

## ADMINISTRATIVE APPEAL DECISION

HENRY WILLIAMS III

FILE NO. SAW-2009-876

WILMINGTON DISTRICT

25 MARCH 2011

**Review Officer:** Jason Steele, U.S. Army Corps of Engineers, South Atlantic Division (SAD)

**Appellant:** Henry Williams III

**Date of Receipt of Request for Appeal:** 29 November 2010

**Acceptance of Request for Appeal:** 29 December 2010

**Appeal Conference:** 21 January 2011

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

### SUMMARY OF DECISION

Appellant's request for appeal (RFA) does not have merit. The administrative record (AR) substantiates the District's determination that the subject property contains waters of the United States (U.S.), as required by the *Corps of Engineers Wetland Delineation Manual*, January 1987 ("87 Manual").

### BACKGROUND

Henry Williams III is appealing the Wilmington District's (District) 1 October 2010 decision to assert jurisdiction over 0.49 acres of wetlands (W-136 = 0.34 acres, W-124 = 0.15 acres) and 1,358 linear-feet of stream (S-116 & S-117)<sup>1</sup> on the appellants property, located just north of the intersection of Old Williams Road and Monroe-Ansonville Road, Latitude 35.002599, Longitude -80.468309, Monroe, Union County, North Carolina.

A jurisdictional determination (JD) was requested by the North Carolina Department of Transportation (NC DOT) and the North Carolina Turnpike Authority (NCTA) as part of their future plans to construct a road known as the "Monroe Connector/Bypass". The District issued one approved JD to the NC DOT and NCTA with instructions to notify all fee owners along the proposed road corridor as "affected parties," where a JD was made on their property. Mr. Williams was notified that a portion of his property was determined to have Waters of the United

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<sup>1</sup> W-136 and W-124 correspond to the two wetland areas identified on appellant's property. S-116 and S-117 correspond to the two streams identified on the appellant's property.

States (WOUS). Since Mr. Williams is a landowner, he was considered an “affected party” and was notified of his appeal rights.

The District contends that the areas designated as wetlands on the appellant’s property (0.49 acres) satisfy the 3-parameter test, as per the 87 Manual: soils, hydrology, and hydrophytic vegetation. It should be noted that the *Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont*, July 2010 (“Supplement to the 87 Manual”), was still in draft form at the time the District made their approved jurisdictional determination. Although the Supplement to the 87 Manual is dated July 2010, the interim version was not available for use until November 2010 (30 days after the Wilmington District published the public notice for the supplement). There is no evidence that the use of the Supplement to the 87 Manual would have changed the results in this case.

The appellant contends the 0.49-acre area designated as wetlands on his property does not meet the definition of wetlands, due to the lack of wetland soils, hydrology, and hydrophytic vegetation. During the teleconference, the appellant stated that the area (0.49-acre designated wetlands) flood approximately 1-2 times a year (in the Spring).

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

1. The District provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.
2. The appellant supplied supporting documentation at the time of submittal of the RFA.
3. The District and appellant supplied information at the time of the appeal conference. This information was in the form of answered questions.

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

**Appeal Reason:** “[I]ncorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands.” Essentially that the areas designated as wetland on the property (0.49 acres), do not satisfy the 3-parameter test (soils, hydrology, hydrophytic vegetation) as required by the 87 Manual.

#### **EVALUATION OF THE REASON FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE WILMINGTON DISTRICT COMMANDER**

**Appeal Reason:** The areas designated as wetland on the property (0.49 acres), do not meet the 3-parameter test (soils, hydrology, hydrophytic vegetation) as required by the 87 Manual.

**Finding:** This reason for appeal does not have merit.

**Discussion:** The 87 Manual provides the following information as it pertains to hydrophytic vegetation (page 16):

35. Several indicators may be used to determine whether hydrophytic vegetation is present on a site. However, the presence of a single individual of a hydrophytic species does not mean that hydrophytic vegetation is present. The strongest case for the presence of hydrophytic vegetation can be made when several indicators, such as those in the following list, are present. However, any one of the following is indicative that hydrophytic vegetation is present:

a. More than 50 percent of the dominant species are OBL, FACW, or FAC (Table 1) on lists of plant species that occur in wetlands....

The District provided the following information, related to the vegetation present onsite (Data Form, Routine Wetland Determination, (1987 CE Wetlands Delineation Manual) (3/6/2008)):

Dominant Plant Species (Wetland 136)	Stratum	Indicator
1. Red Maple ( <i>Acer rubrum</i> )	tree	FAC
2. Sweetgum ( <i>Liquidambar styraciflua</i> )	tree	FAC+
3. White Oak ( <i>Quercus alba</i> )	tree	FACU
4. Soft Rush ( <i>Juncus effusus</i> )	herb	FACW+
5. Japanese Honeysuckle ( <i>Lonicera japonica</i> )	vine	FAC-
Percent of dominant species that are OBL, FACW, or FAC (Excluding FAC-): 60%		
Remarks: The hydrophytic vegetation criteria has been met.		

