ADMINISTRATIVE APPEAL DECISION FOR APPROVED JURISDICTIONAL DETERMINATION

Riverside Bayview Partnership property
(also referred to as the Lozon or Land and Lake Realty property)
Detroit District File Number 81-011-026-3

AUGUST 8, 2005

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.

Appellant Representative: Mr. Lanny Lozon, Co-owner Riverside Bayview Partnership; Mr. Robert Charles Davis, O'Reilly Rancilio (Counsel for Appellant)

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

Appeal Meeting: July 7, 2004

Site Visit: By mutual agreement of all parties, no site visit was held as the Review Officer had previously viewed the areas in question from a public road (Macomber Boulevard) about ten months earlier in connection with another project in the vicinity.

Background Information: The Riverside Bayview Partnership owns property in Harrison Township, Macomb County, Michigan, at the southern end of Macomber Boulevard including lot numbers 96, 97, 98, 99, 100, 101, 102, and 103 on the west side of Macomber Boulevard. Just south and east of the southern end of Macomber Boulevard is a large wetland complex that connects to Lake St. Clair and for purposes of this appeal that entire complex will be referred to as the Black Creek Marsh. The Detroit District (District) and the appellant agree that the 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. There has been extensive litigation in federal court regarding the extent of Clean Water Act (CWA) jurisdiction regarding this property and this area.

The District and the appellant agree that construction and fill activities occurred to extend Macomber Boulevard southward in the year 2001. By letter of December 21, 2001, the District formally informed the appellant that it was conducting an investigation of fill material placed in wetlands on Lots 97 – 102, and fill material placed to extend Macomber Boulevard to the south. The District was investigating whether the placement of that fill was in violation of the CWA, and if so, what actions the District should take to resolve that CWA violation.

As part of that investigation, on March 6, 2003, the District issued a CWA approved jurisdictional determination for the area under investigation. The specific boundaries of

CWA jurisdiction are labeled as the "area of discharge, Sec. 404" on a map accompanying the approved jurisdictional determination and include the southern portion of Macomber Boulevard and Lots 96, 97, 98, 99, 100, 101, 102, and 103. Although other areas within CWA jurisdiction occur in the vicinity, this appeal decision is limited to an evaluation of the District's conclusions regarding the CWA jurisdictional status of the areas covered by the District's March 6, 2003 CWA approved jurisdictional determination.

Summary of Decision:

I find that the District's administrative record supports its conclusion that wetlands regulated under the CWA were present throughout the areas under consideration in this administrative appeal prior to the fill activities that occurred in 2001, and that some wetlands remain despite those fill activities. The CWA jurisdictional line that the appellant claimed was applicable to these areas 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 Wetland Delineation 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 District used the current "on-line" version of the 1987 Wetland Delineation Manual (1987 Manual) as posted on the U.S. Army Corps of Engineers, Environmental Research and Development Center, Environmental Laboratory website to evaluate the Riverside Bayview Partnership property. This 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.

The Corps regulations at 33 CFR 328.3(b) and the 1987 Manual define wetlands as follows: "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." The 1987 Manual states (page 4) that: "Normal circumstances has been further defined as "the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed." The determination of whether normal circumstances exist in a disturbed area "involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydrophytic vegetation"

and consideration of the "purpose and cause of the physical alterations to hydrology and vegetation."

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 portions of the appellant's property. The District used procedures for a routine on-site wetland delineation supplemented by procedures for an "Atypical Situation" because of the fill activities and vegetation removal that had occurred on portions of the Riverside Bayview Partnership property.

As part of the delineation, the District evaluated the presence/absence of wetlands on the property. Because of the disturbance of vegetation and presence of fill on portions of the property, the District also evaluated several offsite areas for comparison – an approach the 1987 Manual (page 73) recommends as part of the evaluation of Atypical Situations. In the District's December 21, 2001 *Investigative Report of Lozon/Riverside Bayview*, the District described information collected from three sites on its December 19, 2001, site visit. These sites were sample site X1, located in a wooded portion of the Riverside Bayview Partnership Lot 103, immediately west of Macomber Boulevard; sample site X2, located on Lot 104 (formerly the Rapp property), which is immediately north of Lot 103; and site X3, located on South River Road, about 800 feet north of the Riverside Bayview Partnership property.

