

ADMINISTRATIVE APPEAL DECISION

Tyler-SOM Properties, LLC

Approved JD; File No. 2004-01332(0)

BUFFALO DISTRICT

May 26, 2005

Review Officer: James E. Gilmore, US Army Corps of Engineers, Southwestern Division, Dallas, Texas

Appellant: Mr. Michael Miozzi, Tyler-SOM Properties, LLC.

Permit Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): December 14, 2004

Background Information: On 26 April 2004, the appellant's environmental consultant (hereafter referred to as HzW) submitted a wetland delineation report to the Buffalo District (District) for its review and concurrence. HzW reported that they had identified nine wetland areas (labeled A-I) totaling 1.11 acres, a perennial stream, a drainage way, and a ditch on an undeveloped 13 acre parcel in the City of Willoughby, Lake County, Ohio. HzW stated their opinion that wetland D (0.45 acres) was adjacent and will be regulated by the District while the remaining wetlands A, B, C, E, F, G, H, and I (totaling 0.66 acres) were isolated and would not be regulated by the District.

Along with the wetland delineation report, the appellant submitted a Department of the Army permit application and requested authorization to complete work (proposed residential development) under Nationwide Permit (NWP) 39. NWP 39 may be used to authorize the discharge of dredged or fill material into non-tidal wetlands for the construction or expansion of residential, commercial, and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures.

On May 25, 2004, the District met on site with HzW. The purpose of the site visit was to investigate the boundaries of previously delineated wetlands and to determine the boundaries, if any, of waters of the United States. According to correspondence from HzW to the District, during the site visit, the District requested additional information be submitted to assist with its jurisdictional determination. On July 13, 2004, HzW submitted the requested additional information to the District and stated in its opinion that, in addition to wetland D, wetland A (0.17 acres) met the definition of federally jurisdictional wetlands, but restated its opinion that wetlands B,C,E,F,G, H, and I (totaling 0.49 acres) did not.

On October 5, 2004, HzW sent an e-mail correspondence to the District requesting a status update. The District responded on the same day by stating that it disagreed with the findings

reported by HzW and provided its opinion that wetlands A, B, C, D, E, F, G, and H were federally jurisdictional and wetland I (0.01 acre) was not.

On October 16, 2004, the District issued an approved jurisdictional determination (JD) to the appellant, stating its final determination that wetlands A, B, C, D, E, G, and H (totaling 1.08 acres) were jurisdictional and wetlands F and I (totaling 0.03 acres) were not. The District had also notified HzW of its intention to issue the JD earlier that day in an e-mail to HzW. The District provided a rationale for its JD in the e-mail, the JD letter, site notes, and an additional information sheet titled "Determinations of No Jurisdiction for Isolated, Non-navigable, Intra-state Waters Resulting from U.S. Supreme Court Decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (hereafter referred to as "NJD Sheet")."

In its October 16, 2004 JD letter, the District also notified the appellant that based on their permit application submittal, the proposed project could not be authorized by NWP 39. The District then directed the appellant to contact them for further guidance on the standard permit process.

The administrative appeal review was limited to information contained within the appellant's RFA, the District's administrative record, and relevant Corps regulations. Specifically, the text of the 2002 Nationwide Permit *General Condition No. 13* as published in the Federal Register on Tuesday, January 15, 2002 and the text of 33 CFR Part 325.2, *Processing of Department of the Army Permits*, were reviewed (see attached).

Note: Per appeal regulations at 33 CFR 331.7(f) the administrative appeal review was limited to documents that were dated on or before the date of the Notification of Appeals Process for the District's JD. Therefore, correspondence between HzW and the District referred to by the appellant in his RFA and contained in the District's administrative record, but dated after October 16, 2004, was not considered during this appeal.

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

Appeal Reason 1: Procedural Error - the District did not comply with the timeframe indicated in 33 CFR Section 325.2 for the review and notification that the appellant's Section 404 application was considered complete. In addition, the District did not provide written notification within the required timeframe concerning whether the permit would be issued or denied.

