

ADMINISTRATIVE APPEAL DECISION

LAKE MOHAWK PROPERTY OWNERS ASSOCIATION, INC

HUNTINGTON DISTRICT FILE NO. LRH-2010-891

February 2, 2015

Review Officer (RO): Ms. Mary J. Hoffman, U.S. Army Corps of Engineers, Northwestern Division

Appellant: Lake Mohawk Property Owners Association, Inc.

Permit Authority: Section 404 of the Clean Water Act (33 USC § 1344 et seq.)

Receipt of Request for Appeal: March 28, 2014

Site Visit/Informal Meeting: June 24, 2014

Summary: The Appellant is challenging the District's determination that waters of the United States, subject to federal regulation under the Clean Water Act, are present on the subject parcel. The Appellant's request for appeal (RFA) stated three reasons for the appeal: 1) The proposed activity is not regulated under Section 404 of the Clean Water Act; 2) The wetlands do not meet the definition of adjacency; and 3) The wetlands are a result of man induced conditions. The Appellant provided rationale for its assertions in their letter dated, March 21, 2014.

For reasons detailed in this document, the second reason for appeal was found to have merit. The jurisdictional determination is remanded to the District Engineer for reconsideration, additional evaluation and documentation sufficient to support the decision. The final Corps jurisdictional decision in this case will be made by the Huntington District Engineer or his designated representative.

Background Information: Lake Mohawk is a private reservoir created in the 1960s and located about 1.5 miles south of Malvern, Ohio and 2.5 miles east of Waynesburg, Carroll County, Ohio. The Lake Mohawk Dam creates a 507 acre impoundment of Middle Run, a perennial relatively permanent water (RPW) tributary of Sandy Creek, also an RPW and tributary of the Tuscarawas River, the nearest traditionally navigable water (TNW).

The Huntington District received a request for a jurisdictional determination from the Appellant on July 8, 2013, regarding a 13.2 acre sediment disposal site on Middle Run, upstream of Lake Mohawk. Accompanying the request was a report entitled, *Preliminary Jurisdictional Waters Determination Report Proposed Phase II Sediment Removal Project, Malvern, Carroll County, Ohio*, dated January 2012, rev. July 3, 2013, which was completed by its consultant, Civil & Environmental Consultants, Inc.

The site contains constructed berms that were built to divide the site into two sediment disposal areas. According to the Appellant, in 1991 they obtained a Nationwide Permit No. 26 permit

verification letter from the Corps Huntington District which authorized the relocation of approximately 1,600 feet of Middle Run for the purpose of constructing the sediment disposal areas. Materials dredged from Lake Mohawk were last deposited within the subject disposal areas in 1993. Wetland conditions have developed over time within these dredge disposal areas.

Two linear channels are within or nearby the subject wetland site. The relocated channel of Middle Run (located immediately off the subject site) is adjacent to an earthen berm on the western portion of the site, where it outlets via a culvert under East Mohawk Drive to Lake Mohawk. A second channel, an unnamed tributary to Lake Mohawk, is located approximately 100-150 feet east of the subject site and also outlets via a culvert under East Mohawk Drive into Lake Mohawk.

The Appellant's report (cited above) identified three palustrine emergent wetlands, totaling approximately 7.07 acres. The District evaluated the three wetlands in accordance with current guidance and determined that each met criteria to be classified as jurisdictional waters of the United States under the Clean Water Act (CWA). The District's findings were recorded in two separate jurisdictional determination forms¹ contained in the administrative record (AR).²

The District notified the Appellant in a letter dated February 5, 2014, that the three palustrine emergent wetlands, totaling 7.07 acres, are subject to jurisdiction under the federal CWA.

On March 28, 2014, the Great Lakes and Ohio River Division received a Request for Appeal from the Appellant, which explains their three reasons for the appeal.

Information Received and its Disposition During the Appeal Review:

The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the AR because the District Engineer did not consider it in making the decision on the Approved Jurisdictional Determination (AJD). However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal review includes:

The district provided a copy of the AR to the RO and the appellant on April 29, 2014. With the RFA, the appellant provided documents containing their comments and analysis of the district's jurisdictional determination. The submittals were accepted as clarifying information in accordance with 33 CFR § 331.7 (e).

