

**ADMINISTRATIVE APPEAL DECISION**  
**POTLATCH CORPORATION, FILE NO. 020600150**  
**WALLA WALLA DISTRICT**  
**DATE: November 14, 2002**

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

**Appellant:** Potlatch Corporation, Lewiston, Idaho

**Appellant's Representative:** Kevin Beaton, Stoel Rives Attorneys

**Receipt of Request For Appeal:** July 26, 2002

**Action Appealed:** Approved Jurisdictional Determination

**Site Visit Date:** September 17, 2002

**Background Information:**

On May 28, 2002, the Corps of Engineers Walla Walla District (District) provided an approved Jurisdictional Determination (JD) to Potlatch Corporation (Potlatch) in connection with a proposed project to fill a wetland area that exists on Potlatch's Wood Products Division property located in Lewiston, Idaho. The District's approved JD includes a basis of JD, dated March 4, 2002, and concludes that the site in question contains an isolated wetland (hereafter called "Lost Creek Wetland") which is the Corps jurisdiction because it meets the definition of a water of the US contained in the Corps Regulatory Program Regulation 33CFR 328.3(a)(3)(iii).

On July 26, 2002, Mr. Kevin Beaton sent a Request for Appeal (RFA) of the approved JD to the Corps Northwestern Division, on behalf of Potlatch. The reasons for appeal are listed below. The Review Officer conducted a site visit on September 17, 2002.

**Reasons For Appeal Submitted by Appellant's Representative:** The following reasons are verbatim from the RFA form submitted July 26, 2002.

**Reason 1:** Use of incorrect facts. The Lost Creek Wetland has not, as the Corps assert's been "used extensively in the past as a log holding area" and cannot be used for this purpose in the future.

**Reason 2:** Incorrect application of the rule, 33CFR Part 328.3(a)(3)(iii), to the Lost Creek Wetland.

**Reason 3:** The assertion of jurisdiction over the Lost Creek Wetland is unconstitutional and an incorrect application of law in light of *Solid Waste Agency of Northern Cook County. V. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)*.

**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 Jurisdictional Determination, which included the basis for JD, maps and photographs of the area in question. This information was considered in the appeal review.

A site visit was conducted at the Potlatch property on September 17, 2002 as part of the appeal review. Information obtained during the site visit was considered in the appeal review.

On July 26, 2002, Mr. Beaton provided a Memorandum of Supplemental Information and supporting affidavits as an attachment to the RFA. These documents were considered in the appeal review to the extent that they provided clarification of the reasons for appeal.

**Summary of Decision:**

The appellant's appeal has merit for Reason 1 regarding the use of the Lost Creek Wetland for industrial purposes in interstate commerce. The District's approved JD does not provide adequate evidence or justification to support their JD decision, and is therefore being remanded to the Walla Walla District Engineer for re-evaluation.

**Appeal Decision Findings and Instructions for District Action (if required):**

**Reason 1:** Use of incorrect facts. The Lost Creek Wetland has not, as the Corps asserts, been "used extensively in the past as a log holding area" and cannot be used for this purpose in the future.

**Findings:** This appeal reason has merit for the reasons contained in the Discussion section below.

**Action:** The JD determination is remanded to the District to re-evaluate whether the Corps has jurisdiction over the Lost Creek Wetland as the approved JD does not provide adequate evidence or justification to support Corps jurisdiction.

**Discussion:** In the statement of Reason 1 and in the Memorandum of Supplemental Information (MSI), submitted with the RFA, the appellant's representative, Mr. Beaton, contends that the Lost Creek Wetland has not been used in the past as a log holding area. It is, however, found on pages 3 through 5 of the MSI, in Section III, entitled, "Factual

Background", that the area in question was once part of the log holding pond, and that sometime between 1974 and 1979 the area converted to a wetland. The fact that the wetland area was once part of the log holding pond is further supported on page 5 of the MSI, which states: "Potlatch has not even cleared the wetland of the deadheads and remnants of the old log pond, which are still visible in photographs of the area". The MSI also contains exhibits that support this statement regarding the change from a log holding pond to a wetland at the location in question. Mr. Beaton also stated in the MSI, that the water source for the log ponds was the Clearwater River until that water supply was cut off in 1972, and that the Lost Creek Wetland formed from a different water source. The District's administrative record contains photographs and drawings that support the fact that the area where the Lost Creek Wetland is located has continued to exist either as a log holding pond or as a wetland from approximately 1927 to the present. Although it is agreed that the main source of water for the log pond was diversion water from the Clearwater River, the record also shows that historically there has been another source that supplied water to the pond from a spring located in a hillside adjacent to the Potlatch property. Water from the spring has historically, and still does, flow down a channel to the Potlatch property, entering the property at the site of the Lost Creek Wetland. The District has shown in their basis of JD that the Lost Creek wetland clearly meets the definition of a wetland, and that the water from Lost Creek supports the wetland. These facts were verified during the site visit held on September 27, 2002. After reviewing the information provided in the MSI and in the District's administrative record, I conclude that the wetland area in question is in fact the same aquatic area (although it now has the characteristics of a wetland instead of an open pond) that was part of the log pond that was used by Potlatch in interstate commerce until the mid-1970's.

