

## ADMINISTRATIVE APPEAL DECISION

COXCO REALTY, LLC; FILE NO. 2000-00935

### LOUISVILLE DISTRICT

December 15, 2009

**Review Officer:** Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division, acting by designation on behalf of the Great Lakes and Ohio River Division

**Appellant:** Mr. Vaiden Cox, Coxco Realty, LLC

**Appellant's agent:** Penni Livingston, Livingston Law Firm

**Receipt of Request for Appeal:** April 17, 2009

**Appeal Conference and Site Visit Date:** Not Applicable

**Summary of Decision:** The appellant's request for appeal has merit. The administrative record does not support the Districts determination that mitigation at a ratio of 3:1 is necessary to offset impacts caused by the proposed project in accordance with U.S. Army Corps of Engineers, Regulatory Guidance Letter (RGL) No. 02-2, dated 24 December 2002.

#### Background Information:

An initial jurisdictional determination (JD) was completed for the site on 9 December 1999 and was re-affirmed on 23 August 2002 after the Supreme Court ruling in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (hereinafter "*SWANCC*") regarding isolated wetlands. In October 2002, the appellant appealed the District JD which resulted in the decision being remanded back to the District for reconsideration. In a letter dated 20 June 2003, the District notified the appellant that seven wetlands totaling 0.33 acres had been removed from jurisdiction and six wetlands totaling 14.12 acres remained jurisdictional. Coxco initiated a lawsuit on 24 August 2006 alleging that the wetlands onsite are not adjacent to a tributary of navigable water and therefore should not be considered jurisdictional by the Corps. As a result of the Supreme Court ruling in *Rapanos v. United States*, 547 U.S. 715 (2006) (hereinafter "*Rapanos*"), the District issued a letter dated 9 November 2006 in which the Corps advised the Appellant that the previous determination was no longer valid and informed the Appellant that they were beginning to re-evaluate the 19 June 2003 jurisdictional determination. Since a significant nexus determination was required the jurisdictional determination was coordinated with the Corps and the United States Environmental Protection Agency (USEPA) headquarters. As a result of that coordination the review of the JD was elevated to the USEPA who initiated a review to determine federal wetland jurisdiction and issued a new wetland jurisdictional determination for the Coxco property on 29 May 2007. The determination by USEPA stated that wetlands and waters subject to jurisdiction under the Clean Water Act are present on the Coxco site. Since the JD was completed by the U.S.

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Environmental Protection Agency (EPA) and is not a Corps document, the JD is not subject to appeal.

Coxco Realty, LLC filed for a Department of the Army (DA) permit in June 2000 with proposed impacts to 10.33 acres of wetlands. It was determined during the Public Notice comment period that the initially proposed mitigation was inadequate. The Corps worked with the Appellant and the federal resource agencies to come to agreement on a final mitigation plan which was submitted by the Appellant on 1 July 2008. An Initial Proffered Permit was issued to the Appellant on 19 November 2008. In a letter dated 16 January 2009 the appellant requested that the District reconsider the Initial Proffered Permit because they felt that the wetlands should not be jurisdictional and because they had concerns with some of the permit conditions. The District issued a Proffered Permit on 8 April 2009; No changes were made to the Initial Proffered Permit.

In response to the Proffered Permit of 8 April 2009, the appellant submitted a Request for Appeal (RFA) on 17 April 2009 that was accepted by the Great Lakes and Ohio River Division (LRD) on 15 June 2009. The Appellant's RFA stated that the Corps should not be taking jurisdiction over their property. As the JD was completed by EPA, it was determined not to be an appealable action under the Corps regulations. The appeal was accepted based on the Appellant's assertion that the administrative record does not support the District's determination that mitigation at a 3:1 ratio is necessary to offset impacts from the proposed project.

**Information Received During the Appeal and its Disposition:**

The district provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.

**Appeal Evaluation and Findings:**

**Appeal Reason 1. The Appellant objects to the 3:1 mitigation ratio under Special Condition No. 1 because mitigation is not required.**

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

**Action:** The District shall provide a rationale in the administrative record for requiring a mitigation ratio of 3:1, or shall reconsider the mitigation ratio and fully document their reconsideration.

**Discussion:** The Appellant does not feel that mitigation is required because they allege that the District already required mitigation for the 10.435 acres of proposed impacts on the Coxco site in the Corps permit issued to the Kentucky Department of Transportation (KyDOT) for the Jefferson Boulevard extension, Louisville District Permit No. 1999-494. The appellant alleges that the reason a mitigation ratio of approximately 11:1 was required in the KyDOT permit was because the Corps was accounting for secondary impacts that affect the 10.435 acres on the Coxco property in the KyDOT permit.

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In discussions with the District, they confirmed that KyDOT proposed the mitigation for the road extension project without regard for the proposed wetland impacts associated with those for the Coxco Realty, LLC proposal. Based on this information the District was correct in requiring additional mitigation for the proposed Coxco development as the impacts associated with it were not considered in the KyDOT permit.

