

ADMINISTRATIVE APPEAL DECISION

JURISDICTIONAL DETERMINATION

Dr. KERRY A. WILLIS

FILE NUMBER 200401002

WILMINGTON DISTRICT

DATE: September 6, 2006

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

Appellant/Representative: Dr. Kerry A. Willis, Appellant
Mickey Sugg, Project Manager (PM), Wilmington District
Emily Burton, Wilmington District, Observer
Dr. James Gregory, Appellant Representative, Hydrologist
Larry Baldwin, Appellant Representative, Soil Scientist
Vince Lewis, Soil Scientist, US Natural Resources
Conservation Service (NRCS)

Date of Receipt of Request for Appeal (RFA): April 17, 2006

Date Appeal Accepted: May 3, 2006

Date of Appeal Conference/Site Visit: June 14, 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 jurisdictional determination.

Background Information: The Wilmington District (District) PM conducted an on-site investigation for a proposed mitigation area on May 5, 2004, north of Newport, in Carteret County, North Carolina. During the site visit, the PM discovered unauthorized excavation and side casting in wetlands on the Appellant's adjacent property. The Appellant's excavated ditch alignment was identical to a prior unauthorized excavated activity by a different landowner (Permit Number 199802005/2006). The 1998 enforcement case was closed when the violator restored the site to previous conditions.

On December 8, 2004, the PM contacted the Appellant to explain the remediation options of restoration, applying for an after-the-fact (ATF) permit, or referring the enforcement case to the US Environmental Protection Agency (EPA). The District

met the Appellant on-site on January 5, 2005, to discuss these options and the District decided to send a Cease and Desist letter requiring restoration.

On January 13, 2005, the Appellant contacted the District to inform the PM that he had a forest management plan and that his forester stated that the new ditch should be considered exempt from regulation due to the minor drainage exemption for silviculture under the Clean Water Act. The PM explained that the exemption determination is the Corps responsibility and the present ditch is not exempt because it drains wetlands adjacent to the ditch and converts the wetlands to uplands. The Appellant insisted that the ditch is not draining wetlands but only conveying water flow from the highway, through his property. The PM provided the Appellant with a copy of Corps regulations at 33 CFR Parts 320-330, pages 41233 & 41234, defining the minor drainage exemption. The Appellant was also sent EPA's *Application of Best Management Practices to Mechanical Silvicultural Site Preparation Activities for the Establishment of Pine Plantations in the Southeast*, which states that forestry activities must "not immediately or gradually convert the wetland to a non-wetland" for the activity to be exempt from regulation.

The District sent a Cease and Desist letter to the Appellant on February 22, 2005, with a restoration plan. The Appellant notified the District that he intends to appeal the wetland jurisdictional determination (JD). On March 9, 2005, the Appellant notified the District that his excavation activities meet the federal definition of minor drainage and that there has been no change in hydrology that would convert wetlands to uplands.

The PM inspected the site on April 12, 2005, and noticed that the excavated ditch was now connected to roadside ditches and was draining water from the highway. On June 23, 2005, the PM followed the ditch alignment from the highway to the rear of the Appellant's property. He discovered that the ditch terminated into a bottomland hardwood system and drained through wetland drainage patterns to an outside drainage feature.

On September 28, 2005, the District and NRCS met with the Appellant and his consultants on site. NRCS confirmed the soil types the District had previously identified. The Appellant's consultants argued for the minor drainage exemption even if the 2 to 5 feet deep ditch converts a small segment of wetlands to uplands adjacent to the ditch.

The Appellant contracted *Carolina Engineers* to conduct a survey to determine if minimal drainage conditions occur on the site. The report recommended a flashboard riser to keep the ditches from converting the wetlands to uplands. The report also concluded that the Appellant is complying with the North Carolina Department of Forestry Best Management Plan.

On March 20, 2006, the District issued a JD with an appeal form to the Appellant. The District decided to grant an opportunity to apply for an after-the-fact permit and required a tolling agreement.

The JD was appealed to the South Atlantic Division Review Officer on April 17, 2006. The RO accepted the appeal on May 3, 2006. In his Memo of Appeal, the Appellant stated:

I have not maintained that the area is not a wetland except for the ridge in the back held by [the District] not to be upland. I have maintained that the activity is exempt per ACOE minor drainage requirements.

