District), requesting the District visit his property located at the Northeast ¼ of Section 9, Township 10 North, Range 18 West, Buffalo County, Nebraska to discuss his proposal to fill an existing waterway for the installation of a pivot irrigation system for the purpose of farming the property. Ms. Barbara Friskopp of the Nebraska Regulatory Office met with Mr. Stamm on March 10, 2005 at the site in question and explained the permitting requirements to him and informed him that the Corps had regulatory jurisdiction over the waterway on his property. As a result of further questions from Mr. Stamm, a second site visit was held with Mr. Stamm on August 10, 2005 to review the jurisdictional determination and to explain the definition of waters of the United States as contained in the Corps' regulation 33 C.F.R. part 328. The District provided Mr. Stamm with an approved jurisdictional Determination (JD) for the property on August 10, 2005. In the approved JD, the District stated that the waterway crossing the Stamm property is a tributary of a water of the United States because there is evidence that water flows in the waterway sufficient enough to show an ordinary high water mark and the waterway connects to the Wood River which is a known tributary of a water of the United States.

On September 15, 2005, Mr. Stamm submitted an appeal of the JD to the Northwestern Division. The appeal was received on September 19, 2005 in accordance with the Administrative Appeal Regulation 33 C.F.R. part 331. The appellant's reasons for appeal are listed below. The Review Officer conducted an appeal meeting and site visit on November 15, 2005 and determined that the appeal does not have merit for the reasons described below.

Summary of Reasons for Appeal Submitted by Appellant:

Reason 1: Definitions being applied by the Corps of Engineers (COE) are from the early 1900s, wherein a comprehensive reading of their meaning demonstrates they were never meant to be read in such a manner as to be applied to non-wetland, dry, extremely sporadic, small upland drains.

Reason 2: By finding it has jurisdiction over my property; the COE is attempting to wrongfully expand their jurisdiction over more than their legislated responsibility.

Reason 3: No objective minimum water flow for COE jurisdiction has been provided by COE representatives despite numerous requests by the appellant.

Reason 4: The appellant contends that before the COE can take jurisdiction over an activity, a specific water flow must be identified. Therefore, since the COE has not identified a specific water flow to the appellant, there is no basis for the COE to allege jurisdiction.

Reason 5: The appellant contends that COE representatives state that “water flow” is not a jurisdictional consideration, yet the COE still asserts jurisdiction, suggesting that the COE position is untenable.

Reason 6: Appellant contends the definition being used for “ordinary high water mark” (OHWM) is vague, old, and not applicable to the appellant’s project. This definition is meant to apply to flowing rivers that continuously contain water.

Reason 7: By their own admission, COE representatives cannot see an OHWM at some locations on the drain. What the COE thinks to be an OHWM may actually be an illusion caused by other things which the COE is unwilling to consider.

Reason 8: The location of an OHWM is completely subjective with no independent (non-COE) verification or confirmation. Moreover, the appellant has repeatedly requested an objective definition of OHWM from the COE without receiving the same.

Reason 9: COE representatives fail to use the intended or standard meaning of the word “ordinary.”

Reason 10: COE representatives fail to base their opinions on factual or scientific evidence, and are unable (or unwilling) to provide verifiable examples or comparable determinations in the same area as the appellant’s project.

Reason 11: Since COE representatives stated that there was no OHWM on the low water crossing of the county road that is adjoining the appellant’s property, it demonstrates that no OHWM exists on the appellant’s property. This demonstrates, by the COE representatives own admission, that the COE cannot exert jurisdiction over the appellant’s property as such assertion is completely contrary to the fact that no ordinary water mark exists on the designated low water crossing.

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 subject JD. This information was considered in the appeal review. Information obtained during the appeal site visit conducted on November 15, 2005 was also considered in the appeal review to the extent that it provided clarification or explanation of the appeal request and the Administrative Record.

Summary of Decision: The appeal does not have merit. I find that the District has correctly applied the definitions contained in 33 C.F.R. Part 328 in determining that the waterway on the Stamm property is a tributary to a water of the United States and is therefore jurisdictional. In particular, I find the District has properly interpreted and applied the definition of “ordinary high water mark” as stated in 33 C.F.R. § 328.3 in making their jurisdictional determination, and has provided adequate evidence in their administrative record to support the determination.

Appeal Decision Findings and Instructions for District Action:

Reason 1: Definitions being applied by the Corps of Engineers (COE) are from the early 1900s, wherein a comprehensive reading of their meaning demonstrates they were never meant to be read in such a manner as to be applied to non-wetland, dry, extremely sporadic, small upland drains.

