

**ADMINISTRATIVE APPEAL DECISION**

**STAR FINANCIAL BANK PROPERTY; FILE NO. 2003-1020251**

**DETROIT DISTRICT**

**MARCH 31, 2010**

**Review Officer:** Pauline Thorndike, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division (LRD)

**Appellant:** STAR Financial Bank, represented by Mr. David Cornwell

**Permit Authority:** Rivers and Harbors Act, Section 10 (33 U.S.C. 403) and the Clean Water Act, Section 404 (33 U.S.C. 1344)

**Receipt of Request for Appeal:** April 13, 2009

**Appeal Meeting and Site Visit Date:** None

**Summary of Decision:** The appellant's request for appeal has merit and the approved jurisdictional determination is remanded to the District to reconsider and document its decision as appropriate.

**Background Information:**

The appellant's property is located at the southwest corner of Dupont and Auburn Roads in Fort Wayne, Allen County, Indiana. An initial request for a jurisdictional determination (JD) was dated September 15, 2003. The Detroit District (District) performed site visits in December 2003 and in the spring of 2004. However, the JD request was withdrawn because the project proponents no longer wished to pursue the project. The District received a new JD request in September 2006 and a permit application in June 2007.

Headquarters interagency guidance following the Supreme Court ruling in *Rapanos v. United States*, 547 U.S. 715 (June 2006) (hereinafter "*Rapanos*"), recommended that all Districts delay making CWA jurisdictional determinations for areas beyond the limits of the traditional navigable waters until official guidance became available. Joint Corps and U.S. Environmental Protection Agency guidance was issued on June 5, 2007. Meanwhile, unauthorized activities occurred on the property during the JD review period.

On October 24, 2008, the District issued an approved JD. In response to the approved JD, the appellant submitted a request for appeal dated December 16, 2008, to the Great Lakes and Ohio River Division of the U.S. Army Corps of Engineers (LRD). Since the request for appeal contained new information, it was withdrawn so that the District could reconsider the JD based

on the new information. The District issued a new approved JD on February 11, 2009, that included evaluation and consideration of the new information. The appellant submitted a new request for appeal on April 17, 2009, that was accepted by LRD on May 20, 2009. Because unauthorized activities had occurred on the property, regulations at 33 CFR 331.11 require that the appellant submit a signed tolling agreement. A completed/signed tolling agreement was received by LRD on July 21, 2009.

The subject property is an approximately 10-acre site bounded in part by Dupont and Auburn Roads and commercially developed properties. Prior to unauthorized activities occurring on-site, the site consisted of maintained residential lawn areas with an approximately 0.5-acre forested area in the south section of the property. The District describes the site in their administrative record as containing one 0.82-acre wetland located toward the center portion of the property. The wetland drains to the southwest into an on-site swale which empties into a subsurface pipe that continues off-site until it outlets into Swift Ditch. Swift Ditch flows southeast to the St. Joseph River, the nearest traditional navigable waterway (TNW) to the subject property. The St. Joseph River is a tributary of the Maumee River and ultimately Lake Erie. The District determined the swale and pipe, a distance of approximately 700 linear feet, to be non-jurisdictional conveyances with a seasonal flow regime. Swift Ditch is described as a jurisdictional waterway with relatively permanent flow.

**Appeal Evaluation, Findings and Instructions to the Detroit District Commander:**

**Appeal Reason 1.** The site is not jurisdictional under the Clean Water Act (CWA) because the JD is based on conclusions that are contrary to fact and the facts do not support a significant nexus.

**Finding:** This reason for appeal does not have merit.

**Action:** No action required.

**Discussion:**

This reason for appeal focuses on three jurisdictional questions – whether water flows from the wetland into the swale ditch, whether the wetland abuts the swale, and whether the wetland has a significant nexus to a downstream TNW. The appellant identifies two findings in the administrative record as contrary to fact. Specifically, the appellant disagrees with the District’s statements in the JD that:

- “Wetlands drain into a swale ditch, which drains into a subsurface drain;” and
- “Waters from the wetland abutted and emptied into swale/ditch and drain before entering Swift Ditch.”

The appellant references several sources in support of his belief that these statements are incorrect and that the JD wrongly concludes that the wetlands have a significant nexus with a TNW. The appellant submitted a topographical survey dated September 23, 2003, and various

site photographs taken in March 2007. The appellant states that the topographical survey shows that water would have to flow uphill after an extraordinary precipitation event in order to make the connection documented in the District's JD. The appellant submitted a photo, labeled Exhibit B, they claim was taken during a time with a large amount of water present and no observable flow from the wetland into the onsite swale or subsurface drain. The appellant claims that the flow into the swale is neither intermittent nor seasonal and thus is not a connection sufficient to support a significant nexus determination. The appellant mentions that the wetland probably would not be present if the site was properly graded to connect to the Swift Ditch through the subsurface drain. Finally, the appellant also believes that due to the less than intermittent or seasonal flow of water into the swale, there is no connection between the wetland and Swift Ditch, a relatively permanent water (RPW). As a result, the appellant concludes that hydrological conditions on the site fail to support a finding of a significant nexus to the RPW and then to the St. Joseph River, the nearest downstream TNW.