The District also used information collected from two sites described in its December 27, 2001 *Inspection Report of Lozon/Riverside Bayview*. The District evaluated a sample plot approximately 200 feet east of Macomber Boulevard (and 100 feet east of Lot 23), which was also approximately 25 feet east of the "Judge Kennedy" 575.5 foot International Great Lakes Datum (IGLD) 1955 contour line (the "Judge Kennedy" line is described in detail later in this appeal decision). This point was also identified as X1 but is a distinct location from the X1 sample site evaluated on December 19, 2001. The District and the appellant agreed that the December 27, 2001 sample site X1 was a wetland. The District concluded that sample site X1 was a wetland because it met the criteria for a wetland as defined by the 1987 Manual. The appellant considered sample site X1 a wetland because it was located within the Black Creek Marsh, south and east of the property and the "Judge Kennedy" 575.5 foot IGLD 1955 elevation contour line.

The District conducted an additional evaluation of the area on July 29, 2002 as described in the District's July 30, 2002 *Inspection Report of Lozon/Riverside Bayview*, and collected information from two more sample sites. Sample site A-1 (also referred to as sample site X-1 in the July 29, 2002 report, and distinct from the two other sample sites labeled X-1 above) was located in the center of the cul-de-sac at the south end of Macomber Boulevard – a graded, disturbed area. Sample site A-2 (also referred to as sample site X-2 in the July 29, 2002 report, and distinct from the other sample site X-2 described above) was located in Lot 99, west of Macomber Boulevard.

In addition, the District used as supplementary information, its July 19, 2002 site investigation report of an adjoining property to the west entitled *Inspection Report of Village Building Company (VBC) – Unauthorized Activities.* The District also considered its March 4, 1992 *Inspection Report of Richard Rapp,"* which concerned an investigation of fill materials deposited without a Corps permit on the west side of Macomber Street on Lots 104, 105, 107, and 108, immediately north of the Riverside Bayview Partnership property.

Hydrophytic Vegetation

The 1987 Manual provides a series of methods to evaluate whether hydrophytic vegetation is present. The first indicator listed in the 1987 Manual (pg 17) involves whether a sufficient percentage of plants found at the site are listed as wetland indicator plants on the U.S. Fish and Wildlife Service's 1988 *National List of Plant Species that Occur in Wetlands."* The 1987 Manual defines this indicator in terms of plant cover as "More than 50 percent of the dominant species are OBL, FACW, or FAC (Table 1) on lists of plants that occur in wetlands." [Note: OBL is the abbreviation for Obligate Wetland Plant; FACW is the abbreviation for Facultative Wetland Plant; and FAC is the abbreviation for Facultative Plants.] The District found this criterion was met at several different sampling locations.

The District found three different layers of vegetation – herbs, shrubs, and trees – at the December 21, 2001 report X1 (Lot 103) and X2 (Lot 104) sample sites immediately west of Macomber Boulevard. At both sites, all three layers of vegetation were dominated by plant species listed as OBL or FACW wetland plants. The District reasonably concluded that the 1987 Manual criteria for the presence of hydrophytic vegetation had been met at these two sites.

The December 21, 2001 report also includes sample site X3 at South River Road, about 800 feet north of the Riverside Bayview Partnership property, which the District had selected as a nearby offsite comparison location, consistent with Step 3d (1987 Manual page 76) of the procedures for Atypical Situations. Sample site X3 was dominated by one stratum, trees, which were listed as FACW wetland plants. The District reasonably concluded that the 1987 Manual criteria for the presence of hydrophytic vegetation were met at site X-3.

The December 27, 2001 X1 sample site, which the District had selected as another nearby offsite comparison location, was also dominated by a single stratum, emergent vegetation. All the dominant species within the emergent vegetative strata were listed as FACW or OBL wetland plants. The District reasonably concluded that the 1987 Manual criteria for the presence of hydrophytic vegetation were met at the December 27, 2001 sample site X-1.

The District's July 29, 2002 report includes information from two more sample sites. The District's July 29, 2002 sample site A-2 on Lot 99, was dominated by *Phragmites*

australis, a plant listed as FACW+ on the Wetland Plant List. The District noted that this area had been subject to prior fill activities and disturbance and photographs of sample site A-2 show that *Phragmites australis* covers most of the area surrounding sample site A-2.

