

**ADMINISTRATIVE APPEAL DECISION**

**RJL PROPERTY, File No. NAO-2009-01402**

**NORFOLK DISTRICT**

**Review Officer:** Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division

**Appellant:** Lawrence Whitlock – RJL Property

**Date of Receipt of Request for Appeal:** 2 February 2010

**Date of Acceptance by Division of Request for Appeal:** 24 February 2010

**Appeal Conference Call Date:** 14 April 2010

**NAD-ACCEPTED REASONS FOR APPEAL:**

NAD accepted the following reason for appeal as detailed by Mr. Whitlock in the Request for Appeal dated 1 February 2010:

The District was incorrect in asserting jurisdiction based on their application of the current regulatory criteria and associated guidance in identifying “waters of the United States.”

**SUMMARY OF DECISION:**

The appellant’s request for appeal has merit. The administrative record does not support the District’s determination that Wetland’s “A” and “C” through “U” are jurisdictional based on the current regulatory criteria.

**BACKGROUND INFORMATION:**

Mr. Whitlock submitted a Request for Appeal (RFA) on 2 February 2010 appealing the Norfolk District’s (the District) 3 December 2009 jurisdictional determination (JD) for waters located on property known as RJL property, on a 19 acre parcel off of North Main Street in Chincoteague, Accomack County, Virginia. On 18 March 2002 the Norfolk District issued an Approved Jurisdictional Determination (JD) for the same property, with different findings as those identified in the 2009 JD. The 2002 JD did not take jurisdiction over wetlands B, N, O, P and Q which that JD stated were isolated. The 2009 JD stated that these wetlands had a surface connection to a Traditionally Navigable Waterway (TNW) and were subject to jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344).

The Appellant provided letters to the District dated 15 February 2002, 13 May 2009, 25 June 2009 and 23 September 2009 stating that several of the wetlands on site were isolated and, therefore, not subject to jurisdiction by the Corps. Specifically the Appellant alleges wetlands A, B, C, D, E, F, G, H, I, J, T and U as identified in the 23 September 2009 letter and associated map sent by Mr. Alex Dolgos (consultant for Mr. Whitlock) to Mr. Robert Cole (NAO Project Manger) are isolated and not subject to Corps jurisdiction. The Appellant provided a wetland delineation report, data forms, and salinity readings to support his rationale for these conclusions.

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The District conducted a site visit on 29 September 2009 with EPA to review the 19 areas identified as Wetland's "A" and "C" through "U" located on the site. During the site visit the District and EPA were in agreement that all wetlands on the property with the exception of one identified as Wetland "B" had a surface connection to a TNW. The Appellant's agent believed that only 9 of the wetlands (K through S) had a surface water connection and were jurisdictional.

A conference call on 14 April 2010 was held by the North Atlantic Division's Regulatory Appeals Review Office (RO) with the District and the Appellant. The conference call was held to clarify the Appellant's RFA and to allow the RO to gain a better understanding of the District's rationale to support their JD. During the conference call, the Appellant explained that they thought wetlands A through J as well as T and U are isolated and not jurisdictional in light of the Fourth Circuit court decision in the case of United States v. Wilson, 133F 3d 251 (4<sup>th</sup> Cir 1997).

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

- 1) The district provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.
- 2) With the request for appeal, the Appellant provided documents containing his comments and analysis of the District's jurisdictional determination. The RO accepted the submittals as clarifying information in accordance with 33 CFR 331.7 (f).
- 3) The RO obtained and reviewed a copy of the Wilson decision and the 29 May 1998 HQ/EPA guidance issued in light of the Wilson case.

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

**Appeal Reason:** The District was incorrect in asserting jurisdiction based on its application of the current regulatory criteria and associated guidance in identifying "waters of the United States."

**Finding:** This reason for appeal has merit.

**Discussion:** The Administrative record does not clearly support the District's rationale for its decision to take jurisdiction over Wetland's "A" and "C" through "U". The District's 27 November 2009 Memorandum for the Record (MFR) states that of the 19 wetlands in questions all but one (Wetland "B") have a surface connection to a TNW and are therefore jurisdictional. Although it states that the wetlands have a surface connection, it is not clear if the district considers them wetlands adjacent to a TNW or adjacent to tributaries of a TNW.

