

**ADMINISTRATIVE APPEAL DECISION**

**MR. DON RICHARDS; FILE NO. 02-157-021-0**

**DETROIT DISTRICT**

**SEPTEMBER 15, 2005**

**Review Officer:** Martha S. Chieply, U.S. Army Corps of Engineers, Mississippi Valley Division<sup>1</sup>

**Appellant:** Mr. Don Richards

**Appellant Representative:** Mr. G.W. Sedgwick

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

**Appeal Meeting and Site Visit Date:** 7 March 2005

**Background:** On 1 October 2002, Mr. G.W. Sedgwick, on behalf of Mr. Don Richards, submitted a permit application to recap/reface 284 feet of existing concrete seawall, construct 292 feet of new concrete seawall, and dredge material along the shoreline of a property on Sylvan Lake, referred to as Bliss Point, located within Rome City, Noble County, Indiana.

The project was revised, and as documented in the 19 February 2003, Joint Public Notice, proposed to recap and reface 247 feet of existing concrete seawall (Areas 1 and 2) and construct 292 feet of new concrete seawall (Areas 3 and 4). Material would be dredged from the shoreline to prepare the area for construction. Existing riprap would be removed along Area 3. Bio-engineered materials would be placed along the toe of the Area 4 seawall and glacial stone placed along Areas 3 and 4. The stated purpose for work was to reinforce the existing seawall and protect the property from erosion and ice damage.

The Detroit District (District) determined that the placement of dredged or fill material below the Ordinary High Water Mark of Sylvan Lake would not impact jurisdictional wetlands. Comments in response to the public notice were received from the U.S. Fish and Wildlife Service and State Historic Preservation Officer. In its letter dated 16 April 2003, the Indiana Department of Environmental Management granted Section 401 Water Quality Certification.

The District's Environmental Assessment, Public Interest Review Summary, and 404(b)(1) Guidelines Factual/Compliance Determination (District Decision Document) and 3 December 2003, Statement of Findings documented that the proposed discharge complied with the Guidelines with the inclusion of appropriate and practicable modifications to the original proposal. The District determined that the proposed project by Mr. Richards did not comply with the 404(b)(1) Guidelines and would contribute to adverse cumulative effects in the area.

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<sup>1</sup> Great Lakes and Ohio River Division Commander Bruce A. Berwick appointed Ms. Chieply to serve as the Administrative Appeal Review Officer for this appeal.

The District advised that the project could be modified to allow only glacial stone and bioengineered shoreline protection in the undeveloped areas and allow the existing concrete walls to be refaced. In a letter dated 10 December 2003, the District forwarded an Initial Proffered Permit to Mr. Richards with the fore-mentioned modifications.

In his letter dated 1 January 2004, Mr. Sedgwick, on behalf of Mr. Richards, submitted a Request for Appeal (RFA) to the District and detailed reasons why Mr. Richards could not accept the Initial Proffered Permit. In a letter dated 6 June 2004, Mr. Richards requested the District authorize a 100-foot portion of the recap/reface work. The District broke out a portion of the proposed work that could be permitted under a Nationwide Permit and authorized the 100-foot work as a Nationwide Permit on 24 June 2004. Upon consideration of Mr. Richards' concerns with the Initial Proffered Permit, the District, in its 2 July 2004, letter and 1 July 2004, Memorandum, determined that the Initial Proffered Permit to Mr. Richards fulfilled the project purpose of reinforcing the existing seawall and protected the property from erosion, while minimizing the negative impacts to water quality, terrestrial and aquatic habitat, and shoreline erosion in the surrounding area. The District provided an unmodified Proffered Permit and Request for Appeal (RFA) form.

On behalf of Mr. Richards, Mr. Sedgwick submitted a RFA to the Great Lakes and Ohio River Division on 22 August 2004. In his letter dated 8 November 2004, the Acting Division Engineer notified Mr. Sedgwick that the RFA was incomplete and provided the opportunity to resubmit a revised RFA.

