

ADMINISTRATIVE APPEAL DECISION

JURISDICTIONAL DETERMINATION

US ONE PROPERTIES, LLC

FILE NUMBER 2004-1359

JACKSONVILLE DISTRICT

DATE: APRIL 20, 2008

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

Appellant: Mr. Roy Waldhauer.

Receipt of Request for Appeal (RFA): September 26, 2007.

Appeal Accepted: October 30, 2007.

Appeal Conference/Site Visit: January 17, 2008.

Summary of Decision: This appeal has merit. I find that the District must reassess jurisdiction and in accordance with applicable law, determine whether the wetlands on the Appellant's property, and any adjacent wetlands, have a significant nexus to a Traditional Navigable Water (TNW).

Background Information: On August 26, 2004, the District received an *Application for Works in Waters of the United States for US One Properties Office Complex*, located east of US 1, north of State Road 100, in Section 10, Township 12 South, Range 30 East, Bunnell, Flager County, Florida. The Appellant proposes to fill 2.15 acres of wetlands to construct an office complex with associated warehouse and parking facilities. The Application states that the District is expected to identify an estimated 2.149 acres of wetlands within the 2.249 project site.

The Application identified the on-site wetlands as contiguous with an adjacent wetland to the east. The wetland is classified as a mixed forested wetland and is dominated by a maple and sweet gum sub-canopy. The vegetative composition for the wetland was assessed as moderate quality and habitat value as low. The water quality of the wetland was considered low based on the run-off from the surrounding development and US 1.

A public notice for the proposed project was issued on January 31, 2005, and stated the wetlands are contiguous to the Trestle Bay Swamp in the Lower St. Johns River

watershed. The Appellant's consultants submitted additional information and a topographical survey stating that the application is not correct because the wetlands are isolated and do not discharge to Trestle Bay Swamp or any other TNW. The drainage system that does connect the on-site wetlands to a TNW must pass through a culvert that is higher in elevation than the ordinary high water levels of the drainage ditch, which would interrupt flow.

By letter dated September 19, 2006, the District advised the Appellant of pending JD guidance in light of the Supreme Court's 2006 decision in the *Rapanos/Carabell (Rapanos)* case concerning the scope of the Clean Water Act, specifically addressing adjacency. The Government issued its *Rapanos* Guidance on June 5, 2007¹, on how to conduct wetland determinations using the standards set by the Supreme Court in the *Rapanos* case. The Appellant opted to wait on the guidance and requested a new jurisdictional determination and on July 16, 2007, with supplied documentation indicating no significant nexus to a TNW.

On August 29, 2007, the District met with another applicant's consultant regarding another site (Cypress Woods) to observe and evaluate the effect of the hydrologic drainage features on the area that includes the Appellant's property. The District prepared a site inspection report to document the meeting. The report summarized that the subject wetland area is connected to a drainage ditch that flows to a Relatively Permanent Water (RPW) that eventually connects to a TNW.

Using the Cypress Woods report information, the District completed a jurisdictional determination on September 14, 2007, for this project, and determined the Appellant's proposed work site contained jurisdictional wetlands. The District used the new *Rapanos* JD form issued on June 5, 2007, and asserted jurisdiction on the basis that the wetlands directly abut a RPW that flows directly or indirectly into a TNW. Specifically, JD Form Section II.D.4. states:

Project site wetlands are part of a larger wetland system that is directly connected, via a culvert, to an RPW drainage canal that contains perennial flow. Field inspection of the culvert and canal confirmed the hydrologic connection and the level of water within the canal. The RPW flows into a larger RPW that eventually flows into Little Black Branch, a tributary to Haw Creek, which is a tributary to Crescent Lake.

The Appellant disagreed with the JD and appealed the decision to the South Atlantic Division Commander on September 26, 2007. The South Atlantic Division Appeal Review Officer (RO) accepted the appeal on October 30, 2007.

¹ The *Rapanos* Guidance included the following documents relevant to this appeal: a Memorandum Re: CWA Jurisdiction Following the U.S. Supreme Court Decision in *Rapanos v. United States*; an Approved JD Form; and, a Jurisdictional Determination Form Instructional Guidebook. Also released with these documents were Questions and Answers for *Rapanos and Carabell* Decisions. These materials are jointly referred to as the "*Rapanos* Guidance."

Appeal Conference/Site Visit: Michael Bell, Review Officer Observer Tom Cavanaugh, the Appellant, and his consultant Bert Heimer, and Attorneys Susan Stevens and Amelia Savage met District Project Managers Marie Huber and Mark Evans at the Appellant's office to discuss the reasons for appeal before visiting the site. The purpose of the appeal conference was to provide a forum that allows the participants to discuss freely all relevant issues and material facts associated with the appeal. The RO reviewed the project history then led a discussion on each reason for appeal. While reviewing the history of the project, it became apparent that neither the RO nor the Appellant had a complete copy of the administrative record (AR). All parties would later exchange the complete AR and a revised project history. The appeal reasons discussed are broken down below along with a summary of comments and answers given at the appeal conference.

Appeal reasons 1 and 2 reflect two arguments that the District lacks jurisdiction over the Appellant's wetlands: (1) that the drainage ditch in question is not a RPW, and (2) that the wetlands in question do not directly abut the drainage ditch. The Appellant also clarified that Woodland Avenue separates the larger wetland system from the drainage ditch. The District maintained its position that the project wetlands are part of a 90-acre wetland continuum that abuts the RPW, then flows through the culvert under Woodland Avenue to a TNW.

