

**U.S. ARMY CORPS OF ENGINEERS  
NORTH ATLANTIC DIVISION  
DATE: 10 November 2004**

**ADMINISTRATIVE APPEAL DECISION**

**PORT JERVIS SCHOOL DISTRICT  
NEW YORK DISTRICT FILE NO. 2003-01187-YS**

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

**Appellant:** Port Jervis School District

**Appellant's Agent:** Michael J. Lamoreaux, McGoey, Hauser & Edsall Consulting Engineers

**Date of Receipt of Request for Appeal:** 8 September 2004

**Date of Acceptance of Request for Appeal:** 21 September 2004

**Appeal Conference/Site Visit Date:** 19 October 2004

**APPELLANT'S STATED REASON FOR APPEAL:**

The two delineated wetland areas on the project site are hydrologically isolated and should not be regulated pursuant to Section 404 of the Clean Water Act in light of the ruling in the United States Supreme Court in the matter of Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).

**BACKGROUND INFORMATION:**

On 3 October 2003, the New York District, Corps of Engineers received a request from Ecological Solutions, LLC acting on behalf of the Port Jervis School District for a determination of the extent of Department of the Army jurisdiction on an approximate 35.6-acre site in the Town of Deerpark, Orange County, New York. The irregularly shaped parcel of land is bounded generally on its northwest by U.S. Route 209, and on its southeast by the Neversink River, which is a tributary to the Delaware River. Other private properties surround the site in question. The neighboring City of Port Jervis proposes to construct a school on the site, much of which lies within the floodplain of the Neversink River.

The district performed a site inspection on 29 October 2003 and generally agreed with the wetland delineation performed by the consultant except for one area. The district received the revised wetland delineation on 11 December 2003, and it showed two wetland areas on the site, encompassing 1.05 acres and 0.21 acres. An additional jurisdictional area of 0.07 acres was determined to exist between the ordinary high water mark of the Neversink River and the surveyed property boundary immediately waterward of the ordinary high water mark. The district issued its approved jurisdictional determination to the consultant on 21 June 2004.

CENAD-PDS

SUBJECT: Port Jervis School District Appeal Decision, New York District File No. 2003-01187-YS

The request for appeal was filed with the district by Mr. Lamoreaux on 19 August 2004, within the 60-day time limit specified in 33 CFR 331.5(a)(1). North Atlantic Division received the request for appeal and supporting documentation from the district on 8 September 2004.

**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 19 October 2004 site inspection and appeal conference.
- b) During the appeal conference, the consultant provided a copy of the soil survey map for Orange County with site boundaries drawn in. This was accepted as clarifying information in accordance with 33 CFR 331.7 (f).

**SUMMARY OF DECISION:**

The appellant's Request for Appeal has merit, because the New York District's administrative record does not sufficiently document their conclusion that the two wetland areas in question are adjacent to the Neversink River.

**INSTRUCTIONS FOR SUBSEQUENT DISTRICT ACTION/APPEAL DECISION FINDINGS:**

*Action:* The New York District is to reassess its decision, and provide specific documentation and analysis to support their contention that the two wetland areas in question meet the definition of adjacency as indicated in the regulations.

*Appeal Decision Findings:* The New York District's administrative record contains three major internal documents: a Memorandum for the Record (MFR), dated 21 June 2004; 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 19 April 2004.

The Basis for Jurisdictional Determination Memorandum clearly states that the site has been considered to contain jurisdictional waters of the United States based upon two factors. The first is that the site contains a tributary to a navigable water of the United States. The second is that the site contains wetlands that are adjacent to a navigable water of the United States, or a tributary thereto. The MFR states that the two wetland areas are part of a tributary system and are considered to be waters of the United States along with the portion of the Neversink River below the ordinary high water mark. The MFR does not specifically state that the wetland areas are considered to be adjacent to the Neversink River; however, this was stated in the Basis for Jurisdictional Determination Memorandum, which is an enclosure to the MFR.

CENAD-PDS

SUBJECT: Port Jervis School District Appeal Decision, New York District File No. 2003-01187-YS

The following is an excerpt from the 19 April 2004 Site Inspection Report:

*“The USDA Soil Survey of Orange County, New York indicates a continuous soil unit known as Barbour fine sandy loam, which runs through both wetlands, then south and southeast toward the Neversink River. This soil unit is characterized by spring flooding. Both wetlands are located within the mapped flood plain of the Neversink River. Therefore, this wetland [sic] is considered to be adjacent to the Neversink River...and is [sic] considered to be waters of the United States.”*

The above clearly indicates that the district considers the two wetland areas in question to be adjacent to the Neversink River since they are located within the floodplain of the river. However, this does not comport with 33 CFR 328.3 (c), which states that the term adjacent means bordering, contiguous or neighboring, and that wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are considered adjacent wetlands. It should be noted that the wetlands in question are approximately 1,400-1,500 linear feet from the river. Additional analysis and documentation is needed in the administrative record to support the district’s jurisdictional determination.

During the site inspection, the district stated their belief that the wetland areas may have been within a historic flowpath of the Neversink River, and that they became separated from the river itself by alluvial deposits. There is no information in the administrative record discussing or supporting the district’s contention in this regard.

**OVERALL CONCLUSION:**

After reviewing and evaluating the entirety of the administrative record provided by the New York District, I conclude there is insufficient information therein to support its determination that two wetland areas totaling 2.90 acres 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.

/s/  
FRANCIS X. KOSICH  
COL, EN  
Acting Commander