



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, NORTHWESTERN DIVISION
PO BOX 2870
PORTLAND OR 97208-2870

April 15, 2005

Program Support Division

Mr. William H. Sherlock
Hutchinson, Cox, Coons,
DuPriest, Orr & Sherlock, P.C.
200 Forum Building
777 High Street
Eugene, OR 97401-2782

Dear Mr. Sherlock:

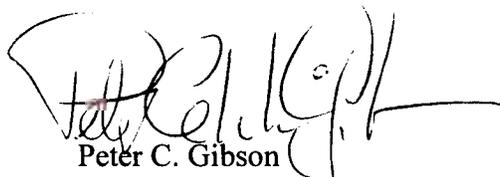
I have completed my review of the Request for Appeal, submitted on behalf of Mr. Homer Beldt, regarding the approved jurisdictional determination (JD) made by the Portland District for the Beldt property, located in Sutherlin, Douglas County, Oregon, File No. 200300787.

After evaluating the information provided in the Request for Appeal, the District's administrative record, and information obtained during the appeal meeting and site visit, I have determined that the appeal does not have merit. Enclosed is a copy of the Administrative Appeal Decision document, which provides the details of my findings for the appeal.

If you have any questions about the appeal decision, you may contact the Appeal Review Officer, Mr. Mores Bergman, at 402-697-2533.

I am also providing a copy of my decision to Mr. Beldt, at his request.

Sincerely,


Peter C. Gibson
Chief, Program Support Division

4/15/05

Enclosure

ADMINISTRATIVE APPEAL DECISION

HOMER BELDT, FILE NO. 200300787

PORTLAND DISTRICT

DATE: April 15, 2005

Review Officer: Mores Bergman, U.S. Army Corps of Engineers (Corps), Northwestern Division.

Appellant: Homer Beldt

Appellant's Representative: William Sherlock, Attorney

Receipt of Request for Appeal: July 26, 2004

Appeal Conference and Site Visit Date: October 18, 2004

Background Information: On January 12, 2004, Ms. Barnes submitted a wetland delineation report to the Portland District (District) on behalf of Homer Beldt, for a parcel of land located at Tax Lot 300, in Section 16, Township 25 South, Range 5 West, in Sutherlin, Douglas County, Oregon. The site is the location of a proposed mobile home park project by Mr. Beldt. Mr. Beldt had previously made an application for a Section 404 permit to the District for the project on December 9, 2003. The wetland report, dated February 14, 2002, had originally been prepared for the project site in connection with the permit application that Mr. Beldt submitted to the State of Oregon for his proposed project. On March 9, 2004, District representatives met with Ms. Barnes at the project site to review the findings of the report, since considerable time that had passed since the report had been prepared.

After performing a site inspection, reviewing the wetlands delineation report, and obtaining additional hydrologic information, the District prepared an Approved Jurisdictional Determination (JD) for the site and sent it to Homer Beldt on May 26, 2004. In the Approved JD, the District identified eleven wetland areas on the site. The District determined that eight of the wetlands were isolated and therefore not jurisdictional, and that the other three areas were waters of the United States (U.S.). They determined that one of the waters is an old drainage channel that is connected to a known water of U.S., and that the other two wetlands are adjacent to the drainage channel. On July 22, 2004, William Sherlock submitted a request for appeal (RFA), on behalf of Mr. Beldt, to the Corps Northwestern Division in accordance with Regulation 33CFR 331. The appellant contends that one of the wetlands, known as wetland A, is isolated, and therefore is not a water of the U.S. The appellant's reasons for appeal are listed below. On October 18, 2004, the Review Officer held an appeal meeting and site visit for the project. Attached is a copy of the meeting and site visit report.

Reasons for Appeal Submitted by Appellant:

Reason 1: The Corps claim of jurisdiction over Wetland A is an incorrect application of 33 CFR 328.3(a)(7).

Reason 2: The Corps claim of jurisdiction over Wetland A is outside of its scope of authority as delineated by the Supreme Court in *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), (SWANCC).

Information Received during the Appeal Review and Its Disposition: The District provided the Review Officer and the appellant with a copy of the administrative record for the permit decision. This information was considered in the appeal review. Information obtained during the appeal conference and site visit conducted on October 18, 2004 was also considered in the appeal review, to the extent that it provided clarification or explanation of the administrative record.

Summary of Decision: The appeal is found not to have merit since the District has not shown that wetland A is jurisdictional.

Appeal Decision Findings and Instructions for District Action:

Reason 1: The Corps claim of jurisdiction over Wetland A is an incorrect application of 33 CFR 328.3(a)(7).

