

ADMINISTRATIVE APPEAL DECISION

MIKE VICKERY - JURISDICTIONAL NUMBER MSJ00-01172-Y

MOBILE DISTRICT

Review Officer: Arthur L. Middleton, US Army Corps of Engineers (USACE), South Atlantic Division, Atlanta, Georgia.

Appellant Representatives: Mr. Mike Vickery.

Mobile District Representatives: Frank Hubiak, Project Manager.

Permit Authority: Section 404 of the Clean Water Act (33 U.S.C. 1344).

Receipt of Request For Appeal (RFA): 7 June 2002.

Appeal Conference/Site Visit Date: 4 September 2002.

Background Information: On February 3, 2000, the USACE, Mobile District (District) informed Ms Karen Fountain (under Jurisdictional Number MSJ00-00215-ZZ) the District had completed a field inspection of her lot and that the inspection “disclosed that the property is composed entirely of wetlands...”. The site is located on Cochran Road, located within Section 2, Township 7 South, Range 6 West, Jackson County, Mississippi.

The District’s letter informed Ms Fountain, “Due to condition placed on Nationwide Permit 18 by the State of Mississippi concerning filling wetlands, this permit would not be applicable in this situation. Ms. Fountain was informed that the wetlands were subject to the USACE jurisdiction under Section 404 of the Clean Water Act.

On March 30, 2000, Ms Fountain submitted new information to the District and requested that a permit to fill less than 0.1- acre of wetlands be granted. By letter of April 26, 2000, the District verified that Nationwide Permit 18 authorizes Ms Fountain’s request to place fill in 0.1- acre of wetlands. This authorization was assigned Jurisdictional Number MSJ00-01172-Y.

By telephone conversation on May 23, 2000, a Mobile District representative informed Ms Fountain that the previous verification of Nationwide Permit 18 was rescinded and revoked. In a letter of January 18, 2002, explained, “Your Nationwide Permit authorization was revoked for the following reasons: Nationwide permits are for projects with minimal impacts. They can not [sic] be used to initiate a larger project which would require an individual...permit. Nationwide 18 can not [sic] be used to piecemeal a project when the total impact including additional development would be greater than minimal. Nationwide permits are not to be used if there will be cumulative impacts to the environment. Nationwide permits are used for projects that are in the public interest, and it has been determined...that residential development totally in wetlands is not in the public interest.” This action was taken when the District learned that Mr. Mike

SUBJECT: Mike Vickery Appeal of a Jurisdictional Determination. Mobile District, File Number MSJ00-01172-Y

Vickery, Ms Fountain's father, had subdivided a [10]-acre parcel of land, a part of which is the lot for which Ms Fountain had obtained verification to use Nationwide Permit 18. The letter further stated, "You can act as your father[']s agent or he can apply for an individual...permit to fill and develop this property."

By letter of March 15, 2002, Ms Fountain provided a list of events and issues and requested that the District reinstate her permit.

By letter of April 11, 2002, the District stated, "Subsequent to our issuance of the [Nationwide Permit] NWP18...we learned that your lot was one of numerous lots within a 10-acre parcel of property that had been newly subdivided by the land owner [sic]...Since the NWP program is intended to accommodate impacts that have very minimal impact, we were concerned that your NWP 18 was a small piece of a much larger environmental impact...Because of this...the NWP issued you was revoked." The District further stated, "...this office has had several satisfactory conversations with the land owner regarding his intentions for the remainder of the 10-acre parcel. We have concluded that your NWP 18 should be reinstated, and this letter verifies that your proposed filling...is authorized..."

By letter of April 23, 2002, the District informed Mr. Mike Vickery of the reinstatement of the Nationwide Permit authorization to Ms Fountain to fill 0.1 acre of wetlands on her lot. The letter further stated, "Previous inspections have disclosed that the entire 10 acre tract, from which this lot was subdivided, is a wetland subject to our Federal permitting authority...Normally a permit to fill wetland areas for non[-]water-dependent activities under the present regulation is difficult to obtain."

