

ADMINISTRATIVE APPEAL DECISION

CHINESE AMERICAN BENEVOLENT ASSOCIATION

FILE NO. SAJ-2010-1243(JD-LCK)

JACKSONVILLE DISTRICT

21 JANUARY 2011

Review Officer: Jason Steele, U.S. Army Corps of Engineers, South Atlantic Division (SAD)

Appellant: Chinese American Benevolent Association

Date of Receipt of Request for Appeal: 23 September 2010

Acceptance of Request for Appeal: 27 September 2010

Appeal Conference: 27 October 2010

Authority: Section 404 of the Clean Water Act (CWA) (33 U.S.C. § 1344)

BACKGROUND

The Chinese American Benevolent Association is appealing the Jacksonville District's (District) 3 August 2010 decision to assert jurisdiction on a 2.3 acre site (subject property), located at 14195 Old Sheridan Street, Section 3, Township 51 South, Range 40 East, Southwest Ranches, Broward County, Florida.

The appellant contends that the 0.74 acres of identified onsite wetlands is a County required stormwater management facility designed to retain water onsite. The Appellant acknowledges that the onsite wetlands discharge through an overflow bleeder/water control structure, during heavy rain/flooding events, into the Central Broward Water Control District (CBWCD) canal, which is considered a Relatively Permanent Water (RPW). However, the appellant contends that the periodicity of flow, between the 0.74 acres of onsite wetlands, through the drainage bleeder and into the CBWCD canal is not "significant" enough to be considered jurisdictional. The issue is not, according to the appellant, whether the identified onsite wetlands are isolated, but that they do not have a significant nexus (primarily flow) to the CBWCD canal and ultimately the downstream Traditional Navigable Water (TNW), which is the New River Canal (the New River Canal transitions from an RPW to a TNW).

The appellant offered the following as to support its position that the District's approved jurisdictional determination is insufficient to reach a significant nexus determination.

First, there is no physical connection between the CBWCD canal and the onsite wetlands.

A 15' utility easement and a 20' canal maintenance easement separate the wetlands area from the canal. Additionally, a berm is located in the area separating the property from the canal. Although, the drainage bleeder is situated on the property and allows for runoff from the property to enter the canal, the drainage bleeder is designed in compliance with the CBWCD regulations that permits a maximum of 1/3 inches of runoff during the 10 day 25 year storm event. Furthermore, there is no continuous runoff through the bleeder and into the CBWCD canal and the lack of a continuous flow from the wetlands is a factor indicating that there is no significant nexus between the wetlands and the canal. As such, the wetlands account for an insignificant amount of runoff into the canal that is not continuous and quite insignificant when taking into account the canal system. There is no evidence that the wetlands provide any significant contribution to the chemical, biological or physical integrity of the CBWCD canal. Rather, the Army Corp has provided evidence that the canal is maintained through a series of pumps and interconnectivity with the C-11 canal. Thus cannot be thought to reach the threshold of a significant nexus.

With respect to the connectivity of the CBWCD canal to the C-11 Canal or New River Canal, it is not disputed that the CBWCD canal is connected to the C-11 Canal. However, the Army Corps must also show the significant nexus between the CBWCD canal and the wetlands. Unlike the CBWCD canal's connection to the C-11 Canal, there is no continuous hydrological flow from the wetlands to the CBWCD canal and there is no physical connection between the wetlands and the CBWCD canal. There are also no pumping stations directing the flow of water into the canal. The onsite bleeder solely allows storm water runoff at a maximum level of 1/3 of an inch per day during storm events to enter the canal to prevent an accumulation of water from settling on the property.

The District contends there are 0.74 acres of onsite jurisdictional wetlands that are adjacent to but not directly abutting an RPW (CBWCD canal) that flows directly or indirectly into a TNW (New River Canal). The District considers the connection, from the onsite wetlands to the CBWCD canal, to be an indirect hydrologic connection. In addition, the District contends that the onsite wetlands, in combination with all of the similarly situated wetlands adjacent to the RPW/s, have a significant nexus (physical, chemical, and biological characteristics) to the downstream TNW.

