

**ADMINISTRATIVE APPEAL DECISION FOR
APPROVED JURISDICTIONAL DETERMINATION**

**Village Building Company, Inc.
Detroit District File Number 01-010-078-0**

July 8, 2004

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California, on behalf of the Great Lakes and Ohio River Division, Cincinnati, Ohio.

Technical Advisor to Review Officer: Chris Noble, Soil Scientist, Environmental Laboratory, Engineering Research and Development Center, Vicksburg, Mississippi.

Appellant Representative: Joseph Polito and Jeffrey Woolstrum; Honigman, Miller, Schwartz, and Cohn LLP

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

Appeal Meeting/Site Visit Date: September 4, 2003

Background Information: The Village Building Company (Appellant) owns an approximately 14 acre rectangular property in Harrison Township, Macomb County, Michigan. This property is located just southeast of the intersection of Jefferson Street and Emerick Street. The property extends from approximately Arbor Road to past Detroit Street. Just south and east of the property is a large wetland complex that connects to Lake St. Clair and for purposes of this appeal the entire complex will be referred to as the Black Creek Marsh. The District and the Appellant agree that Black Creek Marsh below a specific elevation contour line is within Clean Water Act (CWA) jurisdiction, but disagree as to whether areas above that elevation contour line are within CWA jurisdiction.

In late Summer/Fall 2001, a contractor started activities on the property on behalf of the Appellant using mechanized heavy equipment. This work was observed by a member of the public, who reported it to the Detroit District as a possible violation of Section 404 of the CWA. The District initiated an investigation of a potential unauthorized activity in December 2001 and documented the presence of both rubber tire and tracked vehicles on the property as shown in District photographs taken of the equipment on December 4, 2001. The District's investigation found that almost all vegetation had been removed from the site.

The Appellant's consultant conducted a site investigation in January 2002 and concluded that the property was outside of CWA jurisdiction. The District received the Appellant's permission to conduct a site investigation and did so on May 23, 2002, with the assistance of the Michigan Department of Environmental Quality. The District agreed as

a provision of its access agreement to issue an approved jurisdictional determination (JD) for the property and to allow the Appellant to appeal that determination if he disagreed with it. The Appellant requested the District delay issuance of the approved JD several times so that he could submit additional information. The District then issued an approved JD on January 31, 2003. Due to several procedural delays resulting from actions of both the Appellant and the Corps, the appeal meeting and site visit were held in September 2003. The District's evaluation and response to the activities that occurred on the Appellant's property are ongoing. However, this administrative appeal is limited to an evaluation of the Detroit District's approved JD of January 31, 2003.

The Appellant argues that the District's conclusion that the property is within CWA jurisdiction is an incorrect application of the laws, regulations, and policies associated with the Corps CWA Section 404 Regulatory program. The Appellant also asserts that prior Federal court decisions preclude establishing CWA jurisdiction on the Appellant's property.

Summary of Decision:

I find that the District's administrative record supports its conclusion that wetlands regulated under the CWA were present throughout the Appellant's property prior to the mechanized land clearing activities. The CWA jurisdictional line that the Appellant claimed was applicable to his entire property actually related to the limits of a restoration order under the Corps regulations as they stood in 1975, and is not relevant to a Corps CWA jurisdictional determination under the Corps current regulations. This appeal does not have merit.

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

Reason 1: The Appellant asserts that the property does not contain any wetlands as defined in the Corps' 1987 manual.

FINDING: This reason for appeal does not have merit.

ACTION: None required.

DISCUSSION: In the Reasons for Appeal, the Appellant asserts that the property does not contain wetlands that are regulated under the CWA. The Appellant further asserts that, even if the property did contain wetlands, those wetlands are isolated, and not regulated by the Corps of Engineers.

The District used the current "on-line" version of the 1987 Manual as posted on the U.S. Army Corps of Engineers, Environmental Research and Development Center, Environmental Laboratory website. The on-line version of the manual reflects several modifications to the original 1987 Manual that have been directed by U.S. Army Corps of Engineers Headquarters. What has not changed is that the 1987 Manual identifies three environmental parameters - hydrophytic vegetation, hydric soils, and wetland hydrology

– that must be evaluated when determining whether a wetland is present. The 1987 Manual identifies a variety of indicators that would show the presence or absence of each parameter. Typically, indicators of all three parameters would be present in wetland areas. The 1987 Manual also provides methods for evaluating disturbed sites, such as the Appellant’s property. The District used these procedures for an “atypical” determination because of the removal of virtually all the vegetation on the site, and because the District believed the soils and the hydrology of the site had been disturbed as well.

Hydrophytic Vegetation

The District and the Appellant agreed that the vegetation on the property prior to clearing in the Summer and Fall of 2001 met the hydrophytic vegetation criteria under the 1987 Manual. The Appellant also asserted that he believed the vast majority of the plants that had occurred on the property were classified as facultative wetland plants and that such plants would be located in upland areas approximately one third of the time. The Appellant therefore asserted that vegetation would not be considered a sufficiently accurate indicator of whether the area was a wetland, because vegetation such as occurred on this site would be expected to occur in wetland areas about two-thirds of the time and in upland areas one third of the time. However, the Appellant’s statement does not clearly show the variability of occurrence of facultative wetland plants acknowledged in the 1987 Manual. The 1987 “on-line” Manual (page 14) defines facultative wetland plants as:

Plants that occur usually (estimated probability >67 percent to 99 percent) in wetlands, but also occur (estimated probability 1 percent to 33 percent) in nonwetlands.

As most of the property was bare ground, or bare ground covered with open water when the District conducted its investigations, little direct evaluation of the wetland indicator status of vegetation was possible. No generalization as to the proportions of plants with different wetland indicators that were present prior to vegetation clearing could be made.

At the site visit for this administrative appeal the Review Officer found the site had been completely revegetated by natural recolonization. The District and the Appellant had different interpretations of this revegetation. However, I concluded any analysis of vegetation data based on the subsequent recolonization of the site after the JD was issued should be considered new information. In accordance with 33 CFR 331.7(f):

Neither the appellant nor the Corps may present new information not already contained in the administrative record, but both parties may interpret, clarify or explain issues and information contained in the record.

Thus, no information on the revegetation of the property was considered as part of this administrative appeal.

Hydric Soils

The District and the Appellant disagreed on several issues regarding the correct interpretation of the soils on the property. The District and the Appellant disagreed on the appropriate definition of a hydric soil, what sample sites were representative of the entire property, the proper interpretation of observed conditions on the site, and whether hydric soils were present on the property.

The Appellant stated that the appropriate definition of a hydric soil was contained in the original version of the 1987 Manual. That definition is from the definition of a hydric soil used by the National Technical Committee for Hydric Soils in December 1986. Under that definition drained hydric soils were no longer considered to be an identifying characteristic of wetland soils.

