ADMINISTRATIVE APPEAL DECISION

RICHARD S. PACULA

JURISDICTIONAL DETERMINATION NUMBER 200100717

WILMINGTON DISTRICT

Review Officer: Arthur L. Middleton, U.S. Army Corps of Engineers (USACE), South Atlantic Division, Atlanta, Georgia.

Appellant Representative: Mr. Richard S. Pacula.

Receipt of Request for Appeal (RFA): February 4, 2002.

Appeal Conference Date: August 8, 2002. **Site Visit Date:** August 8, 2002.

Summary of Decision: I find that the appeal does not have merit. I find that the District properly evaluated and documented their approved jurisdictional determination dated October 22, 2001.

Background Information: The property consists of 13.11 acres located adjacent to the Atlantic Intracoastal Waterway, northwest of the intersection of the Atlantic Intracoastal Waterway and North Carolina Highway 133, Oak Island, Brunswick County, North Carolina. At the appeal conference the appellant stated that he purchased the property in 1976. The appellant stated that in an August 20, 1984 letter, the Chief, Regulatory Branch, Wilmington District, "categorized the property in question as high ground except for a fringe of smooth cordgrass marsh along the shoreline." In a "Notification of Unauthorized Activity/Permit Noncompliance" report dated May 23, 2001, the District documented an unauthorized activity at the site and requested remedial action to "remove all fill material from wetlands, including stone filter material in detention basin and road crossing...; refill basin and ditch connecting to large pond and restore to grade level prior to this work." The District closed this enforcement action on August 8, 2001, stating, "no further action required." In a document dated October 22, 2001, the District certified the wetland delineation survey. By letter dated December 18, 2001, the appellant submitted a Request for Appeal of an approved jurisdictional determination. The Request for Appeal did not specifically state the reasons for appeal. The appellant was given the opportunity to specifically state the reasons for appeal and this was done by letter dated February 4, 2002.

Appeal Decision and Instructions to the Wilmington District Engineer (DE):

Reasons for the appeal as presented by the appellant:

Appeal Reason 1: "INCONSISTENT TREATMENT – The COE [Corps of Engineers] approves wetland delineations in an unscientific, unfair and inconsistent manner. See Waterway Palms [contiguous property to the north side] and Winner [property owner on west side of Cape Fear River] properties."

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: There is nothing in the administrative record to suggest that the science of the wetland delineation in question was in error. Wetland delineations are conducted by applying the criteria set forth in the CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL (TECHNICAL REPORT Y-87-1, January, 1987). See the discussion in Appeal Reason 2 below.

The administrative record does not support a conclusion that this wetland delineation was the result of unfair or inconsistent delineation practices, or that it resulted from an incorrect application for identifying and delineating wetlands. The District was unable to locate any wetland delineations attributed to Waterway Palms. According to the appellant, the inconsistency associated with the Waterway Palms property is that a ditch located along the appellant's north property line was identified as a Water of the United States on the appellant's wetland delineation but was not shown on a document that he observed related to the Waterway Palms property. As noted above, the District is not aware of a wetland delineation associated with the Waterway Palms property. There was no indication by the appellant as to who developed or issued the document he had observed.

In the original, undated, submittal of the wetland delineation by Land Management Group, Inc. the ditch, noted above, was not shown as a feature of the wetland delineation. In an e-mail message to the District, dated October 16, 2001, a representative of the appellant's consultant stated, "[t]he ditch does fall mostly, if not entirely on Mr. Pacula's property, just along the PL [Property Line]. There was an existing ditch in this location prior to Mr. Pacula's work. He was attempting to maintain this ditch and may have dug it a bit deeper than intended[.] The ditch is no more than 3' deep...portions of the ditch were holding water and portions were not."

In an e-mail message to the District, dated October 22, 2001, a representative of the appellant's consultant stated, "[i]n regards to the northern PL ditch, this is holding backed up water from the pond following the damming done with restoration. I am indicating the ditch boundary on the wetland survey so that it can be included as "Waters of the US"."

As noted above, in a document dated October 22, 2001, the District certified the wetland delineation survey.

The appellant also identified the Winner property as an example of inconsistency. There is no information regarding the Winner property in the administrative record. On February 25, 2004, at the request of the Review Officer, the District furnished a copy of a dock plan, W.W. "SKEETS" WINNER DOCKING FACILITY. The docking facility plan, dated February 2003, was on a base map dated March 2000. The base map depicted the Cape Fear River, the United

States Harbor Line, areas designated as "MARSH", areas designated as "WETLAND/AEC LINE", AND "UPLANDS". Two areas on the map, depicted as "W.W. WINNER", appear to be the property owner designation. There is nothing unusual about the map. It appears as a routine map depicting various features on the property, including wetlands.

Appeal Reason 2: "PRIVATE FIRMS – The COE designates others authority for the delineation process which results in poor repetitive practices and a political process lending to loose stewardship of Environment and Natural Resources."

