

**ADMINISTRATIVE APPEAL DECISION**  
**CROSSROADS COMMERCE CENTER SITE**

**FILE NO. SAJ-2007-2127**

**JACKSONVILLE DISTRICT**

**29 JUNE 2009**

**Review Officer:** Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division, acting by designation on behalf of the South Atlantic Division

**Appellant:** Gary Delanois, Crossroads Commerce Center

**Appellant's agents:** Kristina Ramsey – Broad and Cassel, Attorney's at Law; Mark Minor – Q. Grady Minor and Associates, P.A.; Rae Ann Boylan – Boylan Environmental Consultants, Inc.

**Date of Receipt of Request for Appeal:** 7 October 2008

**Date of Acceptance of Request for Appeal:** 8 December 2008

**Appeal Conference/Site Visit Date:** 17 March 2009

**SAD-ACCEPTED REASON FOR APPEAL:** SAD accepted the following reasons for appeal as detailed by the agent in the attachment to the Request for Appeal dated 27 May 2008:

The Jacksonville District of the U.S. Army Corps of Engineers (the District) was incorrect in asserting jurisdiction based on its application of the current regulatory criteria and associated guidance in identifying "waters of the United States" and they omitted factual information contained in the administrative record when issuing their final Jurisdictional Determination (JD).

**SUMMARY OF DECISION:** The appellant's request for appeal has merit. The administrative record does not support the District's determination that Wetland A or B has a significant nexus with the nearest Traditionally Navigable Waterway (TNW), Ten Mile Creek.

**BACKGROUND INFORMATION:** Mr. Gary Delanois of Crossroads Commerce Center is appealing the Jacksonville District's decision to take jurisdiction over wetlands on property located off of Colonial Boulevard and State Route 82 (SR-82) at Section 25, Township 44 South, Range 25 East in Ft. Myers, Lee County, Florida.

In a submittal dated 5 April 2007, the appellant submitted a permit application package to the District stating that Mr. Delanois did not feel that the wetlands on the property were under jurisdiction of the Corps and that if the wetlands were jurisdictional that Mr. Delanois requested that the permit application be processed.

In submittals of 8 November 2007, 11 December 2007 and 17 March 2008, several agents representing the appellant submitted supplemental information to the District supporting a request for a JD.

On 10 April 2008, the District issued a JD stating that Wetlands A and B on the property are subject to Corps jurisdiction. In response to the District's JD, the Appellant submitted additional information on 5 June 2008 to the District for reconsideration of the JD. In June and July 2008, the District and the Appellant's representatives made several visits to the site (at least once they visited the site together on 30 July 2008) to look at the conditions of the onsite wetlands and the tributaries to which they are adjacent. On 25 July 2008, the Appellant again provided supplemental information to support their argument that they do not believe the wetlands are jurisdictional.

On 8 August 2008 the District issued a revised JD stating that the site does contain wetlands which are jurisdictional under Section 404 of the Clean Water Act (33 USC 1344). A cover letter that addressed the main concerns raised by the appellant in their 5 June 2008 request for reconsideration of the JD was included with the revised final JD. The District made some changes to the documentation in the final JD that were not included in the initial JD, the determination that Wetlands A and B are jurisdictional under Section 404 of the Clean Water Act did not change.

On 7 October 2008, the appellant submitted a request for appeal which was accepted by the South Atlantic Division.

#### **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) With the request for appeal, the appellant provided documents containing their comments and analysis of the District's jurisdictional determination. At the appeal conference, 3 maps showing the property were provided by the Appellant's representatives. The maps included an engineering drawing of the site identifying the wetlands entitled "Crossroads Commerce Center Site – SFWMD Wetland Map" dated 21 June 2002, a black and white aerial photo of the general vicinity near the project site entitled "Crossroads Commerce Center – Aerial Photograph with Existing and Proposed Developments" dated 2 June 2008, and a color aerial photo showing the location of the onsite wetlands in relation to the tributaries down to the nearest TNW entitled "Crossroads Commerce Center – Traditional Navigable Waterways and Relative Permanent Water" dated 22 July 2008. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7 (e).

## **EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:**

**Appeal Reason 1:** The District was incorrect in asserting jurisdiction based on its application of the current regulatory criteria and associated guidance in identifying “waters of the United States.”