¹ *Jurisdictional Determination Form Instructional Guidebook*. U.S. Army Corps of Engineers and Environmental Protection Agency. 30 May 2007. This *JD Guidebook* is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting and documenting an Approved Jurisdictional Determination (JD).

² AR 010-025

On June 24, 2014, on behalf of the LRD Division Commander, the RO conducted a site visit and held an informal meeting. Participants representing the Appellant included Mr. Scott Noble, Mohawk Lake Community Manager; Mr. Rob Greene, Director of Lake and Conservation Management; Mr. Ron Tschantz, former Board member and current member of the Lake Management and Restoration Committee; Mr. Matt King, former Lake Mohawk Property Owners Association member and Board member and employed by Beaver Excavating; Mr. Bill Acton, Civil & Environmental Consultants, Inc. (via telephone); and Ms. Jamie VanDusen, Civil & Environmental Consultants, Inc. The Appellant was afforded an opportunity to discuss and clarify the reasons stated in its RFA.

Participants representing the Huntington District Engineer included Mr. Chris Carson, Regulatory Project Manager, and Mr. Mike Hatten, Chief, North Regulatory Branch. The District discussed its rationale used in reaching the jurisdictional determination and clarified information contained within the AR.

No new or additional information was received or used during the appeal review.

APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE HUNTINGTON DISTRICT ENGINEER

Appellant's First Reason for Appeal: The Appellant asserts that the proposed activity is not regulated under Section 404 of the Clean Water Act, contending that the dredge material disposal areas should be considered a waste treatment system which is excluded as waters of the United States under 33 CFR 328.3.

Finding: This reason for appeal does not have merit.

Action: No further action is required.

Discussion: The Appellant states that the dredge material disposal areas were created in 1991 to prevent material dredged from Lake Mohawk from reentering waters of the U.S., avoiding potential violations [and regulation] under Sections 401 and 402 of the CWA.

The CWA exclusion, referenced in 33 CFR § 328.3, addresses waste treatment facilities associated with industrial and municipal discharges which are regulated under Section 402 of the Clean Water Act (33 U.S.C. § 1342). According to EPA, creation of a lagoon or treatment pond is generally for the purposes of treating discharges associated with CWA Section 402, the National Pollution Discharge Elimination System (NPDES) permit program.³ The appellant did not obtain a NPDES permit at the time of construction in 1991.⁴ The exclusion of waters described in this part of the regulations is intended to assure one did not have double liability under the CWA (sections 402 and 404). As a result, this reason does not have merit.

³ The NPDES permit program controls water pollution by regulating point sources that discharge pollutants into waters of the United States. Point sources are discrete conveyances such as pipes or man-made ditches. <http://cfpub.epa.gov/npdes/>

⁴ The RO confirmed this fact verbally during the appeal site visit and meeting.

Appellant’s Second Reason for Appeal: The Appellant asserts that the wetlands do not meet the definition of adjacency.

Finding: This reason for appeal has merit.

Action: The AJD is remanded to the District Engineer. Upon remand, the District shall reconsider the JD and provide sufficient documentation of a significant nexus of the wetlands to the nearest TNW.

Discussion: The Appellant asserts that the wetland areas do not fit adjacency criteria. The Appellant states that the area was upland prior to construction of the earthen berms, and that the disposal area sits at an elevation approximately 5-10 feet above Lake Mohawk, indicating that the berms capture water from entering Lake Mohawk rather than preventing lake water from entering the disposal area. The Appellant opines that the “disposal area was never intact to Lake Mohawk, ultimately resulting in no significant nexus to a traditional navigable water by adjacency.”

As a result of the *Rapanos* Supreme Court decision, the U.S. Environmental Protection Agency and the Corps developed the memorandum *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States*, dated 5 June 2007, and amended 2 December 2008 (Rapanos Guidance). The Rapanos Guidance requires the application of new standards, as well as a greater level of documentation to support an agency JD for a particular waterbody. The Rapanos Guidance also provides a methodology to ensure CWA jurisdictional determinations are consistent with the *Rapanos* decision.

The Corps and EPA assert jurisdiction over TNWs and all wetlands adjacent to TNWs. CWA regulatory jurisdiction also includes relatively permanent waters (RPWs) that are not TNWs, if that waterbody flows year-round, or at least seasonally,⁵ and wetlands adjacent to such waterbodies, if the wetland directly abuts the waterbody.

