

ADMINISTRATIVE APPEAL DECISION

CENTERPOINT PROPERTIES; FILE NO. 200301082

CHICAGO DISTRICT

OCTOBER 6, 2005

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

Appellant: Mr. Jim Cross, owner of CenterPoint Properties

Appellant Representative: Ms. Valerie Jakobi, Environmental Scientist, Cowhey Gudmundson Leder, Ltd.

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

Background Information: On September 26, 2003, Cowhey Gudmundson Leder, Ltd. (CGL) submitted a request for an approved jurisdictional determination (JD) to the Chicago District (District). The request was made on behalf of Mr. Jim Cross, owner of CenterPoint Properties and included a "Jurisdictional Wetland Delineation Report" completed by CGL. CenterPoint Properties is an industrial developer and proposes to demolish the existing buildings on site and construct new buildings.

The property, referred to as the "Caterpillar Site" by CGL, is located in Joliet, Will County, Illinois. The site is bordered by Route 6 to the north, the Des Plaines River to the south, vacant land to the east, and industrial development to the west. An industrial facility exists on the property which is 285 acres in area and approximately 75% developed.

The request for an approved JD was focused on the undeveloped areas of the property. The undeveloped areas are labeled as Areas A, B, C, and D on Figure 6 of the delineation report submitted by CGL. Area A is located in the southwest corner of the property. Area D is north of, and directly adjacent to, Area A. Area B is located at the northern most portion of the property and Area C is at the eastern most portion of the property. Figure 6 identified wetland AA, wetland AC, and ditch A within Area A; wetland B within Area B; and Ditch C within Area C.

The District performed site visits on December 7, and 31, 2003 with representatives of CGL. On November 15, 2004, the District issued the appellant an approved JD that stated:

There are no jurisdictional areas on Area B and Area D. Wetland AA and Wetland AC are adjacent to Ditch A. Ditch A is hydrologically connected to the Des Plaines River via an underground culvert. Ditch C is adjacent to the Des Plaines River and is therefore jurisdictional.

Although not specifically stated by the District in their JD letter or documented in their administrative record, the Des Plaines River is a navigable waterway under Section 10 of the Rivers and Harbors Act of 1899. The appellant agrees that the Des Plaines River is a known Section 10 navigable waterway and that wetland AA, wetland AC, and ditch A are waters of the U.S. However, the appellant disputes that ditch C is a water of the U.S. and on January 14, 2005, submitted a Request for Appeal (RFA) to the Great Lakes & Ohio River Division office.

Summary of Decision: The Appellant's Reason for Appeal has merit and the approved JD is remanded 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:

Appellant's Stated Reason for Appeal:

Appeal Reason 1: The appellant disputes that ditch C is jurisdictional for two reasons: ditch C is 40 feet higher in elevation than the Des Plaines River; and ditch C does not discharge into the Des Plaines River (lack of hydrologic connection).

Finding: This reason for appeal has merit.

Action: The District shall prepare and include in the administrative record a decision document that completely documents the basis for JD and supports its final JD. The District shall complete these tasks within thirty 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 District's "Approved Jurisdictional Determination Decision Document" indicated that the District based its JD on three factors:

The presence of a tributary to an interstate water or other water of the U.S. (33 CFR 328.3 (a)(5))

The presence of wetlands adjacent (bordering, contiguous, or neighboring) to interstate or other waters of the U.S., except for those wetlands adjacent to other wetlands. (33 CFR 328.3 (a)(7))

The presence of an isolated water (e.g., intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds).

The District clarified how these factors applied to each aquatic resource during a telephone conversation on September 15, 2005, between the District and the Review Officer. Accordingly,

the District based its jurisdiction over ditch C on Corps regulations at 33 CFR 328.3(a)(7), or the presence of wetlands adjacent to interstate or other waters of the U.S. except for those wetlands adjacent to other wetlands. Likewise, in its JD letter the District stated that “Ditch C is adjacent to the Des Plaines River and is therefore jurisdictional.”

Corps regulations at 33 CFR 328.3(a) provide the definition for waters of the U.S. and 33 CFR 328.3(a)(7) limits the application of adjacency principles to wetlands. Therefore, ditch C must first meet the criteria for wetlands before it can be considered adjacent. However, the only evidence that ditch C may contain wetlands was submitted by the appellant and the District’s administrative record does not clearly indicate that it considered any portion of ditch C to be wetlands. The District refers to ditch C as a “ditch” or “drainage ditch” throughout its administrative record and documented that ditch C does not have a continuous ordinary high water mark (OHWM) and does not discharge into any other waters, including the Des Plaines River (December 31, 2003 site note).

Data sheets contained within the wetland delineation report submitted to the District by CGL indicate that ten data points were recorded within area C. Area C is rectangular in shape and is bisected (lengthwise) by ditch C. Ditch C is oriented in a north-south direction and runs almost the entire length of area C. Eight of the data points (data points 3-10) collected in Area C are located in, or near the delineated limits of ditch C. According to data sheets submitted by CGL, five points (data points 3, 4, 6, 7, and 10) meet the criteria for wetlands per the Corps 1987 Wetland Delineation Manual. The five points that meet the criteria for wetlands appear loosely scattered within, or near the limits of ditch C (see figure 6). The District’s description of existing wetland conditions within Area C is limited to its site notes from December 31, 2003. This site note indicates that any wetlands in Area C are adjacent to, or outside the limits of ditch C:

The wetland directly adjacent to the ditch primarily consists of a monoculture of reed canary grass. There are sporadic patches of fragmites [sic].

The “wetland” referenced above is not identified in the District’s approved JD letter. The District also failed to document the proximity of the wetland to a tributary and/or the hydrologic connection between the wetland and a tributary. Likewise, the District failed to indicate within the administrative record how it considered that ditch C is a wetland in accordance with the definition of waters of the U.S. at 33 CFR 328.3(a)(7).

Corps regulations at 33 CFR 328.4(c)(1) define the limits of jurisdiction for non-tidal waters of the U.S. and state that in the absence of adjacent wetlands, the jurisdiction extends to the OHWM. The District acknowledges that ditch C does not have a continuous OHWM and does not discharge into the Des Plaines River (December 31, 2003 site note). Therefore, without further documentation, it is unclear from the District’s administrative record how jurisdiction extends beyond the Des Plaines River to ditch C.

Programs Support Division
Subject: CenterPoint Properties Appeal Decision

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

FOR THE COMMANDER:



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