

## **ADMINISTRATIVE APPEAL DECISION**

**EDDIE O's ENTERPRISES, LTD**

**FILE NO. SAW-1995-459**

**WILMINGTON DISTRICT**

**7 JUNE 2012**

**Review Officer:** Elliott N. Carman, U.S. Army Corps of Engineers, Southwestern Division

**Appellant:** Eddie O's Enterprises, Ltd (represented by Ms. Lynne Stephens)

**Receipt of Request for Appeal:** 1 November 2011

**Acceptance of Request for Appeal:** 1 December 2011

**Appeal Meeting:** 26 January 2012

**Authority:** Section 404 of the Clean Water Act (CWA) (33 U.S.C. § 1344)

### **SUMMARY OF DECISION**

Eddie O's Enterprises Ltd (appellant) is appealing a Wilmington District (District) approved jurisdictional determination (AJD) that included property located in Rockingham, Richmond County, North Carolina. In their request for appeal (RFA), the appellant asserted that the District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands. More specifically, the appellant believes the on-site wetlands should be larger than that illustrated on District's map. For the reasons detailed in this document, this appeal has merit. The AJD specific to the appellant's property is remanded to the District for reconsideration and reevaluation.

### **BACKGROUND**

The property is located at 612 Loch Haven Road in Rockingham, Richmond County, North Carolina. The North Carolina Department of Transportation (NCDOT) requested an AJD on 24 May 2011 for multiple properties along a proposed transportation project alignment that included the appellant's property. The District received this request on 25 May 2011 and issued the AJD to the NCDOT on 17 August 2011. In addition, the District provided the appellant a copy of the portion of the AJD specific to their property because of their substantial legal interest in this property (they are the landowner). In their AJD letter, the District stated that a RFA must be received within 60 days of the receipt of either the appeal form or a wetland delineation map from the NCDOT. The appellant received a wetland delineation map from the NCDOT on

9 September 2011.

The appellant submitted a RFA on 28 October 2011, received by the District on 31 October 2011 and the South Atlantic Division (SAD) office on 1 November 2011. The appellant was informed, by letter dated 1 December 2011, that their RFA was accepted.<sup>1</sup>

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

33 CFR § 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this AJD. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding AJDs, as that authority remains with the District Engineer. Upon appeal of the District Engineer's determination, the Division Engineer or his Review Officer (RO) conducts an independent review of the Administrative Record (AR) to address the reasons for appeal cited by the appellant. The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. Neither the appellant nor the District may present new information to SAD. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the AR, because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision.

1. The District provided a copy of the AR to the RO and the appellant. The RO received his copy on 5 December 2011. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is 17 August 2011.

---

<sup>1</sup> 33 CFR § 331.5(a) states, "The RFA must be received by the division engineer within 60 days of the date of the [appeal form]." RGL 06-01, section 3(a) clarifies that "day 1" is the date of the appeal form and "day 60" is the 60<sup>th</sup> calendar day after the date of the appeal form. RGL 06-01 section 3(a) also clarifies that, "when 'day 60' is a traditional non-working day (e.g., a holiday or weekend), the 60 day timeframe is extended to the next business day."

Day one in this case would be 17 August 2011 (the date of the appeal form) and day 60 would be Sunday, 16 October 2011. Because day 60 fell on a traditional non-working day (a weekend), the 60 day timeframe should be extended to the next business day which was 17 October 2011.

While SAD received the RFA after this date, it should be noted that SAW provided incorrect and inconsistent direction in multiple documents to the appellant regarding their appeal rights. SAW's AJD letter dated 17 August 2011 as well as the accompanying "notification of jurisdictional determination" form incorrectly directed the appellant to send their RFA to the district instead of the division. In addition, SAW's AJD letter incorrectly advised the appellant that the RFA must be "...received by the district within 60 days of the date you received the [appeal form] or receipt of a wetland delineation map from the NCDOT." The appellant received the wetland delineation map from the NCDOT on 9 September 2011. The RFA, dated 28 October 2011, was received by SAW on 31 October 2011 and SAD on 1 November 2011. Because SAW incorrectly advised the appellant regarding their appeal rights, SAD determined this RFA was timely and accepted the appeal as it was received by both SAW and SAD within 60 days of the date the appellant received their wetland delineation map from NCDOT (day 60 in that case would be 8 November 2011).

2. An appeal meeting and site visit was held on 26 January 2012 at the Loch Haven Golf Course in Rockingham, Richmond County, North Carolina. The appeal meeting followed the agenda provided to the District and the appellant by the RO via email on 11 January 2012 and a summary of this meeting was prepared as detailed in points three and four below.
3. On 7 February 2012, the RO forwarded via email a draft Memorandum for Record (MFR) summarizing the appeal meeting topics and site visit to the appellant and SAW with a request that they review and provide comment by 14 February 2012. In emails dated 12 and 14 February 2012, the appellant provided comments regarding their coordination with the NCDOT, the inaccuracies of the District's data points, and community types present within their property (sections 5.a., 5.i. and 7.b. of the draft MFR respectively). These comments are consistent with the appellant's statements during the appeal meeting and served to clarify the appellant's reasons for appeal. The District indicated via email on 13 February 2012 that they did not have any comments on the draft MFR.
4. The final MFR was supplied to the appellant and the District via email on 21 February 2012. The appellant's remarks were included in the respective sections of the final MFR which was reviewed and considered in the evaluation of this request for appeal. A copy of the final MFR is included as Attachment A to this decision document.

