

ADMINISTRATIVE APPEAL DECISION

JURISDICTIONAL DETERMINATION

ANTONIO ORBAY, PRESIDENT OF XANA DEVELOPMENT, INC.

FILE NUMBER 2005-600

JACKSONVILLE DISTRICT

DATE: FEBRUARY 21, 2008

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

Appellant: Mr. Antonio Orbay.

Receipt of Request for Appeal (RFA): December 3, 2007.

Appeal Accepted: January 2, 2008.

Appeal Conference/Site Visit: February 19, 2008.

Summary of Decision: I find this appeal has merit. The information contained in the administrative record did not properly support or document the jurisdictional determination according to applicable laws, regulations, and policy guidance. I hereby return this matter to the Jacksonville District for reconsideration and/or additional analysis as prescribed within this document.

Background Information: On March 1, 2005, The District issued a Cease and Desist order to the Appellant for the unauthorized discharge of fill material into approximately 75 meters of an unnamed tributary that eventually connects to the Bayamón River. The appellant did have authorization to fill the area from local and Puerto Rican authorities. The purpose of the work is for the construction of the Laderas de Monteverde Residential Development. The project is located to the west of Street Number 3 of the Carmen Hills neighborhood, at Camarones Ward, Municipality of Guaynabo, Puerto Rico.

On June 2, 2005, the Appellant filed an after-the-fact permit application to discharge fill material into approximately 0.037 acres (75 linear meters) of Waters of the US. In addition, the Appellant is requesting to discharge new fill material into approximately 0.061 acres (123.5 linear meters) of the intermittent tributary located north of the existing fill. The tributary runs in a north-south direction across the 5.57-acre property where the Appellant intends to construct 47 single-family residential units. The unnamed tributary's 190.9 meters drains a 15.36-acre upland residential complex. The

residential complex drains primarily storm-water runoff through a 42-inch headwall into the Appellant's property and forms the intermittent creek that is the subject of the appeal. The Appellant included a Jurisdictional Determination (JD) report with his application. The JD concluded that the length of the tributary on the proposed project is a Water of the US, based on the Corps pre-Rapanos interpretation of waters that includes ephemeral streams and drainages as regulated waters.

On May 22, 2007, the District issued an individual permit to the Appellant authorizing the existing fill and 0.061 acres of additional fill into the unnamed tributary. The permit authorized the realignment and channelization of the tributary into reinforced concrete pipe. The Appellant offered mitigation to compensate for the stream impacts. The District notified the Appellant that he would have the opportunity to readdress the JD following the issuance of the expected Corps guidance concerning the Carabell/Rapanos Supreme Court decision (*Rapanos*).

The Corps issued guidance on June 5, 2007, on how to conduct determinations using the standards set by the Supreme Court in the *Rapanos* case. On June 28, 2007, Mr. Laredo González, on behalf of the Appellant, requested the District to re-evaluate the JD pursuant to the *Rapanos* guidance. The District first asked the Appellant to complete a new JD using the June 5, 2007, guidance. The Appellant completed a JD and determined the tributary is non-jurisdictional because it only serves to drain the storm-water runoffs from the relatively small residential complex located upland of the project. The Consultant also stated that no significant nexus existed between the tributary and a Traditional Navigable Water (TNW).

The District completed a *Rapanos* JD on October 3, 2007, and determined the tributary on the proposed work site is a jurisdictional Water of the US with a significant nexus to a TNW. The District forwarded the draft JD to the Environmental Protection Agency (EPA) Region IV, for coordination and review. EPA declined to comment on, or elevate the determination. The Appellant disagreed with the District's determination and appealed the decision to the South Atlantic Division Commander on December 3, 2007. The South Atlantic Division Appeal Review Officer (RO) accepted the appeal on January 2, 2008.