Finding: This reason for appeal does not have merit for the reasons contained in the Discussion section below.

Action: No action required by the District regarding this reason for appeal.

Discussion: The appellant has not provided evidence to support this reason for appeal as it would apply to the determination of whether the waterway in question is a water of the United States. The definitions for “waters of the United States” and “ordinary high water mark,” which the appellant is questioning, were first promulgated in November 1986 in 33 C.F.R. parts 320-330. Part 328 of the regulation contains the definitions that apply to activities regulated by the Clean Water Act which was first passed in 1972 and later was amended in 1976. Interpretations of those definitions are based on the regulations and subsequent case law. Although it is true that the regulations do not directly apply to non-wetlands and dry uplands, the regulations do apply to drainage-ways, intermittent streams, ephemeral waterways, flowing streams, and a variety of other similar waterways that show evidence of an ordinary high water mark, and are part of a surface tributary system that connect to other known waters of the United States. The District has shown adequate evidence in their administrative record to demonstrate that the waterway in question does contain water flow to the extent necessary to show an OHWM, and that the waterway does connect to other known waters of the U.S. It is therefore found that this reason for appeal does not have merit.

Reason 2: The COE may be responsible for “waters of the United States,” but by finding that it has jurisdiction over the appellant’s property, the COE is attempting to wrongfully expand their jurisdiction over more than their legislated responsibility.

Finding: This reason for appeal does not have merit for the reasons contained in the Discussion section below.

Action: No action required by the District regarding this reason for appeal.

Discussion: The appellant has not provided any evidence to support this reason for appeal in his request for appeal or otherwise. It is found that the District has provided evidence in their approved jurisdictional determination dated August 10, 2005, and in their Administrative Record to support their approved JD. The District's record contains several pictures dated August 10, 2005 which clearly show the waterway in question with evidence of an OHWM. Also, the District's jurisdictional determination data sheet which was prepared on August 10, 2005 indicates that the waterway meets the definition of a "water of the United States" as contained in the Corps of Engineers Regulation 33 C.F.R. § 328.3(a). Part 328 of this regulation defines those waters that are regulated by the COE under Section 404 of the Clean Water Act. There are also an aerial photo dated February 2005 and a USGS topographic map contained in the administrative record that show the existence of a tributary on the Stamm property that connects to the Wood River, which is a known water of the United States. The existence of the drainage-way with an identifiable bed and banks and an OHWM was observed by the Review Officer during the appeal site visit held on November 15, 2005.

Reason 3: No objective minimum water flow for COE jurisdiction has been provided by COE representatives despite numerous requests by the appellant.

Finding: This reason for appeal does not have merit for the reasons contained in the Discussion section below.

Action: No action required by the District regarding this reason for appeal.

Discussion: In the discussion provided by the appellant with his reasons for appeal dated September 15, 2005, Mr. Stamm states that in order for a drain to be a water of the United States that an objective minimum water flow should be required. In reviewing the Corps' regulations at 33 C.F.R. Part 328.3, there is no mention of a specific minimum flow requirement for a waterway to be considered a water of the U.S. What is stated in the regulation is that jurisdiction extends to the OHWM, and that this point is defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." In the District's administrative record is found a letter, dated August 10, 2005, to Mr. Stamm from Ms. Friskopp of the District's Nebraska Regulatory office, in which she informed Mr. Stamm of the definitions of waters of the U.S. and OHWM, and informed him that a specific amount of flow is not required by the Corps regulation for a stream to be considered jurisdictional. Since it is found that the definition of jurisdiction in the Corps regulation does not specify a specific minimum flow for a waterway to be jurisdictional, this reason for appeal is determined to not have merit.

Reason 4: The appellant contends that before the COE can take jurisdiction over an activity, a specific water flow must be identified. Therefore, since the COE has not identified a specific water flow to the appellant, there is no basis for the COE to allege jurisdiction.

Finding: This reason for appeal does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District regarding this reason for appeal.

Discussion: This reason for appeal is found to not have merit for the same reasons as stated in the discussion under reason 3 above.

Reason 5: The appellant contends that COE representatives state that “water flow” is not a jurisdictional consideration, yet the COE still asserts jurisdiction, suggesting that the COE position is untenable.

Finding: This reason for appeal does not have merit for the reasons contained in the Discussion section below.

Action: No action required by the District regarding this reason for appeal.

