



DEPARTMENT OF THE ARMY  
US ARMY CORPS OF ENGINEERS NORTH ATLANTIC DIVISION  
FORT HAMILTON MILITARY COMMUNITY  
302 GENERAL LEE AVENUE  
BROOKLYN, NY 11252-6700

JUN 23-2017

Office of the Commander

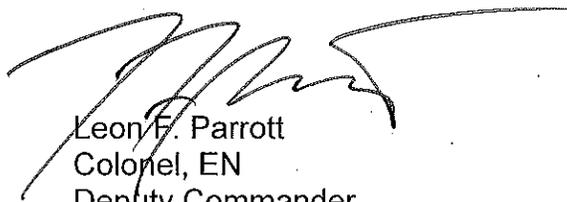
Mr. Brian R. Owen  
MSA, P.C.  
5033 Rouse Drive  
Virginia Beach, VA 23462-3708

Dear Mr. Owen:

I have completed my review of the administrative appeal you filed on behalf of your client, Pungo Air Field, LLC, of the Norfolk District's Approved Jurisdictional Determination (file number NAO-2016-01839) for a property at 1848 Princess Anne Road, City of Virginia Beach, Virginia. The request for appeal was reviewed under the provisions of Title 33 of the Code of Federal Regulations (CFR) Section 331. For reasons detailed in the enclosed decision document, the Request for Appeal does not have merit.

Any questions regarding this appeal decision should be directed to Mr. James Haggerty, Regulatory Program Manager, at (347) 370-4650, by e-mail at [James.W.Haggerty@usace.army.mil](mailto:James.W.Haggerty@usace.army.mil) or by writing to the address at the top of this letter.

Sincerely,



Leon F. Parrott  
Colonel, EN  
Deputy Commander

Encl

## ADMINISTRATIVE APPEAL DECISION

PUNGO AIR FIELD, LLC; FILE NO. NAO-2016-01839

### NORFOLK DISTRICT

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

**Appellant:** Pungo Air Field, LLC

**Date of Receipt of Request for Appeal:** 4 April 2017

**Date of Acceptance of Request for Appeal:** 1 May 2017

**Appeal Meeting/Site Visit Date:** 23 May 2017

#### ACCEPTED REASON FOR APPEAL:

The North Atlantic Division accepted a request for appeal from Mr. Brian R. Owen of MSA, P.C. on behalf of Pungo Air Field, LLC on 1 May 2017. The Request for Appeal (RFA) purports that the Norfolk District (the district) incorrectly applied the current regulatory criteria for identifying and delineating wetlands as part of its Approved Jurisdictional Determination (AJD) issued on 24 March 2017. Specifically, the RFA disputes the district's findings that certain hydrologically isolated wetlands on the property, while not considered jurisdictional under the Clean Water Act, meet current regulatory criteria to be considered as wetlands. The property location is at 1848 Princess Anne Road, City of Virginia Beach, Virginia.

#### SUMMARY OF DECISION:

The appellant's RFA does not have merit. The district correctly applied the current regulatory criteria and associated guidance in determining that the hydrologically isolated wetland areas in question meet the current regulatory criteria to be considered as wetlands, but are not considered to be jurisdictional waters of the United States.

#### BACKGROUND INFORMATION:

The appellant is appealing a portion of the district's AJD that pertains to five irregularly-shaped hydrologically isolated wetland areas totaling approximately 0.479 acres on a 51.156-acre site. These wetlands are contained within a triangular-shaped area which was a runway-taxiway infield at an airfield that formerly existed on the site. The appellant is not appealing the remainder of the AJD as it pertains to a north-south ditch encompassing an approximate area of 0.079 acres and an approximate 0.078-acre wetland area adjacent to the ditch which the district identified as being jurisdictional waters of the United States in the AJD.

