

ADMINISTRATIVE APPEAL DECISION

JURISDICTIONAL DETERMINATION

A & H COMMERCE PARK

FILE NUMBER 2008-1091

JACKSONVILLE DISTRICT

DATE: December 26, 2008

Review Officer: Michael F. Bell (RO), US Army Corps of Engineers, South Atlantic Division

Appellants: William Albornoz and Luis Henaco

Request for Appeal (RFA): July 8, 2008

Appeal Accepted: September 7, 2008

Appeal Conference/Site Visit: October 2, 2008

Summary of Decision: I find this appeal has merit. The District's administrative record (Record) does not contain substantial evidence to support the exclusion of man-made features in reaching its adjacency determination between the wetlands and the Florida City Canal. Additionally, the Record does not include the required significant nexus finding regarding the connection between the wetlands and North Canal/Biscayne Bay.

Background Information: On October 12, 2007, the Appellants requested a jurisdictional determination for a 60-acre parcel of land owned by A&H Park Commerce. The parcel is identified by folio # 10-7921-011-0040, east of Southwest 147th Avenue & south of Southwest 336 Street, in Section 21, Township 57 South, Range 39, East, Homestead, Miami-Dade County, Florida. The Appellants supplied information to the District to support their contention that the wetlands on the property were isolated.

The site consists of approximately 60 acres located within the City of Homestead's Villages of the Homestead Development Regional Impact (DRI). The DRI was authorized in 1976 and designed to include land use elements of a commercial/industrial park as well as residential, parks and recreation, institutional, and other land uses. Currently, the site contains an abandoned tree farm dominated by invasive species. The site, which includes freshwater wetlands, is situated between two major drainage canals (North Canal and Florida City Canal) managed by the South Florida Water Management District. The canals drain 5.8 miles from the site to Biscayne Bay.

The North Canal is located north of the site along SW 328th Street and the Florida City Canal runs south of the site along Palm Drive/SW 344th Street. Park of Commerce Boulevard is situated halfway between the two canals and immediately north of the Appellants' property. The area between the two canals includes recently delineated and regulated wetlands, a baseball complex, a golf course, a NASCAR race track, a Contender Boat manufacturing facility, a satellite dish communications facility, and a future Drug Enforcement Agency facility (currently under construction).

The site itself is located between Alex Muxo Boulevard and Park of Commerce Boulevard, at least 1,200 linear feet from the Florida City Canal, the nearest TNW (Traditional Navigable Water). The District completed a jurisdictional determination on May 7, 2008, and determined the Appellant's property contained jurisdictional wetlands. The Appellants and the District agree that the site contains wetlands according to the *1987 Wetland Delineation Manual*. However, the Appellants believe the wetlands are isolated and not jurisdictional under the Clean Water Act (CWA). The District used the *Rapanos* JD form and asserted jurisdiction on the basis that the wetlands on the subject property are adjacent to a TNW and are also adjacent to, but do not directly abut, RPWs (Relatively Permanent Waters) that flow directly or indirectly into TNWs.¹

The Appellant disagreed with the May 7, 2008, jurisdictional determination (JD) and appealed the decision to the South Atlantic Division Commander on July 8, 2008. The South Atlantic Division Review Officer (RO) accepted the appeal on September 7, 2008.

Site Visit: On October 2, 2008, the RO, the Appellants, attorneys Larry Liebesman and Leila Batteis, and consultants Brad Waller, Greg Juszli, Jeff Marcus, and Richard Alger met District Project Managers Megan Clouser and Albert Gonzalez and District Attorney John Kasbar at the appeal site. Volunteer Taylor Bell and area farmer Richard Alger also attended the site visit. The attendees spot checked the area and inspected the canals and culverts that are discussed in the jurisdictional determination. The District determined that a Relatively Permanent Water (RPW) indirectly abuts the Appellants' property and flows to North Canal. Various fish species were discovered in the RPW. An unimproved road separates the wetland from the RPW and a culvert opening exists on both sides of the road. It was not clear whether flow moved from one side of the road to the other or whether the culvert was continuous.

The site visit included reviewing a December 20, 2007, jurisdictional determination on a 40-acre tract of wetlands the Appellants also own to the north and on the opposite side of Park of Commerce Boulevard. The District determined that the 40-acre wetland tract was adjacent to a RPW that emptied into a TNW. This jurisdictional determination is not a part of this appeal.

The RO concluded the field investigation at 1200 hours.

¹ June 5, 2007, The Jurisdictional Determination Form and instructions are an attachment to the Legal Memorandum discussing Clean Water Act jurisdiction following the US Supreme Court decision in *Rapanos v. United States* & *Carabell v. United States*.

