

**ADMINISTRATIVE APPEAL DECISION**

**RIVER OF LIFE, INC.**

**FILE NO. SAW-2012-599**

**WILMINGTON DISTRICT**

**5 MARCH 2013**

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

**Receipt of Request for Appeal:** 13 July 2012

**Acceptance of Request for Appeal:** 21 August 2012

**Appeal Conference:** 20 September 2012

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

**SUMMARY OF DECISION**

Appellant's request for appeal (RFA) does not have merit. The administrative record (AR) supports the District's determination that the subject site contains waters of the United States (WOUS) that are within CWA jurisdiction, consistent with the *Corps of Engineers Wetland Delineation Manual*, Wetlands Research Program Technical Report Y-87-1 (1987 Manual) and the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region* November 2010, Version 2.0 (Supplement).

**BACKGROUND**

River of Life, Inc. is appealing the Wilmington District's (District) 14 May 2012 decision to assert jurisdiction over 2 acres of wetlands on their property, located at the corner of Gum Branch Road (SR 1308) and Western Boulevard (SR 1407) (adjacent to the CVS), Jacksonville, Onslow County, North Carolina.

The District contends that the area designated as wetlands on the appellant's property (2 acres) satisfy the 3-parameter test, as per the 1987 Manual and Supplement: soils, hydrology, and hydrophytic vegetation.

The appellant contends the 2-acre area designated as wetlands on the property does not meet the definition of wetlands, due to the lack of hydrology. In addition, the appellant contends that two previous jurisdictional determinations (JD), verified (1999) and re-verified (2005) by the District, found the site to be non-jurisdictional (uplands).

## **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 at the appeal meeting with the Appellant and District.

## **APPELLANT'S STATED REASONS FOR APPEAL**

**Appeal Reason 1:** The site is lacking hydrology and therefore should not be considered a wetland.

**Appeal Reason 2:** The site had 2 prior JD's verified by the Corps that considered it non-jurisdictional (1999 and a re-verification in 2005).

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

**Appeal Reason 1:** The site is lacking hydrology and therefore should not be considered a wetland.

**Finding:** This reason for appeal does not have merit.

**Discussion:** Wetlands are defined in 33 CFR § 328.3(b) as, "...those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." The 1987 Manual further clarifies that wetlands are generally characterized by the presence of hydrophytic vegetation, hydric soils, and wetland hydrology. Conversely, the 1987 Manual characterizes non-wetlands as having the presence of at least one of the following: 1) aerobic soils, 2) a prevalence of vegetation adapted for life in aerobic soils, and/or 3) hydrology that does not preclude the occurrence of plant species typically adapted for life in aerobic soil conditions. Finally, the 1987 Manual identifies a wetland boundary as the interface between a wetland and a non-wetland. According to the prior JDs (1999 & 2005), we have hydrophytic vegetation, hydric soils, and possibly wetland hydrology. Since the appellant does not dispute the presence of hydrophytic vegetation and hydric soils, the following evaluation will focus on the District's hydrology documentation.

The Supplement provides the following information as it pertains to hydrology (pages 81-82):

Wetland hydrology indicators are presented in four groups. Indicators in Group A are based on the direct observation of surface water or groundwater during a site visit. Group B consists of evidence that the site is subject to flooding or ponding, although it may not be inundated currently. These indicators include water marks, drift deposits, sediment deposits, and similar features. Group C consists of other evidence that the soil is saturated currently or was saturated recently. Some of these indicators, such as oxidized rhizospheres surrounding living roots and the presence of reduced iron or sulfur in the

soil profile, indicate that the soil has been saturated for an extended period. Group D consists of landscape, vegetation, and soil features that indicate contemporary rather than historical wet conditions. Wetland hydrology indicators are intended as one-time observations of site conditions that are sufficient evidence of wetland hydrology in areas where hydric soils and hydrophytic vegetation are present. Unless otherwise noted, all indicators are applicable throughout the Atlantic and Gulf Coastal Plain Region.

Within each group, indicators are divided into two categories – *primary* and *secondary* – based on their estimated reliability in this region. One primary indicator from any group is sufficient to conclude that wetland hydrology is present; the area is a wetland if indicators of hydric soil and hydrophytic vegetation are also present. In the absence of a primary indicator, two or more secondary indicators from any group are required to conclude that wetland hydrology is present. Indicators of wetland hydrology include, but are not necessarily limited to, those listed in Table 10. Other evidence of wetland hydrology may also be used with appropriate documentation.

**Table 10. Wetland hydrology indicators for the Atlantic and Gulf Coastal Plain Region.**

Indicator	Category	
	Primary	Secondary
<b>Group A - Observation of Surface Water or Saturated Soils</b>		
A1 - Surface water	X	
A2 - High water table	X	
A3 - Saturation	X	
<b>Group B - Evidence of Recent Inundation</b>		
B1 - Water marks	X	
B2 - Sediment deposits	X	
B3 - Drift deposits	X	
B4 - Algal mat or crust	X	
B5 - Iron deposits	X	
B7 - Inundation visible on aerial imagery	X	
B9 - Water-stained leaves	X	
B13 - Aquatic fauna	X	
B15 - Marl deposits	X (LRR U)	
B6 - Surface soil cracks		X
B8 - Sparsely vegetated concave surface		X
B10 - Drainage patterns		X
B16 - Moss trim lines		X
<b>Group C - Evidence of Current or Recent Soil Saturation</b>		
C1 - Hydrogen sulfide odor	X	
C3 - Oxidized rhizospheres along living roots	X	
C4 - Presence of reduced iron	X	
C6 - Recent iron reduction in tilled soils	X	
C7 - Thin muck surface	X	
C2 - Dry-season water table		X
C8 - Crayfish burrows		X
C9 - Saturation visible on aerial imagery		X
<b>Group D - Evidence from Other Site Conditions or Data</b>		
D2 - Geomorphic position		X
D3 - Shallow aquitard		X
D5 - FAC-neutral test		X
D8 - Sphagnum moss		X (LRR T, U)

