

ADMINISTRATIVE APPEAL DECISION

ALTON DAVIS

FILE NO. SAW-2016-01017

WILMINGTON DISTRICT

23 February 2017

Review Officer (RO): Jason Steele, U.S. Army Corps of Engineers, South Atlantic Division, Atlanta, Georgia; and Kyle Gordon, U.S. Army Corps of Engineers, Mississippi Valley Division, Vicksburg, Mississippi

Receipt of Request for Appeal: 20 October 2016

Acceptance of Request for Appeal: 14 November 2016

Appeal Meeting: 24 January 2017

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

SUMMARY OF DECISION

Mr. Alton Davis (Appellant) is appealing a U.S. Army Corps of Engineers (Corps), Wilmington District (District) approved jurisdictional determination (AJD) for a wetland on his property located in Swansboro, Onslow County, North Carolina (Property). The Appellant asserts the District incorrectly applied law, regulation, guidance, and policy when it determined that the unnamed tributary to Rooty Branch was a relatively permanent water (RPW), when it determined that the wetland on the Property connected to the unnamed tributary to Rooty Branch¹ through a man-altered drain, and when it concluded that the subject wetland was jurisdictional without determining that the wetland had a significant nexus to the nearest downstream Traditional Navigable Water (TNW), White Oak River.

For reasons detailed in this document, it is found that the District's Administrative Record (AR) contains sufficient documentation to support the AJD; therefore, the Appellant's reasons for appeal are found not to have merit. The District's AJD dated 18 May 2016 stands.

¹ The District's AJD determined that water flows from the wetland on the Property, to the unnamed tributary to Rooty Branch, then to Rooty Branch, then to Cartwheel Branch, and then to White Oak River, a Traditional Navigable Water. Furthermore, the District determined that Rooty Branch was the first named tributary in the flow route by utilizing Onslow County's web-based GIS mapping service found at <http://maps2.roktech.net/onslow/#>. The Notification of Jurisdictional Determination and AJD are in the AR at Bates stamp #004 – 015.

BACKGROUND

The Property is approximately 2.41 acres and is located at 918 West Corbett Avenue, Swansboro, Onslow County, North Carolina. While conducting a field investigation on 31 March 2016 for a separate AJD request on an adjacent tract (referred to as the Bailey Tract) that is located to the east of the Property, the District obtained permission from Mr. Davis to enter the Property to determine downstream jurisdiction of the Bailey Tract. On 13 May 2016, the District conducted an additional field investigation to delineate the wetland on the Property, and to determine the wetland's jurisdictional status. During this site investigation the District discovered fill in a wetland on the Property without proper Department of the Army authorization. On 18 May 2016, the District provided the Appellant with a Notice of Violation.² On 12 July 2016, the District received a delineation report completed by Mr. Larry Baldwin of Land Management Group, Inc., an agent acting on behalf of Mr. Davis. On 14 July 2016, the District conducted an additional site investigation to determine jurisdiction of the wetland on the Property. On 18 May 2016, the District issued an AJD for the Property,³ which concluded that a 1.3 acre wetland which is subject to the permit requirements of Section 404 of the CWA existed on the Property.⁴

The Appellant objected to the District's AJD and submitted a Request for Appeal (RFA) to the District and the South Atlantic Division (Division) on 8 August 2016. The RFA did not meet the criteria for appeal as set forth in 33 CFR § 331.5(b)(10) and § 331.11 because the AJD associated with the RFA included unauthorized fill in waters of the United States and, although the District had initiated an enforcement action against the Appellant, the Appellant did not provide a signed tolling agreement and after-the-fact permit application. The Division notified the Appellant and District of the deficiency via email dated 11 August 2016. In response, on 23 August 2016, the Division received an executed tolling agreement⁵ and RFA. The District subsequently received a copy of the tolling agreement that should be used Corps-wide, and the District and Appellant executed a new tolling agreement that conformed with the tolling agreement for Corps-wide use. On 20 October 2016, the Appellant provided its RFA, the signed Tolling Agreement,⁶ and after-the-fact permit application to the District and Division. The Division determined that the revised RFA was acceptable and met the criteria for appeal and notified the Appellant of the acceptance of the RFA on 14 November 2016.

