

# SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 919-967-1450

601 WEST ROSEMARY STREET, SUITE 220  
CHAPEL HILL, NC 27516-2356

Facsimile 919-929-9421

December 17, 2014

**Via U.S. Certified Mail—Return Receipt Requested**

The Honorable John M. McHugh  
Secretary of the U.S. Army  
101 Army Pentagon  
Washington, DC 20310-0101

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
Mailcode 1101A  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

***RE: Notice of Intent to Commence Civil Action Under Section 505 of the Clean Water Act—Atlas Tract, Pamlico County, North Carolina (Spring Creek Farms, LLC)***

Dear Sec. McHugh and Ms. McCarthy:

By service of this letter, the North Carolina Coastal Federation (“NCCF”) hereby notifies you, through its undersigned counsel, of its intent to commence a civil action sixty days from the date of this letter under Section 505 of the Clean Water Act, 33 U.S.C. § 1365 (2010) (“CWA” or the “Act”), against the U.S. Army Corps of Engineers (“Corps”) and the U.S. Environmental Protection Agency (“EPA”) to challenge the erroneous determination that 251 acres of converted wetlands owned by Spring Creek, LLC (“Spring Creek”) in Pamlico County, North Carolina are not jurisdictional under the Act.

NCCF requests that the Corps and EPA consider the information provided in this letter, issue a revised determination that asserts jurisdiction over the 251-acre tract, and issue an order requiring restoration of the converted wetlands within it. The determination that the 251 acres are not jurisdictional based on the lack of wetland hydrology due to illegally constructed ditches is clearly erroneous in light of the requirements of the Act and the 1987 U.S. Army Corps of Engineers Wetland Delineation Manual as supplemented by the Atlantic and Gulf Coast Regional Supplement. If the Corps and EPA do not exercise jurisdiction over the 251-acre tract as required by the Clean Water Act by the end of the 60-day period, the North Carolina Coastal Federation intends to file a civil action in the U.S. District Court for the Eastern District of North Carolina under Section 505 of the Act.

## **Factual Background**

### **I. Atlas Tract**

The Atlas Tract consists of approximately 4,600 acres owned by Spring Creek, LLC in Pamlico County, North Carolina. *See* Exhibit 1 (map showing approximate location.) The site is mapped in the U.S. Fish and Wildlife Service's National Wetlands Inventory as predominantly forested wetlands. *See* Exhibit 2. The Natural Resource Conservation Service has found hydric soils on a majority of the site. *See* Exhibit 3. Further, the North Carolina Natural Heritage Program previously identified the site as containing large tracts of nonriverine wet hardwood forests. *See* Exhibit 4.

In approximately 1990, drainage ditches were installed on the approximately 251-acre section of the Atlas Tract described above and depicted in Exhibit 5. As shown in the aerial photographs marked 1975 (Exhibit 6), 1982 (Exhibit 7), and 1988 (Exhibit 8), drainage ditches were not present at the site as of 1988. The ditches appear for the first time in aerial photographs from March 7, 1993. *See* Exhibit 9. The Corps has acknowledged that "[r]eview of available aerial photography reveals that [ditching] occurred between 1988 and 1993." Letter from S. McLendon, Corps, to M. Davis, EPA, at 1 (Apr. 15, 2014) ("McLendon Letter") (Exhibit 10).

### **II. Agency Analysis**

Representatives of the Corps conducted a site visit at the Atlas Tract on August 7, 2013. Based on that investigation, the Corps determined that "the 250-acres revealed the hydrology parameter was not met" and that the tract is not currently a wetland. Letter from W. Biddlecome, Corps, to County of Pamlico Board of Commissioners (Nov. 4, 2013) (Exhibit 11). Corps and EPA staff conducted a site visit on December 3-4, 2013. EPA subsequently deferred to the Corps's jurisdictional analysis. *See* Email from M. Wylie, EPA, to T. Miller, NCCF (Oct. 6, 2014) (Exhibit 12).

