

ADMINISTRATIVE APPEAL DECISION

WALTER HELMKE, LRE-2007-1187-176

DETROIT DISTRICT

MAY 29, 2008

Review Officer: Michael Montone, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division

Appellant: Mr. Walter Helmke

Permit Authority: The Clean Water Act, Section 404 (33 U.S.C. 1344)

Receipt of Request for Appeal: November 13, 2007

Background Information:

In June 2007, Mr. Helmke (the appellant) contacted the Detroit District (District) regarding lands he owns and intends to sell, located on Lane 150 in Lake James, Steuben County, Indiana. The appellant's property encompasses three lots approximately 0.38 acres in total area. The area is bordered by a roadway to the north and west, steep bluff to the east, and a residence to the south.

The appellant reported that the Indiana Department of Environmental (IDEM) informed him that his property was wetlands. The appellant disagreed with IDEM determination and requested that the District meet him on site to resolve the matter.

In August 2007, the District met with the appellant to inspect the site and perform a JD. The District's administrative record contains site notes (dated 23 August 2007) and a memorandum to the file (dated 24 August 2007) documenting their site visit.

In September 2007, the District issued its approved JD stating the presence of waters of the U.S. on site. The appellant disagrees and appealed the District's approved JD In November 2007.

Summary of Decision: The District's administrative record does not support its decision that wetlands regulated under the Clean Water Act are present on the appellant's property and the appeal has merit for the reasons discussed below.

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

Appellant's Stated Reasons for Appeal: The appellant provided a two-paged narrative articulating his objection to the District's determination that waters of the U.S. exist on the subject property. The appellant's reasons for appeal have been summarized below in Reason 1.

Reason 1: The appellant disagrees with the District's conclusion that wetlands exist on the property. Even if wetlands existed on the site, the appellant disagrees that any such wetlands could be considered adjacent to Lake James or jurisdictional under the Rapanos decision.

Finding: This reason for appeal has merit.

Action: The District shall prepare and include in the administrative record a decision document that supports its final JD in light of the Rapanos decision and adequately documents its basis for jurisdiction. The District shall complete these tasks within 30 days from the date of this decision, and upon completion, provide the Division office and appellant with its decision document and final JD.

Discussion: The appellant disputes the District's determination that wetlands exist on site. In doing so, the appellant points out that the District's determination was based on its site visit that took place just after a highly unusual precipitation event. According to the appellant, the area received close to 12 inches of rainfall within the four or five days preceding the District's site visit. While the appellant acknowledged that water was flowing from the property to Lake James, he states that this is first time such an event has taken place in the past 20 years.

The appellant also disputes that his property is adjacent to Lake James. The appellant points out that his property is approximately 400 feet removed from the water's edge and separated from Lake James by a roadway and residential structures.

Lastly, the Appellant argues that the District's decision is not consistent with the U.S. Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715, (2006) ("*Rapanos*"). The appellant states that his subject property does not have a "continuous surface connection with the tributary" and does not have a significant nexus with a navigable water of the United States.

Rapanos

On June 5, 2007, the U.S. Environmental Protection Agency (EPA) and the Corps jointly issued guidance, intended to foster nationally-consistent implementation of the CWA that takes into account *Rapanos*. The collective guidance is referred to herein as the "Rapanos Guidance" and contains five major parts: a memorandum titled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*"; a coordination memo establishing a process for coordinating specific JDs between the EPA and the Corps; a JD form to document approved JDs; a JD form instructional guidebook ("JD Guidebook") that provides specific instructions for completing the approved JD form and

offering supplemental information for the preparation of JDs, and an appendix titled “Legal Definition of ‘Traditional Navigable Waters’ ”.

The guidance memorandum provides:

[The U.S.] EPA and the Corps will continue to assert jurisdiction over “all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” These waters are referred to in this guidance as traditional navigable waters.

The agencies will also continue to assert jurisdiction over wetlands “adjacent” to traditional navigable waters as defined in the agencies’ regulations. Under EPA and Corps regulations and as used in this guidance, “adjacent” means “bordering, contiguous, or neighboring.” Finding a continuous surface connection is not required to establish adjacency under this definition. The Rapanos decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are “waters of the United States.”