Discussion: In reviewing the District’s administrative record, there is no evidence found that COE representatives have informed Mr. Stamm that water flow is not a jurisdictional consideration. What is found in the record is a letter to Mr. Stamm dated August 10, 2005 in which the District’s Nebraska Regulatory office informed Mr. Stamm that “Jurisdiction is not based on the amount of water flow for any specific period of time but rather the effect the water has on the channel.” In the same letter the District pointed out that the OHWM also is determined by the effect of the water flowing in the channel, not the amount of water flowing. I find that these statements are consistent with the definitions provided in the applicable COE regulations, and support the District’s determination of jurisdiction (See discussion of definitions under reason 3 above). It is impossible for the Corps to have flow data on every drainage feature in the U.S. Corps inspectors require criteria that can be observed during a site visit. To require historical flow data would be to effectively abandon the goals of the Clean Water Act. The Corps’ regulations recognize this by using observable field features as the criteria. These regulations have been upheld as reasonable by the federal courts. For the above reasons, I therefore find that this reason for appeal does not have merit.

Reason 6: Appellant contends the definition being used for “ordinary high water mark” (OHWM) is vague, old and not applicable to the appellant’s project. This definition is meant to apply to flowing rivers that continuously contain water.

Finding: This reason for appeal does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District regarding this reason for appeal.

Discussion: As discussed above under reasons 1, 3, and 5, the definition of OHWM is applicable to all waterways that carry water either continuously or occasionally, as long as there is enough flow to leave evidence of an OHWM. The definitions of waters of the United States, as contained 33 C.F.R. § 328.3, do not require a stream to have continuous flow to be jurisdictional. I therefore find that this reason for appeal does not have merit.

Reason 7: By their own admission, COE representatives cannot see an OHWM at some locations on the drain. What the COE thinks to be an OHWM may actually be an illusion caused by other things which the COE is unwilling to consider.

Finding: This reason for appeal does not have merit for the reasons contained in the Discussion section below.

Action: No action required by the District regarding this reason for appeal.

Discussion: In reviewing the administrative record, evidence is found in an inspection report prepared by Ms. Friskopp, dated March 10, 2005, that grass is growing in portions of the north side-channel that branches off from the main channel and that the north side channel is not jurisdictional. However, nothing is found in the record that states that the District determined that the main channel, that is in question, does not have an OHWM where it crosses the Stamm property. The photos dated Aug 10, 2005, that are contained in the administrative record, clearly show an OHWM in the main channel. The photos also show that the main channel clearly has a bed and bank, and that the channel ranges in width from approximately 1 foot to 20 feet, and ranges in depth from approximately 1 ft to approximately 6 feet or more at some locations. The photos also showed scoured out areas, water flow lines, debris and flattened grass areas in the channel, which indicated that water does flow at times in the identified channel. These facts were also observed by the Review Officer during the appeal site visit on November 15, 2005. One area that did not show evidence of an OHWM during the site visit was the low-water-crossing area of the county road that crosses the channel in question, which is located just downstream and adjacent to the Stamm property. Since this road is constructed of compacted gravel and is disturbed by traffic and by maintenance by the county, it is not unusual that it would not show evidence of water crossing the road, except during or immediately after those times when water is crossing the road. Based on the evidence that is contained in the administrative record and the observations made during the appeal site visit, it is determined that this reason for appeal does not have merit.

Reason 8: The location of an OHWM is completely subjective with no independent (non-COE) verification or confirmation. Moreover, the appellant has repeatedly requested an objective definition of OHWM from the COE without receiving the same.

Finding: This reason for appeal does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District regarding this reason for appeal.

Discussion: The Regulatory Program regulation at 33 C.F.R. Part 328.1 states that the COE will use the procedures contained in that part of the regulation to determine Clean Water Act jurisdiction concerning waters of the United States. There is no provision for independent non-COE entities to verify the determination. The affected party does however have the right to appeal a JD to the COE Division Engineer's office if there is a disagreement with the District's determination. This procedure was followed in this case.

The issue the appellant has raised regarding "an objective definition of OHWM" was addressed in the discussion section under reason 3 above. The record shows that the COE Nebraska Regulatory Office did inform Mr. Stamm of the definitions that are contained the 33 C.F.R. Part 328 for determining OHWM and Clean Water Act jurisdiction. Therefore, this reason for appeal does not have merit.

Reason 9: COE representatives fail to use the intended or standard meaning of the word "ordinary."

Finding: This reason for appeal does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District regarding this reason for appeal.

