

ADMINISTRATIVE APPEAL DECISION

RAYMOND & MILDRED ROBERTS; FILE NO. CENAP-OP-R-2012-0364

PHILADELPHIA DISTRICT

6 February 2013

Review Officer: Mr. James W. Haggerty, U.S. Army Corps of Engineers, North Atlantic Division

Appellants: Raymond & Mildred Roberts

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

Receipt of Request for Appeal: 4 October 2012

Appeal Meeting: 27 November 2012

Summary of Decision: The appellants' request for appeal does not have merit. The district correctly applied the current regulatory criteria and associated guidance in determining the presence and extent of "waters of the United States" on a portion of the appellants' property.

Background Information: The administrative record indicates four interactions occurred between the appellants and the Philadelphia District over an approximate two year period starting on 22 April 2003. These interactions were apparently related to the appellants' concern regarding drainage and sediment entering their property, the source of which they identified as a retention pond on the upstream property of the Farmington subdivision, located across Frazer Road to the south of the appellants' property. In conjunction with the initial on-site meeting, the district opened a violation case but exercised its discretion not to pursue action against the appellants at that time.

On 15 December 2011, the district received separate reports, from a New Castle County code officer and an adjacent property owner, purporting unauthorized discharges of fill material into waters of the United States on the appellants' property. The district visited the area on 20 January 2012 and met with the appellants on 27 January 2012 but the appellants denied district personnel access to the property to investigate the alleged violation. On 18 April 2012 the same adjacent property owner submitted a new report of unauthorized filling of wetlands on the appellants' property, which led to an on-site meeting on 19 April 2012. During this meeting, the appellants allowed district personnel to take soil borings and identify vegetation and hydrology at various locations on the property in an effort to determine the approximate extent of jurisdiction. A follow-up on-site meeting occurred on 1 May 2012 to help finalize jurisdiction and determine the extent of unauthorized work.

By letter dated 30 May 2012 the district notified the appellants that unauthorized work had occurred on their property, the extent of which was 0.04 acres of fill in jurisdictional wetlands. The district also determined that additional fill had previously been discharged into wetlands on the appellants' property; however, this work was considered authorized by a nationwide general permit. By letter dated 10 August 2012, the district provided the appellants with the approved jurisdictional determination which is the subject of this administrative appeal. This office formally accepted the request for appeal on 7 November 2012, after the appellants and the district jointly executed a tolling agreement as required by 33 CFR Part 331.2.

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) With the request for appeal, the appellants provided copies of some previous correspondence with the district, including a permit application they submitted on 20 June 2012, and copies of correspondence and documents with state and county agencies from 2004-2005 relative to their contention regarding the drainage pattern on their site. The appellants also submitted color photographs at the appeal meeting, black and white copies of which were included in their request for appeal. The color photographs were accepted as clarifying information in accordance with 33 CFR Part 331.7 (f). This office agreed to maintain scanned copies of the color photographs and return the original photographs to the appellants.

EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:

Appeal Reason: The appellants allege that the district did not correctly apply the current regulatory criteria and associated guidance in determining that there are "waters of the United States" on the site.

Finding: This reason for appeal does not have merit.

Discussion: The appellants believe that the district is incorrectly asserting jurisdiction over wetlands on their property. Specifically, the appellants assert that the predominant source of wetland hydrology on the site is surface drainage entering and flowing across their property. They contend the site did not exhibit wetland characteristics until this source of hydrology was introduced after construction of a retention pond circa 2000-2002 on the Farmington subdivision property, an upstream parcel of land to the east of Frazer Road and to the southeast of the appellants' property. During the 20 January 2012 area visit district personnel observed flow from the retention pond through a culvert under Frazer Road, which proceeded northward along the road right-of-way the onto and across the appellants' property¹. This observation confirmed the appellants' assertion regarding the presence of the drainage pattern.

¹ CENAP-OP-R Memorandum for Record dated 20 January 2012.

