ADMINISTRATIVE APPEAL DECISION
PERMIT DENIAL

SANTIAGO VARELA

FILE NUMBER SAJ-2001-1824 (IP-ML)

JACKSONVILLE DISTRICT

DATE: July 3, 2006

Review Officer: Michael F. Bell (RO), US Army Corps of Engineers, South Atlantic Division (SAD), Atlanta, Georgia

Appellant/Representative: Santiago Varela, Appellant
Myrna Lopez, Jacksonville District, Regulatory Division
Sindulfo Castillo, Jacksonville District, Regulatory Division
Carlos M. Calderón-Garnier, Appellant's Attorney
Gilberto Aceredo, Appellant Representative, Soil Scientist
Frank Torres, Appellant Representative, Ecologist
Ana Roman, US Fish and Wildlife Service, Observer
Lisamarie Corrubba, National Marine Fisheries Service, Observer

Date of Receipt of Request for Appeal (RFA): April 14, 2006

Date Appeal Accepted: May 4, 2006

Date of Appeal Conference/Site Visit: June 30, 2006

Summary of Decision: This appeal does not have merit. I find that the District did comply with applicable laws, regulations, and policies in reaching their permit denial decision and did apply current regulatory criteria and associated guidance for identifying and delineating wetlands.

Background Information: The Jacksonville District (District) inspected the proposed Valle Verde Housing Development site on March 15, 2001, and discovered the unauthorized discharge of fill material in approximately five acres of waters of the US, including herbaceous wetlands and an unnamed tributary to Guaniquilla Creek. The Appellant excavated and stockpiled the topsoil before discharging the fill material. The unauthorized activity is located at PR-441, near the intersection with PR-115, Guaniquilla Ward, Aguada, Puerto Rico. A Cease and Desist order was issued on April 23, 2001, for the violation described above. The District decided to grant an opportunity to apply for an after-the-fact permit on August 22, 2001.

The District received an incomplete application and the Applicant's wetland jurisdictional determination (JD) report on December 6, 2001. *Environmental Permitting, Inc.*, conducted the determination on October 5, 2001. The results of the investigation revealed that hydrophytic vegetation, wetland hydrology, and hydric soils criteria were not met in two of the eight sampling points. The Consultant preformed the determination in the filled area by excavating pits and observed the gray subsoil below the limestone fill. He classified the subsoil as a hydric soil. Current consultants for the Appellant disputed the 2001 hydric soil determination.

The Applicant's JD report states that the project site is not subject to flooding, according to Federal Emergency Management Agency (FEMA) maps, therefore, the site does not meet the wetland hydrology criteria. The Consultant also concluded that most of the site encompasses the Santoni Soil Series. The US Soil Conservation Service listed this soil series as a "Hydric Soil of the Caribbean". The Consultant stated that Santoni clay in itself is not hydric, unless it has a Bajura soil as an inclusion. The Consultant's report states the soil does not meet flooding or ponding criteria, although it meets the saturation criteria. The District did not agree with all the information contained within the report and requested additional information.

The District sent requests for additional information to the Applicant on March 4, 2002, July 24, 2002, and October 29, 2002. The applicant did not respond. The District issued a JD on February 26, 2003, without the requested information, and estimated there were 12 acres of regulated wetlands present at the project site. The JD was based on aerial photography.

The Applicant filed a survey of the property on May 31, 2005, after the District identified the 1.75 elevation contour as the wetland delineation line. According to the survey, the site contains 15.69 acres (10.24 wetland acres). The Appellant excavated then filled 5.54 wetland acres prior to submitting a complete permit application.

The application was not complete until August 7, 2003. The Applicant also proposed to relocate 140 linear meters of the creek through the construction of 151 meter by 2.5-meter earthen open channel. The District completed their permit evaluation and determined that the project is not in compliance with the Clean Water Act, Section 404 (b)(1) Guidelines. The District determined that alternatives were available which would result in less or no impacts to waters of the US. In addition, the District determined that the proposed mitigation was not sufficient to compensate for the impacted wetlands. Therefore, the District also determined that project was contrary to the overall public interest. The District denied the Department of the Army permit on February 13, 2006.

On March 24, 2006, the District met with another consultant for the Applicant, Mr. Jose Orsini, to discuss the required restoration. The Consultant agreed to sign a restoration order and not appeal the permit denial. Nevertheless, the Applicant appealed the permit denial to the South Atlantic Division Review Officer (RO) on April 14, 2006. The RO accepted the appeal on May 4, 2006.

A September 2002 Tolling Agreement executed by Mr. Varela is in the administrative record.

