

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

Date: 7 March 2006

**ADMINISTRATIVE APPEAL DECISION**

**PULTE HOMES OF PA, L.P./SENTINEL RIDGE PROJECT  
PHILADELPHIA DISTRICT FILE NO. 200500708-60**

**Review Officer:** James W. Haggerty, U.S. Army Corps of Engineers, North Atlantic Division

**Appellant:** William Dion/Pulte Homes of PA, L.P.

**Appellant's Agent:** Jonathan E. Rinde/Manko Gold Katcher Fox LLP

**Date of Receipt of Request for Appeal:** 30 December 2005

**Date of Acceptance of Request for Appeal:** 11 January 2006

**Appeal Conference/Site Visit Date:** 26 January 2006

**NAD-ACCEPTED REASON FOR APPEAL:**

NAD accepted for consideration the agent's contention, as stated in the request for appeal, that an existing springhouse and concrete basin on the site should not be considered jurisdictional under the Clean Water Act since the springhouse does not exhibit the characteristics of a wetland, and the springhouse and adjacent concrete basin are non-jurisdictional artificial structures.

**BACKGROUND INFORMATION:**

On 2 May 2005, the Philadelphia District ("the district") received a request for a determination of the extent of Department of the Army jurisdiction on an approximate 35-acre site known as the Gaster/Robinson Tract, located in Marple Township, Delaware County, Pennsylvania. The irregularly-shaped parcel is bounded to the south by Old State Road, to the east by Marple Woods Road, to the north by residential properties, and to the west by Crum Creek.

The district conducted an inspection of the site on 15 July 2005 and concluded that the delineation of federally-regulated waters and wetlands as performed by the appellant's environmental consultant was generally accurate, with the exception of the omission by the consultant of a springhouse that may have been historically used for storage of milk containers, and an area adjacent to the springhouse. This matter is discussed in greater detail below. On 11 October 2005, the district received a revised wetland jurisdictional determination plan that included the springhouse area, and the district issued its approved jurisdictional determination on 2 November 2005.

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**INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:**

The district provided a copy of the administrative record, which was reviewed and considered in the review process along with the results of the site inspection and appeal conference.

**DECISION:**

The appellant's request for appeal has merit because: 1) in two instances, the district did not fully follow the procedures described in the 1987 Corps of Engineers Wetland Delineation Manual ("1987 Manual"); 2) the district did not sufficiently justify its decision in this specific case to take jurisdiction over the contested jurisdictional area; and 3) the administrative record does not indicate whether the district determined the presence of an ordinary high water mark in a portion of the contested jurisdictional area.

**EVALUATION OF THE REASONS FOR APPEAL/APPEAL DECISION FINDINGS:**

The agent believes an existing springhouse, wet area below the springhouse, and concrete basin on the site should not be considered jurisdictional under the Clean Water Act since: 1) the springhouse does not exhibit the characteristics of a wetland; and 2) the springhouse and adjacent concrete basin are non-jurisdictional, artificial, man-made structures.

As observed during the 26 January 2006 site inspection, the springhouse contains what appears to be a groundwater seep that flows intermittently across an approximate two-foot wide concrete channel along the bottom of the north and west facing walls inside the springhouse. Upon exiting the springhouse, water passes over an external concrete slab then into a small concrete-lined area behind a crescent-shaped concrete impoundment approximately 18 inches in height with a notched overflow weir several inches below the top of the impoundment. Vegetation is now growing in the concrete-lined basin behind the impoundment. It appears that in the past the impoundment created a small pool in the concrete-lined basin, the depth of which was regulated by the overflow weir, but the impoundment is in disrepair and the concrete-lined basin has become silted. There is also an outlet box located several feet south of the impoundment; it appears that in the past, water flowing over the weir entered the outlet box. The outlet box is connected to the storm sewer system along the north side of Old State Road, and eventually discharges into Hotland Run, to the south of Old State Road.

The agent presented the following arguments to support his contention that these areas should not be considered jurisdictional under the Clean Water Act:

- As stated at 51 FR 41217, the preamble to the 13 November 1986 Final Rule for the Corps Regulatory Program, "[a]rtificially irrigated areas which would revert to upland if the irrigation ceased" are areas generally not considered to be waters of the United States. Without the irrigating flow emanating from the springhouse, water that is seasonally present within the concrete-lined basin would not exist and the basin would not support hydrophytic vegetation.

