

ADMINISTRATIVE APPEAL DECISION

TRINITY BAPTIST CHURCH, LLC

FILE NO. 2008-834

BUFFALO DISTRICT

5 FEBRUARY 2010

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division, acting on behalf of the Great Lakes and Ohio River Division

Appellant: Mr. Ralph Wilson, Trinity Baptist Church, LLC

Authority: Clean Water Act, Section 404 (33 USC 1344)

Receipt of Request for Appeal: 13 February 2009

Appeal Meeting and Site Visit Date: 27 August 2009

Summary of Decision: The appellant's request for appeal has merit. I find that the appeal has merit because the Buffalo District's administrative record does not contain substantial information in support of its decision that the wetlands are subject to Federal jurisdiction and regulation as waters of the United States. I am remanding the approved Jurisdictional Determination (JD) decision back to the district for reconsideration in light of this decision.

Background Information:

Trinity Baptist Church, LLC (the "Appellant") is appealing the Buffalo District's (the "District") decision to take jurisdiction over wetlands on property located on Hendricks Road in the City of Mentor, Lake County, Ohio.

On 30 April 2008, HzW Environmental Consultants (HzW), acting on behalf of Trinity Baptist Church, submitted a wetland delineation report dated April 2008 to the District and requested a jurisdictional determination (JD) for the approximately 24-acre site the church owns on Hendricks Road in Mentor, Ohio. The wetland report from HzW stated that the site contains 8.66 acres of jurisdictional waters and approximately 411 feet of a perennial stream, Heisley Creek, that is also jurisdictional under the Corps regulatory program.

On 10 July 2008, representatives of the Buffalo District conducted a site visit to verify that the wetland boundaries identified by HzW were accurate in accordance with the

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1987 Corps Wetland Delineation Manual¹ and to determine if the site was subject to jurisdiction under Section 404 of the Clean Water Act (CWA). The District observed that the wetlands were larger than those delineated by HzW and requested that a revised delineation be submitted showing that the entire property is jurisdictional wetlands with the exception of a small fill pile located south of Heisley Creek along the western boundary of the property. HzW submitted a revised delineation on 14 July 2008 that the District states in their 23 July 2008 Memorandum for the Record (MFR) accurately depicted all on-site waters. The 14 July 2008 delineation was verified in the 5 August 2008 JD issued by the Buffalo District which stated that Wetland B (25.28 acres) and Stream 1 (411 linear feet) are part of a surface water tributary system to a navigable water of the United States and are subject to regulation under Section 404 of the CWA.

On 30 September 2008, the Appellant submitted additional information to the District supporting their original determination that only 8.66 acres of the site were subject to jurisdiction. The new information submitted by the Appellant stated that the July site visit to verify the wetland boundary was conducted after a period of several heavy rain events. HzW stated that because of this they did not feel the site conditions at the time of the site visit were typical hydrologic conditions at the site. The appellant also provided information obtained from twelve piezometers randomly placed at the site to gather surface and groundwater data. The piezometers were only monitored for approximately three weeks in September 2008 prior to submittal of their Request for Appeal. The District determined that the piezometer data did not provide conclusive data to support that certain areas of the site are not periodically inundated or saturated continuously for at least five percent of the growing season as required per the 1987 Corps Wetland Delineation Manual.

On 12 December 2008, the District reconfirmed their 5 August 2008 JD. In an undated MFR attached to the 12 December 2008 JD, the District provided detailed data regarding rainfall at the site prior to their July 2008 field inspection and provided the following reasons (as summarized by the RO for the purposes of this document) why the piezometer data provided by the Appellant did not affect their original determination:

1. The arrangement of the data sampling locations was random and not in transects;
2. No information was provided on vegetation, soils or secondary indicators of hydrology at each of the monitoring well locations;
3. Of the twelve monitoring wells only one was in an area that both the Corps and HzW agreed was a wetland;
4. The length of time the sampling was conducted and the fact that it was conducted during September, one of the driest times of year did not provide sufficient data to make any conclusions;

¹ Environmental Laboratory. 1987. Corps of Engineers Wetland Delineation Manual. Technical Report Y-87-1. Vicksburg, MS: U.S. Army Corps of Engineers Waterways Experiment Station. (<http://el.erdc.usace.army.mil/wetlands/pdfs/wlman87.pdf>)

5. The months of August and September, preceding and during the sampling period, were drier than normal, and;
6. Sampling was done during a time when evapo-transpiration is very high due to the amount of growth.

On 12 February 2009, the Appellant filed a Request for Appeal with the Great Lakes and Ohio River Division Office contesting that the 12 December 2008 JD was arbitrary, capricious, and an abuse of discretion, not supported by substantial evidence in the administrative record and plainly contrary to a requirement of law, regulation or officially promulgated Corps policy and guidance.

