

**ADMINISTRATIVE APPEAL DECISION FOR
APPROVED JURISDICTIONAL DETERMINATION
FOR THE PETERSON PROPERTY**

WEST VALLEY CITY, SALT LAKE COUNTY, UTAH

ARMY CORPS OF ENGINEERS FILE NO. 200050067

SACRAMENTO DISTRICT

August 28, 2002

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California

District Representatives: Jim Thomas and Nancy Kang, U.S. Army Corps of Engineers (Corps), Sacramento District (District) Bountiful, Utah Field Office

Appellant Representative: Randy Peterson

Authority: Clean Water Act (CWA), Section 404

Receipt of Request For Appeal (RFA): May 7, 2002

Appeal Conference Date: July 11, 2002 **Site Visit Date:** July 11, 2002

Background Information: The District's initial communication with this Appellant identified in the administrative record was in December 1998. The Environmental Protection Agency (EPA) resolved an enforcement action regarding this property and Appellant in October 2001. The EPA provided geographic Clean Water Act Jurisdictional Determinations (CWA JD) to this Appellant in September and November 2001. The EPA determined that there was a tributary connection meeting the requirements of the Clean Water Act between the Appellant's property and the Great Salt Lake. After resolution of the enforcement action, the EPA referred the Appellant to the District regarding any further questions on CWA jurisdiction.

The District subsequently issued an approved geographic CWA JD to this Appellant, reaffirming the EPA's conclusion. The Appellant asserts that no such jurisdictional connection has ever been present.

Summary of Decision: I concluded the EPA's prior CWA JD issued during the enforcement case was conclusive. The Appellant provided no new information to the District that demonstrated the EPA's CWA JD issued during the enforcement case should have been reconsidered. Therefore, there was no basis for the District to reconsider the EPA's conclusion. In the absence of such new information, the District should not have reconsidered the EPA's CWA JD and issued a new CWA JD. However, as the District's CWA JD was consistent with the prior EPA CWA JD, its issuance was a harmless procedural error. The appeal did not have merit.

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

Reason 1: The Appellant asserts that no water leaves his property and that no CWA jurisdictional tributary connection exists between his property and the Great Salt Lake. In addition, even if there had been a surface water connection, the Appellant asserts that the channel extending across his property, and other down-gradient channels are man-made and cannot correctly be considered within the jurisdiction of the Clean Water Act. The Appellant further asserts that any waters or wetlands present on his site are isolated waters and do not have a sufficient connection to interstate commerce to be subject to Clean Water Act jurisdiction.

FINDING: The appeal does not have merit.

ACTION: None required.

DISCUSSION: The relatively flat, Peterson property is located on Road 7200 West in West Valley City, Salt Lake County, Utah. The surrounding land area consists of a mix of undeveloped land and commercial developed land. A channel crosses the Peterson property from southeast to northwest and connects to a culvert at the northwest end of the Appellant's property.

The EPA explained the basis of its CWA JD for that enforcement action in detail in its September 14, 2001, letter to the Appellant. The EPA's November 9, 2001 letter reconfirmed EPA's CWA JD to the Appellant, and instructed the Appellant to contact the Corps of Engineers regarding further jurisdictional and permitting issues. The Appellant then contacted the District and requested a jurisdictional determination from the Corps. The District issued an approved CWA JD on March 8, 2002.

EPA and the Corps responsibilities for making specific CWA JD's were assigned in two Memorandums of Agreement (MOAs) issued in 1989, the *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* (Jurisdiction MOA) and the *MOA Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement of the Clean Water Act* (Enforcement MOA).

As stated in the Jurisdiction MOA, the Attorney General for the United States has determined that the Administrator for the EPA has the ultimate authority for the Executive Branch under the CWA to determine the geographic jurisdictional scope of section 404 waters of the United States. While these MOA's have expired, they still represent the current allocation of responsibilities between the Corps and the EPA. Under the Enforcement MOA, a lead enforcement agency decision with regard to any issue in a particular case is final for that case. As the EPA was the lead enforcement agency for the enforcement case regarding the Peterson property, its CWA JD was conclusive.

A Corps CWA JD is normally valid for a period of five years from the date of its issuance, as explained in the Corps Regulatory Guidance Letter 94-1, unless new information warrants revision of the determination before the expiration date. The Appellant provided no new information to the District that demonstrated the EPA's CWA JD issued during the enforcement case should have been reconsidered. The EPA's CWA JD should have been given the same deference as a Corps CWA JD, and not reconsidered for a period of five years unless sufficient new information was provided to the District to warrant issuance of a new CWA JD.

The Appellant identified no changes in the condition of the property, nor any changes in applicable laws, regulations, policies, or new court decisions which constituted new information that might reasonably require the District to reconsider the EPA's CWA JD from the enforcement case.

The Appellant did provide and cite some legal information that he believed supported his position that he was not within CWA jurisdiction and that the EPA's position was no longer valid. However, this material was not provided to the District prior to its issuance of the March 8, 2002 CWA JD.

I conclude the District's March 8, 2002 approved CWA JD was issued in error. The EPA's prior CWA JD issued during the enforcement case was conclusive and no new information was provided that would merit a reconsideration of that action. However, as the District's CWA JD was consistent with the prior EPA CWA JD, its issuance was a harmless procedural error.

Information Received and its Disposition During the Appeal Review: In addition to the Administrative Record, the following additional information was submitted during the appeal. Under 33 CFR 331, clarifying information can be considered by the Corps in evaluating an administrative appeal, while new information must be referred back to the appropriate Corps District for consideration.

- 1) The Appellant submitted clarifying information regarding the administrative record that consisted primarily of EPA letters and the Appellant's responses during the recently resolved EPA enforcement action concerning the Appellant and this property; and additional communications with the District in 1998 and 1999. These materials were considered clarifying information and considered during the administrative appeal.
- 2) The Appellant submitted as clarifying information, the *Interstate General Company (IGC) L.P. and St. Charles Associates L.P. Brief of Appellants to the United States Court of Appeals for the Fourth Circuit*, dated September 17, 2001. There was no information in the Administrative Record that this document had been previously provided for consideration by the District. The Review Officer initially reviewed this material to determine whether it should be considered clarifying information or new information. This determination

became moot when the Review Officer was notified just before issuance of this decision that the U.S. Court of Appeals for the Fourth Circuit had ruled on that matter and had rejected IGC's position. Therefore, this material was not considered further as it was inconsistent with the Fourth Circuit Court's determination in that matter.

- 3) The Appellant also cited *United States v. Newdunn Associates* (195 F. Supp. 2d 751), a district court decision from the Eastern District of Virginia, issued April 3, 2002. This was considered new information, as it was not available to the District at the time they issued their March 8, 2002 CWA JD. Although that decision would not be the controlling legal authority in Utah, the District could consider the logic used in that decision if the Appellant could demonstrate how it applies to his situation. The District would also have to consider other federal court decisions relevant to the situation, not just the decision specifically mentioned by the Appellant.

Conclusion: I conclude the EPA's CWA JD made during the enforcement case was conclusive for this action and no new information was provided to the District that would merit a reconsideration of the EPA's CWA JD. The appeal did not have merit.

Original signed by

Robert L. Davis
Brigadier General, U.S. Army
Division Engineer