The appellant appealed this determination to the USACE, South Atlantic Division by letter of May 24, 2002.

Summary of Decision: Appeal reasons one and two are similar and are found to have merit. The District's administrative record does not adequately address these issues. The District shall reconsider its approved jurisdictional determination decision as appropriate and include sufficient documentation to support its determination.

Appeal Decision and Instructions to the Mobile District Engineer (DE):

Reasons for the appeal as presented by the appellant:

Appeal Reason 1: "I appeal the decision that my "entire 10 acre tract is jurisdictional wetlands" on the following basis:

SUBJECT: Mike Vickery Appeal of a Jurisdictional Determination. Mobile District, File Number MSJ00-01172-Y

1. After discussing this matter with the local Corps office I am lead [sic] to believe that no actual inspection of the “entire 10 acre tract” has ever been conducted. If an inspection was conducted, it was done without my knowledge, consent or accompaniment.

2. The alleged inspection, if conducted, failed to identify a large area paralleling Smear Bayou which does not, in my opinion, have the soils, hydrology or plants required to classify the area as jurisdictional wetlands.

3. There may be other areas, which would not be classified as jurisdictional wetlands if an actual complete and fair inspection were to be conducted in accordance with proper procedures.”

FINDING: This reason for appeal has merit.

ACTION: The District’s administrative record does not adequately address this issue. The District shall reconsider its approved jurisdictional determination decision as appropriate and include sufficient documentation to support its determination.

DISCUSSION: The approved jurisdictional determination issued by the District on April 23, 2002, states, “Previous inspections have disclosed that the entire 10 acre tract, from which this lot was subdivided, is a wetland subject to our Federal permitting authority [Emphasis added]...that this jurisdictional determination reflects current policy and regulation and is based upon criteria contained in the January 1987 U.S. Army Corps of Engineers’ Wetlands Delineation Manual.

The appellant does not believe that the entire 10-acre parcel is wetlands. At the site visit on September 4, 2002, aerial photography was observed that indicated a questionable area in the center of the 10-acre tract, paralleling Smear Bayou that may not meet the criteria for a wetland. According to Mr. Vickery, “there are some dry areas where pines are growing...There is nothing in the record to show when someone went the site. There are no soils, plant, nor hydrology data.”

The administrative record does not contain any documentation regarding the location of wetlands located on the site. There are no data sheets of sample plots or transects for the site that identify where wetland parameters are present. Therefore, I cannot conclude that the District’s administrative record leads to a reasoned conclusion that the entire 10-acre parcel is a wetland.

Appeal Reason 2: “I appeal the decision that no Nationwide permit will be allowed on the following basis:

SUBJECT: Mike Vickery Appeal of a Jurisdictional Determination. Mobile District, File Number MSJ00-01172-Y

1. This decision is inconsistent with other decisions having been made by the local Corps office. I am familiar with some of these decisions. I am sure a review of the Corps files will reveal other inconsistent decisions (based on filling on filling activities I see taking place).

2. This decision is inconsistent with interpretations I have received, in the past, from Corps officials.

3. No evidence was presented to support the Corps contention that impacts of Nationwide permits in this area would be more than minimal. The lack of evidence of this decision leads me to believe that this decision is arbitrary and capricious.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The Administrative record demonstrates the concern the District had regarding the use of Nationwide Permit 18 in what surfaced a piece of a larger project. The District reinstated the Nationwide Permit 18 to Ms Karen Fountain, but informed Mr. Vickery “[t]he maximum limit of Nationwide Permit 18 has been used by Ms Karen Fountain.” In the **Federal Register**/Vol. 61, No. 241/Friday, December 13, 1996/Notices, pages 65915 – 65916: Nationwide Permit 18. Minor Discharges, it states, “Minor discharges of dredged or fill material into waters of the United States provided that the activity meets all of the following...The discharge...will not cause the loss of more than 1/10 acre of a special aquatic site, including wetlands...if the discharge...exceeds 10 cubic yards below the plane of ordinary high water mark or the high tide line or if the discharge is in a special aquatic site, including wetlands, the permittee notifies the District Engineer...” The **Federal Register**/Vol. 65, No. 47/Thursday, March 9, 2000/Notices, page 12895: District Engineer’s Decision, states, “In reviewing the PCN [Preconstruction Notification] for the proposed activity, the District Engineer will determine whether the activity authorized will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest...If the District engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either: (1) That the project does not qualify authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit...”. Further, at page 12896: Use of Multiple Nationwide Permits, states, “The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit.”

