

ADMINISTRATIVE APPEAL DECISION

GARY GILLIKIN

FILE NO. SAW-2013-00512

WILMINGTON DISTRICT

8 December 2014

Review Officer: Elliott N. Carman, U.S. Army Corps of Engineers (Corps), Southwestern Division, Dallas, Texas

Receipt of Request for Appeal: 8 January 2014

Acceptance of Request for Appeal: 9 January 2014

Appeal Meeting: 20 February 2014

Authority: Section 404 of the Clean Water Act (CWA) (33 U.S.C. §1344) and Section 10, Rivers and Harbors Act of 1899 (Section 10) (33 U.S.C. § 403)

SUMMARY OF DECISION

Mr. Gary Gillikin (Appellant) is appealing a Wilmington District (District) approved jurisdictional determination (AJD) dated 10 December 2013 for a wetland on his property located in Newport, Carteret County, North Carolina. The Appellant believes the District incorrectly applied law, regulation, guidance, and policy when it determined that this wetland, which Appellant identified as man-made, was a water of the United States. For reasons detailed in this document, this reason for appeal has merit. The AJD is remanded to the District for reconsideration.

BACKGROUND

The property in question is located at the southeast corner of State Highway 24 and George Taylor Road in Newport, Carteret County, North Carolina. In response to a request for an AJD, the District conducted site visits on 27 March and 3 April 2013, and issued an AJD dated 8 July 2013, which stated that there were waters on the Appellant's property subject to both Section 404 of the CWA and Section 10.¹

The Appellant submitted a complete Request for Appeal (RFA) which was received by the South Atlantic Division (Division) office on 6 September 2013, and accepted by the Division via letter dated 13 September 2013.² On 10 October 2013, the Appellant requested to withdraw his appeal

¹ Administrative record (AR) page 44.

² AR page 25.

so the District could reconsider the Section 404 aspect of its AJD based on new information (i.e., information stating the wetland in question was man-made).³ The appeal was officially withdrawn by letter dated 11 October 2013.⁴

The Appellant submitted new information, which the District considered and, in turn, provided the Appellant a new AJD (the subject of this appeal) dated 10 December 2013, which concluded that the wetland area in question was still a water of the United States because all three wetland parameters were present.⁵ Finally, the Appellant submitted a complete RFA, which was received by the Division office on 8 January 2014 and accepted via letter dated 9 January 2014.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

Upon appeal of the District Engineer's determination, the Division Engineer or his Review Officer (RO) conducts an independent review of the District's administrative record (AR) to address the reasons for appeal cited by the Appellant. The District's 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 the Division. 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 District's AR. Such interpretation, clarification, or explanation does not become part of the District's AR because the District Engineer did not consider it in making the decision on the AJD. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the District's AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal process and its disposition are as follows:

1. The District provided a copy of its AR to the RO and the Appellant via email dated 13 January 2014. The District's AR is limited to information contained in the record on or before the date of the NAO/NAP form. In this case, that date is 10 December 2013.
2. An appeal meeting was held on 20 February 2014. The appeal meeting followed the agenda provided to the District and the Appellant by the RO via email on 12 February 2014. During the appeal meeting, it was discovered that the District inadvertently omitted several items from the copies of the AR provided to the RO and the Appellant. Additionally, the District provided a handout to the RO and the Appellant. These items are as follows:
 - a. The District provided a handout to both the RO and the Appellant that contained the District's written responses to the points for clarification contained in the appeal meeting agenda. This document was not considered new information as it was merely a written form of the verbal clarification provided during the appeal meeting

³ AR pages 14-15.

⁴ AR page 13.

⁵ AR pages 4-5.

and documented in the appeal meeting memorandum for record (MFR). Therefore, the handout was considered as part of the evaluation of this RFA.

