

**U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION
DATE: 5 December 2003**

ADMINISTRATIVE APPEAL DECISION

LANDS OF DAVID FUSCO,
NEW YORK DISTRICT FILE NO. 2000-01007-YN

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

Appellant: David Fusco

Appellant's Agent: Stephen P. George, North Country Ecological Services, Inc.

Date of Receipt of Request for Appeal: 17 September 2003

Date of Acceptance of Request for Appeal: 30 September 2003

Appeal Conference/Site Visit Date: 28 October 2003

APPELLANT'S STATED REASON FOR APPEAL:

There is no current or accurate evidence supporting the New York District's determination that there is an existing physical or historical connection of some of the wetland areas on the site with a navigable waterway.

BACKGROUND INFORMATION:

On 7 August 2000, the New York District, Corps of Engineers received a request from North Country Ecological Services, Inc. for a determination of the extent of Department of the Army jurisdiction on an approximate 66.71-acre site in the Town of Rotterdam, Schenectady County, New York. The irregularly-shaped parcel of land lies to the east of the New York State Thruway (Interstate Route 90) and a portion of the property boundary abuts New York State Route 159. Two major watercourses traverse the site: the Poentic Kill flows generally eastward across the southern portion of the site, and an unnamed tributary of the Poentic Kill flows in a southerly direction across the eastern portion of the site. The confluence point of these waterways is just to the east of the site boundary. Much of the site has been used in the past for agricultural purposes, but some of the northwestern portion of the site remains wooded, along with the majority of the Poentic Kill stream corridor.

On 6 August 2003, after a series of site inspections, the New York District determined that approximately 4.66 acres of jurisdictional waters of the United States exist on the site. This figure includes approximately 4,150 linear feet of the Poentic Kill and its unnamed tributary, with a jurisdictional surface area of approximately 1.76 acres. The appellant is appealing the district's determination that the remaining 2.90 acres of wetlands are jurisdictional for purposes of the Clean Water Act.

CENAD-CM-O

SUBJECT: David Fusco Appeal Decision New York District File No. 2000-01007-YN

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

a) The New York District provided a copy of their administrative record, which was reviewed and considered in the appeal review process along with the results of the 28 October 2003 site inspection and appeal conference.

b) Prior to the conference, the New York District was requested to copy and submit a clear original copy of the relevant portion of the 1949 edition of the US Geological Service's Amsterdam, NY Quadrangle map. This was also necessary to help clarify the copy of the administrative record, which contained an unclear copy of the relevant portion of this map. The district provided the requested information during the appeal conference.

SUMMARY OF DECISION:

The appellant's Request for Appeal has merit, because the New York District's administrative record does not sufficiently document the conclusion in their 6 August 2003 Basis for Jurisdictional Determination that the on-site wetland areas totaling 2.90 acres are adjacent to tributaries of waters of the United States. The record does not adequately support the statement in the district's 6 August 2003 Memorandum for the Record that the wetland areas in question were historically part of a surface tributary system. Additionally, the district's administrative record contains conflicting information and presents differing conclusions regarding the jurisdictional status of these wetland areas.

INSTRUCTIONS FOR SUBSEQUENT DISTRICT ACTION/APPEAL DECISION FINDINGS:

Action: The New York District is to reassess its decision, applying the guidance set forth in the 30 March 1988 CECW-OR memorandum (enclosed) pertaining to adjacent wetlands, and resolve the conflicting information in its administrative record.

Appeal Decision Findings: The New York District's administrative record contains three major internal documents: a Memorandum for the Record (MFR), dated 6 August 2003; a Basis for Jurisdictional Determination Memorandum, also dated 6 August 2003, which is an enclosure to the aforementioned MFR; and a Site Inspection Report dated 30 May 2003. As explained below, discrepancies exist among all three documents, to the extent that the administrative record insufficiently supports the district's jurisdictional determination.

The third paragraph of the 30 May 2003 Site Inspection Report states that based upon a 23 May 2003 site inspection, no hydrological connection was found between the 2.90 acres of wetland areas in question and any surface water tributaries on or near the project site.