The Corps of Engineers, Directorate of Civil Works Memorandum of March 6, 1992, requires Districts to use the most recent version of the National Technical Committee for Hydric Soils hydric soil criteria. The District used the definition of a hydric soil from the current "on-line" version of the 1987 Manual, which is based on the current definition of a hydric soil developed by the National Technical Committee for Hydric Soils and published in the Federal Register (Vol. 59, No. 133, Wednesday, July 13, 1994, page 35681) that states: "A *hydric soil* is a soil that was formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part." That notice further states that: "...*artificially drained* phases [of soil] are hydric soils if the soil in its undisturbed state meets the criteria." Consistent with current Corps policy and guidance, the District reasonably and appropriately used the most recently promulgated definition of a hydric soil.

The District and the Appellant agreed that the current Soil Conservation Service (now Natural Resources Conservation Service) *Soil Survey of Macomb County, Michigan*, identifies the soil series on the site as Lamson fine sandy loam soils. The Appellant noted that the soil survey indicated that small inclusions of Selfridge fine sand soils could be expected to occur on knolls and slightly higher elevations within Lamson soil-mapping units. The District and the Appellant disagree as to whether such inclusions actually occurred on this site. The Lamson soil series is listed by the National Technical Committee for Hydric Soils as a hydric soil. The Selfridge soils are not listed on the hydric soils list.

The District collected soil data at twelve locations on the property on a May 23, 2002, site visit. The results of these investigations are documented in the District's July 19, 2002, Memorandum to File: *Inspection Report of Village Building Company (VBC) – Unauthorized Activities*. This data, combined with existing information, led the District to conclude that all soils on the Appellant's property met the current 1987 "on-line" Manual's requirements to be identified as hydric soils because (a) one small, non-representative sample (data sheet G-8) at the southeastern corner of the property was determined to have a Histic Epipedon, and the District stated that if this layer had been sufficiently thick in the undisturbed soil it would have been classified as an organic soil

(Histosol), (b) soil colors at the eleven other District soil sampling sites were consistent with mineral hydric soils, and (c) the entire site is mapped on the Soil Conservation Service (now Natural Resources Conservation Service) as Lamson soil, a hydric soil listed on the National Technical Committee for Hydric Soils current hydric soils list.

The Appellant did not challenge the District's conclusion that sample site G-8, was a Histosol and a hydric soil. The District and the Appellant agreed since the soil at site G-8 was the only sample location with a Histosol soil, that it was not representative of the Appellant's property.

At the District's eleven other soil sampling sites, the District found soil colors and characteristics that indicated the presence of mineral hydric soil. The 1987 Manual uses soil color as an indicator for mineral hydric soils. This indicator is the presence of bright mottles and/or low matrix chroma present immediately below the soil A-horizon or ten inches below the ground surface (whichever is shallower) in ungleyed soils (except Mollisols). Specifically the indicators of hydric soils are a soil matrix color that is: "matrix chroma of 2 or less in mottled soils" and "matrix chroma of 1 or less in unmottled soils." Of the District's eleven mineral soil sampling sites observed on its May 23, 2002, site visit, all eleven had a soil chroma of one in the appropriate soil layer and seven of eleven soil sample locations had mottled soils in the appropriate soil layers.

The Appellant's evaluation of the property found in the *Wetland Determination Report, River Bay Gardens*, by Tilton and Associates (Tilton Report dated March 14, 2002) was based on three site visits in January 2002. The Tilton report acknowledged that the soil matrix color in some soil profiles had a low chroma value, thus suggesting a hydric soil. The Tilton Report concluded the soils were not hydric because they were effectively drained. In accordance with the 1987 "on-line" Manual, drainage is no longer an appropriate criteria for separating hydric from non-hydric soils.

The District evaluated the hydric soils data contained in the Tilton Report and concluded that 27 of 36 sample locations had soil data that the District considered representative of hydric soils conditions because they met the criteria for soil color described above. The Review Officer and the Technical Advisor reviewed the Tilton Report, and the District's evaluation of the Tilton report, and concluded that the District's evaluation was reasonable. The District's evaluation may actually be a conservative estimate of the number of Tilton Report sample sites that met the definition of hydric soils because only 3 of 36 sampling points (Tilton points B-8, C-4 and C-6) had no soils with chroma values of 1. Taking into account that this was a disturbed site, and that portions of the soil profile may have been removed, there might actually have been more Tilton sample sites that could have been considered as meeting the 1987 Manual soil color indicator for hydric soils.

The District and the Appellant particularly disagreed over the District's interpretation of the data collected at District sampling point F-6 in the southeastern corner of the property. The District considered this sampling point to be the best available representation of conditions on the Appellant's property prior to the Appellant's

mechanized land clearing activity in the Summer and Fall of 2001 because it was not disturbed during those activities. Photographs labeled VBC32.JPG and VBC34.JPG taken on the District's inspection visit of May 23, 2002, show vegetation at District Sample Plot F-6 while the remainder of the property contains bare ground or ponded water.

The Appellant argued that the District's characterization of data point F-6 as representative of the entire site was inappropriate because the District's data sheet stated that there was a layer of broken glass six to eight inches below the ground surface. The District also found this sampling location had old fill at least eight inches thick and that the "Original ground surface not discernable due to mechanical disturbance." The District stated it considered the glass layer and older fill over the original soil surface at site F-6 to be minor disturbances compared to the extensive disturbance that occurred as a result of mechanized clearing of most of the site in the Fall of 2001. The Appellant considered District sampling sites A-1, B-1, C-2, C-3, C-4 and D-1 more representative of conditions on this property than District site F-6. However, the photographs of these sites in the District's inspection report show all of these sites having bare ground, or small re-colonizing plants, and evidence of extensive disturbance (ruts) from heavy equipment.

I find the District's use of site F-6, the least disturbed mineral hydric soil sampling location, to be reasonable and a representative example of site conditions on the property. The District also stated that the location of the property, located near Lake St. Clair in a relatively flat wetland area, suggested that the soils on the property would not exhibit much variability. I find the District's conclusion that hydric soils were present throughout the entire property to be reasonable. The Tilton Report did not provide information that clearly showed that the District's determinations were unreasonable, nor did it clearly demonstrate that inclusions of non-hydric soils were present on this property.

Wetland Hydrology

The District used the 1987 Manual, Atypical Situations methodology, to evaluate the presence of wetland hydrology. The methodology for Atypical Situations also allows the use of primary and secondary wetland hydrology indicators from Part III of the 1987 Manual, and the District found both primary and secondary indicators on this property.

