

ADMINISTRATIVE APPEAL DECISION

PAL GROUP, FILE NO. 200100602

CHICAGO DISTRICT

FEBRUARY 5, 2002

Review Officer: Suzanne L. Chubb, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

Appellant Representative: Mr. Jedd M. Anderson, Christopher B. Burke Engineering, LTD, Rosemont, Illinois.

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

Receipt of Request For Appeal (RFA): September 6, 2001.

Appeal Conference/Site Visit: None.

Background Information: The site is located northeast of the intersection of Mundhank and Barrington Roads in Barrington Township, Cook County, Illinois. In March 2001, the appellant's consultant requested a jurisdictional determination (JD) of the site. The consultant furnished the Chicago District (District) with a wetland assessment report that identified one large emergent wetland area approximately 48.4 acres in size. The report was based on a March 8, 2001 field investigation. The District performed a site visit on April 6, 2001 (site photographs provided) and requested additional information from Burke Engineering, the appellant's consultant, on April 12, 2001. The consulting firm supplied additional information to the District on April 26, 2001 and May 31, 2001. The April correspondence from Burke Engineering included onsite photographs taken March 23, 2001. The May correspondence from the consultant provided a November 2000 Existing Subsurface Agricultural Drain Tile Investigation plan drawing prepared on the Meijer property located south of but not directly adjoining the subject property.

In a letter dated July 13, 2001, the District confirmed the presence of jurisdictional waters of the U.S. because the onsite wetland is "bordering, contiguous or neighboring other interstate 'waters of the U.S.', pursuant to 33 CFR 328.3(a)(7)". The appellant has appealed this determination to the Division office.

The subject wetland area is located along the eastern half of the parcel and currently drains south under Mundhank Road and into various agricultural drain tiles on two properties identified as the Duntemann and Meijer properties respectively. The tiles eventually outlet into a Barrington Road ditch. The Cook County soil survey map (1971) indicates a hydric soil series, Muskego and Houghton mucks, in the vicinity of the wetland area. The wetland area is also evident on U.S. Geological Survey (USGS) maps

dated 1923 and 1961, and the 1981 National Wetland Inventory (NWI) map. Also shown on the 1923 USGS map is an intermittent stream channel that begins at the southern end of the subject wetland, north of Mundhank Road, and flows in a southwesterly direction through the Duntemann and Meijer properties. The stream is not evident on later USGS maps. The intermittent stream flowed into a permanent waterway, Poplar Creek (evident on later USGS maps). Poplar Creek is a tributary of the Fox River, a navigable waterway.

In a September 14, 2001 letter to the appellant, I was delegated the authority to serve as both the Review Officer and decision authority regarding this RFA. This delegated authority is allowed by regulations at 33 CFR 331.3(a)(1).

Appeal Decision and Instructions to Chicago District Commander (DE):

Appeal Reason: In the appellant's opinion, the subject wetland is isolated and not bordering, contiguous or neighboring other interstate "waters of the U.S." pursuant to 33 CFR 328.3(a)(7).

Finding: The appeal reason has merit.

Action: The District should consider the guidance outlined below and the new information that accompanied the appellant's RFA. The District shall prepare and include in the administrative record a decision document that supports the District's JD. The District shall complete these tasks by March 7, 2002 and, upon completion, provide the Division office and appellant with a copy of this documentation.

Discussion:

In the RFA, the appellant provided three reasons to support their assertion that the subject wetland is isolated. First, the appellant asserted that since a February 2001 District JD on the Meijer property found no jurisdictional waters (file no. 200100342), the District cannot now use the drain tiles on the Meijer property as a connection for the subject wetland. Second, the appellant performed a soils investigation on the Duntemann property and could find no evidence of a historic stream channel, either by the presence of "hydric soils" or the presence of a stone line associated with a former stream channel. Last, given that the current site topography of the Duntemann and Meijer properties contradicts the 1923 USGS map topography (10-foot contour interval), the appellant believes the intermittent stream channel on the 1923 map was an error and never existed.

In response to the appellant's first reason, the District has clarified that the Meijer determination was, as in the subject case, based upon the 1923 USGS map. The two Meijer wetland areas, totaling 2.76 acres, were determined to be a result of broken agricultural tile lines, with no surface inlet or outlet, and isolated. However, the lack of a written memorandum for the record or other decision document in the District files for each project contributes to the lack of understanding of the District's reasoning in either case. I am unsure whether the District considered the location of the historic stream

channel or the location of the main drain tiles in these determinations. Given the close proximity and related nature of the two sites, it is unclear what site-specific features on these parcels factored into the District's jurisdictional determinations. The District must document how its jurisdictional decisions are reached, including a description of the tools used (data, maps) to reach a decision. In the documentation of this JD, the District should also discuss the Meijer JD decision and how those site conditions and circumstances were similar and/or different from the subject parcel. Because the administrative record for this JD is inadequately documented, it is impossible for me to conduct an independent review of the administrative record in accordance with Corps regulations. Therefore, the appeal has merit in that the administrative record did not support the District's decision.

In a related matter, the "Basis of Jurisdiction" checklist utilized by the District and attached to their JD letters, is not sufficiently comprehensive. Assuming that Corps jurisdiction exists on the subject parcel, the explanation selected by the District that "The subject parcel contains a wetland that is bordering, contiguous, or neighboring other interstate 'Waters of the U.S.' . . ." is an overly broad basis for jurisdiction. If regulated, the subject wetland is jurisdictional because it is bordering, contiguous, or neighboring a tributary to navigable or interstate waters of the U.S. This is a more accurate statement and would reduce confusion and misunderstanding by applicants and the public. Another option on the District's checklist: "The subject parcel contains tributaries to navigable or interstate 'Waters of the U.S.' . . ." appears to be more appropriate in this instance. This basis pertains to waterways and wetland areas that, by themselves, can be part of a tributary system to navigable waters.

In support of the second reason for appeal, the appellant's consultant completed soil explorations on the Duntemann property on August 24, 2001 and submitted the data with the RFA. This parcel is southeast of the Mundhank and Barrington Road intersection and "connects" the subject parcel and the Meijer property. This information was clearly obtained by the appellants after the District's July 13, 2001 decision and cannot be considered in the appeal review. The information is being forwarded to the District with this decision for consideration.

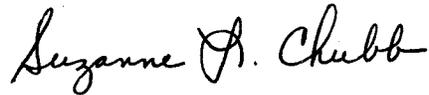
In regard to the appellant's third reason, on most sites, present-day topography is expected to differ from what was mapped in the 1920's. Natural disasters, farming and forestry practices, and other man-induced development activities will alter landscapes significantly. Nevertheless, the practice of consulting historical maps and utilizing them as a reference when making jurisdictional determinations is not an arbitrary and capricious action on the part of the District. There is no reason to limit the review of mapped data to post-Clean Water Act (CWA) material. Much of the field work, mapping and publication of resources and aerial photographs commonly utilized by the Corps and consultants alike, particularly soil surveys, pre-date the CWA. Certainly, historical maps should not be the sole basis for a jurisdictional determination. Present day drainage characteristics and topography must also be considered. However, historical mapping and other resources provide a vital tool in understanding both the past and present environmental conditions of a site. The District will consider the Duntemann soil

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exploration information provided with the RFA and will document their decision in the administrative record.

Conclusion: For the reasons stated above, I conclude that this Request For Appeal has merit.

FOR THE COMMANDER:



SUZANNE L. CHUBB
Appeal Review Officer
Great Lakes & Ohio River Division

Encl
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