

ADMINISTRATIVE APPEAL DECISION

TONY BLANTON

FILE NO. SAW-2011-758

WILMINGTON DISTRICT

6 MARCH 2013

Review Officer: Elliott N. Carman, U.S. Army Corps of Engineers (Corps), Southwestern Division, Dallas, Texas

Receipt of Request for Appeal: 23 September 2011

Acceptance of Request for Appeal: 31 October 2011

Appeal Meeting: 25 July 2012

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

SUMMARY OF DECISION

Mr. Tony Blanton (appellant) is appealing a Wilmington District (District) approved jurisdictional determination (AJD) for a wetland within his property located at 2643 Hoover Road in the City of Hampstead, Pender County, North Carolina. The appellant submitted two reasons for appeal: 1) He does not have any wetlands on his property and 2) The District did not have permission to get on the site. Accordingly, the appellant believes the District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands. For reasons detailed in this document, the first reason for appeal has merit while the second reason is not an acceptable reason for appeal. The AJD is remanded to the District for reconsideration.

BACKGROUND

The property in question is located at 2643 Hoover Road in the City of Hampstead, Pender County, North Carolina. In response to a request for an AJD, the District conducted a site visit on 5 May 2011 and issued an AJD dated 6 September 2011, which stated that, "There are waters of the U.S. including wetlands on the above described property subject to the permit requirements of Section 404 of the Clean Water Act..."¹

The appellant submitted a complete Request for Appeal (RFA) which was received by the South Atlantic Division (the Division) office on 23 September 2011. The appellant was informed, by

¹ From Section B of the District's "Notification of Jurisdictional Determination."

letter dated 23 October 2011, that his RFA was accepted.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

33 CFR § 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this AJD. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding AJDs, as that authority remains with the District Engineer. Upon appeal of the District Engineer's determination, the Division Engineer or his Review Officer (RO) conducts an independent review of the District's administrative record (AR) to address the reasons for appeal cited by the appellant. The District's AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. Neither the appellant nor the District may present new information to the Division. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the District's AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the AJD. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the District's AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal process and its disposal is as follows:

1. The District provided a copy of their AR to the RO via emails dated 28 September 2011 and 13 December 2011. The District provided a copy of their AR to the appellant via certified mail dated 4 January 2012. The District's AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is 6 September 2011.
2. An appeal meeting was held on 25 July 2012. The appeal meeting followed the agenda provided to the District and the appellant by the RO via email and fax (respectively) on 18 July 2012.² During the appeal meeting, the District provided several documents to the RO and the appellant and clarified that several documents in their AR were inadvertently omitted from the copies provided to the RO and the appellant. These documents are as follows:
 - a. The District clarified that they inadvertently omitted the four attachments to the 28 April 2011 email from Mr. Gulley (a consultant) to Ms. Amschler. The District further clarified that these attachments were comprised of two wetland data forms prepared by the consultant, the agent authorization form, and the consultant's wetland map. The RO requested that the District forward a copy of the email and all attachments to both the RO and the appellant. The RO received a copy of the 28 April 2011 email and associated attachments via email dated 26 July 2012. The District forwarded a hard copy of the email and associated attachments to the appellant via letter dated 31 July 2012. Because the attachments were part of an

² This agenda was provided via fax to the appellant instead of email because the appellant indicated he did not have an email address.

- email sent prior to 6 September 2011, they should be considered as part of the District's AR and consequently, part of the evaluation of this RFA.
- b. The District indicated that a reference in a 19 April 2011 email from Mr. Gulley to Ms. Amschler regarding a sketch previously sent to the District that "underestimates the wetland area in the front of the tract" was in error as the District did not believe they received a sketch. However, the District indicated via email dated 26 July 2012 (after the appeal meeting) that they had received a sketch, a copy of which was provided in the same email. A hard copy of this sketch was provided to the appellant via letter dated 31 July 2012. Because the sketch was part of an email sent prior to 6 September 2011, it should be considered as part of the District's AR and consequently, as part of the evaluation of this RFA.
 - c. The District indicated they inadvertently omitted a copy of the 2008 aerial photograph referenced in the 29 December 2010 email from Mr. Gulley to Ms. Amschler. The District provided hard copies of this aerial photograph to both the RO and the appellant during the appeal meeting. Because this aerial photograph is associated with an email sent prior to 6 September 2011, it should be considered as part of the District's AR and consequently, as part of the evaluation of this RFA.
 - d. The District indicated they inadvertently omitted a copy of the map attached to the 8 April 2011 email from Mr. Gulley to Amschler. This map was also referenced in a 19 April 2011 email as the sketch that underestimated, "...the wetland area in front of the tract." Because this map was attached to an email sent prior to 6 September 2011, it should be considered as part of the District's AR and consequently, as part of the evaluation of this RFA.
 - e. The District provided copies of a map illustrating the location of the two wetland data points to the RO and the appellant during the appeal meeting. This map was not considered new information as it is intended to be an illustration of the location coordinates already provided on the wetland data forms in the AR. Therefore, the map was considered as part of the evaluation of this RFA.
 - f. The District utilized the consultant's "preliminary 404 wetland delineation map" during the appeal meeting to illustrate the sizes of the two wetlands on the appellant's property. In addition, the District indicated that LIDAR imagery was used to determine the wetland sizes. This information is considered new information because neither the size of each individual wetland nor the basis of this determination was provided in the District's AR. Therefore, this information was not considered as part of the evaluation of this RFA.
 - g. The District provided a hard copy of an updated AJD form that corrected various errors to the RO and the appellant during the appeal meeting. This updated AJD form was considered new information as it contained information not in the District's AR prior to 6 September 2011. Therefore, it was not considered as part of the evaluation of this RFA.
3. On 21 September 2012, the RO forwarded via email and fax a draft Memorandum for Record (MFR) summarizing the appeal meeting topics to the District and the appellant (respectively) with a request that they review and provide comment by close of business on 28 September 2012. In an email response dated 27 September 2012, the District provided comments