Site Visit: Michael Bell, Myrna Lopez, Sindulfo Castillo, Carlos M. Calderón, Gilberto Aceredo, Frank Torres, Ana Roman, and Lisamarie Corrubba conducted a site investigation June 30, 2006. On June 29, 2006, a heavy rainstorm had occurred. The area annually receives approximately 90 inches of rain, but at the time it was the dry season in northwestern Puerto Rico. An inspection was made where the District had conducted the atypical wetland delineation. The soil surface beside the fill in the Santoni clay was ponded and saturated and the clay stuck to shoes. The Appellant's agents dug two pits adjacent to the filled area to demonstrate that the Santoni soils were over permeable sandy or hard parent material. The pits supported standing water approximately 14 to 18 inches from the surface. The appeal conference followed the site visit. Before the conference began, the Appellant's attorney objected to not being allowed to have a court recorder present. He filed a writ of mandamus in Federal Court to have the conference recorded. The RO conducted the administrative appeal conference without the court reporter.

APPEAL EVALUATION, FINDINGS, and INSTRUCTIONS to the Jacksonville District Engineer (DE):

Reasons for Appeal as Presented by the Appellant:

Appeal Reason 1: "Land does not meet characteristics nor indicators of Hydric Soils. Soil is not saturated nor ponded long enough to develop anaerobic conditions. Taking in consideration that the growing season in Puerto Rico is 365 days a year, the Corps has not received data or determined a positive characteristic of Hydric Soils. Other manual indicators are not reliable or were not taken into consideration."

FINDINGS: This reason for appeal did not have merit.

ACTION: None required.

Discussion: The Appellant's first reason for appeal is that the filled area is not located on a site that exhibited hydric soils. As discussed in his consultant's JD of October 5, 2001, most of the site (including the filled area) encompasses the Santoni Soil Series and was listed as a "Hydric Soil of the Caribbean" by the US Soil Conservation Service in 1993[1]. The publication makes note that Santoni clay in itself is not hydric, unless it has a Bajura soil as an inclusion. The consultant's report does not state whether Bajura is an inclusion in the impacted soil series or not. The report does conclude that, "This soil does not meet flooding or ponding criteria, ***although it meets the saturation criteria***." [emphasis added].

[1] U.S. Department of Agriculture, Soil Conservation Service, 1993. *Hydric Soils of the Caribbean.*

Due to the dated 1993 Soil Conservation Service Report, the RO reviewed the *Puerto Rico Portion of the National Soil List*, dated August 11, 2005, and found Santoni clay listed as a hydric soil. The Bajura Soil Series is in the same subgroup as the Santoni Soil Series[2].

The District must use the *1987 Corps of Engineers Wetlands Delineation Manual* (Manual) (Waterways Experiment Station Technical Report Y-87-1, January 1987) to determine if wetlands existed on the site. For hydric soils, the Manual states that:

> Although all soil-forming factors (climate, parent material, relief, organisms, and time) affect the characteristics of a hydric soil, the overriding influence is the hydrologic regime. The unique characteristics of hydric soils result from the influence of periodic or permanent inundation or ***soil saturation*** for sufficient duration to effect anaerobic conditions. Prolonged anaerobic soil conditions lead to a reducing environment, thereby lowering the soil redox potential. This results in chemical reduction of some soil components (e.g., iron and manganese oxides), which leads to development of soil colors and other physical characteristics that usually are indicative of hydric soils." [emphasis added]

The Manual and the National Technical Committee for Hydric Soils have listed indicators that must be met for sandy and non-sandy soils.

At the administrative appeal conference, the Appellant's consultant noted that Santoni clay is a naturally dark soil (mollisol) that occurs on alluvial fans and floodplains. Therefore, soil colors representing depleted conditions would be present whether the site was a wetland or not. The Consultant emphasized the position that no indicators of hydric soils were found in the stockpiled topsoil that had been removed. The RO found evidence of depleted conditions (spots or blotches of different color or shades of color interspersed within the dominant color in a soil layer) in the stockpiled topsoil during the onsite field visit. The Consultant stated that the depleted conditions in the topsoil were mixed with other soil materials so that should not be a hydric soil indicator.

During the site visit and administrative appeal conference, the Consultant restated that the Santoni clay soil series at the violation site is not hydric. At the soil pits adjacent to the filled area on Santoni soils, he noted that the parent material below the A-horizon had high permeability; therefore, the water would drain quickly and not produce anaerobic conditions.

The Appellant's consultant also referenced a 1999 geotechnical study conducted at the violation site. According to the soil scientist, the geotechnical study clearly indicates that the water depth was 2-3 feet below the removed soil. He concluded that the water table was too deep to provide surface saturation.

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[2] US Department of Agriculture, Natural Resources Conservation Service, National Soil Survey Center, *Puerto Rico Portion of the National Hydric Soil List – August 11, 2005.*

After discovering fill material at the site that appeared to be in wetlands, the District followed the suggested method in the Manual for a typical Situations. A typical situations include:

> Unauthorized discharges requiring enforcement actions may result in removal or covering of indicators of one or more wetland parameters. Examples include, but are not limited to: (1) alteration or removal of vegetation; (2) placement of dredged or fill material over hydric soils; and/or (3) construction of levees, drainage systems, or dams that significantly alter the area hydrology.

To characterize whether hydric soils previously existed, the District should adhere to the following guidance contained in the Manual to determine whether the site was a wetland.

