

ADMINISTRATIVE APPEAL DECISION

MIKE HARRIS

FILE NUMBER SAW-2009-909

WILMINGTON DISTRICT

2 AUGUST 2012

Review Officer: Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

Appellant: Mike Harris

Receipt of Request for Appeal: 6 September 2011

Acceptance of Request for Appeal: 5 October 2011

Appeal Meeting and Site Visit: 14 December 2011

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

SUMMARY OF DECISION

Appellant's request for appeal (RFA) has merit. The administrative record (AR) does not substantiate the Wilmington District's (District) determination that the subject property contains waters of the United States (WOUS).

BACKGROUND

The Harris property is located at 1290 Dorchester Road, Gastonia, Gaston County, North Carolina.

For purposes of evaluation during the approved jurisdictional determination (AJD), consultants for the North Carolina Department of Transportation (NC DOT) evaluated and the Corps verified the site using the 1987 Wetland Delineation Manual (87 Manual), as part of a delineation for the North Carolina Turnpike Authority (NCTA) Gaston Bypass project.

On 24 August 2011, the District issued an AJD 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. Harris was notified that a portion of his property was determined to contain WOUS. Since Mr. Harris is a landowner, he was considered an "affected party" and was notified of his appeal rights.

The Appellant submitted an RFA on September 6, 2011. The Appellant disagreed with the District's determination, citing the reason for appeal addressed in this decision document.

In the RFA and during the appeal meeting the Appellant indicated that his concern was that the designation of the area as a wetland would have a bearing on the construction of the Garden Parkway through his property. The Appellant indicated that he believed that a wetland designation would result in NC DOT shifting the alignment away from his home. The Appellant indicated that, in that circumstance, NC DOT would not take his home for the project, but would take only a portion of his property, thus forcing his family and him to live in close proximity to a major freeway.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, and discussions during the site visit/appeal meeting with the Appellant and the District.

APPELLANT'S STATED REASON FOR APPEAL

"The area designated as a wetland is simply a runoff area in heavy rains. If it is not raining heavily, it is not wet."

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

Appeal Reason: The area designated as a wetland is simply a runoff area in heavy rains. If it is not raining heavily, it is not wet.

Finding: This reason for appeal has merit.

Discussion: The District completed one AJD Form, for Wetlands 154-161, Wetland 163, and Streams 210-212. It appears, from review of Figure 2-3j titled "Preferred Alternative Refined Design" (printed April 2010), that the appellant's property contains only Stream 212 (S212).

Review of the District's completed AJD Form found that it was lacking a clear distinction between the various wetlands and streams listed under Section I.C. Specifically, Section III.B.1.(ii)(c) states that the flow is seasonal. However, it could not be determined which stream/s the District was referring to. In addition, it does not appear that the District performed a significant nexus for the seasonal Relatively Permanent Water (RPW) as required by the JD Guidebook.

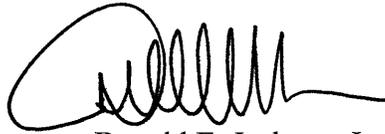
Action: Clearly distinguish between which wetlands and streams you are referring to and which property they occur on. It may be helpful to complete a separate JD Form

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specific to the appellant's property. Depending on the flow determination (perennial, seasonal, intermittent, ephemeral), the District may need to perform a significant nexus (ie for seasonal, intermittent, ephemeral). After the District has made a determination as to the type of stream on the appellant's property, they shall follow the JD Guidebook as it relates to completing the AJD Form.

CONCLUSION

For the reasons stated above, I have determined the appeal has merit. The AJD is remanded to the District for reconsideration and reevaluation based on comments detailed above. 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, appearing to read 'Donald E. Jackson, Jr.', with a large, stylized initial 'D' and several vertical strokes.

Donald E. Jackson, Jr.
Colonel, US Army
Commanding