

ADMINISTRATIVE APPEAL DECISION

JIM ASHBAUGH, FILE NO. 99-012-004-0

DETROIT DISTRICT

JANUARY 3, 2001

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

Appellant Representative: Mr. James W. Bigelow, 43599 Schoenherr Road, Suite 300, Sterling Heights, Michigan 48313.

Permit Authority: Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403) and Section 404 of the Clean Water Act (33 USC 1344)

Receipt of Request For Appeal (RFA): October 5, 2000

Appeal Conference Date: November 29, 2000 **Site Visit Date:** None

Background Information: The project site is located on an island at the mouth of the North Channel of the St. Clair River in the Town/City of Algonac, St. Clair County, Michigan. The appellant's initial application, received by the Detroit District (District) on 13 January 1999, requested authorization to install 265 linear feet of steel sheet-pile bulkhead and dredge 209 cubic yards of material for backfill. A public notice (PN) was published on 8 April 1999 and a joint Corps and Michigan Department of Environmental Quality (MDEQ) site visit was conducted on 30 April 1999. On 18 May 1999, the MDEQ informed the appellant that a permit could not be issued for the proposal. Based upon the State's action, the District withdrew the application on 8 June 1999.

Following a 20 July 1999 onsite meeting between the appellant, MDEQ and the Corps, the project was modified to relocate the bulkhead landward of the original alignment. Additional shore protection, in the form of rip rap along remaining portions of the Ashbaugh shoreline, a deck and debris removal waterward of the Ordinary High Water mark was also discussed. Revised project plans of the relocated bulkhead and new project features were received on 22 July 1999. The District issued Regional General Permit 80-200-001-3 for the revised bulkhead and dredging proposal and informed the appellant that the proposed deck and rip rap would require an Individual Permit and second PN (notice published 2 August 1999).

On 1 September 1999, the MDEQ informed the District that they had placed a cease and desist (C & D) order on unauthorized work (installation of a septic field) the appellant was performing within an onsite wetland. The District also issued a C & D order on 9 September 1999. Corps enforcement action was suspended pending review of an after-the-fact (ATF) application for the septic field work. The appellant submitted the ATF application on 10 October 1999.

A third PN was issued on 30 December 1999 and included a mitigation proposal the appellant had discussed with the MDEQ, a land use restriction placed on a wetland island north of the project area. Following this review period, an initial proffered permit was sent to the appellant on 17 April 2000. The permit included a special condition for a land use restriction on both the offsite wetland island and the remaining onsite wetlands. The appellant appealed this condition to the District in a letter dated 14 June 2000, objecting to the restrictions on the onsite wetland. Following consideration of the appellant's concerns, a second proffered permit was sent on 7 August 2000. The District corrected the location of the offsite wetland island but left the land use restriction special condition unchanged. The appellant appealed to the Division on 5 October 2000.

Basis for Appeal as Presented by the Appellant:

Reason 1: "Failing to issue the permit without a deed restriction which restricts the use of the backyard area of the property will result in an arbitrary and capricious taking of property, as the Ashbaughs and their families will be precluded from using the property in a manner consistent with all other neighboring residents." Further,

"Instead of issuing the permit as originally contemplated and as is memorialized in the Joint Public Notice attached as Exhibit 4 to the Request for Appeal, the permit was issued with the caveat that Mr. Ashbaugh and his brother deed restrict the portion of their property which they and the prior residents utilized as a back yard – precluding any recreational use of that portion of the property."

Reason 2: "Additionally, the subject property does not appear to be a property which falls within the statutory or common definition of a wetland, as soil saturation and wetland vegetation do not appear evident on a large portion of the property for which the deed restriction is now being demanded."

Summary of Decision: I find that Reason 1 of the RFA has merit. As outlined below, the District should correct areas of confusion and ensure that the administrative record supports the final permit decision. Reason 2 of the RFA does not have merit. The District's record supports their determination on the presence and location of onsite wetlands. The appellant did not provide any documentation to refute the wetland delineation data collected onsite by the District.

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

Reason 1: "Failing to issue the permit without a deed restriction which restricts the use of the backyard area of the property will result in an arbitrary and capricious taking of property, as the Ashbaughs and their families will be precluded from using the property in a manner consistent with all other neighboring residents." Further,

"Instead of issuing the permit as originally contemplated and as is memorialized in the Joint Public Notice attached as Exhibit 4 to the Request for Appeal, the permit was issued with the caveat that Mr. Ashbaugh and his brother deed restrict the portion of their property which they and the prior residents utilized as a back yard – precluding any recreational use of that portion of the property."

Finding: Reason 1 of this appeal has merit.

Action: The District should review its administrative record to correct conflicting statements and clarify areas of confusion to ensure that the record supports the final permit decision. The District should also clearly address both onsite and offsite mitigation alternatives in the Environmental Assessment (EA). The District should ensure that any required mitigation and associated permit conditions are commensurate to the project's impacts on the aquatic environment. The review of mitigation alternatives need not be limited to the two options currently in the administrative record.

Discussion: The purpose of a Corps PN is to gain public input concerning the potential impacts of a project. It does not constitute an agreement with an applicant as to what aspects of a project will receive a Department of the Army permit or the conditions under which a permit will be issued. The appellant appears to be confusing the mitigation he discussed with the MDEQ (waterward island 80 feet in length with variable width) with the mitigation placed on the Corps proffered permit (remaining onsite wetland adjacent to septic field). The appellant's suggested mitigation option was mentioned in the second Corps PN. No mention of Corps mitigation occurred until the permit decision was made and an individual proffered permit was sent to Mr. Ashbaugh.

