

**ADMINISTRATIVE APPEAL DECISION**

**FIRST CONTINENTAL INVESTMENT CO., LTD.**

**US ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT**

**8 MARCH 2007**

**Review Officer:** James E. Gilmore, US Army Corps of Engineers, Southwestern Division

**Appellant:** First Continental Investment Co., Ltd

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

**Background Information:** On 28 January 2004, the US Army Corps of Engineers' Galveston District (the District) confirmed that an unauthorized activity had occurred on property located south of Needham Road, east of the Missouri Pacific Railroad tracks, along Carters Slough, Montgomery County, Texas (the site). The unauthorized activity involved the discharge of dredged or fill material into waters of the United States without Department of the Army authorization.

Mr. Steven Lack, President, Wood Lake Village Developer, Inc. was the original owner/Appellant for this action; however, the development was forced into bankruptcy. In May 2006, the US Bankruptcy Court issued an order permitting the foreclosure of the property by auction. That auction took place on 4 July 2006. The successful bidder and current owner is First Continental Investment Co., Ltd. As an affected party, First Continental Investment Co., Ltd. was allowed to continue the appeal process.

**Summary of Decision:** The District's administrative record supports its jurisdictional determination (JD) that wetlands regulated under the Clean Water Act (CWA) are present on the site.

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

**Reason 1:** "The foundation of the JD is the U.S. Geological Survey (USGS) quadrangle map of Tamina, Texas, 1961, and photo revised in 1979. As will be shown in the discussion below, the CE's [US Army Corps of Engineers] reliance on this map is contrary to the Corps of Engineers' standard expressed in the definition of normal circumstances at 33CFR 328.3(b) (c) and the Regulatory Guidance Letter 86-9 entitled "Clarification of 'Normal Circumstances' in the Wetland Definition."

**Finding:** This reason for appeal has partial merit.

**Action: The use of the older maps did not impact the results of this case. However, the District needs to review its policy regarding the use of older USGS maps to make final approved JDs and ensure the current conditions are adequately represented on the older USGS map.**

**Discussion:** Appellant's argument is essentially that the District overly relied on out-dated maps and aerial photography, in particular the 1961 and photo revised 1979 Tamina quadrangle map, to complete its approved JD. Appellant argues that the District's over reliance on the Tamina quadrangle maps was not in compliance with the Corps' "standard" regarding normal circumstances. To support its argument, Appellant stated in the Request for Appeal (RFA) that use of the Tamina map "guided the CE in all aspects of their after-the-fact delineation" which "led them to issue a cease and desist order." In addition, Appellant argued that "[T]he influence of this USGS map was so strong that it was used as the basis for the conclusion to claim that an unnamed tributary to Carters Slough existed on the site prior to the alleged violation."

The term "normal circumstances" appears in the Corps' definition of "wetlands" under Section 328.3(b).<sup>1</sup> The term "wetlands" is defined to mean:

...those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and **that under normal circumstances** do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas (emphasis added).

The term "normal circumstances" was first defined in guidance contained in Regulatory Guidance Letter (RGL) 82-2. RGL 82-2, which is no longer considered valid by the Corps, was replaced by RGL 86-9<sup>2</sup>. Both of these RGLs state that it is the Corps' intent to regulate the discharge of dredged or fill material into special aquatic sites, including wetlands, as the site exists, not as it might have existed in the past. Guidance contained in RGL 86-9 states:

The use of the phrase "under normal circumstances" is meant to respond to those situations in which an individual would attempt to eliminate the permit review requirements of Section 404 by destroying the aquatic vegetation, and to those areas that are not aquatic but experience an abnormal presence of aquatic vegetation.

It is further stated that:

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<sup>1</sup> This is the same definition contained in the Corps 22 July 1982 regulations at 33 CFR 323.2(c).

<sup>2</sup> RGL 05-06, issued on 7 December 2005, provided guidance on the status and use of RGLs issued prior to 2002. Attached to RGL 05-06 was a list of expired RGLs whose guidance is still considered applicable to the Corps' Regulatory Program. Guidance contained in RGL 86-9 is still considered applicable.

