ADMINISTRATIVE APPEAL DECISION

A & B PROPERTIES, INC.; FILE NO. POH-2011-00026

HONOLULU DISTRICT

March 27, 2011

Review Officer: Mr. Mike Vissichelli, U.S. Army Corps of Engineers (Corps), North Atlantic Division, acting on behalf of the Pacific Ocean Division

Appellant: A & B Properties, Incorporated

Jurisdictional Authority: Section 10 of the Rivers and Harbors Act (RHA) of 1899 (33 U.S.C. 403); Section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344)

Receipt of Request for Appeal: December 5, 2011

Appeal Meeting: February 28, 2012

Summary of Decision: The Appellant's request for appeal has merit. The approved jurisdictional determination (JD) is remanded to the Honolulu District (District) to provide further analysis to support if RHA jurisdiction applies to the onsite drainage ditch. The District shall clarify how it characterized the mean high water (MHW) mark in accordance with existing regulations and policy, the elevation of MHW and the extent to which RHA and CWA jurisdiction applies to the onsite drainage channel. The District shall also clarify the applicability of regulatory guidance letter RGL 07-02 as appropriate.

Background Information: The District processed two separate permit actions for work proposed on property located off Amala Place in Kahului, Hawaii owned by the Appellant, A & B Properties, Inc. On August 1, 2011, the District issued a Letter of Permission (LOP) to the Appellant authorizing it to remove a maximum of 25 cubic yards of sand from the makai (seaward) end of three adjacent culverts connecting the Maui Industrial Park offsite drainage channel to the ocean with upland placement on an as-needed basis over the next 10 years. On February 23, 2011, the District verified that Nationwide Permit Number 3 was appropriate for proposed work to slipline three existing culverts in the Maui Industrial Park offsite drainage channel located under Amala Place.

The Appellant submitted a letter dated September 27, 2011, to the Division office requesting an appeal of the LOP. The Appellant questioned the district's determination that the waters on the site are subject to jurisdiction under the RHA. Upon review of the request for appeal (RFA), the Division office sent the Appellant a letter dated October 12, 2011, stating that the RFA could not be accepted. The Appellant's RFA was for a JD issued with the NWP and more than 60 days had passed since that JD was issued. The Division office could not accept the appeal in accordance with title 33 Code of Federal Regulations (CFR) Section 331.5(a)(1) which states that for an action to be appealable, the RFA must be received within 60 days of the date of the

Notification of Administrative Appeal Options and Process/Request for Appeal form (NAP). Additionally, it was identified that the District made an error in filling out the NAP form. The NAP form had the Proffered Permit box checked when it should have been issued as an Initial Proffered Permit. As such, the Appellant's objections were forwarded by the Division to the District for their reconsideration.

In response to the Appellant's objection the District issued a new JD dated October 5, 2011. On December 2, 2011 the Appellant submitted a new RFA of the October 5, 2011 JD. The RFA was accepted on December 22, 2011.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION:

1) The District provided a copy of the administrative record (AR), which was reviewed and considered in the evaluation of this request for appeal. References used to support the JD (see AR page 253, Section IV.A) were not provided with the initial copy of the AR. The District provided copies of this information to the Division and the Appellant on February 29, 2012.

2) With the request for appeal, the Appellant provided documents containing its comments and analysis of the district's jurisdictional determination. The Appellant also submitted a letter dated January 6, 2012 which also had a certification from its surveyor on the elevation of the MHW mark. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7 (f).

EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:

Appeal Reason: The Appellant alleges that the District did not correctly apply the current regulatory criteria and associated guidance in determining that there are "waters of the United States" on the site. Specifically, the Appellant alleges that the District was incorrect in its determination that the onsite drainage ditch is subject to jurisdiction under the RHA.

Finding: This reason for appeal has merit.

Action: The District shall revise the AR to provide further analysis to support how the MHW mark is determined in accordance with existing regulations and policy, the elevation of MHW and the extent to which jurisdiction applies to the onsite drainage channel. The District shall reconsider the JD based upon the revised administrative record. The District should clarify the applicability of RGL 07-02 for maintenance work in the drainage ditch at the site based upon the reissued JD for the waters on the site.

Discussion: It is not clear in the AR if the ebb and flow of the tide extends into the drainage ditch. The issue was brought into question because the Appellant wants to remove sand prior to storm events at the outlet of three culverts that allow water to flow from the drainage ditch and into the Pacific Ocean. The outlets are blocked by wooden panels that are removed during storm events. The panels are often partially covered with sand that routinely needs to be removed prior to removal of the panels. The District determined that the inverts of the culverts are below

MHW, and thus, the tide ebbs and flows freely in and out of the drainage ditch through the culverts and up the drainage ditch for the length of the site. The Appellant does not agree with this determination and believes that the elevation of MHW is located below the inverts to the culverts, and is therefore not subject to jurisdiction under the RHA.