Elsewhere in the Memo of Appeal, however, the Appellant did raise questions regarding the wetland determination. While the RFA is contradictory on whether the determination that the property meets the definition of wetlands is being appealed, the focus of the appeal is clearly on the determination that the activity in question does not meet the exemption for minor drainage. The wetland definition issues will be addressed first.

Site Visit: Michael Bell, Dr. Kerry A. Willis, Mickey Sugg, Emily Burton, Dr. James Gregory, Larry Baldwin, and Vince Lewis conducted a site investigation on June 14, 2006. It rained heavily during the site visit and the water level in the ditch was approximately 2 feet below the bank. The Review Officer observed at the time that the ditch varied from approximately 3 to 6 feet deep and 6 to 10 feet wide. The water in the ditch drained slowly from the highway at the front of the property to the back of the property. The attendees walked the ditch to the bottomland hardwood wetlands at the rear of the property. The ditch was full at the terminus of the ditch and overflowed into drainage patterns in the forest floor. The appeal conference followed the site visit and was held in the Appellant's equipment storage building.

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

Reasons for Appeal as Presented by the Appellant:

Appeal Reason 1: "Systemic error in data collection and reporting as well as [improper] site selection for sampling," * * * The use of "other criteria to classify the property as wetlands [that] are not found in the 1987 Manual ... appear[s] to be inappropriate as the sole method for determining that a wetland is present."

FINDINGS: This reason for appeal did not have merit.

ACTION: None required.

Discussion: The Appellant's first reason for appeal is that the District misidentified vegetation and soil samples taken at the site. The Appellant also claimed that the NRCS and the District had conflicting opinions on the existence of wetlands and their possible drainage.

The administrative record contains field notes and memorandums detailing sampling methods and the interpretation of the results. The *Routine Wetland Determination Data Forms* (1987 COE Wetlands Delineation Manual) are complete and the results correctly identify that the Appellant's property meets all three wetland criteria. The majority of the vegetation was wetland vegetation (first criteria) and the vegetation meets the "fac-neutral" hydrology test for one secondary hydrology indicator. The confirmation of the soil survey data by a soil scientist (NRCS) is the additional secondary hydrology indicator (second criteria). The "other" category on the wetland delineation form to which the Appellant refers was not used in the delineation of this wetland. Two secondary indicators satisfy the hydrology criteria. NRCS and the District sampled the site on September 28, 2005, and confirmed the soil types that the PM previously identified are hydric (third criteria). The RFA stated that a conflict existed between the Corps and NRCS on sampling methods. After questioning at the appeal site visit, NRCS and the District agreed on all issues. The Consultant's belief that the ditch was excavated in uplands, not wetlands, is not supported by information in the administrative record or demonstrated at the administrative appeal site visit.

The administrative record does not support a conclusion that the wetland delineation was the result of unfair or inconsistent delineation practices, use of incorrect data, or that it resulted from an incorrect application of the regulatory criteria and guidance for identifying and delineating wetlands.

Appeal Reason 2: "Systemic error in the interpretation of ACOE Guidance and Policy especially in the areas of significant drainage and extensive drainage and lawful entry as noted above and in emails and letters to ACOE Personnel and BMPs for road construction and site preparation as evidence in the notes and emails to and from ACOE personnel." [emphasis added]

FINDINGS: This reason for appeal did not have merit.

ACTION: None required.

Discussion: Since Appeal Reason 2 substantially overlaps with Appeal Reason 3, all but the discussion of the issue of lawful entry will be covered under Appeal Reason 3.

The Appellant contends that a representative of the Wilmington District entered his property without permission, and in violation of posted signs against trespassing. This individual "disregarded repeatedly the law and property rights and ACOE policy in general." While this ground of appeal raises an issue of concern, it has not been shown that the actions alleged to be unlawful and in violation of ACOE policy impacted the determination that the ditch in question was non-exempt. Therefore, this is not the type of reason for appeal recognized in 33 CFR 33.15(a)(2). In addition, this is not the type of issue for which relief can be granted under 33 CFR 331.10(b), even if it were to be shown that there was a violation of requirements concerning lawful entry.