The term “adjacent” is defined at 33 CFR § 328.3, as “bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, dunes and the like are ‘adjacent wetlands.’” The 2008 amended Rapanos Guidance directs the agencies to assert jurisdiction over wetlands “adjacent” to TNWs, and that finding a continuous surface connection is not necessary to establish adjacency under this definition.

Under criteria found in the most recent Rapanos Guidance, the agencies consider wetlands adjacent if one of the following three criteria is satisfied:

- An unbroken surface connection or shallow subsurface connection to jurisdictional waters. This hydrologic connection may be intermittent;
- The wetlands are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes and the like; and

⁵ *JD Guidebook* (May 30, 2007), pg 50, (e.g., typically at least 3 months)

- The proximity of the wetlands to jurisdictional water is reasonably close, supporting the science based inference that such wetlands have an ecological interconnection with jurisdictional waters.

The District determined that “Wetland A” (1.18 acres) abuts an unnamed tributary (RPW with perennial flow) of Lake Mohawk.⁶ Lake Mohawk is an impoundment of Middle Run (a perennial RPW) which is a tributary of Sandy Creek (perennial RPW) and the Tuscarawas River, the nearest TNW. In this case the aquatic resource is a wetland adjacent to (directly abutting) an RPW with perennial flow. According to the *JD Guidebook*, wetlands adjacent to RPWs that flow directly or indirectly into TNWs are categorically jurisdictional.⁷

The District determined that “Wetland B” (3.51 acre) and “Wetland C” (2.38 acre) are adjacent to, but not directly abutting Middle Run. This class of water body requires that adjacency be determined through a significant nexus finding for the Corps to assert jurisdiction under the CWA. The District summarized its significant nexus evaluation on the AJD form,⁸ concluding that Wetlands B and C are hydrologically connected to the Middle Run and have more than a speculative or insubstantial effect on the chemical, biological or physical integrity of the Tuscarawas River. The District used the Ohio Rapid Assessment Method for Wetlands (ORAM), published by the Ohio Environmental Protection Agency in 2001, to analyze and categorize Wetlands B and C. The District determined that, as “Category 1” wetlands, the wetlands are highly disturbed and have a low ecological value while supporting minimal wildlife habitat and hydrological and recreational functions.⁹

The District’s summary conclusion for Wetlands B and C provides general characteristics of wetland functions and services, and generally infers that there is a chemical, biological [and/or], physical connection to the TNW, but the District falls short of explaining the specific connections between documented wetland characteristics found at the site, and if, or how these wetland functions and services would affect the Tuscarawas River (TNW) located approximately thirty miles downstream.

As a result, I find that this reason for appeal has merit. The AR does not support the District’s determination that Wetlands B and C have a more than speculative and not insubstantial significant nexus to the nearest TNW, and thus the JD will be remanded on this point.

Upon remand, the District shall reconsider the JD and provide additional analysis and documentation of the significant nexus of Wetlands B and C to the nearest TNW, the Tuscarawas River. Specifically, an evaluation should include a consideration of the frequency, volume, and duration of flow (of the RPW), the proximity to the TNW, capacity to transfer nutrients and organic carbon vital to support food webs, habitat services such as providing spawning areas for important aquatic species, functions related to the maintenance of water quality such as sediment trapping, and other relevant factors.

⁶ AR at 018, 023

⁷ *JD Guidebook* (May 30, 2007), Section II.B.1

⁸ AR at 010-017

⁹ AR at 014

In addition, the evaluation should also consider the functions performed cumulatively by any and all wetlands that are adjacent to the tributary, such as storage of flood water and runoff; pollutant trapping and filtration; improvement of water quality; support of habitat for aquatic species; and other functions that contribute to the maintenance of water quality, aquatic life, commerce, navigation, recreation, and public health in the TNW. This is particularly important where the presence or absence of a significant nexus is less apparent, such as for a tributary at the upper reaches of a watershed. Because such a tributary may not have a large volume, frequency, and duration of flow, it is important to consider how the functions supported by the wetland, cumulatively, have more than speculative or insubstantial effect on the chemical, physical, or biological integrity of a TNW.¹⁰

Appellant's Third Reason for Appeal: The Appellant asserts that the wetlands are a result of man induced conditions.

Finding: This reason for appeal does not have merit.

