

ADMINISTRATIVE APPEAL DECISION

BOOS PROPERTY; FILE NUMBER 2007-01633

BUFFALO DISTRICT

July 2, 2009

Review Officer: Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

Appellant: Dennis Boos

District Representative: Brian Swartz, Army Corps of Engineers, Buffalo District

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

Receipt of Request for Appeal: 02 May 2008

Appeal Meeting and Site Visit Date: NA

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

Background Information: Mr. Boos' (the "appellant") Inland Marina property is located at 10655 West State Route 2 in Carroll Township, Ottawa County, Ohio. The property is an approximately 8 acre site, bound on the north by Turtle Creek, on the south by West State Route 2, on the west by the South Lake Hunt Club, and on the east by a "boat channel".

Two letters were written by Buffalo District ("the District") following a November 16, 2007 site visit, in response to a complaint made by the appellant about flooding on his property. The flooding allegedly resulted from activities at the South Lake Hunt Club located adjacent to the Boos property. Mr. Boos' property borders the eastern impoundment of the South Lake Hunt Club. The District affirmed the use of an After-the-Fact Nationwide Permit (ATF NWP) 3 for the South Lake Hunt Club to rebuild a breached dike within the western impoundment and to perform minor maintenance work due to erosion within the eastern impoundment (no breach in the eastern dike).

In a letter dated December 12, 2007, and addressed to Mr., Boos, the District stated the presence of federally regulated wetlands within the approximate 8 acre bermed area on the appellant's property. The District's letter further stated that "the bermed wetland area within the western portion of the property [is] adjacent to a navigable water of the U.S..."

and the “wetland is regulated under Section 404 of the Clean Water Act.” Attached to the letter was an approved jurisdictional determination (JD) form. Per Corps regulations at 33 CFR 331, the declarative statement identifying the presence of federal wetlands in the project area in the District’s December 12, 2007 letter is an approved JD.

In a November 26, 2007 letter to the appellant the District confirmed that areas within the appellant’s property met the federal wetland criteria and are subject to regulation by the U.S. Unlike the December 2007 letter, the November 2007 letter did not contain an approved JD form. Per Corps regulations at 33 CFR 331, this declarative statement identifying the presence of federal wetlands in the project area in the District’s letter is an approved JD. The November 26, 2007 letter also stated that the area in which the appellant proposed digging a channel and discharging fill materials in order to expand the marina/mobile home park is located “below the ordinary high water mark of Lake Erie and contains federally regulated wetlands”. The letter further stated that “it appears that other areas of your property in which the USACE was not permitted access to during the November 16, 2007 site visit may also contain federally jurisdictional areas.” Per Corps regulations at 33 CFR 331, this tentative statement is considered a preliminary JD and is not an appealable action.

According to the District’s November 16, 2007 “File Memorandum”, Mr. Boos alleged that the property did not flood until early October after South Lake Hunt Club started pumping, but admitted that his property had been inundated during the spring. Following a review of historic aerial photography, National Wetland Inventory (NWI) maps, the U.S.G.S. Quadrangle, NRCS soil survey map, among other historic resources, the District concluded that the site was historically subject to flooding and inundation, has been part of Turtle Creek (NWI), has always contained standing water or wetland vegetation (aerials), contains hydric soils and water table is at or above the soil surface during most of the year (soil survey), and is reportedly at or below 575 msl (U.S.G.S. quadrangle map.)

Per Corps regulations at 33 CFR 331, the declarative statement identifying the presence of federal wetlands in the project area in the District’s December 12, 2007 letter is an approved JD, supersedes the approved JD statement issued on November 26, 2007, and is an appealable action. Thus, this appeal decision is limited to the District’s December 12, 2007 approved JD. However, all information within the administrative record for both actions were considered as they are relevant to the District’s ultimate approved JD on December 12, 2007.

The appellant disagrees with and has appealed the District’s December 2007 approved JD. The appellant submitted a narrative listing several reasons for appeal. These reasons were summarized as reflected below.

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

REASON 1: The District incorrectly categorized the area as wetland.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION:

The appellant asserts that the District incorrectly categorized the area as wetland.