Appeal Reason 3: “Systemic error and misapplication of standards for minor drainage and standards for determining that an exemption does not apply. Not only does the ACOE in this case not meet the standard of determining that extensive drainage has occurred, Mr. Sugg fails to make any technical determination that based on the soils and ditch size and configuration that the exemption does not apply by his discussion of his interpretation of these criteria, Mr. Sugg’s “I don’t think so” is not the burden of standard required by intent of congress when this activity was exempted, For this JD to be technically adequate, the Congress and the courts placed a large burden of proof on ACOE personnel to probe that the exemption does not apply. The statements, retractions and eventually ignoring of repeated questions by ACOE personnel reveal a pattern that can only be characterized as arbitrary and capricious and violating reasonable standards of conduct and interpretation in this case.”

FINDINGS: This reason for appeal did not have merit.

ACTION: None required.

Discussion: As noted above, with the exception of the trespass issue, appeal reasons 2 and 3 are similar.

As stated in the RFA, “That wetlands are present is not at issue, whether wetlands have been drained in violation of Section 404(f) of the clean water act is at issue.” At the administrative appeal conference and in the administrative record, the Appellant emphasized that the ditch would not cause significant and excessive drainage so as to be proscribed by Section 404 f(2) of the Clean Water Act. The appellant also stated that “[t]he burden of proof for the exemption not to apply lies with the ACOE.” During the appeal site visit, the Appellant’s consultants admitted that the wetlands near the ditch would convert, over time, for a varied distance. The excavated ditch would also not cause a conversion of wetlands to uplands or impact the reach and breadth of waters of the US. Therefore, the ditch would be exempt from regulation by the District. The Appellant made reference to what he understood to be US Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) policy guidance concerning significant and excessive drainage – “extensive conversion of the area surrounding the ditch is the established standard by EPA/ACOE policy.” At the site visit, the Appellant stated that the guidance was, in fact, the Clean Water Act.

Section 404(f) of the Clean Water Act, 33 U.S.C. 1344(f) discusses activities that are exempted from regulation under Section 404:

(f) Non-prohibited discharge of dredged or fill material

(1) ***Except as provided in paragraph (2)*** of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices;

(F) ... is not prohibited by or otherwise subject to regulation under this section

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section. [33 U.S.C. § 1344, emphasis added]

Section 404(f)(2) is known as the “recapture provision.” Activities otherwise exempted may nevertheless require a permit if they meet its 2-prong test. Regarding the second prong, Corps regulations state: “Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.” 33 CFR 323.4(c).

Corps regulations implementing 404(f) define “minor drainage” to include, among other things:

(ii) The discharge of dredged or fill material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production; [33 CFR 323.4(a)(1)(C)(1)]

These regulations further clarify that:

(2) Minor drainage in waters of the US is limited to drainage within areas that are part of an established farming or silviculture operation. ***It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland*** (e.g., wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ***ditch***, dike or other waterway or structure ***which drains or otherwise significantly modifies*** a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. ***Any discharge of dredged or fill material into the waters of the United States incidental to the construction or any such structure or waterway requires a permit.*** [33 CFR 323.4(a)(1)(C)(2), emphasis added].

The Appellant's refers to either EPA and ACOE guidance, or the Clean Water Act, itself, as establishing the requirement that there must be an extensive area of conversion for the minor drainage exemption not to apply. There is no such EPA or ACOE guidance. It may be that the Appellant is referring to the legislative history of the Clean Water Act. For example, the statement of Senator Muskie, one of the primary sponsors of the Clean Water Act, noted that the exemptions were for "narrowly defined activities" that might result in "incidental" or "minor" harm, and would "not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body." *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Water Pollution Control Act*, at 474 (1978).

Between the Corps and EPA, pursuant to the January 19, 1989, DEPARTMENT OF THE ARMY/ENVIRONMENTAL PROTECTION AGENCY MEMORANDUM OF AGREEMENT 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, the EPA has the final call on the scope of the 404(f) exemptions. The only available EPA guidance addressing the scope of minor drainage in any detail is found in the EPA Office of General Counsel Memorandum, *Issues Concerning the Interpretation of 404(f) of the Clean Water Act* (February 8, 1985). It states that "the 'minor drainage' definition was carefully crafted to describe very specific drainage activities which ... have minimal adverse effects."