Neither the District nor the Appellant evaluated the presence of wetland hydrology at the start of the growing season, which both acknowledge starts in mid-April and lasts until mid-October. The District's evaluations were in December 2001 and May 2002, and the Appellant's observations were in January 2002 and July 2002. The Appellant's consultant also accompanied the District on its May 2002 site visit.

As described above, District sampling site F-6 was the only representative, relatively undisturbed, sampling site on the property. The District found at site F-6 that the water table was one and a half inches below the soil surface and the soil was saturated to the surface. The 1987 Manual considers soil saturation within a major portion of the root

zone (usually considered within twelve inches of the soil surface) to be a primary indicator of wetland hydrology and the District considered the presence of standing water within one and a half inches of the surface at site F-6 to be a primary indicator that wetland hydrology was present throughout the property. The District also found standing water at four and a half inches below the surface at District sampling point A-4 and at eight inches below the surface at District sampling site C-1 and considered this to be further evidence of the presence of wetland hydrology on this property.

The Appellant asserted that the water in the holes at District sampling sites A-4 and C-1 was actually due to ponded surface water entering these holes, and did not represent evidence of a high water table or saturated soils. The photographs of District sampling site A-4 (VBC12.JPG and VBC14.JPG) in the administrative record show no surface water visible in either photograph. However, a review of the photograph of District sampling site C-1 (VBC7.JPG) shows standing water in the right foreground of the picture. This water extends through the sampler's legs and it appears quite possible, but not altogether clear from the photograph, that ponded surface water could have entered District sampling hole C-1. Although the photograph cannot be considered conclusive, it establishes enough doubt regarding the source of water the District observed at site C-1 that evidence of wetland hydrology based on the standing water in the sample hole at site C-1 must be considered inconclusive.

In all, the District sampled twelve sites. One of these, G-8, was a histosol soil and the District and the Appellant agreed at the appeal meeting that conditions associated with that sample site could not be considered representative of conditions on the remainder of the Appellant's property. Wetland hydrology data for another site, C-1, must be considered inconclusive, as described above. Two of the remaining ten District sample sites, A-4 and F-6, met a primary criteria for wetland hydrology – soil saturation within a major portion of the root zone (i.e. within twelve inches of the ground surface).

Also, the District estimated that over three-quarters of the property was inundated during the May 23, 2002, site visit. All twelve data points were collected from non-inundated areas of the property. Under other circumstances the inundation of much of the property would be a primary indicator of wetland hydrology under the 1987 Manual. However, both the District and the Appellant agreed that unusually heavy precipitation had occurred in the preceding months – well above typical seasonal totals. Therefore, the extent of inundation observed during the Appellant's and the District's site investigations cannot be considered conclusive evidence of wetland hydrology.

The District asserted that several secondary indicators of wetland hydrology identified in the 1987 Manual (on-line edition page 34) were present. The District noted that all sample locations examined on the May 23, 2002, site visit that had identifiable vegetation would meet the "FAC-neutral test" requirements. The District also noted that three nearby off-site comparison sites, two located immediately east of the property (X1 and X2) and a third site located about 800 feet (distance estimated by the Review Officer from aerial photographs in the administrative record) north of the property (X3), discussed in the District's December 21, 2001, *Investigative Report of Village Building*

Company – Unauthorized Activities, also met the FAC-neutral test. The Appellant considered data from these offsite locations irrelevant to conditions on the property.

The 1987 Manual allows consideration of adjacent vegetation when the vegetation on-site is disturbed and the District reasonably used this off-site information to supplement the information on site. The District reasonably concluded that requirements of the FAC-neutral test described in the 1987 Manual had been met, and that the presence of this secondary wetland hydrology indicator had been reasonably documented. The Appellant did not dispute this District conclusion but noted that facultative wetland plants also occur in uplands and the 1987 Manual does not consider this secondary indicator to be conclusive in the absence of other indicators.

The 1987 Manual considers the presence of a hydric soil as indicated by a soil survey to be a weak secondary indicator of wetland hydrology. Lamson soil is a hydric soil. The District's consideration of this factor as an additional secondary wetland hydrology indicator was reasonable and in accordance with the 1987 Manual.

The District stated they found oxidized root channels (rhizosperes) at sample site B-1. The Appellant stated that since there is no photo-documentation of this, and that oxidized roots were not observed at other sample sites, that this information should be disregarded, presumably because it is a questionable observation. However, the District had experienced observers collect this sample information and the absence of oxidized root channels at other locations is reasonable, as the District suggests, because of the extensive disturbance of vegetation on this property. I conclude that the District reasonably concluded the presence of oxidized root channels was a secondary indicator of wetland hydrology in accordance with the 1987 Manual.

On July 18 and July 25, 2002, the Appellant collected data on groundwater elevation data at six locations on the property. The groundwater at these locations was at least eighteen inches below the ground surface. This data shows only that groundwater was greater than twelve inches below the surface during the period of July 18 to July 25, 2002, and that the soil saturation primary indicator of wetland hydrology was not met between July 18 – 25. This data provides no information regarding whether the 1987 Manual wetland hydrology indicator of soil saturation within a major portion of the root zone (usually considered within twelve inches of the soil surface) was met at other times during the growing season.

The District noted that the *Soil Survey of Macomb County* identified the normal growing season (defined as the date of fifty percent probability of the last 28 degree frost) as starting April 17. The District also noted that the local groundwater table would be expected to drop as the growing season progresses due to evapo-transpiration, so groundwater table measurements would be expected to be lower later in the growing season.

The Appellant's groundwater elevation data also does not address that soil compaction had likely affected the hydrology of the property. The District concluded that the use of

heavy equipment on wet soils had likely compacted the soils on the property and affected their hydrology. The Technical Advisor to the Review Officer considered this a reasonable conclusion, as the heavy equipment was known to have operated on wet soils. The District reasonably concluded that typical surface soil saturation might be affected by such disturbances.

The Appellant also suggested that the groundwater monitoring data provided evidence that a sand layer or “sand lens” was present on this property. The Appellant further hypothesized that this property might be effectively drained by subsurface water movement from the property through this sand layer to a local storm drain pipe buried under Jefferson Street, about 250 feet west of the property. The Appellant’s explanation is that water from the property would subsequently infiltrate the storm drain and then be pumped back into the Black Creek Marsh. The Appellant clarified at the appeal meeting that he had no data to show that this actually occurred. There is no information in the administrative record that such a continuous sand layer is present.

As described above, the District identified one primary indicator (saturated soils) and three secondary indicators (local soil survey hydrology data, vegetation meeting the FAC-neutral test of wetland hydrology, and oxidized rhizospheres), of wetland hydrology identified in the 1987 Manual. As the 1987 Manual only requires one primary or two secondary indicators of wetland hydrology, the District correctly concluded that it had obtained sufficient data to conclude that wetland hydrology was present on the Appellant’s property.

