

ADMINISTRATIVE APPEAL DECISION

TONY McNEILL

FILE NO. SAW-2006-207

WILMINGTON DISTRICT

10 MAY 2010

Review Officer: Jason Steele, U.S. Army Corps of Engineers, South Atlantic Division (SAD)

Appellant: Tony McNeill

Acceptance of Request for Appeal: 24 January 2010

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

BACKGROUND

Tony McNeill is appealing the Wilmington District's 18 September 2009 decision to deny an after-the-fact (ATF) permit application to maintain and expand a 135-foot long by 35-foot wide earthen dam in approximately 0.1 acres of jurisdictional wetlands and waters of the United States (U.S.). The dam would impound approximately 2 acres of wetlands and approximately 500 linear feet of stream. The proposed project is located at 523 Old Church Road, Latitude: 34.7692°N / Longitude: -77.0881°W, Carteret County, North Carolina.

The appellant contends that since his property is considered a legitimate farming/ranching operation, that the proposed dam/pond is an exempt activity, pursuant to 40 CFR § 232.3 and 33 CFR § 323.4. As such, appellant believes that he should never have had to apply for a permit, since his proposed activity is exempt from USACE permitting requirements. In addition, the appellant believes he supplied sufficient information to the District that showed the proposal did meet the 404(b)(1) Guidelines (avoidance, minimization, mitigation) and satisfied the criteria for the issuance of an ATF permit.

The District does not dispute that the subject property is a legitimate farming/ranching operation. The District does, however, contend that the proposed dam/pond is not a 40 CFR § 232.3 and 33 CFR § 323.4, exempt activity since the work would bring a water of the U.S. into a use to which it was not previously subject (dam footprint would convert the stream and adjacent floodplain to a non-water of the U.S. / 0.10 acres), and it would also alter the flow and/or circulation of the water of the U.S. (onsite stream). In addition, the District contends that the pond is sized above the minimum standards necessary for the farming operation and may be used for recreational purposes (non-farming related activity). Therefore, a permit was required to maintain and expand the dam. Through the permitting process, the District further contends that there are less environmentally damaging practicable alternatives that exist to meet the overall project purpose

(taking into consideration cost, logistics, and existing technology), that the activity is non-water dependant, and that the need of the additional pond was not established. Since the appellant did not substantiate a need for the proposed pond, did not rebut the least environmentally damaging practicable alternatives, and the proposal did not meet the 404(b)(1) Guidelines, the District denied the ATF permit application.

SUMMARY OF DECISION

The appellant's request for appeal (RFA) does not have merit. At the outset, it should be noted that exemption determinations are not appealable actions pursuant to 33 CFR Part 331. Accordingly, while the administrative record may support the District's determination that the proposed activity is not exempt, as per 40 CFR § 232.3(b) and 33 CFR § 323.4(c), this Administrative Appeal Decision ultimately will not determine the merits of the reasons for appeal that stem from a non-appealable action (the District's denial of a farm pond exemption). However, the administrative record supports the permit denial based on failure to substantiate the need for the proposed pond, failure to comply with the 404(b)(1) Guidelines (40 CFR Part 230), and failure to provide a less environmentally damaging practicable alternative (LEDPA), after the District found there to be at least three (3) LEDPA's available that would meet the appellants overall project purpose of irrigation and waterfowl habitat.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

1. The District provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.
2. The appellant's attorney supplied supporting documentation at the time of submittal of the RFA and subsequent request for additional information.
3. The appellant provided the following, in response to SAD's 24 November 2009 request for additional information:

Avoidance – 1) There is a need for constant and suitable water source for ag activities (smaller existing ponds stagnate due to no water circulation). 2) There is a need for adequate water volume for irrigation of crops and watering livestock. 3) There is a need for wetland road crossing to access and conduct ag activities on adjacent lands owned.

Minimization – 1) Pond size is minimum and reasonable for ag activities stated by Carteret Soil & Water District. 2) Abolishing use of previously used existing dam that was washed out by Hurricane Floyd (+500-800 yr storm event). 3) The area is not a recognized "blue line stream"; pond will be located in this intermittent stream rather than in a "blue line" intermittent or perennial stream.