MSA, P.C. indicates in the RFA that they performed wetland delineations on the property on 24 August and 27 September 2016, and the district received the AJD request on 29 September 2016. The district performed a site inspection with MSA, P.C. on 22 November 2016 to verify the delineation. In the aftermath of this event, back-and-forth dialogue occurred between the district and MSA, P.C. relative to whether the five aforementioned areas should be considered wetlands, albeit non-jurisdictional. Ultimately, in order to facilitate issuance of the AJD, MSA, P.C. submitted a revised wetland delineation exhibit to the district that showed the five areas as having been delineated as wetlands by the district but continues to maintain that these areas

should not be considered as wetlands, largely in light of area geology, past usage of the site, and extensive disturbance of the triangular-shaped area over several generations.

This office conducted an appeal conference in accordance with the provisions of Title 33 of the Code of Federal Regulations (33 CFR) Part 331.7 (d) on 23 May 2017. Originally, a combined appeal conference/site visit was scheduled to commence at 1030 hours on that date, but it was aborted due to inclement weather in lieu of an appeal conference that ran from approximately 1100 through 1145 hours at the office of MSA, P.C. Participants included the North Atlantic Division Regulatory Program Manager (who served as the Review Officer for this request); two district Regulatory Branch representatives; the appellant; and a representative of MSA, P.C.. During this event the Review Officer explained the appeal process to all participants and facilitated a back-and-forth discussion of the specifics of this case.

**INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION:**

Since the district's file materials were scanned into the permit processing database prior to submission of this RFA, and were readily available for review, there was no need for the district to provide this office with a CD-R or a paper version of the administrative record (AR). On or about 8 May 2017, the district confirmed that they supplied MSA, P.C. with a CD-R version of the AR.

**EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:**

**Appeal Reason:** The appellant believes that the district incorrectly applied the current regulatory criteria for identifying and delineating the aforementioned five areas as wetlands.

**Finding:** This reason for appeal does not have merit.

**Action:** No Action Required.

**Discussion:**

MSA, P.C. submitted a robust discussion of the geological setting and past history of the site from just before World War II to recent time. As evidenced in aerial photographs<sup>1</sup>, many of which focused on the aforementioned triangular-shaped portion of the site, historically the property consisted of cultivated agricultural field. The RFA states that the site was developed as part of the Naval Auxiliary Air Field Pungo in 1943; it was transferred to the Commonwealth of Virginia in the 1950s and was used and maintained by the Virginia Air National Guard for a period of time. Subsequently the site was later sold to private concerns and was used for a variety of purposes including automobile racing, stump grinding and mulching, and debris storage. As of the date of the aborted site visit, many commercial vehicles were parked adjacent and proximate to the triangular-shaped area in anticipation of a local event. In the RFA, MSA, P.C. also included an interview with the current property owner, and a discussion of their past site inspections over the prior 20+ years, plus LIDAR imagery and topographic maps as additional attachments.

As also stated in the RFA, geologically the property sits along the southern end of Pungo Ridge which runs roughly north-south through the area<sup>2</sup>. According to the US Department of Agriculture Soil Conservation Service Survey of Virginia Beach and the accompanying Map Unit

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<sup>1</sup> Attachments to RFA

<sup>2</sup> US Geological Survey topographic surveys and a LIDAR image attached to the RFA support the contention that the property is situated on a local ridge, higher than most neighboring properties

Legend<sup>3</sup>, approximately one-half of the site consists of Udorthents-Urban land complex with adjacent areas mapped as containing upland soils with the exception of a transitional series to the southeast of the property. According to the RFA, land to the north of the property along the same geologic terrain and position were determined by the district to not contain wetlands; many of these properties have either been developed or are currently under development.

