

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

Date: 27 April 2006

ADMINISTRATIVE APPEAL DECISION

LEGACY DEVELOPMENT, LLC
NORFOLK DISTRICT FILE NO. 05-R3049

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

Appellant: Legacy Development, LLC, ATTN: Mr. T. Harrison Burt

Appellant's Agent: Thomas A. Houston/Townes Site Engineering

Date of Receipt of Request for Appeal: 19 December 2005

Date of Acceptance of Request for Appeal: 9 January 2006

Appeal Conference/Site Visit Date: 17 February 2006

NAD-ACCEPTED REASON FOR APPEAL:

NAD accepted for consideration the agent's contention, as stated in the request for appeal, that a "channel of questionable jurisdiction" shown on the original Townes Site Engineering wetland delineation map of 5 October 2005 should not be considered jurisdictional under the Clean Water Act since it is an ephemeral channel lacking an ordinary high water mark.

BACKGROUND INFORMATION:

On 6 October 2005, the Norfolk District ("the district") received a request for a determination of the extent of Department of the Army jurisdiction on an approximate 70-acre site owned by Cameron Holding Company, LP located in the City of Hopewell, Virginia. The irregularly-shaped parcel is bounded to the south by forested land and Atwater Park, to the east by single-family residential land and Atwater Road, to the north by the Appomattox River, and to the west by Interstate 295. The applicant, Legacy Development, LLC, proposes to construct a residential development on the site.

The district conducted an inspection of the site on 9 November 2005 and concluded that the delineation of federally-regulated wetlands as performed by the agent was generally accurate, with one minor exception. The district also decided to take jurisdiction over a stream system that the agent believes is non-jurisdictional, as described in the request for appeal. After conclusion of the site inspection, the district provided the agent with an approved jurisdictional determination and a Notification of Administrative Appeal Options and Process and Request for Appeal form dated 9 November 2005. The appellant submitted a completed form to this office within the allotted 60-day timeframe.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

The district provided a copy of the administrative record, which was reviewed and considered in the review process along with the results of the site inspection and appeal conference. The district also provided two memoranda for the record, dated 15 November 2005 and 13 January 2006. In accordance with Title 33 of the Code of Federal Regulations, Part 331.7 (e)(6), these memoranda cannot be considered in the review of this appeal request since they are dated after the date of the approved jurisdictional determination.

During the 17 February 2006 site inspection, the agent provided a written statement that included a summary of thoughts during the initial wetland delineation, the previous site inspection on 9 November 2005, and reasoning behind the request for appeal. The district provided a memorandum in response to the agent's written statement on 6 April 2006. Both the written statement and the district's memorandum were accepted as clarifying information in accordance with Title 33 of the Code of Federal Regulations, Part 331.7 (e).

DECISION:

The district did not prepare a Basis for Jurisdictional Determination memorandum in conjunction with the approved jurisdictional determination. According to CECW-CO policy, the Basis for Jurisdictional Determination memorandum form, revised 13 August 2004, must be completed for all approved jurisdictional determination decisions. Since the district did not prepare the required documentation, the approved jurisdictional determination is not supported by the administrative record.

OVERALL CONCLUSION:

Since the administrative record does not support the district's approved jurisdictional determination, I hereby find that the appellant's request for appeal has merit. This matter is hereby remanded to the Norfolk District Engineer to complete the administrative record by preparing a Basis for Jurisdictional Determination memorandum. The analysis in the memorandum should particularly focus upon the jurisdictional status of the "channel of questionable jurisdiction" and apply the criteria of Regulatory Guidance Letter No. 05-05 to determine the presence or absence of an ordinary high water mark within this landscape feature. If the preparation of a completed memorandum results in a modification to the approved jurisdictional determination, the Norfolk District Engineer should advise the appellant as appropriate.

SIGNED

WILLIAM T. GRISOLI
Major General, USA
Commanding