

ADMINISTRATIVE APPEAL DECISION

J. BLAIR MITCHELL; FILE NO. NAO-2010-02246

NORFOLK DISTRICT

May 1, 2011

Review Officer: Mr. Mike Vissichelli, U.S. Army Corps of Engineers (Corps), North Atlantic Division

Appellant: Mr. J. Blair Mitchell

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

Receipt of Request for Appeal: August 10, 2011

Appeal Meeting: November 10, 2011

Summary of Decision: The Appellant's request for appeal does not have merit. The district correctly applied the current regulatory criteria and associated guidance in determining that "waters of the United States" are present on the appellant's property.

Background Information: The district and the Virginia Department of Environmental Quality held a joint site visit at the appellant's property, identified as the Mead Property, in September 2010 in response to an alleged violation.

The district did not pursue an enforcement action, however, they prepared a preliminary jurisdictional determination (PJD) dated February 2, 2011. In a letter dated June 7, 2011, the appellant stated that they disagreed with the district's determination that jurisdictional wetlands exist on the site and that they would not sign the PJD, as they felt it would sacrifice their property rights.

The district issued an approved jurisdictional determination (AJD) dated July 20, 2011. In a letter dated August 8, 2011 the appellant submitted a request for appeal (RFA) of the AJD. The division office accepted the RFA on August 25, 2011.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION:

- 1) The District provided a copy of the administrative record (AR), which was reviewed and considered in the evaluation of this request for appeal. Copies of the PJD and AJD were provided separately and do not contain a Bates stamp.

- 2) With the request for appeal, the appellant provided documents containing its comments and analysis of the district's jurisdictional determination. The appellant also submitted additional pictures at the appeal meeting. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7 (f).

EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:

Appeal Reason: The appellant alleges 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 appellant alleges that the district is incorrectly asserting jurisdiction over wetlands on his property. Specifically, the appellant states that the hydrology on the site is supported by intermittent flow off of impervious surfaces flowing through an unmaintained drainage ditch located at the south side of the property. The appellant references past permits issued by, and to, the Commonwealth of Virginia for work in the vicinity of the area identified as subject to CWA jurisdiction. The appellant alleges that work conducted by the State for culvert replacement was authorized by the Corps but never identified as wetlands subject to Corps jurisdiction. That area is where jurisdictional wetlands have now been identified. The appellant also states that they received a general permit from the state for work on its property and there was no mention or concern of a wetland associated with that authorization. It is the appellant's position that the property was not always wet and that its historic industrial use demonstrates this. The appellant alleges that a pipe discharging runoff from the nearby Interstate 64 was backing up onto their property causing the wet conditions observed by the Corps. The appellant states that the pipe has been rerouted to discharge closer to the river and no longer causes the wet conditions on the site that were present when the AJD was completed. The appellant believes that based upon its interpretation of the Rapanos decision¹, the site does not contain jurisdictional wetlands. They believe the Rapanos decision says that waters of the United States include only those relatively permanent standing or continuously flowing bodies of water forming geographic features such as streams, oceans or rivers.

The district determined that the site contains wetlands subject to jurisdiction under the CWA. In accordance with the Jurisdictional Determination Form Instructional Guidebook² (see pages 20 and 52), wetlands adjacent to TNW's are subject to jurisdiction under the Clean Water Act. In its AJD, the district states that the wetlands are adjacent to the Jackson River which is a Traditionally Navigable Water (TNW). Per 33 CFR 328.3 (c): “the term *adjacent* means bordering, contiguous, or neighboring.” The district details in the AR that the wetlands are adjacent based on their close proximity (approximately 125 feet from the wetlands to the Jackson River) and their hydrologic interconnectivity (the wetland discharges to the river through several channels). The AJD provides information which shows that the channels connecting the wetland and the river contain rack lines, scouring and water stained leaves.

¹ In 2006, the Supreme Court addressed the jurisdictional scope of Section 404 of the CWA, in *Rapanos v. U.S.* and in *Carabell v. U.S.*

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

The JD Guidebook identifies necessary documentation to support that wetlands are adjacent to a TNW as well as necessary documentation to support the district's determination that a water is a TNW (see pages 51 and 52). The district meets these criteria through documentation it provided in the AJD form³.

This documentation identifies the TNW located just to the north of the site as the Jackson River. The district references a February 1978 navigation study completed by the district that identifies the Jackson River as a navigable Section 10⁴ waterway from the mouth of the Jackson River to its confluence with Back Creek, which is located at river mile 55. The site is located within that stretch of the river that is considered to be subject to Section 10 jurisdiction. Appendix D of the JD Guidebook defines TNW's as:

..."[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 33 CFR. 328.3(a)(1); 40 CFR. 230.3(s)(1). The guidance also states that, for purposes of the guidance, these "(a)(1) waters" are the "traditional navigable waters." These (a)(1) waters include all of the "navigable waters of the United States," defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN)."

Per Appendix D of the JD Guidebook, "pursuant to 33 CFR 329.16, the Corps should maintain lists of final determinations of navigability for purposes of Corps jurisdiction under the Rivers and Harbors Act of 1899. While absence from the list should not be taken as an indication that the water is not navigable (329.16(b)), Corps districts and EPA regions should rely on any final Corps determination that a water body is a navigable water of the United States." The Jackson River is posted on the districts website as a Section 10 water based on a navigability determination completed by the district.

The district supports its determination that the wetlands are adjacent to the TNW (Jackson River) by identifying its proximity and connection through channels that connect them. The AJD documents that the wetlands meet the three parameters (soils, vegetation and hydrology) of the 1987 Wetland Delineation Manual⁵ and the regional supplement to the manual⁶. The AR shows that the area identified by the appellant's consultant, with changes incorporated by the Corps, accurately delineates the limits of jurisdictional waters on the site in accordance with the Corps wetland delineation manual.

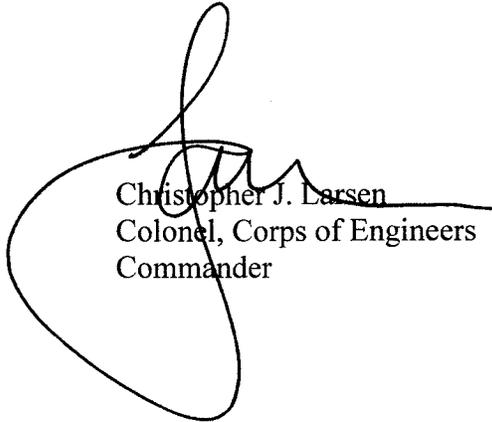
³ See the July 20, 2011 AJD letter and the AJD form at Section III.A and Section IV.

⁴ Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403)

⁵ Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1, January 1987.

⁶ Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region, ERDC/EL TR-10-20, November 2010.

Conclusion: I find that the District's administrative record supports its decision that the wetlands on the appellant's property are subject to federal jurisdiction and regulation 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.



Christopher J. Larsen
Colonel, Corps of Engineers
Commander