

ADMINISTRATIVE APPEAL DECISION

FILE NO. 200100619

WILMINGTON DISTRICT

August 13, 2002

Review Officer: Arthur L. Middleton, U.S. Army Corps of Engineers (USACE), South Atlantic Division, Atlanta, Georgia.

Appellant: Mr. Robert James, Bolton, North Carolina.

Receipt of Request For Appeal (RFA): June 13, 2001

Appeal Conference Date: November 5, 2001. **Site Visit Date:** November 5, 2001.

Background Information: The site is located on the north side of 19259 Andrew Jackson Highway (Highway 74/76), adjacent to an unnamed tributary to Mill Creek, approximately one mile west of Byrdsville, Columbus County, North Carolina. By Notification of Jurisdictional Determination dated April 20, 2001, the Wilmington District (District) informed Mr. James that the site described above contains jurisdictional wetlands.

The site is a depression located down slope of and to the east of Mr. James residence. Immediately east of the depression is berm constructed of material excavated from the stream channel located immediately east of the berm. The stream channel is aligned north to south and is designed to pass water to the south through a double box culvert under Highway 74/76.

Summary of Decision: I find that the appeal does not have merit. I find that the District properly evaluated and documented their approved jurisdictional determination dated April 20, 2001. The changes in the drainage that have occurred over the past 30 years, at the site and in the general area were fully considered by the District.

Appeal Evaluation, Findings and Instructions to the Wilmington District Engineer (DE):

Reasons for the appeal as presented by the appellant:

Reason 1: "It was raining all day and had been raining all week when Ms. Pennock took soil samples on my land...I have had drainage problems here due to backed up ditches and canals from trash, beaver dams and undersize culverts. When there has not been a lot of rain...the land is usually dry. She told me the type of soil she found here was a type of wetland soil...she told me this soil had been here a long time. My grandfather owns this land and he told me the state started putting this soil here when they were building the four lanes here in the 60's...He said the soil came from an area known locally as Black Bay."

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The Administrative Record acknowledges the fact that the area in the vicinity of the site received approximately one inch of rain on the day before the District's Project Manager conducted the site visit for the evaluation of jurisdiction. A rain event for a day or over several weeks would not change the characteristics of the soil to move it from a non-hydric soil to a hydric soil. Field notes made on March 16, 2001 indicated that the District's Regulatory representative collected soil samples from three data points (DP). One data point was located on the slope between Mr. James' residence and the depression. At this data point (DP1), "The top 12 inches appear to be fill material. No indicators of hydric soil detected in lower level." The summary for this data point is "[a] rea on the west side of the lot is not classified as a wetland based upon the criteria set forth in the 1987 Army Corps of Engineers Wetland Delineation Manual." According to the field notes, data points DP2 and DP3, located in the depression, both had the same soil. That soil, classified as Meggett, "consists of poorly drained soils that formed in loamy and clayey alluvial sediments... These soils are on flood plains and low stream terraces." This soil is not listed on the National Hydric Soils List, but is considered to be hydric in accordance with the 1987 Army Corps of Engineers Wetland Delineation Manual based on their low matrix chroma. A soil is considered to be hydric if it has a matrix chroma of 2 or less in mottled soils (Mottled means "Spots or blotches of different color or shades of color interspersed within the dominant color in a soil layer, usually resulting from the periodic reducing soil conditions"). The Administrative Record indicates that the soil at data points DP2 and DP3 has mottles and has a matrix chroma of 1. In addition, the soil at data Points DP2 and DP3 had other hydric features, specifically oxidized root channels. The hydric soils map shows that the Meggett series soil was known to be present on the site in July 1990.

Reason 2: "International Paper Co. also dug a lot of drainage ditches in this area which turned a lot of water out of the woods onto my land. They drained what used to be an alligator pond not far from my house. There have been several non-natural changes over the years in this general area that has impacted the condition of other areas such as my land. My mother...told me she could remember playing in what used to be the natural ditch here called [B]rowning [C]reek and she said it was always dry...That ditch is no more. Now there is a canal dug by International Paper Co. [which] holds low water in, but hardly ever flows out because of bad drainage down stream...due to the problems mentioned before. When a hard rain comes here or even up stream of the canal...it can cause flooding problems here...my grandfather stated in the paper, we didn't have these flooding problems until 1977 when International Paper began digging new ditches...I just wanted to make you aware that the conditions of my land now is not the natural conditions, but the effects of causes made by big corporations..."

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The Administrative Record states that the “area previously owned by Weyerhaeuser – explains look of some compaction and ditches / reamed out creek.” At the site visit the Review Officer observed that the stream channel had been excavated as evidenced by the spoil berm. Mr. James and Ms. Rackley stated that a new channel had been excavated and the old channel abandoned. According to Ms. Rackley the old channel ran through the area that now forms the depression immediately west of the stream channel. The Review Officer observed that the box culvert under Highway 74/76 was open. The Review Officer did not go downstream to observe any beaver dams, but accepted the appellant’s statement that they exist. It is possible that if water flow is retarded by under size culverts or beaver dams over long periods of time, upstream areas could become wetter. The District representatives said that the ditching that occurred in the 1960’s through the 1970’s was not regulated under Section 404 of the Clean Water Act. The preamble of the regulations at 33 CFR 320 {Federal Register, Vol. 42, No. 138 – Tuesday, July 19, 1977} states, “The July 1975 regulations established a cutoff point, referred to as the headwaters, for each river and stream identified as a water of the United States. “Headwaters” was defined as “the point on the stream beyond which the flow of the waterway is normally less than five cubic feet per second.” Waters above the “headwaters” cutoff point were also included as “waters of the United States”, but only if the District Engineer determined that regulation of these waters was necessary to protect water quality.” The July 19, 1977 regulation at 33 CFR 323.3 states, “Department of the Army permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in §§ 323.4-1, 323.4-2 and 323.4-3 are permitted by this regulation.” The permitting of discharges of dredged or fill material into waters of the United States became a requirement in accordance with the following phased schedule. “Before July 25, 1975, discharges into navigable waters of the United States...After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands...After September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area...After July 1, 1977, discharges into all waters of the United States. In § 323.4-2 the regulation states, “Discharges of dredged or fill material into the following waters of the United States are hereby permitted for the purposes of Section 404, provided the conditions in paragraph (b) below are met...Non-tidal rivers, streams and their impoundments including adjacent wetlands that are located above the headwaters;...For the purposes of Section 404, the following conditions must be satisfied for any discharge of dredged or fill material in waters described...above...That the discharge will not destroy a threatened or endangered species...That the discharge will consist of suitable material free from toxic pollutants...That the fill created by the discharge will be properly maintained to prevent erosion...and...That the discharge will not occur in a component of the National Wild and Scenic Rivers System...” The circumstances at the subject site have been developing over the past 30 years during times of no regulation through times of increasing regulation to the present.

Information Received and its Disposition During the Appeal Review:

The Wilmington District furnished a copy of the administrative record.

A statement regarding the history of the site, signed by Agnes Ann Rackley, was presented to the Review Officer at the appeal conference. A copy was made and the original was returned to the appellant.

A statement regarding the history of the site, signed by Mr. Armond Lamar Ellis (appellant's grand father and owner of the land) and Lewis Ray Ellis (appellant's uncle – owns a business adjacent to the site), was presented to the Review Officer at the appeal conference. A copy was made and the original returned to the appellant.

A handwritten signature in black ink, appearing to read "Peter T. Madsen". The signature is fluid and cursive, with a large initial "P" and "M".

Peter T. Madsen
Brigadier General, US Army
Commanding