The District’s administrative record supports its conclusion that under normal circumstances hydrophytic vegetation, hydric soils, and wetland hydrology are present throughout this property. The District correctly concluded that since it had determined that the three criteria required by the 1987 Manual - hydrophytic vegetation, hydric soil, and wetland hydrology – had been documented to be present on the entire property, that in accordance with the 1987 Manual, the entire property must be considered a wetland.

Reason 2: The District incorrectly applied the law and Corps regulations when it concluded that the Appellant’s property was a wetland adjacent to waters of the United States within CWA jurisdiction.

FINDING: This reason for appeal does not have merit.

ACTION: None required.

DISCUSSION: In order for the District to exert CWA jurisdiction over the property, it must also demonstrate that these wetlands fall within the definition of waters of the United States under 33 CFR 328. This reason for appeal asserts that the District’s jurisdictional conclusions are inconsistent with the Corps current CWA implementing regulations,

The District concluded in its January 31, 2003, approved JD that the wetlands on the Appellant's property were adjacent to Lake St. Clair. The District clarified at the appeal meeting that they considered the shoreline of Black Creek Marsh a part of Lake St. Clair, as it is contiguous with the shoreline of the lake.

The Appellant and the District agree that areas below elevation contour 575.5 foot International Great Lakes Datum, 1955 (IGLD 1955), now elevation 576.1 foot IGLD 1985 – the “Judge Kennedy” line discussed in more detail below, are subject to CWA jurisdiction, but disagree regarding CWA jurisdiction above that contour line. The Appellant has asserted that CWA jurisdiction in the vicinity does not extend higher than the “Judge Kennedy” line, while the District believes jurisdiction does extend beyond that line.

To understand the basis of the District's technical and procedural conclusions not to use the 575.5 foot IGLD 1955 elevation contour for CWA jurisdictional purposes, it is necessary to understand the basis of establishment of that line. Therefore, some discussion of that aspect of prior litigation is included here. The legal implications of prior litigation are discussed under Appeal Reason 3.

As discussed in the administrative record, the reference datum for measuring water elevations in the Great Lakes-St. Lawrence River system is the International Great Lakes Datum. It is adjusted approximately every thirty years to account for changes in the Earth's crust. The United States started using the 1985 International Great Lakes Datum in 1992 in place of the former 1955 International Great Lakes Datum. In the Lake St. Clair area, elevations reported in IGLD 1985 datum have not *physically* changed in elevation or lateral location relative to the IGLD 1955 datum for Lake St. Clair, but are *reported* as 0.6 feet higher in elevation under IGLD 1985 as compared to the IGLD 1955. Elevations are discussed in IGLD 1955 datum in the litigation actions associated with the Riverside Bayview property. The two elevations of concern in this administrative appeal are the elevation contour 575.5 foot IGLD 1955 contour line, which represents the same physical location on the ground as the 576.1 foot IGLD 1985 contour line; and the 575.7 foot IGLD 1955 contour line, which represents the same physical location on the ground as the 576.3 foot IGLD 1985 contour line.

Riverside Bayview Inc. owned property in the Black Creek Marsh area to the south and east of the Appellant's property. A portion of the former Riverside Bayview property was sold several times and eventually was purchased by the Appellant.

Riverside Bayview started filling in portions of its property in the early 1970's and eventually filled a portion of the property without a required Corps permit, resulting in a Corps Cease and Desist Order in December 1976. Riverside Bayview then violated the Cease and Desist Order, starting an extended litigation process, the results of which the Appellant applies to the current situation as discussed in Appeal Reason 3.

During the Corps' enforcement action, Judge Kennedy established the 575.5 foot IGLD 1955 elevation contour line as a limit of CWA jurisdiction on the Riverside Bayview

property in the following manner. Judge Kennedy issued an *Opinion and Order Granting Motion for Preliminary Injunction in Part* regarding Riverside in the United States District Court, Eastern District of Michigan, Southern Division, on February 24, 1977. In that opinion, Judge Kennedy based her findings on the Corps regulations regarding CWA jurisdiction over wetland areas in place in 1975 (33 CFR 209.120 (d)(2)(i)(h), since superceded). Judge Kennedy then established the limit of CWA jurisdiction for the Riverside Bayview litigation in her February 24, 1977, preliminary injunction as that water level on Lake St. Clair that had been exceeded more than five times between 1897 and 1977, and added 0.5 foot to account for the average variation from the average monthly level. That water level corresponded to the 575.5 foot IGLD 1955 elevation (or 576.1 foot IGLD 1985):

The Court, therefore, hereby enjoins the fill of all land south and east of a contour line of elevation 575.5. If there are pockets of lower-lying lands entirely within this contour line, they may be filled.

Subsequent to Judge Kennedy's decision, the Corps issued revised regulations on July 19, 1977, (Federal Register Vol 42. No. 138, pgs 37122 – 37164), which changed the definition of what is a wetland under the Corps' regulation and the definition of an adjacent wetland within CWA jurisdiction. Those definitions established by the Corps July 19, 1977, final rule are the same as those in place today and read as follows:

33 CFR 328.3(b) [33 CFR 323.2(c) in the 1977 regulations] defines "wetlands" as:

The term wetlands means those areas that *are inundated or saturated by surface or ground water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. (emphasis added).

and 33 CFR 328.3(c) [33 CFR 323.2(d) in the 1977 regulations] defines "adjacent" as:

The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

The litigation regarding the Riverside Bayview property continued, eventually reaching the Supreme Court, which issued its decision on December 4, 1985 (*United States v. Riverside Bayview* 474 U.S. 121). The Supreme Court reversed the Court of Appeals for the Sixth Circuit and remanded the case for findings consistent with its ruling. The District Court was subsequently instructed by the Sixth Circuit to reenter its prior injunction in the matter, the consequences of which as they relate to this action are discussed under Appeal Reason 3.

The Corps regulations relevant to the determination of whether the wetlands on the Appellant's property are within CWA jurisdiction as adjacent wetlands are 33 CFR 328.3(c), quoted above, and 33 CFR 328.3(a)(7) which states that waters of the United States within CWA jurisdiction include: "(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section." A clarification of the meaning of adjacent wetlands is included in the Preamble to the 1991 re-issuance of the Corps Nationwide Permits (56 Federal Register page 59113) which explained that: "In systems where there is a broad continuum of wetlands, all are considered adjacent to the major waterbody to which it is contiguous."

