

**U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION**

DATE: DEC 8 2004

ADMINISTRATIVE APPEAL DECISION

J.B Jennings,
NORFOLK DISTRICT FILE NO. 04-R1415

Review Officer: James E. Gilmore, U.S. Army Corps of Engineers, Southwestern Division

Appellant: J.B. Jennings

Date of Receipt of Request for Appeal: 23 June 2004

Date of Acceptance of Request for Appeal: 26 July 2004

Appeal Conference/Site Visit Date: N/A

APPELLANT'S STATED REASON FOR APPEAL:

1. Hydrology: The hydrology on this site has been altered, thus not meeting wetland hydrology criteria. The 12-acre site is surrounded on four sides with an agricultural drainage ditch. This ditch drains water from the site's interior and also cuts water off from entering the site from the west, which is a wooded area. An interior ditch also exist through the property which removes some water, altering the hydrology. The site also appears to be wetter than it really was prior to the trees being cut because the hundreds of "pumps" (trees) are now not pumping water into live actively growing trees.

2. Vegetation: Prior to 2002 this site was a mature pine plantation. These mature, actively growing pine trees were the predominate vegetation on the site. It is the appellant's understanding that pine trees are not an indicator of wetlands. If the site had been a true wetland, the pines would not have been growing as well for as long as they did. This determination was made after the pines were harvested which does not give a clear picture of the condition of the vegetation in its natural state.

BACKGROUND INFORMATION:

Mr. Jennings contacted the Norfolk District ("district") requesting a jurisdictional determination be conducted on a 12-acre tract located on his farm. The project site is located at the terminus of Campbell Road, Chesapeake, Chesapeake County, Virginia. District staff completed a site inspection on 27 April 2004 and determined that the appellant's property contained wetlands according to the criteria established in the 1987 "Corps of Engineers Wetland Delineation Manual". The District issued Mr. Jennings an approved jurisdictional determination (JD) on 3 May 2004. The District determined that Mr. Jennings' property contains wetlands that are subject to the Corps jurisdiction under Section 404 of the Clean Water Act. The appellant is appealing the district's determination that the wetlands are subject to Corps' jurisdiction.

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INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

The Norfolk District provided a copy of its administrative record, which was reviewed and considered in the appeal review.

SUMMARY OF DECISION:

The appellant's Request for Appeal has merit, because the Norfolk District's administrative record does not sufficiently document the conclusion in its 3 May 2004 approved JD letter that the on-site wetland areas are part of a surface tributary system.

INSTRUCTIONS FOR SUBSEQUENT DISTRICT ACTION/APPEAL DECISION FINDINGS:

Action: The Norfolk District is to reassess its decision, applying the guidance, policies and regulations pertaining to identifying wetlands under Title 33 of the Code of Federal Regulations, Part 328.3(a) and resolve the conflicting information in its administrative record.

Appeal Decision Findings: The District's administrative record contains three major documents: a Site Visit Report, dated 28 April 2004; a Corps Data Form for Routine Wetland Determination (1987 COE Wetlands Delineation Manual), dated 27 April 2004 and the District's 3 May 2004 approved JD letter. In addition to these documents the record also contains a copy of the county soil survey sheet, soil map and three color photographs of the site. As explained below, discrepancies exist among the documents, to the extent that the administrative record insufficiently supports the District's JD.

In the Site Visit Report the project manager stated that some wetland pockets were found on the site that "*may or may not be isolated*". In addition, the project manager stated that it was suggested to Mr. Jennings that he have a wetland delineation completed on the property.¹ The project manager did complete a data sheet for one plot on the property. This plot met the criteria to be identified as a wetland in accordance with the Corps Wetland Delineation Manual. The District's approved JD letter states "The basis for this wetland determination is the application of the Corps' 1987 Wetland Delineation Manual and the positive indicators of wetland hydrology, hydric soils, and hydrophytic vegetation. The wetland is a water of the United States and is part of a tributary system to interstate waters (33 CFR 328.3(a))." In making this statement, the District asserts that the entire project site meets the criteria to be identified as a wetland and that the entire site is part of a tributary system. However, in the following paragraph of its approved JD letter, the District states, "We recommend that you have the 12-acre parcel delineated for the presence of wetland areas, after which we can determine the most appropriate form of permit."

¹ There is no documentation in the administrative record that Mr. Jennings completed a wetland delineation of the project site.

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OVERALL CONCLUSION:

After reviewing and evaluating the administrative record provided by the Norfolk District, I conclude there is insufficient and conflicting information to support its determination that the wetlands on the 12-acre project site are jurisdictional for purposes of the Clean Water Act.

A handwritten signature in black ink, appearing to read "Meredith W.B. Temple". The signature is written in a cursive, flowing style.

MERDITH W.B. TEMPLE
Brigadier General, US Army
Commanding