

ADMINISTRATIVE APPEAL DECISION

RUSSELL FOX

FILE NUMBER 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: Russell Fox

Receipt of Request for Appeal: 30 September 2011

Acceptance of Request for Appeal: 31 October 2011

Appeal Conference: 13 December 2011

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

BACKGROUND

The Russell Fox property is located at 3415 West Franklin Boulevard, 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 Corps of Engineers 1987 Wetland 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 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 a JD was made on their property. Mr. Fox was notified that a portion of his property was determined to have Waters of the United States (WOUS). Since Mr. Fox 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 include wetlands, identified as W46 and W338. The District contends that the areas designated as wetlands (W46 and W338) on the appellant’s property satisfy the 3-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 jurisdictional determination. 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.

The Appellant disagrees with the District's determination that features W46 and W338 exist on the property and submitted a Request for Appeal (RFA) on 30 September 2011. The appellant's reasons for appeal are addressed in this appeal decision.

SUMMARY OF DECISION

Appellant's request for appeal (RFA) has merit. While the administrative record (AR) substantiates the District's determination that W46 and W338 are waters of the United States (U.S.), as required by the 1987 Manual, the District has not sufficiently documented the locations of W46 and W338, relative to property boundaries. The District must provide Mr. Fox a revised delineation map, which accurately depicts the extent and location of waters of the United States on his property (within the study area) associated with the Gaston Bypass project.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, and discussions during the site visit/appeal meeting with the Appellant and the District.

APPELLANT'S STATED REASONS FOR APPEAL

Appeal Reason 1: The delineation of wetlands, W46 and W338, is not accurate. They do not exist.

Appeal Reason 2: The floodway and 100-year floodplain lines that are noted seem to be prior to the 31 May 2000, survey submitted to FEMA by PBS&J after the modification of a stream, which moved the lines.

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

Appeal Reason 1: The delineation of wetlands, W46 and W338, is not accurate. They do not exist.

Finding: This reason for appeal has merit.

Discussion: In the RFA, the Appellant indicated that he did not believe that wetlands noted as W338 and W46 were accurate and that he did not believe that they existed.

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 OBL, FACW, or FAC (Table 1) on lists of plant species that occur in wetlands....

The District's conclusions regarding the vegetation present onsite (Data Form, Routine Wetland Determination dated 1/24/2007 and 12/03/2009, for W46 and W338 respectively) were that eighty six percent of the dominant species present in the wetland (W46) were OBL, FACW, or FAC and that seventy five percent of the dominant species present in the wetland (W338) were OBL, FACW, or FAC. These conclusions were 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 (Appendix D (D2 & 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 in both W46 and W338 (Data Form, Routine Wetland Determination dated 1/24/2007 and 12/03/2009, for W46 and W338 respectively). The soil colors are recorded in the data sheet and indicate that soils in W46 exhibited reducing conditions and gleyed or low chroma color and indicate that soils in W338 exhibited sulfidic odor and concretions, as well as color typical of with hydric soils, supporting the District's conclusion that the soil is hydric.

The District has provided sufficient information to document that soils in wetlands W46 and W338 exhibit characteristics of hydric soil as required by the 87 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.

(3) Watermarks. Watermarks are most common on woody vegetation. They occur as stains on bark or other fixed objects (e.g., bridge pillars, buildings, fences, etc.). When

several watermarks are present, the highest reflects the maximum extent of recent inundation.

(6) *Drainage patterns within wetlands.* This indicator, which occurs primarily in wetlands adjacent to streams, consists of surface evidence of drainage flow into or through an area. In some wetlands, this evidence may exist as a drainage pattern eroded into the soil, vegetative matter (debris) piled against thick vegetation or woody stems oriented perpendicular to the direction of water flow, or the absence of leaf litter. Scouring is often evident around roots of persistent vegetation. Debris may be deposited in or along the drainage pattern.

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 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 W46 and W338 (Data Form, Routine Wetland Determination dated 1/24/2007 and 12/03/2009, for W46 and W338 respectively) with recorded observations, in both W46 and W338, of inundation, saturation, water marks, water-stained leaves, and, in W46 the presence of oxidized root channels.

The District has, therefore, sufficiently documented that wetlands W46 and W338 exhibit hydrologic characteristics as required by the 87 Manual.

During the site visit, there was some confusion as to the locations of features W46 and W338 on the property. After some searching of the property, it appeared that the placement of the delineated features on the map may not be correct, relative to the boundaries of the property or that the depiction of property boundaries is incorrect on the delineation map.

Therefore, while the District has sufficiently documented that wetlands W46 and W338 exhibit hydrophytic vegetation, hydric soils, and hydrologic characteristics as required by the 1987 Manual to support the conclusion that they are wetlands, the District has not sufficiently documented the extent to which wetlands W46 and W338 are located on the property.

Action: The District must provide the Appellant a revised delineation map, which accurately depicts the extent and location of WOUS on the appellant's property and

within the study area associated with the Gaston Bypass project.

Appeal Reason 2: The floodway and 100-year floodplain lines that are noted seem to be prior to the 31 May 2000, survey submitted to FEMA by PBS&J after the modification of a stream, which moved the lines.

Finding: This reason for appeal does not have merit.

Discussion: In the RFA, the Appellant stated that the floodway and 100-year floodplain lines that are noted seem to be prior to the 31 May 2000, survey submitted to FEMA by PBS&J after the modification of a stream, which moved the lines. The Appellant included a page from a document that indicated that the U.S. Army Corps of Engineers and the City of Gastonia had issued a Notification of Unauthorized Activity, dated May 10, 1999, and an Order to Take Corrective Action, dated May 12, 1999, respectively. The document indicated that a consulting firm had been retained to provide a stream restoration/enhancement plan for the relocated channel and that the establishment of meanders, woody vegetation, and in-stream habitat enhancement features were required to be part of the plan. The document further indicated that PBS&J had prepared a flood study and Letter of Map Revision for FEMA to support the removal of restrictions associated with the floodplain as it had existed prior to the relocation of the stream and that the Letter of Map Revision had been submitted to the City of Gastonia for review.

During the site visit, the Appellant indicated that approximately 10 years prior, a stream which had crossed the Property diagonally had been relocated so that it now crossed straight along the back of the property. The Appellant stated that the stream relocation had been done in anticipation of a project that never went forward. It is unclear if the revision of the map for the floodplain was ever finalized or approved. It is also unclear whether the planned stream restoration/enhancement plan was ever finalized, approved, or implemented.

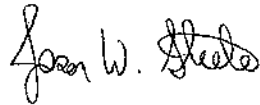
While it appears that actions were at least planned to respond to the unauthorized activity and the modification of the floodplain resulting from the relocation of the channel, it is unclear if those actions were completed. More importantly, mapping of floodplains is beyond the purview of the Corps' Regulatory program. The Appellant may wish to work with the City of Gastonia to ensure that the floodplain issue has been resolved with the City and NC DOT to ensure that the floodplain is depicted properly on NC DOT's project maps.

Action: No action is required.

CONCLUSION

For the reasons stated above, I find that the appeal has merit. The District's administrative record 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 87 Manual. The District has not sufficiently documented that wetlands W46 and W338 are on the Property and the District must provide the Appellant a revised delineation map, which accurately depicts the extent and location of waters of the United States on the Property within the study area associated with the Gaston Bypass project. The District has no obligation relative to the mapping of the floodway and the 100-year floodplain or to correcting any errors in such mapping. 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