ADMINISTRATIVE APPEAL DECISION

Mori Properties, LLC; FILE NO. CENAN-2008-318

NEW YORK DISTRICT

1 December 2008

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division

Appellant: Mori Properties, LLC

Appellant's agents: Kevin J. Coakley, Connell Foley, LLP, Attorneys at Law
George D. Cascino, Cascino Engineering

Date of Receipt of Request for Appeal: 9 May 2008

Date of Acceptance of Request for Appeal: 9 June 2008

Appeal Conference/Site Visit Date: 9 July 2008

NAD-ACCEPTED REASON FOR APPEAL:
NAD accepted the following reason for appeal as detailed by the agent in the attachment to the Request for Appeal dated 9 May 2008:

The decision was arbitrary and capricious because the administrative record does not support jurisdiction under either Section 10 of the Rivers and Harbors Act (33 U.S.C. 403) or Section 404 of the Clean Water Act (33 U.S.C. 1344).

SUMMARY OF DECISION:
The appellant's request for appeal does not have merit. The district correctly determined that the wetlands and waters on site are subject to jurisdiction under Section 10 of the Rivers and Harbors Act (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344), as supported by the administrative record.

BACKGROUND INFORMATION:
On 5 October 2006 a letter was submitted by George D. Cascino of Cascino Engineering on behalf of Mori Properties, LLC ("the appellant") requesting that the New York District ("the district") of the U.S. Army Corps of Engineers ("the Corps") verify that there are no wetlands subject to federal jurisdiction on the subject property located on 11.16 acres at Block 453A Lots 1, 13A3 (Part), 14A, 15A and 21A in the Borough of North Bergen, Bergen County, New Jersey. The appellant stated that based on its analysis that its property contained no wetlands under the jurisdiction of the Corps as a result of the Supreme Court Decision on Carabell and Rapanos. The appellant sent several follow up letters to its initial request asking that the district take action on the pending jurisdictional determination ("JD") request. On 3 March 2008 the district conducted a site visit noting two culverts that carry tidal flows on the site and a mean high water mark on nearby rocks. The district also used aerial photographs and

The appellant also states that the wetlands on site should not be subject to jurisdiction under Section 404 of the Clean Water Act because:

- They are not adjacent to the Hackensack River;
- The tidal influence to the waters on the site flows through a series of covered pipes and man-made ditches;
- It does not feel that tidal influence alone is sufficient to take jurisdiction;
- It does not feel the waters onsite are navigable and therefore are not adjacent to waters identified in 33 CFR 328.3 (a)(1) - (a)(6);
- It does not think a significant nexus exists between the wetlands on the property and the Hackensack River.

Section 10 Of the Rivers and Harbors Act Jurisdiction

The Appellant's concerns do not have merit under 33 CFR 329.4. The regulation defines navigable waters of the United States as those that are subject to the ebb and flow of the tide and/or are presently used or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. The waters on the appellant's site are subject to the ebb and flow of the tide as supported by the record and a site visit by this office. Despite the appellant's claim to the contrary, the regulation states that waters have to be subject to the ebb and flow of the tide **and/or** be susceptible for use to transport interstate commerce; it does not require both.

Furthermore, 33 CFR 329.12 (b) explains that "regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by 329.12 (a)(2)[1]) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes."

In accordance with the 5 June 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, page 35, surface water flow through pipes maintains jurisdiction as long as the pipes do not sever jurisdiction with upstream waters. As the pipes and ditches maintain the tidal flow to the appellant's site as the District shows in the administrative record, the waters are subject to jurisdiction. Furthermore, in accordance with the 5 June 2007 Guidebook, since the waters are themselves tidal and are therefore a traditional navigable water (TNW) there is no need to document a significant nexus to the TNW, despite appellant's claim.

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[1]In accordance with 33 CFR 329.12 (a)(2) "regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water."

Based on the above, the administrative record supports the findings that the waters are subject to the ebb and flow of the tide and therefore they are subject to jurisdiction under Section 10 of the Rivers and Harbors Act.

Section 404 of the Clean Water Act Jurisdiction

Similar to the rationale above, the waters on site are subject to jurisdiction under Section 404 of the Clean Water Act because they are subject to the ebb and flow of the tide in accordance with 33 CFR 328.3(a)(1). The regulation states that "waters of the United States means all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."

OVERALL CONCLUSION:

I find that the district's administrative record supports its decision that the wetlands and waters on the appellant's property are subject to federal jurisdiction and regulation under Section 10 of the Rivers and Harbors Act (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344). For the reasons stated above, the appeal does not have merit. The administrative appeals process for this permit action is hereby concluded.

TODD T. SEMONITE
Brigadier General, USA
Commanding