

ADMINISTRATIVE APPEAL DECISION

ROBERT TARTE JR.

FILE NO. SAW-2009-909

WILMINGTON DISTRICT

3 MAY 2012

Review Officer: Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

Appellant: Robert Tarte Jr.

Receipt of Request for Appeal: 14 September 2011

Acceptance of Request for Appeal: 21 September 2011

Appeal Conference: 13 December 2011

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

BACKGROUND

The Robert Tarte Jr. property is located at 2501 Briar Oak Circle, Gastonia, Gaston County, North Carolina.

For purposes of evaluation during the CWA jurisdictional determination, consultants for the North Carolina Department of Transportation (NC DOT) evaluated the site using the 1987 *Corps of Engineers Wetlands Delineation Manual* (1987 Manual), the Code of Federal Regulations (CFR) definitions of jurisdictional waters, and supporting guidance documents, as part of a delineation for the North Carolina Turnpike Authority (NCTA) Gaston Bypass project.

On 24 August 2011, the Wilmington District (District) issued an approved jurisdictional determination (JD) to the NC DOT and NCTA with instructions to notify all fee owners along the proposed road corridor as “affected parties,” where an approved JD was made on their property. Accordingly, Mr. Tarte was notified that waters of the United States (WOUS) were present on a portion of his property. Since Mr. Tarte is a landowner, he was considered an “affected party” and was notified of his appeal rights.

The District concluded that the appellant’s property contained WOUS, including wetlands within CWA jurisdiction. These included a stream, identified as S92A, which the District identified as an intermittent relatively permanent water (RPW), and a wetland, identified as W87. The

District contends that the area designated as wetlands (W87) on the appellant's property satisfy the three parameter test, as per the 1987 Manual: soils, hydrology, and hydrophytic vegetation. It should be noted that the *Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont*, July 2010 ("Supplement to the 1987 Manual"), was still in draft form at the time the District made their approved JD. Although the Supplement to the 1987 Manual is dated July 2010, the interim version was not available for use until November 2010 (30 days after the Wilmington District published the public notice for the supplement). There is no evidence that the use of the Supplement to the 1987 Manual would have changed the results in this case.

Mr. Tarte (Appellant) disagrees with the District's determination that feature W87 is a wetland and submitted a Request for Appeal (RFA) on 14 September 2011, citing the reasons for appeal addressed in this appeal decision.

SUMMARY OF DECISION

The Appellant's request for appeal (RFA) does not have merit. The administrative record (AR) substantiates the District's determination that W87 is a WOUS, as required by the 1987 Manual.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

The administrative appeal was evaluated based on the District's AR, the Appellant's RFA, and discussions during the site visit/appeal meeting with the Appellant and the District.

APPELLANT'S STATED REASON FOR APPEAL

Appeal Reason: The area delineated as a wetland is clearly not a wetland, as there is no standing water or plant life for a wetland or bog.

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

Appeal Reason: The area delineated as a wetland is clearly not a wetland, as there is no standing water or plant life for a wetland or bog.

Finding: This reason for appeal does not have merit.

Discussion: In the RFA, the Appellant asserted that the area delineated as a wetland is clearly not a wetland, as there is no standing water or plant life for a wetland or bog.

The 1987 Manual provides the following information as it pertains to hydrophytic

vegetation (page 16):

35. Several indicators may be used to determine whether hydrophytic vegetation is present on a site. However, the presence of a single individual of a hydrophytic species does not mean that hydrophytic vegetation is present. The strongest case for the presence of hydrophytic vegetation can be made when several indicators, such as those in the following list, are present. However, any one of the following is indicative that hydrophytic vegetation is present:

a. More than 50 percent of the dominant species are [obligate]OBL, [[facultative wet] FACW, or [facultative]FAC (Table 1) on lists of plant species that occur in wetlands....

The District's conclusion regarding the vegetation present onsite (Data Form, Routine Wetland Determination dated 2/08/2007) was that eighty percent of the dominant species present in the wetland (W87) were OBL, FACW, or FAC. This conclusion was substantiated with a species list and the indicator status of each species.

The 1987 Manual provides the following information as it pertains to hydric soils (Appendices D2 and D3):

c. Determine whether sulfidic materials are present by smelling the soil. The presence of a "rotten egg" odor is indicative of hydrogen sulfide, which forms only under extreme reducing conditions associated with prolonged inundation/soil saturation.

d. Determine whether the soil has an aquic or peraquic moisture regime (see paragraph 44 of the main text). If so, the soil is hydric.