Initially the appellant proposed approximately 21 acres of mitigation consisting of creation, restoration and preservation. Following the District's review of comments received on the public notice, the initial mitigation proposal by the appellant was not accepted. Comments received from the U.S. Fish and Wildlife Service (USFWS) and the U.S. Environmental Protection Agency (USEPA) stated that mitigation as initially proposed was not acceptable. After coordinating with the District, the appellant revised their proposal in a document dated 1 July 2008 which proposed to buy thirty credits at a mitigation bank at a mitigation ratio of approximately 3:1. The District states in the administrative record that the 3:1 ratio is what has historically been required by the District for projects in Jefferson County's Pond Creek watershed.

In accordance with RGL 02-2 Section 1(a):

Under existing law the Corps requires compensatory mitigation to replace aquatic resource functions unavoidably lost or adversely affected by authorized activities.

(Note: 33 CFR 332 was not implemented at the time of the District's decision. RGL 02-2 was the applicable guidance at the time the District made their determination.)

The District was correct in its determination that it was appropriate to issue a DA permit provided appropriate mitigation was proposed to meet the Section 404(b)(1) guidelines. After coordination with the resource agencies the Appellant proposed to purchase thirty credits (1 credit = 1 acre) from a mitigation bank for a mitigation to impact area ratio of approximately 3:1. The District's requirement for compensatory mitigation is valid since they determined that the proposed project avoided and minimized impacts to wetlands to the extent possible but would still result in 10.435 acres of impact to jurisdictional wetlands. In order to meet the Section 404(b)(1) Guidelines, compensatory mitigation is appropriate to offset the proposed environmental losses resulting from unavoidable impacts to 10.435 acres of wetlands on the Coxco property which would be filled as a result of the issuance of a DA permit.

In accordance with RGL 02-2 Section 2(d):

Districts will determine on a case by case basis, whether to use a functional assessment or acreage surrogates for determining mitigation and for describing authorized impacts.

Based on the administrative record, it appears that the district opted to use an acreage surrogate rather than a functional assessment to determine the amount of mitigation for the proposed project.

In accordance with RGL 02-2 Section 2(d)(4):

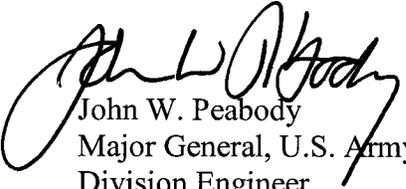
In the absence of more definitive information on the functions of a specific wetland site, a minimum 1:1 acreage replacement may be used as a reasonable surrogate for no net loss of functions . . . When Districts require 1:1 acreage replacement, they will inform applicants of specific amounts and types of required mitigation. Districts will provide rationales for acreage replacement and identify the factors considered when the required mitigation differs from the 1:1 surrogate.

The District, after coordinating with the Federal resource agencies, required a mitigation ratio of 3:1. In response, the Appellant submitted a mitigation plan dated 1 July 2008 proposing to buy thirty credits at a mitigation bank for a replacement ratio of 3:1. It is stated by the District in the Decision Document that because credits will be purchased at a mitigation bank that no temporal losses will occur. The decision document says that the main functions provided by the onsite wetlands proposed to be impacted include nutrient cycling and storage, removal and sequestration of elements and compounds, export of organic carbon and wildlife habitat. The administrative record does not clearly identify the factors considered to support the rationale of the required replacement ratio in the permit.

Letters from the USFWS and USEPA state that the original mitigation proposal ratio of 1.6:1 is inadequate for several reasons. The administrative record reflects that a meeting was held between the Appellant and the District on 7 February 2006 to discuss the comments received from the resource agencies and it appears that is when the District requested the appellant to consider a mitigation ratio of 3:1. The administrative record also alludes to a telephone discussion that was held between the District and the Appellant regarding the amount of mitigation on 5 August 2008. There is no documentation by the District in the record to support either the meeting or the phone call or any other requests of the Appellant to modify their original mitigation proposal; however reference is made to these requests by the Appellant's in submittals dated 10 March 2006; 13 August 2008 and 14 October 2008. Based on these references it appears that the District did request the appellant to use a mitigation ratio of 3:1. The District states in the administrative record that a 3:1 ratio is what has been historically required by the Corps for projects in Jefferson County's Pond Creek watershed. There is no rationale to identify the factors considered to support why the 3:1 ratio has been historically required. The administrative record is also lacking any discussion of why a mitigation ratio of 1:1 would not be sufficient; per RGL 02-2 a mitigation ratio of 1:1 is considered a reasonable surrogate for no net loss of functions in the absence of a functional assessment. Therefore, this reason for appeal has merit.

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**Conclusion: For the reasons stated above, I find that the appeal has merit since the District's administrative record does not contain adequate evidence in support of its determination to require mitigation at a ratio of 3:1. The District's determination is not otherwise arbitrary, capricious or an abuse of discretion, and is not plainly contrary to applicable law or policy. With regard to the aspects of the appeal on which merit has been found, I am remanding the decision back to the district to provide a rationale for the 3:1 mitigation ratio, or to reconsider the 3:1 mitigation ratio and fully document their reconsideration. This concludes the Administrative Appeal Process. The District shall complete these tasks within 60 days from the date of this decision and upon completion, provide the Division office and appellant with its final decision and the supporting decision document.**



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