Dominant Plant Species (Wetland 124)	Stratum	Indicator
1. Slippery Elm ( <i>Ulmus rubra</i> )	tree	FAC
2. Wild Onion ( <i>Allium sp.</i> )	tree	FAC
3. Honeysuckle ( <i>Lonicera japonica</i> )	vine	FAC-
4. Common Greenbrier ( <i>Smilax rotundifolia</i> )	vine	FAC
5. Panic Grass ( <i>Panicum sp.</i> )	herb	FACW
Percent of dominant species that are OBL, FACW, or FAC (Excluding FAC-): 80%		
Remarks: The hydrophytic vegetation criteria has been met.		

The only information which the Appellant provides that is contrary to the data in the administrative record relied upon by the District are the observations that “[a]n on-site review of the delineated wetland areas indicates similar vegetation as other wooded parts of the property ... [and that] other more common wetland vegetation such as cattails, bulrushes, moss, willows, etc., are not present in the delineated areas.” Without more, the District’s data sheets provide sufficient information to substantiate that wetland 124 (80% dominant species that are OBL, FACW, or FAC) and wetland 136 (60% dominant species that are OBL, FACW, or FAC) exhibit a predominance of hydrophytic vegetation (more than 50% dominant species that are OBL, FACW, or FAC), as required by the 87 Manual (page 16, 35.a.).

The 87 Manual provides the following information as it pertains to hydric soils (Appendix D (D2 & D3)):

- c. Determine whether sulfidic materials are present by smelling the soil. The presence of a "rotten egg" odor is indicative of hydrogen sulfide, which forms only under extreme reducing conditions associated with prolonged inundation/soil saturation.
- d. Determine whether the soil has an aquic or peraquic moisture regime (see paragraph 44 of the main text). If so, the soil is hydric.

(1) Gleyed soil.

Determine whether the soil is gleyed. If the matrix color best fits a color chip found on the gley page of the Munsell soil color charts, the soil is gleyed. This indicates prolonged soil saturation, and the soil is highly reduced.

- g. Determine whether the mapped soil series or phase is on the national list of hydric soils (Section 2). *CAUTION: It will often be necessary to compare the profile description of the soil with that of the soil series or phase indicated on the soil map to verify that the soil was correctly mapped. This is especially true when the soil survey indicates the presence of inclusions or when the soil is mapped as an association of two or more soil series.*

The District provided the following information, related to the hydric soils present onsite (Data Form, Routine Wetland Determination, (1987 CE Wetlands Delineation Manual) (3/6/2008)):

Map Unit Name (Series and Phase):		<b>Wetland 136</b>	Drainage Class: <u>Well Drained</u>		<i>Circle</i>
Taxonomy (Subgroup):		<u>Badin</u> <u>Typic Hapludults</u>	Field Observations Confirm Mapped Type?		Yes No X
Profile Description					
Depth (inches)	Horizon	Matrix Color (Munsell Moist)	Mottle Colors (Munsell Moist)	Mottle Abundance/Size/Contrast	Texture, Concretions, Structure, etc.
0-7		10YR 5/4			Sandy Clay Loam
7-14		2.5Y 5/2	7.5YR 4/6	Common/Distinct	Clay Loam
Hydric Soil Indicators:					
<input type="checkbox"/>	Histosol	<input type="checkbox"/>	Reducing Conditions	<input type="checkbox"/>	High Organic Content in Surface Layer in Sandy Soils
<input type="checkbox"/>	Histic Epipedon	<input checked="" type="checkbox"/>	Gleyed or Low-Chroma Colors	<input type="checkbox"/>	Listed on National Hydric Soils List
<input type="checkbox"/>	Sulfidic Odor	<input type="checkbox"/>	Concretions	<input type="checkbox"/>	Listed on Local Hydric Soils List
<input type="checkbox"/>	Aquatic Moisture Regime	<input type="checkbox"/>	Organic Streaking in Sandy Soils	<input type="checkbox"/>	Other (explain in remarks)
<i>Remarks</i> The hydric soil criterion has been met.					

\* Badin soils are not listed on the National List of Hydric Soils. However, the classification of a soil, in a soil survey, does not necessary mean that the soil is present. The soil was field verified and found to have "Gleyed or Low-Chroma Colors".

