

ADMINISTRATIVE APPEAL DECISION

FAIRBANKS NORTH STAR BOROUGH; FILE NO. POA-2005-1845-9

U.S. ARMY CORPS OF ENGINEERS, ALASKA DISTRICT

25 MAY 2006

Review Officer: James E. Gilmore, U.S. Army Corps of Engineers, Southwestern Division

Appellant: Fairbanks North Star Borough

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

Background Information:

On 26 October 2005, Mr. Paul Costello, Director, Department of Land Management, Fairbanks North Star Borough (Appellant) contacted the U.S. Army Corps of Engineers' Alaska District (the District) and requested a jurisdictional determination (JD) for Lots 4 – 8, Block 1, North Shanly Subdivision, Recorded Plat no. 110.493, Fairbanks Meridian, Fairbanks, Alaska (the site).

On 3 November 2005, the District performed an office (desktop) determination/review of the information submitted by the Appellant and other available information regarding the site. Based on this review, the District determined that the site contained wetlands that are subject to the Corps' jurisdiction. The District issued a preliminary JD to the Appellant on 3 November 2005.

In a letter dated 18 November 2005, Mr. Costello requested that the District issue an approved JD for the project site. The District re-evaluated the information submitted with Appellant's original request and other available information pertaining to the project site. The District again determined that the site contained wetlands adjacent to other waters of the United States and, as such, the site was subject to the Corps jurisdiction under Section 404 of the Clean Water Act (CWA). An approved JD was issued to the Appellant on 13 December 2005.

The Appellant disagreed that the site contains wetlands that are subject to the Corps' jurisdiction and submitted its Request for Appeal (RFA) dated 8 February 2006.

Summary of Decision: The District's administrative record supports its decision that wetlands regulated under the CWA are present on the site, and the appeal does not have merit, for the reasons discussed below.

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Appeal Decision Evaluation, Findings and Instructions to the Alaska District Engineer (DE):

The basis for this appeal of the final Jurisdictional Determination POA-2005-1845-9 is that the Alaska district has incorrectly applied current regulatory criteria and associated guidance resulting in an erroneous conclusion that portions of the subject property are subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. § 1344).

Finding: This reason for appeal does not have merit.

Action: No Action Required.

Discussion: Appellant's argument is essentially twofold: (1) that the site cannot be a jurisdictional wetland because it does not meet the hydrology criteria as described in the 1987 Corps of Engineers Wetland Delineation Manual (the 1987 Manual); and (2) that the District failed to adhere to the guidance contained in a particular memorandum dated 17 July 2003 distributed by the Washington, D.C., Headquarters of the U.S. Army Corps of Engineers (HQUSACE).

To support the first part of its argument, Appellant stated in its RFA that a "site must be saturated for a continuous period that equals or exceeds 12.5 percent of the growing season" to meet the wetland hydrology definition contained in the 1987 Manual. In addition, Appellant stated that the Corps 1987 Manual defines the growing season as "the portion of the year when soil temperatures at 19.7 inches below the soil surface are higher than biological zero (5 degrees C)."

The Appellant is only partially correct in its statements regarding the definition of "growing season" and the duration of inundation and/or soil saturation required to meet the hydrology criteria contained in the 1987 Manual.¹ The definition of the "growing season" contained in the 1987 Manual is as follows:

"The portion of the year when soil temperatures at 19.7 inches below the soil surface are higher than biological zero (5 degrees C) (U.S. Department of Agriculture – Soil Conservation Service 1985). For ease of determination this period can be approximated by the number of frost-free days (U.S. Department of the Interior 1970). (Emphasis added.)"

¹ The manual was originally published in January 1987. Since that time, the use and interpretation of the 1987 Manual have been clarified and updated through a series of guidance documents and memoranda from HQUSACE. An on-line version of the 1987 Manual is available. This electronic edition does not change the intent or jurisdictional area of the 1987 Manual. It does, however, attempt to clarify the manual and current guidance by including a number of boxed "USER NOTES" indicating where the 1987 Manual has been augmented by more recent information or guidance.

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In the 1987 Manual's "User Notes" discussing the definition of the "growing season" it states:

"Estimated starting and ending dates for the growing season are based on 28° F air temperature thresholds at a frequency of 5 years in 10 (HQUSACE, 6 Mar 92²). This information is available in NRCS county soil survey reports or from the NRCS Water and Climate Center in Portland, Oregon, for most weather stations in the country."