### **Evaluation of Wetland Adjacency**

The administrative record shows that the District fully considered the appellant's documents. The District noted that Exhibit B shows the southwestern portion of the wetlands as contiguous with the swale and not disconnected as the appellant indicates. In addition, the District analyzed the September 23, 2003, topographic survey submitted by the appellant and determined that it is possible for water in the wetlands on the site to drain into the swale and to downstream waters. The District mentions in the administrative record that the appellant selectively highlighted elevations in the survey to support an argument that the wetlands and swale have no connection. Also, the District obtained a photo taken by the Indiana Department of Environmental Management in March 2007 which shows the eastern end of the swale contiguous with the wetlands.

According to the District's JD form and February 2009 memo, the swale and subsurface drain connect the onsite wetland to Swift Ditch but are not themselves jurisdictional waters of the U.S. However, the onsite wetland is adjacent (contiguous) to the swale, and the swale and drain hydrologically connect the wetland to the nearest downstream TNW, the St. Joseph River. The JD form stated that water from the wetland only emptied into the swale/ditch during precipitation events and seasonally, and that this surface flow connection was discrete and confined. The District stated that the inlet elevation of the subsurface drain provided on the September 2003 survey was the top of the pipe and not the invert or bottom elevation of the pipe. Therefore, the District determined that the topographic survey does not suggest that water has to flow uphill to reach downstream waters.

### **Evaluation of Water Flow**

In their JD form, the District documented that the swale was in hydric soils (as shown on the Allen County USDA Natural Resources Conservation Service Soil Survey) and contiguous with the southwestern portion of the wetland. The District stated that water flow in the man-made swale and drain is seasonal, only conveying water during more substantive precipitation events and prolonged snowmelt situations, and that urbanization in the watershed has made the flow regime very "flashy". The District also documented that there was no prominent ordinary high

water mark along the swale. Although several of these reasons may have contributed to the District's decision not to regulate the swale, the District did not provide a clear and distinct rationale for not asserting jurisdiction over the swale. Although the District erred when they did not clearly document their rationale for not asserting jurisdiction over certain onsite features (RGL 08-02, dated June 26, 2008, Section (2)(a)(3)), this is a harmless error because page 38 of the U.S Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (JD Guidebook) states that "Swales are generally not waters of the U.S. because they are not tributaries or they do not have a significant nexus to TNWs. Even when not themselves waters of the United States, swales may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW."

### **Evaluation of the Significant Nexus Determination**

The appellant's arguments are focused on the jurisdictional status of the wetland following the *Rapanos* ruling. 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 following the *Rapanos* ruling. The collective guidance is referred to herein as the "*Rapanos* Guidance" and contains four major parts: 1) a memorandum titled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*"; 2) a JD form to document approved JDs; 3) a Jurisdictional Determination 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 4) an appendix titled "Legal Definition of 'Traditional Navigable Waters'". A revised memorandum was issued on December 2, 2008.

The *Rapanos* Guidance directs the Corps 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". Criteria that satisfy this definition can include shallow sub-surface connection to jurisdictional waters. The *Rapanos* guidance clarifies that finding a continuous surface connection is not required to establish adjacency. The District, in asserting jurisdiction over the subject wetland, but not over the swale and sub-surface drain connecting the wetlands to Swift Ditch, documented a surface water connection in their February 11, 2009, approved JD letter as follows:

We have determined that the wetlands in question were contiguous to a headwaters tributary to Swift Ditch, which is a tributary to the St. Joseph River, which, in turn is a tributary to the Maumee River, a navigable water of the United States.

The District substantiated this statement on their JD form. On the form, the District stated that the site contains wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs. The District explained the basis of their significant nexus finding with the following statement:

Wetlands on site did retain and desynchronize flows of water into Swift Ditch and, as such, helped mitigate potential flooding in the St. Joseph River and in the Maumee River in downtown Fort Wayne. Smaller tiles such as these often provide direct water inputs into perennial tributaries including storm water and snow melt water with substantial

amounts of sediment and agricultural chemicals. Wetlands adjacent to small tiles can store runoff water and reduce flood peaks downstream while removing pollutants before they enter drains and ditches. The wetlands in question are in the Lower St. Joseph River watershed, the most downstream reach of the River before its confluence with the Maumee River. Most of the wetlands in the Maumee River watershed in Indiana are relatively small and exist as fragments or relic portions of the Great Black Swamp, which stretched from Fort Wayne to Toledo, Ohio and was subjected to massive drainage projects in the 1800s. The drainage work facilitated the pervasive conversion of the landscape to agricultural land. Prior to the drainage efforts, the Maumee River's watershed was basically one large forested wetland with interspersed marshes. The ditches that drained the Great Black Swamp are conduits for fast drainage and provide little flood retention and little ability to filter/retain pollutants. [The] Lower St. Joseph-Bear Creek Watershed Management Plan<sup>1</sup> states: 'The Lower St. Joseph and Bear Creek sub-watersheds comprise the southeastern portion of the St. Joseph River Watershed and include the urban areas of Fort Wayne and Leo-Cedarville as well as rural residential and agricultural lands. The land of these watersheds lies in two Indiana counties, Allen and DeKalb. Together with the Lower and Upper Cedar, these two sub-watersheds lie directly upstream of the City of Fort Wayne. They have the greatest impact on the quality of Fort Wayne's source water, both by virtue of their proximity to the city and by the volume of water carried by the streams and the river.' The subject wetlands and Swift Ditch are just upstream of Ft. Wayne's municipal water source on the St. Joseph River – impacts to these wetlands will increase turbidity in the St. Joseph River and add cost to Ft. Wayne's already-costly efforts (per Lower St. Joseph-Bear Creek Watershed Management Plan, some \$300,000 annually), to remove turbidity from the water before they filter sediments out of their municipal water. The Lower St. Joseph-Bear Creek Watershed Management Plan noted that construction-related erosion is a major contributor to the St. Joseph River's turbidity. Such construction is extensively occurring in the Swift Ditch watershed. We noted a relatively sizeable build up of sediments in the culverts entering/exiting the retention basins that have been constructed in Swift Ditch just downstream from the project site. The subject wetlands did filter sediments that would otherwise flow into Swift Ditch and become part of the St. Joseph River's sediment load. The remaining wetlands in the Lower St. Joseph River watershed, including the subject wetlands, play a significant role in mitigation effects on the biological, chemical, and physical integrity of the St. Joseph and Maumee Rivers. . . .

Although the District erred when they did not fill out the table at Section III(B)(3) of the JD form, which is a required section of the JD form for significant nexus determinations according to p. 53 of the JD guidebook, this is a harmless error because the same or substantially similar information is provided earlier at Section III(B)(3), and at Section III(C)(2) and Section III(B)(2) of the JD form.

I find that the District adequately documented its significant nexus determination on the Approved JD form and the District's conclusions are supported by documentation in the record.

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<sup>1</sup> Prepared by the St. Joseph River Watershed Initiative

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The District provided a fact specific analysis that takes into account the appellant's documents. Therefore, this reason for appeal has no merit.

**Appeal Reason 2.** The District did not properly weigh the conclusions in the three different delineation reports.

**Finding:** This reason for appeal does not have merit.

**Action:** No action required.

**Discussion:**

The appellant lists three separate wetland delineation reports, prepared by private consultants, which were available to the Detroit District office at the time they evaluated the JD. These delineations are dated January 24, 2004, August 8, 2006, and April 27, 2007. The January 2004 and August 2006 delineations stated that isolated wetlands existed on-site; The April 2007 delineation identified two separate wetlands of 0.3 acres and 0.5 acres.

The District took into consideration four separate wetland delineations, the three aforementioned delineations, and a fourth consultant's delineation dated March 1, 2007, that incorporated wetland boundaries established during a May 20, 2004, onsite meeting with District staff. The variations between the four delineations are explained in a Memorandum for the Record dated February 2, 2009. The District based its jurisdictional determination on District observations made during December 2003 and May 2004 site visits and on the March 2007 delineation which concluded that a single wetland had contiguous drainage to Swift Ditch.

The appellant observed that the April 2007 delineation did not conclude whether the identified wetlands were isolated waters and that the remaining two delineations [January 2004 and August 2006] stated that the wetlands were non-jurisdictional. Therefore, the appellant believes the District did not properly weigh the conclusions in all the delineation reports.

Wetland delineations prepared by environmental consultants, in and of themselves, do not determine Corps jurisdiction pursuant to Section 404 of the Clean Water Act. These delineation reports must be reviewed and validated by the Corps and any conclusions they contain may not be accepted by the Corps. While wetland delineations may serve as part of the basis of a JD, they are not a substitute for a written Corps approved JD. An approved JD provides an official determination of the presence or absence of waters of the U.S. on a parcel.

Regulations at 33 CFR 331 state:

*Approved jurisdictional determination* means a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.

