

ADMINISTRATIVE APPEAL DECISION

KEITH & JUNE CARABELL, FILE NO. 99-250-002-1

DETROIT DISTRICT

MARCH 5, 2001

Review Officer: Suzanne L. Chubb, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

Appellant Representative: Mr. Timothy A. Stoepker, Dickinson Wright PLLC, 500 Woodward Avenue, Suite 4000, Detroit, Michigan 48226-3425.

Permit Authority: Section 404 of the Clean Water Act (33 USC 1344)

Receipt of Request For Appeal (RFA): December 4, 2000

Appeal Conference Date: January 30, 2001 **Site Visit Date:** Same

Background Information: The appellant proposes to construct a 112-unit townhouse condominium development on a 19.6-acre triangular-shaped parcel located in Chesterfield Township, Macomb County, Michigan. A county drain follows the hypotenuse side of the property on a northeast-southwest alignment. A small amount of upland is located in the southwest corner of the parcel and along the ditch. The appellant proposes to place fill into approximately 15.9 acres of wetland and convert approximately 3.7 acres of forested wetland to emergent and open-water cover types as mitigation (enhancement).

Following Michigan Department of Natural Resources (MDNR) permit reviews in 1993 and 1994 with subsequent permit denials, a Michigan Department of Environmental Quality (MDEQ) administrative law judge ruled in favor of a modified project design in September 1998 and ordered the issuance of a State permit. The United States Environmental Protection Agency (USEPA) sustained their objections to issuance of a permit and, pursuant to Section 404(j) of the Clean Water Act and 40 CFR 233.50(j), Section 404 permit authority was transferred from the MDEQ to the Army Corps of Engineers (Corps).

The appellant subsequently filed an application dated 19 August 1999 with the Detroit District (District). The District published a public notice (PN) on 8 February 2000 and conducted three site visits on 12 October 1999, 5 May 2000 and 2 August 2000. Following the review period, the application was denied on 5 October 2000. The appellant submitted a RFA to the Division on 4 December 2000.

Summary of Decision: I find that this RFA has no merit. The onsite wetland is regulated because it is adjacent to a tributary system of Lake St. Clair. Further, under the Clean Water Act (CWA), the permit issuance decision by the MDEQ administrative law

judge does not bar Federal review and jurisdiction. The District completed a fair and reasonable review of the appellant's application in accordance with all applicable laws and regulations.

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

Reason 1: The Corps has no jurisdiction over the land at issue.

Finding: Reason 1 of this appeal has no merit.

Action: No action required.

Discussion: The appellant considers the onsite wetland to be isolated and therefore non-jurisdictional based on current USEPA and Corps regulations at 40 CFR 230.3(s) and 33 CFR 328.3 respectively and the recent U.S. Supreme Court ruling in Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers. The appellant also does not consider the onsite ditch to be waters of the United States. The appellant requested that the Corps identify the section or provision of the Clean Water Act (CWA) that provides for Corps jurisdiction of wetlands not directly adjacent to navigable waters and for tributaries to navigable waters.

Under the Federal Water Pollution Control Act (FWPCA) amendments of 1972 (Public Law 92-500), Congress extended Corps' regulatory jurisdiction beyond the traditional "navigable waters" to include "all waters of the United States", including wetlands (33 U.S.C. 1362). In 1977, the FWPCA was further amended and renamed the Clean Water Act. Title 33 U.S.C. 1344 (also known as Section 404) requires a permit from the Secretary of the Army for discharges of dredged or fill material into "all waters of the United States." The statutory authorities under which the Corps implements its regulatory program are found at 33 CFR 320.2 and the policies, practices, and procedures followed by the Corps in connection with the review of permit applications to authorize the discharge of dredged or fill material into waters of the United States pursuant to Section 404 are found at 33 CFR 323.

"**Waters of the U.S.**" include traditional navigable waters and their tributaries, adjacent wetlands and isolated waters with an interstate commerce nexus. "**Adjacent**" means bordering, contiguous or neighboring and includes wetlands separated from other waters of the U.S. by a man-made dike or barrier, natural river berms, beach dunes and the like (33 CFR 328). "**Isolated waters**" are defined as non-tidal waters of the U.S. that are 1) not part of a surface tributary system to interstate or navigable waters of the U.S.; and 2) not adjacent to such tributary waterbodies (33 CFR 330.2). A ditch excavated in a water of the U.S. (wetland or stream) remains a regulated water of the U.S. provided an Ordinary High Water mark is present. A ditch constructed wholly within upland is generally not a water of the U.S. (Preamble to 2000 Nationwide Permit Regulations, 65 FR 12823).