Map Unit Name (Series and Phase):		<b>Wetland 124</b>	Drainage Class: <u>Somewhat Poorly Drained</u>		<i>Circle</i>
Taxonomy (Subgroup):		<u>Chewacla Silt Loam</u> <u>Fluvaquentic Dystrochrepts</u>	Field Observations Confirm Mapped Type?		Yes No X
Profile Description					
Depth (inches)	Horizon	Matrix Color (Munsell Moist)	Mottle Colors (Munsell Moist)	Mottle Abundance/Size/Contrast	Texture, Concretions, Structure, etc.
0-3	A	2.5Y 5/3			Clay 2msbk
3-9	B1	2.5Y 6/2			Clay 2msbk
9-18	B2	2.5Y 6/2	7.5YR 5/8 and 2.5Y 5/3	Few/Distinct	Clay 2msbk All Saturated
Hydric Soil Indicators:					
<input type="checkbox"/>	Histosol	<input checked="" type="checkbox"/>	Reducing Conditions	<input type="checkbox"/>	High Organic Content in Surface Layer in Sandy Soils
<input type="checkbox"/>	Histic Epipedon	<input checked="" type="checkbox"/>	Gleyed or Low-Chroma Colors	<input type="checkbox"/>	Listed on National Hydric Soils List
<input type="checkbox"/>	Sulfidic Odor	<input type="checkbox"/>	Concretions	<input type="checkbox"/>	Listed on Local Hydric Soils List
<input checked="" type="checkbox"/>	Aquatic Moisture Regime	<input type="checkbox"/>	Organic Streaking in Sandy Soils	<input type="checkbox"/>	Other (explain in remarks)
<i>Remarks</i> The hydric soil criterion was met.					

\* Chewacla Silt Loam soils are listed on the National List of Hydric Soils. In addition, the field verified soils were found to have “Gleyed or Low-Chroma Colors”, “Reducing Conditions”, and “Aquatic Moisture Regime”.

Absent reliable data to the contrary, the District has provided sufficient information to prove that wetland 124 (Chewacla Silt Loam) and wetland 136 (Badin) exhibit hydric soil characteristics as required by the 87 Manual/NRCS soil criteria (Appendix D (D2 & D3)).

The 87 Manual provides the following information as it pertains to hydrology (pages 30-31):

49. Indicators of wetland hydrology may include, but are not necessarily limited to: drainage patterns, drift lines, sediment deposition, watermarks, stream gage data and flood predictions, historic records, visual observation of saturated soils, and visual observation of inundation. Any of these indicators may be evidence of wetland hydrologic characteristics...

*b. (1) Visual observation of inundation.* The most obvious and revealing hydrologic indicator may be simply observing the areal extent of inundation. However, because seasonal conditions and recent weather conditions can contribute to surface water being present on a nonwetland site, both should be considered when applying this indicator.

*(2) Visual observation of soil saturation.* Examination of this indicator requires digging a soil pit (Appendix D, Section 1) to a depth of 16 inches and observing the level at which water stands in the hole after sufficient time has been allowed for water to drain into the hole. The required time will vary depending on soil texture. In some cases, the upper level at which water is flowing into the pit can be observed by examining the wall of the hole. This level represents the depth to the water table. The depth to saturated soils will always be nearer the surface due to the capillary fringe. For soil saturation to impact vegetation, it must occur within a *major portion of the root zone* (usually within 12 inches of the surface) of the prevalent vegetation. The major portion of the root zone is that portion of the soil profile in which more than one half of the plant roots occur.

*CAUTION: In some heavy clay soils, water may not rapidly accumulate in the hole even when the soil is saturated. If water is observed at the bottom of the hole but has not filled to the 12-inch depth, examine the sides of the hole and determine the shallowest depth at which water is entering the hole. When applying this indicator, both the season of the year and preceding weather conditions must be considered.*

*(3) Watermarks.* Watermarks are most common on woody vegetation. They occur as stains on bark or other fixed objects (e.g., bridge pillars, buildings,

fences, etc.). When several watermarks are present, the highest reflects the maximum extent of recent inundation.

(6) *Drainage patterns within wetlands.* This indicator, which occurs primarily in wetlands adjacent to streams, consists of surface evidence of drainage flow into or through an area. In some wetlands, this evidence may exist as a drainage pattern eroded into the soil, vegetative matter (debris) piled against thick vegetation or woody stems oriented perpendicular to the direction of water flow, or the absence of leaf litter. Scouring is often evident around roots of persistent vegetation. Debris may be deposited in or along the drainage pattern.

