ADMINISTRATIVE APPEAL DECISION

MARTIN MARIETTA AGGREGATES, INC.

FILE NUMBER 200304140

SAVANNAH DISTRICT

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

Appellant Representative: Mr. Craig A. Bromby, Hunton & Williams, L.L.P.

Receipt of Request For Appeal (RFA): 5 September 2003.

Appeal Conference Date: 27 January 2004. **Site Visit Date:** 27 January 2004.

Background Information: The Savannah District's (District) initial involvement with this action was in September 1995, when Sligh Environmental Consultants, Inc. (Sligh) submitted a request to the District for verification of a jurisdictional determination (JD) completed for the Martin Marietta site. The site is located on the Martin Marietta Aggregates, Inc.'s Appling Quarry, Columbia County, Georgia. The District concurred with the Sligh determination and issued a JD on 5 October 1995. After receipt of the District's concurrence, Martin Marietta submitted a pre-construction notification to the District requesting authorization to discharge fill material into 3.45 acres of wetlands in accordance with 33 CFR 330.5(a)(26) (NWP 26) for construction of a 20-acre water supply pond. NWP 26 authorized the discharge of dredged or fill material into headwaters and isolated waters provided: (a) The discharge does not cause the loss of more than 10 acres of waters of the United States; (b) The permittee notifies the district engineer if the discharge would cause the loss of waters of the United States greater than one acre in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands; and (c) The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project. On 10 June 1996, the District issued a NWP 26 authorization to Martin Marietta. The permit authorized the discharge of fill material into 3.45 acres of wetlands.

The administrative record documents, in a December 9, 1998 letter to Martin Marietta Aggregates, the Georgia Department of Natural Resources issued National Pollutant Discharge Elimination System (NPDES) permit no. GA0037346 to Martin Marietta Aggregates to discharge from "the specified wastewater treatment facility" at Columbia County Quarry, Highway 232, Columbia County, Georgia, into Little Kiokee Creek. Emphasis added. There is no documentation in the administrative record as to how, when or by what approvals the water supply pond was converted to a wastewater treatment facility.

On 10 March 2003, Sligh, on behalf of Martin Marietta Aggregates, Inc., submitted a request to the District for a jurisdiction determination (JD) of a storm water/sediment retention pond. The District issued a preliminary JD on 5 May 2003, which stated that the pond was not subject to the Corps jurisdiction under §404 of the Clean Water Act (CWA). However, the District did determine that the streams and/or wetlands located above the pond's normal pool elevation were subject to the Corps jurisdiction under §404 of the CWA. By letter dated 30 June 2003, Martin Marietta requested that the District review its 5 May 2003 JD in accordance with 33 CFR 331.6(c). The District completed its review of the new information submitted by Martin Marietta and again concluded that the existing pond was not subject to the Corps jurisdiction, but that the intermittent stream and wetlands located above the pond were subject to the Corps jurisdiction under §404 of the CWA. The District stated "Conversion of these wetlands to open water (i.e., man-made pond) did not eliminate the pre-existing continuous surface water connection between jurisdictional waters located above the pond and jurisdictional waters of the US located downstream of the pond." A final approved JD was issued on 8 July 2004.

The appellant believes that the District's determination that there is a "continuous surface water connection" between the intermittent stream and wetlands located upstream of the pond and those located downstream of the pond is arbitrary and capricious and not supported by regulation. The appellant is determined, based on the 9 January 2001 US Supreme Court decision, Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers (Slip Opinion, No. 99-1178, October Term, 2000), that the intermittent stream and wetlands at issue are not subject to the Corps jurisdiction under §404 of the CWA. This decision limited the Corps jurisdiction under the CWA to regulate isolated waters. Specifically, the Supreme Court struck down the use of the "Migratory Bird Rule"[1] to assert CWA jurisdiction over isolated, non-navigable, intrastate waters that are not tributary or adjacent to navigable waters.

