

ADMINISTRATIVE APPEAL DECISION

MR. ALLEN GORDON, FILE NO. 01-R0173

NORFOLK DISTRICT

DATE: 25 January 2002

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

Appellant: Allen Gordon, Attorney at Law

Appellant's Agent: Thomas Lane Stokes, Jr., President, Stokes Environmental Associates, Ltd., Norfolk, VA

Receipt of Request For Appeal (RFA): 10 April 2001

Site Visit Date: 25 September 2001

BACKGROUND INFORMATION:

On 30 January 1996, the Corps Norfolk District ("the District") issued a Department of the Army jurisdictional determination (JD) for a 45-lot residential subdivision to be known as Silverwood Forest, Section 3, proposed for an approximate 18-acre site at the end of Mapleton Crescent in Western Branch Borough, Chesapeake City, Virginia.

The JD resulted from a series of inspections of the property. The first inspection occurred on 18 July 1994, during which the District observed several primary indicators of wetland hydrology. Several subsequent inspections occurred during which the District monitored test wells at the site that were placed by both them and the Appellant's previous environmental consultant. The practice of test well monitoring is widely utilized by the District to assist in documenting the presence or absence of hydrology on sites such as this, which lie in the coastal plain where the primary source of hydrology is seasonally high groundwater. The District concluded that test well data from the Spring of 1995 was not representative of normal conditions due to substantially below-average precipitation, and thus the data could not be reliably utilized to conclude that there was an insufficient duration of seasonally high groundwater to demonstrate a lack of wetland hydrology. The JD concluded that approximately 10 acres of wetlands exist on the site.

On 7 January 2000, Stokes Environmental Associates ("the Agent") requested a JD for the site, unbeknownst of the District's earlier JD, which was handled by the previous environmental consultant. Their analysis concluded that wetlands were not present anywhere on the site, due to a purported lack of hydric soils and wetland hydrology. The District conducted a site inspection on 7 February 2000 in order to evaluate this conclusion. In a memorandum for the record dated 29 February 2000, the District

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indicated that there was one wetland area associated with a watercourse, along with four other wetland areas.

The Agent submitted a revised wetland delineation field map on 8 February 2000, and requested written confirmation of the JD. The District conducted a second site visit on 13 March 2000, after discovery of the previously approved JD for this site. During this inspection, the District reconfirmed the presence of one or more primary indicators of hydrology in the 10-acre wetland area, documenting this information on data sheets from the *1987 Corps of Engineers Wetland Delineation Manual*. On 29 March 2000, the District informed the Appellant of the existence of the original approved JD and indicated it would continue to remain valid until 30 January 2001, consistent with Regulatory Guidance Letter No. 94-01.

Following the expiration of the approved JD on 30 January 2001, the Agent submitted a request for a new JD for the site. The size of one wetland area in the middle of the site was increased in the 2001 delineation; otherwise, the delineation of the remaining wetlands was the same as was determined on 7 February 2000. The District conducted a site inspection in response to this JD request on 6 March 2001. In a letter to the Appellant dated 13 March 2001, the District indicated that the majority of the site contains wetlands, based upon previous hydrology monitoring. In the absence of the Appellant undertaking another well monitoring study during normal springtime rainfall conditions, and a finding of a different conclusion based upon normal conditions, the District saw no reason to change the previous determination regarding the extent of wetlands on the site. Any future well monitoring study would need to be approved by the District in order for it to be accepted as part of the evaluation process.

The North Atlantic Division accepted the RFA on 17 May 2001.

REASON FOR APPEAL SUBMITTED BY AGENT:

An approximate 10-acre area identified by the District lacks the required hydrology parameter to allow this area to meet the three-parameter criteria set forth in the *1987 Corps of Engineers Wetland Delineation Manual*. This is based upon physical inspections of the site by the Agent, one on 3 January 2000 and three during the month of January, 2001.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

1. The Norfolk District provided a copy of the complete administrative record, which included information from four separate files pertaining to this project. This information was considered in the appeal review process.
2. An Appeals Conference and site inspection were held on 25 September 2001, the results of which were considered in this process.

