

ADMINISTRATIVE APPEAL DECISION

ROBERT BROWN

FILE NO. SAJ-1999-5413

JACKSONVILLE DISTRICT

29 June 2009

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division, acting by designation on behalf of the South Atlantic Division

Appellant: Robert Brown

Date of Receipt of Request for Appeal: 13 February 2009

Date of Acceptance of Request for Appeal: 15 April 2009

Appeal Conference/Site Visit Date: 21 April 2009

SAD-ACCEPTED REASONS FOR APPEAL: SAD accepted the following reasons for appeal as detailed by the Appellant in the Request for Appeal dated 13 February 2009:

1. The District made a procedural error by providing a JD that was unsolicited by the appellant;
2. The District was incorrect in its application of existing laws, regulations and officially promulgated policy;
3. The District was incorrect in its application of the current regulatory criteria and associated guidance for identifying and delineating wetlands;
4. The District used incorrect data in making its final determination.

SUMMARY OF DECISION: The appellant's request for appeal does not have merit. The administrative record supports the District's determination that the Appellant's site contains wetlands and waters that are subject to jurisdiction under Section 10 of the Rivers and Harbors Act (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344).

BACKGROUND INFORMATION: Mr. Robert Brown is appealing the Jacksonville District's Jurisdictional Determination (JD) issued in support of a letter dated 18 December 2008 by the District stating that no permit is required to construct a pile supported single family residence. Mr. Brown's property is located at NE 7th Street adjacent to the Lake Worth Lagoon and the Intracoastal Waterway, Section 21, Township 43 South, Range 45 East, Boynton Beach, Palm Beach County, Florida.

Mr. Brown has filed for several permit actions in the past and has received a permit from the District to construct a dock in navigable waters abutting his property. For the purposes of this appeal the historic permit actions will not be referenced or detailed as they are not relevant; the jurisdictional determination which is the subject of this appeal stands on its own.

On 25 September 2008 the appellant sent a letter to the Jacksonville District requesting they consider his property exempt from jurisdiction as past permit actions were issued for the seawall, because his site is grandfathered, and because past pierhead lines exempted the appellant from being required to obtain authorizations to conduct work on his property.

In a 28 October 2008 letter the District responded to Mr. Brown stating that permits were required for the activities he was stating that he should be exempt from.

The Appellant followed up with a 5 November 2008 letter stating his understanding of several points that he discussed over the telephone with the District on 4 November 2008 and requesting a letter stating that no permit was required for construction of a pile supported structure on his property.

On 18 December 2008 the Jacksonville District issued a letter stating that no permit was required provided the project is constructed as proposed and detailed in the letter. Attached to the 18 December 2008 letter was an approved Jurisdictional Determination (JD) Form stating that the property contains wetlands and waters subject to jurisdiction under Section 10 of the Rivers and Harbors Act (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344).

On 13 February 2009, the Appellant submitted a request for appeal which was accepted by the South Atlantic Division on 15 April 2009.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION:

1. The district provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.
2. With the request for appeal, the appellant provided documents containing their comments and analysis of the District's jurisdictional determination. The submittals were accepted as clarifying information in accordance with 33 Code of Federal Regulations, Section 331.7 (e).

At the appeal conference, a letter was provided by Mr. Brown regarding the location of the Mean High Water (MHW) line. The letter dated 23 January 2003 sent by the Florida Department of Environmental Protection (FLDEP) to Mr. Brown confirmed that the State was in agreement with Mr. Brown that the MHW line was located at the seawall. The letter was not relevant to the jurisdictional determination as the state definition of MHW may differ from that provided at 33 Code of Federal Regulations, Section 329.12 and because the administrative record provides information provided by the Appellant depicting the MHW which was accepted by the Corps in its determination that no permit was required for the construction of a pile supported structure as detailed in their letter dated 18 December 2008.

The District provided photographs of the site in an e-mail dated 9 April 2009 to the Review Officer. The photographs were taken of an adjacent property but show Mr. Brown's property as well. The photographs provide a representative depiction of what was observed during the site visit. The photographs are included in the administrative record for the Request for Appeal as clarifying information in accordance with 33 Code of Federal Regulations, Section 331.7(e).

EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:

Appeal Reason 1: The District made a procedural error by providing a JD that was unsolicited by the appellant.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: At the Appeal Conference, Ms. Tori White stated that the District agreed that the JD was not solicited. She said that a new JD was done to support their determination that a permit was not required for the Appellant to construct a pile supported structure on its property. Ms. White explained that the JD was not a reproduction of the previous JD and that it was done as a desktop determination based on existing information that was in the record. She clarified that the JD was for the entire site, not just beneath the structure. Ms. White explained that they did a new JD to allow the appellant the ability to appeal should he choose.