regarding sections 5.a., 5.o., and 7.b. of the draft MFR. The appellant did not provide any comments and confirmed during a telephone conversation on 1 October 2012, that he did not intend on providing any.

4. The RO supplied the final MFR to the appellant and the District via fax and email (respectively) on 5 October 2012. The District's comments provided in their 27 September 2012 email were included in section 8 of the final MFR.

APPELLANT'S STATED REASONS FOR APPEAL

Appeal Reason 1: The District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands. More specifically, the appellant does not believe that he has any wetlands on his property.

Appeal Reason 2: The District did not have permission to get on the site.

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

Appeal Reason 1: The District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands. More specifically, the appellant does not believe that he has any wetlands on his property.

Finding: This reason for appeal has 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 Corps Wetland Delineation Manual³ (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 nonwetlands 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.⁴ Finally, the 1987 Manual identifies a wetland boundary as the interface between a wetland and a nonwetland.⁵

Use of the 1987 Manual is required to identify and delineate wetlands potentially subject to regulation under Section 404 of the Clean Water Act.⁶ In addition, regional supplements were developed by the Corps for use with the 1987 Manual in order to address regional wetland

³ Environmental Laboratory. (1987). "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

⁴ 1987 Manual pages 9-11.

⁵ 1987 Manual pages 49 and 55.

⁶ "Implementation of the 1987 Corps Wetland Delineation Manual," memorandum from John P. Elmore dated 27 August 1991.

characteristics and improve the accuracy and efficiency of wetland delineation procedures.⁷ In this case, the site associated with this appeal falls within the applicable region of the Atlantic and Gulf Coastal Plain regional supplement (Supplement).⁸

Both the 1987 Manual and the Supplement indicate that a data form should be used to document the hydrology, vegetation, and soil characteristics for each community type within a site, or in the case of sites that are greater than five acres, for observation points within each community type along a transect within a site.⁹

The consultant's delineation report, with which the District concurred,¹⁰ indicates on several figures (titles "the site location map," "soils map," "1998 color aerial photograph," "USGS topographic quadrangle map," and the "preliminary 404 wetland map" in the AR) that the appellant's property is 5 acres. Additionally, the District's AR identifies two wetland areas on the property,¹¹ and contains two data forms, both dated 30 March 2011, that document the conditions of two locations within the appellant's property.¹² Both data forms note on the first page that normal circumstances exist on the site and that the vegetation is neither "significantly disturbed" nor "naturally problematic." However, the data form labeled "wetland" contradicts these observations by stating on the second page that the "site [was] recently bush-hogged."¹³ The District acknowledged during the appeal meeting that on-site hydrophytic vegetation was altered from bush-hogging in preparation for the wetlands review. The District also stated that they utilized a single wetland data form to represent both wetlands on the appellant's property because of similar soil, wetland and hydrologic characteristics of both wetlands.

The 1987 Manual and the Supplement both outline procedures for conducting wetland delineations in atypical or difficult wetland situations such as where vegetation was altered or removed. Both the 1987 Manual and the Supplement indicate the type of alteration observed on the site should be clearly described on the data form.¹⁴ The 1987 Manual also indicates utilization of adjacent vegetation is one potential source of evidence to determine if hydrophytic vegetation occurred in an area prior to alteration. The Manual states:

Circumstantial evidence of the type of plant communities that previously occurred may sometimes be obtained by examining the vegetation in adjacent areas. If adjacent areas have the same topographic position, soils, and hydrology as the altered area, the plant community types on the altered area were probably similar to those of the adjacent areas.¹⁵

⁷ U.S. Army Corps of Engineers. 2010. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)*, ed. J.S. Wakeley, R.W. Lichvar, and C.V. Noble. ERDC/EL TR-10-20. Vicksburg, MS: U.S. Army Engineer Research and Development Center: 1-2.