Finding: Reason 1 of this appeal has no merit.

Action: No action required

Discussion: In his RFA, the appellant stated that the District committed a procedural error in evaluating his permit application citing the procedures listed under 33 CFR 325.2. The appellant then makes reference to both a 15-day and a 45-day timeframe and states that the District did not comply with these timeframes.

The procedures listed under 33 CFR 325.2 reference a 15-day timeframe. However, these regulations are limited to the processing of permit applications and the stated timeframes do not apply to the process of making a JD.

The appellant also stated that the District did not respond to his submittal of a permit application within 45 days. Regulations at 33 CFR 325.2 do not reference a 45-day timeframe. Relative to processing permit applications, a 45-day timeframe is referenced in the text of Nationwide Permit General Condition No. 13, for notification of an applicant's intention to use a Nationwide Permit (NWP) prior to commencing construction activities. However, General Condition No. 13 applies to the processing of NWP applications, not to the process of making a JD.

Lastly, I find nothing in the regulations that prohibit a District from issuing a JD at anytime during the pre-permit or permit application process. Therefore, reason 1 of this appeal has no merit

Appeal Reason 2: Incorrect applications of the Law – the District's evaluation of the jurisdictional designation of the wetland areas, designated as Wetland A, B, C, E, G and H, represented an incorrect application of the law.

Finding: Appeal reason 2 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 an approved 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.

Discussion: In their approved JD letter to the appellant, the District asserted jurisdiction over wetlands A, B, C, D, E, G, and H based upon a hydrologic connection between those wetlands and the Chagrin River. In their letter, the District stated that wetlands A, B, C, D, E, G, and H are part of a surface water tributary system to the Chagrin River. The District provided additional rationales for asserting jurisdiction over wetlands A, B, C, D, E, G, and H in their site inspection notes and NJD Sheet (the rationales in both documents are virtually identical and are hereafter collectively referred to as the "District's rationale"). However, the District's supporting documentation for asserting jurisdiction over wetlands B, C, E, G and H is not sufficient for the reasons discussed below.

Wetlands A, B, C, and D

In the District's rationale for asserting jurisdiction over wetlands A, B, C, and D, the District stated that these wetlands are a complex of wetlands that ultimately drain into an unnamed perennial stream that flows into the Chagrin River (see attached figure 5). The Chagrin River is a navigable water that ultimately flows into Lake Erie, a navigable, interstate waterway. The District further characterized the hydrologic connection for the wetland complex by stating that wetland D has a surface water connection with the unnamed perennial stream, wetland A has a surface water connection with wetland D, and on the day of the site visit, standing water connected wetlands B and C to wetland D, thereby establishing a hydrologic connection.

The District appropriately considered and characterized the hydrologic connection between wetlands A, B, C, and D and a navigable, interstate waterway by stating in its observation that the complex of wetlands ultimately “drain” into an unnamed “perennial” stream that “flows” into the Chagrin River. Similarly, the District stated that wetland A has a surface water connection with wetland D. The connection between wetland A and D, and wetland D and the unnamed tributary to the Chagrin River was acknowledged by the appellant when he modified a map to reflect this in his submittal to the District on July 13, 2004.

The District’s description using the terms “drain,” and “flow” document that water is actively transported from the wetland complex to the Chagrin River. The designation of a perennial stream documents a persistent, or reoccurring, flow throughout the year. The District described how the wetlands are acting as a tributary to an interstate and navigable waterway. The nexus for jurisdiction is clear for wetlands A and D. The nexus for jurisdiction is not clear for wetlands B and C because of the District’s additional statements that appear to contradict its previous conclusion.

The contradiction is introduced when the District further characterizes the hydrologic connection that wetlands B and C share with wetland D as “standing water.” While the terms “drain” and “flow” were used to describe water as ultimately *moving* from the wetland complex to the Chagrin River, the term “standing water” can be limited to a one-time observation of static water occupying an upland space between wetlands B and D and wetlands C and D. In fact, this is what the appellant attempts to assert in its July 13, 2004 letter.