Site Visit: Michael Bell, Mr. Antonio Orbay, Rafael A. Toro-Ramírez, P.E., Esq., Consultant Laredo González, and District Project Manager Carmen Roman and Field Office Manager Sindulfo Castillo attended the site investigation on February 19, 2008. The attendees began the investigation at the Appellant's property and observed the unnamed tributary. The total length of the tributary is 198.5 meters and approximately 2 meters wide. The violation occurred near the southern end the project site and was resolved by restoration.

The unnamed tributary drains a 15.36-acre upland residential complex. The residential complex produces storm-water runoff that flows through a 42-inch culvert that is under the entrance road (Street Number 1) and down a steep embankment. Water pooled at the bottom of the embankment and contained small fish. The water then moved

underground and did not resurface. The Appellant stated the entire floodplain adjacent to the tributary had been a waste site for construction debris and the channel was cut through the debris. The tributary appeared to move below the subject channel and into the historic construction debris.

The RO concluded the field investigation and the attendees discussed the Reasons for Appeal (RFA).

APPEAL EVALUATION, FINDINGS and INSTRUCTIONS to the Jacksonville District Engineer (DE):

The Appellant listed five reasons for appeal with over 50 supporting citations and/or statements. The reasons for appeal and the supporting documentation has been combined, when possible, to allow for a manageable decision-making process and document.

Appeal Reason I: A comparison of the new JD Form completed by the Corps with the one completed by the Appellant's environmental professional reflects the following significant aspects. [Corps use of incorrect data]

FINDINGS: This reason for appeal has merit.

ACTION: The District is required to revisit its jurisdictional determination to document and adequately explain the watershed and tributary characteristics.

Discussion: The Appellant's RFA stated the Corps used incorrect data when completing the tributary section of their Approved Jurisdictional Determination Form (JD Form).

In section III (B) (1)(ii)(b) of the Corps' JD Form identifies the tributary as Natural and Manipulated, and limit the man-altered characteristics of the tributary to the already filled [relocated] portion of the ditch. Here the Corps fails to mention the documented origin of the ditch, which was carved on man deposited material and construction debris, by the water poured by a man-made storm water system through a discharge headwall into the project's site. This was identified and described by the Appellant at the Section III(B)(1)(ii)(b) of its' JD Form.

The administrative record contains a soil map, which appears to show an intermediate tributary on the site before the upstream development occurred. The record also states that the tributary headwaters had been filed for residential housing. However, the JD Form does not contain this information. The headwater information is important in determining if the tributary is a roadside ditch "excavated wholly in and draining only uplands", which would effect the jurisdictional status of the subject tributary (see discussion in Appeal Reason 5). In addition, during the site visit, the District and the Appellant agreed that the tributary is not natural; it was excavated in construction debris. The JD Form is incorrect.

The Appellant additionally stated that the JD Form was in contrast to the Appellant's version of the form concerning the presence of a significant nexus between the tributary on the project site and a TNW. Appeal Reasons 3 and 4 will discuss the significant nexus issues.

Appeal Reason 2: The Corps' determination on "Seasonal Flow" is not supported by evidence and is contradictory with its own conclusion that the subject tributary is a Non-RPW.

FINDINGS: This reason for appeal has merit.

ACTION: The District is required to revisit its jurisdictional determination to support or remove the seasonal flow classification from the tributary.

Discussion: The RFA references Section III(B)(1)(ii)(c) from the JD Form that addresses tributary flows. In this section, the District determined that the subject tributary had a seasonal flow. However, in the Summary of Findings section of the JD Form the District concluded the same tributary is a non-Relatively Permanent Water (RPW) that flows directly or indirectly into a TNW. A non-RPW would not have a seasonal flow and would require a significant nexus determination to be jurisdictional. The District completed the significant nexus determination.

The Corps *US Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (Guidebook) states that the Corps will assert jurisdiction over "non-navigable tributaries of TNWs that are relatively permanent. The Guidebook defines RPWs as "tributaries that typically flow year-round (e.g. except due to drought) or have continuous flow at least seasonally (typically three months)." However, in this case, the District also determined that the subject tributary is a non-RPW. Therefore, it is a contradiction on the part of the District to conclude that the subject tributary has "Seasonal Flow" and thus, is an RPW, while at the same time concluding that it is a non-RPW.

