

ADMINISTRATIVE APPEAL DECISION

JUDY SIMPSON

JURISDICTIONAL DETERMINATION NUMBER 200430709

WILMINGTON DISTRICT

DATE: JULY 10, 2005

Review Officer: Michael F. Bell (RO), US Army Corps of Engineers (Corps), South Atlantic Division, Atlanta, Georgia.

Appellant: Ms. Judy Simpson, PhD.

Receipt of Request For Appeal (RFA): April 7, 2005.

Site Visit Date: May 17, 2005.

Background Information: The appellant lives on lot number 93 at 1920 Timberline Drive, south of US 74 in Monroe, North Carolina. A drainageway runs from a concrete-lined conveyance under Timberline Drive, then across the appellant's lot to an adjacent parcel (the "Poplin property"), then behind (east of) the appellant's property across the Poplin property. A large construction project is underway on the Poplin property where landclearing activities have been of some concern to the appellant. She states that the drainageway on her property is a regulated Water of the United States and that the work on the adjacent parcel should stop. The appellant requested a jurisdictional determination of the drainageway. The jurisdictional request came to the Corps of Engineers, Asheville Regulatory Field Office (Corps) from the appellant on March 19, 2004. Several letters and phone conversations followed the request. The drainageway was determined to be non-jurisdictional on April 1, 2004. The Corps neglected to attach an appeals form with the determination letter. On February 14, 2005, the Corps conducted another jurisdictional determination and sent a confirmation letter with an appeals form. The confirmation letter stated the property contained no regulated waters of the United States. By letter dated April 7, 2005, the appellant submitted a Request For Appeal (RFA) of the approved jurisdictional determination.

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 February 14, 2005.

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

Reasons for Appeal as Presented by the Appellant:

Appeal Reason: The appellant asserts that, “Due to water back up on this property because of the natural creek bed being prevented – [the] Poplin property has to open [the] creek bed.” She also states in her cover letter: “The reason for this letter is your determination that there is no creek on Poplin’s property. I was told there was no creek on this property or Poplin’s”

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: Section 404(a) of the Clean Water Act, 33 U.S.C. 1344, delegates authority to the Secretary of the Army to issue permits for the discharge of dredged or fill material into waters of the United States. The Corps implements this statute through regulations found at 33 C.F.R. 320, 323, 325, and 328. Corps regulations found at 33 C.F.R. 325.9 state that District Engineers are authorized to determine the area defined by the terms “navigable waters of the United States” and “waters of the United States.” Corps regulations found at 33 C.F.R. 328.3(a)(1) through (a)(7) define the term “waters of the United States.” The applicable section for this case is 33 C.F.R. 328.3(a) (5), “Tributaries of waters identified in paragraphs (a) (1) through (4) of this section.”

To determine whether the appellant’s lot contains waters of the United States, including the drainageway, the Corps conducted field investigations, utilized photographs, topographic maps, and information provided by the appellant and the registered property owner. The topographic maps depict a drainage system that drains across the appellant’s lot and unto the Poplin property. In correspondence, the appellant has also stated that any flow through the drainageway would be across her property and unto the Poplin property. She further states that an active tributary previously existed and will exist in the future, if not now.

However, the photographs taken during the site visits do not indicate water flow or conveyance. The March 30, 2004, Corps field notes state: “the channel is ephemeral with no flow today, even as it is raining. Vegetation [is] growing in the channel.” The field notes also provide a field sketch of the drainageway. The drainageway crosses the appellant’s property then transects the northwest corner of the Poplin property to US 74. The field sketch designates the drainage way on both properties as “non j.[urisdictional] ditch.” The RO noted during his site visit that the designations appear accurate. The RO also observed construction activities on the Poplin property that could possibility impact aquatic resources not associated with the subject appeal.

Additionally, the appellant made a number of statements in correspondence with the Corps that indicates a lack of flow through the drainageway. In her March 19, 2004 letter, she states: “[My son] is a witness to the fact that no water has been in [the] creek/ditch from his childhood and he is 46 [years old].” In a March 20, 2004 letter, the appellant stated: “This creek has been dried up for at least 30 years.” And, “[t]here has never been water in that creek” The Corps spoke with the registered property owner (appellant’s son), who confirmed that water has not been in the ditch for the past thirty years.

Further, the drainageway lacks an Ordinary High Water Mark (OHWM). The determination of whether there is continuous or intermittent flow should include the presence or absence of an OHWM. The Corps utilizes an OHWM in determining the limits of waters of the United States. The term “ordinary high water mark” is defined in 33 C.F.R. 328.3(e) as:

... that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics or the surrounding areas.

Ordinary high water marks should still exist in some form even if adjacent construction has temporarily diverted the water. The photographs taken during the site visits do not indicate an OHWM. In addition, the RO did not find an OHWM during the site visit.

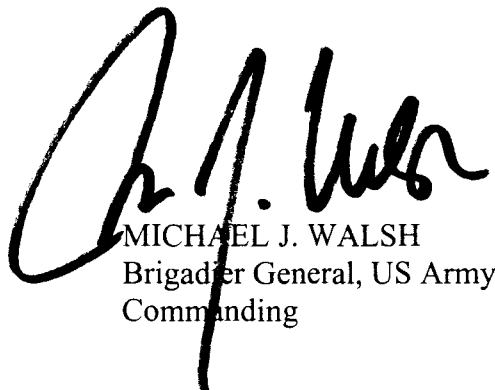
The appellant’s real contention appears to be not so much that the drainageway on her property is a jurisdictional water of the United States, but that there shouldn’t be any water in the drainageway. The appellant also raises issues concerning the jurisdictional status of features and activities on the Poplin property – the Poplin property and activities there are outside the scope of the appealed jurisdictional determination.

Instructions to the Wilmington District Engineer (DE): Although I found that the appeal had no merit, it is partially because the fact that the absence of an OHWM on the banks of the conveyance was confirmed during the site visit. Although two project managers visited the site and one documented the conditions in his field notes, neither mentioned the existence or absence of an OHWM. The Corps utilizes an OHWM in determining the limits of waters of the United States. I recommend that the evidence or absence of an OHWM be documented in future jurisdictional determinations.

CONCLUSION: After reviewing the information contained in the administrative record, and information obtained at the site visit and meeting, I conclude there is substantial evidence in the administrative record to support the District’s approved jurisdictional determination, and that this 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.

23 Sep 05

(Date)


MICHAEL J. WALSH
Brigadier General, US Army
Commanding