The District states in the JD form (AR, 246) under its rationale supporting its determination that the site is a Traditional Navigable Water (TNW) and that "[t]he ebb and flow of the Pacific Ocean extends up the drainage channel past the project site. The waterbody is considered to be an extension of the Pacific Ocean. The Pacific Ocean has been documented to pre-historic times as being used for recreational, subsistence and commercial navigation between international ports."

The Appellant disputes the district's statements that the drainage ditch is subject to the ebb and flow of the tide, that the ebb and flow of the Pacific Ocean extends up the drainage channel past the project site and that the waterbody is considered to be an extension of the Pacific Ocean.

In review of the administrative record there is no clear information to support the District's determination that the onsite drainage ditch is subject to the ebb and flow of the tide. The AR (page 253) references several past JD's used to support its findings in this JD. The information in these documents is inconclusive and provides contradictory findings with regard to RHA Jurisdiction within the onsite drainage channel. In a JD dated April 25, 2008 for the Maui Medical Plaza at Kanaha, Maui, application number POH-2006-531, the drainage ditch is characterized as a relatively permanent water (RPW) and the JD does not indicate that the drainage channel is subject to the ebb and flow of the tide or RHA jurisdiction. The JD associated with the Abandoned Vehicle Storage Facility, application number POH-2005-00149 discusses jurisdictional wetlands and waters in the area, and appears to indicate that the channel is subject to the ebb and flow of the tide and RHA jurisdiction.

The District concludes in the AR (page 166) that the culvert invert is below the high tide elevation, within RHA jurisdiction, that RHA jurisdiction goes past the project site and the entire portion of the drainage ditch on the property is subject to RHA jurisdiction. No specific details are provided in the AR on the elevation of MHW, how it was determined[1], the elevation of the invert, the correlation between the two and the affects they have on RHA jurisdiction in the drainage ditch.

The District states (AR, 246) that the boundary for CWA jurisdiction was established based on the mean (average) high waters. There is an area for the District to provide additional info on the JD form[2], however the District did not provide any additional information and it is not clear in the AR what the elevation of the established Ordinary High Water Mark (OHWM) is or how it was determined in accordance with the existing regulations[3].

The plans referenced in the AR supporting the JD and permitting actions do not support if the ditch is subject to the ebb and flow of the tide. The plans provided by the Appellant (AR, 180)

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[1] 33 CFR 329.12
[2] See AR at page 246, Section II.B.c of the JD form
[3] 33 CFR 328.3

state that the invert of the outlet end of the culverts in question are located at elevation 2. There is no reference on the plan to the datum used for the elevations provided. There are no specific plans referenced in the JD and the only plan with the JD provides no detail on the location of the jurisdictional boundaries. In accordance with RGL 08-02[4], "[i]f wetlands or other water bodies are present on a site, an approved JD for that site will identify and delineate those water bodies and wetlands that are subject to CWA/Section 10 jurisdiction, and serve as an initial step in the permitting process"[5] The RGL also says that "[t]he information used to support an approved JD should be reliable and verifiable[6]."

The Appellant raised questions in the RFA and at the appeal meeting regarding the applicability of RGL 07-02[7] for recurring maintenance work it wants to perform to maintain the onsite drainage ditch. RGL 07-02 is a two-part test that addresses statutory exemptions for maintenance work in drainage ditches. The Appellant has said that they believe the exemption is appropriate for the ongoing maintenance work they need to do to allow the drainage ditch to function as it was designed. In discussions with the Appellant and the District it seems there was some agreement that the exemptions applied to the maintenance activities, but there is nothing in the AR to support the district's position on this. Although the JD is not intended to address this issue, the District should clarify the applicability of the RGL 07-02 for maintenance work at the site based upon the reissued JD for the waters on the site.

Conclusion: After review and evaluating the RFA and the above recommendations and analysis of the RO, I find the Appellant's request for appeal has merit. The JD is remanded to the Honolulu District to provide further analysis to support if RHA jurisdiction applies to the onsite drainage ditch. The District shall clarify how they characterized the MHW mark in accordance with existing regulations and policy, the elevation of MHW and the extent to which RHA and CWA jurisdiction applies to the onsite drainage channel. The District shall also clarify the applicability of RGL 07-02 as appropriate. The District shall complete these tasks within 60 days from the date of this decision and upon completion, provide the Division office and Appellant with its decision document and final JD.

RICHARD L. STEVENS
Brigadier General, USA
Commanding

[4] RGL 08-02 – Jurisdictional Determinations
[5] See paragraph 2(B0(4)(d) of RGL 08-02
[6] See paragraph 9(c) of RGL 08-02
[7] RGL 07-02 – Exemptions for construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act