

ADMINISTRATIVE APPEAL DECISION

LUCKY 7 DEVELOPMENT LLC; FILE NO. 91-012-048-4

DETROIT DISTRICT

DECEMBER 1, 2006

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

Appellant: Mr. Michael Malik of Lucky 7 Development LLC

Authority: Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403)

Date Request for Appeal received: May 30, 2006

Appeal Meeting and Site Visit Date: None

Background Information: The Detroit District (District) initiated an investigation into the disposition of the property owned by Michael Malik of Lucky 7 Development, LLC (appellant) in February 2006. The District's investigation was in response to an inquiry from the U.S. Attorney Office. The investigation focused on identifying the owner and his intentions to develop the former Boys Club/Boy Scout Camp property located near the North Channel of the St. Clair River, off of North Channel Drive, on Harsens Island, in St. Clair County, Michigan.

The District sent an advisory letter to the appellant on February 8, 2006, after identifying him as the property owner. The letter informed the appellant of the District's general jurisdiction pursuant to Section 10 of the Rivers and Harbors Act (RHA) and Section 404 of the Clean Water Act (CWA) and stated:

Under Section 10, a Department of the Army permit is required for any structures or work in the navigable waters of the United States such as the North Channel of the St. Clair River to what is called the Ordinary High Water Mark (OHWM).

The letter concluded by requesting that the appellant inform the District of any future intentions to develop the property, noting that wetlands and other waters are known to exist on the property. While waters of the U.S. can include wetlands and other waters (33 CFR 328.3), not every wetland or other water is necessarily a federally regulated water of the U.S. Therefore, while the District noted the presence of wetlands and other waters, it did not confirm the absence or presence of federally regulated waters of the U.S. on the appellant's property, nor did it conclude that the appellant planned to initiate activities within a water of the U.S. that would require a permit from the Corps. The February advisory letter does not meet the definition of an approved jurisdictional determination (JD) and is not an appealable action (33 CFR 331.2).

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The appellant responded to the District's request for information regarding plans for the property by letter dated March 16, 2006. The appellant stated his intention to develop an approximately 350 unit residential development and connect to an established sewer treatment facility by directionally drilling a sewer line under the bed of the St. Clair River.

Based on this information, the District issued an approved jurisdictional determination (JD) on March 30, 2006. In its approved JD, the District concluded that the appellant's proposed activity of installing a sanitary sewer line below the bed of the North Channel of the St. Clair River is a regulated activity and will require a permit. While the approved JD does not specifically state the absence or presence of waters of the U.S. on the appellant's property, it states that the appellant's proposed activity will occur within the limits of the North Channel of the St. Clair River, a navigable water of the U.S. Therefore, the District's March 2006 letter meets the definition of an approved JD and is an appealable action.

The appellant disagrees with the District's approved JD and submitted a Request for Appeal (RFA) on March 30, 2006.

Summary of Decision: The District's administrative record supports its decision that the appellant's proposed activity of installing a sanitary sewer line below the bed of the North Channel of the St. Clair River is regulated under the RHA. The appeal does not have merit for the reasons discussed below.

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

Appeal Reason 1: The District did not form a sufficient basis under the Clean Water Act to establish jurisdiction over the appellant's property.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The appellant provided six arguments to support his objection to the District asserting jurisdiction over his property under the CWA. As explained in detail below, the District did not assert jurisdiction under the CWA. Rather, the District has jurisdiction over the proposed installation of the sewer line under the Rivers and Harbors Act which applies to work within a navigable waterway.

The March 2006 JD letter does not purport to assert jurisdiction over activities proposed by the appellant under the CWA. Rather, in the letter, the District stated generally that the North Channel of the St. Clair River and its adjacent wetlands are under the District's jurisdiction. In doing so, the District referred to and enclosed their February 2006 advisory letter. The February letter did not specifically identify any adjacent wetlands that were on the appellant's property or that were proposed to be impacted by his proposal. Furthermore, although the February letter did note that wetlands and other waters are known to exist on the property, an approved JD, beyond the sewer pipe crossing of the St. Clair River, has not been made by the District. Therefore, statements within the District's approved JD referring to adjacent wetlands serve to

advise the appellant by conveying general information. The District's approved JD does not assert jurisdiction over the appellant's property under the CWA..

In the March 2006 letter, the District asserted jurisdiction over the placement of the sewer pipe under Section 10 of the Rivers and Harbors Act based on evidence that the appellant's proposed activity will take place waterward of the OHWM , within a navigable water of the U.S. – the St. Clair River. Thus, the approved JD letter was limited to addressing waters and activities regulated by Section 10 of the RHA.

The District is authorized to issue determinations concerning the applicability of the RHA to activities or tracts of land (33 CFR 320.1(a)(6)). The RHA prohibits the alteration of any navigable water of the United States unless the work has been authorized by a Department of the Army permit (33 CFR 320.2(b)).

Corp regulations define navigable waters of the U.S. as waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce (33 CFR 329.4). The District supported its determination that the St. Clair River is a navigable water of the U.S. with adequate documentation within its administrative record (see Jurisdictional Determination form).

The District's jurisdiction over navigable waters extends laterally to the entire water surface and bed of a navigable waterbody and includes all the land and waters below the ordinary high water mark (33 CFR 329.11). Therefore, jurisdiction extends to tunnels or other structures or work under a navigable water of the United States (33 CFR 322.3(a)). Thus, the District correctly applied Corps regulations and the RHA when it asserted jurisdiction over the appellant's proposed activity of installing a sanitary sewer line below the bed of the North Channel of the St. Clair River.

The District's approved JD does not assert jurisdiction over the appellant's property under the CWA. The District appropriately applied the RHA and supported its approved JD by substantially documenting its jurisdiction over the appellant's proposed activity of installing a sanitary sewer line below the bed of the North Channel of the St. Clair River. Therefore, this reason for appeal does not have merit.

Appeal Reason 2: The District did not form a sufficient basis when it apparently asserted its jurisdiction over the entirety of the appellant's property, including uplands.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: There is no evidence in the District's approved JD or administrative record to suggest that it asserted jurisdiction over the entirety of the appellant's property or uplands. To the contrary, as discussed above, the District's approved JD was limited to stating its jurisdiction over the aspect of the proposed project anticipated to take place within the North Channel of the St. Clair River. Therefore, this reason for appeal does not have merit.

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Conclusion: I find that the District's administrative record supports its decision that the appellant's proposed activity of installing a sanitary sewer line below the bed of the North Channel of the St. Clair River is regulated under the RHA. For the reasons stated above, the appeal does not have merit.



MICHAEL G. MONTONE
Administrative Appeal Review Officer
Great Lakes and Ohio River Division