As detailed in the interview with the current property owner, and supported by ground level photography taken in May, 2001, approximately 12-15 years ago the aforementioned triangular area was filled with soil excavated from a nearby property to facilitate its development. The RFA suggests that this material may have been a sandy clay loam. According to the property owner, he stopped the filling activities and based upon a 2005 aerial photograph<sup>4</sup> it appears that the fill piles, estimated to have consisted of 100 loads of material, had been largely removed from the site. Subsequently, this portion of the site was used to conduct mud pulls with test vehicles by two separate entities who failed to regrade and restore this portion of the site, which "...result[s] in poor topography which translates into poor drainage."<sup>5</sup> (emphasis added) Further, the RFA states: "In summary, this area was first backfilled with an undesirable clay based soil from offsite, then compacted by vehicle use in several separate actions, and never re-graded, resulting in the conditions observed today. The bad draining/topography are results of this history, and the Juncus, Phragmites and other plants we observed are both volunteer, and likely brought in on the seed bank in the fill material."

Subsequent to the 22 November 2016 site visit, at the behest of the district, MSA, P.C. prepared and submitted an additional Wetland Determination Data Form – Atlantic and Gulf Coastal Plain Region which documented the presence of hydrology, hydric soils, and hydrophytic vegetation at a specific sampling point that was representative of the five aforementioned isolated wetland areas on the site. This form is prescribed by a regional supplement<sup>6</sup> to the 1987 Wetland Delineation Manual.<sup>7</sup> The data form concluded that all three wetland parameters existed at the sampling point; however, in light of reasons set forth in the RFA, MSA, P.C. does not agree that these five areas should be considered wetlands.<sup>8</sup>

Information contained within the AR, most notably the data form prepared on 22 November 2016<sup>9</sup> and the district's 6 December 2016 electronic mail communication to MSA, P.C. which documented its determination regarding the presence of normal conditions on the site in accordance with applicable regulatory guidance, supports the district's position that the five aforementioned isolated areas meet the current regulatory definition of wetlands at 33 CFR 328.3 (c)(4). As stated previously in this document, the AJD found that these wetland areas are

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<sup>3</sup> Attachments to RFA

<sup>4</sup> Attachment to RFA

<sup>5</sup> RFA, Page 4, interview with current property owner

<sup>6</sup> U.S. Army Corps of Engineers. 2010. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)*. 180 Pages.

<sup>7</sup> Corps of Engineers Wetland Delineation manual - Technical Report Y-87-1. January 1987. U.S. Army Corps of Engineers Waterways Experiment Station, Vicksburg, MS. 92 Pages.

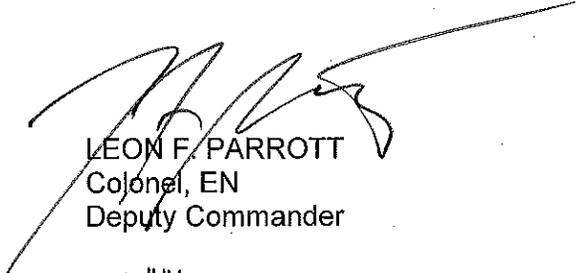
<sup>8</sup> An electronic mail communication sent by the district to MSA, P.C. on 6 December 2016 suggests that during the 22 November 2016 site visit both parties agreed the five areas met the criteria to be classified as wetlands, but this was not independently corroborated during the appeal conference held on 23 May 2017.

<sup>9</sup> It is duly noted that the data form as prepared by MSA, P.C. states that "normal circumstances" were not present at the sampling point, reflecting their professional judgment; the 6 December 2016 electronic mail communication from the district stated that normal circumstances existed in the triangular-shaped area as of the 22 November 2016 site visit

hydrologically isolated and both the district and MSA, P.C. agree that Clean Water Act jurisdiction does not apply.

**OVERALL CONCLUSION:**

I find that the district's AR supports its decision regarding the presence and extent of wetlands in the five aforementioned hydrologically-isolated areas. For the reasons stated above, the appeal does not have merit, and the administrative appeals process for this AJD is hereby concluded.



LEON F. PARROTT  
Colonel, EN  
Deputy Commander

JUN 23 2017