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: This is really not a basis for appeal. In any event, the USACE does not delegate its authority to make jurisdictional determinations. Due to large numbers of jurisdictional determinations made by the USACE, it has become a standard practice for much of the requisite field work to be conducted by environmental consultants serving in a contractor capacity. These consultants are trained in the application of the CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL (TECHNICAL REPORT Y-87-1). The USACE relies on these consultants to get the bulk of the work wetland delineation work done. USACE representatives spot check for quality assurance and quality control. The wetland delineation process is generally standardized which allows for duplication by the various consultants and oversight by the USACE. This practice in the Wilmington District is no exception.

Reason 3: "DELINEATION PROCESS – The COE fails to communicate clearly, effectively, and openly with Pacula and never afforded Pacula to be a party to any field investigations at the site."

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The appellant contracted with Land Management Group, Inc., Environmental Consultants, to conduct the wetland delineation for the site. Typically when a consultant is involved in a wetland investigation they do the work and communicate with district representatives as necessary. That is what appears to have happened in this instance. On September 15, 2003, the Review Officer called the Land Management Group, Inc. representative identified in the administrative record to confirm that Land Management Group had worked for the appellant as environmental consultants by performing a jurisdictional determination. The representative confirmed that that was the case. There is no documentation in the administrative record to indicate that the appellant desired to participate in field investigations or that any request from appellant to personally participate was refused.

Reason 4: "ACCOUNTABILITY – The COE completed wetland delineation was haphazardly flagged. Grass tags were windblown before a survey could be accomplished. As a result the survey when accomplished didn't reflect the determinations made when tagged."

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: This is a statement that is not documented in the administrative record. The appellant documented dates when site visits and or adjustments were made during the wetland delineation process. The appellant documented when the wetland delineation was submitted to the District for approval and when the notification of approved jurisdiction determination was issued. The first indication that a possible problem existed with regard to the location, presence, and/or absence of flagging appeared in the appellant's initial submittal of his Request for Appeal, December 18, 2001 (not accepted because it did not meet the criteria for appeal). During the site visit and appeal conference the appellant was not specific about having reported the problem of wind blown flagging to the District or to the consultant involved in the wetland delineation. In the initial submittal of his Request for Appeal, the appellant documented that on June 8, 2001, District representatives visited the site to do further delineation work that he referred to as "Wetlands delineation # 2...The resultant flagging was disputed because grass tags were windblown free before [the] survey was started." The survey, conducted by Hanover Design Services, P.A., was dated August 21, 2001. Notes on the survey indicated that the site was surveyed in January 2001 and that the wetlands were flagged by Land Management Group, Inc. By undated cover, a representative of Land Management Group, Inc. submitted "Wetland maps", "For approval" regarding the "Pacula Delineation". This submittal included a survey by Hanover Design Services, P.A., dated August 21, 2001, and data forms for "Routine Wetland Determination (1987 COE Wetlands Determination Manual)". There were two sets of data forms dated June 5, 2001. One set "transected across [a]continuum from coastal marsh to point where [the] marsh intergrades with freshwater drain". The other set represented uplands. The data forms indicated a distinct break for soils along the wetland/upland interface. The data for vegetation supported this distinction. The administrative record also contained data forms completed by a District representative. These data forms, dated May 9, 2001, provided similar information as those noted above. As noted above, the appellant stated, "[t]he resultant flagging was disputed because grass tags were windblown free before [the] survey was started." However, there is no indication that the appellant brought this situation to the attention of his consultant or the District prior to his appeal. The appellant, working through his consultant, had the responsibility to provide accurate information to the District upon his request for an approved Jurisdictional determination. Often, inaccuracies may be detected by USACE representatives, but that is not always the case. The District, having been involved in this case since it was identified as an unauthorized activity, worked with the applicant, applicant's consultant, and the North Carolina Department of Environment and Natural Resources. In certifying the approved Jurisdictional determination the District relied on the discussions, site visits, and information available at the time of their decision.

Regulatory Guidance letter (RGL) 90-06[1], August 14, 1990, states, "As specified in the 20 March 1989, Memorandum of Agreement Between the Department of the Army and the

[1] Unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs generally remains valid after the expiration date as discussed in the Federal Register notice on RGLs of March 22, 1999, FR Vol. 64, No. 54, Page 13783.

Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (MOA), all wetlands jurisdictional delineations (including those prepared by the project proponent or consultant and verified by the Corps) shall be put in writing. Generally this should be in the form of a letter to the project proponent. The Corps letter shall include a statement that the wetlands jurisdictional delineation is valid for a period of three years from the date of the letter unless new information warrants revision of the delineation before the expiration date. Longer periods, not to exceed five years, may be provided where the nature and duration of a proposed project so warrant. The delineation should be supported by proper documentation. Generally the project proponent should be given the opportunity to complete the delineation and provide the supporting documentation subject to the Corps verification. However, the Corps will complete the delineation and documentation at the project proponent's request, consistent with other work priorities." Emphasis added. The emphasized wording was not present in the District's October 22, 2001 Wetland Delineation Survey Certification provided the appellant.

