

**ADMINISTRATIVE APPEAL DECISION**

**BULLITT FARM; FILE NO. 200100892**

**LOUISVILLE DISTRICT**

**AUGUST 23, 2002**

**Review Officer:** Suzanne L. Chubb, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

**Appellant Representative:** Mr. Chris Schipper, Gresham, Smith and Partners, Louisville, Kentucky.

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

**Receipt of Request For Appeal (RFA):** September 17, 2001.

**Site Visit:** None.

**Background Information:** The site is located at the northeast corner of the intersection of I-64 and Route 264 in Jefferson County, Kentucky. On July 2, 2001, Gresham Smith and Partners (GS&P) requested "a jurisdictional determination on the identified stream". The northwest portion of the U.S. Geological Survey, Jeffersontown quadrangle map, was attached with a stream segment highlighted and labeled as the project location.

The District performed a staff reconnaissance on July 9, 2001 and determined that the stream is jurisdictional. In a letter dated July 26, 2001 to GS&P, the District informed them that the stream is a tributary that eventually drains into navigable or interstate waters. GS&P have appealed this determination to the Division office. In an October 6, 2001 letter to the appellant, I was delegated the authority to serve as both the Review Officer and decision authority regarding this RFA. This delegated authority is allowed by regulations at 33 CFR 331.3(a)(1).

**Appeal Decision and Instructions to the Louisville District Commander (DE):**

**Appeal Reason 1:** The onsite "ditch", an impacted farm ditch, should not be considered a jurisdictional water of the U.S.

**Finding:** This appeal reason does not have merit.

**Action:** No action required.

**Discussion:**

In support of their reason for appeal, the appellant pointed out that the ditch has been channelized and riprapped (photos enclosed with the RFA) to abate erosion from an upstream subdivision and provides minimal aquatic benefits, if any. They also stated that water flow is only observed during, and for short periods after, a rain event. They indicate there is no apparent bed and bank outside of the riprapped area.

The district's file documentation indicates that the waterway in question is a segment of intermittent tributary that outlets less than 3/10ths of a mile downstream of the site into an unnamed permanent tributary that flows into the Middle Fork of Beargrass Creek. The Middle Fork of Beargrass Creek flows into the South Fork of Beargrass Creek and into a navigable waterway, the Ohio River near milepost 602. Furthermore, in the RFA you note that water flow occurs during and following a rain event. This meets the Corps definition of an ephemeral stream (2002 Nationwide Permit Regulations, 67 FR 2094). Waters of the United States are defined in the regulation at 33 CFR Part 328.3(a). Aquatic resources like tributaries and intermittent streams that flow into tributaries, regardless of the man-made impacts from channelization and the placement of riprap, are waters of the United States, and, as such, are subject to the Clean Water Act jurisdiction of the Corps. Should a permit application be submitted, the District's evaluation of project impacts and permit decision would include a consideration of the quality of the aquatic resource.

**Conclusion:** For the reasons stated above, I conclude that this Request For Appeal does not have merit.

FOR THE COMMANDER:

  
SUZANNE L. CHUBB  
Appeal Review Officer  
Great Lakes & Ohio River Division