SUMMARY OF DECISION

Appellant's request for appeal (RFA) has merit. The administrative record (AR) does not adequately support the District's determination that the subject property contains waters of the United States (U.S.), as required by the *Corps of Engineers Wetland Delineation Manual*, January 1987 ("87 Manual"), *Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region*, October 2008 ("Supplement to the 87 Manual"), and *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (6/1/2007) ("JD Guidebook"). In addition, the AR does not adequately

support the District's determination that the identified "potential" wetlands would have a significant nexus to the nearest downstream TNW, as required by the JD Guidebook, and the EPA/Army Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (2 December 2008) ("Rapanos Memorandum").

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

1. The District provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.
2. The appellant's agent supplied supporting documentation at the time of submittal of the RFA.
3. The District and appellant's agent supplied information after the appeal conference. This information was in the form of answered questions.

APPELLANT'S STATED REASON FOR APPEAL

Appeal Reason: "...only in extraordinary circumstances will a relatively small amount of runoff from the property reach the C-11 Canal and thereby theoretically flow into the Intercoastal Waterway, located hours east of the property site. Under normal circumstances, the storm water management plan contemplates that no runoff will flow from the property."

EVALUATION OF THE REASON FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE JACKSONVILLE DISTRICT COMMANDER

Appeal Reason: Only in extraordinary circumstances will a relatively small amount of runoff from the property reach the C-11 Canal and thereby theoretically flow into the Intercoastal Waterway, located hours east of the property site. Under normal circumstances, the storm water management plan contemplates that no runoff will flow from the property.

Finding: This reason for appeal has merit.

Discussion: As stated above, the appeal has two arguments: 1) The 0.74 acres of onsite wetlands is a County required stormwater management facility designed to retain water onsite, under normal conditions. 2) The periodicity of flow, between the 0.74 acres of onsite wetlands, through the drainage bleeder and into the CBWCD canal is not "significant" enough to be considered jurisdictional.

As to the first argument: 33 CFR § 328.3(a) states: "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States."

It is recognized that stormwater management facilities provide some water quality benefits, such as entrapping sediments and retaining flood waters onsite. However, the onsite wetlands are not designed to “treat” any waters, within the meaning of 33 CFR § 328.3(a). Furthermore, the onsite wetlands/stormwater management facility is designed to periodically discharge into the RPW (CBWCD Canal), thus, making it susceptible to discharging pollutants to the downstream TNW.

As to the second argument: The District classified the onsite wetlands, under Section II.B.1. of the JD Form dated 28 June 2010, as “wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs”.

The JD Guidebook,¹ page 58, states: “**Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs.** This class of water bodies is jurisdictional under the CWA where there is a ‘significant nexus’ with a TNW.” This section goes on to state:

Documentation requirements to support determination:

- Wetlands will meet the 3-parameter test contained in the agency's regulatory definition of wetlands. See also the protocol identified in the *Corps of Engineers Wetlands Delineation Manual* (1987) or appropriate Regional Supplement
- Section III.B.1 of the form needs to demonstrate that water flows from an RPW directly or indirectly into a TNW
- Section III.B.2 and 3 need to identify rationale that wetland is adjacent (not directly abutting) to an RPW that flows directly or indirectly into a TNW
- Section III.C.3 needs to identify rationale to support significant nexus determination for a wetland, in combination with all other wetlands adjacent to that tributary

In order to establish jurisdiction of the onsite wetlands, the JD Form and supporting record must demonstrate that the onsite wetland meets the 3-parameter test. The District’s administrative record did not include any documentation, either via data forms or memorandum for record, which identified the onsite wetlands as meeting the 3-parameter test. According to the 87 Manual, the 3-parameter test involves identifying the hydrophytic vegetation, hydric soils, and hydrology on the site (see also 33 C.F.R. § 328.3(b)). Therefore, the District has not met this first documentation requirement.

In order to establish jurisdiction for the onsite wetlands, the JD Form and supporting record must also demonstrate that water flows from an RPW directly or indirectly into a TNW. Section III.B.1 of the District’s JD Form, dated 28 June 2010, provides the following information:

¹ The JD Guidebook states that, while it “does not impose legally binding requirements on EPA [or] the Corps ..., it is nevertheless “intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD.” Deviation needs to be supported by a determination of why the SOP procedures are not appropriate in a particular case. JD Guidebook at 1.