The Appellant disagreed with the argument that the culvert makes the connection and pointed out that the invert of the culvert is higher than the ditch or wetland surface elevations, and argued that water only flows intermittently through the culvert (there is not even seasonal flow), and the ditch normally contains only standing groundwater, as the ditch is cut below groundwater elevations. The District conceded that the inverts of the culvert are higher than the bottom of the ditch and wetlands and that the ditch normally contains only standing groundwater. The Appellant argued that the road and higher elevation culvert breaks any connection between the wetlands and the TNW, except intermediate flow.

Appeal reason 3 reiterates that the 90-acre wetland system does not discharge to waters of the United States, but collects water and is isolated. The inverted culvert actually moves water toward the center of the site rather than discharging the water. If a discharge occurs, it is only minimal. The District stated that enough water flows from the 90-acre wetland to establish RPW indicators in the channel.

Appeal reason 4 further carries the argument that the wetlands do not directly abut a RPW, as well as the argument that the Woodland Avenue Ditch is not, in fact, a RPW. The District stated that due to recent rain events, the RPW should be transporting water

to a TNW during the site visit.²

The Appellant clarified that appeal reason 5 was in response to the District's characterization that the roadside ditches running along or crossing under US 1 were RPWs, noting that the size of the culverts was probably of uniform design and not based on any expectation of a certain level or period of flow.

The Conference participants then discussed appeal reason 6 with the Appellant stating that no significant nexus exists between the subject wetlands and a TNW. Discussions concerning appeal reason 7 also revolved around the significant nexus issue. However, none of the Appellant's reasons for appeal asserted that the District was required to perform a significant nexus determination to establish jurisdiction. In response to appeal reasons 6 and 7, the District argued that there was no need for a significant nexus test to be done because of its assertion that the wetlands directly abut a RPW. The District acknowledged that if the wetlands were not directly abutting, then a significant nexus test would have been required.

The District relied on the recent *Rapanos* Supreme Court Decision and associated guidance to make the decision that no significant nexus is required for a wetland determination where the wetland abuts a RPW that discharges into a TNW. The *Rapanos* decision issued five opinions with no single opinion commanding a majority of the court. The *Rapanos* 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. **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 re CWA Jurisdiction*, p. 3 [emphasis added]. 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 re CWA Jurisdiction*, pp. 1 - 3. This is sometimes referred to as the “two test approach.”

However, after the District issued its *Rapanos* JD, the 11th Circuit Court of Appeals in *U.S. v. Robison*, 505 F.3d 1208 (11th Cir. 2007) disagreed with the “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-

² The site visit took place directly after the Conference. Water was observed flowing from wetlands abutting the RPW, through the Woodland Ave. culvert and apparently to a TNW.

in-fact body of water would not necessarily be sufficiently substantial to meet his "significant nexus" test." Under the rule of the *Robison* decision,³ the Kennedy Test must no longer be used to establish jurisdiction in the states of the 11th Circuit.

At the appeal conference, the Appellant asserted that due to *Robison*, Justice Kennedy's "significant nexus" test from *Rapanos* is the only valid test in Florida, and that the continuous hydrological connection test utilized by the District in its JD has been overcome by events. As all parties agreed a significant nexus determination was not done in this case, appeal reasons 6 and 7 were not discussed, nor were any arguments concerning significant nexus presented by either party. Counsel for the Appellant requested that the South Atlantic Division Commander include language in his decision that the significant nexus arguments were not ripe and that those arguments are preserved (presumably for additional appeal).

This JD appeal is in an unusual posture. Under the Administrative Appeals regulations, an Appellant has the ability to obtain reconsideration of an approved JD by submitting new information to the District Engineer within 60 days of the NAP. 33 CFR 331.6(c). The *Robison* decision was issued October 24, 2007, within the 60-day timeframe after the September 14, 2007 NAP. Within this timeframe, no official guidance was issued to the District regarding *Robison*, and reconsideration was not requested by the Appellant from the District. However, *Rapanos*, *Robison* has changed the applicable legal framework for determining jurisdiction. As a result of *Robison*, the reasons for appeal presented here are either academic or unaddressed in the administrative record. Accordingly, as a procedural matter in this appeal, the Appellant may have its JD reassessed as directed with issuance of an NAP and appeal rights.

FINDINGS: This appeal has merit. The 11th Circuit Court of Appeals Decision in *U.S. v. Robison*, 505 F.3d 1208, has rendered academic the specific reasons for appeal. Under *Robison*, the finding of Clean Water Act jurisdiction based solely on the conclusion that the Appellants' wetlands directly abut an RPW that flows into a TNW is insufficient - a significant nexus determination pursuant to the Kennedy Test is required. In order to assert CWA jurisdiction over the wetlands on the Appellants' property, the District must determine whether a significant nexus exists between these wetlands and a TNW, considering and documenting hydrologic and ecologic factors.

ACTION: The District must reassess jurisdiction and determine whether a significant nexus exists between the wetlands on the Appellant's property and a TNW using the Kennedy Test.

³ In the event that the *Robison* decision is appealed, its import may need to be reassessed.

CONCLUSION: As my final decision on the merits of the appeal, I conclude the Jacksonville District's JD is contrary to applicable law. The District must reassess jurisdiction and determine whether the wetlands on the Appellant's property, and any adjacent wetlands, have a significant nexus to a TNW. I hereby return this matter to the Jacksonville District for additional analysis as prescribed within this document. After the reassessment has been concluded, provide a copy of the District's final decision to me with the supporting documentation.



Joseph Schroedel
Brigadier General, US Army
Commanding