Information Received And Its Disposition During The Appeal Review:

a.) The Jacksonville District provided a copy of the administrative record (Record) to the RO and the Appellants. The RO reviewed and considered the Record during the appeal process along with the results of the site inspection and appeal conference.

b.) During the Conference, the Appellants indicated that they might submit additional legal information on whether man-made structures might sever adjacency. By letter dated October 29, 2008, the Appellants decided not to send additional information.

APPEAL EVALUATION, FINDINGS and INSTRUCTIONS to the Jacksonville District Engineer

Appeal Reason I: The Corps' basis of jurisdiction under 33 C.F.R Section 328.3 (a)(7) (the presence of wetlands adjacent to waters used in interstate commerce; see JD at Section II.B1.a) incorrectly interprets the facts in light of case law. The site is not adjacent to a Traditional Navigable Water ("TNW") (the Florida City Canal 1,200 feet away), based on the Supreme Court's clear interpretation that adjacency requires a wetland to be "inseparably bound up with" and "actually abut[ted] on a navigable waterway." U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121,134,135 (1985).

FINDINGS: This reason for appeal has merit.

ACTION: The District is required to revisit its jurisdictional determination to document and adequately account for the effects on adjacency from all the man-made features between the subject wetlands and the Florida City Canal, a TNW.

Discussion: According to the Record and the RFA, the Appellant agreed with the District's findings that the site contains wetlands according to the definition of the *1987 Wetland Delineation Manual*. However, they disagreed with the May 7, 2008, JD that determined the wetlands with the stream channel on the parcel were adjacent to TNWs and therefore jurisdictional under the CWA. The District determined the wetlands on the Appellants' property were adjacent to the Florida City Canal, a TNW. The District also determined that the wetlands on the Appellants' property directly abut a Relatively Permanent Water (RPW) that flows directly or indirectly into North Canal, which is identified as a TNW – this aspect of the determination is addressed under Appeal Reason 2. Under Appeal Reason 1, the Appellants do not contest the navigability (TNW status) of the Florida City Canal to the south of the site; however, they do contend the wetlands on the site are not adjacent to the Florida City Canal.

In order to address this reason for appeal, reference must be made to the United States Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006). In

Rapanos, the Supreme Court addressed the question of the circumstances under which a wetland or tributary is a "water of the United States" within the meaning of the CWA. The *Rapanos* decision included five opinions, with no single opinion commanding as majority of the court. The *Rapanos* Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (December 2, 2008) ("Guidance Memorandum"), provides that "[w]here there is no majority opinion ..., controlling legal principles may be derived from those principles espoused by five or more justices." Thus, regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied." *Guidance Memorandum*, p. 3 [emphasis added]. In the case of wetlands adjacent to TNWs, the Guidance Memorandum states:

The agencies will also continue to assert jurisdiction over wetlands "adjacent" to traditional navigable waters as defined in the agencies' regulations. * * * The *Rapanos* decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are "waters of the United States,"

The *Guidance Memorandum* notes that this conclusion is based on the concurring opinion of Justice Kennedy. *Guidance Memorandum*, p. 5.

Regarding the definition of adjacency, the *Guidance Memorandum*, pp. 5-6, states:

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. Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters . This hydrologic connection maybe intermittent . Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.

Regarding wetlands adjacent due to their "proximity," the *Guidance Memorandum*, p. 6, goes on to state:

Because of the scientific basis for this inference, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case-specific demonstration of an ecologic interconnection. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial. For example, species, such as amphibians or anadromous and catadromous fish, move between such waters for spawning and their life stage requirements . Migratory species, however, shall not be used to support an ecologic interconnection. In assessing

whether a wetland is reasonably close to a jurisdictional water, the proximity of the wetland (including all parts of a single wetland that has been divided by road crossings, ditches, berms, etc.) in question will be evaluated and shall not be evaluated together with other wetlands in the area.

Again, the focus of this reason for appeal is that the District incorrectly established adjacency between the wetlands on the Appellants' property and the Florida City Canal. The Record, discussion at the appeal conference, and the observations made during the site visit all support the conclusion that the Florida City Canal is a TNW, and the Appellants concede this point. The question is whether the wetlands on the site meet one of the three criteria for adjacency.

The appeal site was once part of a broad continuum of wetlands with excavated canals draining to Biscayne Bay. The site is separated from the Florida City Canal by 1,200 feet of man-made features. These features include a two-lane roadway and median, a baseball complex, and water filled borrow pit to the southeast. Between the borrow pit and the Florida City Canal lies a one-lane 20-foot wide maintenance road. Although borrow pits and fill for a baseball complex are not explicitly mentioned in the definition, they may (along with the 2 roadways) individually constitute the type of man-made barriers or obstructions that might be determined to separate portions of a once intact wetland adjacent to the Florida City Canal.

