

**ADMINISTRATIVE APPEAL DECISION**

**DUTCHMAN VILLAGE**

**FILE NUMBER 200500131**

**WILMINGTON DISTRICT**

**November 9, 2006**

**Review Officer:** James E. Gilmore (RO), US Army Corps of Engineers (Corps), Southwestern Division

**Appellant & Representatives:** Mr. Jabe Hardee, Appellant; David Syster, James Taylor, Southern Environmental Group, Inc.

**District Representatives:** Dave Timpy, Keith Harris

**Date of Recite of Request for Appeal (RFA):** April 14, 2006

**Appeal Meeting:** July 18, 2006

**Summary of Decision:** This appeal does not have merit. I find that the District did comply with applicable laws, regulations, and policies in reaching their jurisdictional determination.

**Background Information:** On August 28, 2005, Mr. David Scibetta of Southern Environmental Group, Inc., (SEGi) submitted a packet to the US Army Corps of Engineers' Wilmington District's (District) Brunswick County Regulatory Project Manager requesting verification of a wetland delineation completed on behalf of Mr. Jabe Hardee (Appellant). The project site is located on the north side of NC 211, west of Doshier Cutoff Road, Brunswick County, North Carolina.

Prior to receiving the verification request from SEGi, the District's North Carolina Department of Transportation Project Manager (NCDOT PM) received a verification request for a wetland delineation completed by EcoScience Corporation (ESC) for an estimated 1,600-acre tract that also included the Appellant's project site. ESC had completed the wetland delineation for the NCDOT. On July 1, 2005, ESC personnel informed the District that they had discovered that a portion of the 1600-acre NCDOT site had been "flagged" (delineated) by unknown individuals. During a July 13, 2005, District/ESC site visit, other individuals were observed delineating a portion of the NCDOT project area (at the time of the site visit no contact was made with these individuals). During the site visit, the District's NCDOT PM informed ESC that only one delineation for the entire 1600-acre site would be verified and that ESC needed

to contact the District's Brunswick County Regulatory Project Manager (PM) to determine the identity of the other wetland delineators. It was later determined that the individuals seen delineating other portions of the NCDOT project site were personnel from SEGi and the work was being completed for the Appellant. As previously stated, the District decided that only one wetland verification would be verified for the entire site. The District's NCDOT PM was appointed to review both delineations and determine which delineation would be verified.

SEGi was contacted by the PM and he informed SEGi that he was working with NCDOT consultants (ESC) to verify a wetland jurisdictional delineation (JD) on a 1600-acre site, which included the Appellant's property. The NCDOT PM agreed to meet with the Appellant and his consultant to discuss the differences between the two delineations. During the office meeting, it was decided that a site visit would be conducted by the NCDOT PM, the Appellant, and his consultant to review some areas that the Appellant and his consultant questioned. The on-site visit investigation was conducted on November 23, 2005, to review the indicators used to identify the three criteria required to identify a site as a wetland.

The NCDOT PM documented the November 23, 2005, on-site investigation with a Memorandum for Record (MFR) dated February 14, 2006. The MFR stated that both parties agreed that the proposed "upland" sites met the vegetation and hydrology wetland criteria. The disagreement between the two parties concerned the use of the S7 hydric soil indicator to determine hydric soils.

The S7 hydric soil indicator is contained in the United States Department of Agriculture's *Field Indicators of Hydric Soils in the United States*. The Appellant's consultant disagreed with the use of the S7 indicator to determine hydric soils on the project site. The PM excavated several sample soil pits to evaluate the use of the S7 indicator on the site. SEGi was not convinced that the use of the S7 indicator was appropriate. The parties could not agree on the use of the S7 indicator, so the District recommended that SEGi return to the site on a later date to further investigate the use of the S7 indicator to help identify hydric soils located on the project site.

During the site visit, the Appellant's consultant stated that he was willing to provide a map overlaying both delineation lines to show the differences between the two delineations. The NCDOT representative stated he would provide a CAD file of the NCDOT delineation to the Appellant's consultant so they could complete the overlay. The NCDOT PM agreed to review the overlay of the conflicting delineations. The District conducted a second meeting on December 14, 2005, to discuss the conflicting results. After reviewing the overlay and aerial photographs, the Appellant felt that non-jurisdictional (upland) areas were located within the project site and NCDOT should include these areas in the delineation map. Based on the Appellant's findings, the PM requested that SEGi submit additional data forms for the areas in question. SEGi submitted the requested information on February 3, 2006.

On February 14, 2006, the District informed the Appellant that the ESC/North Carolina Department of Transportation wetland delineation would be used as the "official" delineation of his site. This is because the entire site has listed hydric soils and the consultant's data sheets state the controversial sites exhibit hydric soils.