“...if a former wetland has been converted to another use (other than by recent **unpermitted** action not subject to 404(f) or 404(r) exemptions) and that use alters its wetland characteristics to such an extent that it is no longer a “water of the United States,” that area will no longer come under the Corps regulatory jurisdiction for purposes of Section 404.”

The approved JD for this action was issued for an unauthorized (unpermitted) activity, which meant all or part of the project site had been impacted prior to Appellant applying for and receiving Department of the Army authorization to discharge dredge or fill material into waters of the United States. As previously stated, the Corps’ policy regarding “under normal circumstances” was written in part to address situations in which an unauthorized activity has taken place and that activity either destroyed or obscured the aquatic vegetation that would normally be found on the project site.

As stated in the background section of this document, Appellant had prior knowledge that wetlands existed on the project site. Because Appellant chose not to submit a wetland determination to the District prior to starting work, it appears that, as stated in RGL 86-9, Appellant was attempting to avoid Section 404 review by destroying the aquatic vegetation. Based on the guidance contained in RGL 86-9, the District did adhere to the Corps’ standard regarding “normal circumstances.”

In regards to the issuance of the cease and desist order, there is sufficient supporting documentation in the administrative record to show that an unauthorized activity occurred on the project site and that the use or non-use of the Tamina map would not have influenced the findings that an unauthorized activity had occurred on the site. Section 326.3(c) of the Corps’ regulations states that “[O]nce the district engineer has determined that a violation exists, he should take appropriate steps to notify the responsible parties.” Section 326.3(c)(1) – (6) discusses the type of notification that should be used depending on the situation. In this instance, Section 326.3(c)(1) applies. This section states:

If the violation involves a project that is not completed, the district engineer’s notification should be in the form of a cease and desist order prohibiting any further work pending resolution of the violation in accordance with the procedures contained in this part.

The District’s issuance of its cease and desist letter was done in accordance with Corps regulation governing unauthorized activities.

Appellant also stated that the District’s over reliance on the Tamina map led the District to conclude that the unauthorized work impacted an unnamed tributary. Appellant stated that the District’s reliance on the Tamina map led the District to conclude in its 19 October 2004 approved JD letter that the unauthorized work

resulted in the discharge of fill material into 2,591 linear feet of an unnamed tributary of Carters Slough.

Documentation contained in the administrative record support Appellant's assertion that the District did use the Tamina map to support its initial findings that a portion of the unauthorized work impacted an unnamed tributary. As pointed out by the appellant, in a 21 September 2004 Memorandum for the File (Memo), the District Project Manager listed several maps and photographs that were used to complete an office JD for the project. It was stated in the Memo that:

Using Section F and Section E of the manual, the information supplied and the 1979 Tamina U.S.G.S. topographic map, we conclude that the project resulted in the placement of fill material within approximately 2,591 linear feet of an unnamed tributary of Carters Slough, approximately 866 linear feet of Carters slough and approximately 57 acres of adjacent wetlands located within the areas defined as the residential area and the ditch.

However, based on additional site visits and information provided by the appellant's consultants, the District issued a new approved JD letter on 10 February 2005. In that letter the District concluded that there was "insufficient evidence to indicate that the project resulted in the deposition of dredged or fill material within Carters Slough or the unnamed tributary of Carters Slough as outlined in our October 2004 verification letter."

Although the District corrected its initial determination which stated the unauthorized work had impacted an unnamed tributary, it still needs to review its policy regarding the use of quad maps and aerial photography that is greater than five years old to make final approved JDs. The Corps of Engineers 1987 Wetland Delineation Manual (WDM) directs District personnel to use the most recent USGS maps because older maps may show features that no longer exist.

**Reason 2: "The CE did not adequately consider relevant information from the U.S. Fish and Wildlife Service (USFWS) National Wetland Inventory (NWI) maps concerning the extent of and location of waters of the U.S. and wetlands on the Wood Lake Village subdivision tract prior to development."**