During the on-site visit, the District Project Manager stated that she obtained the seasonal flow information from a consultant's report. At this point, she agreed with the Appellant that the tributary does not classify as having seasonal flow. Although this conclusion is not the one that leads the District to the final determination of jurisdiction in this case, it is incorrect and an error on the form.

Appeal Reason 3: The Corps did not conclude that the effects would be "significant".

And

Appeal Reason 4: The Corps did not meet the Administrative Law requirement of having substantial evidence in the administrative record to support its Jurisdictional Determination.

FINDINGS: Both reasons for appeal have merit.

ACTION: The District is required to revisit and re-evaluate its jurisdictional determination to document and explain the characteristics and underlying rationale for the conclusions regarding the presence or absence of a significant nexus between the non-RPW and the Bayamón River.

Discussion: The Appellant's RFA has a detailed discussion on the background of the *Rapanos* Supreme Court Decision in arguing that the District did not support their findings that the subject tributary would have a significant nexus with a TNW. The Appellant summarizes the discussion by stating that Justice Kennedy specifically indicated that in order to be have a significant nexus between the non-RPW and a TNW the "effect on the chemical, physical, and biological integrity of the traditional navigable water must be significant."

The Appellant stated during the on-site investigation and in the RFA that the District has not indicated nor has it concluded anywhere in the JD that the effect of the non-RPW on the TNW is significant. In addition, he stated that the District did not use a logical rational or discussion of how the evidence in the administration record is used to establish a significant nexus.

The JD Form Instructional Guidebook provided as part of the *Rapanos* Guidance requires the District to explain and document specific connections. The excerpt which follows explains the type of information needed when making significant nexus findings for a non-RPW that has no adjacent wetland and flows directly or indirectly into a TNW.

Principle considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a TNW. Field staff will consider all available hydrologic information (e.g., gage data, flood predictions, historic records of water flow, statistical data, personal observations/records, ect.) and physical indicators of flow including the presence and characteristics of a reliable OHWM [ordinary high water mark] with a channel defined by bed and banks. Other physical indicators of flow may include shelving, wracking, water staining, sediment sorting, and scour (Appendix H). Consideration will be given to certain relevant contextual factors that directly influence the hydrology of tributaries including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions.

Field staff will provide an explanation that demonstrates whether on not the aquatic resource has more than an insubstantial or speculative effect on the chemical, physical, or biological integrity of the TNW. The specific connections between the characteristics documented and the functions/services they play in affecting the TNW will be demonstrated. Specifically, an evaluation will be made of the frequency, volume, and duration of flow; proximity to the TNW; capacity to

transfer nutrients and organic carbon vital to support food webs; habitat services such as providing spawning areas for important aquatic species; functions related to the maintenance of water quality such as sediment trapping; and other relevant factors. In some cases, even tributaries that are relatively distant from a TNW may have a significant nexus with a TNW. [Instructional Guidebook, p. 55].

The District's JD Form indicates that waters of the US on the site consist of non-RPWs (with the exception of the statement regarding seasonal flow, discussed under Appeal Reason 2, above) that flow directly or indirectly into TNWs. [JD Form, II.B.1.a.]. The limits of the non-RPW are established by an OHWM that was noticed by a Consultant in a previous report. The non-RPW flows to another intermittent creek to the Guaynabo River and eventually to the Bayamón River, a Section 10 TNW. [JD Form, II.B.1.ii.a]. The JD Form states the "significant nexus" as follows:

The intermittent creek existing at the project site has a bed and bank. Based on the H&H study the intermittent watercourse drains from Basin B-3 and enters the project site by the east and flows in a southerly direction for about 365 meters up to state road PR-20 box culvert. The H&H study also mentioned that physical characteristics of the intermittent watercourse were observed such as: streambed material composition, channel geometry, channel slope, vegetation, reach alignment and overbanks. The soil (Mucara Clay) found in the property has a high run-off potential based on [the] H&H Study performed for this site. The study concluded that run-off increase is expected due to the project development and a retention pond was recommended to mitigate this increase. After review of the H&H study and information contained in the file as mentioned below, an intermittent stream is present at the project site that has the capacity to carry pollutants or floodwaters to the TNW (Bayamó River). Based on the above, a significant nexus is present.