In this case, the District determined that the onsite wetland was adjacent to a surface tributary system of a navigable waterway, Lake St. Clair. Specifically, the project manager observed that the onsite county ditch flowed into the Sutherland-Oemig Drain, which flows into Auvase Creek, which outlets into Lake St. Clair. The ditch

appears to have been excavated in wetland based upon the adjoining onsite wetlands and the identification of poorly drained hydric soils (Toledo silty clay loam, 0-2% slopes) by the U.S. Department of Agriculture, Natural Resources Conservation Service (Macomb County Soil Survey, 1971). The appellant's wetland consultant delineated the ditch as wetland. Spoil material from the excavated ditch was sidecast into berms on both sides of the ditch. However, the man-made spoil berm that separates the wetland from the ditch does not exclude adjacency as described above. Construction of the ditch is thought to have occurred some fifty to sixty years ago, prior to CWA jurisdiction.

One confusing aspect of the ditch is the direction of water flow. The appellant's wetland consultant believed it flowed in a southwesterly direction away from the Sutherland-Oemig Drain while the District project manager (PM) observed it flowing northeasterly during a site visit. The PM also remarked during the appeal site visit that he thought the drainage was more "feathery" (diffuse, less defined) to the southwest. A review of the spot elevations on Sheet 1 of the appellant's grading plan, dated 12 August 1999, does not clarify the issue. The last bottom elevation of the ditch at the southwest property corner is 584.50 feet U.S. Geological Service (USGS) datum and 584.40 feet at the northeast corner. The lowest elevation is 583.90 feet, noted at two locations along the ditch northeast of its midpoint along the property line.

Although confusing, the appellant has not presented any information to refute the District's evaluation. Furthermore, even if I assume that the ditch flows in a southwesterly direction, the USGS topographical map, New Haven quadrangle, appears to indicate that the ditch is connected to other ditches that outlet to Auvase Creek and eventually Lake St. Clair. This decision does not prevent the appellant from presenting new information to the District for reconsideration of their original determination.

The District also performed a site visit in May 2000 [Environmental Assessment (EA) enclosure 16] to document migratory bird use and their connection to interstate commerce. The recent U.S. Supreme Court ruling (*SWANNC v. Corps*) negated use of the Migratory Bird Rule to establish an interstate commerce connection on isolated, intrastate waters. The *SWANNC* decision is not relevant to this proposal because the subject wetlands are not isolated.

Finally, although not raised in the RFA, during the appeal conference the appellant questioned a statement made by the District in the decision document. The District suggests that Section 10 jurisdiction from Lake St. Clair may extend upstream on its tributaries (Auvase Creek and the Sutherland-Oemig Drain) to 23-Mile Road as it does on the Salt River, an established federally navigable waterway (EA page 6). The administrative record does not support this statement. The Ordinary High Water elevation for Lake St. Clair is 576.3 feet International Great Lakes Datum (IGLD), 1985, and the bottom elevation of the onsite ditch at the northeastern end is 583.7 feet IGLD, 85 (converted from 584.4 feet USGS Datum). This statement may be supported by bottom elevations for the nearby Sutherland-Oemig Drain but they are absent from the administrative record. However, the District's statement is irrelevant to the jurisdictional determination made by the District and to the discussion above.

Reason 2: The issues presented in the Carabell's RFA were already decided by the MDNR in favor of the Carabells, so the Corps and the USEPA are barred by *res judicata* from deciding against the Carabells.

Finding: Reason 2 of this appeal has no merit.

Action: No action required.