(1) Gleyed soil. Determine whether the soil is gleyed. If the matrix color best fits a color chip found on the gley page of the Munsell soil color charts, the soil is gleyed. This indicates prolonged soil saturation, and the soil is highly reduced.

g. Determine whether the mapped soil series or phase is on the national list of hydric soils (Section 2). CAUTION: It will often be necessary to compare the profile description of the soil with that of the soil series or phase indicated on the soil map to verify that the soil was correctly mapped. This is especially true when the soil survey indicates the presence of inclusions or when the soil is mapped as an association of two or more soil series.

The District concluded that hydric soils are present onsite (Data Form, Routine Wetland Determination dated 2/08/2007). The soil colors are recorded in the data sheet and indicate that soils exhibit gleyed or low chroma color, supporting the District's conclusion that the soil is hydric.

The District provided sufficient information in their AR to document that soils in wetland W87 exhibit characteristics of hydric soil as required by the 1987 Manual/NRCS soil criteria.

The 1987 Manual provides the following information as it pertains to hydrology (pages 30-31):

49. Indicators of wetland hydrology may include, but are not necessarily limited to: drainage patterns, drift lines, sediment deposition, watermarks, stream gage data and flood predictions, historic records, visual observation of saturated soils, and visual observation of inundation. Any of these indicators may be evidence of wetland hydrologic characteristics...

b. (1) Visual observation of inundation. The most obvious and revealing hydrologic indicator may be simply observing the areal extent of inundation. However, because seasonal conditions and recent weather conditions can contribute to surface water being present on a nonwetland site, both should be considered when applying this indicator.

(2) Visual observation of soil saturation. Examination of this indicator requires digging a soil pit (Appendix D, Section 1) to a depth of 16 inches and observing the level at which water stands in the hole after sufficient time has been allowed for water to drain into the hole. The required time will vary depending on soil texture. In some cases, the upper level at which water is flowing into the pit can be observed by examining the wall of the hole. This level represents the depth to the water table. The depth to saturated soils will always be nearer the surface due to the capillary fringe. For soil saturation to impact vegetation, it must occur within a *major portion of the root zone* (usually within 12 inches of the surface) of the prevalent vegetation. The major portion of the root zone is that portion of the soil profile in which more than one half of the plant roots occur.

CAUTION: In some heavy clay soils, water may not rapidly accumulate in the hole even when the soil is saturated. If water is observed at the bottom of the hole but has not filled to the 12-inch depth, examine the sides of the hole and determine the shallowest depth at which water is entering the hole. When applying this indicator, both the season of the year and preceding weather conditions must be considered.

NOTE: The hydrology indicators described above are considered to be "primary indicators", any one of which is sufficient evidence that wetland hydrology is present when combined with a hydrophytic plant community and hydric soils. In addition, the following "secondary indicators" may also be used to determine whether wetland hydrology is present. In the absence of a primary indicator, any two secondary indicators must be present to conclude that wetland hydrology is

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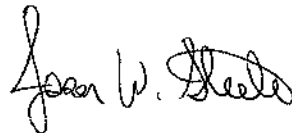
present. Secondary indicators are: presence of oxidized rhizospheres associated with living plant roots in the upper 12 inches of the soil, presence of waterstained leaves, local soil survey hydrology data for identified soils, and the FAC-neutral test of the vegetation. (HQUSACE, 6 Mar 92)

The District concluded wetland hydrology was present in W87 (Data Form, Routine Wetland Determination dated 2/08/2007) with recorded observations of inundation, saturation, and the presence of oxidized root channels. Accordingly, the District has sufficiently documented that wetland W87 exhibits hydrologic characteristics as required by the 1987 Manual.

Action: None.

CONCLUSION

For the reasons stated above, I find that the appeal does not have merit. The District's AR contains substantial evidence to support the District's determination that the subject wetlands satisfy the 3-parameter test (soils, hydrology, hydrophytic vegetation), as required by the 1987 Manual. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law, regulation, Executive Order, or policy. The administrative appeals process for this action is hereby concluded.



JASON W. STEELE
Administrative Appeals Review Officer
South Atlantic Division