(ii)(a) The tributary (CBWCD canal) flows directly into a TNW. This section goes on to further explain:

The 0.74 acres of onsite wetland prairie is located within the Sunshine Village of the Town of Davie. The wetland is approximately 15 feet east of the Central Broward Water Control District (CBWCD) canal (RPW). In the northwest corner of the wetland is a drainage bleeder that is utilized to assist in maintaining the level of run off from the property since on-site water retention is required by Central Broward on all properties within this area. The water control elevation of the site and the adjacent CBWCD canal are both set at 4.0 feet NGVD. The CBWCD is within the C-11 District drainage basin and is hydrologically connected to the C-11 canal (RPW). The C-11 canal is also known as the New River Canal (RPW) which turns into the New River South canal (RPW). When the New River Canal turns north at the S-13 pump station, the canal encounters saltwater and becomes an estuarine system, and is also considered navigable. The New River eventually flows into the Intracoastal Waterway which is also considered a TNW.

(ii)(c) Flow: This section provides some explanation for duration and volume in the CBWCD and New River Canals, i.e., that the “water elevation ... is kept at a constant elevation,” but does not specify the frequency of flow, number of flow events, or flow regimes within these RPWs.

As outlined in Section III.B.1.(ii)(a), the District adequately documented that the tributary (CBWCD canal) directly and hydrologically connects to the downstream TNW. However, as outlined in Section III.B.1.(ii)(c), the District did not adequately document the flow characteristics (frequency and volume) of the tributary (CBWCD canal). Therefore, the District has only partially met this second documentation requirement.

Next, Sections III.B.2 and 3 need to identify the District’s rationale for concluding that the wetland is adjacent (not directly abutting) to an RPW that flows directly or indirectly into a TNW. Section III.B.2 and 3 of the JD Form, dated 28 June 2010, provides the following information:

Physical Characteristics

2.(i)(b) General Flow Relationship with Non-TNW: Ephemeral flow

2.(i)(c) Discrete wetland hydrologic connection: Property and onsite wetland maintains the same elevation 4 feet NGVD. There is a water control structure (drainage bleeder) onsite. This structure connects to the concrete wall head that surrounds and supports the pipes that flow into the CBWCD canal (RPW) that eventually hydrologically connects to the C-11 (RPW). The drainage bleeder is

utilized to assist in maintain the level of run-off from the property at an acceptable level since on-site water retention is required by the Central Broward on all properties within the community.

2.(i)(c) Ecological connection: The onsite wetland is approximately 15 feet east of the CBWCD canal. Wading birds were present within the onsite wetland during a site visit... During the field survey of the CBWCD canal near other properties throughout the Sunrise Village indicated that wading birds utilize the canal. Due to the proximity of the onsite wetlands and the canal and the lack of impeding barriers such as berms or roads, it can be determined that an ecological and biological connection exists due to wildlife utilization.

Chemical Characteristics

2.(ii) Water is tannic/clear, water quality is fair to good, wetlands exist in silvicultural and residential area. According to the USGS the top pollutant in this watershed is Phosphorus and Nitrogen. Dissolved Oxygen and nutrients are the number one cause of impairment for this watershed.

Biological Characteristics

2.(iii) The onsite wetlands support: wetland vegetation, provides wood stork foraging habitat, wading birds and small mammals would typically utilize similar wetland systems.

3. Characteristics of all wetlands adjacent to the tributary (if any)

The District identified 10 wetlands that totaled approximately 19.32 acres in their cumulative analysis. The District went on to summarize the overall biological, chemical, and physical functions being performed by these similarly situated wetlands:

Only similarly situated wetlands, along the CBWCD canal and the New River Canal (C-11) up to the point where the New River turns north (S-13 pump station), are being considered in the cumulative analysis. The New River Canal continues north where it takes on characteristics of an estuarine water system. Along this stretch of waterway there are over 340 acres of wetland habitat that directly abuts the tributary/navigable waterway. This area was not included because the wetlands, adjacent to the New River, in this area are not similar in nature to the freshwater wetland being considered in this jurisdictional determination.

The Rapanos Memorandum, pp 5-6, states that wetlands are 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 may be 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.

The AR includes adequate documentation of the third criterion of adjacency: The District met this requirement through their explanation under Section III.B.2(c) above, Ecological connection. Specifically,

The onsite wetland is approximately 15 feet east of the CBWCD canal... Due to the proximity of the onsite wetlands and the canal and the lack of impeding barriers such as berms or roads, it can be determined that an ecological and biological connection exists due to wildlife utilization.