As previously stated in the background section, statements within the District's December 2007 letter referring to the presence of federal wetlands within the project site constitute an approved JD. Approved JDs identifying the presence of federal wetlands need to be documented according to the Corps 1987 Wetland Delineation Manual ("1987 Manual") (below) and the Rapanos Guidance (explained in Reason 2).

1987 Manual

Corps policy requires the District to use the 1987 Manual to identify and delineate wetlands that may be regulated under Section 404 of the CWA. Accordingly, under normal circumstances¹ 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 District documented their wetland determination and the presence of all three wetland criteria in site inspection notes, photographs, and a data sheet dated November 16, 2007. The data sheet completed by the District indicates that normal circumstances exist at the site. The data sheet also indicates there is an obligate plant community, hydric soils, and wetland hydrology, which supports the District's conclusions that there are wetlands within the 8 acre property. I find that the District adequately documented the presence of wetlands in accordance with the 1987 Manual and this reason for appeal has no merit.

REASON 2: The jurisdictional determination form incorrectly identifies Turtle Creek as a waterway used for the transport of interstate or foreign commerce.

FINDING: This reason for appeal has merit.

ACTION: Upon remand, the District should clarify to what extent, if any, Section 10 Rivers and Harbors Act jurisdiction exists on the property. If no Section 10 RHA jurisdiction exists on the property, the District should address the

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*.

jurisdictional status of Turtle Creek. In doing so the District must clearly state its determination as to whether Turtle Creek is a TNW and document how they considered this information in their JD)

DISCUSSION: The appellant asserts that the District incorrectly identified Turtle Creek as a waterway used for the transport of Interstate or Foreign Commerce.

On June 5, 2007, the U.S. Environmental Protection Agency and the Corps jointly issued guidance, intended to foster nationally-consistent implementation of the CWA that takes into account the U.S. Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*") The guidance included memos, an approved JD form, an instructional guidebook and a Regulatory Guidance Letter (RGL). The collective guidance is referred to herein as the "Rapanos Guidance".

Approved JDs identifying the presence of federal wetlands need to be documented according to the 1987 Manual (explained above in Reason 1) and the Rapanos Guidance (explained below).

Rapanos Guidance

The Rapanos Guidance provides direction for the District when evaluating, documenting and making jurisdictional determinations. The Rapanos Guidance (specifically RGL 07-01) requires the District to use an approved JD form when documenting approved JDs, including approved JDs associated with enforcement actions.

Specific to wetlands, the Rapanos Guidance addresses making JDs in four distinct scenarios. The guidance directs the District to assert jurisdiction over 1) wetlands adjacent to traditional navigable waters (TNWs) and 2) wetlands that directly abut non-navigable tributaries of TNWs that are relatively permanent. The Rapanos Guidance does not define relatively permanent waters (RPW) but does provide illustrative examples including waters that typically flow year-round or have continuous flow at least seasonally. In addition, the Rapanos Guidance directs the Districts to use the "significant nexus" test to determine the jurisdictional status of 3) wetlands adjacent to non-navigable tributaries that are not relatively permanent waters (NRPW) and 4) wetlands that are adjacent to but do not directly abut a non-navigable RPW. The significant nexus test must be a fact-specific analysis that determines whether the wetlands have a significant nexus with TNWs.

An additional category is for Rivers and Harbors Act (RHA) Section 10 Determinations of Jurisdiction. Corps regulations at 33 CFR 329 specifically define the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers under Section 10 of the Rivers and Harbors Act of 1899 and do not apply to authorities under Section 404 of the Clean Water Act (CWA) defined at 33 CFR Parts 323 and 328.

Geographic and jurisdictional limits of rivers and lakes as navigable waters are defined at 33 CFR 329.11, as follows:

“Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.”

Although the District’s approved JD letter did not indicate any Section 10 RHA jurisdiction, the District documented in the approved JD form under Section I.A. (RHA Section 10 Determination of Jurisdiction) that waters presently used, or have been in the past, or may be susceptible for use to transport interstate or foreign commerce are present. In this section of the JD form, the District explained that the wetland was a coastal wetland that was hydrologically connected to Turtle Creek and Lake Erie prior to being bermed in the early to mid 1980s. **The District should clarify to what extent, if any, Section 10 RHA jurisdiction exists on the property. In doing so, the District should clarify whether the wetland is inundated by the ordinary high waters of Lake Erie.**

In its administrative record, the District identified Lake Erie as a TNW under Section III.A.1 of the approved JD form, and documented a rationale supporting the TNW determination as follows: “the area is located approximately 2 to 3 feet below the OHWM of Lake Erie and was historically (less than 30 years ago) hydrologically connect[ed] to Lake Erie via Turtle Creek before the area was impounded. Turtle Creek is also reported to be below [the] OHWM of Lake Erie.”