CENAD-CM-O

SUBJECT: David Fusco Appeal Decision New York District File No. 2000-01007-YN

The Basis for Jurisdictional Determination Form states that the project site has been determined to contain jurisdictional waters of the United States based upon two factors. The first is that the site contains tributaries to waters of the United States, which are themselves classified as waters of the United States in accordance with Title 33 of the Code of Federal Regulations, Part 328.3 (a)(5). The second is that the site contains wetlands according to the criteria established in the 1987 "Corps of Engineers Wetland Delineation Manual" which are adjacent to waters of the United States. In making this statement, the district asserts that all 4.66 acres of watercourses (1.76 acres) and wetlands (2.90 acres) on the site are waters of the United States, or are adjacent to waters of the United States and are therefore jurisdictional for purposes of the Clean Water Act. This conflicts with information contained within the 30 May 2003 Site Inspection Report cited above.

Paragraph 3 of the 6 August 2003 MFR also contains ambiguous language as follows: "...there are five wetland areas on the project site which *are or were part* of a tributary system, and are considered to be waters of the United States. The wetlands consist of a total of approximately 4.66 acres and 4,150 linear feet of the Poentic Kill and a tributary to the Poentic Kill within the project boundary. These wetlands and streams are considered to be above the headwaters, *are part* of a tributary system to the Mohawk River, and are considered to be waters of the United States..." (emphasis added).

Subsequent paragraphs of the MFR state that the wetland areas totaling 2.90 acres "...*appear to be part* of a wetland complex that *was associated* with an unnamed tributary to the Poentic Kill ..." that was "...located in the *proximity* of these wetlands" (emphasis added), as shown on a 1949 US Geological Survey map; that the soil survey maps [show] hydric and poorly drained soils over much of the site; and "[i]t is apparent that the hydrology of the part of the site has been altered by past agricultural activities, the construction of a ditch connecting two of the wetland areas on the site, and the construction of Interstate Route 90 immediately west of the site." This information, even when considered synergistically, is inadequate to support the district's finding that the wetlands are jurisdictional on the basis of adjacency, a term defined in Title 33 of the Code of Federal Regulations, Part 328.3 (c).

The issue of adjacent wetlands is the specific subject of a CECW-OR memorandum to the field issued 30 March 1988. Paragraph 3 of the memorandum states that "...a determination of adjacency should not be based on historic connections unless the area of man-made fill is an unpermitted discharge occurring after the relevant phase-in date for jurisdiction, or unless the area is a berm, dike or other narrow upland landscape feature... If we take the broad-based view that any historic connection makes a wetland adjacent to another water, it could create substantial problems with trying to prove that the exact upland parcel now separating the wetland from another of the US was, indeed, filled. This position also fails to recognize that the wetland is currently functioning as an isolated wetland. Finally, a call of "adjacency" on a historic connection,...is apt to cause public confusion and complicate administration of the program."

CENAD-CM-O

SUBJECT: David Fusco Appeal Decision New York District File No. 2000-01007-YN

It is entirely possible that the unnamed tributary of the Poentic Kill shown on the 1949 survey map was filled or otherwise altered to help support agricultural activities on and/or upslope of the project site. Historic maps of the project site also provide reasonable evidence that the historic course of the Poentic Kill, upstream of the site, was most likely relocated westward as part of construction of Interstate Route 90. However, any determination that the 2.90 acres of wetland are adjacent to waters of the United States must withstand the test outlined in the 30 March 1988 memorandum.

OVERALL CONCLUSION:

After reviewing and evaluating the entirety of the administrative record provided by the New York District, I conclude there is insufficient and conflicting information therein to support its determination that 2.90 acres of on-site wetlands are jurisdictional for purposes of the Clean Water Act. I hereby recommend returning this matter to the New York District for additional analysis as prescribed within this decision memorandum.

Encl
as

RECOMMENDED: _____ /s/
JAMES W. HAGGERTY
NAD Administrative Appeals Review Officer

CONCUR: _____ /s/
THOMAS M. CREAMER
Chief of Operations – HQNAD

APPROVED: _____ /s/
JOHN P. CARROLL
Colonel, EN
Acting Commander