⁸ Supplement pages 3-5.

⁹ 1987 Manual pages 41, 46, 48, 49, 53, 54, 57, and 60; Supplement page 17. The data form can be found in the Supplement; Appendices C and D.

¹⁰ See Section IV.A. of the Districts AJD form dated 6 September 2011.

¹¹ See the consultant's "preliminary 404 wetland delineation map" also called the Needham Map in the appeal meeting MFR.

¹² The sampling point is identified as "wetland" on one form and "upland" on the other.

¹³ See vegetation remarks section on page two of the data form for the wetland community.

¹⁴ See Section F of the 1987 Manual and Chapter 5 of the Supplement.

¹⁵ 1987 Manual, p. 76 (d)

The procedures outlined in the Supplement's section on problematic hydrophytic vegetation all describe utilizing an un-impacted site with similar soils and hydrology as the impacted site with the conclusion that the same plant community would exist on the impacted site in the absence of the impact.¹⁶

As previously stated, the District stated that they utilized a single wetland data form to represent both wetlands on the appellant's property because of the similar soil, vegetation, and hydrologic characteristics of both wetlands. However, this rationale is not documented in the AR.

Additionally, the District acknowledged during the appeal meeting that on-site hydrophytic vegetation was altered from bush-hogging in preparation for the wetlands review. The District further stated that they believed that the alteration was not substantial enough to prevent them from adequately documenting the vegetation. Consequently, the District concluded that an alternative delineation method was not necessary. This information was also not documented in the AR and should therefore be considered new information.

The District correctly noted the alteration to the on-site vegetation in the vegetation remarks of the data form labeled "wetland." However, the District erred when it did not correctly capture this condition on the first page of both data forms and then follow the procedures for atypical or difficult wetland situations as outlined in both the 1987 Manual and the Supplement.

Based on the above discussion, the District did not correctly follow regulatory criteria and associated guidance for identifying and delineating wetlands.

Action: The District should follow the 1987 Manual and the Supplement to correctly identify and delineate wetlands associated with the appellant's property potentially subject to regulation under Section 404 of the Clean Water Act. The District should ensure that they clearly document in the AR the hydrology, vegetation, and soil characteristics for each community type within the property. Additionally, if the site is disturbed during the District's assessment, the District should correctly follow the procedures for atypical or difficult wetland situations as outlined in the 1987 Manual and the Supplement. Should this result in a change in some aspect of the wetlands within the review area (i.e. size of the wetlands, their proximity to a relatively permanent water, or other), the District should reassess if regulatory jurisdiction continues to extend to these wetland areas by following relevant regulation, guidance, and policy while considering these changes. The AR should be revised accordingly to document and reflect the additional factual data considered and this analysis.

Appeal Reason 2: The District did not have permission to get on the site.

Finding: This reason is not an acceptable reason for appeal.

Discussion: 33 CFR § 331.2 states that an RFA is an, "...affected party's official request to initiate the appeal process," and includes, "the name of the affected party, ...the reason(s) for the

¹⁶ Supplement, p. 115-121.

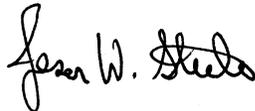
appeal, and any supporting data and information.” 33 CFR § 331.5(a)(2) further states that, “The reason(s) for requesting an appeal of an approved JD...must be specifically stated in the RFA and must be more than a simple request for appeal because the affected party did not like the approved JD...” 33 CFR § 331.5(a)(2) provides examples of reasons for appeals which include, but are not limited to, “...a procedural error; an incorrect application of law, regulation or officially promulgated policy; omission of material fact; incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands; incorrect application of the Section 404(b)(1) Guidelines (see 40 CFR Part 230); or use of incorrect data.”

Based on the above discussion, property access does not provide a basis for appeal that is recognized under the regulations. Therefore, this is not an acceptable reason for appeal.

Action: No action required.

CONCLUSION

For the reasons stated above, I have determined the first reason for appeal has merit while the second reason is not an acceptable reason for appeal. The AJD is remanded to the Wilmington District for reconsideration consistent with comments detailed above. The final Corps decision on jurisdiction in this case will be the Wilmington District Commander’s decision made pursuant to my remand. The administrative appeals process for this action is hereby concluded.



Jason W. Steele
Administrative Appeals Review Officer
South Atlantic Division