The District provided numerous references in the "supporting information" section of the JD Form to support and explain the significant nexus determination. The references include:

1. US Geological Soil Survey Map: An intermittent creek is illustrated at the project site.
2. Hydrologic and Hydraulic (H&H) Study performed for this project, dated October 2003, indicated that there is an intermittent water course that flows along the east part of the project toward the south. On page 4, it stated that "the physical characteristics of the intermittent water course, such as the streambed material composition, channel geometry, channel slope, vegetation, reach alignment and overbanks were observed to determine the roughness coefficients that will be considered for the hydraulic models." It also indicates that the main channel is covered mainly by grass, with some small bushes along the banks.
3. Report on the geotechnical exploration performed at the site of proposed

Laderas de Monteverde-Phase II Development prepared by Jaca & Sierra Testing Laboratories Soil Consulting Engineers on 7 March 2005. The document stated on page 5 that temporary bodies of water might be found entrapped within the fill deposit or within the zone of transition of the fill deposit and virgin soil, thus establishing an underground water flow toward trenches cut beneath natural soil of the site.

4. Report on the Geotechnical exploration performed at the site of proposed Laderas de Monte Verde-Phase I Development prepared by Jaca & Sierra Testing Laboratories Soil Consulting Engineers dated 24 May 2002. This report found ground water level from 8 feet to 25 feet below the ground surface for sampling borings 1,6,7,8 and 10 and above ground surface (creek) for sampling borings 2 and 4. In addition, temporary bodies of water might be found entrapped within the existing fill layer and/or between the **transition zone of the fill deposit and virgin soil...**
5. The Environmental Quality Board's letter dated 16 December 2004, informed the District that a discharge of fill material in the property had impacted an existing intermittent creek.
6. Mr. Juan Molina's letter (on behalf of Mr. Antonio Orbay) dated 18 January 2005, indicating that fill material on approximately 150 square meters of a seasonal intermittent creek was discharged without a Corps permit.
7. Mr. Juan Molina's letter dated 22 March 2005, stated that on the aerial photograph the seasonal intermittent stream has been also identified.
8. Mr. Juan Molina's letter dated 2 June 2005, mentioned the presence of an intermittent creek.

In this case, the JD Form and supporting documentation has minimal documentation of the volume and duration of flow through the non-RPW to the TNW. Additionally, the JD Form contradicts itself on the frequency of flow (seasonal or non-RPW). Little evidence of an OHWM was found during the onsite review. The flow and watershed characteristics have an important impact on the connection between the relative reach of tributary and the functions and services it provides that affect the TNW, such as functions related to the maintenance of water quality, sediment trapping, capacity to transfer nutrients and organic carbon, sediment trapping, etc. The significant nexus determination in III.C.1 of the JD Form does not discuss the **"specific connections** between the characteristics documented and the functions/services that affect a TNW" (emphasis added) but rather appears to assume those connections and the effect on the TNW based upon typical non-RPW functions. For example, flood runoff and the resultant effect on the TNW is mentioned without any explanation of how the dry channel and the possible underground tributary perform this function. The statement that "temporary bodies of water might be found entrapped ... thus establishing an underground flow" appears speculative and is not supported by data. Additionally, floodwater storage and flow are not a listed function of a non-RPW.