² Bates stamp #151-152.

³ AR, Bates stamp #006 - 034, 103 - 104. The Appellant requested the District to reconsider its AJD and, on 29 July 2016, the District concluded its reconsideration and again issued the AJD to the Appellant. AR, Bates stamp #085 - 086.

⁴ AR, Bates stamp #008, Section II.B.1.

⁵ AR, Bates stamp #081 - 084.

⁶ AR, Bates stamp #082-084.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

The administrative appeal was evaluated based on the District's AR, received by the RO on 23 November 2016, the Appellant's RFA, and the discussions at the 24 January 2017 appeal meeting. The RO documented a summary of the appeal meeting topics and discussion in a memorandum for record (MFR). On 27 January 2017, a draft MFR was provided to the Appellant and the District via email with a request to review and provide comment by 3 February 2017. The RO received comments from the Appellant and the District regarding the MFR on 1 February 2017 and 3 February 2017, respectively. The MFR was finalized on 3 February 2017.

SUMMARY OF APPELLANT'S REASONS FOR APPEAL

Appeal Reason 1: The District incorrectly determined the unnamed tributary to Rooty Branch to be an RPW by using "speculative or insubstantial" indicators of continuous flow and Ordinary High Water Mark (OHWM), and also ignored guidance regarding the jurisdiction of ditches located in uplands.

Appeal Reason 2: The District incorrectly determined that the wetland on the Property abutted the unnamed tributary to Rooty Branch by establishing a connection through a man-altered drain.

Appeal Reason 3: The District incorrectly concluded that the subject wetland was jurisdictional without determining that the wetland had a significant nexus to the nearest downstream TNW.

EVALUATION OF THE REASONS FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE WILMINGTON DISTRICT COMMANDER

Appeal Reason 1: The District incorrectly determined the unnamed tributary to Rooty Branch to be an RPW by using "speculative or insubstantial" indicators of continuous flow and OHWM, and also ignored guidance regarding the jurisdiction of ditches located in uplands.

Finding: This reason for appeal does not have merit.

Discussion: As a result of the U.S. Supreme Court *Rapanos*⁷ decision, the U.S. Environmental Protection Agency and the Department of the Army issued a memorandum entitled, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, dated June 5, 2007, and amended December 2, 2008 (Rapanos Guidance).⁸

⁷ Combined cases of *Rapanos v. United States* and *Carabell v. United States*, 126 S. Ct. 2208 (2006).

⁸ The original guidance was released on 5 June 2007 in response to the U.S. Supreme Court consolidated cases of *Rapanos v. United States* and *Carabell v. United States*, 126 S. Ct. 2208 (2006). Revised guidance was released on 2 December 2008.

The Rapanos Guidance outlines the application of two standards to support an agency AJD for certain water bodies, including tributaries – the plurality’s standard or Justice Kennedy’s standard. Regulatory jurisdiction under the Clean Water Act exists over a water body if either of these two tests is met, except for in the Eleventh Circuit, which requires the application of the Kennedy test.⁹ The State of North Carolina is in the Fourth Circuit.

As specified in the Rapanos Guidance, agencies will assert regulatory jurisdiction over TNWs and their adjacent wetlands, as well as a water body that is not a TNW if that water body is "relatively permanent" (i.e., it flows year round or has continuous flow at least "seasonally" (typically 3 months)) and their adjacent wetlands if the wetlands directly abut such water body.