Mitigation – 1) Fence pond area and controlled access to pond for livestock watering. 2) Fence remaining natural wetland areas to prevent livestock from utilizing Hadnot Creek. 3) Place ~50

ft natural conservation easement and fence around pond perimeter. 4) New pond would provide stormwater and ag runoff detention / treatment and reaeration of outlet waters before entering natural tributary to Hadnot Creek. 5) The proposed pond will reduce the increased flow & velocity, and improve water quality from up-gradient, off-site development activities. 6) Proposed pond, its created wetland fringe, and 50 ft conservation easement perimeter area will provide diverse wildlife habitat. 7) Proposed pond will also be used by USFS for water source in fighting wildfires in the near adjacent Croatan National Forest.

4. The appellant's agent supplied information, at the appeal conference, in the form of aerial maps.

5. The District and appellant's attorney supplied information, after the appeal conference, in the form of answered questions asked at the conference.

APPELLANT'S STATED REASONS FOR APPEAL

Appeal Reason 1: "Mr. McNeill's position on exemption is that the pond construction activity and proposed pond was and is exempt pursuant to Section 404(f)(1)(c) of the U.S. Clean Water Act and 33 C.F.R. 323.4(a)(3). * * * To summarize, Mr. McNeill has been farming and ranching on the property at issue since at least 1987. Thus, there is no question that this is an existing farming and ranching operation. Mr. McNeill's reasons for constructing the pond * * * include the need for a viable water source to serve pasture areas utilized as part of standard rotational stock grazing practices. Additionally, the impoundment will provide secondary utility as a farm road to provide access to areas of the farm property where access is otherwise limited, which would also be exempt pursuant to 404(f)(1)(e) and 33 CFR 323.4(a)(6). For all these reasons, and based on the facts in the record, the activity and proposed pond in question was an exempt activity, and the only question is whether the recapture provision in 404(f)(2) is implicated to change that exempt status."

Appeal Reason 2: "Based on applicable statutory language and legal precedent the proposed activity would not be "recaptured" under 404(f)(2). There are two parts to the recapture provision: (a) impairment of circulation or flow and (b) new use. As applied to the facts of the McNeill case, neither of these criteria is present, so the McNeill pond is not recaptured and retains exempt status under 404(f)(1)(C).

a. Reduce Circulation or Flow

The proposed impoundment will not reduce or impair the circulation or flow. Rather, it is a proposed farm and stock pond which will allow the same flow of an intermittent stream to continue as before while arguably increasing the quantity or reach of surface waters and wetlands. * * * In order to construct a reasonable farm pond, common sense dictates that some alteration to the historical flow and level of the local run-off must occur. * * * If such incidental and unavoidable alteration invokes the recapture provisions, then the farm pond exemption constitutes a mere superfluity. * * * At worst, the McNeill stock/farm pond can and

would allow the same stream flow to continue. Indeed, once the pond is established, not only would the stream continue to flow as before, but, according to Mr. Baldwin, a new wetland fringe would develop along the banks of the new pond, arguably increasing the circulation and flow of the water both through additional surface waters and the development of additional wetlands.

The Corps has asserted in correspondence in this case that, based on Corps experience, any impoundment of a stream to create a pond will impair circulation or flow. The Corps has also asserted that there is a possibility of reduced or impaired flow with regard to tidal influence from Hadnot Creek. These types of assertions arguably underscore the tenuous basis for the Corps position on a recapture of the McNeill pond based on impairment of flow.