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by District.

Discussion: In the Request for Appeal, dated July 22, 2004, Mr. Sherlock contends that the District's basis for determining jurisdiction over wetland A is not supported by the language in 33 CFR 328.3(a)(7). Section 328.3(a)(7) states: "Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) – (6) of this section." Mr. Sherlock further points out, in his appeal request that the District had stated in their jurisdictional determination dated May 28, 2004: "the Corps concurs with the delineated wetland boundaries as they are shown on Figure 7 dated March 11, 2002." In reviewing figure 7, wetland A is jurisdictional because it is adjacent to tributary F, not because it is adjacent to another wetland.

In the District's Approved JD letter, dated May 28, 2004, it is found (on page 2) that the District had determined that area F is part of a historical drainage, and that "F" is a tributary to Sutherland Creek and would be regulated as a "category 5" water of the U.S. The District's determination is supported by aerial photographs and other information in the District's administrative record. During the site visit conducted on October 18, 2004, the Review Officer observed that area F was a linear drainage-way that connected with Sutherlin Creek and was part of the tributary system. The Review Officer also observed that wetland A was located nearby tributary F and that wetland A was connected to tributary F with a small ditch.

Reason 2: The Corps claim of jurisdiction over Wetland A is outside of its scope of authority as delineated by the Supreme Court in *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), (SWANCC).

Findings: The appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by District.

Discussion: In the Request for Appeal, dated July 22, 2004, Mr. Sherlock states (on page 2 of his reasons for appeal) that in the SWANCC decision, “the [Supreme] Court found that Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate waters “inseparably bound up with the ‘waters’ of the United States.” *Id.* at 171.” He further stated: “The Court found no indication that Congress intended the Corps regulatory authority to reach an abandoned sand and gravel pit. *Id.* at 172.” Mr. Sherlock then stated that like the sand and gravel pit in the SWANCC case, wetland A is an isolated borrow pit that is outside the scope of the Corps regulatory authority. On page 1 of the reasons for appeal, Mr. Sherlock explained that the area known as wetland A was created, in March of 2000, by excavating the area to obtain fill material for an adjacent site. He stated that due to economic reasons, plans to build the project on the site had been delayed, and that over time (since March 2000) that an artificial isolated wetland formed in the borrow pit.

It is correct that accordance with the SWANCC decision, the Corps would not have jurisdiction over wetland A; in this case, if it had been determined that wetland A was isolated. However, as discussed under reason 1 above, the District has determined and has provided sufficient evidence to show that wetland A is adjacent to tributary F, and not isolated. Therefore, this reason for appeal does not have merit.

Overall Conclusion: After reviewing and evaluating information provided by the appellant, the District’s administrative record, and information obtained during the appeal conference, I conclude that this Request for Appeal does not have merit for the reasons provided in the discussion above. The District’s jurisdictional determination is upheld.

FOR THE DIVISION ENGINEER


Peter C. Gibson
Chief, Program Support Division

Enclosure

MEMORANDUM TO FILE

SUBJECT: Summary of the Appeal Meeting and Site Visit for the Homer Beldt Appeal Case, File No. 200300787

Date of Appeal Meeting and Site Visit: October 18, 2004

2. Purpose: The purpose of the meeting and site visit was to gather information regarding the Request For Appeal submitted by the Homer Beldt regarding an Approved Jurisdictional Determination (JD) made by the Corps of Engineers Portland District. The appeal meeting and site visit was held in accordance with Corps of Engineers (Corps) Administrative Appeal Regulation 33 CFR Part 331.

3. Attendees:

William Sherlock, Attorney Representing the Appellant

Larry DeMuth, Representing the Appellant

Janet Levinson Barnes of Land and Water Environmental Services, Representing the Appellant

Teena Monical, Corps of Engineers Portland District

Jim Goudzwaard, Corps of Engineers Portland District

Mores Bergman, Appeal Review Officer (RO), Corps of Engineers Northwestern Division

4. Background: On January 12, 2004, Ms. Barnes submitted a wetlands delineation report to the Portland District (District) on behalf of Homer Beldt, for a parcel of land located at Tax Lot 300, in Section 16, Township 25 South, Range 5 West, in Sutherlin, Douglas County, Oregon. The site is the location of a proposed mobile home park project by Mr. Beldt, for which he had made application to the District for a Section 404 permit for the project on December 9, 2003. The wetland report, dated February 14, 2002, had originally been prepared for the project site in connection with the permit application that Mr. Beldt submitted to the State of Oregon for his proposed project. On March 9, 2004, District representatives met with Ms. Barnes at the project site to review the findings of the report, since considerable time had passed since the report had been prepared.