Summary of Decision: The appellant believes that the District's determination that there is a "continuous surface water connection" between the intermittent stream and wetlands located upstream of the pond and those located downstream of the pond is arbitrary and capricious and not supported by regulation. Based on my review of the administrative record, I have concluded that the District is correct in its exercise of jurisdiction over the intermittent stream and wetlands located upstream of the pond, and its determination was not arbitrary or capricious, and was not contrary to applicable law, regulations, and guidance.

Appeal Evaluation, Findings and Instructions to the Savannah District Engineer (DE):

Reason 1: "The reason for this appeal is that [the] Appellant contends that the Corps has incorrectly applied the law to the facts pertaining to the Contested Waters. Appellant does not challenge the JD insofar as it determined the pond is not jurisdictional. However, Appellant contends the Contested Waters are not properly characterized as "waters of the United States" and therefore are not within the jurisdiction of the Corps."

[1] The "Migratory Bird Rule" extended § 404(a) jurisdiction to intrastate waters: (a) Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or (b) Which are or would be used as habitat by other migratory birds which cross state lines; or (c) Which are or would be used as habitat for endangered species; or (d) Used to irrigate crops sold in interstate commerce.

FINDING: This reason for appeal does not have merit.

ACTION: No further action required

DISCUSSION: Mr. Craig Bromby, attorney for the appellant, stated that the pond is not subject to the Corps jurisdiction based on 33 CFR 328.3(a) (7). Section 328.3(a) (7) states "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States." The appellant feels that because the pond is not a water of the US, then any streams or wetlands located upstream of the pond are isolated and not subject to the Corps jurisdiction under §404. To support their position, the appellant cited e-mail correspondence between the District and the South Atlantic Division's (SAD) Regulatory Program Manager (PM). In the e-mail, the District noted that an EPA Region IV staff member has stated "that EPA is of the opinion that when a jurisdictional wetland and/or stream (i.e., regulated under Section 404) is incorporated into a storm water management plan (i.e., NPDES permit under Section 402) then that entire wetland and/or stream system above the NPDES discharge point is no longer jurisdictional under Section 404." In the email, the District disagreed with this opinion. Mr. Bromby also stated that in accordance with §328.3(a) (8) the EPA is the final authority regarding CWA jurisdiction.

Mr. Bromby is correct when he stated that the EPA has final authority regarding CWA jurisdiction. However, the EPA has delegated to the Corps the day-to-day authority for administering the program. Under a memorandum of agreement between the EPA and the Corps, the EPA may initiate a "special case," in which the EPA determines the scope of jurisdiction for §404 purposes. There is nothing in the administrative record to indicate that the EPA intended to exert its authority to determine the scope of jurisdiction under §404 for this action. Further, there is nothing in the record from EPA providing guidance or expressing a position on this issue. Therefore, the Corps retained its authority to determine the scope of jurisdiction.

The appellant is incorrect in assuming that wetlands located upstream of the pond are isolated and not a water of the United States. The regulation at 33 CFR 328.3(a) states, "The term "waters of the United States" means ... (4) All impoundments of waters otherwise defined as of the United States under the definition; (5) Tributaries of waters identified in paragraphs (a) (1)-(4) of this section;...(7) Wetlands adjacent to waters (other than waters that are themselves wetlands)...(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." Emphasis added.

The District did not disagree with the appellant's position that the pond is not a water of the US subject to the Corps jurisdiction under §404 of the CWA. The District's approved jurisdictional determination included a Basis for Jurisdiction that states, "Since compensatory mitigation was provided to offset the wetland loss associated with construction of this pond, and the pond is regulated under Section 402 of the Clean Water Act, we have determined that the pond, up to its

normal pool elevation, is not a water of the United States and is not subject to our jurisdiction pursuant to Section 404 of the Clean Water Act."