Although the Appellant did not formally request a JD, the District decided it was in their interest and the Appellant's to issue an Approved JD. The Approved JD allows the appellant the ability to appeal the District's determination and it provides a basis for the District's determination that wetlands and waters subject to jurisdiction under Section 10 of the Rivers and Harbors Act (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344) are present on the property. There is nothing in the regulations or associated policies that state otherwise. Based on this, the District followed proper procedure by using its discretion in issuing a JD even though it was unsolicited by the Appellant.

Appeal Reason 2: The District was incorrect in its application of existing laws, regulations and officially promulgated policy.

Finding: This reason for appeal does not have merit.

Discussion: The appellant listed several reasons why he felt the District was incorrect in its application of existing laws, regulations and officially promulgated policy; each specific reason with a discussion follows:

A. The site is not a water of the United States, a navigable water of the United States, nor a wetland.

Waters of the United States: Pursuant to Section 404 of the Clean Water Act, and in accordance with 33 CFR Section 328.3(a)(1) and (a)(7):

a) The term *waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

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

It is clearly documented in the approved JD form, which is part of the administrative record, that the property is bordered by the Intracoastal Waterway which is subject to the ebb and flow of the tide and is used for navigation and the transportation of goods and services. The wetlands on the site directly abut and are tidally influenced by the Intracoastal Waterway. Information provided in the administrative record supports the District's determination that there are waters of the United States present on the site.

Navigable Waters of the United States: Pursuant to Section 10 of the Rivers and Harbors Act of 1899, and in accordance with 33 CFR Section 329.4:

“Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.”

It is clearly documented in the approved JD form, which is part of the administrative record, that the property is bordered by the Intracoastal Waterway which is subject to the ebb and flow of the tide and is used for navigation and the transportation of goods and services. Information provided in the administrative record supports the District's determination that there are Section 10 navigable waters of the United States present on the site.

Wetlands: In accordance with 33 CFR Section 328.3(b):

“The term *wetlands* means 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. Wetlands generally include swamps, marshes, bogs, and similar areas.”

Wetlands are identified in accordance with the three parameter methodology as defined in the U.S. Army Corps of Engineers Wetland Delineation Manual - Wetlands Research Program Technical Report Y-87-1. The 1987 Manual was the current Federal delineation manual used in the Clean Water Act Section 404 regulatory program for the identification and delineation of wetlands at the time of the District's decision.

In accordance with the 1987 Wetland Delineation Manual on-line edition, Part II, Page 10, Section 26(3)(c) *Technical approach for the identification and delineation of wetlands*:

“Except in certain situations defined in the manual, evidence of a minimum of one positive wetland indicator from each parameter (hydrology, soil, and vegetation) must be found in order to make a positive wetland determination.”

The administrative record contains a Routine Wetland Determination Data Form dated 26 March 2003 which shows that the site contains the three parameters and provides the basis that the District used in making its determination that wetlands are present on the property. Although over 6 years have passed and vegetation has been removed by the property owner, the information in the administrative record supports the District's determination that wetlands are present on the site since the vegetation layer was present prior to being altered.

The 1987 Wetland Delineation Manual on-line edition, Part I, Page 4 acknowledges that: “under normal circumstances” there are instances in which the vegetation in a wetland has been inadvertently or purposely removed or altered as a result of recent natural events or human activities. When such activities occur, an area may fail to meet the diagnostic criteria for a wetland. In such cases the wetland areas are reviewed in accordance with Part IV, Section F of the manual which states that historical vegetation trends should be looked at using available resources. Based on the fact that there was documentation of the existence of hydrophytic vegetation on the site when the documentation form was completed in 2003, it supports that the three parameters exist to support that the area is a wetland within the jurisdiction of Section 404 of the CWA.

B. There are no adjacent wetlands.

In accordance with 33 CFR Section 328.3(c): The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands.”

As clarified above, wetlands exist on the site and the Intracoastal Waterway is considered a water of the United States. The administrative record states that the wetlands directly abut the Intracoastal Waterway. As the wetlands directly abut the Intracoastal Waterway they border it and are considered wetlands adjacent to waters of the United States subject to jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344).