After performing a site inspection, reviewing the wetlands delineation report, and obtaining additional hydrologic information, the District prepared an Approved JD for the site and sent it to Homer Beldt on May 26, 2004. In the Approved JD, the District identified 11 wetland areas on the site. The District determined that 8 of the wetlands were isolated and therefore not jurisdictional, and that the other 3 areas were waters of the United States (U.S.). They determined that one of the waters is an old drainage channel that is connected to a known water of U.S., and that the other two wetlands are adjacent to the drainage channel. On July 22, 2004, William Sherlock submitted a request for appeal, on behalf of Mr. Beldt, to the Corps Northwestern Division in

accordance with Regulation 33CFR 331. The appellant contends that one of the wetlands, known as wetland A, is isolated, and therefore is not a water of the U.S.

5. Summary of Appeal Meeting and Site Visit: The group met at the office of the Pine Park Mobile Home Estates in Sutherlin, Oregon. The property in question is adjacent to the Pine Park site, which is also owned by Mr. Beldt.

The Review Officer (RO) began the meeting by explaining the appeal review process. He then asked if the appellant's representatives if they would like to explain their reasons for appeal. Mr. Sherlock started by saying that Mr. Beldt has acted in good faith through out the permit process and had agreed to mitigate for jurisdictional areas that would be affected by his project. Mr. Sherlock then explained that wetland area "A" was created by excavating for a road base on uplands and the material excavated was used for fill on phase one of the project, in 2000. He said that it was Mr. Belt's intention to build the road later on the site, but due to economic conditions, he had delayed the project until this year. Mr. Sherlock further said that the State Department of Lands had considered area A not to be jurisdictional, so he wondered why the Corps would take jurisdiction. Mr. Sherlock said that area A is an artificial area, so should not be considered jurisdictional. He said that he was of the understanding that artificial areas, dug on the uplands, were not jurisdictional waters. Mr. Sherlock asked if the District considered artificial areas to be jurisdictional. He also asked if there were criteria used by the District to determine abandonment.

Mr. Goudzwaard of the District stated that such area normally would be exempt from jurisdiction, but once such an area is abandoned and turns into a wetland, then it could be jurisdictional. He also stated that the District usually considers that is the area in question has had no activity for 5 years that it is considered abandoned. Mr. Sherlock said that area A had not been abandoned for five years. Mr. Goudzwaard explained that since nearly 5 years have now passed since the excavation was dug, and since wetland A meets the definition of a wetland and was found to be adjacent to a tributary, that the District considered it jurisdictional. He said that wetland A is adjacent to the natural drain, known as area F, which is located nearby. He said that there also had been a drainage ditch dug connecting wetland A to tributary F. Mr. Goudzwaard clarified that area F is a tributary, not a wetland. He said that tributary F connects with Sutherlin Creek, which is a tributary to the Umpqua River. Mr. Goudzwaard also pointed out that wetland K, which is also located on the site, is also jurisdictional because it is also adjacent to tributary F. He further said that the other wetlands on the site were determined to be isolated, so they are not considered jurisdictional.

The group then inspected the site, beginning at wetland A. Wetland A is a shallow, long, rectangular shaped area. Mr. DeMuth, who is the manager for the mobile home park, described how the wetland was created. He said that they had excavated a trench the wide of the future roadway during the spring of 2000. He said they used the excavated material for fill at the adjacent phase one site. He said that they planned to come back at a later date and place the sub-base for the phase two roadway. Mr. DeMuth also said that during the rainy season the excavation fills up with water, so they had hand dug a small

ditch to drain the water away. The RO observed the ditch connected to the drain-way identified as area F on the wetland delineation map that was prepared by Land and Water Environmental Services. Ms. Barnes then explained that she had determined that wetland A did meet the 3 criteria contained in the Corps Wetland Manual, so she had identified it as a wetland, but she considered it non-jurisdictional. The group then looked at area F. Area F did look like a drainage way. It had a bed and bank and evidence of an ordinary high water mark (OHWM). Drain-way F was connected, by a culvert, to a creek 20 or 30 feet to the south of the Beldt property. The group next inspected wetland K, which was also connected by a shallow ditch to drain-way F. Wetland K appeared to be had been there for sometime.

After seeing all pertinent site features and having a short exist briefing, I thanked the participants for their assistance and left the site.



Mores Bergman
Appeal Review Officer