EPA concluded that the ditches installed in approximately 1990 drained the on-site wetlands resulting in the lack of wetland hydrology. Letter from J. Giattina, EPA, to B. King, Spring Creek, at 2 (Apr. 10, 2014) ("Giattina Letter") (Exhibit 13). The Corps has also determined that "ditches excavated in wetlands removed wetland hydrology on the tract." McLendon Letter at 1. The Corps does not have any record of permits authorizing the ditches. Letter from M. Lamson, Corps, to T. Miller, NCCF at 2 (Dec. 13, 2013) (Exhibit 14). Both the Corps and EPA have determined that ditching on the property "exceeds that allowed under 404(f)(1)" and therefore was not exempt from the Clean Water Act. McLendon Letter at 1; Giattina Letter at 2.

## **Legal Analysis**

The Clean Water Act was enacted in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a). Section 404 of the Act requires that a permit be obtained for the discharge of dredged or fill material into "navigable waters." 33 U.S.C. § 1344(a). In order to give the CWA the broadest possible scope,

Congress defined navigable waters to include all “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). The Senate’s Conference Report made in connection with passage of the Act in 1972 explained that the “waters of the United States” definition was intended to “be given the broadest possible constitutional interpretation.” S. Conf. Rep. No. 92-1236, p. 144 (1972), reprinted in 1 Leg. Hist. 327.

That broad reach extends to wetlands. “The term wetlands means 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.” 33 C.F.R. 328.3(b).

The Corps, EPA, and the courts recognize that “normal circumstances” as used in the regulatory definition means that the Corps does not lose jurisdiction over wetlands that are drained unlawfully. The Corps’s 1987 Wetland Delineation Manual specifically describes the process the Corps must use if hydrology is altered by “unpermitted activities” including installation of “drainage systems . . . that significantly affect the area hydrology.” 1987 Wetland Delineation Manual at 72-73 (“Wetlands Manual”). In that instance, the Corps must follow specific procedures to “determine whether positive indicators of . . . wetland hydrology existed prior to alteration of the area.” *Id.* at 74. Likewise, EPA has recognized that “[a]reas of former wetlands on the Atlas Tract, that appear to have the hydrology removed without authorization, should be considered waters of the United States unless new evidence dictates otherwise.” In *Golden Gate Audubon Society*, the court recognized that allowing unpermitted activities to destroy jurisdiction “would permit the very evil that the regulation is intended to prevent: the destruction of wetlands to eliminate the permit requirement.” *Golden Gate Audubon Soc’y v. U.S. Army Corps of Eng’rs*, 717 F.Supp. 1417, 1421 (N.D. Cal. 1988); see *N.C. Wildlife Fed’n v. Woodbury*, 1989 WL 106517, \*3 (E.D.N.C. 1989).

The Corps Wetlands Manual specifically directs the agency, in circumstances such as these, to “[d]etermine the approximate date when the alteration occurred.” Wetlands Manual at 80. In that analysis, “[i]t is especially important to determine whether the alteration occurred prior to implementation of Section 404.” Wetlands Manual at 80. The Corps must “[c]haracterize the hydrology that previously existed in the area” and is directed to use “aerial photography” to “[d]etermine whether wetland hydrology previously occurred.” Wetlands Manual at 82. The November 2010 Regional Supplement affirms the need to evaluate previously existing hydrology. U.S. Army Corps of Engineers: Wetland Regulatory Assistance Program, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0) at 115 (“The goal is to determine whether wetland hydrology is present on a managed site under normal circumstances, as defined in the Corps Manual and subsequent guidance.”) (Nov. 2010).