For tributaries that are not relatively permanent, a "significant nexus" analysis is required to determine whether waters and their adjacent wetlands are jurisdictional. A significant nexus may be found where a tributary, including its adjacent wetlands (if applicable), has more than a speculative or insubstantial effect on the chemical, physical and biological integrity of a TNW. Consequently, the agencies may assess jurisdiction over a water body that is not a RPW if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water bodies that are subject to CWA jurisdiction, if such a significant nexus is demonstrated, are: (1) wetlands adjacent to, but not directly abutting, relatively permanently non-navigable waters, (2) non-relatively permanent waters, and (3) wetlands adjacent to those non-relatively permanent waters.

To have thorough and consistent documentation, the Corps uses a standardized AJD Form. The *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (JD Guidebook), dated 30 May 2007, establishes standard operating procedures to conduct and document an AJD, provides instructions to complete the AJD Form, clarifies terms commonly used in the Form, presents an overview on jurisdictional practices, and supplements the AJD Form instructions.

The term "waters of the United States" is defined by regulations to include "tributaries".¹⁰ The Rapanos Guidance and the JD Guidebook further define a tributary as a "natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water."¹¹ For the purposes of determining and documenting jurisdiction of a tributary, the JD Guidebook describes a tributary as "the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such

⁹ The Eleventh Circuit concluded that the Kennedy standard is the sole method of determining CWA jurisdiction in that Circuit in *United States v. McWane, Inc. et al.*, 505 F.3d 1208 (11th Cir. 2007) (*cert. denied*, 555 U.S. 1045 (2008)).

¹⁰ 33 C.F.R. § 328.3(a)(5).

¹¹ Rapanos Guidance, 6; see also JD Guidebook, 21.

tributary enters a higher order stream).¹² The flow characteristics of a particular tributary will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream).¹³ Where the downstream limit of a tributary is not representative of the entire tributary, the flow regime that best characterizes the entire tributary should be used.¹⁴

As mentioned above, while the Rapanos Guidance states that the Corps will assess jurisdiction over RPWs, the JD Guidebook clarifies that "...an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least seasonally (e.g., typically 3 months)."¹⁵ Examples of hydrologic information to consider when determining flow are gage data, flood predictions, historic records of water flow, statistical data, and personal observations/records.¹⁶ Examples of physical indicators of flow are the presence and characteristics of a reliable OHWM with a channel defined by bed and banks.¹⁷ Other physical indicators of flow may include shelving, wracking, water staining, sediment sorting, and scour.¹⁸

In the First Reason for Appeal, the Appellant alleges that the District incorrectly determined the unnamed tributary to Rooty Branch to be an RPW by using "speculative or insubstantial" indicators of continuous flow. In Section III.D.2. of the AJD Form, the District determined that the entire reach of the unnamed tributary to Rooty Branch was a perennial RPW.¹⁹ Additionally, during the appeal meeting, the District clarified that its AJD concluded the entire reach of the unnamed tributary to Rooty Branch was perennial from the culverts underneath Charleston Park Lane downstream to Rooty Branch.²⁰

Also, the District documents support for its conclusion that the unnamed tributary was a perennial RPW, including its analysis of aerial imagery, multiple site visits, the observable flow regime in the unnamed tributary to Rooty Branch (even with an unauthorized berm located on the Property which removed a substantial input of flow), and predicted flow due to the number and size of culverts under Charleston Park Lane.²¹

As noted above, the District reviewed aerial imagery and other supporting data in its assessment of the jurisdiction of the unnamed tributary to Rooty Branch. Specifically, in Section III.D.2. of the AJD Form, the District concluded that "a substantial topographic crenulation is apparent in both the LIDAR data and USGS topo map which is consistent

¹² JD Guidebook, 40.

¹³ JD Guidebook, 40.

¹⁴ Rapanos Guidance, 6, n.24.

¹⁵ JD Guidebook, 50, n.6.

¹⁶ JD Guidebook, 55.

¹⁷ JD Guidebook, 55.

¹⁸ JD Guidebook, 55.

¹⁹ AR, Bates stamp #012-013.

²⁰ MFR, 3.

