

ADMINISTRATIVE APPEAL DECISION

SCHROEDER MATERIAL, INC.; FILE NO. 200500049

CHICAGO DISTRICT

FEBRUARY 28, 2006

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

Appellant: Mr. Richard Schroeder of Schroeder Material, Inc., property owner

Jurisdiction: Section 404 of the Clean Water Act (33 U.S.C. 1344)

Receipt of Request For Appeal: November 30, 2005

Background Information:

In October 2004, Christopher B. Burke Engineering, LTD (retained by the appellant) contacted the Chicago District (District) and requested an approved jurisdictional determination (JD) for lands located north of Illinois Route 83, south of the Calumet Sag Channel, west of Autobahn Drive West, and east of Holmes Avenue, in the City of Palos Park, Cook County, Illinois.

The JD request submitted by Christopher B. Burke Engineering, LTD (CBB) included a wetland delineation report based on a site inspection performed by CBB on September 7, 2004. According to CBB, the 8.3 acre site contains two wetlands and an excavated ditch that were identified in accordance with methodology described by the 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual).

CBB acknowledged a surface water connection between wetland 2 and the Calumet Sag Channel in the following statement at page one of the cover letter associated with its wetland assessment:

...Wetland 1 is not jurisdictional because it does not appear to be contiguous with a jurisdictional 'waters [sic] of the U.S.' However, we believe that Wetland 2 could be under the Corps' jurisdiction because it drains through the drainage ditch and culverts, which appear to be contiguous with the Calumet Sag Channel, a jurisdictional waters [sic] of the U.S.

The Calumet Sag Channel is an intrastate waterway, generally flowing from east to west. The Calumet Sag Channel begins at the Little Calumet River at Calumet Park, Illinois and discharges into the Chicago Sanitary and Ship Canal at Lemont, Illinois.

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On August 24, 2004, the District performed a site visit with CBB. However, there are no documents within the administrative record to indicate what the District observed during its site visit, which was prior to the CBB wetland delineation and JD request to the District.

On August 8, 2005, the District issued an approved JD to Schroeder Material, Inc. stating the presence of waters of the U.S. on the appellant's property.

The appellant submitted an acceptable RFA dated November 29, 2005, which was accepted by the Division on January 20, 2006, and serves as the basis for this appeal.

Summary of Decision: The Appellant's Request for Appeal has merit and the approved JD is remanded to the District to include sufficient documentation to support its JD and to reconsider its JD as appropriate.

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

Appeal Reason 1: There has been an incorrect application of law, regulation or official policy.

Finding: This reason for appeal has merit.

Action: The District's administrative record does not adequately address this issue. The District shall prepare and include in the administrative record a decision document that supports its final JD. 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:

In the RFA, CBB asserts that the District incorrectly applied the definition of waters of the U.S. at 33 CFR § 328.3(a)(7) to its JD for lands owned by the appellant. The appellant also acknowledges that "[t]he depressional area in the eastern property" meets the criteria of wetlands according to the 1987 Manual. However, the appellant disputes that this area (wetland 2) is adjacent to a navigable water of the U.S. The appellant also disputes that wetland 1 is jurisdictional.

CBB states in the RFA that a man-made drainage ditch was excavated in upland soils to allow wetland 2 to drain west and north. CBB then asserts that according to the November 1986 preamble to 33 CFR 320-330, a non-tidal drainage ditch excavated on dry land is not a water of the U.S. Therefore, the appellant concludes that wetland 2 cannot be considered adjacent to a water of the U.S. based on the definition of "waters of the United States" at 33 CFR 328.3(a)(7).

Preamble language to support 33 CFR 328.3 refers to non-tidal drainage ditches excavated in uplands in the following manner:

For clarification it should be noted that we generally do not consider the following waters [including non-tidal drainage ditches excavated in uplands] to be 'Waters of the United States' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States...

The purpose of preamble language is to describe the setting in which its associated regulations were promulgated. Preamble language is not considered binding and is not to be relied upon in the same manner that regulations are when making a JD. Furthermore, the preamble cited by the appellant clearly states the Corps' intent to clarify its right to make JDs regarding drainage ditches excavated in uplands on a case-by-case basis. Therefore, the appellant's argument that the District's JD was incorrect based upon preamble language does not have merit.

In making its JD, the District does not specify that its jurisdiction is based on 33 CFR 328.3(a)(7). Instead, the District's approved JD letter makes the following statements: the appellant's property contains waters of the U.S.; the waters of the U.S. have a hydrological connection to the Cal-Sag Channel via a ditch that runs along the project site; the enclosed decision document contains a detailed description of its determination; and it concurs with the wetland boundaries as submitted by CBB.

The District's decision document indicates that the basis for its determination that there are waters of the U.S. on the project site is 33 CFR 328.3(a)(2), the presence of interstate waters including interstate wetlands. The rationale given for that basis is that the waters of the U.S. have a hydrological connection to the Calumet Sag Channel via a ditch that runs along and within the project site.

There is nothing in the District's administrative record that states the District considered wetlands 1 and 2 adjacent wetlands and asserted jurisdiction based on 33 CFR 328.3(a)(7). To the contrary, the District stated that it asserted jurisdiction based on the presence of interstate wetlands per Corps regulations at 33 CFR 328.3(a)(2). Therefore, the appellant's argument on this matter is moot.

However, the lack of documentation within the District's administrative record raises questions regarding how the District applied Corps regulations in making its JD. First, it is not clear which aquatic resources (wetlands 1, 2, or ditch) are waters of the U.S. and how they meet the criteria of waters of the U.S. defined at 33 CFR 328.3(a)(2).

A drawing submitted by CBB (exhibit 7 of wetland assessment) illustrates that wetland 2 is contiguous with a ditch that leads to the Calumet Sag Channel. However, the same drawing illustrates the lack of a definitive surface water connection between wetland 1 and the drainage ditch or the Calumet Sag Channel. Therefore, it is unclear how wetland

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1 is connected to the Calumet Sag channel as stated by the District in its approved JD and decision document.

Second, interstate is generally defined as occurring in one or more states. The dictionary definition of "interstate" is "of, connecting, or existing between two or more states especially of the U.S." Merriam-Webster Online Dictionary (14 February 2006), available at <http://www.m-w.com/dictionary/interstate>.

The District's administrative record is silent on how the waters of the U.S. on site qualify as interstate waters per Corps regulations at 33 CFR 328.3(a)(2). There is nothing in the District's administrative record that explains or documents how any of the identified aquatic resources (wetlands 1, 2, or the ditch) occur within the boundaries of multiple states. Therefore, the District did not support its decision to assert jurisdiction based on Corps regulations at 33 CFR 328.3(a)(2) and this appeal has merit.

Conclusion: For the reasons stated above, I conclude that this RFA has merit. The approved JD is remanded to the District to include sufficient documentation to support their JD and to reconsider their JD decision as appropriate.

FOR THE COMMANDER:



Michael Montone
Appeal Review Officer
Great Lakes and Ohio River Division