The District did not evaluate the appellant's offer of mitigation in the EA and Statement of Findings (SOF). Following consideration of the appellant's initial appeal, the DE attempted to explain the lack of an evaluation in a memorandum dated 28 July 2000. However, the administrative record does not support this explanation. The memorandum suggests that the District had not understood that the appellant's offer was intended as compensatory mitigation (Paragraph 3a). However, paragraph 2 of the District's 30 December 1999 PN did identify the land use restriction on the offsite island as mitigation for the proposed and completed discharges. The District should clearly address this alternative in the EA.

The memorandum also introduced confusion and conflicting statements into the administrative record. Conflicting statements occurred when, twice, the DE stated that all or most of the septic field could have been located on the upland portion of the property. Under Section 5 of the EA (the 404(b)(1) Guidelines Compliance Evaluation, page 15), the District found that ". . . the applicant has demonstrated satisfactorily that a less damaging practicable alternative does not exist. We have not identified any alternatives that would avoid discharges and would not have other significant adverse environmental consequences." Upon review of Enclosure 4 to the EA, I concur with this determination. The statements in the memorandum are inconsistent with the EA.

Furthermore, the District's rationale to require onsite land use restrictions remains unclear. While the EA discusses, in general terms, the water quality and wildlife habitat functions provided by the onsite wetland, the administrative record is inadequate in describing the value of the wetland when considering the total wetland size and wetland vegetation. The total wetland area is slightly more than one-tenth of an acre. The project wetland impacts total 0.06 acre, 0.04 acre already filled by installation of the septic field and 0.02 acre of riparian wetland proposed to be filled by the placement of rip rap. The wetland vegetation consists of a low-quality exotic plant species (purple loosestrife),

cattail, and incompletely identified sedges and rushes. The above information supports a conclusion that the wetland is of low quality with limited ability to provide water quality and wildlife habitat functions. If this conclusion is not accurate, the District's documentation should support the appropriate conclusion.

Following a review and documentation of the existing onsite wetland functions and value, the District should also ensure that the record clearly supports the need for onsite land use restrictions, including the prohibition of mowing activities throughout the entire remaining wetland area. Both the District and appellant should explore whether other mitigation options are available. The mitigation should be reasonable and commensurate with the authorized wetland impacts. Regardless of the District's final decision regarding required mitigation, the administrative record must support the decision and explain why it is preferable to the alternative offered by the appellant.

My final recommended correction to the District's record pertains to its characterization of the required land use restrictions as a form of minimization of direct, secondary and cumulative project impacts (EA pages 12 and 15). I believe this is a misuse of the term "minimization". Minimization of project impacts should be related to the currently proposed activities, not the speculation of future activities, particularly when the activity (mowing) is not a Federally-regulated activity. The District should review its record on this and the above mentioned areas of confusion to ensure that the administrative record supports the final permit decision.

The appellant also raised concerns that they were treated differently than neighboring properties that had completed erosion control projects within recent years. Specifically, the appellant stated that the neighbors had not been required to place land use restrictions on their properties and they were not prohibited from mowing portions of their property. Following the appeal conference, the appellant provided the names and addresses of these neighboring properties to the District. Upon review of the Regulatory database, the District found that these projects had not entailed any impacts to wetland. An earlier application for a nearby bulkhead within wetlands was denied. The District's response provides adequate documentation that the appellant was not treated differently from his neighbors during their review of his application.

Reason 2: "Additionally, the subject property does not appear to be a property which falls within the statutory or common definition of a wetland, as soil saturation and wetland vegetation do not appear evident on a large portion of the property for which the deed restriction is now being demanded."

Finding: Reason 2 of this appeal has no merit.

Action: No action required.

Discussion: Enclosure 7 of the District's record supports their determination on the presence and location of onsite wetlands. The field inspection report documents a 30 April 1999 site visit and includes data on three sample points taken on the Ashbaugh property. Two data points were designated wetland and one upland. The appellant has not provided any documentation to refute this data. However, in the future, I encourage the District to provide more specific and complete data concerning project site

vegetation. Four plant species were found to be dominant in the two wetland data points but two of the plant species are identified by genus name only (Carex sp. and Juncus sp.) A complete plant identification would include the plant's scientific name, the Latin binomial name containing both genus and species epithet names. Only with a complete identification, to species epithet, can an accurate wetland indicator status be determined. Numerous sedge (Carex) and rush (Juncus) plant species are listed in the "National List of Plant Species That Occur in Wetlands: North Central (Region 3)" and not all of them have a wetland indicator status of facultative (FAC), facultative wetland (FACW) or obligate (OBL). Unless all species within a particular genus have a wetland indicator of FAC or wetter, dominant species that cannot be fully identified should not be used in the percent of dominant wetland plant species.

It is not clear in this case whether two or four of the identified plant species were counted toward determination of wetland vegetation. One hundred percent wetland plant cover was reported and would be accurate based upon the two fully identified plant species (purple loosestrife, Lythrum salicaria, and broad-leaf cattail, Typha latifolia). In the future, I recommend placing comments in the "Remarks" section or the use of a fraction to indicate the number of dominant wetland species counted of the total number of dominant species listed (2/4) to clarify this delineation criteria.

Conclusion: For the reasons stated above, I conclude that Reason 1 of this administrative appeal has merit. The District should clearly address the appellant's mitigation option in the EA. The District's record should also clearly explain why the onsite mitigation is preferable to the option offered by the appellant. The District should review its record on these areas of confusion to ensure that the administrative record supports the final permit decision.



ROBERT H. GRIFFIN
Brigadier General, U.S. Army
Commanding