Information Received During the Appeal and its Disposition:

- The district provided a copy of the administrative record which was reviewed and considered in the evaluation of this request for appeal.
- With the request for appeal, the appellant provided documents containing their comments and analysis of the District's JD. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7(e). At the appeal meeting the Appellant provided copies of two previous appeal decisions that they thought were relevant to their situation. The decisions were accepted and entered into the administrative record however, in accordance with 33 CFR 331.7(g) they were not considered in making the final determination on this appeal. This section of the Corps appeal regulation states:

Because a decision to determine geographic jurisdiction, deny a permit, or condition a permit depends on the facts, circumstances, and physical conditions particular to the specific project and/or site being evaluated, appeal decisions would be of little or no precedential utility. Therefore, an appeal decision of the division engineer is applicable only to the instant appeal, and has no other precedential effect. Such a decision may not be cited in any other administrative appeal, and may not be used as precedent for the evaluation of any other jurisdictional determination or permit application.

Appeal Evaluation, Findings and Instructions to the Buffalo District Engineer:

Appeal Reason 1: The decision is not supported by substantial information in the administrative record.

Finding: This reason for appeal has merit.

Action: The administrative record should be revised to clearly support the District's determination that 25.28 acres of the site are jurisdictional wetlands or the District should reconsider its JD.

Discussion: The administrative record does not adequately support the District's decision based on lack of documentation in the following areas:

Additional Information Request

It is apparent from the administrative record that the District disagreed with the Appellant's original delineation of the site. This is detailed in the MFR dated 23 July 2008 supporting the JD. However, it is not clear from the record why the District disagreed with the Appellant's original delineation and when, how or why the District asked for a revised drawing. It appears based on the Appellant's submission of 30 September 2008 to the District and the District's "Site Inspection Notes and Rationale for Decision" attached to the 12 December 2008 JD that hydrology was the main discrepancy the District had with the Appellant's original delineation showing only 8.24 acres of jurisdictional wetlands on the site. This was further clarified at the appeal meeting but it is not clearly documented in the District's administrative record.

Hydrology

The administrative record contains documentation forms prepared by the Appellant from various locations on the site demonstrating that hydrology does not exist in areas they originally identified as uplands. The District disagreed with this information based on the above discussion and their request for a revised drawing, but there is no documentation in the record to support their determination that wetland hydrology exists on the site in specific locations that the Appellant identified as uplands. The District's "Site Inspection Notes and Rationale for Decision" states the additional area they identified as wetland (that the Appellant identified as upland) was based on primary and secondary indicators of hydrology as defined in the 1987 Corps Wetlands Delineation Manual. However there are no data forms to support the District's determination.

Hydrology for the site should be evaluated and documented on data forms in accordance with the 1987 Corps Wetlands Delineation Manual. Information on hydrology as summarized on pages 28 to 34 and pages 42 to 44 of the 1987 Corps Wetlands Delineation Manual should be included in the administrative record to support the District's final determination.

The District should provide further clarification and rationale on how the rainfall data supports the District JD. It is not clear what the District's final conclusion was regarding hydrologic conditions present at the site, both at the time of the appellant's original data collection and during the District's site visit. A new site visit may be necessary if further clarification cannot be detailed from the existing administrative record. If a new site visit is conducted, it should be completed during a time when typical hydrologic conditions exist at the site and it should be thoroughly documented in the administrative record. The District's final JD should be informed by the observations and documentation of any new site visit.

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Appeal Reason 2: The District JD decision was arbitrary, capricious and an abuse of discretion.

Finding: This reason for appeal has partial merit.

Action: See Appeal Reason 1.

Discussion: This reason for appeal has partial merit based on the discussion and finding in Appeal Reason 1 that the District's administrative record does not support its JD decision.

Appeal Reason 3: The District JD decision was contrary to a requirement of law, regulation or officially promulgated Corps policy and guidance.

Finding: This reason for appeal has partial merit.

Action: See Appeal Reason 1.

Discussion: This reason for appeal has partial merit based on the discussion and finding in Appeal Reason 1 that the District's administrative record does not support its JD decision.

Conclusion:

For the reasons stated above, I find that the appeal has merit. The District's administrative record does not contain substantial information to support its decision that the wetlands are subject to Federal jurisdiction and regulation as waters of the United States under Section 404 of the CWA. I am remanding the approved JD decision back to the District to revise the administrative record as necessary and to reconsider its decision in light of the revised record. The District shall complete these tasks within 45 days from the date of this decision (unless delayed by the need for a site visit) and upon completion, provide the Division office and appellant with its decision document and final JD. The District will notify the Appellant and Division if a site visit is required and the expected date of the final JD if not within the above 45-day period.



SUZANNE L. CHUBB
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