

ADMINISTRATIVE APPEAL DECISION

RB3; FILE NO. 2004-01413(0)

BUFFALO DISTRICT

JULY 28, 2005

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

Appellant: Mr. William Rae, Benderson Development Company, Inc.

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

Appeal Meeting and Site Visit Date: 22 October 2004

Background Information:

On April 23, 2004, Mr. William Rae, Director of Engineering for Benderson Development Company Inc. (RB3), requested an approved jurisdictional determination (JD) from the Buffalo District (District). The property in question is a parcel approximately six acres in area within the Town of Orchard Park, Erie County, New York.

According to maps submitted by the appellant and accepted by the District as part of its JD, three wetland areas totaling approximately 1.5 acres were identified within the limits of the project area. The wetlands were labeled as wetlands 1, 2 and 3. The District determined that wetland 1 (approximately 0.5 acres in area) is a water of the U.S. Wetlands 2 and 3 were determined to be isolated and therefore non-jurisdictional. In its rationale for decision, the District stated its basis for asserting jurisdiction was that wetland 1 meets the criteria of the Corps of Engineers 1987 Wetland Delineation Manual (1987 Manual) and a hydrological connection exists between wetland 1 and Smokes Creek, a water of the U.S. The appellant disagrees that wetland 1 is a water of the U.S. and submitted a Request for Appeal (RFA) on August 20, 2004.

Summary of Decision: I find that the District's administrative record supports its conclusion that wetlands regulated under the Clean Water Act (CWA) are present on the appellant's property. This appeal does not have merit.

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

Reason 1: Wetland 1 should not be considered jurisdictional because it drains via a man-made culvert that was installed on the appellant's property without the formal approval of the appellant. The wetlands are characterized as an enclosed depression and have no historic hydrologic connection to navigable or interstate waters (Reason 1 was divided into Reasons 1a and 1b for review and reference purposes).

Reason 1a: Wetland 1 should not be considered jurisdictional because it drains via a man-made culvert that was installed on the appellant's property without the formal approval of the appellant.

Finding: Reason 1a of this appeal has no merit.

Action: No action required.

Discussion: During the appeal meeting the appellant clarified that the culvert the District cites as a connection was recently and illegally placed within his property to reduce ponding and flooding in the general area. Furthermore, he stated he should not have to endure the hardship of the permit process due to wetlands that are only jurisdictional because they were hydrologically connected to a water of the U.S. by illegal activities (i.e. trespass).

Prior to the District's decision, the appellant submitted a letter addressed to him from the State of New York, Department of Transportation (NYSDOT). This letter confirms that the NYSDOT is responsible for the installation of the culvert. The District documented their review and consideration of this information prior to their decision (see District's Telephone Conversation Record, July 30, 2004).

Waters of the U.S. are defined at 33 CFR 328.3. When conducting a jurisdictional determination, the Corps considers past and current conditions, both natural and man-made alterations to the land, but does not consider legal issues associated with non-jurisdictional activities. The trespass allegation is not a factor in the Corps' determination of jurisdictional waters or wetlands and is best addressed by the appellant with other means. Rather, jurisdictional decisions will be based on relevant case law, regulations, and policy. The District is not expected to investigate local or state laws and consider how the legality of an activity may influence its determination of jurisdictional waters and wetlands. Therefore, this specific reason for appeal has no merit.

Reason 1b: Wetland 1 should not be considered jurisdictional because the wetland is characterized as an enclosed depression and has no historic hydrologic connection to navigable or interstate waters.

Finding: Reason 1b of this appeal has no merit.

Action: No action required relative to this appeal. However, regulations at 33 CFR Parts 331.2 and 331.4 require the District to include a basis of jurisdiction with each of its JDs. The District is instructed to include its basis for jurisdiction with each JD, ensuring it is in compliance with the above regulations, and notify me within 15 days of how it completed this task.

Discussion: During the appeal meeting, the appellant and the District stated their agreement with the wetland boundaries. The District's administrative record clearly documented that the wetlands were delineated per the 1987 Manual. The appellant clarified that he agrees with and accepts the location of the wetlands as identified in the District's JD, but is appealing the

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District's determination that wetland 1 is jurisdictional due to its connection via an unauthorized culvert.