> Soil surveys. In many cases, recent soil surveys will be available. If so, determine the soil series that were mapped for the area, and compare these soil series with the list of hydric soils. ***If all soil series are listed as hydric soils, the entire area had hydric soils prior to alteration.*** [emphasis added]
>
> Removal of surface layers. Dig a hole and determine whether the entire surface layer (A-horizon) has been removed. If so, examine the soil immediately below the top of the subsurface layer (B-horizon) for hydric soil characteristics. As an alternative, examine an undisturbed soil of the same soil series occurring in the same topographic position in an immediately adjacent area that has not been altered. Look for hydric soil indicators immediately below the A-horizon or 10 inches (whichever is shallower)...

As detailed in the project history, the District issued an approved JD on February 26, 2003, delineating the filled and adjacent property and determined that:

> The owner stated that the topsoil was removed prior the discharge of fill material. The topsoil was piled along the site limits, Depletion/concentrations signs, and concretions were found in the piled soil. The Soil Survey of Mayaguez Ward identifies the soil at the area as Santoni clay (Sn). This soil has hydric inclusions in depressions. Two holes were dug to observe the original material below the fill material. Since the topsoil was removed, it was necessary to dig down to between four to six feet to find the original material. The material found was black/grayish clay. In addition, following Subsection 2, Step 3.d of the Manual, one boring was made immediately east of the Guaniquilla Creek, in undisturbed soil, and disclosed the presence of hydric soils (low chroma clay soils with gleyed mottles). A second boring was made near the northern limit of the site, in undisturbed soil, and also disclosed the presence of hydric soils (dark surface sandy soils). A sample of this soil was taken *** and the boring meets the S7 field indicator for hydric soils.

The District followed the proper wetland delineation methods for atypical situations. The administrative record supports the District's hydric soil determination.

Appeal Reason 2: "No wetland indicators were found to include wetland hydrology characteristics. Frequency and duration of influencing factors do not maintain soil saturation or inundation for a period greater of 19 days in a consecutive period of 365 days. The Corps has not concluded to the contrary in any wetland delineations preformed."

FINDINGS: This reason for appeal did not have merit.

ACTION: None required.

Discussion: The Appellant's second reason for appeal is that the filled area is not located on a site that exhibited wetland hydrology. The Appellant's delineation stated that Guaniquilla Creek may influence the site, but neither FEMA nor the Puerto Rico Planning Board zoned the area as a flood zone. The Appellant stated that he conducted site surveys before and after the site was filled. The water flow patterns are the same. His argument is that the hydrology must not have been altered since the flow patterns are unchanged. The Appellant did not mention that he filled an unnamed tributary to Guaniquilla Creek. In addition, during the administrative appeals conference, the Appellant provided photos of 16-inch deep soil borings he had taken in the areas adjacent to the fill in Santoni clay. According to the Manual, the soil boring holes should usually fill with water after a period of time to indicate soil saturation. The photos show dry holes.

The District must use the Manual to determine if wetlands previously existed on the fill site. For hydrology, the Manual states that the District should:

> Describe the Type of Alteration. Examine the area and describe the type of alteration that occurred. Look for evidence of...[F]illing of channels or depressions (land-leveling). Have natural channels or depressions been recently filled?
>
> Diversion of water. Has an upstream drainage pattern been altered that results in water being diverted from the area?

As described in the Manual and supported in the administrative record, the District used aerial photography and historical records to determine if hydrology previously existed on the site. The District's 2003 delineation report stated that:

> An existing tributary to Guaniquilla Creek was filled as part of the unauthorized work performed. The water was diverted ***. Photographical evidence also shows inundation in the area. *** In conversation with the neighbors, [they] indicated the area was frequently inundated, and normally saturated.

The Manual also discussed the 16-inch soil boring method to determine if the soil is saturated. As stated in the soil description, this soil has slow permeability and is high in

clay content. The Manual cautions against using the soil borings method to determine saturation in heavy clay soils. In addition, the adjacent areas in Santoni soil were ponded and saturated during the site investigation. The Appellant's own delineation report states the soil meets the saturation criterion for a hydric soil. Either saturation or inundation are sufficient to support wetland hydrology.

The administrative record, appeal conference and site visit support the District's determination that the Appellant deposited fill material in an area that previously exhibited wetland hydrology. The filled wetland is adjacent to Guaniquilla Creek, which flows into navigable waters of the US at the Atlantic Ocean.

Information Received and it's Disposition During the Appeal Review:

1) The Jacksonville District furnished a copy of the Administrative Record for the subject request to the RO and the Appellant's attorney.

2) Mr. Gilberto Acevedo's document entitled, *Report For A Jurisdictional Determination, Guaniquilla Ward, Aguada, Puerto Rico* and an atypical situation delineation report from the Appellant were given to the RO on June 30, 2006.

CONCLUSION: As my final decision on the merits of the appeal, I conclude there is substantial evidence in the administrative record to support the Jacksonville District's decision to deny the permit, and that this determination was not arbitrary, capricious or an abuse of discretion, was not plainly contrary to applicable law or policy. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

FOR JOSEPH SCHROEDEL
Brigadier General, US Army
Commanding