While the District documented Lake Erie as a TNW, it did not provide a rationale for why Lake Erie is a TNW, and instead explained the elevation of the property and its historic connection to Lake Erie. However, this oversight appears harmless, as the Buffalo District public website lists Lake Erie as a Section 10 navigable waterway at http://www.lrb.usace.army.mil/regulatory/waterway_oh.pdf. Therefore, it can be implied that Lake Erie is a TNW, since all Section 10 waterways are also TNWs (although not all TNWs are Section 10 waterways).

The District documented a rationale supporting wetland adjacency to a TNW under Section III.A.2 of the approved JD form by stating that the “area consists of an impounded marsh that is located below the OHWM of Lake Erie. [This] area was part of Turtle Creek/coastal wetland complex until it was surrounded by a berm in the early to mid-1980s. Turtle Creek is a perennial waterway located below 573.4 IGLD.”

While the District’s administrative record documents the flow of water from the wetland to Turtle Creek to Lake Erie, it fails to adequately document which of the four scenarios addressed by the Rapanos Guidance apply to Turtle Creek. In addition, while the District’s jurisdictional determination form documents a Section 10 RHA water on the property, it does not clearly identify which water has Section 10 RHA jurisdiction.

Furthermore, the jurisdictional determination letter does not indicate there is any Section 10 RHA jurisdiction on the property.

Upon remand, the District should address the jurisdictional status of Turtle Creek according to the Rapanos Guidance. Additionally, the District shall address whether Section 10 RHA jurisdiction exists for the wetland and/or Turtle Creek.

REASON 3: The word hydrologically is improperly used in the administrative record.

FINDING: This reason for appeal does not have merit.

ACTION: No action necessary.

DISCUSSION: Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are “adjacent wetlands” (33 CFR 328.3). In addition, the Rapanos Guidance (specifically the Detailed JD Form Instructions) states that generally impoundment of a water does not affect the water’s jurisdictional status. Documentation required to support a determination of impoundment of jurisdictional waters includes a demonstration that the impoundment was created from waters of the U.S., or that the water meets the criteria for a TNW, RPW, NRPW, a wetland adjacent or abutting a RPW, or a wetland adjacent to a TNW or NRPW, or that the water is isolated with a nexus to commerce.

In its administrative record, the District identified a hydrologic connection between the wetland and Lake Erie, documented as follows: “the area is located approximately 2 to 3 feet below the OHWM of Lake Erie and was historically (less than 30 years ago) hydrologically connect[ed] to Lake Erie via Turtle Creek before the area was impounded. Turtle Creek is also reported to be below [the] OHWM of Lake Erie.” The administrative record also states “[This] area was part of Turtle Creek/coastal wetland complex until it was surrounded by a berm in the early to mid-1980s. Turtle Creek is a perennial waterway located below 573.4 IGLD.” Additionally, the District documented that aerial photographs (1977-2006) show that the property has always contained areas of inundation and wetland habitat (these photographs are also available in the administrative record.) Finally, the District documented that the NWI maps show the wetland as part of/continuous with Turtle Creek.

I find that the District adequately demonstrated that the impoundment was created in an area that was hydrologically connected to Turtle Creek and a water of the U.S. prior to being bermed. Therefore, this reason for appeal has no merit.

REASON 4: The elevation of the Boos property is misidentified.

FINDING: This reason for appeal has merit.

ACTION: The District should substantiate the statement that the wetland area is about 2 to 3 feet below the ordinary high water (OHW) elevation of Lake Erie.

DISCUSSION: The appellant asserts that the OHW elevation of the wetland is incorrectly stated in the JD document.

The definition of a jurisdictional determination is stated in 33 CFR Part 331. A portion of this definition states “Geographic JDs may include, but are not limited to, one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark....”

