

**ADMINISTRATIVE APPEAL DECISION**

**CITY OF GARY; FILE NO. 90-145-129-2**

**DETROIT DISTRICT**

**DECEMBER 7, 2004**

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

**Appellant:** City of Gary

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

**Receipt of Request for Appeal:** 16 February 2004

**Appeal Meeting and Site Visit Date:** 22 April 2004

**Background Information:**

On May 17, 2003, the City of Gary (appellant) requested an approved jurisdictional determination (JD) from the Detroit District (District). The property in question is a 216-acre site that is divided by city streets into five separate parcels. The City of Gary owns all the parcels. The five parcels are individually identified as the J-Pit and four areas numbered one through four (Area 1- 4). The J-Pit is the largest and centrally located parcel with the remaining four parcels located along its rectangular border. The project area is located within the City of Gary, Lake County, Indiana.

The J-Pit encompasses 114 acres and is a former gravel and sand quarry that has not been abandoned and is being maintained by pumping. On June 20, 2003, the District determined there were no waters of the United States (WOTUS) within the J-Pit. This JD was limited to the J-Pit as the delineation for Areas 1-4 was not yet completed by the appellant.

Area 1 is located north of the north east corner of the J-Pit. Area 1 encompasses 16 acres and contains native black oak (*Quercus velutina*) savannah on remnant sand dunes. Area 1 also contains a residential structure and an auto repair business. On December 19, 2003, the District determined there were no WOTUS within Area 1.

Area 4 is located south of the southwest corner of the J-Pit. Area 4 encompasses 36 acres and contains leveled dunes and a sand borrow pit in the northern section and a large emergent wetland partially surrounded by black oak savannah in the southern section. The southern section of Area 4 represents the largest dune and swale complex (approximately 18 acres) identified within the project area. On December 19, 2003, the District determined there were WOTUS within Area 4, including approximately 13.26 acres of wetland.

Area 2 is located south of the south east corner of the J-Pit. Area 2 encompasses 23 acres and contains mostly leveled dunes and a small emergent wetland. Area 2 also contains a platted subdivision that has not been developed beyond infrastructure such as roadways and utilities.

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Area 2 also contains a junkyard and a used car business. On December 19, 2003, the District determined there were WOTUS within Area 2, including approximately 0.1 acre of wetland.

Area 3 is located south east of the south east corner of the J-Pit. Area 3 encompasses 27 acres and contains leveled dunes in the northern section and emergent wetlands and black oak savannah in the southern section. Area 3 has undergone intense disturbance evidenced by little or no topsoil, burned soil, compacted soils, and contains a mix of debris including discarded foundry materials, demolished building materials, shredded plastic and rubber. On December 19, 2003, the District determined there were WOTUS within Area 3, including approximately 4.91 acres of wetland.

According to maps submitted by the appellant and accepted by the District as part of its JD, four wetlands totaling 18.27 acres were identified within the limits of the project area. Wetlands were only identified in Areas 2, 3 and 4. The District stated its basis for asserting jurisdiction over the four wetland areas was that each of the identified wetlands met the criteria of the Corps of Engineers 1987 Wetlands Delineation Manual (1987 Manual) and were historically connected to Lake Michigan in that they were part of the Lake Michigan Dune-Swale fringe landform.

The appellant disagreed that the identified wetland areas were WOTUS and submitted a Request for Appeal (RFA) on February 16, 2004. The District's administrative record contained:

- Approved jurisdictional determination from the District dated 19 December 2003
- Letter from the appellant dated 18 December 2003 submitting revised maps (two large scale maps submitted and accepted as final wetland delineation per 19 December approved JD)
- Letter from the appellant dated 18 December 2003 submitting revised Ecological Assessment dated 12 November 2003
- District's site inspection report for 18 December 2003
- Appellant's request for jurisdictional determination dated 12 November 2003
- Draft Baseline Ecological Assessment submitted by appellant on 20 June 2003
- Letter from appellant to District dated 22 April 2003
- District's site inspection report for 23 July 2002
- Letter (facsimile) from District to appellant dated 5 June 2002.
- Appellant's request for jurisdictional determination dated May 17, 2002
- Endangered species coordination between appellant and US Fish and Wildlife Service dated 5 February 2002
- Endangered species coordination between appellant and Indiana Department of Natural Resources dated 5 February 2002
- District Memorandum dated 29 November 2001
- District Memorandum dated 12 July 1999
- Approved JD from the District dated 21 October 1994
- 1917 map of western Gary, Hammond, and East Chicago illustrating dune-swale complex (attached to Baseline Ecological Assessment)