Mr. Beaton has also provided information in the MSI in support of their claim that the Lost Creek Wetland cannot be used as a log holding area in the future. In the MSI and in Exhibit "O", attached to the MSI, it is further indicated that the Potlatch Lewiston Mill was rebuilt in 1987 and no longer utilizes ponds for storage or sorting of logs.

Mr. Beaton also states that because of the current design of the mill, it would not be possible to use the wetland site as a log holding or forebay pond without reconfiguration and relocation of the mill at considerable expense. He also indicates that the wetland is located on Potlatch property and is not being used by Potlatch or any other industrial user for any purpose. The current operation of the mill and the current non-use of the Lost Creek Wetland for industrial purposes, as described above, were verified during the site visit on September 26, 2002.

The District states the following in their basis of JD dated March 4, 2002: "This wetland does fit the definition of a jurisdictional intrastate wetland as found in 33CFR 328.3(a)(3)(iii) since it has been and still could be used for industrial purpose by industries in interstate commerce". The District's basis of JD further states: "This wetland is on land owned by the Potlatch Corporation and has been used extensively in the past for a log holding area for the lumber industry and could be used again for this purpose or other purposes related to the production of lumber." The District does not,

however, provide adequate documentation to support their statements regarding future use. Based on the fact that Potlatch no longer uses ponds for log storage and handling at the site, nor do they have the capability to resume that type of operation at the mill without considerable reconfiguration and expense, it is believed unlikely that the wetland area would be used in the future for this purpose. The District's basis of JD also does not mention any other interstate commerce connection for the wetland.

The Administrative Appeal Process Regulation 33 CFR Part 331.9 provides that the Division Engineer will disapprove the district engineer's decision if (among other reasons) the decision is not supported by substantial evidence in the administrative record. In this case, the District's decision to exert Section 404 of the Clean Water Act (CWA) jurisdiction over the wetland in question, based on possible future use for industrial purposes by industries in interstate commerce, is not supported by substantial evidence in the District's administrative record. The Jurisdictional Determination is therefore being remanded to the District Engineer for re-evaluation.

**Reason 2:** Incorrect application of the industrial purpose rule, 33CFR Part 328.3(a)(3)(iii), to the Lost Creek Wetland.

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

**Action:** No action required by the District relative to this appeal reason.

**Discussion:** Mr. Beaton indicated in the SMI (pages 9 and 10) that the industrial purpose rule (33 CFR Part 328.3(a)(3)(iii)) has historically focused on water quality issues and the protection of navigability of waterways used for commerce. In the SMI, Mr. Beaton mentioned two Environmental Protection Agency (EPA) jurisdictional cases from the 1970's that involved industrial uses of a stream and a lake. He indicated that in those cases the determinations regarding jurisdiction were based on the possible effect of the uses on water quality and navigability. Mr. Beaton then concluded: "Based on the limited historical application of the "industrial purpose" regulation the Lost Creek Wetland clearly does not fall within the regulation".

In reviewing the regulation at 33 CFR 328.3(a)(3), it is not found that the affects of the use of "waters" only applies to impacts to navigation and water quality, or that this portion of the regulation is not applicable to isolated wetlands. It is believed that Mr. Beaton has taken too narrow of interpretation of the Corps regulation in reaching the conclusion that he did. Wetlands are one of the categories of "other waters" listed in Part 328.3(a)(iii) that are subject to review when determining if any of the uses described in sub-paragraphs "(i)" through "(iii)" are applicable. The definition of "waters of the United States" in the regulation also states under Part 328.3(a)(3) that these listed "other waters" are waters of the United States if "the use, degradation or destruction of which could affect interstate or foreign commerce".

Since the regulation clearly indicates that wetlands are included in the category of "other waters" that are subject to the provisions of 33 CFR 328.3(a)(3)(i) through (iii), and the argument provided by Mr. Beaton in the SMI does not provide proof that the regulation was incorrectly applied to the Lost Creek Wetland, I find that this appeal reason does not have merit.