Discussion: In the Request for Appeal submittal letter dated September 15, 2005, Mr. Stamm stated his opinion that " COE representatives are intentionally and arbitrarily assigning an unintended meaning to the word "ordinary" in their effort to confuse the public, to take more power than the legislation intended and devalue private property by taking landowner rights." Mr. Stamm further indicates in his September 15, 2005 letter that according to the definition of the word "ordinary," as contained in widely accepted dictionaries, the definition the COE is using to determination jurisdiction is totally wrong. Mr. Stamm also stated in his appeal submittal letter that there was an extraordinary rain event that occurred previous to the COE representatives viewing of the site which made the drain look different than usual. During the site visit on November 15, 2005, Mr. Stamm stated that a six inch rain had occurred in June 2005 which had flooded the area and caused erosion. During the site visit, Ms. Friskopp confirmed that there was a large rain that had occurred in the area in June 2005, but she said that she had observed an OHWM in the main channel during her first visit to the Stamm property on March 10, 2005, which was before the large rain event occurred. The site visit report dated March 10, 2005 and photos included with that report, support her findings of jurisdiction. The District's administrative record also contains aerial photos and USGS maps, pre-dating June 2005, that show a waterway crossing the Stamm property. The record also contains a letter dated August 10, 2005, from the Mr. Michael Rabbe of the COE Nebraska Regulatory office, to Mr. Stamm, in which Mr. Rabbe explained that the term "ordinary high water mark" is specifically defined in the Corps regulation that is used in determining jurisdiction. He also explained that word "ordinary" cannot be separately be defined from the term "ordinary high water mark" when making a jurisdictional determination. Upon reviewing the administrative record, it is determined that the District did properly interpret the definition of "ordinary high water mark" for the purpose of determining jurisdiction in this case. Therefore, this reason for appeal does not have merit.

Reason 10: COE representatives fail to base their opinions on factual or scientific evidence, and are unable (or unwilling) to provide verifiable examples or comparable determinations in the same area as the appellant's project.

Finding: This reason for appeal does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District regarding this reason for appeal.

Discussion: In reviewing the District's Administrative Record, it is found that the District did provide evidence in the form of photos, maps, aerial photos and field inspection reports to support their decision regarding COE jurisdiction over the waterway on the Stamm property. Regarding the appellant's statement regarding examples or comparable determinations, no record is found in the administrative record that a request for such information was made to the District by the appellant during the course of the JD decision process. Further the regulation does not require such information as part of the JD process. However, it is noted that after the appeal site visit on November 15, 2005, the site inspection group, at the request of Mr. Stamm, did visit a stream modification project that had been permitted by the District, which was located approximately two miles downstream of the Stamm property, on the same waterway. While visiting the site, Ms. Friskopp pointed out to Mr. Stamm that the District had jurisdiction over the waterway and had permitted the project to allow minor modifications of the waterway at that location to accommodate the wheel tracks of a pivot irrigation system. Although the review of this example occurred after the jurisdictional determination was made by the District, it demonstrates that the District had made similar decisions on jurisdiction in the same area in the past. Therefore, this reason for appeal does not have merit.

Reason 11: Since COE representatives stated that there was no OHWM on the low water crossing of the county road that is adjoining the appellant's property, it demonstrates that no OHWM exists on the appellant's property. This demonstrates, by the COE representatives own admission, that the COE cannot exert jurisdiction over the appellant's property as such assertion is completely contrary to the fact that no ordinary water mark exists on the designated low water crossing.

Finding: This reason for appeal does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District regarding this reason for appeal.

Discussion: In reviewing the administrative record, there is no record found that the District representatives had stated that no OHWM existed on the low water crossing of the county road. However at the appeal site visit on November 15, 2005, Ms Friskopp did say that she had agreed with Mr. Stamm that there was not evidence of a flow mark on the road during her previous visit. She explained that since the gravel road was maintained by the county and is disturbed by vehicular traffic, it is not usual that an OHWM would not be present except for a short period of time after a rain event large enough to cause water to flow over the road. There was not an

OHWL present on the road during the November 15, 2005 appeal site visit. On November 15th, Ms. Friskopp further mentioned that there was evidence of an OHWM upstream and downstream of the road during her earlier visits, so it was reasonable to assume that water must have flowed over the road at least sometime, since there is not a culvert under the road, and the road was built with a low area for the water to cross. It is not reasonable to conclude, as is suggested in Mr. Stamm's statement in his Reason 11, that just because there was no OHWM present on the road at the low water crossing on the days of that inspections took place, that the COE cannot exert jurisdiction over the appellant's property. I find that the District have provided sufficient evidence to show the waterway on the Stamm property is jurisdictional. It is therefore determined that this reason fore appeal does not have merit.

Overall Conclusion:

After reviewing and evaluating information provided by the appellant, the District's Administrative Record, and information obtained during the appeal site visit, I conclude that this appeal does not have merit for the reasons stated above.

FOR THE COMMANDER:

PETER C. GIBSON
Chief, Program Support Division