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SUMMARY OF DECISION:

The Appellant's RFA does not have merit, because the District's administrative record sufficiently supports their contention that the 10-acre area in question exhibits positive characteristics of wetland hydrology.

**INSTRUCTION FOR DISTRICT ACTION AND APPEAL DECISION
FINDINGS:**

Action: None necessary.

Discussion: The administrative record contains references to the presence of wetland hydrology on the site as far back the 18 July 1994 site inspection, and a study performed previously on the site, the results of which also confirmed the presence of wetland hydrology during the early part of the growing season. The District conducted a series of site visits during 1995 to gather hydrologic data from check well bore holes that they dug on the site as a backup source of data for wells dug by the Appellant's former environmental consultant, which the District indicated were not in accordance with standards promulgated by the Corps Waterways Experiment Station. Since rainfall during that year was deficient, the District indicated that there was insufficient reason to overturn their previous determination regarding hydrology.

The District reconfirmed the presence of one or more primary indicators of hydrology during the 13 March 2000 site inspection, despite below-normal rainfall conditions. The District notified the Appellant in a 29 March 2000 letter that the approved JD would remain in effect until 30 January 2001.

The District conducted another site inspection on 6 March 2001, during which they observed some secondary hydrology indicators, but no primary indicators. However, seasonal rainfall was substantially below normal, and they reasonably concluded that this was an abnormal situation, which resulted in a substantial effect upon the overall hydrology of the site. On 13 March 2001, the District notified the Appellant that, in light of their analysis, there was no reason to change the earlier JD. However, they did provide the Appellant the option to perform a District-approved well monitoring study in an effort to disprove the presence of hydrology at the site. Neither the Agent nor the Appellant responded to this offer; the Agent submitted the RFA on 10 April 2001.

As a point of clarification, the 1996 JD is not an appealable action since it was issued prior to the implementation of the Administrative Appeal Process. However, since the 2001 approved JD is, in essence, a reverification of the 1996 JD of the district, the entire administrative record must be examined, not just the record pertaining to the 2001 JD. The District's findings resulting from the 7 February 2000 site inspection, which suggested the presence of wetlands on approximately 0.41 acres of the site, was never confirmed in writing to the applicant; thus, it does not constitute an approved JD as defined in 33 CFR 331.2, and is therefore not an appealable action.

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The findings of the 7 February 2000 site inspection conflict with prior and subsequent findings regarding the extent of wetlands on the site. Although an Approved JD was never issued by the District based upon these findings, and therefore it cannot be considered an appealable action in and of itself, the existence of this conflicting information cannot merely be overlooked.

It is noted that this inspection was performed during a period when many sites in the coastal plain do not exhibit primary indicators of wetland hydrology, which includes but is not limited to saturation of the growing zone by groundwater in accordance with the 1987 *Corps of Engineers Wetland Delineation Manual*. However, the manual allows saturation to occur for a little as 5% of the growing season on a continuous basis to allow the hydrology criteria to be met. This equates to approximately 15 consecutive days. The fact that hydrology was not observed over most the site at the time the inspection was performed does not conclusively disprove that the hydrology parameter is not met. In fact, the preponderance of information in the record, including inspections taken at differing times during the growing seasons of different years, sufficiently document the presence of wetland hydrology on the 10-acre portion of the site.

OVERALL CONCLUSION:

After reviewing and evaluating the entirety of the administrative record provided by the District, I conclude that District personnel utilized proper procedures to determine the presence of wetland hydrology within the approximate 10-acre wetland portion of the site, and that the determination of the presence of hydrology is adequately supported by the administrative record. Accordingly, I conclude that this Request For Appeal does not have merit for the reasons that are provided in the discussion above.

/s/

**M. STEPHEN RHOADES
Brigadier General, USA
Commanding**