There is nothing in the Administrative Record to support the appellant’s statements that the District’s decision is “inconsistent with interpretations I have received, in the past, from Corps

SUBJECT: Mike Vickery Appeal of a Jurisdictional Determination. Mobile District, File Number MSJ00-01172-Y

officials.” At the site meeting on September 4, 2002, the appellant stated that he had asked the District if the property is a wetland. The Appeal Review Officer asked when this had occurred. The appellant said, “prior to purchasing the land [3] or [4] years ago.” Mr. Vickery said he asked the District in writing for documentation for any delineation on the property but did not get a response. Apparently a neighbor was filling a lot and had to get a permit. The appellant said he asked, “How did he get a permit?” and “can I get a permit?” The appellant said he was informed, “yes you can get a nationwide permit but you can’t get multiple permits.” He said he asked, “If I sell to individuals can they get nationwide permits?” He said, “the person [Mr. Vickery] was talking with left room for a while and came back and said yes, individuals could each get a nationwide permit 18.” The appellant could not identify whom he had talked with.

Appeal Reason 3: “I appeal the decision to make it difficult for me to obtain a permit on the following basis:

1. This decision is arbitrary, capricious and constitutes an unconstitutional, uncompensated taking of my property.
2. This decision prejudices my rights to a permit should a permit application be made. It effectively tells me, don’t bother to apply.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The District has the responsibility to provide sound advice to applicants seeking authorization to place dredged or fill material in waters of the United States, including wetlands. The District advised that the appellant should pursue an individual permit for any proposed activities in the remainder of the 10-acre parcel. The appellant was not told that he could not get a permit, but that it would be difficult.

Appeal Reason 4: “I appeal all three decisions on the following basis:

1. The decision is improperly styled. The jurisdictional number used is for a tiny 0.10-acre tract, which is not representative of the “entire 10 acre tract” and is owned by my daughter, Karen Fountain.
2. These decisions constitute an uncompensated taking of my property and violate my rights under the constitution and laws of the United States.
3. I strongly suspect that the manner in which these decisions were promulgated violate the Corps own policies and procedures.

SUBJECT: Mike Vickery Appeal of a Jurisdictional Determination. Mobile District, File Number MSJ00-01172-Y

4. These decisions are not reflective of good government policy.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: At the site meeting the Appeal Review Officer suggested that the jurisdictional determination might have come about as a result of his daughter's nationwide permit activity. Mr. Vickery said, "Yes, that was on for a 0.1-acre parcel, not [his] property." Mr. Vickery's daughter had a contract on the 0.1-acre parcel at the time when the Jurisdictional Determination was done. At the time of the site meeting the contract Ms Fountain had on the 0.1 acre lot had not been closed/executed so the property remained in Mr Vickery's name. As noted above, in Appeal Reason 1, it is possible that not the entire 10-acre parcel is wetlands.

CONCLUSION: After reviewing and evaluating the administrative record provided by the Mobile District, I conclude that there is insufficient information in the administrative record to support the District's determination that the entire 10-acre tract is a wetland. Accordingly, I conclude that this Request for Appeal has merit. Therefore, I am remanding this matter to the Mobile District for additional evaluation.

21 March 03

(Date)



PETER T. MADSEN
Brigadier General, US Army
Commanding