Clarifying information received after the District's Decision that was reviewed and considered during the appeal:

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- Division meeting notes from 22 April 2004 site visit and appeal meeting
- 1998 US Geological Survey aerial photograph of project site (submitted by the District during the 22 April 2004 site visit and appeal meeting)

**Summary of Decision:** The Appellant's Reason 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 DETROIT DISTRICT ENGINEER (DE):**

**APPELLANT'S STATED REASON FOR APPEAL:** The District's JD is in clear violation of the principles enunciated by the U.S. Supreme Court in its decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC") and subsequent court decisions implementing those principles. Some existing overland connection is required for jurisdiction to exist.

During the appeal meeting the appellant further clarified his RFA by stating that the area lacked a sufficient hydrological connection to assert jurisdiction. The appellant stated that there is not a hydrological connection. According to the appellant, there is a permanent disconnect as evidenced by the distance between the identified wetland areas and interstate waters. The appellant pointed out that the wetland areas are about two miles south of the Grand Calumet River and the area in between is highly developed. Therefore, the wetlands in question are not adjacent because of their *current* position within the landscape and the District's JD contradicted the holding in SWANCC that requires an overland hydrologic connection to interstate waters barring "direct adjacency." In making its case, the appellant also disputed the appropriateness of the District's 1999 memo that was used as a basis for the JD.

**FINDING:** This reason for appeal has merit.

**ACTION:** The District's basis for JD was incorrect. The District shall prepare and include in the administrative record a decision document that correctly considers the basis for JD and supports its final JD. The District shall complete these tasks within 45 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 concurs that the identified wetland areas meet the criteria of the 1987 Manual. The appellant also agrees with the wetland boundaries represented by the final delineation and verified by the District in its JD dated December 19, 2003. The appellant also agrees (as evidenced by the 1917 map of western Gary, Hammond, and East Chicago illustrating historic conditions of the dune-swale complex) that the identified wetland areas are likely remnant features of the historic dune-swale complex that existed along the southern shore of Lake Michigan and historically covered the project area. However, the appellant disagrees that the wetland areas are WOTUS based on their historic connection to Lake Michigan.

At the center of the appellant's RFA is its dispute of the application of the 12 July 1999 District Memorandum (1999 Memo) titled "Guidance regarding adjacency." The 1999 Memo is an internal District memo to staff providing operational guidance. The memo is part of the District's administrative record and was considered by the District in making its JD. The 1999 Memo is based on language taken from the Nationwide Permit Program Regulations Preamble of November 22, 1991 (1991 Preamble). Specifically, the selected language from the 1991 Preamble states that "[i]n systems where there is a broad continuum of wetlands, all are considered adjacent to the major waterbody to which it is contiguous." The 1999 Memo restates this and adds the following: "[w]hen a wetland is hydrologically and ecologically part of the same system it should be treated as a whole system." The 1999 memo also states the following with regard to dune-swale complex, "...in a dune-swale wetland (broad continuum) adjacent to the Great Lakes, the entire system is considered adjacent to a section 10 waterway. In some situations, the system may extend more than a mile from the existing lakeshore and may have been overlain with roads and other artificial features. It is, nevertheless, a coastal feature of the great Lakes and is hydrologically and ecologically a part of the same system."

The appellant stated that the preamble language is written in present tense as opposed to past tense and accordingly existing conditions, not historic conditions, should be evaluated. Therefore, according to the appellant, the 1999 Memo should not be applied to the project area based on the historic conditions represented by the 1917 map, but should be applied based on the current conditions represented by current maps. The appellant stated that current maps give evidence that there is not a connection, perennially, intermittently, or otherwise. In fact, according to the appellant there is a permanent disconnect. The appellant stated that the wetlands identified within the project areas can not be adjacent because of their *current* status and the vast expanse of area (twenty city blocks or two miles) that exists between the wetlands and interstate waters. Therefore the 1999 Memo which provides guidance that even systems which may have been overlain with roads and other artificial features are adjacent does not apply to current conditions because there is substantial development between the wetlands and an interstate water. The appellant stated that the 1999 Memo references minimal barriers whereas the present conditions display major barriers and development.