Regarding adjacency by means of geographic proximity, the Rapanos Memorandum further states,

Because of the scientific basis for this [science-based] 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.

In this case, the wetland is in close geographic proximity - 15 feet - to the CBWCD canal (RPW). The identified close geographic proximity is sufficient for a finding of adjacency under the third criterion of the Rapanos Memorandum. As outlined in Section III.B.2 and 3. of the JD Form, the District adequately documented that the onsite wetland is adjacent (not directly abutting) to an RPW that flows directly or indirectly into a TNW. Therefore, the District has met this third documentation requirement.

Finally, Section III.C.3 of the JD Form must identify the rationale to support a significant nexus determination for the identified on-site wetland, in combination with all other wetlands adjacent to that tributary. Section III.C.3 of the JD Form, dated 28 June 2010, provides the following information:

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

This project lies within the 8 digit United States Geological Survey (USGS) Hydrologic Unit Code 03090202 known as Everglades and C9 & C11, and encompass 3128 square miles. The subject reach is located less than 10 river miles from the New River, a TNW. The subject wetland is adjacent to the CBWCD canal, shown as a solid orange line and connects to the New River Canal (C-11 a dotted blue line) on the USGS quadrangle maps. According to the USGS, a solid orange line indicates a canal ditch and a dotted blue line indicates artificial path. Wetlands and adjacent canals are a source of beneficial material, energy, inorganic nutrients, organic matter, and organisms. In this case these conveyances of water can remove harmful materials such as sediments and pollutants. The canals (CBWCD canal, C-11 canal, and New River, have a chemical, physical and biological connection with the adjacent onsite wetland within this reach: providing habitat, flood water retention, ground water recharge and water filtration. The CBWCD canal, New River canal and the New River collectively have a chemical, physical and biological connection. The onsite wetland is determined to be jurisdictional based on the chemical, physical and biological connection the onsite wetland and the similarly situated wetlands have on the TNW. The CBWCD canals are hydrologically connected to the C-11. The C-11 has the ability to use the S-9 Pump Station at the west end of the C-11 to back-pump into the Everglades or flow into the New River. The water control elevation of the onsite wetland and the adjacent CBWCD canal are both set at 4.0 feet NGVD. Because the onsite drainage bleeder directly connects to the CBWCD canal a direct physical and chemical relationship exists between both water environments. Due to the close proximity of the onsite wetlands and the canal and the lack of impeding barriers, it can be determined that an ecological and biological connection exists due to wildlife utilization.

The Guidebook, page 7, states: "A significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological, integrity of a TNW." In other words, a significant nexus may exist where the effect is on either the chemical, physical or biological integrity (an effect on one or more, but not necessarily all, is required) of the TNW, depending on the significance of the effect(s).

The 2 December 2008 Memorandum, page 1, states: "A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters." "Significant nexus includes consideration of hydrologic and ecologic factors."

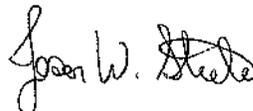
In order to establish jurisdiction for the onsite wetlands, the JD Form and supporting record must identify rationale to support significant nexus determination for a wetland, in combination with all other wetlands adjacent to that tributary. As outlined in Section III.C.3., the District adequately documented that the tributary, in combination with all of its adjacent wetlands has more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the TNW. In addition, the District considered hydrologic and ecologic factors in their assessment. Therefore, the District has met this fourth documentation requirement.

Action: 1) Demonstrate that the onsite wetland meets the 3-parameter test.

2) Provide greater documentation regarding the frequency of flow, number of flow events, and flow regimes from the onsite wetland to the TNW. As part of documenting the flow regimes for the RPWs, provide data and rationale indicating that the tributaries are perennial so as to support a finding of jurisdiction based on a significant nexus.

CONCLUSION

For the reasons stated above, I find that the appeal has merit. On a couple of documentation requirements, the District's administrative record does not contain substantial evidence to support the District's determination that the subject property contains adjacent wetlands with a significant nexus to a downstream TNW. The District's determination was not arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law, regulation, Executive Order, or policy. The administrative appeals process for this action is hereby concluded.



Jason W. Steele
Administrative Appeals Review Officer
South Atlantic Division