In accordance with Pages 26 and 52 of the Jurisdictional Determination Form Instructional Guidebook², and Pages 6-7 of the Joint Corps/EPA Guidance Memorandum on Clean Water Act Jurisdiction³, wetlands directly abutting Relatively Permanent Waters that flow directly or indirectly into Traditional Navigable Waters are subject to jurisdiction under the Clean Water Act. In its Approved Jurisdictional Determination Form, the district documented that the wetlands on the appellants' property are contiguous with wetlands that directly abut Perch Creek. Perch Creek is an interstate waterbody which flows across the boundary separating the states of Delaware and Maryland into the Elk River, which is a Traditionally Navigable Water (TNW) that is subject to the ebb and flow of the tide.⁴ On the basis of the documentation presented in the Approved Jurisdictional Determination Form, the district demonstrated the wetlands on the appellants' property are jurisdictional under the Clean Water Act in accordance with current guidance and regulations.

During the 19 April 2012 on-site meeting, the district gathered information on soils, vegetation and hydrology from seven sampling points on a portion of the appellants' property. Sample Point 1 was in an unvegetated location identified as having been recently filled; Sample Points 2 & 3 were in undisturbed areas; Sample Points 4 & 7 were in previously filled areas containing vegetation; Sample Point 5 was adjacent to the previously filled area; and Sample Point 6 was adjacent to the recently filled area. The district consolidated and documented the sampling information in Atlantic and Gulf Coastal Plain Region Wetland Determination Data Forms, as prescribed in Version 2.0 of the Atlantic and Gulf Coastal Plan Regional Supplement to the Corps of Engineers Wetland Delineation Manual. On the basis of the collected information and in accordance with the current regulatory methodology for delineating wetlands, the district properly determined the extent of jurisdictional wetlands within the portion of the appellants' property investigated by the district.⁵

The appellants contend that wetlands were not present on the recently filled portion of their property prior to the construction of the retention pond on the Farmington subdivision property, and submitted photographs to bolster their contention. As noted in the preceding paragraph, the district followed proper procedures in arriving at its approved jurisdictional determination. The district reviewed aerial photographs from 1937, 1954 and 1968 that show the entire tract of land was predominantly forested. Aerial photographs from 1992, 1997, 2002 and 2007 show portions of the site were cleared, filled and/or developed, while the remainder of the site continued to be predominantly forested. A 1970 New Castle County soil survey map shows the site consisted mainly of Fallsington series, which is considered to be a hydric soil. The same map, which is based upon 1962 aerial photography, indicates that Perch Creek traversed a portion of the site which is the subject of the approved jurisdictional determination. During the 19 April 2012 on-site meeting the district determined that red maple (*Acer rubrum*) and pin oak (*Quercus palustris*), species that commonly occur in wetlands, are the dominant species in the tree stratum on the site⁶.

² U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, 30 May 2007.

³ "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States", 2 December 2008.

⁴ See 33 CFR Parts 328.e (a)(1-2)—waters that are subject to the ebb and flow of the tide and interstate waters and wetlands are waters of the United States.

⁵ See Enclosure 1 of CENAP-OP-R letter to appellants dated 30 May 2012.

⁶ See pages 0147 and 0153 of the Administrative Record.

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The photographs submitted by the appellants do not show evidence of standing water or saturated soils, which are common indicators of wetland hydrology. However, this information is insufficient to conclusively demonstrate that the site did not contain wetlands either historically or at the time the photographs were taken. The district's determination is supported in the administrative record based upon the preponderance of information demonstrating the site contained wetland characteristics prior to the construction of the retention pond on the Farmington subdivision property.

Conclusion: I find that the district's administrative record supports its determination regarding the presence and extent of wetlands on the appellants' property that are subject to federal jurisdiction under Section 404 of the CWA. For the reasons stated above, the appeal does not have merit. The administrative appeals process for this permit action is hereby concluded.



KENT D. SAVRE
Colonel, EN
Commanding