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

**APPEAL REASON:** The District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands. More specifically, the on-site wetlands should be larger than that illustrated on the district's map.

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

**DISCUSSION:** Wetlands are defined in 33 CFR § 328.3(b) as, "...those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." The 1987 Corps Wetland Delineation Manual<sup>2</sup> (1987 Manual) further clarifies that wetlands are generally characterized by the presence of hydrophytic vegetation, hydric soils, and wetland hydrology. Conversely, the 1987 Manual characterizes nonwetlands as having the presence of at least one of the following: 1) aerobic soils, 2) a prevalence of vegetation adapted for life in aerobic soils, and/or 3) hydrology that does not preclude the occurrence of plant species typically adapted for life in aerobic soil conditions.<sup>3</sup> Finally, the 1987 Manual identifies a wetland boundary as the interface between a wetland and a nonwetland.<sup>4</sup>

Use of the 1987 Manual is required to identify and delineate wetlands potentially subject to

---

<sup>2</sup> Environmental Laboratory. (1987). "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

<sup>3</sup> 1987 Manual pages 9-11.

<sup>4</sup> 1987 Manual pages 49 and 55.

regulation under Section 404 of the Clean Water Act.<sup>5</sup> In addition, regional supplements were developed by the Corps for use with the 1987 Manual in order to address regional wetland characteristics and improve the accuracy and efficiency of wetland delineation procedures.<sup>6</sup> In this case, the site associated with this appeal falls within the applicable region of the Atlantic and Gulf Coastal Plain regional supplement (Supplement).<sup>7</sup>

Both the 1987 Manual and the Supplement indicate that a data form should be used to document the hydrology, vegetation, and soil characteristics for each community type within a site, or in the case of sites that are greater than five acres, for observation points within each community type along a transect within a site.<sup>8</sup>

The District indicated in their "Notification of Jurisdictional Determination" form that the project area, which includes the appellant's property, is 4,030 acres. As this AJD was prepared for a NCDOT project and not specifically for the appellant's property, it is not surprising that the AR does not specifically describe the size of the appellant's property. The District does, however, include in the AR an aerial photograph as well as a USGS topographic quadrangle map that illustrate the presence of more than one community type within the appellant's property.

The District correctly used the Supplement data form to document in the AR the conditions at two sample points, a wetland and corresponding upland data point, within the review area. The District clarified during the appeal meeting that both sample points were located within an existing power line easement, even though this is not correctly described as such on the data forms.<sup>9</sup> Finally, the District indicated these two data points, which reflect the wetland boundaries within the disturbed power line easement, were used to characterize all the community types within the appellant's property.

Because the appellant's property contained more than one community type, the District did not correctly follow current regulatory criteria and associated guidance for identifying and delineating wetlands when they used two sample points within a single, disturbed community to represent that of the all the community types within the appellant's property.

**ACTION:** The District should follow the 1987 Manual and the Supplement to correctly identify and delineate wetlands associated with the appellant's property potentially subject to regulation under Section 404 of the Clean Water Act. The District must adequately document how they characterized the hydrology, vegetation, and soil characteristics for each community type within

---

<sup>5</sup> "Implementation of the 1987 Corps Wetland Delineation Manual," memorandum from John P. Elmore dated 27 August 1991.

<sup>6</sup> U.S. Army Corps of Engineers. 2010. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)*, ed. J.S. Wakeley, R.W. Lichvar, and C.V. Noble. ERDC/EL TR-10-20. Vicksburg, MS: U.S. Army Engineer Research and Development Center: 1-2.

<sup>7</sup> Supplement pages 3-5.

<sup>8</sup> 1987 Manual pages 41, 46, 48, 49, 53, 54, 57, and 60; Supplement page 17. The data form can be found in the Supplement; Appendices C and D.

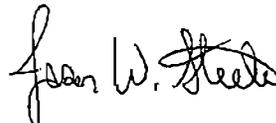
<sup>9</sup> Both the 1987 Manual and the Supplement provide instructions on how to correctly delineate an area when positive indicators of hydrophytic vegetation, hydric soils, and/or wetland hydrology could not be found due to effects of recent human activities or natural events. These circumstances are defined as atypical or difficult wetland situations in the 1987 Manual (pages 73-83) and the Supplement (pages 112-143) respectively.

Subject: Eddie O's Enterprises, LTD. Appeal  
District: Wilmington  
JD Number: SAW-1995-459  
Page: 5 of 6

the site. Should this result in a change in some aspect of the wetlands within the review area (i.e. size of the wetlands, their proximity to a relatively permanent water, or other), the District should reassess if regulatory jurisdiction continues to extend to these wetland areas by following the *Rapanos* guidance<sup>10</sup> while considering these changes. The administrative record should be revised accordingly to document and reflect the factual data and this analysis.

## **CONCLUSION**

For the reasons stated above, I have determined the appeal has merit. The AJD specific to the appellant's property is remanded to the District for reconsideration and reevaluation based on comments detailed above. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law, regulation, Executive Order, or policy. The administrative appeals process for this action is hereby concluded.



JASON W. STEELE  
Administrative Appeals Review Officer  
South Atlantic Division

---

<sup>10</sup> Grumbles, Benjamin H. and John Paul Woodley, Jr. 2007, 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*. Original guidance released June 5, 2007; revised guidance released December 2, 2008.