In its September 20, 2007 approved JD letter, the District states that the subject property contains federal wetlands that meet the criteria in the 1987 Corps of Engineers Wetlands Delineation Manual and are adjacent to Lake James, which is a *tributary* of the St. Joseph River, a navigable water of the United States. The District’s assertion of jurisdiction was based in part on its “...documentation that the wetland in question is adjacent (bordering, contiguous, or neighboring) to Lake James, which is a tributary of the St. Joseph River, a navigable water of the United States.” However, materials within the administrative record (see District’s Approved JD Form) document that the District concluded their assertion of jurisdiction was based on wetlands being adjacent to Lake James, *which itself is a traditional navigable water* (TNW) versus a tributary to a TNW as stated in the approved JD letter. Therefore, based on this documentation, it appears that the District misstated their basis for jurisdiction in their approved JD letter. Documentation within the administrative record clearly indicates that the District asserted its jurisdiction based on the alleged wetlands being adjacent to Lake James, a TNW.

Thus, based on the District’s conclusion in its Approved JD Form, the District should have adequately documented the following to substantiate its jurisdiction: the wetlands in question meet the criteria of the Corps’ 1987 Wetlands Delineation Manual; the wetlands are adjacent to a TNW.

Wetlands

Corps policy requires the District to use the 1987 Corps of Engineers Wetlands Delineation Manual (the 1987 Manual) to identify and delineate wetlands that may be regulated under Section 404 of the Clean Water Act. Accordingly, under normal circumstances¹ and site

¹ The 1987 Manual notes “normal circumstances” to address situations where an area may fail to meet the diagnostic criteria for wetlands due to human alterations (e.g. vegetation removal, draining, deposition of fill, impoundments, etc.) or natural events (e.g. change in river course, beaver dams, fires, mudslides, etc.) that result in one or more parameters being *absent*.

conditions, the District will document the presence of wetland hydrology, hydrophytic vegetation, and hydric soils in order to substantiate that an area is wetlands. This is commonly referred to as a “routine determination” or the “three parameter test”. Depending on resources available and specific site conditions, an on-site inspection may or may not be necessary for completing a routine determination.

There is no information within the administrative record to suggest that circumstances and site conditions were not normal (i.e. a wetland criteria was *absent* due to human alteration or natural event) *and* the District documented their approved JD was based on their site inspection. Therefore, the process for making a routine inspection with an on-site inspection will be reviewed to address how the District documented the presence of wetlands on site.

WETLAND VEGETATION

The presence of hydrophytic vegetation can generally be concluded when more than 50% of the dominant plant species in a community type have an indicator status² of obligate (OBL), facultative wetland (FACW) and/or facultative (FAC). The District identified the dominant plant species on site as green ash, American elm, silver maple, and sensitive fern. The District documented that each of the identified plant species are considered FACW and that some of the individuals also displayed morphological adaptations for occurring in wetlands. Thus, the District adequately documented that the site meets the hydrophytic vegetation parameter.

WETLAND HYDROLOGY

The presence of wetland hydrology can be concluded for an area if there has been no recent hydrologic alteration of the area and:

a) the entire area is occupied by a plant community or communities in which all dominant species are OBL

or

b) the area contains two or more plant communities all of which are dominated by OBL and/or FACW species and the wetland-non-wetland boundary is abrupt.

In this case, the District documented that the dominant plant community was FACW. There is no evidence within the record to suggest an abrupt boundary. Therefore, there is no evidence within the District’s administrative record to support a determination of wetland hydrology based on plant communities.

The presence of wetland hydrology can also be concluded independent of the type of plant communities present if the area is documented evidence (presence of indicators) that the area is

² OBL plants almost always occur in wetlands (greater than 99% probability) but may also occur rarely (probability less than 1 percent) in nonwetlands; FACW plants will usually occur in wetlands (67% to 99% probability) and sometimes occur in nonwetlands (1% to 33% probability); and FAC plants have a similar likelihood of occurring (probability 33% to 67%) in both wetlands and nonwetlands.

periodically inundated or has saturated soils. An area is considered to meet the criteria for wetland hydrology when it possesses at least one primary indicator of wetland hydrology or two secondary indicators of wetland hydrology.

The District documented within its administrative record (memorandum to the file and field notes dated August 23, 2007) that the area had recently received heavy rains and the site was inundated with approximately six-inches of water.

