

ADMINISTRATIVE APPEAL DECISION

LESTER BLACK

JURISDICTIONAL DETERMINATION NUMBER 200300111JF-EPS

JACKSONVILLE DISTRICT

DATE: OCTOBER 11, 2005

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

Appellant Representative: Mr. Lester Black.

Receipt of Request for Appeal (RFA): May 20, 2003.

Appeal Conference Date: May 26, 2005.

Site Visit Date: May 26, 2005.

Background Information: The appellant owns a 4-acre lot located on the south side of Highway 90, approximately 800 feet east of State Road 89 in Section 02, Township 01 North, Range 28 West, Santa Rosa County, Florida. The appellant maintains his property, other than the previously developed areas, by periodic mowing. The northern half of the property is designated as (uplands); the southern half is designated as wetlands. A man-made ditch running east and west is present at the southern end of the property. The jurisdictional request came to the Corps of Engineers, Pensacola Field Office (Corps) from Gena Todia of Wetland Resources Environmental Consulting, a consulting firm in Mobile, Alabama. Ms. Todia delineated an upland/wetland boundary in the mowed area southwest of a small office complex and due south of a newly constructed communications tower. The consultant's opinion was that an area on the southern portion of the parcel is jurisdiction wetlands. Her flagged line was field verified as correct by the Corps, who sent an approved jurisdictional determination letter with copies of the submitted surveys certified as accurate.

The consultant worked for Verizon Wireless to delineate properties at proposed communications towers. Mr. Black gave permission to conduct the delineation on his property, and construct the tower, but he disagrees with the delineation. By letter dated May 20, 2003, the appellant submitted a Request for Appeal (RFA) of the approved jurisdictional determination.

Summary of Decision: I find that the appeal does not have merit. I find that the District properly evaluated and documented their approved jurisdictional determination dated March 31, 2003.

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

Reason(s) for the Appeal as Presented by the Appellant:

Appeal Reason: The appellant asserts that, “This property is dry, no standing water, no wetland trees or plants. The Northeast Florida Aquatic Preserve raises wetland plants to plant up and down Backwater and Yellow River on this property, so if you find any (plants) it is because they have been raising them here for approximately 8 years.” Mr. Black further states that he felt the consultant was encouraged to move the wetland/upland boundary close to the road by her employer.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: There is nothing in the administrative record to suggest that the scientific methods or data used to determine the wetland delineation in question were in error. Wetland delineations are conducted by applying the criteria set forth in the CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL (TECHNICAL REPORT Y-87-1, January, 1987). The administrative record does not support a conclusion that this 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.

Wetland Resources Environmental Consulting conducted the wetland survey on December 31, 2002. This submittal included a survey by Rowe Surveying and Engineering Company, Inc., dated August 30, 2002, and data forms for “Routine Wetland Determination (1987 COE Wetlands Determination Manual).” There were two sets of data forms dated August 8, 2002, that differentiated the uplands from the wetlands. The data forms indicated a distinct break for soils along the wetland/upland interface. The vegetation data supported this distinction. The administrative record also contained notes completed by a District representative. These notes, dated July 30, 2003, confirmed the delineation. Often, Corps representatives may detect inaccuracies in wetland delineations conducted by a consultant, but that is not always the case. In certifying the approved jurisdictional determination, the District relied on the discussions, site visits, and information available at the time of their decision.

As stated above, the appellant thought that the employer unduly influenced the consultant. However, the Corps concurred with the delineation and it is common practice for a Corps project manager to work with consultants. The Regulatory Guidance letter (RGL) 90-06¹, August 14, 1990, states, “As specified in the 20 March 1989, Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of

¹ Unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs generally remains valid after the expiration date as discussed in the Federal Register notice on RGLs of March 22, 1999, FR Vol. 64, No. 54, Page 13783.

the Exemptions Under Section 404(f) of the Clean Water Act (MOA), all wetlands jurisdictional delineations (including those prepared by the project proponent or consultant and verified by the Corps) shall be put in writing. Generally, this should be in the form of a letter to the project proponent. The Corps letter shall include a statement that the wetlands jurisdictional delineation is valid for a period of three years from the date of the letter unless new information warrants revision of the delineation before the expiration date. Longer periods, not to exceed five years, may be provided where the nature and duration of a proposed project so warrant. Proper documentation should support the delineation. Generally, the project proponent should be given the opportunity to complete the delineation and provide the supporting documentation subject to the Corps verification. However, the Corps will complete the delineation and documentation at the project proponent's request, consistent with other work priorities.” Emphasis added.

In addition, RGL 90-06 states, “When making wetlands jurisdictional delineations it is very important to have complete and accurate documentation which substantiates the Corps decision (e.g., data sheets, etc). Documentation must allow a reasonably accurate replication of the delineation at a future date. In this regard, documentation will normally include information such as data sheets, maps, sketches, and in some cases surveys.” Emphasis added. The District’s approved JD included data based on information submitted and discussed with the consulting firm.

As noted above, the appellant also stated his property is dry; there is no standing water, no wetland trees, or plants. During the site visit and meeting, there indeed was no standing water on the site. The Corps explained that the site contained a primary hydrologic indicator (saturation in the upper 12 inches) which denotes wetland hydrology. The appellant admitted that he sometimes saw standing water on the site, but that was due to beaver activity.

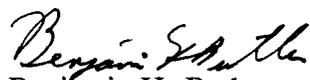
The appellant believed the mowing of the site affected the “normal circumstances” of the site, possibly removing the area from regulation. The RO noticed, during the site visit, that the area was mowed; however, a large percentage of hydrophytic vegetation existed. The amount of rooted and new growth vegetation assured the RO that the material was not just “washed in.” Additionally, the Corps defines the term “normal circumstances” in Regulatory Guidance Letters (RGL) 82-2, and 90-07². The 1987 Wetland Delineation Manual discusses “normal circumstances” because the authors realized there are instances in which the vegetation has been removed or altered, but the area still has the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed. These areas are still regulated wetlands, and the appellant’s site is no exception.

The site visit and meeting concluded with the appellant stating that he simply wanted his “land back.” The Corps representatives explained to the appellant that mowing wetlands is not a violation of the Clean Water Act.

² RGL 90-7 was rescinded on September 13, 1993 and is no longer used as guidance since the guidance contained in that RGL has been superceded by regulation. However, it gives insight into the Corps’ perspective regarding “normal circumstances.” 90-7 states “The primary consideration in determining whether a disturbed area qualifies as a section 404 wetland under “normal circumstances” involves an evaluation of the extent and relative permanence of the physical alteration of wetland hydrology and hydrophytic vegetation.”

CONCLUSION: After reviewing the information contained in the administrative record, information obtained at the site visit and meeting, I conclude there is substantial evidence in the administrative record to support the District's approved jurisdictional determination, 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.

17 Oct 2005 (Date)


Benjamin H. Butler
Colonel, US Army
Acting Commander