

ADMINISTRATIVE APPEAL DECISION

CITY OF HICKORY HILLS; FILE NO. 200400798

CHICAGO DISTRICT

SEPTEMBER 6, 2005

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

Appellant: Mr. Larry Boettcher, City of Hickory Hills

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

Appeal Meeting and Site Visit Date: December 9, 2004

Background Information: On June 7, 2004, the appellant submitted a request for an approved jurisdictional determination (JD) to the Chicago District (District) for lands owned by the appellant. The subject site is an undeveloped parcel, approximately 1.4 acres in area. The lot is located north of 87th Street along the corridor of the proposed extension of 83rd Avenue, in the City of Hickory Hills, Cook County, Illinois.

In its request for JD, the appellant stated, “[t]he City believes that the enclosed previous wetland delineation is no longer applicable, as these lots are not adjacent to or tributary to a natural waterway.” The request for JD included: a project location map; a preliminary wetland delineation dated December 2, 1999, for Chicago District file no. 200000052; and a drawing detailing the existing topography of the property in question.

On June 29, 2004, the District conducted a site visit. On July 9, 2004 the District issued the appellant an approved JD letter stating that his property contained waters of the U.S. including a wetland that ultimately drains to the Sanitary and Ship Canal, a navigable water. The District’s JD decision document indicates the basis of JD is the presence of adjacent wetlands.

The appellant disagreed that his property contained waters of the U.S. and on September 2, 2004, submitted a Request for Appeal (RFA).

The District’s administrative record contains: JD letter dated July 9, 2004; the JD decision document dated July 9, 2004; District telephone note dated July 8, 2004; District site notes dated June 29, 2004; aerial photographs (Air Photo 1999 and 2002); U.S. Geological Survey quad maps (Des Plaines, 1902 and Palos Park, 1993); U.S. Fish and Wildlife Service (USFWS) National Wetland Inventory map (Palos Park, undated); U.S. Geological Survey Hydrologic Atlas (Palos Park); the appellant’s request for JD dated June 7, 2004.

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Summary of Decision: The Appellant's Request 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 Decision Evaluation, Findings and Instructions to the Chicago District Engineer (DE):

The appellant originally submitted two reasons for appeal (with three sub reasons) with its RFA. During the appeal meeting, the appellant condensed its reasons for appeal into the following three reasons.

Appeal Reason 1: A valid connection does not exist between the wetlands and waters of the U.S. because the drainage system includes a pump which breaks the hydrologic connection.

Finding: This reason for appeal 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 adequately documents the basis for jurisdiction and supports its final 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 document and final JD.

Discussion: The appellant stated that the District failed to consider the pump in making their JD and that the pump breaks the continuity of any hydrologic connection. Without the presence and operation of the pump, water would not flow by gravity into waters of the U.S. The pump has an automatic switch, set at a specific depth. The functional flow in both sewer systems (IDOT and Cook County) will not allow the pump to turn on if those pipes are full. The purpose of this pump is to maintain the water depth of the Reservoir to facilitate positive drainage from the roadway system thereby managing the drainage concerns of the local area. The construction of 87th Street required the construction of both the Reservoir and the pump. Use of the pump is dependent upon the level of precipitation received and can be controlled manually. The City does allow the water level in the Reservoir to fluctuate depending upon the season and water levels are controlled for aesthetics and recreational values. The pump is the sole means by which the Reservoir can be dewatered.

The District's JD decision document indicates the basis of JD is the presence of *adjacent* [emphasis added] wetlands. There are no Corps regulations or guidance that address the use of mechanized pumps to establish adjacency. However, the Corps failure to specifically identify drainage connections as a measure of adjacency cannot be interpreted as an explicit exclusion of drainage connections as such a measure. *U.S. v. Lamplight Equestrian Center, Inc.*, 2002 WL 360652 (N.D.Ill.2002). The Corps regulations define "adjacency" without listing the types of water flow or connections that may constitute adjacency, but instead identify the characteristics of "adjacency" as "bordering, contiguous, or neighboring." 33 CFR 328.3(c). *Id.* The dictionary definition of "contiguous" is "being in actual contact: touching along a boundary or a point." Merriam-Webster Online Dictionary (22 July 2005), available at <http://www.m->

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w.com/cgi-bin/dictionary?book=Dictionary&va=contiguous&cx=88y=8. Wetlands could come into actual contact with the tributary by virtue of the path of water, whether it be a delta, a meandering swale, or a drainage connection.

During the appeal meeting, the District clarified that in making its JD it was aware of the pump which dewatered the Reservoir and that the existence of the pump did not in any way alter their decision. However, the administrative record lacks this explanation regarding the pump and the District did not provide any support for its assertion of jurisdiction by means of a mechanized drainage connection. Therefore, appeal reason 1 has merit.