There is also not substantial evidence in the JD Form or in the Administrative Record to support or explain how the non-RPW has the ability to carry pollutants to the Bayamón River. The JD Form actually contradicts itself concerning the ability of the channel to carry pollutants in Section IV.A.B. "The soil (Mucara Clay) found in the property has a high run-off potential based on [the] H&H Study performed for this site. The study concluded that run-off increase is expected due to the project development and a **retention pond was recommended to mitigate this increase.** [emphasis added] The underground retention pond is a requirement of the permit and is designed to treat run-off (pollutants) from the proposed project. Since the District did not discuss or explain how pollutants from the relative reach of the tributary would reach or effect the Bayamón River and no watershed or other calculations were used to determine the non-RPW's ability to carry floodwaters, these two reasons for appeal have merit.

Appeal Reason 5: The Corps' significant nexus analysis is speculative and unsubstantial.

At the Appeal site visit, the significant nexus issues discussed under Appeal Reasons 3 and 4 were re-visited when discussing this reason for appeal. Accordingly, Appeal Reasons 3 and 4 address the significant nexus issue. The remaining issue is discussed below.

One paragraph of this reason for appeal states that the tributary is non-jurisdictional because of the instruction on Page 54 of the Guidebook. The instruction is "[r]oadside 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 US because they are not tributaries or they do not have a significant nexus to a TNW." The Appellant states that this is precisely the description of the subject tributary, i.e. a ditch, next to a roadway, that only drains an upland and does not carry permanent flow of water.

FINDINGS: This reason for appeal has merit.

ACTION: The District is required the revisit and re-evaluate the jurisdictional determination to document how the channel is a jurisdictional tributary and not a ditch excavated wholly in and draining only uplands without a relatively permanent flow of water.

Discussion: During the on-site investigation, the attendees observed the dense layer of vegetation that completely covered the tributary and they did not notice a OHWM. The channel was dry at the violation site and at the proposed work area. The non-RPW had evidence of sediment deposition and sediment sorting which appears to illustrate that water flowed through the area during rain events.

The unnamed tributary drains a 15.36-acre upland residential complex. The residential complex produces storm-water runoff that flows through a 42-inch culvert that is under the entrance road (Street Number 1) and down a steep embankment. Water pooled at

the bottom of the embankment then moved underground and did not resurface. The Appellant stated the entire floodplain adjacent to the tributary had been a waste site for construction debris and the channel was cut through the debris. The tributary appeared to move below the subject channel and into the historic construction debris.

Appendix A of the June 5, 2007, US Army Corps of Engineers and the Environmental Protection Agency's Rapanos Guidance, *Memorandum R.E. CWA Jurisdiction Following the US Supreme Court Decision in Rapanos v. United States*, discusses the areas over which the Corps will not assert jurisdiction.¹

The agencies will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

The Appellant believes that this tributary is a ditch excavated in uplands and draining only uplands and does not carry a relatively permanent flow of water. The tributary is not jurisdictional.

The District used several references to provide evidence that the channel had an ordinary OHWM, is a tributary, and was therefore jurisdictional. In particular, on the last page of the JD Form the District wrote the Appellant's consultant, Mr. González, indicated that the tributary has bed and banks and a mean high water mark indicated by survey to available datum." The District also wrote that the October 2003 H&H study reported the main channel is covered by grass, with small bushes along the banks.

During the site visit, the consultant stated that he had repeated this information from previous Hydrologic Reports and had decided the stream was not jurisdictional after a site visit. The District did not visit the site and used the recorded data in the administrative record to conclude the stream had an OHWM and other indicators to prove the tributary was more than a man-made ditch.

From observations and discussions conducted during the site visit, the District does not appear to substantively support their position that the channel is a jurisdictional tributary and not a ditch excavated wholly in and draining only uplands without a relatively permanent flow of water. The tributary appears to flow below the established channel and drains a filled upland residential development.

¹ June 5, 2007, Legal Memorandum discussing Clean Water Act jurisdiction following the US Supreme Court decision in *Rapanos v. United States* & *Carabell v. United States*.

CONCLUSION: As my final decision on the merits of the appeal, I conclude the information contained in the administrative record does not substantially support the jurisdictional determination according to applicable laws, regulations, and policy guidance. I hereby return this matter to the Jacksonville District for reconsideration and/or 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