NOTE: The hydrology indicators described above are considered to be "primary indicators", any one of which is sufficient evidence that wetland hydrology is present when combined with a hydrophytic plant community and hydric soils. In addition, the following "secondary indicators" may also be used to determine whether wetland hydrology is present. In the absence of a primary indicator, any two secondary indicators must be present to conclude that wetland hydrology is present. Secondary indicators are: presence of oxidized rhizospheres associated with living plant roots in the upper 12 inches of the soil, presence of waterstained leaves, local soil survey hydrology data for identified soils, and the FAC-neutral test of the vegetation. (HQUSACE, 6 Mar 92)

The District provided the following information, related to the hydrology present onsite (Data Form, Routine Wetland Determination, (1987 CE Wetlands Delineation Manual) (3/6/2008)):

<input type="checkbox"/> Recorded Data (Describe in Remarks) <input type="checkbox"/> Stream, Lake, or Tide Gauge <input type="checkbox"/> Aerial Photographs <input type="checkbox"/> Other <input checked="" type="checkbox"/> No recorded data available	<p style="text-align: right;"><b>WETLAND 136</b></p> <p>Wetland Hydrology Indicators:</p> <p><i>Primary Indicators:</i></p> <input type="checkbox"/> Inundated <input checked="" type="checkbox"/> Saturated in Upper 12 inches <input type="checkbox"/> Water Marks <input type="checkbox"/> Drift Lines <input type="checkbox"/> Sediment Deposits <input type="checkbox"/> Drainage Patters in Wetlands	<p><i>Secondary Indicators (2 or more required):</i></p> <input checked="" type="checkbox"/> Oxidized Root Channels in Upper 12" <input checked="" type="checkbox"/> Water-Stained Leaves <input type="checkbox"/> Local Soil Survey Data <input type="checkbox"/> FAC-Neutral Test <input type="checkbox"/> Other (explain in remarks)
<p>FIELD OBSERVATIONS:</p> <p>Depth of Surface    n/a            (In.)          Water:          Depth to Free        12                    (In.)          Water in Pit:          Depth to Saturated    10                    (In.)          Soil: _____</p>	<p>Remarks: The hydrologic criterion has been met.</p>	

<input type="checkbox"/> Recorded Data (Describe in Remarks) <input type="checkbox"/> Stream, Lake, or Tide Gauge <input type="checkbox"/> Aerial Photographs <input type="checkbox"/> Other <input checked="" type="checkbox"/> No recorded data available	<div style="text-align: right; font-weight: bold; font-size: small;">WETLAND 124</div> <p>Wetland Hydrology Indicators:</p> <p><i>Primary Indicators:</i></p> <input checked="" type="checkbox"/> Inundated <input checked="" type="checkbox"/> Saturated in Upper 12 inches <input checked="" type="checkbox"/> Water Marks <input type="checkbox"/> Drift Lines <input type="checkbox"/> Sediment Deposits <input checked="" type="checkbox"/> Drainage Patterns in Wetlands
<p>FIELD OBSERVATIONS:</p> <p>Depth of Surface    2                    (In.)          Water:          Depth to Free            8                    (In.)          Water in Pit:          Depth to Saturated    0                    (In.)          Soil: _____</p>	<p><i>Secondary Indicators (2 or more required):</i></p> <input type="checkbox"/> Oxidized Root Channels in Upper 12" <input checked="" type="checkbox"/> Water-Stained Leaves <input type="checkbox"/> Local Soil Survey Data <input checked="" type="checkbox"/> FAC-Neutral Test <input type="checkbox"/> Other (explain in remarks)
<p><i>Remarks:</i>    The hydrologic criterion has been met.</p>	

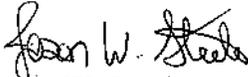
Absent reliable data to the contrary, the District has provided sufficient information to prove that wetland 124 and wetland 136 exhibit hydrologic characteristics as required by the 87 Manual (pages 30-31).

Regarding both the soils and hydrology criteria, the Appellant contends that “[t]he soils and hydrology of the delineated areas show little or no difference than other areas near ditches and creeks on the property not designated wetlands,” that [m]y personal experiences on this property during different times of the year indicates to me that the soil and hydrology requirements are not being met,” and that “[t]here was no noted difference in the wildlife in the delineated areas.” Without more, this is insufficient to raise an issue concerning the District’s findings concerning these two criteria.

**Actions:** None required.

**CONCLUSION**

For the reasons stated above, I find that the appeal does not have merit. The District’s administrative record contains substantial evidence to support the District’s determination that the subject wetlands satisfy the 3-parameter test (soils, hydrology, hydrophytic vegetation), as required by the 87 Manual. 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