U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION

Date: 10 December 2007

ADMINSTRATIVE APPEAL DECISION

PRECON DEVELOPMENT CORPORATION, INC.
NORFOLK DISTRICT FILE NAO-2007-240

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

Appellant: Precon Development Corporation, Inc.

Date of Receipt of Request for Appeal: 23 July 2007

Date of Acceptance of Request for Appeal: 17 August 2007

Appeal Conference/Site Visit Date: 13 September 2007

NAD-ACCEPTED BASIS FOR APPEAL:

NAD accepted the following basis for appeal as enumerated by the appellant in the attachment to the Request for Appeal: The Norfolk District's record does not establish a significant nexus between the subject property and traditionally navigable waters as required by current Corps guidance, regulations, statutes and United States Supreme Court precedent.

BACKGROUND INFORMATION:

On 31 May 2007, the Norfolk District ("the district") issued an approved jurisdictional determination ("approved JD") for a 4.8-acre portion of the 653-acre Edinburgh Planned Unit Development ("Edinburgh PUD") located in the City of Chesapeake, Virginia. The approved JD indicated that the entire 4.8-acre portion of the site consists of jurisdictional wetlands that are adjacent to an existing ditch. I understand that the district performed a significant nexus test after the JD was made and the appellant was informed of the JD result. As such, it is a post hoc rationalization and is not incuded in the administrative record for this appeal.

The geographic area of the JD is the subject of a Department of the Army permit application that was originally received by the district on 4 January 2007. Initially, the application sought approval to fill 10.7 acres of freshwater, forested wetlands to facilitate the construction of 10 residential units, a portion of a recreational trail, a clubhouse, and an associated recreational facility as part of the overall Edinburgh PUD. In an amended permit application that the district received on 2 July 2007, the appellant formally removed the 5.9-acre clubhouse and recreational facility from their construction plans.

It should be noted that on 11 July 2007, the Norfolk District Commander denied the permit application, and on 10 September 2007 NAD received a request for appeal of said decision. That appeal case will be reviewed and decided upon separately.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

a) The district provided a copy of the portion of the administrative record pertaining to this approved jurisdictional determination, which was reviewed and considered in the appeal review process along with the results of the 13 September 2007 site inspection and appeal conference.

b) Title 33 of the Code of Federal Regulations, Part 331.7 (e)(6) states that issues that are not identified in the administrative record as of the date of the Notification of Appeal Process form may not be raised or discussed. On this basis, an 11 July 2007 addendum to the district's Memorandum for the Record ("MFR") supporting its approved JD was not considered in conjunction with review of this appeal request, because the Notification of Appeal Process form was dated 31 May 2007.

DECISION:

This approved JD is being returned to the Norfolk District Commander for action as discussed below.

EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:

The supporting documentation for the district's approved JD in this portion of the administrative record is an MFR that was signed on 31 May 2007 by the district's project manager and on 4 June 2007 by his supervisor. The MFR includes the district's analysis supporting its contention that the 4.8-acre wetland area is adjacent to a ditch that flows north to Saint Brides ditch, which the MFR categorizes as "...a main drainage feature for this portion of the City of Chesapeake." The MFR also discusses the functions of the wetland area and states that the receiving waters in the Northwest River serve as a public water supply for residents of the southern portion of the City of Chesapeake.

The district's issued the approved JD to the appellant two business days before the supervisor signed the supporting MFR as the district's approving authority. This fact was not prejudicial to the appellant, and the district is being asked to remedy this timing factor on future decisions by ensuring that supporting MFR's are signed concurrently or prior to final actions. Additionally, Corps Headquarters, in a 13 August 2004 electronic mail communication required districts to complete a revised version of the Jurisdictional Determination form prescribed for all approved JD's, beginning 24 August 2004. Although the district issued its approved JD prior to this new guidance, I recommend the district document the approved JD by the currently prescribed Approved Jurisdictional Determination Form, which is found in Appendix B of the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook.

OVERALL CONCLUSION:

The appellant's request for appeal is being remanded to the district recommending that they document their approved decision via preparation of the present Approved Jurisdictional Determination Form.

TODD T. SEMONITE
Brigadier General, USA
Commanding