Spring Creek has conceded that but for the illegally installed ditches, the 251-acre site would have wetland hydrology and would be jurisdictional. See Letter from A. Harmon and M. Beck, Spring Creek, to E. Greer, Corps (Aug. 9, 2013) (Exhibit 15). The company concluded that “the extensive network of drainage ditches on the tract has resulted in the removal of the hydrology parameters required to meet the wetland criteria” described in Corps Guidance. *Id.*

EPA and the Corps have also recognized that prior to the installation of the 1990 ditches, the 251-acre tract was jurisdictional wetlands. EPA determined that “[t]he original ditch excavation apparently occurred under the pretext of minor drainage in association with the 404(f) silviculture exemptions. The ditches appear to have removed . . . wetland hydrology and are not considered minor drainage ditches exempt under the CWA.” Giattina Letter at 2. The Corps likewise concluded that “the ditches excavated in wetlands removed wetland hydrology.” McLendon Letter at 1.

As EPA recognized, the Clean Water Act and the Corps Wetland Manual mandate that “[a]reas of former wetlands on the Atlas Tract, that appear to have the hydrology removed without authorization, should be considered waters of the United States unless new evidence dictates otherwise.” Giattina Letter at 2. No new evidence is available to “dictate otherwise,” and the EPA and Corps must, therefore, exercise jurisdiction over the 251-acre tract. Previously existing wetland hydrology as accepted by EPA, the Corps, and Spring Creek requires the Corps and EPA to exercise jurisdiction over the 251-acre section of the Atlas Tract.

Section 505(a)(2) of the CWA, 33 U.S.C. § 1365(a)(2), provides that any citizen may commence a civil action “where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.” In *National Wildlife Federation v. Hanson*, 859 F.2d 313, 315 (4th Cir. 1988), the Fourth Circuit ruled that EPA and the Corps have the non-discretionary duty to regulate the discharge of dredged or fill material into wetlands and to “make reasoned wetlands determinations.” Although Section 505(a)(2) only refers to the Administrator, the Fourth Circuit held that “[i]t is quite clear that both the Corps and the EPA are responsible for the issuance of permits under the CWA and enforcement of their terms.” *Id.* Consequently, the court held that Section 505(a)(2) of the CWA “should be interpreted . . . to allow citizens to sue the Administrator [of EPA] and join the Corps when the Corps abdicates its responsibility to make reasoned wetlands determinations and the Administrator fails to exercise the duty of oversight imposed by section 1344(c).” *Id.* at 316.

Here, the Corps has abdicated its responsibility to make a reasoned wetland determination with respect to the 251-acre section of the Atlas Tract, and the EPA has failed to exercise the duty of oversight. For these reasons, both agencies have violated the Clean Water Act.

### **Conclusion**

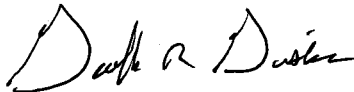
The jurisdictional determination on the 251-acre tract at issue here is clearly erroneous, arbitrary and capricious, and in violation of the Clean Water Act. If at the close of the 60-day notice period, you have not reconsidered and issued a revised jurisdictional determination asserting Clean Water Act authority over the 251-acre tract, the North Carolina Coastal Federation will file an action pursuant to section 505 of the Clean Water Act, 33 U.S.C. § 1365, against the Corps and EPA to challenge this determination.

Pursuant to 40 C.F.R. §§ 135.2, 135.3, you are hereby notified of the name and addresses for the organization giving this notice:

Todd Miller  
Executive Director  
North Carolina Coastal Federation  
3609 N.C. 24 (Ocean)  
Newport, NC 28570  
252-393-8181

In the meantime, if you have any questions or would like to discuss this matter, please feel free to contact me at (919) 967-1450 or [ggisler@selcnc.org](mailto:ggisler@selcnc.org).

Sincerely,



Geoffrey R. Gisler  
Senior Attorney

GRG/rgd  
Enclosures  
cc: *(via U.S. certified mail, return receipt requested)*

The Honorable Eric H. Holder, Jr., Attorney General of the United States  
Heather McTeer Toney, USEPA  
John Skvarla, N.C. DENR  
Tom Reeder, N.C. DENR, Division of Water Resources  
Col. Kevin P. Landers, Sr., USACE  
Scott McLendon, USACE  
Phillip Mancusi-Ungaro, USEPA  
I. Clark Wright, Jr.  
Todd Miller *(via U.S. mail)*