

**U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION**

Date: 10 March 2005

ADMINISTRATIVE APPEAL DECISION

**WILLIAM & AGNES E. MOHR
NEW YORK DISTRICT FILE NO. 2003-00236-YN**

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

Appellants: William & Agnes E. Mohr

Appellants' Agent: Chazen Engineering & Land Surveying Company, P.C.

Date of Receipt of Request for Appeal: 22 October 2004

Date of Acceptance of Request for Appeal: 8 November 2004

Appeal Conference/Site Visit Date: 29 December 2004

NAD-ACCEPTED REASONS FOR APPEAL:

NAD accepted the following reasons for appeal for consideration, as enumerated in the agent's submittal of the Request for Appeal:

- 1) There are omissions of material facts in the district's memorandum for the record supporting their approved jurisdictional determination.
- 2) The district's approved jurisdictional determination contains incorrect applications of guidance for identifying wetland areas.
- 3) There are inconsistent findings in the district's administrative record regarding the New York State Department of Transportation's reconstruction of West Avenue and any culverts under the avenue.
- 4) There are incorrect applications of the current regulatory criteria and associated guidance for identifying and delineating "waters of the United States" in the district's memorandum for the record supporting their approved jurisdictional determination.

BACKGROUND INFORMATION:

On 17 March 2003, the New York District received a request for a determination of the extent of Department of the Army ("DA") jurisdiction on an approximate 8.9-acre site located in the City of Saratoga Springs, Saratoga County, New York. The irregularly shaped site is generally bounded to the west by West Avenue and several developed parcels; to the north by an American Legion facility; to the east by several developed parcels fronting on Outlook Avenue; and to the south by New York State Route 29 (Washington Street). On 31 December 1997, the district had previously determined the extent of DA jurisdiction on a 2.9-acre portion of the site fronting on Route 29; the appellants subsequently developed that portion of the overall

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site. The environmental consultant who prepared the 2003 wetland delineation report concluded that the two delineated wetland areas on the site were isolated and, therefore, should not be subject to Clean Water Act jurisdiction.

During review of the 2003 jurisdictional determination request, the district performed several inspections of the 8.9-acre parcel and other properties in the project vicinity. They also consulted with local and state officials to obtain and discuss information regarding historic drainage patterns in and near the project site. The additional areas that the district inspected included a wetland area on the west side of West Avenue (this wetland is also a New York State regulated wetland), and properties to the north and south of New York State Route 9N, including Magee Lane and Care Lane, all located to the north of the state-regulated wetland area. This extensive collection of information was necessary to enable the district to accurately determine whether the wetland area on the appellants' site is jurisdictional under the Clean Water Act.

The district issued its approved jurisdictional determination on 27 August 2004. They determined that the approximate one-acre wetland area on the central and southern portion of the site was isolated and therefore not jurisdictional under the Clean Water Act. They also determined that the wetland area on the northern portion of the site, approximately 1.69 acres in size, is jurisdictional under the Clean Water Act. The appellants are appealing this finding.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

- a) The New York District provided a copy of the administrative record, which was reviewed and considered in the appeal review process along with the results of the 29 December 2004 site inspection and appeal conference.
- b) During the conference, the district provided an enhanced view of a portion of the Saratoga County Soil Survey that contained an aerial photograph of the project vicinity with soil type mapping superimposed thereupon. This was accepted as clarifying information in accordance with 33 CFR Part 331.7 (e)(6) since a normal sized view of this document was already in the administrative record.
- c) In a letter dated 7 January 2005, the agent provided a letter to this office after reviewing the entirety of the district's administrative record. The letter indicated that it identified items in the administrative record which supported the appellants' position as enumerated in the Request for Appeal, and/or which refute the district's decision documentation. This was also accepted as clarifying information in accordance with 33 CFR Part 331.7 (e)(6).

SUMMARY OF DECISION:

The appellants' request for appeal does not have merit, because the administrative record and current Regulatory policies support New York District's determination that the 1.69-acre wetland area on the property is jurisdictional under the Clean Water Act.

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EVALUATION OF THE REASONS FOR APPEAL/APPEAL DECISION FINDINGS:

First Accepted Reason for Appeal— There are omissions of material facts in the district’s memorandum for the record supporting their approved jurisdictional determination.

Second Accepted Reason for Appeal— The district’s approved jurisdictional determination contains incorrect applications of guidance for identifying wetland areas.

Third Accepted Reason for Appeal— There are inconsistent findings in the district’s administrative record regarding the New York State Department of Transportation’s reconstruction of West Avenue and any culverts under the avenue.

Fourth Accepted Reason for Appeal— There are incorrect applications of the current regulatory criteria and associated guidance for identifying and delineating “waters of the United States” in the district’s memorandum for the record supporting their approved jurisdictional determination.

Determination on the Merits of These Reasons for Appeal—these reasons for appeal do not have merit: The agent provided voluminous information to the district during the review of the jurisdictional determination request, and to this office in the Request for Appeal and the subsequent clarifying submittal. In summary, the agent indicates that the wetland area in question should not be considered jurisdictional for three main reasons: 1) There is no current hydrological connection between the wetland area in question and the wetland area on the west side of West Avenue; 2) There is no hydrologic flow between the wetland area in question and any other wetlands or waters in the vicinity of the site; 3) Review of historical data and maps demonstrates there was never a natural connection between the wetlands in question and other interstate waters. The agent also indicates that they believe the hydric soil criterion of the 1987 Corps of Engineers Wetland Delineation Manual is not met because the Saratoga County Soil Survey Map shows the property as containing Deerfield fine sandy loam, a non-hydric soil that does not have any hydric inclusions. Another major argument is that the wetland area in question is separated from Putnam Brook by a drainage divide, which is an issue since the district indicates that the wetland area in question is adjacent to an unnamed tributary of Putnam Brook, which itself is a tributary of a navigable waterbody, namely Saratoga Lake. Finally, the agent believes that the plugging of a culvert under West Avenue has severed any surface water connection between the 1.69-acre wetland and the wetland on the west side of West Avenue, thereby hydrologically isolating the wetland on the project site.