The appellant agreed that *Phragmites australis* was listed as a FACW+ wetland indicator plant, but stated that *Phragmites australis* should not be considered a wetland indicator plant in the vicinity of sample site A-2, because it was colonizing an upland area. The District agreed that *Phragmites australis* could colonize upland areas. However, the District concluded that the presence of *Phragmites australis* in this situation was an indicator of the presence of hydrophytic vegetation, rather than the atypical presence of a wetland plant on an upland site. When the administrative record is considered as a whole, including the presence of hydrophytic vegetation, hydric soils, and wetland hydrology throughout the area, the District's conclusion that sampling site A-2 contained hydrophytic vegetation was reasonable.

The District's July 29, 2002 Sample site A-1 was located in the middle of the cul-de-sac at the south end of Macomber Boulevard. This was a filled area and this sample was taken for comparison purposes. No evidence of hydrophytic vegetation could be obtained from Sample site A-1. Similarly, the vegetation had been cleared on the adjoining property considered in the District's July 19, 2002, *Inspection Report of Village Building Company (VBC) – Unauthorized Activities,* and so direct observations of hydrophytic vegetation on that property were limited.

Finally, the District considered its March 4, 1992 *Inspection Report of Richard Rapp,* regarding Lots 104, 105, 107, and 108 (Lot 106 had been filled and developed). This report does not give specific locations for its sampling sites within the lots. However, the District's results are consistent with other wetland delineation sampling sites in the area. The District found three vegetation layers - herbs, shrubs, and trees – on the areas of Lots 104, 105, 107, and 108 and all three layers of vegetation were dominated by plant species listed as OBL, FACW, or FAC wetland plants. The District considered this as further evidence that wetland vegetation was present throughout the area surrounding the Riverside Bayview Partnership property.

The appellant stated that a sketch map dated February 28, 1992 in the March 4, 1992 *Inspection Report of Richard Rapp* supported his contention that the Riverside Bayview Partnership property was not a wetland. This sketch includes the word "upland" in the approximate location of Riverside Bayview lot number 103. However, the Rapp report was prepared to address the unpermitted fill in Lots 104, 105, 107, 108, and was not intended to be a full evaluation of Lots 96 – 103. There is no specific information on why the word upland was included for the Lot 103 area in the Rapp report. As described above, the data from several sample plots demonstrates that hydrophytic vegetation is present on Lots 96, 97, 98, 99, 100, 101, 102, and 103 or would be present under normal circumstances (i.e. without the recent ground-disturbing grading and fill activities of 2001 to extend Macomber Boulevard, and other similar disturbances).

The District also considered historical information. The District's July 30, 2002 *Inspection Report of Lozon/Riverside Bayview* includes a May 26, 1976 aerial photograph of the area. The 1976 photograph shows forested areas on both sides of Macomber Boulevard on the Riverside Bayview Partnership property, and forested area on most of the nearby Village Building Company property to the west of the Riverside Bayview Partnership Lots 96 - 103. The District notes that the Riverside Bayview Partnership property was wooded except for a swale area adjacent to a dike on the southeastern portion of the property (the Operation Foresight Dike).

Most of the area was still wooded in a September 6, 1998 aerial photograph contained in the same report. The District's December 21, 2001 report, sample sites X-1, X-2 and X-3 all included a tree layer which was dominated by FACW tree species. Photographs at sampling sites X-2 and X-3 in the December 21, 2001 report show relatively large trees at least thirty feet tall with a diameter at breast height of over eight inches (as estimated by the Review Officer based on the photographs). The presence of such trees throughout the area further supports the District's conclusion that if disturbances to the Riverside Bayview Partnership property and nearby property had not occurred, hydrophytic vegetation would still occur throughout the property.

Based on the administrative record, the District had direct evidence that hydrophytic vegetation was present on the undisturbed areas of the Riverside Bayview Partnership property, and substantial evidence that hydrophytic vegetation occurred throughout the nearby area prior to fill activities. The Appellant's argument that *Phragmites australis* can occur in upland areas, and that the word "upland" was written next to Lot 103 without detailed explanation in the 1992 Rapp report, do not provide a sufficient basis for the District to reject the evidence of hydrophytic vegetation it established through several sampling efforts. The District's conclusion that hydrophytic vegetation was present throughout the Riverside Bayview Partnership property considered in the March 6, 2003 approved CWA jurisdictional determination, or would be under normal circumstances, was reasonable.