***Basis of jurisdictional determination*** is a summary of the indicators that support the Corps approved JD. Indicators supporting the Corps approved JD can include, but are not limited to: indicators of wetland hydrology, hydric soils, and hydrophytic plant communities; indicators of ordinary high water marks, high tide lines, or mean high water marks; indicators of adjacency to navigable or interstate waters; indicators that the wetland or waterbody is of part of a tributary system; or indicators of linkages between isolated water bodies and interstate or foreign commerce.

There is no requirement that the District weighs each of the conclusions of the wetland delineation reports or accord them any particular meaning. Regulatory Guidance Letter 07-01 states that all pertinent information reviewed for a given JD should be adequately reflected in the file. The District's administrative record contains a memorandum that discusses the District's evaluation of the four delineation reports and reflects that its JD is based on District observations made during December 2003 and May 2004 site visits and on the March 2007 delineation. Therefore, this reason for appeal has no merit.

**Appeal Reason 3.** The site contains isolated wetlands and is comprised of at most two separate non-connected wetlands of 0.3 acres and 0.5 acres rather than one continuous wetland of 0.82 acres. The 0.82-acre District delineation is not supported by the record.

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

**Action:** The District did not adequately document the presence of a single wetland, as opposed to two non-connected wetlands, pursuant to applicable guidance. Therefore, the decision is remanded for appropriate action. Upon remand, the District shall address the presence of wetlands in accordance with the 1987 Corps of Engineers Wetlands Delineation Manual and appropriate supplemental guidance and reconsider its JD as appropriate.

**Discussion:**

As explained above, the appellant relied on three separate wetland delineation reports that were completed between 2004 and 2007. The January 2004 and August 2006 delineations stated that isolated wetlands existed on-site and the April 2007 delineation identified two separate wetlands of 0.3 acres and 0.5 acres. The appellant claims that the District ignored the April 2007 delineation and provided no scientific evidence to support its finding of one contiguous wetland of 0.82 acres.

The District evaluated the three wetland delineations in addition to a fourth wetland delineation dated March 2007 not listed by the appellant. The March 2007 delineation documented that a single 0.83 acre wetland had contiguous drainage to Swift Ditch, a tributary to the St. Joseph River. This delineation included boundaries established during a May 20, 2004, onsite meeting with District staff. During the May 2004 site visit, the District found that the previously identified two separate wetlands were actually one contiguous wetland. The complete March 2007 delineation report was not provided to the District. The District AR includes portions of the delineation submitted by the consultant including the delineation map, an aerial photograph showing the delineation boundaries, and the cover letter for the delineation report. Data sheets supporting the wetland boundary are not in the AR. The District documented the approved JD

based on these materials, site inspections, photographs dated March 2004 taken by the District during one of their site visits, and photographs dated March 2007 submitted by the appellant. The District stated in their 2 February 2009 Memorandum for the Record that no obvious topographical break or upland exists between the two wetlands formerly identified as separate areas.

1987 Corps of Engineers Wetlands Delineation Manual

Districts are to use the 1987 Manual and supplemental guidance to identify and delineate wetlands that may be regulated under Section 404 of the CWA. Accordingly, under normal circumstances<sup>2</sup> and site conditions, the District will document the presence of wetland hydrology, hydrophytic vegetation, and hydric soils in order to substantiate that an area is wetlands.

The presence of hydrophytic vegetation can generally be supported when more than 50% of the dominant plant species have a wetland indicator status of facultative wetland (FACW)<sup>3</sup> or wetter. The District identified the dominant plant species in the middle of the wetland (formerly identified as the area between two wetlands) as facultative upland or upland plants, instead of FACW plants. Thus, the middle of the wetland did not meet the hydrophytic vegetation parameter.

The delineation relied upon by the District documents hydric soils and hydrology, but no hydric vegetation, in the middle of the wetland. Thus, the District improperly characterized this area as contiguous wetland as one of the three wetland criteria (hydrophytic/wetland vegetation) was not documented in the middle of the wetland. There is no information within the administrative record to suggest that circumstances and site conditions were not “normal”.

I find that the AR does not adequately support the District determination that a single, 0.82-acre wetland is present onsite. Upon remand, the District shall reconsider its JD by addressing the presence of wetlands according to the 1987 manual and adequately documenting their decision as to the extent and location of wetlands on site.

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<sup>2</sup> 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*.

<sup>3</sup> FACW plants will usually occur in wetlands (67 to 99 percent probability) and sometimes occur in non-wetlands (1 to 33 percent probability).

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**Conclusion:**

For the reasons stated above, I conclude that this request for appeal has merit. The approved JD is remanded to the District to reconsider and document its JD as appropriate. **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.**



SUZANNE L. CHUBB  
Regulatory Program Manager  
Great Lakes and Ohio River Division