In addition, RGL 90-06 states, "When making wetlands jurisdictional delineations it is very important to have complete and accurate documentation which substantiates the Corps decision (e.g., data sheets, etc). Documentation must allow a reasonably accurate replication of the delineation at a future date. In this regard, documentation will normally include information such as data sheets, maps, sketches, and in some cases surveys." Emphasis added. The District's approved JD includedthis information, which was based on information submitted and discussed with the appellant's consultant.

As noted above, the appellant made no mention that "new information warrants revision of the delineation" prior to his December 18, 2001 initial submittal of his Request for Appeal. Although he has stated the new information warrants revision of the approved delineation, no such information has been presented to the District Engineer, or is it included in the administrative record. The appellant is responsible for the data submitted to the District on which it bases its approved jurisdictional determination. If, in the future, the appellant believes new information about the site should be evaluated, he may submit a request for consideration to the District.

As noted above in "Background Information", the appellant stated that in an August 20, 1984 letter, the Chief, Regulatory Branch, Wilmington District, "categorized the property in question as high ground except for a fringe of smooth cordgrass marsh along the shoreline." This 1984 letter was superceded by RGL 90-06 which established timeframes by which approved jurisdictional determinations could be relied upon. The RGL established a three year limit for most jurisdictional determinations with a maximum limit of five years. So, with the latter scenario any reliance on the 1984 letter would have expired in 1989.

Reason 5: "CUSTOMER FOCUS – The COE failed to provide quality services on a level playing field and its practices lead to exorbitant customer expenditures."

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: This is really not a basis for appeal. However, quite the contrary is documented in the administrative record. Following the documentation of the unauthorized activity noted above, the District worked with the appellant, his consultant, and others to resolve various issues.

In a Memorandum for Record, dated May 31, 2001, the District representative advised the appellant regarding erosion control measures and other restoration measures to be taken in resolving the unauthorized activity. Subsequent coordination is noted below.

In a letter, July 9, 2001, to the North Carolina Department of Environment and Natural Resources (NCDENR), Division of Coastal Management, the appellant addressed several issues stating, "[y]ou indicated that the sedimentation basin would be best left alone rather than removed as ...[Project Manager], Corps of Engineers, had recommended. You indicated that you would discuss this with him and report back to me before I finalize work on the Western property line...You were in agreement with...[Project Manager] and my desire to close off the pond and fill the existing ditch affording an 8 to 12 inch swale."

In a Memorandum for Record, dated August 8, 2001, the District representative advised that the appellant "can leave the small sediment basin as-is if it is allowed to regenerate into natural vegetation and if it is not maintained as a sediment basin by scooping out sediment."

In a letter, August 17, 2001, the appellant acknowledged, "I am in receipt of your August 15, 2001, recorded message in which you indicated, "everything is fine at my property located northwest of the Oak Island Bridge and the ...file is closed."

In a letter, October 5, 2001, referencing the August 17, 2001 letter, the appellant stated, "I requested an official letter from the Corps...To date, I have not received that notification from you...Will you please review...and forward an official statement concerning closure and particularly mentioned the fact that I leave the 30'x60' sedimentation basin on the West property line as...[NCDENR] has recommended."

In a Memorandum For Record, August 21, 2001, the District representative stated, "[m]ailed [the] following information to [appellant]...As of August 8, 2001, the enforcement action at your site northwest of Oak Island Bridge is considered closed and no further action is required...."

In a letter, August 8, 2001, addressed to NCDENR, the appellant stated, "[t]oday,...[Project Manager] Corps of Engineers has agreed to leaving the sedimentation basin in place at the Western end of my property at the Oak Island Bridge as you suggested...[Project Manager] has agreed to an 8-12 inch swale and filling in the ditch from the pond to the north side of the basin."

A hand written note at the top of a copy of the appellant's October 5, 2001 letter indicated that a copy of the August 21, 2001 Memorandum for Record was mailed on October 10, 2001.

Subsequent to the above and prior to the Request for Appeal there is nothing in the administrative record that indicates dissatisfaction on the part of the appellant.

At the appeal conference the only reference to "exorbitant customer expenditures" was related to the cost of the survey of the flagged wetlands. This is a responsibility and a cost that is typically incurred by the applicant/property owner in areas where the USACE jurisdiction over waters of the United States is an issue.

Information Received and its Disposition During the Appeal Review:

The District furnished a copy of the administrative record.

The District furnished a copy of a dock plan W.W. "SKEETS" WINNER DOCKING FACILITY.

CONCLUSION: After reviewing and evaluating the administrative record provided by the Wilmington District, I conclude there is sufficient information in the administrative record to support the District's approved jurisdictional determination. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

17 May 2004
(Date)

Randal R. Castro
Brigadier General, US Army
Commanding