Attached to the July 13, 2004 letter are four data sheets reporting information collected on July 1, 2004 for four additional data points labeled ADD 1-4. ADD 1 and 2 were collected at the area between wetlands B and D and C and D respectively (see attached figure 5). According to the data sheets submitted by the appellant, none of the six primary indicators of wetland hydrology were present in either location (ADD 1 and 2) and only one of the five secondary indicators were present in one location (ADD 2). The appellant concluded that these data points reflect the presence of uplands in these areas. Unlike the area between wetland A and D where the appellant modified the delineation map to depict a surface water connection, the appellant disagrees that a valid connection exists between wetlands B and D and wetlands C and D. The appellant states in his opinion that the “standing water” connection that was observed on May 25, 2004 was a result of heavy rainfalls prior to the May site visit. The District stated its concurrence that the areas represented by ADD 1 and ADD 2 are uplands in its e-mail response to HzW on October 5, 2004 and did not require the delineation map to be modified. However, in its response, the District maintained that the standing water established a valid connection. In its rationale, the District stated that standing water was observed at the time of the site visit. The District did not address the temporary nature of the observed hydrologic conditions as pointed out by the appellant. In failing to do so, the possibility that hydrology observed during the site visit could be attributed to, and limited to a single event was not resolved. Therefore, without further explanation, (e.g. documenting past District practices, applicable case law, or acceptable regulations or guidance) the District unreasonably used a single observation of non-flowing water occupying an unconfined upland space as a hydrologic connection.

Two factors are considered when determining adjacency: actual proximity of the wetland to the waterway and hydrologic connections between the wetland and waterway. Regulations at 33

328.3(c) define “adjacent” as bordering, contiguous, or neighboring. As stated above, the nexus for jurisdiction for wetlands A and D is made clear by the District’s appropriate consideration and adequate documentation of the hydrologic connection between the wetlands and an interstate, navigable waterway. However, the nexus for wetlands B and C is unclear as the District did not choose to address proximity and did not adequately document the hydrologic connection of these wetlands. Therefore, appeal reason 2 has merit and the District is instructed to include sufficient documentation to support its JD and to reconsider its JD as appropriate.

Wetlands E, G and H

In its approved JD letter to the appellant, the District asserted jurisdiction over wetlands E, G, and H based upon a hydrologic connection between the wetlands and the Chagrin River. The District stated that wetlands E, G, and H are part of a surface water tributary system to the Chagrin River. In the District’s rationale for asserting jurisdiction over wetlands E, G, and H, the District stated that these wetlands are a complex of wetlands that ultimately drain into a storm sewer system for the City of Willoughby. The District also clarified in its October 5, 2004 e-mail to HzW that a connection to a storm sewer system does not preclude a wetland from being federally jurisdictional. However, the District failed to describe the path that the water flows to reach the Chagrin River and to characterize the hydrology along this path, thereby showing how water entering a storm sewer system is ultimately a tributary to the Chagrin River.

Hydrology within the storm sewer system possibly could be interrupted or terminate in a waterway other than a navigable, interstate water, thereby never establishing a hydrologic connection to a navigable, interstate waterway. Therefore, without clear support for its position, the District unreasonably relied solely on the fact that wetlands that flow into a storm sewer system created a valid hydrologic connection to a navigable water.

The nexus for wetlands E, G and H is unclear as the District did not choose to address proximity and did not adequately document the hydrologic connection of these wetlands. Therefore, appeal reason 2 has merit and the District is instructed to include sufficient documentation to support its JD and to reconsider its JD as appropriate.

CONCLUSION: The Appellant’s Reason for Appeal has merit and the approved JD is remanded back to the District to include sufficient documentation to support its JD and to reconsider its JD as appropriate.

FOR THE COMMANDER:



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