**Findings: This reason for appeal does not have merit.**

**Action: No action is required.**

**Discussion:** Appellant stated that the District "...did not properly consider relevant information from the USFWS/NWI mapping." It was further stated that "[O]n page 3 of the 1987 WDM, the National Wetland Inventory (NWI) maps are accorded credibility and are recommended for use when applying the criteria of the manual". Appellant continued by stating "[T]his section of the 1987 WDM

indicates that the FWS/NWI maps can be used (“contribute significantly” to the application of the manual itself) because they employ a scientific system for identifying and classifying wetlands and other special aquatic sites (Cowardin et. al. 1979). This system only requires one of three parameters stipulated in the 1987 WDM to be met in order to be classified as a wetland.” It is true that the WDM does recommend the use of the USFWS’s NWI maps when making a wetland delineation. However, in the Methods part of the manual it states:

Caution: Due to the scale of aerial photography used and other factors, all NWI map boundaries are approximate. The optimum use of NWI maps is to plan field review (i.e., how wet, big, or diverse is the area?) and to assist during field review particularly by showing the approximate area extent of the wetland and its association with other communities.

In addition, it is stated in the NWI Maps Made Easy; A User’s Guide to National Wetlands Inventory Maps of the Northeast Region that:

“NWI maps are prepared “primarily by stereoscopic analysis of high altitude aerial photographs. Wetlands were identified on the photographs based on vegetation, visible hydrology, and geography in accordance with **Classification of Wetlands and Deepwater Habitats of the United States, (FWS/OBS-79/31 December 1979)**. The aerial photographs typically reflect conditions during the specific year and season when they were taken. In addition, there is a margin of error inherent in the use of the aerial photographs. Thus a detailed on the ground and historical analysis of a single site may result in revision of the wetland boundaries established through photographic interpretation. In addition, some small wetlands and those obscured by dense forest cover may not be included on this document.”<sup>3</sup>

As part of its argument that the District should have relied more on the USFWS’s NWI map for the project site, Appellant stated “[t]his system only requires one of three parameters stipulated in the 1987 WDM to be met in order to be classified as a wetland.” The parameter used to identify wetlands on NWI maps is vegetation.” Based on the definition of normal circumstances, sites identified as wetlands on a NWI map may or may not be the “normal circumstances” of the site. As previously stated, RGL 86-9 defines the term “normal circumstance” as:

The use of the phrase “under normal circumstances” is meant to respond to those situations in which an individual would attempt to eliminate the permit review requirements of Section 404 by destroying the aquatic vegetation, and to those areas that are not aquatic but experience an abnormal presence of aquatic vegetation.

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<sup>3</sup> This statement is included on all NWI maps under the “Special Note” section of the map.

In this instance, the important part of the definition is “those areas that are not aquatic but experience an abnormal presence of aquatic vegetation. That is why the Corps requires all three criteria (hydrophytic vegetation, hydrology and hydric soil) to be present before a site is identified as a wetland under Section 404 of the CWA, unless it is an atypical situation.

Appellant points out that the NWI map only identified approximately 18 acres of wetlands on the project site; this may or may not be accurate. As stated in the “Special Note” section of the NWI map “some small wetlands and those obscured by dense forest cover may not be included on this document.” The project site is a forested area.

It is also important to note that NWI maps are generally composites of USGS base maps. In this case the NWI map is a composite of the USGS Tamina map and shows the same features as the USGS map. So reliance on the USFWS’s NWI could result in the same reason for appeal as contained in Appellant’s reason number one above. I find that the District followed the Corps’ regulations, guidance and policies regarding the use of USFWS NWI maps. Therefore, this reason for appeal does not have merit.

**Reason 3: “The CE dismissed and did not consider the Turner Collie & Braden Inc. (TCB) (after the fact) preliminary jurisdiction report (PJD) (Attachment 9D) that utilized methods and technology consistent with the standards required by the 1987 Corps’ *Wetland Delineation Manual* – online edition, (WDM). As the detailed discussion below will demonstrate, this PJD should have been considered and its results fully evaluated because it provides compelling evidence to support the determination that 14.323 acres of wetlands formerly existed on the subdivision portion of the tract as opposed to the approximately 40 to 50 acres claimed by the CE’s JD.”**

**Findings:** This reason for appeal has partial merit.

**Action:** The District needs to review the methodology used to complete the approved JD for this action and explain why it did not verify one of the appellant’s consultants’ wetland delineation reports. In addition, the District needs to explain why it used parts of two different reports to complete its approved JD.