As indicated in the Jurisdictional Determination form in the administrative record, the district asserted jurisdiction over the 1.69 acre wetland area under 33 CFR Part 328.3 (a)(7), indicating that it is adjacent to other waters of the United States. In the Basis for Jurisdictional Determination form in the administrative record, the district indicated that the site contains wetlands according to the criteria established in the 1987 “Corps of Engineers Wetland Delineation Manual”, and the wetlands on the site are jurisdictional because they are adjacent to other waters of the United States, also in accordance with 33 CFR Part 328.3 (a)(7).

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Although the Saratoga County Soil Survey maps a non-hydric soil series on the portion of the site containing the jurisdictional wetland, site-specific field data contained within the agent's wetland delineation report indicates the presence of hydric soils within the delineated wetland area. The agent determined the presence of hydric soils based upon results of soil profiling and examination of soil samples performed in accordance with the specifications of the Wetland Delineation Manual. The district confirmed the agent's findings during an inspection of the project site, and the district's determination that the 1.69-acre area is a wetland is consistent with the procedures described in the manual.

The administrative record contains a great deal of information pertaining to drainage patterns in the project area. The Saratoga County Soil Survey maps a stream which crosses the appellants' property, flows under West Avenue, then meanders northward under Route 9N and eventually empties into Putnam Brook. Other historic sources of information, including U.S. Geological Survey mapping, do not confirm the presence of such a stream. However, in a 31 March 1998 jurisdictional determination for a proposed medical facility along Care Lane north of Route 9N, the district documented that a watercourse on the site is a surface tributary of Putnam Brook. This finding is relevant to the present case in that the district indicates that the wetland to the west of West Avenue is connected to Putnam Brook via a surface water conveyance extending northward from the wetland, and an approximate 600 linear foot culvert system that conveys flow under the drainage divide to the watercourse on the medical facility property and ultimately into the brook.

The agent argues that the surface water conveyance extending northward from the main wetland and the watercourse on the medical facility site were excavated into uplands and together with the culvert system represents a man-made attempt to force flow beneath a natural drainage divide. The agent also argues that a section of culvert that is part of the 600 linear foot culvert system has its inlet at a lower elevation than its outlet. In other words, the slope of that portion of the culvert system is counter to the surface water flow gradient in the downstream conveyance that extends northward from the main wetland. This issue was addressed by the district in its 27 August 2004 Memorandum for the Record supporting its approved jurisdictional determination:

"NOTE: The information submitted by the City [of Saratoga Springs] on April 20, 2004, confirmed [the agent's] contention that the outlet elevation from the 30" pipe under Magee Lane (at its connection with the twin 24" culverts) is approximately 0.7' higher than its inlet elevation south of Magee Lane. However, the outlet of the 36" pipe under Care Lane [on the medical facility property] is approximately 2.8' lower in elevation than the inlet of the 30" pipe under Magee Lane, and at the April 22, 2004 site inspection it was apparent that surface hydrology [sic]...was flowing in a northerly direction, toward the medical facility, and exiting the 36" pipe under Care Lane."

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It is reasonable to deduce that when there is sufficient hydraulic head in the main wetland area, sufficient pressure is created to force water through the 30" pipe despite its slight upward slope of less than one foot. Information contained in the administrative record supports the district's contention that surface water passing through the 30" pipe is conveyed through the 36" pipe onto the watercourse on the medical facility site. As indicated previously, in 1998 the district determined the watercourse on the medical facility site is a tributary of Putnam Brook.

NAD's review of the administrative record leads us to conclude that district has sufficiently documented that the wetland on the appellants' property is adjacent to a tributary to a navigable water of the United States and is therefore jurisdictional in accordance with 33 CFR Part 328.3 (a)(7). Tributaries to navigable waters of the United States are themselves waters of the United States in accordance with 33 CFR Part 328.3 (a)(5). The district's decision is also consistent with existing Corps policy and guidance, particularly with respect to their determination that the surface watercourses between the main wetland and the culvert under Magee Lane plus the conveyance on the medical facility site and culvert system constitute a discrete conveyance of water. The district accurately and appropriately considers this discrete conveyance to be part of a tributary system to a navigable waterbody. Whether the connection is natural or artificial does not affect its current status a tributary to a navigable water. Additionally, under current Corps policy, jurisdiction in tributaries that are waters of the United States extends to the upper reaches of the tributary system; in this instance, the district has sufficiently demonstrated that the upper reach of the tributary system is the boundary between wetlands and uplands on the appellants' property. It should also be noted that the district's determination in this matter is consistent with several recent Federal court decisions, including but not limited to Headwaters v. Talent Irrigation District, 243 F. 3d 526, 534 (9th Cir. 2001).

OVERALL CONCLUSION:

After reviewing and evaluating the entirety of the administrative record provided by the New York District, I conclude its determination regarding the jurisdictional status of the wetland area on the property in question is adequately supported. I hereby find that the appellants' request for appeal does not have merit.

SIGNED

MERDITH W.B. TEMPLE
Brigadier General, USA
Commanding