For all these reasons, and as based on the actual facts of the McNeill situation to the applicable law, the McNeill pond activity is not recaptured by any reduction in the circulation or flow of waters.

b. No New Use

Although it is arguably not necessary to reach it because there is no impairment of flows or circulation, the second prong of the recapture provisions also does not apply. Based on the legal precedents in the excerpts below as applied to the McNeill case, a construction of a farm pond does not constitute a new use, where the same farming and ranching operation has been carried on for over 20 years. * * * “Courts have interpreted the recapture provision to mean that a party needs a permit only when it is starting a new farming operation, not when it is building a new pond to support an existing farming operation. [citations omitted] * * * For all these reasons, and from an application of the law to the facts of the McNeill case, the proposed pond activity does not constitute a new use as required to trigger the “new use” recapture provision.”

Appeal Reason 3: “The Corp’s Regulatory Guidance Letter 87-09 arguably exceeds statutory authority, violates the APA and is not entitled to judicial deference * * *, and which on its face expired at the end of 1989. For all the reasons stated herein, Mr. McNeill respectfully disagrees with the Army Corps determination that his proposed pond was not exempt and requires a permit.”

Appeal Reason 4: Mr. McNeill respectfully disagrees with USACE decision on his ATF permit application and takes the position that his proposed pond activity generally satisfies the applicable criteria for an ATF permit, including but not limited to: Avoidance, Minimization, and Mitigation.

EVALUATION OF THE REASONS FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE WILMINGTON DISTRICT ENGINEER (DE)

Appeal Reason 1: The pond construction activity and proposed pond was and is exempt pursuant to Section 404(f)(1)(c) of the U.S. Clean Water Act and 33 C.F.R. 323.4(a)(3).

Finding: This reason for appeal (along with Appeal Reasons 2 and 3) contests the District's exemption determination which is not an appealable action under 33 CFR Part 331. While this reason for appeal was included in the appellant's overall RFA which was accepted for appeal, because it relates to a non-appealable action it individually does not state a basis for any relief under the appeal process.

Discussion: When the Corps published its Final Rule establishing an administrative appeal process for jurisdictional determinations in 65 Federal Register 16485-16503 (28 March 2000), it stated:

A number of comments were received requesting that the appeal process be expanded to include ... the applicability of exemptions and general permits. Those comments were addressed in the March 9, 1999 Federal Register document. For the reasons stated in the March 9, 1999 Federal Register document, the Corps is not including an administrative appeal process for determining whether a particular activity requires a Section 404 and/or Section 10 permit. It should be noted that the biggest concern of applicants and landowners was the geographic extent of waters of the United States on their property (e.g., wetlands delineation)." [16487]

For purposes of the appeal process (and for some other purposes), a distinction is drawn between determinations regarding the "*geographic extent*" of jurisdiction and those regarding jurisdiction over a particular "*activity*." Only the former were intended to be within the scope of the appeal process. Whether an activity is or is not exempt (and therefore requires a permit) is a determination not subject to administrative appeal under 33 CFR Part 331. "JDs do not include determinations that a particular activity requires a DA permit." 33 CFR § 331.2 (definition of jurisdictional determination).

The Corps' appeal regulation in Part 331 further states that there are only three types of appealable actions: "an approved JD [jurisdictional determination], a permit denial, or a declined permit, as these terms are defined in this section." 33 CFR § 331.2. The definition of "Jurisdictional determination (JD)" states, in part: "For example, such *geographic* JDs may include ..." [italics added]. 33 CFR § 331.2. Section 331.7(g) likewise refers to "a decision to determine *geographic* jurisdiction ..." [italics added]. Regulatory Guidance Letter (RGL) 08-02, *Jurisdictional Determinations* (26 June 2008), states that "Approved JDs shall be documented in accordance with the guidance provided in RGL 07-01. Documentation requires the use of the JD Form published on June 5, 2007" (as Appendix B of the Rapanos Guidance). The required Approved Jurisdictional Determination Form (used by the District in this case) does not include any findings regarding the applicability of exemptions or jurisdiction over particular *activities*, but is confined to the elements of *geographic* jurisdiction. While a jurisdictional determination may be appealed as part of an appeal of a permit denial or declined permit (regardless of whether the jurisdictional determination was appealed previously (33 CFR § 331.5(a)(2)), there is no

provision for the appeal of a determination that an activity is not exempt (either on its own or as an element of another appealable action).¹

While the District's exemption determination is not an appealable action, either standing alone or as part of a jurisdictional determination, declined permit or permit denial, the Review Officer's examination of the administrative record and the parties presentations at the appeal conference does indicate that the District's decision would not be plainly contrary to law, regulation, or officially promulgated policy. The Environmental Assessment, 404(b)(1) Analysis, Findings of No Significant Impact (FONSI), and Statement of Findings appears to substantially document² that the existing and proposed dam/pond is a non-exempt activity consistent with 40 CFR § 232.3(b) and 33 CFR § 323.4(c).

