

ADMINISTRATIVE APPEAL DECISION

JEFFREY SPICER; FILE NO. 2006-00138

BUFFALO DISTRICT

2 July 2009

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division

Appellant: Mr. Jeffrey Spicer

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

BACKGROUND INFORMATION:

On 11 February 2008, a joint permit application submitted by Mr. Jeffrey Spicer (“the appellant”) for construction at 128 South Lake Road, in the Town of DeRuyter, Madison County, New York was received by the Buffalo District (“the District”). Attached to the permit application was a 9 January 2008, transmittal from Barbara Reuter, Consultant for Mr. Spicer containing four sets of data forms for routine wetland determinations identifying four upland and four wetland plots along the wetland boundary. Also included with the permit application was correspondence from a previous request by the appellant dated 23 January 2006 which stated that the Corps had no jurisdiction over proposed work involving dredging and removal of accumulated sediments from a private dockage area along the shoreline of DeRuyter Reservoir with placement of dredged material in uplands

In response to the 11 February 2008 permit application filed by Mr. Spicer, the District affirmed the use of a Nationwide Permit (NWP) on 1 April 2008 to place fill in 0.1 acres of wetlands for the construction of a woodchip walkway and a boat ramp along the shore of DeRuyter Reservoir at 123 South Lake Road, in the Town of DeRuyter, Madison County, New York.

The NWP cover letter also served as an approved jurisdictional determination as it stated the presence of waters of the U.S. by stating that the wetland boundary on the property as shown on the attached drawings was confirmed on 6 March 2008 and this determination will remain valid for 5 years. The NWP also contained four special conditions. In addition, the NWP letter contained a paragraph which stated that proposed work to dredge a portion of DeRuyter Reservoir with upland disposal of the dredged material, construction of an elevated boardwalk through the on-site wetland as well as installation of two open pile docks at lots 9 and 10 would not involve a discharge of dredged or fill material into “waters of the United States” and therefore the Corps does not have jurisdiction over the dredging or construction of the elevated boardwalk and open pile docks.

On 30 May 2008 a request for appeal was filed by the appellant questioning the determination by the Buffalo District to take jurisdiction of the wetlands on the site under the Clean Water Act, 33 U.S.C. 1344. The appellant disagrees that the wetlands are a surface water tributary to DeRuyter Reservoir.

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. The Review Officer also spoke to Ms. Barbara Reuter, consultant for the appellant who conducted the wetland delineation and Ms. Megan Oberst, Project Manager for the Buffalo District, both confirmed that the wetlands on site directly abut the DeRuyter Reservoir.

Summary of Decision:

The appellant's request for appeal does not have merit. The District correctly determined that the wetland on site is a water of the United States and subject to jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344).

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

Appeal Reason 1: The Buffalo District's determination that wetlands on the site are waters of the United States, subject to federal jurisdiction and regulation under the Clean Water Act, 33 U.S.C. 1344 is incorrect.

Finding: This reason for appeal does not have merit.

Action: The District shall address documentation inconsistencies in the administrative record.

Discussion: In the request for appeal, the appellant's agent states that he questions the District's assumption that the small wetland on the site is a surface water tributary of DeRuyter Reservoir and a water of the U.S. However, the District's determination that the wetland on site is a water of the U.S. is supported by evidence submitted by the appellant and within the administrative record. For instance, the drawings provided by the appellant with the initial application (see drawing 4 of 9) support that the wetlands on the site directly abut DeRuyter Reservoir, a relatively permanent tributary that ultimately discharges into Oneida Lake and the Erie Canal, traditionally navigable waters. According to Corps guidance¹, wetlands directly abutting such tributaries are waters of the U.S. This determination is further clarified in phone conversations initiated by the Review Officer to clarify the location of the wetlands in regards to DeRuyter Reservoir with the applicant's consultant and the Buffalo District's Project Manager, both of whom agreed and confirmed that the wetlands directly abut the reservoir.

In the review of the District's administrative record two inconsistencies were identified. The first is in the NWP verification letter on page 3, paragraph 2 where the District states its determination is "based upon [its] review of the submitted delineation and on-site observations...". The administrative record does not support that any on-site observations were made. This inconsistency is likely the result of the District using a template letter and not correcting for this specific case. However, it does not impact the evidence within the record that supports that the wetland on-site is a water of the U.S. Second, on pages 2 and 3 of the of the JD form the District states that the DeRuyter Reservoir is a relatively permanent water which flows into the Susquehanna River, a traditional navigable waterway (TNW). Based on a telephone conversation with the appellant and after further review of topographic maps, it appears that this DeRuyter Reservoir drains to the north into Limestone Creek, then into the Chittenango River, then

¹ Corps Guidance dated December 2, 2008 and titled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos V. United States and Carabell V. United States."

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Oneida Lake, and then the Erie Canal. According to the District internet website pages, both Oneida Lake and the Erie Canal are navigable waterways. Furthermore, because of this inconsistency, the distance in river miles and aerial miles regarding the proximity to the nearest TNW is incorrectly documented on the District's JD form. Again, this inconsistency is likely attributed to an oversight when using template documents. The District is directed to address these inconsistencies and ensure the administrative record is complete and accurate.

Conclusion:

While inconsistent documentation was identified, I find that the District's administrative record adequately supports its decision that the wetland on the appellant's property is a water of the U.S. and subject to federal jurisdiction and regulation under the Clean Water Act, 33 U.S.C. 1344. For the reasons stated above, the appeal does not have merit. Accordingly the District shall address the inconsistencies in the administrative record and the administrative appeals process for this approved jurisdictional determination is concluded.



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