Thus, Appellant is mistaken in its statement that "it is clear that the ultimate regulatory determination of when the growing season occurs is based upon soil temperature. The definition of "growing season" contained in the 1987 Manual allows the District to determine the duration of the growing season by approximating the number of "frost free" days, as the District did in this case.

Appellant's assumption that only areas that are "saturated for a continuous period that equals or exceeds 12.5 percent of the growing season" meet the wetland hydrology definition contained in the 1987 Manual is also not correct. Paragraph 48 of the 1987 Manual contains Table 5,³ which discusses a classification system for non-tidal areas. The "User Notes" explaining the use of Table 5 state the following:

"Based on a review of Table 5 and paragraph 55, 8.i., contained in the 1987 Manual, an area has wetland hydrology if it is inundated or saturated to the surface continuously for at least 5% of the growing season in most years (50% probability of recurrence). These areas are wetlands if they also meet the hydrophytic vegetation and hydric soil requirements. (HQUSACE, 7 Oct 91 and 6 Mar 92.)"

The 1987 Manual and subsequent guidance from HQUSACE clearly indicate that an area does not have to be "saturated for a continuous period that equals or exceeds 12.5 percent of the growing season" to have "wetland hydrology," as Appellant contends.

Secondly, Appellant does not believe the District adhered to the guidance issued by HQUSACE on 17 July 2003 regarding use of local scientific and technical information to supplement the 1987 Manual. In particular, Appellant contends that the District did not follow the guidance contained in paragraph 3 of the referenced memorandum. Paragraph 3 states:

"[T]here are a number of districts in the country which have ongoing problems not addressed by the manual. If there are scientific data and studies that can be used to clarify wetland delineations, Districts should submit these data or studies to Headquarters [HQUSACE] through the MSCs [Major Subordinate Commands] for consistency review before use.

² Subject of the 6 Mar 92 Memorandum is "Clarification and Interpretation of the 1987 Manual".

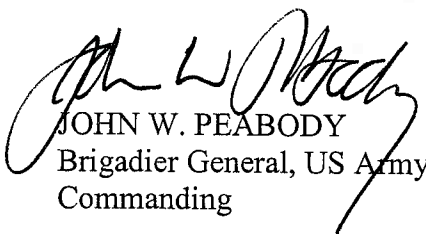
³ Table 5 is a classification system developed for nontidal areas titled "Hydrologic Zones - Nontidal Areas"

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In addition, once Headquarters has approved the use of these data or studies for use, the Districts must prepare and publish a Public Notice outlining the proposed change, providing a schedule when these changes would take effect, and requesting comments. A final Public Notice announcing the effective date of these changes should be published along with a summary of the comments and responses. One issue that should be addressed in the Public Notice is that the manual allows for regional differences.”

The paragraph that Appellant points to as authority for the proposition that the District was supposed to go through a type of a rule making process dictated by HQUSACE applies, by its own terms, only to situations in "a number of Districts in the country which have ongoing problems not addressed by the manual." However, the situation in the instant case does not involve a problem not addressed by the 1987 Manual. In fact, the 1987 Manual contemplates situations in which the subsurface temperatures might not be adequate indicators of the "growing season," and the 1987 Manual specifically says that the "period" of the "growing season" can be "approximated by the number of frost-free days." In addition, "soil temperatures at 19.7 inches below the soil surface" are not intrinsically any less an "approximation" over a broad area than the "number of frost free days" in determining the "growing season" for that same area. The whole purpose of establishing a "growing season" clearly is to determine the extent to which "an area is periodically inundated or has saturated soils during the growing season" to determine whether "under normal circumstances" it would "support a prevalence of vegetation typically adapted for life in saturated soil conditions," to qualify as a "wetland" under the Corps' regulatory definition of "wetlands" (see 33 C.F.R. § 328.3). Appellant apparently is not challenging the fact that the site under normal circumstances does support a prevalence of such vegetation.

Conclusion: I find that the District's methodology for determining the length of the growing season is in accordance with the Manual and all issued guidance and policies. For the reasons stated above, the appeal does not have merit.


JOHN W. PEABODY
Brigadier General, US Army
Commanding