The visual observation of inundation is a primary indicator of wetland hydrology. However, the 1987 Manual notes that care must be taken to consider if seasonal conditions and recent weather conditions may have resulted in inundation being present on a nonwetland site. As previously discussed above, the appellant's point that the District's determination was based on its site visit that took place immediately after a rare and extreme precipitation event is central to his argument that wetlands do not exist on site. There is no evidence in the record that the District documented additional indicators of wetland hydrology or considered and addressed the recent weather conditions when assessing wetland hydrology. Therefore, the District did not adequately document its determination that wetlands exist based on the 1987 Manual and the approved JD is remanded to the District for further consideration.

WETLAND SOILS

The presence of wetland (hydric) soils can be concluded for an area based on the presence of any one of a number of indicators listed in the 1987 Manual. The District's administrative record included a Natural Resources Conservation Service (NRCS) soil map. According to the District's notations, the appellant's site is apparently mapped as a hydric soil on the NRCS soils map. Use of NRCS soils maps to indicate the presence of mapped hydric soils may be used as an indicator of hydric soils. However, the 1987 Manual specifically cautions the Districts to ensure that the profile of the actual soils on site correspond to the profile description of the mapped soil by examining a soil sample. In this case, the District noted in its field notes that soil samples were not taken due to the area being inundated with six inches of water and no other hydric soil indicators were documented. Therefore, the District did not adequately document its determination that wetlands exist based on the 1987 Manual and the approved JD is remanded to the District for further consideration.

TNW

The Rapanos Guidance directs the District to consider the following when determining whether a water body qualifies as a TNW:

... whether a Corps District has determined that the water body is a navigable water of the United States pursuant to 33 C.F.R. § 329.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. § 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is "navigable-in-fact" under the standards that have been used by the federal courts.

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The Rapanos Guidance further clarifies navigable in fact for purposes of determining a TNW by reviewing multiple Supreme Court Cases, most notably *The Daniel Ball*, 77 U.S. 557 (1870) and *States v. Holt State Bank*, 270 U.S. 49 (1926).

In *The Daniel Ball*, the Court stated:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

In *United States v. Holt State Bank* the Supreme Court further clarified how navigability can be concluded when it stated:

...that navigability does not depend on the particular mode in which such use is or may be had - whether by steamboats, sailing vessels or flatboats - nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

The District concluded that Lake James is a TNW when it stated in its approved JD form that the lake is "suceptable [sic] to being used in its ordinary conditions as a highway for commerce over which trade and travel may be conducted." The District's administrative record (see electronic mail message dated September 20, 2007 between Corps Headquarters and the District) documented that Lake James meets the navigable in fact criteria for TNW by stating that "[t]his lake has public access, sailing competitions, seaplane fly-ins, etc. ...". Therefore, I find the District's determination that Lake James is a TNW reasonable and adequately documented.

Adjacency

As previously discussed, the Rapanos Guidance directs the Districts to continue to assert jurisdiction over wetlands "adjacent" to TNWs and maintains the definition of adjacency per Corps regulations at 33 CFR 328.3(c) as "...bordering, contiguous, or neighboring."

In their approved JD form, the District provides the following rationale for why the alleged wetland area is adjacent to Lake James.

The wetland within the review area is approximately 300 feet east of Lake James (TNW) and connected via seasonal overland sheet flow (during rain/snow events) as well as by an underground culvert, with outlet/inlet observed at the western edge of the wetland and at the waters edge of Lake James. In addition, surface flow from the south side and southwest corner of the wetland was observed to be flowing into a stormwater structure connected to Lake James.

Therefore, I find the District's determination that wetlands (if determined to exist) on site are adjacent to Lake James, a TNW, reasonable and adequately documented. However, as

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previously discussed above, the District must reconsider and adequately document their determination as to whether or not wetlands exist on site.

Conclusion: For the reasons stated above, I find that the District's administrative record does not fully support its decision that wetlands regulated under the CWA are present on the appellant's property. The District is instructed to further consider and adequately document its final determination based on the 1987 Manual and prepare a final JD with a basis of jurisdictional determination that is consistent with the administrative record.

Michael Montone
Administrative Appeal Review Officer
Great Lakes and Ohio River Division