**Finding:** This reason for appeal has merit.

**Discussion:** The Appellant stated in its Request for Appeal that the District failed to provide the necessary data required to establish a significant nexus between Wetlands A and B and the closest TNW, Ten Mile Canal. The Appellant states that the District did not identify and analyze site specific factors including specific functions performed at the site and their affects on the nearest TNW including the affects that Wetlands A and B have on the chemical, physical and biological integrity of Ten Mile Canal.

Based on the 5 June 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, page 7: “Principal 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, plus the hydrologic, ecologic and other functions performed by the tributary and all of its adjacent wetlands.”

As described in the administrative record, Wetland A flows offsite during times of high water through a culvert into an adjacent unnamed tributary located on the north side of Colonial Boulevard and flows into Six Mile Cypress Slough, which is a relatively permanent water (RPW), which then flows into Ten Mile Canal, the nearest TNW.

As described in the administrative record, Wetland B flows offsite during times of high water via overland flow, into an adjacent unnamed tributary located on the southeast side of SR-82 (also known as Immokalee Road), which flows into Six Mile Cypress Slough, which then flows into Ten Mile Canal. There are discrepancies between the 8 August 2008 letter to the Appellant’s Agent and the supporting Approved JD Form. The JD Form states in Section II (B)(2)(C) and III (C)(3) that Wetland B is adjacent to the SR-82 ditch and the cover letter with the JD dated 8 August 2008 says on page 2 in Bullet 2 that Wetland B is abutting SR-82.

In accordance with the JD form the tributaries associated with both Wetlands A and B are considered to be RPW’s. Per Appendix A, page 5 of the 5 June 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook: “The agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g. typically three months).”

However, as a result of the 11th Circuit Court of Appeals' decision in *U.S. v. Robison*, 505 F.3d 1208 (11th Cir. 2007), whether these tributaries constitute "RPWs" or not is no longer determinative of whether jurisdiction exists.<sup>1</sup>

The administrative record does not sufficiently evaluate and provide information on the volume, duration and frequency of flow to support that a significant nexus exists between Wetlands A and B and the TNW. The record provides historic rainfall data and direct observation by District employees of flow from Wetland A to the adjacent tributary on two occasions in June and July of 2008. The rainfall data is not supported by documentation to support how this information correlates to volume and duration of flow in the tributaries and their significant nexus with the TNW and it only inappreciably supports the frequency of flow. Frequency of flow can be affected by numerous factors such as the volume, duration and frequency of previous rain events that may impact the wetlands ability to retain flows from entering the tributaries; there is no analysis to support that the onsite observations were not abnormal occurrences. The two dates when water was observed flowing from Wetland A do not sufficiently support that a volume, duration and frequency of flow exists to provide a significant nexus between Wetland A, the tributary it flows into and the TNW. The record is also deficient in documentation of the volume, duration and frequency of flow in the tributary associated with Wetland B. There is nothing in the record that clearly supports that the volume, duration and frequency of flow in the tributary which Wetland B is adjacent to supports a significant nexus between Wetland B, the tributary it flows into and the TNW.

The Jurisdictional Determination form states that fish are present in the tributaries to which both Wetlands A and B are adjacent. It is not clear in the administrative record what relationship the fish or their life stages have between Wetlands A and B, the tributaries to which they are adjacent and the TNW. There is nothing in the record to clarify the intent of the reference regarding the fish species observed in the tributaries.

The administrative record provides documentation in Section III (B)(3) of the JD form stating that various functions occur in Wetlands A and B. The statements in the administrative record referring to production and export of organic matter, groundwater recharge, water quality and ecological effects may be factual, however they come across as generic or speculative in nature as they are the opinions of District personnel and are not supported by site-specific findings. A statement in Sections III (B)(1)(iii) and III (B)(2)(ii) of the JD form that says "The waters from the wetlands can help provide a reduction in polluted waters, control of fresh water inundation and clean water entering Estero Bay" is also speculative.

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<sup>1</sup> In *Robison*, the 11<sup>th</sup> Circuit disagreed with the "two-test approach." This is the approach taken by the official guidance in response to *Rapanos v. United States*, 126 S. Ct. 2208 (2006), where jurisdiction may be found under the CWA if either the Plurality or Kennedy Tests of *Rapanos* is satisfied. Under the Plurality Test, consideration is given to whether a tributary constitutes a relatively permanent water (RPW). In *Robison*, 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*." Under the rule of the *Robison* decision, the Plurality Test may no longer be used to establish jurisdiction in the states of the 11th Circuit.