The District asserts that the Appellant's property and the intervening areas between the Black Creek Marsh and the Appellant's property are within CWA jurisdiction. These features are shown on various maps and diagrams in the District's administrative record, but most clearly on a sketch map in the District's December 11, 2001, *Inspection Report of Village Building Company – Unauthorized Activities* labeled "site sketch, File No. 01-010-078-0, 12/4/01, no scale". The intervening areas include the man-made Operation Foresight dike – a small flood control structure built with Corps technical assistance in the 1973–1974 time period, unauthorized fills associated with the original Riverside Bayview litigation, and subsequent separate fill activities the District considers to be unauthorized fills associated with the extensions of Detroit Street and Macomber Boulevard - just east of the Appellant's property. The Operation Foresight dike has been breached to allow the drainage swale extending from the southeast portion of the property to connect to Black Creek Marsh. But for these intervening fills, the wetlands on the Appellant's property form an essentially contiguous area of wetlands with other wetlands that extend to Black Creek Marsh below the 575.5 foot IGLD 1955 elevation contour line.

The Corps regulations at 33 CFR 323.2(d)(4) state that:

Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.

Under 33 CFR 323.2(d)(4) it is appropriate for the District to consider conditions present prior to the unauthorized fill in reaching a determination of CWA jurisdiction. The Appellant and the District already agree that areas below the 575.5 foot IGLD 1955 datum elevation contour line are within CWA jurisdiction. The District considered the unauthorized fill activities in the vicinity and reasonably concluded that adjacent wetlands extended from below the 575.5 foot IGLD 1955 elevation contour to the wetlands on the Appellant's property.

The Appellant considers the District's determination that the ordinary high water mark (OHWM) of Lake St. Clair extends to the 575.7 foot IGLD 1955 to be incorrect. As wetlands form an essentially contiguous area extending from below the 575.5 foot IGLD 1955 contour elevation that the District and the Appellant agree is within CWA jurisdiction, up to the wetlands on the Appellant's property, the evaluation of the

District's and the Appellant's respective positions regarding the location of the OHWM is unnecessary to an evaluation of whether wetlands within CWA jurisdiction as "adjacent" wetlands are present on the Appellant's property.

The only wetland delineations conducted in accordance with the 1987 Manual in the administrative record for the Appellant's property or the surrounding areas are the Appellant's and the District's investigations between December 2001 and January 31, 2003, and the District's wetland delineation of the nearby Land and Lake Realty, Inc. property (also known as the Lozon property) also conducted in December 2001.

The Appellant has asserted that the District has previously had a different position regarding the extent of CWA jurisdiction on the Riverside Bayview property. The Appellant cites letters to Riverside Bayview (George Short Estate) dated January 27, 2000, Land and Lake Realty dated January 31, 2000, and Mr. Mark Sipe dated January 27, 2000, as evidence that the District, until recently, had not asserted CWA jurisdiction above the 575.5 foot IGLD 1955 contour line. However, the District stated in the Land and Lake Realty letter that:

In Lake St. Clair, the OHWM (ordinary high water mark) extends to 576.3 International Great Lakes Datum (IGLD) [1985]. . . . The area of Corps jurisdiction under Section 404 extends to the OHWM, and to the upland boundary of any adjacent wetlands.

Those are the same CWA boundaries that the District now claims are the limits of its CWA jurisdiction. The Appellant also asserted that the Federal government has advocated a different CWA jurisdictional line in the Federal Court of Claims proceeding *George F. Short v. United States, Cl. Ct. No. 677-87L*, and that assertion is discussed under Reason 3.

The District has applied the current regulations of the Corps regulatory program to reach its CWA jurisdictional determination regarding the Appellant's property. The District has reasonably documented that the wetlands on the Appellant's property meet the definition of wetlands in accordance with the 1987 Manual. The District has also shown that these wetlands are adjacent to the areas that the District and the Appellant agree are within CWA jurisdiction. If the unauthorized fills in the vicinity were removed, at the narrowest areas only the Operation Foresight Dike, an approximately thirty foot wide structure, would serve as a barrier between the wetlands on the Appellant's property and other wetlands extending south into the Black Creek Marsh and finally to the open waters of Black Creek and Lake St. Clair. Also, the District and the Appellant agreed that a channel has been cut through the Operation Foresight Dike that connects the property to the Black Creek Marsh. Corps regulations specify that neither the unauthorized fills, nor the narrow man-made dike, should be considered a sufficient barrier to consider the wetlands on the Appellant's property to be isolated rather than adjacent wetlands. The District's conclusion that the Appellant's property is within CWA jurisdiction because of the presence of wetlands adjacent to Lake St. Clair is consistent with current Corps regulations.

Reason 3: The Appellant asserts that as a result of prior litigation, CWA jurisdiction in the vicinity of the Appellant's property is restricted to below the 575.5 foot IGLD 1955 elevation contour line. In addition the Appellant asserts that the District did not consider the Appellant's legal arguments regarding this issue.

FINDING: This reason for appeal does not have merit.

ACTION: None required

DISCUSSION: The Appellant asserts that the regulatory status of the property has been fully and finally litigated in the Federal courts and that the Corps is bound by the court's decision that the property is not within the Corps' jurisdiction. Specifically, the Appellant believes that Corps' regulatory jurisdiction is restricted to below the 575.5 foot IGLD 1955 elevation contour line, a line established by a court order in 1979 and affirmed by the Eastern District of Michigan in 1981 in an action against Riverside Bayview Homes, Inc. The Appellant also asserts that the Corps cannot establish CWA jurisdiction over the property because it is isolated from all waters of the United States. Further, the Appellant complains that the District did not consider the Appellant's legal arguments regarding these issues when making its JD.

The basis for the 575.5 foot IGLD 1955 elevation contour line as a regulatory boundary is in a nearly thirty year old CWA enforcement action. The United States brought an action in the Eastern District of Michigan against Riverside Bayview Homes seeking to enjoin it from filling wetlands on its property in Macomb County, Michigan without a Corps permit. *United States v. Riverside Bayview Homes Inc.*, 7 Env'tl. L. Rep. 20445 (E.D.Mich. 1979). The District Court held that the property, below 575.5 foot IGLD 1955, was wetland and permanently enjoined the defendant from depositing fill below this contour line absent a permit from the Corps.

The defendant appealed the decision to the United States Court of Appeals for the Sixth Circuit. However, the Appeals Court remanded the case to the District Court because the Corps had promulgated new regulations which changed the definition of "waters of the United States." *United States v. Riverside Bayview Homes Inc.*, No. 77-70041 (E.D.Mich. 1981). Judge Gilmore, who presided over the remanded case, recognized that the new definition was more expansive than the prior definition. Consequently, he held that the wetlands on the property below the 575.5 foot contour line were "waters of the United States" under the new definition, and he permanently enjoined Riverside Bayview from depositing fill on its property below that contour line without a permit.

