



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
PACIFIC OCEAN DIVISION, CORPS OF ENGINEERS
FORT SHAFTER, HAWAII 96858-5440

Office of the Commander

14 MAR 2008

Mr. Daniel Young
TERRASAT, Inc.
1413 West 31st Avenue
Anchorage, Alaska 99503

Dear Mr. Young:

This is in regards to your Request for Appeal (RFA), concerning Cottonwood Creek, received by my Administrative Appeal Review Officer on January 25, 2008, regarding an approved jurisdictional determination (JD) associated with a signed Department of the Army (DA) permit number POA-2006-1282-4, by the U.S. Army Corps of Engineers, Alaska District. Under Title 33 Code of Federal Regulations Part 331 (33 CFR 331) – Administrative Appeal Process, I have the authority to make the final decision on the merits of the appeal. The review of your RFA has been completed. I conclude that your JD is not eligible for an administrative appeal for the reasons stated below.

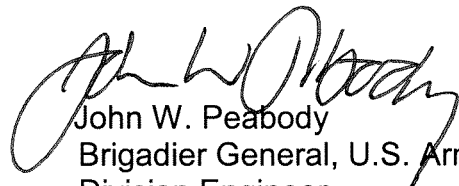
By letter dated November 16, 2007, you were notified by the District that the Corps' Headquarters and the U.S. Environmental Protection Agency reviewed the August 30, 2007, JD associated with your application using the newly established *Rapanos* guidance and found the wetland on the property to be a jurisdictional water of the United States. The Corps determined that 2.83 acres of wetlands are part of a larger complex that directly abuts a relatively permanent water that flows into a traditional navigable water. The District attached a notice of appeal form to the JD and you appealed the JD on December 26, 2007.

Prior to your appeal of the JD, you signed and agreed to the conditions of DA permit number 2006-1282-4 on December 11, 2007, which allowed the filling of the wetland on the site that is under appeal. Special Condition 4 on the DA permit has a notation that states, "the jurisdictional decision for this project site is being reviewed by Corps Headquarters. If it is determined that the Corps does not have jurisdiction on the site due to the *Rapanos* decision, then no authorization from the Corps is required and the permit shall be null and void." However, at the time you signed the permit you were already aware that the Corps had completed its review and asserted jurisdiction over the site (as noted above, you were specifically informed of the Corps decision by the November 16, 2007 letter).

The Administrative Appeal Process regulations at 33 CFR 331.5(b)(8) define those actions not appealable as including, “[a]n approved JD associated with an individual permit where the permit has been accepted and signed by the permittee.” Since the JD that you appealed is associated with a permit you accepted and signed, the JD is not subject to an administrative appeal. I also note that, under 33 CFR 331.5(b)(1), once an individual permit has been accepted and signed by the permittee, the terms and conditions of that permit are no longer appealable *unless* i) the authorized work in waters of the United States has not started *and* ii) the permit is subsequently modified (there has been no modification here). Because the Corps concluded its JD review process prior to your acceptance and signature of the permit, and because the Corps determined that it did have jurisdiction, Special Condition 4 in the permit was of no force and effect. Accordingly, this concludes the Administrative Appeal process. I am returning your RFA (see enclosure).

If you have questions, please call Mr. Michael Bell, my Administrative Appeal Review Officer, at (404) 562-5137. I am forwarding a copy of this letter to Mr. Jack Hewitt, Project Manager, U.S. Army Engineer District, Alaska, Regulatory Division, Post Office Box 6898, Elmendorf Air Force Base, Alaska 99506-0898.

Sincerely,



John W. Peabody
Brigadier General, U.S. Army
Division Engineer

Enclosure