The alignment of the ditch in question was identical to a previous, unauthorized ditch (prior to Appellant's ownership of the site). The Appellant apparently re-dug the same ditch. Appellant contends that the ditch is part of a "normal silviculture" activity that needs "minor drainage" to allow maximum tree growth for "the production of food, fiber, and forest products." An October 4, 2004 *Forest Stewardship Plan* for the Appellant is in the administrative record. The objective of the plan is to:

Keep the commercial forest healthy for income production but not as a focused objective. Develop habitat to encourage deer, turkey, squirrel, rabbits, and quail to become inhabitants, or at least be regular visitors. **Comply with all laws, rules and regulations affecting water quality, and erosion.** Provide opportunities for recreational hunting and wildlife observations. [emphasis added]

The Forest Stewardship Plan says nothing about plans for minor drainage of the site. In fact, the Management Prescriptions recommend "bedding and fertilization" which will provide benefits "about the same as extensive drainage." A later (Marcy 27, 2005) Site Visit Report from the Appellant's hydrology consultant, James D. Gregory, states that

the objective of the new ditch is to provide minor drainage to remove excess surface water resulting from the discharge of stormwater from US 70 and SR 1247 onto the Willis Tract. That minor drainage is needed to facilitate normal silviculture on the Willis Tract.

The December 9, 2005 Water Management and Monitoring Plan adds that a ditch plug is to be installed to “block continuing discharge through the ditch between storm events.”

As noted in the District's June 14, 2005 letter, the ditch travels 800 linear feet through wetlands. The Review Officer observed a ditch width varying between 6 to 10 feet; Dr. Gregory states the average ditch width to be 6 feet. The Review Officer observed the depth to vary from 3 to 6 feet. The Wilmington District's October 6, 2005 Memorandum for Record states that the “surface and subsurface drainage influence on the wetlands ... could be up to 150' to 200'” (it is not clear whether this distance is from either side of the ditch, or includes the breadth of impact on both sides) Dr. Gregory, who believed that only 250 - 300 feet of the ditch length was through wetlands, believed that approximately 0.03 – 0.04 acres would be affected by drainage. In making its determination, notes in the file indicate that the District considered whether there would be drainage of the surrounding wetlands based on “soil types, depth of ditch, connection to outside waters,” etc. Also significant to the District was the fact that the subject ditch connected other ditches (a logging road-side ditch and a property boundary ditch), with the installation of a culvert under the logging road which drained the opposite side of the road (see June 14, 2005 letter). All these combined to cause more than minor drainage. There is also some discussion in the record regarding whether *de minimis* drainage could occur adjacent to the ditch without voiding the exemption (e.g., whether conversion to uplands within 5 feet of the ditch would still be within “minor drainage”).

It is not disputed that minor drainage for ongoing silviculture is permissible where necessary to facilitate management requirements such as access and regeneration. While there may be general rules that can be applied to determine what is permissible minor drainage, each site must be evaluated in terms of ditch depth, ditch spacing, surface topography, soil characteristics, connections, etc. Here, while the benefit of the doubt may be given to Mr. Willis for purposes of this appeal, it is worth noting that his Forest Stewardship Plan did not recommend minor drainage, and instead proposed a bedding approach to get seedlings above the water level.

The District considered appropriate factors in determining whether the Appellant's ditch effected more than minor drainage. While a more detailed analysis of the drainage effect would be desirable, the record - bolstered with the observations of the Review Officer during the site visit - is sufficient to support the District's position. The Review Officer observed during the site visit that even during the heavy rain that was occurring at the time, the water level in most of the ditch was 2 feet below the bank. This will lower the water table at least 2 feet for an undetermined distance from the bank. Depending on the soil type, the cone of depression from the drainage ditch could convert approximately 10 to 60 lateral feet of wetlands to uplands on either side of the ditch. The Corps has established that the water table must be within 12 inches of the surface for specified period of the growing season to produce wetland conditions.

The 12-inch requirement is discussed in the *1987 Corps of Engineers Wetlands Delineation Manual* (Manual) (Waterways Experiment Station Technical Report Y-87-1,

January 1987). As an example, for hydric soil indicators, the Manual states in paragraph 44g:

Soil appearing on hydric soils list. Using the criteria for hydric soils (paragraph 37), the NTCHS has developed a list of hydric soils. **Listed soils have reducing conditions for a significant portion of the growing season in a major portion of the root zone and are frequently saturated within 12 inches of the soil surface.** [emphasis added]

For Hydrology indicators, the manual states in paragraph 49(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. [emphasis added]

The Manual also discusses onsite inspection methods to determine hydric soils in paragraph 65, Step 14:

Apply Hydric Soil Indicators. Examine the soil at each location and compare its characteristics immediately below the A-horizon **or 10 inches (whichever is shallower)** with the hydric soil indicators *** [emphasis added]

In addition to the impacts directly adjacent to the ditch, the ditch connections were leading to additional drainage off of other areas of the site. The combination of these effects is such that the ditch is impairing the "flow or circulation of navigable waters." The District correctly applied the minor drainage exception of Section 404(f) of the Clean Water Act in determining that the Appellant's activity is subject to regulation. While the legislative history of the Clean Water Act does suggest that there are some incidental impacts associated with the exemptions that would not void their applicability, there has been no showing by the Appellant that the drainage impacts here are so limited.

Because of the recapture provision, Federal courts have concluded that the 404(f) exemptions are to be narrowly construed. Rather than being on the Corps, the burden is on the applicant to demonstrate that a particular exemption applies. While for purposes of this appeal it must be determined that, at a minimum, there is substantial evidence in the administrative record to support the conclusion reached by the District,

the District's conclusion is itself based on whether the Appellant's has met his obligation to establish the exemption. Further, where there are significant discernible alterations, there is a presumption that flow or circulation will be impaired which the Appellant must overcome.

Appeal Reason 4: "Specific error in the interpretation of site elevations by including points in upland to determine the effect of the drainage in the wetlands on the property. It is not illegal to drain uplands, only the wetlands under review for the purposes of this exemption and minor drainage activity are appropriate and they show minimal drainage effects by the ditch consistent with the Clean Water Act and the minor drainage activity."

FINDINGS: This reason for appeal did not have merit.

ACTION: None required.

Discussion: At the administrative appeal conference, the issues discussed under Appeal Reason 3 were re-visited when discussing Appeal Reason 4. No new information was discovered. Accordingly, this issue was covered under Appeal Reason 3, above

Appeal Reason 5: "Specific error in failing to identify any areas of extensive drainage that have or will occur in finding that the exemption does not apply in the now 23 month period that the ditch has been open and that the Clean Water Act has not been violated at all by this ditch and minor drainage activity."

FINDINGS: This reason for appeal did not have merit.

ACTION: None required.

Discussion: The issue is not, as Appellant puts it, whether the District has established that a drainage ditch has or will convert extensive areas in order for the minor drainage exemption to be inapplicable. The issue is whether the Appellant has met his burden of establishing that he is entitled to the exemption because the minor drainage activities have no more than incidental, minimal adverse impact on waters of the United States, and therefore do not convert or reduce the extent of such waters. This issue was also covered under Appeal Reason 3, above. .

Appeal Reason 6: "I renew all questions contained in the file and all questions of fact and interpretation contained in the enforcement file as previously emailed/supplied to Wilmington ACOA personnel."

FINDINGS: This is not a reason for appeal.

ACTION: None required.

Discussion: Corps regulations at 33 CFR 331.5 state:

The reason(s) for requesting an appeal of an approved JD, a permit denial, or a declined permit must be specifically stated in the RFA.

This reason for appeal is not specific enough to be evaluated.

Appeal Reason 7: "Failure to site [sic] technical information as a basis for your opinion that the area is subject to recapture and that impairment of the reach and flow of waters of the US has occurred as a result of this action by this ditch."

FINDINGS: This reason for appeal did not have merit.

ACTION: None required.

Discussion: This issue is likewise subsumed in the discussion of Appeal Reason 3..

Appeal Reason 8: "Failure to differentiate actions by this ditch from prior actions as a basis for your opinion. Indeed it appears that you intend to hold actions prior to 1980 which are clearly exempt from ACOE jurisdiction as part of your holding as to the effects and have all questions answered and clarified as to the record."

FINDINGS: This reason for appeal did not have merit.

ACTION: None required.

Discussion: The District discussed the history of the enforcement actions at the site visit and in the administrative record. There is no evidence that the District failed to differentiate between the two different enforcement actions, nor that the District held the Appellant responsible for the violation when the site was under prior ownership. The previous, unauthorized ditch in the same location post-dated 1980.

CONCLUSION: As my final decision on the merits of the appeal, I conclude there is substantial evidence in the administrative record to support the Wilmington District's jurisdictional determination and that the exemption for minor drainage does not apply. The District's 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.


Joseph Schroedel
Brigadier General, US Army
Commanding