²¹ AR, Bates stamp #012-013 (Section III.D.2.), 015 (Section IV.B.).

with features that contain perennial flow.”²² During the appeal meeting, the District clarified that available resources were accessed to obtain relevant information, such as groundwater level data compiled by the North Carolina Division of Water Resources, which supported its findings in the field. The District sufficiently documented its decision based on its analysis of specific, acceptable supporting data.

Using physical indicators obtained during its site visits, the District determined that the unnamed tributary to Rooty Branch is a perennial RPW, and that the tributary “begins at the eastern extent of the culverts underneath Charleston Park Lane”, continues westward through the culverts under Charleston Park Lane, daylights into a rip rap-lined scour pool, and then flows back into a series of culverts at which point it enters Rooty Branch.²³ The District observed impounded, exposed groundwater immediately upstream of the culverts under Charleston Park Lane, and concluded that this impoundment of groundwater indicated consistent flow.²⁴ The District’s conclusion that exposed groundwater indicated consistent flow is supported by the definitions in the Corps’ reissuance of the 2012 Nationwide Permits, which states, “A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.”²⁵ The District also observed additional exposed groundwater downstream of the culverts at the unnamed tributary to Rooty Branch’s confluence with Rooty Branch, as well as indicators of perennial flow in Rooty Branch.²⁶ Furthermore, the District observed staining inside the culverts under Charleston Park Lane, and scour immediately downstream of the culverted section of the unnamed tributary to Rooty Branch,²⁷ both of which are listed as physical indicators of flow in the Rapanos Guidance.²⁸

As mentioned above, the District determined that the unnamed tributary to Rooty Branch begins at the eastern extent of the culverts underneath Charleston Park Lane, continues westward through the culverts under Charleston Park Lane, daylights into a riprap-lined scour pool, and then flows into Rooty Branch.²⁹ This flow path results in portions of the tributary being located within the culverts under Charleston Park Lane and the culverts between Charleston Park Lane and Rooty Branch. During the appeal meeting, the Appellant questioned the Corps’ jurisdiction over the piped and culverted section of the unnamed tributary to Rooty Branch.³⁰ Pipes and culverts do not necessarily sever jurisdiction with the upstream waters. The JD Guidebook shows

²² AR, Bates stamp #013.

²³ AR, Bates stamp #012-013.

²⁴ AR, Bates stamp #012-013, 071.

²⁵ Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184, 10,289, (February 21, 2012) (final notice).

²⁶ AR, Bates stamp #013.

²⁷ AR, Bates stamp #013.

²⁸ Rapanos Guidance, 10-11

²⁹ AR, Bates stamp #012-013.

³⁰ MFR, 7.

examples of two such cases and instructs field staff to make a case-by-case determination on jurisdictional status of the aquatic resource.³¹

On Appellant's Property, the District observed impounded, exposed groundwater immediately upstream of the culverts under Charleston Park Lane, and concluded that this impoundment indicated consistent flow.³² The District also observed additional exposed groundwater downstream of the culverts at the unnamed tributary to Rooty Branch's confluence with Rooty Branch, and indicators of perennial flow in Rooty Branch.³³ Furthermore, the District observed staining inside the culverts under Charleston Park Lane, and scour immediately downstream of the culverted section of the unnamed tributary to Rooty Branch,³⁴ both of which are listed as physical indicators of flow in the Rapanos Guidance.³⁵ The District satisfied the JD Guidebook by determining the jurisdictional status and flow regime throughout the reach of the tributary.