Hydric Soils

The District and the appellant agree that the soil in this area is Lamson soil, and that Lamson soils are present under the filled areas on the property. The National Technical Committee for Hydric Soils lists the Lamson soil series as a hydric soil.

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 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 Lamson soils on the site would still be considered hydric soils, even if they had been effectively drained.

However, even though portions of the area had been filled, the District still found evidence of hydric soil conditions in the fill material. The 1987 Manual identifies soil color as an indicator of soil saturation and defines the criteria for that indicator as "Matrix chroma of 2 or less in mottled soils or matrix chroma of 1 or less in unmottled soils." These soil color indicators were present in the fill material covering the original soil surface at the December 19, 2001 X1 (Lot 103) and X2 (Lot 104) sample sites. The District considered this as evidence that the fill material placed in these areas had retained the characteristics of hydric soils. The relatively undisturbed sample locations at the December 19, 2001 South River Road X3 sample site, the December 27, 2001 X1 sample site located in Black Creek Marsh, and the July 29, 2002 A-2 sample site in Lot 99 all had soil color indicators representative of hydric soils. The July 29, 2002 A-1 sample site in the Macomber Boulevard cul-de-sac also had soil color indicators in the original soil profile, which was underneath approximately 42 inches of fill material placed to extend Macomber Boulevard southward in 2001.

The administrative record shows that the District and the appellant agree that the soils in the area of the Riverside Bayview Partnership property are Lamson soils, and that Lamson soils are considered hydric soils. The administrative record also shows that soil color indicators consistent with hydric soil indicators are present throughout the area, including some of the areas that had received fill material previously.

The District considered the discharges of fill material onto Lots 96, 97, 98, 99, 100, 101, 102, 103, and the Macomber Boulevard cul-de-sac road extension to be unauthorized discharges of fill material. Therefore it was reasonable for the District to take into account what soil would have been present prior to the placement of the fill. As stated above, the District and the appellant agreed that Lamson soils were present prior to the placement of fill, and agreed that Lamson soil was considered a hydric soil.

The District reasonably concluded, and the administrative record supports, the conclusion that hydric soils were present throughout the area prior to the placement of fill material on the Macomber Boulevard extension in 2001, and prior to placement of fill materials on portions of Riverside Bayview Partnership Lots 96, 97, 98, 99, 100, 101, 102, and 103. The administrative record also supports that fill on portions of Lot 103 is still functioning as a hydric soil.

Wetland Hydrology

The District concluded that wetland hydrology was present on this site, or would have been present on this site but for the fill activities and disturbances that had occurred. The District used the 1987 Manual, Routine On-site Determinations and Atypical Situations methodologies, to evaluate the presence of wetland hydrology.

The District found several indicators of wetland hydrology and documented these in its administrative record. The District found saturated soils within twelve inches of the soil surface at the December 19, 2001 sampling sites X1 (Lot 103) and X2 (Lot 104), an indicator that the 1987 Manual (page 34) defines as a primary indicator of wetland hydrology. However, these observations were not made during the approximately April to October growing season. The District also found saturated soil within 12 inches of the surface on the adjoining property, as discussed in regard to sample site F-6, sampled May 23, 2002 in the District's July 19, 2002 report *Inspection Report of Village Building Company (VBC) – Unauthorized Activities* (page 12).

In addition, the District found secondary indicators of wetland hydrology as defined in the 1987 Manual (page 34). First, vegetation at the December 19, 2001 sampling sites X1 (Lot 103) and X2 (Lot 104) met the requirements of the "FAC Neutral" test (1987 Manual, page 17), which the 1987 Manual (page 34) identifies as a secondary indicator of wetland hydrology. The District also found oxidized rhizospheres (root channels), another secondary indicator of wetland hydrology (1987 Manual page 34) at those two sample sites. The 1987 Manual also considers the presence of hydric soil as indicated by a soil survey to be a "weak" secondary indicatory of wetland hydrology. The District appropriately considered the presence of Lamson soil to be a secondary indicator of wetland hydrology.