Action: None required.

Appeal Reason 2: Based on applicable statutory language and legal precedent the proposed activity would not be "recaptured" under 404(f)(2).

Finding: This reason for appeal contests the District's exemption determination which is not an appealable action under 33 CFR Part 331.

Discussion: See Appeal Reason 1 above.

Action: None required.

Appeal Reason 3: The Corp's Regulatory Guidance Letter 87-09 arguably exceeds statutory authority, violates the APA and is not entitled to judicial deference, and expired at the end of 1989.

Finding: This reason for appeal contests the District's exemption determination which is not an appealable action under 33 CFR Part 331.

Discussion: See Appeal Reason 1 above.

Action: None required.

¹ Regulatory provisions and RGLs reflect the fact that an exemption determination is based on the nature of the *activity* conducted. For example, "Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited" 33 CFR § 323.4(a). RGL 07-02, *Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of Clean Water Act* (July 4, 2007) advises that to make an exemption determination, one must "[i]dentify the type of ... *activity*, and whether the activity is eligible for the exemptions at Subsection 404(f)(1)" [italics added].

² The District's analysis and findings applicable to the exemption determination are found at: p. 3, no. 1.c (1st and 3rd paragraphs); p. 5, no. 6 (3rd paragraph); p. 17, no. 7.a(2); p. 18, no. 7.a(5); p. 20, no. 7.a(7); p. 23, nos. 8.a(4) and (5); p. 24, no. 8.a(7); and, p. 26, no. 8.d.

Appeal Reason 4: The proposed pond activity generally satisfies the applicable criteria for an ATF permit, including but not limited to: Avoidance, Minimization, and Mitigation

Finding: This reason for appeal does not have merit.

Discussion: The administrative record states (page 16, no. 6.f.):

In concluding the alternative analysis, it is our position that the applicant has failed to substantiate the need for the Proposed Action and/or rebut the presumption of other onsite lesser damaging practicable alternatives that could be implemented to achieve his stated project purpose and need. Based on our analysis, we have determined that there are several lesser environmentally damaging practicable alternatives compared to the applicant's. Any of these alternatives would accomplish the goals of irrigating the 45-acre pastureland, ensuring the sustainability of the cattle ranch, and creating or enhancing waterfowl habitat. Of the five alternatives evaluated, the Corps has concluded that the No-Action Alternative is the LEDPA. Pending the quality of the extracted material, the Expansion of Existing Pond(s) and/or the New Upland Pond(s) Alternative could be substituted as the LEDPA.

It should be noted an irrigation/waterfowl habitat pond in wetlands and/or streams is not considered a water dependent activity as defined in 40 CFR 230.10(a)(3). Pursuant to this regulation, the applicant's proposal is presumed to have an alternative method that reduces or eliminates impacts to those special aquatic sites unless the applicant proves that his alternative is the least damaging, practicable alternative, which the applicant has failed to do.

The administrative record states (pages 22-23, no. 7.b.(3)(a-c)):

(a) Appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem: yes ___ no X

(b) Compensatory Mitigation (Wetland restoration, enhancement, creation, preservation, etc.): * * * The applicant proposes to reduce impacts by enhancing onsite wetlands with the following: 1) Place a conservation easement around the perimeter of the entire pond, extending 50 feet landward from the designed ordinary high water level of the pond. This easement area will be an undeveloped mixed forested zone that could be overseen by a non-profit conservation group, such as Ducks Unlimited or NC Land Conservatory. 2) Implement "Best Management Practices" to limit and control cattle access in the wetlands and pond water. This would be accomplished through a network of fencing.