In a facsimile received on 7 December 2004, Mr. Sedgwick provided a revised RFA. In his letter dated 1 February 2005, the Great Lakes and Ohio River Acting Division Engineer accepted the RFA and delegated Ms. Martha Chieply to serve as the Administrative Appeal Review Officer. The appeal conference and site visit was conducted on 7 March 2005.

**Summary of Decision:** I find that the District's administrative record supports its conclusion that waters of the United States regulated under the Clean Water Act are present on the Appellant's property. Even though other persons received permits to construct new concrete bulkheads in the geographic area, the administrative record provides substantial documentation regarding the cumulative impacts and the availability of a less damaging practicable alternative. While the project manager who prepared the District's Decision Document may not have visited the site, there is sufficient documentation in the administrative record to support the District Engineer's permit decision. This appeal does not have merit.

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

**Reason 1:** The appellant disagrees that the Corps of Engineers has jurisdiction.

**Finding:** This reason for appeal does not have merit.

**Action:** No action specific to this RFA is required. However, the record is unclear as to the District's compliance with regulations at 33 CFR Parts 331.2 and 331.4. Therefore, effective immediately, the District is instructed to ensure it is in compliance with the above regulations and notify my Regulatory Program Manager within fifteen days of how it completed this task.

**Discussion:** The administrative record contains sufficient evidence that portions of Mr. Richards' property contains waters of the United States and that the proposed placement of dredged or fill material is subject to Corps jurisdiction.

Portions of Mr. Richards' property meet the applicable definition of waters of the United States found in Corps regulations at 33 CFR 328.3(a)(5) "Tributaries of waters identified in paragraphs (a)(1) through (4) of this section." The administrative record contains a 16 October 2002, inspection report which states that the project site is located along Sylvan Lake, a tributary to a navigable water of the United States. The District's Environmental Assessment states that Sylvan Lake was created as a feeder reservoir for a ship channel in the Elkhart River. The Elkhart River is a tributary to the St. Joseph River, a navigable waterway.

The administrative record also sufficiently documented the extent of Corps jurisdiction. Corps regulations at 33 CFR 328.4 state that the limit of jurisdiction in non-tidal waters of the United States, in the absence of adjacent wetlands, extends to the Ordinary High Water Mark (OHWM). The 16 October 2002 District inspection report states that the project is located below the OHWM of Sylvan Lake. Photographs in the administrative record document evidence of an OHWM. Prior to the appeal conference, a site visit was performed with Mr. Richards, Mr. Sedgwick, District representatives, and the RO where indicators of an OHWM were observed.

The District adequately documented that the work as proposed in the Joint Public Notice would result in the placement of dredged or fill material below the OHWM of Sylvan Lake which is a tributary to a navigable waterway. The District correctly asserted jurisdiction based on regulations found in 33 CFR 328.3(a)(5). Therefore, this reason for appeal does not have merit.

However, while the District's administrative record documented its basis for jurisdiction, the record is unclear if Mr. Richards or his agent was provided a written determination that portions of the property are subject to regulatory jurisdiction under Section 404 of the Clean Water Act. Regulations at 33 CFR parts 331.2 and 331.4 require the District to include a basis of JD with each jurisdictional determination.

**Reasons 2, 4, and 5:** The Appellant asserts that he is being treated differently than other persons. Other contractors in the area are doing similar projects without obtaining a permit. They are either not reprimanded or received permits.

**Finding:** These reasons for appeal do not have merit.

**Action:** No action required.

**Discussion:** While other persons received permits to construct new concrete bulkheads in the geographic area, the appellant's administrative record provides substantial documentation regarding the adverse cumulative impacts on shore erosion from continued construction of new concrete bulkheads and the availability of a less damaging practicable alternative. Based on its public interest review, the District's approach, which allowed existing concrete walls to be refaced and advocated a less damaging practicable utilization of glacial stone and bio-engineered

material protection in undeveloped areas, was reasonable and supported in the administrative record. Additionally, the District recognized instances, locations with severe erosion problems, which necessitated the construction of new concrete bulkheads but noted no evidence of erosion problems on Mr. Richards' property.