During the appeal meeting the appellant also stated that there is a District Memo in the administrative file dated November 29, 2001 (2001 Memo) that contradicts the 1999 Memo. The 2001 Memo addressed taking jurisdiction over lands owned by the Tree of Life Missionary Baptist Church (TLMBC) in Gary, Indiana. The Memo states that the wetlands on TLMBC property are a remnant dune/swale complex and references the 1991 preamble describing the dune/swale as a broad continuum. The 2001 memo also references the 1999 memo and its guidance that such wetland systems may be considered adjacent. However, the 2001 memo concludes that "[t]he wetlands in question no longer have a contiguous connection with other waterbodies (nor an easily discerned bordering or neighboring relationship). In situations where a portion of a dune/swale complex connects with another body of water, a presumption that even the farthest reaches of the dune/swale complex are adjacent to that waterbody may be made. In this case however, the isolation of the remnant dune/swale complex precludes such a determination."

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In summary, the appellant stated that the wetland areas are not adjacent based on current conditions and there is no evidence of a sufficient hydrological connection. Therefore, the District's JD is in direct conflict with the holding in SWANCC that requires an overland hydrologic connection to interstate waters barring "direct adjacency."

In its JD dated December 19, 2003, the District stated its basis for asserting jurisdiction over the four wetland areas was that each of the identified wetlands met the criteria of the Corps of Engineers 1987 Wetlands Delineation Manual and were historically connected to Lake Michigan in that they were part of the Lake Michigan Dune-Swale fringe landform. District notes referring to the December 18, 2003, site visit state that "[the project manager] explained [the District's] jurisdictional claim post-SWANCC due to the Dune-Swale geomorphology and ecology." District notes dated December 19, 2003, refer to the five project areas and provide a brief rationale for asserting jurisdiction over the four wetland areas with the following statement. "All [wetlands are] jurisdictional due to Dune-Swale history..."

During the appeal meeting the District clarified its opinion that post SWANCC, the Secretary of the Army may not assert jurisdiction over waters where the only nexus to interstate commerce was migratory birds. The District then clarified its position that SWANCC did not invalidate the 1991 Preamble and stated that adjacency can be determined by "part of a larger continuum of waters or wetlands."

The District stated that historically, there was a broad system (continuum) of dune-swale wetlands along the fringe of Lake Michigan. The District clarified that during its JD review, it considered the 1917 map which illustrates that the project area is consistent with the historic location of the broad continuum. The District also clarified that the 1999 Memo draws a parallel between dune-swale and broad continuum. The District clarified that it relied, in part, on the 1999 Memo for its JD.

The District also clarified that the following statements were inherent to its training and background but not documented in the administrative file: man-made structures do not sever adjacency and the definition of adjacency which discusses wetland separated by man-made structures, 33 CFR 328.3(c).

Regarding the appellant's statements that the 2001 Memo appears to contradict the 1999 Memo, the District responded that the field office responsible for making the JD requested that the district office send information to assist them in their evaluation of the file. Part of the district office's response included the two memos (1999 and 2001). The District reviewed both files before making their JD, however, the District stated that they relied on the 1999 memo to make their decision.

In summary, the District documented the historic location of dune-swale wetlands (broad continuum) along the fringe of Lake Michigan and the project area is consistent with the historic location of this broad continuum. The District also documented that the wetlands identified within the project area are remnant features of the dune-swale wetlands. Therefore, the District stated that its JD is supported by both the 1999 Memo and the definition of adjacency at 33 CFR 328.3(c).

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The process followed by the District to assert jurisdiction in this case was clearly documented. However, the basis of this JD is flawed due to its reliance on inappropriate guidance (provided by the 1999 Memo) on how to determine adjacency.

The 1991 Preamble language cited in the 1999 Memo was not intended to be interpreted in the context of making jurisdictional determinations. Instead, the language pertained to making headwater determinations for purposes of the 1991 Nationwide Permit Program. The purpose of the preamble language was to describe the setting in which its associated regulations were promulgated.

Even if the 1999 memo was an appropriate interpretation of the 1991 Preamble, it would be superceded by post SWANCC procedures as articulated in Appendix A of the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 FR 1991 ("APPENDIX A"). The 1999 memo offers guidance that is inconsistent with post SWANCC practices. Following SWANCC, the District must base jurisdictional determinations on current law and regulations.

According to regulations at 33 CFR 328.c, adjacency is defined as bordering, neighboring, or contiguous. Therefore, as a matter of practice, adjacency must be based on proximity or a surface water connection. Both the District and appellant agreed that the wetlands in question are remnant features of an historic ecological continuum and are hydrologically isolated and separated from the nearest tributary system by two miles overlain by urban and industrial development. The District did not document appropriate factors to support adjacency between the wetlands and interstate, navigable waters. Therefore, the District's JD is not adequately supported by the administrative record.

**Overall 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