ADMINISTRATIVE APPEAL DECISION

Cardinal Properties, LLC; FILE NO. CENAO-2008-746

NORFOLK DISTRICT

3 October 2008

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

Appellant: Cardinal Properties, LLC

Appellant's agents: Mark Baumgartner, Pender and Coward, LLP, Attorneys at Law
Chuck Wolfe, Wolfe Environmental and Engineering Consultants, Inc.

Date of Receipt of Request for Appeal: 5 June 2008

Date of Acceptance of Request for Appeal: 12 June 2008

Appeal Conference/Site Visit Date: 10 July 2008

NAD-ACCEPTED REASON FOR APPEAL:
NAD accepted the following reason for appeal as detailed by the agent in the attachment to the Request for Appeal dated 5 June 2008:

The District was incorrect in asserting jurisdiction based on their application of the current regulatory criteria and associated guidance in identifying "waters of the United States."

SUMMARY OF DECISION:
The appellant's request for appeal does not have merit. The district correctly applied the regulations and associated policies in determining that "waters of the United States" are present on the appellant's property.

BACKGROUND INFORMATION:
Cardinal Properties, LLC is appealing the Norfolk District's decision to take jurisdiction over wetlands on property located in the vicinity of Shipp's Corner Road and Old Clubhouse Road in Virginia Beach, VA.

Acting on behalf of the appellant, Chuck Wolfe of Wolfe Environmental and Engineering Consultants submitted correspondence dated 21 December 2007 requesting a no permit required letter from the Norfolk District for fill associated with the state required closure of a sanitary sewage treatment lagoon located on the site. The letter explained that the owner is required by state law to close the lagoon in accordance with Virginia State law. Mr. Wolfe explained in his letter that although a previous determination from 7 February 2003 found based on aerial photographs that wetlands are present on the property, that the wetlands are located within the sewage treatment lagoon and therefore he felt the facility is exempt from Corps jurisdiction.

In response to Mr. Wolfe's letter, the Norfolk District issued an approved jurisdictional determination (JD) dated 8 April 2008. The JD stated that the wetlands on site are jurisdictional pursuant to the Corps' 1987 Wetland Delineation Manual. The jurisdictional determination letter clarified that the wetland is adjacent to West Neck Creek, which is a traditionally navigable water. Further, the District said the wetland was not exempt from jurisdiction because it had been abandoned since 1974 according to a letter from the City of Virginia Beach and in that time, it has since taken on characteristics that meet the definition of wetlands.

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 appellant provided documents containing their comments and analysis of the district's jurisdictional determination. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7 (e).

EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:

Appeal Reason 1: The district was incorrect in asserting jurisdiction based on its application of the current regulatory criteria and associated guidance in identifying "waters of the United States."

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion:

Regulatory Guidance Letter (RGL) 86-09, paragraph 5 states that "Many areas of wetlands converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature…" and "…if the area is abandoned and over time regains wetland characteristics such that it meets the definition of "wetlands", then the Corps 404 jurisdiction has been restored." Regulatory Guidance Letter 86-09 says that it expired on 31 December 2008. Regulatory Guidance Letter 05-06 states that expired RGL's continue to be generally applicable to the Corps Regulatory Program as long as they "provide useful information and that, although outdated, is still generally applicable to current program execution it is still relevant and applicable…". Based on this, RGL 86-09 is still relevant and applicable. As documented in the administrative record and through visual observation of a site visit by the Review Officer, the lagoons have reverted to vegetated wetlands and taken on wetland characteristics such that would meet the definition of wetlands as defined at 33 CFR 328.3(b). Per the regulations wetlands are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

Although the wetlands on the property were not delineated, they are located adjacent to West Neck Creek, which is a traditionally navigable water. Based on the 5 June 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, wetlands adjacent to traditionally

navigable waters are jurisdictional under the Clean Water Act and do not require a significant nexus determination.

Furthermore, In accordance with 33 CFR 328.3(a)(7): "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act (CWA) (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States."

The administrative record contains a letter from the City of Virginia Beach to Mr. Mark E. Slaughter from Pender & Coward dated 26 May 1995 stating that the public sewage lagoon for Cardinal Estates was abandoned in 1974 when a pump station and force main were installed for that development. The administrative record contains aerial photographs from 1974 to the present that show the site was abandoned and has reverted to natural conditions (i.e. wetlands).

Amendments to the Water Pollution Control Act of 1972 gave the EPA authority to implement pollution control programs such as setting wastewater standards for industry in the Clean Water Act of 1977 (P.L. 95-217). The Appellant did not provide any information to support that the sewage treatment facility was designed to meet the requirements of the Clean Water Act. The sewage treatment facility located on the Cardinal Properties site was abandoned in 1974 and designed prior to the Clean Water Act of 1977. Therefore it does not meet the exemption at 33 CFR 328.3(a)(7) and it is subject to jurisdiction under Section 404 of the Clean Water Act.

Based on the above, the administrative record supports the District's determination to take jurisdiction over the wetlands on the site.

OVERALL 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 Clean Water Act (33 U.S.C. 1344). For the reasons stated above, the appeal does not have merit. The administrative appeals process for this permit action is hereby concluded.

TODD T. SEMONITE
Brigadier General, USA
Commanding