Mr. Richards' RFA did not specify other persons that were similarly situated. The administrative record documented that six persons were issued Nationwide Permits (NWP 13) and one person was issued a Regional General Permit for new concrete bulkheads. The scale of new bulkhead construction of these seven was less than Mr. Richards' proposal. With the exception of two permits; five permits were authorized seven to ten years before the Richards' permit decision.<sup>2</sup>

In summary, while other persons with similar projects received authorizations for the construction of new concrete bulkhead, the District provided substantial reasons in the administrative record for concluding that the modified proffered permit would minimize minor, long term detriments to water quality, aquatic and terrestrial biota, and erosion to the greatest extent possible, while still allowing reasonable erosion control to the applicant. The District's decision to evaluate proposed new concrete bulkheads in the geographic area more rigorously was documented in the administrative record. The District was within its authority to propose a practicable, less damaging alternative. The District coordinated with state and Federal agencies, factored into its evaluation the information on cumulative effects, and adjusted its decision appropriately. These reasons for appeal do not have merit.

**Reason 3:** The project manager issued the Proffered Permit without visiting the site.

**Finding:** This reason for appeal does not have merit.

**Action:** No action required.

**Discussion:** While the project manager who prepared the District's Decision Document may not have visited the site prior to issuing the Proffered Permit, there is evidence in the administrative record that another District regulatory person inspected the site on 16 October 2002. There is sufficient documentation in the administrative record to support the District Engineer's permit decision.

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<sup>2</sup> Of the two recently authorized permits for new concrete bulkheads, one (#97-157-029-0) was originally authorized in 1994 and extended in 2000. In the second permit (#02-157-011-0) the project purpose was different; the seawall construction would close off an existing boat well.

**Additional information deemed clarifying information and considered during the appeal review:**

1. Written and verbal responses to questions posed by the RO and documented in the 9 March 2005, Appeal Conference Memorandum for Record (MFR).
2. The District provided page 7 of Indiana Administrative code which defines waterline or shore line (Exhibit 3 of the Appeal Conference MFR). The code is found in its entirety at [www.in.gov/legislative/iac/T03120/A00110.pdf](http://www.in.gov/legislative/iac/T03120/A00110.pdf).
3. The District provided a list of seawall permits issued within one-half mile of Mr. Richards' project site (Exhibit 4 of the Appeal Conference MFR).
4. The District provided a map which depicted the location of seawall permits referenced in the administrative record (Exhibit 5 of the Appeal Conference MFR).
5. The District provided a copy of the Regional General Permit issued by the Louisville and Detroit Districts on 12 April 2000, for construction or installation of new facilities or structures and agriculture/mining activities (Exhibit 6 of the Appeal Conference MFR). The Regional General Permit was reissued on December 15, 2004.
6. The District provided a copy of the 2 July 2004, District letter sent to Mr. Don Richards which offered a proffered permit (Exhibit 7 of the Appeal Conference MFR).
7. The District provided copies of photographs and site drawings in the administrative record (Exhibit 8 of the Appeal Conference MFR).
8. The District provided pages 2078 – 2095 of the Corps of Engineers (Corps) regulations relating to Nationwide Permits issued on 15 January 2002 (Exhibit 9 of the Appeal Conference MFR).
9. During the site visit, the RO took eight digital photographs of the site. The photos are Exhibit 10 of the Appeal Conference MFR.
10. By facsimile dated 8 March 2005, the District provided a copy of Mr. Richards' 20 January 2003, letter to the Indiana Department of Natural Resources (Exhibit 11 of the Appeal Conference MFR).

Programs Support Division  
Subject: Mr. Don Richards Appeal Decision

**Conclusion:** I find that the District's administrative record supports its decision regarding Mr. Richards' permit application. For the reasons stated above, the appeal does not have merit.

  
WILLIAM E. RYAN III  
Colonel, Corps of Engineers  
Acting Division Engineer