The District also considered information provided by Mr. Eric Jones of Sanders Ford, a car dealership located immediately adjacent and to the east of the Property, to conclude that the unnamed tributary to Rooty Branch was a perennial RPW. In the District's discussions with Mr. Jones during the site visit on 14 July 2016, Mr. Jones indicated that, prior to the unauthorized berm being constructed, water would routinely flow during rainfall events through the linear wetland feature located on the Sanders Ford property, and, that during higher flows, Charleston Park Lane would be overtopped by water flowing down the wetland.³⁶ The Appellant (represented by Mr. Charles Lanier) disagreed with Mr. Jones' statement during the appeal meeting.³⁷

The Appellant provided its own information in the AR regarding the adjacent Sanders Ford property, which contradicted the information provided by Mr. Jones. This information included an affidavit from Mr. Charles Riggs, in which Mr. Riggs stated, "At the time I surveyed the [Sanders Ford] property, there were no ditches crossing the property lines."³⁸ During the appeal meeting, the District indicated that it considered Mr. Riggs' affidavit as part of its decision, but disagreed with his statement. The District indicated that the linear wetland feature on the Sanders Ford property was visible on the 1993 aerial found on page 170 of the AR and the 1983 aerials found in the Onslow County Soil Survey book.³⁹

³¹ JD Guidebook, 35.

³² AR, Bates stamp #012-013, 071.

³³ AR, Bates stamp #013.

³⁴ AR, Bates stamp #013.

³⁵ Rapanos Guidance, 10-11.

³⁶ AR, Bates stamp #57, 71; MFR, 5.

³⁷ MFR, 7.

³⁸ AR, Bates stamp #173.

³⁹ MFR, 5.

In addition to the documentation discussed above, the District also relied on anticipated flow in the absence of the unauthorized berm located on the Property to document the flow regime of the unnamed tributary to Rooty Branch.⁴⁰ The District documented the presence of a berm constructed in a wetland on the Property without proper Department of the Army authorization,⁴¹ which is further described in the discussion for the Second Reason for Appeal. The District concluded that the unauthorized berm prevented flow from the wetland on the property from entering the unnamed tributary, which removed a “substantial input of flow into the hydrologic regime”.⁴² The District also concluded that in the absence of the unauthorized berm, “more surface flow would be contributing to downstream flow”.

As mentioned above, an adjacent stakeholder stated to the District that, prior to the unauthorized berm being constructed, water would routinely flow during rainfall events through the linear wetland feature located on the Sanders Ford property. The District was also told that, during higher flows, Charleston Park Lane would be overtopped by water. While the Appellant disagreed at the appeal meeting that Charleston Park Lane could be overtopped during rainfall events, the Appellant agreed with the District regarding the berm’s ability to impede flow.⁴³ On the AJD Form, the District also noted that, even with the reduced hydrologic input to the unnamed tributary to Rooty Branch, it was still able to document indicators of perennial flow in the tributary.

In addition to alleging that the District used “speculative or insubstantial indicators of continuous flow,” the Appellant alleged that the District incorrectly determined the unnamed tributary to Rooty Branch to be an RPW by using “speculative or insubstantial” indicators of OHWM. During the appeal meeting, the Appellant disagreed with the District’s use of staining as an indicator of OHWM.⁴⁴ The term OHWM means “that line on the shore established by the fluctuations of water and indicated by physical characteristics.”⁴⁵ In non-tidal waters that lack adjacent wetlands, the Corps’ jurisdiction extends to the OHWM.⁴⁶

To provide guidance for identifying the OHWM of tributaries, the Corps issued Regulatory Guidance Letter (RGL) No. 05-05 (Ordinary High Water Mark Identification). RGL No. 05-05 provides a list of physical characteristics to be considered when making an OHWM determination.⁴⁷ While there are no required physical characteristics that must be present to make an OHWM determination, districts should generally try to identify two or more characteristics, unless there is particularly strong evidence of one.⁴⁸

⁴⁰ AR, Bates stamp #013.

⁴¹ AR, Bates stamp #025, 041-043, 053.

⁴² AR, Bates stamp #013.

⁴³ MFR, 7.

⁴⁴ MFR, 7.

⁴⁵ 33 C.F.R. § 328.3(e).

⁴⁶ 33 C.F.R. § 328.4(c).

⁴⁷ RGL No. 05-05, 3.

⁴⁸ RGL No. 05-05, 3.