As noted above, the attorney for the appellant relied on the exception for waste treatment systems in 33 CFR 328.3(a) (7) for his conclusion that the pond is not subject to the Corps jurisdiction. Section 328.3(a) (7) provides that waters of the United States include:

> Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)-(6) of this section. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

This exception for waste treatment systems is contained in the general provision stating that adjacent wetlands are jurisdictional. The preamble to the Final Rule including this regulation in the Federal Register, 51 F.R. November 13, 1986, states,

> *Section 328.3: Definitions* . . . For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular water body within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States" . . . . (c) Artificial lakes or ponds created by excavating and/or diking **dry land** to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing. Emphasis added.

The regulation which preceded the 1986 regulation noted above also reflects a distinction between artificial waters constructed out of dry land and those that impound natural water bodies for purposes of Corps jurisdiction. As stated in the preamble to the 1977 Final Rule, 42 F.R. 37130 (July 19, 1977):

> We have defined the term "impoundment" as a "standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area." Responding to several suggestions, we have clarified what is not included in the term "impoundment" by stating that it does not include artificial lakes or ponds created by excavating and/or diking **dry land** to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing. Emphasis added.

Section 328.3(a) (4) of Title 33 of the CFR provides that "[a]ll impoundments of waters otherwise defined as waters of the United States under the definition" are jurisdictional waters of the United States. This includes in-stream waste treatment systems. West Virginia Coal Ass'n v. Reilly, 728 F.Supp. 1276, 1289-1290 (S.D.W.Va. 1989), aff'd, West Virginia Coal Ass'n v. Reilly, 932 F.2d 964 (4th Cir. 1991) (Table).

The pond in this case is an impoundment created by artificially blocking an unnamed tributary to Little Kiokee Creek. To the extent it occupies this preexisting tributary, it was not constructed

by excavating and/or diking dry land, and is not an artificial water body adjacent to other waters of the United States. Accordingly, the portions of the pond occupying preexisting waters of the United States (the unnamed tributary) continue to be jurisdictional waters of the United States for purposes of Section 404 of the CWA. The pond is not, however, the subject of this appeal.

Nevertheless, because of the connecting link of the pond, the intermittent stream and wetlands located upstream of the pond are not isolated, but are part of a jurisdictional surface tributary system. The District noted that there is a "continuous surface water connection between the portion of the intermittent stream and wetlands located upstream of the pond and those downstream of the pond. The Corps defines 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 waterbodies" (33 CFR §330.2(e)). The District's Basis for Jurisdiction stated "Based on available information (i.e., 1999 color infrared aerial photograph) we have determined that water flows from these streams and wetlands, into the storm water pond, thru the pond's outfall and downstream to Little Kiokee Creek, a jurisdictional water of the United States. In its 30 June 2003 letter, Martin Marietta appears to concur with the District's finding when they stated "The discharge from this pond flows through an outfall permitted under our NPDES Industrial Wastewater Permit No. GA0097946 – Outfall 002 and into an unnamed tributary to Little Kiokee Creek."

During the appeal conference, the appellant stated that once the pond was constructed and the Georgia Department of Natural Resources issued its NPDES permit, the system became a closed system because any water that is released from the pond must meet effluent limitations and monitoring requirements. Because of the monitoring requirements, downstream releases are not made. The pond is not only used as a sedimentation basin but a water supply for the quarry's daily operations. The water used in the mining process is returned to the pond and recycled. The Martin-Marietta staff stated that in the last five years only one release has been made from the pond. The information contained in the administrative record does not support the appellant assertion that the pond and the upstream portion of the intermittent stream and wetlands are now a closed system. The fact there has been a release of water downstream would indicate that it is not a closed system. Further, the issuance of the NWP 26 permit did not sever the preexisting jurisdictional surface water connection so as to reduce the reach of jurisdictional waters of the United States.

Information Received and its Disposition During the Appeal Review:

The District provided a copy of the Administrative Record.

Conclusion: Based on my review of the administrative record, I have concluded that the District's determination was not arbitrary or capricious, and was not contrary to applicable law, regulations, and guidance. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

22 Jun 04
(Date)

Randal R. Castro
Brigadier General, US Army
Commanding