- The 1987 Manual, Part IV, Section F, Subsection 4, “Man-Induced Wetlands”, states: “If hydrophytic vegetation is being maintained only because of man-induced wetland hydrology that would no longer exist if the activity (e.g. irrigation) were to be terminated, the area should not be considered a wetland.” The concrete-lined basin only supports hydrophytic vegetation because of the irrigation; therefore, it should not be considered a jurisdictional wetland area.
- “Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing” and “[a]rtificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons” are generally not considered jurisdictional.
- The agent cited two court cases to bolster his argument: Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp 983, 989 (E.D. Wash. 1994) (man-made tailing ponds are not navigable waters and therefore not within CWA jurisdiction); Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7<sup>th</sup> Cir. 1994) (federal government does not have CWA jurisdiction over the discharges from a six acre artificial stormwater pond that drains into groundwater).

It should be noted that 51 FR 41271 also states that the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within the categories of waters indicated in the second and fourth bullets above is a water of the United States. The U.S. Environmental Protection Agency also has the right on a case-by-case basis to determine if these categories of waters are waters of the United States. Because these categories of waters are generally not considered waters of the United States, any decision to regulate these waters on a case-by-case basis must be well-reasoned and fully justified. The administrative record for this approved jurisdictional determination does not present a sufficiently compelling rationale for the district’s determination in this particular instance that the springhouse, the wet area below the springhouse and the concrete-lined basin should be regulated as waters of the United States. Also, although the district indicated during the site inspection that it considered the wetness of the area in question to be man-induced, it did not correctly apply the criteria of Part IV, Section F, Subsection 4 of the 1987 Manual in arriving at its decision.

The district’s Basis for Jurisdictional Determination states as follows: “[t]here are two perennial tributaries (Hotland Run & Crum Creek) on-site with contiguous wetlands. Hotland Run is a tributary to Crum Creek. Crum Reek [sic] is a tributary to the Delaware River. The Delaware River is a navigable waterway and susceptible to use by interstate/foreign commerce...*All wetlands on the site are contiguous with the perennial tributaries* (emphasis added). Wetlands adjacent to waters of the US are themselves waters of the US pursuant to 33 CFR 328.3 (a)(7). One springhouse with flow to Hotland Run is part of the surface water tributary system of a navigable water of the US pursuant to 33 CFR 328.3 (a)(5).” This discussion suggests the district determined the wetland area in the concrete basin is contiguous to either or both Hotland Run and Crum Creek; the site inspection revealed this is not the case. Since the discussion only states that the springhouse is part of a surface water tributary system, and does not reference the presence of wetlands in the concrete-lined basin, this discussion is at

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odds with the district's 18 July 2005 site inspection report that stated a wetland area is present in the concrete-lined basin.

The 18 July 2005 site inspection report states that states that "...spring water flows approximately 5'-10' overland from the pool to a concrete inlet." This does not comport with the district's conclusion that the flow is part of a jurisdictional surface water tributary system because the Corps of Engineers does not regulate unchannelized overland flow. Further, in accordance with Regulatory Guidance Letter No. 05-05, the lateral limits of jurisdiction over non-tidal waterbodies extends to the ordinary high water mark, in the absence of adjacent wetlands; the district's characterization of overland flow can lead to a conclusion that an ordinary high water mark is not present.

The site inspection report also states that hydric soil is present within the concrete-lined basin. Part III of the 1987 Manual, Page 22 states that "[s]oils consist of unconsolidated natural material that supports, or is capable of supporting, plant life. The upper limit is air and the lower limit is either bedrock or the limit of biological activity." In this case, the material that is present within the concrete-lined basin does not appear to meet this description of soil from the 1987 Manual. Both the appellant and district agree that the concrete-lined basin contains several inches of fine grained sediment atop a concrete bottom that is painted sky blue. The fine grained sediment does not meet the criteria to be classified as a hydric soil. Part II of the 1987 Manual states that, generally, wetland hydrology, hydric soils, and hydrophytic vegetation must be present in order to make a positive wetland determination. In this case, the area within the concrete-lined basin identified by the district as having hydrophytic vegetation does not have hydric soil and should not be considered a wetland.

#### **OVERALL CONCLUSION:**

After reviewing and evaluating the entirety of the administrative record provided by the district, I hereby find that the appellant's request for appeal has merit. This matter is hereby remanded to the Philadelphia District Engineer for reevaluation to: 1) ensure that the approved jurisdictional determination fully comports with the requirements and procedures described in the 1987 Manual; 2) provide additional justification for its decision in this specific case to take jurisdiction over the contested jurisdictional area; and 3) specifically document the presence (or absence) of an ordinary high water mark in the springhouse and the wet area below the springhouse, in accordance with Regulatory Guidance Letter No. 05-05.

**SIGNED**

WILLIAM T. GRISOLI  
Brigadier General, USA  
Commanding