In the case of the AJD, the District documented three physical OHWM indicators that are listed in RGL NO. 05-05: scour, multiple observed flow events, and water staining.⁴⁹

During the appeal meeting, the Appellant questioned Corps jurisdiction over the piped and culverted section of the unnamed tributary to Rooty Branch.⁵⁰ The AJD Form states, "A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development of agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break."⁵¹ The District's AJD documented OHWM indicators upstream and downstream of the culverted section of the unnamed tributary to Rooty Branch, and also documented OHWM indicators within the culvert.

During the appeal meeting, the Appellant also clarified that he disagreed with the District exerting jurisdiction over the unnamed tributary between Rooty Branch and Charleston Park Lane because these features exhibited characteristics of a ditch that flows through uplands, a feature that he indicated should not be jurisdictional according to the Rapanos Guidance.⁵² Specifically, the portion of the Rapanos Guidance to which the Appellant referenced states that "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters."⁵³ Because the District's AJD concluded that the unnamed tributary to Rooty Branch has a relatively permanent flow, this statement in the Rapanos Guidance is not applicable.

In the case of this AJD, the District determined that the Corps maintained jurisdiction over the unnamed tributary to Rooty Branch because it is not a drainage ditch excavated in dry land. Instead, the District determined that the unnamed tributary to Rooty Branch is man-altered but was created from a natural tributary, based on its review of historic aerials, USGS maps, and LIDAR topography data.⁵⁴

The District's AJD regarding the perennial RPW determination for the unnamed tributary to Rooty Branch is adequately documented and substantiated by the AR; therefore, this reason for appeal does not have merit.

Action: No further action is required by the District.

⁴⁹ AR, Bates stamp #012-013, 015, 027-028.

⁵⁰ MFR, 7.

⁵¹ AR, Bates stamp #10, n.6.

⁵² MFR, 7.

⁵³ Rapanos Guidance, 12.

⁵⁴ MFR, 7.

Appeal Reason 2: The District incorrectly determined that the wetland on the Property abutted the unnamed tributary to Rooty Branch by establishing a connection through a man-altered drain.

Finding: This reason for appeal does not have merit.

Discussion: As discussed in the First Reason for Appeal, the Rapanos Guidance describes the application of two standards to support an agency AJD for certain water bodies, including tributaries. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over TNWs and their adjacent wetlands, as well as a water body that is not a TNW, if that water body is "relatively permanent" (i.e., it flows year round or has continuous flow at least "seasonally" (typically 3 months)) and over wetlands adjacent to such water bodies if the wetlands directly abut the water body.

In the RFA and clarified during the appeal meeting, the Appellant disagreed that the "swale drain" located between the Property and Charleston Park Lane is jurisdictional because it does not have any indicators OHWM, and it has a break in topography that would preclude it from being a tributary with perennial flow.⁵⁵ In the appeal meeting, the District explained that human alteration of an aquatic feature does not preclude it from being considered a wetland and, furthermore, the "man-altered drain" meets all three wetland criteria and is a contiguous wetland feature.⁵⁶ In Section III.D.4. of the AJD Form, the District determined that a portion of the Property met the definition of a wetland,⁵⁷ and that the wetland was part of a larger, contiguous wetland complex that flowed offsite to the west and directly abutted the relatively permanent, unnamed tributary to Rooty Branch.⁵⁸ The District documented the wetland on the Property and the offsite wetland complex by utilizing the 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual)⁵⁹ and the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region* (Regional Supplement)⁶⁰, and the District recorded the data on Wetland Determination Data Forms.⁶¹ The Appellant's agent, Mr. Larry Baldwin, Land Management Group, Inc., provided a wetland delineation report on 12 July 2016 which also documented a wetland and fill within that wetland on the Property.⁶²

⁵⁵ MFR, 6.

⁵⁶ MFR, 6.

⁵⁷ 33 C.F.R. § 328.3(b).

⁵⁸ AR, Bates stamp #013.