Action: No further action is required

Discussion: The Appellant asserts that normal conditions do not exist within the disposal areas due to the man-made berms, which he believes is modifying hydrology and allowing wetland conditions to form. The Appellant contends that if the berms were removed, the area would revert back to "natural conditions", and then would no longer exhibit wetland characteristics.

According to the AR, the Appellant obtained a Nationwide Permit No. 26 permit verification letter from the Corps Huntington District in 1991 authorizing the relocation of approximately 1,600 feet of the Middle Run streambed and route. Earthen berms were built to create dredge material disposal areas. The AR indicates that materials dredged from Lake Mohawk were last deposited within the subject disposal areas in 1993. The berm was altered when two cuts were made to provide a hydrologic connection to the Middle Run waterway. Otherwise unattended, wetland conditions developed within the disposal areas over the past twenty years.

The primary consideration in determining whether a disturbed area is viewed as "normal circumstances" involves an evaluation of the extent and relative permanence of the physical alterations that have occurred onsite. In addition, consideration is given to the purpose and cause of the physical alterations and effect on hydrology and vegetation. When evaluating wetlands in an altered landscape, districts consider whether the man-induced changes are now the "normal circumstances" for the area, considering the relative permanence of the changes, whether the area is functioning as a wetland, and whether it meets federal wetland criteria.¹¹

¹⁰ Section IV. Detailed JD Form Instructions (Section III.C.3)

¹¹ *Corps of Engineers Wetlands Delineation Manual*, Wetlands Research Program Technical Report Y-87-1(1987 Manual). The 1987 Manual is the current Federal delineation manual used in the Clean Water Act Section 404 regulatory program for the identification and delineation of wetlands (used to determine federal wetland criteria). Except where noted in the manual, the approach requires positive evidence of hydrophytic vegetation, hydric soils, and wetland hydrology for a determination that an area is a wetland. The 1987 Manual describes procedures to be used when delineating wetlands in "atypical situations," where the subject areas have been purposely or incidentally created by human activities, but in which wetland indicators of one or more parameters are absent.

Many aquatic areas, including streams and wetlands, converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature. Normal circumstances are determined on the basis of an area's characteristics and use at present and in the recent past. Thus, if a former wetland or other aquatic area (e.g. a relocated stream) has been converted to another use¹² and that use alters its wetland characteristics to such an extent that it is no longer a "water of the United States", that area will no longer come under the Corps regulatory jurisdiction for purposes of Section 404. However, if the area is abandoned and over time regains wetland characteristics such that it meets federal wetland criteria, then the area may be subject to CWA jurisdiction.¹³

The Corps' general practice is to consider an area abandoned if for five consecutive years there have been no management or maintenance activities. In such cases, positive indicators of all mandatory wetlands criteria, including hydrophytic vegetation, hydrology, and hydric soils, must be observed. The AR indicates that the circumstance of abandonment applies to the subject dredged material containment areas. According to information provided by the Appellant to the District, the containment areas were last used for the disposal of dredged material in 1993. When the District evaluated the site in 2012, applying the 1987 Manual, it found that present conditions meet federal wetland criteria.

The District supports its determination, following current regulations and guidance, that the subject wetlands meet federal criteria, and are subject to jurisdiction under Section 404 of the CWA. As a result, this reason for appeal is without merit.

CONCLUSION: Upon review and evaluation of the Request For Appeal and District's Administrative Record, I have determined that the District's conclusions regarding Reasons for Appeal 1 and 3 were reasonable, supported by the AR, and do not conflict with laws, regulations, executive orders, or officially promulgated policies of the Corps Regulatory Program. However, I have determined that Reason for Appeal 2 has merit because the District failed to support its determination regarding adjacency through a significant nexus as required under the guidance and promulgated policies of the Corps Regulatory Program. As a result, the jurisdictional determination is remanded to the District for reconsideration, additional evaluation and documentation sufficient to support the decision. The final Corps jurisdictional decision will be made by the Huntington District Engineer, or his designated representative, pursuant to my remand.



Suzanne Chubb
Chief, Regulatory Division
Great Lakes & Ohio River Division

¹² Other than by recent un-permitted action not subject to 404(f) or 404(r) exemptions.

¹³ Regulatory Guidance Letter 86-09 dated 8/27/86, SUBJECT: Clarification of "Normal Circumstances" in the Wetland Definition (33 CFR 323.2(e)).