Riverside Bayview again filed an appeal with the Sixth Circuit. The Sixth Circuit construed the regulation narrowly in order to avoid what it saw as "a very real takings problem." *United States v. Riverside Bayview Homes Inc.*, 729 F.2d 391, 397-98 (1984). The property on which Riverside Bayview was enjoined by the District Court from depositing fill was not a "wetland". Thus, it was not a "water of the United States" under

the Court's narrow construction of the Corps' regulation. Consequently, the Sixth Circuit vacated the District Court's holding.

The Corps filed for a *writ of certiorari*, which the Supreme Court granted in order "to consider the proper interpretation of the Corps' regulation defining 'waters of the United States' and the scope of the Corps' jurisdiction under the Clean Water Act."

In its decision, the Supreme Court dismissed the Sixth Circuit's constitutional concern that application of the Corps' permit program to a wetland may result in a taking. *Riverside Bayview*, 474 U.S. at 460. The remainder of the Supreme Court's opinion addressed the administrative law issues. In this part of its opinion the court addressed two distinct issues. First, the Court reviewed the district court's findings and held that the findings were not clearly erroneous. *Riverside Bayview*, 474 U.S. at 130-31. Second, the Court addressed the Corps's ability to make administrative determinations under the CWA which was the majority of the opinion. *Id.* at 126.

The majority of the opinion focused on the Corps' administrative determinations. The Court recognized that deference should be shown to an agency's interpretation of a statute that it enforces, so long as that interpretation is reasonable and does not conflict with the intent of Congress. *Id.* at 131 (*citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). The Court in *Riverside* determined that the Corps' inclusion of wetlands under "waters" was reasonable given the legislative history and the policy behind CWA Section 404(a). Consequently, the Supreme Court reversed the Sixth Circuit's decision.

The Court's deference to an agency's interpretation of statute that it enforces in *Riverside* is important not only in the context of the geographic location of the Appellant's property and the applicability of prior decisions in that case to the current situation, but also in the context of the Appellant's assertion that the District did not follow applicable law and regulations when making its JD. Since the Supreme Court's decision in *Riverside* two relevant events have occurred that reinforce the Court's decision in that case. First, the Corps has adopted a new method for identifying wetlands as defined by 33 CFR 328.3(b). The Corps currently uses the 1987 Corps of Engineers Wetlands Delineation Manual (Technical Report Y-87-1) to implement the regulation.

An agency's interpretation of its own regulation is shown deference by courts unless the interpretation is clearly erroneous. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *see also C.F. Communications Corp. V.F.C.C.*, 128 F.3d 735, 738 (D.C.Cir. 1997). Similarly, courts will defer to an agency's new interpretation of a regulation. Courts have recognized that an agency may change its interpretation of a statute, and, provided the new interpretation is reasonable, courts will show deference to that interpretation. *United States v. Deaton*, 332 F.3d 698, 711 (4th Cir.2003) (*citing Smiley v. Citibank (South Dakota) N.S.*, 517 U.S. 735, 742 (1996)).

Even though the Corps' interpretation of how to implement its regulation has changed since *Riverside Bayview*, it must still be deferred to by the courts. A number of courts

have already recognized the 1987 Manual as the Corps' interpretation of the regulation. See e.g. *Deaton*, 332 F.3d at 713; *Stoeco Development Ltd. v. Department of the Army*, 701 F.Supp. 107, n.10 (D.N.J. 1988). In *Deaton*, the Fourth Circuit determined that the 1987 Manual was not "'plainly erroneous and inconsistent' with the regulatory definition."

The second relevant event was the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (hereinafter "*SWANCC*"). In *SWANCC*, the Court recognized and discussed at length its holding in *Riverside Bayview*, but neither overruled nor limited the holding or rationale of *Riverside Bayview*. Rather, the Court squarely eliminated CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations. The Court reasoned that deference to the Corps' interpretation of statutes that it enforces, while recognizing that the courts need not show deference, stating: "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172.

Based on the legal analysis above, I find the District's application of the criteria and methodology of the 1987 Manual to be reasonable. Clearly, the use of the 1987 Manual has been found by several courts over a significant period of time to be appropriate, deferring to the Corps' interpretation of the CWA and implementation of its regulations as long as that interpretation was not clearly erroneous or invoking the outer limits of Congress' power.

In addition, the Appellant also asserts that the Corps CWA jurisdiction on the Appellant's property is restricted to the area below the 575.5 foot IGLD 1955 elevation contour line. As noted above, the genesis of this line is from Judge Kennedy in the Eastern District of Michigan who determined, under a different set of Corps regulations, where the boundaries of the Corps' CWA jurisdiction were to be placed. The reinstatement of Judge Kennedy's injunction following the Supreme Court's decision was designed simply to require that the *Riverside Bayview* company comply with the CWA and applicable regulations. Therefore the entirety of the Appellant's property is subject to the Corps' current interpretation of its regulation. In *Riverside*, the Supreme Court never discussed the propriety of the 575.5 foot IGLD 1955 contour line. Any such discussion about this line is limited to the description of the District Court's original holding and injunction. See *Riverside*, 474 U.S. at 125. Rather, the Court simply held that the District Court's findings were not clearly erroneous. *Riverside*, 474 U.S. at 130-31. The Corps requested that the Sixth Circuit instruct the District Court to "reenter a permanent injunction identical to the injunction previously entered by the district court" in an effort to quickly end the litigation and prevent *Riverside Bayview* Company from depositing fill without a permit. United States' Statement to Sixth Circuit (January 1986). The Sixth Circuit did so. See *United States v. Riverside Bayview Homes, Inc.*, 793 F.2d 1294 (6th Cir. 1986) (unpublished decision). In essence the injunction required *Riverside* to comply with the CWA and relevant regulations. Consequently, compliance with the

Supreme Court's opinion and the injunction can only be achieved by recognizing that the Corps' jurisdiction on Riverside's property is subject to the Corps' reasonable interpretations of the CWA and its implementing regulations.

Furthermore, the Supreme Court, in its *Riverside Bayview* opinion, emphasized the Corps' determination that the hydrologic cycles make inadequate the regulation of activities based on "artificial lines." 474 U.S. at 133-34 (*quoting* 42 Fed. Reg. 37128 (1977)). Limiting the Corps' jurisdiction on the property that was at issue in *Riverside Bayview* to the 575.5 foot IGLD 1955 line would limit the Corps' regulatory activities to an "artificial line." Continuing to uphold this "artificial line" would ignore the Corps' evolving understandings of what constitutes "wetlands" and "waters of the United States." *See Deaton*, 332 F.3d at 711 ("Over the years, the Corps' understanding of the best way to exercise its discretion under the CWA has evolved.").

The Appellant also contends that the injunction imposed in *Riverside Bayview* defined the jurisdiction of the Corps in regards to property around Lake St. Clair. Specifically, the Appellant's position is that the Corps' jurisdiction is limited to wetlands that are to the east and the south of the 575.5 foot IGLD 1955 contour line. Thus, the Appellant argues that the Corps is precluded or collaterally estopped from asserting jurisdiction because the very claim or issue has already been fully litigated.

