

ADMINISTRATIVE APPEAL DECISION

GINN DEVELOPMENT

FILE NO. SAJ-2003-10995

JACKSONVILLE DISTRICT

24 NOVEMBER 2009

Review Officer: Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California, acting by designation on behalf of the South Atlantic Division

Appellant: Michael Frankenberger

District Representative: Skip Bergmann, Army Corps of Engineers, Jacksonville District (District)

Receipt of Request for Appeal: 1 December 2008

Appeal Conference and Site Visit Date: 26 March 2009

Authority: Clean Water Act (33 USC 1344 et seq.)

ACCEPTED REASONS FOR APPEAL:

1. The determination that wetlands 1, 5, 12, 15, 31, 56, and 61 as directly abutting RPWs and having a seasonal overland sheet flow connection when these wetlands clearly have no surface water connection and are heavily influenced by water levels in the isolated mine lakes is either inaccurate and/or lack significant nexus support.
2. Identifying wetlands 2, 3, 4, 8, 9, 11, 16, 20 – 30, 32, 55, 58, 69, and 70 as wetlands adjacent, but not directly abutting RPWs that flow directly or indirectly into TNWs, and having intermittent overland sheet flow connections is either inaccurate and/or lack significant nexus support.

SUMMARY OF DECISION: The appellant's request for appeal has merit. This Clean Water Act (CWA) jurisdictional determination (JD) is remanded to the District for further evaluation and consideration of information provided by the Appellant. The District must complete an analysis of whether waters on the property, including wetlands, have a significant nexus with the nearest Traditionally Navigable Waterway (TNW) and, consequently, constitute "navigable waters".

BACKGROUND INFORMATION: The property is an approximate 3560.4 acre site, located on the north side of Corkscrew Road, 3 miles east of Interstate 75, in Sections 7, 8, 17, 18, 19 and 20, Township 46 South, Range 26 East, Latitude 26.470 North, Longitude 81.739 West, Lee County, Florida. The topography of the site is relatively flat.

For purposes of evaluation during the CWA jurisdictional determination, the property owner's consultant delineated the site using the 1987 Wetland Delineation Manual (1987 WDM). On November 6, 2007, the Appellant's consultant provided the District with a series of Ginn Development maps and data to assist in its determination of wetland jurisdiction. The consultant indicated in his request for a jurisdictional determination that they were not asserting that all isolated wetlands on site were non-jurisdictional, but that they wanted the determination to include a significant nexus evaluation for wetlands not identified as Relatively Permanent Waters (RPW) and/or wetlands not abutting RPWs.

On October 2, 2008, the District issued its CWA jurisdictional determination for the property. The District concluded that the site contained 2366.5 acres of waters of the United States, including wetlands that are within CWA jurisdiction. The District also determined that an additional 8.3 acres of wetlands on the property were isolated, non-jurisdictional wetlands. The Appellant disagreed and appealed, citing the reasons for appeal which are addressed in this appeal decision.

INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL REVIEW:

The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, and responses from the Appellant and the District to questions provided with the agenda and discussed at the appeal conference.

EVALUATION OF THE REASONS FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS:

Appeal Reason 1: The determination that wetlands 1, 5, 12, 15, 31, 56, and 61 as directly abutting RPWs and having a seasonal overland sheet flow connection when these wetlands clearly have no surface water connection and are heavily influenced by water levels in the isolated mine lakes is either inaccurate and/or lack significant nexus support.

Appeal Reason 2: Identifying wetlands 2, 3, 4, 8, 9, 11, 16, 20 – 30, 32, 55, 58, 69, and 70 as wetlands adjacent, but not directly abutting RPWs that flow directly or indirectly into TNWs, and having intermittent overland sheet flow connections is either inaccurate and/or lack significant nexus support.

Finding: These reasons for appeal have merit.

Action: For each wetland, the District must complete an analysis of whether wetlands on the property have a significant nexus with the nearest downstream TNW. The District must complete the required significant nexus analysis, as detailed in the Revised Guidance and appropriately modified in light of applicable case law (i.e., *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007)). The administrative record should contain clear documentation supporting any significant nexus determinations.