In addition, the Appellant believes that the District's determination that surface water connections exist between the wetlands and TNW were based on a field visit conducted at a time when water levels were not what would be consider ordinary circumstances due to recent precipitation prior to the site visit.

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The Appellant states that due to the United States v. Wilson decision, the wetlands on their site are isolated and, therefore, should not be jurisdictional. The U.S. Army Corps of Engineers Headquarters (HQUSACE) 29 May 1998 joint guidance memo<sup>1</sup> states:

Within the Fourth Circuit states, both the Corps and EPA will continue to assert CWA jurisdiction over any and all isolated water bodies, including isolated wetlands, based on the CWA statute itself, where (1) either agency can establish an actual link between that water body and interstate or foreign commerce and (2) individually and/or in the aggregate, the use, degradation or destruction of isolated waters with such a link would have a substantial effect on interstate or foreign commerce. This approach addresses the concerns of the Fourth Circuit regarding jurisdiction over these waters.

The JD itself states that the wetlands are waters of the U.S. and are part of a tributary system to interstate waters (33 CFR 328.3(a)). But it is not clear as to what part of 33 CFR 328.3(a) the District relied upon when taking jurisdiction over these wetlands in the administrative record.

Based on references in e-mails dated 16 June 2009 (from Bob Hume to Robert Cole and Gerald Tracy) and 3 December 2009 (from Kimberly Baggett to Robert Cole), it appears that the District was relying upon 33 CFR 328.3(a)(7) and 33 CFR 328.3(c) as a basis for jurisdiction. Based on the lack of clarity in the administrative record, it is not clear if the Wilson case affects the Districts decision.

**Action:**

- 1) The District should clarify its determination and provide further supporting documentation to support the reference in the JD form at Section III(A)(2) that states “NAO and HQ have previously determined that wetlands in Chincoteague such as the ones identified on this site are wetlands adjacent to TNW.” If wetlands are jurisdictional based on adjacency, it should be clearly stated and supported in the administrative record by showing how each specific wetlands is adjacent to a specific TNW. The record should also clarify that the rationale to support the Districts determination was done during a period when ordinary circumstances were present.
- 2) The District should explain how its determination is in accordance with the 29 May 1998, Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson. The administrative record (AR) should clarify which subsections or part of 33 CFR 328 are relevant for taking jurisdiction over these wetlands. If 33 CFR 328.3(a)(3) is cited it should be substantiated how that is in accordance with the guidance. The decision to take jurisdiction over each of the wetlands identified in the jurisdictional determination should be reconsidered in accordance with the results of any additional documentation.

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<sup>1</sup> Joint Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson, 29 May 1998

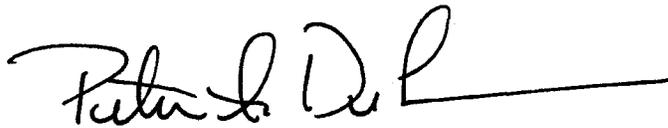
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- 3) The first sentence of the JD form at Section B is incomplete. It states "There **Pick List** "waters of the U.S. within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. The **Pick List** area should be completed in the revised JD Form.
- 4) Section III(D)(1) of the JD form is incomplete. The second box at this bullet is not checked where it states "Wetlands adjacent to TNW's: 7.955 acres."

**OVERALL CONCLUSION:**

For the reasons stated above, I find that the appeal has merit since the District's administrative record does not contain substantial evidence to support its determination that Wetland's "A" and "C" through "U" located on the appellant's property are subject to federal jurisdiction and regulation under Section 404 of the Clean Water Act (33 U.S.C. 1344). With regard to the aspects of the appeal on which merit has been found, I am remanding the approved JD decision back to the District to reconsider its determination and provide additional documentation in the administrative record. This concludes the Administrative Appeal Process. The District shall complete these tasks within 45 days from the date of this decision and upon completion, provide the Division office and appellant with its decision document and final JD.



PETER A. DELUCA  
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Division Engineer