

ADMINISTRATIVE APPEAL DECISION
LIBERTY SQUARE HOMEOWNERS ASSOCIATION

FILE NO. SAW-2001-21125

WILMINGTON DISTRICT

12 October 2016

Review Officer: Jason Steele, U.S. Army Corps of Engineers (USACE), South Atlantic Division, Atlanta, Georgia

Receipt of Request for Appeal: 12 October 2015

Acceptance of Request for Appeal: 2 November 2015

Appeal Meeting/Teleconference: 5 November 2015

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

SUMMARY OF DECISION

The request for appeal (RFA) submitted by Liberty Square Homeowners Association (Appellant) has merit. For the reasons set forth below, the administrative record (AR) does not sufficiently support the approved jurisdictional determination (AJD) by the U.S. Army Corps of Engineers, Wilmington District (hereinafter the "District").

In reaching this decision, I find that:

- 1) the District's AR does not establish that the information provided to and available to the Appellant is sufficient for the Appellant to determine that there are waters of the United States (WOUS) on its property. [Appeal Reason 1]; and
- 2) the District's AR does not sufficiently document the presence of jurisdictional waters on the Appellant's property. [Appeal Reason 2].

BACKGROUND

Appellant's property is located along Liberty Square Drive and Liberty Square Circle, Greensboro, Guilford County, North Carolina.

On 12 August 2015, the District issued an AJD to the North Carolina Department of Transportation (NCDOT) for an area for NCDOT's project U-2524D (Greensboro Western Loop). The District concluded that the project area contains water bodies with

ordinary high water marks and areas exhibiting the wetland criteria as defined in the applicable Regional Supplement to the 1987 wetland delineation manual. The water bodies in the study area include Richland Creek, six unnamed tributaries (UTs), and four UTs to Horsepen Creek (all determined to be Relatively Permanent Waters (RPWs) that flow via Reedy Fork to the Haw River, a Traditionally Navigable Water), plus adjacent wetlands. The determination was based on a site visit and verification by the District.

Along with the issuance of the AJD to NCDOT, the District's process included notification to each landowner who has property within the project area when the property is identified as having WOUS onsite. In its notification, the District provides a website address where the landowner can find maps showing the limits of WOUS within the project area.¹ This notification also provides District contact information in case landowners have questions. And finally, this notification provides information to the landowner on how to appeal the AJD.

On 12 October 2015, the Appellant submitted a request for appeal (RFA) listing the following five reasons as grounds for appeal:

1. The documentation received does not identify any property or property owner, and therefore is too vague to enable Liberty Square Homeowners Association to determine the extent to which the Jurisdictional Designation is intended to relate to or cover any property which belongs to the Association.
2. There are no wetlands upon property owned by Liberty Square Homeowners Association.
3. There are no soil conditions, hydrological characteristics or vegetation upon any property owned by Liberty Square Homeowners Association that could or might be construed as forming part of any wetlands.
4. There are no physical characteristics of Plaintiff's property that could or might be reasonably construed as wetlands subject to the jurisdiction of the Army Corps of Engineers.
5. The Notice of Jurisdictional Determination is not addressed to Liberty Square Homeowners Association, but is instead addressed to N.C. Department of Transportation. This document does not purport to designate lands belonging to Liberty Square Homeowners Association as subject to the jurisdiction of the U.S. Army Corps of Engineers, nor document any grounds upon which any such jurisdictional determination

¹ This website is

https://connect.ncdot.gov/resources/Environmental/Jurisdictional%20Mapping/U2524D_FinalJDAppealsMap.pdf.

might be made as to property and lands belonging to Liberty Square Homeowners Association.

During a 5 November 2015 teleconference between the RO, District, and Appellant to discuss the appeal the RO advised that appeal reasons 1 and 5 address the same overriding issue and, therefore, could be combined into one "reason." Appellant concurred with this approach. Similarly, RFA reasons 2, 3, and 4 address the same overriding issue, and Appellant concurred with combining them into one "reason." Consequently, the response to Appellant's reasons 1 and 5 are addressed below under Appeal Reason 1, and the Appellant's reasons 2, 3, and 4 are addressed below under Appeal Reason 2.

INFORMATION RECEIVED AND CONSIDERED IN DECIDING THE APPEAL

1. The Appellant's RFA, received by the RO on 12 October 2015.
2. The District's AR, received by the RO on 20 November 2015.
3. Information provided by both the District and Appellant during the 5 November 2015 appeal meeting/teleconference.

SUMMARY OF APPELLANT'S REASONS FOR APPEAL

Appeal Reason 1: The AJD is not addressed to Appellant; does not designate lands belonging to Appellant as subject to jurisdiction by the U.S. Army Corps of Engineers; and does not identify any property or property owner, and therefore is too vague to enable Appellant to determine the extent to which the AJD is intended to relate to or cover any property which belongs to the Appellant.

Appeal Reason 2: There are no aquatic features found on the Appellant's property that satisfy Federal wetland criteria and are subject to the Corps' jurisdiction.

EVALUATION OF THE REASONS FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE WILMINGTON DISTRICT COMMANDER

Appeal Reason 1: The AJD is not addressed to Appellant; does not designate lands belonging to Appellant as subject to jurisdiction by the U.S. Army Corps of Engineers; and does not identify any property or property owner, and therefore is too vague to enable Appellant to determine the extent to which the AJD is intended to relate to or cover any property which belongs to the Appellant.

Finding: For the reasons set forth below, this reason for appeal has merit. I find that the AR does not establish that the District followed appropriate procedures when notifying Appellant that an AJD had been conducted on its property.