- b. The Appellant noted that a map he submitted to the District via correspondence found on AR page 34 was not included in the AR. This map, which was included in Appendix C to appeal meeting MFR, was similar to the one found on AR page 29, but had additional text at the bottom of the figure that is not on the map on AR page 29. The District stated the omission was an error, as they thought the map was the same as that on AR page 29 and, therefore, did not include it in the AR because of a District policy not to include multiple copies of the same document in the AR. Because the map was submitted to the District prior to 10 December 2013, but not included in the AR due to a District error, it should be considered as part of the District's AR and consequently, part of the evaluation of this RFA.
 - c. The Appellant also noted that his 6 August 2013 email to the District, where he alerted the District to the history of the contested portion of the site and the District's 9 August 2013 response, in which the District indicated the area would still be a water of the United States, were also missing from the AR. These emails were included in Appendix D to appeal meeting MFR. Because these emails occurred prior to 10 December 2013 and were not included in the AR due to a District error, they should be considered as part of the District's AR and consequently, part of the evaluation of this RFA.
3. On 27 February 2014, the RO forwarded a draft MFR summarizing the appeal meeting topics to the District and the Appellant for review and comment. Both the District and the Appellant responded (via emails dated 27 and 28 February 2014, respectively) that did not have any comments. A final MFR was supplied to the Appellant and the District by the RO via email on 3 March 2014.

EVALUATION OF THE APPELLANT'S STATED REASON FOR APPEAL

Appeal Reason: The District incorrectly applied law, regulation, guidance, and policy when it determined that a portion of the Appellant's property should be considered a wetland that is a water of the United States.

Finding: This reason for appeal has merit.

Discussion: During the appeal meeting, the Appellant clarified that he was not contesting that the area in question was a wetland; rather, he was contesting the jurisdictional status of the wetland pursuant to Section 404 of the CWA. He believed that because the area in question was originally an upland and is now only a wetland due to human causes, that the area in question should not be subject to Section 404 of the CWA, and that he should therefore be able to return

the area to an upland state.⁶ The Appellant believed his rationale was supported by the following specific language from 33 CFR § 323.4(a)(1)(ii) and 323.4(c), respectively:

If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

[and]

Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a)(1)— (6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced.

The sections of the regulation referenced by the Appellant in support of his reason for appeal refer to discharges of dredged or fill materials resulting from certain activities (such as ongoing farming, silviculture, or ranching operations) that are not prohibited by or subject to permitting under section 404 of the Clean Water Act as long as the activity meets the conditions outlined in the section. There was nothing in the District's AR, either included by the District or submitted by the Appellant, that indicated the Appellant's property or any proposed activity would satisfy any of the circumstances as outlined in the referenced language.

Furthermore, it is important to note that there is a difference between the exercise of Section 404 jurisdiction and an exemption from Section 404 permitting. A proposed activity within an aquatic feature may be exempt from Section 404 permitting requirements, while the same aquatic feature would still be considered jurisdictional (a water of the United States). Therefore, the Appellant's references to 33 CFR § 323.4(a)(1)(ii) and 323.4(c) concern exemptions from permitting and are irrelevant for purposes of objecting to jurisdiction under Section 404 of the CWA. While the regulations referenced by the Appellant might operate to exempt an activity from Section 404 permitting, they would have no impact on whether or not a wetland is a water of the United States.

The issue presented by Appellant's RFA is whether the man-made nature of the wetland in question affects or precludes the exercise of jurisdiction under Section 404 of the CWA. That was the basis of the Appellant's AJD reconsideration request which led to the 10 December 2013 AJD (the subject of this appeal).

Considering regulation, guidance, and policy applicable to this reason for appeal, 33 CFR § 328.3(a) states that waters of the United States include wetlands that are adjacent to other waters of the United States. The revised *Rapanos* guidance states that agencies will assert jurisdiction

⁶ While the District's AJD did not clearly establish whether Section 10 authority extended to the wetland in question, the Appellant's appeal was limited to the District's determination that the wetland in question was subject to Section 404 of the CWA and did not challenge whether the same feature was subject to Section 10.

over wetlands adjacent to traditional navigable waters (TNW) without the need for a fact-specific analysis to determine whether the wetland has a significant nexus with the TNW.⁷ Wetlands are defined 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."⁸ Finally, wetlands are generally characterized by the presence of hydrophytic vegetation, hydric soils, and wetland hydrology.⁹

While not regulation, the preamble to 33 CFR § 328.3¹⁰ provides a list of waters that are generally not considered to be waters of the United States. This list includes, "waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR § 328.3(a))." The preamble also explains that the Corps and EPA reserve the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States.