The JD Form summarizes the rationale for supporting the determination that wetlands are adjacent to a TNW: [JD Form, III.A.2].

There is a continuum of wetlands (55 acres) that extend south of the unpermitted Park of Commerce Boulevard. Palm Dr (SW 344th Street) runs along the north bank of the canal and the review area is north of Palm Drive. The site contains freshwater wetlands that meet the criteria of the Corps 1987 Wetland Delineation Manual and are within 1200 ft of less of the Florida City Canal on the south side.... Additionally, EPA was on site in April 2008, reviewed the surrounding area and did not dispute the Corps adjacency determination.

The District emphasized on the proximity of the wetlands to the Florida City Canal in calling them adjacent. The RFA states that:

the Corps cannot just assert that the site is adjacent simply because it is 'separated from [the tributary] by uplands, a berm, dike, or similar feature.' ...the separations from the two canals are much greater than any upland, berm, or dike...Simply put, this separation is too tenuous to meet the definition of adjacency.

During the appeal conference, the RO addressed questions to the District concerning the barriers between the TNW and the project wetland. A two-lane roadway with median, a baseball complex, a water-filled borrow pit, and a one-lane 20-foot wide maintenance road separate the two. The District acknowledged that there are 1,200

feet of man-made features between the wetlands and the Florida City Canal, but stated that conversations with EPA Region IV led to the conclusion that the District should ignore the borrow pit in determining adjacency. By considering the borrow pit as a storm water retaining pond and by ignoring these “retaining ponds” in determining the degree of separation, the wetland would still be separated from the Florida City Canal by only the two-lane roadway with median, the baseball complex, and the maintenance road. The Appellant, on the other hand, argues that no hydrological connection exists between the borrow pit and the TNW. In any event, the Record contains no information concerning the substance of the communications with EPA Region IV.

While the District is correct that hydrologic surface connections are not necessary for an adjacency determination, and that the wetland and the TNW were historically part of a large wetland system, the proximity of the wetland, including the cumulative effect of all of the man-made separations, were not sufficiently evaluated. The Record does not contain substantial evidence to support the District’s determination regarding the proximity of the wetland to the TNW.

Appeal Reason 2: The Corps incorrectly categorizes the site as Relatively Permanent Water (“RPW”) that flows directly or indirectly into a TNW. JD at Section III.D.2. The completely opposite is true: no water flows off-site at all because the site is completely bermed and hydrologically isolated. Water certainly does not flow north from the site, under a major road, into a ditch, then on to the North Canal. Even if it did, the Corps has not met its burden to show that the North Canal is a TNW.

FINDINGS: This reason for appeal has merit.

ACTION: The District is required to revisit its jurisdictional determination to document and determine if a significant nexus exists between project wetlands and the North Canal and Biscayne Bay..

Discussion: As discussed under Appeal Reason 1, the *Rapanos Guidance Memorandum*, provides that “[w]here there is no majority opinion ..., controlling legal principles may be derived from those principles espoused by five or more justices.” Thus, regulatory jurisdiction under the CWA exists over a water body if either the plurality’s or Justice Kennedy’s standard is satisfied.” *Guidance Memorandum*, p. 3 [emphasis added]. This is sometimes referred to as the “two test” approach. The plurality’s test (Plurality Test) extends the Corps regulatory authority “only to ‘relatively permanent, standing or continuously flowing bodies of water’ connected to traditional navigable waters (referred to as “RPWs”), and to ‘wetlands with a continuous surface connection to’ [i.e., the wetland directly abuts and is not separated by uplands, a berm, dike, or similar feature] such relatively permanent waters.” Justice Kennedy’s test (Kennedy Test) concluded that wetlands are waters of the United States “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity” of traditional navigable waters. *Guidance Memorandum*, pp. 1 – 3.

However, the Plurality Test may no longer be used to establish jurisdiction in the states of the 11th Circuit. The recent decision of the 11th Circuit Court of Appeals in *U.S. v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *cert. denied sub nom, U.S. v. McWane, Inc.*, 129 S.Ct. 627 (Dec. 1, 2008) disagreed with this “two-test approach” where jurisdiction may be found under the CWA if either the Plurality or Kennedy Tests is satisfied. Instead, the 11th Circuit held that it was Justice Kennedy’s ‘significant nexus’ test which provides the “governing rule of *Rapanos*” and “governing definition of ‘navigable waters’ under *Rapanos*.” The *Robison* Court further noted Justice Kennedy’s determination that “a ‘mere hydrologic connection’ between a wetland and a navigable-in-fact body of water would not necessarily be sufficiently substantial to meet his “significant nexus” test.” Under the rule of the *Robison* decision, the Kennedy Test may no longer be used to establish jurisdiction in the states of the 11th Circuit. The *Rapanos Guidance Memorandum*, p. 3, n. 16, recognizes that “the Kennedy standard is the sole method of determining CWA jurisdiction in [the Eleventh] Circuit.”