As explained in Reason 2 above, geographic and jurisdictional limits of rivers and lakes as navigable waters are defined at 33 CFR 329.11. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.

The Buffalo District public website lists Lake Erie as a Section 10 RHA navigable waterway at http://www.lrb.usace.army.mil/regulatory/waterway_oh.pdf. The Buffalo District approved Jurisdictional Determination form for navigable waterways states the following (bolded for emphasis):

“Prior to the determination and listing of Buffalo District's Section 10 navigable waters, detailed navigability studies were performed throughout the Buffalo District to determine which waters met the navigable waters definition found in 33 CFR Part 329. Upon completion, the Buffalo District issued several public notices updating the listing of Section 10 navigable waters determinations within the Buffalo District’s regulatory boundaries. Since the most recent Public Notice (PN) 7-81, dated 27 July 1981, the extent of navigability of these listed waters and additional waters determined to be navigable was further refined pursuant to the “Definition of Navigable Waters of the United States” as provided in 33 CFR Part 329. **The PN indicated that federal regulatory jurisdiction extends laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark (OHW) and that all adjacent embayments, or backwater areas, ponds or wetlands located below OHW are considered navigable for administrative purposes.**

The District’s approved JD letter states that wetlands are present within the 8 acre bermed area of the western portion of the Boos property. The approved JD form states that the wetland area is about 2 to 3 feet below the OHW of Lake Erie, and that Turtle Creek is a perennial waterway located below 573.4 IGLD.

It is unclear if the District meant for the letter to simply identify the presence or absence of wetlands, or to also identify the locations of the ordinary high water mark for purposes of a wetland verification or to determine if the wetland is part of or in itself a Section 10 navigable waterway.

The identification of the OHW elevation of a wetland is not necessary in order to determine its presence or absence. Therefore, if the District was simply identifying the presence or absence of wetlands, and not a wetland verification or presence of a Section 10 navigable waterway, the District did not need to include the OHW elevation the administrative record. However, if the District is identifying that the wetland and/or Turtle Creek are part of Lake Erie or itself a Section 10 navigable waterway, identification of the OHW elevation(s) is necessary.

Upon remand, if the District determines that the wetland or Turtle Creek is part of Lake Erie or itself a Section 10 navigable waterway, the District should substantiate any statements regarding elevations on the property. If the District is not identifying the wetland or Turtle Creek is a Section 10 navigable waterway, the District shall further clarify the relevance of the statement that the wetland area is about 2 to 3 feet below the ordinary high water (OHW) elevation of Lake Erie, and substantiate their statement.

REASON 5: The information in Section IV.B. of the jurisdictional form is inaccurate.

FINDING: This reason for appeal has merit.

ACTION: The District should substantiate the statements made in Section IV.B.

DISCUSSION: According to the appellant, the information stated in Section IV.B of the Jurisdictional Determination form is inaccurate.

In Section IV. B. the District made statements regarding the status of the wetlands on the property being hydrologically connected with Turtle Creek and two to three feet below the OHWM of Lake Erie. As previously discussed in Reasons 2 and 4, upon remand the District should address the jurisdictional status of Turtle Creek according to the Rapanos Guidance, whether Section 10 RHA jurisdiction exists for Turtle Creek, and substantiate or clarify the relevance of the statement that the wetland area is about 2 to 3 feet below the ordinary high water (OHW) elevation of Lake Erie.

REASON 6: The wetland is incorrectly categorized as part of a FEMA designated floodplain.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The appellant asserts that the District incorrectly categorized the wetland as being located within a FEMA floodplain.

No documents within the Administrative record state that the property is located in a FEMA floodplain. Therefore, this reason for appeal does not have merit.

REASON 7: The appellant alleges that the District was arbitrary and capricious in stating that the District reached a decision prior to performing a site visit.

FINDING: This reason for appeal does not have merit.

ACTION: No Action Required.

DISCUSSION: The allegation is over a verbal statement. A written wetland determination is the only acceptable form of an approved jurisdictional determination. Therefore, this reason for appeal does not have merit.

Information Received and its Disposition During the Appeal Review: The administrative appeal was evaluated based on the District's administrative record and the Appellant's Request for Appeal.

Overall 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 explain its JD as appropriate.



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