Generally, claim preclusion is used to prevent the litigating of a claim when a valid and final judgment has been issued on the claim in a prior action (or when a party had an opportunity to present the claim in the prior action but failed to do so). Charles A. Wright, The Law of Federal Courts, 720-725 (1994). Claim preclusion requires (1) identity of the cause of action or claim, (2) judgment by a court of competent jurisdiction, (3) that there was an opportunity to get to or was actually final judgment on the merits, and (4) identity of the parties – whether they are "identical or in privity." *Lawson v. Toney* 169 F.Supp. 2d 456, 462 (M.D.N.C.2001); *Meador v. Oryx*, 87 F.Supp. 2d 658, 663 (E.D.Tex.2000). A successor in interest to property may be in privity with a party in a prior action where the property interest was the basis for the litigation. *Meza v. General Battery Corp.*, 908 F.2d 1262 (5th Cir.1990); *see also Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 367 (2nd Cir.1995). Given that some of the Appellant's property was the basis for the litigation in *Riverside Bayview*, the Appellant is in privity with Riverside only to the extent of the property that is common between them. Thus, not only is the Appellant precluded from depositing fill on its property below the 575.5 foot IGLD 1955 contour line without authorization from the Corps, neither may the Appellant deposit fill on its property that was not covered by the decision in *Riverside Bayview* absent a permit from the Corps.

Issue preclusion or collateral estoppel prevents the re-litigation of issues of fact or law that have already been put in issue in a prior action and determined in a prior action. *Next Level Communications LP v. DSC Communications Corp.*, 179 F.3d 244, 250 (5th Cir.1999); *In re Quality Beverage Co.*, 181 B.R. 887 (S.D.Tex.1995). For a party to be precluded from litigating an issue under issue preclusion (1) the issue must be identical to the issue in the prior action, (2) the issue must have actually been litigated and decided in

the prior action, and (3) the determination of the issue must have been necessary for the judgment of the prior case. *Next Level Comm.*, 179 F.3d at 250; *Meza v. General Battery Corp.*, 908 F.2d 1262, 1273 (5th Cir.1990).

Issue preclusion is not applicable under the circumstances of this case. The policy behind permitting this defense is to induce the plaintiff, in this case the Corps, into joining all potential parties in the original action, rather than “relitigating identical issues by ‘merely switching adversaries.’” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979) (quoting *Bernhard v. Bank of American Nat. Turst & Savings Assn.*, 19 Cal.2d 807, 813 (1947)). Here, the Corps could not join the Appellant in the prior action because the Appellant was not violating the CWA at the time of *Riverside Bayview*. Furthermore, had the fill violations at issue in this case been present at the time of the prior action, the Corps would have had a larger incentive to litigate that claim and could have dedicated more resources to doing so.

The Appellant also asserts that the District did not consider the Appellant’s legal arguments when making its JD. Any Detroit District Office of Counsel internal legal advice to the Detroit District regarding the Appellant’s legal arguments would be considered privileged information that is part of the administrative record, but not subject to release to the Appellant as part of the administrative record, or under the Freedom of Information Act. However, the District is required to disclose the existence of such privileged documents as a part of the administrative record. The administrative record neither identified nor contained any documents regarding the Detroit District’s Office of Counsel opinion regarding this action. The District did not provide the Appellant any written response to the Appellant’s legal arguments presented prior to issuance of the District’s approved JD.

The District’s January 30, 2003, *Memorandum to File, SUBJECT: Inspection Report of Village Building Company – Unauthorized Activities*, stated that:

Their [legal counsel for the Appellant] letter continues with information why I [District Regulatory Project Manager Nancy Peterson] have misunderstood the legal issues (taken from my Site Inspection of the Lan Lozon wetland violation and FOIAed [Freedom of Information Act] by VBC) [District Memorandum to File dated December 21, 2001] in my jurisdiction determination. This summary was for the purpose of regulatory determination of jurisdiction on the Lozon site and was not for legal review as I am not an attorney. (Note: text in brackets added for clarity, other text in parentheses was in original version).

This memo further states that:

Regarding the legal discussion in the October 21, 2002 letter of VBC, the Corps of Engineers Office of Counsel would have to review this. They were requested to do this per Memo dated October 28, 2002 but have not, thus the reply to VBC will only be from the Regulatory Office.

At the appeal meeting the District representatives stated that the District Regulatory Office and the District Office of Counsel did consult prior to the District issuing its approved JD on January 31, 2003. However, the District representatives stated that there were no written documents of such conversations and they could not recall when such conversations occurred.

The only District document evaluating whether the prior litigation on the nearby Riverside Bayview Inc. property affected the properties being investigated in the Fall of 2001 was in the District's December 21, 2001, *Memorandum to File, SUBJECT: Investigative Report of LOZON/RIVERSIDE BAYVIEW*, which addressed a nearby property and stated that:

The 'Judge Kennedy line (576.5 feet)' is not valid as the past Riverside Bayview court cases were all overturned by the Supreme Court of the United States with the decision of December 4, 1985 [No. 84-701 United States, petitioner v. Riverside Bayview Homes, Inc. et al].

and further stated in this memorandum that:

This (575.5 foot) elevation/wetland line was overturned, as noted above, by the Supreme Court of the United States.

There is no written documentation in the administrative record that the District modified its conclusions regarding the effect of *Riverside Bayview* prior to issuing its approved JD on January 31, 2003. Since this was the case, the Review Officer asked the District to provide clarifying information as to its current legal position regarding the Appellant's legal arguments. The District's Office of Counsel provided a September 26, 2003, e-mail that stated in part:

The 575.5 contour line impermissibly limits the holding of the Supreme Court to an area less than would otherwise be within Corps jurisdiction. If however, both [the District Court and the Supreme Court opinions] are followed, certain property above that elevation which meets the 3 parameter wetland criteria would fall within the Corps jurisdiction, as it would everywhere else in the country.

I consider the District's Office of Counsel e-mail to be clarifying information and I considered it in my evaluation of whether the District made either a substantive or procedural error in considering the Appellant's legal arguments. My conclusion is that both the District and the Appellant failed to recognize the context in which the CWA jurisdictional limit of 575.5 foot IGLD 1955 was established. As explained under Reason 2 above, this CWA jurisdictional limit was initially established by the District Court in response to the fill activities of Riverside Bayview that the Corps and the Federal government considered in violation of the CWA and its implementing regulations *as they existed in 1975*.