Appeal Reason 2: The subject JD is inconsistent with an earlier approved JD issued by the District in 2002 for an adjacent property within the same watershed (District file number 200200597).

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: Jurisdictional determinations must be evaluated on a case by case basis and by careful examination of the site specific conditions. The issuance of a JD does not, in itself, provide substantial merit for a similar JD to be issued. Thus, appeal reason 2 has no merit.

A District may choose to review information from any files, including files located within the same locale or watershed. During the appeal meeting, the District clarified it did consider information from a 2002 JD (District file no. 200200597) of a property located at 8400 West 87th Street in making its decision. The District determined the absence of waters of the U.S. for the project site associated with file no. 200200597. The District stated that additional, new information was discovered and reviewed that did not appear to be considered in the 200200597 file. Specifically, the District conducted a site visit as part of their review in the Hickory Hills JD. A site visit was not conducted as part of the 200200597 JD. The district's administrative record lacks this explanation. However, considering the lack of precedent that prior JDs have and the fact that the District did not rely on this file to support its JD, the lack of an explanation by the District on this point is harmless since it did not affect the JD.

Appeal Reason 3: Historically, drainage patterns of the wetlands did not reach waters of the U.S.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The appellant asserts that the District committed an error in its review and application of the U.S. Geological Survey topographic map titled Des Plaines Quadrangle and dated 1902 (1902 map). According to the appellant, there is no evidence that there is an historic water drainage from the wetlands to waters of the U.S.

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During the appeal meeting, the District acknowledged that it made erroneous notations describing the drainage shown on the 1902 map between the project site and the Sanitary and Ship Canal. Prior to making their JD in July 2004, the District noted the historic drainage per the 1902 map in the following manner: “blue line stream draining wetlands to the *west, northwest*, [emphasis added] then north into the Sanitary & Ship Canal.” Based on a conversation with the appellant in September 2004 (undocumented), the District determined that it had incorrectly noted the direction that water drained and modified the notations in the administrative file to: “blue line stream draining wetlands to the *east, northeast*, [emphasis added] then north into the Sanitary & Ship Canal.” The District also clarified that this error was typographical rather than interpretive in nature. The administrative record lacks an explanation of how, why, or when the administrative record was modified.

The copy of the 1902 map within the administrative record lacked the approximate location of the project as determined by the District. During the appeal meeting, the District initially indicated (on the 1902 map) the approximate location for the project site and the drainage path from that site to the Sanitary & Ship Canal. This approximate location was disputed by the appellant. The District then reconsidered the approximate site location and relocated the project site on the 1902 map that was more acceptable to the appellant. The relocated site was still situated within the same drainage path initially identified by the District. The District then stated that from this approximate location the water would have eventually drained (historically) to the Sanitary and Ship Canal. This was disputed by the appellant who stated that the land was historically very flat in the location of the project site and waters would have traveled through the Town of Justice and dissipated long before they ever reached the Canal or the pathway indicated by the blue line on the 1902 map.

According to the administrative record, the District relied on the 1902 map in determining the historical drainage patterns of the subject property and partially based its JD on this historic connection. In its JD decision document and JD letter, the District states that “The piped drainage path of the wetlands is consistent with historic surface drainage ways indicated on the 1902 Des Plaines historic [topographic] map...” and “[t]he drainage paths are consistent with historic surface drainage ways in the area, so the wetlands in question are under jurisdiction of this office.”

The District must interpret and apply data using best professional judgment. The District is also obligated to support their JD with adequate rationale. In this case, the District made an error in its initial location of the site on the 1902 map and failed to document the relative importance of the historic information to their JD process. However, the District clarified that based on the more accurately located project site on the 1902 map, its interpretation that water historically drained from the project site to the Sanitary and Ship Canal would not change. Ultimately, the procedural errors committed by the District appear harmless.

The District’s administrative record lacks an explanation for citing drainage patterns on the 1902 map that would support and establish jurisdiction in 2004. The District based its JD on the presence of adjacent wetlands. Adjacency is previously discussed under appeal reason 1. As a matter of practice, adjacency must be based on proximity or a hydrologic connection. The District did not address proximity and relied solely on establishing a hydrologic connection.

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With the exception of omitting the presence of mechanized pumps (see appeal reason 1), the current connection was substantially documented in the administrative record by notes from the District's site inspection on June 29, 2004 and a phone conversation with the appellant on July 8, 2004. The appellant clarified in the appeal meeting that he agreed with the current connection as established by the District. Therefore, the District's lack of documentation explaining the importance of the historic connection to their JD process appears harmless as it would have no bearing on the manner in which the District confirmed the current connection.

Conclusion: For the reasons stated above, I conclude that this RFA has merit. The approved JD is remanded back to the District to include sufficient documentation to support their JD and to reconsider their JD decision as appropriate.

FOR THE COMMANDER:



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