**Reason 3:** The assertion of jurisdiction over the Lost Creek Wetland is unconstitutional and an incorrect application of law in light of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001)

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

**Action:** Although I have determined that appeal "Reason 3" does not have merit, the decision is being remanded to the District for re-evaluation regarding "Reason 1" because the District's basis of JD does not provide adequate evidence to support their determination. In that re-evaluation, I am further requiring that the District address the implications of the SWANCC decision and the joint Corps and EPA guidance memorandum dated January 19, 2001, on the District's JD.

**Discussion:** In the SMI (pages 16-21), Mr. Beaton has presented the argument that the wetland in question is no longer subject to CWA jurisdiction as a result of the SWANCC decision. He states on page 19 of the SMI: "After SWANCC the Corps cannot rely on the Commerce Clause to expand their jurisdiction to waters "utilized for industrial purposes" where, as here, the waters are isolated and non-navigable. The industrial purpose rule must, instead, be tied to Congress' "commerce power over navigation"." Mr. Beaton further states on page 21 of the SMI: "There is no evidence in the record of any present or past activity involving the wetland and no impact on any navigable water is present; therefore, whether individually, or in the aggregate, the Corps cannot establish a substantial affect on interstate commerce. Furthermore, the location of the wetland on the Potlatch facility and the general commercial activity at Potlatch does not establish a sufficient link to interstate commerce according to the Court's decision in SWANCC." Mr. Beaton then concludes: "The Lost Creek Wetland has absolutely no impact on interstate commerce and it would, therefore, be unconstitutional for the Corps to assert jurisdiction over the Lost Creek Wetland."

The District's administrative record, and in particular the basis of JD, does not contain any discussion regarding how the SWANCC decision might, or might not, affect the determination of jurisdiction for the Lost Creek Wetland. The District did state in their basis of JD that: "This wetland does fit the definition of a jurisdictional intrastate wetland as found in 33 CFR 328.3(a)(3)(iii) since it has been and still could be used for industrial purpose by industries in interstate commerce". The District further stated: "This wetland is on land owned by the Potlatch Corporation and has been used extensively in the past for a log holding area for the lumber industry and could be used again for this purpose or other purposes related to the production of lumber." The District did not, however, provide documentation as to how the "use, degradation or destruction" of the Lost Creek

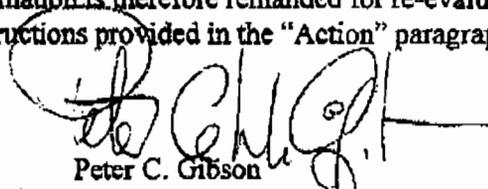
Wetland "could affect interstate or foreign commerce", to show the commerce connection in accordance with the provisions of 33 CFR 328.3(a)(3).

In reviewing the guidance provided by the joint memorandum from Corps and EPA general counsels dated January 19, 2001, Subject: Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters, it is found that jurisdiction over "other waters" as described in Part 328.3(a)(3) may still be valid on a case-by-case basis post-SWANCC. The memorandum states at paragraph 5.b (1) that: "With respect to waters that are isolated, intrastate, and non-navigable -- jurisdiction may also be possible if their use, degradation, or destruction could affect other "waters of the United States," thus establishing a significant nexus between the water in question and other waters of the United States."

As discussed under "Reason 1" above, it is believed that the District has adequately shown that the Lost Creek Wetland was once used for industrial purpose by an industry in interstate commerce. The District did not however provided adequate evidence of present or future industrial use of the wetland by industries in interstate commerce or show that the use, degradation or destruction of the wetland could affect other waters of the United States. Although the District did not provide sufficient evidence to support their JD decision as I stated under Reason 1 above, I also find that the appellant's representative has not presented adequate evidence to support his conclusion that "assertion of jurisdiction over the Lost Creek Wetland is unconstitutional and an incorrect application of law". I therefore find that appeal Reason 3 does not have merit. Although this appeal reason does not have merit, I am requiring that the District address the implications of the SWANCC decision and the guidance memorandum provided by the EPA and the Corps, dated January 19, 2001, as a part of the re-evaluation that will be performed as a result of the findings under Reason 1 above.

**Overall Conclusion:**

After reviewing the information contained in the Walla Walla District's administrative record, information presented by the appellant, and observations made during the site visit, I conclude that this Request For Appeal has merit regarding Reason 1 and does not have merit regarding Reasons 2 and 3, for the reasons provided in the discussions above. The District's jurisdictional determination is therefore remanded for re-evaluation by the District in accordance with the instructions provided in the "Action" paragraphs above.



Peter C. Gibson  
Chief, Operations Division

Enclosures