The Appellant disagreed with the District and submitted a Request for Appeal regarding the approved JD to the South Atlantic Division Commander.

**APPEAL DECISION EVALUATION, FINDINGS, and INSTRUCTIONS to the Wilmington District Engineer (DE):**

**Reason for Appeal as Presented by the Appellant:** The site appears to contain areas of uplands within those marked as jurisdictional wetlands on the NCDOT wetland delineation. This is supported by the data sheets submitted on September 28, 2005, and additional data sheets submitted February 3, 2006, and is reflected on the survey drawn by Hanover Design Services, P.A.

**FINDINGS:** This reason for appeal did not have merit.

**ACTION:** None required.

**Discussion:** Under Section 404 of the Clean Water Act, the US Army Corps of Engineers has the authority to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. The Corps 1987 Wetland Delineation Manual (Manual) is the current Federal delineation manual used to identify and delineate wetlands and its use is mandatory for the Corps. The Manual continues to be clarified and updated through guidance documents and memoranda from the Corps Headquarters.

There is nothing in the administrative record to suggest that the scientific methods or data used to determine the NCDOT wetland delineation in question were in error. The Manual states that under normal circumstances wetlands must exhibit wetland vegetation, hydric soils and wetland hydrology. The District's administrative record does contain sufficient documentation to support its determination that non-jurisdictional areas do not exist on the Appellant's property. The administrative record includes the wetland delineation data sheets and associated information for the Dutchman Village JD (Permit Number 200500131) and the North Carolina Department of Transportation (NCDOT) JD (Permit Number 200100921) that includes the Appellant's property.

As detailed in the project history, the District issued an approved JD on February 14, 2006, stating:

This office concurs with the delineation report, dated January 24, 2006, prepared by (Ecoscience Corporation): [and] This Office does **not** concur with the delineation report, dated 9-28-05, prepared by the Southern Environmental Group INC (SEGI), including datasheets submitted by email on 2-3-06.

This determination was made by the District after reviewing the different delineations and finally, by an on-site meeting with all parties on November 23, 2005. The Appellant, his consultant, the PM and a representative from NCDOT met at the Appellant's property to review the indicators used to identify the three criteria required to identify the entire site as a wetland.

The PM documented the November 23, 2005, on-site investigation with a Memorandum for Record (MFR) dated February 14, 2006. The MFR stated that both parties agreed that the Appellant's proposed upland sites met two of the three-wetland criteria (vegetation and hydrology). The disagreement between the parties centered on the use of the S7 hydric soil criteria to determine hydric soils.

ESC used the S7 hydric soil indicator as one of the supporting factors for hydric soils on some of the data sheets. The S7 hydric soil indicator is contained in the United States Department of Agriculture's *Field Indicators of Hydric Soils in the United States*.<sup>1</sup> This indicator can be used in situations where sandy hydric soils exist on a site. The Appellant's consultant disagreed with the use of the S7 indicator to determine hydric soils. The PM excavated several sample soil pits to evaluate the use of the S7 indicator. The parties could still not agree on the use of the S7 indicator. However, the District documented that additional hydric soil characteristics existed at the questionable sites.

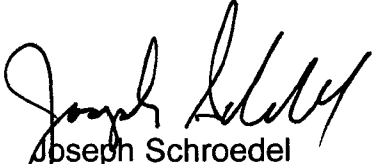
The Appellant's consultant supplied data sheets to support the conclusion the site contained uplands. The data sheets identified the upland areas as having hydric soils, therefore, the Appellant's argument is moot. Both the District and the Appellant's consultant determined the site contained the necessary characteristics for hydric soils without using the S7 soil indicator for sandy soils.

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<sup>1</sup> The indicators contained in this publication are the hydric soil indicators approved by the Natural Resource Conservation Service and the National Technical Committee for Hydric Soils. The S7 indicator is one indicator used to identify a hydric soil in sandy soils. Use of this publication has not been officially adopted by the US Army Corps of Engineers. Reference 21 March 1997, *Memorandum for All Major Subordinate Commands, District Commands* regarding use of the NRCS (Natural Resource Conservation Service) Field Indicators of Hydric Soils. The memorandum stated that uses of the indicators are recommended as additional tools, but not as stand-alone indicators.

The District followed the proper wetland delineation methods for conducting the wetland delineation. The District also properly allowed the Appellant to appeal the NCDOT delineation. The administrative records for the Dutchman Village JD and the NCDOT JD that includes the Dutchman Village JD, support the District's wetland delineation.

**CONCLUSION:** As my final decision on the merits of the appeal, I conclude there is substantial evidence in the administrative record to support the Wilmington District's jurisdictional determination. The District's determination was not arbitrary, capricious or an abuse of discretion was not plainly contrary to applicable law or policy. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.



Joseph Schroedel  
Brigadier General, US Army  
Commanding