⁵⁹ Environmental Laboratory. 1987. *Corps of Engineers Wetlands Delineation Manual*. U.S. Army Engineer Waterways Experiment Station, Vicksburg, Miss. Technical Report Y-87-1.

⁶⁰ U.S. Army Corps of Engineers. 2010. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)*, ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-10-20. Vicksburg, MS: U.S. Army Engineer Research and Development Center.

⁶¹ AR, Bates stamp #035-037, 041-043, 044-049.

⁶² AR, Bates stamp #113-148.

While Mr. Baldwin's delineation report and the District's AJD both concur that wetlands are present on the Property, Mr. Baldwin initially disagreed with the District's determination that the wetland continues offsite to the west through a wetland complex into the unnamed tributary to Rooty Branch. Instead, the Appellant states that the wetland on the Property is isolated, the District's hydrologic connection is through a man-altered drain,⁶³ and wetland determinations cannot accurately be made within an altered area.⁶⁴

The Corps guidance document titled "Questions and Answers for *Rapanos* and *Carabell* Decision" (Rapanos Decision Q&A) states, "Unless an area has been altered or is a rare natural situation, wetland indicators of all three characteristics must be present during some portion of the growing season for an area to be a wetland."⁶⁵ This statement means that if an area is altered or rare, the Corps does not need to document all three indicators of wetland characteristics (that is, wetland hydrology, hydrophytic vegetation, and hydric soils) because all three may not be present.

In the District's AJD, it documented that indicators of all three wetland characteristics were present in the man-altered drain on two Wetland Determination Data Forms dated 15 May 2016,⁶⁶ even though documentation of all three were not necessary. Mr. Baldwin also documented the presence of wetlands within the man-altered drain in his delineation report on Wetland Determination Data Form 7.⁶⁷ In email discussions between the District and Mr. Baldwin, the District indicated that Mr. Baldwin's Wetland Determination Data Form 12⁶⁸ erroneously omitted the wetland hydrology indicator of Saturation (A3),⁶⁹ even though Mr. Baldwin recorded on the Wetland Determination Data Form that saturation was present within 10 inches of the soil surface.⁷⁰ In subsequent email correspondence, Mr. Baldwin agreed that the sampling point located at Wetland Determination Data Form 12 and "the [Property] and portions to the west" met the indicators of all three wetland characteristics.⁷¹

As described above, the District documented the presence of a wetland on the Property, and concluded that the wetland was jurisdictional because of a continuous connection to the unnamed tributary (a RPW) to Rooty Branch through a contiguous linear wetland feature. Rapanos Guidance states that "a continuous surface connection exists between a wetland and a relative permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature)."⁷²

⁶³ AR, Bates stamp #087.

⁶⁴ MFR, 2.

⁶⁵ Questions and Answers for *Rapanos* and *Carabell* Decision, page 3 (June 5, 2007).

⁶⁶ AR, Bates stamp #044-049.

⁶⁷ AR, Bates stamp #140-142.

⁶⁸ AR, Bates stamp #146-148.

⁶⁹ Regional Supplement, pages 85-86.

⁷⁰ AR, Bates stamp #073-074.

⁷¹ AR, Bates stamp #072.

⁷² Rapanos Guidance, 7.

The Rapanos Decision Q&A further explains, “Wetlands that are not separated from the tributary by an upland feature, such as a berm or dike is ‘abutting.’”⁷³

In Section III.D.4. of the AJD, the District determined that “Pre-violation (ie construction of the berm/dam across the outlet) there was no physical barrier between the on-site wetlands and the RPW identified in section III.D.2.”⁷⁴ The presence of the unauthorized berm was documented by the District, which it concluded separated the wetland on the Property from the other portions of the wetland complex located west of the Property.⁷⁵ While the unauthorized berm served as a barrier between the Property and the offsite wetland system (and ultimately the unnamed tributary to Rooty Branch), the regulations at 33 C.F.R. § 323.2(d)(4) states, “Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.” As discussed above, the district adequately documented the presence of wetlands on the Property, and the continuance of this wetland complex in a westward direction offsite, which the District determined was a continuous surface connection to the unnamed tributary to Rooty Branch.⁷⁶ During the appeal meeting, the Appellant clarified that he did not disagree with the District’s determination that the berm did not sever jurisdiction of the wetland on the Property.⁷⁷