Discussion: In the Request for Appeal (RFA), the Appellant indicated that his appeal of the jurisdictional determination specifically relates to the Rapanos ruling and subsequent Corps guidance relating to significant nexus. The Appellant indicated that the project site is characterized primarily by two intermittent wetland sloughs and adjacent wetlands and four large lakes, permitted and designed to have no hydrologic outfall during normal years. While the Appellant did not question jurisdiction over the wetland sloughs and abutting systems, he concluded that the District failed to adequately address significant nexus on wetlands which do not directly abut the two sloughs, including a number of wetlands which he concludes are isolated from any reasonable surface water connection with the sloughs and which are drained by and into the isolated mine lakes. The Appellant disagrees with the District's determination that a significant nexus evaluation was not required, referencing the Supreme Court's opinions in the Rapanos case and the Corps' subsequent guidance.

The Appellant indicated, in his RFA that, while the Corps reviewer generally characterized the physical, chemical, and biological characteristics of wetlands in the Estero River Basin, the Corps did not identify specific values to these wetlands and specifically stipulated that a nexus determination was not needed for these wetlands. The Appellant further stated that, while he did not doubt that some of these wetlands would have a significant nexus, others, based on their isolation from the sloughs and based on their poor condition, would be difficult to identify more than a speculative value to a downstream TNW.

In both the July 28, 2008 and July 29, 2008, "ORM Printer Friendly JD Form" supporting its October 2, 2008, jurisdictional determination, the District indicated that there were wetlands abutting RPWs that flow directly or indirectly into TNWs and wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs on the property. In each of those JD forms, under part C, "Significant Nexus Determination", the District indicated that the significant nexus determination was "not applicable".

In response to questions asked at the appeal conference, the Appellant indicated that he thought many of the waters on site do not have the required surface connections to be determined jurisdictional under the plurality opinion. The Appellant also restated his concern expressed in his RFA that, while he believes that some of those wetlands may have a significant nexus to the downstream TNW, other wetlands on the site have been isolated from any surface water connection to downstream navigable waters based on previous approvals and construction of large mine lakes.

In response to questions asked at the appeal conference, the District indicated there was a shallow subsurface connection between all of the wetlands on site, and the wetlands collectively have a significant nexus to the TNW. Additionally, the District asserted that since all wetlands on site are similarly situated, they could all be evaluated with the same significant nexus analysis.

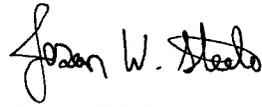
In *Rapanos v. United States*, 547 U.S. 715 (2006), the United States Supreme Court addressed the question of the circumstances under which a wetland or tributary is a "water of the United States" within the meaning of the CWA. The *Rapanos* decision included five opinions, with no single opinion commanding as majority of the court. The U.S. Army Corps of Engineers and Environmental Protection Agency issued guidance in response to the *Rapanos* decision. The December 2, 2008, "Clean Water Act Jurisdiction

Following the Supreme Court Decision in *Rapanos v. United States* and *Carabell v. United States* ("Revised Guidance") provides that "[w]here there is no majority opinion ..., controlling legal principles may be derived from those principles espoused by five or more justices." As a result, "regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied." Revised Guidance, p. 3. 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' [referred to as "RPWs"] connected to traditional navigable waters [TNWs], and to 'wetlands with a continuous surface connection to' 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 [TNWs]." Revised Guidance, pp. 1 – 3.

However, the Plurality Test may no longer be used to establish jurisdiction in the states of the 11th Circuit. The 2007 decision of the 11th Circuit Court of Appeals in *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), cert. denied sub nom, *United States 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/McWane* 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/McWane* decision, the Plurality Test may no longer be used to establish jurisdiction in the states of the 11th Circuit. The Revised Guidance, p. 3, n. 16, recognizes that "the Kennedy standard is the sole method of determining CWA jurisdiction in [the Eleventh] Circuit."

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CONCLUSION: For the reasons stated above, I find that the appeal has merit. The approved JD is remanded to the District to include sufficient documentation in the administrative record to support its JD and reconsider its JD as appropriate. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. This concludes the Administrative Appeal Process.

A handwritten signature in black ink that reads "Jason W. Steele". The signature is written in a cursive style with a large initial 'J' and a distinct 'S'.

Jason W. Steele
Administrative Appeals Review Officer
South Atlantic Division