The District's administrative record supports its conclusion that under normal circumstances (i.e. without the fill that had been placed without Corps authorization), that wetland hydrology would be present. The District identified one primary indicator of wetland hydrology (soil saturation), and three secondary indicators of soil saturation (vegetation meeting the FAC-Neutral test of wetland hydrology, presence of oxidized rhizospheres, and local soil survey hydrology data). The District's conclusion is consistent with the evaluation of primary and secondary indicators of wetland hydrology as described on page 34 of the 1987 Manual.

The administrative record for this action provides sufficient documentation that all three environmental parameters necessary to establish the presence of a wetland – hydrophytic vegetation, hydric soils, and wetland hydrology – are present, or would have been present under normal circumstances, throughout the area covered by the District's March 6, 2003 approved jurisdictional determination. Therefore, the District's conclusion that wetlands are present, or would be present under normal circumstances on all portions of Riverside Bayview Partnership Lots 96, 97, 98, 99, 100, 101, 102, and 103, and on the area filled for the southward extension for Macomber Boulevard, is reasonable. Normal circumstances are not present in all portions of the area covered by the jurisdictional determination due to the presence of fill material that was placed without the District's authorization.

Reason 2: The appellant asserts that as a result of prior litigation, CWA jurisdiction in the vicinity of the appellant's property is restricted to elevations below the 575.5 foot IGLD 1955 elevation contour line.

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 and a subsequent permanent injunction 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. The appellant asserts this CWA jurisdictional line was established by a U.S. District Court, Eastern District of Michigan court order in 1979, affirmed by that court in 1981, and, after the U.S. Supreme Court's decision in *U.S. v. Riverside Bayview Homes Inc.,* 474 U.S. 121 on December 4, 1985, reinstated in May 1986. The Riverside Bayview Partnership is a successor of Riverside Bayview Homes Inc. as owner of the property.

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 Inc. 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 Envtl. 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 genesis of this line is from Judge Kennedy in the Eastern District of Michigan who determined, under the Corps regulations as they existed in 1975, where the boundaries of the Corps' CWA jurisdiction were to be placed.

The defendant appealed the decision to the U.S. 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 on July 19, 1977 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 of waters of the United States. Consequently, he held that the wetlands on the property below the 575.5 foot IGLD 1955 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. In addition, Judge Gilmore's May 18, 1981 permanent injunction also enjoined Riverside Bayview Homes, Inc., from filling *any other water of the United States*, unless and until a CWA permit was obtained from the Corps. The May 18, 1981 permanent injunction did not identify the boundaries of such waters. Judge Gilmore's injunction enjoined Riverside Bayview Homes Inc., from

filling any area within CWA jurisdiction based on the CWA jurisdiction regulations as they were defined in 1981, that is, under the Corps regulations established on July 19, 1977. Therefore, the 1981 federal court injunction covered a broader area than the 1979 federal court injunction it replaced. (Note: The Corps' July 19, 1977 regulations contained the same definition of wetlands and adjacent wetlands as the Corps' current regulations.) Judge Gilmore's injunction of 1981 superceded the prior 1979 injunction of Judge Kennedy.

Riverside Bayview Homes Inc. 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 Sixth Circuit concluded 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 reinstatement of the District court's injunction following the Supreme Court's decision was designed simply to require that the Riverside Bayview Homes Inc. comply with the CWA and applicable regulations. Therefore, the entirety of the appellant's property is subject to the Corps' interpretation of the 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 Homes Inc. 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 contour 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.").

When the Supreme Court found that the District Court's ruling was not clearly erroneous, the effect of that action was to establish that the District Court's 575.5 foot IGLD 1955 contour line was an appropriate limit for restoration activities related to the unauthorized fill activities that took place on the Riverside Bayview Inc. 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.

Not all wetland areas that meet the 1987 Manual definition of a wetland are within CWA jurisdiction. The Corps regulations issued July 19, 1977, [33 CFR 323.2(c) in the 1977 regulations] and currently found at 33 CFR 328.3(a)(7) defines wetlands within CWA jurisdiction as: "Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section." The Corps regulations define adjacent at 33 CFR 328.3 (b) 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'." 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 areas in question in this appeal, the appellant's lot numbers 96, 97, 98, 99, 100, 101, 102, 103, and the southern extension of Macomber Boulevard, are within CWA jurisdiction as adjacent wetlands. As described under Reason 1 above, the District reasonably concluded these are wetland areas. 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 was appropriate for the District to consider conditions present prior to placement of the unauthorized fill in the area in reaching a determination of CWA jurisdiction.

