ADMINSTRATIVE APPEAL DECISION

POTLATCH CORPORATION

WALLA WALLA DISTRICT FILE NO. 020600150

DATE: February 04, 2004

Review Officer: James W. Haggerty, U.S. Army Corps of Engineers, North Atlantic Division (as designated by CENWD-DE)

Appellant: Potlatch Corporation

Appellant's Agent: Stoel Rives LLP, Attorneys at Law

Date of Receipt of Request for Appeal: 4 August 2003

Date of Acceptance of Request for Appeal: 30 September 2003

Appeal Conference/Site Visit Date: 30 October 2003

BACKGROUND INFORMATION:

The matter at hand is the jurisdictional status of an area referred to as the "Lost Creek wetland". It encompasses approximately 15 acres of a pulp, paper and wood products facility owned and operated by Potlatch Corporation, on a site just under two miles long and approximately 0.6 miles wide in a meander bend along the Clearwater River in Lewiston, Nez Perce County, Idaho. Potlatch has used the site for commercial purposes since the late 1920's. The appellant is appealing the district's determination that the Lost Creek wetland is jurisdictional for purposes of the Clean Water Act.

The subject request for appeal is the result of a reevaluation of a previous appeal case that was remanded by Northwestern Division to the Walla Walla District on 14 November 2002. The Division's decision is documented in an Administrative Appeal Decision document of the same date. As a result of their reevaluation, the district modified their basis for assertion of jurisdiction under the Clean Water Act. As indicated in their 4 June 2003 determination, the district now asserts the wetland area is adjacent [as defined in 33 CFR 328.3 (c)] to the Clearwater River, and as such is a regulated water of the United States in accordance with 33 CFR 328.3 (a)(7) since the Clearwater River is itself a water of the United States, because it is a tributary to the Snake River, a navigable water of the United States. Since the district modified their basis for asserting jurisdiction, it was determined that their action constituted a new approved jurisdictional determination, thereby providing the appellant with an opportunity to appeal the decision. The agent submitted a completed request for appeal on 4 August 2003.

APPELLANT'S STATED REASONS FOR APPEAL:

1. The Walla Walla District's determination that the Lost Creek wetland is adjacent to interstate or other waters of the United States is inconsistent with the district's prior position that the wetland is isolated.

2. The Walla Walla District's new jurisdictional determination is factually unsupportable for the following reasons:

a) The Lost Creek wetland does not abut the Clearwater River.

b) The district has failed to establish a hydrological connection with surface waters that are waters of the United States. The attenuated hydrological connection is between the Lost Creek wetland and the Corps Pond and aeration pond, which are excluded by definition from waters of the United States.

c) The district has presented no evidence that the Lost Creek wetland is inseparably bound up with and directly impacts the water quality of the Clearwater River.

3. The Walla Walla District's determination that the Lost Creek wetland is adjacent to the Clearwater River is inconsistent with *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) because there is no evidence of a significant nexus between the wetland and waters of the United States.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

Northwestern Division provided a copy of entirety of Walla Walla District's administrative record for both appeal cases. This information was reviewed and considered in the review process along with the results of the 30 October 2003 site inspection and appeal conference.

SUMMARY OF DECISION:

The appellant's request for appeal does not have merit because on 19 March 2003 the U.S. Environmental Agency (EPA) issued a jurisdictional determination stating that the Lost Creek wetland is adjacent to the Clearwater River and as such is a regulated water of the United States. This action obviated the need for the Walla Walla District to issue its own determination on 4 June 2003. However, the determination made by the district agreed with that of EPA and as such their decision to issue a separate determination is a harmless procedural error.

APPEAL DECISION FINDINGS:

The agent provided a 24-page memorandum, supporting documentation, and an affidavit in support of their request for appeal. The agent summarized the request as three overarching reasons for appeal, as indicated on Page 1 of this memorandum. One of the reasons was an assertion that the district had always considered the Lost Creek wetland to be hyrdologically isolated and that the district failed to provide adequate factual justification for "...its sudden change in position from treating the wetland as "isolated" to "adjacent." Another major point made by the agent is that according to the EPA/Corps memorandum of 19 January 2001, the district's original basis for assertion of jurisdiction under 33 CFR 328.3 (a)(3) included a determination that there was no alternative basis for jurisdiction pursuant to any other subsection of 33 CFR 328.3 (a). As such, the agent believes the district is precluded from now using 33 CFR 328.3 (a)(7) as a basis for regulating the Lost Creek wetland.

During the district's reevaluation of the remanded jurisdictional determination, they coordinated with EPA Region X. Under Section 402 of the Clean Water Act, EPA regulates discharges of pollutants into the Clearwater and Snake Rivers from a secondary treatment aeration pond on the Potlatch site. EPA indicated in their 19 March 2003 jurisdictional determination letter that the district had made a preliminary determination that the Lost Creek wetland is not adjacent to other waters of the United States and that the district considered the wetland to be isolated. EPA disagreed with the district and found that the Lost Creek wetland is "...clearly adjacent to the Clearwater River within the meaning of the term "adjacent" as defined at 33 CFR Part 328.3 (c) and 40 CFR Part 230.3 (b)..." The EPA letter emphasized the need for the agencies to reach agreement on the applicability of Clean Water Act jurisdiction on the site so as to avoid any unnecessary confusion to Potlatch Corporation.

The district specifically referenced EPA's determination in their 4 June 2003 approved jurisdictional determination and indicated agreement with EPA's decision.

The respective responsibilities of EPA and the Corps of Engineers for making jurisdictional determinations under the Clean Water Act are outlined in the *Memorandum of Agreement (MOA) Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404 (f) of the Clean Water Act*, issued in 1989. As stated within the MOA, former United States Attorney General Benjamin Civiletti has determined that the EPA Administrator has the ultimate authority for the Executive Branch under the Clean Water Act to determine the geographic jurisdictional scope of Section 404 Waters of the United States. Although EPA's ongoing jurisdiction on the site is pursuant to Section 402 of the Clean Water Act, their jurisdictional determination in this case under Section 404 is considered conclusive. Instead of issuing their own approved jurisdictional determination, the district should have informed Potlatch Corporation of EPA's conclusive findings relative to the scope of Section 404 jurisdiction over the Lost Creek wetland. However, I find the district's action to be a harmless procedural error that does not support a finding that this appeal request has merit.

OVERALL CONCLUSION:

After reviewing and evaluating the entirety of the administrative record provided by the Walla Walla District, I conclude that this request for appeal does not have merit since EPA already issued a jurisdictional determination under to Section 404 of the Clean Water Act in their ultimate authority to make such a determination.

Peter C. Gibson
Chief, Operations Division