Although it is agreed that controlling livestock access to the wetland and stream system would be beneficial, it is wholly inadequate, along with the other

proposals, to compensate for the impacts associated with the Proposed Action. It is our position that the applicant has failed to provide appropriate mitigation for the adverse impacts to the approximate 2.0 acres of wetlands and +500 linear feet of stream.

(c) Findings: * * * The applicant has failed to provide adequate information that would override the presumption of the 404(b)(1) Guideline that for non-water dependent projects, there is a less damaging practicable alternative (40 CFR 230.10(a)(3)). It is our determination that the applicant could support his objective for irrigation and waterfowl habitat, as stated, by other practicable alternatives with less impacts on the aquatic resources.

The administrative record states (page 27, no. 8.f.):

* * * The applicant has not proposed sufficient mitigation to adequately offset the loss of function that will occur as a result of the proposed activity. Therefore, the project, as proposed, will result in a net loss of aquatic function. This is contrary to the Corps wetland policy.

The administrative record states (page 29, no. 11.d.-e.):

d. Compliance with 404(b)(1) guidelines: * * * I have determined that the proposed non-water dependent activity does not comply with the 404(b)(1) guidelines.

e. Public Interest Determination: * * * issuance of a Department of the Army permit is contrary to the overall public interest, according to Department of the Army regulations (33 CFR 320-330). * * * The Applicant has failed to provide appropriate and practicable mitigation for these impacts thereby the project will result in a net loss of aquatic function. Finally, the Corps has determined that there are several alternatives, some of which have little or no impact on aquatic resources, available to the applicant and are capable of being accomplished in a reasonable manner. * * *

33 CFR § 323.6 (a) states:

* * * a permit will be denied if the discharge that would be authorized by such a permit would not comply with the 404(b)(1) guidelines. If the district engineer determines that the proposed discharge would comply with the 404(b)(1) guidelines, he will grant the permit unless issuance would be contrary to the public interest.

40 CFR § 230.10 (a) states:

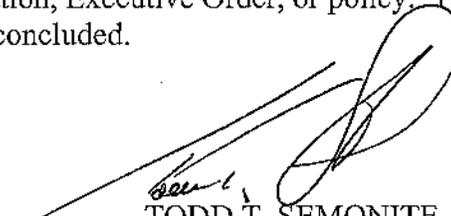
* * * no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

The appellant never rebutted, through supporting data, the District's assertion that there are less environmentally damaging practicable alternatives to the existing and proposed dam/pond. Specifically, the record shows that the appellant did not rebut the finding that the five (5) existing onsite upland constructed ponds, ranging in size from approximately 0.5 acres to 2.65 acres and supporting a 200 acre farm, are sufficient to meet the basic project purpose. This alone is sufficient justification to deny a Department of the Army permit. However, the District further denied the permit based on the project being contrary to the public interest. The District found the project could adversely affect: general environmental concerns, wetlands, fish & wildlife values, flood hazards, floodplain values, water quality, and secondary effects. As noted above, the District found that the appellant failed to provide appropriate and practicable mitigation for the adverse impacts of the project, and that he has alternatives available to him which have little or no impact on aquatic resources. The Environmental Assessment, 404(b)(1) Analysis, Findings of No Significant Impact (FONSI), and Statement of Findings and supporting documents provide substantial evidence for these findings.

Action: None required.

CONCLUSION

For the reasons stated above, I find that the appeal does not have merit. The District's exemption determination is not an appealable action and was not eligible for an administrative appeal under 33 CFR Part 331. Regarding the after-the-fact permit denial, the District's administrative record contains substantial evidence to support its determination that the proposed project is not a CWA exempt activity and the permit denial was based on supporting evidence. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law, regulation, Executive Order, or policy. The administrative appeals process for this action is hereby concluded.



TODD T. SEMONITE
Major General, USA
Commanding