

## ADMINISTRATIVE APPEAL DECISION

QUALITY RESOURCES INC., FILE NO. MSJ02-01415-T

### MOBILE DISTRICT

**Review Officer:** James E. Gilmore, U.S. Army Corps of Engineers (USACE), Southwestern Division, Dallas, Texas.

**Appellant Representatives:** Mr. Max Marsh, Quality Resources Inc., Messrs Gary Cuevas and Billy Culpepper, wetland consultants with EnviroSouth.

**Mobile District Representatives:** Frank Hubiak, Project Manager, Art Hosey, Section Chief, and Ann Taylor, Office of Counsel.

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

**Receipt of Request For Appeal (RFA):** 14 August 2002.

**Appeal Conference/Site Visit Date:** 17 December 2002.

**Background Information:** On June 29, 2002, the USACE, Mobile District (District) issued an approved jurisdictional determination for a 16.3-acre site to Mr. Max Marsh of Quality Resources, Inc. The site is located south of Big Ridge Road, east of Woodsvie Drive and west of Interstate Highway 110, D'Iberville, Harrison County, Mississippi. The appellant's wetland consultant completed a wetland delineation of the site and determined that 6.85 acres of wetlands existed on the site. The appellant submitted the wetland delineation report to the district on April 26, 2002.

The District's regulatory staff performed two site visits on June 12 and 19, 2002, respectively. By letter dated June 29, 2002, the District informed Mr. Marsh that it did not agree with the findings of his wetland delineation report. The District stated that approximately 11.4 acres (70 percent) of the site was wetlands and not 6.85 acres (42 percent) as stated in the consultant's report. Mr. Marsh was informed that the wetlands were subject to the USACE jurisdiction under Section 404 of the Clean Water Act.

The appellant appealed this determination to the USACE, South Atlantic Division on August 14, 2002. An administrative appeal site visit was conducted on December 17, 2002. The appellant did not request an appeal conference.

**Summary of Decision:** Appeal reasons one and two are similar and are found to have merit. The District's administrative record does not adequately address these issues. The District shall reconsider its approved jurisdictional determination decision as appropriate and include sufficient documentation to support its determination.

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**Appeal Decision and Instructions to the Mobile District Engineer (DE):**

**Appeal Reason 1:** Non-jurisdictional wetlands.

**FINDING:** This appeal reason has merit.

**ACTION:** The District's administrative record does not adequately address this issue. The District shall reconsider its approved jurisdictional determination decision as appropriate and include sufficient documentation to support its determination.

**DISCUSSION:** See discussion below.

**Appeal Reason 2:** Wetlands are not adjacent to navigable waters and/or are isolated.

**FINDING:** This appeal reason has merit.

**ACTION:** The District's administrative record does not adequately address this issue. The District shall reconsider its approved jurisdictional determination decision as appropriate and include sufficient documentation to support its determination.

**DISCUSSION:** The response to appeal reasons 1 and 2 is similar and is combined for convenience. The appellant did not elaborate on his reasons for appeal, however, during the appeal site visit, Mr. Cuevas of EnviroSouth clarified the reasons for appeal. He stated that the wetlands located on the site are not jurisdictional because wetlands that are adjacent to wetlands are not themselves adjacent and, therefore, not subject to the USACE jurisdiction. The appellant feels that the wetland at issue does not meet the definition of waters of the United States as defined under Section 328.3, in particular Section 328.3(a)(7). Section 328.3(a)(7) states in part:

“Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.”

Based on his interpretation of the USACE regulations, the appellant feels that wetlands that are adjacent to wetlands are not adjacent by regulation. He, therefore, believes the USACE does not have regulatory authority over the wetlands located on his property.

The approved jurisdictional determination issued by the District on June 29, 2002 states “...that Federally-regulated wetlands comprise approximately 70 percent not 42 percent of the property as indicated in your wetland delineation report. Additional previously-disturbed wetland areas were identified by members of my staff during the field review. This determination was based

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upon available soils data, aerial photographs, and a field review of your wetland delineation map.” The District did not indicate in its letter why the wetlands were considered jurisdictional under Section 404 of the Clean Water Act. It should also be noted that the appellant’s wetland delineation report did not indicate if they had determined if the wetlands located on the site were jurisdictional or not.

During the administrative appeal site visit, the district staff stated that they had determined that the site was a “headwater”. However, the administrative record does not support the District’s conclusion that the wetland located on this site is a headwater. The only information contained in administrative record is the appellant’s wetland delineation report and the District’s approved jurisdictional determination. The administrative record does not contain any documentation why the District is exerting Section 404 jurisdiction over the wetlands located on the site. Therefore, I cannot conclude that the District’s administrative record leads to a reasoned conclusion that the wetland is either an adjacent wetland or a headwater to a tributary of a navigable water.

**CONCLUSION:** After reviewing and evaluating the administrative record provided by the Mobile District, I conclude that there is insufficient information in the administrative record to support the District’s determination that the wetlands located on the appellant’s 16.3-acre site are subject to the USACE jurisdiction under Section 404 of the Clean Water Act. Accordingly, I conclude that this Request for Appeal has merit. Therefore, I am remanding this matter to the Mobile District for additional evaluation.

24 Feb 03  
(Date)

  
PETER T. MADSEN  
Brigadier General, US Army  
Commanding