The District’s analysis relies upon the Plurality Test to establish jurisdiction in terms of the on-site wetlands adjacency to RPWs. The Kennedy Test is the exclusive test within the 11th Circuit. While the Record supports the conclusion that the North Canal is a TNW, because the Record does not contain substantial evidence supporting the conclusion that there is a significant nexus between the wetlands in question and a TNW, this aspect of the jurisdictional determination is remanded to the District for further action.

Appeal Reason 3: The site is not “directly abutting an RPW that flow[s] directly or indirectly into a TNW.” JD at Section III.D.4. While A&H concedes there is a ditch to the west of its northern parcel, it disputes that this same ditch system exists to the west of its southern parcel, this site in question. Due to the separation of the two parcels, it is factually impossible for wetlands on the southern parcel to directly abut an RPW on the northern parcel.

FINDINGS: This reason for appeal is rendered academic given the requirement to use the Kennedy Test in the 11th Circuit.

ACTION: No additional action required.

Discussion: The discussion of RPWs and adjacency to RPWs reflects the application of the Plurality Test, which is not to be used in the 11th Circuit. Consistent with the Findings and Discussion under Appeal Reason 2, the analysis of hydrological and other connections to tributaries of TNWs should be performed as part of a significant nexus analysis.

Appeal Reason 4: The site is not “adjacent to but not directly abutting an RPW that flow[s] directly or indirectly into TNWs” JD at Section III.D.5. The relationship between

the site and nearby TNW's is insufficient to support jurisdiction under the "significant nexus" test articulated by the Supreme Court in Carabell v. U.S. Army Corps of Eng'rs., Rapanos v. United States, 126 S.Ct. (2006) ("Rapanos"), and adopted as the governing standard by the Eleventh Circuit in United States v. Robinson, 505 F.3d 1208 (11th Cir. 2007). The May 7, 2007 JD does not provide the detailed evidence that the Guidance requires to demonstrate that the wetlands at issue have "significant nexus" to the closest TNW. On the contrary, the wetlands do not "significantly affect" the chemical, physical, and biological integrity" of the Florida City Canal, the North Canal, or Biscayne Bay.

FINDINGS: This reason for appeal has merit.

ACTION: No additional action required. As required under Appeal Reason 2, the District is required to revisit its jurisdictional determination to document and determine if a significant nexus exists between project wetlands and the North Canal and Biscayne Bay.

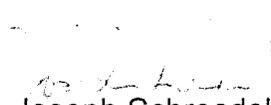
Discussion: To the extent that the District intends to assert jurisdiction on the basis that the wetlands on the Appellants' property directly abut an RPW that flow directly or indirectly into one or more TNWs (JD Form Section III.D.4), it must perform a significant nexus determination as required by *U.S. v. Robinson*. Or (as also discussed in the RFA), if the District intends to assert that the subject wetlands are adjacent to but do not directly abut an RPW that flows directly or indirectly into TNWs (JD Form Section III.D.5), it must likewise perform a significant nexus determination under both *U.S. v. Robinson* and the *Guidance Memorandum*. The Revised Memorandum and instructions on the JD Form at Section III.C.3, require the District to do a:

Significant nexus finding for wetlands adjacent to an RPW but that do not directly abut the RPW. Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D.

The Record contains no significant nexus determination. Since the District did not perform a significant nexus determination, this reason for appeal has merit.

CONCLUSION: For the reasons stated above, I find that the appeal has merit. The District's Record does not contain substantial evidence in support of its determination of the proximity or of the cumulative effect of man-made features on the adjacency of the subject wetlands to the Florida City Canal. The Record also does not include substantial evidence to support the finding of a significant nexus between the wetlands and North Canal/Biscayne Bay – such a finding is required to support the District's bases of jurisdiction other than adjacency to a TNW. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. I am remanding the approved JD decision back to the District for further analysis and documentation consistent with the required actions

regarding the reasons for appeal on which merit was been found. This concludes the Administrative Appeal Process. The District shall complete these tasks within 45 days from the date of this decision and upon completion, provide the Division Commander and Appellant with its decision document and final JD.



Joseph Schroedel
Brigadier General, US Army
Commanding