When the Supreme Court found that the District Court's ruling was not clearly erroneous, it found that the 575.5 foot IGLD 1955 contour line was an appropriate limit for CWA jurisdiction as it related to the unauthorized fill activities that took place on the Riverside Bayview property in violation of the Corps 1975 regulations and prior to issuance of the Corps July 19, 1977, regulations. The Supreme Court also evaluated whether the Corps 1977 regulations regarding the definition of wetlands and adjacency were an allowable interpretation of the CWA. The Supreme Court found that they were. Therefore any area of the Riverside Bayview Inc. property, or any other property, was subject to those regulations after their implementation date.

The Appellant also asserts that the Federal government has advocated a different CWA jurisdictional line regarding the Riverside Bayview property in the Federal Court of Claims proceeding *George F. Short v. United States, Cl. Ct. No. 677-87L* (Mr. Short was the owner of the Riverside Bayview property and sought compensation from the Federal government after his after-the-fact permit application to develop the Riverside Bayview property was denied). Several diagrams identified as exhibits from *George F. Short v. United States* are included in this administrative record as enclosures. There is not sufficient information in the administrative record for this action to determine the extent of CWA jurisdiction advocated by the government in *George F. Short v. United States*. However, as *Riverside Bayview*, not *George F. Short v. United States*, is the controlling legal authority regarding CWA jurisdiction associated with the Appellant's property, a more detailed evaluation of what the Federal government's position was in *George F. Short v. United States* is unnecessary.

The Appellant has asserted that although he does not believe wetlands meeting the definition of the 1987 Manual are present on his property, that even if there were, those wetlands would be isolated wetlands. The Appellant asserts such isolated wetlands are beyond CWA jurisdiction in accordance with *SWANCC*. As discussed under Reason 2 above, the administrative record provides sufficient evidence that wetlands meeting the definition of the 1987 manual would be present on the property if they had not been mechanically cleared and that such wetlands would easily meet the definition of adjacent wetlands in accordance with the Corps regulations. Those regulations were affirmed by the Supreme Court in *Riverside Bayview*, which was not altered by the Supreme Court's decision in *SWANCC*.

In reviewing this action I found that the Appellant made repeated requests for the District to respond in detail to his legal evaluation but received no response. The Corps regulations at 33 CFR 331.2 identify that an approved JD should include a basis of jurisdiction. Corps regulations do not specifically require that legal arguments be addressed in an approved JD. However, the Corps regulations at 33 CFR 331.3(b)(2) identify that an administrative appeal can address whether the District had a reasonable basis for concluding that all relevant requirements of law had been satisfied. When an approved JD is requested, the Corps may reasonably provide its position on legal issues associated with that JD when those issues are substantive. That did not happen in this case.

The District's Regulatory Branch requested the District Office of Counsel review the Appellant's materials, but the administrative record does not indicate that such a review was done. Any discussions within the District between its Regulatory Branch and Office of Counsel were not documented, as no notes of such conversations appear in the administrative record and the District's representatives could not recall when such conversations occurred. Yet despite this apparent limited discussion within the District of the legal issues associated with this action, I find that the District's ultimate decision was consistent with the applicable laws, regulations, and policies regarding the Corps implementation of the CWA and is consistent with the relevant Federal court decisions.

The administrative record indicates that the Appellant relied on the assertions of third parties regarding the CWA jurisdictional status of this property despite apparently being aware of the extensive CWA litigation on jurisdictional issues that had occurred in the vicinity. Unfortunately, the Appellant appears to have had no substantial discussions with the District regarding the CWA jurisdictional status of the property until after he had already conducted mechanized land clearing of the property and the District had responded by initiating an investigation into possible violations of the CWA.

Since the District's conclusions were reasonable, I find the District's failure to provide an analysis of those legal issues to the Appellant prior to or accompanying the issuance of the approved JD ultimately to be harmless procedural error with regard to the District's CWA jurisdictional determination for this property.

Information Received and its Disposition During the Appeal Review: In addition to the administrative record, the following materials were provided:

- 1) By e-mail of August 18, 2003 the District provided clarifying information regarding the amount of precipitation that had occurred in the months preceding the District's May 23, 2002, site visit to the Appellant's property.
- 2) On August 25, 2003, the District provided clarification regarding its conclusions in the administrative record that it considered misstated in the draft appeal meeting agenda.
- 3) The Appellant provided written responses to some of the draft appeal meeting agenda questions on August 21, 2003.
- 4) The Appellant provided additional written responses to draft appeal meeting agenda questions on August 25, 2003.
- 5) On September 4, 2003, the Appellant provided information from the Detroit District's website regarding the relationship of the IGLD 1955 datum to the IGLD 1985 datum.
- 6) On September 4, 2003, the Appellant provided an annotated map showing wetland and upland areas stated to be from the *George F. Short v. United*

States litigation. This map is an annotated version of other maps already in the administrative record.

- 7) On September 4, 2003, the District provided summary notes of its planned responses at the appeal meeting.
- 8) On September 19, 2003, the Appellant provided his conclusions and summary of the appeal meeting.
- 9) On September 26, 2003, the Appellant provided a copy of the Sixth Circuit Court of Appeals, May 9, 1986, instructions to the District Court to reenter the permanent injunction against Riverside Bayview previously vacated by the Court of Appeals.
- 10) On September 29, 2003, the Appellant provided an additional letter that was primarily a restatement of prior reasoning and conclusions and included an attachment regarding local climate and the extent of the local growing season as that term is used in the 1987 Manual.
- 11) On September 25, 2003, the District provided additional information on why it used a different definition of hydric soils than appears in the original 1987 Manual.
- 12) On September 26, 2003, Assistant District Counsel Arvis Freimuts provided a statement regarding the District's legal conclusions associated with its approved JD for this action.
- 13) On October 2, 2003, the District provided a December 16, 1974, Memorandum of the North Central Division, Army Corps of Engineers, which described the Corps basis for concluding that the Lake St. Clair OHWM was 575.7 feet IGLD 1955.
- 14) The Appellant e-mailed that the District had excluded two letters from the administrative record that the Appellant believed should be included. After review, it was determined that the District intended to include these materials.
- 15) The Appellant asked that the current vegetation on the property be considered as clarifying information, and, while the District did not support this position, the District believed that most of the vegetation currently growing on the site would be classified as hydrophytic vegetation in accordance with the 1987 Manual. I concluded that the present vegetation composition of the property would be new information and could not be considered as part of this administrative appeal.

Conclusion: I find that the District's administrative record supports its decision that wetlands regulated under the CWA were present throughout the Appellant's property. The Appellant was apparently aware of the past litigation over CWA issues in the vicinity yet chose to contact third parties, rather than the Corps, regarding the extent of CWA jurisdiction. Unfortunately, the evaluation of CWA jurisdictional status by those third parties was flawed. I find the District's approved JD reasonable and appropriate. The appeal does not have merit.

FOR THE COMMANDER:



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