In addition to the reasons for appeal listed in the RFA, the Appellant clarified during the appeal meeting that he disagreed with the District exerting jurisdiction over the “swale drain” (also referred to as a ditch in discussions) between the Property and Charleston Park Lane because it exhibits characteristics of a swale, a feature that he indicated should not be jurisdictional according to the Rapanos Guidance.⁷⁸ While the Rapanos Guidance states that swales “are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters,”⁷⁹ the District documented that indicators of all three wetland characteristics were present in the “swale drain” (see above discussion). In doing so, the District determined that the “swale drain” is jurisdictional because it is a wetland that is part of a contiguous wetland system that directly abuts an RPW.

As required by the JD Guidebook,⁸⁰ and supported by law, regulation, policy, and guidance, the District adequately documented a wetland on the property and properly demonstrated that the wetland is part of a larger, contiguous wetland system that

⁷³ Rapanos Decision Q&A, 4.

⁷⁴ AR, Bates stamp #013.

⁷⁵ AR, Bates stamp #041-044.

⁷⁶ The District also noted its previous jurisdictional determinations that identified this wetland on adjacent properties as jurisdictional. Wetland Determination Data Form, Bates Stamp #035.

⁷⁷ MFR 7.

⁷⁸ MFR 7.

⁷⁹ Rapanos Guidance, 11-12.

⁸⁰ JD Guidebook, 57.

continues off the Property to the west, and abuts a perennial RPW via a continuous surface connection. Therefore, this reason for appeal does not have merit.

Action: No further action is required by the District.

Appeal Reason 3: The District incorrectly concluded that the subject wetland was jurisdictional without determining that the wetland had a significant nexus to the nearest downstream TNW.

Finding: This reason for appeal does not have merit.

Discussion: In summary, the law did not require a significant nexus test to be performed because the Corps will assert jurisdiction over wetlands that directly abut a relatively permanent tributary. Also, a significant nexus test was not required as a matter of policy because the policy requires Corps districts to include any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands, if any) and a traditional navigable water. The relatively permanent tributary on Appellant's Property, however, is perennial.

The Rapanos Guidance states, the "agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding."⁸¹ The Guidance also states that "the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding", as long as "a continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature)."⁸² A case-specific, fact-based significant nexus analysis is only required when determining CWA jurisdiction of non-navigable tributaries that are not relatively permanent, wetlands adjacent to non-navigable tributaries that are not relatively permanent, and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.⁸³

As discussed in the First and Second Reasons for Appeal, the District adequately documented that the wetland on the Property was part of a larger, contiguous wetland system that continued off the Property to the west. Next, the District adequately documented that the contiguous wetland system, of which the wetland on the Property is a part of, has a direct surface connection to the unnamed tributary to Rooty Branch. Finally, the District adequately documented that the unnamed tributary to Rooty Branch was a perennial RPW that connects to a TNW, White Oak River.

⁸¹ Rapanos Guidance, 7.

⁸² Rapanos Guidance, 7.

⁸³ Rapanos Guidance, 1.

Since the Rapanos Guidance states that the Corps will assert jurisdiction over RPWs and their abutting wetlands without a legal obligation to make a significant nexus finding,⁸⁴ a case-specific significant nexus analysis was not required for this AJD. Furthermore, because the RPW was determined to be perennial, a significant nexus finding was not required by policy. Therefore, this reason for appeal does not have merit.

Action: No further action is required by the District.

CONCLUSION

For the reasons stated above, I find that this appeal does not have merit. The District's AR contains sufficient documentation to support the AJD. The District's determination was not otherwise 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

⁸⁴ Rapanos Guidance, 12.