The District provided the following information, related to the hydrology present onsite via completion of the “Wetland Determination Data Form – Atlantic and Gulf Coastal Plain Region” (Data Form), dated 4/11/2012:

**HYDROLOGY**

Wetland Hydrology Indicators:		Secondary Indicators (minimum of two required)	
Primary Indicators (minimum of one is required; check all that apply)			
<input type="checkbox"/> Surface Water (A1)	<input type="checkbox"/> Water-Stained Leaves (B9)	<input type="checkbox"/> Surface Soil Cracks (B6)	
<input checked="" type="checkbox"/> High Water Table (A2)	<input type="checkbox"/> Aquatic Fauna (B13)	<input type="checkbox"/> Sparsely Vegetated Concave Surface (B8)	
<input checked="" type="checkbox"/> Saturation (A3)	<input type="checkbox"/> Marl Deposits (B15) (LRR U)	<input type="checkbox"/> Drainage Patterns (B10)	
<input type="checkbox"/> Water Marks (B1)	<input type="checkbox"/> Hydrogen Sulfide Odor (C1)	<input type="checkbox"/> Moss Trim Lines (B16)	
<input type="checkbox"/> Sediment Deposits (B2)	<input checked="" type="checkbox"/> Oxidized Rhizospheres on Living Roots (C3)	<input type="checkbox"/> Dry-Season Water Table (C2)	
<input type="checkbox"/> Drift Deposits (B3)	<input type="checkbox"/> Presence of Reduced Iron (C4)	<input type="checkbox"/> Crayfish Burrows (C8)	
<input type="checkbox"/> Algal Mat or Crust (B4)	<input type="checkbox"/> Recent Iron Reduction in Tilled Soils (C6)	<input type="checkbox"/> Saturation Visible on Aerial Imagery (C9)	
<input type="checkbox"/> Iron Deposits (B5)	<input type="checkbox"/> Thin Muck Surface (C7)	<input type="checkbox"/> Geomorphic Position (D2)	
<input checked="" type="checkbox"/> Inundation Visible on Aerial Imagery (B7)	<input type="checkbox"/> Other (Explain in Remarks)	<input type="checkbox"/> Shallow Aquitard (D3)	
		<input checked="" type="checkbox"/> FAC-Neutral Test (D5)	
<b>Field Observations:</b>			
Surface Water Present?	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Depth (inches): _____		
Water Table Present?	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Depth (inches): <u>6</u>		
Saturation Present? (includes capillary fringe)	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Depth (inches): <u>4</u>	Wetland Hydrology Present? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	
Describe Recorded Data (stream gauge, monitoring well, aerial photos, previous inspections), if available:			
Remarks:  Standing water present on ruts in surrounding area, within 50' radius.			

As outlined above, the District listed four primary indicators of hydrology. The Supplement requires just one indicator of hydrology, along with indicators of hydric soils and hydrophytic vegetation, in order for the area to be considered a wetland. The District documented (and the appellant is not disagreeing) that hydric soils and hydrophytic vegetation are present at the subject site. Absent reliable data to the contrary, the District has provided sufficient information to prove that the onsite wetland exhibits hydrologic characteristics as required by the Supplement. Coupled with the soil and vegetation data, provided on the District’s Data Forms, the District appropriately documented that the site contains wetlands subject to jurisdiction by the Corps.

**Action:** None required.

**Appeal Reason 2:** The site had 2 prior JD's verified by the Corps that considered it

non-jurisdictional (1999 and a re-verification in 2005).

**Finding:** This reason for appeal does not have merit.

**Discussion:** Regulatory Guidance Letter (RGL) 05-02, section 3.a. states,

All approved jurisdictional determinations must be verified in writing in the form of a letter to the project proponent. The Corps must include a statement that the determination is valid for a period of five years from the date of the letter, unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.

It is also found that:

1. The two previous JD's (1999 & 2005) were verified using the 1987 Manual, whereas the current JD was processed using both the 1987 Manual and Supplement. An example of changes from the 1987 Manual vs. the Supplement, that could have affected the hydrology: oxidized rhizospheres are now a primary hydrology indicator where in the 1987 Manual they are not.
2. It appears the two previous JDs were not completely field verified.
3. It appears timber (pine) was present during the two previous JDs and not present during the current JD. This could affect the hydrology considerably.
4. Other areas that could impact the hydrology and/or change non-JD to JD status include: different project managers, changing area (development around the parcel from 1999 to present), and, the time of year JDs were conducted.

Therefore, it is concluded that the District is not inconsistent in asserting jurisdiction now when in the past had declined jurisdiction. This finding is based on a 13 year period between the initial JD and the current JD (JDs are valid for only 5 years), a change in how JD's are performed (1987 Manual vs. Supplement), the possibility that the previous JDs were never ground-truthed for the specific area in question, timber being removed from the parcel after the 2005 JD, different District project manager for the current JD vs previous 2 JDs, development around the parcel from 1999 to present, and time of year the JDs were conducted.

**Action:** None required.

## **CONCLUSION**

For the reasons stated above, I have determined the appeal does not have merit. The AR supports the District's determination that the subject site contains WOUS that are within CWA

Subject: River of Life, Inc. Appeal  
District: Wilmington  
JD Number: SAW-2012-599  
Page: 7 of 7

jurisdiction, consistent with the 1987 Manual and Supplement. The District's determination was not 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 "Jason W. Steele". The signature is written in a cursive, flowing style.

Jason W. Steele  
Administrative Appeals Review Officer  
South Atlantic Division