C. A section 404 Clean Water Act permit is inapplicable to this site.

The action under which the request for appeal was submitted did not require a permit under Section 404 of the Clean Water Act as there was no proposed discharge of fill material. The District issued a letter 18 December 2008 stating that no permit is required to construct a pile supported single family residence. If the appellant were to propose the discharge of fill material into the 0.24 acres of the site identified as jurisdictional wetlands and waters that are documented

in the administrative record, a permit would be required under Section 404 of the Clean Water Act (33 U.S.C. 1344).

D. The site has been an agricultural nursery for 5 years and granted an agricultural classification by a property appraiser.

In accordance with 33 CFR Section 323.4(a): Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (*i.e.* , on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in §323.4(a)(1)(iii)...

(iii)(A) *Cultivating* means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.

33 CFR Section 323.4(c) says: Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1) through (6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.

For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a section 404 wetland to a non-wetland is a change in use of an area of waters of the United States. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.

The action under which the request for appeal was submitted did not require a permit under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899 as there was no proposed discharge of dredged or fill material or work in, on or over navigable waters of the United States. The District issued a letter 18 December 2008 stating that no permit is required to construct a pile supported single family residence. If the property did fall under the categories of discharges not requiring a permit as detailed above, it still would not be exempt from requiring a permit because the proposal to change from an agricultural use to an area of residential development would convert an area of waters of the United States into a use to which

it was not previously subject, where the flow or circulation of waters of the United States would be impaired. If the appellant were to propose the discharge of fill material into the 0.24 acres of the site that have been identified as wetlands and waters for construction of residential development, a permit would be required under Section 404 of the Clean Water Act (33 U.S.C. 1344). It should also be noted that the granting of an agricultural classification by a property appraiser is not sufficient to characterize an operation as “normal farming” for purposes of an exemption.

E. Site is grandfathered by USACOE permit No.1322 for dredging, filling, erection of a seawall and backfilling, issued and completed in the year 1995.

Permit No. 1322 was issued on 19 August 1925. As stated by the Appellant, the permit authorized dredging, filling, erection of a seawall and backfilling on property now owned by Mr. Brown. In accordance with permit condition (i) – if the structure or work authorized was not completed on or before 31 December 1928 the permit, if not previously revoked or specifically extended, shall cease and be null and void. There is nothing that states that the site is grandfathered or that any work is authorized other than for the specific intent and purpose of that described in the 9 August 1925 authorization. Any new or maintenance work on the property involving a discharge within the jurisdiction of the Corps would require the issuance of a new permit from the Jacksonville District of the U.S. Army Corps of Engineers.

F. Site is grandfathered from regulatory oversight by bulkhead line issued by USACE in 1956 and federal right of way line platted in 1930.

Documentation in the Administrative record contains an 8 November 1956 “Ordinance of the City of Boynton Beach Establishing a Bulkhead Line for Bulkheading Into the Waters of Lake Worth and Providing for Securing of Permit Approval of Elevation; Repealing all Ordinances in Conflict Herewith and Providing Penalty.” This document was issued by the City of Boynton Beach and is not a U.S. Army Corps of Engineers document which has any affect on the Corps regulatory Program.

Further, as stated at 33 CFR Section 320.4(o): (1) Section 11 of the Rivers and Harbors Act of 1899 authorized establishment of harbor lines shoreward of which no individual permits were required. Because harbor lines were established on the basis of navigation impacts only, the Corps of Engineers published a regulation on 27 May 1970 (33 CFR 209.150) which declared that permits would thereafter be required for activities shoreward of the harbor lines. Review of applications would be based on a full public interest evaluation and harbor lines would serve as guidance for assessing navigation impacts. Accordingly, activities constructed shoreward of harbor lines prior to 27 May 1970 do not require specific authorization.

The 27 May 1970 regulation defines “harbor lines” as including types of “harbor lines frequently referred to by other names, including, for example, pierhead and bulkhead lines.” The regulation states that “activities constructed shoreward of harbor lines prior to 27 May 1970 do not require specific authorization”, however it does not say that they are grandfathered from regulatory oversight of any work proposed after 1970. Any new or maintenance work on the property

involving a discharge within the jurisdiction of the Corps would require the issuance of a new permit from the Jacksonville District of the U.S. Army Corps of Engineers.

The action under which the request for appeal was submitted did not require a permit under Section 404 of the Clean Water Act or the Rivers and Harbors Act of 1899 as there was no proposed discharge of dredged or fill material or work in, on or over navigable waters of the United States. The District issued a letter 18 December 2008 stating that no permit is required to construct a pile-supported single family residence.