**Action:** The JD should be reconsidered by providing further individual analysis of each Wetland A and Wetland B and their associated tributary reaches. The administrative record should be revised to include more specific details to support the volume, duration and frequency of the flow of water in the non-navigable tributaries that Wetlands A and B flow into, the proximity of the tributaries to Ten Mile Canal, the nearest TNW, plus the hydrologic, ecologic and other functions performed by the non-navigable tributaries and Wetlands A and B (and any other wetlands similarly situated to these tributaries). The effects of these factors have on the physical, chemical and biological integrity of the TNW should be analyzed and detailed in the administrative record and the revised Jurisdictional Determination to determine if there is a significant nexus between Wetlands A and B, their associated tributaries and Ten Mile Canal.

In accordance with the 5 June 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, page 29: "Wetlands adjacent to non-RPW's that flow directly or indirectly into TNW's are jurisdictional under the Clean Water Act (CWA) where there is a 'significant nexus' with a TNW. For each specific request, field staff will need to perform a significant nexus evaluation to determine if tributary is jurisdictional under the CWA."

The decision should be revised to look at each tributary reach associated with each Wetland A and Wetland B on separate Approved JD forms. Each JD form should evaluate the reach based on the aquatic functions performed by the tributary itself and in combination with the aquatic functions performed by the tributary's adjacent wetland. Each form should provide clear documentation supporting volume, duration and frequency of the flow of water in the tributary to show whether the tributary is an RPW or a non-RPW. There should also be clear documentation on why the wetlands are considered adjacent or abutting to the tributaries with which they are associated.

The District should provide in the administrative record an assessment that clearly portrays its findings of the aquatic characteristics and functions performed by each of the tributaries and their adjacent wetlands, and establish whether they do or do not have a significant affect (more than speculative or insubstantial) on the chemical, physical and biological integrity of Ten Mile Canal. Depending on results of further documentation, a significant nexus evaluation may be necessary for each wetland and the tributary with which it is associated. See the 5 June 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook pages 55-56.

As stated in the 5 June 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, page 47: "JD's require documentation that identifies if there is the presence and/or absence of jurisdiction and the boundaries of the water body. Maps, Aerial photography, soil surveys, watershed studies, scientific literature, previous JD's for the review area, and local development plans may assist staff in completing accurate JD's. This information should be referenced in the file with any conclusions formulated from this information stated in the Approved JD form."

This section of the guide book goes on to say that: "Identification and evaluation of the functions relevant to the significant nexus determination will be more complete when

incorporating literature citations and/or references from studies pertinent to the parameters being reviewed.”

The administrative record should be revised to exclude language that is generic or speculative. Conclusions of scientific findings or conclusions (see fish reference in Discussion portion of this document) should be substantiated and supported by literature citations and/or references from studies pertinent to the parameters being reviewed. The District should further analyze various resources such as soils maps and data, NWI maps, aerial photographs, personal communications and document them in the administrative record to determine and support the flow characteristics in the tributaries. The District’s documentation and research may include, but not be limited to, talking to adjacent property owners and local Department of Transportation and Water Management District representatives to identify the tributary’s hydrology, including groundwater levels, soil types, length of inundation and other information on the volume, duration and frequency of flow. The administrative record should be revised accordingly to reflect the additional information.

**Appeal Reason 2:** The District omitted factual information contained in the administrative record when issuing their final Jurisdictional Determination (JD).

**Finding:** This reason for appeal does not have merit.

**Discussion:** The administrative record contains significant documentation provided by the appellant in support of their arguments that Wetlands A and B should not be considered jurisdictional. Although the District does not agree with all of the appellant’s information in the administrative record based on their decision, it appears that the information was considered by the District and was not omitted in making their final Jurisdictional Determination.

**OVERALL CONCLUSION:** For the reasons stated above, I find that the appeal has merit since the District’s administrative record does not contain substantial evidence in support its decision that the wetlands are subject to federal jurisdiction and regulation as waters of the United States under Section 404 of the Clean Water Act (33 U.S.C. 1344). I am remanding the approved Jurisdictional Determination back to the District for reconsideration in light of this decision. The District shall complete these tasks within 60 days from the date of this decision and upon completion, provide the Division office and Appellant with its decision document and final JD.



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Commanding