During the appeal meeting the appellant further clarified by explaining the natural history of how features within the local landscape were formed. The appellant referenced the depression/mound topography within the project site and stated that it was part of a kettle/kame formation. The appellant further explained that a kettle is a depression in glacial till that formed when a block of ice, separated from the glacier and buried in the till melts, leaving behind a void. A kame is a mound of glacial till that formed when melting water plunged into voids (created by separated ice blocks that will later form kames) within the glacier and deposited sediment loads. The appellant then stated that all the onsite wetlands exist within a kettle and argued that because of natural geo-morphology and the position of the culvert inlet above the elevation of the wetland, there was no natural way for water to leave this depressional system.

The District responded that the elevation of the culvert inlet was at the same or lower elevation than wetland 1. The District's administrative record also documented, in its Rationale for Decision, that drainage from wetland 1 would enter the culvert and then into a storm sewer system that discharges into Smokes Creek, a tributary of Lake Erie.

Following the appeal meeting, a site visit was performed with the appellant and District to investigate the current field conditions. During this site visit, the following field indicators of water flow from wetland 1 to the culvert pipe were observed: matted grass and vegetation; absence of leaf litter; drainage patterns; invert of culvert pipe at lower elevation than surrounding landscape; and water marks 4-6" above the ground on trees directly adjacent to the culvert inlet and within the wetland. The wetland flags used to delineate the wetland boundary were also placed so that the wetland edge appeared to directly border the inlet. These field observations support the District's JD and administrative record that concluded water normally drains from wetland 1 into the culvert. Therefore, this specific reason for appeal has no merit.

However, it is important to note that while the District's Rationale for Decision included its basis for JD, its actual JD (letter sent to the applicant) did not. Regulations at 33 CFR Parts 331.2 and 331.4 require the District to include a basis of jurisdiction with each of its JDs. The District is instructed to ensure compliance with this regulation and provide notification of how this will be accomplished to me within 15 days.

Reason 2: Prior to the District issuing its JD, the appellant contacted the District and requested that the District delay the issuance of its JD. The reason for delay was to allow the appellant to submit additional information to support its assertion that wetland 1 is isolated. The additional information was intended to show that the culvert was placed on the appellant's property without his permission. According to the appellant, the District issued its JD without reviewing or considering this additional information (omission of facts).

Finding: Reason 2 of this appeal has no merit.

Action: No action required.

Discussion: During the appeal meeting, the appellant and the District agreed to the following timeline of events that was adequately documented in the District's administrative record:

- July 15: The appellant mailed additional information to the District
- July 16: The District received the additional information
- July 19: The District project manager coordinated the additional information with the District's office of counsel
- July 21: The appellant received the District's determination dated July 2, 2004

The appellant asserted that because of the July 2 date of the JD letter, it appears the District did not consider the additional information. The appellant stated that the additional information proves the culvert was installed without his permission and therefore, he should not have to endure the hardship (permitting process) associated with the illegally installed culvert.

The District further clarified that the July 2, 2004 date on its JD letter to the appellant was associated with the date when the original draft of the JD was near completion. The District ultimately held the JD past this date and considered the additional information that was submitted by the appellant. When the District reached its final conclusion on July 19, it did not change the date on the original draft from July 2, 2004 to July 19, 2004. The JD was subsequently mailed on July 20, 2004. Later, when the appellant requested that the District revise the date on the JD to allow more time to prepare its RFA, the District responded that the delay of 13 days between the date of the JD and the date the appellant received the JD still left the appellant adequate time to prepare a RFA.

In this case, (and as documented by the July 30, 2004 telephone conversation record) the appellant agreed with the District that the remaining timeframe minus the 13-day delay was adequate to prepare its RFA. The appellant also met the 60-day timeframe and his RFA was accepted. The District's administrative record (July 30, 2004 telephone conversation record) also adequately documented that the additional information was considered. Furthermore, even if the information was not considered, this reason for appeal would not have merit given that the additional information, supporting that the culvert was illegally installed, is inconsequential with regards to the JD analysis requirements discussed in Reason 1a. Therefore, while the District erred in not accurately dating its JD, changing this date would not have impacted the outcome of the District's decision. Therefore, this reason for appeal has no merit.

Conclusion: I find that the District's administrative record supports its decision that wetlands regulated under the CWA are present on the appellant's property. For the reasons stated above, the appeal does not have merit.

FOR THE COMMANDER:



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