G. The site is above mean high water as determined by the State Division of Land and the Florida Department of Environmental Protection.

These determinations are state determinations which are not relevant to the U.S. Army Corps of Engineers regulatory program. The Corps defines mean high water at 33 CFR, Section 329.12(a)(2): Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the “apparent shoreline” which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

The action under which the request for appeal was submitted did not require a permit under Section 404 of the Clean Water Act or the Rivers and Harbors Act of 1899 as there was no proposed discharge of dredged or fill material or work in, on or over navigable waters of the United States. The District issued a letter 18 December 2008 stating that no permit is required to construct a pile supported single family residence.

As detailed above, the administrative record supports that the Districts determination was made in accordance with existing laws, regulations and officially promulgated policy. The Districts determination that the Appellant’s site contains wetlands and waters that are subject to jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) is correct.

Appeal Reason 3: The District was incorrect in its application of the current regulatory criteria and associated guidance for identifying and delineating wetlands.

Finding: This reason for appeal does not have merit.

Discussion: The Appellant stated two reasons why he felt the District was incorrect in its application of the current regulatory criteria and associated guidance for identifying and delineating wetlands; each specific reason is listed below and has been addressed in Appeal Reason 2, Section A above:

A. There is no wetland vegetation existing to “persist” beneath the house footprint anywhere else on the property.

B. The property has been free of wetland vegetation for over six years and is presently a nursery area for ornamentals.

The administrative record supports that the District was correct in its application of the current regulatory criteria and associated guidance for identifying and delineating wetlands. Although over 6 years have passed and vegetation has been removed by the property owner, the information in the administrative record supports the District's determination that the site is not a normal circumstance. Wetlands are present on the site since the vegetation layer was present prior to being altered. The fact that the landowner altered the vegetation and says he is managing the area as a nursery for ornamentals further supports the District's determination that the vegetation was altered by the land owner and under normal circumstances (no alteration by the land-owner) wetland vegetation would be present.

Appeal Reason 4: The District used incorrect data in making its final determination.

Finding: This reason for appeal does not have merit.

Discussion: The appellant detailed three reasons why he felt the District used incorrect data in making its final determination that portions of Mr. Brown's property are subject to jurisdiction under the Corps regulatory Program. Each specific reason with a discussion follows:

A. The approved jurisdictional determination is based upon illegal, unrequested and old information over 5 years old.

See Appeal Reason 1 for a detailed discussion on why an unsolicited JD was prepared. The information used in the JD was not obtained illegally as it is based upon information provided by the appellant in support of past proposals for permits on his property. Some of the information is greater than 5 years old. However, based on disturbance to the site through removal of vegetation, this information supports the determination that the current site is functioning as a wetland. See the "Wetlands" section of Appeal Reason 2(A) for additional details on the use of historic information in support of a JD where the site has been disturbed. Other than the removal of wetlands vegetation, there is no showing of ways in which the information is "old."

B. The data form prepared for routine wetland determination, was unsolicited and incorrect.

See Appeal Reason 1 for a detailed discussion on why it was necessary for the District to prepare a JD. The District followed proper procedure by using its discretion in issuing a JD even though it was unsolicited by the Appellant.

C. Section 1-4 of Approved Jurisdictional Determination form is incorrect/in error.

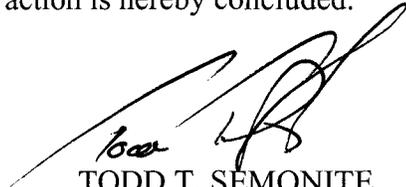
The approved JD from was prepared in accordance with the 5 June 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook. The information in the JD is supported in the administrative record and is not incorrect or in error.

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One harmless error was identified in the first sentence of Section II(A) of the Approved JD form. The form says "Pick List"; this should be corrected to say "Are". After the correction is made a revised copy of the JD form should be provided to this office and the Appellant.

The administrative record supports that the District used correct data in making its final determination that portions of Mr. Brown's property are subject to jurisdiction under the Corps regulatory Program.

OVERALL CONCLUSION: For the reasons stated above, I find that the appeal does not have merit since the District's administrative record contains substantial evidence to support its decision that the wetlands are subject to federal jurisdiction and regulation as waters of the United States under Section 10 of the Rivers and Harbors Act (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344). The District's determination was not arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. The administrative appeals process for this action is hereby concluded.



TODD T. SEMONITE
Brigadier General, USA
Commanding