Discussion: The appellant believes that the State of Michigan, while administering the Section 404 program, was acting on behalf of the federal government. The USEPA, pursuant to Section 404(g) and 40 CFR 233, formally transferred administration of the Section 404 permit program to the State of Michigan through a Memorandum of Agreement (MOA) signed in 1983. However, under Section 404(j), the State must still coordinate with the USEPA on certain classes and categories of activities. Because the appellant's proposed discharge of fill material exceeded 10,000 cubic yards, the subject application was not waived from the requirements of Section 404(j). The USEPA responded to the State's public notice with a letter of objection dated 4 March 1994. Regulations at 40 CFR 233.50(j) clearly state that if the State neither satisfies EPA's objections nor denies the permit, processing of the Section 404 permit application reverts to the Secretary of the Army, acting through the Chief of Engineers.

Following issuance of a State permit, pursuant to an administrative court order, the USEPA sent a letter dated 23 November 1998 that sustained their objections to the project. This effectively transferred Section 404 permitting authority to the Corps pursuant to the aforementioned regulations.

Res judicata is not an applicable legal principal here. There has been no preceding decision or judgment regarding this permit application in a federal forum. The State of Michigan followed its own program procedures by conducting an administrative hearing. The USEPA objected to the result. When the USEPA objects to the State's issuance of a permit, and the State does not revise the permit (or deny it) in accordance with the stated objections, both Section 404(j) of the CWA and 40 CFR 233.50(j) require the Administrator of the EPA to turn over the permit application to the Secretary of the Army so that the Secretary can process the permit application. The MOA between the State and the USEPA merely implements the statute and regulation.

Reason 3: The Carabells have demonstrated that a permit can be issued under the applicable laws and regulations.

Finding: Reason 3 of this appeal has no merit.

Action: No action required.

Discussion: In the RFA, the appellant states that the primary factors in the District's denial decision are valuable seasonal habitat and water storage functions from the public interest review. While the District's 5 October 2000 letter does mention these factors, the letter also states that the denial is based on non-compliance with the USEPA's 404(b)(1) Guidelines. The presence of potential habitat and use of the site by the Indiana bat (*Myotis sodalis*) and possible consultation with the United States Fish and Wildlife Service (USFWS) pursuant to the Endangered Species Act is also unresolved. Therefore, the appellant has not shown compliance with all applicable laws and regulations.

The District conducted a fair and adequate public interest review. They published a PN, considered all comments received and documented their evaluation of the applicable public interest review factors. Besides the effects on wildlife habitat and water quality, the District also noted that the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology. The District did err when they stated that the proposed storm water detention basin would outlet into the proposed mitigation areas. The proposed project drawings show that the detention basin would outlet to the county ditch. This error is present under several EA headings including Operational Impacts on Water Quality, Shoreline Erosion and Accretion, Flood Hazards and Floodplain Values, and Effects on Wetlands, and is implied in Effects on Aquatic Biota. However, although this misconception was a factor in the District's evaluation of the aforementioned public interest factors, this error is harmless because it, alone, is not the sole or overwhelming basis of the District's denial decision.

The District acted appropriately in finding that the appellant has not demonstrated that the proposal is the least environmentally damaging practicable alternative. A housing project is a non-water dependent activity and does not require siting in a wetland. During the State administrative hearing, Mr. Patrick Meagher, the planning consultant for Chesterfield township, stated that, besides the project site, another undeveloped property is zoned RM-3 (multifamily development) within Chesterfield township (Transcript page 166). At the appeal conference, the appellant stated that this parcel was not considered in their alternatives analysis because it would mean "abandoning" the project parcel. The appellant only examined on-site alternatives and those did not result in a measurable decrease in wetland impacts. Additional properties may also be available if re-zoned for RM-3 development. A permit cannot be issued when a less environmentally damaging practicable alternative exists or when insufficient information is provided to determine compliance [40 CFR 230.12(a)(3)].

Although the appellant has not demonstrated avoidance and minimization of aquatic impacts, the District also determined that the proposed mitigation was inadequate. They found that the conversion of 3.7 acres of onsite forested wetland to emergent and open water cover types would not replace the wetland functions lost due to the proposed fill activities. The District did not consider alternative mitigation proposals that may be acceptable because earlier steps in the Guidelines sequence (avoidance and minimization) had not been adequately addressed. The appellant bears the burden of proof to demonstrate compliance with the Guidelines.

Conclusion: For the reasons stated above, I conclude that the three reasons presented in this Request For Appeal do not have merit.



ROBERT H. GRIFFIN
Brigadier General, U.S. Army
Commanding