The appellant and the District already agree that areas below the 575.5 foot IGLD 1955 elevation contour line are within CWA jurisdiction. Except for the narrow, upland area forming the Operation Foresight dike, and the areas of fill that have not received Corps authorization, the wetlands in the area would form an essentially continuous area of wetland habitat. In the absence of fill, this wetland area would extend northwest from the Black Creek Marsh. Starting below the 575.5 foot IGLD 1955 elevation contour line, this wetland area would extend through the area filled for the Macomber Boulevard road extension, and continue northwest beyond the northwest edge of Lots 96, 97, 98, 99, 100, 101, 102, and 103. The District reasonably concluded this entire area was within CWA jurisdiction as adjacent wetlands.

The administrative record indicates that the District advised the appellant by a letter of January 31, 2000 of the permanent injunction regarding the property, that there was an extensive CWA regulatory history associated with the property, and that wetlands within CWA jurisdiction existed on the property. Unfortunately, the appellant's discussions with the District regarding the CWA jurisdictional status of the property appear to have been limited until after unauthorized fill had already been placed to extend Macomber Boulevard to the south.

The District's conclusions that the Corps' current CWA jurisdictional regulations applied to all areas of the site including the Macomber Boulevard southern extension and Lots 96, 97, 98, 99, 100, 101, 102, and 103 were reasonable and consistent with the Federal Court decisions regarding this site. The District's conclusion that adjacent wetlands within CWA jurisdiction are present on the site, or would be under normal circumstances, is also supported as a reasonable conclusion based on the administrative record for this action. The administrative record shows that the 575.5 foot IGLD 1955 contour line is only relevant as a CWA jurisdictional line of demarcation relative to whether fill placed prior to implementation of the Corps July 19, 1977 regulations required a Corps authorization.

Information received and its Disposition During the Appeal Review: In addition to the administrative record, the following materials were provided during the appeal process. All items were considered clarifying information.

1) By facsimile transmission on July 7, 2004, the District provided a copy of a February 23, 2003 letter regarding the CWA jurisdictional status of Lots 104 and 105 on Macomber Boulevard.

2) By facsimile transmission on July 11, 2004, appellant Lanny Lozon provided a December 28, 2001 letter to the Detroit District that was inadvertently left out of the administrative record describing the fill activities extending Macomber Boulevard, and fill material on Lot 103.

3) By August 5, 2004 letter the appellant's attorney submitted the Judge Kennedy's *Judgment Permanently Enjoining Defendants* dated June 20, 1979.

4) By e-mail and letter of August 13, 2004 the Review Officer confirmed with the District and the appellant that the following materials were clarifying information.

   a. February 24, 1977, Judge Kennedy, Federal District Court, Eastern District of Michigan, Southern Division, *Opinion and Order Granting Motion for Preliminary Injunction in Part.*

   b. June 20, 1979, Judge Kennedy, Federal District Court, Eastern District of Michigan, Southern Division, *Opinion of the Court.*

   c. June 20, 1979, Judge Kennedy, Federal District Court, Eastern District of Michigan, Southern Division, *Judgment Permanently Enjoining Defendants.*

   d. May 18, 1981, Judge Gilmore, Federal District Court, Eastern District of Michigan, Southern Division, *Findings and Order.*

   e. May 9, 1986, Order of United States Court of Appeals for the Sixth Circuit remanding case to the Federal District Court, Eastern District of Michigan to reenter the injunction previously vacated by the United States Court of Appeals for the Sixth Circuit as a result of the U.S. Supreme Court's reversal of the Sixth Circuit's decision in *U.S. v. Riverside Bayview.*

5) By August 19, 2004 letter the appellant's attorney stated that he considered the information the Review Officer identified in the August 13, 2004 e-mail transmittal as relevant clarifying information that supported the Appellant's position.

6) By e-mail of September 27, 2004, the District confirmed the exact boundaries of the area covered by the March 6, 2003 CWA jurisdictional determination under 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

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