**Discussion:** A review of the administrative record for this action found two Memorandums for the Record which showed that the Turner Collie & Braden Inc. (TCB) preliminary jurisdictional report had been reviewed by the District. The first Memorandum, dated 8 September 2004, stated:

Turner Collie and Braden, on behalf of Woodlake Development, submitted a revised delineation report on 7 September 2004. This is the fifth revision of the delineation report for the project site. A review of this report indicates that this revision does not meet the criteria for a delineation as outlined in the 1987 Corps of Engineers

Wetland Delineation Manual (Manual). Several of the items includes, but is not limited to:

1. The site is greater than five acres, however, Part IV, Section D, Subsection 2 for areas greater than five acres, as outlined in the Manual, was not used. (e.g. No baseline or transects were established or sampled)
2. The site has undergone notable anthropogenic modifications, however, Part IV, Section F of the Manual was not used properly. (e.g. Ditching was not properly accounted for)
3. WETS tables were completed using six months of rainfall data instead of three.

As a result of these problems, the fifth delineation report cannot be verified as submitted.

The second Memorandum, dated 21 January 2005, documented a 20 January 2005 site visit that was made by the District and personnel from TCB. According to the information contained in this Memorandum, the District again determined that the delineation completed by TCB was not in compliance with the criteria contained in the Corps' 1987 manual, in particular, the TCB delineation did not adhere to the atypical approach outlined in Section F of the manual.

The 1987 Manual is the current Federal delineation manual used to identify and delineate wetlands that are potentially subject to the Corps' jurisdiction under Section 404 of the Clean Water Act Section. Use of the 1987 Manual to identify and delineate these wetlands is mandatory.<sup>4</sup> There is no evidence in the administrative record to indicate that the District "dismissed and did not consider" the TCB preliminary JD.

Although there is no evidence that the District did not review and consider the TCB preliminary JD, documentation within the District's 1 February 2005 Memorandum for the File raises questions regarding how the District applied Corps regulations in verifying the wetland delineation and its approved JD. In particular it was stated in the Memorandum that:

Wetland data points from the Berg•Oliver Associates delineation report, submitted 7 July 2004, and the wetland data points from the TC&B delineation report, submitted 7 September 2004, were used in conjunction with wetland data points taken by the Corps on 30 January 27 and May 2004 site visits. The wetland data, submitted on behalf of Woodland Lakes Development, was used despite not

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<sup>4</sup> 27 August 1991 Memorandum for See Distribution signed by John P. Elmore, Chief, Operations, Construction and Readiness Division, Directorate of Civil Works stated "[U]se of the 1987 Manual is mandatory..."

being collected, interpreted and/or cataloged per the Manual. These data points were mapped on the 1995 DOQQ and 2002 LIDAR. The areas that included wetland data points that met the criteria of the Manual, were located within a wetland signature on the 1995 DOQQ and were located below the base flood elevation, were determined to be adjacent wetlands.

It is not clear from the record why the District used different data points from different sources. Therefore, the District needs to explain why it used three different wetland data point sources to complete its approved JD for this action. The District should have verified one of the wetland delineations submitted by Appellant and not have used data from 3 different sources.

**Reason 4: “The CE’s JD misinterprets data concerning site inundation, does not explain the basis for its wetland/non-wetland boundary decisions, uses 9-year-old aerial photos and a 24-year-old USGS topo map as the foundation for its JD instead of using recent and available aerial photos of the Wood Lake Village subdivision tract.”**

**Findings: This reason for appeal does not have merit.**

**Action: No action required.**

**Discussion:** The District used the current on-line version of the 1987 Manual as posted on the US Army Corps of Engineers, Environmental Research and Development Center, Environmental Laboratory website. The on-line version of the manual reflects several modifications to the original 1987 Manual that have been directed by US Army Corps of Engineers Headquarters. What has not changed is that the 1987 Manual identifies three mandatory criteria – hydrophytic vegetation, hydric soils and hydrology – that must be evaluated when determining whether a wetland is present. The 1987 Manual identifies a variety of indicators that would show the presence or absence of each criteria. The 1987 Manual provides methods for evaluating disturbed sites, such as found on Appellant’s property. The District used the procedures in the 1987 Manual for an “atypical” determination because some of the vegetation on the site had been impacted by the unauthorized work completed by the appellant.