Discussion: The District completed an AJD at the request of the NCDOT and, by letter dated 12 August 2015, notified the Appellant that "at least a portion of your property" was included in the final jurisdictional determination provided to NCDOT.

The District's standard procedure when issuing an AJD is to disclose to affected parties² that an AJD has been completed, provide a copy or access to a copy of the AJD, and provide an opportunity to appeal the AJD.³ In this case, the District identified the Appellant as an affected party and sent it a notification letter which was addressed generically (Dear Madam/Sir) and provided instructions on where to view the wetland delineation map. The notification letter also included a *Property Owner JD Information Sheet*, which provided general information about NCDOT's road planning process and reiterated how the landowner may access a map of the properties affected by NCDOT's corridor study. And finally, the notification letter included a copy of the *Notification of Jurisdictional Determination*, which provided the location description of the entire project area (though not a property-specific description) and definitively identified that "there are waters of the U.S. including wetlands on the above described project area...."

An *Approved Jurisdictional Determination* means a Corps document stating the presence or absence of WOUS on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.⁴

The *basis of jurisdictional determination* is a summary of the indicators that support the Corps AJD. Indicators supporting the Corps AJD can include, but are not limited to: indicators of wetland hydrology, hydric soils, and hydrophytic plant communities; indicators of ordinary high water marks, high tide lines, or mean high water marks; indicators of adjacency to navigable or interstate waters; indicators that the wetland or waterbody is of part of a tributary system; or indicators of linkages between isolated water bodies and interstate or foreign commerce.⁵ The *Approved Jurisdictional Determination Form* was developed to ensure that the basis and rationale for the AJD is presented to satisfy this condition. The required *basis of JD* for an AJD may be satisfied by proper completion of the Corps AJD Form.⁶

The District's Notification of Jurisdictional Determination sufficiently notified the Appellant that an AJD was completed for NCDOT and the AJD included a portion of Appellant's property. However the notification was generic (that is, it was not

² Affected party means a permit applicant, landowner, lease, easement or option holder (i.e., an individual who has an identifiable and substantial legal interest in the property) who has received an approved JD, permit denial, or has declined a proffered individual permit. 33 C.F.R. § 331.2

³ Affected parties will be notified in writing of a Corps decision on those activities that are eligible for an appeal. 33 CFR § 331.4.

⁴ 33 C.F.R. § 331.2.

⁵ 33 C.F.R. § 331.2.

⁶ Regulatory Guidance Letter 07-01 "Practices for Documenting Jurisdiction under Section 404 of the Clean Water Act and Sections 9 & 10 of the Rivers & Harbors Act (RHA) of 1899." The JD Form Instructional Guidebook was developed by Corps Headquarters.

specifically addressed to an affected party) and the AR does not support that the notification satisfied the criteria required in both regulation and agency guidance. More specifically, the AJD provided to the Appellant did not include, with specificity, a statement of the presence or absence of a wetland and/or waterbody on the Appellant's parcel, or a written statement and a map identifying the limits of wetland and/or a waterbody on the Appellant's parcel, and, as per regulation and guidance, the AJD did not include a *basis of JD* (that is, a copy of the JD Form specific to WOUS on the Appellant's property).

Accordingly, I find the AR does not support that the District followed applicable procedures when they notified the Appellant that an AJD had been conducted on its property.

Action: This appeal basis is remanded to the District for it to provide the Appellant an AJD that satisfies criteria laid out in regulation and agency guidance. The AJD should be addressed to the Appellant and include a document stating the presence or absence of waters of the United States on the Appellant's parcel, or a written statement and map identifying the limits of waters of the United States on the Appellant's parcel, along with a basis of jurisdictional determination (that is, a completed copy of the *Approved Jurisdictional Determination Form* that adequately documents the indicators that the District analyzed to reach its determination). To accomplish this, the District may choose to use the existing AJD Form(s) and maps associated with Appellant's property and clearly identify/describe how this documentation applies to the Appellant's property.

Appeal Reason 2: There are no aquatic features found on the Appellant's property that satisfy Federal wetland criteria which would be subject to jurisdiction by the U.S. Army Corps of Engineers.

Finding: For the reasons set forth below, this reason for appeal has merit. I find that the District did not sufficiently document jurisdiction on the Appellant's property, though Appellant's additional challenge to the presence of aquatic features that satisfy Federal wetland criteria is premature and cannot be addressed given the lack of clarity about the specific WOUS that might be present on Appellant's property.

This finding is based on the District's AR not clearly establishing jurisdiction and not on the lack of evidence supporting whether there are aquatic features on Appellant's property. Instead, our conclusion is based on the vagueness of the AR that does not identify what specific WOUS are located on Appellant's property.

Discussion: The District's notification of jurisdiction sent to the Appellant did not sufficiently establish either the presence or absence of WOUS on the Appellant's parcel. As a result, it is premature for the RO to evaluate whether the District's evaluation substantially documented that there are, or are not, aquatic features on Appellant's property which satisfy the Federal criteria for waters of the U.S., and thus be subject to Corps jurisdiction.

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Action: See above action for Appeal Reason 1.

CONCLUSION

For the reasons stated above, I find that the appeal has merit. The District's AR does not contain sufficient documentation to support its AJD as it applies to Appellant's property. 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.

A handwritten signature in black ink that reads "Jason Steele". The signature is written in a cursive, slightly slanted style.

Jason W. Steele
Administrative Appeals Review Officer
South Atlantic Division