The regulation at 33 CFR § 328.5 states that, "permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. ...Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer. Verification of changes to the lateral limits of jurisdiction may be obtained from the district engineer."

The District illustrated, on field notes in their AR, two wetland types found within the Appellant's property: a coastal marsh and the wetland in question.¹¹ This distinction was not discussed in the District's AJD form, which simply indicated that the Appellant's property contained approximately 1.5 acres of wetlands that were adjacent to Bogue Sound, a TNW.¹² The District also prepared a MFR that assessed the Appellant's description of the property's history. In the MFR, the District indicated it reviewed the "...1987 Wetland Delineation Manual, Part IV, Subsection D-Man-Induced Wetlands..."¹³ and concluded, "Since the area has all three wetland parameters, the area in question would be considered jurisdictional."¹⁴

⁷ 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.

⁸ 33 CFR § 328.3(b).

⁹ Environmental Laboratory. (1987). "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS. (1987 Manual).

¹⁰ 51 Federal Register 41206, at 41217 (1986).

¹¹ AR page 71.

¹² AR pages 50-51. It is also noted that the district's AJD form included only the cumulative acreage of the wetlands identified on the Appellant's property and did not identify the size of each individual wetland.

¹³ Here, the District is referring to the 1987 Manual. However, the District incorrectly referred to the section on man-induced wetlands as "Part IV, Subsection D- Man-Induced Wetlands." The correct reference in the manual for man-induced wetlands is Part IV, Section F (atypical situations), Subsection 4 (man-induced wetlands).

¹⁴ AR page 9. The District clarified during the appeal meeting that it reconsidered AJD was the same as the AJD Form found on AR page 50. Therefore, this MFR represents the District's only response to the Appellant's new information regarding the property's historic nature.

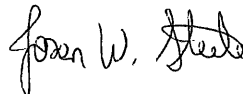
This section of the Corps' 1987 Wetland Delineation Manual referenced by the District in its MFR does not speak to the jurisdictional status of man-induced features, but how to delineate a wetland that was purposely or incidentally created by human activities when "wetland indicators of one or more parameters are absent."¹⁵ Additionally, the presence of the three wetland parameters does not speak to an area's jurisdictional status, but rather to whether an area meets the definition of a wetland.¹⁶ As previously stated, the Appellant is not contesting that the area in question is a wetland; rather, he is contesting the jurisdictional status of the wetland.

Although the District documented in their AR the presence of a wetland within the Appellant's property (consistent with the 1987 Manual) and that the wetland was adjacent to a TNW (consistent with 33 C.F.R. § 328.3(a) as described above), the District failed to document whether the historic excavation acted to either create a water that is generally not considered to be water of the United States (from the preamble to 33 CFR § 328.3) or to change the lateral limits of jurisdiction (from 33 CFR § 328.5). Therefore, in the absence of any other assessment in the District's AR that addressed the historic nature of the wetland relative to its jurisdictional status, it is concluded that the District incorrectly applied law, regulation, guidance, and policy when it determined that a portion of the Appellant's property should be considered a wetland that is a water of the United States.

Action: The District shall revise its AJD by utilizing applicable regulation, guidance, and policy (particularly those referenced in the discussion above) to determine whether the man-made nature of the wetland in question affects or precludes the exercise of jurisdiction under Section 404 of the CWA. The AR should be revised accordingly to document and reflect the additional factual data considered and this analysis. This documentation should include a revised AJD form that captures the District's rationale as well as clearly distinguishes the aquatic resources on the appellant's property (i.e. wetland type and size) as well as the regulatory authority(ies) for each.

CONCLUSION

For the reasons stated above, I have determined the reason for appeal has merit. The AJD is remanded to the District for reconsideration consistent with comments detailed herein. The final Corps decision on jurisdiction in this case will be the Wilmington District Engineer's decision made pursuant to my remand. The administrative appeals process for this action is hereby concluded.



Jason W. Steele
Administrative Appeals Review Officer
South Atlantic Division

¹⁵ 1987 Manual, page 74.

¹⁶ 1987 Manual, pages 9-10.