The District considered the available information on wetland hydrology sufficient to support its conclusion that wetland hydrology is present on all the areas it identified as jurisdictional wetlands. Appellant feels that there was sufficient evidence to establish that wetland hydrology was present only in the smaller area it had identified as wetlands.

As pointed out by Appellant in its RFA, the 1987 Manual contains additional clarifying statements describing wetland hydrology as follows:

The term “wetland hydrology” encompasses all hydrologic characteristics of areas that are periodically inundated or have soils satu-

rated to the surface at some time during the growing season....Areas with evident characteristics of wetland hydrology are those where the presence of water has an overriding influence on characteristics of vegetation and soils due to anaerobic and reducing conditions respectively. Such characteristics are usually present in areas that are inundated or have soils that are saturated to the surface for sufficient duration to develop hydric soils and support vegetation typically adapted for life in periodically anaerobic soil conditions. Hydrology is often the least exact of the parameters, and indicators of wetland hydrology are sometimes difficult to find in the field. However, it is essential to establish that a wetland area is periodically inundated or has saturated soils during the growing season.

The definition for wetland hydrology contained in the 1987 Manual states “[a]reas with evident characteristics of wetland hydrology are those where the presence of water has an overriding influence on characteristics of vegetation and soils due to anaerobic and reducing conditions respectively.” During site visits to Appellant’s property, the District documented the “characteristics of vegetation and soils due to anaerobic and reducing conditions” in the areas identified as jurisdictional wetlands.

Appellant also stated:

The 1987 WDM also provided guidance concerning the length of time an area must be inundated or saturated to the surface at some time during the growing season. Table 5 indicates that areas saturated more than 12.5 percent of the growing season have wetland hydrology while those areas that are saturated for less than 5 percent of the growing season do not (p. 30, 1987 WDM). The manual also states that many areas saturated from 5 percent to 12.5 percent of the growing season are not wetlands.

What Appellant failed to note is that in the “USER NOTES” block (located on page 30 of the 1987 WDM) it states:

Based on Table 5 and on paragraph 55, Step 8.i., 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 hydrophytic vegetation and hydric soil requirements. (HQUSACE, 7 Oct 91 and 6 Mar 92).

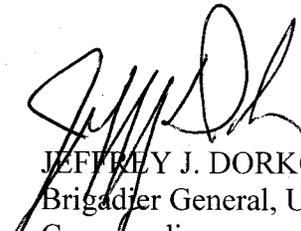
Therefore, Appellant’s contention that “an area must be inundated or the soils saturated to the surface in more than half the years (1 out of 2, 5 out of 10, or 50 out of 100) for more

than 12.5 percent of the growing season, to conclude with reasonable certainty that the area has wetland hydrology” is incorrect.

The Corps 1987 Wetland Delineation Manual lists primary and secondary field indicators of wetland hydrology that can be used to identify the hydrology criteria. Wetland hydrology can be considered sufficient evidence that wetland hydrology is present. In the absence of a primary indicator, two secondary indicators must be present to conclude that wetland hydrology is present. The District concluded that the required primary and secondary indicators for hydrology were present within the areas identified as jurisdictional wetlands on the site. These indicators included inundation, visual observation of soil saturation, oxidized rhizospheres, water stained leaves and the FAC-Neutral test.

The District’s administrative record provided sufficient documentation based on the observations of inundation and/or soil saturation, sediment deposits and oxidized rhizospheres, to support its conclusion that wetland hydrology was present in the areas of the site identified as jurisdictional wetlands.

**Conclusion: After reviewing and evaluating the administrative record, I conclude that there is sufficient documentation in the administrative record to support the District’s determination that the portion of wetlands located on the appellant’s property are jurisdictional waters of the United States subject to the authority of Section 404 of the Clean Water Act. However, I find that Reasons 1 and 3 have partial merit and I am requiring the District to supplement its findings. Accordingly, I conclude that this Request For Appeal has partial merit, and remand it to the District for further action consistent with the instruction contained in this decision document. The District should conclude its actions 60 days from issuance of this document.**



JEFFREY J. DORKO  
Brigadier General, USA  
Commanding